2018 IL App (5th) 170335-U

NO. 5-17-0335

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WILLIAM BRAMMEIER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Washington County.
	)	
v.	)	No. 16-CH-7
	)	
CHARLES T. BRAMMEIER and	)	
MELISSA A. BRAMMEIER,	)	Honorable
	)	Daniel J. Emge,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justice Chapman concurred in the judgment.
Justice Moore dissented.

ORDER

¶ 1 *Held*: The trial court erred in the manner it chose to partition property when there was no evidence on the record as to the value of the property, thereby preventing an equitable division between the parties.

¶ 2 Plaintiff, William Brammeier (William), appeals the July 21, 2017, order of the circuit court of Washington County partitioning a tract of real property situated in Washington County, Illinois. For the following reasons, we reverse and remand.

¶ 3 On February 19, 2016, William filed a complaint in the circuit court for partition of a certain tract of land. The complaint alleged that on or about December 9, 2009,

William and his son, defendant Charles T. Brammeier (Charles), each owned an undivided one-half interest in the property. The complaint further alleged that on or about October 8, 2015, Charles transferred his interest in the property to defendant Melissa A. Brammeier (Melissa) via a quitclaim deed. William requested the circuit court to, *inter alia*, divide and partition the property according to the respective rights of the owners or, if a division could not be made without manifest prejudice to the owners, to order a sale of the property with the proceeds to be divided equally between the owners.

¶ 4 On March 15, 2017, William filed a motion to enforce settlement, in which he alleged that on or about December 30, 2016, the parties reached a settlement agreement for Melissa to purchase the property from William. Attached to the motion were two exhibits titled "Memorandum of Understand [*sic*] Regarding Real Estate Sales Agreement" (agreement), which reflect that the agreement was signed by William on December 30, 2016, and signed by Melissa on January 3, 2017. William made eight handwritten changes to the agreement, and initialed each one. Melissa made only one change to the agreement, but otherwise did not make any other notations indicating that she disagreed with the agreement, as presented. On the one section where Melissa made a notation, she wrote "NEED CLARIFICATION" next to the section, and initialed her notation along with the date of 1-3-17. She then signed the agreement before a notary public on January 3, 2017. In his motion to enforce the settlement, William requested the circuit court to, *inter alia*, find the agreement was binding and enforceable.

¶ 5 On March 29, 2017, after a hearing was held on the motion to enforce settlement, the court found the parties were still in negotiations. The court therefore scheduled a hearing on all remaining issues.

¶ 6 At the hearing conducted on June 21, 2017, the court noted that the hearing was proceeding on the complaint for partition. The parties stipulated to this representation by the court and further stipulated that William and Melissa each owned an undivided, one-half interest in the 100 acres of property. The motion to enforce the settlement agreement was not brought up by either party, and the agreement, itself, was not mentioned at any time during this proceeding.

¶ 7 After being sworn, William identified Exhibit A, which was an aerial photo of the 100 acres. William described the property, which consisted of approximately 76 acres that were farmable, and 23 acres that were wooded or pasture land. William also identified a creek that ran from the northwest to the southeast of the property, as well as a road that cut through a portion of the land. William testified that he desired to have his share of the property sold, and believed that the property could not be equitably divided.

¶ 8 Melissa testified that she believed the property could be equitably divided, and preferred to partition the property rather than sell it. She indicated that the property was farmed in three separate fields, and that there were about 76 acres of tillable ground. Melissa used Exhibit A to identify the pasture, which she testified was about 23 1/2 acres. She identified a "huge" waterway on the aerial photograph. Melissa suggested to the court that she be given the southern half of the property, so long as it was equal in value to the amount of the northern portion of the property granted to William. She explained

that because the tillable farm ground to the north was worth more than the pasture ground to the south, she should receive additional acreage to compensate for the discrepancy in value.

¶ 9 After closing arguments, the trial court, *sua sponte*, determined that the property could be equitably divided. The trial court commented that the statute required the property be "fairly and impartially divided. Not equally." Immediately thereafter, relying on the aerial photograph of the acreage, the trial court stated, "The division that is most obvious to me from looking at the aerial map is one party gets the west 50 acres and the other party gets the east 50 acres." After making his finding regarding an east-west division, the judge asked, "The parties have any input on a east-west division as opposed to anything else?" William initially responded that he just wanted to sell his share of the property, and explained that he would have trouble selling the land if the court divided the parcel on an east-west basis. William indicated that if he received the eastern parcel, there was no way to access the pasture from the northern part of the property to the southern part without putting in culverts and a road.

¶ 10 In response to William's concerns, the judge indicated that he did not know what it would take to get to the pasture, as there had been no testimony regarding this issue. The trial court simply explained that the east-west division was probably the fairest way to split the property because each party would receive a little bit of pasture, and each would get some tillable ground. Additionally, each party would receive some road frontage, and William would receive ground that was adjacent to property he already owned.

¶ 11 At that point, there was a discussion held off the record. Neither party has offered any information about what was said during that discussion with the court. When the proceedings resumed on the record, William's counsel stated that "[a]n east-west split would work in theory, but again, my client would prefer that the entire 100 acres be sold." In response, Melissa's counsel stated, "We have no objection to an east-west split. We object to selling the entire property. There is no reason. You are right. It can be equitably divided."

¶ 12 The circuit court then indicated that the law favors the partition of real estate over a sale and division of proceeds, and observed that the parties presented no appraisal evidence to determine the value of the property. The judge commented that he had "very limited evidence" to make his decision, but concluded that an east-west division would not result in a manifest prejudice to either party, and such a split would be equitable because both parties would have road frontage, tillable farm ground, and pasture. The court subsequently entered an order on July 21, 2017, partitioning the property between the parties in an east-west fashion. Specifically, William was awarded the eastern portion, and Melissa was awarded the western portion. The circuit court further ordered a survey, and ordered the parties to split the costs of the survey, as well as the costs of an appraisal that had been conducted earlier. William appeals the court's July 21 order.

¶ 13 On appeal, William raises the following three issues: (1) whether the circuit court erred in partitioning the property when Melissa agreed to purchase William's interest in the property as set forth in the agreement; (2) whether the circuit court erred in partitioning the property when doing so resulted in manifest prejudice to him; and

(3) whether the circuit court failed to equitably partition the property by failing to order Melissa to pay owelty to William. Owelty is the amount paid by one owner to another to equalize a partition of property in kind. *Rothert v. Rothert*, 109 Ill. App. 3d 911, 912 (1982).

¶ 14 Given that a complaint for a partition seeks equitable relief, we review the matter under a manifest-weight-of-the-evidence standard. See *Robinson v. North Pond Hunting Club*, 382 Ill. App. 3d 888, 892 (2008). A judgment is against the manifest weight of the evidence when an opposite conclusion is clearly apparent or when findings appear to be unreasonable, arbitrary, or not based on the evidence. *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154 (2001).

¶ 15 We first address whether the circuit court erred in partitioning the property when Melissa promised to purchase William's interest in the property, pursuant to their agreement. Unfortunately for William, we conclude that he abandoned his motion to enforce settlement. It is the responsibility of the party filing a motion to request the trial court to rule on it. When no ruling has been made on that motion, the motion is presumed to have been abandoned absent circumstances indicating otherwise. See *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 433 (2007). Here, although the court acknowledged the existence of the agreement, the court noted on March 29, 2017, that the parties were still in negotiations. Some three months later, at the commencement of the June 21, 2017, hearing, the parties agreed that they were there to address William's complaint for partition. The hearing on William's complaint for partition proceeded, and no mention of the agreement was made at any time during that

hearing. If William wished to discuss the agreement or request the court to rule on his pending motion to enforce settlement, he certainly had the opportunity to do so at the hearing. Instead, he took no action on that motion. Moreover, William failed to file any posttrial motion and his notice of appeal referenced only the July 21, 2017, order that dealt solely with partitioning the property. For these reasons, we find William abandoned the motion to enforce settlement at the trial level, and we decline to address it on appeal.

¶ 16 William next argues that the court erred in partitioning the property when doing so resulted in manifest prejudice to him. The court believed that an east-west partition would give each party road frontage, tillable farm ground, and pasture. Accordingly, an order was entered awarding William 50 acres to the east and Melissa 50 acres to the west. William contends that the court "chose to ignore specific and undisputed evidence regarding access to the parcels at issue." William points out that both parties testified a waterway begins at approximately the center of the northern field and continues southeast to the property line, and adds that Melissa described the waterway as "huge." The aerial photo of the property clearly shows that if the property were to be divided into eastern and western parcels, the waterway would split the eastern parcel. William further noted that, in order to access the southern field from the north, the owner of the eastern parcel would have to construct a culvert and road across the waterway. He emphasizes that, at the hearing, "there was no reason to address how one might access the southeastern field from the north" because neither party suggested that the property should be divided into eastern and western parcels. According to William, the court created a burden by

effectively requiring the parties to preemptively anticipate each and every number of the infinite ways the court might possibly divide the property.

¶ 17 Section 17-105 of the Illinois Code of Civil Procedure provides that the court shall determine whether or not the premises "can be divided *** without manifest prejudice to the parties in interest. If the court finds that a division can be made, then the court shall enter further judgment fairly and impartially dividing the premises *** with or without owelty." 735 ILCS 5/17-105 (West 2016). Section 17-105 further provides that the court shall order a sale of the property *only if* a partition would result in a manifest prejudice to the owners. 735 ILCS 5/17-105 (West 2016).

¶ 18 Here, the court correctly observed that the law favors partition over sale. The court also noted the "very limited evidence to make this decision," before ordering partition. Yet, the court proceeded to partition the property in a manner in which neither party had anticipated prior to the hearing. Moreover, the record is completely devoid of any evidence regarding the value of the property, or the relative value of the parcels once partitioned. In fact, the only evidence the court had pertaining to value was Melissa's opinion that the northern half of the property was worth more than the southern half.

¶ 19 We agree with the circuit court that the property was capable of being equitably divided, without manifest prejudice to the parties. Based upon the complete lack of testimony or other evidence regarding the value of the parcels, once divided, we fail to see how the circuit court could fairly and impartially divide the property, no matter how, or in which direction. Therefore, we must vacate that portion of the circuit court's order awarding William the east portion of the property, and giving Melissa the west portion of

the property. Further, we remand this cause to the circuit court for further proceedings consistent with section 17-105 to determine how the property can be fairly and impartially divided between the parties, with consideration of whether or not owelty is due and owing. 735 ILCS 5/17-105 (West 2016).

¶ 20 Finally, the dissent suggests that the court reopened the proofs. Our review of the record does not support this conclusion. Indeed, the court merely asked the parties for comment. Had the court truly reopened proofs, each party would have had the right to formally respond, and put on evidence, had they so desired. None of this formality is suggested by the record.

¶ 21 For the foregoing reasons, we reverse the judgment of the circuit court of Washington County and remand this cause for further proceedings.

¶ 22 Reversed and remanded.

¶ 23 JUSTICE MOORE, dissenting:

¶ 24 I respectfully dissent. As the majority pointed out, after the parties closed their cases, the circuit court reopened the proofs and conducted its own examination of the parties. At that time, William repeated that he wished to sell his share because of the perceived difficulty in selling the eastern portion due to the trouble of accessing the pasture. After an off-record discussion was held, however, despite William's adamancy to sell the property, his counsel conceded that "[a]n east-west split would work in theory." The defendant responded with no objection to an east-west division of the

property. The circuit court then stated that the law favors partition over sale, noted the "very limited evidence to make this decision," and ordered the east-west partition. I believe our standard of review, and the deference to be given the circuit court, requires us to affirm its decision, which it made based on the evidence before it.

¶ 25 While William opined that the property could not be equitably divided, he presented absolutely no evidence to support this argument. As the Code provides, if the circuit court determines that a division may be made without manifest prejudice to either party, the court shall enter a judgment fairly and impartially doing so. See 735 ILCS 5/17-105 (West 2016). The proceedings were held to address the complaint for partition that William himself filed. Notwithstanding that fact, William offered no evidence to demonstrate how a manifest prejudice would result from the circuit court's ruling of partition. William's testimony was limited to no more than a physical description of the property, his asserted belief that the property could not be equitably divided, and his request for the circuit court to order a sale of the property.

¶ 26 The majority reverses this cause and remands for a new hearing to allow William to present more evidence as to the east-west partition. However, the circuit court made the parties aware of its intent in this regard, and requested their input. At this point, William could have requested a continuance to gather and present this evidence, but failed to do so. I do not believe William should be afforded "another bite at the apple" to present evidence on remand that could have been presented in the proceedings below. I agree with the circuit court that, *based on the evidence*, the division did not cause a manifest prejudice to either party. Accordingly, I believe that the circuit court's decision

was not against the manifest weight of the evidence because, based on the evidence before it, an opposite conclusion was not apparent, nor were the findings unreasonable, arbitrary, or not based on the evidence. For these reasons, I respectfully dissent and would affirm the circuit court's order of partition.