

GREG A. DEICHMANN, SR.

*

NO. 2018-CA-0358

VERSUS

*

COURT OF APPEAL

MARK A. MOELLER

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

* * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2013-10075, DIVISION "I-14"
Honorable Piper D. Griffin, Judge

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Judge Dale N. Atkins

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(Court composed of Judge Daniel L. Dysart, Judge Joy Cossich Lobrano, Judge Dale N. Atkins)

LOBRANO, J., CONCURS IN THE RESULT.

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DEFENDANT/APPELLANT/IN PROPER PERSON

REVERSED
DECEMBER 28, 2018

This case arises from a judgment declaring a December 2009 tax sale a nullity and ordering the appellant, Mr. Mark Moeller, the original owner of the property, to reimburse the appellee, Mr. Greg Deichmann, within one year for taxes and other monies Mr. Deichmann paid upon acquiring the property at the tax sale. For the reasons discussed below, we reverse the district court's judgment finding the tax sale a "nullity" to hold that the tax sale was an absolute nullity, reduce the interest rate imposed upon the repayment amounts from 12% to 10%, and vacating the 5% penalty and the one-year repayment period.

BACKGROUND

Mr. Mark Moeller and his family have lived on the property at issue since 2003. Hurricane Katrina destroyed their home, and from 2006 to 2008, the Moeller family lived in a mobile home on the property while their permanent home was being rebuilt. They moved into the permanent home in 2008. The appellee, Mr. Greg Deichmann, purchased the Moeller property at a tax sale in December 2009 after Moeller failed to pay property taxes in 2007 and 2008.

According to Moeller, the Assessor for the City of New Orleans applied a homestead exemption on the subject property in Moeller's favor before Katrina but

did not recognize the homestead exemption after Katrina. Tax bills that failed to reflect the exemption were mailed to Moeller for 2007, 2008, and 2009, but no taxes were paid. On October 8, 2009, Moeller sent a letter to both the Bureau of the Treasury for the City of New Orleans and the Assessor indicating that the tax bills for 2007, 2008, and 2009 were incorrect because they did not incorporate Moeller's homestead exemption. Moeller's letter asked that the homestead exemption be reapplied.

On December 1, 2009, Moeller spoke to the Assessor and obtained the appropriate homestead exemptions for 2007, 2008, 2009, and 2010. He also spoke to the staff in the City's Treasury Department to let them know that he was entitled to a homestead exemption for those years. He was notified on December 1 that a tax sale had been scheduled to take place, but he was assured that the sale would not go forward. The record contains Homestead Exemption Receipts for 2007, 2008, 2009, and 2010 issued by the Assessor on December 1, 2009.

Despite Moeller's meeting with the Assessor and with the Treasury Department a day or two before the scheduled tax sale,¹ the City of New Orleans sold the property to Mr. Deichmann. The City issued a Tax Sale Deed to Deichmann on January 28, 2010, and the deed was recorded in the Notarial Archives on February 2, 2010.

Deichmann paid the delinquent taxes from 2007 and 2008 at the tax sale, and he continued paying the property taxes as they came due.² Deichmann's Affidavit of Proof of Costs, submitted pursuant to La. R.S. 47:2291 (B)(3), establishes that he paid \$2,649.27 at the tax sale on December 3, 2009, plus

¹ It is unclear whether the tax sale occurred on December 2 or December 3, 2009.

² The amounts that Deichman paid did not account for Moeller's homestead exemption.

\$6,327.11 on January 17, 2011; \$3,329.41 on January 30, 2012; \$4,410.85 on November 8, 2013; \$3,705.72 on July 19, 2014; \$3,536.65 on June 28, 2015; and \$3,217.00 on May 31, 2016, for a total of \$27,176.01.

On October 25, 2013, Deichmann filed a Petition to Quiet Tax Title but did not serve Moeller with this Petition. Deichmann filed an Amended Petition on September 9, 2015, and Moeller was served with both the Petition and the Amended Petition at that time.

Moeller responded to Deichmann's Amended Petition by filing an Answer, Affirmative Defenses, and Reconventional Demand naming Deichmann and the City of New Orleans as defendants in reconvention. Moeller alleged that the tax sale and tax deed were absolutely null and had no legal effect because the tax sale was not properly published and/or advertised under La. R.S. 47:2153 (B), LA. CONST. art. VII, § 25, and the Constitution of the United States. Moeller also argued in the alternative that the obligation for taxes due was extinguished by operation of law when his homestead exemption was retroactively granted before the tax sale, which, he argued, is equivalent to "payment of taxes prior to tax sale."

After losing a motion for summary judgment, Deichmann filed an Amended Answer to Moeller's Reconventional Demand in which Deichmann admitted that the tax sale *was* null because it was not properly advertised prior to the sale. Deichmann then filed a Motion for Judgment on the Pleadings, seeking enforcement of a tax sale nullity under the provisions of La. R.S. 47:2290, and requesting a judgment awarding him reimbursement of taxes paid, costs, penalties, and interest.

The district court entered a judgment declaring the tax sale a "nullity" without specificity. The district court further found Moeller owed Deichmann

\$43,402.03, the same amount that Deichmann claimed he was owed in his sworn Affidavit of Costs for taxes and costs paid plus penalty and interest, using the rate that applies to reimbursement for a redemption nullity – 5% penalty plus 12% interest per year – under La. R.S. 47:2290 (B). The district court further ordered that the declaration of nullity would become effective only if Moeller made full and complete payment to Deichmann within one year from the date of signing of judgment “and upon Order of this court issued pursuant to La. R.S. 47:2291 (D).” Finally, the district court held that if Moeller failed to make “full and complete payment” to Deichmann within one year of signing the judgment, the nullity shall be vacated and the Reconventional Demand seeking to annul the tax sale filed by Moeller shall be dismissed with prejudice. Moeller timely sought review of the district court’s judgment.

JURISDICTION

Although the district court’s judgment does not dispose of all claims between the parties, this Court has appellate jurisdiction to consider this appeal of a judgment from a Motion for Judgment on the Pleadings. La. C.C.P. art. 1915 (A)(2); *see also* La. C.C.P. art. 968 (“Judgments on the pleadings ... are final judgments and shall be rendered and signed in the same manner and with the same effect as if a trial had been had upon evidence regularly adduced.”). We therefore address Mr. Moeller’s appeal, and Mr. Deichmann’s cross appeal, below.

DISCUSSION

A motion for judgment on the pleadings presents solely a question of law. *Stonebridge Development, LLC v. Stonebridge Enterprises, LLC*, 42,039, p. 3 (La. App. 2 Cir. 4/4/07), 954 So. 2d 893, 895 (citing La. C.C.P. art. 965). We review questions of law under a *de novo* standard of review. *Harper v. State, Dep’t of*

Health & Hosp., 2104-0110, p. 7 (La. App. 4 Cir. 9/9/15), 176 So. 3d 479, 486.

With regard to a motion for judgment on the pleadings, La. C.C.P. art. 965 states:

“Any party may move for judgment on the pleadings For purposes of this motion, all allegations of fact in mover’s pleadings not denied by the adverse party or by effect of law, and all allegations of fact in the adverse party’s pleadings shall be considered as true.” When evaluating a motion for judgment on the pleadings, “nothing beyond the pleadings may be considered; supporting evidence may not be considered.” *Daigre v. Int’l Truck & Engine Corp.*, 2010-1379, p. 5 (La. App. 4 Cir. 5/5/11), 67 So. 3d 504, 508.

Moeller’s appeal of the district court’s ruling on Deichmann’s motion for judgment on the pleadings raises three issues: (1) whether the tax sale nullity is a “payment nullity” under La. R.S. 47:2290 (A), a “redemption nullity” under La. R.S. 47:2290 (B), or some other type of nullity; (2) whether the district court erred in ordering that the entire judgment amount be paid within one year of the date of judgment; and (3) whether the amount calculated as being owed to Deichmann should have taken into account Moeller’s homestead exemption.

