

Kese Indus. v Roslyn Torah Found.
2007 NY Slip Op 34121(U)
December 10, 2007
Supreme Court, Nassau County
Docket Number: 0610-07/
Judge: William R. LaMarca
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Scan

Present: HON. WILLIAM R. LaMARCA
Justice

KESE INDUSTRIES, as Assignee of the
Mortgage of Theodore Roosevelt Council, Inc.,
BOY SCOUTS OF AMERICA and ROSLYN
GATE CORPORATION,

Motion Sequence # 001, # 002,
003
Submitted October 5, 2007

Petitioner,

-against-

INDEX NO: 10610/07

ROSLYN TORAH FOUNDATION, STEVEN D.
CONKLING, as Treasurer of Nassau County,
ROSLYN GATE CORP., MATIN EMOUNA, NANCY
BERMAN, ESQ. as Referee, THOMAS GILLEN as
Trustee of the GILLEN LIVING TRUST and d/b/a
JUMBO INVESTMENTS and the SIAT FOUNDATION,

Respondents.

The following papers were read on these motions:

KESE Notice of Motion/Order to Show Cause and Petition.....1
COUNTY Verified Answer.....2
COUNTY Affirmation in Opposition.....3
SIAT Affirmation in Opposition.....4
SIAT Memorandum of Law in Opposition.....5
EMOUNA Affirmation in Opposition.....6
RTF Verified Answer.....7
GILLEN 2d Amended Notice of Motion.....8
KESE Affirmation in Opposition and in Further Support.....9
GILLEN Reply Affirmation.....10
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Requested Relief

In an Article 78 proceeding, petitioner, KESE INDUSTRIES, AS ASSIGNEE OF THE MORTGAGE OF THEODORE ROOSEVELT COUNCIL INC. BOY SCOUTS OF AMERICA (hereinafter referred to as "KESE") and ROSLYN GATE CORPORATION (hereinafter referred to as "RGC"), moves for an order, pursuant to CPLR § § 103, 3001, 5103, Article 78 and RPAPL Article 15, staying the transfer of the tax deed issued by respondent, STEVEN D. CONKLING AS TREASURER OF NASSAU COUNTY (hereinafter referred to as the "Treasurer"), dated April 23, 2007 (the "Tax Deed"), pertaining to certain real property at one time known as SD 9, Section 9, Block 652, Lot 13 (now known as Lots 14-23) ("the subject Property") pending the determination of the rights of the parties; declaring the Tax Deed void; directing the Treasurer to void the Tax Deed; directing the Treasurer to determine what portion of the real estate taxes allegedly owed with respect to the Property are applicable to that part of the Property now known as Lot 18 and what part is applicable to the other nine (9) lots; and authorizing KESE and RGC to redeem the Property by the payment of any or all taxes determined to be due. In a companion motion (Sequence #2), counsel for respondent, THOMAS GILLEN, AS TRUSTEE OF THE GILLEN LIVING TRUST d/b/a JUMBO INVESTMENTS (hereinafter referred to as "GILLEN" and "JUMBO"), moves for an order, pursuant to CPLR § §7804(f), 404(a) and 3211, dismissing this action/proceeding as to respondent GILLEN on the ground that he

has transferred his entire interest in the subject matter to another respondent. Thereafter, (Sequence #3), petitioners move for an order, pursuant to Article 78, authorizing KESE to file the appropriate documents necessary to procure an exemption from real estate taxes *nunc pro tunc*.

Background

Petitioner, KESE, is the holder of a mortgage (the mortgage) in the principal amount of \$1.2 million on Section 9, Block 652, Lot 13 (now Lots 14-23) (the subject Property). Respondent, ROSLYN TORAH FOUNDATION (hereinafter referred to as "RTF") is the owner of Lot 18 which lot is subject to the mortgage. RTF is a domestic not-for-profit corporation and has been one since 1998. RGC, a New York corporation, is the owner of the remaining portions of the subject Property, now known as Lots 14, 15, 16, 17, 19, 20, 21, 22 and 23. The Treasurer has an interest in the Property since Nassau County has alleged that there are unpaid real estate taxes for the 2003-2004 School Full Year and 2004 General Full Year. Respondent, MATIN EMOUNA, holds an interest in the Property by virtue of his being the winning bidder to purchase Lot 18 at the foreclosure sale held on March 6, 2007. Respondent, GILLEN, holds an interest in the Property since he purchased the Tax Lien Certificate 1167/2004 from Nassau County. GILLEN subsequently transferred the tax deed to respondent, the SIAT Foundation (hereinafter referred to as "SIAT") for consideration. Respondent SIAT holds an interest in the Property because it holds title to the property by virtue of the deed from GILLEN. Respondent, NANCY BERMAN, ESQ. AS REFEREE (whose actual name is NANCY BERNHEIM, ESQ., hereinafter referred to as the "Referee") holds an interest in the Property pursuant to a

Judgment of Foreclosure, dated March 2, 2005.

In January, 1998, the Theodore Roosevelt Council of the Boy Scouts of America ("BSA") sold the subject Property, located at the corner of Shelter Rock Road and I.U. Willets Road in Roslyn, New York, to RTF. The subject Property contained a building, a parking lot and a tract of unimproved land. Simultaneously with the sale, BSA, as mortgagee, and RTF, as mortgagor, entered into a mortgage in the principal amount of \$1.2 million on the subject Property.

On or about November 19, 2001, RTF defaulted under the terms of the mortgage with BSA. On May 24, 2002, BSA commenced an action in Nassau County entitled *Kese Industries as Assignee of Theodore Roosevelt Council, Inc. Boy Scouts of America v Roslyn Torah Foundation, et al.*, Index No. 8720/2002 (the "Foreclosure Action"), to foreclose on the Property. The law firm, Meyer Suozzi (hereinafter referred to as "MS") appeared as counsel for the plaintiff. On or about October 3, 2002, BSA assigned the note and mortgage to KESE. MS was retained to represent Kese in January 2003. Petitioner KESE claims that Nassau County sent all tax bills pertaining to the Property to RTF.

At the time of the commencement of the foreclosure action, and apparently up to the present time, the BSA mortgage covered former Lot 13, now Lots 14-23. RTF conveyed its interest in Lots 14-17 and 19-23 to RGC by a bargain and sale deed, dated December 10, 2003. According to the Nassau County Clerk's Office Endorsement Cover Page, a transfer tax of \$4,000 was paid indicating consideration of \$1,000,000.00. At the time of this conveyance, the mortgage on Lots 14-17; 18; and 19-23 had not been satisfied and was still a lien of record. However, the deed of conveyance from RTF to RGC, dated December 10, 2003, does not indicate that the transfer was "subject to a mortgage" or that

the grantee was "assuming a mortgage". Yet for some inexplicable reason not apparent from any of the submissions before the Court, although RTF transferred ownership of the subdivided residential Lots 14-17 and 19-23 to petitioner RGC, retaining Lot 18 for itself, the mortgage foreclosure action continued to proceed **only** against Lot 18, rather than 14-17 or 19-23. Again, the mortgage of record refers to Lot 13, which is the same as Lots 14-17; 18; 19-23. RTF conveyed its interest in Lots 14-17 and 19-23 to RGC by bargain and sale deed dated December 10, 2003. Other than being designated as parties to the action, the Court has not been given any other information about the identity of KESE, RGC, RTF, EMOUNA, GILLEN or SIAT. For example, RTF is a non-profit corporation but nowhere is the "type" of non-profit corporation indicated. Also, as to SIAT, there is no indication as to what type of legal entity it is. A copy of an agreement attached to the title report procured by the bidder at the foreclosure sale reflects that the subject Property (Lot 13) was to be divided into parcels so that an application for a subdivision could be made to create nine buildable lots for residential use and the remaining parcel retained as and for a synagogue. Another unexplained anomaly is why RGC is named as a petitioner/plaintiff as well as respondent/defendant.

Tax Lien Certificate 1167/2004 was sold by Nassau County, in February 2005, to defendant GILLEN for non-payment of the 2003-2004 School Taxes and 2004 General Taxes on the subject Property, identified on the Landlord Tax Map of Nassau County as Section 9, Block 652, Lot 13 (the subject Property). The designation of Lot 13 was changed to Lots 14-23 to take effect with the 2004-2005 School Tax and 2005 General Tax Rolls. After the designation of Lot 13 to Lots 14-23, Lot 18 was split away from Lots 14-17 and 19-23. On December 10, 2003 RTF conveyed to respondent RGC ownership of the

subdivided Lots 14-17, and Lots 19-23. After the subdivision, RTF retained ownership of Lot 18.

