NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 0721

ANNIE WALKER

VERSUS

DEVANT K. SMITH AND MARTHA C. SMITH

Judgment Rendered: October 29, 2010

* * * * * * * *

Appealed from the
21st Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Case No. 2006-002798

The Honorable L. J. Hymel, Judge Presiding

* * * * * * * *

Annie Walker **Amite, Louisiana**	**Plaintiff/Appellant *Pro Se***
Walter Antin, Jr. **Hammond, Louisiana**	**Counsel for Defendants/Appellees** **Devant K. Smith and Martha C. Smith**

* * * * * * * *

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

Carter C.J. Concurs in the result
Welch J. Concurs in the result by SJR

GAIDRY, J.

The plaintiff, the purchaser of immovable property at a tax sale, appeals a judgment on the defendants' reconventional demand declaring her tax title null by reason of deficient notice of the sale to the defendants, the owners of the immovable property. For the following reasons, we affirm the trial court's judgment. We also deny the defendants' answer to the appeal, seeking damages for frivolous appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Procedural History Through Prior Appeal

On May 16, 2001, the plaintiff, Annie Walker, purchased immovable property in Tangipahoa Parish for the total sum of $415.96 at a sheriff's tax sale for delinquent taxes. The defendants, Devant K. Smith and Martha C. Smith, were the owners of the property and the delinquent tax debtors.

On August 28, 2006, Ms. Walker filed a petition to quiet tax title, pursuant to former La. R.S. 47:2228,[1] in the 21st Judicial District Court for the Parish of Tangipahoa. She alleged that the defendants could not be found and that their last-known address was in Mississippi, and requested that a curator *ad hoc* be appointed to represent the defendants for purposes of service, pursuant to the above-cited statute.

On September 25, 2006, the defendants, through their own retained counsel, filed a combined pleading, including exceptions, an answer, and a reconventional demand. In their answer, the defendants asserted a general denial of the allegations of Ms. Walker's petition. Although the defendants captioned their reconventional demand as a "Reconventional Demand to

[1] This statute was repealed by Acts 2008, No. 819, § 2, effective January 1, 2009. However, Section 1 of the same act enacted the new La. R.S. 47:2266, effective January 1, 2009, which reproduces the substance of and combines former La. R.S. 47:2228 and 47:2228.1. La. R.S. 47:2266, Comment – 2008.

Annul Tax Sale and for Damages," they did not allege the nullity of Ms. Walker's tax title, nor did they set forth a cause of action to annul the tax sale or pray for judgment annulling the tax sale.[2] They simply alleged that the notices and other formal requirements for the tax sale were not satisfied. They further alleged that Ms. Walker refused their offer of reimbursement of taxes paid and costs and expenses incurred. Finally, the defendants alleged that Ms. Walker and her representatives trespassed upon the property, causing damage to the property and movable property on it, and causing them "pain and suffering and mental anguish." The defendants, as plaintiffs in reconvention, prayed for a money judgment for damages, attorney fees, and court costs, but did not pray for annulment of the tax sale.

The defendants filed a motion for summary judgment on October 20, 2006, seeking the dismissal of Ms. Walker's petition to quiet the tax title. Ms. Walker responded with a cross-motion for summary judgment. At the conclusion of the hearing on both motions on April 12, 2007, the trial court scheduled another limited hearing and deferred its ruling until May 21, 2007. Following the hearing of May 21, 2007, by judgment signed that day, the trial court granted the defendants' motion for summary judgment and dismissed Ms. Walker's petition with prejudice.[3]

---

[2] The defendants did allege in their exceptions, raised in a combined filing with their answer and reconventional demand, that notice of the tax sale was deficient and the tax sale was therefore null. However, after the original hearing on their exceptions was continued without date, the defendants never requested that their exceptions be heard before the hearing on the summary judgment that determined the merits of Ms. Walker's principal action. As we noted in our original opinion, the exceptions were therefore waived. *Walker v. Smith*, 08-2489, p. 8, n.4 (La. App. 1st Cir. 6/12/09), 11 So.3d 1244 (table; unpublished opinion). This circumstance, however, would not serve to preclude the defendants from again raising the issue of the tax sale's nullity in the context of their reconventional demand, as there was no final judgment on the exceptions dispositive of the issue.

[3] Although the record does not expressly confirm it, the trial court obviously denied Ms. Walker's cross-motion for summary judgment. Arguably, the dismissal of Ms. Walker's cause of action should have been without prejudice. But as the summary judgment was not appealed, it is final and definitive as to Ms. Walker's cause of action to quiet the tax title.

