SECOND DIVISION
March 14, 2017

No. 1-15-2103

HANNA STADNYK,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee/Cross-Appellant,	)	Cook County
	)	
v.	)	No. 14 CH 4775
	)	
ROMAN NEDOSHYTKO and TATYANA GOINYAK,	)	Honorable
	)	Kathleen Kennedy,
Defendants-Appellants/Cross-Appellees.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err when it struck defendant's affirmative defenses. The trial court erred when it entered an order directing that the property be sold in a private sale after granting plaintiff's partial motion for summary judgment. The court erred when it denied plaintiff's request for apportionment of attorney fees.

¶ 2 Roman Nedoshytko (Roman) and Tatyana Goinyak (Tatyana) (collectively, defendants), husband and wife, appeal from an order of the circuit court striking their affirmative defenses in a partition action and ordering the private sale of their ownership interests in violation of section 17-105 of the Code of Civil Procedure (Code) (735 ILCS 5/17-105 (West 2012)), sometimes referred to as the Illinois Partition Act (Act) 735 ILCS 5/17-101 through 17-127 (West 2012). Hanna Stadnyk (Hanna) cross-appeals from the circuit court's order denying her request for apportionment of costs and legal fees incurred in her suit for partition. For the following reasons,

we affirm the order of the trial court striking defendants' affirmative defenses. We affirm that portion of the summary judgment order granting partition. We reverse that portion of the summary judgment order directing the property to be sold at a private sale. We vacate the order denying plaintiff's request for apportionment of attorney fees and costs. We remand to the trial court for a public sale of the subject property on terms as directed by the circuit court, including allowing the parties to credit bid. Further, on remand we direct the circuit court to apportion plaintiff's attorney fees and costs between the parties based on their respective ownership interests through the date of the judgment declaring their respective property interests.

¶ 3 BACKGROUND

¶ 4 The trial court granted partial summary judgment in favor of Hanna, finding that partition of the subject property was warranted and that the property could not be partitioned without "manifest prejudice." The circuit court ordered Roman to sell, at a private sale, his 1/8 interest in the property to Hanna, who owned the remaining 7/8 interest, pursuant to section 17-105 of the Code (735 ILCS 5/17-101 (West 2012)). The judgment provided that the value of Roman's 1/8 interest was determined by an appraisal that neither party objected to. Lastly, the court terminated any homestead right held by Tatyana in the property.

¶ 5 Hanna and Roman each maintained interests in a two-story, four-unit residential building located at 2345 West Superior Street in Chicago. Both parties resided at the property and received their shares of ownership via five quit claim deeds. At the time the partition lawsuit was commenced, Hanna owned a 7/8 interest in the property and resided on the first floor of the building. Roman owned a 1/8 interest in the property and resided there with his wife Tatyana on the second floor of the building. Tatyana possibly maintained a homestead interest in Roman's 1/8 interest.

¶ 6 On March 19, 2014, Hanna filed a verified complaint for partition of real estate seeking an order: (1) declaring the respective rights and interests of the parties in the property; (2) declaring that the property cannot be divided without "manifest prejudice" to the parties in interest; (3) directing an appraisal of the property and ordering defendants to sell their interest in the property to plaintiff at a price in proportion to the value of their 1/8 interest; (4) declaring that Tatyana's homestead interest, if any, is terminated; (5) granting possession of the property in favor of plaintiff and against defendants; and (6) for any other relief that the court deemed equitable and proper.

¶ 7 On July 2, 2014, defendants filed a motion to dismiss Hanna's complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)), arguing that the trial court lacked authority under section 17-105 (735 ILCS 5/17-105 (West 2012)) to order defendants to sell their interest in the property to plaintiff through a private sale. Defendants argued that the sole remedy under the statute was a public sale. On July 17, 2014, the trial court denied defendants' motion to dismiss.

