NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JUDE S. VAVALA AND THERESA ANN VAVALA, HUSBAND AND WIFE, AND PAUL J. VAVALA

Appellees

v.

KATE M. HALL & J.K.P. HALL, HUSBAND AND WIFE, LIZZIE M. HYDE, JANE HYDE HALL LIDDEL & VINTON LIDDELL, HUSBAND & WIFE, SUSAN E. HALL, HARRY R. HYDE & H. MAUDE ALLEN HYDE, HUSBAND AND WIFE, GEORGE H. HYDE & FRANCES H. HYDE, HUSBAND AND WIFE, J.P. STRAMBERG & MRS. J.P. STRAMBERG, AKA J.P. STRANBERG & MRS. J.P. STRANBERG, HUSBAND & WIFE, NELS STRAMBERG & NELLIE STRAMBERG, AKA NELS STRANBERG & NELLIE STRANDBERG, HUSBAND AND WIFE, PETER A. STRAMBERG & SANNA STRAMBERG AKA PETER STRANBERG & SANNA STRANBERG, HUSBAND AND WIFE, SOPHIE JOHNSON & SIMON JOHNSON, HUSBAND & WIFE, CHARLES J. STRANDBERG & EMMA STRANDBERG, AKA CHARLES STRAMBERG & EMMA STRAMBERG, HUSBAND AND WIFE, DAVID STRANDBERG & JENNIE STRANDBERG, AKA DAVID STRAMBERG & JENNIE STRAMBERG, HUSBAND AND WIFE, MERTON MOYER & ALMA MOYER, HUSBAND AND WIFE, AND MELDEN MOYER, THEIR HEIRS, SUCCESSORS AND ASSIGNS AND ALL OTHER PERSONS CLAIMING ANY INTEREST IN THE PROPERTY DESCRIBED IN THE ACTION.

APPEAL OF: SENECA RESOURCES CORPORATION

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1147 WDA 2011

Appeal from the Order Entered of June 24, 2011
In the Court of Common Pleas of Cameron/Elk County
Civil Division at No(s): No. 384-2009

BEFORE: MUSMANNO, J., WECHT, J., and COLVILLE, J.*

MEMORANDUM BY WECHT, J.: **FILED MAY 1, 2013**

Seneca Resources Corporation (hereinafter "Appellant") appeals from the trial court order dated June 24, 2011. That order denied Appellant's petition to open and/or strike a default judgment entered on September 24, 2009, in a quiet title action concerning property located in Fox Township, Elk County. We affirm.

This matter involves a 71.28-acre tract of property located in Fox Township. This particular tract of land is owned by Jude Vavala, Theresa Ann Vavala, and Paul J. Vavala (hereinafter "the Vavalas"). On April 26, 2009, the Vavalas filed a complaint to quiet title, asserting that their title was uncertain and not properly defined by the property records. The complaint focused, in part, upon the oil and gas rights of the property. The Vavalas maintained that the defendants in the quiet title action had not paid taxes on any of the oil and gas rights appurtenant to the property. The

---

* Retired Senior Judge assigned to the Superior Court.

Vavalas also asserted that they had acquired the oil and gas rights either through adverse possession or abandonment.

With their quiet title action, the Vavalas also filed a motion for service by publication. This motion alleged that all of the defendants named in the quiet title action, and their heirs, were either dead or their whereabouts unknown. This motion for publication was supported with an affidavit by Vavalas' counsel, asserting that he had made a detailed and good-faith investigation into the present whereabouts of the defendants and their heirs. This detailed investigation examined: (1) real estate and estate records, (2) tax assessment and local tax records, (3) voter registration records, (4) death records at the Elk County Courthouse, and (5) local telephone directories.

On April 22, 2009, the trial court granted the Vavalas' motion for service by publication. On May 6, 2009, and May 7, 2009, the Vavalas published notices of the complaint in two local newspapers, the Johnsonburg Press and the Ridgway Record. On September 24, 2009, the trial court granted the Vavalas' motion for default judgment on the quiet title action. On September 30, 2009, and October 1, 2009, this order was published in the same two local newspapers.

