IN THE COURT OF APPEALS OF IOWA

No. 3-559 / 12-2147
Filed August 21, 2013

VIRGINIA E. SCHEFFERT and THE ESTATE OF GAIL R. SCHEFFERT,
Plaintiffs-Appellees,

vs.

MARK J. SCHEFFERT,
Defendant-Appellant.

Appeal from the Iowa District Court for Clayton County, John Bauercamper, Judge.

Mark Scheffert appeals from the district court order approving a partition sale. **AFFIRMED.**

David A. Lemanski, Dubuque, for appellant.

W. Richard White of Morrow & White Law Office, Waukon, for appellees.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

Mark Scheffert appeals from the district court's ruling in which the court approved the partition sale of Scheffert farmland. The summary judgment on the partition sale was granted without objection. Mark failed to claim either the defense of homestead or partition in kind until more than three months after summary judgment was entered ordering the real estate sold. Because homestead is a personal defense, which was waived when Mark failed to assert it before the summary judgment was entered, we affirm.

I. Background Facts and Proceedings.

Mark and the two petitioners, Virginia Scheffert and the Estate of Gail Scheffert, were owners as tenants in common of approximately 122 acres of real estate located in Clayton County, Iowa. Each party owned an undivided one-third interest in the real estate.

The petitioners filed their petition in equity for partition of the real estate on August 22, 2011. On October 21, 2011, Mark filed his answer and did not assert a homestead defense or that he was entitled to homestead rights.

The petitioners thereafter filed a motion for summary judgment. On March 27, 2012, the court entered summary judgment for the petitioners. In the order for summary judgment the court notes Mark "consents to the entry of summary judgment and does not contest" the motion for summary judgment. The court concluded "as a matter of law that the real estate is owned in equal shares by Gail R. Scheffert, Virginia E. Scheffert and Mark J. Scheffert; that the Petitioners are entitled to partition by sale; and that the real estate may be sold free of all

claims and liens . . . ." The court appointed a referee to make private or public sale of the premises "and such sale shall be free of all liens or claims of any party; and that the referee's deed shall pass full, absolute tide in fee simple to the purchaser." The referee was to "report the proposed sale and deed to the Court pursuant to Iowa Rule of Civil Procedure 1.1217."[1]

On June 26, 2012, the referee reported the sale of the property to Tom and Pam Winch for the sum of $519,110, and sought court authorization to finalize the sale. On July 6, 2012, Mark resisted the referee's petition, claiming for the first time that the property was his homestead.

On November 2, 2012, the district court entered its decree in which it noted no objection had been filed to the motion for summary judgment and no appeal had been taken. The court concluded the summary judgment was res judicata and approved the sale of the real estate.

Mark now appeals, contending the court erred in rejecting his homestead defense and request for partition in kind. The petitioners argue the summary judgment order was a final order, which was not appealed, and the court's approval of the sale should be affirmed.

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[1] The court ordered a sale, not a partition in kind, and the citation to rule 1.1217 thus appears to be contrary to the court's intent. *See* Iowa R. Civ. P. 1.1217(1) ("Referees shall file a report of their proposed partition in kind . . . ."). It appears the report would be more appropriately ordered pursuant to Iowa Rule of Civil Procedure 1.1221 ("The referees shall report all proposed sales to the court, which in its discretion, may require a hearing thereon at a specified time and place."). Indeed, this is the rule upon which the referee relied in the petition for authority to sell real estate filed on June 26, 2012.

II. Scope and Standard of Review.

Our review of this equitable proceeding is de novo. *See* Iowa R. App. P. 6.907; Iowa R. Civ. P. 1.1201(1) (stating an action to partition real property is an equitable proceeding). In equity cases, especially when considering the credibility of witnesses, we give weight to the fact findings of the district court, but are not bound by them. Iowa R. App. P. 6.904(3)(g)

III. Discussion.

In Iowa, "[h]omestead rights are purely statutory and get their vitality solely from the provisions of legislative enactment." *Merchants Mut. Bonding Co.*, 291 N.W.2d at 21. Iowa Code chapter 561 (2011), which sets forth homestead rights, provides special procedures to protect homestead rights. *See Martin v. Martin*, 720 N.W.2d 732, 738 (Iowa 2006). Specifically, Iowa law exempts one's homestead "from judicial sale where there is no special declaration of statute to the contrary." *See* Iowa Code § 561.16; *see also* Iowa Code § 561.1 (defining "homestead").

However, under the applicable rules of civil procedure governing the partition action, the defendant's answer "must state the amount and nature of their respective interests." *See* Iowa R. Civ. P. 1.1203(2); *see also* Iowa R. Civ. P. 1.1201(2) ("Property shall be partitioned by sale and division of the proceeds, *unless a party prays for partition in kind* by division into parcels, and shows that such partition is equitable and practicable." (emphasis added)). As noted in *Franksen v. Miller*, 297 N.W.2d 375, 377 (Iowa 1980), a homestead defense is a personal defense, which may be waived. In *Franksen*, the defendant did not

raise the homestead defense in a foreclosure proceeding, rather he attempted to raise his homestead defense in a later forcible entry and detainer (FED) action. 297 N.W.2d at 377. The court concluded defendant's attempt to raise the defense in the later FED action was untimely pursuant to principles of res judicata. *Id.* ("[T]he judgment and deed are valid against defendant's present assertion of homestead rights. He had his opportunity for a day in court on that defense and it is unavailable to him now.").

"The doctrine of res judicata embraces the concepts of claim preclusion and issue preclusion." *Colvin v. Story Cnty. Bd. of Review*, 653 N.W.2d 345, 348 (Iowa 2002) (citing *Bennett v. MC No. 619, Inc.*, 586 N.W.2d 512, 516 (Iowa 1998)); *accord* 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4402, at 7 (2d ed. 2002). "Failure to plead an affirmative defense normally results in waiver of the defense, unless the issue is tried with the consent of the parties." *Dutcher v. Randall Foods*, 546 N.W.2d 889, 893 (Iowa 1996).

Mark did not raise the homestead defense in answer to the partition petition and consented to summary judgment in the partition action. Because Mark did not timely raise his homestead claim, the district court did not err in ruling the matter res judicata. *See Neoco, Inc. v. Christenson*, 312 N.W.2d 559, 560 (Iowa 1981) (affirming summary judgment decreeing partition of real estate and concluding district court did not abuse its discretion in refusing to consider defendant's late filed defenses; "After the hearing [on the motion for summary judgment], but before the decree was entered, the defendants filed a further resistance, claiming for the first time that the property should be partitioned in

kind rather than by sale. The trial court held this resistance was not timely and refused to consider it.”).

Mark argues that his claim is not too late, citing *Myrick v. Bloomfield*, 210 N.W. 428, 429-30 (Iowa 1926). The case is not on point as it concerns the homestead rights of a surviving spouse to whom special remedies are available. *See Coyle v. Kujaczynski*, 759 N.W.2d 637, 641 n.1 (Iowa Ct. App. 2008.). Mark contends he should “be given the forty acres to which he is entitled under Iowa law.” But Iowa law also holds that res judicata principles apply to the homestead defense. *Franksen*, 297 N.W.2d at 377.

Here, summary judgment was granted by the district court on the referee’s petition for partition sale, the entry of summary judgment being with Mark’s consent. No valid defense was presented prior to summary judgment. Mark was therefore precluded from raising his homestead defense at the time of the hearing on referee’s report of sale, three months after entry of summary judgment approving the partition sale.[2]

AFFIRMED.

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[2] Here, the district court stated, “There is no merit to the defendant’s argument that homestead property of a tenant in common is not subject to partition.” *See Coyle v. Kujaczynski*, 759 N.W.2d 637 (Iowa Ct. App. 2008). Mark argues the district court misunderstood his argument. Even assuming the court misunderstood the argument, there is no effect on the conclusion that Mark failed to timely assert his homestead defense.