

Maxim Dev. Group v Montezuma Props., LLC

2015 NY Slip Op 30143(U)

February 2, 2015

Supreme Court, Seneca County

Docket Number: 48341

Judge: Dennis F. Bender

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

MAXIM DEVELOPMENT GROUP,
 Plaintiff

DECISION AND ORDER

-against-

Index No. 48341

MONTEZUMA PROPERTIES, LLC AND
THE COUNTY OF SENECA,
 Defendants

APPEARANCES: Dirk A. Galbraith, Esq.
 Holmerg Galbraith, LLP
 On behalf of the Plaintiff

 Michael S. Ciaccio, Esq.
 Boyle & Anderson, P.C.
 On behalf of the Defendant Montezuma Properties, LLC

 Frank R. Fisher, Esq.
 Seneca County Attorney
 On behalf of the Defendant County of Seneca

BENDER, Acting J.S.C.

The plaintiff, Maxim Development Group, hereinafter Maxim, moves for an order pursuant to CPLR 3212 striking the answers of the defendants and awarding judgment in favor of the plaintiff for the relief demanded in the complaint. The plaintiff asserts that there is no meritorious defense to its cause of action. The defendant Montezuma Properties, LLC cross moves for summary judgment in its favor and in the alternative, requests leave to file a proposed amended answer which would assert an additional affirmative defense based upon “bonafide purchaser”. It also seeks to allege cross claims against the defendant, Seneca County, for reimbursement of money damages and attorney fees. The County of Seneca opposes plaintiff’s motion and alleges its motion must be denied as being barred for failure to serve a timely notice

of claim as required as a prerequisite to suit under Article 4 of the New York State General Municipal Law and/or that the application is untimely under RPTL 1131.

Facts

The plaintiff owned a parcel of lake front property in the Town of Seneca Falls with an assessed value of \$425,000. In March, 2014, the property was sold at a tax sale.

In January of 2013 the plaintiff moved its offices from Trenton, New Jersey to Allendale, New Jersey. It appears undisputed that a partner in Maxim, Patrick Gawrysiak, called the Seneca County Real Property Tax Services Office to notify the County of the change of address. The Seneca County Real Property Tax Services Office mailed the plaintiff a change of address form to it's new address, 215 Franklin Turnpike, Allendale, New Jersey 07401. Plaintiff alleges it mailed in the change of address form. The County denies receipt of any such change of address.

The County's policy was apparently to initially only send notice of tax sales by certified mail. Such was done in timely manner here, but the certified mailing was returned to the County marked "Not deliverable as addressed, unable to forward" (Exhibit O, moving papers). The County Treasurer apparently believed that because of the statement that the post office was "unable to forward", that a second mailing or making contact with the post office to seek an alternative mailing address would be futile, and immediately arranged for posting of notice on the vacant property

The plaintiff never received any notice of the tax sale directly from the County. According to Maxim partner, Patrick Gawrysiak, he became aware of the pending tax sale by way of a telephone call from a friend during the evening of February 27, 2014, who informed him that the property was scheduled for sale on March 5, 2014. Mr. Gawrysiak states he called the Seneca County Real Property Tax Services Office the next day and was advised that he could stop the property from going to auction if he presented a certified check by the end of business on

that very day. He alleges that he explained that he could not do that because he was several States away and that office personnel told him he was welcome to bid on the property the following Wednesday, March 5, 2014. He alleges he drove to Waterloo, New York, on March 5th, but erroneously went to the Seneca County Courthouse instead of the Seneca County Offices at 1 DiPronio Drive. He arrived at 1 DiPronio Drive at approximately 10:05 a.m. and was informed by the secretary that after speaking with the Director of Seneca County Real Property Tax Services, he would not be allowed to register to bid because he had not arrived before 10:00 a.m. The property was then sold to defendant, Montezuma Property, LLC (herein after Montezuma).

