

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CW 0386

JERRI G. SMITKO

VERSUS

GULF SOUTH SHRIMP, INC.

DATE OF JUDGMENT: April 24, 2015

ON SUPERVISORY REVIEW FROM THE
THIRTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 149864, PARISH OF TERREBONNE
STATE OF LOUISIANA

HONORABLE JOHN R. WALKER, JUDGE

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BEFORE: WELCH, DRAKE, AND CHUTZ, JJ.

**Disposition: APPEAL CONVERTED TO APPLICATION FOR SUPERVISORY REVIEW; WRIT GRANTED; JUDGMENT AMENDED; AND REMANDED WITH INSTRUCTIONS.
CHUTZ, J.**

This appeal is taken from a summary judgment declaring three tax sales of immovable property absolute nullities. Because we find the judgment is not a final, appealable judgment, we convert this matter to an application for supervisory review, amend the summary judgment, and remand this matter to the trial court.

FACTS AND PROCEDURAL BACKGROUND

Gulf South Shrimp, Inc. (GSS) failed to pay the 2002 property taxes on three tracts of property it owned in Terrebonne Parish. Jerri G. Smitko purchased the property at sheriff tax sales in June 2003. Following the expiration of the redemption period, she filed a petition to quiet tax title. In its answer, GSS denied the allegations of the petition and alleged it was never sent nor received notice of the 2002 tax delinquencies. Additionally, Source Business and Industrial Development Company, L.L.C.¹ (Source Bidco), claiming to be the holder of a recorded mortgage on the properties, filed a petition of intervention praying that the tax sales be annulled.

In 2007, Smitko sold her interests in the properties to Dulac Dat, L.L.C. (Dulac Dat), which was substituted as party plaintiff. GSS subsequently filed an amended answer and reconventional demand alleging that the 2003 tax sales were absolute nullities because it had received no notice of either the tax delinquencies or tax sales. In March 2009, Dulac Dat filed a motion for summary judgment to quiet the titles to the subject properties, which was granted by the trial court.

On appeal, this Court affirmed the summary judgment, concluding both that the nullity claims were untimely and that GSS and Source Bidco failed to rebut the presumption of regularity owed to the recorded tax sales. See *Smitko v. Gulf South Shrimp, Inc.*, 10-0531 (La. App. 1st Cir. 10/19/11), 77 So.3d 1012. The Supreme Court disagreed, concluding that GSS' nullity claim was properly and

¹ Formerly known as First Louisiana Business & Industrial Development Corporation (First Louisiana Bidco).

timely asserted and that genuine issues of material facts existed regarding whether the sheriff provided adequate notice to GSS of the tax delinquencies and tax sales as required by due process. Accordingly, the Supreme Court reversed the summary judgment in favor of Dulac Dat and remanded this matter to the trial court for further proceedings. See *Smitko v. Gulf South Shrimp, Inc.*, 11-2566 (La. 7/2/12), 94 So.3d 750, 751-52.

On remand, GSS and Source Bidco filed a motion for summary judgment to annul the tax sales on the grounds of improper notice. Following a hearing, the trial court concluded no genuine issue of material fact existed concerning the sheriff's failure to comply with former La R.S. 47:2180, since he did not provide notice to GSS of the 2002 tax delinquencies and the 2003 tax sales by certified mail sent to GSS's registered address. On September 23, 2013, the trial court rendered summary judgment holding that the three tax sales were absolute nullities and ordering the sheriff to calculate the costs of the tax sales, as well as the taxes and interest due, upon payment of which the tax deeds shall be redeemed. Dulac Dat now appeals.

DISCUSSION

Our review reveals that the September 2013 summary judgment is not a final, appealable judgment rendered in accordance with statutory requirements. The procedure to be followed by a trial court in declaring a tax sale a nullity is set forth in La. R.S. 47:2291, which provides:

A. A nullity action shall be an ordinary proceeding governed by the Louisiana Code of Civil Procedure. Upon conclusion of the action for nullity, the court shall either:

(1) **Issue a preliminary order that the tax sale**, an acquisition of full ownership by a political subdivision, or a sale or donation of adjudicated property, as applicable, **will be declared a nullity.**

(2) Render judgment dismissing the action with prejudice which shall be a final judgment for purposes of appeal.

B. (1) The tax sale purchaser, the political subdivision, or the purchaser or donee from a political subdivision shall be presumed to be a good faith possessor of the property.

(2) Costs pursuant to Article VII, Section 25 of the Louisiana Constitution and R.S. 47:2290 shall include costs of sending notice, costs of publication, and costs of determining tax sale parties. Costs shall also include amounts set forth in Civil Code Articles 496 and 497, if applicable.

(3) Within fifteen days after the rendering of the order under Paragraph (A)(1) of this Section, the party claiming costs shall submit proof of costs. Proof of costs may be made by affidavit or other competent evidence and may be contested by the party claiming the nullity. **A contest of costs shall be filed within fifteen days after the filing of the proof of costs, and the contest shall be heard within forty-five days after the filing of the proof of costs.**

(4) Within sixty days after the issuance of the order pursuant to Paragraph (A)(1) of this Section, the court shall render a judgment of nullity, and the judgment shall fix the costs allowed. This judgment shall be a final judgment subject to appeal.

C. After a judgment under Subsection B of this Section has been rendered, the governmental liens, other than statutory impositions paid if the nullity has been rendered on the basis of prior payment, and costs, shall be paid within one year from the date of the judgment. This one-year period shall be suspended while an appeal is pending. If the payment is not made within the period allowed, the judgment of nullity shall be vacated and the case dismissed with prejudice at the request of the person against whom the judgment of nullity was rendered.

D. After payment has been made, the party in whose favor judgment has been rendered may apply for an ex parte order stating that the required payments have been made. The application shall be verified and shall state, or an affidavit accompanying the application shall state, the amount and method of payment, that the payment was made to the party against whom the judgment has been rendered, and that a request for dismissal under Subsection C of this Section has not been filed.

[Emphasis added.]

In the instant case, the summary judgment orders the sheriff to confirm the tax sales costs and compute the taxes and interest owed, but does not specifically fix costs. Accordingly, the summary judgment is not an appealable final judgment because it does not meet the mandatory requirement of La. R.S. 47:2291(B)(4) that a final judgment of nullity “*shall fix the costs allowed.*” (Emphasis added.) *In Re*

Davis, 10-1435 (La. App. 1st Cir. 2/23/11), 59 So.3d 452, 454. In the absence of fixed costs, the summary judgment is more in the nature of a preliminary order under La. R.S. 47:2291(A)(1), even though its language does not completely conform with that provision. See *In Re Davis*, 59 So.3d at 454. In the interests of justice, we will convert this appeal to an application for supervisory review in order to amend the summary judgment to conform its language to that of a preliminary order, as well as to remand this matter to the trial court for compliance with the additional provisions of La. R.S. 47:2291(B). See La. C.C.P. art. 2164.

CONCLUSION

For the above reasons, the appeal of the September 23, 2013 summary judgment rendered in favor of Gulf South Shrimp, Inc. and Source Business and Industrial Development Company, L.L.C. and against Dulac Dat, L.L.C. is hereby converted to an application for supervisory review. Pursuant to our supervisory jurisdiction, it is ordered that the language of the September 23, 2013 summary judgment stating that “the three June 25, 2003 tax sales ... are absolute nullities” be amended to provide that “the three June 25, 2003 tax sales ... will be declared absolute nullities,” all in conformity with the requirements of a preliminary order under La. R.S. 47:2291(A)(1).

Additionally, this matter is remanded for the limited purpose of the trial court fixing costs and rendering a final judgment of nullity within the time delays delineated in La. R.S. 47:2291(B), which shall be calculated from the date of notice of judgment by this Court in the instant matter.² In accordance with La. R.S. 47:2291(B)(3), Dulac Dat is hereby ordered to submit proof of costs to the trial court no later than fifteen days of the notice of judgment by this Court in order to ensure compliance with the additional time delays set forth in La. R.S.

² The delays are to run from this date because the order of this Court constitutes the preliminary order required by La. R.S. 47:2291(A)(1).

47:2291(B) for the filing by the opposing party of a contest of costs, a hearing on the same, and the rendition of a judgment of nullity.

The fixing of costs and the rendition of a judgment of nullity in conformity with statutory requirements are the only matters to be considered by the trial court on remand. Once a final judgment of nullity, including the fixing of costs in compliance with La. R.S. 47:2291(B), has been rendered, an appeal may then be taken within applicable delays. The assessment of costs by this Court shall await final disposition of this matter.

APPEAL CONVERTED TO APPLICATION FOR SUPERVISORY REVIEW; WRIT GRANTED; JUDGMENT AMENDED; AND REMANDED WITH INSTRUCTIONS.