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ATTORNEY FOR APPELLANT:

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IN THE
COURT OF APPEALS OF INDIANA

IN RE: THE MATTER OF THE 2006 TAX SALE	)	
	)	
DELAWARE COUNTY AUDITOR,	)	
DELAWARE COUNTY TREASURER and	)	
SFS LLC,[1]	)	
	)	
Appellants-Respondents,	)	
	)	
vs.	)	No. 18A02-0812-CV-1124
	)	
RITA L. DENNEY,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE DELAWARE CIRCUIT #5
The Honorable Chris M. Teagle, Judge
Cause No. 18C05-0609-MI-52

September 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

[1] Respondents, Delaware County Auditor and Delaware County Treasurer, were named in Denney's Verified Complaint To Set Aside Tax Sale; however, they are not seeking relief on appeal and have not filed briefs as appellants or appellees. Pursuant to Indiana Appellate Rule 17(A), however, a party of record in the trial court is a party on appeal.

STATEMENT OF THE CASE

Appellant-Respondent, SFS, LLC (SFS), appeals the trial court's Order that SFS pay back to Delaware County interest which it had previously received for a tax lien purchase it had made, but that was later redeemed by Delaware County.

We reverse and remand with instructions.

ISSUES

SFS raises three issues on appeal, which we restate as the following two issues:

(1) Whether the trial court erred by setting aside the tax sale; and

(2) Whether the trial court's Order that SFS reimburse Delaware County for interest was contrary to law.

FACTS AND PROCEDURAL HISTORY

Margaret V. Price (Price) owned a residence located at 3200 West Main Street, Muncie, Indiana. She passed away and her estate was opened on August 13, 2004. Approximately two years later, on August 8, 2006, the Delaware County Auditor's Office sent notice of an impending tax sale of her property consisting of "Lots numbered one hundred eighty seven [] and one hundred eighty eight [] in Kenmore, Section A" to Price at 3200 West Main Street by certified mail. The certified letter was returned to sender marked "deceased (illegible)." (Petitioner's Exhibit 1). On September 22, 2006, the Delaware County Auditor's Office sent a follow up notice by First Class U.S. Mail to Price at 3200 West Main Street, Muncie, Indiana.

On October 10, 2006, a tax sale was held and a lien in the amount of $135,000 was sold to SFS on the above listed real estate due to an alleged special assessment for unpaid sewage bills. On October 5, 2007, Appellee-Petitioner, Rita L. Denney, an heir of Price, filed a complaint to set aside the tax sale alleging that at the time of the tax sale all real estate taxes due and owing on the subject property had been paid prior to the date of the tax sale. Further, the complaint alleged that the Auditor of Delaware County had not provided sufficient notice of the tax sale and Denney had not received notice of the tax sale. The complaint requested an order setting aside and declaring invalid the tax sale and "for all relief just and proper in the premises." (Appellant's App. p. 80).

SFS did not file an answer to Denney's complaint. Rather, its attorney, who had entered his appearance in the matter, filed a withdrawal of appearance stating SFS "does not wish to contest the Plaintiff/Petitioner's petition and has requested this Counsel to withdraw." (Appellant's App. p. 81). Prior to the withdrawal of appearance by SFS's counsel, the lien had been redeemed by the Auditor of Delaware County by returning the monies that SFS had paid for the property plus $11,274.50 in interest.

On July 16, 2008, the trial court held a hearing on Denney's complaint to set aside the tax sale. At the hearing Denney requested that SFS be ordered to return the $11,274.50 in interest that they had received. On July 31, 2008, the trial court issued its Order that the tax sale should be set aside and ordered that SFS "shall pay the interest it previously received to the Delaware County Auditor of Delaware County, *i.e*. $11,274.50." (Appellant's App. p. 78). On August 11, 2008, SFS filed a motion for relief from Order alleging that Denney had

"obtained the Court's order by fraud or misrepresentation." (Appellant's Br. p. 83). Specifically, SFS alleged that Denney's prayer for relief in her complaint failed to notify the adverse parties that she was seeking a return of the interest that had been paid to SFS and that such a remedy was contrary to law. Further, SFS alleged that Denney had misled the trial court by her counsel's representations as to what notice of the impending tax sale was provided. On September 29, 2008, SFS filed an amended motion for relief from judgment adding to its prior contentions that due process notice requirements were satisfied by the manner and form of notice provided of the impending tax sale. With the amended motion, SFS submitted affidavits from Jennifer Barker, Tax Sale Clerk for the Delaware County Auditor's Office, and the attorney for SFS, each asserting that proper notice had been provided of the impending tax sale. On September 30, 2008, the trial court denied SFS's motion for relief from judgment. On October 29, 2008, SFS filed a motion to correct error based on essentially the same contentions it had advanced in its amended motion for relief from judgment. On November 20, 2008, the trial court denied SFS's motion to correct error.

