Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-114

NOVEMBER TERM, 2019

TNM, LLC v. David Wilson Rosler*	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 174-6-18 Bncv
		Trial Judge: David A. Barra

In the above-entitled cause, the Clerk will enter:

Defendant appeals the civil division's decision granting summary judgment and issuing a writ of possession in favor of plaintiff in this eviction case. We affirm.

The following facts were undisputed for purposes of summary judgment. Defendant owned real property in Rupert, Vermont. After he failed to pay property taxes for tax years 2014-15 and 2015-16, the town treasurer issued warrants for outstanding taxes. On August 10, 2016, the collector of delinquent taxes filed the warrants with the town clerk along with a notice of tax sale and a description of the property. The notice of tax sale stated that the sale would occur on September 7, 2016 at 12:00 p.m. in the town office. The notice was posted at the town office. A copy was sent to defendant by certified mail with return receipt requested. The mailing also included a notice of intent to proceed with the sale, copies of the tax warrants reflecting the amounts due, and a letter informing defendant of additional outstanding charges and that he could request to partition the property to satisfy the tax delinquency. The return receipt was signed and returned. No request for partition was received. The notice of tax sale was published in the Rutland Herald on August 12, 18, and 26, 2016.

The tax sale took place on September 7, 2016 at the time and place specified. Plaintiff was the successful bidder. The collector filed a report of the sale with the town clerk's office. Defendant failed to redeem the property within one year. On March 15, 2018, the town executed a tax deed conveying title to the property to plaintiff. Defendant refused to vacate the property.

In June 2018, plaintiff filed a complaint for writ of possession. Defendant moved for a change of venue to federal court. The court denied the motion. Trial was rescheduled three times, once at plaintiff's request and twice at defendant's request. Trial was eventually set for November 30, 2018. The day before, defendant filed a third motion to continue. The court indicated it would hear the motion during the time scheduled for trial.

At the hearing, defendant stated that he needed a continuance because he had pneumonia and that he could not present his case over the phone. The court suggested that plaintiff present its evidence in a dispositive motion and allow defendant to respond, and that "if the motion does,

indeed, resolve the matter, then we're done, we're done with the hearing. If it doesn't, then we can schedule this matter for another hearing at that time. Does that make sense?" Defendant responded, "I think it's a terrific idea." The court stated that it would continue the hearing and ordered plaintiff to file a case-dispositive motion by the end of the year. It asked defendant if he understood what it had decided, and defendant responded, "Absolutely, and I appreciate it very much."

Plaintiff moved for summary judgment in December 2018. The court granted the motion in a February 2019 order. It considered the facts as stated by plaintiff to be undisputed because although defendant purported to dispute defendant's statement of facts and made various factual assertions of his own, he had failed to support his assertions with affidavits or other evidence in the record. The court rejected defendant's argument that the tax collector had failed to properly publish notice of the sale in the newspaper, because the undisputed facts showed that the collector advertised the sale three weeks in a row in the Rutland Herald, a newspaper that circulates in the vicinity of the town of Rupert. The court also rejected defendant's argument that summary judgment was inappropriate because he needed more time for discovery, explaining that defendant failed to engage in discovery when he had the chance and had not demonstrated that the materials sought would help his position. The court concluded that plaintiff was entitled to judgment because it had established that the tax sale was conducted properly, defendant failed to redeem the property, and plaintiff was entitled to possession. Defendant appealed.

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a); see also Ainsworth v. Chandler, 2014 VT 107, ¶ 8, 197 Vt. 541. Not every dispute as to the facts creates a genuine issue that defeats summary judgment; only disputes about facts that are material to the legal question before the court. See In re Estate of Fitzsimmons, 2013 VT 95, ¶ 13, 195 Vt. 94 ("An issue of fact is material only if it might affect the outcome." (quotation omitted)). The court views the pleadings and affidavits in the light most favorable to the nonmoving party, Ainsworth, 2014 VT 107, ¶ 8, but "the nonmoving party has the burden of submitting credible documentary evidence or affidavits sufficient to rebut the evidence of the moving party." Endres v. Endres, 2008 VT 124, ¶ 10, 185 Vt. 63.

On appeal, defendant argues that the court erred in granting plaintiff's motion for summary judgment because it was genuinely disputed whether plaintiff was a "straw buyer" who intended to "flip" the property by selling it to another buyer.[1] Even if these allegations are true, defendant has not established that this would invalidate the tax sale, or that plaintiff is not entitled to a writ of possession. As the trial court found, the undisputed facts show that the tax sale was conducted according to the statutory procedure after defendant failed to pay property taxes for two years; plaintiff was the highest bidder at the sale; defendant failed to exercise his right to redemption within one year of the sale; the collector executed a deed to plaintiff; and plaintiff was therefore entitled to possession of the property. See 32 V.S.A. §§ 5251-5255, 5260, 5261 (setting forth requirements for tax sale). To the extent that he argues that the sale is invalid because the buyer intended to resell the property for a profit, defendant has not cited any law to support this

[1] In response to plaintiff's motion for summary judgment, defendant provided the court with various recordings of communications that he contends support this assertion.

suggestion. Given the absence of any evidence that the sale did not conform to the requirements of the statute, the court properly granted summary judgment to plaintiff.[2]

Defendant also argues that it was disputed whether the tax sale was properly advertised in accordance with the statute. We disagree. Section 5252(a)(2) of Title 32 requires the tax collector to advertise the property "three weeks successively in a newspaper circulating in the vicinity, the last publication to be at least 10 days before such sale." Plaintiff provided evidence below that the tax collector advertised the sale in the Rutland Herald on August 12, 18, and 26, 2016, and that the sale took place on September 7, 2016, more than ten days after the last publication. This evidence was sufficient to show compliance with the statute. See Isaacs v. Shattuck, 12 Vt. 668, 671 (1839) (holding that publication on June 1, 8, and 15 was sufficient to meet statutory requirement that advertisement be published three weeks successively). Defendant now argues that the statute should be interpreted to require the collector to advertise the sale every day for three weeks. Defendant failed to preserve this argument by raising it below. See Lane v. Town of Grafton, 166 Vt. 148, 153 (1997) ("Failure to raise a reason why summary judgment should not be granted at the trial level precludes raising it on appeal."). Even if we reached the argument, we would conclude that defendant's argument is contradicted by the applicable statute. See 1 V.S.A. § 174 ("Whenever a notice of any kind is required to be given by publication in a newspaper prior to a certain date for a certain number of weeks successively, it may be given by an insertion prior to such date once a week, for the number of successive weeks required . . . .").

Defendant contends that plaintiff's failure to respond to his allegation that it was engaged in a conspiracy to defraud him of his property through a "rigged" tax sale amounts to an admission that the allegation was true. In particular, he suggests that plaintiff and the town were involved in some sort of conspiracy to secure his property through a rigged sale. Although he reiterated these claims in his response to plaintiff's summary judgment motion, he did not produce any evidence to support these claims. The specifics of his allegation are not clear.[3] He argued below, and reasserts on appeal, that the evidence supporting his claims is in a tape recording of an abatement hearing that "must be brought in to trial by the Town Clerk." The burden was on defendant in his response to the summary judgment motion to provide the court with any evidence that might support an assertion that the tax sale was invalid. He did not produce any evidence concerning this claim. His response was therefore insufficient to create a dispute of fact. See Webb v. Leclair, 2007 VT 65, ¶ 14, 182 Vt. 559 (explaining that party "may not . . . rely on bare allegations alone to meet the burden of demonstrating a disputed issue of fact"); V.R.C.P. 56(c) (providing that party asserting that fact cannot be or is genuinely disputed must provide support for the assertion).

Finally, defendant claims that his constitutional rights were violated because the court disposed of the case at summary judgment instead of allowing him to present his evidence at a trial. The record does not support defendant's claim that the court forced him to make his case on the telephone. Rather, the court granted his motion to continue the trial and directed plaintiff to file a motion for summary judgment if it wished. Defendant agreed to this procedure and responded to plaintiff's motion when it was filed. Defendant had an opportunity to present evidence to the court in responding to the summary judgment motion. Because in response to plaintiff's motion for summary judgment defendant did not produce any evidence that creates a

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[2] If defendant is suggesting that the purchase price at the tax sale was below the property's market value, he did not produce competent evidence to support such a claim.

[3] Even if we treat the statement of material facts defendant filed in the trial court as if it were an affidavit, it still would not defeat summary judgment because it relies heavily on allegations not supported by any evidence.

dispute concerning a fact that is material to the legality of the tax sale and the court's writ of possession, he is not entitled to present his evidence in court. We therefore reject defendant's argument that his right to due process was violated. We also reject defendant's argument that the court violated his constitutional right to confront the witnesses against him. This is not a criminal case. See U.S. Const. amend. VI (giving accused right to confront witnesses "in all criminal prosecutions"); accord Vt. Const., ch. I, art. 10. Summary judgment is permitted in a civil action when the moving party demonstrates that the material facts are undisputed and that it is entitled to relief under the law. V.R.C.P. 56(a). Such was the case here.[4]

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

[4] Defendant asserts in his brief that plaintiff is no longer the owner of the property in question. He argues that plaintiff no longer owned the property at the time the court issued the writ of possession. Defendant did not present this argument or evidence below. Lane, 166 Vt. at 153; V.R.A.P. 10 (defining record on appeal). Accordingly, we do not address the effect, if any, of the alleged change in ownership.