

168 Misc.2d 610
Supreme Court, Westchester County, New York.

Rinaldo PRARIO, Plaintiff,
v.
Guy P. NOVO et al., Defendants.

May 23, 1996.

Plaintiff grantee sued defendant grantees for declaration of rights that plaintiff was a **joint tenant** of certain real property. Plaintiff moved for summary judgment. The Supreme Court, Westchester County, Lefkowitz, J., held that deed under review created **joint tenancy** among all four grantees.

Motion for summary judgment granted in part and denied in part.

West Headnotes (17)

^[1] **Partition**
Effect of agreements as to partition or of partition by act of parties

Agreement not to partition is valid defense to partition action.

Cases that cite this headnote

^[2] **Frauds, Statute Of**
Nature of Contract in General

Oral agreement not to partition was barred by statute of frauds. McKinney's General Obligations Law § 5-703, subd. 1.

Cases that cite this headnote

^[3] **Partition**
Cotenancy or other common interest of

parties

Joint tenancy is subject to partition during lifetimes of **joint tenants**.

Cases that cite this headnote

^[4] **Husband and Wife**
Severance and termination

Tenancy by the entirety cannot be divided absent consent of both spouses or upon divorce.

Cases that cite this headnote

^[5] **Husband and Wife**
Creation and existence in general

Tenancy by the entirety can only be created in real property by grant to husband and wife.

Cases that cite this headnote

^[6] **Husband and Wife**
Nature and incidents

Tenancy by the entirety means that married couple takes title as one person.

Cases that cite this headnote

^[7] **Husband and Wife**
Survivorship

When real property has been granted by tenancy by the entirety, right of survivorship inheres from original grant.

2 Cases that cite this headnote

- [8] **Divorce**
 - ☞ Tenancies
 - Husband and Wife**
 - ☞ Severance and termination

Tenancy by the entirety can be changed by voluntary act of couple, divorce, or death.

Cases that cite this headnote

- [9] **Joint Tenancy**
 - ☞ Survivorship
- Joint tenancy** creates right of survivorship.

Cases that cite this headnote

- [10] **Joint Tenancy**
 - ☞ Termination
- Joint tenancy** can be changed by conveyance or partition without assent of other **joint tenants**.

Cases that cite this headnote

- [11] **Husband and Wife**
 - ☞ Creation and existence in general
 - Tenancy in Common**
 - ☞ Creation of cotenancy
- Grant to grantees as husband and wife and also to a third or additional persons creates tenancy by the entirety as to husband and wife and tenancy in common as to other grantees.

Cases that cite this headnote

- [12] **Husband and Wife**
 - ☞ **Joint tenancy** or entirety
- Grant to husband and wife that says as “**joint tenants**” and not “as **tenants in common**” creates **joint tenancy** and not tenancy by the entirety.

2 Cases that cite this headnote

- [13] **Husband and Wife**
 - ☞ Creation and existence in general
- Grant to two married couples as tenants by the entirety results in two tenancies by the entirety, with each couple owning one-half.

1 Cases that cite this headnote

- [14] **Joint Tenancy**
 - ☞ Creation and existence
- Grant to married couple and third person jointly and not as **tenants in common** creates **joint tenancy** with each person having one-third interest.

Cases that cite this headnote

- [15] **Deeds**
 - ☞ Language of instrument
- Language in deed must be so interpreted and applied as to be meaningful and valid. McKinney’s Real Property Law § 240, subd. 3.

Cases that cite this headnote

[16]

Deeds

Creation by deed in general

Evidence

Deeds

Generally, interests obtained from deed are construed in accordance with language contained in instrument, and parol proof is inadmissible to vary or contradict its terms.

Cases that cite this headnote

[17]

Husband and Wife

Joint tenancy or entirety

Grant of real property to two married couples "as **joint tenants** with right of survivorship, among all four of said individuals," created **joint tenancy** among all four persons, rather than two tenancies by the entirety.

5 Cases that cite this headnote

Attorneys and Law Firms

****270 *610** Anthony J. Grazioli, Tuckahoe, for plaintiff.

Helene M. Greenberg, Hartsdale, for defendants.

Opinion

JOAN B. LEFKOWITZ, Justice.

Plaintiff sues for a declaration of rights that he is a **joint tenant** of certain real property, entitled to fifty (50) percent of the proceeds of any sale and for partition and sale. Plaintiff and his wife, Ines, who died January 10, 1995, are grantees of the subject real property along with defendants, who are the daughter of plaintiff and son-in-law, respectively. The deed into the grantees, dated October 15, 1981, from one Claire Nichols, states in the granting clause to "Rinaldo Prario and Ines Prario, His wife ... and Guy P. Novo and Celia P. Novo, His wife ... the Prarios and the Novos to take as **joint tenants** with

right of survivorship, among all four of said individuals."

