STATE OF MICHIGAN

COURT OF APPEALS

DONALD C. WRIGHT, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED May 18, 1999
v	No. 205861 Charlevoix Circuit Court
ELMER CRAIN and CLARA CRAIN, Defendants-Appellants/Cross-Appellees.	LC No. 96-075818 CH

Before: McDonald, P.J., and Sawyer and Collins, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff cross-appeals the trial court's refusal to award him costs and attorney fees. We reverse the trial court's order granting summary disposition to plaintiff and remand, and we affirm the trial court's denial of costs and attorney fees.

I

This case involves an action to quiet title to a stretch of real property located in Boyne Valley Township, Charlevoix County. The subject property consists of a portion of land formerly used as a railroad right-of-way that extends through and is surrounded by two forty-acre parcels of property owned by plaintiff. Each forty-acre parcel has been the subject of numerous conveyances to various landowners since 1876, when the United States first issued a patent to properties to Enoch K. Robinson.

The railroad that ran through the property in question was constructed in 1883 for service primarily between Boyne City and Boyne Falls. The property was used as a railway by four railroad companies until 1979 or 1980, at which time the railroad was disbanded by the Boyne Valley Railroad Company for economic reasons. The railroad was apparently officially abandoned in 1982, when the tracks and ties were liquidated for scrap.

In 1985, defendants purchased the entire stretch of railroad right-of-way extending from Boyne City to Boyne Falls, which included the disputed portion across plaintiff's property, from the personal representatives of the estate of Dennis R. Caughey. Defendant received a quitclaim deed reflecting title to the property, which was recorded on August 5, 1985.[1] The estate of Dennis Caughey had purchased the right-of-way from the Boyne Valley Railroad Company, the last company to operate the railroad. The estate subsequently received a warranty deed, which was recorded on September 16, 1982.

Defendants paid the overdue taxes on the property and received two tax deeds dated August 25 and November 9, 1987 (the latter deed simply correcting the land description on the former deed) from the State of Michigan to a "Main-line right-of-way" through Section 6 of Boyne Valley Township.[2] The language of conveyance provides:

> The First Party [Department of Natural Resources] acting for and in behalf of the State of Michigan by authority of Section 131e, Act 206 P.A. 1893, as amended, hereby grants, conveys, releases and quit-claims unto Second Party [Elmer Crain and Clara Crain], and to the Second Party's heirs, successors, and assigns, all the right, title, and interest acquired by the State of Michigan . . . .

The deed also indicates that title to the described property had previously vested in the State of Michigan when the property was "sold and bid in to the State of Michigan at the 1985 tax sale."

In 1990, plaintiff purchased the northwest quarter parcel through which the railroad bed extends. Plaintiff received a warranty deed, which was recorded on April 10, 1990. In 1992, plaintiff purchased the adjoining northeast quarter parcel. The warranty deed reflecting plaintiff's interest was recorded on November 8, 1996. The original warranty deeds state:

> EXCEPTING THEREFROM the main line railroad right of way as now laid out and used established and constructed across section 6, Town 32 North, Range 5 West including any buildings thereon.

On December 5, 1996, plaintiff obtained and filed new deeds to the same parcels. The new quitclaim deeds omitted the above cited language.

When plaintiff began placing cut trees on the railroad right-of-way that ran through the two forty-acre parcels, defendant objected and claimed title to the railroad right-of-way. Plaintiff then filed this lawsuit to quiet title, supporting his claim with a "statement of title" listing eighty-two conveyances.

Thereafter, plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that no genuine issues of material fact existed regarding whether plaintiff held fee simple title to the disputed portion of the abandoned railroad bed. Plaintiff maintained that the evidence showed an unbroken chain of title to him, and that defendants failed to produce any documentation establishing otherwise. Therefore, argued plaintiff, the railroad companies acted without title regarding the subject

property, gained no property rights to the subject property and, at best, acquired prescriptive rights which were never enforced.

Plaintiff also asserted that defendants could not claim title to the property through the 1987 tax deeds they received from the State of Michigan because those deeds were only redemption deeds, which simply returned title to the party possessing title prior to the tax foreclosure, and were not deeds conveying a fee interest which would commence a new chain of title. Since defendants did not have an interest in the subject property prior to the ineffective deed from the Caughey estate in 1985, defendants had no interest of any kind by which they could redeem the premises by tax foreclosure.

Defendants argued in response that, irrespective of defendants' valid claims of interest in the property, there were numerous imperfections in plaintiff's claim of title that raised questions of fact concerning plaintiff's claim of right. Defendants also argued that they had a valid claim to the property via the 1985 deed from the Caughey estate and through the 1987 tax deed they received from the State of Michigan.

The trial court granted plaintiff's motion with regard to the tax deed issue, and denied the motion in part without prejudice to allow the court the opportunity to review new deeds submitted by defendants and to allow defendants the opportunity to provide additional documents to support their chain of title. Specifically, the Court held:

> I think that the particular type of tax deed under Michigan Compiled Laws 211.141 does not convey any greater title to Mr. Crain than what he had by way of acquisition through these deeds [the three new deeds submitted by defendant] and through this deed from the [Caughey] estate, because that statute provides that a quitclaim deed or reconveyance made under this section shall not vest in the grantee, title or interest in the land beyond that already owned by the grantee.
>
> And so if Mr. Crain had good title, he redeemed it, and by paying the back taxes on it then, that clears up that title.
>
> On the other hand, if he didn't have marketable title to the property, for whatever reason, by simply purchasing or redeeming the taxes and getting that type of deed, does not create any greater title in him than what he had before he paid those back taxes.
>
> So I don't think he can prevail by virtue of the quitclaim deed, the limited quitclaim deed from the State of Michigan.

Defendants responded with a trial brief in which they traced their interest in the property from the Caughey estate to a conveyance from the Boyne City and Southeastern Railroad to the Boyne City, Gaylord and Alpena Railroad in 1936. Defendants explained that they were unable to produce evidence of an initial deed or interest respecting plaintiff's property because certain libers at the register of deeds were destroyed in an 1887 fire.[3]

The trial court then entered an order granting plaintiff's motion for summary disposition in full. The order stated that defendants failed to present additional documents to support their chain of title and that the deeds attached to defendants' motion for summary disposition did not relate to plaintiff's property.

II

On appeal, defendants argue that the trial court erred in ruling that they did not acquire a vested interest in the subject property through 1981 and 1987 state tax deeds and in concluding, therefore, that there existed no genuine issue of material fact with regard to the parties' opposing claims of title.[4] We review the trial court's grant of summary disposition de novo. *Pinckney Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), a trial court must consider affidavits, pleadings, depositions, admissions, and documentary evidence presented by the parties in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996). The trial court may grant the motion only if the affidavits or other documentary evidence show that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.* Before summary disposition may be granted, the court must be satisfied that it is impossible for the claim or defense asserted to be supported by evidence at trial. *SSC Associates Ltd. Partnership v Detroit Retirement System*, 192 Mich App 360, 365; 480 NW2d 275 (1991).

III

We agree with the trial court that defendants did not acquire absolute title to the property in question through purchase or redemption of state tax deeds. Defendants correctly state that once lands subject to a tax sale are bid off to the state, the state subsequently becomes vested with absolute title when the owner of the property has failed to redeem the property during the statutory redemption period provided by MCL 211.74; MSA 7.120. See MCL 211.70; MSA 7.115; MCL 211.67; MSA 7.112; *City of Flint v Tackacs*, 181 Mich App 732, 736; 449 NW2d 699 (1989). However, defendants cite no authority and have produced no facts to establish their conclusory claim that the state acquired absolute title. Defendants have not shown that the owners of the property related to the 1987 or 1981 tax deeds failed to redeem the property before the expiration of the statutory period of redemption such that absolute title vested in the state. A party may not merely announce a position on appeal and leave it to the appellate court to discover and rationalize the basis for the claim. *Morris v Allstate Ins Co*, 230 Mich App 361, 370; 584 NW2d 340 (1998); *Great Lakes Division of National Steel Corp v Ecorse*, 227 Mich App 379, 422; 576 NW2d 667 (1998).

