Despite Rosaria's protestations that the support order could not be amended because of the holdings of *Millstein v. Millstein,* Pa._____ Pa. Super._____, 457 A.2d 859 (1983), and *Brown v. Hall,* 495 Pa.635, 435 A.2d 859 (1981), the parties agreed that if the order was to be adjusted $210 semimonthly is the amount Thomas should pay.

The holdings of *Millstein* and *Brown* are that where a separation agreement covers all aspects of the economic relationships of the parties, in a proceeding to modify an order, the agreement would not preclude the court from *increasing* a parent's support obligation but may preclude a court from *decreasing* it. (emphasis in original) *Millstein,* supra, at 1294,1297.

The separation agreement between the parties in this case did not cover all aspects of the economic relationships of the parties. Specifically left open, for a stipulation and agreement, was the matter of child support. In that stipulation and agreement the parties provided that the support agreed upon should continue "until further order of the court." That the stipulation and agreement might be subject to a further order is reflected in the stating of the relative income of the parties, suggesting, so it seems, that should the incomes go up or down, a change in the order would be warranted.

An argument might be made that the stipulation and agreement in this case is the only one contemplated if the separation agreement is read without it. However, the separation agreement refers the issue to a stipulation and agreement which in turn provides for further orders in the matter.

For these reasons *Millstein* and *Brown* do not apply and we will make an order fixing the amount Thomas must pay for the support of Maret at $210 semimonthly beginning Monday, February 1, 1984.

ORDER OF COURT

March 15, 1984, the Order of Court dated January 25, 1984, which incorporated by reference the Order of the Hearing Officer dated January 19, 1984, is amended and Thomas N. Dodd, defendant, shall pay to his wife, Rosaria Ann Dodd, the sum of $210 and 50¢ service charge on the first and fifteenth of each month commencing February 1, 1984, until further order of court for the support of Margaret E. Dodd, child of the parties. In all other respects the Order of January 25th shall remain in full force and effect.

INDUSTRIAL VALLEY BANK & TRUST COMPANY V. FIRST NATIONAL BANK OF GREENCASTLE,
C.P. Franklin County Branch, No. A.D. 1983 - 328

Declaratory Judgment - Security Agreements - Inventory - Purchase Money - Security Interest

1. For an auto to be classified as inventory under 13 Pa. C.S.A. 9109, it must be held by a dealer for the purpose of resale to a purchaser in the ordinary course of business.

2. The burden is on the party claiming a purchase money security interest to prove he has met the required elements.

OPINION AND ORDER

EPPINGER, P.J. April 5, 1984:

Industrial Valley Bank & Trust Company, plaintiff, and the First National Bank of Greencastle, defendant, are both creditors of Cambridge Wreckers, Inc., holding conflicting security interests in a 1984 Chevrolet Corvette possessed by Cambridge on April 29, 1983.

Under agreements made on November 24, 1980, plaintiff periodically made loans to Cambridge to finance the purchase of inventory for its business and retained a security interest in all of Cambridge's inventory and accounts receivable. Plaintiff properly perfected its security interest by filing a financing statement in Bucks County and with the Pennsylvania Department of State.

On May 19, 1983, defendant made a loan to Cambridge for $24,000 and retained a security interest in the Corvette as evidenced by a note and security agreement entered on the same date. Defendant argues that this security interest qualifies as a purchase money security interest, 13 Pa. C.S.A. 9107, claimimg the funds loaned to Cambridge were in fact used to purchase the Corvette.

Cambridge defaulted on both loans. Defendant repossessed the Corvette, and plaintiff instituted this action for declaratory judgment on December 9, 1983. An amended complaint was filed on December 9, 1983. Plaintiff in Count I prays for a judgment declaring the rights, duties, and legal relations of a plaintiff and defendant with regard to who has priority in the Corvette.

Plaintiff argues that it has priority by virtue of its perfected security agreement, and in Count II argues that defendant acted maliciously, intentionally, and willfully to defraud plaintiff therefore giving rise to a claim for punitive damages.

Presently before us for determination are defendant's preliminary objections in the nature of a demurrer, motion to strike, and a motion for a more specific complaint.

Two matters may be disposed of at the outset. Defendant submitted that the action should be dismissed because plaintiff's security agreement is void of legal effect and the caption fails to conform to the Franklin County Rules of Court. At argument, defendant conceded as to the former that the security agreement is valid and as to the latter that such failure is not determinative.

In its demurrer, defendant first argues that plaintiff fails to allege that the Corvette is included in the loan and security agreements because it is not alleged that the Corvette was part of the "inventory" at Cambridge. While this may be true, demurrer should only be sustained when the complaint on its face indicates that the law will not permit relief under any theory of law. *Gekas v. Shapp,* 469 Pa. 1, 5, 364 A.2d 691, 693 (1976); *Packler v. State Employment Retirement Board,* 470 Pa. 368, 371, 368 A.2d 673, 675 (1977). The plaintiff should be permitted to allege any additional facts, by the way of amended complaint, which would prove that the Corvette was in fact Cambridge "inventory". *Price v. Pa.R.R. Co.,* 17 D.&C.2d 518, 522 (Dauphin 1958); Pa. R.C.P. 1019(a).

It is not sufficient as plaintiff argues to allege in the complaint that its security agreement covers all the"inventory" of Cambridge. For an auto to be classified as "inventory", under 13 Pa.C.S.A. §9109, it must be held by a dealer for the purpose of resale to a purchaser in the ordinary course of business. *Girard Trust Corn Exchange Bank v. Warren Lepley Ford, Inc. (No. 1),* 12 D.&C. 2d 351, 356 (Phila. 1957). See also *McFadden v. Mercantile-Safe Deposit & Trust Co.,* 260 Md. 601, 273 A.2d 198 (1971). Absent from the complaint are facts which show the business in which Cambridge Wreckers is involved and the purpose for their purchase of the Corvette. Plaintiff should accordingly amend the amended complaint to allege sufficient facts which show the Corvette was "inventory" to Cambridge.

Defendant next argues in support of its demurrer that plaintiff does not allege any facts to disprove the existence of a purchase money security interest, which would give priority to defendant under 13 Pa. C.S.A. §9312 (c). But this is not necessary. The language of 9312 (c) grants priority to the holder of a purchase money security interest when three conditions have occured. Thus, the burden is on the holder of the purchase money security interest to demonstrate that it has met the conditions necessary to assert priority over another secured party. This is in accord with the principle that one asserting priority over another security interest must show the adequacy of their priority. See *Whitworth v. Krueger,* 558 P.2d 1026, 1036 (Idaho S. Ct. 1976); *American National Bank v. First National Bank,* 446 P.2d 968,969 (Wyoming S. Ct. 1968). Defendant may not shift this burden to plaintiff.

In the motion to strike, defendant argues that Count II of the amended complaint should be stricken as containing scandalous and impertinent matter into a conspiracy to make it appear that defendant had retained a purchase money security interest with the intent to defraud plaintiff. Plaintiff seeks punitive damages under this count. We agree with defendant that Count II should be stricken as impertinent.

Pa.R.C.P. 1019 (b) requires that averments of fraud be made with particularity. It is necessary for plaintiff to plead the alleged conspiracy and fraud with sufficient facts and clarity so that defendant understands the claim and may prepare a defense. *Keehn v. Granite Run, Inc.,* 73 D.&C.2d 307, 310 (Delaware 1976). Here, plaintiff has alleged nothing more than that defendant never disbursed funds to Cambridge to purchase the Corvette, that defendant entered into a conspiracy with Cambridge to make it appear a purchase money security interest was created, and that the conduct was done with the intent to defraud plaintiff. While it is true that proof of fraud may arise from attendant circumstances, *Id.* at 310, plaintiff has alleged none of the circumstances which would demonstrate fraud. Defendant's motion to strike Count II as impertinent is sustained.

Since insufficient facts have been alleged to support a cause of action for fraud, an award of punitive damages would be improper. See *Bethlehem Steel Corp. v. Litton Industries, Inc.,* 71 D.&C. 2d 635, 647 (Allegheny 1974), citing *Hudock v. Donegal Mutual Insurance C.* 438 Pa. 272, 264 A.2d 668 (1970).

LEGAL NOTICES

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IN THE COURT OF COMMON PLEAS OF THE 39th JUDICIAL DISTRICT OF FRANKLIN COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION

The following list of Executors, Administrators and Guardian Accounts, Proposed Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: August 2, 1984.

BAER First and final account, statement of proposed distribution and notice to the creditors of J. Robert Naer, executor of the estate of A. Evelyne Baer, late of Washington Township, Franklin County, deceased.

CAUFMAN First and final account, statement of proposed distribution and notice to the creditors of The Valley Bank & Trust Company, executor of the estate of Anna Caufman, late of The Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

LANDIS First and final account, statement of proposed distribution and notice to the creditors of Harold S. Cook, executor of the estate of Joseph H. Landis, late of The Borough of Mercersburg, Franklin County, Pennsylvania deceased.

LEGAL NOTICES, cont.

MCNEW First and final account, statement of proposed distribution and notice to the creditors of The Valley Bank & Trust Company, executor of the estate of Jean R. McNew, late of Fayetteville, Franklin County, Pennsylvania, deceased.

Glenn E. Shadle
Clerk of Orphans' Court
of Franklin County, Pa.

7-6, 7-13, 7-20, 7-27

On February 6, 1984, counsel for Husband presented a petition to dismiss the partition proceeding commenced by Wife on the grounds that an action in divorce with a request for equitable distribution had been commenced and the real estate Wife seeks to have partitioned is marital property subject to equitable distribution and thus not available for partition. A rule to show cause why an order should not be entered dismissing the partition action was issued upon the same date. An answer to the petition with new matter was filed February 27, 1984. Wife admitted the allegations of the petition but alleged under new matter that the divorce action filed by Husband requires him to proceed and there is no guarantee that he will do so. The matter was placed on the April Argument List; briefs were exchanged and arguments heard. The matter is now ripe for disposition.

It has long been the law in Pennsylvania that where one spouse appropriates entireties' property to his own use and to the exclusion of the other spouse that is deemed to be an offer by the excluding party to partition all of the entireties' property owned by the parties. The offer is deemed accepted by the non-appropriating spouse's commencement of a partition action. *Vento v. Vento,* 256 Pa. Super. 91,389 A. 2d 615 (1978). In the case at bar Wife contends that her exclusion from the marital home constituted the offer to partition, and she accepted that offer by the filing of her complaint on December 1, 1983. If the plaintiff proved the allegations of her complaint by a preponderance of the evidence, the Court is satisfied that the Wife would be entitled to a decree in partition.

On July 1, 1980, the Pennsylvania Divorce Code became effective, Act of April 2, 1980 P.L. 63, No. 26, §101, et seq., 23 P.S. §101 et seq., Section 401 (d) provides:

> "In a proceeding for divorce or annulment, the court shall, upon request of either party, equitably divide, distribute or assign the marital property between the parties."

Section 401 (f) provides:

> "All property, whether real or personal, acquired by either party during the marriage is presumed to be marital property regardless of whether title is held individually or by the parties in some form of co-ownership such as joint tenancy, tenancy in common or tenancy by the entirety..."

Husband contends that where parties are married and a divorce action commenced, the provisions of the new Divorce Code pre-empts the equitable action for partition of marital property because that equitable action permits only a 50-50 distribution of tenancy by the entireties property. He cites *Playtek v. Playtek,* _____ Pa. Super. _____, 454 A. 2d 1059 (1982) wherein the appellant initiated a divorce action and also appropriated to her own use the proceeds of a personal injury action which had been placed in the parties' joint savings account. The appellee petitioned the lower court to enjoin the appellant from disposing of the settlement proceeds on the theory that they were marital property. The Superior Court held:

> "It is apparent, therefore, that the court's power to direct a partition of property is qualified by its duty to divide marital property in an equitable way. If the property is not marital property, the court may direct its partition. But if it is marital property, the court must instead, upon request of either party, direct its equitable division. The result may well be different. For partition is an even division. *Vento v. Vento,* supra. But an equitable division often will not be even; the essence of the concept of an equitable division is that 'after considering all relevant factors,' the court may 'deem just' a division that awards one of the parties more than half, perhaps the lion's share, of the property.
>
> ...
>
> "The lower court justified its order of partition by expressing 'the opinion...that the Vento doctrine is still viable, and that the Divorce Code of 1980 has not rendered it mute'...if the property in question is not 'marital property,' as that term is defined by the Divorce Code, then the *Vento* doctrine is indeed still viable. If the joint tenants are not husband and wife, *Vento* will apply. *Vento v. Vento,* supra. at 94 n.3, 389 A.2d at 617 n.3. Even if the joint tenants are husband and wife, *Vento* will still apply if the propety is the separate propety of one of them. But if the property is marital property, *Vento* has no application." (At 1062, 1063)

Thus, Husband urges his petition to dismiss Wife's partition action must be granted.

To the contrary Wife argues that the petition must be denied for the following reasons:

1. Husband agreed to the partition by his pleading in that he alleged in new matter and counterclaim that the Court should reduce the amount of
Thus, Husband urges his petition to dismiss Wife's partition action must be granted.

To the contrary Wife argues that the petition must be denied for the following reasons:

1. Husband agreed to the partition by his pleading in that he alleged in new matter and counterclaim that the Court should reduce the amount of the estate to be partitioned to Wife by the amound she had allegedly withdrawn from their joint account, and it would be an anomaly for the Court to permit them to recognize Wife's rights to partition and then deny them.

2. *Platek v. Platek* is distinguishable by virtue of the fact that the action in divorce which triggered the application of the new Divorce Code occurred first; whereas in the case at bar the action for partition was first commenced and that constituted the acceptance of the Husband'ss offer to partition which changed the nature of the property from entireties to individually held assets, and eliminated the concept of "marital property."

3. The right of a spouse excluded from tenancy by the entireties' property to recover a share of that property should not be held hostage to the whim of the other spouse who commence an action in divorce to the extent that that excluding spouse could indefinitely delay action on the divorce proceeding he had initiated.

There is no merit in Wife's first argument, for as previously noted Husband did not in his new matter and counterclaim "agree to the partition", but rather in the ad damnum clause of his pleading prayed that *if* partition was decreed that Wife's share be reduced by the amount she had allegedly withdrawn from the tenancy by the entireties' savings account plus interest. Clearly, there was no factual justification for Wife's counsel to assert the argument. It compels the conclusion that either counsel failed to read and/or comprehend the pleading or intended to mislead the Court. Whatever the explanation, we find the conduct unprofessional and it should never be repeated.

Wife's second contention that the filing of her complaint for partition not only constituted an acceptance of Husband's offer but also and instantaneously effected a de jure partition of the entireties' real estate is unsupported by the facts pleaded and the law, and is consequently unpersuasive. The insurmountable factual problem confronted by Wife's contention is that Husband's answer to the partition complaint denies that he ejected her from the premises and excluded her from use or enjoyment of the property; and to the contrary he alleges that she left voluntarily. Whatever the ultimate resolution of the factual issue might be, it is obvious that at this stage of the proceeding no determination of her right to partition is possible. While we doubt seriously that the legal fiction employed in Pennsylvania to permit the partition of entireties' property during marriage effects the change in the manner that the parties hold the real estate immediately upon the filing of a complaint in partition, it would not do so where the grounds alleged for the partition are denied.

Furthermore, we find nothing in the Superior Court's opinion in *Platek v. Platek,* which would justify distinguishing the rule there established on the basis of which party won the race to the courthouse. Generally the law does not encourage such contests. Section 102 of the Divorce Code, 23 P.S. 102 provides inter alia:

> "(a) The family is the basic unit in society and the protection and preservation of the family is of paramount public concern. Therefore, it is hereby declared to be the policy of the Commonwealth of Pennsylvania to:
>
> (6) effectuate economic justice between parties who are divorced or separated and grant or withhold alimony according to the actual need and ability to pay of the parties and insure a fair and just determination and settlement of their property rights.
>
> "(b) The objectives set forth in subsection (2) shall be considered in construing provisions of this act and shall be regarded as expressing the legislative intent."

The Superior Court in *Platek* clearly demonstrates its intention to advance the legislative intent of the Divorce Code by favoring equitable distribution in cases to which the Code applies over the equal division mandated by partition which until July 1, 1980 was the only legal remedy available.

Wife urges in support of her third contention that dismissal of her partition action solely on the grounds that Husband has commenced a divorce action is legally and logically indefensible because it permits a spouse who excludes the other spouse from use and enjoyment of entireties' property to destroy the right of the excluded spouse to partition of that property by the simple expedient of filing a complaint in divorce and claiming equitable distribution. Once the complaint has been filed contends Wife, there is no incentive for the excluding spouse to proceed with the expeditious disposition of the divorce action, and the equitable distribution of the marital property. The fact that Husband's complaint in divorce was filed on February 6, 1984, and he has neither filed a motion for the appointment of a Master nor an inventory and appraisement as mandated by Pa. R.C.P. 1920.33 gives credence to Wife's argument that there is no incentive for him to proceed expeditiously or otherwise with his action in divorce so long as Wife is barred from her partition action and he is in control of the marital property. It is true Wife has the option to file her own motion for the appointment of a Master, file her own inventory and appraisement with 60 days as required by the Rule of Civil Procedure, and seek the imposition of sanctions upon Husband for non-compliance with the Rule. However, this option may be largely illusory, for if a Master is to be appointed to consider divorce, alimony, alimony pendente lite, distribution of property, support, counsel fees and costs and expenses, the party filing the motion would be required to deposit with the Prothonotary the sum of $675.00 which is not an insignificant amount. (we take judicial notice of an order of this court filed January 27, 1984, wherein it is noted that Husband's net weekly income is approximately $230.00 and Wife's is $180.00.)

