Judge Teachout

STATE OF VERMONT
RUTLAND COUNTY, SS

RICHARD RUPE,	) **RUTLAND SUPERIOR COURT**
Plaintiff,	) **DOCKET NO. S0238-93RcC**
	)
V.	)
	)
JOHN M. WILLIAMS, CHARLES	)
HUDY and CHARLES HUDY and	)
JOHN M. WILLIAMS SLATE CO.	)
(The Partnership),	)
Defendant.	)

CONFORMED COPY
RUTLAND SUPERIOR COURT

FEB 10 1999

Gary S. Johnson Clerk

OPINION AND ORDER

This case came before the Court for hearing on October 8, 1998. Plaintiff was present and represented by his attorney, Theodore A. Parisi, Jr., Esq.; Defendant was present and represented by his attorney, Richard J. Wright, Esq. Evidence was completed and the parties were given the opportunity to submit supplemental memoranda of law by October 19th with responses due October 26, 1998.

The parties to this action are equal co-tenants of a 42+/- acre parcel of land in Poultney, Vermont. The case is before the Court at this time on Defendant's counterclaim for partition. Three Commissioners for partition have been appointed. Before partition can proceed, the parties are agreed that the Court shall first determine the parties' respective interests in the property. The parties disagree over the effect of the value of improvements made to the premises over time by one of the co-tenants alone; if such improvements have increased the value of the property, is it value to which

the co-tenants are equally entitled, or is the Defendant solely entitled to such enhancement value since he constructed the improvements? The Court finds the facts as stated below. Based upon those facts and upon consideration of the memoranda of law of counsel, and additional research, the Court renders its decision and opinion as set forth below.

FACTS

1 On May 15, 1986, the 42+/- acre premises at issue in this case was conveyed by Rising and Nelson Slate Company to Michael J. Tatko, Jr. and John M. Williams as tenants in common, together with any and all buildings thereon situated.

2 John Williams, Defendant in this action, has remained a one-half owner as tenant in common from May 15, 1986, to the present.

3 On May 27, 1992, Michael J. Tatko, Jr. conveyed his one-half interest as tenant in common to Richard Rupe, Plaintiff in this action.

4 The description of the premises in the deed from Tatko to Rupe references the description in the deed of Rising and Nelson Slate Company to Tatko and Williams.

5 Richard Rupe paid $101,000.00 for his one-half ownership interest in the premises.

6 The 42+/- acres is a parcel in approximately the shape of a fat T. Area A is the westerly section on the top of the T. Area B is the easterly section on the top of the T, and area C is the stem of the T.

7 Plaintiff Richard Rupe for many years has run a slate quarry operation with his father on lands adjacent to and outside area B. This operation was in existence prior to the 1986 purchase of the 42 acres by Tatko and Williams. The Rupe quarry operation had a shed that

was located partly on the Rupe's adjoining property, and partly on the 42 acres. In 1986, there was no survey of the premises, and it was not known that this building was located partly on the subject premises.

8 Defendant John Williams operates a slate quarrying operation with a partner on land adjacent to Area A.

9 At the time of the purchase in 1986 by Tatko and Williams, there were no buildings located on the 42 acres in the vicinity of Area A or of the Williams slate operation on adjoining land.

10 A right-of-way leaves Upper Road, a public highway, and runs through the 42 acres, serving first Area A and ending up near Area B. It leads to the Rupe mill and quarry on land adjacent to and outside Area B.

11 The 42 acre parcel was purchased in 1986 by Tatko and Williams after it had been offered for sale for a period of years. It contains slate reserves, and Tatko and Williams bought it as investment property.

12 Between 1986 and 1989, neither Tatko nor Williams made any use of the property except to hold it for investment purposes. Tatko's work was not in the vicinity of the property, and he did not have occasion to visit the property regularly. No survey was made of the property.

13 In 1989, Defendant John Williams began to operate a slate quarry on Dubonis land adjacent to Area A. He applied for a zoning permit in order to build a 100 foot by 25 foot building in Area A on the subject property for use in connection with his slate quarrying on adjacent Dubonis lands. At no time did he contact Mr. Tatko about this project. He signed the

application for a zoning permit himself. The application included a sketch that clearly identified the building location as being wholly on the 42 acre property owned by John Williams and Michael Tatko. He acknowledges that he knew he was building on jointly owned land. Mr. Tatko was not involved in any way and did not know about the construction of the building until it was completed. He saw it one day when he happened to drive across the right-of-way to visit Mr. Rupe at the Rupe quarry. He was upset and surprised that Mr. Williams had constructed the shed without his consent. He attempted to contact Mr. Williams and spoke instead with Mr. Williams' partner. Mr. Williams visited him the next day. Mr. Tatko asked why the building had been constructed without his consent. Mr. Tatko was upset that the building had been located over slate reserves, since they were the investment purpose of ownership of the land. He did not wish to subsidize someone else's slate business, and was not happy about incurring liability for the building. Mr. Williams offered to obtain liability insurance to cover Mr. Tatko, and agreed to pay all taxes and insurance, which he did.

