

**IN THE COURT OF APPEALS OF IOWA**

No. 2-195 / 11-0553  
Filed May 23, 2012

**ST. JOHN'S FULL GOSPEL  
BAPTIST CHURCH,**  
Plaintiff-Appellant,

**vs.**

**TAX 207 and POLK COUNTY  
TREASURER,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Polk County, Karen A. Romano,  
Judge.

St. John's appeals the district court's grant of summary judgment in favor  
of Tax 207, which dismissed its action to void a tax deed. **REVERSED AND  
REMANDED.**

Robert A. Wright, Jr. of Wright Law Office, Des Moines, for appellant.

Michael D. Ensley of Hanson, Bjork & Russell, L.L.P., Des Moines, for  
appellee Tax 207.

Heard by Potterfield, P.J., and Mullins and Bower, JJ.

**MULLINS, J.**

St. John's Full Gospel Baptist Church (St. John's) appeals the district court's decision granting Tax 207's motion for summary judgment and dismissing St. John's petition to declare the tax deed obtained by Tax 207 void. St. John's claims the district court erred in granting summary judgment to Tax 207 because there is a material question of fact regarding the service of the notice of the expiration of the right of redemption under Iowa Code section 447.9 (2001).<sup>1</sup> St. John's also claims the district court erred in denying its cross-motion for summary judgment as it was undisputed Tax 207 failed to serve the same notice on the mortgagee of the property, Community State Bank. For the reasons stated below, we reverse and remand.

**I. BACKGROUND AND PROCEEDINGS.**

St. John's failed to pay \$241.84 in a special assessment property tax due on a property it owned located at 3511 Bowdoin Street, Des Moines. As a result of the failure to pay the tax, the property was sold at a tax sale to Tax 207 on June 17, 2002. On June 7, 2005, Tax 207 mailed a notice to redeem from tax sale to St. John's and "persons in possession" at 3511 Bowdoin Street. No action was taken by St. John's or any other entity in response to the notice, and as a result, ninety days later the county treasurer issued Tax 207 a tax sale deed to the property.

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<sup>1</sup> All references to the Iowa Code in this opinion will reference the 2001 Code unless otherwise stated, as Iowa Code section 447.14 provides, "The law in effect at the time of tax sale governs redemption." The tax sale in this case occurred June 17, 2002. Therefore, the 2001 Code is applicable.

At some later point in time, St. John's became aware of the tax sale deed and on March 11, 2009, filed a petition in equity to have the deed declared void. In its petition, St. John's asserted the notice was mailed to St. John's at 3511 Bowdoin Street, but at no time was this location the address of St. John's. Tax 207 filed its answer and affirmative defenses noting St. John's failed to name the Polk County Treasurer as a defendant in the action. On August 18, 2009, with the court's permission, St. John's filed an amended petition including the Polk County Treasurer.

Tax 207 filed a motion for summary judgment on May 7, 2010, asserting it was entitled to judgment as a matter of law as it complied with all statutory requirements for mailing the notice of the right of redemption to St. John's. As an exhibit to its motion, Tax 207 attached an affidavit of service asserting it provided notice to St. John's, persons in possession, the City of Des Moines, County Auditor of Polk, the Attorney General, Director of Revenue and Finance Department, and Director of Human Services Department.

St. John's filed a resistance to Tax 207's motion and also a cross-motion for summary judgment on June 2, 2010. In its cross-motion St. John's asserted Tax 207 failed to serve the required notice on the mortgagee of the property, Community State Bank. It pointed to the affidavit of service filed by Tax 207 as proof Community State Bank was not served, and also filed an affidavit by St. John's pastor, president, and director stating that if Community State Bank had been served with such a notice, the bank would have contacted him.

On August 11, 2011, a hearing was held on the motions for summary judgment. In its initial decision filed October 28, 2010, the district court concluded Tax 207 properly served St. John's with the notice as the address of the property in question was the address listed for St. John's in both the county treasurer's office and the county assessor's office. The court found there was nothing in the statute to require Tax 207 to search for every possible address for a titleholder. In addition, the court noted St. John's admitted it was in possession of the property "caring for its outside and inside upkeep" during the time the notice was sent to the property.

However, the district court also found the tax sale deed void as it was undisputed Tax 207 failed to serve the required notice on Community State Bank. Because the tax deed was not valid, the district court found the statute of limitations contained in section 448.12<sup>2</sup> did not apply to bar St. John's petition. It ordered the tax deed to be set aside and provided:

If the property is not redeemed within 90 days of completed service of Notice of Redemption on the Mortgagee (the title holder has been properly served and need not be reserved), then the County Treasurer may properly issue a tax deed.

