

NO. A08-788

State of Minnesota

In Court of Appeals

Carroll A. Britton Family Trust, et al.,

Appellants,

vs.

Glenwood Investment Properties, L.L.C. et al.,
Pierce Serrin, et al.,

Respondents.

APPELLANT'S REPLY BRIEF

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STATEMENT OF LEGAL ISSUES

I. Whether Appellants were required to appeal the December 3, 2007 ORDER ON PARTITION when such order did not mandate a sale or cancel the contract for deed between the parties.

ANSWER: Appellants were not required to appeal the December 3, 2007 Order on Partition as such order did not mandate a sale or cancel the contract for deed between the parties.

II. Whether an equitable title holder who cannot demand a conveyance of legal title may maintain a partition action.

ANSWER: A partition action may not be maintained by an equitable title holder who cannot demand a conveyance of legal title.

STATEMENT OF FACTS

On November 21, 2007 a motion hearing was held before the Honorable Jon Stafsholt. The Respondent, (Garatoni), sought an order to proceed with a partition action. Appellant, (Kail), sought relief including a requirement that Garatoni continue to make the contract for deed payments.

Judge Stafsholt issued two orders. The first was dated November 26, 2007 and entitled Temporary Order (Appellant Brief Appendix A-46-47). In order paragraph 1a, the court ordered that Garatoni pay the required contract for deed payments for the two contract for deeds. The court stated:

“Alicia Garatoni or Glenwood Investment Properties, LLC, shall submit \$4,242.04 payable to Harold Kail, trustee for the Carroll A. Britton Family Trust dated March 9, 2000, and the Bonnie L. Kail Irrevocable Trust dated June 25, 1992, to the receiver upon the date the payment is due.”

The Court in order #4 stated that:

“All other issues raised at the motion hearing will be addressed in a subsequent order.”

On December 3, 2007, the court issued an order entitled Order on Partition. The court in Finding #23 (Appellant Brief Appendix A-53) addressed the Trusts’ assertion that partition was premature and the court stated:

“Defendant trusts asserted that the partition is premature because, while the plaintiffs have an interest in the property it is not paid for, nor is it fully realized. Defendant trusts asserted that the appropriate measure would be to lift the stay on the Notices of Cancellation and allow Defendants to cancel the contract for deed, permanently resolving the issues between the parties.”

In Conclusion of Law #4, for the December 3, 2007 Order on Partition, the court addressed the contract for deeds and states:

“The parties do not dispute that Plaintiffs acquired an undivided one-half interest in both Parcel A and B pursuant to a contract for deed. This contract for deed has not been fully paid by Plaintiffs and any partition would have to include consideration of the payments Plaintiffs owe to Defendant trusts.”

The court made further orders in paragraphs 8, 9 and 10, (Appellant Brief Appendix A-54, 55, and 56). Those included, appointing three referees in paragraphs 8.a, 8.b, and 8.c, and a requirement in paragraph 10 that the referees investigate and submit a report to the court. Most notably in 10.e at (Appellant Brief Appendix A-55) the court stated:

“The referees shall also make a recommendation to the court regarding the feasibility of a partition in kind or by sale.”

ARGUMENT

I. The December 3, 2007 Order on Partition did not mandate a partition or sale and did not cancel the contract for deed between the parties.

The December 3, 2007 Order does not mandate a partition. The order is entitled an ORDER ON PARTITION. The court does not mandate a sale. The court orders the referees to report a recommendation of the feasibility of a partition or sale.

The December 3, 2007 Order acknowledges the following with respect to the existing contracts for deed:

“The parties do not dispute that Plaintiffs acquired an undivided one-half interest in both Parcel A and B pursuant to a contract for deed. This contract for deed has not been fully paid by Plaintiffs and any partition would have to include consideration of the payments Plaintiffs owe to Defendant trusts.”

Conclusion of Law #4

The appraiser’s report and the ORDER FOR PARTITION of April 17, 2008 erroneously considered the payments made by Garatoni and not the payments owed by Garatoni. The order of April 17, 2008, which is appealed from, is an ORDER FOR PARTITION and JUDGMENT. The ORDER FOR PARTITION and JUDGMENT is the first time that the court ordered cancellation of the contract for deed. The April 17, 2008 ORDER FOR PARTITION and JUDGMENT is also the first time in this proceeding that the District Court held that the contract for deed vendee could maintain a partition action without completing its contractual obligations under the contract for deed. On December 3, 2007 the court affirmed the obligation of Garatoni to continue payments on the contracts for deed as per the order of November 26, 2007.

The April 17, 2008 ORDER FOR PARTITION and JUDGMENT is the first time the court ordered specific partition to occur rather than a sale.

Appellant asserts that the December 3, 2007 ORDER ON PARTITION is not an appealable order. Thus, Respondents argument for lack of jurisdiction must fail.

The *County of Blue Earth vs. Dennis J. Turtle, et al.*, unpublished decision of the Minnesota Court of Appeals July 14, 1998, C1-98-205 (attached) dismissed as not appealable the initial order of the district court. “To be appealable thereunder, a ruling must mandate a partition or sale.” The *Turtle* district court order in part stated that at #6:

“This appears to be a proper case, pursuant to Minn. Stat. §558.04 for the Court to render judgment that partition should be made. The Court notes there are several options other than a sale in a partition action. The Court intends to appoint three disinterested and judicious citizens of the County as referees, *after the parties have had an opportunity to make recommendations to the Court, and discuss other matters, on February 13, 1998 at 2:15 p.m.*”

The *Turtle* district court did not mandate partition or sale. The appeal was dismissed as the court of appeals stated:

“Moreover, because the order (1) does not require partition, (2) notes the existence of “several other options,” and (3) states that the court “intends” to appoint persons to advise the court on how to resolve this matter, the order is not final because it contemplates further proceedings. Thus, we cannot say the district court’s order is appealable under the rules.”

