

Loveless v Koenig

2013 NY Slip Op 30425(U)

February 22, 2013

Supreme Court, Wayne County

Docket Number: 57585/2005

Judge: Dennis M. Kehoe

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF WAYNE

NEIL LOVELESS
PAULA MANNING

Plaintiffs

-vs-

PAUL KOENIG

Defendant

DECISION

Index No. 57585
2005

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The Plaintiffs Neil Loveless and Paula Manning (referred to collectively at times as "Loveless") have commenced this action for statutory and common law partition of real property, in which they hold a one-half interest, as the only surviving beneficiaries of the Loveless Family Trust. The Defendant (referred to at times as "Koenig") is the uncle of the Plaintiffs. He acquired his one-half interest in the property under the will of his father, Charles Koenig, who died in 1970. The subject premises is a farm located at 3519 State Road 414 in the Town of Rose, New York which

was acquired by Charles Koenig in 1911.

The property consists of approximately 257.3 acres, of which 139.3 acres are crop land, 4 acres are farmstead, and 114 acres are woods and other vacant land. The property is improved by a farm house (treated as a single family residence for purposes of this decision), as well as several other out buildings. The Plaintiffs retained a real estate appraiser, who determined that the fair market value of the property as of April 2, 2012 was \$445,000.00, with \$339,600.00 allocated to the land and \$106,000.00 allocated to the structures. The Defendant did not hire his own expert; therefore, the Court accepts the opinion of the Plaintiffs' expert as proof of the value of the property.

The Plaintiffs have never resided at the premises, nor have they been actively involved in the operation of the farm or in the maintenance of the premises. Their actual use of the property has been incidental in nature. The Defendant has been involved in the operation of the farm for over 40 years, although it is clear that such operation was never a major economic success. The Defendant and his extended family, including his daughter Paulette and her children, have resided at the farm house since the early 1970's. (The Defendant himself has actually occupied the farm

house as a residence on a sporadic basis in recent years.)

Clearly, the 94 year old Defendant wishes to remain on the premises with his family. However, extensive negotiations directed toward an agreement regarding the assessment of the economic interests of the respective parties and the purchase of the Plaintiffs' interests by the Defendant were ultimately unsuccessful. Therefore the matter proceeded to a non-jury trial.

The Defendant maintains that he is entitled to a credit against the Plaintiffs' one-half interest in the premises for actual monies expended by him over the years for repairs, maintenance and farming operations. He seeks reimbursement for the payment of property insurance premiums and for real property taxes, which he partially paid from personal funds, over and above the amounts derived from rental income, which payments were deposited into a "farm account". He also maintains that he should be reimbursed for the time and labor he invested in the management and improvement of the premises. The Plaintiffs contend that the figures presented by the Defendant are over-blown and unsupported by adequate documentation and credible testimony; further they maintain that they are entitled to offsets, including rental payments owed to them by Koenig's

family and a portion of the income tax deductions taken by Koenig for the real property taxes, against any credits allowed to the Defendant. Loveless also seeks reimbursement for half of the expenses associated with the expert's appraisal, as well as monetary sanctions for the imposition of allegedly frivolous claims by the Defendant.

The obvious starting point for the Court's calculations is the fair market value as stated in the report submitted by the Plaintiffs' expert. Therefore, each side is presumptively entitled to one-half of the value, or \$222,500.00. The parties have exhaustively briefed their respective arguments regarding the credits and offsets to which each maintains they are entitled. Based upon those arguments, including the case law cited therein, and the excerpts of testimony set forth from the trial transcripts, the Court find as follows:

- 1) The Plaintiffs have not established that they are entitled to any credit for unpaid rent.

Counsel for Koenig correctly maintains that Loveless cannot demand rent from the Defendant absent an ouster. (See, e.g. Gralicer v Johstone, 144 AD2d 436 (2nd Dept, 1988)). New York courts have held that, where a tenant has been ousted, a court may offset, as against the co-tenant's

credit for expenses incurred in maintaining the property, the reasonable value of the co-tenant's use and occupancy. However, the Fourth Department, in a decision which upheld the prior trial court's ruling regarding the question of adverse possession in the instant action, found that there was no merit to the Plaintiffs' claim that they had been ousted by the Defendant. (*Loveless Family Trust, et al v Koenig*, 77 AD3d 1447 (4th Dept, 2010)). Despite the fact that the appellate court's holding was made in connection with the determination regarding adverse possession, this Court finds that the prior findings regarding the absence of proof of ouster are valid for purposes of the relief requested in the partition action as well.

