

IN THE COURT OF APPEALS OF IOWA

No. 7-257 / 95-2054

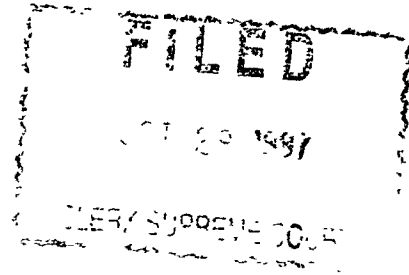
Filed 10/29/97

000219

KLIMROD INDUSTRIES, INC.,
Plaintiff-Appellee/Cross-Appellant,

vs.

WALTER OKERLUND and VICKY OKERLUND,
Individually; **JAMES SHAW and MICHELLE SHAW,**
Individually; and **OTHERS YET UNKNOWN,**
Defendants-Appellants/Cross-Appellees,



WALLACE BUSSEWITZ and KAY
BUSSEWITZ, Individually,
Defendants,

JOSEPH and JEANNE DAHM, JIM and
SHIRLEY KLEMP, BOB and BETTY SKVOR,
Intervenors-Appellants/Cross-Appellees.

Appeal from the Iowa District Court for Linn County, Thomas L. Koehler, Judge.

Defendants and intervenors appeal the district court's refusal to void tax and quit claim deeds and the court's ruling that they did not prove ownership by adverse possession or estoppel. Plaintiff cross-appeals the trial court's denial of its motion for Rule 80 sanctions.

AFFIRMED.

Gregory D. Kingery and Larry J. Thorson of Ackley, Kopecky & Kingery, Cedar Rapids, for appellants.

Richard D. Raymon and Todd P. Forsythe, Cedar Rapids, for appellee.

Considered by Cady, C.J., Streit, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

STREIT, J.

Defendants and intervenors [hereafter claimants] appeal the district court's refusal to void tax and quit claim deeds to disputed property because of alleged statutory defects in the tax sale proceedings. They further appeal the trial court's denial of their adverse possession and title by estoppel claims. The plaintiff, Klimrod, cross-appeals for Rule 80 sanctions. We affirm the trial court.

I. Background and Facts.

The parties dispute the ownership of nine and one-half acres of real estate deeded in plaintiff's name and adjoined to the claimants' backyards. The property is along a floodplain of Dry Creek in Marion, Iowa. In 1975, the property was sold by tax sale to Linn County. In September of 1979, a notice of expiration of right of redemption was served on Merchants National Bank and Austin Fernow, the record title holders of the property. The claimants assert they were entitled to receive, but did not receive, a notice of expiration in 1979. They also allege other defects--more technical in nature--in the tax sale proceedings.

The parties served with notice of expiration in 1979 did not act on the notice. A tax deed was therefore executed to Linn County on June 27, 1980. In May, 1993, Linn County published notice to sell the property. Notice of the sale was mailed to the claimants. In June 1993, plaintiff, Klimrod Industries, purchased the property for \$4000 and Linn County executed it a quit claim deed, recorded on June 18, 1993.

Once Klimrod began utilizing the property, a dispute arose with the claimants regarding ownership of the property. Klimrod brought suit against the claimants in April, 1994, to enjoin them from disturbing his development of the property. Claimants counterclaimed to quiet title.

On June 1, 1994, plaintiff filed a motion requesting rule 80 sanctions alleging claimants' attorney, Larry Thorson, filed a motion for temporary restraining order and scheduled a hearing with a judge while plaintiff's attorney was on vacation. Judge Kristin L. Hibbs denied the motion for sanctions, finding a lack of bad faith on the part of Thorson. The plaintiff appealed the decision, but the supreme court dismissed it as interlocutory.

At trial, the court held the tax deed unimpeachable and rejected claimants' adverse possession and title by estoppel claims.

II. Validity of the 1980 Tax Deed & Subsequent Sale to Plaintiff, Klimrod.
A. Standard of Review.

An action to set aside and declare void a tax deed is reviewed de novo. *Nelson v. Forbes*, 545 N.W.2d 576, 579 (Iowa App. 1996)(citing *Pendergast v. Davenport*, 375 N.W.2d 684, 686 (Iowa 1985)).

