STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM J. FOGNINI,

Plaintiff-Appellee,

v

MICHAEL L. VERELLEN and NICHOLAS A. VERELLEN,

Defendants-Appellants.

UNPUBLISHED
March 25, 2003

No. 235453
Oakland Circuit Court
LC No. 00-028208-CH

Before: Markey, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

In this action to quiet title, the trial court granted summary disposition in favor of plaintiff on March 28, 2001, for tax years 1993, 1994, and 1995. Defendants appeal as of right. We reverse and remand for proceedings consistent with this opinion.

Defendants first argue that this action is barred by the doctrine of res judicata. We disagree. The applicability of res judicata is a question of law which is reviewed de novo on appeal. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). Res judicata requires that: (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the second case was or could have been resolved in the first; and (4) both actions involved the same parties or their privies. *Baraga County v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

There is no dispute that the prior action was a final decision on the merits, as a final judgment was entered in that case. Further, the fact that the judgment was appealed does not eliminate its res judicata effect. *City of Troy Bldg Inspector v Herchberger*, 27 Mich App 123, 127; 183 NW2d 430 (1970). Also, both actions involved the same parties in adversarial roles. *York v Wayne County Sheriff*, 157 Mich App 417, 426; 403 NW2d 152 (1987). Plaintiff asserts that because the parties in the previous action were not exactly the same as the parties to this action, res judicata does not apply. However, the parties need only be substantially identical. *In re Humphrey Estate*, 141 Mich App 412, 434; 367 NW2d 873 (1985).

The test to determine whether the two actions involve the same subject is whether the facts are identical in both actions or whether the same evidence would sustain both actions. If the same facts or evidence would sustain both, the two actions are the same for the purpose of res judicata. *Huggett v DNR*, 232 Mich App 188, 197-198; 590 NW2d 747 (1998). This case did involve tax deeds for different tax years, but more importantly, the facts surrounding notice to defendants and the subsequent redemption period were entirely different in the first action. If different facts or proofs would be required, res judicata does not apply. *VanDeventer v Michigan Nat'l Bank*, 172 Mich App 456, 464; 432 NW2d 338 (1988).

Defendants next argue that the trial court erred in granting summary disposition in favor of plaintiff because this case was unnecessary as title had already been quieted in plaintiff by virtue of the court's order in the prior suit. We review a circuit court's determination of a motion for summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). The court granted summary disposition pursuant to both MCR 2.116(C)(9) and (C)(10). "When deciding a motion under MCR 2.116(C)(9), which tests the sufficiency of a defendant's pleadings, the trial court must accept as true all well-pleaded allegations and properly grants summary disposition where a defendant fails to plead a valid defense to a claim." *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002).

Under MCR 2.116(C)(10), summary disposition may be granted if there "is no genuine issue as to any material fact, and the moving party is entitled to judgment ... as a matter of law." A court must consider the pleadings as well as affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). Actions to quiet title are equitable in nature and are reviewed by this Court de novo. *Dobie v Morrison*, 227 Mich App 536, 538; 575 NW2d 817 (1998).

One of the reasons the trial court determined that plaintiff's second suit to quiet title was proper was because each tax deed provided an independent right to quiet title. The language of MCL 211.72 is clear; each tax deed does provide an independent right to quiet title. However, although each of the tax deeds plaintiff received for tax years 1993-1995 provided a basis upon which to quiet title, the question is whether it was necessary for plaintiff to quiet title again based on these other tax deeds.

The trial court also reasoned that MCL 211.73a requires the purchaser to perfect title under a tax deed within five years or it expires by operation of law. However, we find that the trial court misconstrued MCL 211.73a. This statute does not require that the holder of a tax deed must file an action to quiet title. Rather, the statute provides that the purchaser of a tax title *must give notice of reconveyance to the proper parties* in compliance with MCL 211.140 within five years of purchase or be forever barred from asserting title, claiming a lien, or securing a tax deed on the property. Given our analysis below, this notice was unnecessary and MCL 211.73a is inapplicable.

Defendants argue that because the court's judgment in the prior action quieted title to the subject property in plaintiff, absolute title to the subject property was vested in plaintiff and this suit was unnecessary. MCL 211.72 provides, in pertinent part,

> The tax deeds convey an absolute title to the land sold, and constitute conclusive evidence of title, in fee, in the grantee, *subject, however, to all taxes assessed and levied on the land subsequent to the taxes for which the land was bid off.* This title also is subject to unpaid special assessments and unpaid installments of special assessments. A person holding a state tax deed of lands executed for nonpayment of taxes may commence an action in the circuit court of the county where the lands lie to quiet his or her title to the land without taking possession of the lands and all parties who have, claim to have, or appear of record in the register's office in the county where the lands are situated to have, any interest in the land or who may be in possession of the land may be made defendants in the action; and no outstanding unrecorded deed, mortgage, or claim shall be of any effect as against the title or right of the plaintiff as fixed and declared by the order made in the case. [Emphasis added.]

Tax titles are available for purchase at the annual tax sale in May when the taxes have been delinquent for three years. MCL 211.60. There is no dispute that defendants did not pay any taxes on the property after 1990. Thus, each year that plaintiff purchased the tax titles, his absolute title was burdened with the liens on the land for the delinquent taxes for the subsequent tax years. Also, all prior liens and encumbrances were destroyed, subject to the owner or lien holder's right to redeem the property within six months of receiving notice of reconveyance. MCL 211.140; *Ottaco, Inc v Gauze*, 226 Mich App 646, 652-653; 574 NW2d 393 (1997).

The court issued a judgment on January 20, 1999, in the first action which was filed in 1997, quieting title in plaintiff for the subject property. Proceedings under the tax law have the effect of divesting the true owners of their title to property. *Andre v Fink*, 180 Mich App 403, 407-408; 447 NW2d 808 (1989). Thus, the effect of this judgment was to judicially recognize that fee simple title had transferred to plaintiff by virtue of the tax deeds. Plaintiff became the record owner of the property.

However, plaintiff's title was still subject to "all taxes assessed and levied on the land subsequent to" 1992. MCL 211.72. Therefore, as of the January 1999 judgment, plaintiff became responsible for any delinquent taxes. Had plaintiff not bought the tax titles for the delinquent taxes, he would still have had to pay off these state liens or find the property liable for sale at the next annual tax sale and find himself in the position of exercising his redemption rights. Therefore, we conclude that, *in general*, it was unnecessary for plaintiff to file this second action to quiet title, as title had already vested in him.[1] To hold otherwise would subject a prior owner who ceased to pay taxes on a piece of property to never-ending litigation. At some point, the chain of title must start anew and the new owner becomes responsible for all the liabilities of the property.

Finally, defendants argue that the summary disposition decision was premature because the prior action was pending on appeal at the time the trial court rendered its decision, and the

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[1] See *Conzelman v Detroit*, 281 Mich 328, 332; 274 NW 811 (1937) (notice of redemption to owner of easement's reversionary interest was unnecessary where prior to time notices were served the plaintiff himself became the possessor of such interest).

court should have granted them summary disposition, presumably under MCR 2.116(C)(6). We agree that the court's decision was premature; however, disagree that dismissal was the proper remedy.

Summary disposition is proper under MCR 2.116(C)(6) where "[a]nother action has been initiated between the same parties involving the same claim."[2] *Sovran Bank, NA v Parsons*, 159 Mich App 408, 412; 407 NW2d 13 (1987). The purpose of this rule is to preclude parties from being harassed by new suits brought by the same plaintiff involving the same questions as those existing in pending litigation. *Fast Air, Inc v Knight*, 235 Mich App 541, 546; 599 NW2d 489 (1999). To be applicable, the first suit must still be pending at the time of the court's decision on the motion for summary disposition. *Id*. at 549. Pendency of an action in an appellate court will constitute pendency of an action for purposes of MCR 2.116(C)(6). *Darin v Haven*, 175 Mich App 144, 151; 437 NW2d 349 (1989). Also, the parties and the issues need not be identical; rather, it is sufficient that the plaintiff and the defendant were parties to both actions, *Chapple v Nat'l Harwood Co*, 234 Mich 296, 299; 207 NW2d 888 (1926), and the suits need only be based on the same or substantially the same cause of action, *J D Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986).

