

IN THE COURT OF APPEALS OF IOWA

No. 8-165 / 07-1548

Filed June 25, 2008

SHARON ROBINSON,
Plaintiff,

vs.

FIRST AMERICAN TITLE INSURANCE COMPANY,
CLEAN TITLE & ESCROW L.L.C., CHASE
MANHATTAN MORTGAGE COMPANY,
JOHN KUCHEL, L.L.C., and JOHN DAVIS,
Defendants.

CLEAN TITLE & ESCROW, L.L.C.,
Third-Party Plaintiff-Appellee,

vs.

THE CADLE COMPANY II,
Third-Party Defendant-Appellant,

PRESTI & PRESTI INVESTIGATIONS, INC.,
Third-Party Defendant.

PRESTI & PRESTI INVESTIGATIONS, INC.,
Fourth-Party Plaintiff,

vs.

TERESA A. MANN,
Fourth-Party Defendant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert,
Judge.

Mortgagee appeals from a district court ruling granting summary judgment
in favor of title company in a declaratory judgment action. **REVERSED AND
REMANDED.**

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellant Cadle Company II.

Lisa R. Perdue of Grefe & Sidney, P.L.C., Des Moines, for appellee Clean Title & Escrow, L.L.C.

Todd Gaffney of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for Presti & Presti Investigations, Inc.

Laura E. Lockard, Des Moines, Des Moines, for Sharon Robinson.

Michael Ensley of Hanson, Bjork & Russell, L.L.P., Des Moines, for John Kuchel, L.L.C. and John Davis.

Daniel Manning of Connolly Law Firm, Des Moines, for Teresa Mann.

Heard by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

MILLER, P.J.

The Cadle Company II (Cadle) appeals from a district court ruling granting summary judgment in favor of Clean Title & Escrow, L.L.C. (Clean Title) in a declaratory judgment action. We reverse and remand for further proceedings.

I. BACKGROUND FACTS AND PROCEEDINGS.

In 2001, Sharon Robinson entered into a contract with John Kuchel, L.L.C. (Kuchel) to purchase real estate in Des Moines, Iowa. Robinson's purchase was financed by Chase Manhattan Mortgage Company (Chase). Clean Title performed a title search for Chase and Robinson prior to the real estate closing and assured them Kuchel possessed a clear title to the property. Kuchel accordingly executed a warranty deed transferring title to the property to Robinson in March 2003. Robinson thereafter discovered that she did not, in fact, obtain clear title to the property due to irregularities in a tax sale of the property in 1999.

Real Tax Developers, Ltd. (Real Tax) had purchased the property at a tax sale conducted by the Polk County Treasurer in June 1997. It received a certificate of purchase at that time and paid subsequent taxes accruing on the property. On April 6, 1999, Real Tax filed an affidavit of service stating the person in possession of the parcel, the person in whose name the parcel was taxed, judgment lienholders, and mortgagees had been served with notice that their right to redeem the property would expire unless redemption from the tax sale was made within ninety days. No one redeemed the property within the ninety days following the filing of the affidavit of service.

The Polk County Treasurer consequently issued a tax deed to Real Tax on July 7, 1999. On July 26, 1999, Real Tax filed a "120-day affidavit" under Iowa Code section 448.15 (1999) in the office of the Polk County Recorder. The affidavit stated, in relevant part,

Any person claiming any right, title, or interest in or to the parcel adverse to the title or purported title by virtue of the tax deed referred to shall file a claim with the recorder of the County where the parcel is located, within one hundred twenty (120) days after the filing of this affidavit, the claim to set forth the nature of the interest, also the time and manner in which the interest claimed was acquired.

After filing that affidavit, Real Tax discovered it had failed to serve Cadle, which held a recorded first mortgage on the property, with the ninety-day notice of the right to redeem. On November 3, 1999, Real Tax served Cadle with a notice of its right to redeem and filed an amended affidavit of service attesting to that fact. Cadle redeemed the property on December 17, 1999, and obtained a redemption certificate from the Polk County Treasurer. It did not, however, file a claim with the recorder within the 120-day period. Real Tax thereafter transferred title of the property pursuant to a quit claim deed to an individual who then quit-claimed her interest to Kuchel.

