

Matter of Schuyler County (Solomon)

2007 NY Slip Op 34093(U)

December 13, 2007

Supreme Court, Schuyler County

Docket Number: 0000328/2006

Judge: Judith F. O'Shea

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At a Motion Term of The Supreme Court of the State of New York held in and for the Sixth Judicial District, at the Hazlett Building, in the County of Chemung, Elmira, New York, heard on the 2nd day of November 2007.

**PRESENT: HON. JUDITH F. O'SHEA
SUPREME COURT JUSTICE**

STATE OF NEW YORK
SUPREME COURT: COUNTY OF SCHUYLER

In the Matter of the Foreclosure of Tax Lien by Proceeding In Rem pursuant to Article 11, Title 3, of the Real Property Tax Law by Schuyler County,

Petitioner,

DECISION AND ORDER

vs.

INDEX # 06-328

Edward J. Solomon,

Respondent.

JUDITH F. O'SHEA, JSC

FINDINGS OF FACT

In an order to show cause dated October 4, 2007, respondent Edward J. Solomon seeks to vacate a Judgment of Foreclosure dated August 23, 2007, which was based upon his default in answering a petition seeking foreclosure of his property due to nonpayment of taxes. Respondent seeks to vacate the default judgment on the grounds of excusable default and a meritorious defense.

Respondent's application indicates that he was served with a combined Notice of Foreclosure and Petition on or about November 1, 2006, which indicated that he had until February 9, 2007 to pay all back property taxes in order to avoid transfer of ownership to Schuyler County, or to file an answer. On February 8, 2007, respondent appeared at the Schuyler County Treasurer's Office to request a "statutory payment agreement" in order to prevent foreclosure of his property. Respondent states that he previously entered into such an agreement with Schuyler County in the past, and has attached a February 28, 2003 signed installment

payment agreement evincing the same. According to respondent, when he appeared at the Schuylers County Treasurer's Office on February 8, 2007 to purportedly enter into a payment agreement, he was allegedly advised by the Deputy Treasurer that as long as he paid all back taxes prior to the date of the public auction of his property, he could redeem his property and receive title thereto. Respondent opines that he relied on this information in not interposing an answer to the petition because he planned on paying the outstanding taxes prior to the date of auction, which was scheduled for September 29, 2007. Thereafter, in early September 2007, respondent noticed that auction signs were taped to the front of his windows and called the Schuylers County Treasurer's Office on September 4, 2007 and was purportedly told by Deputy Treasurer Lisa Buckley that if he paid his delinquent taxes in full by September 28, 2007, he would be allowed to sign a purchase offer with Schuylers County and the property would be deeded back to him. The following day, he discovered that a default Judgment of Foreclosure had been entered against him on August 23, 2007.

On September 7, 2007, respondent appeared at the Schuylers County Treasurer's Office with borrowed funds to pay the \$6,528.21 in back taxes. At that time, he also executed an "Offer to Purchase," whereby he turned over the sum of \$6,528.21. Under the terms of the "Offer to Purchase," the \$6,528.21 was deposited with the Schuylers County Treasurer and was to be held until "this offer is accepted, at which time it shall become part of the purchase price, or it shall be returned if not accepted." Furthermore, the "Offer to Purchase" stated that transfer of the property to respondent would be completed on or before September 28, 2007 at the office of the Schuylers County Legislature. Respondent asserts that it has been a practice in Schuylers County that property owners could redeem their property by paying all delinquent taxes, interest and penalties on the last business day before public auction. Respondent has attached Schuylers County Legislature resolutions in 2003, 2004 and 2005 to support this contention.

However, on September 10, 2007, the Schuylers County Legislature passed Resolution No. 334, which granted the legislature the right to accept or reject any purchase offer from a tax delinquent property owner. Thereafter, on September 18, 2007, the Schuylers County Legislature passed Resolution No. 338 which rejected respondent's previously submitted purchase offer and accepted the Village of Montour Falls purchase offer for the property. On September 22, 2007, respondent received in the mail a copy of Resolution No. 338, together with a check for \$6,528.21, which represented the funds he deposited with the Schuylers County Treasurer's Office on September 7, 2007. Respondent complains that the retroactive application of Resolution No. 338 was arbitrary and capricious and constitutes eminent domain. He claims that he has a "good and substantial defense upon the merits" and is entitled to properly defend this matter.

Petitioner has filed a cross-motion seeking denial of respondent's application to vacate the default Judgment of Foreclosure. Petitioner maintains that since no answer to the petition was filed by respondent, an application for a default judgment was made August 13, 2007 and subsequently granted on August 23, 2007. As a result, the respondent's property was conveyed to Schuylers County by a deed that was recorded on August 30, 2007. Petitioner opines that respondent application to vacate the default Judgment of Foreclosure is untimely by relying on Real Property Tax Law § 1131, which explains that an application to reopen a default must be brought within one month of entry of the judgment. In the case at bar, petitioner argues that the

Judgment of Foreclosure was entered on August 23, 2007 and respondent commenced his application by filing the instant order to show cause with the Schuyler County Clerk on September 27, 2007.

