

<b>Morpurgo v Morpurgo</b>
2011 NY Slip Op 31987(U)
June 30, 2011
Supreme Court, Suffolk County
Docket Number: 5554/2003
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

Supreme Court - State of New York  
IAS PART 6 - SUFFOLK COUNTY

COPY

ORDER

**PRESENT:**

Hon. RALPH T. GAZZILLO  
A.J.S.C.

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HELGA MORPURGO a/k/a	:	CALECA & TOWNER, P.C.
CHRISTINE STALEY,	:	257 Pantigo Road
	:	East Hampton, NY 11937
	:	
Plaintiff(s),	:	
- against -	:	ANSELM MORPURGO
	:	Defendant Pro Se
ANSELM MORPURGO, a/k/a ANNA SELMA	:	34 Good Ground Road
VINJIE MORPURGO, INDIVIDUALLY, <i>et.al.</i> ,	:	Suite 1
	:	Hampton Bays, NY 11946
	:	
Defendant(s).	:	
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The non-jury trial of this matter was conducted before the undersigned on May 5<sup>th</sup> and 6<sup>th</sup>, 2011. After the completion of the testimony as well as submission of the documentary evidence and exhibits, and both sides having rested, they were afforded the opportunity to submit their respective written memoranda of law and arguments in lieu of summations. Those memorandum having since been received and reviewed, the decision of the court is as follows:

First and foremost, having observed the witnesses, "the very whites of their eyes," on direct as well as cross-examination, the so-called "greatest engine for ascertaining the truth," *Wigmore on Evidence*, Sec 1367, the court is satisfied that the process has established sufficient credible information and, simultaneously, has been a filter to that which is less than reliable. Secondly, it should go without saying that in evaluating the each witness' contributions to the resolution of the controversies in this matter (as well as all such determinations) it is hornbook law that the quality of the witness, not the quantity, is determinative. *See, e.g., Fisch on New York Evidence*, 2d ed., Sec 1090. Additionally, during the course of its fact-finding analysis, the undersigned's tasks included, of course, segregating the competent evidence from that which was not, an undertaking for which the law presupposes a court's unassisted ability. *See, e.g., People v. Brown*, 24 NY2d 168 (1969); *Matter of Onuoha v. Onuoha*, 28 AD3d 563 (2d Dept 2006). Lastly, and for the sake of candor and completeness, the undersigned freely admits that due to the defendant's *pro se* status,<sup>1</sup> on a number of instances she was afforded some latitude. *See, e.g., Mosso v. Mosso*, 6 AD3d 827 (3d Dept 2004).

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<sup>1</sup> Prior to the initial trial date, her counsel's application to be relieved was granted and the trial date re-scheduled. She was afforded ample time to secure new counsel but apparently elected not to do so. It should be noted, however, and as contained within the record, she is by no means a stranger to state and federal litigation and *pro se* representation. Indeed, during a substantial portion of this matter's long litigious history she appeared *pro se*.

As to the testimonial proof, the prime contributions were made by the parties themselves. This finding is despite the fact that the defendant called a number of apparently bipartisan and uninvolved witnesses as their testimony was predominately speculative, sometimes lacking sufficient indicia of reliability, and often dealt with tangential matters. Indeed, relevant, informative and/or pivotal matters of fact seemed largely outside their purview.

Focusing on the parties, the plaintiff's presentation appeared credible, forthright, and consistent. Much of her testimony was corroborated by the documentary evidence and, occasionally, by the defendant's testimony. Conversely, the defendant's presentation was not as satisfying. At times she was inconsistent, and her contentions often lacked corroboration. Indeed, there were instances where her testimony *appeared* - figuratively and literally - incredible. The stenographic record lends some support to this conclusion<sup>2</sup>. Consistent with this perception was what was not captured by the cold record: her mannerisms, bearing, deportment and inflection. In simplest terms, her presentation—both on paper and in person—was far less than persuasive.

