STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master in Equity

James O. Spence, Master in Equity

Appellate Case No. 2022-001128

Grayson J. Dailey,

Appellant,

v.

SC Home Holdings, LLC, Lexington County, and Jim Eckstrom in his official capacity as Treasurer of Lexington County.

Respondents.

INITIAL BRIEF OF APPELLANT

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I. STATEMENT OF THE ISSUES ON APPEAL

1. Is a Tax Sale Notice of real estate posted to the land considered "conspicuous" if it is not visible to the public?
2. Does the State have to prove that a Tax Sale Notice is affixed to the land such that it remains visible for a period of time after it is posted?
3. Does publication notice to the homeowner in a tax sale have to be listed alphabetically in the name of the owner as well as the defaulting taxpayer in a newspaper publication?

II. STATEMENT OF THE CASE

A. STATEMENT OF MATERIAL FACTS

Plaintiff purchased the property at 855 Park Road, Lexington, SC 29072, TMS # 004200-02-038 (hereinafter "the property") from Regina Y. Quattlebaum on March 10, 2017. Lexington County Record Book 19058 at Page 345; despite the mobile home having an attached deck and roofed addition, the title was not retired, and it still has a separate tax bill which is not the subject of this action. The taxes on the mobile home was the only subject of one pre-sale phone discussion between Lexington and Plaintiff discussed below. Appellant had no knowledge or actual notice of the sale of his real estate until after phone discussions with Lexington revealed it was eligible for redemption.

After purchasing the home, Appellant had to spend a significant amount of time in Hartsville, SC due to his parents' serious medical conditions and deaths of his close relatives. After purchasing the home, there was significant commercial construction in the lot across the street and road widening. The road widening made his driveway difficult to use and his mailbox inaccessible. Appellant used his neighbor's driveway to access his home since it was wider and closer to his residence.

Defendant Lexington properly mailed notices, but notices to Plaintiff/Appellant were returned unclaimed. Lexington attempted to seize the property by posting a notice of seizure and levy by distress on the land. The notice was not visible from the road by the public. Lexington introduced an exhibit purporting to show the notice affixed to a tree, but offered no evidence as to the method or materials used to secure the notice to the tree. There was no evidence presented that the notice was affixed in such a way to ensure it remained displayed. Thereafter, on November 5, 2018, the property was sold at public auction.

Plaintiff argues that the tax sale should be set aside because of Defendant Lexington

County's failure to strictly comply with the tax sale statutory requirements. Specifically, Plaintiff argues that Lexington failed to properly post notice on the property and failed to properly advertise the sale of the property in violation of S.C. precedent. Notice of the constructive seizure of the land was posted on an unused driveway out of public sight. The advertisement of sale in the newspaper was listed alphabetically in the name of the non-owner taxpayer and not in the name of the Plaintiff owner.

B. PROCEDURAL HISTORY

This matter came before the South Carolina Court of Common Pleas for the Eleventh Judicial Circuit for trial on April 14, 2022. The Summons, Complaint, and *Lis Pendens* was filed on June 24, 2020. Defendants Lexington County and Jim Eckstrom were served on July 13, 2020. Defendant SC Home Holdings, LLC was served on July 14, 2020. Defendants Lexington County and Jim Eckstrom filed an Answer on or about July 23, 2020. Defendant SC Home Holdings, LLC filed an Answer on or about August 13, 2020. This case was transferred to the Lexington County Master-in-Equity on or about August 24, 2021 pursuant to Plaintiff's Motion for Reference, filed on or about August 23, 2021.

III. STANDARD OF REVIEW

"An action to set aside a tax sale lies in equity. [An Appellate Court's] scope of review for a case heard by a Master permits [the Appellate Court] to determine facts in accordance with [its] own view of the preponderance of the evidence." *Smith v. Barr*, 650 SE 2d 486, 375 S.C. 157, 160 (SC Ct. App. 2007).

IV. ARGUMENT

A. Defendant Lexington did not post notice of seizure in a conspicuous location as required by statute.

South Carolina Code § 12-51-40(a) provides that, in the event the certified mail notice has been returned, a delinquent tax collector is required to "take exclusive physical possession of the property… by posting a notice at **one or more <u>conspicuous</u> places** on the premises." (emphasis added).

Only one notice was posted on a tree near a driveway on the property not regularly used by Plaintiff and away from the road such that it could not be seen from the road. (R___P. Ex. E). The photographs of the scene clearly show a winding driveway through forested land that is covered in pine-straw with no tire tracks. (Id.) Plaintiff's neighbor testified that, despite driving by the property anywhere from two to four times a day on average, he never saw any notices posted on the land. (R.____Tr. 24:15-20). No witness appeared for Defendants to testify as to how the notice was allegedly affixed to the tree, or what the weight, durability, or composition of the notice was comprised of. The representative from the County, Brett Finley, had no information about the method of securing the notice to a tree.

The United States Constitution states only one command twice. The Fifth Amendment says to the federal government that no one shall be "deprived of life, liberty or property without due process of law." The Fourteenth Amendment, ratified in 1868, uses the same eleven words, called the Due Process Clause, to describe a legal obligation of all states. These words have as their central promise an assurance that all levels of American government must operate within the law and provide fair procedures.

The United State Supreme Court has addressed the importance of notice as the initial question for due process analysis. In *Greene v. Lindsey*, 456 US 444, 453 (1982), the Court reasoned, "But whatever the efficacy of posting in many cases, it is clear that, in the circumstances of this case, merely posting notice on an apartment door does not satisfy minimum standards of due process."

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Id.*, at 449-450. *See also, Milliken v. Meyer*, 311 U. S. 457; *Grannis v. Ordean*, (1914) 234 U. S. 385; *Priest v. Las Vegas*, 232 U. S. 604; *Roller v. Holly*, 176 U. S. 398. *Mullane v. Central Hanover Tr. Co.*, 339 U. S. 306, 314. *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962) (where, in addition to newspaper publication, the state posted 22 notices on trees and poles along a seven-or eight-mile stretch of the river in the general vicinity of the appellant's premises.)

South Carolina has no case directly addressing when a Tax Sale Notice is "conspicuous". However several other courts have addressed this issue. "[C]ourts have properly required that posting be accomplished by 'placing the notices **somewhere on the premises <u>for all to observe</u>**,' rather than handing the notice to an owner, *In re Upset Tax Sale of September 10, 1990*, 147 Pa.Cmwlth. 52, 606 A.2d 1255, 1258 (1992). *Otto v. Dauphin County Tax Claim Bureau*, 24 606 A.2d 1255 (PA 1980) reasoned:

> Not only does public posting assist in informing a taxpayer that his or her property is to be exposed at tax sale, especially when, as here, personal service cannot be accomplished, it serves the additional purpose of **notifying others** whose interest may be affected by the sale such as mortgage and other lien holders. Posting also serves to **notify the public at large** that the property is going to be offered at tax sale. This **increases the number of bidders** for the property, aiding in the likelihood that the taxing bodies will receive the taxes owed, as well as making the sale fair to the delinquent taxpayer so that the property is **sold for the highest amount possible** so that the delinquent *58 taxpayer may not be subject to any deficiency or, if the bid is over the amount of taxes owed, can receive any excess. (emphasis added)

"We agree with the trial court that in this case, the manner in which the notice was posted informed no one that the subject property was being exposed to tax sale." *Consol. Return by McKean County*, 820 A.2d 900, 903 (Pa. Cmmw. Ct. 2003). Lexington offered no evidence that

even if it was initially posted in a conspicuous location, that the manner of posting was sufficiently secured. In a similar situation, the Pennsylvania Court reasoned:

> The issue is whether or not the notice was "reasonably secured" to the telephone pole. Nannen testified that he attached it with "ordinary masking tape." He had no recollection of how he attached it. Consequently we have no way of concluding whether or not it was "reasonably secured." There is no testimony, for example, whether he secured the notice by winding the tape around the pole, or whether he only taped the corners of the notice to the pole, or only the top and bottom of the notice. Obviously, how it was affixed to the pole determines whether it was reasonably secured. If we do not [know] how it was taped to the pole, we cannot conclude whether it was reasonably secured.

Id., at 903.

Although the SC statute does not specifically require that a notice of seizure be posted on the road, nor does it give guidance as to the format or methodology of the Notice, it is of considerable significance that the statute requires the notice to be "conspicuous." Under South Carolina law, the "cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 577 S.E.2d at 207 (2000). Where a statute's language is plain and unambiguous, conveying a clear meaning, there is "no occasion for employing rules of statutory interpretation;" however, where the language is ambiguous, the Court must construe the terms of the statute. *Wade v. Berkeley Cnty.*, 348 S.C. 224, 559 S.E.2d 586, 588 (2002).