On July 30, 2007, the defendants filed a "Motion to Enforce Judgment." Asserting that the summary judgment dismissing Ms. Walker's petition had not been appealed, the defendants moved for an order compelling her to execute a deed transferring the property at issue back to them. On August 23, 2007, Ms. Walker filed a motion opposing the defendants' "Motion to Enforce Judgment" and seeking to declare the summary judgment a nullity. For unrelated reasons, all judges of the trial court recused themselves from hearing this action, and a judge *ad hoc* was appointed.

On November 28, 2007, the defendants filed a "Rule to Show Cause," again seeking "enforcement" of the summary judgment as prayed for in their previous motion. On January 25, 2008, Ms. Walker, who was by then unrepresented by counsel, filed another "Motion in Opposition to Defendants' Motion to Enforce Judgment." On January 30, 2008, the trial court heard the defendants' "Rule to Show Cause," or renewed "Motion to Enforce Judgment," and at the conclusion of the hearing took the matter under advisement.

On March 25, 2008, the trial court signed its judgment granting the defendants' motion to "enforce" the summary judgment. The judgment recited that Ms. Walker's first motion in opposition and to declare the summary judgment a nullity (filed on August 23, 2007) was denied, and that the defendants' "Motion to Enforce Judgment" was granted. The judgment further provided that the sheriff's deed for the tax sale was declared "null and void and without effect" and that the clerk of court was to so mark the deed recorded in the conveyance records; that Ms. Walker was ordered to execute the necessary documents transferring the property to the defendants; and that the defendants were ordered to pay Ms. Walker all sums of money

she paid for property taxes plus interest thereon. On April 11, 2008, the trial court denied Ms. Walker's second "Motion in Opposition to Defendants' Motion to Enforce Judgment" by an *ex parte* judgment.

Ms. Walker appealed the March 25, 2008 judgment. On June 12, 2009, we reversed that judgment on the grounds that the defendants improperly used summary procedure rather than ordinary procedure to seek annulment of the tax sale, over Ms. Walker's proper procedural objection, and that the trial court further erred in overruling that objection. We remanded the matter for further proceedings. *Walker v. Smith*, 08-2489 (La. App. 1st Cir. 6/12/09), 11 So.3d 1244 (table; unpublished opinion).

Procedural History Following Remand

On June 15, 2009, the defendants filed an amended reconventional demand. After reciting the procedural history of the case through this court's decision of June 12, 2009, the defendants further alleged that they remained in possession of the property at all pertinent times; that notice of the tax sale was not given as required by law and that the tax sale was therefore null; that they reimbursed Ms. Walker for all taxes and costs paid by her; and that she wrongfully claimed title to the property, thereby causing them injury. The defendants prayed for judgment annulling the tax sale and for damages, attorney fees, and costs.

Ms. Walker's answer to that pleading was filed on July 13, 2009. In her answer, besides generally denying most of the defendants' allegations, Ms. Walker affirmatively alleged that the defendants were in fact properly served with notice by mail at their last known address in Mississippi; that the defendants failed to mitigate their damages by failing to notify the sheriff of their change of address prior to the tax sale; and that the defendants' claims

in their reconventional demand were barred by *res judicata*.[4] On the same date, Ms. Walker filed a peremptory exception of *res judicata*, essentially on the grounds that the failure of both the May 21, 2007 summary judgment to address the issue of the nullity of the tax sale and this court's prior decision reversing the judgment of March 25, 2008 precluded further litigation on the issue of the validity of the tax sale.

On July 22, 2009, the defendants filed a motion for partial summary judgment, seeking judgment annulling the tax sale on the grounds that the prior summary judgment of May 21, 2007 was a final and definitive determination of the issue of insufficiency of notice of the tax sale, precluding relitigation of that issue by reason of collateral estoppel or issue preclusion, and therefore entitling them to judgment as a matter of law annulling the tax sale.

On August 19, 2009, Ms. Walker filed a cross-motion for summary judgment, arguing that the tax sale was valid, the defendants' reconventional demand be dismissed and the trial court recognize her as owner of the subject property. On the same day, she also filed a second exception of *res judicata*, supplementing and clarifying her prior peremptory exception to include specific reference to the doctrine of collateral estoppel or issue preclusion.

Ms. Walker's exceptions of *res judicata*, the defendants' motion for partial summary judgment, and Ms. Walker's cross-motion for summary judgment were heard on August 25, 2009. At the conclusion of the hearing, the trial court overruled the exceptions and denied both motions, and its

[4] Although the caption of this pleading does not so state, its allegations appear to incorporate a reconventional demand of Ms. Walker, seeking damages from the defendants based upon their malicious prosecution of their claims to ownership of the subject property and other alleged wrongful acts. The appeal record contains no answer by the defendants to that purported cause of action.

judgment to that effect was later signed on September 1, 2009. Following the hearing, the trial court further set the trial on the merits of the defendants' reconventional demand on November 9, 2009, and instructed Ms. Walker to subpoena any witnesses 30 days prior to trial.

