

IN THE COURT OF APPEALS 01/28/97
OF THE
STATE OF MISSISSIPPI
NO. 94-CA-00467 COA

BILLY H. TAYLOR, SHERRY SMITH

AND DIANE MAY

APPELLANTS

v.

WYATT W. SHORTER

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. BRUCE B. SMITH, SPECIAL MASTER

COURT FROM WHICH APPEALED: SIMPSON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

TERRELL STUBBS

ATTORNEYS FOR APPELLEE:

L. WESLEY BROADHEAD

NATURE OF THE CASE: REAL PROPERTY; SETTING ASIDE A TAX SALE

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT FOR PLAINTIFF

BEFORE FRAISER, C.J., DIAZ, KING, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Wyatt W. Shorter succeeded in having set aside a tax sale of certain lots in the town of Braxton. The case was heard and a final decision entered by a Special Master appointed by the chancellor, who recused himself from the case. The purchaser and successors under those tax deeds, Billy H. Taylor, Sherry Smith and Diane May, argue on appeal that since Shorter did not seek relief from the sale for over five years, their title was perfected. They also allege various procedural defects in the actions of the Special Master. We find that a Special Master does not have authority to enter a final judgment. Since the master's recommendations were never reviewed and adopted by a chancellor, there is no final judgment. We dismiss the appeal.

STATEMENT OF FACTS

A tax sale was conducted by the town of Braxton on August 25, 1986. On that date, ten city lots that are at issue in this case were sold for unpaid 1985 taxes. The lots were assessed to W. W. Shorter. The purchaser of all the lots was Billy H. Taylor. On October 1, 1990, the tax collector for the City of Braxton executed three separate tax deeds conveying these lots to Taylor.

The initial suit filed by Shorter was solely against the town of Braxton, and was filed on June 4, 1991. Shorter alleged that he had not been properly notified of the tax sale and that the town had in other respects failed to comply with the relevant statutes. The result of this complaint was an Agreed Order between the town and Shorter, dated March 16, 1992. In this Order, the tax sales were declared void.

On April 28, 1992, Billy H. Taylor and Sherry Smith filed a motion to set aside the Agreed Order. As record title owners of the property, they alleged that they should have been brought in as parties in Shorter's suit. On June 22, 1993, Shorter filed a motion for summary judgment. In the Motion, Shorter alleged that he had never received notice of the tax sale, until after the two year redemption period had passed. The Chancellor, Harris Sullivan, recused himself from this and another case. Bruce Smith, an attorney in practice in Simpson County, was named Special Master by Judge Sullivan. Both sides agreed to this appointment. In the appointment decree, Smith was empowered "to sit and consider the merits of these causes."

On December 28, 1993, Shorter filed a new complaint to set aside the tax deeds. This time, in addition to suing the town, he joined Billy Taylor, Sherry Smith and Diane May. Taylor and Smith filed a joint answer, denying the invalidity of the tax sale. On April 20, 1994, the Special Master set aside the 1992 agreed order. On the same date, the Special Master granted Shorter's summary judgment motion that had been filed before the complaint was amended to join the three individuals. The Special Master found the tax sale to be void.

In the final Order, the interest of Diane May is shown to have been relinquished by deeds she executed to Sherry Smith. There never has been an answer by Diane May. Nonetheless, a notice of appeal was filed on behalf of Billy Taylor, Sherry Smith and Diane May.

DISCUSSION

The central question on the merits is what notice a record title owner must receive regarding a tax sale and of the right to redeem within two years of the sale? If no notice is given, what is the effect of that when the former owner brings suit five years after the tax sale has occurred? There are additional legal issues concerning the procedures that were followed after suit was filed.

1. Statutory Requirement of Notice

The notice that must be given for the sale of property for unpaid municipal taxes is the same as the notice required for unpaid state and county taxes. Miss. Code Ann. § 21-33-63 (1972).

The only statutory notice required prior to the sale of lands for unpaid county taxes is notice by publication in a local newspaper, and by posting at the courthouse. Miss. Code Ann. § 27-41-55 (Rev. 1993). There is no requirement of personal service prior or at the time of the actual tax sale. There is a requirement that additional notice be sent prior to the time that the right of redemption expires. The person who has lost property at a tax sale has two years from the day of the sale to redeem the property by paying the unpaid taxes and certain other amounts. Miss. Code. Ann. § 27-45-3 (1995). The Chancery Clerk must give notice "within one hundred eighty (180) days and not less than sixty (60) days prior to the expiration of the time of redemption" for land sold for unpaid county taxes. *Id.* § 27-43-1. This must be personal notice by mail or delivered by the Sheriff. *Id.* § 27-43-3. These provisions are applicable to land sold for the nonpayment of municipal taxes. *Id.* § 27-43-4. The effect of failure to send notice is clear:

Should the clerk inadvertently fail to send notice as prescribed in this section, then such sale shall be void. . . .

Miss. Code. Ann. § 27-43-3.

The only evidence introduced in the trial court was an affidavit from the individual who was the town clerk for Braxton for a period of time "including 1985, and for the first eight or nine months of 1986." How long she was clerk after that is not indicated in the affidavit. She states that the "only notice that W. W. Shorter ever received from Braxton prior to the lands being struck off for nonpayment of taxes, was in the newspaper; and that he would not have received any other notice while I was town clerk, either before or after that sale." Because of the representations of when she was clerk, that assertion only covers the period of 1985 through 1986. Whatever the town clerk may have meant to say cannot be written into the margin. We as well as the trial court are limited to the evidence actually admitted and to reasonable inferences. There is a hint in a brief that at the oral argument on summary judgment the attorney for the town of Braxton admitted no notice was given even of the right of redemption. Such hints in briefs, absent a transcript of the hearing, also do not constitute record evidence.

As indicated in the statutory description above, there is no requirement of personal service of notice at the time of the sale. The statutory mandate is that notice be sent directly to the record title owner prior to the time of redemption.

There are due process obligations regarding tax sales. *See Mennonite Board of Missions v. Adams*,

462 U.S. 791 (1983). Our supreme court has found that since "notice must be given by personal service, mail, and publication before a landowner's rights *are finally extinguished by the maturing of a tax deed*," that our statutes pass constitutional muster. *DeWeese Nelson Realty, Inc. v. Equity Servs. Co.*, 502 So. 2d 310, 314 (Miss. 1986) (emphasis added). Thus, if W. W. Shorter received notice as required under sections 27-43-1, 27-43-3 and 27-43-4, within the period prior to redemption, there is no due process violation.

Two years from the tax sale of August 25, 1986, would have required notice to be sent in 1988. The actual tax deed was executed on October 1, 1990. If in fact no notice was sent regarding the redemption during the proper period in 1988, the tax sale is void. The effect of that would be that the landowner would be entitled to have the tax deeds canceled. *Hart v. Catoe*, 390 So. 2d 1001, 1003 (Miss. 1980).

Even a void tax sale does not preclude the purchaser from obtaining good title through operation of law, such as adverse possession. However, since there are no claims by the purchasers in this case of another source of title, we need not consider such alternatives.

On the basis of the record before us, all that the special master could conclude is that no personal notice was sent Shorter in 1985 or 1986. There is no evidence indicating that the town clerk or other authority failed in statutory and due process obligations to send notice prior to the period of redemption expiring, i.e., in 1988. Thus on this record, summary judgment invalidating the tax sale was improper.

2. Procedural Defects in Case Below

As detailed earlier, this suit was initially brought by the record title owner at the time of the tax sale, W. W. Shorter, only against the town of Braxton. An Agreed Order was initially entered finding the tax sale to be void. Shorter does not here stand on that Order, as well he should not because the purchasers at the tax sale had not yet been made parties. Billy Taylor and Sherry Smith then filed a motion to set aside that agreed order, which did not by its mere filing make them parties to the litigation. However, Billy Taylor, Sherry Smith and Diane May did become parties when a new Complaint was filed on December 28, 1993, joining them in the suit.

The summary judgment motion that was granted on April 20, 1994, was actually filed prior to Taylor, Smith and May being joined as parties. At most this is a technical defect that was assuredly waived unless an argument was made prior to the Special Master's ruling that the motion needed to be refiled. There was no such argument that appears in the record, and the issue was adequately joined at the summary judgment motion hearing.

An additional argument is raised that the Special Master who was named acted invalidly. The alleged invalidity is rather simple. Certain orders that he signed had typed below the signature line the designation of "Special Chancellor," rather than "Special Master." What appears on a signature block cannot change, either by addition or subtraction, the authority of an official acting under an appointment. There is a deeper problem here, however.

