STATE OF MICHIGAN

COURT OF APPEALS

HOX INVESTMENTS, LLC,

Plaintiff-Appellee/Cross-Appellant,

v

PHILLIP HOXSEY, VERONICA HOXSEY, and HOX ACRES, INC.,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
October 27, 2022

No. 357278
Macomb Circuit Court
LC No. 19-000272-CB

Before: RONAYNE KRAUSE, P.J., and JANSEN and MURRAY, JJ.

PER CURIAM.

In this partition action, defendants, Phillip Hoxsey, Veronica Hoxsey,[1] and Hox Acres, Inc., appeal as of right the trial court's May 6, 2021, denial of their motion for relief from judgment in favor of plaintiff, Hox Investments, LLC. Specifically, defendants argue that the trial court erred by awarding owelty to plaintiff because they did not exclude co-tenant plaintiff from using the subject property, and even if they had, the amount of owelty was unsupported by the evidence and awarded for an inappropriate amount of time. We affirm.

I. FACTS AND PROCEEDINGS

The property that is the subject of this dispute is comprised of approximately 76 acres and is located at 64464 Mound Road, Washington Township, Michigan. The property was previously held as an asset of the Hoxsey Family Trust, and Hox Acres has operated its horse boarding and farm business on the property since 1946. In approximately 1993, Hoxsey and his siblings, Paul Hoxsey and Karen Boggs, became owners of the property as tenants in common, with each owning an undivided one-third interest. Some years later, a series of events resulted in Karen's husband, Douglas Boggs, obtaining Paul's one-third interest, and Hoxsey becoming the sole shareholder of

[1] References to "Hoxsey" shall mean Phillip, and "the Hoxseys" shall mean Phillip and Veronica.

Hox Acres. Eventually, in 2017 the Boggses' two-thirds interest was acquired by plaintiff, who wanted to create a single-family residential home development on the property.

After several attempts to purchase the remaining one-third interest in the property, in January 2019 plaintiff filed this lawsuit, seeking partition of the property and also alleging defendants owed plaintiff rent because defendants were using 100% of the property to the exclusion of plaintiff, prohibiting it from exercising any of its rights as a tenant in common, and because defendants were receiving an unfair monetary advantage under the Hoxseys' lease with Hox Acres.

Soon after filing suit, plaintiff sought the appointment of a receiver to, among other things, determine the fair market rental value for the property and collect rent from Hox Acres for the time period beginning December 2018, when it acquired its interest, until completion of the partition. The trial court ordered the appointment of a receiver for the limited purpose of determining the fair market rental value of the property and making certain the property taxes were paid. The receiver hired an appraiser who, in August 2019, authored a report that calculated the fair market rental value as $75,000 a year.

In January 2020, in an effort to avoid continued rent issues, the trial court ordered a temporary partition of the property, awarding plaintiff two-thirds and defendants one-third of the property and ordering each side the exclusive use of their property and precluding any claims for rent from a party's use of the property they had been awarded under the temporary partition order. In August 2020, plaintiff filed a motion for relief from the temporary partition order, alleging that defendants were violating the order by using property awarded to plaintiff for "(1) storage of horse trailers, jumping equipment (2) for allowing horses to jump, trot, jog, canter, and lope and (3) dumping of manure and debris." The trial court subsequently entered an order requiring the parties to "strictly abide" by the terms of the temporary partition order and providing that parties could petition the trial court for sanctions and other relief if any further violations occurred.

Shortly thereafter, the parties appeared before a partition commissioner. Included in the trial court's September 2020 order was a clarification that all claims were to be addressed, including those related to the value of the use of the property or benefits conferred on defendants before and after plaintiff obtained its interest in the property (owelty). After taking his testimony, receiving exhibits, and hearing the closing arguments, the commissioner issued his report and recommendation to the trial court in February 2021. He concurred with plaintiff's report and recommended that the trial court approve plaintiff's plan as the final partition, award plaintiff $52,732 "as a[n] adjustment to the equities" for the time period from December 2018 until the January 2020 temporary partition, and "as a further adjustment of the equities," award plaintiff $4,166 a month as the fair market rent for the property until a final order of partition was entered and delivery of possession was completed. Defendants were entitled to credit for taxes, maintenance, and insurance that they paid "during these time periods."

Plaintiff moved for confirmation of the commissioner's report and recommendations, and defendants moved to set aside or modify the report and recommendations. In its opinion and order, the trial court adopted plaintiff's plan of partition. With respect to the rent issue, it ruled:

The second question before the Court concerns amounts due, if any, for adjustments of the equities under MCL 600.3336. Specifically at issue, Hox Investments seeks rent for Mr. Hoxsey's exclusive use of the Property from December 18, 2018, the date of Hox Investments' purchase of its interest.

Hox Investments argues that it was not able to pursue development of its interest in the Property until partition occurred while Mr. Hoxsey continued to operate his horse boarding business and uses the entire Property. In response, Mr. Hoxsey denied excluding Hox Investments. To the contrary, Mr. Hoxsey maintains that his attorney sent an email communication inviting Mr. D'Agostino of Hox Investments to participate in the horse operation and, therefore, Mr. Hoxsey owes no rent.

"When partitioning the premises . . . the court may take into consideration the equities of the situation, such as the value of the use of the premises by a party or the benefits which a party has conferred upon the premises." MCL 600.3336(2).

The Court is satisfied that the testimony showed Mr. Hoxsey utilized 100% of the Property to the exclusion of Hox Investments by dumping manure on the Property, operating a horse boarding business, cultivated and harvested hay, having debris and cattle throughout the Property and otherwise exercising dominion and control over the same. Mr. Hoxsey produced no supporting evidence of an email offer inviting Hox Investments to participate in the boarding business. It is clear Mr. Hoxsey benefitted from the exclusive use of the Property after Hox Investments purchased its 2/3 interest in December 2018. During the same time, Hox Investments was unable to utilize the Property for its intended purpose.

Hox Investments introduced evidence of the fair market rental value of the Property based on the testimony of a credentialed appraiser who utilized the Uniform Standards of Professional Appraisal Practices. The Appraiser testified at length regarding his methods and calculations. Mr. Hoxsey introduced no opposing expert testimony in response. The Commissioner accepted Hox Investments' calculations of a fair market rental amount of $4,166 per month.

However the appraiser estimated the rental value of the Property based on a calculation of market value of the Property together with an investment rate of return. The Appraiser made assumptions of highest and best use—which is single family residential homes. Such an inquiry is by definition hypothetical and imprecise. Clearly, the Property was not capable of immediate use for residential homes which have yet to be developed. In the Court's view, and under its statutory authority in MCL 600.3336(2) to consider the equities of the situation, a fair market rent for Hox Investments' interest in the Property is $1,000 per month. In light of delays from the Covid-19 pandemic and Mr. Hoxsey's continued use of the entire Property, the Court considers such rent due and owing for a time period of December 18, 2018 to the ordered surrendered date of June 30, 2021—30 months and 12 days. At a rate of $1,000, Mr. Hoxsey equitably owes its co-tenant Hox Investments $30,400 for its exclusive use of the Property.

Defendants subsequently filed a motion for relief from judgment, which the trial court denied. Defendants filed a claim of appeal with this Court and sought a stay of proceedings in the trial court and in this Court, both of which were denied, although defendants eventually obtained a stay as to the rent award only from the trial court. Plaintiff filed a delayed motion for a cross-appeal, which this Court granted, but ordered all filings to take place in this appeal and administratively closed the other file. *Hox Investments LLC v Hoxsey*, unpublished order of the Court of Appeals, entered December 15, 2021 (Docket No. 359068).

