

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG COUNTY COURT OF COMMON PLEAS

Honorable Edgar W. Dickson, Circuit Court Judge

Case No. 2010-DR-05-39
Appeal No. 2014-002727

RECEIVED

OCT 15 2015

SC Court of Appeals

The Forfeited Land Commission of Bamberg County, Plaintiff,

v.

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

v.

Bank One, N.A. Consec Finance Servicing Corp., Equity One, Inc., JPMorgan 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, EDITH K. GILMORE, EDDIE GRIMES, HENRY C. GUESS, WILLIE THOMPSON, BESSIE THOMPSON, ANNIE MAE 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

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. As the Circuit Court properly concluded the Bamberg County Delinquent Tax Collector failed to post the property and deliver notice of execution was an irregularity that would otherwise lead it to overturn the tax sale, the Circuit Court erred when it did not not.
2. The Circuit Court erred when it concluded the two year statute of limitations expired in this case prior to Coretta McMillan's counterclaim.
3. The Circuit Court erred when it ruled the Forfeited Land Commission's bid was properly assigned to Ralph Johnson.
4. The Circuit Court erred when it did not rule the tax sale void as a matter of law as it was not in strict compliance with the statutory requirements and, therefore, erred when it did not set aside the deed to Ralph Johnson.

STATEMENT OF THE CASE

Defendant Bessie Thompson, died September 27, 2004. Her husband, Willie Thompson died on October 21, 2005. The administration of their estates had not been commenced as of the date of filing of this action. Their estates had not been completely administered as of the date of trial. Coretta McMillan, Samuel Lee Morant, Jr., and Betsy Felicia Morant are devisees and/or heirs at law of Willie and Bessie Thompson. Ms. Mcmillan rented the property to Bernard Holman, who occupied the property at trial.

The real estate at issue in Johnson's Cross-claim and Third-Party Complaint consists of a parcel of land, more particularly described as follows:

Parcel No. 38:

All that certain lot of land situate in the County of Bamberg, State of South Carolina, and having the following boundaries: On the Northeast by Geraldine Dowling; on the Southeast by Eugene Small Heirs, et al; on the Southwest by Binnicker Bridge Road; on the Northwest by Frances S. Bonaparte.

This being the same property conveyed to Willis and Bessie Thompson by Willis and Bessie Thompson on January 11, 2001, and being recorded in the Bamberg County Clerk of Court's office in Deed Book 116, Page 11, on January 22, 2001. Also referenced in Plat Book J, Page 55.

Tax Map#: 0086-04-01-027

Mrs. McMillan paid the property taxes for the year of 2005 and redeemed the property in 2006 when she discovered the delinquency. After that, she was never notified of continuing delinquency and was not notified of the tax sale. There is a discrepancy with the Tax Assessor's office of Bamberg on who paid the taxes for the years 2006 and 2007 for this property, but regardless, Mrs. McMillan was not informed of any delinquency and did not receive any notice of the tax sale.

Bamberg County ad valorem taxes assessed for 2006 on the property at issue became delinquent. The County complied with S. C. Code Ann. §12-45-180 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, Willie and Bessie Thompson, at the addressees shown on the tax receipts, to-wit: 2055 Binnicker Bridge Road, Bamberg, SC 29003. On May 17, 2007, or soon thereafter, the Tax Collector sent notices to the defaulting taxpayers, the co-defendants affected herein 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. Ralph Johnson asserts the taxes were unpaid after 30 days and the Tax Collector attempted to comply with the second set of the process, §12-51-40 (b), by taking exclusive possession of the property and sending a second notice by certified mail, return receipt requests, 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.

The taxes were unpaid after 30 days and 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.

Because the certified letter was returned, the Tax Collector should have complied with §12-51-40(c), taking exclusive possession by posting the property. The Tax Collector's file contains a copy of a notice dated June 19, 2007. The file documentation does not contain separate indication of posting, as other files reviewed by the tax collector during her testimony. Appellant Coretta McMillan testified she never received a tax notice. Mr. Holman denied that the premises were posted, and denied that the notice was delivered to him as the occupant of the premises. The tax collector who testified had no personal knowledge the property was posted. Ralph Johnson was assigned the delinquent tax collector bid and later had a deed issued to him. He did not purchase the property at the tax sale. He brought this action to quiet title.

