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IN THE
COURT OF APPEALS OF INDIANA

MELISSA D. (UPCHURCH) BLAIR,	)	
	)	
Appellant/Petitioner,	)	
	)	
vs.	)	No. 18A04-0901-CV-45
	)	
YHOM, LLC,	)	
	)	
Appellee/Respondent.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Chris M. Teagle, Judge
Cause No. 18C05-0808-PL-14

September 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Petitioner Melissa Upchurch appeals from the trial court's grant of Appellee/Respondent YHOM, LLC's motion to dismiss her appeal from the issuance of a tax deed to YHOM. We reverse and remand.

FACTS

On October 10, 2006, the Delaware County Auditor sold a parcel of land to YHOM in a tax sale, a parcel of which Upchurch was the owner. On January 11, 2008, the Delaware County Auditor issued to YHOM a tax deed for the parcel. On September 4, 2008, Upchurch filed a petition to set aside the tax deed and complaint for conversion.[1] On October 29, 2008, YHOM filed a motion to dismiss Upchurch's petition and complaint for failure to state a claim upon which relief may be granted, which motion the trial court granted on December 9, 2008.

DISCUSSION AND DECISION

Upchurch contends that the trial court improperly granted YHOM's motion to dismiss for failure to state a claim upon which relief can be granted.

Standard of Review

> In reviewing a 12(B)(6) motion to dismiss, we look at the complaint in the light most favorable to the plaintiff, with every inference drawn in its favor, to determine if there is any set of allegations under which the plaintiff could be granted relief. *King v. S.B.*, 837 N.E.2d 965, 966 (Ind. 2005). A 12(B)(6) dismissal is improper unless it appears to a certainty on the face of the complaint that the complaining party is not entitled to any relief. *Id*. Dismissals under T.R. 12(B)(6) are "rarely appropriate." *Id*. (citing *State Civil Rights Comm'n v. County Line Park, Inc.*, 738 N.E.2d 1044, 1049 (Ind. 2000)). Though Indiana's notice pleading rules do not require the complaint to state all elements of a cause of action, *Miller v. Mem'l Hosp. of S. Bend, Inc.*, 679

[1] Upchurch does not challenge the dismissal of her conversion complaint on appeal.

> N.E.2d 1329, 1332 (Ind. 1997) (citing *State v. Rankin*, 260 Ind. 228, 294 N.E.2d 604, 606 (1973)), the plaintiff must still plead the operative facts necessary to set forth an actionable claim. *Trail v. Boys and Girls Clubs of Nw. Ind.*, 845 N.E.2d 130, 135 (Ind. 2006) (citing *Mem'l Hosp. of S. Bend, Inc.*, 679 N.E.2d at 1332).

State v. Am. Family Voices, Inc., 898 N.E.2d 293, 295-96 (Ind. 2008) (footnote omitted).

In order to set aside a tax deed, the person seeking to do so must allege and then establish at least one of the seven items listed in Indiana Code section 6-1.1-25-16 (2006), which provides as follows:

> A person may, upon appeal, defeat the title conveyed by a tax deed executed under this chapter only if:
>
> (1) the tract or real property described in the deed was not subject to the taxes for which it was sold;
> (2) the delinquent taxes or special assessments for which the tract or real property was sold were paid before the sale;
> (3) the tract or real property was not assessed for the taxes and special assessments for which it was sold;
> (4) the tract or real property was redeemed before the expiration of the period of redemption (as specified in section 4 of this chapter);
> (5) the proper county officers issued a certificate, within the time limited by law for paying taxes or for redeeming the tract or real property, which states either that no taxes were due at the time the sale was made or that the tract or real property was not subject to taxation;
> (6) the description of the tract or real property was so imperfect as to fail to describe it with reasonable certainty; or
> (7) the notices required by IC 6-1.1-24-2, IC 6-1.1-24-4, and sections 4.5 and 4.6 of this chapter were not in substantial compliance with the manner prescribed in those sections.

In order to prevail in an action to set aside a tax deed, a person must prove at least one of the above seven items. *See Leininger v. Gren*, 596 N.E.2d 955, 958 (Ind. Ct. App. 1992) ("The legislative intent is clear from the words of IND.CODE 6-1.1-25-16 that a person may defeat a tax title '*only by proving*' one of the seven defects."), *trans denied*.

Upchurch alleged in her original petition that she did not receive notice of the tax sale and that YHOM was aware that an attempt to notify her by certified mail had been returned. While it is true that due process does not require that a property owner receive actual notice before the government may take her property, *Dusenbery v. U.S.*, 534 U.S. 161, 170 (2002), Upchurch alleges that attempts to give her various notices were nevertheless unconstitutionally inadequate under *Jones v. Flowers*, 547 U.S. 220 (2006), which provides in part as follows:

> We hold 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. Under the circumstances presented here, additional reasonable steps were available to the State.

Id. at 225.

Drawing each possible inference in Upchurch's favor, we conclude that her allegation that she did not receive actual notice of the tax sale is adequate to allege that Indiana Code section 6-1.1-25-16(7), dealing with notice requirements, was not satisfied. Assuming, as we must, that Upchurch did not receive actual notice of the tax sale, it is possible that this was because the notice given her was constitutionally inadequate, and that is all that is required at this stage. *See Dominiack Mech., Inc. v. Dunbar*, 757 N.E.2d 186, 188 (Ind. Ct. App. 2001) ("A motion to dismiss is properly granted only when the allegations present no possible set of facts upon which the plaintiff could recover."). We conclude that Upchurch has stated a claim upon which relief can be granted and that dismissal is therefore inappropriate on Rule 12(B)(6) grounds. We therefore reverse and remand for further proceedings.

The judgment of the trial court is reversed and remanded.

BAILEY, J., and VAIDIK, J., concur.