THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

HILLSBOROUGH, SS.
NORTHERN DISTRICT

Mary Feeney

v.

Karyn Kelley

Docket No. 216-2010-EQ-00193

ORDER ON SALE PROCEEDS AND ALL PENDING MOTIONS

As the docket number above indicates, this case was filed in 2010. This court conducted a bench trial on January 28, 2014 and August 28, 2014. On October 20, 2014, the court issued an order granting petitioner Mary Feeney's petition for partition of the parties' condominium unit at 62 Indian Rock Road in Merrimack (the "Unit"). The court concluded that the property could not be physically divided. Thus the court ordered that if no agreement was reached for one party voluntarily buying the other party out for one-half of fair market value, the property would be sold with the proceeds of the sale divided equally. The Court also allocated both personal property and debt between the parties.

The property was eventually sold on February 5, 2020, for $165,000 to David and Christy Masciarelli. Commissioner's Report to Court and Parties February 10, 2020. According to the closing statement attached to the February 5, 2020 report, the Commissioner Charles A. Russell, Esq. received $125,880.26 plus $10,000 for an expense escrow. The remainder of the purchase price went to closing costs, condominium fees, and moving expenses. After payment of the Commissioner's fees

(dating back to 2016), the Court has before it **$124,185.43**[1] for division between Feeney and Kelley.

In its July 10, 2020 ruling, the Court held that the parties could not re-litigate their entitlement to more than a one-half interest in the sale proceeds for the Unit based on any events prior to October 2014. The Court based that conclusion on the preclusive effect of the October 2014 order which was appealed to the New Hampshire Supreme Court and affirmed.

The Court, however, allowed the parties to introduce evidence concerning events or activities after October 2014 that affected either the value of the Unit or an allocation of proceeds between the parties. Feeney argued that Kelley's actions diminished the value of the Unit and also led to expenses and costs that Kelley should pay. Kelley argued that Feeney never contributed to expenses or maintenance of the Unit and also points to payments still owed to Kelley under the October 20, 2014 order. The Court agreed to hear evidence on these claims during the July 28, 2020 and July 29, 2020 bench trial.

Evidence at Trial

The following facts are found from the testimony and exhibits admitted during the July 28, 2020 and July 29, 2020 bench trial.

The parties never entered into an agreement on selling the property and the Commissioner appointed by the court was not able to sell the property until earlier this year. The delay was largely the product of a number of actions taken by Kelley including multiple appeals and a bankruptcy filing. Moreover, Kelley routinely

[1] These funds earned approximately $5 in interest. The interest will be divided into two equal shares and paid to the parties. The interest must be paid separately because it is subject to the federal income tax.

challenged and objected to the Commissioner's efforts to sell the Unit. Most importantly, she refused to leave the property. The Court was asked on three occasions for orders requiring Kelley to leave the Unit. After the third order, Kelley finally vacated the premises but left her personal possessions behind. This required real estate broker John Poirier and the Commissioner to propose a sale process whereby the buyer purchased the Unit and thereafter the Commissioner paid for the items to be moved at a time when Kelley no longer had an ownership interest in the Unit.

Kelley's possessions were not the only obstacle to selling the property. After the Commissioner changed the locks at the Unit, Kelley installed additional locks in an attempt to bar his entry into the Unit. After those additional locks were neutralized, Kelley added a deadbolt to the property which required Poirier to climb through a window in order to access the Unit. On January 22, 2020, Kelley sent David Masciarelli, who along with his wife bought the Unit on February 5, 2020, a cease and desist letter ordering him to cease all activities concerning the Unit.

Kelley also issued a number of deeds purporting to convey the property after this court's October 2014 order requiring the property be sold and the proceeds split. At one point, she conveyed the property to her own trust. At another point, she conveyed the property to an individual, Charles Kirk. On February 3, 2020, this Court discharged the mortgage granted by Kirk to Kelley.

The Court finds that the combined effect of these actions and inactions was to depress the market for the Unit. As an initial matter, the Court notes that it found the

testimony of Poirier to be very credible.[2] Poirier explained that he was unable to market the Unit in the normal manner. He noted that because it lacked a working heating system, he was unable to list the Unit on the MLS system. He noted that while Kelley was in possession of the Unit she ignored multiple requests by him to view the Unit. He noted that after Kelley finally left the Unit in 2019, it contained numerous items of personal property. He said that her items were piled floor to ceiling in the basement, with walking paths left between the piles of personal property. He said that Kelley's installation of locks on the Unit made showing the property difficult. He concluded that all of these factors in combination diminished the value of the Unit and that without these obstacles the Unit would have sold for $195,000 even without a working heating system.

Use and Expenses of the Unit

There is no dispute that Feeney made no payments towards taxes, condominium fees and maintenance from October 20, 2014 through the sale of the Unit in 2020. Kelley or people acting on her behalf made all such payments. There is also no dispute that Feeney never stayed at the Unit from October 20, 2014 through the sale of the Unit in 2020 or derived any other benefit. During that period, Kelley had exclusive use of the Unit and it served as her residence during this time.

[2] Kelley attempted to impeach Poirier on the basis that she had terminated a romantic relationship between the two sometime well before the year 2000. Poirier denied that the two had a romantic relationship and denied being upset because she would not date him. Regardless of what exactly transpired between the two during the twentieth century, given the passage of time and Poirier's testimony and demeanor, the Court finds that Poirier was not biased against Kelley even if Kelley did reject a request by Poirier to date him.

Analysis

Under New Hampshire law, partition actions invoke a court's equitable authority. *Foley v. Wheelock*, 157 N.H. 329, 332 (2008). "An action for partition calls upon the court to exercise its equity powers and consider the special circumstances of the case in order to achieve complete justice." *Id.* at 333.

> In exercising its discretion. . .the court may consider: the direct or indirect actions and contributions of the parties to the acquisition, maintenance, repair, preservation, improvement, and appreciation of the property; the duration of the occupancy and nature of the use made of the property by the parties; disparities in the contributions of the parties to the property; any contractual agreements entered into between the parties in relation to sale or other disposition of the property; waste or other detriment caused to the property by the actions or inactions of the parties; tax consequences to the parties; the status of the legal title to the property; and any other factors the court deems relevant.

RSA 547-C:29. The statute's provisions "are to be liberally construed in favor of the exercise of broad equitable jurisdiction by the court in any proceeding pending before it." *Brooks v.* Allen, 168 N.H. 707, 712 (2016) (quoting RSA 547-C:30 (Supp.2015)).

At the outset, it is important to reemphasize the limited nature of the inquiry. As explained in prior orders, this court's October 20, 2014 order ruled that in the event the parties could not reach agreement on selling the property, the property should be sold and the proceeds divided 50/50. That became a final order after appeal and became the law of the case.

However, both parties have claimed that they are entitled to more than half of the proceeds based on activities that occurred after October 20, 2014. Kelley points to all of the tax, condominium and maintenance fees that she has paid and notes that Feeney has paid none. Kelley also points to roughly $10,000 which she was awarded by the

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October 20, 2014 order. For her part, Feeney points to the exclusive use that Kelley had of the property during the relevant time period and notes she had no use of the property. Feeney also points to the diminishment of the value of the Unit and a series of expenses and fees incurred by the Commissioner as a result of Kelley's actions.

Starting with the payment of expenses and use of the property, the Court concludes that these competing interests cross each other out. One way to value property is the cost approach, which involves calculating the cost of construction (minus depreciation) plus the costs of the land. Although not directly applicable here, that formula suggests that one way to value Kelley's use of the property is by considering the ongoing expenses of residing in the Unit which includes the taxes, condominium fees, and maintenance expenses. Indeed, there is a fair amount of equity to that approach. As Kelley drew all the benefit from residing in the Unit, it certainly makes sense that she paid all of the expenses associated with the Unit during her exclusive residency. Accordingly, the Court does not award or debit either party for Kelley's exclusive use and payment of all expenses.

Turning toward Feeney's diminution in value argument, the Court finds that Feeney has established by a preponderance of the evidence that Kelley's actions substantially diminished the value of the Unit. From her repeated appeals to her repeated attempts to prevent anyone from viewing the Unit to her extended refusal to cooperate with the Commissioner, Kelley made it very difficult for the Commissioner to do this job and for Poirier to sell the property. As noted previously, the Court found Poirier credible, including his testimony that the Unit would have sold for $195,000 were it not for Kelley's campaign of interference. During her cross-examination, Kelley

Kelley's efforts to make the sales process as difficult as possible at every stage. Accordingly, the Court charges Kelley with the $14,448 that is above $3,000, the top of the Commissioner's range.

