[Cite as *Wyckoff v. Wyckoff*, 2009-Ohio-4740.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
SANDRA S. WYCKOFF	:	William B. Hoffman, P.J.
	:	John W. Wise, J.
Plaintiff-Appellant	:	Julie A. Edwards, J.
	:	
-vs-	:	Case No. 2008 CA 0076
	:	
	:	
RONALD F. WYCKOFF	:	O P I N I O N
Defendant-Appellee		

CHARACTER OF PROCEEDING:	Civil Appeal from Fairfield County Court of Common Pleas Case No. 08 CV 276
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 26, 2009

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
JOHN M. GONZALES Robert J. Behal Law Offices, LLC 501 South High Street Columbus, Ohio 43215	JONATHAN T. TYACK Tyack, Blackmore & Liston Co., LPA 536 South High Street Columbus, Ohio 43215-5605

Edwards, J.

{¶1} Plaintiff-appellant, Sandra Wyckoff, appeals from the October 13, 2008, Entry of the Fairfield County Court of Common Pleas granting the Motion for Summary Judgment filed by defendant-appellee Ronald Wyckoff while overruling the Motion for Summary Judgment filed by plaintiff-appellant.

STATEMENT OF THE FACTS AND CASE

{¶2} On April 5, 2006, a Decree of Dissolution of the parties' marriage was filed in the Fairfield County Court of Common Pleas, Domestic Relations Division. The Separation Agreement that was incorporated into the Decree stated in paragraph 4.A., in relevant part, as follows:

{¶3} "Division of Property: All property, real and personal, and wherever situated, which the parties own separately, or jointly, or in common with each other, or in which either party has any interest or control, shall be divided as follows:

{¶4} "Real Estate: Petitioners are joint titled owners of the real property situated in the State of Ohio, County of Fairfield, located at 10670 Lithopolis Road, N.W., Canal Winchester, Ohio 43110. Said property is secured by a promissory note executed by both Husband and Wife in favor of Greenpoint Mortgage and is secured by a first mortgage upon the marital residence. The Husband shall retain possession of the property located at 10670 Lithopolis Road, N.W., Canal Winchester, Ohio 43110 and shall timely pay, indemnify, and hold Wife harmless on the mortgage indebtedness to Greenpoint Mortgage, the real estate taxes, insurance and utilities serving the premises…Husband and Wife agree to cooperate with one another for the sale of the properties or the refinance of the properties at such time said event(s) takes place.

Further, Husband and Wife will take responsibility for the disposition of the properties and divide proceeds pursuant to their respective estate plans if either predeceases the other prior to sale or refinance."

{¶5} Subsequently, on February 29, 2008, appellant filed a complaint for partition of real estate in the Fairfield County Court of Common Pleas, seeking partition of the property located at 10670 Lithopolis Road pursuant to R.C. 5307.01. Appellant, in her complaint, alleged that the parties were both titled owners of such property and that they "are tenants in common and jointly own the real estate."

{¶6} Both parties filed Motions for Summary Judgment. Pursuant to an Entry filed on October 13, 2008, the trial court granted appellee's motion while denying the Motion for Summary Judgment filed by appellant. The trial court, in its Entry, stated, in relevant part, as follows:

{¶7} "Here, Plaintiff [appellant] is not entitled to possess the subject real estate. Plaintiff is a co-owner of the property in title only. Plaintiff has foregone any right to possession that a co-owner would normally enjoy when she executed the Agreement that gives possession to Defendant. Because Plaintiff is not entitled to possess the subject property, she cannot not (sic) seek to partition it so that she may obtain exclusive possession of a portion. To allow Plaintiff to do so would be contrary to the Agreement and the Decree of the Domestic Relations Division of this Court."

{¶8} Appellant now raises the following assignment of error on appeal:

{¶9} "THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION OF SUMMARY JUDGMENT."

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{¶10} Appellant, in her sole assignment of error, argues that the trial court erred in granting appellee's Motion for Summary Judgment. Appellant specifically argues that she has the right, as a matter of law, to partition of the real estate which she owns jointly with appellee.

{¶11} R.C. 5307.01 states as follows: "Tenants in common, survivorship tenants, and coparceners, of any estate in lands, tenements, or hereditaments within the state, may be compelled to make or suffer partition thereof as provided in sections 5307.01 to 5307.25 of the Revised Code." Pursuant to R.C. 5307.04 "If the court of common pleas finds that the plaintiff in an action for partition has a legal right to any part of the estate, it shall order partition thereof in favor of the plaintiff or all parties in interest, appoint three disinterested and judicious freeholders of the vicinity to be commissioners to make the partition, and order a writ of partition to issue."

