IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DAVID C. BAILEY, Plaintiff	:	NO. 08 – 02,327
	:	CIVIL ACTION - LAW
vs.	:	
GEORGE A. ELDER a/k/a G.A. ELDER, WILLIAM HOYT and MARY HOYT, MARK HOYT and ANN A. HOYT, EDWARD C. HOYT and CORDELIA IDA HOYT, THEODORE R. HOYT, GEORGE S. HOYT, ELK TANNING COMPANY, CENTRAL PENNSYLVANIA LUMBER COMPANY, their successors, heirs, administrators and assigns or anyone claiming by, through or under them, Defendants	:	Petition to Strike or Open Default Judgment

OPINION AND ORDER

Before the court is the Petition to Strike or Open Default Judgment filed by Hoyt Royalty, LLC on February 27, 2013. Argument on the petition was heard April 23, 2013, at which time Plaintiff's counsel requested an additional thirty days in which to file a brief. That brief was filed May 22, 2013.

On October 7, 2008, Plaintiff filed a Complaint in Action to Quiet Title, alleging ownership of a 168 acre tract of land in Pine Township. Plaintiff alleges that the Hoyt Defendants reserved all oil, gas and mineral rights to themselves when deeding the property to Elk Tanning Company in 1893, and that he acquired the property from his mother, who acquired it in 1942 after a tax sale. Plaintiff claims to have acquired title to the mineral rights by virtue of a lost deed, adverse possession, abandonment, and the tax sale. On October 9, 2008, Plaintiff's counsel filed a Motion and Affidavit for Leave to Obtain Service by Advertisement, and said motion was granted by Order dated October 13, 2008. On December 1, 2008, Plaintiff filed a Motion for Default Judgment, and by order dated December 2, 2008, a preliminary default judgment was entered. Following a praecipe for final judgment on January 21, 2009, final judgment was entered that date.

In its Petition to Strike or Open Default Judgment, Hoyt Royalty claims it was formed to acquire and manage all oil, gas and mineral rights owned by William Hoyt, Mark, Hoyt, Edward Hoyt, Theodore Hoyt and George Hoyt, and their heirs, successors and assigns, and that it now owns 83.9% of the Hoyt mineral estate, which includes the mineral rights retained in the 1893 deed to Elk Tanning Company. Hoyt Royalty contends the default judgment must be stricken because the underlying complaint is not self-sustaining and the record reflects improper service, or, in the alternative, that the judgment must be opened because no good faith effort was made to locate the defendants and Hoyt Royalty has a meritorious defense to the Complaint. As the court finds the judgment must be stricken for lack of a self-sustaining complaint, the remaining grounds will not be addressed.

If a Complaint fails to state a cause of action upon which relief may be granted, such is a fatal defect appearing of record and on that basis, any default judgment entered for want of an answer may be stricken. Navarro v. George, 615 A.2d 890 (Pa. Commw. 1992); Calesnick v. Redevelopment Authority of City of Philadelphia, 529 A.2d 528 (Pa. Super. 1987). A review of the Complaint filed in the instant matter shows that none of the four counts contained therein sufficiently states a cause of action.

In Count I, Plaintiff asserts he has "actual title to all mineral rights, including oil and gas, in the premises by virtue of a deed which was lost wherein the Defendants reconvey all of their right, title and interest, including mineral rights, to the Plaintiffs and/or their predecessors in title." This contention is insufficient to support a finding of actual title as Plaintiff fails to allege when, by whom or to whom the deed was executed. *See* Burke v. Hammond, 76 Pa. 172 (1874). To establish title to land based on a lost deed, all terms and conditions of the transaction, including the facts and circumstances of delivery, must be alleged and proven. *See* Manley v. Manley, 357 A.2d 641 (Pa. Super. 1976). Since Plaintiff has not set forth the specifics of the alleged "lost deed", he has not stated a claim to the mineral rights upon which relief may be granted.

In Count II, Plaintiff asserts he and his mother "have been in actual, continuous, visible, distinct, open, exclusive, notorious and hostile adverse possession of the premises in excess of 21 years." Where the mineral rights have been severed from the surface rights by a reservation

in a deed, however, in order to claim title to the mineral rights by adverse possession, the claimant must show continuous drilling and/or production for an uninterrupted twenty-one year period. Hoffman v. Arcelormittal Pristine Resources, Inc., 2011 U.S. Dist. LEXIS 50170 (W.D. Pa. May 10, 2011)(citing Thomas v. Oviatt, 5 Pa. D. & C. 4th 83)(Warren County 1989). Plaintiff does not allege such drilling and/or production and thus has failed to set forth a claim for adverse possession of the mineral estate upon which relief may be granted.

In Count III, Plaintiff claims that Defendants have abandoned their mineral rights by non-use and non-payment of taxes. Mere non-use does not support a finding of abandonment, Buffalo Township v. Jones, 813 A.2d 659 (Pa. 2002); nor does non-payment of taxes. Kreamer v. Voneida, 24 Pa. Super 347 (1904). There must be some affirmative act which expresses an intent to abandon, and Plaintiff has failed to allege any such act. Therefore, Plaintiff has failed to set forth a claim of abandonment upon which relief may be granted.

Finally, in Count IV, Plaintiff alleges that "[b]ecause Defendants failed to pay taxes on the premises, all rights, exceptions and reservations for oil, gas and minerals were extinguished by the 1940 tax sale". Plaintiff also alleges, however, that "[n]o assessment was ever made by Lycoming County on the mineral rights". Where mineral rights have been severed from surface rights and are not separately assessed, only the surface passes in a tax sale for failure to pay taxes. *See* New York State Natural Gas Corp. v. Swan-Finch Gas Development Corp., 173 F. Supp. 184 (W.D. Pa. 1959). *See also* Babcock Lumber Co. v. Faust, 39 A.2d 298 (Pa. Super. 1944)("The lien for unpaid taxes attaches only to the estate assessed, and that estate, but no more, passes at a public sale even though the authorities assume to convey land against which there had been no valid assessment.")[1] Plaintiff has alleged no facts which would support a finding that the tax sale passed title to the mineral rights. Thus, this count also fails to state a claim for which relief may be granted.

[1] Plaintiff cites Proctor v. Sagamore Big Game Club, 166 F.Supp. 465, 475 (W.D. Pa. 1958), for the proposition that where there is no separate assessment of the mineral estate, "a purchase of the whole by the owner of the surface divests the title of the owner of the minerals." There, the Court found that an owner of surface rights in unseated land had no legal obligation to pay the taxes and could purchase the property at a tax sale and thus acquire title to the previously reserved gas rights. The court fails to see how the holding of Proctor supports Plaintiff's position in this matter since Plaintiff alleges that at the time of the sale, George A. Elder was the owner of the surface, not his mother. The holding of Proctor does not apply.

In summary, as none of Plaintiff's claims would entitle him to relief, he was not entitled to a default judgment and such must be stricken.

ORDER

AND NOW, this 29th day of May 2013, for the foregoing reasons, the Petition to Strike is hereby GRANTED. The default judgment entered January 21, 2009, is hereby STRICKEN.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Scott A. Williams, Esq.
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Hon. Dudley Anderson