IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL

JOSEPH C. HONER, JR., Plaintiff, vs. **DANIEL SUTTON and CHASE MANHATTAN BANK, N.A.,** Defendants.	**CIVIL NO. 534/1996** **ACTION FOR PARTITION, ACCOUNTING and APPOINTMENT OF A RECEIVER** **NOT FOR PUBLICATION**

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CABRET, J.

MEMORANDUM OPINION

(May 11, 1999)

Joseph Honer and Daniel Sutton are co-owners, as tenants in common, of improved real property located at plot 38, Estate South Slob, St. Croix, United States Virgin Islands ("the subject property"). Honer sued Sutton alleging that they have "developed irreconcilable differences over the possession of the [subject] property"[1] and requested that the Court therefore order partition. Honer also sued Chase Manhattan Bank, N.A. ("Chase"), the holder of a mortgage on the subject property, as a nominal defendant pursuant to title 28, section 453 of the Virgin Islands Code. In his answer to the complaint, Sutton alleged that ownership of the subject property is governed by a written partnership agreement and that "[p]artition of the land as requested by the Plaintiff is not [a] remedy available to Plaintiff under the terms of the partnership agreement."[2] The matter is now before the Court on Honer's motion for summary judgment on the issue of whether the Court should order a partition by sale of the subject property. For reasons which follow, Honer's motion is granted.

I. SUMMARY JUDGMENT STANDARD

To prevail on his motion for summary judgment, Honer must show that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [he is] entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Under this standard, Honer "bears the initial burden of showing that no genuine issue of material fact exists. But once [Honer] properly supports a motion for summary judgment, [Sutton] 'may not rest upon the mere allegations or denial of [his] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial.' Any doubts are resolved in favor of [Sutton] whose allegations are taken to be

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[1] Compl. at paragraph 9.

[2] Answer at paragraph 21.

true." Mingolla v. Minnesota Mining and Mfg. Co., 893 F. Supp. 499, 503 (D.V.I. 1995) (citations omitted). In determining whether Honer has met his initial burden, the Court must view the evidence in a light most favorable to Sutton as the party opposing the motion. *See* Fleming v. Frett, 33 V.I. 58, 60 (Terr. Ct. 1995).

II. FACTS

Viewed in this light, the evidence shows that on June 21, 1985 the subject property, which includes a residence, was deeded to four individuals as tenants in common: Honer, Sutton, William Hamre and John R. Messick, Jr. On February 19, 1986, these four individuals formed a partnership named Hillside Developers. The partnership was governed by a written partnership agreement (the "agreement") which described the purpose of Hillside Developers as engaging "in the business of real estate ownership and management of residential REAL ESTATE."[3] The agreement contains a partner withdrawal provision which provides that if a partner wishes to withdraw from the partnership, he must sell his share of the partnership assets to the partnership. The partners agreed that under such circumstances, Robert Bidelspacher, a real estate broker and appraiser, will determine the value of the partnership's real and personal property. The agreement, however, does not refer to the subject property or any other real or personal property owned by the partnership.

On June 29, 1986, the four individuals conveyed the subject property to Honer, Sutton and Hamre as tenants in common. The evidence offers no explanation for this conveyance. On

[3] Partnership Agreement dated Feb. 19, 1986 at paragraph 1 (capitalization in original).

December 31, 1987, these three tenants in common conveyed the subject property to Sutton and Honer. The deed for the latter conveyance, which is in evidence, does not include any references to Hillside Developers, is executed by all three grantors in their individual capacity and conveys title to Sutton and Honor as tenants in common. The evidence also fails to explain this conveyance.

On June 30, 1993, Honer, Sutton and their wives obtained a $100,000 loan from nominal defendant Chase and pledged the property as collateral. It appears that the Honers subsequently payed the Suttons one half of the remaining balance on the loan in exchange for the Suttons assuming full responsibility for repaying the loan to Chase.

Finally, the evidence shows that the parties have periodically rented the subject property to third parties over the years and that the their relationship concerning the property has deteriorated. Indeed, after the commencement of the instant case, Sutton vigorously contested Honer's motion to appoint a receiver to manage the property and collect the rents while the action is pending. The Court granted the motion and appointed a receiver.

