Opinion filed August 25, 2017

In The

Eleventh Court of Appeals

No. 11-15-00150-CV

ANDRE KODA, Appellant/Cross-Appellee

V.

AGNES ROSSI, Appellee/Cross-Appellant

On Appeal from the 220th District Court
Comanche County, Texas
Trial Court Cause No. CV-14812

MEMORANDUM OPINION

After a bench trial, the trial court found that Andre Koda breached his fiduciary duty as trustee of a trust in which he and his sister, Agnes Rossi, were beneficiaries. The trial court assessed "damages" against Andre; ordered an in-kind partition of real property; and, among other things not relevant to this appeal, ordered that he distribute the remaining personal property in equal shares to his sister and

himself. Andre and Agnes both appeal. We affirm in part and reverse and remand in part.

Andre and Agnes's mother, Teresa Koda, created "The Koda Trust". The trust provided that Andre was to serve as trustee. Andre and his sister, Agnes, were beneficiaries of the trust. As provided in the trust agreement, the trust was to terminate upon Teresa's death and the trustee was to distribute the trust estate, free of any trust, to Andre and Agnes.

Despite Teresa's death and the provisions of the trust agreement, Andre never formally terminated the trust and never distributed the trust estate. Because Andre did not voluntarily produce an accounting for the trust as requested by Agnes, she sued him. She later amended her lawsuit to include a claim against Andre for breach of fiduciary duty. Her lawsuit also included a claim for partition.

Agnes's claims for breach of fiduciary duty were that Andre had used trust funds to pay his own personal and business obligations and expenses in the amount of $21,921.28. On the other hand, Andre had never made any distributions to Agnes during the entire existence of the trust.

After a bench trial, the trial court entered a judgment by which it terminated the trust, awarded Agnes attorney's fees and expenses of $17,349.60, assessed "damages" against Andre in the amount of $1,647.25 (calculated from the date of Teresa's death), and also taxed court costs against Andre. The trial court also held that each of the parties owned an undivided 50% interest in the real property, a certain note, Teresa's personal effects (including but not limited to, jewelry, paintings, and other household furnishings), and the balance of the trust bank account, all free of any trust. Additionally, the trial court found that the real property was susceptible to partition in kind, and it ordered that partition. Andre had a claim for conversion before the trial court, and the trial court denied it; he has not appealed

that portion of the judgment. Andre also has not appealed the award against him of $17,349.60 in attorney's fees and expenses.

On appeal, Andre brings four issues for us to resolve. In his first issue on appeal, Andre asserts that the trial court erred when it denied his motion for new trial. He contends that, if it had granted the motion and had considered the clarifying evidence that Andre had attached to the motion, the trial court would not have been so confused as to allowable funeral costs and expenses.

In his motion for new trial, Andre claims that his harm came from the ineffective assistance that his counsel provided to him. In the "Conclusion" portion of his motion for new trial, Andre states: "This motion requests the Court grant a new trial because ANDRE KODA'S trial attorney failed to present evidence of ANDRE KODA'S personal payments although they were readily ascertainable from bank records." If Andre is attempting to raise a claim of ineffective assistance of counsel on appeal, we note that the doctrine of ineffective assistance of counsel does not apply to civil cases where, as here, there is no constitutional or statutory right to counsel. *Culver v. Culver*, 360 S.W.3d 526, 535 (Tex. App.—Texarkana 2011, no pet.).

Otherwise, we review a trial court's denial of a motion for new trial for an abuse of discretion. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 813 (Tex. 2010). Before a party can obtain a new trial on the basis of newly discovered evidence, the movant must demonstrate that "(1) the evidence has come to its knowledge since the trial, (2) its failure to discover the evidence sooner was not due to lack of diligence, (3) the evidence is not cumulative, and (4) the evidence is so material [that] it would probably produce a different result if a new trial were granted." *Id.* By Andre's own argument, he says that the evidence was "readily ascertainable from bank records." By all accounts, as trustee, this evidence was

under his control at the time of trial. Andre has not shown that the evidence came to his knowledge after the trial. *See id.*

A sizeable portion of Andre's brief is composed of arguments based upon the unoffered and therefore unadmitted evidence. As a part of his first issue on appeal, Andre posits that the trial court should have granted the motion for new trial in the interest of justice. If we were to agree with that argument, we would remand for a new trial. That would be tantamount to this court's granting a new trial in the interest of justice on our own without first having found error "on trial." An appellate court may not do that unless it is remanding the case for error "on trial." *U.S. Fire Ins. Co. v. Carter*, 473 S.W.2d 2, 3 (Tex. 1971).

We cannot say that the trial court abused its discretion when it denied Andre's motion for new trial. We overrrule Andre's first issue on appeal.

In his second issue on appeal, Andre complains about the trial court's sua sponte action when it admitted "otherwise unoffered evidence." At the conclusion of the testimony, Andre's trial counsel, in an apparent abundance of caution, asked that all his exhibits be admitted. Opposing counsel had no objection. After the trial court acknowledged that they were admitted, it asked Agnes's trial counsel what he wanted to do about this "whole book of Plaintiff's exhibits here, some were mentioned, some were not. How did you want the Court to handle that?" Agnes's lawyer responded, "I kept a checklist of the exhibits I entered. If there's no objection, I'll read off those exhibits, ask they be admitted." The trial court told him to "[g]o ahead." Andre's counsel told the trial court, "That would be fine with me." Agnes's counsel then read the list of exhibits and asked that they "be entered into the record." Andre's counsel told the court that the list did not conflict with his records and that he did not see any conflict with what he had in his file, and he further said to the trial court, "I have no objection." In the absence of an objection, the issue

has not been preserved for review. TEX. R. APP. P. 33.1(a); *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 829 (Tex. 2012) (preservation inquiry focuses on trial court's awareness of and opportunity to remedy problem). We overrule Andre's second issue on appeal.

