

**IN THE COURT OF APPEALS OF IOWA**

No. 3-726 / 13-0287  
Filed August 21, 2013

**FRANCISCO DUQUE and  
ESPERANZA DUQUE,**  
Plaintiffs-Appellees,

**vs.**

**TIMOTHY J. MCDONNELL,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, Mark J. Smith,  
Judge.

Timothy McDonnell appeals a district court's ruling vacating his affidavit of  
forfeiture for improper service. **REVERSED AND REMANDED.**

John Flynn, Davenport, for appellant.

John Newman of Wehr, Berger, Lane & Stevens, and Michael Koury,  
Davenport, for appellees.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

**TABOR, J.**

Vendor Timothy McDonnell appeals the district court's order vacating the forfeiture of his real estate contract with vendee Francisco Duque. The court decided Timothy had not complied with Iowa Code section 656.2(2) (2011). That statute requires a vendor to serve notice of forfeiture on a person in possession of the property if different from the vendee. Although the petition filed by Francisco and Esperanza Duque did not allege the failure to serve their son and daughter-in-law, Bruce and Tina Duque, the court nonetheless found the younger couple qualified as persons in possession.

Because the district court sua sponte ruled on a ground not raised in the Duques' petition, we reverse. Moreover, even if the petition's reference to "improper service" could be read so broadly as to encompass the issue reached by the district court, the court erred in finding Bruce and Tina Duque were persons in possession when they did not physically occupy the property or have an interest in the real estate contact.

***I. Background Facts and Proceedings***

Francisco and Esperanza Duque and their son, Bruce, ran a used car lot called Aardvark Auto Sales in Davenport. They rented the land at 802 West 2nd Street, where the dealership was located. On March 30, 2000, Francisco entered into a real estate purchase contract with R.C. McDonnell to buy the property for \$105,000 at eight percent interest. The agreement included a \$5000 down payment, with the balance to be paid over fifteen years in monthly

installments of \$956. Francisco also was responsible for paying real estate taxes and maintaining insurance on the property.

Although the contract is between Francisco Duque and R.C. McDonnell, Bruce Duque and his wife, Tina, paid contract installments and property taxes. Bruce and Tina were occasionally late on their contract payments and would sometimes fall behind on the property taxes. When R.C. McDonnell died in 2004, Bruce and Tina sent payments to his estate and to his successors in interest: Harold McDonnell, Mary Cox, and Joanne Meyers. Three years later, Aardvark Auto Sales closed, and the couple rented the property to Brad Burris for his business, Bridgeview Auto Sales. As tenant, Bridgeview Auto Sales sent rent payments to Bruce and Tina.

In June 2008, R.C. McDonnell's nephew, Timothy McDonnell, purchased the real estate contract. Bruce and Tina were delinquent on many payments to Timothy as well, which increased the interest added to the contract balance. At the time of trial, parties disputed the amount owed. Bruce and Tina contended \$30,000 is still due; Timothy argued \$68,954.54 remains unpaid.

Timothy contacted Bruce and Tina in June 2011 regarding the property's delinquent taxes and the \$12,000 in outstanding payments on the contract. He served a notice of forfeiture on Bruce's parents, Francisco and Esperanza Duque, that same month. Bruce and Tina addressed the delinquent tax payments and paid the contracted amount owed through July 1, 2011, but neglected to continue paying on the contract or taxes due. September 30, 2011 passed without the couple paying taxes.

On November 8, 2011, Timothy served a notice of forfeiture on Francisco and Esperanza Duque at their residence and served a notice on Bridgeview Auto Sales. Timothy attempted to serve notice on Bruce and Tina Duque, but because their home had burned down, service was unsuccessful.

On the day Timothy served notice on Bridgeview Auto Sales, an employee told Tina about the forfeiture. While the parties acknowledge Tina and Timothy spoke regarding the notice served, they dispute the content of this conversation. Tina testified Timothy told her "Don't worry; just get caught up." Timothy testified he demanded one lump-sum check for \$5289 to be paid by December 9, 2011, as was demanded in the notice.

In an envelope addressed to Timothy and postmarked December 8, 2011, Tina mailed four checks: (1) a \$2000 check dated December 4, 2011, (2) a \$2000 check dated December 18, 2011; (3) a \$2000 check dated December 28; and (4) a \$1200 check dated January 8, 2012. Timothy received the checks two days later, but did not cash them since the non-postdated check did not satisfy the outstanding \$5289 debt. On December 22, 2011, Timothy recorded an affidavit of forfeiture.

