

1957

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

Utah Supreme Court

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NOV 1 1957

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, person-
ally;

AMALIA V. YBARRA, as Ad-
ministratrix of the Estate of To-
mas Velarde, Deceased;

SAN JUAN COUNTY, a body
corporate and politic of the State
of Utah, and all other persons un-
known claiming right, title, estate
or interest in or lien upon the real
property described in the com-
plaint adverse to Plaintiffs' own-
ership or clouding Plaintiffs' title
thereto,

Defendants.

FILED

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Clerk, Supreme Court, Utah

Civil No. 8633

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Civil No. 8633

RESPONDENTS' BRIEF

STATEMENT OF FACTS

The land in question claimed by the appellants is situated in San Juan County, Utah, and is accurately described in appellants' brief at page 4. The land was patented on June 13, 1922. The patentee, Tomas Velarde, after receiving the patent on the ground in 1922 failed to pay taxes to San Juan County. As a result the land was sold to San Juan County on March 25, 1927, by an Auditor's Tax Deed. In 1941 J. M. Bailey, predecessor in title and interest of plaintiffs and respondents herein, purchased the land from San Juan County, and a Tax Deed was issued by San Juan County to J. N. Bailey on December 12, 1941. Since that date the plaintiffs and their predecessors in title and interest have been in exclusive and open possession of the land and have cultivated the land, planted crops thereon, harvested the same, used the land for grazing purposes and broke up ground and improved the same which was adapted to cultivation and enclosed the land with a substantial fence. From 1941 to date plaintiffs and their predecessors in title and interest have paid or redeemed all of the taxes assessed against the property. As stated in appellants' brief there are no 4 consecutive years where the property taxes were paid before they became delinquent, but the taxes that were allowed to go delinquent were always redeemed before there was any May sale conveying the property to San Juan County.

The appellants asserted or claimed no possession from 1927 when the Auditor's Tax Deed was issued

conveying the property to San Juan County. Tomas Velarde and his heirs have paid no taxes on the property since it was patented in 1922. Plaintiffs then filed this quiet title action and after a period of 29 years from the date the Auditor's Tax Deed was issued the appellant then comes into Court and asserts title in behalf of herself and as the Administratrix of her father's estate.

STATEMENT OF POINTS

In connection with the appeal the appellants have argued their case under 3 separate points. For the purpose of replying to the argument of appellants respondents will answer each of appellant's points and then submit argument supporting the respondent's points which are as follows:

1. Defendants are barred from asserting any right, title or interest to the land or from setting up any defense to plaintiff's complaint by the 4 year statute of limitations where the property is acquired under tax title.

2. Defendants are barred from asserting any right, title or interest to the land or from setting up any defense to plaintiff's complaint by the general 7 year statute of limitations.

3. Plaintiffs have a valid title to the property under the 4 year statute of limitations on tax titles plus exclusive possession during this period and the payment of taxes during the 4 year period.

ANSWER TO APPELLANTS' ARGUMENT

Defendants' point No. 1 is that "payment of

taxes each year for the statutory period before they become delinquent is necessary to establish title by adverse possession.” In answer to this point plaintiffs recognize that the Utah case of *Bowen vs. Olsen*, 268 P. 2d 983, 2 U (2d) 12, holds that redemption of taxes is not equivalent to the payment of taxes before they become delinquent and that this case is against plaintiff’s contention on this point. The *Bowen vs. Olsen* case, however, was decided in 1954 construing the law as it applied under the old Section 104-2-12 UCA 1943. This section now has been amended and is now Section 78-12-12 UCA 1953. The amendment was made in the 1951 session laws Chapter 19. In this amendment an additional proviso was enacted providing for situations where the property was acquired under a tax title. The wording in this proviso added by this amendment is slightly different from the wording of the old section which was amended and the *Bowen vs. Olsen* case is not necessarily controlling where there has been adverse possession and payment of taxes since the amendment of this particular section. Additional argument will be presented in discussing plaintiffs’ point No. 3 later on in this Brief.

As point No. 2 defendants claim “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.” The new Sections enacted in Chapter 19, 1951 session laws which are now Sections 78-12-5.1 and 78-12-5.2 UCA 1953 as they relate to titles acquired under tax sale were enacted specifically to eliminate the problems arising under the old statutes in upholding tax

deeds. These new sections are both statutes of limitation which prevent the imposing of a defense or asserting the right to real property by the original owner against someone that holds under a tax title. Under these 2 sections enacted in 1951 it is not now necessary for the holder of a tax title to show all of the elements of adverse possession in order to defeat the title of the original owner and his successors in interest before the land was sold to the County for nonpayment of taxes. This point will be further discussed by plaintiffs in their arguments supporting points 1 and 2.

Under point 2 defendants claim that the plaintiffs should have pleaded the statute of limitations or had the same covered in a pre-trial order. As pointed out by the Utah Supreme Court in Hansen vs. Morris 283 P. 2d 884, 3 U (2d) 310, under rule 7(a) the plaintiff has no authorized pleading under this rule to set up the statute of limitations. Defendant did not file a counterclaim or a cross complaint and her answer completed the pleadings allowed under this rule. The situation in the instant case is the same as in the Hansen vs. Morris case wherein this Court held that the plaintiffs did not have to affirmatively plead the statute of limitations in order to claim the benefits of this statute.

Defendant also mentions under point No. 2 that there is a presumption of possession in the legal title holder. This presumption is rebutted by direct evidence at the trial that the plaintiffs and their predecessors in interest and title had actually occupied, grazed, cultivated, planted, farmed and har-

vested crops from this particular land since 1941 when the property was conveyed to J. N. Bailey by San Juan County.

Defendant claims as Point No. 3 “There is no proof that the plaintiffs are ‘holders of a tax title’ within the meaning of the statute.” The deed from San Juan County to J. N. Bailey which is dated December 12, 1941, and appears at page of the abstract of title is certainly a tax title as defined in Section 78-12-5.3 UCA 1953, which section was enacted under Chapter 19 of the 1951 session laws. This conveyance from San Juan County comes within the provisions of this Section which states that a tax title includes any title whether valid or derived through or dependant upon any sale, conveyance of 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 released from a tax lien. The tax deed from San Juan County recites that the property was received by the County for nonpayment of taxes and recites that an Auditor’s Tax Deed was issued conveying the property to San Juan County and the Deed from the County to J. N. Bailey was a further transfer of the property which relieved the land in question from the original tax lien. The requirements set forth in this Section are met by an Auditor’s Tax Deed or a Deed at the May sale or a Deed from the County to a purchaser after the May sale.

As conclusions defendants ask that the lower Court be reversed and that a Decree be entered against the plaintiffs in favor of the defendants

and appellants herein adjudging and decreeing that defendants are the owners in fee simple of the land involved in the suit. In this demand defendants exceed the prayer of their complaint. In the prayer of their complaint defendants do not ask for any affirmative relief but only ask that the plaintiffs take nothing by their Complaint. Defendants only filed an Answer, and there is no Counter Claim or Cross Complaint. Defendants are, therefore, not entitled to any affirmative relief, and there should be no Decree quieting title in the defendants, even if the court found that plaintiffs were not entitled to have title quieted in them. The most that could be done would be to send the case back for new trial or to set aside the Findings and Decree Quieting Title in the Plaintiffs.

ARGUMENT IN SUPPORT OF PLAINTIFFS' POINTS POINT 1

DEFENDANTS ARE BARRED FROM ASSERTING ANY RIGHT, TITLE OR INTEREST TO THE LAND OR FROM SETTING UP ANY DEFENSE TO PLAINTIFFS' COMPLAINT BY THE 4 YEAR STATUTE OF LIMITATIONS WHERE THE PROPERTY IS ACQUIRED UNDER TAX TITLE.

Sections 78-12-5.1 and 78-12-5.2, UCA, 1953, set up the 4 year statute of limitations against the original owner where property has been acquired under tax title and is held and possessed by the new

tax title purchaser. These two sections were formerly Sections 104-2-5 and 104-2-5.10 of the 1943 code as amended and enacted by Chapter 19 of the 1951 session laws. Section 78-12-5.3, UCA, 1953, which was formerly Section 104-2-5.11 of the 1943 code enacted by Chapter 19 of the 1951 session laws defines what is a tax title. In order to come within this definition the tax title does not have to be valid. In the words of this section it states "Whether valid or not." The tax title under these 3 sections quoted in this paragraph originated by the Auditor's Tax Deed issued to San Juan County in 1927. This Auditor's Tax Deed by its very terms is one of the instruments issued where the original owner has failed to pay the taxes and they have gone delinquent for a period of 4 years after which time the County was authorized to issue an Auditor's Tax Deed conveying the property to San Juan County.

