SUPREME COURT OF GEORGIA

Mark Turner Properties, Inc. v. Evans, 274 Ga. 547

554 S.E.2d 492 (2001) · No. No. S01A1051 · Decided November 5, 2001

SUMMARY

The Supreme Court of Georgia addresses whether a tax deed holder's title ripened by prescription and whether the appellant properly redeemed the property. The court held that payment of taxes alone did not establish the adverse possession required for prescriptive title, but the appellant remained obligated to pay the correct redemption price. The court affirmed in part, reversed in part, and remanded for further proceedings.

CASE DETAILS

COURT	Supreme Court of Georgia
WRITING FOR THE COURT	Carley, Justice
JURISDICTION	Georgia
DECIDED	November 5, 2001
DOCKET	No. S01A1051
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Mark Turner Properties, Inc. appealed from an order granting Diana Smith Evans summary judgment on the issues of prescriptive title and the redemption price, while denying Mark Turner Properties' cross-motion for partial summary judgment. The Supreme Court of Georgia affirmed in part, reversed in part, and remanded.
STANDARD OF REVIEW	Summary judgment is reviewed de novo, with the undisputed evidence determining whether either party was entitled to judgment as a matter of law.
PRECEDENTIAL VALUE	Published opinion; precedential Georgia Supreme Court decision.
PARTIES	Mark Turner Properties, Inc. v. Diana Smith Evans

TOPICS

real estate · summary judgment · statutory interpretation · civil procedure · equitable relief

PRACTICE AREAS

real estate · civil procedure · remedies · statutory interpretation

QUESTIONS PRESENTED

1. Whether Evans's tax-deed title ripened by prescription and thereby barred Mark Turner Properties' right of redemption.
2. Whether Evans waived the statutory tender requirement by refusing to state the amount she claimed was necessary for redemption and failing to respond to repeated redemption efforts.
3. Whether Mark Turner Properties was required to deposit the entire redemption price into the court registry despite Evans's waiver of tender.
4. Whether the 20-percent annual premium under the 1996 amendment to OCGA § 48-4-42 applied to the redemption calculation.
5. Whether the redemption premium had to include the fourth year, or any fraction of that year, following the tax sale.

HOLDINGS

1. A tax-deed grantee's title does not ripen by prescription merely through the passage of time or payment of property taxes; the grantee must establish the adverse possession required by OCGA §§ 48-4-48 and 44-5-161. Because Evans never occupied the property or engaged in acts evidencing possession or a claim of ownership, her title had not ripened by prescription.
2. Evans waived the requirement that Mark Turner Properties make a formal tender before filing and prosecuting the redemption action because her refusal to identify the amount due and her failure to respond to repeated redemption efforts demonstrated that she would not accept payment.
3. The inadequacy of Mark Turner Properties' deposit did not prevent it from redeeming the property because Evans had waived tender before prescriptive title could ripen, and the complaint's allegation that Mark Turner Properties was ready, willing, and able to pay the redemption price was sufficient.
4. The redemption price included a 20-percent annual premium for each of four years, or fractions thereof, after the tax sale. The 1996 amendment increasing the premium from 10 percent to 20 percent was not unconstitutionally retroactive because the parties' property rights had not fully vested before the amendment's effective date.

KEY QUOTATIONS

> *“Thus, contrary to Ms. Evans' assertion and the trial court's order, OCGA § 48-4-48 is not a statute of repose which operates to foreclose the right of redemption upon the mere passage of time.”* (274 Ga. at 548)

> *“Payments of taxes "are insufficient to establish prescriptive title, however long continued, even though accompanied by constant assertions of title."”* (274 Ga. at 549)

> *“Where, as here, an offer is made to pay whatever amount is due, and the person to whom tender is due refuses by her conduct to accept any amount, the refusal dispenses with the formality of making a legal tender.”* (274 Ga. at 549-550)

> *"Because Ms. Evans waived tender prior to the ripening of prescriptive title, the allegation in Appellant's complaint that it stands ready, willing, and able to pay the redemption price was sufficient without payment into the trial court of the entire sum eventually fixed by the judgment."* (274 Ga. at 551)

FACTUAL BACKGROUND

Diana Smith Evans purchased the property at a tax sale on January 3, 1995, received a recorded tax deed, and later attempted to foreclose the right of redemption. Mark Turner Properties acquired quitclaim deeds from the record title holders, including a 1998 deed specifically conveying the right to redeem, and repeatedly attempted to redeem the property. Evans paid the taxes for most years after the sale but did not occupy the property or engage in other conduct visibly evidencing possession or a claim of ownership. Mark Turner Properties deposited $3,616.92 into the court registry, while the trial court calculated the redemption price as $4,674.12.