Here, the vast wealth of case law favors an interpretation of any statutory ambiguity in favor a property owner and a defaulting taxpayer. "All requirements of law leading up to tax sales are intended for the protection of the taxpayer against surprise or the sacrifice of his property…" *Baker v. Denton*, 37 F.Supp.3d 794, 799 (D.S.C. 2014) (citing *Tanner v. Florence County Treasurer*, 336 S.C. 552, 563, 521 S.E.2d 153, 158-159 (1999)). Black's Law Dictionary defines a "conspicuous place" as "for purposes of posting notices, a location that is **reasonably**

likely to be seen," that is, likely to put people on notice that the property has been seized for delinquent taxes. *Black Law's Dictionary,* 11th ed. 2019.

"South Carolina's tax sales were promulgated to protect the government against willful, persistent, and long standing delinquents; they were not created to punish taxpayers who failed to pay their taxes because of legitimate mistake or error." *Johnson v. Arbabi*, 347 S.C. 132, 553 S.E.2d 453 (S.C.App. 2001). At the time the notice was posted, Plaintiff was routinely out of town for family emergencies. He bought the mobile home and land at the same time and was unaware the taxes were separate and not paid as part of the sale (tR. 39). There was significant construction which rendered his driveway and mailbox unusable (tR.). Additionally, while he had communication with Lexington regarding the mobile home delinquency, he had no conversation about the Real Estate being delinquent according to the county's representative. (tR. 50)

Lexington County only offered one witness to testify about the "conspicuousness" of the posting. Mr. Brett Finley testified that he did not know how the seizure notice was affixed to the property or which tree it was affixed to. He further testified that the purpose of posting was so notice could be given to the public, and not just to the taxpayer or owner (R. [p.46-47]):

The only evidence submitted by the county shows the notice was posted far from the road on a tree that was not visible to passersby. As the Pennsylvania Courts reasoned, tax sale notices should be placed "**somewhere on the premises for all to observe** [and] … **in "such a manner as to attract attention**," the manner in which the notice was posted informed no one that the subject property was being exposed to tax sale. Consol. Return by McKean County, 820 A.2d 900, 903 (Pa. Cmmw. Ct. 2003). (emphasis added, internal quotes omitted).

Plaintiff used his neighbor's property to gain access to his property. (R.___Tr. 27:4-7). While Plaintiff did not have an easement nor any legal right to use his neighbor's property as a

driveway to enter his property, the neighbor's driveway is the driveway closest to the Plaintiff's trailer and there are clear tire tracks from use between the properties. (Tr. 31:2-3, Pl. Ex. B.) The burden of hanging multiple notices is low. The photographs show several suitable trees and areas to post notices conspicuous to passersby visible to the public. Given the existence of two driveways in close proximity to another, the consideration that the driveway on Plaintiff's property was clearly unkempt and unused, the significant road construction occurring at the time, and the potential risk that a delinquent tax owner may not become aware of a posted notice, it is reasonable that a delinquent tax collector post more than one notice in such circumstances. At the very least, notice should have been posted in a conspicuous location on the property visible to the public.

In the present case, the trial court reasoned the posting was conspicuous because, "**had he driven down his driveway off the public road he would have seen the posted sign." (Order p.5).** However, if a notice has to be accessed by traveling a difficult path away from the public eye, it is not "conspicuous" within the meaning of § 12-51-40(a).

Mr. Finlay admitted the posting was not at the entrance to the property and was "off the road a little bit" (tR. 58). Mr. Finlay testified the purpose of posting was not just for the taxpayer, but for the general public. (R._____). Mr. Finlay testified that the phone conversation his office had with Plaintiff discussed the seizure of the mobile home, but did not address the real estate. (tR. 61). Mr. Finlay testified that he had no knowledge of how the notice was affixed to the tree or if it was sufficiently secured to the tree. The County did not provide a witness to testify about the durability of the posted notice.

