

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

James Maragos, Andrew Maragos and)	
Vivian Zimmerman, Trustees of the)	
George S. Maragos Residuary Trust,)	Supreme Court No. 20160441
a/k/a The George S. Maragos Trust,)	
)	
Plaintiff/Appellants,)	McKenzie County District
)	Court No. 27-2015-CV-00047
vs.)	
)	
Newfield Production Company,)	
)	
Defendant/Appellee,)	

APPEAL FROM THE JUDGMENT ENTERED NOVEMBER 22, 2016 (DOC. ID #78)
PURSUANT TO THE ORDER FOR JUDGMENT
DATED NOVEMBER 16, 2016 (DOC. ID #65)

THE HONORABLE ROBIN A. SCHMIDT, PRESIDING

APPELLANT'S REPLY BRIEF *w/addendum*

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[¶2]

LAW AND ARGUMENT

[¶3] Appellant Maragos Trust files this Reply Brief to Appellee Newfield's Brief.

[¶4] **I. This case is not a quiet title action.**

[¶5] Newfield argues that the District Court correctly characterized this action as one to quiet title. This action is not one to quiet title because the Maragos Trust's complaint seeks the payment of unpaid royalty, which is personal property, and because there is no person claiming an adverse interest in its royalty.

[¶6] **A. Unpaid royalty is personal property.**

[¶7] The Maragos Trust's complaint seeks payment of unpaid royalty. An interest or right in accrued oil and gas royalties is personal property. *Finstrom v. First State Bank*, 525 NW2d 675, 677 (ND 1994). The Maragos Trust's action is one for recovery of accrued oil and gas royalties, attributable to its record title interest in the property forming part of the spacing unit for the producing wells.

[¶8] **B. No adverse interest or estate.**

[¶9] Additionally, this action is not one to quiet title because there is no person claiming an adverse interest. "An action may be maintained by any person having an estate or an interest in . . . real property . . . against any person claiming an estate or interest in . . . the same, for the purpose of determining such adverse estate, interest . . ." *NDCC* §32-17-01. To sustain a quiet title action, there must be a claim of an adverse interest and the existence of a justiciable controversy. *See Stephenson v. Stephenson*, 249 F2d 203 (7th Cir., 1957) [dismissal of case where no evidence that defendants asserted claims adverse to plaintiff].

[¶10] A quiet title action is a mechanism for parties asserting competing interests to settle the issue of title. *Smulley v. Webster Financial Corporation*, 2016 U.S. Dist. Lexis, 75165 (D. CT, 2016) (citation omitted). A quiet title action may only be maintained against defendants who assert an interest in the property that is adverse to the plaintiff's interest. *Id.* [referring to Connecticut statute providing that “ An action may be brought by any person claiming title to, or any interest in, real . . . property . . . against any person who may claim to own the property, or any part of it, or to have any estate in it . . . or to have any interest in the property, or any lien or encumbrance on it, adverse to the plaintiff . . . for the purpose of determining such adverse estate, interest, or claim, and to clear up all doubts and disputes and to quiet and settle the title to the property.”]. The plaintiff's and the defendant's asserted interest in the land must be "in controversy.” *Id.* [Citation omitted].

[¶11] This court has similarly recognized that our quiet title statute requires “as a necessary ingredient to plaintiff's cause of action a showing that defendant claims certain estates or interests in or liens upon the property adverse to plaintiff.” *Klemmens v. First National Bank of Cassopolis*, 133 NW 1044 (ND 1911). In our case, no person has been identified as claiming or asserting an adverse interest. No person has come forward asserting a claim adverse to the interest of the Maragos Trust. There is no document of record identified as creating a cloud on the Maragos Trust's royalty interest. A quiet title action simply is not sustainable under the facts of this case. Interestingly, Newfield argues that it cannot be named a party because it has no competing claim, but yet contends that the Maragos Trust must bring suit against persons who have no competing claim.

[¶12] II. Newfield is a proper defendant.

[¶13] *Acoma Oil Corporation v. Wilson*, 471 NW2d 476 (ND 1991), makes clear that suit against an operator for underpayment is allowed. Newfield understandably has tried to diminish that case by arguing (incorrectly) that the mineral owner in Acoma had previously established its right to payment in a separate, prior action, and that the Maragos Trust should have first established its right to the “disputed royalty” in a suit against everyone claiming an interest. First, the prior action involved the succession of minerals from a decedent, and did not resolve the issue of whose minerals were burdened by the outstanding royalty. Second, there are no competing claims or adverse interests that would justify a quiet title action, as discussed above. The Maragos Trust has established its right to the 1/8% royalty interest in its supporting documentation in its motion for summary judgment, unchallenged by Newfield.

[¶14] III. Suit not required against other mineral/royalty owners.

[¶15] Newfield asserts that the Maragos Trust’s only recourse is to sue unnamed and unidentified persons who have competing interests. (Appellee Brief, ¶22). There are no competing interests. Newfield asserts that a prior determination from a court is necessary before Newfield has an obligation to make payments. (Appellee Brief, ¶21). In other words, Newfield expects others to correct, through court action, mistakes in its division order title opinions at their own expense. Newfield certainly does not commence lawsuits to determine whom to send division orders, but in this case, seeks to impose that very burden on an omitted revenue owner.

[¶16] Newfield also contends that all owners whose interests would be affected by the judgment are necessary parties, citing *Cudworth v. Cudworth*, 312 NW2d 331 (ND 1981). (Appellee Brief, ¶26). Again, this might be the case if the Maragos Trust were seeking to have the court interpret an ambiguous document, vacate a judgment, reform a deed, or cancel a conveyance, from which those owners' interests are derived. But, that is not the case here.

[¶17] The case of *Crawford v. XTO Energy, Inc.*, No. 15-0142, 2017 Tex. LEXIS 121, 60 Tex. Sup. J. 350 (TX, 2017), is instructive. In *Crawford*, XTO's title opinion credited minerals under a strip of land to 44 adjoining landowners rather than to the record owner Crawford. *Id.*, at *3. XTO paid royalties to the adjoining landowners instead of Crawford. Crawford sued XTO, and the trial court dismissed for failure to join the 44 adjoining landowners. *Id.*, at *4. An appellate court affirmed the dismissal, finding that the adjoining landowners had a pecuniary interest in the outcome of the litigation. *Id.* The Texas Supreme Court reversed, holding that the adjoining landowners are not necessary parties because they do not claim an interest relating to the subject of the action. *Id.*, at *10. The court noted that there was no evidence that any of the adjoining landowners ever demanded or asserted ownership of or a royalty interest in the minerals. *Id.* The court noted that it was only XTO that actually claimed that the adjacent landowners had an interest, and that the landowners had not directly or indirectly claimed an interest. *Id.*, at *13. The argument that the adjoining landowners had a pecuniary interest was rejected by the court because it was XTO that unilaterally determined to credit Crawford's royalties to the adjoining landowners. *Id.*, at *14. The court declined to hold that the adjacent landowners have claimed an interest in the Crawford minerals merely because XTO paid them royalties to which they never claimed

entitlement. *Id.* It was significant that none of the adjoining landowners demanded or asserted a right to the portion of the royalties attributable to the Crawford minerals. *Id.* The court also rejected XTO's argument that it was at a substantial risk of incurring double, multiple or inconsistent obligations:

XTO's risk of incurring inconsistent obligations has arisen not "by reason of" the adjacent landowners' "claimed interest" in the Crawford-tract minerals—they have claimed no such interest—but because XTO might reduce their royalty payments after unilaterally determining that they should encompass the Crawford tract. That determination does not make the adjacent landowners necessary parties under Rule 39(a).

[¶18] Crawford, at *15 and *16. The court found that XTO could have brought in the adjoining landowners to avoid the risk, but could not force Crawford to add the adjoining landowners. *Id.*, at *16.

[¶19] **IV. There is no title dispute making NDCC §47-16-39.1 inapplicable.**

[¶20] Newfield has pointed to no document in the chain of title creating a title dispute. Newfield's argument is that any disagreement with the conclusions of a Newfield title opinion constitutes a title dispute. The statute does not except from its provisions mistakes or errors in payment, or good-faith reliance upon a title opinion. Moreover, contrary to Newfield's apparent reliance on legislative history that the title dispute exception to the statute centered around disputes that could not reasonably be resolved in a short period of time and require court action, (Appellee's Brief, ¶29), this is a situation that could have been easily and quickly resolved without court action.

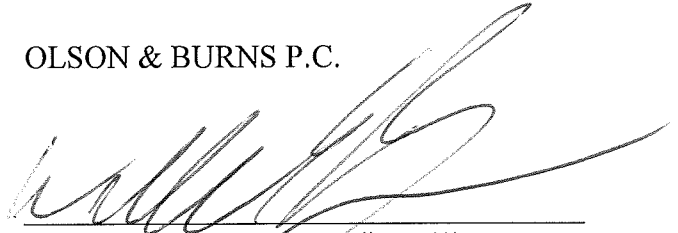
[¶21]

CONCLUSION

[¶22] The Maragos Trust is seeking payment of royalties. There are no claims asserted by anyone to those royalties. There is no title dispute. The Maragos Trust requests that the Judgment of the District Court be reversed.

[¶23] Dated this 9th day of March, 2017.

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[¶24]

CERTIFICATE OF SERVICE

I, William E. Bergman, attorney for Appellants Maragos, do hereby certify that on the 9th day of March, 2017, copies of the APPELLANT'S REPLY BRIEF were served on the following by electronic mail transmission, per N.D. Sup.Ct. Admin. Order 14(D):

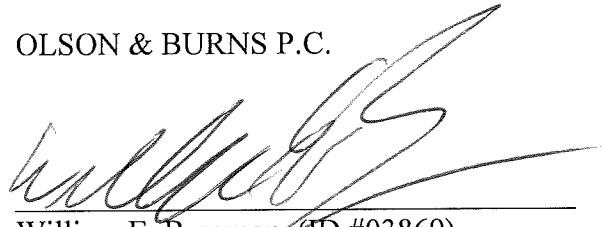
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[¶25]

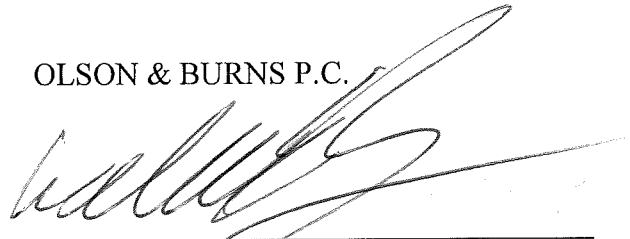
CERTIFICATE OF COMPLIANCE

I, William E. Bergman, attorney for the Appellants Maragos, do hereby certify that the above brief complies with all type-volume limitations as set forth in the North Dakota Rules of Appellate Procedure.

I further certify that the attached Brief of Appellant contains less than 2,500 words, and was prepared using WordPerfect 10.0, Times New Roman font, size 12.

Dated this 9th day of March, 2017.

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NDCC Ch. 32-17 - ACTIONS TO QUIET TITLE AND DETERMINE CLAIMS TO REAL ESTATE**32-17-01. Action to determine adverse claims.**

An action may be maintained by any person having an estate or an interest in, or lien or encumbrance upon, real property, whether in or out of possession thereof and whether such property is vacant or unoccupied, against any person claiming an estate or interest in, or lien or encumbrance upon, the same, for the purpose of determining such adverse estate, interest, lien, or encumbrance.

NDCC Ch. 47-16 - LEASING OF REAL PROPERTY**47-16-39.1. Obligation to pay royalties - Breach.**

The obligation arising under an oil and gas lease to pay oil or gas royalties to the mineral owner or the mineral owner's assignee, or to deliver oil or gas to a purchaser to the credit of the mineral owner or the mineral owner's assignee, or to pay the market value thereof is of the essence in the lease contract, and breach of the obligation may constitute grounds for the cancellation of the lease in cases where it is determined by the court that the equities of the case require cancellation. If the operator under an oil and gas lease fails to pay oil or gas royalties to the mineral owner or the mineral owner's assignee within one hundred fifty days after oil or gas produced under the lease is marketed and cancellation of the lease is not sought or if the operator fails to pay oil or gas royalties to an unleased mineral interest owner within one hundred fifty days after oil or gas production is marketed from the unleased mineral interest owner's mineral interest, the operator thereafter shall pay interest on the unpaid royalties, without the requirement that the mineral owner or the mineral owner's assignee request the payment of interest, at the rate of eighteen percent per annum until paid, except that the commissioner of university and school lands may negotiate a rate to be no less than the prime rate as established by the Bank of North Dakota plus four percent per annum with a maximum of eighteen percent per annum, for unpaid royalties on minerals owned or managed by the board of university and school lands. Provided, that the operator may remit semiannually to a person entitled to royalties the aggregate of six months' monthly royalties where the aggregate amount is less than fifty dollars. The district court for the county in which the oil or gas well is located has jurisdiction over all proceedings brought pursuant to this section. The prevailing party in any proceeding brought pursuant to this section is entitled to recover any court costs and reasonable attorney's fees. This section does not apply when mineral owners or their assignees elect to take their proportionate share of production in kind, in the event of a dispute of title existing that would affect distribution of royalty payments, or when a mineral owner cannot be located after reasonable inquiry by the operator; however, the operator shall make royalty payments to those mineral owners whose title and ownership interest is not in dispute.