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 Respondents

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 Executrix of the Estate of William DeNiro, Deceased,
Defendants-Respondents.

Case No. 12752

BRIEF OF RESPONDENTS

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

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STATEMENT OF KIND OF CASE

Plaintiff, David W. Smith, 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 lower court quieted title to all of the lots in the plaintiff. Defendant Mary Ann DeNiro appealed claiming ownership of the southerly portion of Lot 40 and 41 and the southwesterly corner of Lot 42 which lay within the confines of the old Gordon Mill Race. On rehearing of this appeal on June 30, 1971, this Court remanded the case to the District Court with instructions to modify the decree so as to give to Mrs. DeNiro the southerly portion of Lots 40 and 41 and the southwesterly corner of Lot 42 lying south of the north bank of the mill race as shown by Exhibit 1-P.

RELIEF SOUGHT ON APPEAL

Appellant Smith here seeks to reverse the original Findings and Decree by the lower court which quieted title in Mrs. DeNiro in and to the land lying *south* of Lot 42.

STATEMENT OF FACTS

After the case was remanded to the District Court two hearings were held by the Court. The first hearing was held on August 25, 1971 and the second hearing on October 18, 1971. Following those hearings the District Court signed the Amendments to Findings of Fact and Amendments to Decree Quieting Title (R. 112, 113, 114, 115) which were submitted by counsel for Mrs.

DeNiro. The description in these amendments followed along the north bank of the mill race through Lote 40, 41, and 42 in accordance with the opinion of this Court on rehearing. The description used followed exactly the survey plat of the plaintiff Smith, (Exhibit 1-P) which this Court recognized and approved in its opinion on rehearing. Counsel for Smith submitted to the Court a Motion to Amend Decree (R. 5) and urged upon the Court an amended description which would have deviated from the Smith survey, (Exhibit 1-P) and would have cut down Mrs. DeNiro's ownership in Lots 40 and 41 to approximately ten feet instead of twenty-four feet as shown by Exhibit 1-P. In this appeal, Smith does not now question the line which the Court drew but maintains that the area south of Lot 42 which was never involved in the appeal should not have been quieted in Mrs. DeNiro since it is a piece of "no-man's land." Counsel for Smith admits that Smith does not own it but maintains that Mrs. DeNiro also does not own it, and that the Court should have preserved it as a piece of "no-man's land." This point has never heretofore been raised in any court in this action. When the case was remanded to the District Court, counsel for Smith submitted to the Court two proposed amended descriptions. (See R. 5 and R. 103-105) In both proposals, Mrs. DeNiro's ownership of the land south of Lot 42 was left undisturbed. This matter was never even considered by the District Court because it has never heretofore been raised. Smith's whole argument in the District Court as shown by R. 5 and R. 103-105 was to cut down Mrs. DeNiro's

ownership in Lots 40 and 41 so that she would receive a smaller portion of those Lots than was shown by Smith's own Exhibit 1-P. The Court signed the amendments to the Decree submitted by counsel for Mrs. DeNiro which followed along the line shown on Exhibit 1-P.

ARGUMENT

POINT I

THE COURT DID NOT ERR IN QUIETING TITLE IN MRS. DENIRO TO THE AREA SOUTH OF LOT 42.

The District Court correctly followed the mandate of this Court. Smith now contends that the Court should not have quieted title to the area south of Lot 42 in Mrs. DeNiro. There are three short but cogent reasons why the District Court did not err in quieting title to the land south of Lot 42, outside the Smith subdivision, in Mrs. DeNiro. They are:

1. The question of ownership of the area south of Lot 42 has never been raised by either party in this case prior to now. Smith should not now be allowed to make it an issue. When this action was originally tried in the District Court, plaintiff Smith claimed only the area within the subdivision he had platted into lots and recorded. He had included part of the mill race in these lots. Smith prevailed at the trial and the Court allowed counsel for Smith to draw the Findings and Decree, and

the Court thereafter signed them exactly as he had drawn them. In those Findings and Decree, counsel for Smith, at the east end of the mill race, followed along the south line of Lot 42. He made no claim to anything south of Lot 42 in the trial Court. Counsel himself provided in the Findings and Decree that everything south of Lot 42 should be and was quieted in DeNiro. (See Paragraph 2 of Decree, R. 69) When DeNiro appealed to this Court it was concerning only Lots 40, 41 and the small southwest corner of Lot 42. (See Page 2 of DeNiro's original Brief on Appeal). Had Smith been dissatisfied with the Decree which his counsel drew, he could have cross appealed, but he did not. He was satisfied with it at that point.

Upon appeal and upon rehearing, this Court held that DeNiro should have been given the south part of Lots 40 and 41 and the corner of Lot 42. This Court said nothing about the area south of Lot 42 because neither party had made it an issue in any court. When the case was remanded to the District Court to amend the Findings and Decree, counsel for both parties submitted proposed amendments. In the motion to amend Decree submitted by Smith's counsel, (See R. 5) he did not attempt in any way to disturb or change Mrs. DeNiro's ownership of the area south of Lot 42. His description, which he tried to pursuade the Court to sign did not deviate from the original line running along the south side of Lot 42 which he had inserted into the original Decree. His whole contention in the District Court was that his own Exhibit 1 as it pertained to Lots 40 and 41 should

not be followed and more evidence should be taken. The court refused his request.

Now, in this Court, nine years after he filed his action and two years after trial, Smith for the *first time* questions DeNiro having title quieted in her to the area south of Lot 42. Obviously piqued by his losses in the south end of Lots 40 and 41, he now seeks to disturb her ownership of the property south of and outside the subdivision which he platted years ago and recorded. Smith frankly admits he does not own the area south of Lot 42, but urges that it should be maintained as a "no-man's land." This claim comes much too late. We are in this Court for the third time, and he cannot now bring in new claims which he has never asserted before. This case must end someday but it never will if either party is allowed to assert new claims at his pleasure. This Court has in many decisions refused to allow new claims to be presented on appeal which were not presented below. The rules should especially be invoked where we are now in our third hearing in this Court.

2. This Court in its opinion on rehearing directed the District Court to draw the line between the parties following Exhibit 1, which was Smith's own survey plat. This plat drawn by Smith's engineers gave to Smith everything embraced within his Deed from James H. Park in October, 1946. This Court found no acquiescence and hence restricted Smith to his deed description. Said this Court:

> "The courses and distances are set out in the conveyance under which the plaintiff claims and are depicted in Exhibit 1, which is a map of the area offered in evidence by the plaintiff. The description and the deed as outlined on the Exhibit clearly shows that plaintiff's boundary is to the north of the location of the abandoned mill race . . . We are therefore of the opinion that the trial court erred in determining that the plaintiff's southerly boundary was a line running generally along the south bank of the Gordon Mill Race."

The amendments entered by the District Court follow the line drawn by Smith's own surveyor in Exhibit 1. Everything north of the survey line was quieted in Smith and everything south of the survey line was quieted in Mrs. DeNiro. If Smith disagreed with this Court's opinion on rehearing, he should have then petitioned for further rehearing. He did not do so. He cannot now under the guise of a new appeal complain and attempt to reargue matters put to rest by that opinion on rehearing. This court should summarily dismiss his contentions.

3. Smith admits that he does not own the area south of Lot 42 and that it could not be quieted in him, (See Page 7 of Smith's Brief) but asserts there that "third parties have interest therein which should not be adjudged or prejudiced by this amended Decree." The answer to that contention is that no party is prejudiced by this amended Decree. This Court recognized that principal in its opinion on rehearing. It said: "The record does not disclose whether or not the claim of defend-

ant (DeNiro) 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." Certainly there was never any attempt by this Court to shut the door on claims of third parties. They may still be presented.

This law suit was filed by Smith in 1963. Now, nine years later, Smith suggests that there may be some phantom claimants which might be prejudiced by this Decree. Certainly if such phantom claimants do exist, they would have come forward by now. This argument is obviously without merit and smacks of "dog-in-the-manger."

POINT II

THE LOWER COURT DID NOT ERR WITH RESPECT TO THE DRAINAGE EASEMENT.

In the original Decree quieting title, Smith was ordered to provide for Mrs. DeNiro a drainage easement generally falling along the bottom of the old mill race. This, of course, as a low point and a point where the water would naturally run. Smith now complains that since DeNiro has been awarded ownership of the bed of the mill race through Lots 40 and 41, the drain ditch should run through her property at that point and not Smiths. We do not disagree with this contention, but think that the Decree as written so provides this. Because of the topography of the land, the drain water will con-

tinue to run to the bottom of the mill race irrespective of who may own it. DeNiro has never made claim for any easement north of the mill race. DeNiro would have to make water run up hill to make it run north of the mill race. This matter, like other matters raised by Smith in this appeal, was not raised in the District Court. We believe, however, from reading the original Decree quieting title that the true meaning and intent is that the drainage easement would be provided along the bottom of the old mill race. This is the level which the water would naturally seek. Since now part of the mill race through Lots 40 and 41 belong to Mrs. DeNiro, the drain water would run on her own property through these lots. It could not be forced to run on the high ground lying north of the mill race which is owned by Smith in Lots 40 and 41. The drainage ditch would have to run on a relatively straight course and could not make sharp bends around lot corners. We believe that there is no problem with the Decree quieting title in this rsepect. We believe that a fair and reasonable interpretation of its language requires that the drainage ditch be established at the low point at the bottom of the old mill race.

CONCLUSION

Smith should not now be permitted to raise new matters for the first time. Ownership of the land south of Lot 42 has never been an issue in this lawsuit or appeal. In the original decree it was given to Mrs. DeNiro since Smith laid no claim to it. He has no title

to it. The only land involved in the appeal to this court was Lots 40, 41 and a corner of Lot 42. The appeal should not now be expanded to encompass new issues not heretofore raised. Smith could have cross-appealed any portion of the original Decree which aggrieved him. He did not do so and his complaint to this Court now comes too late.

Respectfully submitted,

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