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STATE OF NORTH DAKOTA

NORTH DAKOTA SUPREME COURT

Harry W. Chornuk and

Linda D. Chornuk,

Plaintiffs and Appellees,

v.

Craig Nelson and

Julie Nelson,

Defendants and Appellants.

Supreme Court File No. 20140124

Appeal Following Bench Trial Before the Honorable Josh B. Rustad, Judge of the McKenzie County Court, Northwest Judicial District, Civil No. 27-10-C-00123

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INTRODUCTION

[1] The Chornuks have not cited any part of the record to contradict the Nelsons' core argument on appeal: The burden was on the Chornuks to record their deed, and they failed to do so. Sporadic lawn maintenance – especially on a piece of Property believed to be owned by an elderly widow – is not sufficient to deprive the Nelsons of their status as "good faith" purchasers for value. Therefore, this Court should reverse the trial court's decision and quiet title in favor of the Nelsons.

[2] The Nelsons have not waived their right to appeal. Contrary to the Chornuks' misinformed (and frankly, irresponsible) argument, the money judgment in this case was satisfied by a sheriff's execution. The Nelsons did not voluntarily pay the Chornuks' judgment, nor waive their right to appeal.

ARGUMENT

I. THE APPLICABLE STANDARD OF REVIEW IS DE NOVO

[3] The Chornuks' brief states that, "the Nelsons correctly note that the District Court decisions should be reviewed under a clearly erroneous standard." (Chornuks' Brief ¶ 19.) The Nelsons noted no such thing, and this is not a correct description of the standard of review applicable to this case. (See Nelsons' Opening Brief ¶¶ 21-22.)

[4] "A party's status as a good faith purchaser without notice of a competing interest is a mixed question of fact and law." Diocese of Bismarck Trust v. Ramada, Inc., 553 N.W.2d 760, 769 (N.D. 1996). "The factual circumstances relating to events surrounding the transaction – the realities disclosed by the evidence as distinguished from their legal effect – constitute the findings of fact necessary to determine whether a party has attained the status of a good faith purchaser without notice." Id. "A court's ultimate determination that a party is not a good faith purchaser for value is a conclusion of law,

because that determination describes the legal effect of the underlying factual circumstances." Id. Thus, whether the evidence cited by the District Court suffices to establish constructive notice is reviewed de novo.[1]

II. THE NELSONS WERE GOOD-FAITH PURCHASERS.

[5] The Chornuks assert, without citation to the record, that the "Chornuks activities of maintaining, improving and using the property were known to the Nelsons . . . ." (Chornuks' Brief ¶ 25.) This is an overgeneralization. It is also completely misleading. The trial record reveals that, at the time of the purchase, the Nelsons knew that *the Chornuks* had mowed the grass and watered some trees. (Nelsons' Opening Brief ¶¶ 29-31.) Nothing more. These are the only relevant facts because, under North Dakota's Recording Act, a determination of good faith requires "an examination of the information possessed by a person." Nygaard v. Robinson, 341 N.W.2d 349, 355 (N.D. 1983) (emphasis added). Thus, the only facts that matter are the subsequent purchaser's actual, personal knowledge at the time of the purchase. See id. (stating that a "purchaser's knowledge entails an examination of the circumstances in each case to determine if the information the purchaser received constituted notice or created a duty to inquire").

[6] The Chornuks repeatedly rely on the fact that the Nelsons saw the Chornuks mowing the grass on the Property *after* the Nelsons purchased it. (Chornuks' Brief ¶¶ 9, 22, 27.) Reliance on this fact represents the same misunderstanding of the law that

[1] This Court has previously considered whether the de novo standard of review applies to every aspect of a district court's determination of good faith purchaser status, including the underlying factual circumstances. See Nygaard v. Robinson, 341 N.W.2d 349, 353 (N.D. 1983). This Court reaffirmed that while factual findings are reviewed under the clearly erroneous standard, "[t]he trial court's ultimate determination that [a buyer] was not a bona fide purchaser for value . . . is a conclusion of law because such a determination describes the legal effect of the realities-the findings of fact-ascertained by the trial court." Id. at 354. Such determinations, of course, are reviewed de novo. Id.

infected the District Court's decision. The only relevant acts with respect to the property are those that occurred before the Nelsons purchased it. (Nelsons' Opening Brief ¶ 29 (citing Anderson v. Anderson, 435 N.W.2d 687, 688 n.2 (N.D. 1989); Nygaard, 341 N.W.2d at 355 (N.D. 1983); Peterson v. Dill, 33 N.D. 407, 157 N.W. 301 (1915)).)

[7] Again, merely mowing the lawn and watering trees on a neighbor's property does not provide constructive notice to third-parties that the mower/waterer may claim to own the parcel. (Nelsons' Opening Brief ¶¶ 31-34.) This is demonstrated by the cases the Chornuks' cite.

[8] The Chornuks rely on the one hundred (plus) year-old case of Hunter v. McDevitt, 12 N.D. 505, 97 N.W. 869 (1903). (Chornuks' Brief ¶ 21.) There, McDevitt purchased a piece of property after being expressly told that Hunter had already purchased it. Id., 97 N.W. at 869-70. Hunter had also "prepared part of the land for crop." Id. at 870. This Court found that McDevitt had constructive notice of Hunter's interest, but only because he had been told that Hunter had purchased the property. The Court explained:

> Our conclusion that McDevitt is not a purchaser in good faith does not rest on notice from possession. In our opinion, the evidence wholly fails to show any acts of open and visible possession by plaintiff sufficient to constitute notice of his rights.

Id. at 870-71 (emphasis added). Like preparing land for crop, the Chornuks' sporadic lawn maintenance wholly failed to show open and visible possession sufficient to constitute notice of their rights.

[9] The Chornuks also state that the "decision of the North Dakota Supreme Court in Farmers Union Oil Co. of Garrison v. Smetana is instructive in this case." (Chornuks Brief ¶ 22.) The Nelsons agree.

[10] In Farmers Union Oil Co. of Garrison v. Smetana, 2009 ND 74, 764 N.W.2d 665 the issue was whether the Smetanas had knowledge that a prior deed (from 1992) incorrectly described the boundary line of real property they had purchased. Id. at ¶¶ 3-5. The correct boundary line was marked by a fence. Id. at ¶ 4. This Court held that the Smetanas' knowledge of the fence was inconsequential to their knowledge of the boundary line: "The 'act' which has caused injury to the Smetanas is the error in the 1992 deed, and unless they had constructive or actual notice of that 'act' the Smetanas acted in good faith when they purchased the property." Id. at ¶ 20. The Court's reasoning in Smetana is in line with amended N.D.C.C. § 47-19-41, which requires holders of unrecorded conveyances to prove that subsequent purchasers had actual knowledge of the unrecorded instrument itself in order to defeat good faith status. While not directly applicable to this appeal, the logic of Smetana and the legislature's judgment in amending N.D.C.C. § 47-19-41 strongly indicate that this Court should not find the Nelsons to have lacked good faith unless they had knowledge of the Chornuks' unrecorded deed itself.

[11] The Nelsons did not have constructive knowledge of the Chornuks' unrecorded deed. The Chornuks' acts of occasionally mowing the grass and watering the trees on the subject property cannot, as a matter of law, constitute constructive notice. (Nelsons' Opening Brief ¶¶ 31-34) see also Weinstein v. Hurlbert, 2012 ME 84, 45 A.3d 743, 746 (holding that "lawn mowing, the planting and pruning of several bushes, [and] minimal gardening" did not establish notorious possession); Bailey v. Moten, 717 S.E.2d 205, 207 (Ga. 2011) (finding that plaintiff's lawn mowing, timber cutting, and use of a property for occasional family gatherings did not provide sufficient evidence of possession to

establish ownership); Romans v. Nadler, 14 N.W.2d 482, 486 (Minn. 1944) ("It is a well-known fact that many thousands of homeowners have no boundary fences and that adjoining owners occasionally trespass on their neighbors' lands in cutting grass . . . . Such harmless trespasses are committed upon the well-founded assumption that ordinarily a neighbor will acquiesce in and consent to them.").

III. THE NELSONS DID NOT VOLUNTARILY SATISFY THE JUDGMENT AGAINST THEM AND DID NOT WAIVE THEIR RIGHT TO APPEAL.

[12] The Chornuks assert that the Nelsons waived their right to appeal because the judgment against them was satisfied and, according to the Chornuks, "[t]here is no evidence indicating that the payment of the judgment by the Nelsons was not voluntary." (Chornuks' Brief ¶ 34.) The Chornuks are wrong.

[13] The Chornuks initially obtained a judgment against the Nelsons in the amount of $2,830 in November 2011. (A.30.) The record demonstrates that the Chornuks obtained an Execution of Judgment in July 2012. (A.5, Index No. 63.) That Execution was fulfilled by the sheriff, as demonstrated by the documents titled Sherriff's Return of Service and Return of Service – Satisfied in the record. (Id., Index Nos. 64-65.) In March 2014, on the Nelsons' motion for reconsideration, the trial court reduced the damage award to $360. (A.95.) The Chornuks then filed a Satisfaction of Judgment on March 11, 2014. (A.97.) Of course, the Nelsons were owed money as a result of the amended judgment, given that the Chornuks' damages were reduced. The judgment had automatically been involuntarily satisfied due to the Chornuks' initial Execution of Judgment. As with the underlying facts, the Chornuks' inattention to detail fatally undercuts their arguments.

CONCLUSION

[14] The Nelsons respectfully request that this court reverse the trial court's decision and quiet title to the Property in their favor. Additionally, the Nelsons respectfully request that this court reverse the trial court's award of damages in favor of the Chornuks, which award was predicated on the Chornuks' ownership of the property.

Dated: June 27, 2014

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AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Barbara K. Becker, being first duly sworn, deposes and says that on the 27th day of June 2014 she served:

Appellants' Reply Brief

upon the parties outlined below, by email and/or by placing true and correct copies thereof in an envelope addressed as follows:

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Barbara K. Becker

Barbara K. Becker

Subscribed and sworn to before me
this 27th day of June 2014.

Deanna J. Stower

Notary Public

DEANNA J. STOWER
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2015