IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Consolidated Return of Blair County Tax Claim Bureau of the Tax Sale of September 25, 2008	:	No. 595 C.D. 2009
John Heverly and Dorothy Heverly, his Wife, Appellants	:	Argued: December 8, 2009

BEFORE: HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: March 8, 2010

John Heverly and Dorothy Heverly (Landowners)[1] appeal the order of the Court of Common Pleas of Blair County (trial court) denying and dismissing their objections to the tax sale of their parcel of realty that took place on September 25, 2008, and approving and confirming that sale of their parcel of realty. We reverse.

Landowners are the owners of a mobile home that was assigned Tax Map No. 0600-07-1 TR by the Blair County[2] Tax Assessment Office (Tax Office).[3]

[1] John Heverly and Dorothy Heverly are husband and wife.

[2] Blair County is a Fifth Class County. See 118 The Pennsylvania Manual 6 – 16 (2007).

In September of 2005, Landowners, and their son, subsequently purchased the 1.91-acre parcel of realty on which the mobile home is situate, and which was assigned Tax Map No. 0600-06-10 by the Tax Office. Because the two properties had different numbers, a representative of the Tax Office informed Landowners in 2005 that both properties would be combined for tax purposes. Landowners believed that the combination had taken place at that time. However, a combination is not effective until the following tax year, and there was a three-year delay by the Tax Office in effecting such a combination of the taxable properties.

Landowners failed to pay the taxes due on the mobile home in 2005 and 2006, and failed to pay the taxes due on the realty in 2006 and 2007. As a result, Xspand[4] initiated proceedings to sell both properties at upset sale pursuant to the provisions of the Real Estate Tax Sale Law (Law),[5] and notices of the sales were sent to Landowners under the Law.[6,7] Pursuant to Section 602(e)(3) of the

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[3] Section 201 of the Fourth to Eighth Class and Selective County Assessment Law, Act of May 21, 1943, P.L. 571, as amended, 72 P.S. § 5453.201, provides, in pertinent part:

> The following subject and property shall as hereinafter provided be valued and assessed and subject to taxation for all county, borough, town, township, school (except in cities) … purposes, at the annual rate,
>
> (a) All real estate to wit: Houses, house trailers and mobile homes permanently attached to land or connected with water, gas, electric or sewage facilities, … lands, lost of ground and ground rents, trailer parks … and all other real estate not exempt by law from taxation….

[4] The Blair County Tax Claim Bureau (Bureau) had contracted with Xspand to perform Bureau collection services for delinquent tax accounts.

[5] Act of July 7, 1947, P.L. 1368, as amended, 72 P.S. §§ 5860.101 – 5860.803.

[6] Section 602 of the Law provides, in pertinent part:

> (a) At least thirty (30) days prior to any scheduled sale the

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> 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.
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> * * *
>
> (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 identified by this act.
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> (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 by United States first class mail, proof of mailing, at his last known post office address….
>
> (3) Each property scheduled for sale shall be posted at least ten (10) days prior to the sale.

72 P.S. § 5860.602(a), (e).

[7] On May 2, 2007, Landowners received two notices for the county, municipal, and school taxes due, with costs and interest, for each of the properties. The notice relating to the 2006 taxes due for the realty contained Tax Map No. 0600-06-10, Xspand ID No. 572853, and listed an amount due totaling $112.21. The notice relating to the 2006 taxes due for the mobile home contained Tax Map No. 0600-07-1 TR, Xspand ID No. 498493, and listed an amount due totaling $1,215.98.

Likewise, the Notice of Return and Claim dated May 1, 2008, relating to the taxes due for the realty, contained Tax Map No. 0600-06-10, Xspand ID No. 572853, and listed an amount due totaling $115.89. The Notice of Return and Claim dated May 1, 2008, relating to the taxes due for the mobile home, contained Tax Map No. 0600-07-1 TR, Xspand ID No. 498493, and listed an amount due totaling $1,391.89.

Finally, the Notice of Public Sale for the sale of the realty was identified by Tax Map No. 0600-06-10, Xspand ID No. 572853, stated an assessed value of $323.00, stated an approximate upset sale price of $668.03, and stated the sum necessary to remove it from sale of $488.23. The Notice of Public Sale for the sale of the mobile home was identified by Tax Map

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Law, on July 28, 2008, the representative of the Tax Office posted notice on a decorative fence in the largest part of the 1.91-acre parcel, located up a private driveway approximately 300 yards from a township road.

Operating under the belief that the two properties had been combined for tax purposes, Landowners worked out an installment plan with Xspand and believed that the payment plan covered the taxes due on both the mobile home and the realty. Unfortunately, the representatives of Xspand believed that the payment plan only covered the taxes due on the mobile home. When Landowners received service by a constable of notice of the upset sale of their parcel of realty, they contacted Xspand. Believing that the notice related to the upset sale of the mobile home, the Xspand representative told Landowners not to worry about the notice, that the property had been removed from upset sale, and that the Tax Office had simply not received the paperwork relating to the installment payment plan.

On September 24, 2008, the Tax Office issued a notice that the two properties had been combined for taxing purposes for the 2009 tax year. On September 25, 2008, the parcel of realty was purchased at upset sale by Floyd W. Merritts (Purchaser). On November 10, 2008, the trial court entered an order confirming the sale.

On December 4, 2008, Landowners filed objections to the upset sale and confirmation in the trial court. A hearing was conducted before the trial court on February 3, 2009. On February 10, 2009, the trial court issued an order denying and dismissing Landowners' objections[8] to the tax upset sale of their realty that

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No. 0600-07-1 TR, Xspand ID No. 498493, stated an assessed value of $6,345.00, stated an approximate upset sale price of $4,445.15, and stated the sum necessary to remove it from sale of $1,713.39.

[8] In the opinion filed in support of its order, the trial court rejected Landowners' claims

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took place on September 25, 2008, and approving and confirming that sale. Landowners then filed the instant appeal.[9]

In this appeal, Landowners claim[10]: (1) the trial court erred in determining that the posting of the realty complied with the relevant provisions of Section 602 of the Law; and (2) the trial court erred in determining that the doctrine of "equitable estoppel" did not apply to void the upset sale of Landowners' realty.

Landowners first claim that the trial court erred in determining that the posting of the realty complied with the relevant provisions of Section 602 of the Law. We agree.

It is well settled that a valid tax sale requires strict compliance with all three of the notice provisions of Section 602(a), (e)(1), and (e)(3) of the Law, and that the sale is void if any of the three forms of notice are defective. In re Upset Sale Tax Claim Bureau McKean County on September 10, 2007 (Miller), 965 A.2d 1244 (Pa. Cmwlth.), petition for allowance of appeal denied, ___ Pa. ___, 981 A.2d 221 (2009). Strict compliance is necessary to guard against any deprivation of property without due process of law. Id.; Ban v. Tax Claim Bureau of Washington County, 698 A.2d 1386 (Pa. Cmwlth. 1997); In re Upset Price Tax Sale of September 10, 1990 (Sortino), 606 A.2d 1255 (Pa. Cmwlth. 1992).

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that the posting of the realty did not comply with the relevant provisions of Section 602 of the Law, and that the upset sale should be voided under the doctrine of "equitable estoppel". See Trial Court Opinion at 3-4, 6-8.

[9] This Court's scope of review in tax sale cases is limited to determining whether the trial court abused its discretion, rendered a decision unsupported by the evidence, or clearly erred as a matter of law. Hunter v. Washington County Tax Bureau, 729 A.2d 142 (Pa. Cmwlth. 1999).

[10] In the interest of clarity, we reorder the claims raised by Landowners in this appeal.

In determining whether a property is properly posted, a court "[m]ust consider not only whether the posting is sufficient to notify the owner of the pending sale, but provides sufficient notice to the public so that any interested parties will have an opportunity to participate in the auction process." Ban, 698 A.2d at 1388. By notifying the public at large of the sale, the taxing authority has the greatest opportunity to recover lost tax revenues. O'Brien v. Lackawanna County Tax Claim Bureau, 889 A.2d 127 (Pa. Cmwlth. 2005). As a result, a court may set aside a tax sale where the property is not properly posted under Section 602(e)(3), even though the property owners possess actual knowledge of the tax sale, because a defect in posting prevents adequate notice to the public. Ban.

Section 602(e)(3) does not provide a specific method of posting, merely stating that "[e]ach property scheduled for sale shall be posted at least ten (10) days prior to the sale." 72 P.S. § 5860.602(e)(3). Although a presumption of the regularity of the posting exists until the contrary appears, a property owner may create a contrary appearance and overcome this presumption by filing exceptions to the tax sale on the basis that the Law's notice provisions were not strictly followed. Miller; Sortino. The burden then shifts to the Bureau or to the purchaser to show that the Bureau strictly complied with the notice provisions of the Law. Miller; Sortino. "[T]he case law clearly establishes that the posting must be done in a manner reasonably calculated to provide notice to the public. The courts have required that the posting be conspicuous." O'Brien, 889 A.2d at 128.

With respect to the posting of the property in the instant matter, the trial court stated the following, in pertinent part:

> Relative to posting, Ann Kociolo of the Blair County Tax Assessment Office testified that she personally posted the property on July 8, 2008 at 10:45 a.m. She indicated that she posted on a fence, which was

> located between the house, and the driveway and garage. She confirmed that the primary purpose of posting is to advise the general public of the upcoming upset sale.
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> Mr. Heverly testified that he never saw any such posting. He also took issue as to whether the location of the posting would provide any notice to the general public, noting that the township road was approximately 300 yards away from the fence that was posted. Mr. Heverly testified that one would actually have to drive up the driveway to see any such posting.
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> We accept Ms. Kociolo's testimony that she personally posted the subject property on July 8, 2008 as credible. We also find that the posting was sufficient, and further note that Mr. and Mrs. Heverly had actual notice of the upset sale.

Trial Court Opinion at 4 (citations and citations to the record omitted).[11]

Based on the foregoing, it is clear that the trial court erred in concluding that the Bureau had sustained its burden of proof with respect to the posting requirements of Section 602(e)(3) of the Law. As noted above, the testimony of the representative from the Tax Office that was found credible by the trial court merely demonstrates that she posted the property on a decorative fence located between the mobile home, the driveway and the garage, and that the purpose of posting property is to advise the public of the tax sale. There is absolutely no credible evidence cited by the trial court which demonstrates that the posting in this case was conspicuous, or that it was done in a manner likely to inform the taxpayer and other interested buyers of the intended sale. To the

[11] In matters involving a tax sale, the trial court is the ultimate finder of fact. Smith v. Tax Claim Bureau of Pike County, 834 A.2d 1247 (Pa. Cmwlth. 2003). As fact-finder, it is within the trial court's exclusive province to weigh conflicting evidence, to make credibility determinations, and to make specific factual findings based upon those assessments. Id.

contrary, the testimony cited by the trial court demonstrates that the notice was posted on a decorative fence, located up a private driveway approximately 300 yards from a township road.

In Sortino, a deputy sheriff folded the notice of a tax sale and thumbtacked it at keyhole level to the doorframe of a side door of a house, between the main door and the storm door. This Court concluded that under those circumstances, "[t]he posting was not conspicuous, it did not attract attention, nor was it placed for all to observe." Sortino, 606 A.2d at 1258.

In O'Brien, a constable folded the notice of a tax sale into thirds and wrapped it around a tree branch on the side of the property fronting an impassable street. This Court concluded that "[t]he posting was not conspicuous and precluded interested parties from participating in the tax sale." O'Brien, 889 A.2d at 129.

In Ban, the tax bureau's representative posted the notice of a tax sale on the "back door" on a side of the house which she could only reach by driving onto the property and following a private sidewalk to the door. This Court concluded that "[t]he posting in this case was not conspicuous, did not attract attention, and was not placed there for all to see…." Ban, 698 A.2d at 1389.

Likewise, in the instant case, the testimony found credible by the trial court does not demonstrate that the notice in this case was adequate under the requirements of Section 602(e)(3) of the Law.[12] As a result, it is clear that the trial

[12] Our opinion in Miller does not compel a different result. In Miller, the evidence demonstrated that the notice of a tax sale was posted on the front door of the house which fronted a private road, that the private road was part of the system of public roads, and that the private road afforded the general public access to the property because it was used by neighbors, garbage and delivery trucks, mail carriers, visitors and employees of the Bureau. Miller, 965 A.2d at 1247. In such a case, this Court determined that the notice was "conspicuous" because, "[g]iven

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court erred in denying and dismissing Landowners' objections to the tax sale of their realty that took place on September 25, 2008, and in approving and confirming that sale.[13]

Accordingly, the order of the trial court is reversed.

JAMES R. KELLEY, Senior Judge

the circumstances, the Notice was placed in a location where it reasonably could have been viewed by members of the public…." Id. at 1248. In contrast, as outlined above, the trial court cites to no credible testimony offered by the Bureau in this case which demonstrates that the notice was place in such a conspicuous location on Landowners' property.

[13] In light of our disposition of this claim, we will not reach Landowners' second allegation of error raised in this appeal.

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O R D E R

AND NOW, this 8th day of March, 2010, the order of the Court of Common Pleas of Blair County, dated February 10, 2009 at No. 2008 GN 3693, is REVERSED.

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JAMES R. KELLEY, Senior Judge