A P P E L L A T E C O U R T

OF THE

STATE OF CONNECTICUT

JUDICIAL DISTRICT OF MIDDLESEX
AT MIDDLETOWN

A.C. 12482

HIGH STREET ASSOCIATES

V.

WILLIAM J. ZISK

BRIEF OF WILLIAM J. ZISK
DEFENDANT - APPELLANT

JULY 26, 1993

To Be Argued By:

PAUL GOZZI
Carta, Sluis & Paladino
P.O. Box 308
Essex, Connecticut 06426
(203) 767-3100

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES

STATEMENT OF FACTS AND PROCEDURAL HISTORY OF THE CASE

On March 30 and 31, 1993, a trial was held before State Trial Referee Daniel F. Spallone upon the Plaintiff's Complaint seeking a partition of certain real estate in Haddam, Connecticut.

The real property at issue is a parcel consisting of thirty-four acres, more or less (T.3-31-93, p.5, T.3-30-93, p.67) upon which is a two-family home (T.3-31-93, pp.5-6). The property has frontage along Route 81 and High Street.

The property was purchased on December 13, 1943 by William W. Zisk and, Mary A. Zisk, as husband and wife. (Plaintiff's Exhibit A). William W. Zisk died intestate on February 3, 1969.

On February 28, 1987, Mary A. Zisk, Donald R. Zisk, Edward J. Zisk and Marion A. Krivanec entered into a contract to sell their interest in the real property to Steven Rocco, a developer. (Defendant's Exhibit 3). Pursuant to the contract of sale, the sellers attempted to assign their rights to bring a partition action to the buyer, Mr. Rocco.

By Complaint returnable on November 14, 1989 to the Superior Court in Middletown, Mr. Rocco brought a partition action, Docket # CV89-56040S, against the Appellant, William J. Zisk. The Complaint was dismissed on March 7, 1991, by Judge O'Connell, when the court granted William Zisk's Motion for Summary Judgment. Said Motion was based on the claim that a contract-purchaser did not have standing to bring a partition action not being an owner.

On March 23, 1991, Marion A. Krivanec, conveyed her interest to the Appellant, William J. Zisk. (Plaintiff's Exhibit G).

On May 8, 1991, Mary A. Zisk, Donald R. Zisk, and Edward J. Zisk, by quit-claim and warranty deeds, conveyed their interest to High Street Associates, a developer. (Plaintiff's Exhibits H and I). On the same date, the Appellee gave back a mortgage to the sellers in the amount of $183,333.32, payable, interest free, in 5 years. (Plaintiff's Exhibit J).

High Street Associates, purportedly a Connecticut partnership, consisted per the testimony, of Stephen Rocco, solely of Architects Equity Inc., a corporation owned and comprised solely of Mr. Rocco. (T.3-30-91, pp. 30-31), as of

the date of conveyance, May 8, 1991. On December 14, 1991, seven months after the alleged purchase, ACF Inc. (a corporation comprised only of Jonathan Gottlieb), "officially", according to Mr. Rocco, became a part of High Street Associates. (T.3-30-91, pg.31).

On July 18, 1991, Mr. Rocco, as sole principal of High Street Associates, filed in the Land Records of the Town of Haddam a certificate of trade name, publicly declaring Architects Equity Inc. to be the sole component of High Street Associates. (Defendant's Exhibit #4, T.3-30-93, pp. 30-31).

On December 4, 1991, Mr. Rocco, filed another certificate of trade name, this time disclosing that High Street Associates, was then comprised of Architects Equity Inc. and ACF Inc.. (Defendant's Exhibits #5, T.3-30-93, pp. 32-33).

By a one count Complaint dated June 4, 1991, the Plaintiff, High Street Associates brought the instant partition action. The Defendant, as pro se, filed his Answer and Special Defenses on or about September 27, 1991.

The pro se Defendant forwarded seven Special Defenses claiming, inter alia, that the Plaintiff procured its title to

the property through fraudulent acts (First Special Defense) and by way of an invalid agreement (Second). He also claimed that the action was barred under the principles of res judicita and collateral estoppel (Sixth) and that the Appellee lacked standing (Seventh).

The pro se Defendant further filed a Counterclaim on or about November 23, 1992 which the Plaintiff answered and filed a Special Defense to on December 2, 1992.

