IN THE COURT OF APPEALS OF IOWA

No. 0-405 / 09-1720
Filed August 11, 2010

BILLY E. STOCKBAUER,
Plaintiff-Appellant,

vs.

FLOYD A. SCHAKE,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

The plaintiff appeals from a district court ruling entering summary judgment in favor of the defendant in a quiet title action. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Ronald R. Rieper, Des Moines, for appellant.

Jerrold Wanek and Robert C. Gainer of Garten & Wanek, Des Moines, for appellee.

Considered by Vaithewaran, P.J., and Doyle and Tabor, JJ.

VAITHESWARAN, P.J.

For close to two decades, Billy Stockbauer lived in a house titled in Floyd Schake's name. In this quiet title action, the district court concluded Schake was the owner. We agree, but remand for consideration of Stockbauer's significant monetary contributions to the property.

I. Background Facts and Proceedings

Floyd Schake purchased a Des Moines home in 1987. He took possession of the home in 1988 and lived there for less than a year before moving to Florida. Billy Stockbauer then moved into the home.

Stockbauer began paying the mortgage, insurance, and property taxes on the home. He and Schake subsequently signed the following agreement: "I Floyd A. Schake agree to put 1500 E. 9th on contract with Billy Erico Stockbauer on 1 Feb. 1989."

In 1990, Stockbauer filed a petition for declaratory judgment against Schake requesting a determination of the parties' respective rights to the house. A copy of the petition was personally served on an individual named Jerald Brantley, as Schake's "agent." Schake did not respond to the lawsuit and a default judgment was entered against him. In that judgment, the court concluded "the written contract between Plaintiff and Defendant . . . constitutes a valid and binding contract between Plaintiff and Defendant for the purchase of the following-described real estate in Polk County, Iowa. . . ." The court further concluded that if Stockbauer made the required mortgage, tax, and insurance payments and otherwise complied with the terms of the mortgage he would "be deemed to be the equitable title owner of said real estate and rightfully in

possession thereof." Stockbauer remained in possession of the home and made the mortgage, tax, and insurance payments.

In 2008, with less than $5000 remaining on the mortgage, Schake sought to evict Stockbauer from the property. He was unsuccessful.

This brings us to the present litigation. Stockbauer filed a petition to quiet title to the property in his name. Referencing the 1990 default judgment, he alleged his written agreement with Schake was a binding real estate contract. Schake filed an answer and a counterclaim to quiet title in his name. Stockbauer responded with several affirmative defenses, including the defense of unjust enrichment.

Both parties filed summary judgment motions. The district court denied Stockbauer's summary judgment motion and granted Schake's. The court concluded the 1990 default judgment was void for lack of notice to Schake and the February 1, 1989 agreement was "not a valid oral contract," but an "agreement to agree."

Stockbauer filed a motion to reconsider. The court summarily denied the motion and quieted title in favor of Schake. Stockbauer appealed.

II. Analysis

Stockbauer contends the district court erred in (A) finding Schake was not served with notice of the 1990 declaratory judgment action; (B) ruling as a matter of law that there was no valid oral contract for the sale of the real estate; and (C) failing to address his affirmative defense of unjust enrichment.

We review the district court's ruling on a motion for summary judgment for the correction of errors at law. *See* Iowa R. App. P. 6.907. Summary judgment

is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3).

As a preliminary matter, we note that our appellate record contains materials that were not part of the summary judgment record or the trial record. We will not consider these materials. *See* Iowa R. App. P. 6.801; *cf. Moser v. Thorp Sales Corp.*, 312 N.W.2d 881, 893 (Iowa 1981) (considering, in a limited situation, depositions that were not part of the record before the trial court in ruling on a summary judgment motion).

A. 1990 Default Judgment

"[A] judgment entered against a party without notice is void, as the court has no personal jurisdiction over the defendant." *Opat v. Ludeking*, 666 N.W.2d 597, 607 (Iowa 2003). As noted, the district court concluded that Schacke was not notified of the 1990 action and, accordingly, the subsequently-entered default judgment was void. Stockbauer contends he generated a genuine issue of material fact on the question of whether Schake was served. We disagree.

Our rules of civil procedure prescribe several methods of service. Stockbauer could have personally served Schake as prescribed in Iowa Rule of Civil Procedure 1.305.[1] Stockbauer did not personally serve Schake in that

[1] The rule states:

> Original notices are "served" by delivering a copy to the proper person. Personal service may be made as follows:
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> 1.305(1) Upon any individual who has attained majority and who has not been adjudged incompetent, either by taking the individual's signed, dated acknowledgment of service endorsed on the notice, or by serving the individual personally; or by serving, at the individual's dwelling house or usual place of abode, any person residing therein who is at least 18 years old, but if such place is a rooming house, hotel, club or apartment building, a copy may be delivered to such person who resides with the individual or is either a member of the individual's family or the

manner. Instead, he attempted to serve Schacke by delivering a copy of the petition to Jerald Brantley, who was listed on the return of service as Schake's agent. Substituted service on an agent is authorized where the action "arises out of or is connected with the business of any office or agency maintained by the defendant in a county other than where the principal resides." Iowa R. Civ. P. 1.305(7). The declaratory judgment action did not arise out of or have a connection with Schake's business or agency. Therefore, this method of service was inappropriate. While the rules allow for alternate methods of service, those methods must be "prescribed by order of the court in which the action is brought." Iowa R. Civ. P. 1.306; *see also* Iowa R. Civ. P. 1.305(14). No court permission was obtained. Nor did Stockbauer utilize Iowa's long-arm statute to effect service. *See* Iowa Code § 617.3 (1990) (allowing a nonresident to be served by filing the original notice with the secretary of the state of Iowa and mailing a notification of the filing to the defendant). In short, Stockbauer did not use any of the authorized means of serving Schacke with the lawsuit.

