Judge Eaton

STATE OF VERMONT
WINDSOR COUNTY

JAMES McGUIRE	)	
	)	**Windsor Superior Court**
v.	)	**Docket No. 700-10-07 Wrcv**
	)	
BRIAN GOODRO	)	
and REGINA McGUIRE	)	

DECISION
Defendants' Motion for Appeal of Collateral Final Order
Defendants' Motion for Stay and Modify Provisions of Order Regarding Sale

This matter involves a condominium and garage unit owned by plaintiff James McGuire and defendant Brian Goodro as tenants in common. In the complaint, Mr. McGuire alleges that the parties purchased the condominium as a vacation and investment property, but that Mr. Goodro and his spouse took up residence in the condominium to the detriment of Mr. McGuire's interests in the property. Mr. McGuire therefore seeks partition pursuant to 12 V.S.A. §§ 5161–5188.

In April 2008, the parties entered into a stipulation that permitted Mr. Goodro to remain living in the condominium unit so long as he paid all of the expenses associated with the property—the mortgage, QLLA dues, condominium dues, property taxes, utilities, and insurance. If Mr. Goodro failed to pay all of the expenses, he was required to vacate the property within thirty days. The parties would then be "equally responsible for all costs associated with the Property during the pendency of this matter."

Mr. Goodro subsequently failed to make all of the payments required by the April 2008 order. As a result, he vacated the property, and Mr. McGuire made payments that should have been made by Mr. Goodro under the terms of the April 2008 order. After a court hearing held in January 2009 on the motion to compel payment, the parties agreed that the property would be listed for sale, and that the costs of maintaining the property until it was sold would be "split equally between McGuire and Goodro." The parties also agreed that the commissioners would have the power to resolve any disputed matters regarding the listing or sale.

Mr. McGuire thereafter prepared a form of judgment ordering that the property be listed for sale, which the court signed in February 2009. The order included a number of reimbursement provisions designed to govern the distribution of the proceeds from the sale. In pertinent part, the order provided that the following payments would be made before the equitable interests of the parties were considered by the commissioners: (1) payment of the costs of sale and the secured debt; (2) reimbursement to Mr. McGuire for payments that he made that should have been made by Mr. Goodro under the terms of the April 2008 order; (3) reimbursement to any party who made payments that should have

been made by the other party under the terms of the February 2009 order; and (4) reimbursement to both parties for all payments made in accordance with the February 2009 order. Only after these payments were made would the remaining proceeds from the sale be distributed by the commissioners according to the parties' respective equitable interests in the property.

After the judgment order was issued by the court, Mr. McGuire sought reconsideration on the grounds that the fourth reimbursement provision above—granting payment "off the top" to both parties for all payments made in accordance with the February 2009 order—did not accurately reflect the court's rulings. The court denied the motion for reconsideration, noting that the equitable interests of the parties would be determined by the commissioners.

Mr. McGuire then filed the present motion seeking permission to appeal from the February 2009 order under V.R.A.P. 5.1 on the grounds that the fourth reimbursement provision would "substantially alter the parties' equitable interests in the property" and would be effectively unreviewable after partition had occurred. He subsequently filed a motion seeking an order from the court removing the property from the market so that he may explore the possibility of assignment. The latter motion is based in part on his dissatisfaction with the fourth reimbursement provision contained within the February 2090 order, and in part on a March 2009 appraisal that found that the property was worth significantly less ($185,000) than the appraisal performed the previous year ($256,000).

The availability of interlocutory appeals from collateral final orders is meant to provide an effective avenue of relief in circumstances where the court has issued a final order that "conclusively determine[s] important issues unrelated to the merits of the action," and where the interests at stake would be forever lost if immediate review were not available to the parties. *In re J.G.*, 160 Vt. 250, 251 (1993). An example is a final order denying transfer of a criminal proceeding to juvenile court, since the youthful defendant's interests in benefitting from the confidentiality of juvenile court proceedings and avoiding the stigma associated with criminal trials cannot be protected without an immediate appeal from the transfer decision. *State v. Lafayette*, 148 Vt. 288, 291 (1987). The availability of appeals from collateral final orders is limited, and does not abrogate the longstanding "policy of avoiding piecemeal review." *In re Maple Tree Place Assocs.*, 151 Vt. 331, 332–33 (1989).

In this case, the February 2009 order does not contain the characteristics of a collateral final order. The components of the order that are presently in dispute deal only with the distribution of proceeds from the sale of the home. The distribution of money between the parties can be effectively reviewed on final judgment, and it does not appear that any important rights will be lost in the interim that cannot be remedied by an appeal following final judgment. For these reasons, the motion for permission to appeal from a collateral final order of the court is ***denied***.

However, on its own further reconsideration of the February 2009 order, the court recognizes the possibility that the fourth reimbursement provision might substantially alter the parties' equitable interests in the property, especially in light of the declining value of the property. In particular, if the expenses of maintaining the property between February 2009 and the time of sale exceed the value of the parties' equity interests in the property, the distribution of proceeds from the sale will be solely governed by the fourth reimbursement provision (providing for distribution of proceeds on a 50/50 basis) rather than by considerations of the parties' respective long-term equitable interests in the property. See *Begin v. Benoit*, 2006 VT 130, ¶ 6, 181 Vt. 553 (mem.) (explaining that partition actions are equitable in nature, and that the court should consider all relevant circumstances to ensure that complete justice is done). For this reason, the court will strike the fourth reimbursement provision from the February 2009 order. The question of how the parties shall be reimbursed for the payments made in accordance with the February 2009 order that would have been subject to the fourth reimbursement provision shall be submitted to the commissioners and considered as part of the equitable distribution of the property.

It appears to the court that the submission of the fourth reimbursement provision to the commissioners alleviates one of the central concerns presented by Mr. Goodro in his motion seeking to remove the property from the market and modify the terms of the February 2009 order. It therefore appears that the motion may be moot.

However, Mr. Goodro has also raised the possibility that he may seek assignment of the property, rather than sale, in light of what he views as a change in circumstances regarding the value of the property. In this regard, the court notes that its previous order requiring sale of the property was expressly based upon the stipulation of the parties concerning their preference for a sale. Neither the court nor the commissioners have determined, after hearing evidence and making findings of fact, that the property must be sold because it cannot be divided in kind or assigned to one of the parties. See *Wilk v. Wilk*, 173 Vt. 343, 346 (2001) (explaining statutory preference for partition in kind, assignment, and sale, in that order); see also *Malletts Bay Homeowners' Ass'n, Inc. v. Mongeon Bay Properties, LLC*, 2008 VT 62, ¶ 6 (describing procedures for involvement of commissioners).

In the present posture, the court cannot ascertain whether Mr. Goodro would continue to pursue the possibility of assignment based solely on the alleged change in circumstances regarding the value of the property. For this reason, the motion seeking modification of the order requiring sale will be denied as moot unless Mr. Goodro files a request for hearing with the court within ten days indicating that he wishes to proceed with the motion solely on the grounds of the value of the property. The matter will be set for hearing only if Mr. Goodro so requests.

ORDER

(1) Defendant's Motion for Appeal of Collateral Final Order (MPR #9), filed March 25, 2009, is ***denied***.

(2) Paragraph #5 of the February 13, 2009 order is stricken and replaced with the following language: "Any party who has made a payment of expenses that the other party was required to make under paragraph 4 shall be reimbursed off the top, after the costs of sale and secured debt are paid, and after Mr. McGuire is reimbursed pursuant to paragraph 3. If the parties are unable to agree on whether expenses fall within the description of paragraph 4 or otherwise should not be reimbursed from the proceeds of the sale of the property, they shall refer the dispute to the commissioners."

(3) Defendant's Motion For Stay and to Modify Provisions of the Order Regarding Sale of the Property (MPR #10), filed May 1, 2009, will be ***denied as moot*** unless Defendant files a request for hearing within ten days indicating that he wishes to proceed with the motion solely on the grounds pertaining to the value of the property.

Dated at Woodstock, Vermont this 8 day of June, 2009.

Hon. Harold E. Eaton, Jr.
Superior Court Judge

FILED

JUN - 8 2009

WINDSOR COUNTY CLERK