THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2018 TERM

DECEMBER SESSION

CASE NO. 2018-0202

EVELYN TARNAWA

V.

RICHARD GOODE

BRIEF FOR THE APPELLANT RICHARD GOODE

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Source. RS 171:6. CS 181:9. 1855, 1659:12. GS 190:1. GL 209:1. 1885, 87:1. 1887, 77:2. PS 205:1. PL 317:1. RL 371:1. RSA 498:1. 1971, 179:9. 1992, 284:24. 2006, 91:1, eff. May 5, 2006.

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Source. RS 152:8. CS 161:8. GS 170:7. GL 189:7. PS 182:9. PL 293:9. RL 346:9.

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Source. 1992, 284:57. 2000, 232:2, eff. Jan. 1, 2001. 2008, 109:7, eff. July 27, 2008.

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Source. 1992, 284:57. 2000, 232:13, eff. Jan. 1, 2001.

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Source. 1992, 284:57. 2000, 232:16, eff. Jan. 1, 2001.

552:7 Proof, Solemn Form; Issues to Court. – Any party interested may have the probate of a will which has been proved without notice re-examined, and the will proved in solemn form before the court of probate at any time within 6 months of such probate. Any issue related to the execution of a will, testamentary capacity, or fraud, duress, or undue influence shall be tried to the court of probate, and any party interested may request the same within 6 months of such probate.
Source. RS 157:7. CS 166:7. GS 175:7. GL 194:7. PS 187:7. PL 298:7. RL 351:7. RSA 552:7. 1959, 114:9. 1975, 395:9. 1992, 284:61, eff. Jan. 1, 1993.

4. QUESTIONS PRESENTED FOR REVIEW

A. Whether, where the real estate at issue has been the subject of a proceeding involving the settlement of an estate, probate, interpretation, and construction of, a will, over which RSA 498:1, RSA 547:3(a) and (c) and RSA 547:9 give the probate court exclusive jurisdiction, and RSA 547-C:2 gives the probate court concurrent jurisdiction over an action for partition, the Superior Court lacks subject matter jurisdiction over a subsequent action seeking to establish the rights and obligations of the joint owners of the property. **Motion to Dismiss, App. at 8-9, and Motion for Reconsideration, App. at 61, 62-63.**

B. Whether the appellee's failure to seek partition of the real estate devised to the parties by their mother in the estate proceeding in probate court, where the real estate was listed in the inventory filed with the probate court and a claim for partition could have been raised, has the effect of barring the current claim under the doctrine of *res judicata*. **Motion for Summary Judgment, App. at 23-24, and Motion for Reconsideration, App. at 60-61.**

C. Whether the appellee's equitable claim for partition of the real estate should have been dismissed on the basis that there was an adequate remedy at law available in the form of money damages. **Answer, App. at 7, and Motion for Reconsideration, App. at 62-63.**

D. Whether, because the Trial Court found that no contract between the parties existed requiring the appellant to pay all property-related expenses as a condition of his continued residence there, the appellee's action for breach of contract should have been dismissed. **Motion for Reconsideration, App. at 63.**

E. Whether the appellee's action should have been dismissed on the basis of *laches,* when the defendant had detrimentally relied upon the plaintiff's failure to

seek partition in the probate court, and had made several improvements to increase the value of the property, but had not kept careful records of those improvements. **Answer, App. at 7, and Motion for Reconsideration, App. at 62.**

F. Whether the Trial Court's Order, forcing the parties to sell the real estate in which the appellant resides, when the appellee demonstrated no immediate need for the money, lives in her own home in another state and has not visited the residence since their mother's death, and an alternate remedy of a life estate with a sale at the end of the appellant's residence is available, was an abuse of discretion for failure to consider the special circumstances of the parties, and effect "complete justice". **Requests for Findings of Fact and Rulings of Law, App. at 44; Proposed Order, App. at 45-46; Motion for Reconsideration, App. at 64-65.**

5. STATEMENT OF THE CASE

Evelyn Tarnawa (Appellee) filed a Complaint asserting jurisdiction pursuant to RSA 498:1 alleging that the parties had agreed that Richard Goode (Appellant) would continue to live in the home jointly devised to them by their mother, as long as he continued to pay expenses, including real estate taxes. No specific cause of action was alleged, but, on the basis that he had not paid the taxes, the appellee requested "a sale of the demised premises and a division of the proceeds of the sale on an equitable basis". **App. at 5.** The appellant moved to dismiss the complaint for lack of jurisdiction, on the basis that RSA 498:1 grants exclusive jurisdiction to the probate court over, *inter alia,* partition of real estate which is related to the settlement of an estate. RSA 547:9, RSA 547-C:2 and RSA 547-C:22. **App. at 10.** The Trial Court denied the Motion, **App. at 24.** Appellant filed a Motion for Summary Judgment on the basis of *Res Judicata* alleging that

since the issue of partition could have been raised during the estate proceedings the appellee was barred from bringing a new claim. **App. at 25.** Appellant also moved for a ruling that, based on the language of the will, the property had been devised to the parties as joint tenants. **App. at 26.** The Trial Court denied both motions. **App. at 41-42.** A Bench Trial took place on December 19, 2017, the transcript of which has been supplied to the Court. Both parties submitted Requests for Findings of Fact and Rulings of Law and proposed decrees, **App. at 45-57.** The Court issued its Decision on January 29, 2018, ruling that the property was to be sold, with the proceeds divided equally, with the appellant receiving no credit for value added by improvements he made, and that the parties are jointly liable for payment of real estate taxes, but the appellant is solely liable for interest and penalties. **App. at 60-62.** The appellant timely moved for Reconsideration, **App. at 64-91**, which was denied on March 27, 2018, **App. at 99-102**. This Appeal ensued.

6. STATEMENT OF THE FACTS

The parties are the children of Stella Goode, who died on July 8, 2009. Her estate included real estate located at 22 Orchard Ave., Manchester, New Hampshire which was valued at $135,000.00. **Tr. 31.** As of the date of the trial it was assessed by the City of Manchester at $176,000.00. **Order at 4, App. at 61.** Mrs. Goode left a will which provided that she devised the remainder of her estate, which included that real estate, to her children "in equal shares... if they survive me. If I am survived by only one of my children, then I give... all of my said estate to him or her, and his or her heirs forever." **Motion for Summary Judgment – Finding of Joint Tenancy, App. at 32, 34.**

Prior to Mrs. Goode's death, appellant was appointed as guardian of her person. **Tr. 97,110.** He lived with his mother and cared for her since 2004. **Tr. 96,107,112.** The appellee has not visited the home since her mother's death. **Tr. 83.**

While living in the home, appellant has made a number of improvements representing major expenses to increase the value of the house, including:

a. Putting up a block wall and filling in the area next to the garage
b. Installed a chimney
c. Replaced the furnace
d. Paid the annual homeowner's insurance premiums
e. Performed work for the neighbor, who in return gave Mrs. Goode ten feet of property
f. Installed 100 feet of granite curbs in front of the house
g. Installed insulation in the house
h. Installed new storm windows
i. Extermination of termites
j. Garage door
k. Pump for basement

He has also paid all maintenance and upkeep expenses since 2010, including utilities. **Tr. 31, 76-77,93-94,112-115.** Appellee admitted she was aware of those improvements, including a furnace, new windows, and insulation, which cost $26,000.00. **Tr. 94**, and that they would have increased the value of the property. **Tr. 95.**

Appellant has also paid a portion of the annual real estate taxes, but has disputed some of them because of his disability status. **Tr. 117-119,122,130.**

Appellant sought reimbursement from appellee for some of the expenses for maintaining the home but she refused. **Tr. 116-117, 90-91.** She admitted she would not have paid half the taxes had he asked her. "I don't live on the property, that's my brother's responsibility." **Tr. 92.** She also testified that she would not be willing to pay half of the taxes going forward. **Tr. 99-100.** She denied any interest in moving into the Manchester home, as she has her own home in Connecticut. **Tr. 100-101.**

Through her attorney, appellee proposed an agreement while the estate was open that appellant would live in the home until his death, and pay all expenses related to the house, and that, should he fail to comply with those conditions, the property "shall immediately be placed for sale at a price to be agreed upon by the parties". **Tr. 52,57-58**

Appellant did not agree to that, and the estate was closed with the issue unresolved, but appellant remaining in residence at the home. **Tr. 53,56,58,67-68.** Those issues could have been litigated and resolved during the estate proceedings, but appellee, through her attorney, agreed to close the estate without doing so, in order to minimize the legal expense to the parties. **Tr. 67-68.**

7. SUMMARY OF ARGUMENT

The superior court had no jurisdiction over this matter, because it arose from the settlement of an estate, as to which the probate courts have exclusive jurisdiction. The appropriate remedy for the appellee was to seek to reopen the probate proceeding, particularly since interpretation of the will was an issue.

Because the issues raised by the present proceeding could have been resolved by the probate court, the principle of res judicata precludes re-litigation in a different forum.

The provision of Stella Goode's will which includes the devise of the real estate does not state whether it is devised to Mr. Goode and Mrs. Tarnawa as joint tenants, or tenants in common, but it does provide that if one of them was not living on the date of Mrs. Goode's death, only the survivor would take the property. This is evidence that Mrs. Goode's intent was to leave the property to her children as joint tenants.

Therefore, it is premature to determine whether it should be sold, because upon the death of one of the parties, the other will take the entire property.

Should appellee inherit the property, either in whole or half, she will benefit by its increase in value, to which she has contributed nothing.

The appellee did not prove or even claim that she has any need of either the property or the money from a current sale of the property. In contrast, the appellant has need of the property, because he has no other place to live and cannot afford to find an alternative residence.

Partition of the property at the present time would not be fair and equitable.

8. ARGUMENT

A. The Superior Court lacked subject matter jurisdiction over the appellee's request to partition the property.

The appellee alleged that the Superior Court had jurisdiction pursuant to RSA 498:1. That statute provides, *inter alia*, that "the Superior Court shall have

the powers of a court of equity... except that the court of probate shall have exclusive jurisdiction over equitable matters arising under its subject matter jurisdiction authority in RSA 547, RSA 547-C and RSA 552:7." (emphasis supplied). RSA 547:3-b provides that "the Probate Court shall have the powers of a court of equity in all cases within its subject matter jurisdiction in which there is not a plain, adequate, and complete remedy at law." RSA 547:9 further provides that "all proceedings in relation to the settlement of the Estate of a person deceased shall be had in the Probate court of the county in which his will was proved or administration on his estate was granted." RSA 547:3(a) also gives the probate court exclusive jurisdiction over the probate of wills, and RSA 547:3(c) the interpretation and construction of wills

> RSA 547-C:22 affords the exact remedy sought by the appellee. It provides:
>
> whenever property is so situated or is of such a nature that it cannot be divided so as to give each owner his or her share or interest without great prejudice or inconvenience, the whole or a part of the property may be assigned to one of them, the assignee paying to the others who have less of their share such sums as the court shall award or order.

The obvious legislative intent was to vest the probate court with full and exclusive jurisdiction to resolve all issues relating to the distribution of property at death.

However, the Trial Court rejected the argument that it lacked jurisdiction, on the basis of RSA 547:3,II(e), which gives the probate and superior courts concurrent jurisdiction over petitions for partition. That statute appears to be in direct conflict with RSA 498:1. The only apparent way to resolve the conflict is to construe RSA 547:3, II(e) as not applying to "the settlement of the Estate of a person deceased", RSA 547:9. The Trial Court held, however, that the instant

action did not relate to "the settlement of [Stella Goode's] Estate, because the estate was closed. "Instead, this action arises from the respondent's alleged failure to pay the property taxes in the years following the estate's settlement." **Order at 4, App. at 22.** The problem with this position is that the Court did not confine its ruling to deciding who was to pay the property taxes. Although it ruled against the appellee on that issue, finding that she was responsible for half of them, it went beyond a simple order directing her to pay her share, and directing the appellant to pay his share plus penalties and interest. The Court's assumption of jurisdiction went far beyond its characterization of the issue in the case, and is in direct conflict with the limitation of RSA 498:1, which was the only jurisdictional basis alleged in the Complaint.

B. Principles of Res Judicata preclude litigation of issues pertaining to the devised real estate which could have been raised in the probate proceeding.

Under the doctrine of *Res Judicata,* a party is precluded from litigating "matters actually decided and matters that could have been litigated, in an earlier action, between the same parties and for the same cause of action" *Kalil v. Town of Dummer Board of Adjustment*, 159 N.H. 725, 730(2010). In determining whether two proceedings are for "the same cause of action" the New Hampshire Supreme Court "embrace[s] the modern trend 'to define cause of action collectively to refer to all theories on which relief could be claimed on the basis of the factual transaction in question.'", *id.* at 730. See also RSA 547:9: ("all proceedings in relation to the settlement of the Estate of a person deceased shall

be had in the Probate court of the county in which his will was proved or administration on his estate was granted.")

Canty v. Hopkins, 146 N.H. 151 (2001), held that, since the property which was the subject of a superior court action had been listed as inventory in an earlier estate proceeding in which the plaintiff could have raised the claims asserted in the current action, including undue influence and reformation of a deed to create a joint tenancy instead of a tenancy in common, they were barred by *res judicata*. The Court held "[w]hether sounding at law or in equity, conflicting claims flowing from a common source should be determined in a single action, thus avoiding vexatious litigation and conflicting judgments." *Id.* at 155.

The Trial Court rejected the appellant's argument that *res judicata* barred the appellee's claim, because "[a]n action to partition property is not a theory of recovery that arises out of the settlement of a probate estate". 9/22/17 **Order at 2, App. at 42**. The Court cited no authority for this proposition which, the appellant respectfully suggests, is incorrect. As the correspondence between the parties' probate attorneys makes clear, an action to partition and sell the property was very much a possibility during the settlement of the estate, and was in fact discussed. **Tr. 58, 61-63**

The Trial Court correctly noted that, in order for *res judicata* to apply, "the cause of action must be before the court in both instances." 9/22/17 **Order at 2, App. at 42**. This Court has "defined a (cause of action) as 'the underlying right that is preserved by bringing a suit or action.' *Hansa Consult of N. Am. v. Hansaconsult Ingenieurgesellschaft*, 163 N.H. 46, 50(2011) (quotation omitted). We have also defined it as 'the right to recover, regardless of the theory of

recovery,' and as referring to 'all theories [upon] which relief could be claimed on the basis of the factual transaction in question.' *Appeal of Morrissey*, 165 N.H. 87,92 (2013) (quotations omitted). *In Re Estate of Bergquist*, 166 N.H. 531,535 (2014).

The "cause of action" in both the estate proceeding and this was the parties' right to a share of their mother's property based upon her will, including a determination of their respective obligations for its upkeep and related expenses. Partition is simply a theory of recovery to enforce that right. Clearly, the probate court had the authority to order partition if either of the parties had sought it at the time the estate was probated, RSA 547-C, and both are precluded from seeking it now. Although *Canty* did not involve an action for partition, that makes no difference; courts in other states have made it clear that a party can be precluded from seeking partition if he or she fails to seek it in an earlier action *Adamson v. Marill*, No. CV166055562S (Superior Court of Connecticut 2017); *Judy v. Judy*, 712 S.E. 2d 408 (S.C. 2011).

The fact that appellee allegedly discovered after the estate was closed that taxes were owed on the property does not change the analysis; it is the fact of joint ownership, not the actions of an owner relative to the property, that give rise to the cause of action. Further, the Trial Court ruled that half of the unpaid taxes were owed by the plaintiff, making the defendant's nonpayment irrelevant to a claim for partition.

C. Based on the Trial Court's analysis, appellee's claim was really one for breach of contract, the remedy for which would be monetary damages.

Nonpayment of taxes was relevant to the actual cause of action pled by the appellee – breach of contract. The remedy for that, had the court found a breach, which it did not, would have been monetary damages – payment by the defendant of the amount representing unpaid taxes to the plaintiff, which she could then pay to the City. The equitable remedy of partition is unavailable, as is any equitable remedy, where there is an adequate remedy at law in the form of monetary damages.

Because the claim for partition should have been dismissed on *res judicata* grounds, and because the Court found that no contract existed obligating the defendant to pay property taxes (although he owed an obligation to the City, the plaintiff had no standing to enforce that in the absence of a contract), the case should have been dismissed in its entirety.

D. If this Court holds that neither Res Judicata nor lack of jurisdiction bars the claim, it should have been dismissed on the basis of *laches*.

This Court has defined *laches* as

> an equitable doctrine that bars litigation when a potential plaintiff has slept on his rights. *Laches* is not a mere matter of time, but is principally a question of the inequity of permitting the claim to be enforced-an inequity founded on some change in the conditions or relations of the property or the parties involved. When the delay in bringing the suit is less than the applicable statute of limitation period, *laches* will constitute a bar to suit only if the delay was unreasonable and prejudicial. In determining whether the doctrine should apply to bar a suit, the court should consider the knowledge of the plaintiffs, the conduct of the defendants, the interests to be vindicated, and the resulting prejudice. The trial court has broad discretion in deciding whether the circumstances justify its application, and unless we find that the trial court's

> decision is unsupported by the evidence or erroneous as a matter of law, we will not overturn it.

Flaherty v. Dixie, 158 N.H. 385, 387 (2009).

Here, the appellee waited over seven years to bring an action that, if successful, would result in ousting the appellant from his childhood home. During that time, as she admitted, he made substantial repairs and improvements to it. She admitted she had knowledge of these, and also had the ability to visit the residence, but chose not to do so. Through her counsel, she had knowledge at the time the estate was probated of her right to seek partition, or at least an order based on the proposed agreement. That proposal included the very remedy which she now seeks, but she knowingly abandoned her right to enforce it at the time. In the meantime, the appellant has detrimentally relied on his sister's implied agreement to allow him a life tenancy, by maintaining and making improvements to the property, which, as the Court acknowledged, increased the value of her share. The Court refused to even credit him for that increase, because he had not kept receipts or documentation, 1/29/18 **Order** at 4, **App. at 57** – but he had no reason to do so, given the closure of the estate.

Because the appellee seeks an equitable remedy in this action, the Trial Court should have considered the defense of *laches*, which was raised in both the appellant's Answer, **App. at 8**, and his Motion for Reconsideration. **App. at 66.** The appellant requests that this Court reverse the decision and either dismiss the Complaint, or remand it to the Trial Court to take evidence on the issue of *laches*.

E. If this Court holds that Res Judicata does not apply and that the Trial Court had subject matter jurisdiction, it should reverse the decision, and remand the case to the Trial Court to consider the individual circumstances of the parties.

RSA 547-C:29 provides that

> In exercising its discretion in determining what is fair and equitable... the court may consider: the direct or indirect actions and contributions of the parties to the acquisition, maintenance, repair, preservation, improvement, and appreciation of the property; the duration of the occupancy and nature of the use made of the property by the parties; disparities in the contributions of the parties to the property... and any other factors the court deems relevant

The equitable remedy of partition exists "so that complete justice may be done by such means as are appropriate to the special circumstances and situation of each particular case", *Delucca v. Delucca,* 152 N.H. 100,104 (2005); *Pederson v. Brook,* 151 NH 65, 67 (2004). "Since a partition sale results in the conversion of real estate into money, possibly against the will of an owner, it should not be ordered unless the necessity for it is clearly established. The burden of proof to establish the necessity of a partition sale, rather than a partition in kind, is upon the party alleging the necessity and advisability of such a sale." *Id.* at 104-105.

Further, the Court is not limited to either a physical partition or a sale in fashioning a remedy. "[T]he beneficial and convenient partition of real estate will often require that a right of way, or some other privilege or easement, should be given to one share in the parts assigned to other shares" *Cheswell v. Chapman,* 38 NH 14, 16 (1859), cited in *Hajek v. Hajek,* 092104 NHSC 20030618 (2004)(unpublished opinion)(court can grant easement even though statute does

not expressly allow it). See also *Boissonnault v. Savage*, 137 N.H. 229, 232 (1993), where the Court noted "[f]or instance, ...the defendant argues that partition would prejudice her interest in the marital property and dispossess her of her home. The defendant has the opportunity to have the court consider any such special circumstances and allocate interests based thereon".

