



Ethel Bergman had contracted with him to sell him this 1/6 interest in the John F. Wilson property. The appellant had farmed this land for many years and already owned, with his wife, a 1/2 interest in the 393.6-acre property. Although the contract was allegedly executed, the land was never conveyed, and when Ethel Bergman died her 1/6 interest in the John F. Wilson property passed to her children, the appellees. Denying the validity of the contract, the appellees refused to honor it.

¶ 4 On June 25, 2007, the appellees and other interested parties filed suit against the appellant to partition the entire 393.6-acre John F. Wilson property. The petition listed the appellant as the owner, with his wife, of 3/6 of the property and the appellees as the owners of Ethel's 1/6 interest in the property. Two other individuals owned the other 2/6 interest in the property.

¶ 5 The appellant filed an answer to the petition for partition and on the same day, August 13, 2007, filed his own, separate action against the appellees for breach of his contract with Ethel. At no time did the appellant raise in the partition proceeding the existence of his contract with Ethel or make a claim to the land by virtue of that contract. He did not seek to consolidate his breach of contract action with the partition proceeding and did not seek a stay of the partition proceedings pending resolution of his breach of contract claim. Instead, the two actions proceeded simultaneously, but separately, before the same judge.

¶ 6 While the breach of contract action was still at the pleading stage, the partition action proceeded to sale of the entire 393.6 acres, which the appellant purchased at the partition sale on May 4, 2009. The appellant never made any objection based on his breach of contract claim to the partition order or to the sale. However, after the sale, the appellant amended his complaint for breach of contract to seek not specific performance of the contract, but money damages for the difference between what he actually paid for the land and what he would have paid for it under the contract.

¶ 7 On June 25, 2010, the appellees filed motions pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)) to dismiss the appellant's complaint on numerous grounds including lack of jurisdiction, judicial estoppel, estoppel by acquiescence, that the action was barred by provisions of the partition statute, and that the appellant could not mount a collateral attack against the partition judgment when he had been a party to the action and had participated fully therein.

¶ 8 On October 6, 2011, the circuit court entered an order dismissing the appellant's breach of contract action. The court relied on section 17-118 of the partition statute (735 ILCS 5/17-118 (West 2010)) and on *Pollack v. Kuhn*, 96 Ill. App. 2d 82 (1968), and *Dennis v. Silzer*, 48 Ill. App. 3d 468 (1977), to hold that the appellant's breach of contract claim was barred by his failure to raise it in the partition proceeding to which he was a party. The appellant's motion to reconsider was denied, and the appellant brings this appeal.

¶ 9 The parties agree that our standard of review is *de novo*. A reviewing court conducts a *de novo* review of a decision on a motion to dismiss and may, therefore, base its affirmance of that decision on any ground in the record, regardless of whether the circuit court relied on that ground or whether the circuit court's reasoning was correct. *Pryweller v. Cohen*, 282 Ill. App. 3d 899, 907 (1996). Because we find that the appellant is barred by section 17-118 of the partition statute (735 ILCS 5/17-118 (West 2010)) from pursuing his breach of contract claim, we affirm the judgment of the circuit court which dismissed that claim.

¶ 10 The partition statute (735 ILCS 5/17-101 to 17-127 (West 2010)) provides a procedure by which lands which are held in some form of co-ownership may be equitably severed into individual interests. To that purpose, the statute requires that the complaint particularly describe the land sought to be divided and that it set forth the interests of all parties interested therein, including tenants for years or life, and all persons entitled to reversion, remainder, or inheritance, "and of every person who, upon any contingency, may be or become entitled

to any beneficial interest in the premises." 735 ILCS 5/17-102 (West 2010). The complaint shall ask for the division of the property according to the respective rights of the parties interested therein, or, if a division cannot be made without manifest prejudice to the owners, that a sale thereof be made and the proceeds divided according to the respective rights of the parties. 735 ILCS 5/17-102 (West 2010). Every person having an interest in the property who is not a plaintiff must be joined as a defendant. 735 ILCS 5/17-103 (West 2010).