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<sup>2</sup> Iowa Code section 448.12 provides: "An action under section 447.8 or 448.6 or for the recovery of a parcel sold for the nonpayment of taxes shall not be brought after three years from the execution and recording of the county treasurer's deed." The tax sale deed was issued to Tax 207 and recorded by the county treasurer on September 20, 2005. St. John's did not file its petition until March 11, 2009. However, the three-year statute of limitations under Iowa Code section 448.12 does not apply when there has been a failure to give proper notice of the right to redemption. *Dohrn v. Mooring Tax Asset Group, LLC*, 743 N.W.2d 857, 863–64 (Iowa 2008); *Smith v. Huber*, 277 N.W. 557, 562 (Iowa 1938).

Both parties filed motions to reconsider under Iowa Rule of Civil Procedure 1.904(2).<sup>3</sup> Attached to its motion to reconsider, Tax 207 included what it identified as the tax sale deed, which listed Community State Bank as one of the entities that had been served with notice. It also filed a supplement to its motion to reconsider where it attached what it identified as the Polk County Treasurer's file. Within this file was a copy of the affidavit of service previously attached as an exhibit to Tax 207's summary judgment motion, but this copy had a handwritten addition to the list of entities receiving notice—Community State Bank. Tax 207 also claimed St. John's failed to name Community State Bank in its petition, and this barred St. John's attempt to void the tax sale deed based on Tax 207's failure to serve the bank with notice.

After a hearing, the district court granted Tax 207's motion to reconsider and amended its ruling to provide Community State Bank was in fact served with the required notice as evidenced by the Polk County Treasurer's file. It therefore granted Tax 207's summary judgment motion again concluding service of the notice on St. John's was proper and denied St. John's cross-motion for summary judgment as Community State Bank was served with notice. It also concluded that because the tax sale deed was valid, St. John's petition was barred by the

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<sup>3</sup> Iowa Rule of Civil Procedure 1.904(2) provides:

On motion joined with or filed within the time allowed for a motion for new trial, the findings and conclusions may be enlarged or amended and the judgment or decree modified accordingly or a different judgment or decree substituted. But a party, on appeal, may challenge the sufficiency of the evidence to sustain any finding without having objected to it by such motion or otherwise. Resistances to such motions and replies may be filed and supporting briefs may be served as provided in rules 1.431(4) and 1.431(5).

statute of limitations contained in section 448.12. The district court thereby dismissed the matter and assessed costs to St. John's. St. John's appeals.

## **II. SCOPE OF REVIEW.**

We review the district court's decision on summary judgment for correction of errors at law. *Koeppel v. Speirs*, 808 N.W.2d 177, 179 (Iowa 2011). Summary judgment is proper:

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Iowa. R. Civ. P. 1.981(3). We view the facts in the light most favorable to the nonmoving party. *Travelers Indem. Co. v. D.J. Franzen, Inc.*, 792 N.W.2d 242, 246 (Iowa 2010). "We also afford the opposing party every legitimate inference the record will bear." *Frontier Leasing Corp. v. Links Eng'g, LLC*, 781 N.W.2d 772, 775 (Iowa 2010). The district court is not to make credibility determinations in granting summary judgment as these assessments are for the ultimate finder of fact. *Id.* at 776.

## **III. VALIDITY OF THE TAX SALE DEED.**

As both motions for summary judgment pertain to the validity of the tax sale deed, we will review the record to determine whether we can conclude as a matter of law that the tax sale deed is either valid or void. There is no dispute that the property was properly sold for failure to pay the special assessment property tax, or that Tax 207 purchased the parcel for the total amount of outstanding tax due on June 17, 2002. See Iowa Code ch. 446 (describing the method and procedure of a tax sale). The question here involves whether there

is a genuine issue of fact as to whether Tax 207 gave all required parties notice of the expiration of the right of redemption under Iowa Code section 447.9. This section provides in part:

1. After one year and nine months from the date of sale, . . . the holder of the certificate of purchase may cause to be served *upon the person in possession of the parcel*, and also upon the *person in whose name the parcel is taxed*, a notice signed by the certificate holder or the certificate holder's agent or attorney, stating the date of sale, the description of the parcel sold, the name of the purchaser, and that the right of redemption will expire and a deed for the parcel be made unless redemption is made within ninety days from the completed service of the notice. *The notice shall be served by both regular mail and certified mail to the person's last known address* and such service is deemed completed when the notice by certified mail is deposited in the mail and postmarked for delivery. . . .

2. Service of the notice shall be *made by mail on any mortgagee having a lien upon the parcel*, a vendor of the parcel under a recorded contract of sale, a lessor who has a recorded lease or recorded memorandum of a lease, and any other person who has an interest of record, at the person's last known address.

Iowa Code § 447.9(1)–(2) (emphasis added). According to this code section, Tax 207 was required to give notice to St. John's by both regular and certified mail at St. John's last known address. It was also required to give Community State Bank notice by mail at its last known address.

**A. Service on St. John's.** St. John's claims it was not properly served with notice because the notice was sent to 3511 Bowdoin Street—the address of the property in dispute and the address listed for St. John's on file in the county treasurer's and assessor's offices—and not 555 East Euclid—St. John's principal place of business and the address registered with the secretary of state's office. St. John's claims Tax 207's search for the address in the public records at the treasurer's office was insufficient and asserts Tax 207 should have searched the

secretary of state's office records to discover the proper address of a nonprofit corporation such as St. John's.<sup>4</sup>

St. John's claims the disagreement of what address suffices for proper service of the notice on St. John's demonstrates that there is a dispute of a material fact making summary judgment in Tax 207's favor improper. We disagree. There is no dispute of material fact. The question is purely legal: whether service at the address listed for St. John's in the treasurer's office satisfied the requirements of section 447.9(1). As there is no material fact in dispute, this question is ripe for determination under a motion for summary judgment.

St. John's cites *Dohrn*, 743 N.W.2d at 861, for the proposition that relying on information obtained from a search of public records is not sufficient when serving the notice. However, *Dohrn*, is not "identical" to this case as St. John's claims. In *Dohrn*, the tax certificate holder searched the public records to determine who was in possession of the property in question. 743 N.W.2d at 858. The public records contained no evidence that a particular entity had a lease on the property, and as a result, the tax certificate holder failed to serve this entity with notice. *Id.* at 859. The court held that a search of the public records alone was not sufficient for a tax certificate holder to determine who was in possession of the property. *Id.* at 861–62. The court found that if the tax

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<sup>4</sup> Ironically, St. John's asserts a search of public records is insufficient, but then argues Tax 207 should have searched the secretary of state's records—public records—to obtain its proper address.



certificate holder had visited the property, it could have discovered who was in possession of the property in question. *Id.* at 862.

In this case, the question is not what action is required to discover who is in possession of a parcel. The question is what action is required to discover the address of a known titleholder. The statute requires service only at the titleholder's "last known address." The county treasurer's and assessor's office indicated the address for St. John's was 3511 Bowdoin Street. There was no indication of an alternative address. If this address was inaccurate or incorrect, St. John's should have acted to change the address with the respective offices. We find that Tax 207's service of the notice to St. John's at the address listed for the titleholder with the treasurer's and assessor's offices complied with the "last known address" requirement of section 447.9(1). Therefore we agree with the district court that St. John's was properly served with the notice of the expiration of the right of redemption.

**B. Service on Community State Bank.** Next, St. John's asserts it is entitled to summary judgment as it is undisputed Tax 207 failed to serve notice on the mortgagee of the property, Community State Bank, as required by section 447.9(2). Because Tax 207 failed to serve a mortgagee, St. John's asserts the tax sale deed is void.<sup>5</sup> Based on the record available to the court at the time of the summary judgment hearing, we agree.

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<sup>5</sup> At the time of the tax sale, Iowa case law had long held that any party with a right to redeem may take advantage of the failure to serve notice on any other party entitled to redeem, and challenge the validity of a tax deed. See *Dohrn*, 743 N.W.2d at 862–63; *Burks v. Hedinger*, 167 N.W.2d 650, 654 (Iowa 1969); *Koch v. Kiron State Bank of Kiron*, 297 N.W. 450, 466 (Iowa 1941); see also 1992 Op. Iowa Att'y Gen. 77 (asserting all who

The district court originally ruled in St. John's favor finding it was undisputed that Tax 207 did not serve the notice on Community State Bank. Its decision was based on the lack of any evidence submitted as part of the summary judgment record indicating Community State Bank was served with the required notice. However, Tax 207 in the supplement to its motion to reconsider attached what it claimed to be the county treasurer's file, which included a file-stamped copy of the affidavit of service with Community State Bank handwritten onto the form. This same document without the handwritten notation had been previously submitted to the court in Tax 207's motion for summary judgment and was the basis for the court's original ruling. Tax 207 also attached a copy of the tax sale deed,<sup>6</sup> which recited the entities to whom notice had been given, including Community State Bank.

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were entitled to notice of expiration of right of redemption from tax sale were entitled to redeem and finding redemption is not limited to those who are only entitled to mailed notice). Iowa Code section 447.8 was amended in 2005 to prohibit a person from challenging a tax deed based on the failure of the tax certificate holder to serve a different person with the notice of the expiration of right of redemption. However, because the tax sale occurred in 2002, this amendment does not apply to this case. See Iowa Code § 447.14 ("The law in effect at the time of tax sale governs redemption.").