PROCEDURAL HISTORY

Evans purchased the property at a tax sale and received a recorded tax deed. After an earlier action concerning redemption, Mark Turner Properties filed the present action seeking to redeem the property and related relief, depositing $3,616.92 into the trial court registry. On cross-motions for summary judgment, the trial court held that the redemption right had expired through prescriptive title and that the deposited amount was insufficient, although it also found that Evans had waived the tender requirement. The Supreme Court reversed the prescriptive-title ruling, affirmed the calculation of the redemption price, and remanded for further proceedings.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The case was remanded for further proceedings not inconsistent with the opinion, including proceedings allowing redemption upon payment of the correct redemption price.

CASES CITED

- Whitaker Acres v. Schrenk, 170 Ga. App. 238, 316 S.E.2d 537 (1984)
- Blizzard v. Moniz, 271 Ga. 50, 518 S.E.2d 407 (1999)
- Moultrie v. Wright, 266 Ga. 30, 464 S.E.2d 194 (1995)
- Machen v. Wolande Mgmt. Group, 271 Ga. 163, 517 S.E.2d 58 (1999)
- Talmadge v. Adams, 240 Ga. 193, 240 S.E.2d 9 (1977)
- Scott v. Cain, 90 Ga. 34, 15 S.E. 816 (1892)
- Crawley v. Selby, 208 Ga. 530, 67 S.E.2d 775 (1951)
- Coffey Enterprises Realty & Development Co. v. Holmes, 233 Ga. 937, 213 S.E.2d 882 (1975)
- Stith v. Morris, 241 Ga. 247, 244 S.E.2d 817 (1978)
- Southerland v. Bradshaw, 255 Ga. 455, 339 S.E.2d 579 (1986)
- The B-X Corp. v. Jeter, 210 Ga. 250, 78 S.E.2d 790 (1953)

- Peyton v. Stephens, 130 Ga. 338, 60 S.E. 563 (1908)
- Ingram v. The Methodist Church Dist. Bd. of Missions & Church Extension, 219 Ga. 100, 131 S.E.2d 848 (1963)
- Laroche v. Kinchlo, 150 Ga. 296, 103 S.E. 713 (1920)

OPINION

CARLEY, J.

554 S.E.2d 492 (2001) 274 Ga. 547 MARK TURNER PROPERTIES, INC. v. EVANS. No. S01A1051. Supreme Court of Georgia. November 5, 2001. Reconsideration Denied December 3, 2001. *493 Cochran, Camp & Snipes, Scott A. Cochran, Smyrna, for appellant. Cauthorn & Phillips, Thomas E. Cauthorn III, Melissa M. Nohr, Marietta, for appellee. CARLEY, Justice. Diana Smith Evans was the successful bidder at a tax sale on January 3, 1995 and was the grantee in a recorded tax deed.

She attempted to foreclose the right of redemption in 1996. In that same year, the record title holders executed quitclaim deeds in favor of Mark Turner Properties, Inc. (Appellant). Appellant attempted to redeem the property and, also in 1996, brought an action to cancel the tax deed, to enjoin Ms. Evans from preventing the redemption, and to award damages for her interference with its property rights.

The trial court found that the quitclaim deeds did not convey to Appellant the right to redeem and that Appellant failed to make a proper tender. However, the court also held that the right to redeem had not been foreclosed. Appellant again brought suit on January 4, 1999, seeking remedies identical to those sought in its 1996 complaint, and paid into the registry of the court a sum which it contended was the amount payable for redemption.

On cross-motions for summary judgment, the undisputed evidence showed that Ms. Evans paid the taxes on the property for the years 1994-1996 and 1998, and Appellant paid for the year 1997. In January 1998, Appellant obtained a new quitclaim deed which specifically conveyed the right to redeem the property.

In September, Ms. Evans received a certified letter from Appellant asserting its desire to redeem the property for the amount required by law and asking her to provide the dollar amount necessary to redeem the property, but she did not respond. Appellant's president left several telephone messages for Ms. Evans regarding redemption and attempted to redeem the property in person at her residence.

Ms. Evans would not personally speak with him or respond in any way. The trial court found that the judgment in the 1996 action does not bar Appellant from maintaining the current proceeding and that Ms. Evans waived the requirements of tender by failing to respond to the September 1998 letter.

However, the trial court also *494 held that the amount tendered by Appellant into the court's registry was insufficient as a matter of law, that the title conveyed by the tax deed ripened by prescription on January 3, 1999 and that Appellant's right of redemption expired on that same date. Appellant appeals from this order. 1.

The title acquired by a purchaser of a tax deed "`is not a perfect fee-simple title, but an inchoate or defeasible title, subject to the right of the owner to redeem within the time prescribed by the statute.' [Cit.]" Whitaker Acres v. Schrenk, 170 Ga.App. 238, 240(2), 316 S.E.2d 537 (1984). Appellant's predecessors had an absolute right to redeem the property "[a]t any time within 12 months from the date of the sale," OCGA § 48-4-40(1), but it is uncontroverted that they failed to exercise that right.

Blizzard v. Moniz, 271 Ga. 50, 53, 518 S.E.2d 407 (1999); Moultrie v. Wright, 266 Ga. 30, 32(1), 464 S.E.2d 194 (1995). After the expiration of 12 months, the right to redeem may, under current law, be "barred by either the giving of notice under OCGA § 48-4-45 or the ripening of title by prescription under OCGA § 48-4-48 (1989)." Blizzard v. Moniz, supra at 53, 518 S.E.2d 407.

However, it is undisputed that, since the prior judgment, Ms. Evans has not given the statutorily required notice of foreclosure or otherwise communicated with Appellant. See Moultrie v. Wright, supra at 32(1), 464 S.E.2d 194.

Thus, the only remaining method by which the right to redeem could have been barred is the ripening of prescriptive title. 2. The trial court correctly stated that Ms. Evans "did not erect any structure on the property, visibly evidencing possession of the property, but she did pay the taxes on the property from 1994 through 1998, with the exception of 1997, when [Appellant] voluntarily paid the taxes."

However, the trial court did not rely on any other conduct by or on behalf of Ms. Evans. As stated in OCGA § 44-5-160, title acquired by prescription requires continuance of possession for a period of time fixed by law.... [T]he plain language of OCGA § 48-4-48 (1989) requires such adverse possession by the tax deed grantee in order for title to ripen under the statute.

(Emphasis in original.) Blizzard v. Moniz, supra at 54, 518 S.E.2d 407. Thus, contrary to Ms. Evans' assertion and the trial court's order, OCGA § 48-4-48 is not a statute of repose which operates to foreclose the right of redemption upon the mere passage of time. Compare Moultrie v. Wright, supra at 31(1), 464 S.E.2d 194 (involving a predecessor statute). Like the tax deed holder in Blizzard, Ms. Evans "never occupied any part of the property or ever engaged in any act evidencing possession or claim of ownership except for the payment of a portion of the imposed taxes...."

Blizzard v. Moniz, supra at 53, 518 S.E.2d 407. Thus, as in Blizzard, "[i]t is uncontroverted that [the tax deed grantee] never occupied the property, nor committed any acts or exhibited any conduct which would amount to adverse possession of the property for the requisite period. See OCGA § 44-5-161." Blizzard v. Moniz, supra at 54, 518 S.E.2d 407. Compare Machen v. Wolande Mgmt.

Group, 271 Ga. 163, 164(1), 517 S.E.2d 58 (1999). Payments of taxes "are insufficient to establish prescriptive title, however long continued, even though accompanied by constant assertions of title." 1 Hinkel, Pindar's Ga. Real Estate Law § 12-36, p. 612 (5th ed.1998). See also Talmadge v. Adams, 240 Ga. 193, 195-196(1), 240 S.E.2d 9 (1977); Scott v. Cain, 90 Ga. 34(1), 15 S.E.

816 (1892) (payment of taxes not sufficient evidence of adverse possession even when claimant visits property and warns off intruders). Moreover, the purchaser at a tax sale does not have constructive possession of the premises. Whitaker Acres v. Schrenk, supra at 240(2), 316 S.E.2d 537.

Therefore, the trial court erred in granting summary judgment in favor of Ms. Evans on the issue of prescriptive title and in denying Appellant's cross-motion for partial summary judgment on the same issue. 3. Although neither ripening of title by prescription nor foreclosure of the equity of redemption has barred Appellant's right to redeem the property, it still was required to fulfil the requirements of tender before filing this redemption action. *495 "(T)ender of the amount due... is a prerequisite to the filing and prosecution of [Appellant's] suit.

(Cits.).... [Ms. Evans] is entitled to have an opportunity to accept the money and convey the property voluntarily, before processes of the courts are invoked to compel [her] to do that which [she] is required to do under the law, and perhaps would do if afforded an opportunity." [Cit.]

Therefore, in order for [Appellant] to have a viable redemption claim, it was incumbent upon [it] either to pay or to tender the necessary sums, unless payment or tender was waived by [Ms. Evans]. Machen v. Wolande Mgmt. Group, supra at 165, 517 S.E.2d 58.

Although the trial court ultimately granted summary judgment on the erroneous basis that prescriptive title had ripened, it preliminarily found that Ms. Evans waived the requirement of tender. "`(T)ender of an amount due is waived when the party entitled to payment, by declaration or by conduct, proclaims that, if tender of the amount due is made, an acceptance of it will be refused.

