

34947

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

BARBARA K. MOTT,

PLAINTIFF,

v.

CIVIL ACTION NO. 03-C-548
JUDGE JOHN L. CUMMINGS

FRANK P. KIRBY SR, LLC,
KENNY KIRBY and
FRANK P. KIRBY, JR.,

DEFENDANTS.

ORDER

On June 9, 2008, came the parties, Plaintiff, Barbara K. Mott, by counsel, Paul E. Biser and Fredeking, Fredeking & Biser and Defendants, Frank P. Kirby Sr, LLC, Kenny Kirby and Frank P. Kirby, Jr, by counsel Thomas E. Scarr and Jenkins Fenstermaker, PLLC for a hearing on *Defendants' Motion to Alter or Amend Judgment and/or for Relief from Judgment or Order*. The Court, having heard the argument of counsel and reviewing the record, the evidence, and being otherwise fully advised, hereby DENIES *Defendants' Motion to Alter or Amend Judgment and/or for Relief from Judgment or Order*.

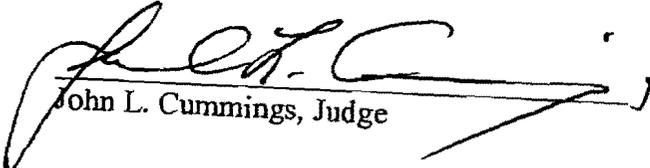
WHEREFORE, this Court hereby ORDERS that *Defendants' Motion to Alter or Amend Judgment and/or for Relief from Judgment or Order* is DENIED.

The Circuit Clerk of Cabell County is directed to distribute a copy of this Order to the following:

Paul E. Biser
Fredeking, Fredeking & Biser
511 Eighth Street
Huntington, WV 25701

Thomas E. Scarr
Jenkins Fenstermaker, PLLC
PO Box 2688
Huntington, WV 25726-2688

Executed this 31st day of October 2008.


John L. Cummings, Judge

STATE OF WEST VIRGINIA
COUNTY OF CABELL

I, ADELL CHANDLER, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS
A TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON _____

GIVEN UNDER MY HAND AND SEAL OF SAID COURT

THIS _____

OCT 31 2008

 CLERK,
CIRCUIT COURT OF CABELL COUNTY WEST VIRGINIA

FILED
IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

2007 JUN 11 P 2:24

BARBARA K. MOTT,

Plaintiff,

ADELL CHANDLER
CIRCUIT CLERK
CABELL WV

vs.

CIVIL ACTION NO. 03-C-548
JOHN L. CUMMINGS, JUDGE

FRANK P. KIRBY SR.
LIMITED LIABILITY COMPANY,
KENNY KIRBY AND
FRANK P. KIRBY, JR.

Defendants.

FINAL ORDER

On the 18th day of April, 2007 came the plaintiff Barbara K. Mott, in person and through counsel Paul E. Biser, and the defendants Kenny Kirby and Frank P. Kirby, Jr., in person and through counsel W. Merton Prunty and Paul Prunty, for a bench trial. The Court, having reviewed the file, evidence, and oral arguments, makes the following findings of fact and conclusions of law:

This court has jurisdiction of this matter, in accordance with West Virginia Code §37-4-1, because the parties to the lawsuit are stockholders of the closely-held corporation Frank P. Kirby Sr. Limited Liability Company. Further, the real estate at issue is located in Cabell County, West Virginia.

Prior to the deed conveyed to David Kirby, dated the 26th of July, 2002, there is ample evidence in finding that there were discussions that all parties wished to divide the property, and had agreed that it was divisible and they would each take a share. Further, shareholder meeting minutes, that were signed by Frank Kirby, Jr., Kenneth Kirby and Barbara Kirby-Mott, support the finding

that the parties intended to divide the property between the shareholders.

It is further held that when David Kirby was conveyed an approximate one-fourth interest of the land, by deed dated July 26th, 2002, it established that the land could be partitioned in kind, and constituted a waiver of the right to object to partition in kind, as believed by all members of the corporation.

This Court Orders that the real estate be partitioned along the lines of the survey that David Nemeth prepared, dated January 23, 2003, with no restrictions to be placed upon the land. Further, partition between the plots of Frank Kirby, Jr., and Kenny Kirby is to be done within sixty days, to establish the one boundary line, with no restrictions to be placed upon the land. While the division of real estate is approximately of equal value, any discrepancies in equity or amount of property is provided for, because this case is about restrictions on the land, as demonstrated by the last witness at trial.

WHEREFORE, this Court hereby Orders that the real estate be partitioned along the lines of the survey that David Nemeth prepared, with no restrictions to be placed upon the land. FURTHER, partition between the plots of Frank Kirby, Jr. and Kenny Kirby is to be done within sixty days, with no restrictions to be placed upon the land.

The Circuit Clerk is directed to forward a certified copy of this Order to:

Paul E. Biser, Esquire
Fredeking & Fredeking Law Offices, LC
511 Eighth Street
Huntington, West Virginia 25701

W. Merton Prunty, Esquire
Paul Prunty, Esquire
430 Sixth Avenue
Huntington, West Virginia 25701

Entered this 11th day of June, 2007.


John L. Cummings, Judge

ENTERED Circuit Court Civil Order Book
No. 206 Page 685 this
JUN 11 2007

STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, ADELL CHANDLER, CLERK OF THE CIRCUIT COURT
FOR THE COUNTY AND STATE AFORESAID DO HEREBY
CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE
RECORDS OF SAID COURT ENTERED ON 6-11-07
GIVEN UNDER MY HAND AND SEAL OF SAID
COURT THIS JUN 11 2007
 CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA