1957

Karl R. Lyman and Edith K. Lyman v. National Mortgage Bond Corp et al : Brief of Appellants

Utah Supreme Court

E. J. Skeen; Attorney for Appellants;

In the Supreme Court of the State of Utah

KARL R. LYMAN and EDITH K. LYMAN, his wife,

Plaintiffs,

vs.

NATIONAL MORTGAGE BOND CORPORATION, a corporation of the State of Delaware, AMALIA V. YBARRA, personally; AMALIA V. YBARRA, as Administratrix of the Estate of Tomas Velarde, Deceased; SAN JUAN COUNTY, a body corporate and politic of the State of Utah, and all other persons unknown claiming right, title, estate or interest in or lien upon the real property described in the complaint adverse to Plaintiffs' ownership or clouding Plaintiffs' title thereto,

Defendants.

Case No. 8633

BRIEF OF APPELLANTS

E. J. SKEEN

Attorney for Appellants

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STATEMENT OF FACTS

This is an appeal from a decree of the District Court of San Juan County quieting plaintiffs' title to several tracts of land. The only tract in which the appellants are interested

is the SE1/4 of the SE1/4 of Section 31, Township 32 South, Range 24 East, SLB&M. This tract was patented to one Tomas Velarde on June 13, 1922. The abstract of title, Plaintiffs' Exhibit A, shows no conveyance from Tomas Velarde to the plaintiffs or to their predecessors. However, entry 3 of the abstract is a "tax deed" dated December 12, 1941, from Frank Halls as County Clerk and also as County Auditor to one J. M. Bailey. This deed recites that the County got title by an auditor's tax deed dated March 25, 1927. There is no auditor's tax deed to the County shown in the abstract. The plaintiffs are successors-in-interest of J. M. Bailey.

If we assume for the sake of discussion of the facts that the auditor's tax deed was actually delivered on March 25, 1927, it would have to have been based on a sale for failure to pay 1922 taxes. Any tax levy in 1922 would be void because as shown by defendants' Exhibit 1, the homestead proceedings were in the early stages on January 1, 1922, and the property was not taxable on that date. It was part of the public domain.

It was stipulated by the attorney for the plaintiffs that the auditor's affidavit required by Title 59, Chapter 8, Section 7, Utah Code Annotated, 1953 was not attached to the assessment roll (Trans. 10). The case was tried upon the assumption that the tax title was void and that the only theory upon which the plaintiffs could prevail was that they had acquired a title by adverse possession. The testimony of Karl R. Lyman (Trans. 5-9) shows all of the elements necessary to prove title by adverse possession, except one. The plaintiffs failed to show payment of "all the taxes which have been levied and assessed

upon such land according to law." The plaintiffs offered in evidence Exhibit B, as follows:

TO WHOM IT MAY CONCERN:

This is to certify that the taxes on the following described real estate situated in San Juan County, State of Utah, were paid as below indicated:

Township 32 *South, Range* 24 *East, SLM,* Section 31: The Southeast quarter of the Southeast quarter.

Year	Date Paid	By Whom Paid	Redeemed By	Date
1955	9-29-55	Karl R. Lyman		
1954	Tax sale		Karl R. Lyman	5-17-56
1953	11-13-53	Karl R. Lyman		
1952	11-29-52	Wallace Bailey		
1951	Tax sale		Karl R. Lyman	5-17-56
1950	9-22-50	Not shown		
1949	Tax sale			
1948	Tax sale		Mrs. Arthur Holt	9-22-50
1947	11-3-47	Reta Bailey		
1946	Tax sale			
1945	Tax sale		K. R. Bailey	2-20-47
1944	12-4-44	K. R. Bailey		
1943	11-30-43	J. M. Bailey		
1942	11-6-42	J. M. Bailey		
1941	No Tax Charged, County Land on January 1, 1941.			

WITNESS MY HAND AND SEAL THIS 14th day of September, 1956.

(Seal)

/s/ Joy James
Joy James, Treasurer
San Juan County, Utah

The trial court made the usual finding of fact as to the color of title, and that the plaintiffs and their predecessors

have had "sole, exclusive, open, notorious and hostile possession of the said land" since 1941, and

"6. That from December 12, 1941 to date of judgment, the plaintiffs and their predecessors in interest have paid all taxes assessed against said parcel No. 1." Elsewhere in the findings of fact it is stated that parcel No. 1 is the land involved in this appeal.

The decree is in the usual form quieting title in the plaintiffs.

STATEMENT OF POINTS

1. Payment of taxes each year for the statutory period before they become delinquent is necessary to establish title by adverse possession.

2. The plaintiffs still have the burden of proving all elements of adverse possession despite the 1951 amendments to the statute relating to limitation of actions.

