RENDERED: JANUARY 7, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001112-MR

THE SAWYER PLACE COMPANY — APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NO. 08-CI-02465

MARJORIE ADLER; STEVEN G. ADLER; DAVID BERGMAN; JOHN B. BERGMAN; KATHY BERGMAN; LAURENCE BERGMAN; THOMAS BERGMAN; DANIEL J. FIEGELSON; JODI FIEGELSON — APPELLEES

AND

NO. 2009-CA-001113-MR

THE SAWYER PLACE COMPANY — APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE JAMES R. SCHRAND II, JUDGE
ACTION NO. 07-CI-02710

BEDROCK INVESTMENT, LLC — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY, SENIOR JUDGE.[1]

HENRY, SENIOR JUDGE: These appeals both arise from a judgment of the Boone Circuit Court which ordered the sale of two farms pursuant to Kentucky Revised Statutes (KRS) 389A.030. The appellant, the Sawyer Place Company, argues that the trial court erred in finding that the properties were indivisible and in finding that there was no joint venture between the parties who own the farms. We affirm.

The two properties at issue in these appeals, the Carpenter Farm (2009-CA-001112-MR) and the Garber Farm (2009-CA-001113-MR), are located in Boone County and comprise 545.6 and 273.5 acres respectively. The properties were originally acquired in 1967 by three friends, George Stewart, Harvey Bergman and Milton Bergman, who each held a one-third interest in the farms. In the 1990s, they conveyed their interests in the farms to various corporations and family members. In regard to the Carpenter Farm, Stewart conveyed his one-third interest to the Sawyer Place Company, an Ohio corporation owned by his family. Harvey Bergman transferred his one-third interest to his four children and their spouses. Milton Bergman's one-third interest passed at his death to his two sons. The

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Carpenter Farm is currently owned by the Sawyer Place Company, Marjorie Adler, Steven G. Adler, David Bergman, Lauren Bergman, Thomas Bergman, Kathy Bergman, David J. Feigelson and Jodi Feigelson.

As to the Garber Farm, Stewart conveyed his one-third interest to the Sawyer Place Company (Sawyer). The Bergmans transferred their two-thirds interest to Bedrock Investment (Bedrock), a Kentucky limited liability company.

The value of these properties has risen considerably since the time they were purchased, due in part to the construction of the I-275 expressway and the Cincinnati/Northern Kentucky International Airport. The Garber Farm's value rose from its purchase price of $80,000 in 1967 to over $4 million when it was appraised in August 2007.

From the time the farms were acquired, the owners made various unsuccessful attempts to develop both properties or to lease the mineral rights to the Carpenter Farm. Meanwhile, the relationship between the Stewart and Bergman families deteriorated due to a conflict culminating in a lawsuit over some property they once co-owned in New Orleans. The Bergmans demanded that the families sever their interests in the Carpenter and Garber Farms (as well as other jointly-owned property which is not at issue in these appeals). The Adlers, Bergmans, Feigelsons and Bedrock filed suits against Sawyer in the Boone Circuit Court to have the Carpenter Farm and the Garber Farm sold at public auction. The two suits were consolidated by agreed order on January 6, 2009.

Sawyer opposed the sale on the ground that it would not yield a fair value given the current depressed real estate market. Sawyer also contended that the farms could be partitioned without impairing their value. Sawyer accordingly filed counterclaims requesting partition of the property; alleging that the parties had a joint venture and that therefore the plaintiffs owed Sawyer and its representatives duties of loyalty and good faith; and that they should be barred from bidding on the properties if they were auctioned, or, if they were permitted to purchase the properties, that Sawyer's interest should be held in a constructive trust so that Sawyer could receive the benefit of any future sales.

Following a bench trial, the court found that partitioning the farms would materially impair their value, and that the parties did not have a joint venture. The trial court ordered that the Carpenter Farm and Garber Farm be sold, and referred the matter to the Boone County Master Commissioner to conduct a public sale. These appeals by Sawyer followed.

> We begin by noting that this case was tried by the circuit court sitting without a jury. It is before this Court upon the trial court's findings of fact and conclusions of law and upon the record made in the trial court. Accordingly, appellate review of the trial court's findings of fact is governed by the rule that such findings shall not be set aside unless clearly erroneous. A factual finding is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. The trial court's conclusions of law, however, are subject to independent de novo appellate determination.

