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STATE OF CONNECTICUT

DOCKET NO.: CV-89-0056040S : SUPERIOR COURT
STEVEN A. ROCCO : J.D. OF MIDDLESEX
V. : AT MIDDLETOWN
WILLIAM J. ZISK : FEBRUARY 13, 1991

MOTION FOR SUMMARY JUDGMENT

The Defendant, William J. Zisk, hereby moves for summary judgment against the Plaintiff, Steven A. Rocco. Summary Judgment is sought on the grounds that the Defendant is entitled to Judgment as a matter of law and material facts upon which the Plaintiff bases his claim are undisputed.

A Memorandum of Law in support of this Motion for Summary Judgment is annexed hereto. With respect to the facts pertinent to this Motion, the following are attached and marked:

Purchase and Sale Agreement - Exhibit A; Plaintiff's Response to Interrogatories - Exhibit B; Narowski v. Kichar - Exhibit C; Penfield v. Jarvis - Exhibit D; Baker v. Murphy - Exhibit E; and Wu v. Moody - Exhibit F.

WHEREFORE, the Defendant respectfully moves that the Court

LAW OFFICES
CLEIN, GOZZI, FRASURE & MIANO, P.C.
A PROFESSIONAL CORPORATION

48 MAIN STREET
P.O. BOX 528
OLD SAYBROOK, CT 06475
JURIS NO. 09740

TELEPHONE
(203) 386-0100
TELEFAX
(203) 386-0002

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enter Summary Judgment in his favor against the Plaintiff.

THE DEFENDANT

CLEIN, GOZZI, FRASURE
& MIANO, P.C.
48 Main Street
P.O. Box 528
Old Saybrook, CT 06475
(203) 388-0808

By Paul Gozzi
PAUL GOZZI, ESQ.

I hereby certify that a copy of the foregoing has been sent by facsimile transmission to all counsel of record this 13th day of February, 1991.

Paul Gozzi
PAUL GOZZI, ESQ.
COMMISSIONER OF THE SUPERIOR COURT

LAW OFFICES
CLEIN, GOZZI, FRASURE & MIANO, P.C.
PROFESSIONAL CORPORATION

48 MAIN STREET
P.O. BOX 528
OLD SAYBROOK, CT 06475
JURIS NO. 09740

TELEPHONE
(203) 388-0808
TELECOPIER
(203) 388-6402

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ORDER

The foregoing Motion having been HEARD/REVIEWED and it appearing that it ought to be GRANTED/DENIED, it is hereby ORDERED:

GRANTED/DENIED

Dated at Middletown, Ct. this day of , 1991.

THE COURT:

By: _____
JUDGE/Clerk

LAW OFFICES
CLEIN, PALADINO, GOZZI & FRASURE
PROFESSIONAL CORPORATION

48 MAIN STREET
P.O. BOX 528
OLD SAYBROOK, CT 06475
JURIS NO. 09740

TELEPHONE
(203) 388-0808
TELECOPIER
(203) 388-6402

(4)

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MEMORANDUM OF LAW

IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. STATEMENT OF FACTS

This action was commenced by Writ, Summons and Complaint returnable to this Court on November 14, 1989. The Plaintiff subsequently, on or about April 13, 1990 filed an Amended Complaint wherein the only change from the original Complaint concerned the subject real property's location being corrected from 103 High Street in the Town of Haddam to 106 High Street.

The Plaintiff's Amended Complaint contains two Counts, both of which seek the remedy of partition of real property.

The subject property is owned by five individuals as tenants in common; namely, Mary A. Zisk, Edward J. Zisk, Marion A. Krivanec, Donald R. Zisk and the Defendant, William J. Zisk. The Plaintiff, in the First Count of the Complaint, alleges that

LAW OFFICES
CLEIN, PALADINO, GOZZI & FRASURE
PROFESSIONAL CORPORATION

48 MAIN STREET
P.O. BOX 528
OLD SAYBROOK, CT 06475
JURIS NO. 09740

TELEPHONE
(203) 388-0808
TELECOPIER
(203) 388-6402

he is attorney in fact for Mary A. Zisk, Edward J. Zisk, Marion Krivanec and Donald R. Zisk and as such, is duly appointed and authorized to bring this partition action.

In the Second Count, the Plaintiff alleges that, having contracted with Mary A. Zisk, Edward J. Zisk, Marion A. Krivanec and Donald R. Zisk, to purchase their interest in the subject property, by virtue of the doctrine of equitable conversion, he has the standing to bring this partition action.

