

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

DANIEL R. CLARK AND VICTORIA :
CLARK BOLGER trading as SPLIT :
ROCK FAMILY PARTNERSHIP, :
 Plaintiffs :
 : :
vs. : No. 20-2694
 : :
COUNTY OF CARBON, TAX CLAIM :
BUREAU, :
 Defendant :
 : :
and : :
 : :
CHRISTIAN FEHRENBACHER, :
 Intervenor :

CARBON COUNTY
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Walter Zimolong, Esquire Counsel for Plaintiffs
Robert Frycklund, Esquire Counsel for Defendant
Chad DiFelice, Esquire Counsel for Intervenor

MEMORANDUM OPINION

Matika, J. - July 15, 2021

This Court writes this opinion to support its decision to overrule and dismiss the exceptions and objections filed by Daniel R. Clark and Victoria Clark Bolger trading as Split Rock Family Partnership (hereinafter "SRFP") to an upset tax sale at which their property located at 18 Birchwood Drive, Lake Harmony, Pennsylvania was sold for unpaid taxes to Christian Fehrenbacher (hereinafter "Fehrenbacher"). For the reasons stated herein, this

Court seeks affirmance of that decision and a denial of this appeal.

FACTUAL AND PROCEDURAL BACKGROUND¹

On September 15, 2020, the Carbon County Tax Claim Bureau (hereinafter "CCTCB") pursuant to the Real Estate Tax Sale Law ("RETSL"), 72 P.S. §5860.101 et. seq., exposed for sale property located at 18 Birchwood Drive, Lake Harmony, Pennsylvania. Intervenor Fehrenbacher was the successful bidder of this property. This property was titled in the name of "Split Rock Family Partnership."

On November 9, 2020, Daniel R. Clark and Victoria Clark Bolger (hereinafter "Clark and Bolger" or individually as "Clark" or "Bolger") filed exceptions and objections to that sale. By Order of Court dated January 22, 2021, Fehrenbacher was permitted to intervene in this action. After a hearing on January 28, 2021, all parties were provided with an opportunity to file and/or lodge appropriate post-hearing submissions.

After careful consideration of all such post-hearing submissions, this Court overruled and dismissed, by Order of Court dated May 17, 2021, those exceptions and objections. On May 26,

¹ This Court dispenses with a recitation of the facts herein and respectfully direct the Appellate Court to that portion of the attached trial memorandum opinion identified "Factual and Procedural Background" for the facts as found by the Court after hearing.

2021, Clark and Bolger, trading as SRFP filed a timely notice of appeal. On May 26, 2021, this Court issued a Pa.R.A.P. Rule 1925(b) Order directing Clark and Bolger to file a concise statement of matters complained of on appeal. On June 14, 2021, Clark and Bolger filed that concise statement. In so doing, Clark and Bolger presented twelve (12) claimed errors, five (5) dealing with the issue of standing, six (6) dealing with notices related to the underlying tax sale, and one (1) dealing with the jurisdiction of the court.

Clark and Bolger have claimed that this Court erred relative to initially finding that Clark, Bolger and specifically SRFP did not have standing to pursue this action in the first instance. They claim the following perceived errors on the part of the court that:

1. The Court erred by concluding that petitioners were barred from filing the instant action;
2. The Court erred by concluding that a petition to set aside a tax sale is an "action" contemplated by the Pa. Rules of Civil Procedure *vis-à-vis* the implications of failing to register a fictitious name pursuant to the Fictitious Names Act, 54 Pa.C.S.A. §331(a);
3. The Court erred in ultimately determining that petitioners lacked standing to sue;

4. The Court erred in ultimately determining that petitioners lacked standing to sue at a time when the petitioners had substantially complied with the Fictitious Name Act because it had in fact registered this fictitious name on January 29, 2021;² and
5. The Court erred by concluding that both CCTCB and Fehrenbacher preserved and did not waive the issue of standing.

As to the sale itself, Clark and Bolger claimed that the Court erred in the following aspects:

1. By affirming the sale and finding that CCTCB strictly followed RETSL;
2. By ignoring precedent in holding that CCTCB was excused from its mandatory duties under §607a of RETSL because at least one mailed notice was signed for at the address on file at the CTCB for SRF;P;
3. By failing to address CCTCB's failure to keep written records of any additional efforts it conducted pursuant to §607a where CCTCB failed to produce any evidence that it did;

² At no time was any evidence of this registration presented to the Court. In fact, if it did occur, it occurred after the hearing held on the exceptions and objections.

4. By upholding the sale and finding that CCTCB complied with §607a despite CCTCB failing to produce any evidence that it did;
5. By upholding the sale and finding that CCTCB complied with §607a despite failing to undertake any additional efforts to locate another address for SRF;P;
6. By concluding that the CCTCB sufficiently complied with the statutory pre-sale posting requirements of RETSL; and
7. By exercising personal jurisdiction over Clark, Bolger and presumably SRF;P and entering a judgment against them where "personal service" was never made on petitioners.

Many of these claimed errors have been adequately addressed in our Memorandum Opinion of May 17, 2021. To the extent they are addressed therein, this Court will reference the Appellate Court to the appropriate section and page of our opinion, where attached hereto. To the extent not addressed therein, this Court will address it herein seriatim.

LEGAL DISCUSSION

A. STANDING/FICTITIOUS NAME ACT

1. Petition to Set Aside an Upset Sale - Defending Action

SRFP's first contention is that the Fictitious Names Act barred an unregistered entity from prosecuting a claim. This Court wholeheartedly agrees. SRFP further contends though that what SRFP is engaged in here is not the prosecution of a claim, but rather the defending of an action. We disagree with this contention. SRFP is the party that instituted this action challenging the sale of its property when it filed the objections and exceptions on November 9, 2020. Furthermore, the trial court's determination did not preclude SRFP from filing suit or even defending it as they claim; rather we simply found that SRFP did not comply with the Fictitious Names Act in filing this instant action.

2. Petition to Set Aside an Upset Sale - Not an Action

Clark and Bolger contend that the Court erred by concluding that a petition to set aside a tax sale is an "action" as defined by the Pennsylvania Rules of Civil Procedure. The Fictitious Names Act does not permit an unregistered entity to "maintain an action." Clark and Bolger claimed that a petition to set aside a tax sale is not an action as defined by Pa.R.C.P. 1007 and accordingly, the Court erred in concluding that SRFP was not permitted to maintain

this action, i.e., a petition to set aside a tax sale, because it does not meet the definition of an action.

This argument fails for two reasons. First, to argue that a petition to set aside a tax sale, or in this case as labelled by SRFP, "objection and exception to upset tax sale," does not constitute an "action" for purposes of the Fictitious Names Act as that term is defined in Pa.R.C.P. 1007, flies in the face of SRFP's logic. To otherwise agree with SRFP logic would prohibit SRFP from filing these "objections and exceptions" as this terminology is likewise not included in the definition under Pa.R.C.P. 1007. This would be an absurd result.

Additionally, in the case of *In Re: Tax Claim Bureau, German Township, Mount Sterling 54 ½ Acres, Miscellaneous Buildings*, Appeal of *Solomon and Teslovich*, 436 A.2d 144, (1981), the court held that the trial court was not divested of its equitable jurisdiction to void a tax sale where the initiating pleading was labelled a "petition" as opposed to a complaint. In the case, the Supreme Court noted,

In all substantive respects, the Tax Bureau's verified "petition" includes the essential ingredients of a complaint[.] Although entitled "petition," the pleading was divided into consecutively numbered paragraphs each of which, as far as practicable, contained only one material allegation. See Pa.R.Civ.P. 1021. Pursuant to Pa.R.Civ.P. 1019(a), the material facts upon which the Tax Bureaus' cause of action is based are stated "in a concise and summary form." Moreover, the pleading

clearly specifies, as required by Pa.R.Civ.P. 1021, the relief sought. In addition, appellees treated the pleading as properly initiating this proceeding, since they filed their Answer and New Matter in response without objection. Thus, with the exception of the erroneous caption, the Tax Bureau's pleading is substantially identical to a conventional complaint.

To affirm the dismissal of this action solely because the initiating pleading was entitled "petition" rather than "complaint" would be a manifestly unjust and unnecessary waste of time and expense[.] As Judge Craig succinctly declared in his dissenting opinion below, "That kind of legal doctrine is what gives the law a bad name, benefits no one, and leaves the judicial job undone." *In Re Tax Bureau*, 52 Pa.Comwlth. at 600, 416 A.2d at 619. In the interest of justice, our civil procedural rules must be liberally construed. Form must not be exalted over substance, and procedural errors must not be dispositive where there has been substantial compliance with the rules and no prejudice has resulted from purely technical error. *Pomerantz v. Goldstein*, 479 Pa. 175, 179, 387 A.2d 1280, 1282 (198). See *Stout v. Universal Underwriters Insurance Co.*, 491 Pa.601, 605, 421 A.2d 1047, 1049 (1980) (rules of Appellate Procedure were not intended to be so rigidly applied as to result in manifest injustice, particularly when there has been substantial compliance and no prejudice.)

The Rules of Civil Procedure are not ends in themselves, but are designed to insure the fair, orderly and expeditious administration of justice; pleading is not intended to be a game of skill in which "one misstep by counsel may be decisive to the outcome." *Foman v. Davis*, 371 U.S. 178, 181-82, 83 S.Ct. 227, 229-30, 9 L.Ed.2d 222 (1962). Indeed, in *Pomerantz v. Goldstine*, supra, we refused to dismiss exceptions simply because of a nonprejudicial caption error by appellant who incorrectly entitled his pleading as a motion for a new trial:

Had the pleading been properly titled, it would have been disposed of on the merits, rather than upon the erroneous caption . . . Procedural rules are not ends

in themselves, but means whereby justice, as expressed in legal principles, is administered. They are not to be exalted to the status of substantive objectives The niceties of procedure and pleading make fine intelligence games for lawyers but should never be used to deny ultimate justice. 479 Pa. at 178, 387 A.2d at 1281. See *Norris Van Tops, Inc. v. Kopitsky*, 278 Pa.Super. 77, 419 A.2d 1365 (1980)[.]

Because the pleading here substantially complies without our rules and may be treated as if properly labeled without prejudice to appellees' substantive rights, we conclude that the Commonwealth Court erred in reversing strictly on jurisdictional grounds [.] Accordingly, we vacate the order of the Commonwealth Court and remand for its consideration of the substantive issues raised[.]

In this analysis, the Supreme Court refused to accept the argument that a petition is not an "action" simply because it was a petition and not a complaint. We, therefore, reject SRF's claim that the Fictitious Names Act analysis *vis-à-vis* SRF's non-registration and the impact of a failure to maintain an "action" is not negated simply because the action was initiated by something other than a complaint or writ of summons.

3. Lacking Standing to Sue

With regard to this matter complained of, we direct the Commonwealth Court to the May 17, 2021 Memorandum Opinion, under the heading "Application of Fictitious Names Act, 54 Pa.C.S. §301 et. seq. to SRF and the Issue of Standing" beginning on page 14. We believe our analysis there needs no further explanation.

4. Fictitious Names Act - Substantial Compliance

SRFP next contends that its "substantial compliance" with the Fictitious Names Act is sufficient to obviate the Court from finding that SRFP lacks standing to sue. Section 331(c) states that, "[t]he penalties of subsections (a) and (b) shall not be applicable if there is substantial compliance in good faith with the requirements of this chapter or the corresponding provisions of prior law." There is nothing in the record to show even a scintilla of compliance with the relevant provisions of that act. In fact, both Clark and Bolger testified that they were not even aware if SRFP was registered with the Pennsylvania Corporation Bureau.³ Thus, to claim that the Court erred in determining that the petitioners did not have standing to sue because SRFP substantially complied or in this case, registered the fictitious name, after the hearing is in and of itself erroneous.

5. Preservation/Waiver of Standing Issue - CCTCB and Fehrenbacher

SRFP contends that the Court erred in not finding that CCTCB and Fehrenbacher waived the right to raise the issue of SRFP's standing. We disagree and refer the Appellate Court again to the May 17, 2021 Memorandum Opinion under the heading "Standing/Lack

³ In its concise statement, SRFP claims it registered its name on January 29, 2021. Even if true, it is inconsequential and irrelevant because: 1) it occurred after the hearing; and 2) it is not part of the record created on January 28, 2021.

Thereof in Pleadings" beginning on page 12. That analysis supports why SRF is incorrect in this assertion.

B. Substantive Challenges to Tax Sale/Notification Efforts

Clark and Bolger next challenge the Court's determinations with regard to the sale of the subject property. Specifically, they argue that the pre-sale posting requirements under 72 P.S. §5860.602(e)(3) were not met and it was error for the Court to find that they were; that the Court erred in not finding that CCTCB was required to undertake additional, reasonable notification efforts pursuant to 72 P.S. §607a, and, in general, that the Court erred in finding that CCTCB strictly complied with all requirements of RETSL. In further reviewing these matters complained of, we believe that our May 17, 2021 Memorandum Opinion, under the heading "Substantive Challenge to Upset Sale" adequately supports and explains our decisions with regard to these issues and why we felt that CCTCB complied with RETSL *vis-à-vis* 18 Birchwood Road, Lake Harmony.

C. Jurisdiction of the Court

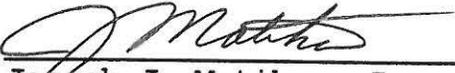
Lastly, Clark and Bolger appear to challenge the Trial Court's personal jurisdiction over the parties to the action on the basis that because "the bureau did not comply with the law's notice requirements and never personally served petitioners."

Initially, we believe this issue may have been waived on appeal. *In Re: RHA Pa Nursing Homes Health and Rehab. Residence*, 747 A.2d 1257, 1260 (Pa. Comwlth. Ct. 2000). Notwithstanding, for the reasons stated in the May 17, Memorandum Opinion, this Court has found that service has been made in accordance with RETSL. Consequently, this Court has personal jurisdiction over the parties to this action.

CONCLUSION

For the reasons stated herein, in conjunction with the May 17, 2021 Memorandum Opinion, this Court seeks affirmance from the Commonwealth Court.

BY THE COURT:



Joseph J. Matika, J.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

DANIEL R. CLARK AND VICTORIA :
CLARK BOLGER trading as SPLIT :
ROCK FAMILY PARTNERSHIP, :
 Plaintiffs :
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 vs. :
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COUNTY OF CARBON, TAX CLAIM :
BUREAU, :
 Defendant :
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 and :
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CHRISTIAN FEHRENBACHER, :
 Intervenor :

No. 20-2694

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Walter Zimolong, Esquire Counsel for Plaintiffs
Robert Frycklund, Esquire Counsel for Defendant
Chad Difelice, Esquire Counsel for Intervenor

MEMORANDUM OPINION

Matika, J. - May 17 , 2021

What recourse does a property owner have when its property is sold by a tax claim bureau at an upset sale for failure to pay real estate taxes? It has the right to file objections and exceptions to that sale assuming it has standing to do so. These are the issues before the Court today.

FACTUAL AND PROCEDURAL BACKGROUND

On September 15, 2020, the Carbon County Tax Claim Bureau (hereinafter "CCTCB") held an upset sale pursuant to the provisions

of the Real Estate Tax Sale Law, (hereinafter "RETSL"), 72 P.S. §5860.101 et. seq. One of the properties subjected to that sale was real estate titled to Split Rock Family Partnership (hereinafter "SRFP"), located at 18 Birchwood Road, Lake Harmony, Pennsylvania, and having a tax parcel number of 33A-21-B52, (hereinafter "the property"). The property was sold to Christian Fehrenbacher, (hereinafter "Fehrenbacher"), Intervenor herein, for the bid price of \$45,000.00. This sale occurred as a result of delinquent real estate taxes beginning with the tax year 2018.

On November 9, 2020, Petitioners, Daniel Clark and Victoria Clark, trading as SRFP, filed objections and exceptions to the sale of the property exposed at the September 15, 2020 upset sale. CCTCB filed an answer to these objections and exceptions on November 30, 2020. Fehrenbacher filed an answer on December 23, 2020.¹

A hearing was held on January 28, 2021 to address these objections and exceptions. Testimony was elicited from three witnesses. Testifying for SRFP were Daniel Clark and Victoria Clark Bolger (hereinafter "Clark and Bolger." Testifying for CCTCB was its Director, Renee Roberts (hereinafter "Roberts").

¹ On December 23, 2020, Fehrenbacher filed not only this answer but also a Notice of Intention as an intervenor pursuant to Pa.R.C.P. Rules 2327 and 2378. Also on that same date, Fehrenbacher filed a Petition for Intervention which neither CCTCB nor SRFP opposed.

According to Bolger, on or about September 9, 2013, Lisa Clark, Executrix of the Estate of Dominick Vittese, executed and delivered a deed from the estate to SRFP for its interest in a parcel of real estate located at 18 Birchwood, Kidder Township, Carbon County, Pennsylvania. In executing and delivering this deed, Lisa Clark, the mother of the petitioners, Clark and Bolger certified the address of the Grantee, SRFP as being 18 Miles Road, Darien, Connecticut 06820.² This address was at the time the residence of Bolger.³

Bolger testified that she and Clark are the only general partners of SRFP,⁴ however, neither Bolger nor Clark produced any documentation supporting the existence nor creation of this partnership. Bolger also indicated that she was unaware if any income tax filings were ever submitted for SRFP as a partnership or if any fictitious name registration was ever filed. Clark also testified that he did not know if SRFP was registered with the Pennsylvania Corporation Bureau. Likewise, he did not know if any taxes were paid by SRFP.

² The reason to certify the address of the grantee is to identify the location where real estate tax bills are to be sent.

³ Bolger testified that her family moved from this residence sometime in June, 2017 to Summit, New Jersey.

⁴ The existence and validity of this partnership was raised by both Respondents in their answers to Clark and Bolger's objections and exceptions as well as at the hearing.

On the issue of real estate taxes, Clark never saw any tax bills for the property nor was he aware that 18 Miles Road, Darien, Connecticut was used on the deed for the property as its "certified address." Clark also explained that if tax bills were sent to his sister, he would be surprised. Notwithstanding his lack of knowledge of where these tax bills were sent, he did indicate that all taxes were paid through January 1, 2018. Clark also indicated that Bolger never sent any tax bills to him but he also stated that the bills were sent to Bolger until she moved.

Bolger testified that she did not direct estate counsel, Gerstien, Grayson and Cohen, LLP of Mount Laurel, New Jersey to use her address as the "certified address" for the property.⁵ In furtherance of her denial, she claimed she was not aware that 18 Miles Road, Darien, Connecticut, her former residence, was being used as the address to where real estate tax bills were being sent. However, she also said that if those tax bills were sent to that address while she lived there, she would make sure they would be paid or sent to her father for payment. Bolger then contradicted her direct testimony by saying that she thought the real estate taxes were being sent to the family business address. Finally, Bolger testified that she only became aware that 18 Miles Road,

⁵ Both Clark and Bolger testified that Attorney Grayson had long been general counsel for their family and the family business in Pennsauken, New Jersey.

Darien, Connecticut was being used as the address to where real estate taxes were being sent when the property was actually sold.

When Bolger moved from Connecticut to New Jersey in June, 2017, she claims she completed a change of address form with the United States Postal Service. She did not, however indicate whether she changed the certified address for the property with anyone (i.e., tax collector or tax assessment office.) Clark testified that he was likewise unaware if any forwarding address was ever supplied for the property.

Clark and Bolger also provided documentation related to various bills associated with this property. For example, they produced a copy of the 2020 trash invoice from Kidder Township dated January 1, 2020 showing "Split Rock Family Partnership, 7221 N. Crescent Blvd., Pennsauken, New Jersey" as the then address for SRFP.⁶ This invoice however, does not specifically identify the subject property. Similarly, Clark and Bolger produced a copy of a road maintenance invoice,⁷ with a "bill to" name and address of Lisa Clark, 340 Tom Brown Road, Moorestown, New Jersey 08057." This invoice likewise does not identify the subject property nor SRFP. Lastly, Clark and Bolger produced copies of PPL bills for

⁶ Petitioner's Exhibit #4.

⁷ Petitioner's Exhibit #5.

all of 2020.⁸ These invoices do in fact identify SRFP and the address of Birchwood Road, Lake Harmony.⁹

As to all notices sent by CCTCB, Clark and Bolger both testified that neither of them either signed for any certified or registered mail, nor had seen any of the notices. Likewise, they claimed they had not observed any postings on the property. Bolger also testified that she never authorized anyone at 18 Miles Road, Darien, Connecticut to sign for any notices after she moved to Summit, New Jersey.

CCTCB Director Roberts testified that all notices relative to the property were always sent to 18 Miles Road, Darien, Connecticut, as that was the only address on file for SRFP. CCTCB presented six (6) exhibits which Roberts identified and testified about extensively. The first notice sent as required by RETSL, dated April 1, 2019, was the Notice of Return and Claim.¹⁰ This was sent by CCTCB for unpaid 2018 real estate taxes. Roberts

⁸ Petitioner's Exhibit #6. Notwithstanding the lack of property identification on these bills, for reasons noted later in this opinion, we did not give any consideration to these bills as something CCTCB should have investigated to find another address for SRFP.

⁹ Clark and Bolger claimed that had CCTCB contacted PPL they would have known of the new address for SRFP. While these documents may have been helpful in identifying a forwarding address for SRFP, this Court is unsure how a third party could access them. Additionally, as noted in footnote 8, we do not believe CCTCB was required to contact PPL in any event.

¹⁰ Respondent's Exhibit #1.

testified that this was sent to SRFPP at the 18 Miles Road, Darien Connecticut address by certified mail. Roberts noted that this mailing was returned by the United States Postal Service on or about April 22, 2019 with a notation on the envelope of "wrong address" and a postal sticker noting "return to sender, not deliverable as addressed, unable to forward."¹¹ When queried, Roberts indicated she then double checked the records in the tax assessment office. Roberts noted that the address in the tax assessment office was the same as the one possessed by CCTCB. As a result, nothing further was done to locate a different address. When asked by SRFPP's counsel if she took any additional steps to locate a correct address for SRFPP, Roberts indicated she did not feel that 607a applied to a Notice of Return and Claim.¹²

Roberts testified that a similar Notice of Return and Claim for the unpaid 2018 real estate taxes dated June 3, 2019 was posted on the property by Palmetto Posting, Inc. on July 11, 2019. This is supported by a photograph showing a copy of the notice placed on the property.¹³

Roberts further testified that a Notice of Return and Claim

¹¹ Page 2 of Respondent's Exhibit #2.

¹² Notwithstanding, 72 P.S. §3860.607a requires a tax bureau to engage in additional notification efforts under certain circumstances. This issue will be addressed seriatim.

¹³ Respondent's Exhibit #2.

was next sent to SRFP for unpaid 2019 real estate taxes. This notice, dated May 1, 2020 was also sent to the 18 Miles Road, Darien, Connecticut address, however, unlike the Notice of Return and Claim sent the previous year, this mailing was not returned. Records received from the U.S. Postal Service indicated that this item, #9214 8969 0037 9886 3303 60, was received at 18 Miles Road, Darien, Connecticut on May 22, 2020 at 2:04 P.M.¹⁴

On June 3, 2020, CCTCB sent a "Notice of Public Sale" to SRFP advising it that unless a certain sum is paid (\$1,481.43) the property will be sold at a public sale on September 15, 2020.¹⁵ This notice was likewise sent to SRFP at 18 Miles Road, Darien, Connecticut. According to the records received from the U.S. Postal Service, this mailing was received at this address on June 12, 2020 at 4:29 P.M. Roberts admitted that the signature on this record was not legible but that did not require CCTCB to engage in the additional notification efforts required by §607a. Had this Notice of Public Sale been returned, CCTCB then would have undertaken those efforts but since this was the second notice that was signed for at the Darien, Connecticut address, Roberts felt no

¹⁴ Respondent's Exhibit #3

¹⁵ Respondent's Exhibit #4.

further efforts were needed.¹⁶

On July 8, 2020, Palmetto Posting, Inc. posted a "Notice of Public Sale" on the property.¹⁷ Similar to the Notice of Public Sale sent to the Darien, Connecticut address, this notice provided SRFP with notice of the exposure of the property at a public sale on September 15, 2020 and that the amount that needed to be paid to remove it from that sale was \$1,481.43. A picture showing the location of where this notice was posted on the property appears on the back of the exhibit.

Through a further mailing dated August 17, 2020, the CCTCB sent another Notice of Public Tax Sale to SRFP at the Darien, Connecticut address. Roberts testified that this notice was not required to be sent, but it was sent as a courtesy to the owner.¹⁸

¹⁶ Throughout cross-examination, Petitioners' counsel inquired as to why CCTCB did not investigate connections between Lisa Clark and SRFP, did not contact Gerstein, Grayson and Cohen, LLP, did not reach out to Kidder Township for a possible different address nor do any internet searches for SRFP. Roberts indicated she had no reason to suspect a connection between Clark and SRFP, nor between the law firm and SRFP and did not believe it was necessary to look for any other addresses for SRFP because two of the notices sent were delivered at the Darien, Connecticut address, the only address they had for SRFP.

¹⁷ Respondent's Exhibit #5.

¹⁸ §5860.602(e)(2) of the RETSL reads as follows: "If return receipt is not received from each owner pursuant to the provisions of clause (1), then, at least ten (10) days before the date of the sale, similar notice of the sale shall be given to each owner who failed to acknowledge the first notice 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, by the tax collector for the taxing district making the return and by the county office responsible for assessments and revisions of taxes. It shall be the duty of the bureau to determine the last post office address known to said collector and county assessment office."

This mailing was returned by the U.S. Postal Service on August 26, 2020 with a label affixed thereto indicating "return to sender, not deliverable as addressed, unable to forward." Roberts also indicated that because two mailings resulted in actual deliveries of delivery at the address on record with her office, there were no further additional notification efforts to undertake pursuant to §607a.

After the sale occurred on September 15, 2020, CCTCB as required by §607 of the RESTL, made a consolidated return to the Court.¹⁹ This return included the subject property. An order was issued, dated October 13, 2020, requiring that objections or exceptions to that sale had to be filed within thirty (30) days or else the sale would be confirmed absolute. Bolger testified that she never received nor saw that consolidated return. Clark testified that he learned of the sale of the property when he had a handyman notify him that the locks to the home were changed.

All parties were given the opportunity to lodge post-hearing proposed findings of fact, conclusions of law and legal memoranda. This matter is now ripe for disposition.

Roberts testified that CCTCB was not required by this section to send the notice identified herein because "return receipt" was received from the mailing required by clause (1). That receipt was attached to Respondent's Exhibit #4 which evidenced delivery on June 12, 2020.

¹⁹ Petitioner's Exhibit #8.

LEGAL DISCUSSION

The issue raised by SRFP centers on claims that CCTCB failed to comply with the requirements of the RETSL. However, prior to determining whether CCTCB complied with the notice requirements of the RETSL, a preliminary issue, Clark and Bolger's standing to object to the loss of the property of SRFP must be determined. This issue centers on the actual existence of SRFP and thus the implications that may have on the objections and exceptions filed.

A. STANDING TO FILE OBJECTIONS

Both Fehrenbacher and CCTCB allege that Clark and Bolger, trading as SRFP, have no standing to raise objections to the loss of this property as SRFP, the owner noted on all related documents, does not exist as a legal entity, i.e., a Pennsylvania partnership. In their objections, Clark and Bolger identify SRFP as a Pennsylvania partnership. In both CCTCB's response to that averment as well as in Fehrenbacher's answer, they state the SRFP does not exist nor appear as a registered Pennsylvania partnership with the Pennsylvania Department of State in accordance with the Fictitious Names Act of 1982, 54 Pa.C.S. §301 et. seq. CCTCB further demands in its answer that SRFP provide "strict proof to the contrary [. . .] at the time and place of hearing or trial in this matter." At the time of hearing, Clark and Bolger both testified that they did not know whether SRFP was registered as a

partnership in Pennsylvania or if a fictitious name was ever filed for. Further, Bolger stated that to her knowledge, income tax returns were never filed for the partnership.

1. STANDING/LACK THEREOF IN PLEADINGS

Fehrenbacher contends that, by virtue of SRFP's failure to factually deny his averment set forth in paragraph 16 of his Petition to Intervene, this averment is deemed admitted.²⁰ We agree with Fehrenbacher's assertion that this averment should have elicited a response beyond the boilerplate "conclusion of law" assertion, as the knowledge to answer paragraph 16 was clearly within the possession of the petitioners or at least easily obtainable by them. However, this Court does not see this averment nor the response given as consequential to the objections of SRFP as the Petition to Intervene is not now before the Court and those pleadings were not introduced as exhibits in the hearing on the objections.

In defense of Fehrenbacher's assertion that SRFP has no standing in this matter, SRFP claims Fehrenbacher failed to properly raise this issue and in fact waived it. In support of

²⁰ Fehrenbacher's averment in paragraph 16 reads: "Split Rock Family Partnership is not and had never been a registered partnership, entity and/or "fictitious name" existing in the Commonwealth of Pennsylvania as required per 54 Pa.C.S. §§304 et. seq." The response provided by SRFP was: "Denied. Petitioners deny the averments of this paragraph as conclusions of law to which no response is required."

this proposition, SRFP points to Pa.R.C.P. Rule 1032(a). This rule reads as follows: "A party waives all defenses and objections which are not presented either by preliminary objection, answer or reply, except a defense which is not required to be pleaded under Rule 1030(b), the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, the objection of failure to state a legal defense to a claim, the defenses of failure to exercise or exhaust a statutory remedy and an adequate remedy of law and any other nonwaivable defense or objection." SRFP's reliance upon this rule to support its argument is misplaced.

In paragraph 1 of SRFP's "Objections and Exceptions to Upset Tax Sale," it states: "Petitioner, Split Rock Family Partnership, is a Pennsylvania General Partnership." In response to this averment and contained in its filing entitled "Respondent Carbon County Tax Claim Bureau's Answer to Objections and Exceptions to Upset Tax Sale," CCTCB answers as follows, in pertinent part: ". . . there do not appear to be any current records in the Pennsylvania Department of State to reflect the registration of a Pennsylvania General Partnership and/or fictitious name for "Split Rock Family Partnership" . . . Strict proof to the contrary is demanded at the time and place scheduled for hearing or trial in this matter." Likewise, in his answer to that same paragraph

contained in the objections, Fehrenbacher responded: "Denied. It is specifically denied that Split Rock Family Partnership is a registered Pennsylvania general partnership, pursuant to 54 Pa.C.S. §§301 et. seq. It is further denied that Split Rock Family Partnership exists as any other form of partnership or as a legal entity in the Commonwealth of Pennsylvania." Clearly, both CCTCB and Fehrenbacher raised the issue of the lack of standing on the part of SRFPP to bring these objections pursuant to the mandates of Rule 1032(a). A party preserves its standing argument by raising it in his answer. *Mae v. Janczak*, A.3d, FN2 2021 WL 209279 (Pa. Super. Ct. 2021). See also *Drake Mfg. Co. Inc. v. Polyflow, Inc.* 109 A.3d 250, 257, (Pa. Super 2015) (objection to standing properly presented when raised in preliminary objections or answer.)

2. APPLICATION OF FICTITIOUS NAME ACT, 54 PA.C.S. §301 ET.SEQ., TO SRFPP AND THE ISSUE OF STANDING

"Standing or capacity to sue, relates to a party's right to make a legal claim or seek judicial enforcement." *Mae v. Janczak*, A.3d, 2021 WL 209279, FN2 (Pa. Super. 2021). 54 Pa.C.S. §301 et. seq. is known as Pennsylvania's "Fictitious Names Act." "The purposes of the Fictitious Names Act are: (1) to protect persons giving credit in reliance on the fictitious name; and (2) to establish definitively the identities of those owning the business for the information of those who have dealings with

the entity. *George Stash and Sons v. New Holland Credit Co., LLC*, 905 A.2d 541, 543 (Pa. Super 2006), (internal citations omitted). A "fictitious name" is defined as "any assumed or fictitious name, style or designation other than the proper name of the entity using such name. The term includes a name assumed by a general partnership, syndicate, joint adventure ship or similar combination or group of persons." 54 Pa.C.S.A. §302 (emphasis ours).

Clearly, SRFP is a fictitious name devoid of any proper names to identify its partners. "The Fictitious Names Act provides that an entity which has failed to register its fictitious name shall not be permitted to maintain any action in a tribunal in this Commonwealth." *George Stash and Sons, Supra* at 543; 54 Pa.C.S.A. §331(a). Additionally, pursuant to 331(b), "[B]efore any entity may institute any action in any tribunal of this Commonwealth on any cause of action arising out of any transaction in respect to which such entity used a fictitious name prior to the date of the registration of such fictitious name, or after the date its registration under this chapter was cancelled or otherwise terminated as to such entity, the entity shall pay to the department for the use of the Commonwealth a civil penalty of \$500." There was no testimony presented by any of the parties testifying on behalf of SRFP suggesting that a fictitious name was

registered or that the \$500.00 civil penalty was paid prior to instituting this action. This is clearly what is required in order for SRFP to file these objections.

Lastly, SRFP argues that even if SRFP was not a registered fictitious name, both CCTCB and Fehrenbacher knew, by virtue of Clark and Bolger filing the objections, that they were the general partners for the SRFP general partnership upon Fehrenbacher and CCTCB receiving a copy of the objections.²¹ There is no doubt that upon receipt of the objections, receipt of which occurred after the filing of the same, that the identities of Clark and Bolger as the purported general partners of SRFP were revealed to Fehrenbacher and CCTCB. However, the statute is clear: no entity shall be permitted to maintain an action if it has no registered fictitious name, but can still institute an action if before doing so, it pays to the Commonwealth the civil penalty of \$500.00. This SRFP did not do prior to the filing of the objections on November, 9, 2020. Any knowledge that Clark and Bolger were the partners of SRFP had to be known by Fehrenbacher and/or CCTCB before that date.

As such, this Court finds that SRFP, an unregistered general partnership pursuant to 54 Pa.C.S. §301 et. seq., an

²¹ When someone dealing with an unregistered party knows with whom they are dealing, notwithstanding the fact that the civil penalty was not paid, that lack of registration, in certain circumstances does not preclude the filing of a civil suit. *George Stash and Sons, supra*.

unregistered fictitious name which did not pay the requisite civil penalty pursuant to §331(b) prior to instituting this action, lacks standing to file these objections.

Notwithstanding this decision, this Court still intends to embark on addressing this sale on the merits as well.

B. SUBSTANTIVE CHALLENGE TO UPSET SALE

[There is a prima facie presumption that the acts of public officers exists and applies to tax sales.] This presumption exists until the contrary appears. A property owner overcomes this presumption when exceptions to a tax sale are filed alleging that a tax claim bureau did not comply with statutory notice requirements. *Dolphin Service Corp. v. Montgomery County Tax Claim Bureau*, 557 A.2d 38, 39 (Pa. Cmwlth. 1989). Once averments are made that notices are inadequate or insufficient, a prima facie challenge to the presumption of regularity is made out. *Ali v. Montgomery Co. Tax Claim Bureau*, 557 A.2d 35 (Pa. Cmwlth. 1989). The burden then falls on the tax claim bureau to prove compliance with the challenged notice provisions. *In Re: 1999 Upset Sale of Real Estate*, 811 A.2d 85, 88 (Pa. Cmwlth. 2002).

In the case sub judice, SRFP's allegations that the CCTCB did not mail notices to the proper address nor properly post the real estate subject to the sale, are sufficient to raise a challenge to CCTCB's notice obligations. Accordingly, the burden shifts to the

CCTCB to show that it strictly complied with RETSL. Thus, when a hearing is commenced to address objections to the procedures leading to the tax sale and specifically, the statutory notice requirements, the burden is on the agency, CCTCB, to prove that "it complied with all statutory notice provisions and applied common sense business practices in ascertaining proper addresses" where notice of the tax sale may be given. *Farro, Tax Claim Bureau of Monroe County*, 704 A.2d 1137, 1142 (Pa. Cmwlth. 1997); *Rinier v. Tax Claim Bureau of Delaware County*, 606 A.2d 635, 641-42 (Pa. Cmwlth. 1992).

72 P.S. §5860.602 identifies the notice requirements that must occur before real estate can be exposed at an upset sale. Section 602(a) requires publication "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 the publication of legal notices."

Additionally, §602(e)(3) requires that "[e]ach property scheduled for sale shall be posted at least ten (10) days prior to the sale." 72 P.S. §5860.602(e)(3). SRFP contends that CCTCB failed to strictly comply with this requirement in that there was no evidence that the notice remained posted for ten (10) days prior to the sale, nor was there evidence of what any such notice said or where exactly such notice was posted.

Lastly, "[A]t least thirty (30) days before the date of the sale," notice must be given, "by United States certified mail, restricted delivery, return receipt requested, postage prepaid, to each other as defined by this act." 72 P.S. §5860.602(e)(1). SRFP contends that while this notice appears to have been signed for "by someone" via the United States Postal Service, it was not signed by a representative of SRFP or by someone authorized by SRFP to sign on its behalf. SRFP claims that as a result, CCTCB was required, but failed, to engage in the additional notification efforts set forth in 72 P.S. §5860.607a.

"A fundamental requirement of due process is that notice be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Famagelitto v. County of Erie Tax Claim Bureau*, 133 A.3d 337, 345 (Pa. Cmwlth. 2016) (*en banc*). When dealing with upset sales such as this, at a minimum, a property owner shall be actually notified by CCTCB if reasonably possible, before the land subject to that sale is forfeited. *Tracy v. County of Chester, Tax Claim Bureau*, 489 A.2d 1334, 1339 (1985). In furtherance of this requirement, CCTCB where necessary, shall "conduct reasonable investigations to ascertain the identity and whereabouts of the latest owners of record of property subject to an upset sale for purposes of providing notice to that party."

Farro v. Tax Claim Bureau of Monroe County, 704 A.2d 1137, 1142 (Pa. Cmwlth. 1997). These provisions are strictly construed and strict compliance is mandated for each notice so as to avoid the deprivation of property without due process. *Donofrin v. Northampton County Tax Claim Bureau*, 811 A.2d 1120, 1122 (Pa. Cmwlth. 2002).

1. ADEQUACY OF POSTING

As noted, SRFP contends that the posting performed by Palmetto Posting, Inc. on behalf of CCTCB did not meet the requirements of §602(e)(3), including proving that the notice remain posted for ten (10) days prior to the sale. Roberts testified that Exhibit #5, a double-sided document, depicted on the front side a copy of the notice that was posted on the subject property and the back side provided a "field report" of the work performed by Palmetto, including identifying information of the property and when posting was completed. According to this exhibit, the notice was posted on July 8, 2020, well in advance of the September 15, 2020 upset sale. "The method of posting must be reasonable and likely to inform the taxpayer as well as the public at large of [the] intended real estate property sale." *In Re: Somerset County Tax Sale of Real Estate Assessed in the Name of Tub Mill Farms, Inc.*, 14 A.3d 180, 184 (Pa. Cmwlth. 2010) (quoting *Wiles v. Washington County Tax Claim Bureau*, 972 A.2d 24, 28 (Pa.

Cmwlth. 2009.)). Further, "in order to constitute posting that [is] reasonable and likely to ensure notice . . . the posting must be conspicuous, attract attention, and be placed there for all to observe." *Id.* (quoting *Ban v. Tax Claim Bureau of Washington County*, 698 A.2d 1386, 1389 (Pa. Cmwlth. 1997)). In addition, the posted notice must be securely attached. *Wiles*, 972 A.2d at 28. Clearly, the posting was placed in a conspicuous spot as required, i.e., alongside of what appears to be a driveway used to approach the building on the subject property, affixed in such a manner to ensure that it remained secure thereon, and intended to notify the public. There is nothing in the actions of CCTCB or Palmetto as shown by the evidence and testimony, or in any contradictory testimony to show noncompliance with §5860.602(e)(3). Also, this Court is unaware of any authority that requires the CCTCB to prove that the posting remained there for the ten (10) day period preceding the actual sale.

2. MAILED NOTICES

SRFP next argued that CCTCB failed to properly notice SRFP regarding the September 15, 2020 sale as required by §5860.602(e)(1). SRFP argues that because certain mailings sent by CCTCB to SRFP were returned, required notices were never provided to SRFP and as a result, CCTCB was thereafter required to

engage in those additional notification efforts required by §5860.607a.

CCTCB sent all notices to the address it possessed for SRF. The following are those mailings, the dates they were mailed, the contents of those mailings and the results of the mailing:

<u>Date of Mailing</u>	<u>Contents of Mailing</u>	<u>Delivery Status</u>
April 1, 2019	Notice of Return and Claim (Unpaid 2018 taxes)	return to sender not deliverable as addressed; unable to forward; wrong address (handwritten)
May 1, 2020	Notice of Return and Claim (Unpaid 2019 taxes)	Delivered / Mailing signed for (5/12/20)
June 3, 2020	Notice of Public Sale	Delivered / Mailing signed for (6/12/20)
August 17, 2020	Notice of Public Tax Sale	Return to sender, not deliverable as addressed, unable to forward; return to sender (handwritten)

Pursuant to 72 P.S. §5860.308(a),

"Not later than the thirty-first day of July of each year, the bureau shall give only one notice of the return of said taxes and the entry of such claim in one envelope for each delinquent taxable property, by United States registered mail or United States certified mail, return

receipt requested, postage prepaid, addressed to the owners at the same address listed on the form returned by the tax collector for taxes that are delinquent.

. . .

. . . If no post office address of the owner is known or if a notice mailed to an owner at such last known post office address is not delivered by the postal authorities, then notice as herein provided shall be posted on the property affected."

As noted, Respondent's Exhibit #1 is the notice required to be sent to SRFP pursuant to §308(a) to notify SRFP of the return and claim from the tax collector that the 2018 real estate taxes are unpaid and that the property was in jeopardy of being sold if this claim is not paid. As also noted, this mail was returned to CCTCB with the notation of "return to sender, not deliverable as addressed; unable to forward wrong address." Roberts testified that she investigated this address and the file in the CCTCB Office reflected this as the correct address for SRFP. Next, in accordance with §308(a), CCTCB caused this property to be posted. A copy of this posting was introduced into evidence as Respondent's Exhibit #2 which not only contained the contents of the posting, but also the date, time and location, complete with a photograph of the posting. Thus, this Court finds that CCTCB complied with the requirements of §308(a) with regard to the Notice of Return and Claim of the unpaid real estate taxes for 2018 in anticipation of a 2020 upset sale.

Next, we examined the Notice of Return and Claim for unpaid 2019 real estate taxes. As evidenced by the testimony and exhibit, this notice dated May 1, 2020 and addressed to SRFP, was delivered on May 12, 2020. While the recipient's signature is not legible and appears to be more cryptic than an actual signature, this Court does note that the USPS tracking number and address listed match that listed on the Notice of Return and Claim itself. This Court finds that the exhibit evidences a delivery to the address for SRFP known to CCTCB.²²

As the sale for the upset sale neared, CCTCB was required to provide three (3) different types of notices to all property owners.

Pursuant to 72 P.S. §5860.602(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 county for the publication of legal notices."²³ 72 P.S. §5860.602(a).

"In addition to such publications, similar notice of the sale shall also be given by the bureau as follows:

²² While this notice is not one required to be sent for purposes of the upset sale for the delinquent 2018 real estate taxes, it is important to note that it evidences to CCTCB that mail is in fact deliverable to the address on file for SRFP.

²³ This type of notice was never raised nor contested by SRFP so we will assume that the proper notices by publication were given to SRFP.

(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." 72 P.S. §5860.602(e).

In support of the required mailing under this section, CCTCB presented Respondent's Exhibit #4, a copy of the Notice of Public Sale dated June 3, 2020. The third page, from the United States Postal Service, shows that certified mail item number 9269 3969 0037 9887 1357 47 was delivered on June 12, 2020, well in advance of the September 15, 2020 sale date. This item number likewise matches that listed on the Notice of Public Sale attached as page one of this exhibit.

CCTCB's last notice requirement as a prerequisite to exposing SRFP's property at the upset sale is that of posting the subject property at least ten (10) days prior to the sale. Respondent Exhibit #5, a two-sided document, was offered by CCTCB to satisfy this obligation. The front of this exhibit is a copy of the Notice of Public Sale that meets the content requirements of the statute. The back side of this exhibit contains posting information including but not limited to location of the posting (18 Breezewood Road, Lake Harmony, Pennsylvania), date and time posted (July 8, 2000, 7:15:00 P.M.) and relevant information pertaining to property details. In addition, this exhibit contains two photos,

an aerial shot of the subject property and a photo of the posting which is located along the drive to the residence, similarly to that in Exhibit #2. Accordingly, this Court finds that CCTCB has satisfied its obligation of posting the subject property at least ten (10) days prior to the sale.

In addition to the aforementioned required notices, Roberts testified that "as a courtesy" another notice was sent on or about August 17, 2020 to 18 Miles Road, Darien, Connecticut. Similarly to the results of the mailing of the initial Notice of Return and Claim, this mailing was returned with the postal notation of "return to sender, not deliverable as addressed, unable to forward." As a result, Roberts indicated that she researched files in CCTCB, the Tax Assessment Office and with the Recorder of Deeds Office to see if CCTCB could locate a different address than that to which this mailing was sent. This search did not reveal any different addresses. When queried on why CCTCB did not undertake additional notification efforts pursuant to 72 P.S. §5860.607(a),²⁴

²⁴ Pursuant to this section,

"When any notification of a pending tax sale or a tax sale subject to court confirmation is required to be mailed to any owner, mortgagee, lienholder or other person or entity whose property interests are likely to be significantly affected by such tax sale, and such mailed notification is either returned without the required receipted personal signature of the addressee or under other circumstances raising a significant doubt as to the actual receipt of such notification by the named addressee or is not returned or acknowledged at all, then, before the tax sale can be conducted or confirmed, the bureau must exercise reasonable efforts to discover the whereabouts of such person or entity and notify him. The

she indicated that she did not feel that CCTCB needed to do so since two other mailings were signed for and accepted at the address in the possession of CCTCB. This Court agrees with CCTCB that additional notification efforts were not necessary as the CCTCB was within its authority to accept that the Notice of the Public Sale, notice required by 72 P.S. §5860.602(e)(1), was accepted and signed for at 18 Miles Road, Darien, Connecticut as evidenced by the notification that was received back from the United States Postal Service.

CONCLUSION

As a result of the efforts of CCTCB regarding the notice requirements as prerequisites to the sale of SRPF's property at 18

bureau's efforts shall include, but not necessarily be restricted to, a search of current telephone directories for the county and of the dockets and indices of the county tax assessment offices, recorder of deeds office and prothonotary's office, as well as contacts made to any apparent alternate address or telephone number which may have been written on or in the file pertinent to such property. When such reasonable efforts have been exhausted, regardless of whether or not the notification efforts have been successful, and notification shall be placed in the property file describing the efforts made and the results thereof, and the property may be rescheduled for sale of the sale may be confirmed as provided in this act." 607a(a).

Roberts testified that the notification of the pending sale was signed for at the address known to the CCTCB (Exhibit #4) and thus no other efforts needed to be undertaken. While the testimony of Bolger would indicate that she no longer resided at that address and could not have signed for that mailing nor authorize someone else to do so, the fact remains that there was no way for CCTCB to have known about those circumstances.

Section 5860.602(h) reads, "No sale shall be defeated and no title to property sold shall be invalidated because of proof that mail notice as herein required was not received by the owner, provided such notice was given as prescribed by this section." Thus, it is no consequence that SRPF ever received these notices, just that CCTCB sent them in accordance with this section.

Breezewood Road, Lake Harmony, Pennsylvania, this Court finds that it met its obligations and satisfied the heavy burden placed upon it by the statute. Accordingly, this Court enters the following:

and DECREED that said Exceptions and Objections are OVERRULED and
DISMISSED.

BY THE COURT:



Joseph J. Matika, J.