IN THE COURT OF APPEALS OF IOWA

No. 4-060 / 93-0609

FILED
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CLERK SUPREME COURT

NORA J. DAVIS,

Appellant,

vs.

RONALD MEEKER and GLENDA MEEKER,

Appellees.

Appeal from the Iowa District Court for Harrison County, Leo Connolly, Judge.

Nora Davis appeals from the district court's grant of summary judgment to the Meekers on her quiet title action. **AFFIRMED.**

Nora J. Davis, pro se, appellant.

Judson L. Frisk, Logan, and Robert Kohorst of Kohorst Law Firm, Harlan, for appellees.

Considered by Donielson, C.J., Cady, J., and Keefe, S.J.*

*Senior judge from the first judicial district serving on this court by order of the Iowa Supreme Court.

KEEFE, S.J.

In 1986, Nora Davis purchased certain real property in Woodbine, Iowa, from the Farmers Home Administration. She subsequently became delinquent in paying federal income taxes, and the Internal Revenue Service (IRS) imposed a tax lien on the property. The property was sold in a tax sale to Ronald and Glenda Meeker. Davis failed to redeem during the redemption period and, on September 17, 1991, the IRS conveyed the property to the Meekers.

In April 1992, Davis filed a petition for quiet title in Harrison County naming the Meekers as defendants. She claimed the IRS failed to send notice and demand for tax pursuant to section 6303(a) of the Internal Revenue Code and this precluded the IRS from perfecting a lien on her property. She claimed the IRS had not obtained legal title to her property, and thus was unable to convey title to the Meekers.

In May 1992, Davis and her husband, Keith Davis, filed a petition for quiet title in federal court which named the United States as defendant. The petition raised the same claim as the Harrison County case, that the IRS had not sent them a notice and demand for tax as required by section 6303(a). On December 4, 1992, the Davises and the United States entered into a stipulation which dismissed the case with prejudice.

On December 21, 1992, the Meekers filed a motion for summary judgment in the Harrison County case. They alleged

Davis's suit was barred by the doctrine of res judicata due to the dismissal with prejudice in the federal case.

Davis did not resist the motion for summary judgment, but filed an amended petition for quiet title in which she alleged she had not received notice of the tax sale, as required by section 6335, and this precluded the IRS from obtaining a valid title to the property. By affidavit she stated she had not received notice of the sale by personal service or mail. Davis also filed a cross-motion for summary judgment based on her claim she had not received notice of the tax sale.

The Meekers filed a motion to strike Davis's amended petition on the ground it raised new issues. They also claimed Davis's cross-motion for summary judgment should not be considered a resistance to their own motion for summary judgment because the cross-motion raised the same new issues as the amended petition. Additionally, they claimed the cross-motion was not filed within the time for a resistance.

The district court issued one decision on all motions before it. The court struck the amended petition. The court determined Davis was not entitled to summary judgment on her cross-motion. Also, the court concluded her cross-motion for summary judgment should not be considered a resistance to the Meekers' motion. The court granted the Meekers' motion for summary judgment, finding that due to the dismissal with prejudice in the federal case Davis's claims were barred by the doctrine of res judicata.

Davis filed a motion pursuant to Iowa Rule of Civil Procedure 179(b) seeking to set aside the summary judgment and asking for a rehearing. The district court denied her motion. Davis appealed.

I. Davis contends the district court should not have granted the Meekers' motion for summary judgment on the ground her claims were barred by the doctrine of res judicata. She states the Meekers did not raise res judicata as an affirmative defense in their answer, and the theory was not properly before the court.

In response, the Meekers claim Davis failed to object on this ground before the district court. As noted above, Davis did not file a resistance to the motion for summary judgment. In her cross-motion for summary judgment, Davis discussed the merits of applying the doctrine of res judicata, but did not mention the Meekers' failure to raise the doctrine as an affirmative defense.

In considering a similar situation, the supreme court has stated:

> It is not necessary to determine whether the issue was correctly raised by the pleadings, however, since it is apparent from the record that the parties tried the issue. Where the parties to an action proceed to try an issue not raised by the pleadings, it is generally deemed to have been properly raised and is included in the case.

Folkers v. Britt, 457 N.W.2d 578, 580 (Iowa 1990).

