

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Albert Serrino :
 :
 v. : No. 2683 C.D. 2010
 :
 County of Luzerne Tax Claim Bureau : Argued: October 20, 2011
 :
 Appeal of: Christopher Puma :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE ROBERT SIMPSON, Judge (P.)
 HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: December 28, 2011

Christopher Puma (Purchaser) appeals from the November 15, 2010 Order of the Court of Common Pleas of Luzerne County (trial court), which granted Albert Serrino's (Owner) Petition to Set Aside Tax Sale of Real Estate (Petition to Set Aside) of property located at 858 Sans Souci Parkway (Property) and declared the September 23, 2010 judicial sale of the Property null and void. The trial court further directed the Luzerne County Tax Claim Bureau (Bureau) to accept payment of all taxes due and owing from Owner. We vacate and remand.

The Bureau initially exposed the Property to an upset tax sale on September 16, 2009, based on Owner's failure to pay the 2007, 2008, and 2009 real estate taxes in the total amount of \$11,976.34; however, the Bureau was unable to obtain a bid sufficient to pay the upset price. (Petition to Sell Tax Delinquent Property Free and Clear of all Liens and Encumbrances (Petition to Sell) at 2, Reproduced Record (R.R.) at 02-03.) Consequently, on July 23, 2010, the Bureau filed the Petition to Sell with the trial court, pursuant to Section 610 of the Real Estate Tax Sale Law (Law).¹ By order dated August 23, 2010, the trial court ordered that the Property be

¹ Act of July 7, 1949, P.L. 1368, as amended, 72 P.S. § 5860.610. Section 610 permits a tax claim bureau, in cases where the upset price is not bid at an upset tax sale, to petition the court of common pleas for judicial sale of the property. Section 610 provides as follows:

In cases where the upset price shall not be bid at any such sale, the sale shall be continued, but not beyond the end of the calendar year, without further advertising, and the bureau may, at any time during or after the continuance, and shall, immediately at the written direction of a taxing district, file its petition in the court of common pleas of the county to sell the property under sections 612 and 612.1. The bureau shall set forth on the petition (1) the tax claim upon which the property was exposed for sale, (2) that neither the owner, his heirs or legal representatives or any lien creditor, his heirs, assigns or legal representatives or other person interested has caused stay of sale, discharge of tax claim or removal from sale, (3) that the property was exposed to public sale and the date of such sale, (4) that before exposing the property to public sale the bureau fixed an upset price, as herein provided, and (5) that it was unable to obtain a bid sufficient to pay said upset price. Upon the presentation of such petition, accompanied with searches, showing the state of the record and the ownership of the property and all tax and municipal claims, liens, mortgages, ground rents, charges and estates against the same, the court shall grant a rule upon all parties thus shown to be interested to appear and show cause why a decree should not be made that said property be sold, freed and cleared of their respective tax and municipal claims, liens, mortgages, charges and estates, except separately taxed ground rents. The rule shall be made returnable in not more than thirty (30) days from the date the petition was presented or as otherwise determined by the court.

Id.

sold at a judicial sale on September 23, 2010, free and clear to the highest bidder, and that the purchaser at such sale shall take and have absolute title to the Property. (Order for Judicial Sale, August 23, 2010, R.R. at 018.) It is undisputed that Purchaser was the successful bidder at the judicial sale.

On September 27, 2010, Owner filed the Petition to Set Aside alleging, *inter alia*, that: (1) the bid at the judicial sale was substantially less than the amount due and owing and did not include the mortgage or other previously filed liens of record; (2) Owner is ready, willing, and able to make payment of the total amount of tax due; (3) proper notice and/or service of the Petition to Sell was not received by Owner and/or all interested parties as required by the Law; (4) Owner never received proper notice of the taxes due for 2007, 2008, or 2009 prior to the sale; (5) the Property is a commercial property with an ongoing cleaning business operated by a tenant with an option to purchase and said tenant never received notice of the sale in order to protect its interest; (6) Owner's estranged wife, who has marital interest in the Property, never received notice of the sale; and (7) the mortgage holder, Citizens Bank of PA, was not provided with proper notice of the sale because it did not receive notice at its local office. (Petition to Set Aside at 1-2, R.R. at 020-021.) Attached to the Petition to Set Aside was a certificate of service stating that the Petition was served on Purchaser by United States Mail and on the Bureau by hand delivery. (Petition to Set Aside, R.R. at 023.) On September 27, 2010, the trial court issued a Rule to Show Cause (Rule Returnable) upon the Bureau to show cause why the proposed tax sale entered against Owner should not