The contract for purchase of the real property between the Plaintiff and the aforementioned owners of property is attached hereto and marked "Exhibit A".

II. STANDARD OF REVIEW

Motions for Summary Judgment are not to be granted except where "the pleadings, affidavits and other proof submitted show that there is no genuine issue as to any material fact, and that the moving Party is entitled to Judgment as a matter of law". Connecticut Practice Book, Section 384. See also Catz v. Rubenstein, 201 Conn. 38, 513 A.2d 98(1986). The Party seeking Summary Judgment has the burden of proof and "to satisfy his burden, the movant must make a showing that it is quite clear

LAW OFFICES
CLEIN, PALADINO, GOZZI & FRASURE
PROFESSIONAL CORPORATION

48 MAIN STREET
P.O. BOX 528
OLD SAYBROOK, CT 06475
JURIS NO. 09740

TELEPHONE
(203) 388-0608
TELECOPIER
(203) 388-6402

(6)

what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact". Dougherty v. Graham, 161 Conn. 248, 287 A.2d, 382 (1971). For Summary Judgment purposes, "material facts" are those which will make a difference in the result of the case. Yanow v. Teal Industries, Inc., 178 Conn. 262, 422 A.2d 311 (1979). It has been consistently held that issues of fact encompass both evidentiary facts in issue, as well as questions as to how the jury would characterize such facts, and what inferences and conclusions it would draw from them. United Oil Co. v. Urban Redevelopment Commission, 158 Conn. 364, 260 A.2d 596 (1969).

Once the moving Party has presented evidence by Affidavit or other documents in support of motion, the opposing Party must set forth specific facts showing that there is a genuine issue for trial. If the opponent does not respond, the Court is entitled to reply upon the facts stated in the Affidavit of the movant. Bartha v. Waterbury House Wrecking Co., 190 Conn. 8, 459 A.2d 115 (1983). In determining the Motion for Summary Judgment, the Trial Court may consider the pleadings and depositions. Esposito v. Wethered, 4 Conn. App. 641 (1985). Mere assertions of fact, whether contained in

LAW OFFICES

CLEIN, PALADINO, GOZZI & FRASURE
PROFESSIONAL CORPORATION

48 MAIN STREET
P.O. BOX 528
OLD SAYBROOK, CT 06475
JURIS NO. 09740

TELEPHONE
(203) 368-0808
TELECOPIER
(203) 368-6402

(7)

the Complaint or in the Brief, are insufficient to establish the existence of material fact and, therefore, cannot refute evidence properly presented to the Court on the motion for summary judgment. Connecticut Practice Book Section 280.

The Court's function in reviewing a Motion for Summary Judgment is to determine whether any issues of material fact exist; it does not decide them. Nolan v. Borkowski, 206 Conn. 495, 538 A.2d, 1031 (1988).

III. ARGUMENT AND LAW

The partition of joint and common estates is governed by Connecticut General Statute Section 52-495 as herein set forth:

Courts having jurisdiction of actions for equitable relief may, upon the complaint of any person interested, order partition of any real property held in joint tenancy, tenancy in common, coparcenary or by tenants in tail. The Court may appoint a committee to partition any such property. Any decrees partitioning entailed estates shall bind the parties and all persons who thereafter claim title to the property as heirs of their bodies.

As set forth in the Plaintiff's Complaint, it is undisputed that the current owners of the property, holding said title as tenants in common, are all members of the Zisk family;

LAW OFFICES
CLEIN, PALADINO, GOZZI & FRASURE
PROFESSIONAL CORPORATION

48 MAIN STREET
PO BOX 528
OLD SAYBROOK, CT 06475
JURIS NO. 09740

TELEPHONE
(203) 388-0808
TELECOPIER
(203) 388-6402

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namely, Mary A. Zisk, Edward J. Zisk, Marion A. Krivanec, Donald R. Zisk and William J. Zisk. The Plaintiff, in the First Count of the Complaint, alleges that he is entitled to bring his partition action by virtue of a power of attorney granted him by the subject family members, with the exception of William J. Zisk. In response to the Defendant's Interrogatories, the Plaintiff has stated that the authority by which he is attorney in fact for said family members is by virtue of a power of attorney conferred under Paragraph 4 of the Purchase and Sale Agreement attached hereto as "Exhibit A" (Plaintiff's response to the Defendant's Request for Interrogatories and Production dated April 2, 1990 is attached hereto and marked "Exhibit B").

A partition action is equitable in nature. Land Enterprises, Inc. v. Dorman, 549 A.2d 672, 17 Conn. App. 4 (1988). At one time, a Writ of Partition would lie only between coparceners wherein the Plaintiff must be in possession or seised of the land when the Writ was brought but has been expanded to joint tenants and tenants in common. Adam v. Ames Iron Co., 24 Conn. 230 (1855).

The Plaintiff in the within action now wishes to extend the right of partition further by allowing contract purchasers,

LAW OFFICES
CLEIN, PALADINO, GOZZI & FRASURE
PROFESSIONAL CORPORATION

48 MAIN STREET
P.O. BOX 528
OLD SAYBROOK, CT 06475
JURIS NO. 09740

TELEPHONE
(203) 388-0808
TELECOPIER
(203) 388-6402

(9)

or parties conferred with powers of attorney, to be appropriate plaintiffs. There is absolutely no authority for this proposition, and in fact, case law is clear that such an action cannot be sustained.

Only the owner of real or personal property may proceed to have that property partitioned. Narowski v. Kichar, 435 A.2d 32, 181 Conn. 251 (1980). (Attached as "Exhibit C") The term "owner" is generally defined with reference to title. Smith v. Planning and Zoning Board of City of Milford, 490 A.2d 539, 3 Conn. App. 550 (1985). It has long been established that the joint tenant or tenant in common must have either actual possession or an immediate right to possession in order to bring a partition action. Penfield v. Jarvis, 399 A.2d 1280, 175 Conn. 463 (1978); (Attached as "Exhibit D") Baker v. Murphy 13 CLT 19, Page 475 (Superior Court at Middletown, J. Arena, 1987). (Attached as "Exhibit E")

The Court, in Penfield, explained this rule as follows:

Such a rule is understandable in the context of the problem to which the remedy by partition was directed: avoiding the conflicts which might arise if each cotenant asserted the right to be in possession of every part of the lands of the cotenancy. Through the right to partition, "it was intended that the undivided possession should be severed, and that each person having the right to be in possession of

LAW OFFICES
CLEIN, PALADINO, GOZZI & FRASURE
PROFESSIONAL CORPORATION

48 MAIN STREET
P.O. BOX 528
OLD SAYBROOK, CT 06475
JURIS NO. 09740

TELEPHONE
(203) 388-0608
TELECOPIER
(203) 388-6402

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the whole property should exchange that right for one more exclusive in its nature, whereby, during the continuance of his estate, he should be entitled to the sole use and enjoyment of some specific purparty." Freeman, op. cit. Sec. 440, p. 582. Since those with no right to immediate possession would not be deprived of present use and enjoyment or inconvenienced by the undivided possession of the property by others, there was a logical basis for denying to tenants of estates in reversion or remainder the right to interfere with tenants in possession, and, correspondingly, for precluding tenants in possession from effecting a severance of estate in remainder or reversion. Freeman, loc. cit.; 2 American Law of Property, op. cit. Sec. 6.22. Possession or the right to immediate possession is, therefore, a general prerequisite to the maintenance of an action for partition. Adam v. Ames Iron Co., supra. Penfield v. Jarvis at 399 A.2d 1282.

It is clear from the reading of the contract upon which the Plaintiff relies to bring this action that he has neither actual possession or the immediate right to possess the property. The contract is executory in nature, and in fact has not been completed as no closing has occurred. The contract, in paragraph 5, expressly states that the Plaintiff would get possession only upon the closing. Possession involves not only the exercise of acts at ownership but also exclusion of exercise of such acts by others. State v. Schaffel, 229 A.2d 552, 4 Conn. Cir. 234 (1966). It is axiomatic that the delivery of the deed with intent by the grantor to pass title is essential.

LAW OFFICES
CLEIN, GOZZI, FRASURE & MIANO, P.C.
PROFESSIONAL CORPORATION

48 MAIN STREET
P.O. BOX 528
OLD SAYBROOK, CT 06475
JURIS NO. 09740

TELEPHONE
(203) 368-0808
TELECOPIER
(203) 368-6402

to valid conveyance. Bell v. Bloom, 150 A.2d 300, 146 Conn. 307 (1959).

