

**Court of Appeals**  
**OF THE STATE OF NEW YORK**

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JAMES B. NUTTER & COMPANY,

*Plaintiff-Appellant-Movant*

-against-

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

*Defendants-Appellees-Respondents.*

*(see inside cover for continuation of caption)*

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**MOTION FOR LEAVE TO APPEAL**  
**IN A CIVIL CASE**

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**Saratoga County Clerk's Index No. 2019-3177**  
**Supreme Court, Appellate Division (Third Department) No. 531787**

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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, described in the complaint.

*Defendants.*

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**COURT OF APPEALS  
STATE OF NEW YORK**

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JAMES B. NUTTER & COMPANY, x Saratoga County Clerk's  
: Index No. 2019-3177  
Plaintiff-Appellant-Movant, :  
: Supreme Court, Appellate  
-against- : Division (Third  
: Department) No. 531787  
: COUNTY OF SARATOGA, STEPHEN M. :  
: DORSEY, IN HIS CAPACITY AS TAX : **NOTICE OF MOTION**  
: ENFORCEMENT OFFICER OF THE COUNTY : **FOR LEAVE TO**  
: OF SARATOGA and TOWN OF GALWAY, : **APPEAL TO THE**  
: **COURT OF APPEALS**  
: Defendants-Appellees-Respondents. x  
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**PLEASE TAKE NOTICE** that, upon the annexed affirmation of Gregory N. Blase, sworn to on the 20th day of October 2021 and accompanying exhibits, the accompanying memorandum of law, and all papers and prior proceedings in this action, Plaintiff-Appellant-Movant James B. Nutter & Company will move this Court at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, 12207, on November 1, 2021, or as soon thereafter as counsel may be heard, for an order granting leave to appeal to the Court of Appeals pursuant to Civil Practice Law and Rules 5602 from the decision and order of the Appellate Division, Third Department, dated June 24, 2021, which affirmed the final order of the Supreme Court, Saratoga County, dated April 28, 2020.

Dated: New York, New York  
October 20, 2021

Respectfully submitted,

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**Court of Appeals**  
**OF THE STATE OF NEW YORK**

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*Plaintiff-Appellant-Movant*

-against-

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ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA and TOWN OF GALWAY,

*Defendants-Appellees-Respondents.*

*(see inside cover for continuation of caption)*

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**Memorandum of Law in Support of Motion**

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## STATEMENT

Section 1125 of the Real Property Tax Law (the “RPTL”) sets out requirements for a taxing entity to provide notice to interested parties before a tax sale that might affect (or erase) their interests. That notice requirement protects the due-process rights of property owners and those with right, title or interest in property, and it affords them fundamental fairness. The legislature amended § 1125 in 2006 to *strengthen* the notice requirement in light of *Jones v. Flowers*, 547 U.S. 220 [2006], in which the Supreme Court held that certain tax-sale practices in Arkansas violated the due-process rights of those interested in properties subject to tax sales.

In this case, however, the Appellate Division, Third Department, erroneously held that the 2006 amendment *narrowed* the rights of property owners whose land is subject to tax sales and, in doing so, superseded its own precedent—and that of other departments—that had allowed a property owner to demonstrate through competent evidence that it did not receive notice of a tax sale even if the U.S. Postal Service did not return the notice as undeliverable.

This Court has not yet had occasion to address the amended § 1125 and the means by which a party may overcome the presumption that it received adequate notice of a tax sale, and this case presents an opportunity for the Court to weigh in

on that important question that has constitutional implications for innocent property owners and property stakeholders across New York.<sup>1</sup>

## **BACKGROUND**

### **I. Factual Background**

Donald H. Craig and Lois R. Craig signed a promissory note in favor of JBNC in the original principal amount of \$365,107.50.<sup>2</sup> To secure repayment of that note, the Craigs granted to JBNC a mortgage on property located in Galway, New York (the “Property”).<sup>3</sup> The Craigs defaulted on the note, and JBNC filed a foreclosure action in the Supreme Court of Saratoga County in July 2015.<sup>4</sup> In July 2015 and again in March 2018, JBNC filed notices of the pendency of its foreclosure action.<sup>5</sup>

