

Decided on June 11, 2008

Supreme Court, Queens County

Zhi Jie Li, Plaintiff,
against
Fang Wang and SHERWOOD VILLAGE
COOPERATIVE D, INC., Defendants.

6968/06

Allan B. Weiss, J.

Plaintiff commenced this action for partition of a cooperative apartment which the plaintiff and defendant purchased as husband and wife. In 1996 the plaintiff and defendant obtained a Judgment of Divorce which did not provide for equitable distribution of the marital property and merely awarded to the plaintiff exclusive occupancy of the coop apartment. As a result, the plaintiff and defendant now own the apartment as tenants in common.

The defendant now moves for summary judgment as to partition and an Order appointing of a referee to sell the apartment and directing that the net proceeds of such sale be distributed equally, 50% to plaintiff and 50% to the defendant. The plaintiff opposes the motion on the ground that the defendant, who has not asserted a counter-claim in his answer, cannot move for summary judgment on behalf of the plaintiff. Plaintiff further maintains that summary judgment cannot be granted inasmuch as issues of fact exist as to whether and to what extent an adjustment must be made regarding the distribution of the net proceeds based upon plaintiff having paid more than her share of the expenses and carrying charges of the apartment; and whether the defendant has the right to any of the net proceeds and whether he has any "ownership" interest in the apartment by virtue of an alleged agreement executed in 1995 by and between the plaintiff and the defendant.

Insofar as plaintiff claims that defendant cannot move for summary judgment as he has not asserted any counterclaims, this argument is without merit. The defendant's answer, in addition to responding to the plaintiff's complaint, asserts that plaintiff had rented the apartment, derived profit and gain from the rental and, therefore, defendant demands a judgment directing partition [*2] and sale of the apartment; an accounting between the parties which includes the income and profit generated from the rental of the property; and distribution to the defendant from the net proceeds of the sale an amount which will be determined to be his share of such profits and gain. The defendant's answer is adequate to advise the plaintiff that he asserts counter claims for partition, an accounting and distribution of the alleged income from the rental of the apartment (see CPLR 3013, 3017, 318; McKinney's Cons Laws of NY, Book 7B Siegel Practice Commentaries to CPLR 3013, 3017, 3018). In addition, even where a defendant does not assert a counter claim, the court has the power to grant relief appropriate to the proof whether or not demanded (see CPLR 3017[a]).

The defendant has established his entitlement to interlocutory summary judgment on the claim for partition and appointment of a referee (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In opposition, the plaintiff has failed to raise a triable issue of fact.

Plaintiff's argument that issues of fact exist as to whether the defendant has any interest in the apartment as a result of the alleged 1995 agreement is without merit. The plaintiff in her verified complaint affirmatively pleaded, inter alia, that the plaintiff and defendant are tenants in common each being "seized of an undivided one-half interest in the premises". In his answer the defendant admitted that the plaintiff and defendant each owned a one-half interest in the apartment. Facts admitted by pleadings constitute judicial admissions and, are, thus, not in controversy (see *Figueiredo v. New Palace Painters Supply Co. Inc.*, 39 AD3d 363 [2007]). The plaintiff may not by this action for partition attempt to indirectly enforce a contract allegedly entered into 13 years ago.

Plaintiff's claims that she is entitled to reimbursement for having paid defendant's share of the mortgage and the maintenance, repairs and upkeep of the apartment do not raise any triable issue, but merely involved an accounting, which is a necessary incident of a partition action (see, 24 NY Jur 2d, Cotenancy and Partition, §§ 70, 77, 246, 247).

Accordingly, the defendant's motion is granted.

Settle Order containing a provision for the appointment of a Referee to ascertain the interests of the parties in the subject property (RPAPL 911), report whether the property is so circumstanced that a partition cannot be made without great prejudice to the owners (RPAPL 901[1]), and, should the Referee determine that a sale is necessary, ascertain the existence of any creditor not joined as a party who may have a lien against an undivided share of any party (RPAPL 913); and that the referee's fee, to be shared equally by the parties, will be determined at the time of the confirmation of the referee's report based upon, [*3] inter alia, a reasonable hourly fee and an affirmation of services rendered (see *Majewski v. Majewski*, 221 AD2d 420 [1995]).

Dated: June 11, 2008

DNo. 34.....,

J. S. C.