

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pottery Emporium, LTD. :
 :
 v. : No. 1392 C.D. 2010
 : Submitted: February 7, 2011
 Tax Claim Bureau of Monroe County :
 and Mount Pocono Enterprises, LLC :
 :
 Appeal of: Mount Pocono :
 Enterprises, LLC :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE JAMES R. KELLEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: May 3, 2011

Mount Pocono Enterprises, LLC (Mt. Pocono) appeals from the order of the Court of Common Pleas of Monroe County (trial court), setting aside the upset tax sale of property owned by Pottery Emporium, LTD. (Pottery Emporium) and located at Route 115 in Effort, Monroe County. Mt. Pocono questions whether the trial court erred in invalidating the sale to Mt. Pocono based on its finding that although the Monroe County Tax Claim Bureau (Bureau) had properly posted the property, a representative of Mt. Pocono interfered with the posted notice of a tax sale.

The property in question is a Victorian-style building owned by Pottery Emporium, whose sole shareholder and president is Jane Lynn Becker (Becker), a resident of Florida. Becker rents the property to her sister, Mary Kathleen Gallagher (Gallagher), who operates a barbershop on the premises and resides there along with other tenants. J.D. Dalrymple (Dalrymple) has been a tenant since approximately August 2009. Becker failed to pay real estate taxes on the property for the years 2007 and 2008. After non-payment of the 2007 taxes, the Bureau sent Becker a Notice of Return and Claim, stating that the amount of taxes owed for 2007 was \$5259.76. Similarly, after non-payment of the 2008 taxes, Becker was sent another Notice of Return and Claim, advising her that the taxes were unpaid for 2008 and 2007 and the total amount owed was \$10,969.40, which she received on May 11, 2009.

The Bureau listed the property for Upset Tax Sale and sent a Notice of Tax Sale to Becker advising her that the property would be sold for non-payment of taxes at an upset sale scheduled for September 15, 2009. Becker signed a certified mail receipt acknowledging service on May 30, 2009. Becker received an Amended Notice of Return and Claim on July 10, 2009, for tax years 2007 and 2008, revising the claim amount for 2007 to \$5727.53 and for 2008 to \$5459.30 with a notice that if this claim was paid before July 1, 2010, the property would not be sold.¹ Subsequently, the Bureau posted the property on July 15, 2009, by

¹ As the trial court pointed out and as evidenced by the parties' Joint Exhibit 1, there were numerous notices sent to Pottery Emporium regarding delinquent taxes for the property, all of which are required under various provisions of the Real Estate Tax Sale Law (Law), Act of July 7, 1947, P.L. 1368, *as amended*, 72 P.S. §§ 5860.101-5860.803. Included in the joint exhibit were five Notices of Return and Claim, a form that advises the taxpayer that a claim has been entered for non-payment of taxes, sets forth the specific tax year(s) for which taxes are delinquent, and notifies the taxpayer that if the claim is not paid "on or before December 31 of (Footnote continued on next page...)

placing the notice in a clear, waterproof pouch stapled to a green nylon flag that was attached to a two to two and one-half foot metal rod inserted into the ground near the front of the property along Route 115, near the barbershop sign. The property was sold at the upset sale on September 15, 2009 to Mt. Pocono.²

Becker filed exceptions to the upset sale and a petition to set aside the sale on October 13, 2009, alleging that the Amended Notice of Return and Claim was confusing and led her to believe that the upset sale scheduled for September 15, 2009 would not take place and that eventual purchaser Mt. Pocono's representative, Michael Price, interfered with the posted Notice of Sale on the property. At a hearing before the trial court on April 26, 2010, Becker, Gallagher and Dalrymple testified on Pottery Emporium's behalf, and Darrell Lutz, an employee of the Monroe County Assessment Office, testified for the Bureau.

Becker testified that she received a Notice of Public Tax Sale on May 30, 2009, informing her that a tax sale was scheduled for September 15, 2009 for delinquent taxes and she then made arrangements to borrow the money, but became confused when she received an "Amended Notice of Return and Claim" on July 10, 2009. Becker testified that she "thought . . . that that meant they had amended when the sale was, or whatever was. I thought that had been changed."

(continued...)

this year . . . the claim will become absolute . . . [and] the property will be advertised for and exposed to sale . . .” See Joint Exhibit 1, at 2. Becker acknowledged receiving one such notice on May 11, 2009, which listed unpaid taxes for 2008 and prior years in the amount of \$10,969.40. However, as the claim for tax year 2007 had become absolute, the property was exposed to tax sale, and Ms. Becker was sent a Notice of Public Tax Sale, scheduling the sale for September 15, 2009, which she received on May 30, 2009.

² At the hearing, Pottery Emporium's attorney stated that he was not raising an issue with the advertising notice of Section 602(a) of the Law, 72 P.S. § 5860.602(a), and that issue is not before us on appeal.

Hearing of April 26, 2010, Notes of Testimony (N.T.) at 20. She explained that she didn't know that the amendment referred to a revision of the amount she owed in taxes for tax years 2007 and 2008 and that she thought her property would not be sold because the amended notice said she had until July 1, 2010 to pay her taxes. Becker admitted a previous tax delinquency for 2006 and that she had received a notice of return and claim for the unpaid 2006 taxes, which she then paid.³ Becker stated that after she got the notices in 2009, she called the Bureau twice about the taxes and while she admitted that “[t]hey [the Bureau] didn’t tell me the sale would not occur . . . I just felt I had time when I talked to them.” *Id.* at 29. Finally, Becker stated that she did not know whether the property was posted and that she learned that the property had been sold when her sister called her the day after the sale.

Gallagher testified that she did see a notice posted on the property sometime between May and September 2009, but she denied that it was a tax sale notice. She testified that she sent this notice down to her sister in Florida. Gallagher also testified that sometime during the summer of 2009, she found a notice “on the other side of our planters” and, while it was “hardly noticeable,” it said something about taxes being due. N.T. at 43, 45. She explained that she and a friend had seen a car drive up to the property one day and someone got out and placed something out front. When she and the friend went out later that day, the friend insisted on seeing what had been posted, which Gallagher testified was the notice about taxes being due and that it was attached to “[a] little metal thing.” *Id.*

³ The property in question was previously listed by the Bureau for upset tax sale in 2007. Lutz testified that he posted the property twice, once on July 18, 2007, and again on July 15, 2009, in connection with delinquent taxes owed by Becker. An affidavit of posting was included with the Bureau’s documents submitted at the hearing. *See* Joint Exhibit 1, at 15.

at 46. Finally, Gallagher testified that on September 16, 2009, Michael Price, an agent for Mt. Pocono, came to the property and told her he had purchased the property, that he owned everything in the building and that he had personally posted the property by putting the notice in a wooden frame he had built himself and then placing it in the yard of the property. Gallagher testified that Price told her he took a photograph of the posting, but she denied seeing either the photograph or the notice in the wooden frame anywhere on the property.

Dalrymple testified that he moved into the property as a tenant in August, 2009. He never saw any notice posted on the property. Dalrymple corroborated Gallagher's testimony that Price came to the property the day after the upset sale and told them he owned the property and everything in it. Dalrymple also testified that Price told him that he had built a wooden frame, put the notice of sale in the frame, placed it in the yard and then took a picture of it. Dalrymple also denied seeing either the wooden-framed notice or the photograph.

Darrell Lutz testified that he had been posting properties on behalf of the Bureau for ten years and that he follows a general procedure of posting as close to the road as possible to ensure that the notice is visible. Lutz testified that the notice is stapled to a green flag and then attached to a metal rod which is stuck in the ground. When shown a picture of the property, he stated that he specifically remembered it because he had previously posted the property in July 2007. Lutz identified an affidavit of posting signed by him on July 15, 2009. Lutz testified that he and another employee "pulled up near where the sign and the mailbox would be" and posted the notice adjacent to the haircuttery sign. N.T. at 59. Lutz testified that the notice was placed in a water-proof sealed envelope and then stapled to a green nylon plastic flag attached to a two foot long metal rod, which

was stuck in the ground. Finally, Lutz stated that the posting was placed as near to Route 115 as possible and that it was visible from the road.

