FILED
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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

ROBERT W. HOPKINS and GENEVIEVE HOPKINS,

Plaintiffs-Appellants,

vs.

WILLIAM F. LIPTON, GISELA LIPTON, WAYNE WHEELER d/b/a WHEELER LANDSURVEY, REMNEF CONSTRUCTION COMPANY, REDY MIX CONCRETE COMPANY, BUILDERS SUPPLY CO., INC., PORTER-TRUSTIN CARLSON CO., and LEO ROBERTS,

Defendants,

and

HOWARD WARD,

Intervenor.

Filed September 23, 1980

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Appeal from Pottawattamie District Court, Harold Martin, Judge.

Plaintiffs appeal from trial court's order dismissing their application requesting an order reforming a mortgage subsequent to foreclosure and sale. - AFFIRMED.

Raymond E. Pogge, of Pogge, Root & Steege, Council Bluffs, for plaintiffs-appellants.

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

PER CURIAM

Plaintiffs, Robert and Genevieve Hopkins, appeal from trial court's order dismissing their application requesting reformation of a mortgage to include a correct legal description of property after a foreclosure decree had been entered. We affirm.

Plaintiffs sought and obtained foreclosure of a mortgage against William and Gisela Lipton in December 1977. In that action six other lien holders were named as defendants. When the matter was heard, the Liptons and the other defendants either did not appear or filed disclaimer to any interest in the property. After foreclosure, the plaintiffs purchased the property at Sheriffs sale on February 10, 1978.

In November 1978, Howard Ward petitioned as intervenor and stated he levied upon the foreclosed property and purchased same in January 1978 following a 1976 judgment he had obtained against the Liptons. Ward alleged the legal description of the mortgage foreclosed upon by plaintiffs was vague and ambiguous and did not give plaintiffs any right, title or interest in the real estate. Plaintiffs upon investigation discovered the mortgage indeed recited an incorrect legal description. They filed what was captioned "Application" seeking an injunction against execution of Sheriff's deed to Ward and reformation of the mortgage to include the correct legal description. The plaintiffs claimed the incorrect description was attached to the mortgage by mistake, and an affidavit of the preparing attorney supported this claim. The application contained a stamped proof of service indicating copies had been mailed to "attorneys of record", but procedures for serving original notice to all parties were not followed. The intervenor filed a responsive application, appeared at the hearing and withdrew his petition prior to the ruling on the plaintiffs' application.

The trial court dismissed plaintiffs' application on the grounds it did not comply with Rules 252 and 253 of the Iowa Rules of Civil Procedure. Plaintiffs appeal that order.

A sheriff's deed has been executed and delivered to Ward. The plaintiffs take issue with Ward's right to the property. We are asked to determine whether the ex parte method the plaintiffs' employed to remedy the situation was appropriate. The trial court found, and plaintiffs agree, the application is a proceeding under Rules 252 and 253, Iowa R. Civ. P., and subject to the procedural requirements.

Final judgments and orders may be corrected, modified or vacated upon timely petition and notice with sufficient grounds. Plaintiffs argue these requirements were met in their application in that (1) the application served as an adequate petition, (2) the discovery of the incorrect description constituted newly discovered material evidence, and (3) notice and service were unnecessary since defendants had defaulted or disclaimed their interest in original action and intervenor had withdrawn.

Without addressing the first two contentions, we find the plaintiffs failed the notice requirements set forth in the rule.

The general rule is that a supplemental decree which changes or varies the original decree in any material particular cannot be entered without notice to the other party. Chariton & Lucas Co. National Bank v. Taylor, 210 Iowa 1153, 1160, 232 N.W. 487, 493 (1930). See also Lamp v. Guth, 183 N.W.2d 674, 677 (Iowa 1971). On the other hand, in an action to correct a mistake in a judgment, notice is not necessary unless it would be prejudicial to the other party. Miller v. Bates, 228 Iowa 775, 777, 292 N.W. 818, 821 (1940). We find the reformation of the mortgage sought by plaintiffs constituted a change of a material particular and the lack of notice was prejudicial to the parties. The fact of defendants' defaults or disclaimers in the original action is not conclusive in showing lack of prejudice in this additional proceeding. See Lamp v. Guth, 183 N.W.2d 674, 675 (Iowa 1971). The original pleadings and answers referred only to the incorrect legal description. We cannot determine whether the original defendants would be affected by this claim for reformation. All persons to be affected by proposed reformation must be made parties and given notice. 66 Am. Jur. 2d Reformation of Instruments § 100.

At the time the application was filed, the intervenor was a party to the action and had an interest that would be affected. Although original notice was not served upon him pursuant to Iowa R. Civ. P. 253 and 50, his subsequent pleadings and appearance at the hearing constituted a waiver of those requirements as to him. Lonning v. Lonning, 199 N.W.2d 60 (Iowa 1972). We do not consider the merits of plaintiff's claim for reformation as the matter was properly dismissed on jurisdictional grounds.

AFFIRMED.