

COURT OF APPEALS  
COSHOCTON COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

IN THE MATTER OF THE  
FORECLOSURE OF LIENS FOR  
DELINQUENT TAXES BY ACTION  
IN REM, JANETTE DONAKER,  
COSHOCTON COUNTY  
TREASURER

Plaintiff-Appellee

vs.

PARCELS FOR MINERAL RIGHTS  
TAXES ENCUMBERED WITH  
DELINQUENT TAX LIENS AND  
DIVERSIFIED OIL AND GAS LLC NKA  
DIVERSIFIED PRODUCTION LLC

Defendants-Appellants

JUDGES:

Hon. Patricia A. Delaney, P.J.  
Hon. Craig R. Baldwin, J.  
Hon. Earle E. Wise, Jr., J.

Case No. 2020CA0005

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Coshocton County  
Court of Common Pleas, Case No. 20  
CI 0091

JUDGMENT:

REVERSED AND REMANDED

DATE OF JUDGMENT ENTRY:

November 16, 2020

APPEARANCES:

For Plaintiff-Appellee:

JASON GIVEN  
COSHOCTON COUNTY PROSECUTOR

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For Defendant-Appellant:

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*Delaney, P.J.*

{¶1} Defendant-Appellant Diversified Oil and Gas, LLC nka Diversified Production LLC appeals the May 29, 2020 judgment entry of the Coshocton County Court of Common Pleas.

### **FACTS AND PROCEDURAL HISTORY**

{¶2} On March 5, 2020, Plaintiff-Appellee Coshocton County Treasurer filed an in rem action to foreclose on tax liens against two mineral rights parcels pursuant to R.C. 5721.18. The complaint alleged the last known owners of the parcels were the Peabody Coal Co. and R & F Coal. The judicial certificate of title stated the title to the real estate was vested in the Adams Mills Coal Company, Oxford Oil Company, and Sentry Royalty Company. Coshocton County served copies of the in rem foreclosure complaint on the interest holders.

{¶3} On March 9, 2020, the Governor of the State of Ohio issued Executive Order 2020-01D and declared a state of emergency in Ohio in response to COVID-19. On March 27, 2020, H.B. 197 immediately tolled, retroactively to March 9, 2020, all statutorily established statutes of limitations, time limitations, and deadlines in the Ohio Revised Code and Administrative Code until the expiration of Executive Order 2020-01D or July 30, 2020, whichever came sooner. On March 27, 2020, the Ohio Supreme Court issued an Administrative Order to work in conjunction with H.B. 197 that tolled the time requirements established by all Supreme Court-promulgated rules.

{¶4} Although it was not served with the complaint, Defendant-Appellant Diversified Oil and Gas, LLC nka Diversified Production LLC filed an answer on April 3, 2020. It alleged it was the owner of the mineral rights parcels at issue in the complaint

and submitted a Limited Warranty Mineral Deed demonstrating its interest. Diversified denied the taxes were owing because the parcels were incorrectly valued and/or clerical errors.

{¶5} On April 14, 2020, Coshocton County filed a Motion for Summary Judgment on its in rem foreclosure complaint. It argued there was no genuine issue of material fact that the property taxes on the mineral rights parcels were delinquent. Coshocton County argued Diversified as the interest holder was not entitled to file a responsive pleading because it was not a party to the action. In an in rem foreclosure proceeding, the two mineral rights parcels were the defendants. If Diversified contested the valuation of the mineral rights parcels, Diversified was required to raise the issue with the Board of Revision and it had not brought a claim to the Board of Revision. Attached to its motion for summary judgment, Coshocton County submitted the affidavit of the Treasurer reflecting the taxes were delinquent for the two parcels in the total amount of \$254,593.65.

{¶6} Diversified filed a Civ.R. 56(F) motion on May 11, 2020. In its motion, it sought additional time to conduct discovery on the material facts of the basis and amounts of the claimed tax delinquencies. In support of its motion, Diversified attached the affidavit of its Senior Vice President. It first countered Coshocton County's argument that it was not entitled to file a responsive pleading stating that pursuant to R.C. 5721.18(B)(2)(a), any person claiming an interest in any parcel described in the complaint could file an answer and assert defenses or objections to the foreclosure. It next argued the tax foreclosure amounts sought by Coshocton County were incorrect either by clerical error and/or an incorrect valuation. Diversified was conducting a parallel proceeding with the Board of Revision and the Coshocton County Auditor to address the valuation. Diversified

further argued an extension of time to respond to the motion for summary judgment was appropriate considering the state of emergency within the State of Ohio and resulting Executive and Administrative Orders tolling time limitations.

{¶7} Coshocton County did not respond to the Civ.R. 56(F) motion.

{¶8} On May 29, 2020, the trial court issued its judgment entry simultaneously denying Diversified's Civ.R. 56(F) motion and granting Coshocton County's motion for summary judgment. Diversified did not have the opportunity to file a response to the motion for summary judgment before the trial court ruled. In its judgment entry, the trial court found there was no genuine issue of material fact that property taxes were delinquent for the two mineral rights parcels in the total amount of \$254,593.65. It next found that Diversified had not filed a complaint with the Board of Revision challenging the valuation of the mineral rights parcels within the time frame allowed by R.C. 5715.19. By challenging the in rem foreclosure, the trial court found that Diversified was using the tax foreclosure proceeding as a second opportunity for relief, which it was not entitled to as a matter of law.

{¶9} It is from this judgment Diversified now appeals.

#### **ASSIGNMENTS OF ERROR**

{¶10} Diversified raises two Assignments of Error:

{¶11} "1. THE TRIAL COURT ERRED IN DENYING APPELLANT'S UNOPPOSED MOTION FOR A CIVIL RULE 56(F) ORDER FOR A CONTINUANCE TO PERMIT DISCOVERY TO BE HAD IN RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

{¶12} “II. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF-APPELLEE’S MOTION FOR SUMMARY JUDGMENT BEFORE ANY DISCOVERY HAD BEEN CONDUCTED.”

## **ANALYSIS**

### **I. & II. Civ.R. 56(F) and Summary Judgment**

{¶13} Diversified argues in its first Assignment of Error the trial court abused its discretion when it denied its Civ.R. 56(F) motion for additional time for discovery. It argues in its second Assignment of Error that if the trial court abused its discretion in denying the Civ.R. 56(F) motion, the May 29, 2020 judgment entry granting summary judgment in favor of Coshocton County was premature. We agree.

### **Foreclosure Complaint and Answer**

{¶14} We first review the statutory requirements for bringing and responding to a tax foreclosure proceeding. Pursuant to R.C. 5721.18, Coshocton County initiated the tax foreclosure proceedings against the two parcels of mineral rights. R.C. 5721.18 states that the county prosecuting attorney, upon the delivery to the prosecutor by the county auditor of a delinquent land tax certificate containing minerals or rights to minerals, “may institute a foreclosure proceeding in the name of the county treasurer, in any court with jurisdiction, to foreclose the lien of the state against such minerals or rights to minerals, unless the taxes, assessments, charges, penalties, and interest are paid prior to the time the complaint is filed \* \* \*.” A tax foreclosure action is an action in rem and not in personam. *Leonard v. Pilkington*, 10th Dist. Franklin No. 14AP-650, 2015-Ohio-1432, 2015 WL 1641392, ¶ 14. Thus, the foreclosure operates on the land itself and not on the title of the one in whose name the property is listed for taxation. *Id.* In this case, Coshocton

County sent notice of the in rem foreclosure proceeding to the last known owners, according to the Judicial Certificate of Title, lienholders, or persons with an interest in the parcels named in the foreclosure proceeding. The Judicial Certificate of Title did not list Diversified as an owner or person of interest in the mineral rights parcels.

{¶15} Pursuant to 5721.18(B)(2)(a), “an answer may be filed in an action in rem under this division by any person owning or claiming any right, title, or interest in, or lien upon, any parcel described in the complaint. \* \* \* The answer shall set forth the nature and amount of interest claimed in the parcel and any defense or objection to the foreclosure of the lien of the state for delinquent taxes, assessments, charges, penalties, and interest as shown in the complaint.” Diversified filed an answer identifying its ownership in the mineral rights and denied that the amounts claimed were properly due and owing, alleged a clerical error had occurred, and reserved the right to assert additional affirmative defenses after discovery.

#### **Motion for Summary Judgment and Civ.R. 56(F)**

{¶16} Eleven days after Diversified filed its answer, Coshocton County filed a motion for summary judgment arguing it was entitled to judgment as a matter of law on its complaint in foreclosure because there was no genuine issue of material fact that taxes in the amount of \$83,675.84 and \$170,917.81 were due and owing on the two mineral parcels. In response to the motion for summary judgment, Diversified filed a motion for Civ.R. 56(F), asking for a continuance on the motion for summary judgment to conduct discovery.

{¶17} Civ.R. 56(F) provides:

(F) When affidavits unavailable

Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

{¶18} Civ.R. 56(F) provides the remedy for a party who seeks a continuance on a motion for summary judgment in order to conduct discovery relevant to the motion. *TPI Asset Mgt., L.L.C. v. Baxter*, 5th Dist. Knox No. 2011CA000007, 2011-Ohio-5584, 2011 WL 5143308, ¶ 16 citing *Jacobs v. Jones*, 10th Dist. Franklin No. 10AP-930, 2011-Ohio-3313, 2011 WL 2586741, ¶ 58 citing *Hahn v. Groveport*, 10th Dist. Franklin No. 07AP-27, 2007-Ohio-5559, 2007 WL 3027075, ¶ 30, citing *Gates Mills Invest. Co. v. Pepper Pike*, 59 Ohio App.2d 155, 168, 392 N.E.2d 1316 (8th Dist.1978). Civ.R. 56(F) requires a party opposing summary judgment to submit affidavits with sufficient reasons stating why he cannot present by affidavit facts sufficient to justify its opposition. “Mere allegations requesting a continuance or deferral of action for the purpose of discovery are not sufficient reasons why a party cannot present affidavits in opposition to the motion for summary judgment. There must be a factual basis stated and the reasons given why it cannot present facts essential to its opposition of the motion.” *McCord, supra* at ¶ 15 citing *Gates Mills Invest. Co., supra*.

{¶19} Just as this Court reviews the resolution of discovery matters under an abuse of discretion standard, the decision whether to grant a motion for extension of time in order to conduct further discovery lies within the broad discretion of the trial court and

will be reversed on appeal only for an abuse of discretion. *McCord v. Ron Laymon Trucking Co.*, 5th Dist. Knox No. 04CA000033, 2005-Ohio-4399, 2005 WL 2045390, ¶ 14. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983). A trial court does not abuse its discretion in denying a request for a continuance in order to respond to a motion for summary judgment where the party seeking the continuance “did not sustain [its] burden of demonstrating that a continuance was warranted for further discovery.” *Gates Mills Invest. Co., supra*.

{¶20} On May 29, 2020, the trial court denied Diversified's motion for Civ.R. 56(F) and granted Coshocton County's motion for summary judgment. We first review the motion for summary judgment and the Civ.R. 56(F) motion and then the trial court's judgment entry to determine whether it abused its discretion in denying Diversified's motion for Civ.R. 56(F).

{¶21} Pursuant to R.C. 5721.18(B)(3), “[a]t the trial of an action in rem under this division, the certificate or master list filed by the auditor with the prosecuting attorney shall be prima-facie evidence of the amount and validity of the taxes, assessments, charges, penalties, and interest appearing due and unpaid on the parcel to which the certificate or master list relates and their nonpayment.” Coshocton County submitted the Delinquent Land Tax Certificate with its complaint stating that \$83,675.84 and \$170,917.81 was due and owing on the two mineral parcels. “Prima facie evidence” has been defined as:

Evidence which if unexplained or uncontradicted, is sufficient to carry the case to the jury and to sustain a verdict or finding in favor of the side of the



issue which it supports, but which may be contradicted by other evidence.

*McKenzie v Standard Acci. Ins. Co.* 198 SC 109, 16 SE2d 529

That is prima facie just, reasonable, or correct which is presumed to be just, reasonable, or correct until the presumption has been overcome by evidence which clearly rebuts it. *Atchison, Topeka & Santa Fe Railway Co. v State*, 23 Okla 210, 100 P 11.

*In the Matter of the Application of the State of New York for an order requiring Stone (Vicki) to appear as a witness before the Grand Jury in & for Cty. of Erie, State of New York*, 7th Dist. Columbiana No. 86-C-39, 1986 WL 8686, \*4 (Aug. 7, 1986) citing Ballentine's Law Dictionary, Third Edition, 1969.

{¶22} Coshocton County supported the prima facie evidence of the Delinquent Land Tax Certificate with the affidavit of the Treasurer. The affidavit stated that the records of Coshocton County showed taxes were delinquent for the mineral rights parcels for more than one year, the parcels were listed on the delinquent tax parcel list, demand for payment of the taxes had been made, and there was not a current payment agreement on file for the parcels.

{¶23} Coshocton County further argued it was entitled to judgment as a matter of law because Diversified did not have any remedies to the delinquent tax amount because Diversified could only challenge the tax valuation through the Board of Revision. It stated within its motion that the Board of Revision was not available to Diversified: "Diversified has not filed a complaint with the Board of Revision and even if it had, the amounts set out as delinquent are over a year old which exempts them from consideration by the Board." (Motion for Summary Judgment, Apr. 14, 2020). Coshocton County did not submit

any Civ.R. 56 evidence to support its statement that Diversified was not pursuing a claim with the Board of Revision.