be null and void.² (Rule Returnable, R.R. at 024.) There are no documents in the record indicating that the Rule Returnable was served on Purchaser. The Rule was returnable on November 15, 2010 and a hearing was scheduled for 9:30 a.m. on November 15, 2010. (Rule Returnable, R.R. at 024.)

On November 15, 2010, only Owner and the Bureau appeared before the trial court; Purchaser did not appear. (Hr'g Tr. at 2, R.R. at 028.) Counsel for the Bureau informed the trial court that the Petition to Set Aside was unopposed. (Hrg. Tr. at 2, R.R. at 028.) Without taking any evidence, the trial court stated on the record that, "based on the submissions, the petition being unopposed and the Court determining that the petition has merit, the Court will grant the petition to set aside the sale of real estate in question." (Hr'g Tr. at 2, R.R. at 028.) Thereafter, the trial court entered its November 15, 2010, Order granting Owner's Petition to Set Aside. In a brief opinion in support of its Order, the trial court points out that both the Petition to Set Aside and a Rule Returnable were filed on September 27, 2010, and that a certificate of service also filed on that date indicates that service by mail was made upon Purchaser. (Trial Ct. Op. at 1.) Purchaser now appeals the trial court's November 15, 2010, Order to this Court.³

² In addition, the trial court stayed all proceedings pending the outcome of the Petition to Set Aside. (Rule Returnable, R.R. 024.)

³ "Our standard of review in tax sale cases is limited to determining whether the trial court abused its discretion, rendered a decision with a lack of supporting evidence, or clearly erred as a matter of law." Sabbeth v. Tax Claim Bureau of Fulton County, 714 A.2d 514, 516 n.3 (Pa. Cmwlth. 1998).

Before this Court, Purchaser argues that Owner did not properly serve the Petition to Set Aside because Owner sent the copy via mail. Purchaser argues that Owner was required to serve him with the Petition to Set Aside as original process pursuant to Rule 402 of the Pennsylvania Rules of Civil Procedure, which requires that a pleading be handed to a party personally or to an adult member of the party's family at his residence, or to the agent or person in charge at the party's office or place of business. Purchaser avers that he never received a copy of the Petition to Set Aside despite the certificate of service indicating that Owner mailed a copy to him. Purchaser also avers that he never received a copy of the Rule Returnable and that there is no affidavit or certificate of service in the record or on the docket showing that the Rule Returnable was properly served on anyone. Purchaser argues that, on this basis alone, the trial court's November 15, 2010 Order should be vacated and this matter remanded for a hearing on the Petition to Set Aside, with notice to Purchaser, so that he will have an opportunity to be heard.

In response, Owner argues that the certificate of service in the record shows that Purchaser was mailed a copy of the Petition to Set Aside and that notice was mailed the day the Rule Returnable was granted. Purchaser does not contend that his address was incorrect on the certificate of service. Owner contends that Purchaser's counsel was also notified on behalf of Purchaser, and Purchaser's counsel contacted Owner's counsel and advised that he had a conflict and would advise Purchaser to retain new counsel. The Petition to Set Aside and Rule Returnable were never returned as undeliverable to Owner's counsel. Owner argues that there is nothing in the Law which mandates that a purchaser must be given notice of a property owner's filing of a petition to set aside a tax sale. The Law only provides that a tax claim bureau give a property owner notice by certified mail;

therefore, required notice to a purchaser cannot rise above the level required by the Law. Thus, Owner argues, Purchaser's argument that the service of the Petition to Set Aside should have been treated as original process is misplaced. Owner contends that Purchaser was aware of the hearing and failed to take action.

