

1998

Robert Neldon Conder v. Royal K. Hunt, Kim C. Hansen, Bancroft Whitney Company, Eileen M. Salisbury, John Harr, SR., the U.S. Internal Revenue Service, the Utah State Tax Commission, and Jean Conder, and any other persons unknown claiming and right, title, estate, lien or interest in the real property described in the complaint by or through Royal K. Hunt : Reply Brief

Utah Court of Appeals

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Richard C. Terry; Corbridge, Baird, Christensen; attorney for appellant; Larry R. Vonwald, Pro Se. Randy M. Lish; McCullough, Jones, Ivins; Larry L. Whyte; attorneys for appellees.

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IN THE UTAH COURT OF APPEALS

ROBERT NELDON CONDER,)
)
 Plaintiff and Appellant,)
)
 vs.) Appellate
) Case No. 980270-CA
)
 ROYAL K. HUNT, KIM C. HANSEN,) Trial Court
 BANCROFT WHITNEY COMPANY, EILEEN) No. 960902150 QT
 M. SALISBURY, JOHN HARR, SR., THE U.S.)
 INTERNAL REVENUE SERVICE, THE UTAH)
 STATE TAX COMMISSION, and JEAN CONDER)
 and any and all other persons unknown claiming)
 any right, title, estate, lien or interest in the real) Priority Number 15
 property described in the complaint)
 by or through Royal K. Hunt,)
)
 Defendants and Appellees.)

REPLY BRIEF OF APPELLANT

APPEAL FROM FINDINGS AND ORDER ENTERED APRIL 21, 1998
BY THE HONORABLE SANDRA PEULER
OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Attorneys for the Appellee Royal Hunt
Larry L. Whyte
380 North 200 West, Suite 260
Bountiful, Utah 84010

Attorney for Appellee John Harr, Sr.
Randy M. Lish
McCULLOUGH JONES & IVINS
853 W. Center Street
Orem, Utah 84058

Attorneys for Appellant
Richard C. Terry
Corbridge Baird & Christensen
39 Exchange Place, Suite 100
Salt Lake City, Utah 84111

Larry R. Vonwald, pro se
2535 Chalet Road
Sandy, Utah 84093
FILED
Utah Court of Appeals

JUL - 7 1999

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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|--------------------------------------------------------|---|--------------------|
| ROBERT NELDON CONDER, |) | |
| |) | |
| Plaintiff and Appellant, |) | |
| |) | Appellate |
| vs. |) | Case No. 980270-CA |
| |) | |
| ROYAL K. HUNT, KIM C. HANSEN, |) | Trial Court |
| BANCROFT WHITNEY COMPANY, EILEEN |) | No. 960902150 QT |
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| property described in the complaint |) | |
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Attorneys for the Appellee Royal Hunt
Larry L. Whyte
380 North 200 West, Suite 260
Bountiful, Utah 84010

Attorney for Appellee John Harr, Sr.
Randy M. Lish
McCULLOUGH JONES & IVINS
853 W. Center Street
Orem, Utah 84058

Attorneys for Appellant
Richard C. Terry
Corbridge Baird & Christensen
39 Exchange Place, Suite 100
Salt Lake City, Utah 84111

Larry R. Vonwald, pro se
2535 Chalet Road
Sandy, Utah 84093

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ARGUMENT

I. No Statute of Limitations Commences to Run Against a Party in Possession in an Action to Quiet Title in Real Property.

The appellees assert that Mr. Conder admits that the present action is based on fraud and that, therefore, the statute of limitations governing fraud applies and bars his action to quiet the title to his home and residence. They argue, in the alternative, that the six year statute of limitations governing contractual actions acts as a bar to Mr. Conder's quiet title action. These arguments are baseless and lack merit,¹ and they are irrelevant to the issue as to Mr. Conder's quiet title action.

