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, et al., Defendants	:	
	:	Preliminary Objections

OPINION AND ORDER

Before the court are five sets of preliminary objections to Plaintiff's First Amended Complaint. Argument was heard May 9, 2014.

Plaintiff's original Complaint was filed on December 12, 1988, as an action to quiet title to interests in all natural gas, coal, coal oil, petroleum, marble and other minerals.[1] The Complaint alleged acquisition of the surface estate of the property at issue by deed dated June 24, 1987, and set forth a claim for adverse possession of the mineral rights. The Complaint was served by publication and, no response having been filed, a default judgment was entered February 10, 1989, followed by a Final Judgment entered April 3, 1989. In response to petitions filed in late 2012 and early 2013, this court found a fatal defect on the face of the record[2] and struck the 1989 judgment as void by Order dated February 8, 2013. Plaintiff then moved for, and was granted, leave to file an Amended Complaint. That Amended Complaint was filed January 29, 2014, and sets forth three counts: (1) Adverse Possession based on having "for a period in excess of twenty-one (21) years before 1988, continuously, adversely, openly and notoriously used, mined, timbered, compiled and sold such gas, coal, coal oil, petroleum, marble and other minerals as have been found and located on the subject premises"; (2) Adverse Possession based on the 1989 judgment which "constituted actual physical

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[1] The Dunham Rule notwithstanding, for ease of reference, the court will hereinafter refer to these rights as "mineral rights".

[2] The affidavit required by Pa.R.C.P. 430(a) was found defective for failing to allege "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". The defective affidavit rendered service ineffective and in the absence of jurisdiction over the persons of the defendants, the judgment entered by the court was void. *See* Opinion and Order of February 8, 2013, at p. 3-4.

possession" of the mineral rights, and (3) Declaratory Judgment, seeking a declaration that Plaintiff owns the mineral rights, subject only to certain interests under or through Plaintiff. Through the five sets of preliminary objections,[3] all three counts are challenged as failing to set forth a claim upon which relief can be granted.

Count I. Adverse Possession based on use prior to 1988.

> It is beyond peradventure that in order to claim title to real property by adverse possession in this Commonwealth, a party must affirmatively prove that he or she had actual, continuous, visible, notorious, distinct, and hostile possession of the land in excess of twenty-one (21) years. Rec. Land. Corp. v. Hartzfeld, 2008 PA Super 76, 947 A.2d 771, 774 (Pa. Super. 2008); Kaminski Brothers v. Grassi, 237 Pa. Super. 478, 352 A.2d 80, 81 (Pa. Super. 1975). It is also well-established precedent that, where mineral rights have been severed from surface rights, the possession of the surface estate will not become adverse possession of the mineral estate unless there is an actual entry upon and use of the underlying minerals for the requisite time period. Plummer v. Hillside Coal & Iron Co., 160 Pa. 483, 28 A. 853, 34 Week. Notes Cas. 366 (Pa. 1894); Shaffer v. O'Toole, 2009 PA Super 6, 964 A.2d 420, 423 (Pa. Super. 2000).

Hoffman v. Arcelormittal Pristine Resources, Inc., 2011 U.S. Dist. LEXIS 50170 (W.D. Pa. 2011). As noted above, Plaintiff herein claims title by virtue of having "for a period in excess of twenty-one (21) years before 1988, continuously, adversely, openly and notoriously used, mined, timbered, compiled and sold such gas, coal, coal oil, petroleum, marble and other minerals as have been found and located on the subject premises". The objection is raised that this allegation is not sufficient to allege production. An objection is also raised that Plaintiff is obviously tacking on the alleged possession of its predecessor, having just acquired title to the property in 1987, and the deed into Plaintiff does not purport to pass title to the sub-surface estate, contrary to the requirement that it do so in order to allow for tacking. Both objections have merit.

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[3] Objections were filed by Mountain Development Group, Inc. and Cynthia Stanton McKenney on February 19, 2014, by the Trustees of the Margaret O.F. Proctor Trust on February 28, 2014, by the Trustees of the Thomas E. Proctor Heirs Trust on March 7, 2014, by Lancaster Exploration and Development Company, LLC on March 10, 2014, and by International Development Corporation on March 14, 2014. Other Defendants have filed Answers

With respect to the sufficiency of the allegation, as has been pointed out by one of the objectors, although Plaintiff alleges that it has used and sold "such gas, coal, coal oil, petroleum, marble and other minerals as have been found and located on the subject premises", it does not allege that any has been found. The allegation is therefore too vague to support the claim.[4] While ordinarily the court would allow for amendment, at argument counsel admitted that no such allegation could be made as no production has occurred, either before 1988 or after.

With respect to tacking, in order to tack on to one's adverse possession a period of adverse possession of a predecessor, the interest purportedly possessed by the predecessor must be described in the deed from the grantor to the grantee. Baylor v. Soska, 658 A.2d 743 (Pa. 1995). There is no such description in the deed into Plaintiff and, as there has been no production, there was no period of adverse possession to tack in any event.

Therefore, as Plaintiff has not and cannot allege production with respect to any period of time prior to 1988, Count I fails to set forth a claim upon which relief can be granted.

Count II. Adverse Possession based on the 1989 judgment.

Apparently since Plaintiff is unable to allege actual possession based on production, Plaintiff alleges in Count II that the 1989 default judgment, which was on record for more than 21 years before being stricken, "constituted notice to the world of the assertion by Northern Forests of its interest [and] claim and constituted actual physical possession of the said subsurface rights (i.e. the res) adverse to the entire world". Plaintiff's Amended Complaint at Paragraph 31. Plaintiff also alleges "[b]y virtue of the 1989 Default Judgment being part of the official public records of Lycoming County, … Northern Forests asserted actual, continuous, visible, distinct, open, exclusive, notorious and hostile ownership of the subsurface rights described herein (i.e. the res) adverse to any other claimants and to the entire world." Id. at

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(some with New Matter), and one of those parties, Southwestern Energy Production Company, has filed a motion for summary judgment, which is scheduled to be heard June 30, 2014.

[4] *See, e.g.,* Cornwall Mountain Investments, LP v. Thomas E. Proctor Heirs Trust, et al., Lycoming County No. 11-00,718 (Order of March 30, 2012) (allegation that a party has "maintained actual production and extraction of the Minerals" held conclusory and insufficient to plead actual production).

paragraph 30. Plaintiff argues that while production may be one way to assert actual possession, it is not the only way. This court does not agree.

Appellate authority makes it clear that actual possession means actual, and not constructive possession. *See, e.g.,* Flannery v. Stump, 786 A.2d 255, 258 (Pa. Super. 2001), quoting Hole v. Rittenhouse, 25 Pa. 491 (1855)(“In order to give title under the statute of limitations, the possession of the disseisor must not only be actual, but it must be visible, notorious, distinct, hostile, and continued for the period of twenty-one years”), and Recreation Land Corporation v. Hartzfeld, 947 A.2d 771, 774 (Pa. Super. 2008)(“The requirements for ‘actual’ possession of a property will necessarily vary based on the nature of the property”, implying that some physical manifestation of possession is required). *See also*, Plummer v. Hillside Coal & Iron Co., 28 A. 853 (Pa. 1894)(“To affect the title of the owner of the coal there must be an *entry upon* his estate, and an adverse possession of it.”)(emphasis added), and Kaminski Brothers v. Grassi, 352 A.2d 80, 81 (Pa. Super. 1975)(the adverse possessor’s intention to hold the land for himself “must be *made manifest by his acts*” and is “sufficiently shown where one *goes upon the land and uses it openly and notoriously*, as owners of similar lands use their property, to the exclusion of the true owner”)(emphasis added).

A similar argument (that actual possession could be proved based on a filed claim) was presented to the United States District Court in Hoffman v. Arcelormittal Pristine Resources, Inc., *supra*. There, the plaintiff argued that because she leased the oil and gas estate underlying her property on three separate occasions beginning shortly after her acquisition of the land, she somehow acquired rights in and title to said property through the law of adverse possession, despite the prior reservation of mineral rights by previous owners. In rejecting that argument, the Court stated as follows:

> At least one Court of this Commonwealth has already considered and rejected the exact argument now advanced by plaintiff. Thomas v. Oviatt, 5 Pa. D & C 4th 83, 83 (C.C.P. Warren Cty. 1989). In Oviatt, the Court of Common Pleas of Warren County summarily rejected the exact same argument advanced by plaintiff herein, that is: by leasing the mineral rights on three separate occasions beginning in 1971 and recording the leases openly in the Washington County Recorder of Deeds, she now maintains title to the mineral rights through the law of adverse possession. The Court stated:

> Plaintiffs' contention, that plaintiffs' intention to hold the subsurface for themselves, was manifested by the granting of the aforesaid three leases is woefully lacking in that one may not lose title to realty simply by one claiming a right thereto. If this were so, no estate would be free from attack and acquisition. Plaintiff argue defendants could have, with due diligence, checked the indexes at the courthouse periodically to determine if there was any activity affecting their oil, gas and minerals. A property owner does not have to daily visit the Recorder's Office to ascertain if one is making a claim for his property.

Id. at 85.

As defendants have emphasized, other state courts that have considered this issue have held the same - - in order achieve title to oil and natural gas by adverse possession, actual possession, meaning drilling and production, of the minerals must occur. See e.g. Natural Gas Pipeline Co. of America v. Pool, 124 S.W.3d 188 (Tex. 2003); Schaneman v. Wright, 238 Neb. 309, 470 N.W.2d 566, 577 (Neb. 1991)(mere execution, delivery or recording of oil and gas lease or mineral deeds will not constitute adverse possession); Piney Oil & Gas Co. v. Scott, 258 Ky. 51, 79 S.W.2d 394, 401 (Ky. 1934)(adverse occupation and use of property "cannot be wrought in the office of the county clerk no matter how many deeds or leases the would-be disseisor may record there.") Lyles v. Dodge, 228 S.W. 316, 317 (Tex. Civ. App. 1921) (registration of oil lease, even if they had been recorded for a sufficient length of time to meet the requirements of the statute, would not constitute notice of adverse possession of the minerals.)

In this case, judging the facts in the light most favorable to plaintiff, there is not even an allegation that plaintiff or her alleged "leaseholders" drilled or attempted to drill on the property at any point since the date she bought and first leased the property (1971). On the contrary, the material facts as set forth by plaintiff demonstrates that she has merely leased this property and there has not, to date, been any further cultivation of the subject property (save survey). Therefore, plaintiff fails to meet the first element required under the law of adverse possession: that there be actual possession on some part of the land at issue. Without belaboring the point, since there has never been any drilling on the property, it necessarily follows then, that plaintiff has failed to demonstrate other crucial elements of the law of adverse possession - - that the possession was visible and notorious. Stark v. Pennsylvania Coal Co., 241 Pa. 597, 600, 88 A. 770 (Pa. 1913). The Court will not continue to address the remaining elements of adverse possession because each of these elements must be satisfied in order to acquire title through the law of adverse possession. Hartzfeld, 947 A.2d at 774.

This court must conclude that only actual drilling and production will suffice to establish actual possession.[5]

Thus, the 1989 judgment cannot serve as the basis for a claim of adverse possession and Count II fails to set forth a claim upon which relief can be granted.

Count III. Declaratory Judgment.

Inasmuch as Plaintiff has failed to set forth a claim in either Count I or II, the request to declare its rights based on those claims necessarily falls, even were the request proper in the context of an action to quiet title in the first place.

ORDER

AND NOW, this 20th day of May 2014, for the foregoing reasons, the preliminary objections are hereby SUSTAINED and Plaintiff's Amended Complaint is hereby DISMISSED.

BY THE COURT,

Dudley N. Anderson, Judge

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[5] The court also wishes to note that the document on which Plaintiff bases its claim in this case is even less effective than the leases in Hoffman. Here, the judgment upon which Plaintiff bases its claim was eventually stricken from the record as void. As was stated in Rieser v. Glukowsky, 646 A.2d 1221, 1224 (Pa. Super. 1994):

> The effect of a void judgment is that it must be treated as having never existed.
> A void judgment is not entitled to the respect accorded to, and is attended by none of the consequences of, a valid adjudication. Indeed, a void judgment need not be recognized by anyone, but may be entirely disregarded or declared inoperative by any tribunal in which effect is sought to be given to it. It has no legal or binding force or efficacy for any purpose or at any place. It cannot affect, impair, or create rights, nor can any rights be based thereon.
> Although it is not necessary to take any steps to have a void judgment reversed or vacated, it is open to attack or impeachment in any proceedings, direct or collateral, and at any time or place, at least where the invalidity appears upon the face of the record. It is not entitled to enforcement and is, ordinarily, no protection to those who seek to enforce it. All proceedings founded on the void judgment are themselves regarded as invalid and ineffective for any purpose.

Quoting First Seneca Bank v. Greenville Distributing Co., 533 A.2d 157, 162 (Pa. Super. 1987).

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