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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20180112
McKenzie County Case No. 27-2013-CV-00030

Desert Partners IV, L.P. and Family Tree Corporation, Inc.,

Plaintiffs/Respondent,

vs.

Thomas H. Benson, Leatrice Benson, Brian Benson, Ann P. Kemske, Jon Kemske; and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon the property described in the Complaint,

Defendants/Respondents,

and

John Benson,

Defendant/Appellant.

Appeal from Memorandum Opinion and Order for Judgment Following Trial dated October 13, 2017, Post Trial Order for Costs dated January 10, 2018, and Judgment dated January 17, 2018
Northwest Judicial District Court, McKenzie County, North Dakota
Honorable Robin A. Schmidt

BRIEF OF THE DEFENDANTS/RESPONDENTS ANN P. KEMSKE AND JON KEMSKE

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TABLE OF AUTHORITIES

JURISDICTION OF THE COURT

[1] This Court has jurisdiction to hear this matter under Article IV of the North Dakota Constitution. The Judgment is final and the appeal time frame is proper.

STATEMENT OF ISSUES

[2] Did the Court abuse its discretion by denying a third continuance for trial based upon the procedural history of the case?

[3] Were the Court's findings of fact from a bench trial clearly erroneous in that no evidence exists to support the findings, leaving the Appellant Court with a definitive and firm conviction that a mistake has been made?

STATEMENT OF THE CASE

[4] Respondent Desert Partners commenced this action to quiet title on certain real estate in McKenzie County against the named defendants. Respondents Ann and Jon Kemske served an Answer and filed it on May 13, 2013. (Index No. 10). Appellant John Benson filed and served an Answer for himself and his son. (Index No. 6). No Answer was filed on behalf of Thomas H. Benson and Leatrice Benson. As a result, Default Judgment was entered against them. (Index No. 17-18). No Appeal was taken from that Judgment.

[5] The Respondent Desert Partners brought a Motion for Summary Judgment. Appellant filed a Motion for Summary Judgment and a Cross-Motion for Summary Judgment. (Index No. 20, 28). The Trial Court granted Summary Judgment in favor of the Respondent Desert Partners. (Index No. 39). The Appellant sought relief from this Court on the basis that he was not allowed to present oral argument to the Trial Court.

This Court remanded the matter to the District Court to allow Appellant to present oral argument. *Desert Partners IV, L.P. v. Benson,* 2014 ND 192, 855 N.W. 2d 608. A hearing was held in the District Court on the Motion for Summary Judgment. On February 11, 2015, the Trial Court again entered Summary Judgment in favor of the Respondent Desert Partners. (Index No. 61). An Appeal was filed by Appellant on April 20, 2015. (Index No. 67). The Trial Court reversed the Judgment Order as the Supreme Court found that there were issues of material fact which precluded Summary Judgment. This matter was remanded to the District Court. *Desert Partners IV, L.P. v. Benson*, 2016 ND 37, 875 N.W. 2d 510.

[6] On August 10, 2016, this case was scheduled for trial to begin November 1, 2016. (Index No. 81). On October 19, 2016, Appellant filed a Motion to continue or stay the trial which was supported by numerous emailed exhibits. (Index No. 82-105). The Motion was denied on the afternoon of October 31, 2016. (Index No.119). David McLaughlin also moved the Court for admission to the bar for this case. (Index No. 108, 118). Paul Brutlag, the undersigned, appeared on the date of trial and was prepared to proceed. Paul Brutlag has been admitted to the North Dakota bar since October 23, 1990.

[7] On November 1, 2016, the parties appeared for trial. The Appellant stated he was unable to proceed. See Transcript A from November 1, 2016 Trial. Until that point, the Appellant had not informed the Court of his stated medical problems or his inability to proceed. It is believed that after the denial of the stay was received, Appellant sought medical attention. Appellant stated he went to Urgent Care at 4:00 p.m. on October 31, 2017. Appellant took Percocet and Oxycontin. Appellant said he was under the influence of narcotics and unable to drive. (Transcript A). Opposing counsel agreed to a

continuance but stated that this should be the last time. The Court accepted the document Appellant provided and filed it as confidential. The trial was continued and a pretrial hearing was scheduled. (Index No. 120).

[8] A pretrial continuance was held by phone on February 3, 2017. Appellant again asked for Summary Judgment despite the Supreme Court finding there were issues of fact and Summary Judgment was not proper. Kemskes' attorney denied that neither he nor the firm had a conflict of interest in representing the Kemskes. (Transcript B). Thomas Benson had possession of the original Kemske Deed and failed to do anything with it for 22 years. No claim was asserted against Kemskes except the quiet title claim. Kemskes were appearing to make sure no party would try to amend the pleadings to include an affirmative claim against Kemskes. Kemskes' attorney informed the Court that if amendments were prohibited, Kemskes would not participate in the proceeding. Respondent Desert Partners consented to not amending the pleadings. Appellant refused to agree so Kemskes stayed involved. (Transcript B). All parties were advised to be prepared for trial on February 17, 2018 as previously scheduled.

