

The South Carolina Supreme Court

On Certiorari From the Court of Appeals

Appellate Case No.: 2020-001531

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S.C. SUPREME COURT

Alvetta L. Massenberg,

Petitioner,

v.

Clarendon County Treasurer, Clarendon County
Delinquent Tax Collector, Blacktop Ventures, LLC,

Respondents.

BRIEF OF PETITIONER

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QUESTION PRESENTED

Did the Court of Appeals err in issuing a per curiam opinion, made without oral argument, affirming the Clarendon County Master-in-Equity's order that did not set aside a delinquent tax sale where the evidence before the Master-in-Equity proved that the notice of levy was not posted in a conspicuous place?

STATEMENT OF THE CASE

The petitioner, Alvetta L. Massenberg is a delinquent taxpayer who on May 30, 2019, filed her complaint to set aside a tax sale of her 2.54 acre tract of land in Clarendon County. Her property taken has frontage on two public right-of-ways. One on S.C. State Highway 49, and the other a county maintained dirt farm road. The required statutory "Notice of Levy" was posted on the less traveled one lane unpaved farm road and not on the well traveled paved public highway on which her property fronts.

Following a hearing on October 18, 2019, the Clarendon County Master-in-Equity issued an order denying the petitioner relief holding that the County conducted the 2017 tax sale in compliance with Section 12-51-40 and that the respondent tax sale bidder was the rightful owner of the subject property.

Massenberg timely filed her Notice of Intent to Appeal and the parties submitted their respective briefs. The Court of Appeals, without oral argument, on November 16, 2022, filed an unpublished Opinion affirming the master. The petitioner timely filed her Motion for Rehearing which was denied by order filed December 22, 2022.

The Court of Appeals Order affirmed that the Clarendon County Treasurer was in full compliance with the requirements of S.C. Code § 12-51-40 (c) in posting the notice of levy at a conspicuous location. Petitioner submits that the order of the court disregards the well-stated law in South Carolina that a posting for a tax sale requires the notice of levy must be located at a conspicuous place on the property to be in compliance with this statute.

STATEMENT OF THE FACTS

Petitioner Massenberg's property is an undeveloped 2.54 acre tract of land located in the village of Alcolu in Clarendon County. It is a portion of a triangle-shaped property which fronts on Plowden Mill Road, a state maintained highway known as SC Highway 49. The back of her property faces Robert Rees Durant Road, a county maintained unpaved one-lane farm road. The intersection of Plowden Mill Road and Durant Road forms the tip of the triangle-shaped property. The County through a private vendor placed the notice of levy on a tree located on the unpaved farm road side of her property on July 26, 2017. The purpose of this posted notice was to alert the general public that the petitioner's property was to be sold for the nonpayment of \$221.27 in 2016 delinquent county taxes and costs.

The notice of levy posting report to Respondent County Treasurer is a Field Report of Palmetto Posting, Inc. (ROA p. 94). This report shows an aerial view of her 2.54 acre lot. The placement of the posting on the property is marked by a small "star" shown on an aerial view. This location is on the unpaved Durant farm road. The aerial view also shows the posting site surrounded by thick forest on Durant Road. Conversely on the same aerial photograph and also on Plaintiff's Exhibit 6 (ROA p. 53) we see on the South Carolina Highway 49 side of her property a neighborhood with houses and driveways.

Massenberg's uncle Frank Frierson testified that he maintains a home and some farm property on Plowden Mill Road near his niece's property. Several other witnesses called by

Massenberg confirmed that they are familiar with her 2.54 acre property, as they lived within close proximity to this tract. They all denied seeing a notice of levy placed on the property.

The condition of the Robert Rees Durant Road was a central issue at trial. The witness Frierson describes it as only wide enough for one vehicle. "If you meet another car, you have to pull over to the side and let one car pass." (ROA p. 32 L. 5-7). He identified a Google photo of the intersection of Plowden Mill Road and Durant Road (ROA p. 52, 53, 54). There are no homes on the unpaved Durant Road (ROA p. 37 L. 7-18). When asked to compare the traffic volume on Plowden Mill Road to that on Durant Road Frierson answered, "Oh it would be 100 to one, sir, or maybe more." (ROA p. 36 L. 8). The first notice that the witness Frierson had that something was happening on the property was a call on January 2, 2019, from a neighbor who lived next door, that timber was being cut on the petitioner's property (ROA p. 33 L. 24 and p. 34 L. 1 to 15).

David Epperson, the Clarendon County Administrator introduced a spreadsheet which contained the 2017 work orders for Durant Road (County Exhibit 4, ROA p. 96). He testified that based on these work orders for Robert Rees Durant Road "it is indicative that it is used quite a bit" (ROA p. 47 L. 6-8). Mr. Epperson could not confirm whether it was a relatively well-traveled road because he was unable to provide a traffic count (ROA p. 96) (ROA p. 48 L. 20).

The work orders reveal that the "grading and shaping" are a less significant portion of the 2017 work orders. Many of the work orders were to cut water drains and twice the work orders were just for checking. One of the work orders says the road was too wet to be graded, that three times during the year "brush cutting" is performed, and on another occasion "limbs and trees"

were removed. On the very day the notice of levy was posted the County Exhibit 4 shows the County was also cutting water drains on Durant Road.

