Third District Court of Appeal

State of Florida

Opinion filed September 25, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-2931
Lower Tribunal No. 15-10845

Jorge Alfonso Fernandez,
Appellant,

vs.

Romena Marrero,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, John Schlesinger, Judge.

Alvin Goodman P.A., and Ilene F. Tuckfield, for appellant.

Jorge A. Fernandez; Matthew E. Ladd, for appellee.

Before SALTER,[1] FERNANDEZ, and LINDSEY, JJ.

LINDSEY, J.

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[1] Judge Salter did not participate in oral argument.

Appellant Jorge Alfonso Fernandez ("Fernandez") appeals a final judgment[2] of partition entered following a non-jury trial. For the reasons set forth below, we affirm.

I. BACKGROUND

Fernandez and Romena Marrero ("Marrero") began dating in January of 2013. They moved in together in June 2013. Thereafter, in December 2013, the parties moved into a house ("the property") that they ultimately purchased. The parties were permitted to move in prior to the closing because Fernandez knew the owner. During this time, Fernandez made several repairs and improvements to the property, including, but not limited to, lawn care and the replacement of a fence. The closing took place on March 25, 2014. Fernandez paid the down payment and closing costs. The parties purchased and titled the property as joint tenants with rights of survivorship.

Since the closing, Fernandez has paid all the mortgage payments without contribution from Marrero. After the closing, Fernandez incurred expenses to repair

[2] An Agreed Order on Plaintiff's Motion for Rehearing was filed in this Court on September 6, 2017. While we recognize that the Order purports to amend the Final Judgment, for present purposes, and as reflected in this opinion, the substance of the same does not change or affect the disposition of this case.

the property, to reduce the principal balance of the mortgage, and to pay for taxes and insurance. The parties ended their relationship on or about March 10, 2015—less than one year after the closing. Marrero moved out shortly thereafter and filed the underlying action. In her one count complaint, Marrero sought partition of the property.

While Fernandez conceded that Marrero was entitled to partition, Fernandez argued that he should receive credit for the down payment and closing costs, as well as expenses that he incurred before and after the closing. In support of his claim, Fernandez contends that he only purchased the property with Marrero as joint tenants with rights of survivorship because his credit score was not high enough for him to qualify for a loan on his own. In furtherance of this theory, Fernandez testified that Marrero had agreed to sign over her interest in the property after the first year of ownership. Thereafter, it was his intention to refinance the loan on his own. Fernandez further testified that the only reason he chose to title the home as a joint tenancy with rights of survivorship was because he did not want the property to escheat to the state upon his death. In his view, the purchase of the property was a business transaction and not a product of his relationship with Marrero.

Marrero, on the other hand, testified that they purchased the property because they had plans to start a family and that Fernandez never asked her to sign any kind

of contract or promissory note that would support his position that the purchase of the property was merely a business transaction.

Nidia Lopez ("Lopez"), the title/closing agent, also testified at the trial. Lopez testified that, prior to the closing, she explained to Fernandez that he and Marrero could take title as joint tenants with right of survivorship or as tenants in common. She further explained the differences between the two tenancies, as well as the implications of taking title as joint tenants with rights of survivorship. Specifically, she explained that upon Fernandez's death, his half would automatically go to the other joint tenant—in this case, Marrero. By contrast, she explained that if they acquired the property as tenants in common, Fernandez's heirs would inherit his half upon his death. Lopez testified that, following her explanation, Fernandez elected to take title as joint tenants with a right of survivorship.

After a day-long bench trial the trial court made its findings, focusing on the following three categories: (1) down payment and closing costs; (2) pre-closing expenses; and (3) post-closing expenses. The trial court concluded that Fernandez was not entitled to any credits for the down payment and closing costs. The trial court also declined to award Fernandez a credit/reimbursement for pre-closing expenditures. However, following O'Donnell v. Marks, 823 So. 2d 197, 199 (Fla. 4th DCA 2002), the trial court ordered Marrero to reimburse Fernandez for his post-

closing expenditures. Lastly, the trial court ordered that the property be sold by way of a private sale. This timely appeal followed.

II. STANDARD OF REVIEW

We review a trial court's factual findings for competent substantial evidence. Griffin Indus., LLC v. Dixie Southland Corp., 162 So. 3d 1062, 1066-67 (Fla. 4th DCA 2015).

III. ANALYSIS

As indicated above, the expenses claimed by Fernandez fall into three categories. The amounts at issue are contested, and the record is somewhat unclear as to what was sought with respect to each category and what was actually awarded. For the reasons that follow, we affirm the trial court's findings as to the down payment/closing costs, the pre-closing expenses, and the post-closing expenses.

In a partition proceeding, there must be an accounting to determine whether each co-tenant has paid his or her proportionate share of the expenses of the property, and to adjust the co-tenants' accounts accordingly. Santos v. Santos, 773 So. 2d 568, 570 (Fla. 3d DCA 2000) (citing Biondo v. Powers, 743 So. 2d 161, 164 (Fla. 4th DCA 1999)); Kail v. Supernant, No. 8:15-cv-2719-T-27TGW, 2017 U.S. Dist. LEXIS 105043 (M.D. Fla. July 7, 2017) ("After the right to partition by sale is established, a two-step analysis is undertaken to: (1) determine each owner's percentage of ownership, and (2) calculate the proportionate share owed to each

owner from the proceeds of a partition for reimbursable investments.")(citing Biondo, 743 So. 2d at 163-64); O'Donnell, 823 So. 2d at 199 (same).

As to the first step, the trial court found that Marrero and Fernandez each hold an "undivided one half (1/2) interest in [the Property] in fee simple." In other words, each party owns an undivided 50% interest in the property. As to the second step, Florida courts have held that co-tenants have a mutual obligation to pay charges upon the co-owned property, including mortgage payments, insurance, taxes, and necessary repairs. The equity of one party should not be increased by the expenditures of the other. Biondo, 743 So. 2d at 164 (citing Singer v. Singer, 342 So. 2d 861 (Fla. 1st DCA 1977); Waskin v. Waskin, 346 So. 2d 1060 (Fla. 3d DCA 1977)). For this reason, "a cotenant paying [the] obligations of the property is entitled to a credit from the proceeds of the sale for the other cotenant's proportionate share of those expenses." Id. (citing Goolsby v. Wiley, 547 So. 2d 227 (Fla. 4th DCA 1989); Gerver v. Stein, 490 So. 2d 1331 (Fla. 3d DCA 1986)).

A. Down Payment/Closing Costs

In determining that Fernandez is not entitled to a credit for the down payment and closing costs, the trial court relied on O'Donnell, 823 So. 2d at 198. In O'Donnell, the Court found that "[w]here a transfer of property is made to one person and the purchase price is paid by another a resulting trust arises in favor of the person by whom the purchase price is paid." Id. (citing Restatement (Second) of

Trusts § 440 (Am. Law Ins. 1959)). "However, '[a] resulting trust does not arise where a transfer of property is made to one person and the purchase price is paid by another, if the person by whom the purchase price is paid manifests an intention that no resulting trust should arise.'" Id. (citing Restatement (Second) of Trusts § 441). Comment e to section 440 of the Restatement (Second) of Trusts states, in part:

> *The fact that the payor takes title to property in the name of himself and another jointly is an indication of an intention of the payor to make a beneficial gift of an undivided interest in the property to the other person*; and in the absence of evidence of a different intention of the payor, the other person does not hold his interest upon a resulting trust for the payor. This is true whether the transfer was made to the payor and the other person as joint tenants or tenants in common.

(Emphasis added).