Notwithstanding that observation, it goes without saying that the competition between litigating parties is not resolved merely by one being the more credible. The burden of proof—proof of the elements of the asserted cause of action by a preponderance of the competent evidence—remains with the plaintiff. But even on that score the plaintiff prevailed and her rendition of the facts is credited as the more accurate and is summarized below. As to the defendant and while fully recognizing that she carried no burden of proof, her testimony was not helpful to her defense. Indeed, at times her proffered defense often seemed to avoid and/or fail to focus upon the plaintiff's contentions and the elements of the cause of action. On other occasions, the defendant actually lent support to the plaintiff's position.

## FACTS

As regards the facts, the court initially finds that there are some matters which are uncontested or were satisfactorily resolved during this case's long, contentious, and tortuous litigation history<sup>3</sup>.

To begin with, the parties are sisters and their parents' only children. Their mother died in November of 1975; their father virtually weeks later. After his death, the parties inherited a multiple dwelling at 6 Union Street, Sag Harbor, Suffolk County. The next year, the plaintiff transferred her interest in the property to the defendant in exchange for a mortgage in the amount

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<sup>2</sup> For example, during the latter portion of the defendant's cross-examination by plaintiff's attorney, her explanation of her finances was - at best - convoluted.

<sup>3</sup> As even a casual reader of the record will surmise, the parties have a long history of animosity toward each other. This is sad, and the origin of their difficulties - albeit irrelevant to the undersigned's function - remained unexplained.

of \$34,500 which carried a 8½ % annual interest rate.<sup>4</sup>

After that point the parties' contentions are at times irreconcilable. The undersigned is, however, satisfied, by a preponderance of the credible evidence, of the accuracy of the following:

At least since the time of taking ownership, the defendant has lived on the property and assumed duties as an apparently self-appointed "caretaker". Meanwhile, the plaintiff lived elsewhere. A number of units were rented from time to time and from 1976 until 2008 rent in the approximate amount of \$533,000 was collected but not shared with the plaintiff. On a few occasions, the plaintiff contributed towards some of the property's expenses but the defendant paid the majority. Some of the expenses now claimed by the defendant were for utilities as well as other, non-repair and somewhat personal expenses. Other than perhaps one payment and one partial payment, she never made any payments toward the mortgage held by her sister. In April of 1985, the defendant purportedly sold her interest in the property to Savant Garde Institute, Ltd. (hereinafter "SGI")<sup>5</sup>. This transfer was subject a first mortgage held by the Sag Harbor Bank and that of the plaintiff. Simultaneously, there were two lease agreements. The tenant of the first was the Sag Harbor Art Center and the rent \$500 per month. The second lease's tenants were the parties herein as well as the defendant's partner; the rent was \$1 a year and one-half of the premises' yearly expenses<sup>6</sup>. By the time of these purported conveyances, the amount due on the mortgage held by the plaintiff was \$73,059.50. Thereafter, and although the defendant continued to reside there, SGI didn't charge her rent and she agreed to assume all expenses. Other tenants, however, were paying rent. In April of 1999, SGI supposedly transferred the property back to the defendant; once again, the transfer was subject to the mortgages and SGI was given a perpetual lease. The following September, the plaintiff, in an effort to make the property more marketable and to acknowledge their intent to share ownership equally, executed a satisfaction of her mortgage.

Additionally, certain other facts are satisfactorily established by the testimonial evidence, the exhibits, and the record (including the multiple prior orders of this court). For example, it appears that by the December 4, 2002, written agreement of the parties the defendant transferred "37.5" percent of the property's ownership to the plaintiff in exchange for her (the plaintiff's) forgiveness of the mortgage. The defendant retained an equal percentage of the property and the balance or 25 percent was allegedly made up of equal (12.5%) contributions from each party. (As noted below, this transaction and the leases to SGI would be subject to judicial scrutiny and criticism.) Pursuant to the December 2, 2003, "So Ordered" stipulation signed by the parties and ordered by this court (Underwood, J.), the parties agreed to select real estate brokers and to sell

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<sup>4</sup>Although the trial record may indicate some confusion and/or controversy about this allegation, the contention was contained in the plaintiff's Verified Complaint (para. 9) and thereafter admitted in defendant's Answer (para 3).

<sup>5</sup> In the 1999 lease, SGI was referred to as a "corporate think tank".