We conclude Davis's failure to raise any objection before the district court to the Meekers' failure to plead the doctrine of res judicata as an affirmative defense

precludes her from raising this issue on appeal. Issues must be presented to and passed upon by the district court before they may be raised and decided on appeal. Farmers State Bank v. United Central Bank, 463 N.W.2d 69, 73 (Iowa 1990).

II. Davis also contends summary judgment was improper because there was a genuine issue of material fact concerning whether she received notice of the tax sale pursuant to section 6335 of the Internal Revenue Code. She states that such notice is mandatory, and the failure to comply with section 6335 renders the sale void. She claims her cross-motion for summary judgment and supporting affidavit sufficiently raised this issue for consideration by the district court.

Davis's cross-motion for summary judgment was based upon her amended petition. Under Iowa Rule of Civil Procedure 88, Davis could amend her petition only by leave of court or by written consent of the adverse party. Davis did not obtain such leave or consent before filing her amended petition. The district court noted this fact and struck the amended petition.

A trial court has considerable discretion in determining whether to allow amendment of pleadings, and we will interfere with that decision only upon a clear showing that the court abused its discretion. Kellar v. Peoples Natural Gas Co., 352 N.W.2d 688, 692 (Iowa App. 1984). Amendments should generally not be allowed after a

responsive pleading has been filed if they substantially change the issues. Id.

Here, we find no abuse of discretion in the district court's decision not to allow Davis to amend her pleadings. The amended petition was based on different facts and raised different issues than the original petition. Davis first claimed she had not received a notice and demand for tax pursuant to section 6303(a) of the Internal Revenue Code. The amended petition claimed she had not received a notice of the tax sale pursuant to section 6335. These are two separate notices, and thus, the question of whether Davis received the two notices is based on two separate sets of facts.

Because Davis's amended petition was struck, her cross-motion for summary judgment, which was based upon her amended petition, was properly denied. Furthermore, because the cross-motion dealt with a new set of facts, it was not a resistance to the Meekers' claim there were no genuine issues of material fact concerning the facts relied upon in the original petition.

In reviewing the grant of summary judgment to the Meekers, we first determine whether any genuine issues of material fact were in dispute. See Hoefer v. Wisconsin Education Association Insurance Trust, 470 N.W.2d 336, 338 (Iowa 1991). If there are none, then we determine whether the trial court correctly decided that the moving party is entitled to judgment as a matter of law. Id. The moving

party has the burden of demonstrating there is no genuine issue of material fact. Colton v. Branstad, 372 N.W.2d 184, 188 (Iowa 1985). The resisting party is afforded every legitimate inference that can be reasonably deduced from the evidence. Knapp v. Simmons, 345 N.W.2d 118, 121 (Iowa 1984).

Where a party is prohibited from raising a claim due to the doctrine of res judicata, summary judgment may be properly granted. Citizens State Bank v. Hardin, 439 N.W.2d 675, 677 (Iowa App. 1989). The voluntary dismissal of an action with prejudice operates as an adjudication on the merits and res judicata will apply. State ex rel. Iowa Department of Human Services v. Mundie, 436 N.W.2d 60, 61 (Iowa 1989). A party may not adjudicate a question in federal courts and attempt to relitigate the same question in our courts. Ackley State Bank v. Haupt, 451 N.W.2d 495, 497 (Iowa 1990).

We conclude the district court properly granted summary judgment to the Meekers on the ground that Davis's claims were barred by the doctrine of res judicata. We affirm the decision of the district court. Costs of this appeal are assessed to Nora Davis.

AFFIRMED.

Donielson, C.J., concurs; Cady, J., dissents.

CADY, J. (dissenting)

I respectfully dissent. I believe the action of the trial court in striking plaintiff's amendment was contrary to two accepted principles. It conflicts both with the notion of notice pleading and the concept that amendments be liberally granted.

Although the decision to grant or deny amendments after a responsive pleading has been filed is largely discretionary, trial courts are "strongly encouraged" to allow amendments under normal circumstances. In re Marriage of Fields, 508 N.W.2d 730, 732 (Iowa 1993). The plaintiff in this case merely sought to change the underlying code section supporting her claim of lack of notice. Her claim - lack of notice - remained unchanged. The lawsuit, nevertheless, was dismissed without this claim being fully considered. Our system of justice requires more. I believe the trial court abused its discretion by failing to consider plaintiff's amendment.