

Gillen v County of Nassau

2011 NY Slip Op 30760(U)

March 16, 2011

Supreme Court, Nassau County

Docket Number: 15104/10

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

**THOMAS GILLEN, as trustee of the Gillen Living
Trust, d/b/a Jumbo Investments,**

Index No. 15104/10

Plaintiff(s),

**Motion Submitted: 1/18/11
Motion Sequence: 001**

-against-

THE COUNTY OF NASSAU,

Defendant(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....X
- Defendant's/Respondent's.....

Plaintiff moves this Court unopposed for an Order granting summary judgment in his favor, and directing defendant County of Nassau ("County") to issue a tax deed to plaintiff, together with incidental monetary relief for lost rent from April 8, 2010. In the alternative, plaintiff seeks a monetary award of \$713,770, representing the fair market value of the property, together with interest from April 8, 2010.

Plaintiff states that he is in the business of purchasing tax liens at public auction. According to the verified complaint, plaintiff purchased a tax lien, which is identified as Tax Sale Certificate No. 2921/2007 ("the tax lien"), for real property designated as Section 62,

Block D, Lot 326. The property is also known as 60-62 Albany Avenue, Freeport, New York (“the subject premises”).

Further according to plaintiff, the tax lien was not redeemed for 21 months after its sale to plaintiff by defendant County. On November 23, 2009, plaintiff mailed notices to redeem to all persons entitled to such notice. No one redeemed the tax lien, and on March 2, 2010, plaintiff submitted a Class 4 commercial property application to the County’s Treasurer for a tax deed to the subject premises.

On May 10, 2010, the County’s Treasurer issued a written explanation to plaintiff as to why it was returning his tax deed application. According to the Treasurer’s letter, “the Notice to Redeem form used should have been for a Class (one) property. In your ‘explanation packet’ on the Land record Viewer, Values Page, it clearly states in red that there is a class change. On the Property Description page, it clearly states the change with the new code.”

Plaintiff contends that, when he purchased the tax lien, and when he sent out the required notices in November 2009, the records of the County’s Treasurer and Assessor showed that the subject premises were designated a Class 4 property.

The County contends in its verified answer that, at the time of plaintiff’s application for a tax deed, the subject premises were a Class 1 property, and thus, no tax deed could properly be issued, pursuant to the provisions of the Nassau County Administrative Code.

This Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (*Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (*Cauthers v. Brite Ideas, LLC*, 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court’s analysis of the evidence must be viewed in the light most favorable to the non-moving party, in this case the defendant. (*Makaj v. Metropolitan Transportation Authority*, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

In support of his motion, plaintiff has submitted, *inter alia*, his tax lien application, as well as his written objection to the rejection of his Class 4 application. Plaintiff has included copies of the County’s Land Record Viewer pages for various relevant years, the County Treasurer’s tax department lien records and listing of delinquent taxes, notices of tentative assessed value issued by the County’s Department of Assessment, and the County’s

2011 property card for the subject premises.¹

According to the County records submitted, the subject premises were designated as code 483.14 at the time plaintiff purchased the tax lien in early 2008, and thereafter in 2009 and 2010. According to the County's own definition of Land Use Codes found on its website, 483.14 is defined as "a residence which has been fully converted to non-residential use." The term "Class 4" derives from the numeral that appears two places to the right of the decimal point.

Specifically, the Land Record View for 2008 and 2009 indicates that the subject premises are a "Class IV property." Likewise, the County Treasurer's lien detail printouts dated December 15, 2009 and February 24, 2010 designate the property's "class code" as being 483.14. The lien detail reports contained in plaintiff's Exhibit D are dated April 22, 2010 and May 14, 2010. On each of those reports, is the entry, "last maintenance was changed at 14:00:55 on 03/04/2010 by Helen." In each of those reports, the "class code" for the subject premises is listed as being 483.14. Thus, well after plaintiff sent notices in November 2009 to redeem the tax lien, and after the submission of his tax deed application on March 2, 2010, the subject premises were still listed by the County, in its own records, as a Class 4 property.

Furthermore, prior to plaintiff's purchase of the tax lien in February 2008, the "Notice of Tentative Assessed Value for 2009/2010," issued by the County's Department of Assessment and dated January 2, 2008, designates the "Tax Class" of the subject premises as "Class 4".

It is not until viewing the property card for the 2011 tax year for the subject premises (plaintiff's Exhibit D) that the tax class appears to have been changed to "Class: 1."

According to the Nassau County Administrative Code, § 6-2.1, ". . . the Board of Assessors shall determine the taxable status and classification of all real property for state, county, town, special and school district taxes for the second succeeding fiscal year

¹The County has not opposed the instant motion, or in any way challenged the accuracy/authenticity of the County documents appended to plaintiff's motion as exhibits. Thus, the content of the County's records submitted in support of the instant summary judgment motion are deemed admitted by defendant County (*Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539, 330 N.E.2d 624, 369 N.Y.S.2d 667 (1975); *McNamee v. City of New Rochelle*, 29 A.D.3d 544, 817 N.Y.S.2d 295 (2d Dept., 2006); *Bell Atlantic Yellow Pages Co., v. Padded Wagon, Inc.*, 292 A.D.2d 317, 740 N.Y.S.2d 32 (1st Dept., 2002); *Schneider Fuel Oil, Inc. v. DeGennaro*, 238 A.D.2d 495, 656 N.Y.S.2d 668 [2d Dept., 1997]).

according to its condition, ownership and use as of the second day of January in each year.” Thus, the plain meaning of the Code is that the County’s Board of Assessors determines tax classes for various properties by each January 2nd, which classifications take effect in the “second succeeding fiscal year,” not in the year when the Board of Assessors makes its determination (see *Matter of Raritan Development Corp. v. Silva*, 91 N.Y.2d 98, 106-07, 689 N.E.2d 1373, 667 N.Y.S.2d 327 [1997]).

Accordingly, this Court has determined that, since the class code of the subject property appears to have been made a Class 1 property for the year 2011, the Board of Assessors, in 2009, changed the property’s class code for the “second succeeding fiscal year” (2011). Thus, the Court finds that the class code for the subject property at the time plaintiff purchased the tax lien in 2008, mailed the notices to redeem in late 2009, and submitted his tax lien application in 2010 was designated as “Class 4.” On this basis, plaintiff has demonstrated his entitlement to summary judgment as a matter of law.

Having failed to oppose the instant motion, or to in any way controvert the exhibits submitted by plaintiff, the County has failed to raise a triable issue of fact with regard to the class code for the subject property.

Plaintiff’s summary judgment is granted, and it is hereby

ORDERED that, the County issue a tax deed to plaintiff for the subject property, provided that the requirements of Nassau County Administrative Code § 5-53 have been met by plaintiff.

This matter is referred to the Calendar Control Part (CCP), for an inquest on the issue of damages to be held on April 28, 2011 at 9:30 a.m. The Petitioner shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

The foregoing constitutes the Order of this Court.

Dated: March 16, 2011
Mineola, N.Y.

ENTERED
MAR 23 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE
Karen V. Murphy
J. S. C.