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Decided on May 30, 2007
Supreme Court, New York County

C.Y., Plaintiff,

against

H.C., Defendant.

The appearances are:

For plaintiff:

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For defendant:

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Rosalyn H. Richter, J.

In this action, plaintiff C.Y. seeks partition and sale of a single family townhouse owned by her and defendant H.C.[FN1] This Court previously granted C.Y.'s motion for summary judgment on the partition claim and ordered the property sold after a trial was held on how the proceeds should be divided between the parties. The evidence at trial established that C.Y. and H.C. were involved in a committed personal relationship from 2001 until December 2005. In the summer of 2003, they began living together and filed for a Certificate of Domestic Partnership with the New York City Clerk. Shortly thereafter, they had a religious wedding ceremony where they exchanged vows. On December 31, 2003, C.Y. and H.C., who were living together with H.C.'s two children from a prior relationship, purchased the townhouse pursuant to a contract of sale for several million dollars. The deed reflecting the transfer of the house states that H.C. and C.Y. own the property as "tenants in common, a one-half undivided interest to each." In December

2005, C.Y. moved out of the townhouse because she felt it was not safe for her to live there as a result of alleged verbal and physical abuse by H.C.

There is no dispute that C.Y. owns the townhouse as a tenant in common with H.C. The

parties, however, disagree as to how the proceeds of the sale should be apportioned between them. C.Y. argues that she is entitled to 50% of the proceeds of the sale because the deed clearly and unequivocally declares that she and H.C. each owns a one-half interest in the premises. Although H.C. concedes that C.Y. is entitled to some of the profits, H.C. vigorously disputes that C.Y. is entitled to a 50% share and instead argues that C.Y. should only get 7% of the proceeds. H.C. maintains that C.Y.'s ownership interest is significantly smaller because H.C. purportedly provided the bulk of the down payment and closing costs, paid for all subsequent repairs and renovations to the property and made virtually all of the mortgage, tax and insurance payments.

It is well-settled that tenants in common share a rebuttable presumption that each holds an equal undivided one-half interest in the subject premises. See, e.g., Lang v. Lang, 270 AD2d 463 (2d Dept. 2000). However, "partition is an equitable remedy in nature and Supreme Court has the authority to adjust the rights of the parties so each receives his or her proper share of the property [*2]and its benefits." Hunt v. Hunt, 13 AD3d 1041, 1042 (3d Dept. 2004); see also Ranninger v. Pevsner, 306 AD2d 20 (1st Dept. 2003); Deitz v. Deitz, 245 AD2d 638 (3d Dept. 1997). In a partition action, this Court sits both as a court of law, which must evaluate the wording of the deed, and as a court of equity, which must consider issues of fairness and the respective contributions of the parties. In determining the equitable division of the sale proceeds, the Court may consider the nature of the parties' relationship, disparities in down payments and mortgage payments, whether any such disparate contributions to the property were intended to be a gift, the reasonable value of improvements and repairs to the property and the reasonable value of rental payments with regard to an ousted co-tenant. Laney v. Siewert, 26 AD3d 194 (1st Dept. 2006); Vlcek v. Vlcek, 42 AD2d 308 (3d Dept. 1973).

Applying these principles, the Court concludes that, under the circumstances of this case, a perfectly equal division of the proceeds of the sale would neither be consistent with the parties' intentions nor would it be equitable. There is a significant disparity in the parties' respective shares of the 25% down payment made on the property. H.C. paid a total of $866,250 from her own funds toward the down payment. In a writing dated December 30, 2003, shortly before the closing, C.Y. tendered a $100,000 check to H.C. "as reimbursement for monies previously advanced to the Sellers [by H.C.] on [C.Y.'s] behalf." In this document, C.Y. explicitly admitted that this payment was "a portion of my contribution toward our joint purchase of the [townhouse]" (emphasis added). Although C.Y. testified at the trial that she drafted this document for "tax purposes", she could not adequately explain how it would have aided her tax preparation. Nor did she consult any accountant or tax advisor before writing the document. More importantly, C.Y. could not explain why she used the words "a portion of my contribution" to describe the $100,000 payment. C.Y. also did not adequately explain why she would have gone through the effort of memorializing the parties' respective contributions to the down payment if, as she now claims, the money was all going to be split 50/50 if they broke up.

Since it is undisputed that C.Y. never matched H.C.'s share of the down payment, the equitable result here, consistent with the document executed by C.Y., is to credit each of the parties, from the proceeds of the sale, with their respective down payments. Thus, before the proceeds of the sale are distributed to the parties, C.Y. shall be credited with $100,000 and H.C. shall be credited with $766,250.[FN2] The Court finds that equity will be served by also crediting H.C. with the closing costs she paid out of her own money in the amount of $56,312. Under the circumstances, it is logical to treat these the same as the down payment and to conclude that H.C.'s disparate contributions toward the initial costs involved in the purchase be returned to her in the event of a sale.

For the same reason, the Court will credit H.C. with the $43,773 cost associated with her obtaining a bridge loan during the time it took for her to sell her former residence and obtain the financing for the townhouse.C.Y. initially testified at trial that the interest on the bridge loan was paid from rental income received from the townhouse's prior owners, who remained in the residence for several months after the closing. However, on cross-examination, C.Y. conceded that she was not sure how the bridge loan was repaid. The exhibits at trial show that there was no regular rental income received from the prior owners; rather, the purchase price of the townhouse was discounted in consideration for their being allowed to remain post-closing. Furthermore, the bridge loan was [*3]secured solely by H.C. and was repaid from H.C.'s separate bank account. Thus, the equitable result is to credit H.C. with these costs.

However, the Court concludes that H.C. is not entitled to a credit for any disparities in payments made by the parties to carry and maintain the townhouse after the couple moved in and before C.Y. left. The parties were involved in a committed relationship, had a religious wedding ceremony and entered into a domestic partnership in New York City. In terms of how they lived their lives, they essentially considered themselves married and operated as a couple. They lived together with H.C.'s two children from a previous relationship and C.Y. gave birth to a child before the parties separated. They held themselves out as, and were, in all respects, a family.

After they purchased the property, the parties opened and maintained a joint checking account from which the mortgage and many other household and living expenses were paid. These expenses included property taxes, insurance, utilities, medical bills, salaries of household employees and repairs and renovations. Both parties contributed to this joint account during the time they lived together based on their financial ability to do so. In addition, both H.C. and C.Y. took responsibility for paying the household bills. Most times, the payments came from the joint account; other times, however, H.C. and C.Y. would use their own separate accounts to pay expenses. Furthermore, the evidence showed that, with H.C.'s approval, C.Y. maintained the checkbook for the joint account and wrote most of the checks, even though the funds came mostly from H.C.'s salary. In addition, H.C. would at times use C.Y.'s personal credit card to make certain payments.

During the parties' relationship, neither party made any attempt to keep track of exactly how much money each was contributing to the running of the household. H.C., who admittedly earned more money and therefore contributed more money, took no steps to contemporaneously record who paid which bills and from whose account they were paid. Nor is there any evidence that she kept any contemporaneous records to suggest that the parties contemplated anything

other than a 50/50 division. In fact, both of their trial testimony suggests the contrary - - that they intended to commingle their funds as needed and that H.C. had no objection to sharing her salary with C.Y. and never expected to be paid dollar for dollar for monies C.Y. expended on the house and family support. In fact, C.Y. credibly testified that, after they moved into the townhouse, there was no consideration given as to whose money was whose. If C.Y. needed more money for household or townhouse expenses, she would ask H.C. or she might pay the bill herself if she had the funds.Although H.C. now claims that the parties had an oral agreement that any disparate contributions for the townhouse would be "equalized" in the event of a breakup, the Court does not credit that testimony. It is simply not believable that H.C., an accomplished and experienced attorney, would have failed to put any such agreement into writing if such an agreement existed. Unlike the down payment document, which does set forth the parties' disparate contributions, there is no documentary proof that would lend credence to H.C.'s present claim that the parties intended to own the house in proportion to their respective contributions. Indeed, just prior to the closing, H.C. agreed to amend the deed to clarify that the parties' interests as "tenants in common" meant "a one half undivided interest to each." Thus, the only writing that exists as to the parties' intent is a deed that calls for equal ownership.

H.C. now claims that, despite the language added to the deed, she never intended C.Y. to own anything more than her proportionate share of the townhouse. The Court rejects this testimony in light of the fact that H.C. is an experienced attorney who had previously bought and sold several [*4]properties. If the parties had intended a disparate ownership interest, as H.C. now claims, H.C. could easily have included a disproportionate percentage in the deed or could have chosen not to add any language at all. She also could have entered into a separate agreement with C.Y. clarifying the parties' interest in the property. She could have kept all of her finances separate except for mortgage payments made from the joint account, which the bank required because both of their names were on the mortgage. But she did not; instead, she agreed to a deed showing the parties having an equal interest - - one-half to each. The parties' different approaches to the down payment and to the deed suggests that they were aware of the potential significance of written records concerning their property and respective contributions. The Court concludes that, in light of the nature of the parties' relationship, the manner in which they conducted their finances and the language contained in the deed, H.C. should not be entitled to any credit for the purportedly disparate contributions made after the mortgage was obtained and prior to the time C.Y. left the townhouse.

C.Y. moved out of the townhouse in early December 2005. After she left, she stopped contributing to the joint account, the parties' finances were separated and the relationship was over. There is no dispute that during this time period, and continuing to the present, H.C. has made all payments for the mortgage, taxes, repairs and other charges on the property. However, in order to determine whether any credit is due to H.C. for the payments she made after C.Y. left the townhouse, the Court must first determine whether there was an ouster.

