

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE:	:	
LYCOMING COUNTY TAX	:	No. 01-01922
CLAIM BUREAU	:	
	:	
TAX PARCEL #36-415-116B	:	
PROPERTY PREVIOUSLY OF	:	
JAMES H. BANKS, JR. and	:	Petition to Set Aside
JODY S. BANKS,	:	Judicial Tax Sale

ORDER

AND NOW, this 18 day of May 2004, the court GRANTS the petition to set aside judicial tax sale filed by Jody S. Banks and James H. Banks, Jr. The court finds that when the Sheriff receives information that the delinquent taxpayer has moved and information regarding the location to which he or she moved, service of the rule to show cause must be attempted at the new location. Here, the Sheriff of Sullivan County was deputized to serve Mr. and Mrs. Banks in Muncy Valley. The Sullivan County Sheriff filed a return indicating the Banks only had a post office box in Muncy Valley and they were allegedly living at James Banks' father's residence, which was a green house on Route 220 north of Glen Mawr. No evidence was presented to show that any attempt was made to serve the Banks at this location. Mr. and Mrs. Banks testified they were residing at James's father's residence, which has an address of 12681 Route 220 Highway, Hughesville, PA and is the only green house as you leave Glen Mawr.¹ If service had been attempted at this residence, it is likely the Banks would have received personal service of the rule to show cause.

The Tax Claim Bureau argued that, when the Sheriff filed the “not found” return, service was complete and nothing further was required. This court cannot agree. The court relies on Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983); Tracy v. Chester County Tax Claim Bureau, 507 Pa. 288, 489 A.2d 1334 (1985); Montgomery County Tax Claim Bureau v. Mermelstein Family Trust, 836 A.2d 1010 (Pa.Cmwlt. 2003) and In re Tax Sale No. 10, 801 A.2d 1280 (Pa.Cmwlt. 2002). The court believes these cases stand for the proposition that due process requires actual notice when the party’s whereabouts are reasonably known.²

The purchasers at the judicial sale, Richard and Judith Hartzell, contend that service at the Glen Mawr location was not required because the Banks had actual notice of the judicial tax sale. The court cannot agree. There is no evidence in the record that Mrs. Banks had any knowledge regarding the date of the judicial tax sale. The only evidence relating to Mr. Banks concerned a phone conversation with an employee of the Tax Claim Bureau/Collections Office on or about May 21, 2002. There is no evidence that the **date** of the sale was discussed during this conversation. Mr. Banks denied there were any discussions about a judicial tax sale. He claimed he called in regard to the notice and return of claim he had received for the outstanding 2001 taxes. The individual who spoke to Mr.

1 Mr. and Mrs. Banks testified that Mr. Banks was a heavy drinker and only was present at his father’s residence off and on, but he didn’t maintain any other residence.

2 In this decision, the court is not addressing what efforts, if any, need to be made to locate and serve a taxpayer when neither the Tax Claim Bureau nor the sheriff has any information regarding the taxpayer’s new address, including the Banks’ argument that the sheriff has an obligation to notify the taxpayers by publication when they cannot be found. Since the Banks likely would have received notice of the rule if the information about them living in Glen Mawr had been acted upon, these issues are left for another day.

Banks was not called to testify. Instead, the Tax Claim Bureau called Thomas Heap, the Director of the Tax Claim Bureau, who introduced a printout of a note the individual entered into the computer system and explained its contents. See Exhibit F. The note states: “5/21/02 JAMES CL. ADV MUST PAY 1999 YR IN FULL AND CONT FOR 2000 TO GET OFF J SALE. OK PER TDH. PJK.” Neither the note nor Mr. Heap’s explanation of it indicated Mr. Banks was ever told the date of the judicial sale. Moreover, as of the date of the phone call, the property technically was not on the judicial sale because the court did not grant the Tax Claim Bureau’s petition and approve the sale of the property until June 22, 2002.³

Even assuming for the sake of argument that Mr. Banks had actual notice of the judicial sale date, the Commonwealth Court has found that such notice is immaterial when the owner or other party having an interest in the property did not receive notice of the rule to show cause or the hearing date. Montgomery County Tax Claim Bureau v. Mermelstein Family Trust, 836 A.2d 1010, 1014 (Pa.Cmwlth. 2002). In so finding, the Commonwealth Court stated: “The Law requires that an owner receive service of the rule, not notice of the actual date of judicial sale, because that proceeding is the opportunity for interested parties to appear and contest the validity of a judicial sale.” Id. (citations omitted).

The purchasers also argue that the petition to set aside the sale was filed beyond the applicable statute of limitations and therefore, must be denied. The statute of limitations is an affirmative defense. See Pa.R.Civ.P. 1030(a). The relevant statute of limitations is found at 42 Pa.C.S.A. §5522(b)(5), which states an action to set aside a judicial sale of property must be commenced within six months. The judicial tax sale was held on

³ The typewritten portion of the order, which was prepared by counsel for the Tax Claim Bureau and submitted to the court, incorrectly states the date of the order as August 22, 2002. The order, however, was signed and docketed on July 22, 2002.

August 29, 2002. The Banks' petition to set aside the judicial tax sale was filed on March 28, 2003, approximately seven months after the sale date. The Banks, however, were not served with notice of the rule to show cause and did not have actual notice of the sale date. Counsel for the Banks cited Murphy v. Monroe County Tax Claim Bureau, 784 A.2d 874 (Pa.Cmwlth 2001) and Forsythe v. Franklin County Tax Claim Bureau, 12 Pa. D. &C. 4th 283 (Franklin County 1990) for the proposition that the statute of limitations does not begin to run until the Banks had actual notice of the sale. Mrs. Banks testified that she did not realize the property was up for judicial sale until counsel for the Hartzells telephoned her in late February 2003 about problems the Hartzells were having with the property. Although the language relied upon by the Banks from Murphy and Forsythe is dicta because in both cases the court found the six-month statute of limitations was inapplicable, this language is consistent with the discovery rule. The discovery rule generally provides that the statute of limitations does not begin to run until a party knows or in the exercise of reasonable diligence should have known of his or her injury and its cause. In a prior section of this order, the court found that the Banks did not have actual notice of the judicial sale date. Although counsel for the Hartzells questioned the Banks on areas that could be construed as relating to whether they should have known the property was up for judicial sale, no argument was made on this issue as the Hartzells believed the Banks had actual knowledge. Even if such an argument had been made, the court believes the earliest date the statute of limitations could have begun to run against Mrs. Banks is October 1, 2002, when the deed to the Hartzells was recorded. The petition to set aside was filed within six months of this date. Therefore, the court finds the petition was not barred by the statute of limitations.

The court does not believe the proceeds from the sale have been distributed

due to the filing of the petition to set aside the sale. Therefore, the court directs the Tax Claim Bureau to return the funds to the Hartzells. Counsel for the Banks shall provide current addresses for his clients to the Tax Claim Bureau. The Banks shall contact Thomas Heap, the Director of the Tax Claim Bureau, within thirty (30) days to make arrangements to pay the back taxes. If the Banks fail to make payment arrangements in this time period, the Tax Claim Bureau may petition the court to sell the property at a judicial tax sale.

By The Court,

Kenneth D. Brown, P.J.

cc: Christopher Williams, Esquire
Peter Burchanowski, Esquire
J. Howard Langdon, Esquire
Work File
Gary Weber, Esquire (Lycoming Reporter)
Sheriff