

Wilmot v Kirik

2023 NY Slip Op 32025(U)

June 20, 2023

Supreme Court, Monroe County

Docket Number: Index No. E2020005150

Judge: Debra A. Martin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

THOMAS C. WILMOT, SR.
THOMAS C. WILMOT, JR., and
LORETTA W. CONROY,

Plaintiffs,

DECISION AND ORDER

v.

Index No. E2020005150

TONY KIRIK, and COUNTY OF MONROE

Defendants.

APPEARANCES:

Attorneys for plaintiffs:
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MONROE COUNTY LAW DEPT.
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Documents reviewed by the Court:

1. Amended Notice of Cross-Motion for a modification and clarification of the Court's Order filed with the Office of Monroe County Clerk on May 9, 2023;
2. Affidavit of H. Todd Bullard, Esq. sworn to on May 9, 2023, with exhibits A-B;
3. Notice of Cross-Motion for a dismissal of Wilmonts' cross motion filed with the Office of Monroe County Clerk on June 7, 2023;
4. Affidavit of Michael A. Rosenhouse, Esq. sworn to on June 7, 2023;
5. Affidavit of Tony Kirik sworn to on June 7, 2023, with exhibits A-B;
6. Memorandum of Points and Authorities by defendant Kirik filed June 7, 2023;
7. Reply Affidavit of H. Todd Bullard, Esq. sworn to on June 12, 2023, with exhibits A-B;
8. Reply Memorandum of Law in further support of Wilmonts' amended motion filed, June 12, 2023.

Martin, J.

Previously, this Court decided a declaratory judgment action that, at its core, was a dispute over the ownership of a 145-acre parcel of unimproved land. (see *Wilmot v Kirik*, 78 Misc 3d 1219(A) [Sup Ct 2021].) The land had been purchased at a tax foreclosure sale by defendant Tony Kirik (“Kirik”) for \$250,000. However, that sale was vacated by decision and order of this Court, dated October 22, 2021, after defendant County of Monroe (“County”) acknowledged it failed to follow its policies and procedures when it did not provide the required advanced statutory notice of the foreclosure proceedings to the plaintiffs, Thomas C. Wilmot, Sr. and his two adult children, Thomas C. Wilmot, Jr., and Loretta W. Conroy (“the Wilmots”). With respect to the property, this Court (1) declared that the Wilmots, beneficiaries of a right of first refusal filed in the Office of the Monroe County Clerk, were denied due process and invoked its broad equitable powers to set aside the Judgment of Foreclosure Sale; and (2) ordered the County to “cause a new foreclosure sale to be held in compliance *with all notice protocols* as soon as practicable.” (*Id* at 9.) All parties appealed the Court’s decision and judgment, which was unanimously affirmed for the reasons stated therein. (*Wilmot v Kirik*, 210 AD3d 1432 [4th Dept 2022], *appeal dismissed*, 39 NY3d 1069 [2023].)

Presently before the Court is plaintiffs’ application¹ to modify/resettle per CPLR § 5019 (a), seeking clarification as to how to carry out the Court’s judgment, and to add sisters, Mary Phillips and Jane A. Hunter (“the owners”) to the post-judgment

¹ The plaintiffs incorrectly identified its application as a cross motion as no other motion was pending before the Court. Although defendant Kirik had previously submitted an order to show cause, the Court declined to sign it.

proceedings. These owners resumed ownership of the property by virtue of the Court's vacatur of the Judgment of Foreclosure. In response, defendant Kirik filed a cross motion that sought an order (1) denying Wilmots' application; (2) vacatur of this Court's prior judgment; and (3) granting discovery. For the reasons set forth below, all motions are denied.

Wilmots' motion was characterized as one to modify, resettle and/or clarify this Court's prior judgment pursuant to CPLR 5019, the purpose of which is limited to revising an order to reflect the Court's decision. (*Barretta v Webb Corp.*, 181 AD2d 1018, 1018 [4th Dept 1992]; see Siegel, N.Y. Prac. § 420 [6th ed].) It is designed to enable a party to seek correction of an error or omission in form or for clarification, however substantive amplifications of a decision are impermissible. (*Gormel v Prudential Ins. Co. of America*, 167 AD2d 829, 829 [4th Dept 1990].) Motions to resettle "rest on the inherent power of the courts to cure mistakes, defects and irregularities that do not affect substantial rights of [the] parties." (*Torpey v Town of Colonie*, 107 AD3d 1124, 1126 [3d Dept 2013] [internal citations and quotation marks omitted].)

Although the Court acknowledges the unprecedented nature of its prior judgment, it declines the Wilmots' invitation to advise how to carry out its directives. Since the Court's prior judgment sufficiently declared the plaintiffs' rights, resettlement is improper. Common sense and the County's application of its governing statutory procedures should rule the day. The net effect of this Court's prior judgment is that ownership of the property automatically reverted to the owners after the Judgment in Foreclosure was vacated. Further, the Court's directives to the County to hold a new

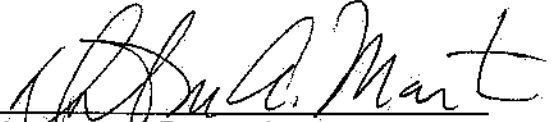
foreclosure sale “*with all notice protocols*”, could only be interpreted to mean starting from the beginning of the foreclosure process dictated by the controlling statute.

The County's hesitation to follow this directive is perplexing given this Court's judgment, which was affirmed by the Fourth Department, and the dismissal of defendant Kirik's appeal by the Court of Appeals. Inherent in the Court's judgment was the likelihood that the outstanding taxes owed would either be paid by the owners or the Wilmots, and their redemption of the property would eliminate the need for a tax foreclosure sale. As to making Kirik whole, it is for the County to decide how to return the \$250,000 he paid at the now-vacated foreclosure sale, along with any additional taxes he may have paid. Presumptively, the County will seek repayment from the owners and add the taxes paid by Kirik to the current outstanding tax bill, thereby making the County whole. Absent evidence to the contrary, there is no basis to believe that the owners will not fully cooperate with the County's request to recoup any surplus funds previously paid to them. Accordingly, there is no need to join them as parties to this action.

Defendant Kirik's cross motion is without foundation in law or fact, and is denied. The Court is unaware of any statutory authority to seek a substantive change to its prior judgment at this juncture. Moreover, it is noted that defendant Kirik's notice of cross motion is not specifically identified as one to reargue or to renew as required by CPLR 2221 [d] [1] and [e] [1]. Even if the Court were to treat the application as one to reargue, it is untimely. (CPLR 2221 [d] [3].) Neither does the application qualify as a motion to renew, since there are no new facts that were not previously contemplated by the Court

in its earlier decision. Similarly, the request for discovery must be denied since there is no action pending before the Court.

Dated: June 20, 2023


HONORABLE DEBRA A. MARTIN
ACTING JUSTICE OF THE SUPREME COURT