Here there were a number of special circumstances. The appellant has lived in the residence for years, both before his mother's death and since, maintaining and improving it, as the Court acknowledged, while the appellee has not even visited the property since her mother's death. The appellee demonstrated no need of either the money from an immediate sale or of a place to live. The appellant, on the other hand, has no alternative place to live, nor, according to the appellee, sufficient means to purchase a new home. The appellee proved no harm or prejudice from delaying a sale and division of the proceeds which would reflect the parties' respective tax obligations until the death of one of them, as requested by the appellant.

The Court's order considers none of these circumstances, or, to the extent that it does, rejects a remedy that would recognize the appellant's contributions because he failed to produce receipts (which, as discussed, he had no reason to keep), or failed to produce an appraisal. Most significantly, no reason was articulated by either the appellee or the Court as to why an immediate sale would achieve "complete justice" which recognized all the special circumstances of this case.

The appellee's only complaint was that she had not been informed that the appellant was not paying taxes. Yet, as the Court recognized, her ownership

interest gave her the legal obligation to pay half of them; one who owes a legal obligation is presumed to know the law. Further, the appellant did attempt to get her to contribute to payment of the taxes, but, after she rebuffed his attempts, she made no effort to find out whether they were being paid. Since appellee had a legal obligation to pay half the taxes, and failed to do so, she alone should be responsible for the penalties and interest attributable to nonpayment of her share. The most equitable partition remedy would be, as was requested by the appellant, to grant him a life estate, and sell the property upon his death, reducing his estate's share of the proceeds by his share of the unpaid taxes, interest and penalties.

9. CONCLUSION

For the reasons set forth herein the appellant respectfully requests that this Court reverse the decision of the Trial Court and dismiss the case or, in the alternative, remand it to the Trial Court to fashion an equitable remedy taking into account the circumstances of the parties as discussed herein, which does not require a forced sale. The appellant respectfully requests such other relief as may be just.

CERTIFICATE OF COMPLIANCE RE: APPEALED DECISION

I hereby certify that the appealed decision is in writing and is appended to the brief.

Respectfully submitted,

Richard Goode

By His Attorneys,
NIXON, VOGELMAN, SLAWSKY &

Date: 9/26/18

By: SIMONEAU, P.A.

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CERTIFICATE OF COMPLIANCE RE: SERVICE

I hereby certify that copies of the foregoing have been forwarded to Joshua L. Gordon, Esquire, Law Office of Joshua Gordon, 75 South Main Street, #7, Concord, New Hampshire, 03301.

Date:

Leslie C. Nixon, Esquire

STATEMENT OF ORAL ARGUMENT

Pursuant to Supreme Court Rule 18, Richard Goode respectfully requests 15 minutes to present oral argument. The oral argument will be presented by Leslie C. Nixon, Esquire, of the firm of Nixon, Vogelman, Slawsky & Simoneau, P.A.

Leslie C. Nixon, Esquire

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Evelyn Tarnawa

v.

Richard Goode

Docket No. 216-2016-CV-00869

ORDER

Plaintiff, Evelyn Tarnawa, has brought this petition seeking to partition property jointly owned by the parties. Prior to trial, the court issued orders on defendant's motion to dismiss and motion for summary judgment on July 10, 2017 and September 22, 2017, respectively (Messer, J.). The court held a bench trial on December 19, 2017 and issued a final judgment by order of the court dated January 29, 2018 (Messer, J.). Before the court is defendant's motion for reconsideration and stay. Upon consideration of the pleadings, arguments, and the applicable law, the court finds and rules as follows.

A motion for reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended." Super. Ct. Civ. R. 12(e). However, while "[the rule] entitles a party who has received an adverse ruling on a motion to seek reconsideration, [it] does not purport to authorize either party to submit further evidence bearing on the motion." Smith v. Shepard, 144 N.H. 262, 265 (1999). Moreover, the Court is not obligated to consider new arguments raised for the first time in the motion for reconsideration. See Mountain Valley Mall Assocs. v. Municipality of Conway, 144 N.H. 642, 655 (2000) (finding no abuse of discretion where

"the trial court expressly refused to consider the merits of the claim" first raised in a motion for reconsideration); Smith, 144 N.H. at 265 ("Because the plaintiffs first raised the issue in their motion for reconsideration, the trial court had the discretion to . . . not consider the issue . . . .").

