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2017 IL App (3d) 170022-U

Order filed December 15, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

<i>In re</i> APPLICATION OF THE KANKAKEE)	Appeal from the Circuit Court
COUNTY COLLECTOR)	of the 21st Judicial Circuit,
(Vista Securities, Inc.,)	Kankakee County, Illinois.
)	
Petitioner-Appellee,)	
)	Appeal No. 3-17-0022
v.)	Circuit No. 09-TX-14
)	
John Edwards,)	
)	Honorable Thomas W. Cunnington,
Respondent-Appellant).)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Holdridge and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Section 22-45 of the Tax Code (35 ILCS 200/22-45 (West 2016)) precluded respondent's collateral challenge to a technical error in the tax deed purchaser's initial take notice. (2) Respondent received the process due to him under the Tax Code (35 ILCS 200/22-5 *et seq.* (West 2006)). (3) Respondent failed to present clear and convincing evidence of fraud.

¶ 2 In November 2006, Vista Securities, Inc. (Vista) purchased a tax sale certificate for property located at 1905 East Locust Street in Kankakee. Three years later, the trial court granted Vista a tax deed and order of possession on the property. On September 29, 2015, Vista obtained a renewed order of possession, which remained valid until October 29, 2016. In March 2016, the occupant and former owner, John Edwards, filed a “Motion to Set Aside Void Tax Deed” pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2016)). Edwards appeals the trial court’s order denying his motion. We affirm the court’s judgment.

¶ 3 **BACKGROUND**

¶ 4 The parties agree that Vista purchased the tax certificate at issue on November 9, 2006. The certificate listed Municipal Trust and Savings Bank (MTSB) as the assessee of record. Pursuant to section 22-5 of the Property Tax Code (Tax Code) (35 ILCS 200/22-5 (West 2006)), Vista timely filed a notice of sale and redemption rights addressed to MTSB on March 9, 2007. However, Vista erroneously listed two different redemption deadlines on the section 22-5 take notice: January 9, 2009, and June 9, 2009. Neither date was correct. The statutory redemption period spanned two years and six months from the tax sale date in November 2006 (35 ILCS 200/21-350(b) (West 2006)). The correct redemption deadline fell in May 2009.

¶ 5 On May 18, 2009, Vista filed a petition for tax deed. The petition alleged that Vista “complied in all things with the provisions of the Statutes of Illinois in relation to the issuance of tax deeds and is entitled to [the tax deed].” Don Ballinger, Vista’s chief executive officer, attached his affidavit to the petition. Ballinger stated Vista timely “delivered to the County Clerk a notice as prescribed by Section 22-5 of the Illinois Property Tax Code, together with funds

sufficient to effect mailing such notice to the party in whose name the taxes were last assessed be [sic] certified mail, return receipt requested.”

¶ 6 The same day, Vista filed a second take notice with the clerk pursuant to section 22-10 of the Tax Code (35 ILCS 200/22-10 (West 2008)). Vista addressed the section 22-10 take notice to Edwards and other interested parties. The notice listed October 29, 2009, as the final redemption deadline. It also stated that Vista scheduled a hearing on its petition for November 4. Pursuant to sections 22-15 and 22-20 of the Tax Code (35 ILCS 200/22-15, 20 (West 2008)), Vista published a notice listing all interested parties, including Edwards, in a local newspaper on June 30, July 1, and July 2, 2009. The sheriff’s office successfully served Edwards with the section 22-10 take notice on July 6. Vista’s published notice and section 22-10 take notice strictly complied with the statutory requirements.

¶ 7 At the hearing on November 4, 2009, the court granted Vista’s motion. The court directed the circuit clerk to issue Vista a tax deed and granted Vista an order of possession. Vista timely recorded the deed on October 20, 2010.

¶ 8 On September 8, 2015, Vista filed a motion requesting a renewed order of possession. In its motion, Vista stated it “attempted *** negotiations with [Edwards] to allow [him] to retain possession and reacquire ownership of the property.” The negotiations failed, and Edwards refused to vacate the property. By this time, the original order of possession was nearly six years old; the sheriff’s office refused to serve it. The court granted Vista a renewed order of possession on September 29.

