

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Sandra S. Wyckoff,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-266 (C.P.C. No. 08CVH02-3087)
Ronald F. Wyckoff,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on January 28, 2010

Robert J. Behal Law Offices, LLC, and John M. Gonzales, for appellant.

Tyack, Blackmore & Liston Co., LPA, and Jonathan T. Tyack, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, Sandra S. Wyckoff ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, in which that court granted a summary judgment in favor of defendant-appellee, Ronald F. Wyckoff ("appellee"), as to appellant's action for partition of real estate.

{¶2} The following relevant facts are taken from the record and are undisputed. Appellant and appellee are jointly titled owners of a parcel of real property known as 5050

Dacron Place, Canal Winchester, in Franklin County, Ohio. The parties were formerly married to one another but, on April 5, 2006, the Fairfield County Court of Common Pleas journalized a decree of dissolution of the parties' marriage, which incorporated the parties' separation agreement. The separation agreement provided for the division of property, including two parcels of real property: the Dacron Place property and another parcel located in Fairfield County, Ohio.

{¶3} The separation agreement provided, inter alia, "[t]he Husband shall retain possession of the property located at 5050 Dacron Place, Canal Winchester, Ohio 43110 and shall timely pay, indemnify, and hold Wife harmless on the mortgage indebtedness * * * . Husband and Wife agree to cooperate with one another for the sale of the properties, or the refinance of the properties at such time as said event(s) takes place. Further, Husband and Wife will take responsibility for the disposition of the properties and divide proceeds pursuant to their respective estate plans if either predeceases the other prior to sale or refinance." (Separation Agreement, at Section 4A.)

{¶4} In her complaint, appellant alleged that she and appellee own the Dacron Place property as tenants in common and she prayed for partition of the property pursuant to R.C. Chapter 5307. The parties filed cross-motions for summary judgment. The trial court granted appellee's motion because it found the complaint to be an impermissible collateral attack on the decree of dissolution. The court based this on its determination that the plain language of the dissolution decree allows appellee to maintain possession of the Dacron Place property indefinitely, and the partition action, if allowed to proceed, would abrogate that right.

{¶5} Appellant advances a single assignment of error as follows:

THE TRIAL COURT ERRED IN GRANTING THE
DEFENDANT'S MOTION OF SUMMARY JUDGMENT.

{¶6} We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the nonmoving party. *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221. We review questions of law de novo. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 1995-Ohio-214, citing *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 145, 147.

{¶7} In support of her assignment of error, appellant argues that the trial court should not have ascribed to the word "possession" in the dissolution decree a "strict or technical meaning." (Brief of appellant, at 5.) Appellant cites Black's Law Dictionary for the proposition that "possession" means only physical occupation and, as such, does not affect appellant's right to partition as a joint owner of the property. There is no indication that the trial court interpreted "possession" any differently than appellant does. The court simply concluded that, because the decree allowed appellee to "possess" — or physically occupy — the premises indefinitely, and because the partition action would extinguish that right if it were allowed to go forward, the action was an impermissible collateral attack on the original domestic relations judgment.

{¶8} Appellant cites two cases for the proposition that even where one party has the exclusive right to occupy a property, the other titled owner may proceed with a partition action. Appellant cites the case of *Rose v. Rose* (App.1963), 92 Ohio L.Abs. 321, from the Seventh Appellate District. There, the plaintiff was allowed to maintain a partition action with respect to property that was titled solely in her former husband's name, but with respect to which she had been awarded a one-half equitable interest as part of the couple's divorce decree. *Rose* is inapposite because the only issue discussed in that case was whether the plaintiff had a sufficient interest in the property, and the husband admitted that she did; the issue of whether the partition action would be a collateral attack on the divorce decree was never raised or discussed, presumably because the partition action would not have altered the rights fixed by the divorce decree.

{¶9} Appellant also cites the case of *Dungan v. Dungan* (1928), 36 Ohio App. 427. In *Dungan*, the plaintiff was permitted to maintain a partition action with respect to real property that he co-owned with his former wife, even though she had been granted the exclusive right to occupy the property, because the divorce decree in that case had required the parties to sell the property within a reasonable time, and the court found that a "reasonable time" had elapsed such that the former husband was within his rights to pursue partition.

{¶10} We question the continued value of the decision in *Dungan* given the remedies now available under Civ.R. 70 ("If a judgment directs a party to execute a conveyance of land, to transfer title or possession of personal property, to deliver deeds or other documents, or to perform any other specific act, and the party fails to comply within the time specified, the court may, where necessary, direct the act to be done at the

cost of the disobedient party by some other person appointed by the court, and the act when so done has like effect as if done by the party.").

{¶11} Nonetheless, *Dungan* is distinguishable from the present case because here, the dissolution decree contains no requirement that the parties sell or divide the subject property. The decree in this case provides that appellee has an indefinite right to occupy it and the parties will dispose of the property through their estate plans. This is the manner in which the parties agreed — and the court ordered — the marital property to be divided. To divide them in a different manner through partition would amount to a collateral attack on the dissolution decree. *Hagensick v. Hagensick* (Nov. 5, 1985), 10th Dist. No. 85AP-374, citing *State ex rel. Smith v. Friedman* (1970), 22 Ohio St.2d 25, and *Arbogast v. Arbogast* (1956), 165 Ohio St. 459.

{¶12} A collateral attack is defined as an attempt to defeat the operation of a judgment in a proceeding where some new right derived from or through the judgment is involved. *Barenholtz v. Barenholtz* (June 28, 1983), 11th Dist. No. 1249, citing *In re Estate of Gingery* (1921), 103 Ohio St. 559; *George W. McAlpin Co. v. Finsterwald* (1898), 57 Ohio St. 524; *Kingsborough v. Tousley* (1897), 56 Ohio St. 450. A judgment of a court of competent jurisdiction granting a divorce or dissolution in which the proceedings were apparently regular is not subject to collateral attack. *In re Estate of Lombard* (1951), 154 Ohio St. 432; *Sanborn v. Sanborn* (1922), 106 Ohio St. 641; *Heflebower v. Heflebower* (1921), 102 Ohio St. 674; *Thomarios v. Thomarios* (Dec. 27, 1989), 9th Dist. No. 14170.

{¶13} Based on these authorities, the trial court correctly concluded that appellee's right to indefinite exclusive possession of the property, which was conferred

upon him by court order in the dissolution decree, would be abrogated if appellant's partition action were permitted. This would constitute an impermissible collateral attack on the dissolution decree and therefore the trial court correctly granted summary judgment in favor of appellee. For this reason, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and SADLER, JJ., concur.
