IN THE COURT OF APPEALS OF IOWA

No. 9-832 / 08-1418
Filed December 17, 2009

KATHRYN E. NICHOLSON,
Plaintiff-Appellant,

vs.

HF05, TRISTAN FRANK, Individually and as Agent for HF05, JOHN DAVIS, Individually and as Partner in HF05 and FRANK ROTTINGHAUS, as Floyd County Treasurer,
Defendants-Appellees.

Appeal from the Iowa District Court for Floyd County, Colleen D. Weiland, Judge.

A one-time property owner appeals the district court's decision to grant a tax deed holder's motion for summary judgment, contending that the statute prescribing the method of notice to a property owner of his or her right to redeem the property is unconstitutional. **AFFIRMED.**

Russell Schroeder of Schroeder Law Office, Charles City, for appellant.

Michael Ensley of Hanson, Bjork, and Russell, L.L.P., Des Moines, for appellees Tristan Frank, HF05, and John Davis.

Jesse Marzen, Floyd County Attorney, Charles City, for appellee Frank Rottinghaus.

Considered by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

VAITHESWARAN, J.

We must decide whether the manner of providing notice of redemption under Iowa Code section 447.9 (2007) comports with due process.

I. Background Facts and Proceedings

A Floyd County parcel of real estate owned by Kathryn Nicholson was sold at a tax sale to an entity known as HF05. HF05 subsequently notified Nicholson of her right to redeem the property within ninety days. The notice was sent by certified and regular mail as prescribed by Iowa Code section 447.9. The certified mail was returned to HF05 as undelivered. Nicholson attested that she did not receive "either certified mail or regular mail from HF05, or its agents." The agent for HF05 stated his belief that Nicholson "was aware of the matter as she asked about redemption status at the treasurer's office prior to the redemption date and failed to ever redeem."

After the ninety-day period expired, the Floyd County Treasurer issued HF05 a tax deed. Nicholson sued HF05 and others, alleging she did not receive "actual notice" of her right of redemption. She further alleged that, to the extent section 447.9 does not require "actual delivery of notice," it is unconstitutional. Nicholson and HF05 filed motions for summary judgment. The district court denied Nicholson's motion, stating:

> HF05 provided proper and sufficient notice as required by Iowa Code. The Iowa Code § 447.9 requirements of service by mailing both regular ***and*** certified mailing to the last known address, completed when deposited and postmarked, do not violate the principles of due process, even when the mailer knows the certified mail to be unreceived.

The court granted HF05's motion and dismissed the petition with prejudice. The petition against the Floyd County Treasurer, who was also a defendant in this suit, was dismissed as well. Nicholson appealed.

II. Analysis

Section 447.9 authorizes the holder of a certificate of purchase to serve the homeowner with a notice of redemption "by both regular mail and certified mail to the person's last known address." Iowa Code § 447.9(1).[1] "[S]ervice is deemed completed when the notice by certified mail is deposited in the mail and postmarked for delivery." *Id.*

Nicholson maintains this provision violates a homeowner's "due process rights under the Fourteenth Amendment to the United States Constitution and Article I, §§ 1 and 9 of the Constitution of the State of Iowa." She asserts that "[e]vidence of actual delivery should be constitutionally required before [her] rights to the real estate are decided."

Nicholson does not argue that our analysis would be any different under the Iowa Constitution than it would be under the United States Constitution. Therefore, we will "interpret both in a similar fashion." *War Eagle Vill. Apartments v. Plummer*, ___ N.W.2d ___, ___ (Iowa 2009); *Holm v. Iowa Dist. Ct.*, 767 N.W.2d 409, 417 (Iowa 2009) ("The due process provisions of the United States and the Iowa Constitutions are 'nearly identical in scope, import and purpose.'" (citations omitted)).

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[1] *See Dohrn v. Mooring Tax Asset Group*, *L.L.C.*, 743 N.W.2d 857, 861 (Iowa 2008) (noting that "the legislature amended section 447.9 in 1999 so that personal service is no longer required.").

