

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

D32003
W/prt

_____AD3d_____

Argued - June 16, 2011

DANIEL D. ANGIOLILLO, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
SHERI S. ROMAN, JJ.

2010-03847
2011-00119

DECISION & ORDER

Diane D. Marshall, formerly known as Diane D. Bonica,
appellant, v Joseph E. Bonica, respondent.

(Index No. 24713/08)

Renda & Associates, P.C., Brooklyn, N.Y. (Sigismondo F. Renda of counsel), for
appellant.

David H. Singer, New York, N.Y., for respondent.

In an action, inter alia, for the partition of real property, the plaintiff appeals (1), as limited by her brief, from so much of an order of the Supreme Court, Kings County (Sunshine, J.), dated April 1, 2010, as granted that branch of the defendant's motion which was pursuant to CPLR 3211(a)(7) to dismiss the cause of action for partition, and denied those branches of her cross motion which were pursuant to CPLR 3025(b) to amend her reply to the defendant's counterclaims to add an affirmative defense based on the statute of limitations and, upon amendment, to dismiss the counterclaim for equitable distribution as time-barred pursuant to CPLR 3211(a)(5), and (2) from an order of the same court dated October 18, 2010, which denied her motion for leave to reargue.

ORDERED that the appeal from the order dated October 18, 2010, is dismissed, without costs or disbursements, as no appeal lies from an order denying reargument; and it is further,

ORDERED that the order dated April 1, 2010, is modified, on the law, (1) by deleting the provision thereof denying that branch of the plaintiff's cross motion which was to amend her reply to add an affirmative defense based on the statute of limitations, and substituting therefor a provision granting that branch of the cross motion, and (2) by deleting the provision thereof denying that branch of the plaintiff's cross motion which was to dismiss the defendant's counterclaim for equitable

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distribution as time-barred, and substituting therefor a provision granting that branch of the plaintiff's cross motion; as so modified, the order dated April 1, 2010, is affirmed insofar as appealed from, without costs or disbursements.

The Supreme Court properly granted that branch of the defendant's motion which was pursuant to CPLR 3211(a)(7) to dismiss the cause of action for the partition of the parties' former marital residence because an action for partition does not lie with respect to property held as tenants by the entirety and, under New York's "divisible divorce" rule, the ex parte foreign divorce secured by the plaintiff did not convert the parties' tenancy by the entirety to a tenancy in common (*see* RPAPL 901[1]; *Vanderbilt v Vanderbilt*, 1 NY2d 342, *affd* 354 US 416; *Russo Realty Corp. v Orlando*, 288 AD2d 289, 290).

However, the Supreme Court should have granted that branch of the plaintiff's cross motion which was to amend her reply to add an affirmative defense to the defendant's counterclaims based on the statute of limitations (*see* CPLR 3025[b]) and, upon such amendment, to dismiss the defendant's counterclaim for equitable distribution as time-barred. "A . . . counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed" (CPLR 203[d]), except that if the counterclaim arose from "the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed" (*id.*). Here, however, when this action was commenced in 2008, the defendant's counterclaim for equitable distribution was already barred by the six-year limitations period set forth in CPLR 213(1) (*see* *Walter v Starbird-Veltidi*, 78 AD3d 820, 822; *cf.* *Young v Knight*, 236 AD2d 534, 535; *Mattwell v Mattwell*, 194 AD2d 715, 717; *Peterson v Goldberg*, 180 AD2d 260, 263-264). Moreover, there is no basis upon which to conclude that a counterclaim for equitable distribution, which would involve a mathematical determination of the apportionment of marital property between the parties based on their contribution to the value of that property during the marriage and other relevant factors, arises from the same transaction or occurrences as the cause of action for partition of the marital residence. Even if a cause of action for partition were cognizable between tenants by the entirety, that cause of action presumes that the value of the marital residence has already been apportioned to each party, and seeks only the judicial supervision of the disposition of each share.

The plaintiff's appeal from the order dated October 18, 2010, denying her motion for leave to reargue must be dismissed, as no appeal lies from an order denying a motion for leave to reargue (*see* CPLR 2221[d]; *Galasso, Langione & Botter, LLP v Liotti*, 81 AD3d 880, 884).

ANGIOLILLO, J.P., DICKERSON, HALL and ROMAN, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court