IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

September 29, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

NANCY S. ROBERTS, JOAN SELL and JAMES SELL	)	WASHINGTON COUNTY 03A01-9504-CH-00136
Plaintiffs-Appellants	)	
v.	)	HON. THOMAS J. SEELEY, JR., JUDGE
EARL W. SELL, JR.	)	
Defendant-Appellee	)	AFFIRMED AND REMANDED

RICK J. BEARFIELD OF JOHNSON CITY FOR APPELLANTS

GREGORY H. BOWERS OF ELIZABETHTON and ROBERT E. CUPP OF JOHNSON CITY FOR APPELLEE

O P I N I O N

Goddard, P.J.

This is a suit seeking partition of certain land owned by the parties as tenants in common[1] and an accounting as to certain property previously sub-divided and sold. The parties to the suit are the children of Earl W. Sell, Sr., who died on

[1] No complaint is made as to the partition feature of the suit.

December 19, 1977, and his wife, Jean Sell, who died August 8, 1991.

The only issue presented on appeal is whether the Defendant Earl W. Sell, Jr., properly paid himself $16,000 incident to the development and sale of lots in a subdivision known as Charbray Acres.

The Trial Court found that it was proper for Mr. Sell, Jr., to receive these monies, resulting in this appeal, which raises the following issue:

> Whether the trial court erred in allowing compensation for one partner in a partnership where there was no agreement among the partners for such compensation.

Earl W. Sell, Sr., willed his real estate to his widow, Jean Sell, for life with the remainder to his four children, Nancy S. Roberts, Joan Sell and James Sell, who are the Plaintiffs, and Earl W. Sell, Jr., who is the Defendant. The parties formed an oral partnership (the Defendant contends their mother was also a partner) for the purpose of sub-dividing and selling a portion of the acreage inherited. Their mother wanted the Defendant to be responsible for the enterprise and suggested that he charge $1000 for each of the 22 lots which were sold. He, however, testified he thought that $500 would be sufficient and he accordingly charged $11,000 for the sale of the lots. He charged an additional $5000 for his labors in overseeing the

development and keeping the subdivision suitably clean that favorable sales could be effected.

Initially the parties borrowed from a financial institution approximately $100,000 for the development. This loan was secured by a certificate of deposit owned by their mother. Upon her CD maturing and interest rates reaching 23-1/2 percent, their mother decided to finance the project herself, and proceeded to do so in November 1982, with an interest free loan.

The lots were sold between the years 1981 and 1985, resulting in a net payout to each of the children of $46,000. The present suit was filed on July 17, 1992, over 13 years after the last lot in the subdivision was sold and less than one year after the death of their mother.

In determining that the Defendant was entitled to retain the $16,000 in question, the Trial Court made the following findings and conclusions of law:

> THE COURT: The Plaintiffs contend there was a partnership among the parties here. The two sisters and two brothers and that the Defendant, Earl W. Sell, Jr. paid himself $11,000.00 and $5,000.00, a total of $16,000.00 over and above what he would be entitled to as his prorata share of the profits.
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> Now, those four parties were remaindermen with respect to the properties sold, called Charbray Acres. Their mother was the life tenant. And based on the

testimony of Mr. Bud Sell[2] and Mr. Joan -- Mrs. Joan Sell, it seems to me that the senior Mrs. Sell was basically a partner in this situation also but apparently a partner who waived any rights that she would have had to any prorata share of the profits, whether it be equal or based on some allocation of her life tenant interest. But certainly with respect to setting up this entire arrangement it was the senior Mrs. Sell who was calling the shots. That's the testimony of Joan Sell and Mr. Bud Sell. She agreed to basically finance them, which she did. She's the one that directed that Bud Sell be in charge, that he do it all, and to this the Plaintiffs agreed.

With respect to Mr. Bud Sell taking the $11,000.00 that was based on his taking $500.00 per lot that was sold and of course each of the twenty-two lots was sold for a total of $11,000.00. Whether it was a fee or commission or whatever you characterize it, according to Mr. Bud Sell, that was what his mother directed him to do. In fact, his testimony was she told him to take a thousand dollars per lot, so -- and his testimony was that he would not do that and took $500.00 per lot. With respect to the $5,000.00 Mr. Bud Well testified that again that he took that after discussing it with his mother and that was for the work that he did in connection with the development and maintenance of Charbray Acres until all the lots were sold.

Now, the Plaintiffs do not contend, as Mr. Bearfield indicated, that Mr. Bud Sell did anything criminal or had any malicious intention in paying himself, simply that it was not a part of the oral partnership [sic] that the parties had. Now, we know there was no written partnership agreement, so whatever they did was oral. The Plaintiffs really do not question or they have not questioned the reasonableness of the monies that Bud Sell paid to himself. Further, Plaintiffs agree or do not contest that with respect to the total development and sale of all of the lots in Charbray Acres, Mr. Bud Sell did everything, not only in setting it up but even in maintaining the lots and the streets after the subdivision was established. And of course he did, through his efforts, sell all the lots.

The last payout to the various parties was June 13, 1986. This suit was filed July 17, 1992. Certainly during the period of time that these lots were selling, and certainly from 1986 to 1992, when this lawsuit was filed, Plaintiffs basically knew or

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[2] Earl W. Sell, Jr.'s nickname is Bud.

should have known that Mr. Sell, Bud Sell, that is, was paying himself the $500.00 per lot and at some point paid himself the $5,000.00. Mr. Bud Sell let the other parties know that the records were at his house, they were available for inspection. The Plaintiffs, for reasons personal to themselves, did not take advantage of that offer to look at the books. Mr. Steagall was doing the accounting for the partnership and Mrs. Joan Sell indicated she had made some effort through her accountant to talk to Mr. Steagall, but certainly Mr. Steagall was under a legal duty to account to, to at least show the books to any of the partners, and I find it very difficult to believe that Mr. Steagall would not have done that at any partner's request. Certainly the books were at the residence of Mr. Bud Sell, and he did advise the others that the books were there and they could see them any time they wanted to. I don't know if you want to call it laches, I don't know if you want to call it estoppel, but it does seem to me that there was at the very least an implied agreement that Mr. Bud Sell could pay himself, which was at the direction of his mother. That the parties knew or should have known that he was paying himself and had every opportunity between the time when the lots were first sold up until 1991, some six years after the last payout of the indicated shares that he was paying himself. And now, at least six years after the final payout the parties come in basically as part of a partition suit of other properties and ask that Mr. Bud Sell be held accountable for the $16,000.00.

I think there was an implied agreement and Mr. Bud Sell was authorized to pay himself certainly through the direction of his mother who for whatever reason was obviously calling the shots in this thing. And the reason was she had the money and basically she had the property at that time.

And the Court's going to find that even as a matter of equity that Mr. Bud Sell should be entitled to receive compensation for the work that he did really in developing this property and making a profit for the other partners. And that money is not a share of partnership profits, but is simply compensation for his efforts to which I think the parties acquiesced and agreed in and it's from that that I find the implied agreement.

The Plaintiffs principally rely upon T.C.A. 61-1-117, which provides as follows:

> **61-1-117. Relationship between partners and partnership.** -- The rights and duties of the partners in relation to the partnership shall be determined, <u>subject to any agreement between them</u>, by the following rules:
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> . . . .
>
> (6) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his service in winding up the partnership affairs. (Emphasis supplied.)

There is a dispute as to whether the mother was in fact a partner or, as found by the Trial Court, the managing partner. We do not believe the evidence preponderates against such a finding in that she was indeed "calling the shots." In this regard it will be noted that it was necessary for her or her attorney-in-fact to sign each of the deeds to insure that the grantees received a fee simple title.

Additionally, as found by the Trial Court, the Plaintiffs acquiesced in the Defendant's actions. Indeed, the only Plaintiff who testified, Mrs. Roberts, conceded that books, which were kept by the Defendant's wife, were available to her at all times. In this regard we suspect that it was no coincidence that the Plaintiffs waited until after the death of their mother before filing this suit.

Moreover, we observe that if the mother had charged interest on the money loaned for the development, even at the modest rate by today's standard of six percent, it would have

exceeded the $5000 charged by the Defendant for his oversight. Additionally, although the mother's age is not shown, we suspect that her life estate as to the lots sold would have exceeded the $500 per lot received by the Defendant.[3]

For the foregoing reasons the judgment of the Trial Court is affirmed and the cause is remanded for disbursement of the $12,000[4] retained in court in accordance with the Trial Court's direction, and collection of costs below. Costs of appeal are adjudged against the Plaintiffs and their surety.

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Houston M. Goddard, P.J.

CONCUR:

____
Don T. McMurray, J.

____
Charles D. Susano, Jr., J.

[3] The approximate average net sales price of each of the 22 lots, after deducting all expenses except the $16,000 in dispute, was $9000.

[4] The Defendant was entitled to one-fourth, or $4000, of the $16,000 in dispute.