¶ 9 Six months later, Edwards filed his “Motion to Set Aside Void Tax Deed” pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2016)). His motion argued that Vista failed to timely record the tax deed. If a tax deed recipient fails to record the deed “within one

year from and after the time for redemption expires,” then the tax deed and the tax *sale* are “absolutely void with no right to reimbursement.” 35 ILCS 200/22-85 (West 2016). Edwards argued the redemption deadline was May 2009 (the date that should have been listed on the 22-5 take notice), not October 29, 2009 (the date listed on the 22-10 take notice).

¶ 10 At the hearing on August 25, 2016, Vista’s president, Mike Ballinger, testified that he extended the redemption period twice (on April 27 and May 14, 2009). Ballinger’s extensions postponed the final redemption deadline until October 29, 2009. Ballinger did not produce the original extension documents at the hearing. Edwards’ counsel also attempted to examine Ballinger regarding the section 22-5 take notice. After Vista’s counsel objected, the court determined that the notice fell outside the scope of the proceedings. The court also noted that section 22-45 of the Tax Code (35 ILCS 200/22-45 (West 2016)) prohibited Edwards from collaterally challenging the section 22-5 take notice.

¶ 11 Carla Anderson testified that she worked as “the tax lady” in the Kankakee County Clerk’s office for nearly 19 years. She explained the “Devnet” computer program that the county used to track tax deeds. To extend a redemption period, the certificate purchaser (Vista) would file the extension notice with the county clerk. The clerk then file stamped the notice, placed a hardcopy in the file, and digitally recorded the extension in Devnet. From Devnet records, Anderson confirmed Ballinger filed extensions on April 27 and May 14, 2009. After the extensions, the final redemption deadline was October 29.

¶ 12 On September 27, 2016, the court denied Edwards’ motion. The court found that Vista properly extended the redemption deadline to October 29, 2009, and timely recorded the tax deed within one year.

¶ 13 Edwards then filed an emergency motion to reconsider in which he argued that section 21-385 of the Tax Code (35 ILCS 200/21-385 (West 2008)) required Vista to provide him with notice to extend the redemption period. He also raised several new legal theories. First, he claimed that the defects in Vista’s section 22-5 take notice rendered it void. He also argued that the notice’s deficiencies constituted clear and convincing evidence that Vista obtained the tax deed by fraud. He pointed out that Vista’s petition for tax deed and Don Ballinger’s attached affidavit stated Vista complied with all statutory notice requirements; however, the section 22-5 take notice contained facial errors. Finally, Edwards argued that Vista denied him due process by not serving him with the section 22-5 take notice.

¶ 14 The court denied Edwards’ motion on December 5, 2016. On December 15, Edwards filed his “Emergency Motion to Set Aside Void Tax Deed Due to Lack of Subject Matter Jurisdiction and Personal Jurisdiction.” Before the hearing on this motion, Edwards filed a notice of appeal. At a hearing on January 23, 2017, the trial court correctly ruled that Edwards’ notice of appeal divested the court of jurisdiction to decide his pending motion. See *Huber v. American Accounting Ass’n*, 2014 IL 117293, ¶ 8. We now turn to the merits of Edwards’ appeal.

¶ 15 ANALYSIS

¶ 16 Edwards has abandoned his challenge to the October 29, 2009, redemption deadline—the primary issue before the trial court. He also abandoned his claim that section 21-385 of the Tax Code (35 ILCS 200/21-385 (West 2008)) required Vista to provide him with written notice of its intent to extend the redemption deadline. It does not: “If the period of redemption is extended, the purchaser *** must give the notices provided for in Section 22-10 at the specified times prior to the expiration of the extended period of the redemption.” 35 ILCS 200/21-385 (West 2008).

¶ 17 On appeal, Edwards argues that Vista’s failure to strictly comply with section 22-5 renders the tax deed void; the trial court lacked subject matter jurisdiction to issue the deed. He also asserts that due process required Vista to serve him with the section 22-5 take notice in 2007. Finally, Edwards argues that the defects in Vista’s section 22-5 take notice constitute clear and convincing evidence of fraud. He claims Vista also perpetrated a fraud on the court by stating in its petition and attached affidavit that it complied with the relevant statutory notice requirements.

¶ 18 Vista counters that Edwards waived these arguments by not raising them in the trial court. Edwards’ counsel certainly presented a maelstrom of arguments in several different motions. He abandoned some arguments after the court’s initial order and abandoned others on appeal. After the court denied his initial petition, Edwards filed a motion to reconsider and an emergency motion to set aside the tax deed. Each motion raised new legal theories pertaining to Vista’s section 22-5 take notice. Regardless of their procedural propriety, Edwards’ arguments fail on the merits.

¶ 19 I. Section 22-5 Take Notice Deficiencies

¶ 20 Edwards first argues that Vista’s deficient section 22-5 take notice (35 ILCS 200/22-5 (West 2006)) divested the trial court of subject matter jurisdiction to issue the tax deed. He claims the notice deficiency voids the court’s November 2009 order that issued the tax deed to Vista.

¶ 21 The Tax Code deems tax deeds “incontestable unless order appealed or relief petitioned.” 35 ILCS 200/22-45 (West 2016). Edwards never appealed the court’s November 2009 order. Instead, he collaterally attacked the tax deed in March 2016 with a section 2-1401 petition (735 ILCS 5/2-1401 (West 2016)). Our supreme court has recently made clear that notice deficiencies

cannot constitute grounds for relief in a collateral tax deed challenge. *DG Enterprises, LLC-Will Tax, LLC v. Cornelius*, 2015 IL 118975, ¶ 29.

¶ 22 Because “ [t]he forced sale of a home is a grave and melancholy event, ” the Tax Code allows delinquent taxpayers to directly and collaterally challenge tax deeds. *Cornelius*, 2015 IL 118975, ¶ 24 (quoting *In re Application of the County Collector*, 217 Ill. 2d 1, 17-18 (2005) (*Lowe I*)). However, the Tax Code must also protect tax deeds’ marketability in order to maintain tax revenues. *Id.* Section 22-45 balances these competing interests by limiting collateral relief to: “(1) proof that the taxes were paid prior to sale; (2) proof that the property was exempt from taxation; (3) proof by clear and convincing evidence that the tax deed had been procured by fraud or deception by the tax purchaser or his or her assignee; or (4) proof by a person or party holding a recorded ownership or other recorded interest in the property that he or she was not named as a party in the publication notice as set forth in *Section 22-20*, and that the tax purchaser *** did not make a diligent inquiry and effort to serve that person or party with the notices required by *Sections 22-20 through 22-30*.” (Emphasis added.) 35 ILCS 200/22-45 (West 2016).

¶ 23 In *Cornelius*, 2015 IL 118975, the respondent argued that the purchaser’s sections 22-5 and 22-10 take notices were defective because they failed to include the county clerk’s name and phone number. The respondent claimed these defects deprived the court of subject matter jurisdiction and voided the trial court’s order issuing the tax deed. She claimed that she could attack the void order and tax deed at any time. A divided panel of this court agreed. *People ex rel. McGuire v. Cornelius*, 2014 IL App (3d) 130288.

¶ 24 On review, our supreme court reversed. It held: “Section 22-45 evinces an intent on the part of the General Assembly to protect tax deed orders from collateral attack on questions

relating to notice unless the challenge squarely fits within the language of section 22-45.” (Internal quotation marks omitted.) *Cornelius*, 2015 IL 118975, ¶ 29.

¶ 25 Here, Edwards makes a similar argument as the respondent in *Cornelius*. We are bound by the supreme court’s holding. Section 22-45 does not reference section 22-5 take notices. Section 22-45 therefore precludes the collateral relief Edwards seeks in this case.

¶ 26 II. Due Process

¶ 27 Although section 22-45 precludes collateral relief based on notice defects, respondents who are altogether denied due process may collaterally enforce their constitutional rights. This is so because due process requires, at a minimum, that any “deprivation of *** property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). We distinguish the two collateral challenges—strict compliance with a notice statute and due process violations—because notice defects do not necessarily deprive respondents of their due process rights. See *Cornelius*, 2015 IL 118975, ¶ 27 (holding that the purchaser’s failure to include the county clerk’s address and phone number was not “tantamount to respondent not being named in the notice at all”).

¶ 28 Edwards argues that Vista denied him due process by not serving him with the section 22-5 take notice. He claims Vista intentionally deprived him of due process by addressing the notice to MTSB. However, section 22-5 (35 ILCS 200/22-5 (West 2006)) requires the purchaser to serve “the party in whose name the taxes are last assessed as shown by the most recent tax collector’s warrant books.” The tax certificate listed MTSB, not Edwards, as the assessee of record.

¶ 29 By contrast, section 22-10 of the Tax Code (35 ILCS 200/22-10 (West 2008)) requires the purchaser to serve the second take notice to “the owners, occupants, and parties interested in the property, including any mortgagee of record.” The purchaser must also “publish a notice as to the owner or party interested, in some newspaper published in the municipality.” 35 ILCS 200/22-20 (West 2008). Vista listed Edwards as an interested party in a published notice on June 30, July 1, and July 2, 2009. The sheriff’s office served Edwards with the section 22-10 take notice on June 9, 2009. Edwards received the process due him under the Tax Code.

¶ 30 The remaining question is whether the Tax Code’s process is constitutionally sufficient. See *People v. R.G.*, 131 Ill. 2d 328, 353 (1989); *In re Phillip C.*, 364 Ill. App. 3d 822, 831 (2006). We hold that it is. Although only assesses of record are entitled to receive the section 22-5 take notice, sections 22-10 and 22-20 provide all interested parties with sufficient notice and opportunity to present their case.

¶ 31 In this case, for example, Edwards received the section 22-10 take notice in June 2009. The notice listed the correct redemption deadline (October 29, 2009) and hearing date (November 4, 2009). The notice gave Edwards nearly five months to redeem the property or challenge Vista’s petition. However, Edwards did not redeem the property, oppose Vista’s petition, or directly challenge the tax deed. Nothing in the record suggests that nearly five months’ notice deprived Edwards of a meaningful opportunity to redeem the property or challenge Vista’s petition. We find no due process violation.

¶ 32 III. Fraud

¶ 33 Edwards’ final argument alleges that Vista fraudulently acquired the tax deed in November 2009. To prevail, Edwards must present clear and convincing evidence of fraud. 35 ILCS 200/22-45 (West 2016). He claims that “noncompliance with [section 22-5’s] notice

requirement is clear and convincing evidence that the tax deed was procured by fraud or deception.” He adds that Vista’s petition and Ballinger’s attached affidavit misrepresented that Vista complied with the statutory notice requirements before filing its petition for tax deed. This evidence does not satisfy Edwards’ burden.

¶ 34 Fraud is a “knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.” Black’s Law Dictionary 670 (7th ed. 1999). A notice defect does not automatically establish sufficient evidence of fraud. See *Bank of America, N.A. v. Luca*, 2013 IL App (3d) 120601, ¶ 17. Defects vary as to their severity and materiality. It defies logic to conclude that a typographical error or some other notice defect that has no bearing on the ultimate outcome, as is the case here, clearly and convincingly demonstrates that the notice’s author knowingly deceived the recipient to induce a certain outcome.

¶ 35 Vista’s petition does not support Edwards’ position. For one thing, courts need not consider section 22-5 take notice defects in determining whether to grant a purchaser’s petition for tax deed. *Cornelius*, 2015 IL 118975, ¶ 8. To obtain a tax deed, purchasers must prove that they complied with the notice provisions in sections 22-10 through 22-25 of the Tax Code (35 ILCS 200/22-10 to 22-25 (West 2014)). *Id.* Vista complied with these provisions. Therefore, the petition for tax deed did not misrepresent that Vista complied with all statutory provisions “in relation to the issuance of tax deeds.”

¶ 36 Additionally, the fact that Vista strictly complied with every statutory requirement after it filed the section 22-5 take notice strongly suggests Vista did not commit fraud. Although Ballinger’s attached affidavit failed to acknowledge the section 22-5 take notice defects, Vista complied with every notice requirement necessary to obtain the tax deed. *After* filing its section 22-5 take notice, to which Edwards was not entitled by statute, Vista ensured Edwards received

the notice to which he was entitled under sections 22-10 and 22-20 of the Tax Code (35 ILCS 200/22-10, 22-20 (West 2014)). These notices strictly complied with their statutory requirements. Based on this record, Edwards cannot present clear and convincing evidence of fraud.

¶ 37

CONCLUSION

¶ 38

For the foregoing reasons, we affirm the judgment of the circuit court of Kankakee County.

¶ 39

Affirmed.