

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEVIN FISCHER,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
	:	
JOHN MICHAEL WURTS,	:	NO. 96-6863
Defendant.	:	

MEMORANDUM AND ORDER

Yohn, J. July, 1997

Plaintiff, Kevin Fischer, brings this action in equity seeking partition of a three-bedroom dwelling (the "property") located at 127 Summit Terrace, in Rosemont, Pennsylvania which plaintiff and defendant, John Michael Wurts, own as tenants in common. Defendant agrees to transfer to plaintiff all of defendant's right, title and interest in the property as a co-tenant in common so long as he receives from plaintiff one-half of the parties' equity in the property and one-half of the rental income received by plaintiff during plaintiff's exclusive occupancy of the premises. Plaintiff agrees to the transfer but argues that the amount given to defendant in return for the transfer of title should be reduced by the amount of mortgage payments and repair expenses made by plaintiff during his occupancy.

In June, 1997, this court conducted a non-jury trial to determine the appropriate distribution between the parties.

Based upon the testimony of several witnesses,<sup>1</sup> and careful review of the evidence presented and the applicable law, the court makes the following findings of fact and conclusions of law pursuant to Rule 52 (a) of the Federal Rules of Civil Procedure:

## I. FINDINGS OF FACT

### A. Background

The property, located at 127 Summit Terrace, in Rosemont, Pennsylvania, has six rooms, including three bedrooms.

In February, 1988, plaintiff and defendant signed a contract to purchase the property for \$ 81,900.00. On April 15, 1988, the date of settlement, plaintiff and defendant took the property as tenants in common. Each contributed \$ 4,095.00 toward the down-payment and a mortgage of \$ 73,710.00 was taken out to cover the rest of the purchase price.

At the time of the parties' purchase of the property, defendant had completed college and graduate school and was working full-time. Plaintiff was still a student working toward his undergraduate degree. Both men had been living in rented residences prior to their purchase of the property. The parties

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1. Kevin Fischer was the only witness who testified for the plaintiff. The following witnesses testified for the defendant:

1. Tony DiPietro--Real Estate Appraisal Expert
2. Kathleen Price--Real Estate Appraisal Expert
3. Martin Flynn--Real Estate Appraisal Expert
4. Judy Wurts--Defendant's Wife
5. John Wurts--Defendant.

bought the property so they could live there and rent the third bedroom to a student.

Sometime between April 8 and April 14, 1988, defendant interviewed for and accepted an offer for a new job in Ohio, and, about two weeks after settlement, defendant relocated there. From April, 1988 to the present, defendant lived at the property a total of one night, on or about April 30, 1988, and visited the property only twice. Plaintiff has continuously resided in the property since its purchase.

## B. Rental Value

### 1. Actual Income

From April, 1988 to December, 1995, plaintiff rented bedrooms on the property to six individuals. Robert Mahon, an acquaintance of defendant's, rented a bedroom at the premises from April 16, 1988 to March 28, 1990 at a rate of \$ 250 per month; Kenneth Mortensen rented a bedroom at the premises from May, 1988 to August 31, 1989 at a rate of \$ 250 per month; Pauline Matese rented a bedroom at the premises from November 1, 1991 to April 20, 1992 at a rate of \$ 275 per month; Kevin McMearty rented a bedroom at the premises from May, 1992 to August 31, 1992 at a rate of \$ 275 per month; John White rented a bedroom at the premises from September, 1993 to June, 1994 at a rate of \$ 275 per month; and Douglas Osborne rented a bedroom at the premises from August, 1993 to December, 1995, at a rate of \$ 275 per month.

Defendant participated in getting Mahon and Mortensen to become renters but defendant had nothing to do with the other individuals becoming renters. Plaintiff did not consult defendant before renting to Matese, McMearty, White and Osborne.

From May, 1988 through August, 1989, and from August, 1993 through June, 1994, both bedrooms were rented by plaintiff. As such, there were no vacant bedrooms available at the property during those periods.

