

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 1144

REMELL HARDER

VERSUS

HENRY WONG

Judgment Rendered: FEB 18 2014

Appealed from the
23rd Judicial District Court
In and for the Parish of Ascension, Louisiana
Trial Court Number 90,021

Honorable Guy Holdridge, Judge

Jean Paul Robert
Gonzales, LA

Attorney for Appellee
Plaintiff – Remell Harder

Benjamin L. Johnson
Donaldsonville, LA

Attorney for Appellant
Defendant – Henry Wong

BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

Crain, J. concurs and assigns reasons

JEW
WJW

WELCH, J.

Defendant, Henry Wong, appeals a judgment declaring a tax sale an absolute nullity and denying his peremptory exception raising the objections of peremption and prescription. We affirm.

BACKGROUND

On August 8, 2008, Remell Harder filed this possessory action against Mr. Wong seeking to be restored to a 35% interest in a 4.88 acre tract of land located in Ascension Parish, Louisiana. Mrs. Harder acquired title to the subject property by virtue of a 1992 judgment of possession, and Mr. Wong purchased a 35% interest in that property at an Ascension Parish Sheriff's tax sale on June 4, 1997, for \$32.61. In her original and amending petitions, Mrs. Harder alleged that she maintained continuous possession of the property on her own or through her ancestors in title for over 30 years. She also sought a ruling that the tax title held by Mr. Wong is an absolute nullity, pleading that no "notice of the purchase of the tax sale," post-sale notice or post-redemptive notice had been provided to her as required by statute.

Mrs. Harder filed a motion for summary judgment declaring her to be the sole possessor of the subject property. In opposition to the motion, Mr. Wong maintained that he is a co-owner of the disputed tract by virtue of his tax deed and that Mrs. Harder, a co-owner, could not adversely possess the property against his interest. The trial court denied the motion for summary judgment on March 24, 2011.

Mr. Wong filed peremptory exceptions raising the objections of peremption, prescription, and failure to state a cause of action as to Mrs. Harder's amended petition. In his original and reurged exception of peremption/prescription, Mr. Wong claimed that Mrs. Harder could no longer reclaim her former 35% interest in the property because the three-year redemption period and the five-year time

period for annulling a tax sale set forth by law had expired. He also submitted that Mrs. Harder's petition did not make sufficient allegations of fact to state a cause of action for a declaration of nullity for the tax sale.

Trial was held on December 17, 2012. At that time, the matter was submitted to the trial court on trial memoranda and a joint exhibit book. In her trial memorandum, Mrs. Harder asserted that the tax sale was defective because she did not get notice of the 1996 taxes owed by her or of the impending tax sale for the failure to pay the 1996 taxes. In support of her claim of lack of pre-sale notice, Mrs. Harder relied on her deposition testimony and the deposition testimony of Renee Mire Michel, the Ascension Parish Tax Assessor, and Wanza Tridico of the Ascension Parish Sheriff's Office.

In her deposition, Mrs. Harder testified that she inherited the subject property when her mother died in 1990. Mrs. Harder lived in Colorado in 1992 and moved back to Baton Rouge in 1995. In Baton Rouge, Mrs. Harder lived at 1623 Richland Avenue until she moved to Kansas in 2003. Mrs. Harder testified that while she lived in Colorado, tax notices were sent to her there and that she received a tax notice in 1995. Mrs. Harder testified that she did not receive a tax notice in 1996. She further acknowledged that she did not receive notice when the property went up for tax sale and that she had no knowledge of the tax sale. Mrs. Harder admitted that she received the tax notices in 1997 and 1998 while residing in Baton Rouge and paid those taxes and that she continued to receive tax notices after moving to Kansas. She further testified that her husband actually paid the tax bills, he was very conscientious regarding paying bills, and if notice of the tax bill had been received, it would have been paid.

Renee Michel testified regarding the process the assessor's office uses to prepare tax rolls. She identified the official tax rolls for the years 1993-1998,

which reflect a Colorado address for Mrs. Harder in 1995 and the 1623 Richland Avenue Baton Rouge address for Mrs. Harder in 1996, 1997, and 1998.