(Cits.)' [Cit.]" (Emphasis supplied.) Machen v. Wolande Mgmt. Group, supra at 165(1), 517 S.E.2d 58. Ms. Evans refused, in response to the September 1998 letter, to name the amount she claimed to be due her, and she thereafter failed to respond in any way to repeated contacts by Appellant's president. Crawley v. Selby, 208 Ga. 530, 537(3), 67 S.E.2d 775 (1951).

See also Coffey Enterprises Realty & Development Co. v. Holmes, 233 Ga. 937, 940(3), 213 S.E.2d 882 (1975). "`It is unnecessary to make a tender, to prove that a tender legal in every particular has been made, where the person to whom it is offered will not accept it even though it were a perfect tender. (Cits.)' [Cit.]" (Emphasis in original.) Machen v. Wolande Mgmt.

Group, supra at 166(1), 517 S.E.2d 58. Where, as here, an offer is made to pay whatever amount is due, and the person to whom tender is due refuses by her conduct to accept any amount, the refusal dispenses with the formality of making a legal tender. Crawley v. Selby, supra at 537(3), 67 S.E.2d 775. 4.

However, Appellant is still obligated to pay the correct redemption price in order to succeed in this redemption action. OCGA § 48-4-40(2). The amount required to be paid for redemption of property from any sale for taxes as provided in [OCGA § 48-4-1 et seq.], or the redemption price, shall be the amount paid for the property at the tax sale..., plus any taxes paid on the property by the purchaser after the sale for taxes, plus any special assessments on the property, plus a premium of 20 percent of the amount for each year or fraction of a year which has elapsed between the date of the sale and the date on which the redemption payment is made.

OCGA § 48-4-42. Upon filing suit, Appellant paid $3,616.92 into the registry of the trial court. It contends that this amount is more than sufficient for redemption and that the trial court erred in calculating the redemption price as $4,674.12. It is undisputed that, under the statute, the amount payable for redemption includes the $2,200 Ms. Evans paid at the tax sale and $714 in taxes subsequently paid by her.

With respect to the premium, Appellant relies on a previous version of OCGA § 48-4-42 which was in effect at the time of the tax sale and, as a result, contends that the premium payable on the $2,200 is only 10%. However, the trial court's application of the 1996 amendment to OCGA § 48-4-42, which increased the amount of the annual premium from 10% to 20%, Ga. L.1996, p. 1022, is not unconstitutionally retroactive, because neither Ms. Evans' nor Appellant's rights to the property had fully vested prior to the effective date of that amendment.

See Stith v. Morris, 241 Ga. 247, 248(1), 244 S.E.2d 817 (1978). Compare Moultrie v. Wright, supra at 32(1), fn. 3, 464 S.E.2d 194. Furthermore, although Appellant calculated the premium based upon an elapse of three years, it was also required to pay, under the plain language of OCGA § 48-4-42, a premium attributable to the fourth year after the sale, which commenced on January 3, 1998, even if only a fraction of that year is considered to have elapsed due to Ms. Evans' waiver of tender in September, 1998.

Southerland v. Bradshaw, 255 Ga. 455(2), 339 S.E.2d 579 (1986); The B-X Corp. v. Jeter, 210 Ga. 250, 255(2), 78 S.E.2d 790 (1953). Therefore, the trial court correctly *496 included $1,760 in premiums in the redemption price, rather than the $660 urged by Appellant, by applying the 20% annual premium in the present statute, for each of four years, to the $2,200 paid at the tax sale.

Accordingly, Appellant's payment into the registry of the court was less than the amount payable for redemption. However, the inadequacy of Appellant's payment into the court registry does not prevent it from redeeming the property in this action. Since prescriptive title had not ripened at the time suit was filed, it also has not ripened during the pendency thereof.

Even if the running of prescription has begun, it was suspended by the filing of this action. Peyton v. Stephens, 130 Ga. 338, 343(2), 60 S.E. 563 (1908); 1 Hinkel, supra at § 12-62, p. 623. Because Ms. Evans waived tender prior to the ripening of prescriptive title, the allegation in Appellant's complaint that it stands ready, willing, and able to pay the redemption price was sufficient without payment into the trial court of the entire sum eventually fixed by the judgment.

See Ingram v. The Methodist Church Dist. Bd. of Missions & Church Extension, 219 Ga. 100, 101(1), 131 S.E.2d 848 (1963); Laroche v. Kinchlo, 150 Ga. 296, 103 S.E. 713 (1920); OCGA § 9-11-67 (contemplating a party's deposit with the trial court of any part of a sum of money expected to be awarded as part of a judgment).

Accordingly, we reverse the judgment in part and affirm in part, and remand the case to the trial court for further proceedings not inconsistent with this opinion. Judgment affirmed in part and reversed in part, and case remanded with direction. All the Justices concur.