The court of appeals concludes that because the appeal has been taken from a nonappealable order, they did not reach the issue of whether partition was proper.

The appealable order in *Turtle* was taken after the court mandated the partition and appointed the referees—a final determination. *County of Blue Earth vs. Turtle*, 593 N.W.2d 258 (Minn. App. 1999).

The Kail/Garatoni order of December 3, 2007 is on point with the nonappealable *Turtle* order as the trial court did not order a partition or a sale on December 3, 2007. The court made an Order on Partition that appointed referees and directed the referees to make recommendations to the court for future action such as whether a partition or a sale could be the best route to take.

II. Respondents' cite no authority and provide no rationale to alter the rule of law that a partition action can only be maintained by an equitable title holder if the individual's equity is complete and entitles him to demand a conveyance of the legal title.

The essence of Respondents' argument on pages 20-26 of their Brief regarding the right to maintain a partition action is that a party holding any equitable title in real property can maintain a partition action without having to fulfill the obligations in the transaction creating that equitable interest. Respondents cite no authority for this proposition nor does such authority exist. Respondents apparently rely solely on *Searles v. Searles*, 420 N.W.2d 581, 583 (Minn. 1988) to support its assertion that any equitable title is sufficient to maintain a partition action. However, *Searles* did not address the issues of what type of equitable interests can sustain a partition claim and whether a party having an equitable interest in the property can maintain the action if the equitable interest is not complete.

Respondents' attempts to distinguish *Tollefson Development, Inc. v. McCarthy*, 668 N.W.2d 701 (Minn. Ct. App. 2003) on its facts is to no avail. In confining the broad statements in *Searles*, the *Tollefson* court held in no uncertain

terms that “An examination of the nature of the equitable interest is necessary to determine whether it provides an interest in real property that is sufficient to maintain a partition action.” *Tollefson*, 668 N.W.2d at 704. The *Tollefson* court adopted the analysis of the various appellate courts in the jurisdictions that have considered this issue in holding that a partition action can be maintained by an equitable title holder only if the individual’s “equity is complete and entitles him to demand a conveyance of the legal title.” *Id.* The courts in Indiana, Oklahoma, Missouri, New York, Michigan, West Virginia and Illinois have all acknowledged and adopted this rule of law. See, *Helvey v. O’Neill*, 153 Ind. App. 635, 288 N.E.2d 553, 557 (1972); *Hargis v. Wedge*, 195 Okla, 493, 159 P.2d 553, 554 (1945); *Trenholm v. Trenholm*, 701 S.W.2d 209, 212 (Mo. Ct. App. 1985); *Gifford v. Whittemore*, 4 A.D.2d 379, 165 N.Y.S.2d 201, 204-205 (N.Y.A.D. 3 Dept. 1957); *Shaw v. August*, 266 Mich. 634, 254 N.W. 231 (1934); *French v. McMillion, et al.*, L.R.A. 1917D,228, 91 S.E. 538 (1917); and *Chandler v. Chandler*, 381 N.E.2d 37, 40 (Ill. Ct. App. 1978).

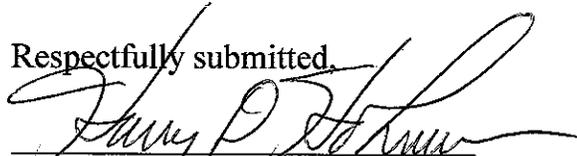
Respondents have cited no cases nor can Appellant find any case holding contrary to the above rule of law adopted in *Tollefson*. In essence, Respondents are asking this court to adopt a rule of law which allows a party who has not fulfilled its obligations under the contract creating the equitable interest to avoid those contractual obligations and partition the property. The rule of law which requires an equitable title holder to maintain a partition action only when the equity is complete and the party is entitled to demand a conveyance of legal title

prevents the obvious abuse inherent in Respondents' position. A party seeking partition should not be able to do so when such action would result in the party being able to avoid its contractual obligations. To the best of Appellants' knowledge and research, no Appellate Court in this country has allowed a contract for deed vendee or any equitable title holder who has not fulfilled its contractual obligations to maintain a partition action. There is no logical reason or legal rationale for this court to be the first to do so.

CONCLUSION

The Order on Partition of December 3, 2007 does not mandate a partition or sale as such order requests recommendations for future proceedings of partition in kind or by sale. The Order on Partition of December 3, 2007 reaffirms the continued required payments of the contracts for deed by concluding any partition would have to include consideration of the payments owed to the trust. The Order on Partition of December 3, 2007 was a nonappealable order. The Order for Partition and Judgment of April 17, 2008 for the first time cancels the contracts for deed and mandates partition is the appealable order.

Dated: July 21, 2008

Respectfully submitted,


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CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3 for a brief produced with a proportional font. The length of this brief is 2,251 words. This brief was prepared using Microsoft Word 2003.

Dated:

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