

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BAMBERG COUNTY COURT OF COMMON PLEAS

The Honorable Edgar W. Dickson, Circuit Court Judge

Case No. 2010-CP-05-0039
Appeal No. 2014-002727

RECEIVED
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SC Court of Appeals

The Forfeited Land Commission of Bamberg County

v.

Eartha Dean Moody Beard, et.al., Ralph Johnson, et.al., of whom Ralph Johnson is answering as Defendant/Third Party Plaintiff.....Respondent

v.

Bank One, N.A., Conseco Finance Servicing Corp., Equity One, Inc., JP Morgan Chase Bank, National Association, as trustee for the C-___ Mortgage Loan Asset-Backed Certificates, Series 2005-CB2, and Mark D. Johnson, JOHN DOE and MARY ROWE, fictitious names representing any known minors, incompetents, persons in the military, persons imprisoned and persons under any legal disability and RICHARD ROE and SARAH DOE, fictitious names representing unknown devisees, distributees, or personal representatives of LILLIAN G. BROWN, GERALDINE G. REED, RETHA G. GREGGS, LILLIE D. GRAY, GEORGE DAVIS, JULIA DAVIS, VIVIAN DAVIS, MARGARET DAVIS, LILLIE MAE DAVIS, LECIA RICE, ROY H. SETZLER, DYAN SETZLER, LUCIOUS WRIGHT, JULIA JONES, EKITH K. GILMORE, EDDIE GRIMES, HENRY C. GUESS, WILLIE THOMPSON, BESSIE THOMPSON, ANNIE ME WHITE, and also all other unknown persons claiming any right, title, estate or lien upon the real estate which is the subject of this action, Third Party Defendants, of whom Ralph Johnson is the Respondent and Coretta McMillan, Samuel Lee Morant, Jr. and Betsy Felicia Morant are the Appellants.....Appellants

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- A. WHAT IS THE APPLICABLE STANDARD OF REVIEW?
- B. IS RALPH JOHNSON'S TAX DEED INCONTESTABLE UNDER S.C. CODE ANN. §§12-51-90(C) AND 12-5-160?
- C. DID THE TAX COLLECTOR TAKE EXCLUSIVE POSSESSION OF THE PROPERTY BY POSTING A NOTICE OF LEVY PRIOR TO CONDUCTING THE TAX SALE ON NOVEMBER 5, 2007?
- D. CAN THE FORFEITED LAND COMMISSION ASSIGN ITS BID MADE AT A DELINQUENT TAX SALE TO A THIRD PARTY?

STATEMENT OF THE CASE

The parties before this Court are: Respondent, Ralph Johnson, who acquired title to 39 properties by tax deed after Bamberg County conducted a delinquent tax sale on November 5, 2007; and Appellants, Coretta McMillan, Samuel Lee Morant, Jr., and Betsy Felicia Morant, who are heirs of delinquent taxpayers Defendants Willie Thompson and Bessie Thompson. The party that filed the pleadings that initiated this action -- the Bamberg County Forfeited Land Commission, [hereafter sometimes referred to as "FLC"] -- is not a participant in this appeal.

The FLC filed its Summons, Complaint and Lis Pendens on February 19, 2010 (thereafter amending it on August 3, 2010). The FLC alleged the tax deeds issued to the purchasers were invalid because they were by an invalid assignment of the FLC's bid to Johnson and that the tax sale had not been conducted in compliance with the "rigid statutory structure described in S.C. Code Ann. §12-59-10, et. seq. and S.C. Code Ann. §12-51-40, et. seq." [Amended Complaint]. Ralph Johnson was named as a defendant. Willis Thompson and Bessie Thompson, owners of record of the parcel subject to this action and in whose names the delinquent taxes were assessed, were also named as parties-defendant.

Ralph Johnson timely filed his Answer, Counterclaim, Cross-Claim and Third-Party Complaint on May 10, 2010, which he amended on November 9, 2011. Johnson's Answer denied Bamberg County had improperly conducted the tax sale. He affirmatively claimed his deeds were valid, asserting the lapse of the two-year statute of limitations established by S. C. Code Ann. §§12-51-90 and-160. By his Counterclaim, Cross-Claim and Third-Party Complaint Johnson asked the Court to quiet his title to the properties.

Defendants Willis and Bessie Thompson could not be located to be personally served. Unbeknownst to counsel for the FLC and Johnson at the time they filed their pleadings, both Mr. and Mrs. Thompson were deceased. Mrs. Thompson had died on September 27, 2004 and Mr. Thompson had passed on October 21, 2005. When the Complaint was filed, and when Johnson filed his responsive pleadings, no estate had been opened in the Bamberg County Probate Court for either Mr. or Mrs. Thompson. Neither the FLC nor Johnson could identify the Thompsons' heirs for purposes of service of process. There were a number of other defendants upon whom personal service could not be had and the FLC and Johnson jointly served their pleadings upon them by publication, designating them all as Richard Roe and Sarah Doe. Publication dates were August 10, 17 and 24, 2011. None of the Appellants appeared or timely answered on behalf of the Thompsons or in their own right.

Third Party Defendant BankOne, N.A., was made a party to this action by virtue of Mortgage of Willis Thompson and Bessie W. Thompson to Bank One, N.A., covering the property in question dated March 21, 2003 and recorded April 4, 2003 in Mortgage Book 153 at page 9. BankOne, N.A. did not file an Answer and was held in default.

The lower Court scheduled a trial on the merits to be held on November 18, 2013. Appellant Coretta McMillan appeared at the hearing, along with 8 others who informed the Court they were present on behalf of a family member named as a defendant and who were owners of other parcels at issue. The FLC abandoned its suit at the call of the case, and the lower Court's Order dated January 13, 2014, filed on February 4, 2014, dismissed the FLC's Amended Complaint with prejudice, leaving Johnson's Cross-claims and Third-Party Complaint at issue. [Order 1].

By another, separate Order, likewise dated January 13, 2014, but filed on February 3, 2014, Ralph Johnson's claims remained open. Having just issuing an Order dismissing with prejudice the only assertion that had been raised that the tax sale had not been conducted properly, the Circuit Court therein held 39 named defendants in default, and quieted Johnson's title to 34 of the properties he had acquired by tax deed executed by the Tax Collector. The Court's Order specifically found as a matter of law that the Bamberg County Delinquent Tax Collector had fully complied with the requirements of the law and that the tax deeds conveyed valid, fee simple title to Johnson to the properties addressed by the Order. The Court further ordered those parties in interest who were present at the November 18 hearing, including Appellant McMillan, to inform the Clerk of Court of their decision to retain counsel not later than December 19, 2013.¹ [Order 2]. After entry of the January 13 Orders, Johnson's title to 5 parcels, including the subject parcel, remained at issue.

Appellant McMillan did not timely notify the Court of her retention of counsel. She waited until April 8, 2014 to file an Answer and Counterclaim, in which she sought to have Respondent's tax deed set aside. Johnson timely replied.

The Circuit Judge scheduled another trial on the merits for August 28, 2014. On September 15, 2014, the Court signed an Order quieting Johnson's title to 4 of the remaining 5 parcels. A trial on the remaining parcel that is the subject of this matter on appeal was held on September 22, 2014. On November 24, 2014, the Circuit Judge signed an Order ruling in Respondent's favor. The Order filed on December 1, 2014,

¹ . The Court stated that the terms of its second Order dated January 13, 2014, quieting title as to those defendants in default were without prejudice to the interests of the remaining defendants, including Willis and Bessie Thompson. The Court's Order dismissing the FLC's Complaint with prejudice did not include clarifying language as to the Thompsons.

upheld Respondent's tax deed, reasoning that Appellants had allowed the two year statute of limitations to run and concluding that the Tax Collector had authority to assign the Forfeited Land Commission's bid to Johnson.

Appellant timely filed her Notice of Appeal on January 2, 2015.

FACTS

The house and lot in controversy is located outside the corporate limits of the Town of Bamberg, identified in the Bamberg County Tax Assessors office as Tax Map #0086-04-01-027. Willis Thompson and Bessie Thompson had acquired the property as joint tenants with rights of survivorship, by deed dated January 11, 2001 and recorded in the office of the Clerk of Court for Bamberg County in Deed Book 116, page 11.

When Bessie Thompson died on September 27, 2004 her husband Willis, as joint tenant, was vested in full fee simple title by operation of law. Mr. Thompson died on October 21, 2005. No estate for Mr. Thompson was open as of the date this case was commenced. Mr. Thompson's estate had not been completely administered as of the date of trial, some 4 ½ years later.

Appellants Coretta McMillan, Samuel Lee Morant, Jr., and Betsy Felicia Morant are devisees and/or heirs at law of Willis and Bessie Thompson. Ms. McMillan admitted she did not notify the Tax Assessor that her grandparents were deceased, and did not give the Assessor a different address to which the tax notice should be mailed. [Transcript p. 59, l. 5]. Ms. McMillan rented the property to Bernard Holman, who occupied the property at the time of trial. [Tr. p. 55, l. 6-10].

Bamberg County ad valorem taxes assessed for 2006 on the properties at issue became delinquent. The County complied with S. C. Code Ann. §12-45-180(A) on March 17, 2007 by having the Treasurer send the Tax Collector a Notice that the taxes on the property were delinquent, a copy of which was mailed on the same day by certified mail, return receipt requested to the defaulting taxpayers, Willis and Bessie Thompson, at the addresses shown on the tax receipts, to-wit: 2055 Binnicker Bridge Road, Bamberg, SC

29003. Bernard. Holman denied receiving any mail from the County [Tr. p. 52, l. 15-21]. This is understandable inasmuch as he could not have taken delivery due to the restricted delivery requirement.

The taxes on the parcel in question remained unpaid, and by virtue of such execution, on May 17, 2007, or soon thereafter, the Tax Collector sent notices to the defaulting taxpayers, Willis and Bessie Thompson, at their addresses of record, by certified mail, restricted delivery, return receipt requested stating that if the taxes, penalties, assessments, and costs were not paid, the property must be duly advertised and sold to satisfy the delinquency. [Plaintiff's Exhibit 1].

The taxes were unpaid after 30 days because the Thompsons were deceased and Holman could not claim the restricted delivery items. The Tax Collector attempted to comply with the second step of the process, §12-51-40(b), by taking exclusive possession of the property and sending a second notice by certified mail, return receipt requested, restricted delivery, which was returned because Mr. and Mrs. Thompson were both deceased, and the Postal Service could not have complied with the restricted delivery requirement. [Plf. Ex. 1].

Because the certified letter was returned, the Tax Collector complied with §12-51-40(c), taking exclusive possession by posting the property. The Tax Collector's file contains a copy of a Notice of Levy dated June 19, 2007. [Plf. Ex. 1, pp 7-8]. The Tax Collector testified the presence of the Notice of Levy in the file indicated that the property had been posted. [Tr. p. 26, l. 23-25]. Mr. Holman denied that the premises were posted, and denied that he received the notice as the occupant of the premises. [Tr. p. 50, l. 2-14].

The property was part of the advertisement of the tax sale published in the local newspaper as required by §12-51-40(d). The publication listed the deceased property owners; as required by §12-51-40(f). The Tax Collector sold the property in question on November 5, 2007. The Tax Collector, acting as statutory agent for the County Forfeited Land Commission, bid the property in for the amount of the taxes, penalties and interest due. The Tax Collector assigned the FLC's bid to Ralph Johnson, who paid the amount of the bid. [Tr. p. 9, l. 16-19].

The Tax Collector complied with the requirement of S. C. Code Ann. §12-51-120 by sending the notice of right to redeem to the owners of record, the Thompsons, and their mortgagee, BankOne, N.A. at the addresses of record, on October 3, 2008 by certified mail, return receipt requested, restricted delivery. [Plf's. Ex. 1].

Ms. McMillan attempted to redeem the property in January 2009, two months after the redemption period expired, but was informed the taxes had been paid by another. [Tr. p. 60, l. 19-25; p. 61, l. 1-4]. [Defendant's Exhibit 2]. Bamberg County issued a tax deed to Johnson, as assignee of the high bidder at the tax sale, on February 27, 2009, which was recorded in Deed Book 245 at pages 218- 222. [Plf's. Ex. 1].

