RENDERED: DECEMBER 8, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001138-MR

JARRELL MARCUM AND
MAXINE MARCUM, HIS WIFE — APPELLANTS

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 15-CI-00270

EQUITABLE RESOURCES EXPLORATION, INC.
A PENNSYLVANIA CORPORATION;
EQT PRODUCTION COMPANY,
A PENNSYLVANIA CORPORATION;
MAYO RESOURCES, INC.,
A KENTUCKY CORPORATION;
NORTH-EAST COAL COMPANY,
A KENTUCKY CORPORATION;
UNKNOWN SPOUSES, HEIRS, GRANTEES,
BENEFICIARIES, SUCCESSORS, ASSIGNS
AND DEVISEES OF CARL BURTON — APPELLEES

<u>OPINION</u>
<u>AFFIRMING</u>

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; DIXON AND NICKELL, JUDGES.

DIXON, JUDGE: Appellants, Jarrell and Maxine Marcum, appeal from an order of the Lawrence Circuit Court denying their motion to quiet title to the mineral estate underlying their property, and granting Appellee, EQT Production Company's, motion for summary judgment. Finding no error, we affirm.

The Marcums are the record surface owners of approximately 150 acres of property located on Brushy Fork of Blaine Creek in Lawrence County, Kentucky. The Marcums acquired a 105-acre tract in 1993, and subsequently acquired an additional 45 acres in 2002. Previously, by deed dated March 11, 1903, all of the minerals underlying the Marcum's property had been conveyed by broad form deed to John C. Mayo. By various subsequent conveyances, EQT acquired ownership of the oil and gas underlying the property, and Appellee, Mayo Resources, Inc., acquired ownership of the minerals other than oil and gas.

On December 23, 2015, the Marcums filed a complaint in the Lawrence Circuit Court to quiet title to the mineral estate on their property, claiming ownership by adverse possession. Both EQT and Mayo filed answers asserting record title ownership of their respective mineral interests. Subsequently, the Marcums filed a motion for summary judgment arguing that they had been in open, notorious, and continuous possession of the mineral estate for more than the statutorily-required fifteen years because their predecessors in title had leased the subject property to Magnum Drilling in 1992, a few months before the Marcums purchased the surface property. The Marcums contended that Magnum Drilling had placed one well on the property and produced gas from 1993 until 2013. The Marcums further asserted that their adverse possession encompassed all of the minerals underlying their property.

EQT thereafter filed a response, as well as a cross-motion for summary judgment arguing that possession of the surface estate could not constitute adverse possession of the mineral estate, and that in order for a surface owner to obtain title to the minerals by adverse possession when there is a severed estate, he must have openly disavowed and repudiated the trust, exercised dominion over the mineral estate, and given actual notice to the owner of that estate. Mayo also filed a response to the Marcums' motion arguing that the Marcums' claim could not ripen into adverse possession unless there had been actual mining and removal of coal from the property, which the Marcums conceded had not occurred.

On June 8, 2016, the trial court held a hearing on the parties' cross-motions for summary judgment. The trial court thereafter entered findings of fact and conclusions of law granting EQT's motion for summary judgment and dismissing the Marcums' action. Therein, the trial court found that EQT's record title to the oil and gas interests was not defeated by the Marcums' adverse possession claim. Relying upon the Kentucky Supreme Court's decision in *Great*

Western Land Management, Inc. v. Slusher, 939 S.W.2d 865 (Ky. 1996), the trial court concluded that actual notice of any adverse claim to a mineral estate is required, and that the Marcums had not given such notice to EQT. As such, they could not establish as a matter of law all the elements of adverse possession. The trial court further ruled that even had the Marcums proved adverse possession of the oil and gas interests, such adverse claim would not have extended to the coal interest owned by Mayo. This appeal ensued.

On appeal, the Marcums argue that the trial court erred in concluding that they had failed in their burden of proving adverse possession of the mineral estate underlying their property. The Marcums contend that the continuous commercial production of gas from their property for twenty years was sufficient to establish adverse possession. Further, the Marcums believe that, contrary to the trial court's ruling, they were not required to give EQT actual formal notice and that their actions constituted sufficient constructive notice that they were adversely possessing the minerals.

Our standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.*

The basic elements of adverse possession are well-established in Kentucky. In order to prove title through adverse possession, "a claimant must show possession of disputed property under a claim of right that is hostile to the title owners interest. Further, the possession must be shown to be actual, open and notorious, exclusive, and continuous for a period of fifteen years." *Phillips v. Akers*, 103 S.W.3d 705, 708 (Ky. App. 2002) (citations omitted); *Tartar v. Tucker*, 280 S.W.2d 150, 152 (Ky. 1955); KRS 413.010. However, where there has been a severance of the mineral estate from the surface estate, the presumption is that the surface owner holds the severed mineral estate in trust for the use and benefit of the mineral estate owner. KRS 381.430. Accordingly, "[b]ecause the surface owner is in the position of a trustee, 'he cannot acquire title by adverse possession to the mineral estate except in the way and manner which a trustee of other real property may acquire title against a *cestui que* trust.'"[1] *Slusher*, 939 S.W.2d 865, 867 (Ky. 1996) (quoting *McPherson v. Thompson*, 203 Ky. 35, 261 S.W. 853, 854 (1924)).

In *Diederich v. Ware*, 288 S.W.2d 643 (Ky. 1956), Kentucky's then-highest Court discussed what is required by the surface owner to prove adverse possession of a severed mineral estate:

> Even though the surface owner, as so-called trustee, holds possession for the benefit of the owner of the minerals, he may, however, repudiate the trust and claim adversely to the mineral holder. He may repudiate the trust by acts or words which clearly and unmistakably bring home to the mineral holder the knowledge that the surface owner is claiming the minerals adversely. [*Piney Oil & Gas Co. v. Scott*, 258 Ky. 51, 79 S.W.2d 394 (1934); *Curtis-Jordan Oil Co. v. Mullins*, 269 Ky. 514, 106 S.W.2d 979 (1936)].