<sup>6</sup> During the trial, the defendant indicated she agreed to pay all the expenses.

the property for a minimum of \$1,500,000.00 and divide the proceeds at 67½% to the defendant, 37½% to the plaintiff. Due to the parties' disagreement regarding the sale, the court (Underwood, J) intervened and, by order dated October 15, 2004, appointed a referee to sell the property. The property, however, continued to remain on the market for quite some time. By the decision of this court (Whelan, J.) dated November 28, 2005, owing to filing and other failures, SGI was found to be "a non-existent entity, which lack[ed] the capacity to take title to real property or acquire rights in it via a contract". As a result, the lease between the defendant and SGI was deemed null and void. By court order (Whelan, J.) of August 7, 2007, and although the sale of the property was yet finalized, any proceeds were directed to be disbursed as follows: 37½% to each of the sisters, the remaining 25% to be held until apportionment by the trial court. As a result of a public auction, the property was finally sold and transferred on April 3, 2008, for slightly in excess of 1.5 million dollars. After distribution of the parties' shares, the remaining 25% or \$374,954.25 was deposited with the Suffolk County Treasurer. By the agreement of the parties and a January 4, 2011, stipulation "So Ordered" by the undersigned, each party was permitted to receive an additional \$10,000.00 from that fund.

As for the premises itself, the record is replete with uncontradicted evidence that over the years it sank well below what might be called "serious disrepair". Despite the defendant's position as "caretaker", there were cracked, backed-up cesspool lines, no heat, missing windows in the attic, leaking roof, no running water, a collapsed front porch, one door which did not open (for a time the only entry was through a window), and at times there was no bathroom for tenants. The premises' history also includes a declaration by the local authorities that the premises was "uninhabitable".

#### ANALYSIS

By order of this Court (Whelan, J.) dated November 28, 2005, it has been determined that the parties are entitled to equal shares in the proceeds of the sale of the premises, and as ouster has not been established by the plaintiff herein, this Court is relegated to a simple accounting of the income and expenses of the parties to determine whether one co-tenant is entitled to receive more than 50% of the monies currently being held by the Suffolk County Treasurer.

Under the facts of this case, there can be little question that during the relevant period the defendant assumed somewhat singlehanded responsibility for the property's expenses. Also, there can be no dispute that the parties initially began their tenancy as equals, with neither in a position in any fashion legally superior to the other. The same result applies to their respective financial interests in the property. Moreover, and quite obviously, whatever legal interest they may have had ceased upon the property's sale. The only residue, of course, is their respective interests in the sale's proceeds, now the subject of this litigation. That being noted, the relevant period for analysis begins with their acquisition of the property by inheritance 1975 and ends upon its April, 2008 sale.

The template for this analysis is as follows: Initially, it should be noted that an action in partition, although a creature of statute (RPAPL Art.9), is equitable in nature, and as such, it is hornbook law that the Court may compel the parties to do equity between themselves when

adjusting the proceeds of sale. *See, e.g., Worthing v. Cossar*, 93 AD2d 515 (4<sup>th</sup> Dept 1983). Furthermore, unless a co-tenant can establish ouster, “[i]t has been held that [e]xpenditures made by a tenant in excess of his obligation may be a charge against the interests of the co-tenant and the court may adjust the equities of the parties in determining the distribution of the proceeds of an sale of the subject premises” *In re Schroeder*, 19 Misc.3d 1119(A) at 3 (Surr. Ct. Nassau 2008) *citing Tenzer v. Tucker*, 154 Misc.2d 468 at 471; *see, also, Degliuomini v. Degliuomini*, 45 A.D.3d 626 (2d Dept 2007); *Freigang v. Freigang*, 256 AD2d 539 (2d Dept 1998). However, it is axiomatic that a co-tenant is not entitled to an allowance for improvements made for the co-tenant’s benefit without the consent of the other co-tenants. *Wawrzusin.v. Wawrzusin*, 212 AD2d 779 (2d Dept 1995). Said another way, “a tenant in common may be allowed reimbursement for money expended in repairing and improving the property if the repairs and improvements were made in good faith and were necessary to protect and preserve the property.” *Worthing v. Cossar, supra*, at 518. In addition, the non-resident co-tenant would not be responsible to contribute to the cost of utilities and fuel. *See, e.g., Degliuomini v. Degliuomini, supra*. A tenant is, however, entitled to credit for expenses such as mortgage, taxes, necessary repairs (*see, e.g., Worthing v. Cossar, supra; In Re Schroeder, supra*), but obviously not for personal expenses. Simultaneously, a tenant would be entitled to share in any rents. *See, e.g., Worthing v. Cossar, supra*. These rules, of course, are not triggered unless there is competent, satisfactory proof.

