RECEIVED
Jun 05 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

Roger E. Henderson, Presiding Judge

Case No. 2021-CP-34-00150

Appellate Case No. 2022-001791

RS&A Piping & Fabrication, Inc. a/k/a R. S. & A. Piping, Inc., ………………………….. Appellant,

v.

Ronald D. Kirby, Dylan T. Kirby, Treasurer for Marlboro County and Danny T. Williams,……..………………………………………………………………….. Respondents.

INITIAL REPLY BRIEF
(REPLYING TO BRIEF OF INDIVIDUAL RESPONDENTS RONALD D. KIRBY, DYLAN T. KIRBY AND DANNY T. WILLIAMS)

Leonard R. Jordan, Jr., #3221
JORDAN LAW FIRM
211 Veterans Road, Suite D
Columbia, South Carolina 29209
(803) 726-1950 Tel
(803) 726-1951 Fax
ljordan@ljordanlaw.com
Attorney for Appellant

Other Counsel of Record:

J. Rene Josey, Esquire
Andrew F. Lindemann, Esquire

TABLE OF CONTENTS

Table of Authorities ii

Arguments

I. Appellant remained in possession of the Property 1
II. Because the redemption notice was defective (mailed too early), the statute of limitations is inapplicable 3
III. When there is a fundamental or jurisdictional defect in the tax sale procedure – including the failure to comply with Section 12-51-120 – the sale is void 4
IV. Appellant's conversion cause of action was improperly dismissed 7
V. Appellant's personal property was not the subject of the tax sale 8

Conclusion 8

TABLE OF AUTHORITIES

Cases **Page**

Dibble v. Bryant, 274 S.C. 481, 265 S.E.2d 673 (1980)..........1, 2, 3

Donohue v. Ward, 298 S.C. 75, 378 S.E.2d 261 (Ct. App. 1989)..........4, 6

Forfeited Land Comm'n of Bamberg Cty. v. Beard, 424 S.C. 137, 817 S.E.2d 801 (Ct. App. 2018)..........4, 5, 6

Good v. Kennedy, 291 S.C. 202, 352 S.E.2d 708 (Ct. App. 1987) 4, 6

King v. James, 388 S.C. 16, 694 S.E.2d 35 (Ct. App. 2010)..........4

Leysath v. Leysath, 209 S.C. 342, 40 S.E.2d 233 (1946)..........5, 6

Manji v. Blackwell, 323 S.C. 91, 473 S.E.2d 837 (Ct. App. 1996)..........4, 6

Reeping v. Jebbco, LLC, 402 S.C. 195, 740 S.E.2d 504 (Ct. App. 2013) 4, 5, 6

Other Authorities

S.C. Code Ann. §12-51-40..........8
S.C. Code Ann. §12-51-120.......... 4, 6
S.C. Code Ann. §12-51-160 .... 3, 4

ARGUMENTS

I. Appellant remained in possession of the Property.

II. Because the redemption notice was defective (mailed too early), the statute of limitations is inapplicable.

III. When there is a fundamental or jurisdictional defect in the tax sale procedure – including the failure to comply with Section 12-51-120 – the sale is void.

IV. Appellant's conversion cause of action was improperly dismissed.

V. Appellant's personal property was not the subject of the tax sale.

I. APPELLANT REMAINED IN POSSESSION OF THE PROPERTY.

The Brief of Individual Respondents (p. 11) claims that the exceptions to the statute of limitations, "[u]nlike the unpublished opinion and its predecessor, Dibble v. Bryant, 274 S.C. 481, 265 S.E.2d 673 (1980)," do not apply in this case because "the Appellant here did not remain in possession of the property as in those cases." Respondents' comments fail to consider the factual circumstances that Appellant maintained/stored a significant amount of their personal property (itemized in the Complaint) on the subject property until or after April 2020 (R.p. ____), when such personal property was converted by Respondents and Appellant was, in fact, dispossessed.

Further with regard to the "dispossessed" issue, the Brief of Individual Respondents (pp. 8-9) makes a half-hearted attempt to argue that Appellant was dispossessed of the property when the property was seized by county officials prior to the tax sale. This is obviously some legal concept, as there is no evidence that the county made any effort to take actual (physical) possession of the property. Said Brief (p. 9) actually calls it "the Sheriff's presumed legal possession." There has been no mention whatsoever of any involvement by the Sheriff's Office. Actually, there is nothing in the Complaint, the Defendants' pleadings or in the record before the lower court to raise this issue. It must therefore be assumed that there was no involvement whatsoever by the Sheriff.

There was, admittedly, a notice posted by the Treasurer (or Tax Collector) on October 5,

2018,[1] but no more direct involvement with the property was indicated. Consider *Dibble v. Bryant* (cited in Brief of Appellant, p. 15), which held that, "the sole act of tacking a notice of sale in the name of the prior owner to the front of an abandoned building on property subject to an outstanding mortgage lien fails to give reasonable notice to the parties in interest as required by due process and statute." (p. 486) As discussed in the Brief of Appellant (pp. 14-16), and hereinafter, the actual process for "dispossession" requires that the Buyer (i.e. Individual Respondents or Backwoods, LLC) come into possession.

The Brief of Individual Respondents also states that the Brief of Appellant suggests:

> . . . that Williams began removing and/or disposing of Appellants personal property . . . and Kirby's continued removing and/or disposing of the Appellant's personal property, Appellant's Brief at 7, is *denied.* ROA at _____ (Answer ¶), (sic) This claim was unsupported in the trial record when the dispositive decision was made and thus, is without evidentiary support in this appellate record. (pp. 5-6)

To the contrary, the following allegations in the Complaint were expressly *admitted* in the Answer for Defendants Ronald D. Kirby, Dylan T. Kirby and Danny T. Kirby: [2]

> 27. Upon information and belief, Williams took possession of the Property in or about June 2020, and, upon information and belief, began removing and/or disposing of the Plaintiff's personal property.
>
> 28. Upon information and belief, the Kirbys took possession of the Property in or about February 2021, and, upon information and belief, continued removing and/or disposing of the Plaintiff's personal property.

As the Individual Respondents (along with Backwoods LLC) did not obtain title to the property before April 29, 2020, none of them could not have legally taken possession of the property (and dispossessed Appellant) before that date. As Appellant's suit was filed on May 17, 2021, it was filed within 13 (or fewer) months after the earliest date of legal dispossession.

---

1 Complaint, ¶10; Answer of Treasurer, ¶XIV. (R.p. ____)
2 See Complaint, ¶s 27 and 28; and Answer for Defendants, ¶s 28 and 29. (R.pp. ____)

II. BECAUSE THE REDEMPTION NOTICE WAS DEFECTIVE (MAILED TOO EARLY), THE STATUTE OF LIMITATIONS IS INAPPLICABLE.

S.C. Code Ann. §12-51-160 (statute of limitations) has been applied to certain tax sales and not to others. Through numerous, sound decisions of the Supreme Court and the Court of Appeals (cited in the Brief of Appellant), this statute (including its predecessor statutes) has been considered inapplicable when dealing with tax sales, which had a jurisdictional or fundamental defect, or when the limitation period was extended because it did not start to run until the taxpayer was dispossessed of the property.

The unpublished opinion (specifically referred to in the Brief of Individual Respondents, p. 11), which, like the present case, had to do with the end of redemption notice being "mailed . . . too early" (Respondents' words, Brief, p. 5), is, factually, almost identical to the present case;[3] and it involved whether the statute of limitations barred the claim to overturn the tax sale. Importantly, that suit was instituted "**more than two years after receiving the tax deed**."

As stated in footnote 5 of the Brief of Individual Respondents (p. 10), the "context" of the unpublished opinion was: ". . . look at whether the statute of limitations applies first." The Court did that. It, first, found that "the trial court erred in finding the statute of limitations barred Ethridge's defense," expressly relying on *Dibble v. Bryant*, which actually stated: "The statute did not intend to bar the taxpayer's right until he had two years within which he could bring his action. He could not bring his action **until there was a person on the land withholding possession from him**." (p. 488) (emphasis added)

Note from the foregoing that the two-year limitation period does not run from the date the county took "exclusive possession," the date of the tax sale, the date of the tax deed, or the date

---

3 Respondents' counsel declared at the first hearing: "I think this case is *exactly on point*. Mr. Jordan agrees that this is on point. I think it is *most certainly on point* because this case . . . looks at whether that 45 to 25 (sic) day time period was complied with . . . ." (R.p. ____) (Tr.p. 12)

the taxpayer abandoned the property. It runs from the date the new owner took possession. Consider *King v. James*, cited in the Brief of Appellant (p. 15), which held that Section 12-51-160 is inapplicable as owner "brought her action within two years of the buyer coming into possession."

No, Appellant does not suggest that the statute of limitations does not apply "if an argument is made for voiding a tax sale" (as stated in the Brief of Individual Respondents, p. 8). Appellant simply cites case-after-case wherein the court decided that the statute of limitations is inapplicable where the sale is void because the county failed to comply strictly with a statutory notice requirement.

III. WHEN THERE IS A FUNDAMENTAL OR JURISDICTIONAL DEFECT IN THE TAX SALE PROCEDURE – INCLUDING THE FAILURE TO COMPLY WITH SECTION 12-51-120 – THE SALE IS VOID.

