

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Whitetail Orchard, LLC

Court of Appeals No. E-13-064

Appellant

Trial Court No. 2013-CV-0327

v.

Elaine R. Anadell, et al.

DECISION AND JUDGMENT

Appellee

Decided: May 16, 2014

* * * * *

W. Zack Dolyk, for appellant.

Gregory R. Flax and Robert E. Moore, for appellee.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Erie County Court of Common Pleas, granting appellee's, Elaine Anadell, Civ.R. 12(B)(6) motion to dismiss. Appellant, Whitetail Orchard, LLC, argues that the trial court erred when it determined that the

transfer of a portion of real property by survivorship tenants did not terminate the survivorship tenancy with respect to the remaining real property. We affirm.

A. Factual and Procedural Background

{¶ 2} The facts set forth in the complaint are as follows. On December 29, 1997, Katherine Krysik conveyed certain real property located in Florence Township, Erie County, Ohio, to Diana Kay Krysik and appellee as survivorship tenants. On August 14, 2004, Diana and appellee conveyed a portion of the real property (25 acres) to Robert and Mary Morog. Several years later, on April 8, 2011, Diana conveyed her interest in the remaining real property to appellant. On February 25, 2013, Diana passed away. Thereafter, on March 5, 2013, appellee filed an “Affidavit for Transfer of Real Estate under Survivorship Deed” with the Erie County Recorder.

{¶ 3} On May 6, 2013, appellant initiated the present suit. Appellant alleged in its complaint that the August 14, 2004 conveyance to the Morogs terminated the survivorship estate. As a result, appellant claimed that when Diana conveyed her interest in the remaining real property to it on April 8, 2011, appellant received an interest in the property as a tenant in common. Therefore, appellant sought a judgment that appellee’s “Affidavit for Transfer of Real Estate under Survivorship Deed” be declared null and void, an order restoring appellant’s one-half interest in the property free and clear of any interest or claim of appellee, an order for partition, and an award of monetary damages.

{¶ 4} Appellee responded by filing a motion to dismiss under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. In her motion, appellee argued

that under R.C. 5302.20(C)(2) neither the August 14, 2004 conveyance nor the April 8, 2011 conveyance terminated the survivorship tenancy as to the remaining real property. Thus, she concluded that she became the sole owner of the remaining real estate when Diana died, and therefore appellant can prove no set of facts that would entitle it to relief. Appellant, on the other hand, argued that the August 14, 2004 transfer in fact did terminate the survivorship tenancy pursuant to the first sentence of R.C. 5302.20(C)(2)—”A conveyance from all of the survivorship tenants * * * *terminates the survivorship tenancy* and vests title in the grantee.” (Emphasis added.)

{¶ 5} Upon considering the motion to dismiss, opposition, and reply, the trial court ordered the parties to submit supplemental authority on the issue of “Whether conveying part of a parcel that is held in survivorship tenancy to a third party by all survivorship tenants terminates the survivorship tenancy in the remainder of the parcel.” The parties filed supplemental briefs, but both were unable to cite any Ohio case law directly addressing this issue.

{¶ 6} On September 19, 2013, the trial court granted appellee’s motion to dismiss. In its judgment entry, the trial court reasoned, “the statutory language ‘vests title in the grantee’ signifies that the survivorship tenancy is terminated only in regards to the conveyed portion.” Therefore, the court held that when Diana died, appellant’s interest in the real property was terminated pursuant to the survivorship tenancy, and appellee became the sole owner of the remainder of the parcel.

B. Assignment of Error

{¶ 7} Appellant has timely appealed the trial court’s judgment, and now presents one assignment of error for our review:

1. The Trial Court erred in granting Appellee’s Motion to Dismiss.

II. Analysis

{¶ 8} We review dismissals granted pursuant to Civ.R. 12(B)(6) de novo.

Perrysburg Twp. v. Rossford, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

In conducting our review, we must presume that all factual allegations in the complaint are true, and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Before a complaint may be dismissed, “it must appear beyond doubt that plaintiff can prove no set of facts warranting a recovery.” *Id.*

{¶ 9} Here, the facts are not in dispute. The sole issue we must decide is whether a conveyance of a portion of real property by all of the survivorship tenants terminates the survivorship tenancy with respect to the remaining real property.¹ We hold that it does not.

¹ Appellant does not argue that the August 8, 2011 conveyance from Diana terminated the survivorship tenancy. The second sentence of R.C. 5302.20(C)(2) provides that where a transfer is from less than all of the survivorship tenants, the grantee takes the interest conditioned on the survivorship of the grantor, and the remaining survivorship tenants’ interest is not affected. *See also Spitz v. Rapport*, 78 Ohio App.3d 330, 332, 604 N.E.2d 801 (8th Dist.1992) (“R.C. 5302.20 provides that one of two or more joint tenants may not unilaterally terminate the survivorship rights of a joint tenancy by conveying its interest to a third party.”).

{¶ 10} The parties take opposite views of the first sentence of R.C. 5302.20(C)(2), which provides, “A conveyance from all of the survivorship tenants to any other person or from all but one of the survivorship tenants to the remaining survivorship tenant terminates the survivorship tenancy and vests title in the grantee.” Appellant emphasizes the phrase “terminates the survivorship tenancy.” Thus, it concludes that any conveyance from all of the survivorship tenants entirely terminates the survivorship tenancy, and if the tenants wish to recreate the survivorship tenancy as to any remaining real property, they may do so through a separate deed. Additionally, appellant argues that the statute is ambiguous on this issue, and therefore contends we should turn to the common law, which has historically favored tenancies in common over joint tenancies with rights of survivorship.

{¶ 11} Conversely, appellee emphasizes the phrase that the conveyance “vests title in the grantee,” which she argues clearly dictates that the survivorship tenancy is only terminated with respect to the real property conveyed. Appellee contends that appellant’s interpretation leads to absurd results in that any time owners under a survivorship deed conveyed any interest in the property to a third party, including a lease or mortgage, they would be required to execute a new deed to maintain the survivorship tenancy.

{¶ 12} In determining the meaning of the first sentence of R.C. 5302.20(C)(2), we employ fundamental rules of statutory construction. “The primary goal of statutory interpretation is to discern the intent of the legislature.” *State v. Anthony*, 96 Ohio St.3d 173, 2002-Ohio-4008, 772 N.E.2d 1167, ¶ 10. “In determining intent, we first look to the

language of the statute.” *Id.* “Where the meaning of the statute is clear and definite, it must be applied as written.” *Id.* “However, where the words are ambiguous and are subject to varying interpretations, further interpretation is necessary.” *Id.*

{¶ 13} We find that the language of the statute is clear and definite. The subject of the sentence is the conveyance from the survivorship tenants. In speaking of the effects of a conveyance, the statute states both that the survivorship tenancy is terminated and title is vested in the grantee. A plain reading of that statute applies those effects to the real property that is conveyed. The statute does not refer to survivorship tenants’ ownership interest in real property that is not conveyed, and it follows that such property is not affected by the statute.

{¶ 14} Furthermore, even if we were to determine that the statute is ambiguous, application of the aids of construction under R.C. 1.49 leads us to the same result. Appellant relies on R.C. 1.49(D), which permits us to consider the common law or former statutory provisions in determining the intent of the legislature. Appellant argues that survivorship tenancies were traditionally disfavored, and in fact were not recognized, at common law. *Spitz v. Rapport*, 78 Ohio App.3d 330, 333, 604 N.E.2d 801 (8th Dist.1992). Therefore, appellant urges us to construe the statute in favor of creating a tenancy in common in the remaining real property. However, appellant’s view discounts the legislature’s subsequent enactment of R.C. 5302.17 et seq., which codifies the ability to create survivorship tenancies through conveyance. In so doing, the legislature has

demonstrated a clear intent to permit survivorship tenancies. Consequently, we do not feel constrained to presume that a tenancy in common was created.

{¶ 15} Additionally, we find that the common law requirements for a survivorship tenancy have been maintained as to the remaining property.

Under the common law it has been said that to create a joint tenancy the four unities of interest, time, title and possession must be present. The common law rule indicates that all tenants must have the same interest in the land in respect to the duration of the estate. One cannot be a tenant for life while another is a tenant in fee; that unity of title means that all must acquire their interest by the same title; that one cannot hold by one deed and another by another deed; there must be a vesting at the same time of the estate of joint tenancy, otherwise there would be no unity of time; also the estate must take effect in possession at the same time. One could not have an estate in remainder with the other having an estate in possession.

Cleaver v. Long, 69 Ohio Law Abs. 488, 490-491, 126 N.E.2d 479
(C.P.1955).

Here, following the August 14, 2004 conveyance to the Morogs, Diana and appellee still owned the same possessory fee interest in the remaining property, which vested at the same time, and was acquired through the same deed. Therefore, as to the remaining property, the four unities required for a survivorship tenancy under the common law have not been severed.

{¶ 16} Finally, appellant’s interpretation would result in inconsistency within the statute, and would require us to ignore part of the statute. R.C. 5302.20(C)(2) lists two effects that a conveyance has: (1) it terminates the survivorship tenancy, and (2) it vests title in the grantee. Appellant’s interpretation applies the first effect of termination of the survivorship tenancy to the remaining real property. However, it does not apply the second effect to the remaining property since it would lead to the absurd result that a conveyance of *some* of the real property would result in title vesting in the grantee to *all* of the real property. Therefore, we decline to adopt appellant’s interpretation because it would require us to ignore part of the statute as it pertains to the remaining property. *See State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 220, 631 N.E.2d 150 (1994) (“In construing a statute, it is the duty of the court to give effect to the words used and not to insert words not used.”).

{¶ 17} Accordingly, we hold that conveyance of a portion of real property by all survivorship tenants does not terminate the survivorship tenancy as to the remaining real property. Appellant’s assignment of error is not well-taken.

III. Conclusion

{¶ 18} For the foregoing reasons, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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