In reply, respondent claims that the Judgment of Foreclosure, although signed on August 23, 2007, bears a time stamp, stating "Received 2007 Aug 28 PM 4:22 Schuyler County Clerk." Thus, respondent claims that the judgment was entered on August 28, 2007, thereby making his application timely under Real Property Tax Law § 1131.

Neither party submitted a copy of the original Judgment of Foreclosure showing the date of entry. However, confirmation from the Schuyler County Court Clerk indicates that the judgment was in fact entered on August 28, 2007.

CONCLUSIONS OF LAW

Pursuant to Real Property Tax Law § 1131, respondent was required to bring his motion to vacate his default within thirty days of entry of the judgment. In light of the fact that Judgment of Foreclosure was entered on August 28, 2007 and respondent commenced this proceeding on September 27, 2007, his application is timely. While Real Property Tax Law § 1131 does not address the grounds for a motion to reopen a default in tax foreclosure proceedings, CPLR § 5015 applies, thereby requiring respondent to proffer a reasonable excuse for his default as well as a meritorious defense. See, Clinton County v. Miner, 39 A.D.3d 1015 (3rd Dept. 2007).

Upon review of respondent's moving papers, it appears that his excuse for not interposing an answer to the petition, which was served on him in November 2006, was his reliance on past practices of redeeming his property by tendering past due taxes prior to the date of public auction. In fact, respondent states that he filed no answer because he planned to pay all outstanding taxes before the property went to auction. The Combined Notice of Foreclosure and Petition explicitly states that "to avoid loss of ownership or of any other rights in the property, all unpaid taxes and any other legal charges must be paid prior to February 9, 2007 or you must interpose a duly verified answer in the proceeding." It also explains that "after February 9, 2007, a court will transfer the title of the property to the County of Schuyler by means of a court judgment." Respondent neither submitted an answer nor paid the delinquent taxes by February 9, 2007. Rather than submitting an answer or tendering payment by February 9, 2007, respondent instead took his chances by submitting a purchase offer to redeem his property on September 7, 2007. The "Offer to Purchase," which is merely an offer and not a binding contract to ensure redemption of the property, clearly stated that his deposit of \$6,528.21 would be returned if his offer was not accepted. There is nothing before the Court to indicate that the Schuyler County Legislature was required to accept an "Offer to Purchase" from a former property owner, although it appears that they were routinely accepted in the past. The prior resolutions concerning acceptance of purchase offers from 2003, 2004, 2005 and 2006 indicate that the "Legislature authorizes its Chairman to accept the Offer to Purchase . . ." Thus, there is no evidence that respondent's purchase offer was legally required to be accepted, thereby obviating

the need to file an answer or otherwise redeeming prior to February 9, 2007.

Clearly, respondent risked being held in default and losing his property by not interposing an answer to the petition as well as not paying all outstanding taxes by February 9, 2007. Respondent's papers indicate that he made a conscious decision to not interpose an answer and to not pay the back taxes by February 9, 2007, but instead to execute a purchase offer to redeem which could potentially be rejected under its explicit terms. Despite respondent's reliance on past practices of petitioner and the recent resolutions passed by the legislature, the Court finds that he has failed to proffer a reasonable excuse. Accordingly, since no reasonable excuse exists, the issue of whether respondent has demonstrated a meritorious defense is academic and need not be addressed. See, Select Papers Inc. v. College Promotions Corporation, 241 A.D.2d 675 (3rd Dept. 1997); Wilson's Heavy Equipment, Inc. v. La Vallee, 302 A.D.2d 806 (3rd Dept. 2003). Even so, respondent has failed to explain the nature of his meritorious defense.

It is therefore,

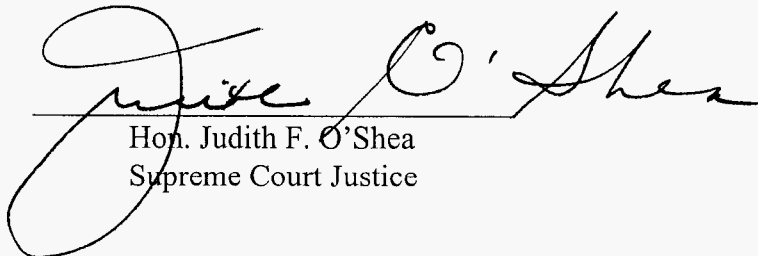
ORDERED, that respondent's application to vacate the default Judgment of Foreclosure is hereby **denied** in its entirety and the Judgment of Foreclosure remains in full force and effect; and it is further

ORDERED, that petitioner's cross-motion is hereby **granted** in its entirety.

This shall constitute the Decision and Order of The Court.

ENTER

Dated: December 13, 2007.



Hon. Judith F. O'Shea
Supreme Court Justice