On March 24, 2010, Appellant filed a petition to open and/or strike the September 24, 2009 judgment. In its petition, Appellant averred that it was the successor to the oil and gas rights on the property in question. On May 26, 2010, a hearing was held on Appellant's petition. During that hearing,

Appellant sought to call Attorney Jessica Songster as an expert witness regarding oil and gas titles. The trial court denied Appellant's request on the basis that Attorney Songster had never performed a full title search in her history of working with oil and gas titles. Trial Court Opinion ("T.C.O."), 6/24/2011, at 3-4. Further, the trial court noted that Attorney Songster did not have experience testifying in any court in either Pennsylvania or New York. ***Id.*** On June 24, 2011, the trial court denied Appellant's petition to open and/or strike the judgment.

On July 11, 2011, Appellant filed a timely appeal. On July 22, 2011, the trial court directed Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). On August 12, 2011, Appellant filed its concise statement. On January 13, 2012, the trial court issued an opinion pursuant to PaR.A.P 1925(a).

Appellant raises the following issues for our review:

I. Whether the trial court abused its discretion in holding that [Appellant] did not meet the standard for opening a judgment?

A. Whether the judgment should have been opened for lack of jurisdiction because [Appellant] was the record holder of title, and should have been served personally, but was not?

B. Whether the judgment should have been opened for lack of jurisdiction when the trial court permitted service by publication after the Vavalas asserted they had made a good faith investigation to locate any defendants under Rule Pa.Civ.P. 430(a), when [Appellant] established that it (1) had record title to the oil and gas rights in the

property, and (2) had been assessed for taxes on the property from 1901 to 2002?

II. Whether the trial court abused its discretion by not qualifying Attorney Jessica Songster as an expert on the issue of ownership of the oil and gas rights when she had practiced basic real estate law since 2005, performed numerous "bring down" searches and had reviewed and rendered title opinions on approximately two abstracts compiled by others per day for eight months prior to testifying, but had never personally completed and compiled an abstract herself?

Brief for Appellant at 4.

Appellant first argues that the trial court abused its discretion when it held that Appellant did not meet the standard for opening a judgment. Specifically, Appellant argues that the judgment should have been opened because the trial court lacked jurisdiction to hear the case. Appellant bases this argument upon the assertion that, as the record titleholder of the property, it should have been personally served notice of the quiet title action. Brief for Appellant at 11.

"A petition to open a default judgment is an appeal to the court's equitable powers, and the trial court's disposition of the petition will not be disturbed absent an error of law or a manifest abuse of discretion." ***Deer Park Lumber, Inc. v. Major***, 559 A.2d 941, 943 (Pa. Super. 1989). The court must look to three factors when determining whether it is appropriate to open a default judgment: (1) the petition must be promptly filed, (2) the failure to make an appearance or file an answer must be excused, and (3) the party seeking to open a judgment must have a meritorious defense. ***Id.***

However, this analysis is appropriate only if the court has jurisdiction to hear the case. If the party seeking to open the judgment did not receive proper service or notice of the proceedings, the court has no jurisdiction over the party and the judgment is invalid. ***Id.*** Accordingly, we must first look to determine whether the notice by publication was proper such that the court had jurisdiction over Appellant to enter the default judgment in this matter.

Rule 410 of our Rules of Civil Procedure provides: "In actions involving title to, interest in, possession of, or charges or liens upon real property, original process shall be served upon the defendant in the manner provided by Rule 400 et seq." Pa.R.C.P. 410(a). However, Rule 410 also allows for service by publication if performed in accordance with Rule 430. Pa.R.C.P. 410(c). Rule 430 states that service by publication is appropriate when the plaintiff cannot serve the defendant under the applicable rule. Pa.R.C.P. 430(a). In these cases, the plaintiff must file a motion with the court requesting service by publication, and must accompany the motion with an affidavit stating the manner of investigation used to locate the defendant, and the reasons why service cannot be made. ***Id.*** The note to this rule states:

> An illustration of a good faith effort to locate the defendant includes (1) inquiries of postal authorities including inquiries pursuant to the Freedom of Information Act, 39 C.F.R. Part 265, (2) inquiries of relatives, neighbors, friends, and employers of the defendant, and (3) examinations of local telephone directories, voter registration records, local tax records, and motor vehicle records.

Id. These rules provide a procedure whereby plaintiffs can provide proof that they made a good-faith effort to comply with the service requirements under normal methods. ***Deer Park Lumber***, 559 A.2d at 944. The plaintiff must provide this proof before the court may allow for service by publication. ***Id.***

Turning to the facts of this case, the Vavalas sufficiently complied with the Rules of Civil Procedure to make service by publication appropriate. In their motion for service by publication, the Vavalas named a number of defendants who they believed to be deceased or whose whereabouts were unknown. The Vavalas supported this motion with an affidavit stating that their attorney had searched real estate records, estate records, tax assessment records, local tax records, voter registration records, Elk County death records, and local telephone directories. These good-faith efforts to locate the defendants were sufficient for the trial court to find service by publication to be warranted in this case. Therefore, it was not an abuse of discretion for the trial court to exercise jurisdiction over Appellant in its judgment.

