IN THE COURT OF APPEALS OF IOWA

No. 7-277 / 06-1766
Filed June 13, 2007

AGNES M. THACKER and JOHN M. THACKER,
Plaintiffs-Appellants,

vs.

ROBERT L. THACKER and FRANCES M. THACKER, BETTY WATERHOUSE, JOHN GREEN and JOAN GREEN GOLDAPP, EDNA ROBERTS, RICK THACKER, BRIAN THACKER, LAURA SAMUELS, a/k/a LAURA SAMMUELS and WILLIAM SAMUELS, GEORGE THACKER, DOUG THACKER, TIM THACKER and FARM CREDIT SERVICES OF AMERICA (FLCA),
Defendants-Appellees.

Appeal from the Iowa District Court for Muscatine County, James E. Kelley, Judge.

The plaintiffs appeal the district court's order granting summary judgment in favor of the defendants Robert and Frances Thacker and dismissing the claims against these defendants. **AFFIRMED.**

Timothy L. Baumann, Christopher L. Surls, and William B. Norton of Wm. B. Norton Law Firm, Lowden, for appellants Agnes Thacker and John Thacker.

Kenza B. Nelson and Eric M. Knoernschild of Stanley, Lande & Hunter, P.C., Muscatine, for appellees Robert and Frances Thacker.

Thomas H. Burke of Whitfield & Eddy, P.L.C., Des Moines, for appellee Farm Credit Services of America (FLCA).

Joan Goldapp, Milwaukee, Wisconsin, pro se.

Edna Roberts, Mt. Pleasant, pro se.

Laura Samuels, Muscatine, pro se.

Rick Thacker, Oakville, pro se.

Brian Thacker, Mt. Pleasant, pro se.

George Thacker, Keosauqua, pro se.

Doug Thacker, Muscatine, pro se.

Tim Thacker, Muscatine, pro se.

Betty Waterhouse, Mediapolis, pro se.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

VOGEL, J.

Agnes Thacker and John Thacker, plaintiffs, appeal from the district court's order granting summary judgment to the defendants, Robert and Frances Thacker. Because we agree with the district court that the statute of limitations had run, thereby barring plaintiff's attempt to bring a partition action as to certain farm real estate, we affirm.[1]

The plaintiffs, Agnes and John Thacker, are brother and sister and co-executors of their brother, James Thacker's estate. The defendant, Robert Thacker, is also a brother of the plaintiffs and of the decedent; Frances is Robert's wife. For over thirty years Robert and James were engaged in a farm partnership known as the "Thacker Brothers' Partnership." The brothers operated informally, without a written partnership agreement, sharing the income and expenses of the partnership on a 50-50 basis. Both brothers worked on the various farms they owned as tenants in common, but James was primarily responsible for keeping the books and handling most business matters.

The Altekruse Farm was purchased on an installment contract in February 1972 by James and Robert. On March 7, 1987, the sellers gave a warranty deed to "James A. Thacker and Robert L. Thacker" in full satisfaction of the contract. On March 20, 1987 another warranty deed was executed by James, Robert, and Frances, conveying "an undivided interest in" the Altekruse Farm to "Robert L. Thacker and Frances M. Thacker, husband and wife." In early 1994, James

[1] The remaining defendants were named as part of the original petition, seeking to partition other land owned in part by James. As those issues have been resolved, they are not part of this appeal. In addition, we note the plaintiffs brought this action, not as executors of James's estate, but rather in their individual capacity.

mentioned to attorney John Hintermeister that he thought there was a mistake in the deed to the Altekruse Farm. Hintermeister, who had drafted the 1987 deed, wrote to Robert and Frances on April 5, 1994, conveying James's concerns. Hintermeister wrote again to Robert and Frances on October 10, 1995, suggesting he meet with James, Robert, and Frances to discuss the concerns. No such meeting ever occurred. Additional correspondence between Hintermeister and another attorney, James Keele, occurred in 1997; however, once again, no action was taken. After James's death in 2004, the plaintiffs brought suit against Robert and Frances, seeking to partition certain real estate. Part of this property included any alleged interest James held in the Altekruse Farm at his death. Agnes and John claimed the 1987 conveyance to Robert and Frances was a mistake and requested the district court to reform the deed. Robert and Frances moved for summary judgment on several grounds, including the running of the applicable statute of limitations. The district court granted the motion, finding the 1987 warranty deed unambiguous, that it conveyed title to Robert and Frances, and concluding the ten-year statute of limitations had run prior to the filing of the petition. It also rejected the plaintiffs' claims of adverse possession,[2] laches, and estoppel by acquiescence. The plaintiffs appeal.

We review summary judgment motions for correction of errors at law. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007). Summary judgment is appropriate only when the entire record demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.*

[2] The plaintiffs do not assert error on appeal as to the adverse possession claim.

The plaintiffs contend that the district court erred when it found the statute of limitations period had run and barred their partition action as to the Altekruse Farm. Iowa Code section 614.17A governs plaintiffs' claim and provides among other things that, "an action shall not be maintained . . . in order to recover or establish an interest in or claim to real estate if . . . (a) The action is based upon a claim arising more than ten years earlier or existing for more than ten years." *See also* Iowa Code § 614.1(5) (1985) (setting forth a ten-year limitation period for "the recovery of real property"); *Gibson v. Gibson*, 217 N.W. 852, 854-855 (Iowa 1928) (holding the test of whether a proceeding is an "action to recover real estate" within the statute of limitations at Code 1927, § 11007(6) [currently 614.1(5)] is whether the petition seeks right to, title in, or possession of realty); *Tilton v. Bader*, 181 Iowa 473, 475, 164 N.W. 871, 874 (1917) (noting that an action for the "recovery of real property" need not be for possession, but is sufficient if it is for an adjudication of the title). The district court found that the ten-year period had run prior to the plaintiffs' petition which was filed in September 2005.

The heart of the plaintiffs' claim in this case centers on the right and title, if any, held by James in the Altekruse Farm at the time of his death in 2004. They argue that the 1987 deed only intended to convey Robert's interest to himself and his wife, even though James was a grantor and signed the deed as such. They claim any other result from the conveyance was a mistake and the deed should be reformed. The deed at question was executed and recorded in March 1987, at which time James's claim accrued as he then had the right to bring a cause of action. *See Weiser v. McDowell*, 93 Iowa 772, 774, 61 N.W. 1094,

1096 (1895) (stating a cause of action does not "accrue" within statute of limitations until plaintiff is entitled to sue thereon). Therefore, the statute of limitations ran as early as ten years later, March 1997.

Plaintiffs counter that the discovery rule applies, that is, the claim period begins when the cause of action is discovered or when by the exercise of reasonable diligence it should have been discovered, whichever is earlier. *Franzen v. Deere and Co.*, 334 N.W.2d 730, 732 (Iowa 1983). The record at summary judgment indicates that James had actual knowledge of an alleged problem or mistake with the deed conveying the Altekruse Farm as early as March or April 1994. He contacted attorney Hintermeister at that time to investigate the situation, but no action was ever taken by James to pursue his concerns. At that point James had actual knowledge that he may have an action to recover an interest in the Altekruse Farm, thereby accruing his claim under the discovery rule as of March or April 1994. *See Garst v. Brutsche*, 129 Iowa 502, 504, 105 N.W. 452, 453 (1905) (holding where a plaintiff, knowing of a mistake in the description of a deed but remained silent for nearly sixteen years, was barred by limitation provision of ten years for the recovery of real property at code sections 3447, 3448 [currently 614.1(5)]). The ten-year period would thus have run in March or April 2004, barring any claim to quiet title or as later brought by the plaintiffs in September 2005 in a partition action. Even assuming the later date of 1994, the district court correctly granted summary judgment as a matter of law for the defendants based upon the limitation period of Iowa Code section 614.17A. We therefore affirm.

The remaining issues as to laches, estoppel, and the alleged ambiguity of the deed either lack merit or are rendered moot by our decision, affirming the district court on the statute of limitations issue.

AFFIRMED.

Vogel, J. and Miller, J. concur. Sackett, C.J., dissents.

SACKETT, C.J.

I respectfully dissent. I would reverse and remand.

The question in this appeal is what interests did James A. Thacker and Robert and Frances Thacker have at the time of James's death in 2004 in approximately 160 acres in Muscatine County, Iowa. Plaintiffs, two heirs of James, filed this action contending James had an interest in this land at the time of his death. Defendants Robert and Frances Thacker claim James had no interest. They filed a motion for summary judgment claiming that because James executed a warranty deed on March 20, 1987, they owned the land free and clear of any claims by James's estate. The district court sustained the motion, finding for a number of reasons that James had no interest in the land at the time of his death or if he did, the statute of limitation precluded the plaintiffs from claiming James's interest. The majority has affirmed, finding the statute of limitation has run on the claim made by plaintiffs. For reasons set forth below, I disagree. I would reverse and remand.

Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. No fact question exists if the only dispute concerns the legal consequences flowing from undisputed facts. *In re Estate of Beck v. Engene*, 557 N.W.2d 270, 271 (Iowa 1996).

It is undisputed that decedent and Robert farmed in a fifty-fifty partnership for a number of years. As partners they purchased the land in question on contract in 1972 and on March 7, 1987, the sellers in performance of the contract

executed and delivered a warranty deed for the property to "James A. Thacker and Robert L. Thacker."

Then on March 20, 1987, a warranty deed for the property from "James A. Thacker and Robert Thacker and Frances M. Thacker, husband and wife" was executed and delivered to "Robert L. Thacker and Frances M. Thacker, husband and wife" conveying "*an undivided interest* in" the property. (emphasis supplied). The deed further provided: "The actual consideration for this conveyance is less than $500.00, and it is exempt from Declaration of Value under exemption #11."[3] No other exemption was sought.

This deed is ambiguous. First, at the time the deed was executed James owned an undivided one-half interest in the property. The deed only conveyed "an undivided interest". The interest conveyed, if any, is not defined. Therefore one cannot conclude that the deed conveyed either an undivided one-half interest or all of James's interest. Second, the exemption from transfer tax referenced in the deed applies only to the transfer of Robert's interest to Frances, his wife.[4] This raises the question of whether James signed the deed only to affirm Robert's transfer of Robert's undivided one-half interest to an undivided one-fourth interest in Robert and an undivided one-fourth interest in Frances.

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[3] Iowa Code § 428A.2(11) (2007). Exceptions

> The tax imposed by this chapter shall not apply to:
> . . .
> 11. Deeds between husband and wife, or parent and child, without actual consideration. A cancellation of indebtedness alone which is secured by the property being transferred and which is not greater than the fair market value of the property being transferred is not actual consideration within the meaning of this subsection.

[2] *Id.*

Third, the deed's unclear language leads to the concern of why Frances joined in the transfer if the deed were merely to transfer James's interest to her and Robert.

To determine what interest was conveyed by that ambiguous March 20, 1987 deed one must resort to extrinsic evidence.

That said, I also disagree with the majority's conclusion that the statute of limitation has run. James's heirs are not seeking to establish or recover an interest in land in which Robert and Frances have title to the entire fee. For the court to find Frances and Robert have title to the entire fee, the court would need to add words to the deed providing that James transferred an undivided one-half interest. A court can neither put words into a deed that are not there nor put a construction on the words directly contrary to the plain sense of them. *Schenck v. Dibel*, 242 Iowa 1289, 1291, 50 N.W.2d 33, 35 (1951). The March 20 deed did not by its terms convey all of James's undivided one-half interest to Robert and Frances. The title as it now stands shows that James, at the time of his death, had not divested himself of all of his interest.

This is an action to clarify an interest rather than to establish or recover an interest. Furthermore, despite the time period that has passed since the March 20 deed was executed and delivered, there can be no claim of adverse possession of James's interest by Robert and Frances. Since the evidence shows that James and Robert treated the property as being owned by the partnership from the time before the deed was executed through the time of James's death in 2004, the applicable period necessary to prove adverse possession cannot be shown.