

decide not to dismiss the action outright the Defendant petitions the Court to stay the case. This is the Court's Decision after review of the submissions by both parties.

THE FACTS

Barry S. Bernstein (hereinafter "Decedent"), died on October 4, 2007. Plaintiff Carol B. Lovett (hereinafter "Plaintiff"), his daughter, was appointed Executrix of Decedent's Estate by the Registrar of Wills of New Castle County on November 8, 2007. At the time of Decedent's death, Decedent was a one-third owner as a tenant in common of a condominium located at 675 Ocean Avenue, Apt. 9j, Long Branch, New Jersey (hereinafter "the Property"). The other two-thirds interest in the Property was and is owned by the Plaintiff. By the terms of the Codicil to his Will Decedent devised his one-third interest in the Property to his widow, Ocie Bernstein (hereinafter "Defendant"). As such, the property became owned one-third by Defendant and two-thirds by Plaintiff, as tenants in common.

At the time of Decedent's death, the property was subject to a first mortgage payable to Washington Bank (now Chase Bank) in the amount of \$109,649.68 (hereinafter "the Mortgage"). Plaintiff's Complaint alleges that Defendant has refused to pay her one-third share of the carrying costs of the Property, including payments on the Mortgage, condominium fees, tax escrow payments, insurance and utilities to date. Plaintiff has had to bear such charges in full and is seeking contribution from the Defendant for one-third of the overall expenses paid to date plus interest at the legal rate from November 1, 2007.

The record also reflects that Decedent's Estate was insufficient to pay his debts and the Estate's administration expenses. Consequently, on or about January, 2008, Plaintiff filed a *pro se* Petition "to Sell Real Estate to Pay Debts" in the Court of Chancery. The parties stipulated to dismiss the January, 2008 Petition to "Sell Real Estate to Pay Debts" on May 13, 2008, without prejudice.

Thereafter, on November 11, 2008, Plaintiff filed the equivalent of a petition to sell real estate to pay debts in the New Jersey Superior Court, Probate Part, requesting that she be allowed to sell the Property and apply one-third of the net proceeds of the sale to payment of the debts and expenses of the Estate. On March 5, 2009, the Superior Court of New Jersey, Chancery Division entered an order granting Plaintiff, as Executrix, to list the Property for sale and to sell the Property. The Superior Court of New Jersey held that the proceeds of sale were to be held in an interest-bearing escrow account pending a written agreement of the parties as to the disposition of those proceeds or an order of the Delaware Court of Chancery directing the disposition of those funds. The Property has not been sold to date.

Meanwhile, on April 30, 2008, Defendant also filed a Petition for Elective Share in the Court of Chancery seeking one-third interest in her deceased husband's Estate pursuant to 12 *Del. C.* § 903(a). Following a trial, Master Kim Ayvazian issued a Draft Master's Report on October 7, 2009. In her Report, Master Ayvazian concludes that the calculation of Defendant's elective share is the amount equal to the balance remaining after the net proceeds from the sale of Defendant's one-third

interest in the Property subject to payment of the debts of Decedent's estate. Following the issuance of the Master's Report, the parties have submitted exceptions but the case has yet to be heard by a Chancellor or Vice Chancellor.

FAILURE TO STATE A CLAIM

When deciding a motion to dismiss a complaint for failure to state a claim, made pursuant to Court of Common Pleas Civil Rule 12(b)(6), the Court should not dismiss the complaint unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances. *Jackson v. Fleming*, 2005 WL 2090773 at *1 (Del.Super.2005). If the plaintiff may recover, the motion must be denied. *Spence v. Funk*, Del.Supr., 396 A.2d 967, 968 (1978); *Diamond State Telephone Co. v. University of Delaware*, Del.Supr., 269 A.2d 52, 58 (1970). As such, a complaint attacked by a motion to dismiss for failure to state a claim will not be dismissed unless it is clearly without merit, which may be either as a matter of law or of fact. *Diamond State Telephone Co.*, 269 A.2d at 58. Vagueness or lack of detail in the pleaded claim are not sufficient grounds alone to dismiss a complaint for failure to state a claim. *Id.* The Delaware Court of Chancery has held that, “[a] tenant in common who pays the debts or obligations for the benefit of joint property is entitled to contribution from the other tenant in common for his proportionate part of the amount paid. *In re Real Estate of Holmes*, 2000 WL 1800127 at *4 (Del.Ch.2000) (citing *Whitehead v. Whitehead*, Del. Orph., 181 A. 684 (1935); *In re Manning*, Del. Ch., C.M. No. 4666, Berger, V.C., Letter Op. at 6 (June 18, 1986)). As such, applying the controlling standard to the

subject motion to dismiss, a review of Plaintiff's Complaint reveals that she has stated at least one potentially viable claim (if proven) and, therefore, Plaintiff's Complaint is not subject to dismissal in its entirety.

SUBJECT MATTER JURISDICTION

Defendant's Motion to Dismiss or Stay asserts that this Court lacks jurisdiction over the subject matter of the dispute. Specifically, Defendant argues that the right to contribution is an equitable claim, and as such, must be pursued in the Court of Chancery. Alternatively, Defendant argues that this Court should stay the action pending a determination by the Court of Chancery. The Court finds after reviewing the facts in the record that a grant of the Motion to Stay is appropriate at this time.

The doctrine of contribution is founded upon principles of equity and natural justice. *20 Am. Jur. 2d "Cotenancy and Joint Ownership" § 69 (2010) (citing 18 Am. Jur. 2d Contribution § 6)*. As such, a court of equity is equipped to handle the issues in this case. The Delaware Court of Chancery exercises subject matter jurisdiction over a case where there is: "(1) the invocation of an equitable right; (2) a request for an equitable remedy when there is no adequate remedy at law; or (3) a statutory delegation of subject matter jurisdiction." *Pitts v. City of Wilmington*, 2009 WL 1204492, at *5 (Del. Ch. Apr. 27, 2009). Furthermore, under the clean-up doctrine, "if a controversy is vested with equitable features which would support Chancery jurisdiction of at least part of the controversy, then the Chancellor has discretion to

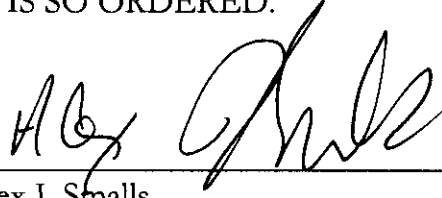
resolve the remaining portions of the controversy as well.” *Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 149 (Del. Ch.1978).

In this case, Plaintiff filed a petition to sell the Property in the Court of Chancery. Subsequently, that petition was dismissed via stipulation. Thereafter, Plaintiff filed a petition to sell the Property in the New Jersey Superior Court, Probate Part. The New Jersey Probate Court granted the petition to sell and directed that Defendant’s share (one-third of the proceeds of the sale) would be held in escrow pending further order of the Delaware Court of Chancery. The Property remains unsold as of now. Plaintiff also filed a Petition for Elective Share in the Delaware Court of Chancery. Master Ayvazian’s Report was issued in March, 2009 and the parties have since filed briefs. The matter is on-going at present.

The Court finds that ultimately, the Court of Chancery would be able to rule on the issue of contribution following the sale of the Property. At present, neither the action in the Court of Chancery, nor the action in New Jersey Probate Court is at an end. In fact, the New Jersey Probate Court matter has for all intents and purposes been stayed pending the sale of the home and the conclusion of the Delaware Court of Chancery matter. Following the sale of the property, the issue of contribution may be easily be dealt with by either of these courts; therefore, it is appropriate to stay these proceedings pending resolution in the Delaware Court of Chancery and the New Jersey Superior Court. Should the matter not reach a resolution in either of these venues, the matter may once again be reopened in this Court.

Accordingly, these matters are stayed until further order of the Court.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Alex J. Smalls", written over a horizontal line.

Alex J. Smalls
Chief Judge

Lovett-OP July 2010