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PENN-SOTA, INC., Plaintiff vs. FRANKLIN COUNTY TAX CLAIM BUREAU; and MARTIN L. WELLER and DIANA M. WELLER, his wife, Defendants, Franklin County Branch, CIVIL ACTION VOLUME 8, PAGE 198, IN EQUITY

Penn-Sota v. Franklin County Tax Claim Bureau

tax sale set aside - failure to comply with posting requirements - failure to inform taxpayer of opportunity to make installment payments

1. Real Estate Tax Sale Law requires that property be posted prior to sale.

2. Purpose behind posting is not only to inform *taxpayer* of impending sale, but also to notify the *public*, which increases the likelihood that the property will be sold for the highest amount possible.

3. To fulfill purposes of posting requirements, posting must be conspicuous, attract attention, and placed where it can be observed by all.

4. Posting of sale notice on base of light post fifty feet away from the building located on the property was not sufficiently conspicuous.

5. Failure of Tax Bureau to post notice conspicuously is not excused by the fact that the taxpayer had actual notice of the tax sale.

6. Where taxpayer has paid at least 25% of the taxes due, the Tax Claim Bureau has an affirmative duty to advise the taxpayer of the opportunity to make installment payments before the Bureau may deprive him of his property.

7. The duty to inform of the installment option exists not only when a payment of more than 25% is made after receiving the notice of impending sale, but exists equally when payment is made after receipt of the overdue notice.

8. Purpose of tax sales is not to strip taxpayer of his property but to insure the collection of taxes; strict provisions of the tax sales law were meant to protect local governments against willful, persistent, and long-standing delinquencies.

9. Where taxpayer paid all the taxes stated on the overdue notice, but not the interest owed, which was not stated on the notice, there is no case of willful and persistent delinquencies.

10. Taxpayer did not need to show that it qualified to enter into an installment agreement had it been offered; because the taxpayer paid all the taxes owed, but not the interest which was a small amount of only $116.80, the court presumes that the Bureau would have permitted the taxpayer to enter into an installment plan.

John McD. Sharpe, Esquire, Attorney for Plaintiff
Shawn D. Meyers, Esquire, Attorney for Franklin Co. Tax Claim Bureau
Timothy W. Misner, Esquire, Attorney for Weller's

OPINION AND DECREE NISI

Walker, P.J., April 30, 1998:

Factual and Procedural Background

This case involves a complaint to set aside the upset sale of property for overdue taxes. The property at issue, located on 3 Overhill Drive, Mercersburg, Franklin County, Pennsylvania, was sold by public auction on September 26, 1996. The sale was confirmed by decree nisi on October 11, and was made absolute on December 6, 1996. On December 30, 1996, the Tax Claim Bureau of Franklin County ("Bureau") issued a deed conveying the property to the buyers, Martin and Diana Weller ("the Wellers"). On March 5, 1997, Plaintiff Penn-Sota, Inc. ("Penn-Sota") filed a "complaint in equity for set off of tax sale." The Wellers have filed an answer to the complaint in which they asserted new matter. The Bureau has taken a passive position in this matter, deferring to the arguments made by the Wellers that the tax sale should not be set aside. A non-jury trial was scheduled for February 16, 1998. The matter was submitted to the court on depositions, which provide the following relevant facts.

Penn-Sota is a real estate agency whose sole shareholder is W.E. Schonek. (N.T. of Deposition of W.E. Schonek, at 8). Penn-Sota owns the property at issue, which is leased to Mason-Dixon Holdings. (N.T. of Deposition of W.E. Schonek, at 9; plaintiff's exhibit 7, attached to deposition of Paul Martin). The building located on the property is in use as an auto parts store by the name of Academy Auto Supply. (N.T. of Deposition of Paul Martin, at 8). Section 3.3 of the lease provides that the tenant would be responsible for payment of all real estate taxes. (Plaintiff's exhibit 7). However, for unknown reasons, Academy Auto Supply apparently never paid the taxes on that property. (N.T. of Deposition of Paul Martin, at 16).

The person who did take care of the taxes was Ann Dragovich. She is an employee of Dick's Automotive, which is also owned by Mr. Schonek, and she serves as his office manager. . (N.T. of Deposition of W.E. Schonek, at 16). Dick's Automotive has its bookkeeping offices at 123 Fairfield Avenue, Johnstown, Pennsylvania. (N.T. of Deposition of W.E. Schonek, at 14). Penn-Sota has its office address in that same building on the third floor, at 125 Fairfield Avenue. This office is an unstaffed. (N.T. of Deposition of W.E. Schonek, at 16-17). The depositions showed that generally Mary Ressler, a bookkeeper for Dick's Automotive who

works in the Fairfield Avenue office, receives mail addressed to Penn-Sota and puts it on a pile for Ann Dragovich's review. (N.T. of Deposition of Mary Ressler, at 10-11).

