

**IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA**

**JOHN M. BURK, BARBARA A. BURK  
KING and ROBERT L. KING,**

Plaintiffs,

vs.

**MARILYN M. DEMARAY, GARY  
BARTAK, MARY BARTAK, LOUIS  
EUGENE DEMARAY, ERICSON STATE  
BANK, and all persons having or claiming  
some right, title or interest in or lien upon  
the following described property, to-wit:  
The Southwest Quarter of Section 34,  
Township 25 North, Range 9 West of the  
6th P.M., Holt County, Nebraska,**

Defendants.

Case No. CI00-58

**INTERLOCUTORY  
ORDER ON MOTION FOR  
SUMMARY JUDGMENT**

**DATE OF HEARING:** February 5, 2001.  
**DATE OF RENDITION:** February 12, 2001.  
**DATE OF ENTRY:** Date of filing by court clerk (§ 25-1301(3)).  
**TYPE OF HEARING:** Open court.  
**APPEARANCES:**  
For plaintiffs: James G. Egley without plaintiffs.  
For defendants:  
Marilyn Demaray: No appearance.  
Bartaks: James D. Gotschall with defendants.  
L.E. Demaray: No appearance.  
Ericson State Bank: No appearance.  
Unknown claimants: No appearance.  
**SUBJECT OF ORDER:** Motion of defendants Bartak for summary judgment.  
**PROCEEDINGS:** See journal entry made on proceedings.  
**FINDINGS:** The court finds and concludes that:

1. The plaintiffs' petition seeks to quiet title to a 4/9ths interest in certain Holt County real estate, asserting that deeds from the plaintiffs to Marilyn Demaray were forged. The defendants Bartak (unless otherwise required by the context, the court will refer to the Bartaks as the defendants), the present owners of record, seek a summary judgment in their favor. They assert that they are entitled to judgment as a matter of law under three alternative theories. First, they assert that the Marketable Title Act establishes their defense as a matter of law. NEB. REV. STAT. § 76-288 *et seq.* (Reissue 1996). Second, they assert the effect of § 76-258 cures any defect in the execution of the deeds in question. NEB. REV. STAT. § 76-258 (Reissue 1996). Finally, they claim entitlement to summary judgment under the doctrine of adverse possession.

2. In *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, \_\_\_ N.W.2d \_\_\_ (2000), the Nebraska Supreme Court restated the familiar principles applicable to motions for summary judgment:

A. Summary judgment is proper 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. In considering a summary judgment motion, 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. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.

D. 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.

E. A *prima facie* case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.

F. After the moving party makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

3. The plaintiffs allege certain facts which are not contested and generally supported by Exhibit 14. Patrick J. Burk was the natural father of plaintiffs John M. Burk and Barbara A. Burk King. Patrick died intestate on or about May 16, 1961, owning the subject real estate. The property descended to his spouse, Marilyn M. Burk, and their children, including John M. Burk, Barbara A. Burk King, and a third child who died later. Patrick's full ownership descended one-third to Marilyn, and two-thirds to the three children, or 2/9ths to each child. The petition asserts the respective claims of these two children, and some marital interest in Barbara's husband as to her 2/9ths interest.

4. The alleged forgery as to Barbara is dated as to execution and acknowledgment on November 20, 1972, but not recorded until February 27, 1978. Exhibit 8. The alleged forgery as to John is dated as to execution and acknowledgment on February 27, 1978, and recorded the same date. Exhibit 9.

5. The defendants forthrightly concede that a genuine issue of fact exists as to whether the deeds attacked by the plaintiffs were forged. Thus, summary judgment may only be granted if the defendants are entitled to judgment even if the questioned deeds were forged by Marilyn Demaray.

6. The defendants also concede that, to extend the chain of title to a deed or deeds of record more than 22 years before the plaintiffs commenced this action, the chain of title must be considered including the deeds claimed to have been forged. Exhibits 8 and 9.

7. The parties disagree whether quitclaim deeds such as Exhibits 8 and 9 qualify as "deed[s] of conveyance" under § 76-288 based upon the Supreme Court decision in *Smith v. Berberich*, 168 Neb. 142, 95 N.W.2d 325 (1959). This court need not consider that interesting issue.

8. Section 76-288 provides that the person claiming title under an unbroken chain of title "under a deed of conveyance which has been recorded for a period of twenty-two years or longer . . . shall be deemed to have a marketable title . . . , *subject only to such claims* thereto and defects of title *as are not extinguished or barred* by the application of the provisions of sections 25-207 . . . ." NEB. REV. STAT. § 76-288 (Reissue 1996) (emphasis supplied). Of course, § 25-207 is the statute establishing

a statute of limitation of four years from the discovery of any fraud. The plaintiffs adduced evidence on the motion raising a material issue of fact whether they discovered the alleged forgeries within four years of the date of commencement of this action. Thus, because the deed or deeds commencing the unbroken chain of title are the alleged forgeries, the defendants' relief accorded by § 76-288 is "subject to" the plaintiffs' fraud claim. Consequently, the Marketable Title Act provides no basis upon which to grant a judgment for the defendants in this case.

9. The defendants also assert the curative effect of § 76-258. This section cures any "defect, irregularity or omission" where an instrument recorded for more than 10 years fails to comply with "any statutory requirement or requirements relating to the execution, attestation, acknowledgment, certificate of acknowledgment, recording or certificate of recording . . . ." NEB. REV. STAT. § 76-258 (Reissue 1996). The only case found by this court addressing § 76-258 is the decision in *Bailey v. Karnopp*, 170 Neb. 836, 104 N.W.2d 417 (1960). Unfortunately, the court in *Bailey* did not describe the nature of the defect of execution present in that case.

10. It seems self-evident to this court that a true forgery, where the purported grantor never had the intent to convey the property, is more than a mere "defect, irregularity or omission." The law requires that a deed be made by the grantor freely and voluntarily. 26 C.J.S. *Deeds* § 54a (1956). For that reason, no title passes by a deed which is forged, as against one who did not participate in, or who had no knowledge of, the forgery. 26 C.J.S. *Deeds* § 54g (1956). A forged deed is absolutely void; the deed and its record is wholly ineffective for any and all purposes. *Id.* The court concludes that the curative statute provides no assistance to the defendants in this case.

11. Finally, the court considers the defendants' claim to title by adverse possession. A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for the statutory period of 10 years. *The Rush Creek Land & Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998). Title cannot be acquired without simultaneous and continuous existence of each element of adverse possession for the required period. *Id.* A tenant may adversely possess real property in the name of his landlord. *Id.*

12. The plaintiffs filed their petition on March 22, 2000. Consequently, the court examines the evidence for the 10-year period immediately prior to that date. The defendants' affidavits show that they met all of the requirements for adverse possession from the date they became owners of the property on March 28, 1990. Exhibits 1 and 2. That date was the date of execution and delivery into escrow of the deed of the land from Louis Eugene Demaray and Marilyn M. Demaray to the defendants. The defendants' affidavits show that they were already in possession of the land as of that date under a lease from the Demarays.

13. The plaintiffs' counsel forthrightly conceded during argument that there was no evidence raising an issue of fact regarding the possession by the defendants during the period of their ownership. Consequently, the focus of the court's inquiry narrows to the period from March 21, 1990, to March 28, 1990.

14. The plaintiff, John M. Burk, was born in 1952. Exhibit 3, at 20:16-17. By the time of the purported forged deed pertaining to his interest, he had already attained the age of majority. Any events after that date would have occurred after the cessation of his minority.

15. The plaintiff, Barbara A. Burk King, testified that on November 20, 1972, she was 19 years of age. Exhibit 4, at 18:21-22. By November 1, 1972, the law in Nebraska provided that the age of majority was 19 years. See NEB. REV. STAT. § 43-2101 (Reissue 1998) (previously codified as § 38-101). Consequently, as of November 20, 1972, and at all times after February 27, 1978, Barbara had attained the age of majority. As any marital claim of Barbara's husband derives solely from Barbara's interest, the court will disregard the husband's marital claim and focus on Barbara's interest.

16. After Patrick's death, Marilyn and the children were cotenants of the property. The possession of real property by a tenant in common is ordinarily the possession of all cotenants and before their ouster arises notice or knowledge of acts causing their ouster must be brought home to them in some plain and unequivocal manner. *Unick v. Saint Joseph Loan and Trust Co.*, 146 Neb. 789, 21 N.W.2d 752 (1946); *Severson v. McKenzie*, 122 Neb. 827, 241 N.W. 774 (1932). The notice or knowledge out of which ouster of cotenants arises need not be actual but may be constructively inferred from acts and circumstances attending adverse possession which are open, notorious, and unequivocal in their character. *Id.* In other words, notice of such hostile claim may be shown by acts of the cotenant in

possession of such a notorious and hostile character as would put a person of ordinary prudence upon his or her guard. *Id.* Where the other cotenants' knowledge, actual or constructive, is shown, their ignorance or mistake as to their rights will not affect the operation of the statute in the absence of fraudulent concealment or misrepresentation. *Id.*

17. Both of the plaintiffs who are the principal claimants admitted during their depositions that they knew that, before the sale to the defendants, Marilyn Demaray had previously sold the property to Schmiser. Exhibit 3, at 14:9-19; Exhibit 4, at 19:16-20:12. These deposition excerpts also demonstrate that they were then ignorant of the possible claim. Marilyn's sale to Schmiser qualified as an act of such notorious and hostile character as to place any cotenants on notice. The plaintiffs' ignorance or mistake as to their rights does not affect the operation of the statute in the absence of fraudulent concealment or misrepresentation. The date of the sale to Schmiser does not readily appear in the record, however the deed back from Schmiser to Marilyn Demaray and Gene Demaray appears of record by March 1, 1984. Exhibit 13. Certainly, the hostile character of Marilyn's possession as against any cotenants was constructively brought home to the plaintiffs at or prior to that date.

18. As the Demarays' successors in title, the defendants are entitled to tack the Demarays' possession to their own, as least from March 1, 1984, on. *Thornburg v. Haecker*, 243 Neb. 693, 502 N.W.2d 434 (1993); *Bryan v. Reifschneider*, 181 Neb. 787, 150 N.W.2d 900 (1967).

19. Thus, as the cases quoted above disclose, the plaintiffs' ignorance or mistaken belief does not affect the operation of the statute of limitations for adverse possession in the absence of fraudulent concealment or misrepresentation. Viewed in the light most favorable to the plaintiffs, there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts concerning fraudulent concealment or misrepresentation.

20. To prove fraudulent concealment, a plaintiff must show that (1) the defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's

action or inaction in response to the concealment. *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000). By the time of the alleged forgeries, both of the plaintiffs were of legal age. By that time, whatever duty Marilyn might have owed to a minor child had terminated. Thus, Marilyn had no duty to disclose the children's ownership interest. Moreover, there is no evidence suggesting any concealment.

21. The plaintiffs make no claim of fraudulent concealment and state no facts raising any inferences of fraudulent concealment. Both of their affidavits simply state they were unaware of any interest in the real estate until discovery in the second half of 1999 or July of 1999. Exhibits 15 and 17. Their depositions state no facts raising any inferences supporting a claim of fraudulent concealment. Exhibits 3 and 4. John M. Burk stated the situation concisely: "See, this was, the way I understand, given to us kids back when we were like eight years old and nobody told us different. I mean, nobody told us that that was – I guess *we just assumed that it was all left to mother and never checked any of it.*" Exhibit 3, at 12:17-21 (emphasis supplied). The only evidence remotely bearing favorably to the plaintiffs was Barbara's deposition testimony that she asked her mother generally about her mother's financial status over the years and "would never get an answer." Exhibit 4, at 14:6-8. However, it is clear in context that these inquiries were not specifically directed to this property, but were general financial inquiries. That testimony simply fails to raise any inference of fraudulent concealment.

22. The elements of a cause of action for fraudulent misrepresentation are (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff did so rely; and (6) that he or she suffered damage as a result. *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000). Quite simply, the record is wholly devoid of any representation by Marilyn to either plaintiff.

23. As to the defendants' defense of adverse possession, there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts, and the defendants are entitled to judgment as a matter of law.

24. As the court observed verbally at the conclusion of the summary judgment hearing, this matter contests the legal rights of the plaintiffs, whose signatures for purposes of this motion are considered to have been forged, against the defendants, who the evidence shows were bona fide purchasers for value without notice of the forgery. Nebraska law, through the concept of adverse possession under these particular facts, values the defendants' rights over the wrong allegedly done to the plaintiffs. The principles of law are well-settled. Any policy considerations are appropriately addressed to the Legislature rather than to a court.

25. The plaintiffs' petition sought only relief to quiet title in the real estate. The petition raised no claim of damages against Marilyn Demaray or Louis Eugene Demaray. Although the pretrial order expressly supersedes the pleadings, the issues stated by the plaintiffs in Schedule 7 similar raise no claim of damages. Indeed, the pretrial order records that the claims of plaintiffs and the defendants Bartak against Marilyn M. Demaray are abated by operation of law following Marilyn's death and the absence of any revivor. The defendants Bartak are entitled to judgment against the plaintiffs dismissing the plaintiffs' petition with prejudice and on the defendants' amended counterclaim quieting title to the real estate in the defendants Bartak. The defendants' motion must be granted to that extent.

26. Because the plaintiffs' petition fails as a matter of law against the defendants Bartak, the petition similarly fails as to the other defendants. *State of Florida v. Countrywide Truck Ins. Agency*, 258 Neb. 113, 602 N.W.2d 432 (1999). The petition must be dismissed as to all defendants.

27. There remains the matter of the Bartaks' cross-petition against the defendants Demaray. As noted above, as to Marilyn the cross-petition has abated by operation of law. However, the cross-petition exists as to defendant Louis Eugene Demaray. Neither his answer nor the pretrial order asserts any limitations defense against the Bartaks' breach of warranty claim for indemnity. As to liability on the indemnity claim against Louis Eugene Demaray, there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts, and the defendants Bartak are entitled to judgment as a matter of law. The defendants' motion must also be granted to that extent.

28. However, the evidence contains no proof of any loss or damages to the Bartaks. Consequently, as to the matter of damages on indemnity, the motion must be denied, and the issue of loss

or damages on the indemnity claim of the Bartaks' cross-petition against Louis Eugene Demaray must be assigned for trial.

29. Because one of the parties' claims remains unresolved, this order is interlocutory in character and remains subject to revision at any time before the entry of final judgment. NEB. REV. STAT. § 25-1315 (Cum. Supp. 2000). Because of the interlocutory character of this order, the court includes in the order below a limitation on the right of the defendants' Bartak to dismiss their cross-petition against Louis Eugene Demaray without prejudice that any such purported dismissal shall not be effective until order of the court is entered thereon.

30. The date of rendition of this order establishes the trial priority date on this court's trial calendar. Pretrial order at ¶ 4D(1).

**ORDER:** IT IS THEREFORE ORDERED that:

1. The motion for summary judgment of the defendants Bartak is granted to the extent of the following relief and is otherwise denied.

2. Interlocutory summary judgment is hereby entered in favor of the defendants, Gary Bartak and Mary Bartak, and against the plaintiffs, John M. Burk, Barbara A. Burk King, and Robert L. King:

A. Dismissing the plaintiffs' petition with prejudice to future action as to all defendants at plaintiffs' cost;

B. Granting the amended counterclaim and adjudging that:

(1) The defendants, Gary Bartak and Mary Bartak, husband and wife, are the owners in fee simple of the real estate legally described as the Southwest Quarter (SW¼) of Section 34, Township 25 North, Range 9 West of the 6<sup>th</sup> P.M. in Holt County, Nebraska, and the said defendants and their predecessors in title have been in actual, continuous, exclusive, open, notorious, and adverse possession of said real estate under a claim of ownership for the statutory period of 10 years last past prior to the commencement of this action and during all of said time had asserted title to said premises against all persons whomsoever, and,

(2) The title of the defendants, Gary Bartak and Mary Bartak, husband and wife, to the Southwest Quarter (SW¼) of Section 34, Township 25 North, Range 9 West of the 6<sup>th</sup> P.M. in Holt County, Nebraska, is quieted and confirmed in them as against each of the plaintiffs and against all

persons having or claiming any interest in said real estate through any one or more of the plaintiffs, and each of them is hereby enjoined forever from asserting any claim or interest in said real estate or any portion thereof; and,

(3) Taxing the costs incurred by said defendants against the plaintiffs, jointly and severally, in the amount of \$191.50, with interest at 7.052% per annum from February 12, 2001, until paid.

3. Interlocutory summary judgment is hereby entered on the cross-petition of the defendants, Gary Bartak and Mary Bartak, in favor of said defendants and against the defendant, Louis Eugene Demaray, on the issue of liability.

4. Trial on the issue of damages of the cross-petition of the defendants, Gary Bartak and Mary Bartak, against the defendant, Louis Eugene Demaray, is assigned for the trial term commencing on March 6, 2001, subject to call as provided in the pretrial order.

5. Because of the interlocutory character of this order, the right of the defendants' Bartak to dismiss their cross-petition against Louis Eugene Demaray without prejudice is limited to the extent that any such purported dismissal shall not be effective until an order of the court is entered thereon.

6. This order is interlocutory in character and remains subject to revision at any time before the entry of final judgment.

Signed in chambers at O'Neill, Nebraska, on February 12, 2001.  
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 \_\_\_\_.
- 9 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  
"Interlocutory Order on Motion for Summary Judgment" entered.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.

Mailed to:

BY THE COURT:

\_\_\_\_\_  
William B. Cassel  
District Judge