THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Mikell R. Scarborough, Master in Equity for Charleston County

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Appellate Case No. 2013-002108

Essie B. Bryan,.....Appellant

v.

Charleston County and C.A. Roberds.....Respondents

v.

C.A. Roberds,.....Respondent

v.

Ernest Kinloch d/b/a Ernie's Restaurant,..... Third Party Defendant

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FINAL BRIEF OF RESPONDENT C.A. ROBERDS

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STATEMENT OF THE CASE

This action was filed August 6, 2012, seeking to set aside a tax deed dated March 20, 2012, resulting from a tax sale occurring on November 1, 2010. Respondents Charleston County and C.A. Roberds timely answered the complaint. Roberds filed a Counterclaim and Third Party Complaint against Ernest Kinloch d/b/a Ernie's Restaurant, which were duly answered.

The action was referred to the Honorable Mikell R. Scarborough, Master in Equity for Charleston County, with finality, by Order dated January 22, 2013.

Respondent Charleston County served the Appellant with nineteen (19) Requests for Admissions on September 28, 2012 (R. pp. 94-121). Respondent Roberds served identical Requests for Admissions dated October 4, 2012 (R. pp. 90-93).

Appellant did not respond to either set of Requests for Admissions.

Both Respondents moved for Summary Judgment grounded upon Appellant's failure to respond.

A hearing was held before the Master in Equity on August 19, 2013, at which time the Master verbally granted both motions. A written Order Granting Summary Judgment was filed September 11, 2013 (R. pp. 4-7). This appeal followed.

FACTS

The property in question is known as 64 Spring Street located within the City of Charleston, South Carolina. The property is a two (2) story building which, at all relevant times, was occupied on the first floor by a business known as Ernie's Restaurant (App. P. 176). Appellant was the owner of the property prior to the tax deed.

Appellant has been the owner of Ernie's Restaurant since 1997 (R. p. 87, lines 8-19). Third Party Defendant Ernest Kinloch managed the restaurant.

Appellant failed to pay the Charleston County ad valorem taxes for 2009. The Charleston County Treasurer mailed to Appellant an Execution Notice on or about April 2, 2010, as required by S.C. Code Section 12-51-40(a). The notice was mailed to Appellant at the property address, which is also the address of the business she owns and the grantee's address on the deed by which she took title (R. pp. 117-121).

On or about May 24, 2010, as required by Section 12-51-40(b), the official Notice of Levy was mailed by certified mail, return receipt requested, to the Appellant at the same address (R. pp. 102-105). The certified letter was receipted for, however, the signature is not identifiable as Appellant's (R. pp. 106-107).

The property was posted as required by Section 12-51-40(c), on August 4, 2010 (R. p. 111-112).

The tax sale was duly advertised on October 8th, 15th and 22nd, 2010 (R. p. 40-45).

Respondent C.A. Roberds was the successful bidder at the tax sale.

A Final Notice of Property Redemption was sent by certified mail, return receipt requested and restricted delivery on or about September 30, 2011, in compliance with Section 12-51-40 (12-51-

120). This notice was sent to Appellant at 64 Spring Street and at 1540 Staffordshire Drive, Charleston, South Carolina 29407 (R. pp. 113-116).

The property was not redeemed prior to the expiration of the redemption period and the tax deed was subsequently executed in favor of the Respondent C.A. Roberds.

After the execution of the deed, Appellant filed a claim for the overage resulting from the tax sale and was issued a check for $23,483.92 (R. pp. 47-49). The check for the overage was dated July 13, 2012. This action was commenced 24 days later on August 6, 2012.

ARGUMENTS

I. DID THE COURT PROPERLY GRANT RESPONDENTS CHARLESTON COUNTY AND C.A. ROBERDS' MOTION FOR SUMMARY JUDGMENT?

Rule 36 of the South Carolina Rules of Civil Procedure provides in pertinent part as follows:

> "...Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the Court may allow or as stipulated in writing by the parties pursuant to Rules 29 and 6(b), the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but unless the Court shortens the time, a Defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him..."

Rule 36 further provides:

> "...A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it..."

and,

> " **(b) Effect of Admission.** Any matter admitted under this rule is conclusively established unless the Court on motion permits withdrawal or amendment of the admission...."

In *Scott v. Greenville Housing Authority* 353 S.C. 639, 579 S.E. 2nd 151 (Ct. App. 2003) the Court of Appeals held:

> "In reviewing the tenants of Rule 36(a), our courts have repeatedly found that failure to respond to request for admissions deems matters contained therein admitted for trial, regardless of whether the admission concerns a matter responded to in a parties' pleadings." Id. at 353 S.C. 646, 579 S.E. 2nd 154-155.

Thus, not only does the failure to respond deem matters admitted for trial, they are admitted regardless of the allegations of the pleadings.

In *Commerce Center of Greenville, Inc. v. W. Powers McElveen & Associates, Inc.* 347 S.C. 545, 556 S.E. 2nd 718 (Ct. App. 2001) the Court held that admissions under Rule 36 are treated as admissions in the pleadings. Id. at 347 S.C. 554, 556 S.E. 2nd 723.

The motions for summary judgment were not filed until August 1, 2013 (Roberds) and August 9, 2013 (County). The summary judgment hearing was held on August 19, 2013, nearly eleven (11) months after the service of the County's requests a little over ten (10) months after service of Roberds' requests.

Thus, neither the County nor Roberds acted in an overreaching or hyper technical manner, nor did they harass or take advantage of inadvertence or surprise. *Perez v. Miami Dade County*, 297 F. 3rd 1255, cited by Appellant, is completely inapplicable.

The Request for Admissions, together with the documents obtained pursuant to the Freedom of Information Act and submitted as exhibits to Roberds' counsel's affidavit, conclusively establish that the County complied with each step in the required statutory process and summary judgment was therefore appropriate.

First, as required by Section 12-51-40(a), the County prepared and mailed an execution notice

dated April 2, 2010, addressed to Appellant at 64 Spring Street, Charleston, South Carolina 29403-5413. (R. pp. 90, 95).

Second, as required by Section 12-51-40(b), the County mailed a Notice of Levy for the property by certified mail, return receipt requested, to her at the same address, (R. pp. 91, 95).

Third, that the County posted a Delinquent Tax Notice on the property on August 4, 2010 (R. pp. 91-92, 96).

Fourth, the County mailed a Final Notice of Redemption by certified mail, return receipt requested, to Appellant at 64 Spring Street and 1540 Staffordshire Drive, Charleston, South Carolina 29407 (R. pp. 91-92, 96-97), pursuant to the requirements of Section 12-51-120.

Exhibit "C" to the Koon affidavit (R. pp. 40-45) demonstrates that the County published due notice of the approaching tax sale on October 8th, 15th and 22nd, 2010, in compliance with Section 12-51-40(d).

All of the requests for admission above cited are supported by copies of documents, regular in form, demonstrating the County's compliance with the required procedure. Since these documents are matters of public record and were served on the Appellant, it is difficult to imagine how the Appellant could have, in good faith, denied their authenticity and efficacy.

Appellant's reliance on the assertion that the "green card" bears a signature by one other than herself is misplaced. The entire thrust of the body of law concerning tax sales is directed to the strict compliance by the taxing authority "Tax sales must be conducted in strict compliance with statutory requirements." *In re: Ryan Investment, Co.*, 335 S.C. 392, 395, 517 S.E. 2nd 692, 693 (1999). The statutory scheme set out in Section 12-51-40 sets out the requirements for strict compliance, all of which were observed by the County within the time limits specified. As argued by the County in its

brief, and found by the Master, if the County complied with the statutory notice requirements, receipt by the taxpayer is not required. (R. p. 84, lines 6-24, p. 6).

The statutory scheme anticipates that the certified mail receipt may be returned unsigned. Section 12-51-40(c) mandates the procedure to be followed in those circumstances. In those cases the County is required to take exclusive physical possession of the property by posting a notice which is the equivalent of levying by distress. Here, not only did the failure to respond to the Requests for Admissions conclusively settle that issue, the record contains a photograph of the notice physically attached to the building at 64 Spring Street indicating compliance by the County (R. pp. 111-112).

Further, the Appellant cannot challenge the authenticity of the certified mailing. Even under the most conservative interpretation of the purpose of requests to admit, documents such as the mail receipt and the letter described in the official Notice of Levy are public records, kept in the ordinary course of business and, had Appellant responded to the request for admissions, she could not have in good faith denied their authenticity.

Appellant argues that "There is no house at 64." There is certainly a two story building there in which Ernie's Restaurant was operated.

In *Rife v. Hitachi Construction Machinery, Co., Ltd.*, 363 S.C. 209, 609 S.E. 2nd 565 (Ct. App. 2005) the Court of Appeals held:

> "Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law..." Citations omitted.

and

> "...However, when plain, palpable, and indisputable facts exist on which reasonable

minds cannot differ, summary judgment should be granted..." Citations omitted. Id. at 363 S.C. 214, 609 S.E. 2nd 568.

This is such a case. The grant of summary judgment was proper.

II. DOES APPELLANT'S CLAIM AND RECEIPT FOR OVERAGE LESS THAN THIRTY (30) DAYS PRIOR TO THE COMMENCEMENT OF THIS ACTION BAR HER FROM ATTEMPTING TO SET ASIDE THE TAX DEED?

This argument is presented pursuant to Rule 220(c) as an additional ground for affirmance appearing in the record.

An action to set aside a tax sale is one in equity. *Johnson v. Arbabi*, 355 S.C. 64, 68, 584 S.E. 2nd 113, 115 (2003). Appellant is therefore bound by equitable principals. By applying for and accepting the overage of $23,483.92, Appellant waived the right to attempt to set aside the tax sale.

> "Waiver is an intentional relinquishment of a known right and may be implied from circumstances indicating an intent to waive. Citations omitted. Acts inconsistent with the continued assertion of a right, such as failure to insist upon the right, may constitute waiver..." *Bonnette v. State* 277 S.C. 17, 18, 282 S.E. 2nd 597, 598 (1981).

Appellant is also bound by the maxim that 'he who seeks equity must do equity'. In *Williams v. Wylie* 212 S.C. 51, 46 S.E. 2nd 540 (1948) the Supreme Court held:

> "Undoubtedly, the general rule, subject, however, to certain limitations and exceptions, is that a complainant seeking cancellation must, as a condition to his obtaining relief, restore a defendant as far as possible to the position which he occupied prior to the transaction which is sought to be rescinded. Citations omitted. The remedy of cancellation, like other forms of equitable relief, being subject to the maxim, 'He who seeks equity must do equity,' the rule as to tender generally applies irrespective of the ground upon which cancellation is sought, be it for fraud or other subject of equitable cognizance. Citations omitted. Id. at 212 S.C. 57, 46 S.E. 2nd 542.

Appellant has not restored or offered to tender the overage. This issue was of obvious concern to the Master (R. p. 81, line 3 -p. 82, line 7).

The claim and acceptance of the $23,483.92 overage less than thirty (30) days prior to the

commencement of this action is an independent ground for affirming the Master.

RESPONDENT ROBERDS JOINS IN RESPONDENT COUNTY'S BRIEF

In addition to the arguments herein, Respondent Roberds hereby adopts by reference the entirety of the brief of Respondent County.

CONCLUSION

There being no genuine issue of fact or law, Master in Equity's Order Granting Summary Judgment to Respondent C.A. Roberds should be affirmed.

Respectfully Submitted,

July 25, 2014

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THE STATE OF SOUTH CAROLINA

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CERTIFICATE OF COUNSEL

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

August 26, 2014

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PROOF OF SERVICE

I certify that I have served Respondent C.A. Roberds' Final Brief on the Appellant by depositing a copy of same in the United States mail, postage prepaid, on August 26, 2014, addressed to Appellant's attorney of record, Robert Gailliard, Esq. and Respondent County of Charleston's attorney of record, Bernard Ferrara, Esq., as follows:

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