IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

HERDER SPRING HUNTING CLUB, Plaintiff, v. HARRY KELLER and ANNA KELLER, his wife; J. ORVIS KELLER; ELLIS O. KELLER; HENRY HARRY KELLER; WILLIAM H. KELLER; MARY EGOLF; JOHN KELLER; HARRY KELLER; ANNA BULLOCK; ALLEN EGOLF; MARY LYNN COX; ROBERT EGOLF; NATHAN EGOLF; ROBERT S. KELLER; BETTY BUNNELL; ANN K. BUTLER; MARGUERITE TOSE; HENRY PARKER KELLER; PENNY ARCHIBALD; HEIDE SUE HUTCHISON; REBECCA SMITH; ALEXANDRA NILES CALABRESE; CORRINE GRAHAM FISHERMAN; JENNIFER LAYTON MANRIQUE; DAVID KELLER; STEPHEN RICHARD KELLER; MICHAEL EGOLF, their heirs, successors, executors, administrators, and assigns, as well, as ANY OTHER PERSON, PARTY OF ENTITY, Defendants.	:	No. 2008-3434

Attorney for Plaintiff: *David Mason, Esq.*
Attorney for Defendants: *Brian Marshall, Esq.*
Timothy Schoonover, Esq.
Rebecca Warren, Esq.

Lunsford, J.

OPINION and ORDER

Plaintiff and Defendant filed Motions for Summary Judgment which are presently before the Court. For the following reasons, the Motion for Summary Judgment filed by Plaintiff is

denied and the Motion for Summary Judgment filed by Defendant is granted.

Background

On August 14, 2008, Plaintiff initiated this action by filing a Complaint in the nature of an Action to Quiet Title. Plaintiff subsequently filed a First Amended Complaint on October 27, 2008. Plaintiff contends a 1935 tax sale extinguished the 1899 reservation of subsurface rights by Harry and Anna Keller and conveyed fee simple title to the tax sale purchaser, Max Herr. Plaintiff argues Defendants failed to report their reservation of subsurface rights as required under the Act of March 28, 1806. Plaintiff also asserts it has adversely possessed the mineral rights for a period in excess of twenty-one (21) years. The adverse possession claim has not been addressed by either party in the Motions for Summary Judgment.

This suit arises out of a dispute over subsurface rights. In 1894, Defendants Harry and Anna Keller[1] acquired a tract of "unseated[2]" real estate containing 460 acres strict measure, known as the Eleanor Siddons Warrant (hereinafter also referred to as the "property") at a tax sale. On June 20, 1899, the Kellers transferred the surface rights of the property to Isaac Beck, Isaiah Beck and James Fisher by deed but reserved unto themselves, their heirs and assigns all subsurface rights therein:

> [e]xcepting and reserving unto the said parties of the first part, their heirs and assigns forever all the coal, stone, fire clay, iron ore and other minerals of whatever kind, oil and natural gas lying or being, or which may now or hereafter be formed or contained in or upon the said above mentioned or hereafter be formed or contained in or upon the said above mentioned or described tract of land; together with the sole and exclusive right liberty and privilege of ingress and egress unto, upon and from the said land for the

[1] Harry Keller served as a Court of Common Pleas Judge in Centre County, Pennsylvania. Judge Keller served from 1926 to 1927.

[2] The distinction of seated and unseated land was part of Pennsylvania tax assessment law prior to 1961. Unseated land was unoccupied and unimproved whereas seated land contained permanent improvements as indicate a personal responsibility for taxes. *See Hutchinson v. Kline*, 199 Pa. 564, (1901).

