No. 125,456

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CRAIG M. MOG and DEBBIE A. MOG,
Trustees of the CRAIG M. MOG LIVING TRUST
DATED OCTOBER 23, 2015, and the DEBBIE A. MOG
LIVING TRUST DATED OCTOBER 23, 2015,
Appellees,

v.

ST. FRANCIS EPISCOPAL BOYS' HOME OF SALINA, KANSAS, et al.,
Appellees,

and

KELSEY ALEXANDER, Trustee of the ANNE STODDER MCEWEN
KANSAS TRUST DATED FEBRUARY 20, 1987,
Appellant.

SYLLABUS BY THE COURT

1.

A partition case is a single judicial action that determines the parties' interests in property and orders partition. When there is an action to partition property, that case is the one and only opportunity for interested parties to challenge the partition.

2.

A defendant named in a petition in a partition action and served with process must file an answer or a responsive motion before it can participate as a party in that case.

3.

As with any other civil action, when a defendant in a partition case fails to file an answer to the petition or file a responsive motion, the defendant is in default. A defaulting party is no longer entitled to participate in the case. This means, among other things, that

the remaining parties are no longer required to provide the defaulting party notice of filings or rulings in the case.

Appeal from Ellsworth District Court; CAREY L. HIPP, judge. Opinion filed July 14, 2023. Affirmed.

Keith A. Brock and *Daniel J. Keating*, of Anderson & Byrd, LLP, of Ottawa, for appellant Kelsey Alexander.

William W. Jeter, *Tyler K. Turner*, *Ashley D. Comeau*, and *Christopher W. Sook*, of Jeter Turner Sook Baxter LLP, of Hays, for appellees Craig Mog and Debbie Mog.

Before WARNER, P.J., COBLE and PICKERING, JJ.

WARNER, J.: To participate as a party in a civil case, a defendant named in a petition must respond to the lawsuit. Most often, that means the defendant must file an answer—the procedural gateway that informs all other parties and the court that the answering party is entitled to notice of all case filings, to file motions and participate in discovery, and to contest court rulings. By filing an answer, a defendant indicates an intent to participate in the case. When a party chooses not to file an answer or otherwise respond to the petition, it foregoes this opportunity.

This rule governs the outcome of this appeal. The Craig M. Mog Living Trust and the Debbie A. Mog Living Trust sought to partition the property rights to oil, gas, and other minerals in Ellsworth County. The petition indicated that the Anne Stodder McEwen Kansas Trust had ownership interests in the mineral rights, and the McEwen Trust was served with notice of the lawsuit. But the McEwen Trust never filed an answer to the petition. Instead, its trustee-beneficiary—who could not represent the trust because she was not licensed to practice law—appeared at a hearing. After a lengthy discussion, she informed the district court that she declined to continue the proceedings to obtain an

attorney to challenge the partition or otherwise participate in the case. The district court found that the McEwen Trust had defaulted, and the case progressed without the McEwen Trust's involvement.

Months later, after the mineral rights were partitioned and sold, the McEwen Trust retained an attorney and unsuccessfully tried to set the partition aside. It now appeals, challenging the sufficiency of the notice it received regarding proceedings after the district court found it to be in default. But by not filing an answer, the McEwen Trust gave up its right to participate in the partition action and thus had no right to receive notice of ongoing developments in the case. We affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Several parties owned undivided interests in oil, gas, and other minerals in and under four tracts of land in Ellsworth County. The Mog Trusts owned most of these mineral rights—together, about 60% of the rights in each tract. In January 2021, Craig and Debbie Mog, as trustees of the Mog Trusts, sued to quiet title to and partition the minerals, seeking to simplify the ability to explore for and extract oil and gas. As the case proceeded, some parties with mineral interests elected to participate, while others quitclaimed their interests to the Mog Trusts. One of the interested parties was the McEwen Trust, which owned about 2% of the mineral rights in each tract.