Moreover, the Court concludes that the proof presented at trial was insufficient to establish the Plaintiffs' entitlement to an offset for rent. The evidence submitted in support of the Plaintiffs' claim essentially consists of deposition testimony of the late Clifford Loveless, a prior co-owner of the property regarding a purported discussion, with Koenig in 1972 regarding rent; a Statement of Net Worth submitted by Koenig's daughter Paulette in a matrimonial action in 1989, listing her expenses; a letter from Loveless in 2004 demanding payment of rent; and the assertion (which is essentially speculative) that any surplus funds in the farm account over and above the

rental income from the farm must have been due to the deposit of payments constituting rent by the Defendant's daughter. The Court finds that these arguments are insufficient to support a valid claim by the Plaintiffs for the rental value of the residence.

2) The Defendant has not established that he is entitled to a credit representing the alleged value of his labor and management/supervision responsibilities regarding the farming operation.

Although partition is a statutory creation it is nevertheless equitable in nature. (See, e.g. *Equity Search, Inc. v Kao*, 37 AD3d 1106 (4th Dept, 2007)). Therefore, a court can compel parties in a partition action to do equity as between themselves.

In spite of this principle of law, however, this Court is unable to find on this record that Koenig is entitled to reimbursement for his labor and management. There is no proof of any agreement between the parties as to payment of a management fee. The farming operation was never a thriving enterprise, so no profit and loss statements are available. Finally, there simply is no credible evidence that Koenig's alleged actions, including the conversion of old orchards to more profitable tillable acreage and the installation of a gravel lane, contributed to the appreciation of the

value of the land as argued by the Defendant. In its effort to balance the equities between the parties, the Court must be afforded a factual basis in admissible form for its calculations, a basis which has not been established in this action.

The Court acknowledges that Mr. Koenig has spent the last four decades of his life working on this property. However, based upon the evidence at trial, this Court is unable to place a dollar value on those services. There is simply insufficient proof that the Defendant's efforts were responsible for an increase in the value of the acreage. It is clear that the actual farming operations, as well as much of the other labor, performed on the premises was the work of Donald Ballagh (and later, Brian Manktelow), who rented the property from the parties. In effect, the co-tenants have had an unwritten, unspoken, de facto agreement for 40 years, according to which the Defendant and his family occupied the premises rent free, in exchange for the Defendant's supervision of the property.

3) The Court finds that the Defendant is entitled to a credit to be applied against the Plaintiffs' interest in the value of the property for one-half the following expenditures:

● Farm taxes over farm income stipulated as of May 30, 2012.	\$13,018.96
● Property Insurance 1998-2004	\$ 5,402.35
● Property Insurance 2005-2010	\$ 4,955.02
● Payments directly to Clifford Loveless from farm account	\$10,000.00
● Payments to Donald Ballagh	\$ 8,500.00
* Paul Koening personal funds toward farm operation (in full)	\$ 5,000.00
● Payments to John Allen-farm lawn maintenance 1998-2009	\$14,400.00
● Payments to John Allen-farm lawn maintenance for 2010 only	\$ 585.00
● Storage building repair	\$ 775.44
● Roof and Gutter Repair	\$ 2,849.00
● Soffits and Cupola Repair	\$ 1,586.66
● Rebuild house porch - material only	\$ 1,157.45
● Rebuild porch steps	\$ 119.40
● Replaced galvanized plumbing with copper -material only	\$ 653.11
● Farm equipment repair	\$ 861.00
● Payment to Contractor David Nevidomsky - repair house bricks, paint house, horse barn, storage building, apply vinyl siding	\$ 9,000.00
● Payment to Tom Townsend - new roof for house, house barn and garage	\$ 5,000.00
● Payment to Tom Townsend - roof repair 6/30/10	\$ 1,200.00

● Garage vinyl siding - material only	\$ 288.90
● Furnace Repair	\$ 120.00
● Furnace Replacement	\$ 7,100.00
● Cold storage roof coating	\$ 300.00
● Water pump repair	\$ 215.94
● Cistern Repair	<u>\$ 2,150.00</u>
TOTAL	\$85,283.21
LESS ONE-HALF	\$42,641.61
CREDIT	\$47,641.61
(*includes \$5,000.00)	

Both parties have cited the Fourth Department's decision in Worthing v Cossar, 93 AD2d 515 (4th Dept, 1983). In that opinion, the Court held that a tenant in possession who in good faith makes repairs and improvements necessary to protect or preserve the property, and who pays for property taxes and homeowners insurance premiums, is entitled to be reimbursed for such expenditures by the other tenant(s) in common. However, the Court went on to state that, if the expenditures were made for "personal convenience and enjoyment of the property", rather than for the purpose of improving and/or preserving the property, any claim by the tenant in possession for reimbursement will be disallowed. The Court finds

that the expenditures listed above were made by the Defendant to preserve the property, and the Defendant is entitled to a credit equal to 50% of that total, as set forth above.

The Defendant maintains that he is entitled to full credit for those expenditures, attempting to argue that by only allowing a 50% credit, the Plaintiffs "are credited twice for money (they) never spent". This argument ignores the fact that, absent an agreement to the contrary, tenants in common share the responsibility for taxes and insurance on the premise, and for the preservation of the property. Moreover, as the actual occupants of the farm house, the Defendant and his family did directly benefit from the repairs to the residence, and the Defendant should be held responsible for one-half of those expenditures.

The Court has considered the nature of the evidence produced by the Defendant in regard to his expenditures, as well as the manner in which the proof was presented at trial. Loveless maintains that Koenig's testimony regarding the above payments is inadmissible as a matter of law and should be stricken from the record. The Plaintiffs acknowledge that they stipulated to the admission of the Defendant's summary schedule of check registers into evidence. However, said stipulation was entered as a

procedural convenience, to eliminate the need for technical compliance with the usual authenticity and foundational requirements. Much, if not most, of the testimony offered by Koenig consisted of “refreshed recollection” elicited by counsel for the Defendant, by her showing Koenig the entries set forth in his check registers. Loveless maintains that Koenig had no actual memory of the expenditures and that the Defendant failed to produce the actual cancelled checks or paid invoices in support of his claims.

At the time of trial, this Court expressed concerns regarding the manner in which the Defendant testified. However, given the advanced age of the Defendant and the number of years over which the expenditures allegedly were paid, considered with other evidence presented at trial, the Court finds that Koenig’s memory was sufficiently refreshed to render his testimony regarding the expenditures credible.

4) The Plaintiffs have requested that the Court revisit its prior ruling regarding their alleged entitlement to a credit for a portion of the real property tax deductions claimed by Koenig on his income taxes over the years. The Plaintiffs never attempted to take any of the deductions, and nothing prevented them from filing at any time in the past. More

significantly, the Court has previously held that these issues are properly within the purview of the Internal Revenue Service, and as this Court is in no position to determine the tax ramifications of such a determination, it will not re-consider this claim.

5) The Court finds that the imposition by the Defendant of a claim for reimbursement for his personal labor and management does not constitute frivolous conduct, as that term is defined under Part 130 of the Uniform Rules. While the Court is unable to award the Defendant any credit for his services, based upon the absence of credible evidence establishing the actual dollar value, the court also recognizes the fact that the Defendant has expended many years of his life in working this farm, for better or for worse. His claim may not be reimbursable, but it is certainly not frivolous and therefore not sanctionable.


6) RPAPL §981 requires that a final Judgment of Partition must include a provision stating that a defendant shall be directed to pay his proportion of a Plaintiffs' costs, and this Court so directs. However, reimbursement to the Plaintiffs for expenses incurred regarding the written reports and trial testimony rendered by the Plaintiffs' experts as an additional allowance is discretionary. The Court will not require the

Defendant to contribute toward those expenses.

Therefore, the Court directs that an Interlocutory Judgment be entered in accordance with Article 9 of the Real Property Actions and Proceedings Law, directing the partition of the premises located at 3519 State Road 414 in the Town of Rose, New York owned by Neil Loveless and Paula Manning, Plaintiffs, and Paul Koenig, Defendant, as tenants in common. The Judgment shall provide for credits to the parties as set forth in the above findings, to be applied toward the interests of the respective parties. If the Defendant has paid any property taxes or homeowners insurance premiums not included at the time of trial, the Defendant shall be entitled to an additional credit for one-half of those expenditures after the sale is conducted.

Counsel for the Plaintiffs is directed to submit the proposed Judgment to the Court, upon notice to counsel for the Defendant.

Dated: February 22, 2013
Lyons, New York


Honorable Dennis M. Kehoe
Acting Supreme Court Justice

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