FILED
MAR 24 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CATHERINE M. ROYEK,	)	
Plaintiff-Appellant,	)	Filed March 24, 1981
vs.	)	0-419 64928
JOSEPH E. ROYEK and JOHANNA ROUSE,	)	
Defendants-Appellee.	)	

Appeal from Floyd District Court - B. C. Sullivan, Judge.

Plaintiff appeals from dismissal of her partition action. - REVERSED AND REMANDED.

Judith O'Donohoe, of Erb, O'Donohoe & Frye, Charles City, for plaintiff-appellant.

Roger L. Sutton, Charles City, for defendant-appellee.

Submitted by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

Plaintiff, Catherine Royek, appeals from dismissal of her partition action. We reverse and remand for further proceedings.

On February 6, 1980, Catherine filed her petition seeking partition of real estate. The petition alleged she and her former husband, Joseph Royek, were equitable joint owners of the property under a 1962 contract now held by Johanna Rouse, who is also named as defendant in the action. Catherine further pleaded the owners of the real estate are unable to agree upon a division and division in kind is impossible.

Defendant, Joseph Royek, appeared specially to challenge jurisdiction. He alleged the court could not acquire jurisdiction of the subject matter as it was under a divorce court's power. He also alleged judicial notice of the divorce proceedings was beyond the court's power and that plaintiff's petition does not provide adequate facts concerning the terms of the divorce decree.

The trial court sustained his special appearance and dismissed Catherine's action. Its ruling stated plaintiff was in the wrong forum as the jurisdiction of this subject matter was retained in the divorce cause. Catherine appeals that ruling. Our review on special appearance is on error only. N.F.O. Members' Custodial Account v. Beneficiaries of Aforeside Trust, 255 N.W.2d 162, 164 (Iowa 1977). Catherine asserts the trial court erred in determining jurisdiction of this matter was exclusively reserved in divorce action. She further argues the court erred in dismissing her petition for partition.

Partition is a remedy available to be sought by a joint owner of property. Synder v. Synder, 211 Iowa 445, 233 N.W. 498 (1930). In ruling on a special appearance, the allegations of the petition are accepted as true. Creative Communication Consultants, Inc. v. Byers Transportation Co., Inc., 229 N.W.2d 266, 268 (Iowa 1975). If such pleadings make out of prima facia case showing jurisdiction, plaintiff has met her burden. Id. We find in this case Catherines' petition alleged sufficient facts and grounds seeking partition to place jurisdiction in the court.

The defendant attempts to over-come this showing by alleging the property provision in the parties divorce decree deprives the court of jurisdiction. In her petition, Catherine does not seek enforcement of the decree. She contends the real estate involved is still owned by both parties and has not been affected by the divorce

decree because the condition precedent set forth in the property provision was not met. For the partition action to be determined the property provision of the divorce decree will need to be interpreted. This interpretation, however, does not mandate that jurisdiction be vested in the divorce cause. See Bowman v. Bennett, 250 N.W.2d 47 (Iowa 1977), where a partition action was sought following divorce decree and interpretation of the decree was appropriate to determine plaintiff's entitlement to possession. We find the trial court erred in restricting jurisdiction of this matter to the divorce cause.

Defendant's issues and authorities raised at his special appearance concerning judicial notice of the divorce decree are not applicable at this point. In special appearance proceedings it is inappropriate to raise defensive matters or to serve any purpose beyond challenging the jurisdiction of the court. Rothe v. City of Des Moines, 249 N.W.2d 849, 850 (Iowa 1977). While it is true evidence of the divorce proceedings must be presented in some manner other than judicial notice see Johnson v. Johnson, 188 N.W.2d 288 (Iowa 1971), this evidenciary question is not appropriate in a special appearance proceeding.

Finding error below, and jurisdiction of the subject matter properly before the trial court we reverse the dismissal of this cause and remand for further proceedings.

REVERSED AND REMANDED.