In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-14-00325-CV

FORT APACHE ENERGY, INC., DAVID JACOB HRIVNATZ, IN HIS CAPACITY AS PERMANENT GUARDIAN OF THE PERSON AND ESTATE OF DAVID ALLAN HRIVNATZ, AN INCAPACITATED PERSON, AND HARRY G. HRIVNATZ JR.,
Appellants

V.

RESACA RESOURCES, LLC,
Appellee

On Appeal from the 88th District Court
Tyler County, Texas
Trial Cause No. 22494

MEMORANDUM OPINION

This appeal involves two competing oil and gas leases purportedly conveyed by three members of the Hrivnatz family. The trial court ruled on nine pending motions for summary judgment or partial summary judgment filed by appellant Fort Apache, Inc. ("Fort Apache") and various other parties and signed a written

order that severed "any claims or defenses of the [p]arties that are not decided by the Final Judgment" into a new cause of action and abated those claims. Fort Apache, Harry G. Hrivnatz Jr. ("Hrivnatz Jr."), and David Jacob Hrivnatz ("Jay"),[1] in his capacity as permanent guardian of the person of David Allan Hrivnatz ("David"), an incapacitated person, appealed the trial court's final judgment. We affirm the trial court's judgment in part and reverse and remand in part.

FACTUAL BACKGROUND

Appellant Fort Apache filed suit against Resaca Resources, LLC ("Resaca") and numerous other working interest owners, seeking an adjudication of the "rights, status, and legal relations between Fort Apache and the Defendants, due to competing oil, gas[,] and mineral leases" pertaining to a 112.174-acre tract of property in Tyler County, Texas. Fort Apache pleaded that it was engaged in oil and gas exploration in Tyler County, and while performing due diligence, "Fort Apache discovered that a portion of the [p]roperty's mineral interest of the Hrivnatz family (owners of 1/2 of the oil, gas[,] and minerals on the [p]roperty) was unleased[,]" and that a lease from the Hrivnatzes to Miller Energy, Inc. was "flawed."

[1] David Jacob Hrivnatz is the son of David Allan Hrivnatz.

According to Fort Apache's petition, all of the defendants' alleged working interests and overriding royalty interests in the subject property are traceable to eight leases, "all with Miller Energy, Inc. as Lessee[.]" Fort Apache contended that seven of the leases traced to Mary Guimont McBride, who, together with her husband, conveyed to H.G. Hrivnatz Sr. as "trustee" an undivided 1/2 interest in the oil, gas, and other minerals.[2] The eighth lease, which is at issue in this case, is the January 1, 2009, lease signed by Hrivnatz Jr. (as "Harry Hrivnatz") to Miller Energy, Inc. According to Fort Apache, "it is likely that Miller Energy thought that the Hrivnatz-Miller Lease conveyed to them the other 1/2 of the minerals[,]" but Hrivnatz Jr. did not have "the authority or ability to transfer the other 1/2 undivided interest in the Property's minerals in 2009[,]" and Fort Apache has now leased those minerals. Miller Energy subsequently assigned its leases to appellee Resaca, and Resaca[3] spudded a well on the property in November 2011.

Fort Apache pleaded that although the property was conveyed to (and later conveyed by) H.G. Hrivnatz as trustee, there is neither any known trust agreement nor any known beneficiaries of any such trust. Fort Apache contended that the property was therefore the community property of Harry G. ("H.G.") Hrivnatz and

[2]The McBrides retained the other 1/2 undivided interest in the tract.

[3]For clarity, brevity, and convenience, we will refer to the defendants-appellees collectively as "Resaca".

Vannie, his wife. H. G. Hrivnatz died on May 22, 1992, and his will devised his estate as follows: 50% to Vannie and 25% to each of his sons, Hrivnatz Jr. and David, "to be held in trust by [Vannie] as long as she is alive." Fort Apache pleaded that Vannie already owned half of the 50% mineral estate as community property, and H.G. Hrivnatz's will gave all power over the mineral estate to Vannie and required Vannie to control and administer all of the bequeathed property throughout her lifetime. Fort Apache contended that it is unclear from the language of H. G. Hrivnatz's will whether he intended for all of the property to be held in trust by Vannie or for only the property devised to his sons to be held in trust by Vannie. According to Fort Apache, "Vannie King Hrivnatz indisputably held all executive rights . . . in the [p]roperty as of the time of her husband's death."

Fort Apache pleaded that Miller Energy obtained a three-year lease signed by "Harry Hrivnatz" on January 1, 2009, but the lease was actually signed by Harry Hrivnatz Jr., who Fort Apache contends "neither owned nor controlled the Hrivnatz minerals at the date of the execution of the Hrivnatz-Miller Lease, as Vannie Hrivnatz was still alive." The lease taken by Miller Energy does not mention Vannie or any trust. The lease provided that it would continue after the primary term as long as operations were conducted upon the land without cessation

for more than ninety consecutive days. According to Fort Apache, Resaca's title attorney noted Vannie's potential interest in two title opinions, but neither Miller nor Resaca "performed any title curative to secure Vannie's signature individually or as trustee."

Fort Apache pleaded that landmen hired by Southern Star Exploration LLC ("Southern Star") "discovered the ineffective Hrivnatz-Miller lease beginning in early 2011[,]" when Southern Star and Fort Apache were leasing tracts around the property in Tyler County. According to Fort Apache, the primary three-year term on the Miller leases would expire on January 1, 2012, and after confirming that the Hrivnatz interests were unleased, Southern Star and Fort Apache contacted Hrivnatz Jr. to negotiate a lease with the family. Fort Apache pleaded that although Hrivnatz Jr. notified both Miller and Resaca about problems with the Miller lease, "neither Miller nor Resaca Resources did anything to ensure they had an effective lease." Fort Apache contended that as negotiations for a Southern Star-Hrivnatz lease were concluding, Resaca took an assignment of the lease from Miller, drilled, and spudded a well, and Southern Star finished its lease negotiations.

According to Fort Apache, while Vannie was still alive, Fort Apache, via an assignment to Fort Apache of the Hrivnatz-Southern Star lease, leased the property from Vannie, "as well as her sons in all relevant capacities." The "Memorandum of

Oil, Gas and Mineral Lease" signed by Hrivnatz Jr. on February 10, 2012, stated that Hrivnatz Jr. was acting individually and as trustee of the testamentary trust created under his father's will, as trustee of the Vannie K. Hrivnatz revocable trust, and as attorney-in fact for Vannie and David. Vannie signed (via signature by her attorney-in-fact, Hrivnatz Jr.) individually and as trustee of the testamentary trust created under H.G. Hrivnatz's will. The memorandum indicated that the Hrivnatzes were granting a three-year lease to Southern Star.

Fort Apache pleaded that it notified Resaca's oil purchaser, GulfMark Energy, Inc., ("GulfMark") of the title dispute, and GulfMark suspended production revenues. According to Fort Apache, Resaca, unbeknownst to Fort Apache, found another oil purchaser and, through an indemnifying division order, Resaca agreed to assume all responsibilities for proper and timely disbursements to all interest owners entitled to share in production. Fort Apache argued in its petition that Resaca thereby "assumed the duties of a payor as that term is defined under Section 91.401 of the Texas Natural Resources Code, and effective July 20, 2012, intervenor O.G.O. Marketing, LLC ("OGO") paid 100% of the production revenues attributable to the Miller leases without suspending the 50% attributable to the Hrivnatz interests.

Fort Apache pleaded that because the Hrivnatz-Miller Lease did not convey any mineral rights to Miller, the Hrivnatz-Miller lease constitutes a cloud on title vested in Fort Apache to the property. Fort Apache asserted causes of action for (1) declaratory judgment; (2) trespass to try title; (3) equitable suit to quiet title; (4) mineral trespass; (5) conversion and accounting; (6) recovery under the Natural Resources Code "for all funds Resaca Resources wrongfully disbursed amongst the Defendants[,]" as well as attorney's fees "as provided by Section 91.406[;]" (7) money had and received from each defendant; and (8) damages, including actual damages as well as punitive damages against defendants under section 41.003 of the Texas Civil Practice and Remedies Code because, according to Fort Apache, defendants "conspired to maliciously trespass on [Fort Apache]'s property, convert [Fort Apache]'s property[,] and fraudulently conceal their theft of [Fort Apache]'s production revenue.

Resaca entered a general denial and pleaded "not guilty" to Fort Apache's "allegations of trespass to try title." In addition, Resaca asserted that Fort Apache's claims were barred by fraud, as well as by estoppel or waiver. According to Resaca, "Hrivnatz[,] Jr. is in possession of all payments." Resaca asserted a counterclaim, in which it sought a declaration that its lease was valid, and Resaca also sued Hrivnatz Jr. as a third-party defendant. Resaca contended that Hrivnatz

Jr. “never disclosed the death of his father to Miller Energy, instead holding himself out to be Hrivnatz Sr. and representing himself as having all requisite power and authority to lease the full [i]nterest.” As discussed above, Resaca had obtained the Miller leases by assignment. Resaca asserted causes of action for statutory fraud, common law fraud, equitable estoppel, and breach of warranty against Hrivnatz Jr. According to Resaca, Hrivnatz Jr. breached his warranty obligation to Resaca by failing to defend title to Miller Energy’s interest. Specifically, Resaca pleaded that the Miller lease is a valid and enforceable contract between Miller Energy and Hrivnatz Jr., and Resaca alleged that in section 10 of the Miller lease, “Hrivnatz, Jr. warranted as follows: ‘Lessor her[e]by warrants and agrees to defend title to said land against the claims of all persons whatsoever.’”

OGO intervened in the litigation and requested declaratory relief. According to OGO, OGO and Resaca entered into a “100% Indemnifying Division Order under which OGO agreed to remit 100% of the proceeds received by OGO from the sale of oil produced from the Hriv[n]atz-McBride Lease and delivered by Resaca to OGO, and Resaca agreed to properly and timely disperse such production revenues to the parties entitled thereto and to indemnify and hold OGO harmless from claims resulting from such disbursement.” OGO sought a

declaration that, pursuant to section 91.401 of the Texas Natural Resources Code, OGO is not a payor and that Resaca, not OGO, was required to disperse production revenues remitted to it.

THE MOTIONS FOR SUMMARY JUDGMENT

The trial court ruled on nine motions for summary judgment, six of which are at issue in this appeal: (1) Fort Apache's motion, in which Fort Apache asserted that, as a matter of law, the Miller lease "failed to lease the mineral interest at issue in this suit" because "Defendants failed to lease from the record title owners"; (2) Resaca and other defendants' motion for partial summary judgment against Hrivnatz Jr. for breach of his alleged duty to defend the Miller lease; (3) Resaca and other defendants' motion based on estoppel and after-acquired title; (4) Resaca and other defendants' motion based on powers of attorney held by Hrivnatz Jr. to act on Vannie's behalf; (5) Resaca and other defendants' motion for summary judgment as to all of Fort Apache's claims "other than accounting"; and (6) OGO's hybrid motion for partial summary judgment. The trial court denied Fort Apache's motion for summary judgment and granted the other motions for summary judgment. In its final judgment, the trial court explicitly stated that its rulings on the various motions for summary judgment "bind[] all parties in this lawsuit,

including . . . David Jacob Hrivnatz, in his Capacity as Permanent Guardian of the Person and Estate of David A. Hrivnatz[.]"

