IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Consolidated Return of the Tax Claim Bureau of Blair County from the Upset Tax Sale of September 19, 2007	:	No. 2417 C.D. 2008
Appeal of: Philip Huss	:	Argued: September 17, 2009

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: January 5, 2010

Philip J. Huss (Huss) appeals from an order of the Court of Common Pleas of Blair County (Trial Court) that denied Huss' Motion for Post Trial Relief. Huss brought his Motion in the wake of the Trial Court's order of December 1, 2008, upholding the upset tax sale of four properties owned by Huss. We affirm.

Huss is the owner of four parcels of real property located within Logan Township, Blair County, Pennsylvania (collectively, the Properties; individually, Parcels #1, 2, 3 and 4). Parcel #1 contains a mobile home in which Huss resided over the past ten years. Parcel #2 contains a two story structure in which Huss' son resided, apparently until approximately six months before the tax

sale at issue. Parcels #3 and 4 contained no houses or structures, and/or were vacant ground.

XSPAND has a contractual relationship with Blair County to manage certain activities within the Tax Claim Bureau (Bureau). In that capacity, XSPAND conducts activities in regards to properties deemed delinquent in tax payment, including the issuance of various voluntary and required notices of taxes due, and notices of potential tax sales resulting from delinquent property taxes. In May, 2005, XSPAND issued via certified mail Notices of Return and Claim for unpaid taxes due for the year 2004 in regards to the Properties.[1] Yvonne McGarvey (McGarvey), Huss' fiancée, signed the receipt cards for those Notices. Notices of Public Sale for the Properties were sent via restricted delivery to Huss in June, 2006, which Notices were signed for by Huss. An error in relation to these Notices, in the form of the absence of certain specific information relating to the intended tax sale, prevented the Properties from proceeding to sale in 2006.

In November, 2006, XSPAND mailed Huss a "Fall reminder" regarding the delinquent 2004 taxes, which reminder was sent as a courtesy and is not required by law. Thereafter, XSPAND scheduled the Properties for tax sale on September 19, 2007, and mailed to Huss via restricted delivery Notices of Public Sale in relation to the Properties. Huss signed each of the receipt cards for those Notices, which were dated June 1, 2007. Additionally, on August 7, 2007, Huss was personally served with a separate Notice of Publication regarding the pending

[1] It is undisputed that Huss paid real estate taxes on the Properties in the years 2003, and 2005-2007.

sales, and the Properties themselves were each posted with notices of the upcoming sale.

The Properties were sold at a Blair County Upset Tax Sale on September 19, 2007. Huss thereafter filed timely Objections to Sale in the Trial Court, and proceedings ensued at which both Huss and the Bureau were represented by counsel, and produced evidence and testimony.

The Trial Court upheld the tax sale, and in its opinion accompanying its order made findings, and drew conclusions therefrom. In relevant part, the Trial Court did not directly address Huss' argument that Condition 9[2] of the sale – providing that a property owner is not permitted to bid on his own properties at a tax sale – was illegal and invalid and thusly invalidated the sale at issue. Instead, the Trial Court emphasized that Huss had ample opportunity, following his receipt of notice prior to the actual sale, in which to pay the delinquent 2004 taxes to avoid the sale, which Huss failed to do. On those apparent grounds, the Trial Court declined to conclude that the sale was invalid for the reasons advanced by Huss on this issue.

Additionally, the Trial Court concluded that the Bureau sufficiently complied with all notice provisions governing the sale at issue. The Trial Court further concluded that the issue of the Bureau's proper publication of its notice of sale was an issue that Huss failed to raise in his written Objections to Sale filed in

[2] XSPAND prepares Conditions of Sale relating to tax sales, which Conditions are provided to prospective investors at the time of the sale. Huss alleged in the proceedings before the Trial Court that he was advised by XSPAND of Condition 9, which purported to prohibit

(Continued....)

the sale's wake. Therefore, the Trial Court reasoned, the Bureau was unaware of the existence of that issue, and as such did not specifically introduce any further evidence of its proof of publication at the hearing before the Trial Court beyond its Affidavits of Proof of Publication. Resultantly, the Trial Court took judicial notice, based upon its stated concerns for fundamental fairness, of the Affidavits of Proof of Publication that had already been entered into evidence. Based thereon, the Trial Court concluded that the Bureau had complied with the statutory requirements regarding notice by publication.

By order dated December 1, 2008, the Trial Court overruled Huss' Objections to Sale, and upheld the upset tax sale of the Properties. Huss thereafter filed a Motion for Post-Trial Relief, which the Trial Court denied without a hearing by order dated December 11, 2008. Huss now appeals to this Court.[3]

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. Ban v. Tax Claim Bureau of Washington County, 698 A.2d 1386 (Pa. Cmwlth. 1997).

Huss first argues that Condition No. 9 of the Upset Sale Conditions, under which a property's owner is not permitted to bid on his own property at an upset sale, was illegal and irregular. Condition 9 reads, in its entirety:

Huss from bidding on his own Properties at the sale.

[3] Pursuant to Pa.R.A.P. 1925, the Trial Court ordered, and Huss thereafter filed, a Statement of Errors Complained of on Appeal, and the Trial Court subsequently issued an opinion in this matter.

> 9. Please Note: No owner of record can bid on his or her own property.

Reproduced Record (R.R.) at 36a.

Huss founds his argument on the assertion that Condition 9 is illegal, or invalid, and that the sale itself is therefore rendered invalid. However, under the instant facts, we cannot entertain Huss's argument on this issue as he has waived any challenge to his exclusion from bidding at the upset tax sale by failing to assert that purported right until after the sale at issue.

The record is clear – and Huss does not dispute – that he did not attend the sale at issue herein, and thusly was not at that time denied any opportunity to bid on his own property. The record is also clear that XSPAND did not issue the Conditions of Sale prohibiting any such bidding on Huss's part until the day of the sale, at which time the Conditions were distributed to those present. That fact was found by the Trial Court, and has not been challenged by Huss. Trial Court Opinion (Tr. Ct. Op.) at Finding 15, p.4. While Huss testified that he had been told via telephone by an XSPAND agent that he could not bid on the Properties at the pending sale, that testimony was found not credible by the Trial Court. Tr. Ct. Op. at 12.[4] Buttressing the Trial Court's credibility determination on this point, we note that Huss's argument defies logic: the minimum bid on the Properties at the sale exceeded the amount of taxes owed thereon which Huss

[4] We emphasize that, notwithstanding his assertion that XSPAND informed him that he would not be able to bid at the sale, Huss did not testify that he relied upon that purported representation, and did not testify that but for that representation, he would have appeared at the

(Continued....)

could have paid prior to the tax sale, enabling him to redeem the property under the Law. R.R. at 51a, 56a, 59a, 65a.

Clearly, then, Huss was never denied any opportunity to attend the tax sale, or to participate therein. It is beyond dispute that Huss never indicated any desire to bid on the Properties at the upset tax sale, did not attend the tax sale, and never attempted to bid (or was precluded from bidding) on his own property at the tax sale. Indeed, the credible evidence of record establishes that Huss was unaware of Condition 9 until after the sale had already taken place. Given his actions in either relinquishing or abandoning any purported or perceived right to bid on his own property, Huss waived any subsequent challenge to that purported right in the wake of his failure to make any attempt to exercise it. See generally, Morgan Signs, Inc. v. Pennsylvania Department of Transportation, 676 A.2d 1284 (Pa. Cmwlth. 1996) ("Waiver" is defined as act of intentionally relinquishing or abandoning some known right, claim or privilege, and one may be deemed to have waived statutorily or constitutionally guaranteed rights by one's action or inaction).

Huss next argues that the Bureau did not sufficiently prove compliance with the statutory duty to post the Properties with notice prior to the date of sale. The relevant portions of Section 602 of the Real Estate Tax Sale Law (hereinafter, the Law), Act of July 7, 1947, P.L. 1368, as amended, 72 P.S. §5860.602, governing the notice requirements of the sale at issue, read:

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sale and bid on his property. Id.

Notice of sale

(a) At least thirty (30) days prior to any scheduled sale the bureau shall give notice thereof, not less than once in two (2) newspapers of general circulation in the county, if so many are published therein, and once in the legal journal, if any, designated by the court for the publication of legal notices. Such notice shall set forth (1) the purposes of such sale, (2) the time of such sale, (3) the place of such sale, (4) the terms of the sale including the approximate upset price, (5) the descriptions of the properties to be sold as stated in the claims entered and the name of the owner.

(b) Where the owner is unknown and has been unknown for a period of not less than five years, the name of the owner need not be included in such description.

(c) The description may be given intelligible abbreviations.

(d) Such published notice shall be addressed to the "owners of properties described in this notice and to all persons having liens, judgments or municipal or other claims against such properties."

