

Muzio v Alfano-Hardy

2007 NY Slip Op 33173(U)

October 3, 2007

Supreme Court, Nassau County

Docket Number: 0528-05/

Judge: Daniel Martin

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

JOHN MUZIO and THERESA MUZIO.

TRIAL/IAS, PART 31
NASSAU COUNTY

Plaintiffs.

- against -

Sequence No.: 006 & 007
Index No.: 010528/05
XXX

MARIA ALFANO-HARDY, individually and as Treasurer of the Village of Bayville, New York; JOANNE BANCO, individually and as Tax Clerk of the Village of Bayville, New York; VILLAGE OF BAYVILLE, New York, and FLORENCE RISMAN.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Motion by defendants Village of Bayville, Alfano-Hardy, and Banco for summary judgment dismissing the complaint is granted. Motion by defendant Florence Risman for summary judgment dismissing the complaint is granted.

This is an action for alleged violation of plaintiffs' civil rights pursuant to 42 U.S.C. § 1983. Plaintiffs John and Theresa Muzio were the owners of a 1-family dwelling located at 15 July Avenue in Bayville. The property is designated as section 28, block 4, lot 7 but actually consists of lots 7 to 10. Defendant Florence Risman is engaged in the business of investing in tax liens sold at public auction by municipalities.

On July 24, 2001, defendant Joanne Banco, the Tax Assessor of the Village of Bayville, conducted a tax sale of plaintiffs' property. The property was purchased by Risman for \$966.69, the unpaid village tax for the 2000/2001 tax year. On July 27, 2001, defendant Maria Alfano-

Hardy, the Village Clerk, issued Risman a tax sale certificate pertaining to the property.¹

On September 24, 2003, Risman filed an affidavit of service with the Village reciting that on the same date, she had served plaintiffs with a “notice of redemption of lands sold for taxes” by certified mail return receipt requested. The notice of redemption was mailed to plaintiffs at P.O. Box 93, E. Norwich, NY. While plaintiffs did in fact rent Box 93 at the East Norwich post office, the return receipt was signed by a “J. Martin.” Whether J. Martin is a postal employee or someone unauthorized to receive the certified letter is unclear. In any event, plaintiffs allege that they did not receive actual notice of the tax sale until after a tax deed was issued. The affidavit of service further recited that Risman had mailed a copy of the notice of redemption by certified mail to “John & Jane Doe 1-10” at 15 July Avenue, Bayville and to the Roslyn Savings Bank, 1400 Northern Blvd., Roslyn, NY.

The notice of redemption stated that the total amount required for redemption of the property was \$966.69 with interest and penalties, as well as the amount of any “subsequent tax liens.” In the interim, Risman had purchased tax sale certificates for the 2001-2002 and the 2002-2003 tax years, representing subsequent liens on the property. The notice further stated that in order to redeem the property, the total amount due must be paid to the collecting officer of the village within six months from the date of service of the notice.

Plaintiffs allege that on January 12, 2004 plaintiff John Muzio tendered the outstanding village taxes on the property to Banco, but Banco stated that she was “busy” and refused to accept the tender. Because plaintiffs owned other property in the Village which was also delinquent as to taxes, some effort may have been required to determine the total amount which was outstanding. In any event, plaintiffs allege that John Muzio tendered the outstanding taxes again on February 18 and March 3, 2004, and on other occasions, but Banco refused to accept them. The amended complaint may be read as alleging that plaintiffs were still unaware of the issuance of the tax certificate at this time, despite their efforts to pay the delinquent taxes on the property.

On May 5, 2004, Alfano-Hardy issued Risman a tax deed to the property. However, the tax deed erroneously referred to the property as “lot 15,” a parcel located at 19 July Avenue which was also owned by the plaintiffs. According to the Village, the reason for the error was that the deed had actually been prepared by Risman. On May 25, 2004, a “correction deed” was issued, referring to the property as lot 7. Whether the correction deed was prepared by Risman or a village employee is unclear. On June 1, 2005, a second correction deed was issued, referring to the property as lots 7, 8, 9, and 10. The second correction deed was issued at the request of the holder of the mortgage on 19 July Avenue (the actual lot 15), who was bringing an action to foreclose the mortgage on that property.

In their second amended complaint, plaintiffs assert a cause of action for violation of

¹Alfano-Hardy signed the tax sale certificate as the Treasurer of the Village.

their civil rights pursuant to 42 U.S.C. § 1983. Plaintiffs allege that defendants acting “under color of their authority as village officials” deprived plaintiffs of rights secured by the Fourteenth Amendment, specifically their title to the property. Plaintiffs allege that Risman engaged in “tortious fraud or other wrongful conduct,” and the Village officials acted jointly with her to thwart plaintiffs’ right to redeem the property. Plaintiffs seek compensatory and punitive damages, including loss of rental income on the property. Plaintiffs also request a declaratory judgment that they are the “owners” of the property. However, because plaintiffs clearly do not have legal title, the complaint should be read as seeking the remedy of rescission of the tax deed for improper service of the notice of redemption.

Defendants move for summary judgment dismissing the amended complaint. The Village defendants assert that plaintiffs are collaterally estopped from challenging the tax deed by a judgment of Hon. Scott Fairgrieve in the Nassau County District Court. In an order dated August 1, 2005, Judge Fairgrieve ruled that the issuance of the tax deed divested plaintiffs of ownership of the property. Finding that the landlord-tenant relationship had been terminated, Judge Fairgrieve dismissed a summary proceeding which plaintiffs brought against the tenants of the property, Joseph and Irene Rogers. Alternatively, the Village defendants argue that, if the district court judgment is not preclusive, plaintiffs received sufficient notice of their right of redemption. Finally, the Village defendants argue that Alfano-Hardy and Banco did not deprive plaintiffs of their civil rights and there was no municipal custom or policy on which to predicate liability against the Village. Arguing that the notice to redeem was proper, Risman requests judgment quieting her title and determining any adverse claims by plaintiffs.

The federal civil rights statute provides:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...”

42 U.S.C. § 1983. To state a claim under § 1983, plaintiff must allege 1) that the conduct complained of was committed by a person acting under color of state law, and 2) that this conduct deprived plaintiff of rights, privileges, or immunities secured by the U.S. Constitution or laws of the United States (West v. Atkins, 487 U.S. 42, 48 [1988]).

Because municipalities operate pursuant to authority delegated by the state, municipal employees act under color of state law (*See e.g.* Village Law § 1-102). While a municipality is also a “person” subject to suit under § 1983, it cannot be held liable for its employees’ actions on a theory of respondeat superior (Monell v. Dept. of Social Services, 436 U.S. 658 [1978]). It is only when the execution of the local government’s policy or custom, whether made by its

lawmakers or those whose actions may fairly be said to represent official policy, inflicts injury that the municipality as an entity is responsible (Monell v. Dept. of Social Services, 436 U.S. 658 [1978]). Nonetheless, a municipality is immune from punitive damages under § 1983, although punitive damages are available against an individual defendant (Newport v. Fact Concerts, Inc., 453 U.S. 247 [1981]).

If an actor is a private individual, rather than a municipal official, the court must engage in a “fact-specific” inquiry as to whether the private person’s activity can be deemed to be under color of state law (Groman v. Manapalan, 47 F.3d 628, 638 [3d Cir. 1995]). A private person does not act under color of state law merely because her conduct bears a tenuous connection to state action. The issue is not whether the state or municipality was involved in some way in the relevant events, but whether the action taken can be fairly attributed to the state itself. The issue has been phrased as “whether the state provided a mantle of authority that enhanced the power of the harm-causing actor.” There are several approaches for detecting the presence of state action, including whether the conduct was an exclusive government function, whether there was joint participation or a “symbiotic relationship” between state and private individuals, and the nexus between the state and private activity (47 F.3d at 639).

In a § 1983 action, plaintiff must prove a deprivation of a constitutional or federal statutory right (Daniels v. Williams, 474 U.S. 327 [1985]). The term “deprive” suggests that the conduct giving rise to a § 1983 action must be intentional. However, the Supreme Court stated in Daniels that “§ 1983... contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right” (474 U.S. at 330). Nonetheless, the Court noted that the due process clause provides that a state shall not “deprive any person of life, liberty, or property,” and historically, the due process clause has been applied only to deliberate decisions of government officials (474 U.S. at 331). Thus, if a § 1983 action is predicated upon a due process violation, intentional conduct, rather than mere negligence, is required to give rise to liability (*Id.*).

The state and federal courts have concurrent jurisdiction over actions brought pursuant to § 1983 (Felder v. Casey, 487 U.S. 131, 139 [1988]). However, because of the principle of comity, a damage action under § 1983 to redress an allegedly unconstitutional administration of a state or local tax system may be brought only in state court (Fair Assessment in Real Estate Ass’n v. McNary, 454 U.S. 100 [1981]). Before proceeding to determine whether Risman is a state actor and whether defendants’ actions pass muster under the due process clause, the court must set forth in detail the statutory provisions pursuant to which plaintiffs were deprived of their property.

