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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Master in Equity for Orangeburg County

Case No. 2017-CP-38-0948

Appellate Case No. 2021-000120

Cutter & Company, LLC, Appellant,

v.

Stafford Funding Group, LLC, O & P Properties, LLC, Kathy Henderson, as Delinquent Tax Collector of Orangeburg County, Defendants,

Of which Stafford Funding Group, LLC and Kathy Henderson, as Delinquent Tax Collector of Orangeburg County, are Respondents and O & P Properties, LLC is an Appellant.

REPLY

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I. RESPONDENTS' ARGUMENT THAT THE REDEMPTION NOTICES NEED NOT BE SENT VIA RESTRICTED DELIVERY UNDER CODE SECTIONS 12-51-120 AND 40(B) WAS NOT RAISED IN EITHER ANSWER, AT TRIAL BEFORE THE MASTER OR IN EITHER OF THE MASTER'S ORDERS AND IS THERFORE NOT PRESERVED FOR APPEAL.

In their Answers to Appellant Cutter & Company, LLC's Amended Complaint, Respondents only generally deny the following claims without any mention whatsoever of S.C. Code Sections 12-51-120 and 40(b). (R.pp. 33 and 34)

> 61. Upon information and belief, no such notice was received by the Defendant, O & P Properties, LLC; no notice was sent to said mortgagee's post office address; and the notice purportedly sent to O & P Properties, LLC was not sent by certified mail, return receipt requested-*restricted delivery.* (R.p. 61)

At the trial, neither Respondents nor their counsel mentioned the said Code Sections – in the context of certified mail addressed to an entity – notwithstanding that they were provided with copies of the said Code Sections at the start of the trial by Appellant's counsel (R.p. 105, lines 11-15)

Neither of the appealed Orders makes mention of S.C. Code Sections 12-51-120 and 40(b) in the context of certified mail addressed to an entity.

Every opportunity was afforded to Respondents to raise the Postal Service regulations. For example, Respondents could have attempted to rehabilitate Henderson's (Tax Collector's) admission regarding the Redemption Notice not being sent to O & P Properties via restricted delivery (R.p. 334, line 4), which she made, without any attempt to explain, or offer an excuse for, not mailing the notice via restricted delivery. Although Respondents could have pursued this argument, no evidence was produced, and no testimony was elicited, to show that the failure to send the Notice via "restricted delivery" was excused (by Sections 12-51-120 and 40(b) or otherwise).

Thus, for these procedural and preservation reasons, Respondents cannot prevail on their

claim that the mailing of the Redemption Notice by "restricted delivery" was not required or was unavailable under Postal Service regulations, which claim was first raised in the Brief of Respondents.

As cited with approval in the Brief of Respondents (R. Brief, p. 10), the authority for this ARGUMENT I is *Wilder Corp. v. Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review").

Respondents assert in the Brief of Respondents that, ". . . Cutter & Company may not argue that improper notice to another party [O & P Properties] invalidates the tax sale . . . ." (R. Brief, p. 9), but they cite no authority in support of this conclusory statement. As Respondents first raised this argument in the Brief of Respondents, this argument has not been preserved for appeal. See *Wilder, supra.*

In addition, since the argument is not supported by a citation of authority, it should be deemed abandoned and should not be considered on appeal. *Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008).

Based upon the following authorities, any statutorily-required notice, which is not properly given, would be a fundamental defect rendering the tax sale void:

a. "Tax sales must be conducted in strict compliance with statutory requirements." *King v. James*, 388 S.C. 16, 25, 694 S.E.2d 35, 39 (Ct. App. 2010) (quoting *In Re Ryan Inv. Co.*, 335 S.C. 392, 395, 517 S.E.2d 692, 693 (1999)).

b. "[F]ailure 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, 36, 577 S.E.2d 202, 205 (2003).

c. "The sound view is that all requirements of law leading up to the tax sales [that] 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." *Rives v. Bulsa*, 325 S.C. 287, 292-93, 478 S.E.2d 871, 881 (Ct. App. 1996).

