

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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MURRAYRAYEDEBBIE, LLC, and JANDM LLC,

INDEX NO. 156640/2017

Plaintiffs,

MOTION DATE _____

- v -

MOTION SEQ. NO. 1

ROSENPIL LLC,

DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 44, 45

were read on this application for summary judgment

HON. BARBARA JAFFE:

By notice of motion and motion, plaintiffs move pursuant to CPLR 3212 for an order granting them summary judgment in their action for partition and sale, and dismissing defendant's affirmative defenses. (NYSCEF 9, 10). Defendant opposes. (NYSCEF 26).

I. FACTS

The property at issue, a building located at 1832 Second Avenue, New York, New York, is owned by plaintiffs and defendant as tenants in common. Defendant owns a 50 percent interest in the property, and each plaintiff owns a respective 25 percent. Each owner has a deed to the property. (NYSCEF 10).

The property is leased to a single tenant who uses the entire building as a parking garage, with the lease commencing in 1986 and ending in 2046. The lease provides that if the landlord

has the opportunity to sell the premises, the tenant must be given 45-days notice thereof and has the first option to purchase the premises for the same price and on the same terms. (NYSCEF 17, 18).

In 2017, plaintiffs commenced this action, claiming that they will be unable to sustain themselves financially on the tenant's below-market rent. They seek a forced sale of the entire property. (*Id.*). Defendant opposes and sets forth affirmative defenses, including unjust enrichment, unclean hands, that plaintiffs previously sold their interest, that plaintiffs previously refused to sell their interest to defendant, that the sale is precluded by the terms of the lease, and that no sale may take place, as this motion is made prematurely. (NYSCEF 26).

II. CONTENTIONS

Plaintiffs contend that they have set forth, *prima facie*, a case for partition and sale, as defendant does not dispute their ownership interest or that a partition is impossible, and the parties are bound by the tenant's lease which pertains to the entire premises. Moreover, they assert that the equities are in their favor, as they struggle to sustain themselves financially on the below-market monthly rent currently paid by the tenant. They argue that they have tried unsuccessfully to sell their interests in the property, but few buyers are interested in partial ownership and, where buyers have expressed interest in the entire property, defendant has refused to sell its interest. Thus, they contend, they must force the sale of the entire building. (NYSCEF 10). They offer, *inter alia*, copies of the parties' deeds, and the lease. (NYSCEF 14, 15, 16, 17, 18).

Defendant argues that it would be greatly prejudiced should the property be sold now, as its value will increase threefold when the lease expires. Moreover, it contends, plaintiffs are conspiring with the tenant to force a sale to defendant's detriment. Specifically, defendant

asserts, the tenant has bribed plaintiffs to commence this action, as the tenant has a right of first refusal and will be able to purchase the property at auction. Plaintiff will thus be enriched by both the bribe and proceeds from the sale, defendant argues, and the tenant will own a valuable property unencumbered by a lease. Defendant, however, will be left in the lurch, having been forced to sell an asset prematurely, at a fraction of its future value. (NYSCEF 26, 38). It also asserts that this motion is advanced in bad faith, maintaining that their offers to purchase defendant's interest for millions of dollars belie their claims of financial hardship, as does their refusal of defendant's offer to purchase their interest. It offers in support a copy of an appraisal indicating that the property is worth significantly less now than it will be once the lease has expired. Defendant also maintains that the action is missing a necessary party, namely, the tenant. (NYSCEF 44).

In reply, plaintiffs argue that defendant's offers were rejected because they were unreasonably low. Moreover, they deny any secret deal with the tenant and, even if they did, it would not be unjust or constitute a bar to partition and sale. (NYSCEF 40).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not

meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

Pursuant to Real Property Actions and Proceedings Law (RPAPL) § 901(1), a tenant in common “may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners.” A plaintiff establishes a *prima facie* case for summary judgment for partition and sale by demonstrating ownership and a right to possess of the property, and that a physical partition cannot be made without great prejudice (*Manganiello v Lipman*, 74 AD3d 667, 668 [1st Dept 2010]; *Dalmacy v Joseph*, 297 AD2d 329, 329 [2d Dept 2002]).

The court must weigh the equities and, in doing so, should consider fairness and the parties’ respective contributions to the property. (*Vlcek v Vlcek*, 42 AD2d 308, 311 [3d Dept 1973]). Equitable defenses to partition may not, however, be based solely on “the adverse consequences which would befall [a] defendant if partition were ordered” (*Manganiello*, 74 AD3d at 668-669) or “the desire to maintain the status quo” (*Ferguson v McLoughlin*, 184 AD2d 294 [1st Dept 1992], *appeal dismissed* 80 NY2d 972).

Defendant does not dispute that the parties own the property as tenants in common or that partition is impossible, as they are contractually obligated to permit the current tenant to occupy the entire building. Thus, plaintiff establishes, *prima facie*, its entitlement to summary judgment. (*See Manganiello*, 74 AD3d at 668 [plaintiff established entitlement to summary judgment in action for partition and sale by showing possession and impossibility of physical partition without great prejudice]).

Moreover, the parties do not dispute that the property generates substantially less money than it would if unencumbered by the lease, or that the property’s value is likely to increase over

the term of the lease. Rather, at issue is whether defendant establishes that the equities weigh in its favor.

That the property may sell for less at public auction than it would if unencumbered by the lease does not constitute a legally sufficient basis to deny the right of partition and sale. (*See Loughran v Cruickshank*, 8 AD3d 799, 801 [3d Dept 2004] [court properly ordered sale as one parcel as, among other things, it was irrelevant that owners might receive bid lower than property's appraised value]). Nor must the tenant be a party. (*See McCaffery v McCaffery*, 2018 WL 1598617, at *7 [ED NY 2018] [New York authority supported premise that tenant not necessary defendant in partition action]).

Although an allegation of unclean hands is a defense to partition and sale, it is inapplicable here, as defendant presents no evidence that plaintiffs acted immorally or unconscionably, rather than legally in seeking to promote or enhance their own interests. (*See Kopsidas v Krokos*, 294 AD2d 406, 407 [2d Dept 2002] [in action for partition and sale, unclean hands inapplicable, even though defendant alleged plaintiff procured lease improperly, as record reflected defendant signed lease]). Nor does defendant cite authority for the proposition that another owners' alleged deal with a tenant to buy the property after its partition and sale constitutes immoral or unconscionable behavior. Moreover, defendant submits no proof that plaintiffs previously sold their interest in the property, or any proof that the sale is precluded by any term of the lease.

Plaintiffs have thus established their entitlement to a partition and sale. No accounting is necessary before the partition and sale (*Lane v Tyson*, 133 AD3d 530 [1st Dept 2015], *lv dismissed* 27 NY3d 1033 [2016]), and in any event, neither party requests it.

IV. CONCLUSION


Accordingly, it is hereby

ORDERED, that plaintiffs' motion for summary judgment is granted; it is further

ORDERED, that within 60 days of the date of this order, the parties are directed to confer and submit a proposed judgment and order directing the partition and sale.

7/9/2018

DATE


BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: