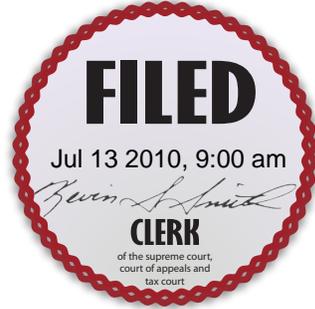


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DONALD JOHNSTON, TRUSTEE and)
TERRY M. JOHNSTON, CO-SUCCESSOR)
TRUSTEE,)

Appellants-Plaintiffs,)

vs.)

No. 43A03-0912-CV-568

CARL W. JOHNSTON, JACK MIKEY and)
NATHAN MIKEL d/b/a MIKEL FARMS,)

Appellees-Defendants.)

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-0701-PL-58

JULY 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Appellants Donald Johnston (“Donald”), as Trustee of the Donald Johnston Family Trust, and Terry M. Johnston (“Terry”), as Co-Successor Trustee of the Henry Johnston Family Trust, appeal from the trial court’s Judgment and Order for Distribution of Sale Proceeds (“the Judgment”). We affirm.

ISSUES

Donald and Terry raise two issues, which we restate as:

- I. Whether the trial court erred by not granting additional equitable relief to Donald and Terry in the course of distributing sale proceeds; and
- II. Whether the trial court erred in the course of calculating the costs and expenses to which Donald and Terry are entitled.

FACTS AND PROCEDURAL HISTORY

This case concerns a forty-five (45) acre tract of land (“the farm”) in Kosciusko County. The farm consists of forty-three (43) acres of tillable land and a home, detached garage, and three (3) outbuildings on the remaining two (2) acres. Following the death of their mother in 1986, three brothers, Donald, Henry Johnston (“Henry”), and Defendant Carl W. Johnston (“Carl”)¹ inherited the farm. Next, Donald, Henry, and Carl each established separate revocable family trusts. Each brother transferred title for his one-third undivided interest in the farm into his respective trust. The three brothers were the

¹ Carl died prior to the trial court’s evidentiary hearing. It does not appear that his estate has been substituted as a party.

primary trustees of their respective trusts. Henry named his sons, Terry and Craig Johnston (“Craig”), co-successor trustees.

From the time the brothers inherited the farm until some point in 2004, Carl worked on the farm on a day-to-day basis and Donald and Henry were less involved. Carl began to lose his sight in 2004 and could no longer operate the farm. At some point in 2005, Carl brought in Appellees Jack Mikel (“Jack”) and Nathan Mikel d/b/a Mikel Farms (collectively, “Mikel Farms”) to farm the land on a sharecropper basis.

In April 2005, Donald, Carl, and Terry, as Henry’s representative, met to discuss the status of the farm. Donald and Terry believed that all three had agreed that Donald should manage the farm from that point forward. Carl apparently did not accept being replaced by Donald and continued to dispute who had the authority to make decisions about the farm. After their meeting, Donald and Terry repeatedly asked Carl for information about his arrangement with Mikel Farms but did not receive a detailed response. Carl wanted to sell the farm directly to Mikel Farms, but Donald and Terry did not agree.

Henry died on September 20, 2005.

In late 2005-2006, at Carl’s request Mikel Farms removed brush and a tree from the farm, for which they billed “Johnston Farms” \$16,110.00. Appellees’ App. p. 37. Mikel Farms also installed an irrigation system, which irrigated the farm and a neighboring tract of land owned by Mikel Farms.

In February 2006, during another meeting, Donald and Terry told Carl that they wanted Mikel Farms removed from the property, but Carl said that it was too late to evict

Mikel Farms in that year. On May 17, 2006, Carl and Craig, each signing as an “Owner” of the farm, and Jack, signing as an “Operator [sic],” executed a “Land Lease.” Appellants’ App. p. 154. The Land Lease, in its entirety, provides as follows:

I agree to Lease the Johnston Family farm to Mikel farms [sic] for the term of no less than 10 YRS. This agreement starts as of 2006 and expires December 31 2016. This agreement is created to protect the investment made by Mikel farms [sic] for the Irrigation system Installed. Mikel Farms is the sole Owner of the Irrigation, and will be responsible for any expenses involved. A Payment of \$4000.00 will be made no later than November 30 each year.