The McEwen Trust did not file an answer or other responsive motion to the partition petition. But Kelsey McEwen Alexander—the McEwen Trust's trustee and only beneficiary—sent a letter to the district court in March 2021, copying the Mog Trusts. The letter stated that Alexander understood the nature of the partition request and indicated that she "d[id] not dispute the legal descriptions nor the percent interests stated" for the McEwen Trust. But Alexander did not believe partition was necessary and would prefer that no partition take place, as the trust's interests had belonged to her mother.

The court held a hearing on the Mog Trusts' request for partition in October 2021. Alexander appeared in person, purporting to represent the McEwen Trust. The district court and Alexander spoke at length on the record about Alexander's involvement in the case. Ultimately, the court explained that Alexander—who was not a lawyer or licensed to practice law in Kansas—could not represent an entity like the McEwen Trust in legal proceedings. And the court noted that it was the trust, not Alexander individually, that owned the mineral rights.

The district court asked Alexander whether she wanted to hire an attorney to represent the McEwen Trust, offering to continue the proceedings to allow her time to do so and making clear that it did not want to pressure Alexander into a decision. The court explained that because Alexander could not represent the McEwen Trust, if she did not hire an attorney to do so, the trust would be in default and lose the ability to challenge the proposed partition. Alexander confirmed that she understood.

After an extensive discussion between Alexander, the district court, and the attorneys representing the Mog Trusts, Alexander stated that she would not seek extra time to hire an attorney and challenge the partition. The court thus found the McEwen Trust to be in default. Later at the hearing—after this exchange and ruling—one of the Mog Trusts' attorneys stated that they would continue to notify Alexander of future proceedings and keep her aware of how the case unfolded.

The court filed a journal entry confirming that Alexander had "decline[d] the suggestion by the District Court to allow additional time to hire counsel," and thus "the Trust failed to appear and is in default." The court then quieted title to the property in the manner described in the petition, finding that the McEwen Trust owned about 2% of the mineral rights in question. And the court ordered a partition, appointing commissioners to appraise the mineral interests for a sale.

In January 2022, the court-appointed commissioners completed a report valuing the total mineral interests at roughly $45,000, which the district court later approved. One of the Mog Trusts' attorneys emailed the report to Alexander. The Mog Trusts were the only parties that elected to retain their mineral rights and to purchase the property (including the McEwen Trust's and other parties' interests in the mineral rights) at the commissioners' appraised value. After deducting applicable taxes, expenses, and attorney fees, the McEwen Trust's portion of the sale proceeds—reflecting its proportional interest in the mineral rights—was $227.86.

In May 2022, the Mog Trusts moved to confirm the sale and distribute the proceeds. The McEwen Trust, which had since hired an attorney, opposed this motion and moved to set aside the sale so it could file an election out of time. After a hearing, the district court granted the Mog Trusts' motion and denied the McEwen Trust's request, ultimately confirming the sale and distributing the proceeds to the affected parties. The McEwen Trust now appeals the district court's decision not to set aside the sale.

DISCUSSION

Partition proceedings have their origins in equity. Broadly speaking, partition actions seek to fairly determine and divide ownership interests in property. This can be motivated by any number of reasons. For example, property owners may "wish to terminate their relationship or avoid the discord that so often comes with shared possession." *Einsel v. Einsel*, 304 Kan. 567, 576, 374 P.3d 612 (2016). Or the sheer number of shared owners of the property may render the administrative costs associated with maintaining the separate property interests unworkable. The partition in this case falls into the latter category—more than a dozen owners shared interests in mineral rights, most with ownership shares involving 2% or less of the property in question.

Sometimes partition can occur by dividing land into separate parcels. But the district court here found after the October 2021 hearing that a physical partition—or partition in kind—was impracticable. Thus, the court appointed commissioners to determine the value of each interest in the property and the property as a whole. See K.S.A. 60-1003(c)(2). When the court approved the appraisal, any of the interested parties participating in the partition lawsuit could have elected to purchase all or part of property at the appraised value. K.S.A. 60-1003(c)(4). The Mog Trusts were the only parties who elected to purchase the mineral rights.

