

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No. 2013-CP-10-05112

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
RESPONDENT CHARLESTON COUNTY**

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE MASTER-IN-EQUITY ABUSE HIS DISCRETION WHEN HE GRANTED RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT BASED ON FACTS DEEMED ADMITTED DUE TO APPELLANT'S FAILURE TO RESPOND TO THE REQUESTS FOR ADMISSIONS?
- II. DID THE MASTER-IN-EQUITY ERR WHEN HE FOUND THAT CHARLESTON COUNTY IS ONLY REQUIRED TO MAIL NOTICE BY CERTIFIED MAIL RETURN RECEIPT REQUESTED-RESTRICTED DELIVERY AND NOT GUARANTEE ACTUAL RECEIPT OF THE CERTIFIED MAIL BY THE DEFAULTING TAXPAYER?

STATEMENT OF THE CASE

Appellant Essie B. Bryan, ("Appellant" or "Bryan") was the owner of real property located at 64 Spring Street in Charleston, South Carolina. Appellant failed to pay the ad valorem property taxes for tax year 2009 and Respondent Charleston County ("the County") sold the property to Respondent C. A. Roberds ("Roberds") at a tax sale and conveyed title to Roberds by tax deed on March 20, 2012.

The tax sale produced \$23,483.92 more cash than the full amount due in taxes, assessments, penalties and costs. On June 26, 2012, Robert L. Gailliard, Esquire, submitted a "Claim by Defaulting Taxpayer for Overage" on behalf of Bryan to the County for the remaining overage. Gailliard included a copy of Bryan's South Carolina driver's license that expires October 29, 2015. It shows an address of 64 Spring Street, Charleston, S.C. On July 13, 2012, the County disbursed the amount of the overage to Appellant. Then on August 6, 2012, Appellant commenced this action to declare the tax deed null and void.

On September 7, 2012, the County filed its answer. On September 26, 2012, Roberds filed his answer, counterclaim and third party complaint. On September 28, 2012, the County served its First Set of Interrogatories, Requests for Production of Documents, and Requests for Admissions upon Appellant's counsel. On October 8, 2012, Roberds served his Interrogatories, Request for Production, and Request for Admissions upon Appellant's counsel.

On January 28, 2013, the third party defendant Ernest Kinloch d/b/a Ernie's Restaurant filed its answer. On March 15, 2013, Roberds filed a Motion to Appoint a Receiver, which was granted by the Master. On April 22, 2013, the County sent

Appellant's counsel a letter deeming the requests admitted and seeking responses to its Interrogatories and Requests for Production of Documents within 2 weeks of the date of the letter to avoid a motion to compel. On June 25, 2013, Appellant's counsel served the County responses to its Request for Production of Documents. Appellant never responded to the County's First Set of Interrogatories and Requests for Admissions.

On August 1, 2013, Roberds filed his motion for summary judgment on his counterclaim against Bryan. On August 9, 2013, the County filed a motion to declare requests for admission deemed admitted and for summary judgment along with a supporting affidavit.

On August 19, 2013, Mikell R. Scarborough, Master-in-Equity for Charleston County, heard both the County's and Roberd's Motions for Summary Judgment. The Master granted the County and Roberds summary judgment by Order Granting Summary Judgment filed on September 10, 2013. Appellant served its notice of intent to appeal on October 15, 2013.

STATEMENT OF THE FACTS

This is an action to set aside a tax sale where Appellant claims the County failed to strictly comply with the delinquent tax sale statutes. The material facts are not in dispute. Appellant was the owner of property located at 64 Spring Street, Charleston, South Carolina 29403, identified as tax map parcel number 460-08-02-036, when Charleston County sold the property for unpaid, delinquent taxes for tax year 2009.

Bryan became owner by virtue of a conveyance from Ernest Kinloch, Jr. also known as Ernest Kinlock, Jr. to Essie B. Bryan by Title to Real Estate dated March 23, 1999, and recorded on March 25, 1999, in Book D323, Page 370 in the Office of the

Register of Mesne Conveyance for Charleston County, South Carolina. The Title shows the grantee's address as 64 Spring St., Charleston, S.C. 29403. (R. p. 97) (Req. for Admis. ¶¶ 15, 16, 17).

On April 2, 2010, Charleston County issued an Execution Notice for the property addressed to Essie B. Bryan, 64 Spring St., Charleston, SC 29403-5413. (R. p. 95) (Req. for Admis. ¶ 1). On May 24, 2010, Charleston County mailed the Official Notice of Levy by certified mail return receipt requested-restricted delivery to the same owner at the same address. (R. p. 95) (Req. for Admis. ¶ 3). On August 4, 2010, Charleston County posted notice that the property would be sold for delinquent taxes. (R. p. 96) (Req. for Admis. ¶¶ 9, 10 11, 12). On September 30, 2011, the County mailed the Final Notice of Redemption to Essie B. Bryan, 64 Spring St., Charleston, SC 29403-5413 and 1540 Staffordshire Dr., Charleston, SC 29407. (R. p. 96-97) (Req. for Admis. ¶¶ 13, 14).

