IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Frank McCartan, Appellant	:	
v.	:	No. 1162 C.D. 2007
Montgomery County Tax Claim Bureau and Albert Martin	:	Submitted: April 18, 2008

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: June 2, 2008

Frank McCartan appeals from an order of the Court of Common Pleas of Montgomery County (trial court) denying his Petition for Exceptions to Tax Upset Sale.[1] We reverse.

McCartan was the owner of real property located at 120 Argyle Road, Lower Merion Township, Montgomery County, Pennsylvania. On or about October 15, 2005, McCartan filed a Petition for Exceptions to Tax Upset Sale (Petition), against the Montgomery Tax Claim Bureau (Tax Claim Bureau) and the purchaser Albert Martin, with the trial court alleging that he and his deceased wife, Margaret McCartan, were the registered owners of the aforementioned property.

[1] By order of April 7, 2008, the Montgomery County Tax Claim Bureau was precluded from filing a brief in this appeal.

McCartan alleged further that the Tax Claim Bureau sold his property at a tax sale on September 19, 2005, for unpaid taxes for the tax year 2003. McCartan alleged that he did not receive formal written notice of the tax sale either before or after said sale. McCartan alleged that he was verbally advised by Martin on September 19, 2005, that Martin had purchased the subject property at a tax upset sale on September 19, 2005, for the sum of $244,320.22.

McCartan alleged that a separate "Notice of Public Tax Sale Warning" was mailed to him and his deceased wife on May 20, 2005, but were never delivered to him or his wife by restricted delivery as required by law. McCartan alleged that the certified mail return receipt cards bearing the date of May 21, 2005, contained in the record of the Tax Claim Bureau, which purport to bear his signature and that of his deceased wife, are forgeries and/or were falsely signed. McCartan alleged that he was in the State of Florida from May 19, 2005, and did not return to Pennsylvania until May 23, 2005. McCartan alleged that his wife died on January 27, 2001.

McCartan alleged further that no notice was posted on the subject property which he does not occupy. McCartan alleged that as a result of the Tax Claim Bureau's failure to comply with the notice requirements of the Real Estate Tax Sale Law[2] (Law), the upset tax sale that occurred on September 19, 2005, was defective. McCartan alleged that he has been wrongfully deprived of his property as a result of the Tax Claim Bureau's action, which knew or should have known, that he did not receive proper notice of the tax sale. McCartan requested that the trial court set aside the tax sale. McCartan attached to his Petition a copy of his

[2] Act of July 7, 1947, P.L. 1368, as amended, 72 P.S. §§5860.101-5860.803.

wife's death certificate, copies of the certified mail return receipt cards, and copies of the Notices of Public Tax Sale Warning.

Both the Tax Claim Bureau and Martin[3] filed answers to the Petition. The Tax Claim Bureau did not attach any exhibits to its answer. Martin attached a copy of an Affidavit for Posting of Notice of Public Tax Sale which was signed by a sheriff's deputy, but not notarized, stating that he posted the subject property on August 4, 2005, at "12:00." Thereafter, the trial court entered an order on November 18, 2005, directing that discovery, if needed, be completed within sixty days from the date of its order.

On December 14, 2005, McCartan was deposed by Martin. Therein, McCartan testified with regard to the issues raised in his Petition. McCartan testified that he first learned his property had been sold on September 19, 2005, when he met Martin at the property after the sale in October 2005. McCartan testified further that the signature contained on the certified mail return receipt card was not his signature; that he did not know if the notice warning him that his property was going to be sold at an upset tax sale had come to his house because he did not sign for it; and that he was in Florida on May 21, 2005. McCartan also testified that he went to the subject property on August 4, 2005, around 3:30 or 4:00 o'clock p.m. and that he did not see any postings that indicated that the property was scheduled to be sold at a public tax sale. McCartan testified that he went to all the doors of the property and did not see anything posted on the doors or any portion of the building. McCartan testified that he later boarded a seven o'clock flight to London on August 4, 2005.

[3] Although Martin indicates in his filings that he is *pro se*, he also indicates that he is an attorney.