In this case, there is no dispute that the appeal in the prior action was pending at the time the court made its summary disposition ruling in March 2001. Defendants appealed the prior action to this Court in February 1999, and this Court issued its opinion in September 2001. Additionally, plaintiff and defendants were parties to the prior action, which involved an action to quiet title to the same subject property for failure to redeem. The mere fact that this case involves different tax years does not remove the case from being "substantially the same" as the prior action.

However, dismissal of the second suit is not necessarily the appropriate remedy. If there is another action pending, and there is a question whether that suit can and will continue, a stay of the second action pending resolution of the first action should be granted. *Fast Air, supra* at 549; see also *Sovran Bank, supra* at 412. The issue on appeal in the prior action was whether defendants had lost their redemption rights and title could be quieted to the property in plaintiff. Because the outcome of the first action determined the necessity of the continuance of this suit, a stay of the proceedings was the appropriate action to be taken by the trial court.

However, because this Court has already issued its decision in the prior case, this procedure is unnecessary. The essential issue in this case becomes what is the proper remedy at this junction. Had the trial court stayed the proceedings in this case, upon this Court's decision in the prior action, the trial court should have dismissed defendant Michael Verellen as a defendant from this case, given that filing of this suit to quiet title as to defendant Michael Verellen was unnecessary as discussed above. Therefore, in accordance with our powers under MCR 7.216, we reverse and vacate the court's order of summary disposition in favor of plaintiff as to defendant Michael Verellen and order that he be dismissed from this case.

[2] Defendants first raised this issue in their brief opposing plaintiff's motion for summary disposition. Although this defense is supposed to be raised in the party's responsive pleading, MCR 2.116(D)(2), plaintiff addressed it below and the trial court decided the issue. Therefore, we will address it.

In regards to defendant Nicholas Verellen, had the trial court stayed the proceedings, plaintiff might have needed to quiet title in the subject land for tax years 1993-1995, because this Court's determination in the prior action renewed defendant Nicholas Verellen's statutory redemption rights in regards to tax years 1991 and 1992.

It is undisputed that defendants did not redeem their statutory redemption rights in regards to tax years 1993-1995. Plaintiff argues that, therefore, he is entitled to summary disposition. Defendants contend that the notice was ineffectual because, at the time it was given, defendants were not entitled to redeem the property. We agree with defendants.

The trial court issued its order in the prior action, quieting title to the subject property in plaintiff, in January 1999. Defendants are correct in stating that, despite being given notices of reconveyance for tax years 1993-1995, they had no right to redeem. As discussed above, all rights to the property vested in plaintiff when the court issued its January 1999 order and any rights defendants had in the property were cut off. Thus, we conclude that the reconveyance notices served on defendants were effectively void.

This conclusion does not effect defendant Michael Verellen because we have already determined that he should be dismissed from this suit, as his interest in the property was extinguished by operation of the trial court's order in the prior action. However, in regards to defendant Nicholas Verellen, this conclusion may revive his redemption rights for tax years 1993-1995. We say *may* because the effect of this conclusion depends on whether defendant Nicholas Verellen exercised his redemption rights for tax years 1991-1992 after this Court's remand in the prior suit. If he did, then plaintiff must issue a new notice of reconveyance for tax years 1993-1995 to begin the six-month statutory redemption period. If he did not *and* if title has been quieted in plaintiff in regards to defendant Nicholas Verellen based on tax years 1991-1992, then defendant Nicholas Verellen's interest in the property has been extinguished, and the fact that the reconveyance notice for tax years 1993-1995 is void is irrelevant. Accordingly, we remand this case to the trial court for proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Michael R. Smolenski
/s/ Patrick M. Meter