

CV-91 0062496 S

HIGH STREET ASSOCIATES

VS.

WILLIAM J. ZISK

SUPERIOR COURT

JUDICIAL DISTRICT
OF MIDDLESEX

MARCH 1, 1993

B E F O R E:

HON. DANIEL F. SPALLONE, TRIAL REFEREE

A p p e a r a n c e s:

For the Plaintiff:

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For the Defendant:

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THE COURT: Good morning. Court is in session.

MR. MILARDO: Good morning, Your Honor.

MR. GOZZI: Good morning, Your Honor.

THE COURT: This is the matter of High Street Associates versus Zisk. The court has before it several motions.

Counsel, identify yourself for the record, and the parties you represent.

MR. MILARDO: Yes. Joseph Milardo for the plaintiff, High Street Associates, Connecticut partnership.

MR. GOZZI: I'm Paul Gozzi for the defendant, William J. Zisk.

THE COURT: All right, what I know about the file so far is that I have a trial on a particular cause of action set down for March 30th. So the number one motion, Motion to Set Trial Dates, the trial date is already set, isn't it?

MR. MILARDO: Yes. I don't know what that motion is, Your Honor. We didn't file that. I'm prepared to address the one motion that I filed and two objections that I filed to defendant's motions; but I don't know where that other motion came from.

THE COURT: All right. This is the defendant's Motion to Set Trial Date. I assume that that trial date has already been set. Is that--

MR. GOZZI: It has been set, Your Honor, so I would--

THE COURT: Okay. So that goes off then. And then Petition for--This is a--I'm going to try to do them in

order in which they appear on the short calendar. It's a Petition for Participate--I assume that that's a misprint. That must mean Partition by Division. It says Participation by Division, but that's partition. Is that correct?

MR. GOZZI: That's correct, Your Honor.

THE COURT: Now, from what I know of partition law, that it's well established in this state that partition by division is preferred and the partition by sale will be granted in accordance with the findings of the court of which is the more--

MR. GOZZI: That's correct, Your Honor. I only wanted to file that before the trial, so it really doesn't, it doesn't--I would think it doesn't get ruled on. I just want to preserve that issue for the time of trial.

MR. MILARDO: Well, our claim for relief, Your Honor, our complaint, if we read the complaint, says that either partition in kind or by sale, so I--

THE COURT: Right. That depends on the equities and the factual situation and the--

MR. MILARDO: That's correct. Our concern was that it would preclude us from putting any evidence on for a partition by sale if it were granted. We didn't want to be precluded from putting any evidence on.

If Your Honor wishes to grant it, as long as we're not precluded from putting evidence on as to partition by sale, then we don't care.

THE COURT: Well, the court will assume that it will

hear the evidence and the evidence will indicate to the court which partition is most equitable to all the parties. The court has handled this problem before, and it's a-- And I think it's discretionary with the court which is the most equitable remedy to apply, so--

MR. MILARDO: We agree, Your Honor.

THE COURT: So, I'll treat this motion as a request of the court to consider all possibilities and grant the most equitable. So that may--I'm not going to grant it. I'll just take it and notice it--For the record, I'll deny it without prejudice. I'm not going to commit myself to partition by division, so I'll deny this motion without prejudice. If partition by division is most equitable, the court will grant same.

Then we have Motion to File Amended Counterclaim. Now, that's Mr. Gozzi's motion. The only thing I want to say before we--We can maybe cut this short. Does this counterclaim raise a new cause of action?

MR. MILARDO: No, Your Honor.

MR. GOZZI: I don't think it does, Your Honor. Basically, Your Honor, my client was pro se for a long period of time, hired counsel that was in the case for, I don't know, a month or two; and then I took over in the middle of February. Once I had the file and I saw the counterclaim that the pro se had filed, I just basically fine tuned the counterclaim and put it into separate counts. I thought it would be more logical. And as far as I can determine, there is no objection to the amendment.

MR. MILARDO: That's correct, Your Honor. There is no objection to the amendment, because as Your Honor noted, it doesn't introduce any new cause of action. My client has been fully apprized of the claims of the counterclaim based on the pro se's previous filing. What we object to, I guess, goes to the next motion--that is, the Motion to Implead--because necessary parties to the counterclaim would be in. So I don't know whether one follows the other or whether Your Honor wants to hear the objection to the Motion to Implead at this time, because I think that essentially one does follow the other. They kind of mesh.

