FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-114 / 90-1820

GARY A. MAUSSER,

Appellee,

vs.

RAYMOND R. MORRIS,

Appellant.

Appeal from the Iowa District Court for Buchanan County, James C. Bauch and L. D. Lybbert, Judges.

The defendant appeals from the district court's judgment entered in a forcible entry and detainer action removing the defendant from the property. **AFFIRMED.**

Kenneth F. Dolezal, Cedar Rapids, for appellant.

Jon M. McCright of Fisher, Ehrhart, McCright & Turner, Cedar Rapids, for appellee.

Considered by Oxberger, C.J., and Donielson and Habhab, JJ.

DONIELSON, J.

Plaintiff Gary Mausser filed the present petition for forcible entry and detainer against Raymond Morris on June 26, 1990. The district court concluded Morris should be removed from the premises. Morris appealed. We affirm.

The property in question is a farm in Buchanan County which contains a residence, some farm buildings, and about forty acres of land. Morris has lived on this property as his homestead.

Morris failed to pay all of his federal income taxes for the 1984 tax year. The Internal Revenue Service (IRS) filed a federal tax lien upon the property in March 1988. The property was then levied on and seized by the IRS.

Morris filed a voluntary Chapter 7 bankruptcy petition on April 14, 1988. He received a discharge on July 21, 1988. The farm was abandoned to him as his homestead on July 28, 1988.

Once Morris was discharged from bankruptcy, the IRS proceeded with its plan to sell the farm at a public sale under sealed bids. At this time Morris's tax debt was $7,248. The property was also subject to a prior mortgage lien of $6,162. The farm was worth about $43,030.

The sale was conducted on the steps of the Buchanan County Courthouse at about 1 p.m. on April 12, 1989, and was completed in approximately ten to fifteen minutes. The revenue officer conducting the sale, Mary Jo Ratchford, determined Mausser had submitted the highest conforming

bid. Mausser bid $19,020. He paid $3,804 as a down payment and received a written acceptance of his bid at that time. Mausser received a certificate of sale from the IRS on April 19, 1989.

Morris filed a voluntary Chapter 13 bankruptcy petition at 1:27 on April 12, 1989, a few minutes after the tax sale was completed.

Under Internal Revenue Code section 6337(b), Morris had 180 days after the sale to redeem the property. He attempted to redeem the farm on October 12, 1989, by tendering a check to Mausser's attorney. The tender was rejected on the ground that the redemption period had ended on October 10, 1989.

Mausser received a deed to the property from the IRS on October 18, 1989. He then filed a motion in the bankruptcy proceedings seeking relief from the stay prior to taking action to obtain possession of the property. Morris resisted on the ground that the tax sale was invalid due to procedural defects. On February 8, 1990, the bankruptcy court concluded the tax sale was invalid because the IRS failed to comply with the requirements of section 6335(c), which provides that only property which is not divisible should be sold as a whole. However, the only relief the court could grant was to deny Mausser's motion, which allowed Morris to remain on the property. The court pointed out that an adversarial proceeding was necessary to actually set aside the conveyance pursuant to the tax sale.

The bankruptcy court entered an order giving Morris until March 8, 1990, to file an adversarial complaint against the IRS. By April 27, 1990, Morris had still not filed a complaint. The bankruptcy court then dismissed his case for failure to file a Chapter 13 plan and because he had engaged in unreasonable delay that was prejudicial to his creditors. The court vacated its earlier order of February 8, 1990. The court specifically stated that it had not set aside the deed issued to Mausser by the IRS. The dismissal of Morris's bankruptcy action lifted the automatic stay.

Mausser next filed the present action for forcible entry and detainer in Iowa district court. Morris again raised questions concerning alleged procedural defects in the tax sale. The district court found the tax sale was valid and concluded Morris should be removed from the premises. Morris then filed this appeal.

I. Forcible entry and detainer actions under Iowa Code chapter 648 are equitable proceedings. Iowa Code § 648.5 (1991). Our review is de novo. Iowa R. App. P. 4.