¶ 11 The court must ascertain and declare the rights, titles, and interest of all the parties to the action and shall enter judgment according to the rights of the parties. 735 ILCS 5/17-105 (West 2010). In the event the property cannot be divided among the parties without manifest prejudice, the court shall order the property sold at public sale. 735 ILCS 5/17-105 (West 2010). The proceeds of the sale shall be distributed to the persons entitled thereto, according to their interests. 735 ILCS 5/17-119 (West 2010). Any conveyance pursuant to the public sale "*shall operate as an effectual bar against all parties and privies to the proceedings and all persons claiming under them.*" (Emphasis added.) 735 ILCS 5/17-118 (West 2010).

¶ 12 The statute gives the court authority to, among other things, "investigate and determine all questions of conflicting or controverted titles, and remove clouds upon the titles to any of the premises sought to be partitioned." 735 ILCS 5/17-124 (West 2010). Under this provision, courts have determined questions of ownership, rents, and mechanics' liens (see *Pollack v. Kuhn*, 96 Ill. App. 2d 82, 85 (1968)) and the value of improvements made to, or crops growing on, the land subject to partition (see *Dennis v. Silzer*, 48 Ill. App. 3d 468, 471 (1977)).

¶ 13 There is no question in the case at bar that the appellant was made a party/defendant to, and properly served in, the partition action. He participated fully in that proceeding and, indeed, purchased at public sale the entire property subject to partition. He knew throughout the pendency of the partition proceedings of his alleged equitable interest in the property

which existed by virtue of the alleged contract for sale to him of Ethel's 1/6 interest in the property. Nevertheless, he failed to raise in the partition proceedings his claim of an equitable interest in the property. Accordingly, 1/6 of the proceeds of the partition sale were distributed to the appellees as owners of Ethel's 1/6 interest in the property. The appellant now seeks to "claim" his equitable interest in the property through the mechanism of a suit for damages for breach of contract, seeking the difference between what his equitable interest was worth under the contract for sale and what he actually paid for the property.

¶ 14 This is a claim which could, and should, have been litigated in the partition proceeding. In partition proceedings a court may properly convert an equitable estate into a legal estate by proof of circumstances which would justify such a judgment. *Kohl v. Montgomery*, 379 Ill. 579, 583 (1942). Partition proceedings are adversary, they are *res judicata*, and they are not, except in extraordinary circumstances, subject to collateral attack. *O'Malley v. Walker*, 4 Ill. App. 2d 555, 561 (1955). The appellant accepted conveyance of the property subject to partition following the public sale thereof. Pursuant to section 17-118 of the partition statute, this conveyance operated as an effectual bar against the appellant's claim of an equitable interest in the property by virtue of the alleged contract for sale. 735 ILCS 5/17-118 (West 2010).

¶ 15 The cases relied on by the circuit court support our view. In *Pollack v. Kuhn*, 96 Ill. App. 2d 82 (1968), Pollack was named and served as a defendant in a partition action regarding property of which he owned one-half. He failed to appear and a default judgment was entered against him. After the partition decree was entered, but before the property was sold, Pollack sought to file a claim for the rental value of the property during the pendency of the partition proceeding. His petition was denied. The property was sold and the sale approved by the court. Pollack did not object to or attempt to appeal from the partition decree. Instead, he filed suit against his previous co-owners to recover rent for their use of

the property. The defendants moved to dismiss on the ground that the suit was barred by the prior partition judgment. The motion was granted and Pollack appealed, arguing that his action was not barred because the issue of rent had not been decided on the merits in the partition suit.

¶ 16 On appeal, this court held that all parties to a partition action are required to assert their claims with respect to the real estate so that their interests may be protected by the decree. 96 Ill. App. 2d at 84. After the decree is rendered, the parties are bound by its terms and cannot impeach it or set it aside in a collateral proceeding. 96 Ill. App. 2d at 84. The court pointed out that claims such as ownership, rents, and mechanics' liens are all properly litigated in the partition proceeding and therefore the partition judgment acts as a bar to bringing those claims in a subsequent suit. 96 Ill. App. 2d at 85. The court concluded that Pollack had been a party to the partition proceeding and had been served with process. If he had appeared, he could have litigated his interest in the property, but having failed to take advantage of this opportunity, and having failed to appeal from the partition decree, he was bound by that decree and he could not insist on any rights in the property which were not protected by that decree. 96 Ill. App. 2d at 86.