Defendant first argues that the court should reconsider its ruling on the grounds of *res judicata*. However, the court has already addressed this argument and found it to be without merit in its September 22, 2017 order. Although defendant now seeks to convince the court that reconsideration is warranted based upon the ruling in Canty v. Hopkins, 146 N.H. 151 (2001), the court is unpersuaded. The facts in Canty are substantially dissimilar to the facts in this matter. Most notably, this is an action to partition property which was not before the probate court during the administration of the estate. Here, unlike Canty, defendant did not challenge title to the property as joint tenants (or tenants in common) in the probate court, and neither party sought a partition of the property. Therefore, the cause of action here was never before the probate court and there was no final judgment on the merits in the matter presently before this court.[1] The court finds the additional cases cited by defendant, Adamson v. Marill, No. CV 166055562S, 2017 WL 715686 (Conn. Super. Ct. Jan. 13, 2017), and Judy v. Judy, 712 S.E.2d 408 (S.C. 2011), similarly distinguishable where the parties in those cases not only had the opportunity to litigate the issues in a prior action, but in fact did so. Such are not the circumstances here.

Defendant further argues that plaintiff's partition action is barred by the doctrine of laches. "Laches is an equitable doctrine that bars litigation when a potential plaintiff

[1] Although defendant has argued that this action should have been heard by the probate court as the partition action existed at the time of the probating of the will, the court notes that a partition action is a right held by any joint owner of property that need not be raised at any particular time.

has slept on his rights." In re Estate of Laura, 141 N.H. 628, 635 (1997). The Court considers four factors when contemplating the doctrine: (1) the knowledge of the plaintiffs; (2) the conduct of the defendants; (3) the interests to be vindicated; and (4) the resulting prejudice." Appeal of City of Laconia, 150 N.H. 91, 93 (2003). "In determining whether to apply the doctrine of laches, most courts will look for guidance to the analogous statute of limitations." State Emps. Ass'n of N.H., Inc. v. Belknap County, 122 N.H. 614, 622 (1982). "When an action is brought within the limitations period, laches will present a bar only if the delay in bringing suit was unreasonable and prejudicial to the defendant." Id. "The party asserting laches bears the burden of proving both that the delay was unreasonable and that prejudice resulted from the delay." Appeal of Plantier, 126 N.H. 500, 505 (1985).

As discussed at length in both the court's order on defendant's motion to dismiss and motion for summary judgment, "any person owning a present undivided legal or equitable interest or estate in real or personal property . . . , not subject to redemption, or the holder of an equity of redemption shall be entitled to have partition or division." RSA 547-C:1. The fact that plaintiff did not object to defendant living on the property rent-free, and did not move to partition sooner, was beneficial to him and certainly does not eviscerate plaintiff's right to seek partition of the property, a right she may exercise at any time.

Finally, defendant argues that the court did not consider the special circumstances in this case before ordering partition and sale of the property. The defendant is incorrect. The court carefully considered all of the information before it in

determining that the appropriate remedy is partition and sale of the property. (Order, January 29, 2018.)

With respect to defendant's request for a stay, the court finds that justice would not be served by a stay of this action. In particular, the court notes that the taxes on the property have not been paid and there is nothing that would prevent the City of Manchester from moving forward with a tax lien or taking other action on the property. The plaintiff is over eighty years old. She has not objected to defendant's continued use and enjoyment of the property, without compensation, for approximately eight years. Although defendant has purportedly maintained the property during that time, he does not have a right to force that continued arrangement indefinitely. The grant of a stay would be of significant detriment to the plaintiff as she would be required to continue contributing to the taxes on the property and arguably required to pay her share of the back taxes without the benefit of the proceeds from the sale.

For all of the foregoing reasons, defendant's motion for reconsideration and stay are DENIED. The parties shall notify the court of the status of the commissioner within thirty days of this order.

SO ORDERED.

Date: 3-27-2018

Amy B. Messer
Presiding Justice