The following exhibits were attached to McCartan's deposition: (1) A warning letter dated October 28, 2005, from the Tax Claim Bureau to McCartan advising McCartan that the subject property had been sold on September 19, 2005, at the annual upset tax sale (Martin Exhibit #1); (2) An Affidavit for Posting of Notice of Public Tax Sale (Martin Exhibit #2); (3) A boarding pass from British Airways for McCartan for a flight on August 4, 2005, from Philadelphia to London (Martin Exhibit #3); and (4) a flight itinerary for McCartan depicting a round trip flight departing from Philadelphia to West Palm Beach on May 19, 2005, and returning May 23, 2005 (Martin Exhibit #4). No further discovery was conducted in this matter.

On June 5, 2007, the trial court, without conducting an evidentiary hearing, entered the following order: "[F]ollowing, and, upon consideration of the Petitioner, Frank McCartan's Petition for Exceptions to the Montgomery County Tax Claim Bureau's Tax Upset Sale, the Response of the Montgomery County Tax Claim Bureau, the Answers of the Respondent, Albert Martin, and the Memoranda of Law submitted by the parties, it is hereby ORDERED AND DECREED that the said Petition is DENIED." This appeal followed.[4]

Herein, McCartan raises the following issues:[5] (1) Whether the Tax Claim Bureau failed to properly notice McCartan prior to the sale of the subject property in accordance with the mailing notice requirements of the Law; (2) Whether the Tax Claim Bureau failed to properly post the subject property prior to sale in accordance with the notice requirements of the Law; and (3) Whether the

[4] This Court's scope of review is limited to determining whether the trial court abused its discretion, clearly erred as a matter of law, or rendered a decision unsupported by the evidence. Hunter v. Washington County Tax Bureau, 729 A.2d 142 (Pa. Cmwlth. 1999).

[5] In the interest of clarity, we have reordered the issues.

Tax Claim Bureau failed to provide sufficient evidence of record regarding the published notice requirements of the Law.[6]

The law is well-settled in Pennsylvania that a valid tax sale requires the Tax Claim Bureau to strictly comply with all three of the notice provisions of Section 602 of the Law, 72 P.S. §5860.602, or the sale is void. In re Upset Price Tax Sale of September 25, 1989, 615 A.2d 870, 872 (Pa. Cmwlth. 1992). The Tax Claim Bureau must notify the owner of the property in the following three ways: (1) publication of the tax sale at least 30 days prior to the sale; (2) notification of the sale to each owner by certified mail at least 30 days in advance of the sale; and (3) posting notice of the sale on the property at least 10 days prior to the sale. 72 P.S. §§5860.602(a), (e). Strict compliance is necessary to guard against any deprivation of property without due process of law. In re Upset Price Tax Sale of September 10, 1990 (Sortino), 606 A.2d 1255 (Pa. Cmwlth. 1992).

Our Supreme Court has explained that a presumption of the regularity of an official act "exists until the contrary appears." Hughes v. Chaplin, 389 Pa. 93, 95, 132 A.2d 200, 202 (1957). A property owner may create a contrary appearance and overcome this presumption by filing exceptions to the tax sale, averring that the Law's notice provisions were not strictly followed. Sortino,

[6] Martin contends in his brief that McCartan's Concise Statement of Matters Complained of on Appeal are so broad and general and lack specificity that all the issues McCartan has raised on appeal have been waived. Our docket for this matter reveals that Martin filed a Motion to Quash/Dismiss the Appeal with this Court on December 20, 2007. Therein, Martin argued that McCartan's appeal should be quashed or dismissed due to McCartan's failure to properly identify the issues in his Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). By order of January 8, 2008, we denied Martin's motion on the basis that the trial court found the statement adequate for the purpose of preparing a Rule 1925(a) opinion. Accordingly, we decline to hold that McCartan has waived any issue based on any deficiency in his Concise Statement of Matters Complained of on Appeal.

606 A.2d at 1257. The burden then shifts to the Tax Claim Bureau or the purchaser to show that the Tax Claim Bureau strictly "complied with the notice provisions" of the Law. Id.

McCartan first argues that the certified mail return receipts received back by the Tax Claim Bureau raised significant doubt on their faces as to whether they were in fact received by the named addressees and the Tax Claim Bureau was therefore required to proceed with efforts to assure receipt of mailed notice by McCartan as per Section 607.1 of the Law.[7] We disagree.

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[7] Added by Act of July 3, 1986, P.L. 351, 72 P.S. §5860.607a. Section 607.1 governs additional notification efforts and provides as follows:

> (a) When any notification of a pending tax sale or a tax sale subject to court confirmation is required to be mailed to any owner, mortgagee, lienholder or other person or entity whose property interests are likely to be significantly affected by such tax sale, and such mailed notification is either returned without the required receipted personal signature of the addressee or under other circumstances raising a significant doubt as to the actual receipt of such notification by the named addressee or is not returned or acknowledged at all, then, before the tax sale can be conducted or confirmed, the bureau must exercise reasonable efforts to discover the whereabouts of such person or entity and notify him. The bureau's efforts shall include, but not necessarily be restricted to, a search of current telephone directories for the county and of the dockets and indices of the county tax assessment offices, recorder of deeds office and prothonotary's office, as well as contacts made to any apparent alternate address or telephone number which may have been written on or in the file pertinent to such property. When such reasonable efforts have been exhausted, regardless of whether or not the notification efforts have been successful, a notation shall be placed in the property file describing the efforts made and the results thereof, and the property may be rescheduled for sale or the sale may be confirmed as provided in this act.
>
> (b) The notification efforts required by subsection (a) shall be in addition to any other notice requirements imposed by this act.

In In re Upset Tax Sale Held 11/10/97, 784 A.2d 834 (Pa. Cmwlth. 2001), petition for allowance of appeal denied, 569 Pa. 688, 800 A.2d 936 (2002), this Court noted that a tax bureau is required to determine whether there is a significant doubt whether a record owner of a property to be sold received the required notice under the Law. Gerald Baklycki (Mr. Baklycki) and Orysia Baklycki (Mrs. Baklycki) owned property in Bucks County and had failed to pay real estate taxes in 1995. The Bucks County Tax Claim Bureau sent notice of an impending sale to each owner by certified mail, restricted delivery, return receipt requested. Mrs. Baklycki signed her name and received her certified letter. She also signed her husband's name and received his certified letter. After the Bucks County Tax Claim Bureau received the return receipts, it posted the property and ultimately sold the property at tax sale. Mr. and Mrs. Baklycki filed objections/exceptions to the sale in the Court of Common Pleas of Bucks County. In re Upset Tax Sale, 784 A.2d at 835. The Court of Common Pleas of Bucks County set aside the sale on the basis that Mr. Baklycki did not receive express or implied notice of the sale. Id. at 836.

The Bucks County Tax Claim Bureau appealed to this Court which reversed. This Court reasoned that the signed receipt that the Bucks County Tax Claim Bureau received bore Mr. Baklycki's signature. Once the Bucks County Tax Claim Bureau received a receipt with Mr. Baklycki's signature, it did not have to do anything more. This Court determined: "The statute itself provides that 'no sale shall be invalidated because of proof that mail notice as herein required was not received by the owner, provided such notice was given as prescribed by this statute.' Section 602 of the Law, 72 P.S. §5860.602." Id. at 837.

Herein, the record shows that the Tax Claim Bureau received back two certified mail return receipt cards bearing the signatures of McCartan and his

deceased wife. There is no indication in the record that McCartan had notified the Tax Claim Bureau prior to May 20, 2005, that his wife had died and he makes no allegation that he did indeed notify the Tax Claim Bureau of her death. Therefore, pursuant to this Court's decision in In re Upset Tax Sale Held 11/10/97, once the Tax Claim Bureau received a receipt purportedly bearing the signatures of McCartan and his wife, the Tax Claim Bureau did not have to do anything more. While McCartan meticulously points out several alleged flaws on the face of the certified mail return receipt cards, we conclude that there was nothing on the face of the signed receipt cards to indicate that the Tax Claim Bureau should have had significant doubt as to whether McCartan had actual receipt of the Notice of Public Sale Warning informing him that his property was scheduled for a public tax sale. Accordingly, the trial court did not err in holding that the Tax Claim Bureau properly notified McCartan of the sale of his property by certified mail at least 30 days in advance of the sale as required by Section 602 of the Law.

McCartan next contends that the evidence of notice, via posting, was insufficient as a matter of law, inasmuch as the only such evidence provided was a non-notarized document that does not meet the definition of "affidavit" as provided in Section 102 of the Judicial Code.[8] McCartan argues that Martin's attempt, after discovery had closed, to correct the fact that the document was not notarized by attaching a "re-executed" document to his brief does not cure the deficiency in the evidence. McCartan argues that attaching the now notarized document to Martin's

[8] 42 Pa.C.S. §102. Section 102 defines "affidavit" as follows:

> "AFFIDAVIT." Includes an unsworn document containing statements of fact and a statement by the signatory that it is made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

brief does not constitute evidence and that the attached document was clearly altered by adding a signature and a notarization seal date of June 28, 2006.

