Opinion filed June 4, 2020

In The

Eleventh Court of Appeals

No. 11-18-00095-CV

BRAD HEIDELBERG; SPENCER LEIGH; RIO SECO RESOURCES; DONNA SANDERS SANMAN; GARY DUANE SANDERS; SANDRA GAYLE WARD; JIM ALLAN SANDERS REVOCABLE LIVING TRUST; PERSHING BENNETT MOORE; JEFFERY A. MCWHORTER; JUDITH A. COLE; MARA BETH STEVENSON; BETH J. BARTON; GAIL J. GUNN; READ B. JOHNSTON; VICKI L. SIRES; JAMES STANFIELD LUCKIE; SOFTVEST, LLP; AOG MINERAL PARTNERS, LTD.; WADE PHILIP KOEHL; AND KIMBERLY WENDT-GONSALVES, Appellants

V.

DOH OIL COMPANY, Appellee

On Appeal from the 118th District Court
Martin County, Texas
Trial Court Cause No. 7033

M E M O R A N D U M O P I N I O N

In 1931, H.A. Moore and his wife, M.J. Moore, received a deed to, among other property, a 1/32 nonparticipating royalty interest (NPRI) in Section 3 of the H.A. Moore Survey in Martin County. Much later, on September 27, 2011, because the property taxes on the NPRI were not paid for the years 2009 through 2012 to Martin County and for the years 2010 through 2012 to the Grady Independent School District and the Martin County Hospital District, those taxing entities brought suit to foreclose the property tax lien on the NPRI. On September 3, 2013, DOH Oil Company purchased the NPRI at a property tax sale. By deed dated September 16, 2013, the sheriff conveyed the NPRI to DOH. DOH recorded the deed on September 18, 2013. Subsequently, royalties accumulated attributable to the NPRI. QEP Resources, Inc., the holder of those funds, became aware that there might be competing claims to the NPRI. On October 20, 2016, QEP filed an interpleader action and sought a determination as to whether DOH or the successors in interest of H.A. and M.J. Moore were rightful owners of the funds that QEP held. The trial court granted summary judgment for DOH and denied competing motions for summary judgment. We affirm.

In the interpleader action, DOH claimed that it was entitled to the accumulated royalties by virtue of its deed from the sheriff. Certain of the other defendants in the interpleader action asserted that the tax foreclosure and the resultant sheriff's deed to DOH were invalid for lack of proper notice and that, therefore, they, not DOH, were entitled to the royalties held by QEP. Additional claims were made that the property descriptions used in the tax sale were inadequate and therefore violated the statute of frauds.

Without going into unnecessary details of the summary judgment practice involved below, suffice it to say that all defendants in the interpleader action filed motions for summary judgment. Ultimately, at the time that the trial court entered

its order, three summary judgment motions were before it: DOH's motion for summary judgment, a motion for summary judgment filed by a group of H.A. Moore's heirs and assigns (referred to by the parties as the "Sanders Defendants"), and a motion for summary judgment filed by all other defendants.

By order dated March 9, 2018, the trial court granted DOH's motion for summary judgment as to all defendants in the interpleader suit and denied all other motions for summary judgment. The trial court ordered that the interpleaded funds be paid to DOH and that title to the NPRI be quieted in DOH. The trial court did not state the grounds upon which it based its order.

In their first issue on appeal, Appellants claim that the foreclosure judgment was void because the taxing entities failed to properly serve Appellants with notice of the foreclosure suit. In their second issue on appeal, Appellants argue that the sheriff's deed was void due to lack of a sufficient legal description. And, in their final issue on appeal, Appellants claim that the trial court abused its discretion when it granted DOH's motion to strike an amended motion for summary judgment as to some defendants.

Appellants maintain that, at the time that the tax authorities filed the tax suit, Appellants "and/or" the predecessors in title were the record owners of the NPRI. The tax suit, however, was brought against the "unknown owners" of the interest. The unnamed defendants in the tax suit were cited by posting. The citation was directed to: "THE UNKNOWN OWNERS OF A 0.03125 ROYALTY INTEREST IN MABEE 'B' LEASE NO. 37676." On March 11, 2013, the trial court foreclosed on the NPRI and ordered that it be sold at a tax sale. In the foreclosure citation and in the judgment, the subject property was described as: "TRACT 1: A 0.03125 Royalty Interest located in the Mabee 'B' Lease, Section Three (3), Abstract Nine Hundred Eighteen (918), H.A. Moore Survey, Martin County,

Texas; Lease No. 37676, Chesapeake Operating, Inc.- Operator GEO: 07097451015090600000."

At the tax sale, DOH Oil Company bought the NPRI that is the subject of this suit, and on September 16, 2013, DOH received a sheriff's deed to the NPRI. DOH recorded the deed on September 18, 2013. The sheriff's deed contained the same property description as the foreclosure judgment.

Meanwhile, QEP was performing drilling operations on this and other property. According to the petition filed by QEP in its interpleader lawsuit, sometime after the tax sale, and while QEP was in the process of performing drilling operations, QEP hired a title examiner to verify the percentages of the interest owners and to confirm the record mineral title owners. In October 2014, QEP learned of DOH's claim of ownership of the NPRI, and DOH provided QEP with a copy of its sheriff's deed. But in a title report that was updated in 2015, the title examiner reported that he had discovered that thirty-four other persons or entities possibly claimed title to the same NPRI as DOH.

QEP also alleged that, because of the information contained in the updated title opinion, QEP suspended payment until it could clarify the proper ownership of the NPRI. Furthermore, QEP alleged that its counsel determined that, in addition to due process claims that had been raised by the purported record owners, there was a question as to the sufficiency of the legal description in the tax foreclosure judgment and the sheriff's deed. QEP states in its petition that, after several attempts to resolve the competing ownership issues, QEP filed this interpleader action. It tendered the funds owing on the NPRI to the court and disclaimed any interest in the interpleaded funds.

As we have said, DOH and other defendants in the interpleader action filed competing traditional motions for summary judgment. The standard of review for such motions is well established. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d

546, 548 (Tex. 1985). Under that standard, we review the trial court's ruling de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). The burden is on the moving party to show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005). In our review as to whether there is a disputed issue of material fact, we will take as true evidence favorable to the nonmovant. *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 99 (Tex. 2004). All reasonable inferences, including any doubts, must be resolved in favor of the nonmovant. *Id.* When a defendant establishes a right to summary judgment as a matter of law, the burden shifts to the plaintiff to respond to the motion and present evidence raising a genuine issue of material fact. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678–79 (Tex. 1979).

In this case, the trial court did not specify the grounds upon which it granted summary judgment. In such a case, we must affirm the summary judgment if any of the grounds presented in the motion are meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003). "When both sides move for summary judgment and the trial court grants one motion and denies the other, we review the summary judgment evidence presented by both sides, determine all questions presented, and render the judgment the trial court should have rendered." *SeaBright Ins. Co. v. Lopez*, 465 S.W.3d 637, 641–42 (Tex. 2015)

The overarching issue that demands our initial attention is: When, in a suit to foreclose a property tax lien, if the taxing authorities do not exercise due diligence to support service of citation by a method other than by personal service, can the owners, as a matter of due process, raise that defect for the first time after the expiration of the period of time provided for in a statute of limitations?

DOH claims that Appellants are barred from collaterally contesting the tax proceedings. Appellants assert that they are not time-barred because the taxing

agencies improperly cited Appellants and thereby deprived them of their property without due process.

Constitutional due process is offended when a person is deprived of property without notice and a reasonable opportunity to be heard in any proceeding in which such deprivation is sought. *In re E.R.*, 385 S.W.3d 552, 559 (Tex. 2012); *Doue v. City of Texarkana*, 786 S.W.2d 474, 477 (Tex. App.—Texarkana 1990, writ denied). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice 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." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "Failure to give notice violates 'the most rudimentary demands of due process of law.'" *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84 (1988) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965)).

