

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-018896

08/04/2008

HONORABLE GLENN M. DAVIS

CLERK OF THE COURT
J. Rutledge
Deputy

SLAVICA RISTIC

DON C FLETCHER

v.

CVETANKA PETROVIC

RORY L WHIPPLE

RULING

The Court took this matter under advisement, following trial. Based upon the matters presented, including the testimony of the witnesses and the admitted exhibits, the Court makes the following findings and orders.

The parties entered into an agreement that Plaintiff would sell her house to Defendant. The sale would be accomplished by Defendant taking a no-money down mortgage on the property. Plaintiff agreed to pay all closing costs at the time of sale, so that Defendant would not have to make any out-of-pocket payment at the time of sale.

The parties further agreed that Plaintiff would live in the house, pay all mortgage payments, fees and costs, until such time that the house was sold. There was either a direct or implied agreement that the house would be sold at a time agreeable to the parties or within the five-year term of the mortgage taken by Defendant to purchase the house. At the time of sale of the house, the net gain (or loss) on the house would be divided equally between the parties.

The parties chose not to memorialize the agreement in writing, but went forward with the sale of the property and the Plaintiff remained in the house and made payments. Defendant changed her mind after the purchase had already been finalized. The change of mind may have been triggered by the Plaintiff demanding some additional terms including that the parties take

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-018896

08/04/2008

out insurance on each other, that they set up a joint reserve account, and that they would split the closing costs.

The Court is unable to find by a preponderance of the evidence that the terms, as to the insurance, reserve account and closing costs, were agreed to as part of the agreement. In fact, the contract for sale specifically provides that the closing costs were to be borne by Plaintiff. As to the insurance and the reserve account terms, there is conflicting circumstantial evidence.

The Court does find that there was an agreement that Plaintiff would stay in the house until it was sold, cover the expenses and that the profit or loss on the house would be split. That finding is based not just on the testimony of the Plaintiff, which the Court found credible, but also upon the corroborating conduct and communications between the parties. Due to the inconsistencies and unexplained aspects of the Defendant's testimony, the Court finds her testimony, that this was an outright sale with no agreement to split proceeds, less than credible.

Whether this agreement is considered a partnership agreement or a real estate agreement that was partly performed or based upon an equitable unjust enrichment constructive trust theory, the Statute of Frauds does not preclude its enforcement. Under any of those theories the Court would reach the same conclusion about what should be ordered. Therefore,

IT IS ORDERED finding in favor of the Plaintiff.

IT IS FURTHER ORDERED that the subject property shall be sold and the proceeds divided. At the time of sale, prior to division of the proceeds, the Defendant shall be paid for any amounts she paid on the mortgage or to the homeowner's association. The net remaining, after payment of the costs of sale and other necessary expenses, shall be divided equally between the parties.

The parties may agree on how the property will be placed on the market and sold. If the parties are unable to agree, they may seek direction from the Court.

If the parties are unable to agree on a selling price, the property shall be appraised by a neutral appraiser, selected by the parties or named by the Court, if the parties are unable to agree. The costs of the appraisal shall be borne equally by both parties. The property shall be sold at a price either agreed to by the parties or, if the parties are unable to agree, shall be sold at a price offered that is equal to or more than the appraised value, if that offer is acceptable to at least one of the parties.

Pursuant to the agreement of the parties, Plaintiff shall continue to reside in the house and make all payments for mortgage, fees and other expenses related to the property, until it is sold.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-018896

08/04/2008

Defendant will continue to take the tax deduction for the mortgage interest as agreed to by the parties.

On the issue of attorneys' fees, the Court, in its discretion, finds that each party should bear her own attorneys' fees. The Court makes this finding in part based upon the relative position of the parties, the nature of the matter, the fact that the Plaintiff did not prevail on every issue and the fact that imposition of Plaintiff's fees would impose a substantial hardship on the Defendant.

Most important to the decision not to award fees against Defendant is that this litigation would not have ensued had it been fully memorialized in writing. The Court finds that the agreement was primarily initiated by Plaintiff and that Plaintiff had enough business background to have known of the importance of putting the agreement in writing. She was the more experienced party to the transaction and the fault for not putting it in writing falls primarily on her.

Based upon the foregoing,

IT IS ORDERED that each party shall bear her own attorneys' fees incurred in this action.

IT IS FURTHER ORDERED that taxable costs shall be awarded in favor of the Plaintiff and against the Defendant.