

IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA

LLOYD LURZ,

Plaintiff,

vs.

DAVID LURZ and KARY LURZ, husband and wife; ANN POWELL and DENNY POWELL, wife and husband; LAWRENCE LURZ and ARLENE LURZ, husband and wife; LEONARD LURZ and PHYLLIS LURZ, husband and wife; RAYMOND LURZ and JUDY LURZ, husband and wife; DELORES HAMLING and JOHN HAMLING, wife and husband; LOUISE McLANE and MIKE McLANE, wife and husband; DON LURZ and DONNA LURZ, husband and wife; DOROTHY J. GALLINO, a single person; LEROY LURZ, a single person; CHARLES A. WARD, a single person; WILLIAM A. WARD and PAMINA WARD, husband and wife; THE HEIRS, DEVISEES, LEGATEES, PERSONAL REPRESENTATIVES AND ALL PERSONS INTERESTED IN THE ESTATE OF INEZ LURZ, DECEASED, REAL NAMES UNKNOWN; and ALL PERSONS HAVING OR CLAIMING ANY INTEREST IN AND TO THE SOUTH HALF, SECTION TWENTY-SIX, TOWNSHIP THIRTY-FIVE, NORTH, RANGE TWENTY-EIGHT, WEST OF THE SIXTH PRINCIPAL MERIDIAN IN CHERRY COUNTY, NEBRASKA, EXCEPT A TRACT DESCRIBED AS FOLLOWS: COMMENCING AT A POINT 2 RODS WEST OF THE NORTHEAST CORNER OF THE SOUTHEAST QUARTER OF SECTION TWENTY-SIX, RUNNING THENCE WEST 344 FEET, THENCE SOUTH 356 FEET, THENCE EAST 344 FEET, THENCE NORTH 356 FEET TO THE POINT OF BEGINNING, REAL NAMES UNKNOWN,

Defendants.

Case No. CI00-6

SUMMARY JUDGMENT

DATE OF HEARING:

March 17, 2000.

DATE OF DECISION: Date of Filing by Court Clerk.

APPEARANCES:

Robert D. Coupland	for plaintiff.
David Pederson	for defendants Charles A. Ward, William A. Ward, and Pamina Ward.
W. Gerald O’Kief	for defendants Mary Ann Powell, Benny L. Powell, Lawrence Lurz, Arline Lurz, Leonard R. Lurz, Phyllis J. Lurz, Deloris Hamling, John R. Hamling, Louise J. McLean, Michael L. McLean, Donald L. Lurz, Dorothy Gallino, and LeRoy Lurz.
No appearances	for defendant David Lurz, Kary Lurz, Raymond Lurz, Judy Lurz, and Donna Lurz.

SUBJECT OF ORDER: Motion for summary judgment of defendants Ward.

FINDINGS: The court finds and concludes that:

1. The decision in *Derr v. Columbus Convention Center, Inc.*, 258 Neb. 537, ___ N.W.2d ___ (2000), restates the oft-repeated principles regarding summary judgments that control this decision:

A. Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

B. The court views the evidence in a light most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence.

C. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

D. A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion.

2. The plaintiff asserts a cause of action to quiet title to, and for partition of, certain real estate. The plaintiff asserts his claim to the subject real estate through his mother, Inez Lurz. He claims that she died seized of the property and seeks that title be quieted and partition made.

3. A quiet title action sounds in equity. *Mueller v. Bohannon*, 256 Neb. 286, 589 N.W.2d 852 (1999). A partition action is also an action in equity. *Gustafson v. Gustafson*, 239 Neb. 448, 476 N.W.2d 819 (1991).

4. The controversy turns upon the effect of a deed from Eustach Lurz and Inez Lurz to the defendant, LeRoy Lurz, and the effect of previous litigation involving that conveyance. The material facts are not disputed.

5. The plaintiff's petition admits that Eustach Lurz and Inez Lurz executed a warranty deed of the property to LeRoy Lurz on or about November 25, 1969. The petition also admits that the deed was recorded in Deed Record 69 at Page 120. The defendants Ward, moving parties upon this motion, derive their title by deed from LeRoy Lurz.

