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OF THE
STATE OF DELAWARE

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RE: ***IMO of the Real Property: Tax Parcel No. 26-012.20-080 generally known as 2300 W. Seventeenth Street, Wilmington DE 19807***
C.A. No. 2020-0049-SEM

Dear Counsel:

This partition action is nearing completion with sale proceeds of less than $65,000.00 waiting in escrow. Both parties have requested setoffs to recover more than their 50/50 share of the remaining pot. The petitioner seeks to recover her share of unearned and allegedly underpaid rent and her fees and costs associated with this action. The respondent rejects those requests and, instead, requests setoff to compensate for expenses he incurred maintaining the property.

As explained herein, I recommend that the petitioner's requests be denied in part, regarding rent for the four two-bedroom units and shifting of fees and costs. I find, however, that a further evidentiary record must be developed to determine (1) the fair rental value of the penthouse apartment or whether an early lease applies and

(2) the amount and character of the expenses incurred by the respondent. This is a final report and exceptions are stayed until a final report is issued on these remaining issues after an evidentiary hearing.

I. Background

This is a dispute regarding property owned by Maria I. Murowany (the "Decedent") which passed to her two children, Christine Murowany-Hidell ("Petitioner") and Mark Murowany ("Respondent"), through intestate succession when she died on May 12, 2019.[1] The property is located at 2300 West Seventeenth Street, in Wilmington, Delaware and is a three-story apartment building originally containing six two-bedroom apartments (the "Property").[2] Before her death, Decedent converted the second floor from two two-bedroom apartments into a single penthouse suite (the "Penthouse"), leaving four two-bedroom apartments and the Penthouse.[3] The Property also had a basement and an efficiency apartment within the basement.[4]

[1] Docket Item ("D.I.") 1 ¶ 1.

[2] *Id.* ¶¶ 1, 6.

[3] *Id.* ¶ 8.

[4] D.I. 17 ¶ 34.

Respondent leased the Penthouse from the Decedent from April 2009 until her passing in May 2019.[5] Respondent continued to operate under the lease, and live in the Property, paying the rent previously agreed to through July 2020.[6] Specifically, Respondent paid rent of $1,300.00 per month, a reduced rate in recognition of the services Respondent provided as the manager of the Property.[7]

After Decedent passed, Respondent continued to live in the Penthouse; Petitioner did not immediately move in or attempt to access the Property. Rather, Petitioner began requesting keys to the Property and its units through her counsel on June 4, 2019.[8] It appears Respondent did not provide the requested keys but there is, likewise, no argument or showing that Petitioner visited and tried to personally access the Property or its units for several months. Petitioner did, however, continue to request keys in October 2019, December 2019, and January 2020, and added in her later communications that she would have the locks changed or drilled if she did

[5] D.I. 1 ¶ 4.

[6] D.I. 17 ¶ 38. Respondent's post-death payments were made to the Decedent's estate, which will be distributed to the parties in equal shares upon closing. *See In the Matter of Maria I. Murowany*, ROW 172267. "Because the Register of Wills is a Clerk of the Court of Chancery, filings with the Register of Wills are subject to judicial notice." *Arot v. Lardani*, 2018 WL 5430297, at *1 n.6 (Del. Ch. Oct. 29, 2018) (citing 12 *Del. C.* § 2501; Del. R. Evid. 202(d)(1)(C)).

[7] D.I. 1 ¶ 3. D.I. 17 ¶ 38.

[8] D.I. 17 ¶ 21.

not receive the requested keys.[9] Thereafter, and presumably in response, Petitioner received keys to the four two-bedroom apartments.[10] Petitioner did not receive keys to the basement and efficiency apartment within the basement but she took it upon herself to have those locks professionally drilled on February 6, 2020.[11] Petitioner was not given keys to the Penthouse until February 7, 2020.[12]

On January 24, 2020, unable to resolve disputes about her joint ownership with Respondent, Petitioner commenced an action for partition.[13] While this action was proceeding, the parties worked to settle their disputes and avoid a court-ordered sale.[14] After their efforts failed, Respondent filed an answer to the petition for partition and the parties stipulated to a partition by sale, which was granted on April 28, 2020 (the "Order").[15] The Order required the sale of the Property at public

[9] *Id.* ¶¶ 22, 24, 26, 29, 30. Respondent's counsel responded to the October and December requests by stating he would discuss them with Respondent. *Id.* ¶¶ 25, 27, 29, 30.