There is no statutory provision directing how, or upon whom, a petition to set aside filed by the property owner must be served. However, our Courts have made it clear that a purchaser has standing to participate in an action seeking to set aside a tax sale before the sale is confirmed by the court. In Wheatcroft Appeal, 272 A.2d 186, 187 (Pa. Super. 1970), the tax claim bureau filed a consolidated return with the court of common pleas pursuant to Section 607 of the Law, 72 P.S. § 5860.607,⁴ after conducting its yearly upset sale of real property. However, in the return the bureau recommended that the sale of certain property purchased by Wheatcroft at the upset tax sale not be confirmed by the court because the sale was void due to improper notice and a question as to the validity of the claim. Wheatcroft, 272 A.2d at 187. The trial court in that case declared the sale to Wheatcroft void for the reasons set forth by the bureau. Id. Wheatcroft filed exceptions to the decree, which the trial court denied on the basis that Wheatcroft had no standing to object to the decree since he was not an owner or lien creditor but a mere "preferred proposer." Id. On appeal, the Superior Court reversed and remanded the matter, finding that the trial court's decision was based on the mere suggestion by the bureau that the

⁴ Section 607 of the Law directs that the tax claim bureau make a consolidated return with the trial court no later than sixty days after a tax sale is held setting forth the description of the property exposed to sale, the owner's name, the names of those to whom notice by mail was given in accordance with the Law and other particulars of the tax sale. 72 P.S. § 5860.607.

sale not be confirmed and there were no facts on the record supporting the bureau's reasons; therefore, Wheatcroft "should have been afforded an opportunity to be heard." Id. Accordingly, the Superior Court held that Wheatcroft had standing to object to the trial court's action, stating:

We do not disapprove of the action of the [b]ureau in making suggestions to the court and of its giving evidence upon which the court might base a decision on the propriety of confirming a tax sale. However, we believe that when the [b]ureau makes the required Return, as it did in this case, in the interest of justice the purchaser should have an opportunity to hear and refute any evidence offered by the [b]ureau or owner. Without a full hearing on the matter, the door might be opened to fraud, whereby the [b]ureau could repudiate an otherwise valid sale for frivolous or illegal reasons. A question of fact having been raised by the [b]ureau's suggestion, the case should have been set down for hearing before the court made a decision on the validity of the sale.

Id.

In M.J.M. Financial Services, Inc. v. Burgess by Dignazio, 533 A.2d 1092 (Pa. Cmwlth. 1987), M.J.M. Financial Services, Inc. (M.J.M.) was the purchaser of certain property at a tax sale. The property owner (Dignazio) sought to have the tax sale set aside due to improper notice. M.J.M., 533 A.2d at 1093. The trial court held a hearing at which Dignazio and a witness for the tax claim bureau appeared. Id. M.J.M. did not participate in the hearing. Id. The trial court ordered that the tax sale be set aside. Id. at 1093-94. M.J.M. filed a petition to open judgment and to intervene, alleging that it did not learn of the proceedings in the trial court until two days after the trial court ordered that the tax sale be set aside when a letter was received via first class mail advising of the petition to strike off the sale and the hearing date. Id. at 1094. The trial court denied the petition to intervene on the

ground that M.J.M. lacked standing. Id. Dignazio argued that M.J.M. did not have standing to appeal to the trial court because “it is up to the [b]ureau to prove that it complied with the notice provisions of the [L]aw and that where it concedes it has not done so, M.J.M. has no standing to complain.” Id. Relying on L. Marra Real Estate Appeal, 457 A.2d 231 (Pa. Cmwlth. 1983), the property owner argued that, because a “successful bidder lacks standing to file exceptions to the confirmation nisi, *a fortiori*, M.J.M. has no standing here.” Id. This Court disagreed stating:

We note first that this case is distinguishable from the situation in L. Marra because here the successful bidder is not attempting to file exceptions to the *confirmation* of the sale but to file exceptions to the *setting aside* of the sale. There is a world of difference. Despite [Dignazio’s] protestations to the contrary, we find Wheatcroft Appeal, [], 272 A.2d 186 (1970) to be controlling here. In Wheatcroft[,] after a tax sale, the [b]ureau requested that the Court not confirm the sale by indicating in its return that the sale was void for “improper notice and question of validity of claim.” The trial court determined that the purchaser lacked standing to contest the [b]ureau’s recommendation. The Superior Court disagreed. It reasoned that the trial court had acted in error in setting aside the sale based only upon the suggestion of the [b]ureau when there were no facts of record to support the [b]ureau’s position. [Dignazio’s] attempts to distinguish Wheatcroft by asserting that the facts were of record here in that a hearing was held on its petition to set aside.

