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SC Court of Appeals

ELECTRONICALLY FILED - 2024 Feb 05 4:17 PM - NEWBERRY - COMMON PLEAS - CASE#2022CP3600326

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Charles M. Watson Jr., Special Referee

Appellate Case No.: 2024-_____

Related Appellate Case No.: 2023-001143

Lower Case No.: 2022-CP-36-00326

Lena Sue YarboroughAppellant,

v.

Joel F. Yarborough, III..... Respondent.

NOTICE OF APPEAL

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, Appellant Lena Sue Yarborough appeals the Special Referee Charles M. Watson Jr.’s January 9, 2024, Order granting partition by allotment of the Fairfield Timber Tract (Tax Map Number: 194-00-02-010) to Respondent Joel F. Yarborough III, and the Special Referee’s February 2, 2024, Order denying Appellant’s Rule 59, SCRCF, motion regarding the same. Copies of these orders are attached as Exhibits A and B. Further, a copy of this Notice of Appeal is simultaneously being filed in the Court of Common Pleas for Newberry County.

(Signature Page to Follow)

Respectfully submitted,

s/Beth B. Richardson

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February 5, 2024

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STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

IN THE COURT OF COMMON PLEAS

2022-CP-36-326

Lena Sue Yarborough)
)
Plaintiff)

vs.)

Joel F. Yarborough III)
)
Defendant)

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ORDER

This matter was before me on September 7, 2023 for a hearing to determine whether the subject properties might be partitioned equitably between the parties. Other matters, including awarding attorney fees and ordering reimbursement for expenses advanced by either party, were reserved for a future hearing.

In addition, on May 25, 2023, I granted summary judgment regarding the construction of deeds related to the ownership of approximately 78 acres, referred to by the parties as the Newberry Timber Tract. I construed the relevant deed to create a Tenancy in Common with Right of Survivorship, as contended by the Defendant, rather than a Joint Tenancy with Right of Survivorship, as contended by the Plaintiff. On June 6, 2023, the Plaintiff filed a motion for reconsideration. On June 16, 2023, I issued my order affirming the grant of summary judgment. The contents of those orders are incorporated herein by reference.

Finally, all Exhibits submitted by the parties at the hearing are incorporated herein by reference.

FINDINGS OF FACT

1. This partition action initially involved four parcels:

- a. The Newberry Timber Tract, which is not involved in this hearing today. Pursuant to my order granting summary judgment, the Newberry Timber Tract is owned 100% by the Defendant. However, the Plaintiff has filed an appeal from my order, and the appeal is pending before the appellate courts.
- b. 1807 Livingston Road (“Grandmother’s House”) which the parties own in equal shares.
- c. 1648 Livingston Road (“Mother’s House”) in which the Plaintiff owns a 75% interest and the Defendant owns a 25% interest.
- d. The Fairfield Timber Tract in which the Plaintiff owns an 14/36 interest and the Defendant owns a 22/36 interest.

1648 Livingston Road (“Mother’s House”)

2. The parties have stipulated that the value of Mother’s House is \$150,000. The Defendant has agreed to the Plaintiff’s request that Mother’s house be allotted to her at that value. In addition, the Plaintiff waives her claim to recover expenses advanced by her with regard to this particular property.

The Fairfield Timber Tract

3. The Plaintiff presented expert testimony from Benjamin Royer, a S.C Certified General Real Estate Appraiser and S.C. Registered Forester. I found he was qualified to testify, as an expert, in those areas. He presented a very granular (and impressively thorough) analysis of the different components of the property which contribute or detract from the values of different portions. He correctly pointed out that dividing property equally, by the number of acres, does not necessarily

mean that the property is being divided equitably. He provided very detailed information regarding the locations of different types of timber, soil classifications, and topography for the entire property. He presented evidence of the historical rise and decline of the timber market, along with his assessment of the current market and his predictions for the near term future market. He determined that the property has benefitted from having been extensively managed for timber productivity. He also pointed out the potential value of the property from being desirable for recreational or hunting uses by residents of the more densely populated urban areas, as well as from outside of the state. His very detailed appraisal, which is incorporated into this order by reference, valued the entire Fairfield Timber Tract at \$442,200 on the date of the appraisal, July 26, 2022. Both parties accepted the value he placed on the property.

4. The Defendant offered to purchase the Plaintiff's interest for 14/36 of that value, but the Plaintiff rejected that offer because she wanted to keep the property for long-term investment and for sentimental reasons.
5. The Plaintiff has offered a proposed division in which she would be awarded a particular portion of the tract with the Defendant being awarded the remaining portion of the tract. The Plaintiff's proposed division is incorporated into this order by reference.
 - a. The proposed division was prepared by the Plaintiff's expert witness, Mr. Royer, who attempted to divide the property, in an equitable fashion, by taking into account all of the components addressed in his appraisal. However, I find that, even with the granularity and detail of Mr. Royer's

proposed division, the Plaintiff has failed to meet her burden of proof that her proposed division is fair and equitable.

i. First, the proposed division would award virtually all of the high, flat ground to the Plaintiff, while the Defendant's portion of the tract would consist of a lot of gullies and creeks.

ii. Second, approximately 25% of the value of the Defendant's portion is attributed to hardwood trees that are located on a small portion of the property that is separated from the remainder of the Defendant's portion by a stream that would have to be crossed. In addition, the Defendant presented testimony from a witness who testified to the difficulty of harvesting the timber on the Defendant's portion because the primary access road to the Defendant's portion would be owned by the Plaintiff. Without the primary access road, getting to the stands of timber on the Defendant's portion would be impaired by the gullies and creeks that would have to be crossed.

b. In pre-trial discussions, the Defendant presented a proposed division, and his proposed division is incorporated into this order by reference. While the Defendant's proposal would have divided the property equally, on a per acre basis, I find that he failed to meet his burden of proving that his proposed division was equitable. No evidence of the values of the different components of each tract were presented, as the Plaintiff's expert witness had presented.

- c. Finally, I have considered variations for dividing the property in which each party would receive a relatively equal portion of the high ground and the areas with gullies and creeks, using the detail provide by Mr. Royer. However, because of the shape of the property, and the concentration of the high ground along one side property line, I have not been able to come up with an equitable way to do so.
- d. As a result, I find that the Fairfield Timber Tract cannot be divided, solely in kind, in a manner that is equitable to both parties. It is apparent that one of the parties will have to receive payment, from the other, for some or all of his or her share. The value of the property has been agreed upon by the parties. The sole remaining issue is simply finding a buyer who will pay that price. Since the Defendant has indicated a willingness to pay that price, I find that the most equitable result would be for the entire property to go to him.

1807 Livingston Road (“Grandmother’s House”)

6. Grandmother’s house is located on a tract of land containing 17.7 acres, according to a recent survey, with a house, some barns and pastures with fencing. It is located across the street from Mother’s house. The grandparents historically raised cows on the property, and the Defendant continues to raise cows on the property. There is only one well on the property, and it is the sole existing source of water to the house and the barns.
- a. The Plaintiff presented a proposed division whereby the house and a 2.6 acre yard would be cut out as a residential property. Under her proposed

division, the house and 2.6 acres would be awarded to the Defendant and the remaining 15.1 acres would be awarded to her. At trial, however, the Plaintiff stated that she would be willing to receive either of the pieces.

- b. The Defendant contends that the property should not be divided in kind but that it should be awarded to him by allotment because of his long time use of the property raising cows. He did offer an agreement that the Plaintiff could have a small portion of the pasture located directly across the street from Mother's house. The Plaintiff declined his offer.
- c. The Plaintiff presented expert testimony from Christopher P. Monson, a S.C. Certified Residential Appraiser. I found he was qualified to testify as an expert as to the value of residential properties. He testified that his valuation of the property, as of December 29, 2022, was \$210,000. His written report is incorporated herein by reference. The Defendant agrees with this valuation.
- d. The Plaintiff also presented expert testimony from William H. Brown, a S.C. Certified Residential Appraiser. I found he was qualified to testify as an expert as to the value of residential properties. He testified that he appraised the property on August 21, 2023. He submitted two written reports, each valuing the two separate parcels which would be created if I accepted the Plaintiff's proposed division. He valued the house and 2.6 acres at \$116,000 and the remaining 15.1 acres, at \$116,000. Both of his written reports are incorporated herein by reference.

- e. The Defendant disputes these valuations and contends that the property is only worth \$210,000. However, based on the evidence presented, I find the property is worth \$232,000.
- f. The Defendant argues that I should disregard, or at least discount, the Plaintiff's claim of sentimental attachment to the property. He points out that she lives several hours from the property and is not be able to visit the property very often. However, I find that the Plaintiff has met her burden of proof with regard to establishing her sentimental attachment.
- g. The Plaintiff argues that I should give little or no weight to the length of time that the Defendant has been using the property for raising cows, as their grandparents did for many years. She points out that the Defendant has the ability to rent other pastures and argues that her sentimental attachment is more important.
- h. At this point, I have to balance the equities between the Plaintiff's sentimental attachment and the Defendant's current use of the property for raising cows. I consider it significant that the barns on the property are dependent upon the well serving the house, as their sole source of water. Severing the house from the pasture would require the necessity of finding an alternate was source for the pasture.
- i. Based on the length of time that the Defendant has used the property for raising cows, I find the most equitable result would be to allot the entire 17.7 acres to him.

CONCLUSIONS OF LAW

1. This court has personal jurisdiction over the parties.
2. Newberry County is a proper venue for this action.
3. This court has jurisdiction to make partition, in kind or by allotment, to one or more of the parties owning property, as joint tenants or tenants in common, upon their accounting to the other parties in interest for their respective shares or, in case partition in kind or by allotment cannot be fairly and impartially made and without injury to any of the parties in interest, by the sale of the property and the division of the proceeds according to the rights of the parties. S.C. Code 15-61-50.
4. The Clementa C. Pinckney Uniform Partition of Heirs' Property Act does not apply to this action.

IT IS THEREFORE ORDERED that:

1. 1648 Livingston Road (“Mother’s House”) be allotted to the Plaintiff, upon her accounting to the Defendant for the sum of \$37,500.
2. The Fairfield Timber Tract be allotted to the Defendant, upon his accounting to the Plaintiff for the sum of \$171,966.67.
3. 1807 Livingston Road (“Grandmother’s House”) be allotted to the Defendant, upon his accounting to the Plaintiff for the sum of \$116,000.
4. This order is not the final order in this case, and its filing shall not trigger the time for filing an appeal. An additional hearing will be scheduled, in the very near future, to determine all remaining issues which have not yet been addressed, including adjustments based on the decisions the Plaintiff makes regarding the exercise of her options, and the final order in this case will be issued at that time.

5. In the event the appellate courts reverse or modify any of my orders, including the order granting summary judgment as to the ownership of the Newberry Timber Tract, I retain jurisdiction to conduct additional hearings, and to issue additional orders, consistent with the rulings of the appellate courts.

AND IT IS SO ORDERED!

January 8, 2024
Greenwood, South Carolina

/s/ Charles M. Watson Jr.
Charles M. Watson Jr., Special Referee

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

IN THE COURT OF COMMON PLEAS

2022-CP-36-326

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SC Court of Appeals

Lena Sue Yarborough)

Plaintiff)

vs.)

ORDER ON MOTION TO RECONSIDER

Joel F. Yarborough III)

Defendant)

This matter was before me on September 7, 2023 for a hearing to determine whether the subject properties might be partitioned equitably between the parties. Other matters, including awarding attorney fees and ordering reimbursement for expenses advanced by either party, were reserved for a future hearing. I issued an order dated January 8, 2024 which was filed on January 9, 2024. On January 19, 2024, the Plaintiff filed a motion for reconsideration and amendment of my order. The motion is denied.

The Plaintiff apparently contends that I am not allowed to determine what weight should be given to her expert witness (Mr. Royer)'s testimony in determining whether her proposed partition is equitable. I disagree. It is a well-established rule of law that the final determination of the credibility and weight accorded to evidence is reserved to the finder of fact. I have considered Mr. Royer's testimony, along with all of the other testimony and evidence presented, and based on the weight I gave to the testimony presented, including his testimony, I found that the Plaintiff had not met her burden of proving, by the greater weight or preponderance of the evidence, that her proposed partition is equitable. I decline to reconsider that finding.

The Plaintiff also contends that my decision that her proposed partition was not equitable was solely based my view of the ease of harvesting timber on the Defendant's proposed tract. She completely overlooks a specific finding in my order that portion she would be receiving contains virtually all of the high, flat ground while the Defendant's portion would consist of a lot of gullies and creeks. Mr. Royer took the topography of the land into account, along with other factors, into making his recommendations. His testimony indicated that he did not consider the relative topographies to be very significant at all. However, after giving the matter a great deal of thought, and considering other evidence regarding differences in topography, I chose to give the comparative topographies greater weight than he did.

Finally, the Plaintiff contends that I lacked the authority to partition the property by allotment to the Defendant. She argues that the Defendant did not request partition by allotment in his pleadings. However, the Plaintiff ignores the fact that she requested a "partition in kind or by allotment" herself. Her first cause of action in the Complaint seeks a partition in kind or by allotment. Paragraph 10 of the Complaint acknowledges the court's authority to make partition in kind or by allotment. Paragraph 17 of the Complaint and paragraph 3 of the prayer for relief specifically seek partition in kind or by allotment. The Defendant's Answer admits the allegations of those Paragraphs and joins in the prayer for relief. The argument that I lacked the authority to partition by allotment is completely without merit.

With regard to the Plaintiff's argument that I should allot the property to her, instead of to the Defendant, I would point out that her request was not made until long after the hearing was over and then only in response to a question from me. That issue is not properly before me.

IT IS THEREFORE ORDERED that the motion for reconsideration is denied.

AND IT IS SO ORDERED!

February 1, 2024
Greenwood, South Carolina

/s/ Charles M. Watson Jr.
Charles M. Watson Jr., Special Referee

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APPEAL FROM NEWBERRY COUNTY
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Appellate Case No.: 2024-_____

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Lena Sue YarboroughAppellant,

v.

Joel F. Yarborough, III..... Respondent,

PROOF OF SERVICE

Pursuant to Rule 262(c)(3), SCACR, I certify that I have caused the **NOTICE OF APPEAL** to be served on the following counsel of record by AIS email at the following addresses:

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Columbia, South Carolina
February 5, 2024

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Bcc: "[F397049}.Clients@f8eed.imanage.work](#)"
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Good afternoon,

Attached herewith for service upon you please find a Notice of Appeal regarding this matter and Proof of Service being filed with SC Court of Appeals this afternoon. A copy of this email will be filed with the Proof of Service.

Please note: Although AIS lists another email address for you, we are serving you via the email address that has been used for communication throughout this case.

Thank you,
Dara



DARA CARMICHAEL LEGAL ASSISTANT

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