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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20170148
Civil No. 31-2014-CV-00064

Sundance Oil & Gas, LLC, Plaintiff and Appellee

v.

Hess Corporation, Defendant and Appellant

and

Barbara B. Corwin and Patricia B. Goldberg, Defendants

APPELLANT'S REPLY BRIEF

Appeal from Judgment Dated February 28, 2017, Order for Partial Summary Judgment Dated May 11, 2016, and Order for Entry of Judgment Dated February 28, 2017
District Court, North Central Judicial District, Mountrail County, North Dakota
The Honorable Judge Stacy J. Louser

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REPLY

[¶1] Sundance wants the benefit of the extraordinary judicial proceeding it launched —putting minerals in trust—while avoiding the minimum due process that judicial proceedings require. It tries to navigate around this inconsistency by arguing that this is a simple recording act case. But Sundance's position is at odds with the trust statute it invoked and basic due process protections.

[¶2] Because Sundance could not obtain from a trustee a superior competing lease to the same acreage as Hess without providing Hess with actual notice of the trust proceedings, this Court should reverse and render for Hess. Alternatively, Sundance's status as a good faith purchaser for value is a disputed fact issue that requires remand.

I. Sundance could not obtain from the Trust a superior competing lease without actual notice to Hess.

[¶3] The trust statute required that Sundance show "that appointment of a trustee will be in the best interest of all owners of an interest in the mineral, leasehold, or royalty interest." N.D.C.C. § 38-13.1-01. Sundance admitted that Hess was an owner of an interest in the leasehold. (App. 199.) Due process requires actual notice to Hess. *See Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983). But Sundance never notified Hess, much less showed that appointment of the Trustee would be in the best interest of Hess.

[¶4] Dodging the issue, Sundance first argues that procedural reasons bar the Court from considering the notice issue. Sundance next argues that it should be excused from notifying Hess because it would have been too hard to do so. Neither argument has merit.

A. Sundance's procedural arguments are meritless.

[¶5] First, Sundance argues that Hess's due process argument was somehow waived—even though Hess raised the issue both in its summary judgment briefing and at the hearing. (*See* App. 140–41 ("Hess was a leasehold owner that Sundance was required to join or notify under § 38-13.1-01" and "Due process demands the right to appear in a trial which might jeopardize or destroy the interest of such person" (quotations and citation omitted)); (*see* MSJ Hr'g Tr. 22:2-3 ("[I]f you enforce this trust statute without notice to other owners there are constitutional implications.")) Hess did not waive its due process argument.

[¶6] Second, Sundance's res judicata and collateral estoppel argument misses the mark. Hess was not made a party to the Trust Action nor was it served with any notice of the Trust Action. (App. 153–57.) Res judicata and collateral estoppel do not apply. (*See* Hess Br. ¶¶ 46–48.) And Hess was not required to seek relief in the Trust Action—a proceeding Hess was not notified of, and that was final before Hess ever learned that Sundance was claiming an interest in its leasehold minerals. (*See* App. 7, 184); *Hull v. Rolfsrud*, 65 N.W.2d. 94, 98 (N.D. 1954) (allowing subsequent quiet title action attacking probate court's final decree); *see Kulczyk v. Tioga Ready Mix Co.*, 2017 ND 218, ¶ 11 ("Fundamental fairness underlies determinations of privity and res judicata.").

B. Hess was a reasonably ascertainable owner that was entitled to actual notice.

[¶7] The Hess Leases were indexed in the tract index system for each portion of the Tract and readily identifiable by a simple search of the proper township, section, and range. (App. 228, 233.) The "tract index system . . . makes all instruments *easily accessible* by focusing on the tract of land in question, rather than on the grantor or

grantee of the land." *Swanson v. Swanson*, 2011 ND 74, ¶ 15, 796 N.W.2d 614 (emphasis added).

