DIVISION ONE
FILED: 04-06-2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SANDRA CORTEZ VASQUEZ, a single woman,	1 CA-CV 09-0005
	DEPARTMENT E
Plaintiff/ Counterdefendant/Appellant,	**MEMORANDUM DECISION**
v.	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
FRANCISCO JIMENEZ POLANCO, a single man,	
Defendant/ Counterclaimant/Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2006-018683

The Honorable Bethany G. Hicks, Judge

VACATED AND REMANDED

Dominguez Law Firm PC — Phoenix
By Antonio Dominguez
Attorney for Plaintiff/Counterdefendant/Appellant

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Attorney for Defendant Counterclaimant/Appellee

H A L L, Judge

¶1 Sandra Cortez Vasquez (Vasquez) appeals from a judgment quieting title in a residence to Francisco Jimenez Polanco (Polanco). For the reasons stated below, we vacate the quiet title judgment and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In 1998, Vasquez and Polanco purchased a residence for $94,500. They took title as joint tenants with right of survivorship. Both parties signed the deed of trust. Polanco testified that he could not obtain credit to buy the house alone, so Vasquez helped him buy the house with her good credit history. Vasquez claimed that she also contributed some unspecified amount to the down payment and monthly mortgage payments. Polanco disputed this and claimed that Vasquez did not contribute any money toward the purchase price, closing costs, monthly mortgage, or other expenses. Vasquez presented no evidence establishing how much she contributed.

¶3 Vasquez lived in the house for about one year with Polanco's brother, Eden Polanco (Eden) and the child she and Eden had together. In addition, Polanco's mother, his cousin, and another brother lived in the house with them. Vasquez moved out of the house permanently in March 2001 after she and Eden fought and he hit her. Vasquez filed a complaint to partition the property in 2006.

¶4 The record shows that the house was worth $225,000 to $250,000 at the time of trial in April 2008. The parties claimed there was $141,000 to $166,000 in equity in the property.

¶5 Polanco testified that he alone paid the mortgage payments, taxes, and insurance on the property. He collected money from the other residents for utilities and food only. Polanco also estimated that he spent $35,000 on improvements to the property, including flooring, paint, landscaping, resurfacing, and pouring concrete. Polanco filed a counterclaim to quiet title in his name. At trial and in the joint pretrial statement, Polanco requested contribution from Vasquez for her share of the down payment, mortgage payments, and improvements.

¶6 The trial court found that Vasquez had no interest in the property and entered a judgment quieting title to Polanco. Vasquez filed a motion for new trial, which the court denied without comment. Vasquez filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(B) (2003).

DISCUSSION

I. Jurisdiction

¶7 Polanco asks this court to review whether Vasquez's appeal is defective. The trial court entered a signed judgment

quieting title to Polanco on July 1, 2008. Vasquez filed a timely motion for new trial from that judgment. This motion for new trial extended the time for appealing from that judgment. *See* ARCAP 9(b).

¶8 While the motion for new trial was pending, Vasquez filed a notice of appeal in July 2008. This court ruled that the notice of appeal was a nullity and dismissed the appeal. *See Baumann v. Tuton,* 180 Ariz. 370, 372-73, 884 P.2d 256, 258-59 (App. 1994).

¶9 During this time, the trial court entered an unsigned minute entry order denying the motion for new trial. The time for filing a notice of appeal did not begin to run until the trial court entered a *signed* order denying the motion for new trial. *See* ARCAP 9(b). The court entered a signed minute entry order denying the motion for new trial on November 10, 2008.[1] Vasquez filed a notice of appeal within thirty days after that

[1] There is a subsequent signed order that Vasquez apparently submitted to the trial court. The notice of appeal was filed after the first signed minute entry order and before the subsequent signed order. This is not a basis for finding a lack of jurisdiction. *See, e.g., Schwab v. Ames Constr.,* 207 Ariz. 56, 58-59, ¶¶ 9, 11, 83 P.3d 56, 58-59 (App. 2004) (holding that premature notice of appeal followed by appealable judgment confers appellate jurisdiction and courts "generally disfavor[] hypertechnical challenges to a notice of appeal[]" when there is no prejudice to appellee).

order. Thus, the November 2008 notice of appeal is timely, and this court has jurisdiction over the appeal. *See id.*

II. Vasquez's Interest in the Property and Polanco's Contribution Claim

¶10 Vasquez argues that the trial court's finding that she had no interest in the property was legally erroneous. Polanco does not dispute that he and Vasquez took title as joint tenants with right of survivorship. At trial, Polanco conceded that Vasquez was entitled to some interest in the property.