Gosney v. Glenn, 163 S.W.3d 894, 898 (Ky. App. 2005) (internal citations omitted).

Sawyer argues that the plaintiffs failed to meet their burden of proving that the properties could not be divided without materially impairing their value.

KRS 389A.030(3) provides that

> indivisibility of the real estate shall be presumed unless an issue in respect thereto is raised by the pleading of any party, and if the court is satisfied from the evidence that the property is divisible, without materially impairing the value of any interest therein, division thereof pursuant to KRS 381.135 shall be ordered.

The party claiming divisibility, which in this case is Sawyer, bears the burden of going forward. *Collins v. Lewis*, 314 S.W.3d 316, 318 (Ky. App. 2010) citing *Acton v. Acton*, 283 S.W.3d 744, 750 (Ky. App. 2008). Once some evidence that the property can be partitioned without materially impairing its value is presented, as Sawyer did in its answer and counterclaim, the party seeking the sale bears the burden of proving that division would materially impair the property's value. *Id*. Although the appellees argue that Sawyer failed to provide sufficient evidence to rebut the presumption of indivisibility, at trial the appellees' attorney conceded that Sawyer had successfully rebutted the presumption. He stated that he should present his case first, that the "burden is still on me" and that he (Sawyer) "has put the presumption [of indivisibility] into issue." In its final judgment, the trial court correctly stated that

> The Defendants have made pleadings stating that the property is divisible and at trial they presented evidence contrary to the presumption of indivisibility. Therefore,

> this Court will not consider the presumption of indivisibility, but will instead determine whether the property in question is divisible on the basis of the facts presented at trial.

Sawyer argues that the proof offered by the appellees failed to overcome Kentucky's public policy favoring the division of property over a forced sale. In *Taylor v. Farmers & Gardeners Market Ass'n,* 295 Ky. 126, 173 S.W.2d 803 (1943), for example, it was stated that

> the law favors a division of land in kind rather than a sale and a division of the proceeds, and this rule particularly obtains where the property sought to be divided or sold is farm land or other parcels of real estate reasonably susceptible of division.

Id at 806 (internal citations omitted).

Sawyer contends that neither of the appellees' witnesses, Daniel Feigelson nor Harvey Bergman, was qualified to testify as a lay witness regarding the value of the farms. It is also contended that the trial court erroneously gave excessive weight to factors such as the accessibility and terrain of the farms rather than to evidence regarding their value.

Although neither Feigelson nor Bergman presented himself as an expert in property valuation, lay witnesses are nonetheless permitted to give valuation testimony. "[W]e have not adhered to the rule that witnesses must be expert land appraisers in order to state their opinions as to real estate values[.]" *Commonwealth, Dept. of Highways v. Slusher*, 371 S.W.2d 851, 853 (Ky. 1963). "A witness, to be qualified to testify as to the value of realty, must know the property to be valued and the value of the property in the vicinity, must understand

the standard of value, and must be possessed of the ability to make a reasonable inference." *Id.,* quoting 32 CJS *Evidence* §545, p.299. Sawyer contends that Feigelman and Bergman did not possess these qualifications.

Feigelman and Bergman testified as to their extensive experience in property management and real estate investment. Feigelman is the chief financial officer of the Bergman Group, Inc., d/b/a NAI Bergman, a property management and brokerage company. He owns 4.1% of the Carpenter Farm. He is a licensed real estate agent, and has been a shareholder in the Bergman Group since 1990. He is married to Harvey Bergman's daughter. He testified that he has personal experience buying, selling and shaping parcels of real estate. He testified that he possesses extensive personal knowledge of both farms, which he visits on a monthly or bimonthly basis. He testified that he did not know of any way to divide the farms which would maximize their potential, and that he could not figure out how to "carve out" a piece.

Harvey Bergman is one of the original purchasers of the farm. He is a principal of the Bergman group and an owner of Bedrock. He has been a developer for fifty-nine years. In his opinion, the physical character of the land makes it impossible to partition the farms without impairing their value. Bergman testified that the Garber Farm has limited access points, with hilly terrain between those points. The Carpenter Farm has a very small frontage on I-275. He testified that if that portion was sold, access to the rest of the farm would be lost.

The trial court was very careful to limit Feigelson and Bergman's testimony to their personal observations of the properties at issue, and to reasonable inferences that could be drawn from these experiences. Their testimony was well within the parameters set forth in *Slusher*.

