STATE OF IDAHO)
County of KOOTENAI)ss
FILED March 24, 2023
AT 3:30 O'Clock P. M
CLERK OF DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

RAYMOND A. FERNANDES,

Plaintiff,

vs.

BONNIE Y. MASSON,

Defendant.

Case No. **CV28-20-7760**

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNT II (OUSTER), AND GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO THE DEFENDANT'S COUNTERCLAIM FOR CONTRIBUTION PRIOR TO JUNE 5, 2020

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on cross motions for partial summary judgment brought by defendant Bonnie Y. Masson ("Ms. Masson") and plaintiff Raymond A. Fernandes ("Mr. Fernandes"). Mr. Fernandes and Ms. Masson are involved in a real property dispute following probate of the property located at 22304 S. Candlelight Drive, Worley, Idaho 83876 ("Subject Property"), which has a single-family residence on the lot, is located in Cave Bay of Lake Coeur d'Alene, and has rights to a boat slip, known as D-14, ("boat slip") which is "appurtenant to the Subject Property" and belongs to the "Cave Bay Community Services community docks". Am. V. Compl. ¶¶ 6-8; Answer to Am. V. Compl. and Countercl. ¶¶ 7-8.

Although Thelma J. Nelson's ("Ms. Nelson") will devised the Subject Property to her daughters, Ms. Masson and Patricia Marengo ("Ms. Marengo"), equally, Ms. Nelson conveyed her interest in the Subject Property to Ms. Masson and Ms. Marengo via a

quitclaim deed on October 15, 2008, retaining a life estate therein. Mem. in Supp. of Def.'s Mot. for Part. Summ. J. Pursuant to I.R.C.P. 56 at 4-5 ¶¶ 3-4 (citing Masson Decl. ¶ 4; Am. V. Compl. ¶ 10, Ex. A) ("Mem. in Supp. of Defs.' Mot. for Part. Summ. J."); Am. V. Compl. ¶¶ 9-10. Ms. Nelson passed away on November 26, 2008. *Id.* 4 ¶ 2 (citing Masson Decl. ¶ 3). Ms. Masson continued living on the Subject Property after Ms. Nelson's death and continues to reside there today. Am. V. Compl. ¶ 17; Answer to Am. V. Compl. ¶ 17. Ms. Marengo passed away on October 29, 2019, and a probate of her estate was filed in Kootenai County, Idaho. Counter-Def.'s Mem. in Supp. of Mot. for Part. Summ. J. 2 (citing Am. V. Compl. ¶ 11; Answer to Am. V. Compl. ¶ 13; Fernandes Decl. ¶ 8). Ms. Marengo's will devised her interest in the Subject Property to her son, Mr. Fernandes. Am. V. Compl. ¶ 14. Counter-Defs.' Mem. in Supp. of Mot. for Part. Summ. J. 2 (citing Am. V. Compl. ¶ 13; Answer to Am. V. Compl. ¶ 13; Fernandes Decl. ¶ 8). Mr. Fernandes was appointed as Personal Representative ("PR") of Ms. Marengo's estate on January 6, 2020. *Id.* (citing Fernandes Dec. ¶ 10, Ex. A). Mr. Fernandes, in his capacity as PR of Ms. Marengo's estate, published formal notice to creditors in the Coeur d'Alene Press from January 31, 2020 for three consecutive weeks. *Id.* (citing Fernandes Decl. ¶ 11, Ex. B). Ms. Marengo's interest in the Subject Property was deeded to Mr. Fernandes on June 5, 2020. *Id.*

On December 16, 2020, Mr. Fernandes filed a Verified Complaint against Ms. Masson for (1) partition of the Subject Property, requesting the proceeds of the sale be split among Mr. Fernandes and Ms. Masson; (2) payment of rent for Ms. Masson's sole use of the Subject Property; (3) conversion for the sale of the boat slip; and (4) attorney's fees. On January 25, 2021, Ms. Masson filed an Answer to Verified Complaint. On November 16, 2021, after another hearing on summary judgment, this Court ordered that the Subject Property:

> be listed for sale immediately with Tye Scott, John L. Scott Real Estate, in Coeur d'Alene, with the proceeds of the sale, after payment of closing costs and realtor commissions, to be disbursed 40% to Plaintiff Raymond A. Fernandes, 40% to Defendant Bonnie Y. Masson, and 20% to the Court, with such 20% disbursed to the parties after questions of fact concerning the credits, offsets and advancements claimed by the parties have been resolved.

Order Granting Defendant's Motion for Partial Summary Judgment Pursuant to I.R.C.P. 56 as to Counts 1 and 2 and Denying as to Count 3 at 2. With respect to Count 2, the Court granted dismissal of the claim for payment of rent without prejudice and granted leave for Mr. Fernandes to move to amend his pleading to assert a claim for ouster. Ms. Masson filed an Amended Answer to Verified Complaint and Counterclaim on January 6, 2022. On January 10, 2022, this Court issued an order granting Mr. Fernandes' motion for leave to amend his complaint and granting Ms. Masson leave to amend her pleadings.

On January 12, 2022, Mr. Fernandes filed an Amended Verified Complaint, amending his complaint to include a claim of ouster. Am. V. Compl. ¶¶ 25-28. In addition to rent, he is seeking his one-half interest in Ms. Masson's sale of the boat slip, which she sold for approximately $25,000, or in the alternative for his one-half interest in the decrease in market value to the Subject Property as a result of the alleged conversion of the boat slip, plus twelve percent interest. Am. V. Compl. 5 ¶¶ 29-33, 7; Answer to Am. V. Compl. and Countercl. 4 ¶¶ 29-33. The conversion claim is not at issue in this motion. Ms. Masson is countersuing for contribution for "maintenance, care, and improvements, insurance, taxes, HOA fees, and other costs and expenses to which neither [Mr. Fernandes] nor Ms. Marengo contributed" from 2009 to present, totaling $43,527.58. Answer to Am. V. Compl. and Countercl. 3 ¶ 21, 8-9 ¶¶ 18-20. On January 14, 2022, Mr. Fernandes filed an Answer to Counterclaim. On January 26, 2022, Ms. Masson filed an Answer to Amended Verified Complaint and Counterclaim.

On March 8, 2022, Mr. Fernandes filed Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Partial Summary Judgment.

On February 15, 2022, Ms. Masson filed her second Motion for Partial Summary Judgment, Memorandum in Support of Defendant's Motion for Partial Summary Judgment Pursuant to I.R.C.P. 56, and Declaration of Jennifer Escruceria and Declaration of Counsel in support of her motion. Ms. Masson now seeks partial summary judgment on Mr. Fernandes' Count II of the Amended Verified Complaint, Mr. Fernandes' claim of ouster. Def.'s Mot. for Partial Summ. J. 1-2. On March 1, 2022, Mr. Fernandes filed his Plaintiff's Opposition to Defendant's Partial Summary Judgment and Declaration of Raymond Fernandes and Declaration of Jonathan D. Hallin in support of his opposition.

On February 15, 2022, Mr. Fernandes filed his Counter-Defendant's Motion for Partial Summary Judgment, Request for Judicial Notice, and Counter-Defendant's Memorandum and Declaration of Raymond Fernandes in support of his motion. Mr. Fernandes seeks dismissal of Ms. Masson's counter-claim for contribution of all expenses incurred prior to June 5, 2020, the date Ms. Marengo's interest in the property was conveyed to Mr. Fernandes. Counter-Def.'s Mem in Supp. of Mot. for Partial Summ. J. 2.

On March 1, 2022, Ms. Masson filed her Memorandum in Response to Counter-Defendant's Motion for Partial Summary Judgment. On March 8, 2022, Mr. Fernandes filed his Defendant's Reply Memorandum in Support of Motion for Partial Summary Judgment Pursuant to I.R.C.P. 56 and Defendant's Motion to Strike and Motion to Shorten Time.

On March 15, 2022, a hearing was held on the cross motions for partial summary judgment, request for judicial notice, and motion to strike and motion to shorten time for

the motion to strike. At that hearing, the Court granted the request for judicial notice, the motion to shorten time, and the motion to strike. The Court took under advisement the cross-motions for partial summary judgment, primarily because counsel for Mr. Fernandes for the first time cited and directed the Court's attention to the Idaho Supreme Court's very recent decision in *Martin v. Garrett Living Trust*, 2022 WL 697540 (Mar. 9, 2022). Those cross-motions for summary judgment are now addressed in this memorandum decision and order.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to that Rule, summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.*

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
>
> (1) give an opportunity to properly support or address the fact;
> (2) consider the fact undisputed for purposes of the motion;
> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
> (4) issue any other appropriate order.

Id. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156

P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994)). "A material fact is one upon which the outcome of the case may be different." *Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998).

Once the moving party meets their burden of establishing the absence of a genuine issue of material fact, the burden shifts to the non-moving party to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). "Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence." *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the

> record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

> However, where . . . no jury has been requested and the facts are to be tried to the court, a somewhat different standard is employed. If the evidentiary facts are not in dispute, the trial court may grant summary judgment despite the possibility of conflicting inferences, because the court alone will be in the position of resolving the conflicting inferences at trial. Findings which are based on such inferences will not be disturbed on appeal if the uncontroverted evidentiary facts are sufficient to justify them.

Crown v. State, Dept. of Agriculture, 127 Idaho 188, 191, 898 P.2d 1099, 1102 (Ct. App. 1994) (citing *Riverside Development Co. v. Ritchie,* 103 Idaho 515, 519, 650 P.2d 657, 661 (1982)) (internal citations omitted).

III. ANALYSIS

Ms. Masson moves for partial summary judgment regarding the claim for the fair market rental value of the Subject Property because Mr. Fernandes does not have any evidence to support a claim of ouster. Mem. in Supp. of Defs.' Mot. for Part. Summ. J. 2. Mr. Fernandes is cross moving for partial summary judgment regarding the claim of contribution for expenses because "there is no genuine issue of material fact as to whether proper notice was given to creditors by Plaintiff following his appointment as the Personal Representative of his mother's estate, and that Defendant [sic] did not provide notice of [sic] claim within the statutory period. Counter-Defs.' Mem. in Supp. of Mot. for Part. Summ. J. 2.

A. There are no genuine issues of material fact on the issue of ouster.

Ms. Masson argues:

> Plaintiff appears to believe that Ms. Masson's use of the Property as her personal residence, that she kept personal property within the Property, and that she desired not to sell the Property support a claim for ouster. They do not. Those sorts of facts exist whenever one cotenant resides in a single-family home

and desires not to the [sic] sell the property. That common scenario gives rise to a partition lawsuit, like here. To adopt Plaintiff's argument would be to find ouster in nearly every case that commonly leads to a partition action between cotenants of a single family home.

Lastly, Plaintiff's ouster claim asserts damages of rent. . . . Ms. Masson has testified that she did not rent the property and consequently, there is no rent to disgorge. To the extent Plaintiff believes he is entitled to half of the fair market rental value, he has failed to disclose an expert witness pursuant to this Court's Pretrial Order. In either instance, Plaintiff has not and cannot create a question of material fact to show damages resulting from the alleged ouster.

Mem. in Supp. of Defs.' Mot. for Part. Summ. J. 10-11.

Mr. Fernandes responds:

At all times since Ms. Nelson's death, Defendant has resided on the Subject Property. Defendant has acted as if she was the sole owner of the Subject Property by altering the Subject Property and selling the dock slip without the input of her co-owner.

Defendant has not sought contribution for expenses before this lawsuit or shared income derived from the Subject Property and its appurtenant property. Defendant possesses the only key(s) to the Subject Property.

Plaintiff . . . believed, based on his knowledge and experience with his mother's attempts to partition the Subject Property in the years prior to her death, that Defendant would be resistant to his claim of ownership.

On August 17, 2020, Defendant called and left a voicemail with Plaintiff's counsel. In that voicemail, Defendant questions Plaintiff's ownership interest in the Subject Property and doubted whether he had the right to ask for its sale.

Pls.' Opp'n to Defs.' Part. Mot. for Summ. J. 2 ¶¶ 2-5 (internal citations and paragraph numbers omitted).

. . . Defendant mischaracterizes the evidence in this case in order to play down its effect.

Defendant has resided on the Subject Property since Ms. Nelson's death. Defendant has occupied the Subject Property and maintained in such a condition as to effectively prevent its use by the Plaintiff. Defendant has done so by hoarding property making the space impossible to use and enjoy by Plaintiff as an *equal owner*[.]

Id. at 7 (internal citations omitted). Mr. Fernandes then attaches three photographs showing extreme amounts of clutter throughout the residence, indicating that the

photographs "were taken for the property's *listing*, and it is reasonable to infer that this is a relatively clean and tidy state for the house, being that it is being sold." *Id.* at 8-9 (emphasis in original). Mr. Fernandes argues that "A reasonable fact finder could view the photos shown in Exhibit A to Fernandes' Declaration in Support of this Opposition and find that Defendant kept the Subject Property is such a condition that it effectively excluded its co-owner." *Id.* at 9.

Mr. Fernandes further argues:

> Defendant, in her communications with Plaintiff's counsel has expressed resistance to the idea needing to share the Subject Property. In particular,
>
> > And I have my mother's Will that I'm going to send you a copy of that states in the Will that Patricia A. Marengo, Raymond Fernandes' [sic] mother, and myself were owners in the property and in her Will is said . . . that if either one of us passed away during our life after she gave us the house, and that I was allowed to live here until we decided to sell . . . you can see it that if either one of us passed away that everything in the Will would go to the surviving daughter, fully and wholly . . . I think that what Raymond is doing that he may not be able to do this . . .
>
> *Id.* at 9-10.
>
> The purported Will is itself not relevant as the Subject Property was quitclaimed by Ms. Nelson to her daughters prior to her passing away and thus was not part of her estate to be devised subject to the purported Will. What is relevant is its effect on the Defendant's state of mind.
>
> *Id.* at 10 n.1.
>
> When drawing all reasonable inferences based on the foregoing quote in the Plaintiff's favor, it is clear that the Defendant believed the Subject Property was exclusively hers. It is also reasonable to infer that Defendant's conduct described above was in accord with that belief.
>
> Due to the condition of the Subject Property being completely full with various items, Defendant having the only key, Defendant expressing her doubt that Plaintiff has an ownership interest in the Subject Property in her voicemail to Plaintiff's counsel, and her not including Plaintiff in decisions affecting the property, Plaintiff has felt excluded and not welcome to use and enjoy the Subject Property consistent with my equal ownership interest. As such Plaintiff has presented more than a mere scintilla of evidence. In fact, the evidence presented here by Plaintiff

demonstrate that there is a genuine issue of material fact of whether the listing photos alone would suffice as a showing to the world that Defendant's occupation of the Subject Property was to the exclusion of her co-tenant.

Id. at 10-11.

While ouster in Idaho likely requires some sort of showing of exclusion to the ousted party, analyzing ouster through the lens of adverse possession can be misleading. Making a showing to the world for adverse possession is important because it is a claim of ownership to all others. For ouster, the claim should not need to be made so that the public at large would understand the ousting party's claim for exclusive ownership, but instead that it be made to a co-tenant. However, a sufficient showing to the world should also satisfy the requirement of a communicated exclusion to co-tenant.

Id. at 11 n.2.

Additionally, Defendant's argument that "[t]o adopt Plaintiffs argument would be to find ouster in nearly every case that commonly leads to a partition action between cotenants of a single family home." [sic] That assertion again mischaracterizes Plaintiff's argument. The problem is not that there is *some* property as one would expect to find in most cases, but that there is such an excess, a build-up, a hoard of property as to effectively prevent Plaintiff from being in and utilizing the space in the manner expected in an equal ownership share. In short, Defendant has dominated the Subject Property as to effectively oust Plaintiff.

Defendant asserts that Plaintiffs answer to Request for Admission No. 11 is somehow relevant, but it is plainly irrelevant to the issue of Plaintiff being ousted by Defendant.

Therefore, there exists a genuine issue of material fact as to whether Plaintiff was ousted by Defendant's use of the Subject Property.

Finally, Defendant asserts that because she has previously testified that she never subleased the Subject Property, that conclusively establishes the issue of disgorging rental profits. If that were true, there would be no need for trials or finders of fact. That is precisely what is needed here.

Plaintiff has done a review of the market and comparable rental listings and believes $1,800.00 is a reasonable sum for monthly rental income. In addition, Plaintiff and Defendant are currently under contract to sell the Subject Property with a rentback condition for Defendant to remain at the rate of $1,800.00 per month.

Therefore, there exists genuine issues of material fact as to whether Defendant sub-leased the Subject Property and what the value of the rent was.

Id. at 11-12 (internal citations omitted).

Ms. Masson replies:

Plaintiff admits he has ***never*** asked his aunt to visit the Subject Property and that all communication regarding the same have been through his lawyer. Plaintiff has not filed a Rule 56(d) motion to continue and implicitly concedes that all materials responsive to Ms. Masson's discovery request have been provided. Those materials provide ***no*** evidence to support ouster - i.e., a hostile, unequivocal act by Ms. Masson to show she has openly and notoriously claimed the entire Subject Property for herself to the exclusion of Plaintiff.

Plaintiff's Opposition to Defendant's Partial Motion for Summary Judgment, filed March 1, 2022 ("Opposition") asserts the following facts or allegations to show ouster: (1) that Ms. Masson has lived at the Subject Property; (2) that Ms. Masson sold a boat slip; (3) that photographs Plaintiff viewed in January 2022 depict what Plaintiff believes is clutter so as to prevent his use of the Subject Property; and (4) that Ms. Masson believed she could live at the Subject Property pursuant to terms of her late mother's last will and testament.

The first two arguments clearly lack basis in law or fact and will not be addressed.

The third argument – ouster by clutter – was evidently manufactured by Plaintiff in January of 2022 (no allegations of clutter are contained in the original or amended complaint). Plaintiff admits he never asked to visit the Subject Property. His discovery responses – by which he produced all evidence to support his claim – contain no evidence (1) that Ms. Masson told him he could not visit the Subject Property; (2) that he complained - even once - to Ms. Masson that he felt like he was unable to use or visit the Subject Property; (3) that he complained – even once – that Ms. Masson allowed too much personal property to exist within the Subject Property; (4) that he requested a key to the Subject Property (or did not have his late mother's key to the Subject Property); or (5) that he brought any of the issues raised in this lawsuit to Ms. Masson's attention. Even if the Subject Property was "cluttered" with personal property in January of 2022 (or at any time), such would not create a genuine issue of material fact to prevent the Court from dismissing Plaintiff's ouster claim as a matter of law.

The same is true for Plaintiffs fourth argument – ouster by mistaken belief. In support of this argument, Plaintiff primarily relies upon voicemails from Ms. Masson to Plaintiff's counsel that demonstrate nothing other than the concerns of a frightened, confused elderly woman who received a demand letter concerning her residence of several decades directly from a lawyer, not her nephew. Assuming, *arguendo,* that Ms. Masson believed that the last will and testament controlled versus the quitclaim deed executed by her mother a month prior to her death, that reality would not create a genuine issue of material fact to prevent dismissal of the ouster claim. As stated in Ms. Masson's opening brief, ouster requires what its name bestows – to ***oust*** a fellow cotenant by excluding

his or her use of the property at issue. See *Terry v. Terry,* 70 Idaho 161,168,213 P.2d 906, 909-910 (1950) (before a cotenant can establish adverse possession against a fellow cotenant, ***"'the one in possession must, by acts of the most open and notorious character, clearly show to the world, and to all having occasion to observe the condition of occupancy of the property, that his possession is intended to exclude, and does exclude, the rights of cotenant."***) (emphasis added [in brief]) (internal citations omitted [in brief]).

Lastly, Plaintiff asserts a question of fact exists with respect to his claim for lost rent. Lost rent is a measure of damage available to a party who shows a genuine issue of material fact to support a claim for ouster. Plaintiff has failed to present any material fact as required per Rule 56 to support ouster on which he bears the burden of proof. Consequently, Ms. Masson respectfully requests the Court to dismiss the claim as a matter of law.

. . . .

Plaintiff's Opposition cites the following cases related to his claim for ouster: *Cox v. Cox,* 138 Idaho 881, 71 P.3d 1028, 2003 Ida. LEXIS 89 (2003); *Ames v. Howes,* 13 Idaho 756, 93 P.35, 1907 Ida. LEXIS 92 (1907); *Brewer v. Wash. Rsa No. 8 L.P.,* 145 Idaho 735, 184 P.3d 860, 2008 Ida. LEXIS 93 (2008); *Yakavonis v. Tilton,* 93 Wn. App. 304, 968 P.2d 908, 1998 Wash. App. LEXIS 1765 (1998); *Fritch v. Fritch,* 53 Wn.2d 496, 335 P.2d 43, 1959 Wash. LEXIS 291 (1959); *Cummings v. Anderson,* 94 Wn.2d 135,614 P.2d 1283, 1980 Wash. LEXIS 1348 (1980); *Hardman v. Brown,* 77 W. Va. 478, 88 S.E. 116, 1916 W. Va. LEXIS 180 (1916); and *Lohman v. Lohmann,* 50 N.J. Super. 37, 141 A.2d 84, 1958 N.J. Super. LEXIS 472 (1958). A plain reading of those cases leads to one conclusion – that Plaintiff's ouster claim should be dismissed.

While the appellate decision in *Cox* does not go into detail on the underlying facts relied upon by the trial court to find ouster, it shows that one cotenant made the overt act of telling his cotenant that he was selling the house and that she'd "better find a place to live". *Cox v. Cox, supra,* 138 Idaho at 887. Here, there is no such overt act. To the contrary, Plaintiff readily admits he never asked Ms. Masson to visit the Subject Property and did not communicate with her directly.

Defs.' Reply Mem. in Supp. of Mot. for Part. Summ. J. 56 2-4 (emphasis in original).

Ms. Masson then proceeds to discuss the context of the decisions in *Ames*, *Brewer*, *Cummings*, and *Lohmann*, indicating that:

none of the cases cited by Plaintiff contradict the authority relied upon in Ms. Masson's opening brief. Ouster requires a hostile, unequivocal act, by Ms. Masson to claim the Subject Property for herself, to the exclusion of Plaintiff, that serves to repudiate Plaintiff's cotenancy (internal citations omitted). Ouster is not presumed (internal citations omitted). To the extent Ms. Masson "cluttered" the Subject Property or believed prior to the commencement of this lawsuit that her

mother's last will and testament allowed her to reside thereon, such do not support a claim for ouster. Plaintiff cites no authority to show that they do.

Ms. Masson respectfully requests the Court to grant her Motion and order that Plaintiff's cause of action (Count II) for ouster in the Amended Verified Complaint be dismissed with prejudice.

Id. at 4-6.

Ouster exists when a defendant shows, "any acts of ownership or control over the property to the exclusion of the plaintiff." *Dumas v. Ropp*, 98 Idaho 61, 63, 558 P.2d 632, 634 (1977). A co-tenant who has been ousted may "seek the fair rental value of common property." *Brewer v. Washington RSA No. 8 Ltd. Partnership*, 145 Idaho 735, 739, 184 P.3d 860, 863 (2008).

In the context of adverse possession, in order to make a showing of ouster,

> the one in possession must, by acts of the most open and notorious character, clearly show to the world, and to all having occasion to observe the condition and occupancy of the property, that his possession is intended to exclude, and does exclude, the rights of his cotenant. It is not necessary for him to give actual notice of this ouster or disseising of his cotenant, to him. He must in the language of the authorities, 'bring it home' to his cotenant. But he may do this by conduct, the implication of which cannot escape the notice of the world about him, or of anyone, though not a resident in the neighborhood, who has an interest in the property, and exercises that degree of attention in respect to what is his that the law presumes in every owner.

Terry v. Terry, 70 Idaho 161, 213 P.2d 906, 909-10 (1950).

Outside the context of adverse possession, one cotenant may be liable to another cotenant for one-half the fair rental value of the property if he or she excludes another cotenant from use and possession of the property or to half of the amount of rents received if he or she rents the property to a third party for a profit. *See, e.g., In re Randall's Estate*, 64 Idaho 629, 132 P.2d 763, 766 (1942).

> Tenants in common are entitled to use and possess common property subject to the condition that they may not exclude other co-tenants from use and possession of the common property. *Watts v. Krebs,* 131 Idaho 616, 623, 962 P.2d 387, 394 (1998). Though a settled issue in many states, no Idaho court

> has decided the issue of whether an ousted co-tenant is entitled to a proportion of the fair rental value of common property. The majority rule is that when one co-tenant excludes another co-tenant from use and possession of common property, the excluding co-tenant is liable for the value of their exclusive use of the property, including rent. *Sack v. Tomlin,* 110 Nev. 204, 871 P.2d 298, 306 (1994); *Palmer v. Protrka,* 257 Or. 23, 476 P.2d 185, 190 (1970) (when difficulties in personal relationships between cotenants make co-occupancy impossible, the excluded co-tenant is entitled to the rental value of their interest in the property); *Ireland v. Flanagan,* 51 Or. App. 837, 627 P.2d 496, 500 (1981); *Maxfield v. Maxfield,* 47 Wash. App. 699, 737 P.2d 671, 676 (1987); *Cummings v. Anderson,* 94 Wash.2d 135, 614 P.2d 1283, 1289 (1980) (where property is not adaptable to double occupancy, the mere occupation by one co-tenant may operate to exclude the other). This Court adopts this position.

Cox v. Cox, 138 Idaho 881, 886, 71 P.3d 1028, 1033 (2003).

> . . . [T]he mere fact that one is in possession and the other is not in possession does not presumptively show an ouster. Nor is it shown by the mere appropriation by one cotenant of all the rents and profits, though such appropriation may have that effect if accompanied by a notorious claim to the exclusive ownership. The ouster cannot be accomplished except by acts so hostile to rights of other cotenants that the ouster's intent to dispossess the other cotenants is clear and unmistakable. Before an occupying cotenant can be liable for rent, he must have denied his cotenants the right to enter; simply requesting the occupying cotenant to vacate is not sufficient because the occupying cotenant holds title to the whole and may rightfully occupy the whole unless the other cotenants assert their possessory rights.
>
> . . . .
>
> Owing to the unity of possession existing in the cases of concurrent ownership, each cotenant has the right to be in possession of any and every part of the land at any time. Consequently, one cotenant cannot ordinarily assert a right to the exclusive possession of any part, though it be smaller in extent than his proportionate share of the whole, and, if he excludes his cotenant from such part, he is guilty of an ouster. One cotenant may, however, have a right to the exclusive possession by force of a lease from the others. . . . The general presumption against ouster of a co-tenant can be overcome only by some overt and notorious act or acts or an unequivocal character, indicating an assertion of ownership of the entire premises to the exclusion of the right of the co-tenant.

2 Tiffany Real Prop., Ouster of cotenant § 449 (3d ed.), Westlaw (database updated September 2022).

As the parties point out, *Cox* is the only Idaho case that directly discusses the issue of ouster outside of the adverse possession context. In *Cox*, a brother conveyed

half of his interest in a newly purchased home to his sister. 138 Idaho at 833, 71 P.3d at 1030. Approximately one year after the conveyance, the brother and sister began to have "differences with one another." *Id.* The brother informed the sister that he was going to sell the home and that she "needed to find other living arrangements" due to their inability to get along. *Id.* at 834, 71 P.3d at 1031. The sister responded, "Okay," and moved out of the home. *Id.* at 886, 71 P.3d at 1033. Based on this and the fact that the sister felt she was not welcome to live in the house, the Idaho Supreme Court found the brother had ousted the sister, entitling her to half of the fair rental value of the house form the time she was ousted until the time the house was sold. *Id.* at 886-87, 71 P.3d at 1033-34.

For the claim of ouster to be successful in this case, Mr. Fernandes must show that Ms. Masson committed some overt act or made a statement indicating that Mr. Fernandes was not welcome on the Subject Property. Preliminarily, this Court does not find that Ms. Masson's "state of mind" is relevant here. Ouster requires an overt act, and simply believing that one has the right to live in a residence exclusively is not the same as *actually excluding* a co-tenant and denying that co-tenant the right to use the property. Until that can be shown, Ms. Masson's state of mind is simply irrelevant.

The Court agrees with Ms. Masson that the present case is distinguishable from *Cox* because no overt acts or statements have occurred here. Simply residing on the property and filling the home with clutter, even if Ms. Masson subjectively believed she had the right to sole residency, is not enough to show that she was claiming exclusive possession of the property since both co-tenants have equal rights of possession of the entire property. Moreover, if Ms. Masson truly believed that the terms of the will still

governed,[1] she would also believe that she does not have a right to seek contribution, since the will expressly provided that, while Ms. Masson lives in the house, "she is required to maintain the house, lot and boat slip as well as pay all taxes, fees, insurance and utilities". Decl. of Counsel in Supp. of Def.'s Mot. for Part. Summ. J. 40 [Exhibit A does not contain page numbers]. Unlike in *Cox*, 138 Idaho at 834, 71 P.3d at 1031, there is no evidence that Ms. Masson expressly informed Mr. Fernandes that he was not welcome there or that he was not allowed to stay on or visit the premises. On the contrary, if anything, Mr. Fernandes' attempt at retaining a lawyer to obtain partition of the property is analogous to the facts of *Cox*, where the brother informed the sister that he was selling the property and she was no longer allowed to live there.

The Court repeats for convenience the summary judgment standard from above:

> If the evidentiary facts are not in dispute, the trial court may grant summary judgment despite the possibility of conflicting inferences, because the court alone will be in the position of resolving the conflicting inferences at trial. Findings which are based on such inferences will not be disturbed on appeal if the uncontroverted evidentiary facts are sufficient to justify them.

Crown v. State, Dept. of Agriculture, 127 Idaho 188, 191, 898 P.2d 1099, 1102 (Ct. App. 1994).

First, the Court finds that the photos of clutter are not enough to create a genuine issue of material fact here. The evidentiary facts, the photographs, are not in dispute. It is clear that the house is extremely cluttered, or at least it was at the time the house was listed for sale. However, while it would certainly be uncomfortable to share

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[1] The Court rejects any argument that the terms or the intention of the will apply in this case. "The general rule is that a voluntary alienation of property by deed works a revocation of will to the extent that they are inconsistent. . . . The grantee takes title under the [subsequently executed] deed and not under the will." *Stone v. Fisher*, 65 Idaho 52, 139 P.2d 479, 481 (1943). Thus, the Court will not address any such argument at length. The deed, which was executed after the will, controls, and there is no restriction in the deed that Ms. Masson must be allowed to live on the property. If Ms. Nelson wished that condition to continue, she would have included it in the deed.

a residency with so much clutter as is shown in these photos, it is not impossible, nor is there any evidence that Mr. Fernandes ever attempted to request removal of the clutter so that he could also use the property. As discussed above, the Idaho Supreme Court has held that the mere occupation of one co-tenant *may* be enough to show ouster where property is not adaptable to double occupancy. *Supra; see Cox*, 138 Idaho at 886, 71 P.3d at 1033. However, the facts of this case are not enough to show that. Mr. Fernandes has not shown any evidence that the Subject Property is not adaptable to double occupancy other than to submit photographs showing clutter in the home. Second, nothing submitted to this Court demonstrates that Mr. Fernandes or his mother before him ever requested a copy of the key to the Subject Property. Had they done so and Ms. Masson denied them, that may be evidence of ouster. However, that is not the case, and the mere fact that Mr. Fernandes does not have a key is unconvincing. Finally, Mr. Fernandes' indication that he believed it would be "fruitless" to speak to Ms. Masson about partitioning the property is not convincing because in order to properly show a claim of ouster he should have actually asked her rather than assuming she would say no. It is entirely possible that, had he asked about either sharing or selling the property, that she would have agreed. As discussed above, the Idaho Supreme Court has held that ouster *may* exist where difficulties in personal relationships between co-tenants make co-occupancy impossible. *Supra; see Cox*, 138 Idaho at 886, 71 P.3d at 1033. It is not enough to simply state that he felt it would be fruitless to speak with her or to show that he felt the need to get a lawyer to facilitate communication with her about partitioning the property. More is needed, such as a sworn statement under oath that the relationship has broken down to the point that he was not allowed to enter or use the home or that he was actually refused entry. No such evidence has been provided here. There simply is not enough here to show ouster in this regard. Thus,

ouster is not present here as a matter of law, summary judgment is granted in part, and Count II of the Amended Verified Complaint is dismissed with prejudice.

B. There Defendant/Counterclaim Plaintiff's (Ms. Masson) Counterclaim for contribution for amounts prior to June 5, 2020, is dismissed as a matter of law, Plaintiff's Motion for Partial Summary Judgment is granted.

Mr. Fernandes cross moves for partial summary judgment, requesting the Court to "bar[ ] Defendant's counterclaim as it relates to contribution for expenses incurred during her co-ownership of the Subject Property with Patricia A. Marengo and then her estate until her interest was deeded to Plaintiff" because "no genuine issue of material fact as to whether proper notice was given to creditors by Plaintiff following his appointment as the Personal Representative of his mother's estate, and that [sic] Defendant did not provide notice of claim within the statutory period". Counter-Defs.' Mem. in Supp. of Mot. for Part. Summ. J. 2.

First, Mr. Fernandes argues that the statute of limitations under I.C. § 15-1-201 has lapsed for any claim for contribution prior to his receiving title to the Subject Property in June 2020. Counter-Def.'s Mem. in Supp. of Mot. for Part. Summ. J. 4-5. Specifically, he argues:

> Here, Ms. Marengo owned an equal interest in the Subject Property with Defendant until she passed away in April 2019. Plaintiff was appointed [Personal Representative ("PR")] of his mother's estate on January 6, 2020. Plaintiff published notice to creditors on January 31, 2020, and such notice featured in the Coeur d'Alene Press for three consecutive weeks. That publication provided notice that Plaintiff had been appointed as the PR for Ms. Marengo's estate, contact information for Plaintiff's attorney for Plaintiff in his capacity as the PR, and warned that claims will be barred if not brought within four months from the date of first publication . . . Therefore, Plaintiff complied with the notice requirements of I.C. § 15-3-801(a).
>
> Plaintiff never received notice from Defendant that she was asserting a claim for contribution against her sister's estate during the statutory period following notice to creditors. Therefore, I.C. § 15-3-803(a)(2) operates to bar Defendant's counterclaim as it relates to claims for contribution caused by Ms. Marengo. Since Defendant never asserted a claim against Ms. Marengo's estate following proper notice of publication to creditors by Plaintiff, her claim is

untimely. Instead of asserting the claim against the estate, Defendant is now attempting to hold Ms. Marengo's successor in interest responsible for expenses incurred by Defendant while he had no ownership interest in the Subject Property when there is no legal basis to do so.

In sum, there is no genuine issue of material fact as to whether Defendant being [sic] barred from asserting a claim for contribution against Ms. Marengo's estate.

Id. at 5-7 (internal citations omitted).

Ms. Masson responds:

It is settled law in Idaho that "advances made by a cotenant upon the common property give rise to a right to contribution from a fellow cotenant enforceable only against the interest of the fellow cotenant in the common estate; that it is not a personal liability of the cotenant upon which a money judgment could be had; and that beyond his interest in the common property the cotenant is immune." *Werry v. Goodman,* 78 Idaho 298, 303; 301 P.2d 1111, 1114-1115 (1956) (underline added [in brief]). Thus, a cotenant can ***only*** recover against a fellow cotenant's interest in the underlying real property, not from the cotenant himself or his or her estate. Ms. Marengo's one-half interest in the Subject Property passed to Plaintiff/counter-defendant Raymond A. Fernandes ("Plaintiff") by operation of law, and Ms. Masson's right of contribution can only be recovered from that interest now owned by Plaintiff.

Plaintiff's argument that Ms. Masson was required to bring a "claim" as defined under Idaho Code § 15-1-201 against the estate confuses debts of the estate with interest in real property. Ms. Masson's interest is and was limited to recovery against the real property itself that passed by operation of law to Plaintiff. Pursuant to Idaho Code § 5-204, Ms. Masson has twenty (20) years to seek contribution for advancements re the Subject Property from her cotenant, whomever that maybe.

Plaintiff's assertion that cotenants must bring creditor claims at the time of death would eviscerate the statutory period provided in Section 5-204 by forcing the surviving cotenant to bring a partition action - the only method of recovery given that "beyond [the] interest in the common property the cotenant [or cotenant's estate] is immune" - every time a cotenant died lest they forego their right to seek contribution for advancements. Plaintiff cites no authority to support such proposition. Pursuant to *Werry* and settled Idaho law, Ms. Masson was not required to bring a creditor claim against Ms. Marengo's estate; therefore, she respectfully requests this Court to deny Plaintiff/Counter-Defendant's pending motion.

Mem. in Resp. to Counter-Defs.' Mot. for Part. Summ. J. 2-3 (emphasis in original).

She further asserts that because "An action concerning the partition or sale of real

property by 'its nature involves title or possession of real estate[,]' . . . Claims arising out of the title, rents or profits to real property may be brought within 20 years. *Id.* at 3 (citing *Call v. Marler,* 89 Idaho 120, 127,403 P.2d 588, 592 (1965) and I.C. § 5-204) (internal citations omitted).

> Ms. Masson does not dispute that Mr. Fernandes succeeded to his mother's interest in the Subject Property by operation of law. The distinction between interest in real property passing by operation of law versus personal liabilities of an estate is clear, and Idaho law does not force surviving cotenants into the Robson's choice of filing a partition action pursuant to Idaho Code § 6-501 or forfeiting a right of contribution upon the death of a cotenant. Ms. Masson had and has twenty (20) years to seek contribution for the advancements she has made to care and maintain the Subject Property. Her Counterclaim seeking to enforce her claim for advancements from 2008 to present against Plaintiff's interest in the Subject Property is therefore proper and timely.

Id. at 3-4.

Mr. Fernandes replies:

> Defendant, in her Response does not assert facts which would dispute Plaintiff's argument as briefed. To that end, such argument should be considered *conceded.*
>
> Instead, Defendant argues that Plaintiff's one-half interest in the Subject Property should be held responsible for the actions of his now deceased mother, and theoretically could be held responsible for the conduct of up to 20 years of predecessors in interest. This is all despite Plaintiff having properly published notice to creditors as the administrator of his mother's estate and having received no claim from the Defendant during that time period.
>
> To advance her argument, Defendant relies on *Werry v. Goodman.* 78 Idaho 298, 303, (1956). However, the passage Defendant relies on is *dicta* because the issue was resolved on other grounds. The full passage being:
>
> > By appropriate assignments, appellant makes two principal attacks upon the court's findings and conclusions as to the offset. First, advances made by a cotenant upon the common property give rise to a right to contribution from a fellow cotenant enforceable only against the interest of the fellow cotenant in the common estate; that it is not a personal liability of the cotenant upon which a money judgment could be had; and that beyond his interest in the common property the cotenant is immune. This appears to be the settled law in this state. Thurston v. Holden, 45 Idaho 724,265 P. 697. **In the case at bar, however, that defense or objection to the offset was waived.**

Werry, 78 Idaho at 303 [emphasis added in brief].

Even though the assertion in *Werry* is *dicta,* it relies upon an earlier decision, *Thurston v. Holden,* to support its statement that the law *appears to be* well settled. 265 P. 697, 697 (Idaho 1928). Upon close examination, the holding in *Thurston* was heavily influenced by a statute (C.S. § 7588) which was repealed long ago and currently finds no support in the modem Uniform Probate Code. Moreover, authority which pre-dates *Thurston* and was recently affirmed, refutes Defendant's contention that the liability for common expenses is exclusively *in rem. Keyser v. Morehead, 23 Idaho 501, 130 P. 992 (1913); cited with approval by Bahnmiller v. Banhmiller*, 145 Idaho 517, 521-22 (2008).

In *Thurston,* John and Lizzie Thurston each held a 1/3 interest in the property there, with the other 1/3 held by Frank Crighton. *Id.* at 697. Frank Crighton deeded his interest to his wife Minnie, who then passed away before suit was filed. *Id.* The case was tried and a judgment for an equitable lien was entered for the Thurstons. *Id.* at 698.

Thurston held that,

> As has already been noted, Frank Crighton was alive and represented throughout the trial. The filing of a claim against the estate of Minnie Crighton was not required. Plaintiffs were seeking purely equitable relief, the recognition and enforcement of a lien already imposed by equity in their favor to the amount of their expenditures necessarily and beneficially made. When a cotenant pays off an incumbrance or redeems from a sale of common property, he is immediately subrogated to the right of the creditor, and acquires an equitable lien on the moiety of his noncontributing cotenant. The function of the court declaring such lien is a matter of determination, not creation.

Id. The argument that had been advanced by the defendants there was that "It is argued that, **under C. S. § 7588, no action may be brought against an estate to enforce a lien, unless recourse against any other property of such estate be expressly waived in the complaint, and that the complaint includes no such waiver."** *Id.* (emphasis added [in brief]). "From the very nature of contribution between cotenants, the lien of an advancing cotenant is limited to the interest of his cotenant in the common estate. Beyond that particular interest, his cotenant stands immune and cannot be subjected to a money judgment, for he may elect to pay or let his interest go." *Id.* "This right of election cannot be taken from him." *Id.* "Manifestly, there can be no waiver where there is nothing to waive." *Id.* It is unclear from the Court's opinion what effect Frank Crighton still being alive at the time of trial had on its C. S. § 7588 analysis, but it is clear that the Court's opinion as to the first issue in the case is a reaction to the parties' specific argument based on C. S. § 7588.

Moreover, when confronted with the Appellants' assertion that Plaintiff's testimony should have been barred pursuant to C. S. § 7936, the Thurstons argued that they "are seeking to recover their own property, something they created themselves and which has never been a part of Minnie Crighton's estate." *Id.* However, the Court held that "It would therefore necessarily appear to be settled law in this state that **the enforcement of an equitable lien against the property of a decedent involves a claim or demand against the estate."** *Id.*

While *Thurston* appears to hold that an action for an equitable lien against a co-tenant is against the co-tenant's interest, and not them personally, it also holds that "the **enforcement** of an equitable lien **against the property of a decedent** involves a claim or demand against the estate." *Thurston,* 265 P. at 698; *see also Ferrell v. McVey,* 71 Idaho 339, 341-42 (1951) *("Thurston v. Holden ...* held enforcement of an equitable lien was a claim against a decedent's estate . . .").

Here, Plaintiff's interest which is the basis for Defendant's contribution claim, was passed to Plaintiff by his mother's estate. His mother's alleged conduct is what forms the basis for Defendant's damages at issue in this motion. Defendant does not contest that she did not file a claim against Plaintiff's mother's estate (which is required by I.C. § 15-3-801) and which *Thurston* states is required for an equitable lien's *enforcement* against a co-tenant's interest.

Additionally, the *Thurston* decision predates the enactment of I.C. § 15-3-801 by forty-three years. There is no readily available published case which addresses the applicability of I.C. § 15-3-801 to a claim for contribution, indicated by Defendant's reliance on *Werry.*

As noted above, the conclusion of the Court in *Keyser* shows that a party may be personally liable for contribution relating to an improvement to real property. 130 P. 992. In *Keyser,* the Court addressed a claim for contribution for improvements as between two "co-owners in [a] lateral ditch. [sic] *Id.* at 994. The Court began by highlighting the controlling law on this front:

> If there be authority by agreement or otherwise to improve the property at the
>
> expense of the cotenants therein, then the cotenant so improving will be entitled to contribution from his cotenants if he act prudently and in good faith, and, under such circumstances, . . .

cited with approval in *Bahnmiller,* 145 Idaho at 521-22.

Ultimately, the Court ruled that "the trial court is directed to hear proof of all parties, and find the cost of the improvement made and the amount plaintiff owes defendants, and to **require such sum to be paid to the defendants** or to the clerk of the district court . . . ." *Id.* at 995 (emphasis added [in brief]). Thus,

while the right to contribution generally is well-settled law, Defendant's contention that a contribution judgment is purely *in rem* is anything but.

> Finally, it is generally the rule in other jurisdictions that,
>
> > Whether a cotenant's rights to contribution . . . gives rise to personal liability on the part of the delinquent cotenant is enforceable by a personal judgment against the latter is a questions which, in the absence of any agreement between the cotenants, and of any circumstances which clearly establish that the paying cotenant must necessarily have been authorized to act for the other, ordinarily depends upon whether the delinquent cotenants, at the time of the payments, **was personally liable for the debt paid by the cotenant entitled to contribution.**
>
> 48 A.L.R.2d 1305, § 14 (1956). Defendant counterclaimed, *inter alia,* for contribution for property taxes and HOA fees allegedly paid by Defendant between 2009 and 2021. *Amen. Answ. to V. Compl.,* at 8. Plaintiff's predecessor in interest could have been held to be personally liable for such taxes and fees, and thus Defendant should be prohibited from requesting those as damages.
>
> . . . .
>
> Mr. Fernandes has uncontrovertibly met the requirements of I.C. § 15-3-801 to bar the Defendant's claim for damages against Mr. Fernandes' mother's estate. Defendant was required to assert her claim for contribution against the estate but did not. Also, parts of her claim for contribution are for sums which Plaintiff's predecessor in interest could have been held personally liable for. Plaintiff therefore respectfully requests his Motion for Partial Summary Judgment be granted.

Pls.' Reply to Defs.' Resp. to Pls.' Mot. for Part. Summ. J. 2-6 (emphasis in original).

The Court agrees with Mr. Fernandes' argument. The Court agrees with Mr. Fernandes' following summary of the applicable law:

> Idaho Code§ 15-1-201 defines "claims" under the Uniform Probate Code as, "includes liabilities of the decedent or protected person whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration." Defendant's counterclaim for contribution, as it relates to Ms. Marengo's alleged actions or omissions leading to expenses paid and incurred by Defendant between the time when equal ownership was granted in 2008 and until her interest was conveyed to Plaintiff on June 5, 2020, is asserting a tort liability based on a now deceased person's conduct. (Answer Am. Compl., p. 7-9). That claim became an assertion of a liability against Ms. Marengo's estate since she passed away in 2019. Therefore, it qualifies as a "claim" under the Uniform Probate Code.

In the course of administering an estate, Idaho Code§ 15-3-801(a) provides that a personal representative may publish notice to creditors so that all claims may be timely presented and settled:

> [A] personal representative upon his appointment may publish a notice to creditors once a week for three (3) successive weeks in a newspaper of general circulation in the county announcing his appointment and address and notifying creditors of the estate to present their claims within four (4) months after the date of the first publication of the notice or be forever barred.

I.C. § 15-3-803 provides the authority for creditors claims to be barred when untimely:

> All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof (except claims for state taxes), whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or nonclaim statute, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following dates:
> (1) three (3) years after the decedent's death; or
> (2) within the time provided in section 15-3-801(b), Idaho Code, for creditors who are given actual notice, and within the time provided in section 15-3-801(a), Idaho Code, for all creditors barred by publication.

"Any claim asserted against an estate which is not presented within four months of the first publication of notice to creditors is barred." *Matter of Lewis' Est.,* 97 Idaho 299, 303 (1975) (creditor's claim filed seven months after creditor notice was published correctly barred).

Counter-Def.'s Mem. in Supp. of Mot. for Part. Summ. J. 4-5.

Additionally, as mentioned at the outset of this memorandum decision, during oral argument, counsel for Mr. Fernandes recited the facts of a very recent Idaho Supreme Court case, *Martin v. Garrett Living Trust*, 2022 WL 697540 (Mar. 9, 2022). This Court has now had the opportunity to read such case. *Martin* concerned a property dispute among stepsiblings after the death of their parents. Their parents, husband and wife, who, respectively, had four children and three children from prior marriages. Husband and wife executed reciprocal wills, whereby each will left their

entire estate to the surviving spouse, and upon the death of the surviving spouse the property would pass equally to the seven children. 2022 WL 697540 at *1. The spouses also executed a will contract, whereby the surviving spouse agreed to abide by the terms of the will, which was incorporated by reference, and provided that neither spouse may change, modify, or discharge the terms of the will absent written agreement of both spouses. *Id.* at *1-2. After the husband died, the wife transferred her interest in real property that was in both her and the husband's name to a trust, which listed her three children and one of her four stepchildren as the sole beneficiaries. *Id.* at *2. She later amended the trust to distribute the real property to only one of her children under obligation to pay the cash contributions to her two siblings and one stepsibling. *Id.* Upon the wife's death, the trust was distributed and none of the late husband's children received any proceeds from the trust, and the daughter listed as the sole beneficiary conveyed the property to herself and her husband. *Id.* at *3. The husband's children sued to quiet title, alleging breach of the will contract. *Id.* No probate was filed and the three-year statute of limitations for claims against the estate had run. *Id.* The Idaho Supreme Court found that the quiet title action was "predicated on the alleged breach of the Will Contract—not the Trust", and:

> Any action seeking to recover property from the Swartzes based on [the mother's] breach of the Will Contract should have first been initiated against her estate. If a breach of the Will Contract were established, then the personal representative could pursue an action against the Swartzes to "claw back" the real property and have it restored to the estate so that it could be properly distributed to the heirs.

Id. at *5. The Idaho Supreme Court held that the purpose of this section of the probate code was "to channel controversies which may arise among successors of a decedent because of improper distributions through the personal representative who made the

distribution, or a successor personal representative" and therefore "the legislature has mandated that the ability to claw back property that was improperly removed from the estate is vested in the personal representative". *Id.* at *5. The Idaho Supreme Court held that because the husband's children failed to initiate probate proceedings within three years of their stepmother's death, the claim to quiet title was untimely and the late husband's children were not permitted to "sidestep the probate code by bringing a breach of contract and quiet title action directly against the Trust and the Swatzes." *Id.* at *6.

Here, the statute of limitations for any claim for contribution that Ms. Masson had against Ms. Marengo for advancements of expenses was four months here rather than three years, because Mr. Fernandes, in his capacity as personal representative of Marengo's estate, properly filed notice pursuant to the probate code. Accordingly, any claim for contribution that Ms. Masson had against Ms. Marengo for any expenses should have been asserted against the estate during the four-month period following the notice to creditors.

Ms. Masson's argument is not convincing. Her claim that "Idaho law does not force surviving cotenants into the Hobson's choice of filing a partition action pursuant to Idaho Code § 6-501 or forfeiting a right of contribution upon the death of a cotenant" is without merit because the surviving co-tenant still has the right to seek contribution from the estate after the death of the other co-tenant. Ms. Masson chose not to do so here, and in fact did not attempt to assert a claim for contribution until January 6, 2022, over a year after litigation began and over two years after Ms. Marengo's death. In fact, it is likely that Ms. Masson only asserted this claim in response to Mr. Fernandes' claim for rent due to ouster. Likewise, Ms. Masson's argument that she was "not required to bring a creditor claim against Ms. Marengo's estate" is equally unconvincing. Mem. in

Resp. to Counter-Defs.' Mot. for Part. Summ. J. 3. The probate code defines a "claim" as:

> liabilities of the decedent or protected person whether arising in contract, in tort or otherwise . . . The term does not include estate or inheritance taxes, other tax obligations arising from activities or transactions of the estate, demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

I.C. § 15-1-201(5). A claim for contribution is not one of the few enumerated exceptions to what the probate code considers to be a claim. On the contrary, it is clearly a "liability of the decedent . . . arising in contract, in tort or otherwise". If the drafters of the probate code intended for a right of contribution to have a longer statute of limitations, it would have included it in the text of the statute. That is simply not the case here. Thus, if Ms. Masson wanted to receive contribution for the advancements that she made, she should have done so within the four-month statutory period following the notice to creditors. She did not, and as a result, she has forfeited that right. Ms. Masson may only be entitled to contribution (discussed below) from the time Mr. Fernandes took title to the property in June 2020.

The law of equity imposes a right to contribution for cotenants for advancements made on encumbrances, mortgages, taxes, and necessary repairs and improvements based on "the principle that conscience requires equality among parties equally responsible for a common burden." *Thurston v. Holden*, 45 Idaho 724, 265 P. 697, 697-98 (1928). However, a co-tenant is only entitled to contribution for expenditures that are "absolutely necessary for the preservation of the common property." *Keyser v. Morehead*, 23 Idaho 501, 130 P. 992, 994 (1913). The Court only notes this distinction for purposes of any claims for contribution occurring **after** June 5, 2020. The Idaho Supreme Court has held that mortgages and property taxes are necessary for the preservation of the common property and co-tenants are generally entitled to

contribution for those expenses because they are not voluntary and because they protect the co-tenants' title in the property. *Bahnmiller v. Bahnmiller*, 145 Idaho 517, 552, 181 P.3d 443, 448 (2008) (quoting 20 Am.Jur.2d *Cotenancy and Joint Ownership* § 66 (2005)). There is no settled law in Idaho regarding whether a co-tenant generally has an absolute right to contribution for HOA fees, but it would follow from the reasoning in *Bahnmiller* that they do if the HOA fees are mandatory and if they protect both co-tenants' title in the property. The parties have not presented evidence at this summary judgment phase. Likewise, the parties have presented no evidence to show that the repairs, maintenance, improvements, and insurance were necessary beyond Ms. Masson stating in her Answer that the advancements were "reasonably and necessarily incurred to improve and maintain the Subject Property." More is needed for trial. A party cannot simply state that the expenses were reasonable and necessary without indicating some justification. It is not just the fees charged by the repair company that must be reasonable, but rather the repairs and maintenance themselves must be necessary for the preservation of the common property. At the present time there are genuine issues of material fact pertaining to the issue of contribution after June 2020 to the present.

IV. CONCLUSION AND ORDER.

For the foregoing reasons,

IT IS HEREBY ORDERED Defendant's Ms. Masson's Motion for Partial Summary Judgment is **GRANTED** as to the issues of ouster (formerly characterized as collection of rent).

IT IS FURTHER ORDERED that Count II of the Fernandes' Amended Verified Complaint (claim for ouster) is **DISMISSED** with prejudice.

IT IS FURTHER ORDERED the (Plaintiff Fernandes) Counter-Defendant's Motion for Partial Summary Judgment is **GRANTED** as to the issues contribution for advancements of insurance premiums for homeowner's insurance, maintenance, repairs, improvements, utilities, and homeowner association dues incurred prior to June 5, 2020.

IT IS FURTHER ORDERED the Defendant's/Counterclaim Plaintiff's counterclaim for contribution from Plaintiff for advancements made by Defendant of insurance premiums for homeowner's insurance, maintenance, repairs, improvements, utilities, and homeowner association dues incurred prior to June 5, 2020, is **DISMISSED** with prejudice.

Entered this 24th day of March, 2022.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 24th day of March, 2022, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Jonathon Hallin	jhallin@lukins.com	Nathan Ohler	nohler@ermedlaw.com

Jeanne Clausen, Deputy Clerk