

## **Judicial Partition of Real Property** **by Dale S. Alberstone, Esq.**

Apartment buildings are often owned jointly by two or more individuals as tenants-in-common. Upon acquisition, the parties usually have harmonious ideas for the investment. Over time, however, disputes may arise concerning the management of the building, the desirability of refinancing the property, strategy for its sale or exchange, etc. Sometimes one co-owner believes that another is embezzling funds or otherwise cheating in the operation of the building. One owner may want to sell, whereas the other may not. Income tax consequences of continued ownership may also create problems between the owners.

If such disputes cannot be amicably resolved by the co-owners, the Superior Court has jurisdiction to offer the parties relief in connection with the sale or division of the property. The procedure is technically known as “partition,” which is usually followed by a judicial accounting.

A partition of real property means that the Superior Court will supervise its physical division, or alternatively its sale, and thereafter order an allocation of any proceeds through appropriate accounting procedures. The Superior Court’s jurisdiction is conferred by one of the co-owners filing a “Complaint for Partition” which names all other co-owners as defendants. A partner in a partnership may also file an action for partition unless it is forbidden by the partnership agreement. (An action for partition of community property between spouses may *not* be commenced under the usual partition statutes. (See: C.C.P. Section 872.210.)

To initiate a partition proceeding, one co-owner files his Complaint setting forth 1) a description of the property which is the subject of the action, 2) all interests that all co-owners have in the property, 3) a prayer for the partition of the interest therein, and 4) an allegation of facts justifying why a partition is appropriate. The Complaint may seek the partition of both real and personal property in the same action.

Immediately upon filing the Complaint, the plaintiff must record a lis pendens with the county recorder so as to give notice to all others who deal with the property or have liens against it that a partition action is underway. If the notice is not recorded, the court may, upon its own motion, order the plaintiff to record the notice. The notice is particularly important so that creditors, such as lenders, may know that important matters affecting the property’s title are involved.

The plaintiff will then serve the partition Complaint on all other owners of record. Each other owner has 30 days after receipt of the Complaint to file an Answer setting forth the interest that the other co-owners claim in the property, all facts tending to controvert the allegations of the Complaint which the defendants do not wish to be taken as true, and, if the defendants wish to seek a sale of the property, an allegation of facts setting forth why that is appropriate.

During the months preceding the trial of the action, each party may engage in such discovery as is customarily available to other types of litigation. Discovery consists of depositions, interrogatories, production of documents, production of accountings, production of bills and invoices, production of receipt books, etc. The purpose of discovery is to assist each party to determine exactly what interests the other parties claim, and to also determine the income and expenses of the property throughout the years of ownership. It also permits an owner to determine if any other owner embezzled or misappropriated rents or money generated by the apartment building.

If one party believes another party is embezzling funds or otherwise mismanaging the property, he may seek immediate relief from the court in the nature of a temporary restraining order. The court has the power to issue a TRO to prevent the property from being damaged, destroyed, embezzled or mismanaged. If any party violates the court's orders, that party can be fined or incarcerated.

### **Trial and Judgment**

At the time of trial, the court is required to determine whether the plaintiff, or any of the other parties, has a right to partition. As a general rule, the court will order the partition of the property upon the application of any co-owner unless the co-owner had previously signed a waiver of his rights to partition. Except in cases of partnership property or property owned pursuant to a Tenancy in Common agreement, it is rare that a co-owner would have signed a waiver. On the other hand, well-drafted partnership and TIC agreements almost always provide for a waiver of this right.

If the court finds that the plaintiff is entitled to partition, it will render at trial an interlocutory judgment which determines the interests of the parties and orders the sale or other distribution of the property. The court also has the power to appoint a referee (i.e. an independent third party) to divide or sell the property as ordered by the court.

In some instances, the court may feel that a division of the property would be more equitable than a sale of it. For example, if the parties own two side-by-side ten-unit buildings, the court may vest title of one in the first co-owner, and the other in the second co-owner. Or, if two adjacent vacant lots are owned by the parties, each may be awarded one of the two parcels.

If physical division is not practical, as in the case when there is one building having several owners, then the court will order the sale and distribution of the profits upon a subsequent accounting. The sale may either be public auction or private offer solicitation, depending on which method the court feels would be more fair and just.

At the discretion of the court, the sale may be for all cash, or on credit. The court may also approve and prescribe the terms of security to be taken upon the sale, including the manner in which title to the security is to be taken. The parties themselves may bid at the sale and attempt to purchase a 100% interest in the property.

### **Proceeds Following Sale**

The proceeds of the sale are applied in the following order: First, to the payment of the expense of sale; second, to the payment of the costs of partition (including attorneys' fees paid by a party for the common benefit of all); and then to the payment of liens on the property in order of priority, except liens which, under the terms of the sale, are to remain on the property. Thereafter, the court will order the distribution of the balance of the residue among the parties in proportion to their share as determined by the court.

### **Three Types of Partition**

There are three judicially recognized types of partition, namely: partition by division, partition by sale and partition by appraisal.

Partition by division, sometimes referred to as "partition in kind," is favored since it does not compel a person to sell property against his will or disturb an existing form of inheritance. In general, forced sales are strongly disfavored in California and the burden of proof to compel a conveyance rests with the party endeavoring to force a sale. If the Court is able to partition the property by physical division, it will do so, rather than order its sale.

There are two types of evidence which typically justify a partition by sale rather than by division. The first is evidence that the property is so situated that a division into sub-parcels of equal value cannot be made. (Usually that is the case with an apartment building. There is no practical way to physically sever a tenement.) In order to meet this test, the party desiring a partition sale must show that the land cannot be divided equally.

The second type of evidence which supports a partition sale rather than division in kind is economic evidence to the effect that, due to the particular situation of the land, the division of the land would substantially diminish the value of each party's interest. (Attorneys reading this article may telephone me for a further discussion of the preference of partition by sale and the leading 1982 Court of Appeal decision setting forth the parameters.)

A middle ground between partition by division and partition by outright sale is partition by appraisal. This latter method empowers one party, upon court approval, to purchase the other party's interest at its market value.

### **Concluding Remarks**

An action for partition of real property is generally a remedy of last resort. It is almost always allowed by the court and, since judgment of one form or another is virtually assured, the parties should do their best to negotiate their own settlement without filing a partition action.

One non-judicial method often used for resolution is a procedure whereby the co-owners each appoint an appraiser to value the property. Through a variety of techniques, the appraisals may be averaged or weighted so as to determine a fair value. Co-owners may then have the right to buy out any other co-owner based on the appraised value, or else

have the property placed on the market for sale at that value.

Only in the event that the parties absolutely cannot agree should they consider filing a Complaint for partition. Nevertheless, the court remains ready, willing and able to assist if partition litigation is necessary.

*Dale Alberstone is a prominent real estate attorney who has practiced real property and business law in Century City for the past 32 years. He has been appointed to periodically serve as a judge pro tem of the Los Angeles Superior Court and is a former arbitrator for the American Arbitration Association. He also testifies as an expert witness for and against other attorneys who have been accused of legal malpractice.*

*Mr. Alberstone has been awarded an AV rating from Mardindale-Hubbell. An AV rating, registered through Reed Elsevier, reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill and integrity.*

*The foregoing discussion is intended as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.*

*Address correspondence to Dale S. Alberstone, Esq., ALBERSTONE & ALBERSTONE, 1801 Avenue of the Stars, Suite 600, Los Angeles, California 90067. Phone: (310) 277-7300.*