Diederich, 288 S.W.2d at 645-46. In *Ward v. Woods*, 310 S.W.2d 63, 65 (Ky. 1958), the Court similarly stated, "We have held many times that in order for the surface owner to obtain title by adverse possession to the minerals which constitute a severed estate, he must have openly disavowed or repudiated the trust declared by [KRS 381.430] and have exercised dominion over the mineral estate and brought notice thereof to the owner of that estate."

---

[1] "Cestui que trust" is defined as "One who possesses equitable rights in property and received the rents, issues, and profits from it; BENEFICIARY." Black's Law Dictionary (7th ed. 1999).

Thus, in order to repudiate or avoid the role of trustee and claim the mineral rights by adverse possession, a claimant must prove the same elements underlying adverse possession. As previously noted, that is, "there must be exclusive, actual, peaceable, open and notorious, continuous and hostile possession of the minerals under a claim of right for the statutory period." *Diederich*, 288 S.W.2d at 646. Additionally, however, *Diederich* and its progeny clearly established an additional requirement that the surface owner give notice "by acts or words which clearly and unmistakably bring home to the mineral holder the knowledge that the surface owner is claiming the minerals adversely." *Id.*

In *Slusher*, the Court again clarified what constitutes repudiation of the trust relationship:

> A repudiation is required in order to convert the surface owner's permissive possession, as a trustee, of the mineral estate into possession that is hostile to the interest of the owner of the mineral estate. *See Ward v. Woods*, Ky., 310 S.W.2d 63 (1958).
>
> In general terms, a "repudiation must be unequivocal and in violation of the duties of the trust." *First Kentucky Trust Co. v. Christian*, Ky., 849 S.W.2d 534, 537 (1993). This Court requires a separate formal repudiation of the trust relationship mandated by KRS 381.430.
>
>> Under this statute [KRS 381.430], the Kentucky authorities are unanimous in holding that after severance of the mineral title one who acquires possession of the surface from the same grantor is deemed to hold possession of the minerals as trustee for

> the holder of the mineral title and, in the absence of an explicit disclaimer and clear repudiation of this subsisting relationship in a manner sufficiently open and notorious to bring home to the mineral owner knowledge or notice of the hostility of the surface holder's possession, the surface holder, being a trustee in possession, can never acquire title of his cestui que trust by any length of possession for his possession never becomes adverse. The possession of the mineral owner thus being preserved and protected by the statute is not lost nor its continuity interrupted by any length of non-user.

> *Ward v. Woods*, *supra* at 65, *citing Kentucky River Coal Corp. v. Singleton*, 36 F.Supp. 123, 125 (E.D.Ky.1941).
> . . .

> Apparently there is confusion as to whether there is a requirement of a formal repudiation as evidenced by case law wherein this requirement has not been expressly applied. We see no need for such confusion and put it to rest with this opinion. When a surface owner is holding the mineral estate in trust, he or she must, before any statute begins to run, repudiate that trust by acts or words in such a manner as to clearly and unmistakably bring notice to the owner of the mineral estate.

Slusher, 939 S.W.2d at 867-68 (citations omitted).

The Marcums argue that the trial court's conclusion that *Slusher* requires actual notice to owner of the mineral estate is erroneous because *Slusher* explicitly states that repudiation can be established by "acts or words" of the surface owner. The Marcums point out that the trial court found there had been production from a gas well on the property from 1993 until 2013, and further that there was an old oil tank located on a corner of the property next to a county road, "in plain sight of anyone who would happen to drive by." The Marcums argue that based upon this evidence of record, EQT had, at a minimum, constructive notice of the adverse possession. However, we are inclined to agree with EQT that the mere possibility that an EQT employee traveling in the vicinity of the property, who had knowledge about EQT's mineral rights on the subject property, would see the oil tank is simply too speculative to constitute the notice contemplated by *Slusher*. While the Marcums are certainly correct that there is no authority, statutory or otherwise, requiring actual written notice, there still must be evidence in the record of "acts or words" conveyed in such a manner as to "clearly and unmistakably bring notice" to EQT of the Marcum's intent to repudiate the trust and claim adverse possession of the mineral estate. We agree with the trial court that such evidence did not exist and that, as such, the Marcums failed as a matter of law to establish a claim to the mineral estate by adverse possession.

Because we conclude that the Marcums have failed to establish adverse possession of EQT's oil and gas estate, their argument pertaining to Mayo's coal estate is necessarily rendered moot. However, we would note that Marcums have conceded that there is a split of authority as to whether the adverse possession of one mineral extends to all minerals. 58 CJS Mines and Minerals, §

176. Furthermore, the trial court herein noted that although there are no Kentucky cases dealing with this precise issue, the Sixth Circuit Court of Appeals in *Kentucky Block Cannel Coal Co. v. Sewell*, 249 F. 840 (6th Cir. 1918), indicated that adverse possession only extends to those minerals being removed. Thus, even had the Marcums satisfied their burden of demonstrating adverse possession of the EQT's gas and oil interest, they would have failed as to their claim against Mayo.

For the reasons set forth herein, the order of the Lawrence Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Eldred E. Adams Jr.
Louisa, Kentucky

BRIEF FOR APPELLEE:

Kimberly McCann
Ashland, Kentucky

Michael J. Schmitt
Jeffrey M. Baldwin
Paintsville, Kentucky

Michael T. Hogan,
Special Assistant Attorney General
Louisa, Kentucky