(e) In addition to such publications, similar notice of the sale shall also be given by the bureau as follows:

> (1) At least thirty (30) days before the date of the sale, by United States certified mail, restricted delivery, return receipt requested, postage prepaid, to each owner as defined by this act.
>
> (2) If return receipt is not received from each owner pursuant to the provisions of clause (1), then, at least ten (10) days before the date of the sale, similar notice of the sale shall be given to each owner who failed to acknowledge the first notice by United States first class mail, proof of mailing, at his last known post office address by virtue of the knowledge and information possessed

> by the bureau, by the tax collector for the taxing district making the return and by the county office responsible for assessments and revisions of taxes. It shall be the duty of the bureau to determine the last post office address known to said collector and county assessment office.
>
> (3) Each property scheduled for sale shall be posted at least ten (10) days prior to the sale.
>
> (f) The published notice, the mail notice and the posted notice shall each state that the sale of any property may, at the option of the bureau, be stayed if the owner thereof or any lien creditor of the owner on or before the actual sale enters into an agreement with the bureau to pay the taxes in instalments [sic], in the manner provided by this act.

Case law has provided guidance as to what constitutes proper compliance with the notice-by-posting requirements of the Law, which itself is silent as to the precise instructions of such posting. Huss argues that the Bureau did not present evidence as to how the poster of those Notices had affixed the Notices, and that the poster in his testimony could not unequivocally state what precisely he had used to attach the Notices.

In support for his argument, Huss cites to Wiles v. Washington County Tax Claim Bureau, 972 A.2d 24 (Pa. Cmwlth. 2009), and to Consolidated Return by McKean County Tax Claim Bureau of 9/12/2000 ex rel. Howard, 820 A.2d 900 (Pa. Cmwlth. 2003). In Wiles, this Court held that a bureau must convince a court that its posting of a property subject to an impending upset tax sale was: 1.) conspicuous, and; 2.) that the notice was "securely attached" to the location at which it was placed, in order to satisfy the requirements of Section

602(e)(3) of the Law. Huss asserts that it therefore logically follows that if either of those two requirements is not sufficiently proven by a bureau, the court must deem the posting defective under the Law and invalidate the sale.

In McKean, the notice poster testified that he used masking tape to secure the posted notice, but had no recollection of the specific manner of the taping attachment. Under the facts of that case, we affirmed the trial court's determination that this testimony was insufficient to establish the propriety of the posting at issue.

In the instant matter, Huss argues that the notice poster was even less specific and informative than the poster in McKean. R.R. at 133a. Huss emphasizes that the Bureau's witness unequivocally testified that he did not know *what* he had used to attach the notices on Parcels # 1, 2, and 4, and offered no testimony as to *how* he attached the notices. Id. Huss further argues that the Bureau insufficiently proved proper posting on Parcel #3, where the poster could not specify what he had used to secure the notice. Id. Under Wiles and McKean, therefore, Huss argues that the Bureau failed as a matter of law to carry its burden of proving compliance with Section 602(e)(3) of the Law, and that thusly the sale must be invalidated.

Huss mischaracterizes our holding in Wiles, which does not establish any particular standards regarding the specific manner of secure attachment of a notice upon a subject property. The entirety of our address of that issue reveals that this Court placed no specific emphasis on the manner of posting attachment, and set no particular standard for the secure attachment of notice. Rather, Wiles

stands for the general proposition that common sense, and the individual facts of each case, dictate the reasonableness of the notice at issue:

> While the [Law] is silent as to the manner of posting required, this Court has interpreted Section 602(e)(3) to mean that the method of posting must be reasonable and likely to inform the taxpayer as well as the public at large of an intended real property sale. In re Tax Sale of 2003 Upset, 860 A.2d 1184, 1188 (Pa. Cmwlth. 2004). Case law requires that the posting be reasonable, meaning conspicuous to the owner and public and securely attached. Thomas v. Montgomery County Tax Claim Bureau, [] 553 A.2d 1044 (Pa. Cmwlth. 1989). "Conspicuous" means posting such that it will be seen by the property owner and public generally. In re Sale of Real Estate by Montgomery Tax Claim Bureau, 836 A.2d 1037 (Pa. Cmwlth. 2003).
>
> In particular, this Court has taken a practical and commonsense [sic] approach to determine whether a posting was reasonable. Each case depends on the nature and location of the property and, of course, the placement of the Notice. . .
>
> Here the evidence established: 1) that the Property was a vacant lot; 2) that the Property was located between Wiles' residence and Vanzin's residence; 3) that the posting notice was stapled twice, at the top and at the bottom, to a stick and hammered securely into the ground on the Property; 4) that the posting notice was conspicuously placed on the property and was "parallel to the row of houses" and faced the road; 5) that Wright photographed the posting notice as required by the Tax Claim Bureau; 6) that Vanzin, the purchaser of the Property, first became aware of the upcoming upset tax sale when he saw the posting notice on the Property; and 7) that "the posting was there for quite a while and then the whole thing was gone, the stick and everything was gone." [] Given the circumstances, this Court concludes the posting notice was conspicuous and that the posting was reasonable and was reviewable from the public road.

Wiles, 972 A.2d at 28 (citations to record omitted). A closer examination of the facts of Wiles reveals that our concentration on the manner of affixing the notice at issue therein was rooted in testimony before the Trial Court that the notice therein was erected on a stick, which notice was later alleged to have been missing. No such facts are at issue herein, and Wiles does not establish any particular standard of notice affixing that is applicable to the instant matter. Dispositively, the poster in Wiles convinced the trial court of the conspicuousness and security of the posting. In the case before us, the Trial Court was also convinced of the sufficiency of the posting at issue.

In McKean, the property owner filed exceptions to a sale asserting that the notice thereof had not been posted on the property ten days before the sale as required by the Law. Before the Trial Court, it was established that notice was posted on a telephone pole on the property, and the landowner produced five witnesses who live nearby and visit the property daily to testify that they did not see a notice on the telephone pole. The issue became, simply, whether the notice had been reasonably secured to the pole. The Trial Court in McKean was not satisfied with the notice poster's testimony regarding his inability to remember precisely how he had attached the particular notice at issue, and based upon its credibility determination and weighing of the evidence, concluded on that basis that the notice had not been securely attached as required.

McKean is also mischaracterized by Huss in his argument to this Court, as this precedent does not stand for the establishment of any one particular manner of securely affixing notice upon subject properties; rather, the long

standing axiom for which McKean does stand, and which is applicable to the matter *sub judice*, is that questions of credibility, conflicts in the evidence presented, and the weight to assign evidence are matters for the trier of fact to resolve and will not be disturbed on appeal. McKean, 820 A.2d at 903.

In the instant matter, the evidence before the Trial Court supported a finding that each of the Parcels were properly posted. As noted, the Trial Court as the finder of fact has exclusive authority to weigh the evidence, make credibility determinations, and draw reasonable inferences from the evidence presented. McKean. Notwithstanding the distinguishable and fact dependant holdings of both Wiles and McKean, under the instant facts and the Trial Court's credibility determinations in favor of the poster, the Trial Court's finding that the Parcels were properly posted can only be overturned if the finding is unsupported by the evidence. Id.

The notice poster in this case, Thomas Goodfellow, testified that he personally posted each Parcel, three of those on a tree, and one on some abandoned detached stairs, with all postings near the road and in sight of public view.[5] R.R. at 130a-135a. Goodfellow also testified to signing the Verification for Posting Premises for each Parcel.[6] R.R. at 130a-135a. The Trial Court found this evidence to be credible. R.R. at 306a-307a, 312a-313a. The Trial Court did not find

[5] Posting on a tree or other object is valid if placed where the posting can be viewed by the public. In re Tax Sale of 2003 Upset, 860 A.2d 1184 (Pa. Cmwlth. 2004).

[6] A court can accept the Bureau's business records as proof relative to posting. Tax Sale of 2003 Upset.

credible Huss' testimony that he did not see the postings himself. R.R. at 313a. The Trial Court's findings on these facts, as supported by the credible evidence of record, are not error, and we will not disturb them on appeal. McKean.

In Huss's final two arguments in this matter, he challenges the Trial Court's conclusion that he waived any challenge to the issue of the Bureau's proper publication of notice, and relatedly argues that the Trial Court erred in taking judicial notice of the Bureau's evidence establishing notice by publication. We agree with the Trial Court that Huss has waived this argument by failing to properly raise it in his Objections to Sale.

In articulating his objections to the sale at issue, Huss addressed his challenge to notice in this matter in Paragraph 6 of his Objections to Sale, which states in its entirety:

> 6. [Huss] did not receive himself, personally, proper notice of the sale of the properties herein involved.

