

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

Bridgette K. Tenney f/k/a
Bridgette K. St. Clair

Appellee

Court of Appeals No. OT-12-011

Trial Court No. 10CV748H

v.

Mark T. St. Clair

Appellant

DECISION AND JUDGMENT

Decided: April 26, 2013

* * * * *

Richard R. Gillum, for appellee.

Thomas M. Dusza, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Ottawa County Court of Common Pleas that granted summary judgment in favor of appellee Bridgette Tenney. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} The parties were divorced in the Ottawa County Common Pleas Court on October 1, 2007. (Case No. 06-DR-170 B.) It is undisputed that pursuant to the judgment entry of divorce, appellant Mark St. Clair was awarded the real property located in Marblehead, Ohio (“the property”). Although the record of the parties’ divorce case is not a part of the record in this case, the parties do not dispute that the following relevant language is contained in the divorce decree:

2. Defendant is awarded the real property located at 8901 S. Hartshorn Rd., Marblehead, Ohio free and clear of any claim of Plaintiff, *contingent upon Defendant obtaining financing. Plaintiff shall execute a quit claim deed transferring her interest in said property to Defendant.*

3. Defendant shall pay to Plaintiff the sum of \$28,300 as and for Plaintiff’s equity interest in the real property located at 8901 S. Hartshorn Rd., Marblehead, Ohio, *contingent upon Defendant obtaining financing.*

* * * Defendant shall refinance the first mortgage for the property within sixty days. Said sum shall be paid to Plaintiff and quit claim deed delivered within sixty days. (Emphasis added.)

{¶ 3} The case before us was filed by appellee as a partition action under case No. 10CV748 on October 22, 2010. Appellee sought a court order requiring sale of the marital property because appellant had not paid appellee her share of the equity as set forth in the divorce decree filed three years earlier. In her complaint, appellee alleged, inter alia, that the property is zoned for agricultural use, it is currently used as a horse

arena and stable and thus cannot be divided between the interests of its owners, and the only remedy therefore is an order of partition and sale. Appellant filed an answer and, on April 20, 2011, appellee filed a motion for summary judgment on her partition complaint, asserting that she is entitled to partition under R.C. 5307.01 and 5307.04. Appellee further asserted that she and appellant are co-tenants, each holding a legal and fee interest in the real property in question, thereby giving appellee a right to compel partition. Appellee asked that the court order the subject property to be appraised and the estate sold. Appellant filed a reply and a motion to dismiss the partition complaint, asserting that the partition complaint constituted an impermissible collateral attack on the decree of divorce.

{¶ 4} By judgment entry filed November 23, 2011, the trial court granted appellee's motion for summary judgment. The trial court found that appellant was awarded all right and title to the property *contingent upon* his obtaining financing and found that, due to the contingency, there was no final adjudication of the parties' property rights, which therefore entitles appellee to partition. The trial court ordered appellee to prepare an appropriate entry for appraisal and sale of the property. The entry, which was signed by the court and filed on March 5, 2012, states that "partition is not possible pursuant to R.C. 5307.06 and therefore the commissioner shall appraise the property and offer it for sale pursuant to R.C. 5307.09. The parties are tenants in common each owning one half (1/2) interest in the following property, pursuant to the provisions of R.C. 5302.20(C)(5)."

{¶ 5} Appellant sets forth the following assignment of error:

The trial court erred in granting plaintiff/appellee's motion for summary judgment and denying defendant/appellant's motion to dismiss.

{¶ 6} Appellate review of summary judgment determinations is conducted on a de novo basis, applying the same standard utilized by the trial court. *Lorain Nat'l. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 572 N.E.2d 198 (9th Dist.1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment shall be granted when there remains no genuine issue of material fact and, when considering the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 7} The action herein turns on whether the parties' property rights were finally and completely adjudicated in the divorce proceeding so as to preclude appellee's action for partition; if so, then appellant's claim of an impermissible collateral attack would have merit. However, we find that the parties' property rights were not finally adjudicated in the divorce proceeding.

{¶ 8} The complete adjudication was contingent upon appellee's receipt of payment for her interest in the real property. Appellant failed to fulfill the condition precedent necessary to have appellee's rights in the property finally relinquished from her. *See Foster v. Foster*, 2d Dist. No. 9850, 1986 WL 10318 (Sept. 19, 1986). Because payment was the triggering event, and this never occurred, appellee retained her half interest rights in the property. The divorce decree gave appellant the opportunity to gain

complete title to the property by refinancing the mortgage within 60 days. His failure to abide by the decree and obtain financing to cover appellee's equity share in the property cannot preclude appellee from seeking remedies to enforce her rights.

{¶ 9} R.C. 5307.01 provides that an action for partition of realty is available to “tenants in common, survivorship tenants and coparceners * * *.” Appellee provided the trial court with evidence that she and appellant were joint owners of the property as tenants in common. A certified copy of the real estate deed was attached to her motion for summary judgment. Appellant supported his argument by attaching a copy of the final judgment and decree of divorce to his memorandum in opposition to summary judgment. If not for the nature of the property in this case as described by appellee, an action for partition would be a viable alternative to ensure satisfaction of appellee's rights under the divorce decree. *See Foster, supra*. Instead, outright sale of the property, as ordered by the trial court, is the only alternative.

{¶ 10} Upon consideration of the foregoing, we find that there is no issue of material fact and appellee was entitled to judgment as a matter of law. Accordingly, summary judgment was proper as to the issue of whether a writ of partition should issue. Further, the trial court did not err by denying appellant's motion to dismiss.

{¶ 11} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant 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, P.J.

JUDGE

Thomas J. Osowik, 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:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.