IN THE COURT OF APPEALS OF IOWA

No. 0-780 / 09-1564
Filed February 9, 2011

GLENWOOD STATE BANK,
Plaintiff-Appellee,

vs.

THOMAS A. HAWBAKER and ALL PERSONS IN POSSESSION,
Defendants-Appellants.

Appeal from the Iowa District Court for Mills County, Timothy O'Grady, Judge.

Appeal from the district court's entry of an order for forcible entry and detainer. **AFFIRMED.**

Thomas A. Hawbaker, Glenwood, appellant pro se.

Matthew G. Woods of Peters Law Firm, P.C., Glenwood, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

SACKETT, C.J.

Glenwood State Bank filed a petition for summary forcible entry and detainer, naming as a defendant among others, Thomas A. Hawbaker. The Bank contended it was the legal title holder of a single family home and an acreage locally known as 51185 243rd Street in Glenwood in Mills County, Iowa,[1] having purchased it at a sheriff's sale and that it was entitled to immediate possession. The district court granted the Bank's petition. Hawbaker alone appealed. He contends that the order on appeal is void or voidable and subject to abatement. We affirm.

I. SCOPE OF REVIEW. Our review of a forcible entry and detainer action, which is tried in equity, is de novo. Iowa Code § 648.5 (2009); *Capital Fund 85 Ltd. P'ship v. Priority Sys., L.L.C.*, 670 N.W.2d 154, 157 (Iowa 2003); *Petty v. Faith Bible Christian Outreach Ctr.*, 584 N.W.2d 303, 306 (Iowa 1998); *Bernet v. Rogers*, 519 N.W.2d 808, 810 (Iowa 1994). Although we are not bound by the factual or legal findings of the district court, "we give them weight, especially when considering the credibility of witnesses." *Capital Fund*, 670 N.W.2d at 157.

II. BACKGROUND. On January 31, 2002, Thomas Hawbaker and his wife, Deborah Hawbaker,[2] gave to the then Chase Manhattan Mortgage

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[1] The property was legally described as: lots four and five of Grand View Heights Subdivision, being a part of the Northeast Quarter of the Northwest Quarter of Section Seven, Township Seventy-three North, Range Forty-two West of the 5th Principal Meridian, Mills County, Iowa.

[2] On January 26, 2007, Deborah gave Thomas a quit claim deed to the property in question.

Corporation[3] a promissory note and purchase money mortgage encumbering the property in question.[4] The mortgage was foreclosed on March 17, 2008, at which time the district court entered a foreclosure decree in favor of Chase Home Finance L.L.C., finding the mortgage given by the Hawbakers on the home and acreage should be foreclosed and any right, title, lien, and interest that Chase had in and to the mortgaged premises and all improvements thereon be declared prior and superior to the right, title, lien, and interest of the Hawbakers. The court then issued a special execution for the sale of the real estate and the improvements and provided, upon the expiration of six months from the entry of the decree of foreclosure, the real estate be sold to pay the judgment rendered in favor of Chase, and the Hawbakers and anyone claiming by, through, or under them be foreclosed of all right, title, lien, and interest to the premises. The foreclosure court also ordered that a sheriff's deed issue immediately to the purchaser at the sale and that a writ of possession issue to the sheriff of Mills County commanding him to put the purchaser at the sale or his successor in interest into immediate possession of the premises.

The sheriff's sale was held on September 15, 2009.[5] The Bank purchased the property for $181,533 the same day and received a sheriff's deed from the Sheriff of Mills County, conveying the property to Glenwood State Bank.

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[3] Its name was subsequently changed to Chase Home Finance L.L.C.

[4] The property had been conveyed to the Hawbakers by warranty deed from Brian and Claire Kovacs. The deed dated January 27, 2001, was recorded with the Mills County Recorder on May 16, 2001.

[5] Hawbaker obtained several injunctions to stop the sale that were subsequently dissolved and do not appear to be at issue here.

Shortly thereafter Hawbaker was served with a notice to quit and then with a petition for summary forcible entry and detainer and an order setting hearing on the petition for October 5, 2009. Hawbaker answered, claiming he was the legal title holder of the property and his title was paramount to the lien under which the sale was made. He agreed the Bank was the successful bidder at the sheriff's sale but did not agree to the enforceability of the deed. He contended that his assertion of a "Paramount Title Defense" with nothing more mandated the dismissal of the Bank's petition. He also alleged that the action should be dismissed because of a pending declaratory judgment action.

The hearing on the petition for forcible entry and detainer was held as scheduled and on October 6, 2009, the district court filed an order granting the Bank's petition. The court found that it had jurisdiction of the parties and the subject matter and that Hawbaker had asserted he held paramount title to the premise and refused to vacate the premises. The court overruled Hawbaker's motion to dismiss the petition and found that the pleadings and stipulations before the court showed the Bank was entitled to immediate possession of the real estate and the Sheriff of Mills County should remove Hawbaker from the premises and deliver the property to the Bank.

Hawbaker sought to file a supersedeas bond and the matter came on for hearing on October 13, 2009. The court, in ruling on the matter, found the petition for forcible entry and detainer was granted on October 6, 2009, and

Hawbaker had filed a notice of appeal.[6] The court set the supersedeas bond at $15,750 and, as a condition of the stay, ordered Hawbaker to pay all real estate taxes that become due during the pendency of the appeal and to maintain a policy of liability and casualty insurance with the Bank named as an additional insured.

On October 13, 2009, Hawbaker filed a notice of appeal from "the final order entered in this case on the thirteenth day of October 2009, and from all rulings adverse rulings and orders inhering therein."

IV. JURISDICTION TO DECIDE ISSUE OF TITLE. Hawbaker contends that the October 6, 2009 order is void or voidable by operation of his claim of paramount title and the proceedings were subject to abatement under the prior pending action doctrine.

Hawbaker has the burden of proving by a preponderance of the evidence any affirmative defenses he raises. *Capitol Fund*, 670 N.W.2d at 157. We determine if he has met that burden by considering all the evidence, both in support of and contrary to the proposition, and then weighing each to determine which is more convincing. *Petty*, 584 N.W.2d at 306. In interpreting the forcible entry and detainer statutes we give them a liberal construction with a view toward promoting their object of enabling a person entitled to the possession of real estate to obtain such possession from anyone illegally in possession thereof. *Petty*, 584 N.W.2d at 307; *Bernet*, 519 N.W.2d at 811.

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[6] This appears to be an erroneous finding as Hawbaker does not direct us to such a filing and we are unable to find one in the record.

We understand Hawbaker's first argument to be that the order granting the Bank's petition is void because the district court lacked subject matter jurisdiction for subject matter jurisdiction of paramount title cases is excluded from the grant of jurisdiction conferred by Iowa Code section 648.1(4), which provides in applicable part:

> A summary remedy for forcible entry and detainer is allowable:
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> . . . .
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> 4. Where the defendant continues in possession after a sale by foreclosure of a mortgage, or on execution, unless the defendant claims by a title paramount to the lien by virtue of which the sale was made, or by title derived from the purchaser at the sale; in either of which cases such title should be clearly and concisely set forth in the defendant's pleading.

Hawbaker supports his argument by relying in part on *Bosworth v. Farrenholtz*, 4 Greene 440 (1854). In *Bosworth*, a defendant in a forcible entry and detainer action commenced before a justice of peace pled title paramount of plaintiffs' title. *Bosworth*, 4 Greene at 440. The justice of the peace with whom the case had been filed dismissed the case "on the ground that justices of the peace have no jurisdiction where questions of title are involved." *Id.* The case was taken to the district court and decided in the same way. *Id.* The supreme court, in addressing the issue on appeal, noted that Iowa Code section 2371 (1851)[7] provided "the question of title cannot be investigated in this form of action." The court went on to find if a defendant claimed "by a title paramount to the lien under which the sale was made, or by title derived from the purchaser at

[7] This section appears under Title XXI Chapter 129 "Of Justices of the Peace and Their Courts."

such sale," the summary remedy was not allowed noting the answer was in strict conformity to the code.[8] *Id.* at 441.

In *Steele v. Northup*, 168 N.W.2d 785, 788 (Iowa 1969), the court addressed and rejected a defendant's claim that the district court erred in considering evidence of title and right to possession in a forcible entry case. The court recognized earlier cases[9] where it was announced that in a forcible entry and detainer action the question of title or right of possession was not involved and could not be tried. *Id.* at 787-88. The court in *Steele* noted that historically sole original jurisdiction for forcible entry and detainer was in the justice of the peace courts with appeal available to district court, and code provisions provided title was not to be investigated in such actions. *Id.* at 787. The court said early statutory intent was clear from the summary nature of the procedure, sole original jurisdiction in the justice court, and the Iowa constitutional prohibition against justices of the peace considering questions involving title to real estate. *Id.* The court further recognized the statutory action of forcible entry and detention had "been considerably changed since 1873" and the prohibition against investigation into title had been altered under section 4216 (1897) [then section 648.13 (1966)].

The *Steele* court went on to say that a careful study of the foregoing statutes with due regard to the history of their amendments indicates that title is a

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[8] In the earlier case of *Settle v. Henson,* 1 Morris 111 (1841), the court said a forcible entry and detainer action was not the proper action for trying titles of any description.

[9] The court cited *Rudolph v. Davis*, 239 Iowa 372, 30 N.W.2d 484 (1948); *Missildine v. Brightman*, 234 Iowa 1339, 14 N.W.2d 700 (1944); *Emsley v. Bennett*, 37 Iowa 15 (1873); *Stephens v. McCloy*, 36 Iowa 659 (1873); and *Settle v. Henson*, 1 Morris 111 (1841).

justiciable issue in a forcible entry and detainer action when the action has been originally commenced in district court. The district court here had jurisdiction to address the title issue. We therefore reject Hawbaker's argument that the judgment here was void or voidable because of lack of jurisdiction.

V. PARAMOUNT TITLE. Hawbaker contends that at the time of the hearing on the forcible entry and detainer action he had paramount title. In making such a claim he is required by section 648.1(4) to set forth "clearly and concisely" in his motion a claim of title paramount to the lien by which the sale was made or by title derived from the purchaser at the sale. Hawbaker's mere allegation of paramount title is not, contrary to his argument, sufficient to support dismissal of the forcible entry and detainer petition. Saying this, we recognize that Hawbaker has made numerous less-than-clear arguments as to why he has paramount title. We have on our de novo review looked at the allegations but find nothing to support Hawbaker's claim of paramount title.[10]

Hawbaker had notice of and participated in the mortgage foreclosure action that declared Chase's interest in the property superior to Hawbaker's, ordered the property sold, and directed the sheriff to issue a deed. He also received notice of the sheriff's sale. We affirm on this issue.

VII. ABATEMENT OF ACTION. Hawbaker contends this action should have been abated because of a prior pending action. He contends he preserved error in his initial motion to dismiss. He acknowledges that, in denying his motion

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[10] "Paramount title. 1. *Archaic*. A title that is the source of the current title; original title. 2. A title that is superior to another title or claim on the same property." *Black's Law Dictionary* 1523 (8th ed. 2004).

to dismiss, the court did "not distinguish the case law requiring abatement," but argues this error was preserved by his motion for relief under Iowa Rule of Civil Procedure 1.904(2). Hawbaker has failed to show where in the record evidence of a prior pending action appears. He has also failed to point to where in the record a copy of his rule 1.904(2) motion appears. We find in the appendix what appears to be a copy of a petition for declaratory judgment and other equitable relief, but apparently it was not entered as an exhibit, nor was the court asked to take judicial notice of the action. It is not properly in the record before us on appeal. Hawbaker has failed to give us the tools we need to consider this argument and we do not do so.

AFFIRMED.