Our Rules of Civil Procedure allow for the appointment of Special Masters with such powers as directed by the trial court. M.R.C.P. 53(a) & (d). What was done by the Chancellor in this case on

August 27, 1993, was to appoint a Special Master to "sit and consider the merits of these causes." Under Rule 53(g), a Master is to prepare a report upon the matters submitted to him. "The Court shall accept the Master's findings of fact unless manifestly wrong." M.R.C.P. 53(g)(2). In this case, there was no report made. Instead, the parties and the Special Master appeared to assume that the Chancellor's powers over this case had been acquired in their entirety by the Special Master. Rule 53 does not authorize the grant of plenary powers to a Master. The Master could consider the merits and submit a report on his findings and conclusions, but it was for a judge, special or otherwise, to adopt, amend, or reject the work of the Special Master. Knowledge of the problem may explain the signature block being prepared for a "Special Chancellor."

Our supreme court has found reversible error for a judge to "rubber stamp" a master's report and not conduct a good faith review. *Banks v. Banks*, 648 So. 2d 1116, 1124 (Miss. 1994). The whole concept is that the master "shall prepare a report upon the matters submitted to him," and the trial court will then review the report. M.R.C.P. 53(g)(1). The Comment to the rule indicates that "masters are not supernumerary judges"; i.e., they are not extra, fully empowered judges. In *Banks* the court gave a long quote by an authority on the federal rule who was explaining the limits of Rule 53. This quote included an assertion that with the parties' consent a federal judge "may refer the whole case to the master for final decision." *Banks*, 648 So. 2d at 1125, quoting 5A, MOORE'S FEDERAL PRACTICE (2d ed.) Ch. 53 (1994). The idea would appear to be an extrapolation of the authority of federal magistrates with parties' consent to assume complete responsibility for the decision in a case. F.R.C.P. 73(a). We have no analogous rule here. We find that our Rule 53 does not authorize a judge, with or without approval of parties, to delegate his final decision authority in a case to a special master. In speaking about masters, the *Banks* court said Rule 53 authorizes their appointment, "but sets limitations on powers and duties." *Banks*, 649 So. 2d at 1124. The powers can be quite broad, but they cannot be limitless. The powers end with submitting a report to a judge. There simply is no provision in the rule for the Special Master himself to convert his report into a final judgment.

We also find no authority for appointing a master other than under Rule 53. Our supreme court has noted that in some of its opinions that interpreted two now-repealed statutes, "loose language has been used which implies that these two statutes authorize the appointment of a master. That is incorrect." *Massey v. Massey*, 475 So. 2d 802, 804 (Miss. 1985), describing Miss Code Ann. §§ 11-1-11 & 11-1-13, repealed, Laws 1989, ch. 587, § 7. We have found no other authorization, through loose language or otherwise, for naming a special master. There are other, systematic procedures for appointing special judges of either chancery or of circuit courts. Miss. Code Ann. § 9-1-105 (1996). The need for a sitting judge to recuse himself is one of the reasons for appointment. §9-1-105(1). Those procedures were not utilized here either. The parties in a case also have authority under Section 165 of the Mississippi Constitution "to agree upon a member of the bar to preside in a case," but here the parties and the chancellor agreed to the appointment of a special master, not a special judge. Miss. Const. Art 6, § 165; Miss. Code. Ann. § 9-1-105 (13). We cannot rewrite the appointment for them. Thus the chancellor's appointment of the special master in this case had to conform to the procedures and limitations laid out in Rule 53.

If it is reversible error for a judge to "rubber stamp" a master's report, then it is equally reversible for the court not even to provide for a report that will be reviewed at the trial level.

This is an appeal from what is in effect a Special Master's Report never adopted by a Chancellor or Special Chancellor with authority to enter a final judgment. Accordingly, the appeal must be dismissed. This same Special Master's order, if submitted to the current chancellor, could be the basis for completing the Rule 53 procedures that were truncated before. The chancellor can address defects in the evidence that we have already noted. The chancellor can instead take such other steps as are consistent with this opinion.

THE APPEAL FROM THE ORDER OF APRIL 20, 1994 IS DISMISSED. COSTS ARE TAXED TO THE APPELLANTS.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.