Charleston County sent the tax notices for tax years 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009 for the parcel to Bryan at the 64 Spring Street address. The tax bills for tax years 2000 through 2008 were paid. Bryan, nor anyone acting on her behalf, ever sent Charleston County a corrected or forwarding address. (R. p. 96-97) (Req. for Admis. ¶¶ 13, 14). Bryan did not redeem the property identified as Tax Map Parcel Identification Number 094-00-00-071. (R. p. 98) (Req. for Admis. ¶ 20).

In Appellant's Statement of the Case, she claims that "Charleston County served Interrogatories and Request to Admit" and that she "answered the Interrogatories but failed to respond to the Request to Admit." (Appellant's Br. p. 1, ¶ 2). In Appellant's Questions Presented, she claims that "Plaintiff was served with Interrogatories that were

answered.” The statements are false as they relate to the County. The first statement insinuates that the County served only Interrogatories and Requests for Admissions upon Appellant. Factually, Charleston County served a Set of Interrogatories, Request for Production of Documents, and Requests for Admissions upon Appellant. And Appellant responded to the Request for Production of Documents, not the Set of Interrogatories or Requests for Admissions.

STANDARD OF REVIEW

On appeal, the applicable standard of review is specific to each of the legal or equitable actions contained in the single lawsuit. Key Corporate Capital, Inc. v. County of Beaufort, 360 S.C. 513, 516, 602 S.E.2d 104, 106 (Ct.App.2004), overruled on other grounds by Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007) (citations omitted). An action to set aside a tax sale lies in equity. Hawkins & Gryphon, Inc. v. Bruno Yacht Sales, 342 S.C. 352, 359, 536 S.E.2d 698, 701 (Ct.App.2000) (citations omitted). “In an action at equity, this court can find facts in accordance with its view of the preponderance of the evidence.” Key Corporate, 360 S.C. 513, 516, 602 S.E.2d 104, 106 (Ct.App.2007) (citations omitted). “In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law.” Id. Furthermore, “in an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge’s findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

ARGUMENT

I. THE MASTER-IN-EQUITY DID NOT ABUSE HIS DISCRETION WHEN HE DEEMED ADMITTED RESPONDENTS' REQUESTS FOR ADMISSIONS SERVED ON APPELLANT WHEN APPELLANT FAILED TO RESPOND TO THE REQUESTS.

A. There is no abuse of discretion.

In Scott v. Greenville Hous. Auth., 353 S.C. 639, 579 S.E.2d 151 (Ct.App.2003),

this Court held that:

... South Carolina has long had the discovery rule that failure to respond to requests for admissions renders any matter listed in the request **conclusively admitted for trial**. . . . In reviewing the tenets of Rule 36(a), our courts have repeatedly found that failure to respond to requests for admissions deems matters contained therein admitted for trial, regardless of whether the admission concerns a matter responded to in a party's pleadings.

Scott v. Greenville Hous. Auth., 353 S.C. 639, 646, 579 S.E.2d 151, 155 (Ct.App.2003) (Emphasis added).

Bryan argues the Master abused his discretion by granting the County's motion for summary judgment because of Bryan's failure to respond to the County's Requests for Admissions. The Master-in-Equity did not abuse his discretion when he deemed the Requests for Admissions admitted that were served on Appellant pursuant to Rule 36(a), S.C.R.C.P., when Appellant failed to serve the County written responses or objections addressed to the Requests.

In Dorrell v. S.C. DOT, 361 S.C. 312, 605 S.E.2d 12 (2004), the South Carolina Supreme Court disagreed with Dorrell who argued that the trial judge abused his discretion by using SCDOT's responses to APAC-Carolina, Inc.'s Requests for Admissions. In Dorrell, two months before trial, APAC filed a second motion for summary judgment reiterating the same arguments in the initial motion and including

additional evidence in the form of SCDOT's responses to APAC's requests for admissions. Based on the new evidence, the trial judge granted summary judgment to APAC. The Supreme Court stated "[a]s to SCDOT's admissions, the trial judge had the discretion to consider the impact of these admissions just as he would any other evidence. Moreover, the trial judge had the discretion to allow such evidence to be admitted outside of the scheduling order. Accordingly, the trial judge did not abuse his discretion." Dorrell v. S.C. DOT, 361 S.C. 312, 325, 605 S.E.2d 12, 21 (2004),

It is undisputed that Appellant never responded to the County's Requests for Admissions served on September 28, 2012. By its failure to act, Appellant admitted that the County followed the tax sale procedures. This fact is conclusively admitted for the purpose of this action since Appellant did not offer an affidavit or any other evidence at the hearing to then refute it.