The Circuit Court found and concluded, however, that the Tax Collector's failure to post the property and deliver notice of execution to the occupant is an irregularity that would

otherwise lead it to overturn the tax deed, but for the expiration of the statute of limitations. Plaintiff never took possession of the property. He initiated an action in the Magistrate's Court, but this action was never prosecuted to judgment. The Magistrate never issued an order granting him possession or ejected Coretta McMillan or her tenant.

The property at issue was not redeemed and the 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.

ARGUMENTS

1. As the Circuit Court properly concluded the Bamberg County Delinquent Tax Collector failed to post the property and deliver notice of execution was an irregularity that would otherwise lead it to overturn the tax sale, the Circuit Court erred when it did not.

S. C. Code §12-51-40 (c) states that if the certified mail notice has been returned, the delinquent tax collector is to take exclusive physical possession of the property against which the taxes were assessed. The delinquent tax collector is to do this by, "posting a notice at one or more conspicuous places on the premises. In the case of real estate, reading "Seized by person officially charged with the collection of delinquent taxes of (name of political subdivision) to be sold for delinquent taxes". The Circuit Court found that the Bamberg County Delinquent Tax Collector failed to properly post the property and deliver notice of execution. Officials from Bamberg County testified they had no personal knowledge that the property was ever posted as is required. This is a prerequisite for the property to be sold. [R. p. 95-96, lines 19-22 and R. p. 96, lines 1-3].

The law in this state mandates that, "tax sales must be conducted in strict compliance with statutory requirements." In Re Ryan Investment Company, 335 S.C. 392, 517 S.E.2d

692 (1999). The Court of Appeals has held that, “all 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.” King v. James, 388 S.C. 16, 694, S.E. 2d 35, S.C. App. 2010. Donohue v. Ward, 298 S.C. 75, 378, S.E. 2d 265, S.C. App. 1989. “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, 478, S.E.2d 878, S. C. App, 1996. Neither Appellant or her tenant received a notice the property was posted.

The Circuit Court made a conclusion of law that the tax collector’s failure to post the property and deliver notice of execution to the occupant is an irregularity that should have led the Circuit Court to overturn the tax deed. Appellants assert the Circuit Court erred in not applying this conclusion of law. As the tax sale was not conducted as was required with statutory requirements, specifically with the posting of property required by §12-51-40 (c), the tax sale should have been set aside and the deed issued to Ralph Johnson should be void as the tax sale proceedings were void. Therefore, Appellants respectfully assert the Circuit Court made an error of law and that the tax sale should be deemed absolutely void and the deed issued to Ralph Johnson void as a matter of law. Rives v. Bulsa, 325 S.C. 287, 478, S.E.2d 878, S. C. App, 1996.

2. The Circuit Court erred when it concluded the two year statute of limitations expired in this case prior to Coretta McMillan’s counterclaim.

This Court has held the purpose of the statute of limitations as set forth in §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 S. C. App. 2005. Appellants assert they were denied proper notice of the tax sale as the Tax Collector never took exclusive possession of the property. Appellant asserts the statute did not, therefore, run.

“On one hand, we find case law that says when notice to the homeowner is not in strict compliance with the statute, such a defect is “jurisdictional,” and the statute of limitations does not run at all.” Donahue v. Ward, 298, S.C. 75, 82, 378 S.E.2d 261, 265 (1989) (holding where a defect in notice is jurisdictional, such a defect “invalidates the tax proceeding and prevents the running of the limitations statute.”). The County failed to establish by a preponderance of the evidence that it took “exclusive possession” of the Property by posting, as is required under §12-51-40 (c).