Wanza Tridico, who has been a deputy tax collector since 1979, testified that her responsibilities in the tax collecting department involve overseeing the notification procedures regarding tax bills. She explained that tax bills are mailed at the end of November, become delinquent after December 31, and at the end of February, certified letters are sent to all delinquent taxpayers using the tax roll generated by the assessor's office. Ms. Tridico testified that the tax rolls are actually given to Southwest Computer Company to print out the notices and mail the bills for the sheriff's office. According to Ms. Tridico, the sheriff's office only keeps a record of the mailing of certified letters notifying tax debtors of delinquent taxes for 10 years and at the end of the 10-year period, the records are destroyed. She testified that the sheriff's office did not have evidence of any copies of the certified notices sent to Mrs. Harder. Further, the sheriff's office did not have any evidence of the "green cards," or return receipts, indicating that the mailing had been signed for, as those records had been destroyed after 10 years.

In her trial memorandum, Mrs. Harder asserted that because she testified that she did not have notice of the taxes owed or the impending tax sale for the 1996 taxes and because the sheriff's office had no evidence that notice was sent to her, she successfully rebutted the presumption of the validity of the tax sale. She further claimed that because Mr. Wong had no evidence to show that the notice requirement had been met, the tax sale was an absolute nullity.

The trial court entered judgment denying Mr. Wong's exceptions of prescription and no cause of action and further decreeing that the tax sale is an absolute nullity. The court ordered that Mrs. Harder be placed in possession of the property and ordered her to reimburse Mr. Wong for the taxes paid by him plus interest in the amount of \$138.28.

In lengthy reasons for judgment, the trial court concluded that the evidence demonstrated that Mrs. Harder did not pay taxes owed on the property for the year 1996 and that Mr. Wong's payments at the tax sale, combined with a proper property description, created a valid tax deed to an interest in the property. The court then concluded that because the tax deed acted as *prima facie* evidence that a valid tax sale occurred, Mrs. Harder had the burden to prove a defect in the tax adjudication proceedings in order to nullify the tax sale. The court observed that Mrs. Harder testified that she did not receive a required notice of the tax sale and that no evidence existed with the sheriff's office to contradict that claim. The court found that because no evidence existed to indicate that Mrs. Harder received the required **Mennonite** notice, or if any steps at all were taken to notify her of the impending tax sale, the tax sale was an absolute nullity. Because the court concluded that the sale was an absolute nullity, it denied Mr. Wong's plea of prescription and further denied the exception of no cause of action, observing that any argument raised by Mr. Wong regarding the lack of specifically raised causes of action by Mrs. Harder were without merit because La. C.C. art. 2030 permits any person or the court on its own to invoke an absolute nullity. The court also noted in its reasons for judgment that Mrs. Harder did in fact raise the issue of pre-sale notice in her trial memorandum.

In this appeal, Mr. Wong alleges that the trial court erred: (1) in relying on the self-serving and uncorroborated testimony of Mrs. Harder; (2) by substituting a lower burden of proof for Mrs. Harder than established by law; (3) by improperly shifting the burden of proof on the notice issue to him; (4) in declaring the sale null on its own motion; and (5) in denying his exceptions of peremption and prescription.

DISCUSSION

In his fourth assignment of error, Mr. Wong contends that the trial court improperly declared the sheriff's sale null because Mrs. Harder did not allege in either her original or two amending petitions that she did not receive notice of the impending tax sale. He maintains that the trial court improperly supplied, on Mrs. Harder's behalf, the cause of action for nullity of the tax sale based on the failure to receive pre-sale notice. Mr. Wong argues that La. C.C. art. 2030, entitled "Absolute nullity of contracts," which permits a court to declare an absolute nullity on its own initiative, applies only to matters arising under contract and has no application to this case.

The record reflects that Mrs. Harder alleged in her petitions that the sale was an absolute nullity. As the trial court correctly noted, Mrs. Harder squarely raised the issue of pre-sale notice in her trial memorandum. Moreover, as Mr. Wong relied on the tax sale to establish his ownership interest in the subject property as a defense to Mrs. Harder's possessory action, he placed the validity of the tax title at issue, and Mrs. Harder was entitled to avail herself of any defense sufficient to defeat the tax title. See Vucinovich v. Lakeshore Club, 2008-2244 (La. App. 1st Cir. 5/8/09)(unpublished). Thus, the issue of nullity of the tax sale for lack of pre-sale notice was clearly placed before the court, making it unnecessary for the court to raise the issue of nullity on its own motion pursuant to La. C.C. art. 2030. Accordingly, we find no merit in this assignment of error.

In his fifth assignment of error, Mr. Wong submits that the trial court erred in denying his exceptions of peremption and prescription. Again, we find no merit to these assertions. In his peremption/prescription objection, Mr. Wong cited La. Const. art. 7 §25, which provides that property sold at a tax sale shall be redeemable for three years and that no sale of property for taxes shall be annulled unless a proceeding to annul is instituted within five years after the date of the

recordation of the tax deed. La. Const. art. 7 §25(B) and (C). Mr. Wong argues that Mrs. Harder's right to reclaim the property terminated by the lapse of the three-year period to redeem the property and the five-year period to annul the sale. However, the time periods provided by law on actions seeking to annul tax sales do not apply to those sales which have already been fatally defective for lack of due process. **Smitko v. Gulf South Shrimp, Inc.**, 2011-2566 (La. 7/2/12), 94 So.3d 750, 759; **Orleans District Redevelopment Corporation v. Ocwen Loan Servicing, L.L.C.**, 2011-0260 (La. App. 4th Cir. 12/21/11), 83 So.3d 105, 112, writ denied, 2012-0175 (La. 3/23/12), 85 So.3d 96. Thus, the failure to provide notice of a tax delinquency and a tax sale to the record owner of the property is a violation of due process that would preclude confirmation of the tax sale in favor of the tax purchaser, as it renders the tax sale null and of no legal force or effect, such that neither peremption nor prescription can save the sale. *Id.* As Mrs. Harder stated a cause of action for nullity of the sale for lack of pre-sale notice, the trial court correctly denied Mr. Wong's exceptions of peremption and prescription.

In his first three assignments of error, Mr. Wong challenges the trial court's finding that the tax sale is an absolute nullity. First, he submits that the trial court erred in relying on Mrs. Harder's self-serving, uncorroborated testimony that she did not receive notice of the 1996 assessment and notice of the tax sale. He contends that Mrs. Harder was required to prove that she did not receive pre-sale notice by a preponderance of the evidence, and insists that her mere claim that she did not receive notice in her deposition is insufficient to overcome the presumption of regularity of tax sales established by the jurisprudence. He also complains that Mrs. Harder failed to produce her husband's testimony to support her self-serving testimony, suggesting that Mrs. Harder's failure to call her husband as a witness, given her admission that she relied on him to pay the tax bills, created an adverse presumption that his testimony would not have been favorable to her position. Mr.

Wong further claims that the trial court's acceptance of Mrs. Harder's "minimal assertions," without more, improperly shifted the burden of proof to him. Lastly, Mr. Wong contends that the trial court's holding that Mrs. Harder did not receive pre-sale notice was unreasonable and manifestly erroneous in light of the totality of evidence introduced at trial demonstrating the procedures employed by the sheriff's office to provide pre-sale notice to property owners.

A tax deed by the collector shall be prima facie evidence that a valid sale was made. La. Const. art. VII, § 25(A). Therefore, the former property owner must carry the burden of proving any defects in the tax adjudication proceeding. If the former property owner offers sufficient evidence to rebut the presumption of regularity, it then becomes the duty of the tax purchaser to go forward and prove that all of the requisites for a valid tax sale were complied with. **Smitko**, 94 So.3d at 757-58.

It is well settled that under the Fourteenth Amendment to the United States Constitution and La. Const. art. I, § 2, deprivation of property by adjudication must be preceded by notice and opportunity to be heard appropriate to the nature of the case. **Smitko**, 94 So.3d at 756. Before taking any action affecting a property right protected by the due process clause of the Fourteenth Amendment, such as a tax sale, a State must provide notice reasonably calculated to apprise interested parties of the pending tax sale. **Mennonite Board of Missions v. Adams**, 462 U.S. 791, 798-800, 103 S.Ct. 2706, 2711-2712, 77 L.Ed.2d 180 (1983).

Article VII, § 25(A) of the Louisiana Constitution of 1974 requires the tax collector to provide notice of the tax delinquency and the tax sale to all owners of record of any interest in the property in the manner provided by law. In former La. R.S. 47:2180¹, which was in effect at the time of the tax sale in this case, the

¹ Louisiana Revised Statutes 47:2180 was repealed by 2008 La. Acts, No. 819, Sec. 2, effective January 1, 2009. Section 1 of Act No. 819 enacted current La. R.S. 47:2153(A) and (B), which

legislature set forth the manner in which notice of delinquencies in immovable property taxes must be provided in compliance with La. Const. art. VII, § 25. Louisiana Revised Statutes 47:2180 required the tax collector to provide the delinquent tax payer with specific notice by certified mail, with return receipt requested, that the taxes must be paid within twenty days after the service or mailing of the notice, or the property would be sold according to law. La. R.S. 47:2180(A) and (B). It further provided that “[a]fter the tax collector shall have completed the service by the notices herein required...he shall make out a proces verbal stating therein the names of the 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.” La. R.S. 47:2180(B). Finally, the statute provided that the proces verbal was to be signed by the tax collector and filed in the office of the clerk of court for recording and preservation, and that the proces verbal shall be received by the courts as evidence. La. R.S. 47:2180(B).

The purpose of the proces verbal is to create an authenticated record of the actions taken by the tax collector to comply with the notice requirements. **East-West of Metairie, Inc.**, 2008-1771; **Jamie Land Company, Inc. v. Jones**, 05-1471 (La. App. 1st Cir. 6/9/06), 938 So.2d 738, 740, writ denied, 06-1735 (La. 10/6/06), 938 So.2d 86. Under the jurisprudence, where there is a proces verbal properly executed and filed, the burden of establishing that no notice or insufficient notice was given rests with the delinquent taxpayer. *Id.* However, in the absence of a proces verbal, the burden of proof is on the tax purchaser to show by clear and convincing evidence that the necessary notice was conveyed to the tax debtor. **Jamie Land Company, Inc.**, 938 So.2d at 740; **Spencer v. James**, 42,168 (La. App. 2nd Cir. 5/9/07) 955 So.2d 1287, 1292.

generally reproduce the substance of the former statute with certain modifications. **Smitko**, 94 So.3d at 756, fn. 6. The tax sale in this case occurred in 1997; thus, the former provisions apply to this matter. **East-West of Metairie, Inc. v. Stewart**, 2008-1771, n. 2 (La. App 1st Cir. 5/6/09) (unpublished).

There is no evidence that a proces verbal conforming with La. R.S. 47:2180's requirements was ever prepared and filed into the clerk of court's records in this case. We note that there have been cases holding that the proces verbal need not be a separate, stand alone document, and the recitation required by La. R.S. 47:2180 can be contained in the tax sale itself. See Succession of Caldarera v. Zeno, 2009-1397 (La. App. 4th Cir. 7/16/10), 43 So.3d 1080, 1085 writ denied, 2010-1909 (La. 11/5/10), 50 So.3d 810. However, this court has held that because it is statutorily recognized as evidence of what it purports to be, the form requirements, which are minimal, are indispensable. **Jamie Land Company, Inc.**, 938 So.2d at 740.

Mr. Wong's tax deed contains the following language: "Remell Harder having been assessed with the property hereinafter described for the year 1996, and the taxes having become delinquent on the 31st day of December of said year, I made out and mailed to said Remell Harder by registered letter, a notice in conformity with said Act No. 170 of 1898 as amended, and Act 228 of 1932... ." The tax deed further describes the dates on which advertisements for sale were published in the local newspaper. The tax deed does not state the address to which the notice was mailed, that such notice contained a description of the property and the amount of taxes due, and it does not state that notice was sent with return receipt requested. We do not find the tax deed to constitute sufficient proof that notice had been sent to Mrs. Harder at her correct address, return receipt requested, in conformity with La. R.S. 47:2180. See Spencer, 955 So.2d at 1292 (holding that a tax form deed, stating that notice had been given "according to law," where there were no copies of the notice itself showing that it had been sent by certified mail, returned receipt requested, as required by law, was insufficient proof, by clear and convincing evidence, that notice was sent by certified mail, that notice was addressed to the correct party, or that notice was sent to the correct address).