Stockbauer points out that Schake may have been aware of the action. Even if the summary judgment record supported this assertion, Schake's informal awareness of the lawsuit is immaterial. *See, e.g.*, *Harrington v. City of Keokuk*,

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> manager or proprietor of such place; or upon the individual's spouse at a place other than the individual's dwelling house or usual place of abode if probable cause exists to believe that the spouse lives at the individual's dwelling house or usual place of abode.

The substance of this rule and others cited in this opinion has not changed from the versions in effect in 1990 when Stockbauer filed his declaratory judgment action against Schake, though they have since been renumbered. We accordingly cite to the current version of the rules of civil procedure. *See Kolb v. City of Storm Lake*, 736 N.W.2d 546, 553 n.6 (Iowa 2007).

258 Iowa 1043, 1050, 141 N.W.2d 633, 638 (1966) ("It is the rule in this and most jurisdictions that knowledge on the part of the defendant will not supply the need for a valid, legal notice or summons, as required by rule or statute."). For these reasons, we conclude the district court did not err in determining the 1990 default judgment against Schake was void for lack of notice.

B. Contract

The district court concluded that the 1989 agreement was "an agreement to contract at some point in the future and not a valid oral contract." The court continued,

> [T]he record does not establish genuine issues of material fact regarding whether Exhibit A is a valid oral contract, as it is clear from the language of the document that it does not include the material terms customary for a valid contract.

We discern no error in this ruling. "An 'agreement to agree to enter into a contract is of no effect unless all of the terms and conditions of the contract are agreed on and nothing is left to future negotiations.'" *Scott v. Grinnell Mut. Reins. Co.*, 653 N.W.2d 556, 562 (Iowa 2002) (citation omitted). Here, the agreement was comprised of a single sentence, which made no mention of essential terms and details such as the purchase price of the real estate, the monthly payment amounts, and the number of payments. In the absence of these details, the district court did not err in concluding the agreement was not a valid contract.

Stockbauer nevertheless argues that the writing was simply an expression of an earlier oral contract. It is true that an oral agreement may be "'enforceable, even though the parties contemplate that it be reduced to writing and signed, if it

is complete as to its terms and has been finally agreed to.'" *Faught v. Budlong*, 540 N.W.2d 33, 35 (Iowa 1995) (citation omitted). The problem here is that the summary judgment record contains no evidence of an oral contract. Therefore, this argument necessarily fails.

Stockbauer also cites an exception to the statute of frauds for partial performance. Neither the statute of frauds nor the exception is applicable, as Stockbauer was not precluded from presenting evidence of an oral contract; he just failed to do so. *See* Iowa Code §§ 622.32(3) (2007) (precluding evidence of a contract for the creation or transfer of interest in land unless written and signed by the parties); 622.33 (enumerating circumstances when section 622.32 does not apply); *Davis v. Roberts*, 563 N.W.2d 16, 20 (Iowa Ct. App. 1997) (stating the statute of frauds "is not a substantive rule of law forbidding oral contracts" but is instead "a rule of evidence limiting the manner of proving a contract within its provision"); *see also Gardner v. Gardner*, 454 N.W.2d 361, 363 (Iowa 1990) ("Under our statute of frauds, it is well established that a party who partially performs under the agreement may avoid the impact of the statute of frauds and introduce evidence of the oral contract.").

C. Unjust Enrichment

This brings us to the final issue raised by Stockbauer: whether the court erred in dismissing his affirmative defense of unjust enrichment. The district court did not address this defense in its summary judgment ruling even though it was raised and argued by Stockbauer. Stockbauer called that omission to the court's attention in his post-trial motion. Therefore, the issue is properly before us. *See Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002) (stating for the

preservation of error doctrine to be satisfied, the district court must be given an opportunity to address its failure to rule on an issue either by making a ruling or refusing to do so).

"The doctrine of unjust enrichment is based on the principle that a party should not be permitted to be unjustly enriched at the expense of another or receive property or benefits without paying just compensation." *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154 (Iowa 2001). To recover for unjust enrichment, a plaintiff must show: "(1) defendant was enriched by the receipt of a benefit; (2) the enrichment was at the expense of the plaintiff; and (3) it is unjust to allow the defendant to retain the benefit under the circumstances." *Id.* at 154–55.

Stockbauer asserts that he significantly improved the property at his own expense in addition to paying the mortgage, insurance, and taxes. While Stockbauer failed to itemize his home improvements in the summary judgment record, Schake essentially conceded that improvements were made. Additionally, he admitted that Stockbauer made the mortgage, insurance, and tax payments on the home. Therefore, the first two elements are essentially undisputed and the only remaining question is whether it would be "inequitable or unjust not to order restitution." *Iowa Waste Sys., Inc. v. Buchanan County*, 617 N.W.2d 23, 31 (Iowa Ct. App. 2000). We conclude Stockbauer generated a genuine issue of material fact on this third element. Accordingly, we reverse and remand for further proceedings on this issue.

III. Conclusion

We affirm the district court's conclusion that the 1990 default judgment was void for lack of notice and its conclusion that the 1989 agreement was not a valid contract. We conclude genuine issues of material fact exist on Stockbauer's unjust enrichment claim. We reverse and remand for further proceedings on that claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.