
 No. 126150

**IN THE SUPREME COURT
OF ILLINOIS**

IN RE APPLICATION FOR TAX DEED)	On Appeal from the Appellate Court
<u>OPAL AND STEPHEN R. CASTLEMAN</u>)	Fifth Judicial District No. 5-19-0168
)	
SI RESOURCES, LLC AND)	There Heard on Appeal from the
CADIJAH BROWN)	Circuit Court of the Second Judicial
)	Circuit, Hamilton County, Illinois
Petitioners-Appellants,)	2015TX10, the Honorable Barry L.
)	Vaughn, Judge Presiding
)	
v.)	
)	
OPAL CASTLEMAN AND STEPHEN R.)	
CASTLEMAN, WILLIAM GROOME AND)	
AND VICKI GROOME)	
)	
Respondents -Appellees.)	

**BRIEF OF RESPONDENTS – APPELLEES’
STEPHEN CASTLEMAN, OPAL CASTLEMAN,
WILLIAM GROOME AND VICKI GROOME**

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NATURE OF ACTION

This appeal arises from the ongoing attempts by Appellants to set aside a Tax Deed Order and to declare void the Tax Deed issued to Appellees.

ISSUES PRESENTED FOR REVIEW

Whether the Appellate Court correctly found that Count I fails to state a claim for which the relief requested may be granted ?

Whether this reviewing court can uphold the decision of the circuit court on any grounds which are called for by the record regardless of whether the circuit court or appellate court relied on the grounds alleged and regardless of whether the circuit court's or appellate court's reasoning was correct ?

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Illinois Supreme Court Rule 315.

STATUTES INVOLVED

35 ILCS 200/22-40(a)

If the redemption period expires and the property has not been redeemed.... the court shall so find and shall enter an order directing the county clerk on the production of the certificate of purchase and a certified copy of the order, to issue to the purchaser or his or her assignee a tax deed.

35 ILCS 200/22-45

Tax deed incontestable unless order appealed or relief petitioned. Tax deeds issued under Section 22-40 are incontestable except by appeal from the order of the court directing the county clerk to issue the tax deed. However, relief from such order may be had under Sections 2-1203 or 2-1401 of the Code of Civil Procedure in the same manner and to the same extent as may be had under those Sections with respect to final orders and judgments in other proceedings. The grounds for relief under Section 2-1401 shall be limited to:

- (1) proof that the taxes were paid prior to sale;
- (2) proof that the property was exempt from taxation;
- (3) proof by clear and convincing evidence that the

- tax deed had been procured by fraud or deception by the tax purchaser or his or her assignee; or
- (4) proof by a person or party holding a recorded ownership or other recorded interest in the property that he or she was not named as a party in the publication notice as set forth in Section 22-20, and that the tax purchaser or his or her assignee did not make a diligent inquiry and effort to serve that person or party with the notices required by Sections 22-10 through 22-30.

35 ILCS 200/22-85

Unless the holder of the certificate purchased at any tax sale under this Code takes out the deed in the time provided by law, and records the same within one year from and after the time for redemption expires, the certificate or deed, and the sale on which it is based, shall, after the expiration of the one year period, be absolutely void with no right to reimbursement. If the holder of the certificate is prevented from obtaining a deed by injunction or order of any court, or by the refusal or inability of any court to act upon the application for a tax deed, or by the refusal of the clerk to execute the same deed, the time he or she is so prevented shall be excluded from computation of the one year period. Certificates of purchase and deeds executed by the clerk shall recite the qualifications required in this Section.

735 ILCS 5/2-615

Motions with respect to pleadings.

- (a) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth.
- (b) If a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein the pleading or division thereof is insufficient.
- (c) Upon motions based upon defects in pleadings, substantial defects in prior pleadings may be considered.
- (d) After rulings on motions, the court may enter appropriate orders either to permit or require pleading over or amending or to terminate the litigation in whole or in part.
- (e) Any party may seasonably move for judgment on the pleadings.

735 ILCS 5/2-701

Declaratory judgments.

(a) No action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought thereby. The court may, in cases of actual controversy, make binding declarations of rights, having the force of final judgments, whether or not any consequential relief is or could be claimed, including the determination, at the instance of anyone interested in the controversy, of the construction of any statute, municipal ordinance, or other governmental regulation, or of any deed, will, contract or other written instrument, and a declaration of the rights of the parties interested. The foregoing enumeration does not exclude other cases of actual controversy. The court shall refuse to enter a declaratory judgment or order, if it appears that the judgment or order, would not terminate the controversy or some part thereof, giving rise to the proceeding. In no event shall the court entertain any action or proceeding for a declaratory judgment or order involving any political question where the defendant is a State officer whose election is provided for by the Constitution; however, nothing herein shall prevent the court from entertaining any such action or proceeding for a declaratory judgment or order if such question also involves a constitutional convention or the construction of a statute involving a constitutional convention.