> purpose of examining, digging and searching for, and of mining and manufacturing any minerals oil, or natural gas found therein or thereon for market, and the transportation and removal of the same without hindrance or molestation from the said parties of the second part, there heirs executors administrators, lessees or assigns, or any of them; together with the right and privilege onto the said parties of the first part, their heirs or assigns, to take from said land such timber as may be necessary for the purposes aforesaid, and for the said purposes to build, construct or dig common roads, railroads, tramways, or monkey drifts and make all and every other improvement that may be necessary either upon or under the surface of said land, on and over which may be transported or manufactured all mineral, oil and natural gas formed in or on said land, and to erect such buildings structures and other necessary improvement thereon as the parties of the first part hereto their heirs or assigns, may deem necessary for the convenient use of working of said mines mills or works, and the manufacturing and preparing of the out put of the same for market with the right to deposit the dirt and waste from said mines, mills and works upon the surface of said land as may be necessary for convenient and for all of said foregoing uses and purposes to take and appropriate such land for their exclusive use as the said parties of the first part, their heirs or assigns may deem necessary.

The deed was recorded on August 8, 1899 in Centre County Deed Book 80, Page 878. The property was subsequently transferred on various occasions.

In February of 1910, the Becks sold the property to Arthur Baird. In August of 1910, Mr. Baird sold the property to Robert Jackson and Thomas Litz. In 1922, Ralph Smith acquired the property via deed from Jackson and Litz. In November of 1935, the Centre County Commissioners acquired title to the property via Treasurers Sale. The property was offered for sale by the Treasurer for unpaid real estate taxes. No bidder bid the upset price and the Commissioners purchased the property. At the time the land was unseated. By deed dated June 3, 1941, the Centre County Commissioners sold the property to Max Herr. Max Herr died intestate on February 2, 1944.

In 1959, Plaintiffs were interested in purchasing the property from Mr. Herr's widow. A title search was performed and Plaintiff became aware of the reservation. Plaintiff's attorney, Richard Sharp, Esquire[3], suggested to grantor's attorney, Roy Wilkinson, Jr., Esquire,[4] that Mr. Wilkinson "cover the exception by a specific clause making the conveyance subject to all exceptions and reservations as are contained in the chain of title." (Defendant's Motion for Summary Judgment 3/11/2010 Exhibit E) Plaintiff's deed dated November 30, 1959 reflected "this conveyance is subject to all exceptions and reservations as are contained in the chain of title." Plaintiff's deed was recorded on April 12, 1960 at Deed Book 253, page 107.

Recently it was discovered that the property contains "a deep stratum of shale which contains natural gas." Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment, 4/8/2010, at 2.

Discussion

Under the Pennsylvania Rules of Civil Procedure, Rule 1035.2, "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law:

> 1. whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> 2. if, after 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

[3] Richard Sharpe served as a Court of Common Pleas Judge in Centre County, Pennsylvania from 1978 to 1980.

[4] Roy Wilkinson, Jr. was one of the seven original judges nominated by Governor Raymond Shafer to the Commonwealth Court and confirmed by the Senate in 1971. Wilkinson served on the Court until 1981 when he was appointed a Justice of the Pennsylvania Supreme Court by Governor Richard Thornburgh.

> of facts 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. Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Blackman v. Federal Realty Inv. Trust*, 444 Pa. Super. 411, 415, 664 A.2d 139, 141 (1995). The court may grant summary judgment only where, examining the record in the light most favorable to the non-moving party, the moving party's right to it is clear and free from doubt. *Id.* at 141-142.

I. Plaintiff's Motion for Summary Judgment

Plaintiff argues that Defendants neglected to take any action in order to protect their respective subsurface interests in the premises. Plaintiff argues if Harry Keller was to retain the reserved subsurface rights, he was required to notify the County Commissioners of his severance of the subsurface interest from the ownership of the surface so that it could be taxed pursuant to Act of March 8, 1806. Plaintiff points out that the Act of March 8, 1806, placed an obligation on owners of unseated lands to give the county commissioners a description of the unseated lands held. Plaintiff argues because there is no evidence the subsurface interest was reported to the county for taxation and no separate assessment issued, the fee simple interest was assessed, levied and sold to Max Herr.

Additionally, Plaintiff argues it has adversely possessed the mineral rights for a period in excess of twenty-one (21) years although this issue was not addressed in the Motion for Summary Judgment.

In response, Defendants argue: 1.) only subsurface rights under operation and production have value which is assessable and taxable, and 2.) only assessed property can be acquired by a tax sale purchaser and, as Plaintiff admits, the subsurface rights were never assessed

prior to the tax sale in this matter. Furthermore, Defendants contend Plaintiff has failed to meet its burden to prove that the Keller subsurface rights were taxable prior to the 1935 tax sale. Because the property's subsurface rights were not assessed, Plaintiff's predecessor-in-interest received only the assessed surface rights at the tax sale. Defendants also argue that Plaintiff is estopped from claiming ownership of the subsurface rights, where it expressly acknowledged all reservations in the chain of title in its own deed.

In *F. H. Rockwell & Co. v. Warren County*, 228 Pa. 430, 433, 77 A.655, 666 (1910), the Court noted "[a] mere naked reservation of oil and gas in a deed without any other facts to base a valuation upon is not sufficient to warrant the assessment of taxes.[5]" *Id.* at 433. In *Day v. Johnson*, 31 Pa. D.&C.3d 556, 1983 WL 968 (Pa.Com.Pl., 2003), the court found in favor of a plaintiff who claimed subsurface rights through a deed reservation over defendants who claimed ownership through a tax sale. The *Day* court found the subsurface interest was never assessed for taxation purposes and therefore could not be sold for delinquent taxes. *Id.* at 558. The court further found the creation of an exception and reservation without the operation for the removal of the minerals does not create a taxable estate *per se* and would not until production is commenced and the property is assessed. *Id.* The court provided the assessment for tax purposes of the subsurface rights is on the production of the oil and gas from the subsurface not on an estate where valuation

[5] In a 2007 Pennsylvania Supreme Court case, the Court clarified that in *F.H. Rockwell* it stated that "oil and gas beneath the surface are also separately taxable as land, but *F.H. Rockwell* did not contemplate whether any particular statutory provision permitted the taxation of oil and gas interests, as we have since repeatedly instructed that an enactment of the General Assembly is necessary for a tax to be valid. *See Northwood Constr. Co.*, 856 A.2d at 796; *IOGA*, 814 A.2d at 182; *Appeal of H.K. Porter Co.*, 219 A.2d at 654. Moreover, the enactment of the General County Assessment Law followed *F.H. Rockwell* and, as determined in *IOGA*, there is no statutory authority that presently supports the real estate taxation of oil and gas interests." *Coolspring Stone Supply, Inc. v. County of Fayette*, 593 Pa. 338, 929 A.2d 1150 (2007).

cannot be determined. *Id.* The present case is analogous to *Day*. As Defendants note, Plaintiff admits the subsurface rights were not assessed prior to the 1935 tax sale. Furthermore, Plaintiff does not have any evidence that there has ever been production of subsurface resources on the property since the recordation of the Keller reservation in 1899. Because the subsurface interest was never assessed for taxation purposes it could not have been sold for delinquent taxes.

Regarding Plaintiff's claim that the Kellers failed to report their reservation of subsurface rights to the county commissioners, all inferences must be drawn in favor of the non-moving party, Defendants. There is no evidence one way or another whether the Kellers ever reported their ownership interest for assessment purposes. Defendants were unable to locate evidence of *any* reserved mineral interest having been reported to the county for taxation purposes consistent with the Act of March 28, 1806. Defendants aver the records were not kept by the Recorder of Deeds or were lost or destroyed. Therefore Plaintiff's claim of ownership based on the purported failure of Harry Keller to report his reservation of subsurface rights to the Centre County Commissioners which resulted in Keller escaping assessment and taxation and his rights being sold at tax sale along with the surface rights to the County, Max Herr and Plaintiff fails and Plaintiff's Motion for Summary Judgment is denied.

II. Defendants' Motion for Summary Judgment

Defendants argue that the Keller heirs have clear record title to the subsurface rights and Plaintiff is bound by its explicit acknowledgement thereof in its own recorded deed and; therefore, this Court should grant Defendants' Motion for Summary Judgment as a matter of law. Defendants argue the Kellers detailed an explicit reservation of subsurface rights which was recorded in the Centre County land records. Plaintiff had actual knowledge of the reservation when it acknowledged the reservation at the time of purchase in 1959.

Defendants also argue Plaintiff is estopped from claiming ownership of the subsurface rights, where the chain of title in its deed expressly acknowledged the reservations concerning subsurface rights. When Plaintiff purchased the property from Max Herr's widow, the language "[t]his conveyance is subject to all exceptions and reservations as are contained in the chain of title." Defendants contend that because Plaintiff drafted the acknowledgement in its deed recognizing the Keller reservation, Plaintiff must be estopped from now claiming the Keller reservation was "extinguished" by the Tax Sale in 1935. In response, Plaintiff argues the language contained in the 1959 deed from Kate Herr to Plaintiff, "[t]his conveyance is subject to all exceptions and reservations contained in the chain of title," does not support Defendant's arguments. Plaintiff argues the language is not part of the description but part of the "Habendum." However, clearly Plaintiff was aware of the reservation of subsurface rights no matter where it was included in the deed. When Plaintiff purchased the property in 1959, Plaintiff's attorney, Richard Sharp, sent correspondence to Ms. Herr's attorney, Roy Wilkinson, Jr., suggesting that Attorney Wilkinson "cover the exception by a specific clause making the conveyance subject to all exceptions and reservations as are contained in the chain of title." The deed contains the suggested language, "this conveyance is subject to all exceptions and reservations as are contained in the chain of title." Therefore, Plaintiffs cannot claim they were unaware of the reservation as Plaintiff's attorney proposed the language to cover the exception that was added to the deed.

Essentially Plaintiff relies on the arguments made in its Motion for Summary Judgment that that the Kellers failed to report the reservation under the Act of March 8, 1806 and; therefore, the 1935 tax sale extinguished the 1899 reservation of subsurface rights. However, as addressed above, Defendants make a valid point that there are no records of any reports of such

reservations. Plaintiff also argues "tax sale does not convey weak title" citing *Ziff v. Taylor* from Centre County. However, rights to minerals are separate estates and may be assessed and taxed separately from the surface rights. *Armstrong v. Black* Fox *Mining and Development Corp.*, 15 Pa. D & C.3d 757, 762, 1980 WL 741 (Pa.Com.Pl., 1980) *citing Sanderson v. Scranton*, 105 Pa. 469 (1884).

In *Armstrong*, a 1903 deed severed title to the surface from the coal and conveyed "[a]ll coal of whatever king lying and being in and under" a 54 acre tract of land. *Id.* at 758. The surface rights were sold for delinquent taxes by the Armstrong County Tax Claim Bureau to the Duppstadts. *Id.* at 759. In *Armstrong*, the defendant argued the coal ownership to a 54 acre tract was not separately assessed for taxation purposes from the surface and thus was sold with the surface by the Tax Claim Bureau. *Id.* at 761. Plaintiffs denied the coal was not separately assessed and further argued the tax sale could not have conveyed the coal since it was not owned by the prior owners in whose name the sale for delinquent taxes was made. *Id.* The court noted, "[a] purchaser at a tax sale of the surface of the estate would not be able to rely on this to claim he purchased the coal estate as well." *Id.* at 762. A tax sale for delinquent taxes conveys only that estate owned by the titleholder and covered by the assessment. *Id. citing Miller v. McCollough*, 104 Pa. 624 (1884), *Brundred v. Egbert*, 164 Pa. 615 (1894). Therefore, in the present case, because the property was undisputedly unseated and was not under production at any time prior to the tax sale to Max Herr, the subsurface rights were not conveyed to Max Herr as the prior owner did not possess the subsurface rights. Defendants' Motion for Summary Judgment is granted as to the above issues raised in the Motion for Summary Judgment.

Neither party has addressed the issue of adverse possession in the Motions for Summary Judgment consequently this issue is still pending before this Court.

ORDER OF COURT

AND NOW, this 29th day of September, 2010, upon consideration of the Motion for Summary Judgment filed by Plaintiff, Herder Spring Hunting Club, said motion is hereby denied. Upon consideration of Defendants' Motion for Summary Judgment, said motion is hereby Granted; however, Plaintiff's claim that it has adversely possessed the property known as the Eleanor Siddons Warrant for a period in excess of twenty-one (21) years is still at issue before this Court.

BY THE COURT:

Bradley P. Lunsford, Judge