The burden is on Lexington to show they complied with posting in a "conspicuous" location. Lexington failed to offer any evidence that the location or manner of posting was reasonable and calculated to provide notice. Even if it is determined the notice deep within the

property was "conspicuous enough", there is no evidence as to whether the notice was up for 10 days or 10 minutes. Without testimony about the material and method used to post the notice, the County cannot establish how long the posting was even displayed, and the Court is left to speculate how long the Notice was displayed. In fact the only evidence Lexington provided shows the posting was not visible from the road to passersby and therefore not posted in a "conspicuous" location as required by statute. Even the trial court concluded someone would have to "drive down the driveway off the public road" to see the notice.

Once it is determined there is a defect in the statutory notice, it renders the tax sale absolutely void. All other testimony or evidence relating to confusion about the redemption period is irrelevant under S.C. law. Under South Carolina law, failure to give the required notice of a tax sale is a fundamental defect in the tax sale proceedings that renders the proceedings absolutely void. *Baker v. Denton*, 37 F.Supp. 3d 794 (2014). Moreover, under South Carolina law, the fact that the defaulting taxpayer has actual notice of the impending tax sale is insufficient to uphold a tax sale absent strict compliance with statutory requirements. *Baker*. *Reeping v. JEBBCO, LLC* 402 S.C.195, 740 S.E.2d 504 (S.C.App. 2013). *King v. James* 388 S.C. 16, 694 S.E.2d 35 (S.C.App. 2010). *Hawkins v. Bruno Yacht Sales, Inc.* (S.C. 2003) 353 S.C. 31, 577 S.E.2d 202.

2. Advertisement in the newspaper was non-compliant with constitutional principles of notice.

The advertisement was defective because it was posted under the name of "Quattlebaum, Regina Y." Plaintiff's name appeared only in the body of the notice and, not alphabetically; as such, it was not sufficient notice to him. (R_____Tr. 10:5-13, 47:14-18). The South Carolina Supreme Court has ruled the newspaper publication must be "**in the name of the owners**".

Osborne et al. v. Vallentine, 196 S.C. 90, 96 (S.C. 1941) found a tax sale invalid when "[t]he advertisement of sale was not **in their names as owners**" (emphasis added). This advertisement was in the name of Quattlebaum, not Dailey. Plaintiff Daily's name was included in the body of the advertisement, but the advertisement itself was not "in the name of the owner."

As earlier stated, "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is **notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections**. *Mullane v. Central Hanover Tr. Co.*, 339 U. S. 306, 314(emphasis added). *See also, Milliken v. Meyer*, 311 U. S. 457; *Grannis v. Ordean*, 234 U. S. 385; *Priest v. Las Vegas*, 232 U. S. 604; *Roller v. Holly*, 176 U. S. 398. *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962). The overriding objective of the statute providing that once a constructive "levy by distress" has been accomplished, the tax collector must "advertise the property for sale at a public auction," is to protect the defaulting taxpayer from unfair surprise and sacrifice. *See, e.g., Folk v. Thomas*, 336 S.C. 466, 470, 520 S.E.2d 327, 330 (Ct.App.1999) (construing § 12-51-40(d) "to protect against forfeiture"); *Manji v. Blackwell*, 323 S.C. 91, 94 473 S.E.2d 837 (S.C. Ct. App. 1996) ("The sound view is that all requirements of the law leading up to tax sales which are intended for the protection of the taxpayer against surprise or the sacrifice of his property are to be regarded [as] mandatory, and are to be strictly enforced.") (*quoting, Osborne v. Vallentine*, 196 S.C. 90, 94, 12 S.E.2d 856, 858 (1941)).

In order to find Plaintiff's name in the newspaper postings, one would have to read through the actual text of what was posted. As such, someone skimming the postings, whether that be Plaintiff or someone likely to notify him, would not have seen Plaintiff's name listed alphabetically with the other owners. Merely including Plaintiff's name in the body of the notice, as opposed to listing his name alphabetically as the owner, is not likely to accomplish the

objective of protecting a defaulting taxpayer from unfair surprise and sacrifice. And it does not constitute a publication "in the name of the owner" as required by South Carolina precedent.

CONCLUSION

The trial court's Order should be reversed and the tax sale of Appellant's property should be voided since Lexington county failed to post a "conspicuous" notice as required by statute and since Lexington county failed to show strict compliance with advertising "in the name of the defaulting taxpayer" in the publication.

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