{¶12} In order to obtain partition the plaintiff must have title to some part of the real estate and be in possession of the property or have an immediate right to possession. *Lauer v. Green* (1918), 99 Ohio St. 20, 121 N.E. 821; *Bryan v. Looker* (1994), 94 Ohio App.3d 228, 231, 640 N.E.2d 590, 592. Under *Tabler v. Wiseman* (1853), 2 Ohio St. 207, 1853 WL 143, only one who has the right of entry has a right to seek partition.

{¶13} In the case sub judice, appellant did not have possession or an immediate right to possession. Nor did she have the right of entry. The Separation Agreement incorporated into the Divorce Decree clearly granted appellee the right of possession. Therefore, appellant has not met the threshold requirement of bringing a partition action.

See *In re The Marriage of Stearns* (March 23, 1995), Franklin App. No. 94APF07-1052, 1995 WL 127868. In such case, the appellee was, pursuant to the separation agreement, given sole possession of the former martial residence, subject to the earlier of any one of several specified events. After his motion for partition of the martial residence pursuant to R.C. Chapter 5307 was denied, the appellant appealed. The trial court, in holding that appellant was not entitled to partition, stated, in relevant part, as follows:

{¶14} "The separation agreement between the parties conveyed the former marital residence from appellant and appellee as cotenants, to appellee until the earliest occurrence of any one of the several specified 'events.' And upon the happening of such 'event' back to appellant and appellee as cotenants. None of the 'events' has yet occurred. Appellee's current interest in the property then constitutes a 'determinable fee' subject to the happening of any one of the 'events' set forth in the separation agreement, as indicated by use of the term 'until' in introducing the limiting 'events' upon appellee's present estate. See *Simes on Future Interests* (2 Ed. 1966) 28, Section 13. As between the parties, appellant does not have possession, or an immediate right to possession of the property; rather, appellant possesses only a future interest in the former marital residence. As a result, appellant has not satisfied the threshold requirements of R.C. 5307.01 for bringing an action for partition. Indeed, to allow appellant a cause of action in partition under these circumstances would allow appellant to collaterally attack and thereby seek modification of, the division of property established in the prior proceedings in this case. See *Wolfe v. Wolfe* (1976), 46 Ohio

St.2d 399, paragraph one of the syllabus; *Bond v. Bond*. (1990), 69 Ohio App.3d 225, 227." (Footnotes omitted). Id. at 5.

{¶15} In the case sub judice, we also find that appellant did not have an immediate right to possession of some part of the real estate located at Lithopolis Rd., N.W. The parties' Decree of Dissolution, which is cited above, awarded the same to appellee. As noted by the court in *Gulbis v. Gulbis* (Aug. 27, 1991), Franklin App. No. 90AP-1155, 1991 WL 224560, "With respect to the particular issue of partition, the Supreme Court of Ohio has recognized that where a divorce decree sets forth the division of properties held by the parties to a divorce, an action in partition is in essence a collateral attack on the divorce decree and is therefore ordinarily impermissible. See *Sanborn v. Sanborn* (1922), 106 Ohio St. 641; *Thiessen v. Moore* (1922), 105 Ohio St. 401. "Id at 3. See also *Thomarios v. Thomarios* (Dec. 21, 1989), Summit App. No. 14170, 1989 WL 157237 at 2 ("Thus, where a divorce court has ordered a division of property in which the property rights were completely adjudicated, a dissatisfied party will not be allowed to attack collaterally the decree of the divorce court by a subsequent action for partition. 19 Ohio Jurisprudence 3d (1980) 287, Cotenancy and Partition, Section 46.").

{¶16} Based on the foregoing, we find that the trial court did not err in granting appellee's Motion for Summary Judgment.

{¶17} Appellant's sole assignment of error is, therefore, overruled.

{¶18} Accordingly, the judgment of the Fairfield County Court of Common Pleas is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Wise, J. concur

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JUDGES

JAE/d0817

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IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

SANDRA S. WYCKOFF	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
RONALD F. WYCKOFF	:	
Defendant-Appellee	:	CASE NO. 2008 CA 0076

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES