

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

AISSATO DIALLO

Appellee

v.

MAMADOU BARRY

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 2254 EDA 2013

Appeal from the Order Entered May 20, 2013  
In the Court of Common Pleas of Philadelphia County  
Civil Division at No(s): February term, 2011, No. 4707

BEFORE: BENDER, P.J.E., PANELLA, J., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J.

**FILED MARCH 28, 2014**

Mamadou Barry ("Barry") appeals from the order entered in the Court of Common Pleas of Philadelphia County denying his motion to set aside a sheriff's sale. Upon review, we affirm based on the opinion of the Honorable Leon W. Tucker.

The instant sheriff's sale arises out of a child support matter. The relevant facts are as follows.

On March 3, 2011, a judgment was entered in favor of [Aissata Diallo ("Diallo")] and against [Barry] based on a certification of child support arrearages given by the Philadelphia County Family Court. On March 3, 2011, Diallo commenced an action against [Barry] by filing a judgment in the amount of seventeen thousand seven hundred and fifty-eight dollars and forty-six

cents (\$17,758.46) in the Philadelphia County Court of Common Pleas.<sup>[1]</sup>

[Diallo] proceeded to execute on the judgment. On February 4, 2013, [Barry] filed a Motion to Postpone Sheriff's Sale of two properties located in Philadelphia, PA.<sup>[2]</sup> [Barry] is incarcerated; [Barry] has been represented by counsel since February 2013. The court issued a Rule and ultimately granted [Barry's] Motion to Postpone Sheriff's Sale by Order stating the following:

1. The petition to postpone sheriff's sale of real property is granted, and the sale is postponed to April 5, 2013.
2. The petitioner must serve a copy of this order on the sheriff.

[. . .]

**5. No further notice/advertisement required.**

**6. No further postponement except by agreement.**

There is no evidence of record that [Barry] sought another postponement of the April Sheriff's Sale by agreement. The two Philadelphia properties were sold at Sheriff's Sale on Tuesday, April 2, 2013.<sup>[3]</sup>

On April 8, 2013, [Barry] filed the instant Motion to Set Aside Sheriff's Sale wherein alleging that: 1) the Sheriff's Sale went forward in contravention of the Court's February 5, 2013 Order; and 2) the Sheriff's Sale went forward in contravention of some

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<sup>1</sup> The filing pertained to the property at 7431 E. Tulpehocken Street in Philadelphia, PA, which the parties purchased during their relationship, with title in both of their names as tenants in common.

<sup>2</sup> The sale pertained to the property at 7431 E. Tulpehocken Street and another property owned by Barry located at 5816 Old York Road, Philadelphia, PA.

<sup>3</sup> It is customary for sheriff's sales in Philadelphia to take place on the first Tuesday of each month. Neither Barry nor his counsel attended the sheriff's sale as they were under the impression that it was scheduled for April 5, 2013.

agreement related to another matter between [Diallo] and [Barry]. The court denied [Barry's] Motion to Set-Aside Sheriff's Sale on May 21, 2013. [Barry] filed a Motion for Reconsideration, which the court denied.

Trial Court Opinion, filed 8/5/13, at 1-3. On June 19, 2013, Barry filed the instant appeal of the court's May 21, 2013 order denying his motion to set aside sheriff's sale. The court ordered Barry to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Barry complied on July 2, 2013.

On appeal, Barry presents the following issues for our review:

1. Was notice of the 4/2/13 sheriff's sale properly given?
2. Was the 4/2/13 sheriff's sale in direct violation of a court order?
3. Should the sheriff's sale have been postponed because of Barry's incarceration?

Brief of Appellant, at 4. Initially, we note our standard of review:

A petition to set aside a sheriff's sale is grounded in equitable principles and is addressed to the sound discretion of the hearing court. The burden of proving circumstances warranting the exercise of the court's equitable powers is on the petitioner, and the request to set aside a sheriff's sale may be refused due to insufficient proof to support the allegations in the petition.

***U.S. Bank National Ass'n v. Powers***, 986 A.2d 1231, 1233 (Pa. Super. 2009) (citation omitted).

In his first issue, Barry argues that the trial court erred as a matter of law when it denied his motion to set aside the sheriff's sale for lack of notice.

Barry further argues that the trial court's reliance on Pa.R.C.P. 3129.3<sup>4</sup> is erroneous because the original notice of the sheriff's sale failed to comply with Rule 3129.2.<sup>5</sup> We agree with the trial court's conclusion that Barry's

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<sup>4</sup> Rule 3129.3. Postponement of Sale. New Notice. Failure of Plaintiff to Attend Sale.

(a) Except as provided by subdivision (b) or special order of court, new notice shall be given as provided by Rule 3129.2 if a sale of real property is stayed, continued, postponed or adjourned.

(b) If the sale is stayed, continued, postponed or adjourned to a date certain within one hundred thirty days of the scheduled sale, notice of which sale was given as provided by Rule 3129.2, and public announcement thereof, including the new date, is made to the bidders assembled at the time and place fixed for the sale, no new notice as provided by Rule 3129.2 shall be required, but there may be only two such stays, continuances, postponements or adjournments within the one hundred thirty day period without new notice.

<sup>5</sup> Rule 3129.2. Notice of Sale. Handbills. Written Notice. Publication

(a) Notice of the sale of real property shall be given by handbills as provided by subdivision (b), by written notice as provided by subdivision (c) to all persons whose names and addresses are set forth in the affidavit required by Rule 3129.1, and by publication as provided by subdivision (d).

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(c) The written notice shall be prepared by the plaintiff, shall contain the same information as the handbills or may consist of the handbill and shall be served at least thirty days before the sale on all persons whose names and addresses are set forth in the affidavit required by Rule 3129.1.

(1) Service of the notice shall be made

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*(Footnote Continued Next Page)*

claim he did not receive notice is disingenuous. Therefore, his argument that the trial court erred as a matter of law must fail. As the trial court explains in its Pa.R.A.P. 1925(a) opinion,

First, the court's order of February 5, 2013 originally postponing the sheriff's sale to April 2013 clearly states "no further notice/advertisement required." Diallo was not obligated to provide further notice of the April 2013 sheriff's sale; the court may enter such an order pursuant to Pa.R.C.P. 3129.3. Pa.R.C.P. 3129.3 (Postponement of Sale. New Notice).

Second, the record is clear that although Barry was incarcerated at some point in time, [he] was able to obtain counsel who continues to litigate this matter on [Barry's] behalf. Service to counsel is service upon appellant. Pa.R.C.P. 440; Pa.R.C.P. 3129.2; Pa.R.C.P. 3129.3.

*(Footnote Continued)* \_\_\_\_\_

(ii) upon the defendant in the judgment who has entered an appearance, by the plaintiff in the manner provided by Rule 440, and

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(3) If service on any person is not made at least thirty days prior to the date of the sale stated in the notice, such notice shall be deemed timely if the sale is stayed, continued, postponed or adjourned in accordance with Rule 3129.3 to a date certain which is at least thirty days after the date of the last required service.

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(d) Notice containing the information required by subdivision (b) shall also be given by publication by the sheriff once a week for three successive weeks in one newspaper of general circulation in the county and in the legal publication, if any, designated by rule of court for publication of notices, the first publication to be made not less than twenty-one days before the date of sale. No additional publication shall be required.

Trial Court Opinion, filed 8/5/13, at 4. Moreover, Barry contradicts himself when he avers, "on October 8, 2012, Diallo filed a Praecipe and Writ of Execution, after which [Barry], who was and still is incarcerated, **received a notice of a Sheriff's Sale scheduled for February 5, 2013.**" Motion to Set Aside Sheriff's Sale, filed 4/8/13, at 2 (emphasis added). Accordingly, we discern no error of law as Barry admits he received notice. Therefore, we cannot grant him relief on this issue.

In his second issue, Barry argues that the trial court erred as a matter of law when it denied his motion to set aside the sheriff's sale because the sale was in direct violation of the February 5, 2013 order postponing the sheriff's sale. As the trial court explained,

The court's postponement order postponed the sheriff's sale until April 5, 2013. April 5, 2013 was a Friday; the April 2013 sheriff's sale took place on Tuesday, April 2, 2013. The inclusion of the April 5, 2013 date is clearly a typo which [Barry] seeks to take advantage of and obtain sanctions against [Diallo]. Diallo in no way violated the court's February 5, 2013 postponement order as it relates to the April 2013 sheriff's sale.

Trial Court Opinion, filed 8/5/2013, at 5. As it is customary for Philadelphia sheriff's sales to take place on the first Tuesday of each month, we agree with the trial court. Accordingly, we find no error of law, merely a typographical error, and therefore cannot grant Barry relief on this claim.

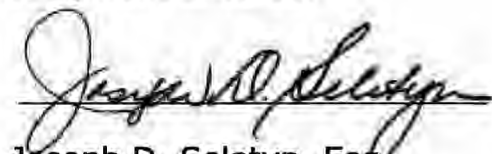
In his third issue, Barry argues that the trial court abused its discretion when it denied his motion to set aside the April 2, 2013 sheriff's sale because he was unable to attend or appoint a representative to attend. In its Rule 1925(a) opinion, the trial court concluded that Barry's argument

was, again, disingenuous because he had not provided any evidence that he was incarcerated at the time of the sale, while Diallo provided evidence of record that Barry was released prior to the April sheriff's sale. ***Id.*** at 4. The trial court also astutely acknowledged that even if Barry was in prison at the time of the sale, he failed to identify relevant case law in support of his proposition that execution on a civil judgment for support should be stayed pending his release from incarceration. ***See Leasure v. Leasure***, 549 A.2d 225 (Pa. Super. 1988) (discussing policy that parent may be liable for child support payments while incarcerated where parent has income or assets to make child support payments). For these reasons, we discern no abuse of discretion in denying Barry's motion to set aside the sheriff's sale. Accordingly, we cannot grant him relief on this claim.

After careful review of the parties' briefs, the record and the relevant law, we agree with Judge Tucker's analysis and affirm on the basis of his opinion. We instruct the parties to attach a copy of Judge Tucker's decision in the event of further proceedings.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 3/28/2014

**COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

**AISSATA DIALLO**  
Appellee

**SUPERIOR COURT**  
\_\_\_\_ EDA 2013

**V.**

**MAMADOU BARRY**  
Appellant

**FEBRUARY TERM, 2011  
NO. 04707**

**OPINION**

**LEON W. TUCKER, J.**

**DATE: AUGUST 5, 2013**

**I. PROCEDURAL HISTORY & FACTS**

This matter comes before the Court from the denial of Mamadou Barry's (hereinafter referred to as "Appellant") Motion to Set-Aside a Sheriff's Sale. On March 3, 2011, a judgment was entered in favor of Appellee and against Appellant based on a certification of child support arrearages given by the Philadelphia County Family Court. Miscellaneous Motion (07/05/2011); Ans (Mot./Pet.) Filed (04/29/2013). On March 3, 2011, Aissata Diallo (hereinafter referred to as "Appellee") commenced an action against Appellant by filing a judgment in the amount of seventeen thousand seven hundred and fifty-eight dollars and forty-six cents (\$17,758.46) in the Philadelphia County Court of Common Pleas. Commencement of J. (03/03/2011); J. in Arrearages Filed (03/03/2011).

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Appellee proceeded to execute on the judgment. Miscellaneous Motion to Overrule Garnishee's Objections (07/05/2011); Order Entered by J. Panepinto (11/21/2011); Praecipe to Issue Writ Filed (10/08/2012). On February 4, 2013, Appellant filed a Motion to Postpone Sheriff's Sale of two properties located in Philadelphia, PA. Mot. to Postpone (02/04/2013). Appellant is incarcerated; Appellant has been represented by counsel since February 2013. Entry of Appearance Filed (02/04/2013). The Court issued a Rule and ultimately granted Appellant's Motion to Postpone Sheriff's Sale by Order stating the following:

1. The petition to postpone sheriff's sale of real property is granted, and the sale is postponed to **April 5, 2013**
2. The petitioner must serve a copy of this order on the sheriff [...]  
[...]
5. **No further notice/advertisement required.**
6. **No further postponement except by agreement**

Order Entered by J. Tucker (02/05/2013)(emphasis added). There is no evidence of record that Appellant sought another postponement of the April Sheriff's Sale by agreement. The two Philadelphia properties were sold at Sheriff's Sale on Tuesday, April 2, 2013. Mot. to Set-Aside Sheriff's Sale (04/08/2013).

On April 8, 2013, Appellant filed the instant Motion to Set Aside Sheriff's Sale wherein alleging that: 1) the Sheriff's Sale went forward in contravention of the Court's February 5, 2013 Order; and 2) the Sheriff's Sale went forward in contravention of some agreement related to another matter between Appellee and Appellant. The Court denied Appellant's Motion to Set-Aside Sheriff's Sale on May 21, 2013. Order Entered by J. Tucker (05/21/2013). Appellant filed a Motion for Reconsideration, which the Court denied. Mot. for Reconsideration (06/03/2013); Order Entered by J. Tucker (06/10/2013).

On June 19, 2013, Appellant filed the instant appeal of the Court's May 21, 2013 Order denying his Motion to Set Aside Sheriff's Sale. Appeal to Superior Court (06/19/2013). The

Court ordered Appellant to file a Concise Statement of Matters Complained of pursuant to *Pa.R.A.P. 1925(b)*; the Court will not reproduce Appellant's 1925(b) Statement herein as per its usual custom. Order Entered by J. Tucker (06/26/2013); Statement of Matters (07/02/2013).

Essentially, Appellant alleges the following errors against this Court:

- 1) The Court erred in denying the Motion to Set-Aside Sheriff's Sale because further notice of the April 2013 sale was not given;
- 2) The Court erred in denying the Motion to Set-Aside Sheriff's Sale because the sale was in "direct violation" of another Court's Order of November 2012 pertaining to a separate action between Appellee and Appellant;
- 3) The Court erred in denying the Motion to Set-Aside Sheriff's Sale because this Court's February 2013 Order stated that the sale was postponed until "April 5, 2013;"
- 4) The Court erred in denying the Motion to Set-Aside Sheriff's Sale because defendant is incarcerated;
- 5) The Court erred in denying the Motion to Set-Aside Sheriff's Sale because the properties were ultimately "vested in Plaintiff's attorney."

A discussion ensues:

## II. LEGAL ANALYSIS

**Appellant did not meet his burden of proving circumstances warranting the exercise of the court's equitable powers to set aside the Sheriff's Sale of two properties.**

Pursuant to the *Pa.R.C.P. 3132*, "upon petition of any party in interest before delivery of the personal property or of the sheriff's deed to real property, the court may, upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances." *Pa.R.C.P. 3132*. Petitions to set-aside Sheriff's sale are governed by equitable principles. *Doherty v. Adal Corp.*, 261 A.2d 311, 312-313 (Pa. 1970). Equitable principles are applied to Sheriff's sales because "[t]he purpose of a sheriff's sale in mortgage foreclosure proceedings is to realize out of the land, the debt, interest, and costs which are due,

or have accrued to, the judgment creditor.” *Kaib v. Smith*, 684 A.2d 630, 632 (Pa. Super. 1996).

Accordingly, the petitioner, or in this case the Appellant, has the burden of proving circumstances warranting the exercise of the Court’s equitable powers. *Bornman v. Gordon*, 527 A.2d 109, 111 (Pa. Super. 1987). A petition to set-aside a Sheriff’s sale may be denied where the petitioner provides insufficient proof to support the allegations in the petition. *Id.* Therefore, the material allegations of the petition generally must be proved by clear evidence. *Greater Pittsburgh Bus. Dev. Corp. v. Braunstein*, 568 A.2d 1261, 1263 (Pa. Super. 1989).

**Allegations (1), (3) and (4): No Notice of April Sale, Violation of Court Order, Appellant Incarcerated**

Appellant’s claim that he did not receive notice of the April 2013 Sheriff’s Sale is disingenuous. First, the Court’s Order of February 5, 2013 originally postponing the Sheriff’s Sale to April 2013 clearly states “No Further Notice/Advertisement Required.” Order Entered by J. Tucker (02/05/2013). Appellee was not obligated to provide further notice of the April 2013 Sheriff’s Sale; the Court may enter such an order pursuant to *Pa.R.C.P. 3129.3*. *Pa.R.C.P. 3129.3* (“Postponement of Sale. New Notice”).

Second, the record is clear that although Appellant was incarcerated at some point in time, Appellant was able to obtain counsel who continues to litigate this matter on Appellant’s behalf. Service to counsel is service upon Appellant. *Pa.R.C.P. 440*; *Pa.R.C.P. 3129.2*; *Pa.R.C.P. 3129.3*.

Third, Appellant seems to imply that the Sheriff’s Sale should have been set-aside because he was incarcerated at the time of the sale. Appellant has not provided any evidence that he was incarcerated at the time of the sale, while Appellee has provided evidence of record that he was released prior to the April Sheriff’s Sale on February 15, 2013. Ans. (Mot/Pet.) Filed

(04/29/2013). Moreover, even if Appellant was incarcerated, he has failed to point this Court's attention to relevant case law to support his proposition that execution on a civil judgment for child support should be stayed pending his release from incarceration. *Leasure v. Leasure*, 549 A.2d 225 (Pa. Super. 1988)(discussing policy that a parent may be liable for child support payments while incarcerated where the parent has income or other assets to make the child support payments). Furthermore, to the extent that Appellant has an issue with the child support judgment and its relation to his purported incarceration, Appellant should direct his concerns to the Philadelphia Family Court, which issued the certification of child support arrearages. *Plunkard v. McConnell*, 962 A.2d 1227 (Pa. Super. 2008).

Fourth, Appellee did not permit the Sheriff's Sale of the two properties in violation of the Court's postponement Order. The Court's postponement Order postponed the Sheriff's Sale until "April 5, 2013." Order Entered by J. Tucker (04/05/2013). April 5, 2013 was a Friday; the April 2013 Sheriff's Sale took place on Tuesday, April 2, 2013. Mot. to Set Aside (04/08/2013); Ans. (Mot./Pet.) Filed (04/29/2013). The inclusion of the April 5, 2013 date is clearly a typo which Appellant seeks to take advantage of and obtain sanctions against Appellant. Mot. to Set Aside (04/08/2013). Appellee in no way violated the Court's February 5, 2013 postponement Order as it relates to the April 2013 Sheriff's Sale.

**Allegations (2): "Direct Violation" of the Court's Order of November 2012**

Fifth, in regard to Appellant's allegations that the Court's Order denying the Motion to Postpone Sheriff's Sale in "direct violation" the Court's Order of November 16, 2013, this claim is without merit. The Court based its ruling on the record in the instant matter, found under Court & Term Number February Term, 2011, No. 04707. To the extent that Appellant seeks to bring this Court's attention to an Order entered by this Court under a Court & Term Number



separate and distinct from the instant matter, Appellant does so in error. The matters are not consolidated. It is not incumbent upon this Court to peruse the Civil Administration dockets to cull facts from other matters and then apply those facts to the instant matter.

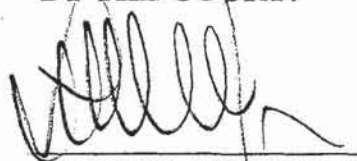
**Allegation (5): Properties “vested” in Appellee’s Attorney**

Sixth, and last, Appellant claims that the Sheriff’s Sale should have been set aside because Appellee’s properties “became vested in [Appellant’s] attorney, who is thoroughly familiar with the lower Court’s prior Orders, and knew or should have known that the sale was in violation of those Orders.” 1925(b) Statement (07/02/2013). As best as the Court can tell, Appellant is making an allegation of fraud against Appellant’s attorney. Mot. to Set Aside Sheriff’s Sale (04/08/2013). Although evidence of fraud in a Sheriff’s Sale may warrant the setting aside of the Sheriff’s Sale, vague allegations such as here are not sufficient to trigger the exercise of the Court’s discretion to set aside the sheriff’s sale. *Marine Bank v. Huhta*, 420 A.2d 1066, 1070 (Pa. Super. 1980). Simply put, Appellant has not met the burden of proving circumstances warranting the exercise of the Court’s equitable powers to set-aside the Sheriff’s Sale in this matter.

**III. Conclusion**

The Court properly denied Appellant’s Motion to Set Aside Sheriff’s Sale in this matter. Appellant failed to show sufficient and clear evidence warranting the exercise of the Court’s equitable power to set aside the sheriff’s sale in this matter. The Court’s ruling should stand.

**BY THE COURT:**



LEON W. TUCKER, J