B. 1980 Tax Deed to Linn County & Subsequent Sale to Plaintiff.

The claimants seek to void Linn County's tax deed because of alleged defects in the tax sale procedure. Their foremost complaint is they were not served notices of expiration of rights of redemption in 1979. They contend they were parties in possession and thus were

entitled to be served notices of expiration. In our de novo review, we find the parties were not in possession of the disputed land in 1979 to the extent necessary to put the taxing authority on notice that they had an interest in the property taxed. Thus none of the claimants were entitled to notice of redemption rights. As parties out of possession and accordingly not entitled to notice of redemption rights, two Iowa statutes bear on the question before us: sections 589.16A and 614.22(2).

Section 589.16A bars claims against real estate sold at a tax sale held prior to July 1, 1986, when the claim is based upon a defect in the tax sale proceedings.¹ Iowa Code § 589.16A (1993). The statute only applies to claims brought after July 1, 1987. The tax sale and proceedings in this case were before July 1, 1986. The claimants' action was brought after July 1, 1987. As parties not entitled to notice of redemption rights, the claimants' action to void the deed is barred under this section.

Iowa Code section 614.22(2) bars actions attacking tax deeds, if the action is brought more than ten years after the deed was recorded. Iowa Code § 614.22(2) (1993). The limitation period applies to actions brought on and after January 1, 1992. *Id.* The statute does not apply to persons in possession of the property who claim title to the property *under the challenged deed*. *Id.* (emphasis added). More than ten years passed between the time Linn County's tax deed was recorded in 1980 and the time the claimants brought this action

¹ “. . . including the inadequacy of the notice of tax sale or the inadequacy of the notice of the expiration of the redemption period.” Iowa Code § 589.16A (1993).

in 1994. As parties not in possession, the claimants' action to void the deed is barred under this section.

C. Claimants' Contentions.

Claimants argue section 589.16A is not a bar to their claim because it is not retroactive. The limitation period became effective July 1, 1987 and bars claims involving defects in tax sale proceedings held prior to July 1, 1986. This is a retroactive statute. *See Campbell v. Bruce*, 3 N.W.2d at 524.

The claimants argue the statutes are unconstitutional as depriving them of property without due process of law. Although Iowa courts have not specifically ruled on the constitutionality of sections 589.16A or 614.22(2), they have addressed the constitutionality of other statutes of limitation applying to tax sales. *See, i.e., Nelson v. Forbes*, 545 N.W.2d at 576, 580 (Iowa App. 1996); *Swanson v. Pontralo*, 27 N.W.2d at 24-25; *Campbell*, 3 N.W.2d at 524-25. In *Campbell*, the court found a statute of limitation constitutional because there was a reasonable time for parties to assert their rights before the statute became operative. *Campbell*, 3 N.W.2d at 524-25.

The statutes here are constitutional for the same reason. Section 589.16A became effective July 1, 1986. Claims were not barred under the statute until July 1, 1987. The defendants had one year--a reasonable time--to assert their rights. *Id; see also Swanson v. Pontralo*, 27 N.W.2d at 25. Section 614.22(2) sets a limitation period of January 1, 1992.

The statute became effective on July 1, 1991. The defendants had a reasonable time period, from July 1, 1991 to January 1, 1992, to assert their rights.

Because the claimants are statutorily barred from attacking Linn County's deed, they are unable to invalidate Klimrod's quit claim deed.

III. Adverse Possession.

Adverse possession is an equitable proceeding and our review is de novo. *Sille v. Shaffer*, 297 N.W.2d 379, 380 (Iowa 1980). The claimants can not assert an adverse possession claim against Linn County if Linn County had valid title. *See Sioux City v. Betz*, 4 N.W.2d 872, 873 (Iowa 1942) (holding adverse possession cannot lie against the state). To avoid this rule of law, the claimants base their argument on the assumption Linn County did not have valid title to the property.

To prove ownership by adverse possession, the defendants must establish hostile,² actual, open,³ exclusive,⁴ and continuous possession, under a claim of right or color of title

² "Hostile" possession requires "an intention to hold title exclusive of all other titles or against the world" *Burgess v. Leverett and Assoc.*, 105 N.W.2d 703, 706 (Iowa 1960).

³ Open use of property requires knowledge be given to everyone of the use of the property and can be demonstrated "where one goes upon the land and uses it openly and notoriously, as owners of similar lands use their property, to the exclusion of the true owner." *I-80 Assoc. v. Rock Island & Pacific Railroad*, 224 N.W.2d 8, 11 (Iowa 1974).