After Kuchel conveyed the property to Robinson in 2003, Robinson learned that Cadle had an unsatisfied mortgage on the property, which it refused to release. Robinson accordingly filed suit against Clean Title, Chase, and Kuchel, among others, to resolve the title issues. Clean Title filed a cross-petition against Cadle, seeking a declaratory judgment that Cadle's interest in the property was extinguished with the filing of the 120-day affidavit, notwithstanding Real Tax's initial failure to serve Cadle with notice of its right to redeem. Clean

Title subsequently filed a motion for summary judgment, which the district court granted. The court concluded that Cadle was barred by sections 448.15 and 448.16 from challenging the validity of Real Tax's tax deed because it did not file a claim within the 120-day period set forth in those sections.

Cadle appeals. It claims the district court erred in granting summary judgment in favor of Clean Title. Cadle argues that Real Tax's tax deed is void because Real Tax did not serve it with notice of the right to redeem before it obtained that deed; thus, sections 448.15 and 448.16 do not bar it from challenging the validity of the void tax sale deed.

II. SCOPE AND STANDARDS OF REVIEW.

Our review of a district court order granting summary judgment in a declaratory judgment action is for correction of errors at law. *Robinson v. Fremont County*, 744 N.W.2d 323, 325 (Iowa 2008). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Walderbach v. Archdiocese of Dubuque, Inc.*, 730 N.W.2d 198, 199 (Iowa 2007). A fact question arises if reasonable minds can differ on how the issue should be resolved. *Walderbach*, 730 N.W.2d at 199. No fact question arises if, as here, the only conflict concerns legal consequences flowing from undisputed facts. *McNertney v. Kahler*, 710 N.W.2d 209, 210 (Iowa 2006).

III. MERITS.

Under Iowa Code section 446.7, when a property owner fails to pay his or her taxes, the county treasurer shall sell the property "for the total amount of

taxes, interest, fees, and costs due.” The tax sale purchaser receives a “certificate of purchase” from the treasurer. Iowa Code § 446.29. The property owner or any other person who has an interest of record in the property “has two years to redeem the property by paying the county treasurer” as directed in section 447.1. *Dohrn v. Mooring Tax Asset Group, L.L.C.*, 743 N.W.2d 857, 860 (Iowa 2008). If the property is not redeemed, the tax sale certificate holder is entitled to a tax deed. Iowa Code § 448.1.

However, before the county treasurer may issue a tax deed, the certificate holder is required to provide notice of the expiration of the right of redemption to, among others, “the person in possession of the parcel,” “the person in whose name the parcel is taxed,” and “any mortgagee having a lien upon the parcel.” *Id.* § 447.9(1), (2). The notice must inform those parties “that the right of redemption will expire and a deed for the parcel be made unless redemption is made within ninety days from the completed service of the notice.” *Id.* § 447.9(1). The ninety-day redemption period does not begin until “service is complete.” *Id.* § 447.12; *Dohrn*, 743 N.W.2d at 860. Service is complete only after an affidavit has been filed with the county treasurer attesting to service of the notice. Iowa Code § 447.12. Once service of notice is completed and ninety days have passed from the filing of the section 447.12 affidavit, the county treasurer shall issue a tax deed upon return of the certificate of purchase. *Id.* § 448.1.

Cadle argues the tax deed obtained by Real Tax is void because Cadle was not served with notice of the right to redeem before Real Tax obtained that deed. Clean Title, on the other hand, argues that sections 448.15 and 448.16

bar challenges to a tax deed by an out-of-possession claimant, such as Cadle, regardless of whether the deed is void. We believe this case is controlled by our supreme court's recent decision in *Dohrn*, which implicitly rejects the argument advanced by Clean Title.