Under similar circumstances, this court held that a tax sale was an absolute nullity. In **Vucinovich**, the tax purchaser filed a lawsuit to quiet tax title on a parcel of property against the former property owner, Lake Shore Club, which reconvened and sought annulment of the tax sale on the basis that it did not receive notice of the tax delinquency or the tax sale. The tax deed stated that the sheriff mailed notice of a tax delinquency to the Lake Shore Club "by Certified letter," but it did not state that a return receipt had been requested and the address to which the certified letter was mailed was not given. Discovery revealed that the sheriff's office had no proces verbal or other documents that could show the address to which notice had been sent or whether a return receipt had been requested. Moreover, Lake Shore Club submitted two affidavits of its members who attested that Lake Shore Club received no notice of a tax delinquency or a tax sale. This court held that the tax sale was an absolute nullity due to lack of proof of required notice. In so doing, this court stressed that: (1) there was no documentation of the address to which the notice was mailed; (2) there was no documentation to show that the notice was mailed by certified mail with return receipt requested, as was required by La. R.S. 47:2180, and (3) the only documentation of notice was contained in the Sheriff's tax deed, which indicated that notice was advertised in the newspaper; however, notice by such means did not satisfy the requirements of due process or Louisiana law. **Vucinovich**, 2008-2244 at pp. 3-5.

In accordance with **Vucinovich**, we find no error in the trial court's conclusion that the tax sale of Mrs. Harder's 35% interest in the subject property to Mr. Wong is null and void. Mrs. Harder testified that she did not receive notice of the 1996 tax or notice of the tax sale for delinquent taxes and her claim of lack of notice was accepted as credible by the trial court. Mr. Wong offered no proof to overcome Mrs. Harder's claim that she did not receive pre-sale notice. There is no proof that notice was mailed to Mrs. Harder at her correct address and there is no

documentation to show that the notice was mailed with return receipt requested as required by La. R.S. 47:2180. Due to the lack of proof of the constitutionally and statutorily required pre-sale notice, the tax sale is null and void.

CONCLUSION

Based on the foregoing, the judgment appealed from is affirmed. All costs of this appeal are assessed to defendant, Henry Wong.

AFFIRMED.

REMELL HARDER

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CRAIN, J., concurs.



While I agree that the proces verbal in the tax deed does not comply with La. R.S. 47:2180B, I do not believe that the deficiency in the proces verbal requires the tax purchaser to prove notice to the tax debtor by clear and convincing evidence. The “clear and convincing” standard appears to have originated in *Succession of Windes v. Yerger*, 234 So. 2d 224, 228 (La. App. 2 Cir. 1970), without any statutory or jurisprudential basis.

As the majority opinion recognizes, the tax deed is presumed valid and is *prima facie* evidence that a valid tax sale was made. See La. Const. art. VII, Sec. 25(A); *Smitko v. Gulf South Shrimp, Inc.*, 11-2566 (La. 7/2/12), 94 So. 3d 750, 757. The former property owner has the initial burden of proving any defects in the tax adjudication proceedings. If the presumption of validity is rebutted, it is then the duty of the tax purchaser to prove that all requisites for a valid tax sale were complied with. *Smitko*, 94 So. 3d at 757-758. Where no proces verbal is filed as required by La. R.S. 47:2180, the presumption of validity is rebutted, and the tax purchaser must prove compliance with all requisites for a valid tax sale, including notice of delinquency. *Gottlieb v. Babin*, 197 La. 802, 815, 2 So. 2d 218, 222 (1941).

The trial court found that Harder rebutted the presumption of validity and shifted the burden of proof to the defendant. The court then found that the defendant failed to prove the requisites for a valid tax sale. I find no manifest error in that determination. Consistent with this court’s approach in *Vucinovich v.*

Lakeshore Club, 08-2244 (La. App. 1 Cir. 5/8/09) 2009 WL 1272411 (unpublished opinion), the trial court's judgment should be affirmed on that basis.