

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

WILLIAM F. BROBST, SR.,

Appellee

v.

WILLIAM F. BROBST, JR. AND ROXANNE  
BROBST,

Appellants

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1212 MDA 2016

Appeal from the Order Entered June 23, 2016  
In the Court of Common Pleas of Berks County  
Civil Division at No(s): 15-13571

BEFORE: BENDER, P.J.E., PANELLA, J., and PLATT, J.\*

MEMORANDUM BY BENDER, P.J.E.:

**FILED FEBRUARY 21, 2017**

William F. Brobst, Jr. ("Brobst Jr.") and his wife, Roxanne Brobst (collectively "Defendants") appeal from the June 22, 2016 order<sup>1</sup> that granted the motion for summary judgment filed by William F. Brobst, Sr. ("Brobst Sr." or "Plaintiff") in his suit seeking ejectment of Defendants from the entirety property Brobst Sr. solely owned after the death of his wife. The order also denied Defendants' counterclaims and in essence denied their motion for partial summary judgment. We affirm.

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\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> The order from which this appeal was taken is dated June 22, 2016, but was entered on the docket on June 23, 2016.

Defendants filed this appeal raising the following three issues for our review:

- A. Did the lower court err in finding the [e]ntireties [e]state was not extinguished?
- B. Did the lower court err and/or abuse its discretion by failing to recognize the Defendants were seized with an [e]state/interest of some sort in the subject parcel regardless?
- C. Did the lower court err as a matter of law and/or abuse its discretion by failing to consider Defendants' [a]ffirmative [d]efenses?

Defendants' brief at 3.

In reviewing an appeal from the grant of a motion for summary judgment, we are guided by the following:

"Our scope of review of a trial court's order granting or denying summary judgment is plenary, and our standard of review is clear: the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion." ***Universal Health Services, Inc. v. Pennsylvania Property and Casualty Insurance Guaranty Assoc.***, 884 A.2d 889, 892 (Pa. Super. 2005) (citation omitted).

The entry of summary judgment is proper whenever no genuine issue of any material fact exists as to a necessary element of the cause of action. The moving party's right to summary judgment must be clear and free from doubt. We examine the record, which consists of all pleadings, as well as any depositions, answers to interrogatories, admissions, affidavits, and expert reports, in a light most favorable to the non-moving party, and we resolve all doubts as to the existence of a genuine issue of material fact against the moving party.

***LJL Transp., Inc. v. Pilot Air Freight Corp.***, 599 Pa. 546, 962 A.2d 639, 647 (Pa. 2009) (citations omitted).

**Krapf v. St. Luke's Hospital**, 4 A.3d 642, 649 (Pa. Super. 2010), *appeal denied*, 34 A.3d 831 (Pa. 2011).

Moreover, our Supreme Court has stated:

Rule 1035 also provides that “[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth *specific facts showing that there is a genuine issue for trial*. If he does not respond, summary judgment, if appropriate, shall be entered against him.” Pa.R.C.P. 1035(d) ([e]mphasis added). Therefore, where a motion for summary judgment has been made and properly supported, parties seeking to avoid the imposition of summary judgment must show by specific facts in their depositions, answers to interrogatories, admissions or affidavits that there is a genuine issue for trial. **See *Overly v. Kass***, 382 Pa. Super. 108, 554 A.2d 970 (1989), and ***Tom Morello Construction Co., Inc. v. Bridgeport Federal Savings and Loan Assn.***, 280 Pa. Super. 329, 421 A.2d 747 (1980).

**Marks v. Tasman**, 589 A.2d 205, 206 (Pa. 1991) (emphasis in original).<sup>2</sup>

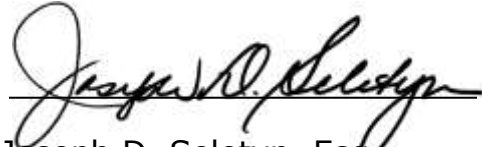
We have reviewed the certified record, the briefs of the parties, the applicable law, and the thorough 12-page opinion of the Honorable James M. Lillis of the Court of Common Pleas of Berks County, dated September 19, 2016. We conclude that Judge Lillis’s well-reasoned opinion properly disposes of the issues presented by Defendants on appeal and we discern no abuse of discretion or error of law. Accordingly, we adopt Judge Lillis’s opinion as our own and affirm the June 23, 2016 order on that basis.

Order affirmed.

