STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(Filed: January 27, 2012)

VIRGINIA BREWER, in her capacity as TRUSTEE UNDER THE VIRGINIA BREWER GRANTOR TRUST, dated May 15, 1997	:	
v.	:	**W.C. No. 09-0173**
IRIS E. DONNELLY, ALIAS, formerly known as IRIS E. FALCK	:	

DECISION

CARNES, J. This matter came on to be heard on November 18, 2011, before the Superior Court, Carnes, J., on Plaintiff's Motion Seeking an Order of Partition. Virginia Brewer ("Brewer" or "Plaintiff") seeks partition of certain real property located in Narragansett, Rhode Island. Defendant Iris Donnelly ("Donnelly" or "Defendant") claims that Plaintiff is not entitled to partition due to the restrictive covenant on the land. Jurisdiction is pursuant to G.L. 1956 § 8-2-13.

I.

Facts and Travel

The background facts are as follow. On July 27, 1973, Brewer and Richard C. Hart received a parcel of land by deed, which was recorded on or about August 1, 1973. (Hearing Ex. 2, Narragansett Land Evidence Records, Book 84, Page 328.) On October 14, 1977, the lots were conveyed solely to Brewer by deed, which was recorded on or about October 18, 1977. (Hearing Ex. 3, Narragansett Land Evidence Records, Book 124, Page 35.) Brewer developed

the real estate and divided the parcel into five contiguous lots, identified in the Narragansett Tax Assessor's Plat N-B as Lot 29; Lot 29-2, which eventually merged into Lot 29; Lot 29-3; Lot 29-4; and Lot 29-5.

On July 25, 1980, Brewer conveyed Lot 29-3 and a 25% undivided interest in Lot 29-5 to Donnelly and Yves G. Flack ("Flack") by warranty deed, which was recorded on or about July 28, 1980. (Hearing Ex. 6, Narragansett Land Evidence Records, Book 124, Page 42.) On February 27, 1985, Flack conveyed his interest in the property to Donnelly by deed, which was recorded on or about November 8, 1985. (Hearing Ex. 7, Narragansett Land Evidence Records, Book 180, Page 128.)

On September 19, 1997, Brewer conveyed Lot 29, which included Lot 29-2, and Lot 29-4 to herself, each with a 25% undivided interest in Lot 29-5, resulting in a total undivided interest of 75% in Lot 29-5. Brewer recorded the conveyances on or about September 24, 1997. (Hearing Exs. 8-10, Narragansett Land Evidence Records, Book 368, Pages 373, 376, 379.) Lots 29 (including Lot 29-2), 29-4, and 29-5 are presently undeveloped.

The subject of the present petition is Lot 29-5, due to the restrictive covenant encumbering that lot. On July 25, 1980, Brewer created the Declaration of Restrictions ("Declaration") imposing restrictions on Lot 29-5, which was recorded on or about July 28, 1980. (Hearing Ex. 5, Narragansett Land Evidence Records, Book 124, Page 28.) The restrictions in the Declaration included that Lot 29-5 "shall be used exclusively for conservation, recreational or park purposes for the benefit of the Owners of the said four (4) lots in the Development[,] and no residential or commercial use shall be made of said lot." Further, the Declaration provided that "each of the said four (4) lots and the undivided one-fourth (1/4) interest in said lot . . . shall not be separated or separately conveyed." Id.

In 2006, Brewer applied for a permit to build a house on Lot 29-4. The Narragansett Building Official refused to issue the building permit based on a finding that Lots 29-4 and 29-5 were not legal lots because they "fronted" Narragansett Road, which has never been accepted as a Town street, is not improved to Town standards, and is not maintained by the Town. (Hearing Ex. 11, Correspondence to and from Town of Narragansett.)

In order to build on Lot 29-4, Brewer opted to merge Lots 29 (which included Lot 29-2), 29-4, and 29-5 into one legal lot, which required a partition of Lot 29-5. A hearing was held on November 8, 2011 regarding Plaintiff's petition to partition Lot 29-5. At the hearing, testimony was presented by Marcus Channell ("Channell"), a licensed land surveyor in Rhode Island, and Plaintiff. Channell testified that he believes Lot 29-5 could be divided by metes and bounds and proposed a three-to-one division of Lot 29-5: assigning the northern one-quarter of Lot 29-5 to Defendant and the southern three-quarters of Lot 29-5 to Plaintiff. (Tr. at 19-20.) Brewer testified about the layout of the five lots, the restrictions on Lot 29-5, and her alternative to the partition, which would require her to develop Narragansett Road at a great expense. (Tr. at 26, 28-29, 33.) At the hearing, Defendant, through her attorney, objected to the proposed property line due to the restrictive covenant on Lot 29-5. (Tr. at 11-12, 17.) Brewer and Donnelly are unable to reach an agreement to divide Lot 29-5. Brewer now seeks partition of Lot 29-5 by metes and bounds. Donnelly objects to a partition.

