ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
D.P. MARSHALL JR., JUDGE

DIVISION II

CA07-590

23 April 2008

EDWARD WARREN and
JUANITA WARREN,
APPELLANTS
v.

AN APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[CV-2004-11984]

JOHNNY WARREN,

THE HONORABLE BARRY ALAN SIMS, JUDGE

APPELLEE

AFFIRMED

The five Warren brothers—Edward, Johnny, Arthur, Leodies, and Jerry—fell into disagreement about the management of eight parcels of real estate owned in common. Litigation ensued. Johnny, who had managed the property, sought a partition. Edward, and some of the others, sought an accounting from Johnny and alleged mismanagement. The brothers mediated and settled their case. The circuit court adopted the mediation agreement as its judgment, but retained jurisdiction to handle any disputes about implementing the settlement—which involved the sale of most of the property, the conveyance of one parcel to Edward, and various other steps. Disputes soon arose. Eventually the circuit court ordered all the property sold by a commissioner. This was done without objection from any party. After the sale, the court ordered the proceeds disbursed and awarded Johnny's lawyer some

attorney's fees. Edward and his wife* appeal, asserting four errors. None of the other brothers or their wives has appealed or filed a brief defending the circuit court's rulings.

Contrary to Edward's first point, the circuit court did not err by failing to address his counterclaim against Johnny on the merits. The brothers' settlement, which the circuit court adopted, resolved the counterclaim. Edward and his brothers agreed "to execute mutual releases and to dismiss the pending lawsuit with prejudice." The circuit court entered an order stating that "the Mediation Settlement Agreement of the parties has resolved all issues of fact and law herein, and therefore the terms and conditions contained in the Mediation Settlement Agreement should be adopted by the Court as its Order and Judgment in this case . . .." Edward never asked the circuit court to set the brothers' agreement aside. He cannot agree to one thing in the circuit court and then fault that court on appeal for following the parties' agreement. *Dodson v. Dodson*, 37 Ark. App. 86, 89, 825 S.W.2d 608, 610 (1992).

Edward's second point concerns his lawyers. When disputes first arose about implementing the settlement, Edward's lawyers (his second counsel in the case) sought permission to withdraw. They pointed to their disagreement with Edward about two things: how to follow through on the settlement and unpaid fees. Edward objected and sought to keep his lawyers. The circuit court released them, which Edward now argues was error.

No reversible error occurred because there was substantial compliance with Rule of Civil Procedure 64(b). *Rush v. Fieldcrest Cannon, Inc.*, 326 Ark. 849, 853–54, 934 S.W.2d 512, 514–15 (1996). This record shows an irreparable break in the attorney-client relationship.

---

*The wives of four of the brothers were parties. Edward and his wife Juanita are the appellants, but for simplicity we refer to their arguments as Edward's arguments.

This circumstance supported withdrawal. *Ibid.* Edward found new counsel in less than a month. And during the short time that Edward was unrepresented, the circuit court took no action in the case. There were no prepaid fees to refund; nor does Edward contend that his former counsel refused to release his file. *Cf.* Ark. R. Civ. P. 64(b). Thus no prejudice resulted from the circuit court's decision allowing Edward's counsel to withdraw. *Rush*, *supra*.

Edward's third point is about an inconsistency between the settlement terms and the circuit court's later actions: he says that the circuit court's decision to sell all the property deprived him of a house and lot that he was supposed to get outright. Under the settlement, Edward was to receive one parcel, Johnny was to receive the proceeds of one parcel, and the proceeds from all the other parcels were to be divided evenly after another credit to Johnny. Things happened differently. Johnny did not get all the proceeds from one parcel. And no lot was conveyed to Edward. Despite several opportunities to do so, however, Edward never objected to the sale of all eight parcels. Indeed, Edward appeared at the sale and made unsuccessful bids. Finally, the transcript contains this note at the end of one of the pre-sale hearings about enforcing the settlement: "THEREUPON, the case was settled off the record and no further proceedings were had in the case . . .." Taken as a whole, this record suggests to us that—by agreement—the parties abandoned the conveyance to Edward and the lot-specific proceeds to Johnny and allowed an across-the-board sale and division of proceeds.

But we cannot pursue whether Edward waived his right to the lot, or what actually happened, because we lack jurisdiction to reach Edward's argument here. It is old law that a party aggrieved by a judicial sale must appeal from the order confirming the sale within

thirty days of that order's entry. *Clarke v. Federal Land Bank of St. Louis*, 197 Ark. 1094, 1095–97, 126 S.W.2d 601, 602 (1939). Edward failed to do so. He appealed after the court distributed the sale proceeds, approximately sixty days after the confirmation order. Our law requires a prompt appeal to clear title acquired through judicial sales. *Alberty v. Wideman*, 312 Ark. 434, 437, 850 S.W.2d 314, 316 (1993). Edward did not challenge the sale promptly enough to give this court jurisdiction to consider the sale's particulars.

Finally we come to the attorney's fees. The governing statute says that the circuit court "shall" award fees to the party pursuing partition (here, Johnny) for all the owners' common benefit. Ark. Code Ann. § 18-60-419(a)&(b) (Repl. 2003). Johnny asked the circuit court for the approximately $13,000.00 in fees that he had incurred for the entire litigation. The court, however, awarded him approximately $5,000.00 (assessed pro rata against each brother) for fees that Johnny had incurred in enforcing the settlement. Johnny has not appealed this award with an argument that he was short-changed under the partition statute. But Edward contends that the circuit court's award of any fees to Johnny was an abuse of discretion.

The circuit court's explanation of its fee ruling does not square with the partition statute's mandatory-fee provision; Edward, however, is not entitled to a reversal on this issue either. We may affirm on any ground supported by the record, *Marshall School District v. Hill*, 56 Ark. App. 134, 138, 939 S.W.2d 319, 321 (1997), and here two grounds exist.

First, this litigation involved issues beyond partition. And $5,000.00 is a reasonable fee for that part of Johnny's lawyer's work attributable to achieving partition by sale, which was in the brothers' common interest. Therefore, no error occurred under the statute's

mandatory-fee provision. Ark. Code Ann. § 18-60-419(b). Second, the circuit court was rightly concerned about the fees generated by the brothers' squabbling over implementing the settlement. That settlement was a contract, and the parties' failure to perform was a breach, which gave the circuit court discretion to award some attorney's fees. Ark. Code Ann. § 16-22-308 (Repl. 1999); *Marshall School District*, 56 Ark. App. at 137–38, 939 S.W.2d at 320–21. Johnny's lawyer played a leading role in drafting the court papers, and in the various hearings, about enforcing the settlement. Viewing the fee as the consequence of a breach, we see no abuse of discretion in the fee awarded and assessed against all the brothers. *Stilley v. James*, 347 Ark. 74, 77, 60 S.W.3d 410, 412 (2001).

Affirmed.

ROBBINS, J., agrees.

PITTMAN, C.J., concurs.