On September 17, 2009, the defendants filed a second amended reconventional demand, adding the allegations that the sheriff's notice to them by certified mail was sent to an incorrect address; that their correct address could easily have been found in the Tangipahoa Parish public records; that they never received prior notice of the tax sale; and that the sheriff took no additional steps to provide them notice. Ms. Walker filed her answer to the second amended reconventional demand on October 8, 2009.

On October 2, 2009, the defendants filed a third amended reconventional demand, with a certificate of service on Ms. Walker by mail.[5] In that pleading, they added allegations that two banks holding collateral mortgages on the subject property were not given notice of the unpaid taxes and tax sale; that the addresses of the banks were ascertainable from the Tangipahoa Parish public records; and that such lack of notice further served to render the tax sale null and void. The defendants further alleged that the tax sale was unconstitutional by reason of lack of notice to the mortgagee banks, and that former La. R.S. 47:2180.1(A)[6] was unconstitutional if interpreted to require a mortgagee to request such notice.

On October 20, 2009, Ms. Walker served interrogatories by facsimile telecopier and mail upon the defendants, through their attorney, seeking,

---

[5] The accompanying motion for leave of court to file the third amended reconventional demand was not signed until November 2, 2009.

[6] The former statute was repealed by Acts 2008, No. 819, § 2, effective January 1, 2009, and its substance was reproduced in current La. R.S. 47:2159 by § 1 of the same act. Because the constitutionality of the statute was neither argued at trial nor used as a basis for its decision by the trial court, we need not address that issue in this appeal.

among other information, the names of all witnesses that the defendants might call at trial.

On November 3, 2009, the defendants filed and served by mail their trial witness and exhibit lists, along with a pretrial memorandum incorporating detailed statement of the facts, proposed findings of fact, and proposed conclusions of law.

Ms. Walker filed her answer to the third amended reconventional demand on November 4, 2009. On the same date, she filed a peremptory exception of no right of action, making the objection that the defendants had no right of action to raise the issue of lack of notice to the mortgagee banks as grounds for annulling the tax sale. The exception was set for hearing on the morning of trial.

On November 6, 2009, Ms. Walker filed a motion to compel responses to discovery, as well as a motion to continue the trial on the grounds that the defendants had not properly responded to discovery and that she was "blindsided" or unfairly surprised by new issues and witnesses supporting the allegations of the defendants' third amended reconventional demand. Both motions were set for hearing on the morning of trial.

Trial on the merits was held on November 9, 2009. The trial court referred Ms. Walker's peremptory exception of no right of action to the merits. After testimony was presented, evidence introduced, and argument presented, the trial court ruled in favor of the defendants on their reconventional demand and overruled Ms. Walker's peremptory exception of no right of action.

On November 23, 2009, the trial court signed the judgment in favor of the defendants on their reconventional demand, prepared by counsel for the defendants, incorporating detailed findings of fact. In addition to annulling

and vacating the tax sale and Ms. Walker's tax title, the judgment overruled Ms. Walker's peremptory exception of no right of action.

Ms. Walker now appeals.

ASSIGNMENTS OF ERROR

Ms. Walker assigns the following error on the part of the trial court:

> 1. The trial court committed manifest error in denying [plaintiff's] [m]otion to [c]ontinue.
>
> 2. The trial court committed manifest error in "curing" [plaintiff's] [m]otion to [c]ompel [*sic*] by compelling the [defendants] to copy and submit the discovery material to [plaintiff] in open court on the very day of, and actually in fact during[,] the very trial itself.
>
> 3. The trial court erred in allowing the [defendants] to photocopy their third amended reconventional demand and furnish it to [plaintiff] at trial as "service" thereof, thereby essentially once again effectively failing to meet the mandates of ordinary procedure in this matter, especially considering [plaintiff's] urges [*sic*] for a continuance.
>
> 4. The trial court committed manifest error in allowing the subpoenaed representatives of Omni Bank and Gulf Coast Bank, or any other [defendant-]subpoenaed witnesses, to testify. This error was due to the [defendants'] maliciously aforethought failure to timely submit a witness/testimony list to [plaintiff] . . . .
>
> 5. The trial court committed manifest error in allowing . . . Mr. Douglas Curet [] to testify as an expert witness, this error being due to the [defendants'] failure to timely submit a witness/testimony list to [plaintiff] . . . .
>
> 6. The trial [court] committed reversible error in denying [p]laintiff's [p]eremptory [e]xception of [n]o [r]ight of [a]ction regarding the eleventh hour claims made via a third amended reconventional demand . . . .
>
> 7. The trial court erred in finding that the Tangipahoa Parish Sheriff's Office . . . failed to take further steps beyond that which was mandated by statute to locate [defendants] upon return of the original notice of sale by certified mail.
>
> 8. The trial court erred in finding that the [defendants] met their burden of proof to establish that the tax sale was invalid and a nullity.