[¶8] Hess was a reasonably ascertainable owner. Any search of the tract index would have shown the Hess Leases. (App. 228.) And reasonably ascertainable owners are entitled to actual notice. *See Mennonite*, 462 U.S. at 800 (if a party is reasonably ascertainable, "actual notice is a minimum constitutional precondition"). With actual notice, Hess could have told Sundance and the district court in the Trust Action that the minerals were already leased—this entire dispute would have been prevented.

[¶9] Sundance argues that it was excused from notifying Hess because the Hess Leases "were recorded out of the chain of title" (*i.e.* leased from the legal owners instead of the record owner) (Sundance Br. ¶ 45.) This interpretation adds words not present in the trust statute. The terms "record owner" or "chain of title" do not appear in N.D.C.C. § 38-13.1-01. In *Estate of Christeson v. Gilstad*, this Court reject a similar "tortured" statutory argument, refusing to read the term "record owner" into a statute that "does not on its face require that that a lease be executed by a record owner." 2013 ND 50, ¶¶ 9–13, 829 N.W.2d 453 (holding that recorded lease executed by heirs, legal owners out of the chain of title, precluded abandonment of mineral interest).

[¶10] Second, Sundance argues that the trust statute does not require a petitioner "to identify every mineral, lease, and royalty owner of any portion of the mineral estate at issue." (Sundance Br. ¶ 45.) But the trust statute requires exactly that—Sundance had to show "that appointment of a trustee [was] in the best interest of *all owners* of an interest in the mineral, leasehold, or royalty interest." N.D.C.C. § 38-13.1-01 (emphasis added). Part of showing that is identifying all of the owners. *See id*.

[¶11] Third, Sundance echoes the district court, arguing that Hess could have protected its interest in the leases in some manner. But "a party's ability to take steps to safeguard its interests" does not relieve a "constitutional obligation" even with respect to parties "well-versed in commercial practice." *Mennonite*, 462 U.S. at 799.

[¶12] Finally, Sundance argues that actual notice would be too cumbersome. But through the Trust Action, Sundance sought an extraordinary remedy—"the appointment of a receiver [in this case, a trustee] is an extreme and extraordinary remedy which is applied with caution." 1-5 Kuntz, Law of Oil and Gas § 5.7 (2017). Given that the tract index system "makes all instruments easily accessible," *Swanson*, 2011 ND 74, ¶ 15, 796 N.W.2d 614, it is not too cumbersome to require a tract index search before granting this extraordinary remedy.

[¶13] Sundance also misreads *Davis Oil Co. v. Mills* to argue such a search is impracticable. *Mills* supports Hess's argument. The search in *Mills* was "extremely cumbersome" because it was not a one-time search. 873 F.2d 774, 789 (5th Cir. 1989). Rather, the process required searching *by name* (unlike a tract index), and required tracing down a "large tree" of conveyances. *Id.*

[¶14] There is no question that the Hess Leases were from the legal mineral owners. *See Gilstad*, 2013 ND 50, ¶ 9, 829 N.W.2d 453 (stating record owner's heir "succeeded to her interest and became the legal owner of the mineral interest upon her death"). To pass constitutional muster, the trust statute requires actual notice to Hess, lessee of the legal owners. Sundance did not provide Hess with actual notice. Sundance's end-run to displace Hess as the lessee of the legal owners should be rejected. This Court should reverse and render for Hess.

II. Sundance was not, as a matter of law, a good faith purchaser for value.

A. The district court's improper application of res judicata requires remand.

[¶15] Whether a party "acquired rights to the property in good faith and for value requires findings of fact about the events surrounding the transaction." *N. Oil & Gas, Inc. v. Creighton*, 2013 ND 73, ¶ 25, 830 N.W.2d 556. The facts about the events surrounding Sundance's transaction have not been determined in this case. And there is no dispute about this.

[¶16] The district court bypassed that determination by an improper application of res judicata. (*See* App. 273–74.) First, Judge Hagar's determination in the Trust Action, which the district court adopted, never addressed the issue in this case—whether Sundance had notice of Hess's competing leases. Second, res judicata does not apply because Hess was neither a party nor a party's privy to the Trust Action. *See Hull v. Rolfsrud*, 65 N.W.2d 94, 97–98 (N.D. 1954); *Kulczyk v. Tioga Ready Mix Co.*, 2017 ND 218, ¶¶ 18–19.

[¶17] Because the factual issues about notice have not been determined, remand is required. *See Creighton*, 2013 ND 73, ¶ 25, 830 N.W.2d 556.

B. Factual issues on notice preclude summary judgment.

[¶18] There is a factual dispute about when Sundance had notice of facts which would provoke a prudent person to make further inquiry. "*[A]ny* circumstances[] which should cause further inquiry into the status of the 'stranger' preclude the prospective purchaser from ignoring the 'stranger's' conveyance." *Swanson*, 2011 ND 74, ¶ 17, 796 N.W.2d 614 (emphasis added).

[¶19] In petitioning for an unlocatable mineral owner trust, Sundance "investigat[ed] and review[ed] . . . [the] title documents recorded in Mountrail County"—which Hess proved "would have necessarily disclosed Hess's leasehold interests." (*See* App. 121, 228.) Sundance also claimed it was "actively engaged in the exploration and development" of the Tract—the same Tract that Hess was operating. (*See* App. 153, 227–28.)

[¶20] Eventually, circumstances *did* cause Sundance to conduct further inquiry—at some point, Sundance identified Hess as a leasehold owner and sued Hess. But nothing in the record shows what those circumstances were, when they arose, when Sundance identified Hess, or how Sundance identified Hess.

[¶21] Hess's evidence suggests those circumstances arose before Sundance acquired its lease. Sundance disputes this. But "[m]ore than one inference can reasonably be drawn from this evidence and findings of fact are required, which is not appropriate in a summary judgment proceeding." *See Creighton*, 2013 ND 73, ¶ 25, 830 N.W.2d 556.

C. Factual issues on payment also preclude summary judgment.

[¶22] Sundance also has to prove that it paid substantial consideration for its lease. *See Anderson v. Anderson*, 435 N.W.2d 687 N.W.2d 687, 689 (N.D. 1989). Yet, Sundance's only evidence was a single, conclusory affidavit attached it its summary judgment reply brief. (App. 258.)

[¶23] In addition to its other conclusory statements, Sundance's affidavit states that O'Brien Resources paid the lease bonus and suggests that O'Brien Resources actually owns the Sundance Lease. (App. 258 ("Sundance was acting as an agent for O'Brien Resources")). Who owns the Sundance Lease is a material fact because if O'Brien

Resources owns the Sundance Lease, the wrong party is suing to quiet title in the Sundance Lease. *See Rooks v. Robb*, 2015 ND 274, ¶ 13, 871 N.W.2d 468 ("Whether an assignment to the Trust occurred is a material fact because, in the absence of an assignment, the wrong party is suing on the note."). Like Robb, Hess "did all [it] could do by pointing out the conclusory nature of the affidavit." *Id.* This additional fact issue precluded summary judgment.

D. The pre-2013 version of N.D.C.C. § 47-19-41 applies.

[¶24] Attempting to bypass factual issues, Sundance argues that the district court applied the wrong law, but nevertheless the district court's judgment should stand. For the reasons stated by the district court, it did not err in applying the pre-2013 version of the statute.

[¶25] Accepting Sundance's argument would also create an additional fact issue which requires remand. Sundance relies on *Wehner v. Schroeder*, 335 N.W.2d 563, 567 (N.D. 1983) to argue that accrual depends on when facts "in the exercise of reasonable diligence should have been[] discovered." (Sundance Br. ¶ 22.) But, as stated above, there is a factual dispute as to when, in the exercise of reasonable diligence, Sundance should have discovered Hess's Leases.

CONCLUSION

[¶26] Hess respectfully requests that this Court grant the relief requested in its initial brief.

Dated this 26th day of September, 2017.

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