***611** Plaintiff urges that the grant into himself and wife constituted a tenancy by the entirety and that he is now seized of a one-half interest in the property. Defendants argue that the intent of the parties was that the survivor would succeed to the interests of those who predeceased him or her, that plaintiff presently owns a one-third interest and that an oral agreement not to partition during the lifetimes of the grantees was made. Plaintiff moves for summary judgment. Defendants cross-move for sanctions.

[1] [2] While it is true that an agreement not to partition is a valid defense to a partition action (*McNally v. McNally*, 129 A.D.2d 686, 514 N.Y.S.2d 449 (2d Dep't 1987)), if, as here, the agreement is not in writing, its enforcement is barred by the statute of frauds. General Obligations Law § 5-703(1); *Smith v. Smith*, 214 App.Div. 383, 212 N.Y.S. 196 (3rd Dep't 1925); *Steinberg v. Singer*, 5 Misc.2d 278, 163 N.Y.S.2d 774 (Supreme Ct. Kings County 1957); *Casolo v. Nardella*, 193 Misc. 378, 84 N.Y.S.2d 178 (Supreme Ct. Saratoga County 1948), *aff'd*, 275 App.Div. 502, 90 N.Y.S.2d 420 (3rd Dep't 1949), *app. disp.* 300 N.Y. 549, 89 N.E.2d 518 (1949); 14 Carmody-Wait 2d, N.Y.Prac., § 91:91; Ann. 37 ALR 3rd 962, 973-74 (1971), Right To Judicial Partition-Contract; 3A Warren's Weed, New York Real Property, Partition, § 2.04.

[3] [4] A grant of real property to a husband and wife creates a tenancy by the entirety "unless expressly declared to be a **joint tenancy** or tenancy in common." Estates, Powers & Trusts Law § 6-2.2(b). A **joint tenancy** is subject to partition during the lifetimes of the **joint tenants** (24 N.Y.Jur.2d, Cotenancy & Partition, § 33; 3A Warren's Weed, New York Real Property, Partition, § 3.03; *id.*, vol. 2A, **Joint Tenants**, § 4.01) whereas a tenancy by the entirety cannot be divided absent consent of both spouses or upon a divorce (24 N.Y.Jur.2d, Cotenancy & Partition, §§ 38, 56; 3A Warren's Weed, *op. cit.*, Partition, § 3.12).

[5] [6] [7] [8] [9] [10] A tenancy by the entirety can only be created in real property by grant to husband and wife and means that the married ****271** couple take title as one person and the right of survivorship inheres from the original grant. *Matter of Klatzl*, 216 N.Y. 83, 86-87, 110 N.E. 181 (1915); *Bertles v. Nunan*, 92 N.Y. 152 (1883); 5A Warren's Weed, New York Real Property, Tenancy By Entirety, §§ 1.01, 1.02, 1.05, 2.02. The tenancy by the entirety can be changed by voluntary act of the couple, divorce or death. A **joint tenancy** creates a right of survivorship. 2A Warren's Weed, New York Real Property, **Joint Tenants**, § 1.03. It, however, can be

changed by conveyance or partition without the assent of other **joint tenants**.

[11] [12] [13] [14] *612 A grant to grantees as husband and wife and also to a third or additional persons creates a tenancy by the entirety as to the husband and wife and a tenancy in common as to the other grantees. *Bartholomew v. Marshall*, 257 App.Div. 1060, 13 N.Y.S.2d 568 (3rd Dep't.1939); *Price v. Pestka*, 54 App.Div. 59, 66 N.Y.S. 297 (2d Dep't 1900); 24 N.Y.Jur.2d, Cotenancy & Partition, § 46. A grant to a husband and wife that says as **joint tenants** and not as **tenants in common** creates a **joint tenancy** and not a tenancy by the entirety. *Jooss v. Fey*, 129 N.Y. 17, 29 N.E. 136 (1891). A grant to two married couples as tenants by the entirety results in two tenancies by the entirety, with each couple owning one-half. *Price v. Pestka*, *supra*, 54 App.Div. 59, 66 N.Y.S. 297. A grant to a married couple and third-person jointly and not as **tenants in common** creates a **joint tenancy** with each person having a one-third interest. *Kurpiel v. Kurpiel*, 50 Misc.2d 604, 271 N.Y.S.2d 114 (Supreme Ct. Nassau County 1966). But a grant to a married couple and third-person jointly has been held to create a tenancy by the entirety with a one-half interest and **joint tenant** with a one-half interest. *Matter of Buttonow*, 49 Misc.2d 445, 267 N.Y.S.2d 740 (Supreme Ct. Queens County 1966). In *Schwab v. Schwab*, 280 App.Div. 139, 112 N.Y.S.2d 354 (4th Dep't 1952) a grant to four persons, two sets of married individuals, as **joint tenants** was held to create a **joint tenancy** in an action by the heir of one of the three deceased **joint tenants** against the survivor (Record on Appeal No. 899, 4th Dep't as maintained by the Supreme Court Library in White Plains). The Court declared the survivor to be the owner of the full interest. However, the Court did not have to answer whether each set of married persons took as tenants by the entirety as that determination was not necessary to the decision (280 App.Div. at 141, 112 N.Y.S.2d 354).

[15] [16] The "language in a deed must be so interpreted and applied as to be meaningful and valid." *Lipton v. Bruce*, 1 N.Y.2d 631, 636, 154 N.Y.S.2d 951, 136 N.E.2d 900 (1956); Real Property Law § 240(3). Generally, the interests obtained from the deed are construed in accordance with the language contained in the instrument and parol proof is inadmissible to vary or contradict its terms. 43A N.Y.Jur.2d, Deeds, § 212.

Plaintiff urges that any factual issues can be dealt with after the sale of the property with adjustments made in an accounting. *Goldberg v. Goldberg*, 173 A.D.2d 679, 570 N.Y.S.2d 333 (2d Dep't 1991); 24 N.Y.Jur.2d, Cotenancy & Partition, §§ 242-47. This result, of course, begs the

issue of what interest the plaintiff actually holds and does not take into account the fact that the defendants and their teenage son reside at the premises. Plaintiff and his deceased wife, while alive, also resided at the *613 premises from the date of purchase. Plaintiff no longer resides at the subject property. The parties sharply dispute the monetary amount of their contributions over the years.

[17] While the language in the deed under review is subject to differing interpretations as to whether two tenancy by the entireties were created or four **joint tenancies**, the Court concludes that what was created by the terms of the deed was a **joint tenancy** among all four persons. This is clearly demonstrated by use of the phrase "as **joint tenants** with right of survivorship, among all four of said individuals" (emphasis added). *Jooss v. Fey*, *supra*, 129 N.Y. 17, 29 N.E. 136; *Schwab v. Schwab*, *supra*, 280 App.Div. 139, 112 N.Y.S.2d 354; *Kurpiel v. Kurpiel*, *supra*, 50 Misc.2d 604, 271 N.Y.S.2d 114. Estates, Powers & Trusts Law § 6-2.2(b). Therefore, no triable issue of fact exists as to the meaning of the language in the deed. Consequently, plaintiff is declared the owner as **joint tenant** of a one-third interest and the **272 defendants as owners of a two-third's interest as **joint tenants**.

Plaintiff, therefore, is entitled to maintain this action for partition. Real Property Actions & Proceedings Law § 901(1). Defendants do not oppose upon the ground of "great prejudice to the owners." *Ibid*. However, rather than grant partition outright with an accounting to follow, the Court believes it would be more equitable and fair to appoint a referee to hear and report on the computations involved prior to any actual sale. The order hereon shall provide for such appointment and the referee's fee is fixed at \$210 per hour to be paid one-third by each party. CPLR 4321(1), 8003(a); *Pepe v. Miller & Miller Consulting Activities*, 221 A.D.2d 512, 633 N.Y.S.2d 602 (2d Dep't 1995); *Zamir v. Rottenstein*, 166 Misc.2d 45, 631 N.Y.S.2d 505 (Supreme Ct. Rockland County 1995). The referee shall have all of the powers set forth in CPLR 3104(c).

The referee shall also make inquiry as to creditors. Real Property Actions & Proceedings Law § 913. The real property is subject to a mortgage which should be paid off on partition. Therefore, while not necessary to obtain a judgment on partition, it is desirable for the mortgagee to be made a party herein (Real Property Actions & Proceedings Law § 904[1]), so as to render title marketable at the partition sale if the lien extends to the entire property. 3A Warren's Weed, New York Real Property, Partition, § 5.27, § 7.07 (assumes that notice of pendency filed); 14 Carmody-Wait 2d, N.Y. Prac., §

91.63.

otherwise denied. The cross-motion is denied.

The order hereon shall provide for adding the mortgagee as a party defendant (CPLR 1003), with service of the pleadings and a copy of the order with notice of entry to be made on the *614 mortgagee within thirty (30) days after entry and filing of proof of service in due course.

All Citations

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The motion is granted to the extent indicated herein and is

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