The parties agree that by renting bedrooms at the property from April, 1988 to December, 1995, plaintiff realized a rental income of \$ 26,000.00. Plaintiff retained this rental income and did not give any of it to defendant. At no time before this trial did defendant make any claim for a portion of this rental income.

It is also agreed that interest on the rents received by plaintiff, through June, 1997, is \$ 7,494.00, calculated at 6 percent per annum.

2. Attributed Rental Value Because of Plaintiff's Failure to Rent the Second Bedroom ("Vacancy Value").

Plaintiff lived alone at the premises from September 1, 1989 to November 1, 1991, a period of twenty-six months, and from January 1, 1996 to June 1, 1997, the time of the trial, a period of seventeen months, for a total of forty-three months. During these periods there were two vacant bedrooms on the property, one

of which (hereinafter "the second") could have been rented by plaintiff.<sup>2</sup>

At trial, plaintiff testified that he did not rent the second bedroom during these periods because he was doing rehabilitative work and did not feel that the second bedroom was habitable. Plaintiff specifically testified that repairs to a bathroom precluded renting the second bedroom for a six month period.

In view of the fact that both parties testified to the high demand in the area for rental apartments because of the students who went to college nearby, the court finds that the second bedroom should have been rented by plaintiff during the forty-three month period when plaintiff lived in the house alone. However, the court accepts plaintiff's testimony that the six months of repair to the bathroom precluded renting of the second bedroom. The court also accepts Anthony DiPietro's testimony that the average vacancy rate in the area is five percent. Therefore, by reducing the forty-three month vacancy period by the six month repair period and taking into consideration a five percent vacancy rate, and a per-bedroom rental rate of either \$ 250 or \$ 275, the court finds that through June, 1997, the time

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2. Under Radnor Township Zoning laws, so long as plaintiff lived on the property, only one other bedroom was capable of being rented by plaintiff at any time. Some time between April, 1988 and the present, plaintiff learned of this ordinance and therefore the court has not attributed any value to the third bedroom in terms of renting it to a third tenant.

of the trial, the attributable vacancy value of the second bedroom is \$ 8,190.00.<sup>3</sup>

Six percent simple interest per annum on this figure is \$ 1,871.00. This was calculated by multiplying each year's total vacancy value by six percent and then multiplying that amount by the number of years that elapsed through the trial.<sup>4</sup>

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3. Plaintiff and defendant have owned the property for a total of one-hundred and ten months. The second bedroom has been vacant for forty-three of those months. During twenty-six of them (60 %), the rental rate was \$ 250 per month, whereas during seventeen (40 %), of them the rental rate was \$ 275 per month. Six of those months of vacancy are attributable to plaintiff's rehabilitation and repair work and 5.5 of them are attributable to an average five percent vacancy rate (5% of 110 = 5.5). Therefore, there are 31.5 months of vacancy for which plaintiff is accountable. The value of that vacancy is as follows:

60 % of 31.5 = 18.9 months X \$ 250 = \$ 4,725.00  
40 % of 31.5 = 12.6 months X \$ 275 = \$ 3,465.00

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**Total vacancy value = \$ 8,190.00**

Considering the fact that plaintiff continues not to rent the second bedroom out, this amount, and any interest thereon, should be increased accordingly until the date of settlement.

4. **1990**-9.9 months X \$ 250= \$ 2,475 X .06 = \$ 149 X 6.5 = \$969  
**1991**-9 months X \$ 250 = \$ 2,250 X .06 = \$ 135 X 5.5 = \$ 743

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Total= \$ 1,712

**1996**-6.6 months X \$ 275 = \$ 1,815 X .06 = \$ 109 X 1 = \$ 109  
**1997**-6 months X \$ 275 = \$ 1,650 X .06 = \$ 99 X .5 = \$ 50

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Total= \$ 214

**Total Vacancy Interest = \$ 1,871.00**

3. Attributed Rental Value Because of Plaintiff's Continued Use and Occupancy of One Bedroom ("Occupancy Value").

The court also finds that the value of plaintiff's uninterrupted use and occupancy of his own bedroom is \$ 29,050.00. To determine the amount, the court multiplied the number of months during which plaintiff lived in his bedroom (110) by the amount of rent normally received for a bedroom in the house.<sup>5</sup>

Interest on this amount is \$ 7,284.00, which was calculated by determining the total yearly occupancy value, multiplying that amount by six percent and then multiplying that amount by the number of years through the trial date.<sup>6</sup>

C. Plaintiff's Repair Expenses

From April, 1988 to December, 1995, plaintiff undertook significant repairs and improvements to the property. Among other things, plaintiff added new walls, plumbing, tiling, and a

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5. The per-bedroom rate realized by plaintiff was \$ 250.00 per month from May, 1988 through October, 1991 and \$ 275.00 per month from November, 1991 through June, 1997. Forty-two (5/88-10/91) times \$ 250 equals \$ 10,500.00. Sixty-seven (11/91-6/97) times \$ 275 equals \$ 18,425.00. Adding the \$ 125 received for April, 1988, the total equals \$ 29,050.00.

Considering that plaintiff still lives in his bedroom, the occupancy value, and any interest thereon, should be increased accordingly until the date of settlement.

6. For example, in 1990, a bedroom rented for \$ 250 per month. Multiplying that by twelve months produces \$ 3000.00 in yearly occupancy value for that bedroom; multiplying \$ 3000.00 by .06 percent produces yearly interest of \$ 180; multiplying that by 6.5 years produces interest income of \$ 1,170.00 for 1990.

new skylight to the bathroom, new doors, walls, molding, paint and carpet to the living room, new tarpaper and gutter to the roof, new walls, ceiling, and electrical wiring to the dining room, and a new garbage disposal and dishwasher to the kitchen.

During this time, defendant was aware that plaintiff was doing repairs to the property, although defendant was not told the details, particularly the cost, of each and every repair or renovation. Defendant declined to participate in any way in paying any portion of any of the expenses associated with the household repairs and improvements and defendant never objected to any of plaintiff's repairs.

The court finds that the repairs were properly made by plaintiff who was left with the sole care of the property and were particularly reasonable in view of the fact that plaintiff has made no claim for a management fee for his management of the property, no claim for his labor in constructing and installing the repairs and no claim for any of the utility expenses.

The parties agree that plaintiff expended \$ 13,000.00 on the repairs. Interest on this amount at the rate of six percent per annum is \$ 3,818.00.<sup>7</sup>

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7. The \$ 13,000 in total repair expenses was divided by the number of years over which the repairs were made to get an average amount spent on repairs each year (\$ 1,529.40). For each year beginning in 1988, this amount was multiplied by six percent, which was then multiplied by the total years which elapsed through the date of the trial. For example, for 1989, \$ 1,529.40 was multiplied by .06 and then multiplied by 7.5, the number of years through the trial.

D. Plaintiff's Payment of Mortgage, Taxes & Insurance

The parties also agree that from April, 1988 to the trial date, plaintiff paid a total of \$ 73,666.00 for the mortgage, taxes and insurance thereby decreasing the outstanding balance on the original mortgage to \$ 66,190.00. The \$ 73,666.00 paid by plaintiff must be reduced by \$ 439.00, representing escrow refunds received by plaintiff (less an appraisal fee plaintiff paid in order to have PMI insurance removed from the parties' mortgage), and \$ 5,834.00, representing the agreed tax benefits, including interest, plaintiff derived from the mortgage payments. This puts plaintiff's net payments related to the mortgage at \$ 67,393.00.<sup>8</sup>

The parties agree that interest on the mortgage, tax and insurance payments is to be \$ 18,458.00.

E. Net Value of the Property

Defendant's real estate appraiser, Kathleen Ann Price, testified that the house is now worth \$ 122,000.00. Because that was the only evidence offered as to the value of the property, the court finds that the current fair market value of the property is \$ 122,000.00.