Feeney also seeks offsets for expenses that the Commissioner incurred as a result of Kelley's conduct. These include moving expenses of $7,360, towing expenses of $375, condominium fees of $2,352 (at a time when Kelley had exclusive use of the Unit), and locksmith expenses of $301 (subtracting $200 that was discharged in bankruptcy). The Court agrees with Feeney that Kelley should pay for these expenses. Accordingly, the Court charges Kelley with a total of $10,388.

Finally, the Court awards Kelley $9,800 pursuant to paragraph B.(G.) on page 6 of the October 20, 2014 order which has never been paid. The parties also agreed that Kelley was entitled to an additional $200 pursuant to that same order. Accordingly, $10,000 is reduced from the amounts awarded to Feeney.[3]

All Pending Motions

Kelley has filed numerous motions for reconsideration of a variety of rulings before or during the trial. Those motions are all DENIED for the reasons stated in prior orders or on the record.[4] As for the pool table and other accessories that have not yet been transferred by Feeney to Kelley, the court awards Feeney $246.50 to pay for a

[3] This order describes the findings of fact and rulings of law on which the decision is based. Therefore, the Court declines to address the parties' requests for separate findings of fact and rulings of law. *See Geiss v. Bourassa*, 140 N.H. 629, 632–33 (1996).

[4] On August 7, 2020, Kelley moved for reconsideration of the October 20, 2014 order based on the testimony presented during the July 2020 trial. For the reasons already stated in a number of orders, the October 20, 2014 is a final order that this Court cannot and will not revise. As for the request to reconsider the Court's denial of her request to pursue testimony in relation to a 2018 motion to compel, that motion is DENIED for the reasons stated on the record on July 29, 2020.

four-hour (the minimum time) civil standby. Kelley is to provide at least 5 potential times that work for her to Feeney's counsel within 10 days of this order.[5]

Conclusion

In sum, the Court awards Feeney $31,970 above her half share. That figure is subtracted from the $124,185.43 leaving $92,215.43 to be split by the parties. Accordingly, Feeney and Kelley shall each receive checks for $46,107.72. Feeney shall receive a second check for $31,970.

So Ordered.

6/30/2020
Date

David A. Anderson
Presiding Justice

[5] Plaintiff's files a motion to compel in connection with the parties' failed attempt to transfer the pool table after the bench trial. That motion is DENIED except with respect to the relief provided in this order.

APPENDIX E

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2020-0490, Mary Feeney v. Karyn Kelley, the court on October 20, 2021, issued the following order:

The defendant's motion for leave to replace certain black and white photographs in her appendix with color photographs is granted.

Having considered the briefs, memorandum of law, and record submitted on appeal, the court concludes that oral argument is unnecessary in this case, see Sup. Ct. R. 18(1), and that the defendant has not established reversible error, see Sup. Ct. R. 25(8); Gallo v. Traina, 166 N.H. 737, 740 (2014).

Affirmed.

MacDonald, C.J., and Hicks, Hantz Marconi, and Donovan, JJ., concurred.

Timothy A. Gudas,
Clerk

Distribution:
Hillsborough County Superior Court North, 216-2010-EQ-00193
Honorable David A. Anderson
Honorable Tina L. Nadeau
✓Ms. Karyn Kelley
Daniel C. Proctor, Esq.
Michael R. Feniger, Esq.
William J. Amann, Esq.
Charles A. Russell, Esq.
Lin Willis, Supreme Court
Carolyn A. Koegler, Supreme Court
File

APPENDIX F

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2020-0490, Mary Feeney v. Karyn Kelley, the court on November 12, 2021, issued the following order:

Supreme Court Rule 22(2) provides that a party filing a motion for rehearing or reconsideration shall state with particularity the points of law or fact that she claims the court has overlooked or misapprehended.

We have reviewed the claims made in the motion to reconsider and conclude that no points of law or fact were overlooked or misapprehended in our decision. Accordingly, upon reconsideration, we affirm our October 20, 2021 decision and deny the relief requested in the motion.

Relief requested in motion to reconsider denied.

MacDonald, C.J., and Hicks, Hantz Marconi, and Donovan, JJ., concurred.

Timothy A. Gudas,
Clerk

Distribution:
Hillsborough County Superior Court North, 216-2010-EQ-00193
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