II.

Standard of Review

Pursuant to Super. R. Civ. P. Rule 52(a), "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." In a non-jury trial, "the trial justice sits as a trier of fact as well as of law," as provided

in Hood v. Hawkins, at 478 A.2d 181, 184 (R.I. 1984). "Consequently, [he or she] weighs and considers the evidence, passes upon the credibility of witnesses, and draws proper inferences." Id. Our Supreme Court further explained in McEntee v. Davis, at 861 A.2d 459, 464 (R.I. 2004), that "[t]he task of determining credibility of witnesses is peculiarly the function of the trial justice when sitting without a jury." Id. When rendering a decision in a non-jury trial, "the trial justice need not engage in extensive analysis to comply with this requirement." Nardone v. Ritacco, 936 A.2d 200, 206 (R.I. 2007). Thus, "even brief findings will suffice as long as they address and resolve the controlling factual and legal issues." Id.

III.

Petition for Partition

Plaintiff argues that the Court should grant a partition by metes and bounds since Lot 29-5 is undeveloped, and partition by metes and bounds is favored in Rhode Island. Defendant contends that Lot 29-5 cannot be partitioned because Plaintiff conveyed the interest in Lot 29-5 by warranty deed, and the restrictive covenant prohibits the separate conveyance of Lot 29-5.

Whenever persons interested in land as owners and cotenants cannot agree to voluntary partition, any one or more of them may apply for a partition by judicial proceedings, pursuant to G.L. 1956 § 34-15-1. Partition is an equitable remedy that is governed by statute in Rhode Island, which is derived from the right in equity for owners to partition by metes and bounds. Bianchini v. Bianchini, 76 R.I. 30, 33, 68 A.2d 59, 61 (R.I. 1949). The intent of the statute is to provide "for the petition of realty by metes and bounds[,] giving each owner therein their fair and equitable portion of the same, but in the event of it not being practicable to make such a division, . . . the court may in its discretion order a sale of the property and a division of the proceeds." Lannon v. Lannon, 40 R.I. 60, 62, 99 A. 819, 820 (R.I. 1917). Generally, inconvenience or

difficulty in making the partition or hardship or substantial loss to some of the parties does not affect the right of the court to exercise its discretion in ordering partition. Matracia v. Matracia, 119 R.I. 431, 436, 378 A.2d 1388, 1392 (1977). However, if partition by metes and bounds is impracticable, § 34-15-16 permits this Court to "order the whole premises sought to be divided [or] . . . to be sold, either at public auction or by private contract, under the direction of the Court, by the commissioner or commissioners appointed to divide or sell the same[.]" In partitioning property, this Court is required to consider all facts and circumstances in evidence. DeBartolo v. DiBattista, 117 R.I. 353, 367 A.2d 701, 703 (R.I. 1976).

In this case, Defendant maintains that Plaintiff cannot seek a partition since she conveyed the 25% undivided interest in Lot 29-5 by a warranty deed. However, parties have a right in equity to partition by metes and bounds. Bianchini v. Bianchini, at 76 R.I. 30, 33, 68 A.2d 59, 61 (R.I. 1949). Further, Defendant maintains that partition by metes and bounds is not practical because Lot 29-5 cannot be separated or separately conveyed under the restrictive covenant. Section 34-4-21 of the Rhode Island General Laws, titled "[l]imitations of restrictive covenants," provides:

> "If a covenant or restriction concerning the use of land, other than housing restrictions set forth in § 34-39.1-3, and conservation restrictions and preservation restrictions as set forth in §§ 34-39-3 and 34-39-4, is created by an instrument taking effect after May 11, 1953, the covenant or restriction, if unlimited in time in the instrument, shall cease to be valid and operate thirty (30) years after the execution of the instrument creating it." Sec. 34-4-21.

