Supreme Court of Ohio Clerk of Court - Filed January 23, 2015 - Case No. 2015-0120

COURT OF APPEALS
NO. 14 BE 22
CYNTHIA K. MOGEE
CLERK OF COURTS, BELMONT COUNTY
DEC 12 2014

STATE OF OHIO)
)
BELMONT COUNTY) SS:

IN THE COURT OF APPEALS OF OHIO
SEVENTH DISTRICT

MARK ALBANESE, EXECUTOR OF THE ESTATE OF JAMES ALBANESE,

PLAINTIFF-APPELLANT,

VS.

NILE BATMAN, et al.,

DEFENDANTS-APPELLEES.

CASE NO. 14 BE 22

JUDGMENT ENTRY

For the reasons stated in the Opinion rendered herein, the sole assignment of error is without merit and is overruled. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Belmont County, Ohio, is affirmed. Costs taxed against appellant.

JUDGES.

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STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

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MARK ALBANESE, EXECUTOR OF THE ESTATE OF JAMES ALBANESE,	)	
PLAINTIFF-APPELLANT,	)	CASE NO. 14 BE 22
VS.	)	OPINION
NILE BATMAN, et al.,	)	
DEFENDANTS-APPELLEES.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 12CV44.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant:

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For Defendants-Appellees:

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JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 12, 2014

VUKOVICH, J.

{¶1} Plaintiff-appellant Mark Albanese, Executor of the estate of James Albanese III, appeals the decision of the Belmont County Common Pleas Court granting summary judgment for defendants Nile Batman and Katheryn Batman (Batman) and defendant-appellee Hess Ohio Developments, LLC.

{¶2} This appeal concerns the 1989 version of the Ohio Dormant Mineral Act (DMA) and approximately 104 acres of real estate in Smith Township, Belmont County, Ohio. Albanese owns the surface. Batman claims to own an interest in the oil and gas underlying said property. Albanese is attempting to have that interest deemed abandoned and subject to automatic divesture under the 1989 version of the act.

{¶3} The 1989 version of the DMA, former R.C. 5301.56(B)(1), provides that a mineral interest held by a person other than the surface owner of the land subject to the interest shall be deemed abandoned and vested in the owner of the surface unless (a) the mineral interest deals with coal, (b) the mineral interest is held by the government, or (c) a savings event occurred within the preceding twenty years. The six savings events are as follows: (i) the mineral interest has been the subject of a title transaction that has been filed or recorded in the recorder's office; (ii) there has been actual production or withdrawal by the holder; (iii) the holder used the mineral interest for underground gas storage; (iv) a mining permit has been issued to the holder; (v) a claim to preserve the mineral interest has been filed; or (vi) a separately listed tax parcel number has been created. R.C. 5301.56(B)(1)(c)(i)-(vi).

{¶4} The trial court decided that under the 1989 version of the Act, the 20 year period is a rolling period. It found that two savings events occurred that preserved Batman's interest in the minerals Nile Batman inherited from his mother, Frances Batman. The first was the 1981 affidavit from Frances Batman that was recorded in the Belmont County Recorder's Office specifically preserving her mineral interest in the subject tract of land. The second was the filing of Frances' will in the Belmont County Probate Court and Recorder's Office in 1989, which was approximately eight years after she died.

{¶5} Appellant finds fault with the trial court's second determination. He admits that the 1981 affidavit that was filed one month before Frances died, was a savings event. However, he asserts that her death in 1981 was the second savings event and that the recording of her will in 1989 relates back to the date of her death and thus, the recording of the will only preserves the interest until 2001 (20 years from the date of her death).

{¶6} For the reasons expressed below, the trial court's decision is affirmed, albeit for reasons other than those espoused in its judgment entry. We have recently determined that the look-back period in the 1989 version of the Act is a fixed period that extends from March 22, 1969 to March 22, 1989. The act further provides for a three year grace period to perfect a savings event, which meant that a savings event could occur as late as March 22, 1992. *Eisenbarth v. Reusser*, 7th Dist. No. 13MO10, 2014-Ohio-3792. Thus, based on our *Eisenbarth* decision we are only concerned with what occurred from March 22, 1969 to March 22, 1992. The trial court's statement that it is a rolling period is incorrect. However, that does not affect the result in this instance. It is undisputed that the 1981 affidavit occurred within that period and is a savings event. Thus, Batman's interest in the minerals was preserved and the trial court correctly determined that there was no abandonment.

Statement of the Case

{¶7} The facts in this case are undisputed. Albanese owns a tract of land in Belmont County, Ohio. Batman claims to own a quarter interest in the oil and gas underlying that said tract of land; he claims to have acquired the interest through inheritance.

{¶8} Batman signed a lease of the oil and gas rights with Mason Dixon Energy in October 2008. Mason Dixon assigned those rights to Hess in April 2009. The record appears to indicate that Albanese also has signed a lease of the mineral interest he owns in the land with Hess.

{¶9} On January 20, 2012, James Albanese III (the decedent) filed a complaint for quiet title in Belmont County Common Pleas Court against Batman and Hess. Albanese was seeking to have the quarter interest in the minerals deemed abandoned under the 1989 version of the DMA. Albanese was asking for the minerals

to merge with the surface and that he be named owner of the quarter interest that Batman was claiming to own. This complaint only sought to invoke the 1989 version of the DMA, it did not seek to apply the 2006 version of the act. After Albanese's death, the executor of his estate, Mark Albanese, was replaced as the plaintiff (collectively referred to as Albanese).

{¶10} Batman and Hess both filed answers asserting that there were savings events that preserved Batman's mineral interest. 02/21/12 Batman Answer; 03/30/12 Hess Answer.

{¶11} On March 24, 2014, Hess and Albanese both moved for summary judgment.

{¶12} Albanese argued that even if Frances Batman's September 14, 1981 Affidavit and Notice of Claim of Interest in Land that was filed and recorded in Belmont County, Ohio was a savings event under the 1989 version of the DMA, no other savings event occurred until 2008. Thus, he claimed that in 2001, 20 years following the last savings event, the interest was abandoned. Albanese asserted that the 20 year period in the 1989 version of the DMA is a rolling period.

{¶13} Hess argued that summary judgment should be granted in its favor because there were savings events that occurred within the 20 year look-back period. It cited the trial court's decision in *Lipperman v. Batman*, Belmont County Common Pleas Case No. 12-CV-0085, to support this position. The *Lipperman* case is closely related to the case at hand. It appears that Frances Batman owned a mineral interest in a number of tracts of land throughout Belmont County, Ohio. Both the *Lipperman* case and the case at hand deal with Frances Batman's affidavit and the recordation of her will. In *Lipperman*, the same judge that was deciding this case found that the look-back period in the 1989 version of DMA was a rolling period and that the 1981 Frances Batman affidavit and the 1989 recordation of her will in the Belmont County Recorder's Officer preserved the interest. Hess asked for that ruling to equally apply to the matter at hand.

{¶14} After considering the parties arguments, the trial court granted Hess' motion for summary judgment. The reasons espoused in that decision were very

similar, if not identical, to the reasons provided in the *Lipperman* decision. 04/28/14 J.E.

{¶15} Albanese timely appealed the trial court's decision.[1] 05/22/14 Notice of Appeal.

Assignment of Error

{¶16} "The trial court erred in granting summary judgment for the defendant Hess Ohio Developemtns [sic], LLC and Hess Ohio Developments, LLC and Hess Ohio Resources, LLC because the mere act of recording an out of state will is not a titile [sic] transaction under ORC §5601.56. [sic]"

{¶17} We review a trial court's decision to grant summary judgment using a de novo standard of review. *Cole v. Am. Industries & Resources Corp.,* 128 Ohio App.3d 546, 552, 715 N.E.2d 1179 (7th Dist.1998). Thus, we apply the same test the trial court uses, which is set forth in Civ.R. 56(C). That rule provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Flemming,* 68 Ohio St.3d 509, 511, 628 N.E.2d 1377 (1994).

{¶18} In granting summary judgment for Hess the trial court made multiple findings. First, it stated that Albanese sought to have the minerals deemed abandoned under the 1989 version of the DMA. They did not seek to have the mineral interest deemed abandoned under the 2006 version of the act and they did not make an attempt to comply with the notice provisions in the 2006 version. Thus, the trial court indicated that it was only applying the 1989 version of the act. It also found that the 20 year look-back period in the 1989 version of the act is a rolling, not a fixed, look-back period. It then found that there were three savings events that preserved the mineral interest. First, is Frances Batman's Affidavit that was filed with the Belmont County Recorder's Office on September 14, 1981. It found that the language contained in the affidavit complies with the requirements of R.C. 5301.52 and as such

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[1]This appeal is closely related to the *Lipperman v. Batman*, 7th Dist. No. 14BE2 appeal

qualifies as a savings event under the 1989 version of the DMA. The second savings event was the filing of a certified copy of Frances Batman's will in the Belmont County Recorder's Office on April 10, 1989 and the recordation of that will on April 11, 1989. The third savings event was the October 16, 2008 oil and gas lease between Batman and Mason Dixon Energy, Inc. that was recorded on March 3, 2009 and was later assigned to Hess. Given those savings events, the trial court determined that Batman had preserved his interest in the minerals and thus, granted summary judgment for Hess.

{¶19} Albanese finds fault with the trial court's decision that the recordation of Frances Batman's will was a savings event. In making this argument, he concedes that the 1981 Frances Batman affidavit is a savings event. He also states that the trial court was correct when it determined that the 20 year look-back period in the 1989 DMA is a rolling period. However, he claims that it is the date of death, not recordation that is to be used to determine the twenty years of preservation of the interest. Or in other words, the recordation relates back to the date of death.

{¶20} As Hess points out, this is a different argument than the one presented to the trial court. Albanese did not assert the relation back argument in its summary judgment motion or in his opposition motion. Rather, in those motions he argued that the 1989 recordation of the will is not a savings event because the will was not properly probated in Belmont County, Ohio and there was no certificate of transfer issued. That argument is abandoned on appeal.

{¶21} Since the relation back argument is asserted for the first time on appeal, Hess contends the argument should be deemed waived. Hess is correct. We have previously stated that appellate courts will not consider arguments that parties raise for the first time on appeal. *Nasser ex rel. Nasser v. Orthopedic Assn. of Youngstown,* 7th Dist. No. 01CA123, 2002-Ohio-5208, ¶ 27. "Despite the fact that appellate courts review summary judgment decisions de novo, '[t]he parties are not given a second chance to raise arguments that they should have raised below.'" *Litva v. Richmond*, 172 Ohio App.3d 349, 2007-Ohio-3499, 874 N.E.2d 1243, ¶ 18 (7th Dist.), quoting *Aubin v. Metzger,* 3d Dist. No. 1–03–08, 2003-Ohio-5130, ¶ 10, quoting *Smith v. Capriolo*, 9th Dist. No. 19993 (Apr. 11, 2001).

{¶22} However, even if in the interest of justice we found that this argument was properly before us, we still would not need to reach a decision on the issue presented to us. The issue presented is whether or not the recordation of a will relates back to the date of the death for purposes of determining whether a savings event under the 1989 version of the DMA occurred within a given 20 year period. The premise of this argument and Albanese's position is that the look-back period in the 1989 version of the DMA is rolling.

{¶23} There are two views about the look-back period in the 1989 version of the DMA. One view is that it is a rolling period. In generic terms, if the look-back period is rolling and there is a 20 year period where there is no savings event then the mineral interest is abandoned. The other view is that the look-back period is fixed. If it is fixed then the look-back period is twenty years preceding the enactment of the statute plus the three year grace period. Under Ohio's statute this would mean from March 22, 1969 (twenty years prior to the date of enactment) to March 22, 1992 (the end of the three year grace period). Albanese cannot prevail under a fixed theory because he admits that the 1981 affidavit is a savings event. Since that affidavit was recorded within the fixed period, it would not matter whether the will was a title transaction or whether the recordation of the will relates back to the date of Frances' death.

{¶24} The reason we would not need to reach a decision on the issue presented is because the premise of Albanese's position, that the look-back period is rolling, is incorrect. *Eisenbarth v. Reusser*, 7th Dist. No. 13MO10, 2014-Ohio-3792. In *Eisenbarth*, we concluded that "the statute is ambiguous as to whether the look-back period is anything but fixed. The use of the words 'preceding twenty years,' without stating the preceding twenty years of what, does not create a rolling look-back period." *Id.* at ¶ 48. In addressing the argument that the statute's language that provides for successive claims to preserve indicates that the statute has a rolling period, we explained:

> The mention of successive claims to preserve and indefinite preservation in R.C. 5301.56(D)(1) could merely be a reference to any preservations that were filed under the OMTA as existed prior to the

> 1989 DMA in order to show that a new claim to preserve can still be filed if the old one was filed outside of the new twenty-year look-back. There is other statutory language connecting the twenty-year look-back period to the date of enactment as (B)(2)'s grace period provides three years *from the date of enactment* before items will be deemed abandoned. R.C. 5301.56(B)(2). As forfeitures are abhorred in the law, we refuse to extend the look-back period from fixed to rolling. *See generally State ex rel. Falke v. Montgomery Cty. Resid. Dev., Inc.*, 40 Ohio St.3d 71, 73, 531 N.E.2d 688 (1988) (the law abhors a forfeiture).
>
> As to the Eisenbarths' query of why the legislature would enact a "dead letter law," the point of the 1989 DMA may have been to give three years to eliminate or refresh stale mineral claims in the original look-back period, and the legislature planned to enact a new version for the next twenty-year period if public policy reasons for abandonment still applied in the future. And, the legislature did then enact the 2006 DMA within twenty years of the former DMA, adding a new look-back, twenty years from the service of notice. (Or, the intent was a multiple future periods, but that intent was not properly expressed.)

Id. at ¶ 49-50.

{¶25} Therefore, since the look-back period is fixed and the 1989 version of the DMA became effective on March 22, 1989, the 20 year fixed look-back period extends from March 22, 1969 to March 22, 1989. However, the act further provides for a three year grace period to perfect a savings event, which meant that a saving event could occur as late as March 22, 1992. Here, all parties admit that the 1981 Frances Batman affidavit is a savings event. This affidavit states that it is "intended to be recorded in the Deed Records in Belmont County, Ohio for the purposes of evidencing the descent of such mineral interests and evidencing the claim" of Frances Batman in the "interests as provided in Section 5301/47 et seq., Ohio Revised Code, the "Ohio Marketable title Act." Furthermore, the claim to preserve complies with R.C. 5301.52. See R.C. 5301.56(C) (claims to preserve must comply with R.C. 5301.52).

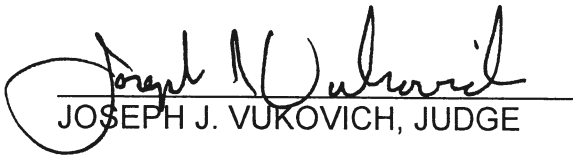
Consequently, since the statute has a fixed look-back period and a preservation act occurred during that period, the minerals were not abandoned under the 1989 DMA.

{¶26} Therefore, even if the argument Albanese asserts on appeal is properly before us, it still fails.

{¶27} Consequently, the trial court's grant of summary judgment for Hess is hereby affirmed. The sole assignment of error is deemed meritless.

Donofrio, J., concurs.
Waite, J., concurs.

APPROVED:



JOSEPH J. VUKOVICH, JUDGE