

Cite as 2010 Ark. App. 794

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA10-375JIM PETERSON and JAN PETERSON
APPELLANTS

V.

WILLIAM "BILL" DAVIS, SHERI
DAVIS, SHERMAN FINE, and RUTH
FINE

APPELLEES

Opinion Delivered on DECEMBER 1, 2010

APPEAL FROM THE BAXTER
COUNTY CIRCUIT COURT,
[NO. CV-06-173-3]HONORABLE JOHNNY RAY
PUTMAN, JUDGE

DISMISSED WITHOUT PREJUDICE

ROBERT J. GLADWIN, Judge

The Baxter County Circuit Court issued a decree on January 5, 2010, granting appellees' petition for partition and ordering the boat dock at issue in this litigation sold. Appellants Jim and Jan Peterson appeal, claiming that (1) the trial court erred in denying their motion to dismiss; (2) the trial court erred in denying their motion for judgment on the pleadings; and (3) the trial court erred in treating the petition for partition as an amended complaint. We dismiss the appeal without prejudice because the partition order is not a final, appealable order.

At issue in this protracted litigation is a boat dock located on Bull Shoals Lake and owned by three married couples. Appellees Sheri and Jim Davis and Ruth and Sherman Fine filed suit in Baxter County Circuit Court on June 27, 2006, against the Petersons, alleging

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that the trial court had jurisdiction based on a contractual relationship between the parties. The petition alleged that the parties were owners in a boat dock; that the boat dock was subject to standards set forth by the U.S. Army Corps of Engineers; that the boat dock was deteriorating; and that the parties could not agree as to its maintenance in order for the dock to meet the Corps' standards. The petition sought a court order allowing appellees to demolish the boat dock and build a new one. Finally, appellees asked that the Petersons either share in the cost of the new structure or be relieved of their interest in the boat dock. The Petersons responded by denying the existence of a contract between the parties, stating several affirmative defenses, and asking for the dismissal of appellees' petition.

The Petersons filed a counterclaim alleging damages to the boat dock, psychological abuse, harassment, and abuse of the legal process. Central to their counterclaim was the request that appellees be ordered to produce the contract cited in the original petition. In response to the counterclaim, appellees admitted that no contract existed between the parties regarding the boat dock and affirmatively stated that the reason for the lawsuit was that the majority of the owners of the boat dock agreed to make necessary improvements to the dock and that the Petersons did not.

Between September 2006 and May 2008, the Petersons filed several motions aimed at dismissing the suit, and the trial court denied all of them. After a flurry of petitions relating to ex parte requests, discovery, and scheduling were filed and responded to over the summer of 2008, appellees filed a petition for partition on October 9, 2008, claiming that the parties

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were all owners of the boat dock at issue and that they could not agree on how to maintain the dock to meet the standards and deadline set by the U.S. Army Corps of Engineers. Appellees sought sale of the boat dock and a division of the proceeds. The Petersons responded that the petition should be denied because it added an additional cause of action that was different from the original complaint. Further, the Petersons claimed that the dock was not subject to partition as each party owned a one-third interest in the dock and could sell their interest at any time.

After several more motions were filed, including the Petersons' motion for stay of trial, the trial court postponed the matter indefinitely by order filed November 12, 2008. However, on November 13, 2008, the Petersons filed a motion to dismiss, alleging that appellees lacked standing, and on June 10, 2009, the Petersons filed a motion for judgment on the pleadings. On August 14, 2009, the trial court scheduled a hearing for August 20, 2009, and ruled that it would treat the petition for partition as an amended complaint and dismissed appellees' first cause of action sounding in contract.

On September 11, 2009, the Petersons filed a motion to dismiss the petition for partition, and the trial court denied this motion by order filed September 17, 2009. On January 5, 2010, the trial court entered a decree granting partition of the boat dock and ordering it sold at public sale as set forth in the order. The Petersons filed a timely notice of appeal, which designated the court's partition decree, and this appeal followed.

We said in *Trafford v. Lilley*, 2010 Ark. App. 158, at 2:

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Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure–Civil provides that an appeal may be taken only from a final judgment or decree entered by the circuit court. The question of whether an order is final and subject to an appeal is a jurisdictional issue that this court will raise on its own. *Moses v. Hanna’s Candle Co.*, 353 Ark. 101, 110 S.W.3d 725 (2003). The supreme court has specifically held that a decree ordering partition either in kind or by a sale and division of the proceeds is not a final order from which an appeal may be taken. *Bell v. Wilson*, 298 Ark. 415, 768 S.W.2d 23 (1989). See also *Rigsby v. Rigsby*, 340 Ark. 544, 11 S.W.3d 551 (2000); *Looney v. Looney*, 336 Ark. 542, 986 S.W.2d 858 (1999); *Kinkead v. Spillers*, 327 Ark. 552, 940 S.W.2d 437 (1997); *Magness v. Commerce Bank of St. Louis*, 42 Ark. App. 72, 853 S.W.2d 890 (1993). In both *Kinkead* and *Magness*, the appellate courts indicated that the proper order from which to file an appeal in a partition action is the order confirming the sale of the property. However, there has been no sale of the property in the present case. Therefore, the appeal is premature.

In the instant case, there has been no sale of the property and no order confirming the sale has been filed. Accordingly, we dismiss the appeal as premature.

Appeal dismissed without prejudice.

VAUGHT, C.J., and HENRY, J., agree.