Appellant cites Perez v. Miami-Dade County, 297 F.3d 1255 (2002) as the authority to support the argument that the County's use of Requests to Admit to ask Appellant admit that she filed a case knowing the allegations in the complaint were false, "has been condemned by courts who have considered the question." (Appellant's Br. p. 3, ¶ 2). Appellant then states that 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". (Appellant's Br. p. 3, ¶ 2). Not only do the facts in Perez differ greatly from the facts in this case, but the rule in Perez does not apply here.

First, Perez used the allegations in its complaint, virtually verbatim, as his Requests for Admissions. Secondly, the requests were served simultaneously with the

complaint. In Perez, the Court states “it is inappropriate . . . for a plaintiff to serve a request for admissions along with the complaint. It is simply too early for the defendant, having not yet received the allegations, to perceive what facts should or should not be contested.” Id. at 1268-9. As Appellant states in her Brief, when the rule is used to establish uncontested facts and to narrow issues for trial, then the rule functions properly. However, when Perez used the rule to harass the other side by serving discovery along with the complaint hoping the other side will fail to answer, then the function of the rule ceases. The rule becomes a weapon. See Perez.

Further, in Perez, Perez served multiple copies and versions of its Requests for Admissions on Miami-Dade County, while also filing multiple motions to seemingly harass the other party. In this case, after tax title passed in March 2012 and Bryan claimed \$23,482 in overage in July 2012, Appellant filed her complaint in August 2012. The County served its answer on September 7, 2012, and its First Set of Interrogatories, Requests for Production of Documents, and Requests for Admissions three weeks later on September 28, 2012. The County sent a letter to Appellant to respond to the Interrogatories and Requests for Production of Documents nearly five months after the responses were due. This is far from the use of Rule 36 as “a weapon, dragging out the litigation and wasting valuable resources” as determined in Perez. Id. at 1268. Instead, Appellant is disingenuous. Appellant claimed the overage and then filed an action to set aside the tax sale.

“An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support.” Conner v. City of Forest Acres, 363 S.C. 460, 611 S.E.2d 905 (2005). Here, Appellant cannot rest on the allegations in its

complaint to shield it from the judicial admissions of the trial court. Appellant cannot show that the Master's decision was based on an error of law or a factual conclusion without evidentiary support, because Appellant's failure to respond to Requests for Admissions deems the matters admitted for trial.

II. THE MASTER-IN-EQUITY DID NOT ERR WHEN HE FOUND THAT CHARLESTON COUNTY IS ONLY REQUIRED TO MAIL NOTICE BY CERTIFIED MAIL RETURN RECEIPT REQUESTED-RESTRICTED DELIVERY AND NOT GUARANTEE ACTUAL RECEIPT OF THE CERTIFIED MAIL BY THE DEFAULTING TAXPAYER.

Appellant claims that Charleston County unlawfully conveyed the property to Roberds, because the County's Official Notice of Levy was not signed by Appellant. Appellant does not dispute that all notices from the County were sent to Appellant's correct address at 64 Spring Street and that the County failed to exercise due diligence in attempting to find a better or corrected address. Instead, Appellant argues that South Carolina law requires Appellant's signature to perfect the statutory notice required by law.

Appellant's argument is without merit. The Master disagreed with the argument finding that "[t]he Court notes that applicable statutes do not require proof of actual receipt of the certified mail by the tax payer, only that the official Notice of Levy and the Final Notice of Property Redemption be mailed in compliance with Section 12-51-40(b) and Section 12-51-120, respectively, which the Requests for Admissions and associated documentation prove." (R. p. 6) (Order Granting Summ. J. p. 3). Section 12-51-40(c) provides that "[i]f the 'certified mail' notice has been returned, [the delinquent tax collector] take exclusive physical possession of the property . . . by posting a notice at one or more conspicuous places on the premises" And Section

12-51-120 provides that “the return of the certified mail ‘undelivered’ is not grounds for a tax title to be withheld or found defective and ordered set aside or canceled of record.”

