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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

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Howard Ross

v.

**Madison County; Dale Strong, in his official capacity as
Chairman of the Madison County Commission; and Lynda Hall,
in her official capacity as the Tax Collector of Madison County**

**Appeal from Madison Circuit Court
(CV-18-36)**

On Application for Rehearing

MOORE, Judge.

This court's no-opinion order of affirmance of February 5, 2021, is withdrawn, and the following is substituted therefor.

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Howard Ross appeals from a summary judgment entered by the Madison Circuit Court ("the trial court") in favor of Madison County, Dale Strong, in his official capacity as chairman of the Madison County Commission, and Lynda Hall, in her official capacity as the tax collector of Madison County. We affirm the trial court's judgment.

Procedural History

On April 4, 2018, Ross commenced an action in the trial court against the defendants. Subsequently, on May 8, 2018, Ross filed a "More Definite Statement of Claim," asserting that he had purchased certain properties ("the properties") located in Madison County at separate tax sales held on May 5, 2017, and that he had "paid [an] amount that included the taxes that were assessed at that time with an excess that the Tax Collector paid to the Madison County treasury." He also asserted that, subsequently, the Madison County tax assessor had discovered that "there was an unreported change in homestead status in 2016" for the properties; that "the Tax Assessor [had] corrected the amount of 2016 taxes that were due by vacating erroneous year 2016 homestead exemptions and sending notice to the previous owners c/o Ross" that the

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amount of the underpaid taxes owed for 2016 on the properties ("the escape taxes") were due;¹ that, in January 2018, the tax assessor had sent final notices to Ross informing him that the escape taxes were due; and that, "[o]n February 7, 2018, ... Ross was listed in a legal ad in the Huntsville Times newspaper to show cause on March 5, 2018 in the Probate Court why [the] properties ... should not be sold at the next tax sale." Ross requested that the trial court restrain the defendants from proceeding with the tax sales to recover the escape taxes that had been assessed after he had purchased the properties. On June 14, 2018, the defendants answered Ross's complaint.

On July 3, 2018, Ross filed an amended complaint asserting that "he [had] tendered the amount[] [of the escape taxes] necessary to discharge the [escape] tax liens on [the] properties in question before the taxes due were charged as delinquent." He asserted, however, that he was due to be reimbursed for the payment of the escape taxes. On July 30, 2018,

¹See Ala. Code 1975, § 40-7-23, discussed infra.

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Ross filed a motion requesting a summary judgment in his favor. On August 22, 2018, the defendants answered the amended complaint.

On October 17, 2018, Ross filed a second amended complaint asserting that the excess funds that he had paid at the May 5, 2017, tax sales of the properties should be used to satisfy the escape taxes owed on the properties. He asserted that "[a] tax sale purchaser cannot be required to pay additional taxes that are assessed after the tax sale for tax years prior to the year in which the sale is held." He requested a refund of the amount that he had paid to satisfy the escape taxes.

On October 4, 2019, the defendants filed a motion for a summary judgment arguing, among other things, that, Ross's "claims challenging the escape [tax] assessments should be dismissed for failure to comply with the statutory provisions for appeals."

On October 15, 2019, the trial court entered an order stating: "This case came on for trial on October 15, 2019. Both parties have motions for summary judgment pending. Both parties agree that no facts are in dispute and this case involves questions of law, not questions of fact. Both parties are ordered to submit proposed orders by November 5, 2019. The

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case will be taken under submission at that time." On October 23, 2019, the defendants filed a response to Ross's summary-judgment motion.

On March 10, 2020, the trial court entered a judgment granting the defendants' summary-judgment motion and denying the summary-judgment motion filed by Ross. On April 9, 2020, Ross filed a motion for a new trial; that motion was denied by operation of law on July 8, 2020. On August 19, 2020, Ross filed his notice of appeal to this court. This court transferred the appeal to the Alabama Supreme Court for lack of appellate jurisdiction; that court subsequently transferred the appeal to this court, pursuant to Ala. Code 1975, § 12-2-7.

Discussion

On appeal, Ross argues that the trial court erred by granting the summary-judgment motion filed by the defendants and by denying his summary-judgment motion. In short, Ross argues that he bore no personal liability for the payment of the escape taxes but that he paid them involuntarily to avoid a tax sale of the properties. Ross asserts that, under those circumstances, the trial court should have ordered the defendants to reimburse him for his payment of the escape taxes and that

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the escape taxes should instead be paid from the excess funds from the earlier tax sales of the properties. In other words, Ross claims that the trial court should have relieved him of the responsibility for paying the escape taxes from his own funds.

The record shows that the Madison County tax assessor determined that the properties had been improperly classified as the homesteads of the previous owners. Upon discovering that the properties did not qualify for the homestead-tax exemption, the tax assessor reassessed the property taxes for the 2016 tax year and determined that additional taxes, i.e., escape taxes, were due.

Section 40-7-23, Ala. Code 1975, provides the method by which an assessing official may recover taxes that have "escaped" from assessment within the previous five-year period. That section provides, in pertinent part:

"(a) Whenever the tax assessor, county revenue commissioner, or other assessing official shall discover that any property, including any improvements on real estate assessed as vacant property, has escaped taxation in any assessment within five years next preceding the current year, he shall list, return, and value said property for assessment for the years during which same has escaped taxation and shall

also endorse on such returns the year or years for which the property has escaped taxation and ... the accrual of a penalty of 10 percent of the taxes assessed thereon for each year.

"....

"(d) The assessing official shall give notice of an escape assessment by certified or registered mail, return receipt requested, to the owner or to the agent or attorney of such owner, notifying such person to appear before the assessing official in person, or by agent or attorney, within 20 days after such notice is given, if there is an objection to the assessment, and notifying such person that if no objection is made said assessment will be made final on the twentieth day after the mailing of such notice of escape assessment. If on the date set for hearing such objection the person against whom the assessment is made fails to appear or if in the opinion of the assessing official the assessment should not be changed and the assessment is proper, then the assessing official shall make the assessment final. The property owner, if he has filed objection to such assessment, may appeal from the assessment to the circuit court of the county in which the property is located within 30 days after such assessment becomes final, by giving notice in writing to the assessing official and by filing a copy of such notice with the clerk of the circuit court and giving bond to be approved by and filed with the clerk of the circuit court to cover costs, and thereafter such case shall be tried as other tax cases appealed to the circuit court from the board of equalization. The taxpayer or the state shall have the right to demand a trial by jury by filing a written demand therefor, within 10 days after the appeal is taken."

The defendants argued in their summary-judgment motion that Ross had failed to comply with the appeal procedures set forth in § 40-7-23(d).

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As the defendants pointed out, this court has held that "the right of appeal in tax cases is purely statutory and, as a consequence, must be exercised in the mode and within the time prescribed by" the pertinent statute. State v. Colonial Refrigerated Transp., Inc., 48 Ala. App. 46, 50, 261 So. 2d 767, 770 (Civ. App. 1971).²

Ross admits that he did not file an appeal from the assessment of the escape taxes, but he argues that he did not do so because he did not contest the assessments or the amounts due; he asserts only that he, as the tax-sale purchaser and current property owner, should not be responsible for payment of the escape taxes that accrued on the properties under previous ownership. Regardless of the merits of that argument, we conclude that the argument falls within the scope of the matters that could have been determined on appeal from the assessments. Section 40-7-23(d) provides that the tax assessor shall notify "the owner" of the escape-tax assessment; that "such person" shall, within 20 days, notify the

²The statutes at issue in Colonial Refrigerated were Title 51, §§ 53, 110, and 131, Ala. Code 1940 (Recomp. 1958); § 53 was a predecessor to § 40-7-23.

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tax assessor of "an objection" to the assessment; that, if "the person against whom the assessment is made" fails to appear for a hearing on the objection or if it is determined that no change to the assessment should be made, the assessment shall become final; and, finally, that the "property owner, if he has filed objection to such assessment, may appeal from the assessment" to the appropriate circuit court within 30 days. Section 40-7-23(d) does not, as Ross contends, limit the "objection" that can be made to an escape-tax assessment so as to preclude a challenge to the assessment against a successor property owner.