(b) Declarations of rights, as herein provided for, may be obtained by means of a pleading seeking that relief alone, or as incident to or part of a complaint, counterclaim or other pleading seeking other relief as well, and if a declaration of rights is the only relief asked, the case may be set for early hearing as in the case of a motion.

735 ILCS 5/2-1203

(a) In all cases tried without a jury, any party may, within 30 days after the entry of the judgment or within any further time the court may allow within the 30 days or any extensions thereof, file a motion for a rehearing, or a retrial, or modification of the judgment or to vacate the judgment or for other relief.

735 ILCS 5/2-1401

(a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered.

(b) The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof...

(f) Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief.

STATEMENT OF FACTS**THE PROCEDURAL HISTORY OF 2015-TX-10: PART ONE**

On January 28, 2013 delinquent real estate taxes in the amount of \$79.64 that L.I. Brown Jr. failed to pay on certain mineral rights located in the County were sold to Kathy Riley at the Hamilton County Annual Delinquent Tax Auction. (C12) As a result Kathy Riley received a Tax Sale Certificate from the County Collector. (C12) On June 1, 2015, Kathy Riley assigned the Tax Sale Certificate to Appellees Opal and Steve Castleman. (C12) On June 22, 2015 Appellee Steve Castleman filed a Petition for Tax Deed. (C10-14) On October 10, 2015 the Period to Redeem (pay back) the taxes expired. (C13) On October 19, 2015 Appellee Steven Castleman obtained an Order directing the issuance of a Tax Deed and thereafter assigned the Tax Sale Certificate to Appellee Groome. (A 22-23) On October 21, 2015, Appellant Brown, for good and valuable consideration, delivered a Quitclaim Deed to the Mineral Rights to Appellant SI Resources, LLC. (C357, 451) On November 12, 2015, Appellant SI Resources, LLC filed a 735 LCS 5/2-1203 Motion to Vacate the Judgment ordering the issuance of the Tax Deed. (C40-62) On December 15, 2015 Appellant Brown was added as a Petitioner to an Amended Petition pursuant to 735 ILCS 5/2-1203. (C5) On December 21, 2015 Appellants filed a Motion to Dismiss alleging that Appellants lacked standing to bring suit. (C5) On February 29, 2016 the Trial Court granted Appellee's Motion to Dismiss finding that Appellants lacked standing. (C6) On February 29, 2016, Appellee Groome, the holder of Tax Sale Certificate by way of an Assignment from the Castleman Appellees, filed the Tax Deed along with the Assignment with the Recorder of Deeds/County Clerk. (A24-

26) On May 9, 2016 Appellants' Motion to Reconsider was denied. (C6) On June 1, 2016 Appellants appealed the dismissal. (C6) On August 10, 2017 the Appellants' Appeal was dismissed because Appellant SI Resources, LLC was not a party to the underlying Tax Deed proceeding and because Appellant Brown did not file his 2-1203 Petition within 30 days. *In Re Application for Tax Deed*, 2017 IL App 5th 160230-U.

THE PROCEDURAL HISTORY OF THE SEPARATE MANDAMUS PROCEEDING

While the 2015-TX-10 case was on appeal and before the appellate court ruled, on June 26, 2017, Appellant SI Resources, LLC filed a separate Complaint of Mandamus against the County Clerk seeking to reform the Tax Deed recorded with the County Clerk naming Appellee Groome as Grantee to a Tax Deed and instead naming Appellee Castleman or their assignees as the grantees. (C538-548) The prayer for relief sought a reformation of the February 29, 2016 Tax Deed, not to declare it void. (C 543) This cause of action was not filed in the underlying tax deed proceeding. (C 538) Appellees were not named in the Mandamus suit. (C538-548) The Complaint of Mandamus specifically cited to 35 ILCS 200/22-45 and stated that "Tax deeds issued pursuant to this section shall be incontestable except by appeal from the order of the county court directing the county clerk to issue the tax deed." (C 541) On August 16, 2017 a Tax Deed was issued and filed by the County Clerk granting a tax Deed in favor of the Castleman and their successors and assigns. (C370) On October 26, 2017 an Agreed upon Judgment Order between Appellants and the County Clerk was entered in the Mandamus case finding that the Hamilton County Clerk "concedes" that the Tax Deed issued and recorded on February 29, 2016 was void. (A27-28) On October 27, 2017 a "Corrective Tax Deed",

naming the Castlemans and their assigns as the grantees, was filed with the Recorder of Deeds/County Clerk that purported to correct the February 29, 2016 Tax Deed and the August 16, 2017 Tax Deed. (A29-30)

