IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC09-2075

DELTA PROPERTY MANAGEMENT, INC.,

Petitioner,

vs.

PROFILE INVESTMENTS, INC.,

Respondent.
_____/

DCA CASE NO. 1D08-515

PETITIONER DELTA PROPERTY MANAGEMENT'S REPLY BRIEF ON THE MERITS

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The seed which blossomed into this ten-year litigation was planted when the tax collector failed to post Delta's change of address in a timely manner. That fact set off a series of governmental blunders from which Delta never recovered. Critical evidence presented below included the affidavit of Judith Califano, which confirmed that Delta submitted its change of address to the tax collector on December 21, 1999. (R3:527-29; R5:821) Delta also offered a computer printout from the 2000 tax roll showing this updated address. As the trial court recognized, Profile offered no evidence rebutting these submissions. (R2:305) [1]

On May 30, 2000, five months after the change of address was submitted, the clerk obtained Delta's outdated address from the prior year's tax roll. Four months after that, the clerk mailed the notices of tax sale based upon the outdated information.[2] As the record shows, the clerk misdirected the notices and then did

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[1] Profile's argument that the change of address was not "proven" below ignores the evidentiary burdens set forth in Landers v. Milton, 370 So. 2d 368 (Fla. 1979). Since this case was resolved below on *summary judgment*, it was incumbent upon Profile under Landers to present counterevidence on this point if it intended to create a genuine issue of material fact, yet it failed to do so.

[2] As noted in the initial brief, during the two-year statutory waiting period between the tax sale and the awarding of the tax deed to Profile, tax bills for the following few years were submitted to *and paid by Delta*. Delta had no idea that the two-year fuse was burning since tax bills do not show delinquent amounts.

nothing with the returned notices, as it was the clerk's office policy to do nothing further. (R3:579-80; SR:Wootson depo. at 20, 22)

This Court recognized in Delta Property Mgmt., Inc. v. Profile Inv., Inc., 875 So. 2d 443, 447 (Fla. 2004) ("Delta II"), *quashing*, 830 So. 2d 867 (Fla. 1st DCA 2002), that under Florida Statutes § 193.023(1), the latest assessment roll for the current year *must be completed by July 1st*. The tax collector and the clerk are surely charged with knowledge of that deadline since the very thing they do for a living is dictated by Florida's statutory property tax procedures and substantive requirements. Otherwise stated, it is their job to know such things. Nevertheless, no attempt was made by the clerk to check the July 1st update before preparing and sending out the notices of tax sale. Then, as noted, the clerk did nothing when those notices were returned undelivered -- a circumstance that the trial court correctly identified as violating Delta's due process rights under Jones v. Flowers, 547 U.S. 220 (2006) and Vosilla v. Rosado, 944 So. 2d 289 (Fla. 2006).

In its answer brief, Profile makes essentially three basic points -- that Jones and Vosilla do not control; that the law of the case doctrine restricted the trial court to a narrow fact determination and precluded further due process analysis; and that the statutory scheme for certifying tax assessment rolls justifies the actions of the clerk. Each topic is separately discussed.

I

Jones and Vosilla

Given the facts of this case and the legal principles which the United States Supreme Court and this Court have applied in tax sale cases, it is difficult to square the consistently divergent view expressed by the First District. Obviously feeling a disdain for any criticism of the clerk's conduct, the First District has ruled in Profile's favor on three separate occasions -- each time with little or no mention of due process.[3] In the latest chapter, the First District interpreted the mandate in Delta II as narrowly as humanly imaginable and -- believing that it could end the controversy then and there -- reversed and remanded with instructions to enter judgment in Profile's favor. While professing to follow Delta II, the First District actually ignored its due process teaching altogether.

