OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (SEPTEMBER 17, 2021)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LUMINANT MINING COMPANY, L.L.C.,

Plaintiff-Appellee,

v.

KENDI NARMER PAKEYBEY, Also Known as NARMER BEY, CHIEF, Also Known as KENNETH PARKER; DAWUD ALLANTU BEY, First Trustee of AMEXEMNU TAYSHA TRUST; AMEXEMNU CITY STATE, INCORPORATED; ANU TAFARI ZION EL, Second Trustee of AMEXEMNU TAYSHA TRUST,

Defendants-Appellants.

No. 20-40803

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:19-CV-372

Before: KING, HIGGINSON,
and WILSON, Circuit Judges.

Cory T. Wilson, Circuit Judge:

Kendi Narmer PakeyBey, asserting that he is the heir of a nineteenth century tenant in common, came to Rusk County, Texas, to lay claim to his land. Luminant Mining, a company that holds title to the land and uses it for mining and logging operations, thought otherwise and filed suit in state court. After removing the case to federal court, PakeyBey argued that Luminant's chain of title showed no partition of the tenancy, so the tenancy still existed. Luminant countered that it was entitled to a presumption of full ownership or, alternatively, it had adversely possessed the property. The district court granted summary judgment for Luminant on both grounds. We agree that Luminant has fulfilled Texas's adverse possession requirements and therefore holds the land in fee simple. We AFFIRM.

I.

On March 20, 1848, the state of Texas conveyed 1,280 acres of land in Rusk County, Texas, to Isham Chism and Jesse Walling as tenants in common. Chism and Walling held undivided shares in the property, with each tenant having an equal right to possess the whole property. *See, e.g., Dierschke v. Cent. Nat'l Branch of First Nat'l Bank*, 876 S.W.2d 377, 379 (Tex. App. 1994) (citations omitted). Their tenancy in common differed considerably from a fee simple interest, with which a titleholder has total ownership of the property. *See Jackson v. Wildflower Prod. Co., Inc.*, 505 S.W.3d 80, 88 (Tex. App. 2016) (citations omitted). This case turns on whether Chism and Walling's tenancy in common, through succeeding

years and conveyances, persists or at some point merged into fee simple ownership of the land.

In 1979, about 131 years after Chism and Walling took title, the Texas Utilities Generating Company started acquiring land that was once part of the tenancy in common. That company was succeeded by the Texas Utilities Mining Company, then by TXU Mining Company, and finally by Luminant Mining Company, LLC. From 1979 to 1994, these companies acquired title to roughly three dozen tracts of land once part of the Chism-Walling tenancy. Each deed was duly recorded and the chain of title for each tract was traced to a conveyance by either Chism or Walling. All the deeds purport to convey a fee simple. Since at least 2009, Luminant has either mined lignite coal or managed timber on the tracts.

PakeyBey, Dawud Allantu Bey, the Amexemnu Taysha Trust, the Amexemnu City State, and Anu Tafari Zion El (collectively, the PakeyBey parties) assert they have severed ties with the United States of America and are "Moorish Americans" who are "sovereign freemen under the Republic . . . ." PakeyBey also asserts he is the heir of John Walling, the son of Jesse Walling, and thus the inheritor of Walling's tenancy in common. On February 4, 2019, PakeyBey filed a warranty deed in Rusk County purporting to convey roughly 951 acres[1] of the Walling-Chism tenancy to Bey and the Amexemnu Taysha Trust.

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[1] Initially PakeyBey claimed ownership of an additional 258 acres and the district court found that Luminant was the exclusive owner of that property. The PakeyBey parties do not appeal this judgment; thus, they have waived any arguments related to it. *In re Southmark Corp.*, 163 F.3d 925, 934 n.12 (5th Cir. 1999).

The PakeyBey parties occupied the land and attempted to harvest timber. Luminant discovered them and demanded they vacate the land, asserting it alone was the owner of the property. When the PakeyBey parties persisted in claiming rights to the land, Luminant filed a trespass-to-try-title action[2] against them in state court, seeking damages and injunctive relief. Luminant alleged it had superior title to the tracts and exclusive right to possession of the land.

The PakeyBey parties removed the case to federal court on diversity grounds. At the direction of the district court, the parties filed motions for summary judgment. The district court granted summary judgment for Luminant.

The district court examined the abstracts of title presented by the parties and found that even though gaps existed in Luminant's chain of title, Texas's doctrine of presumed grant applied to fill those gaps. That doctrine is in effect "a common law form of adverse possession" and settles "titles where the land was understood to belong to one who does not have a complete record title, but has claimed the land a long time." *Fair v. Arp Club Lake, Inc.*, 437 S.W.3d 619, 626 (Tex. App. 2014) (citing *Conley v. Comstock Oil & Gas LP*, 356 S.W.3d 755, 765 (Tex. App. 2011)). Basically, when a chain of title reveals a gap, Texas courts can presume a grant of title from the party preceding the gap to the party succeeding the gap. *Clark v. Amoco*

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2 "A trespass to try title action is the method of determining title to lands, tenements, or other real property." Tex. Prop. Code Ann. § 22.001(a).

Prod. Co., 794 F.2d 967, 970 (5th Cir. 1986).[3] The district court did so here, concluded that the gaps in Luminant's chain of title therefore did not defeat its fee simple ownership, and confirmed Luminant's fee simple interest in the tracts.

The district court specifically rejected the Pakey-Bey parties' assertion that Walling's tenancy in common existed even after Chism's conveyances to Luminant's predecessors. The district court further found that the PakeyBey parties failed to demonstrate an actual connection between PakeyBey and Walling. It alternatively found that summary judgment was appropriate because Luminant had demonstrated a matured limitations period under Texas's adverse possession statutes. The PakeyBey parties now appeal.

II.

"This court reviews a grant of summary judgment de novo, applying the same standard as the district court." *Renfroe v. Parker*, 974 F.3d 594, 599 (5th Cir. 2020) (citations omitted). Summary judgment is merited when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If a reasonable jury could return a verdict for the non-moving party, then a genuine dispute of material fact exists, and summary judgment is not appropriate.

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[3] More specifically, the doctrine of presumed grant can be applied when three elements are met: (1) "a long-asserted and open claim, adverse to that of the apparent owner"; (2) "nonclaim by the apparent owner"; and (3) "acquiescence by the apparent owner in the adverse claim." *Adams v. Slattery*, 295 S.W.2d 859, 868 (Tex. 1956) (internal quotation marks omitted) (quoting *Magee v. Paul*, 221 S.W. 254, 256 (Tex. 1920)).

Ahders v. SEI Priv. Tr. Co., 982 F.3d 312, 315 (5th Cir. 2020) (quoting *Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000)). All facts and all reasonable inferences from facts should be construed most favorably to the nonmoving party. *Murray v. Earle*, 405 F.3d 278, 284 (5th Cir. 2005).

Because this is an action disputing title to real property in Texas, this court applies Texas substantive law. *United States v. Denby*, 522 F.2d 1358, 1362 (5th Cir. 1975) (citing *United States v. Williams*, 441 F.2d 637, 643 (5th Cir. 1971)). In Texas, "[b]y statute, a trespass-to-try-title action 'is the method of determining title to lands.'" *Brumley v. McDuff*, 616 S.W.3d 826, 831-32 (Tex. 2021) (quoting Tex. Prop. Code Ann. § 22.001(a)). In these actions, "a plaintiff may prove legal title by establishing: (1) a regular chain of title of conveyances from sovereign to the plaintiff; (2) a superior title to that of the defendant out of a common source; (3) title by limitations (i.e., adverse possession); or (4) possession that has not been abandoned." *Id.* at 832 (citing *Rogers v. Ricane Enters., Inc.*, 884 S.W.2d 763, 768 (Tex. 1994)). As the crucial question is "the strength" of the plaintiff's title rather than the weaknesses of a defendant's claims, *Land v. Turner*, 377 S.W.2d 181, 183 (Tex. 1964), we focus on whether Luminant has demonstrated a fee simple interest in the tracts disputed by the PakeyBey parties.

III.

The district court concluded summary judgment was warranted for Luminant on two grounds: Luminant had demonstrated a regular chain of title of conveyances and, alternatively, Luminant had adversely possessed the land. On appeal, the PakeyBey parties

attack the district court's application of the presumed grant doctrine to complete Luminant's chain of title. But it is not necessary for us to address this issue because, regardless, Luminant has demonstrated it adversely possessed the land. We therefore affirm the district court's summary judgment on that ground.

"In order to establish adverse possession as a matter of law, the claimant must show by undisputed evidence his actual peaceable and adverse possession of the property . . . ." *Bywaters v. Gannon*, 686 S.W.2d 593, 595 (Tex. 1985) (citations omitted). Peaceable possession is "possession of real property that is continuous and is not interrupted by an adverse suit to recover the property." Tex. Civ. Prac. & Rem. Code § 16.021(3). Adverse possession is "actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person." *Id.* § 16.021(1). Generally, a party claiming title by adverse possession under Texas law must show (1) actual and (2) visible possession that is (3) under a claim of right, (4) hostile to another's claim to the property, and (5) peaceable for the applicable limitations period. *See Nat. Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 193 (Tex. 2003).

More specifically, this case centers on an alleged tenancy in common, and a tenant in common must clear a heightened threshold for proving that its possession is hostile to any other claimant. To do so, a cotenant must repudiate its cotenant's title. *Todd v. Bruner*, 365 S.W.2d 155, 156 (Tex. 1963) (citations omitted). This is because cotenants' possession of common land is "presumed to be in right of the common title. [A cotenant] will not be permitted to claim the protection of the statute of limitations unless it clearly appears

that he has repudiated the title of his cotenant and is holding adversely to it." *Id.* (citations omitted). To be effective, repudiation must provide notice to the cotenant, *id.* at 159, though notice can be actual or constructive, *Moore v. Knight*, 94 S.W.2d 1137, 1139 (Tex. Comm'n App. 1936). Conveying the common estate to a third party who records a deed and takes possession of the property provides constructive notice. *Parr v. Ratisseau*, 236 S.W.2d 503, 506 (Tex. Civ. App. 1951) (citations omitted). "This effects an ouster of the cotenants and after the expiration of the statutory period will bar the right of the cotenants to recover." *Id.* (citations omitted).

The applicable limitations period differs based on the possessor's conduct. If a possessor is claiming under "title or color of title[,]" it must possess the land for three years. Tex. Civ. Prac. & Rem. Code Ann. § 16.024. If a possessor "cultivates, uses, or enjoys the property" and pays "applicable taxes on the property" while claiming "the property under a duly registered deed[,]" the period is five years. *Id.* § 16.025. If a possessor merely "cultivates, uses, or enjoys the property[,]" the period is ten years. *Id.* § 16.026. For calculating time, Texas allows successors in interest to tack their time in possession to their predecessors' time provided there is privity. *Id.* § 16.023.

This appeal ultimately turns on whether Luminant's possession of the land has been hostile to any claim of its alleged cotenants. The record is uncontested that Luminant had either been mining or managing timber on the disputed tracts for at least ten years prior to the 2019 deed recorded by the PakeyBey parties or Luminant's filing of this suit on July 26, 2019. Further, the record shows that since November

15, 1994, Luminant or its predecessors have held the tracts at issue under recorded deeds. *See id.* The undisputed facts thus establish the first, second, third, and fifth elements of Luminant's adverse possession claim. *See id.* § 16.026.

But the PakeyBey parties contend that Luminant failed to demonstrate hostile possession vis-à-vis its cotenants. They assert that the record is devoid of evidence of actual notice of repudiation of the common title. They further contend that Luminant cannot show constructive notice of repudiation, arguing that constructive notice and ouster require more than Luminant's demonstrated possession of the land and the absence of a claim against the land by Walling's heirs. Their argument rests on a correct reading of the law, up to a point. *See Hardaway v. Nixon*, 544 S.W.3d 402, 410 (Tex. App. 2017). But Luminant's possession and Luminant's recorded deeds are sufficient to give constructive notice of hostility to cotenants and to effect an ouster. *Parr*, 236 S.W.2d at 506 (citations omitted). The PakeyBey parties' argument is therefore unavailing.

Every recorded grant in Luminant's chain of title after the original patent to Chism and Walling as tenants in common purported to convey the whole estate. The recordation of these deeds long ago provided constructive notice to any cotenants of a hostile possession sufficient to accomplish ouster. *Parr*, 236 S.W.2d at 506 (citations omitted). Again, the PakeyBey parties do not contest any of the facts related to recordation of these deeds. Therefore, there is no genuine dispute of fact regarding Luminant's constructive notice and ouster of any alleged cotenant. Without that, there is no genuine issue of material fact regarding Luminant's

actual, visible, hostile, and peaceable possession of the disputed tracts under a claim of right for at least ten years. Because every element of peaceable and adverse possession is established by undisputed evidence, Luminant has established its adverse possession of the property as a matter of law. *Bywaters*, 686 S.W.2d at 595 (citations omitted). Thus, the district court properly granted summary judgment to Luminant on this ground.

IV.

Luminant demonstrated, by uncontested evidence, its adverse and peaceable possession of the tracts of land also claimed by the PakeyBey parties for at least ten years, satisfying Texas's adverse possession statutes. Luminant is therefore vested with a fee simple interest in the disputed tracts, and summary judgment in Luminant's favor was proper.

AFFIRMED.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS (AUGUST 28, 2020)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

LUMINANT MINING COMPANY, LLC,

Plaintiff,

v.

KENDI NARMER PAKEYBEY, ET AL.,

Defendants.

No. 6:19-cv-00372

Before: J. Campbell BARKER,
United States District Judge.

On July 26, 2019, plaintiff Luminant Mining Company LLC filed this property dispute in the Fourth Judicial District Court of Rusk County, Texas. Doc. 2. Defendants Kenneth E. Parker, n/k/a Kendi Narmer PakeyBey, a/k/a Chief Narmer Bey ("Chief Bey"), Dawud Allantu Bey, Anu Tafari Zion El, and Amexemnu City State, Inc., removed this action to federal court based on diversity jurisdiction. Doc. 1. The case was referred to United States Magistrate Judge John D. Love pursuant to 28 U.S.C. § 636. Doc. 3.

This order concerns the parties' cross motions for summary judgment regarding trespass-to-try-title actions on two properties: (1) "the Tracts," 950.833 acres of land in Rusk County, Texas; and (2) "the Additional Tracts," 258 acres of land also located in Rusk County. Docs. 56, 57, 109, 112.

On July 6, 2020, Judge Love issued a report and recommendation to grant summary judgment in Luminant's favor as to both properties. Doc. 123. The report and recommendation was served on the parties, and defendants filed timely objections, triggering their de novo review. Doc. 126.

Discussion

Defendants first object to the magistrate judge's application of the doctrine of presumed grant. Doc. 126 at 2. Defendants argue the doctrine is improperly applied because the magistrate judge failed to account for the lack of a partition agreement. *See* Doc. 126 at 2. In their view, because no clear evidence of a partition agreement can be found, subsequent transfers of the Tracts were void because they failed to account for the Walling interest, from which their alleged claim descended. *Id.*

The doctrine of presumed grant was developed by Texas courts in response to a number of cases featuring ownership claims by heirs to old Spanish land grants. *Humphries v. Texas Gulf Sulfur Co*, 393 F.2d 69, 72 (5th Cir. 1968). Like defendants, these "heirs" asserted historical claims of ownership based on transactions, or the lack thereof, that could not be proved due to limited or no evidence. *Id.* To quiet title to the disputed land, Texas courts decided that the prolonged inaction could only be explained by an

unrecorded conveyance, and they began conclusively presuming the existence of a "lost deed" in these cases. *See, e.g., id.; Purnell v. Gulihur*, 339 S.W.2d 86 (Tex. Civ. App. 196); *Page v. Pan Am. Petroleum Corp.*, 381 S.W.2d 949 (Tex. Civ. App. 1964). Thus, contrary to defendants' objection, the doctrine of presumed grant applies because of the absence of a clear historical record rather than despite it.

Accordingly, the magistrate judge correctly determined that the doctrine of presumed grant creates a conclusive presumption that moots defendants' claim. The record of title offered by the plaintiffs establishes a claim under color of title and exclusive possession dating back more than a century. *See* Doc. 57, Exs. A, A1-A33, F, G. Defendants offer no evidence they or their predecessors brought any claim against plaintiff's title during that time. As such, the magistrate judge was correct to presume a partition agreement existed between Isham Chism and Jesse Walling. Defendants' objection is therefore overruled.

Next, defendants object to magistrate judge's finding that Luminant proved superior title out of a common source. Doc. 126 at 4. This objection largely rehashes the content of the previous objection and is likewise overruled.

Defendants' third objection concerns Chief Bey's purported familial connection to the original owners of the properties. Doc. 126 at 4-7. Defendants object to the magistrate judge's "finding of no evidence of family connection between Jesse and John Walling, to the Parker heirs." *Id.* at 4. The report noted that the Parker heirs' interest stems from John and Anna Walling, not Jesse Walling, and from a property located in a different survey than the Tracts. Doc. 123

at 16-17, *see also In re Samson Resources Corp.*, Case No. 15-11934 (BLS), Doc. 2436 at 7 (Bankr. D. Del. June 15, 2017)).

This objection is not persuasive. Defendants' meticulous inventory of the Walling family tree, even taken as true, has no effect on the disposition of this action given the foregoing discussion. The objection is therefore overruled.

Finally, defendants object to the magistrate judge's finding that plaintiff demonstrated matured limitations title in the absence of record title. Doc. 126 at 7. Reviewing the magistrate judge's findings de novo, the court concludes that the magistrate judge correctly determined that Luminant satisfied the requisite limitations periods under Texas law. Doc. 123 at 17-20. The objection is overruled.

Conclusion

For the reasons stated above, defendants' objections are overruled, and the report and recommendation of the magistrate judge (Doc. 123) is adopted. *See* Fed. R. Civ. P. 72(b)(3). Luminant's motions for summary judgment (Docs. 57, 112) are granted, and defendants' motions for summary judgement (Docs. 56, 109) are denied. Luminant's motion for default against Amexemnu City State, Inc., (Doc. 36) and defendants' motion for final judgment (Doc. 109) are denied as moot. Defendants' motion to dismiss the remaining claims is denied. Doc. 109.

So ordered by the court on August 28, 2020.

/s/ J. Campbell Barker
United States District Judge

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (SEPTEMBER 26, 2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LUMINANT MINING COMPANY, LLC,

Plaintiff,

v.

KENNETH E PARKER; and
DAWUD ALLANTU BEY, First Trustee of
AMEXEMNU TAYSHA TRUST,

Defendants.

Civil Action No. 6:19-CV-00372-JCB-JDL

Before: John D. LOVE,
United States Magistrate Judge.

Before the Court is Plaintiff Luminant Mining Company, LLC's ("Luminant" or "Plaintiff") Motion for Leave to Amend Complaint and Motion to Remand under § 1447(e). (Doc. No. 7.) Defendants Kenneth Parker, n/k/a Kendi Narmer PakeyBey, a/k/a Chief Narmer Bey ("Chief Bey"), and Dawud Allantu Bey ("Trustee Bey") (collectively "Defendants") have filed

a response.[1] (Doc. No. 18.) Luminant has filed a reply (Doc. No. 22) and Defendants have filed a surreply (Doc. No. 24). For the reasons stated herein, the Court RECOMMENDS that Plaintiff's motion (Doc. No. 7) be GRANTED-IN-PART as to the request for leave to amend, and DENIED-IN-PART as to the request for remand.

BACKGROUND

Luminant initially filed this suit on July 26, 2019, in the Fourth Judicial District Court of Rusk County, Texas. (Doc. No. 2.) Defendants were served with a copy of the Petition and Citation in the state court action on July 26, 2019. (Doc. No. 1-5, Ex. E at 4.) Luminant is a subsidiary of Vistra Energy, a Texas corporation, with its primary place of business in Irving, Texas. (Doc. No. 2 at 1.) Both Defendants claim that they have "rescinded all the 14th Amendment contracts with the United States," are "sovereign freemen," and identify as "Moorish American." (Doc. No. 1 at 3-4.) Despite these contentions, Defendants state that they are "de jure American citizens." (Doc. No. 1 at 4.) Chief Bey claims domicile in "the California territory," and Trustee Bey claims domicile in "the Florida territory." (Doc. No. 1 at 4.)

In its Petition, Luminant alleges that "at all times pertinent to this lawsuit," it has owned in fee simple

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[1] Defendants filed "Motion to Deny Plaintiff's Motion to Amend Complaint and Plaintiff's Motion to Remand under § 1447(e)," which effectively operates as a response to Plaintiff's motion. (Doc. No. 18.)

approximately 950.833 acres of land[2] (the "Tracts") in Rusk County, Texas, upon which it conducts coal mining and power generation operations. (Doc. No. 2 at 3.) On February 4, 2019, Defendants filed a "Warranty Deed" in Rusk County purporting to convey the Tracts from Chief Bey to Trustee Bey as trustee of the Amexemnu Taysha Trust. (Doc. No. 2 at 3; Doc. No. 2-2, Ex. B at 4.) Luminant argues that Defendants' purported warranty deed is a false instrument and Defendants have no right of entry upon or possession of the Tracts. (Doc. No. 2 at 3-5.) Further, Luminant alleges that Defendants have occupied the Tracts and have attempted to harvest timber from the property. (Doc. No. 2 at 3.)

Defendants, both proceeding *pro se*, allege that Chief Bey is the "sui juris Heir to the John Walling/ Walling Estate," a 255-acre tract of land in Rusk County, Texas, owned by John and Anna Walling in the 1800s. (Doc. No. 9 at 2; Doc. No. 1-2, Ex. B at 8.) Chief Bey alleges that as heir to the Walling Estate and holder of a "government Land Patent" from 1848, he has superior title to the Tracts and power to convey them to Trustee Bey and the Amexemnu Taysha Trust. (Doc. No. 1 at 2-3.) On August 16, 2019, Defendants removed this action from state court under diversity jurisdiction. (Doc. No. 1.) Luminant filed its Motion for Leave to Amend Complaint and Motion to Remand under § 1447(e) on September 5, 2019. (Doc. No. 7.)

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[2] The legal descriptions of the property are attached to Plaintiff's Original Petition (Doc. No. 2) as Exhibit A.

DISCUSSION

I. Motion for Leave to Amend

Luminant requests leave of this Court to join Amexemnu City State, Inc. ("Amexemnu") as a defendant. (Doc. No. 7 at 6.) Luminant alleges that Amexemnu is a necessary party to this action as the corporate means through which Defendants are attempting to establish a "Republic of Amexemnu" on the Tracts. (Doc. No. 7 at 6.) Without the addition of Amexemnu to this action, Luminant argues that it cannot receive complete relief, and would be forced to pursue a separate action against Amexemnu for actual possession of the property. (Doc. No. 7 at 6-7.) Further, Luminant notes that it "has been diligent in moving to amend as soon as it became apparent . . . that the Amexemnu City State entity should be joined" upon discovering Amexemnu's involvement with this action through the entity's website.[3] (Doc. No. 7 at 7.)

Defendants respond that Luminant should not be granted leave to add Amexemnu to this action because two offices "presumably owned and controlled by [Luminant's] parent company" allegedly visited Amexemnu's website in May 2019, prior to the initial filing of this lawsuit in state court, and therefore impliedly

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[3] In their response, Defendants do not dispute that the referenced website, www.amexemnu.city, is the official website of Amexemnu. (Doc. No. 18 at 1-2.) The website is titled "Amexemnu City State" and appears to detail plans to found a sovereign city that will "house around 7,000 residents and . . . 700 businesses" on the Tracts. (Doc. No. 7-1, Ex. D at 2.) The stated purpose of the city is to organize a "Juridical Society" of "Moors" that will be a "Hive for Industry, Commerce, Education and Technology." (Doc. No. 7-1, Ex. D at 2.)

had knowledge of Amexemnu's existence and involvement with the Tracts. (Doc. No. 18 at 3.) Because Luminant claims to have discovered relevant information pertaining to its need to add Amexemnu to this suit on August 13, 2019, Defendants argue that this claim should be construed as "actual fraud in the pleading of jurisdictional facts" under the doctrine of fraudulent joinder. (Doc. No. 18 at 3-4.)

When considering a motion to amend the pleadings, it is well established that "the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). Rule 15(a) provides in relevant part that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Granting leave to amend, however, "is by no means automatic." *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993) (quoting *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663, 666 (5th Cir. Unit A July 1981)). The district court may consider factors such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment. *Id.* (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). A complaint is futile when it fails to state a claim upon which relief could be granted. *Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 873 (5th Cir. 2000). Futility is evaluated with the same standard of legal sufficiency as applies to Rule 12(b)(6) motions to dismiss. *Id.*

Here, Luminant has sufficiently established that Amexemnu's absence as a defendant in this action would be prejudicial. Amexemnu's website manifestly

demonstrates the entity's alleged claim of right to the Tracts and its present intent to possess the land for the creation of the "Republic of Amexemnu." (Doc. No. 7-1, Ex. D.) Denial of leave to amend would prejudice Luminant's possibility of complete relief in this action and force Luminant to file a separate cause of action against Amexemnu to achieve unencumbered possession of the Tracts. There are no facts before the Court to indicate that Luminant is seeking the requested leave for the purposes of undue delay, or that adding Amexemnu as a defendant would in any way prejudice either Defendant.

Defendants claim Luminant's request to amend is in bad faith because two offices of Luminant's parent company allegedly visited Amexemnu's website in May 2019. This argument fails to recognize, however, that Vistra Energy is not a party to this lawsuit—the actions of its employees are not attributable to Luminant. Further, Luminant concedes knowledge of the Amexemnu website, but alleges that the website was at times inactive and its content has changed throughout Luminant's investigation. (Doc. No. 7 at 2-3.) The mere fact that Luminant—or Vistra Energy—was aware of Amexemnu's existence does not imply bad faith. As the decision to grant leave is within its discretion and should be granted "freely," the Court finds no reason why Luminant should be barred from adding Amexemnu to this action. Fed. R. Civ. P. 15(a)(2).

Insofar that Defendants argue that Luminant's attempt to add Amexemnu as a defendant implicates the doctrine of fraudulent joinder, these arguments are irrelevant, as Amexemnu is a diverse party for the reasons discussed below in the Court's remand analysis.

Because Luminant would be prejudiced absent Amexemnu's presence as a party in this action and Defendants have not persuasively shown that Luminant has acted in bad faith, the Court finds that the allowance of the requested amendment should be freely given in this instance. Fed. R. Civ. P. 15(a)(2).

The Court therefore RECOMMENDS that Luminant's motion (Doc. No. 7) be GRANTED-IN-PART as to the request for leave to amend.

II. Motion for Remand

Necessarily connected with Luminant's motion to amend is the motion for remand. (Doc. No. 7.) If granted leave to add Amexemnu as a defendant, Luminant argues that the Court must then remand this action for want of jurisdiction under 28 U.S.C. § 1447(e). (Doc. No. 7 at 7.) Amexemnu's Texas office is located at 112 E. Line Street, Suite #204, Tyler, TX 75702, which Luminant claims is the corporation's principal place of business; the addition of Amexemnu as a party would therefore destroy diversity and mandate remand. (Doc. No. 7 at 3-4.) Luminant further argues that remand would also be necessary under 28 U.S.C. § 1441(b)(2), as Amexemnu is a citizen of Texas. (Doc. No. 7 at 8.)

Despite the addition of Amexemnu as a party, Defendants argue diversity remains intact because Amexemnu is not a Texas entity, but rather a foreign corporation with its principal place of business in Florida. (Doc. No. 18 at 2.) Defendants note that several documents included with Luminant's motion indicate that Amexemnu's headquarters are located at 5458 Hoffner Ave, Suite #308, Orlando, Florida 32812. (Doc. No. 18 at 2, citing Doc. No. 7-1 at 6; Doc. No. 7-2 at 4.)

Defendants allege that Amexemnu's Texas office is not the principal place of business, but rather a "Virtual Office Space" controlled by Co.Work Tyler, a collaboration community center. (Doc. No. 18 at 3.) In light of these facts, Defendants argue that the Court cannot properly remand this action for lack of subject-matter jurisdiction. (Doc. No. 18 at 5.) Further, in their surreply, Defendants claims that, for the sake of "absolute clarity," they have filed a Certificate of Withdrawal with the Texas Secretary of State and have canceled their Tyler office space membership. (Doc. No. 24 at 1.)

"The general-diversity statute, § 1332(a), authorizes federal court jurisdiction over cases in which the citizenship of each plaintiff is diverse from the citizenship of each defendant." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 61 (1996); 28 U.S.C. § 1332(a). A corporation is deemed a citizen of both its state of incorporation and the state where it has its principal place of business. 28 U.S.C. § 1332(c)(1). The principal place of business of a corporation is "the place where a corporation's officers direct, control, and coordinate" its activities—the "nerve center"—often where the corporation maintains its headquarters. *Hertz Corp. v. Friend*, 559 U.S. 77, 93–94 (2010). A defendant may seek to remove a civil action brought in state court of which a district court has original jurisdiction. 28 U.S.C. § 1441(a). An action removable under § 1332(a) "may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b)(2). "Because removal raises significant federalism concerns, the removal statutes are strictly and narrowly construed with any doubt resolved against removal and in favor of remand." *Aguilar v. Wal-Mart*

Stores Texas, LLC, No. 1:14-cv-245, 2015 WL 11023492, *2 (E.D. Tex. Jan. 6, 2015).

Here, exhibits filed with Luminant's motion to remand demonstrate that Amexemnu is a corporation foreign to Texas. Amexemnu lists its "Florida HQ" at 5458 Hoffner Ave, Suite #308, Orlando, Florida 32812, with satellite offices in three other states, including the Texas office cited by Luminant. (Doc. No. 7-1, Ex. D at 12.) An affidavit of religious corporation filed with the Cook County Recorder of Deeds in Illinois reveals that Amexemnu was first organized at 3309 S. Shields Ave, Chicago, IL 60616, but indicates that the entity relocated to its current Florida headquarters in March 2019. (Doc. No. 7-2, Ex. E at 3.) Further, while a Business Organizations Inquiry for Amexemnu through the Texas Secretary of State does list the address of the Texas office in Tyler, Amexemnu lists itself as a "foreign nonprofit corporation" organized in Illinois in its May 2019 Application for Registration for a Nonprofit Corporation or Cooperative Association. (Doc. No. 7-3, Ex. F at 2.)

While merely labeling an office as "headquarters" does not conclusively establish that office as a corporation's principal place of business, Luminant has not demonstrated any facts to persuade the Court that Amexemnu's Tyler office can properly be deemed its principal place of business. The Tyler office address is, as Defendants assert, associated with Co.Work Tyler, a collaborative center offering "virtual office mailing/addresses [for] up to 8 hours [of] use per month," which is unlikely to operate as a primary corporate office space. Co.Work Tyler, www.co.work (last visited Sep. 19, 2019). Luminant points to the filings with the Texas Secretary of State as proof of Amexemnu's Texas

citizenship; however, the Fifth Circuit has held that "statements made to the secretary of state of a particular state are not binding for the purposes of determining subject matter jurisdiction." *Harris v. Black Clawson Co.*, 961 F.2d 547, 550 (5th Cir. 1992) (emphasis in original). While these filings are persuasive as to Amexemnu's principal place of business, they are not determinative. *See id.* Other than with the Texas Secretary of State, Amexemnu has consistently listed its Florida office address as its center of operations, including in filings with other state officials. (Doc. No. 7-2, Ex. E at 3.)

The facts before the Court cannot support a finding that Amexemnu is a Texas citizen; consequently, diversity is not destroyed by Amexemnu's addition as a defendant in this lawsuit. The Court therefore RECOMMENDS that Luminant's motion (Doc. No. 7) be DENIED-INPART as to the request for remand.

CONCLUSION

For the reasons discussed herein, the Court RECOMMENDS that Luminant's motion (Doc. No. 7) be GRANTED-IN-PART as to the request for leave to amend, and DENIED-IN-PART as to the request for remand.

So ORDERED and SIGNED this 26th day of September, 2019.

/s/ John D. Love
United States Magistrate Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING (OCTOBER 15, 2021)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LUMINANT MINING COMPANY, L.L.C.,

Plaintiff-Appellee,

v.

KENDI NARMER PAKEYBEY, Also Known as NARMER BEY, CHIEF, Also Known as KENNETH PARKER; DAWUD ALLANTU BEY, First Trustee of Amexemnu Taysha Trust; AMEXEMNU CITY STATE, INCORPORATED; ANU TAFARI ZION EL, Second Trustee of Amexemnu Taysha Trust,

Defendants-Appellants.

No. 20-40803

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:19-CV-372

Before: KING, HIGGINSON,
and WILSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

DEFENDANTS NO EVIDENCE MOTION FOR FINAL SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF, RELEVANT EXCERPTS (JANUARY 12, 2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LUMINANT MINING COMPANY, LLC,

Plaintiff,

v.

KENDI NARMER PAKEYBEY, DAWUD ALLANTU BEY, First Trustee of Amexemnu Taysha Trust, ANU TAFARI ZION EL, Second Trustee of Amexemnu Taysha Trust, AMEXEMNU CITY STATE, INC,

Defendants.

Case No: 6:19-cv-00372-JCB-KNM

[. . .]

Abstract of Title Argument:

With regard to the subject tract, Defendants argue that the undivided interest in the fee simple under "tenancy in common" from the 1848 land patent

prevents the Plaintiff from owning the superior title. Jesse Walling and Isham Chisum each individually owns their share completely, to the exclusion of the other owners. In the 1848 land patent, the proportional shares were expressed as an equal share. Separate proportional shares must be expressed in the deed or the parties are presumed to be equal shareholders. The language in the 1848 land patent from the sovereign does not express separate proportional shares of two (2) separate land descriptions separated into two (2) parcels to each co-tenant. The co-tenancy between Jesse Walling and Isham Chisum is legally an equal share of the fee simple absolute to the entire 1280 acres in the 1848 land patent. Without evidence of a proportional share agreement between the co-tenants the Plaintiff needs to show deeds with both co-tenant signatures purporting a conveyance of fee simple to establish a material issue of fact. Without evidence of a voluntary partitioning agreement by way of exchanging deeds, resulting in each former co-tenant owning a certain parcel solely and holding superior title to that parcel the Plaintiff cannot recover as a matter of law. Without a judicial partitioning agreement both co-tenants are bound to certify and grant by signature (Certificate of Acknowledgement) warranting the conveyance of their own undivided interest on each purported deed as a matter of law. *See, Texas Property Code Section 23 "Title Actions and Remedies'.* All purported deeds bearing only one signature from one co-tenant does not, as a matter of law, pass the fee simple absolute to the grantee. This is because co-tenants are at risk of creating a cloud against or encumbering each other's equal share and undivided interest estate. As a general rule, one co-tenant cannot bind another co-tenant to a deed conveyance or legal obligation

without his or her consent when having equal share to any part of the expressed described property by metes and bounds. A habendum clause is a clause in a deed that defines the type of interest and rights to be enjoyed by the grantee. In a deed, a habendum clause usually begins with the words "to have and to hold". The 1848 land patent habendum clause expressed that the fee simple absolute was held together and controlled as co-tenants. Therefore, as a matter of law, the fee simple will remain with the 1848 land patent to preserve proper title at law and in equity.

Following this premise, Plaintiff's abstract of title lacks the preponderance of evidence to prove that Jesse Walling severed his undivided interest when Isham Chisum deeded land away. (See MSJ Exhibit C). Plaintiff's abstract of title "Tract 71 (1085-1313), Page# 1, Row 3", *See,* "Luminant 001085", *See,* "Luminant 001102-001104" reflects that Isham Chisum conveyed one thousand four hundred and seventy (1470) acres from lands in the Parmela Chisum Survey and the E.R. Jones Survey together on 12/6/1852 to J.W.W. Cook, of which five hundred and seventy (570) acres is in the 1848 land patent. The deed however does not specifically state the metes and bounds describing with certainty the five hundred and seventy (570) acres being conveyed "out of" the 1848 land patent. The evidence must describe the premises by metes and bounds or with certainty to identify the certain portion of land being conveyed solely by Isham Chisum which would not conflict with Jesse Walling's undivided interest in that certain portion. If that certain portion of five hundred and seventy (570) acres is not properly described, then "a faulty description of the disputed

property will render the petition defective for insufficient description"; *Leach v. Cassity's Estate*, 279 S.W.2d 630 (Tex. Civ. App. Fort Worth 1955)). A fatally defective land description is the reference to a certain number of acres or a tract of a certain size "out of" or "being a part of" some larger described tract, without any reference to a more particular description or other guide to the location of the tract. Because the Plaintiff has not provided evidence of a proportional share agreement to show a material issue of fact expressing the details of the undivided interest in this particular five hundred and seventy (570) acres "out of" or "being a part of" the 1848 land patent, Defendants argue that "a conveyance with such a description is void". *Republic Nat'l Bank of Dallas v. Stetson*, 390 S.W. 2d (Tex. 1965); *Granato v. Bravo*, 498 S.W. 2d 499 (Tex Civ. App – San Antonio 1973, no writ)). The fact that cannot be disputed is that Jesse Walling's signature is not on this particular deed. Therefore, this deed cannot warrant the conveyance of his undivided interest in the five hundred and seventy (570) acres to support the language of a purported fee simple estate whereby the Plaintiff can claim a superior title out of a common source. Here the Court should refer back to the Texas Property Code Civil Procedure, Section 23. "*Title Actions and Remedies*", regarding the necessity of partitioning co-tenant property. If co-tenants want to sell property, they must come to a joint agreement first to move forward. This particular deed, having a defective acknowledgment, was not in accordance with law to support Plaintiff's claim. The deed does not express that Jesse Walling had willingly signed the same and there were no words of equivalent import to certify clear title without encumbering the co-tenant.

Following the above-mentioned discrepancy, the Court should also take note of deeds recorded on 3/18/1852, (See MSJ Exhibits D). (Also in Defendants' Abstract, Volume# G, Page# 466 (DX-6) "Amexemnu Taysha Trust 000312-000317"); 2/25/1853, (See MSJ Exhibit E). (Also in Defendants' Abstract, Volume# H, Page# 236 (DX-7) "Amexemnu Taysha Trust 000318-000323"); and 9/24/1857, (See MSJ Exhibit F). (Also in Defendants' Abstract, Volume# L, Page# 219 (DX-8) "Amexemnu Taysha Trust 000324-000328"). Here also, the superior title to the fee simple from the sovereign or out of a common source cannot be obtained without both co-tenant's signatures. These three (3) deeds respectively, when construing the language in the deeds themselves, purported to convey 740 acres in total superseding one co-tenant's equal, undivided interest of 1280 acres in the 1848 land patent. This creates a cloud and explains why a proportional shares agreement between the 1848 land patent co-tenants is needed.

The documentation the Plaintiff relied on in this trespass-to-try-title action must be sound in terms of its own evidentiary value. In *Dominguez v. Moreno*, 618 S.W.2d 125, 126 (Tex. Civ. App.—El Paso 1981, no writ)), a trespass-to-try-title case, the Plaintiff attached a partial deed from the common source to his father. The deed contained no signature and supplied nothing more than a granting clause and a partial description of the land. The court held, in essence, that the writing was not a deed and was not a type of evidence that would be admissible at a trial on the merits. Plaintiff's abstract of title evidence to its purported common source "Tract 71 (1085-1313), Page# 1, Row 3", *See*, "Luminant 001085", *See*, "Luminant

001102-001104" should be construed analogous to the opinion in *Dominguez v. Moreno,* and taking into account the need of both co-tenants certificate of acknowledgement and specified acreage on the deed. These discrepancies from 1852 create conclusive evidence that Texas Utility Mining Co., being one of the Plaintiff's predecessors, did not have the fee simple absolute interest conveyed on August 17th, 1962, Volume# 753, Page# 143 via Connie Tate & F.O. Tate purporting to convey "multiple tracts" to Jerome Rhoden; (See Also Defendants' Abstract of Title, Exhibit DX-28 herein attached "Amexemnu Taysha Trust 000445 to 000453").

The Court should also take note that, through color of title, there are multiple 'Deeds of Trust' that have not been satisfied which would further create a cloud on title. (See MSJ Exhibit G). The Plaintiff has failed to provide evidence showing the Deeds of Trust being satisfied to clear title. Plaintiff's abstract of title either inadvertently or purposefully does not show all of the recorded Deeds of Trust within its chain of title. Defendants conclude that within the chain of title . . .

[. . .]

Respectfully submitted on January 12th, 2019,

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Defendants In Propria Persona Sui Juris
(Pro Se Litigants)

DEFENDANTS' OBJECTIONS TO MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDATIONS, RELEVANT EXCERPTS (AUGUST 5, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LUMINANT MINING COMPANY, LLC,

Plaintiff,

v.

KENDI NARMER PAKEYBEY, DAWUD ALLANTU BEY, First Trustee of Amexemnu Taysha Trust, ANU TAFARI ZION EL, Second Trustee of Amexemnu Taysha Trust, AMEXEMNU CITY STATE, INC,

Defendants.

Case No: 6:19-cv-00372-JCB-KNM

Pursuant to Rule 72 of the F.R.C.P., the Defendants collectively hereby object to the Magistrate Findings and Recommendations issued on July 6, 2020 (Doc. No. 123, "Report"). Specifically, Defendants object to four of the Magistrate's recommendations that are based on errors of fact: (1) the finding of a liberal presumption of a partition agreement existing for the 1848

land patent between the co-tenants, (2) the finding that the Plaintiff has proven a common source to the sovereign, (3) the finding of no evidence of family connection between Jesse & John Walling, to the Parker Heirs, and (4) the finding that Plaintiff has proven matured limitation periods. Further, Defendants object to the magistrate's assertion that Defendants' chose not to retain legal counsel due to Defendants' beliefs.

Standard of Review

Local Rule 72.3(c) provides that "[a] district judge shall make a *de novo* determination of those portions of a magistrate judge's findings and recommendations to which objection is made as . . .

[. . .]

. . . transmissable to his heirs, absolutely and simply, is an absolute estate in perpetuity and the largest possible estate a man can have, being in fact allodial in its nature." *See, Stanton v. Sullivan*, 63 RI. 216696 (1839). The 1848 land patent states that the title is transferrable to the "heirs and assigns forever."

(4) Defendants object to the finding that plaintiff has proven title by limitation periods to be granted a presumption of grant deed.

The Texas Supreme Court has recognized that a presumption cannot shift the burden to a non-movant in a summary judgment proceeding. *Chavez v. Kan. City S. Ry. Co.*, 520 S.W.3d 898, 900 (Tex. 2017) (citing *Missouri-Kansas-Texas R.R. Co. v. City of Dallas*, 623 S.W.2d 296, 298 (Tex. 1981)). "The presumptions and burden of proof for an ordinary or conventional trial

are immaterial to the burden that a movant for summary judgment must bear." *Id.* Likewise, in the context of ouster, the court recognized that an appellate court could not draw such an inference of ouster when reviewing the granting of a summary judgment. *Villarreal v. Chesapeake Zapata, L.P.*, No. 04-08-00171-CV, 2009 WL 1956387, at *3 (Tex. App—San Antonio July 9, 2009, pet. denied) (mem. op.); *cf. Chavez*, 520 S.W.3d at 900. Thus, with regard to co-tenants, long-continued possession and failure of the titleholder to make a claim is insufficient to establish a summary judgment movant's right to judgment as a matter of law. *See Chesapeake Zapata, L.P.*, 2009 WL 1956387, at *3. Based on the foregoing, the Plaintiff, as summary judgment movant, could not establish constructive ouster based on an inference or presumption arising from long-continued possession and absence of a claim. *See Chavez*, 520 S.W.3d at 900; *Chesapeake Zapata, L.P.*, 2009 WL 1956387, at *3. In summary judgment, reasonable inferences must be indulged in favor of the non-movant; the movant is not entitled to inferences, but must prove entitlement to judgment as a matter of law. *See Cantey Hanger*, 467 S.W.3d at 481. "The possession of a co-tenant or tenant in common will be presumed to be right on the common title. He will not be permitted to claim the protection of the statute of limitations unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to it." *See, Phillipson v. Flynn*, 83 Tex. 580, 19 S.W. 136; *Poenisch v. Quarnstrom*, Tex. Sup.Ct., 361 S.W.2d 367. *See also, Hardaway v. Nixon*, 544 S.W.3d 402 (Tex. App—San Antonio 2017).

CONCLUSION

Defendants herein contend that under Texas law there is significantly more evidence required before a court can grant Plaintiff's summary judgment (Doc. No. 57). Defendants assert that there still remains an issue as to fact regarding a lost deed. If this Court sustains Defendants' objections and adopts an amended version of the magistrate's recommendations, it should award Defendants the opportunity to provide further exhibitory evidence to clear up the issue of facts needed to aid the court in a lawful decision. Defendants seek relief via Defendants' Summary Judgment (Doc. No. 56).

Respectfully submitted on August 5, 2020,

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Defendants In Propria Persona Sui Juris
(Pro Se Litigants)

DEFENDANTS' ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT, RELEVANT EXCERPTS (APRIL 14, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

LUMINANT MINING COMPANY, LLC,

Plaintiff,

v.

KENDI NARMER PAKEYBEY, DAWUD ALLANTU BEY, First Trustee of Amexemnu Taysha Trust, ANU TAFARI ZION EL, Second Trustee of Amexemnu Taysha Trust,

Defendants.

Case No: 6:19-cv-00372-JCB-KNM

Defendants collectively file their answer to the Plaintiff's—Luminant Mining Company LLC ("Luminant"), Second Amended Complaint. Defendants affirm that they maybe unschooled in law and judicially notifies said Court of enunciations of principles as stated in *Haines v. Kerner*, 404 U.S. 519, 520 (1972); wherein the court has directed that those who are unschooled in law, making pleadings or complaints,

that the court look to the substance of the pleadings rather than the form.

INTRODUCTION

Defendants have conclusively made the updated revocation to the previous title claim relating to the 258 acre tract hereafter "Parcel# 1716", *See* Exhibit A *"Revocation of Deed, April 9, 2020"*, attached herein, which carries the legal language required to relinquish the "Warranty Deed" filed by the Defendants on February 4, 2019. Defendants contend that Parcel# 1716 is an independent and separate parcel of land that has absolutely no title connection to the 950.833 acre "Warranty . . .

[. . .]

. . . was severed. The Plaintiff can neither show evidence how the 1848 land patent co-tenant heirs were ousted or repudiated from their beneficial interest to the Walling Estate. Plaintiff has stated in Document #95, paragraph 22, page 7, filed February 3, 2020, "It is true, that there is no recorded instrument commemorating the partition of the patented acreage that can be found today . . . ". The Plaintiff has stretched the imagination to request the Court to assume an agreement between the co-patentees had existed and to adjudicate in Plaintiff's favor on a presumption. The whole matter is left in such a nebulous and uncertain state that the Court must conclude that no evidence of a partition agreement was shown. *Joske v. Irvine*, 91 Tex. 574, 44 S.W. 1059.

(5). The supreme court has recognized adverse possession requires "an actual and visible appropriation of real property, commenced and continued under a

claim of right that is inconsistent with and is hostile to the claim of another person." *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 69 (Tex. 2011) (quoting Tex. Civ. Prac. & Rem. Code Ann. § 16.021(1) (West 2002)). Section 16.021 requires "visible appropriation," and mere "mistaken beliefs about ownership do not transfer title until someone acts on them." also *See*, *Marshall*, 342 S.W.3d at 69 (citing *Tran v. Macha*, 213 S.W.3d 913, 914 (Tex. 2006); *Bywaters v. Gannon*, 686 S.W.2d 593, 595 (Tex. 1985)). According to the *Marshall* decision, that means the "possession must be of such character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant." 342 S.W.3d at 70 (quoting *Rhodes v. Cahill*, 802 S.W.2d 643, 645 (Tex. 1990)).

(6). Case law adds that it must be true that the possessor of the property actually does openly possess it (the belief of entitlement to possess is insufficient), has in fact possessed it continuously for the statutory period (sporadic possession is insufficient), and that the possessor peaceably asserts a claim of right adverse to and exclusive of all others (possession shared with an owner is insufficient). *Kinder Morgan N. Tex. Pipeline, L.P. v. Justiss*, 202 S.W.3d 427, 438 (Tex. App.—Texarkana 2006, no pet.). Therefore, if the Plaintiff is claiming adverse possession by limitation periods then the Plaintiff should have published to the world their intentions from the very first day they made purported claims so that all co-tenant heirs would have received an "Actual Notice" legally giving to the effect to have been brought home. The rule is thus stated in *Davis v Lund*, Tex.Com.App., 41 S.W.2d 57: When A enters upon the land in recognition of the title of B, in order for A to prevail under the 10 year

statute of limitations three things must be established, (1) there must be a repudiation of the relationship thus established and claim of tile adversely to that of B, (2) this repudiation and adverse claim must be clearly brought home to B as limitations will only been to run from that date: (3) there must be adverse possession for 10 years after notice of repudiation and adverse claim has been brought home to B."

(7). Thus, to establish a claim for adverse possession, a claimant must prove: (1) actual possession of the disputed property, (2) that is open and notorious, (3) peaceable, (4) under a claim of right, and (5) that is consistently and continuously adverse or hostile to the claim of another person for the duration of the relevant statutory period. *Estrada v. Cheshire*, 470 S.W.3d 109, 123 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *Glover v. Union Pac. R. R. Co.*, 187 S.W.3d 201, 213 (Tex. App.—Texarkana 2006, pet. denied); *see Villarreal v. Guerra*, 446 S.W.3d 404, 410 (Tex. App.—San Antonio 2014, pet. denied).

(8). Accordingly, the Plaintiff needed to assert and prove their entitlement to judgment based on something more than possession and absence of a claim. They would need to specifically assert, and provide evidence establishing, other "unequivocal, unmistakable, and hostile acts" taken "to disseize other co-tenants." *See, Marshall*, 342 S.W.3d at 70. The co-tenant heirs to Parcel # 4444 have never been notified of an adverse possession nor an ouster as required by law. Texas stare decisis further affirms "We are also of the opinion that there is no support in the evidence for the . . .

[. . .]

. . . requested in the amount of US$95,083,300.00, equivalent in silver or gold, recover the costs of suit herein, and such other relief the Court may deem reasonable and just under the circumstances.

Respectfully submitted on April 14, 2020

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Defendants In Propria Persona Sui Juris
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**BRIEF OF APPELLANTS,
RELEVANT EXCERPTS
(FEBRUARY 25, 2021)**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LUMINANT MINING COMPANY, L.L.C.,

Plaintiff-Appellee,

v.

KENDI NARMER PAKEYBEY, Also Known as NARMER BEY, CHIEF, Also Known as KENNETH PARKER; DAWUD ALLANTU BEY, First Trustee of Amexemnu Taysha Trust; AMEXEMNU CITY STATE, INCORPORATED; ANU TAFARI ZION EL, Second Trustee of Amexemnu Taysha Trust,

Defendants-Appellants.

No. 20-40803

Appeal from the United States District Court
for the Eastern District of Texas
Civil Action No. 6:19-CV-372

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[. . .]

A. Presumed grant is a narrow doctrine used to cure ancient gaps in title history.

Before legislation was passed in 1840 to require written conveyances of land, real estate in Texas could be sold orally. *Page v. Pan Am. Petroleum Corp.*, 381 S.W.2d 949, 952 (Tex. App.—Corpus Christi 1964, writ ref'd n.r.e.). Courts developed the presumed-grant doctrine to resolve ownership disputes arising from oral conveyances, lost deeds, or unrecorded deeds. *Humphries v. Tex. Gulf Sulphur Co.*, 393 F.2d 69, 72 (5th Cir. 1968).

To defeat issues raised by singular gaps in title, Texas' presumed-grant doctrine functions as a way for a court to deduce a conveyance in a chain of title or into a particular party. It has been described as "a common law form of adverse possession" to establish title for one entitled to ownership through long periods of open and unchallenged ownership that lacks record title because of an unexplained gap in title transfer. *Conley v. Comstock Oil & Gas, LP*, 356 S.W.3d 755, 765 (Tex. App.—Beaumont 2011, no pet.). The Texas Supreme Court has said that the doctrine would be "more accurately termed 'proof of title by circumstantial

evidence.'" *Love v. Eastham*, 154 S.W.2d 623, 625 (Tex. 1941) (emphasis added).

Many jurisdictions have abandoned the presumed-grant doctrine by statute or common law. For example, California has long dismissed the doctrine, stating that the "preferable view is to treat the case the same as any other, that is, the issue is ordinarily one of fact, giving consideration to all the circumstances and the inferences that may be drawn therefrom," rather than indulging presumptions. *O'Banion v. Borba*, 195 P.2d 10, 13 (Cal. 1948).

Texas appellate courts have described *Magee v. Paul*, 221 S.W. 254 (Tex. 1920), as the "leading case" on presumed grant. *Adams v. Slattery*, 295 S.W.2d 859, 868 (Tex. 1956). In short, Magee established the principle that a factfinder may presume a conveyance "from evidence, first, of a long-asserted and open claim, adverse to that of the apparent owner; second, of nonclaim by the apparent owner; and third, of acquiescence by the apparent owner in the adverse claim." *Magee*, 221 S.W. at 256. Thus, the three elements for presumed grant are: (1) a long-asserted and open claim by the participating owner, (2) nonclaim by the nonparticipating owner, and (3) acquiescence by the nonparticipating owner. *Id.*; *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 970 (5th Cir. 1986) (citing *Humphries v. Texas Gulf Sulphur Co.*, 393 F.2d 69, 73 (5th Cir. 1968)).

Whether a missing grant or deed may be presumed is ordinarily a question of fact. *Clark*, 794 F.2d at 971; Page, 381 S.W.2d at 953. Only when the undisputed evidence conclusively establishes the elements of the doctrine may the presumption be found as a matter of law. *Page*, 381 S.W.2d at 953.

B. Evidence of acquiescence is required for the doctrine of presumed grant to apply.

A finding of presumed grant may not be based on mere proof of a long, adverse claim of ownership and proof of nonclaim on the part of the apparent owner; there must be evidence proving or tending to prove acquiescence by the apparent owner to the adverse claim *Adams v. Slattery*, 295 S.W.2d 859, 868 (Tex. 1956); *Jeffus v. Coon*, 484 S.W.2d 949, 954 (Tex. App.—Tyler 1972, no writ).

This acquiescence must be shown by either direct or circumstantial evidence. *Jeffus*, 484 S.W.2d at 954 (citing *Bruni v. Vidaurri*, 166 S.W.2d 81 (Tex. 1942)). The Texas Supreme Court has explained, however, that acquiescence is possible only when the ostensible owner knows about the adverse claim. *Love*, 154 S.W.2d at 625 ("[o]f course, it cannot be said that the ostensible owner has acquiesced in a claim of ownership adverse to his title, unless it can also be said that he had knowledge of such adverse claim"). This knowledge may be imputed to the ostensible owner in certain circumstances, such as when the competing owners reside in the property's immediate vicinity. *Fair v. Arp Club Lake, Inc.*, 437 S.W.3d 619, 627 (Tex. App.—Tyler 2014, no pet.).

In *Fair*, the court of appeals reversed a summary judgment for the party seeking application of the presumed-grant doctrine. *Id.* The Court held that even if there were a long-asserted claim by the adverse owner and non-claim by the ostensible owner, the adverse owner failed to present evidence that the ostensible owners had either actual or imputed knowledge of the adverse claim. *Id.* There was no evidence that the ostensible owners were informed of the adverse

claim or that they or their heirs were in the immediate vicinity when the adverse claim began. *Id.* Accordingly, the Court reversed the trial court's finding of presumed grant. *Id.*

C. The district court's reliance on *Page v. Pan American Petroleum Corp.* was misplaced.

The district court cited *Page v. Pan American Petroleum Corp.* to support its finding of presumed grant. (ROA.7581.) In *Page*, the defendant heirs sought to use the doctrine to establish that a prior grant between alleged cotenants existed that would have extinguished the cotenancy and vested the interest-holder with clear title. *Page v. Pan Am. Petroleum Corp.*, 381 S.W.2d 949, 952 (Tex. App.—Corpus Christi 1964, writ ref'd n.r.e.).

The plaintiffs in *Page* contended that they were the heirs of Samuel Page, a Brazoria County resident who lived in the region before his death in 1893. *Id.* at 950-51. According to the record, Joseph W. Page, Samuel's brother, sold the land at issue in 1839 to one John Sweeny, providing "the whole of said land" to Sweeny. *Id.* at 951. The defendants, as successors to Sweeny, established a chain of title dating back to the Sweeny deed. *Id.* The plaintiffs, however, alleged that the land was held in cotenancy by Joseph and Samuel Page as the heirs of their mother at the time of the Sweeny deed and that the plaintiffs held a viable cotenant interest as the heirs of Samuel Page. *Id.*

Assuming a cotenancy existed, the court held that "reasonable minds could reach no other conclusion but that the long continued and undisturbed possession and claims of title . . . could be explained only by the presumption of an unrecorded conveyance." *Id.* at 953.

The court applied the three elements of presumed grant to conclude that (1) the Joseph Page successors held the land in long-asserted and open possession, (2) the Samuel Page successors never disturbed the possession or claim of title of the Joseph Page successors, and (3) the Samuel Page successors for over 110 years "knowingly acquiesced" to the claim of the Joseph Page successors. *Id.* at 952-53. Accordingly, the doctrine applied to allow the trial court to "presume" a grant extinguishing Samuel Page's interest, if any. The appellate court affirmed because presumed grant was proved as a matter of law. *Id.* at 953.

To support the finding of acquiescence, the court emphasized evidence that Samuel Page was "keenly aware" of his inheritances, lived within two hundred miles of the property for most of his life, and never made any claim that he held an interest in the property inherited from his mother. *Id.* at 951. The facts here are markedly different and support no such conclusion that Appellants acquiesced as a matter of law.

D. The district court erred in finding a presumed grant as a matter of law because Luminant failed to establish acquiescence by Appellants or their predecessors.

Evidence of acquiescence, the third element of Texas' presumed grant doctrine, is lacking in this case. as a result, the district court erred by concluding that presumed grant was proven as a matter of law.

[. . .]

C. Long-held, exclusive possession alone does not prove ouster as a matter of law.

Constructive notice of ouster can occur when the adverse claim of title is "so long-continued, open, notorious, exclusive and inconsistent with the existence of title in others, except the occupant, that the law will raise the inference of notice to the co-tenant or owner out of possession, or from which a jury might rightfully presume such notice." *Tex-Wis Co. v. Johnson*, 534 S.W.2d 895, 899 (Tex. 1976) (quoting *Mauritz v. Thatcher*, 140 S.W.2d 303, 304 (Tex. App.—Galveston 1940, writ ref'd)). In other words, constructive notice through long-continued, exclusive possession "raises an inference" of notice from which a jury might rightfully presume notice of cotenant ouster. *Id.*

Here, the district court erred by accepting this inference as conclusive proof. as Texas' Fourth Court of Appeals recently explained, a trial court must not allow this presumption to "shift the burden to a nonmovant in a summary judgment proceeding." *Hardaway v. Nixon*, 544 S.W.3d 402, 409 (Tex. App.—San Antonio 2017, pet. denied) (citing *Chavez v. Kan. City S. Ry. Co.*, 520 S.W.3d 898, 900 (Tex. 2017)). A party seeking summary judgment based on constructive notice of ouster must "assert and prove their entitlement to judgment based on something more than possession and absence of a claim . . . [such as] other unequivocal, unmistakable, and hostile acts taken to disseize other cotenants." *Id.* (emphasis added) (internal quotations omitted) (reversing summary judgment granted in favor of parties claiming ouster). The inference, alone, does not entitle the claimant to summary judgment.

A long-held, adverse possession of land coupled with a lack of claim by the ostensible owner alone is

not enough to support a conclusive finding of ouster. *Hardaway*, 544 S.W.3d at 409. Thus, to support the summary judgment here, the record must prove that Luminant acted unequivocally, unmistakably, and hostilely to disseize Appellants. *See id.*

D. The district court erred in granting summary judgment for Luminant despite its failure to establish ouster.

When disposing of this case by summary judgment, the district court adopted the magistrate judge's analysis that "Luminant has sufficiently demonstrated its possession of the Tracts adverse to [Appellants'] interests for each of the four statutory time periods sufficient to acquire title to the Tracts in any instance." (ROA. 7426.) In doing so, the magistrate implicitly rejected Appellants' argument that Luminant failed to support its motion for summary judgment with conclusive evidence of an ouster. (ROA.6202-03.)

In the district court, Luminant failed to prove as a matter of law that Appellants or their predecessors knew about Luminant's adverse claim of exclusive title to the Tracts. While it is true that evidence of Luminant's long use of the Tracts may support an inference of notice to Appellants, an inference alone cannot support a summary judgment in Luminant's favor. *Hardaway*, 544 S.W.3d at 409. Instead, Texas law requires more evidence to establish "unequivocal, unmistakable, and hostile acts" that would disseize any cotenants. *Id.* None of the evidence offered by Luminant—which merely relates is use of the Tracts over the last few decades—meets that high standard for purposes of summary judgment.

Because of the nature of cotenancy, Luminant's use of the Tracts does not, without more, prove that it repudiated the interests of a cotenant in the same land, since each cotenant has a right to possess and use the entire estate. *Byrom*, 717 S.W.2d at 605. Exclusive use and possession of land by one cotenant is not ouster of the other. *Dyer*, 333 S.W.3d at 710-12. Because Luminant failed to establish notice to Appellants or their predecessors of its repudiation of Appellants' cotenancy, it did not prove ouster and summary judgment for Luminant was improper.

Prayer

Appellants request that, for the reasons stated above, this Court:

(1) Reverse the district court's judgment as to the Tracts;

(2) Remand this case to the district court for further proceedings;

(3) Grant Appellants their costs incurred in this Court; and

(4) Grant Appellants such other and further relief to which they may be entitled at law or in equity.

Respectfully submitted,

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**REPLY BRIEF OF APPELLANTS,
RELEVANT EXCERPTS
(MAY 24, 2021)**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LUMINANT MINING COMPANY, L.L.C.,

Plaintiff-Appellee,

v.

KENDI NARMER PAKEYBEY, Also Known as NARMER BEY, CHIEF, Also Known as KENNETH PARKER; DAWUD ALLANTU BEY, First Trustee of Amexemnu Taysha Trust; AMEXEMNU CITY STATE, INCORPORATED; ANU TAFARI ZION EL, Second Trustee of Amexemnu Taysha Trust,

Defendants-Appellants.

No. 20-40803

Appeal from the United States District Court
for the Eastern District of Texas
Civil Action No. 6:19-CV-372

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[. . .]

Argument

I. There is a fact issue on Appellants' cotenancy interest.

Appellants presented at least some evidence to the district court that they hold an interest as tenants-in-common to the Tracts descending from Jesse Walling.[1] Because Appellants presented sufficient evidence to create a triable issue on this point, summary judgment for Luminant was improper.

As the party seeking summary judgment, Luminant bore the burden of proving that there was no genuine issue of material fact and that it was entitled to judgment as a matter of law. Fed. R. Civ. P. 56. In reviewing the summary judgment decision, this Court construes all facts and inferences in the light most favorable to Appellants, as the non-movants. *See In re Matter of Complaint of Settoon Towing, L.L.C.*, 720 F.3d 268, 275 (5th Cir. 2013).

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[1] Appellants do not dispute that Luminant presented a prima facie case of its own interest in the Tracts. Rather, Appellants argue that Luminant's prima case does not defeat Appellants' separate cotenancy interest.

Appellants met their burden to defeat summary judgment by presenting a fact issue on their interest as tenants-in-common in the Tracts as the heirs of Jesse Walling. Certain facts are undisputed. First, Luminant does not dispute that Jesse Walling and Isham Chism were assigned the Tracts in an 1848 land patent.[2] Nor does Luminant dispute that Appellants have traced their lineage back to John C. Walling, the son of Jesse Walling.[3]

Luminant argues, however, that Appellants "produced zero documentary evidence to show how Chief Bey or any other Defendant was an heir to Jesse Walling's ownership interests in the Tracts." (Luminant Br. at 56-57 (emphasis retained).) This no-evidence argument is not supported by the record. Appellants presented ample evidence to reveal a fact issue on this point, including full briefing for their own summary judgment motion that showed their link to the Tracts as the heirs of Jesse Walling.

