J-A07019-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MARK FORKAL,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
RANDOLPH FORKAL,	:	
	:	
Appellant	:	No. 1485 MDA 2012

Appeal from the Order Entered July 17, 2012,
In the Court of Common Pleas of Susquehanna County,
Civil Division, at No. 2007-1140.

BEFORE: BENDER, SHOGAN and FITZGERALD*, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED MAY 15, 2013**

Randolph Forkal ("Randolph") appeals from the order denying his exceptions to a master's report and recommendation concerning two parcels of real estate owned by Randolph and his brother, Mark Forkal ("Mark"), as tenants-in-common. We affirm.

The Forkal brothers inherited two non-contiguous parcels of real estate in Susquehanna County from their late mother (collectively "the property"). One parcel contains 198 acres, a house, a dairy barn, a shop, and farm equipment; the other, 137 acres, unusable buildings, and three pieces of farm equipment. Randolph has lived in the house on the 198 acres and used the land and equipment since his mother died on October 12, 2002. Mark has used the 137 acres and equipment for his farming operation since 2003.

*Former Justice specially assigned to the Superior Court.

Randolph and Mark entered into separate oil and gas leases based on their 50% interest in each parcel.

Although both brothers agreed that the property is capable of partition, they could not agree on a partition plan. Additionally, the brothers disputed possession and control of jointly inherited farm equipment. The farm equipment was appraised at approximately $65,000.00 in 2002 and at $40,000.00 in 2008. To resolve their rancorous dispute, Mark filed a complaint on August 10, 2007, seeking partition of the property, one-half of the fair market value and one-half of the fair rental value of the equipment, and one-half of the fair market value and one-half of the fair rental value of the 198-acre parcel. Randolph filed an answer, new matter, and counterclaims on October 11, 2007. The trial court entered an order on July 8, 2008, directing a partition of the property and appointing Attorney Raymond C. Davis as the partition master.

Master Davis conducted a hearing on March 20, 2009, at which both brothers testified and offered appraisals. Mark offered an appraisal from October 2002. It valued the 137 acres at $145,000, and the 198 acres at $260,000. Randolph offered an appraisal from Nasser Appraisal Services, which he retained in October 2008. Nasser valued the 137 acres at $420,000, and the 198 acres at $330,000. Neither appraisal considered the value of the subsurface estates. With leave of court, the master obtained an

appraisal from Gerber Associates, dated January 2011. Gerber valued the 137 acres at $575,000, and the 198 acres at $872,000, without mentioning whether the appraisals included the value of the subsurface estates.

Despite the brothers' testimony that the property could be partitioned, Master Davis concluded that a partition without prejudice was not possible. In a report and recommendation dated June 9, 2009, Master Davis recommended a private sale of the property between the brothers with open bidding. Randolph filed exceptions, which the trial court, sitting in equity, denied on October 15, 2009. Randolph sought reconsideration, which the trial court denied on December 7, 2009. Randolph filed a premature appeal, which we quashed in a memorandum. ***Forkal v. Forkal***, 11 A.3d 1010, unpublished memorandum (Pa. Super. filed on August 4, 2010).

Master Davis filed an amended report on March 4, 2011, to which Mark and Randolph filed exceptions. The trial court denied Randolph's exceptions and remanded "the additional issues raised in [Mark's] Exceptions and not considered in the Master's Report and Recommendation," *i.e.*, the sale of joint farm equipment and the payment of the rental value of the house Randolph lives in. Order and Opinion, 9/21/11, at 1. Randolph again filed a premature appeal, which we quashed. Order of Court, 1/5/12 (*per curiam*).

As directed by the trial court, Master Davis addressed the farm equipment and rental value of the house in a second amended report and

recommendation filed on March 12, 2012. Mark and Randolph filed exceptions. The trial court denied all of Mark's exceptions, granted Randolph's exception regarding his payment of the property taxes, and denied the remainder of Randolph's exceptions. Order and Opinion, 7/17/12, at 10.

Randolph appealed, presenting the following questions for our review:

> A. Did the lower court commit abuse of discretion and error of law by concluding that the property is ***not*** capable of division when (1) the property consists of purparts of 137 acres and 198 acres, separated by a mile distance, (2) both Parties testified that the property is capable of partition, and (3) there was no attempt to apply the principles set forth in Rule 1570(a) and 1570(b)(1)(2)[?]
>
> B. Did the Lower Court (a) capriciously disregard competent evidence re the Nasser appraisals and (b) capriciously disregard the testimony of the Parties that each was satisfied with the appraisals presented on their behalf of the Masters [sic] Hearing?
>
> C. Did the Lower Court commit abuse of discretion and error of law by *sua sponte* citing speculative facts dehors the record?

Randolph's Brief at 6 (emphasis in original).

"Partition is a possessory action; its purpose and effect being to give to each of a number of joint owners the possession [to which] he is entitled ... of his share in severalty. It is an adversary action and its proceedings are compulsory. The rule is that the right to partition is an incident of a tenancy in common, and an absolute right." ***Lombardo v. DeMarco***, 504 A.2d 1256, 1260 (Pa. Super. 1985) (quotation and citations omitted).

> The scope of appellate review of a decree in equity is particularly limited and such a decree will not be disturbed unless it is unsupported by the evidence or demonstrably capricious.... The test is not whether we would have reached the same result on the evidence presented, but whether the judge's conclusion can be reasonably drawn from the evidence.... Where a reading of the record reasonably can be said to reflect the conclusions reached by the lower court sitting in equity, we cannot substitute our judgment for that of the lower court.

Lombardo, 504 A.2d at 1258; ***In re Kasych***, 614 A.2d 324 (Pa. Super. 1992); ***Moore v. Miller***, 910 A.2d 704 (Pa. Super. 2006). "Conclusions of law or fact, being derived from nothing more than the chancellor's reasoning from underlying facts and not involving a determination of credibility of witnesses, are reviewable." ***In re Kasych***, 614 A.2d at 326 (citation omitted).

The Pennsylvania Rules of Civil Procedure ("Pa.R.C.P.") govern partition actions. The following rules are relevant to the case before us:[1]

[1] Randolph mentions Pa.R.C.P. 1570(a) and 1570(b)(1)(2) in passing. Randolph's Brief at 4, 20, 21. However, those provisions of Rule 1570 delineate the necessary findings of fact in a decision and the requirements of an order where partition is possible under Rules 1560 (**Property Capable of Division without Prejudice**) and 1562 (**Property not Capable of Proportionate Division. Award**). As Master Davis recommended – and the trial court agreed – that the property was **not** capable of partition without prejudice, Rules 1560, 1562, and 1570(b)(1) and (2) are not applicable to the case at hand. ***Compare Bernstein v. Sherman***, 902 A.2d 1276 (Pa. Super. 2006) (holding that rejection of master's partition plan and insistence on a private sale are permissible under rules 1560-1562, 1566, 1570).

> **Rule 1563. Property not Capable of Division without Prejudice. Sale. Objections**
>
> (a) Except as otherwise provided in Subdivision (b), property not capable of division without prejudice to or spoiling the whole shall be offered for private sale confined to the parties.
>
> (b) Parties defendant owning a majority in value of the property may object in writing to any sale, requesting that the property be awarded to them at its valuation fixed by the court and that their interests in the same remain undivided. Upon such request the entire property shall be awarded to the parties objecting to sale, as tenants in common, subject to the payment to the parties desiring partition and sale of the amounts of their respective interests based upon the valuation. The amounts due the parties shall be charged as liens upon the property, to be paid in such manner and time as the court shall direct.

Pa.R.C.P. 1563(a) and (b).

In support of his first issue, Randolph points to the brothers' agreement that the property is capable of division. Randolph's Brief at 20 (citing N.T., 3/20/09, at 50, 74). Randolph refutes the master's assertion that "the property is not capable of division." ***Id.*** According to Randolph, "[t]here are no facts of record indicating that it is not feasible to partition the real estate." ***Id.***

Here, the trial court explained its agreement with Master Davis' conclusion that the property could not be partitioned without prejudice:

> Although we do not believe that division would spoil the property, we do believe that any kind of division would ultimately result in prejudice to either [Mark] or [Randolph]. In reviewing the trial testimony, this Court learned that there are two parcels of property here (one 198 acre, more or less, piece and one 137 acre piece) and that several areas of the property differ in character. Some areas of the acreage contain valuable

> tillable land while other areas contain untillable land. Some areas contain swamps, rivers, areas of valuable timber, huckleberry bushes, and possible veins of very valuable bluestone. One portion of the property has road frontage while another does not. Some of the property is steep, another area is hilly and some of the property is flat. Both parties have signed up for a gas lease and there is possibly valuable gas under the property. Further, trial testimony established that there is an area of the property with magnificent and valuable views. Finally, there is a home, some barns, a shop, milking equipment and different machinery on the property.
>
> [Randolph] at one point suggested splitting the property in half and because of the different valuable minerals on the property, retaining equal shares to the royalties earned from the minerals. However, the Master at the hearing explained that this arrangement would be prejudicial because the owner of the property "burdened" with the mineral would loose [sic] out on usable acreage. This is just one of the problems that would arise if a partition were ordered. Because of the different characters of the property in this case and the different accesses to water and road frontage, any kind of equal and fair partition would be impossible. The Court agrees with the Master that partition would be prejudicial to one party, at least. Therefore, the Court agrees that because the property is not capable of division without prejudice, the property shall be offered for private sale confined to the parties.

Trial Court Opinion, 9/21/11, at 5-6.

Upon review, we discern no abuse of discretion or error of law. The trial court's findings are supported by competent evidence of record. Even though the brothers agreed that the property can be divided, the controlling question under Rule 1563 is whether the property can be partitioned without prejudice to or spoiling of the whole. The brothers cannot agree on a partition plan that is fair to both parties. N.T., 3/20/09, at 26, 28, 75. The geography, access, natural resources, usability, and value of the two parcels

are significantly different. ***Id.*** at 3-5, 7-8, 9-12, 13-18, 20-23, 58, 59-60, 61-65, 66-67. Attempting to partition the parcels by arbitrarily splitting them in half would result in one brother enjoying natural resources, a beautiful view, and access, whereas the other brother would be shorted on natural resources, usable land, and access. Thus, we agree with the trial court that the property cannot be partitioned without prejudice. Pursuant to Rule 1563, therefore, a private sale was warranted. Randolph's contrary argument lacks merit.

Next, Randolph argues that the trial court erred in relying on the 2011 appraisal acquired by Master Davis. Randolph's Brief at 21. The trial court explained its conclusion that Master Davis acted properly as follows:

> Appraisals of the property from 2002 and 2008 were entered into evidence. However, the 2008 appraisal was prepared specifically for [Randolph]. It was reasonable for the Master to question the validity of this document, based on [Mark's] inability to contribute to it. Therefore, the most recent and unbiased appraisal was from 2002 and the hearing in front of the Master took place in March of 2009. Several years had passed since the 2002 appraisal occurred and it was reasonable for the Master to request an updated and unbiased appraisal. Therefore he requested a new, current one. This was within the power of the Master, under the Pennsylvania Rules of Civil Procedure, which make clear that a "master may employ appraisers and, with the authorization of the court, such other experts as are necessary to enable the master to perform his or her duties." Pa.R.C.P. No. 1559. Further, the appraisal did occur and it would not be reasonable to reject a current and unbiased appraisal.

Trial Court Opinion, 9/21/11, at 6. We agree.

Master Davis' use of an independent appraisal was authorized under Pa.R.C.P. 1559 and reasonable given the facts of this case. Mark offered an objective, but stale appraisal from 2002. Randolph offered a newer, but potentially biased appraisal from 2008. The 2011 appraisal was objective and fresh. Thus, we discern no abuse of discretion or error of law.

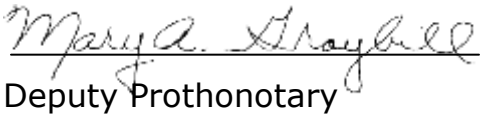
Lastly, Randolph complains that the trial court erroneously attempted "to justify the Master's conclusions by citing speculative facts dehors the record." Randolph's Brief at 22. According to Randolph, the trial court erroneously speculated that (1) "[b]ecause Randolph sought and paid for the 2008 appraisals, they are of suspect impartiality;" (2) "[b]ecause the smaller parcel was appraised at $90,000.00 more than the larger parcel, this is support for the Master's skepticism of the Nasser appraisals;" (3) "[b]ecause the total of the two Nasser appraisals was nearly twice the total of the Country Landmarks appraisals, this supports the Master's skepticism of the Nasser appraisals;" and (4) "[t]he 2002 Pinkowski appraisals were ***objective*** appraisals. The 2008 Nasser appraisals were biased appraisals because prepared specifically for Randolph." Randolph's Brief at 23-24 (emphasis in original).

Contrary to Randolph's assertion, the trial court's findings are supported by competent evidence. Mark obtained the 2002 appraisals as executor of his mother's estate, and Randolph was present for those

appraisals. N.T., 3/20/09, at 4, 42. Randolph objected to the 2002 appraisals as being "stale." ***Id.*** at 103. On the other hand, Randolph sought and paid for the 2008 appraisals, and Mark was not present during those appraisals. ***Id.*** at 46, 52-53, 70, 80, 94-95. The 2008 appraisals increased the values of the two parcels in comparison to the 2002 appraisals and assigned a greater value to the smaller property. Yet, although the 137-acre parcel has more tillable land than the 198-acre parcel, the latter contains more acreage, a house, a dairy barn, farm equipment, outbuildings, pastures, timber, flagstone reserves, and road frontage, all of which enhance its value. ***Id.*** at 3-4, 5, 15-16, 20-23, 31-32, 69, 84-85. These facts of record lead to a reasonable inference that the impartiality and accuracy of the 2008 appraisals were suspect. Consequently, the Master exercised his right to obtain an independent appraisal, having "determined that a new appraisal [was] necessary to affix a value of the property as a whole . . . due to factors raised in the hearing." Master's Report and Recommendation, 6/9/09, at 1. Based on the foregoing, we discern no abuse of discretion or error of law.

Order affirmed.

Judgment Entered.



Deputy Prothonotary

Date: 5/15/2013