IN THE COURT OF APPEALS OF IOWA

No. 7-615 / 06-2065
Filed November 29, 2007

CITY OF McCALLSBURG,
Plaintiff-Appellee,

vs.

RICHARD THOMPSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Michael J. Moon, Judge.

Defendant appeals district court order granting plaintiff's motion for partial summary judgment. **AFFIRMED.**

Richard O. Parker of Parker Law Firm, Nevada, for appellant.

Ivan T. Webber of Ahlers & Cooney, P.C., Des Moines, for appellee.

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

PER CURIAM

Richard Thompson appeals the district court order granting the City of McCallsburg's motion for partial summary judgment. We affirm.

I. Background Facts and Prior Proceedings

This case is the latest in an ongoing dispute between Thompson and the City of McCallsburg (City). In an earlier case, the City obtained a monetary judgment against Thompson and executed against Thompson's real estate to satisfy the judgment. The real estate was sold at sheriff's sale on January 6, 2004. The City was the highest bidder. On April 20, 2005, the sheriff issued sheriff's deeds to the City for twelve parcels of real estate. In June 2005 the City served Thompson a letter notifying him to remove his personal property—primarily salvaged automobiles and scrap metal—within thirty days.

Thompson responded by filing an "Application to Rescind Sheriff's Deeds and Authorize Redemption." The court granted Thompson's request for rescission as to six of the parcels, but denied rescission of the sheriff's deed as to the other six parcels. Neither party appealed this order.

In January 2006 the City filed the present action requesting the court to (1) order Thompson to vacate seven parcels of property, (2) enjoin him from further use of the properties, and (3) enter a judgment against Thompson for the amount of the reasonable rental value for such time as Thompson has remained in unlawful occupation of the properties. Thompson answered the petition with a general denial.

On August 4, 2006, the City filed a motion for partial summary judgment claiming Thompson's actions "constitute trespass as a matter of law." Thompson

filed a brief resistance denying the arguments made in the City's motion. Thompson attached a copy of his answers to interrogatories propounded by the City and alleged that the City was attempting to take his property without fair, adequate, or just compensation. He also claimed the City was barred from equitable relief under the "'clean hands' doctrine."

On November 14, 2006, the court held an unrecorded hearing on the motion for partial summary judgment. Two days later, the district court entered an order granting the City's motion. The court explained that the City had orally amended its petition to seek only injunctive relief against Thompson for the removal of the personal property from six of the seven parcels listed in the original petition. The court ruled "the continued existence of the personalty on the subject real estate constitutes a trespass" and that injunctive relief was a proper remedy for the trespass. The court also dismissed Thompson's clean hands argument by stating

> A pursuit of that defense would require this court to go behind the deeds which were issued by the Sheriff following judicial sale and permit defendant to breathe life into those issues which have now merged in the judgment entered in the previous case. The court simply is not going to engage in that exercise. Defendant's remedy for testing the validity of the sale was in that prior case. He will not be allowed to attack collaterally the judgment and subsequent sale in this case.

Ultimately, the court ordered Thompson to remove all personal property from the real estate within ninety days.

One day after the court entered its order, Thompson filed a "Memorandum of Law" addressing the maxim of clean hands. Thompson also filed a copy of a

quit claim deed and four pages of purported records from the assessor. Thompson then filed a notice of appeal.

On appeal, Thompson raises four claims challenging the court's ruling: (1) the court erred when it relied on the sheriff's deeds because Thompson offered evidence that some of the properties were owned by third parties, (2) there was no trespass because the City failed to prove it had actual possession of the property, (3) the court failed to allow evidence of unclean hands, (4) the court erred because it did not allow Thompson to fairly litigate the factors set forth in *Nichols v. City of Evansdale*, 687 N.W.2d 562, 572 (Iowa 2004), before it granted the City's motion for injunctive relief.