DISCUSSION

Preliminary Procedural Observations

Ms. Walker's first, second, and sixth assignments of error relate to interlocutory judgments of the trial court, denying her motions and peremptory exception of no right of action. Although interlocutory judgments are generally nonappealable, we have held that in appropriate cases, when an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory judgments prejudicial to him, in addition to the review of the final judgment. *Dean v. Griffin Crane & Steel, Inc.*, 05-1226, p. 4 n.3 (La. App. 1st Cir. 5/5/06), 935 So.2d 186, 189 n.3, *writ denied*, 06-1334 (La. 9/22/06), 937 So.2d 387.

As we noted in our prior opinion in this matter, the summary judgment of May 21, 2007 dismissed Ms. Walker's principal action with prejudice and was not appealed, and it was therefore final and definitive as to her cause of action to quiet her tax title. As we also noted in that opinion, the supreme court in *Fellman v. Kay*, 147 La. 953, 966, 86 So. 406, 411 (La. 1920), held that a judgment rejecting the plaintiff's demand in an action under former La. R.S. 47:2228 was *res judicata* as to his right to limit the time within which the defendant could bring an action to annul the plaintiff's tax title, but was not *res judicata* as to the issue of the validity of the tax title.

However, the statutory doctrine of *res judicata* has since been significantly revised, and since 1991 incorporates the principle of collateral estoppel or issue preclusion. Because the issue of the adequacy of notice of the tax sale was actually determined by the trial court and essential to its ruling on the defendants' motion for summary judgment, collateral estoppel or issue preclusion should bar relitigation of the issue and entitle the

defendants to judgment in their favor on the merits of their reconventional demand. *See* La. R.S. 13:4231(3) and *Chaisson v. Central Crane Service*, 10-0112, p. 2 (La. App. 1st Cir. 7/29/10), ___ So.3d ___, ___. Thus, the substantive contentions of the defendants' motion for partial summary judgment, denied by the trial court on August 28, 2009, in fact had merit.[7] However, because the defendants did not seek supervisory review of the trial court's judgment denying that motion and did not seek judgment at trial on the basis of *res judicata*, our decision in this appeal will be based upon the merits of the factual case presented at trial, and we choose not to notice the issue of collateral estoppel or issue preclusion on our own.[8]

Sufficiency of Service of Third Amended Reconventional Demand

In her third assignment of error, Ms. Walker contends that service of the defendants' third amended reconventional demand was not made until the day of trial, when the defendants handed her a photocopy of that pleading in open court. However, the record reflects, and Ms. Walker concedes in brief, that she was mailed and received a copy of the pleading prior to trial. Additionally, she filed her answer to that pleading on November 4, 2009, without raising any objection to service by declinatory

---

[7] The reasons for the trial court's judgment denying the motion for partial summary judgment, which if granted would have terminated this litigation, are not apparent from the record. Our prior decision in this matter was predicated upon the defendants' improper use of a rule to show cause, employing summary procedure, to initially seek the annulment of the tax sale by asserting the benefit of collateral estoppel. The codal definition of summary proceedings encompasses two separate concepts: (1) a "true" summary proceeding by which the parties obtain an expedited trial on the merits, and (2) a summary procedure used to determine incidental issues arising in the course of either an ordinary, summary, or executory proceeding. *Bardwell v. Faust*, 06-1472, p. 7 (La. App. 1st Cir. 5/4/07), 962 So.2d 13, 17, *writ denied*, 07-1174 (La. 9/21/07), 964 So.2d 334. Given the basis for our prior opinion, the trial court may have concluded that the motion for partial summary judgment was not a proper procedural means for determining the issue of the validity of the tax sale. We would emphasize, however, that the defendants' motion for partial summary judgment was filed in the context of an *ordinary* proceeding, rather than a "true" summary proceeding, as the defendants by that time had cured their prior error by properly seeking annulment of the tax sale through their reconventional demand, employing ordinary procedure, rather than solely by rule or motion.

[8] *See* La. C.C.P. art. 927(B).

exception or in that answer. Under these circumstances, any later objection to sufficiency of service was waived. *See* La. C.C.P. arts. 925(C) and 928(A); *Mooring Fin. Plan 401(K) Profit Sharing Plan v. Ninth Ward Hous. Corp.*, p. 3 (La. App. 4th Cir. 9/16/09), 18 So.3d 797, 799; and *Sam v. Feast*, 00-1163, pp. 5-6 (La. App. 1st Cir. 3/28/01), 802 So.2d 680, 683-84. Ms. Walker's third assignment of error has no merit.

