

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CONSECO FINANCE SERVICING )  
CORP., ) C.A. No. 02L-05-031 (JTV)  
)  
Plaintiff, )  
)  
v. )  
)  
DAVID R. SCHOLZ and )  
TONYA A. SCHOLZ, )  
)  
Defendant. )

*Submitted: July 14, 2006*  
*Decided: October 30, 2006*

Stephen P. Doughty, Esq., Lyons, Doughty & Veldhuin, P.A., Wilmington,  
Delaware. Attorney for Plaintiff.

William McPoyle, Dover, Delaware. *Pro Se.*

*Upon Consideration of Motion*  
*to Set Aside a Sheriff Sale*  
**GRANTED**

**VAUGHN, President Judge**

***Conseco v. Scholz***

C.A. No. 02L-05-031 (JTV)

October 30, 2006

**OPINION**

This case presents the Court with a motion to set aside a sheriff's sale. The property involved with the sale is a parcel of real property at 202 Firetower Road, Camden, Kent County, Delaware and a mobile home which is located thereon. The movant is William McPoyle ("McPoyle"), who was the purchaser at the sale. The sale was conducted to enforce a mortgage upon which the defendants' had defaulted. The sale took place on June 1, 2006. As the successful bidder at the sale, McPoyle paid the Sheriff a deposit of \$12,600, with the balance being due and payable at a later date. On June 29, 2006, however, McPoyle filed the motion to set aside the sale which is now before the Court.

McPoyle alleges several grounds for setting aside the sale. First, he alleges that the mobile home is not a part of the real estate because its title has not been retired on the records of the Delaware Department of Transportation ("Del DOT"). The Sheriff's advertisement for the sale makes no mention of the mobile home in the description of the premises. The Court's file does contain a property description for a newspaper advertisement which recites the property as "[a]ll that certain lot, piece or parcel of land with the buildings thereon erected . . ." McPoyle alleges that it was the intent of the Sheriff to sell the property with the mobile home. The description of the property in the mortgage foreclosed upon describes it by standard legal description of the lot, "together with a security interest in that certain 1997, 80 X 14 2764F mobile home." Since the mobile home had not become part of the real estate, McPoyle contends, the sale could not convey the mobile home. He contends that

***Conseco v. Scholz***

C.A. No. 02L-05-031 (JTV)

October 30, 2006

failure to convey the mobile home with the lot constitutes a material defect in the sale.

The second ground for setting aside the sale asserted by McPoyle is that the water well for the mobile home is on the neighbor's property, a condition which he learned only after the sale. The neighbor has informed McPoyle that the well will be shut off.

A third ground which McPoyle asserts for setting aside the sale is that the septic tank which services the mobile home is only 36 feet from a ditch, a condition which violates the permit for the tank and Department of Natural Resources & Environmental Control ("DNREC") regulations, which require that the tank be at least 50 feet from the ditch.

Finally, when the motion was presented in open court, McPoyle presented the Court with a survey of the property, apparently prepared for a prior owner by a professional land surveyor, which shows that a corner of the mobile home, in the rear, is only 1.7 feet from the property line. This fact was not known by him at the time of the sale, McPoyle stated, because what visually appears to be a part of the subject property's back yard is owned by the neighbor (the same area upon which the water well is located). As a result, McPoyle contends, one viewing the property is misled as to where the rear property line is actually located. This condition, McPoyle contends, was not discovered by him until after the sale.

The plaintiff, Conseco Finance Servicing Corp., opposes the motion.

**STANDARD OF REVIEW**

This Court's authority to set aside a sheriff's sale is fully discussed by the

***Conseco v. Scholz***

C.A. No. 02L-05-031 (JTV)

October 30, 2006

Supreme Court in the case of *Burge v. Fidelity Bond and Mortg. Co.*<sup>1</sup> Summarizing from that decision, the Court must ascertain whether there was "some defect or irregularity in the process or mode of conducting the sale, or [] neglect of duty, or misconduct on the part of the Sheriff *or some other sufficient matter* . . . whereby the rights of parties to, or interested in the sale are, or may have been, prejudiced."<sup>2</sup>

*Woolley* is also quoted in relevant part as follows:

Where there has been *mistake*, misconduct or fraud in the course of the sale, whereby any of the parties to or interested in the proceeding are prejudiced, it may be corrected by an application on the part of the party aggrieved to set the sale aside. *The power of the court in this respect is broad and discretionary.*<sup>3</sup>

Judicial sale of a contested sheriff's sale implicates the court's inherent power to control the court's process and functions to protect affected parties from injury or injustice.<sup>4</sup> The court's discretion is not without limitation, however, and the Court may not arbitrarily or capriciously refuse to confirm a sale where there are no

---

<sup>1</sup> 648 A.2d 414 (Del. 1994).

<sup>2</sup> 648 A.2d at 419, citing *Petition of Adair*, 190 A. at 107 (citation and internal quotation marks omitted)(emphasis added).

<sup>3</sup> *Id.*, citing 2 *Woolley's Delaware Practice* § 1108 (1906) (emphasis added).

<sup>4</sup> 648 A.2d at 420.

***Conseco v. Scholz***

C.A. No. 02L-05-031 (JTV)

October 30, 2006

irregularities in the sale proceedings and no fraud, unfairness, or other extraneous matter demonstrating unfairness to one of the parties interested in the sale.<sup>5</sup>

**DISCUSSION**

Under Superior Court Civil Rule 69(d), applications to set aside a sheriff's sale must be made on or before the Thursday following the first Monday in the month succeeding the date of sale. McPoyle did file his motion to set aside the sale within the time frame required and has, therefore, preserved his right to object to the sale.

I am not persuaded on the current record that the fact that the failure to have the title retired on the records of Del DOT justifies setting aside the sale. This may be something that could be easily corrected. In any event, I would require more evidence on this point before seriously entertaining this ground as one upon which the sale should be set aside.

I am also not persuaded on the current record that the location of the septic tank justifies setting aside the sale. It may be that the DNREC would not require the tank to be relocated, or that relocation of the tank could be performed at a cost which would not warrant setting aside the sale. As with the title to the mobile home, I would at least require more evidence on this point before setting aside the sale on this ground.

I am persuaded, however, that the mistake concerning the rear yard of the property, which results in the mobile home being only 1.7 feet from the property line

---

<sup>5</sup> *Id.*

***Conseco v. Scholz***

C.A. No. 02L-05-031 (JTV)

October 30, 2006

and the water well being on the neighbor's property, is a material mistake which seriously prejudices McPoyle. A comparison of the written, legal description of the lot and the survey indicates that there is a strip of land almost 30 feet of which, although appearing to be part of the yard of the subject property, belongs to the neighbor. The distances are such that I am satisfied that the discrepancy was not readily apparent from an inspection of the property. I am satisfied that McPoyle became aware of the problem only after the sale when he learned from the neighbor that the well was on the neighbor's property.

I infer from the record that at some point in the past, either the defendants or a prior owner encroached upon this strip of the neighbor's property. The result is that not only is the water well located on the adjacent property, but it appears that the mobile home is placed in violation of zoning set back requirements. Although the applicable zoning set back requirements are not part of the record, there is no doubt to the Court that 1.7 feet from the property line in this rural part of Kent County is a violation. There is nothing in the record to suggest that the set back violation can be corrected short of relocation of the mobile home, moving it more to the interior of the lot. I am satisfied that these conditions render the property substantially unmarketable until corrected. I am also satisfied that the cost of correcting these issues would in all probability be a substantial amount of money. As a result, I conclude that these mistakes or irregularities in the condition of the property substantially prejudice McPoyle, and that he is sufficiently blameless that it would be an injustice to hold him to the purchase price which he bid at the sale.

***Conseco v. Scholz***

C.A. No. 02L-05-031 (JTV)

October 30, 2006

For these reasons, McPoyle's motion to set aside the sale is *granted*. His deposit shall be refunded to him.

**IT IS SO ORDERED.**

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary  
cc: Order Distribution  
File