

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Virginia E. Bigler, Trustee of :
the Harry Fred Bigler, III, Trust, :
Appellant :
: :
v. : No. 1976 C.D. 2010
: Argued: June 6, 2011
Clearfield County Tax Claim :
Bureau :

BEFORE: HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge (P)
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: August 4, 2011

Virginia E. Bigler, trustee of the Harry Fred Bigler, III, Trust, appeals from an order of the Court of Common Pleas of Clearfield County (Trial Court) dismissing her Petition to Disapprove Private Sale. The Trial Court concluded, in relevant part hereto, that the Clearfield County Tax Claim Bureau (Bureau) had provided proper notice pursuant to the Real Estate Tax Sale Law (Law), Act of July 7, 1947, P.L. 1368, as amended, 72 P.S. §§5860.101-5860.803, that the interested parties had actual notice of the sale, and that the Petition to Disapprove Private Sale was untimely under the Law. We affirm.

At issue herein are the mineral, oil and gas rights upon 66.61 acres of real property within Clearfield County (hereinafter, the Property). Title to the Property was held in the name of H.F. Bigler, III (hereinafter, Decedent). Taxes on the Property have been unpaid for the tax years 1994 through 2009, during which period the Bureau mailed all notices of upset tax sales to Decedent at his residence, 408 Sheridan Drive, Clearfield, PA, 16830.

Decedent died on November 4, 2004, and an estate was opened on December 3, 2004, with the Clearfield County Register and Recorder (hereinafter, Register). Pursuant to Decedent's last will and testament (hereinafter, the Will), Decedent's wife June T. Bigler (hereinafter, Mrs. Bigler) was appointed as personal representative, and John A. Sobel was listed as an alternate personal representative. Mrs. Bigler resided at the same residence as Decedent – 408 Sheridan Drive – until the fall of 2009, at which time Mrs. Bigler was declared incompetent. In Decedent's Will, the Property was not specifically devised, and thus passed under a residuary clause to a testamentary trust to which Mrs. Bigler and Appellant Virginia E. Bigler (hereinafter, Bigler) were co-trustees.

After the Property's rights were not purchased at any prior upset tax sales, Shamel James entered a private bid in the amount of \$250.00. The Bureau accepted the bid and scheduled a private sale for March 24, 2010, notice for which

was again mailed to Mrs. Bigler and the various taxing districts, with the notice published on January 22, 2010, and February 5, 2010.

On April 1, 2010, Bigler filed a Petition to Disapprove Tax Sale (hereinafter, the Petition)¹ asserting that she was deprived of due process rights when the Bureau sent notices of the sale to the wrong address, and asserting that the Bureau failed to use due diligence in determining the correct address to which to send notice of the private tax sale. The Trial Court held a hearing thereon on June 23, 2010, in which Bigler and the Bureau participated.

Michael A. Rudella (Rudella) requested and received permission to brief the Trial Court on whether Bigler should be permitted to participate in the bidding process. Rudella is the petitioner in a companion action pending before the Trial Court on a Petition to Disapprove Private Sale relating to the Property. Further, Nicholas and Janis Miele (hereinafter, collectively, Miele) also filed a Petition to Disapprove Private Sale regarding the Property, which action is also pending before the Trial Court.

¹ The Bureau notes that following Bigler's Petition filing, the Trial Court granted her leave to amend her Petition to add any additional claims. Reproduced Record (R.R.) at 8a. Thereafter, Bigler filed an amended Petition to Return Property to Public Tax Sale List. Id. at 11a. While the Trial Court's opinion does not directly reference the second petition by name, our review of the record herein reveals that the Trial Court's opinion does examine the entirety of the issues as raised/amended in both of Bigler's petitions. Accordingly, our references to the Petition encompass the amendments made to Bigler's original petition.

Following the hearing, the Trial Court issued an Opinion and Order on Bigler's Petition. Bigler argued that the Bureau could have easily ascertained her identity had it inquired into the existence of the estate opened for Decedent at the Register. The Trial Court concluded that the record before it contained no evidence that the Bureau was aware of Decedent's death, and that no evidence existed that the Bureau should have had significant doubt as to the actual receipt of the notices mailed out regarding the sale at issue, and that thusly the Bureau had no duty under the Law to look beyond its own records to ascertain the proper recipients of notice.

Noting that there was no dispute that the Bureau had mailed multiple certified mail notices to the Sheridan Drive address, the Trial Court concluded that no evidence of record existed establishing that the certified notices were returned without Decedent's signature. Additionally, the Trial Court concluded that Mrs. Bigler had actual notice of the prior upset tax sales, due to her residence at Decedent's home address, and due to her status as personal representative of Decedent's estate prior to the declaration of her incompetence in the fall of 2009.

Significantly, the Trial Court also found that Bigler had actual notice of the private sale based on her testimony before the Trial Court that she received a fax of the notice from her stepbrother, her testimony that Mrs. Bigler informed her of a tax notice prompting Bigler to telephone the Bureau in June and December of

2009, and her testimony that she received notice of the private sale in March, 2010. Due to these facts, the Trial Court reasoned that any technical deficiencies on the Bureau's part, in relation to statutory notice requirements in this matter, were waived due to Mrs. Bigler's and Bigler's actual notice. Due to that actual notice, the Trial Court declined to address any issues regarding the validity of the trust formed by Decedent's Will.

The Trial Court also addressed Bigler's arguments that the Bureau was without authority to impose *ad valorem* taxes on the gas and oil rights, and that the Bureau did not have the authority to sell those rights for failure to pay property taxes. Bigler did not contest the Bureau's authority to impose *ad valorem* taxes, and to sell the Property's mineral rights, due to nonpayment of taxes. The Trial Court concluded that the assessed taxes prior to the date of our Supreme Court's decision in Independent Oil and Gas Association of Pennsylvania v. Board of Assessment Appeals of Fayette County, 572 Pa. 240, 814 A.2d 180 (2002) (concluding that Pennsylvania law does not authorize the imposition of *ad valorem* taxes on oil and gas interests), were valid, and that the Bureau was legally entitled to collect taxes on oil and gas rights assessed prior to the Independent Oil and Gas Association decision. Since the taxes at issue herein were delinquent beginning with the 1994 tax year, the Trial Court found that there existed sufficient evidence to find that the taxes were delinquent enough to subject the Property first to upset

sales, and later a private sale. The Trial Court further cited to Oz Gas, Ltd. v. Warren Area School District, 595 Pa. 128, 938 A.2d 274 (2007), cert. denied, 553 U.S. 1065 (2008), for the proposition that the Independent Oil and Gas Association decision applied prospectively, and not retroactively.

The Trial Court also addressed Bigler's request that she be permitted to participate in the private sale at issue. Concluding that her participation as an "owner" under the Law was moot for the purposes of its review, the Trial Court further concluded, significantly in regards to the issues *sub judice*, that Bigler's Petition was not filed within the 45-day time limit required under the Law, and that thusly Bigler was precluded from participating in the private sale.

By order dated August 20, 2010, the Trial Court concluded that Bigler had failed to prove that the Bureau's notice was insufficient, that the sale would stand, and that the sale of the Property's gas and oil rights was proper. Concomitantly, the Trial Court dismissed Bigler's Petition and precluded Bigler from participating in the private sale. Bigler now appeals the Trial Court's August 20, 2010, order.

This Court's scope of review in tax sale cases is limited to determining whether the Trial Court abused its discretion, clearly erred as a matter of law, or rendered a decision with a lack of supporting evidence. Farro v. Tax Claim Bureau

of Monroe County, 704 A.2d 1137 (Pa. Cmwlth. 1997), petition for allowance of appeal denied, 555 Pa. 722, 724 A.2d 936 (1998).

Bigler presents three issues for review: 1.) whether the Trial Court erred in denying the Petition where the Bureau presented no evidence that proper notice of the sale had been received herein; 2.) whether the Trial Court abused its discretion by shifting the burden of proof regarding proper notice from the Bureau to Bigler, and; 3.) whether the Trial Court abused its discretion by allowing the private tax sale of gas and oil rights.

Addressing Bigler's first issue, we first emphasize that following a thorough review of the record, we agree with the Trial Court's conclusion that the Bureau effected proper notice in this matter. See Trial Court Opinion at 4-5. We need not, however, analyze the discussion of the Trial Court's conclusion on this issue, in that Bigler has admitted to actual notice of the sale. As the Trial Court saliently stated:

Even if the Court concludes the Bureau had knowledge of Mr. Bigler's death¹ or had a duty to inquire into the existence of any wills on record with the County, Bigler's argument of insufficient notice still fails. Actual notice waives strict compliance with the statutory notice requirements. Sabbeth v. Tax Claim Bureau of Fulton County, 714 A.2d 514 (Pa. [Cmwlth.] 1998)[, petition for allowance of appeal denied, ___ Pa. ___, ___ A.2d ___ (No. 818 M.D. Alloc. Dkt. 1998, filed April 13, 1999)]. The notices were mailed to the Sheridan Drive address, where Mrs. Bigler resided until last fall. Mrs. Bigler was named personal representative of Mr. Bigler's estates and served in that capacity until she was declared

incompetent, also last fall. Therefore, she had actual knowledge of the prior upset sales despite not being the intended recipient of the notices.

Furthermore, [Bigler] also had actual notice of the private sale. At the June 23, 2010, hearing on the Petition to Return Property to Tax Sale List, [Bigler] testified she received a copy of a notice, which was faxed to her from her stepbrother. [R.R. at 55a.] She also testified that Mrs. Bigler told her she received some type of tax notice, which prompted her to call the Bureau the first time in June 2009. [Id.] She called again near Christmas 2009. [Id.] Finally, she testified she received notice of the private sale in March 2010. [Id.] Consequently, [Bigler] also had actual notice of the sale.

Because Mrs. Bigler as personal representative of Mr. Bigler's estate or [Bigler] each had actual notice of all prior upset sales and the most recent private sale, any technical deficiencies on the Bureau's part concerning the statutory notice requirements are waived.

Trial Court Opinion at 6 (footnote omitted). Bigler, in her arguments to this Court, addresses neither the Trial Court's application of Sabbeth to this matter, nor her own statements of record admitting to her receipt of actual notice in this matter. Undisputedly, Bigler's actual notice waives the Bureau's strict compliance with statutory notice requirements, and thus Bigler's arguments directed toward notice in this matter are without merit. Sabbeth.

We will not address Bigler's two remaining issues. As the Trial Court noted, Bigler's Petition was not filed within the 45-day time limit required under

the Law,² and she was thusly statutorily precluded from petitioning to disapprove the sale.^{3,4}

² Section 613(a) of the Law requires an owner or interested party to file a petition to disapprove a private sale such as that at issue in the instant matter within 45 days after notice of the proposed sale, and reads in relevant part:

Properties not sold because of insufficient bid may be sold at private sale

(a) At any time after any property has been exposed to public sale and such property was not sold because no bid was made equal to the upset price, as hereinbefore provided, and whether or not proceedings are initiated pursuant to sections 610 through 612.1, the bureau may, on its own motion, and shall, on the written instructions of any taxing district having any tax claims or tax judgments against said property, agree to sell the property at private sale, at any price approved by the bureau. Notice of the proposed sale, stating the price and the property proposed to be sold, shall be given to each such taxing district and to the owner of the property. Notice shall also be given by publication at least two (2) times, with approximately ten (10) days intervening between each publication, in at least one (1) newspaper of general circulation published in the county where the property is located and in the official legal journal of that county. The notice by publication shall set forth the location of the property, the date and place of sale, the price and terms of sale, and the provision that the property will be sold free and clear of all tax claims and tax judgments. The corporate authorities of any taxing district having any tax claims or tax judgments against the property which is to be sold, **the owner, an interested party, or a person interested in purchasing the property may, if not satisfied that the sale price approved by the bureau is sufficient, within forty-five (45) days after notice of the proposed sale, petition the court of common pleas of the county to disapprove the sale.**

72 P.S. § 5860.613(a) (emphasis added).

³ Bigler has neither appealed from, nor addressed, the Trial Court's ruling on this issue.
(Continued....)

Bigler has not challenged, and the record clearly supports, the Trial Court's finding that the last advertisement of the proposed private sale was published on February 5, 2010. Trial Court Opinion at 2. Thus, pursuant to Section 613(a), the last date to file a petition to disapprove was 45 days after the final advertised notice, namely March 22, 2010. While Rudella's and Meile's

Issues not included in a party's Statement of Matters Complained of on Appeal pursuant to Pa. R.A.P. 1925(b) are deemed waived. Plank v. Monroe County Tax Claim Bureau, 735 A.2d 178 (Pa. Cmwlth.), petition for allowance of appeal denied, 560 Pa. 753, 747 A.2d 373 (1999). See Certified Record (C.R.) at Item 11. Additionally, issues not briefed before this Court are waived for purposes of appellate review. Id.

⁴ Notwithstanding the untimeliness of Bigler's Petition, the Trial Court correctly concluded that Bigler is precluded by statute from bidding on the Property at a private sale. The facts herein demonstrate that Bigler is an owner and/or individual with an ownership interest or right, and as such, is statutorily precluded from participation under the express language of Section 618 of the Law, which reads:

Repurchase by owner

(a) The owner shall have no right to purchase his own property at a judicial sale, a private sale or from the bureau's repository for unsold property under the provisions of this act.

(b) A change of name or business status shall not defeat the purpose of this section.

(c) For the purpose of this section, "owner" means any individual, partner, shareholder, trust, partnership, limited partnership, corporation or any other business association or any trust, partnership, limited partnership, corporation or any other business association that has any individual as part of the business association who had any ownership interest or rights in the property.

72 P.S. § 5860.618.

Petitions to Disapprove were timely, Bigler's was not filed until April 1, 2010. C.R. at Item 1. As such, Bigler's Petition was untimely under the clear and express terms of Section 613(a) of the Law, 72 P.S. § 5860.613(a).

Accordingly, we affirm.

JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Virginia E. Bigler, Trustee of :
the Harry Fred Bigler, III, Trust, :
Appellant :
: :
v. : No. 1976 C.D. 2010
: :
Clearfield County Tax Claim :
Bureau :

ORDER

AND NOW, this 4th day of August, 2011, the order of the Court of Common Pleas of Clearfield County dated August 20, 2010, at No. 2010-545-CD, is affirmed.

JAMES R. KELLEY, Senior Judge