

Oral Argument Time Requested: 5 Minutes
By: Michael J. Hartnett, Esq.

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – THIRD JUDICIAL DEPARTMENT**

IN THE MATTER OF

**JAMES B. NUTTER & COMPANY,
PLAINTIFF-APPELLANT**

AGAINST

**COUNTY OF SARATOGA, STEPHEN M. DORSEY,
IN HIS CAPACITY AS TAX ENFORCEMENT OFFICER FOR SARATOGA COUNTY,
TOWN OF GALWAY,
GALWAY CENTRAL SCHOOL DISTRICT,
STEVEN ABDOO, AND
SENSIBLE PROPERTY HOLDINGS, LLC,**

DEFENDANTS-RESPONDENTS,

APPELLATE BRIEF for

**DEFENDANT-RESPONDENT
SARATOGA COUNTY AND
STEPHEN M. DORSEY,
AS TAX ENFORCEMENT OFFICER FOR SARATOGA COUNTY**

APPEAL NUMBER 531787

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PRELIMINARY STATEMENT

The underlying proceeding is an application pursuant to the Real Property Tax Law which sought to, amongst other things; vacate a tax foreclosure by the County of Saratoga. The Supreme Court granted a summary judgment motion made by Defendant County of Saratoga and Stephen M. Dorsey as Tax Enforcement Officer, and thereafter dismissed the Petition as it related to all Defendants. Plaintiff, James B. Nutter & Company (hereinafter “JBNC”) filed a Notice of Appeal of the Decision and Order granting summary Judgment on July 2, 2020. (R1 – R2)¹

¹ (R) refers to pages of the Record on Appeal.

STATEMENT OF FACTS

The property subject to this proceeding is located on the banks of Galway Lake in the Town of Galway, Saratoga County with a mailing address of 5732 Crooked Street, Broadalbin, New York. On August 11, 2008, Donald Craig and Lois Craig obtained a reverse mortgage on the property from JBNC. (R 248 – R 258) The mortgage indicates an address for JBNC as “4153 Broadway, Kansas City, MO 64111.” (R 248).

Mortgage Foreclosure Action

In 2015, JBNC commenced a mortgage foreclosure action on the property. (R29 – R42) On June 12, 2019, a Judgement of Foreclosure and Sale was granted determining that \$276,785.43 was due and owing as of January 2019.

Tax Foreclosure Action

Saratoga County held tax liens against the parcel for tax years 2016 and 2017. (R150) On December 16, 2016, the county commenced the proceeding to foreclose on delinquent 2016 taxes by filing a list of all parcels with unpaid 2016 taxes in the Office of the Saratoga County Clerk. (R160) The subject property was included on the recorded list of delinquent taxes, listed as Lien #410 and Tax Parcel #185.13-1-6. (R174) The amount of delinquent 2016 taxes is listed

as \$3,630.64. (R174) The amount of unpaid delinquent taxes at the time the Tax Foreclosure was commenced was \$9,330.97 (R212) JBNC (or any other party or entity) did not pay the delinquent 2016 taxes. JNBC paid the 2018 Town of Galway taxes to the Town of Galway in March 2018. (R64)

A Petition and Notice of Foreclosure was published in the County's official newspapers, *The Daily Gazette* and *The Saratogian*. (R148; R219 – R228). Affidavits of publication were filed with the County Clerk on July 11, 2018. (R218; R225)

As part of the Tax Foreclosure proceeding, Janet Sabin with the Saratoga County Attorney's Office located a Reverse Mortgage (recorded in September 2008) on the subject property filed with the County Clerk by JBNC. (R156 – R157) The address listed on the Mortgage for JBNC was 4153 Broadway, Kansas City, MO 64111 (R157)

A Petition, Notice of Foreclosure, and Notice of commencement of Tax Foreclosure proceeding were mailed to JBNC by both first class and certified mail on May 24, 2018 (R229; R236) The mailings were both addressed to James B. Nutter & Company, Legal Dept., 4153 Broadway, Kansas City, MO 64111 (R231). Neither the certified mailing nor the first class mailing of the Notice of Foreclosure and Petition and Notice of Foreclosure were returned to the County Attorney's Office as undeliverable. (R156 – R157) The Saratoga

County Treasurer's Office has no record of JBNC contacting that office to inquire as to the status or amounts of the unpaid 2016 and 2017 taxes on the subject property. (R158 – R159) Two employees of JBNC have averred that JBNC has no record that the notices were received by JBNC. (R108 – R113)

