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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Calaveras)

ROBERT R. GROSSMAN et al.,

Plaintiffs and Respondents,

v.

ALAN A. KING et al.,

Defendants and Appellants.

C065258

(Super. Ct. No.
CV32486)

Defendants appeal from a final judgment partitioning real property. They contend substantial evidence does not support various valuation determinations made by the trial court in determining the amount of equalization payment owed. We disagree and affirm the judgment in its entirety.

FACTS

Plaintiffs Robert and Eilene Grossman and defendants Alan and Lorraine King purchased approximately 56.44 acres of real property with the plan of subdividing it. The property boundary is shaped roughly like a reverse image of the state of Nevada, with the

parcel's southern boundary running from the southwest to the northeast. The property is bordered on the south by Paloma Road.

The parties eventually obtained a tentative map for an 11-parcel subdivision, but before they obtained a final map and sold the parcels, a dispute arose between them, and the Grossmans filed a complaint for partition of the property by sale. The tentative map has since expired.

In an interlocutory judgment, the trial court determined the partition would proceed as a partition by division, otherwise known as a partition in kind. The court ordered the parcel divided vertically in half from north to south. It awarded the west portion to the Kings and the east portion to the Grossmans.

As part of its interlocutory judgment, the court appointed a referee to determine what compensation if any was required to be made by either party to the other in order to correct for any inequality in the partition, a payment known as owelty. (See Code Civ. Proc., §§ 873.250, subd. (a); 873.280, subd. (b)(2).)¹

The referee's decision took account of the characteristics and features of the divided parcels. The west portion awarded to the Kings (the King property) is the larger parcel. It totals approximately 30.57 acres. It has no improvements or utilities.

The east portion awarded to the Grossmans (the Grossman property) totals roughly 25.87 acres. It adjoins to its east other property owned by the Grossmans.

The Grossman property includes features and improvements which the King property does not. The Grossman property includes a pond on its northeast corner. It also includes a well that was drilled before the parties purchased the property. It

¹ The court also determined the Kings would not be awarded a compensatory adjustment for the time and work they expended to secure development approvals for the 56-acre parcel, and it instructed the referee not to take those factors into account when determining the recommended compensation. The Kings challenged this ruling in an earlier appeal, and we affirmed the trial court's decision. (*Grossman v. King* (Jan. 5, 2009, C057157) [nonpub. opn.])

produces about three gallons of water per minute. However, the water tested positive for coliform bacteria and is not potable.

The Grossman property also includes a small cabin located on the property's southeast corner. The Kings believed the cabin was built in 1897. When the parties purchased the 56-acre parcel, the seller said the cabin was uninhabitable. It never had indoor plumbing or a driveway. However, it had been wired for electricity. A driveway now connects the cabin to Paloma Road (an encroachment).

At the time of trial, the Kings had resided in the cabin and a travel trailer they located next to the cabin for 11 years. They rebuilt the cabin's roof and repaired its floors and foundation. They added a shop area. They also added an aluminum carport to house the trailer and a boat. They stated they spent between \$30,000 and \$40,000 in improvements to the cabin.

To obtain water, the Kings tapped into a neighbor's line that ran from an existing meter in the public water system. They ran a three-quarter-inch line from the neighbor's line to their trailer. They did not get a permit from the water purveyor, Calaveras Public Utility District (CPUD), to run this line, but they claimed they had its permission.

With no indoor plumbing to use, the Kings installed a septic holding tank and used the facilities in their trailer. The tank holds 150 gallons and is pumped by an outside service when needed. The tank is closed and has no leach lines.

Considering all of these property features and two appraisals, the referee concluded the Kings owed the Grossmans \$20,000 or two acres as owelty. He determined the King property, the larger parcel, was worth \$325,000, and the Grossman property, including its improvements, was worth \$285,000.

The Kings filed a motion to modify the referee's report and the interlocutory judgment. They contended the referee had not correctly accounted for the cost of improvements they had made on the Grossman property, nor had he accounted for the costs they would incur to improve their property to make it habitable.