Moreover, defendants incorrectly rely exclusively on MCL 211.72; MSA 7.117 of the General Property Tax Act, MCL 211.1 *et seq.*; MSA 7.1 *et seq.*, to support their contention that once the state acquired absolute title for failure to redeem the property before the expiration of the statutory redemption period, they received absolute title to the disputed property from the state through tax deeds. MCL 211.72; MSA 7.117 sets forth the rights and title acquired by tax deed purchasers once lands subject to a tax sale are bid off to the state and the state subsequently becomes vested with

absolute title after the expiration of the redemption period provided by MCL 211.74; MSA 7.120. See MCL 211.70; MSA 7.115; MCL 211.67; MSA 7.112; *City of Flint, supra* at 736. MCL 211.72; MSA 7.117 provides in pertinent part:

> Upon presentation of the *purchaser's certificate of sale* prescribed by section 71 to the state treasurer of his or her authorized representative *after the expiration of time provided by law for the redemption of lands sold for the nonpayment of taxes*, the state treasurer shall cause a tax deed of conveyance of the land described in the certificate of sale to be executed and delivered to the purchaser, or his or her heirs or assigns, *unless the sale was redeemed or annulled* as provided by law. The tax deed of conveyance shall be sealed with the seal of the state treasurer and be signed by the state treasurer or his or her authorized representative but additional signatures of witnesses or a notary public are not required. The tax deed may be recorded in the office of the register of deeds of the proper county in the same manner and with like effect as other deeds duly witnessed, acknowledged, and certified. *The tax deeds convey an absolute title to the land sold, and constitute conclusive evidence of title, in fee, in the grantee, subject, however, to all taxes assessed and levied on the land subsequent to the taxes for which the land was bid off.* [Emphasis added.]

By its terms, MCL 211.72; MSA 7.117 addresses the rights and title acquired by purchasers from the state following a tax sale of the subject property. See *Ottaco, Inc v Gauze*, 226 Mich App 646, 652; 574 NW2d 393 (1997) (MCL 211.72; MSA 7.117 addresses tax deed issued by the state to a "tax sale purchaser"); see also MCL 211.70; MSA 7.115 to MCL 211.73c; MSA 7.119(2) (the section of the General Tax Act pertaining to sale of property by county treasurer to buyers at a tax sale). Pursuant to this section, the state treasurer will issue a tax deed of conveyance after: (1) the statutory period allotted for the owner to redeem the property has expired and (2) the tax sale purchaser has presented the treasurer with a "purchaser's certificate of sale" prescribed by MCL 211.71; MSA 7.116.[5] Upon such a conveyance, the tax purchaser receives absolute title to the property described in the purchaser's certificate, which destroys and cuts off all previous liens and encumbrances. *Ottaco, supra* at 652, citing *Robbins v Barron*, 32 Mich 36, 39 (1875). Persons holding a state tax deed of land executed for the nonpayment of taxes may commence an action in the circuit court of the county where the land is located to quiet title to the land. MCL 211.72; MSA 7.117.

Even assuming that absolute title vested in the state due to the owners' failure to redeem the property before the expiration of the statutory period, title did not pass to defendants pursuant to MCL 211.72; MSA 7.117. That statute does not apply under the facts presented in this case. First, defendants presented no documentary evidence showing that they acquired the 1987 tax deeds pursuant to a tax sale. At the hearing on plaintiff's motion, plaintiff asserted, and defendants did not contest, that defendants paid the back taxes through the county treasurer's office and not pursuant to a tax sale. Similarly, defendants have presented no evidence whatsoever to establish the manner in which the 1981 tax deed appearing in the chain of title from the Caughey deed and argued for the first time on appeal, was acquired. Secondly, defendants have likewise failed to produce evidence of a "purchaser's certificate of sale" complying with the requirements and description of such a certificate as set forth in

MCL 211.71; MSA 7.116. Finally, at least with respect to the 1987 tax deeds, defendants appeared as the record title holder of the property pursuant to the deed from the Caughey estate. The purpose of the tax sale is for sale to third parties, not the title holder of record. Therefore, contrary to defendants' contention, the statute does not apply to create a genuine issue of material fact regarding defendants' claim of title to the disputed property.

Having determined that defendants did not acquire absolute title to the disputed property through the state tax deeds pursuant to MCL 211.72; MSA 7.117, we agree with the trial court's determination that defendants' tax deeds were redemption deeds which did not vest absolute title in defendants.

The tax deeds defendants received from the state indicate that they were executed pursuant to Section 131e of Act 206, Public Acts 1893, as amended. MCL 211.131e(3); MSA 7.190(3)(3) provides that, "[a] redemption deed pursuant to this section shall reinstate title as provided in section 131c(4)." MCL 211.131c(4); MSA 7.190(1)(4) states in relevant part:

> A redemption deed issued pursuant to this section shall not be construed to vest in the grantee named in the deed any title or interest in the lands beyond that which he or she should have owned, had not title become vested in the state . . . .[6]

Similar language is set forth in MCL 211.141; MSA 7.199. That section applies in the situation where a tax purchaser must give a quitclaim deed to the owner conveying the interests acquired under the tax deed where the owner has redeemed the property. MCL 211.141(4); MSA 7.199(4) provides:

> A quitclaim deed or reconveyance made under this section does not vest in the grantee title or interest in the property beyond that already owned by the grantee . . . .[7]

A redemption deed is issued upon establishing proof that the redeemer is the title holder of record. See MCL 211.74; MSA 7.120. The county treasurer is not charged with examining the quantum or quality of title, but is only charged with issuing a certificate of redemption.

In the present case, defendants' chain of title indicates that they received the deed from the Caughey estate in 1985. Therefore, at the time defendants went to the county treasurer's office to pay the back taxes on the property, they appeared as the title holder of record and were subsequently issued tax deeds. The state, however, did not convey absolute title, but simply returned to defendants the quantum of title they held before the state acquired the property. If defendants did not possess absolute title to the property in question prior to paying the back taxes on that property, they did not possess it after paying the taxes. By arguing that they obtained absolute title through the tax deeds, defendants are attempting to equate themselves with the status of a third-party tax purchaser rather than the status of a tax redeemer.

IV

However, notwithstanding defendants' failure to prove that they acquired absolute title to the land in question through state tax deeds, we find that summary disposition in favor of plaintiff was

inappropriate, because there remained genuine issues of material fact regarding whether plaintiff had clear title to the land in question, and regarding whether defendants could prove superior title via another route.

In an action to quiet title, the plaintiff has the burden of proving clear title to the property at issue; only after plaintiff has made a prima facie case does the burden of showing superior title shift to the defendant. *Ingle v Musgrave*, 159 Mich App 356, 361; 406 NW2d 492 (1987). In this case, plaintiff's documentary evidence of his claim to the property in question, supported by his affidavit indicating that he had researched the history of the property, consisted of a "statement of title" listing eighty-two conveyances, culminating in plaintiff. The purpose of documentary evidence offered with a motion for summary disposition brought pursuant to MCR 2.116(C)(10) is to help the court determine whether an issue of fact exists. *SSC Associates, supra* at 364. The documentary evidence does not resolve issues of fact. *Id.*

As defendants argued in opposing plaintiff's motion for summary disposition, plaintiff's "statement of title" does not establish the absence of factual issues with respect to ownership of the property in question. It appears that plaintiff's statement of title was compiled and prepared by plaintiff himself; there is no indication whatsoever that the document is authentic or represents a true copy from the register of deeds. Where the truth of a material factual assertion depends on the credibility of the person making the assertion, there exists a genuine issue to be decided at trial by the trier of fact and a motion for summary disposition cannot be granted. *Id.* Furthermore, although plaintiff asserts that the "statement of title" establishes his chains of title to both parcels in question, the statement consists only of one listing without any mechanism for determining which individual listing pertains to each parcel. Moreover, the separate listings refer to the transactions or conveyances in very broad terms such as "deed." Thus, it is unclear exactly what interests, if any, were conveyed with each transaction and plaintiff did not provide those documents to the trial court. Finally, by plaintiff's own admission, the statement is confusing because it includes conveyances to property other than property involved in the present matter, without specifying these conveyances. Therefore, we find that plaintiff's "statement of title" was not sufficient to establish that he had clear title to the property in question such that summary disposition in his favor could properly be granted.

In addition, the trial court stated that it based its decision to grant plaintiff summary disposition, in part, on the fact that defendants were unable to submit, as part of their chain of title, evidence of a deed of conveyance from any of plaintiff's predecessors in interest to one of the four railroad companies that operated the railroad from 1883 to 1979 or 1980. However, the trial court essentially ignored defendants' argument that, although they were able to trace their chain of title to 1936, a letter from the Charlevoix Register of Deeds indicated that several early libers had been destroyed in an 1887 fire and the missing deed from plaintiff's predecessors to the railroad company may have been included in those destroyed. The trial court also appeared to ignore the logical proposition advanced by defendants that, because it was undisputed that every railroad involved made active use of the land traversing plaintiff's property and that every other parcel of land between Boyne City and Boyne Falls upon which the railroad operated was encumbered by a deed or easement to the railroads, the same was done with respect to plaintiff's parcels. Giving the benefit of reasonable doubt to defendants, we conclude that

evidence of the fire at the register of deeds coupled with the illogical position that every other part of the railroad was encumbered except plaintiff's property raises a genuine issue of material fact as to whether defendants could trace their title to a conveyance from plaintiff's predecessors to one of the railroad companies.

Accordingly, because there remained genuine issues of material fact regarding the parties' opposing claims of title to the property in question, we find that the trial court erred in granting summary disposition to plaintiff.

V

On cross-appeal, plaintiff argues that the trial court clearly erred in finding that defendants' defense to plaintiff's claim of title was not frivolous and abused its discretion in denying his motion for attorney fees pursuant to MCR 2.114(D) and MCL 600.2591; MSA 27A.2591. However, in light of our finding that the trial court erred in granting summary disposition to plaintiff, we conclude that the trial court did not abuse its discretion in denying plaintiff's motion for costs and attorney fees.

We affirm the trial court's denial of costs and attorney fees, and we reverse the trial court's order granting summary disposition to plaintiff and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ David H. Sawyer
/s/ Jeffrey G. Collins

[1] It is not clear from the record how much of the right-of way defendants acquired or whether the interest conveyed was that of an easement or fee simple title.

[2] Plaintiff alleged that the railroad companies were exempt from taxes during the years of operation, that when the railroad was abandoned in 1979 or 1980, the Charlevoix County Treasurer began assessing taxes against the property, and that the Boyne Valley Railroad Company never paid the taxes on the subject property.

[3] Defendants attached a letter from the register of deeds in support of their assertion concerning the fire.

[4] We note that defendants did not specifically argue in the trial court that they had acquired title to any portion of the property in question via the 1981 state tax deed. However, defendants based their claim, in part, on the deed from the Caughey estate and the chain of title extending therefrom, and the 1981 tax deed appears in that chain of title.

[5] MCL 211.71; MSA 7.116 provides:

> At the sale aforesaid the respective county treasurers shall give to the purchasers, on the payment of the bids, a separate certificate in writing for each parcel, describing the lands

> purchased and the amount paid therefore, the name of the person to whom the same was issued, the number, date and amount of each certificate, and such certificate shall be regularly numbered and entered into the book kept for that purpose and designated as the tax record. Such certificate shall be in substantially the following form: . . . .[See MCL 211.71; MSA 7.116 setting forth the form and language of a purchaser's certificate.]

[6] Both MCL 211.131e(3); MSA 7.190(3)(3) and MCL 211.131c(4); MSA 7.190(1)(4) were amended in 1993 and 1996 and contain the same language as the 1985 versions.

[7] The statute was amended by 1996 PA 476 § 1. The cited language is the same as section 2 of the 1978 pre-amended version.