

EXHIBIT A

NO. 62496

HIGH ST. ASSOCIATES

:

SUPERIOR COURT

V.

:

MIDDLESEX J.D.

WILLIAM J. ZISK

:

MAY 5, 1993

MEMORANDUM OF DECISION

By writ, summons and complaint dated June 4, 1991, the plaintiff is seeking a partition of certain real estate located at 106 High Street in the Higganum section of Haddam, Conn. as is more fully described in schedule A attached to said complaint. This action is brought pursuant to Gen. Stat. Sec. 52-495. The plaintiff is seeking partition by sale under Gen. Stat. Sec. 52-500.

The defendant has filed his answer, special defenses and a counterclaim in four counts. Count one of the defendants counterclaim seeks to quiet title, count two prays to annul a deal for fraud, count three claims unjust enrichment and count four asks relief for tortious interference with

STATE OF
MAY 11
1993

property rights. The plaintiff has filed his answer to the defendant's counterclaim.

After a full trial, all parties represented by counsel, the court, based on a preponderance of the credible, relevant and legally admissible evidence, finds, concludes, rules and orders as follows.

The plaintiff is a general partnership, organized and existing pursuant to the laws of the state of Connecticut. The plaintiff is known as High St. Associates and has an office and place of business at 1783 Saybrook Road, Haddam, Connecticut. The general partners are Architects Equity, Inc., and A.F.C. Inc. The defendant is William J. Zisk, 205 Thomas Street, Roseville, California.

The property subject to this partition action, was originally acquired by the parents of the defendant. They each held an undivided one half interest as tenants in common.

The defendant claims that as a wedding gift in 1952, his parents orally gave to him a four acre parcel contained within the property subject to this action. He also claims that his mother by will acknowledged this gift in writing.

The plaintiff acquired their interest in the property by virtue of certain quit claim and warranty deeds recorded on June 3, 1991.

The court makes the following express finding of facts.

The plaintiff are owners as tenants in common of a 5/6 interest in the subject premises.

The plaintiff acquired title through deeds duly executed and duly recorded on the land records of the town of Haddam.

The defendant is the owner as tenant in common of a 1/6 interest in the subject property. He acquired his interest by virtue of a certificate of devise from his father's intestate estate of a 1/12 interest, and, a purchase from his sister of a 1/12 interest that she acquired from her father's estate.

The defendant's parents never executed or delivered a deed to the defendant conveying his claimed four acres.

The defendant's parents never executed or acknowledged in writing a conveyance of the four acres pursuant to the requirements and mandates of Gen. Stat. Sec. 47-5.

The defendant's parents, even if they orally made a gift of the real estate to the defendant, never completed the gift by delivering a conveyance to him.

Gen. Stat. Sec. 47-5 mandates that all conveyance of land be in writing, subscribed by the grantor, acknowledged and witnessed by two persons. No such conveyance is in this case. The defendant's claim of oral transfer is violative of this statute of fraud.

The defendant's claim of gift also fails because in order to effectuate a gift there must be a delivery. There is

no evidence in this case that any writing, deed or declaration of trust was ever delivered to the defendant. The burden is on the defendant to prove both the donors intent to make a gift and a delivery. Long v. Schull, 184 Conn. 252, 255 (1981). To constitute a valid gift, there must be a valid delivery accompanied by the intent of the donor that title shall pass immediately and irrevocably. Bergen v. Bergen, 177 Conn. 53, 56-57 (1979).

Assuming that the defendant's parents fully intended to make a gift to the defendant, such intent was never carried out because there was in fact no delivery. Before any delivery was made, the defendant's father died intestate and his interest in the land passed to his wife and children. When the defendant's mother declared in her will that she and her now deceased husband intended to give the four acres to the defendant, she was no longer the owner of the land as co-tenant with her husband. Her husband's interests had passed by the laws of intestacy, 1/3 to her and 2/3 to the children. The land was not hers to give. In any event such will was subsequently revoked.

The court finds the issues on the plaintiff's complaint for the plaintiff and a judgment of partition should enter.

The court finds that the defendant has failed to prove the allegations in his counterclaim and finds the issues on all four counts of same for the plaintiff. Judgment should

enter for the plaintiffs on all counts of the defendant's counterclaim.

The court having determined that a partition is appropriate now turns to whether the partition should be in kind or by sale.

We are fully aware that 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 should be ordered only when the physical attributes of the land are such that a partition in kind is impractical and the interests of the owners would be better promoted by a sale and the divisions of the proceeds of the sale as per the respective interests. Filipetti v. Filipetti, 2 Conn. App. 456, 479 A2d 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 highest and best use of the land subject to this action is a multiple lot residential subdivision. The subject property has 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 separate 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. Partition in kind to rear acreage would be inappropriate, spec-

ulative at best and contrary to the best interests of the parties.

Accordingly, a partition by sale should be ordered because in the opinion of the court based on a preponderance of the credible, relevant and legally admissible evidence, a sale would better promote the interests of the owners.

The court heard testimony as to the value of the premises.

Charles Burr, testifying as an expert for the plaintiff, appraised the property at \$182,000.00.

Gerry Adam, testifying as an expert for the defendant, valued the property at \$373,700.00.

In valuating property, the trial court is charged with the duty of making an independent valuation of the property involved. E & F Realty v. Commission of Transportation, 173 Conn. 247, 253, 377 A.2d 302 (1977). The trier is not limited to arbitrating the differing opinions of the witnesses but is to make determinations in the light of all the circumstances, the evidence, and his general knowledge. Pandolphe's Auto Parts, Inc. v. Manchester, 181 Conn. 217, 220, 435 A.2d 24 (1980); Birnbaum v. Ives, 163 Conn. 12, 21, 301 A.2d 262 (1972). The trier may accept or reject the testimony of an expert, offered by one party or the other, in whole or in part. Smith v. Smith, 183 Conn. 121, 123, 438 A.2d 847 (1981); Richard v. A. Waldman & Sons, Inc., 155 Conn. 343, 348, 232 A.2d 307 (1967); see also Pandolphe's Auto Parts,

Inc. v. Manchester, supra, 221. Ultimately the determination of the value of real estate is a matter of opinion, which eventually depends upon the considered judgment of the trial judge who takes into account the different opinions expressed by the various witnesses. Moss v. New Haven Redevelopment Agency, 146 Conn. 421, 425, 151 A.2d 693 (1959).

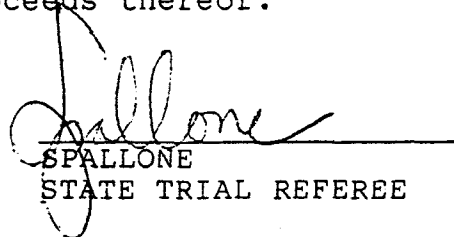
Applying the aforesaid law to the facts and circumstances of this case, the court independently finds the value of the subject premises to be in the amount of \$220,000.00.

In summation, the court having found the issues on the defendant's counterclaim for the plaintiff, judgment is entered for the plaintiff on all four counts of the defendant's counterclaim.

Further the court, having heard the parties, finds that the material allegations of the plaintiff's complaint are true; that the interests of the parties are as follows: the plaintiff, High St. Associates is the owner of a 5/6 undivided interest as a tenant in common with the defendant, William J. Zisk, who is the owner of an undivided 1/6 interest in the premises, and in the opinion of the court a sale will better promote the interests of the parties.

Wherefore, it is ordered that the property be sold and that Attorney Richard D. Carella of 955 South Main Street, Middletown, Conn. is appointed to sell the property subject to this action; that he shall sell the property as a whole, free and clear of all claims against the property, except a mort-

gage, securing a note in the amount of \$183,333.32, from High St. Associates to Mary Zisk, Edward J. Zisk and Donald R. Zisk as recorded in Vol. 180, page 238 of the land records of the town of Haddam, CConn., at public auction at 106 High Street in the Higganum section of Haddam, Conn. on Saturday, June 19, 1993 at 12 noon to the highest bidder; that he shall advertise such sale by placing a notice of same in both the Middletown Press and the Hartford Courant on two successive Saturdays, to wit June 5, 1993 and June 12, 1993 and by a sign on the premises to be placed not later than May 29, 1993; that when such sale has been made, the committee shall execute and submit for the approval of this court a conveyance of the property to the purchaser, and make a return of his doings and pay to the clerk of this court the money arising from such sale; and that the reasonable costs and expenses of the sale shall be paid out of the proceeds thereof.


SPALLONE
STATE TRIAL REFEREE

Judgment Entered in Accordance
with Foregoing Memorandum of Decision.

1s/ Michael Kokoszka
Michael Kokoszka, Chief Clerk