

# MEMORANDUM DECISION

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## IN THE COURT OF APPEALS OF INDIANA

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Thomas DeCola,  
*Appellant-Plaintiff,*

v.

Norfolk Southern Corporation,  
*Appellee-Defendant.*

July 14, 2023

Court of Appeals Case No.  
23A-PL-610

Appeal from the LaPorte Circuit  
Court

The Honorable Thomas J.  
Alevizos, Judge

Trial Court Cause No.  
46C01-2111-PL-2250

**Memorandum Decision by Judge Riley.**  
Judges Bradford and Weissmann concur.

**Riley, Judge.**

## **STATEMENT OF THE CASE**

[1] Appellant-Plaintiff, Thomas DeCola (DeCola), appeals the trial court's summary judgment in favor of Appellee-Defendant, Norfolk Southern Corporation (NSC), denying DeCola's action to quiet title to certain property and concluding that a genuine issue of material fact exists as to whether sufficient notice was sent prior to the issuance of the tax deed.

[2] We affirm.

## **ISSUE**

[3] DeCola presents this court with one issue on appeal, which we restate as: Whether a genuine issue of material fact exists as to whether NSC received the statutorily required notices prior to the issuance of the tax deed to DeCola.

## **FACTS AND PROCEDURAL HISTORY**

[4] For years, NSC was the owner of certain real estate located at East 525 South, in Walkerton, LaPorte County, Indiana (Property). During many years prior to 2018, the Property was not assessed by LaPorte County for property taxation. Starting in 2018, LaPorte County began to locally assess the Property for property tax purposes. NSC was not notified of this decision and was unaware of its obligation to pay taxes.

[5] On March 5, 2021, DeCola purchased a tax lien for the Property for \$800 at a tax sale. On July 6, 2021, he petitioned the LaPorte County Superior Court 2 to direct the LaPorte County Auditor to issue a tax deed to the property. On

September 20, 2021, DeCola's petition was granted and the LaPorte County Superior Court 2 ordered the LaPorte County Auditor to issue the tax deed to the Property to DeCola. The tax deed was recorded on October 4, 2021. Thereafter, on November 30, 2021, DeCola initiated a separate action against NSC by filing a Complaint in the LaPorte Circuit Court (trial court) to quiet title to the Property. NSC filed its Answer on December 27, 2021. The following month, on January 10, 2022, DeCola filed a motion for judgment on the pleadings and supporting brief. On January 31, 2022, NSC filed its response, with supporting affidavits. On September 27, 2022, DeCola filed a motion for entry of order. On January 10, 2023, the trial court conducted a hearing on all pending motions.

[6] On February 21, 2023, the trial court converted DeCola's motion for judgment on the pleadings to a motion for summary judgment, as it considered matters outside the pleadings,<sup>1</sup> and issued its findings of fact and conclusions thereon, denying DeCola's motion. The trial court concluded that it had jurisdiction to hear DeCola's Complaint to quiet title and found that NSC had not received proper notice of the tax sale, the right of redemption, or petition for issuance of

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<sup>1</sup> When a motion for judgment on the pleadings is predicated, as here, on matters extraneous to the pleadings, the motion should be treated in the same manner as a motion for summary judgment. Ind. Trial Rule 12(C). The parties do not contest the trial court's conversion of the motion.

tax deed.<sup>2</sup> On February 23, 2023, DeCola filed a motion to reconsider, which was deemed denied on March 7, 2023.

[7] DeCola now appeals. Additional facts will be provided as necessary.

## **DISCUSSION AND DECISION**

### *I. Standard of Review*

[8] When reviewing the grant or denial of summary judgment, we apply the same test as the trial court: summary judgment is appropriate only if the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Sedam v. 2JR Pizza Enters., LLC*, 84 N.E.3d 1174, 1176 (Ind. 2017). “A fact is ‘material’ if its resolution would affect the outcome of the case, and an issue is ‘genuine’ if a trier of fact is required to resolve the parties’ differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences.” *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). The moving party bears the initial burden of showing the absence of any genuine issue of material fact as to a determinative issue. *Id.*

[9] Our review is limited to those facts designated to the trial court, and we construe all facts and reasonable inferences drawn from those facts in favor of

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<sup>2</sup> Meanwhile, on January 23, 2023, NSC filed a Trial Rule 60 motion in LaPorte Superior Court 2 to challenge the order issuing the tax deed.

the non-moving party. T.R. 56(H); *Meredith v. Pence*, 984 N.E.2d 1213, 1218 (Ind. 2013). Because we review a summary judgment ruling *de novo*, a trial court's findings and conclusions offer insight into the rationale for the court's judgment and facilitate appellate review but are not binding on this court.

*Denson v. Estate of Dillard*, 116 N.E.3d 535, 539 (Ind. Ct. App. 2018).

Additionally, we are not constrained by the claims and arguments presented to the trial court, and we may affirm a summary judgment ruling on any theory supported by the designated evidence. *Id.*

## II. *Analysis*

[10] DeCola contends that the trial court erred in not granting him summary judgment so as to allow him to quiet his title to the Property based on the acquisition of the tax deed. In support of his contention, DeCola submitted the recorded tax deed and a summons of his Complaint to NSC's registered agent. In response, NSC asserts that the tax deed to the Property was improperly granted because it had failed to receive any of the statutorily required notices before a tax deed can be issued.

[11] In Indiana, if an owner of real estate fails to pay property taxes, the property may be sold to satisfy the tax obligation. The tax sale process is a purely statutory creation and requires material compliance with each step of the governing statutes, Indiana Code sections 6-1.1-24-1 through -14 (sale) and 6-1.1-25-1 through -19 (redemption and tax deeds). *Schaefer v. Kumar*, 804 N.E.2d 184, 191 (Ind. Ct. App. 2004). The issuance of a tax deed creates a

presumption that a tax sale and all of the steps leading up to the issuance of the tax deed are proper. *Id.* However, this presumption may be rebutted by affirmative evidence to the contrary. *Id.* Title conveyed by a tax deed may be defeated if the three notices required by Indiana Code sections 6-1.1-24-4 (notice of tax sale), 6-1.1-25-4.5 (notice of the right of redemption), and 6-1.1-25-4.6 (notice of petition for tax deed) were not in substantial compliance with the requirements prescribed in those sections. *Id.*; I.C. § 6-1.1-25-16(7).

[12] In its designated evidence, NSC submitted an affidavit by Jennifer Schilke (Schilke), its Director [of] State Taxes, averring that NSC “never received any notice that LaPorte County was starting to assess the [Property] for local taxes.” (Appellant’s App. Vol. II, p. 76). She stated that NSC did not receive notice of the tax sale of the Property because “the notice was sent to an incorrect address.” (Appellant’s App. Vol. II, p. 75). Similarly, she noted that NSC did not receive notice of its right of redemption and only received notice of the petition for tax deed “after the tax deed had been issued.” (Appellant’s App. Vol. II, p. 76). NSC also submitted an affidavit by Barry Loftus (Loftus), NSC’s registered agent with the Indiana Secretary of State office, who confirmed that, as the registered agent, he never received proper notice of the tax sale of the Property, never received proper notice of NSC’s right to redeem the Property, and never received proper notice of the petition for tax deed or notice of the issuance of the tax deed to DeCola.

[13] Without responding to NSC’s claim that it failed to receive proper notice or rebutting NSC’s designated evidence, DeCola relies on *Chmiel v. US Bank*

*National Association*, 109 N.E.3d 398, 407 (Ind. Ct. App. 2018), for a “paramount title rule,” which stands for the proposition that “[a] plaintiff may recover only upon the strength of his own title and must show that he has legal title with a present right of possession paramount to the title of the defendant. It is therefore appropriate for a defendant to prove that the plaintiff does not have title or interest in the property.” We agree with NSC that DeCola’s reliance on *Chmiel* undercuts his own position as NSC presented this court with substantial issues of material fact which question DeCola’s legal title to the Property.

[14] In a related argument, DeCola challenges the trial court’s jurisdiction over his quiet title action. Focusing on *Kumar v. Bay Bridge, LLC*, 903 N.E.2d 114 (Ind. Ct. App. 2009), DeCola contends on appeal that the trial court lacked jurisdiction to decide his quiet title action based on NSC’s arguments because the LaPorte County Superior Court 2 issued the tax deed and therefore retained continuing jurisdiction over all issues related to the tax sale of the Property, pursuant to Indiana Code section 6-1.1-24-4.7(f). DeCola now maintains that because NSC “failed to object to DeCola’s selection of jurisdiction at their first opportunity within their answer,” NSC cannot defend itself against his quiet title action. (Appellant’s Br. p. 9).

[15] In *Kumar*, defendant Kumar obtained a tax deed in the circuit court while the record owner of the property filed a subsequent quiet title action in the superior court. *Id.* at 115. Kumar, as holder of the tax deed, filed an answer in the superior court without challenging jurisdiction. *Id.* The court found that, while

Kumar correctly noted in his summary judgment motion that the quiet title action should have been brought in circuit court, as the court holding the continuing jurisdiction rather than the superior court, Kumar waived that claim of error. *Id.* Here, however, plaintiff DeCola, who is the holder of the tax deed, petitioned Superior Court 2 for a tax deed and then subsequently initiated the quiet title action in the Circuit Court. As this jurisdictional error is one of DeCola's own making, he cannot now be heard to complain. *See also Packard v. Shoopman*, 852 N.E.2d 927, 929-30 (Ind. 2006) (subject matter jurisdiction over the particular case is a procedural requirement which can be waived if not raised at the appropriate time). Accordingly, as DeCola invoked the jurisdiction of the Circuit Court by filing its action to quiet title, and NSC did not object, DeCola is estopped from relying on the jurisdictional argument. *Capalla v. Best*, 198 N.E.3d 26, 32 (Ind. Ct. App. 2022) (judicial estoppel is a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position).

[16] Accordingly, we affirm the trial court's summary judgment denying DeCola's motion for summary judgment in his action to quiet title to the Property and concluding that genuine issues of material fact exist as to whether NSC received the statutorily required notices.

## **CONCLUSION**

[17] Based on the foregoing, we affirm the trial court's denial of DeCola's motion for summary judgment.

[18] **Affirmed.**

[19] **Bradford, J. and Weissmann, J. concur**