By subtracting the outstanding mortgage (\$ 66,190.00) from the current fair market value of the property, the court

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8. These amounts, and any interest, will have to be adjusted at the time of settlement to reflect any further payments by plaintiff.

finds that the parties' equity in the property as of the trial date is \$ 55,810.00.

The net value of the current property is \$ 55,810.00 minus any realty transfer taxes which will be due on conveyance of defendant's interest to plaintiff. The parties have been unable to provide proof as to the amount of the transfer tax but agree they will divide it equally at the time of settlement.

## II. CONCLUSIONS OF LAW

Under Pennsylvania law,<sup>9</sup> "the procedure in an action for the partition of real estate shall be in accordance with the rules relating to the action in equity." See Pa. R. Civ. P. 1551; Weiskircher v. Connelly, 248 Pa. 327, 332 (Pa. 1915).

The adjudication in partition shall include findings of fact as follows:

- (1) whether the property is capable of division, without prejudice to or spoiling the whole, into purparts proportionate in value to the interests of co-tenants;
- (2) the number of purparts into which the property can be most advantageously divided, if partition proportionate in value to the interests of the parties cannot be made;
- (3) the value of the entire property and of the purparts;
- (4) the mortgages, liens and other encumbrances or charges which affect the whole or any part of the property and the amount due thereon;

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9. A federal court exercising diversity jurisdiction must "apply the substantive law of the state whose laws govern the action." Robertson v. Allied Signal, Inc., 914 F. 2d 360, 378 (3d Cir. 1990) (citing Erie R.R. v. Tompkins, 304 U.S. 64 (1938)). The parties agree that Pennsylvania law applies to the present dispute.

(5) the credit which should be allowed or the charge which should be made, in favor of or against any party because of use and occupancy of the property, taxes, rents or other amounts paid, services rendered, liabilities incurred or benefits derived in connection therewith or therefrom;

(6) whether the interests of persons who have not appeared in the action, or of defendants who have elected to retain their shares together shall remain undivided;

(7) whether the parties have accepted or rejected the allocation of the purparts or bid therefor at private sale confined to the parties; and

(8) whether a sale of the property or any purpart not confined to the parties is required and if so, whether a private or public sale will in its opinion yield the better price.

Pa. R. Civ. P. 1570 (a) (emphasis added).

The decree in partition shall include:

(1) an appropriate award of the property or purparts to the parties subject to owelty<sup>10</sup> where required

(2) if owelty is required, the amount of the awards and charges which shall be necessary to preserve the respective interests of the parties, the purparts and parties for or against which the same shall be charged, the time of payment and the manner of securing the payments;

(3) the protection required for life tenants, unborn and unascertained remaindermen . . . .

(4) an order for public or private sale of the property or part thereof where required.

Pa. R. Civ. P. 1570 (b).

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10. Owelty of partition is defined in Black's Law Dictionary as "[a] sum of money paid by one of two coparceners or co-tenants to the other, when a partition has been effected between them, but, the land not being susceptible of division into exactly equal shares, such payment is required to make the portions respectively assigned to them of equal value. The power to grant owelty has been exercised by the courts of equity from time immemorial." Black's Law Dictionary 1105 (6th ed. 1990).

## 1. Distributive Shares

Here, the fair market value of the property is \$ 122,000.00. As of now, the outstanding mortgage is \$ 66,190.00. Therefore, the net value of the property, before deducting the realty transfer taxes which the parties agree will be divided equally at the time of settlement, is \$ 55,810.00. Each party's distributive share is one-half of this amount, or \$ 27,905.00.

## 2. Plaintiff's Claims

Plaintiff argues that defendant's \$ 27,905.00 distributive share should be reduced by one-half the amount plaintiff expended on mortgage, taxes and insurance and on repairs.<sup>11</sup>

In Pennsylvania, a tenant in possession (plaintiff) can recover from a co-tenant not in possession (defendant) payments, and interest on those payments, made by the tenant in possession on a joint-note or joint-mortgage. See Weiskircher v. Connelly, 248 Pa. 327, 331 (Pa. 1915) (co-tenant in possession recovered one-half the aggregate amount paid by him on account of the parties' joint-note). A tenant in possession can also recover from a co-tenant out of possession, payments, and interest on those payments, made to repair the property. See Grubbs v. Dembec, 359 A. 2d 418, 418 n. 3 (Pa. Super. 1976); Pa. R. Civ. P.