Contrary to the implication in the Brief of Respondents that Appellants relied upon *In re Ryan Investment Co., Inc.* as authority in support of its "restricted delivery" argument (R. Brief, p. 7), Appellants assert that they cited said case only for the following authority: "Tax sales must be conducted in strict compliance with statutory requirements." (A. Brief, p. 5)

II. THE DELINQUENT TAX COLLECTOR ADMITTED THAT THE REDEMPTION NOTICE TO O & P PROPERTIES SHOULD HAVE BEEN, BUT WAS NOT, MAILED VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED – RESTRICTED DELIVERY.

Appellants' argument is that the Redemption Notice to O & P Properties (R.p. 72) failed to comply with S.C. Code Ann. §12-51-120, which provides, in relevant part, that

> . . . the person officially charged with the collection of delinquent taxes shall mail a notice by certified mail, return receipt requested – restricted delivery as provided in Section 12-51-40(b) to the . . . mortgagee . . . of the property of record in the appropriate public records of the county. (emphasis added)

Contrary to the following quotation contained in the Brief of Respondents (R. Brief, p. 4), whereby the Master's Final Order (whose wording was proposed by Respondents) (R.p. 50) found that "[t]he Redemption Notice was sent [to O & P Properties] by certified, return receipt requested – restricted delivery mail . . ." (R.p. 5), the postal green card (R.p. 73) clearly reflects that the "restricted delivery" box was unchecked. Henderson acknowledged that the redemption notice to O & P Properties was <u>not sent restricted delivery</u>. (R.p. 334, line 4) By her testimony, Henderson initially indicated that it was her belief that the Redemption Notice sent to O & P Properties should have been sent – and was sent – by certified mail-restricted delivery, and she was surprised that

the Notice was not sent by restricted delivery. (R.p. 333, line 18 – p. 334, line 3) This exchange cannot be described as "[Henderson] *may* have recanted that," as stated in Respondent's Brief (R. Brief, p. 5) (emphasis added), as Henderson unequivocally admitted the mailing error: "It was not sent restricted." (R.p. 334, line 4)

III. APPELLANTS' ARGUMENT THAT THE REDEMPTION NOTICES MAILED TO APPELLANTS FAILED TO NOTIFY THEM OF THE CORRECT AMOUNT REQUIRED TO REDEEM PARCEL 2 WAS RAISED IN THE AMENDED COMPLAINT, AT THE TRIAL BEFORE THE MASTER AND IN THE RULE 59(e) MOTION.

Respondents argue that, ". . . from a presentation standpoint, the record reflects that this is an issue that was not raised nor argued at trial." (R.Brief, p. 13) That is simply not so. This issue (incorrect redemption amount) was raised in the Amended Complaint (R.pp. 28 and 29), and it is the subject/purpose of Plaintiff's Exhibit 13 (R.pp. 75 and 76). It was also raised in the Plaintiff's Motion to Reconsider, Alter or Amend Final Order (R.p. 14)

Admittedly, this point was not fully fleshed-out at trial, as a consequence of the Master's directive to "let's move on." (R.p. 320, line 10) Notwithstanding the Master's limitation of testimony on this issue, the issue that the Redemption Notices involving both Parcels contained incorrect amounts was brought up on cross-examination of Henderson. (R.p. 321, line 18 – p. 324, line 4)

IV. THE POST-SALE EXECUTION NOTICE DATED APRIL 1, 2016, WAS MISLEADING AND ACTUALLY MISLED THE TAXPAYER.

With regard to the so-called Execution Notice dated April 1, 2016 (R.p. 82), which Respondents claim was "actually required by statute" (R. Brief, p. 15), that, again, is simply not so. How can a Notice in 2016, the purpose of which is to initiate the collection process on the 2015 taxes, be a statutorily required notice, <u>when the 2015 taxes were paid in full through the December</u>

2015 tax sale? This Notice was not the initial step in a 2016 tax sale (to collect the 2015 taxes). There would be no 2016 tax sale. Notwithstanding this Notice, the 2015 tax sale (which included the 2014 and 2015 taxes) would either be redeemed (taxes paid in full) or be final (if not redeemed), and nothing would be gained, in either case, by scheduling, advertising and holding a 2016 tax sale.

Not only was this Notice not statutorily-required, it was unnecessary, mistaken and misleading to any person who might have an interest in the property, which is the subject of the Notice.

This Notice clearly misled Jamie Cutter (taxpayer's manager), who testified as follows:

a. . . . in 2016, I get a notice . . . from you guys that said that – nothing about taxes and a tax sale or any of that nature or that they've been sold in '15 . . . and it even goes so far to say that if I – if I wait until October, I can pay them after October 31st with a penalty amount. (R.p. 153, lines 10-18)

b. . . . that don't say anything about a tax sale. (R.p. 158, line 21 – p. 159, line 9)

c. . . . I have, you know, all year to pay - - pay the taxes . . . (R.p. 158, line 24 – p. 159, line 1)

d. . . . this would be the first year that it would be sold and executed at tax sale. Then I'd have the following year to be able to redeem the property. (R.p. 159, lines 5-9)

e. It just says, taxes are a few months late. (R.p. 159, lines 15-16)

f. . . . back to my notice in 2016 that there was no indication that my property was sold at all to redeem it. (R.p. 163, line 25 – p. 164, line 2)

This Notice created several artificial deadlines for payment of the 2015 taxes, with penalties,[1] when the 2015 taxes had already been paid in full through the 2015 tax sale. Most importantly, it failed to inform the taxpayer about the 2015 tax sale (involving the 2014 and 2015 taxes). Even if the 2015 taxes were tendered by the taxpayer within the timeframe directed by this

[1] Several dates by which to make specified payments: May 26, 2016, June 30, 2016, or October 31, 2016, and an ultimate deadline of December 2, 2016, to pay taxes to avoid tax sale.

Notice, such tender would be, at most, a partial redemption; and the taxpayer's property would still be in jeopardy of being lost as a consequence of the 2015 tax sale.

As reflected by the testimony quoted above, this Notice is not ". . . a new issue raised for the first time on appeal . . . .," as stated to the contrary in the Brief of Respondents. (R. Brief, p. 15)

V. AS PARCEL 2 WAS SUBDIVIDED (REQUIRING NO DETERMINATION THAT IT WAS "DIVISIBLE"), IT WAS A FUNDAMENTAL DEFECT TO SELL THE ENTIRETY OF PARCEL 2 (VALUED AT $75,000) TO COLLECT ONLY $3,623.32.

It appears that Respondents are confused about who actually relied on *Folk v. Thomas*, 344 S.C. 77, 543 S.E.2d 566 (2001). This Court of Appeals' decision was cited (relied upon) by the Master in the Final Order (R.p. 9) and by Respondents, who prepared this Order and proposed it to the Master. (R.p. 57)

Contrary to the Brief of Respondents, Appellants did not cite *Folk v. Thomas*, 336 S.C. 466, 520 S.E.d 327 (Ct. App. 1999), as guiding authority. (R. Brief, 17) To the contrary, the Brief of Appellants cited that case simply: (1) because the appealed Final Order cited it (as guiding authority) (R.p. 9); (2) to point-out that this Court of Appeals decision was reversed by the Supreme Court; and (3) to contrast its decision (that the property's divisibility must be determined prior to the tax sale) with the Supreme Court's decision. (A. Brief, pp. 14-15) Appellants also pointed this out in the Plaintiff's Motion to Reconsider, Alter or Amend Final Order. (R.p. 16)[2]

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[2] "15. By citing and relying on *H. Daniel Folk, Jr. v. W.O. Thomas, Jr., et al.*, 336 S.C. at 82, 543 S.E.2d 556, which case was subsequently reversed by the Supreme Court of South Carolina. See *Folk v. Thomas*, 344 S.C. 72, 543 S.E.2d 556 (2001)."

"16. By citing the *Folk* case for the proposition that "Plaintiff has the initial burden of requesting County to determine divisibility prior to sale," when the facts of that case were clearly distinguishable from the present case (it involved undivided acreage while the present case involves subdivided lots previously approved by the County (i.e. a determination of divisibility had already been made))."

Appellants, instead, cited the Supreme Court decision: *Folk v. Thomas*, 344 S.C. 77, 543 S.E.2d 566 (2001), wherein the Supreme Court held that, ". . . the defaulting taxpayer bears the initial burden of requesting a determination of divisibility *before a county is required to undertake a divisibility study*." (emphasis added) (at 83) (A. Brief, p. 14)

> Policy considerations weigh heavily in favor of finding section 12-51-40(d) does not require the county to self-start a divisibility study. As the amici argue, the *divisibility* of property must be determined according to many statutes and regulations. For example, such regulations as county zoning restrictions, city, town or municipality restrictions, special land use restrictions, conservation easements, development restrictions such as covenants and bylaws, ingress and egress restrictions, availability of public utilities, minimum roadway frontage requirements, and coastal and wetlands restrictions all must be taken into account before a parcel can be divided. (at 82) (emphasis added) (A. Brief, p. 14)

The Brief of Appellant pointed-out that *Folk v. Thomas* was distinguishable from the present case. Here, no divisibility study would be necessary as a determination of divisibility had already been made. Without the necessity of a divisibility study, which was the controlling reason that the Supreme Court reversed the Court of Appeals' decision in *Folk v. Thomas*, the holding of the Court of Appeals should stand. (A. Brief, pp. 14-15)

Admittedly, the statute (§12-51-40(d))[3] was amended after *Folk v. Thomas* to permit (rather than to require) the county, when possible, to sell only so much of the tax parcel as would be sufficient to satisfy the taxes. Here, the tax parcel was clearly divisible – the property was, in fact,

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"17. By citing the *Folk* case as controlling, when the circumstances of the present case do not require the County to take into account the following: "such regulations as county zoning restrictions, city, town or municipality restrictions, special land use restrictions, conservation easements, development restrictions such as covenants and bylaws, ingress and egress restrictions, availability of public utilities, minimum roadway frontage requirements, and coastal and wetlands restrictions. See *Folk v. Thomas*, 344 S.C. 77, 82, 543 S.E.2d 556, 558-59 (2001)."

[3] S.C. Code Ann. §12-51-40(d) now provides, in relevant part, as follows:
". . . *When the real property is divisible*, the tax assessor, county treasurer, and county auditor may ascertain that portion of the property that is sufficient to realize a sum upon sale sufficient to satisfy the payment of the taxes, assessments, penalties, and costs. In those cases, the *officer may partition the property* and furnish a legal description on it." (emphasis added)

divided into four platted lots and was severed into two distinct parcels by a public road. Therefore, no divisibility study was needed.

Notwithstanding the apparent purpose of this statute, which was amended to lessen the burden on the county to determine divisibility, since there would be no burden (on anyone) to determine divisibility, in this case, this statute must be considered in the light of the primary charge upon the county: to protect the interests of the taxpayer (see citations in Conclusion below).

It was error not to determine that the property was divisible (was divided) and to ascertain that the sale of a portion of the property (assessed value: $75,000) would be sufficient to realize full payment of the tax debt of only $3,623.32. This error is serious enough to constitute a fundamental defect in the tax sale proceedings. (See A. Brief, p. 5)

CONCLUSION

Based upon the fundamental defects in the tax sale proceedings discussed in the Brief of Appellant and herein, the tax sale of the subject tax parcel should be vacated, the tax deed should be voided and the title to the tax parcel should be confirmed and quieted in the name of Cutter & Company, LLC, with the mortgage of O & P Properties, LLC retaining its lien on the property.

". . . [A]ll 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." *Donohue v. Ward*, 298 S.C. 75, 83, 378 S.E.2d 261, 265 (Ct.App. 1989) (citing *Osborne v. Vallentine*, 196 S.C. 90, 94, 12 S.E.2d 856, 858 (1941)).

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