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IN THE
COURT OF APPEALS OF INDIANA

S&C Financial Group LLC,
Appellant,

v.

Insider’s Cash LLC and Horizon
Trust Company Custodian FBO
Patricia McCabe IRA,
Appellees.

June 28, 2021

Court of Appeals Case No.
20A-TP-2193

Appeal from the Marion Circuit
Court

The Honorable Sheryl Lynch,
Judge

The Honorable Amber Collins-
Gebrehwet, Magistrate

Trial Court Cause No.
49C01-1904-TP-015153

Tavitas, Judge.

Case Summary

[1] After property taxes were not paid for a property on Admiral Drive in Indianapolis (“Admiral property”), the Marion County Auditor (“Auditor”) set the property for tax sale. S&C Financial Group LLC (“S&C”) successfully bid on the Admiral property and was issued a tax sale certificate. The one-year

statutory redemption period expired, and the Auditor filed a petition for a tax deed, which was granted. S&C subsequently recorded the deed.

Approximately fourteen months later, Horizon Trust Company, acting as custodian for the benefit of Patricia McCabe IRA (“McCabe IRA”), the holder of a mortgage on the Admiral property, filed a motion to intervene and to set aside the tax sale. S&C filed a motion to intervene and opposed the motion to set aside the tax sale. Approximately four months later, a second motion to intervene and set aside the tax sale was filed by the original owner of McCabe IRA’s mortgage, Insider’s Cash LLC (“Insider’s”). The trial court permitted the interventions, and the parties filed cross-motions for summary judgment. The trial court granted summary judgment to McCabe IRA and Insider’s and denied summary judgment to S&C. The tax deed was set aside. Holding that neither McCabe IRA nor Insider’s was entitled to notice of the tax sale, we reverse.

Issues

[2] S&C raises three issues which we restate as:

- I. Whether McCabe IRA had a substantial interest of public record in the Admiral property at the time of the tax sale.
- II. Whether Insider’s had a substantial interest of public record in the Admiral property at the time of the tax sale.
- III. Whether the challenges to the tax sale were timely filed.

Facts

- [3] On December 18, 2012, Isle Slide Properties, LLC (“Isle Slide”) obtained a deed to the Admiral property, which deed was duly recorded on December 21, 2012. Isle Slide deeded the Admiral property to Belinda Luk IRA (“Luk”) in December 2014, which deed was duly recorded on January 9, 2015. Simultaneously, Luk obtained a mortgage, financed by Insider’s. Insider’s recorded the mortgage on January 9, 2015. At the time of the sale to Luk, Isle Slide and Insider’s shared a common manager-Robert Lewis. Isle Slide subsequently went out of business in 2016.
- [4] On March 12, 2015, Insider’s assigned the mortgage to McCabe IRA. McCabe IRA, however, did not record the assignment at that time. Luk’s deed was re-recorded on November 13, 2015. The re-recording featured handwritten notes crossing out the correct legal description of the property and attaching an incorrect legal description. The inaccurate description is also featured in the then-unrecorded March 12, 2015 assignment of the mortgage. The record does not reveal why the re-recording was filed or why the legal description was inaccurate.
- [5] Taxes on the Admiral property went unpaid, and the Admiral property was, therefore, offered at the 2016 Marion County tax sale. The Auditor’s title search revealed Isle Slide as the record owner of the Admiral property but showed no encumbrances or other interested parties. Notice of the tax sale was

sent to Isle Slide, but not to Luk,¹ Insider's, or McCabe IRA. S&C successfully bid on the Admiral property at the tax sale held on October 21, 2016. The statutory redemption period of one year expired, and the Auditor thereafter filed a petition for a tax deed.² That petition was granted, and a tax deed was issued to S&C on January 31, 2018 and recorded on February 15, 2018.

[6] On March 9, 2018, McCabe IRA belatedly recorded its mortgage assignment with the Marion County Recorder's Office. Approximately three months later, Jynell Berkshire ("Attorney Berkshire"), counsel for McCabe IRA, contacted counsel for S&C via email and indicated that she was aware of the tax sale.³ The email further stated: "I will most likely be filing a petition to void the tax sale deed in the coming weeks" Appellant's App. Vol. IV p. 57.⁴ Counsel for S&C replied to Attorney Berkshire on August 13, 2018, and indicated: "I understand that you may have to file the action to set aside the sale, but again I think my client will have good defenses. It was the holder of a presumptively valid tax deed and acted in good faith" *Id.* at 58.

¹ Luk is not a party to this appeal.

² Though, ordinarily, the purchaser would petition the court for a tax deed, Indiana Code Section 6-1.1-25-4.7 provides that a county auditor and county treasurer may enter into a mutual agreement to assign that responsibility to the county auditor.

³ The email says nothing about Insider's or the mortgage assignment. It merely suggests that the Auditor failed to notice the conveyance to Luk. Appellant's App. Vol. IV p. 57.

⁴ We advise Appellant that its appendix is incomplete and fails to comply with Indiana Appellate Rule 50(A)(2). The appendix does not include the order being appealed, which is explicitly required.

- [7] McCabe IRA filed a challenge to the tax sale on May 5, 2019, requesting relief under Indiana Trial Rules 60(B)(6) and 60(B)(8).⁵ Appellant’s App. Vol. II. p. 10. A second challenge, on behalf of Insider’s, again filed by Attorney Berkshire, was filed August 18, 2019. The trial court permitted both parties, as well as S&C, to intervene.
- [8] The parties filed cross-motions for summary judgment on March 6, 2020,⁶ and May 5, 2020. McCabe IRA and Insider’s argued that they were entitled to notice of the tax sale, which they did not receive. S&C countered that notice was not required and that the challenges to the tax sale were untimely. The trial court held a hearing on the summary judgment motions on July 1, 2020.
- [9] On July 31, 2020, the trial court entered findings of fact and conclusions of law thereon. The trial court found: (1) Insider’s was entitled to notice of the tax sale, which it did not receive; (2) the tax sale notice was only sent to Isle Slide, and was constitutionally inadequate; (3) “it may have taken some research and time to go through all of the records and figure out what exactly transpired in order to prepare and file a proper Motion to Intervene and a proper Motion to

⁵ The rule reads, in pertinent part:

(B) Mistake--Excusable Neglect--Newly Discovered Evidence--Fraud, etc. On motion and upon such terms as are just the court may relieve a party or his legal representative from a judgment, including a judgment by default, for the following reasons: . . . (6) the judgment is void; . . . (8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

Ind. Trial Rule 60.

⁶ The motion was filed jointly on behalf of both Insider’s and McCabe IRA.

Set Aside the Tax Deed[;]” (4) “perhaps the Intervenors attempted to resolve this issue outside of Court prior to filing their Motion to Set Aside Tax Deed[;]” and (5) “[d]ue to the complexity of the facts in this case and the totality of the circumstances, the Court finds that the Intervenors filed their Motion to Set Aside Tax Deed Within a reasonable amount of time.” Appealed Order pp. 5-10. The trial court denied S&C’s motion for summary judgment and granted summary judgment to both McCabe IRA and Insider’s on July 31, 2020; the trial court further set aside the tax deed. S&C now appeals.

Analysis

A. Procedural Defects

[10] We first examine several procedural defects in the proceedings below. Two challenges to the tax deed were made on behalf of two different parties. McCabe IRA filed a Trial Rule 60(B) challenge. Appellant’s App. Vol. II p. 15. A Rule 60(B) challenge seeks equitable relief from a final judgment. Ind. Trial Rule 60(B) (“On motion and upon such terms as are just the court may relieve a party or his legal representative from a judgment”). It does not initiate a separate action; rather, it seeks to re-open a prior concluded action. *See* Ind. Appellate Rule 2(H) (“A judgment is a final judgment if: (1) it disposes of all claims as to all parties”). In this case, that motion *did* initiate a separate action with a different cause number. Appellant’s App. Vol. II p. 2.

[11] Insider's did not mention Trial Rule 60(B) in its challenge to the tax deed. *Id.* at 113. Rather, Insider's filed a motion to intervene and challenged the tax deed as allowed under statute pursuant to Indiana Code section 6-1.1-25-4.6. *Id.*

Under Indiana Code section 6-1.1-25-4.6[(1)], “[a] tax deed issued under this section is incontestable except by appeal from the order of the court directing the county auditor to issue the tax deed filed not later than sixty (60) days after the date of the court’s order.” The issuance of a tax deed can be appealed under this statute by *either an independent action or a Trial Rule 60(B) motion* in the same trial court that issued the original tax deed. *BP Amoco Corp. v. Szymanski*, 808 N.E.2d 683, 690 (Ind. Ct. App. 2004), *trans. denied*. “[B]oth remedies are subject to the same sixty-day time frame as stipulated in the [statute].” An exception exists where a motion for relief from judgment alleges a tax deed is void due to constitutionally inadequate notice, in which case an appeal must be brought within a reasonable time rather than within sixty days. *Schaefer [v. Kumar]*, 804 N.E.2d [184,]192 [(Ind. Ct. App. 2004), *trans. denied*].

Diversified Invs., LLC v. U.S. Bank, NA, 838 N.E.2d 536, 544-45 (Ind. Ct. App. 2005) (emphasis added), *trans. denied*.

[12] The trial court entertained both motions simultaneously and disposed of them both via summary judgment. “In passing upon a motion allowed by subdivision (B) of this rule the court shall . . . grant relief as provided under Rule 59 or otherwise as permitted by subdivision (B) of this rule.” T.R. 60(D). Thus, McCabe IRA was not seeking entry of a final judgment, such as a summary judgment, but, rather, McCabe IRA was seeking *relief from the judgment* that awarded the tax deed to S&C.

[13] The trial court, here, without explanation, appeared to treat McCabe IRA and Insider's as a single party, and the court reasoned that Insider's was entitled to notice of the tax sale, Insider's did not receive that notice, and, therefore, Insider's was entitled to summary judgment. The trial court also granted summary judgment in favor of McCabe IRA, without making any findings that would support such a ruling.

[14] The procedural route the parties and the trial court take affects our review. Our standards of review with respect to a Trial Rule 60(B) motion and a summary judgment motion are materially different. We review rulings on Rule 60(B) motions under an abuse of discretion standard. *See, e.g., In re Paternity of P.S.S.*, 934 N.E.2d 737, 740-41 (Ind. 2010) (“A motion made under subdivision (B) of Trial Rule 60 is addressed to the equitable discretion of the trial court; the grant or denial of the Trial Rule 60(B) motion will be disturbed only when that discretion has been abused. An abuse of discretion will be found only when the trial court’s action is clearly erroneous, that is, against the logic and effect of the facts before it and the inferences which may be drawn therefrom.”) (cleaned up). Our summary judgment standard of review, however, is *de novo*, and we must determine “if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Murray v. Indianapolis Pub. Schs.*, 128 N.E.3d 450, 452 (Ind. 2019); *see also* T.R. 56(C).

[15] Neither party raised an objection to the trial court’s proceeding with the motions to set aside the tax deed by way of summary judgment proceedings.

We find that the manner in which the trial court disposed of the motions did not alter the result. Under either standard of review, neither Insider's nor McCabe IRA was entitled to notice of the tax sale as a matter of law, as we discuss as follows.

B. Notice

[16] We first resolve what notice, if any, Insider's and McCabe IRA were entitled to receive. "A tax sale is purely a statutory creation, and material compliance with each step of the statute is required." *Emma v. JP Morgan Chase Bank, N.A.*, 992 N.E.2d 732, 738 (Ind. Ct. App. 2013) (quoting *Nieto v. Kezy*, 846 N.E.2d 327, 337 (Ind. Ct. App. 2006)). "While a tax deed creates a presumption that a tax sale and all of the steps leading to the issuance of the tax deed are proper, the presumption may be rebutted by affirmative evidence to the contrary." *Id.* "An order to issue a tax deed will be given if the court finds that the notices have been provided pursuant to the statutes." *Id.* "[T]itle conveyed by a tax deed may be defeated if the notices were not in substantial compliance with the manner prescribed" by the pertinent statutes. *Id.* Whether a notice "substantially complied" with statutory requirements, though a 'fact-sensitive determination,' is a question of law." *Indiana Land Tr. Co. v. XL Inv. Properties, LLC*, 155 N.E.3d 1177, 1190 (Ind. 2020) (quoting *Collier v. Prater*, 544 N.E.2d 497, 499 (Ind. 1989)).

[17] We also note that the Due Process Clause of the Fourteenth Amendment requires "that before it institutes an action to sell a delinquent property, 'a State must provide notice reasonably calculated, under all circumstances, to apprise

interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *Id.* at 1183 (quoting *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795, 103 S. Ct. 2706, 2709 (1983)). “Put differently, a party that has a legally protected property interest in a particular parcel is ‘entitled to notice reasonably calculated to apprise him of a pending tax sale.’” *Id.* (quoting *Mennonite Bd. of Missions*, 462 U.S. at 798, 103 S. Ct. at 2711).

[18] The General Assembly has codified the procedures and requirements to conduct a tax sale when an owner of real property becomes delinquent on property taxes. *See* Ind. Code § 6-1.1-24 *et seq.* Under the present statutory scheme, there are certain notice requirements that must be met before the property is sold. I.C. § 6-1.1-24-4. If notice is given and no property owner objects or steps forward to contest the sale, the property is subject to sale at a public auction. I.C. §§ 6-1.1-24-4.7, -5. After the tax sale, there is a redemption period during which a person may redeem the property for a certain sum of money. *See* I.C. § 6-1.1-25 *et seq.* If the property is not redeemed, the purchasing party may file a petition for the tax deed to the real property. I.C. § 6-1.1-25-4.6.

Id. at 1187.

[19] The statutory provisions, related to tax sales, require that the property owner of record be provided with three notices: (1) Indiana Code Section 6-1.1-24-4 (the county auditor’s notice of tax sale); (2) Indiana Code Section 6-1.1-25-4.5 (notice of the right of redemption); and (3) Indiana Code Section 6-1.1-25-4.6 (notice of petition for tax deed). Notice must also be provided to anyone with “a substantial property interest of public record in the tract or item of real

property.” I.C. § 6-1.1-25-4.5. Indiana Code Section 6-1.1-23.9-3 defines “substantial property interest of public record” and provides:

(a) “Substantial property interest of public record” means title to *or interest in* a tract that is within the tract’s chain of record title and:

(1) *possessed by a person*; and

(2) either:

(A) *recorded in the office of the county recorder for the county in which the tract is located*; or

(B) available for public inspection and properly indexed in the office of the circuit court clerk in the county in which the tract is located;

not later than the hour and date a sale is scheduled to commence under IC 6-1.1-24.

The term does not include a lien held by the state or a political subdivision.

(b) For purposes of IC 6-1.1-24 and IC 6-1.1-25 only, chain of record title includes instruments executed by the owner and recorded within the five (5) day period before the date the owner acquires title to the tract.

(emphasis added).

- [20] This dispute is resolved by a simple application of the plain text of the statute. Insider's did not "possess" a substantial property interest in the Admiral property at the relevant time because Insider's had assigned its mortgage to McCabe IRA, and, thereby, "assign[ed], transfer[ed], and set [] over to Assignee *all* rights, title, and interest in" the Admiral property. Appellant's App. Vol. IV p. 46 (emphasis added).
- [21] Insider's contends that an effective search by the Auditor for purposes of issuing notice of the tax sale would have revealed the recording of the Insider's mortgage. That is true, but irrelevant. The recording of Insider's mortgage would merely have *appeared* to entitle Insider's to notice, but *only* because McCabe IRA failed to record the assignment. *See Diversified Invs.*, 838 N.E.2d at 540 ("A mortgagee possesses a substantial property interest that is significantly affected by a tax sale and is therefore entitled to notice reasonably calculated to apprise him of a pending tax sale."). The pertinent question under [Indiana Code Section 6-1.1-23.9-3](#) is not whether a party *appears* to have an interest in a property, but whether the party *actually* has a substantial property interest. Insider's assigned its mortgage to McCabe IRA, and thus, ceased to maintain the required interest in the property. Insider's was, therefore, not entitled to notice and, accordingly, its challenge to the tax deed must fail.
- [22] McCabe IRA's challenge fails as well, but for a different reason; McCabe IRA failed to timely record its interest in the Admiral property by recording the assignment of the mortgage it held. That interest was, therefore, not in the public record at the time notice of the tax sale was issued. Accordingly,

McCabe IRA was not entitled to notice of the tax sale. We look to the plain language of the statute to resolve this issue. McCabe IRA, therefore, cannot overcome the presumption that the tax sale and all of the steps leading up to the tax deed were proper; and, given that McCabe IRA was neither the owner of record nor a person with a substantial, publicly recorded interest in the Admiral property, McCabe IRA was not entitled to notice of the tax sale. Accordingly, the McCabe IRA challenge to the tax deed must fail. Because we conclude that neither party was entitled to notice, we need not address the arguments with respect to timeliness of their challenges to the issuance of the tax deed.

Conclusion

[23] Neither Insider's nor McCabe IRA was entitled to notice of the tax sale. Accordingly, neither party can prevail in a challenge seeking to set aside S&C's tax deed, and the trial court erred in setting aside the tax deed. The judgment of the trial court is, therefore, reversed.

[24] Reversed.

Najam, J., and Pyle, J., concur.