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<sup>2</sup> Rule 1035 was rescinded February 14, 1996, and replaced by Pa.R.C.P. Nos. 1035.1–1035.5, which became effective July 1, 1996.

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 2/21/2017

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12 Pgs

WILLIAM F. BROBST, SR.  
Plaintiff,

V.

WILLIAM F. BROBST, JR., ROXANNE,  
BROBST, KESHIA BROBST, and  
AUSTIN HARTZELL,  
Defendants

: IN THE COURT OF COMMON PLEAS  
: OF BERKS COUNTY, PENNSYLVANIA  
:  
: CIVIL ACTION – LAW  
: IN EJECTMENT  
:  
: No. 15-13571  
:  
: JAMES M. LILLIS, J.

OPINION

Before the Court is 1. Plaintiff’s Motion for Summary Judgment seeking ejectment and right of possession as surviving tenant by the entirety; and 2. Defendants’ Motion for Partial Summary Judgment requesting, as this Court understands, that the 1971 deed of such property be reformed or, in the alternative, that Defendants be granted a constructive trust in the property for an undetermined amount of money and services. The Court granted Plaintiff’s Motion for Summary Judgment and dismissed Defendants’ Counterclaims by order of June 22, 2016. This opinion is written in support of such order.<sup>1</sup>

Factual and Procedural History

Plaintiff William Brobst, Sr. (“Brobst Sr.” or “Plaintiff”) and his wife Ruth Brobst (“Ruth”) purchased the property at 118 N. Kemp Road, Kutztown, Berks County, Pennsylvania (the “Property”) and recorded the transaction by a deed dated October 19, 1971. As the Property

<sup>1</sup> The order does not specifically deny Defendants’ Motion for Partial Summary Judgment but does dismiss the Defendants’ Counterclaims for imposition of a constructive trust and reformation of the deed of the subject property, which are the sole remedies Defendants seek judgment upon in their motion for Partial Summary Judgment. The Court notes, also, that Defendants did not raise the form of the Court’s order in their Rule 1925(b) Statement of Matters Complained of on Appeal. Accordingly, this Court requests that the Superior Court deny Defendants’ Appeal or remand the matter to the undersigned for purpose of issuing an order specifically denying Defendants’ Motion for Partial Summary Judgment.

was conveyed to the married couple in both of their names, the Property was held by Brobst Sr. and Ruth as tenants by the entireties with a right of survivorship. Brobst Sr. and Ruth had one son, Defendant William Brobst, Jr. ("Brobst Jr."). Ruth also had a son from a previous marriage, a severely disabled child with Cerebral Palsy, Neil Brobst ("Neil"), who Defendants repeatedly characterize as Plaintiff's son although Plaintiff denies he is the biological or legal father of Neil. In 1984, Plaintiff left Ruth to live with his girlfriend and vacated the marital residence, thereafter allowing Ruth full use of the Property until her death. Plaintiff returned to the Property for occasional visits but he never lived on the Property again.

At some point between 1985-1986, the Defendants Brobst Jr. and his wife Roxanne Brobst sought Plaintiff's permission to purchase a trailer and live on the Property with Ruth and Neil. The Plaintiff granted his permission and since that time the Defendants have occupied the Property. The trailer home was given a separate mailing address of 122 N. Kemp Road and was separately assessed for real estate tax purposes. Defendants maintain that they paid all taxes for 122 N. Kemp Road and 1/3 of the taxes on 118 N. Kemp Road by request of Plaintiff. The Defendants never paid any rent to Plaintiff for their occupancy of the Property and claim that Plaintiff told them they could remain for life and take ownership of the land if they cared for the land, Ruth, and Neil.

Ruth died on December 21, 2011, survived by Plaintiff, Defendant Brobst, Jr. and Neil. In her Will, Ruth purportedly devised the land to Defendants subject to a life estate to Neil. Plaintiff allowed Neil to remain on the Property until his death in February 2015. Thereafter, Plaintiff served a Notice to Vacate on the Defendants on February 18, 2015 followed by a second Notice to Vacate on April 1, 2015. When the Defendants refused to vacate the Property, Plaintiff filed a Complaint in Ejectment on June 1, 2015. Defendants filed an Answer with New Matter,

Counterclaims and Affirmative Defenses. After several discovery issues were resolved, oral argument on the Parties' Cross Motions for Summary Judgment was held on June 6, 2016. This Court entered an Order on June 22, 2016 granting Plaintiff's Motion for Summary Judgment, dismissing Defendants' Counterclaims with prejudice and awarding possession of 118 N. Kemp Road to Plaintiff. Defendants filed a timely appeal on July 20, 2016 followed by a Concise Statement of Matters Complained of on Appeal pursuant to an order of the Court on August 15, 2015.

