

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Tax Sale held on September 24, :  
2007 by the Tax Claim Bureau of :  
Lackawanna County :  
 :  
PIN 19202-010-003 : No. 691 C.D. 2009  
 : Argued: December 7, 2009  
 :  
Appeal of: David Keller :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE KEITH B. QUIGLEY, Senior Judge

*OPINION NOT REPORTED*

MEMORANDUM OPINION  
BY SENIOR JUDGE QUIGLEY

FILED: January 20, 2010

David Keller (Appellant) appeals the March 11, 2009 order of the Court of Common Pleas of Lackawanna County (trial court) granting the petition of Edwin Nashotka (Owner) to set aside the tax sale of the property that he owned in Lackawanna County located at 3875 Nashotka Road, Madison Township (Property). The question raised is whether Owner's petition was barred by res judicata by virtue of a prior judgment entered in favor of Appellant in an action to quiet title to the Property. We affirm.

The Property was put up for sale by the Tax Claim Bureau of Lackawanna County (Bureau) on September 24, 2007 for unpaid taxes and was purchased by Appellant and Eric Malinowski (Purchasers). A decree of absolute confirmation of the sale was issued on November 28, 2007.

On January 8, 2009, Owner filed in the trial court a petition to set aside the tax sale, and exceptions thereto, alleging that the Property had not been properly posted. A hearing on the matter was held on February 27, 2009 (Hearing). At the beginning of the Hearing, the Bureau stipulated that it did not comply with notice requirements of Section 602 the Real Estate Tax Sale Law (Tax Sale Law),<sup>1</sup> and the trial court thereupon granted the petition on the ground that the Bureau's failure to give proper notice of the tax sale rendered the sale void *ab initio*.

Appellant filed a motion for reconsideration, attaching documents pertaining to a quiet title action. In his appeal brief, Appellant asserts that (a) on December 27, 2007, Owner was served with a complaint in an action filed by Appellant in the trial court to quiet title to the Property (Quiet Title Complaint), (b) an order was issued in the quiet title action on January 31, 2008, directing that Owner file exceptions within thirty days or be barred from attacking Appellant's title to the Property (Quiet Title Order), and (c) on March 4, 2008, a final order was entered in the quiet title action (Quiet Title Judgment).

Appellant now appeals to this court.<sup>2</sup> He does not dispute that the Bureau failed to give notice of the tax sale in accordance with the Tax Sale Law and, accordingly, that setting aside the sale ordinarily would be proper. Rather, he argues that he received a default judgment in a quiet title action against Owner and that the Quiet Title Judgment was conclusive between the parties in the tax sale

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<sup>1</sup> Act of July 7, 1947, P.L. 1368, *as amended*, 72 P.S. §5860.602.

<sup>2</sup> Our review in tax sale cases is limited to a determination of whether the trial court abused its discretion, rendered a decision which lacked supporting evidence, or clearly erred as a matter of law. *Willard v. Delaware County Tax Claim Bureau*, 921 A.2d 1273 (Pa. Cmwlth. 2007).

litigation. As a result, the trial court erred in failing to bar Owner's petition to set aside the tax sale based on the res judicata effect of the Quiet Title Judgment. We disagree that the trial court erred.

The Hearing transcript reveals that Appellant never presented, or offered into evidence, the Quiet Title Complaint, the Quiet Title Order and the Quiet Title Judgment<sup>3</sup> and that Appellant never presented any witness to testify about the quiet title proceedings.<sup>4</sup> Thus, there is no evidence before this court to establish that: (1) a judgment was entered in a quiet title action before the trial court set aside the tax sale; (2) the adequacy of the tax sale notice was at issue in the title quiet action; (3) the judgment in the quiet title action was in favor of Appellant; and (4) the terms of the judgment barred a subsequent challenge to the tax sale.

As the party asserting the defense of res judicata, Appellant had the burden of proving the facts allegedly giving rise to res judicata. *Interim House, Inc. v. Philadelphia Zoning Board of Adjustment*, 387 A.2d 511 (Pa. Cmwlth. 1978). Having failed to present evidence of the quiet title action at the Hearing, Appellant failed to establish that what occurred in the quiet title action should have been deemed a res judicata bar to Owner's petition to set aside the tax sale.<sup>5</sup>

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<sup>3</sup> Documents not moved into evidence cannot be relied upon on appeal. *S.H. v. B.L.H.*, 572 A.2d 730 (Pa. Super. 1990).

<sup>4</sup> Appellant asserts in his brief, "Appellant's attorney objected to the overturning of the tax sale based on the fact that the matter had been decided in the action to quiet title ... (R. 65a)." (Brief at 6.) However, it is well settled that attorney statements or questions at trial are not evidence. *Anderson v. Department of Transportation, Bureau of Driver Licensing*, 744 A.2d 825 (Pa. Cmwlth. 2000).

<sup>5</sup> Appellant does not argue in his brief that the trial court erred in failing to take judicial notice of the action to quiet title. Therefore, that issue is waived. Pa. R.A.P. 2119 (setting forth the requirements for the Argument portion of a brief).

Accordingly, we affirm the order of the trial court.

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KEITH B. QUIGLEY, Senior Judge

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***ORDER***

AND NOW, this 20th day of January, 2010, the March 11, 2009 order  
of the Court of Common Pleas of Lackawanna County hereby is affirmed.

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KEITH B. QUIGLEY, Senior Judge