On January 4, 2012, Francisco and Esperanza Duque filed a petition in equity asking the court to set aside the forfeiture. The Duques filed an amended petition on November 5, 2012, seeking to vacate Timothy's affidavit and asserting the manner in which Tina and Bruce paid Timothy stayed forfeiture proceedings. The amended petition alleged: "That Plaintiffs, through their agent, did in fact send payments and post dated checks to defendant, but same were

rejected by the Defendant.” The petition also alleged plaintiffs Francisco and Esperanza Duque were “incompetent and lacked legal capacity or diminished capacity to understand service of process or what it was for.” The petition summarized: “the forfeiture procedure was invalid, null and void, and without legal effect whatsoever due to improper service, and due to the Defendant being paid through either additional monies paid, additional checks tendered, or both.”

In its December 7, 2012, ruling, the district court concluded the Duques did not prove their claim that Francisco and Esperanza were incompetent and unable to recall if they received service of the notice of forfeiture. But the court granted the petition and vacated the affidavit of forfeiture, reasoning because Bruce and Tina were “parties in possession” of the property subject to forfeiture, Timothy’s notice was ineffective.

Timothy filed a motion under Iowa Rule of Civil Procedure 1.904(2), alleging the court erred by invalidating the forfeiture based on a failure to serve notice on Bruce and Tina when the “plaintiffs had not raised the claim that Bruce Duque and Tina Duque were ‘parties in possession’ . . . .” The plaintiffs resisted, arguing: “Due to some credit problems that existed in the year 2000, [Bruce and Tina] decided to put the property in Bruce Duque’s father and mother’s names, but at all times, they were the effective parties in possession and always made the payments.” The district court denied Timothy’s post-ruling motion, and Timothy now appeals.

## **II. Scope and Standard of Review**

Because this forfeiture action based on chapter 656 was an equitable proceeding, our review is de novo. See *Fairfax v. Oaks Dev. Co.*, 713 N.W.2d 704, 706 (Iowa 2006). “In our de novo review we are bound to review the facts and law and determine anew from credible evidence all properly presented and preserved contentions of the parties.” *Miller v. Am. Wonderlands, Inc.*, 275 N.W.2d 399, 402 (Iowa 1979).

Iowa follows the general rule that “equity abhors a forfeiture.” *Jamison v. Knosby*, 423 N.W.2d 2, 4 (Iowa 1988). We construe chapter 656 strictly against forfeiture, with the burden on the party seeking forfeiture to show full and strict compliance with statutory procedures. *Fairfax*, 713 N.W.2d at 708. But our supreme court has “taken some pains to point out that the fact forfeitures are not favored does not mean they will never be enforced.” *Miller*, 275 N.W.2d at 402–403.

## **III. Analysis**

Before addressing the district court’s finding that Bruce and Tina qualified as persons in possession and required notice of the forfeiture under Iowa Code section 656.2(2), we turn to Timothy’s underlying concern the court ruled upon an issue not raised by the Duques’ petition. Timothy asserts he was unprepared to defend against the claim regarding service on Bruce and Tina until the court’s ruling and would otherwise have offered evidence relevant on that point.

The Duques’ petition alleged the forfeiture procedure was invalid due, in part, to “improper service.” But it is obvious from reading the petition in its

entirety that the deficiency alleged was incompetence on the part of Francisco and Esperanza to understand service of process, not incomplete service on Bruce and Tina. The Duques acknowledge they did not specifically cite Timothy's failure to serve Bruce and Tina as a basis of their improper service argument,<sup>1</sup> but contend sufficient evidence was before the court to allow it to rule on such ground.

"It is elementary that an issue should not be considered by the court unless it is fairly raised by the pleadings." *Henry Walker Park Ass'n v. Mathews*, 91 N.W.2d 703, 710 (Iowa 1958); see also *Buda v. Fulton*, 157 N.W.2d 336, 341 (Iowa 1968) (finding trial court erred by inquiring into constitutional issue on its own motion). Because the Duques' petition did not fairly raise the contention that Bruce and Tina were persons in possession of the property who required service of notice, Timothy did not have a chance to present evidence to defend against that claim. We cannot speculate regarding what proof Timothy might have marshaled with proper notice of this claim for vacating the forfeiture. We find the court erred in vacating the affidavit of forfeiture on a ground not advanced by Francisco and Esperanza Duque.

But even if the petition could be liberally construed to challenge improper service on Bruce and Tina, we disagree with the district court's determination that they were persons in possession as that term is used in section 656.2(2). Under

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<sup>1</sup> It does not appear Bruce and Tina Duque moved to intervene in this matter and we are not confident Francisco and Esperanza Duque have standing to allege the failure to serve Bruce and Tina Duque as a ground for vacating the affidavit of forfeiture. See generally *Iowa Civil Liberties Union v. Critelli*, 244 N.W.2d 564, 567 (Iowa 1976) (litigants lack standing to raise the rights of third parties). But because the parties do not discuss standing, we do not decide on that basis.

that provision, a vendor must serve written notice not only on the vendee, but “on the person in possession of the real estate, if different than the vendee; on all the vendee’s mortgagees of record; and on a person who asserts a claim against the vendee’s interest . . . .” Iowa Code § 656.2(2)(a); see *id.* § 656.3 (specifying manner in which vendor may provide effective service). Failure to serve notice upon persons in possession of real estate renders the forfeiture ineffective. *Dreesen v. Leckband*, 479 N.W.2d 620, 622 (Iowa Ct. App. 1991).

Our supreme court has defined “person in possession” in the context of subsection 656.2(2):

Possession requires an act of dominion or control over the property in question. In determining what acts demonstrate possession of land, our cases have referred to conduct which gives notice to the party claiming title to the property. Frequently, that conduct has been actual entry onto the land or some objectively observable use or care made of the land.

*Jamison v. Knosby*, 423 N.W.2d 2, 5 (Iowa 1988) (citations and quotation marks omitted). The question therefore is whether the party claiming possession has demonstrated “objectively observable acts” that would place a reasonably diligent vendor on notice that someone in addition to the vendee has an interest in the property. *Goodale v. Bray*, 546 N.W.2d 212, 214 (Iowa 1996) (listing examples of insufficient acts to provide notice); see *Warren v. Yocum*, 223 N.W.2d 258, 260 (Iowa 1974) (recognizing custody and control as elements involved in term “possession”).

Timothy asserts Bridgeview Auto Sales was the only “person in possession” of the property subject to forfeiture. He argues because neither Bruce nor Tina physically possessed the land or engaged in other observable



use or care of the property, they did not exercise dominion or control over the real estate. Timothy concludes because they were not persons in possession of the land, he was not legally required to serve them notice of forfeiture.

Francisco and Esperanza counter that Bruce and Tina, by paying taxes and installments on the real estate contract, carried out objectively observable acts to be considered persons in possession and therefore under section 656.2, they were necessary parties to be served notice of forfeiture.

Timothy has the stronger argument. We don't rule out the possibility that a single property may have multiple persons in possession. See *Pendergast v. Davenport*, 375 N.W.2d 684, 689 (Iowa 1985) ("Our case law recognizes that more than one person may be in possession of the property and entitled to notice of redemption."). But in this case Bruce and Tina do not profess to be in actual physical possession of the property along with the tenant Bridgeview Auto Sales. The *Jamison* court's articulation of "objectively observable use" applied to the exercise of dominion and control over farm land, not a claim to an interest in commercial property as Bruce and Tina assert here.

In *Eastman v. DeFrees*, 17 N.W.2d 104, 105 (Iowa 1945), the court implicitly held nothing short of being a signatory to the purchase contract would adequately demonstrate possession of nonagricultural commercial real estate. See *Goodale*, 546 N.W.2d at 214 (summarizing result in *Eastman*). The *Eastman* court rejected a husband's claim that cancellation notices were invalid because they were not served on his wife who helped operate his business. *Eastman*, 17 N.W.2d at 105. "The fact that she made leases with the tenants in

her name and otherwise aided her husband in carrying on the apartment house business would not mean that she would have to be served with notice of cancellation of her husband's contract to purchase the premises." *Id.*

*Eastman* is instructive, if not controlling, here. The fact that Tina and Bruce handled the commercial real estate for Francisco and Esperanza did not make them parties to the contract. Without either actual possession or a legal interest in the real estate, Bruce and Tina were not entitled to notice of the forfeiture. Because Timothy complied with chapter 656, we reverse the district court and remand for entry of an order consistent with this opinion.

**REVERSED AND REMANDED.**