On February 10, 1993, undersigned counsel appeared for the Defendant. On the next day, a Motion for Permission to Implead third party Defendants Mary A. Zisk, Donald R. Zisk and Edward J. Zisk, was filed on behalf of the Defendant, as well as a request to file an Amended Counterclaim both to which the Plaintiff objected.

The Motion to Implead alleged that the Appellee's predecessors in-title, Mary A. Zisk, Donald R. Zisk and Edward J. Zisk were indispensible parties in that they had current ownership interests in the property based upon the fraud of the Plaintiff in procurring title and their position as mortgagees.

On March 4, 1993, trial referee Daniel Spallone, denied the Defendant's Motion to Implead and granted his request to amend the Counterclaim.

On March 30, 1993, the Appellant filed a Motion to Strike the Appellee's Complaint for failure to join necessary parties, namely Mary A. Zisk, Donald R. Zisk and Edward J. Zisk. The appellant based his motion on the claim that mortgagees were necessary parties to a partition action and who had effectively retained title ownership in the subject property through the deed transfers.

Both the Motion to Strike and to Reconsider were denied without explanation by the court orally on March 30, 1993. (T.3-30-93, p.3)

After trial, the court issued its Memorandum of Decision dated May 5, 1993. The court did not make any rulings regarding the Defendant's Special Defenses or Amended Counterclaim. This appeal followed.

On May 25, 1993, the Defendant filed a Motion for Articulation and Reclarification which was denied without explanation on June 15, 1993.

On July 1, 1993, a Motion to Review was filed by the Defendant.

ARGUMENT

I. The court erred in finding the appellee to be an owner of the property when the appellant presented unrebutted evidence that the purported partnership of High Street Associates did not exist at the time of the conveyance.

A partition action is equitable in nature. Lovejoy v. Lovejoy, 28 Conn. Supp. 230, 256 A.2d 843 (1969). Partition of real property is governed by Connecticut General Statutes Section 52-495:

> Partition of joint and common estates: Courts having jurisdiction of actions for equitable relief may, upon the complaint of any person interested, order partition of any real property held in joint tenancy, tenancy in common, coparcenary or by tenants in tail. The court may appoint a committee to partition any such property. Any decrees partitioning entailed estates shall bind the parties and all persons who thereafter claim title to the property as heirs of their bodies.

Only the owner of real or personal property may proceed to have that property partitioned. Narowski v. Kichar, 181 Conn. 251, 435 A. 2d. 32 (1980). The term "owner" is generally defined with reference to title. Smith v. Planning and Zoning Board of City of Milford, 3 Conn. App. 550, 490 A. 2d. 539 (1985). It has long been established that the joint tenant or tenant in common must have either actual possession or an

immediate right to possession in order to bring a partition action. Penfield v. Jarvis, 175 Conn. 463, 399 A 2d. 1280 (1978). The court in Penfield explained this rule as follows:

> Such a rule is understandable in the context of the problem to which the remedy by partition was directed: avoiding the conflicts which might arise if each co-tenant asserted the right to be in possession of every part of the lands of the co-tenancy. Through the right to partition, "it was intended that the undivided possession should be severed, and that each person having the right to be in possession of the whole property should exchange that right for one more exclusive in its nature, whereby, during the continuance of his estate, he should be entitled to the sole use and enjoyment of some specific property"... Since those with no right to immediate possession would not be deprived of present use and enjoyment or inconvenience by the undivided possession of the property by others, there was a logical basis for denying to tenants of estates in reversion or remainder the right to interfere with tenants in possession and, correspondingly, for precluding tenants in possession from effecting a severance of estate in remainder or reversion... Possession or the right to immediate possession is, therefore, a general prerequisite to the maintenance of an action for a partition. Penfield v. Jarvis at 399 A 2d. 1282.

It is appropriate for a Defendant in a partition action to raise by Special Defense the alleged invalidity of the deed through which the Plaintiff claims ownership. Narowski v. Kichar, supra.

A "partnership" exists when between two or more persons there is a relationship that each is, as to all the others in respect to the same business, both principal and agent. Samstag and Hildar Brothers v. Ottenheimer and Weil, 90 Conn. 475, 97 A. A65 (1916).

"A deed or other conveyance to a grantee not in existence at the time of the conveyance... does not convey legal title to the land or estate describe in the conveyance". Connecticut Standards of Title, Standard 7.1, Comment 1. "If a deed does not transfer legal title to a purported grantee because such grantee is not in existence at the time of the conveyance... the legal title to the land... remains in the grantor". Connecticut Standards of Title, Standard 7.1, Comment 2.

A. Undisputed facts show that the Plaintiff, a partnership, did not exist at the time it purportedly took title.

Mr. Rocco who comprises Architects Equity Inc., one of the alleged partners (ACF, or John Gottlieb being the other), of High Street Associates testified that High Street Associates did not exist until at least July 18, 1991 (T.3-30-93, pp.30-31) or more that 2 months after it obtained the purported title (Plaintiff's Exhibits H and I). He further testified

that High Street Associates was then composed solely of Architects Equity Inc., or himself (T.3-30-91, p.30). High Street Associates, then, was not a partnership or even in existence as of the date of the purported conveyance.

The Defendant introduced the certificates of trade name, admittedly completed and filed by Mr. Rocco, as collaberation of Mr. Rocco's admission that the partnership did not exist in May of 1991. (Defendant's Exhibits 4 and 5, T.3-30-91 pp. 30-31).

As a matter of law, then, the Plaintiff not being in existence at the time it purportedly took title, has no standing to bring this action.

Mr. Rocco recanted his testimony upon re-direct, and after lunch recess (T.3-30-91, pp. 62-64). The credibility of a witness is attacked by inconsistent and material statements made by him. G&R Tire Distributors, Inc. v. Allstate Ins. Co., 177 Conn. 58, 411 A.2d 31 (1979).

While, of course, a court may choose what version of a story to believe, it is impossible to determine from the court's memorandum of decision if the inconsistent statements were considered, and if they were, why the recantation was given more credibility than the prior testimony.

II. By ordering a partition by sale, the Defendant has been unfairly deprived of his lawful interest, to his great detriment and to the great benefit of the Plaintiff.

The court ordered the property sold subject to a mortgage in the amount of $183,333.33. Said mortgage was given by the Plaintiff, High Street Associates. It is axiomatic, that a property owner cannot encumber more than he owns. Therefore, the mortgage, if valid, can only relate to that interest owned by the mortgagee. Capitol Nat. Bank & Trust Co. v. David B. Roberts, Inc. 129 Conn. 194, 27 A.2d. 116 (1942).

The court, by ordering the sale subject to the mortgage, has created a result that may well deprive the Defendant of his rightful interest and would create a windfall to the Plaintiff.

The developer-Plaintiff proposes to subdivide the property. (T.3-30-93, p. 25). It obviously first needs to obtain sole title. It is a motivated buyer.

The Defendant testified that he sought a partition in kind in order to use and enjoy his land for his home. (T.3-30-93, p. 88).

The developer, Steven Rocco, has obviously made an investment in the property and in fact has paid to Mary A. Zisk

and Donald R. Zisk the amount of $25,000.00. (T.3-30-93, p. 41), prior to the commencement of the first partition action having been set aside by summary judgment dated March 7, 1991.

A sale by committee can only realistically result in the developer purchasing the property subject to the mortgage it has already given.

Even if other parties bid on the property, by subjecting the entire parcel to the mortgage, the court has deprived the Defendant from receiving his lawful interest. Hypothetically, if a successful bidder purchased the property for a nominal sum beyond the mortgage, under the court's orders, the Defendant may only be entitled to a percentage of that nominal amount, as opposed to a percentage of the entire "purchase price" of the initial payment ($25,000.00), the mortgage ($183,333.00) and the additional nominal sum.

Any sale, then, should not result in any loss to the Defendant since the loss was created by the Plaintiff's mortgaging of the property. The court's order that the sale of the entire parcel be subject to the mortgage, without finding the Defendant's interest exempt from the mortgage, unlawfully expands the scope of the mortgage and encumbers the Defendant's portion without compensation. A sale would clearly cause an

inequitable result to the Defendant, a result that our system has attempted to avoid since the inception of partition actions.

III. The court erred in ordering a partition by sale, in contradiction of established law that a partition-in-kind is favored over a sale, when there was no evidence offered indicating that any physical attributes of the land are such that a partition in kind is impractical or inequitable, and that the interests of the owners would be better promoted by a sale.

Generally, a partition in kind is favored over a partition by sale. Rice v. Dowling, 23 Conn. App. 460, 581 A 2d. 1061 (1990). A partition by sale may be ordered only when two conditions are met: 1) the physical attributes of the land are such that a partition in kind is impractical or inequitable and; 2) interests of the owners would be better promoted by a sale and the division of the proceeds of the sale as per the respective interests. Filipetti v. Filipetti, 2 Conn. App. 456, 479 A 2d. 1229 (1984). The burden of proof is on the party requesting the sale to demonstrate that a sale should be ordered. Delfino v. Vealencis, 181 Conn. 533, 436 A 2d. 27 (1980).

The court must consider the interest of all the tenants in common, and not merely the economic gain of one tenant when deciding whether a partition by sale would promote the best

interest of the tenants. Delfino v. Vealencis, supra. "A sale of one's property without his consent is an extreme exercise of power warranted only in clear cases". Ford v. Kirk, 41 Conn. 9 (1874).

The court found that the property had "limited frontage on the public highway and to partition in kind would severely impact on the highest and best use of the property. The potential for development would be virtually destroyed by a partition in kind. If any portion of the road frontage is set out seperate from the balance of the property, access to the balance of the acreage would be severely limited and result in a detriment to all parties." (Memorandum of Decision, p. 5).

However, testimony clearly showed that there was no evidence suggesting that any physical attribute of the land, including road frontage, would make a partition in kind impractible or inequitable. A limited road frontage may have an effect on how extensive a subdivision may be, but it does not directly relate to the question whether the partition in kind is impractical or inequitable. While the court found that "a sale would better promote the interests of the owners" (Memorandum of Decision, p. 6), that finding is only one part of

the requirments needed to order a sale. The court, in fact, never found a partition in kind to be impractical; only that such a partition would harm the property's potential for development. A potential, it should be noted, only practically available to the Plaintiff.

A. Undisputed evidence showed that a partition in kind was feasible and practical and would allow all owners effective and equitable use of the property.

It is the party seeking a sale, not one requesting a partition in kind, to prove by a preponderance of the evidence that a sale should be ordered. Delfino v. Vealencis, supra.

The Plaintiff, however, offered no evidence that a partition in kind was not practical - only that it would not result in the most financially beneficial result to the developer itself.

The Plaintiff, through the testimony of Mr. Rocco, admitted that if the entire parcel was to be subdivided into residential lots, the most it could realistically yield would be 11 or 12 lots (T.3-30-93, p. 39). He also testified that if a partition in kind were ordered, the most lots the Plaintiff's alleged portion could yield would be 7. (T.3-30-93, pp. 21-22). Therefore, the potential for development would not be destroyed

by a partition in kind but would instead be merely diminished by possibly 4 or 5 lots. The practical result of a forced sale will be that the developer receives title, has its full opportunity to develop all the property, and the Defendant loses forever his interest in the property, property owned by his family for close to 50 years.

The Defendant, meanwhile, offered a precise and specific proposal for a feasible partition in kind (T.3-31-93, pp. 5-10, Defendant's Exhibit #9, pp. 16-18). The proposal would allow the co-owners to subdivide its portion while providing the Defendant the land that he owns. While the Defendant did not have any burden to establish a partition in kind's feasibility, he provided such an option to the court. In fact, Mr. Rocco agreed that a partition in kind was feasible (T.3-30-93, p. 25).

The property is easily divisible-in-kind. Testimony showed that the owners could receive shares of the property equal to their ownership interest. (T.3-31-93, pp. 5-10). By ordering a sale, the court has elevated the interest of the Plaintiff over that of the Defendant-owner, and has failed to follow the long-standing presumption that a partition in kind is favored over a sale.

B. The court abused its discretion by ordering a forced sale without receiving evidence reflecting the value of the property as a subdivision or the feasibility of the developer's proposed subdivision.

It is undisputed that no evidence was presented as to the value of the property as subdividable property. All estimates of value are based on the property as undeveloped property. (T.3-30-93, p. 73; T.3-31-93, p. 16). Therefore, without a value, the court had no basis upon which to base its conclusion that a partition in kind would "virtually destroy" the value of the property. It seems to base its conclusion that the developer's speculative subdivision may be hindered if some road frontage was not included, but without having evidence presented as to the value of the property if developed, the court's reasoning is not factually based. Furthermore, the Defendant testified that he would allow a right of way thereby alleviating the necessity for some road frontage. (T.3-30-93, p. 95).

Substantial evidence was presented, by both parties, indicating that a subdivision was impractical and unrealistic. The developer, Mr. Rocco, testified that the

property: had already been part of a subdivision application that was denied by the Town of Haddam's Planning and Zoning, and Inland-Wetland, Commissions. (T.3-30-93, p.42); had extensive wetlands with substantial set-back requirements (T.3-30-93, p.22; Plaintiff's Exhibit L); would require stream crossings (T3-30-93, pp. 24, 58-61) and would require a road cut through ledge (T3-30-93, p. 61).

The Plaintiff's own appraiser testified that there was no need for a subdivision. (T.3-30-91, p. 71).

The trial court seems to have based its conclusion that the property's value would be diminished if the property, as a whole, was not subdivided yet failed to consider whether the Plaintiff's proposed subdivision was in fact feasible. If not feasible, the stated reason for the sale does not exist. To limit the determination of "value" to monetary levels is too narrow. Indeed, the "value" of the property to the Defendant lies in his ability to reside there and to enjoy his property rights.

The fact that the property may speculatively be developed as a whole does not necessarily require a partition by sale when the interests of <u>all</u> the owners, as opposed to just the

Plaintiff-developer, are considered. Delfino v. Vealencis, supra.

IV The court erred when it denied the Defendant's request to implead Mary A. Zisk, Donald R. Zisk and Edward J. Zisk and Third-Party complaint and to strike the complaint for non-joinder of necessary parties.

The pro se Defendant has alleged, beginning with his Answer and Special Defenses, that the Plaintiff's alleged predecessors in title, Mary A. Zisk, Donald R. Zisk and Edward J. Zisk, are indispensible and necessary parties to this action. He has further alleged, both in his Fourth Special Defense (dated September 27, 1991) and in Count Two of his Amended Counterclaim (dated February 11, 1993) that the Plaintiff procured its title through fraud and/or mistake. The Defendant has alleged that the Plaintiff's purported predecessors in title were fraudulently induced by the Plaintiff to convey their interest to it, and/or did so as a result of a mutual mistake. (Defendant's First and Fourth Special Defenses).

The Defendant was pro se until well after the pleadings were closed and the case claimed to the trial list. It is an established policy that Connecticut courts allow latitude to a

litigant who represents himself in legal proceedings.Rodriguez v. Mallory Battery Co., 188 Conn. 145, 448 A.2d 829 (1982).

The court denied the Defendant's Motion to Implead on March 1, 1993, denied the Defendant's Request to Reargue or Reconsider that decision on March 30, 1993, and denied the Motion to Strike on March 30, 1993. All denials were made without explanation.

The Defendant moved for the trial court to articulate its decision regarding the denials by Motion dated May 25, 1993, which was likewise denied without explanation on June 15, 1993.

"Indispensible parties are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience". Standard Mattress Company v. City of Hartford, 31 Conn. Sup. 279, 329 A.2d 613 (1974), citing Shields v. Barrow, 58 U.S. 130, 139. A dismissal is ordinarily required as a result of an absent indispensible party. Standard Mattress Company v. City of Hartford, supra.

A partition action is equitable in nature, Lovejoy v.

Lovejoy, 29 Conn, Supp. 230, 256 A.2d 843 (1969) CGS Section 52-500(a)[1], provides for the sale of jointly held property when, "in the opinion of the court, a sale will better promote the interests of the owners." CGS Section 52-502[2], provides that the court "may make any order necessary to protect the rights of all parties in interest and to carry the sale into effect" (emphasis added), including the appointing of a committee to make the sale. The committee sells the property by auction at a time fixed. Rayhol Co. v. Holland, 110 Conn.

---

1. (a) Any court of equitable jurisdiction may, upon the complaint of any person interested, order the sale of any porperty, real or personal, owned by two or more persons, when, in the opinion of the court, a sale will better promote the interests of the owners.

2. (a) On any complaint for the sale of real or personal property, the court in which the case is pending may make any order necessary to protect the rights of all parties in interest and to carry the sale into effect.

(b) On any such complaint, the court may appoint a committee to make the sale, who shall pay into court the proceeds therefrom. The proceeds from the sale, after deducting such reasonable costs and expenses as the court directs, shall be distributed by order of court among all persons interested in the property, in proportion to their interests.

(c) If the names or residences of any of the parties entitled to share in the fund are unknown to the court and cannot be ascertained, it shall make such order relative to the custody or investment of the share of the unknown parties as it deems reasonable.

516, 148 A. 358 (1930). The committee, therefore, acts in essentially the same way as it would in a foreclosure proceeding. It is axiomatic that all holders of encumbrances are necessary parties to a foreclosure proceeding. Connecticut Foreclosures, by Dennis R. Caron.

Practice Book Form 704.35 states (paragraph 3 and 4 of Complaint, said form being the apparent model for the Plaintiff's Complaint) that any mortgagee and other holders of encumbrances should be set forth in the Complaint and made party Defendants. The Plaintiff has not set forth the subject mortgage information in its Complaint or subsequent pleadings.

As mortgage holders, Mary A. Zisk, Edward J. Zisk and Donald R. Zisk, like any encumbrancer in a foreclosure, has an interest to the extent of the mortgage.

The exclusion of the indispensible parties effectively and inequitably prevented the Defendant from fully presenting his claim regarding the fraud and/or mistake used in procuring the Plaintiff's title.

CONCLUSION

Since the evidence clearly established that the alleged Plaintiff partnership was not in existence at the time it purportedly took title, the deeds to it do not convey legal title. Since ownership is a prerequisite to the bringing of a partition action, the Plaintiff did not have standing to bring this action.

The court clearly erred in ordering a sale of the property, in contradiction of the long-standing principle of favoring a partition in kind over a sale when :

1) No evidence was offered by the party seeking a sale indicating that any physical attributes of the land made a partition in kind impractical or inequitable and that the interests of the owners would be better promoted by a sale;

2) A sale, subject to the Plaintiff's mortgage, would result in great hardship to the Defendant; and

3) No evidence was elicited reflecting the value of the property as a subdivision or its feasibility.

The court's conclusion that the rights of the parties would best be promoted by a judicial sale is not supported by facts.

The court further abused its discretion in denying the

Defendant's request to implead and to strike, regarding necessary third parties. Allegations consistently forwarded by the Defendant, first as a pro se, then as a represented party, set forth legitimate and substantitive grounds for the inclusion in the action of the Plaintiff's alleged predecessors in title. Said parties were indispensible to the determination of allegations of fraud in the Plaintiff's procurement of title as well as necessary parties as owners, due to the invalidity of their conveyance of title to the Plaintiff, and as mortgage holders.

Wherefore, for all of the foregoing reasons the Defendant respectfully requests that this court reverse the trial court's decision and remand for further proceedings consistent with this court's rulings.

DEFENDANT-APPELLANT,
WILLIAM J. ZISK

BY _____
PAUL GOZZI
CARTA, SLUIS & PALADINO
P.O. Box 308
Essex, CT 06426
(203) 767-3100
Juris #: 11070

APPEAL NO.: AC 12482

HIGH STREET ASSOCIATES	:	APPELLATE COURT
VS.	:	J.D. OF MIDDLESEX AT MIDDLETOWN
WILLIAM J. ZISK	:	JULY 26, 1993

CERTIFICATION

I hereby certify that a copy of the Defendant-Appellant's Brief was mailed, postage prepaid this 26th day of July, 1993 to:

Joseph E. Milardo, Esq.
Jozus, Milardo & Thomasson
73 Main Street
Middletown, CT 06457
(203) 347-4686

Attorney for Plaintiff/Appellee

Richard D. Carella, Esq.
Carella & Moore
955 So. Main St.
Middletown, CT 06457
(203) 246-3626

Committee

William J. Zisk
205 Thomas Street
Roseville, Calif. 95678
(916) 782-2233

Defendant/Appellant

PAUL GOZZI
Commissioner of the Superior Court