Prior to January 1, 1995, Villages collected delinquent taxes pursuant to Title 3 of Article 14 of the Real Property Tax Law, RPTL §§ 1450 to 1464. Most notably, Article 14 provided for the immediate sale of delinquent properties at public auction rather than the bringing of foreclosure proceedings (RPTL § 1454[1]). The only notice of sale which the Village was required to give was publication in the Village’s official newspaper (RPTL § 1452). The

successful bidder received a tax sale certificate (RPTL § 1454[2]). If the owner of the property did not pay the taxes within two years of the sale of the property, the holder of the tax sale certificate could apply for a tax deed (RPTL § 1464). Before making an application for a tax deed, the holder of the tax certificate was to serve a notice to redeem by certified or registered mail upon the record owner of the property, and mortgagee if any, using the owner's name and address as it appeared on the records of the collecting officer (RPTL § 1464). If the real property or any part thereof was in the actual occupancy of any person, a further notice to redeem was to be served on the occupant personally, by leaving the notice at the residence of the occupant with a person of suitable age and discretion belonging to his family or by mailing the notice by certified or registered mail (*Id.*). The notice to redeem must contain a statement that in order to redeem the property the total amount due must be paid to the collecting officer within six months from the date of service of the notice.

Article 11 of the Real Property Tax Law, which became effective January 1, 1995, provides that foreclosure of a tax lien shall be commenced by a proceeding in rem (RPTL § 1120). Article 11 provides for not only public notice of foreclosure by publication but also personal notice upon the owner by certified and ordinary mail (RPTL §§ 1124, 1125). Although Article 14 was repealed effective January 1, 1995, the repealing legislation provided that a village which had conducted a tax sale in 1993 pursuant to RPTL § 1454 was authorized to adopt a local law providing that the collection of taxes which became liens between January 1, 1995 and December 31, 2009 would be enforced in the previous manner (RPTL § 1100, historical and statutory notes). The Village of Bayville, along with a number of other villages, opted to continue enforcement of delinquent taxes pursuant to Article 14.

The court does not interpret the amended complaint as claiming that Article 14 violates the due process clause on its face. In determining the level of procedural protection required by the due process clause, the court must consider three factors: 1) the private interest affected by the official action, 2) the risk of erroneous deprivation through the procedures used, and 3) the government's interest (Curiale v. Ardra Ins. Co., 88 N.Y.2d 268, 274 [1996]). In this case, the private interest affected, title to real property, is at the heart of the due process clause. However, local government's interest in collecting delinquent taxes is great, and the risk of an erroneous deprivation, a sale of property which is not delinquent, is negligible.

Nevertheless, the amended complaint may be read as raising a due process challenge to Article 14, as applied. (*See, generally, Curiale v. Ardra Ins. Co.*, 88 N.Y.2d at 272). Thus, plaintiffs assert that they were denied due process because the manner of service of the notice to redeem was not reasonably calculated to apprise plaintiffs of the pending tax sale (Congregation Yetev v. Sullivan, 59 N.Y.2d at 424; see also, Mullane v. Central Hanover Trust Co., 339 U.S. 306 [1950]).

As a preliminary matter, the court determines that plaintiffs are not precluded by the unfavorable district court judgment in the summary eviction proceeding. A judgment on the merits by a court of competent jurisdiction forecloses a party from raising issues or defenses that

might have been litigated in the first suit (Sherman v. Ansell, 207 A.D.2d 537 [2d Dep't 1994]). While the Uniform District Court Act grants district court jurisdiction over summary proceedings, it does not grant that court jurisdiction to try title to real property (UDCA §§ 203-204). Because district court does not have jurisdiction to resolve questions of title, a district court judgment in a summary proceeding cannot become res judicata of an issue of title (O'Frias v. Melton, 32 A.D.2d 1046 [2d Dep't 1969]; *see also*, Collins v. Barbaro, 307 A.D.2d 906 [2d Dep't 2003]). Thus, plaintiffs are not collaterally estopped from challenging the validity of the tax sale by Judge Fairgrieve's finding that the tax deed divested them of legal title and terminated the landlord-tenant relationship.

RPTL § 1454 provides that each tax certificate shall be presumptive evidence that the sale and all proceedings prior thereto were regular and according to the provisions of the section. Thus, tax sales are clothed with a presumption of regularity which also applies to the giving of all required notices prior to the sale (Matter of Tax Foreclosure, 127 A.D.2d 220 [2d Dep't 1987]). While Ms. Banco's affidavit does not state that notice of the sale was published or that the sale was conducted by public auction, the tax sale is nevertheless subject to the presumption of regularity. Plaintiffs have not come forward with any evidence challenging the lawfulness of the initial sale, such as evidence that the notice of publication did not take place. Accordingly, partial summary judgment is granted to defendants as to any claim asserted by plaintiffs concerning the issuance of the tax sale certificate.

The court further concludes that the notice to redeem which was mailed to plaintiffs complied with RPTL § 1464. It appears that there is no postal regulation prohibiting certified mail being sent to a post office box (See, Whitbeck v. Erin's Isle, Inc., 109 A.D.2d 1032 [3d Dep't 1985]). According to Ms. Banco, P.O. Box 93, East Norwich was the "proper address" to which a notice to redeem pertaining to plaintiffs' property was to be sent. Plaintiffs concede that they rented box 93 at the East Norwich post office and do not deny that it was listed as their address on the records of the Bayville tax assessor. There is no requirement that plaintiffs actually receive the notice to redeem, if it was properly mailed.

The court concludes that the notice to redeem which was mailed to the occupants of the property, Joseph and Irene Rogers, was also proper. The notice to redeem was addressed to the occupants as "John and Jane Doe." The applicable statute of service of the notice to redeem upon occupants of the property, RPTL §1464(1), provides for two alternative methods of service, i.e., delivery to a person of suitable age and discretion or by certified or registered mail. The records reveals that said notice was sent to the occupants via certified mail.

Defendants Alfano-Hardy, Banco and the Village all having demonstrated compliance with the statute, the court concludes that these defendants have met their *prima facie* burden of demonstrating entitlement to summary judgment. The burden now shifts to plaintiffs to demonstrate a triable issue of fact which precludes summary judgment. (Zuckerman v. City of New York, 49 N.Y.2d 557 (1980)).

Plaintiffs' conclusory assertions that these defendants failed to comply are insufficient to defeat these defendants' motions. (*See, Doran v. Mutual Benefit Life Ins. Co.*, 106 A.D.2d 540 [2nd Dep't 1984]).

Even were the court to deny Alfano-Hardy and Banco's motion it would still find that the Village met its burden. To establish a *prima facie* case against the Village, plaintiffs must prove a custom or policy on the part of the Village to accept "John Doe" service, or some other manner of service not reasonably calculated to apprise property owners of pending tax sales. Plaintiffs allege that there were "numerous irregularities" concerning the present tax sale. However, plaintiffs do not set forth the circumstances surrounding the tax sale of any other property in Bayville, including most significantly the manner of service of the notice to redeem as to those properties. Since the Village's policy with regard to the collection of delinquent taxes is presumptively regular, the Village has established a *prima facie* case that it is entitled to judgment as a matter of law with respect to plaintiffs' § 1983 claim. Plaintiffs have come forward with no evidence to show a triable issue as to the Village's policy concerning the manner of service of notices to redeem. Accordingly, defendants Alfano-Hardy's, Banco's and the Village's motion for summary judgment dismissing the complaint is granted.

To establish a *prima facie* case against Risman, plaintiffs must prove that she is a state actor. Delinquent tax collection is not an exclusive government function because tax certificates are purchased and notices to redeem are served by private parties. Nevertheless, if plaintiffs can establish that Alfano-Hardy or Banco knew that service upon the owners or occupants was improper, there would be strong evidence of joint participation or a "symbiotic relationship" between Risman and the Village employees. In those circumstances, there would also be a sufficient nexus between the state and private activity. However, as set forth above, it has been demonstrated to the court that service upon both the owners and occupants was in compliance with RPTL §1464.

Thus, the court concludes that Risman has likewise met her burden of demonstrating entitlement to summary judgment in that there is an insufficient nexus between herself and Village employees such that she qualifies as a state actor and therefore subject to a 1983 claim.

Again, as set forth above, plaintiffs offer nothing in admissible form which leads this court to conclude that an issue of fact exists as to whether notice of redemption was properly served upon plaintiffs and the property's occupants and whether, as a result, there was a scheme to thwart plaintiffs' opportunity to redeem the property.

Accordingly, based upon the foregoing, it is directed that the motion and cross-motion are granted and the complaint is dismissed.

So Ordered.

Dated: September 26, 2007

ENTERED

OCT 03 2007

NASSAU COUNTY

COUNTY CLERK'S OFFICE

A.J.S.C.

