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IN THE
COURT OF APPEALS OF INDIANA

BRUCE E. FARLOW and SANDRA L. FARLOW,	)	
Appellants-Defendants,	)	
vs.	)	No. 50A03-0810-CV-489
CALVIN A. RALSTON, MARILYN J. RALSTON, CHARLES M. HOUIN and MARVIN L. HOUIN,	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE MARSHALL SUPERIOR COURT
The Honorable Robert O. Bowen, Judge
Cause No. 50D01-0409-PL-28

September 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

In this action to quiet title to real estate, the trial court granted summary judgment in favor of Calvin A. Ralston, Marilyn J. Ralston, Charles M. Houin, and Marvin L. Houin ("the Ralstons") and denied Bruce E. Farlow and Sandra L. Farlow's ("the Farlows") motion for summary judgment. The Farlows appeal, challenging the validity of tax deeds issued in 1971 and 1999 upon which the Ralstons claim title to the real estate. Because the Farlows have designated no evidence showing that they have a property interest in the real estate at issue, we conclude that the trial court did not err by denying their motion for summary judgment. As for the Ralstons' motion for summary judgment, there is a presumption that the tax deeds issued to their predecessors in interest are valid, and the Farlows have no property interest in the contested real estate and cannot challenge this presumption. Thus, the trial court did not err by granting summary judgment in favor of the Ralstons. We affirm the trial court.

Facts and Procedural History[1]

In Marshall County, Indiana, there is a parcel of real estate known as Lot 28 of Thayer's Addition to Lake of the Woods ("Lot 28 of Thayer's Addition"). Lot 28 of Thayer's Addition is located within "the Northeast corner of Lot 1, Section 12, Township 34 North, Range 2 East." Appellants' App. p. 23. Koontz Ditch runs through Lot 28 of

[1] The Farlows include four exhibits in their appellate appendix which were stricken by the trial court. *See* Appellants' Br. p. 18 (copy of order striking Exhibits F, G, J, and K); Appellants' App. p. 74, 75, 82, 83. We have not considered these exhibits.

Thayer's Addition.[2] There is a vacated alley abutting the southwest boundary of Lot 28 of Thayer's Addition. *See id.* at 115.

Ownership of the land surrounding Koontz Ditch has been the subject of dispute in the past. *See Rodgers v. Marks*, 138 Ind. App. 35, 202 N.E.2d 764 (1964). In 1962, a Marshall County trial court entered an order quieting title to certain real estate in favor of Nelson A. and Lula S. Marks, including

> All South of M. Koontz ditch of Lot No. One (1) of Section Twelve (12) Township Thirty four (34) North, Range Two (2) east.
>
> Also all south the M. Koontz ditch of the East half of the North west quarter of the North east quarter of Section Twelve (12) Township Thirty four (34) North, Range Two (2) East, containing Thirty eight acres more or less lying south of the ditch . . . .

Id. at 764. Thus, at that time, title to the portion of Lot 28 of Thayer's Addition extending south of Koontz Ditch was quieted in favor of the Markses. In 1964, this Court affirmed. *Id.* at 765.

The evidence in the record reflects that Marshall County believed that property taxes were not paid on Lot 28 of Thayer's Addition in 1964, 1965, and 1966. Appellants' App. p. 109. Therefore, on August 14, 1967, Lot 28 of Thayer's Addition was sold at a tax sale to Victor O. and Vada L. Leed for $12.95, which was the amount due for taxes, costs, and charges accrued from 1964-1966. *Id.* After the statutory redemption period passed, on August 10, 1971, the Leeds acquired a tax title deed to the entirety of Lot 28 of Thayer's Addition. *Id.* at 109-11. The paperwork pertaining to the tax sale lists Andrew Thayer as the delinquent taxpayer, and the documents make no mention of the

[2] The ditch is alternately called Kuntz Ditch in the record.

