

1971

David W. Smith v. Joseph Deniro And Helen Deniro, His Wife; Mary Ann Deniro, Individually and as Executrix of the Estate of William Deniro, Deceased : Appellants' Petition For Re-Hearing And Brief On Petition For Re-Hearing

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Recommended Citation

Petition for Rehearing, *Smith v. DeNiro*, No. 12036 (1971).
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IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID W. SMITH,

Plaintiff-Respondent,

vs.

JOSEPH DeNIRO and HELEN
DeNIRO, his wife; MARY ANN
DeNIRO, individually and as
Executrix of the Estate of
William DeNiro, Deceased,

Defendants-Appellants.

Case No.
12086

APPELLANTS' PETITION FOR RE-HEAR- ING AND BRIEF ON PETITION FOR RE-HEARING

Appeal from the Judgment of the Third District Court
for Salt Lake County, Utah
Hon. Stewart M. Hanson, Judge

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FILED

MAR 25 1971

Clerk, Supreme Court, Utah

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12036

APPELLANTS' PETITION FOR RE-HEAR- ING AND BRIEF ON PETITION FOR RE-HEARING

PETITION FOR RE-HEARING

Appellant Mary Ann DeNiro respectfully petitions this court for an order granting a re-hearing in the above entitled case.

This petition is based upon the following point whereby it asserts the court has erred:

POINT I.

THE COURT MISTAKENLY ASSUMED THAT THE MILL RACE WAS A NO MAN'S LAND AND THAT BOTH PARTIES WERE CLAIMING TITLE THERETO ON THE THEORY OF BOUNDARY BY ACQUIESCENCE.

This court mistakenly assumed that the mill race was a no man's land whose owner was not a party to this suit. The court further assumed that both parties were claiming title to the mill race on the theory of boundary by acquiescence. Those statements are true only as pertains to the very east end of the mill race. They are not true as to that part of the mill race wherein lie Lots 40, 41 and the southwesterly part of Lot 42. DeNiro claimed title to that part of the mill race wherein lie those lots *by deed and not acquiescence*. At that point in the mill race the deeds in plaintiff Smith's chain of title and the deeds in DeNiro's chain of title meet perfectly at the *north* bank. So in order for Smith to make any claim to the mill race at this point, he was forced to claim by boundary by acquiescence. But that is not true as to DeNiro. DeNiro has title by deed running to the north bank at this point. The court should have recognized this title and quieted title in DeNiro at that point in the mill race. Smith did not in the District Court or in this Court ever claim title by deed to that area. The lower court did not find that he had any title by deed to that area. On the other hand, the

evidence is uncontroverted that DeNiro has title to the north bank at this point. This court severely prejudiced DeNiro by not quieting title in her to that property.

Let us refer to the record to demonstrate why DeNiro should have had the mill race quieted in her so far as concerns Lots 40, 41 and the southwesterly part of Lot 42. Plaintiff Smith acquired his property from James Park in 1946 by warranty deed (See exhibit 14-d). In that deed the south boundary is designated as follows: "Thence south 5° West 511.5 feet along a line of fence to the north bank of Gordon Mill Race; thence along said bank S. 72° 40' E. 132 ft.; etc." (See the engineer's map, exhibit 1-P and the subdivision plat, exhibit 2-P, which show the south line of Smith's property at this point running along the *north* bank of the mill race).

On the other hand, the DeNiro brothers in 1922 received conveyance of their property by warranty deed from Lorenzo and Sarah Williams. (See page 32 of abstract, exhibit 3-d). It is important to note that the description of this tract runs "thence north 5° 2.70 chains to the north bank of the Gordon Mill Race; thence north 7° west 2 chains to a cedar post in a line of wire fence and about 10 feet from the south bank of said race . . ." Thus at this point both the Smith and DeNiro descriptions meet at the north bank and closely coincide along the line north 70° or 72° west, a distance of 2 chains or 132 feet. At least three prior deeds in the chain of title of DeNiro had also referred to the

north bank of the mill race as the north line of the DeNiro property. Thus at this point both the Smith and DeNiro descriptions perfectly meet at the north bank.

In view of this clarity in the record and complete absence of any evidence to the contrary, this court should have quieted title to the mill race at this point in DeNiro instead of leaving the parties dangling. It is understandable that the court found no evidence of acquiescence, but DeNiro's title is not dependent upon acquiescence but rests entirely on deed.

There was no other person who had any interest in the property at this point and this court erred in not settling title at this point by decreeing that DeNiro owned to the north bank as the deeds of both parties so clearly indicate and call for.

CONCLUSION

Appellant DeNiro respectfully requests that the Petition for Re-Hearing be granted and that upon the re-hearing this court quiet title to the mill race at Lots 40, 41 and the southwesterly part of Lot 42 in DeNiro.

Respectfully submitted,

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