McCartan argues further that the trial court's finding that the property was properly posted was against the weight of the evidence. McCartan points out that he testified that he visited the property on August 4, 2005, the day of the alleged posting, and that he did not see any posting on any portion of the building or property. McCartan contends that his testimony was uncontradicted.

As to what is necessary to accomplish the requisite posting, Section 602 of the Law provides no specific method and only states that "[e]ach property scheduled for sale shall be posted at least ten (10) days prior to the sale." 72 P.S. §5860.602(e)(3). In applying this provision, this Court has held that the method of posting must be reasonable, conspicuous, and likely to inform the taxpayer and other interested buyers of the intended sale. O'Brien v. Lackawanna County Tax Claim Bureau, 889 A.2d 127, 128 (Pa. Cmwlth. 2005); Lapp v. County of Chester, 445 A.2d 1356, 1358 (Pa. Cmwlth. 1982). "The local agency has the initial burden of showing that the notice provisions of Section 602 of the Act have been complied with and a tax sale will not be invalidated when that burden is met." Chester County Tax Claim Bureau v. Griffith, 536 A.2d 503, 504 (Pa. Cmwlth. 1988).

In this case, the only evidence that was introduced into the record to prove that the subject property was properly posted in accordance with Section 602 of the Law was an unnotarized document entitled "Affidavit for Posting of Notice of Public Tax Sale" which was attached to McCartan's deposition as Martin Exhibit 2. The document provides as follows:

> I, (illegible name), being duly sworn according to law, depose and say that I personally posted the original notice, at the above identified location on:

Date of Posting 8/4/05 Time of Posting: 1200

Deputy (illegible signature) Deputy ___ (blank)

Relying on In Re Tax Sale of Real Property Situate in Paint Township, Somerset County, the trial court in this matter determined that the foregoing affidavit was sufficient evidence of posting. However, in Paint Township, the owner did not contend that the property was not posted or that it was posted in such a way that it failed to advise the public of the impending tax sale. The owner only objected to the posted notice because the affidavit of posting was not notarized. This Court pointed out that the Law does not require that the affidavit be notarized in order to be considered competent evidence of compliance with the statute. Paint Township, 865 A.2d at 1018. We stated that "[t]he affidavit of posting establishes the presumption that the premises were properly posted." Id. We stated further that "[i]f a challenger desires to rebut the presumption, he has the burden to go forward with contradictory evidence." Id. In Paint Township, the owner/challenger offered no such evidence. As such, we upheld the trial court's finding that the property had been properly posted.

In the present case, McCartan offered unrebutted contradictory evidence purportedly showing that the subject property was not in fact properly posted. However, the trial court completely ignored this evidence and held that the sheriff's affidavit was sufficient evidence of compliance with Section 602 of the Law. This Court has held that in order to constitute reasonable posting likely to ensure notice, the posting must be conspicuous, attract attention, and be placed for all to observe. Ban v. Tax Claim Bureau of Washington County, 698 A.2d 1386 (Pa. Cmwlth. 1997). Accordingly, we conclude that the trial court abused its discretion by finding that the subject property was properly posted based solely on

the unnotarized "Affidavit for Posting of Notice of Public Tax Sale" where unrebutted evidence to the contrary was submitted into the record.[9]

Finally, McCartan argues that there is no evidence of record to indicate that the tax sale of the subject property was properly noticed via publication as required by Section 602 of the Law. McCartan contends that after he raised the issue of publication, Martin attempted to correct the deficiency in the record by attaching documents purporting to be evidence of publication to a brief filed after the period of discovery had ended and the record closed. McCartan argues that the trial court abused its discretion and erred by considering documents not properly submitted into the record to find that the Tax Claim Bureau complied with the publication requirement found in Section 602 of the Law.

In response, Martin argues that McCartan waived the issue of publication by failing to raise it in his initial Petition. Martin contends that McCartan did not raise the publication issue until he filed a brief with the trial court on June 20, 2006. Martin points out that in response thereto, he provided documentation proving that in fact publication had taken place. Finally, Martin points out that the trial court found that publication had in fact taken place in compliance with the Law.