In March 2018, while JBNC’s foreclosure was pending, one of its employees contacted the Town of Galway to ask about the status of property taxes on the

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<sup>1</sup> As explained below, there is a second and related issue. When James B. Nutter & Company (“JBNC”), which held a first-priority mortgage interest on the property at issue, paid certain outstanding liens on the property, the Town of Galway provided a receipt. Under RPTL § 1112(2)(a), the Town was required to disclose on that receipt if there were any additional liens. There was such a lien, but the Town failed to disclose it. When JBNC pointed to that error as a basis for equitable relief, the trial court and the Third Department held equity was not available, with the Third Department misreading this Court’s relevant authority.

<sup>2</sup> R-6.

<sup>3</sup> R-101, 116-28.

<sup>4</sup> R-101.

<sup>5</sup> R-43-51.

Property and to determine what tax payments might be outstanding.<sup>6</sup> Before that call, JBNC had received no notice from the Town of Galway or any other governmental entity regarding the status of the taxes on the Property.<sup>7</sup> During the call, a town employee provided a statement for county and town taxes in the amount of \$3,309.92.<sup>8</sup> JBNC immediately paid that amount.<sup>9</sup> The Town of Galway provided to JBNC a receipt that acknowledged payment of the county and town taxes and that did not indicate that there remained an additional outstanding tax liens on the Property.<sup>10</sup> That was despite the requirement in New York law that, if earlier tax liens remain unredeemed after payment of delinquent tax liens on a property, the receipt reflecting payment must expressly state that “[t]his parcel remains subject to one or more delinquent tax liens. The payment you have made will not postpone the enforcement of the outstanding lien or liens. Continued failure to pay the entire amount will result in the loss of the property.” RPTL § 1112(2)(a).

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<sup>6</sup> R-6, R-101-102, R-109-110.

<sup>7</sup> R-109, R-113.

<sup>8</sup> R-6, R-64, R-65.

<sup>9</sup> R-6, R-66, R-67, R-102, R-110.

<sup>10</sup> R-7, R-68, R-102, R-110.

On May 10, 2018, Saratoga County filed with the county clerk's office a petition and a notice of foreclosure with a \$9,330.97 lien against the Property.<sup>11</sup>

Under RPTL § 1125(1)(a), the County was required to provide a copy of the notice of the foreclosure proceeding to any “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.” As a holder of a senior mortgage on the property, JBNC was entitled to receive that notice. Under RPTL § 1125(1)(b), the County was required to send the notice of foreclosure by both certified and ordinary, first-class mail. Saratoga County submitted affidavits of service by mail that asserted that the requisite notice was sent to JBNC by certified and first-class mail to the following address: “James B. Nutter & Company, Legal Dept, 4153 Broadway, Kansas City, MO 64111.”<sup>12</sup>

But JBNC never received notice,<sup>13</sup> and the undisputed evidence casts serious doubt on the County's assertion that it complied with § 1125's notice requirement. The certified mail receipt does not bear an official postmark.<sup>14</sup> The United States Postal Service's records contradict the County's affidavits and establish that the

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<sup>11</sup> R-7, R-102, R-207.

<sup>12</sup> R-299-236.

<sup>13</sup> R-7, R-108-109, R-113, R-243-244, R-262.

<sup>14</sup> R-231.

required notice was actually delivered to an unknown post office box in Kansas City, Missouri, that has nothing to do with JBNC.<sup>15</sup> And JBNC's business records confirm that it never received any notice of the County's tax-foreclosure proceedings by either certified or first-class mail.<sup>16</sup>

The trial court granted to the County a foreclosure judgment under RTPL § 1136 on December 4, 2018, thereby effectively wiping out JBNC ownership interest in the Property.<sup>17</sup>

Stephen M. Dorsey, the County's tax-enforcement officer, executed and recorded a deed for the property in favor of the County, and the County Board of Supervisors approved the sale of the property to Steven Abdo for \$142,500.<sup>18</sup> The County then sold the property to Sensible Holdings, LLC, in May 2019, and made a profit of more than \$130,000.<sup>19</sup> The County has since refused to share those profits with any other entity, including JBNC, despite JBNC's lien interest in the property.<sup>20</sup>

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<sup>15</sup> R-262.