¶ 8 On August 14, 2014, defendants answered the complaint, asserting a number of affirmative defenses in the nature of a set-off for maintenance payments they had made. Defendants later moved for leave to file a counterclaim on the grounds of unjust enrichment, breach of fiduciary duty, accounting, and attorneys' fees. The trial court allowed defendants leave to file amended affirmative defenses. Those amended affirmative defenses mirrored the counts that defendants had intended to file as their counterclaims.

¶ 9 On August 29, 2014, Hanna filed a motion for entry of partial summary judgment and appointment of a commissioner pursuant to sections 17-105 and 17-106 of the Code (735 ILCS 5/17-105,106 (West 2012)). The motion sought an order declaring that Hanna was entitled to a

7/8 share of the property and that Roman was entitled to a 1/8 share of the property. Additionally, the order sought the appointment of a commissioner to decide whether the property could be partitioned without "manifest prejudice" to the parties, and if not, seeking an appraisal of the property by the commissioner. Hanna also asked the court to permit either party to purchase the interest of the other party at a price relative to the appraisal and their respective interest. Subsequently, the parties stipulated that the property could not be divided without "manifest prejudice" to the parties and, therefore, the appointment of a commissioner to make that determination was unnecessary.

¶ 10 On January 9, 2015, the trial court granted partial summary judgment granting partition. The trial court entered a judgment finding Hanna "is entitled to a 7/8 part of the real estate" and Roman is "entitled to a 1/8 part of the real estate." The trial court further found that the parties agreed that "division of the property in kind cannot be accomplished without manifest prejudice to the [p]arties" and found the request for a commissioner moot. Defendants do not appeal this order.

¶ 11 The trial court ordered the parties to nominate their own appraisers to value the property. An appraisal report concluded that the fair market value of the property was $525,000. Neither party objected to the appraisal report.

¶ 12 On January 23, 2015, Hanna filed a motion for entry of final judgment and sale seeking an order terminating any homestead interest of Tatyana and directing Roman to sell his 1/8 interest in the property to Hanna for $54,758.72. This amount reflected a 1/8 share of the $525,000 appraised value ($65,625) minus the defendants' equitably apportioned share of Hanna's attorneys' fees ($10,866.28) pursuant to section 17-125 of the Code (735 ILCS 5/17-125 (West 2012)).

¶ 13 On January 30, 2015, defendants sought leave to file counterclaims. The counterclaims alleged unjust enrichment (count I), breach of fiduciary duty (count II), and equitable accounting (count III). The trial court denied defendants leave to file their counterclaims, but permitted them to file amended affirmative defenses. On February 20, 2015, defendants filed their first amended affirmative defenses that were identical to their proposed three-count counterclaim for unjust enrichment, breach of fiduciary duty, and equitable accounting with an additional fourth affirmative defense seeking apportionment of their attorneys' fees and costs.

¶ 14 On February 23, 2015, defendants filed their response to Hanna's motion for entry of final judgment. Defendants argued that Hanna's sole remedy under section 17-105 (735 ILCS 5/17-105 (West 2012)), was a public sale of the property. On March 12, 2015, Hanna filed a reply in support of the motion for entry of final judgment and sale arguing that the trial court is not limited by the statute to a public sale and may use its equitable powers to establish justice among the parties. Hanna also argued that defendants' affirmative defenses must be denied as a matter of law.

¶ 15 On May 6, 2015, the parties appeared for hearing on Hanna's motion for entry of final judgment and sale. The trial court asked the parties to submit additional "supplemental authority" addressing the issue of the court's authority to order the partition remedy of a private sale as opposed to the statutory remedy of a public sale. Hanna filed a supplemental submission of legal authority on May 15, 2015. Defendants did not file any supplemental authority.

¶ 16 On May 26, 2015, the trial court entered an order finding that the court's authority was not limited by statute with respect to the private sale remedy requested by Hanna and granted Hanna's motion for entry of final judgment and sale. The matter was continued to June 23, 2015, for further hearing on Hanna's request for apportionment of attorneys' fees, and for entry of a

final order.

¶ 17 On June 17, 2015, defendants filed their response to Hanna's request for attorneys' fees. Defendants argued that Hanna's attorneys' fees should not be apportioned because the defendants presented "good and substantial defenses" to the partition action. Defendants also argued that their amended affirmative defenses remained pending and that defendants should be permitted to continue the litigation.

¶ 18 On June 19, 2015, Hanna filed a reply in support of her request for apportionment of legal fees. She argued the reasonableness of the legal fees and that defendants' claimed "good and substantial defense" does not bar apportionment of attorneys' fees incurred prior to the date the affirmative defenses were raised.

¶ 19 On June 23, 2015, the trial court denied Hanna's request for apportionment of attorneys' fees and entered a final order for judgment and sale. The order provided that Tatyana's homestead rights were terminated and, upon payment of $65,625 by Hanna to Roman, Roman "shall immediately covey to [Hanna]**,** by valid quitclaim deed, his entire 1/8 undivided interest in the property". The court struck defendants' amended affirmative defenses stating "that the affirmative defenses set forth of unjust enrichment, breach of fiduciary duty and equitable accounting are not affirmative defenses, those are counterclaims, and those are stricken." In denying Hanna's request to apportion fees and costs, the trial court stated:

> "Okay. Well, I think in facing the fees issue, the Court was kind of once again facing the issue of the statutory provisions versus the equitable authority of the Court or the equitable powers of the Court. So I think it raised some questions in the Court's mind as far as if you're not exactly relying on the statute, because the statute would require the sale, and you're really relying on the equitable powers of the Court, how then can you use

the statutory provisions on fees to obtain the fees?"

¶ 20 Defendants filed a timely appeal from the June 23, 2015, order and plaintiff cross-appealed, seeking reversal of only that portion of the June 23, 2015, order denying plaintiff's request for apportionment of attorney's fees and costs.

¶ 21 ANALYSIS

¶ 22 Defendants argue that the trial court erred in striking their affirmative defenses after "indicating that it would give consideration to those defenses in determining the proper disbursement of funds from the sale of the property." Defendants also argue the "exclusive remedy set by 735 ILCS 5/17-105 is a public sale." We review these questions of law *de novo*. *In re Marriage of McGrath*, 2012 IL 112792, ¶ 10. We consider these two issues in turn.

¶ 23 Counterclaims may be brought by a defendant against any number of plaintiffs or co-defendants in the nature of "setoff, recoupment, cross claim or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be pleaded as a cross claim in any action, and when so pleaded shall be called a counterclaim." 735 ILCS 5/2-608 (West 2012).

¶ 24 Section 2-613 of the Code governs affirmative defenses and provides:

> "(d) The facts constituting any affirmative defense, such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, laches, statute of frauds, illegality, that the negligence of a complaining party contributed in whole or in part to the injury of which he complains, that an instrument or transaction is either void or voidable in point of law, or cannot be recovered upon by reason of any statute or by reason of nondelivery, want or failure of consideration in whole or in part, and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth

> in the complaint, counterclaim, or third-party complaint, in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply." 735 ILCS 5/2-613 (West 2012).

¶ 25 "Counterclaims differ from affirmative defenses in that counterclaims seek affirmative relief whereas affirmative defenses attempt to defeat a plaintiff's cause of action." *Dudek, Inc. v. Shred Pax Corp.*, 254 Ill. App. 3d 862, 871 (1993). Those pleadings for affirmative relief that fail to explicitly label that relief as "counterclaims" do not lose the right to their claim. *Id.*, See also *Young Men's Christian Association v. Midland Architects, Inc.*, 174 Ill. App. 3d 966, 971 (1988).

¶ 26 Here, the defendants initially plead as an affirmative defense a request for a set-off of monies spent to maintain the property. The defendants then moved for leave to file a counterclaim after partial summary judgment was entered and after plaintiff moved for a final judgment and order of sale. There is no order or transcript provided with respect to the court denying defendants leave to file a counterclaim, and defendants have not appealed that order, if in fact one was entered. As such, we will not consider the merits of that order. In any event, the court allowed defendants to file their amended affirmative defenses, which they did on February 20, 2015, alleging unjust enrichment, breach of fiduciary duty, and equitable accounting. These affirmative defenses appear to be nearly identical in nature to the counterclaims defendants previously sought to file, plus a fourth affirmative defense seeking apportionment of their attorney fees and costs.

