

**NYCTL 2006-a Trust v Rockaway Beach Holding Corp.**

2008 NY Slip Op 32462(U)

June 20, 2008

Supreme Court, Queens County

Docket Number: 0005904/2007

Judge: Augustus C. Agate

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.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24  
Justice

NYCTL 2006-a TRUST AND THE BANK x Index  
OF NEW YORK, etc. Number 5904 2007

- against - Motion  
Date April 29, 2008

ROCKAWAY BEACH HOLDING CORP., Motion  
et al. Cal. Number 20  
x Motion Seq. No. 1

The following papers numbered 1 to 18 read on this motion by Rockaway Beach Holding Corp. (Rockaway) to vacate and set aside the tax lien foreclosure sale of the property known as 51-17 Rockaway Beach Boulevard, Queens, New York (Block 15857, Lot 0001) and for leave to vacate its default in appearing, and to permit it to redeem the property by paying the outstanding tax lien, or in the alternative, to conduct a hearing on the issue of whether the purchase price shocks the conscience and to set aside the sale in the interest of justice and to permit it to redeem the property by paying the outstanding tax lien.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits .....	1-4
Answering Affidavits - Exhibits .....	5-13
Reply Affidavits .....	14-18

Upon the foregoing papers it is ordered that the motion is determined as follow:

Plaintiffs instituted this tax lien foreclosure action against defendant Rockaway as the record owner of the subject property. Plaintiffs obtained a judgment of foreclosure and sale dated October 11, 2007 against defendant Rockaway upon its default in appearing or answering the complaint. The Referee, appointed

pursuant to the judgment, sold the property at public auction on February 8, 2008 to Keith Alferi, as the successful bidder.

On March 14, 2008, after the foreclosure sale, and the successful bid, and execution of the memorandum of sale, by Alferi, defendant Rockaway obtained the order to show cause, and temporary restraining order, staying delivery of the Referee's deed to Alferi. Defendant Rockaway seeks to vacate the foreclosure sale and the judgment on the grounds of lack of personal jurisdiction due to improper service of process, and that its default in appearing and answering was excusable. In addition, defendant Rockaway asserts that it was never notified of any tax liability owed for the subject premises. Defendant Rockaway also asserts that the sale was the subject of collusion among the bidders, and the sale price is so inadequate that it shocks the conscience.

The affidavit of service dated March 22, 2007 demonstrates plaintiff properly effected service upon defendant Rockaway pursuant to Business Corporation Law § 306 by delivering duplicate copies of the summons and complaint to the Secretary of State and paying the appropriate fee (see Business Corporation Law § 306[b], 311[a][1]; Mauro v 1896 Stillwell Ave., Inc., 39 AD3d 506 [2007]). "[S]ervice of process on a corporate defendant by serving the summons and complaint on the Secretary of State pursuant to Business Corporation Law § 306 is valid service" (Shimel v 5 S. Fulton Ave. Corp., 11 AD3d 527 [2004]; Green Point Sav. Bank v 794 Utica Ave. Realty Corp., 242 AD2d 602 [1997]). Service was complete upon delivery of process to the Secretary of State (see Business Corporation Law § 306[b][1]; Flick v Stewart-Warner Corp., 76 NY2d 50 [1990]; Mauro v 1896 Stillwell Ave., Inc., 39 AD3d 506 [2007], supra).

That branch of the motion by defendant Rockaway to vacate its default in appearing or answering based upon lack of personal jurisdiction due to improper service is denied.

A defendant who has been validly served by a method other than personal delivery is free to move to open a default judgment and both CPLR 317 and 5015(a) (see Pena v Mittleman, 179 AD2d 607 [1992]). In this instance, defendant Rockaway did not specify in its notice of motion, the statutory ground for its seeking vacatur. Nevertheless, the court has the discretion to treat the motion as having been made under both sections (see generally Eugene DiLorenzo, Inc. v A.C. Dutton Lumber Co., 67 NY2d 138 [1986]; Pena v Mittleman, 179 AD2d at 608).

To the extent defendant Rockaway seeks to vacate its default pursuant to CPLR 5015(a), a party may be relieved from a judgment

under this provision on the ground of, among others, "excusable default" (CPLR 5015[a][1]). A defendant seeking to vacate a default under this provision must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action (see Eugene DiLorenzo, Inc. v A.C. Dutton Lumber Co., 67 NY2d at 141).

Defendant Rockaway asserts that it never received a copy of the summons and complaint mailed by the Secretary inasmuch as the registered address on file with the Secretary had not been used by the corporation for the past fifteen years. Under CPLR 5015(a)(1), defendant Rockaway's failure to update its address with the Secretary does not constitute a reasonable excuse for its default in appearing and answering the complaint (see Trujillo v ATA Housing Corp., 281 AD2d 538 [2001]; Ameritek Const. Corp. v Gas, Wash & Go, Inc., 247 AD2d 418 [1998]; Santiago v Sansue Realty Corp., 243 AD2d 622 [1997]; Paul Conte Cadillac, Inc. v C.A.R.S. Purchasing Service, Inc., 126 AD2d 621 [1987]).

Nevertheless, with respect to CPLR 317, that statutory provision does not require a defendant to demonstrate a reasonable excuse for its default (see Eugene DiLorenzo, Inc. v A.C. Dutton Lumber Co., 67 NY2d at 141; Samet v Bedford Flushing Holding Corp., 299 AD2d at 404; Trujillo v ATA Housing Corp., 281 AD2d at 538; Kavourias v Big Six Pharmacy, Inc., 262 AD2d 456 [1999]). Rather, under CPLR 317, the defendant must establish it did not personally receive notice of the summons in time to defend and it has a meritorious defense (see Eugene DiLorenzo, Inc. v A.C. Dutton Lumber Co., 67 NY2d at 136; Samet v Bedford Flushing Holding Corp., 299 AD2d at 404; Trujillo v ATA Housing Corp., 281 AD2d at 538; Kavourias v Big Six Pharmacy, Inc., 262 AD2d at 456).

Defendant Rockaway has failed to state when it first received a copy of the summons, or became aware of the action. Rather, it attempts to shift attention away from this failure, by asserting that plaintiffs' agent failed to warn of the impending sale, when contacted by the son of Rockaway's president on January 17, 2008 to obtain payoff information. Defendant Rockaway, moreover, has failed to cite to any legal obligation on the part of plaintiffs to provide personal service of the notice of sale, insofar as it was in default in answering the complaint, or appearing and demanding such personal service (see Polish Nat. Alliance of Brooklyn, U.S.A. v White Eagle Hall Co., Inc., 98 AD2d 400 [1983]; see also Shaw v Russell, 95 AD2d 977 [1983], affd 60 NY2d 922 [1983]).

Furthermore, defendant Rockaway has failed to establish that it has a meritorious defense (see Green Point Sav. Bank v 794 Utica

Ave. Realty Corp., 242 AD2d 602 [1997]). Defendant Rockaway does not deny that it failed to remit the sums due for real estate taxes. Instead, defendant Rockaway asserts it was unaware of any tax liability owing for the premises, because it had not received tax bills or related notices.

The City of New York uses a registration system to make mailings regarding real property taxes to the address specified by the record owner (see Administrative Code of the City of New York §§ 11-416, 417; compare Administrative Code of the City of New York § 11-406[c]; Matter of ISCA Enters. v City of New York, 77 NY2d 688, 699-701 [1991], cert denied 503 US 906 [1992]). The use of a registration system to make mailings to the address specified by the record owner is reasonably calculated to give proper notice of the liens and the City's intention to sell them, sufficient to comport with constitutional due process requirements (see Matter of McCann v Scaduto, 71 NY2d 164 [1987]; Kennedy v Mossafa, 291 AD2d 378 [2002], affd 100 NY2d 1 [2003]; see also Matter of ISCA Enters. v City of New York, 77 NY2d at 701). Defendant Rockaway asserts that tax bills were sent to the holder of a mortgage on the property instead of the record owner, but admits that its president had paid off such mortgage approximately two years ago. Nevertheless, defendant Rockaway has failed to show that upon the satisfaction of the mortgage, it took timely steps to designate a new, correct address for the mailing of all real estate tax bills and notices (see Administrative Code of the City of New York § 11-416; Matter of ISCA Enters. v City of New York, 77 NY2d at 701).

Defendant Rockaway also challenges the validity of the service of process via the Secretary of State, on the ground that plaintiff did not file an affidavit of service of additional notice in compliance with CPLR 3215(g)(4)(I). The lack of a filed affidavit of service of additional notice, however, is not a fatal defect, where as here the defendants have failed to present a ground for vacatur of the default judgment under CPLR 317 or 5015(a)(1) (see Mauro v 1896 Stillwell Ave., Inc., 39 AD3d 508 [2007]). Defendant Rockaway, furthermore, has failed to show that service by plaintiffs pursuant to Business Corporation Law § 306 violates the holding of Jones v Flowers, (547 US 220 [2006]). In Jones, the United States Supreme Court held that notice of an impending tax sale of property was not reasonably calculated to reach a property owner when notice sent by certified letter by the state government was returned unclaimed and the state did not take additional reasonable steps to ensure that notice was provided (see NYCTL 1999-1 Trust v 114 Tenth Ave. Assoc. Inc., 44 AD3d 576 [2007]).