<sup>16</sup> R-109, R-113.

<sup>17</sup> R-7, R-69-70.

<sup>18</sup> R-78-81, R-103.

<sup>19</sup> R-7, R-103.

<sup>20</sup> R-7, R-103.

## II. Procedural Background

JBNC filed suit in the trial court against Saratoga County, the Town of Galway and others on September 23, 2019, and sought vacatur of the foreclosure judgment in favor of the County and the subsequent sale of the property to Sensible Holdings, LLC.<sup>21</sup> JBNC sought damages in the alternative.<sup>22</sup> The record below established that JBNC never received proper notice before the foreclosure sale in favor of the County. The relevant statutory provision, RPTL § 1125, provides the following in relevant part:

(b) Notification method. (i) Such notice shall be sent to each such party both by certified mail and ordinary first class mail, subject to the provisions of subparagraph (iv) of this paragraph. 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.

JBNC and the County filed cross-motions for summary judgment.<sup>23</sup> JBNC offered tracking records from the U.S. Postal Service that demonstrated that the certified-mail notice was misdirected to an unrelated post-office box.<sup>24</sup> The postal service does not of course track regular U.S. Mail, but JBNC also offered affidavits

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<sup>21</sup> R-14.

<sup>22</sup> *Id.*

<sup>23</sup> R-98, R-145.

<sup>24</sup> R-262.

and business records demonstrating that it did not receive either form of notice.<sup>25</sup> And JBNC pointed out that the certified mail receipt does not bear an official postmark.<sup>26</sup> Thus, there was at least a factual question sufficient to overcome the presumption that JBNC had received the notices such that the trial court should have denied the County's summary-judgment motion.

By order dated April 28, 2020, the trial court granted the County's motion for summary judgment and denied JBNC's.<sup>27</sup> The court held that the County's unsupported affidavits of mailing satisfied § 1125 and that was sufficient.<sup>28</sup> In essence, the trial court held that, once the taxing body offers evidence of the two forms of mailing, § 1125 creates a conclusive presumption of receipt unless both forms of mail are returned by the postal service. Notwithstanding its holding, the trial court agreed that the evidence established that JBNC had not received notice, and that the Town of Galway's failure to provide JBNC with the requisite notice of additional tax liens was "troubling."<sup>29</sup> Indeed, the trial court observed that the case "cries out for an equitable remedy,"<sup>30</sup> where it was obvious that the Property's owner

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<sup>25</sup> R-113.

<sup>26</sup> R-231.

<sup>27</sup> R-4-13.

<sup>28</sup> R-9.

<sup>29</sup> R-10.

<sup>30</sup> *Id.*

had been dispossessed of its title without having the benefit of the legally required notice of foreclosure. Yet, the trial court concluded that it had no authority to fashion any sort of equitable remedy to address the County's failure to provide notice of the foreclosure and the Town's failure to warn JBNC of the additional tax liens.<sup>31</sup>

JBNC took an appeal to the Appellate Division, Third Department.<sup>32</sup> JBNC cited *Law v. Benedict*, 197 A.D.2d 808, 603 N.Y.S.2d 75 [3d Dept. 1993], the Third Department's authority that § 1125 merely creates a presumption of receipt subject to rebuttal limited only by the rule that a party could not prove non-receipt solely by its own testimony to that effect.<sup>33</sup> JBNC argued that it had offered enough evidence to create a triable issue of fact about whether it ever received notice from the County, particularly given the U.S. Postal Service's tracking records, which established that the County's notices were delivered to the wrong address.<sup>34</sup> JBNC also argued that the trial court was mistaken in concluding that it had no equitable authority to grant relief to JBNC since this Court's decision in *Guardian Loan Co. v. Early*, 47 N.Y.2d

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<sup>31</sup> R-10-11.

<sup>32</sup> Affidavit of Gregory N. Blase, Ex. 1.

<sup>33</sup> Blase Aff., Ex. 2 at 11.

<sup>34</sup> *Id.* at 11-13.



515, 419 N.Y.S.2d 56, 392 N.E.2d 1240 [1979], expressly allows for an equitable remedy from an improper tax sale brought about by mistake.<sup>35</sup>

The Third Department affirmed.<sup>36</sup> Justice Aarons wrote the majority opinion, and Presiding Justice Garry, Justice Egan and Justice Reynolds Fitzgerald joined. Justice Pritzker dissented.

The majority opinion reviewed the statute and concluded that, as a result of the 2006 amendment, when § 1125 provides that notice will be “deemed received unless both the certified mailing and the ordinary first class mailing are returned by the United States postal service,” it means that the *only* way for an interested party to rebut a taxing entity’s evidence is by showing that both mail pieces were returned to the County as undeliverable.<sup>37</sup> The majority concluded that any other interpretation of § 1125 would render the language about returned mail “meaningless.”<sup>38</sup> The majority asserted, in a case of first impression, that the Third Department’s previous authority providing that there was a more broadly rebuttable presumption was no longer controlling since the legislature amended the relevant

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<sup>35</sup> *Id.* at 16-19.

<sup>36</sup> *James B. Nutter & Company v. County of Saratoga*, 195 A.D.3d 1359, 149 N.Y.S.3d 373 (3d Dept. 2021).

<sup>37</sup> 195 A.D.3d at 1360-61, 149 N.Y.S.3d at 374-75.

<sup>38</sup> 195 A.D.3d at 1360, 149 N.Y.S.3d at 374.

part of § 1125 in 2006, after those cases were decided.<sup>39</sup> Finally, the majority disagreed with the trial court’s conclusion that it had no power to grant equitable relief, but it held that equitable relief may not be granted absent evidence of fraud, misrepresentation, deception or misconduct by the taxing entity.<sup>40</sup>

Justice Pritzker dissented. He interpreted § 1125’s reference to notices being “deemed received” to create only a rebuttable presumption that was not limited in the way the majority held.<sup>41</sup> He disagreed that JBNC’s interpretation rendered any language in the statute “meaningless” and wrote that, “[i]n fact, precluding such additional proof [as JBNC offered] to rebut the presumption leads to absurd results where, like here, proffered evidence raises core issues of fact as to whether the notices were mailed ‘to [the] owner,’ as required RPTL 1125(1)(a).”<sup>42</sup> Justice Pritzker noted that the postal service tracking information and JBNC’s recent payment of another tax bill on the same property “strongly suggests that [JBNC] did not intend to forfeit the property.”<sup>43</sup>

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<sup>39</sup> 195 A.D.3d at 1360 n.2, 149 N.Y.S.3d at 374 n.2.

<sup>40</sup> 195 A.D.3d at 1361, 149 N.Y.S.3d at 375.

<sup>41</sup> 195 A.D.3d at 1361-62, 149 N.Y.S.3d at 375-76. (Pritzker, J., dissenting).

<sup>42</sup> 195 A.D.3d at 1362, 149 N.Y.S.3d at 376. (Pritzker, J., dissenting).

<sup>43</sup> *Id.*

## TIMELINESS OF MOTION FOR LEAVE TO APPEAL

This motion for leave to appeal is timely. The Supreme Court's final order, dated April 28, 2020, was entered in the office of the County Clerk of Saratoga County on May 4, 2020.<sup>44</sup> JBNC filed a timely appeal to the Third Department on July 2, 2020.<sup>45</sup> The Third Department affirmed by judgment of June 24, 2021, and JBNC received notice of entry of that judgment on July 6, 2021.<sup>46</sup> On August 5, 2021, JBNC filed in the Third Department a timely motion for permission to appeal to this Court, and it served notice of that motion on August 5, 2021.<sup>47</sup> The Third Department denied the motion by order on September 13, 2021, and JBNC received notice of entry of that order on September 24, 2021.<sup>48</sup> JBNC is timely filing this motion within 30 days of its receipt of notice of entry of the Third Department's denial order. CPLR 5513(b).