¶11 On appeal, we review questions of law de novo. *See State ex rel. Udall v. Superior Court,* 183 Ariz. 462, 464, 904 P.2d 1286, 1288 (App. 1995). This court is not bound by a trial court's conclusions of law that are based on undisputed facts. *See Huskie v. Ames Bros. Motor & Supply Co., Inc.,* 139 Ariz. 396, 401, 678 P.2d 977, 982 (App. 1984).

¶12 As a joint tenant, Vasquez demonstrated that she had an interest in the property. *In re Marriage of Berger,* 140 Ariz. 156, 165, 680 P.2d 1217, 1226 (App. 1983) ("Each joint owner has a separate interest in jointly held property."). On this basis, the trial court's ruling was legally erroneous. Vasquez's status as a joint tenant, however, does not mean that she was entitled to an equal share of the equity in the property. *See Brown v. Brown,* 58 Ariz. 333, 336, 119 P.2d 938,

939 (1941) (recognizing general rule of contribution when one co-owner pays obligation owed equally by other co-owner, he is entitled to recover from the other for his respective share); *see also* 59A Am. Jur. 2d Partition § 154 (2009) ("When one cotenant pays more than his or her share, equity imposes on each cotenant the duty to contribute a proportionate share."); *Coyle v. Kujaczynski,* 759 N.W.2d 637, 642 (Iowa Ct. App. 2008) (recognizing co-owner's right to reimbursement from other co-owners).

¶13 Polanco argues on appeal that because partition is an equitable action and the courts have discretion to fashion a remedy that is fair and equitable under the facts of each case, we should affirm the trial court's judgment. Indeed, "[t]he fundamental objective in a partition action is to divide the property so as to be fair and equitable and confer no unfair advantage on any cotenant." 59A Am. Jur. 2d Partition § 6. The court should have begun with the presumption that the parties owned equal shares in the property, *see id.* § 114, however, and then considered Polanco's contribution claim.

¶14 Polanco claims that he was entitled to contribution from Vasquez because he had paid all of the mortgage payments, closing costs, down payment, and improvements. The burden of paying the necessary expenses of jointly owned property is the

responsibility of all cotenants. *See id.* § 154; *see also* 20 Am. Jur. 2d Cotenancy & Joint Ownership § 63 (2009). Polanco bore the burden of proving that he should receive a greater interest in the property because he paid more than his share of these expenses. *See* 59A Am. Jur. 2d Partition § 114.

¶15 Vasquez argues that because Polanco exercised exclusive possession of the property and received rent from other tenants, he was not entitled to contribution for these payments and that she was entitled to an offset for the rental value. *See id.* § 153 ("A tenant in common who does not have actual possession of the property may compel a cotenant in possession to account for rents and profits received from tenants on the premises."); *see also* 20 Am Jur. 2d Cotenancy & Joint Ownership §§ 63 (same), 66 (cotenant with exclusive possession does not have right to contribution). She also contends that the evidence did not establish that Polanco's claim for contribution exceeded her interest in the equity, so awarding the entire property to Polanco was an abuse of discretion.

¶16 Because the trial court found that Vasquez had no interest in the property, it did not address Polanco's contribution claim. Polanco testified that he paid the entire down payment and closing costs, a total of $4,700, as well as

the $800 monthly mortgage since January 1999, an additional $89,600. Vasquez testified that she contributed "some" to Polanco for the down payment, closing costs, and mortgage, but did not specify what amount or to which of these expenses her money went. She claimed she was entitled to an equal share of the equity.

¶17 The trial court concluded that any amounts Vasquez contributed "should more appropriately be treated as rent for the short periods during which she shared occupancy of the property." Vasquez argues that as a joint owner of the property, any payments she made were not properly considered "rent," but should have been credited toward any amount awarded to Polanco on his contribution counterclaim. The record did not establish, however, what amount Vasquez paid. Indeed, Vasquez testified she had no evidence of her contributions and she never specified an amount. Nonetheless, this failure does not, by itself, support the court's decision to award the *entire* interest in the property to Polanco. Instead, the trial court should have considered the defenses Vasquez raised to Polanco's contribution claim.

¶18 First, Vasquez testified that she was effectively ousted from the property in March 2001 when Eden, Polanco's brother and also a tenant, assaulted her. The trial court did

not address Vasquez's argument that Polanco was not entitled to contribution after 2001 because Vasquez was excluded from the property. A cotenant's right of contribution does not exist when the cotenant had exclusive possession and enjoyment of the property. *See* 20 Am. Jur. 2d Cotenancy & Joint Ownership § 66; *see also In re Marriage of Maxfield,* 737 P.2d 671, 676 (Wash. App. 1987).

¶19 If Polanco retained exclusive possession, he may not be entitled to contribution. Vasquez did not leave the property until March 2001. Therefore, any right Polanco had to contribution from Vasquez before that time would not be affected. The trial court, however, did not make any findings regarding this contested issue. Accordingly, we must remand for the trial court to consider this defense to Polanco's contribution claim. *See Beshear v. Ahrens,* 709 S.W.2d 60, 63 (Ark. 1986) (dispossession by cotenant is a question of fact).

¶20 Vasquez next contends that Polanco's contribution claim must be discounted by the amount of rent he received from other tenants. *See* 59A Am. Jur. 2d Partition § 153. Polanco disputed Vasquez's testimony that the other residents paid rent and claimed they only paid for utilities and food. Polanco is liable to Vasquez for the rent he received from the property if he excluded her from the property. *Id.*; *see also* 20 Am. Jur. 2d

Cotenancy & Joint Ownership § 63. The trial court did not address this disputed testimony. On remand, the trial court shall also consider whether Polanco received any rent from other residents and, if so, to what extent this affects his contribution claim.

¶21 Polanco argues that the judgment is equitable given the parties' relative contributions to the property. He cites cases from other jurisdictions that have adopted a rule that a joint owner may rebut the presumption of equal ownership with evidence of unequal contributions. *See Flood v. Kalinyaprak,* 84 P.3d 27, 33, ¶ 28 (Mont. 2004); *Langevin v. York,* 907 P.2d 981, 983-84 (Nev. 1995); *Cummings v. Anderson,* 614 P.2d 1283, 1287 (Wash. 1980).

¶22 However, at least one of these jurisdictions held that in these equitable actions, courts can also consider a joint owner's "overall contribution to the acquisition of assets rather than simply his direct monetary contribution[.]" *Flood,* 84 P.3d at 33, ¶ 27. In *Flood,* one party paid the housing expenses and the other party paid the living expenses, which the court held was evidence that they intended to split their assets equally. *Id.* at 34, ¶¶ 34, 37. Evidence of Vasquez's *overall* contributions would be therefore relevant on remand in determining the parties' proportionate contributions.

¶23 Polanco estimated that he spent $35,000 on improvements to the property. The right to compensation for improvements made on jointly owned property without the consent of the cotenants may be awarded when the improvements: "(1) are made in good faith; (2) are of necessary and substantial nature; (3) materially enhance the value of the property; and (4) are such that circumstances show it would be equitable to do so." 20 Am. Jur. 2d Cotenancy & Joint Ownership § 69; *see also* 59A Am. Jur. 2d Partition § 171 (courts may award a cotenant who makes improvements the resulting increase in value of the property, but not the cost of improvements). Vasquez argues that Polanco is not entitled to contribution for these improvements because he failed to show that the improvements were necessary or that they materially enhanced the value of the property.

¶24 In general, "a co-tenant improving joint tenancy property with separate funds is entitled to reimbursement upon partition of the property[.]" *Berger,* 140 Ariz. at 161, 680 P.2d at 1222; *see also* 59A Am. Jur. 2d Partition § 171. The appropriate reimbursement amount for improvements is the resulting increase in value to the property, and not the actual cost of the improvements. *Berger,* 140 Ariz. at 163, 680 P.2d at 1224; 59A Am. Jur. 2d Partition § 160 ("Proof of increased value

must be offered by the cotenant seeking compensation.") and § 171; *see also* 20 Am. Jur. 2d Cotenancy & Joint Ownership § 69. The only evidence as to the value of these improvements was Polanco's estimation of the cost. Because there was no evidence regarding the resulting increase in value to the property, Polanco did not adequately prove his claim for reimbursement for the improvements. *See* 59A Am. Jur. 2d Partition § 160. However, because we are remanding this case for a new trial, the parties may present additional evidence on this matter.

¶25 Vasquez also argues that the trial court erred by *sua sponte* raising the question whether Polanco intended to gift any interest in the property to Vasquez. Although neither party claimed there was a gift of any interest in the property, the court properly considered this issue in determining whether Polanco and Vasquez intended to take equal interests in the property. *See, e.g., Sack v. Tomlin,* 871 P.2d 298, 304 (Nev. 1994) (holding that a showing of unequal contribution toward purchase of property by unrelated cotenants with no donative intent can rebut presumption of equal ownership); *Cummings,* 614 P.2d at 1287 (same). The record supports the trial court's conclusion that Polanco did not intend to gift any interest in the property to Vasquez.

CONCLUSION

¶26 Polanco conceded that Vasquez had a legal interest in the property as a joint tenant. The question was whether Vasquez had a right to share in the equity of the property given the extent of her financial contribution, if any, and the defenses she raised to Polanco's contribution claim. The trial court did not reach this question because it erroneously concluded that Vasquez had no legal interest in the property. We vacate the judgment quieting title in Polanco and remand for a new trial in which the court can resolve these issues.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
SHELDON H. WEISBERG, Presiding Judge

/s/
JOHN C. GEMMILL, Judge