

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

I/M/O THE REAL ESTATE OF )  
JAIME'S LLC AND ) C.M. No. 10810-NC  
TILLMAN B. COX )

MASTER'S REPORT  
(Motion for Summary Judgment)

Date Submitted: September 23, 2003

Draft Report: December 2, 20003

Final Report: September 20, 2005

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GLASSCOCK, Master

This partition action involves a piece of real property, consisting of four lots, at the corner of Kirkwood Highway and Newport Gap Pike in New Castle County. The property is currently used as an auto sales lot. It is owned in common by Tillman B. Cox (“Tillman”) and Jaime’s LLC (“Jaime’s”).<sup>1</sup> Jaime’s has filed a petition for a partition sale of the property, which Tillman has opposed. First, Tillman argues that Jaime’s is not entitled to a partition, under various theories. Next, Tillman argues that Jaime’s has failed to demonstrate that a partition in kind is not possible here, and therefore that Jaime’s is not entitled to a partition sale. Finally, Tillman argues that if a partition is made of the property, he is entitled to a greater share of the property or the proceeds of the sale of the property, on a number of grounds.

This matter was scheduled for trial on July 30 and 31, 2003. Based apparently on the results of pretrial discovery, Jaime’s requested that the trial be continued and that petitioner be granted leave to file a summary judgment motion. I granted this request and the summary judgment motion has been filed and the matter briefed. This is my report on Jaime’s motion for summary judgment. For the reasons below, summary judgment should be denied in part and granted in part.

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<sup>1</sup>The name of the petitioner variously appears in the record as Jaime LLC and Jaime’s LLC.

Oddly, although this matter has been briefed, neither party included a statement of facts. The facts here have been taken from the petition and response, together with the facts as presented in the body of the briefs. The property was owned before 1994 by individuals and entities associated with the Cox family automobile business. By 1994, the property was held in common by Tillman and his brother, Aubrey Cox (“Aubrey”). In 2002, Aubrey transferred his undivided interest in the property to two family members, Doyle Cox and Jaime Cox, who in turn transferred their interests to the corporate petitioner here. This partition action was brought soon thereafter. The record before me does not disclose which, if any, of these transfers were for value. The property is currently being used to operate a used-car business, run by Jaime’s. The property is subject to a lease or leases in favor of individuals or entities involved in that business.

*I. The Respondent’s Defenses to the Partition*

A co-tenant in common is entitled to a partition of the property owned in common as a matter of right, absent certain very narrow defenses. *See* 25 Del. C. § 721. *See generally* In re Fitzsimmons, Del. Ch., No. 3196, Brown, V.C. (Feb. 15, 1978)(Mem. Op.) at 1; In re Black, Del. Ch., No. C.M. 3735, Berger, V.C. (May 4, 1984)(Letter Order) at 3. Tillman argues that a partition would be unfavorable to

him, and therefore that equity prevents a partition; or that Tillman's brother Aubrey impliedly waived the right to partition at the time the co-tenancy was created, and that the waiver continues to constrain the current petitioner, Aubrey's successor-in-title. Jaime's seeks summary judgment on both of Tillman's defenses to the partition action. A motion for summary judgment will be granted only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *E.g.*, Scureman v. Judge, Del. Ch., 626 A.2d 5, 10-11 (1992). My function in reviewing this matter is not to weigh the evidence but to resolve any conflict of material fact against the moving party. *Id.*

(a) *Manifest Injustice*

Tillman argues that the equities are such that this Court should not order a partition here. He suggests that a partition sale will result in adverse capital gains tax consequences and that he will lose the income stream from his portion of the payments received from the lease of the property, results he points to as manifestly unjust. To the extent that equitable considerations are a defense to a partition action,<sup>2</sup> those stated by Tillman here must fall far short of such an equitable defense. If a partition sale could be avoided by pointing to potential capital gains

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<sup>2</sup>See Fitzsimmons (Mem. Op.), at 1

tax, of course, the right to partition would effectively cease to exist. More pertinent to an equitable analysis, however, is that when Tillman took this property as a tenant in common he understood (or should have understood) that partition was available to his co-tenant and that a sale might be forced at a time not of his own choosing, leading to adverse capital gains tax consequences. Similarly, the fact that the property is currently under lease and represents an income stream to the co-owners is no bar to a partition sale, although the terms of the lease may be reflected in the value received for that sale as well as the proper division of the proceeds. I note here that the property appears to be leased to individuals associated with Jaime's, and that the existence of the lease may therefore require some adjustment in the distribution of the proceeds of any partition sale.<sup>3</sup>

The record is devoid of any facts demonstrating that manifest injustice will result from the partition of the property sufficient to defeat Jaime's' right to partition.

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<sup>3</sup>I have used the unfortunate weasel word "appears" frequently in this report. This usage indicates, not that a conflict in the facts has been demonstrated here, but rather that the parties have failed to address the factual issues in a way that allows me to state confidently these particular factual premises.

*(b) Implied Waiver*

The right to partition is a property right. It is sometimes referred to as “absolute” in that it is a right inherent in the joint ownership of property. Like any other property right, of course, it may be transferred or waived. There was, however, no explicit transfer or waiver of the right to partition involved in the creation of the tenancy in common at issue here. Instead, Tillman argues that a waiver of the right to partition was implied by the facts surrounding the creation of this tenancy in common.