C.Y. convincingly testified that she moved out of the townhouse shortly after the birth of her child and went to live with relatives because she feared for her safety as a result of verbal and physical abuse by H.C. At trial, H.C. tried to minimize her conduct and shift some of the blame to C.Y. Although H.C. claimed that there was merely mutual pushing and shoving, her December 13, 2005 e-mail to C.Y. does not discuss any mutual abuse. In that communication,

H.C. apologizes for her "abusive behavior" and tells C.Y. that "I have acted and spoken abusively toward you throughout our marriage . . . and it has gotten worse as our relationship has deteriorated." Later in that e-mail, H.C. states that there was "something unique" in the parties' relationship that "provoked me to verbal and physical violence." Moreover, it was C.Y., not H.C., who left the townhouse, an act that is consistent with C.Y.'s testimony that she did not believe she could safely remain in the residence. Furthermore, when C.Y. returned to the townhouse several days after moving out to retrieve her belongings, H.C. admittedly threw and broke a picture frame and banged her head against the refrigerator. H.C. also admitted having the locks to the townhouse changed shortly after C.Y. left.

Under these circumstances, the Court finds that H.C. ousted C.Y. from the jointly-owned property. See Johnston v. Martin, 183 AD2d 1019, 1021 (3d Dept. 1992)(finding ouster where "[the] plaintiff moved out in response to her troubled relationship with [the] defendant and his violence toward her and that [the] defendant thereafter changed the locks"). The fact that C.Y. did not call the police during the relationship is of no consequence to the ouster finding. The Court credited C.Y.'s testimony that her concern about the propriety of continuing to reside with H.C. increased after the birth of C.Y.'s child and that the situation seemed to be escalating.

After H.C.'s ouster of C.Y. from their jointly-owned property, H.C. became responsible for paying all charges assessed against the property, including the reasonable value of her exclusive use and occupancy. See Johnston v. Martin, 183 AD2d at 1019; Hufnagel v. Bruns, 152 AD2d 459 (1st Dept. 1989). At trial, C.Y. put on evidence purporting to establish the fair market rental value of the premises during the period of the ouster. However, the Court concludes that C.Y.'s proof as to that [*5]value is deficient because the broker who testified on behalf of C.Y. based her opinion on supposed comparables located in different geographic areas from where the townhouse is located.

H.C.'s broker's testimony fared no better. He conceded that during his career as a broker, he never rented an entire single family home. He never visited the townhouse in question and thus he had no personal knowledge of its condition. He also did not show or rent any of the units he identified as comparables and therefore could not have had personal knowledge of their condition. In addition, it was unclear if his square footage calculation included the townhouse's basement. In the absence of competent proof as to the fair market value, the reasonable value is set as the amount of post-ouster mortgage, insurance, taxes and necessary repairs made by H.C. See Johnston v. Martin, 183 AD2d at 1019; Worthing v. Cossar, 93 AD2d 515 (4th Dept. 1983). Thus, neither C.Y. nor H.C. shall be entitled to any post-ouster credits upon sale of the property. See Cook v. Petito, 208 AD2d 886 (2d Dept. 1994)(finding that the parties' competing claims for rent, use and occupancy, taxes and mortgage payments offset one another and should not be factored into the distribution of the proceeds of the sale).

Finally, H.C. shall not receive any credit for the post-ouster renovations and improvements purportedly made to the property. In the absence of proof that C.Y. agreed to these expenditures, that the work was necessary to protect or preserve the property or that the improvements would contribute to the selling price, the Court cannot award H.C. any credit. See Frater v. Lavine, 229 AD2d 564 (2d Dept. 1996); Wawrzusin v. Wawrzusin, 212 AD2d 779 (2d Dept. 1995); McVicker v. Sarma, 163 AD2d 721 (3d Dept. 1990). Accordingly, it is

ORDERED that, pursuant to a separate order issued by this Court, Lorraine Coyle, Esq. is appointed as Referee to sell the property at a public auction and such property shall be sold after the issuance by this Court of an interlocutory judgment; and it is further

ORDERED that the proceeds of the sale shall be used to pay the Referee's fees, the expenses of the sale and the advertising expenses, and any mortgages, taxes, assessments, sewer rents or water charges and it is further

ORDERED that after said payments are made, H.C. shall be entitled to receive her share of the down payment, closing costs and bridge loan costs as set forth herein, C.Y. shall be entitled to receive her share of the down payment as set forth herein, and any remaining funds shall be divided equally between H.C. and C.Y.; and it is further

ORDERED that C.Y.'s request that the Court allow "open house" showings of the premises prior to the public auction sale is denied unless both parties consent in writing to such a procedure; and it is further

ORDERED that the Referee shall not be obligated to arrange any such showings or to participate in them; and it is further

ORDERED that C.Y. shall inform the Court within ten days of this decision whether she intends to pursue the remaining causes of action in her complaint, since H.C.'s motion to dismiss has been held in abeyance pending the trial and this decision; and it is further

ORDERED that the parties shall each submit to chambers a proposed interlocutory judgment in accordance with the requirements of R.P.A.P.L. Article 9 by June 11, 2007; and it is further

ORDERED that the parties shall retrieve their trial exhibits from the courtroom.

This constitutes the decision and order of the Court. [*6]

May 30, 2007

Justice Rosalyn Richter Footnotes

Footnote 1: With the consent of the parties, the Court severed the partition claim from the remaining tort claims in the action.

Footnote 2: Although H.C. put in a total of $866,250, she was reimbursed $100,000 by C.Y.