The Tax Deed from San Juan County to J. N. Bailey, dated December 12, 1941, is another instrument which transfers a tax title within the meaning of that term in the sections hereinabove quoted. This Tax Deed from San Juan County recites that the taxes were delinquent, they were not redeemed and that an Auditor's Tax Deed was issued and that this particular tax title deed from San Juan County was issued by reason thereof. Plaintiffs and their predecessors in title and interest have been in actual possession of the land since December 12, 1941, and have occupied, farmed and grazed the area continually since then. Defendants have not been in possession of the land since prior to 1927 and make no claim that they were.

The lower Court found that plaintiffs' title was derived from a tax title more than 4 years prior to bringing this action and that plaintiffs and their predecessors have been in possession to the exclusion of defendants since 1941. There is an abundance of evidence to support the findings by the trial court to bring the case under these two statutes of limitation and the trial court should be instructed therein.

As pointed out previously in this Brief these two sections are strictly statutes of limitation and by their terms prevent a plaintiff from asserting a claim or a defendant from asserting a defense where such plaintiff or defendant has not been in possession of the property within a period of 4 years after the land has been acquired under a tax title by another party. These two sections, now 78-12-5.1 and 78-12-5.2, UCA, 1953, say nothing of the payment of taxes and do not require the payment of taxes as one of the conditions under which the statutes could be imposed as a statute of limitations to prevent the asserting of a claim or defense to the recovery or possession of real property.

The fact situation in the instant case squarely comes within the provisions of the fact situation as set forth in Hansen vs. Morris, 283 P 2d 884, 3 U (2d) 310, herein before quoted wherein this court upheld the constitutionality of these 2 sections relied upon by plaintiffs and stated that they were enacted as statutes of limitations and for the specific purpose to prevent the raising of defenses in tax title cases based on failure to comply with the statutory steps leading to the issuance of the tax deeds.

In referring to these two sections the court states:

“Another effort to provide *a statute of limitations* designed to validate tax titles was made by passage of Chapter 19, 104-2, Laws of Utah 1951, 78-12-5.2, U.C.A. 1953, Pocket Supplement, the two sections of which are alone important so far as this case is concerned and which read as follows: . . .”

“It appears obvious that such sections were enacted to eliminate the objections pointed out in the Toronto case, *and were intended to prevent raising of defenses* based on failure to comply with statutory steps leading down the long road traversable in perfecting tax titles, *unless one claiming a better title, assert his rights within four years* after a document of transfer, valid on its face, has been executed and delivered ‘in the course of a statutory proceeding for the liquidation of any tax levied against *** property whereby the property is relieved from a tax lien.’ ”
(Emphasis added)

POINT 2

DEFENDANTS ARE BARRED FROM ASCERTAINING ANY RIGHT, TITLE OR INTEREST TO THE LAND OR FROM SETTING UP ANY DEFENSE TO PLAINTIFFS’ COMPLAINT BY THE GENERAL 7 YEAR STATUTE OF LIMITATIONS.

These same sections mentioned above, 78-12-5.1 and 78-12-5.2, UCA, 1953, give a general statute of limitations for a 7 year period and the 7 year feature of the same statutes also bars the defendants from asserting their claim in this action. **Plaintiffs**

have been in possession and more than 7 years has expired since the Tax Deed was issued to the plaintiffs in 1941. The argument supporting plaintiffs' point No. 1 is also applicable to this 7 year statute of limitations. The only difference between the 2 provisions of the said statutes is the period of time.

POINT 3

PLAINTIFFS HAVE A VALID TITLE TO THE PROPERTY UNDER THE 4 YEAR STATUTE OF LIMITATIONS ON TAX TITLE PLUS EXCLUSIVE POSSESSION DURING THIS PERIOD AND THE PAYMENT OF TAXES DURING THE 4 YEAR PERIOD.