[9] On February 6, 2017 the Appellant's brother, Edward Benson, filed an Answer and sought to remove Judge Schmidt. (Index No. 165, 168). Appellant's letters were also submitted. (Index No. 198-200). The request filed by Appellant's brother to have Judge Schmidt removed was eventually denied. (Index No. 180). The trial was continued to October 3, 2017. When the trial was rescheduled, Appellant was specifically put on notice that no further continuances would be granted. (Index No. 218). Appellant was advised to obtain an attorney to represent him as this is a civil case and the case can proceed in his absence. See Transcript B from the February 17, 2017 hearing.

[10] As the time for trial approached, the Appellant commenced a separate proceeding in Federal District Court for the District of Minnesota. (Index No. 224). This case was commenced on August 18, 2017. On October 2, 2017, Appellant filed a Motion for Stay of the North Dakota action in the Minnesota Federal District Court accompanied by multiple pleadings seeking an Order staying the North Dakota proceeding. No medical issues relating to the Appellant were mentioned in these pleadings. The relief requested by Appellant was denied late in the afternoon on October 2, 2017. (Index No. 224). Respondent Kemskes' attorney and the McKenzie County Court were sent an email from Lidia Morales stating that John Benson would not attend the trial on October 3, 2017. (Index No. 223). No information was submitted by the Appellant to the Trial Court regarding the denial of the request for stay in the Minnesota Federal Court case 0:17-CV-03839-MJD-FLN. No mention of Appellant's claimed medical condition was disclosed to the Federal District Court. Unexplained is how Appellant was filing pleadings in Federal District Court if his condition was as he stated on October 3, 2017.

[11] The parties, excluding Mr. Benson, appeared at the scheduled time for trial. The Court was informed of Mr. Benson's Federal Action and the Court reviewed the information submitted by Ms. Morales. Desert Partners moved for an Order striking the Answer of the Appellant. The Court took the Motion under advisement and directed the parties to proceed to present evidence to the Court as the Trial had been long scheduled.

[12] Three witnesses were called and multiple exhibits were received in the Plaintiff's case. The Court was advised that the Plaintiff's claim only related to the interest conveyed by the Defendants Kemskes and the interest transferred to it by the Appellant's sister, Geri Benson. (Transcript C). Ms. Benson title derived from the same source as Ms.

Kemske. The Court ruled that Plaintiff's claim was so limited. The Court, at the close of evidence, granted the Motion for Default Judgment. The Court also granted the Motion to Strike the Counterclaims and granted Plaintiff relief from Defendant based upon the evidence received. Based on the evidence that was presented, the Court found that Family Tree was a good faith purchaser for value and that Family Tree completed any necessary inquiries after the Statement of Claim was reviewed.

STATEMENT OF FACTS

[13] A mineral interest was conveyed to Plaintiff Family Tree Corporation by Ann P. Kemske through a Mineral Deed dated April 15, 2010, and recorded on May 12, 2010, by the McKenzie County Recorder as Document No. 401900. (Appendix P. 17(4)).

> Township 152 North, Range 100 West
> Section 33: E ½ SE ¼
> Section 34: W ½ SW ¼

The mineral interest was originally conveyed to Ann Kemske by her grandparents, Elmer and Frances Benson, pursuant to two quit claim deeds executed in 1984 and 1985 (hereafter, "Benson QCDs"). Each of the Benson QCDs conveyed an undivided 1/10th mineral interest to each of the grantees, including Ann Kemske and her four cousins (hereafter, the "Benson grandchildren"), for a total transfer to Ms. Kemske of an undivided 1/5th mineral interest, or 32 net mineral acres in the Property. A Quit Claim Deed conveying minerals in real estate situated in Section 34 with the same legal description as that above was executed on November 18, 1990, and recorded on April 9, 2012 was also provided to Thomas Benson. The Trial Court found that the Quit Claim Deed is for Ann P. Kemske's and Jon Kemske's mineral interests located in Section 34 to

Defendant Thomas Benson. (Appendix P. 4). This statement is qualified by the Answer of Ann Kemske and Jon Kemske. (Index No. 6).

[14] Family Tree Corporation conveyed its minerals in Section 34 with the same legal description as the Quit Claim Deed to Respondent Desert Partners IV, L.P., by a Mineral Deed dated May 12, 2010, and recorded by the McKenzie County Recorder on June 14, 2010. (Appendix P. 18).

[15] On November 3, 2005, a Statement of Claim of Mineral Interest was prepared and filed by Thomas H. Benson for the land located in McKenzie County and recorded as Document No. 359760 on November 9, 2005. Thomas H. Benson listed Ann Pflueger Kemske as an Owner, and he was disclosed as her Power of Attorney. (Transcript C and Index No. 236). This statement affirms Thomas Benson's knowledge that Ann Kemske owned an interest in the minerals and that she had not transferred her interest in the mineral rights to him in 1990. Respondent's predecessors in title had constructive notice of this document. Based upon the evidence produced at trial, the Trial Court found that this document does not cause one to question the status of title as of April 15, 2010 and May 12, 2010.

[16] On May 4, 1985, the Benson grandchildren executed a "Power of Attorney" giving Thomas Benson, Plaintiff's father, the authority to act on their behalf with respect to their mineral interests in Montana and North Dakota. The Power of Attorney was first recorded in McKenzie County, North Dakota on December 2, 2015 as Document No. 487412. (Index No. 236). The Power of Attorney granted Thomas Benson the power to a) negotiate and secure leases, b) sign oil and gas leases, unitization agreements, division orders, and other documentation, c) to bill for and receive payments, d) distribute

payments, e) deposit and write checks, and f) to generally act on their behalf with respect to their oil and gas properties. The Power of Attorney does not give Thomas Benson the power to convey the Benson grandchildren's mineral interests without their consent, nor does it divest the Benson grandchildren of the power to act on their own behalf with respect to their individual undivided mineral interests.

LAW AND ARGUMENT

Issue #1

[17] *Did the Trial Court abuse it's discretion by denying a third continuance of the Trial when the case has been pending for four (4) years and the Appellant was informed months before that no continuances would be granted?*

[18] A motion for a continuance rests in the discretion of the Trial Court and its decision to grant or deny a continuance will not be set aside absent an abuse of discretion. *Fahlsing v. Teters*, 522 N.W. 2d 87 (N.D. 1996). A motion for continuance will be granted only for good cause shown. *Fahlsing* 522 N.W. 2d at 90.

[19] As set forth in the Trial Court ruling, there was no motion to continue the trial. Appellant's agent stated that Appellant would not be appearing at trial and the reasons why. The Appellant failed to disclose or explain his activity in the Federal District Court of Minnesota and his attempt to receive a stay of proceedings from the Federal District Court to the Trial Court. The Appellant had received specific notice that no continuances would be granted in the future and that Appellant should obtain legal representation. This direction was ignored by the Appellant.

[20] The Court reminded the Appellant that the trial set November 1, 2016 was continued at the last minute based upon a medical emergency disclosed at the last minute

and no more continuances would be granted. The situation in 2017 is even more egregious. The Appellant did not disclose his health concerns until he knew the Federal District Court in Minnesota had denied his request for a stay. The Appellant did not inform the Trial Court or the other parties' attorneys of the issues with his health until the stay request to the Minnesota Federal District Court was denied. By that time, both parties were present in Watford City, ND.

[21] Based upon the exhibits, oral testimony, and the record, the Trial Court did not abuse its discretion by denying the request for a continuance.

Issue #2

[22] *Were the Court's findings of fact from a bench trial clearly erroneous in that no evidence exists to support the findings, leaving the Appellant Court with a definitive and firm conviction that a mistake has been made?*

[23] The appropriate standard of review for findings of fact from a bench trial is whether the findings of fact are clearly erroneous. *Roise v. Kurtz*, 1998 ND 228, ¶6, 587 N.W. 2d 573. A finding of fact is clearly erroneous only if it is induced by an erroneous view of the law, if no evidence exists to support it, or if, upon review of the entire evidence, the Court is left with a definite and firm conviction a mistake has been made. *Roise v. Kurtz,* 1998 ND 228 at 6.

[24] The Appellant cannot meet this burden. First, the Court ruling is not based upon an erroneous view of the law. The Trial Court followed the direction of the Supreme Court in *Desert Partners IV, L.P. v. Benson*, 2016 ND 37, 875 N.W. 2d 510, took testimony and received exhibits regarding the steps that Family Tree took when faced with the Statement of Mineral Rights. Family Tree examined the real estate records and

saw the statement of Thomas Benson which stated Ann Kemske had an interest and that Thomas Benson was acting Power of Attorney for her. Family Tree had spoken to Thomas Benson and Thomas Benson did not assert that he owned the interest of Ann Kemske, even though he knew Family Tree was seeking to buy her interest. There was nothing more required of Family Tree. If this Court finds that more was needed, then this Court should reverse the Trial Court.

[25] Next there is evidence to support the Court's findings. The Trial Court found that Desert Partners caused title to be examined and received a report that shows Ann Kemske owns the mineral rights. Nothing in the Court record rebuts this. The factual basis is sufficient to uphold Court's Judgment.