Specifically as to the Garber farm, Sawyer argues that the trial court gave excessive weight to evidence that partition was inappropriate because the property contains a farm house and cell phone towers, is inaccessible and has divergent topography. As to the Carpenter Farm, Sawyer argues that the trial court improperly focused on the fact that the farm has access issues and that rolling hills comprise part of the topography. Sawyer argues that the trial court failed to address evidence (or lack of evidence) as to value, or how the facts showed that partitioning the farms would materially impair their value. Although the trial court did not explicitly link each of its specific findings to its ultimate conclusion that division would lead to an impairment in value, its findings fully support such a conclusion.

Sawyer argues that the court should have focused solely on value, leaving the issue of how to divide the property to the commissioners. But the physical characteristics of the properties, and the viability of division are so interrelated that we fail to see how the court could have addressed the issue otherwise, or how it is erroneous to consider that lack of access and a difficult terrain could lead to an impairment in value. Sawyer has cited several Kentucky cases which have affirmed the partition of property that is hilly or variegated in nature, including

Taylor, 173 S.W.2d 803 and *Leslie v. Sparks*, 172 Ky. 303, 189 S.W. 463 (1916). These cases do not, however, stand for the proposition that access issues and a rolling topography are irrelevant to the issue of partition. In *Pack v. Ross*, 264 S.W.2d 887, 888 (Ky. 1954), for example, the property at issue was described as follows:

> Thirteen acres of bottom land were on the west or north side of Hood Creek as it meanders, while all the remaining acreage was on the east side of the creek and consisted of 8 acres of bottom land, 8 acres of sloping, cleared land, and 17 acres of steep timberland.

The chancellor in that case concluded that the property should not be divided, "because of the diverse nature of the terrain and the fractional interests of the parties[.]" *Id.*

Sawyer next argues that the trial court improperly considered evidence concerning the presence of limestone beneath the Garber Farm. Sawyer contends that the plaintiffs failed to establish that the minerals were situated under the farm in such a way as to preclude a fair division of the property and furthermore, that there is not a reasonable probability that mining will be permitted on the Garber Farm in any case due to zoning restrictions. "Admission of incompetent evidence in a bench trial can be viewed as harmless error, . . . if the trial judge did not base his decision on that evidence, or if there was other competent evidence to prove the matter in issue[.]" *Prater v. Cabinet for Human Resources*, 954 S.W.2d 954, 959 (Ky. 1997) (internal citations omitted). Even if the trial court improperly admitted evidence regarding the presence of limestone, it was harmless error because the

trial judge did not base his decision on that evidence, only mentioning in passing that the zoning issue is currently on appeal. In any event, there was other substantial, competent evidence supporting the trial court's conclusion that division would impair the value of the properties.

Finally, Sawyer argues that the trial court erred in not finding the existence of a joint venture between the parties, and hence no corresponding fiduciary duties. The trial court based its decision on a finding that (1) there was no written or express agreement among the parties to enter into such a venture; (2) Bergman entered into written agreements in his other business arrangements; and (3) the parties did not have a plan for the property.

> Sometimes referred to as a joint adventure, a joint enterprise is "an informal association of two or more persons, partaking of the nature of a partnership, usually, but not always, limited to a single transaction in which the participants combine their money, efforts, skill, and knowledge for gain, with each sharing in the expenses and profits or losses." . . . In *Huff v. Rosenberg*, Ky., 496 S.W.2d 352 (1973), we enumerated the elements essential to a joint enterprise, viz: "(1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control." . . . As to element number 3, it is necessary to the relationship that there be a sharing of the profits and losses; though in the absence of an express agreement, the sharing of losses may sometimes be implied from an express agreement to share profits.

Roethke v. Sanger, 68 S.W.3d 352, 364 (Ky. 2001).

We agree with the trial court that there was insufficient evidence to show that the parties were in a joint venture to the extent that a constructive trust should be created to protect Sawyer's interests. If anything, the evidence showed ongoing, irreconcilable disagreement between the parties as to how the properties could or should be developed.

For the foregoing reasons, the judgment of the Boone Circuit Court is affirmed.

LAMBERT, JUDGE, CONCURS.

CLAYTON, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

BRIEFS FOR APPELLANT:

Todd V. McMurtry
Kevin F. Hoskins
Crestview Hills, Kentucky

BRIEFS FOR APPELLEES:

Anthony G. Covatta
Cincinnati, Ohio