S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

BONEHEAD HUNTING CLUB,

Plaintiff/Counterdefendant-Appellant,

v

DEPARTMENT OF NATURAL RESOURCES,

Defendant/Counterplaintiff-Appellee,

and

SHELL WESTERN E & P, INC. and NORTH MICHIGAN LAND & OIL CORPORATION,

Defendants-Appellees.

UNPUBLISHED
December 30, 1997

No. 196510
Montmorency Circuit Court
LC No. 93-003012-CH

Before: Smolenski, P.J., and MacKenzie and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment quieting title to mineral rights in favor of defendant Department of Natural Resources ("DNR"). We affirm.

I

The genesis of this action was a fire that destroyed the Montmorency County Courthouse in 1943. That fire completely destroyed all real estate records on file with the county Register of Deeds, which was located in the county courthouse. In response to the confusion created by the destruction of these real estate documents, the Michigan Legislature passed Public Act No. 52 (the Act) in 1944. MCL 561.1 *et seq.*; MSA 26.878(1) *et seq.* The Act established a procedure by which title disputes resulting from the destruction of records could be resolved. Both plaintiff and the DNR claim that they own the mineral rights to the land at issue in this appeal.

On June 22, 1948, a default decree was issued recognizing plaintiff as the sole owner of the property. On December 29, 1993, plaintiff initiated this current action when it filed a complaint to quiet title to the mineral rights to the disputed land. On November 1, 1995, the Montmorency Circuit Court entered an order vacating the 1948 default decree with respect to the mineral rights. After the circuit court heard plaintiff's motion for partial reconsideration of the November 1, 1995 order, the circuit court reaffirmed its conclusion that the DNR reserved all mineral rights in the land as well as the rights of ingress and egress.

II

Plaintiff first argues that the trial court should have granted its motion for summary disposition under MCL 2.116(C)(10), because the DNR failed to present any evidence refuting the 1948 default decree. The DNR successfully argued below that the 1948 decree was invalid because there was no evidence that the Michigan Department of Conservation (the forerunner of the DNR and hereinafter "MDC") received the required notice in 1948, when plaintiff filed its intervening petition under the Act claiming an interest in the land.

An appellate court will review a grant or denial of summary disposition de novo. *Carlyon v Mutual of Omaha*, 220 Mich App 444, 446; 559 NW2d 407 (1996). When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court must consider the pleadings, affidavits, admissions, depositions and any other documentary evidence available to it in a light most favorable to the nonmoving party in order to determine whether there is a genuine issue with respect to any material fact. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996). All reasonable inferences must be made in favor of the nonmoving party. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 617-618; 537 NW2d 185 (1995).

We disagree with plaintiff's contention that the trial court erred when denying its motion for summary disposition. The record shows that the deputy director of the MDC filed an appearance claiming an interest in the land on July 31, 1944. Pursuant to MCL 561.5; MSA 26.878(5), anyone filing such an appearance must be given notice of any subsequent proceedings affecting the land at issue. There is no evidence that the MDC ever received notice of the proceedings initiated by plaintiff's filing of its intervening petition in 1948. Further, four tax deeds held by the state and covering the affected land were recorded by the MDC in 1946. Thus, when plaintiff filed its intervening petition, there were numerous documents on file indicating that the MDC had an interest in the land. These facts completely undermine the assertion made by plaintiff in its 1948 intervening petition that no other instrument affecting title had been placed on the record and that no other person had filed an appearance with respect to the land. Moreover, under CL 1948 § 613.21, a court could not gain jurisdiction over a party at the time unless there was both a proper service and return of service. There is no evidence in the record to indicate that these requirements were ever fulfilled.

Given all these circumstances, we find that the trial court acted properly when denying plaintiff's motion for summary disposition. Viewed in a light most favorable to the DNR, we find that at the time plaintiff raised its summary disposition motion, a genuine issue existed with respect to plaintiff's claim to the mineral rights contained in the disputed land.

III

Plaintiff next argues that under MCR 2.612, the DNR had to file a motion to void the 1948 default decree within one year of the original proceeding. Because the DNR has never filed such a motion, plaintiff asserts that the trial court's order vacating the 1948 default decree was improper. We disagree.

We first note that there exists some confusion about the proper standard of review to be applied to this issue. That confusion stems from the trial court's differing characterization of the November 1, 1995 order. In this order, the trial court based its decision on MCR 2.612(C), which establishes the various grounds for relief from judgment. At a later proceeding, the court indicated that it had actually granted the DNR's motion for summary disposition under MCR 2.116(C)(10). Given that the November 1, 1995, order was expressly based upon MCR 2.612(C), we conclude that the issue must be reviewed under the standard applicable to MCR 2.612(C) rulings. We note, however, that even under a de novo standard of review, we would still conclude that the trial court's decision was sound.

A trial court's decision based on MCR 2.612(C) "'is discretionary and will not be disturbed absent an abuse of discretion.'" *Williams v Williams*, 214 Mich App 391, 397; 542 NW2d 892 (1995), quoting *Michigan Bank-Midwest v D J Reynaert, Inc*, 165 Mich App 630, 642; 419 NW2d 439 (1988). In order to assure that existing property rights are safeguarded as county officials attempt to recreate the public record, MCL 561.2; MSA 26.878(2) mandates that parties that have publicly expressed an interest in the affected property be given proper notice of any proceeding where those rights will be adjudicated. Further, MCL 561.5; MSA 26.8787(5) states: "Service of summons issued under said intervening petition *shall be made* personally or by registered mail on any person or persons known to have an interest in any of the parcels of land described in said intervening petition." (emphasis added).[1]

As already noted, when plaintiff filed its intervening petition, various tax deeds and a 1946 appearance filed according to the procedures set forth in the Act were a part of the public record. These documents evidenced the MDC's interest in the property. Plaintiff offers no proof that the MDC was given the required notice in 1948. Indeed, the caption of plaintiff's 1948 intervening petition raises the reasonable inference that plaintiff did not give notice to the MDC.[2] Accordingly, because the MDC, DNR's forerunner, was entitled to notice under the Act and because the record tends to show that the Montmorency Circuit Court never had jurisdiction over the MDC because no notice was ever sent and no return of service was ever received, we conclude that the trial court did not abuse its discretion in voiding the 1948 default decree. See *Abbott v Howard*, 182 Mich App 243, 247; 451 NW2d 597 ("It is well established that a judgment which is void for want of jurisdiction may be attacked at any time.").

IV

Finally, plaintiff argues that the trial court erred when it found that the DNR's claim to the mineral rights was superior to that of plaintiff's. We disagree.

Without going into the intricacies and subtleties of the competing claims, we believe that the evidence clearly establishes that the DNR's claim to the mineral rights is far superior to that of plaintiff's. The strength of plaintiff's claim is seriously undermined by the fact that plaintiff's claimed chain of title to the land has changed considerably over the years. Plaintiff's claim is further weakened by the fact that the documents submitted by the DNR in support of its claim predate the earliest link in plaintiff's chain by several years.

We also dismiss plaintiff's assertion that it acquired possession of the disputed mineral rights by adverse possession. Mineral leases issued by the DNR to the property throughout the preceding fifty-plus years shows that any possible exercise of ownership by plaintiff over the land's mineral deposits was not exclusive. This fact alone defeats any claim of adverse possession by plaintiff. *Thomas v Wilcox Trust*, 185 Mich App 733, 736; 463 NW2d 190 (1990).

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Janet T. Neff

[1] The model summons contained in MCL 561.5; MSA 26.878(5) indicates that the opposing party designation should include "the names of all known persons claiming any interest in real property described in the [intervening] petition."

[2] The caption to plaintiff's petition only identifies plaintiff's opposing party as "All persons claiming an interest in or lien upon the real property herein described or any part thereof and their unknown heirs, devisees, legatees and assigns, as the case may be."