THE COURT: All right. Now, that's Motion to File Amendment to the Counterclaim, Motion to Implead, Objections to the Motion. Well, that's partition by division. We've already taken care of that. That was denied without prejudice.

MR. MILARDO: That's correct, Your Honor.

THE COURT: And an Objection to Implead Third Party and a Motion to Sever. So you think that the Motion to File Amended Counterclaim and the Motion to Implead are interconnected?

MR. MILARDO: I think so, Your Honor, because essentially what the claims--if I may--the claims of the counterclaim involve what is ostensibly, or allegedly, a fraudulent transaction as regards the defendant, Mr. Zisk, with regard to his mother and brothers transferring the property, or their interest therein, to my clients.

I have no problem with addressing the counterclaim in the trial and as much of it as may apply to my clients. But I do have a problem on the eve of trial or within three or four weeks of trial impleading parties who reside in the State of California and in the State of Louisiana now being brought into a case. From a practical standpoint, I think Your Honor knows that through rules of practice and pleading and whatnot, there's just no way that these people can be impleaded at this time without delaying further the trial of this matter. It would be inequitable to my clients in our position to do so, because this matter has been, for some time, been litigated between these parties. In fact, there was a previous action involving the same defendant under a similar partition action that had to be withdrawn because one of the siblings of the defendant withdrew her participation in the case, on the day of trial before Judge Higgins. We were scheduled to start evidence on that day and a woman by the name of Mary Ann Krivanic (phonetic), who is a sibling of the defendant, came in and said, okay, I no longer want to be part of this partition action, at which point a new set of documents was drawn by the other members of the family and this plaintiff. And then a new action was brought. So this has been--And if I might, Your Honor, this family has been marketing this property since 1969, and they've finally gotten a buyer; and by virtue of the reluctance of one party to sell the property, I have had to resort to this partition situation in order to obtain

a conveyance of the property.

So, at this point, the delay, the further delay would work a hardship on many, many of the parties. We have no problem with the Motion to Implead and the Motion to Amend Counterclaim if our other motion, that is; to sever and bifurcate the trial and have the partition action heard separately and distinct from that, is heard.

So, when I said that all these motions kind of mesh, what we're saying is in the alternative if Your Honor decides to allow the impleading and the counterclaim to go forward, then we would just say well let's have the hearing on the partition action go forward and then allow us sufficient time for the parties to be impleaded and answer to the counterclaim. But I might point out to Your Honor that since all the parties are in California and the alleged fraud took place in the State of California we have a question of jurisdiction here; and it may, in fact, be this is the wrong forum for this type of action to be heard with regard to other parties. I can't argue for them, because they're not parties in this court and I don't represent them; but I'm just raising the issues, Your Honor, at this point that really this counterclaim sounds in fraud between family members who don't reside-- none of them reside in the State of Connecticut.

THE COURT: Well, how would that finding in that case start the partition action?

MR. MILARDO: As far as we're concerned, it wouldn't, because my client derives his title from one set of

individuals, as opposed to the defendant who is not cooperating in selling his interest in the parcel. That's where we stand on this. We feel that the court has sufficient evidence before it and sufficient jurisdiction to--

THE COURT: Well, that's all I asked. If the--Did the--Does the amended counterclaim raise a different set of factual issues and a different cause of action from the original counterclaim?

MR. MILARDO: Oh yes. Sure it does.

THE COURT: Well, that's what I asked at the beginning.

MR. MILARDO: Oh. I thought you meant from the original counterclaim that had been filed by the defendant.

MR. GOZZI: No, it doesn't raise different issues that have already been plead.

THE COURT: Let's go back to the--The complaint is a request for partition action.

MR. MILARDO: It's a simple one count complaint, which says that my client owns a certain portion of this premises and the defendant, Mr. Zisk, owns a certain portion of the premises. They've been unable to get together with regard to a sale price or anything else; and therefore, we press the court's intervention in equity to partition the--It's a very simple complaint.

THE COURT: All right. Now, tell me the theory of the initial defense on counterclaim, Counsellor.

MR. GOZZI: Excuse me, Your Honor, I'm just trying to find it.

(Pause.)

THE COURT: That answer on special defense of September 27th, 1991?

MR. MILARDO: That's correct, Your Honor.

MR. GOZZI: The counterclaim was filed on November 23, 1992.

MR. MILARDO: That was an amended counterclaim.

THE COURT: There is an answer on special defense filed September 27th, '91. Is that correct? And has that answer on special defense been amended?

MR. MILARDO: I believe so, Your Honor.

THE COURT: There was an answer to special defenses--
(Pause.)

MR. GOZZI: I don't find any amendments on a special defense, Your Honor.

THE COURT: Well, there would be a--The answer would be amended to include a counterclaim. Isn't that the way it happens? I mean, you file an answer and your answer contains an answer to the complaint and special defenses.

MR. GOZZI: Correct.

THE COURT: Now, the next step, I suppose, would be a reply to that. And then a Motion to Amend the Answer to Include a Counterclaim, wouldn't it? I don't think a counterclaim is filed on its own. Isn't that an amended answer?

MR. GOZZI: No. I think a counterclaim would be separate from an answer. I think what normally would have happened is you would file an answer, special defenses and counterclaim at the same time.

THE COURT: Right. Right. If that wasn't done--And then you say a counterclaim was subsequently filed?

MR. GOZZI: Counterclaim was filed on 11-23-92 and was answered on 12-2-92.

THE COURT: I have it, yes.

(Pause.)

MR. MILARDO: And, as I said, Your Honor, we have no problems with that counterclaim, because my client, the plaintiff, is sufficiently apprized of the allegations of the counterclaim even as amended now by Attorney Gozzi. And as far as we're concerned, any issues that were brought to the court in pursuance of that counterclaim which would sway the court's decision with regard to whether or not to even allow a partition action would be properly presentable to the court and defended by my client as far as the counterclaim goes. Our problem runs to impleading other parties now into the counterclaim.

THE COURT: What is the theory behind your impleading other parties, Counsellor?

MR. GOZZI: Your Honor, I think--And I'm not trying to waste Your Honor's time--

THE COURT: No, it's not wasting time. This will shorten the issues of the trial.

MR. GOZZI: I am.

THE COURT: I just want to be clear of all aspects of the case.

MR. GOZZI: Okay. And I think a little bit of a background would go a long way in explaining what's

happening. This is not a simple partition action. There was a partition action filed four years ago that was ultimately--There was a Motion for Summary Judgment granted on behalf of my client two years ago. After the Motion for Summary Judgment was granted, they brought another action with a different named plaintiff, because what happened was the original partition was brought in the name of the family members, the Zisk family against my client. I filed a Motion for Summary Judgment, which was granted by Judge O'Connell. About four or five months later, they filed a second partition action, with a new plaintiff, because what happened in those four months was that the family members conveyed their interest to High Street Associates, so now we had a new plaintiff.

It involves a thirty-two acre. The case has been scheduled for three days of trial. I think Judge Higgins, when he assigned a trial date, knew that there was complex issues. Three days of trial is a long time. It includes-- My client claims in his special defenses, in his answer, and in his counterclaim--not so artfully, but he does claim that he owns outright a four acre parcel contained within those thirty-two acres. Part of my counterclaim is a Motion to Quiet Title concerning that four acres.

This parcel was owned by five members of the Zisk family. One of the members, the only daughter, conveyed her interest to my client, so my client then had his interest and his sister's interest. The three other family members, the mother and the two other sons, purportedly

conveyed their interest to High Street Associates.

The claims made in the pending motions are the same things that have already been brought out by the pro se defendant and--I mean, it's botched up the way the pro se defendant did it, but it's all in there one way or another. I would say, Your Honor, that they've already answered the counterclaim. And I'm talking about the original counterclaim. That's only been amended by me. The original counterclaim has all things; you know, tortious interference, they have allegations sounding in fraud, he talks about a conspiracy. These are all answered and denied.

Our claim as far as impleading these family members, Your Honor, is we believe that the mother, who is in her eighties, conveyed her interest to High Street Associates pursuant to fraud, or it was induced by fraud to do that, by High Street Associates and by other family members. We also believe that they're necessary parties because they are--If, in fact, their agreement to convey to High Street Associates was procured by fraud, then High Street Associates would not have any standing in a partition action. Therefore, we've asked for partition based on the ownership between the family members, and then we would proceed on a partition. And that's included in our counterclaim also.

We're not trying to delay it. My client wants this done. He does think, and I agree with him, that his family are necessary parties. Also they would provide

evidence as to the specific four acre parcel that we've been talking about for years, and we believe they are central parties. It's not my client's fault, Your Honor, that this took four years to come to this point. There was a botched up first partition brought by the plaintiff that was, again, there was a summary judgment granted on behalf of my client. It's been four years going through this, and if there's a delay--and we're not asking for a continuance of the court date. We're going to try to serve these people as soon as we can. There's two in California. We know exactly where they are. There's one in Louisiana and we'll serve him as well. And at this time, we're not asking for a continuance. I'm not misleading the court. I think we may eventually have to ask for it, or the third party defendants may ask for it; but at this time, we're not.

Again, Your Honor, all these issues have been brought up in the pleadings. They've all been plead to. They've all been answered. This is no surprise, and I think for a full hearing a bifurcate--I don't even understand a bifurcation frankly, because if they proceed on a partition, I mean, if the court grants bifurcation, I mean, we would be forced to file a Motion to Stay, because our counterclaim, as well as our third party complaint, if successful, would knock out that partition action. And then we would be left with a partition action between the family members, as opposed to High Street Associates. So it would create two trials. It would have people coming from all over the

country for two different occasions. And I don't think there's any benefit at all in bifurcation.

I hope I--I'm sorry I'm long winded, Your Honor. I hope I answered your question. I think they're essential parties. I don't think it's a surprise. They were essential parties and they were named parties in the first action. And if there's any delay, I think a lot of it goes on the shoulders of the plaintiff in this action.

MR. MILARDO: Well, as to the summary judgment, Your Honor, the only thing that the summary judgment was decided on was the issue of whether or not my clients could proceed under a power of attorney in a litigation. That was the only issue. We had durable short form powers of attorney under which my client sued his plaintiff in behalf of his principals. And Judge O'Connell determined that in this type of litigation that that would not fly. We didn't take an appeal of that. We think Judge O'Connell was in error, but that's, you know, that's neither here nor there. The point is that we commenced the action.

So it was not an issue of delay or a summary judgment on any of the merits of the case. It was a procedural issue as to whether or not my clients had standing based on a durable power of attorney. That's all that was.

As far as the issues before Your Honor in this trial, we do not believe that the other parties that the defendant seeks to implead are indispensable parties for the

following reason. Your Honor notes that this an equitable action governed by statute as to what types of remedies Your Honor can invoke, but it is equitable in nature. And Your Honor is going to hear a lot of evidence with regard to property ownership and statute of frauds issues involving no right, involving the four acre parcel, etcetera, etcetera. And as between my client, who holds a deed to the property, and Mr. Zisk, who holds a deed and ownership in the property, the parties are here. And if there was fraud in the procurement of that deed and the defendant is able to establish that through the counter-claim that's been filed--we've answered it and denied it--then, of course, Your Honor can determine that, in equity, my client is not entitled to partition. And at that point, the matter is status quo.

Whether or not the plaintiff wants to proceed against his family members on any alleged fraudulent fraud or whatever conveyance to my client is another matter entirely separate and distinct from the issue of the partition.

I believe that Your Honor has the sufficient parties. And if the plaintiff has good evidence, and Your Honor finds from the evidence that my client has participated in a fraud, or in anyway worked a fraud to procure the transfer of this property, then Your Honor can, under the powers granted to you in equity, deny, based on unclean hands or whatever other reason Your Honor would wish to hinge your decision on, deny the relief that my client seeks.

So, we believe that the indispensable parties to this suit are my client and the defendant, that no one else is as indispensable party. In fact, there is no request to implead Mary Ann Krivanic, who is the younger sister who has joined in the deed and giving her interest to the property to her brother, the defendant. So, she would be totally out of it.

So, at this point, Your Honor, what we're saying is let's proceed with the trial. There is sufficient evidence that Your Honor will hear in which to make a decision. If Your Honor determines, after hearing the evidence, that there has been fraud; and you make that a finding of fact, and Your Honor has the remedy, or can deny the remedy that's sought by the plaintiff. And at this point, the parties are left to their own devices as to what to do from here on out. To encumber this property, to this lawsuit at this point with the impleading parties, the pleadings that will have to follow, it's obviously going to delay the trial. And that was our Motion to Sever. We are saying, look, if that's what going to happen, let's have the trial on the partition first and have the claims for the counterclaim--

THE COURT: Well, let's analyze this properly. The partition action is brought alleging ownership. Prerequisite to bringing a partition action is the fact that you're an owner and that it's in the best interest of all the parties to partition. And as a matter of fact, you have an absolute right to partition, don't you? But it depends

on which method.

MR. MILARDO: That's correct, Your Honor.

THE COURT: Parties can't agree how to manage the property or want their interest taken out of the property. So the court determines which is the most equitable remedy.

Now, in defense to this partition action, he's claiming that you don't have title to this property in order to have standing to press this partition motion. Is that what you--That's what you're saying?

