"Agency" Becomes a Real Issue in Title Washing: *Pennsylvania Game Commission v. Thomas E. Proctor Heirs Trust*[1]

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In a recent decision, the United States District Court in the Middle District of Pennsylvania (the "Court") denied cross-motions for partial summary judgment that (1) confirms, in part, established Pennsylvania law with regard to the challenge of title wash tax sales, and (2) may offer persuasive support to claims that "agency" between the delinquent surface owner and the purchaser at the tax sale could potentially bar joinder of the oil and gas estate to the surface estate.

I. Background

The Plaintiff, the Commonwealth of Pennsylvania, Pennsylvania Game Commission, being the owner of several tracts of land in Sullivan and Bradford Counties, Pennsylvania, including the Josiah Haines warrant (the "Warrant"), filed an action to quiet title to the subsurface estate of the Warrant.[2] In 1893, the Warrant was conveyed to Thomas E. Proctor (Proctor) and Jonathan A. Hill (Hill), the Defendants' predecessors.[3] In 1894, Proctor and Hill deeded the Warrant to the Union Tanning Company, excepting and reserving the oil and gas thereunder.[4] In 1903, the Union Tanning Company conveyed its rights in the Warrant to the Central Pennsylvania Lumber Company (CPLC). In 1908, Calvin J. McCauley, Jr. (McCauley), purchased the Warrant as "unseated" land at a Bradford County Treasurer's Sale for unpaid taxes during 1907.[5] In December 1910, McCauley and his wife quitclaimed their interest in all the properties including, the Warrant, to CPLC.[6] Finally, in 1920, CPLC conveyed the Warrant to the Game Commission, subject to the 1894 mineral rights exception.[7]

In March 2015, both parties moved for a stay of the proceedings until the Pennsylvania Supreme Court decided the case of *Herder Spring Hunting Club v. Keller*,[8] due to the likelihood that the decision would influence the outcome of their dispute, although both parties agreed that

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2 *Pa. Game Comm'n v. Thomas E. Proctor Heirs Trust*, 2020 WL 1922628, 2 (M.D. Pa. April 21, 2020).
3 *Id.* at 1.
4 *Id.*
5 *Id.*
6 *Id.* at 1-2.
7 *Id.* at 2.
8 143 A.3d. 358 (Pa. 2016).

Herder had different facts.[9] After the *Herder* case was decided in July 2016 both parties after significant discovery and trial proceedings cross-filed for partial summary judgment.[10] Chief Magistrate Judge Susan E. Schwab issued an extensive report, recommending that the cross-motions be denied, and both parties filed objections to that report.[11]

The objections raised four (4) main issues: (1) whether there is a genuine factual dispute as to whether the Warrant was unseated or seated; (2) whether there is a materially factual dispute as to the agency between McCauley and CPLC; (3) whether the language of the 1920 deed estopped the title wash; and (4) whether the tax sale was affected by federal due process concerns.[12] Although the Court addressed each of these four issues, this article focuses on the discussion of the first two of these four issues (the Court rejected the Proctor's arguments that the 1920 deed excepted the oil and gas and also held that the tax sale process complied with due process).

II. Unseated vs. Seated

The first issue that the Court addressed was whether Judge Schwab was correct in determining that there was a factual dispute as to whether the Warrant was correctly classified as unseated land.[13] The designation of unseated land is important when examining basic title wash tax sale scenarios. Prior to 1947, it was Pennsylvania's practice to classify real property as either "seated," which was developed land, or "unseated," which was "wild" or undeveloped land.[14] Each designation had implications as to the tax liability for the owner of said land.[15] For land that was designated as "unseated," the owner was not personally liable for the failure to pay taxes attached to the land; therefore, the only penalty for failure to pay taxes was for the land to be sold at sale. The proceeds from the sale were then used to recoup the tax delinquency.[16] Whereas, if the land was "seated," the property owner was personally liable for the tax on the land.[17]

The usual title wash tax sale fact pattern involves a tax sale of unseated land where oil, gas, or any other mineral rights has been previously severed therefrom, but the commissioners were not notified of such severance, resulting in the severed oil and gas owner's interest not being separately assessed. As a result, the severed oil and gas owner's interest in the property would be "washed" and title to the same passed to the purchaser at the tax sale, resulting in a fee conveyance of the surface and subsurface. If, however, seated land was sold at tax sale, the severed mineral estate, with certain exceptions, would not be washed and would remain with the severed interest owner.

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9 *Pa. Game Comm'n v. Thomas E. Proctor Heirs Trust*, 2019 WL 6954101, 2 (M.D. Pa. Feb. 21, 2019).
10 *Pa. Game Commission*, 2020 WL 1922628 at 1.
11 *Id.*
12 *Id.* at 2.
13 *Id.* at 3.
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*

The defendants argued that, although the Warrant was assessed and sold at the 1908 tax sale as "unseated" land, it was incorrectly assessed as unseated due to the level of hemlock bark stripping that was conducted on the property.[18] Although Judge Schwab and the District Court agreed that this evidence created a genuine dispute of material fact, the Court ultimately ruled that this point was moot because the defendants were barred from making such an argument as a matter of law.[19] After an extensive discussion on the legislative history of the Act of June 3, 1885, P.L. 71, § 1 (the "Act of 1885") and relevant Pennsylvania case law, the Court determined that the Act of 1885 was enacted in part to limit attacks to the validity of a tax sale on the basis of an assessor-classification error as to whether land was seated or unseated.[20] The Court concluded that the assessor-classification could only be challenged "in rare circumstances where (1) land was characterized and assessed as seated and then improperly sold for unpaid taxes as unseated, or vice versa; and (2) in the case of seated land being sold as unseated, there was sufficient personal property on the land to pay the taxes."[21] Therefore, although there was a genuine issue of material fact as to whether the Warrant was seated or unseated, the defendants were barred from making such a challenge to the tax sale by the Act of 1885.[22]

III. Agency

The second issue that the Court addressed was the novel issue of agency. In her report, Judge Schwab tied the determination on the issue of agency to the determination on the issue of whether the Warrant was seated or unseated.[23] Judge Schwab determined that the defendants presented enough evidence to create a genuine factual dispute as to whether McCauley had operated as an agent of CPLC, such that the 1908 tax sale would have resulted in a mere redemption of the surface estate for the Plaintiff's predecessor in title.[24] However, Judge Schwab further found that the materiality of the factual dispute regarding agency was only relevant if the Warrant was seated.[25] Judge Schwab determined that (i) if the Warrant was designated as seated land, then CPLC would have been personally liable for payment of taxes, and (ii) if McCauley was operating as the agent for CPLC, the purchase of the Warrant at tax sale would only result in a redemption of the surface estate. However, if the land was unseated, then CPLC was not personally liable for payment of taxes and it did not matter whether McCauley was acting as CPLC's agent.[26]

The Court agreed with Judge Schwab's determination that the defendants brought forth enough evidence to create a genuine factual argument as to whether McCauley had acted as

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[18] *Id*.
[19] *Id.* at 9.
[20] *Id*.
[21] *Id.*
[22] *Id*.
[23] *Pa. Game Comm'n,* 2019 WL 6954101 at 24.
[24] *Id*. at 14, 24.
[25] *Id*. at 24.
[26] *Id*.

CPLC's agent by purchasing the Warrant at the tax sale; however, the Court disagreed with the determination that agency was only material if the Warrant was determined to be seated land.[27] Judge Schwab, using an analysis similar to the court in *Herder Spring*, determined that there was no genuine factual dispute as to whether the 1907 assessment of the Warrant covered the surface and subsurface estates of the Warrant.[28] The Court disagreed in dicta and distinguished the facts in the present case from the facts in *Herder Spring*.[29] The Court stated that even if the Warrant in fee had properly been offered for sale, that fact is not dispositive as to what interest was effectively sold to the purchaser at the tax sale, because of the issue of agency.[30]

The Court turned to standing Pennsylvania law stating that "one cannot, by a purchase at a tax sale caused by his failure to pay taxes which he owed the state, or which he was otherwise legally or morally bound to pay, acquire a better title, or a title adverse to that of other parties in interest."[31] The Court admitted that this law only applies where the purchaser of the land had a preexisting duty to pay taxes.[32] The Court determined that the primary issue as to agency was whether CPLC had a duty to pay the 1907 taxes on the unseated Warrant.[33]