### Discussion

In order for Plaintiff to claim possession of the Property and eject Defendants he must prove ownership of the Property. Plaintiff argues, and this Court agrees, that as the Property was purchased and deeded to both Plaintiff and Ruth as husband and wife and held in both their names until Ruth's death, the Property was held by them as tenants by the entirety. See *Madden v. Gosztonyi Savings & Trust Co.*, 200 A. 624, 628 (Pa. 1938) (under Pennsylvania law "where property is held in the names of husband and wife they hold it by entirety"). As such, there is a right of survivorship. *Id.* Therefore, as Plaintiff notes, when Ruth died Plaintiff became seized with sole ownership of the Property, even though Ruth attempted to devise ownership of the Property in her last Will and Testament to Defendants. Ruth clearly lacked authority to unilaterally transfer ownership to the Defendants as "the whole estate continues in the survivor as it would continue in a corporation after the death of one of the corporators." *Berhalter v. Berhalter*, 315 Pa. 225 (1934). "One of the parties cannot destroy the incidents of the entirety by any act of his or hers." *Id.*

The Defendants claim that Plaintiff's 30 year estrangement and abandonment of Ruth dissolved his interest in the Property by severing the tenancy by the entirety through an implied mutual agreement. Defendants argue that Plaintiff divested himself of his interest by abandoning the marital estate with a clear intent not to return and cites the case of *Clingerman v. Sadwoski*, 513 Pa. 179 (1986) in support of this idea. However, *Clingerman* says nothing about dissolution by abandonment and neither do any of the other myriad cases or concurring opinions submitted as majority holdings cited by counsel for Defendants.

Under Pennsylvania law, tenancy by the entirety can be extinguished by an implied agreement to partition such as recognized in *Berhalter v. Berhalter*, 315 Pa. 225 (1934). In *Berhalter*, wife and husband owned a bank account held as tenants by entirety. *Id.* The Court held that when wife withdrew almost the entire amount in savings for her own exclusive use that her action was tantamount to an offer to destroy the entirety estate which was accepted by her husband when he sued for relief. *Id.* Thus under *Berhalter*, in order to destroy the estate, one spouse must violate the entirety agreement by taking property for that spouse's exclusive use, which thus deprives the other party of any use thereof or title thereto and the innocent spouse must request a legal division of assets. *Id.* This principle is further expounded upon in *Backus v. Backus*, 464 Pa. 380 (1975) where the Court held "it is clear that it is only the party who is excluded from the exercise or enjoyment of the rights inherent in an entirety estate who can sue in equity to enforce his interest" and "where one spouse appropriates an entirety estate and the other spouse institutes an action to destroy entirety estate, there is a revocation of the estate, by virtue of the fiction that such appropriation is an offer of an agreement to destroy the estate which the other spouse accepts by instituting the action."



Such is not the case here. Plaintiff never excluded Ruth from the Property, never interfered with her enjoyment or use of the Property, and did not misappropriate the Property. Therefore, there was no revocation of the estate held by entireties by the legal fiction of an appropriation being an offer of an agreement to destroy the estate. There was no revocation, so there could be no acceptance of that offer of revocation.

It is also worth noting that in the 30 years that Plaintiff and Ruth were separated but remained legally married that neither party filed for divorce nor did the couple enter into any kind of formal separation or Property distribution agreement of any kind. Therefore, the Property remained held as tenants by the entireties and thus, when Ruth passed away, Plaintiff became the sole owner in fee simple by right of survivorship. Plaintiff's allowing Defendants to remain on the land is therefore best characterized as a revocable gratuitous license which he has recently decided to revoke by ejecting Defendants.

Defendants argue that they still have an interest in the Property, notwithstanding Plaintiff's fee simple interest, by way of constructive trust. Defendants claim that the time and money put into the Property, along with the care provided to Ruth and Neil until their deaths, amounts to hundreds of thousands of dollars and that it would be unjust for Plaintiff to eject them from the Property. They ask for a constructive trust to be placed upon the Property equal to the value of services and monies they provided.

To support the creation of this trust, defense counsel urges the Court to rely exclusively on the case of *In re Estate of Knappenberger*, 100814 PASUP, 182 EDA 2014 (Pa. Super. 2014). The Court notes, however, that *Knappenberger* is an unpublished non-precedential opinion, and, therefore may not be relied upon by this Court upon consideration of available, reliable precedent, it is clear that there is no basis for imposing a constructive trust here.

A constructive trust is “a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.” *City of Philadelphia v. Heinel Motors*, 16 A.2d 761, 765 (Pa. Super. 1940) (quoting Restatement (First) of the Law of Trusts, § 1(e)). The necessity for such a trust may arise from circumstances evidencing fraud, duress, undue influence or mistake. *Hercules v. Jones*, 609 A.2d 837, 841 (Pa. Super. 1992). The controlling factor in determining whether a constructive trust should be imposed is whether it is necessary to prevent unjust enrichment. *Id.* In the instance case, Defendants have provided no evidence of fraud, duress, undue influence or mistake. Furthermore, Defendants have not supported the claim that Plaintiff will be unjustly enriched by keeping ownership of the land. Defendants have lived rent free on Plaintiff’s Property for 30 years, paying only the taxes on their trailer and 1/3 of the Property taxes. Defendants also did not materially or substantially alter the land in any way that would increase its value. Defendants did not build a home, they merely parked their trailer next to Ruth’s house. Defendants have not demonstrated any circumstances which would support imposition of a constructive trust.

Defendants next assert that the record was not postured to support Plaintiff’s Motion for Summary Judgment. Summary Judgment is allowed under Pa. R.C.P. 1035.2 when, “after the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law 1) whenever there is no genuine issue of material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or 2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party

who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury". Mindful of such provisions, it is clear to this Court that Plaintiff's ownership and right of possession of the Property may be conclusively determined from admitted facts from the pleadings. Defendants have not produced evidence of facts essential to their counterclaims or affirmative defenses which would require any issues to be submitted to a jury. The only additional evidence Defendants seek to present is in support of an oral contract which would be barred by the Statute of Frauds as an alleged oral conveyance/contract to claim an interest in the Property. *See* 33 P.S. §1.

Defendants next argue that the Court failed to consider Defendants' claims against Plaintiff and the Property under the Doctrine of Necessities. 23 Pa. C.S.A. §4102 holds that "in all cases where debts are contracted for necessities by either spouse for the support and maintenance of the family, it shall be lawful for the creditor in this case to institute suit against the husband and wife for the price of such necessities and, after obtaining a judgment, have an execution against the spouse contracting the debt alone; and, if no property of that spouse is found, execution may be levied upon and satisfied out of the separate property of the other spouse." In the instant case Defendants have set forth no evidence that any claim was made against Ruth or her estate, and, regardless, such a claim would not affect title to real estate and Defendants cite no legal authority to support such claim.

Finally, with some redundance, Defendants assert, without any legal authority, that even if they are not beneficiaries of an interest in the estate by a constructive trust, they should nevertheless be allowed to remain on the land as an equitable remedy and raise several Affirmative Defenses. Underlying their equitable claim and defenses is their belief that it is

unfair that they lived on the land for 30 years, maintained the Property and cared for Ruth and her son and are now being denied the benefit of any ownership interest in the Property. Before addressing the defenses in turn, this Court again notes that Defendants are ignoring the fact that they lived rent free on the Property for 30 years only by the allowance of Plaintiff and Ruth.

Defendants first assert the affirmative defense of estoppel. Equitable estoppel is a doctrine that prevents one from doing an act differently than the manner in which another was induced by word or deed to expect. *Novelty Knitting Mills, Inc. v. Siskind*, 500 Pa. 432 (1983). A doctrine sounding in equity, equitable estoppel recognizes that an informal promise implied by one's words, deeds or representations which leads another to rely justifiably thereon to his own injury or detriment, may be enforced in equity. *Id.* In the instant case Defendants allege that Plaintiff's words and actions lead them to believe that they would be able to live on the Property for the rest of their lives and take ownership of the Property. They claim that an oral promise or representation was made such that if Defendants cared for Ruth and her disabled son, they could live on the Property and take it as their own. Even if such a promise or representation was spoken and relied upon, such reliance was a benefit, not a detriment as they received 30 years of free use and enjoyment of the Property.