MR. GOZZI: That's correct.

THE COURT: Right. All right.

MR. MILARDO: In essence.

THE COURT: Then you're saying you don't have participation(sic) because you attained title through fraud or you're unable to obtain title because certain of this property wasn't in the party's name to begin with, that four acres, therefore, you don't have title to that four acres and that four acres should be excluded from any partition judgment.

MR. MILARDO: That's a separate count to our counter-claim.

THE COURT: All right. And what you're saying is if I do find that there's fraud and we should continue on with the partition action naming, with the proper owners, or what's your remedy you're seeking if the court does find fraud?

MR. GOZZI: If there's fraud, Your Honor, and we

have--It goes back to the first part of your analysis. You have to be an owner to bring a partition.

THE COURT: Right.

MR. GOZZI: We're saying that High Street isn't an owner. It's the family who owns it. And if, in fact, we prove that, then we're asking on the counterclaim to proceed with a partition between the family members. So there won't be a separate action. It will all get done at once.

THE COURT: Well--

MR. GOZZI: So one way or another, this property is going to be partitioned. The question is what parties are going to take part in that.

THE COURT: Well, if I find that they do have title, and proceed with this partition action, then the case is over. That's why he's talking about bifurcation, right? And if I find that there is fraud and then deny the partition action, then you would proceed against the family members? Isn't that a separate cause of action?

MR. MILARDO: Well, that's what I believe, Your Honor.

THE COURT: That's what's confusing the court.

MR. GOZZI: I wouldn't think so, Your Honor, because the main, the issue, the main issue is who owns this property. The property is the corpus or the central basis of this whole action. You have to determine who owns that property before you can proceed on the partition.

THE COURT: Well, citing--

MR. GOZZI: But the--

THE COURT: Just a minute, Counsellor. Citing in new parties tantamount to putting eighteen months on this case. The court--You have no objection to the granting of the counter--the filed amendment to the counterclaim. Is that right?

MR. MILARDO: Well, if it's going to delay the case, I do. If it's not going to delay the case, no, I don't, because essentially it was a rehashing of what the defendant--

THE COURT: Well, he said it's the same cause of action, but he fine tuned it. Is that what you're saying?

MR. MILARDO: Well, that's correct. That's what I'm saying. I have no problems with that.

THE COURT: All right, just a minute. Just a minute. I will grant that Motion to File Amendment for the Counterclaim. I'll deny the Motion to Implead. I will grant--I don't have to grant any Motion to Sever this thing. We're going to hear this thing.

MR. MILARDO: No. Not when it's--We're satisfied, Your Honor.

THE COURT: Now, if I find against him, you're going to have to bring your own lawsuit to partition. That's what it amounts to.

MR. GOZZI: Can I have an exception on the denial of the Motion to Implead, Your Honor?

THE COURT: Granted.

MR. GOZZI: Thank you, Your Honor.

MR. MILARDO: Thank you for your time.

THE COURT: Anything else while we're here?

MR. GOZZI: No, I don't think--I was just thinking of bifurcation, but that's mute now.

MR. MILARDO: No, that's mute.

THE COURT: That's mute. Now, what I would suggest, Gentlemen, is between now and the date of trial get together and you know certain documents have to come in and then any objection to them are going to be overruled, so if you get together and premark the exhibits and take some time off the start, because these land cases are very complicated.

MR. MILARDO: We'll do that, Your Honor.

THE COURT: But there's so many exhibits that can be premarked that it would be a shame not to take advantage of it. So maybe get together--

MR. GOZZI: Is this case before Your Honor?

THE COURT: Yes.

MR. GOZZI: Oh. Okay. I wasn't sure of that since I came in so late.

THE COURT: April 30th or--

CLERK: March 30th.

THE COURT: March 30th.

MR. GOZZI: Thank you, Your Honor.

THE COURT: So I would suggest you get together and premark the exhibits.

MR. MILARDO: We will, Your Honor.

THE COURT: Recess.

(Whereupon, this matter was concluded.)

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HIGH STREET ASSOCIATES

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SUPERIOR COURT

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C E R T I F I C A T I O N

I hereby certify that the foregoing pages are a true and correct transcription of the tapes recorded of the above entitled matter heard before the Honorable Daniel F. Spallone, Trial Referee, in the Superior Court, Judicial District of Middlesex, Middletown, Connecticut, on the first day of March, 1993.

Dated this eighth day of March, 1993, in Middletown, Connecticut.



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