III. DISCUSSION

Under the common law, every tenant in common has an inherent right to compel partition of the land commonly owned by the tenant. *See* 7 Richard R. Powell, Powell on Real Property, ¶ 607[1] (1998). Likewise, in the Virgin Islands, a tenant in common has the right to compel the judicial partition of real property. *See* V.I. Code Ann. tit. 28, §§ 451-497 (1996). The right to partition, however, may be modified by agreement of the cotenants. *See* Powell, *supra* at ¶ 607[1]. Accordingly, before the Court can order a partition by sale, it must determine whether the parties agreed to modify their right to partition. While Honer contends that there is no such agreement because the subject property is not partnership property, Sutton asserts that it is partnership property and the partner withdrawal provision therefore controls. The Court agrees with Honor.

Title of partnership property is generally governed by the Uniform Partnership Act (the "Act") which has been adopted in the Virgin Islands. *See* V.I. Code Ann. tit. 26, historical notes following section analysis. Under the Act,"[a]ll property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property." V.I. Code Ann. tit. 26, § 23(a) (1997). In determining whether property has been acquired by a partnership, as distinguished from separate property owned individually, the intent of the parties controls. 59A Am. Jur. 2d Partnership § 354 (1987).
Unless a contrary intention appears, property acquired with partnership funds is partnership property." Title 26, § 23(b). Among other factors that may be considered in determining intent, are the actions and conduct of the parties. Vineland Homes, Inc. v. Barish, 292 P.2d 941, 947 (Cal.Dist.Ct.App. 1956). In addition, there is a presumption that "ownership of real estate is where the muniment of title places it." 59AAm. Jur. 2d Partnership § 354 (1987). This presumption has been characterized as a "strong presumption," 68 C.J.S. Partnership § 73 (d) (1998), and at least one court has held that it "could be overcome only by clear and convincing evidence of a contrary intent." Cooper v. Cooper, 266 So.2d 871, 878 (Ala. 1972)."

In this case, the evidence cited by Honer shows that the subject property is owned individually by Honer and Sutton and not by the partnership.[4] Most compelling is the deed under which Honer and Sutton hold title. The deed shows that Honer and Sutton received title in their individual capacities as tenants in common. This evidence, by itself, creates a presumption that the subject property is separate property owned Honer and Sutton in their individual capacities. *See* 59A Am. Jur. 2d Partnership § 354 (1987); Cooper, 266 So.2d at 878. In addition, there is no evidence showing that, when Honor and Sutton acquired the subject property under the December 31, 1987 deed, they used the partnership funds. This is further evidence of the parties' intent that the subject property would not be the partnership's property. *Cf.* Title 26, § 23(a). Finally, the Court finds relevant the evidence of Chase's mortgage encumbering the subject property. The fact that the spouses of Honer and Sutton collateralized a loan with the subject property indicates that the parties did not intend the subject property to be partnership property. *See* Vineland Homes, 292 P.2d at 947.

In opposition to Honer's motion, Sutton has not pointed to any evidence that the property constitutes partnership property. Sutton referred to the partnership agreement in his brief, but failed to present any evidence that ownership of the subject property is governed by the

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[4] The Court notes that although the evidence shows that all four partners previously owned the subject property as tenants in common, the parties presented no other evidence that the partners ever intended the subject property to be partnership property. Furthermore, there is no evidence explaining the subsequent conveyances or otherwise establishing that any of the partners have withdrawn from the partnership. Indeed, the parties have presented no evidence indicating the current status of the partnership. It is difficult to comprehend that the partnership could have owned real property and that two partners could have withdrawn from the partnership without any documentation memorializing such actions.

agreement. Sutton also asserted that the subject property should not be partitioned by sale because its septic system encroaches on an adjacent lot. This, however, is not evidence that the subject property is partnership property.

IV. CONCLUSION

For the above reasons, the Court concludes that Honer is entitled to an order for partition of the subject property by sale. In support of his Motion for Summary Judgment, Honer presented evidence showing that the parties owned the subject property in their individual capacities as tenants in common. In response, Sutton failed to point to any evidence creating a genuine issue that the subject property was partnership property which should be governed by the partnership agreement. Because a tenant in common has the inherent right to partition, including the right to compel partition, the Court will enter an order requiring that the property be partitioned by sale.

MARIA M. CABRET
Territorial Court Judge

ATTEST:
YVONNE V. WESSELHOFT
Clerk of the Court

By: Rita Johnson
Deputy Clerk
Dated: 5-12-99