

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

KIM E. AYVAZIAN
MASTER IN CHANCERY

CHANCERY COURTHOUSE
34 The Circle
GEORGETOWN, DELAWARE 19947
AND
NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 11400
WILMINGTON, DELAWARE 19980-3734

April 18, 2013

Via Lexis-Nexis

David C. Hutt, Esq.
Wilson Halbrook & Bayard
107 West Market Street
PO Box 690
Georgetown, DE 19947

Tasha M. Stevens, Esq.
Fuqua Yori & Willard, PA
26 The Circle
PO Box 250
Georgetown, DE 19947

RE: *Haygood v. Parker*, C.A. No. 6944-MA

Dear Counsel:

Pending before me is a Petition for Contribution filed by Respondent Marguerite Parker Bailey (hereinafter "Mrs. Bailey") in connection with real property that had been devised to Mrs. Bailey and five other individuals: Respondents Camille Parker and Chonice Y. Fisher, and Petitioners Stephanie F. Haygood, Pierce Parker, Jr., and Martin V. Parker.¹ This is my draft report recommending that the request for contribution be denied.

¹ All of the parties except Haygood are siblings; Haygood is their cousin.

The property that is the subject of the current dispute is located at 32183 Powell Farm Road in Frankford, Delaware (hereinafter the “Property”), and was the home of Louise Smith, who had raised the parties as her children. Smith passed away in June 1990 and, pursuant to her will, the Property was left to the parties. Prior to Smith’s passing, Mrs. Bailey, her children, and Haygood lived with Smith at the Property. Haygood moved out of the Property shortly after Smith’s death while Mrs. Bailey and her children continued to reside there. In 1996, Mrs. Bailey married Theodore Bailey (hereinafter “Mr. Bailey”), and the couple resided together at the Property until March 2012.

On October 17, 2011, Haygood, Pierce, and Martin filed a petition for partition of the Property.² On January 4, 2012, I granted the petition and appointed a trustee to sell the Property at public auction. The Property consists of a one-storey residence on approximately one-half acre of land. No bidders appeared at the first auction that was scheduled to take place on March 17, 2012. Another auction was scheduled for June 23, 2012, on which date the Property was sold for \$42,000.00.³ On July 6, 2012, Mrs. Bailey filed her request for contribution from the five cotenants for the mortgage payments, taxes, and insurance premiums that she and her husband had paid since 1990, as well as for the improvements the Baileys had made to the Property.⁴ Haygood, Pierce, and Martin objected to Mrs. Bailey’s request, arguing that any payments Mrs. Bailey had made were in lieu of rental payments owed to the cotenants not in possession, and that

² I use first names here for clarity and to avoid repetition, and not out of any disrespect.

³ Trustee’s Return of Sale, DI 23.

her claim for contribution for improvements was negated by the reduced value of the Property as a result of the poor condition in which the Property had been left by the Baileys prior to its sale.⁵ A hearing took place on December 4, 2012 and January 3, 2013. The parties thereafter submitted written closing statements.

The record shows that after Smith died, Mrs. Bailey made the mortgage payments on the Property, \$117.00 per month, until the mortgage was paid off in March 2003.⁶ She expended a total of \$16,848.00 on the mortgage. In addition, she paid taxes on the Property from 1990 until she and her husband vacated the Property in 2012. Although her documentation did not cover the entire period, the evidence shows that Mrs. Bailey paid \$5,370.15 in property taxes from 1994 to 2012, and she estimated that she had paid \$600.00 from 1991 to 1993, for a total of \$5,970.15 in property tax payments.⁷ Likewise, Mrs. Bailey paid for insurance on the Property in the amount of \$4,672.59 from 1998 to 2012, and she estimated paying \$200.00 per year from 1990 to 1997, for a total of \$6,072.59 in insurance payments.⁸ Mrs. Bailey's payments on the mortgage and for insurance and property taxes total \$28,890.74, and she is seeking reimbursement from her five co-tenants of five-sixths of that amount, i.e., \$24,075.62. In addition, Mrs. Bailey is seeking contribution for improvements that she and her husband made to the Property when they rebuilt a former sunroom into a sitting room and office. The cost of the

⁴ Respondent Marguerite Bailey's Request for Contribution from the Proceeds of the Partition Sale, DI 22.

⁵ Petitioner's Response and Objection to Marguerite Parker Bailey's Request for Contribution from the Proceeds of the Partition Sale, DI 24.

⁶ Defendant's Trial Exhibit 1.

⁷ Defendant's Trial Exhibit 2.

