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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

DAVID C. SNYDER

Plaintiff,

-vs-

Index No. 75256

2013

FRANCIS A. GRAHAM

Defendant.

APPEARANCES: THOMAS A. CORLETTA, ESQ.
Attorney for the Plaintiff

PATRICIA M. CRIPPEN, ESQ.
Attorney for Defendant

MEMORANDUM - DECISION

John B. Nesbitt, J.

Plaintiff brings this action pursuant to Article 9 of the Real Property Actions and Proceedings Law (RPAPL) seeking judicial partition of certain real property he owns in joint tenancy with the defendant. He now moves for summary judgment granting his demand for partition and ancillary relief consistent therewith. Defendant opposes the motion.

I. FACTS AND ISSUE PRESENTED

The operative facts are uncomplicated and, for purposes of this motion, largely undisputed. The plaintiff and defendant never married and both reside at 922 Turner Road in the Town of Macedon, County of Wayne.[1] They own the property as "joint tenants with the right of survivorship" as reflected in warranty deed dated September 23, 1980, and recorded September 29, 1980, in the Wayne County Clerk's Office in Liber 742 of Deeds at page 63. This deed sets out the plaintiff and defendant as sole grantees. Plaintiff, David Snyder instituted this action on January 14, 2013, by the filing of a complaint verified January 9, 2013, alleging in the penultimate paragraph that "[t]he

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[1] This property has a Palmyra mailing address notwithstanding its location in the Town of Macedon.

parties are unable to agree on either a division or liquidation of their respective interests in said property" (Complaint ¶5), that he "is being prejudiced by the continuing inability of the parties to agree to a division or liquidation of their respective interests in said property" (Id at ¶6), and that judicial intervention is required "in partitioning same" (Id at 5). The defendant answered and counterclaimed in writing dated and verified February 1, 2013. Her answer admitted the plaintiff's assertion of joint tenancy, but denied that each owned an undivided one-half interest therein, alleging by way of counterclaim that "[d]efendant made all mortgage payments on the residence and, in fact, paid for the same; therefore, partition of the property would work an undue hardship upon the defendant" (Answer and Counterclaim ¶2).[2]

Two weeks after the defendant's Answer and Counterclaim, the plaintiff filed his motion for summary judgment, supported by his affidavit with exhibits attached. The plaintiff contends that defendant's claim that she made all the mortgage payments on the property and "paid for same" is "patently false"(Snyder Affidavit ¶8).[3] Moreover, plaintiff argues that such a claim is "irrelevant and

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[2] The Answer and Counterclaim also contained an affirmative defense alleging "that the Complaint is defective in that it fails to comply with the provision of section 905 of the RPAPL." In apparent response thereto, plaintiff filed an Amended Complaint, additionally alleging that he "resides in and is in possession of, as joint tenant with right of survivorship, the subject premises" and that "[t]he parties own no other lands in common" (Amended Complaint ¶2&3). This amendment addressed the requirement that, "[i]n an action for partition, the complaint must allege possession or the right of possession in the plaintiff" (24 NY Jur2d, *Cotenancy and Partition* §174)

[3] The Court notes that the deed into the parties dated September 23, 1980, expressly stated that it

> "is made and accepted subject to an indebtedness secured by a mortgage upon said presises executed by [grantors] as mortgagors to Community Savings Bank as mortgagee ... on which there is an unpaid principal of $30,467.13, with interest ... at the rate of 9 per cent per annum, which said mortgage debt the grantees hereby assume and agree to pay, as part of the consideration for this conveyance."

The record also reflects another mortgage on the property dated January 11, 1994, given by the parties to the WCTA Federal Credit Union securing the their obligation in the amount of $27,100.

There appears to be no dispute that these obligations are now satisfied and that the property is now unencumbered by any liens of mortgage or other obligations. In fact, plaintiff alleges that the last mortgage "was paid off about ten (10) years ago" (Snyder Aff ¶8).

immaterial" and thus insufficient to raise a triable issue. In fact, plaintiff states that it is he who is "presently paying the carrying charges on this property," as well as all real estate taxes for at least the past five years.

The plaintiff's position is that the law presumes that as joint tenants the parties are entitled to equal shares in the property and that a judicial sale should be directed and proceeds equally divided. The defendant opposes this relief, arguing that this "would work an undue hardship" upon her, given the fact that she essentially paid for the property by making the mortgage payments (Answer and Counterclaim ¶2).

II. APPLICABLE LEGAL PRINCIPLES

The legal ramifications of owning real property as joint tenants are, of course, several. Relevant for present purposes, however, is the right of partition, which inures to each joint tenant unless negated by agreement or testamentary restriction (24 NY Jur2d, *Cotenancy and Partition* §129). A plaintiff establishes his entitlement of partition by (1) proffering the deed to the property establishing the cotenancy and his entitlement to an undivided fractional interest and (2) showing an extant possessory right as a cotenant (*see e.g. Holley v Hinson-Holley,* 101 AD3d 10841085 [2d *Dept 2012]; Dalmacy v Joseph*, 297 AD2d 329, 330 [2d Dept 2002]). The plaintiff has certainly done so in this motion for summary judgment. Except in limited circumstances, a person cannot be compelled to continue in co-ownership of realty without remedy. Defendant has failed to raise a triable issue of fact on this issue.

That said, what does the remedy of partition entail the plaintiff in this case? Plaintiff asserts that it requires sale of the property and equal division of the proceeds. "Partition is essentially an action between joint tenants or tenants in common for the division of their property between them, according to their respective interests, or if such division cannot be made, then for a sale and a similar division of the proceeds" (24 NY Jur2d, *Cotenancy and Partition* §117). There has been no allegation by either party, and certainly no proof, that the property can be physically divided between the parties in any way reasonable, practicable, and equitable. Hence, the fact of a judicial sale appears compelled.

As for division of the proceeds after judicial sale, generally, "the designation of the parties as joint tenants creates a unity of estates which upon partition, requires an equal division of the

property or the proceeds of any sale" (*Koehler v Koehler*, 182 Misc2d 436 [Suffolk Co. 1999]). This presumption of equal entitlement is, however, not "absolute and may be rebutted" (Id at 445).[4] Although tenants-in-common cases, the principles espoused by the Fourth Department apply as well in joint tenancy instances. In *Moran v Moran*, 280 App Div 1037 (4th Dept 1952), the Court stated:

> "While there is a presumption, where no evidence appears to the contrary, that tenants in common share equally in their common tenancy, nevertheless such a presumption or inference may be rebutted if the facts show that they hold in different shares. 'A court of equity may take into account the amounts invested in the property by the respective tenants in common, in determining the shares thereof to which they are entitled.' *McGreggor v Walters*, 133 Misc. 24, 26 (Sup Ct, Erie Co 1928; *Matter of Maguire's Estate*, 161 Misc. 219, 226 (Surr Ct, Kings Co 1936); *Perrin v Harrington*, 146 AD 292 (4th Dept 1911)."

Thirty years later, the Fourth Department revisited the issue. In *Worthing v Cossar*, 93 AD2d 515 (4th Dept 1992), Justice Schnepp, speaking for a unanimous court, stated:

> "A partition action, although statutory (see RPAPL art 9), is equitable in nature and an accounting of the income and expenses of the property sought to be partitioned is a necessary incident thereof (24 NY Jur2d, Cotenancy and Partition, §242). A court may compel the parties to do equity as between themselves (14 Carmody-Wait 2d, NY Prac, §91:242) and may adjust the equities of the parties in determining the distribution of the proceeds of sale (*Doyle v Hamm*, 52 AD2d 899, 900: *Sirianni v Sirianni*, 14 AD2d 432, 438). Thus, in general, expenditures made by a tenant in excess of his obligations may be a charge against the interest of a cotenant (see *Sirianni* v *Sirianni*, supra, p. 438; *see, also*, *Vlacancich v Kenny*, 271 NY 164, 168; *Johnson v Depew*, 33 AD2d 645; *Goegen v Maar*, 2 AD2d 276, 277; 24 NY Jur 2d, *Cotenancy and Partition*, §70)."

An accounting is had "as a matter or right before entry of an interlocutory or final judgment to ensure that the parties rights are fixed in such manner that a decree 'may work full and complete justice between [them]'" (*Grossman v Baker*, 182 AD2d 1119 [4th Dept 1992], *quoting* Grody v Silverman, 222 App Div 526, 530 [4th Dept 1928]). At a minimum, an accounting may be had as to payment of taxes, insurance, and mortgages in fixing the parties' share of the sale proceeds (24 NY Jur2d, Cotenancy and Partition §232 *et seq.*).

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[4] In *Citron v Malinowitz*, 13 Misc. 3d 1218(A) (Sup Ct, Kings Co 2006), the Court "reject[ed] plaintiff's argument that the proceeds of the sale of [the realty] must be equally divided because title to the property was held by the parties as joint tenants. [The] law ... clearly establish[s] that the fact that parties hold property jointly does not compel the conclusion that they are entitled to share in the proceeds equally when the property is sold."

There is authority to effect that "[a] court does not abuse its discretion in directing a partition sale of real property be held prior to accounting, with the proceeds held in escrow until the accounting can be completed where no prejudice as a result of the delay is found" (24 NY Jur2d, Cotenancy and Partition §228, citing *McCormick v Pickert*, 51 AD3d 1109 [3d Dept] *lv app* dismissed 11 NY3d 838 [2008]; *Wong v Chi-Kay Cheung*, 46 AD3d 1322 [3d Dept 2007]). Here the Court understands from the record and oral argument that the defendant resides at the property. It could well work a hardship for the defendant to be dispossessed from the property upon judicial sale and be without her share of the sale proceeds pending trial to settle the parties' accounts regarding the property.

III. DECISION

The Court grants plaintiff's motion for summary judgment and orders that he is entitled to partition of the parties' property on Turner Road in the Town of Macedon. Further, the Court finds that physical division of the property to effect partition is impracticable; thus, judicial sale shall be conducted by a Referee in accordance with Article 9 of the RPAPL. Prior thereto, trial will be held to settle any claims the parties may have rebutting the legal presumption that the sale proceeds be equally divided as an incident of their equal fractional interests and a matter of equity.

Dated: July 1, 2013
Lyons, New York

JOHN B. NESBITT
Acting Supreme Court Justice