STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JEW

JJP

NUMBER 2018 CA 0299

MARGARET M. AVERILL

VERSUS

WILLIAM BRYAN AVERILL, III

Judgment Rendered: SEP 2 1 2018

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2014-12303

Honorable Dawn Amacker, Judge

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Brian A. Dragon Slidell, LA	Attorney for Appellee Plaintiff – Margaret M. Averill
Kevin M. Edler Covington, LA	Attorney for Appellant Defendant – William Bryan Averill, III

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

Chutz, J. Concurs in Result.

WELCH, J.

William Bryan Averill, III appeals a judgment partitioning the community of acquets and gains formerly existing between him and Margaret M. Averill, which among other things, awarded Ms. Averill reimbursement for one-half of the fair market rental value of the former family home due to Mr. Averill's exclusive use and occupancy of that home. Finding no error in the judgment of the trial court, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Mr. and Ms. Averill were married on August 23, 1977. In early January 2014, Ms. Averill discovered that Mr. Averill was having an adulterous affair. Thereafter, she moved out of the family home, which was community property. Ms. Averill never returned to the home, except briefly to retrieve a few items that she had forgotten. Sometime in May 2014, Mr. Averill changed the locks to the family home.

On May 19, 2014, Ms. Averill filed a petition for divorce. Therein, Ms. Averill alleged, among other things, that Mr. Averill had exclusive use and occupancy of the family home and that he had allowed his paramour to move into the family home with him. Therefore, Ms. Averill specifically requested that she be awarded rent for Mr. Averill's exclusive use and occupancy of the family home. In the petition, Ms. Averill also sought a partition of the community of acquets and gains formerly existing between her and Mr. Averill pursuant to La. R.S. 9:2801, *et seq.* On July 8, 2014, Mr. Averill filed an answer and reconventional demand, wherein he requested that he be awarded exclusive use and occupancy of the family home or, alternatively, fair rental reimbursement.

On August 1, 2014, the trial court signed a consent judgment entered into by the parties, which provided that Mr. Averill was granted the exclusive use and occupancy of the family home until a judicial partition of community property or

mutual agreement of the parties and that Ms. Averill's claim for reimbursement for one-half of the fair market rental value of the family home would be deferred until the partition of the community.

Thereafter, on August 7, 2017, at the trial to partition the community, the parties entered into stipulations on most of the issues, including Mr. Averill's claim for reimbursement in the amount of $26,280.00 for the mortgage payments that he made on the family home with his separate property after the termination of the community. See La. C.C. art. 2365. A trial on the merits was also held with respect to the ownership of the family home and Ms. Averill's claim for reimbursement from Mr. Averill for one-half of the fair market rental value of the family home due to his exclusive use and occupancy of the home. Following the trial, in written reasons for judgment dated October 16, 2017, the trial court awarded Mr. Averill full ownership of the family home and also awarded Ms. Averill rental reimbursement in the amount of $25,920.00, which represented one-half of the fair market rental value of the home during the 36 months that Mr. Averill had exclusive use and occupancy of the home, *i.e.* from consent judgment awarding Mr. Averill exclusive use and occupancy of the home through the partition.[1]

A written judgment partitioning the community of acquets and gains formerly existing between Mr. and Ms. Averill, including the trial court's ruling on the issue of rental reimbursement, was signed on November 29, 2017. From this judgment, Mr. Averill has appealed. On appeal, Mr. Averill contends that the trial court legally erred in awarding Ms. Averill rental reimbursement for his exclusive use and occupancy of the family home because Ms. Averill neither requested nor was denied use and occupancy of the family home.

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[1] The amount of the rental reimbursement awarded to Ms. Averill was approximately $360.00 less than the amount of reimbursement awarded to Mr. Averill for the mortgage payments he made on the family home.

LAW AND DISCUSSION

The award of rental payments for a spouse's use and occupancy of the family home pending a partition of the community is governed by La. R.S. 9:374(C), which provides as follows:

> **A spouse who,** in accordance with the provisions of Subsection A or B of this Section, **uses and occupies or is awarded by the court the use and occupancy of the family residence**, a community immovable occupied as a residence, or a community manufactured home as defined in R.S. 9:1149.2 and occupied as a residence, regardless of whether it has been immobilized, **shall not be liable to the other spouse for rental for the use and occupancy, except as hereafter provided. If the court awards use and occupancy to a spouse, it shall at that time determine whether to award rental for the use and occupancy and, if so, the amount of the rent. The parties may agree to defer the rental issue for decision in the partition proceedings. If the parties agreed at the time of the award of use and occupancy to defer the rental issue, the court may make an award of rental retroactive to the date of the award of use and occupancy**.

(Emphasis added.)

