

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

MEGAN LEIGH MORRISON,

Appellant,

v.

TIMOTHY D. SMOLARICK,

Appellee.

No. 2D20-2693

January 28, 2022

Appeal from the Circuit Court for Sarasota County; Maria M. Ruhl,
Judge.

Gregg Horowitz, Sarasota, for Appellant.

Sheryl A. Edwards of The Edwards Law Firm, PL, Sarasota, for
Appellee.

KELLY, Judge.

Megan Morrison appeals from a final money judgment entered
against her in a partition action. We agree with Ms. Morrison that
the trial court was not authorized to award money damages in an

action for partition under chapter 64, Florida Statutes (2018).

Accordingly, we reverse.

The parties owned a home as joint tenants with the right of survivorship. Mr. Smolarick filed a complaint for partition and asked the court to order a private sale of the property and hold the proceeds in escrow pending a judicial determination of the interests of the parties to the proceeds. See §§ 64.061(4), .071. The court ordered the sale of the property and appointed a special master to effectuate the sale. The court also ordered each party to pay half of any fees required by the special master. This order constituted a final order of partition because it directed the sale of the property. See *Camp Phosphate Co. v. Anderson*, 37 So. 722, 726 (Fla. 1904) (holding that an order of partition is final when the court orders the sale of the property). A partition order directing the sale of property is final even when the court retains jurisdiction "for the purpose of adjusting, by a further decree, the accounts between the parties." *Id.* (quoting *Bellamy v. Bellamy*, 4 Fla. 242, 254 (1851)). No appeal was taken from the final order of partition.

The property sold at a price below the amount owed on the mortgage resulting in zero net profit from the sale. Thus, there

were no funds to be deposited into the registry of the court and divided among the parties. *See* § 64.071(1). In fact, there was a deficit that the parties were ordered to pay in addition to the special master's fees and costs. The order compelling the payment of these sums was not appealed.

Notwithstanding the fact that after the sale there were no funds left to be divided, Mr. Smolarick noticed the case for trial and filed witness and exhibit lists in anticipation of a trial at which the court could determine the amount of reimbursable expenses he was entitled to recover. Ms. Morrison objected arguing a trial was unnecessary because there were no funds to distribute and that because Mr. Smolarick's complaint only sought partition, he was not entitled to a money judgment reimbursing him for the expenses. The trial court went forward with the trial and entered a money judgment in favor of Mr. Smolarick in an amount representing reimbursable expenses Mr. Smolarick paid when the parties were co-owners.

On appeal, Ms. Morrison argues that neither chapter 64 nor the case law applying it authorize entry of a money judgment where only partition is sought and the partition sale resulted in zero

proceeds. We agree. A partition action commences a legal proceeding to divide cotenants' interests in a real property. See *Condrey v. Condrey*, 92 So. 2d 423, 426 (Fla. 1957) (noting that partition actions are a matter of right), *superseded by statute on other grounds as stated in Durand v. Durand*, 16 So. 3d 982, 984 (Fla. 4th DCA 2009); see also *Green v. Green*, 16 So. 3d 298, 301 (Fla. 1st DCA 2009) (explaining that partition proceedings are equitable in nature). Partition is achieved by ordering the physical division of the property or, if indivisible, by sale after which the proceeds are divided. § 64.061(4) (providing that where property is indivisible, the court may order it sold); § 64.071(1) ("[T]he court may order the land to be sold . . . by the commissioners or the clerk and the money arising from such sale paid into the court to be divided among the parties in proportion to their interest.").

After the sale, "the court impounds the fund consisting of the proceeds of sale and conducts proceedings to establish the credits due to the parties and to determine the final amount awarded to each." *McFall v. Trubey*, 992 So. 2d 867, 870 (Fla. 2d DCA 2008).

"[A] cotenant paying obligations of the property is entitled to a credit from the proceeds of the sale for the other cotenant's proportionate

share of those expenses." *Biondo v. Powers*, 743 So. 2d 161, 164 (Fla. 4th DCA 1999). Neither the statute nor the case law provides for an award of money damages in lieu of a credit against the proceeds of the sale. Nor would it be consistent with the nature of the remedy of partition—either the property is divided or, if it cannot be divided, the funds from its sale are divided. As this court explained in *McFall*, 992 So. 2d at 870, the amounts sought after a partition sale are not "damages" but rather are simply "credits" to be awarded in the allocation of the fund. Accordingly, the final money judgment entered in favor of Mr. Smolarick is reversed and we remand for the trial court to vacate that judgment.

Reversed and remanded.

SILBERMAN and LUCAS, JJ., Concur.

Opinion subject to revision prior to official publication.