[10] *Id.* ¶ 31. It is unclear who gave Petitioner the keys.

[11] *Id.* ¶ 34.

[12] *Id.* ¶ 35.

[13] *Id.* ¶¶ 28, 32. D.I. 1.

[14] Respondent made a final offer to purchase Petitioner's share of the Property on January 31, 2020. D.I. 17 ¶ 32. The offer was for $210,000.00 less "Structural Work Costs" to repair the third floor. *Id.* ¶ 32. Petitioner refused the offer and no further efforts to avoid a court-ordered sale are reflected on the docket. *Id.* ¶ 33.

[15] D.I. 7. D.I. 10.

auction and appointed Jason C. Powell, Esquire as trustee (the "Trustee").[16] On July 6, 2020, the Trustee filed an emergency motion for relief from the Order, seeking permission to move forward with a private sale, consented to by the Petitioner and Respondent.[17] This motion was granted and, on August 5, 2020, the Property was sold for $1,045,000.00.[18]

The Trustee filed a return of sale for the Property on August 11, 2020 (the "Return").[19] The Return demonstrated that Petitioner and Respondent received disbursements from the sale proceeds of $470,939.01 each, leaving net proceeds of $75,364.17.[20] Upon request, the Trustee was granted his fees and costs of $13,338.50.[21] The Trustee continues to hold $62,015.67 in escrow.[22]

The parties disagree about who should get what portion of the remaining proceeds. Petitioner filed a petition for decree and order of distribution, with her position and proposal, on December 4, 2020 (the "Petition").[23] Respondent filed a

[16] D.I. 10.

[17] D.I. 11.

[18] D.I. 12. D.I. 17 ¶ 4.

[19] D.I. 13.

[20] *Id.* ¶ 4.

[21] D.I. 16. D.I. 33.

[22] D.I. 17 ¶ 6.

[23] *Id.*

response in opposition to the Petition on February 19, 2021, and a motion for expenses incurred in maintaining the Property and during this litigation on February 22, 2021 (the "Motion").[24] The Petition and the Motion were fully briefed and argued on July 15, 2021.[25] This is my final report.

II. Analysis

The allocation of the remaining sale proceeds ($62,015.67) starts at 50/50 ($31,007.83 each). But both parties assert a right to more, based on various theories. Petitioner seeks shifting to reflect the fair market rent of the Penthouse and for unearned rent from the four two-bedroom apartments (not including the basement). Petitioner also seeks a shifting of attorneys' fees based on her contributions to the Property's value when sold, under the common fund doctrine. Respondent, conversely, seeks reimbursement for expenses related to the Property's upkeep and maintenance. I address these arguments in turn.

A. Petitioner Is Not Entitled To Setoff For Unearned Rent For The Four Two-Bedroom Apartments.

Petitioner seeks an award of $46,200.00 for rental value of the four unrented two-bedroom apartments, arguing that Respondent ousted Petitioner from the Property.[26] Per Petitioner, she was ousted from the date of the Decedent's death

[24] D.I. 21-22.
[25] *See* D.I. 34.
[26] D.I. 17 ¶ 46. D.I. 30 ¶ 13.

through the date she received keys to the four two-bedroom units (January 11, 2020). This ouster, Petitioner argues, entitles her to a setoff in the amount of half of the unearned, fair market rent for the two-bedroom units.

"A cotenant is generally entitled to make personal use of property held in common and is not accountable for such use in the absence of ouster."[27] "However, if a co-tenant has exclusive possession of the property and ousts other co-tenants, then the rental value (representing the benefit received by the co-tenant having exclusive possession) may be set off against their share of the sale proceeds."[28] Ouster is "[t]he wrongful dispossession or exclusion of someone (esp. a cotenant) from property (esp. real property)[.]"[29] To find ouster, Petitioner must have been excluded from the Property by Respondent.[30] Respondent's sole possession of the Property, alone, does not constitute ouster.[31] Rather, for example, ouster would be

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[27] *In re Estate of Gedling*, 2000 WL 567879 at *7 (Del. Ch. Feb. 29, 2000) (citations and quotation marks omitted).

[28] *Ponder v. Willey*, 2020 WL 6735715 at *3 (Del. Ch. Nov. 17, 2020).

[29] *Ouster*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[30] *See In re Real Estate of Holmes*, 2000 WL 1800127, at *4 n.8 (Del. Ch. Nov. 21, 2000), *aff'd*, 787 A.2d 100 (Del. 2001) (finding no ouster when the moving party was barred from entering the property by an order of the Family Court and not the actions of the co-tenant in possession).

[31] *See Smith v. Lemp*, 63 A.2d 169, 170 (Del. Ch. 1949) ("Since each co-tenant is entitled to the possession of the property, the mere fact that one is in possession and the other is not 'does not presumptively show an ouster[.]'"). *See also Huston v. Lambert*, 281 A.2d 511, 512 (Del. Ch. 1971) (finding a co-tenant's action of voluntarily moving out of the jointly owned property, without any evidence of "a disseisin by defendant or an act of possession

Respondent denouncing Petitioner's ownership rights, purporting to be the sole owner of the Property, or otherwise denying Petitioner access to the Property.[32]

Petitioner has asserted that she was denied access to the Property because Respondent did not give her keys immediately when requested. I find this insufficient to support ouster. The Decedent passed, passing title to the parties, on May 12, 2019. But there has been no showing that, after the Decedent's death, Petitioner attempted to access the Property and was rebuffed or refused by Respondent. Further, Petitioner's requests for keys, and the delay that occurred in providing those keys, is insufficient to demonstrate ouster for a few reasons. First, Petitioner did not demand keys until October 2019, five months after she became a co-owner.[33] Second, Petitioner's demands for keys in December 2019 and January

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by him hostile to plaintiff's title or right to possession" was insufficient to show ouster); *In re Estate of Gedling*, 2000 WL 567879, at *7 ("Sole possession by the occupying tenant or appropriation of all of the rents and profits, without more, is not an ouster. There must be a repudiation of the rights of the cotenants and a claim of sole ownership; otherwise, the cotenants may properly assume that the possession of the occupying tenant is not hostile to their interest.") (quoting Moynihan, *Introduction to the Law of Real Property*, West Pub. Co. (1962), p. 225); *Ponder v. Willey*, 2020 WL 6735715, at *3 (finding no ouster where it was unclear if the moving party had a key to the property and the co-tenant in possession had exclusive possession of the property, particularly because the moving party was able to, and did, access the property once or twice a year).

[32] *See Smith v. Lemp*, 63 A.2d 169, 170 ("An ouster of one co-tenant by another can, of course, be shown under some circumstances indicating a clear denial of the co-tenant's rights.")

[33] D.I. 17 ¶¶ 21, 22.

2020 came during negotiations regarding the purchase of Petitioner's interest in the Property and were conditioned as "[pending] receipt of an acceptable offer[.]"[34] And, third, Petitioner's ability and decision to professionally drill the basement units demonstrates that, more likely than not, Petitioner did not need to request and wait for keys from Respondent to access the two-bedroom units; she could have, but failed to, access them earlier.[35]

Petitioner's actions demonstrate both a willingness to temporarily remain without access to the Property and an ability to gain access at will. Petitioner has not pled or provided evidence that Respondent made any threat or attempt to physically exclude her from the Property. Rather, Petitioner's conduct confirms she was able to access the Property but chose not to do so for a period of time; such does not support a finding of ouster.[36] Altogether, I find Respondent did not oust

[34] *Id.* ¶¶ 24, 26, 29, 30.

[35] *Id.* ¶ 34.

[36] *See In re Estate of Gedling*, 2000 WL 567879, at *7 ("If [a cotentent] chooses not to visit the property or is uncomfortable being there, that is not the same as ouster."); *In re 27949 Home Farm Drive, Millsboro, Del. 19966*, 2020 WL 8262283, at *5 (Del. Ch. Jan. 26, 2020) (finding no ouster where "[t]here was no evidence that [the moving party] attempted, or asked, to enter onto the Property and was excluded access" by the co-tenants in possession).

Petitioner such that Petitioner should receive a setoff for unearned rent for the four two-bedroom units.[37]

B. Petitioner Is Not Entitled To Fees Under The Common Fund Doctrine.

Petitioner seeks an award of fees and costs in the amount of $41,230.50, based on a claim that her actions in seeking partition increased the value of the Property by $729,000.00.[38] Delaware generally follows the "American Rule" that each party bears her own fees and costs.[39] There are exceptions to this rule including the "common fund" or "common benefit" doctrine:

> The common benefit exception allows the successful litigant to recover attorneys' fees if the litigation creates a monetary benefit that is shared by others. Historically, this exception has been applied to business enterprise litigation where, for example, a stockholder may recover funds for the benefit of the entire corporation. The exception is premised on the equitable principal that those who benefit from litigation would be unjustly enriched if the entire cost of the action were borne by the successful plaintiff.[40]

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[37] Respondent also argues that Petitioner did not allege or seek relief for ouster in their initial pleading. D.I. 21. Petitioner did not raise the issue of ouster until filing the Petition. D.I. 17 ¶ 2. Because Respondent "had no notice, throughout most of this litigation, that Petitioner[] intended to demand rent payments for [his] occupation of the Property, Petitioner[] effectively . . . waived [her] right to seek such rent payments during the pre-notice period." *Brown v. Wiltbank*, 2012 WL 4340654, at *4 (Del. Ch. Sept. 13, 2012). By the time Petitioner raised the issue of ouster, not only had Petitioner accessed the Property, but the partition sale had already occurred. D.I. 13. Therefore, Petitioner's claim for rent due to ouster fails both on the merits and procedurally.

[38] D.I. 30 ¶¶ 26, 28.

[39] *See, e.g.*, *Nichols v. Chrysler Grp. LLC*, 2010 WL 5549048, at *3 (Del. Ch. Dec. 29, 2010).

[40] *Korn v. New Castle Cty.*, 922 A.2d 409, 410 (Del. 2007).

But, in a typical partition action, neither party produces a benefit that does not already exist.[41] Instead, the parties exchange one asset, their fractional ownership of the property, for an equal asset, their fractional share of the net value of the property at sale.[42] This is a "wash," with no added benefit.[43]

Petitioner contends the Property sold at a higher price due to Petitioner's actions.[44] But the buyer's offer more so reflects the market value of the Property and the buyer's interest in closing the sale. Although Petitioner may have encouraged the buyer to cover certain fees, such does not justify shifting any fees in Petitioner's favor and I find Respondent is not unjustly enriched absent such shifting.

C. An Evidentiary Hearing Is Necessary To Address Fair Market Rent For The Penthouse And Respondent's Expenses.

The parties agree that Respondent was responsible for paying rent for his use of the Penthouse.[45] This obligation arose before the Decedent's death through a lease agreement.[46] After Decedent's death, Respondent continued to pay the monthly rent required by that agreement ($1,300.00) to the Decedent's estate.

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[41] *Moore v. Davis*, 2011 WL 3890534, at *2 (Del. Ch. Aug. 29, 2011).

[42] *Est. of Proffitt v. Miles*, 2012 WL 3542202, at *2 (Del. Ch. Aug. 4, 2012).

[43] *Moore v. Davis*, 2011 WL 3890534, at *2.

[44] D.I. 30 ¶ 26.

[45] D.I. 21 ¶ 11.

[46] *Id.* ¶ 11, Ex. B.

Petitioner argues that Respondent was required to pay $3,300 each month and his failure to do so entitles Petitioner to a setoff for one-half of the difference ($1,000.00) from May 2019 through July 2020 (15 months, $15,000.00 total).[47] Respondent, conversely, seeks a setoff in his favor in the amount of $12,487.52, representing one-half of the expenses he incurred in the upkeep and maintenance of the Property from May 2019 through August 2020.[48]

I find the briefing submitted presents several material disputes of facts which I cannot reconcile without a further evidentiary record. Specifically, the parties dispute the fair rental value of the Penthouse, as well as whether Respondent's original lease was still in effect during the disputed period.[49] And there are disputes regarding the amount and nature of the expenses incurred by Respondent and the services he provided as manager of the Property.[50] An evidentiary hearing will be scheduled to develop the factual record and a separate order will be issued.

III. Conclusion

For the foregoing reasons, I recommend that Petitioner's claims for setoff for unearned rent of the four two-bedroom apartments and for costs and fees be denied.

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[47] D.I. 17 ¶ 41.

[48] D.I. 22.

[49] D.I. 21 ¶ 11.

[50] D.I. 28.

I find further proceedings are required to address Petitioner's request for setoff related to the Penthouse and Respondent's request for reimbursement for upkeep and maintenance of the Property. Counsel shall contact my chambers to schedule a hearing, providing them with sufficient lead time to build an evidentiary record.

This is my final report and exceptions are stayed until a final report is issued on the remaining issues.

Respectfully,

/s/ Selena E. Molina

Master in Chancery

cc: Jason C. Powell, Esquire