APPELLANTS' ISSUES

In five appellate issues, Fort Apache challenges (1) the denial of its motion for summary judgment, (2) the granting of summary judgment regarding powers of attorney, (3) the granting of summary judgment on estoppel and after-acquired title, (4) the granting of summary judgment on all of its claims other than its claim for an accounting, and (5) the granting of OGO's motion for summary judgment. In three appellate issues, Hrivnatz Jr. challenges the granting of partial summary judgment against him as to breach of his alleged duty to defend the Miller lease. In his sole appellate issue, Jay contends that "the trial court erred as a matter of law by validating the Miller Lease as a conveyance of the mineral interest" owned by his incapacitated father in its final judgment and by holding that its rulings on the various motions for summary judgment bound Jay and his incapacitated father.

FORT APACHE'S ISSUE TWO

As previously stated, in its second issue, Fort Apache challenges the granting of summary judgment in favor of Resaca regarding powers of attorney. We address issue two first. Resaca's traditional motion for summary judgment based on powers of attorney alleged as follows: (1) Resaca acquired title to the

entire Hrivnatz half interest in the minerals under the 2009 Miller lease; (2) powers of attorney from Vannie gave Hrivnatz Jr. authority to lease the entire Hrivnatz half interest; (3) Hrivnatz Jr. leased the entire Hrivnatz half interest to Miller Energy, despite the fact that he only signed his own name and "the lease did not indicate that he signed in a representative capacity[;]" (4) Hrivnatz Jr. leased the entire Hrivnatz half interest "because the lease referred to the interest, and the attending circumstances show that [he] acted under the powers of attorney and intended to lease the entire interest; (5) the Miller lease was effective although the powers of attorney were not recorded in 2009, when the lease was executed; (6) because Miller leased the full Hrivnatz half interest in 2009, the Hrivnatz family had no interest to lease to Southern Star in 2012, and the 2012 lease is ineffective; and (7) Fort Apache's claims for mineral trespass, conversion, collection of proceeds, money had and received, and to quiet title "all fail because they are premised on the invalidity of the Miller lease."

We review the trial court's summary judgment *de novo*. *See Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). The movant for traditional summary judgment must establish that (1) there is no genuine issue of material fact and (2) it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995).

If the moving party produces evidence entitling it to summary judgment, the burden shifts to the nonmovant to present evidence that raises a material fact issue. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). In determining whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in his favor. *Id*. at 549.

The parties agree that Vannie owned one-half of H.G. Hrivnatz's interest as community property prior to the death of H.G. Hrivnatz and that Vannie inherited an additional 25% of H.G. Hrivnatz's interest upon his death. As discussed above, H.G. Hrivnatz will devised 25% of his property to each of his sons, Hrivnatz Jr. and David, "to be held in trust by [Vannie] as long as she is alive." Depending upon how the devise is construed, Hrivnatz Jr. either owned nothing outright in January 2009 (because the property was held in trust by his mother for the benefit of Hrivnatz Jr. and David) or owned a 12.5% interest in the Hrivnatz one-half interest in the property. When Hrivnatz Jr. executed the Miller lease on January 1, 2009, he signed his name as "Harry Hrivnatz[,]" and the lease did not reference the existence of any powers of attorney, nor did the Producers 88 form lease indicate that Hrivnatz Jr. was acting in anything other than his individual capacity.

In its motion for summary judgment based upon powers of attorney, Resaca contended that Vannie executed a durable power of attorney to Hrivnatz Jr. in 2003, and again in 2007, and that the powers of attorney granted Hrivnatz Jr. the authority to act as Vannie's attorney-in-fact. As Resaca stated in its motion, neither of the powers of attorney was recorded on January 1, 2009, when Hrivnatz Jr. signed the Miller lease; rather, the powers of attorney were recorded in 2012.

Section 489 of the Texas Probate Code (in the Durable Power of Attorney Act), which was in effect when the Miller lease was executed, provided as follows: "A durable power of attorney for a real property transaction requiring the execution and delivery of an instrument that is to be recorded, including a[n] . . . oil, gas, or other mineral lease, . . . shall be recorded in the office of the county clerk of the county in which the property is located."[4] *See* Act of April 15, 1993, 73rd Leg., R.S., ch. 49, §1, sec. 489, 1993 Tex. Gen. Laws 102, 103 (current version at Tex. Est. Code Ann. § 751.151 (West Supp. 2015)). Resaca argued that "the plain words of § 489 prescribe only the place where the power of attorney is to be recorded[,]" and Resaca also contended that section 489 does not apply

[4]Section 489 was repealed as part of moving the Texas Probate Code into the Estates Code, and the current version of the statute, which adds a time requirement for recording ("not later than the 30th day after the date the instrument is filed for recording"), went into effect on September 1, 2015. Tex. Est. Code Ann. § 751.151 (West Supp. 2015).

because section 13.001(b) of the Texas Property Code “specifically provides that an unrecorded instrument is binding on a party to the instrument and on a subsequent purchaser who has notice of the instrument.”

Section 13.001(b) provides as follows: “The unrecorded instrument is binding on . . . a subsequent purchaser . . . who has notice of the instrument.” Tex. Prop. Code Ann. § 13.001(b) (West 2014). Fort Apache (via its predecessor, Southern Star) referred to and relied upon the powers of attorney in the Memorandum of Oil, Gas, and Mineral Lease executed by Hrivnatz Jr. and Vannie. In the memorandum, Hrivnatz Jr. stated that he was acting individually and as trustee of the testamentary trust created under his father’s will, as trustee of the Vannie K. Hrivnatz revocable trust, as attorney-in fact for both Vannie and David, and Vannie stated that she was signing as trustee of the testamentary trust created under H.G. Hrivnatz’s will.

Resaca argues that because Fort Apache had knowledge of the existence of the unrecorded durable powers of attorney when Hrivnatz Jr. and Vannie signed the Southern Star lease, section 13.001(b) of the Property Code controls. Although Fort Apache had notice of the unrecorded durable powers of attorney when the Southern Star lease was executed, Resaca did not demonstrate that no genuine

issues of fact remained or that it was entitled to judgment as a matter of law as to the powers of attorney.

The plain language of section 13.001 of the Property Code provides that it is a conveyance or interest in property to which a subsequent purchaser may be bound, not an unrecorded durable power of attorney under which a party might have been purporting to act on behalf of a party to the transaction. *See* Tex. Prop. Code Ann. § 13.001(b); *SWEPI LP v. R.R. Comm'n of Tex.*, 314 S.W.3d 253, 260 (Tex. App.—Austin 2010, pet. denied) ("We begin with the plain language of the statute at issue and apply its common meaning."). The powers of attorney do not describe any interest in real property, nor do they purport to convey any such interest. In addition, the cases Resaca cited as support for its position predate the enactment of the Durable Power of Attorney Act. *See, e.g., Rep. Nat'l Bank of Dallas v. Fredericks*, 155 Tex. 79, 283 S.W.2d 39 (1955); *Davis v. Magnolia Petroleum Co.*, 134 Tex. 201, 134 S.W.2d 1042 (1940); *Griffin v. Stanolind Oil & Gas Co.*, 133 Tex. 45, 125 S.W.2d 545 (1939); *Hill v. Conrad*, 91 Tex. 341, 43 S.W.789 (1897); *Morgan v. White*, 20 S.W.2d 366 (Tex. Civ. App.—Beaumont 1929, no writ); *Trinity Cty. Lumber Co. v. Pinckard*, 23 S.W. 720, 723 (Tex. Civ. App. 1893, no writ); *Bennett v. Va. Ranch, Land & Cattle Co.*, 21 S.W.126 (Tex. Civ. App. 1892, no writ); *see also* Act of April 15, 1993, 73rd Leg., R.S., ch. 49, §

3, 1993 Tex. Gen. Laws 102, 112 (current version at Tex. Est. Code Ann. § 751.001-.151 (West 2014 and West Supp. 2015)).

We conclude that Resaca failed to meet is summary judgment burden on its powers of attorney claims. *See* Tex. R. Civ. P.166a(c); *Randall's Food Mkts.,* 891 S.W.2d at 644; *Montenegro v. Ocwen Loan Servicing*, *LLC,* 419 S.W.3d 561, 569 (Tex. App.—Amarillo 2013, pet. denied) (An unrecorded, and therefore ineffective, power of attorney did not authorize the grantor to convey the subject property.). Accordingly, the trial court erred by granting Resaca's motion for summary judgment based on powers of attorney. We sustain issue two and reverse the trial court's order granting summary judgment based on powers of attorney.

FORT APACHE'S ISSUE THREE

Fort Apache's third issue challenges the granting of Resaca's traditional motion for summary judgment on estoppel and after-acquired title. In its motion, Resaca argued that, with respect to Fort Apache's trespass to try title claim, (1) Fort Apache was estopped from denying the validity of the Miller lease or, alternatively, (2) half of the property that Hrivnatz Jr. inherited upon Vannie's death on October 25, 2012, passed to the assignees of the Miller lease under the after-acquired title doctrine. Resaca contended that Hrivnatz Jr. is estopped from denying that he transferred title under the Miller lease, and because Vannie and

David are Hrivnatz Jr.'s "privies at blood" and Southern Star and Fort Apache are Hrivnatz Jr.'s "privies at law," they are likewise estopped. According to Resaca, "it was impossible for [Hrivnatz Jr.] to convey the [i]nterest to Southern Star without contradicting his recital and averment in the Miller Energy Lease that he had previously conveyed and warranted the [i]nterest to Miller Energy."

Resaca asserted that even if Hrivnatz Jr. had no right to convey the interest when the Miller lease was executed, "he and his privies are nevertheless bound by the recitals contained therein." Resaca contended that the Miller lease is valid due to the existence of the unrecorded powers of attorney, yet Resaca also claimed that the Southern Star lease is invalid because although Hrivnatz Jr. explicitly signed the Southern Star lease in several capacities, including as attorney-in-fact for Vannie, Hrivnatz Jr. and his privies (Vannie and David) are bound by the provisions of the Miller lease. Interestingly, although Resaca argues that the existence of the powers of attorney in 2009 estops Fort Apache from denying the validity of the Miller lease, Resaca complains that the Southern Star lease was signed only by Hrivnatz Jr., who stated in the memorandum of oil and gas lease that he was signing on behalf of himself, his brother, and his mother pursuant to powers of attorney.

As support for its position, Resaca cited *Greene v. White*, 153 S.W.2d 575 (Tex. 1941), and *Lindsay v. Freeman*, 83 Tex. 259, 18 S.W. 727 (1892), both of which are cases in which the Supreme Court applied the doctrine of estoppel to persons who were privies of the parties to a conveyance. In response, Fort Apache contended that the Miller lease is "void and invalid as a matter of law" because Hrivnatz Jr. lacked authority to convey the interest and, therefore, the doctrine of estoppel does not apply. Fort Apache also argued that the Miller lease expired before Hrivnatz Jr. acquired title, since its primary term ended on January 1, 2012.[5]

"The doctrine of estoppel by deed precludes parties to a deed from denying the truth of any material fact asserted in the deed." *Teal Trading and Dev., LP v. Champee Springs Ranches Prop. Owners Ass'n*, 432 S.W.3d 381, 388 (Tex. App.—San Antonio 2014, pet. denied). Estoppel by deed binds both the parties to the deed and their successors in interest. *Id*. "Estoppel by deed is founded upon the theory that the parties have contracted upon the basis of the recited facts." *Id*. Although estoppel by deed prevents parties to a deed and their privies from challenging the truth of recited facts in a deed, the doctrine does not validate an

[5]Although we need not reach this argument for reasons explained above, we note that the Miller lease contained a provision that the lease would continue beyond the primary term if operations were being conducted on the land. Both Fort Apache and Resaca state in the appellate record and in their briefs that Resaca drilled a producing well on the property before the Miller lease's primary term expired.

otherwise invalid conveyance and cannot bind or benefit strangers to the conveyance. *Id.*

As previously discussed, nothing in the Miller lease indicated that Hrivnatz Jr. was acting pursuant to the powers of attorney or that he was signing in anything other than his individual capacity, and the recitals regarding the powers of attorney in the Southern Star lease and the memorandum thereof cannot be read into the Miller lease. *See Chesapeake Expl., L.L.C. v. Energen Res. Corp.*, 445 S.W.3d 878, 881-82 (Tex. App.—El Paso 2014, no pet.) ("The primary duty of the court in interpreting an oil and gas lease is to ascertain the parties' intent as expressed within the four corners of the lease."). Because the Miller lease was not signed by H.G. Hrivnatz Jr. in a representative capacity, we conclude that the doctrine of estoppel by deed does not apply, Resaca did not establish that it is entitled to judgment as a matter of law, and there are genuine issues of material fact regarding whether Hrivnatz Jr. had authority to convey any interest on behalf of Vannie or David in the Miller lease (and whether Vannie and David are privies of Hrivnatz Jr.). We conclude that the trial court erred by granting summary judgment on the basis of estoppel by deed. *See id.*; *see also* Tex. R. Civ. P. 166a(c).

We now turn to the doctrine of after-acquired title. As previously discussed, Resaca argued that it is entitled to fifty percent of the interest under the after-

acquired title doctrine. Specifically, Resaca contended that Vannie died on October 25, 2012, and her will devised one half of her property to Hrivnatz Jr. and one-half to David, so "it is undisputed that Hrivnatz, Jr. now holds title to 50% of the [i]nterest." According to Resaca, because Hrivnatz Jr. averred and warranted in the Miller lease that he was conveying the entire interest to Miller Energy, the title Hrivnatz Jr. acquired in the interest upon his mother's death passed to Miller Energy.

The doctrine of after-acquired title does not apply to a void conveyance. *See Pascoe v. Keuhnast*, 642 S.W.2d 37, 40 (Tex. App.—Waco 1982, writ ref'd n.r.e.) (declining to apply doctrine of after-acquired title to a purported conveyance by wife without husband's joinder because said conveyance was void). The doctrine of after-acquired title rests upon the warranty of the grantor, and if the warranty is a nullity, the doctrine does not apply. *Id*. As discussed above, there are genuine issues of material fact regarding whether Hrivnatz Jr. had authority to convey any interest on behalf of Vannie or David in the Miller lease, and Resaca did not establish that it is entitled to judgment as a matter of law. Accordingly, the trial court erred by granting summary judgment. *See* Tex. R. Civ. P. 166a(c). We sustain issue three and reverse the trial court's summary judgment based upon estoppel and after-acquired title.

FORT APACHE'S ISSUE FOUR

Fort Apache's fourth issue challenges the granting of Resaca's traditional motion for summary judgment as to all of Fort Apache's "claims other than accounting." Resaca contended that even if Fort Apache were to prevail in the lawsuit, it would own only an undivided one-half interest and would be a co-tenant with Resaca, who owns the other undivided one-half interest from the McBride family. According to Resaca, Fort Apache's "only available legal remedy against Defendants is for an accounting of the proceeds of any oil taken from the entire interest by Defendants, less the necessary and reasonable costs of production and marketing."

Citing *White v. Smyth*, 147 Tex. 272, 214 S.W.2d 967, 975 (1948) and *Burnham v. Hardy Oil Co.*, 147 S.W. 330, 334-35 (Tex. Civ. App.—San Antonio 1912), *aff'd*, 108 Tex. 555, 195 S.W. 1139 (Tex. 1917), Resaca argued that each mineral co-tenant is entitled to prospect and produce oil from the commonly-owned property without the consent of its co-tenants, and its only obligation to the other co-tenants is to account for their share of the proceeds of oil, less necessary reasonable costs of production and marketing. Resaca then asserted that the co-tenant "is not entitled to seek additional legal remedies, such as mineral trespass, conversion, money had and received, or other damages." Resaca also argued that

Fort Apache's "claim for proceeds, interest, and attorney's fees under the Texas Natural Resources Code must also fail" because there is a title dispute over the minerals.

We do not disagree that *White* and *Burnham* stand for the general proposition for which Resaca cited them, *i.e.*, that each mineral co-tenant is entitled to prospect and produce oil without the consent of its co-tenants, but must pay his co-tenants their share of the proceeds, less necessary reasonable costs of production and marketing. However, Resaca cited no authority for the proposition upon which the motion is based (that a co-tenant is not entitled to seek the additional legal remedies of mineral trespass, conversion, money had and received, or other damages), and we are aware of none. Additionally, the parties' dispute concerns which of them has the superior claim as to the mineral rights of the Hrivnatz portion; that is, the dispute is not simply one between the owners of the McBride interest and the owners of the Hrivnatz interest. As discussed at length above, Resaca did not establish that it is entitled to judgment as a matter of law as to all of Fort Apache's claims except accounting. *See* Tex. R. Civ. P. 166a(c). The trial court erred by granting summary judgment. We sustain issue four and reverse the trial court's summary judgment.

FORT APACHE'S ISSUE FIVE

Fort Apache's fifth issue challenges the granting of intervenor OGO's hybrid motion for partial summary judgment. In its motion, OGO asserted that it is entitled to summary judgment as to its declaratory judgment cause of action because there is no evidence of nonpayment, and there is no genuine issue of material fact regarding whether OGO's performance under the indemnifying division order complied with the requirements of the Texas Natural Resources Code. OGO also asserted that it is entitled to summary judgment as to Fort Apache's cause of action because "there is no evidence of nonpayment or conversion of the proceeds of production."

In response, Fort Apache argued that OGO is a "payor" under section 91.401 of the Texas Natural Resources Code and cannot prove an exception to the statute. Fort Apache asserted that both OGO's traditional and no-evidence grounds for summary judgment turn upon the issue of whether OGO is a payor.

When a party files a hybrid motion for summary judgment, we generally first review the judgment under the no-evidence standards of Rule 166a(i). *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600-01 (Tex. 2004). In reviewing a no-evidence motion for summary judgment, we view the evidence in the light most favorable to the non-movant. *Id*. at 601. "A genuine issue of material fact exists if

more than a scintilla of evidence establishing the existence of the challenged element is produced." *Id.* at 600. "When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983).

OGO argued in its no-evidence motion that Fort Apache had no evidence to establish its claims for non-payment of oil and gas proceeds and conversion. According to OGO, for Fort Apache to make a claim against OGO for non-payment of oil and gas proceeds, Fort Apache must show that OGO has not complied with the statutes governing payments of oil and gas proceeds. OGO asserted that because a 100% indemnifying division order is in place between OGO and Resaca, "Fort Apache would need to establish that the Division Order agreement somehow fails to satisfy the requirements under Texas Natural Resources Code[] § 91.401 to transfer Payor designation and responsibility from OGO to Resaca." According to OGO, Fort Apache has no evidence that OGO is the payor under the applicable statute.

As mentioned above, Gulfmark Energy was Resaca's original oil producer. In June of 2012, Resaca terminated its agreement with Gulfmark and entered into a new agreement with OGO to purchase production from the lease. In the agreement

between Resaca and OGO, Resaca warranted that title to the oil purchased was free and clear of any encumbrances and that it had the right to sell and deliver the crude oil. Resaca further agreed to "indemnify and hold [OGO] harmless from and against any and all cost, damage, and expense suffered and incurred by reason of any failure of the title so warranted or any inaccuracy in the representation of [Resaca's] right and authority to sell said crude oil made herein." Resaca and OGO also signed a 100% indemnifying division order and a division order for disbursement of the proceeds, which required OGO to tender payment to Resaca each month, and in return, Resaca warranted in the division order that it would properly and timely disburse funds to all interest owners entitled to share in the production, and Resaca agreed to hold OGO harmless from all losses, costs, expenses, or other damages that might be associated with paying the proceeds. According to OGO, Resaca is the statutory and contractual payor under the division order.

The parties apparently agree that sections 91.401-.407 of the Texas Natural Resources Code govern the dispute. Section 91.401 provides as follows, in pertinent part:

> **§ 91.401. Definitions**
> . . .
> (2) "Payor" means the party who undertakes to distribute oil and gas proceeds to the payee, whether as the purchaser of the

> production of oil or gas generating such proceeds or as operator of the well from which such production was obtained or as lessee under the lease on which royalty is due. The payor is the first purchaser of such production of oil or gas from an oil or gas well, *unless the owner of the right to produce under an oil or gas lease or pooling order and the first purchaser have entered into arrangements providing that the proceeds derived from the sale of oil or gas are to be paid by the first purchaser to the owner of the right to produce who is thereby deemed to be the payor having the responsibility of paying those proceeds received from the first purchaser to the payee*.

Tex. Nat. Res. Code Ann. § 91.401(2) (West 2011) (emphasis added). Under the crude oil purchase agreement between OGO and Resaca, OGO is the first purchaser of oil production from the lease. OGO (the first purchaser) had a contract with Resaca (the owner of the right to produce) that assigned to Resaca the full responsibility for distributing production revenue. The indemnifying division order obligated OGO to tender proceeds of production to Resaca, and Resaca agreed to properly and timely disburse the proceeds to the interest owners. In addition, under the terms of the indemnifying division order, Resaca agreed to indemnify and hold OGO harmless from all liability from payments made to the owner in accordance with the division of interest.

