

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----X
JONATHAN E. VICK and LINDA ROSE, as

Co-Executors of the Estate of Susan
Vick, Deceased,

Plaintiffs,

INDEX NO. 605143/1999

MOTION DATE _____

-against-

MOTION SEQ. NO. 011

RICHARD ALBERT, ut. al.,

Defendants.

MOTION CAL. NO. _____

-----X

The following papers, numbered 1 to _____ were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

FILED
MAR 3 2004
ROD...

Upon the foregoing papers, it is

ORDERED that the motion is decided in accordance with the accompanying Order and Decision.

Dated: March  2004

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KARLA MOSKOWITZ *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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JONATHAN E. VICK and LINDA ROSE, as
Co-Executors of the Estate of Susan
Vick, Deceased,

Index No. 605143/1999

Plaintiffs,

against-

DECISION and ORDER

RICHARD ALBERT, et. al.,

Defendants.

-----X
Karla Moskowitz, J.:

This action arises in connection with various property and financial interests of Susan Vick (Vick), who died on March 3, 1999. Plaintiffs are her children and are the sole beneficiaries under her will.

Plaintiffs move, pursuant to CPLR 3212, for an order: 1) granting partial summary judgment on their fifth cause of action for partition of the 233 East 32nd Street property in New York County; 2) determining each party's rights in the property and ordering its sale; 3) requiring defendant Richard Albert to provide an accounting of the property's income and expenses; and 4) dismissing the first and second counterclaims. Defendants Richard Albert, Evelyn Albert, Godwin Realty Associates (Godwin), 3054 Terrace Realty Co. (3054 Terrace), and Albert, Greenberg & Vick move, pursuant to CPLR 3212, for an order granting partial summary judgment: 1) dismissing plaintiffs' cause of action for partition; 2) dismissing the third cause of action for dissolution of Godwin;

and 3) dismissing the fourth cause of action for dissolution of 3054 Terrace.

This court's decision dated August 2, 2001 set forth the facts of this case in detail. Briefly, plaintiffs allege that, beginning in 1975, Vick and several of the defendants joined in buying and managing residential and commercial real estate in New York City. The Complaint states that Vick owned interests in several real properties in New York County and in Queens County at the time of her death. She was also a partner in several partnerships that managed real properties.

The Complaint alleges that Vick owned an undivided 20% interest in the 233 East 32nd Street property and that Vick, Richard Albert and Evelyn Albert, were the sole partners of defendant partnership Albert, Greenberg & Vick, manager of the East 32nd Street property. Vick allegedly had a 20% interest in the partnership. The Complaint also alleges that Vick and certain of the defendants were the partners of defendant Godwin Realty Associates, that owned and managed a property located at 3045 Godwin Terrace in the Bronx. Vick owned a 9% interest in Godwin based on a 5% direct interest and a 4% interest through Albert, Greenberg & Vick. She also allegedly held a 4% interest in defendant partnership 3054 Terrace through her interest in Albert, Greenberg & Vick. 3054 Terrace owned and managed the property located at 3054 Godwin Terrace in the Bronx.

Plaintiffs commenced this action in November of 1999 seeking, among other things, a partition of the East 32nd Street property, and a dissolution, an accounting and the appointment of a Receiver with respect to the various partnerships.

Plaintiffs' fifth cause of action seeks a partition and sale of the East 32nd Street property. Plaintiffs allege that Susan Vick owned an undivided 20% interest in the property as a tenant in common and the interest passed to her estate upon her death. Plaintiffs submit the deed to the premises, that states that Vick held a 20% interest in the property.

"It is well settled that a tenant-in-common of real property may maintain an action for the partition and for the sale of the property, if it appears that partition alone cannot be made without great prejudice to the owners." (Wilbur v Wilbur, 266 AD2d 535); DeRisi v Santoro, 262 AD2d 270; see, Real Property Actions and Proceedings Law § 901[1]. However, partition of the property, or the sale of it, is inappropriate prior to an accounting to determine the parties' respective interests in the property. (Ranninger v Revesner, 306 AD2d 20; Grossman v Baker, 182 AD2d 1119; McVicker v Sarma, 163 AD2d 721, 722; RPAPL § 911.

It is undisputed that the 1378 deed states that Vick was the owner of an undivided 20% interest in the property. The closing statement also lists Vick as a 20% owner. Therefore, the court finds that plaintiffs have made a prima facie demonstration that

Vick was a tenant in common and that they are, as her heirs, entitled to seek partition of the property.

Defendants assert that this court should dismiss this claim because Vick was not a tenant in common and the partnership of Albert, Greenberg & Vick owned the premises. This is unpersuasive.

Defendants rely on documents such as tax returns and financial statements to support their assertion that the partnership owned the property. However, these documents demonstrate, at most, that the parties formed the partnership of Albert, Greenberg & Vick (a point that plaintiffs do not dispute) and that the partnership may have managed the premises. The documents do not demonstrate partnership ownership of the property.

Significantly, defendants have not submitted any evidence of a transfer of Vick's interest in the property to the partnership. Defendants claim that there was an agreement for that transfer. However, they provide no specific facts to support this assertion.

Defendants also argue that plaintiffs are estopped from asserting a claim for partition. Specifically, defendants argue that plaintiffs waived a claim by agreeing to hire appraisers to determine the value of Vick's share of the premises and to sell Vick's share to defendants based on the price the appraiser set. Again, defendants put forth no evidence of that agreement and have failed to put forth any other evidence to support a waiver. Therefore, the court finds that defendants have not demonstrated

that. questions of fact exist with respect to the partition claim and the cross-motion to dismiss the fifth cause of action is denied.

The court finds, however, that plaintiffs have not yet demonstrated that they are entitled to an order granting partition and sale of the property. First, as to partition, there has not been an accounting to determine each party's interest in the property. Moreover, plaintiffs have not demonstrated that great prejudice exists that would require a sale of the property. Plaintiffs state in a conclusory manner that the property must be sold because it is an apartment building with approximately fifty separate apartments. However, this is insufficient to demonstrate that the property is incapable of partition. Therefore, the issue of whether the property should be sold is referred to a special referee to hear and report.

Plaintiffs also move for summary judgment dismissing the first and second counterclaims. The first counterclaim seeks an order compelling plaintiffs to sell their interest in the East 32nd Street property to Richard Albert on the grounds that partition and sale of the property would cause him adverse tax consequences. However, Albert does not put forth any facts to support this assertion or to demonstrate that plaintiffs are not entitled to a partition or a public sale of the property. Therefore, this counterclaim is dismissed.

The second counterclaim asserts; that plaintiffs interfered with Richard Albert's prospective contracts to manage the various partnerships. Specifically, it alleges that he already was acting as manager for the partnerships and that he would have entered into new agreements with the surviving partners to continue to manage their interests but for plaintiffs' conduct. The conduct complained of includes the filing of this action.

"Tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct." Vigoda v DCA Productions Plus Inc., 293 AD2d 265, citations omitted. Here, the counterclaim fails to allege any facts to demonstrate that the filing of this action constituted wrongful conduct that would sustain this claim. Therefore, this counterclaim is dismissed.

Defendants move to dismiss the third cause of action, seeking an accounting and dissolution of Godwin Realty Associates. Defendants assert that dissolution is inappropriate because the partnership agreement states in Article III that: the partnership would continue until written agreement of the partners terminated it.

"Absent specific agreement to the contrary, a partnership or a joint venture to which the partnership was a party, dissolves; upon the death of a partner and, though the survivors continue to

operate the business of the former partnership, they in effect create a new partnership at will." (Peirez v Queens P.H.P. Associates, Corp, 148 AD2d 596; see, Burger, Kurzman, Kaplan & Stuchin v. Kurzman, 139 AD2d 422; Partnership Law § 62[4]). Here, the Partnership Agreement states that

"The Partnership shall commence as of the date hereof, and shall continue until terminated by the written agreement of the partners to dissolve the partnership."

The agreement does not specifically address the contingency of a partner's death. Therefore, the partnership automatically dissolved upon Vick's death and the court finds that defendants have not demonstrated that this court should dismiss the third cause of action.

Defendants also move to dismiss the fourth cause of action, that seeks an accounting and dissolution of 3054 Terrace. The complaint alleges that Vick held a 4% interest in this partnership pursuant to her interest in Albert, Greenberg & Vick. It further alleges that the 3054 Terrace automatically dissolved upon her death. Defendants allege that Vick had no interest in 3054 Terrace and that plaintiffs therefore do not have standing to assert this cause of action.

The court dismisses this claim. Plaintiffs present no evidence of Vick's alleged interest in the partnership. Instead, they assert that the court should decline to dismiss the claim because Richard Albert could not identify all the partners in his EBT. This is

insufficient to demonstrate that a triable issue of fact exists with respect to this claim.

Accordingly, it is

ORDERED that the following issues are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine these issues:

(1) an accounting of each parties' interest in the property located at 233 East 32nd Street and the value of that property; and (2) whether or not it is appropriate to sell or to partition the property located at 233 East 32nd Street

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

ORDERED that plaintiffs' motion for summary judgment is granted to the extent that the first and second counterclaims are dismissed; and it is further

ORDERED that defendants' cross-motion for summary judgment is granted to the extent that plaintiffs' fourth cause of action is dismissed and the cross-motion is otherwise denied; and it is further

ORDERED that the clerk is directed to enter partial judgment accordingly; and it is further

ORDERED that pleadings are deemed amended accordingly.

DATED: March 25, 2004

ENTER

FILED
J. S. C. OFFICE