John P. Tita, Sr., et al., Plaintiffs, against Lampeas Family Limited Partnership No. 4, et al., Defendant.

10931, 2009

SUPREME COURT OF NEW YORK, QUEENS COUNTY

26 Misc. 3d 124l (A); 907 N. Y.S.2d 441; 2010 N. Y. Misc. LEXIS 596; 2010 NY Slip Op 50502(U)

March 25, 2010, Decided

HEADNOTES

[* 124l A] [**441] Partnership--Dissolution. Receivers--Appointment.

COUNSEL: [*** l] For Plaintiffs: Ginsburg & Misk, by Hal R. Ginsburg, Queens Village, NY.

For Defendant: Morritt Hock Hamroff & Horowitz, LLP, by William P. Laino and Stephen J. Ginsberg, Esqs., Garden City, NY.

JUDGES: Charles J. Markey, J.

OPINION BY: Charles J. Markey

OPINION

Charles J. Markey, J.

The following papers numbered 1 to 26 read on this motion by plaintiff John P. Tita, Sr. pursuant to CPLR 3212 for summary judgment in his favor against defendant Lampeas Family Partnership No. 4 (Lampeas Family Partnership) and for leave to appoint a referee to ascertain and report the rights,

shares and interests of the parties in the real property known as 35-02 and 35-10 Broadway, Long Island City, New York, and report whether the subject premises is so circumstanced that a partition cannot be had, and whether there is a creditor not a party herein who has a lien upon an undivided share or interest of a party; and this cross motion by defendant Lampeas Family Partnership pursuant to CPLR 3212 for summary the this motion for partial summary judgment in favor of plaintiff John P. Tita, Sr. and against defendant Lampeas Family Partnership with respect to the cause of action for partition asserted in the amended complaint, or alternatively, for summary judgment on the causes of action for dissolution of defendant partnerships Lampeas and Tita, and Lampeas and Tita Realty, asserted in the amended complaint, and to appoint a receiver; and this cross motion by defendants for summary judgment dismissing the first and second causes of action in the amended complaint, for reverse summary judgment with respect to the third cause of action in the amended complaint for dissolution of defendant Lampeas and Tita Realty, and for leave to purchase plaintiffs' interest in defendant Lampeas and Tita Realty after an appraisal, or in the alternative, to direct various relief pursuant to Partnership Law section 75.

Upon the foregoing papers, it is ordered that the motions and cross motions with respect to motions numbered 27 and 28 on the motion calendar for November 19, 2009 are determined together as follows:

Plaintiff John P. Tita, Sr. commenced this action seeking partition and sale of the subject real property. Plaintiff John P. Tita, Sr., alleged that he obtained an undivided one-half interest ownership interest in the property pursuant to a deed dated November 1979, whereby William [***3] R. Quinn conveyed the property to him and Steve Lampeas, now deceased. Plaintiff John P. Tita, Sr., alleged that Steve Lampeas subsequently transferred his (Lampeas's) ownership interest in the premises to defendant Lampeas Family Partnership, a limited family partnership, by deed dated June 18, 2004. Plaintiff John P. Tita, Sr. also alleged that he owns an undivided one-half interest in the property as a tenant in common with defendant Lampeas Family Partnership.

Defendant Lampeas Family Partnership served an answer, asserting various affirmative defenses, including that plaintiff John P. Tita, Sr. and defendant Lampeas Family Partnership hold the subject property as tenants in partnership, not as tenants in common, and as such, the property is an asset of the partnership named "Lampeas and Tita Realty," not subject to partition.

Plaintiff John P. Tita, Sr., thereafter moved for summary judgment in his favor against defendant Lampeas Family Partnership and for leave to appoint a referee to ascertain and report whether the subject premises is so circumstanced that partition cannot be had and whether there is a creditor who is not a party but who has an undivided share or interest in [***4] the property. Defendant Lampeas Family Partnership cross-moved for summary judgment dismissing the complaint asserted against it by plaintiff John P. Tita, Sr. Plaintiff John P. Tita opposed the cross motion, but alternatively sought leave to supplement his summons and amend his complaint.

The parties thereafter entered into a so-ordered stipulation dated July 9, 2009, whereby defendant Lampeas Family Partnership consented to, and accepted the service of, a supplemental summons and amended complaint adding Michael Tita, Sandra Tita, James Tita and Andre Tita as plaintiffs, and Lampeas and Tita, Lampeas and Tita Realty, Ernest Lampeas, Peter Lampeas and Maria Theodorakos as defendants, and asserting additional causes of action as proposed.