To articulate Tillman’s position as I understand it, he contends that he purchased the property at issue and created the co-tenancy as a gift to his family. The intention (according to Tillman) of the parties to the co-tenancy, Tillman and Aubrey, was that the property would provide the brothers with a place to run a family business during their working lives, then income during their retirement, and that their offspring would also receive these benefits. Tillman contends that this was his explicit understanding and that Aubrey “understood” this plan as well. Thus, it is Tillman’s position that the “gift” of the tenancy in common to Aubrey did not include the right of partition, and that that right instead was implicitly waived in favor of the establishment of the property as a kind of family trust.

Under Tillman's theory, Jaime's, owned by Aubrey's son, operates as a kind of alter ego of Aubrey and that therefore the waiver applies to Jaime's just as it would to Aubrey.

Relying on Tillman's deposition, which makes it clear that he never discussed the waiver of a right to partition with Aubrey, Jaime's seeks summary judgment on this issue. Tillman counters with the fact that he testified at deposition that he didn't need to speak to Aubrey because what I have described as the "family trust" plan was understood by Aubrey. It seems to me, at least on the record as it is now developed, that it is particularly unlikely that Tillman will be able to demonstrate that an implied waiver can be found to have occurred in this instance. If Tillman had intended to establish a trust, of course, he could have done so. Moreover, nothing in the nature of the creation of a tenancy in common to benefit the interests of Tillman's and Aubrey's families requires an implied waiver of the right to partition. Having said that, however, I note two things. First, the factual record here is poorly developed. There is a dispute about, or at least an undeveloped record with respect to, who purchased the property; how and why it came to be held by the brothers as tenants in common; what type of business relationship the brothers had and how the use of the property fit into that relationship; why and for what consideration Aubrey's interest was transferred to

Jaime Cox and Doyle Cox, and thence to Jaime's; and whether Jaime's is an entity independent of Aubrey. Second, I note the factual development which would make this situation clearer involves precisely the facts that will necessarily be developed at trial on the issue of division of the proceeds of the partition sale, which I discuss *infra*. Therefore, neither judicial nor litigant's economy will be enhanced by summary judgment on this issue.

For those reasons, summary judgment on the waiver issue should be denied.

## *II. Partition in Kind*

Any co-tenant may demand a partition, and the co-tenants are entitled to have the property partitioned in kind unless such a partition cannot be equitably made. In the latter case, the property will be sold at a partition sale, and the resulting fund partitioned. 25 Del. C. §§ 721, 729. The parties here agree that the burden is on the petitioner to demonstrate that a partition in kind cannot be made equitably.

Jaime's has submitted an appraisal of the property by a licensed appraiser, Robert H. McKennon. Mr. McKennon opines that the property cannot be equitably partitioned in kind for a number of reasons, most fundamentally that the highest use of the parcel is as commercial property and that the property is too



small to be subdivided into two commercial parcels. Jaime's argues that the appraisal report is sufficient to shift the burden to Tillman to come forward with evidence that the property is fairly subject to partition in kind. Jaime's has failed to provide an affidavit from Mr. McKennon adopting the appraisal report, however.<sup>4</sup> Tillman argues that because the appraisal is not in affidavit form, under Rule 56(e) the plaintiff has not met its burden to demonstrate that partition in kind is inappropriate.

I assume that McKennon is willing to support his appraisal with an affidavit. Therefore, I will allow Jaime's to supplement the record with such an affidavit adopting the conclusions of the McKennon appraisal report with respect to partition in kind. The conclusions of Mr. McKennon set forth in the report, if presented in the form of an affidavit, are sufficient to demonstrate that a partition in kind is not feasible here. Assuming such affidavit is filed, I will give Tillman 20 days to produce an opposing affidavit or other evidence indicating that partition in kind is feasible. I reserve decision on this portion of the summary judgment motion pending the submissions of the parties.

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<sup>4</sup>Mr. McKennon has signed a "certification" of the report.

### *III. Adjustments to the Division of the Proceeds of the Partition Sale*

Jaime's asks that I find that the funds resulting from the partition sale must be distributed 50 percent to Jaime's and 50 percent to Tillman, without adjustment.

Jaime's notes that it asserts in the petition that each co-tenant holds a one-half interest in the property, an assertion which Tillman failed to deny in his response. Jaime's also relies on Tillman's inability in deposition to describe how adjustments should be made.

Tillman argues that adjustment must be made in order to distribute the proceeds of the sale equitably. He asserts that his funds were used to purchase the property which is the subject of the partition, and that he made disproportionate contributions to the improvement of the property. I also note that the property is subject to a lease which appears to be from the co-tenants in favor of interests allied with one of the co-tenants. The inadequate factual development of issues regarding contribution to the purchase and improvement of the property together with right to receive the lease proceeds makes this issue inappropriate for summary judgment.

*IV. Conclusion*

For the forgoing reasons, the petitioner's motion for summary judgement must be granted in part, denied in part and continued in part. The petitioner should submit a form of order consistent with this report.

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Master in Chancery

oc: Register in Chancery (NCC)