

Matter of Johnstone v Treasurer of Wayne County
2012 NY Slip Op 32973(U)
December 14, 2012
Sup Ct, Wayne County
Docket Number: 74690/2012
Judge: Daniel G. Barrett
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At a Term of the Supreme Court
held in and for the County of
Wayne at the Hall of Justice in the
Village of Lyons, New York on the
22nd day of August, 2012.

Present: Honorable Daniel G. Barrett
Acting Supreme Court Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WAYNE

In the Matter of the Application of

JEANNE M. JOHNSTONE, F/K/A JEANNE M. CAMP,
Individually and as Executrix of the
Estate of WILLIAM F. JOHNSTONE,

Petitioner,

For a Judgment pursuant to Article 78 of
The Civil Practice Law and Rules

-vs-

TREASURER OF WAYNE COUNTY,
THE BOARD OF SUPERVISORS OF WAYNE COUNTY
KENNY FELTON & LATASHA FELTON,

Respondents

DECISION
Index No. 74690

2012

On June 20, 2012, two adjoining parcels of land located on State Street in Sodus, New York (Property ID number 69118-007-549017 and 69118-00-562025) were sold at public auction by the Treasurer of Wayne County due to delinquent taxes from the year 2010. Respondents, Kenny Felton and Latasha Felton, were the successful bidders of these two

parcels. The Petitioner commenced this Article 78 action to restore title of these parcels to their former owners.

Prior to this auction, Petitioner Jeanne M. Johnstone, f/k/a Jeanne M. Camp owned one parcel and William F. Johnstone owned the second parcel. Mr. Johnstone died on December 26, 2007 and Petitioner, Jeanne M. Johnstone was issued Letters of Administration on October 10, 2008. The Petitioner, Jeanne M. Johnstone, is the surviving spouse of William F. Johnstone.

The record reveals that the Respondent, Treasurer of Wayne County, (hereinafter Treasurer) mailed notice of delinquent taxes by first class mail. These letters were returned and the Treasurer sent notices of the proceeding by certified mail to both record owners. No one signed for either of these letters so the Treasurer had a Notice of Tax Enforcement Notification posted on each of the parcels.

Section 1125 of the Real Property Tax Law sets forth requirements for notice of commencement of a foreclosure proceeding. When ordinary first class mail and certified mail are unsuccessful, and no alternative address is found, the enforcing officer shall cause a copy of such notice to be posted on the property to which the tax lien relates (RPTL 1125 1b(iii)). This procedure was followed.

Petitioner argues that notice was defective because the Treasurer did not conduct a search of the public records which would include the Surrogate records. As to the William Johnstone parcel, a search would reveal that Petitioner was the Administratrix and counsel for Petitioner was counsel for the Estate. If a mailing was made to Petitioner as

Administratrix we would be in the same position we are presently, Petitioner would not have received the notice by mail and posting would be required. If mailing was made to the attorney, the taxes may have been paid before the auction. As to the parcel owned individually by the Petitioner, a search of the public records would have provided no relief.

The due process argument of the Petitioner fails because Petitioner's sister, JoAnn LaForest, residing in the State of Massachusetts, was aware of this proceeding in April of 2012 as she initiated a telephone call to the Treasurer's Office inquiring about the payment of the delinquent taxes.

Due process requires that notice be reasonably calculated, under all circumstances, to apprise the parties to be affected the opportunity to appear and be heard (see In re Foreclosure of Tax Liens, 18 N.Y. 3d 634, 942 N.Y.S. 2d 442, 965 N.E. 2d 944 [2012]). If Petitioner's sister in Massachusetts was aware of this proceeding in a timely manner, it is incomprehensible to this Court that the Petitioner was not aware of it in April of 2012.

The Respondents argue that the last day to retain the property is May 12, 2012 as the Tax Enforcement Notice, was dated April 12, 2012. Mr. Kunzer, a representative of the Respondents, indicates that the Tax Enforcement Notices were posted between April 23, 2012 and April 25, 2012. RPTL Section 1125 allows the party to whom such notice is directed to redeem the property in question or serve a Verified Answer to the Petition of Foreclosure until the 30th day after posting or the date specified in the Notice of Foreclosure as the last day of redemption, which is ever later. The Notice of Redemption submitted with the papers has a redemption date of May 25, 2012 and since the notices were posted

between April 23 and April 25, May 25 would be the last date for redemption.

In late April Ms. LaForest spoke to a representative from the Treasurer's Office and attests that she was informed that she had until June 20, 2012 to pay the delinquent taxes. On June 19, 2012, Ms. LaForest contacted the Treasurer's Office to find out the amount she needed to pay and was informed June 15th was the last day delinquent taxes were being accepted.

The Affidavits of William Shumaker and a representative from the Treasurer's Office indicate that despite the redemption date of May 25, 2012 property owners could retain title to their property if payment of delinquent taxes had been paid on or before June 15, 2012. Mr. Shumaker indicates that for a number of years redemption could be made right until the close of business on the day before the auction.

Initially on the Petitioner's application there is mention of Resolution number 317-11 and it is referred to in the Respondent's papers. No copy of this Resolution is submitted in any of the papers. However, a copy of Resolution number 286-12: Authorizing Public Auction Sale of Real Property Acquired By the County for Delinquent Taxes is contained in the Petitioner's papers. It is the Court's impression that both the Petitioner and Respondent were referring to Resolution number 286-12 rather than Resolution number 317-11.

Resolution number 286-12 provides that the County Treasurer is authorized to convey title to the County of Wayne for properties which are note redeemed for the year 2010 as of the close of business on June 19,

2012. [The County actually took title to the property on June 18, 2012]

The Respondents urge a strict construction of the word redemption. In their view, no redemption can occur after May 25, 2012. Various court decisions use a form of the word "redeem" to mean restore ownership of property to the party being foreclosed against even after the County has taken title (see Staller v. Suffolk County, 139 A.D. 2d 726, 527 N.Y.S. 2d 477).

