

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D18414
O/kmg

_____AD3d_____

Submitted - February 7, 2008

STEVEN W. FISHER, J.P.
HOWARD MILLER
WILLIAM E. McCARTHY
CHERYL E. CHAMBERS, JJ.

2007-01040

DECISION & ORDER

Carol Ehrgott, appellant, v
Daniel F. Buzerak, respondent.

(Index No. 19689/05)

Tackel & Varachi, LLP, White Plains, N.Y. (John P. Varachi of counsel), for
appellant.

Eileen West, Pleasantville, N.Y., for respondent.

In an action pursuant to RPAPL article 9 to partition real property, the plaintiff
appeals from so much of an order of the Supreme Court, Westchester County (Nastasi, J.), entered
January 2, 2007, as, upon searching the record on her cross motion for summary judgment, awarded
summary judgment in favor of the defendant dismissing the complaint.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs,
and the matter is remitted to the Supreme Court, Westchester County, for further proceedings on the
complaint, including determination of any pending undecided motions.

The parties were married in 1974. While married, they purchased the former marital
home located in Croton Falls and took ownership as tenants by the entirety. On or about November
6, 1998, a judgment of divorce was entered in an action commenced by the plaintiff. The judgment
stated, inter alia, "that the parties . . . have no marital property to be disposed of equitably pursuant
to DRL 236B(5)." The defendant continued to reside in, and maintain, the former marital home.

In 2005 the plaintiff commenced this action pursuant to RPAPL article 9 for the

March 18, 2008

Page 1.

EHRGOTT v BUZERAK

partition of the subject property. The defendant, acknowledging that, “under the circumstances[,] the plaintiff still has an ownership interest in the premises,” moved, in effect, for a judgment declaring the respective rights of the parties to the property. The plaintiff cross-moved for summary judgment. Upon searching the record on the plaintiff’s cross motion, the Supreme Court awarded summary judgment to the defendant dismissing the complaint. The court concluded that the plaintiff’s claim to the subject property was both collaterally and judicially estopped. We reverse.

Absent any disposition of the property, the judgment of divorce simply converted the parties’ tenancy-by-the-entirety in the property to a tenancy in common (*see Goldman v Goldman*, 95 NY2d 120, 122; *Thomas v Samuel*, 40 AD3d 744, 745). It did not otherwise affect the parties’ rights and, indeed, the defendant acknowledged that the judgment of divorce did not extinguish the plaintiff’s ownership interest in the property. Nor was the plaintiff estopped from asserting that interest.

The judgment of divorce stated only that “the parties . . . have no marital property to be disposed of equitably pursuant to DRL 236B(5).” Under the circumstances of this case, that represented a finding, not that the parties had no marital property, but that they were not asking the court to equitably distribute any marital property. Inasmuch as the judgment of divorce did not award exclusive occupancy to the defendant, it does not bar the plaintiff, as a tenant-in-common, from seeking to partition the property (*see Freigang v Freigang*, 256 AD2d 539; *cf. Ripp v Ripp*, 38 AD2d 65, *affd* 32 NY2d 755). Accordingly, the Supreme Court erred in searching the record on the plaintiff’s cross motion and awarding summary judgment to the defendant dismissing the complaint.

On this limited appeal, we do not reach the parties’ remaining contentions raised in their respective motion papers regarding, inter alia, the defendant’s alleged right to reimbursement for the expenses he incurred in connection with the subject property during the period of his sole occupancy.

FISHER, J.P., MILLER, McCARTHY and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court