In the amended complaint, plaintiffs reassert, as a first cause of action, a claim for partition and sale, alleging that plaintiff John P. Tita, Sr., and defendant Lampeas Family Partnership are the sole record owners of the subject premises and that plaintiff John P. Tita, Sr. does not wish to hold and use the property in common with defendant Lampeas Family Partnership any longer. Plaintiffs alternatively assert, as a second cause of action, a claim [***5] for dissolution of defendant Lampeas and Tita, a partnership, and an accounting, alleging that plaintiff John P. Tita, Sr., and Steven Lampeas entered into an oral partnership agreement whereby they formed defendant partnership Lampeas and Tita, for the purpose of owning, managing and operating the subject premises.

Plaintiffs also allege that the parties are partners in such partnership, with plaintiffs and defendants respectively owning a 50% share in the partnership. Plaintiffs further allege that they disagree with defendants as to the management of defendant Lampeas and Tita, and have demanded dissolution of it, but defendants continue to operate the partnership business. As a third cause of action for dissolution and an accounting, plaintiffs allege that plaintiff John P. Tita, Sr., and Steve Lampeas entered into an oral partnership agreement whereby they formed defendant Lampeas and Tita Realty, for the purpose of owning, managing and operating the subject premises, and that plaintiffs and defendants are partners in such partnership, with plaintiffs and defendants respectively owning a 50% interest in the partnership.

Plaintiffs further allege that they disagree with defendants [***6) as to the management of defendant Lampeas and Tita Realty, and have demanded dissolution of it, but defendants continue to operate that partnership business.

Defendants Lampeas Family Partnership, Lampeas and Tita, Lampeas and Tita Realty, Ernest Lampeas, Peter Lampeas and Maria Theodorakos served a combined amended answer, denying, among other things, that plaintiffs have demanded that defendant partnerships Lampeas and Tita, and Lampeas and Tita Realty be dissolved, but admitting Lampeas and Tita Realty should be dissolved. Defendants also assert various affirmative defenses, and interpose two counterclaims for an accounting and dissolution of defendant Lampeas and Tita Realty. It is unclear whether a reply has been served.

Insofar as defendants have consented to and accepted service of the supplemental summons and amended the complaint, the motion by plaintiff John P. Tita, Sr., denominated as motion no. 27 on the motion calendar for November 19, 2009, and the cross motion by defendant Lampeas Family Partnership are denied as moot.

With respect to the motion by plaintiffs denominated as number 28 on the motion calendar for November 19, 2009, plaintiffs now seek partial summary judgment [***7] in favor of plaintiff John P. Tita, Sr., and against defendant Lampeas Family Partnership with respect to the cause of action for partition asserted in the amended complaint.

Plaintiffs assert that record title to the property is in the names of plaintiff John P. Tita, Sr., and defendant Lampeas Family Partnership, and that plaintiff John P. Tita, Sr. does not wish to hold and use the property in common with defendant Lampeas Family Partnership any longer and, therefore, plaintiff Tita is entitled to partition. Plaintiffs alternatively seek summary judgment on the causes of action in the amended complaint for dissolution of defendant partnerships Lampeas and Tita, and Lampeas and Tita Realty, and for appointment of a receiver.

Defendants oppose the motion, and cross-move for summary judgment dismissing the first and second causes of action in the amended complaint, for reverse summary judgment with respect to the third cause of action for dissolution of defendant Lampeas and Tita Realty, and for leave to purchase plaintiffs' interest in defendant Lampeas and Tita Realty after an appraisal, or in the alternative, to direct various relief pursuant to Partnership Law section 75. Plaintiffs [***8] oppose the cross motion by defendants.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (Alvarez v Prospect Hosp., 68 NY2d 320, 324, 501 N.E.2d 572, 508 N. Y.S.2d 923 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]; Zuckerman v City of New York, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Furthermore, the court's function on a motion for summary judgment is issue finding, not issue determination (see, Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957]) or credibility assessment (see, Ferrante v American Lung Assn., 90 NY2d 623, 631, 687 N.E.2d 1308, 665 N.Y.S.2d 25 {1997}).

Plaintiffs claim the deeds dated November 1979 and June 18, 2004 establish that plaintiff Tita and defendant Lampeas Family Partnership hold the property as tenants in common. Plaintiffs assert that the June 18, 2004 deed indicates Steve Lampeas treated his ownership interest in the property as his personal asset, insofar as the deed provided for the transference of all of his right, title and interest in the property to defendant Lampeas Family Partnership, without any mention of an [***9] ownership interest by any partnership.

