

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32256
O/prt

_____AD3d_____

Argued - June 17, 2011

PETER B. SKELOS, J.P.
RUTH C. BALKIN
JOHN M. LEVENTHAL
PLUMMER E. LOTT, JJ.

2009-10410

DECISION & ORDER

Richard M. Egloff, plaintiff/petitioner-respondent,
v Town of Lewisboro, et al., appellants, et al.,
defendant/respondent.

(Index No. 13865/09)

Gelardi & Randazzo, LLP, Rye Brook, N.Y. (James A. Randazzo and Karen Lee of counsel), for appellants.

Legal Services of the Hudson Valley, White Plains, N.Y. (Trevor S. Eisenman of counsel), for plaintiff/petitioner-respondent.

In a hybrid action, inter alia, to enjoin the defendants/respondents from evicting the plaintiff/petitioner from the subject property, and proceeding pursuant to CPLR article 78, in effect, to compel the Town of Lewisboro and Joann Vasi, Enforcing Officer of the Town of Lewisboro, to set aside the transfer of a deed to real property previously owned by the plaintiff/petitioner, the Town of Lewisboro and Joann Vasi, Enforcing Officer of the Town of Lewisboro, appeal, as limited by their brief, from so much of an order of the Supreme Court, Westchester County (Loehr, J.), dated October 19, 2009, as, sua sponte, conditionally vacated a final judgment of foreclosure with respect to the subject property entered in a separate proceeding, awarded possession of the subject real property to the plaintiff/petitioner, and directed the execution of a deed conveying the subject property to the plaintiff/petitioner.

ORDERED that on the Court's own motion, the notice of appeal is treated as an application for leave to appeal, and leave to appeal is granted (*see* CPLR 5701); and it is further,

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ORDERED that the order is reversed insofar as appealed from, on the law, without costs or disbursements.

In a prior proceeding entitled *In the Matter of the Foreclosure of Tax Liens by Proceeding in Rem Pursuant to Article Eleven of the Real Property Law, Chapter 602, Laws of 1993 by the Town of Lewisboro in the Year 2005*, commenced under Westchester County Index No. 9674/05, the Town of Lewisboro was awarded a final judgment of foreclosure, upon default, of a tax lien with respect to real property previously owned by the plaintiff/petitioner (hereinafter the plaintiff). The final judgment of foreclosure further awarded the Town possession of the subject property, and directed the execution and recording of a deed conveying the subject property to the Town.

The plaintiff subsequently commenced the instant hybrid action, inter alia, to enjoin, among others, the Town and Joann Vasi, Enforcing Officer of the Town (hereinafter together the Town defendants), from evicting him from the subject property, and proceeding pursuant to CPLR article 78, in effect, to compel the Town defendants to set aside the transfer of the deed to the subject property. The plaintiff then moved, by order to show cause, for the appointment of a guardian ad litem, and to preliminarily enjoin the Town from evicting him. After a hearing on that motion, the Supreme Court, in effect, granted that branch of the motion which sought appointment of a guardian ad litem. Further, the Supreme Court, sua sponte, conditionally vacated the final judgment of foreclosure entered in the prior proceeding, awarded the plaintiff possession of the property, and directed the Town to execute a deed conveying the property to the plaintiff.

The Town correctly contends that the Supreme Court erred in conditionally vacating the final judgment of foreclosure entered in a separate proceeding. Any such relief must be obtained by motion filed in that proceeding (*see* CPLR 5015[a]; *see generally* *Matter of Adelson*, 84 AD3d 952; *State of New York v Kama*, 267 AD2d 225). In light of our determination, the remaining portions of the order which are before us on appeal cannot be upheld, as they were predicated upon the vacatur of the final judgment of foreclosure.

SKELOS, J.P., BALKIN, LEVENTHAL and LOTT, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court