

14340 Euclid Avenue
East Cleveland, Ohio 44112

RONNEY CARTER

August 22, 19 87

Case Number 87 CVG 1420-29

PLAINTIFF

-VS-

BETTY DAVIS

REPORT OF REFEREE

FILED
1987 AUG 22 PM 12:40
PEARL BELTON
Clerk of Court
East Cleveland Municipal Court

CASE CALLED FOR TRIAL ON 7-30-87. CASE REFERRED TO Billings
REFEREE, FOR TRIAL AND DECISION OF ALL ISSUES OF LAW AND FACT. PLAINTIFF
 , DEFENDANT IN COURT. TRIAL HAD, AFTER HEARING EVIDENCE, REFEREE
FINDS:

This matter came on for hearing upon Plaintiff's complaint for resti-
tution of the premises for nonpayment of rent by the Defendant.

Plaintiff is co-owner with his wife, Marsella L. Carter, of real
property located at 16203 Nelaview Road, East Cleveland, Ohio. Plaintiff's
wife was not joined as a party to this action. (Defendant's Exhibit 1.)

The Defendant is the sister of Plaintiff's wife, and has been a tenant
at the foregoing address for fourteen (14) years. Plaintiff is requesting
restitution of the premises because Plaintiff alleges that the Defendant
has failed to pay rent for the past two years.

The Defendant was present with counsel and Defendant's sister, the
Plaintiff's wife.

Plaintiff's wife testified on behalf of the Defendant. Mrs. Carter
testified that she and the Plaintiff are presently involved in divorce
proceedings. The Plaintiff filed this action without her permission, and
she does not wish for the Defendant to be evicted.

Mrs. Carter further testified that she has been the person responsible

THIS REPORT DELIVERED ON 8-22-87 TO THE CLERK OF COURTS FOR FILING.

U. Billingsley
REFEREE

COPY OF THIS REPORT MAILED/DELIVERED ON 8-24-87 TO PARTIES COUNSEL

PAGE 1 OF 4

IN ORDER TO BE CONSIDERED, ALL OBJECTIONS TO THE REFEREE'S REPORT MUST BE FILED WITHIN
FOURTEEN (14) DAYS OF MAILING AND MUST COMPLY WITH THE REQUIREMENTS OF THE OHIO RULES
OF CIVIL PROCEDURE AND THE LOCAL RULES OF THIS COURT. FOR FURTHER INFORMATION, CONSULT
THE ABOVE RULES OR SEEK LEGAL COUNSEL.

REFEREE'S REPORT CONTINUED

for handling all of the legal and business matters involving the property, for the past 14 years. Mrs. Carter further testified that her sister, the Defendant, was formerly receiving a Section 8 subsidy, and that she, Mrs. Carter, was the individual that signed the contract with CMHA for Section 8 assistance on behalf of her sister. (See Defendant's Exhibits 2 and 3). The subsidy terminated in 1985.

Mrs. Carter further testified that she entered into a lease agreement with the Defendant, dated June 26, 1987, involving payment of the back rent due, and for payment of current rent for the ensuing year. (See Defendant's Exhibit 4.) Mrs. Carter acknowledged that the Defendant has not paid rent since January, 1986.

Mrs. Carter stated that she has not received any assistance from her husband, the Plaintiff, who has been unemployed since 1985. Mrs. Carter has been paying the mortgage, taxes and insurance on the subject real estate.

Defendant filed a Motion to Dismiss the action for failure of the Plaintiff to join an indispensable party pursuant to rule 12(B)(7).

In closing the Plaintiff asked the court to take note that the agreement entered into between his wife, Mrs. Carter and the Defendant, dated June 26, 1987, was done so after he filed this action on June 15, 1987. The Plaintiff further stated in closing that the rent would be a source of income, and that the Defendant should have paid.

In closing, the Defendant argued that an agency relationship exists between the Plaintiff and his wife, Mrs. Carter, inasmuch as Mrs. Carter has been responsible for rental of the property for the past fourteen and a half (14½) years, and Plaintiff has never interfered with his wife's role as manager. Defendant further argued that Plaintiff's signature does not appear on any of the contracts or lease agreements (See Defendant's Exhibits 2, 3 and 4). Plaintiff filed the within action against the wishes of Mrs. Carter, and because of his domestic problems with Mrs. Carter.

ARGUMENT AND LAW

This action involves multiple and complex issues of law. It is not the usual action in forcible entry and detainer for nonpayment of rent. The issues include the rights/^{and} powers of co-tenants of real estate to each other and as to third parties. The issue of whether or not an agency relationship exists between the Plaintiff and his wife; and whether this action should be dismissed for failure of the Plaintiff

REFEREE'S REPORT CONTINUED

to join his wife as an indispensable party has also been raised by the Defendant. Moreover, the Court cannot ignore the fact that the parties are related, and the Plaintiff and his wife are presently involved in divorce proceedings.

At the outset, the Court, on its own motion joins the Plaintiff's wife, Marsella L. Carter, as a party Defendant, inasmuch as she has chosen not to evict her sister, the Defendant. As such, Defendant's Motion to Dismiss this action for failure of the Plaintiff to join an indispensable party is hereby denied. The Court agrees with Defendant Davis that Mrs. Carter should be joined as a party for just adjudication. (C.R.19A) However, a dismissal of this action would serve no useful purpose when the Plaintiff need only amend his complaint, or refile the action, since such a dismissal would not be with prejudice. Therefore, pursuant to Civil Rule 21, Marsella L. Carter is hereby joined as a party Defendant.

It is a well-settled general rule of law that a cotenant can do no act to the prejudice of his cotenants in their estate. Lauer v. Green, 99 OS 20, 121 NE 821 (1918). If a tenant in common, to the exclusion of her cotenant, leases and controls the property and collects the rents, she takes upon herself the care, and incurs the duties and responsibilities of a bailiff or trustee. Under these circumstances it is her duty to demand, collect, and account to her cotenant for the rents.

Lipps v. Lipps, 90 O App 578, 100 NE2d 862 (1951). If the rents are not paid, she should not suffer the rent to accumulate, but should put an end to the lease, and relet the premises, or permit her cotenant to manage his own affairs. If she refuses to do this, and suffers the rent to accumulate and permits the tenant to remain in possession, making no effort to collect the rent until the lessee becomes hopelessly insolvent, she must account in money for the rent that should have been collected, and cannot require her cotenant to take notes which she received for rent from the lessee. Converse v. Farwell, 1 O Dec Rep 141; 19 O JUR 3d, Cotenancy and Partition, Section 10 (1980). However, an accounting is not required where the cotenant out of possession knowingly accepts the benefits of disbursement of the rents to others, such as creditors of the cotenants. Ibid., 19 O Jur 3rd.

Tenants in common of real estate may contract with each other for the exclusive right to the use and occupation of the property. So, too, one cotenant may, by contract, express or implied, appoint another to act as his agent to sell, lease, or mortgage his interest in the common property. 19 O Jur 3d Cotenancy and Partition, Section 20 (1980). But there is no agency relationship among cotenants absent an agreement creating such a relationship. Ibid.

In the case at bar, the Plaintiff owns a one-half undivided interest in real estate that is the subject matter of the action herein. Plaintiff's wife, Marsella Carter, owns the other one-half undivided interest (See Defendant's Exhibit 1).

REFEREE'S REPORT CONTINUED

It is apparent from the evidence that Plaintiff's wife, for the past 14½ years, has acted as an agent on behalf of the Plaintiff in leasing and managing the subject premises, and that the Plaintiff has reaped the benefits therefrom, i.e., Mrs. Carter pays the mortgage, taxes and insurance on the subject premises. Now, however, Plaintiff seeks to terminate his wife's agency and deal with his own interest. Plaintiff now desires to evict Defendant Davis from Plaintiff's one-half share of the subject premises. Clearly Plaintiff has a right to possession of his one-half undivided interest in the subject premises, since Defendant Davis, admittedly, has not paid Plaintiff rent for same.

As a practical matter, however, if an order of restitution of the premises were to issue, and the bailiff arrived at the subject premises to enforce the writ of possession, it would be impossible to determine which portion of the subject premises belongs to Plaintiff and which portion belongs to Plaintiff's wife.

What Plaintiff really seeks is a partition of his one-half interest in the subject real estate. A just adjudication of the action herein cannot be accomplished unless and until the property rights of the Plaintiff and Mrs. Carter have been determined. The Court takes judicial notice of the fact that a divorce action is presently pending in the Division of Domestic Relations of the Court of Common Pleas. Inasmuch as a divorce court has jurisdiction to determine property rights between the parties, and it can order a division of property, this Referee recommends a stay of the proceedings in this action until a determination is made in the divorce proceedings, in which the divorce court can give the parties full and complete relief including a compelling, in effect, of a partition of the property. 19 O Jur. 3d Cotenancy and Partition, Section 46.

RECOMMENDATION: (1) Marsella Carter is hereby joined as a party Defendant.

(2) A stay of proceedings in the action herein, pending a determination of the property rights of the Plaintiff and Defendant Carter in the Cuyahoga County Court of Common Pleas, Division of Domestic Relations