Plaintiffs also assert that Steve Lampeas filed a "Real Property Transfer Report" (Transfer Report) in connection with his conveyance of his interest to defendant Lampeas Family Partnership, indicating the property was being transferred to a "Family Trust." Plaintiffs argue that such phrase is consistent with a

conclusion that Steve Lampeas believed he owned an undivided one-half interest in the property which was freely alienable, and not subject to a claim by any partnership. In support of the motion, plaintiffs offer, among other things, the affidavit of plaintiff John P. Tita, and a copy of the November 1979 and June 18, 2004 deeds and the Transfer Report in support of their motion. Defendants argue that the deeds and the Transfer Report are not conclusive proof the property is held as a tenancy in common by plaintiff John P. Tita, Sr., and defendant Lampeas Family Partnership. Rather, defendants assert that defendant partnership Lampeas and Tita Realty owns the subject real property as its sole asset, and that defendant Lampeas and Tita Realty is not a separate entity, but rather is defendant partnership Lampeas and Tita Realty doing (*** 10] business as "Lampeas and Tita."

According to defendants, plaintiff John P. Tita, Sr., and Steve Lampeas jointly acquired the subject property, with each contributing the amount of $ 100,000.00 to the purchase price, and executing a mortgage in the amount of $ 125,000.00. Defendants assert that plaintiff John P. Tita, Sr., and Steve Lampeas considered such property as the asset of their partnership, and conducted the business of the partnership under the name "Lampeas and Tita Realty." Defendants also assert that in 1984, plaintiff John P. Tita, Sr., and Steve Lampeas filed a business certificate for partners under the name "Lampeas and Tita Realty," and also opened a bank account for the partnership in that name.

Defendants further assert that, at some point prior to his death, Steve Lampeas transferred his interest in defendant partnership Lampeas and Tita Realty to defendants Lampeas Family Partnership, Ernest Lampeas, Peter Lampeas and Maria Theodorakos in various fractional shares. Plaintiff John P. Tita, Sr., according to defendants, likewise transferred a small portion of his interest in defendant partnership Lampeas and Tita Realty to plaintiffs Michael Tita, Sandra Tita, James [*** 11] Tita and Andre Tita in equal shares.

In support of the cross motion, defendants offer, among other things, an affidavit of defendant Peter Lampeas, a partner in defendant Lampeas Family Partnership, and copies of partnership tax returns for 2006, 2007 and 2008, as evidence that the net rental income from the subject real property was reported as income of the partnership, and identified Lampeas Family Partnership, Ernest Lampeas, Peter Lampeas, Maria Theodorakos, John P. Tita, Sr., Michael Tita, Sandra Tita, James Tita and Andre Tita, as the partners of the partnership.

Plaintiffs counter that the entity named “Lampeas and Tita Realty" is a partnership which was formed for the purpose of brokerage and real estate management, unrelated to the subject premises, and has never owned any interest in the subject real property. They assert that the partnership tax returns, upon which defendants rely, were filed in the name of "Lampeas and Tita" - not "Lampeas and Tita Realty," and that such returns show the various partners of Lampeas and Tita share the income and expense of the subject premises, as opposed to the ownership of the property itself.

"It is well established that it may always be [***12] shown that property[,] title to which is taken in the name of individuals, is in truth and in fact partnership property' (Benham v Hein, 50 AD2d 808, 809, 376 N. Y.S.2d 581 {1975] [dismissing partition cause of action based on evidence establishing that real

property was a partnership asset], quoting Sugarman, Partnership § 81 [4th ed]; see also Mattikow v Sudarsky, 248 NY 404, 406-407, 162 N.E. 296 [1928]; Pisciotta v Dries, 306 AD2d 262, 263, 760 N. Y.S.2d 526 {2003]; Liffiton v DiBlasi, 170 AD2d 994, 566 N. Y.S.2d 148 [1991]; Goldberg v Goldberg, 276 App Div 1084, 95 N.Y.S.2d 777 [1950} [reversing partition decree where trial court erroneously excluded documentary and oral evidence proffered to establish an independent agreement of partnership,' under which the real property was to be held as a partnership asset']; Altman v Altman, 271 App Div 884, 67 N. Y.S.2d 119 [1946] [dismissing partition cause of action based on evidence establishing that real property was a partnership asset], aff d 297 NY 973, 80 N.E.2d 359 [1948}; 15A NY Jur 2d, Business Relationships § 1448; 10-103 Warren's Weed, New York Real Property § 103.17; 1 Bromberg and Ribstein on Partnership § 3.02 [d] [3]; cf Okun v Braunstein, 172 AD2d 259, 260, 568 N.Y.S.2d 86 [1991] [... reinstated partition action on the ground that the intent of the parties [*** 13] as to whether the property was to be considered separate property or partnership property remains unclear']). Consistent with this principle, the Partnership Law, although providing that [a]ny estate in real property may be acquired in the partnership name' (§ 12 [3}), also recognizes that title to real property of the partnership may be held in the name of one partner, in the names of some but not all of the partners, or in the names of all the partners (§ 21 [3], [4}, [5])" (Vick v Albert, 17 AD3d 255, 256-257, 793 N.Y.S.2d 413 [2005]).