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<sup>44</sup> R-4.

<sup>45</sup> R-2. The notice of appeal was timely in light of New York's COVID-19 provisions that tolled filing deadlines between March 20, 2020, and November 4, 2020.

<sup>46</sup> Blase Aff., Exs. 5 and 6.

<sup>47</sup> *Id.*, Ex. 7.

<sup>48</sup> *Id.* Exs. 8, 9.

## JURISDICTION

This Court has jurisdiction over this motion as it seeks review of a final determination by the Appellate Division. CPLR 5602(a)(1)(i). The Appellate Division's judgment is final in that it resolved all claims with respect to all parties and left nothing to be determined.

## QUESTIONS PRESENTED

1. Whether, when RPTL § 1125, as amended in 2006, provides that certified mail and U.S. Mail notices “shall be deemed received” unless both iterations of the notice are returned by the Postal Service within 45 days, the resulting presumption is rebuttable or irrebuttable.<sup>49</sup>

2. Whether a trial court possesses inherent power to grant equitable relief from a tax sale when a mortgage holder proves that it was prevented from protecting its interest because of a mistake by the taxing entity.<sup>50</sup>

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<sup>49</sup> JBNC preserved this issue in the trial court in its motion for summary judgment. R-106. It preserved the issue in the Third Department in its opening brief in that court. *See Blase Aff., Ex. 2 (Brief for Plaintiff-Appellant) at 4.*

<sup>50</sup> JBNC preserved this issue in the trial court in its motion for summary judgment. R-106. It preserved the issue in the Third Department in its opening brief in that court. *See Brief for Plaintiff-Appellant at 4.*

## **REASONS FOR GRANTING LEAVE**

JBNC did everything it could to protect its interest in the Property, including searching for and paying all of the outstanding tax liens of which it was notified. But the Town of Galway failed to tell JBNC of one such tax lien, and Saratoga County's notice of the upcoming tax sale of the property never reached JBNC. As a result of those things, JBNC was unlawfully dispossessed of its Property through no fault of its own, and the trial and appellate courts have refused to provide to JBNC an appropriate remedy based on their misreading of this Court's authority.

The Third Department's majority opinion resolved an issue of first impression in an important area of law incorrectly, and it read out of this Court's authority an available basis for equitable relief from a tax sale. The Third Department's holdings will undoubtedly have negative consequences for other property owners in New York. Rather than "reduce incidents of non-deliverability"—which is the intent of § 1125's notice provision—under the majority opinion, innocent homeowners can (and will) be dispossessed of their property even where they establish that they were denied notice of the tax foreclosure due to the County's failure to deliver the notices to the correct address. So long as the notices are not returned as undeliverable, the homeowner will have no recourse to save her home. Such an outcome is unfair, and

it runs counter to New York's stated goal of preventing property dispossession without notice and an opportunity to object.

For those reasons, JBNC believes this Court should weigh in.

**I. This Court should definitively interpret RPTL § 1125 given the first-impression nature of the Third Department's determination, the dissent, the apparent conflict between the departments of the Appellate Division and the importance of the issue.**

In this case, the Third Department reached a first-impression holding on an important issue of law regarding the nature of the presumption arising under RPTL § 1125 and what evidence an interested party may offer to successfully rebut that presumption.

As noted, prior to this case, the Third Department held that such an interested party could rebut the presumption of receipt of notice with essentially any competent evidence so long as it was not solely its own denial of receipt. *See Law*, 197 A.D.2d at 810, 603 N.Y.S.2d at 77. Although it did not label it as such, the court's approach was essentially to follow a burden-shifting analysis: if the taxing entity offered proof of mailing, the burden shifted to the interested party to persuade the court that the notice was not in fact received and to do so with competent evidence beyond just its own denial of receipt.