THE PROCEDURAL HISTORY OF 2015-TX-10: PART TWO

Before the Mandamus Court issued its Order purporting to void the tax deed, on October 19, 2017, Appellants filed a Motion to Void the Tax Deed in the underlying Tax Deed proceeding pursuant to 35 ILCS 200/22-85 and a Motion to Vacate the Tax Deed pursuant to 735 ILCS 5/2-1401. (C200-235). After the Mandamus Court issued an Order purporting to rule that the Tax Deed filed on February 28, 2016 was void, on March 20, 2018, Appellants filed an Amended Motion to Void the Tax Deed pursuant to 35 ILCS 200/22-85 and an Amended Motion to Vacate the Tax Deed pursuant to 735 ILCS 5/2-1401. (C347-391) Appellees filed a Motion to Dismiss which was granted by the trial court on September 24, 2018. (C393-421)(C 479-480) Appellant's Motion to Reconsider was denied on March 21, 2019 and an appeal followed to the Appellate Court Fifth Judicial District. (C 509-554)(C8) On June 2, 2020 the Appellate Court Fifth Judicial District affirmed the trial court's order dismissing Appellant's Amended Motion, concluding that Count I failed to state a claim for relief under 35 ILCS 200/22-85 and that Appellants lacked standing to pursue Count II under 735 ILCS 5/2-1401. (A02-19) On the standing issue, the Appellate Court based its decision upon a remarkably similar attempt to set aside a tax deed by Appellant SI Resources, LLC and its same attorneys in the case of *In re Application for a Tax Deed*, 430 Ill.Dec. 718, , 2018 IL App (5th) 170354, 126 N.E.3d 1245. (A15-18) Appellants sought leave to appeal the dismissal and affirmance of the dismissal of Count I. Appellants have not appealed the dismissal of

Count II based upon 735 ILCS 5/2-1401 seeking to overturn the trial court's Tax Deed Order that authorized the issuance of the February 28, 2016 Tax Deed.

ARGUMENT

STANDARD OF REVIEW

The standard of review for the trial court's dismissal of Count I pursuant to a motion to dismiss pursuant to 735 ILCS 5/2-615 is *de novo*. *Marshall v. Burger King Corp.*, 222 Ill.2d 422, 856 N.E.2d 1048, 1053 (2006). A reviewing court can uphold the decision of the circuit court on any grounds which are called for by the record regardless of whether the circuit court relied on the grounds and regardless of whether the circuit court's reasoning was correct. *Ultsch v. Illinois Municipal Retirement Fund*, 874 N.E.2d 1, 15 (2007).

THE APPELLATE COURT CORRECTLY FOUND THAT COUNT I SHOULD BE DISMISSED

Appellees concede that the Appellate Court based its decision to affirm the dismissal of Count I on grounds that were different than those stated by the circuit court and previously urged by Appellees. Without abandoning or discounting their prior arguments, the reasoning of the Appellate Court also supports dismissal of Count I.

Tax Deeds are incontestable except by appeal from the order of the court directing the county clerk to issue the tax deed. 35 ILCS 200/22-45. There are three ways in which a party may challenge a tax deed: (1) by filing a direct appeal from the order directing the issuance of the deed, (2) by filing a motion for relief under section 2-1203 or (3) by filing a 2-1401 motion. *Excalibur Energy Company v. Rochman*, 22 N.E.2d 322, 326 (5th District 2014). Section 22-45 further limits the grounds for which relief from a tax deed

may be obtained under section 2-1401 to four grounds. *Id.* Section 22-45 evinces an intent on the part of the General Assembly "to protect tax deed orders from collateral attack `on questions relating to notice,'" unless the challenge squarely fits within the language of section 22-45. *DG Enterprises, LLC v. Cornelius*, 398 Ill. Dec. 104, 2015 IL 118975, 42 N.E.3d 1014, 1021 (2015).

The Appellate Court correctly concluded that Count I was not an authorized vehicle to void the October 27, 2017 Tax Deed. (A 14) A careful review of the allegations in Count I further supports the Appellate Court's conclusion.

Appellants' introductory paragraph to Count I Motion states in relevant part:

NOW COMES 35 ILCS 200/22-22-85 Movants and 735 ILCS 5/2-1401 Petitioners...by an through their counsel,... moving this Court to vacate the October 19, 2015 Order directing the Hamilton County Clerk to Issue a Tax Deed to Stephen R. and/or Opal Castleman...pursuant 35 ILCS 200/22-85, and pursuant to 735 ILCS 5/2-1401 and 35 ILCS 200/22-45, Illinois Case Law, and this Court's judicial authority..

