Filed 7/2/08

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MARGARET JAMISON, as Trustee, etc., et al. Plaintiffs and Appellants, v. WILLIAM O. JAMISON, Defendant and Appellant.	F049744 (Super. Ct. No. 56299) **O P I N I O N**

APPEALS from a judgment of the Superior Court of Madera County. Thomas L. Bender, Judge.

Gilmore, Wood, Vinnard & Magness and David M. Gilmore for Plaintiffs and Appellants.

Dowling, Aaron & Keeler, Lynne Thaxter Brown and Kenton J. Klassen for Defendant and Appellant.

---

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of part 1 of the discussion.

Following the partition of property owned jointly by defendant and appellant, William O. Jamison, and plaintiffs and appellants, John O. Jamison, Sean O. Jamison, and Bryan O. Jamison, trial was held to value the property for the purpose of making adjustments by owelty. (Code Civ. Proc.,[1] § 873.250.) This property had been used as grazing land by the family for decades.

In his appeal, William challenges the trial court's finding that dividing the property into 40-acre "ranchettes" is the highest and best use for four of the subject parcels. According to William, there is no substantial evidence to support the trial court's conclusion that it is reasonably probable that such development will occur in the near future.

In the cross-appeal, John, Sean and Bryan, through Margaret Jamison as trustee and administrator of their estates (sometimes referred to collectively as John),[2] argue that the owelty awarded to them for the four parcels was inadequate because the court's value determination was not supported by substantial evidence. They further contend that prejudgment interest should have been awarded.

In the nonpublished part of this opinion we conclude the trial court's determination that 40-acre ranchettes is the highest and best use for the subject parcels is supported by substantial evidence. In the published portion we hold that John is precluded from challenging the adequacy of the owelty award on appeal due to his failure to timely move for a new trial on that issue. Finally, John is not entitled to prejudgment interest.

---

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] John, Sean and Bryan were tragically killed in a car accident in September 2006 and their estates became parties to this action. For purposes of clarity, these parties will be referred to by their first names in this opinion. No disrespect is intended.

BACKGROUND

William and John were brothers. Sean and Bryan were John's sons.

At one time, William, John, Sean and Bryan owned several thousand acres of real property in Madera County as tenants in common. In November 1999, John and his sons filed a complaint for partition of all the parcels they owned as tenants in common with William.

Twelve of these parcels are situated east of State Highway 41 near State Route 145 (145). Eight parcels, designated 1-8, are north of 145 and the remaining four parcels, designated 9-12, are south of 145. The southern parcels are the subject of this appeal.

In 2003, the trial court entered an interlocutory judgment of partition awarding William the four parcels south of 145 and John the parcels north of 145. The court reserved the issue of owelty to be determined upon noticed motion by either party. William appealed the interlocutory judgment and this court affirmed. (*Jamison v. Jamison* (Dec. 9, 2004, F043100.)

To resolve the owelty issue, the trial court was required to determine the total acreage and value of each of the 12 parcels. Although trial did not commence until June 13, 2005, the property was valued as of April 8, 2003, the date of the interlocutory judgment of partition.

All of the parcels are zoned ARE-40, "AGRICULTURAL, RURAL, EXCLUSIVE, FORTY ACRE DISTRICT." As such, they can be subdivided into 40-acre parcels with one residence permitted on each parcel.

The parcels are also subject to Williamson Act contracts. A Williamson Act contract restricts the use of agricultural land to agricultural or compatible uses for an initial term of no less than 10 years. However, another year is automatically added to the contract on its anniversary date unless notice of nonrenewal of the contract is given. (Gov. Code, § 51200 et seq.)

The four southern parcels, i.e., 9-12, are within the "Rio Mesa Area Plan." This plan was adopted in 1995 and is designated as a new growth area in the Madera County general plan. Under the Rio Mesa plan, parcels 9-12 are designated for agricultural purposes except for approximately 50 acres in parcel 11 and approximately 80 acres in parcel 12. These portions of parcels 11 and 12 are designated as light industrial or low density residential. However, other than a golf course, no development in the Rio Mesa area has taken place.

William's expert appraiser, James Palmer, testified that the highest and best use of the property for the foreseeable future is cattle grazing. In Palmer's opinion, it will be a "long time" before development occurs in the Rio Mesa area, i.e., "ten years or more." Accordingly, Palmer valued parcels 9-12 at either $1,500 per acre or $1,000 per acre, depending on location. However, Palmer acknowledged that these parcels could legally be divided into 40-acre parcels and that each 40-acre parcel could have one residence. Moreover, it would be financially feasible because small parcels tend to sell for more than larger parcels. In fact, Palmer had recently appraised 40-acre parcels within the Jamison holdings at $3,500 per acre.