"It is the rule that an issue not raised before a trial court, generally in a pleading, is waived and may not be a basis for the court's decision. In re Dauphin County Tax Claim Bureau, 834 A.2d 1229, 1233 (Pa. Cmwlth. 2003). In

[9] We note that compliance with the other notice requirements of the Law does not necessarily cure a defect in posting because the posting requirement serves three purposes: to inform the taxpayer of the impending sale; to notify others whose interests in the land may be affected by the sale; and, to notify the public at large of the impending sale. In the Matter of Tax Sale of 2003 Upset: Appeal of John L. Gerholt, 860 A.2d 1184 (Pa. Cmwlth. 2004).

In re Dauphin County Tax Claim Bureau, the Tax Claim Bureau of Dauphin County and the purchaser at the upset sale argued the property owner had not properly raised the issue of posting and, therefore, waived the issue. Id. They emphasized that the property owner "did not specifically aver improper posting" in his petition "and that he never sought to amend the petition to claim improper posting." Id. The property owner's petition averred that the Tax Claim Bureau "failed to comply with the statutory notice provisions under the tax sale laws," and that "the first time that [the owner] received actual notice that the Tax Claim Bureau was going to proceed with the tax sale of his property was" after the tax sale had occurred from one of the mortgagees of the property. Id. In regard to the claimed technical defect and how it might affect the disposition of the appeal, this court commented:

> The Law, however, imposes duties, not on owners, but on the agencies responsible for sales; and such of those duties as relate to the giving of notice to owners of impending sales of their properties must be strictly complied with. Hence, the inquiry is not to be focused on some neglect of the owner, which is often present in some degree but on whether the activities of the Bureau comply with the requirements of the statute.

Id. at n.4 (quotation omitted). While we noted that "the preferred practice is to identify each deficiency with specificity," we concluded that the owner's "averment alerted [the Tax Claim Bureau and the purchaser] that [the owner] challenged the Bureau's compliance with notice requirements and that the Bureau would have to prove its compliance with the requirements set forth in Section 602 of the Tax Sale Law." Id. at 1233. Therefore, this Court concluded that the issue regarding proper posting had been preserved. Id.; Accord In Re Tax Sale of Real

Property Situate in Paint Township, Somerset County, 865 A.2d 1009 (Pa. Cmwlth. 2005).

Herein, while McCartan's exceptions did not specifically aver that the Tax Claim Bureau failed to comply with the publication requirement mandated by Section 602 of the Law, McCartan did aver that that the tax sale which occurred on September 19, 2005, was defective and that the subject property was improperly sold to Martin as a result of the failure of the Tax Claim Bureau to comply with the notice requirements of the Law. Following our decision in In re Dauphin County Tax Claim Bureau, we conclude that this averment alerted the Tax Claim Bureau and Martin that McCartan was challenging the Tax Claim Bureau's compliance with the notice requirements of Section 602 of the Law and that the Tax Claim Bureau would have to prove its compliance. Thus, we hold that McCartan did not waive the publication issue.

On the merits of this issue, we agree with McCartan that there was no evidence properly submitted into the record to support the Tax Claim Bureau's compliance with the publication requirement. While a trial court is permitted to consider all of the pleadings, briefs, and arguments of the parties when making its decision, a trial court abuses its discretion if it relies on documents attached to a brief as evidence to support a finding a fact. As stated previously herein, the only discovery that took place in this matter was McCartan's deposition testimony and the trial court did not conduct an evidentiary hearing. Martin, apparently standing in the shoes of the Tax Claim Bureau, offered no evidence through the discovery process that the Tax Claim Bureau published notice of the impending tax sale as required by Section 602 of the Law. Accordingly, we conclude that the trial court's determination that the Tax Claim Bureau published notice of the impending tax sale in accordance with Section 602 is not supported by the record.

Accordingly, as the evidence does not support the trial court's denial of McCartan's Petition, the trial court's order is reversed, thereby voiding the upset tax sale of the subject property.

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JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Frank McCartan, Appellant	:	
v.	:	No. 1162 C.D. 2007
Montgomery County Tax Claim Bureau and Albert Martin	:	

O R D E R

AND NOW, this 2nd day of June, 2008, the order of the Court of Common Pleas of Montgomery County in the above-captioned matter is reversed.

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JAMES R. KELLEY, Senior Judge