

IN THE SUPREME COURT OF THE STATE OF MONTANA

CASE NO. DA 009-0033

<p>BRADLEY J. CERTAIN,</p> <p>Plaintiff/Appellee,</p> <p>v.</p> <p>TERRY LYNN TONN aka TERRY LYNN CHAVEZ and GEORGE CHAVEZ,</p> <p>Defendants/Appellants.</p>	<p>APPELLANTS' REPLY BRIEF</p>
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On Appeal from the District Court of the
Sixteenth Judicial District Custer County, Montana

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Montana Statutes:

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INTRODUCTION

Appellant and Respondent have filed briefs. In addition, by order dated May 27, 2009, this court has stricken certain exhibits that were part of Appellee's Appendix. This reply brief addresses the two arguments made by the Appellee Bradley J. Certain in his brief.

ARGUMENT

A. An Occupant Is Entitled to Notice and by Statute Is Entitled to

Redeem. Bradley J. Certain maintains in his brief (p.11) that there is no need to provide notice to George Chavez as George is merely an occupant of the property and has no rights to the property. However, in tax title matters, this Court does not differentiate between mistakes that directly affect the parties and mistakes that show only that the statutes were not followed. As quoted in the opening brief, "In the county treasurer's proceedings to sell the land there is no distinction recognized between the mandatory and the directory requirements of the statute. The county treasurer must act as the statute directs. Otherwise he acts without authority and the purported sale which he assumes to make is invalid. This holds true even though the requirement with which the county treasurer failed to comply was not one enacted for the protection of the owner of the land." *Perry v. Maves*, 125 Mont. 215, 217-8, 233 P.2d 820, 821 (1951). No lesser rule should apply to the purchaser of a

tax lien that is obligated to give notice to an occupant because the same property interests are at stake and although the notice is given by the purchaser, the issuance of the deed is still a governmental and not a private act.

For the principle of *Perry v. Maves* to have any meaning, the issuance of a tax deed would be improper even if occupants could not redeem because the lack of notice to an occupant still means that the statute was not followed and the issuance of the tax deed is improper.

However, Mr. Certain completely misses the point because by statute Mr. Chavez actually does have the valuable statutory right of redemption. The applicable statute says exactly the opposite of Mr. Certain's contention that there is no right of redemption. Instead, the law is that the property may be redeemed by "the owner, the holder of an unrecorded or improperly recorded interest, the occupant of the property, or any interested party" MCA §15-18-111 (1). The statute as stated in the disjunctive means that any person holding any of those separately named classifications can redeem.

It is undisputed at the District Court that George Chavez was an occupant of the property and even if there had been, there was no cross-appeal of that District Court conclusion. Since the occupant has that right to redeem it simply makes sense that notice must be given to George Chavez as the

occupant of the property under MCA §15-18-212(4) and this court's application of the statute to an occupant in *Gentry Montana Ent., Inc. v. McDonald*, 2004 MT 36.

B. Under the Undisputed Facts, Terry Lynn Tonn Was Still a Co-Owner with Bradley Certain at the Time any Tax Deed Was Issued to Bradley J. Certain. If this court retrospectively decides to overturn the ruling and reasoning of *Gentry* (which had already been decided at the time notice was to be given), then as of the date of the issuance of the tax deed by Custer County, Bradley J. Certain and Terry Lynn Tonn were co-owners of the property immediately prior to the issuance of the tax deed. Defendants' Exhibit A at Summary Judgment Hearing, reproduced at Appellants' Appendix Page 6 is a certified copy of the deed of distribution from the Personal Representative of the Estate of Theodore A. Tonn, deceased. This deed of distribution passed the property to Theodore Dana Tonn and Terry Lynn Tonn, as tenants in common.

Mr. Certain states in Appellee's Brief at page 12, "Clearly neither Tonn, not Theodore Dana Tonn, a/k/a/ Theodore D. Tonn, had any ownership in the property at anytime relevant to this proceeding." This is incorrect. The argument of no interest in the property any relevant time is belied by the quitclaim deed itself (signed and recorded just prior to the tax deed issuance),

the affidavit of Mr. Certain and the chain of title that is the present state of the District Court record. The stricken exhibits cannot be relied upon to change the state of the title because they were never offered or admitted by the District Court and there was no cross appeal. Indeed, the court should not even consider this argument that Terry Lynn Tonn had no interest in the property because this argument was not addressed at the District Court level.

Any argument made for the first time on appeal will not be considered by this Court. *Thibodeau v. Bechtold*, 2008 MT 412 ¶29. Since the argument that Tonn had been divested of title prior to the issuance of the tax title was not raised below then it should not be considered now. If the tax deed was validly issued, Mr. Certain was acquiring a tax deed at the same time that he was a co-owner of the property with Terry Tonn. The issue is only moot if, as has been shown by Terry Tonn and George Chavez, the tax title is invalid. In that case since there was no cross appeal, the issue of joint tenancy does not need to be addressed by this court.

CONCLUSION

The District Court ruling should be reversed based on *Gentry* because it is undisputed that there was no notice to the occupant. Bradley J. Certain has given no persuasive argument that the holding and reasoning of *Gentry* should be overturned. Bradley J. Certain has not shown that at the time immediately

before the tax deed was purportedly issued, he was the only owner of the property. Instead the only evidence at the district court level establishes that as of October 24, 2007, he was a co-tenant with Terry Lynn Tonn. In accordance with law from other jurisdictions, the issuance of a tax deed to a co-tenant should not divest another co-tenant of all rights to the property.

Dated:

Peter T. Stanley

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by WordPerfect, is not more than 5,000 words, excluding table of contents, table of citations, certificate of service, and the certificate of compliance.

Dated: June _____, 2009

Peter T. Stanley

CERTIFICATE OF SERVICE

I certify that on this day a true and correct copy of the foregoing has been served by placing the same in the United States mail, postage prepaid, and addressed as follows:

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