In April 1995, the 1994 school taxes for the Penn-Sota property were overdue. (N.T. of Deposition of Mary Jane Lindsey, at 5). The tax collector for Mercersburg, Lynn Stepler, turned the matter over to the Bureau. (N.T. of Deposition of Mary Jane Lindsey, at 5). In June 1995, a notice regarding the delinquent taxes was sent to Penn-Sota at 123 Fairfield Avenue, Johnstown, by certified mail. (N.T. of Deposition of Mary Jane Lindsey, at 6). Mary Ressler signed for its receipt, and she testified that she would have put it on the pile of mail just like any other mail. (N.T. of Deposition of Mary Jane Lindsey, at 11). The notice indicates that school taxes were due in the amount of $1,396.75, "face and penalty." (Defendant's exhibit 2, attached to Deposition of Mary Ressler). Below that amount on the notice is a line with the caption "interest at rate of 9% per year." However, no amount of interest was filled in. The only amount appearing on the notice is $1,396.75.

In an attempt to pay the taxes, Ann Dragovich sent a check in the amount of $1,396.75 to the Mercersburg tax collector in December 1995. (Plaintiff's exhibit 1, attached to deposition of Ann Dragovich). The check was returned to her, with the notification that payment should be made to the Bureau. (Plaintiff's exhibit 2, attached to deposition of Ann Dragovich). She subsequently paid the amount of $1,396.75 to the Bureau on January 19, 1996. (Plaintiff's exhibit 3, attached to deposition of Ann Dragovich; N.T. of Deposition of Mary Jane Lindsey, at 9). Mary Jane Lindsey, a director at the Bureau, testified that the check was cashed and that she sent out a receipt for that payment by regular mail. (N.T. of Deposition of Mary Jane Lindsey, at 9; 11-12). That receipt also indicated that a total balance in interest was due in the amount of $116.80 if paid before January 29, 1996, and an amount of $117.68 if paid before February 28, 1996. (Plaintiff's exhibit 3). In July 1996, a notice of impending sale was sent to Penn-Sota by certified mail, restricted delivery, indicating the approximate upset price of $154.08 and the sale date of the property on September 23, 1996. (N.T. of Deposition of Mary Jane Lindsey, at 13; plaintiff's exhibit 4, attached to deposition of Ann Dragovich). The receipt again was signed by Mary Ressler. (Plaintiff's exhibit 4). On September 9,

1996, Gary Martin, an employee of the Franklin County Tax Assessment Office, posted a notice of the sale on a light post on the property. (N.T. of Deposition of Gary Martin, at 5-6). He testified that he did not put the notice on the building itself because he thought that the building belonged to the adjacent parcel due to the small amount of the overdue taxes. (N.T. of Deposition of Gary Martin, at 11-12). The notice, which was 5 inches by 11 inches, was put on the bottom of the pole because it was windy and would otherwise have been blown away. (N.T. of Deposition of Gary Martin, at 12). On September 23, 1996, the property was sold to the Wellers for a total amount of $165. (Exhibit B, attached to Deposition of W.E. Schonek). The parties stipulated that the property had a value of $108,203.10. (Pre-trial order dated December 29, 1997).

Discussion

The issue in this case is whether the Bureau has complied with the statutory requirements for the tax sale. Penn-Sota argues that the Bureau has not complied with the statute in three ways. First, Penn-Sota argues that the manner of posting was insufficient to comply with the notice provisions of the statute. Secondly, Penn-Sota claims that the Bureau failed to fulfill its affirmative duty to inform Penn-Sota of the possibility to enter into an installment payment plan after making a payment of more than 25% of the overdue taxes. Thirdly, Penn-Sota argues that Bureau did not comply with the notice provisions of the statute because the notices were accepted by an unauthorized agent. These issues will be addressed in this order.

1. Posting Requirements

The Real Estate Tax Sale Law, 72 Pa.C.S.A. § 5860.101 *et seq.*, requires three forms of notice before property may be sold for delinquent taxes, namely by publication, by mail, and by posting. Penn-Sota argues that the Bureau has violated the posting requirements. Section 5860.602 deals with the notice requirements, and provides in relevant part:

> a) At least thirty (30) days prior to any scheduled sale the bureau shall give notice thereof, not less than once in two (2) newspapers of general circulation in the county, if so many are published therein, and once in the legal journal, if any, designated by the court for publication of legal notices. Such notice shall set forth

> (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,
>
> (5) the description of the properties to be sold as stated in the claims entered and the name of the owner.
>
> . . . . .
>
> (e) In addition to such publications, similar notice of the sale shall also be given by the bureau as follows:
>
> (1) At least thirty (30) days before the date of the sale, by United States certified mail, restricted delivery, return receipt requested, postage prepaid, to each owner as defined by this act.
>
> . . . . .
>
> (3) Each property scheduled for sale shall be posted at least ten (10) days prior to the sale.

"It is well established that notice provisions are to be strictly construed, and that strict compliance with such provisions is necessary to guard against deprivation of property without due process, and if any one is defective, the sale is void." *Ban v. Tax Claim Bureau of Washington County*, 698 A.2d 1386, 1388 (Pa. Cmwlth. 1997). The burden of proving compliance with the statutory notice provisions rests on the bureau. *Ban*, at 1388.

The purposes behind the posting provision have been set forth as follows:

> Public posting assists in informing a taxpayer that his or her property will be exposed at tax sale, . . . it serves the additional purpose of notifying others whose interest may be affected by the sale such as mortgage and lien holders. Posting also serves to notify the public at large that the property is going to be offered at tax sale. This increases the number of bidders for the property, aiding in the

likelihood that the taxing bodies will receive the taxes owed, as well as making the sale fair to the delinquent taxpayer so that the property is sold for the highest amount possible so that the delinquent taxpayer may not be subject to any deficiency, or, if the bid is over the amount of taxes owed, can receive any excess.
Ban, at 1388-1389, citing *In re Upset Tax Sale of September 10, 1990*, 147 Pa. Cmwlth. 52, 606 A.2d 1255 (1992).

While the statute does not specify in which manner the notice must be posted, the courts have held that in order to fulfill the above mentioned purposes, the posting must be conspicuous, attract attention, and be placed where it can be observed by all. *Ban*, at 1389. In *Ban*, the posting of the notice on the rear entrance door of the property was held to be insufficient, even though that was the door which was used most. The court found that it was the most likely place to notify the *owner* of the impending sale, but that it would not notify the *public*. Therefore, the posting on the rear door was not conspicuous and did not attract attention. *Ban*, at 1389. The court set aside the tax sale for that reason, even though it had been established that the taxpayer had received the notice of the tax sale by mail. *Ban*, at 1387.

In the underlying case, the notice of the impending sale was posted at the bottom of a light post approximately fifty feet from the building. (N.T. of Deposition of Gary Martin, at 9). No notice was posted on the building itself, because Gary Martin, the tax assessment office employee, thought that the building was not part of the property to be sold due to the small amount of the overdue taxes. Gary Martin testified that the sign was visible from the street and from the driveway leading to the building. (N.T. of Gary Martin, at 12). However, this court does not find that a sign of 5 inches by 11 inches posted on the base of a light post is adequate notice to apprise either the owner of the property or the public of the impending sale. A sign of that size on a light post might easily be mistaken for a notice of a yard sale, a church cook-out, or a lost dog. Because it was posted along side the driveway, people would have to stop and get out of their cars to read it. The fact that the notice was put low on the pole furthermore made it even harder to read. Under these facts, this court finds that the posting of the notice was not conspicuous and did not attract attention. Therefore, the posting was not adequate.

The Wellers argue that a recent line of cases has held that where the owner has actual notice of the tax sale, strict adherence to the statutory requirements is not required. They refer to *Casaday*, where the owner of the property had bought the property knowing of the existing overdue taxes and had been in negotiation with the bureau regarding the tax delinquency. *Casaday v. Clearfield County Tax Claim Bureau*, 156 Pa. Cmwlth. 317, 627 A.2d 257 (1993). The owner sought to set aside the sale on the basis that the published and posted notices did not provide the proper owner's name. The court held that when actual notice is established, the formal requirements of § 5860.602 need not be perfectly met. *Casaday*, 156 Pa. Cmwlth. at 321. However, the Pennsylvania Commonwealth Court has recently stated that *Casaday* should not be read to excuse the failure of a tax bureau to comply with the mandatory posting requirement of § 5860.602. *In re tax sale of 28.8525 acres in Middlecreek Township*, 688 A.2d 1239, 1241 (Pa. Cmwlth. 1997). The court furthermore stated that the defect in failing to post the property is sufficient standing alone to render a sale void, and that the purpose of public posting, to inform both the taxpayer and the public, would be undermined if such a sale was to be upheld. *Middlecreek*, at 1241-1242. While the bureau in *Middlecreek* had not posted the property at all, this court feels that the failure to post a notice conspicuously and where it will attract attention undermines the purposes of the posting requirements as much as not posting at all.

However, even if this court would follow the rule that strict compliance with the notice provisions is not necessary when the taxpayer has actual notice of the impending sale, this will not aid the Wellers in upholding the tax sale. The testimony shows that Ann Dragovich received the notice that the 1994 school taxes were overdue. This is evidenced by the fact that she subsequently paid those taxes. However, she denies any knowledge of the notice of sale. The Wellers have not presented any evidence that Penn-Sota had actual notice of the sale. The testimony showed that Mary Ressler, who accepted mail for Penn-Sota, signed for the receipt of the notice and put it on the pile of mail for Ann Dragovich, but it is unclear what happened to the notice after that. Due to these uncertain facts, this court will not infer that Penn-Sota had actual notice of the impending sale. *See Sabbeth v. Tax Claim Bureau of Fulton County*,

14 Frankl. Coun. L.J. 238 (1997)(court would not infer actual notice where none was shown).

Because the notice provisions of the Real Estate Tax Sale Law must be strictly construed, this court finds that the bureau did not comply with the posting requirements by posting the notice on the base of a light post fifty feet from the building. Therefore, the tax sale will be set aside.

2. Installment Plan

Penn-Sota also argues that the tax sale should be set aside because the bureau did not offer to enter into an installment agreement to pay the balance after Penn-Sota paid well over twenty-five percent of the amount owed. Section 5860.603 provides in relevant part:

> Any owner or lien creditor of the owner may, at the option of the bureau, prior to the actual sale, (1) cause the property to be removed from the sale by payment in full of taxes which have become absolute and of all charges and interest due on these taxes to the time of payment, or (2) enter into an agreement, in writing, with the bureau to stay the sale of the property upon the payment of twenty-five per centum (25%) of the amount due on all tax claims and tax judgments filed or entered against such property and the interest and costs on the taxes returned to date . . .

The Pennsylvania Commonwealth Court has held that where the property owner paid at least twenty-five percent of the taxes due, which is retained by the bureau, the bureau has an affirmative duty to advise the property owner of his opportunity to make installment payments on the balance, before the bureau proceeds to deprive him of his property. *In re Upset Sale of Properties*, 126 Pa. Cmwlth. 280, 283, 559 A.2d 600 (1989). The court stated that the tax unit's failure to do so would deprive the owner of his property without due process of law. *In re Upset Sale*, at 282. The Commonwealth Court has even found an affirmative duty on the part of the bureau to advise the taxpayer of the installment payment possibility where the taxpayer had previously entered into such an agreement, and thus had knowledge about its existence. *York v. Roach*, 163 Pa. Cmwlth. 58, 639 A.2d 1291 (1994) *alloc. den.* 650 A.2d 54.

The Wellers argue that the above cited cases are not applicable because the affirmative duty found by the court in those cases exists only if a payment of more than twenty-five percent is made after the *sale* notice was received. After receipt of the sale notice, taxpayers do not get another notice before the property is sold, thus necessitating the bureau's affirmative duty to inform taxpayers of the installment option at that time. They argue that the underlying case is different because Penn-Sota made its payment after receiving the "*claim* notice." After that, Penn Sota received another notice, the sale notice, which informed it of the installment option in small letters at the bottom.

This court does not agree with that argument. The Commonwealth Court, in holding that the bureau has an affirmative duty to inform the taxpayer of the installment option, has consistently referred to the purpose of tax sales:

> '[T]he purpose of tax sales is not to strip the tax payer of his property but to insure the collection of taxes.' The taxing authorities should not ignore common sense business practices. The strict provisions of the tax sale laws were meant not to punish taxpayers who, through oversight or error, failed to pay taxes. Tax acts were meant to protect local governments against willful, persistent, and long-standing delinquencies.
> *In re Upset Sale*, 126 Pa. Cmwlth. at 281, citing *Ross Appeal*, 366 Pa. 100, 76 A.2d 745 (1950).

Penn-Sota paid the full amount in taxes due, but not the amount owed in interest. However, the interest was not stated on the overdue notice. Thus, it is clear that this does not involve a case of "willful, persistent and longstanding delinquencies." When the bureau accepted the full amount of taxes owed as stated on the "claim notice," it had an affirmative duty to inform Penn-Sota of the option to pay the interest in installments, whether or not this payment was made after the "claim notice" or after the sale notice. Otherwise, the bureau would ignore common business sense practices and punish taxpayers who are trying to comply with their obligations. The payment of the amount owed in actual taxes should have resulted in the removal of the property from the sale list, and the bureau should have informed Penn-Sota that it could pay the remaining amount of $116.80 in installments. Additionally, the fact that Penn-Sota

received another notice after it made the payment, *i.e.* the notice of impending sale, does not aid the Wellers' argument. The Commonwealth Court has held that the bureau is not relieved of this affirmative duty by including a notation regarding the availability of an installment agreement on the notice of the tax sale. *Darden v. Montgomery County Tax Claim Bureau*, 157 Pa. Cmwlth. 357, 629 A.2d 321 (1993).

The Wellers also argue that even if the bureau had an affirmative duty to notify Penn-Sota of the installment option, this is not sufficient to set aside the tax sale, because Penn-Sota failed to show that it was qualified to enter into such an agreement. Counsel for the Wellers refers to *In re Upset Sale*, in which the court took into account that the bureau clerk testified that she would have offered the installment plan to the taxpayer if he had asked for it. *In re Upset Sale*, 126 Pa. Cmwlth. at 282. Counsel for the Wellers also refers to *Darden, supra*, in which the Commonwealth Court remanded the case to determine whether the bureau was granting installment payment agreements in a lawful manner.

Here, there was no testimony regarding the issue of whether the bureau would have offered Penn-Sota an installment plan. Mary Jane Lindsey, a director at the bureau, testified only that no offer for an installment plan was made to Penn-Sota, and that by law the bureau was not required to accept payments. (N.T. of Deposition of Mary Jane Lindsey, at 15). However, this court cannot think of a better case to accept a payment plan than this one. Here, Penn-Sota paid all the taxes as indicated on the "claim notice," in the amount of $1,396.75. Only the amount owed in interest, a mere $116.80, was not paid. Due to the substantial amount paid, and the small amount left unpaid, this court will presume that the bureau would have permitted Penn-Sota to enter into an installment plan rather than selling the property. Thus, the Wellers' argument fails.

Because Penn-Sota made a substantial payment of more than twenty-five percent, the bureau had an affirmative duty to advise Penn-Sota of the opportunity to make installment payments on the balance, a mere $116.80 in interest. In failing to do so, the bureau deprived Penn-Sota of its property without due process of law. This court points out that apparently the bureau fails to engage in any common sense business practices. One telephone call to Penn-Sota

no doubt would have resolved the problem and would have resulted in an agreement to pay the small amount owed. Instead, the bureau adheres to a technical application of the tax sale rules, resulting in the sale of property worth more than $100,000 for a mere $154.08 owed in interest, and the subsequent time and money spent on the foreseeable legal proceedings to set aside the sale. As the Supreme Court of Pennsylvania stated almost fifty years ago, '[c]ommon courtesy demands some recognition of the fact that those who hold public office in this land at least, are still the servants of the people, not their masters. The strict provisions of the Tax Sales Act were never meant to punish taxpayers who omitted through oversight or error (from which the best of us are never exempt) to pay their taxes." *In re Ross*, 366 Pa. 100, 76 A.2d 749 (1950).

3. Authority of Employee to Accept Mail for Penn-Sota

Lastly, Penn-Sota argues that the tax sale should be set aside for failure to comply with the notice provisions of §5860.602(e) because Mary Ressler, who signed for the receipt of the tax notices, was not authorized to accept such notices. This issue involves a question of express and apparent authority to accept tax notices.

Because the tax sale will be set aside for the above mentioned reasons, this court does not need to discuss whether the tax notices were properly mailed and delivered as required by the statute.

Conclusion

This court finds that the Tax Claim Bureau did not comply with the statutory requirements in the manner of the posting of the tax sale notice on the bottom of a light post approximately fifty feet from the building on the property to be sold. This court further finds that the bureau failed to perform its affirmative duty to advise Penn-Sota of the option to enter into an installment plan when Penn-Sota had made a substantial payment of more than twenty-five percent of the total amount owed. Thus, Penn-Sota was deprived of its property without due process of law, and therefore the tax sale will be set aside.

DECREE NISI

April 30, 1998, having considered the evidence presented in this case and the arguments made by counsel, this court finds that the Tax Claim Bureau of Franklin County has failed to comply with the

statutory requirements of the Real Estate Tax Sale Law by not properly posting the property to be sold and by not offering Penn-Sota the option to enter into an installment payment plan, and therefore orders the sale of the real estate to be set aside. Penn-Sota, Inc. is ordered to pay the delinquent taxes due at the time of the sale, and the Tax Claim Bureau is ordered to reimburse purchasers, Martin and Diana Weller, for the purchase price of the property.

Upon praecipe of either party, the prothonotary shall enter this decree nisi as a final decree as authorized by Pa.R.C.P. 227.4 if no timely post trial motions are filed.