

IN THE COURT OF APPEALS OF IOWA

No. 9-786 / 08-0473
Filed December 17, 2009

**ALAN H. KIRSHEN and
JEAN P. KIRSHEN,**
Petitioners-Appellants,

vs.

**STACY VON DIELINGEN,
Individually and As Montgomery
County Assessor, and BOARD OF
REVIEW OF MONTGOMERY COUNTY,**
Respondents-Appellees.

Appeal from the Iowa District Court for Montgomery County, James H. Heckerman, Judge.

Petitioners appeal the district court's rulings dismissing claims against the county assessor and finding it had no jurisdiction to consider the claims against the county board of review. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Jean P. Kirshen, Red Oak, appellant pro se.

Alan H. Kirshen, Red Oak, appellant pro se.

M. Brett Ryan, Frank W. Pechacek, Jr., and Bruce B. Green, of Willson & Pechacek, P.L.C., Council Bluffs, for appellees.

Considered by Sackett, C.J., Vaitheswaran, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

SACKETT, C.J.

Appellants, Alan H. and Jean P. Kirshen, appeal from the dismissal on jurisdictional grounds of their appeal to the district court from a determination on review by the board of review of Montgomery county (Board), of the real estate assessment on real estate they own in the county. They contend, among other things, (1) the district court erred in dismissing the county assessor Stacy Von Dielingen (Assessor), as an unnecessary party, and (2) the district court erred in dismissing their appeal for lack of proper service and jurisdiction. We affirm the district court's ruling dismissing the action against Stacy Von Dielingen, individually. As to the Board, we reverse and remand for further proceedings.

I. SCOPE OF REVIEW. Tax assessment appeals are equitable in nature; therefore, our review is generally de novo. Iowa R. App. P. 6.4; *Soifer v. Bd. of Review*, 759 N.W.2d 775, 782 (Iowa 2009); *Riley v. Bd. of Review*, 549 N.W.2d 289, 290 (Iowa 1996). However, we review the district court's ruling on the motions to dismiss for errors at law. Iowa R. App. P. 6.4; *Ritz v. Wapello County Bd. of Supervisors*, 595 N.W.2d 786, 789 (Iowa 1999); *McCormick v. Meyer*, 582 N.W.2d 141, 144 (Iowa 1998).

II. BACKGROUND AND PROCEEDINGS. On April 15, 2007, Stacy Von Dielingen, acting as the Montgomery county assessor, notified appellants that property they owned legally described as "Lots 7 through 9, Block 13, Original Plat of the city of Red Oak, Iowa," was assessed at \$192,120. On May 3, 2007, appellants filed a petition with the Board appealing the assessment. On May 30, 2007, the Board reduced the appellants' assessment to \$174,690.

The appellants, on June 18, 2007, filed an appeal in the district court naming Stacy Von Dielingen, individually and as Assessor, and the Board, as respondents. They alleged that the Board and the Assessor erred in multiple ways and requested relief. An original notice naming both the Assessor and the Board as respondents was signed by the Montgomery county clerk of court and delivered to the Montgomery county sheriff for service. The directions for service told the sheriff to serve the Board by serving the Assessor with copies for each member and to serve the Assessor in the same manner. Two documents titled "Return of Service" from the sheriff were filed. One bore the word "Substitute" and showed "by Serving Von Dielingen, Stacy for Board." The second bore the word "Official" and showed "By Serving Montgomery County Assessor."

A motion to dismiss by Stacy Von Dielingen, individually and as Montgomery County Assessor, was filed. It was signed by attorney Bruce B. Green and showed he was from the firm of Willson & Pechacek, P.L.C. The motion also showed this firm as representing the Board. The motion, among other things, stated that:

The relief sought by the taxpayer is pursuant to Iowa Code § 441.38 from a decision of the Montgomery County Board of Review. In this regard, the Montgomery County Board of Review admits that it is the duly designated and proper defendant in this case.

On July 23, 2007, the district court sustained the motion as to Stacy Von Dielingen individually without comment.

On January 9, 2008, the Board, still represented by Willson & Pechacek, P.L.C., filed a motion to dismiss the appeal contending that the district court did

not have jurisdiction because appellants had not served notice of their appeal as required by Iowa Code section 441.38(2) (2007)¹ in that they had not personally served “the chairperson, presiding officer, or clerk of the board of review” and at this point any service would be untimely. Appellants resisted the motion contending among other things that the Board, in its motion to dismiss the Assessor, acknowledged service on the Board.

On February 18, 2008, the district court entered an order dismissing the appellants’ action against the Board. In considering the motion, the district court noted its jurisdiction to review the decision of the Board was statutory, and that a failure to timely serve a notice of appeal from the Board’s decision deprives the district court of jurisdiction. The court found that the notice of appeal to the district court was not personally served, as an original notice is to be served on a person provided by the statute. The court also dismissed the appellants’ claims that the motion to dismiss the Assessor acknowledged service, and by acquiescence, was service on the Board.

¹ Iowa Code section 441.38 provides in relevant part:

1. Appeals may be taken from the action of the local board of review with reference to protests of assessment, to the district court of the county in which the board holds its sessions within twenty days after its adjournment or May 31, whichever date is later. . . . No new grounds in addition to those set out in the protest to the local board of review as provided in section 441.37, . . . can be pleaded, but additional evidence to sustain those grounds may be introduced. . . . Appeals shall be taken by filing a written notice of appeal with the clerk of district court. Filing of the written notice of appeal shall preserve all rights of appeal of the appellant.

2. If the appeal to district court is taken from the action of the local board of review, notice of appeal shall be served as an original notice on the chairperson, presiding officer, or clerk of the board of review after the filing of notice under subsection 1 with the clerk of district court.

On March 19, 2008, appellants filed a notice of appeal from the July 23, 2007 order dismissing their claims against Stacy Von Dielingen individually and the February 18, 2008 order dismissing their appeal of the Board's action.

III. APPEAL OF CLAIM AGAINST THE ASSESSOR. The Assessor contends that this court does not have jurisdiction to consider the appeal of the July 23, 2007 order dismissing her individually from the action in that the dismissal was a final judgment and appeal from it was not taken within thirty days.

[A]n order disposing of an action as to fewer than all of the parties to the suit, *even if their interests are severable*, or finally disposing of fewer than all the issues in the suit, even if the issues are severable, may be appealed within the time for an appeal from the order, judgment, or decree finally disposing of the action as to remaining parties or issues.

Iowa R. App. P. 6.5(3) (emphasis supplied). This argument is without merit.

The Assessor also contends that because this is a property tax appeal pursuant to Iowa Code section 441.38 and the court may only increase, decrease, or affirm the amount of assessment appealed from under section 441.43, the district court did not have the power to grant the remedies petitioner sought against the Assessor. We agree and affirm the dismissal of the Assessor individually on this ground.²

IV. APPEARANCE BY THE BOARD OF REVIEW. Appellants contend that the district court had jurisdiction to decide the appeal from the Board because the motion to dismiss Von Dielingen was signed by the attorneys for the

² We find no order dismissing Stacy Von Dielingen as Montgomery County Assessor. The only dismissal we find is the one dismissing Stacy Von Dielingen individually.

Board, as attorneys for the Board, and stated, “the Montgomery County Board of Review admits that it is the duly designated and proper defendant in this case.” Appellants contend this constituted an appearance by the Board and cured any alleged defects in the service of the original notice.

The issue appears to be resolved by looking at two rules of civil procedure. Iowa Rule of Civil Procedure 1.421(1) provides in relevant part,

Every defense to a claim for relief in any pleading must be asserted in the pleading responsive thereto The following defenses or matters may be raised by pre-answer motion:

. . . .

c. Insufficiency of the original notice *or its service*.

(emphasis supplied). Iowa Rule of Civil Procedure 1.421(4) provides in relevant part,

If a pre-answer motion does not contain any matter specified in rule 1.421(1) . . . that matter shall be deemed waived, except lack of jurisdiction of the subject matter or failure to state a claim upon which relief may be granted.

When the attorneys for the Board filed the pre-answer motion making allegations on the part of the Board, without calling to the district court’s attention that the Board had not been properly served with the original notice, they no longer had the right to challenge its service. We reverse the district court’s decision that it had no jurisdiction to hear the appeal from the Board’s action. We reverse on this issue and remand to the district court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.