

**Bridgehampton Dev. Corp. v County of Suffolk**

2010 NY Slip Op 33293(U)

November 18, 2010

Sup Ct, Suffolk County

Docket Number: 04-11183

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 7-9-10 (#009)  
MOTION DATE 10-4-10 (#010)  
ADJ. DATE 10-4-10  
Mot. Seq. # 009 - MG  
# 010 - XMD; CDISPSUBJ

-----X  
BRIDGEHAMPTON DEVELOPMENT CORP., :  
 :  
 :  
 Plaintiff-Petitioner, :  
 :  
 - against - :  
 :  
 COUNTY OF SUFFOLK, PATRICIA B. :  
 ZIELENSKI, as DIVISION DIRECTOR OF THE :  
 SUFFOLK COUNTY DEPARTMENT OF :  
 PLANNING, DIVISION OF REAL ESTATE, :  
 STEVEN J. MACCHIO and RALPH MACCHIO, :  
 :  
 Defendants-Respondents. :  
-----X

ESSEKS, HEFTER & ANGEL, LLP  
Attorney for Plaintiff/Petitioner  
108 East Main Street, P.O. Box 279  
Riverhead, New York 11901-0279  
  
CHRISTINE MALAFI, ESQ., Suffolk Cty Attorney  
By: Elaine M. Barraga, Esq.  
Attorney for Defendant/Respondent Cty of Suffolk  
100 Veterans Memorial Highway, P.O. Box 6100  
Hauppauge, New York 11788-0099  
  
TWOMEY, LATHAM, SHEA, KELLEY, et al.  
Attorney for Defendants/Respondents Macchio  
33 West Second Street, P.O. Box 9398  
Riverhead, New York 11901-9398

Upon the following papers numbered 1 to 113 read on this CPLR Article 78 proceeding and declaratory judgment action; Notice of Motion/ Order to Show Cause and supporting papers 1 - 76; Notice of Cross Motion and supporting papers 79 - 98; Answering Affidavits and supporting papers 100 - 102; Replying Affidavits and supporting papers 106 - 108, 111 - 113; Other memorandum of law 77 - 78, 99, 103 - 105, 109 - 110; (~~and after hearing counsel in support and opposed to the motion~~) it is,

In this hybrid CPLR Article 78 proceeding and action for declaratory relief pursuant to RPAPL Article 15, the petitioner-plaintiff (petitioner) seeks a judgment 1) invalidating a tax deed to real property that was taken by the defendant-respondent, County of Suffolk (the County), upon the non-payment of real property taxes, 2) invalidating the subsequent deed from the County to the defendant-respondents Steven J. Macchio and Ralph Macchio (Macchio) upon an auction sale of said real property, and 3) pursuant to CPLR Article 78, reversing, vacating, and annulling the County's cancellation of petitioner's application for redemption of the real property and directing the County and/or its director of the Division of Real Estate to allow the redemption of the real property.

The petitioner acquired the subject real property, consisting of two parcels, by deed dated December 4, 1996, and recorded in the Office of the Suffolk County Clerk on December 6, 1996.<sup>1</sup> At the time of the petitioner's purchase of the real property, the real property taxes for the tax year 1996/1997, covering December 1, 1996 to November 30, 1997, had not been paid. In October, November and December 1997, the County published notices of the "Sale of 1996/1997 Suffolk County Tax Lien Sale" to be held on December 12, 1997. The County did not mail notice of the tax lien sale to the petitioner. After the real property was sold to the County on December 12, 1997, the County published notices of the right of redemption from the tax lien sale in August and September of 1998. On August 20, 1998, the County sent two letters, one for each parcel of real property, to the petitioner in one envelope mailed to the petitioner's address on the deed dated December 4, 1996. By said letters, the Suffolk County Treasurer (Treasurer) attempted to notify the petitioner that its right to redeem the real property from the tax lien sale would expire on December 12, 1998. The envelope and the letters were returned to the Treasurer by the United States Postal Service (Postal Service) marked, "return to sender insufficient address."