¶ 27 Thereafter, the plaintiff moved for, and the court entered, a final judgment, terminated any homestead interest of Tatyana and ordered the property sold commenting that "as to the

affirmative defenses, the Court finds that the affirmative defenses set forth of unjust enrichment, breach of fiduciary duty and equitable accounting are not affirmative defenses, those are counterclaims, and those are stricken." Again, defendants do not appeal any order denying them leave to file any counterclaims and have not provided this court with any legal basis to determine whether they should have been allowed to file a counterclaim. Therefore, we will address only the question of whether defendants' affirmative defenses were sufficient to defeat summary judgment on the motion for final judgment and order of sale.

¶ 28 We affirm the circuit court's ruling striking the defendants' affirmative defenses. The affirmative defenses filed did not seek to defeat plaintiff's cause of action for partition. *Dudek, Inc.*, 254 Ill. App. 3d at 871. Rather, defendants attempted to set-off from any money due Hanna after the sale, payments for maintenance, upkeep, and repair of the partitioned property that were allegedly made by defendants, as well as recovery of rent payments received by Hanna and proportionally due to defendants. "Setoff most commonly appears as a counterclaim filed by a defendant, based upon a transaction extrinsic to that which is the basis of the plaintiff's cause of action." *Lake County Grading Co. of Libertyville, Inc. v. Advance Mechanical Contractors, Inc.*, 275 Ill. App. 3d 452, 462 (1995). Here, defendants' claims for set-off and an accounting were not properly brought as affirmative defenses because they do not defeat the partition action and were therefore properly stricken. See 735 ILCS 5/2-613 (West 2012). Defendants claim that their affirmative defenses were "not considered" by the trial court is not well-taken because, in "striking" the affirmative defenses, the court obviously considered them and correctly concluded that they were not valid affirmative defenses.

¶ 29 Next, defendants argue that, pursuant to section 17-105 (735 ILCS 5/17-105 (West 2012)), the court was not authorized to conduct a private sale. Rather, section 17-105 required

the court to conduct a public sale of the property once it was stipulated that the property could not be partitioned without manifest prejudice. Defendants do not argue that the partial summary judgment order finding Hanna "is entitled to a 7/8 part of the real estate" and Roman is "entitled to a 1/8 part of the real estate" was in error. Nor do defendants contest the termination of Tatyana's homestead rights. The only issue raised by defendants in regard to the final order of sale is whether the court erred in ordering a private sale of the property where Hanna would pay a certain price, based on an appraised value of the property that neither party objected to, to Roman for his interest rather than selling the property at a public sale.

¶ 30 "Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *County of Cook v. Village of Bridgeview*, 2014 IL App (1st) 122164, ¶ 10. Issues pertaining to statutory interpretation of law are reviewed *de novo*. *Id.* ¶23. A trial court's ruling on a motion for summary judgment is reviewed *de novo*. *LaSalle Bank, N.I. v. First American Bank*, 316 Ill. App. 3d 515, 521 (2000).

¶ 31 Section 17-105 of the Code states in relevant part: "If the court finds that the whole or any part of the premises sought to be partitioned cannot be divided without manifest prejudice to the owners thereof, then the court shall order the premises not susceptible of division to be sold at public sale in such manner and upon such terms and notice of sale as the court directs." 735 ILCS 5/17-105 (West 2012).

¶ 32 Defendants argue that the trial court erred when it granted Hanna's motion for summary judgment and entered an order compelling Roman to sell his interest to Hanna through a private sale, rather than ordering a public sale, as set forth in section 17-105. The defendants argue that

the language of the statute is clear and unambiguous and thus controls. Plaintiff disagrees and argues that the court derives its authority from the "inherent equitable powers" of a court of equity and therefore was not required to order a public sale of the property as required by section 17-105 of the Code. It is clear from our review of the record that Hanna was agreeable that either interested party could purchase the property at a price set by an appraiser. It is equally clear that defendants did not object to the appraised value of $525,000. However, we cannot find that the defendant's decision to not contest the value contained in the appraisal was tantamount to an agreement to sell the property at a private sale using the appraised value as the basis for compensating defendant for his interest in the property. What is also clear is that defendants contested the court's authority to order a partition by way of a private sale even though a public sale may result in a lower sale price and a lower payment to Roman for his 1/8 interest.

¶ 33 In construing section 17-105 of the Code, we must ascertain and give effect to the intent of the legislature. *Varelis v. Northwestern Memorial H*ospital, 167 Ill. 2d 449, 464 (1995). "The most reliable indicator of that intent is the language of the statute itself." *Hendricks v. Board of Trustees of Police Pension Fund of City of Galesburg*, 2015 IL App (3d) 140858 ¶ 14. "If the statutory language is clear and unambiguous, it must be applied as written, without resorting to further aids of statutory interpretation." *Id*. "A court may not depart from the plain language of the statute and read into it exceptions, limitations, or conditions that are not consistent with the express legislative intent." *Id*.

¶ 34 We agree with defendants that the language of section 17-105 of the Code is clear and unambiguous. Section 17-105 of the Code clearly states that if the property cannot be partitioned "without manifest prejudice" to the parties, the court "shall" order the property sold at a public sale. 735 ILCS 5/17-105 (West 2012). The defendants correctly argue that the word "shall"

signals a mandatory obligation to adhere to the statutory language. See *People v. McClure*, 218 Ill. 2d 375, 382 (2006). "As we have often held, a court may not add provisions that are not found in a statute, nor may it depart from a statute's plain language by reading into the law exceptions, limitations, or conditions that the legislature did not express." *Household Bank, FSB v. Lewis*, 229 Ill. 2d 173, 182 (2008).

¶ 35 In *In re Marriage of Mitchell*, 181 Ill. 2d 169 (1998), our supreme court considered a similarly worded section of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/505(a)(5) (West 1994)). Section 505(a)(5) of the Marriage Act provided that "[t]he final order [for child support] in all cases *shall* state the support level in dollar amounts." (Emphasis added.) 750 ILCS 5/505(a)(5) (West 1994). As part of a divorce judgment, the trial court assigned a support payment as a percentage, rather than assigning a dollar amount as specified by statute, as the amount the husband was to pay towards child support. *Mitchell*, 181 Ill. 2d at 173. The court held that "the plain language of the statute requires that the final order state the support level solely in dollar amounts". *Id*. "The legislature used the mandatory word 'shall' to provide that in 'all cases' child support 'shall' be stated in dollar amounts and made no reference to the inclusion of payments as a percentage." *Id*. The court further reasoned that allowing the agreement to be expressed in a percentage, rather than a dollar amount, would "require us to read into the statute payment options that the legislature did not include." *Id*.

¶ 36 Similar to the plain language of the statutory provision reviewed in *Mitchell*, the plain language of section 17-105 of the Code required the court to order the subject property for public sale because it was stipulated that the property could not be partitioned "without manifest prejudice." (735 ILCS 5/17-105 (West 2012)). Were we to find that the court's order that Roman sell his 1/8 interest in the property by way of a private sale was proper under section 17-105, we

would be reading into the statute an option that the legislature did not include. See *Mitchell*, 181 Ill. 2d at 174.

¶ 37 Because we find the statute to be unambiguous, it is clear that to give effect to the intent of the legislature, after the parties agreed that a partition of the property was appropriate and that their respective interests were determined, the statute clearly provided that the trial court was required to order a public sale of the property. Hence, the trial court erred in not ordering a public sale.

¶ 38 In so holding we reject Hanna's argument that the trial court had independent authority as a court of equity to do justice among the parties and therefore was not bound by section 17-105 of the Code. "Partition proceedings in chancery must conform to the Partition Act." *Murphy v. Murphy*, 343 Ill. 234, 236 (1931). "It has long been held that any power existing in a court of equity may not dispense with the plain requirements of a statute." *Evangelical Hospital Association v. Novak*, 125 Ill. App. 3d 439, 444 (1984) (citing *Stone v. Gardner* 20 Ill. 304, 309 (1858)); *First Federal Savings & Loan Association v. Walker*, 91 Ill. 2d 218, 226-27 (1982); *Evergreen Savings & Loan Association v. Barnard*, 65 Ill. App. 3d 492, 497 (1978).

¶ 39 We note that our holding is congruous with decisions rendered by this court concerning earlier versions of this section of the Act. In *Factor v. Factor*, 27 Ill. App. 3d 594, 597 (1975), we construed an earlier version of the Act that provided for a sale by the sheriff or in open court, and held that a decree that appointed a commissioner for the purpose of selling real estate subject to partition at a private sale was in error. The applicable statute provided that:

> "In all cases where a sale of property is decreed, the court may direct the same to be made for cash, or on such credit where no redemption is allowed, and on such terms, as it may deem best and most equitable to the interests of the several parties. The court may

direct that any such sale be held by the sheriff or that the same he held in open court." *Id*; Ill.Rev.Stat.1973; ch. 22, par. 48.

We also held that "this statute forbids judicial sales of property except where held by the sheriff or in open court. The meaning of this language is clear and plain and requires no construction." *Id*. In flatly rejecting the notion that the equitable power of the court can alter the requirements of the statute, we stated that "[U]nder no circumstances can the application of this principle justify a violation of clear constitutional and statutory provisions." *Id.*

¶ 40 Subsequently, in *Anderson v. Anderson*, 42 Ill. App. 3d 781, 785-86 (1976), we cited with approval the ruling in *Factor* that the appointment of a commissioner to sell the property, rather than for the purpose of determining whether the property could be partitioned, was invalid as contrary to the partition statute.

¶ 41 Accordingly, we remand to the circuit court for a public sale consistent with this order, where the trial court has the authority to set the terms and conditions of the sale pursuant to section 17-105 of the Code (735 ILCS 5/17-105 (West 2012)).

¶ 42 In addition to conducting the sale pursuant to the provisions of section 17-105 of the Code (735 ILCS 5/17-105 (West 2012)), we further direct the court to allow the parties to bid at the sale and, in the event a party is the successful bidder, that party shall be entitled to a credit bid to the extent of their interest in the property as determined by the trial court: a 7/8 interest in Hanna, and a 1/8 interest in Roman. For example, if the property is sold for $528,000 and Hanna is the successful bidder, she would have a credit bid of $462,000 ($528,000 divided by 8 and multiplied by 7) resulting in a payment due (plus usual and customary closing costs apportioned between the parties) of $66,000 to complete the sale. Conversely, if Roman is the successful bidder at $528,000, he would receive a credit bid of $66,000 ($528,000 divided by 8 and

multiplied by 1) and would be required to pay $462,000 (plus usual and customary closing costs apportioned between the parties) to complete the sale. Obviously, any sale above or below the uncontested appraised value obtained during this litigation and used by the trial court in determination of the value of Roman's interest at a private sale which we have vacated, will result in more or less money being tendered or received by the parties at the conclusion of the public sale. That unintended consequence, however, is the result of the resolution of this appeal.

¶ 43 Cross-appeal

¶ 44 On cross-appeal, Hanna argues that the trial court abused its discretion in denying her request to apportion legal fees because the defendants did not present a "good and substantial" defense. Defendants respond by asserting that they presented "a good and substantial defense."

¶ 45 The partition statute provides for the apportionment of "costs":

> "In all proceedings for the partition of real estate, when the rights and interests of all the parties in interest are properly set forth in the complaint, the court shall apportion the costs among the parties in interest in the action, including the necessary expense of procuring such evidence of title to the real estate as is usual and customary for making sales of real estate, and a reasonable fee for plaintiff's attorney, so that each party shall pay his or her equitable portion thereof, unless the defendants, or some of them, interpose a good and substantial defense to the complaint. In such case the party or parties making such substantial defense shall recover their costs against the plaintiff according to justice and equity." 735 ILCS 5/17-125 (West 2012).

¶ 46 The premise of apportioning attorney fees in a partition action is that the plaintiff's attorney "acts for all interested parties." *Clayton v. Bradford Nat. Bank*, 250 Ill. App. 3d 775, 777 (1993). However, an award of attorney fees is only warranted when it is unnecessary for the

defendant to hire counsel to protect his interest in the property. *Id*. "It is essential that the conduct of the attorney for the party seeking partition be fair and impartial to all the parties in interest." *Id* at 782. To determine whether the plaintiff's attorney is in fact fair and impartial, the court should look to the partition action itself. See *Bailey v. Bailey*, 150 Ill. App. 3d 81, 88 (1986) "It is error to apportion plaintiff's attorney fees where the suit is strongly contested and defendant has in good faith advanced reasonable and substantial grounds on which she defended." *Clayton*, 250 Ill. App. 3d at 782. The apportionment of attorneys' fees is a matter fixed within the discretion of the trial court. *Id.* at 784.

¶ 47 In *Bailey*, we discussed the difference between a good and substantial defense and a collateral issue. In that case, we held that where a will contest did not affect title to the property subject to partition, the will contest was not a substantial defense to the partition action. *Bailey*, 150 Ill. App. 3d at 89. Rather, it constituted a collateral issue because it was possible to divide the disputed properties without resolution of the will contest. *Id.* However, a will construction action, although in one sense a collateral issue, also constituted a substantial defense to the partition action. *Id.* The parties' differing constructions directly influenced and could have changed the proposed quantity of land to be taken by each individual party. *Id.* The court held that the will construction was, therefore, by definition a substantial defense. *Id.* The court further held that the presentation of this substantial defense to the partition action precluded an award of attorney fees to plaintiff. *Id*.

¶ 48 In the case at bar, defendants did not contest the actual partition action or the complaint averment that Roman held a 1/8 interest in the property. Instead, defendants filed their affirmative defenses after the court entered partial summary judgment and ordered partition. Defendants sought a set-off for maintenance and rents owed, and contested the manner in which

the court could partition the property: whether a public sale was required in accordance with section 17-105 of the Code (735 ILCS 5/17-105 (West 2012)) or if the plaintiff could seek a forced private sale by way of the court's inherent equitable authority. Defendants' argument in the trial court was that section 17-105 of the Code expressly provided for a public sale of the property. The questions of whether a set-off was appropriate and whether a public sale was required were raised after partition was ordered and did not affect the actual determination of the parties' interest in or partition of the property, which defendants did not contest. The defendants never contested the verified complaint for partition asserting that Roman had a 1/8 property interest, and thus a good and substantial defense to the complaint for partition was not made. Accordingly, we remand for the circuit court to apportion Hanna's attorneys' fees and costs through January 9, 2015, the date plaintiff's motion for partial summary judgment for partition was granted.

¶ 49 CONCLUSION

¶ 50 For the foregoing reasons, we affirm the trial court's order striking defendants' affirmative defenses. We reverse the ruling of the circuit court ordering Roman's 1/8 interest in the property to be sold at a private sale and remand to the trial court for a public sale pursuant to section 17-105 and 17-127 of the Code (735 ILCS 5/17-105, 17-127 (West 2012)) and to provide that Hanna and Roman are allowed to credit bid. We affirm the termination of Tatyana's homestead interest in the property. We vacate the order denying Hanna's request for apportionment of her attorneys' fees and costs and remand to the circuit court for the court to apportion her attorneys' fees and costs through January 9, 2015, the date of the entry of partial summary judgment establishing the property interests of the parties.

¶ 51 Affirmed in part; reversed in part; remanded with instructions.