The McEwen Trust argues that the Mog Trusts failed to properly serve it with notice regarding the developments in the partition case after the October 2021 hearing. More specifically, the McEwen Trust challenges the sufficiency of the email Alexander received of the commissioners' report appraising the mineral rights and of the right to elect to purchase the property. According to the McEwen Trust, because it believes the trust did not receive proper notice of these developments, it could not meaningfully contest the appraised value or seek to purchase the mineral rights. Given these alleged notice defects, it asserts the partition was unjust and inequitable. The McEwen Trust also asserts that it relied on the Mog Trusts' commitment at the hearing to notify Alexander of later developments in the case.

The Mog Trusts respond that the McEwen Trust had no right to notice after Alexander stated that she did not intend to hire counsel for the trust and allowed a default judgment to be entered. And they note that Alexander made this decision before they offered to notify her as the case progressed. We agree with the Mog Trusts and affirm the district court's judgment.

1. *The McEwen Trust had no right to notice after it defaulted (and thus ceased participating in the lawsuit).*

We begin our analysis with the McEwen Trust's assertion that it was entitled to notice of all developments in the case because it had an interest in the mineral rights being partitioned. It is generally true that a party must provide copies of all its case filings to the other parties to the lawsuit. See K.S.A. 2022 Supp. 60-205(a)(1). The same is true with court orders. K.S.A. 2022 Supp. 60-205(a)(1)(A), (c)(2). But this ongoing notice is not required when a party that has been properly served with a petition in a lawsuit has opted not to respond or participate in the case—that is, Kansas law does not require notice to "a party who is in default for failing to appear." K.S.A. 2022 Supp. 60-205(a)(2).

Although partition is an equitable remedy, a partition proceeding in Kansas is a civil action, subject to the rules of civil procedure and governed by K.S.A. 60-1003. See *Einsel*, 304 Kan. at 576-77. A judicial action for partition begins when a property owner files a petition for partition. See K.S.A. 60-1003(a). The petition "must describe the property and the respective interests" of the property owners to the extent they are known, naming the other interested parties as defendants. K.S.A. 60-1003(a)(1). Each named defendant must then file an answer describing "the nature and extent of their respective interests" and contesting "the interests of any of the plaintiffs, or any of the defendants." K.S.A. 60-1003(b).

Once the time for filing answers and replies has passed, the partition process begins. The district court first determines "the interest[s] of the respective parties" and assesses whether partition is appropriate. K.S.A. 60-1003(c)(1). If so, the court directs partition, appointing commissioners to either partition the property in kind (by dividing the property into separate parcels) or appraise it for a sale. K.S.A. 60-1003(c)(2). Any

party to the lawsuit may file exceptions to the commissioners' findings, which the district court may approve, disapprove, or modify after a hearing. K.S.A. 60-1003(c)(3).

As this procedure suggests, the partition statute envisions "a single judicial action that both determines the parties' interests and orders partition." *Nelson Energy Programs, Inc. v. Oil & Gas Technology Fund, Inc.*, 36 Kan. App. 2d 462, 470, 143 P.3d 50 (2006). So, when there is an action to partition property, that case is the one and only opportunity for interested parties to challenge the partition. But to participate as a party in the case, regardless of one's interest in the property being partitioned, one must file an answer. See K.S.A. 60-1003(b); K.S.A. 2022 Supp. 60-205(a)(2).

When a defendant in a civil case fails to file an answer or otherwise defend the case, the defendant is in default. K.S.A. 2022 Supp. 60-255(a); see *McGinty v. Hoosier*, 291 Kan. 224, 242, 239 P.3d 843 (2010) (finding adequate notice under K.S.A. 60-1003 when owners were served with a partition cross-petition and had an opportunity to file an answer). Once a party is in default, that party is no longer entitled to participate in the case. This means, among other things, that the remaining parties are no longer required to provide the defaulting party notice of filings or rulings in the case. K.S.A. 2022 Supp. 60-255(a); K.S.A. 2022 Supp. 60-205(a)(2).

Applying these principles here, neither the McEwen Trust nor Alexander had a right to notice of the commissioners' report or to elect to purchase mineral interests at the appraised value. When the Mog Trusts filed an action to partition the mineral interests, that case was the only vehicle through which interested parties—like the McEwen Trust—could challenge the partition. The parties agree that the McEwen Trust was properly served with summons and notified of this action.