Not all of Appellant's Arguments were directed to the statute of limitations issue. *Manji v. Blackwell* and *Good v. Kennedy* were cited in the Brief of Appellant (p. 9) because they, like the unpublished opinion and the present case, involve S.C. Code Ann. §12-51-120. Both cases concluded that the requirement of this statute is "generally regarded as **jurisdictional**, therefore, the **owner's right of redemption cannot be cut off** unless the required notice is given." (p. 94 and p. 207) (emphasis added)

Donohue v. Ward, Reeping v. Jebbco and *Forfeited Land Comm'n of Bamberg Cty. v. Beard,* among other cases, were cited in the Brief of Individual Respondents (pp. 12-13) on the point that they were factually distinguishable from the present case. In *Donohue*, it was because of the application of the *Soldiers' and Sailors' Civil Relief Act of 1940*. Respondents ignore that *Donohue* did involve a failure to properly notify the true owner, i.e. a failure to comply with a statutory notice requirement where strict compliance is required – just like in the present case.

In *Reeping*, it was because of a "systemic postal address realignment" and nothing suggested that "the tax sale purchaser had made improvements to the property." While there was

a suggestion in the present case that Respondents made improvements to the property after taking possession in either June 2020 or February 2021 (less than one year prior to the filing of the present suit),[4] such suggestion was, in no way, asserted as a fact which started the running of the statute of limitations at an earlier date.

Further, the Brief of Individual Respondents (p. 13) said that, in *Reeping*, ". . . the Court clearly stated that it was 'not undertak[ing] to lay down a general rule defining those defects' which would 'render the statute inapplicable.'" This quote actually came from *Leysath v. Leysath*, and it is important to consider the portions of the quote, which were omitted. The entire quote is as follows:

> It appears to be the general rule that a short statute of limitation of the kind under consideration does not apply where, by reason of some jurisdictional defect, the tax deed is absolutely void upon its face; and perhaps the majority of the courts hold that the bar of the statute does not apply if there are jurisdictional or fundamental defects in the tax proceedings which render such proceedings absolutely void. However, in some jurisdictions a statute of this kind is more liberally construed in favor of the purchaser, and it is held that the statute applies in every case in which there has been possession under a deed which is not void on its face. But the courts following the majority rule are not in entire accord as to the jurisdictional grounds which render a tax deed absolutely void. In some states defects which in others are deemed jurisdictional are considered mere irregularities. . . . (p. 349)
>
> We do not undertake to lay down a general rule defining those defects **in tax proceedings which should be considered as mere irregularities, to which the statute under consideration would apply, and those which should be deemed jurisdictional, so as to** render the statute inapplicable. (p. 351) (emphasis added)

In the almost eight decades since this quoted finding was composed in 1946, there have been numerous cases, which lay down a general rule that **statutory requirements calling for notice to the taxpayer are jurisdictional**. Many of these cases are cited in the Brief of Appellant, including *Forfeited Land Comm'n of Bamberg Cty. v. Beard* (p. 13), which also cites *Leysath v.*

4 Answer of Defendants, ¶49. (R.p. ____)

Leysath favorably, and which found that, ". . . **the failure to provide the required statutory notice** is the type of **jurisdictional defect** contemplated in *Leysath* that **renders the tax sale void and the statute of limitations inapplicable**." (p. 148) (emphasis added)

In *Beard*, it was because of a failure to post the notice of levy (not the same "failure" as in the present case). That notice failure, like the notice failure in the present case, was a "fundamental defect" (p. 148), which renders the proceeding absolutely void.

Attention is called to the discussion of these three cases in the Brief of Appellant (pp. 11-13).

All three cases reversed lower court decisions and found inapplicable the statute of limitations bar to the claims to overturn the tax sales.

All three cases make the following finding: "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." *Donohue*, p. 83; *Reeping*, p. 199; *Beard*, p. 145.

All three cases hold that, "failure to give the required notice is a fundamental defect in the tax proceedings which renders the proceedings absolutely void." *Donohue*, p. 83; *Reeping*, p. 199; *Beard*, p. 146.

All three cases hold that, since the defect is jurisdictional, the bar of the statute of limitations does not apply. *Donohue*, p. 82; *Reeping*, p. 201; *Beard*, p. 148.

As *Manji* and *Good* (cited hereinabove) and the unpublished opinion reflect, such jurisdictional defects include the failure to comply strictly with the requirements of Section 12-51-120. Such requirements include the mailing of a notice to the taxpayer (among others) to inform them of the amount due and the deadline to pay such amount to redeem the property from the tax sale, which mailing must be accomplished "[n]either more than forty-five days nor less than twenty

days before the end of the redemption period."[5] There has been no denial of the facts supporting Appellant's claim regarding the timing of the mailing of this post-sale notice. In fact, the Brief of Individual Respondents (p. 5) acknowledges that ". . . the redemption notice was mailed on a Thursday (too early) rather than the following Monday."