II. Standard of Review

We review the district court's summary judgment rulings for the correction of errors at law. *City of Cedar Rapids v. James Props.*, *Inc.*, 701 N.W.2d 673, 675 (Iowa 2005). In determining whether summary judgment is proper, we examine the record in the light most favorable to the nonmoving party and draw all legitimate inferences the evidence bears in order to establish the existence of questions of fact. *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349, 353 (Iowa 2005).

III. Error Preservation

Before an issue may be raised and adjudicated on appeal, the issue must have been raised before and decided by the district court. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). When the district court fails to resolve an issue, claim, or other legal theory properly submitted for adjudication, a party must file a post-ruling motion bringing the omission to the court's attention. *Id.* If the party fails to do so, error will not be preserved. *Id.* at 537.

As noted in *Otterberg v. Farm Bureau Mutual Ins. Co.*, 696 N.W.2d 24, 27 (Iowa 2005), a non-moving party need not file a resistance to a motion for summary judgment because the burden is on the moving party to prove there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. Thus, the non-moving party "can rely upon the district court to correctly apply the law and deny summary judgment when the moving party fails to establish it is entitled to judgment as a matter of law." *Otterberg*, 696 N.W.2d at 27-28. However, if the movant failed to establish its claim and the court nevertheless enters judgment, "the nonmovant must at least preserve error by filing a motion following entry of judgment, allowing the district court to consider the claim of deficiency." *Id.* at 28 (quoting *Bill Grunder's Sons Constr., Inc. v. Ganzer*, 686 N.W.2d 193, 197 (Iowa 2004)). "Simply stated, counsel must take necessary measures to construct a record in order to preserve error for appellate review." *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002) (quoting Robert G. Allbee and Kasey W. Kincaid, *Error Preservation in Civil Litigation: a Primer for the Iowa Practitioner*, 35 Drake L. Rev. 1, 2 (1985-86)).

The hearing on the summary judgment motion was unrecorded and Thompson affirmatively chose not to prepare a statement of the evidence or proceedings pursuant to rule 6.10(3) of the Iowa Rules of Appellate Procedure.[1]

[1] Rule 6.10(3) allows an appellant the chance to have a record on appeal when the lower court does not report or record the proceedings:

> If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be filed with the clerk of the district court and served on appellee within 20 days after the filing of the notice of appeal. Appellee may file with the clerk of the district court and serve on appellant objections or proposed amendments to the statement

The only indication as to what was argued to the district court comes from the order ruling on the motion. This order does not address most of the arguments Thompson now urges on appeal. For example, the order does not address Thompson's argument that the City never had possession of the properties in issue. The order does not address Thompson's claim that one of the six parcels of property was owned, at least in part, by parties not involved in the litigation. And finally, the order does not address Thompson's claim that a court must address the factors set forth in *Nichols* before it grants injunctive relief.

Thompson did not file any type of post-ruling motion asking the court to address these issues, and there is nothing in the record to suggest that these issues were even raised before the district court. *See F.W.S.*, 698 N.W.2d at 135 ("It is the appellant's duty to provide a record on appeal affirmatively disclosing the alleged error relied upon. The court may not speculate as to what took place or predicate error on such speculation." (internal citation omitted)).

Because it "is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider," we "protect the district court from being ambushed by parties raising issues on appeal that were not raised in the district court." *De Voss*, 648 N.W.2d at 60-63 (citation omitted). Accordingly, it would be improvident for this court to review these

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> within 10 days after service of appellant's statement. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included in the record on appeal.

A stipulation setting forth what issues were discussed before the district court is not sufficient. *In re F.W.S.*, 698 N.W.2d 134, 136 n.1 (Iowa 2005). The unrecorded or unreported record must be settled and approved by the lower court. *Id.* "Such approval is not merely ministerial, but provides the lower court an opportunity to ensure the accuracy of the statement." *Id.*

issues when there is nothing in the record to verify these issues were raised before the district court, let alone ruled upon by the district court.

