IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

KETA GAS & OIL COMPANY, a Pennsylvania Corporation, formerly KETA REALTY COMPANY,	: NO. 50-571
Plaintiff,	:
vs.	:
THOMAS E. PROCTOR, JAMES H. PROCTOR, THOMAS E. PROCTOR, JR., ANNE PROCTOR RICE, EMILY PROCTOR MANDELL, LYDIA W. THACHER, AUGUSTA PROCTOR, ELLEN O. PROCTOR, SARAH JOSLIN, ABEL H. PROCTOR, and MASSACHUSETTS GENERAL HOSPITAL, heirs, legatees and devisees under the will of Thomas E. Proctor, and all persons claiming under or through any of the above, and BRINKER HUNTING CLUB,	: CIVIL ACTION
Defendants,	:
ANADARKO E & P ONSHORE LLC, SOUTHWESTERN ENERGEY PRODUCTION COMPANY, and INTERNATIONAL DEVELOPMENT CORPORATION,	: Motions for : Summary Judgment;
Intervenors.	: Motions to Strike

Memorandum Opinion

In 2015, this case was reinvigorated by an order of this Court opening a default judgment entered in 1951. Currently before this Court are five (5) motions. On April 25, 2018, Trout Run Hunting & Fishing Club, Inc. (hereinafter "Trout Run")—claimed successor in title and interest to Defendant Brinker Hunting Club's 948.86 acres in James Strawbridge Warrant 5665—filed a *Motion*

to Strike the Default Judgment entered on March 14, 1951 by this Court.[1] On May 14, 2018, International Development Corporation, Southwestern Energy Production Company, and Anadarko E&P Onshore LLC, as successors in interest to Keta Gas & Oil Company (collectively "Intervenors"), filed separate *Motions for Summary Judgment.*[2] Numerous Briefs in Support, Responses, and Replies have been filed and reviewed by the Court in this matter. On July 10, 2018, the heirs of Thomas E. Proctor (hereinafter "Defendants") filed responses to the Intervenors' Motions for Summary Judgment, raising New Matter as part of those responses. In late July 2018, the Intervenors filed *Motions to Strike New Matter/Reply to New Matter*, arguing it was improper to raise New Matter in a response to a motion for summary judgment as well as responding to said New Matter. A Motion hearing was held on July 20, 2018, and the Court reserved decision. This is the Court's Memorandum Opinion and Order on all five (5) motions.

RECENT PROCEDURAL HISTORY

On October 2, 2014, this Court denied a Petition to Strike filed by the heirs of Thomas Proctor.[3] The Court found that a defect did not exist on the face of the record, as the heirs' challenges of a lack of a "diligent investigation" and claim that the Plaintiff did in fact have actual knowledge of the Proctor heirs'

[1] Trout Run's Petition to Strike Default Judgment at 1-2 (Apr. 25, 2018).
[2] These three (3) motions will be addressed together since they raise identical concerns.

whereabouts were not appropriate for a motion to strike since the former was not a defect and the latter did not appear on the face of the record.[4] Similarly, on August 14, 2015, the Margaret O. Proctor Trust, as heirs of Thomas Proctor, filed a *Petition to Strike and/or Open the March 14, 1951 Default Judgment*.[5] Amidst the Court's discussion of the petitioners' four arguments in relation to the motion to strike, the Court found that the Keta Gas Complaint was not deficient in regard to its description of the land and chain of title.[6] The Court ultimately denied the petitioners' Motion to Strike, but scheduled an evidentiary hearing regarding the Motion to Open.[7] On December 18, 2015, the Court found that fraud had been perpetrated in 1950 in order to attain the 1951 default judgment and, thus, the Court opened the judgment.[8]

RELEVANT FACTUAL HISTORY

In 1894, Thomas Proctor and his wife owned the surface and subsurface underlying the parcels of James Strawbridge Warrant 5665 ("W5665") and James Strawbridge Warrant 5667 ("W5667"). On October 2, 1894, Proctor and his heirs conveyed their surface rights by deed to Elk Tanning Company,

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[3] *Keta Gas & Oil Co. v. Thomas E. Proctor, et al.*, No. 50-00, 571, Opinion and Order: Petition to Strike Judgment (Lyco. Com. Pl. Oct. 2, 2014).
[4] *Id.* at 3.
[5] *Keta Gas & Oil Co. v. Thomas E. Proctor, et al.*, No. 50-00, 571, Opinion and Order: Petition to Strike and/or Open Default Judgment (Lyco. Com. Pl. Aug. 14, 2015).
[6] *Id.* at 3 ("The chain of title alleged in the Complaint is sufficient to support Plaintiff's request to quiet title.").
[7] *Id.* at 5.
[8] *Keta Gas & Oil Co. v. Thomas E. Proctor, et al.*, No. 50-00, 571, Opinion and Order: Petition to Open Default Judgment at 15 (Lyco. Com. Pl. Dec. 18, 2015).

reserving "all the natural gas, coal, coal oil, petroleum, marble and all minerals of every kind and character in, upon, or under the said land."[9] On May 25, 1903, Elk Tanning Company conveyed their surface rights to Central Pennsylvania Lumber Company ("CPLC").[10] And, on June 8, 1908, Calvin H. McCauley Jr. ("McCauley") purchased W5665 and W5667 at a tax sale, as evidenced by entries in the Treasurer's Sales Book No. 2.[11] On December 6, 1910, McCauley and his wife conveyed their interest in W5665 and W5667 to CPLC, conveyed fifty-six (56) parcels within the instrument.[12] On May 26, 1913, CPLC conveyed its interest in W5667 to Four Mile Fish & Game Club, but reserved the subsurface rights to Thomas E. Proctor, his heirs, and assignees.[13] On December 15, 1921, CPLC conveyed its interest in W5665 to Lincoln Hunting & Fishing Club, but reserved the subsurface rights to Thomas E. Proctor, his heirs, and assignees.[14]

On August 7, 1942, CPLC conveyed its subsurface rights in W5665 and

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[9] Thomas E. Proctor Trust and Margaret O.F. Proctor's Trust's Response to International Development Corporation's Motion for Summary Judgment, Ex. 7 (July 10, 2018).
[10] International Development Corporation's Motion for Summary Judgment, Ex. 3. Defendants argue that three separate estates existed on the property following this 1903 transfer—"(1) the Proctor subsurface estate, (2) the Elk Tanning Company bark estate, and (3) the CPLC surface estate." Thomas E. Proctor Trust and Margaret O.F. Proctor's Trust's Response to International Development Corporation's Motion for Summary Judgment at 4 (July 10, 2018). Defendants have provided alleged support for these allegations in their New Matter. For reasons discussed herein, the New Matter is an improper vehicle and, regardless, the claims are mere conjecture.
[11] International Development Corporation's Motion for Summary Judgment, Ex. 4.
[12] *Id.*, Ex. 5.
[13] Thomas E. Proctor Trust and Margaret O.F. Proctor's Trust's Response to International Development Corporation's Motion for Summary Judgment, Ex. 73. While the Court references documents noted in Defendants' New Matter, the Court's reliance is not misplaced as the exhibits reference official documents that the parties do not dispute exist.

W5667 by quitclaim deed to Keystone Tanning & Glue Company. On October 29, 1943, Keystone Tanning & Glue Company conveyed their subsurface rights in W5665 and W5667 to Keta Realty Company, which later became Keta Gas & Oil Company on August 28, 1950. Following conveyances not relevant to the current proceeding, Keta Gas & Oil Company's successors in interest acquired the subsurface rights at issue in the case at bar.

DISCUSSION

I. The Intervenors' Motions for Summary Judgment

Despite the copious amounts of paper utilized in this proceeding, the summary judgment issues revolve around the parties' dispute as to whether a 1908 tax sale of unseated land extinguished the separation of the surface rights and subsurface rights; thus, rendering Thomas Proctor's reservation of subsurface rights in his 1894 deed a nullity. As previously noted by the Pennsylvania Supreme Court,

> The standards which govern summary judgment are well settled. When a party seeks summary judgment, a court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Finally, the court may grant

[14] *Id.*, Ex. 74.

summary judgment only when the right to such a judgment is clear and free from doubt.[15]

Based on the Pennsylvania Supreme Court's recent ruling in *Herder Spring Hunting Club v. Keller*,[16] the following law and history regarding unseated land is clear:

(a) Unseated land refers to "'wild' land" that does not meet the definition of "seated land," which is property that has been "developed with residential structures, had personal property upon it that could be 'levied upon for the tax due,' or was producing regular profit through cultivation, lumbering, or mining."[17]

(b) The Pennsylvania Supreme Court allowed unseated land to be severable into surface and subsurface estates.[18]

(c) Because owners of unseated lands were not always identifiable by the county authorities, the unseated land itself was taxed instead of the owner.[19]

(d) Pursuant to the Act of 1815, a specific procedure was implemented to sell unseated land for a failure to pay taxes assessed on the land.[20]

(e) As part of this procedure, county treasurers were required to "hold a public sale on the second Monday of June 1816, and every two years thereafter for the sale of tracts of unseated land upon which the taxes had been unpaid for at least a year."[21]

(f) To protect owners, the legislature allowed for a two (2) year redemption period in which the owner could pay the taxes and costs plus a percent penalty and recover the land sold.[22]

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[15] *Swords v. Harleysville Ins. Cos.*, 883 A.2d 562, 566–67 (Pa. 2005) (internal citations omitted).
[16] *Herder Spring Hunting Club v. Keller*, 143 A.3d 358 (Pa. 2016).
[17] *Id.* at 363-64.
[18] *Id.* at 364.
[19] *Id.*
[20] *Id.* at 365.
[21] *Id.* at 366.
[22] *Id.*

(g) However, when this two (2) year redemption period expired, the owner forfeited his right to challenge any "irregularity in the assessment, or in the process or otherwise."[23]

(h) Pursuant to the Act of 1806, and case law stemming from the Act, if the county commissioners were not notified of a subsurface reservation, then the purchaser of the land at the tax sale purchased the property as a whole.[24]

(i) The county commissioners were under no obligation to obtain information regarding unseated lands; indeed, that obligation was initially shouldered by the surveyors and then passed onto the original and subsequent owners to update the commissioners as to the status of the land.[25]

In the shadow of this historic exposition, the Pennsylvania Supreme Court found that a failure to inform the county commissioners of the reservation of surface rights, or later transfer, resulted in the lands being taxed as a whole, and later sold.[26] Further, the Supreme Court agreed with the Pennsylvania Superior Court that any issues with the assessments and tax sale had to have been brought within the two (2) year redemption period provided by law.[27] In *Southwestern Energy Production Company v. Anadarko E&P Onshore LLC, et al.*, this Court recently relied on *Herder Spring* in finding that a failure to inform the county commissioners of a severance of subsurface rights resulted in those rights being extinguished in a subsequent tax sale.[28]

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[23] *Id.* (quoting 72 P.S. § 6091).
[24] *Id.* at 368.
[25] *Id.* at 368-89.
[26] *Id.* at 372.
[27] *Id.* at 374.
[28] *Southwestern Energy Production Company v. Anadarko E&P Onshore LLC, et al.*, No. 12-

In the case at bar, Defendants have failed to provide sufficient evidence that Thomas Proctor informed the Lycoming County Commissioners of his reservation of subsurface rights in W5665 or W5667. The 1908 tax sale is supported by documentary records,[29] and the tax assessments of the land do not indicate that the Lycoming County Commissioners were informed of Thomas Proctor's reservation of subsurface rights or that he redeemed W5665 or W5667 within the statutory two (2) year redemption period. It is Defendants' burden to provide evidence sufficient to support its position in opposition to the motions for summary judgment.[30] Indeed, *Herder Spring* requires Defendants to provide evidence supporting their argument that the land was not taxed as a whole.[31]

Despite *Herder Spring*'s elucidation, Defendants argue that: (1) Thomas Proctor retained all rights through his chain of title because he reported his 1894 deed to Lycoming County, which is sufficient to protect it from the subsequent tax sale; (2) McCauley purchased the parcels at the tax sale as an agent for CPLC, therefore, redeeming the land; and (3) the land was not unseated at the time because timber and tanbark were produced on the land.

00,563, Opinion and Order: Motion for Summary Judgment at 2-3 (Lyco. Com. Pl. July 31, 2017).

[29] *See Woodhouse Hunting Club, Inc. v. Hoyt*, 183 A.3d 453, 459 (Pa. Super. Ct. 2018) (finding that only "reliable indicia" that the sale of the deed complied with the terms of law is required to show that the deed was issued).

[30] *See* Pa.R.C.P. Rule 1035.3.

[31] *See Herder Spring Hunting Club*, 143 A.3d at 375 ("In this case, the documents relating to the 1935 tax sale provide no indication that the assessment and taxation occurred on anything other than the entire Eleanor Siddons Warrant, as they provide no reference to the surface estate or a reserved subsurface estate. Therefore, we conclude that the 1935 tax sale to the Centre County Commissioners conveyed the entire Eleanor Siddons Warrant including both the surface and

Preliminarily, the Court notes that to the extent Defendants rely on the new matter found in their responses to the motions for summary judgment, such reliance is misplaced. Defendants have failed to reference the appropriate rule or precedent allowing such a procedure. As such, Defendants' new matter will not be considered. However, even if this Court were to rely on the New Matter, Defendants' arguments are based in speculation and conjecture regarding similar transactions and/or the normal procedure for such transactions.

First, under *Herder Spring*, Thomas Proctor is not simply required to notify the Lycoming County Commissioners of his original deed, as subsequent reservations also require notification. Hence, Defendants' argument that the 1893 Lycoming County assessment records indicate Plaintiff's ownership of these two parcels does not support the argument that a reservation occurred. Alternatively, Defendants provide no evidence that Thomas Proctor notified the Lycoming County Commissioners that he was reserving his subsurface rights in W5665 and W5667. Thus, the Court will decline Defendants' request that it speculate and find that Thomas Proctor did notify the county commissions of such reservations regarding W5665 and W5667 as it was his habit of doing so based on the testimony provided in the 1907 case of *Gamble & Green v. Central Pennsylvania Lumbar Company*.[32] Defendants point to passages of testimony

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subsurface estates.").

[32] Thomas E. Proctor Trust and Margaret O.F. Proctor's Trust's Response to International Development Corporation's Motion for Summary Judgment at 26.

by S.A. Rote, Thomas E. Proctor's tax agent, and B.S. Bentley, Thomas E. Proctor's attorney, who testified to his business practices regarding unseated lands.[33] However, the testimony was focused on Warrant 5666, which is not at issue in this case.[34] Further, an inference is required to find that Mr. Rote testified that he paid taxes on the W5665 and W5667, as he did not mention which taxes were paid.[35]

The Court will similarly decline Defendants' invitation to speculate that the correspondence notifying the Lycoming commissioners was likely "lost or discarded."[36] And, regarding Defendants' claim of habit, more substantial evidence would be required to establish that the "routine practice" of Elk Tanning Company to reserve subsurface rights in other instances proves it acted similarly in this regard. Second, Defendants provide no direct evidence that McCauley was acting as CPLC's agent at the time of the tax sale. Third, *Herder Spring* prevents this Court from analyzing whether the land was properly assessed after the two (2) year redemption period ran.

For these reasons, the entrance of summary judgment against Thomas Proctor and his wife's successors in interest, i.e. Defendants as used herein, seems appropriate. As the 1908 tax sale divested Thomas Proctor of his

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[33] *Id.* at 27-28.
[34] *Id.*, Ex. 1, pp. 189-199 (emphasis added).
[35] *Id.*, Ex. 1, pp. 187.
[36] *Id.* at 28.

subsurface reservations, Defendants possess no interest in the present proceedings.

II. Trout Run's Petition to Strike 1951 Default Judgment

Despite this Court denying two petitions to strike in 2014 and 2015 and opening the 1951 default judgment in 2015, Trout Run Hunting & Fishing Club Inc. ("Trout Run") requests the Court strike the 1951 Default Judgment.[37] Trout Run argues that it is not clear from this Court's December 18, 2015 Opinion and Order opening the 1951 default judgment whether it was opened to all Defendants, including Brinker and its successors in interest.[38] Trout Run argues that a petition to strike is appropriate because the chain of title is incorrect.[39] Trout Run asserts that CPLC misrepresented in its 1921 conveyance of land to Elk Tanning Company that CPLC was conveying land conveyed to it by Thomas E. Proctor.[40] CPLC's deed, which was conveyed to Lincoln Hunting and Fishing Club, states: "Excepting and Reserving, Nevertheless, *unto Thomas E. Proctor his heirs and assigns*, all the natural gas, coal, coal oil, petroleum, marble and all minerals of every kind and character, in, upon or under the said lands hereinbefore mentioned and described and every part thereof . . . ."[41] Trout Run notes that this conveyance was void because Thomas Proctor's rights had