The trial court set aside the tax sale, finding that while the Bureau had “properly posted the property on July 15, 2009,” sometime after that “the notice was moved from where the Bureau had left it.” Trial court’s June 11, 2010 Opinion at 9. The trial court found that a notice was found by a tenant in an inconspicuous location on the property which was not where the Bureau’s witness had placed it and that Michael Price, an agent for the eventual purchaser Mt. Pocono, placed a notice of sale on the property at some point before the sale. The trial court determined that because the eventual purchaser had interfered with the posting requirements, the sale should be set aside.⁴

On appeal,⁵ Mt. Pocono challenges the sufficiency of the evidence supporting the trial court’s finding that as the successful purchaser, it had interfered with the posting, warranting invalidation of the sale. Mt. Pocono argues that the evidence establishes that the Bureau properly posted the property on July 15, 2009, and that there was no evidence that it or its agent at any time removed or possessed this notice. Mt. Pocono further asserts that the only evidence that its agent, Price, allegedly interfered with the posting were the hearsay statements of

⁴ The trial court rejected Pottery Emporium’s argument that the mail notice required by Section 602(e)(1) was defective because Becker was confused after she received an Amended Notice of Return and Claim on July 10, 2009. The trial court found that in addition to Becker’s knowledge that her property was scheduled to be sold at an upset sale because she had received the Notice of Public Tax Sale on May 30, 2009, the Bureau’s subsequent posting of the property and her awareness that she hadn’t paid her taxes in two years “should have caused Becker to investigate the status of her property with the Tax Claim Bureau if she had questions.” Trial court’s Opinion at 7.

⁵ Based on the issues raised, this court’s review is limited to determining whether the trial court erred as a matter of law or rendered a decision unsupported by the evidence. *Schooley v. Beaver County Tax Claim Bureau*, 4 A.3d 797 (Pa. Cmwlth. 2010).

Gallagher and Dalrymple that Price told them he had posted the property himself. Mt. Pocono argues that because there was no evidence that Price either removed or improperly possessed the Bureau's notice, Pottery Emporium's reliance on *In re Erie County Tax Claim Bureau (Appeal of Trussel)*, 517 A.2d 221 (Pa. Cmwlth. 1986), is misplaced. Mt. Pocono argues that the trial court found that the Bureau had properly posted the property and that because Pottery Emporium failed to rebut this with competent evidence, it was error for the trial court to set aside the upset tax sale. We agree.

It is well settled that a valid tax sale requires strict compliance with all three of the notice provisions of Section 602 of the Real Estate Tax Sale Law (Law), Act of July 7, 1947, P.L. 1368, *as amended*, 72 P.S. § 5860.602, and that if any of the notices are defective, the sale is void and must be set aside. *Pacella v. Washington County Tax Claim Bureau*, 10 A.3d 422 (Pa. Cmwlth. 2010). In a tax sale case, the Bureau has the burden of proving compliance with the statutory notice provisions. *Id.*

With regard to posting, Section 602 merely states that “[e]ach property scheduled for sale shall be posted at least ten (10) days prior to the sale.” Section 602 (e)(3) of the Law, 72 P.S. § 5860.602 (e)(3). While the Law does not prescribe a particular method of posting, we have held that the method chosen must be reasonable and conspicuous, and that it not only inform the taxpayer of the impending tax sale, but also the public at large as well as any one else with an interest in the property. *In re Upset Price Tax Sale*, 606 A.2d 1255 (Pa. Cmwlth. 1992). When considering the propriety of a posting, the courts have looked to the particular facts of each case, *i.e.* the nature and location of the property and the placement of the notice. *In re Upset Sale Tax Claim Bureau McKean County*, 965

A.2d 1244 (Pa. Cmwlth. 2009). As we recently noted, “[t]he critical question under Section 602(3) of the [Law] is not whether there was a better manner to post notice, but rather whether the manner of posting actually utilized was ‘reasonable and likely to inform the taxpayer as well as the public at large of an intended real property sale.’” *In re Somerset County Tax Sale of Real Estate Assessed in the Name of Tub Mill Farms, Inc.*, 14 A.3d. 180, 184 (Pa. Cmwlth. 2010) (citation omitted). See also *In re Upset Sale Tax Claim Bureau McKean County*, 965 A.2d 1244 (Pa. Cmwlth. 2009) (notice posted on door fifty yards from private road reasonable); *In re Tax Sale of 2003-Upset*, 860 A.2d 1184 (Pa. Cmwlth. 2004) (tax bureau’s posting near mailbox reasonable as likely both public and owner would see it); *In re Sale of Real Prop. for Delinquent Tax by Elk County Tax Claim Bureau*, 793 A.2d 1025 (Pa. Cmwlth. 2002) (notice posted on tree closest to the road reasonable). There is no requirement that the posted notice remain on the property subject to the tax sale for ten consecutive days prior to the scheduled sale. *Ganzer v. Erie County Tax Claim Bureau*, 641 A.2d 1261 (Pa. Cmwlth. 1994). Nor is the tax bureau required to monitor the notice once it has been posted. *In re Erie County Tax Claim Bureau (Appeal of Trussell)*, 517 A.2d 221 (Pa. Cmwlth. 1986). Finally, while the Law “imposes duties on the agencies responsible for sales, the common law imposes duties on the buyer of the property at the tax sale not to interfere in any manner with the posted notice so as to nullify the posted notice as demonstrated in [*Appeal of*] *Trussell*.” *Ganzer*, 641 A.2d at 1263.

In the matter *sub judice*, the trial court found that Lutz posted the property on July 15, 2009, and that the notice was placed at the front of the property on Route 115. The trial court then found that “[s]omeone” took this notice down and a notice was placed in a “less conspicuous place on the property.”

Trial court's Op. at 3. Finally, the trial court found that Price "posted a notice of tax sale on the property at some point before the sale." *Id.* The trial court based the latter finding on the testimony of Gallagher and Dalrymple that Price told them he had posted the property himself and thus concluded that Mt. Pocono interfered with the posting.⁶ It did not find, however, that Price was the one who took down the Bureau's notice or that he was the one who moved it to a less conspicuous spot, nor was there any evidence – let alone substantial evidence – to support such a finding.

In contrast, in *Appeal of Trussel*, the eventual buyer testified that he saw a neighbor tear down the posted notice and throw it on the ground, after which he picked it up and held on to it for the six days preceding the sale. The court held that because the buyer had retained possession of the notice he had interfered with the notice requirements of the Law. There is no evidence here that Price similarly interfered with the Bureau's properly posted notice at any time, by either moving or removing it, or retaining possession of it, and therefore we believe *Trussell* is inapposite. Even if Price did post his own notice, which both witnesses denied seeing anywhere on the property, this does not establish interference with the Bureau's posted notice.⁷

⁶ While Mt. Pocono argues these statements were hearsay, it made no hearsay objection before the trial court at the hearing, and the trial court accepted them as credible, as was its prerogative. It is within the province of the trial court to weigh the testimony, make credibility determinations and make findings of fact based on those assessments. *Consol. Return by McKean County Tax Claim Bureau*, 820 A.2d 900 (Pa. Cmwlth. 2003).

⁷ The more logical inference that can be drawn from Gallagher's testimony is that she and the tenant removed the notice posted by the Bureau after they saw it being posted that summer day, and that that was the notice she testified she sent to her sister, Becker, in Florida.

Accordingly, because we conclude there was insufficient evidence to support a finding that Mt. Pocono interfered with the notice requirements of Section 602(e)(3) of the Law,⁸ we reverse the trial court's order setting aside the upset tax sale of Becker's property.

BONNIE BRIGANCE LEADBETTER,
President Judge

Senior Judge Kelley dissents.

⁸ 72 P.S. §5860.602(e)(3).

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	:	
Appeal of: Mount Pocono	:	
Enterprises, LLC	:	

ORDER

AND NOW, this 3rd day of May, 2011, the order of the Court of Common Pleas of Monroe County in the above-captioned matter is hereby REVERSED.

BONNIE BRIGANCE LEADBETTER,
President Judge