While the Brief of Individual Respondents asserts again and again that the pre-sale procedures were perfect, the statutory notice procedure is a means for securing constructive notice not necessarily actual notice. As stated in the Complaint, Appellant received neither the notice of levy nor the post-sale notice of the right of redemption.[6] There has been no indication that Appellant knew anything about the tax sale of its property until after the Tax Deed was issued.

IV. APPELLANT'S CONVERSION CAUSE OF ACTION WAS IMPROPERLY DISMISSED.

Appellant's conversion cause of action[7] is *not* "inherently linked" to the tax sale, contrary to the statement in the Brief of Individual Respondents (p. 14). That cause of action is capable of being litigated notwithstanding the outcome of the tax sale contest.

The **Motion to Dismiss** filed by the Treasurer for Marlboro County on June 15, 2021 (R.p. ____), **does not mention** the Appellant's cause of action for conversion. The **Transcript of Record** of the motion hearing on August 31, 2021 (R.p. ____) **does not mention** "conversion." The first mention of "conversion" is in the Order of Dismissal filed on November 4, 2021, (R.p. ____). The Order made no findings regarding said cause of action but nevertheless dismissed same. The Order Denying Motion to Reconsider (R.p. ____) also did not make any findings regarding the conversion cause of action or regarding Appellant's arguments that the movant did not seek dismissal of said cause of action and that the movant had <u>no standing</u> to obtain such relief.

---

5 The complete statute is quoted in the Statement of the Case in the Brief of Appellant (pp. 1-2).
6 Complaint, ¶s 10 and 13. (R.p. ____)
7 Complaint, ¶s 26-36. (R.p. ____)

V. APPELLANT'S PERSONAL PROPERTY WAS NOT THE SUBJECT OF THE TAX SALE.

Curiously, the Brief of Individual Respondents – at the very end of the Arguments (p. 16) – stated: "The county tax collector's statutory seizure of the real property includes any personal property thereon or attached thereto. S.C. Code §12-51-40. Moreover, the County's seizure of the premises – lock, stock and barrel – was not challenged as wrongful in any way." The said statute does not say that "statutory seizure of the real property includes any personal property thereon or attached thereto." The tax lien in this case involved only real property: Map# 003-01-01-062. The seizure and sale of the real property has been challenged as wrongful by the present suit. Until the Brief of Individual Respondents, there has been no mention, much less any formal claim or argument, that the tax sale included personal property.

CONCLUSION

The law in South Carolina is clear. The defect in the tax sale procedures, complained of by Appellant, was a fundamental – a jurisdictional – defect. For that reason, the tax sale and tax deed are absolutely void, and the statute of limitations is inapplicable.

Respectfully submitted,

June 5, 2023

s/Leonard R. Jordan, Jr.

Leonard R. Jordan, Jr., #3221
JORDAN LAW FIRM
211 Veterans Road, Suite D
Columbia, South Carolina 29209
(803) 726-1950 Tel
(803) 726-1951 Fax
ljordan@ljordanlaw.com
Attorney for Appellant

RECEIVED
Jun 05 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

Roger E. Henderson, Presiding Judge

Case No. 2021-CP-34-00150

Appellate Case No. 2022-001791

RS&A Piping & Fabrication, Inc. a/k/a R. S. & A. Piping, Inc., ... Appellant,

v.

Ronald D. Kirby, Dylan T. Kirby, Treasurer for Marlboro County and Danny T. Williams,.. Respondents.

PROOF OF SERVICE

I, Leonard R. Jordan, Jr., attorney for the Appellant, RS&A Piping & Fabrication, Inc. a/k/a R. S. & A. Piping, Inc., hereby certify that I have this 5th day of June, 2023, served the Initial Reply Brief (Replying to Brief of Individual Respondents Ronald D. Kirby, Dylan T. Kirby and Danny T. Williams) upon J. Rene Josey, Esquire, Attorney for Respondents, Ronald D. Kirby, Dylan T. Kirby and Danny T. Williams, and Andrew F. Lindemann, Esquire, Attorney for Respondent, Treasurer for Marlboro County, by e-mailing a copy thereof to each of them at the addresses indicated below:

J. Rene Josey, Esquire
Turner Padget Graham & Laney, P.A.
jjosey@turnerpadget.com

Andrew F. Lindemann, Esquire
Lindemann Law Firm, P.A.
Andrew@ldlawsc.com

s/Leonard R. Jordan, Jr.
Leonard R. Jordan, Jr., SC Bar No. 3221