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NO. COA06-697

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

GARY R. BERRYHILL and
wife MARTHA J. BERRYHILL
Petitioners

v.

McDowell County
No. 00 SP 203

HALEY N. SHELTON and husband
ANTHONY SHELTON; ALVIN R.
BERRYHILL; and PENNY VAUGHAN
and husband SCOTT VAUGHAN,
Respondents

Appeal by respondent from order entered 20 February 2006 by Judge C. Philip Ginn in Superior Court, McDowell County. Heard in the Court of Appeals 23 January 2007.

LeCroy and Willcox, PLLC, by M. Alan LeCroy, for petitioners-appellees.

Little & Goslan, P.A., by Stephen R. Little, for respondents-appellees Shelton and Vaughan.

Hugh J. Franklin, for respondent-appellant Berryhill.

WYNN, Judge.

Under North Carolina General Statute 1-301.2, "when an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading in a special proceeding . . ., the clerk shall transfer the proceeding to the appropriate court." Because we find that the appellant in this case never raised such an issue of fact in a pleading in this case, we hold that appellant waived his right

to have the issue determined in superior court.

On 27 December 2000, Gary Berryhill filed a petition seeking actual partition of Berryhill Farm, a forty-seven acre parcel of land that Gary Berryhill asserted he and his two sisters owned in equal shares as heirs under the will of their mother. One of his sisters, Judy Nodine, responded to the petition by admitting all the allegations and requesting only that the partition order allow those residing on the property to retain their residences and all necessary and appropriate access therein. However, his other sister, Shelia McPeters, responded by asserting the existence of a family settlement agreement whereby one-fourth of the family farm was to be conveyed by the three heirs to Alvin Berryhill, their fourth sibling. Shelia McPeters moved to join Alvin Berryhill as a necessary party to the petition for partition and sought an order of specific performance of the family settlement agreement.

The matter was scheduled for trial in the 6 January 2003 session of McDowell County Superior Court. Just prior to that date, Judy Nodine filed a motion for *ex parte* relief, seeking a prohibition against any co-tenant from parking, or allowing another individual to park, any vehicles or objects in the roadway/driveway of Berryhill Farm that would interfere with the use of that driveway. Judy Nodine specifically asserted that Alvin Berryhill and his son had been bringing and parking "junked" vehicles onto Berryhill Farm for the purpose of harassing the other co-tenants and their family members. Her motion also stated that Berryhill Farm was owned by Gary Berryhill, Shelia McPeters, and herself as

tenants in common, and that Shelia McPeters had given permission to Alvin Berryhill and his son to occupy the "homeplace" on Berryhill Farm.

In his 10 January 2003 order granting relief to Judy Nodine, Clerk of Superior Court Donald Ramsey found as fact that "[t]here [we]re three owners of seven of the eight tracts of the subject land," namely, Gary Berryhill, Shelia McPeters, and Judy Nodine, and that Shelia McPeters had "transferred her 1/3 undivided interest" in the remaining eighth tract to Alvin Berryhill in November 2002. Over the next eighteen months, additional orders to maintain the *status quo* and a preliminary injunction were entered, the last of which barred the use of the property for automotive repair work or for the storage of vehicles. Each of these court documents included the same finding of fact as to ownership as the 10 January 2003 order by the Clerk of Superior Court, namely, that Alvin Berryhill owned only a one-third interest in one of the eight tracts of Berryhill Farm, with the remaining seven tracts owned in equal one-third shares by his three siblings. The record contains no documentation or order from the Superior Court concerning the family settlement agreement or Shelia McPeters's allegations as to title.

In January 2005, the Clerk of Superior Court entered an Order Appointing Commissioners, charging three "disinterested commissioners" to "divide and apportion all the real estate which is the subject of this action among the several owners thereof," at that point, Gary Berryhill, Judy Nodine, Alvin Berryhill, and Penny

Vaughan. The order noted that Alvin Berryhill had "recently purchased all the interest of respondent Shelia McPeters, so that [he] now owns a 1/3 undivided interest in the entire estate to be divided." Additionally, Gary Berryhill and his wife, and Judy Nodine and her husband, had "deeded to Penny Vaughan and husband Scott Vaughan both of their respective interests in and to tract seven" of Berryhill Farm. Thus, when the commissioners were appointed regarding partition, seven of the eight tracts of Berryhill Farm were owned in equal thirds by Gary Berryhill and his wife, Judy Nodine and her husband, and Alvin Berryhill; the remaining eighth tract with the homeplace was owned by Penny and Scott Vaughan, with a two-thirds interest, and Alvin Berryhill, with the remaining one-third interest.

The January 2005 Order also stated that,

5. Any and all additional issues which any party desires to raise having to do with the equal and fair division of the property, whether or not any such issue may have been previously included within the pleadings of this action, . . . shall be deemed by the Court to have been waived if such issues are not presented to the Court by motion and properly served upon all other parties within 30 days of the entry of this order. The Court, after affording opportunity to be heard to all parties, may thereupon give further instructions to the commissioners if it deems further instructions are necessary.

Within that thirty-day window, Gary Berryhill and Judy Nodine each filed motions for consideration of additional issues with the Commissioners, and Alvin Berryhill filed a response to those motions, as well as his own motion for special consideration. In that motion, Alvin Berryhill presented for the first time the

family settlement agreement earlier asserted by Shelia McPeters, arguing that it "clearly entitles [him] to an extra interest in the real estate to be divided to the extent of an extra 1/4 interest in tract seven, and as a set-off against the interest of the remaining heirs."

The Commissioners filed their Summary Proposal for Equitable Distribution of Berryhill Farm on 14 March 2005. Alvin Berryhill filed an objection to the proposal, and Judy Nodine and her husband filed a Summary of Requests of corrections to be made to the proposal. On 17 May 2005, the Clerk of Superior Court heard oral arguments and presentations from the parties as to objections and suggestions for corrections to the report; after agreeing to give the parties additional time to file such objections, he recommitted the matter to the Commissioners to consider corrections and submit their Report. That Report was filed on 29 July 2005, partitioning Berryhill Farm among Penny and Scott Vaughan, Alvin Berryhill, Judy Nodine and her husband, and Gary Berryhill and his wife.

Alvin Berryhill renewed his objections that the Vaughans had been allotted too much land without providing payment. He argued further that the Clerk of Superior Court's instructions to the commissioners were "legally erroneous in substance, exceed[ed] the jurisdiction of the Clerk of Superior Court, and divest[ed] the appointed commissioners of the legal discretion imposed upon them by the provisions of N.C.G.S. 46-10." Specifically, Alvin Berryhill asserted that the Clerk of Court had directed the Commissioners to enforce certain handwritten contracts in the file

but not others, including the family settlement agreement initially raised by Shelia McPeters, which involved an issue of disputed title that should be decided in a civil action and jury trial, rather than in a Special Proceeding such as partition.

Following a response to Alvin Berryhill's objections filed by Gary Berryhill and his wife, the Clerk of Court issued an order on 14 September 2005, ordering a mediation among the parties to deal with two issues, including the question of enforcement of the handwritten contract objected to by Alvin Berryhill. After the mediation, the Clerk entered an order on 9 December 2005, which accepted, affirmed, and approved the July 2005 Report of Commissioners, and made other provisions as to the roads, water, electricity, and distribution of expenses on the property. On 20 February 2006, Superior Court Judge Phillip C. Ginn affirmed the December 2005 order entered by the Clerk concerning the partition of Berryhill Farm.

Alvin Berryhill now appeals that order, asserting that (I) the Clerk and the trial court should have identified the factual issues raised in the pleadings and transferred them to the trial docket for determination, and (II) the Commissioners were erroneously allowed and directed to decide disputed title issues with respect to Berryhill Farm. We affirm the trial court's order.

I.

Alvin Berryhill first argues that the questions of title asserted by Shelia McPeters in her original pleading in this case should properly have been transferred to the trial docket for

determination, rather than decided by the Commissioners and approved by the Clerk of Court and trial judge. In support of this argument, he cites North Carolina General Statute 1-301.2, which provides that "when an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading in a special proceeding . . ., the clerk shall transfer the proceeding to the appropriate court." N.C. Gen. Stat. § 1-301.2 (2005). Because we find that Alvin Berryhill never raised such an issue of fact in a pleading in this case, we overrule this assignment of error.

In her answer to Gary Berryhill's petition for partition, Shelia McPeters alleged an issue of ownership of Berryhill Farm, namely, that a family settlement agreement among the Berryhill siblings provided for the transfer of a one-fourth interest in the property to Alvin Berryhill. That answer was filed on 18 January 2001 and, on 1 November 2002, transferred and set for trial in the 6 January 2003 civil session of Superior Court. However, the record on appeal shows no evidence as to what occurred in that session, nor is there evidence that Shelia McPeters challenged the lack of an order from the Superior Court as to the issue of fact. Thus, the record before us shows only that the Clerk did, in fact, comply with North Carolina General Statute § 1-301.2 by transferring the proceeding to Superior Court based on the pleading by Shelia McPeters, who is not a party to this appeal.

The record further shows that following his joinder, Alvin Berryhill made no effort to raise the question of title until almost two years later, in his 9 February 2005 Motion for Special

Consideration. At that time, he requested transfer of the factual issue to Superior Court only in the alternative to a dismissal and denial of the motions of Gary Berryhill and his wife - not as a necessary prerequisite to the partition proceeding. Indeed, this request came only after the Clerk had already named the Commissioners and received their first report, the results of which Alvin Berryhill found to be objectionable.

Alvin Berryhill cites to *Roberts v. Barlowe*, 260 N.C. 239, 132 S.E.2d 483 (1963), for the proposition that each party who alleges fact or title issues related to the ownership of a property is entitled to have those issues decided before the division is submitted to the Commissioners. However, that case involved an appeal from a judgment ordering a sale of property in a partition proceeding based on the pleadings by the same two parties. Here, Alvin Berryhill seeks to claim Shelia McPeters's pleading as his own, when he had ample time after being joined as a party to assert his own rights, rather than waiting until what he perceived to be a bad outcome to comb through the record for any alleged error. Alvin Berryhill raised the issue of fact in a Motion for Special Consideration, not a pleading; as such, the statute did not require the Clerk to delay the partition proceedings further and again transfer the matter to Superior Court for resolution of the factual issues.

Because we find that Alvin Berryhill failed to raise the issue in his own pleading regarding the family settlement agreement, we conclude that this assignment of error is without merit.

II.

Next, Alvin Berryhill argues that the Commissioners were erroneously allowed and directed to pass on disputed title issues by the Clerk of Superior Court, when he instructed them to consider the provisions of the family settlement agreement asserted by Shelia McPeters in her pleading. We disagree.

Although the procedure for partition is outlined by statute, our courts have consistently held that such proceedings are equitable in nature, and courts accordingly have the authority to give directions to commissioners which seem proper to bring about an equitable partition. *Allen v. Allen*, 263 N.C. 496, 498-99, 139 S.E.2d 585, 587-88 (1965). Indeed, "[t]he rule is that in a suit for partition a court of equity has power to adjust all equities between the parties with respect to the property to be partitioned." *Henson v. Henson*, 236 N.C. 429, 430, 72 S.E.2d 873, 873-74 (1952). Our Legislature has likewise recognized this authority, providing that a court in a partition proceeding "may make such orders as it considers to be in the best interest of the parties." N.C. Gen. Stat. § 46-3.1 (2005).

We find that the instructions to the Commissioners in the instant case were well within the parameters of the authority vested in the Clerk by statute and judicial precedent. Alvin Berryhill specifically objects to language cited in the 9 December 2005 Order in which the Clerk recounted that he had given the Commissioners eight issues for further consideration, including "an agreement regarding the division of real estate upon the death of

Berryhill in connection therewith that involved original Respondent Shelia B. McPeters but which was transferred to respondent Alvin R. Berryhill." As noted by Alvin Berryhill in his brief to this Court, however, the Clerk also stated that he had "explained to the Commissioners that these eight issues were matters that they should consider, but the court did not order the Commissioners to take any particular action on any of these issues." Thus, the Clerk gave no direction as to how the Commissioners should decide the issues; rather, he directed their attention to a question of particular import to the proceedings in order to ensure an equitable partition. We therefore find this assignment of error to be without merit.

In sum, the trial court's order affirmed the Clerk of Court's order, which in turn accepted, affirmed, and approved the Report of the Commissioners. In light of the careful and considered work by the Clerk and the Commissioners over a period of more than five years, we find no abuse of discretion by the trial court in its order. See *Robertson v. Robertson*, 126 N.C. App. 298, 304, 484 S.E.2d 831, 834 (1997) (outlining the standard of review for a partition proceeding, when the trial court affirmed the report of the commissioners, who had discretion in considering different factors). Accordingly, the order of the trial court is,

Affirmed.

Judges HUNTER and STEELMAN concur.

Report per rule 30(e).