

STATE OF MICHIGAN
COURT OF APPEALS

BONNEY K. GOLOWIC,

Plaintiff/Cross-Defendant-
Appellant,

v

JOHN M. GOLOWIC,

Defendant/Cross-Plaintiff-Appellee.

UNPUBLISHED
October 18, 2011

No. 298973
Jackson Circuit Court
LC No. 09-002761-DO

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals the trial court's judgment of divorce. She specifically challenges the trial court's partial grant of summary disposition to defendant with regard to an oil and gas lease. For the reasons set forth below, we remand for further proceedings consistent with this opinion.

The parties married on July 27, 2007 and separated between August and October 2008. Before the marriage, defendant bought a 35-acre parcel of property located on Horning Road in Brooklyn, Michigan. Though the parties resided at defendant's Horning Road property during the marriage, defendant did not convey any part of the property to plaintiff and she was never added to the title for this property. Nevertheless, when defendant entered into an oil and gas lease shortly before the parties separated, the lessee oil company requested that plaintiff also sign the lease because she was defendant's spouse. Under the oil and gas lease, the oil company agreed to pay royalties for the oil produced from the property. After plaintiff filed for divorce, the oil company completed construction of an oil well on the property, and it produced some oil before the trial court entered the judgment of divorce.

Plaintiff argues that the trial court erred in ruling that the oil and gas lease is separate property. We review the grant or denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In reviewing a summary disposition decision, we

consider the entire record to determine whether the party was entitled to summary disposition. *Id.*¹

“The distribution of property in a divorce is controlled by statute.” *Reeves v Reeves*, 226 Mich App 490, 493; 575 NW2d 1 (1997), citing MCL 552.1 *et seq.*; *Charlton v Charlton*, 397 Mich 84, 92; 243 NW2d 261 (1976). “In dividing marital assets, the goal is to reach an equitable division in light of all the circumstances.” *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). “In granting a divorce, the court may divide all property that came ‘to either party by reason of the marriage’” *Reeves*, 226 Mich App at 493, quoting MCL 552.19 (emphasis in original). When dividing property in divorce proceedings, the trial court’s first step is to determine which assets are included in the marital estate and which are separate property. *Id.* at 494; *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005). “Generally, the marital estate is divided between the parties, and each party takes away from the marriage that party’s own separate estate with no invasion by the other party.” *Reeves*, 226 Mich App at 494. Marital property is that “which is acquired or earned during the marriage, whereas separate property is that which is obtained or earned before the marriage.” *Cunningham v Cunningham*, 289 Mich App 195, 201; 795 NW2d 826 (2010). Typically, “assets earned by a spouse during the marriage are subject to division, but the parties’ separate assets may not be invaded.” *Korth v Korth*, 256 Mich App 286, 291; 662 NW2d 111 (2003).

The trial court correctly held that the oil and gas lease is defendant’s separate property. Plaintiff does not dispute that the land at 12225 Horning Road is defendant’s separate property that he bought before the marriage. Because defendant owned the 12225 Horning Road property, he also owned all of the oil and gas beneath it. See *Mfrs Nat’l Bank of Detroit v Dir of Dep’t of Natural Resources*, 420 Mich 128, 141; 362 NW2d 572 (1984) (“[A] surface owner owns the oil and gas beneath his land.”). Accordingly, defendant had the right to sever the ownership of the surface estate from the ownership of the subsurface mineral, oil, and gas interests by leasing the subsurface rights. *Rorke v Savoy Energy, LP*, 260 Mich App 251, 253; 677 NW2d 45 (2003). The oil and gas lease was a conveyance by defendant of a portion of the interest in his subsurface estate to the oil company for a term less than his own for a valuable consideration. See *De Bruyn Produce Co v Romero*, 202 Mich App 92, 98; 508 NW2d 150 (1993). Therefore, the oil and gas lease was defendant’s separate property, and defendant was entitled to take away from the marriage his own separate estate. *Reeves*, 226 Mich App at 494.

¹ “A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” *Maiden*, 461 Mich at 120. A trial court considers the evidence in the light most favorable to the non-moving party. *Id.* “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In deciding a motion for summary disposition, “the trial court may not make findings of fact” or “weigh credibility.” *Jackhill Oil Co v Powell Prod, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995); *Barnell v Taubman Co, Inc*, 203 Mich App 110, 115; 512 NW2d 13 (1993). Summary disposition is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

We reject plaintiff's contention that the oil and gas lease is marital property simply because she signed the lease as a lessor. "The mere fact that property may be held jointly or individually is not necessarily dispositive of whether the property is classified as separate or marital." *Cunningham*, 289 Mich App at 201-202.

We further hold that the trial court correctly ruled that the oil and gas lease was not commingled with marital property. "[S]eparate assets may lose their character as separate property and transform into marital property if they are commingled with marital assets and treated by the parties as marital property." *Cunningham*, 289 Mich App at 201, 207-208 (quotation omitted). Plaintiff merely argues that the oil and gas lease is commingled property because she signed the lease as a lessor. However, her signature on the lease in no way establishes commingling where plaintiff fails to identify any marital property with which the lease was allegedly commingled. Accordingly, plaintiff's claim is without merit.

Plaintiff also contends that the trial court erred because it failed to invade the oil and gas lease based on her contributions pursuant to MCL 552.401. "Generally, marital assets are subject to division between the parties, but the parties' separate assets may not be invaded." *McNamara*, 249 Mich App at 183. There are two statutory exceptions. *Reeves*, 226 Mich App at 494; MCL 552.23(1); MCL 552.401. The one on which plaintiff relies, MCL 552.401, provides:

The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property. The decree, upon becoming final, shall have the same force and effect as a quitclaim deed of the real estate, if any, or a bill of sale of the personal property, if any, given by the party's spouse to the party.

Plaintiff argued to the trial judge that her contributions to the oil and gas lease warranted invasion of the separate property. Though the trial court ruled that the Horning Road property and the oil and gas lease were separate property, it did not make any finding about whether defendant's separate property should be invaded. We remand for the trial court to make a finding regarding whether defendant's separate property should be invaded pursuant to MCL 552.401, but in doing so, we are mindful that such invasion is discretionary. *Czuhai v Czuhai*, 30 Mich App 208, 210-211; 186 NW2d 32 (1971).

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Jane M. Beckering