(emphasis added)(C 347) . Nothing in this paragraph indicates that Appellants are seeking to Void a Tax Deed. Instead this paragraph, as it relates to Count I, refers solely to employing 22-85 to Vacate the October 19, 2015 Tax Deed Order that authorized the issuance of the February 29, 2016. Undoubtedly and undisputedly, 22-85 cannot be used as a procedural device to attack a Tax Deed Order. In fairness, paragraph 11 of Count I of Appellants' Motion states:

SI and Brown's Count I Motion to Void the Tax Deed pursuant to Section 22-85 of the Property Tax Code is an attack to void the Tax Deed, not vacate the order.

(C 350) However, Appellants do not identify which Tax Deed they sought to declare void. There are three Tax Deeds that have been recorded, two of which were created and recorded at the insistence of Appellants as part of their ex parte Mandamus proceeding.

There is no separate “Wherefore” clause at the end of Count I. Instead, at the end of Count II, Appellants’ “Wherefore” clause states in part “Movant...pray this Honorable Court enter an order granting their Count I amended motion to void the tax deed.” (C 359) However, Appellants do not identify which tax deed they are referring to, nor do they seek any type of declaration of rights amongst and between the parties as it relates to the ownership of the mineral rights.

Contrary to Appellants’ arguments in its brief, the Appellate Court did not rule that a 2-1401 petition was an improper vehicle to attack a tax deed or the circuit court’s order directing the issuance of a tax deed for a violation of 22-85. (A 14) The Appellate Court specifically noted: “Here, the petitioners did not raise their section 22-85 complaint in a section 2-1401 petition, and they have not requested this court consider it as such.” (A 14) The Appellate Court’s reasoning is sound, correct and should be affirmed by this Court.

The Appellate Court also correctly distinguished the cases cited by Appellees from the case at bar. See, *In re Application of the County Collector*, 266 Ill.Dec. 524, 333 Ill.App.3d 355, 775 N.E.2d 86 (1st Dist. 2002)(“*GB Property Management*”); *In re Application of County Treasurer*, 2012 IL App (1st) 101976, 359 Ill.Dec. 87, 966 N.E.2d 408 (1st Dist. 2012)(“*MB Financial*”); *In re Application of County Treasurer*, 2014 IL App (2d) 130995, 27 N.E.3d 1020 (2nd Dist. 2014)(“*Zajicek*”); *In re Application of Will County*, 2018 IL App 160659, 421 Ill.Dec. 806, 101 N.E.3d 788 (3rd Dist. 2018)(“*Will County*”).

Unlike the case at bar, the *GB Property Management* decision involved a Motion to declare a tax deed void that was filed in the same court that issued the Tax Deed Order.

In re Application of the County Collector, 775 N.E.2d at 87. The Appellate Court correctly noted that GB Property filed a section 2-1203 motion to void the tax deed pursuant to 22-85. (p. 10 Appellate decision).

Unlike the case at bar, the *Zajicek* decision involved a property owner that paid the back taxes before the period of redemption expired, thus precluding the issuance of a tax deed, and then sought to use 22-85 to preclude the tax buyer from receiving the proceeds of the redemption. *In re Application of County Treasurer*, 27 N.E.3d at 1021-1022.

Unlike the case at bar, the *Will County* decision involved a 22-85 and due process challenge brought pursuant to a 1401 Petition seeking to declare the tax deed order void and the tax deed void. *In re Application of Will County*, 101 N.E.3d at 789.

Like the case at bar, the *MB Financial* decision involved a 22-85 Motion to Vacate the Tax Deed and a Motion to Vacate the Tax Deed Order pursuant to 735 ILCS 5/2-1401. However, unlike the case at bar, the Tax Deed sought to be declared Void was the Tax Deed that was issued pursuant to the Order in the underlying tax deed proceeding as opposed to a Separate Mandamus action. Moreover, unlike the case at bar, there was no issue as to Petitioners standing under the 2-1401 petition.

The Appellate Court in the case at bar questioned the reasoning of the *Will County* and *MB Financial* decisions insofar as they hold that a 22-85 violation can be pursued pursuant to a 1401(f) petition. (A 13). Appellees agree. 22-85 is limited to declaring a Tax Deed Void and 22-85 is silent as to declaring a Tax Deed Order void. 2-1401(f), on the other hand, pertains to void judgments and 22-85 is silent as to declaring a Tax Deed void.

The cases cited by Appellees are also distinguishable from the case at bar as those decisions did not involve the procedural gymnastics that were employed in the case at bar where Appellees filed a separate Mandamus action to attack the tax deed, resulting in a corrective tax deed that Appellees challenged in front of the court that initially issued the Tax Deed Order.

COUNT I WAS PROPERLY DISMISSED BECAUSE DISMISSAL IS SUPPORTED BY THE RECORD

Appellants' unsuccessfully attempted to utilize 735 ILCS 5/2-1203 to challenge the Tax Deed Order that led to the issuance and recordation of the February 28, 2016 Tax Deed. (A 4) Appellants' unsuccessfully attempted to utilize 735 ILCS 5/2-1401(3) and (4) to challenge the Tax Deed Order that led to the issuance and recordation of the February 28, 2016 Tax Deed. (A 18) Appellants have not appealed the dismissal of their 735 ILCS 5/2-1401 action that sought to Vacate the October 19, 2015 Order directing the issuance of the Tax Deed that was recorded and filed on February 28, 2016.

Undeterred, Appellants' disregarded the clear meaning and import of 22-45 and contested the February 29, 2016 Tax Deed by filing a separate, ex parte Mandamus Action. (C 538-548) The Mandamus Court declared and Ordered that the February 29, 2016 Tax Deed was void. (A 27-28) The Mandamus Court entered this Order while Appellant was concurrently and separately pursuing¹ its ultimately unsuccessful 2-1401 Motion to Vacate the Tax Deed Order authorizing the issuance of the February 28, 2016 Tax Deed.

¹ The Appellate Court noted at page 5 of its opinion that this added to the list of "unexplained phenomena" present in Appellants' pleadings.

The Mandamus Court lacked the power to declare the February 29, 2016 Tax Deed void. The Mandamus case was an entirely separate and distinct cause of action and cannot be viewed as an “appeal from the order of the court directing the county clerk to issue the tax deed.” 35 ILCS 200/22-45. Importantly, the Mandamus Court did not rule that the Order directing the issuance of the February 29, 2016 Tax Deed be set aside. (A 27-28) Appellant’s backdoor attempt to declare the February 28, 2016 Tax Deed void in the ex parte Mandamus Action is improper.

In *Excalibur Energy Company v. Rochman*², the Appellate Court held that a Complaint for Ejectment seeking to declare a Tax Deed void should be dismissed with prejudice. 22 N.E.2d 322 (5th District 2014). Specifically, the Appellate Court noted:

On August 14, 2012, Rochman filed a combined motion to dismiss Excalibur Energy's second-amended complaint. In her motion, Rochman argued, among other things, that because the "court having exclusive jurisdiction over the tax deed ha[d] failed to hear any issues thereon, [Rochman's] title to the subject premises [was] valid" and Excalibur Energy was barred from asserting its claim in ejectment.

Id. at 324. (citations omitted). The Appellate Court held that

Section 2-1401 of the Code of Civil Procedure provided the only vehicle for the plaintiff in this case to vacate the tax deed. (citations omitted)...Moreover, Excalibur Energy's complaint could not be treated as a petition for relief from judgment authorizing issuance of the tax deed, in view of the statutory requirement that such petitions "be filed in the same proceeding in which the order or judgment was entered." 735 ILCS 5/2-1401(b); *McCann v. Laster*, 19 Ill.App.3d at 409, 311 N.E.2d 743 (5th Dist. 1974)(complaint to quiet title could not under any circumstances be treated as a motion for relief of judgment, which must be filed in the same proceeding in which the order was entered). [A] section 2-1401 proceeding will always involve the same parties as the underlying case and will always relate back to the original judgment in the underlying case. (citation omitted). It is filed in the same case in which the judgment was entered, and the pleading bears the same docket number....Accordingly, the plaintiff's complaint in ejectment should have been dismissed on Rochman's motion. See 735 ILCS 5/2-1401. (citations omitted)

² Rochman is related to the owners of Appellant SI Resources, LLC. Counsel for Rochman are the counsel for Appellants in this case.

Id. at 328-329. See also, *SI Securities v. Powless*, 403 Ill.App.3d, 934 N.E.2d 15 (5th Dist. 2010)(Incorrect legal description rendered, at most, the Tax Deed voidable, not void); *Elliott v. Johnson*, 156 Ill.App.3d 70, 74, 108 Ill.Dec. 652, 508 N.E.2d 1229 (2nd Dist. 1987)(same); *In re Application of Cook County Treasurer (SI Boo, LLC)*, 386 Ill.App.3d 906, 899 N.E.2d 432, 435 (1st Dist. 2008)(same).

It is settled that even if a court is one of general jurisdiction, when its power to act in a particular matter is controlled by statute, the court is governed by the rules of limited jurisdiction. *People ex rel. Dept of Human Rights v. Arlington Park Race Track Corp.*, 122 Ill.App.3d 517, 461 N.E.2d 505, 521 (1st Dist. 1984). Subject matter jurisdiction includes not only the power to hear and determine a class of cases, but the power to grant the particular relief requested. *Id.* Defects in subject matter jurisdiction cannot be waived, nor can such jurisdiction be conferred on the court by the acquiescence or the stipulation of the parties. *Id.* A Mandamus Court does not have the power to hear and determine a contest to a Tax Deed declare it void.

At the end of the day the Appellants' employed an incorrect procedure (Ex Parte Mandamus Action) to affirmatively contest a Tax Deed to have it declared "void", then have a new Corrective Tax Deed issued and recorded only to come back to the correct court that issued the initial ta deed and seek to declare void the very same "corrected" Tax Deed they sought in the first place. The Mandamus action was obviously not an appeal from the order of the court directing the county clerk to issue the tax deed. For this reason alone dismissal of Count I was proper because the Mandamus Court lacked subject matter jurisdiction. See, *Millennium Park Joint Venture, LLC v. Houlihan*, 241

Ill.2d 281, 349 Ill.Dec. 898, 948 N.E.2d 1, 10-11; *Dumas v. Papas*, 2014 IL APP (1st) 121966, 6 N.E.3d 370, 375.

There is currently no pending challenge or appeal of the Order directing the issuance of the Tax Deed Order. On October 19, 2015, the circuit court issued an Order for a Tax Deed. (A 22-23) The period of redemption expired on October 10, 2015. (C 13). On February 29, 2016, Appellee Groome, as assignee of the Tax Sale Certificate, recorded the Tax Deed. (A 24-26). As such it is undisputed that the Tax Deed was filed and recorded within a year of the deadline for redemption.

Insofar as the Tax Deed recorded by Groome on February 29, 2016 is concerned, the Trial Court correctly dismissed Count I pursuant to 735 ILCS 5/2-615. Count I of the Amended Petition seeks relief pursuant to 35 ILCS 200/22-85 which provides in relevant part:

Unless **the holder of the certificate** purchased at any tax sale under this Code takes out the deed in the time provided by law, and records the same within one year from and after the time for redemption expires, the certificate or deed, and the sale on which it is based, shall, after the expiration of the one year period, be absolutely void with no right to reimbursement.

(emphasis added). 35 ILCS 200/22-40(a) provides in relevant part:

If the redemption period expires and the property has not been redeemed... the court shall so find and shall enter an order directing the county clerk on the production of the certificate of purchase and a certified copy of the order, to issue to the purchaser or his or her assignee a tax deed.

By the plain language of the statutes, the Court enters an order directing the county clerk to issue a Tax Deed to the purchaser or assignee of the Certificate and then the purchaser or assignee must take out the deed and record it within one year from the deadline for redemption. It is undisputed that Appellee Groome was the assignee and holder of the

Tax Sale Certificate and that he took out and recorded the Tax Deed within one year from the deadline for redemption. (A 24-26)

THE OCTOBER 27, 2017 TAX DEED MERELY CORRECTED AND REFORMED THE FEBRUARY 28, 2016 TAX DEED PURSUANT TO THE MANDAMUS COURT'S *NUNC PRO TUNC* ORDER

The Order from the Mandamus Court to have the clerk prepare and file the “Corrective Tax Deed” of October 27, 2017 should be considered a reformation and correction of the original deed that was filed less than one year prior to the expiration of the period of redemption. See, *In re Application of Treasurer v. Higgins*, 169 Ill. App.3d 180, 523 N.E.2d 180, 186 (Ill.App. 5 Dist. 1988). Since the October 27, 2017 Corrective tax deed merely corrects the Tax Deed recorded on February 29, 2016 as is plainly stated on the Corrective Tax Deed, then the period between February 29, 2016 and October 27, 2017 was tolled pursuant to 35 ILCS 200/22-45 See, *Bryant v. Bowman*, 309 Ill.App.3d 181, 721 N.E.2d 745 (1st Dist. 1999)(automatic tolling is appropriate under 22-85 whenever objections are raised in a tax deed proceeding and litigation ensues). In *re Application of Treasurer v. Higgins*, 169 Ill. App.3d 180, 523 N.E.2d 180, 186 (Ill.App. 5 Dist. 1988) (trial court’s order and the tax deed included more than was described in the certificate of purchase. It was an error that the court could and did correct). See also, *Ashline v. Verble*, 130 Ill.App.3d 544, 546, 474 N.E.2d 764, 766-767 (5th Dist. 1984)(“It is well settled that a court may, at any time, correct a clerical error or matter of form so that the record reflects the actual order or judgment rendered by the court, so long as the new entry is based upon a definite and certain record.”).