Denial of Continuance and Admission of Witness Testimony at Trial

In their third amended reconventional demand, the defendants reiterated their prior allegation that they did not receive proper notice of the tax sale, but added allegations that the mortgagee banks likewise did not receive proper notice, thereby rendering the tax sale absolutely null, based upon the rationale of *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983). Ms. Walker urges on appeal that the foregoing amended pleading "alleged wholly new claims and demands" and "was clearly designed to blindside [her]." She contends that the trial court erred in its disposition of her motion to compel discovery responses and, more importantly, in failing to grant her a continuance of the trial to allow her to review the defendants' discovery responses and to undertake additional discovery, if necessary.

One of the peremptory grounds for a continuance set forth in La. C.C.P. art. 1602 is when "the party applying for the continuance shows that he has been unable, *with the exercise of due diligence*, to obtain evidence material to his case." (Emphasis added.) A party seeking a continuance on peremptory grounds has the burden of proving the existence of the requirements of La. C.C.P. art. 1602. *See Armstrong v. State Farm Fire & Cas. Co.*, 423 So.2d 79, 81 (La. 1982). Louisiana Code of Civil Procedure

article 1601 also authorizes the discretionary continuance of a trial "in any case if there is good ground therefor."

The trial court must consider the particular facts of a case when deciding whether to grant or deny a continuance. The trial court should consider the diligence and good faith of the party seeking the continuance and other reasonable grounds, and may also weigh the condition of the court docket, fairness to the parties and other litigants before the court, and the need for orderly and prompt administration of justice. Absent a clear abuse of discretion in granting or denying a continuance, the ruling of the trial court should not be disturbed on appeal. *Denton v. Vidrine*, 06-0141, p. (La. App. 1st Cir. 12/28/06), 951 So.2d 274, 284, *writ denied*, 07-0172 (La. 5/18/07), 957 So.2d 152. A trial judge has wide discretion in the control of his docket, in case management, and in determining whether a motion for continuance should be granted, and appellate courts interfere in such matters only with reluctance and in extreme cases. *Willey v. Roberts*, 95-1037, p. 3 (La. App. 1st Cir. 12/15/95), 664 So.2d 1371, 1374, *writ denied*, 96-0164 (La. 3/15/96), 669 So.2d 422.

The basic objectives of the Louisiana discovery process are (1) to afford all parties a fair opportunity to obtain facts pertinent to the litigation; (2) to discover the true facts and compel disclosure of these facts wherever they may be found; (3) to assist litigants in preparing their cases for trial; (4) to narrow and clarify the basic issues between the parties; and (5) to facilitate and expedite the legal process by encouraging settlement or abandonment of less than meritorious claims. *Hodges v. S. Farm Bureau Cas. Ins. Co.*, 433 So.2d 125, 129 (La. 1983).

However, the goal of our discovery and pretrial procedure is not to necessarily protect parties from *all* surprise at trial, but only from *unfair*

surprise. As noted above, the diligence of a party in pursuing discovery and preparing for trial has long been recognized as a relevant factor in the trial court's exercise of its discretion to grant or deny a continuance. *See Shows v. Shoney's, Inc.*, 98-1254, pp. 5-6 (La. App. 1st Cir. 7/29/99), 738 So.2d 724, 729-30. By the time Ms. Walker filed her motion to continue the trial, this litigation had been ongoing for over three years and the central issue of alleged lack of proper notice to the defendants of the tax sale had been extensively argued in the context of various exceptions, motions, and the prior appeal. The record does not show that Ms. Walker pursued any formal discovery from the defendants until October 20, 2009, when she served her discovery requests by mail upon the defendants less than three weeks before trial. The defendants' detailed witness and exhibit lists were served and filed on November 3, 2009, less than 15 days after Ms. Walker served her discovery requests upon the defendants' counsel. Additionally, much of the information she sought was contained in affidavits and other evidentiary documents previously exchanged in connection with the numerous pretrial motions and exceptions filed and opposed by the parties.

The information relating to the existence of the mortgages on the subject property and the lack of notice to the mortgagee banks, as alleged in the third amended reconventional demand, was obviously just as available to Ms. Walker prior to trial as to the defendants, as the evidence shows that most if not all of that information was public record. Ms. Walker made no actual showing at trial that the bank witnesses were in fact unknown to her prior to her propounding discovery to the defendants less than three weeks before trial.[9] Additionally, considering the substance of the bank witnesses'

[9] One of the bank witnesses, Donald Lucas, was even specifically identified by name and employer in the third amended reconventional demand, as was the subject matter of his trial testimony (lack of notice of the tax sale to Omni Bank).

testimony, relating only to the lack of notice to the mortgagee banks, she has not articulated on appeal any sound or legitimate reason why a continuance would have made any difference in her trial preparation or cross-examination of those witnesses. Finally, contrary to Ms. Walker's characterization, the defendants' amendments to their reconventional demand did not add new claims; rather, they simply supplemented the detail of the factual allegations supporting their original cause of action for annulment of the tax sale based upon inadequate notice to them. While the timing of those amendments (after the matter had been set for trial) is somewhat troubling, their substance did not as a practical matter result in unfair prejudice to Ms. Walker, for the reasons stated above.

