Filed 3/1/18 Lipscomb v. Girardi CA2/3
Received for posting 3/2/19

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LEE LIPSCOMB, Plaintiff, Cross-defendant and Respondent, v. THOMAS GIRARDI et al., Defendants, Cross-complainants and Appellants.	B279364 (Los Angeles County Super. Ct. No. BC547290)

APPEAL from an interlocutory judgment of partition of the Superior Court of Los Angeles County, Ernest H. Hiroshige, Judge. Reversed and remanded.

Law Offices of Martin N. Buchanan and Martin N. Buchanan for Defendants, Cross-complainants and Appellants.

Lurie, Zepeda, Schmalz, Hogan & Martin, Andrew W. Zepeda and Payton E. Garofalo for Plaintiff, Cross-defendant and Respondent.

Defendants and appellants Thomas Girardi (Girardi), G&L Aviation (G&L), 1122 Wilshire Partnership, 1126 Wilshire Partnership, and Girardi Keese (G&K) (collectively, the Girardi defendants) appeal an interlocutory judgment of partition of real property.[1]

The essential issue presented is whether plaintiff and respondent Lee Lipscomb (Lipscomb) established an entitlement to the remedy of partition. We conclude the trial court applied incorrect criteria to conclude that Lipscomb did not waive the right to partition. Therefore, the judgment is reversed and the matter is remanded for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

For decades, Girardi owned the building at 1126 Wilshire Boulevard, through an entity known as 1126 Wilshire Partnership, where he operated his law firm, G&K. In 1997-1998, the three-story building immediately to the east, at 1122 Wilshire Boulevard became available for purchase. The 1122 Wilshire parcel included a rear parking lot on Ingraham Street with 28 parking spaces. Girardi wanted to purchase 1122 Wilshire and to renovate it so as to be able to occupy the two side-by-side buildings, enabling his firm to expand.

The 1122 Wilshire property was purchased for $1.1 million, with $100,000 down and a $1 million loan personally guaranteed by Girardi and Walter Lack (Lack). Title was taken in the name of G&L (a general partnership formed by Girardi and Lack) as 75 percent owner, and Lipscomb as 25 percent owner. G&L

---

1 The interlocutory judgment of partition is appealable. (Code Civ. Proc., § 904.1, subd. (a)(9).)

contributed $75,000 of the down payment and Lipscomb contributed the remaining $25,000. G&L and Lipscomb formed a new general partnership called 1122 Wilshire Building Partnership to own and operate the building.

In 1999, G&K extensively renovated the 1122 property, including creating an opening in the wall between 1122 Wilshire and 1126 Wilshire, so that employees of the firm could walk back and forth between the two buildings. The cost of the improvements was about $2.2 million, and was borne entirely by G&K. In 2000, the renovations were complete and G&K expanded its offices into the 1122 building.

Before G&K moved into the building, the partners of 1122 Wilshire Building Partnership contributed to the mortgage and other expenses in proportion to their ownership interests. After G&K took occupancy, as of June 1, 2000, it paid $10,000 per month rent, as well as utilities, taxes and insurance. There was no written lease agreement, and there was no defined time that the rental arrangement would continue.

In June 2005, G&L and Lipscomb sold the Ingraham Street parking lot to a developer for $925,000. This enabled them to pay off the mortgage on the 1122 Wilshire property and to distribute the remainder to themselves. The sellers also received the right to use 20 nearby parking spaces (the parking license) for a period of 10 years.

After the mortgage was paid off, G&K continued to pay $10,000 per month rent to the 1122 Wilshire Building Partnership for another seven years. Girardi explained he continued paying the $10,000 rent because G&K was still receiving the benefit of the parking license. G&K ceased paying rent in mid-2012.

2. *Proceedings.*

In June 2014, Lipscomb filed suit against Girardi, G&L, G&K, 1122 Wilshire Partnership and 1126 Wilshire Partnership, alleging the following causes of action: (1) partition of the 1122 Wilshire building and the parking license; (2) dissolution of the 1122 Partnership; (3) declaratory relief; and (4) breach of fiduciary duty. With respect to the fourth cause of action, Lipscomb pled that Girardi and G&L breached their fiduciary duties by allowing G&K to fail to pay rent, to pay below market rent, and to make exclusive use of the parking license since June 2005 without any payment to Lipscomb.

The Girardi defendants filed a cross-complaint against Lipscomb, asserting causes of action for (1) breach of contract; (2) breach of fiduciary duty; (3) bad faith; (4) declaratory relief; (5) quiet title to the 1122 Wilshire building; (6) remove cloud on title; and (7) an accounting.

All parties requested a jury trial.

On December 8, 2015, the trial court granted Lipscomb's motion to sever trial of equitable claims and defenses from trial of the legal claims. There has been no trial of the remaining legal claims for breach of fiduciary duty and breach of contract.

On December 18, 2015, the trial court granted summary adjudication in favor of Lipscomb on the Girardi defendants' quiet title claims, and against G&K on its claims for damages and an accounting.

In March 2016, the equitable claims came on for trial. On September 30, 2016, the trial court issued a statement of decision, which determined, inter alia: Lipscomb owned an undivided 25 percent tenancy in common interest in the real property located at 1122 Wilshire. Absent a valid waiver,

Lipscomb was entitled to partition as a matter of right. Lipscomb did not waive his right to partition of the property.

The trial court ruled that partition by sale should be accomplished through appointment of a referee, with the sale proceeds to be allocated 75 percent to G&L and 25 percent to Lipscomb. In addition, Lipscomb was entitled to the following credits against G&L's interest: $301,165.25 for the fair rental value of 1122 Wilshire from August 1, 2012 through June 30, 2016, and a per diem of $220.73 thereafter until the date of sale; and $92,400 for Lipscomb's share of the value of the 10-year parking license.

Thereafter, the trial court entered an interlocutory judgment of partition. This appeal followed.

CONTENTIONS

The Girardi defendants contend: (1) the trial court erred in ruling that G&L lacked standing to oppose partition; (2) the trial court erred in finding Lipscomb did not impliedly waive the right to partition; (3) the trial court erred in refusing to consider their equitable arguments and in ruling that Lipscomb was entitled to partition "as a matter of right" regardless of the equities; (4) the trial court erred in ordering a partition by sale rather than a partition in kind; and (5) the trial court erred in charging G&L for debts allegedly owed by G&K for unpaid rent and the value of the parking license.

DISCUSSION

1. *The Girardi defendants are not aggrieved by the trial court's ruling that G&L lacked standing to oppose partition.*

The Girardi defendants contend the trial court erred in ruling that G&L lacked standing to oppose partition.

The trial court ruled that G&L lacked standing to oppose partition because "Lack still holds a 50% partnership interest in G&L" and "Girardi admittedly lacked Lack's authorization to have G&L oppose partition." The trial court reasoned that Lack did not oppose partition, and "G&L is deadlocked - 50% unopposed and 50% opposed - and lacks standing to oppose partition."

Although the trial court found that G&L lacked standing to oppose partition, the trial court did not grant Lipscomb partition on that basis. Rather, as reflected in the statement of decision, the trial court considered the Girardi defendants' extensive arguments in opposition to partition before determining that partition was appropriate. Therefore, the Girardi defendants were not aggrieved by the trial court's finding that G&L lacked standing to oppose partition, making it unnecessary to address the issue.

2. *Trial court used erroneous criteria to conclude Lipscomb did not waive the right to partition.*

The Girardi defendants contend the trial court erred in finding that Lipscomb did not impliedly waive the right to partition. For the reasons that follow, we agree.

a. *Trial court's ruling.*

In its statement of decision, the trial court found that the Girardi defendants presented no evidence that Lipscomb waived his right to partition. The court explained as follows: "Defendants argued that Lipscomb waived partition because Girardi executed covenants in favor of the City allowing G&K to open doorways between 1122 and 1126. [However,] Girardi signed and recorded these covenants without Lack's or Lipscomb's permission. . . . Moreover, the covenants permit

openings based upon common tenancy of the two properties, not common ownership. . . . The covenants do not manifest a waiver.[2] *Waiver of partition is limited to situations where the property was brought to guarantee a stream of monthly income through a written lease for a term of years, and partition would be incompatible with that purpose.* (*Pine v. Tiedt,* 232 Cal.App.2d 733, 738 (1965).[3] When waiver is implied due to a written lease, the waiver is temporary and lasts only as long as the term of years. *Id*. at 738. Because there was no written lease for a term of years (leaving G&K with a month-to-month tenancy (Civ. Code, §§ 1624(a)(3), 1945)) and the owners are receiving no income, Lipscomb did not waive partition." (Italics added.)

b. *The trial court erroneously concluded that an implied waiver of partition is limited to a discrete situation not present here.*

The Girardi defendants contend the trial court rested its decision that Lipscomb did not waive partition on a mistake of

---

2 Despite the trial court's ruling, the Girardi defendants' theory that Lipscomb waived the right to partition does not turn on the existence of the recorded covenants. Rather, the Girardi defendants contended that Lipscomb waived the right to partition because the property was purchased "for the purpose of the expansion of the [G&K] law offices," so that partition would defeat the purpose for which the property was acquired.

3 In *Pine v. Tiedt*, *supra*, 232 Cal.App.2d 733, the land was acquired for construction of a sanitarium to be leased to an operating company under a 50-year lease. Therefore, to "permit partition would frustrate the very purpose for which the land was acquired by the investors and for which it [was] now being used." (*Id*. at p. 740.)

law as to the circumstances which give rise to a waiver. We agree. Contrary to the trial court's ruling, waiver of partition is not limited to the narrow circumstance that the court specified, i.e., where property is purchased to guarantee a stream of monthly income through a written lease for a term of years.

Rather, the " 'situations in which the right of partition is [impliedly] waived are varied in application.' " (Miller & Starr, Cal. Real Estate (4th ed. 2017) § 11:20, citing *American Medical International, Inc. v. Feller* (1976) 59 Cal.App.3d 1008, 1014 (*AMI*).) *AMI* explained that although the decisional law refers to a cotenant's right of partition " 'as a matter of absolute right' " (*id*. at p. 1013), the stated absolute right of a cotenant to partition is subject to certain limitations such as estoppel and waiver, either express or implied. (*Id*. at pp. 1013-1014.) *AMI* then identified various situations in which a cotenant waived the right of partition, to wit:

"*In Miranda v. Miranda* (1947) 81 Cal.App.2d 61, plaintiff, the former wife of defendant, brought an action for a partition of residential property standing in the names of both parties as joint tenants. As a part of a divorce action, the parties had entered into a property settlement agreement which provided that the family home was to remain in the name of the parties so long as the wife did not remarry and so long as the property was occupied by her as a home for herself and the children. The former wife sought partition of the property while she was still occupying the home with the children and had not remarried. The *Miranda* court held that the agreement constituted a waiver of the right of either party to partition the property so long as the restrictive conditions existed.

"Similar to *Miranda* is the case of *Schwartz v. Shapiro* (1964) 229 Cal.App.2d 238. In *Schwartz*, the two parties purchased real property as coowners and executed a written agreement that provided that one party would not sell his one-half interest without giving the other coowner the right to purchase it at a price not in excess of the original purchase price. . . . The *Schwartz* court held that the agreement between the parties had modified the 'absolute' right to partition and that neither coowner was entitled to a partition of the property without first offering to sell his interest to the other coowner at the price paid for the property. . . . (See also *Rowland v. Clark* (1949) 91 Cal.App.2d 880 (parol agreement between cotenants that one would have a right of possession for life).)

" 'Implied' waiver of partition has [also] been found where cotenants agreed to a plan designed to develop property over a period of time (*Thomas v. Witte* (1963) 214 Cal.App.2d 322) or invested in property which was subject to a long-term lease with a view toward obtaining a secure source of investment income (*Pine v. Tiedt* (1965) 232 Cal.App.2d 733). [¶] The *Pine* court, in denying the right of partition to a coowner with the largest undivided interest in the land, . . . stated [the minority owners' contention] that knowing the nature of the venture and its purpose—to provide a continuous income to the investors under a long term lease with a corporation organized to operate a sanitarium on land they would acquire—[the coowner] impliedly agreed to waive the right of partition when he executed the lease . . . and conveyed to the investors the undivided fractional interests in the land. There is merit to this contention under the rule that *an agreement to postpone partition may be implied where the purpose for which the property was acquired by the*

parties would be defeated by partition. [Citation.]' (*Pine*, *supra*, 232 Cal.App.2d 733, at pp. 736-737.) The *Pine* court concluded as a matter of law that there existed on the part of the coowner seeking partition an implied waiver of any right of partition until the term of existing leases had come to an end because, '[t]o permit partition would frustrate the very purpose for which the land was acquired by the investors and for which it is now being used.' (*Pine*, *supra*, 232 Cal.App.2d 733, at p. 740.)" (*AMI*, *supra*, 59 Cal.App.3d at pp. 1014-1015, italics added.)

In sum, California law is clear that the right to partition can be waived in a variety of ways, including as relevant here, by acquiring property for a purpose that would be defeated by partition. Thus, the trial court erroneously concluded that an implied waiver of partition is limited to the discrete situation that it identified in its ruling – where property is acquired to guarantee a stream of monthly income through a written lease for a term of years.

c. *Trial court's error was prejudicial because defendants presented substantial evidence from which a trier of fact could infer an implied waiver of partition.*

The trial court's legal error was prejudicial because the Girardi defendants presented substantial evidence from which the trier of fact could conclude that a partition of the 1122 Wilshire property would defeat the purpose for which the property was acquired. The evidence included the following: Girardi occupied 1126 Wilshire as his law offices for 20 years before the parties agreed to purchase 1122 Wilshire. Lipscomb understood that Girardi would be expanding his offices into the adjacent 1122 Wilshire building, and that Girardi would be making tenant improvements to modify the premises to meet the

needs of his firm. Lipscomb testified that he "understood that 1122 was being purchased to provide Mr. Girardi the opportunity to expand his business operations from 1126 into both 1126 and 1122." After the sale closed, G&K expended about $2.2 million to renovate 1122 Wilshire, including opening up a common wall, so that the two buildings could function as a single property.

Under these circumstances, a trier of fact could conclude that Lipscomb impliedly waived the right of partition because to permit partition would frustrate the purpose for which 1122 Wilshire was acquired and for which it is being used. (*AMI*, *supra*, 59 Cal.App.3d at pp. 1014-1015, italics added.) Therefore, the issue of Lipscomb's implied waiver of partition must be redetermined on remand.

3. *Remaining issues.*

Our determination the trial court erred in concluding as a matter of law that Lipscomb did not waive the right to partition requires the judgment to be reversed and the matter remanded for further proceedings. However, for purposes of providing guidance to the parties and the trial court on remand (Code Civ. Proc., § 43), we briefly address the Girardi defendants' remaining contentions.

a. *No abuse of discretion in trial court's rejection of a physical division of the property.*

The Girardi defendants argued below that if partition were to be granted, 1122 Wilshire should be divided in kind, that is to say, physically divided into two separate parcels. The trial court rejected that approach, stating a physical division would be "absurd and illegal . . . because 1122 Wilshire consists of one legal parcel which cannot be subdivided."

The Girardi defendants contend that ruling was erroneous and that the trial court should have ordered a partition in kind, rather than a partition by sale. They argue the trial court based its decision on a mistaken belief that a single parcel may not be partitioned in kind, Lipscomb failed to meet his burden of overcoming the presumption in favor of a partition in kind, and the trial court failed to consider the equities of a partition by sale versus partition in kind.

These arguments are unpersuasive. This court's role is to determine whether the trial court acted within the bounds of its discretion in ordering a partition by sale instead of a physical division of the property. (*Richmond v. Dofflemeyer* (1980) 105 Cal.App.3d 745, 757.) On this record, we perceive no abuse of discretion in the trial court's rejection of the physical division approach.

Although the law favors partition in kind because this does not compel owners to sell against their will (*Richmond*, *supra*, 105 Cal.App.3d at p. 757; *Butte Creek Island Ranch v. Crim* (1982) 136 Cal.App.3d 360, 365 (*Butte Creek*)), it is recognized that in certain cases physical division may be either impossible or impractical, so as to justify partition by sale. "In 1976, after a study by the Law Revision Commission, California's scheme for partition actions was amended. (Stats. 1976, ch. 73, p. 107.) . . . . The former sections provided for division by sale only where physical division would cause 'great prejudice' to the parties. The new provisions provide for a presumption in favor of physical division which will control in the absence of proof that under the circumstances sale would be 'more equitable' than division [of the property] [see Code Civ. Proc., § 872.820, subd. (b)]. In proposing this change the Law Revision Commission explained that the

presumption in favor of physical division should continue but that '[i]n many modern transactions, sale of the property is preferable to physical division since the value of the divided parcels frequently will not equal the value of the whole parcel before division. *Moreover, physical division may be impossible due to zoning restrictions or may be highly impractical, particularly in the case of urban property*. [¶] The Commission recommends that partition by physical division be required unless sale would be "more equitable." This new standard would in effect preserve the traditional preference for physical division while broadening the use of partition by sale.' (13 Cal. Law Revision Com. Rep., Reports Recommendations and Studies (1975-1976) pp. 413-414.)" (*Butte Creek*, *supra*, 136 Cal.App.3d at p. 365.)

