

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CLARENDON COUNTY

Master-in-Equity, Joseph K. Coffey

Appellate Case No.: 2020-001531

RECEIVED
Dec 17 2020
SC Court of Appeals

Alvetta L. Massenberg,

Appellant,

v.

Clarendon County Treasurer, Clarendon
County Delinquent Tax Collector,
Blacktop Ventures, LLC,

Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. DID THE MASTER ERR IN FINDING THAT THE MANDATORY STATUTORY POSTING OF THE NOTICE OF LEVY FOR DELINQUENT TAXES ON THE DIRT ROAD BEHIND THE PROPERTY MEET THE REQUIREMENT OF THE LAW THAT THE NOTICE OF LEVY BE POSTED AT ONE OR MORE CONSPICUOUS PLACES ON THE PROPERTY?

STATEMENT OF THE CASE

The Appellant, Alvetta L. Massenberg is a delinquent taxpayer who on May 30, 2019, filed her complaint seeking to set aside a tax sale of her 2.5 acre tract of land in Clarendon County. The Respondents are the County Treasurer, who also serves as the County Delinquent Tax Collector, and Blacktop Ventures, LLC, who received a tax deed for the 2.5 acre tract on December 19, 2017. The County and Blacktop filed general denial answers and additionally Blacktop by its counterclaim asked the Court to quiet title to the 2.5 acre parcel. By a consent order of reference the case was referred to the Honorable Joseph K. Coffey, Master-in-Equity for Clarendon County, with authority to enter a final judgment with any appeal being to the South Carolina Court of Appeals.

Alvetta L. Massenberg resides in an apartment complex in Charlotte, North Carolina. Her mail is delivered to a “kiosk” for the complex. The County sent all required statutory notices to her by U.S. Certified Mail. All but one were returned to the County undelivered. On the certified letter which Massenberg acknowledged signing for she testified she did not recall actually receiving the letter. Her first realization that the property had been taken from her was when her uncle called telling her he had been notified by a neighbor that trees were being cut down on her property. This call was received on January 2, 2020.

The property taken has frontage on two public right-of-ways. One is on S.C. State Highway 49 and the other is a county maintained dirt farm road. The required statutory “Notice of Levy” posting on the property was allegedly posted on this farm road and not on the highway.

A trial was held on October 1, 2020, before the Master who issued an Order on November 3, 2020, finding the County fully complied with the requirements of S.C. Code §12-51-40 in conducting the tax sale. The Master specifically found that the statutory requirement for posting the notice of levy which was completed on July 26, 2017, met the requirements of South Carolina Law. The Order also gave Blacktop a quiet title to the property.

The Notice of Appeal to the Court of Appeals was filed on November 19, 2020.

STANDARD OF REVIEW

The standard of review for a case heard by a master permits this court to determine facts in accordance with its own view of the preponderance of evidence. Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E. 2d 538, 543 (1989), see, Folk v. Thomas, 344 S.C. 77, 80, 543 S.E. 2d 556, 557 (S.C. 2001) (An action to set aside a tax deed rests in equity. Thus, this court may take its own view of the preponderance of the evidence). If this court chooses to find facts in accordance to its view of the evidence it must state such finding of fact and its reasoning for those findings. Dearybury v. Dearybury, 351 S.C. 278, 283, 569 S.E. 2d 367, 369 (2002), and Smith v. Barr, 375 S.C. 157, 650 S.E.2d 486. (2007), Rule 220(b)(1), SCACR.

STATEMENT OF FACTS

Appellant Massenberg's property is an undeveloped tract of tree lined land and is located in the village of Alcolu in Clarendon County. It is a triangle shaped lot which fronts on Plowden Mill Road, a state maintained highway known as SC Highway 49. The back of the property faces Robert Rees Durant Road, a county maintained unpaved farm road. The intersection of Plowden Mill Road and Robert Rees Durant Road form the tip of the triangle shaped property. It was on this unpaved farm road side of the property on July 26, 2017, that the notice of levy was allegedly placed advising the appellant and the general public that her property was going to be sold for the nonpayment of \$221.27 in 2016 county taxes and costs.

The notice of levy posting report to the Respondent County Treasurer is the Field Report of Palmetto Posting, Inc. (Respondent's Exhibit "3"). This report shows an aerial view of Massenberg's 2.54 acres delineated by red lines. The point of the posting on the property is a "yellow star" on the unpaved Durant Road (R. 30 L. 19). A further description of the Massenberg tract can be found on the 1968 recorded plat (Appellant's Exhibit "1"). On this exhibit we see that a portion of the southeast boundary line is marked as a "branch," a source of water which flows to or from the dirt Durant Road.