II. STANDARDS OF REVIEW

"An action to partition land is equitable in nature" and "equitable actions are reviewed de novo with the trial court's findings of fact reviewed for clear error[.]" *In re Temple Marital Trust*, 278 Mich App 122, 141-142; 748 NW2d 265 (2008). However, the de novo review is tempered by the knowledge that, because this is an equitable action, the trial court "looks at the entire matter and grants or denies relief as dictated by good conscience." *Id*. at 142 (quotation marks and citation omitted). Indeed, "[b]roadly speaking the sound discretion of the court is the controlling guide of judicial action in every phase of a suit in equity." *Id*. (quotation marks and citation omitted). This Court also reviews de novo questions of law, such as the interpretation of a statute or court rule. *Silich v Rongers*, 302 Mich App 137, 143; 840 NW2d 1 (2013).

III. ANALYSIS

Defendants raise three related issues on appeal. First, they contend that the trial court erred when it concluded that their use of the property was exclusive and hostile to plaintiff. Second, they contend that, even if their use was hostile and exclusive, the trial court erred by awarding any amounts for rent after entry of the temporary partition award. Third, they argue that the trial court's award of $1,000 a month lacked any evidentiary support and, therefore, must be set aside. Plaintiff generally argues to affirm the trial court on the first two claims of error, but also argues that the trial court's award of $1,000 a month lacked any evidentiary support and, therefore, ought to be returned to the value adopted by the commissioner.[2]

As this Court explained in *Quinlan Investment Co v The Meehan Cos, Inc*, 171 Mich App 635, 639; 430 NW2d 805 (1988):

> A tenancy in common is a legal estate, MCL 554.43, with each tenant having a separate and distinct title to an undivided share of the whole. Each is entitled to possession of the whole and every part thereof, subject to the same right in the other cotenants.
>
> Thus, while a cotenant's lease of his own interest in the property is not binding on the other cotenants, in the absence of authorization or ratification, it is not void and may bind the lessor's undivided interest. Simply put, the lessee steps

[2] Having filed a cross-appeal, plaintiff is not limited to arguing additional grounds for affirmance, but may advocate for a better award than it received. MCR 7.207; *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994).

into the shoes of the cotenant-lessor and may enter and use the premises subject to the same right of the other cotenants. [Citations omitted.]

Accordingly, under the law, the lease permitted Hox Acres to use the entirety of the property, just as Hoxsey could as a co-tenant. Moreover, because Hoxsey was a co-tenant, he could not lease to Hox Acres a specific parcel of the common estate. See *Pellow v Arctic Mining Co*, 164 Mich 87, 92; 128 NW 918 (1910). Thus, Hox Acres' use of the entirety of the property was consistent with Hoxsey's interest and not, by itself, evidence of exclusive and hostile use against Hoxsey's co-tenants. See *Metcalfe v Miller*, 96 Mich 459, 462; 56 NW 16 (1893) ("Not only is the possession of one the possession of all, but the tenants respectively have the present right to enter upon the whole land, and upon every part of it, and to occupy and enjoy the whole.").

Although a co-tenant who has consented to another co-tenants occupation of the premises owned in common may not recover rent from the occupying co-tenant, "where the question arises in partition proceedings in equity, and particularly when the possession has been exclusive, this court has recognized that in adjusting the equities of the parties the one who has had the exclusive occupation of the premises should account for its use and occupation." *Frenzel v Hayes*, 242 Mich 631, 636; 219 NW 740 (1928). However, the party who has had exclusive possession is still entitled to credit for the expenses on the subject property, such as taxes, paid by that party. *Id*. at 639.

Defendants argue that three reasons established their use was nonexclusive. First, there was sufficient evidence that they offered plaintiff the opportunity to participate in the business and receive two-thirds of the profits and that, by failing to accept this offer, plaintiff waived any right to claim exclusion. Second, the evidence established that plaintiff voluntarily declined to use the vacant acreage because it was unsure of its right to do so, and this voluntary declination waived any claim of exclusion. Third, plaintiff had no intended use for the property because, until the land was divided by a final partition, plaintiff could not pursue any land development.

As an initial matter, we note that during cross-examination, Hoxsey essentially agreed that he had exclusive use of the property before the effective date of the temporary partition order. This admission alone would be sufficient to reject defendants' argument of nonexclusive use, but even setting this testimony aside, defendants' propositions do not support their argument that their use was not exclusive or hostile to plaintiff's rights.

Regarding the first premise, the trial court disbelieved Hoxsey's testimony that, in 2019, he asked his attorney to send plaintiff's attorney an offer allowing plaintiff to participate in Hox Acres' business and receive two-thirds of the profit, because D'Agostino (the main partner for plaintiff) testified that he had not been informed of any such offer by his attorneys, and defendants had failed to produce any documentary evidence supporting Hoxsey's testimony, such as a copy of one of the alleged e-mails. As the finder of fact, the trial court is in a superior position to assess the credibility of the witnesses before it, and this Court defers to those determinations. MCR 2.613(C); *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000). Because the record supports the trial court's decision to reject this alleged defense of hostile and exclusive use, it cannot support defendants' claim of error.

Defendants' second premise, that plaintiff waived any claim of exclusion by voluntarily declining to use the vacant acreage, is also unavailing. D'Agostino testified that he understood that, as a co-tenant, there was a possibility he could be deemed to have a landlord-tenant relationship with Hox Acres and, therefore, he could not go onto the property and interfere with the ongoing business or he could be liable for treble damages. Regarding his "voluntary" decision not to make use of the "vacant" acreage containing hay, D'Agostino testified that he knew Hoxsey had a crop there and he would be risking liability if he went onto the land and ruined the hay, so he erred on the side of caution rather than risk a later determination that he interfered with Hoxsey's possession. But defendants' argument runs afoul of the fact that a lease entered into by a co-tenant "is valid as to the contracting parties *and the nonjoining cotenants must respect the rights acquired*. Even in an action for partition, equity will step in to protect the lessee if such can be done without injury to the rights of the other cotenants." *Quinlan*, 171 Mich App at 641 (citations omitted and emphasis added). Here, the terms of the lease permitted Hox Acres to use 100% of the property, so as a co-tenant, plaintiff was legally bound to respect Hox Acres' possessory rights under the lease. Accordingly, plaintiff's decision not to exercise its possessory rights to the property did not evidence a voluntary waiver but rather an acknowledgment of a legal obligation to respect Hox Acres' rights. Thus, plaintiff's refusal to enter and use the "vacant" property for fear of legal liability reinforced the trial court's finding that defendants used 100% of the property and did not permit plaintiff to exercise its occupancy rights. Defendants' contention that plaintiff's actions constituted waiver lacks merit.

Lastly, defendants argue that because plaintiff's intended use of the property was a single-family residential development, plaintiff could not pursue any development until the land was partitioned and, therefore, had no use for the property with which defendants could have been deemed to have interfered. This argument fails because, in this context, plaintiff's ultimate goal for the property is irrelevant. As a holder of an undivided two-thirds' interest in the property, plaintiff was entitled to use the property in any manner, as shown by defendants' alleged offer for plaintiff to share in the horse business.

In addition, as we previously noted, although plaintiff's ownership granted it the right to enter onto the property and do whatever it wished, Hox Acres was legally using the entire property consistent with its rights under the lease. Plaintiff could not enter onto the property without potentially interfering with Hox Acres' business or ruining the crop of hay. Although D'Agostino testified that he was eventually permitted to dig test holes related to development of the property, even then, the courts had to be involved. This evidence undermines defendants' argument in two ways. First, it establishes that there were actions plaintiff could take toward development of the property before a finalized partition occurred. Second, it establishes that defendants exercised complete control over the property because plaintiff could not even minimally enter the property and exercise its rights and dig the test holes without judicial help.[3]

[3] In their reply brief, defendants reference photographs provided to the trial court in response to plaintiff's motion for relief from the temporary partition judgment. The photographs purportedly show plaintiff "utilizing the vacant 50 acres to cultivate and remove the hay which had been growing on it." This evidence, at best, shows plaintiff's use of the property *after* the temporary

Next, defendants argue that the trial court erred when it awarded plaintiff any amount of rent as an adjustment to the equities, for any time after entry of the January 2020 temporary partition order. According to defendants, plaintiff conceded that point when it asserted that it was not waiving any claim for rent for the time period before a temporary partition, and the trial court then asked whether, "when this order goes into effect, that would seem[] to me terminate any claim for future rent, correct?[,]" to which plaintiff's counsel agreed. Generally speaking, "[a] party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal." *Grant v AAA Mich/Wis, Inc* (*On Remand*), 272 Mich App 142, 148-149; 724 NW2d 498 (2006) (citations omitted). Importantly, however, the temporary partition order only provides that rent is not owed for a party's use of the property it was awarded; the order does not preclude charging rent to a party using property that it was not awarded. We conclude that plaintiff's attorney responding to the court's general inquiry holds less weight than the parties' stipulation to the actual terms of the temporary partition order, which terms do not preclude the trial court from awarding rent to plaintiff if defendants used property over which plaintiff had been given exclusive possession and use. And, because the record establishes a pattern of refusal[4] by defendants to comply with the trial court's orders to give plaintiff exclusive possession and control of the property it was awarded, it was neither unreasonable nor inequitable for the trial court to award plaintiff owelty for a period beyond entry of the temporary partition order.[5]

Most importantly, however, defendants' argument ignores their continued failure to comply with the trial court's order to give plaintiff *exclusive* possession of its property—both before and after the final partition order. Whether the trailers were *only* 50 feet onto plaintiff's property, the customers were the ones riding horses on plaintiff's property, or Hoxsey spread manure on plaintiff's property just to fertilize the hay, are irrelevant facts. Irrespective of how minimal the encroachments and trespasses were or if they were committed by customers rather

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partition order, when the trial court granted plaintiff the right to do whatever it wanted with the property without risk of liability to Hox Acres. That evidence does not answer the question whether defendants' use was hostile and exclusive *before* entry of the temporary partition order.

[4] The record reveals not only that defendants violated the terms of the temporary partition order, but that they continually minimized such violations. Notably, after first denying the use of any portion of plaintiff's property for horse training or riding, Hoxsey admitted that there were three acres with a sand ring where jumps had been located for practicing. Hoxsey also admitted that certain photographs showed horse trailers on plaintiff's property, but argued that they were only about 50 feet onto the property and were not being stored there by him, but had been left there by a customer. Although Hoxsey claimed to have removed everything else from plaintiff's land and asserted that the sand ring was not currently being used, his testimony established that he had committed multiple violations of the temporary partition order.

[5] In their reply brief, defendants note that plaintiff harvested hay off of the property it was awarded in the temporary partition order. Although not expressly stated, we infer that defendants mean to argue that plaintiff was able to use the property and profit from that use, suggesting that the record did not support an award of rent to plaintiff for that time period. Defendants' failure to explicitly state and expand upon this argument is not sufficient for this Court to review it. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

than defendants, each one constituted a clear violation of the trial court's express orders requiring defendants give plaintiff *exclusive* use and possession of that property. Exclusive use meant that defendants could not use the property awarded to plaintiff *at all*; not even a *de minimis* amount. "[A] trespass violate[s] a landholder's right to exclude others from the premises." *Adams v Cleveland–Cliffs Iron Co*, 237 Mich App 51, 60; 602 NW2d 215 (1999). Thus, each of defendants' encroachments occurring after entry of the temporary partition order constituted a legal trespass for which plaintiff was entitled to recover at least nominal damages. *Id.*

Defendants also argue that owelty was inappropriate because plaintiff was unable to use the property while waiting for the final partition order. In addition to the record evidence already discussed that establishes there were purposes to which plaintiff could put the property before partition was completed, this argument ignores the basic premise that, even if a property owner has no specific use for an area of land, he is still entitled to stop others from putting anything on the land he does not want. Notably, it was defendants' violations of the temporary partition order that prompted entry of the September 2020 clarification order, which required the parties to "strictly abide" by the terms of the temporary partition order.

Given that partition in an equitable action, and the trial court must grant or deny relief "as dictated by good conscience," *In re Temple*, 278 Mich App at 142, defendants continued refusal to stop using plaintiff's property even after entry of multiple court orders provided a more than sufficient basis on which the trial court could award owelty for the time after the temporary partition order was entered. Additionally, because the September 2020 order allowed the parties to seek sanctions "or other relief" for violations of the temporary partition order, the trial court's consideration of the violations was not simply permissible under equity, but consistent with its orders. It was neither unreasonable nor inequitable for the trial court to take that into consideration when awarding owelty.

Lastly, we consider both parties' arguments that the trial court erred when it awarded $1,000 a month for owelty, because that figure had no evidentiary support. Looking first to plaintiff's argument, we agree that the appraisal could have supported an owelty award of $4,166 a month. However, the trial court expressly rejected the appraisal and adequately supported its decision to do so. There was no evidence that anyone would have rented the property at the appraiser's calculated rate and no comparables supporting the calculation, and the trial court noted the appraiser's failure to calculate the rental value on the basis of the property's current use. Importantly, plaintiff's initial claim of entitlement to rent was premised on Hox Acres not owing rent under its lease. Presumably, if the lease *had* included a provision for rent, the amount would have been premised on and calculated with respect to Hox Acres' use of the property as a farm and horse business, not as a single-family residential development, and would certainly not have been equal to the amount of an expected rate of return on a hypothetical investment having the same value as the property. In addition, the trial court noted that the property could not have been used as single-family home immediately, but required development. Therefore, to the extent plaintiff was entitled to any figure for rent as an adjustment of the equities, the trial court's decision to award an amount less than that calculated by the appraiser was premised on good conscience and, therefore, was a valid exercise of its discretion. *In re Temple*, 278 Mich App at 142.

As for defendants contention that, once the trial court rejected the appraisal value, there was no evidence left in the record from which owelty could be calculated, this argument ignores

both the equitable nature of owelty, which gives rise to the trial court exercising its discretion, and that when the trial court acts as the fact-finder for the value of an asset, a trial court is free to accept either party's valuation or to find some middle ground. See *Pelton v Pelton*, 167 Mich App 22, 25-26; 421 NW2d 560 (1988) and *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994) (holding that there is no clear error where a trial court's valuation of a marital asset is within the range established by the proofs).

Here, defendants' argument was that no owelty was owed, while plaintiff relied on the appraisal to argue that it was entitled to $4,166 a month in owelty. However, the law is clear that a co-tenant is entitled to compensation when it is excluded from exercising its possessory interest in the property, *Frenzel*, 242 Mich at 636, and the trial court stated that it was "satisfied" that Hoxsey had used 100% of the property and excluded plaintiff "by dumping manure on the Property, operating a horse boarding business, cultivated and harvested hay, having debris and cattle throughout the Property and otherwise exercising dominion and control over the same." Therefore, its determination that an adjustment of the equities in plaintiff's favor would be necessary as remuneration for defendants' actions demanded a value above $0. At the same time, the trial court provided multiple logical bases for rejecting the appraiser's $4,166 a month rental value. Acting as the fact-finder, the trial court's decision to select a value of $1,000 a month, which had a reasoned basis in the evidence, was not erroneous. See *Jansen*, 205 Mich App at 171.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Kathleen Jansen
/s/ Christopher M. Murray