IN THE COURT OF APPEALS
STATE OF NEW MEXICO

B.T.U. BLOCK & CONCRETE, INC.,
a New Mexico corporation,

Plaintiff-Appellee,

v.

Cause No. D-0412-CV-02006-00315

TONY C. ORTEGA,

Defendant-Appellant.

Cause No. 32,092

Appeal from:
Fourth Judicial District Court
County of San Miguel
The Honorable Eugenio S. Mathis
Cause No. D-0412-CV-02006-00315

APPELLANT'S BRIEF IN CHIEF

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I. Summary of Proceedings.

A. Nature of the Case.

This appeal arises from the District Court's Decision of July 1, 2008 and the final Judgment that was filed on July 14, 2008, after a bench trial on November 28-29, 2007. The District Court quieted title to certain real property in favor of Plaintiff-Appellee BTU Block & Concrete, Inc. (hereinafter "**BTU**") as against Defendant-Appellant Tony C. Ortega (hereinafter "**Ortega**").

BTU's Complaint sought to quiet title to a parcel of land that of the exact legal description that was added as an exhibit to a re-recorded warranty deed to BTU (hereinafter "**Tract 1**"). BTU also sought to quiet title by adverse possession to an 80-foot-wide strip of land that is part of the legal description of Ortega's property conveyed to Ortega by a warranty deed (hereinafter "**Tract 2**"). In the alternative, BTU claimed an easement by prescription over Tract 2.

Ortega contested BTU's quiet title action with respect to each claimed parcel. With respect to the Tract 1, BTU received a warranty deed in 1983 that did not have a legal description of the property conveyed to it, nor any indication of the location of the property such that Tract 1 could be located by a surveyor. In 1992, BTU's warranty deed was re-recorded with a legal description attached, but the re-recorded deed was not re-executed by a grantor of the claimed property. Thus, there was no record that the grantor actually conveyed Tract 1 to BTU. The grantor of the 1983

deed to BTU did not testify at trial, and BTU did not present any evidence regarding who re-recorded the warranty deed or why.

Ortega also contested BTU's claims against Tract 2, the 80-foot strip of real property to which Ortega has record title. Even the re-recorded warranty deed did not purport to include Tract 2, and there is no document of record that satisfied the requirement of "color of title." BTU has never paid taxes on Tract 2, and Ortega has. Ortega also contested BTU's claim to a prescriptive easement over the 80–foot strip primarily because BTU had never claimed an easement to the property openly and notoriously.

B. Course of Proceedings.

A trial of this matter was held on November 28-29, 2007. Written closing arguments were submitted in December 28, 2007. The District Court filed a Decision six months later, on July 1, 2008. A Final Judgment and Decree was entered on July 15, 2008. Ortega filed the Notice of Appeal on August 26, 2008. That appeal was docketed as Ct. App. No. 28,946. By Order dated February 26, 2010, this Court dismissed the appeal and remanded the matter to District Court for further proceedings because the Court determined that the disposition of some, but not all, claims in the District Court was not a final judgment or order from which Ortega had a right to appeal. Thereafter, the remaining claims in the case were disposed of by Stipulation of Dismissal that was entered on February 27, 2012.

C. Disposition in the District Court.

The District Court granted BTU's claims for quiet title to both the property described in the re-recorded warranty deed to BTU and Ortega's 80-foot strip. The District Court held that Ortega did not contest BTU's title to Tract 1. The District Court held that BTU established adverse possession to Ortega's 80-foot strip by clear and convincing evidence.

II. Argument and Authorities.

A. Standard of Review.

With respect to both Tract 1 and Tract 2, Ortega claims that BTU failed to establish record title and color of title. "What will suffice as color of title is a question of law . . . which we review de novo." *In the Matter of the Estate of Salome Duran*, 2003-NMSC-008, ¶ 20, 133 N.M. 553, 66 P.3d 326.

BTU admits that it did not actually pay taxes on Tract 2, but rather argues that because it believed it was paying taxes on Tract 2, it should be deemed to have met the statutory standard for payment of taxes, as interpreted by the New Mexico Supreme Court. N.M.S.A. 1978, § 37-1-22 (1973); *e.g. Platt v. Martinez*, 90 N.M. 323, 324, 563 P.2d 586 (1977). Therefore, payment of taxes on Tract 2 is an issue of law to be reviewed de novo.

Finally, whether BTU established record title to Tract 1 is determined by whether BTU's 1992 re-recorded deed meets the requirements of N.M.S.A. 1978, §

14-8-4 (1981), which is a question of law that should be reviewed de novo.

B. BTU cannot prevail in a claim for adverse possession because they have not established color of title for Tract 2.

The elements of adverse possession are established by N.M.S.A. 1978, § 37-1-22: (1) color of title, acquired in good faith; (2) open, exclusive, notorious, continuous, and hostile possession; and (3) payment of taxes for the statutory period. Failure to prove any of these elements by clear and convincing evidence is fatal. *See, e.g., City of Rio Ranch v. Amrep Southwest*, 2011-NMSC-037, ¶ 22, 260 P.3d 414; *Mundy & Mundy, Inc. v. Adams*, 93 N.M. 534, 537, 602 P.2d 1021 (1979); *Marquez v. Padilla*, 77 N.M. 620, 624, 426 P.2d 593 (1967). In New Mexico, "a party seeking to quiet title to real estate must recover on the strength of his own title and cannot rely on the weakness of the title claimed by his adversary." *Coe v. Coe*, 113 N.M. 355, 361-362 826 P.2d 576 (Ct. App. 1992).

"'To possess color of title, the claimant must have a writing or a conveyance of some kind that purports to convey the land title to which is claimed.'" *City of Rio Ranch v. Amrep Southwest*, 2011-NMSC-037, ¶ 22, *quoting Madrid v. Rodriguez* (In re Estate of Duran), 2003-NMSC-008, ¶ 20, 133 N.M. 553, 66 P.3d 326. There is no writing or a conveyance purporting to convey Tract 2 to BTU. The District Court's Decision does not contain a finding that BTU had established color of title, nor a conclusion of law that color of title was established. (RP 177-180.) In fact, after the

trial, and after submission of the parties' Findings and Conclusions, at hearing on February 7, 2008, the District Court recognized that BTU did not have color of title to Tract 2, stating in pertinent part:

> We have a plaintiff that has no record title. Their claim is based entirely on adverse possession. And quite frankly . . . I'm struggling to find clear and convincing evidence to support that. I may be hinting to you where I'm heading with this decision, but claims of adverse possession are, there's not record title in BTU.

(TR-02/07/08: 9:26:17 AM-9:27:50 AM.)

At trial, BTU conceded that it had not established color of title to Tract 2. (TR-11/28/07:2:34:11 PM-2:34:40 PM; 2:43:23 PM-2:43:32 PM; 2:52:53 PM-2:53:04 PM.) BTU's expert surveyor testified that the property described in BTU's 1992 re-recorded deed did not include Tract 2. (TR-11/28/07: 10:12:46 AM-10:13:52 AM) Therefore, BTU argued that it was entitled to adverse possession because BTU's principal, Wayne Sonchar, "believed in good faith" that BTU had title to Tract 2. (TR-11/28/07: 2:56:58 PM-2:58:25 PM; RP 145-146.) However, in New Mexico, adverse possession cannot be established without color of title. In *Currier v. Gonzales*, 78 N.M. 541, 434 P.2d 66 (1967), the argument was made, based on cases from Alabama, that New Mexico courts should allow proof of adverse possession by "descent cast," and not require color of title. *Id.* at 542. The New Mexico Supreme Court declined to alter the statutory requirement for color of title, holding:

> We decline to follow the doctrine of descent cast as thus defined. It would do violence to the statute and runs contrary to the decisions of this court. . . . **Color of title must be supported by a writing or a conveyance of some kind purporting to convey land under which the claim of title is asserted** . . . .

Id. (citations omitted)(emphasis added).

BTU conceded that it does not have color of title to Tract 2. (*E.g.* TR-11/28/07: 2:52:53-2:53:04.) There is no finding of fact nor conclusion of law in the District Court's Decision that BTU had established color of title to Tract 2. The District Court's Decision, granting adverse possession to BTU to Tract 2, is contrary to the requirements of N.M.S.A. 1978, § 37-1-22 and the prior decisions of the New Mexico Supreme Court that require color of title to be established as part of any claim of adverse possession. Therefore, this Court should reverse the District Court's grant of quiet title by adverse possession to BTU on Tract 2.

C. BTU cannot prevail in a claim for adverse possession because they have not established payment of taxes on Tract 2.

The New Mexico Supreme Court has held that proof of the payment of taxes for the statutory period is a requirement of a claim for adverse possession:

> The requirements of adverse possession are established in New Mexico by statute. Section 23-1-22, N.M.S.A. 1953 (Supp.1975). We do not have to consider the application of adverse possession in this case beyond stating that there was no evidence of the payment of taxes on the disputed tract by the defendant. **This is a specific requirement of our statute and the lack of that evidence defeats**

> **defendant's claim for title whether or not any other elements of adverse possession are present.** Defendant paid taxes only on the property covered by his deed.

Platt v. Martinez, 90 N.M. at 324 (emphasis added).

At trial, BTU's principal, Wayne Sonchar, conceded that BTU had not paid taxes on Tract 2. (TR-11/28/07:2:35:09-2:36:02; 2:44:24-2:44:29; 2:45:00-2:45:11.) In its Closing Brief, BTU did not claim that it actually paid taxes on Ortega's property. Rather, BTU argued that a reasonable person looking at the assessor's map for the County of Las Vegas could reasonably have believed that they were paying taxes on Ortega's property:

> As Assessor Elaine Estrada testified to, if anyone would have come to her office to see what B.T.U. was being assessed for, her map would clearly indicate it was and is from the Railroad to the Interstate. Based on that assessment, B.T.U. has timely paid all of the taxes as have been assessed and billed.

(RP 146.)[1] The mere hypothetical possibility that someone could have gone to the County Assessor's office, looked at the assessor's map, and believed that BTU owned Tract 2, does not satisfy the element of payment of taxes. This Court has repeatedly held that arguments of counsel do not constitute evidence. There is no statutory authority for this argument, and there is no case law that supports a claim to payment of taxes based on a claimant merely **believing** that they were paying taxes on the

[1] Elaine Estrada also testified that the Assessor's Map was not as accurate as an actual survey of the property. (TR-11/28/07:10:38:09-10:38:19.)

claimed property.

Because BTU did not pay taxes on Tract 2, BTU cannot prove the necessary elements of adverse possession of Tract 2, and the District Court should be reversed.

D. BTU cannot establish superior title to Tract 1.

The District Court's Decision held that Ortega did not contest BTU's title to Tract 1. (RP 179.) However, at trial, the District Court granted Ortega's motion to amend to allow Ortega to contest title to Tract 1, over objection from BTU. (TR 11/28/07: 3:44:23-3:45:23; *see also* RP 125-127.) Ortega's challenge to BTU's quiet title claim to Tract 1 was preserved in the District Court.

Plaintiff failed to establish that the deed from T. Brown Constructors to Plaintiff was for Tract 1. In 1983, a deed from T. Brown Constructors to Plaintiff was signed, notarized and recorded. The 1983 deed did not contain a legal description of Tract 1. In 1992, the legal description for Tract 1 was added to the T. Brown Constructors deed and re-recorded. Mr. Sonchar has no knowledge of how or why the legal description was filed for public record in 1992. (TR-11/28/08:1:45:31-1:46:06.) The 1992 Deed was not contemporaneously signed by T. Brown Constructors, and a signature by T. Brown Constructors is not duly acknowledged and certified. Without proper notarization of a grantor's signature, the 1992 Deed was not capable of being recorded, and should not have been accepted for recording. N.M.S.A. 1978, § 14-8-4; *see also, Pollock v. Ramirez*, 117 N.M. 187, 189-190, 870

P.2d 149 (Ct. App. 1994). Therefore, Plaintiff's Deed for Tract 1 does not establish Plaintiff's record title to Tract 1.

A deed does not satisfy the requirement for color of title if it was not passed on to the claimant by a third party. *In the Matter of the Estate of Salome Duran*, 2003-NMSC-008, ¶ 23. "[A] deed made by a man to himself could not well be supposed to have the characteristics of color of title." *Id.* BTU has no evidence that T. Brown Constructors, or any other third party, conveyed Tract 1 to BTU. Rather, BTU has a re-recorded Warranty Deed, not acknowledged by T. Brown Constructors or any other third party, nine years after recordation of a deed from T. Brown Constructors that contained no legal description. BTU did not produce any evidence of what real property it originally obtained from T. Brown Constructors, nor how it obtained that property. BTU did not establish color of title to Tract 1. Without some evidence that Tract 1 was conveyed to BTU by a writing or a conveyance from a third party, BTU cannot establish adverse possession in Tract 1.

BTU cannot establish record title or adverse possession necessary to prevail in its claim to quiet title to Tract 1.

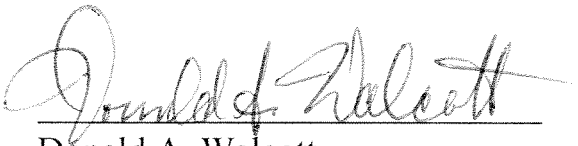
III. Conclusion.

Because BTU failed to establish color of title and payment of taxes for Tract 2, Ortega requests that the District Court's grant to BTU of quiet title to Tract 2 by adverse possession be reversed. Because BTU failed to establish record title or color

of title to Tract 1, Ortega requests that the District Court's grant to BTU of quiet title to Tract 1 be reversed. Ortega requests that this Court mandate to the District Court that it enter a Judgment denying BTU's claims for Quiet Title.

Respectfully submitted,

WALCOTT & HENRY, P.C.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2012, a true and correct copy of the foregoing Brief in Chief was delivered by first class mail to Nicolas T. Leger, 523 W. National Avenue, P.O. Box 454, Las Vegas, New Mexico 87701, attorney for Plaintiff-Appellee

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