Nicholson also does not address the "threshold question in due process challenges . . . whether state action is involved." *Putensen v. Hawkeye Bank*, 564 N.W.2d 404, 408 (Iowa 1997); *see Jensen v. Schreck*, 275 N.W.2d 374, 386 (Iowa 1979). In this instance, the State was not the certificate holder and did not send the redemption notice. *See Jones v. Flowers*, 547 U.S. 220, 225, 126 S. Ct. 1708, 1713, 164 L. Ed. 2d 415, 425 (2006) (addressing "whether the Due Process Clause requires *the government* to take additional reasonable steps to notify a property owner when notice of a tax sale is returned undelivered" (emphasis added)); *NYCTL 1999-1 Trust v. 114 Tenth Ave. Assoc., Inc.*, 845 N.Y.S.2d 235, 237 (N.Y. App. Div. 2007) ("The instant circumstances are readily distinguishable from *Jones,* which concerned the sufficiency of notice provided to an individual by a state government of a tax delinquency and of an impending tax sale of the individual's property, whereas here, process was served by a private actor upon 114 Tenth Avenue pursuant to Business Corporation Law § 306."); *Temple Bnai Shalom of Great Neck v. Village of Great Neck Estates*, 820 N.Y.S.2d 104, 106 (N.Y. App. Div. 2006) ("The certified mail notice in this case concerned the right to redeem, and it was sent not by a governmental entity or official, but by the private citizen who previously had purchased the tax lien."). Additionally, the State took no position with respect to the redemption notice other than to afford the homeowner that protection. *See Putensen*, 564 N.W.2d at 409 ("Mortgagees pursuing a Code chapter 655A foreclosure do so without state participation. No government conduct is involved and no government permission is necessary before undertaking the procedure because foreclosures are unregulated."); *Jensen*, 275 N.W.2d at 386 ("The state, in this balancing

process has not affirmatively caused or even encouraged forfeitures. It has merely said that certain protections must be provided a vendee if forfeiture is sought."). *But see Griffin v. Bierman*, 941 A.2d 475, 481 n.8 (Md. 2008) ("The parties agree that a mortgage foreclosure constitutes state action, and thus, the foreclosure process must satisfy constitutional due process requirements."). In the absence of a showing of state action, we question whether we need to reach the due process claim. *See State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007) ("Due process is designed to ensure fundamental fairness in interactions between individuals and the state."); *Midwest Check Cashing, Inc. v. Richey*, 728 N.W.2d 396, 404 n.6 (Iowa 2007) ("We seriously doubt Richey has shown sufficient state action to bring her substantive due process and equal protection claims."). Affording Nicholson the benefit of the doubt, we will assume without deciding that state action is involved and we will proceed to the merits.

Nicholson relies on *Jones*, to support her argument that once certified mail comes back as undeliverable, the certificate holder has an obligation "to insure actual delivery of notice."[2] In *Jones*, the Arkansas Commissioner of State Lands mailed certified letters to a landowner concerning his right to cure a tax delinquency and redeem his property. 547 U.S. at 223–24, 126 S. Ct. at 1712, 164 L. Ed. 2d at 424. The letters were returned to the Commissioner as

[2] Nicholson does not indicate whether her challenge to the statute is a facial challenge or is as applied. *See Griffin*, 941 A.2d at 481 n.9 ("Griffin's facial challenge to the foreclosure scheme is not limited to an 'as-applied' challenge simply because she did not receive actual notice."). We begin by determining if a statute is unconstitutional under a given set of facts and only if we find it unconstitutional under those facts do we address a facial challenge. *Plummer*, ___N.W.2d at ___. As we have determined that the statute is constitutional under these facts, we would not need to proceed to a facial challenge, even if such a challenge had been raised.

"unclaimed." *Id.* After the house was sold to the new buyer, the landowner brought suit, alleging that "failure to provide notice of the tax sale and of [the landowner's] right to redeem resulted in the taking of his property without due process." *Id.* at 224, 126 S. Ct. at 1713, 164 L. Ed. 2d at 424.

The Court held "that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id.* at 225, 126 S. Ct. at 1713, 164 L. Ed. 2d at 425. The Court suggested that the additional steps might include resending the notice by regular mail, posting it on the front door, or addressing it to the "occupant." *Id.* at 234–35, 126 S. Ct. at 1718–19, 164 L. Ed. 2d at 431. With respect to the regular mail option, the Court stated:

> Following up with regular mail might also increase the chances of actual notice to Jones if—as it turned out—he had moved. Even occupants who ignored certified mail notice slips addressed to the owner (if any had been left) might scrawl the owner's new address on the notice packet and leave it for the postman to retrieve, or notify Jones directly.

Id. at 235, 126 S. Ct. at 1719, 164 L. Ed. 2d at 431; s*ee also Griffin*, 941 A.2d at 484 ("The Maryland scheme assumes a worst case scenario, that the certified mail would be undeliverable, therefore first-class mail notice is necessary in conjunction with the certified mail, even if the certified mail is delivered successfully."). However, the Court declined to prescribe the form of additional

service to be adopted. *Jones*, 547 U.S. at 238, 126 S. Ct. at 1721, 164 L. Ed. 2d at 433.[3]

Jones rejected the notion that due process required the homeowner to receive actual notice. *Id.* at 226, 126 S. Ct. at 1713, 164 L. Ed. 2d at 425. Instead, the Court stated that due process simply required the government to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 226, 126 S. Ct. at 1713–14, L. Ed. 2d at 425 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865, 873 (1950)). Although the Court required the Commissioner to take additional steps to notify the landowner, it did so only because the government knew that its first and only notice failed. *Id.* at 226–32, 126 S. Ct. at 1714–18, 164 L. Ed. 2d at 425–29.

The summary judgment record in this case does not reveal a similar failure of notice. Unlike *Jones*, where notice was only sent by certified mail, HF05 simultaneously sent its notices by certified mail and by regular mail and there was no indication that the regularly mailed notice came back as undeliverable. *See Griffin*, 941 A.2d at 487 n.14 ("If first-class mail is undeliverable, it is returned to the sender. At which point, the sender knows that notice was not received.")*; Borkon v. City of Philadelphia*, No. 04-5823, 2008 WL 4058694, at *3 (E.D. Pa. Aug. 29, 2008) ("There is no evidence that the petition

[3] The Court noted that Arkansas later amended its statute to require notice by personal service if certified mail was returned. *Jones*, 547 U.S. at 236, 126 S. Ct. at 1719, 164 L. Ed. 2d at 432. The court remanded for proceedings consistent with the opinion. *Id*. at 239, 126 S. Ct. at 1721, 164 L. Ed. 2d at 434.

and rule notices sent to the Gladwyne address by regular mail came back. These notices are presumed to have been received."). Because HF05 used two notification methods calculated to apprise Nicholson of her redemption rights and learned that only one of them failed, due process did not require it to take additional steps to notify Nicholson. *See Dusenbery v. United States*, 534 U.S. 161, 172–73, 122 S. Ct. 694, 702, 151 L. Ed. 2d 597, 608 (2002); *Ho v. Donovan*, 569 F.3d 677, 680 (7th Cir. 2009) ("The Constitution does not require that an effort to give notice succeed. If it did, then people could evade knowledge, and avoid responsibility for their conduct, by burning notices on receipt—or just leaving them unopened, as Ho did . . . . [E]ven delivery in-hand by a process server does not compel the recipient to read a notice." (citation omitted)); *Griffin*, 941 A.2d at 484 n.11 ("Our holding would be different, however, had the first-class mail notices been returned undelivered.").

We reach this conclusion notwithstanding *Plummer*, which held a notice provision under our landlord/tenant act unconstitutional because the statutory scheme deemed notice complete upon mailing and because the short time frame between the order setting hearing and the hearing itself made it less likely that timely notice by certified mail would be received. *Plummer*, ___ N.W.2d at ___. Although section 447.9 also deems notice effective upon mailing, the fact that two notices are required and were sent in this case, and the fact that the homeowner's property rights would not immediately be affected, render this statutory scheme as applied to the facts of this case constitutional.

We affirm the district court's decision to grant HF05's summary judgment motion.

AFFIRMED.