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CLERK SUPREME COURT

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Heard by Oxberger, C.J., and Donielson and Schlegel,
JJ.

OXBERGER, C.J.

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Plaintiffs filed a petition seeking relief as occupying claimants pursuant to Iowa Code chapter 560. The district court granted defendant's motion to dismiss and the plaintiffs appealed. Our review is for the correction of errors at law. We affirm.

The Bank's mortgage encumbering Hardens' farm was foreclosed upon by decree on May 16, 1986. On June 6, 1986, the Hardens filed a petition at law pursuant to Iowa Code chapter 560 as occupying claimants. The plaintiffs demanded no sheriff's sale be executed until a trial was held to determine what compensation they were entitled to for improvement made on their land. On July 15, 1986, the defendant moved to dismiss the case pursuant to Iowa Rule of Civil Procedure 104(b). On August 8, 1986, the district court granted defendant's motion and rejected plaintiffs' notice of default. The court based its ruling on the doctrines of res judicata and issue preclusion.

There are four prerequisites to the application of the doctrine of issue preclusion:

- (1) The issue concluded must be identical;
- (2) The issue must have been raised and litigated in the prior action;
- (3) The issue must have been material and relevant to the disposition of the prior action; and
- (4) The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Brown v. Monticello State Bank of Monticello, 360 N.W.2d 81, 84 (Iowa 1984); Hunter v. City of Des Moines, 300 N.W.2d 121, 125 (Iowa 1981); Mauer v. Rhode, 257 N.W.2d 489, 497 (Iowa 1977).

The district court sustained the defendant's motion to dismiss for failure to state a claim on which relief can be granted. The judge's ruling was based on the doctrine of issue preclusion because the decree of foreclosure and the rights of both parties to the land was the subject of the first suit and would necessarily be the subject of the second as well.

Iowa Code chapter 560 is applicable in a situation where an occupant of real estate has color of title and has in good faith made valuable improvements on the land. Iowa Code § 560.1 (1985). The statute was intended to reimburse those who have, in good faith, made improvements upon the land believing themselves to be the owners thereof at the time they were made and of which they are divested in a subsequent action by the true owner. Betz v. Sioux City, 30 N.W.2d 778, 781 (Iowa 1948)(emphasis added). This rule stems from the inequitable, unyielding rule of the early common law that the owner of land was under no liability to pay for improvements made thereon without his authority or knowledge, by an occupying claimant of the property having no title, even though he did so in good faith and in honest belief that the land was his. Id. at 779-80. All such

improvements attached to the land became a part of it and passed to the owner when he ejected the occupant. Id. at 780. Thus the latter was deprived not only of the land which he thought was his, but he lost also the improvements made by his labor and his resources, and the owner was enriched without effort or expense. Id. It would appear that the intention of the legislature in enacting such a statute was to provide for compensation to a claimant who while occupying land believed to be his makes improvements on such land. See Betz v. Sioux City, 239 Iowa 95, 30 N.W.2d 778 (1948); Childs v. Shower, 18 Iowa 261 (1865); Craton v. Wright, 16 Iowa 133 (1864); Parsons v. Moses, 16 Iowa 440 (1864).

In the present action, in order to determine if a chapter 560 action for compensation is appropriate in such a situation the claimant's ownership or believed ownership status must be determined both at the time improvements were made and at present. Such a determination would involve recitation of the identical issues which were determined in the foreclosure action as to whose claim is senior pursuant to the mortgage. This issue was concluded in the prior action, it was raised and litigated in the prior action, it was relevant and material to the prior action, and the determination of the issue in the prior action was necessary and essential to the resulting judgment. Thus, we conclude that this action is barred

under the doctrine of issue preclusion. Accordingly, we affirm the district court's ruling sustaining the defendant's motion to dismiss.

Hardens argue that an action under chapter 560 arises only after an individual is determined to not be the owner of the property. Plaintiffs contend they were determined to not be the owners only after the foreclosure action. We would note that our review of the statute and cases which construe it reveal that the legislature did not intend this remedy to owners of land which was foreclosed upon. Rather, it is intended for situations in which an occupant who believes he or she is the owner of such property but is not the true owner makes improvements for which the owner must reimburse him or her. We fail to find chapter 560 applicable to the Hardens' situation. We reassert that a determination of the applicability would raise issues identical to the foreclosure action and is barred by issue preclusion.

We note the Hardens would, in effect, be compensated under Iowa Code section 654.7. That section provides: "If there is an overplus remaining after satisfying the mortgage and costs, and if there is no other lien upon the property, such overplus shall be paid to the mortgagor. Iowa Code § 654.7 (1985). The improvements which were allegedly made to the property would result in an increase in the value of the property. The excess over satisfaction of the mortgage will be returned to the Hardens.

Hardens also assert the district court erred in failing to enter summary judgment against the defendant for failure to file an answer. Iowa Rule of Civil Procedure 104(b) provides: "Failure to state a claim on which any relief can be granted, may be raised by motion to dismiss such claims, filed before answer." We therefore find the district court correctly denied plaintiffs' motion.

Hardens also assert that the court's dismissal of their action denied them of their right to a jury trial. We note that Hardens failed to demand a jury trial pursuant to Iowa Rules of Civil Procedure 177, 178.

Hardens also claim error in the district court judge's action of contacting both parties by phone in order to notify them of a continuance. We need not reach this issue as plaintiffs did not object before going forward with the hearing in order to preserve error for appeal. See Elkin v. Johnson, 260 Iowa 46, 49, 148 N.W.2d 442, 444 (1967).

Upon our review of the record we find substantial evidence to support the trial court's sustaining defendant's motion to dismiss and the trial court's failure to enter summary judgment upon plaintiffs' motion.

AFFIRMED.