The appellees fail to address the fact that Mr. Conder has remained in possession of his home and real property since its purchase by him. In that he has been in continuous possession at all times relevant to this matter, maintaining the property, paying taxes and mortgages, no statute of limitations is applicable to bar Mr. Conder's suit. Rodgers v. Hansen, 580 P.2d 233, 235 (Utah 1978); see also Muktarian v. Barmby, 63 Cal. 2d 558, 407 P.2d 659 (Ca. 1965). The appellees also fail to discuss the fact that Mr. Conder is simply moving to quiet the title to his real property. Actions to quiet title in real property

¹At no time did Mr. Conder assert or claim that Mr. Hunt obtained the deed from him through fraudulent means, nor do appellees cite to one instance where Mr. Conder has alleged that Mr. Hunt used fraudulent means to obtain the deed. It is not fraudulent to use a deed as a mortgage substitute. A deed can be determined to be a mortgage, even though the deed is absolute on its face. Winegar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1991); see also Bown v. Loveland, 678 P.2d 292, 297 (Utah 1984).

are generally not governed by any statute of limitations. Davidson v. Salt Lake City, 81 P.2d 374 (Utah 1938); Restatement, Property Actions of Ejectment, Suits to Quiet Title and Similar Proceedings §222. In that Mr. Conder is petitioning the court to quiet the title to his real property of which he is in possession, no statute of limitations bars his right to so petition the Court. Rodgers v. Hansen, 508 P.2d 235 (Utah 1978).

The appellees assert that “[a]ll the Conder(s) needed to do ... was to repay the money advanced by Hunt, plus interest at the legal rate, and they thus would be entitled to a reconveyance of the property as agreed”. Appellees’ Brief at 7. If the remedy were as simple as the appellees claim, Mr. Conder would have tendered the payment to Mr. Hunt. However, an examination into the judgment liens and encumbrances that have attached to the property as a result of the Defendants’ interests in this property reveals that this remedy will do nothing more than put money in one Defendant’s pocket, leaving claims between Defendants, and the property still encumbered requiring quiet title. These judgments and encumbrances far exceed the original debt to Mr. Hunt, and possibly exceed the fair market value on the property.

II. Res Judicata Does Not Prevent an Unsuccessful Intervener from Suing Under a Separate Cause of Action.

The appellees also argue that Mr. Conder is precluded from proceeding in this matter by the doctrine of res judicata. They argue that Mr. Conder moved to intervene in

the prior action (Civil No. 880907793), that his motion was denied, and that he failed to appeal the denial. Mr. Conder admits these facts. However, contrary to the appellees' argument, even if the facts in the prior action are similar to the facts in the present case, the similarity does not create a duty for Mr. Conder to appeal such that he is prevented from bringing a separate quiet title action regarding his real property.

Mirroring his motion to affirm and joined by Mr. Hunt, Mr. VonWald argues that Cheyenne River Sioux Tribe v. United States, 338 F.2d 906 (8th Cir. 1964), cert. denied, 382 U.S. 815, 15 L. Ed. 2d 62, 86 S. Ct. 34 (1965), holds that if a necessary party fails to appeal a court's denial of his intervention motion, res judicata applies to bar any other subsequent action with similar facts. The appellees contend that Cheyenne thereby supports their position that res judicata prevents Mr. Conder from bringing the present quiet title action. The appellees' argument is an inaccurate interpretation of Cheyenne.

In Cheyenne, the 8th Circuit held that res judicata precluded the Cheyenne River Sioux Tribe (the "Tribe") from bringing a separate action based on specific findings that the tribe's rights were represented by the government in the previous suit, the Tribe had agreed to the procedure and that they thereby agreed the government was capable of representing them. Cheyenne, 338 F.2d 906, 909-910. No such facts were present in Mr. Conder's action.

Furthermore, the Eighth Circuit clarified its holding in Cheyenne in a case similar to the present case. In Enterprise Bank v. Magna Bank, 92 F. 3d 743 (8th Cir. Mo. 1996)

the court found that the appellees' interpretation of Cheyenne is incorrect. In Enterprise, Magna Bank contended that claim preclusion barred Enterprise's declaratory judgment action against it in that Enterprise failed to appeal the court's denial of its intervention motion. Magna Bank argued that Cheyenne River Sioux Tribe of Indians v. United States, 338 F.2d 906 (8th Cir. 1964) supported their position that failure to appeal a denial of a motion to intervene barred the party from suing on the same issues in a separate action, although they had not been a party to the previous action.

