

CLYDE PATTON * **NO. 2017-CA-0151**
VERSUS *
THE UNOPENED * **COURT OF APPEAL**
SUCCESSION OF ROY L. *
DEARIE AND CLIFFORD * **FOURTH CIRCUIT**
COONEY
* * * * * **STATE OF LOUISIANA**

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2016-00597, DIVISION "F"
Honorable Christopher J. Bruno, Judge

* * * * *

Judge Paula A. Brown

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(Court composed of Judge Rosemary Ledet, Judge Regina Bartholomew Woods,
Judge Paula A. Brown)

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AFFIRMED
10/11/2017

This matter involves the validity of title to property purchased in a tax sale (“the Property”). Defendants-Appellants, the Unopened Succession of Roy L. Dearie and Clifford Cooney, appeal the motion for summary judgment granted in favor of the Plaintiff-Tax Purchaser, Clyde Patton. The judgment granted Mr. Patton’s Petition to Quiet Title (the “Petition”), conveying to him a 67% undivided ownership interest in the Property. For the reasons that follow, we affirm.

FACTS AND PROCEEDINGS BELOW

According to the Petition, the Property was assessed to Mr. Dearie. The Succession of Mr. Dearie was found delinquent in its payment of ad valorem taxes for 2011. The municipal address for the Property is 1006 Milan Street, New Orleans, Louisiana, 70115. As a result of the delinquency, the City of New Orleans, through its Tax Collector (“the City”), sent notice of the public tax sale to Mr. Dearie—via certified mail—at the Milan Street address, the contact address registered in the Conveyance Office for Orleans Parish. The certified mail receipt was signed for by C.E. Cooney¹ on August 7, 2012. The notice advertised the Milan Street property for a public tax sale scheduled to take place on September

¹ C.E. Cooney was later determined to be the Appellant, Mr. Cooney.

25, 2012. On the date of the tax sale, Mr. Patton was the winning bidder and paid the delinquent taxes in the amount of \$1,109.74. Thereafter, on November 26, 2012, the City executed a tax sale certificate to Mr. Patton, which conveyed to him a 67% interest in the property. The certificate was recorded in the Notarial Archives of Orleans Parish on December 28, 2012.

On January 19, 2016, Mr. Patton filed the Petition and requested a curator be appointed. The Petition named the Unopened Succession of Roy L. Dearie² (the “Unopened Succession”) and Mr. Cooney³ as defendants. Mr. Patton alleged that he had paid taxes and other assessments on the property from 2012 through 2016, which totaled \$53,124.12. He maintained that the three-year redemptive period had expired⁴ since the recordation of his tax sale certificate. Hence, pursuant to La. R.S. 47:2266A(1),⁵ as the owner and possessor of a valid tax sale certificate, he

² The petition averred Mr. Dearie had died in Orleans Parish and his succession was unopened.

³ The petition included Mr. Cooney as a defendant based on the Affidavit of Death, Jurisdiction, and Heirship that he had filed in the Notarial Archives on December 2, 2010. In the affidavit Mr. Cooney attested that he was the grandson of Mr. Dearie, that he resided at 1006 Milan St. in New Orleans, and that he had paid all property taxes owed since 1997.

⁴ La. Const. Art. 7, §25B(1) states: “[T]he property sold shall be redeemable for three years after the date of recordation of the tax sale, by paying the price given, including costs, five percent penalty thereon, and interest at the rate of one percent per month until redemption.”

⁵ La. R.S. 47:2266A(1) provides:

After expiration of the redemptive period, an acquiring person may institute an ordinary proceeding against the tax sale parties whose interests the petitioner seeks to be terminated. The petition shall contain a description of the property, the time and place of the sale, and the name of the officer who made the sale, the page and record book and date of filing of the tax sale certificate, and for adjudicated properties sold or donated by a political subdivision, reference to the page of record book and date of filing of the sale or donation, notice that the petitioner is the holder of tax sale title to the property by virtue of tax sale or is the owner of the property by virtue of a sale or donation of adjudicated property, and notice that the title and full ownership in the property will be confirmed unless a proceeding to annul is instituted within six months after the date of service of the petition and citation. This suit shall be brought in the parish in which the property is located unless it lies in two or more parishes, in which case this suit may be instituted in either of the parishes.

