

IN THE COURT OF APPEALS OF IOWA

No. 7 586/ 06-1143
Filed November 29, 2007

**ROBERT A. WRIGHT, SR., and
BERNICE E. WRIGHT,**
Plaintiffs-Appellants,

vs.

**MARY MALONEY, as Treasurer of
Polk County, Iowa, and OHP 23, L.C.,**
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, John D. Lloyd, Judge.

Plaintiff appeals the district court's summary judgment ruling that denied plaintiff's petition for a writ of mandamus compelling a county treasurer to cancel a tax sale. **AFFIRMED.**

Robert A. Wright, Des Moines, for appellant.

Stephen P. Wing of Dwyer & Wing, P.C., Davenport, for appellee-OHP 23,
L.C.

Michael O'Meara, Des Moines, for appellee- Mary Maloney.

Heard by Sackett, C.J., and Vaitheswaran and Baker, JJ.

SACKETT, C.J.

Plaintiff-appellant, Robert Wright, Sr. (Wright), petitioned the district court to issue a writ of mandamus to the Polk County Treasurer, Mary Maloney, ordering her to cancel a tax sale of property. Wright owned the property and OHP 23, L.C. (OHP 23) bought the property at a tax sale. The treasurer and OHP 23 were named as defendants. Wright asserted that statutory requirements of Iowa Code section 447.12 (2001) were not followed by OHP 23 when it filed an affidavit with the treasurer to obtain a tax deed. Wright also argued that because OHP 23's affidavit was not received by the treasurer within three years after the tax sale, the sale must be cancelled under section 446.37. The district court granted the defendants' motion for summary judgment, finding no writ could be issued as a matter of law. Wright appeals.

I. BACKGROUND.

Wright owns real property at 1130 11th Street, Des Moines, Iowa. After Wright failed to pay property taxes, the property was sold at a tax sale to OHP 23 on June 17, 2002. In exchange for paying the delinquent taxes, OHP 23 received a tax certificate for the property. In June 2005, an agent for OHP 23 prepared notices of redemption and an affidavit to be filed with the county treasurer as is required by statute to obtain a tax deed for the property.

The notice of redemption was sent to Wright on June 10, 2005, informing him that his right to redeem the property would expire ninety days after service of the notice was completed. The record contains receipts showing this notice was sent by certified mail and Robert Wright signed when he received it. The affidavit sent to the treasurer states the notices were sent by both ordinary and certified

mail. OHP 23's agent mailed the affidavit and application for a tax deed to the Polk County Treasurer on Friday, June 17, 2005, three years to the day after the tax sale. The mailing date is shown by a metered postmark.

If a tax certificate holder does not file the affidavit with the treasurer within three years after the tax sale, the treasurer is required by statute to cancel the tax sale from the county's system. Iowa Code § 446.37. Thus, at the end of the day on Friday, June 17, the tax sale for the Wright property was marked "cancelled" on the computer system. The Polk County Treasurer received OHP 23's affidavit and application for a tax deed on Monday, June 20, 2005. The treasurer sought advice from the county attorney on whether the affidavit was timely filed. On July 12, 2005, the county attorney advised the treasurer that a statute deems a document filed if it is deposited in the United States mail on or before the required filing date. The treasurer then deemed the affidavit timely filed even though it was received after the statutory cancellation date.

On July 15, 2005, Wright petitioned the district court to issue a writ of mandamus ordering the treasurer to cancel the tax sale. The court issued a temporary injunction enjoining the treasurer from issuing a tax deed to OHP 23 until further order of the court. Both parties moved for summary judgment. The court granted the treasurer's and OHP 23's motion for summary judgment, finding a writ of mandamus could not be issued as a matter of law because the treasurer's action of deeming the affidavit timely filed was within her discretion. Wright filed two motions to amend or enlarge findings, requesting the court to address the sufficiency of the affidavit OHP 23 filed with the treasurer and the fact that the redemption period did not expire within three years of the tax sale.

The district court addressed the request but overruled both motions. Wright appeals claiming the district court erred in finding 1) OHP 23's affidavit complied with section 447.12, 2) OHP 23's affidavit was timely filed, and 3) the redemption period need not expire prior to the cancellation date set forth in section 446.37.

II. PRESERVATION OF ERROR.

The parties dispute whether error was preserved on all of the issues. Wright filed two motions to amend or enlarge findings and defendants argue that filing multiple motions to reconsider is not authorized and successive motions do not preserve error. "Multiple motions to reconsider . . . are permitted if they are not successive or repetitive of an earlier motion." *Boughton v. McAllister*, 576 N.W.2d 94, 95 (1998). A second motion is repetitive if it addresses the same order of the court and same legal issues as the first motion. *Id.* Wright's second motion is repetitive of the first motion. However, this is of no consequence because all of the errors claimed on appeal were preserved in the first motion to amend or enlarge.

III. SCOPE OF REVIEW.

The proper standard of review is also disputed by the parties. A writ of mandamus, as an action in equity, is typically reviewed de novo. *Koenigs v. Mitchell County Bd. of Supervisors*, 659 N.W.2d 589, 592 (Iowa 2003). However, when a case in equity is dismissed by summary judgment, our review is for correction of errors at law. *Id.* Summary judgment should be granted when the record shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). If the dispute only "concerns the legal consequences flowing from

undisputed facts,” summary judgment is appropriate. *McNertney v. Kahler*, 710 N.W.2d 209, 210 (Iowa 2006).

A mandamus action is brought to obtain an order requiring a person to act or refrain from acting, “the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station.” Iowa Code § 661.1. A writ of mandamus is only to be issued in exceptional circumstances when there is no other “plain, speedy, and adequate remedy in the ordinary course of the law.” Iowa Code § 661.7; *Bellon v. Monroe County*, 577 N.W.2d 877, 879 (Iowa Ct. App. 1998). Another remedy is adequate if it gives “relief on the very subject matter in question, and [is] equally convenient, beneficial and effectual.” *Bellon*, 577 N.W.2d at 879 (quoting *Virginia Manor, Inc. v. City of Sioux City*, 261 N.W.2d 510, 514-15 (Iowa 1978)). A writ is issued to enforce rights already established and will not be issued to declare new rights. *Id.* “The writ can be used to compel a tribunal to act but cannot control its discretion.” *Id.*; Iowa Code § 661.2.

IV. SUFFICIENCY OF AFFIDAVIT.

Wright contends the affidavit OHP 23 filed was insufficient as a matter of law because it does not contain all of the information required by statute. According to section 447.12, the affidavit must verify that the property owner and other interested parties have been given notice of when the right to redeem the property will expire. The service of the notice of redemption is only deemed complete “after an affidavit has been filed with the county treasurer, showing the making of the service, the manner of service, the time when and place where made, under whose direction the service was made, and costs incurred” Iowa Code § 447.12. Wright argues that OHP 23’s affidavit is insufficient

because it does not contain “the time when” the notice of redemption was served. The affidavit attests that timely service was made and includes the certified mail receipts. The certified mail receipts show the date of service with a postmark. However, the affidavit does not include the specific hour that service was made.

The requirements of section 447.12 have been described as mandatory and the right of redemption will not expire if the affidavit is incomplete. *Modern Heat & Power Co. v. Bishop Steamotor Corp.*, 239 Iowa 1267, 1276, 34 N.W.2d 581, 586 (1948). In *Modern Heat & Power*, the court held an affidavit invalid when it did not show the manner of service and whether it was served by an agent or attorney of the certificate holder. *Id.* at 1276-77, 34 N.W.2d at 586-87. Another case states the statute’s requirements “must be strictly followed, even in matters which may not seem to be material or which may be thought to be trivial.” *Lyman v. Walker*, 192 Iowa 982, 994, 185 N.W. 607, 612 (1921). In *Lyman*, the affidavit stated notice of redemption was served on Saturday, November 2. *Id.* at 986, 185 N.W. at 609. However, the sheriff who served the notice admitted that he actually delivered the notice on Sunday, November 3 but backdated the return of service form to Saturday, November 2. *Id.* at 986, 185 N.W. at 609. Although the court did not address whether the statute requires the affidavit to state the hour of service, it suggested the purpose of the “time served” requirement is to ensure an accurate date is listed for proper calculation of the redemption right period. *Id.* at 994, 185 N.W. at 613. The court noted “the notice must set forth with clearness and accuracy, the date when the right of redemption expires.” *Id.* at 994, 185 N.W. at 613.