3. There is no proof that the plaintiffs are "holders of a tax title" within the meaning of the statute.

ARGUMENT

1. PAYMENT OF TAXES EACH YEAR FOR THE STATUTORY PERIOD IS NECESSARY TO ESTABLISH TITLE BY ADVERSE POSSESSION.

Exhibit B, copied above, shows that neither the plaintiffs nor their predecessors in interest paid taxes before they became

delinquent for any period of more than three consecutive years since the county deeded the land to J. M. Bailey in 1941. There was only one time when taxes were paid for three consecutive years namely 1942, 1943 and 1944. Tax sales for two years intervened in 1945 and 1946. Since 1946 there was only once when the taxes were paid for two consecutive years before they became delinquent. The evidence is, therefore, clear that taxes were not paid every year for seven years to meet the requirement of section 78-12-12.1 Utah Code Annotated, 1953, or for four years to meet the requirement of the proviso of said section. Redemption is not "payment" within the meaning of the statute.

It is well established by the case of Bowen v. Olsen, 2 U (2d) 12, 268 P. 2d 983, that the language "payment of taxes" in section 78-12-12 U.C.A. 1953 requires the payment of taxes before they become delinquent in order to establish a title by adverse possession. The redemption from a tax sale cannot be considered the payment of taxes. After reviewing the authorities the court said:

> "For the foregoing reasons we hold that the redemption of the property from the County in 1949 did not meet the requirement of the statute as to the payment of taxes in 1947 and 1948, and therefore the trial court properly held that the plaintiffs failed to establish their claim to the land in question by adverse possession."

The statute construed by the Court in the Bowen case was amended by Laws of Utah, 1951, Chapter 19, to provide as follows: See pocket part, Vol. 9, UCA 1953, p. 9) 78-12-12.1.

> Possession and payment of taxes—Priviso—Tax title. —In no case shall adverse possession be established under the provisions of this Code, unless it shall be known that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all the taxes which have been levied and assessed upon such land according to law. Provided, however, that payment by the holder of a tax title to real property or his predecessors, of all the taxes levied and assessed upon such real property after the delinquent tax sale or transfer under which he claims for a period of not less than four years and for not less than one year after the effective date of this amendment, shall be sufficient to satisfy the requirements of this section in regard to the payment of taxes necessary to establish adverse possession.

It will be noted that the amended statute still requires the "*payment of taxes*" for a period of not less than four years to establish a case of adverse possession. The words "according to law" are not repeated in the proviso but the words "payment of taxes" are repeated. It will be observed that in the Bowen case this Court based its decision on the words "payment of taxes" and did not pay any attention to the words "according to law." The Court said.

> More aligned with reason and persuasion are the grounds courts have given as a basis for adopting the majority rule: "Payment of taxes" and "redemption of taxes" have two separate and well defined meanings; redemption is not "payment" because it is only where the taxes have not been "paid" that there is a forfeiture and any need for redemption; a payment made after the land has been sold for taxes is not made to discharge a claim for taxes but to redeem the

land from the sale and reinvest the owner with legal title.

In view of the failure of plaintiffs to show payment of taxes for more than three consecutive years, they have failed to prove adverse possession—the only possible theory under which they can succeed.

2. THE PLAINTIFFS STILL HAVE THE BURDEN OF PROVING ALL ELEMENTS OF ADVERSE POSSESSION DESPITE THE 1951 AMENDMENTS TO THE STATUTE RELATING TO LIMITATION OF ACTIONS.

It is elementary that in a quiet title action the plaintiff must rely upon the strength of his own title and not the weakness of the defendants' title.

In 74 C.J.S., p. 41 the rule is stated as follows:

> As a general rule, one seeking to quiet title or remove a cloud thereon must succeed on the strength of his own title, and not on the weakness of his adversary's title, and want of title in plaintiff ordinarily renders it unnecessary to examine that of defendant.

This means that if the quiet title action is based upon the doctrine of adverse possession all elements must be proved by the plaintiffs to make a case.

It was contended in the district court that sections 78-12-5.1 and 78-12-5.2 prevent the interposing of any defense to this suit by the defendants because they had not actually occupied or been in possession of the property within four years prior to the commencement or interposition of such action or defense.

These sections provide:

78-12-5.1—No action for the recovery of real property or for the possession thereof shall be maintained, unless the plaintiff or his predecessor was seized or possessed of such property within seven years from the commencement of such action; provided, however, that with respect to actions or defenses brought or interposed for the recovery or possession of or to quiet title or determine the ownership of real property against the holder of a tax title to such property, no such action or defense shall be commenced or interposed more than four years after the date of the tax deed, conveyance, or transfer creating such tax title unless the person commencing or interposing such action or defense or his predecessor has actually occupied or been in possession of such property within four years prior to the commencement or interposition of such action or defense or within one year from the effective date of this amendment.