<sup>6</sup> Tax 207 asserted in its brief and at oral argument that the tax sale deed itself is conclusive evidence that it served Community State Bank with the required notice under Iowa Code section 448.5. Upon our review of the relevant case law, we find that the tax sale deed is not conclusive evidence of the certificate holder's service of the notice of the expiration of the right of redemption. See *Reed v. Thompson*, 9 N.W. 331, 332–33 (Iowa 1881). The use of the word "notice" in section 448.5 has been interpreted by the courts in this state to mean notice of sale sent by officers of the State, not the notice of the expiration of the right of redemption sent by a certificate holder. *Id.* at 332. In addition to the tax sale deed not being conclusive evidence that Tax 207 served Community State Bank, as we state later in this opinion the district court improperly considered the tax sale deed in granting Tax 207's motion for summary judgment as the deed was not part of the record at the time of the summary judgment hearing but was only submitted as part of Tax 207's motion to reconsider.

With this new evidence in hand, the district court granted Tax 207's motion to reconsider stating:

[I]t is clear that the issue of notice to a third party as a basis to void the tax sale deed was not raised until the time of the hearing on the Motions for Summary Judgment.<sup>7</sup> Thus, [Tax 207] had no reason to believe that it needed additional documentation of service on a third party who is not a party to this action. Therefore, the court finds that this new information will be considered in order to reach a fair, just and equitable result in this case.

The court ultimately concluded it was undisputed Community State Bank was served with notice. The district court thereby granted Tax 207's motion for summary judgment finding the tax sale deed valid. We find the court's consideration of this new evidence submitted as part of the motion to reconsider was improper.

Tax 207 did not move to reopen the record or otherwise seek permission to submit additional evidence. Without satisfying the requirements of Iowa Rule of Civil Procedure 1.981(5), it simply attached to its motion to reconsider and to its supplement to the motion to reconsider copies of certain documents from the county treasurer, without certification, authentication, or supporting affidavit. A motion to reconsider is not the proper avenue to submit new evidence for the court to consider. *See Marriage of Bolick*, 539 N.W.2d 357, 361 (Iowa 1995) ("Motions under rule [1.904] are permitted so that courts may enlarge or modify

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<sup>7</sup> Upon our review of the record, the issue of service of notice on Community State Bank was raised on June 2, 2010, in St. John's cross-motion for summary judgment. The summary judgment hearing did not occur until August 11, 2010. Thus, Tax 207 had over sixty days to realize the service of notice on Community State Bank was going to be an issue and produce evidence to support its claim that service on the bank was obtained. Tax 207 never resisted or filed any reply to St. John's cross-motion for summary judgment, nor did it offer the tax sale deed or county treasurer's file at the time of the summary judgment hearing.

findings based on evidence already in the record. They are not vehicles for parties to retry issues based on new facts.”). Over St. John’s objection, those documents were considered by the court and became the basis for granting Tax 207’s motion. If those documents had been timely submitted to the court and satisfied the requirements of admissibility as provided by Iowa Rules of Civil Procedure, the trial court could have properly considered them, but that is not the case. Therefore, in determining whether summary judgment was proper in this case, we will consider only the evidence that was properly submitted as part of the motions for summary judgment.

Based on the record before the district court at the time of the hearing on the motions for summary judgment, we find summary judgment in favor of Tax 207 was improperly granted and summary judgment should have been granted to St. John’s. There was no evidence to show that Community State Bank was properly served the notice required by section 447.9(2). As stated above, the district court should not have considered the county treasurer’s documents submitted by Tax 207 in its motion to reconsider. The original affidavit of service attached to Tax 207’s motion for summary judgment made no mention of Community State Bank being served with notice but identified all the other entities served. Community State Bank was also not identified in the original “Notice to Redeem From Tax Sale” sent by Tax 207’s partner Christine Frank.

Based on the record which should have been considered by the court under Iowa Rules of Civil Procedure 1.981, there is no dispute Community State Bank was not served with notice of the expiration of the right of redemption. As a

result, the tax sale deed is void, and the district court erred in denying St. John's cross-motion for summary judgment and erred in granting Tax 207's motion for summary judgment. We reverse and remand with direction to enter judgment in favor of St. John's declaring the tax sale deed issued in 2005 void. As Tax 207 still has the certificate of purchase from the tax sale in 2002, Tax 207 would need to comply with all statutory requirements if it wishes to obtain a valid tax sale deed.

**REVERSED AND REMANDED.**