Finally, Mr. Epperson could not confirm whether its width would allow passage for only one vehicle (ROA p. 49 L. 11).

The Respondent Clarendon County through its Treasurer Matt Evans testified he was responsible for the oversight duties of the Delinquent Tax Collector and that the County contracted with a company named Palmetto Posting, Inc. to post the notice of levy on property. Accordingly, the Palmetto Posting Field Report (ROA p. 94) is the only notice the County has of the actual posting. The County did not physically inspect the posting as it relied exclusively on Palmetto Posting. Mr. Evans further testified there is no stipulation in the state law (§ 12-51-40 (c)) requiring the exact location as to where the tax levy should be posted on the property. "It just has to be physically placed within the boundary of the property." (ROA p. 46 L. 20-24). He failed to testify that the posted notice must be conspicuous.

This suit was brought to remove a cloud on Massenberg's title. As such it is an action in equity. Bryan v. Freeman, 253 S.C. 50, 168 S.E.2d 793 (1969). In actions in equity tried by a judge alone, the court is free to find the facts according to its view of the preponderance of the evidence. Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). Forfeited Land Commission of Bamberg County v. Beard, 424 S.C. 137, 817 S.E.2d 801 (S.C.Ct.App. 2018).

ARGUMENT

As stated by the master-in-equity in his order: “The sole dispute before this court was whether or not the property was conspicuously posted” as required by law for tax sale of real property in South Carolina” (ROA p.1).

South Carolina courts have consistently held the enforcing agencies of government to strict compliance with all legal requirements surrounding tax sales: Dibble v. Bryant, 274 S.C. 481, 265 S.E.2d 673 (1980). All requirements of the law leading up to tax sales 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 v. Ward, 298 S.C. 75, 378 S.E.2d 261 (S.C. Ct. App. 1989).

The question before this court is the meaning of “conspicuous places” found in South Carolina Code §12-51-40 (c) (1976 as amended). This code section says that the posting of a notice of levy must be at one or more “conspicuous places” on the property subject to be taken by a government entity.

The South Carolina Legislature’s intent is the posting must be at a point on property that is “conspicuous”. *Black’s Law Dictionary* defines “conspicuous” in part as “clearly visible” and “... a term or clause is conspicuous if it is written in a way that a reasonable person against whom it is to operate ought to notice it.” In addition the definition of “conspicuous place” is as follows: “For purposes of posting notices, a location that is reasonably likely to be seen.”

The word “conspicuous” is included in other statutory schemes, such as employee and employer relationships. For instance, in consideration of whether a disclaimer was conspicuously located in an employment handbook the court referred to the Uniform Commercial

Code in reference to that term and reiterated that "the language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color." Hannah v. United Refrigerated Services, Inc., 312 S.C. 42, 430 S.E.2d 539 (S.C. Ct. App. 1993).

Likewise, "[A] disclaimer appearing in bold, capitalized letters, in a prominent position, is 'conspicuous' as a matter of law." Hessenthaler v. Tri-County Sister Help, Inc., 365 S.C. 101, 616 S.E.2d 694 (S.C. 2003). Unfortunately, the petitioner is unaware of any appellate opinion defining that term in the context of Section 12-51-40 (c). However, it is reasonable to assume that for the posting of a notice of levy to be conspicuous it must be placed in a prominent location on the subject property and at least in an area highlighted or set apart from some remote location. Posting the notice of levy in this case on a less used one-vehicle-wide back county road is clearly not posting it in a conspicuous place. In fact it is the very opposite of conspicuous as that term is commonly used. The posting is more hidden from the public view and raises questions of why was it placed there. Certainly, there were no obstacles in placing the notice on a much more visible and traveled S.C. Highway 49. Common sense demanded that the posting be on the State Highway.

The required procedure for the tax sale of a delinquent taxpayer's property is set out by South Carolina Code §12-51-40. Our South Carolina courts have repeatedly stated that all requirements of that statute are intended for the protection of the taxpayer against surprise and the sacrifice of the owner's property. Each of these requirements is mandatory and must be strictly followed. F.C. Enterprises, Inc. v. Dibble, 335 S.C. 260, 516 S.E.2d 459 (S.C. Ct. App. 1999), Smith v. Barr, 375 S.C. 157, 650 S.E.2d 486 (S.C. Ct.App. 2007). Section 12-51-40 (c) requires that the seized property be posted with a notice of levy "*at one or more conspicuous*

places on the property." (Emphasis added) "Additionally, the failure to give the required statutory notice renders the tax sale invalid." Smith, 375 S.C. at 164, 650 S.E.2d at 490. "Even actual notice is insufficient to uphold a tax sale absent strict compliance with statutory requirements." In re: Ryan Inv. Co., 335 S.C. 392, 395, 517 S.E.2d 692, 693 (1999).

The key issue before the master-in-equity was not whether the posting was actually viewed by members of the public or the taxpayer, but whether it was in a location where it reasonably could be viewed by her or the general public. While Section 12-51-40(c) does not specify an exact location for the placement of a notice, it must by law be posted in a place that is conspicuous.

As stated above, a common sense definition of "conspicuous" as intended by the Legislature was for the posting of the notice of levy to be placed so that it could be reasonably seen by others. This assertion is further boosted by the language in the statute by the requirement that the notice be posted at one "or more" places on the property. The petitioner's property faces two public paths, one is the dirt utility farm road and the other is the paved state highway. Palmetto Posting company placed the notice at a place where it was least likely to be seen. It ignored that part of the law dictating "one or more conspicuous places" in posting the property.

Pennsylvania and most other states have statutes such as South Carolina that require posted notices of tax sales. In, In Re: Somerset County Tax Sale, et. al., 14 A.3d 180 (Pa. Commw. Ct. 2010) with similar facts to this instant matter where the only issue was whether the notice was properly posted in accordance with the statute. The Pennsylvania Court held: "Although there is no requirement that the notice must be the 'best' notice at a minimum the

nature and location of the property must be considered in calculating "the placement of the notice."

The Court of Appeals in its denial of oral argument failed to recognize the error of the lower court by relying on the respondent's argument in its brief that the posting was on a "well-traveled road." No such evidence "of a well-traveled road" was presented at the trial.

The finding by the master-in-equity that the often wet dirt Durant Road is a "well traveled road" defies reason. It could not have been based on the testimony of the County Administrator David Epperson (ROA 48, 49) who admitted he was not familiar with the width of the road. He had no traffic counts on the road. The work order spreadsheet Epperson put in evidence (County Exhibit 4) (ROA 96) indicates that Durant Road has a water problem.

The Court of Appeals failed to identify both in its unpublished order and in the order denying the request for a rehearing any evidence that the posting was in fact "conspicuous".

The South Carolina judiciary has often stated that the taking of a person's property without the strict compliance of the terms of a statute is unlawful. See, King v. James, 388 S.C.16, 694 S.E.2d 35 (S.C. App. 2010), Smith v. Barr, 375 S.C.157, 650 S.E.2d 486 (S.C. Ct. App. 2007) and Halsey v. Simmons, 429 S.C. 385, 837 S.E. 2d 919 (S.C. Ct. App. 2020).

The issue before the court is not whether the notice was posted but was it in a location to reasonably be seen. The shape, sizes and location of land parcels would make it difficult for the Legislature to specify the exact location of the posting of the notice of levy. But it seems reasonable that if the property is bordered by a state maintained paved road and a dirt one lane farm utility road, it would be logical that the posting should have been placed on the road more traveled. Here the placement of the notice of levy amounted to an unlawful posting. It was not

in strict compliance with the statute and the taking of the petitioner's land by Clarendon County was unlawful.

CONCLUSION

The appellant respectfully submits that the posting of the notice of levy on her land was in no way conspicuous. It defied the statutory scheme for placing the public and the petitioner and most importantly her neighborhood on notice that a government entity was about to deprive her of the lawful right and enjoyment of her land.

PRAYER FOR RELIEF

The petitioner respectfully prays that this honorable court grant her the following relief:

1. That the opinion of the Court of Appeals filed on November 16, 2022, be set aside and reversed and that judgment be awarded to the petitioner; and
2. That the Clarendon County tax sale of the petitioner's property be set aside because of the failure of the County to post the notice of levy at a conspicuous place on her property; and
3. That the Register of Deeds for Clarendon County be directed to cancel and delete from the County records the conveyance of the petitioner's property to the respondent tax sale bidder Blacktop Ventures, LLC; and
4. That the petitioner Massenberg be ordered to reimburse the respondent Blacktop Ventures, LLC, for all county taxes paid for the year 2016 and for each of the subsequent years paid by Blacktop Ventures, LLC; and
5. That the Clarendon County Treasurer reimburse Blacktop Ventures, LLC for such sums it paid to the County Treasurer at the tax sale for the Petitioner's property; and
6. That the court order the respondent Blacktop Ventures, LLC and the Clarendon County Treasurer to reimburse the Petitioner for her reasonable attorney fees and costs of this action; and

7. And for such other and further relief as this Court may find just and equitable.

Respectfully submitted,

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June 15, 2023

THE SUPREME COURT OF SOUTH CAROLINA

Case No. 2023-000098

Appellate Case No: 2020-001531

Alvetta L. Massenberg,

Petitioner,

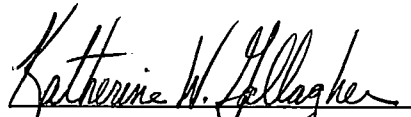
vs.

CERTIFICATE OF SERVICE

Clarendon County Treasurer,
Clarendon County Delinquent Tax
Collector, Blacktop Ventures, LLC,

Respondents.

I hereby certify that a true and correct copy of the Brief of Petitioner and the Record on Appeal have been served on this 15th day of June 2023, via U.S. Mail to: **Scott F. Talley, Esquire**, 291 South Pine Street, Spartanburg, SC 29302; and **William Johnson, Esquire**, P.O. Box 137, 411 N. Brooks Street, Manning, SC 29102.



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