requested that his title to the property be confirmed and quieted against all other interests, claims, or encumbrances held by all duly notified persons. The Petition gave notice to the Unopened Succession and Mr. Cooney that title to the Property would be confirmed unless proceedings to annul were instituted within six months from service of citation of the Petition. The Petition also requested the appointment of a curator (the “Curator”) to represent the absent defendant, the Unopened Succession, and “his heirs, successors, administrators, or assigns, [] surviving spouse, if any, and their heirs, successors, administrators or assigns.” After failed attempts to serve Mr. Cooney, Mr. Patton filed a Motion to Appoint a Special Process Server, which was granted on March 16, 2016.⁶

The trial court appointed the Curator on January 19, 2016; the Curator was served on February 18, 2016. The Curator’s answer, filed on March 1, 2016, denied the allegations of the Petition. The Curator’s Note of Evidence represented the following: 1) all attempts to contact Mr. Cooney by telephone failed; 2) there had been no response to the “whereabouts” advertisements placed in the *Times-Picayune* on April 10, April 13, and April 15, 2016; 3) the internet people search engines did not yield any contact results; and 4) Mr. Cooney had not responded to the certified mail sent to the 1006 Milan Street address. The Note of Evidence also represented that no other heirs had contacted the Curator and that a succession for Mr. Dearie had not been opened.

On July 18, 2016, Mr. Cooney and Patricia Deynoodt filed an answer, reconventional demand, and third party demand. Their answer alleged that Mr. Cooney and Ms. Deynoodt were heirs of Mr. Dearie and challenged the validity of the tax sale, claiming, in part, that Ms. Deynoodt and other unnamed heirs never

⁶ Service was ultimately completed on June 28, 2016.

received any pre-sale notice or post-sale redemption notice of the tax sale. The reconventional demand named Mr. Patton as a defendant. It alleged that the tax sale was null because Mr. Patton refused to provide a redemption figure to Mr. Cooney and the City's method of tax collection contained fees and charges that were not constitutional. In the third party demand, they contended that the underlying tax sale was invalid on its face. They argued that Louisiana law does not allow for less than 100% acquisition of the Property. Based on that argument, the Louisiana Attorney General was named as a defendant to defend the constitutionality of the 67% interest conveyed to Mr. Patton.⁷

Mr. Patton denied the allegations of the reconventional demand.⁸ On August 12, 2016, he filed a motion for summary judgment, requesting that the trial court grant the Petition. In the motion, he alleged summary judgment relief was appropriate because the Property had not been redeemed within the three-year statutory period and all notice requirements and other formalities of the tax sale procedure had been followed.

The trial court conducted a hearing on the summary judgment motion on September 23, 2016. At the hearing, the Curator reiterated that she was unsuccessful in locating any of the heirs. The trial court found Mr. Cooney had not produced any countervailing evidence to show that he paid taxes on the Property,

⁷ The Louisiana Attorney General filed a peremptory exception of no cause of action to the third party demand. In its exception, it asserted that while the Attorney General must be notified when the constitutionality of a statute is challenged, no legal basis existed to name the Attorney General as a defendant or to require its joinder; moreover, it asserted that Louisiana law gives the Attorney General the discretion to become involved in a constitutional challenge. *See* La. C.C.P. art. 1880; La. R.S. 49:257(C).

⁸ On August 30, 2016, Mr. Patton filed a peremptory exception of nonjoinder in response to the reconventional demand. In the exception, he argued that Mr. Cooney had failed to add the City of New Orleans as an indispensable party to respond to the allegations regarding the validity of the tax penalties assessed by the City.

notified the other heirs of the tax sale litigation, or redeemed the Property within the statutory three-year period. Determining there were no issues of disputed fact and finding Mr. Patton had complied with the statutory notice requirements, the trial court granted Mr. Patton's motion for summary judgment.⁹

Subsequently, Mr. Cooney and Ms. Deynoodt filed a motion for new trial. The motion alleged the trial court had not considered their claim that the transfer of 67% interest in the property acquired by way of a tax sale was unconstitutional. The trial court denied the motion.

This devolutive appeal followed.

DISCUSSION

On appeal, Appellants raise as their only assignment of error that the trial court should have nullified the tax sale because all interested parties did not receive pre-sale and post-sale notice, in violation of the guarantees provided by the United States Constitution. Specifically, Appellants contend that with the exception of Mr. Cooney, Patricia Deynoodt and other heirs did not receive pre-sale or post-sale notice. Appellants claim that pursuant to La. R.S. 47:2156, all interested parties are required to be sent pre-tax sale notice, as well as post-tax sale notice; and of the two notices, post-sale notice is the "more important notice."

