

**City of Long Beach v County of Nassau**

2008 NY Slip Op 31415(U)

May 6, 2008

Supreme Court, Nassau County

Docket Number: 9975-07/

Judge: Edward G. McCabe

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK**

Present: **HON. EDWARD G. McCABE**

Justice

TRIAL/IAS PART 1  
NASSAU COUNTY

CITY OF LONG BEACH,

INDEX NO.: 07-009975

Plaintiff,

MOT. SEQ. NOS.: 1 & 2

-against-

COUNTY OF NASSAU; TREASURER OF THE  
COUNTY OF NASSAU, STERLING AMERICAN  
CAPITAL, LLC a/k/a STERLING AMERICA  
CAPITAL, LLC and STEVEN DAVIS,

Defendants.

X

The following papers were read on this application:

Emergency Order to Show Cause.....	1
Affirmation.....	2
Plaintiff's Memorandum of Law.....	3
Notice of Cross-Motion.....	4
Reply Affirmation (Sterling).....	5
Reply Affirmation (City).....	6

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The Plaintiff, City of Long Beach, (hereinafter referred to as the “City”), submits an application seeking an order, pursuant to CPLR §6301, immediately enjoining and restraining the Defendants, County of Nassau and the Treasurer of the County of Nassau, and/or any other persons acting under them or on their behalf, during the pendency of this action, from releasing the \$107, 712.20 in tax lien redemption fees paid by the City towards the satisfaction of a Nassau County issued tax lien certificate number 176 of the 1998 tax lien sale sold on property identified as Section 59 Block 116 Lots 12 and 13. The subject tax lien certificate was originally purchased by Leon Mitrany under the business name of E. Regal. It was subsequently assigned to Defendant, Sterling American Capital, LLC a/k/a Sterling America Capital, LLC (hereinafter referred to as “Sterling”) on June 24, 2003. Leon Mitrany is a principal of Sterling. The City also requests an order enjoining the County defendants from conveying a tax deed to the subject property to defendant Sterling or to any other defendant,

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person or entity claiming under them, pending the outcome of this proceeding.

The Defendant Sterling cross-moves, pursuant to C.P.L.R. §3211 (a)(4), for the dismissal of this action, based upon a prior action pending between the same parties for the same relief under Supreme Court Index number 6971/05 and pursuant to C.P.L.R. §3211 (a)(7), for failure to state a claim. The Defendant claims a part of the relief requested by Plaintiff is based upon a Vesting Order signed by this Court under Index number 14660-05, an action in which Sterling was not a named party. Sterling further requests the imposition of costs and sanctions, pursuant to Title 22 NYCRR Part 130-a, including attorneys' fees incurred on the pending motion and the cross-motion against the City, for having engaged in frivolous litigation.

**BACKGROUND**

A temporary restraining order was signed by this Court on June 11, 2007, which restrained the defendants and all persons acting under their

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direction and/or control or in concert with them, from perfecting the tax lien redemption or issuing a tax deed to Defendant Sterling or any person claiming under them, based upon said lien certificate and/or interfering with the Plaintiff's rights, title and interest in the subject property. The order also directed the Defendant, Nassau County Treasurer, to continue to hold the tax lien redemption funds paid by the City of Long Beach, in satisfaction of the subject tax lien, pending the determination of these applications.

This action was originally assigned to the Honorable Thomas Phelan and transferred to this Part when Justice Phelan saw that a related bar claim action, brought pursuant to Article 15 of the RPAPL, entitled the City of Long Beach vs. Sterling American Capital, LLC, County of Nassau, Treasurer of the County of Nassau, et al. filed under Index No. 05-6971, was already assigned to the undersigned Justice.

In the first action, the City sought the Court's determination of claims to the subject property for purposes of establishing title and ownership and

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a temporary restraining order enjoining the County Treasurer's issuance of a tax deed to Sterling, based upon the same Nassau County issued tax lien certificate number 176 of the 1998 sale, pending the determination of that application. That motion was decided. The stay was lifted and the City promptly redeemed the tax lien. This second action, filed under Index No. 07-9975, involves the validity of the exact same tax lien certificate.

**PRIOR ACTION PENDING**

Clearly both lawsuits have essentially the same purpose. Though the first action lists more defendants, the parties acknowledge that while all of the defendants defaulted in the first action, only the Nassau County defendants and Sterling sought relief for their default and were permitted to serve late answers. In the interests of efficacy and judicial economy, the rights of the parties to the subject property can and should be determined in the context of one proceeding. The cases arise from the same set of facts, the same transaction and similar, but not identical principles of law. A comparison of the two complaints excluding par. (d.) in the second

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complaint dated June 5, 2007, reflects identical wherefore clauses and fourteen identical allegations.

According to Siegel on NY Practice, paragraph 4 of the CPLR §3211 (a) is designed to avoid duplicative litigation. “If the only difference between the two actions is that the relief demand differs and it appears that the relief demanded could by amendment be demanded in the other, the motion to dismiss should be granted.” A review of the two complaints in these actions, leads the Court to the conclusion that it was unnecessary to initiate another action asking the Court to declare the rights of the parties to this same property. The City could have sought leave to amend the original complaint or made a motion in the context of the first action to include the additional facts relative to its’ tax lien redemption payment made on March 31, 2006 and the City’s acquisition of title to the subject property by eminent domain on April 18, 2006.

The first action (6971/05) asked the Court to determine claims to the subject property by virtue of Sterling’s alleged failure to redeem the City’s

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tax lien. It also sought the Court's determination that a.) the Defendants were barred from any claims to an estate or interest in the subject property; b.) that the Defendants be enjoined from taking possession of or entering the premises c.) that their claims be adjudged null and void and d.) that Plaintiff be adjudged the lawful owner of the premises.

The second action, filed under Index No. 9975/07, demands judgment directing the same relief listed above in paragraphs a.) through d.) and adds a new paragraph e.) that Plaintiff be adjudged rightfully entitled to reimbursement of any and all tax lien redemption funds paid by it to the County Treasurer in satisfaction of Sterling's County tax lien certificate.

The Court agrees with the Defendant Sterling that the subject second action should be dismissed, pursuant to C.P.L.R. § 3211 (a)(4), which authorizes the dismissal of an action due to a prior action pending in this Court for essentially the same relief. Plaintiff can be granted leave to amend the complaint in the first action (Index No. 6971/05) to include any non-duplicative allegations and/or requests for relief which were included

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in the second complaint (ie. paragraph (e) of the wherefore clause in the second action). The C.P.L.R. §3025(b) provides that “a party may amend his pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just..”

**Surrender of Tax Lien Redemption Payment**

For purposes of efficiency, the Court will treat the instant application as a motion filed in the first action under (Index No. 05-006971). The City’s application for a temporary restraining order enjoining or restraining the County defendants or any other persons acting under them or on their behalf, from surrendering the \$107,712.20 in tax lien redemption fees paid by the City towards the satisfaction of Nassau County tax lien certificate number 176 of the 1998 sale to Sterling, as tax lien assignee, is denied.

Section 5-50 ( c ) of the Nassau County Administrative Code, also referred to as Nassau County’s Special Tax Act, states “a payment to

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satisfy a tax lien shall be received by the County Treasurer on behalf of the holder of the tax lien.” The City’s redemption payment of the subject tax lien certificate was made on March 31, 2006. This redemption payment pre-dated the City’s acquisition of the subject property by eminent domain on April 18, 2006. Since NCAC Section 5-50 states the County Treasurer received the tax lien redemption payment on behalf of the tax lien holder, Sterling has the right to receive the tax lien redemption sums so deposited, plus whatever lien interest which has accrued, together with any applicable fees and costs a lien holder is entitled to collect, upon the formal surrender of said tax lien certificate to the County Treasurer, in accordance with the detailed provisions of the Administrative Code. Section 5-50.0 is entitled “When tax lien may be discharged” and clearly explains how a proper tax lien redemption payment satisfies a County tax lien. Sec. 5-50 ( c ) reads “The County Treasurer, upon receipt of the satisfaction money or upon the surrender of the tax lien sale certificate shall cancel and discharge the tax. The Code also provides “The County Treasurer, upon receipt of

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the surrender of the certificate of sale of the tax lien shall pay to the holder (Sterling) the amount thus deposited. The Code does not qualify the County Treasurer's responsibility to release a tax lien redemption payment or "satisfaction moneys" to the subject tax lien holder. Furthermore, the Court rejects the City's meritless attempts to create artificial distinctions between privately held tax liens and tax liens held by the County. Tax liens which have not been redeemed are considered open. An open tax lien is not considered paid until it is redeemed or satisfied.

**Sterling's Status**

The City challenges Sterling's status to do business. Sterling American Capital, LLC was reportedly formed on June 18, 2003. The tax lien assignment to Sterling is dated June 24, 2003. Thus it appears the tax lien was properly assigned to a valid legal entity. The City claims Sterling's status as a limited liability company has fluctuated during the period of time it held this tax lien. The record reflects Sterling was reinstated effective March 2006 and that it is also currently registered and

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authorized to do business in New York State. The Court assumes the Treasurer's Office requires all tax lien purchasers and assignees to provide valid federal tax identification numbers, in order to ensure the statutory interest earned on tax liens is properly reported to the Internal Revenue Service. The Court agrees that any tax lien redemption payments released by the County Treasurer should only be made payable to a valid legal entity or successor party in interest who provides a valid tax identification number. The City offers no legal authority to support the position that a temporary lapse of compliance with filing requirements for limited liability companies requires the forfeiture of all tax lien interests. The City's concerns regarding the difficulty of contacting Sterling or its' principal member, Leon Mitrany, appear to have been resolved.

**Preliminary Injunction**

To be entitled to a preliminary injunction, the City must establish by clear and convincing evidence: 1.) the likelihood of success on the merits; 2.) irreparable injury absent granting the preliminary injunction; and 3.) a

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balancing of the equities in its' favor (Aetna Ins. Co. v. Capasso, 75 NY2d 860, 862 [1990]; EdCia Corp. v. McCormack, 44 AD3d 991, 993 [2d Dept. 2007]; Ying Fung Moy v. Hohi Umeki, 10 AD3d 604, 604 [2d Dept. 2004]); Pearlgreen Corp. v. Yau Chi Chu, 8 AD3d 460, 461 [2d Dept. 2004]). “The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual”. See Moy v. Hohi, supra p. 604. Whether to grant a preliminary injunction lies in the court’s discretion (*id.*). A preliminary injunction is a drastic remedy that will not be granted, unless the petitioner meets the heavy burden of establishing a clear right thereto under the law and the undisputed facts...” (Abinanti vs. Pascale, 41 AD3d, 395, 396 [2d Dept. 2007]) quoting, Peterson vs. Corbin, 275 AD2d 35, 37 [Second Dept. 2000] and Nalitt v. City of New York, 138 AD2d 580, 581 [2d Dept. 1988]). Additionally, it is a remedy that should be used sparingly, “with caution, and only when required by urgent situations or grave necessity and

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then upon the clearest evidence” (Wm. Rosen Monuments, Inc. v. Phil Madonick Monuments, Inc., 62 AD2d 1053 [2d Dept. 1978]).

The City’s request for a preliminary injunction to maintain the “status quo” with respect to release of the tax lien redemption payment until the validity of the subject tax lien is determined, is denied because the validity of the subject County tax lien was already determined by an order of this Court dated March 30, 2007 under Index No. 6971/05. In the March 2007 decision, the Court upheld Sterling’s tax lien interest and rejected the City’s argument that Sterling’s interests in a County tax lien, based upon taxes which accrued prior to the City’s tax deed, were extinguished by the City’s issuance of a tax deed to itself. The March 30, 2007 decision addressed the same legal issue (the validity of Sterling’s tax lien), between the same parties (factoring only those parties who appeared in the action) and was based upon a stipulated set of facts which were submitted by the parties to dispense with the need for a hearing. The City appealed the March 30, 2007 order and the Appellate Division affirmed that decision in the City

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of Long Beach vs. Sterling American Capital, LLC. et al 40 AD3d 902 (Second Dept. 2007). The City now repeats the same legal arguments on this branch of the motion. It is puzzling to the Court how the City could state, in its' request for judicial intervention, that there are no related actions, when they filed this second action repeating identical allegations from the first action and four out of five phrases in their wherefore clauses are the same. In circumstances such as this, the Court agrees with Sterling's argument that the application of the doctrine of the law of the case should be invoked to preclude the City's relitigation of the same legal issue between the same parties which was decided based upon stipulated facts. "The doctrine of the law of the case addressed the potentially preclusive effect of judicial determinations made in the course of a single litigation before final judgment." See, People vs. Evans, 94 N.Y. 2d 499, 500-503; 706 N.Y. 2d 678 (2000). "...the law of the case is a judicially crafted policy that expresses the practice of the Courts generally to refuse to re-open what has been decided..." Messenger vs. Anderson, 225 U.S.

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436, 444; 32 S. Ct. 739. All parties who appeared in the action had an opportunity to address this issue and all parties signed off on the stipulation of facts indicating their consent to dispense with the need for a hearing. There were no relevant facts in dispute. For this reason, the Court considers the March 30, 2007 determination as to the validity of Sterling's tax lien after the City acquired a City tax deed and the denial of its' request for a preliminary injunction to be a decision on the merits.

The City has not satisfied the requisite criteria for injunctive relief. They have not demonstrated their likelihood of success on the merits, have failed to establish irreparable injury absent the granting of such relief and the equities balance in favor of allowing the Treasurer to comply with the terms of the Nassau County Administrative Code which so clearly read "the Treasurer shall release the tax lien redemption payment to the holder of the tax lien."

Sterling's right to receive the release of the tax lien redemption payment was established on March 31, 2006, which is the date this tax lien

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was paid or satisfied by the City. The City's tax lien redemption payment authorized the County Treasurer to discharge or cancel the subject lien. Were it not for the court-ordered stay which was in effect at that time, Sterling would have received the release of these funds from the Treasurer, prior to the date the City acquired title by eminent domain on April 18, 2006. The issuance of the stay simply delayed the release of the Treasurer's payment to Sterling. The Court is mindful that the release of the subject tax lien redemption payment to Sterling is not a windfall payment to this tax lien holder. Sterling will simply receive the funds it paid to purchase tax lien certificate no. 176/97, any subsequent general or school taxes paid by Sterling on said premises, together with the legal interest and fees it is entitled to collect in accordance with the Nassau County Administrative Code.

**Condemnation Proceeding**

As stated previously, the City initiated a condemnation proceeding on

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the subject property and acquired title by Vesting Order dated April 18, 2006. Sterling claims its' interest in the subject property was not affected by this order because it was not named and served as an interested party in the action. Sterling's interest in the subject property from the time the condemnation proceeding was filed through the date the tax lien was redeemed by the City, was limited to that of a tax lien assignee. By the time the Vesting Order was signed, Sterling's tax lien interest was already extinguished by the City's tax lien redemption payment. Sterling's interest was reduced to a claim for money against the Treasurer for the release of the redemption funds collected on its' behalf. The Court rejects Sterling's argument that its' interests were not affected by the condemnation proceeding in light of §202(d) of the N.Y.S. Eminent Domain Procedure Law which states "the inadvertent failure to notify a person or persons entitled to notice under this section shall not be jurisdictional, nor construed to affect the validity of any title acquired by a condemnor under this law." This issue was previously addressed in the March 30, 2006 order. However,

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irrespective of this statute, the City's redemption of the subject tax lien on March 31, 2006 effectively discharged or extinguished Sterling's tax lien prior to the date the City acquired title to the subject property by eminent domain. See NCAC §5-50.0. Thus, Sterling's claim for the release of the redemption funds rests with the County Treasurer.

Accordingly, based upon the foregoing, it is hereby

**ORDERED**, that the Defendant Sterling's cross-motion for an order directing the dismissal of the City's action filed under Index No. 07-009975 is granted, pursuant to CPLR §3211 (a) (4), based upon a prior action pending between the same parties for essentially the same relief; and it is further

**ORDERED**, that the branch of the City's motion which asks the Court to declare Nassau County tax lien certificate # 176 of the 1998 tax sale null and void was previously decided by order dated March 30, 2006 under Index No. 6971/05, wherein the Court upheld the validity of

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Sterling's tax lien and this order remains the law of the case, as affirmed by the Appellate Division; and it is further

**ORDERED**, that the branch of the City's application which seeks to restrain the Nassau County Treasurer from the release of the City's tax lien redemption payment to the tax lien assignee, Defendant Sterling, is denied, there being no legal basis therefore; and it is further

**ORDERED**, that the branch of the City's motion which seeks to enjoin the Treasurer's issuance of a tax deed to the subject property to Sterling, is denied as moot, based upon the City's redemption of said tax lien on March 31, 2006, which effectively extinguished Sterling's right to apply for a tax deed; and it is further

**ORDERED**, tht the branch of the City's motion which requests a declaratory judgment that the City of Long Beach is the fee simple absolute owner of the subject property, is denied without prejudice to renew, upon the submission of proper papers including a current title report by a

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reputable title company licensed and/or authorized to do business in New York State; and it is further

**ORDERED**, that the Court exercises its' discretion in denying the branch of the Defendant Sterling's motion which seeks costs and sanctions, pursuant to Title 22 NYCRR, §130-1.1; and it is further

**ORDERED**, that the temporary restraining order enjoining the County Treasurer or anyone acting under him or on his behalf from surrendering the subject tax lien redemption fees or issuing a tax deed to the subject premises based upon the subject tax lien 176 of the 1998 sale, is hereby vacated.

Any other relief requested which has not been specifically addressed, is denied.

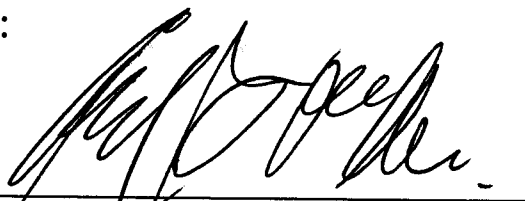
This constitutes the decision and order of the Court.

Dated: May 6, 2008  
Mineola, NY

ENTER:

**ENTERED**  
MAY 12 2008

NASSAU COUNTY  
COUNTY CLERK'S OFFICE



HOWARD G. McCABE  
J.S.C.