

Hecht v City of New York

2008 NY Slip Op 30644(U)

March 4, 2008

Supreme Court, Queens County

Docket Number: 0021728/2007

Judge: Peter Joseph Kelly

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

M E M O R A N D U M

SUPREME COURT - STATE OF NEW YORK
 COUNTY OF QUEENS - IAS PART 16

ELIOT HECHT, ETC., ET AL,

Plaintiffs,

- against -

CITY OF NEW YORK, ET AL,

Defendants.

BY: KELLY, J

DATED: MARCH 4, 2008

INDEX

NUMBER: 21728/07

MOTION

DATE: DECEMBER 11, 2007

MOT. SEQ.

NUMBER 3

In this Article 78 proceeding, petitioner Eliot Hecht, as Administrator of the Estate of Dora Hecht, and as Trustee, seeks a judgment vacating an in-rem deed dated December 2, 1977 and recorded on December 16, 1977 for the real property designated as Block 15819 Lot 145 Queens County. In the alternative, petitioner seeks an order directing the City Register to mark said deed annulled on its records.

The real property designated as Block 15819 Lot 145 Queens County is an unimproved parcel of land. The City Register's records establish that on May 11, 1971 Irving Hecht, the owner, mortgaged said property along with several other parcels to Kate Axelrod to secure a loan of \$57,000.00. These mortgaged parcels were identified as Block 15819, Lots 125, 126, 128, 145, 148 and Block 15820, Lots 55, 56, 57, 67.

On November 9, 1976, the City of New York, pursuant to former Administrative Code of the City of New York § D17-4.0, et seq. (now Administrative Code of the City of New York § 11-401, et seq.) commenced In-Rem Tax Foreclosure Action No. 36, Borough of Queens (Index No. 3000/1976), to foreclose on multiple properties located in

Queens County that were affected by unpaid tax liens, by filing a list of delinquent taxes in the office of the Queens County Clerk. The nine parcels of real property then owned by Irving Hecht were included in said list and proceeding. The Department of Finance mailed notices of the in-rem foreclosure proceeding to every owner, mortgagee, lienor, encumbrancer or other person with an interest in the 36 parcels, pursuant to then section D17-6.0(e) of the Administrative Code. A copy the mailing list, submitted herein, includes the names and addresses of Irving Hecht and K. Axelrod and identifies the subject real property by block and lot number.

On December 2, 1977 a judgment of foreclosure was entered in the in-rem proceeding, and the Commissioner of Finance executed a deed conveying title to the 36 parcels located in Queens County, including the nine parcels owned by Irving Hecht, to the City of New York. The December 2, 1977 deed was recorded on December 20, 1977, thus barring and foreclosing all persons of any rights, titles, interests, claims, liens or equity of redemption in or upon such properties (Administrative Code of the City of New York § D17-12.0).

On April 25, 1977, subsequent to the commencement of the in-rem proceeding, but prior to the in-rem foreclosure judgment, Jacob Axelrod, as the Administrator of the Estate of Kate Axelrod, assigned her 1971 mortgage interest in the nine Hecht properties to Paul Feingold and Karen Feingold. On June 17, 1977 the Feingolds commenced a mortgage foreclosure action on the nine Hecht properties, entitled Paul Feingold and Karen Feingold v Hepo Realty Corp. and also named the City of New York and the City's Parking Violations Bureau as defendants. The in-rem statute

then in effect expressly stated that "actions brought pursuant to this title shall take precedence over any proceeding brought to foreclose a mortgage" and required that all unpaid taxes and penalties owed on mortgaged property be paid out of the proceeds of a mortgage foreclosure sale regardless of any terms to the contrary in the judgment in the mortgage foreclosure proceeding (Administrative Code of the City of New York § D17-10.0).

On November 23, 1977, the court in the Feingold foreclosure action referred the matter to a referee to determine the amount due the plaintiffs and to examine and report whether the mortgaged premises could be sold in parcels, without making any reference to the then pending in-rem proceeding. On January 10, 1978 the court in the Feingold action issued a judgment of foreclosure and sale, and on February 15, 1978, the referee conveyed by deed the nine mortgaged parcels to Paul and Karen Feingold.

The in-rem statute then in effect provided that within 4 months after the City of New York acquired title, a property owner or other party in interest could seek the mandatory release of the property provided that the property owner or party in interest submitted a timely application to the Commissioner of Real Estate and, among other things, paid the delinquent charges owed plus a penalty charge within 60 days of the City's delivery of its written approval to the applicant. Each applicant was required to provide supporting documentation which included a certified search of the City Registrar, stating the recording date of the City's deed and the basis of the applicant's interest in the real property. (Administrative Code of the City of New York § D17-25.0[b][d][f]).

On January 10, 1978, prior to the deed transfer to the Feingolds,

Irving Hecht, as President of Hepo Realty Corp., filed applications with the City of New York for the release of most of the Hecht/Hepo parcels. The release applications identified the properties as Block 15819 Lots 126, 128, 148, 156 157, and Block 15820 Lots 55,56,57, 62, 67 and 72. While one of the applications listed Block 15819 Lot 157, that parcel was not included in the in-rem proceeding and there is no record of an application for the release of the subject property, identified as Block 15819, Lot 145. A record title search performed in connection with these applications, dated January 9, 1978, confirmed that the City had acquired the Hecht parcels by deed pursuant to a judgment of foreclosure in the in-rem proceeding, which was recorded in the City Register on December 20, 1977, in Reel 1039, Page 1.

In letters dated June 2, 1978 the City informed Hecht/Hepo that its release applications were approved, and that in order to prevent the sale of the properties at public auction, they were required to remit to the City \$174,668.91, inclusive of delinquent charges, interest and penalties, within 60 days, or no later than August 31, 1978.

Subsequently, the City informed Hecht/Hepo by correspondence dated March 29, 1979 and December 12, 1979 that due to the failure to pay the amounts owed within the statutory time period, the City would take the necessary steps to sell the properties at public auction, and changed the status of the release applications to "denied." With the exception of the subject real property, the City then disposed of all of the Hecht/Hepo properties it had acquired pursuant to public auctions held in 1996 and 2001.

The Department of Finance's records establish that subsequent to the issuance of the deed by the referee, taxes for the subject real property were canceled for the period of 1976 through 1985, as the property was owned by the City. However, on June 22, 1988, the Feingolds conveyed by deed the nine Hecht parcels, including the subject premises, to Dora Hecht. On September 26, 1988, the Department of Finance received a payment from Dora Hecht for the subject real property for the tax years of 1986/87, 1987/88 and for the first quarter of 1988/89. Payments for the remainder of the 1988/89 tax year through 1989/90, however, were canceled under an "In-Rem City-owned blanket" cancellation. There is no record of any taxes paid by the Feingolds between February 15, 1978 and June 22, 1988, the time during which petitioner asserts the Feingolds owned the subject property. On October 31, 1998, the subject real property was purportedly transferred by deed from Dora Hecht to "Eliot Hecht, Trustee." Eliot Hecht is the grandson of Dora Hecht, and in his capacity as Trustee he registered as the owner of the subject property with the Department of Finance on December 19, 1998. Beginning in 1990, the Department of Finance sent real property tax bills to Mr. Hecht for the subject real property. The Department of Finance's records show that although some real property tax payments were periodically made, all such payments ceased after October 8, 2004.

On June 1, 2000, the City included the subject property in a tax lien sale, due to unpaid taxes. A tax lien certificate was issued to the Bank of New York, which included a lien against the subject real property. The Department of Finance records show that at the time of the tax lien sale, the sum of \$3,934.44 was purportedly owed, including charges for

extermination and sanitation for the period of 1995 to 1997, and unpaid property taxes for the period of October 1, 1994 through April 1, 2000. Mr. Hecht satisfied this tax lien in early 2003.

Petitioner Eliot Hecht, asserts that as the result of a title search, in the latter part of 2006, he first became aware of the 1977 in-rem deed which conveyed title to the subject property to the City of New York. On October 25, 2006, Mr. Hecht, or his counsel, contacted the City's Law Department and orally requested that the 1977 in-rem deed be vacated. By letter addressed to the Law Department's Commercial Real Estate Litigation Division on March 14, 2007, petitioner's counsel requested that the 1977 in-rem deed be vacated, and asserted that all taxes, water and sewer charges were apparently paid, pursuant to the terms the January 10, 1978 judgment of foreclosure and sale in the Feingold action, as the deed was transferred to the mortgagee. This request was denied in writing on the basis that all transfers after the 1977 in-rem transfer to the City were void, but a refund of the 2000 tax lien could be requested.

Petitioner thereafter commenced the within Article 78 proceeding on August 29, 2007, and asserts that the City of New York's denial of his request to vacate the 1977 in-rem deed is arbitrary and capricious, an abuse of discretion, and contrary to the weight of the evidence and therefore should be annulled and the in-rem deed should be vacated. Petitioner asserts that the City of New York has not exercised any indicia of control or ownership over the subject property; that the property was transferred from the Feingolds to Dora Hecht by a deed dated June 22, 1988 and recorded on July 28, 1988; that the Feingolds acquired their interest in the property pursuant to the referee's deed dated February 15, 1978,

which was recorded; that since 1978 tax invoices and ECB liens for the property were sent to either Dora Hecht or himself, and that he has paid all of the real estate taxes due on the property and defrayed the cost of the ECB liens on the property. Petitioner asserts that he believes that the real property taxes that prompted the in-rem proceeding were paid, as the referee in the Feingold foreclosure action was directed to obtain either proof of payment of real estate taxes or to collect such sums that were necessary to pay these taxes prior to tendering a deed to the mortgagee or a successful bidder in the foreclosure. It is asserted that as the referee transferred the property to the Feingolds (the mortgagees) the sums that were required to be paid pursuant to the terms of the judgment of foreclosure must have been paid. It is further asserted that as the City billed either Dora Hecht or Eliot Hecht for real estate taxes, imposed violations, collected fines, and sold a tax lien on the property in 2000, it failed to exercise any ownership over the property for 30 years, and thereby disavowed ownership of the property.

In opposition, the respondents assert that the determination not to vacate the in-rem deed was neither arbitrary nor capricious, nor an abuse of discretion, and has a rational basis in the law. It is asserted that the deeds recorded subsequent to the 1977 in-rem deed have no legal effect, and that the referee's conveyance of the subject real property was improper. It is also asserted that the Feingold deed, in and of itself is not evidence of the payment of outstanding taxes and other charges owed on the subject property, and that in the absence of any evidence of a mortgage foreclosure sale or the payment of delinquent charges owned on the nine parcels transferred by the referee, the City properly concluded that the

referee's transfer of the property was not in accordance with the terms of former section D17-10.0 of the Administrative Code or the Feingold mortgage foreclosure judgment.

Respondents further assert that despite the referee's deed, the City continued to maintain its ownership interest in all of the real property formerly owned by Hecht or Hepo, and that the City, as the owner, cancelled taxes for the subject property through 1989 through an "In-Rem City" blanket cancellation. It is further asserted that petitioner's payment of taxes and the redemption of the tax lien cannot serve to establish his ownership of the subject property. Finally, respondents assert that petitioner's application to vacate the in-rem deed is barred by the statute of limitations as set forth in former section D17-12.0 of the Administrative Code, which required that an action be commenced within two years from the time the in-rem deed was recorded. Since no such action was commenced prior to December 20, 1979, respondents argue the City's compliance with the statutory provisions became conclusive and irrevocable.

Petitioner, in his reply, asserts that he is not challenging the procedures taken by the City prior to the recording of the deed, and therefore the statute of limitations set forth in Administrative Code Section D17-12.0 is inapplicable here. Rather, petitioner asserts that he is only challenging the City's discretionary denial of his application for the release of real property taken in-rem, under former section D17-25.0 (current section 11-424) of the Administrative Code, and asserts that as the City in its denial of May 30, 2007 did not raise any objection based upon the statute of limitation, it waived this defense.

It is well settled that the court's power to review an administrative

action is limited to whether the determination was warranted in the record, has a reasonable basis in law, and is neither arbitrary nor capricious (see Scherbyn v Wayne-Finger Lakes Board, 77 NY2d 753, 758 [1991]; Matter of Pell v Board of Educ., 34 NY2d 222, 230-231 [1974]; Westmoreland Apt. Corp. v N.Y. City Water Bd., 294 AD2d 587, 588 [2002]). The "judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body" (Ostrer v Schenck, 41 NY2d 782, 786 [1977]; see also Pell v Board of Education, 34 NY2d 222, 231 [1974]). The court finds that respondents' denial of petitioner's request to vacate the 1977 in-rem deed was neither arbitrary nor capricious, was not an abuse of discretion and has a rational basis in the law and the record.

In an in-rem tax foreclosure action, all proceedings taken, including all notices required by law, are presumed to be regular and in accordance with the law (see, Administrative Code of City of NY § 11-412 [c][formerly section D17-12.0]; Matter of ISCA Enters. v City of New York, 77 NY2d 688, 696 [1991]; Robinson v City of New York, 224 AD2d 534, 535 [1996]; Matter of Foreclosure Action No. 39, 186 AD2d 624 [1992]). "This presumption becomes conclusive two years after the recording of the deed by the City of New York and thereby operates as a two-year Statute of Limitations, provided the party has actual notice of the foreclosure action within the two-year period." (Matter of Foreclosure Action No. 39, Queens Section 60, Block 15738, Lot 86 186 AD2d 624, [1992]). Here, as the then owner Irving Hecht, and the then mortgagee Axelrod, had notice of the in-rem proceeding, any present challenge to the 1977 in-rem deed is barred by the statute of limitations, and the City's failure to assert the statute of limitations in its denial letter of May 30, 2007, does not constitute a waiver of said

defense.

Section 11-424 of the Administrative Code governs an application to the City for the release of property acquired by in-rem tax foreclosure. In order to seek the release of such property, an applicant must establish that he or she is a party who had an interest in the subject real property as "either owner, mortgagee, lienor, or encumbrancer at the time of the city's acquisition thereof" (Administrative Code of the City of New York § 11-424[a][1]). An applicant is also required to file an application with the Department of Citywide Administrative Services, pay the required fees and submit specific supporting documentation (Administrative Code of the City of New York § 11-424[a][2],[b] and [c]). Where the four-month period for mandatory release of the property has long since expired, the City of New York has the discretion to grant or deny such applications (Administrative Code of the City of New York, § 11-424[g]).

In this case petitioner is unable to establish that he had an interest in the subject property on either December 2, 1977, the date the City acquired the property under the in-rem foreclosure deed, or on December 20, 1977, the date said deed was recorded. In addition, petitioner is unable to establish that he filed a proper application for the release of the subject property. The oral request of October 25, 2006, and his counsel's written request of March 14, 2007, both of which were submitted to the Law Department of the City of New York, failed to comply with the provisions of Section 11-424. Furthermore, even if petitioner had filed a proper application for the release of the subject property, it is well established that discretionary denials made pursuant to Section 11-424(g) will be overturned by the courts only upon a showing of fraud or

illegality (Grant v In-Rem Release Bd., 226 AD2d 375, 376 [1996]; Robinson v City of New York, 224 AD2d 534, 535 [1996]; Matter of Swift v Board of Estimate of the City of New York, 178 AD2d 534 [1991]; Alleyne v Board of Estimate of the City of New York, 176 AD2d 607 [1991]; Matter of Raffa v Department of Gen. Servs., 153 AD2d 561 [1989]; Matter of McDonuts Real Estate v Board of Estimate of the City of New York, 146 AD2d 697 [1989]; Solomon v City of New York Dept. of Gen. Servs. Div. of Real Prop., 94 AD2d 283 [1983]). No such showing has been made here. Therefore, denial of petitioner's request for the release of the subject property was neither arbitrary nor capricious, nor an abuse of discretion (see, Grant v In Rem Release Bd., supra; Robinson v City of New York, supra; Matter of Swift v Board of Estimate of the City of New York, supra; Matter of McDonuts Real Estate v Board of Estimate of the City of New York, supra).

Since the 1977 in-rem tax foreclosure deed was issued to the City of New York on December 2, 1977 and recorded on December 20, 1977, the recorded deed serves as constructive notice to all subsequent grantees, including the petitioner, as to the existence of a prior conveyance affecting their property interests (see Real Property Law § 290, et seq.; Andy Associates Inc. v Bankers Trust Co., 49 NY2d 13 [1979]; United Matura Realty Inc., v Reade Industries, Inc., 155 AD2d 660 [1989]). Therefore, none of the subsequently recorded deeds, including the referee's deed of February 15, 1978, conveyed a valid interest in the subject real property.

Petitioner's claim that the referee's deed is, in itself, evidence of the payment of all outstanding taxes and charges against the subject real property, is rejected. Although the Feingold judgment of foreclosure and sale made the transfer of the property conditional upon the payment of

outstanding taxes, petitioner's assumptions in this regard are insufficient to establish that such payments were, in fact, made. There is no evidence of any payments made by the Feingolds or by the referee in that action, prior to the issuance of the referee's deed, and there is no evidence that the subject property was otherwise redeemed. Rather, the documentary evidence submitted by the City establishes that although Irving Hecht filed applications to redeem some of the mortgaged properties which were conveyed to the Feingolds by the referee's deed which were ultimately denied, neither he nor the Feingolds made an application for the release of the subject property.

Finally, petitioner's payment of real estate taxes and his satisfaction of a tax lien, is not evidence of legal title to the subject property and cannot serve to create title where none existed and divest the City of its ownership of the property (see City of Mount Vernon v The New York Haven & Hartford Railroad, 232 NY 309 [1922]). The court notes that as respondents defected the tax lien payment from petitioner on November 14, 2007, he is entitled to a refund of the amount paid, together with interest.

In view of the foregoing, petitioner's request to vacate the respondents' determination of May 30, 2007, and to vacate the 1977 in-rem deed is denied, and the petition is dismissed.

Settle judgment.

Peter J. Kelly, J.S.C.