John's expert appraiser, Richard Grey, testified that the highest and best use of parcels 1-10 and portions of parcels 11 and 12 is cattle grazing and placed values of $1,100 to $1,400 per acre. However, Grey determined that the highest and best use of the remaining 130 acres in parcels 11 and 12 is light industrial or low density residential as designated in the Rio Mesa plan and placed a value of $32,600 per acre. Grey also acknowledged that the property had the potential to be divided into 40-acre parcels.

John testified that he did not think that the highest and best use of the agriculturally designated portions of parcels 9-12 is cattle grazing. Rather, he concluded that the highest and best use is 40-acre ranchettes. John opined that, as 40-acre ranchettes, the property value is $2,100 per acre.

William testified that he had divided other property in the same general area into 40-acre parcels. One of these parcels was sold for a little less than $4,000 per acre. Although William did not testify regarding either the highest and best use or value of parcels 9-12, two letters that he sent to Palmer in April 2002 were admitted into evidence. In those letters, William expressed his opinion that the highest and best use of parcels 9-12 is 40-acre ranchettes and that a low value is $3,000 per acre.

In its decision after trial on owelty, the trial court stated that the highest and best use of parcels 1-8 is cattle grazing and adopted Grey's valuation. However, the court concluded that 40-acre ranchettes is the highest and best use of parcels 9-12 and valued those parcels at $4,000 per acre.

William moved for a new trial before judgment was entered. He argued that the evidence was insufficient to justify the decision on parcels 9-12. In response, John asserted that there was more than substantial evidence to support the trial court's decision. John also requested prejudgment interest from the date of valuation. The trial court denied the new trial motion.

The trial court entered an interlocutory judgment determining owelty that adopted the findings it made in the decision after trial. The judgment did not award the prejudgment interest requested by John.

Thereafter, John moved for a new trial. According to John, the evidence was insufficient to justify the decision, inadequate damages were awarded, and there was newly discovered evidence. This motion was denied by operation of law.

DISCUSSION

1. *William's appeal.*[*]

a. *John's motion to dismiss.*

John moved to dismiss William's appeal on the ground that the judgment, entitled "INTERLOCUTORY JUDGMENT DETERMINING OWELTY" is nonappealable. John points out that the subject judgment pertains to only one complaint out of three that have been consolidated into one action. Further, John argues, this judgment did not resolve all issues between the parties in these consolidated cases.

Section 904.1, subdivisions (a)(1) and (a)(9), provide that an interlocutory judgment in an action for partition directing partition to be made is appealable. Thus, here, the 2003 judgment partitioning the subject parcels was appealable and in fact was appealed by William. The owelty determination, although entitled an interlocutory judgment, was an order made after the judgment directing partition. As such, it is appealable under section 904.1, subdivision (a)(2).

The owelty determination also meets the two additional requirements developed by case law for an appealable order after judgment. First, it involves issues different from those addressed in the underlying judgment. Second, it affects the judgment or relates to it by enforcing it or staying its execution. (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651-652.) The owelty, i.e., the money awarded to equalize the partition, adds to the partition judgment. (Cf. *Lakin v. Watkins Associated Industries, supra,* 6 Cal.4th at p. 652.)

John's argument that the owelty order is nonappealable because the partition judgment only resolves one of three complaints in the consolidated action is unavailing. The actions are all distinguishable and each has proceeded separately. No other action

---

[*] See footnote on page 1, *ante*.

will have any impact on the parcels at issue here. Accordingly, John's motion to dismiss William's appeal is denied.

b. *The trial court's highest and best use finding is supported by substantial evidence.*

In rendering judgments and orders in a partition action, the trial court sits in equity. (*Formosa Corp. v. Rogers* (1951) 108 Cal.App.2d 397, 412.) Accordingly, the trial court's decision will not be disturbed on appeal absent a showing of a clear abuse of discretion. (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912.) However, to the extent the trial court reviewed the evidence to resolve disputed factual issues, and drew inferences from the presented facts, those factual findings will be reviewed on appeal under a substantial evidence standard. (*Ibid*.) Therefore, with respect to factual findings, this court's power begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, that will support those findings. Moreover, if two or more inferences can reasonably be deduced from the facts, this court is without power to substitute its deductions for those of the trial court. (*Ibid*.)

As noted above, the trial court determined that the highest and best use of parcels 9-12 was as 40-acre ranchettes. However, neither expert appraiser shared the court's opinion. Rather, Palmer appraised the property as grazing land and Grey as grazing, light industrial and low density residential.

William argues the trial court abused its discretion in valuing this property because there is no evidence that William will actually be able to market the property as 40-acre ranchettes any time in the near future. William notes that before the property can be developed, the Subdivision Map Act must be complied with, an infrastructure plan must be prepared and approved, and there must be a CEQA review. William also relies on testimony from Madera County's Chief Assistant Planning Director, David Merchan. Merchan stated that, although Madera County has previously found 40-acre ranchettes

acceptable in ARE-40 zoned parcels, the "long-term outlook has been changing literally over the last … four or five months, and it is becoming more difficult to subdivide ARE 40 zoned parcels into 40-acre parcels, specifically when an ag preserve contract is in place."

The fair market value of real property is not limited to its value as used at the time of the valuation. Rather, this value takes into account the "'highest and most profitable use to which the property might be put in the reasonably near future, to the extent that the probability of such a prospective use affects the market value.'" (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 744.) Thus, "the 'highest and best use' … is simply an ingredient of market value." (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 899.) The property is valued based on the highest and best use for which it is geographically and economically adaptable. (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1058.) In other words, a use to which the property could reasonably, practically, and lawfully be adapted. (*Humphries Investments, Inc. v. Walsh* (1988) 202 Cal.App.3d 766, 772.) Moreover, a determination of the property's highest and best use is not necessarily limited to the current zoning or land use restrictions imposed on the property. (*County of San Diego v. Rancho Vista Del Mar, Inc., supra,* 16 Cal.App.4th at p. 1058.)

Although the expert appraisers did not value the property as 40-acre ranchettes, both appraisers acknowledged that it would be financially profitable and legal to develop parcels 9-12 in that manner. Further, Madera County has approved 40-acre ranchettes for ARE-40 zoned parcels in the past.

Moreover, both John and William, the owners of the property, expressed their opinions that, as of the valuation date, development into 40-acre ranchettes was the highest and best use of parcels 9-12. John so testified at trial and William stated such in two letters written to Palmer.

The value of property may be shown by the opinion of the owner of the property. (Evid. Code, § 813, subd. (a)(2); *Sacramento & San Joaquin Drainage Dist. v. Goehring* (1970) 13 Cal.App.3d 58, 64.) As discussed above, "highest and best use" is an element of market value.

Nevertheless, William argues that these owner opinions do not constitute substantial evidence of value. William points out that in giving their opinions, neither he nor John included the reasonable probability that these parcels would be developed as 40-acre ranchettes *in the near future.* However, in light of John and William's experience as land owners, it is reasonable to infer that they were familiar with the definition of highest and best use.

On review, this court starts with the presumption that the record contains evidence to support every finding of fact and the burden is on the party challenging the finding to demonstrate otherwise. (*Orange County Flood Control Dist. v. Sunny Crest Dairy, Inc.* (1978) 77 Cal.App.3d 742, 758.) Here, in challenging the highest and best use finding, William has not met his burden of demonstrating there is no substantial evidence to support that finding. Rather, the opinion evidence of the owners, the opinions of the appraisers and Madera County's past approval of 40-acre ranchettes support the finding.

2. *John's cross-appeal.*

a. *William's motion to dismiss.*

In his cross-appeal, John argues that the owelty award was inadequate because the $4,000 per acre value was not supported by either the testimony of an expert appraiser or a comparable sale within the Rio Mesa plan area. John further contends that he is entitled to prejudgment interest on the owelty award. William preliminarily responds that this cross-appeal must be dismissed because John cannot argue that the owelty was inadequate for the first time on appeal.

As noted above, both William and John moved for a new trial. William's notice of intent to move for a new trial was served and filed on November 16, 2005. Accordingly, John had 15 days after service of William's notice of intent, i.e., November 30, 2005, to file and serve his own notice of intent to move for a new trial. (§ 659.) However, John did not file and serve his notice of intent until January 20, 2006. Thus, John's new trial motion was untimely and, as such, was not ruled on by the trial court.

A failure to timely move for a new trial ordinarily precludes a party from complaining on appeal that the damages awarded were either excessive or inadequate, whether the case was tried by a jury or by the court. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 122.) The power to weigh the evidence and resolve issues of credibility is vested in the trial court, not the reviewing court. (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919.) Thus, a party who first challenges the damage award on appeal, without a motion for a new trial, unnecessarily burdens the appellate court with issues that can and should be resolved at the trial level. (*Ibid*.) Consequently, if ascertainment of the amount of damages turns on the credibility of witnesses, conflicting evidence, or other factual questions, the award may not be challenged for inadequacy or excessiveness for the first time on appeal. (*County of Los Angeles v. Southern Cal. Edison. Co.* (2003) 112 Cal.App.4th 1108, 1121.)

The owelty award was based on the value of real property. Thus, the award turned on a question of fact, i.e., a question to be resolved by the trial court. (*County of Los Angeles v. Southern Cal. Edison. Co., supra,* 112 Cal.App.4th at p. 1121.) Accordingly, under the above-cited authorities, John is precluded from challenging the amount of the owelty award on appeal because he did not timely move for a new trial.

John concedes that his motion for a new trial was untimely. Nevertheless, he contends that he can challenge the amount of the owelty awarded on appeal because owelty is not damages.

Civil Code section 3281 provides that "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages." In other words, the concept of "damages" requires there to be compensation, in money, recovered by a party for loss or detriment suffered through the acts of another. (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 826.)

John points out that, because owelty is simply compensation to correct the inequality in values that result from a division of property in kind, it is not damages, i.e., no fault or unlawfulness is required. However, in this context, owelty versus damages is a distinction without a difference. Whether the award is termed owelty or damages, it still requires an evaluation of the amount awarded in light of the evidence presented at trial, an issue that can and should be resolved at the trial court level. Thus, the same reasoning for requiring a motion for a new trial applies to both owelty awards and damage awards. Accordingly, here, a new trial motion was a prerequisite to John's challenge to the adequacy of the owelty award on appeal.

An analogous situation was presented to the court in *County of Los Angeles v. Southern Cal. Edison. Co., supra.* There, in a court trial, the County of Los Angeles alleged that the buyer and seller of two power plants had underpaid the documentary transfer taxes. This tax is calculated based on the value of the realty. On appeal, the County alleged that the trial court did not correctly determine the value to be taxed and thus the delinquent tax award was inadequate. However, because the County had not moved for a new trial, the appellate court concluded that the County could not make this argument for the first time on appeal. As with owelty, the concepts of fault and unlawfulness do not enter into the calculation of the amount of documentary transfer taxes due on a transaction. Thus, the delinquent taxes awarded to the County were not technically "damages." Nevertheless, the court held that the County's failure to move for

a new trial precluded the challenge to the award on appeal. (*County of Los Angeles v. Southern Cal. Edison Co., supra,* 112 Cal.App.4th at pp. 1121-1122.)

As discussed above, this court will not consider John's challenge to the adequacy of the owelty award.[3] William's analysis in his motion to dismiss is correct. However, this conclusion does not dispose of the entire cross-appeal. John's claim that the trial court erred in not awarding prejudgment interest under Civil Code section 3287 is reviewable on appeal. John argues this section mandates an interest award, i.e., the court made a legal error. The failure to move for a new trial does not preclude a party from urging legal errors in a trial on damages. (*Glendale Fed. Sav. & Loan Assn v. Marina View Heights Dev. Co., supra,* 66 Cal.App.3d at p. 122.) Accordingly, William's motion to dismiss the cross-appeal is denied.

b. *John is not entitled to prejudgment interest.*

Civil Code section 3287, subdivision (a), provides, in part: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day …." Thus, prejudgment interest is authorized only if the damages were "certain, or capable of being made certain by calculation." "Damages that must be determined by the trier of fact based on conflicting evidence of the property value do not satisfy this requirement." (*County of Los Angeles v. Southern Cal. Edison Co., supra,* 112 Cal.App.4th at p. 1123.)

Here, to make the owelty award, the trial court was required to determine the property values of the various parcels. Moreover, the court was presented with

---

[3] Nevertheless, if John's challenge were reviewable on the merits, this court would affirm the trial court's $4,000 per acre valuation. John's and William's opinions on value and the sales of ranchettes ranging from $2,150 to $5,000 per acre provide substantial evidence for the trial court's ruling.

conflicting evidence of those values. Accordingly, the requirements under Civil Code section 3287 were not met. Thus, John is not entitled to prejudgment interest.

John further argues that he should either be allowed a trial on the postvaluation appreciation of parcels 9-12 or the trial court should be directed to retry the valuation issue with a more recent valuation date. John contends that the two-year delay between the valuation date and the trial led to an inequitable result that could be corrected upon retrial.

This argument is simply another facet of John's claim that the owelty award was inadequate. However, as discussed above, John is precluded from challenging the adequacy of the award due to his failure to move for a new trial.

DISPOSITION

The "INTERLOCUTORY JUDGMENT DETERMINING OWELTY" is affirmed. Each party shall bear their own costs on appeal.

_____
Levy, J.

WE CONCUR:

_____
Vartabedian, Acting P.J.

_____
Dawson, J.