R.R. at 32a. It is beyond dispute that, on its face, Paragraph 6 expressly limits its challenge to personal notice, and cannot be read to in any way implicate notice by publication. The Bureau argues that in addition to failing to present this issue within his Objections to Sale, Huss also did not address or argue the issue before the Trial Court, but raises it only following those proceedings. In its opinion addressing Huss's Post Trial Motions, the Trial Court agreed that the issue was not raised in Huss's Objections to Sale, and was not properly presented or argued before it. However, Huss argues that he properly preserved, and presented, this issue for review in two distinct instances.

First, Huss relies upon our precedent in In re Dauphin County Tax Claim Bureau, 834 A.2d 1229 (Pa. Cmwlth. 2003). In Dauphin County, the trial court found no waiver in a property owner's challenge to the sufficiency of a tax bureau's posting of notice where the landowner, in his petition challenging the subsequent tax sale, averred that the tax bureau "failed to comply with the statutory notice provisions under the tax sale laws," and further averred that "the first time that Ricci received actual notice that the Tax Claim Bureau was going to proceed with the tax sale of his property was on October 11, 2002 from Donald Failor." Dauphin County, 834 A.2d at 1233. We held:

> Arguably the preferred practice is to identify each deficiency with specificity, but the foregoing averment alerted Appellants that Ricci challenged the Bureau's compliance with notice requirements and that the Bureau would have to prove its compliance with the requirements set forth in Section 602 of the Tax Sale Law. The parties also presented testimony and documentary evidence at the hearing regarding the posting issue. In this instance, the Court finds no error in the trial court's ruling that Ricci did not waive the posting issue.

Id.

Under the instant facts, however, we must reach a different result. Huss's Objections to Sale contain no general language that can be read to encompass the entirety of the Bureau's compliance with all notice provision under the Law, unlike the general averment present in Dauphin County. Dispositively, Huss's employment of the specific language of Paragraph 6 can only be read as an express limitation of his stated challenge, being set forth with two distinct and specific qualifiers limiting his challenge to notice received "himself, personally."

Huss's failure to employ any sort of general notice challenge language, and his employment of very specific language limiting his challenge on its face to personal notice, distinguish this matter from the facts of Dauphin County. Thusly, the Trial Court did not err in holding this issue waived.

Finally, we note that Huss's second asserted preservation of this challenge serves to support our foregoing conclusion that this issue is waived. Huss cites to testimony of record before the Trial Court in which he "continue[s] to assert that due notice in all respects was not given in this particular sale." Huss argues that this testimony indicates his address of the issue of notice by publication during the hearing before the Trial Court, or at a minimum, his preservation of the issue before the Trial Court in regards to the instant appeal. An examination of the larger context of Huss's quotation on this matter reveals no such address or concomitant preservation, however, and in fact establishes at best the disingenuous assertion to this Court that this issue was raised or addressed before the Trial Court.

The entirety of the quote before the Trial Court cited by Huss in his argument contains no reference whatsoever to notice by publication, and in fact contains no specific address or reference to any aspect of notice beyond a general statement that can only be read as an attempt to expand the narrow notice challenge expressly limited within his Objections to Sale:

> Judge, before Ms. Andre testifies [on the Conditions of Sale], just so the record's clear, the only real [C]ondition [of Sale] that I am emphasizing is nine, please note no owner of record can bid on his or her own properties. We believe that in any proceeding like this, we can attack

> any irregularity in the proceedings. To the extent that I need to, I would amend my [Objections to Sale] to include that as an issue in this case. It's our belief that that's not the proper law and that could constitute a problem with this sale. So there's no question, we had reserved that in paragraph twelve of our [Objections to Sale, in which Huss "reserves the right to list additional reasons to void the sale as may be produced at time of hearing." See R.R. at 32a]. We feel that's an irregularity and we continue to assert that due notice in all respect was not given in this particular sale. We think that's set forth in our [Objections to Sale] but they're the two points of contention.

R.R. at 188a-89a. Clearly, this portion of the record does not, as Huss now argues, address notice by publication, expressly or impliedly. The inclusion of a catch all provision such as Paragraph 12 in Huss's Objections to Sale, attempting to preserve any additional issue not properly preserved within the Objections to Sale themselves, will not be viewed as preserving for appeal any issue not properly raised and preserved before the Trial Court or within the Objections to Sale. Huss has failed to cite to any other portion of the record before the Trial Court in which he raised or addressed any failure on the part of the Bureau to satisfy its burden of showing notice by publication. As such, Huss has waived the issue, and the Trial Court did not err.

Accordingly, we affirm.

JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 5th day of January, 2010, the order of the Court of Common Pleas of Blair County dated December 11, 2008, is affirmed.

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JAMES R. KELLEY, Senior Judge