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11. Plaintiff also made a claim as to the tax benefits defendant derived from being an owner of the property; however, after examination of defendant's tax returns, plaintiff withdrew that claim.

1570 ("The [partition] adjudication shall include findings of fact as follows: (5) the credit which should be allowed or the charge which should be made, in favor of or against any party because of use and occupancy of the property, taxes, rents or other amounts paid, services rendered, liabilities incurred or benefits derived in connection therewith or therefrom.") (emphasis added).

Here, plaintiff made \$ 73,666.00 in mortgage payments, including taxes and insurance. However, he received back \$ 439.00 from escrow and \$ 5,834.00 in tax benefits. Deducting these amounts from plaintiff's mortgage payments, and adding \$13,000.00 in repair expenses, results in total payments of \$ 80,393.00. Therefore, as of the date of the trial, defendant owes plaintiff one-half this amount, or \$ 40,196.50, plus one-half the interest on the repair expenses, or \$ 1,909.00 (1/2 of \$ 3,818.00), plus one-half the interest on the mortgage payments, or \$ 9,229.00 (1/2 of \$ 18,458.00) for a total of \$ 51,335.00.

### 3. Defendant's Counterclaims

In his answer, defendant asserts four counterclaims: 1) Accounting for Rents and Other Income Under 68 P.S. § 101; 2) Breach of Fiduciary Duty; 3) Partition; and 4) Accounting.

As for the first counter-claim, a tenant not in possession (defendant) may recover from a co-tenant in possession (plaintiff) his or her share of the rental value of a piece of

jointly owned property. See 68 P.S. § 101. 68 P.S. § 101 provides:

In all cases in which any real estate is now or shall be hereafter held by two or more persons as tenants in common, and one or more of said tenants shall have been or shall hereafter be in possession of said real estate, it shall be lawful for any one or more of said tenants in common, not in possession, to sue for and recover from such tenants in possession his or their proportionate part of the rental value of said real estate for the time such real estate shall have been in possession as aforesaid; and in case of partition of such real estate held in common as aforesaid, the parties in possession shall have deducted from their distributive shares of said real estate the rental value thereof to which their co-tenant or tenants are entitled.

Id.(emphasis added); Pa. R. Civ. P. 1570 ("The [partition] adjudication shall include findings of fact as follows: (5) the credit which should be allowed or the charge which should be made, in favor of or against any party because of use and occupancy of the property, taxes, rents or other amounts paid, services rendered, liabilities incurred or benefits derived in connection therewith or therefrom.") (emphasis added).

Two requirements must be satisfied before recovery of the fair rental value of the premises will be permitted: (1) the complaining party must show he is not in possession of the premises; and, (2) it must be shown that the remaining tenant in common occupies exclusive possession of the premises. See Sciotto v. Sciotto, 288 A. 2d 822, 823 (Pa. 1972); Hoog v. Diehl, 3 A. 2d 187, 189 (Pa. Super. 1938) ("For plaintiffs to be entitled to a share of the rental value of the premises sold in partition, it must appear that plaintiffs were out of possession,

and that defendant was in exclusive possession. The statute is not automatically operative." ).

"Exclusive possession" has been defined by the Pennsylvania Supreme Court as a situation where "one tenant alone occupied the property and exercised the rights of an owner such as making repairs and changes to suit his convenience without consulting the others." Sciotto, 288 A. 2d at 823-824 (quoting Rudzinski v. D'Orazio, 80 Pa. D. & C. 471, 475 (C.P. Mont. 1952)). According to Sciotto, it is unnecessary for the party seeking to recover to show that he was excluded from the property by the tenant in possession and it is immaterial that the party seeking to recover may have left the property voluntarily. See id.

The following facts are relevant to defendant's request for past rents: 1) plaintiff continuously resided on the property since April, 1988; 2) defendant voluntarily moved to Ohio soon after the purchase, lived in the house only one night since April, 1988, visited the house no more than twice since April, 1988, and showed no interest in the property after he left the Philadelphia area; 3) from April, 1988 through December, 1995, plaintiff rented the premises to six tenants, all but two without consulting defendant; 4) from May, 1988 through August, 1989, and from August, 1993 through June, 1994, plaintiff had two tenants occupying both vacant bedrooms in the house; 5) from April, 1988 through December, 1995, plaintiff realized a total rental income of \$ 26,000.00, which he did not share with defendant; and, 6)

from April, 1988 to December, 1995, plaintiff made several significant repairs and improvements to the premises without consulting defendant.

In line with Sciotto, these facts clearly support a finding that plaintiff had exclusive possession of the property from April, 1988 to the present. Thus, defendant is entitled to receive his proportionate share of the rental value of the property.

The "rental value" of the property is a matter of dispute. Plaintiff believes that rental value is to be measured only by what he actually received from the six tenants, or \$ 26,000.00. Defendant contends that the appropriate measure of rental value under 68 P.S. § 101 is the fair market rental value, not the actual rents received, as determined by his two expert appraisers, plus the vacancy and occupancy values as well.

The court does not accept defendant's fair market rental valuations. Defendant's appraisers valued the property as a whole and determined that the fair market rental value of the entire property from April, 1988 to the present was approximately \$ 92,600.00.<sup>12</sup> This aggregate approach incorrectly overlooks the

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12. According to DiPietro, the historical rental value of the entire property was as follows: 1988--\$565.00 per month; 1989--\$590.00 per month; 1990--\$615.00 per month; 1991--\$745.00 per month; 1992--\$765.00 per month; 1993--\$840.00 per month; 1994--\$855.00 per month; 1995--\$895.00 per month; 1996--\$905 per month; and 1997--\$910 per month. According to Flynn, the historical fair market rental value of the entire property was as follows: 1991--  
(continued...)

fact that before defendant's unexpected departure to Ohio, the parties both intended to live in the house and rent the third bedroom to a student and that consistent with this original intention, plaintiff lived in the house and rented it room by room. Under these circumstances, plaintiff could not have been expected to move out of the house so he could rent it in its entirety, as defendant's experts value the property, and indeed, defendant never requested that plaintiff do so.

Thus, the court believes that the term "rental value" under 68 P.S. § 101 is more accurately reflected by the actual rents received by plaintiff, as opposed to the appraisers' fair market rental values. Therefore, under 68 P.S. § 101 and Sciotto, defendant is entitled to one-half of \$ 26,000.00, or \$ 13,000.00, in actual rents received by plaintiff from April, 1988, and one-half the \$ 7,494.00 interest thereon, or \$ 3,747.00.

However, the court agrees with defendant that "rental value" includes attributed vacancy and occupancy values as well. Thus, defendant is entitled to one-half the \$ 8,190.00 in rental value attributed to the vacant bedroom, or \$ 4,095.00, and one-half the \$ 1,871.00 in interest thereon, or \$ 936.00, and one-half the \$ 29,050.00 occupancy value of plaintiff's bedroom, or \$ 14,525.00, and one-half the \$ 7,284.00 in interest thereon, or \$

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12. (...continued)  
\$840 per month; 1992--\$830.00 per month; 1993--\$875.00 per month;  
1994--\$875.00 per month; 1995--\$900.00 per month; 1996--\$900.00  
per month; and 1997--\$900.00 per month.

3,642.00. Therefore, as of the date of trial, the total rental value (actual and attributable) plus interest to which defendant is entitled is \$ 39,945.00.

Defendant's counterclaims for breach of fiduciary duty, an accounting and partition do nothing to alter the above distribution analysis. Defendant showed absolutely no interest in the property and therefore he cannot possibly assert that he was injured by plaintiff's alleged mismanagement of it. As for defendant's request for an accounting, it has been received through the course of the trial. As for partition, defendant agrees to transfer his right, title and interest in the property to plaintiff.

#### 4. Affirmative Defenses

In defendant's answer, he asserted that the affirmative defenses of laches, "unclean hands" and failure to mitigate damages prevented plaintiff from recovering on his claims for repayment of mortgage and repair expenses. Similarly, in his motion for summary judgment, plaintiff argued that defendant was not entitled to any past rents because of defendant's unclean hands, laches and waiver. Moreover, on June, 25, 1997, several days after the completion of the trial, plaintiff filed a motion for leave to amend his answer to assert further the affirmative defenses of waiver and estoppel.

Assuming all these affirmative defenses were timely raised and properly asserted,<sup>13</sup> the court concludes that none affect the above distribution analysis.

a. Unclean Hands

"He who comes into a court of equity must come with clean hands." In Re Cross' Estate, 179 A. 38, (Pa. 1935):

The maxim is far more than a mere banality. It is a self-imposed ordinance, that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief. . . . Thus, while "equity does not demand that its suitors shall have led blameless lives" . . . as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy at issue. . . .

Shapiro v. Shapiro, 204 A. 2d 266, 268 (Pa. 1964) (quoting Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814-15 (1945)).

The doctrine does not bar relief to a party merely because his conduct in general has been shown not to be blameless; the doctrine only applies where the wrongdoing directly affects the relationship subsisting between the parties

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13. Considering plaintiff's failure to raise any of his affirmative defenses in his answer, this assumption is a reach. See Fed. R. Civ. P. 8 (c), 15 (a) (b); Charpentier v. Godsil, 937 F. 2d 859, 863-64 (3d Cir. 1991) (Failure to raise an affirmative defense by responsive pleading or by appropriate motion generally results in the waiver of that defense.); Kleinknecht v. Gettysburg College, 989 F. 2d 1360, 1374 (3d Cir. 1993) (raising affirmative defenses for the first time in a motion for summary judgment is inappropriate and should be disallowed where the facts underlying the defenses are in dispute and the opposing party would be prejudiced by the raising of the defenses).

and is directly connected to the matter in controversy. See Stauffer v. Stauffer, 351 A. 2d 236, 245-246 (Pa. 1976).

Here, neither party has successfully proven that the other has unclean hands. Therefore, that defense does not act to limit or bar either side's recovery.

b. Laches, Waiver and Failure to Mitigate Damages

In Pennsylvania,

the application of the equitable doctrine of laches [depends on whether] under the circumstances of the particular case, the complaining party is guilty of want of due diligence in failing to institute his action to another's prejudice. The prejudice required is established where, for example, witnesses die or become unavailable, records are lost or destroyed, and changes in position occur due to the anticipation that a party will not pursue a particular claim . . . . [A]pplication of the defense of laches requires not only an unjustifiable delay, but also that the opposing party's position or rights be prejudiced as a result of that delay.

Weinberg v. Pa. State Bd. of Ex. of Public Accountants, 501 A. 2d 239, 242 (Pa. 1985) (citations omitted).

In Pennsylvania, waiver is the

act of intentionally relinquishing or abandoning some known right, claim or privilege. To constitute a waiver of legal right, there must be a clear, unequivocal and decisive act of the party with knowledge of such right and an evident purpose to surrender it . . . . [T]he person claiming the waiver to prevail must show that he was misled and prejudiced thereby.

Brown v. City of Pittsburgh, 186 A. 2d 399, 401 (Pa. 1962).

Questions of laches and waiver are factual and are determined by examining the circumstances of each case. See Leedom v. Thomas, 373 A. 2d 1329, 1332 (Pa. 1977). The burden of

proving laches and waiver rests with the party asserting the affirmative defense. See Weinberg, 501 A. 2d at 242.

Here, neither party has proven any facts which constitute either laches or waiver. This holds true for defendant's claim that plaintiff failed to mitigate his damages as well. Thus, those affirmative defenses do not alter the court's above distribution analysis.