78-12-5.2—No action or defense for the recovery or possession of real property or to quiet title or determine the ownership thereof shall be commenced or interposed against the holder of a tax title after the expiration of four years from the date of th sale, conveyance or transfer of such tax title to any county, or directly to any other purchaser thereof at any public or private tax sale and after the expiration of one year from the date of this act. Provided, however, that this section shall not bar any action or defense by the owner of the legal title to such property where he or his predecessor has actually occupied or been in actual possession of such property within four years from the commencement or interposition of such action or defense. And provided further, that this section shall not bar any defense by a city or town, to an action by the holder of a tax title, to the effect that such city or town holds a lien against such property which is equal or superior to the claim of the holder of such tax title.

It is settled that statutes of limitations must be pleaded or covered by a pre-trial order or discussion; otherwise they are deemed waived. In this case they were not pleaded, nor was there any pre-trial. They must therefore be considered waived.

If we assume for the sake of argument only that they are to be considered, it is apparent that they are not applicible to this case.

The legislature obviously intended to permit the pleading of the statute of limitations to obviate the necessity of proving all of the steps necessary to show a good tax title where the tax deed was given more than four years prior to the commencement of the suit. Here that question did not come up because the plaintiffs stipulated facts that made the tax title invalid, and they relied only upon a title by adverse possession.

The limitations statutes have no application for a further reason. Under the provisions of section 78-12-7.1 (Vol. 9, Pocket Parts, p. 9), the person establishing a legal title is presumed to have been possessed of land within the time required by law. There is a "proviso" for the benefit of a tax title holder under which he is presumed to be the owner *unless* (1) the owner of the legal title has actually occupied the land, or (2) the tax title owner has failed to pay taxes within the four year period. The "proviso" does not apply in this case because the "tax title owner" has failed to pay all taxes levied or assessed within the four year period. The statute is quoted with emphasis added:

> 78-12-7.1 — Adverse possession — Presumption — Proviso—Tax Title.—In every action for the recovery or possession of real property or to quiet title to or to

> determine the owner thereof the person establishing a legal title to such property shall be presumed to have been possessed thereof within the time required by law; and the occupation of such property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that such property has been held and possessed adversely to such legal title for seven years before the commencement of such action. Provided, however, that if in any action any party shall establish prima facie evidence that he is the owner of any real property under a tax title held by him and his predecessors for four years prior to the commencement of such action and one year after the effective date of this amendment he shall be presumed to be the owner of such property by adverse possession unless it appears that the owner of the legal title or his predecessor has actually occupied or been in possession of such property under such title, *or that such tax title owner and his predecessors have failed to pay all the taxes levied or assessed upon such property within such four year period.*

It will be noted that the words "*to pay*" are used, and the Supreme Court has held that redemption is not the equivalent of payment. The plaintiffs cannot show four years of payment of taxes, so under 78-12-7.1 the Velarde Estate was presumed to have been in possession. Under the plain reading of the statute the plaintiffs can succeed only by showing adverse possession and payment of taxes for seven years.

The plaintiffs are attempting, in effect, to use the limitations statutes quoted above to bolster an inadequate showing under the adverse possession statutes. This, they cannot do. Unless the plaintiffs make a case, it is unnecessary for the defendants to interpose any defense. The title of the Velarde

Estate has not been defeated, and the estate is still the owner of the property.

3. THERE IS NO PROOF THAT THE PLAINTIFFS ARE HOLDERS OF A "TAX TITLE" WITHIN THE MEANING OF THE STATUTE.

Section 78-12-5.3 provides in part as follows:

> The term "tax title" as used in section 78-12-5.2 and section 59-10-65, and the related amended sections 78-12-5, 78-12-7, and 78-12-12, means any title to real property, whether valid or not, which has been derived through or is dependent upon any sale, conveyance or transfer of such property in the course of a statutory proceeding for the liquidation of any tax levied against such property whereby the property is relieved from a tax lien.

The abstract of title, Exhibit A, is the only proof of title offered by the plaintiffs. It does not contain an auditor's tax deed to San Juan County so there is a gap in the title between Tomas Velarde and San Juan County. Furthermore, as indicated above the plaintiffs do not claim title by virtue of a tax deed, but merely claim that the deed clothed them with color of title sufficient to show adverse possession. If we assume for the sake of argument that the limitations statutes are applicable to this case, the plaintiffs have failed to prove that they are holders of a tax title as defined by section 78-12-5.3. No sale, conveyance, or transfer of the property involved from Velarde to the County has been proved and this is essential to proof of a "tax title" even under the liberal language of the statute.

CONCLUSION

It is clear that no title by adverse possession was proved by the plaintiffs by reason of their failure to prove the payment of taxes, and the Velarde Estate is still the owner of the property. The decree of the district court should be reversed and the court directed to enter a decree in favor of the defendant, as administratrix of the Velarde Estate.

Respectfully submitted,

E. J. SKEEN
Attorney for Appellants