

DISTRICT COURT, LA PLATA COUNTY, COLORADO 1060 E. 2nd Ave Durango, Colorado 81301 (970) 247-2304	DATE FILED: April 22, 2024 5:56 PM
Plaintiff: Todd Macon v. Defendants: Brenda Macon; James M. Burger; Nancy M. Burger; and The James M. Burger Trust dated May 14, 1994	▲ COURT USE ONLY ▲
Submitting Attorney: Kimberly C. Perdue, Atty. Reg. No. 42239 SOUTHWEST WATER AND PROPERTY LAW LLC 679 East Second Avenue, Unit 10 Durango, Colorado 81301 Phone Number: (970) 422-5510 Email: kperdue@swpropertylaw.com	Case Number: 2024CV _____ Div.: Ctrm.:
COMPLAINT AND PETITION FOR DECLARATORY JUDGMENT	

I. SUMMARY

1. The Plaintiff, Todd Macon, respectfully asks the Court to tender a declaratory judgment, pursuant to Article 51, Title 13, Colorado Revised Statutes, that a written agreement among the parties to this action affords Mr. Macon and Defendant Brenda Macon a legal and equitable marital interest in the real property addressed 39 Ophir Drive Durango, Colorado.

II. PARTIES, JURISDICTION, AND VENUE

2. Plaintiff incorporates the allegation set forth at paragraph 1 above as if fully set forth herein.

3. Plaintiff is an individual residing in La Plata County, Colorado.

4. Defendant Brenda Macon is an individual residing, on information and belief, in the State of Pennsylvania, County of Montgomery.

5. Defendants James M. Burger and Nancy M. Burger reside part-time in La Plata County, Colorado and part time in the State of Arizona, County of Maricopa.

6. Defendant The James M. Burger Trust dated May 14, 1994 is, on information and belief, an entity with its legal address in La Plata County, Colorado.

7. Jurisdiction is proper in this Court for this matter pursuant to C.R.S. §§ 13-1-124(1)(a) and (c).

8. Venue in the La Plata County District Court is proper pursuant to C.R.C.P. 98(a).

III. ALLEGATIONS

9. Plaintiffs incorporate the allegations set forth at paragraphs 1-8, above, as if fully set forth herein.

10. On or about November 25, 2013, Defendants Nancy M. Burger and James M. Burger (“the Burgers”) purchased real property in La Plata County, as described on the warranty deed recorded with the La Plata County Clerk and Recorder under reception no. 1074733, and addressed 39 Ophir Drive Durango, Colorado 81301 (hereinafter “39 Ophir”).

11. On or about November 25, 2013, the Burgers executed a deed of trust pledging 39 Ophir as security for a mortgage loan (“Deed of Trust”) which was recorded with the La Plata County Clerk and Recorder under reception no. 1074734.

12. That deed of trust provided: “If all or any part of the Property or any Interest in the Property is sold or transferred . . . without Lender’s prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument.”

13. As of November 25, 2013, Plaintiff Todd Macon and Defendant Brenda Macon (“the Macons”) owned real property addressed 396 Clear Spring Avenue, Durango, Colorado 81301 (hereinafter “396 Clear Spring”).

14. In or around December 2013, the Macons leased 396 Clear Spring to a third party and began residing at 39 Ophir.

15. In or around December 2013, the Macons and the Burgers agreed the Macons would tender monthly payments to the Burgers. The Burgers began providing the Macons with monthly invoices for amounts comprising one half of the monthly principal, interest, taxes, utilities, capital expenses, maintenance, and repairs associated with 39 Ophir.

16. The Burgers conveyed 39 Ophir to James M. Burger, Trustee of the James M. Burger Trust dated May 14, 1994 (hereinafter “Trust”), by special warranty deed recorded with the La Plata County Clerk and Recorder under reception no. 1087268.

17. Pursuant to 12, U.S.C. § 1701j-3(d)(8), the Burgers' transfer of 39 Ophir to the Trust did not entitle the Burgers' mortgage lender to immediate payment in full of all sums secured by the Deed of Trust.

18. On or about December 30, 2015, the Macons sold 396 Clear Spring Avenue to a third party by warranty deed recorded with the La Plata County Clerk and Recorder under reception no. 1106551.

19. The Macons continued to reside at 39 Ophir and continued to receive and pay monthly invoices from the Burgers for amounts comprising one of half of the principal, interest, taxes, insurance, utilities, capital expenses, maintenance, and repairs associated with 39 Ophir.

20. In any month in which the Macons did not timely pay the Burgers' invoice, the Burgers and the Macon kept a ledger of the Macons' outstanding payment obligations, which the Macons eventually satisfied.

21. In 2019, Nancy Burger prepared a document titled Agreement for 39 Ophir Dr., Durango, CO (hereinafter "Agreement"). (Exhibit 1.)

22. The Burgers and the Trust (collectively "Burger") and the Macons (collectively "Macon") were parties to the Agreement, which specified that the parties "intend that the purpose of this Agreement is to define their rights regarding their respective interests in the Property." (*Id.* at 1.)

23. The Agreement's effective date is November 25, 2013. (*Id.* at 3.)

24. The Agreement provided in pertinent part:

- a. The Burgers purchased 39 Ophir Drive for \$650,000, with a down payment of \$353,000;
- b. The Burgers and the Macons moved into 39 Ophir intending it would be each's primary residence;
- c. The Burgers, the Macons, and the Trust "intended that they would share in the principal, interest, taxes, insurance, capital expenses, maintenance, and repairs 50/50" and "[a]s of the date of this Agreement, the parties have followed this plan."
- d. Upon the sale of 39 Ophir, the sale price was to be distributed first to pay the costs of the sale; next for payment of outstanding taxes, assessments, and liens; next, to reimburse the Burgers or the Trust the \$353,000 down payment; next, to reimburse any advancements made by Burger to Macon or vice versa and to reimburse Burger for any tax liability arising from the sale; and, finally, for payment of the remaining balance in equal shares to Burger and Macon.