Next, Defendants assert the affirmative defense of laches. A defendant raising laches must show "that because of delay in enforcing a right, some change has occurred to the prejudice of the defendant, which makes inequitable the enforcement of the plaintiff's claim." *Mariner v. Rohana*, 371 Pa. 615 (1952). Defendants claim that Plaintiff waited an unreasonable length of time to assert his claim of ownership to the land and they innocently assert that they have suffered prejudice as a result of his delay. When Ruth died in 2011, Plaintiff became the sole owner of the Property by right of survivorship by the deed of conveyance recorded in 1971.

There was no requirement that he assert ownership as he was and remained the legal owner of the Property. Defendants were not prejudiced as, in the meantime, they continued to live on the land rent free as they had for the past several decades. Plaintiff's waiting to eject Defendants until after Neil's death did not unduly prejudice the Defendants in any cognizable way.

Defendants urge the affirmative defense of unclean hands. The doctrine of unclean hands allows a court to "deprive a party of equitable relief where, to the detriment of the other party, the party applying for such relief is guilty of bad conduct relating to the matter at issue. *Belleville v. David Cutler Group*, 118 A.3d 1184 (Pa. Commw. 2015). The doctrine of unclean hands requires that one seeking equity act fairly and without fraud or deceit as to the controversy in issue. *Id.* The record bears no evidence that either party has engaged in improper or unfair conduct. The Court can conceive of no fraud or deceit whereby Plaintiff claims rights in property which he already owned in fee simple absolute.

Next, Defendants assert the affirmative defense of license. A license in respect to real estate is defined to be an authority to do a particular act or series of acts on another's land without possessing any estate therein. *In re Shipley's Estate*, 45 Pa. Super. 550 (1910). "A mere license to live upon land, and to do certain acts thereon, may be granted without creating the relation of landlord and tenant, or giving any other rights to the occupant than those conceded or granted by the license . . ." *Id.* (citing *Callen v. Hilty*, 14 Pa. 286 (1850)). While the Court believes that Plaintiff granted permission for Defendants to live on his Property, a license does not create any possessory interest in the land and it is clear that Plaintiff has properly revoked any such permission as may have been granted.

Consent is another of Defendants' theories of defense to Plaintiff's claim. Although Plaintiff and Ruth consented to Defendants' moving onto the Property, Plaintiff chose to revoke

his consent after the deaths of Ruth and Neil. Plaintiff does not claim that the Defendants entered as trespassers without consent. Rather, he has asserted his right to revoke such consent and he asserted his right to possess his property.

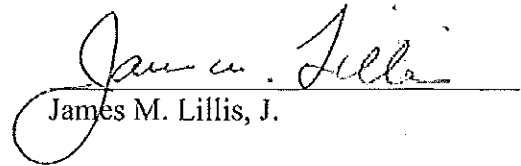
Defendants next assert payment as a defense. Under Pa. R.C.P. 1030 payment is an affirmative defense and as such must be affirmatively pleaded and proved. *Schmidt v. Paul*, 377 Pa. 377 (1954). Defendants have not paid Plaintiff for the land itself nor did they pay any rent while living on the Property. Defendants merely paid the taxes on their trailer and 1/3 of the Property taxes on the land. Arguably, the partial Property tax payments could be considered a form of rent but that payment does not equate to purchasing the Property and does not create any ownership interest in the Property. Furthermore, Defendants do not set forth the price which such "payment" purportedly satisfied.

Finally, Defendants assert the affirmative defense of fraud. However, Defendants do not aver what if any actions on the part of the Plaintiff constituted the fraud alleged as their defense. Bare allegations of fraud are not a defense. *Clayton Title & Trust Co. v. National Wiping Cloth Co.*, 92 Pa.Super. 146 (1927). Bare averments of fraud unsupported by a statement of the facts relied on to constitute the fraud are not sufficient. *Id.* The facts and circumstances constituting the alleged fraud must be stated in detail, so that the court may determine whether, if proved as alleged, they would amount to a fraud and constitute a defense to the action. *Id.* As Defendants have not provided any specific averments of fraud, let alone any evidence of fraud, such a bald claim must fail.

There being no issues of material fact to call into question Plaintiff's claim for possession of the Property as legal owner of the Property by right of survivorship as a matter of law, this Court submits that it properly entered an order granting Plaintiff's Motion for Summary

Judgment and denying Defendants' Motion for Partial Summary Judgment, and respectfully requests that Defendants' Appeal be denied.

BY THE COURT:

  
James M. Lillis, J.

**Certified Distribution:**

Prothonotary  
David W. Crossett, Esq.  
Joseph A. O'Keefe, Esq.