The court in *Dohrn* was confronted with the question of whether a tax deed to a tract of farmland was void where the party in possession was not served with notice of the right to redeem. 743 N.W.2d at 859. In concluding the deed was void, the court stated, “[w]e have consistently held that the requirement of serving notice of redemption is an absolute, and the statutory provisions as to notice must be strictly complied with before parties are deprived of their property.” *Id.* at 862 (citation omitted). *Dohrn* recognized that under section 448.1, “the county treasurer is only authorized to issue a tax sale deed once all of the necessary parties have been served with notice of redemption and at least ninety days have passed.” *Id.* at 863. “Lack of proper notice . . . alone is enough to prevent the redemption period from expiring.” *Id.*; see also *Nelson v. Forbes*, 545 N.W.2d 576, 582 (Iowa Ct. App. 1996) (“Where service is incomplete, the right of redemption is not cut off and no valid tax deed can issue.”). As a mortgagee with a duly recorded mortgage to the property, Cadle was entitled to notice of redemption under section 447.9. Because Cadle was not served with notice of its right to redeem before the tax sale deed was issued to Real Tax, that deed is void. *Dohrn*, 743 N.W.2d at 863.

We therefore agree with Cadle that it timely exercised its right to redeem, because its ninety-day redemption period did not begin to run until November 3, 1999, when Real Tax served it with notice of its right to redeem and filed an

amended affidavit of service.¹ See *id.* at 865 (stating holder of void tax deed “must start again with its notice of redemption” where party in possession was not properly notified of its right to redemption). For the reasons that follow, we reject Clean Title’s argument that sections 448.15 and 448.16 nevertheless bar any claim Cadle might make challenging the validity of the tax deed.

Section 448.15 provides that after a tax deed is issued by the county treasurer, the holder of the deed can file an affidavit with the county recorder describing the property, explaining a tax deed was issued, and notifying parties with claims adverse to the deed to file such claims with the recorder within 120 days. *Id.* at 863. Section 448.16 further provides that the 120-day affidavit

shall be notice to all persons, and any person claiming any right, title, or interest in or to the parcel described adverse to the title or purported title by virtue of the tax deed referred to, shall file a claim with the county recorder . . . within one hundred twenty days after the filing of the affidavit, which claim shall set forth the nature of the

¹ Clean Title argues, however, that the district court’s ruling may nonetheless be affirmed because Cadle did not redeem the property according to the procedure set forth in section 447.8 for redeeming a property after a tax deed has issued. See Iowa Code § 447.8 (“After the delivery of the treasurer’s deed, a person entitled to redeem a parcel sold at tax sale shall do so by an equitable action. . . . A person is not allowed to redeem a parcel sold for taxes in any other manner after the service of the notice provided for by section 447.9 and the execution and delivery of the treasurer’s deed.”). We initially note that the record does not affirmatively show that Cadle did not attempt to redeem the property by filing an equitable action under section 447.8. In addition, although Clean Title mentioned section 447.8 in its brief in support of its summary judgment motion in district court, that section was not urged, as it is here, as a separate ground entitling it to summary judgment. Instead, Clean Title referred to section 447.8 as a part of its argument that “sections 448.15 and 448.16 serve as statutes of limitations for claimants out of possession to challenge a tax title.” Finally, we note that the section 447.8 cited by Clean Title in the district court proceedings was the amended 2005 version, rather than the applicable 1999 version it now urges as a ground for affirmance of the district court’s ruling. See Iowa Code § 447.14 (“The law in effect at the time of tax sale governs redemption.”). For the foregoing reasons, we need not and do not address this ground for affirmance. See, e.g., *DeVoss v. State*, 648 N.W.2d 56, 61 (Iowa 2002) (stating in order to affirm a district court’s ruling on a ground not relied upon by the court, that ground must have been urged by the party in district court); see also *Beck v. Phillips*, 685 N.W.2d 637, 646 (Iowa 2004) (stating the decision to affirm a district court ruling on a ground urged but not relied upon by the court is discretionary).

interest, the time when and the manner in which the interest was acquired.

At the expiration of the period of one hundred twenty days, if no such claim has been filed, all persons shall thereafter be forever barred and estopped from having or claiming any right, title, or interest in the parcel adverse to the tax title or purported tax title, and no action shall thereafter be brought to recover the parcel, and the then tax-title owner or owner of the purported tax title shall also have acquired title to the parcel by adverse possession.