There have been instances in the past where parties have attempted to expand the right to partition and have been unsuccessful in doing so. As an example, in Claydon v. Finizie, 508 A.2d 845, 7 Conn. App. 522 (1986), an administrator of a decedent's estate, alleging a tenancy in common, attempted to partition a certain property. The Court, per Judge Hull, held that the administrator was not a "person interested" within the partition statute and thus did not have standing to commence the partition action.

On point is the case of Wu v. Moody, 497 A.2d 89, 5 Conn. App. 142 (1985). (Attached as "Exhibit F") In that action, the Plaintiffs contracted with a construction company, who were the title owners of the property, for construction of a home. When a dispute arose, the Plaintiffs brought a partition action claiming to have exclusive title to the property under equitable principles against the construction contractors. On appeal, Judge Hull stated in dictum, that the underlying actions should never have been brought as a partition action as the partition statutes were clearly written in contemplation of a partition

LAW OFFICES
CLEIN, PALADINO, GOZZI & FRASURE
PROFESSIONAL CORPORATION

48 MAIN STREET
P.O. BOX 528
OLD SAYBROOK, CT 06475
JURIS NO. 09740

TELEPHONE
(203) 288-0808
TELECOPIER
(203) 588-6402

(12)

between joint tenants, not as between parties that may be claiming title under equitable principles. The Plaintiff in this action is attempting precisely what the Appellate Court in Wu has said that he cannot do.

There is an obvious rationale behind such restrictions. A partition action, by its nature, divides or sells property between owners of that property. The Plaintiff here is merely a contract purchaser. He has no right to possession until he in fact has vested with the title interest to the property.

The Plaintiff seeks to become a valid party to this action by contractual language allowing him to bring this action. However, "standing is a matter of subject matter jurisdiction which cannot be conferred by the parties". Housing Authority v. Local 1161, 468 A.2d 1251, 1 Conn. App. 154 (1964).

The Plaintiff could have brought this action in at least two other ways which he apparently has chosen not to pursue. One way would be to have had the interest in the property held by the tenants in common conveyed to him so that he would then be a record tenant in common. Or, the actual tenants in common could have brought the action, and the Plaintiff would then be named as a Defendant having a future expectancy in the property.

LAW OFFICES
CLEIN, GOZZI, FRASURE & MIANO, P.C.
PROFESSIONAL CORPORATION

48 MAIN STREET
P.O. BOX 528
OLD SAYBROOK, CT 06475
JURIS NO. 09740

TELEPHONE
(203) 366-0608
TELECOPIER
(203) 366-6402

IV. CONCLUSION

The Plaintiff does not have any standing to bring a partition action, not being either a joint tenant or tenant in common with either actual possession or the immediate right to possess. Based on all the foregoing, the Defendant respectfully prays that this Court grant the Defendant's Motion for Summary Judgment.

THE DEFENDANT

CLEIN, GOZZI, FRASURE
& MIANO, P.C.
48 Main Street
P.O. Box 528
Old Saybrook, CT 06475
(203) 388-0808

By _____
PAUL GOZZI, ESQ.

I hereby certify that a copy of the foregoing document has been sent by facsimile transmission to all counsel of record this 13th day of February, 1991.

PAUL GOZZI, ESQ.
COMMISSIONER OF THE SUPERIOR COURT

LAW OFFICES
CLEIN, GOZZI, FRASURE & MIANO, P.C.
PROFESSIONAL CORPORATION

48 MAIN STREET
P.O. BOX 528
OLD SAYBROOK, CT 06475
JURIS NO. 09740

TELEPHONE
(203) 388-0808
TELECOPIER
(203) 366-6402

ROCCO, A. STEVEN
ZISK, WILLIAM J.

VS.

CV-89-0056040-S(C**)

3/7/91

PROPERTY SHORT CALENDAR REPORT 3/5/91
COUNSEL,

=114 MOTION FOR SUMMARY JUDGMENT-GRANT

=119 OBJECTION TO MOTION-OVERRULED

BY THE COURT,
/O'CONNELL, J/
TAC SHEEHAN

SUPERIOR COURT
DEKOVEN DRIVE
MIDDLETOWN, CONNECTICUT 06457

CLEIN GOZZI FRASURE & MI
48 MAIN STREET
PO BOX 528

OLD SAYBROOK CT 06475

DATED MAR 07, 1991
MMX