Based upon our careful review of all pertinent circumstances, we agree with the trial court's conclusion that the defendants adequately responded to Ms. Walker's discovery requests prior to trial and that she was not unfairly surprised. Further, it is quite evident from the trial court's oral reasons for judgment and written findings of fact that the basis for its ruling was its finding of lack of adequate notice to the defendants, rather than to the mortgagee banks. Accordingly, we find no abuse of discretion in the trial court's denial of Ms. Walker's motion to continue the trial and the admission of the testimony of the bank witness and expert legal witness, and there is no reversible error. Ms. Walker's first, second, fourth, and fifth assignments of error have no merit.

Exception of No Right of Action

Ms. Walker excepted to the third amended reconventional demand, raising the issue of lack of notice to the mortgagee banks, on the grounds that the defendants had no right of action to assert the nullity of the tax sale with regard to the mortgagees' interests, as opposed to their own. The trial

court referred the issue to the merits at trial. Ms. Walker contends that the trial court committed error in overruling her exception and in allowing evidence of the lack of notice to the mortgagee banks to be presented by the defendants at trial.

Ms. Walker does not contest the fact that neither of the mortgagee banks received notice of the tax sale. Rather, she challenges the right of the defendants to seek annulment of the tax sale based upon lack of adequate notice to the mortgagee banks.

Arguably, Ms. Walker's argument might very well have merit with respect to the procedural right of the defendants to seek annulment of the tax sale based solely upon lack of notice to other parties with ownership interests in the subject property. In the case of *Lewis v. Succession of Johnson*, 05-1192, pp. 17-22 (La. 4/4/06), 925 So.2d 1172, 1182-84, the supreme court determined that the sheriff failed to send adequate written notice to three of the four co-owners of the property sold at tax sale, and held that such failure rendered the tax sale null and void. However, after so holding, the court still found it necessary to determine whether the fourth co-owner's one-fourth interest had been divested. Although the court ultimately found that the fourth co-owner did not receive adequate notice, its separate analysis of the adequacy of notice with regard to the "individual one-fourth interests in the property" suggests that inadequacy of notice to one co-owner, or to a mortgagee, invalidates the tax sale only as to that person's individual interest. *Id.*, 05-1192 at p. 22, 925 So.2d at 1182.

However, as we have noted above, the ultimate basis of the trial court's judgment in this matter was its finding that the defendants did not receive adequate notice of the tax sale, rather than lack of adequate notice to the mortgagee banks. Thus, if the trial court committed any error in

overruling the peremptory exception of no right of action, such was harmless error. Ms. Walker's sixth assignment of error has no merit.

Annulment of the Tax Sale

Ms. Walker's seventh and eighth assignments of error are directed to the trial court's findings of fact and decision on the merits at trial.

At the time the sheriff mailed notice to the defendants of the impending tax sale at issue, former La. R.S. 47:2180[10] set forth the statutory requirements for notice of delinquent taxes and tax sales. In pertinent part, the statute provided:

> A. (1)(a) On the second day of January each year, or as soon thereafter as possible, the tax collector shall address to each taxpayer who has not paid all the taxes, which have been assessed to him on immovable property, or to the record owner of the property for which the taxes are delinquent, or to the actual owner in the event the record owner is deceased, written or printed notice in the manner provided for herein that his taxes on immovable property must be paid within twenty days after the service or mailing of the notice, or that the property will be sold according to law.
>
> (b) On the second day of January of each year, or as soon thereafter as possible, in each year following the year in which the original notice of delinquency is made pursuant to Subparagraph (a) herein, the tax collector shall address to each taxpayer who has not paid all the taxes which have been assessed to him on immovable property a written notice in the manner provided herein. The notice shall specify the property upon which the taxes are delinquent, the amount of taxes due, and the manner in which the property may be redeemed. The notice shall be made each year until the property is no longer redeemable as provided in Article VII, Section 25(B) of the Constitution of Louisiana. The cost of mailing the notice shall be considered cost for purposes of redemption.
>
> (2) Any taxpayer may designate one additional person to be notified in the event of a delinquency. Such designated person shall receive the same notification as the delinquent taxpayer and such notice shall be made in the manner provided for herein.

---

[10] The statute was repealed by Acts 2008, No. 819, § 2, effective January 1, 2009. Section 1 of the same act enacted current La. R.S. 47:2153(A) and (B), which generally reproduces the substance of the former statute, with certain modifications. *See* La. R.S. 47:2153, Comments – 2008, (a).

> B. The tax collector shall send to each taxpayer by certified mail, with return receipt requested, the notice prescribed herein, provided that in cities containing a population of over fifty thousand persons, the tax collector may either send this notice by certified mail or may make personal or domiciliary service on the taxpayer. In the event the certified notice is returned as being undeliverable by the post office, the tax collector may comply with Article 7 Section 25 of the Constitution of Louisiana and the provisions of this Section by advertising the tax debtor's property in the advertising required for unknown owners in Subsection C of this Section. After the tax collector shall have completed the service by the notices herein required, either by mail or by personal or domiciliary service, he shall make out a proces verbal stating therein the names of delinquents so notified, their post office addresses, a brief description of the property, the amount of taxes due and how the service of notice was made. Such proces verbal shall be signed officially by him in the presence of two witnesses and filed . . . in the office of the clerk of court for recording and preservation. . . . This proces verbal shall be received by the courts as evidence. The tax collector shall be entitled to collect actual mailing costs of each certified, with return receipt, notice, and mileage shall be charged for service of this notice. A like charge will be made if the property is adjudicated to the state or any subdivision thereof.
>
> C. The tax collector shall publish one general notice substantially in the form set forth herein, addressed to all unknown owners of assessed immovable property situated in his parish, and to nonresident owners of such property whose post office address is unknown, in which he shall describe the property as described in the tax roll. Such notice shall be published once a week for two weeks in a newspaper published in his parish, or if there be none published in the parish, then such notice shall be given in the manner provided by law for judicial sales. He shall pay for the publication, and shall be entitled to collect as costs therefor the pro rata share of the publication costs from each unknown owner or from the property assessed to him. The collector shall certify on his tax rolls that he has published the notices, and the certificate on either roll shall make full proof thereof until disproved in a judicial proceeding.
>
> . . .

The evidence showed, and the trial court found, that the defendants purchased the subject property on March 24, 1994, that they executed a collateral mortgage the same day in favor of Gulf Coast Bank and Trust Company, listing the address of the property as their residence address, and

that the mortgage was still recorded in the mortgage records of Tangipahoa Parish and in existence on the date of the tax sale. At the time they purchased the subject property, the defendants resided in Gulfport, Mississippi.

Mr. Smith testified at trial that he and his wife actually resided on the subject property from July 1998 through August 2005, when damage from Hurricane Katrina forced them to temporarily relocate their residence. Even after they relocated, however, they continued to use the property's address as their primary address until sometime in 2007. Voluminous documentary evidence corroborated Mr. Smith's testimony. A notice of federal tax lien was filed in the parish conveyance records against the defendants in August 1998, and a certificate of release of the lien was filed in those records in May 1999, listing the defendants' address as that of the subject property. Both defendants registered to vote in Tangipahoa Parish in 1999, listing the address of the subject property as their residence address, and the records of the registrar of voters confirmed that they both remained active voters through 2009, with no change in address. The defendants also introduced in evidence a photocopy of Mr. Smith's Louisiana driver's license, issued on May 8, 2000, listing his address as that of the subject property, as well as a motor vehicle registration certificate issued to him on April 12, 1999, listing the subject property's address. And on June 26, 2000, the defendants executed a second collateral mortgage on the subject property in favor of Omni Bank, recorded in the mortgage records, listing their residence address as that of the subject property. This second collateral mortgage, like that in favor of Gulf Coast Bank and Trust Company, was still in existence and recorded when the sheriff mailed the notice of the tax sale.

The notice of delinquent taxes mailed by the sheriff of Tangipahoa Parish was sent by certified mail on March 12, 2001 to the defendants' former address in Mississippi, rather than to the address for the subject property. It was returned stamped as "undeliverable" with "no forwarding address," with an additional handwritten notation of "FOE" ("forwarding order expired"). No notice of the tax sale was sent to either of the mortgagee banks.

Ms. Walker, on the other hand, contends that the Mississippi mailing address to which the sheriff sent notice was the defendants' correct address and therefore the subsequent publication of legal notice of the tax sale in the local newspaper, pursuant to former La. R.S. 47:2180(C), satisfied the requirements of due process. She further contends that the defendants' failure to notify the sheriff of their change in mailing address essentially served to relieve him of any burden of undertaking further inquiry to ascertain their new address for purposes of delivering notice of the tax sale. We disagree.

It is well settled that the giving of notice of tax delinquency required by La. Const. art. VII, § 25(A)(1) and La. R.S. 47:2180 is mandatory and that failure to give this notice is constitutional grounds for the annulment of a tax sale. *Hamilton v. Royal Int'l Petroleum Corp.*, 05-846, p. 6 (La. 2/22/06), 934 So.2d 25, 30, *cert. denied*, 549 U.S. 1112, 127 S.Ct. 937, 166 L.Ed.2d 704 (2007). Whether a tax collector has properly notified a delinquent taxpayer of an impending tax sale, a fundamental due process right, must be closely scrutinized by the courts should the notice be challenged. *Id.*, 05-846 at p. 9, 934 So.2d at 32. Due process requires that such notice must be sent by mail or other means certain to ensure actual notice if the party's name and address are reasonably ascertainable.

Vincson, Inc. v. Ingram, 01-2655, p. 3 (La. App. 1st Cir. 11/8/02), 835 So.2d 813, 815, citing *Mennonite Bd. of Missions*, 462 U.S. at 800, 103 S.Ct at 2712.

It has been repeatedly held by the courts of our state that where the tax debtor's correct address is known and used, certified mail with return receipt requested is a reasonable method of notifying the tax debtor of the impending tax sale. *Vincson, Inc.*, 01-2655 at p. 3, 835 So.2d at 815. However, where the mailing of a tax notice is required, and a mailed notice is returned to the tax collector undelivered or unclaimed, the tax collector must take additional reasonable steps to notify the tax debtor of a delinquency. *Lewis*, 05-1192 at p. 9, 925 So.2d at 1178. To determine the reasonableness of the tax collector's actions, the methods of attempted notice must be examined. Advertisements of tax sales have generally been held as insufficient to provide notice, except in the case of unknown owners whose identities are not readily ascertainable. *Id.*, 05-1192 at p. 11, 925 So.2d at 1179. Thus, notice of the tax delinquency by publication of an advertisement for an upcoming tax sale, alone, does not pass constitutional muster if the owners of the property can be identified or are easily discovered. *Id.*, 05-1192 at p. 12, 925 So.2d at 1179.

In the *Lewis* case, the supreme court noted that "a simple search of the conveyance records would have revealed the addresses of the co-owners" who did not receive notice of the tax sale by mail. *Id.*, 05-1192 at p. 17, 925 So.2d at 1182. In the *Vincson, Inc.* case cited above, the notice mailed by the sheriff was returned marked "FOE," as was the notice to the defendants here. In that case, we observed that as the delinquent taxpayer was a corporation, required to file annual reports with the secretary of state, a "simple call by the [s]heriff would have provided him with the correct

address for notice and was an additional reasonable step that could have been taken[.]" *Id.*, 01-2655 at p. 5, 835 So.2d at 816.

The facts of this matter fall squarely within the relevant holdings of the cases cited in the preceding paragraph. Although the nature and duration of defendants' residence on the subject property and their use of its mailing address were vigorously contested by the parties at trial, the trial court obviously found the defendants' testimony and evidence on that issue to be credible. The trial court provided detailed written findings of fact and oral reasons supporting its determination that notice of the tax sale was deficient and that the sheriff did not take additional reasonable steps to provide notice to the defendants, such as simply examining the public records of the parish, as required by the applicable law and jurisprudence.[11] The overwhelming preponderance of the evidence, summarized above, supports the trial court's determination that the tax sale was null and void based upon the applicable law. Accordingly, we find no manifest error. The judgment of the trial court must therefore be affirmed.

Damages for Frivolous Appeal

The recovery of damages for frivolous appeal is authorized by La. C.C.P. art. 2164. Our courts have been very reluctant to grant such damages under this article, as it is penal in nature and must be strictly construed. Additionally, because appeals are favored in our law, penalties for the filing of a frivolous appeal will not be imposed unless they are clearly due. *Guarantee Sys. Constr. & Restoration, Inc. v. Anthony*, 97-1877 (La. App. 1st Cir. 9/25/98), 728 So.2d 398, 405, *writ denied*, 98-2701 (La. 12/18/98), 734 So.2d 636. Damages for frivolous appeal will not be awarded unless it

[11] The collateral mortgage in favor of Gulf Coast Bank and Trust Company listed Mr. Smith's full name of Devant King Smith; thus, the defendants' telephone listing of "King Smith" in the telephone book arguably should have prompted the sheriff to undertake further inquiry by telephone at the number listed for that name.

appears that the appeal was taken solely for the purpose of delay or that the appellant's counsel (or, as here, the appellant *pro se*) does not seriously believe in the position he advocates. *Id.* We cannot conclude that the foregoing criteria exist with regard to this appeal. We therefore deny the defendants' answer to the appeal.

DECREE

The judgment of the trial court, annulling the tax sale of the subject property, is affirmed. The answer to the appeal of the defendants-appellees, Devant K. Smith and Martha C. Smith, is denied. All costs of this appeal are assessed to the plaintiff-appellant, Annie Walker.

AFFIRMED; ANSWER TO APPEAL DENIED.