Under Section 102 of the Divorce Code, supra, it is not only the policy of the Commonwealth and the intent of the Legislature to "effectuate economic justice betweent parties" (Subsection A-6) but also to "(1) make the law for legal dissolution of marriage effective for dealing with the realities of the matrimonial experience." In our judgment it was not the intention of the Legislature to make the rights of the more economically dependent spouse hostage to the whims or dilatory action of the other spouse nor do we believe it was the intention of the Superior Court in *Platek* that its opinion be construed to potentially permit such a transparent violation of Commonwealth policy and legislative intent.

In our opinion Husband should be given the opportunity to demonstrate his good faith by proceeding promptly with his action in divorce and for equitable distribution of marital property. During that time period the court should simply defer acting on Husband's petition to dismiss the partition action, and retain jurisdiction of both proceedings. Then, if Husband fails to pursue his cause of action with reasonable diligence the Court will entertain a motion either to hold a hearing on the petition to dismiss and responsive answer or if appropriate dismiss the petition. For the guidance of the parties and their counsel, it would appear appropriate to expect Husband's motion for the appointment of a Master to be filed within two weeks of the date of this order and in the absence of unusual or unforeseen circumstances for all proceedings before the Master to be concluded within 90 days of the date of this order.

ORDER OF COURT

NOW, this 19th day of April, 1984, all proceedings in the partition action of Joan Marie Federline vs. Bernard L. Federline, Jr. are stayed until further Order of Court. Judicial action on the petition of Bernard L. Federline, Jr. to dismiss the said partition action is deferred pursuant to the Opinion attached hereto. Jurisdiction is herewith retained.

Exceptions are granted the Plaintiff and the Defendant.

MITCHELL V. MITCHELL, C.P. Franklin County Branch, F.R. 1979-1170S

Support Order - Res Judicata - Changed Circumstances

1. An initial support order is res judicata and is subject to further modification only upon a showing of subsequent material changes in conditions and circumstances.

2. Consideration of a request to modify a pre-existing support Petition is appropriate only where a written Petition, cross petition or answer with counterclaim is before the review officer.

3. Where defendant petitioned for a reduction in support and plaintiff did not file an answer with counter claim, plaintiff later petitioned for increased support and must rely on changed circumstances from the time of the last hearing.

Kenneth E. Hankins, Jr., Esq., Counsel for Plaintiff
William H. Kaye, Esq., Counsel for Defendant

OPINION AND ORDER

KELLER, J., April 27, 1984:

On December 3, 1981, the Honorable George C. Eppinger entered an order directing the defendant, Lester J. Mitchell, to $170.00 bi-weekly to the plaintiff, Shirley A. Mitchell, for the support of their three minor children; Lisa, age 16, Adam, age 13, and Lance, age 11. the support order was predicated upon Shirley A. Mitchell's net weekly income of $244.00 and Lester J. Mitchell's net weekly income of $326.00.

In August of 1983, the defendant petitioned the Court to modify the support order, alleging that Lisa had reached the age of majority and graduated from high school. At the office conference the defendant appeared in person but without counsel. The plaintiff appeared with her attorney, Kenneth E. Hankins, Jr.

On September 8, 1983, the Court's Hearing Officer, Robert Woods, granted the defendant's application to remove Lisa from the original support order but did not alter the amount of support defendant was required to pay. On September 12, 1983 the Court entered its order approving the Hearing Officer's recommendation. No appeal was taken from the September 12, 1983 order. However, on the same day Shirley Mitchell presented her petition to modify the 1981 order claiming significantly changed circumstances. Mrs. Mitchell sought an increase in the amount of her husband's weekly support payments.

Accepting the recommendation of the Domestic Relations Hearing Officer, the Court ordered the defendant to pay $200.50 bi-weekly, an increase of $30.50 over the requirement of the original 1981 support order. The defendant appealed and the case was scheduled for a de novo hearing before the Court on January 9, 1984. The evidence presented established that: (1) one of the three children was no longer entitled to support, (2) the defendant's net weekly income had increased by $17.00 and , (3) the plaintiff's weekly income had increased by $11.85. The evidence was marked closed and the case continued for argument.