To the extent defendant Rockaway seeks leave to redeem, the owner of an equity of redemption has a right to redeem at any time before an actual sale under a judgment of foreclosure (see Bank of N.Y. v Ortiz, 30 AD3d 551 [2006]; NYCTL 1996-1 Trust v LFJ Realty Corp., 307 AD2d 957 [2003]). Generally, a foreclosure sale extinguishes the equity of redemption, and "redemption is not permitted after a foreclosure sale, whether or not a deed has actually been delivered to the sale purchaser" (GMAC Mtge. Corp. v Tuck, 299 AD2d 315 [2002]; see also Norwest Mortgage v Brown, 35 AD3d 682 [2006]; NYCTL 1996-1 Trust v LFJ Realty Corp., 307 AD2d 957 [2003], supra). Here, defendant Rockaway failed to redeem before the foreclosure sale (see Ameriquest Mtge. Co. v Bellon, 29 AD3d 612 [2006]; NYCTL 1996-1 Trust v LFJ Realty Corp., 307 AD2d 957 [2003], supra; EMC Mtge. Corp. v Bobb, 296 AD2d 476 [2002]).

With respect to defendant Rockaway's claim that the foreclosure sale should be set aside on the ground of lack of notice of sale, the requirements for publishing and posting the notice of sale in a foreclosure action are found in RPAPL § 231. Plaintiffs have presented an affidavit of publication sufficient to comply with section 231 of the RPAPL. Defendant Rockaway has failed to rebut such showing.

With respect to defendant Rockaway's claim of collusion, a court, in the exercise of discretion, may set aside a judicial sale where fraud, collusion, mistake, or misconduct casts suspicion on the fairness of the sale (see Guardian Loan Co., Inc. v Early, 47 NY2d 515, 521 [1979]; Bankers Federal Savings and Loan Assoc. v House, 182 AD2d 602 [1992]; Harbert Offset Corp. v Bowery Savings Bank, 174 AD2d 650 [1991]; Glenville and 110 Corp. v Tortora, 137 AD2d 654, 655 [1988]; Polish National Alliance of Brooklyn, U.S.A. v White Eagle Hall Co., Inc., 98 AD2d at 407). In this instance, defendant Rockaway's situation is unfortunate, but Rockaway has failed to provide evidence that its rights were not protected to "the fullest extent the law provides" (Long Island Sav. Bank of Centereach, F.S.B. v Jean Valiquette, M.D., P.C., 183 AD2d 877 [1992]).

It is also well established that the mere inadequacy of the price alone is insufficient reason to vacate an otherwise apparently fair judicial sale, unless it is found that the price is so inadequate as to shock the court's conscience (see Long Island Sav. Bank of Centereach, F.S.B. v Jean Valiquette, M.D., P.C., 183 AD2d 877 [1992]; Harbert Offset Corp. v Bowery Savings Bank, 174 AD2d 650 [1991]; Matter of Kropp v 480 Broadway Corp., 151 AD2d 574, 575 [1989]; Zisser v Noak Indus. Marine and Ship Repair, Inc., 129 AD2d 795, 796 [1987]; Polish National Alliance of

Brooklyn, U.S.A. v White Hall Co., Inc., 98 AD2d 400 [1983], supra). Defendant Rockaway asserts that the sale price herein of \$365,000.00 was so inadequate as to shock the conscience of the court, and warrants a vacatur of the sale. It offers an appraisal performed by a New York State certified real estate appraiser indicating the fair market value of the subject premises on March 4, 2008 (one month after the sale) was \$2,080,000.00. Alferi offers an appraisal performed by a New York State certified general real estate appraiser, indicating the fair market value of the subject premises approximately a month later, on April 2, 2008, was \$585,000.00.

"Although foreclosure sales at prices below 10% of value have consistently been held unconscionably low in this State (see e.g. Central Trust Co. Rochester v Alcon Developers, 93 Misc 2d 686 [1978]; Alben Affiliates v Astoria Term., 34 Misc 2d 246 [1962]; Chemical Bank & Trust Co. v Schumann Assoc., 150 Misc 221 [1934]; Purdy v Wilkins, 95 Misc 706 [1916]) while sales at 50% or more of value have been consistently upheld (see e.g. Wesson v Chapman, 76 Hun 592 [1894]; State Realty & Mtge. Co. v Villaume, 121 App Div 793 [19907]; Southold Sav. Bank v Gilligan, 76 Misc 2d 30 [1973]), there is no definitive rule for sale prices that range between 10% and 50% of value" (Polish National Alliance of Brooklyn, U.S.A. v White Eagle Hall Co., Inc., 98 AD2d at 408). In this instance, in view of the significantly large discrepancy regarding the fair market value of the subject premises set forth in the respective appraisals offered by defendant Rockaway and Aleri, a hearing is necessary on the issue of whether the price achieved at the foreclosure sale was unconscionably low.

The hearing shall be held at the Supreme Court, Queens County, 88-11 Sutphin Boulevard, Jamaica, New York, on September 5, 2008, at 10:00 A.M. in Part 24. A copy of this order shall be served by plaintiffs on the successful purchaser at the foreclosure sale, and the purchaser of the property at the foreclosure sale shall have the right to participate in the hearing. Defendant Rockaway and the purchaser shall produce their respective appraisers as witnesses at the hearing. A copy of this order is being sent by facsimile transmission as of this date to counsel for plaintiff and defendant Rockaway, and Alferi.

Dated: June 20, 2008

---

AUGUSTUS C. AGATE, J.S.C.