We first address the type of nullity. Although the district court’s judgment indicates that the tax sale was a “nullity,” it does not specify whether the tax sale is a relative nullity (such as a payment nullity or a redemption nullity) or an absolute nullity.

The Louisiana Revised Statutes addressing “Actions to Annul” include La. R.S. 47:2286, which provides: “[n]o tax sale shall be set aside except for a payment nullity, redemption nullity, or a nullity under R.S. 47:2162, all of which

are relative nullities.”³ In addition, Louisiana courts continue to recognize an “absolute nullity” where pre-tax-sale notification requirements have not been met, notwithstanding the provisions of La. R.S. 47:2286. *See, e.g., Mooring Tax Asset Group, L.L.C. v. James*, 2014-0109, p. 5 (La. 12/9/14), 156 So. 3d 1143, 1145; *Surcouf v. Darling*, 2015-0278, p. 11 (La. App. 4 Cir. 10/21/15), 177 So. 3d 1085, 1092.

On appeal, Moeller makes several arguments why the reimbursement amount specified in the judgment, which incorporates penalty and interest as if the tax sale were a “redemptive nullity,” is incorrect. Moeller first argues that the tax sale is a nullity “for payment.” La. R.S. 47:2122 (8) defines “payment nullity” as “a nullity arising from payment of taxes prior to a tax sale, including payment based on dual assessment.” Under La. R.S. 47:2290 (A), a payment nullity includes the statutorily required reimbursements for taxes paid plus 10% interest.

Alternatively, Moeller asks the Court to render the nullity a “due process” nullity and to rule that the reimbursement provisions of LA. CONST. art. VII, § 25 (C), which would result in full reimbursement of taxes paid by the tax sale purchaser, plus 10% interest, should apply. Moeller’s reconventional demand asserts that he did not receive notice of the tax sale and that the tax sale was not properly advertised in conjunction with LA. CONST. art. VII, § 25 (A)(1), La. R.S. 47:2153 (B)(1), “and any other applicable law.”⁴

³ La. R.S. 47:2162 prohibits the sale of property at a tax sale to a tax collector or tax assessor for a political subdivision.

⁴ LA. CONST. art. VII, §25 (A)(1), provides: “at the expiration of the year in which the taxes are due, the collector, ... after giving notice to the delinquent in the manner provided by law, shall advertise for sale of the property on which the taxes are due. The advertisement shall be published in the official journal ... in the manner provided for judicial sales.”

La. R.S. 47:2153 B(1) provides: At the expiration of twenty days’ notice, counting from the day when the last of the written notices are sent, or as soon thereafter as practicable, the tax collector shall proceed to publish a notice to the tax debtors of the delinquency and to advertise for sale

In response, Deichmann argues that the district court correctly applied the penalty and interest that accompanies a “redemption nullity.” La. R.S. 47:2122 (10) provides that a “redemption nullity” is “the right of a person to annul a tax sale in accordance with R.S. 47:2286 because he was not duly notified at least six months before the termination of the redemption period.” La. R.S. 47:2122 (11) states that “redemptive period” is the period in which a person may redeem property as provided in the Louisiana Constitution. A redemption nullity under La. R.S. 47:2290 (B) carries a 5% penalty, plus 12% interest per year, on statutory reimbursements. Deichmann contends that a nullity pertaining to an issue of due process, such as the lack of sufficient pre-sale advertisement, must be a redemption nullity, but he admits in his brief to this Court that “there is no statute that declares which interest should apply when two parties voluntarily nullify a tax sale for insufficient advertising” before the sale occurs.

When Deichmann amended his answer to Moeller’s reconventional demand, he admitted that pre-tax-sale publication requirements were not met. Furthermore, Moeller alleged in his reconventional demand that he was not given proper notice of the sale. Indeed, the pleadings fail to establish that pre-sale notice requirements were met. “[A]ll allegations of fact in mover’s pleadings not denied by the adverse party or by effect of law, and all allegations of fact in the adverse party’s pleadings shall be considered as true.” La. C.C.P. art. 965. Here, Deichmann is the mover and Moeller is the adverse party. Deichmann’s admission in his amended answer,

the consolidated delinquent tax list under one form two times within thirty days in the official journal of the political subdivision.”

