IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

NORTHERN FORESTS II, INC., Plaintiff	:	NO. 88 – 02,356
	:	CIVIL ACTION - LAW
vs.	:	
KETA REALTY COMPANY, KETA GAS AND OIL COMPANY, KETA GAS AND OIL CORPORATION, GEORGE C. LEVIN, United States Bankruptcy Trustee and MANUFACTURERS LIGHT AND HEAT COMPANY, their successors and assigns, and anyone claiming by, through or under them, or any of them, Defendants	:	Petition to Strike/Open Judgment

OPINION AND ORDER

Before the court is the Petition for Relief to Strike and/or Open Default Judgment filed by Southwestern Energy Production Company ("Southwestern"), Anadarko E&P Company LP and Anadarko Petroleum Corporation (collectively "Anadarko") on November 28, 2012, joined in by Lancaster Exploration and Development Company, LLC ("Lancaster") by petition filed January 17, 2013, and by International Development Corporation ("IDC") by petition filed January 8, 2013. Argument was heard February 4, 2013.

On December 12, 1988, Plaintiff filed a Complaint in Action to Quiet Title, claiming that (1) it owned certain real estate in Pine and Cogan House Townships, (2) its predecessor in title had reserved from the real estate all natural gas, coal, coal oil, petroleum, marble and other minerals, (3) by various conveyances the Defendants had acquired those mineral rights, (4) it had nevertheless for a period in excess of twenty-one years continuously, adversely, openly and notoriously used, mined, timbered, compiled and sold the minerals without interference, and (5) the Defendants' failure to relinquish their mineral rights on the record placed a cloud on

their title. On December 13, 1988, Plaintiff's counsel filed a "Motion and Affidavit for Leave to Obtain Service by Advertisement" in which he stated: "that he does not know the current whereabouts of the Defendants, and the principals of the corporate entities are unknown, and he does not know any successors or assigns of the above or anyone claiming by, through or under them, or any of them", and requested that the court permit service "on the aforementioned Defendants, their successors and assigns, and anyone claiming by, through or under them or any of them by publication." The motion was granted and an Order for Publication was entered on December 16, 1988. On February 6, 1989, counsel filed a Petition for Judgment, and attached an Affidavit stating that Defendants had been served by publication but had not filed an Answer. A Default Judgment was entered pursuant to that petition, on February 10, 1989, "unless the said Defendants, within thirty (30) days of this Order commence an action in ejectment", and notice was directed to be given by publication. No action in ejectment having been filed by any defendant as of April 3, 1989, a Final Judgment was entered upon praecipe that date.

In the instant petitions, Southwestern, Anadarko, Lancaster and IDC seek to strike or open the judgment, asserting that they hold certain interests in the mineral rights as successors in interest to one Clarence Moore, one Kenneth Yates, and/or certain Proctor heirs, all of whom were title owners of record of some or all of the subsurface rights in some or all of the property at the time of the request to serve by publication. Petitioners contend, and the record confirms, that neither Moore, Yates, or any of the Proctor heirs was named as a defendant in the action, or served with notice of such. Petitioners further contend that Moore, Yates and the Proctor heirs, as titled owners of record at the time, were necessary and indispensable parties, and that their whereabouts could have been readily ascertained through the exercise of

reasonable diligence. Petitioners also argue that since the affidavit filed by counsel on December 13, 1988, did not set forth the reasons why regular service on the defendants could not be made, or the nature and extent of the investigation made to locate potential defendants, it contains a defect apparent from the face of the record and the judgment based thereon is thus facially invalid and must be stricken. The court agrees that the facially defective affidavit requires the judgment be stricken.

At the time the affidavit in this case was filed, the Rules of Civil Procedure provided,[1] in pertinent part, as follows:

> Rule 430. Service Pursuant to Special Order of Court. Publication.
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> (a) If service cannot be made under the applicable rule the plaintiff may move the court for a special order directing the method of service. The motion shall be accompanied by an affidavit stating the nature and extent of the investigation which has been made to determine the whereabouts of the defendant and the reasons why service cannot be made.

Pa.R.C.P. 430(a). The affidavit filed in this case clearly did not comply with Rule 430(a) as no mention is made of any investigation into the whereabouts of the defendants, merely that their "current whereabouts" are unknown, the principals of the corporations are unknown and their successors or assigns are unknown. The affidavit was therefore defective on its face, *see* Continental Bank v. Rapp, 485 A.2d 480 (Pa. Super. 1984)(standard for "defects" asks whether the procedures mandated by law have been followed), rendering the service improper. S*ee* Deer Park Lumber, Inc. v. Major, 559 A.2d 941 (Pa. Super. 1989) (in order to effect service by publication pursuant to subsection (b) of Rule 430, the party must first file a motion accompanied by an affidavit conforming to the requirements of

[1] Although the rule was amended in 2003, the language of section (a) remains identical.

subsection (a) of the rule). The improper service prevented the court from obtaining personal jurisdiction over the defendants, *See* Sharp v. Valley Forge Medical Center & Heart Hospital, Inc., 221 A.2d 185 (Pa. 1966) (jurisdiction of the court over the person of the defendant is dependent upon proper service having been made), and without personal jurisdiction, the default judgment was void. *See* Wall v. Wall, 16 A. 598 (Pa. 1889) (judgment entered without jurisdiction over the person of the defendant is void). Since the fatal defect in the judgment appears on the face of the record, that judgment is properly stricken. Gee v. Caffarella, 446 A.2d 956 (Pa. Super. 1982).

Plaintiff contends in response that although it was not reflected in the affidavit, counsel did indeed exercise due diligence in trying to locate potential defendants, and that the court must hold a hearing to allow for the introduction of evidence to that effect, citing Deer Park Lumber, *supra*. In Deer Park, the trial court heard evidence regarding counsel's efforts to locate the defendants, who (he had stated in an affidavit) were dead or, if living, their whereabouts were unknown. For two reasons, this court does not believe such a hearing would be appropriate or necessary in the instant case. First, although the Superior Court reviewed the evidence in its opinion, its holding, noted above, did not refer to any of that evidence and was clearly based on only the non-conforming affidavit. Deer Park Lumber, *supra*. Second, the Court in Deer Park was facing a petition to open, which the Court noted to be "an appeal to the court's equitable powers", and review of the trial court's rulings in that matter required it to uphold such "absent an error of law or a manifest abuse of discretion." Id. at 943. Since the trial court had refused to open the judgment based on its conclusion that the evidence showed due diligence to locate the defendants, the Superior Court was required to review that evidence in

determining whether the trial court abused its equitable powers (which it did so find). In the instant case, the court is not addressing a petition to open, but, rather, a petition to strike, which does not appeal to the court's equitable powers and *must* be granted if the record reflects a fatal defect. *See* Jones v. Seymore, 467 A.2d 878 (Pa. Super. 1983), and City of Philadelphia Water Revenue Bureau v. Towanda Properties, Inc., 976 A.2d 1244 (Pa. Commw. 2009) (a petition to strike operates as a demurrer to the record and does not involve the discretion of the court.).

Plaintiff also contends that Deer Park was wrongly decided; that Rule 430 does *not* always require an affidavit which sets forth the nature and extent of the investigation which has been made to determine the whereabouts of the defendant and the reasons why service cannot be made. Plaintiff contends that in this case its affidavit was sufficient under subsection (b)(2) of the rule which states that "[w]hen service is made by publication upon the heirs and assigns of a named former owner or party in interest, the court may permit publication against the heirs or assigns generally if it is set forth in the complaint or an affidavit that they are unknown." Pa.R.C.P. 430(b)(2). Again the court rejects this argument for two reasons. First, an argument to a trial court that the Superior Court's decision in a particular case was wrong, without more,[2] must necessarily fall on deaf ears. Second, this court agrees with the Deer Park interpretation of Rule 430. Subsection (b)(2) clearly applies only when the heirs or assigns of a named party remain unknown after investigation, as opposed to when the heirs or assigns are known, allowing

[2] While Plaintiff contends the Pennsylvania Supreme Court has set forth a contrary intent in Myers v. Mooney Aircraft, Inc., 240 A.2d 505 (Pa. 1967), the court finds no reading of Myers which would support such a contention. Myers did not deal with Rule 430, but with Rule 2180, which provides for service on an agent of a defendant corporation at its office or usual place of business. As resolution of the question of effective service required evidence outside of the record, the Court rejected Mooney's petition to strike a default judgment. The court did go on to consider the evidence as though a petition to open had been filed but found that *under the circumstances presented*

publication against them "generally", that is, without naming them. Nothing in that subsection justifies the conclusion that it is meant to take the place of subsection (a). Indeed, by using the words "*when* service is made by publication" at the beginning of subsection (b)(2), the legislature is clearly referring to when permission has been granted under subsection (a).

Plaintiff seeks to avoid the requirements of Rule 430 altogether, apparently, by its next argument: since the action to quiet title was *in rem*, the judgment operated directly on the property and was binding as to all persons and upon the whole world. This argument overlooks an essential prerequisite, contained in the definition of an *in rem* judgment, however: "an adjudication pronounced upon the status of some particular subject matter *by a tribunal having competent authority* for that purpose." Plaintiff's brief at 16 (emphasis added). Thus, while a valid *in rem* judgment may be binding on the entire world, if the tribunal does not have jurisdiction over the parties, its judgment is not valid and is binding on no one. Proper service cannot be dispensed with simply because a matter is *in rem.*

Plaintiff next contends that Petitioners lack standing to bring the instant petitions, alleging that the Proctor heirs have lost some or all of their rights by virtue of certain tax wash sales. Petitioners enter the litigation as parties "*claiming* by, through or under" the named defendants, however. It must not be overlooked that the action is one to quiet title. Plaintiff itself does not have title, but only seeks to gain title by proving a claim of adverse possession. It is not for Defendants to prove their title, but for Plaintiff to prove its title. In reality, Petitioners' standing is no less than that of Plaintiff.

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therein, Mooney was not entitled to relief. Thus, any argument that such ruling shows an intent to allow *facially defective* judgments to stand even in the face of invalid service misses the mark.

Plaintiff also asserts that the concept of laches prevents this court from striking the judgment, pointing out that the judgment was entered 24 years ago. The concept of laches does not apply to a judgment which was entered without jurisdiction, however, as such a judgment is void. *See* Thrivent Financial for Lutherans v. Savercool, 2008 U.S. Dist. LEXIS 104474 (M.D. Pa. 2008). *See also* Jones v. Seymore, 467 A.2d 878 (Pa. Super. 1983) (void judgment must be stricken without regard to the passage of time, if its defectiveness is apparent on the face of the record). While the Superior Court in following this rule has expressed its apparent disagreement with such, *see* Jones, *supra*,[3] the Supreme Court has not taken the Superior Court up on its suggestion that the matter be revisited. Therefore, this court is constrained to follow suit.

Finally, Plaintiff argues that equitable considerations require that the judgment be upheld in spite of any finding that it is void, alleging that there are numerous cases wherein "equitable considerations regulate the availability of relief even from **very "void" judgments**." Plaintiff's brief at 25 (emphasis in original). The court has reviewed all of the cases cited by Plaintiff in support of this proposition and finds that none of them would provide relief in the instant matter. The Myers case, discussed previously in this Opinion, involved a defect which was not apparent on the face of the record and was discussed in the concept of a petition to open, which allowed for consideration of equitable factors. Collins v. City of Wichita, 254 F.2d 837 (19th Cir. 1958), was decided under Federal Rule 60(b) and

[3] "The problems engendered by the rule that laches cannot run against a "void" judgment has been the subject of much thoughtful commentary by Judge (now President Judge) Spaeth. *(Citations omitted.)* We note that while there are recent cases in which this court applies the rule, *e.g., Graham v. Kutler, 275 Pa.Super.Ct. 188, 191, 418 A.2d 676, 677 (1980),* the Supreme Court cases which fashioned the rule are fairly old. The time may be ripe for the Supreme Court to review whether the rule is still appropriate." Jones v. Seymore, 467 A.2d 878, 880 (Pa. Super. 1983).