An Affidavit was submitted by a representative of the Treasurer's Office who recalled having a couple of phone conversations with Ms. LaForest. She recalled the first call occurring in April 2012 and two calls after June 15, 2012 and before the date of the auction on June 20, 2012. She indicated she never told Ms. LaForest delinquent taxes could be paid until June 19th or June 20th.

The Affidavits of Ms. LaForest and the Treasurer's representative contradict each other on the latest date that the delinquent taxes could be paid enabling the Petitioner to retain title.

On June 20, 2012 Respondents Kenny Felton and Latasha Felton were the successful bidders at the auction for the two parcels in question.

The County had one more option available to the Petitioner to restore title to these two parcels. Ms. LaForest was advised by a representative of the County Treasurer's Office that she could submit a certified check for the total taxes due, with a offer to purchase the properties submitted to the Wayne County Board of Supervisors for their consideration at a Board meeting on July 17, 2012. Counsel for Petitioner submitted a purchase

offer and a certified check to the Treasurer's Office by July 2, 2012. Ms. LaForest wrote a letter to the Chair of the Wayne County Board Association indicating the reason for non-payment.

On July 17, 2012, the Board of Supervisors convened and rejected the offer by the Petitioner. Not only did the Board reject the Petitioner's offer, it rejected all offers made to re-purchase properties submitted by former owners who lost property in the Tax Enforcement proceeding. Respondent points out that all persons similarly situated were treated in the same manner. However, the Board of Supervisors did not articulate a reason for the denial of the applications other than to state everyone was treated the same way.

As set forth earlier, Ms. LaForest and a representative of the Treasurer's Office are in disagreement as to when the final date was for a person to pay their delinquent taxes without losing title to their property.

The Court of Appeals has addressed the issue of misinformation being provided by the County Treasurer to a delinquent taxpayer. The County Treasurer told a delinquent taxpayer to pay his delinquent taxes to the successful bidder at the auction. This was incorrect information. The taxpayer should have been told to pay the County Treasurer. The Court of Appeals indicated that if misinformation was given to the taxpayer then title to the property should be restored to the taxpayer. If the County Treasurer did not give this information, then the successful bidder would retain title. The Court of Appeals could not make the determination as to whether misinformation was given so it sent the matter back to Supreme Court for a hearing on that issue. (see VanWormer v. Giovatto, 46 N.Y. 2d 751, 413 N.Y.S. 2d 646, 386 N.E. 2d 254).

A hearing in this case is not necessary due to the fact that the Treasurer had printed in a publication that an auction would take place for property not redeemed or removed prior to the auction date. On June 11, 2012 the following was printed in the Wayuga Shopper:

**"WAYNE COUNTY
2012 Real Property Tax Foreclosure List as of 5/30/12
PUBLIC AUCTION
FOR PROPERTY NOT REDEEMED OR REMOVED PRIOR TO AUCTION DATE
DATE: Wednesday, June 20, 2012 Time: 6:00 pm
Location: Wayne County Court House, 26 Church Street, Lyons, New York 14489"**

This publication supports the Petitioner's understanding of her phone conversations regarding payment of delinquent taxes.

It appears from the record that delinquent taxes could be paid by June 15 without any negative repercussions on the title of the property.

The Board of Supervisors, in its discretion, entertained the applications for redemption of property owners on July 17, 2012. This action by the County was in its administrative rather than its legislative capacity. Thus, this Court can review that action to determine whether the decision of the Board was arbitrary and capricious (see Staller v. Suffolk County supra).

The decision of the Board of Supervisors was arbitrary because the County of Wayne uniformly rejected all offers of redemption without reference to any articulated standard for determining whether to accept an auction bid or an offer of redemption. Therefore, the procedure of the July 17th meeting constitutes an unconstitutional termination of the Petitioner's

property rights (see R.M. Investors Corp. v. Maggi, 104 Misc. 2d 41, 427 N.Y.S. 2d 919 (County Ct. 1980), order aff'd., 120 Misc. 2d 327, 467 N.Y.S. 2d 495 (App. Term 1983)).

The Petitioner commenced this proceeding as an Article 78 proceeding. However, in her request for relief, the Petitioner asks for a judgment restoring title to the Petitioner and the Estate of her spouse. This Court has the authority to convert this Article 78 proceeding to an action for declaratory judgment by way of CPLR 103(c) (see Staller v. Suffolk County supra).

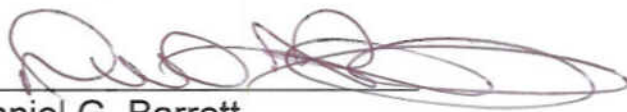
It is the decision of this Court that the title of the two properties in question be restored to the Petitioner and William F. Johnstone (the Court is aware of the death of Mr. Johnstone but this will put the title in the condition it was prior to the auction) provided that the Petitioner pay to the Respondents the delinquent taxes, interests and penalties that accrued through June 19, 2012 within twenty-one days of the entry of the Judgment based on this Decision.

If payment is made by Petitioner to the Respondents by the time set forth in this Decision then the Respondents will refund to the Respondents, Kenny Felton and Latasha Felton, the amount of money they paid to the Respondents for these two parcels. If the Petitioner does not pay the aforementioned accrued charges in the time set forth then the

Respondents, Kenny Felton and Latasha Felton shall retain title to the property.

This constitutes the Decision of the Court. Counsel for the Petitioner to draft an Judgment consistent with this Decision.

Dated: December 14, 2012
Lyons, New York



Daniel G. Barrett
Acting Supreme Court Justice

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