#### 5. Equitable Distribution

Based on the foregoing, the court makes the following equitable distribution: Plaintiff is entitled to be compensated for the following expenses: one-half of the \$ 67,393.00 in mortgage, taxes and insurance payments (including the \$ 439.00 and \$ 5,834.00 deductions), (\$ 33,697.00); (+) \$ one-half of the \$ 18,458.00 in interest on those payments (\$ 9,229.00); (+) one-half of \$ 13,000.00 in repair expenses (\$ 6,500.00); (+) one-half of \$ 3,818.00 in interest on the repair expenses (\$ 1,909.00). This comes to \$ 51,335.<sup>14</sup>

Defendant is entitled to be compensated for the following: one-half the \$ 26,000.00 in actual rents received by plaintiff (\$ 13,000.00); (+) one-half the \$ 7,494.00 in interest on those actual rents (\$ 3,747.00); (+) one-half the \$ 29,050.00 for plaintiff's use and occupancy of his bedroom (\$ 14,525.50);

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14. As noted above, these amounts, including interest, will have to be adjusted at the time of settlement to reflect any further mortgage payments made by plaintiff.

(+) one-half the \$ 7,284.00 in interest on the occupancy value (\$ 3,642.00); (+) one-half the \$ 8,190.00 in vacancy value (\$ 4,095.00); and (+) one-half the interest thereon (\$ 936.00). This totals \$ 39,945.00.<sup>15</sup>

As of the date of trial, therefore, plaintiff overpaid in the amount of \$ 11,390.00. At settlement, this overpayment should be balanced or credited by reducing defendant's distributive share<sup>16</sup> or by whatever other means the parties desire.

## 6. Conclusion

This a relatively simple real estate problem which the parties could have and should have resolved amicably, with a little common sense and exchange of information. Unfortunately, the personality conflicts between the parties, or their lawyers, prevented this from occurring and as a result, much, if not all, of the increase in value of the property, which should have been a profit to the parties, will now have been expended in connection with this litigation. Each party will bear his own costs.

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15. These amounts, including interest, will also have to be adjusted at the time of settlement to reflect plaintiff's continued occupancy of his room and the continued vacancy in the second bedroom.

16. Defendant's distributive share is \$27,905.00, less one-half of the realty transfer tax. Instead of receiving that full amount from plaintiff at settlement, he should receive \$ 16,515.00, which would take into account plaintiff's overpayments. (\$27,905.00 - \$ 11,390.00 = \$ 16,515.00).

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEVIN FISCHER,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
	:	
JOHN MICHAEL WURTS,	:	NO. 96-6863
Defendant.	:	

ORDER

AND NOW, this            day of July, 1997, upon consideration of plaintiff's complaint for partition of the property owned by plaintiff and defendant as tenants in common, and plaintiff's request for compensation for his mortgage and repair expenses, and defendant's request for his proportionate share of the rental income received by plaintiff, and after trial, IT IS HEREBY ORDERED that:

- 1) By agreement, defendant will transfer to plaintiff all of his right, title and interest in the real estate as co-tenant in common.
- 2) By agreement, plaintiff will take whatever steps are necessary at plaintiff's sole cost and expense to release defendant from any further obligation on the existing mortgage and note;
- 3) Each party will be allocated at settlement his distributive share of the property which is one-half of the net value of the property less the agreed real estate transfer tax as determined in the foregoing findings of fact and conclusions of law, but as adjusted hereinafter;

4) In accordance with the foregoing findings of fact and conclusions of law, the distributive shares will be adjusted for the mortgage payments, repairs, interest, escrow refunds, tax benefits to plaintiff, rents received, rents attributed and interest. The amounts determined in this adjudication will be adjusted to the date of settlement. At settlement, the net overpayment by plaintiff will be deducted from defendant's distributive share or credited to plaintiff by whatever appropriate means the parties desire.

5) Plaintiff's motion to amend to conform to the evidence is DENIED AS MOOT.

6) The clerk is directed to mark this matter CLOSED FOR STATISTICAL PURPOSES.

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William H. Yohn, Jr., Judge