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[37] *See generally* Trout Run's Petition to Strike Default Judgment (Apr. 25, 2018).
[38] *Id.* ¶8.
[39] *Id.* ¶15.
[40] *Id.* ¶16.
[41] Thomas E. Proctor Trust and Margaret O.F. Proctor's Trust's Response to International

ceased once Calvin McCauley purchased W5665 and W5667 at the 1908 tax sale.[42] Hence, Trout Run argues that CPLC failed to reserve its subsurface rights in W5665.[43] Based on these facts, Trout Run argues that Keta Gas & Oil Co. possessed no interest to adjudicate with regard to W5665 and, therefore, the 1951 default judgment was void.[44] Under Pennsylvania law,

> A petition to strike a judgment is a common law proceeding which operates as a demurrer to the record. A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record. In considering the merits of a petition to strike, the court will be limited to a review of only the record *as filed by the party in whose favor the warrant is given,* i.e., the complaint and the documents which contain confession of judgment clauses.[45]

However, in this regard, the Court is bound by the law of the case doctrine's coordinate jurisdiction rule.[46] "[T]he coordinate jurisdiction rule commands that upon transfer of a matter between trial judges of coordinate jurisdiction, a transferee trial judge may not alter resolution of a legal question previously decided by a transferor trial judge."[47] In the present case, Judge Anderson previously addressed this issue in his August 14, 2015 Opinion and Order. Specifically, the Court found that Keta Gas & Oil Company's Complaint was not

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Development Corporation's Motion for Summary Judgment, Ex. 74 (emphasis added).
[42] *Id.*
[43] Trout Run's Petition to Strike Default Judgment, ¶46.
[44] *Id.* ¶¶50-51.
[45] *Resolution Tr. Corp. v. Copley Qu-Wayne Assocs.*, 683 A.2d 269, 273 (Pa. 1996) (internal citations omitted).
[46] *Zane v. Friends Hosp.*, 836 A.2d 25, 29 (Pa. 2003).
[47] *Id.*

deficient in regard to its description of the land and chain of title.[48] The Court is bound by this determination.

Nevertheless, to the extent an argument can be made that this Court's prior adjudication did not adequately address Trout Run's argument, this Court finds that *Black Wolf Rod & Gun Club, Inc. v. International Development Corporation* is persuasive.[49] In *Black Wolf*, the Pennsylvania Superior Court affirmed a decision of this Court which found a reservation clause in a deed conveyed after a tax sale to be valid despite the reservation's use of terminology "as fully as the same have been excepted and reserved or conveyed by former owners."[50] The Superior Court agreed with this Court that the intent behind the drafting of the subsequent conveyance was merely meant to reserve the rights in the same manner as the original owner.[51] In the present case, this Court fails to see a distinction to CPLC's reservation. Therefore, the fact that the drafters failed to choose more exacting language does not create a *prima facie* defect.

Moreover, it is unclear why Trout Run is now expressing concern that Brinker Run may have been confused regarding its rights during this case. Brinker Run was free to contest this Court's default judgment ruling in 1951, or

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[48] *Keta Gas & Oil Co. v. Thomas E. Proctor, et al.*, No. 50-00, 571, Opinion and Order: Petition to Strike and/or Open Default Judgment at 3 (Lyco. Com. Pl. August 14, 2015).
[49] *Black Wolf Rod & Gun Club, Inc. v. International Development Corporation, et al.*, 2016 WL 6212981 (Pa. Super. Ct. Oct. 25, 2016). The Court believes this memorandum opinion falls under an exception to the Operating Procedures of the Superior Court. *See* 210 Pa. Code § 65.37 ("when it is relevant under the doctrine of law of the case. . . .").
[50] *Id.* at *4.

when Judge Anderson opened this case in 2015.[52] Indeed, Trout Run's petition to strike seems moot at this juncture.

CONCLUSION

For the reasons discussed above, Trout Run's *Petition to Strike* is **DISMISSED AS MOOT**. The Intervenors' Motion to Strike New Matter is **GRANTED**, and the Intervenors' Motions for Summary Judgment as to the Proctor heir Defendants are **GRANTED**.

IT IS SO ORDERED this 22nd **day of October, 2018.**

BY THE COURT,

Eric R. Linhardt, Judge

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[51] *Id.*

[52] This Court noted that Brinker Run received personal service of the 1951 default judgment in its December 18, 2015 opinion. See *Keta Gas & Oil Co. v. Thomas E. Proctor, et al.*, No. 50-00, 571, Opinion and Order: Petition to Open Default Judgment at 2 n.2 (Lyco. Com. Pl. Dec. 18, 2015).

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