The Court observed that there was substantial evidence that CPLC had deliberately defaulted on its taxes, finding that the timing of CPLC's default was conveniently in the same year that CPLC completed its extensive bark-peeling activities.[34] Furthermore, the Court determined after viewing the facts in the light most favorable to the Defendants, that it was probable that CPLC strategically defaulted on its taxes in 1907 and used McCauley as its agent[35] to hold the Warrant for the two-year redemption period, and then quitclaim it back to CPLC.[36] The Court recognized "[i]t is generally true that the owner of a surface or subsurface estate is not barred from obtaining better title at a treasurer's sale," but the Court went on further to state that it could not find a Pennsylvania case which applied this rule to the facts that were before it.[37] The Court continued to indicate that it found no controlling Pennsylvania precedent as to whether CPLC owed a duty to pay 1907 taxes, and admits that its task was to predict how Pennsylvania courts would rule on the issue.[38] The Court concluded that although an owner of

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[27] *Pa. Game Comm'n*, 2020 WL 1922628 at 18.
[28] *Id*.
[29] *Id*. at 13.
[30] *Id*.
[31] *Id.* (citing *Powell v. Lantzy*, 34A. 450, 451 (Pa. 1896) (emphasis added) (citing *Chambers v. Wilson*, 2 Watts 495 (Pa. 1834); *Coxe v. Wolcott*, 27 Pa. 154 (1856))).
[32] *Id.*
[33] *Id*. at 13.
[34] *Id*. at 14.
[35] McCauley from 1904 to 1916, "purchased at tax sales more than 100 properties that were previously owned by CPLC and later quitclaimed those tracts back to CPLC. CPLC's articles of incorporation and other internal documents, as well as additional historical records predating the tax sale, identify McCauley as CPLC's 'Real Estate Agent.' McCauley also appeared as an attorney for CPLC in state court proceedings shortly after the time of purchase." *Id.* at 11.
[36] *Id*. at 14.
[37] *Id.*
[38] *Id*. at 15.

unseated land did not have any personal liability for failing to pay taxes due and payable, the Commonwealth of Pennsylvania has always recognized a duty to pay such taxes.[39] Therefore, the Court found that CPLC had a duty to pay its taxes on the unseated Warrant and could not itself improve its title by purchase at a tax sale by defaulting on said taxes.[40] As a result, the genuine factual issue of whether McCauley had acted as CPLC's agent was material.[41] The Court did not grant the Defendants' motion for summary judgment because it recognized that a factfinder would need to determine whether the defendants had proven that McCauley actually acted as the agent of CPLC.[42]

IV. Conclusion

It appears that the Court has added yet another wrinkle for oil and gas operators, landowners, and title examiners alike in an area of Pennsylvania law that is already quite convoluted. Cases such as *Herder Spring*, among others, had started to provide some clarity in title wash cases, albeit limited to specific fact patterns. Prior to the Court's opinion in *Pennsylvania Game Commission v. Thomas E. Proctor Heirs Trust*, a reasonable title examiner would likely have treated the defendants' severed oil and gas interest as being effectively title washed via the tax sale based on the facts set forth in the case and existing Pennsylvania law. However, after this ruling, there is now authority, at least in federal court, that evidence of agency could have significant bearing on the ownership of highly valuable oil and gas assets. From a title examiner's perspective, the issue of agency could possibly be difficult to analyze due to a potential lack of record notice surrounding the creation of an agency relationship. Depending on the facts, creation of an agency relationship may need to be determined by a factfinder, which could cause undue delay for oil and gas operators who are determining from which parties they need to obtain oil and gas leases to avoid legal issues such as trespass. Notably, *Pennsylvania Game Commission v. Thomas E. Proctor Heirs Trust* is still being litigated, and there will undoubtedly be further developments on title wash tax sales.

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[39] *Id.* at 16 (citing *Herder Spring*, 143 A.3d at 366 (emphasis added) (quoting *Strauch*, 1 Watts & Serg. 15 176) and *Breich v. Coxe*, 81 Pa. 336, 346 (1876)).
[40] *Id.* at 17.
[41] *Id.*
[42] *Id.* at 18.