STATE OF MICHIGAN

COURT OF APPEALS

ROBERT F. LaPOINT,

Plaintiff/Counterdefendant-Appellant,

v

PHILLIP HEILMAN and LOIS HEILMAN,

Defendants/Counterplaintiffs-Appellees.

UNPUBLISHED
November 12, 1999

No. 209605
Chippewa Circuit Court
LC No. 95-001931 CK

Before: Griffin, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals from orders of the circuit court granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(5) and (8) and denying plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

Defendants in this case are the holders of a 1978 tax deed to forty acres of undeveloped land in Chippewa County. Plaintiff filed suit to extinguish defendants' title to the property, alleging that defendants had failed to comply with the statutory notice requirements necessary to perfect the tax deed. Plaintiff bases his interest in the property on five quit claim deeds he obtained from the alleged heirs of the original property owners, Daniel and Maud Ortago .

The last record title holder was Maud Ortago, who died in the Province of Ontario, Canada, on August 26, 1960. Mrs. Ortago's last known address in 1978 was in Oakland County, though, according to plaintiff, she was living in Chippewa County at the time of her death.

Plaintiff first argues that the trial court erred in denying plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff contends that defendants failed to comply with the notice provisions in MCL 211.140; MSA 7.198, and thus were not entitled to take possession of the property in dispute under MCL 211.73a; MSA 7.119. We agree. This Court reviews a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

This dispute may be resolved by focusing narrowly on plaintiff's claim that defendants did not obtain a certified return from the sheriff of Chippewa County indicating that the sheriff was unable to locate the last grantee of record or the heirs, and that this failure to serve notice on those with an interest in the property invalidated defendants' notice by publication. We agree that defendants' failure to strictly comply with this portion of the statute nullifies their rights under the tax deed.

MCL 211.140(1); MSA 7.198(1) requires notice to be given to the last grantee or grantees in the regular chain of title. It specifically requires that that notice be served by the sheriff of the county in which the land is located:

> A writ of assistance or other process for the possession of land the title to which was obtained by or through a tax sale, except if title is obtained under section 131, shall not be issued until 6 months after there is filed with the county treasurer of *the county where the land is situated*, a return *by the sheriff of that county* showing service of the notice prescribed in subsection (2). [MCL 211.140(1); MSA 7.198(1); emphasis added.]

Thus, notice was required to be given by the sheriff of Chippewa County, the county where the property is located. There is a provision for allowing a sheriff of another county to provide service where the grantee lives in a different county:

> If the grantee or grantees, or the person or persons holding the interest in the land as prescribed in subsection (1) are residents of a county of this state other than the county in which the land is situated, the return as to that person shall be made by the sheriff of the county where that person or persons reside or may be found. [MCL 211.140(3); MSA 7.198(3).]

Thus, had Mrs. Ortago been living in Oakland County when defendants endeavored to serve the notice required under the statute, then actual service on her by the Oakland County Sheriff would be adequate. However, Mrs. Ortago was not, in fact, a resident of Oakland County at the time, having died nearly twenty years before. Furthermore, nothing in subsection (3) indicates that that subsection is applicable merely when the grantee's last known address is in a different county. For that matter, the statute suggests that substituted service is appropriate only when the sheriff of the county in which the property is located makes a return that the grantee cannot be located:

> If the *sheriff of the county where the land is located* makes a return that after careful inquiry the sheriff is unable to ascertain the whereabouts or the post-office address of the persons upon whom notice may be served as prescribed in this section. [sic] The notice shall be published for 4 successive weeks, once each week, in a newspaper published and circulated in the county where the land is located, if there is one. [MCL 211.140(5); MSA 7.198(5).]

We read subsection (5) as providing that service by publication is triggered by a return from the sheriff of the county in which the property is located indicating that the grantee cannot be located, not the return of the sheriff of the county in which it is thought that the grantee may reside.

In other words, section 140 requires service by the sheriff of the county in which the land is located, with an exception that allows for service by the sheriff of the grantee's county of residence where the grantee is found to live in another county in this state. Because Mrs. Ortago was not, in fact, found to be residing in Oakland County in 1978, the Oakland County Sheriff could not serve notice upon her. Furthermore, service by publication was authorized under subsection (5) only after the Chippewa County Sheriff returned service that he could not locate Mrs. Ortago.

The fact that the wrong sheriff was employed is relevant because strict compliance with the statute is required. As this Court noted in *Andre v Fink*, 180 Mich App 403, 407-408; 447 NW2d 808 (1989):

> Michigan courts have long held that, because the effect of proceedings under the tax law is to divest the true owners of their title to property, strict compliance with the notice requirements of the statute is required. *McVannel v Pure Oil Co*, 262 Mich 518, 522; 247 NW 735 (1933); *St Helen's Resort Ass'n, Inc v Hannan*, 321 Mich 536, 543; 33 NW2d 74 (1948); *Stein v Hemminger*, 165 Mich App 678; 419 NW2d 50 (1988), lv den 430 Mich 896 (1988). Defendants' failure to serve notice on the last recorded grantees in the regular chain of title bars defendants from asserting title by reason of their tax deed and tolls the running of the six-month redemption period. MCL 211.73a; MSA 7.119. The fact that an unserved interest is void or has been extinguished, as was the Swishers', is irrelevant to the necessity of serving them notice. *Watters v Kieruj*, 242 Mich 537; 219 NW 673 (1928); *United States v Varani*, 780 F2d 1296, 1299 (CA 6, 1986).

In *Andre*, the plaintiff had purchased the property in question on land contract from the Swishers in 1963. The Swishers deeded the property to plaintiff in 1982, which deed was not recorded, leaving the Swishers as the last grantees in the regular chain of title. The defendants purchased the property at tax sale in 1985. This Court held that the defendants failed to comply with MCL 211.140; MSA 7.198 because they had not served notice on the Swishers, concluding that the statute required such notice because the Swishers were the last grantees of record. The fact that their interest had, in fact, been previously transferred was irrelevant.

Also instructive is the decision in *Stockwell v Curtis*, 279 Mich 388; 272 NW 717 (1937). In *Stockwell*, the notice was served by the defendant's attorney rather than by the sheriff. It was undisputed that the notice was actually received. The trial court ruled that there was substantial compliance with the statute. The Supreme Court reversed, noting that substantial compliance was inadequate and that there must be strict compliance, relying on *Teal Lake Iron Mining Co v Olds*, 178 Mich 335; 144 NW 845 (1914) (wherein a notice was held to be inadequate where it overstated the amount required for redemption by 89 cents).

We are of the opinion that if actual notice fails to comply with the statute because it was given by the wrong person, then it must surely follow that that the failure to give notice by the wrong person must also be inadequate to trigger substituted service.

Furthermore, MCL 211.73a; MSA 7.119 sets out the penalty for failing to give notice within the required time period:

> In case of a failure to give the required notice for reconveyance within the period of 5 years from the date the purchaser, his heirs or assigns shall become entitled to a tax deed to be issued by the auditor general, the person or persons, claiming title under tax deed or certificate of purchase shall be forever barred from asserting that title or claiming a lien on the land by reason of a tax purchase . . . .

Because defendants' right to claim under the tax deed was "forever barred" by their failure to give the required notices within five years, summary disposition to defendants on the basis of the tax deed was inappropriate.[1]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff may tax costs.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Michael R. Smolenski

[1] We need not, and do not, address what interest, if any, was in fact conveyed to plaintiff by the purported heirs of Maud Ortago. We merely conclude that defendants have lost their claim under the tax deed by failing to give notice as required by statute. We need not and do not address who has rightful title to the property beyond concluding that defendants do not under the tax deed. If defendants have any other basis for asserting ownership, such as adverse possession (which was discussed at oral argument), they may raise it on remand. .