In the July 29, 2014 consent judgment, the parties agreed that Mr. Averill would be awarded exclusive use and occupancy of the family home and that Ms. Averill's request for rental reimbursement would be deferred until the partition of community property. In the partition proceedings, the trial court applied La. R.S. 9:374(C), determined that Ms. Averill was entitled to rental reimbursement, and awarded her one-half of that rental value retroactively to the date that Mr. Averill was awarded use and occupancy of the home.

On appeal, Mr. Averill claims that Ms. Averill was not legally entitled to an award of rental reimbursement for his exclusive use and occupancy of the family home. Citing **McCarroll v. McCarroll**, 96-2700 (La. 10/21/97), 701 So.2d 1280, Mr. Averill contends that a spouse seeking rental reimbursement must first demand and subsequently be denied use of the home by the other spouse. Mr. Averill further argues that although Ms. Averill may have put Mr. Averill on notice that

she was seeking rental reimbursement, since Ms. Averill neither demanded nor was denied use of the family home, she should not have been awarded rental reimbursement. [2]

On the other hand, Ms. Averill contends that the trial court properly awarded her rental reimbursement pursuant to La. R.S. 9:374(C). She argues that La. R.S. 9:374(C) is clear and unambiguous and does not require a spouse to request and be denied use and occupancy as a pre-requisite to receiving rental reimbursement; rather all that is required is that there be an award of use and occupancy to one of the spouses. Ms. Averill further points out that Mr. Averill's reliance on **McCarroll** is misplaced because La. R.S. 9:374(C) was amended following the holding of **McCarroll** and, unlike when **McCarroll** was decided, La. R.S. 9:374(C) now expressly allows for a retroactive award of rental reimbursement if exclusive use of the family home is awarded to one of the parties and the parties agree that the issue of rental reimbursement be deferred to the partition trial. We agree.

In **McCarroll**, 701 So.2d at 1288, the Louisiana Supreme Court addressed a split among the circuit courts of appeal on the issue of whether an assessment of rent could be made retroactively for a spouse's use and occupancy of the family home pending a partition of the community property. At the time **McCarroll** was decided, La. R.S. 9:374(C) provided:

> A spouse who uses and occupies or is awarded by the court the use and occupancy of the family residence pending either the termination of the marriage or the partition of the community property in accordance with the provision of R.S. 9:374(A) or (B) **shall not be liable to the other spouse for rental for the use and occupancy, unless otherwise agreed by the spouses or ordered by the court.**

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[2] On appeal, Mr. Averill has not challenged the amount of rental reimbursement awarded by the trial court. Rather, he maintains that Ms. Averill was not legally entitled to such an award under the precepts set forth in **McCarroll**, which presents a question of law. Thus, our appellate review of the judgment herein is simply a review of whether the trial court was legally correct or legally incorrect in determining whether Ms. Averill should have been awarded rental reimbursement. See **Lamz v. Wells**, 2005-1497 (La. App. 1st Cir. 6/9/06), 938 So.2d 792, 795.

(Emphasis added).

In interpreting that statute, both this Court and the Second Circuit Court of Appeal had applied principles of co-ownership and had held that rent could not be assessed retroactively and had to be assessed contemporaneously with either a court order of use and occupancy or an agreement between the parties. However, the Third, Fourth, and Fifth Circuit Courts of Appeal had allowed trial courts to award rental reimbursement at any time, including retroactively. **McCarroll**, 701 So.2d at 1288-1289.

Ultimately, the supreme court adopted the approach taken by this Court and the second circuit and held: (1) that a co-owner in exclusive possession may be liable for rent, but only beginning on the date another co-owner had demanded occupancy and been refused, and (2) that under La. R.S. 9:374(C), there must be an agreement between the spouses or a court order for rent *contemporaneous* with the award for use and occupancy. **McCarroll**, 701 So.2d at 1289-1290 (citing **Juneau v. Laborde**, 228 La. 410, 82 So.2d 693 (La. 1955). In reaching these holdings, the supreme court also relied on public policy reasons, stating that retroactive awards of rent could greatly prejudice the party using and occupying the family home, as that party would not have necessarily anticipated or budgeted for the potential years of back rent that they would then owe. **McCarroll**, 701 So.2d at 1290. In other words, since there was no order for rental reimbursement contemporaneous with the award for use and occupancy, there was no notice to the occupying spouse of the claim for rental reimbursement and it would be against public policy to order such reimbursement retroactively.

However, as pointed out by Ms. Averill, La. R.S. 9:374(C) has been substantively amended since the time that **McCarroll** was decided in 1997.[3]

[3] See **Tassin v. Tassin**, 2014-0488 (La. App. 3rd Cir. 12/3/14), 161 So.3d 818, 826-827 (noting that one of the spouses' reliance on **McCarroll** to support an argument regarding rental

Pursuant to 2004 La. Acts, No. 668, § 1, eff. July 5, 2004, La. R.S. 9:374(C) was amended to its current substantive form[4] by adding the option to defer the issue of rent to the partition hearing, whereas at the time **McCarroll** was decided, La. R.S. 9:374(C) lacked this option and merely provided that a spouse would not be liable for rent "unless otherwise agreed by the spouses or ordered by the court." Thus, that portion of **McCarroll** requiring an agreement or a court award of rent *contemporaneous* with an award for use and occupancy has been legislatively overruled, as La. R.S. 9:374(C) now expressly allows for retroactive rent to be assessed at the partition hearing provided there is an agreement by the parties to defer the issue, as was done herein.

To the extent that Mr. Averill argues that under **McCarroll**, Ms. Averill had to demand use and occupancy of the home and be denied in order to preserve a claim for rental reimbursement,[5] we find that the clear and unambiguous language of the present version of La. R.S. 9:374(C) imposes no such requirement. This statute merely provides that in order to obtain rental reimbursement, one of the parties must be awarded use and occupancy and the court shall determine whether to award rent at the time use and occupancy is awarded, unless the parties agree to defer the issue to the partition. Thus, under La. R.S. 9:374(C), the determination of whether to award rent or whether that decision should be deferred must be undertaken at the time a spouse is awarded use and occupancy, regardless of

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reimbursement was "misplaced" because La. R.S. 9:374(C) had been amended several times since 1997, the year **McCarroll** was decided.

[4] We note that La. R.S. 9:374(C) was also amended by 2009 La. Acts, No. 204, § 2; however, that amendment did not affect its general substance.

[5] In making this argument, Mr. Averill has also relied on **Sheridon v. Sheridon**, 2003-0103 (La. App. 3rd Cir. 2/4/04), 867 So.2d 38, 43-44, wherein the Third Circuit Court of Appeal, sitting *en banc*, relied heavily on **McCarroll** and found that the non-occupying spouse never demanded use and occupancy of the family home and that a reservation of his right to seek rental reimbursement in a stipulated judgment did not equate to a valid agreement of the parties under La. R.S. 9:374(C). However, **Sheridon** was decided in February 2004, and the amendment to La. R.S. 9:374(C) regarding the ability of the parties to defer the issue of rent to the partition proceeding did not take effect until July 2004. See 2004 La. Acts, No. 668, § 1, eff. July 5, 2004. Therefore, we find **Sheridon** inapplicable and unpersuasive to the issue before us.

whether the non-occupying spouse first requested use and occupancy and was denied.

Our review of the record reveals that the trial court properly applied La. R.S. 9:374(C) and awarded Ms. Averill rental reimbursement. Mr. Averill was awarded use and occupancy of the family home as part of the August 1, 2014 consent judgment, and with the consent of the parties, they deferred Ms. Averill's request for rental reimbursement until the partition proceedings. Then, in the partition proceeding, the trial court determined that an award of rent was warranted, determined the amount of the fair market rental value, and awarded one-half of that value to Ms. Averill retroactively. In accord **Keller v. Keller**, 2010-2101 (La. App. 1st Cir. 7/7/11)(*unpublished*), 2011 WL 3806292, writ denied, 2011-1761 (La. 10/14/11), 74 So.3d 214 (where the parties stipulated that Ms. Keller would have use of the family home and that Mr. Keller's request for rental reimbursement would be deferred to the partition of the community, there was no error in the trial court's determination that Mr. Keller preserved a claim for rental reimbursement in accordance with La. R.S. 9:374(C) because the parties contemporaneously agreed to the use and occupancy of the family home and to defer the "rental issue" for decision in the partition proceeding). See also **David v. David**, 2012-1051 (La. App. 3rd Cir. 4/10/13), 117 So.3d 148, writ denied, 2013-1541 (La. 10/4/13), 122 So.3d 1023 and **Bulloch v. Bulloch**, 51,146 (La. App. 2nd Cir. 1/18/17), 214 So.3d 930, writ denied, 2017-0348 (La. 4/13/17), 218 So.3d 629; but cf. **Sequeira v. Sequeira**, 2004-0433 (La. App. 5th Cir. 11/30/04), 888 So.2d 1097,[6] writ denied,

[6] In **Sequeira**, 888 So.2d at 1103, which was decided after the effective date of the 2004 revision to La. R.S. 9:374(C), the Fifth Circuit Court of Appeal held that the trial court did not abuse its discretion in refusing to award rental reimbursement to spouse that was not awarded use and occupancy of the family home even though the parties agreed (in the consent judgment that awarded use and occupancy) that the issue of rent would be deferred until the partition. Notably, the non-occupying spouse therein failed to raise the issue of rent again until after the partition was complete and the family home had been sold. The fifth circuit noted that there was nothing in the record establishing that the non-occupying spouse demanded and was refused occupancy so as to entitle him to rent nor did the record indicate that the non-occupying spouse