⁴ Exclusivity requires occupation and possession by the claimants "with the requisite intent and purpose to assert ownership of the disputed parcel." *Rentschler v. Walnofer*, 277 N.W.2d 548, 553 (Neb. 1979).

for at least ten years. *C.H. Moore Trust Estate v. Storm City*, 423 N.W.2d 13, 15 (Iowa 1988). Proof of these elements must be clear; not merely inferential. *See id.*

The claimants need not establish color of title *and* claim of right to prove adverse possession. *C.H. Moore*, 423 N.W.2d at 13. (emphasis added). Either will suffice. *Id.* at 15. To establish adverse possession by claim of right the claimants must have acted in a manner indicating they had title. *Id.* The actual occupation, use, and improvement of the premises by the claimant, as if they were in fact the owners, will prove adverse possession. *Id.* It is not necessary possession be accompanied by an express declaration of ownership. *I-80 Assoc.*, 224 N.W.2d at 10.

Defendants have not clearly proven the elements of adverse possession. In regard to the ten-year requisite, some of the claimants have not lived on the disputed property for ten years and there is no evidence which supports tacking of the previous owners' possession. Further, the record does not show a clear intention of the claimants to hold exclusive title or that claimants treated the property as owners of similar land would.

It is unnecessary to make an express declaration of title to prove adverse possession by claim of right. But the claimants here did more than fail to expressly declare title, they expressly disavowed ownership of the property. In a letter to the Governor of Iowa, some of the claimants indicated the disputed property was not theirs and that it belonged to the plaintiff. Another admitted they had no valid land claims. Another testified they were told they could "use" the property.

Claim of right can be established by proving that one took and maintained possession of the property; managed, cared for, and held the property in a manner owners of like property would generally. *Id.* The claimants here did not conduct themselves in regard to this property as like owners would. For example, when a tree fell on the disputed property, one claimant called Linn County and requested the county clean up the debris. Another claimant approached a Linn County representative inquiring whether the disputed property could be bought. Another testified other people had used the property and he took no action to remove them. After the claimants received notice the land was to be sold at a public sale, they did not notify Linn County they owned the land or object to the sale.

Good faith is essential to prove a claim of right. *Carpenter v. Ruberto*, 315 N.W.2d 782, 786 (Iowa 1982). If a party has knowledge there is no basis for his interest in the property, a good faith claim of right cannot be established. *Id.* at 785. In light of the testimony and evidence on the record, the claimants can not establish a good faith claim of right. Their good faith claim of right is also placed in question by the fact they never paid taxes on the disputed land. *See Pearson v. City of Gettenberg*, 245 N.W.2d 519, 532 (Iowa 1976).

After de novo review, we affirm the trial court's denial of the claimants' adverse possession claim.

IV. Title by Estoppel.

By asserting facts in the pleadings on which a title by estoppel claim could arise, the claimants preserved that issue for appeal. *See Farmers & Mech. Sav. Bank v. Cambell*, 141 N.W.2d 917, 922 (Iowa 1966). Title by estoppel can be asserted against a municipality in certain circumstances. *See Sioux City v. Johnson*, 165 N.W.2d 762, 767-68 (Iowa 1969). Like adverse possession, one of the essential elements of proving title by estoppel is establishing the parties maintained possession under a claim of right in good faith. *Id.* at 768. The claimants cannot prove a good faith claim of right. Thus, the claimants cannot prove a title by estoppel claim.

V. Denial of Motion for Sanctions Under Rule 80.

The plaintiff cross-appeals for sanctions pursuant to Rule 80 of the Iowa Rules of Civil Procedure. The plaintiff asserts claimants' attorney did not give plaintiff reasonable notice of claimants' motion for restraining order and hearing. Plaintiff asserts the motion was filed while plaintiff's counsel was out of town so that it would go unchallenged.

This court reviews for abuse of discretion. *Schettler v. Iowa Dist. Ct.*, 509 N.W.2d 459, 464 (Iowa 1993). The trial court did not abuse its discretion by denying the plaintiff's motion for sanctions. An abuse of discretion is found when the court exercises its discretion on untenable grounds or to an extent clearly unreasonable. *Id.* Here the court denied the plaintiff's motion for sanctions because it was not convinced claimants' counsel waited until plaintiff's counsel was out of town to file his motion for restraining order. Further, the court

found the plaintiff had not established bad faith or the intention of defendants' counsel to cause unnecessary delay or needlessly increase the cost of litigation. After review of the record regarding this issue and the parties arguments, we find the court's grounds for denying the plaintiff's motion for Rule 80 sanctions were neither unreasonable or untenable. The trial court's ruling denying the plaintiff's motion for Rule 80 sanctions is affirmed.

AFFIRMED.