In his third issue on appeal, Andre takes the position that the trial court abused its discretion when it entered "an order appointing commissioners to execute a partition in kind when the record was clear, based on the court's own admission, that partition evidence was not adequately presented at trial." In what appears to be a separate fourth issue, but one that is argued with the third issue, Andre complains that "[b]ecause of the trial court sua sponte actions the evidence really before the court was legally and factually insufficient for the court to make its determination's [sic]." Insofar as we have not already discussed the fourth issue in our discussion of the second issue, we will discuss issues three and four together.

Texas law favors partition in kind. *See* TEX. R. CIV. P. 770; *Daven Corp. v. Tarh E&P Holdings, L.P.*, 441 S.W.3d 770, 776 (Tex. App.—San Antonio, 2014, pet. denied). The burden of proof is upon the party who opposes partition in kind and seeks instead a partition by sale. The party who seeks partition by sale bears the burden to prove that a partition in kind would not be fair and equitable. *Daven*, 441 S.W.3d at 777. Here, Andre claimed that it was not possible to partition the property in kind. Obviously, Agnes thought that the property was capable of in-kind partition.

We have examined the record for the existence of testimony that would show that the real property could not be fairly and equitably partitioned in kind. We have found evidence to show that the real property consists of "about sixty" acres, that it appraised in 2011 for approximately $230,000, that there was a house on the property, that Andre lived in it, that there was a mortgage on the real property, and that a third party leased 55 acres of the property for deer hunting. We have not been

able to find anything else in the record that bears upon a fair and equitable partition of the real property.

Andre argues that "there was not even a scintilla of evidence produced on the partitionability of the real property." He refers to the trial court's statement that "[it] really didn't hear much about partitionability of the real estate." We do not disagree with the trial court, but we would add that Texas law favors partition in kind. *Daven Corp.*, 441 S.W.3d at 776. Andre concludes his argument on this point with the statement that the trial court abused its discretion because it acted without a scintilla of evidence before it on the issue.

Andre discusses three standards of review in connection with this issue: abuse of discretion (*see Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003)); legal sufficiency (*see Jelinek v. Casas*, 328 S.W.3d 526, 532 (Tex. 2010); *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *Clayton v. Wisener*, 190 S.W.3d 685, 691–92 (Tex. App. — Tyler 2005, no pet.); and factual sufficiency (*see Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986)).

It was Andre's burden to show that the real property was not subject to a fair and equitable division and was, therefore, incapable of an in-kind partition. *See Daven Corp.*, 441 S.W.3d at 777. We have set out above the full extent of the evidence that might even remotely pertain to the partition of the real property. As we have said, partition in kind is favored over sale. Under any of the standards of review under which Andre would have us review his partition issues, the evidence fails to overcome the favored position afforded to an in-kind partition. We overrule Andre's third and fourth issues on appeal.

Agnes has also filed a notice of appeal and raises one issue for our consideration. We take Agnes's issue to be a complaint that the trial court erred when it failed to find that Andre's "actions in using funds belonging to the Trust to pay his business debts, writing checks to his corporation, and depositing funds belonging to the Trust into his personal bank accounts were a breach of his fiduciary duty entitling Agnes Rossi to additional damages."

Agnes argues that Andre owes her an additional $20,274.03 in trust funds that he expended for his personal benefit prior to Teresa's death. Andre argues that, although he used some funds from the trust for his own benefit, some of the funds were used to repay him for money spent on trust property. Agnes presented evidence in support of the $20,274.03 figure. The trial court awarded Agnes $1,647.25 as "damages" for trust funds that Andre spent on his own behalf after the trust terminated when Teresa died. It held that, before the trust terminated upon Teresa's death, Andre, as a beneficiary, had the right to use the funds for himself. Andre presented some testimony about the reasons for some of the withdrawals and expenditures, but a judgment based upon that incomplete testimony is against the great weight and preponderance of the evidence upon this record.

Agnes asks this court to render judgment for her "damages in the amount $21,921.28." We may not render a judgment when a judgment is reversed because a finding is against the great weight and preponderance of the evidence, we may only order a remand. Further, this court cannot find facts (any amount wrongfully withdrawn or spent), we can only unfind them. *Halbert v. Halbert*, 794 S.W.2d 535, 537 (Tex. App.—Tyler 1990, no pet.).

We sustain Agnes's cross-point on appeal and remand the cause for proceedings consistent with this opinion. Because Agnes did not seek special damages and because the error in this case affects only that part of Agnes's claim

that relates to Andre's breach of fiduciary duty that occurred prior to Teresa's death, we see no reason to reverse that part of the judgment that was entered in Agnes's favor in the amount of $1,647.25. *See* TEX. R. APP. P. 44.1(b). The only damages sought by Agnes were repayments of the amounts taken as a result of the various breaches. We are not disturbing the award to Agnes and then awarding the $1,647.25 repayment directly to the trust because we have not been asked to review that issue.

We reverse the judgment of the trial court insofar as it relates to any breach of fiduciary duty, and attendant damages, with respect to Andre's trust activities prior to the Novemer 8, 2011 termination of the trust, and we remand such issues to the trial court. In all other respects, we affirm the judgment of the trial court.

JIM R. WRIGHT
CHIEF JUSTICE

August 24, 2017

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.