Chapter 648 is a summary remedy for possession. Steele v. Northup, 168 N.W.2d 785, 788 (Iowa 1969). Where a defendant raises an affirmative defense, the defendant has the burden of proving that defense by a preponderance of the evidence. Hillview Assoc. v. Bloomquist, 440 N.W.2d 867, 869 (Iowa 1989). In determining if the burden of proof has been established, we consider all evidence, both

in support and contrary to the proposition, and then weigh each to determine which is more convincing. Id.

II. Morris first contends the validity of the tax sale was previously decided by the bankruptcy court and further litigation of the issues is barred by claim preclusion. The bankruptcy court noted in its order of February 1990 the parties had stipulated that all issues relating to the tax sale would be tried as part of the motion to lift the stay. Morris argues that because of this stipulation the February 1990 order should be given preclusive effect, even though his bankruptcy action was later dismissed.

Res judicata as claim preclusion applies when a litigant has brought an action, an adjudication has occurred, and the litigant is thereafter foreclosed from further litigation on that claim. Selchert v. State, 420 N.W.2d 816, 818 (Iowa 1988). Under the theory of claim preclusion, an adjudication in a former suit between the same parties on the same claim is final as to all matters which could have been presented to the court for determination. B & B Asphalt Co. v. T.S. McShane Co., 242 N.W.2d 279, 286 (Iowa 1976).

It is clear that the bankruptcy court's order of April 1990 vacated the earlier February 1990 order. The court specifically stated, "By granting the IRS' motion to vacate the prior order, any ambiguity about the preclusive effect of that ruling will be removed." It is this vacation of the February 1990 order, not the dismissal of the

bankruptcy action, which leads us to conclude that the February 1990 order should not be given any preclusive effect.

III. Morris also contends the tax sale is invalid because the IRS failed to consider the divisibility of the property. Section 6335(c) of the Internal Revenue Code provides:

> If any property liable to levy is not divisible, so as to enable the Secretary by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of such property should be sold.

Sections 6331 through 6335 of the Internal Revenue Code prescribe procedures to be followed by the IRS in seizing and selling the real property of delinquent taxpayers. Bridges v. Internal Revenue Serv., 433 F.2d 299, 300 (5th Cir. 1970). The extraordinary powers granted to the government in levying, seizing, and selling property for tax collection purposes without prior judicial hearing are dependent upon strict compliance with the procedures described in the statute. Goodwin v. United States, 935 F.2d 1061, 1065 (9th Cir. 1991). The general rule is that strict compliance with statutory provisions is required to validate tax sales. Kulawy v. United States, 917 F.2d 729, 734 (2nd Cir. 1990).

There is no statutory or case guidance of the question of when property should be considered "divisible". Surely the fact that property may be divided is not the entire answer to the question. A common sense approach would tell

us that the costs involved in surveying and dividing the property, as well as the likelihood that buyers may not be as interested in a smaller parcel of land, must be considered.

As the district court found, the evidence in this case tended to show the forty-acre parcel of land would be very difficult to divide. The mortgage on the property would have to be paid in full before the property could be divided. Also, the topography of the grounds and buildings in this particular case would make division difficult. We conclude the IRS did not abuse its discretion in selling the property as a whole. Therefore, we determine the tax sale was not invalid.

IV. Finally, Morris contends that his attempt to redeem was timely. He claims the 180-day redemption period began to run on April 19, 1989, the date Mausser was issued a certificate of sale by the IRS, not April 12, 1989, the date Mausser's bid was accepted.

Morris's redemption rights arose under section 6337(b). A similar section has been construed to provide that the redemption period is triggered by the occurrence of the "sale" at a public auction, not the transfer of the property's title. Southwest Products Co., Inc. v. United States, 882 F.2d 113, 117 (4th Cir. 1989) (Section 7425(d) provides that in the case of a sale of real property, to satisfy a lien prior to that of the United States, the IRS may redeem such property within 120 days from the date of

such sale). As that court points out, if the IRS could seek redemption only after the purchaser at foreclosure met all of its contractual obligations, redemption within the permissible period could be easily frustrated by an uncooperative foreclosing lienholder. Id. at 118.

We find this reasoning is applicable to redemption under section 6337(b) as well. We conclude the redemption period began to run on April 12, 1989, the date the IRS accepted Mausser's bid and the "sale" occurred.

After considering all of the issues raised by Morris, we affirm the district court.

AFFIRMED.