Relying on the evidence presented in the referee's report, the testimony at trial, and a personal inspection of the property, the trial court denied the motion and entered final judgment. The court confirmed the division of the property as was set forth in the interlocutory judgment, and it ordered the Kings to pay the Grossmans \$20,000 as owelty. It valued the King property at \$325,000, and the Grossman property without improvements at \$270,000, leaving the Kings with an owelty payment of \$27,500. However, it offset that amount by \$7,500 as the value of the cabin and other improvements on the Grossman property, resulting in an owelty of \$20,000. The court determined the pond, the septic tank, and the well on the Grossman property had no value.

The court also denied the Kings' requests for reimbursement for the loss of the cabin and for the costs to be incurred on their property for constructing a septic system, constructing an encroachment, connecting with the public water system, and running electricity and cable lines to their property.

The Kings appeal. They contend the trial court erred in its valuations of the improvements and resources on the Grossman property, resulting in an unjustified owelty payment. Specifically, they claim the court erred by:

- (1) not reimbursing them for the septic tank;
- (2) not assigning a value to the encroachment onto Paloma Road;
- (3) not reimbursing them for the value of the water hook-up;
- (4) not reimbursing them for the value of the electricity hook-up;
- (5) determining the cabin had no value;
- (6) determining the pond had no value;
- (7) determining the well had no value; and
- (8) determining without substantial evidence that the offset to the Kings' owelty payment would be \$7,500.

DISCUSSION

As tenants in common, the Kings are entitled to be compensated for the improvements they made to the Grossman property to the extent those improvements added to the property's fair market value. "Even though one cotenant does not consent to the making of an improvement, since an action for partition is essentially equitable in its nature, a court of equity is required to take into account the improvements which another cotenant, at his own cost in good faith, placed on the property *which enhanced its value* and to award such cost to him. [Citation.]" (*Mercola v. Chester* (1950) 97 Cal.App.2d 140, 143, italics added; see also *Wallace v. Daley* (1990) 220 Cal.App.3d 1028, 1036.)

The trial court's determinations of value are entitled to deference on appeal. A judgment of partition may be set aside only for abuse of discretion. (*Capuccio v. Caire* (1929) 207 Cal. 200, 211.) We thus defer to the court's findings where the evidence is conflicting and there is sufficient evidence to sustain them. (*Camicia v. Camicia* (1944) 65 Cal.App.2d 487, 490.)

The record here contains conflicting evidence about whether the improvements on the Grossman property enhanced its value. However, because we review for abuse of discretion, we look only for sufficient evidence supporting the trial court's determinations, and we find it here. We address each contention.

1. *Septic tank*

The Kings assert the court erred in denying them any compensation for the value of the septic tank they installed on the Grossman property. They claim there has to be some value because the tank allowed them to live on the Grossman property for 11 years. One of the appraisers relied upon by the referee attributed a value of \$5,000 to the tank. They assert the court's decision not to attribute any value to the tank is not supported by the evidence. We disagree.

The referee relied upon two appraisals by separate appraisers to reach his determinations. The first appraisal concluded none of the improvements on the

Grossman property had any value. The appraiser did “not feel they should be even assigned a token value.” The second appraisal concluded the septic tank was worth \$5,000. The referee cut that amount in half to \$2,500.

The trial court determined the septic tank had no value. It noted the tank was not a septic system “as commonly understood.” The court denied the Kings’ request for reimbursement “for lack of evidence that there was a septic system which could be deemed an improvement, or how much was expended.”

Substantial evidence supports the court’s determination. The first appraisal’s conclusion that none of the improvements held any value was sufficient evidence on which the court could rely to conclude the septic tank added no value to the Grossman property. The tank had not been permitted by the county, and it was not a complete septic system. The court did not abuse its discretion in concluding the tank added no value to the property.

2. *Encroachment onto Paloma Road*

The Kings claim the court’s decision that the encroachment from the Grossman property onto Paloma Road had only minimal value is not supported by the evidence. The court’s offset of \$7,500 to the Kings included, among other things, an amount to compensate for the value of the encroachment. The Kings claim the court should have assigned a higher value. They rely on the testimony of a surveyor who stated the cost of a new, permitted encroachment ranged from \$7,000 to \$12,000. We conclude the court did not abuse its discretion.

Neither the appraisers nor the referee placed any value on the existing encroachment. There was no evidence that the existing encroachment was permitted. Nor was there evidence the Kings had improved the encroachment. Mr. King testified he wanted to pave it or put concrete on it “someday.” By contrast, and according to the Kings’ surveyor, the county would require a new encroachment to be paved for its first

20 feet, likely accounting for much of the improvement's cost. This fact diminished the relevance of the surveyor's testimony of cost.

In addition, there was evidence the King property in fact also had access to Paloma Road. This access was provided through an old farm gate or cattle gate. The surveyor was aware of this access, saw others using it, and even used it himself.

Based on the evidence in the record, the trial court's decision to include a value for the Grossman property's encroachment in the offset was not an abuse of discretion. It was a reasonable attempt to assign some value to an unpermitted and unpaved encroachment while at the same time recognizing the King property also had an unimproved encroachment. Certainly the Grossman property's encroachment did not come close in value to the cost of a new encroachment, and the court did not abuse its discretion in rejecting the Kings' argument to the contrary.

3. *Water hook-up*

The Kings claim the court erred in denying them any compensation for the value of the water hook-up on the Grossman property. A Mr. Fischer, who ran a private lateral line off of the CPUD six-inch water main to water cattle, entered into an agreement with the Kings in 2000 to allow them to tap into his lateral and run water from it to the cabin and travel trailer. The agreement stated it was done with "the knowledge" of the CPUD manager. The Kings asserted this arrangement provided the Grossman property with public water, something their property did not have. One of the appraisers had assigned a value of \$15,000 to this water. The Kings claim the court erred in assigning no value in light of this evidence.

The court did not abuse its discretion in assigning no value. As already mentioned, the first appraiser determined none of the improvements to the Grossman property had any value. The court could have reasonably relied on this evidence. Although the second appraiser valued water on the site at \$15,000, it was unclear from his report to what extent that value was attributed to the well. The referee then cut that

amount in half to \$7,500, and he referred to that amount as reflecting the value of the well. Thus the referee's report could also be interpreted as assigning no value to the water hook-up.

The interim district manager of CPUD also provided evidence supporting the court's determination. She testified that if the Kings had run a line from Mr. Fischer's private lateral without permission from CPUD, it would be an illegal tap. Indeed, CPUD could not service the Grossman property or the King property until they were first annexed into CPUD. The manager had no information or knowledge about the Kings' tap.

The letter the Kings claimed documented the agreement with Mr. Fischer said the tap was done with the CPUD manager's "knowledge." Knowledge is one thing; approval is another. Because the property was not annexed into CPUD and the existing tap was likely illegal, the tap provided little value to the Grossman property. The court did not abuse its discretion in relying on this evidence to determine the water line to the Grossman property had no value.

4. *Electricity hook-up*

The Kings assert the court erred by not reimbursing them for the value of the electricity hook-up that serves the cabin on the Grossman property. A power line goes down Paloma Road and ends at a pole in front of the cabin. The cabin gets its power from that pole.

The surveyor testified that from his experience, the electricity provider, Pacific Gas and Electric (PG&E), would charge approximately \$2,500 to design a new hook-up and easement to take power to the King property. An appraiser who testified at trial, who was not one of the appraisers relied upon by the referee, stated the cost of running a power line to the King property down Paloma Road could be anywhere from \$5,000 to \$10,000. He also stated one could not tell from the appraisals relied upon by the referee whether the appraisers had placed any value on the cabin's electric hook-up.

Mr. King, however, testified he would not need to use an easement along Paloma Road to get electricity to his property. Rather, a high-voltage power line runs across the 56-acre parcel, and his investigation with PG&E led him to understand the utility could hang a transformer on one of the poles on the King property and bring the power down that pole. The power would then be conveyed to locations on the property via overhead or underground lines. He did not testify as to that work's cost.

The trial court denied the request to reimburse for the cost of running electricity to the King property because it viewed electricity as a cost of development the Kings would incur if they ever chose to develop their property. It noted the Kings would not incur the cost of an easement because the Grossmans would be required to provide a public utility easement along Paloma Road so that utilities could get to the King property. The court said nothing about whether the electricity hook-up on the Grossman property was an improvement that increased that property's value as compared to the King property.

Nevertheless, the court approved the \$7,500 offset to address "improvements generally." These improvements included the cabin "claimed as a potential residence," and presumably the electricity that served the cabin. Under these circumstances, we cannot say the court abused its discretion by including the value of electricity in the value it assigned to the offset for the cabin and its improvements. This is so particularly in light of the fact that the Kings failed to introduce any evidence of the cost of hanging a transformer from the high voltage lines and running power from there to their property. Without that evidence or other evidence from the appraisers and referee, the court had little way to determine the value of the electrical hook-up on the Grossman property. Its inclusion of the value in the \$7,500 offset to the Kings' benefit was not an abuse of discretion.

5. *Cabin and RV storage*

The Kings contend the court erred in not reimbursing them for the value of the cabin and RV storage. Mr. King testified he spent between \$30,000 and \$40,000 making

improvements to the cabin. But the evidence supports the court's determination that the cabin added no value to the property.

The first appraisal stated none of the improvements, including the cabin, had any value. The second appraisal assigned a value of \$10,000 to the cabin and RV storage. The referee determined all of the improvements were worth \$20,000.

After inspecting the site, the trial court stated the cabin was "not an improvement to real property as that term is customarily used. There is no running water, bathroom or kitchen. Mr. King did some work on the roof and the floor underpinnings. He used materials left over from jobs as a licensed contractor."

However, the court noted the Grossmans had agreed to give the Kings 18 months to remove the cabin from their property, and they had agreed to allow Mr. King to continue living in the cabin during that time rent free. With this agreement in place, the trial court reserved ruling on the loss of the cabin as the Kings' home or the cost of removal. It authorized the Kings to raise this issue again postjudgment, and it retained jurisdiction for that purpose. In addition, the court stated the \$7,500 offset from the Kings' owelty payment included a value for the cabin.

Thus, the court has not foreclosed the Kings from returning and establishing a value for the cabin if Mr. King intends to use it as his residence. And the court assigned some value to the cabin and credited the Kings for it as part of the \$7,500 offset. Under these circumstances, where one appraisal determined the cabin had no value, we can safely conclude the trial court did not abuse its discretion in its valuation of the cabin.

6. *The pond*

The Kings contend the court erred in determining the pond on the Grossman property had no value, and had in fact negative commercial value. They rely on one of the appraisals, which valued the pond at \$5,000. The referee, however, determined the pond had no value. While noting a pond ordinarily has value, the referee concluded this pond did not because the county, had development proceeded on the property, required

the subdivided parcel that contained the pond be left undeveloped as open space. The referee thus cut the appraiser's \$5,000 valuation of the pond from his final report.

The trial court did not abuse its discretion by relying on the referee's opinion. The court noted there was no evidence the pond provided any material value to the land, such as being a water source for a business venture, and the county's intention to prevent development around the pond confirmed its lack of value.

7. *The well*

The Kings claim the trial court erred by determining the well on the Grossman property had no value. They note one of the appraisers accorded a value to "well/water" of \$15,000. The referee halved that value to \$7,500. The Kings assert they should have been compensated at least by that amount. Even though the well water is not potable and the well produces only three gallons per minute, they claim the well water is still usable for agricultural purposes, and the court erred in concluding the well's value was negligible.

The referee, however, cut the value of the well because it had not been professionally tested. He invited either party to pay for the testing if they sought to increase or decrease his valuations. Neither party did.

The trial court interpreted the invitation for testing as meaning if a party wished to assert a value, the party needed to have a test to back it up. Since no evidence was produced, the court determined the Kings had failed to show a value for the well. It concluded: "Since the well has negligible output, and is not suited for domestic use, this result is not inappropriate."

In light of the facts, we cannot say the court abused its discretion in concluding the well had no value. One of the appraisers stated the Grossman property's highest and best use was improved residential. Obviously, a contaminated well is useless for the property's proposed use, and the court was within its discretion to value it as such.

8. *The \$7,500 offset*

Finally, the Kings contend in a broad brush argument that the \$7,500 offset is not supported by the evidence. They assert the court's methodology resulted in an inequitable result: the Grossman property, with its improvements, was valued at less per acre than the King property, which had no improvements. They claim this occurred because the court was confused about how to apply the appraisals and the referee's report. They assert the record supports a determination that the Grossmans should be ordered to pay owelty to them.

The issue here is not whether the record supports the King's determinations of value. It is whether the record supports the court's determinations of value. We have determined throughout this opinion that sufficient evidence supports the court's various valuation decisions. Its offsetting the owelty by \$7,500 is a reasonable determination based on the facts of this record, and there was no abuse of discretion.

The court was not confused about the methodology it was to use to determine the amount of owelty. It clearly stated it was obligated to determine the raw-land values of the two proposed parcels, and then offset any owelty owed by the Kings (because they received the larger parcel) with the fair market value of the improvements they constructed on the Grossman property.

This methodology is required by statute. Section 873.220 of the Code of Civil Procedure requires a court, to the extent it can do so without materially injuring the rights of other parties, to divide the property so as "to allot to a party any portion that embraces improvements made by that party or that party's predecessor in interest. In such division and allotment, the value of such improvements shall be excluded." If a court did not follow this process and exclude the value of the improvements before assigning a land value, the party who did not construct the improvements would receive a windfall.

Although in this case the court determined not to allot to the Kings the property that contained their improvements, it was still required to ensure the Grossmans did not

receive a windfall in the form of free or reduced-price improvements. Thus, the court correctly excluded the value of the improvements from its valuation of the raw land, and then credited the Kings with the improvements they made that had any value in the form of an offset to the owelty they owed the Grossmans.

It was not this procedure that resulted in the Grossman property being valued at less per acre than the King parcel. That was the conclusion reached by the appraiser who performed the second appraisal. He determined the Grossman property, a parcel 25.87 acres in size, was valued at \$265,000, excluding all improvements. This equaled \$10,243 per acre. He appraised the King property, an unimproved parcel 30.57 acres in size, at \$325,000, or \$10,631 per acre. A difference of roughly \$400 per acre could easily be attributed to numerous individual differences between the parcels which the appraiser would have seen and accounted for in his final determinations.

The court determined the raw-land value of the Grossman property was \$270,000, an increase that benefitted the Kings. At this price, the Grossman property was valued at \$10,437 per acre, narrowing the difference between it and the value of the King property to roughly \$200 per acre. The court did not abuse its discretion in reaching this determination.

The Kings' primary contentions center on the fact they did not receive in offsets an amount equal to the highest values assigned to their improvements by the appraisers or the price of replacing those improvements in a new and legally acceptable form. The court, however, was charged not with determining the price the Kings paid to construct their improvements or will have to pay to construct replacement improvements. Rather, it was charged with determining the fair market value of the improvements the Kings made to the Grossman property. And as we have shown throughout this opinion, sufficient evidence supports the trial court's determination that their fair market value was minimal. The court did not abuse its discretion in assigning a value of \$7,500 to the improvements.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to the Grossmans. (Cal. Rules of Court, rule 8.278(a).)

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.