The appellant Alvetta Massenberg testified that she is a resident of Charlotte, North Carolina. She did not deny that the Clarendon County delinquent tax notices were mailed. Her testimony was she did not receive them. All notices except one were returned as "undelivered" to the County. One notice was signed for by the appellant. As to this notice she testified she did not recall the letter (R. 48 L. 1-6). She had some health problems and she was declared disabled. Also in 2019 she had "two strokes" (R. 47 L. 12-25). She looked "on line" and thought her taxes were shown as paid. Her first notice of a problem with the 2.54 acre parcel was a January 2019 telephone call from her uncle Frank Frierson (R. 48 L. 19-25, R. 50 L. 1-8) that trees were being cut on her property.

Frank Frierson testified he is the 80-year-old uncle of the appellant Alvetta Massenberg. He was raised on Plowden Mill Road but lived in New York for 34 years and is now a retired New York City Police officer. He returned to South Carolina in 1991. He maintains a home and garden on some farm property on Plowden Mill Road near his niece's property. He lives in Sumter but comes

to the area almost every day. He watches over his niece's 2.54 acres. This land belonged to his late beloved sister and it is special to him. He protected the property (R. 91 L. 1-9).

The Master in his order spent more than a page and half finding the testimony of appellant Alvetta Massenberg "inconsistent and not creditable" (Master's Order bottom of page 3.) How his honor reached such a conclusion is unknown. Alvetta did not testify that she paid her property taxes. She thought she paid them (R. 57 L. 22-25, R. 58 L. 1-6). Nor has she testified that the county failed to follow the statutory procedure in anyway other than the failure to properly physically post the notice on her property. On this pivotal question she offered no testimony whatsoever.

At another point in the master's order (Page 5 end of second paragraph) he erroneously finds that Alvetta had notice of the sale on January 2, 2019, when she learned from a neighbor that trees were being cut down on her property and did nothing until she filed her lawsuit in May 2019. This is odd since her property had already been deeded to the tax sale purchaser on December 19, 2018 (See County Exhibit "18"). There is nothing she could have done except appeal to this court.

The condition of the Robert Rees Durant Road was a central issue at trial. Mr. Frierson describes it as only wide enough for one car. "If you meet another car, you have to pull over to the side and let one car pass." (R. 68 L. 5-7). He identified a photograph of the Robert Rees Durant Road sign and a Google photo of the intersection of Plowden Mill Road and Robert Rees Durant Road (appellant's Exhibits 5 and 6). There are no homes on the unpaved Robert Rees Durant Road (R. 82 L. 7-18). When asked to compare the traffic volume on Plowden Mill Road to that on Robert Rees Durant Road Frierson answered, "Oh it would be 100 to 1, sir, or maybe more." (R. 81 L. 8).

Frierson even challenges that the property was in fact posted. He testified that the tree on which the notice of levy is shown on Respondent Exhibit "3" was not on the property (R. 90 L. 25). Further stating, "I know the land like the back of my hand." (R. 94 L. 15). From the photo of the posted sign on Respondent Exhibit "3" he testified, "Sir, where the tree is, and you showed me the star here. Where the easement is here if the tree was here, you could see my cousin's house that lives across the highway, directly in front of the McFadden's. It would be shown through there, so that tree was nowhere on the property." The easement is cleared for a Black River power line. The house which should have been seen through the open easement was his cousin's house on the highway (Plowden Mill Road), right across the highway from the next door McFadden home (R. 78 L. 1-14).

Frierson's testimony, as well as the testimony of three other nearby residents of the area, was that the posted notice was not seen by them. The appellant called as her witnesses Gertrude McFadden Washington, Ruth McFadden Garth and Gloria McFadden. All three witnesses were raised in the Plowden Mill Road neighborhood and know the appellant and that Frank Frierson is her uncle. These witnesses often walked together for exercise in the neighborhood and on the unpaved Robert Rees Durant Road. All three witnesses described the size, condition and vehicle volume of the road consistent with Frank Frierson. The witness Gertrude McFadden Washington when asked if she "had ever seen a notice of levy sign like that before at another location" said she

had and knew what such a sign meant (R. 118 L. 7-19). [On January 2, 2019, Frank Frierson was notified by a neighbor that trees were being cut on his niece's property (R. 76 L. 24-25, R. 77 L. 1-15).]

The Respondent County Treasurer Matt Evans testified he also had the oversight duties of the Delinquent Tax Collector. The County contracts with a company called Palmetto Posting, Inc. to post the notice of levy on property seized for delinquent taxes. From Mr. Evans testimony we learn that the Palmetto Posting Field Report (County Exhibit "3") is the only notice the County has of the actual posting. The County does not physically inspect the postings on real property. It relied on Palmetto Posting. Mr. Evans testified there is no stipulation in the state law (§12-51-40 (c)) giving the exact location as to where the tax levy should be posted on the property. "It just has to be physically placed within the boundary of the property." (R. 128 L. 20-24).

David Epperson, the Clarendon County Administrator testified for the County. His testimony was intended to establish that Robert Rees Durant Road was a well-traveled public road. To do this he brought a spread sheet listing the 2017 work orders for Robert Rees Durant Road. Over the objection of appellant counsel that a list of work orders does not establish a traffic count for the dirt road. The master allowed the 2017 work order spread sheet in evidence (Respondent Exhibit "4"). Mr. Epperson then testified that based on the averages for dirt roads in Clarendon County and the work orders for Robert Rees Durant Road "it is indicative that it is used quite a bit" (R. 137 L. 6-8).

A closer examination of County Exhibit "4" reveals in 2017 that the "grading and shaping" is a less significant portion of the work orders. The majority of work orders were to cut water drains, and twice the work orders were just for checking. One check finds the road is too wet to grade. Three times during the year "brush cutting" is performed. Another time "limbs and trees" are removed. On the very day the Notice of Levy was allegedly posted the County was also cutting water drains in Durant Road. A generous summation of the 2017 work orders is that Durant is a wet road.

Mr. Epperson could not confirm that the road is only wide enough for one vehicle (R. 140 L. 11). He testified he does not live in the vicinity of Robert Rees Durant Road so he could not confirm its width or that there are no houses on the unpaved road. He testified the County does not have a traffic count on the road (R.138 L.20)

ARGUMENT

The required procedure for the tax sale of a delinquent taxpayer's property is set out by South Carolina Code §12-51-40. All requirements of that statute are intended for the protection of the taxpayer against surprise and the sacrifice of his (or her) property. These requirements are mandatory and must be strictly followed. F.C. Enterprises, Inc. v. Dibble, 335 S.C. 260, 516 S.E.2d 459 (S.C. App. 1999), Smith v. Barr, 375 S.C. 157, 650 S.E.2d 486 (Ct.App. 2007). Section 12-51-40(c) requires that the seized property be posted with a notice of levy "at one or more conspicuous places on the property." (Emphasis added) "Additionally, the failure to give the required statutory notice renders the tax sale invalid." Smith, 375 S.C. at 164, 650 S.E.2d at 490. "Even actual notice is insufficient to uphold a tax sale absent strict compliance with statutory requirements." In re: Ryan Inv. Co., 335 S.C. 392, 395, 517 S.E.2d 692, 693 (1999).

The master at pages 5 and 6 of his order finds that the only testimony presented by "family members and neighbors is they did not see the posting," which did not establish that the posting was not done. The key issue before him was not whether the posting was actually viewed by members of the public or the taxpayer, but whether it was in a location where it reasonably could be viewed by her or members of the Plowden Mill Road neighborhood.

Section 12-51-40(c) does not specify an exact location for the placement of a notice other than this posted notice must be conspicuous. A common sense definition of "conspicuous" is that as intended by the Legislature that it be placed so that it could be reasonably seen by the taxpayer and the general public. In fact the statute's intention is that the sign be seen is suggested by the requirement that it be posted at one "or more" places on the property. The appellant's property faces two public paths. One is the often wet and muddy not often traveled county farm road and the other is a paved state highway, Plowden Mill Road. The Palmetto Posting company placed the notice at a place on the property where it was least likely to be seen. It ignored the portion of the statute saying "one or more conspicuous places" in posting the property.

Pennsylvania and most other states have statutes such as South Carolina which require posted notices of tax sales. In In Re: Somerset County Tax Sale, et. al., 14 A. 3d 180 (Pa. Commw. Ct. 2011) an appeal, where like this case, the only issue is whether the property was properly posted in accordance with statute the Pennsylvania Court said:

Although there is no requirement that the notice must be the "best" notice at a minimum "the nature and location of the property must be considered in calculating "the placement of the notice."

In Smith v. Barr, 650 S.C.2d 486, 489, 375 S.C.157 (Ct.App. 2007) this court in an appeal from Greenville County affirmed an order setting aside a tax sale. The testimony in the Smith case was from two witnesses who had a vested interest. One worked in the subdivision and frequented the property or the land adjoining it and that during these visits she never noticed a delinquent tax sign on the property. Another disinterested witness gave testimony that he did not believe a

delinquent tax sign was posted on the property. The two witnesses owned the property and even though their testimony was self serving another witness without an interest substantiated their testimony.

The master heard from three neighbors who often walked on Durant Road that they did not see the posting. One of these witnesses, Ruth McFadden Garth, had paid the sum of \$3,000 to Mr. Epps, the member of the respondent Blacktop Ventures, LLC, to keep him from cutting trees on her driveway next to the appellant's property. Her payment was made in March of 2019 "to leave the trees that were considered our driveway." (R. 105 L. 16) Despite her deal with the respondent Blacktop Ventures Mrs. Garth testified she had not seen a posting on the property. Each of these witnesses was born and raised close to the appellant's property. If a sign had been seen by them (or perhaps anyone else in their neighborhood) they most probably would have heard about it. Their testimony should have been given credibility.

On the other hand the testimony of the respondent county witnesses is self-serving. Its County Administrator offered some unsubstantiated evidence as to the condition and use of the unpaved Durant Road. The County Treasurer offered only that he relied on the report of Palmetto Posting, Inc. He showed little interest as to where on the property the sign was placed. He testified that the County met its responsibility when it posted the Notice of Levy within the boundary of the property. It relied on Palmetto Posting to follow the law. His office never checked postings.

In order for the master to have denied the appellant her relief to set aside the tax sale he would have had to determine the posting of the tax levy was in full compliance with §12-51-40(c). Failure of the County to satisfy its statutory strict compliance dictates setting aside the forced sale. The master could only reach such a conclusion if, and only if the posting was in one or more conspicuous locations. As a matter of law the posting failed that mandatory requirement. It was not conspicuous. The notice was in fact hidden, if it was posted at all. The testimony of the appellant's witnesses is compelling. First none of them saw the posting on the property. Their individual and collective testimony was uncontradicted. Viewing the totality of their testimony the master could have reached one and only one conclusion, that the placement was not conspicuous and by not being conspicuous it was not in compliance with the statute.

The Respondents offered no evidence to undermine the appellant's strong evidence and further failed on its face to establish compliance.

If the property had been properly posted with one "more" sign on Plowden Mill Road, the neighboring public, none of whom lived on Durant Road, would have had notice. The \$221.37 in taxes would most probably have been paid and this case would not have been filed. For this court to find the posting met the intent of our Legislature would be a disservice to those future citizens who by negligence, frailty or other reasons overlook the timely payment of property taxes. A posting at a property owner's back yard or away from the obvious traffic flow does not meet the requirement intended by the South Carolina Legislature before a person's property can be sold.

CONCLUSION

On behalf of the appellant Alvetta Massenberg it is respectfully submitted that the court find by the greater weight of preponderance of the evidence that the master was in error in finding that the posting of the notice of levy complied with the statutory requirements. Therefore the order of the master should be reversed and the following relief ordered.

1. That the delinquent tax sale against Alvetta Massenberg be set aside upon her payment of \$246.27 for 2016 Clarendon County Property Taxes and costs as due on the date of the notice of posting; and
2. Order the Register of Deeds of Clarendon County to mark "Cancelled of Record" the deed of the Clarendon County Treasurer to Blacktop Ventures, LLC, dated and recorded on December 19, 2019, in Deed Book 1003 at Page 5506; and
3. Order the Appellant Alvetta L. Massenberg to also reimburse Respondent Blacktop Ventures, LLC for 2017, 2018 and 2019 taxes; and
4. Direct Blacktop Ventures, LLC to address any claim for interest and cost on its bid to the Clarendon County Treasurer and not the Appellant, Alvetta L. Massenberg.
5. That attorney fees and costs be awarded to appellant.

Respectfully submitted,

December 17, 2020

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail and Email this 17th day of December 2020 on: **William H. Johnson, Esquire**, P.O. Box 137, Manning, SC 29102; and **Scott F. Talley, Esquire**, 134 Oakland Ave., Spartanburg, SC 29302.

S/Katherine Gallagher

Katherine Gallagher