IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 25, 2011 Session

ADAM PAUL ROBERTS ET AL. v. SAMUEL LEE ROBERTS ET AL.

Appeal from the Chancery Court for Dickson County
No. 10874-07 Robert E. Burch, Judge

No. M2010-01616-COA-R9-CV - Filed April 19, 2011

This is a partition action instituted by two children against their father, their stepmother, and their sister. The trial court determined that these five family members are tenants in common of the disputed real property. We affirm.

Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Donald N. Capparella and Jennifer Lee Mullins, Nashville, Tennessee, for the appellants, Samuel Lee Roberts, Teressa Ann King, and Kristen Leah Lewis.

Robert Eric Thornton, Dickson, Tennessee, for the appellees, Adam Paul Roberts and Matthew Thomas Roberts.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Samuel Roberts and Teressa King were divorced in 1993. At the time of the divorce, Samuel and Teressa owned approximately 121 acres of real property in Dickson County. Their marital dissolution agreement ("MDA") contains the following provision:

> [T]he parties agree that the real property of the parties which is located in the Sixth Civil District of Dickson County, Tennessee . . . shall be divided as follows:
>
> Samuel Lee Roberts--------------------20%
> Teressa Ann Roberts-------------------20%

Adam Paul Roberts---------------------20%
Matthew Thomas Roberts--------------20%
Kristen Leah Lewis---------------------20%

> Title to each [person's] percentage shall vest solely in their name and the same shall be divested out of the names of the other parties.

Adam, Matthew, and Kristen are the children of Samuel Roberts.[1] At the time of the divorce, Matthew and Kristen were minors. The MDA was incorporated into the final decree of divorce entered by the Circuit Court of Davidson County on October 4, 1993.

In November 2003, Samuel, Teressa, Adam, and Matthew filed, in the Chancery Court of Dickson County, a petition for approval concerning two proposed sales of portions of the real property. This action was required because Kristen was still a minor at that time. In their sworn petition, the petitioners stated that they and the respondent, Kristen, were "the owners as equal tenants in common" of the real property at issue. A guardian ad litem was appointed for Kristen. In December 2003, the court entered an order approving the sale of real property.

In January 2004, approximately seven (7) acres of the property were sold to Kenny and Melanie Loggains. Samuel, Teressa, Adam, Matthew, and Kristen were all named as grantors on the warranty deed and signed the warranty deed and closing documents.[2] The closing attorney filed the October 1993 divorce decree in the register's office in Dickson County. In April 2004, the parties conveyed approximately three (3) acres of the property to Danny and Cherie Cox. Again, all five family members were named as grantors and signed the warranty deed.

In February 2004, all five family members signed a deed of trust for a loan against the real property.

In June 2007, Adam and Matthew filed this partition action against Samuel, Teressa, Kristen, First Federal Bank, Barney B. Regen, trustee, and Citifinancial, Inc. First Federal and Citifinancial are the lenders for loans for which two deeds of trust were executed, and Mr. Regen is the trustee for the deed of trust in favor of First Federal. The petitioners

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[1]Because of the fact that the main parties are family members, or former family members, we will use their first names in referring to them in this opinion.

[2]Samuel signed on behalf of his minor daughter.

requested that the real property be sold for division or, in the alternative, partitioned as equitably as possible.

After answering, the defendants filed a motion for summary judgment supported by affidavits from Samuel and Teressa. In their affidavits, Samuel and Teressa explained their interpretation of the MDA provision concerning the real property. The following excerpt from Samuel's affidavit mirrors statements in Teressa's affidavit:

> The terms of the aforementioned Marital Dissolution Agreement do not require that me or Ms. King record our Final Decree of Divorce or sign a quitclaim deed transferring the real property described therein. At the time Ms. King and I executed the Marital Dissolution Agreement, we believed the provision that addresses the real property at issue in this matter expressed an agreement between us that if we ever desired to sell or transfer the property, we might as stated in the Marital Dissolution Agreement.
>
> Ms. King and I did not believe our Marital Dissolution Agreement transferred any legal interest in the real property to anyone, and we did not intend to do so.

As to their actions in having all five family members sign the warranty deeds and closing documents in conjunction with the sale of two parcels of the real property, Samuel and Teressa stated that they took these steps in reliance on the advice of their attorney but told the attorney that the children did not own any portion of the property. According to Samuel and Teressa, all of the sale proceeds were paid to Samuel, who paid Teressa for her interest in the property. They further averred that the closing attorney recorded the final divorce decree without telling them and in opposition to their position that the children had no interest in the property.

The plaintiffs opposed the defendants' motion for summary judgment and submitted Matthew's and Adam's affidavits as well as documents including the warranty deeds and HUD settlement statements related to the two property sales; the deed of trust; and the petition and order in the action for approval of the two property sales. The plaintiffs also filed their own motion for summary judgment.

On January 13, 2010, the trial court filed a memorandum opinion on the cross motions for summary judgment. The court rejected the defendants' three grounds for summary judgment: (1) the statute of limitations; (2) absence of an effective conveyance of the property to the plaintiffs; and (3) mutual mistake in expression. The court therefore denied the defendants' motion. As to the plaintiffs, the court found merit in both of their grounds for summary judgment–estoppel and res judicata–and granted their motion on the issue of

ownership of the property only. As to other issues, the court found disputes of material fact. In its order entered on January 29, 2010, the court specifically ruled that "ownership of the subject property is as tenants in common among Plaintiff Adam Paul Roberts, Plaintiff Matthew Thomas Roberts, Defendant Samuel Lee Roberts, Defendant Teressa Ann King, and Defendant Kristen Leah Lewis, each owning a one-fifth undivided interest in the subject property."

After the trial court entered an order for the property to be sold, this court granted the defendants' motion for an interlocutory appeal on the trial court's grant of partial summary judgment as to the ownership of the property. On appeal, the defendants argue that the MDA did not create a tenancy in common; that the doctrine of collateral estoppel cannot be used offensively to create a tenancy in common; that judicial estoppel does not apply in this case to create a tenancy in common; and that any claim that a tenancy in common was created by the MDA is barred by the statutes of limitations.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. P. 56.04. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson,* 100 S.W.3d 202, 205 (Tenn. 2003). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz,* 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we must determine whether factual disputes exist. *Byrd v. Hall,* 847 S.W.2d 208, 211 (Tenn. 1993). If a factual dispute exists, we must determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Id.; Rutherford v. Polar Tank Trailer, Inc.,* 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). To shift the burden of production to the nonmoving party who bears the burden of proof at trial, the moving party must negate an element of the opposing party's claim or "show that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publ'g Co.,* 270 S.W.3d 1, 8-9 (Tenn. 2008).

ANALYSIS

I.

We begin by addressing the defendants' argument that the statute of limitations bars this action.

Tenn. Code Ann. § 29-27-101 gives any person holding property as a tenant in common with others the right to seek partition or sale for partition of the property. Nothing in Tenn. Code Ann. §§ 29-27-101–29-27-219 establishes a statute of limitations for an action for partition of real property, and we know of no authority for a statute of limitations for partition actions. The defendants characterize the present action as an action to enforce a contract, subject to the six-year statute of limitations under Tenn. Code Ann. § 28-3-109(a), or as an action to enforce a judgment, subject to the ten-year statute of limitations under Tenn. Code Ann. § 28-3-110. We disagree, however. As the trial court found, and as we will discuss more fully below, the MDA incorporated into the divorce decree established a joint tenancy among the five family members. There is no deadline by which the plaintiffs were required to seek partition of the property in which they held an interest. As discussed below, with respect to the rights of the family members, no further steps were necessary to effectuate the order's property provisions.

We agree with the trial court's conclusion that the statute of limitations issue is without merit.

II.

The defendants argue that Samuel and Teressa never transferred any interest in the real property to the children. We reject this argument.

The crux of the defendants' argument is that Samuel and Teressa did not intend to convey real property when they entered into the MDA and never executed a deed conveying the property to the children. They rely on caselaw holding that there must be delivery of a deed in order to effect a valid transfer of property. *See Kilgore v. Kilgore*, No. M2006-00495-COA-R3-CV, 2007 WL 2254568, at *5 (Tenn. Ct. App. Aug. 1, 2007). There is no dispute over the fact that Samuel and Teressa never executed or delivered a deed to convey the real property. But, in this case, the source of the plaintiffs' claim to an interest in the real property is the terms of the MDA incorporated in the divorce decree, not a deed.

Tenn. Code Ann. § 16-1-108 provides that "[c]ourts having jurisdiction to sell lands, instead of ordering parties to convey, may divest and vest title directly by decree . . . ." Tenn. Code Ann. § 16-1-109 further provides that "[t]he decree . . . has the same force and effect as a conveyance by the party, and shall be registered." While the divorce decree in this case was not registered for about ten years, Tenn. Code Ann. § 66-26-101 states:

> All of the instruments mentioned in § 66-24-101 [which include marriage settlements and judgments affecting title] shall have effect between the parties to the same, and their heirs and representatives, without registration; but as to

> other persons, not having actual notice of them, only from the noting thereof for registration on the books of the register, unless otherwise expressly provided.

Thus, as between the parties and their children, the divorce decree incorporating the terms of the MDA was effective to convey an interest in the property to the children. *See Hamby v. Northcut*, 149 S.W.2d 484, 491-92 (Tenn. Ct. App. 1940) (holding that former spouses were bound by divorce decree's divesting and vesting of property).

The terms of the MDA are clear and unambiguous: Each person's title to an interest in the property "shall vest solely in their name and the same shall be divested out of the names of the other parties." Use of the word "shall" indicates a mandatory vesting and divesting, not a potential transfer in the future as suggested by the defendants.

We agree with the conclusion of the trial court: "The question then becomes, 'Is it necessary to convey by deed an interest in property which was awarded by decree of the court?'. The answer is in the negative."

The defendants further suggest that, even if the MDA and final decree effectively conveyed an interest in the property to the children, the subsequent actions of Samuel and Teressa were inconsistent with the terms of the MDA and reflect an intent not to convey or a modification of their earlier agreement. In support of this argument, the defendants point to Samuel and Teressa's failure to take any actions to convey the property or to register the divorce decree[3] and to Samuel's payment of taxes on the property and receipt of the proceeds of the two sales of parcels of property.[4] We cannot agree with the defendants' assertion that these actions somehow negate the agreement reflected in the divorce decree, especially in light of the fact that all four adult family members were named as petitioners in the action to approve the two proposed sales and signed all of the closing documents and the warranty deeds, and that all five family members signed the deed of trust.[5] Moreover, in the previous action, Samuel and Teressa swore that all five family members owned the property as tenants in common.

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[3]In their affidavits, Samuel and Teressa assert that the closing attorney recorded the decree without their knowledge or consent.

[4]In their depositions, Matthew and Adam testified that all five of the tenants in common received a check for their 20% of the sale proceeds, but they endorsed their checks over to their father.

[5]In their affidavits, each brother stated: "It has been discussed with my father on several occasions that the property would be divided between the tenants in common to permit my brother and I to build a house on the property."

In making the modification argument, the defendants cite the case of *Puckett v. Harrison*, No. 02A01-9708-CH-00184, 1998 WL 464896 (Tenn. Ct. App. Aug. 11, 1998). We find that case to be distinguishable. In *Puckett*, the divorce decree provided that the husband "shall be entitled to ownership of all real estate." *Id.* at *1. The husband and wife thereafter took actions, including the signing of a deed of trust and statements made by the husband to multiple witnesses, inconsistent with a transfer of ownership to the husband. *Id.* at *1-2. The trial court found that, without a quitclaim deed transferring the wife's interest to the husband, the wife remained a one-half owner of the property. *Id.* at *2. In affirming the result reached by the trial court, this court stated:

> The primary cause of the present dispute is the Harrisons' uncounseled decision to ignore their property settlement agreement in their MDA. After their divorce, they took it upon themselves to depart from their original agreement that had been approved by the trial court.
>
> . . . A final decree embodying a property settlement must be respected and followed like any other court order.
>
> Parties who ignore their court-approved property settlement agreement do so at their peril. An individual party who unilaterally chooses to ignore the agreement may be held in contempt. When both parties ignore their property settlement agreement, the courts will reorder their rights and obligations in light of both the terms of their original agreement and their post-divorce agreements or conduct.
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> Here, the trial court had multiple witnesses before it testifying that decedent appellee [husband] had decided to forego the property settlement provisions in the MDA and allow appellee [wife] to retain her one-half interest in the subject property.

Id. at *2-3 (citations omitted). *Puckett* involved a spouse who decided to forego his right to own the entire marital residence, to the benefit of the other spouse, who was therefore able to retain a one-half interest in the property. *See id.* at *4.

In the present case, however, there is substantial evidence indicating that Samuel and Teressa acted consistently with their property agreement. Moreover, this case involves the property rights of Samuel's children, not just the property rights of his ex-spouse. His purported decision to forego the agreement reflected in the divorce decree works to the detriment of his children, who received an interest in the property under the terms of the decree. We do not read *Puckett* to allow a person(s) to renege on a property settlement in a

divorce decree and thereby take away property interests effectively conveyed by the divorce decree from family members who do not agree to such a modification.

For all of these reasons, we affirm the trial court's conclusion that Samuel, Teressa, Kristen, Adam and Matthew are tenants in common of the property at issue.

III.

In light of this conclusion, we need not consider the issues of collateral estoppel and judicial estoppel. We note, however, that the result reached above is entirely consistent with Samuel's and Teressa's sworn statements in the previous court action for approval of sales that all five family members owned the property as tenants in common.

CONCLUSION

The judgment of the trial court is affirmed. Costs of appeal are assessed against the appellants, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE