IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NEW CASTLE COUNTY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. 02T-04-015**
	)	
W. FRANCIS GALLEN and	)	
STEPHANIE A. GALLEN,	)	
	)	
Defendants.	)	

Date Submitted: March 28, 2003
Date Decided: May 27, 2003

MEMORANDUM OPINION

Upon Consideration of Defendants' Motion to Set Aside Sheriff's Sale and Vacate Confirmation. ***DENIED.***

Dennis J. Siebold, Esquire, New Castle, Delaware. Attorney for the Plaintiff.

Theodore F. Sandstrom, Esquire, Wilmington, Delaware. Attorney for the Defendants.

John R. Weaver, Jr., Esquire, Wilmington, Delaware. Attorney for the Intervenors.

SLIGHTS, J.

I. INTRODUCTION

This matter comes to the Court on the motion of defendants, Francis and Stephanie Gallen ("Mr. and Mrs. Gallen"), to vacate confirmation and set aside a sheriff's sale of their home at 49 Ruby Drive in Claymont, Delaware ('the Property"). The sheriff brought the Property to sale in execution of a monition judgment entered by the Prothonotary after the defendants failed to pay the taxes on the Property. The Property sold at auction on July 9, 2002 for $65,000. The sale was confirmed without objection on August 9, 2002. The statutory right of redemption expired on October 7, 2002.

Mr. and Mrs. Gallen assert two grounds in support of their motion: (1) New Castle County ("the County") failed to provide adequate notice of the sale and confirmation; and (2) the price at which the Property sold at auction was grossly inadequate. The County and the high bidder, SMP Capital Trust ("SMP"), both have filed responses to the motion. They argue: (1) the motion is procedurally improper; (2) notice was proper and adequate; and (3) the purchase price was not grossly inadequate.

The Court conducted a hearing on the motion on December 17, 2002, during which the Court received evidence and heard live testimony. Thereafter, the Court

received written submissions from the parties as well as supplemental evidence and testimony. The matter is now ripe for decision. For the reasons that follow, the motion is **DENIED.** Mr. and Mrs. Gallen have not met their burden of establishing that the County provided inadequate notice of the sale. And, because the sale has been confirmed (without objection), Mr. and Mrs. Gallen cannot be heard to argue that the price paid for the Property was inadequate.

II. FACTS

Mrs. Gallen purchased the property in 1988 for $97,500. Mr. and Mrs. Gallen fell behind on their property tax payments and began to receive notices of delinquency from the County early in 2002.[1] At the time, Mr. Gallen was responsible for paying household bills.[2] He did not respond to the notices, nor did he advise his wife that he had received them.[3] Apparently, he was concerned that his wife, who had been in poor health, might react poorly to learning that the property taxes had fallen delinquent on his watch.[4]

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[1]Transcript at 47 (referring to transcript of December 17, 2002 hearing).

[2]*Id.* at 43.

[3]*Id*. at 47-49.

[4]*Id.*

The County initiated a tax monition action in this Court on April 12, 2002. The Sheriff posted the property with notice of the monition on April 19, 2002.[5] When Mr. and Mrs. Gallen failed to respond to the action as required by statute,[6] the County initiated procedures to obtain a monition judgment and, ultimately, to foreclose on the Property at sheriff's sale. The Sheriff posted the property with notice of the pending sale on or about June 18, 2002.[7] A special process server posted the Property again on June 25, 2002.[8] Notice of the sale was published in two local newspapers as required by statute.[9] And notice was mailed directly to Mr. and Mrs. Gallen by certified mail on four separate occasions.

Mr. and Mrs. Gallen both testified that they never saw any of the three postings at the Property. In response, the County presented the testimony of Julia Kemp, a

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[5](D.I. 1). The Sheriff's return is *prima facie* evidence of the facts stated therein. *Cohen v. Brandywine Raceway Ass'n*, 238 A.2d 320, 324 (Del. Super. 1958).

[6]*See* 9 *Del. C.* §8725(a).

[7]Exhibit 6 (referring to exhibits introduced at the December 17, 2002 hearing).

[8]*See* Exhibit 7; Transcript at 92.

[9]*See* 10 *Del. C.* §4973. The newspaper notices were appended to the County's post-hearing submission at Exhibit B. Mr. and Mrs. Gallen have objected to the presentation of this exhibit because they believe the evidentiary record should have been closed at the conclusion of the December 17 hearing. The Court rejects this argument. As the County correctly observes, Mr. and Mrs. Gallen did not question the adequacy of the newspaper publication in their initial motion papers. The issue was raised for the first time in their post-hearing memorandum. Accordingly, it was reasonable for the County to supplement the evidentiary record after the hearing in response to this newly-raised argument.

Deputy Sheriff with the New Castle County Sheriff's office, who testified that she personally posted a notice of the impending sheriff's sale on the front door of the Property on June 18, 2002.[10] Deputy Kemp referred to a log sheet to confirm the date and time of the posting.[11] On June 25, 2002, special process server DeNorris Britt posted the Property with a notice to lien holders, which notice also advised of the impending sheriff's sale.[12]

Mr. and Mrs. Gallen also denied receiving, or even being aware of, the notices sent to them by certified mail. Edward Smith, a mail carrier for the United States Postal Service, testified that he attempted to deliver the first certified letter, addressed to Mr. and Mrs. Gallen, without success.[13] Markings on the envelope reveal that the first attempted delivery was on April 13, 2002.[14] Because he could not deliver the letter, Mr. Smith left a notice in the Gallen's mailbox, as is the Postal Service's practice, indicating that he had attempted to deliver a certified letter and providing information regarding the letter and how it could be retrieved.[15] Mr. Smith attempted

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[10]Transcript at 87.

[11]*Id.* at 90.

[12]*See* Exhibit 7; Transcript at 92.

[13]*Id*. at 63-65.

[14]Exhibit 2.

[15]Exhibit 1.

to deliver the letter two more times without success, each time leaving a notice of delivery.[16] A second certified letter (with notice of sale) was postmarked May 17, 2002.[17] Mr. Smith again was the mail carrier. He attempted delivery on May 18, 2002 without success, left a notice of attempted delivery, and then another carrier attempted delivery on two subsequent occasions.[18] Again, the letter was returned to the County unclaimed. Finally, a third certified letter (with notice) and fourth certified letter (with notice to lien holders) were sent to the Property on June 24, 2002.[19] And, again, Mr. Smith was the mail carrier who attempted to deliver the notices. When the first attempt was unsuccessful, two subsequent deliveries of each letter were attempted, neither of which was successful.[20] Both letters were returned to the County unclaimed.

Neither Mr. nor Mrs. Gallen was able to explain why they would not have seen the posting of the monition in April, 2002 or received the notices of the certified letters which were delivered in April and May of 2002. The explanation in June,

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[16]Transcript at 64-65.

[17]Exhibit 3.

[18]*Id.*; Transcript at 65-67.

[19]Exhibit 4.

[20]Transcript at 68-69.

2002 was that they were away on vacation.[21] Yet there was no explanation as to why they would not have seen the notice of attempted delivery in June, along with the rest of their mail, upon their return home on June 30. Nor did they explain why they would not have received the second and third notices of attempted delivery, both of which were delivered after their return from vacation.

The sheriff's sale occurred on July 9, 2002. According to the County, its representative opened the bidding at $5400, the amount of the delinquent taxes plus the costs of the sale. The County and SMP both characterize the bidding that followed as "spirited," although the record does not contain any evidence relating to the auction process itself. SMP was the high bidder at $65,000.[22] The sale was confirmed without objection on August 9, 2002, and no attempt to redeem the Property occurred within the prescribed time period.[23]

Mr. Gallen testified that he first became aware of the sheriff's sale in late July or early August, 2002.[24] He did not tell his wife because he did not want to upset

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[21]Transcript at 17-18.

[22]The Court has received evidence that the fair market value of the property is between $125,000 and $150,000, depending upon which expert one is inclined to believe.

[23]*See* 9 *Del. C.* §87289("[t]he owner of any such real estate sold under this subchapter... may redeem the same at any time within 60 days from the day of sale thereof is approved by the Court, by paying to the purchaser... the amount of the purchase price and 15 percent in addition thereto, together with all costs incurred....").

[24]*Id.* at 42.

her.[25] Mrs. Gallen claims that she did not learn of the sale until October 9, 2002, when she received a letter from SMP in which its representative was attempting to make arrangements to take possession of the Property.[26] When she learned that the sale had occurred and had been confirmed, Mrs. Gallen retained counsel and, on October 22, 2002, both she and her husband filed this motion to vacate confirmation and set aside the sheriff's sale.

III. DISCUSSION

A. The Burden of Proof

When a property owner seeks to set aside a tax monition sale after confirmation, the Court will only consider challenges that strike at the heart of the Court's jurisdiction to conduct the sale in the first instance, such as allegations regarding a failure of notice of sale.[27] Such challenges implicate notions of due process and fundamental fairness which are of constitutional dimensions.[28]

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[25] *Id.* at 42-44.

[26] *Id.* at 19-23.

[27] *See Ward v. Gray,* 374 A.2d 15, 16-17 (Del. Super. 1977)("a deed acquired through a tax sale will usually not be questioned once confirmation and approval by Superior Court has taken place"), *aff'd*, 388 A.2d 1197 (Del. 1978).

[28] *Id. See also Brown v. Federal Nat'l Mortgage Assoc.*, 359 A.2d 661, 662 (Del. 1976)("It is settled constitutional law that, absent special circumstances not present here, a person may not be deprived of a significant property interest without prior notice and an opportunity to be heard")(citations omitted).

Otherwise, the Court must be mindful that the primary purpose of confirmation is to provide the good faith purchaser at sheriff's sale a fixed point in the process "where he becomes assured of absolute title and the peace attendant thereto."[29] The burden of establishing a basis for relief is, of course, upon the party seeking to set aside the sale.[30]

B. The Notice of Sale

The means by which the County was obliged to provide notice of the sheriff's sale to Mr. and Mrs. Gallen and all other interested parties is prescribed by court rule and statute. Rule 69(g) required the County to provide notice to the owner(s) of the Property and lien holder(s) by certified mail and by posting the property.[31] The County also was required to publish notice of the sale in "a newspaper of general circulation published in the county wherein the property is situated and ... a newspaper of general or limited circulation published nearest to the place where the

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[29] *Id.*

[30] 2 Woolley, *Practice in Civil Actions*, §1114 (1985). Mr. and Mrs. Gallen cite *Haskins v. Motivational Center, Inc.,* 605 A.2d 15 (Del. Super. 1992) for the proposition that, on a motion to set aside a sheriff's sale, "the party responsible for the sale" bears the burden of proving compliance with the court's rules of procedure. *See* Defendants' Opening Memorandum at 9. The citation is misplaced. *Haskins* does not address the burden of proof.

[31] Del. Super. Ct. Civ. R. 69(g).

property is situated."[32] Mr. and Mrs. Gallen have failed to articulate a meaningful argument that the County did not comply with the letter of the applicable notice procedures. Rather, their argument focuses on whether these procedures, as employed in this case, provided notice to them of a quality that would withstand constitutional (due process) scrutiny. In essence, then, Mr. and Mrs. Gallen have mounted a constitutional challenge to the court's procedure for providing notice of pending sheriff's sales to interested parties. As discussed below, the challenge presents a near vertical climb for the Gallen's who must overcome both an unflattering factual record and settled precedent supporting Delaware's notice scheme.

1. Did Mr. and Mrs. Gallen Receive Actual Notice of the Sale?

The evidence of record reveals that notice of the sale was directed or affixed to the Property on no less than nine occasions (sixteen if one counts each attempt to deliver the certified letters).[33] The first notice was sent almost four months prior to the sale (April 12, 2002); the last was sent two weeks prior to the sale (June 24, 2002). Yet, according to Mr. Gallen, he did not become aware of the July 9 sale until

[32] 10 *Del. C.* §4973(a).

[33] The County advertised the sale in two newspapers, posted the Property three times, sent four certified letters to the Property (three addressed to Mr. and Mrs. Gallen, one addressed to Tenants and/or Lessees) and attempted to deliver each letter three times (leaving a notice of attempted delivery each time).

late July or early August, 2002. In what form or manner notice of the sale was received by him at that time is not clear in the record. For her part, Mrs. Gallen claims her first notice of the sale was in October, 2002. Aside from a vacation which lasted from June 15th through the 29th, Mr. and Mrs. Gallen have offered no explanation, much less a credible explanation, as to how each of the nine attempts at notice missed the mark.

The County presented credible testimony that notice was effected. Mr. and Mrs. Gallen's testimony to the contrary, on the other hand, was not credible.[34] The Court is satisfied that either Mr. or Mrs. Gallen, or both of them, received actual notice of the sale well in advance of the July 9 auction.[35]

2. Was Personal Service Required?

Mr. and Mrs. Gallen argue that notice was defective here because "no personal

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[34]The Court recognizes that each of the certified letters was returned to the County "undelivered" after three attempts at delivery per letter were unsuccessful. Needless to say, actual notice was not effected by these efforts. But, on each occasion delivery was attempted, a notice was left at the Property indicating that a certified letter had been mailed and that delivery had been attempted. Mr. and Mrs. Gallen denied receiving any of the 12 notices of attempted delivery. This incredible denial undermines the credibility of their testimony that they did not see the three separate postings at the Property, two of which published the date, time and location of the sheriff's sale.

[35]Mr. Gallen's testimony that he purposely withheld the County's notices of delinquent property taxes from his wife suggests a plausible, if not probable, explanation for what occurred here: Mr. Gallen concealed the notices of the impending sheriff's sale from Mrs. Gallen in order to spare her from the emotional stress and, perhaps, to spare himself from his wife's upset at learning that he had allowed the delinquent taxes to go unattended for so long. Indeed, Mr. Gallen acknowledged that he learned in late July or early August that the sheriff's sale had occurred but never told his wife.

service of any kind was made [on them] at any time."[36] The Court already has rejected that argument as a matter of fact. It can be rejected, as well, as a matter of law. Even assuming *arguendo* that neither Mr. nor Mrs. Gallen actually received any of the notices sent to them (in various forms) by the County, the Court still would conclude that notice was proper and effective.

To pass constitutional muster, "notice must ... be reasonably calculated to apprize interested parties of the pendency of the action."[37] *Shipley* acknowledges that "due process does not always require actual notice," although it "does favor it whenever possible."[38] In *Shipley*, the court determined that, in the context of the Sheriff's and the Prothonotary's effort to advise a property owner of an impending sheriff's sale, multiple unsuccessful efforts to effect personal service did not amount to adequate notice because the County failed to attempt other means at their disposal to provide notice, including posting the property and sending notice by mail.[39] In this case, the County did both - - repeatedly.

The import of the United States Supreme Court jurisprudence regarding the

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[36]Defendants' Opening Memorandum at 4.

[37]*Shipley v. First Federal Savings and Loan Ass'n of Del.*, 619 F.Supp. 421, 437 (D. Del. 1985)(citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)).

[38]*Id.*

[39]*Id.*

adequacy of notice is that the state, county or other authority attempting to serve notice must address the "practicalities and peculiarities of the case" and, in this context, act reasonably.[40] When considering whether the authority attempting to serve notice has acted reasonably, the court should balance "the interest of the state (or other authority) and the individual interest sought to be protected."[41] In connection with proceedings to collect delinquent property taxes:

> The property owner's interests includes [sic] his right to ownership, possession and profits derived from the property as well as the risk of erroneous deprivation of these rights. The state's interests include the orderly, timely, and efficient collection of taxes and the effect upon these procedures of both additional cost and time of the burden to search for the taxpayer and the value of the search as an additional safeguard. We note that the state's interests are based upon the sovereign power of taxation and both the cost and benefits of any additional burden placed upon the state will be passed on to all taxpayers.[42]

The Court has balanced the competing interests in this case. The County made nine attempts to provide notice to Mr. and Mrs. Gallen, including four certified letters (three addressed to them personally, one addressed to lien holders and/or tenants), each of which was delivered to the Property three times. When delivery was not successful, the mail carrier left a notice at the Property advising the Gallen's that the

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[40] *Mullane*, 339 U.S. at 314-15.

[41] *See Holland v. King*. 500 N.E.2d 1229, 1235 (Ind. App. 1986)(citing *Mullane*, 339 U.S. at 314).

[42] *Id.*

County was attempting to correspond with them by certified mail and advising them where the letter could be retrieved. The County had no information that the address was incorrect. Indeed, the letters were directed to the very address that was the subject of the tax delinquency and impending sheriff's sale. After twelve attempts to deliver four letters failed, the County reasonably could conclude that the property owners were attempting deliberately to avoid the consequences of their failure to pay taxes. Under these circumstances, the County reasonably could determine that the county taxpayers who were meeting their tax obligations should not bear the costs of further futile efforts to provide notice to two property owners who were not.

On the other side of the scale, viewing the evidence most favorably to Mr. and Mrs. Gallen, the Court is presented with property owners who clearly have a constitutionally protected interest in preserving their home. Yet they acknowledge that they knew of a tax delinquency and did nothing, knew of a completed sheriff's sale prior to or immediately following its confirmation and did nothing, and knew or should have known of their right to redeem the Property and did nothing. Under these circumstances, the Court is satisfied that the balancing of competing interests tips decidedly in the County's favor. The County's effort to provide notice to Mr. and Mrs. Gallen was reasonable under the circumstances and provided due process.

Finally, lest there be any doubt, the Court expressly rejects Mr. and Mrs.

Gallen's contention that personal service is mandated by due process. To the contrary, if the effort is "reasonably calculated, under all the circumstances" to provide notice,

then *mailing* (as opposed to *receipt)* of notice will be deemed adequate.[43]

C. The Alleged Inadequacy of the Price Paid for the Property

Notwithstanding that the sale has been confirmed, Mr. and Mrs. Gallen contend that the Court can set aside the sheriff's sale and vacate confirmation because the winning bid for the Property at auction was grossly inadequate. They concede that "[n]o Delaware case has been found to prohibit an attack on a sale after confirmation on the ground of gross inadequacy of purchase price and conversely no case has been found allowing it."[44]

The court's "equitable power to [set aside a sheriff's sale] derives from the inherent control of the court over its own process 'for the correction of abuses or the prevention of injury.'"[45] The decision to exercise this power, or not, rests in the sound

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[43]*See Mullane,* 339 U.S. at 314 ("notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the action...."). *See also Garcia v. Meza*, 235 F.3d 287, 290 (7th Cir. 2000)(written notice by certified mail can comply with due process even if addressee does not receive it); *Montgomery v. Scott*, 802 F. Supp. 930, 935 (W.D.N.Y. 1992)(same); *Holland*, 500 N.E. 2d at 1237("we find the balance weighs in favor of the state and constructive notice by certified mail to the owner's last known address is reasonable and satisfies the requirements of due process"); *Cross v. Linski*, 354 A.2d 409, 411 (N.H. 1976)("The evidence shows that a notice of sale was sent by registered mail to the last known address of the plaintiff. This is all that is required").

[44]Defendants' Opening Memorandum at 8.

[45]*Burge v. Fidelity Bond and Mortg. Co.,* 648 A.2d 414, 420 (Del. 1994).

discretion of the court.[46] When a challenge to the sale is mounted for the first time after confirmation, the court must balance the good faith purchaser's right to finality in the process against the property owner's (and the public's) interest in ensuring that procedural safeguards have been employed properly.[47] The Court already has determined that Mr. and Mrs. Gallen received due process in connection with the sheriff's sale of the Property. Their challenge regarding the adequacy of the price does not reach to a jurisdictional or constitutional summit and comes too late in the process. Under these circumstances, the Court declines to exercise its discretion to set aside a confirmed sheriff's sale.

The challenge with respect to price must be rejected on the merits as well. Mr. and Mrs. Gallen have cited to the general rule that a price which is less than half of the fair market value of the property will be considered *per se* "grossly inadequate, shocking the conscience of the court."[48] The burden to prove an inadequate price rests with Mr. and Mrs. Gallen.[49] In this regard, the Court has been presented with the testimony of competing real estate appraisers. The appraiser engaged by Mr. and

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[46]*Id.* at 419 (citing 2 Woolley *Practice in Civil Actions* § 1108 (1985)("The power of the court in this respect is broad and discretionary.")).

[47]*See Ward*, 374 A.2d at 16.

[48]*Burge*, 648 A.2d at 419 (citations omitted).

[49]2 Woolley, *Practice in Civil Actions*, §1114 (1985).

Mrs. Gallen has opined that fair market value of the Property is $150,000. The appraiser engaged by SMP has opined that the fair market value is $125,000. SMP purchased the Property for $65,000. Thus, to invoke the rule, the relevant mathematics require that Mr. and Mrs. Gallen prove that their appraiser's opinion represents the more reliable assessment of fair market value. They have not sustained their burden. David May, SMP's appraiser, based his opinion regarding the fair market value of the Property on the fair market value of comparable properties in the same community. This is the preferable approach to valuation.[50] On the other hand, George Fantini, Mr. and Mrs Gallen's appraiser, referred to properties outside of the community in question, apparently to inflate the value of the comparable properties from which he would calculate fair market value. Mr. May offered the more credible opinion. The "50% rule" does not apply here.

The Court's conscience is not shocked by the $65,000 purchase price.[51] The record is devoid of evidence suggesting that the auction was inert or otherwise unproductive. There is no evidence from which the Court could conclude that another auction would yield a higher price for the Property and the purchase price has

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[50]*See Fitzsimmons v. McCorkle*, 214 A.2d 344 (Del. 1965).

[51]*See Burge,* 648 A2d at 419 ("A sheriff's sale may be set aside ... when the sales price is so *grossly* inadequate that it shocks the conscience of the court.")(emphasis in original)(citation omitted).

not been proven to be "grossly inadequate." Accordingly, there is no basis to set aside the sale or vacate confirmation for inadequate price.

IV. CONCLUSION

For the foregoing reasons, defendants' Motion to Set Aside Sheriff's Sale and Vacate Confirmation must be, and hereby is, **DENIED.**

IT IS SO ORDERED.

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Judge Joseph R. Slights, III

Original to Prothonotary