I. Notice Requirements: Pre-Sale

⁹ As to the third party demand asserted against the Office of the Louisiana Attorney General, the trial court agreed with the Attorney General's contention that the State did not have to be a party to Mr. Cooney's third party demand. The Attorney General also claimed that Mr. Cooney and Ms. Deynoodt had agreed to dismiss their third party demand. Regardless, the third party demand against the State is not a part of the present record on appeal.

The Louisiana Constitution, Article 7, Section (25)(A)(1) mandates that the Tax Collector provide notice of tax delinquencies in the manner provided by law.¹⁰ This Court discussed the fundamental notice requirements that must be met before a tax debtor's property is taken and the underlying principles behind those requirements in *Surcouf v. Darling*, 2015-0279, p. 8 (La. App. 4 Cir. 10/21/15), 177 So.3d 1085, 1091 as follows:

Both the Fourteenth Amendment to the United States Constitution and Art. I, § 2 of the Louisiana Constitution guarantee due process of law before the deprivation of life, liberty, or property. It is therefore well-established that prior to instituting an action which will affect an interest in property, a state must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Moreover, due process requires that the state give "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party ... if its name and address are reasonably ascertainable." *Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791, 800, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) (emphasis in original). Although a property owner need not receive *actual* notice before his property is taken, when a mailed notice of a tax sale is returned unclaimed, the state "must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Jones v. Flowers*, 547 U.S. 220, 225–26, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006).

Louisiana jurisprudence has consistently found that notice of a tax delinquency is properly sent to the person listed as the owner shown in conveyance office records. *See Hines v. Dance*, 460 So.2d 1152, 1154 (La. App. 2d Cir. 1984),

¹⁰ Louisiana Constitution Article 7, Section 25(A)(1), entitled "Tax Sales," states in pertinent part:

There shall be no forfeiture of property for nonpayment of taxes. However, at the expiration of the year in which taxes are due, the collector, without suit, and after giving notice to the delinquent in the manner provided by law, shall advertise for

citing *Recker v. Dupuy*, 160 La. 392, 108 So.2d 782 (1926). Although the taxing entity is required to apprise any interested party of the pending action as referenced in *Mullane*, 339 U.S. at 314, proper notice is achieved when steps are taken that are reasonably calculated to apprise those interested parties whose names and addresses are reasonably ascertainable. See *Mennonite*, 462 U.S. at 800.

Appellants cite *Blythe v. Zor, Inc.*, 148 So.2d 832, 833 (La. App. 4th Cir. 1963), to argue that notice is required for all heirs. However, the facts of this case are distinguishable from the facts in *Blythe*. In *Blythe*, the widow and heirs of the decedent property owner filed suit to annul a tax sale on the ground that they did not receive proper notice of the tax delinquency. The appellate court affirmed the trial court's judgment to invalidate the tax sale, given the facts showed notice of the tax delinquency was sent to the decedent's real estate office; the notice was returned undeliverable; and no notice was given to the decedent's heirs or legal representatives.

In the case *sub judice*, the City sent the tax sale notice to Mr. Dearie, the party listed in the public records as the property owner, at his last known address. The notice was received by Mr. Cooney. Mr. Cooney then filed an Affidavit of Death, Jurisdiction and Heirship, attesting that he was the deceased property owner's grandson, that he resided on the property, and that he had paid all property taxes. As an heir to Mr. Dearie's estate and a self-admitted succession representative, Mr. Cooney—the only heir whose address was reasonably ascertainable—had the authority to step into the shoes of the decedent to administer the affairs of the Unopened Succession, but failed to do so.

sale the property on which the taxes are due... A tax deed by a tax collector shall be prima facie evidence that a valid sale was made.

Fundamental notice requirements do not encompass nullification of a tax sale for failure to provide all interested parties with pre-sale notice when an heir is put on notice of the sale, but fails to act on behalf of the unopened succession and other interested heirs. Based upon the facts presented here, we conclude the City provided adequate notice of the tax sale, which was received by Mr. Cooney—a party to this suit and an heir to the Unopened Succession.

Accordingly, Appellants' request to set aside the judgment because all interested heirs, including Ms. Deynoodt, did not receive pre-sale notice of the tax sale lacks merit. We now consider Appellants' argument that there was a deficiency in the post-sale tax notice.

II. Notice Requirements: Post-Sale

Appellants argue that notwithstanding the sufficiency of any pre-sale tax notice received by Mr. Cooney, notice was still legally deficient because the heirs did not receive post-sale redemption notice, as provided under La. R.S. 47:2156.¹¹

¹¹ La. R.S. 47:2156 provides in part:

(A) Within the applicable redemptive period, the tax sale purchaser **may** send a written notice to any or all tax sale parties notifying the parties of the sale. The notice shall provide full and accurate information necessary to contact the tax sale purchaser, including the name, physical address, and telephone number of the purchaser. It shall be accompanied by a copy of the tax sale certificate received by the tax sale purchaser under the provisions of this Part and copies of the documents that the purchaser received with that sale. The notice shall inform the tax sale parties that the failure to redeem the property prior to the expiration of the applicable redemptive period will terminate the right to redeem the property, and the purchaser will have the right to seek confirmation of the tax title and take actual possession of the property. The notice shall be sufficient if it is in the form set forth in Subsection B of this Section. (Emphasis added).

B. (1) For each property for which tax sale title was sold at tax sale to a tax sale purchaser, each collector shall within thirty days of the filing of the tax sale certificate, or as soon as practical thereafter, provide written notice to the following persons that tax sale title to the property has been sold at tax sale. The notice shall be sent by postage prepaid United States mail to each tax notice party and each tax sale party whose interest would be shown on a thirty-year mortgage certificate in the name of the tax debtor and whose interest was filed prior to the filing of the tax sale certificate.

In support, Appellants rely principally on *Adair Asset Management, LLC v. Turney*, 50,574 (La. App. 2 Cir. 5/14/16), 195 So.3d 501, *writ denied*, 2016-01347 (La. 11/7/16), 209 So.3d 97.

In *Adair*, the court reviewed a judgment nullifying a tax sale. The nullification was based on the City of Shreveport's failure to provide adequate pre-sale notice to the defendant, a previous record owner of the property. The defendant claimed that he did not receive the City's pre-sale notice, which was sent by ordinary mail.¹² Notwithstanding any deficiency in the pre-sale notice, the *Adair* court reversed the trial court. The decision found that any pre-sale notice deficiencies were cured when the tax sale purchaser sent notice—via certified mail—to all interested parties, including the defendant, and the notice was received more than six months before the expiration of the redemptive period. *Id.*, 50,574 at pp. 21-22, 195 So.3d at 513. The court reasoned that La. R.S. 47:2156A “supplies tax sale purchasers with *the option to safeguard their purchase from nullity* by allowing them to send post-sale notice of the right to redeem to interested parties, at least six months before the expiration of the redemption period.” *Id.*, 50,574 at p. 17, 195 So.3d at 511. (Emphasis added). Premised on *Adair's* holding, Appellants assert that *Mennonite* due process notice requirements now compel and prioritize post-sale notice over pre-trial notice. Therefore, the present tax sale should be annulled because the heirs did not receive any post-sale notice. We disagree.

¹² The *Adair* court disagreed with the trial court's finding that the defendant's pre-sale notice was deficient. The court found the defendant was not entitled to pre-sale notice because at the time the pre-sale notices were mailed, Louisiana law only required notice be sent by regular mail to the tax debtor of record, which the defendant was not at the time of the tax sale. *Id.*, 50,574 at p. 13, 195 So.3d at 508-09.

First, this Court finds no broad mandate within *Adair* that requires invalidation of a tax sale for lack of post-sale notice when the tax debtor has received adequate pre-sale notice. Instead, *Adair* reasons “a tax sale can no longer be found null for problems with presale notice.” *Id.*, 50,574 at p. 14, 195 So.3d at 509.

Next, *Adair*'s holding does not affect the outcome reached in this case. As previously referenced, the other unnamed heirs, including Ms. Deynoodt, are not entitled to notice, albeit their interests were protected through the appointment of the Curator. Mr. Cooney, as the only reasonably ascertainable interested party, is the only heir entitled to receive pre-sale and post-sale notice; and the record shows he, in fact, received notice. In contrast to the *Adair* tax debtor, Mr. Cooney, the self-admitted property owner, acknowledges actual receipt of the pre-sale tax notice and sufficient notification of his post-sale redemption rights. A careful reading of the Petition verifies that both Mr. Cooney and the Unopened Succession were advised of their redemption rights.¹³ Moreover, Mr. Cooney judicially admits in his reconventional demand that he was aware of his post-sale redemption rights before the statutory expiration date. Paragraph 16 of his reconventional demand reads as follows:

Defendant, Clifford Cooney, *during the redemption period* through Alvin Miester, III, Esquire, a Louisiana attorney, attempted to redeem the subject property, 1006 Milan Street, New Orleans, Louisiana. Clyde Patton, on information, and belief, refused to provide a redemption figure. (Emphasis added).