La. R.S. 43:203 (2), which sets forth the advertising requirements for a judicial tax sale, provides: “When two publications are required of notice of a judicial sale by public auction, the first newspaper advertisement of such notice shall be published at least thirty days before the date of the judicial sale, and the second advertisement shall be published not earlier than seven days before, and not later than the day before, the judicial sale.”

Moeller's allegation that he failed to receive notice, and the failure of the pleadings to establish that Moeller did, in fact, receive notice, amount to a violation of Moeller's due process rights.⁵ We therefore reverse the district court's judgment declaring the tax sale a "nullity" to specify that the tax sale in this case was an absolute nullity. *See Engine 22, LLC v. Land & Structure, LLC*, 2016-0664, pp. 5-6 (La. App. 4 Cir. 4/5/17), 220 So. 3d 1, 5 ("A tax sale without proper notice is an absolute nullity").

Because we have determined, based on the pleadings, that the tax sale was an absolute nullity, we also find merit in Moeller's argument that the district court incorrectly applied the 12% interest rate and the 5% penalty for a redemption nullity under La. R.S. 47:2290 (B)(1)(d). Instead, the appropriate amount that Moeller would owe Deichmann should be "the price and all taxes and costs" paid plus "ten percent per annum interest on the amount of the price and taxes paid from date of respective payments...." *Surcouf*, 2015-0278, pp. 2-3, 177 So. 3d at 1088 (citing LA. CONST. art. VII, § 25 (C) and *Mooring*, 14-0109, p. 7 (La. 12/9/14), 156 So. 3d at 1148).

We therefore vacate the district court's award of a 5% penalty and reduce the 12% interest per annum awarded in the district court's judgment to 10% interest per annum "on the amount of the prices and taxes paid from date ... respective payments are paid[.]" *Surcouf*, 2015-0278, p. 2, 177 So. 3d at 1088; *Mooring*, 14-0109, p. 7, 156 So. 3d at 1148. "[A] judgment awarding interest may *only* provide for the ten percent per annum interest on the price and taxes paid from

⁵ "The sale of property for nonpayment of taxes is an action that affects the property right protected by the 14th Amendment." *Tietjen v. City of Shreveport*, 09-2116, p. 5 (La. 5/11/10), 36 So.3d 192, 195 (citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800, 103 S. Ct. 2706, 2712, 77 L. Ed. 2d 180 (1983)). The due process clause of the 14th Amendment requires that deprivation of property be preceded by notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

the respective dates of payment.” *Cititax Group, LLC v. Gibert*, 2015-0371, p. 6 (La. App. 4 Cir. 9/23/15), 176 So. 3d 625, 629 (emphasis in original).

Next, Moeller argues that the Judgment is in error because it requires him to repay Deichmann within one year. La. R.S. 47:2291 (C) requires repayment within one year of “governmental liens, other than statutory impositions paid if the nullity has been rendered on the basis of prior payment, and costs.” La. R.S. 47:2122 (5) defines “governmental lien” as “all liens imposed by law upon immovable property in favor of any political subdivision *and filed in the mortgage records, ... other than statutory impositions.*” (Emphasis added). “‘Statutory imposition’ means ad valorem taxes and any impositions in addition to ad valorem taxes that are included on the tax bill sent to the tax debtor.” La. R.S. 47:2122 (14). “Costs” are defined in La. R.S. 47:2291 (B)(2) to include “costs of sending notice, costs of publication, and costs of determining tax sale parties.” La. R.S. 47:2291 (B)(2) does not include the term “statutory impositions” or “taxes” in its definition of “costs.” Likewise, LA. CONST. art. VII, § 25 A(1) and (A)(2) refer to “taxes, interest, and costs,” thereby distinguishing between “taxes” and “costs.”

In our view, this case involves “statutory impositions” but not “governmental liens,” as those phrases are defined in La. R.S. 47:2122. There is no indication in the pleadings that the City of New Orleans filed a lien against the property in the mortgage records, as required to satisfy the definition of “governmental lien” under La. R.S. 47:2122 (5). Because La. R.S. 47:2291 (C) imposes a one-year repayment period for “governmental liens ... and costs” but not for “statutory impositions,” the one-year repayment period of La. R.S. 47:2291 (C) does not apply here.

In addition, we can find no time limitation for repayment associated with an absolute nullity.⁶ We note, however, that “[i]n order for the nullity to be effected through a cancellation of the tax sale deed, the tax sale purchaser must be restored to the situation that existed before the tax sale.” *Surcouf*, 2015-0278, p. 3, 177 So. 3d at 1088 (citing La. C.C. art. 2033). In short, the tax sale deed cannot be cancelled until such time as Mr. Moeller has reimbursed Mr. Deichmann for the price and taxes paid plus ten percent simple interest per year from the date of each payment. *See Mooring*, 14-0109, p. 10, 156 So. 3d at 1150 (“although Article 2033 states that an absolutely null contract is deemed never to have existed, the article also provides that the ‘parties must be restored to the situation that existed before the contract was made.’”). The one-year repayment period is vacated.

Third, Moeller contends that the amount he owes *Deichmann* should be reduced to reflect the homestead exemption to which he is entitled. There is no merit to this argument. Deichmann is owed the full amount that he paid to purchase the property at the tax sale, plus additional taxes he paid in subsequent years plus 10% interest specified in LA. CONST. art. VII, § 25. A tax-sale purchaser is to be reimbursed in full by the owner, not by the governing entity. *See Brookewood Investments Co., L.L.C. v. Sixty-Three Twenty-Four Chef Menteur Highway, L.L.C.*, 2012-1205, p. 1 n.1 (La. App. 4 Cir. 5/15/13), 116 So. 3d 899, 901 n.1. Deichmann is entitled to repayment in full for the amounts he paid, and Moeller’s

⁶ The appellant in *Cititax Group, LLC v. Gibert*, 2015-0371, p. 11 (La. App. 4 Cir. 9/23/15), 176 So. 3d 625, 632, objected to the one-year repayment period where a tax sale was declared absolutely null, but this Court declined to address whether the one-year repayment period was appropriate. In *Mooring*, however, the Louisiana Supreme Court noted: “if a tax sale is absolutely null for a due process violation, there are no time limitations that can be applied to prevent a party from asserting an action for nullity.” *Mooring*, 2014-0109, p. 9, 156 So. 3d at 1149. Imposing a time limitation for reimbursement of the purchaser at a tax sale that was declared null for a due process violation appears inconsistent with the statement in *Mooring* that such an action never prescribes.

recourse, if any, regarding his homestead exemption is against the City of New Orleans.

Lastly, Deichmann answers Moeller's appeal and requests damages to include attorney's fees and costs, arguing that Moeller's appeal is frivolous and was filed solely to cause a delay in payment. Deichmann cites the Uniform Rules—Courts of Appeal, Rule 2-19, which provides that this Court may award damages for frivolous appeal in civil cases, and La. C.C.P. art. 863 (B)(1), which permits an award of damages if a pleading is "being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."

Considering that the Louisiana Constitution permits an appeal "of right," Moeller was well within his rights to appeal the district court's judgment. LA. CONST. art. V, § 10; *see also Succession of Bongiovanni*, 183 So. 570, 572 (La. App. 1st Cir. 1938) ("The right of appeal is a constitutional one, and the right should be construed liberally in order that an aggrieved party may have a hearing before the appellate court."). Moreover, this Court found merit to Moeller's appeal. We deny Deichmann's request for damages on cross appeal.

CONCLUSION

The district court's judgment finding the sale a "nullity" is reversed to declare the tax sale at issue in this matter an "absolute nullity." The applicable interest rate is reduced from 12% to 10%, payable on the amounts that Deichmann paid, from the dates that each payment was made, as established in Deichmann's Affidavit of Proof of Costs. The 5% penalty and one-year repayment period are vacated.

REVERSED