Johnson attempted to take possession of the property upon receiving title by personally notifying Bernard Hollman, the occupant, on May 11, 2009. [Tr. p. 10, l. 20-25; p. 11, l. 1-13]. He discussed his ownership with Holman again on June 10, 2009 and then on November 21, 2009, notified him to vacate the premises. [Plf's. Ex. 4]. Johnson also informed Ms. McMillan of his acquisition before Christmas, 2009. [Tr. p. 11, l. 25; p.12, l. 1-8].

When Hallman did not voluntarily vacate the house, Johnson filed an eviction action in the Bamberg County Magistrate's Court on January 26, 2010. [Tr p. 12, l. 12-23]. Johnson had Hallman served with eviction papers. [Tr. p. 12, l. 12-23; p. 13, l. 11-16].

McMillan, having knowledge of Johnson's claim of ownership by virtue of his tax deed, took no action to challenge his title until April 8, 2014, more than 6 years after the tax sale was held; more than 5 years after Johnson recorded his tax deed; more than 4 years after she was given notice of Johnson's eviction action; and more than 2 years after last date of publication of Johnson's Answer, Counterclaim, Cross-Claim and Third-party Complaint. Ms. McMillan knew during the period of time between the eviction action was pending and the day she filed her Answer and Counterclaim that Johnson not only had a recorded tax deed, but also had taken steps to have her tenant evicted and was seeking to have his title confirmed through the courts.

ARGUMENT

A. THE STANDARD OF REVIEW IS DIFFERENT IN ADDRESSING APPELLANT'S ASSIGNED ERRORS.

When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal.” Corley v. Ott, 326 S.C. 89, 485 S.E. 2d 97 (1997). The reviewing court should view the actions separately for the purpose of determining the appropriate standard of review. Jordan v. Holt, 362 S.C. 201, 608 S.E. 2d 129 (2005). Johnson’s claim for quiet title under adverse possession is an action at law. Miller v. Leaird, 307 S.C. 56, 413 S.E.2d 841 (1992). McMillan’s counterclaim to set aside Johnson’s tax deed is an action in equity. Smith v. Barr, 375 S.C. 157, 650 S.E.2d 486 (Ct.App. 2007). The Court need not delve into the factual record if it affirms the lower Court on the issue of the statute of limitations. Epworth Children’s Home v. Beasley, 365 S.C. 157, 616 S.E.2d 710 (2005).

B. RALPH JOHNSON'S TAX DEED IS INCONTESTABLE BY VIRTUE OF THE EXPIRATION OF THE TWO-YEAR STATUTE OF LIMITATIONS SET BY S.C. CODE ANN. §§12-51-90(C) AND 12-5-160²

There is substantial evidence in the record that supports the lower Court's findings of fact.

When Willis Thompson died in 2005, Appellant McMillan took over the property. She rented it out to Bernard Holman. [Tr. p. 55, l. 6-10]. In spite of redeeming the property, Ms. McMillan never requested the Tax Assessor to change the address for tax billing purposes to a new location. [Tr. p. 59, l. 5-10]. She did not open an estate for Mr. Thompson so that she could have the title to the property transferred to the Thompson's heirs. As an heir of the property owners of record, Ms. McMillan had a duty to inform the taxing authorities of her grandparents' death. Taylor v. Jennings, 233 S.C. 600, 106 S.E.2d 391 (1958). Instead, it appears she did everything she could to keep the tax notices from being properly delivered.

² §12-51-90. Redemption of real property; assignment of purchaser's interest.

(C) If the defaulting taxpayer, grantee from the owner, or mortgage or judgment creditor fails to redeem the item of real estate sold at the delinquent tax sale within the twelve months provided in subsection (A) and after the passing of an additional twelve months, the tax deed issued is incontestable on procedural or other grounds.

§12-51-160. Deed as evidence of good title; statute of limitations.

In all cases of tax sale the deed of conveyance, whether executed to a private person, a corporation, or a forfeited land commission, is prima facie evidence of a good title in the holder, that all proceedings have been regular and that all legal requirements have been complied with. An action for the recovery of land sold pursuant to this chapter or for the recovery of the possession must not be maintained unless brought within two years from the date of sale as provided in Section 12-51-90(C).

Johnson recorded his tax deed on February 27, 2009. McMillan admitted knowing that the property had been sold for taxes to Johnson as early as January 2009, when she tried to redeem the property but the Tax Collector refused her tender because Johnson already had recorded his tax deed and paid the taxes. [Defendant's Exhibit 2]. [Tr. p. 59, l. 23-25; p. 60, l. 1-5]. She admitted talking to Respondent about his having purchased the property. [Tr. p. 60, l. 6-25]. She admitted getting his letter informing him of his intent to evict. [Tr. p. 56, l. 10-14]. Even with all the facts presented her that someone had a deed and claimed title to property she had inherited, McMillan did not file a lawsuit to set aside Johnson's tax deed. [Tr. p. 61, l. 1-7].

Although S. C. Code Ann. §12-51-130 defines delivery of the tax title to the clerk of court or register of deeds as being considered to put "in possession", the Supreme Court has held that the two-year statute does not begin to run until the purchaser at the tax sale takes possession. Dibble v. Bryant, 274 S.C. 481, 265 S.E.2d 673 (1980).

When taking actual and physical possession is not possible, taking steps to assert ownership, such as having property surveyed and informing the occupant of ownership, starts the running of the statute. King v. James, 388 S.C. 16, 694 S.E.2d 35 (Ct.App. 2010). McMillan prevailed upon the Magistrate to hold Johnson at bay, preventing from taking physical possession of the property during the pendency of this action. Johnson attempted to take possession by using due process and filing an eviction action, giving notice to McMillan. Can it be said that attempting to take possession by due process is at least equivalent to having a survey made?

In analyzing a limitations defense, "[t]he fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can

maintain an action to enforce it." Matthews v. City of Greenwood, 305 S.C. 267, 269, 407 S.E.2d 668, 669). Thus, a particular cause of action accrues "at the moment when the plaintiff has a legal right to sue on it." Harvey v. S.C. Dept. of Corr., 338 S.C. 500, 508, 527 S.E.2d 765, 769 (Ct. App. 2000) .

Having been informed in January 2009 that someone had bought her grandparents' house, McMillan knew with no uncertainty that Johnson claimed title to her grandparents' home at least on January 26, 2010. The moment she had a right to sue to set aside the tax deed was more than 4 years before she acted. Based upon Dibble and King, the deadline for contesting Johnson's title to the property would have been January 26, 2012, more than 2 years before Ms. McMillan asserted that Johnson's tax deed was invalid.

As most recently as 2010 our Supreme Court has discussed the importance of statutes of limitations:

Statutes of limitations are not simply technicalities." Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct.App.1996). "Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Id.* (citation omitted). Statutes of limitations relieve courts of the burden of trying stale claims of those who have slept on their rights. *See McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 49–50, 378 S.E.2d 69, 70 (Ct.App.1989). "The purpose of statutes of limitation is to ensure litigation is 'brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation.' " Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 377 S.C. 217, 227, 659 S.E.2d 213, 218 (Ct.App.2008) (quoting City of North Myrtle Beach v. Lewis–Davis, 360 S.C. 225, 231, 599 S.E.2d 462, 464 (Ct.App.2004)).

Transp. Ins. Co. & Flagstar Corp. v. S. Carolina Second Injury Fund, 389 S.C. 422, 428, 699 S.E.2d 687, 690 (2010)

This court has held the purpose of the statute of limitations established by §12-51-160 is "to create a time limit during which one who lost title to property through a tax sale, after proper notice, may attempt to regain title." Corbin v. Carlin, 366 S.C. 187, 194, 620 S.E.2d 745, 749 (Ct. App. 2005). Ms. McMillan allowed the time limit to expire.

One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights. McKinney v. CSX Transp., Inc., 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989).

Respondent's position is that this Court should place the running of the statute of limitations as paramount to any possible defect in a Delinquent Tax Collector's observation of procedure in attempting to collect past due property taxes. Making the observation of the tax collection process paramount creates nightmares for prospective bidders and could chill future bids, thereby precluding local governments from collecting taxes and funding their operations.

Recent jurisprudence indicates a whittling away of the application of the two-year statute of limitations. The question that remains to be answered is: At what point do the Courts totally abrogate the statute of limitations?

Even if the delinquent tax collector did not strictly comply with the requirements of the tax sale statute, at some point, the time period for contesting the validity of the tax sale has to expire. Adopting the bright-line rule that a delinquent taxpayer has two years from the date a purchaser takes possession addresses any concerns that may dwell in the potential loss in property. At the same time, it assures potential bidders at tax sales that at some point, their title will be certain.

McMillan cannot claim ignorance in having lost title due to failure to pay taxes. She had ample knowledge of a competing claim and took no action to protect her interest in the property from January 26, 2010 and April 8, 2014 – twice as long as the statutes of limitations allow.

C. APPELLANT FAILED TO PROVE BY THE PREPONDERANCE OF THE EVIDENCE THAT PRIOR TO CONDUCTING THE TAX SALE ON NOVEMBER 5, 2007 THE TAX COLLECTOR DID NOT TAKE EXCLUSIVE POSSESSION OF THE PROPERTY BY POSTING A NOTICE OF LEVY ON THE PROPERTY.

The trial Court found that the Delinquent Tax Collector complied with the requirements of the tax collection process with the sole exception of posting the property as required by S. C. Code §12-51-40(c). Appellant has not challenged with specificity any other of the lower Court's findings with respect to the Tax Collector's observance of the collection process, which are law of the case. ML-Lee Acquisition Fund, LP v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997).

If this Court is going to examine whether the process leading up to the tax sale was properly observed without regard to the running of the 2-year statute of limitations, then this Court should examine the entire record *de novo* with respect to posting of Notice of Levy on the property, and make findings of fact as it views the preponderance of the evidence. Townes Assocs., Ltd., v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

Since the Appellant was the moving party asserting the invalidity of the tax sale, she had the burden of proving the property was not posted by a preponderance of the evidence. Leysath v. Leysath, 209 S.C. 342, 40 S.E.2d 233 (1946). This Court should find that the Appellant failed in her burden of proof. The Leysath Court observed that the

adoption of what is now §12-51-160 switched the burden of proof in an action concerning the validity of a tax deed from the purchaser to the former owner of record:

The purpose of the first portion of this statute, making the tax deed prima facie evidence of good title in the holder, was to relieve the purchaser of this burden and require those seeking to impugn the conveyance to assume the burden of showing that some essential prerequisite required by statute had not been complied with.

Leysath v. Leysath, 209 S.C. 342, 348, 40 S.E.2d 233, 235 (1946)

There is conflicting evidence of whether or not the property was posted. Both McMillan and her tenant, Hallman, who have pecuniary interests in the outcome of the litigation, testified they had not seen a Notice of Levy posted on the property. Independent evidence of posting is equivocal. Respondent Johnson could not remember whether the property was posted. The Delinquent Tax Collector's file indicates that property was posted. [Plf's. Ex. 1, p. 7-8]. Sharon Williams, who was at the time of trial the Delinquent Tax Collector, but who was not the Tax Collector in 2008, and who is a disinterested party, testified that the presence of the Notice of Levy in the file indicated to her that the property was posted. [Tr. p .26, l. 23-25]. Under cross-examination, Ms. Williams admitted she did not have any personal knowledge that the property was posted. [Tr. p. 29, l. 1-3]. There is no other testimony in the record on the issue.³

Much was made about the absence of a Notice of Levy in the photograph of the house that was admitted into evidence without objection [Plf's. Ex. 3]; however, the photograph was not authenticated as to the time and date it was taken. The record reflects Johnson's legal counsel (the undersigned) had taken the photograph. [Tr. p. 18, l.

³ The "missing witness rule" is not applicable in that Ms. Carmichael, the former Delinquent Tax Collector, was not in the control of either party or available to testify without the use of compulsory process. Duckworth v. First National Bank, 254 S.C. 563, 176 S.E.2d 297 (1970). However, it is intriguing that the party holding the burden of proof, the Appellant, did not subpoena Ms. Carmichael to testify.

7]. This suit was not filed until 2010, some 2 years after the property should have been posted, and it follows that this Court should consider it extremely doubtful that the photograph is an accurate depiction of the house as it stood in Spring and Summer of 2007.

As the evidence is conflicting, this Court should affirm the lower Court's decision, finding that Appellants had failed to meet their burden of proof by the preponderance of the evidence.

D. THE FORFEITED LAND COMMISSION VALIDLY ASSIGNED ITS BID MADE
AT THE DELINQUENT TAX SALE TO RALPH JOHNSON

The lower Court concluded that the Tax Collector is authorized to assign the Forfeited Land Commission's bid. This conclusion is in keeping with S.C. Code Ann. 12-59-80, which states:

The forfeited land commission may assign its bids at any time before title deed being made pursuant to sale, provided the consideration to be paid for such assignments shall not be less than the amount of taxes, penalties and costs for which the property was sold.

S.C. Code Ann. § 12-59-80⁴

The lower Court observed that S.C. Code Ann. §12-51-90(A) contemplates that a purchaser may assign its bid. It is in keeping with the powers of a forfeited land commission granted by Article 59 of Title 12 of the South Carolina Code. The lower Court correctly ruled that if the FLC is a purchaser, then the FLC is entitled to assign its bid to a third party. This conclusion is consistent with §12-51-130 which directs the tax collector to "make a tax title to the purchaser or the purchaser's assignee." Id.

⁴ Act 87 of the 2015 session of the General Assembly amended this section to allow for sealed bids, but this amendment does not apply to this case.

Johnson testified he had acquired 132 properties by assignment of an FLC's bid in Bamberg, Clarendon, Colleton, Hampton and Allendale Counties. [Tr. p. 20, l. 19-25, p. 21. l. 1-6]. He dealt with Carol McMichael, the Bamberg County Delinquent Tax Collector, as an agent for the FLC, knowing that she had been in the position for several years and believed she knew what she was doing. [Tr. p. 20, l. 8-10] His deed is executed by Ms. McMichael. [Plf's. Ex. 1].

As an additional sustaining ground, this Court should consider that the dismissal of the FLC's Amended Complaint with prejudice operates as res judicata on the issue as to whether the Delinquent Tax Collector was authorized to assign the FLC's bid to Johnson. When an action has been dismissed with prejudice, the judgment operates in subsequent litigation to the same extent as if the action had been tried to a final adjudication. Jones v. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770 (Ct.App.1997).

The gravamen of the FLC's claim was that county employees were not authorized to deal with Johnson and make the assignment on the FLC's behalf. Willis and Bessie Thompson were named as defendants in the FLC's Amended Complaint. The issue was identical to that which Appellants raise as error. The dismissal of the FLC's Amended Complaint precludes Appellants from raising the same claim.

E. Respondents request the court to affirm for any ground appearing on the record as provided by Rule 220(c), SCACR.

CONCLUSION


Ralph Johnson's tax deed is incontestable because the statute of limitations ran more than two years before Appellant filed her Answer and Counterclaim. Johnson was not required to take actual possession under this Court's holding in King v. James, *supra*. His efforts to take possession by seeking legal process of eviction through the magistrate is at least equivalent to the undertaking of a survey of the property that this Court in King held was sufficient to trigger the running of the statute. If Johnson's deed is incontestable because the statute of limitations has run, then all other issues are moot.

Appellant does not specifically assign error to the lower Court's findings of fact with respect to the process by which the Delinquent Tax Collector brought the subject property to sale on November 5, 2007. No error is assigned except on the issue of posting the Notice of Levy on the property. Appellant did not meet her burden of proof in her action to set aside Respondent's tax deed. The preponderance of the evidence does not show that the Delinquent Tax Collector failed to post.

The Forfeited Land Commission is specifically authorized by S. C. Code Ann. §12-59-80 to assign its bid. Moreover, the FLC dismissed with prejudice its action to set aside Johnson's tax deed alleging the Delinquent Tax Collector was without authority to assign the FLC's bid while Appellant's grandparents were parties in interest. The dismissal was an adjudication of this issue on the very grounds that Appellant contends are the reasons Johnson's tax deed should be set aside. This Court should apply SCACR Rule 220 and affirm the lower Court's ruling.

For all these reasons, the Circuit Court's Order quieting Respondent's title should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Martin Harvey", is written over a horizontal line.

J. Martin Harvey
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July 29 2015

Attorneys for Respondents

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY COURT OF COMMON PLEAS

The Honorable Edgar W. Dickson, Circuit Court Judge

RECEIVED

JUL 31 2015

SC Court of Appeals

Case No. 2010-CP-05-0039

Appeal No. 2014-002727

The Forfeited Land Commission of Bamberg County

v.

Eartha Dean Moody Beard, et.al., Ralph Johnson, et.al., of whom Ralph Johnson is answering as Defendant/Third Party Plaintiff.....Respondent

v.

Bank One, N.A., Conseco Finance Servicing Corp., Equity One, Inc., JP Morgan Chase Bank, National Association, as trustee for the C-Bass Mortgage Loan Asset-Backed Certificates, Series 2005-CB2, and Mark D. Johnson, JOHN DOE and MARY ROWE, fictitious names representing any known minors, incompetents, persons in the military, persons imprisoned and persons under any legal disability and RICHARD ROE and SARAH DOE, fictitious names representing unknown devisees, distributees, or personal representatives of LILLIAN G. BROWN, GERALDINE G. REED, RETHA G. GREGGS, LILLIE D. GRAY, GEORGE DAVIS, JULIA DAVIS, VIVIAN DAVIS, MARGARET DAVIS, LILLIE MAE DAVIS, LECIA RICE, ROY H. SETZLER, DYAN SETZLER, LUCIOUS WRIGHT, JULIA JONES, EKITH K. GILMORE, EDDIE GRIMES, HENRY C. GUESS, WILLIE THOMPSON, BESSIE THOMPSON, ANNIE ME WHITE, and also all other unknown persons claiming any right, title, estate or lien upon the real estate which is the subject of this action, Third Party Defendants, of whom Ralph Johnson is the Respondent and Coretta McMillan, Samuel Lee Morant, Jr. and Betsy Felicia Morant are the Appellants.....Appellants

PROOF OF SERVICE

I certify that I have served the Plaintiff a copy of the Respondent, Ralph Johnson's Initial Brief by mailing a copy of same to Appellants Attorney as follows:

Michael C. Tanner, Esq
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Guardian ad Litem

Barnwell, SC
July 29, 2015



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JUL 31 2015

SC Court of Appeals

July 29, 2015

Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1015 Sumter St.
Columbia, SC 29201

Certified Mail No: 7012 1010 0000 5960 8071

Re: The Forfeited Land Commission of Bamberg County vs. Eartha Dean Moody, et.al.
Case No.: 2010-CP-05-039
Appellate Case No: 2014-002727

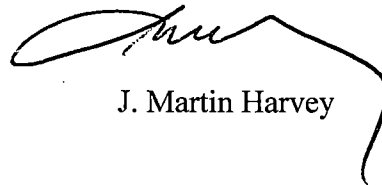
Dear Ms. Kitchings:

Enclosed, please find the original and one copy of Respondent's Initial Brief, together with Respondent's Designation of Matter to be Included in the Record on Appeal.

Kindly file the originals and return clocked copies to me in the envelope I have enclosed for you convenience.

Please accept my kind regards,

Sincerely,



J. Martin Harvey

JMH/kbm

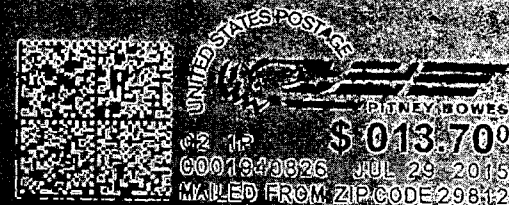
Enclosure

cc: Michael C. Tanner, Esq.
William S. Kemp, Esq.
Ralph Johnson

CERTIFIED MAIL™



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JUL 29 2015

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