Markses. *Id.* at 109, 110. In 1987, ownership of Lot 28 of Thayer's Addition passed to the Leeds' heirs. *Id.* at 112. After a period of time, in 1999, ownership of the property was transferred by way of a tax deed to the Marshall County Commissioners and then to Calvin Ralston by way of a Commissioner's Quitclaim Deed. *Id.* at 114. Calvin Ralston later transferred title to Lot 28 of Thayer's Addition and one-half of the vacated alley abutting the southwest boundary of the real estate to the Ralstons by way of a quitclaim deed. *Id.* at 115.

Meanwhile, in 1968, the Markses obtained a decree from the Marshall Circuit Court vacating the platting of certain lots of Thayer's Addition that they owned. The Decree Vacating the Plat of Lots provides, in relevant part:

> IT IS, THEREFORE, CONSIDERED, ORDERED AND DECREED that *a part of* the plat of Andrew Thayer's Addition in the Northeast corner of Lot 1, Section 12, Township 34 North, Range 2 East, sometimes known as Andrew Thayer's Addition to the Lake of the Woods, and situated in Marshall County, State of Indiana, is vacated, and that the portion thereof hereby vacated is more particularly described as follows:
>
> > *Lots twenty-nine (29) through forty-seven (47) inclusive*, and the alley abutting said lots on the South and West; also *Lots eighty-two (82) through ninety-two (92) inclusive*, that portion of Fourth Street abutting said lots on the West and that portion of the alley abutting said lots on the East; also *Lots ninety-three (93) through One hundred four (104) inclusive*, and the alley abutting said lots on the West; also *Lots One hundred five (105) through One hundred sixteen (116) inclusive*, and the portion of Third Street abutting said lots on the West.

Id. at 80 (emphasis added). The platting of Lot 28 of Thayer's Addition was not implicated by this order.

On June 6, 1971, Nelson passed away, and in July 1971 Lula filed an affidavit of survivorship in which she stated that she was the owner in fee simple of, among other property,

> All South of the M. Koontz ditch of Lot No. One (1) of Section Twelve (12) Township Thirty-four (34) North, Range Two (2) East.
>
> Also all south of M. Koontz ditch of the East half of the North-west quarter of the northeast quarter of Section Twelve (12) Township Thirty-four (34) North, Range Two (2) East, containing thirty-eight acres, more or less, lying south of the ditch,
>
> Except lots No. Forty-eight (48), Fifty-two (52), Seventy-seven (77), Eighty (80), Eighty-one (81), Ninety (90), Ninety-three (93), Ninety-four (94), Ninety-five (95) in Andrew J. Thayer's Addition laid out and platted on the above described real estate situate in Marshall County, Indiana.

Id. at 84. In 1974, after Lula died, her estate sold certain property south of the centerline of Koontz Ditch, in undivided one-third interests, to Paul and Luella Miller, Charles and Barbara Harley, and Clifford and Betty Zillmer. *Id.* at 88-91. In 1976, the real estate that had been un-platted by the Markses in 1968 was re-platted and became Sunset Acres Subdivision. *Id.* at 118. In 1989, the Millers, Harleys, and Zillmers sold twenty-two acres of the land they had purchased from Lula's estate to Calvin Ralston. *Id.* at 78. This land did not include any portion of Sunset Acres. *Id.* The parties agreed below and on appeal that the Farlows, by special warranty deed,[3] obtained title to Lots 1 and 2 of Sunset Acres in 2004. Appellants' Br. p. 7 (quoting Appellants' App. p. 35 (Ralstons'

[3] The parties do not cite to a place in the record where a copy of this special warranty deed may be found. We recently explained the difference between a warranty deed and a special warranty deed as follows: "A warranty deed normally contains covenants of seisin, right to convey, freedom from encumbrances, quiet enjoyment, and warranty. If the usual covenants are limited, the deed is known as a 'special warranty deed.'" *House v. First Am. Title Co.*, 883 N.E.2d 197, 200 (Ind. Ct. App. 2008) (citation omitted). Without a copy of the special warranty deed, we cannot discern the extent to which the entitlements granted by the deed may have been limited.

third amended complaint)); Appellees' Br. p. 2 (reiterating that the Farlows received a deed to Lots 1 and 2 of Sunset Acres in 2004). The real estate to which they took title is described as

> Lot Numbered One (1) and Two (2) of Sunset Acres Subdivision, a part of the Northeast Quarter (NE ¼) of Section Twelve (12) Township Thirty-four (34) North, Range Two (2) East, a portion of the former Andrew J. Thayer's Addition to Lake of the Woods *Lots Numbered 29 through 47* vacated November 28, 1967 [sic], situate in North Township of Marshall County.

Appellants' Br. p. 7 (quoting Appellants' App. p. 35) (emphasis added).

Within months of the Farlows obtaining title to Lots 1 and 2 of Sunset Acres, the Ralstons filed a complaint seeking preliminary and permanent injunctions, alleging that the Ralstons own Lot 28 of Thayer's Addition and seeking an order preventing the Farlows from interfering with their use of a lane that runs through Lot 28 of Thayer's Addition. *Id.* at 20-26. Eventually, the Ralstons filed a third amended complaint for preliminary and permanent injunctions and trespass and to quiet title to Lot 28 of Thayer's Addition and one-half of the alley abutting the property. *Id.* at 34-41. The Farlows responded and filed a motion for summary judgment to quiet title in their favor to the portion of Lot 28 of Thayer's Addition south of the centerline of Koontz Ditch. *Id.* at 46-57. The Ralstons then filed a request that the trial court grant summary judgment to them with respect to the ownership of Lot 28 of Thayer's Addition and one-half of the alley abutting the property. *Id.* at 119-20. The trial court granted summary judgment in favor of the Ralstons and denied the Farlows' motion for summary judgment. The Farlows filed a motion to correct error, which the trial court denied. *Id.* at 123. The Farlows now appeal.

Discussion and Decision

The Farlows appeal the trial court's grant of summary judgment in favor of the Ralstons and the denial of their summary judgment motion. *See Hamilton v. Prewett*, 860 N.E.2d 1234, 1240 (Ind. Ct. App. 2007) (noting that where a motion to correct error is grounded upon a claim that the trial court erred in its ruling on a motion for summary judgment, on appeal we review the summary judgment ruling), *trans. denied*. The purpose of summary judgment under Indiana Trial Rule 56 is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law. *Bushong v. Williamson*, 790 N.E.2d 467, 474 (Ind. 2003). On appeal, our standard of review is the same as that of the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Williams v. Riverside Cmty. Corr. Corp.*, 846 N.E.2d 738, 743 (Ind. Ct. App. 2006), *trans. denied*. A factual issue is "genuine" if it is not capable of being conclusively foreclosed by reference to undisputed facts. *Am. Mgmt., Inc. v. MIF Realty, L.P.*, 666 N.E.2d 424, 428 (Ind. Ct. App. 1996). Although there may be genuine disputes over certain facts, a fact is "material" when its existence facilitates the resolution of an issue in the case. *Id.* We construe all facts and reasonable inferences drawn from those facts in favor of the non-moving party. *Williams*, 846 N.E.2d at 743. On appeal, the trial court's order granting or denying a motion for summary judgment is cloaked with a presumption of validity. *Sizemore v. Erie Ins. Exch.*, 789 N.E.2d 1037, 1038 (Ind. Ct. App. 2003). A party appealing from an order granting summary judgment has the burden of persuading the appellate tribunal that the

decision was erroneous. *Id.* at 1038-39. The fact that the parties filed cross motions for summary judgment does not alter our standard of review. *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1264 (Ind. Ct. App. 2002), *trans. denied*. We consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law. *The Winterton, LLC v. Winterton Investors, LLC*, 900 N.E.2d 754, 758 (Ind. Ct. App. 2009), *trans. denied*. "If the trial court's entry of summary judgment can be sustained on any theory or basis in the record, we must affirm." *Kumar v. Bay Bridge, LLC*, 903 N.E.2d 114, 116 (Ind. Ct. App. 2009) (quotation omitted), *reh'g denied*.

The Farlows argue that the trial court erred by denying their motion for summary judgment and granting the Ralstons' motion for summary judgment, thus quieting title to Lot 28 of Thayer's Addition in the Ralstons' favor. In an action to quiet title, the party seeking relief must recover upon the strength of his or her own title. *Tazian v. Cline*, 686 N.E.2d 95, 97 (Ind. 1997). That is, the evidence must affirmatively show title in the party. *Ritz v. Ind. & Ohio R.R., Inc.*, 632 N.E.2d 769, 772 (Ind. Ct. App. 1994), *reh'g denied*, *trans. denied*.

A. Farlows' Motion for Summary Judgment

The Farlows contend that the trial court erred by denying their motion for summary judgment. They argue that they own the portion of Lot 28 of Thayer's Addition south of the centerline of Koontz Ditch by virtue of the Markses', Millers', Harleys', and Zillmers' previous ownership of this property. The Ralstons respond that the Farlows are not entitled to summary judgment because the designated evidence reflects that the Farlows have no interest in Lot 28 of Thayer's Addition.

We agree with the Ralstons. Regardless of whether the Markses, Millers, Harleys, and Zillmers owned the portion of Lot 28 of Thayer's Addition south of the centerline of Koontz Ditch, in 2004 the *Farlows* only obtained title by special warranty deed to land formerly platted as *Lots 29 through 47* of Thayer's Addition:

> Lot Numbered One (1) and Two (2) of Sunset Acres Subdivision, a part of the Northeast Quarter (NE ¼) of Section Twelve (12) Township Thirty-four (34) North, Range Two (2) East, a portion of the former Andrew J. Thayer's Addition to Lake of the Woods *Lots Numbered 29 through 47* vacated November 28, 1967 [sic], situate in North Township of Marshall County.

Appellants' Br. p. 7 (quoting Appellants' App. p. 35) (emphasis added). There is no designated evidence reflecting that the Farlows received title to *Lot 28* of Thayer's Addition in the special warranty deed.[4] The trial court did not err by denying the Farlows' motion for summary judgment.

B. Ralstons' Motion for Summary Judgment

The Farlows also argue that the trial court erred by granting the Ralstons' motion for summary judgment, quieting title to Lot 28 of Thayer's Addition and one-half of the vacated alley abutting the property to the Ralstons. They argue that the 1971 tax deed transferring title of Lot 28 of Thayer's Addition to the Ralstons' predecessors in title was invalid and that, therefore, the 1999 tax deed transferring title to Calvin Ralston was also

[4] While it is apparent that the parties agree that the Farlows received title to Lots 1 and 2 of Sunset Acres in 2004, our review of the record has not uncovered a copy of the relevant special warranty deed. In their brief on appeal, the Farlows cite only to the Ralstons' third amended complaint for the content of the special warranty deed. Appellants' Br. p. 7 (quoting Appellants' App. p. 35).

invalid.[5] Thus, they contend, there is a question of material fact precluding summary judgment in favor of the Ralstons.

A tax deed creates a presumption that a tax sale and all of the steps leading to the issuance of the tax deed were properly executed. *Nieto v. Kezy*, 846 N.E.2d 327, 337 (Ind. Ct. App. 2006). Subject to restrictions imposed by Indiana Code § 6-1.1-24-11(b), which we need not discuss here, this presumption may be rebutted by affirmative evidence to the contrary. *Id.* The Ralstons' chain of title to Lot 28 of Thayer's Addition can be clearly traced back to a tax sale in 1967 and a subsequent tax deed in 1971. We have determined that the Farlows have no interest in this property, and they cannot, therefore, challenge the presumption of validity of the Ralstons' title. We cannot say that the trial court erred in granting summary judgment in favor of the Ralstons.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.

[5] The Farlows contend that, because the 1971 deed erroneously named someone other than the Markses as the delinquent taxpayer on Lot 28 of Thayer's Addition, the 1967 tax sale was invalid.