

Circuit Court for Frederick County
Case No.: 10-C-02-000895

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1100

September Term, 2017

ALLAN M. PICKETT, et al.

v.

FREDERICK CITY MARYLAND, et al.

Woodward C.J.,
Graeff,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: November 26, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 1982 appellant, Allan Pickett, purchased a property at 20 West Fourth Street in the City of Frederick (“the property”). In 2002, the City initiated a condemnation petition in the Circuit Court for Frederick County, seeking to take the property under the power of eminent domain. After a number of delays, the parties filed a joint motion to postpone the matter pending the disposition of a separate case involving the same property. On August 3, 2007, the court stayed the proceedings.

During the stay, the City purchased the property at a tax sale and was ultimately successful in foreclosing appellant’s right of redemption. On February 16, 2017, the Clerk of the circuit court filed a “Notification to Parties of Contemplated Dismissal.” Despite no longer owning the property, appellant moved to defer the contemplated dismissal of the case. The circuit court denied appellant’s motion and this appeal followed. We affirm.

BACKGROUND

After the City filed its condemnation petition seeking to take the property under the power of eminent domain, a default judgment against appellant was issued in October 2003 and subsequently vacated in December 2003. After a number of lengthy delays, the case was dismissed in favor of appellant in May 2005. The City subsequently appealed and in May of 2006, the Court of Appeals reversed and remanded the case to the Circuit Court of Frederick County for further proceedings. *City of Frederick v. Pickett*, 392 Md. 411 (2006).

After a number of further delays, on July 27, 2007, the parties filed a joint motion to postpone the matter pending the disposition of a separate case involving the same property.¹ On August 3, 2007, the court stayed the proceedings.

In May 2011 the City purchased the property at a tax sale, and in April of 2012, the City filed an action to foreclose appellant’s rights to redeem the property. The circuit court entered an order foreclosing appellant’s right to redemption after appellant failed to pay the redemption amount. Appellant appealed to this Court and we affirmed the circuit court’s judgment. Appellant’s petitions for writ of certiorari to the Court of Appeals and the Supreme Court of the United States were both denied. 446 Md. 293 (2016); 137 S. Ct. 202 (2016).

The original condemnation petition laid largely dormant until February 16, 2017 when the clerk of the circuit court filed a “Notification to Parties of Contemplated Dismissal.” In response, appellant filed a “Motion to Defer Contemplated Dismissal” and requested a hearing on the matter, noting that in 2014 Noreen Manning, an employee of the Office of the Clerk of the Circuit Court for Frederick County, had entered a note in the case file “evidencing her ‘confusion’ about the case and whether it should or should not

¹ The separate case which prompted the parties to request a stay in the proceedings of the City’s condemnation action was a foreclosure petition initiated by Kathy Afzali, a third party. On May 10, 2004, the property was sold at a tax sale to Afzali. Afzali subsequently filed suit to foreclose the right of redemption, and in January 2007 the court entered an order foreclosing appellant’s rights to the property. Upon appellant’s appeal to this Court, the circuit court stayed the City’s condemnation action in July 2007. This Court affirmed the circuit court’s ruling in the Afzali foreclosure case. Afzali did not pay the purchase price from the tax sale, however, and ultimately abandoned her right to the property. As noted, the City acquired the property in a subsequent tax sale.

remain open.” The court scheduled a hearing and appellant subpoenaed Manning to testify. The Office of the Attorney General entered its appearance on behalf of Manning and the court granted its motion to quash the subpoena, and issued a protective order preventing Manning’s compelled appearance and testimony. After a hearing on the matter, the court denied appellant’s motion to defer dismissal of the case.

On May 30, 2017, appellant filed a motion to vacate the order denying his motion to defer dismissal. The court denied appellant’s motion to vacate on June 23, 2017, and this appeal followed.

DISCUSSION

The City’s Response to Appellant’s Motion to Defer

Appellant contends that the trial court erred when it relied upon “factual averments” contained in the City’s response to his motion to defer, because none of the exhibits attached to the response were “verified in any manner,” nor did the response contain an affidavit required by Md. Rule 2-311(d). Appellant’s claim is without merit.

Md. Rule 2-311(d) requires that “[a] motion or response to a motion that is based on facts not contained in the record shall be supported by affidavit and accompanied by any papers on which it is based.” He argues that paragraphs 5-7 “which were relied upon [by] the lower Court, impermissibly tended to paint Appellant as a person completely devoid of fiscal responsibility and therefore not worthy of the Court’s ability to provide equitable relief to Appellant.” Paragraphs five through seven recount the procedural history of the property including the City’s condemnation action, appellant’s failure to rehabilitate the property, the two separate tax sales of the property, and appellant’s failure

to make payment to the Frederick County treasurer towards his outstanding property taxes. While these paragraphs contain arguments, the facts on which those arguments are based had already been established in the record.

Appellant also contends that Exhibits A-1 through A-4, attached to the City’s response, were not “verified in any manner.” Exhibit A-1 is a copy of the Certificate of Sale of the property to Kathryn Afzali on May 10, 2004. That the property had been sold to Afzali at a tax sale on May 10, 2004 was a fact already contained in the record. Exhibit A-2 is a copy of the Certificate of Sale of the property to the Board of County Commissioners on May 9, 2011. That the property had again been sold at a tax sale on May 9, 2011 was a fact already contained in the record. Exhibit A-3 is a document indicating that the property had not been redeemed after it had been sold at the tax sale on May 9, 2011. That the property was available for redemption after the May 9, 2011 tax sale is a fact already contained in the record. Exhibit A-4 is a receipt indicating that the City paid the balance of \$7,792.17 due to foreclose the right of redemption. This too is a fact that was also already contained in the record. As the facts which the exhibits purported to show were already contained in the record, any further “verification” was unnecessary.

Appellant further argues that the City “should not have been allowed to bootstrap his allegations of fact in his obviously unsworn oral argument to the court at the hearing on the motion.” Insomuch as appellant did not raise this objection at the time of the hearing, his argument is not preserved for our review.

Motion to Quash Subpoena

Appellant next contends that the lower court “err[ed] as a matter of law and/or abuse[d] its discretion when it ruled ex parte on Appellee Noreen Manning’s unverified Motion to Quash Subpoena without providing Appellant nor his counsel sufficient time to respond to same.” Appellant’s claim is without merit.

Appellant cites a note in the case file entered by Manning which stated as follows:

[Assistant City Attorney] Waxter contends that the city may be liable for approximately \$20,000.00 of [appellant’s] attorney’s fees upon resolution of this case, so he would like for it to remain open – although there does not appear to be anything currently at issue.

Should this case be set in for a status hearing?

Appellant states that he served Manning with a subpoena compelling her to testify at the motion hearing below because her note in the file “was extremely important in [his] argument” to defer contemplated dismissal of the condemnation proceeding. He states that he received the motion to quash the subpoena on May 11, 2017, and the Circuit Court granted the motion on May 15th with no input from him or his counsel. The hearing was held the next day whereupon the court denied his motion to defer dismissal.

Appellant’s claim is not preserved for our review. Maryland Rule 5-103(a)(2) provides that:

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was requested by the court or required by rule; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered. The court may direct the making of an offer in question and answer form.

Here, other than indicating the contents of Manning’s note in the file, appellant did not provide the requisite offer of proof as required by the rule. At the hearing on his motion to defer, appellant did not proffer what Manning would have testified to had she been required to appear, nor did he indicate the relevancy of any such statement. Further, he did not indicate to the court how he was prejudiced by the exclusion of Manning’s testimony.

Motion to Defer Contemplated Dismissal

Appellant next contends that the lower court “err[ed] as a matter of law and/or abuse[d] its discretion when it denied Appellant’s Motion to Defer Contemplated Dismissal pursuant to Maryland Rule 2-507.” Maryland Rule 2-507 provides in pertinent part:

(c) For Lack of Prosecution. An action is subject to dismissal for lack of prosecution at the expiration of one year from the last docket entry[.]

(d) Notification of Contemplated Dismissal. When an action is subject to dismissal pursuant to this Rule, the clerk, upon written request of a party or upon the clerk’s own initiative, shall serve a notice on all parties pursuant to Rule 1-321 that an order of dismissal for lack of jurisdiction or prosecution will be entered after the expiration of 30 days unless a motion is filed under section (e) of this Rule.

(e) Deferral of Dismissal. On motion filed at any time before 30 days after service of the [Notification of Contemplated Dismissal], the court for good cause shown may defer entry of the order of dismissal for the period and on the terms it deems proper.

The “decision to grant or deny the dismissal is committed to the sound discretion of the trial court,” and will be “overturned on appeal only ‘in extreme cases of clear abuse.’”

Reed v. Cagan, 128 Md. App. 641, 648 (1999) (quoting *Stanford v. District Title Ins. Co.*, 260 Md. 550, 555 (1971)). It is the trial court’s responsibility “to weigh and balance the rights, interests, and reasons of the parties in light of the public demand for prompt resolution of litigation.” *Id.*

Appellant argues that the doctrine of *lis pendens* requires that the case remain open until all issues are resolved. He asserts that he has a “right to receive reimbursement for his counsel fee and costs of the litigation,” and until that matter is settled, the case cannot be dismissed.

Appellant’s reliance on the doctrine of *lis pendens* is misplaced. Black’s Law Dictionary defines *lis pendens* as:

1) A pending lawsuit. 2) The jurisdiction, power or control acquired by a court over property while a legal action is pending. 3) A notice, recorded in the chain or title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome.

Black’s Law Dictionary 1015 (9th ed. 2009).

“[T]he doctrine of *lis pendens* will apply only if the pending action affects title to such real or leasehold property.” *Permanent Financial Corp. v. Taro*, 71 Md. App. 489, 495 (1987). Any *lis pendens* issues would effect a new buyer of the property, not Pickett, who no longer has ownership rights to the property. As *lis pendens* does not apply to appellant’s claim, the lower court did not err when it failed to apply the doctrine of *lis pendens*.

Finally, appellant alleges that the “lower court err[ed] as a matter of law in finding that Appellee did not have a legal and equitable duty to abandon the condemnation case so as to trigger Appellant’s right to have his counsel fees, appraiser fees and other expenses incurred in defending the condemnation suit determined by the Court.” Appellant argues that the City had an “affirmative duty to abandon this condemnation action” prior to purchasing his property in an intervening tax sale.

Upon abandonment of a condemnation proceeding, Md. Code. Ann., Real Prop. §12-109(e) provides for the recovery “from the plaintiff the reasonable, legal, appraisal, and engineering fees actually incurred by the defendant because of the condemnation proceeding.” Here, the City never abandoned its condemnation proceeding. Instead, the parties agreed to stay the proceedings pending the resolution of the Afzali tax sale case. The City correctly points out that, “had the Afzali tax sale case resulted in a disposition in which [appellant] lost his ownership interest in the Property, this case would be in the same procedural posture as it is today.” Instead, Afzali abandoned her tax sale case and appellant continued to refuse to pay his taxes, and the property was sold at a tax sale. The City’s purchase of the property at the tax sale terminated appellant’s ownership interests in the property and rendered this condemnation case moot.

**JUDGMENT OF THE CIRCUIT COURT
FOR FREDERICK COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**