

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-7919

Hallenbeck Sisters, LLC.....Appellant,

v.

Ronald D. Hall and Mary M. Scarborough, Solely in Their Capacities
as Acting Delinquent Tax Collector and Delinquent Tax Collector,
Respectively for Charleston County, SCRespondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the Trial Court err when it failed to void the 2011 Charleston County Tax Sale for not strictly complying with the statutory requirements regarding the sale of real property for past due taxes?

STATEMENT OF THE CASE

On December 5, 2012, Appellant filed a Complaint in the Charleston County Court of Common Pleas seeking to set aside the 2011 Charleston County Tax Sale as to certain real property owned by Appellant for failure of Respondents to strictly comply with the statutes regarding the sale of real property for past due real estate taxes. (Complaint). (R. pp. 14-25). Along with the Complaint, on December 5, 2012, Appellant filed a Motion for Immediate Temporary Restraining Order and Notice of Motion and Motion for a Temporary Injunction seeking to restrain the Respondents from transferring and/or disposing of certain funds in the possession of the Charleston County Delinquent Tax Office in the amount of \$40,634.55, and paid by Appellant to the Charleston County Delinquent Tax Office for the redemption of certain real property sold at the 2011 Charleston County Tax Sale, pending a hearing and determination of the Plaintiff's Motion for a Temporary Injunction. (Plaintiff's Motion for Immediate Temporary Restraining Order and Notice of Motion and Motion for a Temporary Injunction). (R. pp. 33-39).

A hearing on Appellant's Motion was held on December 13, 2012 before the Honorable Deadra L. Jefferson. The Court issued a Form 4 Order instructing Respondents to return the tax sale bid payment of \$460,000.00 to the successful third-party bidder, and that \$13,561.35 be dispersed to Charleston County for application to the 2010 delinquent taxes. (Form 4 Order). (R. pp. 1-3). The remaining \$27,123.30 was ordered to be held by the Charleston County Delinquent Tax Office until a hearing on the merits of the matter. The Court also set a hearing on the merits of the case to be held

February 11, 2013, and instructed the parties to prepare and submit Memoranda of Law to the trial judge for consideration before the hearing date. (Form 4 Order). (R. pp. 1-3).

On January 25, 2013, Respondent filed an Answer to Appellant's Complaint denying the allegations contained therein, and asserted a number of affirmative defenses. (Answer). (R. pp. 26-32). Thereafter, both parties submitted Memoranda of Law to the trial judge in support of their respective positions. A hearing on the merits of the case was held on February 11, 2013, before the Honorable R. Markley Dennis, Jr., wherein the Court denied Appellant's request to overturn the tax sale. By Form 4 Order dated March 15, 2013, the Honorable R. Markley Dennis denied Appellant's request to set aside the 2011 Charleston County tax sale as it related to the subject property. (Order Denying Appellant's Petition to set aside the Tax Sale). (R. pp. 4-6).

On March 27, 2013, Appellant filed a Motion to Amend Findings or Make Additional Findings or in the Alternative Motion to Alter or Amend Judgment. (Plaintiff's Motion to Amend Findings or Make Additional Findings or in the Alternative Motion to Alter or Amend Judgment). (R. pp. 40-43). The Court then issued an Order Granting Defendants' Motion for Summary Judgment dated May 13, 2013. (Order Granting Defendants' Motion for Summary Judgment). (R. pp. 7-13).

On June 3, 2013, Appellant filed and served its Notice of Appeal.

FACTS

Appellant is the owner of real property located in Charleston County, South Carolina, commonly known as 226 Calhoun Street, Charleston, South Carolina (the "Property"). Appellant acquired the Property by a deed dated November 30, 2011 and

recorded December 12, 2011 in the Charleston County RMC in Book 0222 at Page 164.

Appellant purchased the Property from an individual named Aiquyen Thi Tiet. The

Property is more fully described as follows:

All that certain piece, parcel or lot of land, with all improvements thereon, situate, lying and being at the northeast corner of Calhoun and Smith Streets, in the City of Charleston, State of South Carolina, as shown on a plat made by The John McCrady Company dated May 12, 1949 and recorded in Plat Book U-50 at Page 35 in the RMC Office for Charleston County. Said property is more recently shown on a plat entitled "Closing Survey, 226 Calhoun Street, City of Charleston", prepared by Forsberg Engineering and Surveying, Inc. dated March 20, 2002. For a more complete and particular description, reference is hereby made to the aforesaid plats.

TMS: 460-16-03-099 (R. p. 46, lines 3-19).

Appellant's purchase and closing of the Property was held on November 30, 2011. (R. p. 46, lines 20-22). On that date, a title search of the Property revealed that past due real estate taxes for 2010 and 2011 were due and owing on the Property. The attorney responsible for the closing collected payments at the closing for the 2010 and 2011 Charleston County real property taxes in the amounts of \$13,561.35 and \$13,331.85, respectively.

Respondents, Ronald D. Hall, in his capacity as Acting Delinquent Tax Collector for Charleston County, South Carolina and Mary M. Scarborough, in her capacity as Delinquent Tax Collector for Charleston County, South Carolina, were in charge of the noticing, the advertising, and the sale of the Property at the Charleston County 2011 Delinquent Tax Sale held on December 5, 2011 (herein referred to as the "2011 Tax Sale"). (R. p. 45, lines 4-7).

Prior to the 2011 Tax Sale, the Property was advertised and sold in the name of Aiquyen Thi Tiet, as the defaulting taxpayer, who owned property until the closing of the Property on November 30, 2011. (R. p. 45, lines 8-14).

On August 19, 2011, prior to the 2011 Tax Sale, Respondents mailed an "Execution Notice" to Aiquyen Thi Tiet, as the defaulting taxpayer, which stated that if the amount of property taxes was not paid, the property would be sold at public action beginning December 5, 2011. Additionally, the Execution Notice stated:

"All real estate taxes must be paid on or before 5:00 P.M. on December 2, 2011 in order to avoid having the property sold at tax sale."

(R. pp. 66-67).

On October 7, 2011, following the Execution Notice, Respondents mailed an "Official Notice of Levy" to Aiquyen Thi Tiet, as the defaulting taxpayer, which stated:

"All real property taxes must be paid on or before 5:00 P.M. 12/02/11 to avoid tax sale on 12/05/11 return receipt of this notice shall be deemed equivalent to levying by distress."

(R. pp. 68-69).

After the past due taxes were not paid on December 2, 2011, the Property was sold to a third-party bidder on December 5, 2011, subject to Appellant's redemption rights. (R. p. 46, lines 25-26).

Following the closing, the checks to pay 2010 and 2011 taxes were sent from Spartanburg, South Carolina to Charleston, South Carolina to an abstractor in Charleston County with the closing documents for recording. When the abstractor attempted to pay

the taxes on December 12, 2011, he was told the subject property had been sold at the December 5, 2011 tax sale for past due 2010 taxes, and the 2011 taxes could not be paid.

After discussions between the closing attorney and Respondents, Appellant was eventually allowed to pay the 2011 taxes owed in the amount of \$13,421.85 on February 3, 2012, which amount was accepted by Respondents and applied to the 2011 outstanding taxes owed. (R. p. 47, lines 1-3).

Following the sale of the Property and a review of the tax sale procedures, the closing attorney requested that Respondents void the 2011 tax sale for failure to provide proper notices as required under the statutes regarding the sale of real property for past due taxes.

On or about November 7, 2012, Appellant, as the owner of the Property, received a "Final Notice of Property Redemption" wherein said notice stated that the Plaintiff could redeem the Property by paying taxes, assessments, penalties, costs, interest and 2011 taxes for the incorrect total amount of \$56,267.18, or a tax title would be delivered to the successful purchaser. (R. pp. 70-71).

On December 4, 2012, Appellant paid to the Respondents the amount of \$40,684.55 to redeem the Property and avoid the Property being deeded to the third-party purchaser. This payment amount included \$13,561.35 for 2010 taxes due right before the sale, and \$27,123.20 in interest based on the bid amount at the tax sale. (R. p. 47, lines 11-13).

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FAILED TO VOID THE 2011 CHARLESTON COUNTY TAX SALE FOR NOT STRICTLY COMPLYING WITH THE STATUTORY REQUIREMENTS

REGARDING THE SALE OF REAL PROPERTY FOR PAST DUE TAXES.

South Carolina courts have consistently and repeatedly held that tax sales must be conducted in strict compliance with statutory requirements. (See Dibble v. Bryant, 274 S.C. 481, 265 S.E.2d 673 (1980); Aldridge v. Rutledge, 269 S.C. 475, 238 S.E.2d 165 (1977); F.C.Enters., Inc. v. Dibble, 335 S.C. 260, 263, 516 S.E.2d 459, 461 (Ct.App.1999). If the taxing agency does not comply with all the statutory notice requirements, the tax sale is void. (Manji v. Blackwell, 323 S.C. 91, 473 S.E. 2d 837 (Ct.App. 1989). Statutory requirements protecting against tax sale forfeiture of real property are strictly construed, and statutory notice requirements may not be circumvented simply by establishing actual notice of a tax sale. South Carolina Fed. Sav. Bank v. Atlantic Land Title Co., 314 S.C. 292, 442 S.E.2d 630 (Ct.App.1994).

A. The August 19, 2011 Execution Notice and the October 7, 2011 Official Notice of Levy Created An Artificial Deadline for Payment of Past Due Taxes that Does Not Comply With Statutory Requirements; Therefore, the 2011 Tax Sale Should Be Voided.

Pursuant to S.C. Code Ann. § 12-51-40(b) (Supp. 2012) “All delinquent notices shall specify that if the taxes, assessments, penalties, and costs are not paid *before a subsequent sales date*, the property must be duly advertised and sold for delinquent property taxes, assessments, penalties, and costs. The return receipt of the "certified mail" notice is equivalent to "levying by distress". (Emphasis added).

Prior to the 2011 Tax Sale, on August 19, 2011, Respondents mailed a form entitled “Execution Notice” to Aiquyen Thi Tiet, as the defaulting taxpayer and the owner of the Property at the time. That notice stated that if the amount of property taxes

was not paid, the property would be sold at public action beginning December 5, 2011.

(R. pp. 66-67). Additionally, the Execution Notice stated:

“All real estate taxes must be paid on or before 5:00 P.M. on December 2, 2011 in order to avoid having the property sold at tax sale.”

Additionally, the “Official Notice of Levy” dated October 7, 2011, was sent by Respondents to Aiquyen Thi Tiet, and stated in part:

“All real property taxes must be paid on or before 5:00 P.M. 12/02/2011 to avoid tax sale on 12/05/2011 return receipt of this notice shall be deemed equivalent to “levying by distress.” (R. pp. 68-69).

The South Carolina Supreme Court has held that a notice which states that payment must be made before the sales date creates an artificial deadline and does not comply with the statute. (See Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 577 S.E.2d 202 (2003).

Hawkins involved the tax sale of a boat by the Beaufort County Treasurer for past due taxes owed on the boat. Although Hawkins involved the tax sale of personal property, the sale of real and personal property for past due taxes is controlled by the same statutes, and the Hawkins opinion was decided in accordance with § 12-51-40(b).

In Hawkins, the first notice sent to the owner of the boat stated that if the taxes were not paid on or before August 31, 1995, the property would be sold on the first Monday in October. The second notice stated that the property was subject to sale at the October 2, 1995 tax sale, and that all tax payment must be received by September 15, 1995. The County Treasurer subsequently advertised and sold the boat to a third-party bidder at a tax sale. Hawkins, as the owner of the boat, brought an action to have the tax sale of the boat set aside for various deficiencies in the tax sale procedure, including defects in the notices sent to him as the owner.

The Supreme Court agreed with the Court of Appeal's holding that the "two notices created artificial deadlines for payment before the sales date, and thereby contradicted the statutory language requiring that the notice inform the delinquent taxpayer that the must be paid before a subsequent sales date." Hawkins at 37, 577 S.E.2d at 206. Because the sale date was actually October 2, 1995, the notices providing that payment had to be made either by August 31 or September 15 gave the impression that the taxes had to be paid at some point before the actual sales date. It should be noted that the Court in Hawkins made no distinctions as to the length of time between a stated deadline and the actual sales date. Based on the analysis set forth in Hawkins, Appellant asserts that if a deadline is included in a tax sale notice which is not the sales date, the notice is defective, regardless of the proximity of the stated deadline to the actual sale.

The Court in Hawkins continued: "The statute does not provide that the County set a date, other than the sales dates, after which the taxpayer can no longer pay his delinquent taxes before the County can begin advertising." Hawkins at 38, 577 S.E.2d at 206.

Respondents failed to strictly comply with the statutes regarding the sale of real property at tax sales by providing two delinquent notices that provided taxes must be paid on or before a date prior to December 2, 2011, which was not the subsequent sales date. The actual tax sale date was December 5, 2011. While Appellant recognizes that the time span between the stated deadline and the actual sales date is only three days, and December 2, 2011 was a Friday, our Courts have made no distinction or given greater weight to a tax notice that provides for a shorter time period between the payment due date and the actual sales date. Also, our Courts have made no distinction for a tax sale

which is held on a Monday. Appellant also recognizes that while it may more convenient for Respondents to place a deadline for payment on a Friday before a Monday tax sale date in order to process the payments, our statutes and case law simply do not address such a situation.

The December 2, 2011 date provided by Respondents was an artificial deadline that is inconsistent with §12-51-40(b). The opinion in Hawkins is clear and not open to a different interpretation based upon the particular facts of a case. This matter is in no way distinguishable from Hawkins. The notices issued by Respondent were defective by creating an artificial deadline, and the resulting sale tax is consequently void.

B. The Final Notice of Property Redemption Contained a Material Defect, and Did Not Strictly Comply with Statutory Requirements; Therefore, the 2011 Tax Sale Should Be Voided.

S.C. Code Ann. § 12-51-120 (Supp. 2012) states:

Notice of approaching end of redemption period.

Neither more than forty-five days nor less than twenty days before the end of the redemption period for real estate sold for taxes, the person officially charged with the collection of delinquent taxes shall mail a notice by "certified mail, return receipt requested-restricted delivery" as provided in Section 12-51-40(b) to the defaulting taxpayer and to a grantee, mortgagee, or lessee of the property of record in the appropriate public records of the county. The notice must be mailed to the best address of the owner available to the person officially charged with the collection of delinquent taxes that the real property described on the notice has been sold for taxes *and if not redeemed by paying taxes, assessments, penalties, costs, and interest at the applicable rate on the bid price in the total amount of ___ dollars on or before ___ (twelve months from date of sale) (date) _____, a tax title must be delivered to the successful purchaser at the tax sale.* Pursuant to this chapter, the return of the certified mail "undelivered" is not grounds for a tax title to be withheld or be found defective and ordered set aside or canceled of record. (Emphasis added).

On or about November 7, 2012, Appellant received a "Final Notice of Property Redemption" which stated Appellant could redeem the Property by paying taxes,

assessments, penalties, costs, interest and 2011 taxes for total amount of \$56,267.18 or a tax title would be delivered to the successful purchaser. (R. pp. 70-71).

Appellant had previously paid the 2011 taxes in the amount of \$13,421.85 on February 3, 2012. Therefore, the actual amount due from Appellant in order to redeem the Property was \$40,684.55, not \$56,267.18, as provided in the notice. Accordingly, Respondents failed to strictly comply with the statutes regarding the sale of real property at tax sales by providing a notice that contained a material defect in that the notice purportedly required Appellant to pay more than what was actually owned in order to redeem the Property.

The statutory requirements governing tax sales are intended for the protection of the taxpayer against surprise or the sacrifice of his property. Leysath v. Leysath, 40 S.E.2d 233, 235, 209 S.C. 342, 348 (1946). Although Appellant did redeem the Property by paying the correct amount owed of \$40,684.55, Respondents' error could have potentially deterred a taxpayer from paying a greater, incorrect redemption amount, and resulting in a taxpayer losing his property.

C. Respondents Cannot Claim Immunity For the Damages Incurred by Appellant.

As an alternative finding, the trial Court held that even if the notices are defective, and the tax sale would have been set aside, Respondents would be immune from damages sustained by Appellant pursuant to S.C. Code Ann. §15-78-60(4) and (11)(Supp. 1999). (R. p. 11, lines 14-18). S.C. Code §15-78-60(4) and (11) provide, respectively, that "a governmental entity is not liable for a loss resulting from (4) the adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule,

regulation, or written policies and (11) the assessment or collection of taxes or special assessments or enforcement of tax laws.

In H & K Specialists v. Brannen, 532 S.E.2d 617, 340 S.C. 585 (Ct.App. 2000), the Court of Appeals reversed the Beaufort County Master-in-Equity's holding that Beaufort County was immune from liability pursuant to S.C. Code §15-78-60(11). H&K bought property at a Beaufort County tax sale. The tax sale was later set aside because the treasurer failed to provide proper notice to the property owners. Beaufort County subsequently gave the purchase price to the taxpayers instead of refunding the same to H&K.

In H & K, the Court found the exemption stated in S.C. Code §15-78-60(11) to be inapplicable, as H&K's loss was a direct result of the Beaufort County's failure to refund H & K the purchase price when the tax sale was set aside. The Court found this to be a ministerial act separate and distinct from assessing, collecting or enforcing tax laws against a taxpayer. Id. at 619, 340 S.C. at 587. The Court further held that the discernible purpose behind the immunity provision contained in subsection (11) is to afford a governing entity protection from suit by persons like the property owners who lose property because of a faulty tax sale, not to shield the entity from liability for refunding money to the wrong party. Id. at 619, 340 S.C. at 587. Therefore, the Court held that section 15-78-60(11) was inapplicable.

In the event the 2011 Tax Sale is overturned, arguably Appellant would be entitled to a refund in the amount of \$27,123.20, the amount of interest generated by the voided tax sale, and presumably which has been already distributed to the wrong party by Respondents, namely the third-party bidder at the tax sale. Appellant's loss, therefore

will have resulted from Respondents' failure to refund to Appellant the interest paid when the tax sale is set aside. Respondents' improper payment, according to H&K, would constitute a ministerial act separate and distinct from assessing, collecting or enforcing tax laws against a taxpayer. According, Respondents should not have immunity from their act of distributing money to a wrong party. If the 2011 Tax Sale is voided, Respondents should be required to pay over to Appellant the amount of interest generated by the voided tax sale.

D. Appellant Has Standing to Challenge the Tax Sale.

The Court also found Appellant lacked standing to complain of the sufficiency (or the lack thereof) of the notices mailed to the defaulting tax payer as another ground for denying Appellant's request to set aside the 2011 Tax Sale. (R. p. 12, line 16-p. 13, line 7).

The Court, however, failed to address that Appellant was the owner of the Property on November 30, 2011, the date the deed was delivered to Appellant, accepted by Appellant, and the consideration for the Property was paid. Therefore, Appellant was the owner of the Property on the day the Property was sold at the tax sale on December 5, 2011. Indeed, a mortgage holder has standing to challenge a tax sale. Mid-State Trust, II v. Wright, 323 S.C. 303, 306, 474 S.E.2d 421, 423 S.C. 303 (1996). Surely, a property owner whose property is sold at a tax sale has standing to challenge the governmental sale of its own property.

In Taylor v. Aiken County Assessor, 741 S.E.2d 31, 402 S.C. 559 (Ct. App. 2013), Taylor appealed the Administrative Law Court's finding that he lacked standing to challenge Aiken County's property appraisal and tax assessment for a piece of property

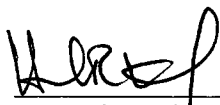
he owned because he did not own the property as of December 31, 2009, the date the 2010 taxes were assessed.

In reversing the Administrative Law Court's ruling, the Court held that although Taylor did not own the subject property at time the tax assessment was levied, he subsequently bought the property at a foreclosure sale, and therefore qualified as a "property taxpayer," as that term is defined under S.C. Code 12-60-30(22), in that his property was subject to property tax by virtue of a tax lien for unpaid property taxes. As such, he had standing to appeal the valuation and tax assessment for the property. *Id.* at 34, 402 S.C. at 564. (See S.C. Code Ann. § 12-60-30(22) (Supp.2012). "Property taxpayer' means a person who is liable for, or whose property or interest in property, is subject to, or liable for, a property tax imposed by this title.") As stated by the Court, "If (he) is a property taxpayer, he has standing as a matter of statutory right. *Id.* at 33, 402 S.C. at 562.

Indeed, Appellant was not the owner of the Property when the real property taxes were assessed, nor was Appellant the owner of the Property during the period when Respondents sent notices to the property owner and advertised the sale of the Property. However, on November 30, 2011, Appellant did become the legal owner of the Property, and thus Appellant became responsible for the payment of taxes on the Property. Appellant was therefore a "property taxpayer", as that term is defined by statute, and thus has standing to challenge a sale of its property for past due taxes. On December 5, 2011, the prior owner of the Property had no interest in the Property.

Conclusion

Appellant readily admits and concedes that that the 2010 real estate property taxes were not paid on time. However, the failure of Appellant to timely pay the real estate taxes does not relieve Respondents from conducting a tax sale of its property in compliance with the applicable statutes governing the sale of property for past due taxes. Additionally, our Courts have consistently held that these statutes must be strictly complied with, and Respondent's notices clearly do not strictly comply with these statutory regulations. Based upon the foregoing arguments, the trial court erred in denying denied the Appellant's request to set aside the 2011 Charleston County tax sale. Appellant respectfully requests that this Court reverse the trial court's ruling, and order that Respondents refund to Appellant the amount of \$27,123.20, the amount of interest generated by the voided tax sale,



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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.



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The undersigned certifies that a copy of the Final Brief has been served upon counsel of record by depositing a copy of the same in Federal Express Overnight Delivery on the 8th day January, 2014, to the address below:

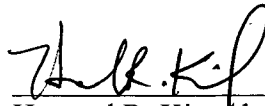
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