NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1825

CLARA WRIGHT

VERSUS

CINGULAR REAL ESTATE HOLDINGS OF LOUISIANA, L.L.C. A/K/A CINGULAR REAL ESTATE HOLDINGS

Judgment Rendered: JUL - 1 2010

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On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 2007-15803, Division "F"

Honorable Martin E. Coady, Judge Presiding

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BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

HUGHES, J.

This is an appeal from a summary judgment granted in favor of Clara Wright, the plaintiff in this suit, to quiet title to immovable property purchased in a tax sale, against the former property owner, Cingular Real Estate Holdings of the Southeast, L.L.C., on behalf of itself and its predecessor by merger, Cingular Real Estate Holdings of Louisiana, L.L.C. ("Cingular"), which failed to pay the assessed 2003 ad valorem taxes.

The pleadings, depositions, answers to interrogatories, and affidavits filed in this case show the following facts.

Cingular acquired the subject property on June 29, 2001. Ms. Wright purchased the property at a sheriff's sale for $283.11, following the failure of Cingular to pay the 2003 ad valorem taxes due to St. Tammany Parish.[1] Ms. Wright was issued a sheriff's deed, dated June 9, 2004, which was thereafter filed in the conveyance records for the parish. Cingular did not redeem the property during the three-year redemption period following the tax sale. At the time that her 2007 suit was filed, Ms. Wright had also paid the 2004, 2005, 2006, and 2007 taxes.

The 2001 act of sale to Cingular listed its address as "Glenridge Highlands Two, 5565 Glenridge Connector, Atlanta, Georgia, 30342." This is also the address that appeared in the St. Tammany Parish Tax Assessor's records.

Cingular paid its 2002 taxes on February 5, 2003. On December 1, 2003, Cingular's 2003 tax bill was mailed to Cingular at its Atlanta address. Thereafter, in April, 2004, when no payment was received by St. Tammany

[1] The amount of the 2003 ad valorem taxes assessed against Cingular was $137.37, to which was added interest, costs, and fees amounting to $145.74, for the sheriff's sale total price of $283.11.

Parish, a delinquency notice was sent by certified mail, return receipt requested, to the Atlanta address.

Although, in response to the plaintiff's 2008 interrogatory inquiring as to Cingular's "present" address, Cingular gave its address as "AT&T Mobility LLC, Personal Property Tax Department, 16331 N.E. 72nd Way, RTC 1, Redmond, WA 98052," Cingular admitted that it did not provide the St. Tammany Parish Tax Assessor with notice of a change of address. Further, Cingular made no showing in this case that the Atlanta address was incorrect in 2003 and 2004 when St. Tammany Parish forwarded the original tax notice and subsequent notice of tax delinquency.

In addition to the general denials asserted in Cingular's answer to the plaintiff's suit, Cingular attached to its opposition to the plaintiff's motion for summary judgment the following: a copy of a Cingular check dated January 24, 2003, made payable to "PARISH OF ST. TAMMANY – LA ... TAX COLLECTOR," in the amount of $8,967.47; the affidavit of a paralegal employed by its counsel of record, who conducted a public records search of the St. Tammany Parish Tax Assessor's records and concluded that the foregoing payment exceeded the 2002 tax assessments against it, resulting in a "substantial overpayment that was larger than the tax assessment issued against [it] in 2003 for the property at issue in this case;"[2] and the answers to interrogatories previously referenced.

The defenses raised by Cingular to the grant of summary judgment in the plaintiff's favor, in essence, contend: the content of tax notices allegedly sent to it was not proven since exact copies of the notices were not produced; delinquency and post sale notices sent to the Atlanta address were without effect, as they were signed for by a person who was not a Cingular

[2] Specific amounts were not stated.

employee; and its January 24, 2003 payment, made for 2002 tax assessments, exceeded the taxes then owed and the overpayment should have been applied to the 2003 tax obligation. We find no merit in these assertions.

First, we find that ample evidence was presented regarding the contents of the notices directed to Cingular, by means of filing into the record sample form letters and through the deposition testimony of Deputy Sheriff Josie Willie (manager of the property tax department). Deputy Willie testified that the sample form letters were the type customarily sent, and she further gave detailed testimony reflecting that all information statutorily required to be included in the notices had been included. Deputy Willie's testimony concerning the content of the tax notices sent to Cingular was uncontradicted.

Next, we reject any argument based on alleged defects in the post sale notices sent to Cingular.[3] The supreme court has ruled that a post tax sale notice is not necessary to satisfy due process, reasoning that the opportunity for a property owner to be heard at a meaningful time and in a meaningful manner is *before* he becomes divested of his property. After a property owner becomes divested of his property, in compliance with due process rights, fundamental due process does not further require that he be informed of his right to redemption of the property. Further, the supreme court concluded that the Louisiana Legislature had at that time included no statutory penalty for failure to provide the post sale notice. **Hamilton v. Royal International Petroleum Corporation**, 2005-846, pp. 6-10 (La.

[3] Deputy Willie testified that three-year redemption letters were sent to Cingular by the Sheriff's Office, which were signed for on March 4, 2005, May 17, 2006 and March 17, 2007. The record contains evidence of three signed return receipts addressed to Cingular at its 5565 Glenridge Collector, Atlanta, Georgia address. Two are stamped "March 4, 2005" and "May 17, 2006," respectively, while the stamp date on the third is not fully legible (though it appears to bear a notation of "March" "2007").

2/22/06), 934 So.2d 25, 30-32, cert. denied, 549 U.S. 1112, 127 S.Ct. 937, 166 L.Ed.2d 704 (2007).[4]

Nor do we find it of any consequence that a person who may not have been a Cingular employee signed the certified return receipt acknowledging delivery to Cingular of the notice of tax delinquency. Former LSA-R.S. 47:2180(A)(1)(a) (subsequently repealed by 2008 La. Acts, No. 819, § 1, effective January 1, 2009, and replaced by LSA-R.S. 47:2153) required that notice of tax delinquency be sent to the delinquent taxpayer by certified mail, return receipt requested, before the property could validly be sold for unpaid taxes. It has repeatedly been held that where the tax debtor's correct address is known and used, certified mail, return receipt requested, is a reasonable method of notifying the debtor, and it is unnecessary that notice actually be received by the tax debtor to establish the validity of the sale (even when the return receipt of the delinquency notice to the tax debtor was signed by an agent whose authority to do so was not established). **Dennis v. Vanderwater**, 498 So.2d 1097, 1099 (La. App. 3 Cir. 1986), writ denied, 501 So.2d 211 (La. 1987) (citing **Securities Mortgage Company v. Triplett**, 374 So.2d 1226 (La. 1979); **Carey v. Green**, 177 La. 32, 147 So. 491 (1933); **Goodwill v. Smith**, 29 So.2d 188 (La. App. 2 Cir. 1947); **Goodwin v. Newsome**, 44 So.2d 189 (La. App. 2 Cir. 1950)). See also **Koeppen v. Raz**, 29,880 (La. App. 2 Cir. 10/29/97), 702 So.2d 337; **DeSalvo v. Roussel**, 629 So.2d 1366 (La. App. 4 Cir. 1993), writ denied, 94-0156 (La. 4/22/94), 637 So.2d 155. Therefore, we cannot conclude that, in the instant case, Cingular raised a question of fact as to the validity of the

[4] We note the scholarly criticism of the supreme court's opinion in **Hamilton** by: Jessica Gladney, Note, Stopping Short of Justice: **Hamilton** and Notice Requirements for the Redemption Period of Tax Sales, 68 La. L. Rev. 263 (2007).

delivery of the delinquency notice by merely asserting the person receiving the notice was not its employee.[5]

Finally, we reject Cingular's contention that there exists an issue of fact regarding whether the 2003 ad valorem tax, for which its property was sold, had been paid. While Cingular alleges that St. Tammany Parish was in possession of an overpayment after it paid $8,967.47 toward 2002 tax assessments, which it argues should have been applied to its 2003 tax debt, the existence of an overpayment was not established.

Before further discussion of the overpayment issue, we note that because of the conclusion we reach on the issue hereinbelow, we find it unnecessary to decide whether the law provides authority for the proposition that an overpayment made on ad valorem taxes due for one year must be applied by the tax collector to taxes due the following year. Cingular's overpayment argument implies that LSA-C.C. art. 1893 (providing in part that "[c]ompensation takes place by operation of law when two persons owe to each other sums of money or quantities of fungible things identical in kind, and these sums or quantities are liquidated and presently due") would apply to create an offset in such a situation. However, Cingular has cited no applicable tax law that mandates such an offset, and we are impressed by the plaintiff's argument on the issue that "[s]uch a concept is unreasonable and would place an unnecessary obstacle upon both the assessor and sheriff as tax collector for the thousands of properties that are under the sheriff's jurisdiction in St. Tammany Parish." Further, we note that other statutorily

[5] We note that there was no assertion in this case that the person signing the return receipt was *unauthorized* to receive mail delivered to that address, merely that he was not an *employee* of Cingular. A copy of the certified return receipt for the April 16, 2004 delivery of the notice of delinquency was filed into the record, showing delivery to Cingular at its Atlanta address; the delivery was accepted and signed for by "O. Murphy." Although, in answers to interrogatories, Cingular stated that "O. Murphy" was not its employee, when asked to list the names of Cingular employees at the Atlanta location, Cingular indicated there were "[n]one."

prescribed remedies exist to address the circumstances alleged; i.e., a refund could have been sought for any overpayment made, in accordance with former LSA-R.S. 47:2108.1, which provided that "[a]ny person who has a claim against a political subdivision for ad valorem taxes erroneously paid into the funds of that political subdivision may present such claim to the Louisiana Tax Commission within three years of the date of such payment" (LSA-R.S. 47:2108.1 was repealed and substantially reenacted by 2008 La. Acts, No. 819, § 1, effective January 1, 2009, as LSA-R.S. 47:2132); or, if Cingular believed the 2003 tax assessment was erroneous, it could have paid the assessed amount "under protest" and sought recovery of the payment, in accordance with former LSA-R.S. 47:2110, which provided that "[a]ny person resisting the payment of any amount of tax due shall pay the amount due to the officer designated by law for the collection of such tax and shall give him, the parish or district assessor, and the Louisiana Tax Commission written notice at the time of payment of his intention to file suit for the recovery of such tax" (LSA-R.S. 47:2110 was repealed and substantially reenacted by 2008 La. Acts, No. 819, § 1, effective January 1, 2009, as LSA-R.S. 47:2134).

Notwithstanding, we conclude that an overpayment was not sufficiently demonstrated. Although a copy of the $8,967.47 check was produced, no St. Tammany Parish records were filed into the record to establish that the $8,967.47 paid for 2002 taxes was not owed in its entirety for those taxes.[6] The affidavit of a paralegal, working for Cingular's counsel, who conducted a public records search on the tax assessor's Internet website was insufficient to raise an issue of fact on the issue,

[6] The 2002 ad valorem tax assessed on the property at issue was $133.77, and there is no evidence in the record to show what other tax debts the $8,967.47 payment was intended to cover.

particularly when no supporting documentation was submitted in conjunction with the affidavit. Louisiana Code of Evidence Article 1005 provides:

> The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Article 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

No explanation for Cingular's failure to produce copies of the pertinent St. Tammany Parish records has been presented. Furthermore, this affidavit, which purports to provide evidence of the contents of those records, failed to reveal personal knowledge on the part of the affiant regarding the validity of the information contained on the Internet. Rather, the affidavit contained only the affiant's hearsay statement that "a staff member of the Assessor's office" told her that "the website search engine accurately and completely reflects the property tax assessments made by the St. Tammany Parish Tax Assessor," contrary to the dictates of LSA-C.E. arts. 602,[7] 801(C),[8] and 802.[9]

Cingular has acknowledged that its burden of proof is as set forth in **Cressionnie v. Intrepid, Inc.**, 2003-1714, p. 4 (La. App. 1 Cir. 5/14/04), 879 So.2d 736, 739, which provides:

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[7] Louisiana Code of Evidence Article 602 provides: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This Article is subject to the provisions of Article 703, relating to opinion testimony by expert witnesses."

[8] Louisiana Code of Evidence Article 801(C) provides: "'Hearsay' is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted."

[9] Louisiana Code of Evidence Article 802 provides: "Hearsay is not admissible except as otherwise provided by this Code or other legislation."

> The tax deed of the sheriff constitutes prima facie proof of the regularity of the tax adjudication proceedings. The former owner must then carry the burden of proof in establishing any defects alleged by him based on allegations of irregularities in the tax adjudication proceedings. If the defendant offers evidence sufficient to rebut the presumption of regularity, it then becomes the duty of the tax purchaser to go forward and prove that all requisites for a valid tax sale were complied with.

(Citations omitted.) After a careful review of the record presented on appeal, we conclude that Cingular failed to establish the existence of any genuine issue of material fact as to the validity of the tax adjudication proceedings at issue herein. Accordingly, we find no error in the summary judgment granted in favor of plaintiff by the district court.[10]

CONCLUSION

For the reasons assigned, the summary judgment rendered by the district court in favor of Clara Wright is affirmed. All costs of this appeal are to be borne by Cingular Real Estate Holdings of the Southeast, L.L.C., on behalf of itself and its predecessor by merger, Cingular Real Estate Holdings of Louisiana, L.L.C.

AFFIRMED.

[10] We have reviewed the case cited by the parties subsequent to oral arguments in this matter, **Tietjen v. City of Shreveport**, 2009-2116 (La. 5/11/10), ___ So.3d ___ (2010 WL 2011581), and we do not find the discussion therein relevant to the issues before this court as the primary issue in **Tietjen** involved the failure of the tax assessor to send proper pre-sale notice to the mortgagee of the tax delinquency.