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**Supreme Court of the State of New York**  
**Appellate Division – Third Department**

**Docket No.:**  
**531787**

JAMES B. NUTTER & COMPANY,

*Plaintiff-Appellant,*

- against -

COUNTY OF SARATOGA, STEPHEN M. DORSEY, IN HIS CAPACITY  
AS TAX ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA  
and TOWN OF GALWAY,

*Defendants-Respondents,*

*(See inside cover for continuation of caption)*

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**REPLY BRIEF FOR PLAINTIFF-APPELLANT**

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**Saratoga County Clerk's Index No.: 2019-3177**

APPELLATE INNOVATIONS  
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- and -

GALWAY CENTRAL SCHOOL DISTRICT, STEVEN ABDOO and SENSIBLE PROPERTY HOLDINGS, LLC, “John Doe #1” through “John Doe #12” the last twelve names being fictitious and unknown to plaintiff the persons or parties intended being the tenants, occupants, persons, or corporations, if any, having or claiming interest in or lien upon the premises, deccribed in the complaint,

*Defendants.*

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**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT .....	1
ARGUMENT	
POINT I	
A DISPUTED ISSUE OF MATERIAL FACT REGARDING SARATOGA COUNTY’S COMPLIANCE WITH RPTL § 1125 MUST PRECLUDE JUDGMENT IN SARATOGA COUNTY’S FAVOR.....	2
POINT II	
THE LOWER COURT POSSESSES THE NECESSARY AUTHORITY TO ENFORCE AN EQUITABLE RESOLUTION.....	6
CONCLUSION.....	9
PRINTING SPECIFICATIONS STATEMENT .....	11

## TABLE OF AUTHORITIES

**Page**

**Cases:**

<i>In re Foreclosure of Tax Liens,</i> 59 A.D.3d 1065 (4th Dep’t 2009) .....	8
<i>Key Bank of Central N.Y. v. County of Broome,</i> 116 A.D.2d 90 (3d Dep’t 1986) .....	7
<i>Law v. Benedict,</i> 197 A.D.2d 808 (3d Dept. 1993) .....	5
<i>Long Island Sav. Bank of Centereach, F.S.B. v. Jean Valiquette, M.D., P.C.,</i> 183 A.D.2d 877 (2d Dep’t 1992) .....	8
<i>Matter of County of Clinton (Greenpoint Assets, Ltd.),</i> 116 A.D.3d 1206 (3d Dep’t 2014) .....	4
<i>Matter of County of Sullivan (Dunne – Town of Bethel),</i> 111 A.D.3d 1235 (3d Dept. 2013) .....	4, 5
<i>Matter of County of Sullivan (Matejkowski),</i> 105 A.D.3d 1170 (3d Dep’t 2013) .....	4, 5
<i>Matter of Foreclosure of Tax Liens By County of Erie,</i> 225 A.D.2d 1089 (4th Dep’t 1996) .....	3, 6
<i>Sheehan v. County of Suffolk,</i> 71 N.Y.2d 52 (1986) .....	7
<i>West Branch Realty Corp. v. County of Putnam,</i> 293 A.D.2d 528 (2d Dep’t 2002) .....	3, 6

**Rules, Laws and Statutes:**

RPTL §§ 1122.....3  
RPTL §§ 1124.....3  
RPTL § 1125 .....1, 2, 3, 4, 6

Appellant James B. Nutter & Company respectfully submits this brief in further support of its appeal of the decision and order denying its motion for summary judgment and granting Appellee Saratoga County’s cross-motion for summary judgment entered by the Supreme Court of Saratoga County on April 28, 2020.

**PRELIMINARY STATEMENT**

Saratoga County’s opposition to JBNC’s appeal ignores a central and dispositive fact: the United States Postal Service (USPS) tracking information establishes that JBNC did not receive the statutorily mandated notice of a tax foreclosure proceeding. This lack of notice is supported by two sworn affidavits from JBNC employees and JBNC’s actions in proactively seeking to identify and pay any unpaid tax liens. This evidence serves to undermine Saratoga County’s self-serving affidavits, and prevents the County relying on the presumption afforded under RPTL § 1125.

Despite clear evidence that JBNC did not receive notice and was therefore deprived of due process prior to losing its interest in the Property,<sup>1</sup> Saratoga County insists that it satisfied its notice obligations under RPTL § 1125, and that even if

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<sup>1</sup> Capitalized terms not defined herein shall retain the meaning ascribed to them in JBNC’s Opening Brief (“Op. Br.”).

JBNC did not receive notice, no equitable relief is warranted. As discussed in further detail below, both arguments fail.

## ARGUMENT

### POINT I

#### **A DISPUTED ISSUE OF MATERIAL FACT REGARDING SARATOGA COUNTY'S COMPLIANCE WITH RPTL § 1125 MUST PRECLUDE JUDGMENT IN SARATOGA COUNTY'S FAVOR**

Rather than address the undisputed evidence that the statutorily required foreclosure notice was not delivered to JBNC, Saratoga County's Response attempts to distract the court with red herrings and non-relevant arguments and case law.

It is instructive to first look at what Saratoga County does *not* argue. The County does not contest that the USPS tracking confirmation confirms that the statutorily required notice was delivered to the wrong address. Saratoga County also does not contest the affidavits from two JBNC employees, both of whom state that JBNC never received any notice of the tax foreclosure proceeding. And, despite their obvious relevance to the Parties' dispute, the County does not attempt to address the cases cited in JBNC's opening brief — cases demonstrating that based on the record, Saratoga County is not entitled to a rebuttable presumption that it complied with the notice obligations under RPTL § 1125. Instead, the County offers arguments devoid of any factual or legal basis, all of which entirely miss the mark.

*First*, Saratoga County dedicates multiple pages recounting its purported efforts to comply with other, unrelated mandatory provisions of the tax foreclosure

statutes, including RPTL §§ 1122(7) and 1124. *See* Response Brief (“Resp. Br.”) at 6-8. Yet the County’s compliance with these statutory provisions is not at issue.

Rather, JBNC contests whether Saratoga County complied with its obligations under RPTL § 1125(1)(b) to send foreclosure notices to JBNC by certified and first-class mail when the undisputed record demonstrates that the notice was not delivered to JBNC, but instead to an unknown P.O. box, thereby depriving JBNC of its right to receive proper notice prior to a tax foreclosure. *See* Op. Br. at 10-16. By failing to meaningfully address and contest whether the undisputed evidence deprives the County of its rebuttable presumption of receipt, the County effectively concedes that summary judgment in its favor was improper, and an issue of material fact remains as to the County’s compliance with its notice obligations under New York law.

*Second*, New York courts require the County to provide *actual* notice before proceeding with foreclosure and will set aside judgments of foreclosure and sale where the evidence demonstrates that the tax foreclosure notice was delivered to the wrong address. *See* Op. Br. at 14-15 (citing *Matter of Foreclosure of Tax Liens By County of Erie*, 225 A.D.2d 1089, 1089 (4th Dep’t 1996) and *West Branch Realty Corp. v. County of Putnam*, 293 A.D.2d 528, 529 (2d Dep’t 2002)). Notably, Saratoga County’s brief does not even address this case law. Instead, it relies solely upon three factually distinguishable cases for the proposition that it is deemed to have provided adequate notice to JBNC pursuant to RPTL § 1125(1)(b) solely



because the tax foreclosure notices were not returned as undeliverable within 45-days after mailing. *See* Op. Br. at 8-10.<sup>2</sup> But this argument misses the point: the record evidence shows that the notices were sent to the wrong address, and so the County does not benefit from the rebuttable presumption that arises when the notices are sent *to the correct address* and not returned. *See* RPTL § 1125. Accordingly, the legal authority upon which the County relies fails to address and reconcile the sole issue at dispute in this case: whether the County complied with its notice obligations when the undisputed evidence demonstrates that the tax foreclosure notice was actually delivered to the wrong address through no fault of JBNC.

That foreclosure notices were not returned as undeliverable within 45 days after mailing in the instant case is of no moment where the clear, uncontroverted evidence establishes that the foreclosure notice was sent to the wrong address.<sup>3</sup> As

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<sup>2</sup> Citing in *Matter of County of Clinton (Greenpoint Assets, Ltd.)*, 116 A.D.3d 1206, 1207 (3d Dep't 2014) (concluding county complied with obligations under RPTL § 1125 when it made two attempts to serve notice, and after the first attempt, only the notice sent by certified mail was returned, and after the second attempt, both notices were returned more than 45-days after being mailed, but there was no record evidence that any notice was actually delivered to an address that did not belong to the former owner of the property); *Matter of County of Sullivan (Dunne – Town of Bethel)*, 111 A.D.3d 1235 (3d Dept. 2013) (concluding county complied with tax foreclosure notice obligations, even though notice was sent and delivered to the wrong address, where the former owners had moved and failed to satisfy their own obligations under RPTL § 1125(d) to update the relevant tax authority and the public record with their current mailing address); *Matter of County of Sullivan (Matejkowski)*, 105 A.D.3d 1170 (3d Dep't 2013) (same).

<sup>3</sup> The plaintiffs in two of the cases relied upon by the County moved and failed

JBNC advised in its opening brief, “[t]he 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.” *See* Op. Br. at 10-11 (citing *Law v. Benedict*, 197 A.D.2d 808, 809-10 (3d Dept. 1993)). Thus, “[e]ven if the notices are not returned, . . . the County’s assertion that it provided the requisite notice only creates a *rebuttable presumption* that can be challenged.” *Id.* at 11 (citing *Law*, 197 A.D.3d at 810).

Saratoga County argues otherwise, claiming, without legal support, that “even if the notices weren’t actually received by JBNC due to an error at the Postal Service,” it is entitled to the presumption that “the notices were properly sent[.]” *Resp. Br.* at 9. There can be no such presumption in this instance, and Saratoga County points to no supporting case law that holds otherwise. Indeed, a tax

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to inform the county of their change of address, resulting in the notices being sent to former addresses at which they no longer lived. *Matter of County of Sullivan (Dunne – Town of Bethel)*, 111 A.D.3d 1235 (3d Dept. 2013); *Matter of County of Sullivan (Matejkowski)*, 105 A.D.3d 1170 (3d Dep’t 2013). Thus, although in both cases, a notice sent by certified mail was returned to the county, the courts held that the notices were deemed received because the notices sent by first class mail were not returned, and the courts noted that it was owners’ responsibility to update their address as necessary. In the instant case, however, the notice was sent to an address that did not belong to JBNC at any point in time, not to a former address. Unlike the plaintiffs in *Matter of County of Sullivan (Dunne – Town of Bethel)* and *Matter of County of Sullivan (Matejkowski)*, JBNC did not receive the requisite notice through no fault of its own.

foreclosure and sale may be set aside where the evidence demonstrates, like here, that the foreclosure notice was delivered to the wrong address. *See Matter of Foreclosure of Tax Liens By County of Erie*, 225 A.D.2d at 1089 (setting aside judgment of foreclosure and sale where property owner put forth evidence that county mailed the notice to the wrong address); *West Branch Realty Corp.*, 293 A.D.2d at 529 (“Pursuant to RPTL 1125, the defendant County of Putnam must provide *actual notice* of an in rem foreclosure proceeding.”).

Accordingly, an unresolved issue of material fact remains as to whether JBNC received notice of the tax foreclosure proceeding as required by RPTL § 1125(1)(b).

## **POINT II**

### **THE LOWER COURT POSSESSES THE NECESSARY AUTHORITY TO ENFORCE AN EQUITABLE RESOLUTION**

Saratoga County contends that the lower court properly declined to impose an equitable remedy to resolve this dispute. But, in doing so, the County again elides the central issue that it failed to provide proper notice under New York law where JBNC never received notice of the tax foreclosure proceeding in which it lost all of its interest in the Property. And, it is for that reason that the lower court said the matter “cries out for an equitable remedy.” R-10.