Rule 117a of the Texas Rules of Civil Procedure governs citations in suits for delinquent ad valorem taxes. TEX. R. CIV. P. 117a. Rule 117a(3) provides, in part, that, if "the name or residence of [an] owner is unknown and cannot be ascertained after diligent inquiry, each such person . . . may be cited by publication." TEX. R. Civ. P. 117a(3). Rule 117a(3) also provides that, in suits for delinquent ad valorem taxes, "record owners of such property or of any apparent interest therein, including, without limitation, record lien holders, shall not be included in the designation of 'unknown owners.'" *Id.*

The rule, then, in cases of this nature, is that an entity seeking to provide notice by substituted service must first make a diligent search to discover the name or residence of those for whom substitute service is sought. *Id.* "A diligent search must include inquiries that someone who really wants to find the defendant would make, and diligence is measured not by the quantity of the search but by its quality." *In re E.R.*, 385 S.W.3d at 565 (footnote omitted). For purposes of this opinion, we

will assume that the summary judgment evidence shows, as a matter of law, that a diligent search of that type was not made and that service was ineffective. We will also assume, for purposes of this opinion, that the taxing entities cited the owners as "unknown" when the owners were in fact either known or could have been discovered if diligently sought. Our assumption, therefore, is that service of process by posting was ineffective "to apprise [Appellants] of the pendency of the action and afford them an opportunity to present their objections"; thus, for purposes of this opinion, we will assume that they were deprived of their property without due process. *Mullane*, 339 U.S. at 314.

But we cannot end our discussion there. DOH basically contends that, even if service of process was defective, that issue cannot be litigated in this proceeding. The basis for that contention is that the contest is barred by the limitation contained in Section 33.54(a)(1) of the Texas Tax Code.

The Texas Tax Code provides as follows:

> (a) Except as provided by Subsection (b), an action relating to the title to property may not be maintained against the purchaser of the property at a tax sale unless the action is commenced:
>
> > (1) before the first anniversary of the date that the deed executed to the purchaser at the tax sale is filed of record; or
> >
> > (2) before the second anniversary of the date that the deed executed to the purchaser is filed of record, if on the date that the suit to collect the delinquent tax was filed the property was:
> >
> > > (A) the residence homestead of the owner; or
> > >
> > > (B) land appraised or eligible to be appraised under Subchapter C or D, Chapter 23.
>
> (b) If a person other than the purchaser at the tax sale or the person's successor in interest pays taxes on the property during the applicable limitations period and until the commencement of an action

> challenging the validity of the tax sale and that person was not served citation in the suit to foreclose the tax lien, that limitations period does not apply to that person.
>
> (c) When actions are barred by this section, the purchaser at the tax sale or the purchaser's successor in interest has full title to the property, precluding all other claims.

TEX. TAX CODE ANN. § 33.54 (West 2015) (footnote omitted).

First, there is nothing in the record to show that Appellants paid taxes on the NPRI during the period covered by Section 33.54(b). Neither is there any record evidence that the NPRI falls under Section 33.54(a)(2). It is also undisputed that Appellants did not contest the tax suit before the first anniversary of the date that the sheriff's deed to DOH was filed of record as provided in Section 33.54(a)(1). Therefore, it would seem, that Appellants are not entitled to any relief from the sale to DOH unless due process considerations relative to service of process in a suit for delinquent taxes trump the one-year statute of limitations provided for in Section 33.54(a)(1).

Generally, "[a] complete failure of service deprives a litigant of due process and a trial court of personal jurisdiction; the resulting judgment is void and may be challenged at any time." *In re E.R.*, 385 S.W.3d at 566. However, although a parental termination case, the Texas Supreme Court indicated in *E.R.* that there must be some bounds upon the right to challenge ineffective service of process. *Id.* at 567. There, the mother acquired actual notice of the termination order, but the record was silent as to when she obtained that notice or what actions she took in response. *Id.* at 569. The court remanded the case to the trial court for a determination of whether the mother unreasonably delayed after she learned of the judgment and whether to grant the relief "would impair another party's substantial reliance on the judgment." *Id.* at 570. The court held that "[the mother] is entitled to a new trial unless she unreasonably delayed in seeking relief after learning of the judgment

against her, and granting relief would impair another party's substantial reliance on the judgment." *Id.*

We believe that the Tax Code provides the bounds to which the court in *E.R.* referred. The post-deprivation relief provided for in Section 33.54 of the Tax Code—payment of taxes within one year of the date of the recordation of the sheriff's deed to the purchaser at the tax sale—demands diligence from property owners as to the payment of taxes on their property. So long as the property owner exercises diligence to perform its obligations to pay property taxes, it will not lose its right to challenge the judgment in the tax case; the statute of limitations is tolled during that time. TAX CODE § 33.54(b); *W.L. Pickens Grandchildren's Joint Venture v. DOH Oil Co.*, 281 S.W.3d 116, 121 (Tex. App.—El Paso 2008, pet. denied).

It seems reasonable to expect property owners to know that taxes on their property are due each year and to know whether they personally paid those taxes. It seems equally as reasonable to expect that property owners would pay their property taxes in the year following a tax sale and each year thereafter, as provided by the legislature. *See W.L. Pickens*, 281 S.W.3d at 121.

Section 33.54(b) provides a means whereby Appellants could have avoided the effect of the statute of limitations: pay the taxes during the year following the recordation of DOH's deed from the sheriff and continue to pay the taxes until Appellants judicially challenged the tax sale. In this case, the summary judgment evidence shows that, after DOH recorded its deed, it paid the taxes that subsequently accrued through 2016 on the NPRI, not Appellants.

The statutory scheme developed by the legislature is in accordance with public policy to provide for finality in the sale of property at tax sales such that purchasers at tax sales receive conveyances that transfer "free and clear title." *Am. Homeowner Pres. Fund, LP v. Pirkle*, 475 S.W.3d 507, 522–23 (Tex. App.—Fort Worth 2015,

pet. denied). As the Fort Worth court noted, the Texas Tax Code contains many references to support that policy principle. *Id.* at 522; *see, e.g.*, TAX CODE §§ 33.54(a)(1), (2); 33.54(c); 34.08(b); 34.01(n).

The statutory plan devised by the legislature avoids uncertainty that could easily dissuade purchasers from purchasing property at tax sales. *Pirkle*, 475 S.W.3d at 523. Instead, the plan reduces the risks and encourages participation in tax sales, and the funds from those sales enable taxing entities to provide valuable services for the public good.

We realize that public policy, without more, might not always override due process. But with the statutory scheme as provided by the legislature in these types of cases, there lies a way to address any due process issues that might exist: pay taxes within one year after the date that the sheriff's deed is recorded and thereafter until the tax sale is contested. *Id.* a 525. Had Appellants availed themselves of this process, there would have been no limitations issue to resolve, and Appellants could attack the tax judgment on due process grounds at any time. *Cf. In re E.R.*, 385 S.W.3d at 570.

Appellants did not take advantage of the tolling provisions of the Tax Code and cannot now attack the sale in the tax suit. We hold that, although a property owner may have some merit in its challenge to a tax sale, that argument must be raised within the statute of limitations. *See W.L. Pickens*, 281 S.W.3d at 122 (citing *John K. Harrison Holdings, LLC v. Strauss*, 221 S.W.3d 785, 791 (Tex. App.—Beaumont 2007, pet. denied)).

For the same reasons that due process claims are barred by limitations, Appellants' statute-of-frauds claims are also barred. Further, because Appellants' claims are barred, Appellants cannot prevail on their third issue on appeal in which they claim that the trial court abused its discretion when it struck an amended motion for summary judgment as to some of the parties.

"Absent a challenge brought within the statute of limitations including its tolling provision, the code allows a tax sale purchaser to 'conclusively presume that the tax sale was valid' and transfers to the purchaser, 'full title to the property free and clear of the right, title, and interest of any person that arose before the tax sale.'" *Id.* at 122–23 (quoting TAX CODE § 34.08(b)).

Because Appellants' claims are barred by limitations, as a matter of law, the trial court did not err when it granted summary judgment to DOH. We overrule Appellants' three issues on appeal.

We affirm the judgment of the trial court.

JIM R. WRIGHT
SENIOR CHIEF JUSTICE

June 4, 2020

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[1]

Willson, J., not participating.

[1]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.