FILED
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CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

No. 1-141 / 90-1412

**KAY FUDGE, PATSY NADINE IHNEN** and **PEGGY CARR,**

Appellants,

145

vs.

**DELMER McELFISH,**

Appellee.

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Appeal from the Iowa District Court for Cass County, Glen M. McGee, Judge.

In this partition action, plaintiffs appeal from the district court's ruling which dismissed their action. The court found it was barred by the statute of limitations and laches. **REVERSED.**

Richard O. McConville of Scalise, Scism, Sandre, Uhl, McConville, Miller & Holliday, Des Moines, for appellants.

Terrance G. Rutherford and John M. Trewet, Atlantic, for appellee.

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

**DONIELSON, J.**

Plaintiffs and JoAnn McElfish, the deceased wife of Delmer McElfish, are the four daughters of Elwood and Marie Jensen. Elwood and Marie are deceased. Following Marie's death, her personal property passed in equal shares to the four daughters. The property was then stored on the McElfish property. After JoAnn died, plaintiffs and Delmer disagreed concerning the distribution of the property.

On June 4, 1990, plaintiffs filed their partition action and requested that all the property be sold and the proceeds be evenly divided. Delmer moved to dismiss the action arguing laches. After a resistance, and an unreported hearing, the district court entered the following calendar entry:

> 7/23/90 Court finds that the petition is not sufficiently definite in describing the items and further that any interest in the personalty would have commenced at death of the parents in 7/71. The Court finds that laches and statute of limitations would apply, and it is Ordered that this matter is dismissed with cost taxed to Plaintiffs.

The district court later denied plaintiffs' motion to reconsider and they have now appealed. On appeal they argue the court erred in considering factual allegations contained in Delmer's motion in its rulings, rather than accepting the facts alleged in their petition as true. They believe that the statute of limitations started to run with JoAnn's death because that is when the dispute arose

with Delmer who claimed full title to property stored on his land. They assert that their petition was not lacking as to specificity and ask that the district court be reversed.

In determining whether a pleading meets the requirement that it state a claim for relief, we sustain the motion "only when it appears to a certainty the pleader has failed to state a claim upon which any relief may be granted under any state of facts which could be proved in support of the claim asserted." Crawford v. Hall, 464 N.W.2d 464, 467 (Iowa App. 1990)(quoting Weber v. Madison, 251 N.W.2d 523, 525 (Iowa 1977)). We construe the pleading "in the light most favorable to the pleader with doubts resolved in his favor and the challenged allegations accepted as true." Id.

Our review of a ruling on a motion to dismiss is limited to grounds asserted in the trial court. Id. (citing Berger v. General United Group, Inc., 268 N.W.2d 630, 634 (Iowa 1978)). "The motion to dismiss can neither rely on facts not alleged in the petition (except those of which judicial notice may be taken) nor be aided by an evidentiary hearing." Id.

Personal property may be partitioned by equitable proceedings. Iowa R. Civ. P. 270. "The petition shall describe the property and plaintiff's interest therein. It shall name the other owners and all indispensable lienholders as defined in R.C.P. 273"a", and state the

nature and extent of each interest or lien, all so far as known." Iowa R. Civ. P. 271.

Furthermore, Iowa Rule of Civil Procedure 69(a) provides in relevant part:

> A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which one deems one's self entitled.

Assuming the truth of the allegations stated in the petition, and only those allegations, the petition meets the requirements of Rules 69(a) and 271. The district court should not have summarily dismissed plaintiffs' petition. Any insufficiency in the specificity of the petition's description of the property can be cured by discovery. See Haugland v. Schmidt, 349 N.W.2d 121, 123 (Iowa 1984).

The trial court found that "any interest in the personalty would have commenced at the death of the parents in 7/71." The fact that the parents died in July of 1971 cannot be found in the petition. Neither is it a fact of which the court can take judicial notice. Thus, the trial court had no factual foundation for a finding that laches barred the partition action.

Our conclusions do not preclude Delmer McElfish from moving for a more definite statement. See Crawford, 464 N.W.2d at 467-68.

For all the reasons stated, the judgment of the district court is reversed. The costs of this appeal are taxed to the appellee, Delmer McElfish.

**REVERSED.**

Oxberger, C.J., concurs; Sackett, J., dissents.

**SACKETT, J.** (dissenting)

I would affirm the trial court.