6. The 1969 deed appears to defeat the plaintiff's claim. However, he claims that, in an action entitled "Edgar Nine vs. Inez Lurz and LeRoy Lurz," Case No. 8290 in this court, "after trial to a jury in said case on October 18, 1974 the jury entered a verdict in favor of [the plaintiff in that action, Edgar Nine,] setting aside said deed recorded at Deed Record 69, Page 120, . . ." Exhibit 10.

7. The petition in Case No. 8290 does not appear in the documents offered in evidence in the present case. However, the opinion of the Supreme Court in that case reversing a summary judgment and remanding for trial was received in evidence. Exhibit 4. The Supreme Court opinion adequately shows the nature of the action and many underlying facts. *Nine v. Lurz*, 191 Neb. 605, 216 N.W.2d 744 (1974). The court will not reiterate those facts here.

8. Following trial upon remand, a jury returned its verdict for plaintiff and the court duly entered judgment as follows:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED on this 18th day of October, 1974, that judgment shall be and hereby is entered in favor of the plaintiff on plaintiff's petition and against the defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the following described real estate, to-wit: [the subject real estate], is subject to sale as upon execution or satisfaction of a judgment entered in Case No. 8258 of this Court on October 27, 1971 for \$6983.17 with interest at six per cent (6%) from March 10, 1971 and costs of \$28.00.

Exhibit 8. The result of this case depends upon the effect of that judgment. The plaintiff contends that the first paragraph of the judgment declared the 1969 deed to be void. The defendants Ward dispute that contention.

9. The evidence also shows, without dispute, that the judgment of Edgar Nine in Case No. 8290 was satisfied and released by an instrument dated December 16, 1974, and filed on December 23, 1974.

10. The plaintiff in *Nine v. Lurz* prosecuted his action upon the statute then effective as to fraudulent conveyances. NEB. REV. STAT. § 36-401 *et seq.* (Reissue 1978). The law regarding such conveyances is well-settled.

A. In *United States Nat. Bank of Omaha v. Rupe*, 207 Neb. 131, 296 N.W.2d 474 (1980), the Nebraska Supreme Court clearly recognized that “a voluntary conveyance is good as between the parties to the instrument and void only as to the creditor or creditors who attack it.” *Id.* at 134, 296 N.W.2d at ___ (citing *Filley v. Mancuso*, 142 Neb. 106, 5 N.W.2d 91 (1942) and *Martin v. Shears*, 78 Neb. 404, 110 N.W. 1010 (1907)). The Supreme Court adhered to that rule in *Lammers Land & Cattle Co.*, 213 Neb. 243, 328 N.W.2d 759 (1983).

B. In *Rupe*, the Supreme Court determined that the “court erred . . . in annulling the deed rather than merely making the property subject to a lien of the defrauded creditors.” *United States Nat. Bank of Omaha v. Rupe, supra* at 134, 296 N.W.2d at ___. The Court reversed that portion of the decree which set aside and annulled the decree.

C. In *Giove v. Stanko*, 49 F.3d 1338 (8th Cir. 1995), the Court of Appeals recognized that the Nebraska courts have “unequivocally” recognized that rule. *Id.* at ___. The federal appeals court observed that the federal “district court’s judgment in the fraudulent conveyance action followed Nebraska law by leaving the fraudulently conveyed property in the hands of the transferees and making the property subject to [the creditor’s] collection efforts.” *Id.* at ___.

D. The decision in *Nine v. Lurz* applied the law as it existed prior to the adoption of the Uniform Fraudulent Conveyance Act in 1980. Both *Rupe* and *Lammers* also applied the pre-1980 law. For purposes of completeness, the court observes that the 1980 legislation was repealed in 1989 by the adoption of the Uniform Fraudulent Transfer Act. Because the decision under consideration and the

applicable precedent rely upon the pre-1980 law, the court need not consider either of the subsequent legislative enactments.

11. This court's judgment in *Nine v. Lurz* properly declared the real estate to be subject to Nine's judgment lien. This court did not annul the deed. Indeed, under the authority quoted above, this court could not have done so. The first quoted paragraph of the *Nine v. Lurz* judgment provided only for entry of judgment in the plaintiff's favor. The specific relief was limited to that specified in the second quoted paragraph. The subsequent satisfaction and release of judgment clearly establishes that the property is no longer subject to the lien thereby imposed on the property. As between the grantor, Inez Lurz, and the grantee, LeRoy Lurz, the conveyance was valid and binding. The plaintiff's contention, i.e., that the judgment entered upon the jury verdict "[set] aside said deed," therefore fails. Because the conveyance to LeRoy was valid and binding, Inez Lurz owned no interest which could have passed at her death to the plaintiff or any of Inez's other heirs.

12. As to the defendants Ward, the moving parties on the motion for summary judgment, there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving parties are entitled to judgment as a matter of law.

13. The only remaining matter regards the proper disposition of the action as to the remaining defendants.

A. The defendant, David Lurz, filed an answer essentially admitting the allegations.

B. The defendants, Mary Ann Powell (named in the petition as Ann Powell), Benny L. Powell (named in the petition as Denny Powell), Lawrence Lurz, Arline Lurz, Leonard R. Lurz, Phyllis J. Lurz, Raymond Lurz, Judy Lurz, Deloris Hamling, John R. Hamling, Louise J. McLean (named in the petition as Louise McLane), Michael L. McLean (named in the petition as Mike McLane), Donald L. Lurz, and Dorothy Gallino, have all filed answers disclaiming any interest in the property.

C. The defendant, LeRoy Lurz, filed an answer claiming an interest in the property adverse to the plaintiff, based upon the 1969 deed. He asserts no claim for relief, however, as to the defendants Ward.

D. The defendants, Kary Lurz and Donna Lurz, have not filed any written response to the petition and appear to be in default.

E. Because the flaw in the plaintiff's legal theory precludes the plaintiff from claiming any interest in the property deriving from intestate succession from Inez Lurz, there is no reason not to dismiss the plaintiff's petition with prejudice as to all defendants. Ancient equity case law holds that there cannot be inconsistent adjudications as to joint liability or as to a single res in controversy. *State of Florida v. Countrywide Truck Ins. Agency*, 258 Neb. 113, ___ N.W.2d ___ (1999).

F. Although David Lurz purported to file a cross-petition, under the principles announced in *Arnold v. Badger Lumber Co.*, 36 Neb. 841, 55 N.W. 269 (1893), and *Youngson v. Bond*, 64 Neb. 615, 90 N.W. 556 (1902), *on rehearing*, 69 Neb. 356, 95 N.W. 700 (1903), service of a notice similar to summons was necessary in order to proceed upon the cross-petition and to vest the court with jurisdiction. The cross-petition should be dismissed for lack of jurisdiction.

14. Various defendants have asserted claims that the petition is frivolous and requested attorneys' fees. Pursuant to NEB. REV. STAT. § 25-824 (Reissue 1995), a court shall assess attorney fees and costs if, upon the motion of any party or the court itself, the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment. *Blecha v. Blecha*, 257 Neb. 543, ___ N.W.2d ___ (1999). If the court finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct, the court shall assess attorney fees and costs. *Id.* The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous. *Id.* The court finds no showing of an improper motive. The plaintiff's legal position, while erroneous, was not so wholly without merit as to be ridiculous. Any requests for attorney fees should be denied.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The motion of the defendants, Charles A. Ward, William A. Ward, and Pamina Ward, for summary judgment is granted.
2. The plaintiff's petition is dismissed with prejudice at plaintiff's cost as to all defendants.
3. The purported cross-petition of the defendant, David Lurz, is dismissed for lack of jurisdiction.
4. All requests for attorneys' fees are denied.

Signed in chambers at Ainsworth, Nebraska, on April 3, 2000.
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 20__ by ____.
- 9 Enter judgment on the judgment record.
Done on _____, 20__ by ____.
- Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20__ by ____.
- Note the decision on the trial docket as: [date of filing] Signed
“Summary Judgment” entered.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge