FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

GUS PAPKE,

Appellant,

vs.

ALLEN J. BIRCH AND MARGARET L. BIRCH,

Appellees.

Filed February 28, 1978

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2-59914

Appeal from Dubuque District Court - L. J. Degnan, Judge.

Appeal from trial court's order granting defendants' motion to dismiss plaintiff's petition for recovery of real estate. REVERSED.

James L. Dahlquist, of Dubuque, counsel for appellant.

William R. Bartmann, of Dubuque, counsel for appellees.

Submitted to Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Plaintiff-Gus Papke appeals the trial court's order granting the motion of defendants-Allen J. and Margaret L. Birch to dismiss plaintiff's petition for recovery of real estate on the basis of a determination that the statute of limitations had run on the cause of action. Papke argues that the trial court erroneously dismissed his petition because no facts were contained therein which would indicate that the statutory period had run.

In his petition filed May 18, 1976, plaintiff alleges the location of plaintiff's property and the derivation of his title; the location of defendants' property and the derivation of their title; that an attached photostat is an accurate depiction of the plat of the properties; that a portion of defendants' house is situated upon plaintiff's land; and that plaintiff has suffered damages in the amount of $15,000. On July 19, defendants moved to dismiss on the ground that the ten-year statutory period set forth in § 614.1(5), The Code, had run, and, consequently, plaintiff had failed to state a cause of action upon which relief could be granted. See rule 104(b), Rules of Civil Procedure. In that motion, defendants asserted that they have held title since July 24, 1950, and their predecessors held it since May 17, 1946. However, neither the petition nor the motion supplied any information as to when the actual encroachment occurred.

An unreported hearing was held on this matter on August 30, 1976, and the court issued its findings of fact and conclusions of law on September 1, holding that plaintiff's claim was time-barred by § 614.1(5), The Code. On appeal, defendants attempt to defend the trial court's action by contending that, during the hearing, the court properly took judicial notice of facts disclosed in previous judicial proceedings in the same district court involving the same property dispute between these parties [in the District Court in and for Dubuque County, Law No. 40500]. Defendants assert that during the hearing, they informed the court, on the basis of the earlier proceedings, of the period of possession of the property by defendants and the date of the encroachment. According to defendants' brief, the trial judge took judicial notice of these facts at the hearing. However, there is no reference to these facts or the fact that the court had taken judicial notice of them in its findings. Further, plaintiff states in his reply brief that defendants' version of what actually transpired at the hearing was in error and was inconsistent with his recollection of the hearing.

In any civil action, the burden of proof is on the defendant to raise the statute of limitations as an affirmative defense and prove by a preponderance of the evidence that it has run against plaintiff's cause of action. In re Estate of Plumb, 256 Iowa 938, 944, 129 N.W.2d 630 (1964); Baines v. Blenderman, 223 N.W.2d 199, 203 (Iowa 1974). The grounds of a motion to dismiss a pleading because it does not state a cause of action must be based on the contents of the pleading. Ambrose v. Harrison Mutual Ins. Ass'n., 206 N.W.2d 683, 684 (Iowa 1973); Newton v. City of Grundy Center, 246 Iowa 916, 919, 70 N.W.2d 162 (1955). Facts not so appearing, except those of which judicial notice may be taken, are to be ignored. Pride v. Peterson, 173 N.W.2d 549, 554 (Iowa 1970); Winneshiek Mutual Ins. Ass'n. v. Roach, 257 Iowa 354, 364-365, 132 N.W.2d 436 (1965). Furthermore, a trial court will take judicial notice of prior proceedings, orders, judgments and decrees in the same case without the necessity of any formal offer or physical production of the records in evidence, and this includes actions of a collateral character. Haaren v. Mould, 144 Iowa 296, 301, 122 N.W. 921 (1909); In re Estate of Hinkle, 240 Iowa 979, 982, 38 N.W.2d 648 (1949); Britven v. Britven, 259 Iowa 650, 659, 145 N.W.2d 450 (1966); McCormick on Evidence § 330, at pp. 765-766 (1972); 31 C.J.S. Evidence § 50(1)-(2) (1964); 29 Am. Jur.2d Evidence § 57 (1967).

After reviewing the record, we conclude that the facts contained in plaintiff's petition were insufficient to justify the trial court's order granting defendants' motion to dismiss. Further, the evidence regarding judicial notice is contradictory at best and we refuse to hold that the trial court properly took judicial notice, especially since we have no record before us upon which to base such a holding.

Nevertheless, defendants argue that plaintiff has never contended that the statute of limitations has not lapsed, and, therefore, even if the trial court did commit error, it would be a waste of time, money and judicial resources to send this matter back to district court inasmuch as the same result will obtain. See McCleeary v. Wirtz, 222 N.W.2d 409, 416 (Iowa 1974). However, plaintiff indicates in his reply brief that he desires to adjudicate this controversy on its merits and intends to argue lack of knowledge of the encroachment and acquiescence by defendants in the existing boundary. Under this set of facts, we cannot say that it would involve unnecessary delay and expense to have this matter proceed in district court. The judgment of the trial court is reversed.

REVERSED.