Saratoga County again relies solely on factually distinguishable cases to support its contention that the lower court was not permitted to fashion an equitable remedy to resolve this dispute. *See Resp. Br.* at 10-13. But, each of the cases relied

upon by the County fails to address the dispositive fact in this case that the party with an interest in the subject property did not actually receive the statutorily required notice. For example, in *Sheehan v. County of Suffolk*, it is undisputed that the plaintiffs actually received the notice of the tax foreclosure. 71 N.Y.2d 52, 59 (1986). The plaintiffs in that case argued that the court should reverse the foreclosure because they were allegedly not apprised that their property would be sold at a tax foreclosure sale without competitive bidding and that they would not receive any surplus from the sale. The court rejected the plaintiffs' claim and acknowledged that the county had complied with its obligations where the plaintiffs had actually received notice of the foreclosure in accordance with New York law. *Id.* (holding "[o]nce taxpayers are provided with notice and an opportunity to be heard on the adjudicative facts concerning the valuation of properties subject to tax, as was done here, they have received all the process that is due."). Similarly, in *Key Bank of Central N.Y. v. County of Broome*, it was again undisputed that the plaintiff actually received notice of the foreclosure, but instead challenged the propriety of the foreclosure where the contents of the notice correctly identified the property, but misidentified the owner of the property. 116 A.D.2d 90, 92, (3d Dep't 1986).

These distinctions are crucial. JBNC does not argue on appeal, as Saratoga County implies, that it is entitled to an equitable remedy solely because the County retained the surplus value of the Property following the tax foreclosure. Rather,

under the unique circumstances present in this action, where it is undisputed that JBNC never actually received the notice of foreclosure, the lower court had the authority and discretion to grant some form of equitable relief to JBNC, as courts have done in the past. *See, e.g., In re Foreclosure of Tax Liens*, 59 A.D.3d 1065, 1065 (4th Dep’t 2009) (setting aside default judgment of foreclosure where property owner failed to pay approximately \$24 in interest on overdue property taxes and concluding “that this is an appropriate case in which to exercise our broad equity power to vacate [the] default judgment” to avoid “disproportionately harsh result”). Such relief can take multiple forms, including allocating some of the surplus value from the sale of the Property to JBNC.

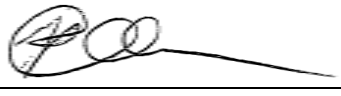
Further, Saratoga County states that JBNC is not entitled to equitable relief because “there was no ‘fraud, misrepresentation, deception, or misconduct’ *as alleged by Appellant. . .*” Resp. Br. at 11 (emphasis added). But JBNC never alleged that Saratoga County engaged in any such behavior and the quote appears nowhere in JBNC’s opening brief. Instead, JBNC quoted a Second Department case in which the court referred to its broad equitable “discretion to set aside a judicial sale where fraud, collusion, mistake, or misconduct that casts suspicion on the fairness of the sale.” Op. Br. at 17 (citing *Long Island Sav. Bank of Centereach, F.S.B. v. Jean Valiquette, M.D., P.C.*, 183 A.D.2d 877, 877 (2d Dep’t 1992)). To be clear, JBNC has not alleged that Saratoga County’s failure to notify it of the tax

foreclosure was intentional or nefarious. *See* Op. Br. at 17 (arguing that “both the Town of Galway and Saratoga County made major mistakes”). And JBNC need not make such a showing to obtain equitable relief. What matters here is that the undisputed evidence demonstrates that JBNC did not receive the notice to which it was entitled by statute, and as a result, it was deprived of due process, which prevented it from taking all necessary steps to protect its first priority interest in the Property. This undoubtedly calls the fairness of the sale into question, making equitable relief warranted. The trial court erred when it ruled that it lacked the legal authority to provide a fair remedy.

### **CONCLUSION**

For the foregoing reasons, Appellant James B. Nutter & Co. respectfully requests that the lower court’s April 28, 2020 order denying its motion for summary judgment and granting Appellee Saratoga County’s cross-motion for summary judgment be reversed, and the matter be remanded to the lower court for further proceedings.

Dated: New York, New York  
January 25, 2021

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## **PRINTING SPECIFICATIONS STATEMENT**

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