Relying on Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983), this Court in Delta II expressed serious concern about a taxpayer's due process rights in a clear, yet stern, warning to clerks regarding the need for compliance with fundamental safeguards. This Court said that notice "which is a mere gesture is

[3] Judge Kahn was the only judge below to be involved in all three appeals to the First District. At each oral argument, he led the questioning and was quite vocal that the topic of due process was not a key issue.

not due process" and that "[w]hile the clerk should use the tax collector's statement when preparing the tax sale notices, circumstances may warrant some additional action by the clerk." Delta II, 875 So. 2d at 447-48. Concluding that the clerk in this case had failed to take adequate steps to obtain updated information about Delta's address, the case was remanded for further proceedings. Id.

Both Jones and Vosilla analyzed fact situations involving forfeitures in the year 2000. Both cases determined that in *all* tax forfeiture matters where a notice of sale is returned undelivered to the property owner who faces the "important and irreversible" prospect of the loss of property, due process *requires* additional reasonable steps to be taken by the taxing authorities to notify the owner if practical to do so. Since the undisputed testimony of record established that the clerk's office altogether ignored the returned notices,[4] the trial judge entered final judgment in Delta's favor consistent with Delta II, Jones and Vosilla.

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[4] In its answer brief, Profile characterizes this point as a "new theory" introduced on remand. Although Jones and Vosilla were newly decided when the case was on remand, there was nothing "new" about Delta's argument that the clerk needed to take further steps when the notices were returned. Indeed, Judge Ervin's dissent -- written back in 2002 -- specifically discussed the further steps which the clerk could have taken. Delta Property Mgmt. v. Profile Inv., Inc., 830 So. 2d 867, 873 (Fla. 1st DCA 2002) (Ervin, J., dissenting) ("Delta I"). Moreover, Delta's essential argument since day one has been due process, as evidenced by its very first appellate brief in 2001. (R1:98-131) While Jones and Vosilla may have further shaped the parameters of due process, that merely gave Delta additional support for the very due process violation it had been arguing all along.

The First District ruled, and Profile contends, that neither Jones nor Vosilla should have been considered by the trial judge and that the mandate of Delta II had been stretched beyond acceptable limits.

In Jones the United States Supreme Court said:

> We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so. 547 U.S. at 225.

Nothing in Jones confines the ruling to a single miscarriage of justice in Arkansas. It applies to *all* tax sales where mailed notice is returned unclaimed or undelivered. In those situations, due process requires additional steps to be taken to locate the owner and "[f]ailing to follow up would be unreasonable." Id. at 229.

Judge Cole followed this directive and found -- based on undisputed evidence establishing that the clerk did nothing with the returned notices -- that "additional steps were possible and practicable, but not taken." (R5:824) She also followed Vosilla, which added that when notices are returned, the additional steps to be taken by the clerk are defined by the circumstances of the particular case.[5] As this Court stated:

[5] Profile's attempt to distinguish Vosilla on pages 34 -35 of its answer brief completely ignores the facts. Like this case, Vosilla involved a 2000 tax sale, a property owner who provided a change of address to the county officials, a notice

> Such circumstances include unique information about an intended recipient that might require the taxing authority to make efforts beyond those required by the statutory scheme under ordinary circumstances. ....
>
> [D]ue process required that the clerk of court take additional reasonable steps to notify the [property owners] of the tax deed sale prior to selling their property, *such as checking to determine whether a change of address had been submitted*. Vosilla, 944 So. 2d at 299-301 (emphasis added).

Consistent with Vosilla, Judge Cole determined that additional steps were intuitively possible, and that doing nothing based upon a policy to do nothing was simply not an option when the record conclusively showed that an address change had been timely submitted:

> The additional steps could have included checking for the hard-copy change of address form submitted by Delta; reviewing the preliminary or final 2000 tax assessment roll; checking the current address(es) shown for Delta on the online records of the State of Florida, Secretary of State, Division of Corporations, and checking the Clerk's own records to see if Delta was involved in other litigation in which it had provided a current address. (R5:824-25)

Accord Patricia Weingarten Assoc. v. Jocalbro, Inc., 974 So. 2d 559, 564-65 (Fla. 5th DCA 2008) (it is unreasonable for clerk not to look at county's *own* records).

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of tax sale that was mailed to the owner's outdated address, and a clerk who did nothing when the notice of tax sale was returned. Vosilla likewise dispatched any relevance to the sheriff's attempt to post notice of tax sale at the property. Vosilla, 944 So. 2d at 292, *citing*, Mullane, 339 U.S. at 314.

Under Jones and Vosilla, as well as Judge Cole's ruling, it would not be asking too much of the clerk to sort out those few cases where notices are returned and check with its sister agencies to determine whether the July 1st roll was prepared and whether a property owner subject to forfeiture without notice has submitted a change of address. Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950), would certainly appear to support this view:

> When notice is a person's due ... [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. Id. at 315.

Quoting Mullane, Vosilla emphasizes that due process is a fundamental right. Vosilla, 944 So. 2d at 294. That fundamental right of due process is meaningless unless a party faced with the prospect of losing property is informed of the impending consequences of a tax deed sale. Id. And lest the interest of mortgagee CIT be forgotten here, a check of the public records to determine whether the lien holder was properly notified would have been a simple matter of a computer key stroke given Florida's efficient "on-line" title searching. See generally Mennonite, 462 U.S. at 800 (addressing constitutional obligation of government to notify *all* interested parties of the pendency of a tax sale).

It is likely that situations like this case do not often arise. But even if this situation were commonplace, due process protection against forfeitures would

surely trump the minimal burden on the clerk to take further steps. Delta II, Jones and Vosilla not only teach this, but they *require* it. Put another way, doing nothing should not be an option. Here, no laws need to be changed. No new duties need to be created. No unreasonable burdens need to be imposed upon state agencies.

The Florida Taxpayer's Bill of Rights, adopted in 2000, has as its fundamental purpose "to guarantee that the … property of the taxpayers of this state are adequately safeguarded and protected during tax levy, assessment, collection, and enforcement processes administered under the revenue laws of this state." Fla. Stat. § 192.0105. The rights so guaranteed include under subparagraph (1)(h) the right to be informed during the tax collection process, including notice of taxes due, notice of back taxes, notice of late taxes and assessments and consequences of nonpayment. Under the Profile "burden" theory, this vesting of taxpayer rights should likewise be compromised, if not ignored altogether.

In essence, Profile is attempting to repackage the "intolerable burden on the clerk" argument appearing in Alwani v. Slocum, 540 So. 2d 908 (Fla. 2d DCA 1989). That "burden" argument, however, was rejected in Delta II, 875 So. 2d at 446, and again in Vosilla, 944 So. 2d at 297-98,[6] in which this Court stated:

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[6] The three *amicus curiae* briefs on file likewise complain that adopting Delta's position would unnecessarily create new burdensome duties on government officials. However, Delta is not asking this Court to expand governmental duties,

> We reject the reasoning in Alwani, which rests on flawed premises. Instead, we apply the reasoning of Delta Property Management [Delta II] and the United States Supreme Court's recent decision in Jones. As we explained in Delta Property Management, "[w]hile the clerk should use the tax collector's statement when preparing the tax sale notices, circumstances may warrant some additional action by the clerk." *Due process requires that the clerk look beyond the tax collector's statement when there is reason to believe that … as in this case and Alwani, the statement no longer reflects the titleholder's correct address*. Vosilla, 944 So. 2d at 299 (citations omitted).

As this passage reflects, Vosilla sent a strong message that the clerks are charged with the duty to provide *meaningful* notice of tax sales, not simply pro forma gestures. This Court went on to say:

> *Following precedent* recognizing the flexible nature of due process, the Supreme Court [in Jones] emphasized that
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> > "[w]e do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed. …."

