

**ANN M. GRANT, Plaintiff v. ALEX R. MOORE,
Defendant, Franklin County Branch, CIVIL ACTION -
LAW A.D. 1998 - 89**

Grant v. Moore

Adverse Possession -- Tenancy in Common -- Preliminary Objections

1. When a conveyance is made to two persons as grantees, there is a presumption, in the absence of plain intent to the contrary, that a tenancy in common has been created, and not a joint tenancy.
2. A tenant in common can establish title by adverse possession against her co-tenant provided she proves an ouster, decisive and unequivocal conduct amounting to an open denial of her co-tenant's rights.
3. Where a plaintiff alleges she ousted a co-tenant more than twenty one (21) years ago, the allegation is sufficient to overcome preliminary objections in an adverse possession action.
4. Sole possession and enjoyment for twenty-one (21) years under a claim of sole ownership is evidence of adverse possession sufficient to go to the jury.
5. Statute providing for the partition of a tenancy in common does not operate to extend the period of the statute of limitations. 68 Pa.C.S.A. §101.
6. A finding of adverse possession for twenty-one (21) years effectively will bar a tenant in common's claim of ownership and his right to rents from the co-tenant in possession of the property.
7. Presumption that co-tenant in possession holds the property for the benefit of all co-tenants may be rebutted by evidence of ouster.

Stephen D. Kulla, Esquire, counsel for the plaintiff
D. L. Reichard II, Esquire, counsel for the defendant

OPINION AND ORDER

Walker, P.J., March 11, 1998:

This case comes before the court on the preliminary objections of defendant to the plaintiff's complaint and the preliminary objections of plaintiff to the defendant's preliminary objections.

The origins of this controversy can be traced to October 6, 1975, when Plaintiff Ann Grant and Defendant Alex Moore purchased a piece of land located in Washington Township, Franklin County, Pennsylvania. The parties bought the property together in anticipation of a marriage that never materialized. In May of 1976, the couple split up and Ms. Grant was left in sole possession of the property. From that point forward, Ms. Grant undertook the responsibility to pay the mortgage and taxes on the property with no

contribution from Mr. Moore. Although there was some contact between the two since the breakup, Mr. Moore has not lived at the residence since he left in 1976.

On September 22, 1997, Ms. Grant commenced an equity action by a complaint by adverse possessor to quiet titles. In her complaint, Ms. Grant alleges that she ousted Mr. Moore more than twenty-one (21) years ago, and that she is now the true owner in fee simple absolute of the property in question.¹

On October 8, 1997, Mr. Moore responded by filing preliminary objections to the complaint. He argues that the complaint fails to state a cause of action because there is no statutory provision allowing one co-tenant to seek an adverse possession action against another co-tenant. Mr. Moore maintains that the proper course is for plaintiff to seek a partition under 68 Pa.C.S.A. § 101.² Further, Mr. Moore contends that there is an adequate remedy at law and, therefore, the action at equity should be dismissed.

Plaintiff has responded to defendant's preliminary objections by filing preliminary objections of her own. She argues that legal precedent in Pennsylvania permits a co-tenant to acquire title to jointly owned property by adverse possession. Further, Ms. Grant asserts that this case was transferred to the law side of the court, and therefore, defendant's preliminary objection seeking dismissal of the equity action is moot. Because we agree with plaintiff's position, the preliminary objections of defendant will be overruled.

Preliminary objections in the nature of a demurrer will be sustained only where the complaint is clearly insufficient to establish a right to relief, and any doubt must be resolved in favor of overruling that demurrer. *Olon v. Com., Dept. Of Corrections*, 147 Pa. Cmwlth. 22, 606 A.2d 1241 (1992), *reversed on other grounds*, 534

¹ We note that the complaint alleges that the ouster occurred in May of 1975 (¶ 6), but we recognize this is a typographical error since the parties did not purchase the property until October of 1975. For purposes of this opinion we will assume the correct date of the alleged ouster is May 1976. This is the date which was set forth in plaintiff's brief and referred to by counsel for both parties at oral argument.

² Act of 1895, June 24, P.L. 237, § 1, as amended.

Pa. 90, 626 A.2d 533, *reargument denied, certiorari denied* 510 U.S. 1044, 114 S.Ct. 691, 126 L.Ed. 2d 658. In the review of preliminary objections, facts that are well pleaded, material and relevant will be considered as true, together with such reasonable inferences as may be drawn from such facts. *Mellon Bank v. Fabinyi*, 437 Pa. Super. 559, 650 A.2d 895 (1994).

We begin our analysis by defining the estate at issue. The property in controversy in this case is a tenancy in common. We know that it is not a tenancy by the entirety because, even though the deed refers to the parties as husband and wife, the anticipated marriage between the two never took place. Further, we recognize that the estate is not a joint tenancy because the required element of survivorship is not present in the instrument of ownership. Moreover, when a conveyance is made to two persons as grantees, there is a presumption, in the absence of plain intent to the contrary, that a tenancy in common has been created, and not a joint tenancy. *Zomisky v. Zamiska*, 449 Pa. 239, 296 A.2d 722 (1972). There being no element of survivorship to this estate, it is presumed to be a tenancy in common.

We now move to the substantive arguments contained in the defendant's preliminary objections. Mr. Moore claims that a co-tenant may not assert adverse possession against another co-tenant, and that the only remedy available to Ms. Grant is an action to partition the property. This is simply not so. A tenant in common can establish title by adverse possession against her co-tenant provided she proves an "ouster," decisive and unequivocal conduct amounting to an open denial of her co-tenant's rights. *Trader Horn Coal Co. v. F.D. Kessler, Inc.*, 31 Northumb. L.J. 168 (C.P., 1959). In the instant matter, Ms. Grant alleges that she ousted Mr. Moore more than twenty-one (21) years ago (Complaint, ¶ 6), and this is sufficient to overcome the defendant's preliminary objections. Sole possession and enjoyment for twenty-one (21) years under a claim of sole ownership is evidence of adverse possession sufficient to go to the jury. *Leibensperger v. Leibensperger*, 41 Berks Cty. L.J. 261 (C.P. 1949).

Defendant argues that under 68 Pa.C.S.A. § 101 partition is the only remedy available to a co-tenant in a tenancy in common situation. However, the statute does not operate to extend the period

of the statute of limitations. *Keller v. Lamb*, 10 Kulp 246 (C.P. Luzerne Cty. 1901), *affirmed* 51 A. 982, 202 Pa. 412 (1902). Therefore, a finding of adverse possession for twenty-one (21) years effectively will bar a tenant-in-common's claim of ownership and his right to rents from the co-tenant in possession of the property. *Truver v. Kennedy*, 425 Pa. 294, 229 A.2d 468 (1967).

Mr. Moore also relies on the well-established presumption that a co-tenant in possession holds the property for the benefit of all co-tenants, and she cannot claim an interest adverse to that of her co-tenants. *Cannon v. Jackson*, 252 Pa. 257, 97 A. 468 (1916). However, this presumption has no more force than any other kind of presumption, *Smith v. Kingsley*, 331 Pa. 10, 200 A.11 (1938), and it can be rebutted by evidence of ouster. *Conneaut Lake Park v. Klingensmith*, 362 Pa. 592, 66 A.2d 828 (1949). At this point in the proceedings, plaintiff is not required to prove ouster, but merely to plead it in the complaint. For purposes of deciding these preliminary objections, we deem plaintiff's allegations of ouster to be sufficient, and this is enough to overrule defendant's objections to the complaint.

Defendant further argues that Ms. Grant has an adequate remedy at law, and therefore, the equity action commenced by her against Mr. Moore should be dismissed. However, this point is moot because, as Ms. Grant correctly points out, the Honorable William H. Kaye signed an order on November 26, 1997 making absolute a rule to transfer the matter to the law side of the court. Defendant was given ample opportunity to argue this point, but he did not take advantage of it. The issue of whether there is an adequate remedy at law is now moot and defendant's preliminary objection based on the adequacy of the legal remedy will be overruled.

ORDER OF COURT

March 11, 1998, upon consideration of the preliminary objections of Defendant Alex R. Moore, the answer and preliminary objections of plaintiff, the briefs submitted by the parties and oral argument of the issues involved,

IT IS ORDERED that the preliminary objections of Defendant Alex R. Moore are hereby overruled consistent with the opinion filed herewith.