Leysath v. Leysath, 209 S.C. 342, 344, 40 S.E.2d 233, 236 (1946) (holding the two-year statute of limitations in §12-49-580 “does not begin to run until the purchaser is put into possession.” Ralph Johnson did not offer any testimony that he was ever put into possession of the property. Instead, he testified the Magistrate never issued an order evicting Appellant or her tenant. [R. p. 92, lines 8-20]. The tenant, Bernard Holman, testified he was never issued any order forcing him to quit the property. [R. p. 118, lines 17-19]. The Sheriff also never took possession of the property before the tax sale. The Sheriff never placed Ralph Johnson in possession following the execution of the tax deed to him. The Supreme Court held in Scott v. Boyle, 271 S.C. 252, 246 S.E.2d 887, (S.C. App. 1978), that the statute of limitations did not begin to run as the purchaser of the tax sale was never in “possession” as the Sheriff did not remove the record owner. This is similar to the instant action in that

Appellant never lost “possession” as they were never evicted by legal order. As such, the statute of limitations did not begin to run against them and as the tax sale was defective, the deed to Ralph Johnson should be set aside as void.

3. The Circuit Court erred when it ruled the Forfeited Land Commission’s bid was properly assigned to Ralph Johnson.

Ralph Johnson testified that he did not appear as a bidder at the tax sale. [R. p. 89, lines 17-20]. According to the testimony of the current Bamberg County delinquent tax collector, the prior delinquent tax collector assigned a number of bids, including this subject matter property, to Ralph Johnson at a later date. There was no testimony or evidence of any written agreement for this assignment of bid. There was also no testimony or evidence that the delinquent tax collector had the authority from Bamberg County or the Forfeited Land Commission to enter into this assignment.

While S. C. Code §12-51-55 authorizes the Forfeited Land Commission of the County to place a bid at a tax sale equal to the amount of all unpaid property taxes, penalties and assessments due to the county, it is silent on whether or not it may allow for an assignment. S. C. Code Ann. §12-51- 90(a) contemplates that a successful purchaser at the tax sale may later assign its bid however, this section is silent on whether the Forfeited Land Commission may assign a bid. As such, Ralph Johnson was not the successful purchaser as he did not bid.

Appellants are not aware of any case law that states that such an assignment may be permitted between the Forfeited Land Commissioner and a third party who is not a successful bidder. As such, Appellants assert that the Bamberg County delinquent tax collector had no

statutory authority to enter into this assignment as there has been no evidence of same produced into the record. As such, Appellants assert that the deed to Ralph Johnson shall be deemed void and of no force and effect. Rives v. Balsa, *supra*.

4. The Circuit Court erred when it did not rule the tax sale void as a matter of law as it was not in strict compliance with the statutory requirements and, therefore, erred when it did not set aside the deed to Ralph Johnson.

As stated above, S. C. Code §12-51-40 (c) states that if the certified mail notice has been returned, the delinquent tax collector is to take exclusive physical possession of the property against which the taxes were assessed. The Circuit Court found that the Bamberg County Delinquent Tax Collector failed to properly post the property and deliver notice of execution. Officials from Bamberg County testified they had no personal knowledge that the property was ever posted as is required. They provided no evidence this was done. This is a prerequisite for the property to be sold.

The law in this state mandates that, “tax sales must be conducted in strict compliance with statutory requirements.” In Re Ryan Investment Company, 335 S.C. 392, 517 S.E.2d 692 (1999). The Court of Appeals has held that, “all 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.” King v. James, 388 S.C. 16, 694, S.E. 2d 35, S.C. App. 2010. “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. Balsa, 325 S.C. 287, 478, S.E.2d 878, S. C. App, 1996. Appellant’s assert this failure was a fundamental defect.

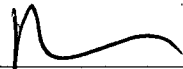
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CONCLUSION

Based upon the foregoing authority, Appellants asserts their *Appeal* be GRANTED; and an Order issued directing the Bamberg County Clerk of Court to set aside the deed recorded at Deed Book 245, page 218-222.

Respectfully submitted,



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October 13, 2015

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.....Appellants

PROOF OF SERVICE

I certify that I have served a copy of the Final Brief of Appellants by depositing a copy of same in the United States Mail, postage prepaid, on October 13, 2015, addressed to the Third Party Plaintiff/Respondent's attorney as follows:

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Of Whom Ralph Johnson is the Respondent and Coretta McMillan, Samuel Lee Morant, Jr., and Betsy Felicia Morant are the Appellants.

CERTIFICATE OF COUNSEL

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

October 13, 2015

A handwritten signature in black ink, appearing to read 'MC Tanner', located above the printed name.

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