J-25-2013
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

GERALD W. HORTON AND SUSAN M. HORTON, HUSBAND AND WIFE	: No. 33 WAP 2012
v.	: Appeal from the Order of the Commonwealth Court entered May 21, 2012 at No. 75 CD 2011, affirming the Order of the Court of Common Pleas of Washington County dated December 29, 2010 at No. 2009-10264.
WASHINGTON COUNTY TAX CLAIM BUREAU AND E.D. LEWIS	: ARGUED: April 9, 2013
APPEAL OF: E.D. LEWIS	:

DISSENTING OPINION

MR. JUSTICE BAER **DECIDED: DECEMBER 16, 2013**

Section 602 of the Real Estate Tax Sale Law,[1] entitled "Notice of Sale," provides extremely detailed and explicit instructions that taxing bureaus must follow to execute the tax sale of a delinquent property. First, all of the notices published and sent to advise delinquent taxpayers of the potential tax sale of their property must: (1) be printed within a conspicuous text box; (2) in at least ten-point font; and (3) contain the explicit warning:

> YOUR PROPERTY IS ABOUT TO BE SOLD WITHOUT YOUR CONSENT FOR DELINQUENT TAXES. YOUR PROPERTY MAY BE SOLD FOR A SMALL FRACTION OF ITS FAIR MARKET VALUE. IF YOU HAVE ANY QUESTIONS AS TO WHAT YOU MUST DO IN ORDER TO

[1] 72 P.S. § 5860.602; Act of July 7, 1947, P.L. 1368, as amended, 72 P.S. §§ 5860.101 - 5860.803.

> SAVE YOUR PROPERTY, PLEASE CALL YOUR ATTORNEY, THE TAX CLAIM BUREAU AT THE FOLLOWING TELEPHONE NUMBER ____________, OR THE COUNTY LAWYER REFERRAL SERVICE.

72 P.S. § 5860.602(g).

Subsection (a) of Section 602 further delineates that taxing bureaus must at least thirty days before a scheduled tax sale place the above-quoted notice in two newspapers of general circulation within the county, as well as in a legal journal if one exists within that county, which sets forth in addition to the notice: "(1) the purposes of such sale, (2) the time of such sale, (3) the place of such sale, (4) the terms of the sale including the approximate upset price, [and] (5) the descriptions of the properties to be sold as stated in the claims entered and the name of the owner." 72 P.S. § 5860.602(a).

Concomitant with the posting of the notice in two newspapers of general circulation and a legal journal, if one is available, the taxing bureau must, "by United States certified mail, restricted delivery, return receipt requested, postage prepaid" notify the owners of the delinquent property of the impending sale with the aforementioned notice. Id. § 5860.602(e)(1). Should the taxing bureau not receive a return receipt from the delinquent property owner, "then, at least ten days before the date of the sale, similar notice of the sale shall be given . . . by United States first class mail, proof of mailing, at his last known post office address by virtue of the knowledge and information possessed by the bureau . . . ." Id. § 5860.602(e)(2) (emphasis added). What the General Assembly meant by "proof of mailing" is the only issue before this Court.

Despite the specific, detailed, and particular instructions given by the legislature to county taxing bureaus for the publication and sending of tax sale notices, the Majority

in the instant appeal countenances a scheme where a taxing bureau can, upon a challenge by the property owner contending notice was not provided pursuant to Section 602(e)(2), simply bring to court any documents it may have to "prove" that mailing of the second, subsection (e)(2) notice actually occurred. In my respectful view, when the legislature mandated that taxing bureaus send the (e)(2) notice by "first class mail, proof of mailing," it intended for the first class mail to be sent accompanied with a USPS document that constitutes "proof of mailing," and did not intend to countenance anything else. My reasoning follows.

Prior to 1986, Section 602(e)(2) actually mandated that the ten-day notice be sent via "United States certified mail." When the General Assembly made vast revisions to the Real Estate Tax Sale Law in 1986, one such change was revising "certified mail" to "first class mail, proof of mailing." Contrary to the reasoning of the Majority, the 1986 revision did not change the (e)(2) notice from certified mail to first class mail without more, which would have permitted taxing bureaus to put a stamp on an envelope containing the requisite notice, and then, when challenged, to proffer any generic evidence that it mailed the envelope.[2] Rather, the General Assembly specified that

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[2] Indeed, in this case, the taxing bureau submitted to the court a self-prepared "United States Postal Service Consolidated Postage Statement -- First Class Mail & Priority Mail" and the envelope that allegedly contained the (e)(2) notice to Appellees as its "proof of mailing." Attached to the Consolidated Postage Statement was a ledger apparently listing the names and addresses of persons to whom the taxing bureau sent (e)(2) notices. Respectfully, these documents do not comply with subsection (e)(2) for various reasons.

First, while the Majority finds of primary importance that the taxing bureau "proffered the actual envelopes sent via first-class mail" to the property owners, Maj. Slip Op. at 14, respectfully, this exemplifies the problem with the Majority's holding. While here, there does not appear to be a dispute that the taxing bureau produced the actual envelopes sent to the property owners, in the thousands of tax sales that occur in the Commonwealth annually, the Majority's holding essentially gives license to taxing authorities to bring whatever proof they can find into court, thus placing judges, who (continued…)

notice had to be sent by first class mail, which must then be proven through a "proof of mailing" form provided by the USPS.

Looking first at the subsection (e)(1) notice provisions provides support for this conclusion. Subsection (e)(1) states that the initial, thirty-day notice must be sent "by United States certified mail, restricted delivery, return receipt requested, postage prepaid." All of these terms - certified mail, restricted delivery, return receipt requested, and postage prepaid - are types of mailings and services added to the mailing; they are not burdens of evidentiary proof that may be provided by a mailer. Indeed, they are terms contained and defined within the Code of Federal Regulations, as incorporated by the United States Postal Service, Domestic Mail Manual. See 39 C.F.R. § 111.1.

First class mail, as defined by the Domestic Mail Manual, is "any mailable item, including postcards, letters, flats, and small packages" that contains "personal information . . . specific to the addressee," or any "mail containing handwritten or typewritten material." Domestic Mail Manual, Part 133, §§ 3.1, 3.3, & 3.4. First class mail is then eligible for any number of "extra services, including: registered mail,

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(…continued)
must sit as fact-finders in any challenges raised, in the position of determining credibility and weight of evidence. Such cannot be what the General Assembly envisioned when codifying a uniform system of providing notice in the statutory language under scrutiny.

In the same vein, the Consolidated Postage Statement by itself does nothing to show "proof of mailing." The statement was no more than a cover sheet for bulk mailings prepared by the mailer, not the USPS, that sets forth the number of parcels and the postage cost for the bulk mailing. While this cover sheet is then later signed and stamped by a USPS employee, that signature only verifies that the cost of postage submitted covers the costs of mailing; it does nothing to prove to whom anything was mailed. Finally, the "attachment" of intended recipients of (e)(2) notices, while also prepared by the taxing bureau, does not seem to be verified in the same manner as the Consolidated Postage Statement, and is therefore no more "proof of mailing" than anything else submitted by the taxing bureau to the court. See Reproduced Record 289a-296a.

certified mail, certificate of mailing, collection on delivery, USPS tracking, insured mail, return receipt for merchandise, restricted delivery, signature confirmation, and special handling." Id. Part 133, § 2.2.5.

None of these extra services are entitled "proof of mailing," as delineated within subsection (e)(2). However, the Domestic Mail Manual does provide for a "mailing receipt" as part of several of the extra services listed above. As defined in the Manual, a mailing receipt shows "the time and date of mailing" and is provided to the mailer at the time of mailing. See, e.g., id. Part 313 § 4.1. Mailing receipts are available for first class mailings that are accompanied by the following extra services: registered mail, certified mail, insured mail, return receipt for merchandise, USPS tracking (when purchased at a post office), signature confirmation (when purchased at a post office), and collect on delivery. Id. Part 503, §§ 1.2.1, 2.2.1, 3.4.1(c), 9.2.1, 10.2.5(a), 11.2.4(a). Similarly, the extra service of a certificate of mailing "is available only at the time of mailing and provides evidence that mail has been presented to the USPS for mailing." Id. Part 503, § 4.2.1.

In my respectful view, these mailing receipts and certificates, which are provided by the USPS to the mailer at the time of sending first class mail, provide the uniform scheme of "proof of mailing" as anticipated by the General Assembly and Section 602(e)(2). Indeed, all of the forms and labels associated with these extra services uniformly designate: (1) the receiver of the mail and his address; (2) the associated postage or cost; and (3) a postmark, depicting the date the USPS took custody of the first class mailing. See, e.g., USPS Form 3817 (certificate of mailing); USPS Form 3800 (certified mail); and Form 3813 (insured mail). Put differently, these all satisfy the

requirement of a notice sent "United States first class mail, proof of mailing,"[3] and ensure that each of the sixty-seven county taxing bureaus in the Commonwealth follow a discrete, predictable procedure for obtaining "proof of mailing." Thus, the legislature expanded the type of extra service mailing a taxing bureau may use to accomplish the sending of the (e)(2) notice from solely certified mail to these other USPS services. It did not, however, negate the necessity of taxing bureaus using some type of USPS proof of mailing when providing the (e)(2) notice.

Accordingly, pursuant to Section 602(e)(2), the General Assembly mandated the ten-day notices to be sent via first class mail, with one of the special services available to first class mail that demonstrate proof of mailing, i.e., a mailing receipt or certificate of mailing. I would therefore find that the Washington County Tax Bureau did not comply with the plain language of Section 602(e)(2) in this case and affirm the decisions of the lower courts that declared the upset tax sale to be null and void. As the Majority holds otherwise, I respectfully dissent.

Former Justice Orie Melvin did not participate in the consideration or decision of this case.

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[3] The USPS's website describes all of the extra services enumerated in the Domestic Mail Manual in plain English. To that end, the website informs customers that they may obtain "proof of mailing" by purchasing either certified mail or certificates of mailing. While I rely upon the actual federal regulation as contained within the Domestic Mail Manual to arrive at my conclusion herein, I would, at the very least, restrict the meaning of "proof of mailing" as contained within Section 602(e)(2) to these two services. Related thereto, I respectfully note that the Majority, on page 12 of its opinion, quotes these plain English provisions from the USPS website, and then inexplicably ignores this very language in permitting self-made ledgers and envelopes to be brought into court as "proof of mailing."