⁸ Defendant's Trial Exhibit 3.

improvements, not including labor, was \$9,743.00, as documented by invoices and receipts.⁹

During the hearing, the following four witnesses testified: Mr. and Mrs. Bailey, David Wilson, the auctioneer who conducted the auction of the Property, and Timothy Hill, a real estate manager at Wilgus Associates, Inc., who gave his opinion of the rental value of the Property from 1990 to 2012. The Baileys' testimony revealed that sometime between 1998 and 2000, Mr. Bailey replaced the entire roof on the house after it had begun leaking.¹⁰ According to Mrs. Bailey, her brother Pierce had offered to help her husband financially with the roof, but no money was ever forthcoming from him.¹¹ According to Mr. Bailey, none of the other cotenants offered to pay for the roof although he had been under the impression that Pierce and Martin were going to contribute to the expense.¹² Starting around 2006, the Baileys removed a dilapidated 12 x 14 foot sunroom,¹³ and later replaced it with a new 19 x 12 foot addition containing a sitting room and office for Mr. Bailey's construction business. Mr. Bailey also made improvements to the kitchen, and performed ordinary maintenance and cosmetic repairs to the bathroom and other rooms in the house.¹⁴ In October 2010, the Baileys obtained an appraisal value of \$135,000.00 for the Property.¹⁵

⁹ Defendant's Trial Exhibit 4.

¹⁰ December 4, 2012 Trial Transcript at 42.

¹¹ *Id.* at 18-19.

¹² *Id.* at 41-43.

¹³ According to Mr. Bailey's testimony, Martin also assisted in this demolition work. *Id.* at 36-37.

¹⁴ *Id.* at 39.

¹⁵ *Id.* at 25-27. Plaintiff's Exhibit 1.

When the dispute that led to the partition proceeding arose among the cotenants, the Baileys stopped making improvements to the Property.¹⁶ Shortly before the first trustee's sale was to take place, the Baileys vacated the Property. When they left, the Baileys removed: (1) the ceiling fan from the new addition; (2) a wall air conditioning unit from the living room; (3) light fixtures; and (4) faucets.¹⁷ On March 17, 2012, the auctioneer walked through the house to familiarize himself with the Property before the auction.¹⁸ Wilson described the house as looking as if it was about to be renovated because so many fixtures had been dismantled.¹⁹ A partial sheet of plywood about the size of a window air conditioner had been placed over the front of the house.²⁰ No bidders appeared that day and the auction was canceled. A second auction was scheduled for June 23, 2012, at which time the Property sold for \$42,000.00. Wilson, who had been conducting auctions of real property for over forty years,²¹ estimated that if the house had been in a condition ready for a buyer to move in, the Property could have sold at a price from \$85,000.00 to \$100,000.00.²²

Citing *Carradin v. Carradin*, 1980 WL 268076 (Del. Ch. Sept. 22, 1980), Mrs. Bailey now argues that she is entitled not only to her one-sixth share of the net sale proceeds, but also to \$24,075.62 from the five other cotenants' shares as their contribution to her payments on the mortgage, and for property taxes and insurance. Mrs.

¹⁶ December 4, 2012 Trial Transcript at 25

¹⁷ *Id.* at 28, 32-34, 45-46. Plaintiff's Exhibit 3.

¹⁸ December 4, 2012 Trial Transcript at 55.

¹⁹ *Id.* at 56.

²⁰ *Id.*

²¹ *Id.* at 51.

²² *Id.* at 58-59.

Bailey disputes that the other cotenants are entitled to any set off for the fair rental value, and even if they were entitled to a set off, she argues that they failed to present reliable evidence: (1) that the property could have been rented during the term it was used by Mrs. Bailey, and (2) as to fair rental value. Furthermore, citing *Matter of McCaffrey*, 1995 WL 347794 (Del. Ch. May 31, 1995) (Master's Mem. Op.), Mrs. Bailey argues that she is entitled to receive two sixths of \$9,743.27 that she expended for repairs, or \$3,247.76, from Pierce and Martin because her brothers knew about the necessary repairs and had offered the Baileys financial help in making these repairs.

Although none of the five other cotenants filed a separate action for rent against Mrs. Bailey under 25 *Del. C.* § 702, three cotenants (Petitioners Haygood, Pierce and Martin) objected to Mrs. Bailey's request and argued that her claim for contribution should be offset against the rental value of the Property. At trial, Petitioners presented a witness, Timothy Hill, a local real estate manager with nearly thirty years experience in the business, who testified that the monthly rent for the Property between 1990 and 2005 would have averaged \$700.00, and that after 2005, when the housing market started to decline and then collapsed in 2008, the average monthly rent would have increased to \$950.00.²³ Hill based these estimates on his review of the October 2010 appraisal of the Property and his knowledge of the local rental market during this period.²⁴

Mrs. Bailey offered no evidence regarding the rental value of the Property, but she now argues that Hill's testimony was not reliable because he had never visited the

²³ January 3, 2012 Trial Transcript at 2-6.