On July 26, 1999, the Treasurer delivered a tax deed to the County. Subsequently, the County began preparation to sell the real property at an auction sale to be held on May 16, 2002. Six months prior to the auction sale, on November 14, 2001, the County sent two letters to the petitioner by certified mail, care of an attorney who was listed as the agent for service of process with the New York State Department of State (DOS). The two letters, one for each parcel of real property, attempted to notify the petitioner that it had six months from the filing of the letter with the Treasurer to redeem the real property by the payment of unpaid taxes and other legal charges. Both letters were returned to the County by the Postal Service marked, "return to sender, undeliverable as addressed, unable to forward." On May 16, 2002, after the public auction was completed, the County entered into a contract to sell the real property to Macchio.

Thereafter, Macchio's title insurance company, Chicago Title Insurance Company (Chicago), agreed to issue its standard policy, listing among the exceptions to coverage the following:

5. Require Quit Claim Deed from Bridgehampton Development Corp. Be (*sic*) Produced for Recording.

By letter dated July 26, 2002, the County expressed its disagreement with the exception raised by Chicago, relying on the letters sent to the petitioner on November 14, 2001, the fact that the six-month redemption period had expired prior to the auction sale, and the fact that the DOS web site showed the petitioner to be an inactive corporation. On August 5, 2002, Tomson Sheh, Esq., office counsel for Chicago, responded to the County's letter in a writing to the attorney for Macchio, indicating that he found the County's proofs "inadequate," and that Chicago would not be able to omit the exception. Mr.

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<sup>1</sup> The individual parcels are identified on the Suffolk County Tax Map as parcel numbers 0990-084-01-013.004 and 0900-84-01-044.000, hereinafter referred to as the "real property."

Sheh stated therein that “[w]e fail to see how redemption notices sent out almost three years later (on November 14, 2001) could comply with the notice requirements of the Suffolk County Tax Act or the due process requirements mandated by the United States Supreme Court in its Mennonite Board of Missions decision.”

Subsequent to the auction sale, but prior to closing of title, the petitioner learned of the attempted sale of its real property. On September 5, 2002 and October 16, 2002, the attorney for the petitioner wrote to the County informing it that the petitioner wished to make an application for redemption of the real property, and requesting the County provide it with the amount of the required deposit. In late 2002 and early 2003, Christine D. Costigan, Division Director of the Suffolk County Department of Planning, Division of Real Estate (Costigan), oversaw the handling of the competing claims for the real property and determined that the petitioner “had satisfied the claim in terms of redemption,” and that the auction sale would now fail. By letters dated January 28, 2003, the County sent a second notice advising the petitioner that it had six months from the filing of the letter with the Treasurer to redeem the real property by the payment of unpaid taxes and other legal charges. On February 14, 2003, the petitioner’s attorney mailed applications to redeem the two parcels and requested the amount of taxes due. On February 28, 2003, the County mailed a letter for each parcel of real property stating “your application for redemption of lot ... has been received,” and that “upon receipt of a certified or bank check in the amount of ... said application will be recommended to the County Legislature for appropriate resolution.”

On April 22, 2003, the petitioner tendered payment of the redemption amounts requested by the County to cover the payment of all tax arrears, interest, penalties and current taxes. The County accepted the tendered payments and deposited them in a duly designated bank account. On June 19, 2003, Costigan wrote to the Suffolk County Treasurer informing him of the history of this matter and that the petitioner’s application for redemption would be put before the county legislature for approval. She indicated that, upon the legislature’s approval, the Macchio’s down payment would be returned. Pursuant to a request from the County, the petitioner provided a certificate of good standing indicating that the corporation was reinstated on August 8, 2003. On August 25, 2003, the Division of Real Estate sent prepared resolutions to the Office of the Suffolk County Executive to enable the County Legislature to approve the petitioner’s redemption of the real property. By letter dated October 1, 2003, the County returned Macchio’s down payment in an attempt to cancel the auction sale contract for the purchase of the real property.

In early 2004, Macchio contacted Kevin Law (Law), an attorney who had previously represented them for approximately ten years, and who had recently been appointed to an executive position within the County. In his deposition in this proceeding, Law testified that Macchio told him that they were getting “screwed” by the County and that he tried to help them, but that he kept out of the deliberations in the matter. On February 12, 2004, Macchio wrote to the Office of the Suffolk County Executive complaining about the handling of the transaction, and requesting that the real property not be conveyed to anyone but himself until he could review certain documents that he had requested under the Freedom of Information Law. By letter dated February 25, 2004, the County advised Macchio that “there will be no conveyance of this property to anyone until this matter is fully researched and a decision reached by the County Attorney’s Office. Both you and the prior owner will be informed of the decision at that time.”

Also, in early 2004, Costigan was replaced by Patricia Zielenski, as the new Division Director of the Suffolk County Department of Planning, Division of Real Estate (Zielenski). By letter dated March 19, 2004, the attorney for petitioner wrote to the County asking for the status of the redemption applications submitted more than one year before. On March 25, 2004, almost six months after its receipt, Macchio returned the refund of the down payment on their contract with the County, and demanded conveyance of the real property to them. In a memorandum dated April 7, 2004, Zielenski directed the Supervisor of the Accounting Unit within the County, "to proceed to closing of title ... with Ralph Macchio, the successful auction bidder." By letter dated April 9, 2004, Betty Schmitt, Redemption Supervisor in the County's Division of Real Estate, advised the petitioner that its redemption of the real property had been cancelled. On April 26, 2004, the County conveyed the real property to Macchio.

The petitioner moves for summary judgment in its declaratory judgment action on the ground that the County's tax deed to its property was acquired in violation of due process of law and, as a result, the tax deed and the County's subsequent conveyance of the real property should be declared null and void. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

In 1995, a new *in rem* system of tax lien foreclosure was adopted in the State of New York. However, as was its right, the County elected to opt out of the new system and to continue to be governed by the Suffolk County Tax Act (Tax Act). The Tax Act provides, in pertinent part:

§ 26 (2). After making said return and before July first in each year, each receiver of taxes shall mail a notice to each person whose name appears on said tax and assessment roll as the owner ... on which taxes or assessments have not been paid, at the address set forth in said tax and assessment roll. Said notice shall be substantially as follows: "The records of this office indicate that you have neglected to pay the taxes levied ... and that unless the unpaid taxes, plus interest and penalties are paid prior to the publication of the tax sale lists ... the tax lien against your real property ... will be sold"

The petitioner contends the County did not mail the required notice pursuant to Tax Act 26 (2), violating its constitutional due process rights. The United States Supreme Court has held that "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable" (*Mennonite Bd. of Missions v Adams*, 463 US 791 [1983]). In addition, it is clear that notice by publication is not

reasonably calculated to provide notice of the pending proceeding and is therefore inadequate to inform a property owner of a tax authority's actions (*Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306 [1950]).

The petitioner has established its entitlement to summary judgment herein. The County does not allege, nor does the record reflect, that it mailed notice of the tax lien sale to the petitioner. In this case, the record indicates that the County relied on publication alone in an attempt to notify the petitioner of the possible loss of its real property due to a tax delinquency.