2005-0350 (La. 4/29/05), 901 So.2d 1065 and **Sork v. Sork**, 2017-0300 (La. App. 1st Cir. 2/9/18), 242 So.3d 640.[7]

Furthermore, the trial court found, and we agree, that **McCarroll** was distinguishable from the present case because, unlike the occupying spouse in **McCarroll**, Mr. Averill was put on notice in the August 1, 2014 consent judgment (and in Ms. Averill's petition for divorce) that Ms. Averill was claiming rental reimbursement and the parties specifically agreed, at the time Mr. Averill was awarded use and occupancy, to defer Ms. Averill's request for rental reimbursement to the partition, as authorized by La. R.S. 9:374(C). In addition, the trial court also found that Ms. Averill was forced to leave the family home; that Mr. Averill changed the locks on the family home,[8] which prevented Ms. Averill from returning to the home or otherwise using or occupying the home; and that Mr.

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was prevented from having the fair market rental value set during the time that the occupying spouse occupied the residence. *Id.*

We find **Sequeira** is clearly distinguishable from the case herein because the issue of rent in **Sequeira**, while reserved, was not raised during the partition, but rather brought up after the partition was finalized, whereas in this case, Ms. Averill did timely raise the issue of rent at the partition hearing and was awarded fair market rental value as part of that judgment.

[7] In **Sork**, 242 So.3d at 645, there was a dispute between co-owners over whether the expenses of maintenance and repairs on the co-owned home should be offset by the other co-owner's use of the home. This Court, citing **McCarroll**, noted that there was nothing in the record to support a finding that the co-owners had demanded occupancy of the co-owned home and had been refused; therefore the trial court did not err in failing to reduce the amount of reimbursement the co-owners owed the other co-owner for repairs and maintenance that the co-owner made to the home by any use that co-owner may have enjoyed. We also find **Sork** is distinguishable because it involved a dispute between co-owners for necessary repairs and whether those expenses should be offset by the other co-owner's use of the home and the issue was resolved based on the general principles of co-ownership; **Sork** did not involve the application of La. R.S. 9:374(C), which provides a very clear, limited set of exceptions to the general rules of co-ownership when a party has been granted exclusive use and occupancy of the family home in a divorce proceeding.

[8] At the partition trial, Mr. Averill claimed that he changed the locks on the family home because Ms. Averill tried to kill him with a handgun. Ms. Averill testified she only intended to shoot the computer on which Mr. Averill was watching pornography. In any event, the trial court apparently rejected Mr. Averill's explanation, which we note is inconsistent with his failure to change the locks in a timely manner if he had actually feared for his safety. The evidence indicated that the incident occurred around Halloween of 2013 and Mr. Averill continued living with Ms. Averill until she left the family home in January of 2014 and, even thereafter, he did not change the locks until May 2014.

Averill moved his girlfriend into the family home.[9] Under such circumstances, the trial court concluded that Ms. Averill did not need to request use and occupancy in order to preserve her claim for rental reimbursement. The trial court then awarded Ms. Averill rental reimbursement. Thus, the trial court apparently determined that Mr. Averill, by changing the locks on the family home and moving his girlfriend into the home, had denied Ms. Averill use of the family home (or constructively evicted her), thereby warranting an award of rental reimbursement in favor of Ms. Averill, and we find no error in this determination. See **Hight v. Hight**, 2017-0566 (La. App. 4th Cir. 12/13/17), 234 So.3d 1143, 1149-1150 (although Mr. Hight only requested rental reimbursement in the event Mrs. Hight was awarded use and occupancy of the family home, once Ms. Hight was awarded exclusive use and occupancy, Mr. Hight's demand for rental reimbursement was proper because his testimony that he moved out of the matrimonial domicile and was no longer allowed to sleep or stay in the home once he moved out sufficiently demonstrated that he was refused use and occupancy of the family home by Mrs. Hight).

Accordingly, we find the trial court correctly concluded that under La. R.S. 9:374(C), Ms. Averill was not required to request and be denied exclusive use of the family home in order to preserve her claim for rental reimbursement and find no error in the trial court's judgment awarding Ms. Averill rental reimbursement in the amount of $25,920.00, which represented one-half of the fair market rental value of the home during the 36 months that Mr. Averill had exclusive use and occupancy of the home.

[9] We note that Mr. Averill has not challenged these factual findings of the trial court in this appeal.

CONCLUSION

For all of the above and foregoing reasons, the November 29, 2017 judgment of the trial court is affirmed. All costs of this appeal are assessed to the defendant/appellant, William Bryan Averill, III.

AFFIRMED.