IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-842

Filed: 2 July 2019

Buncombe County, No. 15 SP 16

JANET H. SOLESBEE, and husband, CARL SOLESBEE, Petitioners,

v.

CHERYL H. BROWN and husband, ROGER BROWN; GWENDA H. ANGEL and husband, WESLEY ANGEL; and LISA H. DEBRUHL, and husband J. DELAINE DEBRUHL, Respondents.

Appeal by Respondents DeBruhl and DeBruhl from order entered 5 February 2018 by Judge J. Thomas Davis in Buncombe County Superior Court. Heard in the Court of Appeals 12 February 2019.

Deutsch & Gottschalk, PA, by Tikkun A. S. Gottschalk, for petitioners-appellees.

Westall Gray & Connolly, P.A., by J. Wiley Westall, III, for respondents-appellees, Browns and Angels.

Long, Parker, Warren, Anderson, Payne & McClellan, P.A., by Robert B. Long, Jr., for respondents-appellants, DeBruhls.

MURPHY, Judge.

This matter is before us for a second time. A detailed statement of the facts, which have remained mostly unchanged, is included in *Solesbee v. Brown*, ___ N.C.

App. ___, 805 S.E.2d 183 (2017) (*hereinafter Solesbee I*). To the extent there are new facts necessary to the outcome of this appeal, they will be set forth below.

Four siblings and their spouses have been involved in a contentious property dispute dating back a number of years, and the trial court has ordered the property in question to be partitioned by sale despite one sibling's objection. As in *Solesbee I*, the Appellants in this matter are Lisa and J. Delaine DeBruhl ("the DeBruhls"), two of the Respondents below. The Appellees in this matter are Janet and Carl Solesbee ("the Solesbees"), Petitioners below, and—the other Respondents below—Cheryl and Roger Brown and Gwenda and Wesley Angel (collectively, we refer to the Solesbees, Browns, and Angels as "Appellees").

ANALYSIS

The DeBruhls argue the trial court erred "by ordering a sale of all of the properties and in failing to order a partition of the three parcels (i) by sale of Parcel One . . . and (ii) by in-kind allotment of Parcels Two and Three to [the DeBruhls], subject to owelty[.]" In making this argument, the DeBruhls challenge Findings of Fact 12 through 17 and Conclusion of Law 7, contending the trial court erred in concluding Parcels Two and Three could not be partitioned in kind without causing substantial injury to the Appellees. In reviewing the decision of a trial court sitting without a jury, we must determine

> whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law

> were proper in light of such facts. Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable de novo.

Lyons-Hart v. Hart, 205 N.C. App. 232, 235-36, 695 S.E.2d 818, 821 (2010) (emphasis omitted). The trial court's findings of fact are supported by competent evidence and those findings support the trial court's conclusions of law. We affirm.

A. Findings of Fact

The DeBruhls argue Findings of Fact 12, 13, and 14—which describe Parcels One, Two, and Three, respectively—are not based on any values in evidence. Each of those three findings begins with a physical description of the relevant parcel and goes on to set out the parcel's fair market value. Findings of Fact 12, 13, and 14 are supported by the unchallenged valuations of the parcels provided by the only testifying expert witness for any party, Robert Boylan, Jr. ("Boylan"). Boylan testified that Parcel One had a fair market value of $191,714 and valuated Parcel Two at $19,550 and Parcel Three at $16,800. As fact finder, the trial court was within its discretion when it valued the parcels in Findings 12, 13, and 14, respectively, at $192,000, $19,600, and $17,000, respectively. These valuations are supported by competent evidence.

In Finding of Fact 15, the trial court found that the value of Parcels Two and Three would be reduced significantly if the parcels were joined as one and partitioned in kind:

> Parcels Two and Three together have a fair market value of $36,750 ($19,750+$17,000), with each share having a fair market value of $9,187.50 ($36,750/4). If Parcels Two and Three were divided further into three or more lots the resulting lots would be of no utility and of no value. The resulting lots would have a nominal or no value amount each of $2,000 . . . with each share having a fair market value of no more than $2,000. A division of Parcels Two and Three would result in a substantial reduction to each of the tenants in common of at least $7,187.50 ($9,187.50-$2,000).

This Finding of Fact is supported by Boylan's testimony that Parcel Two could be harder to sell if divided "because then you have smaller pieces of rock instead of larger pieces of rock." Furthermore, Boylan's testimony was clear that these two parcels, without Parcel One, would be very difficult to sell because the land is of no utility and had been classified as "wasteland" by Buncombe County. Finding of Fact 15 is supported by competent evidence.

