

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: January 7, 2021

528400

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EDWARD KORN et al.,  
Plaintiffs,

v

ROBERT B. KORN,  
Appellant,  
and

MEMORANDUM AND ORDER

MADGE ROTHENBERG, Individually  
and as Coexecutor of the  
Estate of MIRIAM ROTHENBERG,  
Deceased, et al.,  
Respondents.

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Calendar Date: November 16, 2020

Before: Lynch, J.P., Clark, Mulvey and Reynolds Fitzgerald, JJ.

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James M. Bryant, Schoharie, for appellant.

Stroock & Stroock & Lavan LLP, New York City (Kevin L.  
Smith of counsel), for respondents.

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Clark, J.

Appeal from an order and judgment of the Supreme Court (Ferreira, J.), entered December 27, 2018 in Schoharie County, which, among other things, in an action pursuant to RPAPL article 9, granted Miriam Rothenberg's motion to confirm the referee's report and partition the subject properties.

Five parcels of real property in the Village of Sharon Springs, Schoharie County have been owned by members of the same extended family for over a century. At one time, three of the parcels were owned by siblings Robert Korn and Miriam Rothenberg as tenants in common, while the remaining two parcels were owned by Rothenberg and Robert Korn and their cousin Hannah Wassermann as tenants in common. In 2008, sometime after Robert Korn and his spouse had both died, plaintiff Edward Korn – their son – commenced an action pursuant to RPAPL article 9 to partition the five parcels of real property, naming his brother, defendant Robert B. Korn (hereinafter Korn), as well as Rothenberg and Hannah Wassermann as defendants. Hannah Wassermann passed away in 2010 and was survived by her three children – plaintiffs Ross Wassermann, Joel Wassermann and Eric Wassermann (hereinafter collectively referred to as the Wassermans). In 2013, the Wassermans commenced an action pursuant to RPAPL article 9 to partition the two parcels of real property in which they had an interest, naming Korn,<sup>1</sup> Rothenberg and Edward Korn<sup>2</sup> as defendants. Ross Wassermann, as executor of the estate of Hannah Wassermann, was later substituted for Hannah Wassermann in the 2008 partition action.

The Wassermans and Rothenberg thereafter separately moved for, among other things, consolidation of the 2008 and 2013 partition actions. Supreme Court (Connolly, J.) issued an order that, as relevant here, granted the consolidation requests. While an appeal from that order was pending in this Court (135 AD3d 1023 [2016]), Supreme Court (Ferreira, J.) entered an order consolidating the 2008 and 2013 partition actions and amending the caption accordingly. In 2016, after amending her answer to include a counterclaim for partition or sale of all five parcels, Rothenberg moved for summary judgment on her counterclaim. Supreme Court granted the motion and appointed a referee to, among other things, "report on the rights, shares

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<sup>1</sup> The Wassermans named Robert Korn Jr. as a defendant; however, Robert B. Korn and Robert Korn Jr. are the same person.

<sup>2</sup> Edward Korn did not answer or otherwise appear in the 2013 partition action, and the Wassermans ultimately obtained a default judgment against him.

and interests of the parties" and to determine whether the parcels could be partitioned without great prejudice to the owners or if they had to be sold. The referee ultimately issued a report concluding that physical partition of the parcels could not be made without great prejudice to the owners and that "any partition must proceed by sale." Rothenberg then moved to confirm the referee's report. However, before Supreme Court could issue a decision on the motion, Rothenberg advised the court that she no longer wished to pursue partition of three of the parcels and requested that the referee's report be confirmed only with respect to the two parcels in which the Wassermanns have an interest. Supreme Court granted the motion and confirmed the referee's report, but modified the referee's recommendation by directing the partition and sale of only the two parcels in which the Wassermanns have an interest. Korn appeals.<sup>3</sup>

Initially, we reject Korn's assertion that Supreme Court abused its discretion by consolidating the 2008 and 2013 partition actions. When actions involving a common question of law or fact are pending before it, Supreme Court may, upon motion and at its discretion, consolidate the actions, so long as such consolidation does not prejudice a substantial right of the party opposing consolidation (see CPLR 602 [a]; Matter of Powers v De Groodt, 43 AD3d 509, 512 [2007]; Guasconi v Pohl, 2 AD3d 1202, 1203 [2003]). As we previously held, the 2008 and 2013 partition actions "plainly involve common questions of law and fact," given that the 2013 action "concerns two parcels of land that are also at issue in" the 2008 action and considering that both actions would have required a determination as to the respective ownership rights of Rothenberg, Korn, Edward Korn and the Wassermanns (135 AD3d at 1024). Korn failed to demonstrate that a substantial right would be prejudiced by the consolidation. In light of the foregoing, we discern no abuse of discretion in Supreme Court's determination to consolidate the 2008 and 2013 partition actions (see Guasconi v Pohl, 2 AD3d

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<sup>3</sup> Rothenberg passed away in August 2019. Her daughter, defendant Madge Rothenberg, individually and together with coexecutors of Rothenberg's estate, have since been substituted as parties to this consolidated action.

at 1203; compare Matter of Groll v Board of Assessment Review of the Town of Delaware, 183 AD3d 1156, 1159-1160 [2020]).

Korn also argues that Rothenberg was not entitled to summary judgment on her counterclaim for partition. Pursuant to RPAPL 901 (1), "a person holding and in possession of real property as joint tenant or tenant in common, in which he [or she] has an estate of inheritance, or for life, or for years, 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." To establish his or her prima facie entitlement to summary judgment in a partition action, the plaintiff bears the burden of demonstrating his or her ownership and right to possession of the real property (see Fini v Marini, 164 AD3d 1218, 1221 [2018]; Cadle Co. v Calcador, 85 AD3d 700, 702 [2011]). However, the right to seek partition is not absolute and may be defeated when the equities demand (see Manganiello v Lipman, 74 AD3d 667, 668 [2010]; Barol v Barol, 95 AD2d 942, 943 [1983]). Here, Rothenberg amply established her ownership interest and right to possess the subject parcels as a tenant in common by producing the relevant deeds and certificates of title and attesting to her interest in a sworn affidavit (see RPAPL 901 [1]; Fini v Marini, 164 AD3d at 1221; Holley v Hinson-Holley, 101 AD3d 1084, 1085-1086 [2012]).

The burden thus shifted to Korn to raise a triable issue of fact precluding summary judgment (see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). To that end, Korn submitted an affidavit in opposition to Rothenberg's motion for summary judgment that was unsupported by any evidence. In that affidavit, Korn did not challenge Rothenberg's ownership interest in, or right to possess, the parcels as a tenant in common. Rather, he made various conclusory allegations, including that Rothenberg and the Wassermanns were colluding "to orchestrate a sale of all of the five neighboring properties" to obtain a higher sale price and that any interest that he and Edward Korn have in the properties are "the subject of ongoing litigation" relating to their mother's estate. We agree with Supreme Court that Korn's unsupported and conclusory allegations are insufficient to demonstrate a question of fact as to whether

the equities disfavor partition. Accordingly, as Korn failed to raise a triable issue of fact in opposition to Rothenberg's prima facie showing, Supreme Court properly granted Rothenberg summary judgment on her counterclaim for partition (see *Holley v Hinson-Holley*, 101 AD3d at 1086; see generally *Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

To the extent that we have not addressed any of Korn's remaining contentions, they have been examined and found to be lacking in merit.

Lynch, J.P., Mulvey and Reynolds Fitzgerald, JJ., concur.

ORDERED that the order and judgment is affirmed, with costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger  
Clerk of the Court