In opposition to the motion, the County contends that one or more of the notices of redemption mailed to the petitioner at its address, as reflected on the tax assessment roll, is sufficient notice of the tax sale and the auction sale to comport with its constitutional obligations. The County relies on a litany of cases which hold that its reliance on the petitioner's address on the tax assessment roll, and the absence of a valid address in the public record, defeat the petitioner's due process claim. However, none of the cited cases involve the failure of the municipality to provide mailed notice pursuant to statute. In addition, it is well settled that the failure to provide proper notice of a tax lien sale cannot be cured by the subsequent delivery of a notice of redemption (*Kennedy v Mustafa*, 100 NY2d 1, 759 NYS2d 429 [2003]; *McCann v Scaduto*, 71 NY2d 164, 524 NYS2d 398 [1987]; *Szal v Pearson*, 289 AD2d 562, 735 NYS2d 280 [2d Dept 2001]; *Meadow Farm Realty Corp. v Pekich*, 251 AD2d 634, 676 NYS2d 203 [2d Dept 1998]). Instead, the burden is on the party charged with the obligation of giving adequate notice under the Due Process Clause of the Constitution, regardless of whatever "fault" may be attributable to the delinquent taxpayer (*ISCA Enterprises v City of New York*, 77 NY2d 688, 569 NYS2d 927 [1991]). The County's contention that the petitioner's failure to pay the levied real property taxes for a number of years should be construed against the petitioner is without merit. The Supreme Court has made it clear that "knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending" (*Mennonite Bd. of Missions v Adams*, *supra* at 800).

The County failed to make a prima facie showing that it satisfied the due process rights of the plaintiffs by furnishing constitutionally adequate notice of the sale of the underlying tax lien (*Meadow Farm Realty Corp. v Pekich*, *supra*; *Muzio v Alfano-Hardy*, 73 AD 3d 1144, 900 NYS2d 891 [2d Dept 2010]). Accordingly, the petitioner's motion for summary judgment on its claim for declaratory judgment against the County is granted.

In light of the decision herein, the Court need not reach the issues involved in the County's efforts to deliver notices of redemption, or other notices, to the petitioner, or whether the County had a constitutional duty to take further steps in an effort to provide reasonable notice in this case after the postal service returned its mailings (*see eg.*, *Jones v. Flowers*, 547 US 220 [2006]).

In opposition to the plaintiff's motion for summary judgment on its claim for declaratory judgment, Macchio contends that they are bona fide purchasers for value of the subject real property, and that they cannot be divested of their title thereto. The status of a good faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest or equity in the

Bridgehampton Development v County of Suffolk

Index No. 04-11183

Page 6

property or one with knowledge of facts that would lead a reasonably prudent purchaser to make inquiries concerning such (*see, Sprint Equities (NY), Inc. v Sylvester*, 71 AD3d 664, 896 NYS2d 134 [2d Dept 2010]; *Ferdico v Zweig*, 55 AD3d 537, 865 NYS2d 294 [2d Dept 2008]; *Yen-Te Hsueh Chen v Geranium Dev. Corp.*, 243 AD2d 708, 663 NYS2d 288 [2d Dept 1997]; *United Matura Realty v Reade Indus., Inc.*, 155 AD2d 660, 547 NYS2d 892 [2d Dept 1989], *appeal dismissed* 75 NY2d 1005, 557 NYS2d 311 [1990]).

Here, Macchio does not dispute that they had actual knowledge of the issues raised in this action and of the petitioner's putative claim for redemption of the real property. Indeed, Macchio's title company took a very strong stand that the County's title was not marketable and the record reflects that Macchio decided to proceed with the closing of title despite the fact that the issues raised in this action had not been resolved. The fact that the County, the putative seller in the auction sale, made a decision to proceed with the conveyance does not absolve Macchio of their obligations as purchasers. Accordingly, the petitioner's motion for summary judgment on its claim for declaratory judgment against Macchio is granted.

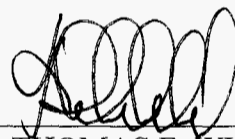
Accordingly, there being no material issues of fact requiring a trial, the petitioner is entitled to entry of judgment declaring that the tax deed to real property that was taken by the defendant-respondent, County of Suffolk, upon the non-payment of real property taxes is null and void, and 2) the subsequent deed from the County of Suffolk to the defendant-respondents Steven J. Macchio and Ralph Macchio upon an auction sale of said real property is null and void.

In light of the Court's decision herein, the cross motion made by the County and Zielenski for summary judgment dismissing the petitioner's claims as a matter of law is denied, and this Article 78 petition is rendered academic.

Submit judgment.

Dated: \_\_\_\_\_

11/18/10



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THOMAS F. WHELAN, J.S.C.