IN THE SUPREME COURT OF THE STATE OF NEVADA

VIRGINIA CITY VENTURES, INC.,
Appellant,
vs.
STOREY COUNTY AND LORRAINE DU FRESNE,
Respondents.

No. 41590

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a summary judgment in a real property case. First Judicial District Court, Storey County; David A. Huff, Judge.

Appellant Virginia City Ventures (VCV), and respondents Storey County and Lorraine DuFresne filed cross-motions for summary judgment in an effort to quiet title to a parcel of land in Virginia City, Nevada. The district court granted Storey County and DuFresne's motion.

FACTS

Block 173, a parcel of land on the western side of B Street in Virginia City, Nevada, consists of fifteen lots and three to four acres described as the "remainder of [B]lock 173." The property is located above the Savage mining claim, which was acquired by VCV's predecessors in interest. VCV claims ownership of Block 173 either because the surface and mining claims merged, or because VCV's predecessor in interest was entitled to, but did not receive, notice of a tax sale that resulted in the transfer of the surface rights to Storey County.

In 1859, the Savage mining claim was legally located. The United States granted Savage Gold & Silver Mining Company a patent

known as "Savage Patent #51"[1] (the Savage patent). The Savage patent conferred the mineral rights located under Block 173. The patent specifically excluded "all town property rights upon the surface and . . . all houses, buildings, structures, lots, blocks, streets, alleys or other municipal improvements on the surface of the . . . premises."

In 1923, the Savage Gold & Silver Mining Company conveyed the Savage patent to Comstock Merger Mines. This indenture contained language that indicated that the conveyance included the mining claim from the one thousand foot level and below down to the Sutro Tunnel.

In 1928, Comstock Merger Mines conveyed the Savage patent to the Sutro Tunnel Coalition. The indenture also described the conveyance of the mining claim to the one thousand foot level down to the Sutro Tunnel. Additionally, this conveyance contained language conveying "all the present holdings of [Comstock Merger Mines] consisting of mines, mining claims, and real estate situate in Virginia and Gold Hill Mining District."

In 1933, the Savage patent was once again conveyed, this time from the Sutro Tunnel Coalition to Arizona Comstock Corporation. This conveyance confused the chain of title, for when describing the conveyance, it states: "SAVAGE lode mining claim . . . from the surface to the Sutro tunnel level." Further in the deed; however, a limitation was placed on the conveyance, indicating that the claim was limited to the one thousand foot level of the lode down to the Sutro Tunnel. The trustee

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[1]The Savage patent is actually number sixty-three, but is considered number fifty-one because it is located on lot fifty-one.

holding the claim for the Arizona Comstock Corporation transferred it to the Central Comstock Mines Corporation in 1963.

In 1971, Central Comstock Mines Corporation transferred the Savage patent to Siskon Corporation. The language of that transfer reiterated the language from the previous conveyance, noting the delivery of the "SAVAGE lode mining claim . . . from the surface to the Sutro Tunnel level." In 1994, the Siskon Corporation conveyed its interest in the Savage patent to VCV, describing the conveyance as "United States Survey Patent #51, Savage together with all rights of a mining patent the year of granting & therefrom."

The history of the surface rights and the Savage patent differ. The earliest reference to the surface rights is a treasurer's deed recorded in 1900, which states that Storey County acquired Block 173 in a tax sale. In 1900, the Storey County Treasurer conveyed the surface of Block 173 to Storey County by a tax deed. Storey County then conveyed the surface rights of Block 173 to Harold Boericke in 1921. In 1923, Boericke transferred the surface property of lots 1, 2, 9 and 11 in Block 173 as well as the "remainder of block 173" to Comstock Merger Mines. At this time, Comstock Merger Mines held both the surface and mining rights to Block 173.

In 1973, based on non-payment of taxes, the treasurer and ex-officio tax receiver of Storey County acquired the surface rights of the property in question through a tax sale. When taxes were not paid, the tax receiver published a notice in the Carson Chronicle, which described the property where the taxes were levied and stated that the property was to be sold. There is no record regarding whether the tax receiver mailed

notice to any interested party. Storey County then took possession of the property subsequent to the tax sale.

In 1990, Northern Nevada Title Company issued a title report indicating that title to the property at issue vested in Kathleen Hilton, the treasurer and ex-officio tax receiver of Storey County. This report noted that Hilton was only entitled to the surface rights, for a mining claim existed on the mineral rights below the surface. In 1991, Hilton filed a complaint in district court, seeking to quiet title to the property. A proper lis pendens was filed in the case, a copy of the summons was posted pursuant to NRS 40.100(2), and the summons was published in the Carson Chronicle for a period of five weeks. The district court then issued a decree quieting title, adjudging Hilton the owner of the surface rights.

The district court concluded, even assuming that the conveyances to Harold Boericke united the chain of title, that the tax sale conducted by Storey County in 1973 severed any surface interests that Comstock Merger Mines may have held in the property.

Further, the district court held that even if the tax sale did not sever the interest, VCV had no claim to the entirety of Block 173. The district court reasoned that the conveyance from Boericke conveyed enumerated lots, and the term "remainder" in the conveyance did not refer to other enumerated lots, but referred to the land not divided into parcels. Accordingly, the district court held that lots three through eight, ten, and twelve through fifteen were never held by VCV or its predecessors in interest. We agree.

DISCUSSION

Summary judgment

The district court granted summary judgment based on its view that the surface rights and mineral rights were separate from one another.

This court conducts a de novo review of a decision by the lower court to grant summary judgment.[2] To successfully oppose a motion for summary judgment, the non-moving party must affirmatively demonstrate that there is either a disputed question of material fact, or that the moving party is not entitled to judgment as a matter of law.[3] These allegations must be demonstrable with admissible evidence or relevant legal authority.[4]

VCV does not hold title to the surface rights.

VCV contends that the mining patent conveys to it the surface rights on the property in question. In particular, VCV argues that the mineral rights and the surface rights were unified, and were conveyed to its predecessors in interest, placing the surface rights in VCV's chain of title. We disagree.

Rights to the surface of a mining location do not vest in the company or claimant who receives a mining patent.[5] A "location upon the surface is not made with the view of getting benefits from the use of that

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[2]Continental Ins. Co. v. Murphy, 120 Nev. ___, ___, 96 P.3d 747, 749 (2004).

[3]Wayment v. Holmes, 112 Nev. 232, 237, 912 P.2d 816, 819 (1996).

[4]Id. at 236, 912 P.2d at 818-19.

[5]Del Monte Min. Co. v. Last Chance Min. Co., 171 U.S. 55, 85 (1898).

surface;" rather, a location is made to measure the rights below the surface.[6] In Nevada, surface rights are separate from mineral rights.[7] This court has held that in mining localities, the boarding houses, mechanics' and trade shops are necessary and "as worthy of protection as the mines themselves."[8] Therefore, separate title attaches to the surface rights and the mineral rights.

Surface rights are not servient to the mineral estate.[9] Minerals found in the surface are not included in a mining patent if those mining techniques destroy the surface estate.[10] Furthermore, "title to surface or subsurface minerals vests in the surface estate owner unless the mineral estate owner can remove the minerals in question by methods of extraction which will not consume, deplete or destroy the surface estate."[11] When a claim or lode is located, which does not have any location on the surface, the person who locates the claim can only recover the claim, not the surface.[12]

The Savage patent describes the mineral lode from the one thousand foot level down to the Sutro Tunnel only, and does not include

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[6]Id. at 75.

[7]Bullion M. Co. v. Croesus M. Co., 2 Nev. 168, 176 (1866).

[8]Id. at 178.

[9]Christensen v. Chromalloy Amer. Corp., 99 Nev. 34, 36-37, 656 P.2d 844, 846 (1983) (citing Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971)).

[10]Id. at 37, 656 P.2d at 846 (citing Reed v. Wylie, 597 S.W.2d 743, 747 (Tex. 1980)).

[11]Id. at 37, 656 P.2d at 847.

[12]Bullion, 2 Nev. at 178.

any surface rights. The conveyances of the Savage patent did not grant to VCV the surface rights in question. While Comstock Merger Mines previously owned part of the surface rights and the mineral rights in the Savage patent, such ownership did not automatically link the two estates and create one. In fact, the indenture within VCV's chain of title from Comstock Merger Mines indicates that the Savage patent is to be conveyed as a mining claim. When Central Comstock, the successor in interest to Arizona Comstock Corporation, conveyed to Siskon Corporation lots one through six in Block 173, the lots were conveyed in a deed separate from the deed that conveyed the Savage patent. The conveyance to VCV includes the Savage patent and all rights of the mining patent. The surface rights and the mineral rights are separate. We conclude the deed did not convey rights to the surface with the Savage patent. Therefore, the district court did not err in concluding that the mineral patent did not convey surface rights to any of the property in question and that the surface and mineral rights did not merge with the Boericke conveyance.

Storey County was statutorily required to mail notice to interested parties

VCV also contends that the district court erred when it relied on the curative provision of NRS 361.590 to overcome a potential defect in the 1973 Storey County tax sale of lots 1, 2, 9, and 11 in block 173, as well as the remainder of block 173.[13] We agree.

A conflict has arisen in this state's jurisprudence regarding what notice, or lack thereof, violates due process, and whether the

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[13]Unless otherwise noted, statutes cited read substantively if not exactly the same today as they did in 1973.

curative provisions of NRS 361.590 cure defects in notice. The provisions of NRS 361.590 and 361.600 cure defects of form in tax sales,[14] but not jurisdictional defects.[15]

In 1973, NRS 361.565(6)(a) mandated that notice of delinquent taxes shall be mailed "to the owner or owners thereof, and also to the person or persons listed as the taxpayer or taxpayers thereon the tax rolls, at their last known addresses."[16] "NRS 361.565 further requires that notice be given by publication to all persons whose taxes are delinquent and that notice by mail be given to each respective taxpayer at such person's last known address. A failure to give the statutorily required notice renders a subsequent tax deed void."[17]

We expressly held in Bogart v. Lathrop that failure to mail notice to an interested party before the sale of the property for delinquent taxes is a jurisdictional defect, not cured by NRS 361.590, therefore rendering a subsequent tax deed void.[18] This notice provision has been interpreted as requiring that the tax receiver conduct a somewhat

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[14]NRS 361.590(6)(c).

[15]Sutro Tunnel Co. v. Lipscomb, 102 Nev. 225, 228, 720 P.2d 1204, 1206 (1986); Bogart v. Lathrop, 90 Nev. 230, 233, 523 P.2d 838, 840 (1974).

[16]Currently, NRS 361.5648(1)(a), (b), and (c) mandate that notice of delinquency must be mailed to owners, persons listed as the taxpayer and each holder of a recorded security interest in the property.

[17]Bogart, 90 Nev. at 232-33, 523 P.2d at 840 (emphasis in original); see also Sutro Tunnel Co., 102 Nev. at 228, 720 P.2d at 1206; Bell v. Anderson, 109 Nev. 363, 365, 849 P.2d 350, 351 (1993); Davison v. Gowen, 69 Nev. 273, 275, 249 P.2d 225, 226 (1952).

[18]Id. at 233, 523 P.2d at 840.

extended search for persons in need of notice, including a search of title records for the property.[19] The notice statute indicates that notice shall be provided to both owners and taxpayers; therefore, the county may not merely rely on the tax roll when determining who should receive notice of the tax sale.[20]

Former NRS 361.565 was clarified through bifurcation and further codification in NRS 361.5648, which expressly sets out the requirement that notice be mailed. Former NRS 361.565 contained substantively the same language as it did at its adoption in 1957 and required both publication and mailing of notice.[21] The statutory language is clear, requiring both forms of notice.[22]

The curative statutes cure defects in form of notice

NRS 361.590 restores the regularity of the proceedings as to the notice requirement of former NRS 361.565 and current NRS 361.5648. NRS 361.590(6) states in pertinent part:

> [n]o tax assessed upon any property, or sale therefor, may be held invalid by any court of this state on account of:
>
> (a) [a]ny irregularity in any assessment;
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> . . . .
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> (c) [a]ny other irregularity, informality, omission, mistake or want of any matter of form or substance in any proceedings which the

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[19]Bell, 109 Nev. at 365, 849 P.2d at 352.