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but rather is asking for the due process holdings in Jones and Vosilla to be enforced. Had the *amici curiae* wanted to challenge the parameters of due process, they could have addressed their concerns about "burden" when the matter was squarely before this Court in Vosilla. As the docket shows, however, none of them sought to participate in Vosilla -- or in Delta II, for that matter.

Vosilla, 944 So. 2d at 299 (emphasis added; citation omitted). The key words are "following precedent" on the issue of due process. Determining that the reasoning of Jones was applicable to the Vosilla facts, this Court issued a ruling impacting *all* tax sales -- *not just the tax sale in that case*.

When Jones and Vosilla are read and understood, it is impossible to conclude that they are not controlling precedent in this case. As a diversionary tactic, Profile expands the First District's analysis of the "law of the case" doctrine hoping to demonstrate that this case is not about due process at all. That logic is fundamentally flawed, as discussed in the next section.

II

Law of the Case

Courts must apply the decisional law in effect at the time it renders a decision. See, e.g., Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974). Nevertheless, Profile insists that the First District properly disregarded Jones and Vosilla because Delta II restricted the scope of remand to a single fact issue. By characterizing one sentence in Delta II as the "law of the case," however, Profile's analysis travels down an erroneous path because it ignores both the remand instruction *and* the entire due process analysis in Delta II.

As for the remand instruction, this Court explicitly stated on page 448 of Delta II that "we quash the decision of the First District in this case *and remand for further proceedings consistent with this opinion.*" (Emphasis added) The heart of the Delta II opinion, in turn, appears at 875 So. 2d 447-48 wherein this Court held that the due process teaching of Mullane *must* be followed and that circumstances may dictate that *additional* steps be taken by the clerk. In this Court's own words:

> *The importance of notice when a person may be deprived of an interest in real property cannot be overemphasized.* The United States Supreme Court in Mullane stated:
>
> > An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.* The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance…
> >
> > But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.
> > ….
>
> *While the clerk should use the tax collector's statement when preparing the tax sale notices, circumstances may warrant some additional action by the clerk.*

Delta II, 875 So. 2d at 447-48 (emphasis added; citation omitted).

This passage constitutes the law of the case established in Delta II, and it was followed *twice* by the trial court. In the first remand proceeding, the trial court determined from the record that Profile had presented *no evidence* rebutting Delta's evidence that it had submitted a change of address in December of 1999 and that the 2000 tax roll reflected Delta's changed address. (R2:305) The trial court thereupon granted Delta's motion to implement the appellate mandate and entered final judgment in favor of Delta. (R2:302-09) When the First District reversed that judgment and remanded the matter, the trial court once again relied on the principles articulated in Delta II and entered judgment for Delta, noting that Jones and Vosilla provided additional due process guidance.[7] (R5:818-27) As such, Profile's repeated accusations that the trial court violated the law of the case are simply not true.

Putting the "law of the case" topic in context, two final points should be made. First, a basic tenet of the doctrine is the advancement of judicial stability. But the concept of judicial stability is poorly served if the First District's decision

[7] To the extent Profile attempts to create the impression that Jones and Vosilla introduced some new or different principle of law, the argument is misleading. There is no repugnancy between Jones and Vosilla on the one hand and Delta II on the other. In fact, all three decisions are the logical and natural extension of longstanding due process principles articulated by the United States Supreme Court in Mullane in 1950 and then reiterated in Mennonite in 1983.

stands because it has implicitly said that Jones and Vosilla may be acceptable for what happens tomorrow but not for what happened yesterday. And second, the law of the case doctrine is a judicially created rule to promote efficiency in the judicial process and is subject to broad exceptions. Due process, however, is a constitutional principle which creates a fundamental right. Vosilla, 944 So. 2d at 294. It thus follows that the doctrine of law of the case must yield to due process. Nevertheless, the decision under review suggests that the opposite is true.