¹³ Paragraph 12 of the Petition To Quiet Title reads as follows:

Petitioner, CLYDE PATTON, hereby gives notice to THE UNOPENED SUCCESSION OF ROY L. DEARIE AND CLIFFORD COONEY, that title, ownership, interests, claims, or encumbrances to the hereinabove property will be confirmed and quieted unless proceedings to annul the same are instituted within six (6) months from the service of citation and petition in notice.

As referenced in *Surcouf*, 2015-0279, p. 9, 177 So.3d at 1091, the purpose behind notice requirements is to provide due process *prior* to an action which will adversely affect a party's property interests. In the instant case, the City received the executed return receipt of publication of the tax sale, which was signed by Mr. Cooney; a Curator was appointed to represent the Unopened Succession heirs; and the tax purchaser advised Mr. Cooney of his post-redemption rights—all of which confirm that the due process obligation to provide *Mennonite* notice to the identifiable tax debtor was satisfied. See *Okpalobi v. LeBorne, II, L.L.C.*, 2012-0804, p. 5 (La. App. 4 Cir. 12/5/12), 106 So.3d 640, 643-44.

We find Appellants were adequately provided due process before their property was sold at tax sale. The only heir entitled to notice—Mr. Cooney—received notice, and the interests of the other heirs were protected by the appointment of the Curator. Accordingly, Appellants' claim that the tax sale should be invalidated because all interested heirs did not receive adequate pre-sale or post-sale notice is not meritorious.

III. Summary Judgment

Appellate courts review a judgment granting or denying a motion for summary judgment *de novo*, under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *Surcouf*, 2015-0278, p. 12, 177 So.3d at 1093. The burden of proof remains with the movant; however, if the movant makes a prima facie showing that the motion should be granted, the burden then shifts to the non-moving party to produce evidence demonstrating that a material factual issue remains; the failure to do so mandates granting of the motion. *Id.* The non-moving party's response may not rest on the allegations or denials contained in his pleading, but must set forth, by affidavit or otherwise

provided by law, specific facts showing that there is a genuine issue of material fact for trial. *Id.* (citing La. C.C.P. art. 967 B).

Our review of the undisputed facts in this matter establishes the following:

- 1) the City sent, via certified mail, notice of the tax sale to Mr. Dearie, as the Property owner, at 1006 Milan Street;
- 2) said notice was received and signed for by Mr. Cooney on August 7, 2012;
- 3) notice of the delinquent taxes was advertised in the *Times-Picayune* on August 24, 2012 and September 21, 2012, with a tax sale date of September 25, 2015 in the event the delinquent taxes were not paid;
- 4) neither the record property owner nor Mr. Cooney made payments on the delinquent taxes;
- 5) Mr. Patton made the winning bid on the Property at the tax sale;
- 6) Mr. Patton paid subsequent tax bills totaling \$53,124.12;
- 7) Mr. Patton received and recorded his Tax Sale Certificate on December 27, 2012;
- 8) Mr. Cooney was aware of his redemption rights;
- 9) a Curator was appointed to represent the Unopened Succession; and
- 10) the Property was not redeemed within the three-year statutory period.

Appellants present no countervailing evidence that the specific identities of Ms. Deynoodt or the other unnamed heirs were reasonably ascertainable to the City. They cite no binding authority that affirmatively requires the taxing entity to identify, locate, and notice interested parties beyond those referenced in the public records or those whose identities are “reasonably attainable.”

It is well-settled that a certified copy of a tax deed amounts to prima facie evidence of the tax sale’s validity. *Mooring Financial Plan 401(K) Profit Sharing Plan, v. Ninth Ward Housing Corp.*, 2009-0327, p. 3 (La. App. 4 Cir. 9/16/09), 18 So.3d 797, 798. Thus, once Mr. Patton offered, filed and introduced the certified

copy of the tax sale deed into evidence, the burden of proof shifted to Appellants to establish that genuine issues of material fact remained as to the tax sale's validity. Appellants failed to meet their burden of proof.

Mr. Patton and the City met all notice requirements; no evidence was offered to challenge the validity of the tax sale; and the Property was not redeemed within the statutory three-year period. Upon our *de novo* review, we find that no genuine issues of material facts exist to preclude Mr. Patton's entitlement to summary judgment as a matter of law.

CONCLUSION

Based on the foregoing reasons, we affirm the trial court's award of summary judgment in favor of Mr. Patton, thereby granting his Petition to Quiet Title.

AFFIRMED

