

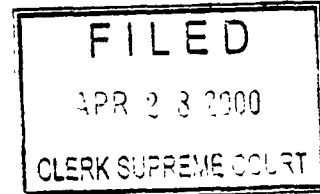
IN THE COURT OF APPEALS OF IOWA

No. 1999-393 (9-646) / 98-2242
Filed April 28, 2000

ROBERT J. DAVIS and PAMELA J. DAVIS,
Appellants,

vs.

JACQUE A. TERRY,
Appellee.



Appeal from the Iowa District Court for Scott County, David E. Schoenthaler, Judge.

Plaintiffs appeal following the denial of their action to set aside the forfeiture of a real estate contract with the defendant. **AFFIRMED.**

Davis L. Foster of the Foster Law Office, Iowa City, for appellants.

Elliott R. McDonald, III, and Patricia Rhodes Cepican of McDonald, Stonebraker, Cepican & Woodward, P.C., Davenport, for appellee

Heard by Sackett, C.J., and Vogel and Hecht, JJ.

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VOGEL, J.

Robert L. and Pamela J. Davis, appeal following the denial of their action to set aside the forfeiture of a real estate contract with Jacque A. Terry. We affirm.

Background facts. The Davises are the assignee-vendees of a real estate contract originally signed in 1975 between Terry, the vendor, and a prior vendee. In July, 1996, after the Davises defaulted on the contract payments, Terry began forfeiture proceedings. Personal service on the Davises was attempted by a process server but all attempts to serve them failed. Terry subsequently caused the Notice of Forfeiture to be published as well as sending the Davises notice by ordinary mail. After thirty days had passed from the last date of publication and no cure was made of the default, Terry filed the notice with affidavit pursuant to Iowa Code section 656.5, to complete the forfeiture. In July, 1997, Terry resold the real estate and substantial improvements were made to the property.

The Davises filed a petition seeking to have the forfeiture set aside in October, 1997. The petition alleged: 1) lack of notice of the forfeiture proceedings, 2) the forfeiture was a breach of contract and 3) Terry slandered the Davises' title to the property.

Terry moved for summary judgment. The court sustained the motion for summary judgment as to the last two arguments but overruled the motion as to the first, finding diligent effort was not made to personally serve the Davises prior to publication of the notice of forfeiture.

Pursuant to Iowa Rule of Civil Procedure 179(b), the court subsequently expanded on the issue of adequacy of service and the court found it to be the law of the case. In this ruling, the court stated:

[T]he Court found, "Based on the record, the Court finds that a diligent effort was not made to personally serve the Davises, therefore, Terry's Motion For Summary Judgment on Division I is overruled." The Court thus has held as a *matter of law* that diligent effort was not made to personally serve a Notice of Forfeiture prior to notice by publication. (emphasis added)

The case proceeded to trial on the sufficiency of the notice. The court found the long time process server to be credible and that numerous attempts had been made to personally serve the Davises. The court also found no agreement existed between the parties which would have been an impediment to completing the forfeiture action. No further ruling was made as to the slander of title claim.

On appeal, the Davises argue the district court erred in concluding service of process was adequate and in finding there was no agreement to delay the completion of the forfeiture.

Scope of review. This action was tried below in equity and we accordingly review all arguments in this case de novo. Iowa R. App. P. 4. We review the entire record and adjudicate anew rights on the issues properly presented. *Hartford-Carlisle Sav. Bank v. Van Zee*, 569 N.W.2d 386, 387 (Iowa App. 1997). We give weight to the fact findings of the trial court, especially when considering the credibility of the witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

Adequacy of service. The Davises argue the forfeiture should be set aside for want of proper service of process. The Davises admit they knew of the forfeiture proceedings as they and their attorney had a copy of the Notice of Forfeiture. The court on the motion of summary judgment correctly found that actual knowledge of the pending proceedings does not supplant proper service of process. Iowa Code § 656.3 (1997). We agree with this conclusion.

When the case proceeded to trial on the issue of service of process, the trial court found the process server had noted his attempts to serve the Davises on the following occasions: May 7th, May 20th, May 22nd, July 23rd, July 25th, July 27th, July 31st, August 3rd, August 7th, August 12th, August 15th, August 21st, and August 30th. There were also several other attempts made including driving by the Davis home and looking for the Davises at the post office where the process server had previously served the Davises. There was some indication the Davises were avoiding process. Having found diligent effort was made by Terry to have them served, the trial court ruled service by publication was appropriate and adequate. Publication occurred on July 24th, July 31st, and August 7th, 1996.

We agree with the trial court's findings. The Davises' petition to have the forfeiture set aside for lack of proper service of process must fail.

Agreement to delay filing of affidavit. The Davises allege there was an agreement that Terry's attorney would delay filing the notice of forfeiture with affidavit beyond the thirty day time period. The trial court found that although there were some discussions regarding a compromise offer to cure the default, it was rejected. The time for curing the default was running with the full knowledge

of the Davises and their attorney. We agree with the trial court's finding that there was no agreement between the parties to delay the completion of the forfeiture.

Other issues raised on appeal.

The Davises now raise additional issues including whether subsequent purchasers were bona fide purchasers and seek to rescind the contract. We will not consider these issues as they were not pled in the original petition. See *Chipokas v. Hugg*, 477 N.W.2d 688, 690 (Iowa 1991) (stating issues not pled or argued at the district court may not be raised for the first time on appeal).

Having considered all other arguments on appeal, we affirm denial of the Davises' motion for summary judgment, as well as the subsequent trial court ruling.

AFFIRMED.

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