Finding of Fact 16 states, "Imposition of an owelty on one or more of the divided parcels could not be a remedy because there would be an overall reduction in the fair market value by a division in kind. Therefore, owelty is not an appropriate remedy under these circumstances." Finding 17 elaborates that because the value of Parcel One is "far greater" than the values of Parcels Two and Three, it could not be allotted to one of the cotenants without the need for an excessive and unreasonable imposition of owelty. The trial court's finding that the imposition of owelty would not remedy the overall reduction in value that would result from a division in kind was supported

by competent evidence.

Our statutes dictate that a trial court should "in its discretion . . . consider the remedy of owelty where such remedy can aid in making an actual partition occur without substantial injury to the parties." N.C.G.S. § 46-22(b1) (2017). This specific subsection is seldom cited in our appellate courts, but our Supreme Court grappled with a similar issue in *Gregory v. Gregory*, 69 N.C. 522 (1873). In *Gregory*, there were three parcels of land at issue and one parcel was—as here—more than five times as valuable as the combined value of the other two. In ordering a partition by sale, the Court held, "an actual partition with a reasonable equality of values cannot be made without dividing the dwelling [the valuable parcel], and thus impairing its value. An actual partition in which there is a gross inequality of values, is generally injurious to some party." *Id.* at 528. Here, the trial court found actual partition would be injurious to the Appellees because it would result in their receiving less than the fair market value of the parcels if they were partitioned by sale. Findings 16 and 17, relating to the impracticality of imposing an owelty, are supported by competent evidence that the values of the three parcels are so disparate that any owelty would necessarily be unwieldy and impair the value of Parcel One.

B. Conclusion of Law

"It is clear from N.C.G.S. § 46-22 and our caselaw that economic factors alone control whether substantial injury exists to disturb the status quo of partition-in-

kind." *Solesbee I*, ___ N.C. App. at ___, 805 S.E.2d at 190. Determining "substantial injury" requires consideration of "(1) [w]hether the fair market value of each cotenant's share in the actual partition of the property would be materially less than the amount each cotenant would receive from the sale of the whole[, and] (2) [w]hether an actual partition would result in material impairment of any cotenant's rights." N.C.G.S. § 46-22 (2017). On remand, the trial court considered these issues and concluded that even a partial partition in kind would render each of the Appellees' fair market shares worth materially less than they would be if the three parcels were sold as a whole. As is discussed above, this conclusion is based on Findings of Fact that are supported by competent evidence and is proper in light of such facts. The economic factors present in this case were sufficient to disturb the status quo of partition-in-kind.

The DeBruhls also argue the trial court erred "in finding and concluding . . . that [the Solesbees] could seek the remedy of partial in kind allotment after completion of trial and entry of the court's Order." The DeBruhls' argument is premised upon a misinterpretation of Conclusion of Law 7. This argument challenges the third sentence of the trial court's Conclusion of Law 7—italicized below—which states:

> [The DeBruhls] contend that pursuant to N.C.G.S. § 46-16 that [sic] the Court should order their share partitioned and the remainder sold. In essence, the DeBruhls are asking that Parcels Two and Three be allotted to them to

> enhance their adjoining property and create a buffer area for their residence. *The Solesbees could make this same request and if so, a division of Parcels Two and Three would result in loss of value as the foregoing facts indicate.*

The DeBruhls argue the third sentence is erroneous because "the Appellees are barred by the doctrine of election of remedies to assert [a right to partition in-kind] post trial and post entry of an order." We disagree.

The Conclusion of Law in question is part of the basis for the trial court's order that "[t]his matter is hereby remanded to the Clerk of Superior Court . . . for the appointment of a Commissioner *to partition by private or public sale . . . all the Parcels One, Two, and Three . . . .*" As the Appellees state in their brief, "[a]t no point in the process have [any of the Appellees] made any request for a partition in kind." The challenged portion of Conclusion of Law 7 is simply an observation by the trial court used to illuminate a reason why the DeBruhls' argument for partition in-kind fails. In reading the Order in its entirety, the challenged language in Conclusion of Law 7 does not, as the DeBruhls argue, allow the Solesbees to elect partition in-kind rather than partition by sale; the DeBruhls' argument to the contrary is unpersuasive.

CONCLUSION

After remand in *Solesbee I*, the trial court's *Order* makes a proper Conclusion of Law based upon Findings of Fact which are supported by competent evidence.

AFFIRMED.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).