**COURT OF CHANCERY** OF THE STATE OF DELAWARE

KIM E. AYVAZIAN MASTER IN CHANCERY

CHANCERY COURTHOUSE 34 The Circle GEORGETOWN, DELAWARE 19947 AND NEW CASTLE COUNTY COURTHOUSE 500 NORTH KING STREET, SUITE 11400 WILMINGTON, DELAWARE 19980-3734

December 19, 2012

Michael F. McGroerty, Esquire 110 North Pine Street Georgetown, DE 19947

Dean A. Campbell, Esquire 401 North Bedford Street P.O. Box 568 Georgetown, DE 19947

RE:

Elizabeth T. Burkett vs. Jason L. Ward

Civil Action No. 7914-MA

Dear Counsel:

Petitioner Elizabeth T. Burkett filed a petition for partition under 25 Del. C. § 721, seeking partition of a mobile home with improvements located on Lot 525 Pot Nets Bayside, Sussex County, Delaware. Burkett and Respondent Jason L. Ward own the mobile home as tenants in common. Burkett alleges that she paid \$12,345 for the mobile home and an additional \$10,000 to improve the property, and that Ward has locked her out of the property. Ward filed an answer and an "alternative counterclaim." Ward alleges as an affirmative defense that Burkett waived all rights to the property when she abandoned it in 2010 and, therefore, he seeks to have Burkett's petition dismissed. In his counterclaim, Ward alleges that he contributed equally to the purchase and maintenance of the mobile home from 1999 until 2010, when Burkett abandoned the property leaving

all maintenance, carrying costs, and property taxes to Ward for payment. If partition is ordered, Ward seeks an order decreeing distribution in his favor to compensate him for his expenditures related to the mobile home.

Pending before me is Burkett's motion to strike Ward's "alternative counterclaim" because it violates Chancery Court Rule 9(g). According to Burkett, the counterclaim claims special damages but they are not specifically stated, and Ward has failed to identify the maintenance or carrying costs he claims to have paid. For the reasons that follow in this draft report, I recommend that the motion to strike be denied.

Ward has responded to the motion to strike, arguing that his claim is not for special damages, *i.e.*, damages that are the actual result of the injury complained of, citing *Pharmaceutical Product Development v. TVM Life Science Ventures, LLC*, 2011 WL 549163 (Del. Ch. Feb. 16, 2011), but rather his counterclaim goes to the heart of the distribution of proceeds following the partition sale. According to Ward, he is simply seeking an equitable distribution of the sale proceeds which recognizes his contributions to the property as exceeding those of Burkett.

"[E]quity courts have historical upheld the right of a tenant in common to seek partition of personal property." *JLF, Inc. v. NJE Aircraft Corp.*, 1988 WL 130641 (Del. Ch. Dec. 5, 1988) (citing *Carridin v. Carridin*, 1980 WL 10015 (Del. Ch. Jan. 31, 1980)). Burkett is seeking a court-ordered partition sale of the mobile home and the division of net sale proceeds between the parties under 25 *Del. C.* § 733. Under Section 733, a Court will, as a matter of equity, take into consideration improvements made by one cotenant and, to the extent those improvements have enhanced the value of the property, the

improving tenant will be compensated proportionally out of the proceeds of the sale. See

Wilson v. Lank, 107 A. 772, 773 (Del. Ch. 1919). In the counterclaim, Ward is, in effect,

claiming that he is entitled to a larger share of the proceeds because he paid Burkett's half

of the maintenance, carrying costs, and property taxes after Burkett abandoned the

property in 2010. What Ward is seeking is an accounting of the partition sale proceeds,

which often is incidental to a petition for partition. Carridin, mem. op. at \*3, supra. See

generally Chancery Court Rule 183(c)(11).

For the above reasons, therefore, I recommend that Burkett's motion to strike on

the ground that the counterclaim violates Chancery Court Rule 9(g) be denied.

Very truly yours,

/s/ Kim E. Ayvazian

Kim E. Ayvazian

Master In Chancery

KEA/kekz

cc: Re

Register in Chancery