

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CITY OF WILMINGTON,)	
)	
Plaintiff,)	
)	
v.)	C.A. No.: 01T-10-023-FSS
)	
ARTHUR B. ROCHESTER and)	
AUSTINE J. BUTLER,)	
)	
Defendants.)	

Submitted: March 15, 2002
Decided: July 16, 2002

OPINION and ORDER

Upon Plaintiff's Motion to Confirm Sheriff's
Sale -- ***DENIED and SALE SET ASIDE.***

Carol A. Casner, Esquire, Louis L. Redding, City/County Building, 800 French Street Wilmington, Delaware 19801-3537. Assistant City Solicitor, for Plaintiff.

Stephen P. Doughty, Esquire, Lyons Doughty & Veldhuis, P.C., 1148 Pulaski Highway, PMB 313, Bear, Delaware, 19701. Attorney for lien holder, Alliance Funding.

Donald L. Gouge, Jr., Esquire, Heiman, Aber, Goldlust & Baker, 702 King Street, Suite 600, P.O. Box 1675, Wilmington, Delaware, 19899. Attorney for the Sheriff.

Theodore F. Sandstrom, Esquire, 1324 King Street, Wilmington, Delaware, 19801. Attorney for Keith J. Call and David M. deBussy, the high bidders and purchasers.

SILVERMAN, J.

This case concerns a monition and execution by *vend. ex.* Recently, at Wilmington's behest, the Sheriff of New Castle County sold a real estate parcel for back taxes. Just before the time set by court rule for the sale's confirmation, a lien holder tendered the taxes and costs, in full. But the lien holder failed to object formally to the confirmation. Before the court authorized the sheriff to issue a deed to the high bidders, however, the lien holder came to court. Now, the lien holder and the high bidders clash over whether the sale was confirmed. The lien holder objects to the sale and asks the court to set it aside.

I.

To understand this case it is necessary to know how real estate is sold for back taxes. To know that, it is necessary to understand the rule governing executions, which is Superior Court Civil Rule 69. It also is necessary to know about the law governing the sale, which in this case is the City of Wilmington Code, Sections 4-147 to -151. Finally, because the fit between Rule 69 and the City Code is imperfect, it is necessary to consider briefly the traditional approach to executions, which is discussed in the legendary treatise, *Woolley on Delaware Practice* at Sections 1100 - 1116.

Generally, the process for selling real estate for back taxes begins when an authorized representative of the taxing authority asks this court's clerk, the Prothonotary, to issue a written order, a "writ," to the Sheriff of New Castle County.

In a tax sale, the initial writ is called the “Writ of Monition.” The term “monition” is an old one. How it found its place in our law is a question for the historians. Generally, monitions can serve several purposes. As used in a tax sale, the monition is an attachment. The Writ of Monition orders the sheriff to post the monition on the real estate. The posted monition shows that the property has been seized and warns that it will be sold at a public sale unless the taxes are paid. As soon as the sheriff posts the writ, the sheriff returns a copy of it to the Prothonotary, confirming that the Writ of Monition was posted as ordered.

Once the sheriff has made the return and if the taxes still are not paid or there is no protest to the monition, the taxing authority asks for a second writ, formally called a “Writ of *Venditioni Exponas* Monitions,” or informally, a “*Vend. Ex.*” The *Vend. Ex.* is a writ of execution. It orders the sheriff to expose the real estate to public sale by auction and to deposit the proceeds with the court “on the first Monday of the succeeding month of the date of the sale.” Superior Court Civil Rule 69(d).

Sheriff’s monition sales are not final. First, the sale must be confirmed by the court. Under Rule 69(d), application to set aside a sheriff’s sale of real estate:

shall be made on or before the first Thursday succeeding said return date, and all such sales not objected to on or before the first Thursday, shall on the first Friday, be confirmed as a matter of course.

In other words, if no one objects on the first Thursday of the month following a monition sale, the sale is confirmed automatically the following day. There is no hearing or other court proceeding associated with the uncontested confirmation of a monition sale. Like Rule 69 (d) says, confirmation is “as a matter of course.”

The confirmation kicks off a sixty day period, during which the owner of record has the right to redeem the property by paying the purchase price. And under City Code Section 4-148 the redeeming owner also must pay “20% in addition to the purchase price . . . , together with all costs incurred in the proceedings” To redeem a property sold at a monition sale, in effect, the owner must buy the property back from the purchaser at the sale price, plus a percentage. The redeemer also must pay the costs of the sale and the city’s costs.

If the redemption period runs and the property is not redeemed, then the purchaser may file a “Petition of No Redemption.” Once the court has reviewed the Petition, the court finally will authorize the sheriff to issue a deed to the purchaser. Typically, the court reviews the petition in chambers and authorizes the deed without further notice or hearing.

II.

In this case, the usual procedures were followed up to the confirmation. The city asked for a Writ of Monition on October 23, 2001. The Prothonotary issued

the writ on October 25, 2001. The sheriff posted the writ on October 29, 2001 and returned it on October 31, 2001. The Prothonotary issued the *Vend. Ex.* on November 20, 2001. And as posted, the property was sold by the sheriff on January 8, 2002. As explained above, based on the date of the sale, the time to object to its confirmation was February 7, 2002, which was the first Thursday of the month following the sale. That made the next day the date of automatic confirmation.

It is undisputed that the lien holder called the sheriff on February 7, 2002, the day before confirmation, and asked about the amount necessary to redeem the property. The lien holder claims that the sheriff's representative answered that the cost of redemption would increase "if the funds were received after February 8, 2002" The sheriff claims that the lien holder was told that the amount required for redemption would increase "if not paid by Friday, February 8, 2002." In other words, the lien holder claims that the sheriff gave the lien holder through February 8, 2002, but the sheriff denies that. The difference is immaterial as a matter of law and fact because, despite how the lien holder put the question, as a matter of law the lien holder was not attempting redemption. Moreover, it does not matter what the sheriff told the lien holder. While the sheriff means to be helpful, the sheriff has no authority to interpret the law and establish deadlines.

The sheriff's conversation with the lien holder also is beside the point as a matter of fact. The lien holder called from New York. After learning the amount owed, the lien holder sent the money to the sheriff by overnight mail and it was received on February 8, 2002. There is no evidence that anything the sheriff said about the deadline, right or wrong, had any impact on when the lien holder paid. Assuming that detrimental reliance could make a difference as a matter of law, which is highly doubtful, the lien holder did not allege detrimental reliance, much less come close to proving it.

It bears repeating that this case is not about redemption. The redemption period does not begin until after confirmation. The amount required for redemption includes the judgment plus the statutory surcharges, mentioned above. And it remains to be decided whether anyone besides the property owner is authorized to redeem a property. This case simply concerns whether the sale was confirmed, or whether it should be set aside.

III.

Were it not for City Code Section 4-147, discussed below, the lien holder likely would have no claim. The property here was sold by the sheriff on January 8, 2002. The time between a sheriff's sale and the sale's confirmation typically is not a grace period during which the sale can be set aside merely by paying the judgment.

The window between sale and confirmation allows a property holder to object to the sale, based on some flaw in procedure such as mistake, improper notice, fraud, and the like. See *Woolley* at Sections 1115-1116.

Traditionally, objection is made by filing a Petition for a Rule to Set Aside a Sheriff's Sale. *Woolley* offers a form of a petition at Section 1112. *Woolley* was published in 1906. After almost a century, it is a bit musty. Nevertheless, much of it remains quite drinkable. *Woolley's* model form is still good.

Woolley further provides that along with the petition, the applicant also is expected to submit an affidavit containing all objections to the sale. And according to *Woolley*, under typical circumstances, the court has broad discretion to set aside a sheriff's sale resulting in prejudice.

The traditional approach to setting aside Sheriff's sales has been modified, as mentioned above, by the City Code. Under Section 4-147:

No sale shall be approved if the owner of the property or any person having an interest therein shall be ready at court to pay the said judgment and all costs.

The court equates the City Code's "approved" with Rule 69's "confirmation," because the confirmation is the court's approval of the sale. Therefore, it is undisputed that on the day of confirmation an interested party tendered the amount of the judgment and costs. The lien holder more than met the City Code's requirement.

Under the circumstances, the sale was not confirmed as a matter of course. If the lien holder or the sheriff simply had notified the court that the lien holder had paid, the court would have entered an order setting aside the sale. Of course, if the money had been received a day later, the redemption period would have been running and the tendered amount would have been short. But as presented above, the lien holder paid in the nick of time.

The court views Section 4-147 as an example of the law's preference for tax collection over monitions. Where a monition for city taxes is involved, full payment stops confirmation. Cash is still king.

IV.

For the foregoing reasons, the January 8, 2002 sheriff's sale is **SET ASIDE**. The Prothonotary shall issue an order to the Sheriff of New Castle County to disperse the lien holder's funds on deposit, in accordance with this decision.

IT IS SO ORDERED.

Judge

cc: Prothonotary (Civil Division)