In addition to the defendant being barred by the 4 year statute of limitations on tax titles and the general 7 year statute of limitations, both discussed above, in plaintiffs' points Nos. 1 and 2, plaintiffs have initiated a new and valid title by being in open, notorious and adverse possession of said property since 1941 and paying the taxes for more than 4 years.

As previously stated in this Brief in answer to defendants' argument since 1941 the plaintiffs and their predecessors in title and interest have paid all the taxes before the due date for each year or redeemed them before the May sale for each and every year since the property was purchased from San Juan County. The question of whether the redemption of taxes during the redemption period is sufficient to comply with the requirements of the statute of limitations was previously discussed by this

Court in *Bowen vs. Olsen*, supra. In that case the Court recognizes that there is a division of authority among the different jurisdictions. The Supreme Court of Utah adopted the majority view that redemption of taxes is not equivalent to the payment of taxes before delinquent and is not sufficient to comply with the statute of limitations on adverse possession. Since this case was decided in 1954 other jurisdictions have considered the matter and the latest annotation in ALR is found in 50 ALR 2d 592 wherein is annotated a Virginia case of *Thomas vs. Young* 196 Virginia 1166, 87 SE 2d 127. In this case the Virginia Supreme Court held that redemption of taxes was sufficient to comply with the requirements of the adverse possession statutes and the Court held that a forfeiture of lien to the commonwealth for nonpayment of taxes, being intended merely to create an indefeasible lien for their collection, does not constitute a break in the required continuity of adverse possession. Following this case at Note 5 under the heading "Adverse Possession Held not Interrupted" are annotated cases from the States of Massachusetts, Texas, Mississippi and Minnesota as all supporting this view.

We respectfully submit that the reasoning of the Virginia, California, Montana and other Courts holding that redemption does not interrupt the running of the statute is the better view. The reasons given under the majority and minority view are fully discussed in the argument of the *Bowen vs. Olsen* case, and it would be superfluous to add to that at this time except to point out that from a

practical standpoint a land owner who has the record title of land in his name does not lose his land or any rights to it by allowing the taxes to become delinquent and redeeming them before the May sale. The very purpose of redemption is to allow a period of time for the owner to pay his taxes where economic difficulties prevent him from paying them the current year before they become delinquent. In redeeming he pays all the taxes that have been assessed plus the penalty and interest that is added to the original amount because they were not paid on the due date. If the land owner chooses to pay the taxes after the current year and pay the penalty and interest he should not thereby be jeopardized in his ownership of the land. The tax sale to the County on January 10 following the due date of November 30 does not divest title from the original owner but is as the term implies a preliminary tax sale which gives the County a lien for the collection of the taxes due. There is no change in ownership of the land, no change in possession and we submit there, therefore, should be no break in the required continuity for adverse possession where payment of taxes is required.

We, therefore, respectfully submit that the Court should reconsider the position taken in the Bowen vs. Olsen case and that the jurisdictions holding that redemption of taxes does not constitute a break in the required continuity for adverse possession is the better reasoned view.

The trial court, therefore, properly found that plaintiffs' title had been purchased from San Juan County by tax deed in 1941, that this title was a tax

title, that plaintiffs had been in open, notorious and adverse possession of the property continuously since 1941 and had paid all taxes on the property since 1941 and that defendants had not been in possession during this period of time. Pursuant to the Findings the Court properly declared that the plaintiffs were the owners of this property. There is ample evidence to support the Court findings as detailed above.

CONCLUSIONS

1. Defendant is barred from asserting any defense to plaintiffs' complaint or from asserting any right, title or interest in said property by reason of the 4 year statute of limitations on tax titles and also by reason of the general 7 year statute of limitations.

2. Plaintiff has established a good and valid title by adverse possession and payment of taxes under the 4 year statute of limitations on tax titles.

3. There was ample evidence to support plaintiffs' findings and the trial court's findings and decree should be sustained.

4. Even if the lower court is not sustained, the case should be remanded back for further proceed-

ings for a new trial and for proceedings in accordance with Section 59-10-65, UCA, 1953.

Respectfully submitted,

FRANDSEN AND KELLER

By Duane A. Frandsen

72 West Main

Price, Utah

Attorneys for Plaintiffs

and Respondents