The defendant claims entitlement to in excess of fifty (50%) percent of the remaining proceeds of the sale of the 6 Union Street property. Her claim is based upon her alleged singlehanded maintenance of the premises (with admitted exceptions) on behalf of herself and the plaintiff. Defendant’s claims for recompense include a salary for acting as “caretaker” for the premises as well as cost of the vehicle she used while undertaking her “caretaker” duties. Defendant also seeks reimbursement for, among other things, electric, telephone, fuel oil, repairs and real property taxes. Defendant also acknowledges \$533,000.00 in rents received from 1976 through April of 2008 when the property was finally sold.

Although defendant sought to establish her claims through the introduction of documents and the testimony of her accountant, very little of what was provided was admissible as evidence. For example, the compilation of expenditures prepared by defendant’s accountant is based on the defendant’s “notes” and statements rather than upon actual receipts. As such, and although the Court has granted the *pro se* defendant wide latitude in submitting alleged documentation of expenditures, the Court has only credited defendant with expenditures established by admissible proof<sup>7</sup>. In that regard, and juxtaposing the trial evidence to the co-tenancy period, it appears that the defendant’s requests for certain expenses such as electric, telephone, water, repair, fuel, newspaper, car, caretaker must be rejected as outside the controlling rules and law or lacking

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<sup>7</sup>It should be noted that to arrive at a figure, the Court was required to dredge through all of her evidence (some of which was duplicitous) in an effort to find any documentation; the figure is, candidly, generous. It should again be noted that an examination of the defendant’s expert’s testimony and exhibits demonstrates their evidentiary incompetence.

sufficient proof. Indeed, the Court finds that the defendant is not entitled to a salary or vehicular expenses for her "caretaker" role. In addition to the lack of proof, it is clear from the state of utter disrepair that the home fell into while occupied almost exclusively by the defendant, that the defendant should not be entitled to reimbursement for any alleged repairs made.

Finally, to focusing upon what has been satisfactorily proven:

- 1) The parties do not dispute that the property has earned \$533,000.00 in rental income since they became co-tenants in 1976. Of the total of rents received - \$533,000.00 - none was shared with the plaintiff; the plaintiff is, therefore, entitled to credit for one-half, or \$266,500.00.
- 2) In support of her claim for credit, the defendant has introduced actual receipts for property tax payments (village and town) she made for the premises paid between 1980 and 2007 totaling \$52,416.41. Additionally, the defendant admits that the plaintiff expended another \$22,736.00 toward the expenses of the property during that time period. Offsetting the defendant's \$52,416.41 payment to the plaintiff's \$22,736.00, the difference of \$29,680.41 is credited to the defendant.<sup>8</sup>

As a result, and offsetting the plaintiff's credits to the defendant, the net is a difference of \$236,819.59 due to the plaintiff.

Therefore, after deduction and retention of appropriate poundage, the Suffolk County Treasurer is directed to pay to the plaintiff the amount of \$236,819.59. After those deductions, the balance of the account is to be divided equally and paid to the parties.

Finally, for the sake of completeness, the defendant's post-trial memorandum demands certain relief. All of the requests are denied as untimely and/or unsupported.

The foregoing constitutes the decision and order of the Court.

Submit order on notice.

Dated 6/30/11

  
\_\_\_\_\_  
Hon. Ralph T. Gazzillo  
A.J.S.C.

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<sup>8</sup> At the time of the property's 2008 transfer any outstanding tax liability was paid at the closing by the referee from the sale's proceeds; as such, payments to satisfy any final, outstanding tax liability have already been shared equally by the parties.