But the McEwen Trust never filed a proper answer or other responsive motion to the partition petition. Because Alexander was not licensed to practice law, she could not

file one or appear for the trust at the hearing. (The McEwen Trust does not contest this ruling.) The district court gave Alexander a chance to hire an attorney and properly challenge the proposed partition, but she declined this opportunity, even after the district court explained that doing so would mean the McEwen Trust defaulted. Thus, the district court properly found the McEwen Trust to be in default for failing to appear. After that point, the McEwen Trust was no longer part of the case and had no right to notice of future proceedings and developments, such as the commissioners' report. The statutes setting out service procedures and requirements no longer applied to the McEwen Trust. See K.S.A. 2022 Supp. 60-205(b).

In some limited instances, a party who has defaulted may successfully seek to set aside a judgment and reopen proceedings in a case. See K.S.A. 2022 Supp. 60-260. But the only reason the McEwen Trust provided for its request was its assertion that it did not receive proper notice of the case developments. (The parties dispute whether the courtesy email to Alexander complied with Kansas notice requirements since the trust was not represented by counsel, but we need not resolve that question here.) The bottom line is that the Mog Trusts were not required serve the McEwen Trust with notice of the commissioners' report or the right to purchase mineral interests because the McEwen Trust had declined to participate in the case. The district court did not err in confirming the commissioners' report or denying the McEwen Trust's motion to set aside the sale.

The McEwen Trust also argues that the district court did not make a just and equitable partition because of the asserted notice defects. But the McEwen Trust had no right to notice after it defaulted. And by choosing to default rather than participate in the proceedings, the McEwen Trust gave up the opportunity to contest the court's subsequent rulings. Thus, the district court did not err in partitioning the mineral interests and confirming the sale of those rights to the Mog Trusts.

2. *Judicial estoppel does not apply because the McEwen Trust did not detrimentally rely on the Mog Trusts' commitment to provide notice.*

Alternatively, the McEwen Trust argues that even if it was not entitled to receive notice of the partition proceedings under Kansas law, principles of fairness and judicial estoppel required the Mog Trusts to provide it notice of the commissioners' report and the right to elect to purchase mineral interests. The McEwen Trust asserts that the Mog Trusts' attorney agreed to provide this notice at the hearing, and this agreement caused the McEwen Trust to decide not to retain counsel or participate further. We do not find this argument persuasive.

Judicial estoppel is a doctrine that "advances notions of fair play by precluding a party from inducing judicial action by taking one legal position and then taking a contrary position later to achieve further advantage over the same adverse party." *State v. Hargrove*, 48 Kan. App. 2d 522, 548-49, 293 P.3d 787 (2013). To invoke judicial estoppel, the party asserting it must show that the other party took a position contradicting a statement in a prior judicial action, the two actions involve the same parties, and the party asserting judicial estoppel changed its position because of the prior statement. *State v. Bird*, 59 Kan. App. 2d 379, Syl. ¶ 2, 482 P.3d 1157 (2021).

The McEwen Trust asserts that it detrimentally relied on the Mog Trusts' attorney's statement at the hearing that he would provide Alexander notice of later developments in the case, such as the commissioners' report. The McEwen Trust argues that Alexander's decision not to participate further in the case hinged on the Mog Trusts' assurance that they would notify her about the case as it developed. But the transcript of the October 2021 hearing belies this argument.

Our review of the record confirms that the Mog Trusts stated they would notify Alexander of further developments *after* she had informed the district court that she

would not be retaining an attorney to challenge the partition on the McEwen Trust's behalf—that is, after the McEwen Trust had defaulted. Thus, consistent with the district court's ruling, the record shows Alexander did not change her position because of the Mog Trusts' promise to keep her informed as the case unfolded. The district court did not err in denying the McEwen Trust's motion to set aside the partition due to judicial estoppel.

In sum, because the McEwen Trust did not file an answer to the petition, it could not participate in the partition action. This means that it was not entitled to notice of later developments in the case. And it did not have a right to contest the outcome of the partition or elect to purchase its mineral rights. The district court did not err when it denied the McEwen Trust's motion to set aside the sale.

Affirmed.