

**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK**

*ScAm*

**PRESENT: HON. DANIEL MARTIN**  
**Acting Supreme Court Justice**

**REBECCA KARAN, ABRAHAM TRAVITSKY,  
DOROTHY CHERWIN and JOSEPH TRAVERS.**

**TRIAL/IAS, PART 38  
NASSAU COUNTY**

**Plaintiffs.**

**- against -**

**Sequence No.: 002 & 003  
Index No.: 005452/00**

**RUSSO REALTY CORP., MILTON BERLIN and  
RORY BURKEN.**

**Defendants.**

**RUSSO REALTY CORP.**

**Third-Party Plaintiff.**

**- against -**

**DESOTO REALTY CORP. And "JOHN DOE #1"  
To "JOHN DOE #10" inclusive, the last ten names  
being unknown to the third party plaintiff, the  
defendants last named in quotation marks being  
parties all of whom claim some right or interest  
in the premises as tenants or otherwise, said names  
being fictitious, their true names being unknown  
to the third party plaintiff.**

**Third-Party Defendants.**

**The following named papers have been read on this motion:**

	<b>Papers Numbered</b>
<b>Notice of Motion and Affidavits Annexed</b>	<b>X</b>
<b>Notice of Cross-Motion and Affidavits Annexed</b>	<b>X</b>
<b>Answering Affidavits</b>	<b>X</b>
<b>Replying Affidavits</b>	<b>X</b>

Motion by defendant Rory Burken for an order appointing a Receiver and directing the Receiver to conduct a sale of the premises which are the subject of this action is denied in its entirety. So much of the cross-motion by defendant and third party plaintiff Russo Realty Corp. as seeks an order pursuant to CPLR 3212 granting summary judgment on so much of its second counterclaim/cross-claim/third party claim as seeks a determination adjudging that defendant Rory Burken has no interest in the subject premises is granted, and it is declared that Rory

Burken has no ownership interest in the subject premises, and so much of the cross-motion as seeks an accounting and dismissal of Burken's counterclaim for a management fee is denied.

This is an action, *inter-alia*, for a partition and sale of real property located at 666 Lakeview Avenue, Rockville Centre, New York, which property was formerly owned by Seymour and Lucille Burken as tenants by the entirety. The main motion by defendant Rory Burken, who is the son of Seymour and Lucille Burken, for the appointment of a receiver was premised upon the nonpayment of rent by the current tenants. As Burken's deposition testimony indicates that the tenants have resumed paying rent to him and that a rental fund is now available for the payment of taxes and bills, the basis for the motion has been removed and it is denied as moot.

Cross-moving, Russo Realty Corp. (Russo) seeks a declaration that Rory Burken has no ownership interest in the premises, and seeks an accounting and dismissal of Burken's claim for management fees.

The facts necessary to render a determination on the ownership issue are not in dispute. Grid Realty Corp. purchased the fee interest of Seymour Burken in 1976 from the Trustee in Seymour Burken's bankruptcy proceeding. By mesne conveyances Seymour Burken's interest came to be held by defendant/third party plaintiff Russo Realty Corp. and third party defendant DeSoto Realty Corp. Lucille Burken transferred her interest to defendant Rory Burken in April of 1998. Lucille Burken died in May of 1998 and was survived by her husband, Seymour.

Defendant Russo contends that once Rory Burken's grantor died, the survivorship interest of Seymour Burken, her husband, ripened into a fee interest as a matter of law, and that, Seymour having transferred the property, such ripened interest adheres in his grantees. It is the position of defendant Rory Burken that the sale by both of his parents of the fee interests created a tenancy in common without a right of survivorship, so that his fee interest was not extinguished by his mother's death.

A tenancy by the entirety "confers on the surviving spouse a right to absolute ownership of the property upon the other spouse's death" (V.R.W., Inc. v. Klein, 68 N.Y.2d 560, 564). What makes the "right of survivorship unique and differentiates it from the right of survivorship inherent in an ordinary joint tenancy is that it remains fixed and cannot be destroyed without the consent of both spouses \* \* \* As long as the marriage remains legally intact, both parties continue to be seized of the whole, and the death of one merely results in the defeasance of the deceased spouse's coextensive interest in the property" (*supra*). While a divorce will, by operation of law, create a tenancy in common and destroy a right of survivorship, such survivorship right is not altered by a sale by one of the spouses, whether voluntary or involuntary (V.R.W., Inc. v. Klein, *supra*). Where one spouse conveys his or her ownership interest, the result is a "tenancy in common" with a right to shared possession in the new owner, and, notwithstanding the tenancy in common terminology, the right of survivorship remains fixed (V.R.W., Inc. v. Klein, *supra*). Had Seymour Burken predeceased his wife, her survivorship

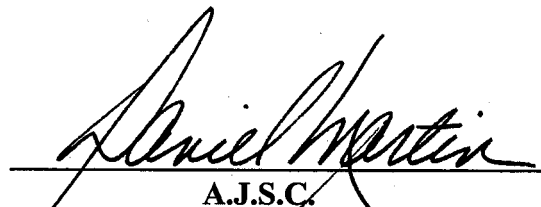
interest would have “ripened into a fee interest by operation of law” and the movant’s interest would have been extinguished (Schwab v. Krauss, 165 A.D.2d 214, 216).

Nor does the fact that both tenants by the entirety conveyed their interests alter the result. “The same rules must be applied when there are two conveyances, one by each of the tenants by the entirety, to different grantees. Each grantee takes a right to share possession and profits but, so far as the ultimate title is concerned, the right of each depends upon the order in which the grantors die” (Lawriw v. City of Rochester, 14 A.D.2d 13, 15, *affd.* 11 NY2d 759). In the present case, as the marriage remained intact (VRW v. Klein, *supra*) and the husband survived the wife, “his grantee became entitled to the whole fee” (Lawriw v. City of Rochester, *supra* at p 16).

As the ownership rights between the plaintiffs and defendant Russo and third party defendant DeSoto have not been determined, an accounting to determine profits, if any, is premature. Insofar as Russo seeks dismissal of Burken’s claim for management fees, he has offered no authority in support of his claim. It has been repeatedly held that “in order to obtain summary judgment, movant must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law ” (Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 967). As Russo has offered no authority indicating that it or any additional owners in fee are entitled to the management services of Rory Burken without compensation, that portion of the motion is denied.

So Ordered.

**Dated:** December 8, 2003

  
A.J.S.C.

**ENTERED**

DEC 16 2003

**NASSAU COUNTY  
COUNTY CLERK’S OFFICE**