[20]Id.

[21]Bell, 109 Nev. at 365, 849 P.2d at 351.

[22]See NRS 361.565; NRS 361.5648(1); NRS 361.565(6) (1973).

> Legislature might have dispensed with in the first place.[23]

Further, NRS 361.590 states, "[a]ll such proceedings in assessing and levying taxes, and in the sale and conveyance therefor, must be presumed by all the courts of this state to be legal until the contrary is shown affirmatively."

In addition, NRS 361.590(4) states that all deeds recorded after the period of redemption are considered "conclusive evidence of the regularity of all other proceedings, from the assessment by the county assessor to the execution of the deed."[24] NRS 361.590(3) also states that a deed recorded with the county recorder after the period of redemption is primary evidence that the property was assessed properly, equalized properly, taxes were levied properly, and the taxes were not paid. The assessing, equalization, levying and non-payment of taxes are not disputed in this case. Therefore, the tax deed itself becomes evidence in support of the regularity of the execution erasing any potential irregularities.[25]

However, this language has been interpreted to apply only to defects in assessments, the form of notice, or the legality of the tax deed.[26] This language has not been held applicable to the requirement of giving notice. Therefore the curative statute does not resolve the apparent failure to mail notice in this case because notice is jurisdictional and required by due process. The curative statute does not provide a

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[23](Emphasis added).

[24](Emphasis added).

[25]NRS 361.590(3); NRS 361.595(6).

[26]See Sutro Tunnel Co., 102 Nev. at 229-30, 720 P.2d at 1207.

mechanism to cure a defect in the mailing of notice to a party, for such a defect is jurisdictional in nature; nor does the posting of notice cure such a defect. In this instance, the district court failed to recognize the modifications and clarifications made to the relevant case law by the decisions of this court indicating that defects in the mailing of notice are jurisdictional in nature, and not saved by the curative statute.

We note that the record is devoid of any record of mailing of notice. The burden to demonstrate such a mailing falls squarely on the shoulders of the county assessor's office.[27] As this court held in Sutro Tunnel Co. v. Lipscomb, placing the burden of demonstrating a failure to mail notice of the party claiming that no such notice was sent would be "impossible to satisfy in a great majority of cases. Records may indicate the sending of notice; however, records will seldom exist indicating that no notice was sent."[28] We therefore reverse the district court's summary judgment and remand for further proceedings consistent with this opinion, in particular with regard to whether notice was mailed before the Storey County tax sale relating to lots 1, 2, 9, and 11 in block 173, as well as the remainder of block 173.

Respondents' claims

Respondents Storey County and DuFresne raise several arguments on their own that were not raised by VCV in this appeal. The issues raised by the respondents in their answering briefs will not be addressed because they are not properly raised by way of cross-appeal.[29]

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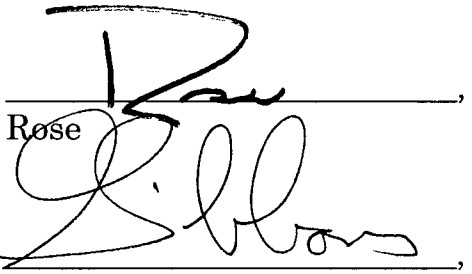
[27]Id. at 230, 720 P.2d at 1207.

[28]Id.

[29]Barton v. DeRousse, 91 Nev. 347, 351, 535 P.2d 1289, 1291 (1975).

In sum, we AFFIRM the district court's grant of summary judgment declaring that the mineral rights did not convey to VCV or its predecessors in interest, any surface rights in question. We REVERSE the district court's grant of summary judgment as it relates to lots 1, 2, 9, and 11, as well as the remainder of block 173, and REMAND for further proceedings to determine if adequate notice was provided prior to the 1973 Storey County tax sale.

It is so ORDERED.



_____, J.
Rose

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Gibbons

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Hardesty

cc: Hon. David A. Huff, District Judge
William G. Rogers
Jack I. McAuliffe, Chtd.
Thorndal Armstrong Delk Balkenbush & Eisinger/Reno
Storey County Clerk