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Article 22

Real Property - Tax Deeds - May a Person Not of Record Attack Order Issuing Tax Deed?

Irving Rosenfeld

cause his opponent has either substituted an element that is the equivalent of one he disclosed,[20] or included a limitation in the count which resulted from the exercise of mere technical skill in perfecting the invention and does not lend patentability to the claim.

James Hill

[20] See Nielsen v. Cahill, (P.O. Bd. Pat. Inter.) 133 U.S.P.Q. 563, 571 (1961).

REAL PROPERTY–TAX DEEDS–MAY A PERSON NOT OF RECORD ATTACK ORDER ISSUING TAX DEED?

On November 12, 1958, property owned by Arthur T. McIntosh & Co. was sold to Vera Place, the respondent, for unpaid 1957 general taxes, and certificates of purchase were issued to her, describing the property as: "Lot 20 and 21 Northwoods, DuPage County, Illinois (same as described in doc 659621.")[1] She filed a petition for an order directing the issuance of a tax deed. Service was had upon Arthur T. McIntosh, in whose name the property was last assessed, and notice was published in a newspaper of general circulation in DuPage County. However, on July 2, 1959, Arthur T. McIntosh & Co. sold the property to Helen E. and Joseph J. Bird. A tax deed was issued to Vera Place and recorded on December 20, 1960. Otto C. Stephani acquired title from the Birds' bankrupt estate on November 21, 1961, and recorded the Birds' deed and his deed at that time. Chicago Title and Trust Co., as trustee for Stephani, filed a petition seeking to set aside the tax deed; fraud was alleged in that: (1) the property was insufficiently described;[2] and (2) the notice was published in a newspaper which was not calculated to reach the petitioner. The Illinois Appellate Court reversed the trial court's dismissal of the petition and remanded the case to the trial court for adjudication of the fraud issue, stating, in effect, that petitioner had standing to attack the issuance of a tax deed. *In re Smith,* 50 Ill. App. 2d 189, 199 N.E.2d 420 (1964).

Before analyzing this case, it may be well to review briefly the procedure followed in an annual tax sale proceeding. When taxes become

[1] Supposedly the number of the plat of subdivision.

[2] ILL. REV. STAT. ch. 120 § 516 (1963) provides that if the legal description includes the document number of the plat of subdivision, it shall be a good and valid description. Appellant's argument here is that there are two Northwoods in DuPage County and the document number included in the legal description was not that of the plat of subdivision. However, appellee used the legal description of the County Clerk's assessment rolls and that which was on the certificate of purchase issued to her. Therefore, the charge of fraud in this respect seems unfounded.

delinquent,[3] the county clerk's office publishes a delinquent list and applies to the county court for a judgment and order of sale on all property still delinquent at the date of sale. It then executes such judgment by selling said property for the amount of the delinquency due, with interest, penalty and cost up to and including the date of sale.[4] The only competition among the bidders is the rate of interest to be repaid by the owner, the maximum being 12% per six months or any fractional time thereof.[5] A certificate of purchase is then issued to the buyer.[6]

This certificate of purchase is the preliminary step towards the issuance of a tax deed. However, section 5 of Article IX of the Illinois Constitution of 1870 provides that the right of redemption from all tax sales shall exist for a period of not less than two years from the date of sale in favor of owners and parties interested in the property sold for taxes. Under the provisions of the Illinois Revised Statutes, chapter 120, section 734 (1963), redemption can also be made after the expiration of two years.[7]

Before a purchaser at an annual tax sale is entitled to a deed at the expiration of the period of redemption, he must comply with the provisions of sections 744 and 747, chapter 120 of the Illinois Revised Statutes (1963), which provide, *inter alia*, that all parties in interest[8] shall be notified of the pending proceedings for the issuance of a tax deed within 3 to 5 months prior to the expiration of the period of redemption, and that the purchaser will pay all general taxes which become due subsequent to the sale. The purchaser must petition the court for a tax deed, and a hearing is set up for compliance with the statutory requirements. At the hearing, all parties interested can contest.

Prior to 1951, a tax deed was issued upon affidavits filed by the lienor averring that proper service was had. These deeds could be set aside on the slightest technical defect.[9] However, in 1951 the Revenue Act was

[3] For example, 1963 taxes are payable in two installments: on May 1, 1964 and Sept. 1, 1964. If not paid by Sept. 1, 1964, the 1963 taxes are delinquent. ILL. REV. STAT. ch. 120 § 705 (1963).

[4] ILL. REV. STAT. ch. 120 §§ 706, 719 (1963).

[5] The maximum amount then being 48%. ILL. REV. STAT. ch. 120 § 697 (1963).

[6] ILL. REV. STAT. ch. 120 § 728 (1963).

[7] Cross reference may be had to ILL. REV. STAT. ch. 120 § 744 (1963), which provides that the purchaser may extend the time of redemption for a period not to exceed 3 years from the date of sale.

[8] Parties in interest are enumerated in § 744 as: ". . . occupants or persons in actual possession. . . , person in whose name the real estate was last assessed for general taxes, if, upon diligent inquiry, he or she can be found in the county . . . , owners of, or parties interested in such real estate, including trustees and mortgagees of record, if they can upon diligent inquiry be found in the county." Since this is an in rem proceeding, personal service is not required. Urban v. Lois, Inc., 29 Ill.2d 542, 194 N.E.2d 294 (1963).

[9] Allen v. Nettleton, 6 Ill.2d 141, 126 N.E.2d 677 (1955).

amended so that these tax deeds, instead of being clouds on title, would vest good marketable title in the grantee.[10] Under the 1951 amendment, the legislature removed the issuance of a deed from a mere administrative act and transformed the issuance of a deed into a judicial proceeding, wherein evidence is presented in the county court in lieu of affidavits.

In a series of recent decisions,[11] the Supreme Court has considered the effect of the provisions of section 747, chapter 120 of the Illinois Revised Statutes (1963)[12] and has ameliorated this statute by still allowing collateral attacks under section 72 of the Civil Practice Act.[13]

In the first case of this series,[14] petitioner, *a party of record* to the tax sale, sought to set aside the tax deed because of lack of diligent inquiry and an incorrect legal description (basically the same as our instant case), but did *not* allege fraud. The Supreme Court held that under section 747 the petitioner could not collaterally attack the county court's order unless it was void.[15]

In *People v. Doe*[16] petitioner, a party to the original pleadings,[17] alleged fraud in that he had received no notice. The Supreme Court held that petitioner was entitled to a hearing on the issue of fraud. This case clearly establishes that a tax title order is subject to collateral attack by reason of fraud that goes to the jurisdiction of the court.

But there still remains the anomalous case of *People v. O'Keefe*[18] which held that one cannot collaterally attack a tax deed order because of jurisdictional fraud, but only if the judgment is void. The court's decision was no doubt influenced by the "equity" of the case since petitioner acquired title immediately after the foreclosure sale.

[10] "This section shall be liberally construed so that tax deeds herein provided for shall convey merchantable title." ILL. REV. STAT. ch. 120 § 747 (1963). See Urban v. Lois, Inc., 29 Ill.2d 542, 194 N.E.2d 294 (1963).

[11] Cherin v. The R & C Co., 11 Ill.2d 447, 143 N.E.2d 235 (1957); Southmoor Bank and Trust Co. v. Willis, 15 Ill.2d 388, 155 N.E.2d 308 (1958); Remer v. Interstate Bond Co., 21 Ill.2d 504, 173 N.E.2d 425 (1961); Freisinger v. Interstate Bond Co., 24 Ill.2d 37, 179 N.E.2d 608 (1962); People ex rel Wright v. Doe, 26 Ill.2d 446, 187 N.E.2d 222 (1962); and Urban v. Lois, Inc., 29 Ill.2d 542, 194 N.E.2d 294 (1963).

[12] "Tax deeds issued pursuant to this section shall be *incontestable except by appeal* from the order of the county court directing the county clerk to issue the tax deed."

[13] This section provides that relief may be had from *any final order* after 30 days but within 2 years if the proper petition is filed in the same court.

[14] Cherin v. The R & C Co., 11 Ill.2d 447, 143 N.E.2d 235 (1957).

[15] A judgment is void only when the court lacks jurisdiction of the parties or subject matter. The Court held here that § 72 applies only when the court lacks jurisdiction and that § 72 will apply even in face of the express provision of § 747.

[16] 26 Ill.2d 446, 187 N.E.2d 222 (1962).

[17] Note that this is an important distinguishing fact.

[18] 18 Ill.2d 386, 164 N.E.2d 253 (1960).

However, in all of these cases the person seeking to set aside the tax deed was a party of record. In the instant case, petitioner not only did not hold title at the time of the issuance of the tax deed, but had no interest whatsoever, the actual title being vested in the Birds by an unrecorded deed and the record title in Arthur T. McIntosh & Co. The problem of what grounds are needed to collaterally attack a tax deed has been fully resolved. *In re Smith* raises a question of standing: Who can attack the tax deed?

Only one decision on this point of law can be found. In *Weiner v. Jobst*[19] an owner not of record (but holding title under an unrecorded deed) sought to redeem from a special assessment sale.[20] The Supreme Court in an evenly split decision affirmed the trial court's holding that a stranger to the record title has no right to redeem. The Court stated that the holder of a certificate of purchase stands in the same position as an execution creditor in respect to prior unrecorded conveyances.[21]

Chief Justice Schaefer, in dissent, stated that a tax sale certificate holder does not stand in the position of an execution creditor in that he acquires no interest in the property, but merely a right to receive a deed. This argument seems to be specious and ill-reasoned since a tax sale is analogous to a levy pursuant to an execution on an unsatisfied judgment. Even though the purchaser in both instances has no interest in the property, but merely a right to receive a deed, he still falls within the purview of the statute.[22] The dissent also cites *Franzen v. Donicky*[23] wherein that court, in effect, posed this question: If the actual owner could not redeem, who could?

Judge House, also dissenting in *Weiner*, answered this rhetorical question by stating that it is the constitutional mandate that one who has title, record or not, has the right to redeem.

Obviously, if a stranger to the record title cannot redeem, as was held in *Weiner*, notice to him is superfluous and it is no great breach of logic to hold that he would have no standing in court to attack a tax deed order.

A fortiori, one who had no title at all, such as Otto Stephani, but who acquires title subsequent to the tax deed has no standing to attack a tax

[19] 22 Ill.2d 11, 174 N.E.2d 561 (1961). This case was an appeal to the court to allow the petitioner to redeem the property. See Case Note, 11 DE PAUL L. REV. 141 (1962).

[20] The procedure in a special assessment sale is the same as for a general tax sale.

[21] "All . . . instruments of writing which are authorized to be recorded shall take effect . . . from and after the time of filing . . . as to all creditors and subsequent purchasers without notice. . . ." ILL. REV. STAT. ch. 30 § 29 (1963). Therefore, if the certificate holder is an execution creditor, an unrecorded deed has no effect as to him.

[22] *Id.*

[23] 9 Ill.2d 382, 137 N.E.2d 825 (1956).

deed order. Ordinary prudence on his part is lacking. Before one purchases property, reasonable care requires a search of the records, which would have revealed the recordation of the tax deed.

In the instant case the appellate court seems not to have taken cognizance of the question of who can attack the tax deed,[24] as it states: ". . . (W)e are here concerned solely with the question whether plaintiff has alleged facts sufficient to constitute fraud."[25] Even with this question, the Court appears to have strayed; it would appear from the facts that there was no fraud as a matter of law. The only allegations of fraud are that: (1) the property was ambiguously described,[26] and (2) the notice was published in a newspaper which was not calculated to reach the petitioner.[27] However, as to the first allegation, we must take into account that petitioner bought this property from a bankrupt estate; this should put her on notice of liens on the property.[28] And as to the second allegation, the notice was published in a paper of general circulation in the county. This was all that was required by law.[29]

The Court bases its decision by citing dicta in *Remer v. Interstate Bond Co.*, "The legislative policy favoring conclusiveness in the county court's determination does not displace the higher policy of the law which requires a remedy for every wrong."[30]

But, as mentioned before, prior to 1951 tax titles were easily vitiated. The 1951 amendment to the Revenue Act sought to eliminate this and make tax titles marketable. The courts at first implemented this policy; but according to this decision even parties who had no interest at the time of the tax deed can vacate a tax deed order. This, of course, makes tax deeds tenuous.

This conflict of whether the policy of the law which requires a remedy for every wrong is a higher policy than the one invoked by the 1951 amendment, that a tax deed holder who has fully complied with the statutes should be protected from attacks by persons having no interest of record or otherwise, need not have been decided in this case since the

[24] The fault here is of the appellee, who failed to bring this issue out in his brief.

[25] In re Smith, 50 Ill. App. 2d 189, 193, 199 N.E.2d 420, 422 (1964).

[26] See, *supra* note 2.

[27] The advertisement was published in a newspaper which had general circulation in the opposite end of the county from Stephani. However, Vera Place knew nothing of Stephani but thought McIntosh was the owner.

[28] A search of the records would have revealed the tax sale and deed. Otto Stephani, of all people, had no claim that the property was insufficiently described because of a mere technicality; the description definitely was clear enough to put him on notice.

[29] ILL. REV. STAT. ch. 120 § 747 (1963).

[30] 21 Ill.2d 504, 514, 173 N.E.2d 425, 430 (1961).

Court should have held there was no fraud as a matter of law. It appears, however, that the legislative intent was contra to the Court's decision. If persons not of record have standing in the courts to attack these orders issuing tax deeds, defense of frivolous suits would be a constant peril. The 1951 amendment sought to make these titles marketable. To be marketable they must be free from totally unanticipated and frivolous suits.

Irving Rosenfeld

TAXATION–APPLICATION OF POSSESSORY INTEREST TAX TO POSSESSOR OF FEDERAL PROPERTY

The Ford Motor Company, a manufacturer engaged in the performance of government contracts, sought to enjoin the State of Illinois from collecting personal property taxes upon property built by the manufacturer or acquired by it from nongovernmental sources in the performance of government contracts.[1] The United States government intervened as a party plaintiff and all pertinent facts were stipulated. From a decree of the Circuit Court of Cook County, holding the property in question exempt from taxation, the County Treasurer, Bernard J. Korzen, appealed. In affirming the decree and a prohibitory injunction awarded by the Circuit Court, the Supreme Court of Illinois ruled that the property, in which the United States held title under the government contracts, was exempt from taxation notwithstanding provisions of the contract giving the manufacturer certain possessory interests, including scrap disposition rights, and laying upon the manufacturer the risk of loss, destruction and damage. *Ford Motor Company and United States of America v. Korzen*, 30 Ill. 2d 314, 196 N.E.2d 656 (1964).

The controversy arose when the Cook County assessor, Bernard J. Korzen, sent a notice to all firms possessing government property demanding that all taxpayers possessing government property report the value of such property on their annual personal property schedule for 1958. The assessor contended that the United States holds mere legal title to the property in question, and that such title does not warrant exemption under Section 19 of the Revenue Act.[2] He further asserted that Ford, rather than the United States, had sufficient ownership in the property to support a valid tax by Cook County without invading the constitutional rights and im-

[1] The tax amounted to $1,911,811.95 for the year 1958.

[2] ILL. REV. STAT. ch. 120, § 500 (1963).
Accord, People v. United States of America, 93 Ill. 30 (1879); Price Flavoring Co., v. Lindheimer, 368 Ill. 450, 14 N.E.2d 476 (1938).