

1972

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 : Brief of Appellant

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IN THE SUPREME COURT
of the
STATE OF UTAH

DAVID W. SMITH,
Plaintiff-Appellant,

—vs.—

JOSEPH DeNIRO and HELEN
DeNIRO, his wife; MARY ANN
DeNIRO, individually and as Exe-
cutrix of the Estate of William De-
Niro, deceased,
Defendants-Respondent.

} Case No. 12752

BRIEF OF APPELLANT

Appeal from the Amendments to Decree Quieting Title
of the Third District Court for Salt Lake County, Utah.
Hon. Stewart M. Hanson, *Judge*

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BRIEF OF APPELLANT

STATEMENT OF KIND OF CASE

Plaintiff, David W. Smth, brought this action to quiet title to certain subdivision lots. Defendant Mary Ann DeNiro counterclaimed, seeking to quiet title to the southerly portion of some of the lots, which portion lies within the banks of the old Gordon Mill Race, and she also claimed an easement to discharge drainage and irrigation water into the mill race.

DISPOSITION IN LOWER COURT

The case was tried to the court. The court quieted title to all of the lots in the plaintiff (R. 62), but subject to certain drainage rights in the defendant Mary Ann

DeNiro. She appealed, and in that case, No. 12036, a decision was rendered February 1, 1971 (R. 90) and then on rehearing the Court, on June 30, 1971 (R. 89) remanded the case to the District Court "with directions to modify its findings and judgment in accordance with the views expressed herein." Two Justices dissented in both decisions. The District Court entered Amended Findings and Decree.

RELIEF SOUGHT ON APPEAL

Appellant, Smith, here seeks to reverse that portion of the Amended Findings and Decree which quiet title to the DeNiros in and to the land north of the "east tract," and which then causes the easement for the drainage ditch to be moved to a point completely north of the old mill race. Further, said Amended Decree misdescribes the area to be awarded to DeNiros and is contrary to the evidence.

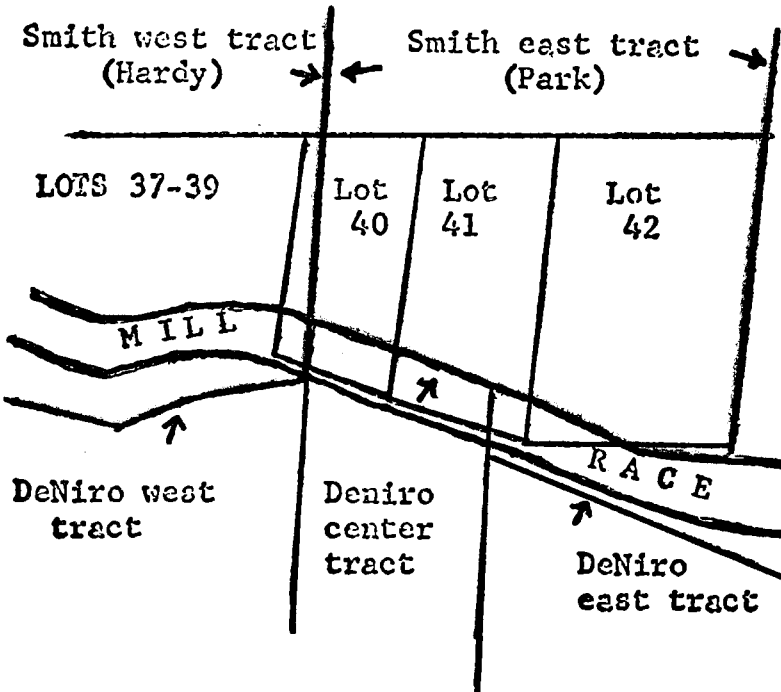
STATEMENT OF FACTS

The decision of your Court on Rehearing (R. 89) remanded this case back to the District Court for entry of an appropriate decree. The parties submitted proposed Amended Findings for the court to enter. No further evidence was taken.

Two basic differences became aparent. The Court adopted as its amended decree and entered a description which not only gave effect to the 1922 deed on DeNiro's center tract, which ran "to the north bank" of the mill race, but then mistakenly also gave to the DeNiros title to the area of "no man's land" opposite the east tract.

The plat which the DeNiros put in their brief on appeal is reproduced on this page. We have colored it for illustrative purposes. This shows clearly the *three*

SMITH tracts - red
DeNIRO tracts - yellow
MILL RACE - green



tracts by which the DeNiros obtained title and the position of the *two* conveyances by which Smith obtained title. Your attention is directed to the DeNiro's east tract and the *center* tract. The center tract is the one which had the 1922 conveyance, with a call to the "north bank" of the mill race at one point. Though we still do not concede the propriety of the decision, we recognize that this Court has decided that such coincided with the Smith "Park" tract as to parts of Lots 40 and 41.

However, the east tract of the DeNiro land has its north border well *south* of the mill race. This leaves an area described in your first decision as "no-man's land" of approximately 44 feet in depth between the north line of the DeNiro east parcel and the south line of the Smith (Park) parcel. This appeal is directed to the error committed by the trial court in gratuitously handing that area to the DeNiros.

As shown by the first paragraph of the Decision on Rehearing (R. 89) Mrs. DeNiro only claimed ownership *south* of Lots 40, 41 and 42. Actually, her claim is only as to an undivided one-third interest in and to the area covered by the 1922 deed. This conveyance ran to three DeNiros and Mrs. DeNiro's husband never received a deed from the other two. The Court will recall that after the 1922 deed, the three brothers made an intra-family division of lands, but did not convey any descriptions

which extended into the mill race area. We believe that such really was an abandonment or a recognition that no ownership extended into the mill race area.

The next factual problem is that the District Court's original Decree Quieting Title (R. 69) provided for a drainage ditch eastment "over and along the South line of the realty." This roughly coincided with the old mill race immediately below the high land of the DeNiro property. By amending just paragraph 1 of the original decree, wherein the land is described, the Court unconsciously caused the easement for drainage to be re-routed to a route completely north of the old mill race, a course wholly inconsistent with the topography and the evidence.

Also, by merely amending paragraph 1 of the Decree, the impact of paragraph 2 is to quiet title in Mary Ann Deniro to everything *south* of that new line, without any regard to the description on her east tract. Appellant, Smith, submitted proposed Amendments (R. 103-105) which would have obviated the three factual problems but these were not signed by Judge Hanson. Mrs. DeNiro immediately built a fence along the line of the Amended Decree on the *north* side of the old mill race all the way from the east line of lot 42 to the west line of Lot 40, thus appropriating the southerly portions of Lots 42 and 41 opposite the DeNiro east tract.

Page 12 of the original DeNiro brief asks for a new decree “based upon title by deed and/or acquiescence of the north bank as the boundary.” This Court held that there could not be title by acquiescence because of no contiguity. This leaves the only relief to be title by deed. Thus the District Court erred in not drawing its Decree to coincide with the deed descriptions of the parties as illustrated by the plat.

Defendant DeNiro has never had possession of or paid taxes on the property within the mill race or to any area north of the south bank of the mill race.

ARGUMENT

POINT I

THE AMENDMENTS TO FINDINGS OF FACT AND AMENDMENTS TO DECREE QUIETING TITLE VIOLATES THE LAW OF THIS CASE AND MIS-DESCRIBES THE LANDS.

POINT II

THE AMENDMENTS WRONGFULLY AWARD TITLE TO DE NIRO OF LAND CLEARLY NORTH OF AND BEYOND ANY RECORD TITLE EVIDENCE.

POINT III

THE DISTRICT COURT MISINTERPRETED THE MANDATE OF THIS COURT UNDER ITS DECISION AND ON REHEARING.

As to these issues, we believe that there are no factual disputes. The problem has developed because the District Court in the Amended Decree quieted title in the plaintiff along the *north* bank of the mill race as stated in the Park deed, and as directed by the Rehearing decision.

But the District Court also quieted title in Mrs. Deiro up to that line. This was the error, and such is not supported by the evidence because:

(a) The DeNiro east tract does not extend northerly even to the south bank of the mill race;

(b) There is a "no man's land" area between Smith's Park tract and the DeNiro east tract — approximately 44 feet wide — which the District Court had no right to deliver to Mrs. DeNiro and which was not ever deeded to the DeNiros and upon which they have never paid any taxes. Third parties have interests therein which should not be adjudged or prejudiced by this Amended Decree;

(c) As to the narrow DeNiro "center tract," such affects only parts of Lot 40 and 41, and it is obvious that the mandate of this Court on Rehearing relates only to this, as it says:

"The claims of ownership of the defendant Mary Ann DeNiro stem generally from a conveyance dated in 1922. After that conveyance, certain of the DeNiro brothers elected to partition their lands by an exchange of deeds. The record does not disclose whether or not the claim of the defendant is good as against all of the world; nevertheless, it would appear that her claims of ownership are superior to the plaintiff's claim to the disputed area. While both of the parties claim possession, the record reveals only a scrambling possession at most by either party. The claims of ownership based upon possession are insufficient to support the claim of either the plaintiff or the defendant.

"This case is remanded to the District Court with directions to modify its findings and judgment in accordance with the views expressed herein."

(d) Any affirmative relief for Mrs. DeNiro must therefore be based solely upon the record titles as between the parties. This means that she can have quieted in her no more than a one-third interest in the center tract and as to her east and west tracts just what the record title reflects.

We recognize that this still leaves the “no man’s land” area, but the third parties now have rights in and to such lands. Unless the position of the two dissenting justices for a boundary by acquiescence along the high south bank of the mill race is adopted, the case should end right there. Mrs. DeNiro is equally bound by the declaration in the Rehearing decision, which says,

“If the plaintiff is entitled to prevail, he must do so upon the strength of his own title, rather than any defect in the title of the defendant.”

Babcock v. Dangerfield, 98 Utah 10, 94 P.2d 862;

Mercur Coalition Min. Co. v. Cannon, 112 Utah 13, 184 P.2d 341.

Here Mrs. DeNiro filed a counterclaim. So here she must rely upon the strength of her own title, rather than upon the weakness of the title held and asserted by Mr. Smith. No affirmative relief can be given to her by the District Court beyond the limits of her descriptions. The District Court erred in awarding her title to the “no man’s land” area or to any land beyond her legal descriptions.

POINT IV

THE AMENDMENTS CAUSE A MISCARRIAGE OF JUSTICE IN RE-ROUTING THE DRAINAGE EASEMENT TO AN IMPROPER LOCATION.

The drainage ditch easement established by the original Decree Quieting Title was along the South line of the subdivision lots. This roughly approximated the portion of the old mill race immediately below the high DeNiro farm land. Mrs. DeNiro in the Third Cause of Action in her Counterclaim alleged that irrigation water had been discharged into the mill race and claimed a prescriptive easement for drainage only.

Now the Amended Decree (by changing only paragraph 1 of the original description and giving title to Mrs. DeNiro to the *north* bank of the mill race) has created a situation where the drainage easement would now run and be required along a line completely *north* of the old mill race.

The evidence was that the topography of the DeNiro land obviated any but a very minor amount of the water from the irrigation of the land getting into the drainage area. (See Plat, Exh. 1-P, prepared by Caldwell, Richards & Sorensen). So only a small drainage ditch is required. Now, unless the Amended Decree is rectified, the easement will run from the east line and would then go to

the north of the old mill race, across the back yards of the people residing within the subdivision, and then around a sharp bend and back to the mill race along the west line of the DeNiro center tract.

We believe that counsel for the defendants will concede that such is well beyond the evidence of any former claimed easement for drainage. All that Mrs. DeNiro is entitled to is a reasonable line for drainage below her high land, and if such crosses the center tract which the Court has awarded to her, she cannot complain.

POINT V

NEW DESCRIPTIONS WHICH SHOULD BE USED BY DISTRICT COURT.

We propose that this Court remand the case to the District Court with directions that it make and enter new Findings and a new Decree which will:

(a) Quiet title in the plaintiff, Smith, exactly in accordance with the legal descriptions of his two tracts, the Park and Hardy conveyances;

(b) Quiet title in the defendant, Mrs. DeNiro, in accordance with the legal descriptions as to the DeNiro east tract, the DeNiro center tract and the DeNiro west tract; and

(c) Provide for a drainage easement *within* the area of the old mill race and directly below the high land of the DeNiro farm, as shown by the topographical maps, Exhibits 1-P.

Though this will result in some gaps, it will not produce any overlaps in titles, and will be consistent with the decision on Rehearing.

CONCLUSION

WHEREFORE, we urge that the Court reverse the Amended Findings and Decree and clearly direct the District Court to make and enter a new set of Findings and Decree Quieting Title, to give effect to the legal titles which the parties have.

Respectfully submitted,

PUGSLEY, HAYES, WATKISS,
CAMPBELL & COWLEY