

IN THE COURT OF COMMON PLEAS OF THE 44TH JUDICIAL DISTRICT
SULLIVAN COUNTY BRANCH – CIVIL DIVISION

.....
DONALD E. MESKE and
HAZEL G. MESKE, his wife,
Plaintiffs

vs.

ALMA K. HULL, widow, CENTRAL
PENNSYLVANIA LUMBAR COMPANY,
JOHN KRAVITZ, ELIZABETH KRAVITZ,
his wife, MATE K. BORDEN, S.
RICHARD, DAVIDGE, CALBERT
CRARY and RUTH CRARY, his wife, their
successors, heirs, administrators and
assigns or anyone claiming by, through or
under them,
Defendants

CIVIL ACTION - LAW
ACTION TO QUIET TITLE

2009-CV-117

RECORDED
2013 APR 23 A 7:51
SULLIVAN COUNTY

.....
DONALD E. MESKE and
HAZEL G. MESKE, his wife,
Plaintiffs

vs.

CALVERT CRARY and RUTH CRARY,
his wife, their successors, heirs,
administrators and assigns or anyone
claiming by, through or under them,
Defendants

CIVIL ACTION - LAW
ACTION TO QUIET TITLE

2011-CV-33

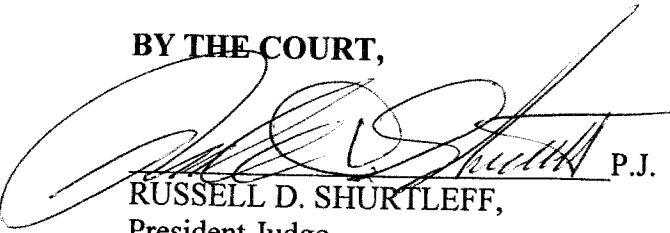
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ORDER

AND NOW, this 19th day of April, 2013, upon consideration of Plaintiffs' Motion for Summary Judgment, Defendants' Cross-Motion for Summary Judgment, the responses filed thereto, the briefs filed in support thereof, oral argument and based upon the attached Opinion,

IT IS HEREBY ORDERED that:

1. Plaintiffs' Motion for Summary Judgment is **DENIED**.
2. Defendants' Cross-Motion for Summary Judgment is **GRANTED**.

BY THE COURT,



P.J.

**RUSSELL D. SHURTLEFF,
President Judge**

cc:

Andrew Fletcher, Esquire
Tucker R. Hull, Esquire
J.C. Wilkinson, III, Esquire
Christopher M. Williams, Esquire
Joel R. Burcat, Esquire

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CIVIL ACTION - LAW
ACTION TO QUIET TITLE

2009-CV-117

RECORDED
2013 APR 23 A 7:49
SULLIVAN COUNTY

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DONALD E. MESKE and
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.....
Christopher Williams, Esquire – Attorney for Plaintiffs
Joel R. Burcat, Esquire – Attorney for Plaintiffs
Tucker R. Hull, Esquire – Attorney for Defendants
Andrew Fletcher, Esquire – Attorney for Defendants
J.C. Wilkinson, Esquire – Attorney for Defendants

OPINION

Shurtleff, P.J., April 19, 2013:

This Opinion is in support of the attached Order.

I. BRIEF FACTS

Donald and Hazel Meske (hereinafter “Plaintiffs”) instituted this action by filing a Complaint to Quiet Title on May 7, 2009 to the subsurface rights of a parcel of land in Sullivan County. More specifically, this case involves a dispute over the ownership of the mineral, oil and gas rights (hereinafter “the Subsurface Estate”) under an approximate one thousand twenty six (1,026) acre parcel of land (hereinafter “the Property”) which is located in Colley Township, Sullivan County, Pennsylvania and identified as Sullivan County Parcel No. 02-041-0014. The surface rights (hereinafter “Surface Estate”) to this land are undisputedly owned by Plaintiffs by deeds dated September 13, 2000 and August 19, 2005, which was recorded in the Sullivan County Records office.

Title to the Surface and Subsurface Estate of the Property originate in a deed dated February 27, 1894, in which Sherwood B. Davidge conveyed to the Union Tanning Company the Surface Estate of the Property. This same deed excepted and reserved all the “petroleum and other oils, gas, coal, iron and other minerals” for Sherwood B. Davidge and his heirs and assigns forever. A tax sale was held on June 3, 1910 and Calvin H. McCauley (hereinafter “McCauley”) acquired certain property. Plaintiffs allege that pursuant to the duly acknowledged tax deed, McCauley acquired both the Surface and Subsurface Estates. After the 1910 tax sale McCauley conveyed to the Central Pennsylvania Lumber Company (hereinafter “CPL”) whatever interest he acquired in the Property as a result of that sale. Thereafter, CPL conveyed the Surface Estate to Edward M. Hull by deed dated November 11, 1924. The “Hull deed” explicitly noted the earlier exception and reservation of the Subsurface Estate in favor of Sherwood B. Davidge and S. Richard Davidge stating:

EXCEPTING AND RESERVING all petroleum and other oils, gas, coal, iron and

other minerals in or under the lands hereinbefore described...as fully as said rights were reserved by Sherwood B. Davidge and others in deed to Union Tanning Company dated February 27, 1894, by Samuel Thorne and John W. Sterling in deed to Union Tanning Company dated May 1, 1893, and by Sherwood B. Davidge and wife in deed to Union Tanning Company dated November 4, 1895, being the deeds hereinbefore recited, and as fully as said minerals and mineral rights were conveyed by the grantor S. Richard Davidge by deed dated March 15, 1924.

See, Linda P. Davidge & Louise Davidge Raimondi's Statement of Undisputed and Disputed Issues of Material Fact; *see also*, Plaintiffs' Counterstatement to Defendants' Statement of Undisputed and Disputed issues of Material Fact at ¶11.

Thereafter, by deed dated January 25, 1939 Edward Hull conveyed the Surface Estate to himself and his wife, Alma K. Hull. Mrs. Hull conveyed the Surface Estate to John Kravitz on October 27, 1954. John Kravitz conveyed a portion of the Surface Estate to DMBW Corporation by deed dated November 21, 1967. Then, by way of assignment dated May 25, 1967 Leon Charney acquired the Surface Estate.

In 1968, a tax sale was held as it pertained to the property at issue. The property was sold to Charles Kschinka by way of a series of treasurer's deeds following the tax sale on August 27, 1968. At some point, Charles Kschinka transferred his interest to C&S Investments who then transferred its interest to Plaintiffs. The issue before this Court is the effect that the 1968 tax sale had on the Subsurface Estate. Plaintiffs maintain that the 1968 tax sale merged the Surface and Subsurface Estates and therefore Charles Kschinka acquired both the Surface and Subsurface Estates in fee simple. Defendants, on the other hand, maintain that at the time of the 1968 tax sale, the Subsurface Estate was a separate interest in land, not subject to taxation and therefore the taxing authority could not have sold it.

II. PROCEDURAL HISTORY

Plaintiffs initiated this action by filing a Complaint on May 7, 2009. Thereafter, on

June 24, 2009 Defendants Linda Davidge and Louise Davidge Raimondi filed Preliminary Objections, which were denied by Court Order on October 6, 2009. Defendants subsequently moved for entry of default judgment against other Defendants in the action. This Court by Order dated September 15, 2009 granted said default.

Defendants filed an Answer with New Matter and Counterclaim on October 22, 2009. Defendants' Counterclaim seeks lost rental income and an injunction enjoining Plaintiff's from exercising any rights to the Subsurface Estate. Plaintiffs filed an Answer to Defendants' Counterclaim and New Matter.

Discovery commenced on December 14, 2009 and proceeded through a consolidation with a similar case docketed in Sullivan County, Pennsylvania to 2009-CV-117. Discovery concluded on May 2, 2012. No depositions were taken. Plaintiffs filed the instant Motion for Summary Judgment on November 30, 2012 and subsequently filed a praecipe to list the case for trial. Defendants thereafter filed a Cross-Motion for Summary Judgment on December 28, 2012. The Motions were briefed, oral arguments were held and this matter is now ripe for discussion.

III. STANDARD OF REVIEW

A party may move for summary judgment any time after the pleadings have closed. An entry of summary judgment is appropriate if, after reviewing the pleadings, answers to interrogatories, depositions, together with any admissions or affidavits, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Welsh v. Bulger*, 548 Pa. 504, 698 A.2d 581 (1997); *Pa.R.C.P.* 1035.2. Summary judgment is appropriate only in those cases where there is no genuine issue of any material fact as to a necessary element of the cause of action. *Pa.R.C.P.* 1035.2(1). More specifically, it is the moving party that bears the burden of

demonstrating clearly that there is no genuine issue of material fact. *Penn Ctr. House Inc. v. Hoffman*, 553 A.2d 900, 903 (Pa. 1989).

Pennsylvania Rule of Civil Procedure 1035.2 states that a party may move for summary judgment as a matter of law:

If, after the completion of discovery relevant to the motion, including, the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of fact essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.
Pa.R.C.P. 1035.2.

In other words, it is appropriate to grant summary judgment when the evidentiary record shows that there is an insufficient basis of fact or evidence to make out a *prima facie* cause of action and, therefore, there is no issue to be submitted to the jury. *See*, Note to *Pa.R.C.P.* 1035.2.

Through this action, Plaintiffs wish to quiet title to the Subsurface Estate. Therefore, Plaintiff must establish title by a fair preponderance of the evidence. *Moor v. Com, Dept. of Environmental Resources*, 129 Pa.Cmwth. 628, 566 A.2d 905 (1989). Once the plaintiff has carried his burden of establishing a *prima facie* title, the adverse party must show better title. *Id.* Through their Motion for Summary Judgment, Plaintiffs assert they have established title to the Subsurface Estate of the Property. Defendants, through their Cross-Motion for Summary Judgment, assert the complete opposite.

IV. DISCUSSION

It is clear that at the time of the 1968 tax sale, S. Richard Davidge owned the Subsurface Estate via quitclaim deed dated November 1, 1924. The issue before this Court, therefore, is whether the 1968 tax sale merged the Surface and Subsurface Estates such that Plaintiffs now own both in fee simple.

Plaintiffs argue that the 1968 tax sale resulted in a merger of the Surface and Subsurface Estates in the Property and as such, Defendants cannot establish that they have title to the Subsurface Estate. In so arguing, Plaintiff's rely on *Proctor v. Sagamore Big Game Club*, 166 F.Supp. 465, (W.D. Pa. 1958), *Hutchinson v. Kline*, 49 A. 312 (Pa. 1901) and *Moore v. Commonwealth of Pa. Dep't of Env'tl. Res.*, 566 A.2d 905 (Pa. Commw. Ct. 1989) for the proposition that at the time of both the 1910 and 1968 tax sales, the purchasers of the property at issue obtained fee simple title to both the Surface and Subsurface Estates because (1) the lands were unseated; (2) the oil, gas, mineral or coal rights had not been previously severed; (3) the purchaser received a duly acknowledged Treasure's Deed for the property; and (4) the property was not redeemed within two (2) years of the date of the tax sale. Plaintiffs' reliance on these cases, however, is misplaced as these cases involved interpretation of the Acts of 1804 and 1815 and not the Act of July 7, 1947, P.L. 1368, No. 542, (hereinafter "the 1947 Act"), which is the Act that governed at the time of the 1968 tax sale. Furthermore, the record reflects that the subsurface rights, namely the oil, gas, mineral and coal rights, had been previously severed from the surface rights.

In arguing for Summary Judgment in their favor, Plaintiffs further rely on the 1947 Act. More specifically, Plaintiffs cite to 72 P.S. § 5860.609 which states:

Every such sale shall discharge the lien of every obligation, claim, lien or estate with which said property may have or shall become charged, or for which it may be liable, except no such sale shall discharge the lien of any ground rent or mortgage which shall have been recorded before such taxes become liens, and which is or shall be prior to all other liens, except other mortgages and ground rents.

The 1947 Act, § 609. Plaintiffs state that based upon this law, "the Court should determine that, under the plain meaning of the statutory text, [footnote omitted], the Davidge family's interest in the Subsurface was divested by operation of Pennsylvania statutory law." Pl. Memorandum of

Law in Opposition to Def. Cross-Motion for Summary Judgment, p. 10. With this argument, this Court simply cannot agree.

The 1947 Act defines property in Section 102 as “real property subject to a tax lien” and that tax liens are permitted only for “taxes which ... may be lawfully levied on property in this Commonwealth”. The 1947 Act, § 301.

Defendants correctly set forth that at the time of the 1968 tax sale, the Subsurface Estate was a separate and distinct interest in land from the Surface Estate. The Pennsylvania Supreme Court has held that the conveyance of property while excepting and reserving oil, gas and mineral rights, creates a separate estate in the land. *See, Rockwell v. Warren County*, 228 Pa. 430, 77 A. 665 (1910). Pursuant to the General County Assessment Law Act of May 22, 1933, the Subsurface Estate was not subject to taxation as of the time of the 1968 tax sale¹. *See, Independent Oil and Gas Ass'n of Pa. v. Bd. of Assessment Appeals of Fayette County*, 814 A.2d 180, 184-5 (Pa. 2002) (holding that the General County Assessment Law Act of May 22, 1933 did not grant counties the authority to impose ad valorem tax on an oil and gas estate). Based upon this, therefore, the real issue before this Court is whether an estate in land that was not legally subject to taxation and the taxing authority was, in fact, not taxing could be sold on account of assessed and unpaid taxes due on a separate estate in land.

At the time of the 1968 tax sale, the Subsurface Estate was an entirely separate estate in land that was not subject to ad valorem taxation. As such, the Sullivan County Taxing Authority had no right under the 1947 Act to merge the Surface and Subsurface Estates at the 1968 tax sale.

Lastly, a deed cannot grant a greater interest in property than the interest owned by the

¹ It is undisputed that Sullivan County was not taxing the Subsurface Estate at or prior to the 1968 tax sale.

grantor. *Wagner v. Landisville Camp Meeting Ass'n*, 24 A.3d 374 (Pa.Super. 2011). To do so would constitute a taking in violation of the United States Constitution. The United States Supreme Court in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) held that to divest a mortgage holder's interest in a property without notice and an opportunity to present objections to the sale would violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Davidge's estate was recorded with the Sullivan County Recorder of Deeds and yet none of the Davidge's predecessors received notice of the 1968 tax sale. See, Statement of Facts, ¶¶ 4, 6.

V. CONCLUSION

Based upon the foregoing, Plaintiffs' Motion for Summary Judgment is denied and Defendants' Cross-Motion for Summary Judgment is granted.