Clean Title argues that these sections operate as a statute of limitations to bar all claims adverse to the tax deed by an out-of-possession claimant after the expiration of the 120-day period regardless of whether the tax deed is void. See *Swanson v. Pontralo*, 238 Iowa 693, 697, 27 N.W.2d 21, 24 (1947) (characterizing sections 448.15 and 448.16 as statutes of limitations that authorize the filing of an affidavit by one in possession of realty under a recorded tax deed as a result of which adverse claims of those not in possession are barred); accord *Simeon v. City of Sioux City*, 252 Iowa 779, 785, 108 N.W.2d 506, 509-10 (1961); *Modern Heat & Power Co. v. Bishop Steamotor Corp.*, 239 Iowa 1267, 1278, 34 N.W.2d 581, 587 (1948).

However, in *Dohrn*, our supreme court stated its previous characterization in the above-cited cases of section 448.16 as a statute of limitations “is inaccurate in light of the fact chapter 448 contains a three year statute of limitations” for “action[s] for the recovery of a parcel sold for the nonpayment of taxes” 743 N.W.2d at 864 (quoting Iowa Code § 448.12). The court determined that sections 448.15 and 448.16 instead “simply provide a quick and low-cost alternative to bringing an action to quiet title.” *Id.* “After the holder of the tax deed files an affidavit with the county recorder, section 448.16 cuts the amount of time to bring an action adverse to the tax title from three years to 120

days.” *Id.* Therefore, it is “only fair to require the tax deed holder to have a valid deed before he may use sections 448.15 and 448.16 to cut off another’s right in the property.” *Id.* “To hold otherwise would in some circumstances ‘deny a potential claimant all opportunity to protest’ and violate due process.”² *Id.* (citation omitted). Sections 448.15 and 448.16 thus do not bar claims adverse to the tax deed where the deed is void for failure to properly serve notice of the right to redeem on necessary parties.³ *Id.* We accordingly determine the district court

² We note that section 448.15 does not require the tax deed holder to serve notice of the 120-day affidavit upon those persons who were entitled to the ninety-day notice of redemption. *Id.* at 864 n.3.

³ Though both parties agree we should apply the 1999 Code of Iowa to our decision in this case, we believe it is important to note recent amendments to chapters 447 and 448 that appear to conflict with our conclusion herein. The legislature amended section 448.16 in 2005 to provide that if no claim asserting an interest adverse to the tax deed is filed with the county recorder within the 120-day period,

all persons shall thereafter be forever barred and estopped from having or claiming any right, title, or interest in the parcel adverse to the tax title or purported tax title, *including but not limited to any claim alleging improper service of notice of expiration of right of redemption.*

Iowa Code § 448.16(2) (Supp. 2005) (emphasis added). The legislature also amended sections 447.8 and 448.6, which concern actions to challenge tax deeds, to provide that such claims are barred “[i]f an affidavit is filed pursuant to section 448.15, and if the time period for filing a claim under section 448.16 expires with no claims having been filed.” Iowa Code §§ 447.8(6), 448.6(6). These amendments, however, are applicable only to parcels sold at tax sales occurring on or after June 1, 2005. Finally, during the 2008 legislative session, the legislature passed House File 2642 amending section 448.3 to provide as follows:

In the event that an owner of record or a person in whose name the parcel is taxed establishes that such person was not served with notice of expiration of right of redemption in accordance with section 447.9, then the county treasurer’s deed is void, subject to the provisions of sections 448.15 and 448.16. *If a person entitled to service of notice under section 447.9, other than an owner of record or a person in whose name the parcel is taxed, establishes that such person was not served with notice in accordance with section 447.9, the deed is not thereby rendered invalid. However, the deed is subject to all of the right and interest of such person not served with notice, as provided in sections 448.15 and 448.16.*

H.F. 2642 § 1 (2008 Iowa Acts ch. _____ § 1) (emphasis added). Again, the legislature provided that the amendment would only apply to deeds issued after its enactment date, April 8, 2008.

erred in concluding otherwise, although it did not have the benefit of the court's opinion in *Dohrn* when rendering its decision.

IV. CONCLUSION.

The district court erred in concluding that Cadle was barred by sections 448.15 and 448.16 from challenging the validity of Real Tax's tax deed where Cadle was not properly served with notice of redemption prior to issuance of the deed. We therefore reverse the district court's ruling granting summary judgment in favor of Clean Title and remand for further proceedings.

REVERSED AND REMANDED.