SFS now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Notice*

We first notice that Denney has not filed an Appellee's Brief.

> When an Appellee does not submit a brief, an appellant may prevail by making a prima facie case of error. In this context, "prima facie" is defined as "at first sight, on first appearance, or on the face of it." By using this prima facie error standard, this court is relieved of the burden of developing arguments for the Appellee—a duty that properly remains with the Appellee.

Brower Corp. v. Brattain, 792 N.E.2d 75, 77 (Ind. Ct. App. 2003) (quoting *Village of College Corner v. Town of West College Corner*, 766 N.E.2d 742, 745 (Ind. Ct. App. 2002)) (citations omitted).

SFS argues that the notice of the tax sale was sufficient, and, therefore, the tax sale was not invalid. However, SFS essentially conceded this point below by stating that they did not wish to contest Denney's complaint to set aside the tax sale. Denney's complaint specifically alleged that the service of notice of the impending tax sale "did not provide adequate notice." (Appellant's App. p. 80). Thus, despite our refusal to make arguments on behalf of an Appellee who does not file a brief on appeal, it would be wrong to permit SFS to now claim that Denney received adequate notice when it conceded that point below.

II. *Tax Lien Remedies*

SFS argues that the remedy which the trial court ordered is not available under the tax lien statutes. In a related argument, SFS contends that it had no notice that Denney intended to request that the trial court order SFS to repay the interest that it had received because Denney did not make that request in her complaint.

The trial court's Order 'setting aside' the tax sale of Price's property must be interpreted as a conclusion that the tax sale was invalid and should have never occurred. The trial court seems to have concluded that since the tax sale should not have occurred due to deficient notice to Denney, SFS should be returned the money which it paid to purchase the tax lien, but nothing more. However, Indiana Code section 6-1.1-25-10 provides the remedy

in the event of an invalid tax sale, which is contrary to the trial court's decision that SFS return the interest it received:

> (a) If, before the court issues an order directing the county auditor to issue a tax deed to a tract or item of real property sold under IC 6-1.1-24, it is found by the county auditor and the county treasurer that the sale was invalid, the county auditor shall refund:
>
> > (1) the purchase money and all taxes and special assessment on the property paid by the purchaser, the purchaser's assigns, or the purchaser of the certificate of sale under IC 6-1.1-24 after the tax sale *plus six percent (6%) interest per annum*; and
> >
> > (2) subject to any limitation under section 2.5 of this chapter, any costs paid by the purchaser, the purchaser's assigns, or the purchaser of the certificate of sale under IC 6-1.1-24 under section 2 of this chapter;
>
> from the county treasury to the purchaser, the purchaser's successors or assigns, or the purchaser of the certificate of sale under IC 6-1.1-24. The tract or item of real property, if it is then eligible for sale under IC 6-1.1-24, shall be placed on the delinquent list as an initial offering under IC 6-1.1-24-6.

(Emphasis added). In *St. Joseph County v. Wilmes*, 428 N.E.2d 103 (1981), the Auditor's Office of St. Joseph's County relied upon a computer printout, which contained an error, to list a property owned by Mr. and Mrs. Oberlin for tax sale. *Id*. at 104. Mr. and Mrs. Wilmes purchased the property at the tax sale, but when the Oberlins received notice of their opportunity to redeem their property by paying the supposedly delinquent taxes and statutory fees, Mr. Oberlin demonstrated that he had previously paid the allegedly delinquent taxes. *Id*. St. Joseph County offered to return the Wilmes purchase price plus interest, but the Wilmes refused and eventually brought suit against St. Joseph's County. *Id*. Eventually, on appeal, we concluded that the proper measure of damages when there is an invalid tax sale is

a return of the purchase price plus interest pursuant to Indiana Code section 6-1.1-25-10. *Id.* at 106.

Therefore, we conclude that the trial court erred by ordering SFS to return the interest which it received when Delaware County redeemed the tax lien. Moreover, since the Order directing SFS to return the interest was contrary to law, SFS did not essentially concede to the trial court's Order that it do so by not contesting Denney's complaint seeking to set aside the tax sale. Therefore, we reverse and remand with instructions that the trial court order Delaware County to pay SFS interest consistent with Indiana Code section 6-1.1-25-10.

CONCLUSION

Based on the foregoing, we conclude that the trial court erred when it ordered SFS to return the interest it had received when Delaware County redeemed the tax lien which SFS had purchased.

Reversed and remanded with instructions.

BAKER, C.J., and FRIEDLANDER, J., concur.