The record reflects that 1122 Wilshire is a single urban parcel, specifically, Lot 47, consisting of 9,839 square feet, improved with a 15,346 square foot office building. The structure is two stories over a finished basement, with a single 1,500 lb. passenger elevator. There are seven surface parking spaces behind the building. The trial court reasonably could conclude these circumstances did not lend themselves to a physical division of the property.

Priddel v. Shankie (1945) 69 Cal.App.2d 319 is on point. There, the property in issue was "an inside lot, 40 by 140 feet, improved by two dwelling houses and three garages so situated that the property could not be partitioned in kind without great prejudice to the parties." (*Id.* at p. 326; see also *Cummings v. Dessel* (2017) 13 Cal.App.5th 589, 598 [physical partition of parcel of land containing a vacation residence was not feasible]; *Formosa Corp. v. Rogers* (1951) 108 Cal.App.2d 397, 411-412 [in

action for partition of 17 acre property used in making of motion pictures, trial court acted within its discretion in ordering partition by sale; aggregate value of the separate parcels after a division would be less than the value of the property as a whole]; compare *Richmond*, *supra*, 105 Cal.App.3d at p. 748 [upholding partition in kind of 4,700 acre ranch]; *Butte Creek*, *supra*, 136 Cal.App.3d at pp. 368-369 [trial court abused its discretion in ordering sale rather than physical partition of 181-acre parcel used for waterfowl hunting].)

In sum, because 1122 Wilshire is a relatively small urban parcel developed with a single office building, the trial court acted within the bounds of reason in rejecting the Girardi defendants' alternative of a physical division of the property.

b. *No merit to the Girardi defendants' contention that the trial court erred in refusing to consider their equitable arguments in opposition to partition.*

The Girardi defendants contend the trial court erred in granting partition without considering their arguments that partition would be inequitable and in ruling that Lipscomb was entitled to partition irrespective of the equities.[4]

The record reflects that in the court below, the Girardi defendants argued that the equities weighed in their favor due to

---

[4] Although the Girardi defendants did not assert this issue below in their objections to the proposed statement of decision, the issue is cognizable on appeal. An appellant is not obligated to object below to an alleged error of law which appears on the face of the statement of decision. (*Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 677, fn. 5.; *Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 251-252.)

the effect that partition would have on G&K's operations and because Lipscomb was well aware of the improvements being made and of G&K's occupancy of the 1122 Wilshire building. The trial court ruled that "*in the absence of a waiver* a joint tenant is entitled as a matter of right to have his interest severed from that of his cotenant." (Italics added.) On appeal, the Girardi defendants contend that by finding that Lipscomb was entitled to partition as a matter of right absent a waiver, the trial court failed to consider the fairness and equitable limitations on the right of partition.

The argument is unavailing. Code of Civil Procedure section 872.710, which the trial court cited, states in relevant part at subdivision (b) that "partition as to *concurrent interests* in the property shall be as of right unless barred by a valid waiver." (Italics added; accord, *Lazzarevich v. Lazzarevich* (1952) 39 Cal.2d 48, 50 ["in the absence of a waiver a joint tenant is entitled as a matter of right to have his interest severed from that of his cotenant"].) In contrast, "[p]artition *as to successive estates* in the property shall be allowed if it is in the best interest of all the parties. The court shall consider whether the possessory interest has become unduly burdensome by reason of taxes or other charges, expense of ordinary or extraordinary repairs, character of the property and change in the character of the property since creation of the estates, circumstances under which the estates were created and change in the circumstances since creation of the estates, and all other factors that would be considered by a court of equity having in mind the intent of the creator of the successive estates and the interests and needs of the successive owners." (Code Civ. Proc., § 872.710, subd. (c), italics added.)

Here, because the parties' interests in the property are concurrent rather than successive, the trial court properly ruled that Lipscomb was entitled to partition as a matter of right absent a waiver.[5]

c. *The trial court erred in the partition phase in ordering G&L to pay Lipscomb for G&K's unpaid rent and parking; the issue of damages for breach of fiduciary duty was reserved for the legal phase of the proceedings.*

The trial court ordered that from the partition sale proceeds, Lipscomb would recover the following credits against G&L's interest: $301,165.25 for the fair rental value of 1122 Wilshire from August 1, 2012 through June 30, 2016, and a per diem of $220.73 thereafter until the date of sale; and $92,400 for Lipscomb's share of the value of the 10-year parking license. Appellants contend the trial court erred in charging G&L for these debts allegedly owed by *G&K* to Lipscomb. We agree that the trial court erred in ordering G&L to pay these items to Lipscomb at the conclusion of the trial on equitable issues because the issue of damages for breach of fiduciary duty was beyond the scope of the partition trial.

---

[5] The Girardi defendants' fairness argument derives from *AMI*, *supra*, 59 Cal.App.3d 1008, which states that "[i]n addition to the limitation on the right of partition derived from express and implied waiver by agreement, there is an even wider and more general limitation. This limitation subjects the right of partition to the 'requirement of fairness.' [Citation.]" (*Id*. at p. 1015.) However, the *AMI* decision does not address Code of Civil Procedure section 872.710, which was enacted the same year that *AMI* was decided. Therefore, *AMI* does not guide our analysis on this point.

By way of background, Lipscomb's fourth cause of action against Girardi and G&L sought damages for breach of fiduciary duty, alleging these defendants breached their fiduciary duties by: allowing G&K to fail and refuse to pay the agreed rent for its occupancy of the 1122 Wilshire building; allowing Girardi's own law firm, G&K, to maintain exclusive possession of the 1122 Wilshire building at rents far below fair rental value; and allowing G&K to make exclusive use of the parking license resulting from the sale of the Ingraham Street parking lot without any payment to Lipscomb since June 2005.

In December 2015, the trial court granted Lipscomb's motion to sever trial of the equitable claims from trial of the legal claims that were to be tried to a jury, and the parties proceeded to trial on the equitable claims only. In closing argument, Lipscomb's counsel requested credits "for 25 percent of the unpaid rental values from July 2012 to present," in the approximate sum of $300,000, as well as "the value of one quarter of the parking lot license he never got to enjoy, which was part of the consideration for the sale of the parking lot"—all of which claims were the subject of Lipscomb's fourth cause of action for breach of fiduciary duty. In its statement of decision, the trial court awarded Lipscomb the requested credits—$301,165 for fair rental value of the property from August 1, 2012 through June 30, 2016, and $92,400 for the value of the parking spaces—citing *Enea v. Superior Court* (2005) 132 Cal.App.4th 1559, 1563-1564 (*Enea*) [breach of fiduciary duty imposed by law on partners].)

This award of damages to Lipscomb for breach of fiduciary duty in the form of "credits" at the close of the partition phase of the bifurcated trial was error. As indicated, the cause of action for breach of fiduciary duty remained to be adjudicated.

In an attempt to uphold the trial court's ruling, Lipscomb argues the trial court properly ordered G&L to pay him for G&K's unpaid rent and use of the parking spaces because in a partition action, the court may "order allowance, accounting, contribution, or other compensatory adjustment among the parties according to the principles of equity." (Code Civ. Proc., § 872.140; *Wallace v. Daley* (1990) 220 Cal.App.3d 1028, 1035 [every partition action "'includes a final accounting according to the principles of equity for both charges and credits upon each cotenant's fractional share"].)

Here, however, the trial court did more than adjust charges and credits between the owners, namely, G&L and Lipscomb. The statement of decision shows that the trial court summarily disposed of the cause of action for breach of fiduciary duty; the trial court found that G&L had breached its fiduciary duty to Lipscomb, and that pursuant to *Enea*, *supra*, 132 Cal.App.4th 1559, G&L was liable to Lipscomb for the uncompensated use of the premises by G&K, their lessee. G&L's liability for G&K's occupancy was beyond the scope of an accounting incidental to the partition action, and the breach of fiduciary duty claim properly had been deferred to the second phase of the bifurcated trial, namely, the trial on the legal issues.

Further, given the posture of this matter, the issue of any credits to be deducted from the sales proceeds is premature. As discussed above, Lipscomb's alleged entitlement to partition needs to be addressed on remand. In the event the trial court determines on remand that Lipscomb waived the right to

partition, the property will not be sold and there will be no sale proceeds to be distributed.[6]

[6] We note G&L's argument that the trial court erred in basing the credit for unpaid rent on the fair market value of the property rather than the rental rate that was previously agreed to by the parties. Nothing herein should be construed as approving the amount of the credits that were awarded to Lipscomb. The amount of credits, if any, is for the trier of fact on remand.

DISPOSITION

The interlocutory judgment of partition is reversed and the matter is remanded for further proceedings consistent with this opinion. Appellants shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.*

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.