(*Id.* at 1-2.)

25. The Agreement represents the final and entire agreement of the Burgers, the Trust, and the Macons and there are "no prior, contemporaneous, or other agreements, representations, warranties, or promises except as set forth in th[e] Agreement." (*Id.* at 4.)

26. Burgers signed the agreement, for themselves and for the Trust, on or about September 30, 2019. (*Id.* at 4.)

27. At a later date, Brenda Macon signed the Agreement, backdating her signature to September 30, 2019. At Todd Macon's direction and consent, Ms. Macon also signed Todd Macon's name to the Agreement and backdated that signature to September 30, 2019.

28. Between September 30, 2019 and the autumn of 2023, the Macons continued to reside at 39 Ophir and continued to tender payment pursuant to the Agreement in amounts specified in the Burgers' monthly invoices.

29. The Agreement provides a process for delivery of written notice of default. (Exhibit 1 at 3.) No party has, at any time, given any other party notice of default under the Agreement.

30. On or about September 22, 2023, Brenda Macon prepared and delivered a letter to the Burgers expressing appreciation for the "[A]greement [the Burgers] carefully drafted in 2019," and asking the Burgers to "accelerate the beneficiary component of th[at A]greement via a Quitclaim Deed, specific to transferring ownership of the house either to [the Macons] or to the Todd & Brenda Macon Trust."

31. Shortly afterward, Ms. Macon prepared and delivered a second letter setting forth additional proposals: adding the Macons to the title to 39 Ophir; allowing the Macons to buy out the Trust's interest in 39 Ophir; selling 39 Ophir and dividing the proceeds as provided in the Agreement; or having the Burgers buy out the Macons' equity in 39 Ophir.

32. The Burgers and the Macons met in person, in late September or early October 2024, to discuss the options Ms. Macon had proposed. The Burgers declined

each option for reasons including their concern that a recorded transfer of interest in 39 Ophir to the Macons could accelerate their mortgage loan. However, the Burgers confirmed they would to honor the Agreement upon the eventual sale of 39 Ophir.

33. Shortly after that meeting, Ms. Macon announced her intent to dissolve her marriage to Mr. Macon.

34. Mr. Macon moved out of 39 Ophir in December 2023.

35. On or about January 24, 2024, Ms. Macon petitioned for dissolution of the Macons' marriage in La Plata County District Court case no. 2024PR2008.

36. Over the same period, the Burgers communicated to Mr. Macon, through Ms. Macon, that they did not intend to perform under the Agreement.

37. Subsequently, the Burgers and Ms. Macon jointly retained counsel and again advised Mr. Macon, through counsel, that they consider the Agreement unenforceable and maintain that Mr. Macon holds no equity in 39 Ophir.

IV. CLAIM FOR RELIEF

DECLARATORY JUDGMENT PURSUANT TO C.R.S. § 13-51-101 et seq. (Against all Defendants)

38. Plaintiffs adopt and incorporate into this claim for relief all of the allegations made elsewhere in this Complaint.

39. The Agreement documents a meeting of the minds between the Burgers, the Trust, and the Macons as to their respective interests and obligations respecting 39 Ophir.

40. The Agreement provides for consideration, i.e., the Macons' contribution of one-half of the principal, interest, taxes, insurance, capital expenses, maintenance,

and repairs respecting 39 Ophir; and the Burgers' and their Trust's obligation to disburse to the Macons a portion of the proceeds of 39 Ophir's eventual sale.

41. The Macons have performed as required under the Agreement.

42. The Agreement is a writing subscribed by the Burgers and their Trust, as the parties granting an interest in 39 Ophir, in consideration of the Macons' performance under the Agreement, compliant with Colorado's statute of frauds. C.R.S. § 38-10-106.

43. The Agreement grants the Macons a legal interest in 39 Ophir enforceable under contract law and subject to partition under Article 28, Title 38, Colorado Revised Statutes.

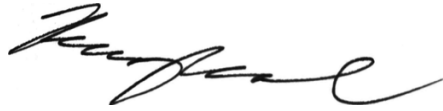
44. The Macons also hold an equitable interest in 39 Ophir entitling the Macons to equitable/quasi-contractual remedies including specific performance.

45. The Macons' interest in 39 Ophir was acquired during during their marriage and thus amounts to marital property pursuant to C.R.S. § 14-10-113(3).

WHEREFORE and for all the foregoing reasons, Mr. Macon respectfully requests that the Court issue a judgment declaring the Agreement for 39 Ophir Dr., Durango CO, between James M. Burger and Nancy M. Burger, the James M. Burger Trust, Todd Macon, and Brenda Macon is a valid and enforceable contract, compliant with the statute of frauds, which grants to Todd and Brenda Macon a marital interest in fifty percent of the proceeds of any future sale of 39 Ophir, after those deductions provided for in the Agreement.

RESPECTFULLY SUBMITTED this 22nd day of April 2024.

SOUTHWEST WATER AND PROPERTY LAW LLC

A handwritten signature in black ink, appearing to read 'Kimberly C. Perdue', written in a cursive style.

Kimberly C. Perdue

Attorneys for Plaintiffs

Plaintiff's Address:

2444 County Road 204
Durango, CO 81301