IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-933

Filed 3 October 2023

Davidson County, No. 18 SP 245

SARAH HEISLER, Petitioner,

v.

DARRUES W. SUTTON, JR., Respondent.

Appeal by petitioner from judgment entered 11 July 2022 by Judge Susan Bray in Davidson County Superior Court. Heard in the Court of Appeals 10 May 2023.

Law Office of Richard Munday by Richard Munday and Brinkley Walser Stoner by E. Drew Nelson, for the petitioner-appellant.

J. Calvin Cunningham, for the respondent-appellee.

DILLON, Judge.

Petitioner Sarah Heisler appeals from judgment denying her petition to partition certain property located in Davidson County. Based on our resolution of the arguments raised in Petitioner's brief, we affirm.

I. Background

Ms. Heisler commenced this action seeking a partition by sale of a single-family home (the "Property") which she owns as a tenant in common with her former fiancé, Respondent Darrues Sutton. Mr. Sutton has owned and lived on the Property

for decades. He added Ms. Heisler to the title as a tenant in common in 2014 when she moved in with him, three months after accepting his proposal of marriage. However, two years later, in 2016, Ms. Heisler called off the engagement and moved off the Property. She commenced this action seeking a partition of the Property by sale. After a hearing on the matter, the trial court determined that Ms. Heisler had waived her right to partition. The findings by the trial court in its judgment and the uncontradicted evidence from the hearing show as follows:

In April 2014, while they were in Florida, Mr. Sutton proposed to Ms. Heisler, which she accepted during that trip.

Three months later, in July 2014, Ms. Heisler moved into the Property, which at the time was owned by Mr. Sutton and his ex-wife. The Property was subject to a mortgage securing a note to which Mr. Sutton and his ex-wife were joint obligors. Mr. Sutton's ex-wife, though, desired to be removed from the title as an owner and from the mortgage note as a joint obligor, as she had remarried and was trying to qualify for a mortgage to buy a home with her new husband.

Mr. Sutton was having difficulty qualifying for a new loan to pay off the existing mortgage debt, due to being unemployed and disabled. Ms. Heisler, however, agreed to co-sign a new mortgage loan with Mr. Sutton. Accordingly, Mr. Sutton's ex-wife deeded her interest in the Property to Mr. Sutton; Mr. Sutton then deeded his interest in the Property to both himself and Ms. Heisler; Mr. Sutton and Ms. Heisler obtained a new loan in their names and secured by their interests in the Property,

with each signing a note and deed of trust.

About two years later, in 2016, Ms. Heisler broke off the engagement and moved off the Property and began living with Mr. Sutton's sister's husband. She has never made any of the monthly payments on the note. Witnesses testified hearing Ms. Heisler verbally state as she was moving off the Property that it was her intention to reconvey her interest in the Property to Mr. Sutton without consideration. However, a few months later, Ms. Heisler indicated that she wanted to be paid for her interest in the Property.

The parties never reached any agreement concerning a reconveyance of Ms. Heisler's interest in the Property back to Mr. Sutton. Accordingly, in May 2018, Ms. Heisler commenced this action, seeking a partition by sale of the Property.

The next month, in June 2018, Mr. Sutton commenced *a separate action* seeking relief against Ms. Heisler for breaching her promise to marry him. However, in November 2019, a trial court granted Ms. Heisler's motion for summary judgment on Mr. Sutton's claims *in that separate action* because Ms. Heisler's promise to marry was made in Florida and Florida abolished the action for breach of promise to marry. No appeal was taken from that summary judgment order.

In any event, in this present partition proceeding, on 14 July 2022, after a hearing on the matter, the trial court entered judgment, denying Ms. Heisler's partition petition. Ms. Heisler timely appeals.

II. Argument

In its judgment, the trial court held that Ms. Heisler "has no right to partition," determining that Ms. Heisler "waived her right to partition by a verbal agreement acted on by [Mr. Sutton]." We discern several potential issues from our review of the record. However, in her brief, Ms. Heisler makes only one argument as to why the trial court erroneously determined that she had waived her right to partition.[1]

In making her argument, Ms. Heisler assumes that the trial court was referring to the verbal agreement she made to marry Mr. Sutton while they were in Florida in determining that she had waived her right to partition. She argues that the trial court improperly relied on this breach based on principles of collateral estoppel and the dismissal of Mr. Sutton's complaint in the separate action for damages arising from that breach.

We conclude Ms. Heisler's argument lacks merit. We do not interpret the trial court's reference in its judgment to a breach of a verbal agreement to be Ms. Heisler's breach of her promise to marry *made in Florida*. That agreement was made several months before Ms. Heisler moved into the Property, was deeded her interest, and agreed to sign for a new mortgage loan. There is no finding or evidence to suggest

[1] Ms. Heisler does make a second argument, that the trial court erred by concluding that she had no right to partition *by sale*, based on an admission by Mr. Sutton that the Property (being a single-family residence) could not be subdivided in any practical way. However, we need not reach this argument, as we affirm the trial court's holding that Ms. Heisler waived her right to partition – whether by subdivision or by sale – based on her breach of a verbal agreement she had made.

that the parties contemplated *at the time* she accepted Mr. Sutton's proposal of marriage *in Florida* that Ms. Heisler would be made a tenant in common.

Rather, the gist of the agreement referenced in the judgment was one made at the time Ms. Heisler was made a tenant in common. When Ms. Heisler and Mr. Sutton arranged to have her placed on the title and to co-sign a new mortgage loan, they did so, in part, to ensure that Mr. Sutton could continue residing on the Property. As discussed below, under our case law, a tenant in common may be deemed to have waived her right to seek partition of the property if a partition would thwart the purpose of some other agreement the tenant in common had previously entered into. However, as Ms. Heisler makes no argument in her brief as to whether her arrangement with Mr. Sutton concerning the addition of her name to the title is the type which constitutes a waiver under our case law, we do not reach this issue.

Even if the trial court was referring to Ms. Heisler's Florida agreement to marry Mr. Sutton, we conclude the summary judgment in the other action concerning that agreement does not collaterally estop Ms. Heisler from seeking a partition in this present action. The trial court in the other action did not determine whether Ms. Heisler had breached her promise to marry. All that was determined was that Mr. Sutton could not seek affirmative relief/damages based on that breach based on Florida law. That ruling did not address or concern whether Mr. Sutton could rely on the Florida agreement with his co-tenant *as a defense* in a proceeding by that co-tenant to partition property located in North Carolina. We need not address the

merits of whether the Florida agreement is the type which could invoke the doctrine of waiver, as Ms. Heisler makes no argument on that issue. She merely argues that the reliance on that breach was improper based on collateral estoppel principles. Accordingly, we affirm the trial court's judgment.

We turn to another issue raised in the briefs concerning one aspect of the trial court's judgment, namely, the nature of Ms. Heisler's interest in the Property. Mr. Sutton has argued all along that he should be deemed the sole owner of the Property, contending that Ms. Heisler forfeited any interest when she called off the engagement. In his brief, he construes the judgment as holding that Ms. Heisler has no right to partition *because* she has no real interest in the Property and that the verbal agreement referenced in the judgment was a verbal agreement she made as she was moving out to deed back her interest to Mr. Sutton. Indeed, in his answer to Ms. Heisler's petition, he denied Ms. Heisler's allegation that they are tenants in common, stating that the Property "was conveyed on condition of marriage[.]"

Ms. Heisler, though, has argued all along that she does own a tenant-in-common interest and that the trial court erred in holding that she had waived her right as a tenant in common to a partition.

Based on the reasoning below, we construe the judgment as holding that Ms. Heisler is a tenant in common, but that she has waived her right as such to seek partition for as long as Mr. Sutton continues to reside on the Property.

Our Supreme Court has held that one who is "[a] tenant in common is entitled,

as a matter of right, to the partition of [real estate] so that [s]he may enjoy [her] share in severalty." *Kayann Properties v. Cox*, 268 N.C. 14, 19, 149 S.E.2d 553, 556 (1966) (emphasis added). However, one who owns a tenant-in-common interest in property "may, either by an express or implied contract, waive [her] right to partition *for a reasonable time*." *Id.* at 19, 149 S.E.2d at 557. *See also Chadwick v. Blades*, 210 N.C. 609, 612, 188 S.E. 198, 200 (1936) (emphasis added) (instructing that "[e]quity will not award partition at the suit of one in violation of [her] own agreement"). Any objection to a co-tenant's right to seek partition based on waiver through some oral or written agreement "is in the nature of estoppel" and "bear[s] a close analogy to the grant of specific performance of [that separate] contract." *Kayann*, 268 N.C. at 20, 149 S.E.2d at 558. *See Ward v. Ward*, 252 N.C. App. 253, 264, 797 S.E.2d 525, 532-33 (2017) ("[I]t is well-settled that a trial court will only deny a cotenant's right to partition where there has been an express or implied agreement not to partition, or where partition would make it impossible to fulfill the terms of an agreement [to which the co-tenant is bound]."). But a tenant in common who has waived her right to partition remains a tenant in common in all other respects.

North Carolina jurisprudence recognizes that when one has acquired a tenant-in-common (or other) interest in real estate, equity may step in and declare she actually has no interest in her own right, but rather holds it for another. For instance, equity may impose a "constructive trust" to prevent unjust enrichment:

> Whenever one obtains legal title to property in violation of

> a duty he owes to another who is equitably entitled to the land or an interest in it, a constructive trust immediately comes into being. Such a trust ordinarily arises from actual or presumptive fraud and usual involve a confidential relationship. Courts of equity will impose a constructive trust to prevent the unjust enrichment of the holder of the legal title to property acquired through a breach of duty, fraud, or other circumstances which make it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.

