

#10
2-18-16

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS
Rowan Tree LLC

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP2603779

RECEIVED

APR 19 2016

SC Court of Appeals

Jeffrey S Mayberry
Waterfront Development
II LLC
Wells Fargo Bank
National Association
Jane Doe

Mary K Mayberry
Wachovia Bank National
Association
John Doe

3Rd Party Crystal
Montgomery Delinquent
Tax Manager for Horry
County

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Clerk of Court

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):
 - Rule 43(k), SCRPC (Settled); Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):
 - Rule 40(j) SCRPC; Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 - Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court.

ORDER INFORMATION

FILED
APR 19 2016
COURT CLERK
WARD

(RLN) Defendants Motion for Summary Judgment-GRANTED Attorney Mark Davis Neill will prepare order incorporating the Arguments made in his memorandum & all the
This order ends does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

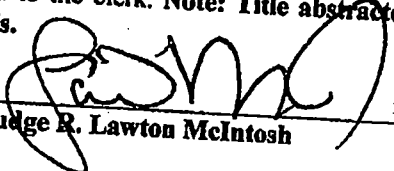
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
n/a	n/a	n/a

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge R. Lawton McIntosh



2155
Judge Code

2/18/2016
Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

Alwyn Taylor Silver PO Box 528 Andrews, SC 29510

ATTORNEY(S) FOR THE PLAINTIFF(S)

Mark David Neill PO Box 2810 Murrells Inlet, SC 29576
Emma Ruth Brittain PO Box 1290 Myrtle Beach, SC 29578

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter Teresa Bautz

Melanie Huggins-Ward - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

The Rowan Tree, LLC,)

Plaintiff,)

vs.)

Jeffrey S. Mayberry, Mary K. Mayberry,)

Waterfront Development, II, LLC, Wachovia)

Bank, National Association, n/k/a Wells)

Fargo Bank, National Association, John Doe,)

and Jane Doe, as statutory Defendants)

representing all other persons unknown and)

unlocatable who have or may claim to have)

an interest in the property which is the)

subject of this action,)

Defendants,)

Vs.)

Crystal Montgomery, Delinquent Tax)

Manager for Horry County,)

Third-Party Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

CASE NO: 2014-CP-26-3779

Order Granting Summary Judgment

(Ending Action)

HORRY COUNTY
2016 MAR 21 PM 2:25
MELANIE...
CLERK OF COURT

Order Granting Summary Judgment

This matter came before the Court pursuant to a Motion for Summary Judgment filed by Defendants Jeffrey S. Mayberry, Mary K. Mayberry, and Waterfront Development, II, LLC. A hearing was held on February 18, 2016. The moving Defendants allege in their Answer, Counterclaim, and Third-Party Complaint that the tax sale of property they own in Horry County must be set aside. Specifically, the tax sale was not conducted in accordance with S.C. Code §12-51-40 and S.C. Code §12-1-120. Present for the hearing was Mark D. Neill, attorney for the moving

Defendants, Taylor Silver, attorney for the Plaintiff, and Leah Cromer, attorney for Third-Party Defendant. After reviewing the pleadings, affidavits filed of record, and legal memoranda submitted by the parties, and after hearing oral argument, the Court finds the moving Defendants are entitled to Summary Judgment based upon the following findings of fact and conclusions of law:

FINDINGS OF FACTS

The facts presented to the Court pertinent to the Motion are not in dispute. Waterfront Development II, LLC is a South Carolina limited liability company. The company's articles of organization were filed with the South Carolina Secretary of State on May 27, 2005. Jeff Tuton is its managing member and registered agent. The Office of the South Carolina Secretary of State provides the company's address to be 109 Charter Drive, Longs, South Carolina 29568. Neither Jeffrey S. Mayberry nor Mary K. Mayberry is a member of Waterfront Development II, LLC. Mr. and Mrs. Mayberry live in Raleigh, North Carolina.

On August 15, 2005, the subject property was conveyed to Waterfront Development II, LLC, Jeffrey S. Mayberry, and Mary K. Mayberry in consideration of payment of One Million Four Hundred Fifty Thousand and no/100 (\$1,450,000.00). The Deed of Conveyance was filed with the Horry County Register of Deeds on August 18, 2005 in Deed Book 2960 at Page 1376. The Deed sets forth that Mr. and Mrs. Mayberry received a 4.17% interest in the property and the remaining 95.83% interest was conveyed to Waterfront Development II, LLC. The Deed further provides the grantees' address is "PO Box 1618, N Myrtle Beach, SC 29597."

Waterfront Development II, LLC, Jeffrey S. Mayberry, and Mary K. Mayberry borrowed money from and executed a mortgage in favor of Wachovia Bank, National Association. The mortgage is secured by the subject property and was filed with the Horry County Register of Deeds on August 18, 2005 in Mortgage Book 4175 at Page 33. The mortgage identifies Mr. and Mrs.

Mayberry's address as 8721 Gleneagle Drive, Raleigh, North Carolina, 27613 and Waterfront Development II, LLC's address as 109 Charter Drive, North Myrtle Beach, South Carolina 29568. The mortgage also provides two addresses for Wachovia Bank, National Association: 816 Greenbriar Circle, Suite G, VA 9505, Chesapeake, VA 23320 and 15 S Main Street, Greenville, SC, 29601.

The record reflects that the 2011 real property taxes for the subject property were not paid. According to the Supplemental Affidavit of Crystal Montgomery, Delinquent Tax Manager for Horry County, the following steps were taken in an effort to collect the unpaid taxes: On April 2, 2012, a notice addressed to "MAYBERRY JEFFREY S ETAL" was sent by regular mail to P.O. Box 1618, North Myrtle Beach, SC, 29598; On or about May 11, 2012, a notice addressed to "MAYBERRY JEFFREY S ETAL" was sent by certified mail, return receipt requested-restricted delivery to P.O. Box 1618, North Myrtle Beach, SC, 29598; On or about September 7, 2012, a notice of levy was posted on the property; On or about September 28, 2012, a Notice of Levy was issued and mailed by certified mail, return receipt requested restricted delivery to Mary K. Mayberry at North Myrtle Beach, SC, 29598.

In each and every notice set forth above, the delinquent taxpayer and owner of record was identified as "Maybery, Jeffrey S., Etal." The notices failed to identify Waterfront Development II, LLC or Mary K. Mayberry as owners. Additionally, all the written notices were mailed to P.O. Box 1618, North Myrtle Beach, SC, 29598-16 and all were returned "Return to Sender Unclaimed Unable To Forward."

On November 15, November 22, and November 29, 2012, notice of the December 3, 2012 Tax Sale was published in the Horry Independent. In each advertisement of sale, the owner of the subject property was once again identified as "MAYBERRY JEFFREY S ETAL." The advertisement of sale failed to identify Mary Mayberry and Waterfront Development II, LLC as

owners. According to the Supplemental Affidavit of Crystal Montgomery, not all of the property owners were identified because when advertising property for sale, Horry County's standard procedure is to identify the names of multiple defaulting taxpayers in the same manner as indexed in the computerized Tax Map System maintained by the Horry County Assessor's Office for all parcels of property located in Horry County.

The property was sold at tax sale on December 3, 2012, Plaintiff purchased the subject property for \$41,900.00 As set forth above, the moving Defendants purchased this property in August of 2005 for \$1,450,000.00.

On or about October 24, 2013, in preparation for sending the notice of redemption, the Delinquent Tax Collector obtained a title search of the subject property. In her affidavit, Ms. Montgomery states the title search revealed Wachovia Bank, N.A. held a mortgage encumbering the property. Mr. Montgomery also stated that two separate redemption notices were sent to the Wachovia. One of these notices was mailed to 15 S. Main Street, Greenville, SC, 29601, the address provided in the first paragraph of the mortgage. Addresses for Mr. and Mrs. Mayberry and Waterfront development are also contained in the same paragraph as that of Wachovia Bank in the Mortgage.

Horry County did not send notices of redemption to Mr. and Mrs. Mayberry and Waterfront Development II, LLC at their addresses appearing in the mortgage. Horry County also failed to ascertain the address for the registered agent for Waterfront Development II, LLC from the Secretary of State website. Instead, Horry County sent the redemption notices for Mr. and Mrs. Mayberry and Waterfront Development II, LLC to P.O. Box 1618, N. Myrtle Beach, SC, 29598 – the same address it utilized before and which all prior notices had been returned "unclaimed and unable to forward". The Tax Collector also continued to identify the owner of the property as "Maybery, Jeffrey S., Et

al." Not surprisingly, all three redemption notices were returned to Horry County and stamped "unclaimed unable to forward."

The affidavits of Jeffrey S. Mayberry and Mary K. Mayberry state that the address shown on the mortgage correctly identifies the address they have resided at for over twenty years. They further provide that the Tax Collector sent notices to the address provided in the Wachovia mortgage in 2006 for unpaid taxes on this property, which resulted in the taxes being paid.

On February 17, 2014, Ms. Montgomery executed a Tax Deed conveying the property to The Rowan Tree, LLC. On June 9, 2014, Plaintiff filed its Complaint seeking an Order of Quiet Title. On October 27, 2014, Mr. and Mayberry and Waterfront Development II, LLC filed their Answer, Counterclaim, and Third-Party Complaint against Crystal Montgomery, Delinquent Tax Manager for Horry County. On December 2, 2014, an Answer was filed on behalf of Crystal Montgomery. On December 9, 2014, a Reply was filed on behalf of Plaintiff. On June 1, 2015, Mr. and Mayberry and Waterfront Development II, LLC filed their Motion for Summary Judgment.

CONCLUSIONS OF LAW

A motion for summary judgment shall be granted "if 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 a judgment as a matter of law." Rule 56(c), SCRPC. In the present case, the undisputed facts clearly show the tax sale was not conducted in strict compliance with statutory requirements and must be declared void. As such, the moving Defendants are entitled to Summary Judgment.

In South Carolina, "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 mandatory and are to be strictly enforced." Donohue v. Ward, 298 S.C. 75, 83, 378 S.E.2d 261, 265

(Ct.App.1989) (internal citations and quotations omitted). Tax sales must be conducted in strict compliance with statutory requirements." In re Ryan Inv. Co., Inc., 335 S.C. 392, 517 S.E.2d 692, 693 (1999). "Failure to give the required notice of a tax sale is a fundamental defect in the tax sale proceedings that renders the proceedings absolutely void." Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 577 S.E.2d 202, 205 (2003). In order for a tax sale to be upheld, the property must be listed, assessed, levied upon, advertised and sold in the name of the true owner. Aldridge v. Rutledge, 269 S.C. 475, 238 S.E.2d 165 (1977). A tax execution is issued against the defaulting tax payer, not the property. 95 S.C. 295, 78 S.E. 883 (1913).

In the present case, the tax sale was not conducted in strict statutory compliance because the property was not listed, assessed, levied upon, advertised and sold in the name of the true owner. The most obvious noncompliance is the Tax Collector's failure to identify all three owners in the advertisement of sale. Pursuant to S.C. Code Ann. §12-51-40 (d), the advertisement must include the delinquent taxpayer's name. In Baker v. Denton, 37 F. Supp.3d 794 (2014), the District Court held the tax sale advertisement violated S.C. Code Ann. §12-51-40 (d) because it did not include the names of **all** the owners of the property. The Court reasoned "[i]f the legislature had intended to require the Tax Collector to advertise the name of only one delinquent taxpayer per property... then the legislature could have specified that the advertisement include "A" or "one" or "at least one" delinquent taxpayer's name." Id. at 799. Because the advertisement did not properly list all owners, the tax sale was not conducted in strict statutory compliance.

In reaching its decision in Baker, the District Court relied in part upon the South Carolina Supreme Court's decision in Osborne v. Vallentine, 196 S.C. 90, 12 S.E.2d 856 (1941). In Osborne, the Supreme Court considered an advertisement for a tax sale which identified the deceased testatrix as the owner of the property instead of the devisees. The Supreme Court held the advertisement

"should have been made in the names of the devisees, the owners at the time thereof." Thus, the Supreme Court interpreted "the name of the owner" to mean the names of **all** of the owners.

The undisputed facts presented in this matter are very comparable to the facts presented in Donohue v. Ward, 298 S.C. 75, 378 S.E.2d 261 (Ct.App.1989), which also arises out of Horry County. In Donohue, the subject property was owned by Stephen Donohue, his wife Patricia Donohue, and Denis Vlaming, Trustee for Caroline Vlaming. The deed evidencing the conveyance of the property to the three owners only listed the address for Stephen Donohue. The addresses of the other grantees were not included on the deed. Tax notices for the years 1979 through 1982 were mailed to Stephen Donohue at the address provided on the deed but were returned undelivered. No notices were sent to his wife Patricia or to Denis Vlaming. When taxes went unpaid, the Horry County Treasurer and Tax Collector issued his warrant of execution against the property naming only "Stephen Donohue, et. al" as the defaulting taxpayer. Thereafter, the Horry County Treasurer and Tax Collector posted a notice on the property and advertised the property for sale, again only naming "Stephen Donohue, et. al" as the defaulting taxpayer. The Court declared the tax sale void because the required statutory steps in the tax proceeding were not performed in the name of each and every owner. The Court reasoned the taxing statutes and legion of cases interpreting the statutes make it clear that property must be listed, assessed, levied upon, advertised, and sold in the name of the true owner. The Court went on to state: "Here, the property was not listed, levied upon, advertised, or sold in the name of either Mrs. Donohue or the trustee. On that basis the sale of their interests must be set aside."

Additionally, in the present case, the Tax Collector failed to exercise due diligence in ascertaining the best address available for the notice of redemption. S.C. Code Ann. §12-51-120 requires notices of redemption to be mailed to the defaulting tax payer and to a grantee, mortgagee or

lessee of record at the best address available. By the time the notices of redemption were mailed by the Tax Collector, each and every notice previously sent to "PO Box 1618" had been returned "Unclaimed Unable to Forward." In preparation for sending out the notices of redemption, the Tax Collector had a title search performed on the property. The title search found that there was a mortgage to Wachovia Bank encumbering the property. The Tax Collector ascertained the name of the mortgage holder and the mortgage holder's address by reviewing the mortgage. In the very same paragraph which identified the mortgage holder and its address, the correct address was provided for Mr. and Mrs. Mayberry - 8721 Gleneagle Drive, Raleigh, North Carolina, 27613. The mortgage also provided the correct address for Waterfront Development II, LLC - 109 Charter Drive, North Myrtle Beach, South Carolina 29568. This is also the address of the registered agent for Waterfront Development II, LLC found on the South Carolina Secretary of State website. Instead of mailing the notices of redemption to the address found on the mortgage, the Tax Collector sent the redemption notices to the same "PO Box 1618" in which all other notices had been returned "Unclaimed Unable to Forward." As expected, these notices were also returned "Unclaimed Unable to Forward".

South Carolina law requires a taxing authority to exercise due diligence in sending notice to a property owner at the best address available. In Reeping v. JEBCO, LLC, 402 S.C. 195, 740 E.E.2d 504 (Cl.App.2013), the Court declared a tax sale void because notice was not sent to the best address available. In Reeping, Orangeburg County repeatedly sent notices to the property owners' former address. The notices were returned to Orangeburg County marked "undeliverable and no such number." The returned envelopes provided a new street address for the property owners but not the City, State, or zip code. The Court determined that Orangeburg County was put on actual notice that the property owners were not receiving mail. The Court further determined that "a minimal amount of diligence could have uncovered their city, state, and zip code had not changed. Id., at 199.

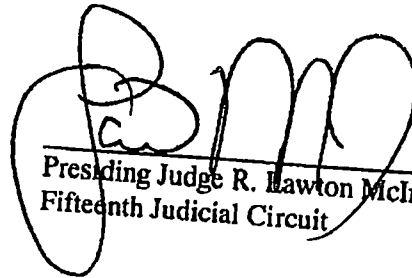
The Court in Reeping relied upon the Court's prior opinion in Benton v. Logan, 323 S.C. 338, 341, 474 S.E.2d 446, 447 (Ct.App.1996). In Benton, the property owner, Ruby Benton did not receive any delinquent tax notice or notice of levy on her property. Beaufort County's records only reflected one address for Ms. Benton – which was the address of the property. Beaufort County's records did not include any change of address forms. Because Ms. Benton did not pay her real estate taxes, Beaufort County commenced proceedings to have the property sold to satisfy its tax lien. Beaufort County sent all statutorily required notices to the one address it had on file. However, the notices were returned unclaimed because Ms. Benton no longer lived at the property. The Court noted that Beaufort County made no effort to inquire of the post office of the availability of a record of Ms. Benton's forwarding address. The Court upheld the lower court's decision to declare the tax sale void because Beaufort County failed to exercise due diligence to ascertain the best available address.

In the present case, the Tax Collector for Horry County was repeatedly put on actual notice that the moving Defendants were not receiving the notices. With a minimal amount of diligence, the Delinquent Tax Manager could have easily determined their correct addresses, as it was clearly stated in the first paragraph of the Wachovia mortgage and shown on the South Carolina Secretary of State website. The facts also show that the Tax Collector had actual knowledge of the Mayberry's address, as previous tax notices were sent to their Raleigh address in July of 2006. The undisputed facts show the Delinquent Tax Manager failed to exercise due diligence in sending the redemption notices to the best address available for Mr. and Mrs. Mayberry and Waterfront Development II, LLC.

Conclusion

For the reasons set forth above, the Motion for Summary Judgment filed by Defendants Jeffrey S. Mayberry, Mary K. Mayberry, and Waterfront Development, II, LLC is GRANTED. The Tax Sale and Deed conveying the property to The Rowan Tree, LLC is hereby declared VOID and set aside.

IT IS SO ORDERED.


Presiding Judge R. Lawton McIntosh
Fifteenth Judicial Circuit

March 16, 2016
Anderson, South Carolina