In O'Donnell, the appellee purchased a property in Jupiter, Florida using his own individual funds. 823 So. 2d at 198. However, the property was then deeded to the appellant and appellee as joint tenants with rights of survivorship. Id. Under those facts, the trial court found that the parties each held an undivided one-half interest in fee simple. Id. On appeal, the Fourth District held that the warranty deed, by which the parties took title as joint tenants with rights of survivorship, was consistent with the presumption of a gift from the appellee to the appellant from the language of the deed. Id. at 199.

Here, as in O'Donnell, an unmarried couple took title to the property as joint tenants with rights of survivorship, and the down payment and closing costs were paid only by one party. Further, there is competent substantial evidence in the record to establish that the parties had been in a relationship for years and that they had discussed moving into the house to start a family and get married. Moreover, nothing in the record suggests that the purchase of the property was a business transaction or a loan. Accordingly, the instant facts likewise create the presumption of a gift from Fernandez to Marrero. See id. The testimony of Lopez, referenced above, supports this presumption, as does the testimony of Marrero that the home was purchased because they were in love and had plans to start a family together.

B. Pre-Closing Expenses

Fernandez's contention that he expected to be reimbursed for the pre-closing expenses is likewise uncorroborated, and was rebutted by Marrero's testimony as follows:

> **Attorney Fernandez**: Did Mr. Fernandez ever ask you to execute an agreement or a promissory note for 50 percent of the funds that he spent?
>
> **Ms. Marrero**: No.
>
> **Attorney Fernandez**: To close on the property or to improve it before or afterwards?
>
> **Ms. Marrero**: No, he didn't.

> **Attorney Fernandez**: Did you have any agreement with him in which you were to buy the house, then sell it, and upon the sale of the house from the sales proceeds, he would be reimbursed of [sic] expenses that he paid at closing and to improve or repair the house; did you have any such agreement?
>
> **Ms. Marrero**: No.

For this reason, among others, we find that the trial court was correct in determining that Fernandez was not entitled to a credit for the maintenance and/or improvements done *prior* to closing. As stated above, the record is unclear as to what exactly was sought and awarded with respect to each category. This is especially true for the pre-closing expenditures. The trial court's order provides only that "by taking title as [joint tenants with right of survivorship, Marrero] took title to the Property *without any debt* to [Fernandez] for funds [that Fernandez] had spent to improve the Property *prior to closing* . . . ." (Emphasis added).

This conclusion is consistent with existing case law and common sense. In other words, why would one be responsible for the upkeep of a home that one does not own? Before the closing, the parties were merely tenants of the property's owner with no legal responsibility for its maintenance expenses. The fact that Fernandez moved in prior to the closing and decided, on his own—as a tenant—to make repairs and improvements does not render Marrero legally responsible for payment of the same. In essence, any improvements made prior to the closing

belonged to the prior owner. For these reasons, we affirm as to the trial court's findings on the expenditures incurred prior to the closing.

C. Post-Closing Expenses

Fernandez also contends that he is entitled to a credit, totaling 50%, of his post-closing expenditures. The trial court agreed and found that Fernandez was entitled to certain credits for half of the post-closing expenses related to "repairs and improvements to the Property," "taxes and insurance," and "[the reduction] of the principal balance of the mortgage." We find no error. See O'Donnell, 823 So. 2d at 199 ("The next step requires the court to determine the reimbursable expenses incurred *after closing* and calculate each party's proportionate share using each party's percentage of ownership, i.e., fifty percent for each party." (emphasis added)).

Lastly, we do not reach the question of whether Fernandez is entitled to a right of first refusal. The record indicates that there was no stipulation as to this issue. Here, the trial court ordered that "[t]he property must be sold at a private sale to a third party not related to either the Plaintiff or the Defendant." The parties concede in their briefs that this was error, and at oral argument the parties stated on the record that they agreed that Fernandez had a right of first refusal to purchase the property. However, this matter was not raised below; thus, the trial court was never given the opportunity to correct or address the same. Based on the language in the order, and

the agreement of the parties, on remand the parties may request that the court correct its order and permit Fernandez to exercise a right of first refusal to purchase the property.

Affirmed and remanded for further proceedings consistent with this opinion.