COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2159 **Cir. Ct. No. 2010CV15796**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

BORISLAV KRESOVIC AND SHIRLEY KRESOVIC,

PLAINTIFFS-RESPONDENTS,

V.

ROCHELLE KRESOVIC,

DEFENDANT,

MIRA KRESOVIC,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. This is an appeal from an order confirming a sheriff's sale stemming from the trial court's order for a judicial sale of real estate after finding that it could not be equitably partitioned. On appeal, Mira Kresovic argues that the trial court erroneously exercised its discretion in ordering the sheriff's sale rather than ordering partition of the property. We disagree and affirm.

BACKGROUND

¶2 The historical facts are generally not in dispute. Borislav Kresovic and his wife, Shirley (hereinafter referred to collectively as "Borislav" unless context requires otherwise), own approximately forty-six acres of undeveloped real estate property in Franklin, Wisconsin (hereinafter "the property"), as tenants in common with their niece, Mira Kresovic (hereinafter "Mira"). Borislav and Mira each have an undivided one-half interest in the property.

¶3 Borislav and his brother Dragomir, Mira's father, purchased the property—vacant farmland—in the early 1980s. Although the brothers intended to develop the property, it is currently undeveloped and is used for agricultural purposes. Dragomir passed away in 2005, and his undivided one-half interest in the property passed to his wife, Rochelle.[1] At some point thereafter, Rochelle's interest passed to Mira. Borislav and Mira are neighbors, and the property at issue abuts their respective separately owned properties. According to Mira, she and her uncle each receive approximately $1400 per year in rent from the farmer who farms the property.

[1] Rochelle Kresovic was named as a defendant in the underlying action; however, during its pendency, Rochelle passed away.

¶4 By all accounts, Borislav and Mira are incapable of getting along. For example: they have accused each other of vandalism; Mira has accused Borislav of having stolen personal property from her; Mira has multiple security cameras pointed toward Borislav's property; they have exchanged profanities; and Mira previously sought, but failed to obtain, a restraining order against Borislav. When Borislav was asked to characterize his relationship with Mira as neighbors, his response was "hostile." Consequently, in September 2010, Borislav filed this action seeking partition or, if equitable partition could not be had, for sale of the property. The partition cause of action against Mira in the amended complaint alleged that the parties were at an impasse on how to separate their interests, and Mira asserted partition as an affirmative defense to the sale request based on her belief that the property can be equitably divided.

¶5 Prior to the court trial, which began nearly four years after the lawsuit was filed, Borislav and Mira agreed to certain factual stipulations, including that the highest and best use of the property is as a residential single-family subdivision development. At trial, Borislav argued that partition would hinder development of the property and that the parties would yield the best result from sale of the property as a single piece, particularly because the parties agree that the best use of the property is for development of single-family residences. Borislav testified that should the court grant partition, he would likely develop his portion of the property if possible, although he expressed concern about the ability to develop one portion separate from the other. Mira, to the contrary, argued that partition is possible because the property can be divided into two equitable portions that can be developed separately. Unlike Borislav, she testified that she would likely continue renting her portion as farmland rather than develop the property if the court granted partition.

¶6 Expert witnesses for both parties confirmed that if the property is partitioned, development of the separate properties will require at least some cooperation between the owners. The experts also testified that there are wetlands throughout the property, that the property has two separate sewer basins, and that one parcel would likely require deeper—and more expensive—sewer pipes. An appraiser testified that if partitioned, the east parcel would be valued at approximately $440,000 and the west parcel would be valued at approximately $435,000.[2] Despite the relatively equal appraised value for the east and west parcels, both Mira and Borislav testified as having a strong preference for the west portion.

¶7 The trial court determined that the property should be sold as a whole at a judicial sale pursuant to WIS. STAT. § 842.17(1) (2013-14).[3] Specifically, the trial court indicated that due to the "unique circumstances" of this case—including Borislav's and Mira's complete inability to cooperate and get along—the property could not be divided fairly and equitably "without significant economic detriment to either or both of the owners." The court therefore ordered the property to be sold.

¶8 After the trial court ordered a judicial sale, Mira appealed; however, we dismissed that appeal as premature after concluding that the judgment ordering the sale was not a final judgment and that "[a] judgment ordering sale of property

[2] These amounts are based on the partition presented and preferred by Mira and discussed at trial, which divides the property approximately in half with an east parcel and a west parcel. Unless otherwise noted, all references to east and west parcels are based on Mira's partition proposal.

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

in a partition action is not final until judgment confirming the sale is entered." ***Kresovic v. Kresovic***, No. 2014AP2308, unpublished op. and order at 6 (WI App Mar. 11, 2015). Upon remittitur, the trial court ordered the sale of the property, which occurred on August 10, 2015. Both Borislav and Mira bid at the sale, and Borislav ultimately outbid Mira $1,125,000 to $1,100,000. Borislav's winning bid netted approximately $250,000 more than the appraisal valuing the east parcel at $440,000 and the west parcel at $435,000. On October 12, 2015, the trial court entered a written order confirming the sale. Mira now appeals.

ANALYSIS

¶9 Although this is an appeal of the order confirming the sale of the property at issue, Mira primarily argues that the trial court erroneously exercised its discretion by ordering judicial sale of the property in the first place. Accordingly, we begin by addressing whether the trial court erred in ordering the sale of the property rather than partition in the first instance, followed by a review of whether the trial court properly exercised its discretion in confirming the sale.

I. Standard of Review

¶10 Partition of real estate is a remedy under the Wisconsin statutes and common law. WIS. STAT. § 842.02; ***Watts v. Watts***, 137 Wis. 2d 506, 535, 405 N.W.2d 303 (1987). Although partition is codified in our statutes, it is an equitable action. ***Klawitter v. Klawitter***, 2001 WI App 16, ¶7, 240 Wis. 2d 685, 623 N.W.2d 169. The trial court is not limited to the statutory partition remedies in § 842.02(2); rather, "[t]he equitable nature of a partition action gives the trial court the discretion to fashion a remedy that meets the needs of the specific case." ***Schmit v. Klumpyan***, 2003 WI App 107, ¶26, 264 Wis. 2d 414, 663 N.W.2d 331.

¶11 We review partition actions under the erroneous exercise of discretion standard. *See* ***Prince Corp. v. Vandenberg***, 2016 WI 49, ¶16, 369 Wis. 2d 387, ___ N.W.2d ___. Our review is highly deferential, *see* ***Klawitter***, 240 Wis. 2d 685, ¶8, and "[d]iscretionary acts are upheld if the [trial] court 'examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Wynhoff v. Vogt***, 2000 WI App 57, ¶13, 233 Wis. 2d 673, 608 N.W.2d 400 (citation omitted). We will sustain the trial court's factual findings unless clearly erroneous. *See* WIS. STAT. § 805.17(2) ("[f]indings of fact shall not be set aside unless clearly erroneous").

II. The trial court did not err in ordering sale of the property.

¶12 Partition is a mechanism by which a person holding a joint or common interest in real property may seek to have the cotenants' interests in that real property divided. WIS. STAT. § 842.02. Unless otherwise limited by law or agreement, a cotenant is entitled to partition as a matter of right. *See* ***id***. Section 842.02 provides:

> **(1)** A person having an interest in real property jointly or in common with others may sue for judgment partitioning such interest unless an action for partition is prohibited elsewhere in the statutes or by agreement between the parties for a period not to exceed 30 years.
>
> **(2)** The plaintiff in the plaintiff's complaint may demand judgment of partition and, in the alternative, if partition is impossible, judicial sale of the land or interest, and division of the proceeds.

If the basis for partition—where the lines dividing the owners' respective interest would be drawn—is clear following trial or default and proofs, the trial court may enter judgment accordingly. *See* WIS. STAT. § 842.07; *see also* ***LaRene v. LaRene***, 133 Wis. 2d 115, 118 n.1, 394 N.W.2d 742 (Ct. App. 1986). Otherwise,

the court shall appoint a referee to report either a basis for partition or the conclusion that partition would be prejudicial. ***LaRene***, 133 Wis. 2d at 119; WIS. STAT. §§ 842.07 and 842.11. After receiving the referee's report, the court may "set aside the report and refer the case to a new referee," adopt a referee's recommendation for partition without sale, or, upon a finding of prejudice, order the premises sold by the sheriff at auction. *See* WIS. STAT. §§ 842.13, 842.14(1), and 842.17(1).

¶13 Conversely, if it is obvious that a line cannot be drawn without prejudice to one or more of the owners, the court may proceed to order sale of the property as a whole and then divide the proceeds rather than dividing the property itself. *See* WIS. STAT. § 842.17; ***LaRene***, 133 Wis. 2d at 120. Although "prejudice" is not defined in § 842.17, courts have determined that prejudice results "if partition would cause a substantial economic loss." *See* ***Boltz v. Boltz***, 133 Wis. 2d 278, 283, 395 N.W.2d 605 (Ct. App. 1986).

¶14 Mira argues that the trial court's exercise of discretion was clearly erroneous because it ordered sale of the property despite having conceded that "[a] line can be drawn" and that a referee and professionals could work together "to design two relatively equally valued parcels," thereby indicating that partition is actually possible. For the reasons we explain, we disagree with Mira's assertion that the trial court's decision was clearly erroneous.

¶15 After multiple days of trial and hearing testimony from the parties and various witnesses, the trial court concluded that the property should be sold rather than partitioned. In so concluding, the trial court noted the applicable law: "Succinctly, if informally, stated, the standard under Ch. 842 is whether the property can be divided, fairly and equitably, and, by necessary implication,

without significant economic detriment to either or both of the owners." The trial court's recitation of the standard is in line with that set forth in ***Idema v. Comstock***, 131 Wis. 16, 18, 110 N.W. 786 (1907).

¶16 In its written trial findings and conclusions of law, the trial court made numerous findings of fact. Of particular importance, the court found that: (1) the parties have a long-standing and substantial history of being unable to cooperate; (2) the highest and best use of the subject real estate is as a residential single-family subdivision development; (3) the property is irregularly shaped and includes multiple sewage basins, has existing developments on three sides, has existing roads to connect with, and contains wetland areas and other attributes that are not equally distributed throughout; and (4) the court was without sufficient information to split the land into two parcels that could be developed at equal cost and resulting in equal value. In light of its factual findings, the trial court concluded that there was no basis for partition because of the property's unique configuration and lack of essential information, and that partition would present the risk of substantial economic loss to one or both parties, thereby prejudicing one or both. The trial court also highlighted the "intransigent irrationality" of Borislav and Mira in regard to their relationship and complete inability to cooperate and get along.

¶17 Having reviewed the record, we cannot say that the trial court's findings were clearly erroneous or that it erroneously exercised its discretion. Prior to trial, the parties stipulated that the "highest and best use of the real estate which is the subject matter of this action is as residential single-family subdivision development." At trial, expert witnesses for both parties discussed the possibility and ramifications of separating the property and developing the two pieces separately. For example, one of Borislav's experts testified that the property is

unique because there are two distinct drainage areas, there is a difference in the grade between the east and west parcels, and that the west parcel is more suited for "designing lots for rear basement walkouts to bring the premium." His expert also testified about the need for a "Road Reservation"—a section set aside for development of a road should one property owner develop before the other—in the event the property was partitioned, and he explained that one concern with the "Road Reservation" in the proposed partition plan was that its location had not yet been approved by the City of Franklin.

¶18 Borislav's expert also testified that the sewers on one parcel would need to be deeper than those on the other, meaning they would likely be more costly to install. Conversely, Mira's expert testified to the contrary, stating that he anticipated roughly similar costs for installing sewers on the two parcels because although one parcel required deeper sewers, the other would ultimately require a greater length of sewer. The former Director of Public Works, City Engineer and Manager of the Water Department for the City of Franklin also testified. He explained that when sewers must be put in at a greater depth than normal, deeper manholes—which are more susceptible to infiltration—are also required, and that it is more costly to maintain deeper sewers. Consequently, he explained that the City of Franklin tries to avoid deep sewers as much as possible and that it may be necessary to consider alternatives when deeper than normal sewers are proposed, as the City of Franklin maintains the sewers after development.

¶19 The former Director of Public Works also testified about another uncertainty in the development of the property: the size and location of a water retention basin. He explained that some of the proposed plans moved the retention basin from where the City had originally planned for it, and also that the City would be interested in paying the property developer to expand the water retention

basin to help alleviate downstream flooding problems. Although he stated that the City would compensate the owner for the use of additional land needed to expand the retention basin, as that land would no longer be available to develop, there was no indication of what that amount might be or if it would at least be equivalent to the amount that could otherwise be obtained from developing that land. In the event of partition, this uncertainty makes it difficult to predict the extent of the economic detriment or benefit, if any, on the owner of the parcel where the retention basin is placed.

¶20 There was also testimony regarding the wetlands throughout the property, the effect of the wetlands on the buildable area, future management of the wetland areas, and the inability to determine the exact extent of the wetlands due to outdated information. Borislav's expert concluded that from the perspective of a land planner, splitting the property into east and west parcels would make it "much harder" to develop than if the property was developed as one unit due to the "unique characteristics of this property and the obvious differences on the easterly portion of the land and the westerly," as well as that the west parcel would be the preferred parcel for development if split. To the contrary, Mira's expert testified that it was his professional opinion that the property could be partitioned and that the two parcels could be developed independently.

¶21 Experts for both parties testified that if the property is partitioned, at least some amount of cooperation between the owners will be necessary in order to successfully develop the parcels, particularly in regard to developing a roadway. However, the parties themselves confirmed their long-standing inability to cooperate and get along, as evidenced by their accusations of vandalism and theft, security cameras directed at Borislav's property, and Mira's failed attempt to obtain a temporary restraining order against Borislav, among other disputes.

¶22 Mira also presented the testimony of a commercial real estate appraiser at trial. He testified that his firm completed an appraisal of the property and that the purpose for the appraisal, which was based on Mira's proposed east/west split, "was to develop an opinion of the market value of the proposed east and west parcels of the property." According to the appraiser, as of March 26, 2014, the value of the east parcel was $440,000 and the value of the west parcel was $435,000. The highest appraisal the parties point to in the record was $950,000 as of February 9, 2012, and that appraisal was jointly commissioned by the parties.

¶23 In light of the trial testimony, we see no clear error or erroneous exercise of discretion in the trial court's findings and conclusion that partition could not be had without prejudicing one or both parties. Although there was conflicting expert testimony, the trial court, as trier of fact, was entitled to reach credibility determinations. *See* ***Gehr v. City of Sheboygan***, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977) ("when more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact"). Based on its decision, the trial court apparently found the testimony explaining the difficulties and risks of developing the property as two separate parcels more credible and convincing. Moreover, the trial court noted the likely continued costs to the parties in the form of fees resulting from continued court and referee involvement if the property was partitioned. While Mira correctly points out that the trial court, in a written letter to the parties explaining its decision, recognized that "[a] line can be drawn," the real question is not simply whether a line dividing the property can be drawn, but rather, whether partition would cause prejudice to one or more parties. *See* ***Idema***, 131 Wis. at 18.

¶24 Accordingly, we conclude that the trial court's determination that the property at issue could not be equitably divided and that sale was necessary was not clearly erroneous.

III. The trial court properly exercised its discretion in confirming the sale.

¶25 We next consider whether the trial court properly exercised its discretion in confirming the sale. We conclude that it did.

¶26 As previously discussed, the property sold for $1,125,000. This price exceeds every appraised value of the property as a whole that the parties point to as having been presented to the trial court, and neither party argues that the property did not sell at or above fair market value. The portion of sale proceeds each party will receive—$562,500—is likewise higher than the estimated fair market value of each divided parcel as presented at trial by Mira's witness ($440,000 for the east parcel and $435,000 for the west parcel). In other words, the sale maximized the value of the parties' interests, and the parties will each receive approximately $125,000 more as a result of the sale than what Mira's witness testified the parcels were worth individually.

¶27 Just as we found no clear error in the trial court's determination that partition could not be had in this case, we likewise see no erroneous exercise of discretion in the trial court's confirmation of the sheriff's sale, particularly in light of the sale price having substantially exceeded the appraised value of the proposed parcels.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.