



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



HAL OWENS v. M.E. SCHEPP LIMITED PARTNERSHIP
1 CA-CV 06-0162; CV-07-0349-PR

PARTIES AND COUNSEL:

Petitioner/Appellee: Hal Owens (“Owens”), represented by Jordan Green and Steven J. Monde of Perkins Coie Brown & Bain, P.A.

Respondent/Appellant: M.E. Schepp Limited Partnership (“Schepp”), represented by Joseph I. McCabe and Clifford J. Roth of McCabe O’Donnell, P.A.

FACTS:

The parties to this lawsuit own undivided interests as tenants in common in Lots 17, 18 and 20, contiguous parcels of residential property located in Phoenix. Owens owns a two-thirds interest and Schepp owns a one-third interest. Lots 17 and 18 are vacant; a residence and guest house are located on Lot 20. The co-managing partners of Schepp are brothers Rex and Thomas Schepp, Owens’s cousins. Thomas resides in the home on Lot 20, and the guest house is rented to third parties.

Owens initiated this lawsuit in May 2005, seeking statutory partition of the lots pursuant to A.R.S. §§ 12-1211 to -1225 (2003), and an accounting of rents and profits. Schepp answered and counterclaimed for specific performance of an alleged voluntary partition agreement or, alternatively, damages for a purported diminution in value of Lots 17 and 18 caused by Owens’s removal of mature trees from those lots.

Owens filed a motion for partial summary judgment on the counterclaim and for appointment of commissioners to begin the process of statutory partition. Schepp filed a response in opposition to the motion, contending that statutory partition was not available to Owens because he had entered into the voluntary partition agreement. In a minute entry filed October 4, 2005, the trial court granted Owens’s Motion for Partial Summary Judgment re: Counterclaim, Partition and Appointment of Commissioners, with the following explanation:

There is no dispute that [Owens] is owner of an undivided two-third interest in the subject property, Lots 17, 18, & 19. There is also no dispute as to the facts surrounding the efforts to settle the dispute. There was never an agreement as to how the property is to be divided between the parties. [Owens] is entitled to judgment on the counterclaim.

Following the disposition of post-hearing motions, the trial court entered formal judgment, and Schepp filed a timely notice of appeal.

In an opinion filed August 23, 2007, a majority of the court of appeals' panel ("Majority") reversed the trial court's entry of partial summary judgment in favor of Owens. The Majority held that the trial court erred by failing to find issues of fact concerning the existence and enforceability of an oral, voluntary partition agreement. Owens filed his petition for review on September 25, 2007. Schepp filed its response on October 29, 2007.

ISSUE:

Part performance that is "unequivocally referable" to an oral contract is recognized as an exception to the Statute of Frauds. Here, the Court of Appeals held that oral explanations by the proponent of the exception could be used to determine whether the part performance alleged was "unequivocally referable" to an oral contract. The question presented is whether consideration of evidence other than the act of part performance was error.

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