Conclusions of Law

Notice

The County's policy did not follow the statutory scheme. RPTL 1125(1)(b)(i) directs the County "shall" send notice of its commencement of a foreclosure proceeding to the property owner "by both certified mail and ordinary first class mail...". If both are returned, the statute then states the County "shall attempt to obtain an alternative mailing address" from the United States postal service." RTPTL 1125(1)(b)(ii). If no alternative address is found, the statute then allows for notice by posting on vacant land. RPTL 1125(1)(b)(ii) and (c).

The County cannot rest on its assertion that doing an ordinary mailing and following up with the Post Office as directed by statute, would have been an exercise in futility. First, the statutes specifically states the County is obligated to do so. Second, certified and ordinary mailings have been done in cases where the certified mailing has been returned as undeliverable, but the ordinary mailing was not. In the Matter of Foreclosure of Tax Liens by the County of Clinton, 116 A.D.3d 1206 (3^d Dept 2014); Matter of County of Sullivan (Dunne-Town of Bethel), 111 AD 3d 1232, 1234 (3d Dept., 2013); Matter of County of Sullivan (Matter of Matejkowski), 105 AD 3d 1170, 1171(3d Dept., 2013), app dismissed 21 NY 3d 1062(2013). Further, "...the overarching principle that "statutes authorizing tax sales are to be liberally construed in the

owner's favor because tax sales are intended to collect taxes, not forfeit real property." Priest v Mareane, as CFO for Onondaga County Finance Dept., 45 A.D.3d 1474, 1476 Lv. Den., 10 N.Y.3rd 704 (2008).¹

Both defendants argue however, that since the plaintiff acknowledges it received actual notice of the sale on February 27, 2014, and the sale itself did not occur until seven days later, any technical defects by the County are moot.

"The purpose of the relevant statutory notice requirements is to provide the constitutionally mandated notice reasonably calculated to apprise interested parties of the pendency of the tax sale proceedings and afford them an opportunity to present their objections (citations omitted). It follows, therefore, that the absence of strict technical compliance with each statute in the notification scheme for an in rem tax foreclosure proceeding is not a fatal defect if the interested parties receive actual notice, which is the goal of the scheme. (Pompe v City of Yonkers, 179 AD 2d 628,629; *lv. Den.*, 81 NY 2d 706)" Law v Benedict, 197 AD 2d 808, 809-810(3d Dept., 1993).

The question then follows regarding whether actual notice is sufficient to defeat the statutory non-compliance. It can be.

"Lack of technical compliance with the provisions governing personal notice of foreclosure is necessarily fatal to an in rem tax foreclosure proceeding only where the failure to comply with the statute was the reason the property owner did not receive the notice which he or she was entitled." 99 NY Jur 2d Taxation & Assessment §689, *Necessity for Strict Technical Compliance; Proof of Compliance*.

The actual notice must be received in time for the party in interest to defend, however, (Pompe, supra), and the Fourth Department has ruled that eighteen days notice before a tax sale in

¹The County would do well to prospectively follow the statutory scheme. If mailings are done by certified and ordinary and one or both is not returned within forty-five days, the notice is "deemed" to have been received (RPTL 1125(1)(b)(i)), and nothing more is required of the County. Likewise, if both mailings are returned within forty-five days and if a subsequent inquiry to the post office yields no result, the posting of the notice on vacant property is "deemed sufficient...." RPTL 1125(1)(b)(i) & (iii) & 1125(1)(c). The statute thus provides a framework which is not only designed to provide a reasonable likelihood of actual notice, but which upon compliance, protects the County from a challenge based upon a lack of it.

insufficient as a matter of law to comport with due process requirements. Lyon v. Estate of Cornell, 269 AD 2d 737 (4th Dept., 2000). See also, 20 NY Jur 2d Constitutional Law §438, *Time of Notice*. This Court is accordingly compelled to determine the seven days notice in the within matter is likewise deficient.

Notice of Claim

The County's argument the Plaintiff needed to file a Notice of Claim as a condition precedent to this lawsuit, also lacks merit. No "...notice of claim is required in an action against a municipality where money damages are deemed incidental to the equitable relief sought (citations omitted). Here, plaintiffs' primary objective was to set aside the tax sale and subsequent conveyances and to obtain judgment declaring them to be the owners of the property." Greaney v Springer, 266 AD 2d 707,708 (3d Dept., 1999) As to its argument the action is untimely under RPTL 1131, the County failed to raise this defense in its answer. That section applies in any event to actions seeking to open up a default judgment tax foreclosure proceeding. Here, the Plaintiff has not asked to open up the default judgment, but rather seeks a declaration that the judgment is a nullity, and that the County accordingly had no title to convey to Montezuma. Such action is governed by the two year statute of limitations under RPTL 1137. In re Foreclosure of Tax Liens by City of Hudson, 114 AD 3d 1106 (3d Dept., 2014); app dismissed, 23 NY 3d 984(2014), lv app denied, 24 NY 3d 903(2014).²

Bona Fide Purchaser Defense

The defendant Montezuma submits it is a bona fide purchaser for value, and cites Panther Mountain Water Park, Inc. v County of Essex, 40 A.D.3d 1336 (3rd Dept, 2007), in support of

²In City of Hudson, the Court noted that the petitioner was not a party to the underlying foreclosure. There is nothing in RPTL §1137 that states the property owner doesn't get the benefit of its provisions. See 2609 Bailey Inc. V City of Buffalo, 161 Misc. 2d 419 (Erie Co. Sup. Ct., 1994); aff'd, 227 AD 2d 959(4th Dept., 1996).

its position that whatever remedies the plaintiff may have against the County of Seneca, it does not include vacatur of the deed that the County gave to Montezuma. Panther Mountain Water Park, Inc. is distinguishable however. In it, the plaintiff did not challenge the original tax foreclosure proceeding, but only contended that the County violated its resolution regarding late payment. Here the plaintiff has challenged the tax proceeding, which, as determined above, was fatally defective. Simply put, the County did not convey proper title to Montezuma because the county never properly acquired title. The deed given by the County to the defendant Montezuma, should accordingly be vacated and the judgment of foreclosure in the proceeding entitled, “In the Matter of the Foreclosure of Tax Liens by Proceeding in Rem pursuant to Article 11 of the Real Property Tax Law by the County of Seneca”, Index No. 45663, should be vacated as a nullity with respect to the plaintiff’s premises (Tax ID No. 38-1-49.111).

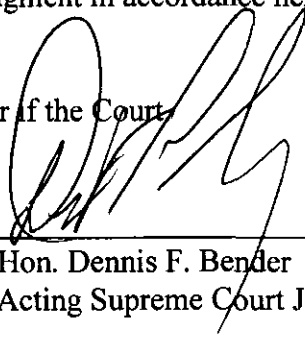
Amended Answer and Cross Claims

The motion by the defendant, Montezuma Properties, LLC, to be permitted to submit an amended verified answer is granted to the extent it may raise its cross claims against Seneca County. Leave to amend should be freely granted and it is noted that the County did not in any event submit any opposition in this regard. The proposed affirmative defenses are however rendered moot by this decision.

The answer by the County and by Montezuma as to the plaintiff Maxim Development Group should be stricken, and summary judgment on behalf of the plaintiff granted in accordance with this decision. (Love v County of Orange, 99 AD 23d 863 (2d Dept., 2012)). The cross claims by Montezuma LLC against the County of Seneca shall continue. Counsel for Montezuma shall make arrangements to have the amended answer and cross claim served upon the County of Seneca within thirty days of this decision date. Within sixty days after issue is joined, counsel for Montezuma shall request a preliminary conference with the Court unless the parties are otherwise able to resolve the claims by Montezuma Properties against the County of Seneca.

Counsel for the plaintiff to submit judgment in accordance herewith.

This constitutes the decision and order of the Court.

A handwritten signature in black ink, appearing to read 'Dennis F. Bender', is written over a horizontal line. The signature is stylized and cursive.

Dated: February 2, 2015

Hon. Dennis F. Bender
Acting Supreme Court Justice