²⁴ *Id.* at 4, 9-11.

Property, had done no research on comparable rental properties in the area, and had no information about the prior condition of the Property. In addition, Mrs. Bailey argues that Hill admitted that a roof in disrepair would render a property unable to be rented. Mrs. Bailey contends that Hill was only speculating that the Property could have been rented during this entire period, and if the Court was inclined to give any weight to Hill's testimony regarding the rental value from 2010 through March 2012, then the Court should take into account the improvements made by Mrs. Bailey. Although the receipts and invoices for these improvements total \$9,743.00, this amount did not include Mr. Bailey's labor. According to Mrs. Bailey, the real cost of the new addition would have been about \$20,000.00 had Mr. Bailey not performed the labor, which amount far exceeds the total amount of rent (\$475.00 per month (half of the \$950.00 estimated by Hill) for 19 months) Petitioners may have been entitled to.

Delaware law is clear that absent an agreement to waive rent, a cotenant not in possession is entitled to a sum equal to his fractional share of the reasonable rental value of the property. *See Carridin*, letter op. at *2, *supra*. The law is likewise clear that a cotenant not in possession also has a duty to contribute to the cotenant in possession as to any payments on a mortgage or for taxes. *See id.* Petitioners acknowledge their duty to contribute to Mrs. Bailey's expenditures on the mortgage, insurance and property taxes. However, because they are urging the Court to divide the net sale proceeds in six equal shares, they are seeking a set off for themselves and the other two cotenants not in possession that is equal to the amount that Mrs. Bailey is seeking in contribution, which

set off appears to be considerably less than would be their fractional share of the reasonable rental value of the Property from 1990 to 2012.

From 1990 until March 2012, as sole cotenant in possession, Mrs. Bailey paid a small mortgage payment (\$117 per month until 2003), property taxes (approximately \$19 per month) and insurance premiums (approximately \$23 per month) on the Property. By dividing the amount Mrs. Bailey is now requesting for contribution (\$24,075.62) by the number of entire calendar years she resided in the Property (21 years) by the number of months in a year (12),²⁵ I calculate that Mrs. Bailey, as the cotenant in possession effectively paid an additional \$95.54 each month in carrying costs (i.e., mortgage, insurance, and property taxes) that now would be the responsibility of the five cotenants to pay in contribution. Likewise, the five cotenants not in possession would be entitled to receive from Mrs. Bailey \$583.30 each month, i.e., five-sixth of the \$700 monthly rent (as estimated by Hill), for the period 1990-2005 and \$791.65 each month, i.e., five-sixth of the \$950.00 monthly rent (as estimated by Hill), for the period from 2006-2012. By asking for a set off equal to the amount Mrs. Bailey is now seeking in contribution, Petitioners are requesting far less than they would be entitled to as their share of the reasonable rental value of this Property as estimated by Hill.

The record shows that Hill based his estimate of rental value on two assumptions: (1) that the structure of the property had remained the same between 1990 and 2012; and

²⁵ The record is unclear as to when Mrs. Smith died and Mrs. Bailey assumed the payments on the mortgage, insurance and property taxes. Out of an abundance of caution, I based my calculations on a slightly shorter period beginning on January 1, 1991, and ending on December 31, 2011, and so may have slightly overestimated the additional monthly carrying costs.

(2) that the house had been occupied during this time period.²⁶ Hill knew from the 2010 appraisal that the house had four bedrooms and one bathroom and its condition was not pristine. Hill testified that cosmetic changes over time or issues of cleanliness would not have affected his estimate, but he admitted that his estimate might have been different: (1) if there had been more bathrooms in the house prior to 2010; (2) if there had been holes in the floor or doors did not properly lock so that the house was not a safe environment; or (3) if the roof had been leaking and had not been repaired in a timely fashion.²⁷ According to Hill, however, if a porch had been removed and not replaced for a period of time, it would not have affected the rental value of the property unless the materials were still on site or steps were missing that should have been there.²⁸

Nothing in the record significantly undermines Hill's assumptions concerning the Property. There is no dispute that Mrs. Bailey lived in the Property first with her children and then with Mr. Bailey continuously from 1990 to March 2012. Although Mrs. Bailey argues that as an owner, she could have ignored safety conditions that would have rendered the Property unfit to be leased by Sussex County standards, there is no evidence that the Property was ever in such poor condition as to render it unsafe and unmarketable as a rental property. While the Baileys testified that the bathroom floor was sinking and the roof was leaking, they also testified that Mr. Bailey made the necessary repairs to the bathroom and replaced the roof as soon as it started leaking sometime around 1998 to 2000. The only evidence of a hole in the structure is the photograph depicting the living

²⁶ January 3, 2013 Trial Transcript at 12, 15.

