

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

MARCH 4, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

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No. 96-1543

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

RICHARD I. ANDRE,

Plaintiff-Respondent,

v.

**ELEANOR M. TOBON and
NORMAN C. ANDRE,**

Defendants-Appellants.

APPEAL from a judgment and an order of the circuit court for Sawyer County: FREDERICK A. HENDERSON, Judge. *Reversed and cause remanded.*

Before Cane, P.J., Myse and Madden, JJ.

PER CURIAM. Eleanor Tobon and Norman Andre appeal a summary judgment in a partition lawsuit that mandated a judicial sale of a 506-acre real estate parcel they co-owned as tenants in common with their brother Richard Andre. The parcel contains a landlocked forty-three-acre private lake. Richard sought the parcel's partition by sale. Eleanor and Norman asked for partition in kind. The trial court ruled that the parcel was unique and that a partition by sale would maximize the parcel's sale value. The trial court also

granted each co-owner rights of first refusal on the sale. The trial court may grant summary judgment if Richard showed no dispute of material fact and deserved judgment as a matter of law. See *Powalka v. State Life Mut. Assur. Co.*, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). However, we agree with Eleanor and Norman that the parties' affidavits contain disputes of material fact. We therefore reverse the summary judgment and remand the matter for further proceedings.

Courts of equity may order partition by sale against the will of a landowner only if the partition in kind would create a substantial economic loss to a co-landowner. *Marshall & Ilsley Bank v. DeWolf*, 268 Wis. 244, 247-48, 67 N.W.2d 380, 382 (1954). Partition in kind is the rule, partition by sale the "extraordinary and dangerous" exception. *Id.* at 247, 67 N.W.2d at 382. Courts have recognized that partition by sale, like other forced judicial sales, ordinarily brings much less than the real estate's true value. *Id.* at 249, 67 N.W.2d at 383. Moreover, courts of equity do not have the power to require partition by sale on the ground that it would leave the landowners better off economically than partition in kind. *Id.* at 248-49, 67 N.W.2d at 383-84. Landowners are *sui generis*; they are entitled to have their real estate in kind, absent material and substantial economic prejudice to another co-landowner. *Id.* Partition by sale claimants have the burden of proof on the matter. *Id.* at 248, 67 N.W.2d at 382.

Here, Eleanor's and Norman's real estate expert claimed partition in kind physically suited the land and would not reduce the entire parcel's overall sale value. On the other hand, Richard's experts claimed that partition in kind would not physically suit the land and would substantially reduce the parcel's overall sale value. Richard's expert, however, did not quantify this reduction or support it with specific facts. Instead, it addressed the matter in generalities. In addition, Richard had a standing offer from Eleanor and Norman to buy Richard's undivided one-third interest at 120% of the value at which their expert appraised the interest. This creates an inference, at least at the summary judgment stage, that separate sales on separate parcels would give each owner adequate sale value. Taken together, the affidavits reveal disputed material facts on whether partition in kind physically suited the land and on whether partition by sale would produce a materially and substantially better economic value than partition in kind. In sum, the parties' affidavits did not rebut the presumption against a partition by sale, and the trial court should have denied Richard's motion for summary judgment.

Last, we reject Richard's argument that the trial court judgment and order was nonfinal and therefore not appealable as a matter of right. He states that the trial court proceedings will not be final until the trial court confirms the sale of the property. We agree with Eleanor and Norman that the doctrine applied in *Shuput v. Lauer*, 109 Wis.2d 164, 325 N.W.2d 321 (1982), should apply by analogy to partition by sale proceedings. The *Shuput* court held that mortgage foreclosure judgments were appealable final judgments despite the fact that the trial court would eventually need to issue a subsequent order confirming the property's sale. The supreme court concluded that the foreclosure and the subsequent confirmation were separate proceedings and thereby separately appealable as a matter of right. *Id.* at 172, 325 N.W.2d at 326. The trial court's judgment and order mandating partition by sale stands in the same position. As a result, we conclude that the supreme court's *Shuput* doctrine applies to the trial court's judgment and order mandating partition by sale, and the judgment and order was thereby appealable as a matter of right.

By the Court.—Judgment and order reversed; cause remanded for further proceedings consistent with this opinion.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.