The Notice of Foreclosure provided the last day to answer or redeem the property was September 28, 2018. JBNC did not file an Answer in the Tax Foreclosure proceeding and did not redeem the property prior to September 28, 2018. (R150; R232 – R235)

The Town of Galway held the tax lien against the parcel for tax year 2018. JBNC paid the delinquent taxes for the parcel for tax year 2018. (R68) At the time that the 2018 Galway taxes were paid, the 2016 and 2017 taxes had been turned over to the County for collection. In that circumstance the County makes the Town whole by paying the amount of the delinquent taxes, and the County acquires the tax lien giving it the right to collect back taxes or foreclose if necessary. (R158 – R159)

On December 4, 2018, Saratoga County Court (Murphy, J.) issued an Order and Judgment Pursuant to RPTL §1136, which granted Saratoga County a Judgment of Foreclosure on the subject property awarding Saratoga County title and possession and the ability to convey the property. (R69 – R75) The property

was subsequently sold at a tax auction on March 19, 2019 and conveyed to Defendant-Respondent Sensible Holdings, LLC on May 8, 2019. (R76 – R83)

Procedural History

The instant proceeding resulting in this appeal was commenced by the Filing of a Summons and Complaint, stamped received by the Saratoga County Clerk on September 23, 2019 in Supreme Court. (R16) The complaint sought, amongst other things, to vacate the tax judgment issued in connection with the Tax Foreclosure proceeding; to vacate the Deed to Saratoga County; to vacate the Deed to Sensible Holdings, LLC; to award monetary damages and to direct Saratoga County to provide surplus monies received through a tax auction to be applied to owners and lienholders of foreclosed properties. (R24)

Saratoga County and Stephen M. Dorsey as Tax Enforcement Officer (collectively “Saratoga County”) filed a Verified Answer on November 6, 2019. (R89 – R94) The Town of Galway filed an Answer on October 31, 2019.

JBNC filed a motion for Summary Judgment on January 21, 2020 (R98). Defendant-Respondent Saratoga County cross-moved for Summary Judgment on February 14, 2020 (R145). A Notice of Motion to intervene was filed by Rostantin Kruczowy, Michelle Bozzi and Adirondack Trust (collectively “intervenors”) on March 17, 2020.

On April 28, 2020, the Supreme Court (Crowell, J.S.C.) dismissed JNBC's motion for summary judgment; granted Saratoga County's motion for summary judgment and dismissed the motion to intervene (without prejudice) as academic (R4 – R13).

ARGUMENT

Point I.

THE CROSS-MOTION FOR SUMMARY JUDGEMENT ESTABLISHED AS A MATTER OF LAW THAT JBNC WAS PROVIDED WITH LEGALLY SUFFICIENT NOTICE OF THE UNDERLYING TAX FORECLOSURE PROCEEDING.

It is well settled that “the proponent of a summary judgment motion must make a prima facie showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” Alvarez v. Prospect Hospital, et al., 68 N.Y.2d 320, 324 (1986) (internal citations omitted). Once a prima facie showing has been made, the burden shifts and a party opposing the motion must demonstrate evidentiary facts or materials to rebut the prima facie showing. Id at 325 (internal citations omitted).

As quoted by Judge Crowell in her Decision and Order, “Tax foreclosure proceedings enjoy a presumption of regularity, such that the tax debtor has the burden of affirmatively establishing a jurisdictional defect or invalidity in such

proceedings.” Matter of County of Sullivan v. Matejkowski, 105 A.D.3d 1170 (3rd Dept. 2013), quoting Kennedy v. Mossafa, 100 N.Y.2d 1, 8 (2003).

RPTL §1122(7) provides that the filing of a list of unpaid taxes by the County with the County Clerk’s Office constitutes and has the same force and effect as filing a notice of pendency. On December 16, 2016, the county commenced the proceeding to foreclose on delinquent 2016 taxes by filing a list of all parcels with unpaid 2016 taxes in the Office of the Saratoga County Clerk.

(R160) The subject property was included on the recorded list of delinquent taxes, listed as Lien #410 and Tax Parcel #185.13-1-6. (R174) There has been no assertion or factual issue raised by any party that Saratoga County failed to comply with RPTL §1122(7).

RPTL §1124, requires that in a Tax Foreclosure proceeding that the Petition and Notice of Foreclosure be published in newspapers for three non-consecutive weeks. A Petition and Notice of Foreclosure was published in the County’s official newspapers, *The Daily Gazette* and *The Saratogian*. (R148; R219 – R228) in accordance with the requirements of the statute. Affidavits of publication were filed with the County Clerk on July 11, 2018. (R218; R225) There has been no assertion or factual issue raised by any party that Saratoga County failed to comply with RPTL §1122(7).