Section 40-7-23(d) authorized Ross to file an objection to payment of the escape taxes and to appeal if his objection was rejected, but Ross did not follow the procedure set forth in the statute. In Mount Tabor Benevolent Ass'n, Inc. v. Sizemore, 608 So. 2d 757 (Ala. Civ. App. 1992), this court considered the effect of a taxpayer's failure to comply with the statutory procedures for an appeal. This court set forth the background of that case as follows:

"On October 21, 1987, the Jefferson County Commission notified Mt. Tabor that its charitable exemption status had been revoked, and that Mt. Tabor must pay taxes beginning

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with the 1987 tax year. Mt. Tabor never paid the delinquent 1987 tax, and on June 1, 1988, the property was sold to the State of Alabama. Ultimately, Mt. Tabor initiated an action on June 28, 1991, requesting an injunction against the sale proposed by the State pursuant to Ala. Code 1975, § 40-10-132, and a declaratory judgment. On July 16, 1991, the trial court dismissed the complaint, holding, *inter alia*, that Mt. Tabor had failed to follow the statutory appeals process, and that the revocation of Mt. Tabor's charitable exemption status was authorized."

Mount Tabor, 608 So. 2d at 758. Mount Tabor appealed the circuit court's order of dismissal to this court. Id. On appeal, this court agreed with the circuit court that Mount Tabor had failed to comply with the statutory appeals process set forth in § 40-7-23(d). Id. This court noted, however, that Mount Tabor contended that it was entitled to appeal despite not having followed the statutory appeal process because, it said, the tax was void on its face. 608 So. 2d at 758-59. Specifically, Mount Tabor asserted "that property which was previously assessed and granted a charitable exemption is not subject to taxation after the end of that tax year, absent fraud in obtaining the exemption." 608 So. 2d at 758. Although this court agreed that "a taxpayer is entitled to a refund[,] despite not following the statutory remedies, if the tax he paid is void on its face," 608 So. 2d at

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758-59, this court disagreed that the tax at issue in Mount Tabor was void on its face and explained that the tax assessor had, in fact, been authorized "to revoke a charitable exemption after the end of the tax year." 608 So. 2d at 759. Therefore, this court affirmed the circuit court's judgment dismissing Mount Tabor's complaint. 608 So. 2d at 759.

In the present case, the evidence submitted by Ross does not rise to the level of showing that the escape taxes were void on their face. Indeed, he asserted that he was not "challenging the correctness of the assessment[s] for [the] escape taxes." Although Ross argues that the tax collector's claim is against the former owners of the properties and not Ross, the current property owner, § 40-7-23(d) provides that the "property owner" has the right to "appeal from the assessment." Having received notice of the assessments, Ross, as the property owner of the properties at that time, had the opportunity to follow the statutory appeal process and have his arguments heard. Because Ross did not follow the statutory procedure for objecting to and appealing the escape-tax assessments and did not prove that the escape taxes were void on their face, he did not have the right to challenge the assessments of the escape taxes in the trial

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court. See, e.g., Colonial Refrigerated, 48 Ala. App. at 50, 261 So. 2d at 770. In the trial court, Ross asserted various legal theories to support his claim that he should be reimbursed for his payment of the escape taxes, but those theories all rest on the assertion that he should not have been responsible for paying them, an issue that he waived by failing to present it to the tax assessor and the trial court through the procedure authorized by § 40-7-23(d).

Ross argues further that the tax collector did not have the authority to conduct tax sales on the properties under the circumstances presented in this case. However, the evidence is undisputed that, because Ross had paid the escape taxes, no tax sales occurred; therefore, this issue is moot.

Based on the foregoing, we conclude that the defendants were entitled to a judgment as a matter of law and, therefore, that the trial court did not err in granting the defendants' summary-judgment motion. Because we conclude that the trial court's judgment is due to be affirmed based on the reasoning explained above, the remaining arguments included in Ross's brief to this court are pretermitted.

The trial court's judgment is affirmed.

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APPLICATION GRANTED; NO-OPINION ORDER OF
AFFIRMANCE OF FEBRUARY 5, 2021, WITHDRAWN; OPINION
SUBSTITUTED; AFFIRMED.

Thompson, P.J., and Edwards, Hanson, and Fridy, J.J., concur.