We turn now to whether the trial court abused its discretion when it denied Appellant's petition to open the default judgment. As stated previously, three factors must be met before the trial court may open a judgment. The trial court found that Appellant had failed to meet any of the three requirements necessary to open a judgment. After a careful review of the record, we agree.

"The timeliness of a petition to open judgment is measured from the date that notice of the entry of the default judgment is received." ***US Bank N.A. v. Mallory***, 982 A.2d 986, 995 (Pa. Super. 2009). The law does not specify a time period within which a petition to open a judgment is timely. ***Id.*** Instead, it is up to the court to consider the length of time between discovery and the filing of the petition to open, as well as the reasons for the delay. ***Id.*** ***See US Bank N.A.***, 982 A.2d at 995 (holding petition to open filed approximately eighty-two days after entry of judgment was untimely); ***Myers v. Wells Fargo Bank, N.A.***, 986 A.2d 171, 176 (Pa. Super. 2009) (holding petition to open filed approximately fourteen days after entry of judgment was timely); ***Attix v. Lehman***, 925 A.2d 864, 867 (Pa. Super. 2007) (holding petition to open filed within ten days of entry of judgment was timely).

On September 24, 2009, the trial court entered the default judgment. On September 30 and October 1, 2009, the judgment was published in two local newspapers. On March 24, 2010, six months after the judgment was entered, Appellant filed its petition to open the judgment. That is well beyond what we previously held was untimely in ***US Bank N.A.***. Appellant claimed that this delay was due to lack of actual notice of the default judgment, yet Appellant failed to present evidence to support this assertion in the hearing on its petition to open the judgment. Further, the trial court found evidence that Appellant had been in contact with the Vavalas' attorney regarding the quiet title action in January, at least two months prior to the

filing of the petition to open. T.C.O. at 8. For these reasons, it was not an abuse of discretion for the trial court to hold that the petition was untimely. Because all three factors must be met for the trial court to open a default judgment, ***Deer Park Lumber***, 559 A.2d at 943, we need not review the remaining two factors. We find the untimeliness of Appellant's petition to be dispositive of this issue.

Finally, Appellant argues that the trial court abused its discretion when it failed to qualify Attorney Jessica Songster as an expert on ownership of oil and gas rights. Appellant claims that the standard for being qualified as an expert is a liberal one, and that Songster's knowledge of oil and gas title searches should have qualified her to testify as an expert under this standard.

When reviewing a trial court's decision not to qualify an expert witness, our standard of review is as follows:

> Whether a witness has been properly qualified to give expert witness testimony is vested in the discretion of the trial court. It is well settled in Pennsylvania that the standard for qualification of an expert witness is a liberal one. When determining whether a witness is qualified as an expert the court is to examine whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation.

Wexler v. Hecht, 847 A.2d 95, 98-99 (Pa. Super. 2004) (internal citations omitted).

"In order to qualify as an expert witness in a given field, a witness normally need only possess more expertise than is within the ordinary range of training, knowledge, intelligence, or experience." ***Freed v. Geisinger***

Med. Ctr., 971 A.2d 1202, 1206 (Pa. 2009), *aff'd on reargument*, 5 A.3d 212 (Pa. 2010). If the witness does have specialized knowledge on the subject, he or she may testify and the finder of fact will determine the weight to be given that testimony. ***Miller v. Brass Rail Tavern, Inc.***, 664 A.2d 525, 528 (Pa. 1995).

In examining Attorney Songster's qualifications, it was not an abuse of the trial court's discretion to find that the witness lacked the experience or education necessary to be qualified as an expert on oil and gas rights. The record shows that the witness had never performed a full title search during her time as an attorney. Attorney Songster also had less than a year of experience reviewing oil and gas abstracts. Further, she had never performed a complete search of oil and gas interests in or under any property. We agree with the trial court that Attorney Songster did not have the specialized knowledge necessary to assist the finder of fact. Therefore, the trial court's ruling denying her qualification as an expert witness was appropriate.

Order affirmed. Jurisdiction relinquished.

Judgment Entered.

Nicholas V. Cusatti

Deputy Prothonotary

Date: 5/1/2013