[26] Finally, there should not be a firm conviction that a mistake has been made by the Trial Court. The Trial Court used the evidence available to it. The Court was aware that North Dakota law permits a tenant in common to transfer their interest in property without joinder by the other co-tenants. *Brandhagen v. Burt,* 117 N.W. 2d 696, 700 (ND 1962). That is exactly what occurred here. If the Court finds that is not the law, the Trial Court decision should be reversed.

[27] The law is clear with regard to the conveyance of undivided mineral interests as present in this case. Appellant seeks a holding of the Court that a tenant in common is precluded from transferring her undivided interest in property without the consent of all the other owners. This holding would overrule long established precedent based upon *Brandhagen v. Burt,* 117 N.W. 2d 696, 700 (ND 1962) and *Stevahn v. Meidinger,* 79 N.D. 323, 337 (ND 1952). There is no basis to overturn existing established law on the

facts presented. The Trial Court's Findings and Rulings are supported by the evidence and this Court should not reverse the Trial Court's Findings and Rulings.

[28] North Dakota's race-notice recording statute reads as follows:

> "Every conveyance of real estate not recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any part or portion thereof, whose conveyance, whether in the form of a warranty deed, or deed of bargain and sale, or deed of quitclaim and release, of the form in common use or otherwise, first is deposited with the proper office for record and subsequently recorded, whether entitled to record or not, or as against an attachment levied thereon or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance.

N.D.C.C. § 47-19-41. North Dakota's race-notice recording statute is clear: If an instrument conveying property is not recorded, and the same property is subsequently conveyed, and the subsequent purchaser provides value, acts in good faith, and records the instrument first, then the first conveyance is void, and the subsequent purchase has superior title.

[29] The Respondents Kemske incorporate herein by reference the findings of the Trial Court regarding the effect of the North Dakota Race-Notice Recording Statute and the actions of Desert Partners.

[30] The Appellant failed to produce any evidence or appear at trial. In particular, there was no evidence produced by the Appellant that Family Tree Corporation had any knowledge with regard to a potential claim by Appellant to the property other than as to the interest he received from his grandfather. No evidence was produced that valuable consideration was not paid by Family Tree Corporation. In fact, the evidence shows that consideration was paid to Ms. Kemske.

[31] The Trial Court findings are supported by evidence presented at trial. There is nothing in the record that would demonstrate that the Trial Court was clearly erroneous. There was evidence to support the Court's Findings of Fact. There can be no finding that the Trial Court made a mistake as to this matter based upon the standard of review.

[32] The Appellant had the opportunity to present evidence and knew the date of trial. The Appellant was told that no further continuances would be granted. The Appellant was advised that he and his son should obtain legal counsel to protect his interest. The Appellant failed to do so and is left with the result due to his failure to abide by the Court's direction.

CONCLUSION

[33] This Court should affirm the Trial Court's Judgment and Order.

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CERTIFICATE OF COMPLIANCE

[34] The undersigned, as attorney for Respondents Ann and Jon Kemske, and as author of this Respondent's Brief, hereby certifies, in compliance with Rule 32(a) of the North Dakota Rules of Civil Procedure, that this Respondent's Brief was prepared with proportional type face and total number of words in this Respondent's Brief, including words in the Table of Contents, Table of Authorities, signature blocks, and this certificate of compliance, totals 3,673.

Dated this 23rd day of August, 2018

FLUEGEL, ANDERSON, MCLAUGHLIN & BRUTLAG, CHTD.

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AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF STEVENS)

Jeanna D. Swanson, being first duly sworn upon oath deposes and says, that she is an employee of Fluegel, Anderson, McLaughlin & Brutlag, Chartered; that she is a citizen of the United States, of legal age, and not a party to nor interested in the above-entitled matter; that on the 23 day of August, 2018, she served the within Brief of Defendants/Respondents Ann P. Kemske and Jon Kemske upon:

via electronic means:
John Benson, Appellant – at 1.john.benson@gmail.com
Nicholas Grant, attorney for Respondents/Appellee – at ngrant@ndlaw.com
Brian Benson – at Brianj.benson@yahoo.com
N.D. Supreme Court Clerk – at supclerkofcourt@ndcourts.gov

by first class United States Mail:
by depositing a copy thereof properly enveloped, with postage prepaid at the Post Office in Morris, Minnesota, addressed as follows:

Leatrice Benson
The Legacy
622 E 7th St, Rm 114
Morris, MN 56267

Jeanna D. Swanson

Subscribed and sworn to before me
this 23rd day of August, 2018.

Notary Public
(Notarial Seal)

CINDY M. YEAGER
NOTARY PUBLIC-MINNESOTA
My Comm. Expires Jan. 31, 2020