

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 23-0394

DAN H. WOODARDS, JR.,
Plaintiff/Appellant,

v.

GARY WOODARDS, CAROL WOOD, TERRI LASELL, BARBARA
WOODARDS, ESTATE OF DAN HOOVER WOODARDS, SR.,
and ESTATE OF DORIS WOODARDS
Defendants/Respondents.

Appeal from the Second Judicial District Court, Silver Bow County
Cause No. DV-20-385
The Honorable Robert J. Whelan, Presiding

APPELLANT'S OPPOSITION TO APPELLEES' MOTION TO DISMISS

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COMES NOW Appellant Dan H. Woodards, Jr., by and through his counsel of record, David L. Vicevich, and lodges his opposition to Appellees' Motion to Dismiss.

PROCEDURAL AND FACTUAL BACKGROUND

Appellees' description of the procedural and factual background in this matter highlights the confusion caused by their attempts at combining multiple steps into one motion or order and the District Court signing orders with relief the sibling Appellees are not entitled to.

Dan agrees with his siblings' rendition of the facts and procedural posture for the first two paragraphs of that section of their motion to dismiss. Dan agrees that a Motion for Determination of Value & Partition by Sale was filed February 23, 2023. The Notice of Withdrawal of Dan's objection stated that he would "accept the determination of value of the properties at issue as set forth by Defendants in the exhibits to their March 20 motion." *Doc. 53, Page 1*. At no point did Dan consent to partition by sale.

Pursuant to M.C.A. § 70-29-410(7), the Court provided the parties with its Order for Determination of Value of the properties on April 24, 2023. *Doc. 55*. On July 13, 2023, with no cotenant exercising his right to purchase the properties under M.C.A. § 70-29-411, the sibling Appellees filed a Motion for

Order for Sale of Heirs Property. *Doc. 57*. The Order for Partition for Sale of Heirs Property was entered the same day. *Doc. 58*.

ARGUMENT

The internal inconsistencies in the sibling Appellee's Motion to Dismiss makes responding difficult.

First, the siblings argue that “[n]one of the rulings in this matter have been certified as final for purposes of appeal as provided by M. R. Civ. P. 54(b).” *Motion to Dismiss, Page 3*. But, in Sections II and III of their motion, Appellees argue that appeal of the “Order for Determination of Value and Partition by Sale” entered on April 24, 2023 and the “Order on Cross Motions for Partial Summary Judgment and Motion for Determination of Heirs Property” dated October 4, 2021¹ were both untimely filed.

In other words, according to the sibling Appellees, Dan filed his Notice of Appeal both too early, and too late.

¹ The heading in Section III says “Order for Partition for Sale of Heirs Property is not appealable as the appeal is untimely filed”, but the first paragraph states the court entered the order 288 days before the notice of appeal was filed, so Dan assumes his siblings meant to reference the summary judgment ruling from October 4, 2022.

A. The July 13, 2023 Order is final for purposes of appeal.

A review of the three relevant Orders in this matter makes it apparent that only the July 13, 2023 Order was final and appealable.

In its October 4, 2022 Order on Cross Motions for Partial Summary Judgment and Motion for Determination of Heirs Property, the Court stated:

Defendants motion that property be partitioned under Mont. Code Ann. Title 70, Chapter 29, Part 4, the Uniform Partition of Heirs Property Act, is hereby granted. This partition action shall proceed under Mont. Code Ann. Title 70, Chapter 29, Part 4, the Uniform Partition of Heirs Property Act.

Doc. 42, pg 6.

Working its way through the Heirs Act, the Court set the value of the properties in its April 24, 2023 Order pursuant to M.C.A. § 70-29-410(7). The sibling Appellees now claim that order also ordered the sale of the property. However, that cannot be because M.C.A. § 70-29-411(4)(c) states:

If no cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall send notice to all the parties of that fact and resolve the partition action under 70-29-412(1) and (2).

Once the cotenants all declined to purchase the properties, the Heirs Act required a separate step to actually “resolve the partition action.” M.C.A. § 70-29-411(4)(c). Likely recognizing the need for an additional order to sell

the property, on July 13, 2023 the sibling Appellees filed a Motion for Order for Sale of Heirs Property. *Doc. 57*. If Appellees truly believed that the April 24, 2023 Order [*Doc. 55*] properly resolved the case, as they now argue on page 4 of their Motion to Dismiss, then there would have been no need to seek an Order for Sale of Heirs Property as they requested on July 13, 2023. Instead, pursuant to M. R. App. P. 6(3)(i), the July 13, 2023 Order [*Doc. 55*] was the first appealable order because it directed that a partition be made.

Additionally, though this began as a regular partition action, by the Court holding that this case was governed by the Heirs Act [*Doc. 42*], it is appropriate to treat the July 13, 2023 Order [*Doc. 55*] as “[a]n order directing . . . the partition, sale, or conveyance of real property. M. R. App. P. 6(4)(d).

B. Prior orders can be reviewed on appeal.

While the July 13, 2023 Order was the first final and appealable order Dan could base his Notice of Appeal on, he also challenges aspects of the April 23, 2023 Order, and the October 4, 2022 Order.

Under M. R. App. P. 6(1), “[u]pon appeal from a final judgment entered in an action or special proceeding in a district court, this court may review the judgment, **as well as all previous orders and rulings excepted or objected** to which led to and resulted in the judgment.” (emphasis added). The sibling

Appellees assert that Dan did not object to the April 23, 2023 Order because he withdrew his objection. *Motion to Dismiss*, pg. 2. This argument ignores that the Notice of Withdrawal of Dan's objection was specific in its scope, limiting the objection he was withdrawing to issues regarding the determination of value of the properties at issue. *Doc. 53, Page 1*. Dan did not withdraw his objection to an unsupported request for discovery sanctions, nor did he agree somehow consent to a sale by partition several months before that relief was properly before the Court. *Id.*

C. Dismissal for 54(b) certification appropriate if Court will not hear matter on the merits.

Though Dan believes this appeal Appellees' Motion to Dismiss should be denied based on the timely filing of his Notice of Appeal just five days after entry of a final and appealable order, so that this Court can rule on the merits of the appeal, as an alternative Dan is willing to accept his siblings' argument that no final order has been entered and return to District Court to obtain a Rule 54(b) certification so that this appeal can be refiled.

CONCLUSION

Based on the foregoing facts and arguments, Plaintiff respectfully requests this Court deny Appellees' Motion to Dismiss.

RESPECTFULLY SUBMITTED this 29th day of November, 2023.

/s/ David L. Vicevich

David L. Vicevich

Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate procedure, I certify that this brief is printed with a proportionately spaced Times New Roman non-script text typeface of 14 points; is double spaced except for quoted and indented material; and the word count calculated by Microsoft Word totals 1,075 words, excluding table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 29th day of November, 2023.

/s/ David L. Vicevich

David L. Vicevich

Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of November, 2023, the foregoing APPELLANT’S OPPOSITION TO APPELLEE’S MOTION TO DISMISS was e-served on all interested parties by the Montana Supreme Court’s ePass MT to the following:

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/s/ David L. Vicevich

David L. Vicevich
Attorney for Appellant

CERTIFICATE OF SERVICE

I, David L. Vicevich, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to Dismiss to the following on 11-29-2023:

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Service Method: eService

Electronically Signed By: David L. Vicevich

Dated: 11-29-2023