Appellant seems to claim that the County’s action of possessing a green card with the name of someone other than the property owner is “egregious” and “violates the provision of the United States Postal Service and puts “even the casual observer on notice that the person the letter was addressed to did NOT receive it.” (Appellant’s Br. p. 8, ¶ 1). Not only is this statement against the clear letter of the law, Appellant does not cite how it violates the postal regulations (which it doesn’t) and does not take into consideration that just maybe the signer may have given the letter to the person the letter was addressed to. Instead, in addition to mailing the notice, Appellant accuses the County for not finding out “why the person who was named did not sign for the letter” and also not getting “the signature of the person to whom the letter was addressed.” (Appellant’s Br. p. 8, ¶ 1). Since someone other than Bryan signed for the letter, maybe Appellant should have done some diligence to find out “why” and also why the Post Service accepted the restricted signature of someone other than Appellant.

Further, our United States Supreme Court stated that “[d]ue process does not require that a property owner receive actual notice before the government may take his property.” Jones v. Flowers, 547 U.S. 220, 226, 126 S.Ct. 1708, 1713 (2006) citing Dusenberry v. United States 534 U.S. 161, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002). In Jones, the Court held that when a notice of tax sale is returned unclaimed, the State of Arkansas must take additional steps to provide notice reasonably calculated under all the circumstances to reach the intended recipient taxpayer. “Other reasonable follow-up measures would have been to post notice on the front door or address otherwise

undeliverable mail to 'occupant.'" Id. at 1711. Here, Charleston County posted notice on the property and sent the notice of the approaching end of redemption to an address it later discovered.

Appellant cites Reeping v. Jebbco, LLC, 402 S.C. 195, 740 S.E.2d 504 (Ct.App.2013) as authority regarding the obligation of a county to exercise diligence in locating the correct address of a property owner. The Reeping case does not apply to the facts in this case and is distinguishable. In Reeping, the Orangeburg County tax office was put on actual notice that the Reepings were not receiving mail at their former address, was provided a new address, and minimal due diligence would have discovered that the Reeping's city, state, and zip code had not changed. Thus, this Court reversed the trial court and set aside the tax sale of the Reeping's property because Orangeburg County failed to use the best address available to provide notice to the Reepings. Here, Appellant never sent a new or corrected address to the County. The County mailed notices to Appellant at the same address, in the same manner, as it had previously done for ten (10) years.

Furthermore, Appellant suggests posting is an issue in dispute even though the Master found "that under Section 12-51-40(c) posting is only required if the certified mail of the official Notice of Levy is returned." (R. p. 6) (Order Granting Summ. J. p. 3, ¶ 2). Under South Carolina law, the County is required to post property under the following situation:

If the "certified mail" notice has been returned, take exclusive physical possession of the property against which the taxes, assessments, penalties, and costs were assessed 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 posting of the notice is equivalent to levying by distress, seizing, and taking exclusive possession of it, or by taking exclusive possession of personalty.

S.C. Code Ann. § 12-51-40.

The Master correctly ruled that the County was not required to post the property because the certified mail was returned to the County. Therefore, the defaulting taxpayer was not statutorily entitled to notice by posting. Moreover, even if Appellant was entitled to such notice, the Master found that the Appellant's failure to respond to Respondents Requests for Admissions deemed that posting was accomplished.

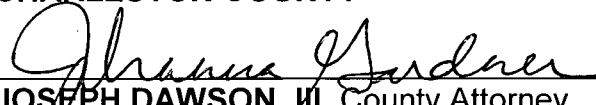
CONCLUSION

Appellant fails to show Charleston County failed to strictly comply with the statutes. Instead, Appellant offers responses to the County's requests that is inappropriate at this time. Appellant fails to demonstrate an abuse of discretion.

The County contends there is no genuine issue as to any material fact that the delinquent tax collector sent the required notices to Appellant in strict compliance with the statutes, and is entitled to judgment as a matter of law. Therefore, this Honorable Court should affirm the trial court's Order Granting Summary Judgment to Charleston County.

Respectfully submitted,

CHARLESTON COUNTY

A handwritten signature in black ink, appearing to read "Johanna S. Gardner", is written over a horizontal line.

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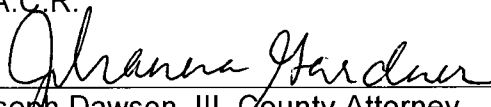
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent Charleston County complies with Rule 211(b), S.C.A.C.R.


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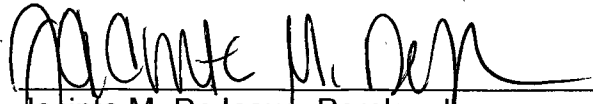
Ernest Kinloch d/b/a Ernie's Restaurant, ... Third Party Defendant.

PROOF OF SERVICE

I certify that I have served the **Final Brief of Respondent Charleston County** on all counsel of record by depositing a copy of the same in the United States Mail, postage prepaid, on August 20, 2014, addressed as follows:

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