We conclude that Fort Apache produced no evidence that OGO was a "payor" as defined by section 94.401(2). Accordingly, the trial court did not err by granting OGO's no-evidence motion for partial summary judgment. *See id.*; Tex. R. Civ. P. 166a(i); *Ridgway*, 135 S.W.3d at 600; *Kindred*, 650 S.W.2d at 63.

Because OGO's traditional motion for partial summary judgment also turns upon whether OGO is a "payor" as defined by section 94.401(2) of the Natural Resources Code, we need not address it. *See* Tex. R. App. P. 47.1. We overrule issue five and affirm the trial court's partial summary judgment in favor of OGO.

FORT APACHE'S FIRST ISSUE

Fort Apache's first issue challenges the trial court's denial of Fort Apache's hybrid motion for summary judgment. Specifically, Fort Apache asserts that (1) it established failure of title under the Miller lease as a matter of law, and (2) Resaca's counterclaims for trespass to try title, slander of title, tortious interference, and declaratory judgment fail because they require the existence of a valid lease. Fort Apache's motion stated that it "relates to [Resaca's] affirmative claims of superior title by virtue of the Miller [l]ease." Fort Apache's motion also noted that both parties claim superior title in their trespass to title claims, and, therefore, addressed both Resaca's alleged lack of title under the Miller lease and Fort Apache's alleged superior title under the Southern Star lease.

As mentioned above, when a party files a hybrid motion for summary judgment, we first review the judgment under the no-evidence standards of Rule 166a(i). *Ridgway*, 135 S.W.3d at 600-01. Fort Apache's motion asserted that because Miller Energy did not properly lease the interest because Hrivnatz Jr.

signed the lease as "Harry Hrivnatz" and the lease did not refer to Vannie, a trust, or any powers of attorney, the Miller lease is invalid, but the Southern Star lease is valid because it was leased "from the Hrivnatz family in all relevant capacities." In response, Resaca argued as an affirmative defense, *inter alia*, that Vannie and David lacked capacity in 2012 when the Southern Star lease was executed.

Fort Apache's no-evidence motion for summary judgment pertained to Resaca's claim for conspiracy and Resaca's affirmative defense of lack of capacity, fraud, prior possession, estoppel through after-acquired property doctrine, and what Fort Apache calls Resaca's "hodge-podge" defenses: waiver, unclean hands, bona fide purchaser, and laches. In its no-evidence motion for summary judgment, Fort Apache contended that Resaca is unable to produce evidence that Vannie or David lacked capacity when the Southern Star lease and related documents were executed. Fort Apache also argued that even if Resaca could establish genuine issues of material fact regarding Vannie's capacity in 2012, Resaca "cannot countermand Vannie's capacity to execute the prior powers of attorney which were recorded as part of the entire Southern Star transaction with the family."

Attached to Resaca's response to Fort Apache's motion was a letter from a psychiatrist, who stated: Vannie was ninety-seven years old when she signed the Southern Star lease in February 2012; in 2008, Vannie was noted to have dementia,

including impaired short-term memory and moderately impaired decision-making ability; and Vannie continued to decline through 2012 and became wheelchair bound, unable to see or hear, and had "no executive function." The psychiatrist opined that Vannie lacked the mental capacity to understand and execute any kind of legal or financial document from January 2012 through April 2012.

Also attached to Resaca's response were excerpts from Jay's deposition testimony. Jay testified that his father was diagnosed with a four-centimeter brain tumor, which doctors believed had been present "since 1994 when he first reported losing his sense of smell." Jay also testified that his father's cognitive ability had been in decline for years, and David had surgery to remove the brain tumor on January 12, 2012. Also attached to Resaca's response was Jay's application for appointment as permanent guardian of David's person and estate, which was filed on May 13, 2013. Included with the application was a certificate of medical examination, in which the physician noted that David was unable to perform sophisticated financial transactions, could not solve problems and reason logically, and could not manage his business and financial affairs. Resaca also attached a copy of a court order that appointed Jay to be David's guardian. Resaca asserts that David executed a power of attorney, in which he named Hrivnatz Jr. as his

attorney-in-fact, but admits that the alleged power of attorney has either been lost or destroyed.

Viewing the evidence in the light most favorable to the non-movant, Resaca, we conclude that Resaca produced more than a scintilla of evidence that Vannie and David lacked capacity in February 2012, when the Southern Star lease was executed. *See Ridgway*, 135 S.W.3d at 601. Accordingly, a genuine issue of material fact exists regarding whether Vannie and David had capacity to execute the Southern Star lease, and the trial court did not err by denying the motion for summary judgment. *See* Tex. R. Civ. P. 166a(i). As mentioned above, Fort Apache asserts that the 2003 and 2007 powers of attorney Vannie granted to Hrivnatz Jr. are valid and controlling. Assuming without deciding that the powers of attorney gave Hrivnatz Jr. the authority to execute the lease documents on behalf of Vannie, a fact issue nonetheless exists regarding David's capacity, both to execute the alleged power of attorney in favor of Hrivnatz Jr. and to execute the 2012 Southern Star lease. In addition, as discussed above, fact issues exist regarding whether Hrivnatz Jr. or David had anything to convey to Southern Star because the Miller lease was still in force. For that reason, the trial court did not err by denying Fort Apache's no-evidence motion for summary judgment.

In addition, because there are genuine issues of material fact regarding the capacity of Vannie and David to lease the property to Southern Star, as well as whether they owned any interest to lease in 2012, Fort Apache failed to establish that it has superior title to the property. *See generally Bellaire Kirkpatrick Joint Venture v. Loots*, 826 S.W.2d 205, 209 (Tex. App.—Fort Worth 1992, writ denied) ("A plaintiff in a trespass to try title suit must recover on the strength of his own title and not on the weakness of the defendant's title[,]" and the plaintiff must "establish a superior title in himself by an affirmative showing."). We need not address the remaining issues raised in Fort Apache's motion for summary judgment, as they all hinge upon Fort Apache proving the superiority of its title, which it failed to do. *See* Tex. R. App. P. 47.1. We overrule issue one and affirm the trial court's denial of Fort Apache's motion for summary judgment.

JAY'S ISSUE

In his sole appellate issue, Jay argues that neither the Miller lease nor the Southern Star lease binds his incapacitated father, and that the trial court erred by ruling otherwise in its final judgment. As discussed above, the trial court's final judgment explicitly stated that David is bound by the motions for summary judgment because he received proper and adequate notices of the motions, filed responses to the motions, and had the opportunity to make oral argument at the

hearings on the motions. Jay asserts that David never signed or executed the Southern Star lease, and that David lacked the mental capacity to ratify the Southern Star lease.

As discussed above in our analysis of Fort Apache's first issue, Resaca contended that David executed a power of attorney, but stated that Hrivnatz Jr. was unable to produce it because it had been lost or destroyed. Regardless of what interpretation of the devise in Hrivnatz Sr.'s will is adopted, there are genuine issues of material fact regarding whether David executed a power of attorney naming Hrivnatz Jr. his attorney-in-fact, as well as when David's incapacity began. We conclude that the trial court erred by determining that the motions for summary judgment it granted bind David and his guardian. We sustain Jay's issue and reverse each of the motions for summary judgment that were granted against him and David.

HRIVNATZ JR.'S ISSUES

As discussed above, Hrivnatz Jr. raises three issues which challenge the granting of partial summary judgment against him as to breach of duty to defend the Miller lease.[6] Hrivnatz Jr. contends in his second issue that summary judgment

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[6]Hrivnatz Jr. does not challenge the denial of his own motion for summary judgment. Accordingly, we do not address the denial of said motion. *See* Tex. R. App. P. 47.1.

is premature because Resaca has not been evicted and no other party has been adjudicated as having superior title. In its traditional motion for partial summary judgment against Hrivnatz Jr., Resaca asserted that Hrivnatz Jr. signed two leases that purported to convey the same mineral interest to two different companies: Miller Energy and Southern Star, and that Hrivnatz Jr. therefore breached his alleged duty to defend title as to the Miller lease. Resaca pointed to paragraph ten of the Miller lease, which states that "[l]essor hereby warrants and agrees to defend title to said land against the claims of all persons whomsoever." According to Resaca, paragraph ten obligated Hrivnatz Jr. to defend Resaca's title, but he refused to do so and instead "aligned himself with Fort Apache and Southern Star in this lawsuit."

"In Texas[,] it has long been recognized that an oil and gas lease is not a 'lease' in the traditional sense of a lease of the surface of real property. In a typical oil or gas lease, the lessor is a grantor and grants a fee simple determinable interest to the lessee, who is actually a grantee." *Nat. Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 192 (Tex. 2003) (footnote omitted). To prevail on a claim for breach of warranty of title, the warrantee must show that his title has failed and that he has been evicted from the land. *Schneider v. Lipscomb Cty. Nat'l Farm Loan Ass'n*, 146 Tex. 66, 202 S.W.2d 832, 834 (1947); *Freeman v. Anderson*, 119 S.W.2d

1081, 1083 (Tex. Civ. App.—Waco 1938, no writ). An eviction may be actual or constructive, and if constructive eviction is alleged, the warrantee must prove that "paramount title has been positively asserted against him, and that it in fact is paramount." *Schneider*, 202 S.W.2d at 834; *see Whitaker v. Felts*, 137 Tex. 578, 155 S.W.2d 604, 606 (1941). Before a warrantor of title may be held accountable for a breach of warranty, the warrantor is generally entitled to an adjudication that title has failed. *Johns v. Hardin*, 81 Tex. 37, 16 S.W. 623, 624 (1891).

As discussed above, factual issues exist regarding what interest, if any, Hrivnatz Jr. possessed when he conveyed the lease to Miller, as well as the existence and validity of the powers of attorney executed by Vannie and, purportedly, David. Resaca did not establish that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c). Accordingly, we sustain issue three, and we need not address Hrivnatz Jr.'s remaining issues, as they would not result in greater relief. *See* Tex. R. App. P. 47.1. We reverse the partial summary judgment entered against Hrivnatz Jr.

In sum, we affirm the trial court's final judgment as to the denial of Fort Apache's motion for summary judgment and the granting of summary judgment in favor of OGO, and we reverse the trial court's final judgment as to the granting of summary judgment in favor of Resaca as to powers of attorney, estoppel and after-

acquired title, all claims other than for accounting, and its breach of warranty claim against Hrivnatz Jr. We further reverse all of the summary judgments granted against the incapacitated ward, David, and his guardian. We remand the cause to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

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STEVE McKEITHEN
Chief Justice

Submitted on September 24, 2015
Opinion Delivered February 18, 2016

Before McKeithen, C.J., Kreger and Horton, JJ.