¶ 17 In *Dennis v. Silzer*, 48 Ill. App. 3d 468 (1977), Dennis was made a party/defendant to a partition proceeding regarding property of which she owned a 1/12 interest. Several weeks later, Dennis filed her own suit claiming that the property was the subject of a valid sales contract between herself and the plaintiffs in the partition action and asking the court to enjoin the partition action. Her request for an injunction was denied. Dennis answered the partition proceeding but never raised therein her claim that the property was the subject of a sales contract between the parties. A partition judgment was entered and the property was ordered to be sold and the proceeds divided between the parties according to their interests. Dennis then filed an amended complaint based on the same alleged sales contract,

seeking money damages. The complaint was dismissed and Dennis appealed.

¶ 18 On appeal, the court held that any matter which either bears upon the state of the title of the land subject to the partition action or affects the manner in which the proceeds of a partition sale will be distributed is a matter which should be raised in a partition action, for each is necessary if the court is to make a correct determination of all the issues. 48 Ill. App. 3d at 470. The court held that the existence or nonexistence of a valid sales contract between the parties to a partition action affects both the title to the property as well as the relative proportions to be distributed subsequent to a partition sale. 48 Ill. App. 3d at 476.

"If a party alleges and proves he is a purchaser of the property under a valid real estate contract, and insists on specific performance, the parties who are sellers no longer have an interest in the land and cannot insist on partition of the real estate. If this same party only demanded monetary damages from the sellers, the relative amounts distributed by the court after a partition sale would alter." 48 Ill. App. 3d at 471.

¶ 19 Accordingly, Dennis should have asserted any rights she might have under the sales contract in the partition action. The court pointed to cases in which it was held that claims to recover the value of improvements made to, or crops growing on, land subject to partition were properly brought in the partition action. 48 Ill. App. 3d at 471. Similarly, Dennis's claim regarding a sales contract should have been brought in the partition action and was properly barred by virtue of the partition judgment.

¶ 20 The appellant seeks to distinguish *Pollack* on the basis that his breach of contract suit for money damages was not "germane" to the partition action because it did not affect the circuit court's ability to divide the property. We respond that, as pointed out in *Dennis*, it did affect the circuit court's ability to distribute equitably the proceeds of the partition sale. The appellant also argues that the two cases are distinguishable on procedural grounds: *Pollack* defaulted in the partition action and brought his breach of contract claim after the partition

judgment was entered, while the appellant filed his breach of contract claim contemporaneously with the partition action and the two actions were heard by the same judge. We find this to be a distinction without a difference. The key point is that neither Pollack nor the appellant raised their claims in the partition action.

¶ 21 The appellant seeks to distinguish *Dennis* on the basis that, in that case, the entire parcel was at issue in both the partition and the breach of contract claims so that the entire division of the property was affected by the outcome of the contract case. In the case at bar, the property at issue in the breach of contract action was only 1/6 of the property at issue in the partition action. The appellant also argues that the circuit judge in the case at bar was well aware of both cases as they proceeded simultaneously before him. Again, we fail to see any consequential distinction.

¶ 22 To the contrary, we find *Pollack* and *Dennis* to be controlling. Parties to a partition action must assert their claims with respect to the real estate in the partition proceeding, and if they fail to do so, they are bound by the decree and cannot impeach it or set it aside in a collateral proceeding, or insist on rights in the property which were not protected by the partition decree. *Pollack*, 96 Ill. App. 2d at 84-86. The existence or nonexistence of a valid sales contract between the parties to a partition action affects both the title to the property as well as the relative proportions to be distributed subsequent to the partition sale. *Dennis*, 48 Ill. App. 3d at 476. The appellant should have raised his claim of a sales contract in the partition action and, having failed to do so, is barred from raising it in a breach of contract suit.

¶ 23 For the foregoing reasons, the judgment of the circuit court of Randolph County is hereby affirmed.

¶ 24 Affirmed.