

STATE OF VERMONT

SUPERIOR COURT  
Washington Unit

CIVIL DIVISION  
Docket No. 7-1-21 Wncv

THE ESTATE OF JOHNSON LEE,  
Plaintiff,

v.

ANDREW LEE, JONATHAN K. LEE, and  
VIRGINIA LEE,  
Defendants

RULING ON DEFENDANTS' MOTIONS TO AMEND, FOR CLARIFICATION  
AND FOR PRELIMINARY INJUNCTION (Motions #6 and 7)

This is a partition action relating to a 125-acre parcel of undeveloped land in Waitsfield, Vermont. The parcel is owned by the four parties to this case, and it is undisputed that each party owns a one-fourth undivided share of the property as tenants in common. The parties disagree, however, over what should be done with the property. Plaintiff and Defendant Virginia Lee contend that the property should be sold, and the proceeds divided equally between the parties. Defendants Andrew and Jonathan Lee contend that the property should be divided into four equal parts, one for each party, an outcome that the other parties claim not to be feasible under the Town of Waitsfield's zoning ordinance.

On November 15, 2021, the Court issued a ruling granting Plaintiff's motion for partial summary judgment. The Court determined that it was an undisputed fact that the parties to this action had entered into a settlement agreement at mediation in 2012 in which the parties agreed to sell the property in Waitsfield (Ruling on Plaintiff's Motion for Summary Judgment, 11/15/21, at 3). The Court therefore ordered as follows:

The 125-acre undeveloped parcel of land owned by the parties in Waitsfield, Vermont shall be sold for its highest possible price. The Plaintiff shall control the sale. The net proceeds of the sale shall be placed in escrow, and shall remain in escrow pending further order of the Court.

In the meantime, within ten (10) business days the parties shall agree upon and submit to the Court a proposed scheduling order for the resolution of all accounting issues and disputes relative to the parties' respective shares of the proceeds from the sale of the property. If the parties cannot agree on a schedule, then each party shall file his, her and its own proposal within that same deadline, and the Court will choose one of them.

(Id, at 3-4).

Plaintiff submitted a proposed scheduling order for the Court's consideration, but the Defendants did not. Therefore, on December 8<sup>th</sup> the Court signed the Plaintiff's proposed order, and the Clerk entered it on December 12<sup>th</sup>. The order included the following provision:

... Consistent with the Court's November 15, 2021 Order, the Estate shall sell the property in a reasonable amount of time using its reasonable and best efforts to sell the property for the highest possible price under the circumstances. To accomplish this ... the Estate is permitted to:

- a. Select the realtor(s) used to sell the property;
- b. Determine the listing price and sales price for the property based on consultation with the selected realtor;
- c. Take necessary steps to increase the sales value of the property;
- d. Have the power of attorney on behalf of all parties to retain engineers, surveyors, and any other person or professional to take necessary steps to increase the sales value of the property and prepare it for sale; and
- e. Have power of attorney on behalf of all parties to sign and execute the necessary documents to effectuate a sale of the property.

(Scheduling Order, 12/12/21, ¶1 at p. 2).

The following day, December 13, 2021, Plaintiff listed the property for sale with Brian Shea, a realtor in the Waitsfield area. Based upon Shea's recommendation, Plaintiff listed the property for an asking price of \$950,000. Defendants were informed of the listing that same day.

On December 17<sup>th</sup> Shea informed the Defendants that there was a high level of interest in the property, and he advised them that, if they wished to purchase the property themselves, they should submit their offer without delay. Later that day, Shea again contacted the Defendants and told them that he had received an offer to

purchase the property for the asking price and that the offer would expire at 4:00 p.m. the following day, so they would need to submit any offer promptly if they wished to purchase the property themselves.

The Defendants did not make an offer to purchase the property, so, on Saturday, December 18, 2021, the Plaintiff signed a purchase and sale agreement to sell the property for \$950,000 to the person who had made the offer.<sup>1</sup> The agreement contains no financing contingency or permitting contingency. Under the agreement, the closing on the sale is to take place within 21 days after the probate court grants the Plaintiff's motion for a license to sell the property.

The following Monday, December 20<sup>th</sup>, Defendants Andrew and Jonathan Lee sent Plaintiff an email offering to purchase the property for \$1,000,000. Under their proposal, they would pay \$500,000 for the benefit of the two other co-owners (Plaintiff and Defendant Virginia Lee). The only contingency is that Defendants have two weeks to confirm that title to the property is clear. Because the Defendants' offer came two days after the Plaintiff had already signed a contract to sell the property to a third party, Plaintiff could not accept the Defendants' offer.

Presently before the Court are two motions filed by Defendants Andrew and Jonathan Lee. In their first motion filed on December 13, 2021, Defendants ask the Court to amend its order of November 15, 2021, as follows:

Since the Court has ordered sale, Defendants Jonathan Lee and Andrew Lee ask for the opportunity to buy. This opportunity should be in form or nature of a first option. That is, Jonathan and Andrew should have the opportunity to meet any offer. Alternatively, the Court can order an appraisal and direct sale to Jonathan and Andrew at that price.

(Motion to Amend the Court's Order dated November 15, 2021, at 1). In their second motion filed on December 17, 2021, the Defendants state as follows:

On December 13, 2021 I filed a Motion to Amend the Court's Order dated November 15, 2021. On December 12 the Court entered a Scheduling Order which, in effect, makes impossible the remedy sought by my December 13. This Motion is to ask the Court's to reconsider its Dec 12 Order in light of my Dec 13 motion and to ask

---

<sup>1</sup> The identity of the prospective purchaser of the property has not been disclosed by the Plaintiff. At oral argument on the Defendants' pending motions, counsel for the Plaintiff represented to the Court that the identity of the purchaser has been withheld to protect the purchaser from possible harassment by the Defendants, that the purchaser is unrelated to the parties, and that the purchase and sale contract is the result of an arms-length negotiation.

that the Court issue a Preliminary Injunction against sale of the Waitsfield property until the Court has ruled on my Dec 13 Motion.

(Motion for Clarification and for Preliminary Injunction, at 1). Plaintiff opposes both motions.

For several reasons, the Defendants' motions must be denied. First, the Defendants have already been afforded the relief that they requested in their Motion to Amend, namely, "the opportunity to buy" the property. Defendants have known since April 21, 2021, the date on which Plaintiff filed its motion for summary judgment, that the Plaintiff was requesting an order from the Court authorizing it to sell the property. The Court granted that motion on November 15<sup>th</sup>, and on December 13<sup>th</sup> Defendants were advised that the property had been listed for sale for \$950,000. On December 17<sup>th</sup> the realtor informed the Defendants that there was a high level of interest in the property, and he advised them to submit an offer without delay if they wanted to purchase the property themselves. Then later that same day, the realtor contacted the Defendants again, he informed them that he had received an offer to purchase the property for the asking price and that the offer would expire at 4:00 p.m. the following day, and he reiterated that they needed to submit any offer promptly if they wanted to purchase the property. Thus, the Defendants have had multiple opportunities to purchase the property, but for reasons that remain unexplained, they failed to make any offer to purchase the property until after it was too late.

Second, the Defendants do not cite to any statute or rule entitling them to a "first option" on the property. While it is true that assigning the property to a co-owner may be preferable to selling it to a third party in a partition action, *see* 12 V.S.A. §§ 5174, nothing in Vermont's partition act authorizes the court to grant a party an option or right of first refusal. Moreover, as noted earlier, the Defendants entered into a settlement agreement in 2012 in which they agreed to sell the property. Thus, the Defendants cannot now object to the sale of the property to a third party.

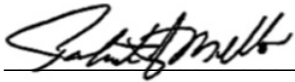
Third, there are no ground for enjoining the Plaintiff from selling the property pursuant to the December 18<sup>th</sup> purchase and sales agreement. The Defendants agreed in 2012 that the property should be sold, this Court order of November 15<sup>th</sup> authorized the Plaintiff to control the sale, and the Plaintiff proceeded to enter into a purchase and sales agreement in accordance with the procedures set forth in this Court's Scheduling Order of December 12<sup>th</sup>. Moreover, there is no claim that the purchase and sales contract that the Plaintiff entered into is deficient in any significant way. Under the contract, the property will be sold for its full listing price of \$950,000, a price that was arrived at on the advice of a local realtor and that is comparable to the price that the Defendants belatedly offered themselves. Moreover, the Plaintiff's purchase and sales contract contains no

contingencies and will close within three weeks of the probate court's issuance of a license to sell. The contract appears to be the result of arms-length negotiations between unrelated parties. In addition, the proceeds of the sale will be placed into escrow for the benefit of the four parties to this partition action.

Lastly, the Defendants complain that the Court issued its December 12<sup>th</sup> Scheduling Order one day before the deadline by which they had to file their Motion to Amend. Defendants further complain that the Scheduling Order "in effect, makes impossible the remedy" they seek in their Motion to Amend (i.e., "the opportunity to buy" the property"). These objections are without merit. As noted above, the Defendants had multiple opportunities to purchase the property; their inability to do so is due not to the Scheduling Order but to their failure to make a timely offer. Moreover, in its November 15<sup>th</sup> ruling on summary judgment, the Court gave the parties ten business days to either agree on a scheduling order or submit competing proposals for the Court to choose from. The Plaintiff submitted a proposed scheduling order by the deadline, but the Defendants did not. They cannot now complain that the Court approved the Plaintiff's proposal when it did.

For the foregoing reasons, Defendants' "Motion to Amend the Court's Order dated November 15, 2021" and "Motion for Clarification and for Preliminary Injunction" are *denied*.

SO ORDERED this 19<sup>th</sup> day of February, 2022.



Robert A. Mello  
Superior Judge