{¶24} Diversified made three arguments in its Civ.R. 56(F) motion supporting its request for a continuance to conduct discovery. First, Diversified did not receive the tax bills allegedly forming the basis of the action. Second, without the ability to examine the County records, there was a possibility the delinquent tax amounts were in error because they could include a value for gas and oil reserves on active wells for which Diversified is taxed separately or they were based on an incorrect acreage. Third, Diversified was pursuing a claim with the Board of Revision as to the tax valuation and inquiring with the County Auditor. These statements were supported by the affidavit of the Senior Vice President of Diversified.

{¶25} The trial court denied the motion for Civ.R. 56(F) and granted the motion for summary judgment. In its judgment entry, it first found there was no genuine issue of material fact that the taxes were delinquent. It next found there was no genuine issue of material fact that Diversified had not filed a complaint with the Board of Revision challenging the valuation of the parcels within the time frame allowed by R.C. 5715.19. It determined that as a matter of law, Diversified could not challenge the tax valuation through the foreclosure proceeding.

{¶26} In this case, we find it was an abuse of discretion to deny the Civ.R. 56(F) motion. Statutorily, the delinquent land tax certificate is prima facie evidence of the amount and validity of the taxes, assessments, charges, penalties, and interest appearing due and unpaid on the parcel to which the certificate or master list relates and their nonpayment; however, pursuant to common law, prima facie evidence may be

contradicted. R.C. 5721.18 provides support that there are opportunities to object to an in rem foreclosure proceeding first by permitting the owner or interested parties to file an answer to set forth the nature and amount of interest claimed in the parcel and any defense or objection to the foreclosure of the lien of the state for delinquent taxes, assessments, charges, penalties, and interest as shown in the complaint. R.C. 5721.18(B)(2)(a). It next states that “[a]t the *trial* of an action in rem under this division, the certificate or master list filed by the auditor with the prosecuting attorney shall be prima-facie evidence of the amount and validity of the taxes, assessments, charges, penalties, and interest appearing due and unpaid on the parcel to which the certificate or master list relates and their nonpayment.” (Emphasis added.) R.C. 5721.18(B)(3). Coshocton County filed the motion for summary judgment 11 days after Diversified filed its answer to the complaint in foreclosure. Diversified argued in its Civ.R. 56(F) motion that it was pursuing its statutory opportunity to object to the foreclosure of the lien of the state for delinquent taxes.

{¶27} Diversified’s Civ.R. 56(F) motion was supported with an affidavit with sufficient reasons stating why it could not present by affidavit facts sufficient to justify its opposition. It alleged it did not receive the tax bills for the mineral parcels. The Judicial Certificate of Title did not list Diversified as the owner of the mineral rights parcels. It argued that it required additional time to conduct discovery to determine the basis of the valuation through the County Auditor and Board of Revision. While Coshocton County stated in its motion that Diversified did not file a claim with the Board of Revision, the statement was not supported with Civ.R. 56 evidence. Diversified provided an affidavit from its Senior Vice President stating it was pursuing a claim with the Board of Revision.

Whether the claim was barred as a matter of law was within the purview of the Board of Revision.

{¶28} Finally, the motions and judgment entry occurred while the courts of the State of Ohio were subject to an Administrative Order tolling the time requirements of all Supreme Court promulgated-rules. Allowing Diversified additional time to conduct discovery and file a response to the motion for summary judgment was within contemplation of the Administrative Order.

{¶29} Our decision today makes no judgment as to Diversified's success or failure in its arguments in response to the motion for summary judgment. Our ruling is only that Diversified should be permitted under Civ.R. 56(F) to conduct discovery and file a response to the motion for summary judgment. We therefore grant Diversified's first Assignment of Error and find the trial court abused its discretion in denying the Civ.R. 56(F) motion.

{¶30} Diversified argues in its second Assignment of Error that the trial court erred when it granted the motion for summary judgment. Based on our decision that the trial court's denial of the Civ.R. 56(F) motion was in error, we find the May 29, 2020 judgment entry granting summary judgment in favor of Coshocton County was premature. We vacate the May 29, 2020 judgment entry and remand this matter to the trial court for further proceedings consistent with this Opinion and law.

**CONCLUSION**

{¶31} The May 29, 2020 judgment of the Coshocton County Court of Common Pleas is vacated and the matter remanded to the trial court for further proceedings consistent with this opinion and law.

By: Delaney, P.J.,

Baldwin, J. and

Wise, Earle, J., concur.