

Claims of Ousted Cotenant under New Jersey Law:

Issue: Can one cotenant make claims against the other cotenant for carrying costs of the co-owned property when one cotenant was in possession to the exclusion of the other? Yes, but equity requires a corresponding credit for the rental value of said cotenant's sole occupancy.

Discussion: Generally, a cotenant who has paid operating and maintenance expenses of the property is entitled to an accounting for a pro-rata share from the other cotenant(s). *See, Capital Finance Company of Delaware Valley, Inc. v. Bell Asterbadi*, 942 A.2d 21, 28 (N.J. Super. 2008). Operating and maintenance expenses include, but are not limited to, charges such as taxes, mortgage, interest and necessary repairs essential to the maintenance of the capital value of the property. *Id.* The possession of said property by one cotenant who makes advances for the benefit of the common estate should not preclude reimbursement by contribution from the other cotenant(s) who share(s) in the benefit by the preservation of the property. *Id.* The cotenant in possession does not have to account to the other cotenant for the use and possession of the property because all tenants in common have a right to occupy all of the property and if one chooses not to do so, that does not give him or her the right to impose an occupancy charge on the other. *Id.*

(1) A balancing of Carrying Costs vs. Rental Value

However, when a cotenant who has been in sole possession of the property demands contribution toward operating and maintenance expenses from his co-owner, fairness and equity dictate that the one seeking that contribution allow a corresponding credit for the value of his or her sole occupancy of the premises. *See, Capital Finance Company of Delaware Valley, Inc. v. Bell Asterbadi*, 942 A.2d 21, 28 (N.J. Super. 2008), *citing, Esteves v. Esteves*, 775 A.2d. 163 (App. Div. 2001), *see also, Baker v. Drabik*, 541 A.2d. 229 (N.J. Super. 1988)(the balance of the mortgage payments, real estate taxes, insurance and other reasonable carrying charges represent the reasonable value of defendant's use and occupancy and he may not seek a credit for same from plaintiff).

In *Esteves*, the New Jersey Superior Court found that when on a final accounting following sale, the tenant who had been in sole possession of the property demands contribution toward operating and maintenance expenses from his co-owner, fairness and equity dictate that the one seeking that contribution allow a corresponding credit for the value of his sole occupancy of the premises. *See, Esteves v. Esteves*, 775 A.2d. 163 (App. Div. 2001)(son who was cotenant of property in which his parents lived for over 18 years had obligation to contribute one-half of the costs expended by his parents offset against a credit for the reasonable value of the occupancy enjoyed by the parents while they, not their son, occupied the property). In addition, the party seeking the credit for the other's occupancy of the property has the burden of demonstrating the "actual rental value" of the property enjoyed by the occupying co-tenant. *Id.*

The only benefit inuring to the tenant in possession is the value of the use and occupancy; in effect, the imputed rental value of the home. *See, Bauer v. Migliaccio*, 561 A.2d. 674 (N.J. Super. 1989). When the cotenant in possession seeks to enforce contribution by the other cotenant for their share of maintenance expenses advanced by the cotenant in possession many courts deem it equitable that the occupying tenant give credit for the value of his use and occupation. *See, Baird v. Moore*, 141 A.2d. 324 (N.J. Super. 1958). It is frequently assumed that considerations of fairness and equity require the setoff of rental value. Id.

(2) Effect of Ouster:

Moreover, where possession by one tenant is accompanied by an ouster or exclusion of a cotenant, the excluded cotenant may recover the reasonable rental value of the portion of the property so occupied. Id., *citing, Lohmann v. Lohmann*, 141 A.2d. 84 (App. Div. 1958). An ouster requires more than an occupation by one tenant and a failure or forbearance to occupy by the cotenant. Id. An ouster may be actual or constructive. Id. A constructive ouster occurs when a cotenant takes possession of property that is not susceptible to joint occupancy. Id., *see also, Bauer v. Migliaccio*, 561 A.2d. 674 (N.J. Super. 1989). When there has been an ouster and the ousted cotenant receives an accounting based on the value of the use and occupancy by the cotenant in possession, equity requires that appropriate payments made by the cotenant in possession be credited in calculating what is due to the cotenant out of possession. *See, Capital Finance Company of Delaware Valley, Inc. v. Bell Asterbadi*, 942 A.2d 21, 28 (N.J. Super. 2008), *citing, Newman v. Chase*, 359 A.2d. 474 (N.J. 1976). For example, where one cotenant with his or her family remains in possession of a one-family house which is not susceptible of joint occupancy and refuses to accede to a cotenant's demands for access to the property, such conduct clearly constitutes an ouster. Id. The cotenant in possession is accountable to the ousted cotenant for one-half of the imputed rental value. Id.