THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
COURT OF Common Pleas

Mikell R. Scarborough
MASTER-IN-EQUITY

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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This action was commenced by the filing of a Summons and Complaint by the Plaintiff on August 6, 2012. Plaintiff brought this action to have the Court of Commons Pleas declare a tax deed issued by Charleston County conveying real property owned by Plaintiff to C.A. Roberds null and void. Charleston County sold real property owned by the Plaintiff at a tax sale allegedly for the non-payment of Real Property taxes by the Plaintiff. Charleston County sold the property to C.A. Roberds who was the highest bidder for the property at a tax sale. Plaintiff's lawsuit declares that the tax sale was improper under several sections of the S.C. Code of Laws, 1976, as amended including sections 12-51-40 and section 12-51-120. Plaintiff sought cancellation of the County tax deed and return of the real property in question to the Plaintiff.

Charleston County denied that they had done anything improper in the tax sale and requested that Plaintiff's Complaint be dismissed. Charleston County served Interrogatories and Requests to Admit. Plaintiff answered the Interrogatories but failed to respond to the Requests to Admit. Charleston County moved for Summary Judgment based upon Plaintiff's failure to respond to the Request to Admit. The Honorable Mikell R. Scarborough, Master-in-Equity, for Charleston County, granted Charleston County's Motion for Summary Judgment by Order dated September 10, 2013. Appellant served her Notice of Intent to Appeal on October 15, 2013.

I. QUESTION PRESENTED

WHETHER THE MASTER-IN-EQUITY ABUSED HIS DISCRETION IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE OF PLAINTIFF'S FAILURE TO RESPOND TO REQUESTS FOR ADMISSIONS.

It is undisputed that Plaintiff did NOT respond to Requests of Admissions by the Defendants. Rule 36, South Carolina Rules of Civil Procedure provides:

"The court may, in lieu of these orders determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial."

The issue here is whether granting Summary Judgment in this instance is an abuse of that discretion. In the instant case, Plaintiff filed her Complaint on August 6, 2012. Defendants answered in a timely fashion putting in issue all of the material facts alleged by Plaintiff.

It is important to note here the provisions of Rule 11, South Carolina Rules of Civil Procedure which provides in relevant part;

"The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion of other paper; that to the best of his knowledge information and belief there is good ground to support it; and that it is not interposed for delay."

Clearly Rule 11, South Carolina Rules of Civil Procedure, provides that the signing of Complaint acts as verification by the complaining party. Plaintiff was served with Interrogatories that were answered.

A close look at the Requests to Admit is instructive at this point. Generally, the Requests to Admit asks Plaintiff to Admit that she filed a case knowing the allegations in the Complaint were false. That was simply not the case.

The use of Requests to Admit in this manner has been condemned by courts who have considered this question. In Perez v. Miami-Dade County, 297 F.3d 1255, the United States Court of Appeals for the Eleventh Circuit eloquently explains the function of Rule 36, Federal Rules of Civil Procedure which is identical to the South Carolina Rule, by making the following ruling:

"We conclude with a comment on Rule 36 and Perez's use of requests for admissions in this case. Essentially, Rule 36 is a time saver designed "to expedite the trial and relieve the parties of cost of *proving facts that will not be disputed at a trial.*" 8A Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, Federal Practice and Procedure 2252 (2d ed, 1994) (emphasis added). That is, when a party uses the rule to establish *uncontested facts* and *to narrow the issues for trial*, then the rule functions properly (emphasis added). When a party like Perez, however, uses the rule to harass the other side or as in this case, with the wild-eyed hope that the other side will fail to answer and therefore admit essential elements (that the party has already denied in its answer), the rule's time-saving function ceases; the rule instead becomes a weapon, dragging out the litigation and wasting valuable resources."

Defendant asked Plaintiff to Admit the following:

Request No. 2: Admit that Essie B. Bryan received the Execution Notice reference in **Request No. 1(R.p.95)** – Clearly, Plaintiff did not receive the Notice and would not have filed this lawsuit had she received the Execution Notice.

Request No. 6 AUTHENTICITY REQUEST: Admit that the document attached hereto as Exhibit D is a true and accurate copy of the Certified Mail Return Receipt Requested Restricted Delivery envelope of the Charleston County Delinquent Tax Collector identified as 7184 9158 3733 0835 1426 addressed to Essie B. Bryan, 64 Spring St., Charleston, SC 29403-5413, and contains a signature acknowledging receipt. (R.p.95)

Plaintiff does not know whether Exhibit D is an accurate copy or not but Plaintiff knows that the signature is not hers and that she does **NOT** know who signed the return receipt. A cursory review of the return receipt reveals that it was NOT signed by Essie B. Bryan but by someone else. (R.p. 107 & 109) Defendant was on notice that the return receipt was **NOT** signed by Plaintiff but Defendant violated the spirit of Rule 11 when their own return receipt has someone else's name on it other than Plaintiff, yet still they requested Plaintiff to admit that the document was authentic and that it contains a signature. This is the very action condemned by the Perez Court and others.

Attention is called to Mutual Federal Savings and Loan Association v. Richards and Associates, 872 F.2d 88 (4th Cir. 1989) in a similar case where dismissal was sought for non-compliance with discovery orders. The Fourth Circuit Court of Appeals repeated its Four-part test announced in Wilson v. Volkswagen of America, Inc., 561 F.2d 494:

> **(1) Whether the noncomplying party acted in bad faith;**
> **(2) The amount of prejudice his noncompliance caused his adversary, which necessarily includes an inquiry into the materiality of the evidence he failed to produce;**
> **(3) The need for deterrence of the particular sort of noncompliance; and**
> **(4) The effectiveness of less drastic sanctions.**

"Such an evaluation will insure that only the most flagrant case, where the party's noncompliance represents bad faith and callous disregard for the authority of the district

court and the Rules, will result in the extreme sanction of dismissal or judgment by default." *Id.* at 504.

Unlike the cases in Federal court, there is no order demanding compliance or any type of interim order, here the Master-in-Equity proceeds straight from noncompliance with a discovery request to granting Summary Judgment. All Federal courts who have considered similar cases agree that dismissal is too drastic an action in this instance.

Under Request No. 6 – Plaintiff has no knowledge of the accuracy of the copy of the Certified Mail Return Receipt Requested Restricted Delivery envelope. Defendant's own document marked "Restricted Delivery" meaning that only the person who is the addressee may sign was returned to Defendant with a signature and name other than Essie B. Bryan. A cursory look at the Return Receipt put Defendant on NOTICE that someone other than Essie B. Bryan signed it. (R.p. 107 & 109) The whole purpose of the Restricted Delivery was defeated when the Return Receipt was signed by someone other than Essie B. Bryan.

Request No. 10 asks Plaintiff to admit "a posting on the house." There is no house at 64.(R.P. 96)

Request No. 12 Requests Plaintiff to admit that Charleston County posted a delinquent tax sale notice. (R.p. 96) Plaintiff's Complaint already made clear that no Notice was posted. Additionally, Plaintiff provided five Affidavits from people who daily went to 64 Spring Street which state that no Notice was posted at 64 Spring Street. The posting of the Notice is an issue in dispute between Plaintiff and Defendant that must be resolved at trial and not by the granting of Summary Judgment. Summary Judgment is only appropriate when there are no issues of Material Fact.

City of Columbia v. American Civil Liberties Union, etc., et al 323 S.C. 384, 475 S.E.2d 747 (1996). The South Carolina Supreme Court has urged that Summary Judgment be "cautiously invoked", stating

"Furthermore, since it is a drastic remedy, Summary Judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." *Baughman v. Am. Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).*

Helena Chemical Company v. Allianz Underwriters Insurance Company, CIGNA, 357 S.C. 631, 644; 594 S.E.2d 455, 462 (2004)

On review, the Appellant is entitled to all inference from the facts being viewed in a light most favorable to the non-moving party.

"On appeal from an order granting Summary Judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976).*

Requests for Admissions are a discovery request (tool) designed to put all the factors in the case out in the open for both parties. There are many options available to parties when a discovery request has not been responded to in a timely manner. They are as follows:

1. Motion to Compel
2. Order for Production of Requested Material
3. Sanctions for Not timely providing the requested material

The grant of Summary Judgment in this case without an Order to Respond to the Admissions by a certain time, or imposition of any of the sanctions under Rule 37 of the South Carolina Rules of Civil Procedure to end Plaintiff's case and to uphold the taking of Plaintiff's property without Defendant, Charleston County, having followed the strict procedures of the

statute is an abuse of discretion and should be rejected by this Court, especially in a case involving a tax sale. See -

Summary Judgment is inappropriate where there are genuine issues of fact (R.p. 160, 161, 162, 163 & 164). The Complaint and Affidavits of Plaintiff clearly establish genuine issues of fact. The Master-in-Equity appears to grant Summary Judgment as ultimate punishment to Plaintiff for not responding to the Requests for Admission. That is wrong.

Finally, Summary Judgment is particularly inappropriate where the Court of Appeals has repeatedly ruled that the tax sale statutes are to be strictly construed and Charleston County's own evidence shows that their "Restricted Delivery" mail was delivered to someone other than the property owner.

The law is clear that strict compliance with statutory requirements is the test that must be met by the taxing authority to validate a tax sale.

King James, 694 S.E.2d 35 (S.C.App 2010)

> [5-8] "Tax sales must be conducted in strict compliance with statutory requirements." *In Re Ryan Investment Co.,* 335 S.C. 392, 395, 517 S.E.2d 692, 693 (1999) (citing *Dibble*, 274 S.C. at 483, 265 S.E.2d at 675). "[A]ll 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 v. Ward,* 298 S.C. 75, 83, 378 S.E.2d 261, 265 (Ct.App.1989) (citing *Osborne v. Vallentine,* 196 S.C. 90, 94, 12 S.E.2d 856, 858 (1941)). "Even actual notice is insufficient to uphold a tax sale absent strict compliance with statutory requirements." *Ryan Inv. Co.,* 335 S.C. at 395, 517 S.E.2d at 693. "Failure to give the required notice [of a tax sale] is a fundamental defect in the tax sale proceedings which renders the proceedings absolutely void." *Rives v. Bulsa,* 325 S.C. 287, 293, 478 S.E.2d 878, 881 (Ct.App.1996).

See also Reeping v. Jebbco, LLC 402.SC.195, 740 S.E.2d 504 (S.C.App.2013) stating emphatically that,

"The person authorized to send the notice must exercise diligence to ascertain the correct address of the property owner."

The Bryan case is even more egregious on the part of Charleston County in that Charleston County had a green card that bore the name of someone other than the property owner. This violated the "Restricted Delivery" provision of the United States Postal Service and put even the casual observer on notice that the person that the letter was addressed to did NOT receive it. Minimal due diligence required Charleston County to find out why the person who was named did not sign for the letter and to get the signature of the person to whom the letter was addressed.

CONCLUSION

For the reasons stated above, the appellant respectfully requests that the Order of the Master-in-Equity be reversed and this matter be remanded for a trial on the issues raised in the Complaint and the Answer in this case.

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The Honorable Mikell R. Scarborough
Charleston County
Trial Court Case No. 2012CP1005112

PROOF OF SERVICE

I certify that I have served the FINAL BRIEF OF APPELLANT on Charleston County and C.A. Roberds by depositing a copy of it in the United States Mail, postage prepaid, on October 31, 2014, addressed to their attorneys of record, Joseph Dawson, III, Lonnie Hamilton, III Public Services Building, 4045 Bridge View Drive, North Charleston, SC 29405 and Kerry W. Koon, Wappoo Center, 147 Wappoo Creek Drive, Suite 203, Charleston, SC 29412.

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CERTIFICATE OF COUNSEL

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

October 31, 2014

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