If Thompson believed the City failed to prove it was in possession of the property, that the court had ignored evidence relating to property ownership by third parties, and that the court was required to justify the use of injunctive relief by applying the *Nichols* factors, he was obligated to alert the trial court of its failure to rule on these issues by filing a motion following entry of judgment. *Meier*, 641 N.W.2d at 537-39. Because Thompson filed no such motion, these issues were not preserved for our review. *See Bill Grunder's Sons*, 686 N.W.2d at 198.

IV. Clean Hands

The only remaining issue raised in Thompson's brief pertains to his claim that the court erred in failing to consider or allow evidence of the City's "unclean hands." The maxim of clean hands

> expresses the principle that where a party comes into equity for relief he or she must show that his or her conduct has been fair, equitable, and honest as to the particular controversy in issue. A complainant will not be permitted to take advantage of his or her own wrong or claim the benefit of his or her own fraud or that of his or her privies.

Opperman v. M. & I. Dehy, Inc., 644 N.W.2d 1, 6 (Iowa 2002) (quoting 27A Am. Jur. 2d *Equity* § 126, at 605 (1996)). What underlies the maxim is the principle that "equity will not aid an applicant in *securing or protecting* gains from wrongdoing or in escaping its consequences." *Id.* This maxim is invoked to protect the integrity of the court where granting affirmative equitable relief would

run contrary to public policy or lend the court's aid to fraudulent, illegal, or unconscionable conduct. *Myers v. Smith*, 208 N.W.2d 919, 921 (Iowa 1973).

"Generally, the clean hands doctrine applies to actions by which a party acquires the claim which it presses." *Anita Valley, Inc. v. Bingley*, 279 N.W.2d 37, 41 (Iowa 1979). "What is material is not that the plaintiff's hands are dirty, but that he dirtied them in acquiring the rights he now asserts." *Id.* (quoting *Republic Molding Corp. v. B. W. Photo Utils.*, 319 F.2d 347, 349 (9th Cir. 1963)). The claimed inequitable conduct giving rise to unclean hands must relate to the transaction in litigation. *See Butler v. Butler,* 253 Iowa 1084, 1125-26, 114 N.W.2d 595, 619-20 (1962). The defense of unclean hands is not favored by our courts. *Id.* at 1125, 114 N.W.2d at 619.

In his appellate brief, Thompson claims the court should not have granted the City's requested relief because the City's prior actions were "wrongful, unfair and unconscionable." Thompson contends the City's hands are unclean because it: (1) rejected his attempts to pay his debt, (2) denied his good faith efforts to redeem his properties, (3) broke into his real estate without proper notice or legal process, (4) entered his real estate without valid court orders, and (5) prevented him from taking pictures of the theft of his personal property from the real property.

Our review of the prior ruling on Thompson's "Application to Rescind Sheriff's Deeds and Authorize Redemption" reveals that the district court rejected the first two allegations when it ruled Thompson's efforts to redeem the parcels sold at sheriff's sale were untimely. Thompson renews these claims on appeal

by stating it was not fair or honest for the City to collect on its judgment by executing against his salvage yard.

The record reveals that the City obtained a monetary judgment against Thompson in 2001. Over a period of nearly five years, the City followed the judicial process to exercise its rights as a judgment creditor to collect its monetary judgment. Thompson had ample time to redeem his property after the sheriff sale, but he neglected to do so in a timely manner. We find his argument that the City made "malicious" use of the judicial process to gain control of his real estate meritless because there is nothing to suggest the City obtained title to these properties by fraud or bad acts.

Thompson's remaining allegations, even if presumed to be true, have no bearing on the current case because none illustrate how the City was trying to take advantage of its own wrong or claim the benefit of its own fraud to prove its trespass claim. The City's alleged misconduct does not relate to the subject of this litigation; therefore, the maxim of clean hands is inapplicable. *See id.* at 1125-26, 114 N.W.2d at 619-20. The court did not err when it refused to consider additional evidence to support these allegations.

AFFIRMED.