The Transfer Report indicates that the subject property is improved with a single-family residence, but it is undisputed that the premises has a building occupied by a number of commercial tenants. To the extent partnership tax returns for the years 2006, 2007 and 2008 were filed on behalf of a partnership named "Lampeas and Tita," those returns indicate that such partnership incurred all costs and charges, including real estate taxes, and received all income, generated by the subject property.

It is unclear whether there were any earlier partnership tax returns filed under the name "Lampeas and Tita" or "Lampeas and Tita Realty," or whether plaintiff John P. Tita, Sr., [*** 14] or Steve Lampeas ever reported the income received, and costs incurred, as a direct owner of an undivided interest in the property on his personal income tax returns, or his share of the income and expenses of a partnership named "Lampeas and Tita" or "Lampeas and Tita Realty," as reported on any Schedule K-1. In addition, it is unclear the manner in which defendant Lampeas Family Partnership itself reported any income received or expenses incurred in relation to the subject property.

Under such circumstances, questions of fact exist as to whether there is a partnership named "Lampeas and Tita," and whether before the present dispute arose between the parties, plaintiffs and defendants understood the subject property to be an asset of defendant partnership Lampeas and Tita or defendant partnership Lampeas and Tita Realty, or an asset co-owned by plaintiff John P. Tita, Sr., and Lampeas Family Partnership. Summary judgment with respect to the first cause of action for partition, hence, is inappropriate (see Vick v Albert, 17 AD3d 255, 793 N. Y.S.2d 413 {2005}, supra).

To the extent that plaintiffs seek dissolution of defendant partnerships Lampeas and Tita, and Lampeas and Tita Realty, and defendants seek [*** 15] dissolution of defendant partnership Lampeas and Tita

Realty, plaintiffs allege that the partnership agreements with defendants are oral, and defendants make no showing there was any written partnership agreement.

A partnership formed as a result of an oral agreement between the parties creates a partnership at will (see, Prince v O'Brien, 234 AD2d 12, 650 N.Y.S.2d 157 [1996)), which may be dissolved at any time by the express will of any partner (see, McElduff v Mansperger, 214 AD2d 653, 625 N.Y.S.2d 594 {1995); see also, Carola v Grogan, 102 AD2d 934, 935, 477 N. Y.S.2d 525 {1984]) and does not require judicial dissolution. The partnership continues until the winding up of partnership affairs is completed (see, Partnership Law § 61). However, court-ordered dissolution is called for when there is a dispute as to whether a partnership in fact exists and the date of dissolution (see, Mehlman v Avrech, 146 AD2d 753, 537 N. Y.S.2d 236 [1989}; see also, Carola v Grogan, 102 AD2d 934, 935, 477 N.Y.S.2d 525 [1984], supra; Jones v Jones, 15 Misc 2d 960, 961, 179 N.Y.S.2d 480 {1958]).

In this instance, the parties disagree as to the existence of any partnership named "Lampeas and Tita." Again, plaintiffs contend such partnership exists. Defendants claim it is not a separate entity, but rather is a trade [*** 16] name used by defendant partnership Lampeas and Tita Realty.

The parties, on the other hand, agree that defendant partnership Lampeas and Tita Realty exists. The parties, however, have failed to demonstrate when the dissolution of such partnership occurred. Absent a mutual agreement to dissolve, a partnership at will may be dissolved by notice of election to terminate the partnership from the partner desiring the dissolution to his or her copartners (see, Gerstein v Teitelbaum, 273 App Div 886, 77 N. Y.S.2d 502 [1948]; Jones v Jones, 15 Misc 2d 960, 179 N.Y.S.2d 480 [1958), supra; Smith v Maine, 145 Misc 521, 260 N.Y.S. 425 [1932]; 15A NY Jur 2d, Business Relationships § 1803). Plaintiffs make no showing when, and if, they notified defendants of their election to terminate defendant partnership Lampeas and Tita Realty (see Gerstein v Teitelbaum, 273 App Div 886, 77 N. Y.S.2d 502 {1948}, supra [the bringing of an action for dissolution of a partnership and for an accounting does not constitute an election on the part of plaintiff to exercise his right to dissolve the partnership notwithstanding that he had such right to dissolve]), and likewise defendants have failed to show they ever notified plaintiffs they elected to terminate defendant partnership Lampeas [*** 17] and Tita Realty.

Thus, notwithstanding the parties can be considered to have mutually agreed to dissolution of defendant partnership Lampeas and Tita Realty, based upon defendants' allegation in their amended answer that Larnpeas and Tita Realty "should be dissolved, it is unclear whether prior thereto, any notification of any election occurred, which would serve to trump the date of the service of the amended answer as the mutually agreed upon date of dissolution.

Under these circumstances, summary judgment with respect to the claims for dissolution of defendant partnerships Lampeas and Tita, and Lampeas and Tita Realty is unwarranted.

To the extent plaintiffs seek the appointment of a receiver to wind up the affairs of defendant partnerships Lampeas and Tita, and Lampeas and Tita Realty, such appointment is inappropriate at this juncture where triable issues of fact remain as to whether defendant partnership Lampeas and Tita exists, and when defendant partnership Lampeas and Tita Realty first became dissolved.

In addition, to the extent plaintiffs seek to appoint a temporary receiver to manage the real property pending resolution of the parties' litigation, CPLR 6401 (a) provides that [***18] a temporary receiver may be appointed "where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." A party seeking appointment of a temporary receiver, must make a clear evidentiary showing that such appointment is necessary in order to conserve the property in question and to protect the party's interest therein (see, Secured Capital Corp. of NY v Dansker, 263 AD2d 503, 694 N. Y.S.2d 409 {1999]). The appointment of a temporary receiver is a drastic remedy, and such appointment may not be made absent a danger of irreparable loss (see, Serdaroglu v Serdaroglu, 209 AD2d 606, 622 N.Y.S.2d 51 [1994]; see, Matter of Armienti & Brooks, 309 AD2d 659, 767 N.Y.S.2d 2 [2003]; McBrien v Murphy, 156 AD2d 140, 548 N.Y.S.2d 186 [1989]). Plaintiffs herein have presented no evidence of waste or mismanagement, and have failed to suggest in what manner the attempted leasing of a portion of the property by "Lampeas Realty" and Lampeas Family Partnership, as "OWNERS," to a third party diminished the property's value.

To the extent that defendants seek an opportunity to purchase the partnership interest of plaintiffs in defendant partnership Lampeas and Tita Realty, after a full appraisal of the subject property, such [*** 19] request appears to be premised upon defendants' contention the subject property is an asset of defendant partnership Lampeas and Tita Realty.

Again, questions of fact exist as to whether defendant partnership Lampeas and Tita Realty has any ownership interest in the subject property.

Defendants alternatively seek to be given exclusive control over the winding up of the affairs of defendant partnership Lampeas and Tita Realty, and the liquidation of its assets. Defendants assert that any attempt to wind up the affairs of defendant partnership Lampeas and Tita Realty amicably will be futile. Defendants, however, have failed to establish a right to dissolution of defendant partnership Lampeas and Tita Realty since they have failed to demonstrate the date of dissolution.

That branch of the motion by plaintiffs for partial summary judgment in the favor of plaintiff John P. Tita, Sr. and against defendant Lampeas Family Partnership with respect to the cause of action for partition in the amended complaint is denied.

The alternative branch of the motion by plaintiffs for summary judgment on the causes of action in the amended complaint for dissolution of defendant partnerships Lampeas and Tita, [***20] and Lampeas and Tita Realty and for leave to appoint a receiver is denied.

That branch of the cross motion by defendants for summary judgment dismissing the first and second causes of action in the amended complaint, for reverse summary judgment with respect to the third cause of action for dissolution of defendant Lampeas and Tita Realty, and for leave to purchase plaintiffs' interest in defendant Lampeas and Tita Realty after an appraisal is denied.

The alternative branch of the cross motion by defendants to direct various relief pursuant to Partnership Law section 75 is also denied.

Dated: March 25, 2010

Long Island City, NY 11010