Real Property Tax Law §1125(1)(b) provides that notices of foreclosures must be served on lienors and persons with a recorded interest in a parcel being foreclosed by certified mail and ordinary first class mail. RPTL §1125(1)(b). Further, RPTL §1125 provides that “the notice shall be deemed received unless both the certified mailing and the ordinary first class mailing are returned by the United States Postal Service within forty-five days after being mailed. RPTL §1125(1)(b).”

Notably, there has been no assertion by any party to the proceeding that raises a question of fact with respect to whether the applicable Petition and Notice of Foreclosure were mailed by Saratoga County to JNBC. Further, there has been no triable issue of fact raised as to the sworn assertions that the mailed notices were returned as undeliverable within forty-five days. JNBC’s assertions that the notices “were improperly sent” are simply not supported by the record. The affidavits of Janet Sabin, Charles Pasquarell and Cynthia Baker are - and remain – entirely undisputed. Those aforementioned sworn affidavits outline that the Petition and Notice of Foreclosure were mailed in envelopes addressed to JNBC by both ordinary first class mail and certified mail, as required by the statute. Further, the affidavits of Janet Sabin and Stephen Dorsey remain undisputed in that the mailings sent to JNBC were not returned by the United States Postal Service within forty-five days. As noted by Justice Crowell in her decision, “Saratoga County’s

filing of the tax foreclosure proceeding, publishing notice of the tax foreclosure proceeding in two newspapers and mailing a notice to [JNBC] by certified mail and first class mail provided plaintiff with sufficient due process.” (R4 – R13)

The submissions by Appellant of JNBC employees who have averred that the notices weren’t delivered to them by the United States Postal Service do not create a triable issue of fact as to whether the notices were properly sent in accordance with the requirements of the Real Property Tax Law. Stated otherwise, even if the notices weren’t actually received by JNBC due to an error at the Postal Service, the notices were properly sent, and when considered in conjunction with both the newspaper publications and filing of a list with the County Clerk under RPTL 1122(7) (serves as a *lis pendens*), constituted adequate notice of the proceeding under RPTL §1125. As provided by this Court in Matter of Clinton County (Greenpoint Assets), “where one of the notices is not returned within the requisite period, a petitioner is ‘not obligated to take additional steps to notify [the] respondent of the foreclosure proceeding.’” Matter of Clinton County (Greenpoint Assets), 116 A.D.3d 1206 (3rd Dept. 2014), *citing* Matter of County of Sullivan (Dunne – Town of Bethel), 111 A.D.3d 1235 (3rd Dept. 2013), Matter of County of Sullivan (Matejkowski), 105 A.D.3d 1170 (3rd Dept. 2013).

The cross-motion for summary judgment submitted by Saratoga County and Stephen M. Dorsey as Tax Enforcement Officer (collectively “Saratoga County”)

establish that Defendants below were entitled to dismissal of the claim because no triable issue of fact was raised relative to whether the notices were actually sent by Saratoga County. JNBC did not rebut the prima facie case through either their motion to dismiss or their response to the cross-motion. The assertion made by JNBC that the Notices sent by Saratoga County were either misdirected by the Postal Service and/or not received by JNBC does not serve as an adequate basis to undo a properly conducted tax foreclosure. Similarly, the purported failure of the Town of Galway to provide a notice of remaining outstanding taxes on the receipt for the 2018 tax payment does not provide any basis to undo the tax foreclosure proceeding based on unpaid 2016 taxes.

POINT II.

THE LOWER COURT PROPERLY DECLINED TO ENFORCE THE DEMAND FOR AN EQUITABLE REMEDY.

The lower court properly declined to exercise independent enforcement of the request for “equitable relief.” Appellant has conflated multiple claims under the umbrella assertion of a claim for “equitable relief” and those claims individually and collectively fail to provide a basis for equitable relief.

It is undisputed that the Town of Galway provided a receipt to JNBC for 2018 that did not include a statement that unpaid taxes remained on the parcel. However, it should be noted that the remaining unpaid 2016 taxes were not due and

owing to the Town of Galway, but rather were owed to the County. As provided in the Affidavit of Cynthia Baker, when a Town turns its annual delinquent tax bills over to the County for collection, the County makes the Town whole by paying the Town the amount of the delinquent taxes, and the County acquires the tax lien thereby giving the County the ability to collect and foreclose if necessary. (R150; R158-R159). As a result, there were no outstanding taxes due to the Town of Galway when JNBC redeemed the unpaid 2018 taxes – and further yet, the Town would have no right to collect those tax liens acquired by the County. The Town of Galway (or any other Town) would have no way to identify or otherwise know if the 2016 delinquent taxes had been paid to the County. (R150-R151) Notably, no RPTL §1110 certificate of redemption was requested by JNBC. Had JNBC requested a certificate of redemption, JNBC would have discovered there were still outstanding County tax liens on the parcel. (R151 – 152) As a result, there was no “fraud, misrepresentation, deception or misconduct” as alleged by Appellant necessitating an override by the Judge to impose an equitable resolution.

Appellants also argue that as a result of Saratoga County retaining surplus money from the subsequent tax sale of the parcel, that JNBC should be entitled to an equitable remedy in this case. This argument is misplaced and not supported in law or fact. The Court of Appeals in Sheehan v. County of Suffolk held: “[t]here is no unfairness, much less a deprivation of due process, in the county’s retention of

any surplus.” Sheehan v. County of Suffolk, 67 N.Y.2d 52 (1986). The Court of Appeals further provided that “[t]he taxpayers in each of the statutory schemes under review are given a three-year period of redemption. During this period, plaintiffs had the opportunity to either pay the taxes and penalties due or sell the property subject to the lien and retain the surplus. This redemption period affords the taxpayer an opportunity to avoid a full forfeiture.” Id. Likewise, RPTL §1136(3) provides that when an owner or person with recorded interest in a parcel being foreclosed fails to interpose an answer in a foreclosure proceeding, “the court shall make a final judgment awarding to such tax district the possession of any parcel of real property described in the petition not redeemed.” RPTL §1136(3).

When such a foreclosure occurs, “upon the execution of a deed, the tax district shall be seized of an estate in fee simple absolute in such parcel *and all persons, including the state, infants, incompetents, absentees and non-residents who may have had any right, title, interest, claim, lien or equity of redemption in or upon such parcel shall be barred and forever foreclosed of all such right, title, interest, claim, lien, or equity of redemption.*” RPTL §1136(3) (emphasis added).

As provided by this Court in Key Bank of Central New York v. County of Broome: “even equity will not interfere in such cases, for “[u]pon the expiration of the time prescribed by the statute [Real Property Tax Law §1110 *et seq.*] for redemption and answer, the rights of the parties...became fixed and unalterable.”


Key Bank of Central New York v. County of Broome, 116 A.D.2d 90, 92 (3rd Dept. 1986). As a result, Appellant has no right to compensation upon the resale of the property. The County's ability to retain any surplus from a valid tax foreclosure sale has been upheld by the Court of Appeals and Appellate Courts across the state repeatedly. Sheehan v. County of Suffolk, *Supra*; Key Bank of Central New York v. County of Broome, 116 A.D.2d 90, 92 (3rd Dept. 1986); Hoge v. Chautauqua County, 173 A.D.3d 1731 (4th Dept. 2019); County of Niagara (Collingwood Construction Corp.), 174 A.D.3d 1454 (4th Dept. 2019).

Appellant's assertion that the Town and County made "major mistakes casting doubt on the fairness of the tax sale" is quite simply not supported by the record. The evidence submitted in support of the cross-motion for summary judgement unequivocally establishes that the Tax Foreclosure proceeding was completed in accordance with the statutory requirements. Judge Crowell appropriately determined that "Saratoga County has established that notice of the tax foreclosure proceeding was provided to [JNBC] pursuant to the governing statutes." (R9). It is respectfully submitted that Appellant's request that an equitable remedy be provided to JNBC must fail and should accordingly be denied.

CONCLUSION

Respondent Saratoga County and Stephen M. Dorsey as Tax Enforcement Officer for the County of Saratoga respectfully maintain that: (1) the cross-motion for summary judgment dismissing the complaint was appropriately granted as no triable issue of fact has been raised regarding Saratoga County's compliance with the applicable notice statutes for the Tax Foreclosure proceeding; and (2) that the Decision and Order issued by the Supreme Court should otherwise be affirmed in all respects.

Dated: January 14, 2021
 Ballston Spa, New York



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PRINTING SPECIFICATION REQUIREMENT

Pursuant to 22 NYCRR §1250.8(j), the foregoing brief was prepared on a computer using Microsoft Word.

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