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SHORT FORM ORDER

INDEX No. 09-33654
CAL No. 11-01870-EQ

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 3/30/12
ADJ. DATE 4/17/12
Mot. Seq. #001 - MotD

JACQUELINE KUYKENDALL, JILL LIPOMI, STEPHEN GANGEME and MEREDITH GILLMAN,

Plaintiffs,

- against -

ALEC PETROULIAS and PAT PETROULIAS, PEOPLE OF THE STATE OF NEW YORK and THE UNITED STATES OF AMERICA,

Defendants.

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KELLY & HULME, P.C.
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiffs, dated March 8, 2012, and supporting papers; (2) Affirmation and Affidavit in Opposition by the defendants, dated April 6, 2012, and supporting papers; (3) Affirmation and Affidavit in Reply by the plaintiffs, dated April 13, 2012, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by the plaintiffs for an order granting summary judgment in their favor for the relief demanded in the complaint and dismissing the counterclaims asserted by defendants Alec Petroulias and Pat Petroulias, is granted to the extent indicated below, and is otherwise denied.

This is an action, *inter alia*, for the partition of real property located at 396 Old Stone Highway, East Hampton, New York.

It is undisputed that the property, a 8.7-acre parcel improved with a residence, was purchased in

or about 1927 by Grover C. Kuykendall and Consuela Kuykendall as tenants by the entirety. Jacqueline Kuykendall, Jill Lipomi, and Pat Petroulias are the surviving daughters of Grover C. Kuykendall and Consuela Kuykendall. A fourth daughter, Gene Gangeme, died in 1991, survived by her children, Stephen Gangeme and Meredith Gillman. It appears from a title search obtained by the plaintiffs in 2009 that each of them is a record fee owner of the property.

Following the death of their mother in 1947, each of the daughters resided at the property from time to time. By 1965, Jacqueline, Jill, Gene and their respective families had all moved out, leaving Pat, her husband Alec, and their family as the sole permanent residents. To date, Pat and Alec ("the defendants") remain the sole residents of the property.

According to the plaintiffs, the property is presently owned by the parties as tenants in common, with Jacqueline Kuykendall, Jill Lipomi, and Pat Petroulias each having a 25% interest, and Stephen Gangeme and Meredith Gillman each having a 12.5% interest.

By way of this action, the plaintiffs seek a partition and sale of the property, with the proceeds divided among the owners according to their respective rights, as well as a determination that any claim by the defendants based on adverse possession is invalid. The defendants, in their answer, assert two counterclaims: the first, alleging that they have acquired title to the property by adverse possession, and the second, seeking compensation for expenses incurred, including taxes paid, relative to the maintenance of the property.

The plaintiffs now move for summary judgment, claiming that, as joint owners, they are entitled to a physical partition of the property or partition and sale as a matter of right, that any occupancy by the defendants since 1965 was permissive and without any claim of right hostile to the plaintiffs, and that it was understood among the parties that the tenant in possession would be responsible for carrying costs with no expectation of reimbursement. The plaintiffs contend, in part, that the property is situated in the Town of East Hampton's A2 Residence District, which requires a minimum lot area of 200,000 square feet and a minimum lot width of 250 feet, and, as such, that it cannot be legally subdivided. The defendants, in opposition, contend that the plaintiffs' claim for partition fails because the defendants acquired title to the property by adverse possession long before the plaintiffs commenced this action.

Since resolution of the parties' competing claims rests, in the first instance, on a determination of the defendants' claim of adverse possession, the court's analysis begins there. "Title by adverse possession is acquired when possession is hostile and under claim of right, actual, open and notorious, exclusive, and continuous for the statutory period of 10 years after ouster" (***Bank of Am. v 414 Midland Ave. Assoc.***, 78 AD3d 746, 749, 911 NYS2d 157, 160 [2010]).

Where, as here, parties hold property as tenants-in-common, the law affords each tenant an extra measure of protection from a cotenant's potential adverse possession claim. To address the danger that an occupying tenant might use his or her exclusive possession as a basis for a claim of adverse possession against an unsuspecting nonpossessory cotenant, the law creates a presumption that the tenant in possession holds the property for the benefit of his or her cotenants (***Myers v Bartholomew***, 91 NY2d

630, 674 NYS2d 259 [1998]; *accord* RPAPL 541). "[E]ach cotenant has an equal right to possess and enjoy all or any portion of the property as if the sole owner. Consequently, nonpossessory cotenants do not relinquish any of their rights as tenants-in-common when another cotenant assumes exclusive possession of the property" (***Myers v Bartholomew***, *supra* at 633, 674 NYS2d at 260). While the presumption may be rebutted,

> the existence of the presumption bespeaks of the feeling that a cotenant need not worry just because his fellow cotenant is in possession of the property. As Judge Cardozo said in *People's Trust Co. v Smith* (215 NY 488, 492, *supra*), "[faith] in the honesty of trusted friends and relatives is seldom negligence". Possession by one cotenant only becomes adverse "on unmistakable repudiation of the owner's right by the possessor and notice thereof to the owner" (III American Law of Property, § 15.7, p 798). Such a repudiation may exist absent vocal or written expression, but only by dint of "unequivocal acts, so open and public, that notice may be presumed of the assault upon his title, and the invasion of his rights" (*Culver v Rhodes*, 87 NY 348, 353).

(***Kraker v Roll***, 100 AD2d 424, 434, 474 NYS2d 527, 534 [1984]). Thus, a cotenant seeking to assert a claim of adverse possession "is required to show more than mere possession; the cotenant must also commit acts constituting ouster" (***Myers v Bartholomew***, *supra* at 633, 674 NYS2d at 260).

> Although actual ouster usually requires a possessing cotenant to expressly communicate an intention to exclude or to deny the rights of cotenants, the common law also recognizes the existence of implied ouster in cases where the acts of the possessing cotenant are so openly hostile that the nonpossessing cotenants can be presumed to know that the property is being adversely possessed against them.

(*id.* at 633, 674 NYS2d at 260). Stated otherwise, there must be "very obvious and overt acts" which "unmistakably repudiate" the ownership rights of a nonpossessory cotenant (***Perez v Perez***, 228 AD2d 161, 163, 644 NYS2d 168, 170, *lv dismissed* 89 NY2d 917, 653 NYS2d 920 [1996]; ***Trevisano v Giordano***, 202 AD2d 1071, 609 NYS2d 122, *lv denied* 1994 WL 231824, 1994 NY App Div LEXIS 7001, *appeal dismissed* 84 NY2d 848, 617 NYS2d 134 [1994]).

Here, the plaintiffs established their prima facie entitlement to judgment as a matter of law, dismissing the defendants' counterclaim for adverse possession, by demonstrating that the defendants' possession of the property was permissive at the outset and that the defendants did not clearly assert a claim of right hostile to the plaintiffs (*see* ***Hancock v Estate of Hancock***, 15 AD3d 620, 791 NYS2d 120, *lv denied* 5 NY3d 703, 800 NYS2d 373 [2005]). In response to the plaintiffs' prima facie showing, the defendants did not sufficiently demonstrate the existence of a triable issue of fact. The defendants do not claim at any time to have communicated their claim of sole ownership to the plaintiffs. Absent such a communication, it cannot be said on this record that an ouster ever took place. That the defendants appear to have exclusively possessed the property and paid all the expenses relating to the property is insufficient to establish a claim of right for purposes of adverse possession (*see* ***Loveless Family Trust v Koenig***, 77 AD3d 1447, 909 NYS2d 254 [2010]). Likewise, while it appears from the affidavit of Pat

Petroulias that she replaced the locks to the house sometime after 1965, it does not appear that this was done in an effort to deny the plaintiffs entry (*see* ***Perkins v Volpe***, 146 AD2d 617, 536 NYS2d 845, *lv dismissed* 74 NY2d 791, 545 NYS2d 106 [1989]). Nor does it appear when this was done. Notably, in 1968 and again in 1982, boundary line agreements were executed by Jacqueline Kuykendall, Jill Lipomi, Gene Gangeme, and Pat Petroulias as co-owners of the property; assuming that the locks were changed prior to 1982, the defendants' written acknowledgment of her sisters as co-owners in 1982 would seemingly undo any prior repudiation of the plaintiffs' ownership rights manifested by the changing of the locks. Summary judgment is granted, therefore, dismissing the defendants' first counterclaim.

Having thus disposed of the adverse possession claim, the analysis turns to the plaintiffs' request for partition and sale of the property.

"A person holding and in possession of real property as joint tenant or tenant in common, in which he 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]). A party jointly owning with another may, as a matter of right, seek a partition of the property or a partition and sale when he or she no longer wishes to jointly use or own the property (***Manganiello v Lipman***, 74 AD3d 667, 905 NYS2d 153 [2010]). The right to a partition is not absolute, however, and the remedy is always subject to the equities between the parties (***Goldberger v Rudnicki***, 94 AD3d 1048, 943 NYS2d 176 [2012]). It is the court's responsibility to ascertain the respective interests of the parties before partition or sale is directed (*see* RPAPL 915).

The plaintiffs established their prima facie entitlement to summary judgment on their action for a partition and sale by demonstrating their ownership and right to possession of the property and that the property was "so circumstanced" that a partition alone could not be made without great prejudice to the owners (*see* ***Graffeo v Paciello***, 46 AD3d 613, 848 NYS2d 264 [2007], *lv dismissed* 10 NY3d 891, 861 NYS2d 263 [2008]). The defendants, in opposition, failed to raise a triable issue of fact. Absent a valid claim of adverse possession, and having asserted only that they continuously resided at the property since 1965 and that they solely contributed to the maintenance of the property since that time, the defendants failed to controvert the plaintiffs' ownership interest or to establish that the equities favor the dismissal of the action (*see* ***Manganiello v Lipman***, *supra*).

However, based on the competing claims of the parties as to reimbursement for expenses incurred, the court finds that further proceedings are required, prior to entry of an interlocutory judgment directing the sale of the property, to adjust the equities of the parties in determining the distribution of the sale proceeds (*see id.*; ***McVicker v Sarma***, 163 AD2d 721, 558 NYS2d 997 [1990]).

Accordingly, the motion is granted only to the extent of (i) granting summary judgment dismissing the defendants' first counterclaim and declaring, relative to the relief demanded in the complaint, that the plaintiffs are entitled to a partition and sale of the property, and (ii) directing the appointment of a referee prior to the sale to ascertain and report the parties' respective rights, shares, and interests (*see* RPAPL 911), to ascertain and report whether there is any creditor not a party who has a lien on the undivided share or interest of any party (*see* RPAPL 913), and to make an accounting as to

expenses incurred, including taxes paid, relative to the maintenance of the property (*see* ***Tedesco v Tedesco***, 269 AD2d 660, 702 NYS2d 459, *lv dismissed* 95 NY2d 791, 711 NYS2d 158 [2000]).

The parties shall settle an order of reference consistent with the foregoing.

Dated: 8/9/12

PETER H. MAYER, J.S.C.