Though not designated as such, the Mandamus Court, in effect, entered a *Nunc pro Tunc* Order. A *nunc pro tunc* order is an entry now for something previously done,

made to make the record speak now for what was actually done then. *In re Estate of Bird*, 410 Ill. 390, 398, 102 N.E.2d 329 (1951). A court has inherent power to make an entry *nunc pro tunc* at any time, even after the expiration of its term, to correct a clerical error or matter of form so that the record reflects the actual order or judgment rendered by the court when such entry is based upon a definite and certain record. *In re Estate of Young*, 414 Ill. 525, 534, 112 N.E.2d 113 (1953). This power rests partly upon the right and duty of the courts to do entire justice to every suitor, and partly upon their control over their own records and their authority to make them speak the truth. *Knefel v. People*, 187 Ill. 212, 215, 58 N.E. 388 (1900). The purpose of a *nunc pro tunc* order is to presently show that which was previously done and it takes effect from such prior time. It is solely a device for supplying omissions and to enter of record something actually done. *Scott v. Skokie Valley Community Hospital*, 54 Ill. App. 3d 766, 370 N.E.2d 107, 108 (1st Dist. 1977). The Order authorizing the Corrective Tax Deed should be considered a *Nunc pro Tunc* Order that relates back to the timely-filed February 28, 2016 Tax Deed.

The facts of the *Landis v. Miles Homes, Inc.* case are remarkably similar to those of the case at bar. 1 Ill.App.2d 331 273 N.E.2d 153 (2nd Dist. 1971). In *Landis*, Petitioner sought to declare a Tax Deed void because of statutory errors contained in the tax deed.

Id. At 332. The Court noted:

On November 3, 1969, the court entered an order for the County Clerk to issue a tax deed. A tax deed was issued by the County Clerk on the same date and recorded November 7, 1969. (This tax deed erroneously stated that the date of tax sale was October 23, 1969, rather than the correct 1967 date; and it was issued on the basis of the court's order without that order having been first filed in the Circuit Clerk's office with a certified copy given to the County Clerk, as is provided in the statute.)

On December 3, 1969, within the thirty day period after the entry of the November 3rd order, Miles Homes filed a motion to vacate pursuant to the provisions of Ill. Rev. Stat. 1969, ch. 110, pars. 68.3 and 50(7). The corporation contended that... (2) the November 3rd order for a tax deed had not been filed with the Clerk of the Circuit Court and, therefore, was not "entered" according to Ill. Rev. Stat. 1969, ch.110A, par. 272; and Miles contended that the tax deed, having thus been issued upon an order having no force or effect, was a nullity....

The trial court, referring to a "corrected" tax deed purporting to have been issued on January 26, 1970, — although no such document appears in the record — , entered an order on February 19, 1970, denying defendant's motion to vacate the November 3rd order. This order was later vacated by the court because the wording was unclear. Thereafter, on April 7, 1970, the court entered an order, based upon its Memorandum Opinion of the same date, which denied Miles' December 3rd, 1969, motion...

The court concluded that even if the November 3rd, 1969, tax deed was invalid as not having been issued pursuant to a prior certified copy of the order for the tax deed, the procedure provided by statute, the January 26th, 1970, tax deed would be effective since it was issued pursuant to a certified copy filed by the County Clerk on December 4, 1969.

Id. at 333-334. The Petitioner also claimed that the tax deed issued on November 3, 1969 was void because the court order authorizing it was not filed with the circuit clerk as was required by statute. *Id.* at 335. The Appellate Court rejected this argument and held that “a tax deed issued by the County Clerk pursuant to the original valid judgment signed by the courts becomes invalid because it was not issue pursuant to a certified copy of the original order which the Circuit Clerk has file stamped.” *Id.*

COUNT I DOES NOT STATE A CAUSE OF ACTION FOR DECLARATORY JUDGMENT

It appears that Appellants are belatedly attempting to describe Count I as a declaratory judgment action. 735 ILCS 5/2-701. A complaint states a cause of action for declaratory judgment if it recites in sufficient detail an actual and legal controversy between the parties and prays for a declaration of rights and, if desired, other legal relief. *Mid-Town Petroleum, Inc. v. Dine*, 72 Ill.App.3d 296, 28 Ill.Dec. 261, 390 N.E.2d 428

(1979). Even when viewed in the light most favorable to Appellants, Motion I fails to state a cause of action upon which relief may be granted because Appellants have not made any type of prayer for a declaration of rights. Paragraph 11 of Count I of

Appellants' Motion states:

SI and Brown's Count I Motion to Void the Tax Deed pursuant to Section 22-85 of the Property Tax Code is an attack to void the Tax Deed, not vacate the order.

(C 350) However, Appellants do not identify which Tax Deed they sought to declare void. There are three Tax Deeds that have been recorded, two of which were created and recorded at the insistence of Appellants as part of their ex parte Mandamus proceeding. There is no separate "Wherefore" clause at the end of Count I. Instead, at the end of Count II, Appellants' "Wherefore" clause states in part "Movant...pray this Honorable Court enter an order granting their Count I amended motion to void the tax deed." (C 359) However, Appellants do not identify which tax deed they are referring to, nor do they seek any type of declaration of rights amongst and between the parties as it relates to the ownership of the mineral rights.

APPELLANTS ARE ESTOPPED FROM CLAIMING THAT THE CORRECTED TAX DEED WAS VOID SINCE IT WAS APPELLANTS THAT SOUGHT THE CORRECTED TAX DEED

Appellants seek to declare that the October 27, 2017 Corrected Tax Deed is void. However, it was the Appellants' themselves that filed a Mandamus case and sought the issuance of the October 27, 2017 Corrected Tax Deed. Appellants should not have it both ways.

The equitable common law doctrine of judicial estoppel prevents a party from asserting inconsistent positions before courts in separate proceedings in order to receive favorable judgments in each proceeding. *Ceres Terminals v. Chicago City Bank*, 256

Ill.App.3d 836, 635 N.E. 2d 485, 494 (1st Dist. 1994); *Giannini v. First National Bank of Des Plaines*, 136 Ill.App.3d 971, 91 Ill.Dec. 438, 483 N.E.2d 924 (Ill.App. 1st Dist. 1985); *Finley v. Kesling*, 105 Ill.App.3d 1, 60 Ill.Dec. 874, 433 N.E.2d 1112 (Ill.App. 1st Dist. 1982). The application of this doctrine serves to limit "the prospect that an adept litigant may succeed in proving a proposition in one suit and, then succeed in proving the opposite in a second." *Ceres Terminals v. Chicago City Bank*, 256 Ill.App.3d 836, 635 NE 2d 485, 495 (Ill.App.1st Dist. 1994). At its heart, this doctrine prevents chameleonic litigants from "shifting positions to suit the exigencies of the moment" and engaging in "cynical gamesmanship" or "[h]oodwinking" a court. *Id.* Illinois courts have generally set forth the following five elements as necessary to assert successfully the doctrine of judicial estoppel:

"(1) the two positions must be taken by the same party; (2) the positions must be taken in separate judicial proceedings; (3) the positions must be given under oath; (4) the party must have successfully maintained the first position, and received some benefit thereby; and (5) the two positions must be `totally inconsistent.'"

Ceres Terminals v. Chicago City Bank, 256 Ill.App.3d 836, 635 NE 2d 485, 495 (Ill.App.1st Dist. 1994); *Parisi v. Jenkins*, 236 Ill.App.3d 42, 53-54, 177 Ill.Dec. 496, 603 N.E.2d 566 (Ill.App. 1st Dist. 1992); *Horwitz v. Bankers Life & Casualty Co.*, 319 Ill. App.3d 390, 400-01, 253 Ill.Dec. 468, 745 N.E.2d 591 (Ill.App. 1st Dist. 2001).

Appellants should be barred from arguing that the October 27, 2017 Corrective Tax Deed is Void. All of the requirements of Judicial Estoppel are present with respect to this issue. The Appellants are the same party that filed the separate Mandamus case and successfully sought issuance of the Corrected Tax Deed and have now taken the inconsistent position that the Tax Deed that they sought is now void. While the position taken in the Mandamus case was not under oath, it was taken by way of the filing of a

PROOF OF SERVICE

The undersigned certifies that on November 30, 2020 he electronically filed Appellees' Brief and Notice of Filing and served a true copy of the foregoing Appellees' Brief upon Appellants Cadjiah Brown and SI Resources, LLC by electronic mail and to their record attorneys' email address to Mindy S. Salyer and Amanda L. Moressi at msalyer@salyerlawoffices.com, and amoresi@salyerlawoffices.com pursuant to Illinois Supreme Court Rule.

VERIFICATION BY CERTIFICATION

Under penalties provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

Under penalties as provide by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that he served this Notice of Filing and the attached Appellees' Brief upon Appellants Cadjiah Brown and SI Resources, LLC by electronic mail to their record attorneys' email address to Mindy S. Salyer and Amanda L. Moressi at msalyer@salyerlawoffices.com, and amoresi@salyerlawoffices.com on November 30, 2020 at 5:00 pm.

Dated this 30th day of November, 2020.

/s/ Paul T. Slocomb
Signature of Attorney

Paul T. Slocomb
Printed Name of Attorney