²⁷ *Id.* at 13-14.

²⁸ *Id.* at 14-15.

room wall after the Baileys had removed a wall air conditioner in March 2012.²⁹ Prior to that time, there had been no other changes to the structure other than a 12 x 14 foot glass sunroom was replaced by a 19 x 12 foot enclosed addition around 2006 or 2007.

Even if the new addition had some effect on the rental value of the Property prior to 2007, the fact that Petitioners are waiving their right to receive the surplus of the rental value over the value of the mortgage, insurance, and tax payments eliminates any concerns about the accuracy of these estimates. It is difficult to imagine a four-bedroom one-bathroom house in average condition located on a half acre of land renting for approximately \$100 per month in Sussex County during this time period. Therefore, Mrs. Bailey's request for \$24,075.62 in contribution from her five cotenants should be denied.

Mrs. Bailey also argues that the Court should take into account the improvements made to the Property, in particular, the addition of a sitting room and office that would have cost \$20,000 if Mr. Bailey had charged for his labor. She seeks compensation from Pierce and Martin in the amount of \$3,247.76, representing two-sixths of \$9,743.27 in documented expenditures. According to Mrs. Bailey, Pierce and Martin were aware of and had offered financial help for these improvements, although they had failed to follow through with their offer.

The evidence at the hearing consists of Mrs. Bailey's testimony that she overheard Pierce offer financial assistance to her husband to replace the entire roof over the house.³⁰

²⁹ Plaintiff's Exhibit 3.

³⁰ December 4, 2012 Trial Transcript at 18-19.

Mr. Bailey, on the other hand, testified that although Pierce and Martin were aware that a new roof was needed, they merely asked to be informed when he put on a new roof; no one had actually offered to help pay for the roof.³¹ Mr. Bailey testified that he was under the impression that they were going to help with the expenses of the roof.³² In the absence of an agreement or consent by other cotenants, a cotenant in sole possession is not entitled to contribution from the other cotenants for repairs. *IMO Charles B. McCaffrey*, 1995 WL 37794, at *1 (Del. Ch. May 31, 1995) (Master's Mem. Op.). It does not appear from the evidence that there was any agreement or meeting of minds between the Baileys and Pierce and Martin as to sharing the expense of a new roof. Even if the statements of Pierce and Martin could be construed as their consent to the proposed roof repair, there was no evidence presented by the Baileys as to the cost of that repair. The expenditures of \$9,743.27, as shown by the receipts and invoices admitted into evidence, were for the construction of the new addition.³³ These receipts and invoices are all dated 2007 and 2008,³⁴ whereas the new roof was put on between 1998 and 2000.³⁵

Mr. Bailey also testified that there had been no discussion with other family members regarding the new addition,³⁶ so Mrs. Bailey would only be entitled to contribution for this improvement if she could show that the new addition had enhanced the value of the Property. *See Wilson v. Lank*, 107 A. 772 773, (Del. Ch. 1919) (“the cost of improvements is not necessarily the measure of [a cotenant’s] rights to

³¹ *Id.* at 41-43

³² *Id.* at 42.

³³ *Id.* at 44.

³⁴ Defendant’s Exhibit No. 4.

³⁵ December 4, 2012 Trial Transcript at 42.

compensation or allowance, but it is the enhancement in value of the premises by reason thereof which is taken into consideration on equitable principle, and this enhancement must be shown.”). Unfortunately, while the Property may have been worth approximately \$135,000 in October 2010, it sold at public auction for \$42,000 in June 2012. Whether that depreciation in value was due to the removal of fixtures by the Baileys or for other reasons not evident in the record, Mrs. Bailey has failed to demonstrate that the value of the Property was enhanced by any improvements made to the Property while she resided there. Accordingly, Mrs. Bailey’s request for contribution for improvements from Pierce and Martin in the amount of \$3,247.76 should be denied.

For the foregoing reasons, therefore, I recommend that Mrs. Bailey’s request for contribution be denied in full. Since Petitioners are agreeing to waive the surplus of the value of the rentals over the value of the mortgage, insurance and tax payments, I am directing the Partition Trustee to submit his affidavit of attorney’s fees no later than 15 days after this report becomes final. Once the amount of attorney’s fees are approved by the Court and disbursed to Moore & Rutt, P.A., the Partition Trustee shall disburse the remaining sale proceeds in six equal shares to the six cotenants/parties, upon completion of which duties, James P. Sharp, Esquire, and Moore & Rutt, P.A. shall be discharged from any further duty as Partition Trustee in this matter.

Very Truly Yours,

/s/ Kim E. Ayvazian

Kim E. Ayvazian
Master in Chancery

³⁶ *Id.* at 41.