Circuit Court for Allegany County
Case No. C-12-38084

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 449

September Term, 2017

BERNARD W. MILTENBERGER

v.

MARY C. MILTENBERGER

Friedman,
Beachley,
Shaw Geter,

JJ.

Opinion by Friedman, J.

Filed: August 3, 2018

In this long running saga concerning division of the parties' family farm, Appellant Bernard W. Miltenberger alleges that the circuit court erred by reopening a case beyond the 30-day period permitted for revision under Maryland Rule 2-535. Appellee, Mary C. Miltenberger, Bernard's Mother, argues by contrast that the court was permitted to reopen the case to enforce the terms of a settlement agreement under Maryland Rule 2-506(b). We do not reach either theory, however, as we hold that Son's appeal is moot. Therefore, we dismiss the appeal.

FACTS AND LEGAL PROCEEDINGS

On October 4, 2005, Mother deeded an approximately 245 acre parcel of real property in Allegany County, then owned solely by her, to herself and Son, as joint tenants with rights of survivorship. Later, apparently worried that Son would deny access to the family farm located on the property to her other six children after her death, Mother severed the joint tenancy and executed a new deed so that she and Son would hold the property as tenants in common. In November 2012, Mother filed a complaint for partition of land, alleging that she and Son were unable to reach an agreement as to the disposition of the property—Mother wanted to sell the property to alleviate ongoing financial concerns and Son refused.

Son moved to dismiss Mother's complaint, contending that her desire to partition the land arose from a personal dispute between her and Son, concerning, in part, Mother's alleged mental illness and admission of "a series of con men" into her life. In Mother's response to the motion, she argued that Son's motion failed to provide a legal basis for

dismissal and that she had a statutory right to the relief she requested in her complaint. The circuit court denied Son's motion and scheduled trial on October 29, 2013.

At trial, Mother detailed her sole ownership of two acres of the larger parcel and her desire to partition the land "so that [Son] has a separate piece and [Mother] can have the land that is under the conservation easement attached to the acreage that [she] already own[s]"[1] because her two acre parcel was otherwise landlocked and not saleable. Mother wished to sell the property because she lacked the income to maintain it. Son declared his strong desire to keep the "historic farm" intact as a family property.

The trial court determined that the property could be partitioned without damage to its value. And, as the law permits any tenant in common of a parcel of real property to seek partition and sale—*see* Md. Code, Real Property Article ("RP) §14-107—the court ordered that the property be partitioned. It also ordered that commissioners be appointed to recommend a partition line for the property.

Son requested a postponement of the appointment of the commissioners, claiming that Mother, without his knowledge or permission, had removed 125 acres of cut timber from the property, and received $57,050 for the sale. He asked for the postponement to address the "damages and injury brought upon him" by Mother. The court denied the request and appointed three commissioners to determine how to divide the property.

[1] Mother had explained that all but 40 acres of the 245 acre parcel, which the family referred to as "the back forty," was subject to a conservation easement for farming purposes. Mother's expert surveyor agreed that "the back forty" was capable of being partitioned from the rest of the property.

The commissioners recommended division parameters that would provide approximately 123 acres to Son and approximately 112 acres to Mother. Mother filed exceptions to the commissioners' report, complaining that it contained no explanation or analysis of its recommendation, did not fairly and equally divide the property, and impinged upon the property owned solely by Mother. Son also excepted to the commissioners' report, on the ground that the proposed conveyance denied him the use and value of any improvements on the property.

Just four days before the scheduled hearing on the exceptions, Mother and Son filed a joint motion to refer the matter to mediation. The court continued the exceptions hearing for a period not to exceed 60 days so that the parties could participate in mediation. At mediation, Mother and Son reached a tentative agreement, which was reduced to writing and signed by both parties. Mother and Son, therefore, dismissed the case.

When surveyors returned to the property, however, it was clear that Mother and Son still disagreed about how the property was to be partitioned. As a result, Mother moved to have the court rescind the agreement signed during the mediation, based on mutual mistake regarding the partition boundary line, and to reset the matter for the exceptions hearing. Son disagreed with Mother and claimed that the settlement agreement reached at mediation had resolved all claims between the parties and that, given their dismissal of the matter, the court had no authority to determine the validity of the mediated agreement.

The circuit court scheduled a hearing on Mother's motion but prior to it, Mother and Son reached an agreement regarding the partition line and submitted a plat to the court showing how the property would be partitioned. Believing an agreement had been reached,

Mother withdrew her motion and dismissed the action. The court filed a written order dismissing the proceedings on February 3, 2015.

On April 4, 2016, Mother filed a motion to enforce the settlement agreement. She argued that she had had deeds prepared that properly reflected the partition line agreed upon by the parties, but that Son claimed they were inaccurate and refused to sign. Mother claimed that Son's refusal to sign the deeds was in bad faith and without substantial justification. Son maintained that "an agreement was reached at the mediation on August 18, 2014, and that that agreement should be given full force and effect."

The court heard argument on Mother's motion to enforce the settlement agreement, at which Son argued that the court's dismissal of the action on February 3, 2015 constituted a final judgment, and thus divested the court of its jurisdiction to take further action in the case. He argued that, in the absence of a claim of fraud, mistake, or irregularity, the court should dismiss the matter, and require Mother, if she wished to move forward, to institute a new cause of action. Mother countered that a predicate of the settlement agreement, including the dismissal of the matter, was the partition of the property according to the terms of the settlement agreement, and that had not occurred despite her many attempts to make it happen.

The circuit court agreed that in the absence of fraud, mistake, or irregularity, it was unable to set aside its dismissal. The court therefore denied Mother's motion to enforce the settlement agreement "based on the fact that this case is concluded" but left open the possibility of her filing a new complaint.

Mother then filed a motion for the court to exercise its revisory power to vacate its dismissal of her motion to enforce the settlement agreement, pursuant to Maryland Rule 2-506(b), which allows the court to reopen an action that was settled and dismissed to enforce the terms of the settlement agreement. Son disagreed, responding that, in the absence of fraud, mistake, or irregularity, the court had no authority to exercise its revisory power.

The court vacated its previous dismissal of Mother's motion to enforce the settlement agreement and scheduled the matter for a hearing. At the hearing, the parties informed the court that they had reached a settlement and signed a consent order, which was introduced into evidence. Attorneys for Mother and Son were confident that they had reached a "final agreement," which directed the preparation of deeds conveying the property to each as depicted in a boundary survey plat that the parties submitted to the court. The consent order contained a default provision that if either party failed to sign the deeds within 15 days, his or her attorney would be appointed as trustee to sign on behalf of the non-complying party "so that we have an end to the process." The consent order also expressly provided that "[t]he proceedings shall remain open until the parties have executed the deeds and fully consummated the settlement as set forth herein whereupon the parties, by their respective counsel, shall dismiss these proceedings." The court accepted and signed the consent order.

Three months later, Mother filed a motion to require execution of the deeds, stating that although Son had acknowledged receipt of the deeds signed by Mother, he had not signed them, nor permitted his attorney to sign them on his behalf within the fifteen day period. Mother therefore requested the court to order Son's attorney, or appoint an

alternate, to sign the deeds, consistent with the parties' agreement and the existing consent order.

The court granted Mother's motion to enforce the consent order. When Son continued to refuse to sign the deeds, the court granted Mother's request for alternate relief and appointed one of Mother's attorneys, Ramon Rozas, III, as trustee of Son with the power and authority to sign the deeds on Son's behalf. Mr. Rozas executed the deeds and they were recorded in the land records office. Son timely appealed the court's order.

DISCUSSION

Son argues that the circuit court did not have jurisdiction to entertain Mother's motions to enforce the settlement agreement in 2016 and to enforce the consent order and appoint a trustee in 2017, after it had dismissed the case in 2015. In his view, the 2015 dismissal of the case without prejudice permitted Mother to file another lawsuit seeking to enforce the agreements on an alleged breach of contract claim, but it foreclosed any further action by the court in the original action in the absence of fraud, mistake, or irregularity, pursuant to Maryland Rule 2-535(b).[2] Therefore, he concludes, the court's ultimate order appointing a trustee to transfer the property was an abuse of its discretion and void.

