

June 28, 2021

VIA FEDERAL EXPRESS

John P. Asiello, Chief Clerk & Legal Counsel
Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: Hetelekides v. County of Ontario
APL-2021-00111
Respondent's Jurisdictional Response

Dear Mr. Asiello:

Please accept this correspondence as the Jurisdictional Response submitted on behalf of Respondent, County of Ontario (the "County") in the above matter.

This matter arises from the County's foreclosure of real property for delinquent taxes pursuant to Article 11 of the Real Property Tax Law. Appellant has filed a notice of appeal and preliminary appeal statement, claiming that an appeal as of right lies on constitutional grounds pursuant to CPLR §5601(b)(1).

Specifically, Appellant is claiming that due process violations occurred where a property owner died after the filing of the list of delinquent taxes, the operative date for determining interested parties entitled to notice under Article 11 of the Real Property Tax Law, and statutory notices addressed to the deceased property owner were mailed to and received at the subject property, and the County Treasurer made additional informal notification attempts during the week prior to the expiration of the redemption deadline.

LEGAL STANDARDS

Not all due process violation claims will present a substantial constitutional question for purposes of CPLR §5601(b). See Steven B. Prystowski, Practice Commentaries, Civil Practice Law and Rules §5601 (Consol. Law Svc. 2021). For an appeal as of right to lie based upon a constitutional issue, the appeal must present “directly and primarily an issue determinable only by [the court’s] construction of the Constitution of the state or of the United States.” People ex rel. Moss v. Bd. of Supervisors of Oneida County, 221 N.Y. 367, 369 (1917). In Moss, this court acknowledged that “each enforcement of a statute by a court involves its constitutionality or the construction of the Constitution of the state. Id. However, the court further acknowledged that an issue of enforcement of a statute did not present a constitutional issue warranting an appeal as of right, and was not within the jurisdictional purview of the court. Id.

Furthermore, if the decision to be reviewed was based upon, or may have been based upon another ground besides a constitutional ground, an appeal as of right will not lie. Haydorn v. Carroll, 225 N.Y. 84, 88 (1918).

AN APPEAL AS OF RIGHT DOES NOT LIE IN THIS MATTER

Initially, this court has had opportunity to consider where an appeal as of right was presented under very similar facts and circumstances, and declined on jurisdictional grounds. Matter of Foreclosure of Tax Liens by Orange County (Goldman), 165 A.D.3d 1112 (2d Dep’t 2018) appeal dismissed 35 N.Y.3d 996 (2020). In Goldman, the Second Department dismissed an *in rem* tax foreclosure proceeding where the property owners had died several years prior to the initiation of those proceedings, focusing on the requirements of due process in providing notice of such proceedings. Goldman, 165 A.D.3d at 1119-1120. Orange County appealed this determination, however, this court dismissed the appeal, holding that “no substantial constitutional question is directly involved.” Goldman, 35 N.Y.3d at 998.

Although the Appellant has argued that because Appellant’s decedent died after the filing of the list of delinquent taxes, but before statutory foreclosure

notices were issued pursuant to RPTL §1125, that Appellant would have been an interested party entitled to due process under RPTL Article 11. Although couched by Appellant as a constitutional issue, the real issue as was recognized by the Fourth Department was the County's compliance with the requirements of relevant statutes, namely RPTL §§1124 and 1125.

In its analysis, the Fourth Department properly found that the County determined the interested parties entitled to notice in accordance with RPTL §1125(a), which requires that the County issue notice to "each owner and any other person whose right, title, or interest was a matter of public record as of the date the list of delinquent taxes was filed, which right, title or interest will be affected by the termination of the redemption period, and whose name and address are reasonably ascertainable from the public record, including the records in the offices of the surrogate of the county, or from material submitted to the enforcing officer pursuant to paragraph (d) of this subdivision." The Fourth Department specifically held that "the list of delinquent taxes was filed on November 14, 2005, when decedent was still alive. Plaintiff was thus not entitled to notice under that statute." Hetelekides v. County of Ontario, 193 A.D.3d 1414, 1417 (4th Dep't 2021).

Furthermore, the Fourth Department further analyzed whether the County's actions were proper under RPTL §1125 when the County became aware just prior to the expiration of the redemption deadline that the property owner had died. In this regard, the Fourth Department stated "we conclude that defendants took steps beyond what was required in the statute in an attempt to provide notice to interested persons . . . In striking the balance that the due process analysis requires, we note that, inasmuch as no Surrogate's Court proceeding had been commenced, defendants could not have been aware of those people whose interests in the property arose after decedent's death. Moreover, despite three personal attempts to talk to someone with authority at the restaurant and provide that person with actual notice, no owner or manager was ever made available until after the redemption period had ended. To require more of defendants would be unreasonable." Hetelekides, 193 A.D.3d at 1419.

The notification requirements of RPTL Article 11 were legislated by the State of New York in light of the United States Supreme Court decisions in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Jones v.

Flowers, 547 U.S.220, 226 (2006). The Court of Appeals has had the opportunity to review the statutory framework of RPTL Article 11 in light of well settled concepts of due process on various occasions. See MacNaughton v. Warren County, 20 N.Y.3d 252 (2012); Matter of Orange County Comm’r. of Fin. (Helseth), 18 N.Y.3d 634, 639 (2012); Kennedy v. Mossafa, 100 N.Y.2d 1, 9 (2003); Matter of Harner v. County of Tioga, 5 N.Y.3d 136, 140 (2005). The arguments raised by Appellant amount to an analysis of whether the County complied with the requirements of RPTL Article 11, and these statutory requirements have been exhaustively reviewed by this court in prior cases. Thus, no substantial constitutional issue has been presented for review.

Finally, the issues raised by Appellant were also raised in Barnes v. McFadden, 25 A.D.3d 955 (3d Dep’t 2006). In Barnes, tax foreclosure notices were sent to the property owner at his daughter’s address, which was where the property owner was living because he was allegedly suffering from dementia at the time. Barnes, 25 A.D.3d at 956. The notices at issue were mailed in December 2003, signed for by the property owner’s 16 year-old granddaughter, and then handed to the property owner. Id. The property owner died in February 2004, and the property was foreclosed in May 2004. Id. The Third Department rejected the petitioner’s claims that as executor and sole beneficiary under the property owner’s will, she was an interested party entitled to notice and upheld the County’s procedures as meeting the requirements of due process, specifically reasoning that: (1) the County did not know when the notices were sent that the property owner was incompetent; and (2) the petitioner was not an “interested person” as defined by RPTL 1125 insofar as her interest in the property was not a matter of public record as of the date the list of delinquent taxes was filed. Id. at 957.

The taxpayer in Barnes filed an appeal with this court on constitutional grounds. However, this court dismissed the appeal, holding that “no substantial constitutional question is directly involved. Barnes v. McFadden, 6 N.Y.3d 890 (2006).

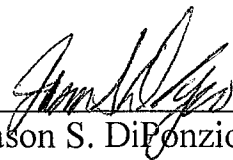
Accordingly, because the determination of the appeal below was based upon a ground other than a constitutional ground, namely the application of RPTL §1125, and because there are no allegations that RPTL §1125 is unconstitutional,

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this appeal must be dismissed on the ground that no substantial constitutional ground is involved.

Thank you for your consideration of this matter.

Respectfully submitted,



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