

Partition Case Summaries

NC Court of Appeals and NC Supreme Court
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January 1, 2015 – March 7, 2017

Waiver of Right to Partition; Equitable Authority of the Court

Ward v. Ward (COA16-832; March 7, 2017)

Husband and wife owned real property as tenants by entirety; parties subsequently divorced resulting in ownership of the property as tenants in common. Husband filed for partition by sale. Wife filed a response raising two defenses: (i) husband waived right to partition by implied in fact contract, and (ii) equitable principles precluded distribution of the property by partition. Clerk and superior court judge on *de novo* appeal from the clerk both authorized the partition by sale. Wife appealed the superior court's order to the NC Court of Appeals. The court affirmed the trial court's order authorizing partition by sale. The court found competent evidence to support the trial court's findings that there was no written agreement, action, or conduct that gave rise to an implied in fact contract and no implied in fact contract existed to waive the husband's right to partition. Second, the court noted that a partition proceeding is equitable in nature and the court has the authority to adjust all equities with respect to the property, including authorize reimbursement of an owner for improvements to the property. However, the husband's extra-marital affair did not have any bearing on such equity when partitioning a marital home.

Division of Proceeds from Partition Sale

Harris v. Gilchrist (COA15-437; March 1, 2016)

Dispute over the division of sale proceeds arising out of an action for partition by sale of real property owned by tenants in common, including awards made for (i) betterments, (ii) fair rental value, and (iii) contributions for property expenses.

1. **Betterments.** The NC Court of Appeals applied G.S. 1-340 to affirm the trial court's award of an allowance for improvements made by a co-tenant occupying the property because he made improvements to the property while in possession of the land under a color of title believed to be good. The court remanded the issue for findings on the value of the improvements because the sole finding by the trial court that there was an increase in tax value was alone insufficient to show how much improvements made by the occupying co-tenant added to the value of the property.
2. **Fair Rental Value.** The court noted the Betterments statutes under Article 30 of G.S. Chapter 1 allow a claim for rent to offset a betterments claim, provided one would be entitled to rents in the first instance. A non-occupying co-tenant is entitled to rents when there has been an actual ouster by the occupying co-tenant of the non-occupying co-tenant. Here the court did not find actual ouster because there was no evidence tending to show that the occupying co-tenant prevented the other co-tenants from accessing the property. The court affirmed the trial court's order denying the claim for rents and profits during the co-tenancy.
3. **Contributions.** The court noted that under GS 105-363(b) and an earlier decision of the court a co-tenant who pays a greater share of taxes, mortgage interest, and costs may

enforce a lien in his favor upon the shares of other joint owners for such payments, except when the co-tenant paying the taxes and costs is in exclusive possession of the property. The court noted that exclusive possession is not the same as sole possession. For possession to be exclusive, the court stated there must be a finding that the occupying co-tenant withheld the property from the other co-tenants and the other co-tenants made a demand to possess the property. In this case, neither had occurred therefore the court affirmed the trial court's award of an allowance for taxes and insurance to the occupying co-tenant during the time he was a tenant in common with the non-occupying co-tenants.

Judicial Immunity of Commissioner

[Price v. Calder \(COA14-832; April 7, 2015\)](#)

Defendant served as a commissioner appointed by the Clerk of Superior Court in a partition proceeding. Plaintiff, a co-owner of the land subject to the partition, filed a complaint against the defendant after the partition by sale was completed alleging, among other things, that the defendant breached his fiduciary duty in carrying out his role as commissioner. The trial court dismissed the plaintiff's complaint. On appeal, the NC Court of Appeals held that a commissioner in a partition proceeding acting within the scope of his or her duties is a quasi-judicial official and is covered by the rule of judicial immunity. The court found no merit to the plaintiff's argument that the defendant acted outside the scope of his duties and therefore concluded that the defendant was immune from suit and affirmed the trial court's dismissal of the case.