Id. Mikel Farms paid rent to Carl in 2006 but did not pay any rent to Carl or anyone else in 2007, 2008 or 2009. Jack and Carl had agreed that Mikel Farms could offset his rent payments with the \$16,110.00 unpaid bill for Mikel Farms’ removal of brush and a tree on the farm. Donald and Terry were not made aware of the Land Lease or Jack and Carl’s agreement to offset rent payments against the unpaid bill.

On November 27, 2006, Donald and Terry, who informed Mikel Farms that they represented “67% ownership” of the farm, gave Mikel Farms written notice that Mikel Farms’ tenancy was terminated and demanded that Mikel Farms remove all equipment from the farm. Appellants’ App. p. 155. Mikel Farms did not comply with Donald and Terry’s demand.

On January 17, 2007, Donald and Terry filed this case against Carl and Mikel Farms. As to Carl, Donald and Terry asked the trial court to partition the farm by ordering it sold at public auction and to order Carl to provide an accounting for his past management of the farm. As to Mikel Farms, Donald and Terry asked the trial court to terminate any lease agreement Mikel Farms had entered into for the farm and to find

Mikel Farms liable for waste for cutting down a tree. Mikel Farms filed a counterclaim, asking the trial court to order Donald and Terry to pay Mikel Farms for brush removal on the farm. Mikel Farms also asked the trial court to allow Mikel Farms to continue to farm the land pursuant to the Land Lease, or, in the alternative, to order Donald and Terry to pay Mikel Farms for the value of the irrigation equipment Mikel Farms installed at the farm.

On February 29, 2008, Mikel Farms purchased the Carl W. Johnston Family Trust's one-third interest in the farm.

Carl consented to the entry of summary judgment as to Donald and Terry's claims to terminate any lease agreement with Mikel Farms and for partition of the farm. Mikel Farms did not consent to summary judgment on those claims. On June 11, 2008, the trial court granted partial summary judgment in favor of Carl and against Donald and Terry as to their claim for an accounting of the farm's finances during Carl's management.

Subsequently, the trial court granted Donald and Terry's request to partition the farm and ordered the farm sold at public auction. Mikel Farms objected to the auction. The trial court deemed Mikel Farms' objection waived due to failure to pay a bond. Mikel Farms appealed the trial court's judgment, and this Court affirmed. *See Mikel v. Johnston*, 907 N.E.2d 547, 553 (Ind. Ct. App. 2009).

On April 20, 2009, the farm was sold at public auction. Jack purchased the farm for \$325,000.00. A court-appointed commissioner subtracted costs of the sale and unpaid taxes from that amount and deposited net sales proceeds in the amount of \$309,012.86 with the trial court clerk pending the trial court's decision on the distribution of the

proceeds. Subsequently, the trial court authorized the payment of \$400.00 to the commissioner for compensation, reducing the net sales proceeds to \$308,612.86.

On October 28, 2009, after a bench trial, the trial court issued the Judgment. In the Judgment, the trial court found in favor of Mikel Farms and against Donald and Terry on Donald and Terry's claim to terminate any lease agreement regarding the farm and on Donald and Terry's claim for waste. The trial court also found in favor of Donald and Terry and against Mikel Farms on Mikel Farms' counterclaim. Finally, the trial court distributed the net sales proceeds, taking into account Donald and Terry's costs and expenses and their trial attorney's fees, as follows:

| | |
|---|--------------|
| Donald Johnston Trust (via Donald): | \$100,708.95 |
| Henry Johnston Trust (via Terry): | \$100,708.95 |
| Mikel Farms: | \$99,591.46 |
| Stephen R. Snyder (Donald and Terry's attorney at trial): | \$7,603.50 |

Appellants' App. p. 17.

DISCUSSION AND DECISION

I. STANDARD OF REVIEW

None of the parties asked the trial court to issue findings of fact and conclusions of law. However, the trial court issued some findings *sua sponte*. The following standard of review applies:

Sua sponte findings control only as to the issues they cover and a general judgment will control as to the issues upon which there are no findings. A general judgment entered with findings will be affirmed if it can be sustained on any legal theory supported by the evidence. When a court has made special findings of fact, an appellate court reviews sufficiency of the evidence using a two-step process. First, it must determine whether the evidence supports the trial court's findings of fact; second, it must

determine whether those findings of fact support the trial court's conclusions of law. Findings will only be set aside if they are clearly erroneous. Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. In order to determine that a finding or conclusion is clearly erroneous, an appellate court's review of the evidence must leave it with the firm conviction that a mistake has been made.

Gibbs v. Kashak, 883 N.E.2d 825, 827-828 (Ind. Ct. App. 2008) (quoting *Estate of Skalka v. Skalka*, 751 N.E.2d 769, 771 (Ind. Ct. App. 2001)). We neither reweigh the evidence nor assess the credibility of witnesses, but consider only the evidence most favorable to the judgment. *Tew v. Tew*, 924 N.E.2d 1262, 1265 (Ind. Ct. App. 2010).

II. EQUITABLE DIVISION OF PROCEEDS FROM PARTITION

Partition is a proceeding to enforce a right to the division of property and to have the shares set off in severalty. *Pavy v. Pavy*, 121 Ind. App. 194, 98 N.E.2d 224, 226 (Ind. Ct. App. 1951). If division cannot be effected without substantial injury to the owners, the court shall order the real estate sold and the proceeds distributed to the owners according to their respective shares. *Janik v. Janik*, 474 N.E.2d 1054, 1056 (Ind. Ct. App. 1985).

The process of partitioning property is governed by statute. See Ind. Code §§ 32-17-4-1 *et seq.* Nevertheless, generally speaking, a partition proceeding is an equitable one, in which the court has great flexibility in fashioning relief for the parties. *Hay v. Hay*, 885 N.E.2d 21, 24 (Ind. Ct. App. 2008). The ultimate goal of any partition proceeding is for a partition that is equitable to the parties involved, and we have recognized “the authority of trial courts . . . to go beyond the express provisions of the

partition statutes in order to accomplish an equitable division.” *Mayfair Inv. Corp. v. Bryant*, 922 N.E.2d 123, 131 (Ind. Ct. App. 2010) (quoting *Culley v. McFadden Lake Corp.*, 674 N.E.2d 208, 212 (Ind. Ct. App. 1996)).

Donald and Terry argue that the trial court should have awarded them additional funds from Mikel’s share of the sale proceeds because: (1) Mikel Farms did not pay rent to them for the tillable portion of the farm from 2005 through the date of the farm’s sale; (2) Mikel Farms did not pay rent for storing equipment in the farm’s outbuildings from 2005 through the date of the farm’s sale; and (3) Mikel Farms did not reimburse Donald and Terry for their payment of certain real estate taxes and insurance on the farm.² The trial court did not enter findings related to these claims, so we may affirm the trial court’s judgment on any theory supported by the evidence.

A. Unpaid Rent on Tillable Ground

Donald and Terry claim that Mikel Farms owes them rent on the farm’s tillable acreage from 2005 until Mikel Farms purchased the entire farm at the April 20, 2009 public auction.

The evidence is undisputed that in 2005 Mikel Farms worked on the farm as a sharecropper for Carl, and in 2006 Mikel Farms paid rent to Carl. As is noted above,

² Donald and Terry also argue that the trial court erroneously determined that it did not have the authority to address anything other than partition-related costs and expenses while allocating the sales proceeds. We disagree. The trial court acknowledged its obligation to ensure that the proceeds were equitably distributed as follows: “the Court FURTHER FINDS that it is required to apportion among and between Plaintiffs and Defendants the proceeds of sale in an equitable manner and is to award and assign costs and necessary expenses, including reasonable attorney fees for Plaintiffs’ attorney in an amount determined by the Court, . . .” (emphasis in original). Appellants’ App. p. 16.

Donald and Terry raised a claim against Carl for their share of the farm's income from rents and crops, and the trial court granted summary judgment to Carl. Donald and Terry did not appeal that decision. Thus, Donald and Terry had already sought relief from Carl for this income.

In addition, pursuant to an agreement with Carl, Mikel Farms was setting off its rent obligation against the \$16,110.00 debt Mikel Farms was owed for clearing brush and removing a tree on the farm in late 2005-early 2006. Pursuant to the Land Lease, Mikel Farms' annual rent was \$4,000.00, and the debt for clearing brush would have offset rental payments for 2007, 2008 and 2009.³ The trial court ruled against Mikel Farms' counterclaim for Donald and Terry to pay Mikel Farms for this work, perhaps because Mikel Farms was already setting off the debt against rent owed. Donald and Terry did not authorize Mikel Farms to remove the brush or agree that Mikel Farms could set off the debt against unpaid rent, but Mikel Farms' work nonetheless enhanced the quality of the tillable land, and the setoff was an equitable method to compensate Mikel Farms for its work. In light of Mikel Farms' payment of some rent owed to Carl and the continuing setoff of rent owed against the debt for brush and tree removal, it was not inequitable for the trial court to decline to allocate additional funds to Donald and Terry from the sale proceeds for unpaid rent on the tillable ground. *See Carver v. Fennimore*, 116 Ind. 236, 19 N.E. 103, 105 (Ind. 1888) (stating "[w]hile a tenant in common who disseizes his co-tenant and makes improvements on the common estate may not be entitled to

³ Donald and Terry contended that the rent amount should have been higher, but Jack testified that the rent amount in the Land Lease was appropriate for the property. Tr. pp. 96-97. Pursuant to our standard of review, we consider the evidence most favorable to the judgment.

compensation for improvements so made, he is nevertheless entitled to have them considered when called to account in an equitable action for rents and profits”).

B. Rent for Outbuildings

The possession of one tenant in common is the possession of all, and the tenant in possession is not required to pay rent unless he or she excludes a cotenant. *Geisendorff v. Cobbs*, 47 Ind.App. 573, 94 N.E. 236, 239 (Ind. Ct. App. 1911). In this case, Donald and Terry note that Mikel Farms stored equipment in the three (3) outbuildings on the farm as a lessee and as a co-tenant. However, Mikel Farms shared space in those buildings with Carl, who also stored farm equipment in the buildings. In addition, Donald and Terry used a portion of one of the outbuildings from the time Mikel Farms began working on the farm until the date of the final hearing. Specifically, Donald and Terry stored 304 bales of straw in a barn. Tr. p. 50. Mikel Farms made no claim of ownership on the straw, and Jack stated that Donald and Terry could come retrieve the bales. Thus, Mikel Farms did not exclusively possess all three (3) outbuildings at all times throughout this case.⁴ Under these circumstances, we cannot say that the trial court acted inequitably by failing to give Donald and Terry additional credit against Mikel Farms’ share of the sale proceeds for rent on the three (3) outbuildings.

C. Property Taxes and Insurance

Generally, a tenant-in-common who has paid or assumed liens or encumbrances is entitled to proportionate reimbursement at the time of partition. *Janik*, 474 N.E.2d at

⁴ Mikel Farms exclusively used one of the outbuildings, a former chicken coop, for storage after purchasing the Carl W. Johnston Family Trust’s interest in the farm, but there was no evidence presented as to the rental value of that particular building.

1057. Turning to property tax bills, Donald paid the property tax bill for 2004 in 2005, and Terry paid the property tax bill for 2007 in 2008. Mikel Farms did not contribute to those payments. However, as is noted above, Mikel Farms was not a co-tenant, but rather a lessee, when those tax liabilities were incurred. In addition, to the extent that Mikel Farms took on Carl's obligations to his brothers when Mikel Farms purchased the Carl W. Johnston Family Trust's share of the farm, the evidence also shows that Carl paid the property tax bills for 2005 and 2006, and he did not seek contribution from Donald and Terry for those payments. Tr. p. 46. Thus, each side was owed contributions for property taxes, and it was not inequitable for the trial court to decline to allocate additional funds from the sales proceeds to Donald and Terry for their property tax payments.

Finally, as to insurance on the farm, Terry purchased hazard insurance in 2009, but Mikel Farms had also maintained a blanket insurance policy on the farm since 2005. Thus, each side was paying for insurance on the farm, and the trial court did not act inequitably by failing to allocate additional money to Donald and Terry as a contribution from Mikel Farms for insurance payments.

For these reasons, we conclude that the trial court acted within its authority to equitably divide the farm and the trial court's decision is supported by the evidence.

III. CALCULATION OF COSTS AND EXPENSES

Costs and expenses in partition actions are governed by Ind. Code § 32-17-4-21, which provides:

(a) All costs and necessary expenses, including reasonable attorney's fees for plaintiff's attorney, in an amount determined by the court, shall be awarded and enforced in favor of the parties entitled to the costs and expenses against the partitioners.

(b) The court shall assign costs and expenses awarded under subsection (a) against each partitioner as the court may determine in equity, taking into consideration each partitioner's relative interest in the land or proceeds apportioned.

In this case, the trial court issued findings regarding Donald and Terry's costs and expenses, as follows:

The Court **FURTHER FINDS** that the Plaintiffs should have and recover from [Mikel Farms] one-third (1/3) of their costs and necessary expenses determined by the Court to be \$745.00.

The Court **FURTHER FINDS** that the reasonable attorney fees for Plaintiffs' attorney, Stephen R. Snyder, is \$7,603.50.

Appellants' App. p. 17. The trial court determined that Attorney Snyder's fees would be deducted from Donald, Terry, and Mikel Farms' shares in equal amounts.

Donald and Terry claim that the trial court erroneously failed to identify the items comprising the \$745.00 in costs and necessary expenditures and also failed to charge those amounts against Mikel Farms' share of the sale proceeds.⁵ We disagree. In the Judgment, the trial court subtracted \$690.00 from Mikel Farms' share to compensate Donald and Terry for a portion of attorney's fees earned by Donald and Terry's first attorney, Max E. Reed. The trial court also subtracted \$55.00 from Mikel Farms' share to compensate Donald and Terry for a portion of the filing fee. \$690.00 plus \$55.00

⁵ Donald and Terry also argue that Mikel Farms failed to address this issue in the Appellees' Brief and that in the absence of any argument from Mikel Farms on this issue, we should review Donald and Terry's claim for *prima facie* error. We disagree. Mikel Farms' Appellees' Brief sufficiently responds to Donald and Terry's claim to avoid application of the *prima facie* error standard.

equals \$745.00. Thus, the trial court explained the basis for this calculation and charged this amount against Mikel Farms' share of the distribution of sales proceeds. Furthermore, there is evidence in the record to support the trial court's valuation of these items. The trial court's finding of fact as to Donald and Terry's costs and necessary expenses is not clearly erroneous.

Next, Donald and Terry note that they were represented in this case by the Valentine Law Office after Attorney Max E. Reed but before Attorney Stephen R. Snyder. Donald and Terry paid all but \$2,012.64 of the Valentine Law Office's fees, and the Valentine Law Office filed an Attorney Lien for \$2,012.64 in this case. Donald and Terry argue that although the trial court accounted for Attorney Reed and Attorney Snyder's fees in the distribution of the sales proceeds, the trial court "failed, whether through oversight or inadvertence, to consider any of those attorney fees incurred through . . . Valentine Law Office." Appellants' Brief, p. 25. We disagree. In the Judgment, the trial court clearly stated that Donald and Terry's shares of the distributed sale proceeds were "subject to Notice of Attorney Lien in the amount of \$2,612.64 filed by Michael L. Valentine on November 18, 2008." Appellants' App. p. 18. Thus, the trial court clearly considered the Valentine Law Office's outstanding fees, and the relevant question is not whether the trial court overlooked the Valentine Law Office's fees, but whether the trial court erred by not requiring Mikel Farms to contribute to payment of those fees.

Notwithstanding the mandatory "shall" employed in the statute, a request for attorney's fees in a partition action is committed to the trial court's discretion. *See Lux v. Schroder*, 645 N.E.2d 1114, 1119 (Ind. Ct. App. 1995), *transfer denied* (discussing a

predecessor to Ind. Code § 32-17-4-21). Moreover, this provision was not intended to apply when all sides are represented by counsel, the matters stated in the complaint are contested by the defendant, and the defendant derives no benefit from plaintiff's counsel's services. *See id.*

In this case, the attorney fees provision of Ind. Code § 32-17-4-21 was not intended to apply because each side was represented by counsel and Mikel Farms derived no benefit from the Valentine Law Office's services. Nevertheless, the trial court allocated some responsibility to Mikel Farms for Donald and Terry's attorneys' fees from Attorneys Reed and Snyder. We also note that the trial court did not allocate any responsibility for attorney's fees to Carl. Under these circumstances, the trial court acted within its discretion by not requiring Mikel Farms to contribute to payment of the Valentine Law Office's fees.

The trial court did not err in the course of calculating and allocating responsibility for Donald and Terry's costs and necessary expenses.

CONCLUSION

For these reasons, we affirm the judgment of the trial court.

Affirmed.

FRIEDLANDER, J., and BROWN, J., concur.