Status/Scheduling Conference April 2, 2012

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

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KAREN FREIFELD,

Plaintiff,

-against -

JEFFREY BEER,

Defendant.

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DECISION & ORDER

Index No. 3496-2010

Sequence Nos. 2 & 3

LUBELL, J.

The following papers were considered in connection with **Motion Sequence "2"** by plaintiff for an Order (a) directing defendant to pay all carrying costs for 520 Croton Falls Road, Carmel, New York, including tax and mortgage payments, to meet his obligations as a joint tenant and the reasonable value of his use and occupancy of the property, pending the outcome of the litigation herein, (b) directing the defendant to repair and preserve the subject property from waste or injury pending the outcome of the litigation, (c) directing that the property immediately be placed on the market for sale, pursuant to plaintiff's claim of partition, (d) directing that any proceeds from the sale be held in escrow pending an accounting of the costs and expenses plaintiff and defendant incurred towards the purchase, use, improvement and maintenance of the home, and the court's ruling on the parties respective rights and interests, and (e) such other and further relief as the Court may determine to be just and proper; and **Motion Sequence "3"** by defendant for a preliminary ruling and order permitting the defendant to introduce into evidence at the trial of this matter the items described in the supporting papers hereto:

PAPERS

Motion Sequence "2"	**NUMBERED**
Motion/Affidavit/Exhibits A-G	1
Memorandum of Law in Opposition	2

Affidavit in Opposition/Exhibits A-B	3

Motion Sequence "3"

Motion/Affirmation/Affidavit/Exhibits A-E	4
Memorandum of Law in Support	5
Affidavit in Opposition	6
Reply Affirmation/Affidavit	7

This is an action by plaintiff, Karen Freifeld, against defendant, Jeffrey Beer, an unmarried couple with three children, for the partition and sale of the single family Putnam County residence known by the street address of 520 Croton Falls Road, Carmel, New York (the "Premises"). By way of counterclaim, defendant seeks damages for unjust enrichment and for the imposition of a constructive trust upon the Premises or the proceeds of its sale.

Although the parties resided in the Premises with their children as a family unit since the Fall of 1996, they have since separated. Defendant, and one or more of the children from time-to-time, resides in the Premises. Plaintiff and the parties' youngest child reside in a New York City condominium which is the subject of separate litigation in New York County (see Freifeld v. Beer, 32 Misc. 3d 330, 331, 923 N.Y.S.2d 825, 826 [Sup. Ct. 2011][NY County counterclaim severed with venue transferred to NY County]). Plaintiff's somewhat routine overnight visits to the Premises to, among other things, allow their child to visit with his father, have since terminated.

Plaintiff's instant application for an Order directing that defendant pay all carrying costs for the Premises including real estate and mortgage payments pending the outcome of this litigation and that the Premises be immediately placed on the market for sale and that the proceeds be placed in escrow, arises out of plaintiff's contention that defendant has unduly delayed the disposition of this action because it is in his economic best interest to do so. The demand that he repair and preserve the property from "waste or injury" is supported by allegations of mismanagement and waste.

Arguing that it would be unjust to limit the partition issue to such matters as the parties' respective direct contributions to real estate taxes and the mortgage, defendant seeks to also rely upon the more complicated and intricate economic circumstances of their cohabitation as a family. For example, defendant alleges that the parties expressly or impliedly agreed and acknowledged that, while plaintiff would make the mortgage payments on the

Premises and the New York City condominium, defendant would pay other family, household and living expenses in lieu of paying his alleged one-half share of same. Defendant argues that, to do otherwise, would allow plaintiff to derive a greater interest in the Premises simply by virtue of having made direct payments from her bank account to the mortgage, for example, while he allocated his income to family expenses and obligations.

> [P]artition 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 and its benefits" (Hunt v. Hunt, 13 A.D.3d 1041, 1042, 788 N.Y.S.2d 219). Expenditures made by a tenant in excess of his or her obligations may be a charge against the interest of a cotenant (see Worthing v. Cossar, 93 A.D.2d 515, 517, 462 N.Y.S.2d 920). These include acquisition payments, such as down payments and mortgage payments (see Quattrone v. Quattrone, 210 A.D.2d 306, 307, 619 N.Y.S.2d 773; Vlcek v. Vlcek, 42 A.D.2d 308, 311, 346 N.Y.S.2d 893).

(Brady v. Varrone, 65 A.D.3d 600, 602-03, 884 N.Y.S.2d 175, 177-78 2d Dept., 2009]). The equitable nature of the action also allows the Court to impose such orders as may be necessary to preserve the property during the pendency of the action and to equitably allocate expenses of same going forward based upon the particular circumstances of the case.

Contrary to plaintiff's position, the Court is not satisfied that there is sufficient evidence of her ouster from the Premises such as would warrant the imposition of rent. There is no disagreement that many of plaintiff's belongings including furniture, furnishings, computer equipment, family photographs, cookware, boxes of personal papers and files, and clothing are still present at the Premises. In addition, there are no allegations of physical ejectment and, despite anything defendant may have earlier said to the contrary, defendant affirms to the Court and to plaintiff that "plaintiff has complete use of the property."

Notwithstanding that determination, the Court concludes that defendant must pay his one-half share of the mortgage, the real estate taxes and insurance subject to the Court's final determination on the equities of the case without prejudice and subject to reallocation, retroactive the date of service of the Order to Show Cause with arrears to be paid in three equal monthly

installments commencing on March 1, 2012.

Since there is no dispute that the Premises is substantially and continually occupied by defendant, defendant is to continue making all payments currently made by him towards utilities and the daily and regular upkeep of the Premises, as is the status quo.

Plaintiff's application for an Order directing the defendant to repair and preserve the subject property from waste or injury pending the outcome of the litigation is granted, but not with respect to any noted defects or deficiencies. In a more general sense, this obligation is imposed upon both parties and, to the extent that the parties may disagree upon what needs to be done to preserve or protect the Premises, such can be accounted for at trial or, if an emergency presents itself, either or both parties can make what they deem to be emergency repairs without prejudice to having that issue resolved by the Court.

The Court denies plaintiff's motion for an Order directing that the property immediately be placed on the market for sale.

> Prior to the entry of an interlocutory judgment directing the sale of the subject property, an accounting must be made of the income and expenses of the property, including but not limited to insurance costs, taxes, rents, and maintenance costs (see RPAPL 911, 915; . . .

(Donlon v. Diamico, 33 A.D.3d 841, 842, 823 N.Y.S.2d 483, 484 (3d Dept., 2006). The accounting has yet to take place. "Such issues as the rights, shares, or interests of the parties, and whether partition may be had without great prejudice, should be determined and declared by the court, after the referee reports to the court on these issues, before a partition or sale may be directed" (Lauriello v. Gallotta, 70 A.D.3d 1009, 1010, 895 N.Y.S.2d 495, citing Wolfe v. Wolfe, 187 A.D.2d 628, 629, 590 N.Y.S.2d 504; Grossman v. Baker, 182 A.D.2d 1119, 583 N.Y.S.2d 92; George v. Bridbord, 113 A.D.2d 869, 493 N.Y.S.2d 794).

In any event, while the actual physical partition of property is the preferred and presumed appropriate method, where it is demonstrated that physical partition would cause great prejudice, the property must be sold *at public auction* (Lauriello v. Gallotta, supra, citing Snyder Fulton St., LLC v. Fulton Interest, LLC, 57 A.D.3d 511, 513, 868 N.Y.S.2d 715; Loughran v. Cruickshank, 8 A.D.3d 799, 800, 778 N.Y.S.2d 225), not by private sale. In any event, if both parties agree to the private sale of the Premises

through a real estate listing or otherwise, they are free to so proceed albeit at the risk of rending the partition action academic.

To any further extent, plaintiff's motion is denied.

Defendant's application for an Order permitting the defendant to introduce into evidence at the trial of the partition action the "items described in the supporting papers" is granted to the extent that defendant may introduce into evidence what he alleges are joint expenses or obligations paid in lieu of direct payments for his asserted one-half interest in the Premises. The Court finds merit to defendant's argument that were he to be precluded from submitting such evidence, plaintiff would inequitably benefit by the submission of her direct payments for such expenses as the mortgage, taxes and insurance for the Premises, were the Court to find that an agreement existed between the parties as defendant asserts.

To any further extent, the application is denied except to the extent that such evidence might properly be considered in connection with defendant's counterclaims for, among other things, unjust enrichment.

The parties are directed to appear before the Court for a Status/Scheduling conference at 9:30 A.M. on _____, 2012.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
February 27, 2012

S/ _____
HON. LEWIS J. LUBELL, J.S.C.

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