The 8th Circuit disagreed, and held that Cheyenne was not applicable to the facts of the Enterprise case, but only precluded an attempted intervener from re-litigating whether the motion for intervention should have been granted.

Contrary to Magna's contention, Cheyenne does not hold that the failure to appeal the denial of a motion to intervene as of right will always preclude that party from bringing a new suit that raises the same underlying claims as did the motion to intervene. **Rather, Cheyenne holds only that failure to appeal the denial of a motion to intervene as of right will bar the party from later relitigating whether it was an indispensable party . . . because the legal issue decided against it in denying intervention--the issue of indispensability--was the precise issue it sought to litigate again in the independent action. Nothing in Cheyenne suggests that its holding was to have any broader implications.**

The facts of the present case do not fit within the limited holding of Cheyenne. Enterprise does not seek to relitigate whether it was an indispensable party to the Magna lawsuit; it does not seek to have the Magna judgment declared null and void. Rather, Enterprise merely seeks to litigate those claims that the Magna court refused to consider. Claim preclusion is therefore not applicable.

Enterprise, 97 F.3d at 746-747, emphasis added citing Cheyenne, 338 F. 2d at 911.

The facts of this case also “do not fit” within Cheyenne’s limited holding, and more closely mirror the facts in Enterprise. Mr. Conder is not suing to determine whether he was an indispensable party to the previous suit. Nor is Mr. Conder seeking to render invalid the Court’s ruling. Mr. Conder, as in Enterprise, is petitioning the Court to consider those issues not considered in the prior suit. Res judicata is therefore not applicable in the present case.

CONCLUSION

Summary judgment was inappropriately granted in that the appellees were not entitled to a judgment as a matter of law. No statute of limitations applies to a person in possession of property who is seeking to quiet the title to his real property, and, in this case, his home and residence for over twenty years. It is not until possession is interrupted or terminated that any statute of limitations begins to run. Since Mr. Conder’s possession of the property has never been interrupted or terminated, his quiet title action is not affected by any “applicable” limitations statute.

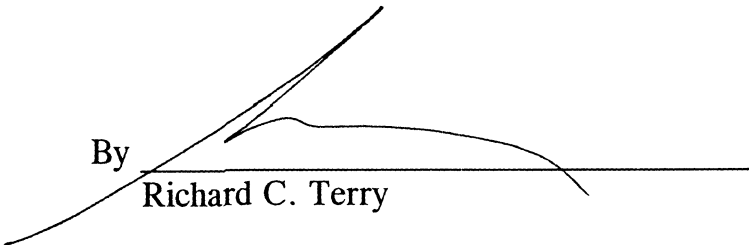
The trial court also inappropriately applied the doctrine of res judicata to a matter in which Mr. Conder was never a party and was not granted the opportunity to stand before the court and present his position. No other entity in the prior action represented

his position and his claims were never adjudicated. Contrary to the appellees' argument, the Eighth Circuit supports Mr. Conder's position that he is not barred by res judicata from proceeding in the present action. The dismissal of Mr. Conder's quiet title action wrongfully terminated Mr. Conder's right to have his day in court. Therefore, the trial court's ruling should be reversed.

DATED this 7th day of July, 1999.

CORBRIDGE BAIRD & CHRISTENSEN

By


Richard C. Terry

MAILING CERTIFICATE

I hereby certify that on this the 7th day of July, 1999, I mailed two true and correct copies of the foregoing, postage prepaid to the following at the addresses indicated below.

Attorneys for the Appellee Royal Hunt
Larry L. Whyte
380 North 200 West, Suite 260
Bountiful, Utah 84010

Attorney for Appellee John Harr, Sr.
Randy M. Lish
McCULLOUGH JONES & IVINS
853 W. Center Street
Orem, Utah 84058

Larry R. Vonwald, pro se
2535 Chalet Road
Sandy, Utah 84093



Richard C. Terry
Counsel for Appellant/Plaintiff