Cline v. Cline, 297 N.C. 336, 343-44, 255 S.E.2d 399, 404 (1979).

Alternatively, equity may impose a "resulting trust", which arises "when a person becomes invested with the title to real property under circumstances which in equity obligate [her] to hold the title and to exercise [her] ownership for the benefit of another." *Mims v. Mims*, 305 N.C. 41, 46, 286 S.E.2d 779, 783 (1982). A resulting trust "does not arise or depend on any agreement . . . but results from the fact that one man's money has been invested in land and the conveyance taken in the name of another." *Id.*

And there is authority stating that where one acquires property from a fiancé by *fraudulently* promising to marry, equity will impose a charge against the fraudster's interest in the property in favor of the donor-fiancé. *See Ewards v. Culberson*, 111 N.C. 342, 16 S.E. 233 (1892). In *Ewards*, a jilted fiancé gave money to his fiancée in anticipation of marriage, the fiancée bought land with the money, and the fiancée thereafter called off the marriage. Our Supreme Court held that the jilted fiancé was entitled to equitable relief in the form of a charge against the

property purchased by the fiancée where it was shown she had no intention to marry when she accepted the proposal, thus acquiring the money by fraud:

> Were there nothing more than a mere promise to marry, it is plain that a violation would not entitle the [fiancé] to any equitable relief; but we must infer from the verdict that [the fiancée] did not intend to perform the promise at the time it was made, and that she intended it . . . simply as a trick or contrivance by which to cheat and defraud [her fiancé] of his money.

Id. at 343, 16 S.E. at 234.

Here, though, the trial court makes no finding which would support the imposition of a trust on her interest. For instance, the trial court makes no finding that Ms. Heisler did not intend to marry Mr. Sutton either at the time she accepted her engagement while they were in Florida or when she moved into the Property.

And the trial court makes no findings which show that Ms. Heisler's tenant-in-common interest was not a gift. Rather, they show that she paid consideration for her interest. While the trial court does find that she paid nothing towards the closing costs nor made any mortgage payments or paid any repair bills, the trial court also finds that she agreed to be a co-obligor on a new mortgage. And there is nothing in the judgment or the record which suggests that she does not continue to be obligated under that mortgage. Additionally, based on the trial court's findings, the mortgage she signed was in an amount that was approximately $18,000 more than the mortgage debt of Mr. Sutton and his ex-wife that was paid off. And the only finding by the trial court concerning how the excess proceeds were used was a finding that at

least some were used to pay for other debt *Mr. Sutton* had incurred with his ex-wife. There is no indication that Ms. Heisler received any of the excess proceeds.

In his brief, Mr. Sutton argues that the parties entered into a verbal agreement as Ms. Heisler was moving out that she would reconvey her interest in the Property for no consideration. However, an agreement affecting an interest in real estate generally must be in writing. N.C. Gen. Stat. § 22-2 (2021). The trial court makes no findings that the parties entered into a written agreement when Ms. Heisler moved out, much less at any other time. Our Supreme Court has quoted an Illinois case with approval which stated that a verbal agreement may be the basis for a waiver, "if it has been acted upon[.]" *Kayann*, 268 N.C. at 20, 149 S.E.2d at 557. But, again, the trial court has made no finding that Mr. Sutton has acted on any promise by Ms. Heisler when she moved out to reconvey the property for no consideration.

In any event, the trial court never expressly finds Ms. Heisler ever stated she would reconvey her interest to Mr. Sutton for no consideration when she was moving out in 2016. Rather, the trial court merely finds that *there was evidence presented* that Ms. Heisler had made the promise, finding that "[t]wo (2) witnesses testified that [she] on two (2) occasions [stated that she] would sign a Deed [reconveying her interest back to Mr. Sutton] for no consideration." *See Harrison v. Gemma Power*, 369 N.C. 572, 583, 799 S.E.2d 855, 863 (2017) (explaining that "a mere recitation of the evidence" is not "true findings" concerning the credibility of that evidence).

Finally, we note that Mr. Sutton's deed conveying an interest to Ms. Heisler

contained no language that the conveyance was conditional. And the trial court concluded that Ms. Heisler "ha[d] waived her right to partition," suggesting the trial court recognized Ms. Heisler has a tenant-in-common interest.

III. Conclusion

We construe the judgment as holding that Ms. Heisler and Mr. Sutton own the Property as tenants in common but that Ms. Heisler has waived her right to a partition of the Property for so long as Mr. Sutton continues to reside at the Property. Based on the argument raised by Ms. Heisler on appeal, we affirm the judgment of the trial court.

AFFIRMED.

Judges COLLINS and STADING concur.

Report per Rule 30(e).