

At a term of the Supreme Court of the State of New York, held in and for the County of Westchester at the Courthouse located at 111 Dr. Martin Luther King, Jr., Blvd., White Plains, New York on the 22 day of August 2017.

PRESENT:

Hon. Sam D. Walker  
J.S.C.

-----X  
THEA D. FRY,

Plaintiff,

**ORDER**

-against-

Index No.: 69308/15

MARY ANN CARR and all persons  
unknown claiming a legal or equitable  
right, title, estate, lien or interest in the  
real property described herein,

Defendant.  
-----X

The Court having signed an Order on June 8, 2017, appointing Massimo DiFabio as Referee to immediately sell the subject property in dispute in the above captioned action, to wit, 105-H Nottingham Road, Bedford Hills, New York 10509, and to compute the amount due the parties, and to hold in escrow the proceeds of the sale pending the outcome of a hearing to ~~determine the rights of the parties. As the Order did not specify the mechanics of how Mr.~~ DiFabio was to sell the property and what his fee for services should be, a conference call was conducted on August 17, 2017, with the Court to resolve these issues and it is now hereby:

**ORDERED**, that the Referee shall immediately proceed to oversee the sale of the subject property including the obtaining of the services of a real estate broker to list and sell the subject property located at 105-H Nottingham Road, Bedford Hills, New York 10509, and also known as

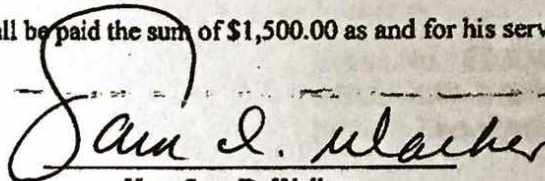
section 60.10, block 6 and lot 33.125, at the highest price possible so as to maximize the benefit to the parties; and it is further

**ORDERED**, that the Referee shall compute the amount due the parties; and it is further

**ORDERED**, that the Referee shall hold in escrow the proceeds of the sale pending the outcome of a hearing to determine the rights of the parties; and it is further

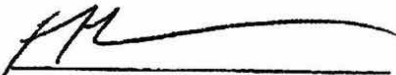
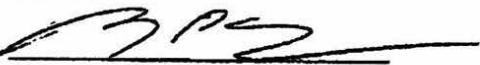
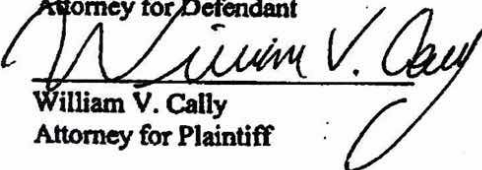
**ORDERED**, that the Referee shall be paid the sum of \$1,500.00 as and for his services as

-Referee:



Hon. Sam D. Walker  
J.S.C.

Approved as to form and substance:

  
Massimo DiFabio  
Referee  
Matthew P. Lipinsky  
Attorney for Defendant  
William V. Cally  
Attorney for Plaintiff



To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
PRESENT: HON. SAM D. WALKER, J.S.C.

-----X  
THEA D. FRY

Plaintiff,

-against-

Index No.: 69308/15  
**DECISION & ORDER**  
Motion Sequence 1

MARY ANN CARR and all persons unknown claiming a legal or equitable right, title estate, lien or interest in the real property described herein,

Defendant.  
-----X

The following papers numbered 1 through 32 were received and considered in connection with the above-captioned matter:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation/Affidavit/ Exhibit A-V	1-25
Memorandum of Law in Support of Motion	26
Affirmation in Opposition/Affidavit/Exhibit A-C	27-31
Reply Affirmation	32

Plaintiff moves for an Order striking Defendant's Answer and Counterclaim; for partial summary judgment for partition by sale of real property in dispute; for an immediate hearing to be scheduled to determine Plaintiff's rights and interest in the subject property; to obtain a judgment against defendant secured by a lien against Defendant's interest in the property or proceeds from the sale of the property for all of the monies Plaintiff has expended for the purchase, maintenance and upkeep of the



property inclusive of the down payment and purchase price, taxes, insurance, maintenance fees and charges, unpaid rent, etc.; and for an award of legal fees and costs.

Plaintiff alleges that she entered into a contract to purchase a condo in Bedford Hills, NY, assist a friend and her teenage daughter who were about to be evicted from their apartment. Plaintiff stated that she agreed to loan Defendant the down payment for the condo with the understanding that Defendant would obtain a mortgage for the remaining balance of the purchase price. Thereafter, Defendant would be solely responsible for the mortgage payments, maintenance fees, taxes, insurance and utilities for the premises.

