

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 102-2-19 Rdcv

Perrino vs. Susco

RULING ON THE MERITS

Plaintiff Valerie Perrino brings this case seeking possession of real estate she purchased at a tax sale. Defendant Daniel Susco resides in the property and asserts affirmative defenses, as well as a counterclaim and a third-party complaint. The counterclaim and affirmative defenses allege that the tax collector's deed is null and void because of improper notice to Susco; the third-party complaint asserts a claim against the tax collector¹ (who is also Valerie Perrino's husband) on the same grounds. A bench trial took place on February 7. Melvin Fink, Esq. represents Perrino; William Vasiliou, Esq. represents Susco; Merrill Bent, Esq. represents Peter Perrino.

Findings of Fact

The property in question is 2380 Vt. Route 103 North in Mount Holly, although the mailing address is 2380 Vt. Route 103 North in East Wallingford. Susco inherited the property from his father in 2013. He lives there part-time, and with his mother in Orwell part-time. Every year after Susco inherited it, it has gone to tax sale because he failed to pay the property taxes. In 2013 through 2016, Susco redeemed the property at the last minute. He received notices of the sales each year until the year at issue here: the 2016/2017 tax year.

¹ Because the tax collector is sued in his official capacity and there are two parties here with the same last name, the court will at times refer to the tax collector's arguments as the Town's arguments.

The reason Susco failed to get the notices mailed to him is that he failed to inform the Town that he changed his mailing address to a post office box in Orwell—first his mother’s box and later his own. He did give the Post Office a change of address form in June of 2016, but never notified the town. He believed that the Post Office would then tell the rest of the world that his address had changed. That did not occur.² Thus, the Town was unaware of the changed address. All of the notices warning of the sale and of the redemption date failed to get to him and the mail was returned to the tax collector.³ However, to make one last attempt to notify him, the tax collector sent a letter to Susco’s mother on May 22, 2018 letting her know of the redemption date of June 26, 2018. Susco did learn of the date through her, but failed to redeem.

Susco also got no property tax bill in 2017 because of the address change. However, he knew that he was required to pay property taxes and he knew that the property would be scheduled for tax sale if he did not pay them. Despite that knowledge, he never inquired about why he had not received a bill and he never made any attempt to pay the taxes.

On June 25, 2018, the day before the redemption deadline, Susco applied for an abatement of the taxes. Exhibit 3. The mailing address he put on that form was the property address, not the post office box.

Peter Perrino was the Mt. Holly tax collector in 2017. Between November of 2016 and May of 2017 he or the Town’s attorney sent multiple notices to Susco about the overdue taxes and the upcoming tax sale. All were sent to the property mailing address, which is the only

² The court is aware that the postal service forwards mail for a limited period, and expected Plaintiff or the Town to ask the court to take judicial notice of that fact. However, as no such request was made, the court does not consider that fact here.

³ Plaintiff and the tax collector argue that Susco admits he received the notice of tax sale based on a reference he made in his abatement request, but it is clear from the other evidence that he did not and that he misspoke on that document and was referring to the notice of the redemption deadline.

one Susco ever provided. All were returned to sender by the post office, with varying reasons stated. Some said “vacant, unable to forward,” some said “no mail receptacle, unable to forward.”

The tax sale was held on June 26, 2017. In addition to being mailed to Susco by certified and first class mail, notice of the sale was posted in the town offices and published in the Rutland Herald. The certified mail notice to Susco was returned undeliverable—prior to the sale date—just as all the earlier mail had been. The first class mail notice that followed was sent to the same mailing address that had repeatedly failed with all the prior notices. The notice was not delivered by personal service or posted on the door at the property. The sale occurred before the tax collector received the notice back from the post office advising that the first class notice of the tax sale was undeliverable.

After the property was sold, Susco was sent notice that he had one year to redeem. That notice, too, was returned as undeliverable. To try one more time to contact Susco, the tax collector sent Susco’s mother a letter on May 22, 2108 letting her know of the June 26, 2018 redemption deadline and explaining that he was sending the letter to her because he had been unable to get mail delivered to Susco. Ex. E.

The tax collector’s wife, Valerie Perrino, bought the property at the tax sale. There is no evidence that she had any inside information from her husband. Although some might find it unseemly, no evidence was presented that any ethics requirements bar the tax collector’s family members from bidding. The sales are announced publicly. Valerie Perrino has purchased two other properties at tax sales.

After the one-year redemption period passed, Valerie obtained the deed from her husband and recorded it. She then found that there was still personal property on the land, so

she contacted a lawyer and initiated this action for possession. She has paid the taxes since then, and paid the property transfer tax. She has also accrued attorney's fees of \$4,311.32.

Conclusions of Law

“A person claiming title to real estate under a tax collector's deed has the burden of proving every act necessary to the validity of the tax, levy, and sale.” Peterson v. Moulton, 120 Vt. 439, 442 (1958). Susco argues that the tax sale was invalid because despite compliance with the statute, the tax collector's attempts at notice to Susco violated due process.

The law regarding tax sales is set forth in Title 32. It requires the tax collector to post the notice of tax sale in a public location, advertise it in the newspaper, and send notice by certified mail to “the last known address” of the taxpayer at least ten days prior to the sale. 32 V.S.A. § 5252. If the certified mail is returned undeliverable, the notice must then be sent by first class mail or personal service. The statute also provides for a one-year redemption period after the tax sale. Id. § 5260. All of those statutory requirements were met here. However, to satisfy due process the government is required to “consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case.” Jones v. Flowers, 547 U.S. 220, 230 (2006).

As the Town points out, “[d]ue process does not require actual notice.” Hogaboom v. Jenkins, 2014 VT 11, ¶ 15, 196 Vt. 18; Flowers, 547 U.S. at 226 (“Due process does not require that a property owner receive actual notice before the government may take his property.”). The Town cites an older case for the proposition that Susco's failure to update his address is the end of the matter. Turner v. Spear, 140 Vt. 19, 22 (1981)(“It was the plaintiff's duty to update his mailing address in the official records. Thus, if he in fact received no notice, he has only himself to blame.”). However, the more recent case law supports Susco's position.

Hogaboom and Flowers make clear that when a tax collector has actual knowledge that his or her notices are not getting to the taxpayer, the tax collector must take further steps to convey notice before the tax sale. Hogaboom, 2014 VT 11, ¶ 17 (“once the government learns that its attempt at notice has failed, it must take the kind of additional reasonable steps that someone ‘desirous of actually informing’ the property owner would take.”)(quoting Flowers, 547 U.S. at 230.). The Court made this quite clear:

We conclude that once notice of a tax sale is returned unclaimed, a town must take additional reasonable steps to apprise the taxpayer of the impending tax sale before the sale occurs. This notice must be more than a “mere gesture” and must be reasonably calculated to provide the taxpayer notice of the impending sale. This holding need not empower delinquent taxpayers to avoid tax sales by refusing receipt of registered mail. The U.S. Supreme Court in *Flowers* identified a number of reasonable steps to provide notice that could not be defeated by an intransigent taxpayer, including resending notice by regular mail, posting notice on the taxpayer’s front door, or addressing otherwise undeliverable mail to “occupant.” *Flowers*, 547 U.S. at 234–35, 126 S.Ct. 1708. Service by sheriff is also a reasonable and cost-effective option to ensure that a property owner is not deprived of property without adequate notice.

Hogaboom, 2014 VT 11, ¶ 27.

