Circuit Court for Garrett County
Case No.: 11-C-15-013940

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1968

September Term, 2015

MESSENGER LIMITED
PARTNERSHIP, LLP

v.

DESIGNORE TRUST

Eyler, Deborah S.,
Reed,
Beachley,

JJ.

Opinion by Reed, J.

Filed: August 31, 2018

The controversy in this case centers around the ownership of oil, gas, and other minerals (except coal) underlying 52.73 acres of land in Garrett County, Maryland. The appellant, Messenger Limited Partnership, LLP (hereinafter "Messenger"), presents two questions for our review, which we reduce to a single question and rephrase:[1]

> 1. Did the circuit court err in granting summary judgment to the appellee on the grounds that the appellant, as a non-party to the earlier proceeding, could not collaterally attack the previously-entered final judgment?

For the following reasons, we answer the above question in the affirmative and, therefore, shall vacate the judgment of the circuit court and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

This case begins in 1906, when Chauncey Kimmell executed a deed in favor of John W. McCullough conveying an interest in the coal underlying certain described lands in Garrett County, Maryland. To be sure, there were conveyances before 1906, starting in 1877 but they were not legally significant in this case. The deed, which was recorded at Liber 52, folio 474 among the land records of Garrett County, contained the following reservation clause:

[1] The appellant presents the following questions:

> I. Whether the trial court erred as a matter of law when it determined that appellant obtained title to all minerals through a 1983 partition decree when the prior owner only owned an interest in coal.
>
> II. Whether the trial court erred in failing to construe a prior deed as to the status of real property ownership.

> Reserving and excepting from the operation of this deed, all the surface of all the land hereinbefore described, it being the intention of said parties to convey to the grantee, the coal underlying the said lands, so described, and reserving the rights to bore and prospect for oil and gas and to operate the same, if any be found.

The aforementioned property interest "made its way through time to a sale in lieu of partition in 1983, whereupon . . . [it] was sold to [the appellee,] the Carl Designore Family Trust, LLC" (hereinafter the "Designore Trust" or, more simply, the "Trust"). The sale was ratified on August 1, 1983, and is evidenced by deed dated October 24, 1983, and recorded among the land records of Garrett County at Liber 441, folio 570. That deed described the property being conveyed in 1983 as follows:

> 691 ¾ acres, more or less, of <u>minerals</u>, underlying five (5) parcels of land located in Garrett County, Maryland, which were conveyed to J.W. McCullough by deed from Chauncey Kimmell, dated July 3, 1906 and recorded in Liber 52, folio 474, among the Land Records.

(Underline added).

On November 13, 1997, Messenger purchased 52 acres of the surface of the lands described in both the 1906 and 1983 deeds from Helen Sines, *et al*. This purchase was evidenced by a deed recorded among the Garrett County Land Records at Liber 723, folio 646. The deed specifically excepted "all coal and/or minerals heretofore conveyed."

A chronology of the conveyances, is as follows: On January 3, 1911, Chauncey Kimmell conveyed 247.25 acres to Daniel Kimmell and Lambert L. Kimmell, excepting the coal sold to John W. McCullough. Also on January 3, 1911, Daniel Kimmell and Grace

Kimmell (who held a one-half interest) conveyed 121.5 acres and 3 acres of coal to Lambert L. Kimmell, reserving coal to Chauncey Kimmell from the coal deed to John W. McCullough, and reserving all other minerals to Daniel Kimmell. The following subsurface rights are indicated as part of the transaction: Chauncey Kimmell maintains 100% coal; Daniel Kimmell 50% minerals, oil and gas; and Lambert Kimmell maintains 50% minerals, oil, and gas. On April 1, 1912, Lambert L. Kimmell conveyed 121.5 acres and 3 acres of coal to L. Granville Shafer, reserving all minerals and mineral substance including oil and gas to Lambert Kimmell. On October 25, 1920, Granville Shafer and Cora Shaffer[2] conveyed 170 acres and 3 acres of coal to Dewey F. Shaffer and Bessie P. Shaffer. This deed mentioned no reservations. On November 9, 1925, Dewey F. Shaffer and Bessie P. Shaffer conveyed 121.5 acres and 3 acres of coal to Robert M. Digman. This deed mentioned no reservations. On November 15, 1926, Robert M. Digman conveyed 121.5 acres and 3 acres of coal to Aaron and Carrie Sines. This deed granted surface rights only. On April 30, 1927, Earnest Ray Jones, acting as trustee for Aaron and Carrie Sines, conveyed 121.5 acres and 3 acres of coal to Jonas and Minnie Sines. This deed granted surface rights only. On March 23, 1933, Jonas and Minnie Sines conveyed 121.5 acres and 3 acres of coal to Robert Pike. This deed granted surface rights only. On March 19, 1938, Robert and Maude Pike conveyed 121.5 acres and 3 acres of coal to Jonas and Minnie Sines. This deed granted surface rights only. On April 19, 1943, Jonas and Minnie Sines conveyed 121.5 acres and 3 acres of coal (less outconveyances) to Joseph and Evelyn

[2] Ms. Cora Shaffer's last name was spelled differently than Mr. Granville Shafer in the record extract provided by Appellant.

Whitacre. This deed granted surface rights only. On June 13, 1985, Ralph M. Burnett, acting as trustee for Joseph and Evelyn Whitacre, conveyed 121.5 acres and 3 acres of coal (less outconveyances) to Helen Sines, Sheldon Whitacre, Sandy Jamison, Robert Whitacre, and Delores Proulx, subject to a life estate and granting surface rights only. On December 4, 1989, a life estate was granted in the previous conveyance from Ralph M. Burnett. On November 13, 1997, Helen Sines, Sheldon Whitacre, Sandy Jamison, Robert Whitacre, and Delores Proulx conveyed 52.73 acres and 3 acres of coal to Messenger Limited Partnership, excepting all coal and/or minerals heretofore conveyed.

Approximately eighteen years later, on February 19, 2015, Messenger filed a complaint to quiet title with respect to "all minerals other than coal" beneath the 52 acres of surface it owns. It should be noted, that there has never been any active mineral exploration on or below the properties that are the subject of this case for over 40 years. Both parties filed motions for summary judgment, which were the subject of a hearing on September 30, 2015, the Honorable James L. Sherbin presiding. On October 27, 2015, the circuit court entered summary judgment in favor of the Designore Trust, reasoning:

> Messenger did not allege that the Circuit Court for Garrett County did not have jurisdiction to pass its Final Order ratifying the sale made by the trustees [in 1983]. Further, more than 30 days have passed since the entry of the Final Order, and thus a modification may only be made by a party to the earlier proceeding by reason of fraud, mistake, or irregularity. Regardless, Messenger was not a party to the earlier proceeding and thus may not collaterally attack the Final Order. Messenger did not allege it has any title or color of title in the estate owned by [the Designore Trust], nor did it allege facts to show that there is a justiciable issue. Therefore, there

> is no genuine dispute as to any material fact and [the Designore Trust] is entitled to judgment as a matter of law.

Assigning error to the circuit court's judgment, Messenger filed a timely notice of appeal on November 12, 2015.

DISCUSSION

I. Grant of Summary Judgment

A. Parties' Contentions

Messenger argues that the clear intent of Chauncey Kimmell in 1906 was to convey only the coal underlying his Garrett County lands to John W. McCullough. Therefore, because Kimmell's successors and Messenger's predecessors were not made a party to, nor served with process in connection with the partition suit, the partition sale deed recorded in 1983 could not operate so as to grant *all* "minerals" to the Designore Trust. Put another way, the trustees in the partition sale could not convey to the Designore Trust that which they did not own. Thus, Messenger asserts that the circuit court erred where it "found that the Partition Judgment defeased Chauncey Kimmell and his heirs of his rights to the oil and gas and essentially merged both the oil and gas and the coal interest into a single estate."

Messenger further contends that Maryland case law is devoid of precedent regarding the merger of mineral estates, thus contending that the law concerning the merger of riparian rights should apply. Accordingly, Messenger argues that "[b]efore the Circuit Court could merge the separate mineral estates of both John McCullough and the heirs of Chauncey Kimmell, Maryland law requires that both Estates coincide and meet in the same

person." Because this never happened, Messenger asserts that title to the oil and gas was never transferred to the Designore Trust and, therefore, that it "has no need to collaterally attack the partition judgment."

The Designore Trust responds that pursuant to Maryland Rule 2-535 (Motion to Revise Judgment) and Section 6-408 of the Courts and Judicial Proceedings Article of the Maryland Code ("CJP"), the circuit court correctly determined that Messenger, as a nonparty to the earlier proceedings, could not collaterally attack the final order ratifying the partition sale in 1983.

The dictates of Rule 2-535 and CJP § 6-408 notwithstanding, the Trust also argues, citing *Herbert v. Pue*, 72 Md. 307 (1890), that "Chauncey Kimmell did not retain any interest in the minerals in his deed to John W. McCullough, dated July 3, 1906." Consequently, even if Messenger did have standing to collaterally attack the ratification of the partition sale, its claim still would not have been able to survive a summary judgment challenge. The Trust asserts that "[a]t best, Kimmell had a qualified use . . . for a specific purpose: the right 'to bore and prospect for oil and gas and to operate the same, if any be found.' However, this is a personal right, not a covenant, and does not run with the land."

Finally, the Trust contends that Messenger's claims are precluded by the doctrine of estoppel by deed, which, though not raised in the lower court, may be discretionarily considered by this Court pursuant to Maryland Rule 8-131(a) because, should Messenger be granted the relief it is requesting, the issue is guaranteed to come up on remand.

B. Standard of Review

Maryland Rule 2-501(f) provides, in relevant part, that

> [t]he court shall enter judgment in favor of or against the moving party if the motion [for summary judgment] and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

This Court has explained that upon review of a grant of summary judgment, appellate courts will

> focus on whether the trial court's grant of the motion was legally correct. *Wood v. Toyota Motor Corp.*, 134 Md. App. 512, 516, 760 A.2d 315 (2000) (citing *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 737, 625 A.2d 1005 (1993)). The parameter for appellate review is determining "whether a fair minded jury could find for the plaintiff in light of the pleadings and the evidence presented, and there must be more than a scintilla of evidence in order to proceed to trial...." *Id.* Additionally, if the facts are susceptible to more than one inference, the court must view the inferences in the light most favorable to the non-moving party. *Id.; see Delia v. Berkey*, 41 Md. App. 47, 395 A.2d 1189 (1978), *aff'd*, 287 Md. 302, 413 A.2d 170 (1980).

Laing v. Volkswagen of Am., Inc., 180 Md. App. 136, 152–53 (2008).

"Ordinarily, we will uphold the grant of summary judgment only on the grounds relied on by the trial court." *Appiah v. Hall*, 183 Md. App. 606, 616 (2008), *aff'd*, 416 Md. 533 (2010) (citing *Stanley v. Am. Fed'n of State & Mun. Employees Local No. 553*, 165 Md. App. 1, 884 A.2d 724 (2005)).

C. Analysis

While neither Maryland Rule 2-535 nor CJP § 6-408 was specifically cited in the lower court's written order granting summary judgment to the Designore Trust, [3] it is clear that those statutes formed the basis for the lower court's decision.[4] Specifically, the lower

[3] We quoted the lower court's reasoning in its entirety *supra*, at page 5.

[4] Maryland Rule 2-535 ("Revisory Power") provides:

> **(a) Generally.** On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534. A motion filed after the announcement or signing by the trial court of a judgment or the return of a verdict but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.
>
> **(b) Fraud, Mistake, Irregularity.** On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.
>
> **(c) Newly-Discovered Evidence.** On motion of any party filed within 30 days after entry of judgment, the court may grant a new trial on the ground of newly-discovered evidence that could not have been discovered by due diligence in time to move for a new trial pursuant to Rule 2-533.
>
> **(d) Clerical Mistakes.** Clerical mistakes in judgments, orders, or other parts of the record may be corrected by the court at any time on its own initiative, or on motion of any party after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed by the appellate court, and thereafter with leave of the appellate court.

Similarly, CJP § 6-408 ("Authority of court to alter judgment") indicates that

court found that "more than 30 days have passed since the entry of the Final Order, and thus a modification may only be made by a party to the earlier proceeding by reason of fraud, mistake, or irregularity." Therefore, because "Messenger was not a party to the earlier proceeding," it was the lower court's opinion that it "may not collaterally attack the Final Order."

The appellant argues that it "has no need to collaterally attack the partition judgment" because "the Partition Court did not have jurisdiction over Chauncey Kimmell and his Estate, nor was his Estate merged into the Estate of [John W.] McCullough." To illustrate this point, Messenger provides the following analogy:

> It is clear that had the Trustees included the Brooklyn Bridge in the Partition Deed, no title would transfer unless John McCullough had some ownership interest in the bridge. The same is true here. John McCullough had no interest in the oil and gas . . . and[,] therefore, the Trustees could not convey more than he owned.

For the following reasons, we agree with the Appellant-Messenger insofar as it argues that the lower court erred in granting summary judgment to the Designore Trust. We decline to order that summary judgment be entered in Messenger's favor, however, because doing so would require us to make factual determinations best left to the trial court. *See Gruss v.*

> [f]or a period of 30 days after the entry of a judgment, or thereafter pursuant to motion filed within that period, the court has revisory power and control over the judgment. After the expiration of that period the court has revisory power and control over the judgment only in case of fraud, mistake, irregularity, or failure of an employee of the court or of the clerk's office to perform a duty required by statute or rule.

Gruss, 123 Md. App. 311, 321 (1998) ("We, as an appellate court, will not make factual determinations properly left to the trial court.") (quoting *Campbell v. Allstate Ins. Co.,* 96 Md. App. 277, 284 n. 3 (1993), *rev'd on other grounds*, 334 Md. 381 (1994) ("Sitting as an appellate court we, of course, cannot make findings of fact that would allow us to decide the issue on the merits.").

Generally, "a judgment is not binding and conclusive except upon parties and those in privity with parties to the suit in which the judgment has been entered." *Watkins v. State*, 162 Md. 609, 161 A. 173, 174 (1932). Moreover, Maryland courts have "no jurisdiction over [a defendant] until . . . service is properly accomplished," or until service "'is waived by a voluntary appearance by the defendant, either personally or through a duly authorized attorney.'" *Flanagan v. Dep't of Human Res.,* 412 Md. 616, 624 (2010) (quoting *Lohman v. Lohman,* 331 Md. 113, 130 (1993)).

In the present case, Messenger's predecessors in title were Chauncey Kimmell, in 1911, and Joseph and Evelyn Whitacre, from 1943 to 1989 (which includes the time when the sale in lieu of partition case was pending) and these predecessors were not parties to the partition suit. Messenger and the Designore Trust agree that Messenger's predecessors were not a party to the partition suit. However, the Trust argues that the publishing of the ratification of sale in a local newspaper was sufficient under Maryland Rule 2-122[5] to put Messenger's predecessors on notice. Because it does not "plainly appear[] by the record to

[5] Rule 2-122 sets forth the requirements for service by posting or publication in *in rem* or *quasi in rem* actions.

have been raised in or decided by the trial court," Md. Rule 8-131(a), this Court is not prepared to decide this issue at this time.

We note, however, that if Messenger's predecessors were not sufficiently put on notice of the partition sale, then Messenger has no need to attack the previous judgment. *See U.S. Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, 896 F.2d. 949, 955 n.2 (5th Cir. 1990) ("[A party] has no need to attack a judgment, collaterally or otherwise, that does not bind it under rules of *res judicata* or collateral estoppel."). Moreover, "[i]t is axiomatic that one cannot convey that which is not theirs." *Johnson v. MacIntyre*, 356 Md. 471, 478 (1999). We hold that the circuit court's ruling was legally incorrect in holding that Messenger was bound by the deed in the sale in lieu of partition case without evidence that any of its predecessors were parties to that case or even were on notice of it

We also decline to address the Trust's estoppel by deed argument and its desire for this Court to address what they predict will happen on remand.

Finally, the circuit court reasoned that because "Messenger did not allege it has any title or color of title in the estate owned by [the Trust], . . . there is no genuine dispute as to any material fact and [the Trust] is entitled to judgment as a matter of law." This finding is clearly erroneous. In its Complaint to Quiet Mineral Title Pursuant to the Maryland Dormant Minerals Act, Messenger alleged that "[the 1906] Deed grants the coal under the subject property only, leaving all other mineral, oil and gas belonging to said property together with the surface." The complaint makes clear that Messenger asserts that it is the

owner of approximately 52 acres of the surface. Thus, Messenger did, in fact, allege that it has title to the minerals claimed by the Trust.

JUDGMENT OF THE CIRCUIT COURT FOR GARRETT COUNTY VACATED AND CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.