Clark v. Witte., Docket No. 1403-06 Cncv (Katz, J., Mar. 30, 2007)

STATE OF VERMONT
Chittenden County, ss.:

SUPERIOR COURT
Docket No. 1403-06 CnC

CLARK

v.

WITTE

FINDINGS OF FACT
CONCLUSIONS OF LAW
NOTICE OF DECISION

This matter was tried to the court. Plaintiff initiated this action seeking both a writ of possession, dispossessing defendant from the property, and declaratory relief to the effect that she has no further interest in it. Defendant's requests for relief are perhaps more difficult to categorize, but essentially mirror plaintiffs—implicitly she claims an interest in the real estate which she wishes to be declared and awarded. We think it is important to note what has never been pled or urged during trial: That this action is one sounding even in part in tort, although there was

some evidence suggesting battery. On the basis of the evidence presented at trial, the following decision is announced.

FINDINGS OF FACT

Plaintiff Peter Clark and defendant Michelle Witte first met at work in 1993, but began dating in 1998 when he separated from his wife. Intimacy ensued. Soon thereafter she moved to Maine to start a new job, but soon told plaintiff that she was unhappy with that move. She wanted to return to Vermont and move in with him. He suggested such was not a good idea. A week later, she called to say she was pregnant. He agreed that she could move in and helped her bring her things back from Maine.

The pregnancy ended before full term. Although probably not relevant to the ultimate task before the court in this case, there was testimony about how the pregnancy ended, which was different from the respective parties. Listening to the plaintiff's recounting evoked such a strong emotional reaction from defendant that a recess was necessary. In the end, we decline to make a finding of fact on this point, but discuss it nevertheless. It is not germane to the question of whether defendant has an interest in plaintiff's real estate. However, what we do think pertinent about the testimony and its effect is that it displayed defendant's emotional fragility in full relief, which inflected her often exaggerated and emotional responses to many of the issues which arose at trial.

Whatever the beginning of their relationship, they remained together from 1998 until September 2006. Plaintiff made clear from the start that he did not wish to marry defendant. They never held themselves out as being married.

Plaintiff Clark owned the house they shared in Underhill. When defendant Witte first moved in, his divorce was evidently not completed

and the pressing task was for Clark to find mortgage financing enabling him to pay off the first wife's relative who had advanced money for the initial house purchase. Defendant helped plaintiff considerably in his search for financing, which ultimately proved successful. The significant fact from this stage of the relationship is that, at a time when title on the real estate changed, because of the divorce, it changed to plaintiff's name alone. It is inescapable that these parties understood it would be his house, not theirs. The mortgage obligation was his, not theirs. These facts have never changed.

At the time defendant moved in, plaintiff had been renting one bedroom to another person. That tenant was paying $350 per month. That tenancy ended and eventually defendant began paying $400 per month toward the cost of housing. Additionally, she paid different expenses, apparently on an ad hoc basis. She might buy groceries, or pay a vet bill. She obtained perennials for the flower gardens she developed. Plaintiff always paid the monthly bills such as mortgage and utilities. She has not had an automobile for several years, although the parties live off the beaten path in Underhill. Other than the telephone, plaintiff paid most household bills most of the time.

Plaintiff has since at least 1993 had essentially one employer, the Culinary Institute, for which he now serves as restaurant manager at the Inn at Essex. Defendant ceased work with the Institute in 1993. During the nine years of living with plaintiff, she has not had regular employment. Instead, she has done different jobs—helping others with gardening, childcare, substitute teaching, etc. If defendant's annual income ever exceeded $5,000 in recent years, we were not so shown by the evidence. We specifically decline to find that it did.

Defendant planted perennial beds. From the photos, they are most attractive. Whether she bought many or most of the plants, or obtained

them from friends, perhaps in exchange for labor, or perhaps because that's just what gardeners do, we don't know. When in bloom, they improve the house's appearance. We are persuaded by the testimony of Mr. Fay that they do not actually enhance the home's fair market value.

Much was made of the physical altercation between these parties in early September. As we understand what happened, plaintiff told defendant he was leaving, moving out, although he had made clear that he would engage an attorney to force defendant out over the long run. We do know that Attorney Kirkpatrick sent a letter to defendant August 30 indicating that plaintiff wanted her to move out, and to do so by September 30. About a week after that letter he announced that he was leaving until she was out. At that point, what appears clear is that defendant took plaintiff's vehicle keys and would not let him have them. What happened next is less clear, in part because plaintiff waived rebuttal testimony and never testified. Defendant's testimony was, essentially,

> [He] was aggressively trying to wrench keys from my hand. [He] was driving the tip of the key into my hand. Bruises appeared quickly on my arm. I would look at them each day.

Defendant also testified that plaintiff was drunk and on pot at the time. It is also clear he did eventually drive off and has never returned to live in the house. Obviously, in defendant's words it was a physical altercation in which she was bruised—domestic violence. But also, clearly, one could view the situation as his simply wanting to leave, thereby ending the nine year period together. Coupled with the recent attorney's letter this had an aura of finality quite different from any earlier argument. Having listened to both parties throughout trial, we must conclude and state that defendant is clearly prone to exaggeration and emotional viewing of one or another event. Further, she several times quite clearly revealed her deepest hurt about the events since August. She revealed particular animosity to Attorney Kirkpatrick and plaintiff's decision to consult her, resulting in the letter. The letter, itself, is a rather mild, straightforward request that

defendant leave the house which at all times has clearly been plaintiff's. Defendant also revealed her deepest resentment by several times mentioning "Peter's actions and choices." We interpret "actions and choices" as his decision to leave the relationship and efforts to remove her from the house.

Whatever the fault, or injury, or causes of the September fracas, it resulted in Ms. Witte seeking and securing a Relief from Abuse Order. Under it, she has had exclusive use and occupancy of the home since early September. Hence, for seven months, she has lived in this nice cottage, with fuel provided, and paid only a few of her $400 shared-rent payments. Mr. Clark has been paying the full mortgage, taxes, insurance during this period, in which he has camped out with friends.

The parties are both very attached to the two Chesapeake Bay Retrievers, Yogi and Caddie. Mr. Clark clearly bought Caddie as his own dog. There was a good deal of dispute around the issue of who purchased Yogi, but at the conclusion of trial an agreement was reached for Ms. Witte to keep possession of Yogi. Hence findings regarding him are not necessary.

Although we have sought here to review the evidence presented during one and a half days of trial, a good deal of it is probably not necessary to apply the law which must govern this decision.

CONCLUSIONS OF LAW

The defendant seeks an equitable distribution of the couple's property, namely the house held in Mr. Clark's name. Equitable distribution is a concept usually applied upon divorce, but the parties should not be treated as married and subject to the statutory marital property distribution system for several reasons. First and foremost, they are not

married. They had at least eight years in which to marry and did not do so. They did not agree to get married or ever hold themselves out as currently married. They shared not a bank account, let alone a name. Even if they had, this would not suffice to make them married under Vermont law because the state does not recognize common-law marriage. See Stahl v. Stahl, 136 Vt. 90, 91 (1978).

Some states have treated non-married couples as married for the limited purpose of property distribution, despite the absence of a legal marriage. Where this has been the case, it has always been consistent with the state's overall approach to and policies regarding marriage. Vermont law does not suggest a similarly flexible approach toward marriage and marital property.

Vermont law demonstrates a commitment to a firm and conservative "you're in or you're out" treatment of marriage. The rejection of common-law marriage is an example of this policy, a longstanding principle of the courts, undisturbed by the legislature. This rule denies the benefits of marriage to couples who do not actually go through with the ritual and procedure, regardless of how they want to structure their relationship. Marital property rights were denied to unmarried co-inhabitants specifically because common-law marriage was not recognized in the state in Carnes v. Sheldon, 311 N.W.2d 747 (Mich. 1981), and Wilber v. DeLapp, 850 P.2d 1151 (Or. 1993). Wajda v. Wajda, 570 A.2d 1308 (N.J. 1989) is similar. A second example of conservative marriage policy is the all-encompassing marital property rule, treating all property whenever and however acquired as subject to equitable distribution. 15 V.S.A. § 751(a). This emphasizes the flipside of the equation- when you're in, you're all in. Finally, Vermont's civil union regime, although perhaps considered a change to traditional marriage by those unfamiliar with the details, again requires participants to expressly opt-in under certain procedures, and also be not

eligible for traditional marriage. 15 V.S.A. § 1202. It is, by name and definition, a parallel system; not marriage.

Vermont's legal climate of conservative treatment of marriage suggests that this couple, who were not married and did not consider themselves married, should not be treated by this court as if they were for the purposes of their property. In the words of the Hawaiian Supreme Court when it was considering whether to award support after an 8-year cohabitation, someone who says "I don't" should not be forced to bear the negative financial consequences of someone who says "I do." Aehegma v. Aehegma , 8 Haw. App. 215, 221-22, 797 P.2d 74 (1990).

Notwithstanding lack of marriage, we will examine whether equity provides Ms. Witte with rights to her co-inhabitant's property. The court may enforce a "quasi-contract" with no reference to the intentions or expressions of the parties. "The obligation is imposed despite, and frequently in frustration of, their intention, where justice so requires. Otherwise stated, contracts implied in law do not arise from the traditional bargaining process, but rather rest on a legal fiction arising from considerations of justice and the equitable principles of unjust enrichment." 66 Am. Jur. 2d Restitution § 4. The inquiry essentially boils down to what would be fair for these parties. Although this is not a strict exercise in enforcing a "bargained-for exchange," the parties' understanding of the situation and their expectations at the time is pertinent to the determination of what is fair and equitable.

It should be noted at this point that the law may impose a "clear and convincing" evidence standard for claims for division of property contrary to record title. See Byrne v. Laura, 52 Cal. App. 4th 1054 (1997). This is notable here because the house is titled to Mr. Clark.

The elements of unjust enrichment, which Ms. Witte asserts justifies restitution, are (1) an enrichment to one party, (2) an impoverishment to the other, (3) a causal connection between the enrichment and the impoverishment, (4) the absence of a justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law. Restitution § 12.

The fourth element is problematic for Ms. Witte. The enrichment must be unjust to be grounds for restitution. Put another way, "[n]o equitable reason exists for making restitution where the plaintiff gets the exchange which he or she expected." Restitution, § 23. If these payments were understood by both parties to be rent and nothing more, Ms. Witte has no equitable claim. Ms. Witte, although she testified to the effect that she believed that she was moving in with Mr. Clark to start a family and a life together, does not assert that she expected when she moved in that she would gain equity in the property. There is no claim of a tacit understanding to this effect, let alone an express agreement. Nothing suggests she ever expected or expressed a desire for any property right other than the right to live in the house with Mr. Clark. Rather, the facts suggest an implied agreement that the payments are month-to-month rent. She paid them to Mr. Clark, not the mortgage company. There was a renting tenant before Ms. Witte moved in. This suggests her payments to Mr. Clark were to serve the same purpose. Ms. Witte may find it objectionable to characterize Mr. Clark as her landlord, but her indignation is not the determinant of whether her payments entitle her to equity in a house titled in his name. Certainly it is not equitable to allow her to now impose a different expectation than the parties had at the time.

Furthermore, there are two particular exceptions to the general rule of unjust enrichment recovery which pose obstacles for Ms. Witte. One is the impossibility of her restoring to Mr. Clark what she received for her payments, namely shelter. "One who seeks to rescind or avoid the

transaction and recover back what he or she has parted with must restore the other party to the transaction to the status quo and return what was received under the transaction... if specific restoration is impossible, restitution is denied." Restitution § 15. The parties freely exchanged love and support in this relationship, which obviously neither can return. Similarly, because she cannot return the housing she received for her payments, Ms. Witte may not recover the money she paid for it. Nothing in the parties' arrangement suggests she should get a full refund of her expenses because the relationship was not indefinite.

The second problematic exception is that the payments were made voluntarily, with a full knowledge of the circumstances. Restitution § 108. She may not rewrite her bargain after the fact. Nothing suggests she expected to receive anything other than housing by her payments and therefore she cannot now have them returned because she did not receive something more.

The facts support finding that this payment was more rent-like and less equity-purchasing. The deed is in his name. Payment to Mr. Clark, not to the mortgage company, looks like rent. Absence of even allegations of a verbal agreement, let alone a written one, to convey an ownership interest makes it look like rent. She was intimately acquainted with the details of title to the house and its financing given her involvement with the mortgages, but her name was never placed on the deed and she did not pay the mortgage company directly. Again, nor did they get married, giving her an interest in the property by action of the equitable distribution statute. In sum, we are not convinced he intended to transfer to her an ownership share when he accepted her payments.

In other cases where non-married co-inhabitants divided property equitably, there were much more convincing facts showing an injustice if restitution is denied, such as the parties were titled to the property "as

husband and wife," and/or purchased the property together as a joint project, and/or had express promises of an ownership share. For example, the court in Pinto and Smalz, 955 P.2d 770 (Or. 1998), awarded an equitable share in a home where both partners had shared the cost of down payments and mortgage, along with all other expenses, which were all paid out of joint bank accounts. That case showed much more pooling and intermingling of assets and a house purchased as a joint venture, not owned by one partner before the relationship. Similarly, in Louisiana, a co-inhabitant was not entitled to one half share absent evidence she, among other things, helped make loan payments. Lacour v. Theard, 439 So. 2d 1127 (La. 1983). There was a similar result, denying implied contract, where female co-inhabitant did not make any payments on a house in Carnes v. Sheldon, 311 N.W.2d 747 (Mich. 1981).

There is also a question of whether Ms. Witte is entitled to recover for her work in the gardens and on the mortgage financing. Ordinarily, someone who performs substantial services for another without an express agreement for compensation becomes entitled to the reasonable value of the services. Restitution § 37. There must be (1) valuable services rendered, (2) for a person from whom recovery is sought, (3) and the services must be accepted by that person (4) under such circumstances as reasonably notified the person that the plaintiff expected to be paid. Restitution § 38. Furthermore, where the parties' relationship repels the idea that services were rendered with expectation of payment, presumption may arise that they were gratuitous. Restitution §§ 51-52.

The expectation of payment element is lacking in this case. If one confers a benefit gratuitously, as, for example, as a gift, the retention of that benefit without payment is not considered unjust. Restitution § 14. The only evidence that there was any expectation of payment is that payment was actually made; Mr. Clark asserts that he lowered Ms. Witte's payment from $400 to $300 for several months in consideration of her work on the

mortgage. It also appears that both the banking and gardening services are of the type people give freely in romantic relationships. They are rendered for mutual benefit between partners to a committed relationship. Such efforts by both parties over the course of the relationship are likely innumerable. They do not entitle Ms. Witte to an ownership interest in the home.

NOTICE OF DECISION

For the foregoing reasons, we conclude that defendant Witte is entitled to no portion of the real estate presently in the title of plaintiff Clark. We also conclude that she is entitled to no settlement or payment. Indeed, even were the law to suggest such an entitlement, the seven plus months of her exclusive occupancy of his house would have a value greater than any such award. We therefore award exclusive possession of the house in Underhill to Peter Clark, free of any interest of Michelle Witte. Counsel for plaintiff to prepare judgment.

Dated at Burlington, Vermont, _____, 2007.

M. I. Katz, Judge

T. M. Crowley, Ass't Judge