The issue in Hogaboom was that the tax collector did not follow up the returned registered⁴ mail with first class mail. Here, the tax collector did so, as required by the statute. That would have been fine if the tax collector had no reason to know that first class mail would not work. The problem is that the tax collector was fully aware of the fact that first class mail was not getting to Susco. To continue to use the same address once learning it is not conveying notice does not satisfy the requirement to use a method “reasonably calculated” to give notice. It would have been a simple matter to post a notice on the door. The Town could

⁴ The statute has since been changed to require certified rather than registered mail. 32 V.S.A. § 5252(a)(3).

also have asked the sheriff to attempt to personally serve Susco, as the statute and Hogaboom specifically suggest. These are small towns; sheriffs are adept at learning who lives where. In fact, the tax collector himself knew where Susco’s mother lived, and could easily have sent her a letter *before* the sale rather than merely *after*—or even asked her for a good address for Susco. There were multiple routes for making a reasonable attempt at notice. The tax collector took none of them.

The Town argues that because Susco admitted in discovery that his address was the property address, and stated as much on his abatement request, using that address was appropriate. The court is not persuaded. Whatever address Susco gave the Town, the tax collector knew it was not working and had a duty to take additional steps once he learned that. The Supreme Court noted in Flowers in discussing an earlier case, “the State had not provided constitutionally sufficient notice, despite having followed its reasonably calculated scheme, *because it knew that Robinson could not be reached at his address of record.*” Flowers, 547 U.S. at 232(emphasis added), discussing Robinson v. Hanrahan, 409 U.S. 38, 39-40 (1972). That is precisely the problem here. Resending notices to a bad address was a “mere gesture.” The tax deed to Valerie Perrino is therefore void.

Plaintiff argues that if the court rules for Susco, it should also find that he has been unjustly enriched and require him to pay her the money she has spent to purchase the property and pay the later taxes. However, she did not assert such a claim in her complaint or in her answer to the counterclaim. To the extent that she asked questions relating to such a claim at trial, Susco objected. The issue was therefore not tried “by express or implied consent of the parties.” V.R.C.P. 15(b). The claim is untimely.

To the extent that the answer to the counterclaim referred in the “wherefore” clause to a request for “indemnification,” the court deems the claim waived as it was not raised at trial or in the post-trial filings. In any case, implied indemnification is “based on a right accruing to a party who, without active fault, has been compelled by some legal obligation . . . to pay damages occasioned by the negligence of another.” Inv. Properties, Inc. v. Lyttle, 169 Vt. 487, 491 (1999)(internal quotations and citations omitted). That is not the situation here. Plaintiff is paying no damages.

Susco’s Counterclaim

The counterclaim asserted by Susco against Valerie Perrin seeks no affirmative relief other than that already being awarded. It is really an affirmative defense, not a counterclaim.

Susco’s Third-Party Claim Against the Tax Collector

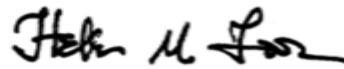
Peter Perrino, the tax collector, asserts the claims addressed above but also argues that the claims against him must be dismissed for other reasons. The court agrees. Susco asserts claims against Perrino only in his official capacity and any such claim can only be filed against the Town. 24 V.S.A. § 901. In addition, to the extent that the claim seeks relief directed at the tax collector in his official capacity, it is barred by the statute of limitations in 32 V.S.A. § 5294(4). Judgment will therefore be entered in favor of Peter Perrino.

To the extent that the Town argues that Susco’s defense to the claim for possession by Valerie Perrino is also barred here, the argument fails. Limitations periods for asserting a claim against the Town “apply only to the commencement of an action and not to the right to defend against a suit for the possession of the property.” Peterson v. Moulton, 120 Vt. 439, 443 (1958).

Order

Judgment on Valerie Perrino's claim will be entered in favor of Susco. The tax sale is vacated and the deed to Valerie Perrino deemed null and void. Susco's counterclaim against Perrino is deemed moot. Judgment on Susco's third-party claim against Peter Perrino will be entered in favor of Perrino.

Electronically signed on March 15, 2022 pursuant to V.R.E.F. 9(d).



Helen M. Toor
Superior Court Judge