III

No Statutory Justification

Even if Profile were to convince this Court that Jones and Vosilla should be ignored, its remaining argument is likewise meritless. Profile contends that because the 2000 tax roll was not actually certified until October of 2000, the operative "latest assessment roll" was still the outdated 1999 tax roll relied upon by the clerk. In so arguing, however, Profile overlooks that the operative statute, namely § 197.502(4)(a), does not speak in terms of the clerk using the latest certified assessment roll. Rather, it merely says the "latest assessment roll."

As for what constitutes the "latest assessment roll," this Court already recognized in Delta II that Florida Statutes § 193.023(1) requires the property appraiser to complete his or her assessment of the value of all property no later

than July 1 of each year. At that point, the new assessment roll for the county is submitted to the Department of Revenue. Profile admits that the Department merely checks that submitted tax roll for *valuation* and *form* according to its criteria (Ans. Brf. at 18) and then issues a certification page. By acknowledging that the certification process is limited to reviewing only valuation and form, Profile has tacitly admitted that any substantive updating of other information such as names and addresses would necessarily have been completed before the July 1st submission date -- long before the clerk prepared and sent out the notices of tax sale in September. Thus, the operative "latest assessment roll" here was clearly the roll for the year 2000.

In a last ditch effort to show that checking the July 1, 2000, roll would have made no difference, Profile relies on isolated testimony of a county worker saying that he recalled seeing the July 1st roll and it contained Delta's old address. But given Profile's own acknowledgment that the computer printout from the 2000 tax roll showed Delta's updated address (Ans. Brf. at 4) coupled with Profile's concession that the only review after July 1st related solely to valuation and form (Ans. Brf. at 18), Profile is in no position to argue that such testimony created any genuine issue of material fact regarding the address under the Landers standard. Indeed, Profile offered *no* evidence below showing that the county made -- or was

even able to make -- address changes on the 2000 tax roll after it was submitted to the Department of Revenue on July 1st.

Moreover, even if the tax collector had failed to post the change of address during the period from December 21, 1999 to July 1, 2000, that should not give the clerk a free pass. Dilatory efforts of one office of government should not serve to exonerate another -- particularly when due process rights are at stake. Certainly the "right to know" and "the right to due process" appearing in the Florida Taxpayer's Bill of Rights for property taxes and assessments, Fla. Stat. §192.0105, would be empty legislative promises if a forfeiture could be excused merely by one branch of local government pointing its finger at another branch.

As this Court has said, due process is designed to promote basic fairness. See Gore v. Harris, 773 So. 2d 524, 527 (Fla. 2000). Should Delta prevail, then by law Profile is treated fairly as well. Profile will be entitled to the return of its entire investment together with accrued interest at 12% and any taxes paid. Fla. Stat. §197.602. Fairness dictates returning the property to Delta and allowing for statutory reimbursement and accrued interest to be paid to Profile.

CONCLUSION

This Court is urged to quash the First District's decision and remand the case for entry of judgment in Delta's favor.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this __ day of August, 2010, to Robert M. Quinn, Esq., Carlton Fields, P.O. Box 3239, Tampa, FL 33601; Edward P. Jackson, Esq., 255 North Liberty Street, 1st Floor, Jacksonville, FL 32202; Robert E. Biasotti, Esq., Carlton Fields, P.A., Post Office Box 2861, St. Petersburg, FL 33731; William S. Graessle, Esq., 219 Newnan Street, 4th Floor, Jacksonville, FL 32202; Renza van Assenderp and Timothy R. Quails, Young van Assenderp, P.A., Gallie's Mall, 225 South Adams Street, Suite 200, Tallahassee, FL 32301; Loree L. French, Sr. Assistant General Counsel, 117 West Duval Street, Suite 480, Jacksonville, Florida 32202; and Thomas M. Findley and Robert J. Telfer III, Messer, Caparello & Self, P.A., P.O. Box 15579, Tallahassee, FL 32317.

CERTIFICATE OF COMPLIANCE WITH FONT SIZE

The undersigned certifies that the font of this brief is Times New Roman 14.

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