Here, the restrictive covenant was recorded on July 28, 1980, and therefore, the effective date was after May 11, 1953. In addition, the restrictive covenant is unlimited in time. Finally, the housing restriction exception under § 34-39.1-3 is of no consequence since there is no "obligation or requirement to maintain real estate affordable for rental to or purchase by low and

modern income citizens," and the conservation and preservation restriction exception does not apply since § 34-39-3 pertains to "any governmental body or by a charitable corporation, association, trust, or other entity." Thus, pursuant to § 34-4-21, the restrictive covenant encumbering Lot 29-5 ceased to be valid after thirty years, which, in this case, was on July 28, 2010. Accordingly, the restrictive covenant that once encumbered Lot 29-5 is not a determinative factor in granting the partition by metes and bounds.

Relying on cases such as Cullen v. Tarini, 15 A.3d 968, 981 (R.I. 2011) and Renaissance Development Corp. v. Universal Properties Group, Inc., 821 A.2d 233 (R.I. 2003), Defendant argues that public policy favors preserving property owner rights to enforce covenants affecting their property. However, even if the restrictive covenant was enforceable, our Supreme Court has held that when giving effect to a restrictive covenant, such provisions should be construed "in favor of the free alienability of land while still respecting the purposes for which the restriction was established." Ashley v. Kehew, 992 A.2d 983 (R.I. 2010).

In this case, the purpose of the restrictive covenant was to preserve the privacy of the surrounding lots by prohibiting residential use of Lot 29-5. (Tr. at 29.) By granting the partition, the purpose of the restrictive covenant will be preserved since Plaintiff does not intend to build on Lot 29-5—indeed, Lot 29-5 is not suitable for building as it is almost entirely wetlands. Further, Plaintiff will be able to build on Lot 29-4, which she currently cannot do unless she improves Narragansett Road to Town standards. Lastly, as this Court is sitting in equity, it must strive to reach an equitable result to all parties. This Court notes that under the current condition, if Plaintiff wants to develop Lot 29-4, Plaintiff would have to upgrade approximately 800 feet of Narragansett Road from Old Boston Neck Road to the eastern edge of Lot 29-4. (Tr. at 30.) In addition, Plaintiff would have to widen the road, which creates further complications as the road

would encroach on the property owners' lots to the south as well as on a wetland. (Tr. at 30.) As an alternative, Plaintiff could engage in costly litigation to attempt to prove that Narragansett Road is legally a Town street. Further, without either the partition or the improvement of Narragansettt Road, Lot 29-4 will remain undeveloped—despite the fact that Plaintiff has already received the necessary preparation work and approval to build on the lot. (Tr. at 29.) Defendant, on the other hand, has failed to demonstrate any hardships as a result of the partition. Accordingly, this Court finds that equity favors granting a partition by metes and bounds per Channell's proposed lot division.

After carefully considering the law and the facts of this case, the Court is of the opinion that the relief sought by Plaintiff should be granted. Given the fact that Lot 29-5 is undeveloped and the Court's preference to physical division of land, this Court finds that partition by metes and bounds is both practicable and equitable. See Dickinson v. Killheffer, 497 A.2d 307, 313-14 (R.I. 1985). Granting the partition will cause no substantial hardship to the Defendant and will further the free alienability of Lot 29-4 while still respecting the purpose of the restrictive covenant. See Ashley, 992 A.2d at 989.

IV.

Commissioner Appointment

Based upon the evidence of the contentious relationship of the parties subsequent to the filing of the within suit, it is unlikely that the parties will be able to effectuate the partition without further intervention by this Court. Accordingly, pursuant to § 34-15-24, this Court will appoint a commissioner for the partition by metes and bounds of Lot 29-5, unless Defendant elects to cooperate. See infra Section V. Specifically, § 34-15-24 provides:

> "after judgment for partition has been entered, the superior court on motion shall appoint and commission one or more discreet, impartial, and disinterested persons to make partition pursuant to such judgment." Sec. 34-15-24.

The commissioner will file a supplemental report to readjust the lot lines. After the commissioner files the supplemental report, and "if no sufficient cause is shown for rejecting the report, judgment shall be rendered thereon in conformity thereto, and the report, plat, and judgment shall be recorded in the records of land evidence in [Narrangansett]," pursuant to § 34-15-27.

V.

Conclusion

This Court finds that partition of Lot 29-5 by metes and bounds is practical and equitable and will cause no substantial hardship to Defendant. Brewer's Motion Seeking an Order of Partition is hereby granted. The partition will be conducted by a commissioner, who will be appointed by this Court at a hearing; however, Defendant has the option and is encouraged to comply with Plaintiff's suggested partition of Lot 29-5 to avoid additional costs. The parties may confer on a mutually agreeable date for hearing to determine who shall serve as commissioner. Thereafter, said partition shall be conducted in accordance with § 34-15 et seq.

Counsel shall prepare and submit an Order in conformity with this Decision.