In his affirmation in opposition, dated August 10, 2007, at ¶5, Nicholas P. Sarandis, Esq., the Deputy County Attorney in the Office of the Court Attorney of Nassau County, attorney for the Treasurer, asserts that RTF failed to file the necessary paperwork to continue the tax exemption for the 2003-2004 General Tax and the entire subject Property, old Lot 13 (new Lots 14-23), was restored to the tax rolls. Taxes were owed on the subject Property for the 2003-2004 School Tax and 2004 General Tax year (without any exemption having been granted). These taxes remained unpaid resulting in the sale of the tax lien at the 2005 Tax Lien Sale. The subject Property (Lot 13) was not subdivided for assessment purposes until the following tax year. The Treasurer sold Tax Lien Certificate 1167/2004 on Section 9, Block 652, Lot 13, the lot designation for the 2003-2004 School and 2004 General Taxes, subject to the tax lien. However, in his affirmation in opposition, dated September 25, 2007, counsel for the Treasurer now asserts that the application to file a tax exempt application *nunc pro tunc* must be denied as being moot since “the application for the continuation of the partial tax exemption was filed by RTF, accepted by the Assessor and granted for the 2003-2004 School Taxes and 2004 General Taxes (¶4)”. However, he claims that “[f]or the 2003-2004 School Taxes and 2004 General Taxes, the property had a total assessed value of \$25,704, with \$15,713 being exempt and \$9,991 being non-exempt. RTF did pay the real property taxes on the non-exempt portion of the property for the prior years but failed to pay the 2003-2004 School Taxes and 2004 General Taxes resulting in the eventual sale of the tax lien”. ¶ 3.

On February 15, 2005, JUMBO, an entity allegedly owned or controlled by the GILLEN Family Trust, purchased tax lien number 1167/2004 for \$67,596.67 from Nassau County (the "Tax Lien"). Defendant RTF owned Lot 18 and plaintiff RGC owned the remaining lots, to wit: 14, 15, 16, 17, 19, 20, 21, 22 and 23. Defendant RTF failed to appear in the foreclosure action. A default judgment was entered against RTF. (RTF interposed an answer in the within proceeding but did not submit papers in support or against the within motions). The Supreme Court, Nassau County, entered a Judgment of Foreclosure and Sale in the Foreclosure Action, appointed a referee and directed that the Referee pay from the proceeds of the sale "taxes, assessments . . . with interest and penalties thereon." A Foreclosure Sale was scheduled to take place on May 25, 2005. On May 24, 2005, RTF filed a voluntary petition under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). The bankruptcy filing stayed the Foreclosure Sale. KESE alleges that, for a year before the Bankruptcy Court and over the opposition of RTF, it sought to have the automatic stay modified so that it could proceed with the foreclosure sale. On August 22, 2006, the bankruptcy case was dismissed, allowing KESE to move forward with the sale.

On November 17, 2006, GILLEN served a Notice to Redeem. GILLEN served the Notice to Redeem via certified mail. The record of the County Clerk's office indicates that the foreclosure proceeding was open and active in November 2006 when GILLEN sent out the Notice to Redeem. Neither MS, KESE's foreclosure attorneys, nor the Referee received notice of the termination of the redemption period.

The Law

In *Hua Nan Commercial Bank, Ltd. v Albicocco*, 270 AD2d 265, 704 NYS2d 605 (2nd Dept. 2000), the Second Department held that “it was proper to vacate the tax deed because appellant was required to serve appellee’s attorney with a copy of the Notice to Redeem pursuant to Nassau County Administrative-Code §5.51.0(a) ,as it was a legal representative of a party entitled to notice”. The argument by SIAT, in opposition to the application to vacate the tax deed, that the “Second Department case of *Hua Nan Commercial Bank, Ltd. v Albicocco*, *supra* was wrongly decided” (*Memorandum of Law in Opposition to Article 78 Petition*), has no basis in law.

Starre decisis rests on the principal that law by which men are governed should be fixed, definite and known when the law is declared and construed, it should not be changed, save for mistake, or error, or until revisited by competent authority.

McGee v McGee, 180 Misc.2d 575, 694 NYS2d 269 (Supreme Suffolk Co. 1999). The doctrine of *starre decisis* is a result of the recognition that judicial chaos could result if every judgment of the past could be overturned because the logic of the judgment fails to persuade the Judges of the present. *Baden v Staples*, 45 NY2d 889, 410 NYS2d 808, 383 NE2d 110 (C.A. 1978, overturned on other grounds).

In *Hua Nan*, *supra*, Second Department decided the issue of whether, in order to comply with §5.51.0 of the Nassau County Administrative Code, a tax lien purchaser was required to serve a lender’s foreclosure attorney with the Notice to Redeem. In *Hua Nan*, the individual failed to serve the notice to redeem on the bank’s foreclosure attorneys of record, Wu & Kao, PLLC. The facts in *Hua Nan* are similar to the facts in the case at bar.

The lender commenced a foreclosure action which was stayed by a bankruptcy proceeding. Nassau County sold the tax lien. The lender was granted a judgment in foreclosure and a referee was appointed to conduct the sale. Neither the Referee nor the lender's foreclosure attorney received a copy of the Notice to Redeem. Nassau County issued a tax deed prior to the closing of the foreclosure sale, and Second Department affirmed the lower court's order vacating the issuance of the tax deed on the ground that the holder of the Notice to Redeem was required to serve petitioner's attorney with a copy of the Notice to Redeem pursuant to Nassau County Administrative Code §5:51.0 (a) since said attorney was a legal representative of a party entitled to notice. In the within action, there is no dispute that GILLEN failed to serve KESE's foreclosure attorney, M&S or the Referee.

The attorney for GILLEN's reliance on *Polish National Alliance of Brooklyn, U.S.A. v White Eagle Hall Co.*, 98 AD2d 400, 420 AD2d 642 (2nd Dept. 1983) is misplaced. The issue in *Polish National Alliance* was the attack on the validity of a foreclosure sale based on the alleged lawlessness of the bid arrangement entered into between the mortgagee and a prospective purchaser, the adequacy of the sales price and the effect of the mortgagee's failure to join a contract vendee as a party defendant in the mortgage foreclosure proceeding, and is inapposite to the facts herein.

The Court finds *Hua Nan* to be controlling in the case at bar and that GILLEN was required to serve MS, counsel to KESE, with the Notice to Redeem, which was not done. Moreover, contrary to GILLEN's argument, the lapse of the Notice of Pendency in no way excuses GILLEN from giving notice to MS as required by Nassau County Administrative

Code §5:51.0.

Moreover, Nassau County requires that GILLEN, or any other tax lien holder, submit a statement that they have searched the records and that the lienholder was unable to find any individual other than those served holding “an interest appearing of record on the premises affected by the sale”. A perfunctory search by GILLEN would have put him on notice of the Judgment of Foreclosure and the foreclosure proceedings. With that information, GILLEN would have known that the Referee and MS each had an interest in the property and further inquiry on his part would have determined that the foreclosure was still active. It would be untenable to condone the failure to give the referee notice of the Tax Sale. §5:51.0 of the Nassau County Administrative Code requires service upon “any other person having a lien, claim or interest appearing of record on the premises affected by such sale”. The referee had a legal duty to sell the property and to ensure that the real estate taxes were paid. The Referee was appointed by, and is an officer of the Court. The Referee is an agent of the Court for the specific purpose of conducting the foreclosure sale on the terms set forth in the Judgment of Foreclosure. *Cf., Segal v Jackson*, 183 Misc. 460, 48 NYS2d 877 (Supreme NY County 1944). Notice to the Referee would have resulted in some action on her part because of the potential loss of the property she was charged to sell at public auction. The Referee is an interested party as defined by §5:51.0 of the Nassau County Administrative Code and should have been served with the Notice to Redeem.