14 In 1990, despite Mr. Williams' knowledge that Mr. Tatko objected to the construction of any building on the premises without his consent, Mr. Williams filed a second application for a zoning permit for the construction of a 125 foot by 42 foot slate mill. Again, he did not contact Mr. Tatko at any time about such construction, and Mr. Tatko never consented to the construction of the building. When Mr. Tatko learned that the building had been erected, he informed Mr. Williams that Mr. Williams could either buy him out or he would sell to a third party. As a result, Mr. Tatko sold to Mr. Rupe on May 7, 1992. At that time, there were two

buildings constructed by Mr. Williams that were located on the 42 acres. Mr. Rupe knew about the two buildings. The purchase price was $101,000.00 for an undivided one-half interest in the property. The Vermont Property Transfer Tax Return for the sale shows the existence of buildings on the property at the time of transfer. Mr. Williams was not a party to the sale represented by this document.

15 In late 1992, John Williams filed a third application for a building permit in order to erect a building 54 feet by 175 feet which was to enclose the area between the two existing mills and to provide an additional storage area. He did not list Mr. Rupe as a co-owner of the property. Attached to the application was a sketch clearly showing the additional building, as well as the two existing buildings, as located on the 42 acres. Nowhere on the application is Mr. Rupe's interest identified in any way. At no time did Mr. Williams contact Mr. Rupe to ask for permission or even to inform Mr. Rupe that he was planning to build on the property. Mr. Rupe, because he was operating a slate quarry business at the end of the right-of-way, passed by the premises every day and saw the construction. When he saw the building being built, he contacted his attorney who wrote Mr. Williams' attorney a letter, and this litigation ensued.

CONCLUSIONS OF LAW

The legal question presented by the partition counterclaim in this case is determination of the parties' respective interests in the improved parcel of 42 acres. Plaintiff Richard Rupe claims that the defendant erected the buildings at his own risk, and that the plaintiff is entitled to one-half of the entire value of the premises, including building value. The defendant claims that he is entitled to

all enhancement value attributed to improvements that he himself made in connection with his own activities on the property, and for which he neither sought nor received contribution from any co-tenant. At this time, it is not known whether the buildings add value to the current fair market value of the property because they enhance its highest and best use, or whether they detract from value because highest and best use is for quarrying the underground slate or some other use, and the buildings are in the way and would have to be demolished in order for such use to be pursued.

Under Vermont law, a tenant in common cannot be forced to contribute toward the cost of permanent improvements for which he did not consent and which were not necessary repairs, nor can an improving tenant recover the monetary cost of the improvements for which the other co-tenants did not approve and which were not necessary repairs. See *Farrand v. Gleason*, 56 Vt. 633, 638 (1884); *Middlebury Electric Co. v. Tupper*, 70 Vt. 603, 606 (1898); *Duplesse v. Haskell and Bilow*, 89 Vt. 166, 170-71 (1915); *Woodbury v. Stetson*, 108 Vt. 110, 115 (1936). It follows that a non-contributing tenant in common cannot then share in any value added to the property from the improvement by the other co-tenant who alone shouldered the costs of the improvement. See *Farrand v. Gleason*, 56 Vt. 633, 638 (1884) (*Action foreclosure and final accounting*. "It is also well-settled . . . that if one tenant in common has made permanent improvements upon the common property, which have not been consented to by the others, on a division of the property, he shall be allowed therefor so much as the same have enhanced the value of the common property . . . "). The principle that the co-tenant making nonconsensual improvements retains the value added to the property by those improvements has been discussed by courts in a number of states and has been applied to both partition-in-kind and partition-by-sale actions; it has also affected financial awards

in actions for final accounting. See *Farrand*, 56 Vt. 633 (*foreclosure and final accounting*); *South Side Bank & Trust v. Sherlock Homes, Inc.*, 126 N.E.2d 742, 743 (Ill.App. 1955) (*foreclosure action discussing principle in application to partition in kind and partition by sale*); *Jenkins v. Strickland*, 199 S.E. 612, 614 (N.C. 1938) (*special proceeding for partition of land discussing principle as it applies to partition in kind*). The rationale for the rule is that when improvements made enhance the value of the estate, then the co-tenants should not be able to take advantage of improvements for which they have contributed nothing. It also rests on an implicit public policy assumption that an enterprising co-tenant should be encouraged to develop land to its highest and best use and need not have his economic improvement plans thwarted by an objecting co-tenant.

Extending this reasoning, a co-tenant should also not be burdened with any loss in property value resulting from the non-consensual additions made by a co-tenant. In other words, if the buildings represent demolition cost that a purchaser would have to incur in order to make use of the property at its highest and best use, and such cost reduces fair market value below the value the property would have if the buildings had not been built, then the plaintiff's interest should not be diminished due to the loss in value represented by such demolition cost. This is not only fair to an objecting co-tenant, but serves the public policy of discouraging nonproductive economic development, since the co-tenant undertaking such a venture will incur the whole of any reduction in value and cannot shift it to an objecting cotenant.

In this case, the defendant should be awarded the value of any increase or decrease brought about as a result of the buildings solely constructed by him. The evidence shows that the plaintiff Richard Rupe did not consent or contribute to the construction of the defendant's third building, and

thus is not entitled to share in the property value increased thereby. The plaintiff is also not entitled to share in the value of the two buildings which existed at the time he purchased his half-interest in the property from Michael Tatko. Even though the plaintiff was aware of the two buildings at the time of his purchase, the previous owner of that interest never consented or contributed to their construction, and thus the plaintiff takes only the interest held by his predecessor Michael Tatko. By the same token, if the defendant's buildings have decreased the fair market value by creating a demolition cost, the plaintiff should suffer no diminution in the value of the premises resulting from the construction of the buildings.

Applying these principles, the commissioners will need to determine whether the defendant's improvements have increased or decreased the fair market value of the property before they can determine the respective interests of the parties. In order to do this, they will need to determine the current highest and best use of the underlying land. The commissioners should follow the following steps:

Step One

> Determine the highest and best use for the land, i.e., as land supporting buildings for a quarry operation, or as a quarry for the removal of slate, or for some other use. In making this determination, the commissioners should ignore the fact that the buildings have been constructed, and focus on establishing what the current highest and best use would be if no improvements had been made by Mr. Williams.

Step Two

a) Determine the present value of the subject property based on its highest and best use, *including* any value added to the land by or diminished from it by the existing structures erected by the defendant. See *Aldrich v. Stevers*, 115 Vt. 379, 382 (1948) (the value of enhancement is to be determined at the time of trial). In other words, what is the current fair market value of the property in its present condition?

b) Determine the present total value of the subject property based on its highest and best use, *excluding* the value added to the land by or diminished from it by the existing structures erected by the defendant. In other words, what would be the current fair market value of the property if the defendant had not erected any structures? See *Aldrich v. Stevers*, 115 Vt. 379, 382 (1948) (in determining rental value due to the noncontributing co-tenant, rental value based on what "property was fairly worth without these improvements").

Step Three

Use the answers to Step Two above to determine the parties' respective percentages of interest in the land by allocating the effect of the improvements solely to the defendant. See the examples below. The values used are for purposes of illustration only and are not intended to suggest any values pertinent to the case.

Example One: If the commissioners were to determine that the highest and

best use of the land is as a commercial property to support neighboring quarry operations, and at its highest and best use it is worth $115,000.00 with the existing structures, and $100,000.00 without the structures, the parties' respective percentages of interest would be determined as follows:

$$\text{Defendant's interest: } \frac{[50{,}000 + 15{,}000]}{115{,}000} = 56.5\%$$

$$\text{Plaintiff's interest: } \frac{50{,}000}{115{,}000} = 43.5\%$$

Example Two: If the commissioners were to determine that the highest and best use of the land is for direct quarrying on the site where the buildings are located, and at its highest and best use the land is worth $85,000.00 with the existing structures, and $100,000.00 without the structures (due to $15,000 demolition costs), the parties' respective interests would be:

$$\text{Defendant's interest: } \frac{[50{,}000 - 15{,}000]}{85{,}000} = 41\%$$

$$\text{Plaintiff's interest: } \frac{50{,}000}{85{,}000} = 59\%$$

Step Four

Once the percentage interests have been determined, then the commissioners can proceed according to the statute:

a) Can the property be divided in kind according to the parties' percentages of interest in the value of the land, awarding the land containing the structures to the defendant who erected them, if reasonable? See 12 V.S.A. § 5171.

b) If the property cannot be divided in kind, then will one co-tenant purchase the other's interest? See 12 V.S.A. § 5174.

c) If neither party will purchase the other's interest, then the commissioners must recommend that the property be sold and the proceeds divided according to the parties' respective interests as determined by the commissioners in Step Two above. See 12 V.S.A. §§ 5175, 5177.

ORDER

The Commissioners shall proceed to prepare a report using the guidance provided in the findings and conclusions stated in this decision.

Dated at Rutland, this 10th day of February, 1999.

Mary Miles Teachout

Hon. Mary Miles Teachout
Superior Court Judge