[Cite as *Hutchins v. Baker*, 2020-Ohio-1108.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MONROE COUNTY

WANDA HUTCHINS,

Plaintiff-Appellant,

v.

TROY E. BAKER ET AL.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 19 MO 0005

Civil Appeal from the
Court of Common Pleas of Monroe County, Ohio
Case No. 2017-148

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Jeffrey W. McCamic, *Atty. Christopher J. Gagin*, McCamic, Sacco & McCoid, P.L.L.C. 56-58 14th Street, Wheeling, West Virginia 26003 for Plaintiff-Appellant and

Atty. Ryan M. Regel, Yoss Law Office, LLC, 122 N, Main Street, P.O. Box 271, Woodsfield, Ohio 43793 and *Atty. Justin H. Werner, Atty. Kevin Abbott,* Reed Smith, LLP, 225 Fifth Avenue, Pittsburgh, Pennsylvania, 15222 for Defendants-Appellees.

Dated: February 26, 2020

Robb, J.

{¶1} Plaintiff-Appellant Wanda Hutchins appeals the decision of Monroe County Common Pleas Court granting summary judgment for Defendants-Appellees Troy Baker, Scott Dierkes, Misty Dierkes, Bayco Family Farm, LLC, and Gulfport Energy. The issue in this case is whether the "Trosch Affidavit" is a title transaction and whether Appellees performed due diligence in finding the mineral interest heirs. For the reasons expressed below, the decision of the trial court is affirmed.

Statement of the Facts and Case

{¶2} This case involves approximately 50 acres in Center Township, Monroe County, Ohio. Defendants-Appellees Baker, Dierkes, and Bayco each own a portion of the surface of the property.

{¶3} The surface and the minerals were once owned by Calvin Baker. Bertha Edna Baker was married to Calvin Baker. When Calvin predeceased his wife and died intestate in Monroe County the property was transferred to Bertha from his estate through a Certificate of Transfer. In 1959, Bertha sold the property to Cyrel Haren. The 1959 deed contains the following reservation, "Also excepting and reserving unto the Grantor, her heir and assigns, all the oil and gas underlying said premises." Bertha died intestate in Wheeling, West Virginia; her property transferred to her and Calvin's two children Hazel E. Baker and Kenneth E. Baker. Hazel never married or had children and she died intestate in Wheeling, West Virginia. Thus, her portion of the property transferred to Kenneth through intestate succession. Kenneth married Myrtle Virginia Bollinger, but they had no children. Kenneth died in North Carolina. His will left his residuary estate, which included any real estate interests in Ohio, to Myrtle. Myrtle later died in North Carolina. Her will left all of her residuary estate, which included any real estate interest owned in Ohio, to Appellant.

{¶4} Troy Baker acquired a portion of the surface by deed in 1994 that was eventually recorded in 2000. Baker conveyed his interest to Bayco and now claims to not own the interest. The Dierkes acquired the other portion of the surface in 2002 by deed

that was recorded in 2002. Appellees Baker, Dierkes, and Bayco have entered into oil and gas leases with Appellee Gulfport Energy.

{¶5} Appellant had the "Trosch Affidavit" filed for record July 26, 2013 in Monroe County. This affidavit states that Louis Trosch attests that he is well acquainted with the life and family history of Bertha Edna Baker and that she owns the oil and gas in the subject property. The affidavit states the intestate and testate transfers of the oil and gas mineral interests resulted in Wanda Hutchins acquiring the interest. 7/17/13 Affidavit of Louis Trosch.

{¶6} The Monroe County Auditor noted on the affidavit "Transfer Not Necessary" on July 29, 2013.

{¶7} On December 18, 2013, Appellees Baker and Dierkes filed a joint affidavit of abandonment pursuant to the Ohio Dormant Mineral Act, R.C. 5301.56. The affidavit of abandonment did not mention Hutchins' claim to the oil and gas mineral rights or the Trosch Affidavit.

{¶8} On November 7, 2016, Appellant filed a "Notice of Claim to Preserve Mineral Interest."

{¶9} Appellant filed a complaint against Appellees sounding in quiet title, declaratory judgment, and slander of title. Appellant sought an order quieting title and declaring her to be the true owner of the oil and gas mineral interest underlying the subject property. She also sought monetary damages for slander of title. 5/1/17 Complaint; 1/8/18 First Amended Complaint.

{¶10} Appellees Baker, Dierkes, and Bayco filed answers and counterclaims. The counterclaim was for a quiet title and a declaratory judgment stating that they own the minerals underlying the subject property. They also challenged the constitutionality of R.C. 5301.56. 6/29/17 Answer; 2/14/18 Answer to First Amended Complaint. Appellee Gulfport also filed an answer and affirmative defenses asserting it has valid oil and gas leases covering the property. 7/3/17 Answer; 3/7/18 Answer to First Amended Complaint.

{¶11} Appellant filed a reply to the counterclaim. 7/13/17 Reply to Counterclaim; 3/2/18 Second Reply to Counterclaim.

{¶12} Following discovery, Appellant filed a motion for partial summary judgment. She argued she was entitled to summary judgment because Appellees failed to serve her

by certified mail; the Trosch Affidavit clearly put them on notice that she was the holder of the mineral interest they were seeking to have deemed abandoned. 9/28/18 Motion for Partial Summary Judgment.

{¶13} Appellees Baker, Dierkes, and Bayco also filed for summary judgment. They argued they complied with the provisions of R.C. 5301.56 and service by publication was proper because the Trosch Affidavit was not in the chain of title and could not be found through a title search. 12/31/18 Motion. They also filed a motion in opposition to Appellant's motion for partial summary judgment for the reasons expressed in their motion for summary judgment. 1/18/19 Motion. Appellee Gulfport also filed a motion for summary judgment asserting similar arguments to the ones made in Appellees Baker, Dierkes, and Bayco's motion for summary judgment. 1/4/19 Motion.

{¶14} Appellant filed a motion in opposition to Appellees' motions for summary judgment arguing the affidavit constitutes a title transaction and notice by publication was not permitted given the filing of the affidavit. 2/8/19 Motion.

{¶15} The trial court granted summary judgment for Appellees. The trial court found the Trosch Affidavit was not in the chain of title and could not be discovered through a reasonable search. Therefore, service by publication was permitted. It found the affidavit of abandonment was properly recorded and Appellee Gulfport reasonably relied on the affidavit of abandonment. Appellee Gulfport also did not have constructive notice of the Trosch Affidavit because it was recorded outside the chain of title. 2/25/19 J.E.

{¶16} Appellant filed a timely appeal. 3/5/19 Notice of Appeal.

Standard of Review

{¶17} Both assignments of error raised assert the trial court incorrectly granted summary judgment to Appellees.

{¶18} We review a trial court's summary judgment decision de novo, applying the same standard used by the trial court as set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). A motion for summary judgment is properly granted if the court, upon viewing the evidence in a light most favorable to the nonmoving party, determines that: (1) there are no genuine issues as to any material facts; (2) the movant is entitled to judgment as a matter of law, and (3) the evidence is such that reasonable minds can come to but one conclusion and that conclusion is

adverse to the opposing party. Civ.R. 56(C); *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10. Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995), citing *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247-248, 106 S.Ct. 2505 (1986).

First Assignment of Error

"The trial court erred in granting summary judgment to defendants-appellees because the property was subject to a 'title transaction' in the twenty years immediately preceding the abandonment."

{¶19} Appellant argues the trial court's analysis was too focused on the issue of whether Appellees Baker/Dierkes was permitted to give her notice of abandonment by publication. She asserts the trial court should have focused on whether the Trosch Affidavit is a title transaction and as such, a savings event. Appellant claims it was a title transaction because it listed how she acquired her interest by will and descent. The affidavit described the three title transactions that lead to her acquiring the interest; each death and passing of the interest was a title transaction regarding the mineral interest. She asserts that the affidavit must therefore be deemed a title transaction. Appellant argues even if it is not legally conclusive that the interest passed to her, it at least creates a material question of fact as to whether the title history as stated in the affidavit is correct.

{¶20} Appellee Gulfport argues the affidavit is not a title transaction. It is merely a recitation of a family history and heirship; it does not encumber, alter, restrict, or transfer any interest in the property. Furthermore, it asserts the affidavit is outside the record chain of title for the property and therefore, it cannot preserve any interest. Appellees Baker/Dierkes make similar arguments.

{¶21} At the outset it is noted that the trial court does not clearly address this argument in its judgment entry. The trial court's focus is on whether the service by publication was proper. By deciding that publication was proper given the facts, the trial court impliedly found the affidavit was not a savings event.

{¶22} R.C. 5301.56(B) states:

> (B) Any mineral interest held by any person, other than the owner of the surface of the lands subject to the interest, shall be deemed abandoned and

> vested in the owner of the surface of the lands subject to the interest if the requirements established in division (E) of this section are satisfied and none of the following applies:
>
> * * *
>
> (3) Within the twenty years immediately preceding the date on which notice is served or published under division (E) of this section, one or more of the following has occurred:
>
> (a) The mineral interest has been the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located.

R.C. 5301.56(B)(3)(a).

{¶23} Appellant claims the Trosch Affidavit recorded in 2013 is a title transaction that occurred within the last 20 years and as such, the interest cannot be deemed abandoned.

{¶24} As both sides state and as this court has already acknowledged, "title transaction" is not defined in the Dormant Mineral Act. *Dodd v. Croskey*, 7th Dist. Harrison No. 12 HA 6, 2013-Ohio-4257, ¶ 43. However, it is defined in the Marketable Title Act. *Id*. In that act it means, "any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage." R.C. 5301.47(F). As we noted in *Dodd*, this is a common definition of a "title transaction." *Id*.

{¶25} The Trosch Affidavit describes how Appellant acquired title to the mineral interest. There is no case law on whether an affidavit of this nature constitutes a title transaction. However, as Appellees indicate the affidavit does not encumber, alter, restrict, or transfer any interest in the property.

{¶26} Admittedly, the affidavit does describe how title was received. However, it fails at being a title transaction because it is not a transaction. Rather it is merely a description of prior title transactions. Descriptions of prior title transactions are not

themselves title transactions. Therefore, the Trosch Affidavit does not constitute a title transaction.

{¶27} That said, some of the information in the Trosch Affidavit is information that would be included in a claim to preserve. A claim to preserve, like a title transaction, is one of the ways to prevent an interest from being deemed abandoned. R.C. 5301.56(B)(3)(c). Appellant does not assert in any manner that the Trosch Affidavit qualifies as a claim to preserve; Appellant's argument is that it is a title transaction. Consequently, the issue of whether the Trosch Affidavit does constitute a claim to preserve is not an issue before this court.

{¶28} However, in the interests of justice, we note that even if that issue was before use, the Trosch Affidavit does not qualify as a claim to preserve because it does not include the statutory requirements for a claim to preserve. R.C. 5301.56(C) lists the requirements for a valid claim to preserve:

> (C)(1) A claim to preserve a mineral interest from being deemed abandoned under division (B) of this section may be filed for record by its holder. Subject to division (C)(3) of this section, the claim shall be recorded in accordance with division (H) of this section and sections 317.18 to 317.20 and 5301.52 of the Revised Code, and shall consist of a notice that does all of the following:
>
> (a) States the nature of the mineral interest claimed and any recording information upon which the claim is based;
>
> (b) Otherwise complies with section 5301.52 of the Revised Code;
>
> (c) States that the holder does not intend to abandon, but instead to preserve, the holder's rights in the mineral interest.

R.C. 5301.56(C)(1).

{¶29} Under R.C. 5301.52(A) a claim to preserve must: 1) be in the form of an affidavit; 2) state the nature of the claim to be preserved along with the names and addresses of the people for whose benefit the notice is being filed; 3) contain an accurate and full description of all land affected by the notice; 4) state the name of each record

owner of the land affected by the notice, at the time of the recording, together with the recording information of the instrument by which each record owner acquired title to the land; and 5) be made by any person who has knowledge of the relevant facts.

{¶30} Although it appears the Trosch Affidavit was an attempt to memorialize the mineral interest, it does not meet the statutory requirements set forth above to be a valid claim to preserve. It is in the form of an affidavit and stated the nature of the claim to preserve, and a description of the land it affects. However, it does not contain Appellant's address, it does not state the names of the record owner of the land affected by the notice (Appellees Baker and Dierkes), or contain the recording information of the instrument by which Appellees Baker and Dierkes acquired title or the recording information of their predecessors in title. There is a description of the property in the affidavit; however, there is no reference to the volume and page number of the deed from which the description came or the volume and page number of the deeds transferring the surface. We have previously explained that the purpose of the requirements of the claim to preserve is to give notice to the surface owner or owners of the preservation claim. *Paul v. Hannon*, 7th Dist. Carroll No. 15 CA 0908, 2017-Ohio-1261, ¶ 56. Without the recording information or Appellees Baker and Dierkes names, this affidavit does not provide notice; this affidavit does not strictly comply or substantially comply (even if a substantial compliance test is applicable) with the statutory requirements.

{¶31} For the above stated reasons, this assignment of error is meritless.

Second Assignment of Error

"The trial court erred in granting summary judgment to Defendants-Appellants because the 'clerical error' relied on for notice by publication under R.C. 5301.56(E)(1) creates a material question of fact."

{¶32} Appellant argues that the heirs in this case were known and were recorded. Therefore, she asserts Appellees did not put forth reasonable efforts in finding the heirs. She also claims it was the Recorder's Office who did not properly index the recording against prior deeds and that is what allegedly caused Appellees not o discover the heirs. Appellant further asserts the Trosch Affidavit was recorded 53 days prior to notice by publication and that affidavit contained an accurate legal description of the property. She acknowledges Appellees put forward an affidavit from a title examiner indicating it was

not possible to find the Trosch Affidavit with reasonable efforts. However, she argues this information at minimum demonstrates there is a genuine issue of material fact and summary judgment should not have been granted.

{¶33} Appellees assert they performed due diligence in trying to discover the heirs and thus, were permitted to give notice by publication. They assert Appellant offered no evidence to dispute the affidavit of the title examiner and did not "attack" the affidavit until the appellate brief. They further assert the Trosch Affidavit is not in the chain of title, and there were no marginal notations on the affidavit to any of the deeds in the chain of title. They assert there was no means for the Recorder's Office to know to index it without that information.

{¶34} The language of R.C. 5301.56(E)(1) permits notice by publication when notice "cannot be completed" through certified mail. We have previously explained prior to giving notice by publication, the party seeking to have the property deemed abandoned must make reasonable efforts to locate the heirs to serve them by certified mail. *Shilts v. Beardmore*, 7th Dist. Monroe No. 16 MO 0003, 2018-Ohio-863, ¶ 14-15. However, if reasonable efforts do not disclose any names or addresses, notice can be completed by publication. *Id*.

{¶35} In the case at hand, Appellees served notice by publication after searching the public records in the Monroe County Recorder's Office to determine the ownership of the oil and gas interest reserved by Bertha Edna Baker in the 1959 deed recorded in Volume 137, Page 371 of the Monroe County Deed Records. Stollar Affidavit. Stollar, a title searcher who works for the attorneys hired by Appellee and formerly worked for the Monroe County Recorder's Office for over 12 years, avowed that in "2013-2014, no one searching the Monroe County records could have found" the Trosch Affidavit "because of how it was indexed." Stollar Affidavit. She further avowed:

> The "Trosch Affidavit" referred to by the Plaintiff in her pleadings was never indexed in any way that would enable me or any title examiner to locate it, or Plaintiff's name, by searching the names of Bertha Edna Baker, Hazel E. Baker, Kenneth E. Baker, and/or any other name in the Defendants' chain of title. Until November 7, 2016, there was never anything found in the chain of title referencing the mineral interest reserved by Bertha Edna Baker in

> 1950 in Deed Volume 137, Page 371. This is evidenced by the attached photographs of the Monroe County official records index that I took on June 14, 2017, marked as Exhibit B1 and Exhibit B2. Exhibit B1 shows that the Affidavit was indexed in the Monroe County records only under "Lois A. Trosch." Exhibit B2, which also was indexed in the Monroe County records, shows that no records were indexed under the name "Bertha Edna Baker."

Stollar Affidavit.

{¶36} Appellant did not file an affidavit from another title examiner indicating the information could have been found through reasonable efforts. Civ.R. 56(E) indicates that when a motion is supported by affidavit, the adverse party may not rest upon mere allegations or denials. The fact that an affidavit was recorded with the Recorder's Office does not necessarily mean that it could have been discovered through reasonable efforts. It must be cross referenced in some manner to make it discoverable. The Stollar Affidavit provides evidence that the Trosch Affidavit could not have been found through reasonable efforts. Appellant did not provide evidence countering the Stollar Affidavit. Thus, Appellant did not meet her burden to show a genuine issue of material fact that Appellees did not make reasonable efforts.

{¶37} Appellant does assert the Recorder's Office did not do its job so that the affidavit could be found. The Trosch Affidavit does not indicate from whom and when Bertha Edna Baker acquired the property. While there is a description of the property in the affidavit, there is no reference to the volume and page number of the deed from which that description came. Furthermore, there is no reference to the volume and page number of the deed where Bertha Edna Baker reserved the oil and gas interests. There is not even a recitation of the oil and gas reservation in the affidavit. While the affidavit does indicate how the interest passed eventually to Appellant through testacy and intestacy, there are no volume and page numbers of deeds in this affidavit. It is also titled "Affidavit of Death, Identity & Heirship." That title may not have given the Recorder enough information for it to understand this affidavit was effectually an attempt at an Affidavit of Preservation.

{¶38} We have previously explained, in the context of a mechanic's lien, that county recorders have discretion to reject instruments for filing or recording. *Kirk*

Excavating & Construction, Inc. v. RKJ Enterprises, LLC, 7th Dist. Carroll No. 18 CA 0926, 2018-Ohio-3735, 108 N.E.3d 1278, ¶ 21. A provision in the recording data statute specifically indicates the recorder is permitted to refuse instruments for recording:

> The county recorder may refuse to record an instrument of writing presented for recording if the instrument is not required or authorized by the Revised Code to be recorded or the county recorder has reasonable cause to believe the instrument is materially false or fraudulent. This division does not create a duty upon a recorder to inspect, evaluate, or investigate an instrument of writing that is presented for recording.

R.C. 317.13(B).

{¶39} Here, if the affidavit had been presented as an Affidavit of Preservation, the Recorder would have been within its authority to reject the instrument for failing to comply with R.C. 5301.52. Section (B) of the version of that statute in effect when the Trosch Affidavit was filed states:

> The notice shall be filed for record in the office of the recorder of the county or counties where the land described in it is situated. The recorder of each county shall accept all such notices presented to him which describe land situated in the county in which he serves, shall enter and record them in the deed records of that county, and shall index each notice in the grantee deed index under the names of the claimants appearing in that notice and in the grantor deed index under the names of the record owners appearing in that notice. Such notices also shall be indexed under the description of the real estate involved in a book set apart for that purpose to be known as the "Notice Index." Each recorder may charge the same fees for the recording of such notices as are charged for recording deeds.

R.C. 5301.52(B).

{¶40} As explained above, Appellant did not comply with R.C. 5301.52. One deficiency was the record owners were not named in the affidavit. Thus, there was a basis to reject the instrument for filing. Furthermore, as the general recording statutes

indicated, the recorder did not have a duty "to inspect, evaluate, or investigate an instrument of writing that is presented for recording." R.C. 317.13(B). In other words, it was not the recorder's obligation to fill in the missing pieces, i.e., the record owners, so that the instrument could be properly indexed. The requirements for an effective affidavit listed in R.C. 5301.52(A) are there, in part, so that instruments can be properly indexed. Therefore, although the Recorder was not required to accept the Trosch Affidavit for recording, the fact that it did, did not put an obligation on the Recorder to determine missing information needed to properly index the affidavit in the chain of title.

{¶41} Consequently, for those reasons, there is no merit with this assignment of error.

Conclusion

{¶42} Both assignments of error lack merit. The trial court's grant of summary judgment for Appellees is affirmed.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Monroe County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.