The issuance of a deed by the County Treasurer is only “presumptive evidence” that, *inter alia*, the tax lien sale was regular and that “all notices required by Section 5:51.0 were given” (Code § 5-54.0b). Moreover, the conveyance is conclusive only after the

passage of “six years from the date of record of any such conveyance in the County Clerk’s office (Code § 5-54.0b[3]). Since a tax lien sale has “momentous consequences” and results in divestiture of title (*Szal v Pearson*, 289 AD2d 562, 735 NYS2d 200 [2nd Dept. 2001]), mailing to all who have an interest whose addresses are easily accessible; is required. *McCann v Scaduto*, 71 NY2d 164, 524 NYS2d 398, 519 NE2d 309 (C.A. 1987). Courts have consistently held that “all formal requirements governing tax sale proceedings must be scrupulously satisfied”. *Land v County of Ulster*, 84 NY2d 613, 620 NYS2d 769, 644 NE2d 1325 (C.A. 1994); *Weinstein v All State Credit Corp.*, 31 NY2d 835, 339 NYS2d 682, 291 NE2d 725 (C.A. 1972). The Court of Appeals has explained that “the purpose of the prescribed statutory process for assessment, sale and redemption is to compel payment of taxes overdue and, in default of such payment, to transfer the title of real estate from the owner thereof to another without the owner’s consent. This being the nature of the process, the owner’s title may not be divested unless statutory requirements are strictly observed”. *Helterline v People*, 295 NY 245, 66 NE 345 (C.A. 1946); *Mastronardi v Mitchell*, 109 AD2d 825, 486 NYS2d 762 (2nd Dept. 1985).

The “failure to comply substantially with requirements that inure to the benefit of the taxpayer, such as determination of whether delinquency even exists, whether the correct property was identified and whether notice was afforded the taxpayer, are examples of jurisdictional defects that operate to invalidate a sale or prevent passage of title”. *Land v County of Ulster, supra*; *Byrnes v County of Saratoga*, 251 AD2d 795, 674 NYS2d 463 (3rd Dept. 1998). The Court of Appeals has generally observed that “the burden is on the party charged with giving notice, regardless of whatever fault may be assigned to the delinquent

taxpayer". *ISCA Enterprises v City of New York*, 77 NY2d 688, 569 NYS2d 927, 572 NE2d 610 (C.A. 1991), and has further emphasized that "knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending". *ISCA Enterprises v City of New York*, *supra*, quoting from *Mennonite Bd. v Adams*, 462 U.S. 791, 800.

After a careful reading of the submissions herein, it is the judgment of the Court that the petition (Motion Sequence #1) to void the tax deeds issued by the Nassau County Treasurer in connection with Tax Certificate 1167/2004 is warranted and said application is granted. The Court finds that the Notice to Redeem is defective and, therefore, the tax deeds issued by the County Treasurer, and the subsequently executed quitclaim deeds to SIAT are void and are vacated. Motion sequence #2, which sought dismissal of the action against GILLEN is denied.

The application by petitioners for an order pursuant to Article 78 for a tax exemption on the subject property for the 2003-2004 School Taxes and 2004 General Taxes (Motion Sequence #3) is denied. First, as asserted by counsel to the Treasurer in his affirmation in opposition, dated September 25, 2007, ". . . the request for permission to file a tax exempt application *nunc pro tunc* must be denied as being moot. The application for the continuation of the partial tax exemption was filed by RTF, accepted by the Assessor and granted for the 2003-2004 School Taxes and 2004 General Taxes". (¶ 4). Second, the statute of limitations is the four-month period applicable to CPLR Article 78 proceedings pursuant to CPLR §217(1). See *Suffolk Family Equity, Inc. v County of Nassau*, 233 AD2d 436, 650 NYS2d 21 (2nd Dept. 1996); *Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 NY2d 194, 573 NYS2d 43, 577 NE2d 34 (C.A. 1991), *Matter*

of *New Jersey Tr. Rail Operations v County of Rockland*, 187 AD2d 430, 589 NYS2d 549 (2nd Dept. 1992). The time to file an exemption for the 2003-2004 School Taxes and 2004 General Tax has long expired.

All further requested relief not specifically granted is denied.

Settle Judgment on Notice.

Dated: December 10, 2007


 WILLIAM R. LaMARCA, J.S.C.

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ENTERED

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**NASSAU COUNTY
 COUNTY CLERK'S OFFICE**