The court has also addressed whether flaws in the notice of redemption or incorrect charges listed on the affidavit will invalidate a tax deed. *White v. Moon*, 256 Iowa 470, 471-72, 127 N.W.2d 578, 579-80 (1964). In *Moon*, the notice of redemption transposed the first and last names of the parties. *Id.* at 471-72, 127 N.W.2d at 579. The court stated that the transposed names did not create confusion or doubt about the identity of the parties served and did not make the notice invalid. *Id.* at 471-72, 127 N.W.2d at 579. The excessive charges in the affidavit also did not invalidate the tax deed when the owners had made no effort to redeem the property and their failure to redeem was not caused by the error in the affidavit. *Id.* at 472, 127 N.W.2d at 580.

The affidavit filed by OHP 23 stated that timely notice was given and attached a signed and dated copy of the notice sent to Wright. The postmarked certified mail receipts were also attached showing timely notice. The district court found this evidence showed compliance with the “time served” requirement of section 447.12. After reviewing the statute and relevant cases, we find no error in the court’s application of the law. Wright received timely notice of the right to redeem as evidenced by his signature on the dated certified mail receipt. The record does not show Wright made any attempt to redeem the property. Wright has not argued that the failure to list a specific hour in the affidavit prevented him from redeeming the property. Wright cites no authority that interprets the “time served” language as requiring the hour of service on the affidavit. We find the affidavit complies with the requirements of section 447.12 and the failure to list a specific hour of service does not invalidate the affidavit.

V. TIMELINESS OF AFFIDAVIT FILING.

Wright next argues that even if the affidavit was sufficient, it was not timely filed. The applicable statute states in part,

After three years have elapsed from the time of any tax sale, and action has not been completed during the time which qualifies the holder of a certificate to obtain a deed, the county treasurer shall cancel the sale from the county system.

Iowa Code § 446.37 (2001). The Wright property was sold on June 17, 2002. The affidavit was mailed on Friday, June 17, 2005. The tax sale was cancelled from the county's system at the end of the day on June 17, 2005. The county treasurer received the affidavit on Monday, June 20, 2005. The treasurer sought the county attorney's legal opinion on whether the affidavit was timely filed. The attorney advised that under Iowa Code section 622.105, the affidavit could be deemed timely filed as of the postmark date. This statute provides in part,

Any report, claim, tax return, statement, or any payment required or authorized to be filed or made to the state, or any political subdivision which is transmitted through the United States Mail . . . shall be deemed filed or made and received on the date it was mailed if the sender establishes by competent evidence that the report, claim, tax return, statement, or payment was deposited in the United States mail on or before the date for filing or paying.

Iowa Code § 622.105. Competent evidence requires testimony by the sender and other independent and credible proof showing "that the document was mailed on a specified date." *Id.*

Wright claims this statute does not apply because it does not specifically list an affidavit as a type of document that can be deemed filed as of the date of mailing. The district court held the statute applied because the affidavit was essentially a "report" or "statement."

When interpreting a statute we attempt to effectuate the legislature's intent. *Carolan v. Hill*, 553 N.W.2d 882, 888 (Iowa 1996). The text should be interpreted "fairly and sensibly in accordance with the plain meaning of the words used by the legislature." *Id.* The intent is gleaned from both the inclusion and exclusion of terms. *Bennett v. Iowa Dep't of Natural Res.*, 573 N.W.2d 25, 28 (Iowa 1997). We attempt to provide a reasonable interpretation that achieves the statute's purposes and avoids absurd results. *State v. Spencer*, 737 N.W.2d 124, 130 (Iowa 2007). Under the maxim of ejusdem generis, general words in a statute apply to things similar or "of the same kind, class, or nature." *Shatzer v. Globe Am. Cas. Co.*, 639 N.W.2d 1, 5 (Iowa 2001).

Although an affidavit is not expressly listed as a type of document that can be deemed filed upon proof of its deposit in the mail, we find the affidavit filing in these circumstances of the same nature as other statements or reports filed with the state or a political subdivision that are included in section 622.105. The only characteristic that distinguishes the affidavit from the other documents listed is that an affidavit must be a statement made under oath. See Iowa Code § 622.85. However, as the district court noted, this characteristic has no bearing on whether an affidavit can be deemed filed upon mailing. The county treasurer is mandated by statute to cancel a sale if the affidavit is not filed within three years. See Iowa Code § 446.37. The language of section 622.105 is also mandatory, stating that a document "shall be deemed filed" if competent evidence shows it was mailed by the required filing date. Iowa Code § 622.105. The metered postmark on the envelope containing the affidavit provides competent evidence OHP 23's affidavit was deposited in the mail on June 17,

2005. The treasurer properly deemed the affidavit filed under the authority of section 622.105. Since the treasurer fully complied with her duties and applicable statutes, the district court properly denied the writ.

VI. REDEMPTION AND CANCELLATION PERIODS.

Wright's final argument concerns whether the right to redeem period must expire within three years of the tax sale for a valid tax deed to be issued. Wright was served with the notice of redemption on June 10, 2005. OHP 23's three-year period to file the affidavit expired on June 17, 2005. Wright's 90 day period of redemption began on the date the affidavit was filed. See Iowa Code § 447.9(1) (providing the redemption period begins when service is complete as provided in section 447.12); Iowa Code § 447.12 (providing service is complete upon filing of the affidavit). Thus, Wright's right of redemption expired mid-September. Wright claims that section 446.37 requires all action be completed, including the running of the redemption period, within three years of the tax sale. Under his interpretation, if the redemption right has not expired within three years of the sale, the treasurer must cancel the tax certificate.

At the time of the tax sale, section 446.37 stated that the sale must be cancelled if after three years "action has not been completed during the time which qualifies the holder of a certificate to obtain a deed." Iowa Code § 446.37 (2001). A deed cannot be issued until the right of redemption has expired. See Iowa Code § 448.1 (requiring the treasurer to issue a deed 90 days after service is completed).

However, as the district court explained, the tax sale cancellation statute has since been amended and applies to the tax sale of Wright's property. In April

2005, the statute was amended requiring cancellation of the sale after three years if “the holder of a certificate has not filed an affidavit of service of notice of expiration of right of redemption under section 447.12” Iowa Code § 446.37 (2007). The amended statute only requires a timely filed affidavit rather than completion of all actions within three years of the sale. The legislature gave this modification retroactive effect, providing that the amendment “applies to tax sale certificates of purchase in existence before the effective date of the Act, notwithstanding section 447.14” 2005 Iowa Acts ch. 34, § 26(2) (codified at Iowa Code § 446.37 (2007)). Section 447.14 provides the general rule that “[t]he law in effect at the time of tax sale governs redemption.” Iowa Code § 447.14. The legislature expressly intended the amendment to apply to tax sales occurring before 2005. The district court correctly applied the amendment retroactively and the treasurer was not under a duty to cancel the sale when the redemption period had not expired within three years of the tax sale.¹

VII. CONCLUSION.

We affirm the district court’s denial of the writ. Certified mail receipts in the affidavit showing the date notice was served provided sufficient evidence of the time of service. The treasurer properly accepted the affidavit as timely filed when a metered postmark provided competent evidence that the affidavit was deposited in the mail on the filing deadline. Amended section 446.37 does not

¹ It is important to note the amendment does not cut short the redemption right. Section 448.1 still prohibits the treasurer from issuing a deed until 90 days after the affidavit has been filed. See Iowa Code § 448.1. The only effect of the amendment is to only require an affidavit to be filed within three years to prevent cancellation of the sale. Wright still had 90 days to redeem the property after the affidavit was filed.

require the treasurer to cancel a tax sale if the redemption period has not expired within three years of the sale.

AFFIRMED.