involved a challenge to a judgment on the basis that the law had subsequently changed. The judgment in that matter was not considered void. Wilger v. Department of Pensions and Security, 343 So.2d 529 (Ala.Civ.App. 1977), a custody case, also did not involve a void judgment. Ledden v. Ehnes, 126 A.2d 633 (N.J. 1956), did apply the doctrines of laches and estoppel to prevent the opening of a judgment, but did so because the defect in that matter was *not* apparent on the face of the record. In Sunray Oil Corp. v. American Royalty Petroleum Co., 224 P.2d 965 (Okla. 1950), the court imposed a three-year statute of limitations on a *voidable* judgment. Similarly, in Haskell v. Gross, 358 P.2sd 1024 (Colo. 1961), the court found the judgment voidable, not void, as there was no defect on the face of the record. In Gersten v. United States, 364 F.2d 850 (Ct.Cl. 1966), cited by Plaintiff in support of the proposition that very long delay is sufficient reason in itself to deny relief, the court held that the defense of laches is entrenched in the jurisprudence of *demands for back pay or for restoration because of an illegal separation from the civilian federal service.* A judgment was not even involved in that matter. Plaintiff also contends that "denial of relief has turned on the fact that the value of the property has radically changed, for example because of the discovery of minerals", Plaintiff's brief at 25, but neither case cited supports that contention. In Tudryck v. Mutch, 30 N.W.2d 518, 520 (Mich. 1948), a motion to set aside a consent decree was denied on the grounds that "judgment by consent cannot ordinarily be set aside or vacated by the court without the consent of the parties thereto for the reason it is not the judgment of the court but the judgment of the parties." While the court did point out that "none of this litigation would have existed were it not for the discovery of oil on the lands involved therein", Id. at 519, that observation was certainly not the basis for the holding and in fact had nothing to do with it.

Likewise, in Hayward Union High School District of Alameda County v. Madrid, 234 Cal.App.2d 100, 128 (1968), the court denied relief based on a statute of limitations, and although the court noted that "[i]t wasn't until the property for which they had received a price fixed by three disinterested appraisers had increased greatly in value that they became attentive to the uses made and to be made of the property", this comment was merely a pointed remark directed at the defendants in the course of scolding them for failing to take appropriate action within the limitations period and played no part in the holding.

Finally, Plaintiff argues boldly that "when a third party has shown reliance in fact, relief will not be given when it will adversely affect innocent third parties, such as bona fide purchasers", Plaintiff's brief at 25, citing Voorhees v. Jackson, 35 U.S. 449 (1836). Voorhees did not involve a petition to strike a void judgment, however, and therefore cannot be relied upon to avoid the directive of Jones v. Seymore that a void judgment must be stricken without regard to the passage of time.

The judgments of April 3, 1989, and February 10, 1989, having been entered by a court which had no jurisdiction over the defendants, must be stricken.

ORDER

AND NOW, this 8th day of February 2013, for the foregoing reasons, the Petitions to Strike are hereby GRANTED. The Default Judgment entered February 10, 1989, and the Final Judgment entered April 3, 1989, are hereby STRICKEN. The Prothonotary is directed to mark the docket accordingly.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Prothonotary
Daniel F. Glassmire, Esq., 5 East Third Street, Coudersport, PA 16915
Jeffrey J. Malak, Esq., 138 South Main Street, Wilkes-Barre, PA 18703
Katherine V. Oliver, Esq., 811 University Drive, State College, PA 16801
Adam B. Fischer, Esq., 500 Grant Street, 50th floor, Pittsburgh, PA 15219
Ronald L. Hicks, Jr., Esq., 535 Smithfield St., Ste. 1300, Pittsburgh, PA 15222
Paul K. Stockman, Esq., 625 Liberty Ave., Ste. 2300, Pittsburgh, PA 15222
J.C. Wilkinson, III, Esq., 200 Mountain View Lane, Eagles Mere, PA 17731
Tucker R. Hull, Esq., 100 Market Street, Suite 200, Harrisburg, PA 17108
David J. Singley, Esq., 301 Grant Street, 28th floor, Pittsburgh, PA 15219
Benjamin Mayer, Esq., 707 Grant Street, Suite 1300, Pittsburgh, PA 15219
Marc S. Drier, Esq.
J. Michael Wiley, Esq.
Lester L. Greevy, Jr., Esq.
Levi Woodward, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson