

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION

HAZEL FRASER AND LLOYD FRANCIS, :
Objectors/Exceptants :
 :
v. : No. 07-3579
 :
CARBON COUNTY TAX CLAIM BUREAU, :
Respondent :

Kim R. Roberti, Esquire Counsel for Plaintiffs
Daniel A. Miscavige, Esquire Counsel for Defendant

Civil law - Objections to Tax Sale - Additional Notice Efforts
- Notice by Posting - Notice by Public
Advertisement

1. When the Tax Claim Bureau has reason to believe that an owner has not received written notification of a pending upset sale, the Bureau is required by statute to exercise additional efforts to locate the owner before a tax sale of the owner's property can occur. 72 P.S. § 5860.607a(a).
2. Provided the Tax Claim Bureau has strictly complied with the notice requirements of the Real Estate Tax Sale Law, the fact that the owner may not have actually received notice is insufficient to set aside the sale.
3. In providing notice of a tax sale by posting, the manner of posting must be reasonable and likely to inform the owner, as well as the public, of the impending sale; must be securely attached; and must be conspicuous, meaning that the posting must be such that it will likely be seen by the property owner and the public generally.
4. The property description used in the advertised notice of an upset tax sale must be the same as that stated in the claims entered and is sufficient if the property is described by reference to assessment maps found in the assessment office.
5. When property is titled in more than one name, the advertised notice of the upset tax sale must state the name of each record owner. If this requirement is not met, the

notice is fatally defective and the tax sale will be set aside.

6. When property is jointly titled in more than one name, an advertised notice of the upset tax sale which contains the name of only one of the property owners is fatally defective, not only with respect to the owner whose name does not appear in the public advertisement, but also with respect to the owner whose name does appear, and will be set aside.

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Daniel A. Miscavige, Esquire		Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. - April 28, 2009

Hazel Fraser and Lloyd Francis, the owners of real property known as Lot 186, Section FVI, Towamensing Trails, Penn Forest Township, Carbon County, Pennsylvania, a/k/a PRC No. 22A-51-FVI186 (the "Property"), have filed exceptions and/or objections to the upset sale of the Property held by the Carbon County Tax Claim Bureau (the "Bureau") on September 21, 2007.

Following a hearing thereon, we make the following findings and conclusions.

FINDINGS OF FACT

1. The Property which is the subject of these proceedings is an unimproved vacant lot located on Emerson Drive in Towamensing Trails, Penn Forest Township, Carbon County, Pennsylvania.

2. The Property was sold by the Bureau for delinquent real estate taxes at the upset sale held on September 21, 2007.

3. At the time of the upset sale, Hazel Fraser and Lloyd Francis (the "Owners") were the record owners of the Property. However, no evidence was presented as to how the Owners hold title, whether as joint tenants, as tenants in common, or by the entirety.

4. On October 24, 2007, the Owners filed exceptions and/or objections seeking to set aside the upset sale which are now before us for disposition.

5. On or about March 1, 2006, the Bureau sent notice of the return of unpaid real estate taxes for the year 2005 and the entry of a claim therefore to the Owners at 582 E. 26th St., Brooklyn, N.Y. 11210 by United States certified mail, return receipt requested, postage prepaid. See 72 P.S. § 5860.308(a).

This notice was returned to the Bureau on April 18, 2006, unclaimed.

6. Thereafter, on April 18, 2006, a courtesy letter was sent by United States first class mail to the Owners at the same address - 582 E. 26th St., Brooklyn, N.Y. 11210 - together with a copy of the 2005 return and claim notice. This mailing was not returned to the Bureau.

7. Following the Bureau's receipt of the undelivered return and claim notice for the 2005 tax year, notice of this return and claim was posted on the Property on August 6, 2006, by Michael Zavagansky, a person designated by the Carbon County Board of Commissioners to post notice of the return and claim. See 72 P.S. § 6860.308(a).

8. On November 1, 2006, the Bureau again sent notice of the delinquent taxes to the Owners at 582 E. 26th St., Brooklyn, N.Y. 11210 by United States first class mail. This mailing was not returned to the Bureau.

9. On March 1, 2007, the Bureau sent notice of the return of unpaid real estate taxes for year 2006 and the entry of a claim therefore to the Owners at 74 Terrace Ave., West Orange, N.J. 07052 by United States certified mail, return receipt requested, postage prepaid. This change in address was based upon information the Bureau received from the Carbon County Assessment Office. A signed receipt for this notice was

returned to the Bureau on or about March 13, 2007. See 72 P.S. § 5860.308(a).

10. On June 1, 2007, the Bureau sent notice of the September 21, 2007, upset sale to Lloyd Francis at 74 Terrace Ave., West Orange, N.J. 07052 by certified mail, restricted delivery, return receipt requested, postage prepaid. See 72 P.S. § 5860.602(e)(1). A signed receipt for this notice was returned to the Bureau on June 13, 2007.

11. On June 1, 2007, the Bureau sent notice of the September 21, 2007, upset sale to Hazel Fraser at 74 Terrace Ave., West Orange, N.J. 07052 by certified mail, restricted delivery, return receipt requested, postage prepaid. See 72 P.S. § 5860.602(e)(1). A signed receipt for this notice was returned to the Bureau on June 13, 2007.

12. Notice of the upset sale of the Property scheduled for September 21, 2007, was also posted by the Bureau on the Property on July 29, 2007. See 72 P.S. § 5860.602(e)(3). This notice was attached to a surveyor's stake located approximately five feet from Emerson Drive and was visible from Emerson Drive.

13. On August 17, 2007, notice of the September 21, 2007, scheduled upset sale of the property was published in the *Times News*, a newspaper of general circulation, and the *Carbon County Law Journal*. See 72 P.S. § 5860.602(a). This notice

described the Property as being located at 186 Emerson Drive with a Map No. of 22A-51-FVI186. The sole owner of the Property identified in each notice was Lloyd Francis.

14. On August 27, 2007, notice of the upset sale scheduled for September 21, 2007, was sent by United States first class mail to Lloyd Francis at 74 Terrace Ave., West Orange, N.J. 07052. A certificate of mailing for this notice was obtained by the Bureau from the post office. See 72 P.S. § 5860.602(e)(2). This mailing was not returned to the Bureau.

15. On August 27, 2007, notice of the upset sale scheduled for September 21, 2007, was sent by United States first class mail to Hazel Fraser at 74 Terrace Avenue, West Orange, N.J. 07052. A certificate of mailing for this notice was obtained by the Bureau from the post office. See 72 P.S. § 5860.602(e)(2). This notice was not returned to the Bureau.

16. The address for the Owners used by the Bureau in the August 27, 2007, mailings - 74 Terrace Avenue, West Orange, N.J. 07052 - was ascertained by the Bureau after searching local telephone directories for the County, dockets and indices of the County Tax Assessment Office, Recorder of Deeds Office and Prothonotary's Office, as well as checking with the tax collector for the affected taxing districts, and reviewing the Bureau's own records. See 72 P.S. §§ 5860.602(e)(2) and 5860.607a(a).

17. On September 26, 2007, the Bureau notified Lloyd Francis by United States certified mail, restricted delivery, return receipt requested, postage prepaid, addressed to 74 Terrace Ave., West Orange, N.J. 07052 that the Property was sold at the upset sale held on September 21, 2007. See 72 P.S. § 5860.607(a.1)(1). This notice was returned to the Bureau unclaimed on October 30, 2007. See 72 P.S. § 5860.607(b.1).

18. On the same date, October 30, 2007, the Bureau sent notice to Lloyd Francis by United States first class mail addressed to 74 Terrace Ave., West Orange, N.J. 07052 of the upset sale held on September 21, 2007. This notice was not returned to the Bureau.

19. On September 26, 2007, the Bureau notified Hazel Fraser by United States certified mail, restricted delivery, return receipt requested, postage prepaid, addressed to 74 Terrace Ave., West Orange, N.J. 07052 that the Property was sold at the upset sale held on September 21, 2007. See 72 P.S. § 5860.607(a.1)(1). This notice was returned to the Bureau unclaimed on October 29, 2007. See 72 P.S. § 5860.607(b.1).

20. On the same date, October 29, 2007, the Bureau sent notice to Hazel Fraser by United States first class mail addressed to 74 Terrace Ave., West Orange, N.J. 07052 of the upset sale held on September 21, 2007. This notice was not returned to the Bureau.

21. At the time of hearing, the only witness called by the Owners was a title searcher. No evidence was presented as to the Owners' actual addresses at any relevant time period or whether the Owners in fact received any of the notices which were not returned to the Bureau.

DISCUSSION

At the time of the hearing, the Owners identified three defects which they claim are fatal to the upset sale of their Property: (1) that the additional efforts made by the Bureau to ascertain the Owners' address for notification of the upset sale were insufficient; (2) that the notice of the upset sale posted on the Property was insufficient; and (3) that the Property description contained in the advertised public notice of the upset sale was insufficient and failed to identify both Hazel Fraser and Lloyd Francis as owners of the Property. These issues will be addressed in the sequence presented.

(1) Additional Notice Efforts

The requirement for additional notification efforts by the Bureau appears in Section 607.1 of the Real Estate Tax Sale Law, 72 P.S. § 5860.607a(a), and provides in pertinent part that additional efforts are required to locate an owner when the mailed notification of a pending upset sale set by the bureau 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” Here, the separate notices of the upset sale sent by the Bureau to the Owners on June 1, 2007, by certified mail, restricted delivery, were in fact delivered and signed for. While the signature for each receipt appears to be that of the same individual and does not appear to be that of either Owner, there is nothing in the record to indicate that the individual who accepted this mail was not authorized to do so by the Owners. See Eathorne v. Westmoreland County Tax Claim Bureau, 845 A.2d 912, 915-16 (Pa.Cmwlth. 2004) (“[I]n evaluating whether notice requirements as to tax sales have been strictly complied with, our inquiry is not to be focused on the neglect of the owner, which is often present in some degree, but on whether the activities of the Bureau comply with the requirements of the statute.”); see also 72 P.S. § 5860.602(h).

Assuming nevertheless that one or more of the conditions triggering the necessity for additional notification efforts has been met, the Bureau exercised reasonable efforts to determine the whereabouts of the Owners. The sources of information specified in Section 607.1 need not each be investigated and are not the exclusive means of satisfying an owner’s due process right to be notified before his property is sold. See Wiles v. Washington County Tax Claim Bureau, 2009 WL

425886 *5 (Pa.Cmwlth. 2009). Only if it is obvious that notice given by the bureau is not reaching the owners, is the bureau obligated to go beyond notice by certified mail. See id. "[D]ue process does not require the taxing bureau to perform the equivalent of a title search or to make decisions to quiet title" Id. Further, as already mentioned in our findings, there is nothing in the record before us to suggest that any additional examination of the county records by the Bureau, beyond those made, would have resulted in any different address for the Owners. See id.

(2) *Posting of the Notice of Sale*

The affidavit of Mr. Zavagansky, who posted notice of the upset sale on the Property, states the date and time of posting. At the hearing held in this matter, Mr. Zavagansky testified that he posted notice of the upset sale on a surveyor's stake, using staples to fasten the notice to the stake. The stake was approximately two inches in width and extended approximately two feet above ground. The stake was located on the Property approximately five feet from Emerson Drive and, once posted, this notice was visible from the road.

With respect to the requirements for posting notice of an upset sale, the Commonwealth Court recently stated the following:

While the [Real Estate Tax Sale Law] is silent as to the manner of posting required, this Court has interpreted Section 602(e)(3) to mean that the method of posting must be reasonable and likely to inform the taxpayer as well as the public at large of an intended real property sale. Case law requires that the posting be reasonable, meaning conspicuous to the owner and public and securely attached. "Conspicuous" means posting such that it will be seen by the property owner and public generally.

Id. at *3 (citations omitted). Accepting the testimony of Mr. Zavagansky as credible, which we do, the Bureau has met its burden of establishing that the posting was reasonable. See In re Upset Price Tax Sale of September 10, 1990, 606 A.2d 1255, 1257 (Pa.Cmwlth. 1992) (placing the burden of proving compliance with proper posting upon the Bureau); see also Wiles, 2009 WL 425886 at *3-*4 (finding posting of notice on a two inch wide piece of wood fastened with staples and located on a vacant lot seven to eight feet from the road complied with Section 602(a)(3)).

(3) *Adequacy of Public Advertisement*

(a) *Description of Property*

The Owners' claim that the property description used in the advertised public notice for the September 21, 2007, upset sale was inadequate is without merit. The description used in this advertisement is the same as that used in the claim entered. Compare Exhibits 15 (advertisement) and 1 (notice of return and claim; see also 72 P.S. § 5860.602(a)(5) (requiring

the property description in the advertised notice of upset sale to be the same as that stated in the claims entered)). Moreover, not only was the Owners' evidence challenging the accuracy of the Property's street address as 186 Emerson Drive unconvincing, the Bureau's additional description of the Property by reference to assessment maps found in the assessment office complies with Section 309 of the Real Estate Tax Sale Law, 72 P.S. § 5860.309(c)(3).

(b) *Identity of Owner*

Notwithstanding the adequacy of this description, the public notice advertising the upset sale identified only Lloyd Francis as the owner of the Property. Among the requirements for the legal advertising of an upset sale is that the notice describe not only the property to be sold but also include the name of the owner. See 72 P.S. § 5860.602(a)(5).

In pertinent part, the Real Estate Tax Sale Law defines "owner" as "the person whose name last appears as an owner of record on any deed or instrument of conveyance recorded in the county office designated for recording." 72 P.S. § 5860.102. Under this definition, whether the Owners' interest in the Property is as joint tenants or as tenants in common, each owner has a separate interest in the Property for which individual notice of the upset sale is required. See Appeal of Marshalek, 541 A.2d 398, 400 (Pa.Cmwlth. 1988), *appeal denied*,

558 A.2d 533 (Pa. 1989). This requirement has not been met with respect to the legal advertisement placed concerning Hazel Fraser's interest in the Property.

Nor can we ignore the error as being harmless. In notifying the public generally of an upset sale, advertising notice of the upset sale serves both to attract bidders to the upset sale and to inform "many people who may be concerned for the welfare of the owners." Hicks v. Och, 331 A.2d 219, 220 (Pa.Cmwlth. 1975). "Such advertising, calling attention to the owners' plight, might prompt these people to take such steps as they may consider appropriate to see to it that the owners' interests are protected." Id. Additionally, absent proof that the record owner has received actual notice of an impending upset sale, a fact not evident in the record before us, "a failure by a tax claim bureau to comply with all the statutory notice requirements ordinarily nullifies a sale." Aldhelm, Inc. v. Schuylkill County Tax Claim Bureau, 879 A.2d 400, 403 (Pa.Cmwlth. 2005), *appeal denied*, 890 A.2d 1060 (Pa. 2005); see also Krawec v. Carbon County Tax Claim Bureau, 842 A.2d 520, 523-24 (Pa.Cmwlth. 2004) ("If any method of notice is defective, the tax sale is void. . . . The Law's notice requirements must be strictly construed to guard against the deprivation of property without due process of law").

The more interesting question is the effect of this defect on the sale of Lloyd Francis's interest in the Property. While it might appear at first glance that the failure to name Hazel Fraser in the legal advertisement should not affect the sale of the interest of Lloyd Francis, this is not the law. In Appeal of Marshalek, the court held that absent notice of the upset sale to all tenants in common, the sale of one tenant's undivided one-fifth interest in real estate was invalid notwithstanding notice of the upset sale to the tenant whose interest was sold. See 541 A.2d at 400-01. A tenant in common owns the whole of an undivided fractional interest in the real estate. See id. at 401. Consequently, as specifically noted by the court, the fractional interest of those co-owners who were not notified would be affected by the upset sale and such owners are entitled to notice both as a matter of due process and under the Real Estate Tax Sale Law. See id. at 400-01; see also 72 P.S. § 5860.602(e)(1) (requiring that "each owner" be notified by certified mail of the upset sale).¹ By extension, and also recognizing that it would be fundamentally unfair to bind the successful bidder at an upset sale to the purchase of a fractional interest in property at the same price for which the

¹ In Appeal of Marshalek, the court stated:

It is contradictory to acknowledge that other owners of fractional interests exist and to state that their interests may not be affected. The fact that they are owners of fractional interests means they have "interests" that will be affected.

541 A.2d 398, 400 (Pa.Cmwlth. 1988), *appeal denied*, 558 A.2d 533 (Pa. 1989).

purchase of the entire ownership interest was bid, the failure to include Hazel Fraser in the legal advertisement also taints the sale of Lloyd Francis's interest in the Property.

CONCLUSIONS OF LAW

1. Prior to the September 21, 2007, upset sale of the Property, the Bureau made a reasonable investigation to ascertain the identity and whereabouts of the owners of record of the Property for the purpose of providing notice to the Owners of the upset sale.

2. The Bureau has met its burden of proving that the posted notice of the September 21, 2007, upset sale of the Property was reasonable and conspicuous, in a manner likely to be seen and likely to inform both the Owners as well as the public at large of the intended upset sale.

3. The description of the Property contained in the legal advertisement for the September 21, 2007, upset sale complied with the requirements of Section 602(a)(5) of the Real Estate Tax Sale Law, 72 P.S. § 5860.602(a)(5).

4. The failure of the public advertisement for the September 21, 2007, upset sale to include the name of Hazel Fraser as an owner of the Property, is a fatal defect both to the sale of Hazel Fraser's interest in the Property as well as that of Lloyd Francis, an additional named owner of the Property.

BY THE COURT:

P. J