In a Texas case involving issues of heirship of a cotenancy, a fact issue exists where the purported heir shows some evidence that he or she is a descendent of the ancestor and the ancestor's cotenancy passed through the generations to the purported heir. *See Sonenthal v. Wheatley*, 661 S.W.2d 169, 173 (Tex. App.—

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[2] "Luminant's abstract of title consisted of title runsheets for each of those three dozen parcels that shows the origin of each tract was a land patent from the State of Texas to co-patentees 'Isham Chism and Jesse Walling, as Assignees of E.R. Jones' . . . " Luminant's Br. at 37.

[3] "[A] cursory review of the Delaware bankruptcy opinion relied upon by Defendants reveals that the Parker heirs were continuously referred to as the heirs of "John and Anna Walling" . . . " Luminant's Br. at 56.

Houston [1st Dist.] 1983, writ ref'd n.r.e.) (fact issue of cotenancy inheritance for granddaughter existed where there was no dispute that grandmother and mother died intestate). "As a practical matter, there is usually no other way to prove the heirship of a person who died in 1836 than by the recitations in ancient documents." *Zobel v. Slim*, 576 S.W.2d 362, 365 (Tex. 1978). Ancient documents, such an old judgment, have high probative value when determining heirship. *Id.*

First, Appellants presented evidence of heirship going back to the original cotenant, Jesse Walling. The *Samson Resources* decision determined that Appellants successfully traced their lineage back to John C. Walling. (ROA.1136-1168). As noted above, Luminant does not dispute this fact. There is also evidence to show that John C. Walling was an heir of Jesse Walling, as his son. The will of Jesse Walling specifically identifies John Walling as one of his children who had received lands before the creation of the will. (ROA.7469-72). An 1859 deed from John C. and Preston Walling to Jesse Walling states that they, as "the undersign heirs of Jesse Walling are satisfied with the property conveyed to [them] by father [Jesse Walling] as children." (ROA. 7473-76). These are all recitations of ancient documents probative of an heirship between Jesse Walling and John C. Walling. *See Zobel*, 576 S.W.2d at 365. As a result, Appellants created a fact issue on their status as heirs descending from John C. Walling as well as Jesse Walling, the original cotenant of the Tracts.

Second, Appellants established a fact issue on their ownership of an interest in the Tracts descending from Jesse Walling. The 1852 deed from Jesse Walling to John C. Walling shows that John Walling received

a portion of Jesse Walling's interest of the Tracts originally derived from the E.R. Jones survey that were assigned to Jesse Walling and Chism in 1848. (ROA. 705-10). This evidence shows that at least a part of Jesse Walling's interest in the Tracts passed directly to John C. Walling. Thus, the record contains evidence that Jesse Walling's interest in the Tracts passed through the generations: first to John C. Walling, and then eventually to the Parker Heirs, including Appellants.

In summary, there is a fact issue on Appellants' current interest in the Tracts. Luminant does not dispute that Jesse Walling received the Tracts along with Chism or that Appellants have shown themselves to be the heirs of John C. Walling. The record also provides at least some evidence that (1) John C. Walling was an heir of Jesse Walling and (2) Jesse Walling's interest in the Tracts passed down to John C. Walling and thus to his heirs, including Appellants.

Viewing this evidence in the light most favorable to Appellants, there is a fact issue on Appellants' current interest in the Tracts. Any holding by the trial court that Appellants produced no evidence of their current ownership interest in the Tracts should be reversed.

II. Luminant's prima facie case for its trespass-to-try-title claim does not, without more, defeat Appellants' cotenancy interest

Because Appellants can show a fact issue on their current interest as tenants-in-common to the Tracts, they do not respond to Luminant's argument that it met the various prongs of the prima facie trespass-to-try-title claim.

In a trespass-to-try-title action, the plaintiff "must establish a prima facie right of title by proving one of the following: (1) a regular chain of conveyances from the sovereign; (2) a superior title out of a common source; (3) title by limitations; or (4) prior possession, which has not been abandoned." *Meekins v. Wisnoski*, 404 S.W.3d 690, 695 (Tex. App.—Houston [14th Dist.] 2013, no pet.). Luminant spends much of its brief arguing that it has met these prima facie prongs, such as title by common source or by limitations.

Appellants do not dispute that Luminant has made a prima facie case for its right to Luminant's own, distinct cotenancy interest at the Tracts. But Luminant's prima facie case for its trespass claim does not necessarily defeat Appellants' distinct cotenancy interest. Without a showing that Appellants' cotenancy interest was extinguished by presumed grant, ouster, or some other mechanism, Luminant's argument that it has shown its title by common source or by limitations does not entitle Luminant to judgment that it holds exclusive title. Instead, it merely shows that Luminant is a cotenant.

III. Luminant has no right to judgment as a matter of law under the theory of presumed grant

Luminant argues that Texas' presumed-grant doctrine resolves any cotenancy problem by allowing a presumption that Jesse Walling's cotenancy interest was extinguished by a "missing link" in the chain of title, specifically away from Jesse Walling or his heirs and into Luminant or its predecessors. Luminant cites cases such as *Humphries v. Tex. Gulf Sulphur Co.*, 393 F.2d 69, 70 (5th Cir. 1968), and *Page v. Pan Am.*

Petroleum Corp., 381 S.W.2d 949 (Tex. App.—Corpus Christi 1964, writ ref'd . . .

[. . .]

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APPELLANTS MOTION FOR RECONSIDERATION, RELEVANT EXCERPTS (OCTOBER 1, 2021)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LUMINANT MINING COMPANY, L.L.C.,

Plaintiff-Appellee,

v.

KENDI NARMER PAKEYBEY, Also Known as NARMER BEY, CHIEF, Also Known as KENNETH PARKER; DAWUD ALLANTU BEY, First Trustee of AMEXEMNU TAYSHA TRUST; AMEXEMNU CITY STATE, INCORPORATED; ANU TAFARI ZION EL, Second Trustee of Amexemnu Taysha Trust,

Defendants-Appellants.

No. 20-40803

Appeal from the United States District Court
for the Eastern District of Texas
Civil Action No. 6:19-CV-372

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[. . .]

As Appellants argued in their objections to the magistrate judge's report and recommendation, at least one deed in Luminant's chain of title purports to grant only an unspecified and undefined portion of the Tracts. (ROA.7449-50.) The 1852 deed from Isham Chisum to J.W.W. Cook states that it conveys 1,470 acres, some of which is part of the original patent to Parmela Chisum and some of which is part of the original patent to Chism and Walling as cotenants. (ROA.1852.) But the deed does not describe the portion of the transferred land that came from the Chism-Walling cotenancy property. As a result, the deed does not provide notice of what part of the Tracts was allegedly transferred away, whether it be the "whole estate" owned by the cotenants or some smaller portion. This defect exists in the chains of title for Tracts 70, 71, 71A, 72, 73, 74, 83, 300, 301, 613, 612, 147, and 611, which total 652.9 acres. (ROA.1836, 2185, 2417, 2618, 2760, 2909, 3231, 3907, 4103, 5637, 5973.)

The description of land in a deed must be sufficiently definite and certain so that, from the face of the instrument alone, the land can be identified with reasonable certainty. *Wooten v. State*, 177 S.W.2d 56, 57 (Tex. 1944); *Smith v. Sorelle*, 87 S.W.2d 703,

705 (Tex. 1935). If it does not, the deed will not be enforceable. *Tex. Builders v. Keller*, 928 S.W.2d 479, 481 (Tex. 1996).

A deed that would be unenforceable because of its lack of specificity can provide no constructive notice of a claim to a cotenant's interest in the subject property. Thus, because the 1852 Chisum-Cook deed made no attempt to describe the land supposedly transferred out of the Chism-Walling cotenancy, that deed could not have provided constructive notice to Appellants' predecessors that the "whole estate" was being transferred to a third party. As a result, summary judgment on Luminant's adverse-possession theory was erroneous.

Furthermore, Luminant waived any right to rely on constructive notice to establish an ouster of the cotenancy interest by failing to argue it in support of its motion for summary judgment. Luminant's motion did not address ouster at all. (*See* ROA.871-90.) In response, Appellants noted the requirement that Luminant must prove ouster of a cotenant to establish its claim to exclusive title by adverse possession. (ROA.6202-03.) Luminant offered no argument or evidence in reply relating to ouster. (*See* ROA.6228-31.) At no time in the pursuit of its motion for summary judgment did Luminant contend that constructive notice was a basis for its claim of adverse possession. As a result, summary judgment for Luminant on that ground was improper. Because summary judgment was likewise erroneous on Luminant's claim to title under the presumed grant doctrine for the reasons explained in Appellants' previous briefing, the judgment of the district court should be reversed.

Prayer

Appellants respectfully requests that, for the reasons stated above, this Court:

(1) vacate its Opinion of September 17, 2021;

(2) reverse the district court's summary judgment for Luminant Mining Company LLC;

(3) remand this case to the district court for further proceedings;

(4) grant Appellants their costs incurred in this Court; and

(5) grant Appellants such other and further relief to which they may be entitled at law or in equity.

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