Plaintiff further alleges that Defendant was not able to qualify for the mortgage and as a result Plaintiff lent her the remaining money, totaling \$230,541.74, required to complete the purchase. As a condition of this loan, it was agreed that Plaintiff would be the deeded owner and once Defendant obtained a mortgage she would purchase the condo from Plaintiff, after which Defendant would become the deeded owner of the condo. Despite the parties' agreement, the deed that was recorded had both Plaintiff's and Defendant's name as joint tenants with a right to survivorship. This was in complete contradiction to the language in the contract of sale and the written agreement entered into by the parties. Defendant's name was added to the contract as a joint tenant, and on the deed as a joint tenant with rights to survivorship. Neither change was consented to nor initialed by Plaintiff.

The written agreement entered into by the parties stated that the money Plaintiff used for the purchase was a loan to Defendant and that Defendant would repay the



loan at 7% interest for a monthly payment of \$1,661.17. The agreement also stated that Defendant was obligated to obtain a mortgage to pay back Plaintiff all the money she spent for the purchase plus other miscellaneous monies previously loaned to Defendant totaling \$237,310.32. Based upon the agreement, once the loan was satisfied in full, Plaintiff would execute a new deed transferring the condo over to Defendant. After the agreement was executed, Defendant made six(6) payments and has failed to make any subsequent payments in violation of the agreement.

On July 28, 2015, the parties entered into a second written agreement wherein, Defendant agreed to transfer her interest in the condo to Plaintiff in return for Plaintiff allowing her to remain in the condo as a tenant. Plaintiff stated that she not only paid for the condo in cash, but she also paid for all of the taxes, insurance and maintenance fees associated with the condo. The only bills Defendant paid were the utilities. Plaintiff alleges that to date, she has paid a total of \$23,388.18 for the above expenses and that Defendant owes her \$44,848.29 in accrued interest.

Plaintiff also alleges that Defendant has failed to comply with all discovery demands to include Demand for Bill of Particulars and should be precluded from any evidence in opposition to Plaintiff's claims. Furthermore, Defendant, in her deposition testimony, admitted that she did not pay any money toward the purchase price of the condo; that she could not remember if she and Plaintiff had a conversation about the purchase of the condo, the down payment and Defendant's obligation to obtain a mortgage or who was responsible for paying the condo expenses going forward after the purchase. Defendant further admitted that she did not pay the maintenance fees,



taxes, insurance or any other condo fees and expenses except for the utilities, and that she never attempted to obtain a mortgage.

Plaintiff contends that Defendant has breached the terms of their agreement and as a result Plaintiff now seeks partial summary judgment to partition the condo by sale and for other relief.

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists, *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325, 508 N.Y.S.2d 923, 501 N.E.2d 572 (1986). The burden is upon the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law, *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067, 416 N.Y.S.2d 790, 390 N.E.2d 298 (1979). A failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063, 601 N.Y.S.2d 463, 619 N.E.2d 400 (1993). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718.

"[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" (RPAPL 901 (1)); *Arata v Behling*, 57 A.D.3d 925, 926 (2<sup>nd</sup> Dept. 2008); *Graffeo v Paciello*, 46 A.D.3d 613, 614



(2d Dep't 2007). A plaintiff establishes his or her right to summary judgment on an action for partition and sale by demonstrating ownership and right to possession of the property, *Arata v Behling*, 57 A.D.3d at 926; *James v James*, 52 AD3d 474 (2d Dep't 2008); *Dalmacy v Joseph*, 297 AD2d 329, 330 (2d Dep't 2002).

Here, Plaintiff has made a prima facie showing by submitting evidence that she and Defendant, each have a one-half interest in the property by deed dated November 15, 2013, and by providing a copy of the Bargain and Sale Deed with Covenants. The subject premises is a condominium apartment and is so situated that division or partition among parties entitled thereto according to their respective rights and interests, cannot be had without great prejudice to the owners thereof, *Deschamps v. Deschamps*, 26 Misc.3d 1221(A), 907 N.Y.S.2d 99 (Table) (Sup. Ct. Kings Cty. 2010). By the premises being a single condominium unit, Plaintiff has also made a prima facie showing that the property was "so circumstanced that a partition thereof cannot be made without great prejudice to the owners", *Cadle Co. v Calcador*, 85 A.D.3d 700, 926 N.Y.S.2d 106 (2d Dep't 2011).

With respect to Plaintiff's request for an accounting, in a partition and sale action of this nature, "an accounting of the income and expenses of the partitioned property is a necessary incident and should be had as a matter of right before entry of . . . final judgment and before any division of money between the parties", *McVicker v. Sarma*, 163 A.D.2d 721, 722, 558 N.Y.S.2d 997 (1990); *Donlon v. Diamico*, 33 A.D.3d 841, 842, 823 N.Y.S.2d 483 (2006). Therefore, Plaintiff's financial interest is protected and an accounting prior to the sale will address the issues of concern raised by Plaintiff in the instant application. Having established her entitlement to partial summary judgment,



the burden now shifts to Defendant to raise triable issues of fact on the issue of partition by sale.

In opposing the motion, Defendant is required to produce evidentiary proof, in admissible form, sufficient to raise a triable issue of fact as to its defenses, *Washington Mut. Bank, F.A. v. O'Connor*, 63 A.D.3d at 833, 880 N.Y.S.2d 696; *US Bank Trust N.A. Trustee*, 16 A.D.3d at 408. Defendant, did oppose Plaintiff's motion for partial summary judgment by filing an Answer to Plaintiff's Complaint as well as written opposition to Plaintiff's motion for summary judgment. In answering Plaintiff's Complaint, Defendant simply entered general denials or asserted denials based upon information and belief as well as six (6) affirmative defenses and one (1) counterclaim. An answer containing general denials are insufficient to defeat summary judgment, *Bankers Trust of Rockland County v. Keesler*, 49 A.D.2d. 918, 373 N.Y.S.2d 637 (2d Dep't 1975). To succeed in defeating Plaintiff's motion for summary judgment, Defendant is required to produce evidentiary proof in admissible form establishing a triable issue of material fact, not mere conclusions, hope, unsubstantiated allegations or assertions, *Zuckerman v. City of New York*, 49 N.Y.2d 577.

In her opposition, Defendant sought denial of Plaintiff's motion to strike her answer, and opposed partition as being inequitable. The determination of whether to strike a pleading lies within the sound discretion of the trial court, CPLR 3126(3); *Walter B. Melvin, Architects, LLC v. 24 Aqueduct Lane Condominium*, 51 A.D.3d 784, 785, 857 N.Y.S.2d 697; *Cianciolo v. Trism Specialized Carriers*, 274 A.D.2d 369, 370, 711 N.Y.S.2d 441). However, the drastic remedy of striking an answer is not appropriate absent a clear showing that the failure to comply with discovery demands was willful or



contumacious, CPLR 3126(3); *Walter B. Melvin, Architects, LLC v. 24 Aqueduct Lane Condominium*, 51 A.D.3d at 785, 857 N.Y.S.2d 697; *Harris v. City of New York*, 211 A.D.2d 663, 664, 622 N.Y.S.2d 289.

According to Plaintiff, other than appearing at the deposition, Defendant failed to comply with the discovery process. Defendant did not produce her tax returns, e-mails, mortgage application etc. or any other documents in response to Plaintiff's first Notice for Discovery & Inspection and Notice to Take Deposition. Defendant also failed to respond to the Demand for Bill of Particular or provide the documents requested at her deposition. In fact, Defendant provided no discovery at all. Here, all Plaintiff offered in support of her claim are copies of The First Notice for Discover and Inspection, Demand for Bill of Particulars, and Notice to Take Deposition Upon Oral Examination, which Defendant attended. Plaintiff provided no additional demands or the Defendant's inadequate response. This was insufficient to show a pattern of willful and contumacious failure to respond to discovery demands or comply with disclosure orders, so as to justify the relief striking the defendant's answer, *JPMorgan Chase Bank N.A. v. New York State Department of Motor Vehicles*, 119 A.D.3d 903, 990 N.Y.S.2d 577, 2014 N.Y. Slip Op. 05516 (2d Dep't 2014).

With respect to Defendant's opposition to partition of the property, the Court adequately addressed this issue above, and there is no need to address it any further. Plaintiff's application for partial summary judgment for partition by sale is granted and the proceeds of the sale shall be held in escrow pending the outcome of a hearing to determine the rights of the parties.



The Court will address the affirmative defenses raised by Defendant in her Answer. Defendant's affirmative defense alleging failure to state a cause of action must be dismissed. The standard to be applied on a motion to dismiss for failure to state a cause of action is both familiar and well settled—"we must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts fit within any cognizable legal theory", *He v. Realty USA*, 121 A.D.3d 1336, 1339 (2014). When the standard is applied, Plaintiff has clearly made out a cause of action for partition.

Defendant's second affirmative defense challenges the jurisdiction of the Court based upon improper services of the Summons and Complaint, is also without merit. "[I]t is well settled that a process server's affidavit of service constitutes prima facie evidence of proper service, *Deutsche Bank Natl. Trust Co. v. Quinones*, 114 A.D.3d 719 (2014); *Rox Riv. 83 Partners v. Ettinger*, 276 A.D.2d 782 (2000). Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to detailed and specific facts to rebut the statements in the process server's affidavit, *Rosario v. NES Med. Servs. of N.Y., P.C.*, 105 A.D.3d at 832; *Indymac Fed. Bank FSB v. Quattrochi*, 99 A.D.3d at 764; *US Natl. Bank Assn. v. Melton*, 90 A.D.3d 742, 743. Here, Defendant failed to swear to detailed and specific facts to rebut the statements in the process server's affidavit. Furthermore, jurisdictional objection based on improper service raised in a responsive pleading is waived if a motion for judgment is not brought within 60 days after serving the pleading, unless the court extends the time upon the ground of undue hardship.



CPLR 3211(e), *Vandemark v. Jaeger*, 267 A.D.2d 672, 699 N.Y.S.2d 522. Here, Defendant did not specifically state how service was improper nor did she move to dismiss based upon improper service within 60-days.

Defendant's remaining affirmative defenses have already been addressed by the Court or should also be dismissed since they were not raised in opposition to Plaintiff's motion for partial summary judgment. By failing to raise these issues in opposition to Plaintiff's motion for partial summary judgment, they are deemed to have been waived. A broad reading of *Nationstar Mortgage, LLC v. Silveri*, 126 A.D.3d 864, 7 N.Y.S.2d 158 (2d Dep't 2015) suggests that since no opposition was filed, no triable issue of fact was raised in response to Plaintiff's prima facie showing or as to the merits of any of [the] ... affirmative defenses, *Flagstar Bank v. Bellafiore*, 94 A.D.3d 1044, 1045, 943 N.Y.S.2d 551. By not raising these issues in her opposition to Plaintiff's motion for summary judgment, Defendant waived her rights for consideration of these issues by the Court. Defendant has failed to raise triable issues of fact rebutting Plaintiff's prima facie showing of her entitlement to partial summary judgment on the issue of partition by sale.

In her single counterclaim, Defendant alleges that the condo was intended as a gift from Plaintiff to Defendant; therefore, Defendant is entitled to a judgment declaring her the owner of the property. Plaintiff denies this allegation and provided two signed written agreements to the contrary. While Plaintiff's evidence that she paid virtually all of the apartment's purchase price and carrying costs is sufficient to rebut the presumption that the parties are entitled to an equal number of shares on partition, *Estate of Menon v. Menon*, 303 A.D.2d 622, 623, 756 N.Y.S.2d 639 (2003); *McVicker v. Sarma*, 163



A.D.2d 721, 722, 558 N.Y.S.2d 997 (1990), such evidence does not resolve what, if anything, Defendant's share should be. That issue is not amenable to summary judgment treatment, requiring as it does consideration of the various equities *Ranninger v. Pevsner*, 306 A.D.2d 20, 759 N.Y.S.2d 661 (2003), citing, inter alia, *McVicker, id.*, including the nature of the parties' relationship and whether, as Defendant claims, Plaintiff intended her disparate contributions to be a gift, *Rettig v. Holler*, 2003 N.Y. Slip Op. 51501[U] (Sup. Ct., N.Y. County, Sept. 16, 2003), 1 Misc.3d 904(A), 2003 N.Y. Misc. LEXIS 1599, 2003 WL 22976599. Defendant's counterclaim should be addressed by the Court at a hearing to be scheduled.

Lastly, even though the property is held as joint tenants, all of the evidence to include the parties written agreements seems to indicate that Plaintiff is the true owner of the property. Defendant offered no credible opposition to Plaintiff's contention either through oral testimony at her deposition or by producing documentary evidence to the contrary.

Therefore, Plaintiff's application for an Order striking Defendant's Answer and dismissing her Affirmative Defenses and Counterclaims pursuant to CPLR 3126 and 3211(11)(b) is DENIED;

Plaintiff's application for an Order scheduling an immediate hearing to determine the respective rights and interest of the parties in the subject property is GRANTED;

Plaintiff's application for partial summary judgment for partition by sale pursuant to CPLR 3212(e) and ordering the immediate sale of the subject property and for the proceeds to be held in escrow is GRANTED;



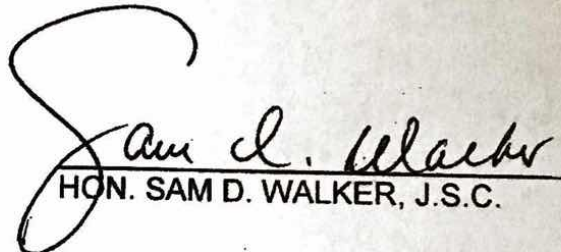
Plaintiff's application for an Order granting an accounting to be completed of Defendant's expenditures for the payment of the costs and expenses for the purchase of the property at issue and for the costs and expenses in maintaining and preserving the property for the benefit of both Plaintiff and Defendant since its purchase, is GRANTED;

The remaining request for relief in Plaintiff's motion as set forth in paragraphs 4, 5, 6, 7 8, the last sentence request in paragraph 9 and paragraph 10 are held in abeyance pending the hearing to determine the respective rights of the parties, to be addressed at that time.

Plaintiff shall submit an Order for the appointment of a referee to compute the amount due the parties and sell the property, and for the appointment of a forensic accountant to conduct an accounting.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York  
March 31, 2017

  
HON. SAM D. WALKER, J.S.C.