The value of this hearing, however, was substantially diminished when the purchaser had no opportunity to appear at the hearing and contest the facts. The Wheatcroft Court indicated that to deny the purchaser standing might be to open the door to fraud because “the [b]ureau could repudiate an otherwise valid sale for frivolous or illegal reasons” and further opined that “in the interest of justice, the purchaser should have an opportunity to hear and refute any evidence offered by the [b]ureau or owner.” Id. at 345-46, 272 A.2d at 188. We agree and note that M.J.M. has alleged that [property owner] did receive notice of the sale through his secretary. This is a question of fact and M.J.M. deserves the opportunity to show that the notice provisions of the Law were met.

Id. at 1094-95 (emphasis in original). Accordingly, this Court vacated the order of the trial court and remanded “this case with directions that the trial court permit the intervention and hold a hearing at which M.J.M. be permitted to put on evidence to demonstrate that the notice provisions of the Law were complied with.” Id. at 1095. See also Plank v. Monroe County Tax Claim Bureau, 735 A.2d 178, 182 (Pa. Cmwlth. 1999) (A purchaser/successful bidder “may not raise . . . lack of notice **after** absolute confirmation.” (emphasis in original)).⁵

As in Wheatcroft and M.J.M., there are many questions of fact in the instant appeal regarding whether Purchaser had notice and an opportunity to be heard that are not answered in the certified record or by the trial court’s decision granting the Petition to Set Aside. The only certificate of service contained in the record is the one attached to the Petition to Set Aside. This certificate of service states that the Petition to Set Aside was mailed via first class mail to Purchaser at a residential address and there is no indication that a copy of the Petition to Set Aside was served in any manner upon Purchaser’s counsel. In addition, there is nothing in the

⁵ In Plank, the purchasers were the successful bidders at a judicial sale; however, the purchasers later learned that the bureau had not given notice of the judicial sale to the current mortgagee. Plank, 735 A.2d at 180-81. The purchasers filed a petition to set aside the tax sale, which the trial court dismissed on the basis that “the [b]ureau owed no duty to provide title information to purchasers at a judicial sale” and the petition to set aside tax sale “disclosed ‘no basis for the *purchaser* at the Judicial Sale to set aside the sale . . .’” Id. at 181 (emphasis in original). The trial court entered a decree of absolute confirmation shortly after dismissing the purchasers petition to set aside the tax sale. Id. at 181-82. On appeal, this Court held that the purchasers lacked standing under the Law to file objections or exceptions to the tax sale, the Law does not permit a purchaser to file a petition to set aside either before or after the tax sale has been absolutely confirmed, and the purchasers lacked standing to raise the lack of notice to the mortgagee. Id. at 181.

certified record showing that the Rule Returnable was served on any of the interested parties or their counsel of record, which includes not only the Bureau but also Purchaser. There is neither an affidavit nor certificate of service with respect to the Rule Returnable nor do the docket entries reflect that any such document was filed with the trial court. Moreover, there is nothing in the record to support either the Purchaser's contentions that he never received the Petition to Set Aside or the Rule Returnable, or Owner's contentions that the Rule Returnable was served on Purchaser and his counsel. As the successful bidder on the Property at the judicial sale, Purchaser is an interested party and should have been served with both the Petition to Set Aside and the Rule Returnable so that he would have an opportunity to oppose the Petition to Set Aside.

Therefore, we must vacate the trial court's Order and remand this matter for an evidentiary hearing as to whether Purchaser was properly served, in accordance with the Pennsylvania Rules of Civil Procedure and the Luzerne County Local Rules of Civil Procedure, with both the Petition to Set Aside and the Rule Returnable. If the trial court determines after the hearing that Purchaser did not have proper service of either document, a new hearing, with notice to Purchaser, must be held on the merits of the Owner's Petition to Set Aside.⁶

RENÉE COHN JUBELIRER, Judge

⁶ Due to our disposition, we need not address the issues raised by Purchaser with regard to the merits of the trial court's November 15, 2010 Order granting Owner's Petition to Set Aside.

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ORDER

NOW, December 28, 2011, it is hereby ordered that the November 15, 2010 Order of the Court of Common Pleas of Luzerne County, entered at Docket No. 9575 of 2010, is **VACATED** and this matter is **REMANDED** for proceedings consistent with the foregoing opinion.

Jurisdiction relinquished.

RENÉE COHN JUBELIRER, Judge

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 HONORABLE ROBERT SIMPSON, Judge (P.)
 HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE LEAVITT

FILED: December 28, 2011

Respectfully, I dissent. The majority overlooks the fact that Christopher Puma (Purchaser), the successful bidder at the judicial sale, never intervened and, therefore, is not a party entitled to appeal. Precedent requires that we quash his appeal. If I were to reach the merits, I would reject Purchaser's argument that he was entitled to notice of the Petition to Set Aside or Rule Returnable because, simply, the Real Estate Tax Sale Law¹ requires no such notice.

The certified record reveals that Purchaser was not a named party nor did he intervene in the proceedings before the trial court. Pennsylvania Rule of Appellate Procedure 501 states: "Except where the right of appeal is enlarged by

¹ Act of July 7, 1947, P.L. 1368, *as amended*, 72 P.S. §§5860.101 – 5860.803.

statute, any *party* who is aggrieved by an appealable order ... may appeal therefrom.” Pa. R.A.P. 501 (emphasis added). Because Puma was not a party to the proceedings below he cannot appeal to this Court. *Commonwealth v. Alessi*, 524 A.2d 1052, 1053 (Pa. Cmwlth. 1987). *See also In re Tax Sale Held September 10, 2003, by the Tax Claim Bureau of County of Lackawanna*, 859 A.2d 15, 20 (Pa. Cmwlth. 2004) (noting that “an appeal by one who is not a party to a proceeding in the trial court must be quashed” and, on that basis, quashing successful bidder’s appeal of order setting aside tax sale). Consistent with precedent, I would quash Purchaser’s appeal for lack of jurisdiction.

I disagree with the majority’s conclusion that because Purchaser had standing to participate in the action to set aside the judicial sale, he was automatically entitled to be served in accordance with the Pennsylvania Rules of Civil Procedure with notice of the Petition to Set Aside and Rule Returnable. The provisions of the Real Estate Tax Sale Law are quite detailed, and they contemplate notice only to the owner of the property exposed to sale and third-party lien creditors. The Law is conspicuously silent about serving purchasers with notice under any circumstances. This makes sense because, as a general proposition in tax sale cases, “[o]nly a person who has suffered an injury as a result of the claimed lack of notice may raise it.” *Plank v. Monroe County Tax Claim Bureau*, 735 A.2d 178, 182 (Pa. Cmwlth. 1999). There can really be no harm to a

purchaser if a tax sale is set aside because he or she will receive a refund of the purchase price.²

Finally, to require service on any person who might have standing in a matter places an undue burden on a petitioner and is beyond the requirements of the Pennsylvania Rules of Civil Procedure.

MARY HANNAH LEAVITT, Judge

² It also bears noting the well settled principle that

[t]he purpose of the [Real Estate Tax Sale Law] is to collect overdue taxes, not to punish taxpayers who omit through oversight or error to pay their taxes, ... and not to permit real estate speculators to obtain the property of taxpayers who are willing and able to pay their taxes.

In re Sale of Real Estate by Montgomery Tax Claim Bureau for 1997 Delinquent Taxes, 836 A.2d 1037, 1042 (Pa. Cmwlth. 2003) (citation omitted). In this case, according to the Petition to Set Aside, Albert Serrino, the owner of the property, was ready, willing and able to pay the total amount of tax due.