Mother counters that the circuit court had the authority to reopen the case in September 2016 for the purpose of enforcing the settlement agreement, pursuant to Md.

[2] Rule 2-535(a) permits the court to exercise revisory power and control over entry of judgment upon motion filed within 30 days after entry of judgment. Pursuant to Rule 2-535(b), however, after the expiration of the 30 days, the court may only exercise revisory power and control over the judgment in the case of fraud, mistake, or irregularity.

(Continued)

Rule 2-506(b).[3] And, when the parties signed their consent order settling all issues, they agreed to sign the deeds within 15 days. The order clearly provided that if either refused to sign, the non-compliant party's attorney could execute the deeds on his client's behalf. Mother thus argues that the issue raised by Son in his appeal is moot because he executed the consent order subsequent to the court's reopening of the action, which estopped his ability to appeal.

Although it would appear that Rule 2-506(b) permitted the court to re-open the case after it dismissed it to enforce the terms of the settlement agreement, we need not determine the applicability of the Rule, as there is no question that Son later acquiesced to the terms of the consent order and is not entitled to appeal. We therefore dismiss his appeal.

Ordinarily, no appeal will lie from a consent judgment. *Osztreicher v. Juanteguy*, 338 Md. 528, 534 (1995). As the Court of Appeals explained in *Osztreicher*: "It is well settled in Maryland that the right to appeal may be lost by acquiescence in the validity of the decision below from which the appeal is taken." *Id.* (cleaned up).[4] Thus, "a litigant who acquiesces in a ruling is completely deprived of the right to complain about that ruling."

[3] Rule 2-506(b) states: "If an action is settled upon written stipulated terms and dismissed, the action may be reopened at any time upon request of any party to the settlement to enforce the stipulated terms through the entry of judgment or other appropriate relief."

[4] "Cleaned up" is a new parenthetical intended to simplify quotations from legal sources. *See* Jack Metzler, *Cleaning Up Quotations*, 18 J. APP. PRAC. & PROCESS 143 (2017). Use of (cleaned up) signals that to improve readability but without altering the substance of the quotation, the current author has removed extraneous, non-substantive clutter such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization.

Id. at 535; *see also In re Nicole B.*, 410 Md. 33, 64 (2009) (a party "is not entitled to appeal from a judgment or order if that party consented to or acquiesced in that judgment or order"); *Barson v. Md. Bd. of Phys.*, 211 Md. App. 602, 614 (2013) ("As a matter both of law and common sense, someone who has agreed to a consent order or consent judgment can't be aggrieved by it.").

Here, Son complains that the circuit court lacked jurisdiction to entertain Mother's April 2016 motion to enforce the settlement agreement after having dismissed the matter in February 2015 and therefore ultimately lacked the authority to appoint a trustee to execute the deeds on his behalf in April 2017. The court's dismissal and reopening of the case, however, are really of no moment. Prior to the November 2016 hearing on Mother's motion to enforce the settlement agreement, Son executed a consent order, which settled all pending matters, stipulated the terms of the partition of the property, provided for the execution of the deeds, and stated that the case would be dismissed after the terms of the order were fulfilled. Later, when Son refused to sign the deeds as provided in the consent order, Mother moved to require the execution of the deeds, which the court accomplished by the appointment of a trustee to sign the deeds on Son's behalf. Son filed his notice of appeal several weeks after the deeds were executed and filed with the land records office of Allegany County, pursuant to the terms of the consent agreement.

In acquiescing to the terms of the consent order subsequent to the reopening of the case, Son surrendered his right to appeal from the court's decision to reopen the matter.[5] *See Globe Am. Cas. Co. v. Chung*, 322 Md. 713, 717 (1991) ("Where a party consents to judgment in a case, the party ordinarily may not appeal and obtain review of an earlier adverse ruling in that case."). We therefore dismiss Son's appeal.

APPEAL DISMISSED; COSTS TO BE PAID BY APPELLANT.

[5] We point out that nowhere in his brief does Son challenge the terms of the consent order itself or suggest that he was impermissibly coerced into signing it.