The Third Department's (former) approach was in keeping with the purpose and requirements of the statute. As that court explained in *Law*, the purpose of

§ 1125's notice provision "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." 197 A.D.2d at 809, 603 N.Y.S.2d at 76. Allowing interested parties the opportunity to prove, with competent evidence, that they did not in fact receive notice of the tax sale plainly furthers that goal. Other New York courts have explained that § 1125 requires a taxing entity to give actual notice of an impending tax sale. *See, e.g., West Branch Realty Corp. v. County of Putnam*, 293 A.D.2d 528, 529, 740 N.Y.S.2d 135, 136 [2d Dept. 2002]; *Matter of Foreclosure of Tax Liens by County of Erie*, 225 A.D.2d 1089, 1090, 639 N.Y.S.2d 192, 193 [4th Dept. 1996]. If actual notice is required, it is even more appropriate for courts to allow interested parties to rebut the presumption that they have received notice by showing that they did not.

In this case, however, the Third Department majority concluded that the 2006 amendment to § 1125 made the presumption of receipt irrebuttable even though nothing in the language or history of the amendment suggests that the legislature had such a goal.

JBNC believes the Third Department's holding about the amendment and the nature of § 1125's presumption was mistaken.

*First*, nothing in the history of the amendment suggests that the legislature intended to limit the proof that could be offered to rebut the presumption. The legislature was instead responding to the U.S. Supreme Court’s decision in *Jones v. Flowers*, which held that the tax-sale statute in Arkansas—which allowed the sale to go forward even when mailed notice to an interested party was returned by the U.S. Postal Service—was unconstitutional. The New York legislature responded with the amendment described above, specifically to try to make sure New York’s process would not be held unconstitutional under *Jones*. See New York Bill Jacket, L 2006, ch 415, Senate Introducer’s Mem in Support (“This legislation brings the state’s uniform tax enforcement procedure, under Article 11 of the Real Property Tax Law, into compliance with an April 26, 2006 United States Supreme Court decision.”) and Mem of Joseph K. Gerberg, Esq. (“This bill imposes *more stringent* notification requirements upon tax districts when foreclosing delinquent real property tax liens under Article 11 of the [RPTL]. It does so in order to align the statute with [*Jones*].”) (emphasis added). Nothing in the legislative history suggests any intention to modify existing New York authority regarding how a party interested in real property could rebut the presumption in § 1125.<sup>51</sup> That is unsurprising since the legislative history

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<sup>51</sup> That absence is even more important since “[t]he Legislature will be assumed to have known of existing statutes and judicial decisions in enacting amendatory legislation,” McKinney’s Cons. Laws of N.Y., Book 1, Statutes § 191, comment, such that the Court should presume that, if the legislature intended to supersede cases



demonstrates that the purpose of the 2006 amendment was to be *more* protective of those with real-property interests—not less so.

*Second*, nothing in the text of the amended § 1125 supports the more restrictive approach the Third Department took in this case. The legislature provided that, if a taxing entity offers evidence that it mailed notice in the two ways described in the statute, the notice would be “deemed” received. But that is just another way of describing the burden-shifting analysis *Law* discussed. Courts routinely interpret the word “deemed” not to be conclusive but to establish a rebuttable presumption. For example, CPLR 3404 provides that cases that have been marked off the calendar and not restored within a year “shall be deemed” abandoned, and courts have held that language to establish a presumption that a party may rebut with competent evidence that it did not intend to abandon the case. *See, e.g., McCarthy v. Jorgensen*, 290 A.D.2d 116, 118 [3d Dept. 2002]; *Beringer v. B.C.P. Management Corp.*, 280 A.D.2d 414, 415 [1st Dept. 2001]. Similarly, courts have held that, while municipal tax assessments are “deemed” valid, that raises only a rebuttable presumption. *See Clara Welch Thanksgiving Home v. Bd. of Assessment Rev.*, 123 A.D.3d 1313, 1315, 999 N.Y.S.2d 247, 249 [3d Dept. 2014]. The Third Department’s construction of the

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such as *Law*, it would have done so expressly. (JBNC notes that, even setting the 2006 amendment to one side, the Court should accept review in this case since the Court has not yet weighed in on whether *Law* was correctly decided.)

word “deemed” to mean conclusive and not subject to rebuttal is not supported by New York law. And the majority opinion is mistaken where it suggests that the return of the notices by the postal service is the only evidence that could rebut the County’s affidavit. As Justice Pritzker correctly observed, the 2006 amendments to § 1125 creating “an additional remedial layer of procedural due process for the taxpayer is legislatively inconsistent with the establishment of, as the majority asserts, an irrebuttable presumption against the taxpayer every time mailings are not returned to the sender as undeliverable, *no matter where they were mailed in the first place.*”<sup>52</sup>

*Third*, the Third Department’s assertion that JBNC’s interpretation would render the returned-mail provision “meaningless” does not withstand scrutiny. As noted, previous cases regarding § 1125 have set up a sort of burden-shifting regime: if the taxing entity makes out a *prima facie* case that it properly provided notice, the burden shifts to the interested party to rebut the presumption of receipt. Nothing about that interpretation renders the returned-mail language meaningless. If the mailed notices are returned, the taxing entity has not made out its *prima facie* case and the burden never shifts to the interested party. If the mailed notices are not returned, the taxing entity has made out a *prima facie* case, the burden shifts and the taxing entity will prevail unless—as occurred in this case—the interested party

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<sup>52</sup> 195 A.D.3d at 1362 n.1, 149 N.Y.S.3d at 376 n.1. (Pritzker, J., dissenting).

satisfies its burden to show a lack of notice. That analysis gives effect to all of § 1125.

*Fourth*, the Third Department’s interpretation, if correct, would render § 1125 constitutionally dubious. Both the federal and New York Constitutions provide that the state may not deprive a party of property without due process. *See Kennedy v. Mossafa*, 100 N.Y.2d 1, 8; 759 N.Y.S.2d 429, 437; 789 N.E.2d 607, 616 [2003]. The purpose of § 1125 is to “provide the constitutionally mandated notice reasonably calculated to apprise interested parties of the pendency of the tax sale proceeding and afford them an opportunity to present their objections.” *Law*, 197 A.D.2d at 810, 603 N.Y.S.2d at 77. The Third Department’s holding in this case—that proof of mailing is conclusive—precludes any opportunity for a property owner to protect its interests no matter what evidence it can offer to show that it did not, in fact, receive that notice. That cannot be said to allow a reasonable opportunity for objections.

As noted, JBNC is not alone in its contention that it should have been permitted to rebut the § 1125 presumption with proof such as the U.S. Postal Service’s tracking records that demonstrated that the certified-mail notice was in fact delivered to an unrelated post-office box. Justice Pritzker dissented from the majority holding in the Third Department and wrote that neither the history of the 2006 amendment nor its text suggest an intent to restrict the proof permitted to rebut

the presumption.<sup>53</sup> Moreover, in *Wilczak*, decided just two years ago and 13 years after the amendment to § 1125, the Fourth Department analyzed the issue employing the same presumption the Third Department discussed in *Law*, thus suggesting that that department has not concluded that the analysis was legislatively superseded.<sup>54</sup>

Of course, the issue for purposes of this motion is not whether the Court should now agree with JBNC and Justice Pritzker on the merits but whether it should agree that there is a significant and reasonably debatable question about how the amended statute should be interpreted such that this Court should provide definitive, uniform guidance. As JBNC has demonstrated, there is a substantial question on which the Third Department's determination may be and has been questioned.

There can be no real question that the issue is an important one. The Court may take judicial notice that a great many New Yorkers have struggled financially in recent years, most particularly during the COVID-19 crisis. There is every reason to expect that the number of tax foreclosures will remain significant and perhaps

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<sup>53</sup> 195 A.D.3d at 1361-62, 149 N.Y.S.3d at 375-76. (Pritzker, J., dissenting).

<sup>54</sup> It should be noted that the Fourth Department has been less than clear, and at least one of its decisions could be read as consistent with the Third Department's decision in this case. *See In re Foreclosure of Tax Liens by Proceeding in Rem Pursuant to Article II of the Real Prop. Tax Law by Co. of Herkimer*, 104 A.D.3d 1332, 961 N.Y.S.2d 715 [4th Dept. 2013].

increase. Just by way of example, at the single tax sale in Saratoga County at which the property at issue in this case was sold, 33 properties were sold.<sup>55</sup> It takes little imagination to appreciate that, across New York, the number of tax sales in any given year must be terrifically higher. Taxing entities will have to comply with § 1125, and those interested in the properties at issue will need to know their rights and the proper procedure should they believe notice to them was insufficient. Moreover, the very existence of § 1125 and the 2006 amendment to it underscore the importance New York places on allowing those with interests in property to know about tax sales and to have the opportunity to protect their interests. That is not merely a public-policy matter; as *Jones v. Flowers* demonstrates, the provision of appropriate notice has very real due-process implications. JBNC urges the Court to allow review to provide definitive guidance in this important area of the law.<sup>56</sup>

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<sup>55</sup> R-78-81.

<sup>56</sup> The Third Department majority suggested that, if its interpretation of § 1125 leads to inequitable results, “the Legislature is free to amend RPTL 1125.” 195 A.D.3d at 1360, 149 N.Y.S.3d at 375. But the issue is not that the statute is unfair or unconstitutional but that the Third Department’s incorrect interpretation of it implicates those concerns.

**II. The Court should clarify whether a trial court has authority to provide an equitable remedy when, as the evidence demonstrates occurred in this case, a taxing entity mistakenly fails to provide required information to allow a party to avoid a tax foreclosure.**

As JBNC demonstrated in its statement of the background of this case, it made every effort to protect its interest in the property at issue here. It contacted the Town of Galway and asked for information about all outstanding tax liens.<sup>57</sup> The Town provided information about *some* outstanding taxes, and JBNC paid them.<sup>58</sup> But, when the Town provided to JBNC a receipt for those payments, it failed to disclose another, still-pending tax lien.<sup>59</sup> It omitted that information even though RPTL § 1112(2)(a) mandates that such a receipt disclose if there remain still-unpaid tax liens. Thus, JBNC, which plainly intended to satisfy all outstanding tax liens in order to protect its interest in the property, did not have the necessary and required information to do so. As described in the factual background earlier in this motion, the undisclosed lien then led to the tax-foreclosure sale that divested JBNC of its interest.

JBNC assumes for purposes of argument that the Town simply made a mistake when it omitted that crucial information. But it was a particularly consequential

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<sup>57</sup> R-6, R-101-102, R-109-110.

<sup>58</sup> R-6, R-64-65, R-66-67, R-102, R-110.

<sup>59</sup> R-7, R-68, R-102, R-110.

mistake and, as the trial court aptly noted, the scenario in this case “cries out for an equitable remedy.”<sup>60</sup> That court believed itself without authority to grant such an equitable remedy and the Third Department affirmed, holding that, while there is authority to grant an equitable remedy, it requires evidence of fraud, misrepresentation, deception or misconduct by the defendants.<sup>61</sup> The majority relied for that holding on this Court’s decision in *Guardian Loan Co. v. Early*.

But the Third Department majority summarized the *Guardian Loan* holding incompletely. In that case, this Court held that a judicial sale of property may be equitably set aside when the challenging party shows “one of the categories integral to the invocation of equity such as fraud, *mistake*, or exploitive overreaching.” 47 N.Y.2d at 521, 419 N.Y.S.2d at 60, 392 N.E.2d at 1248 (emphasis added). JBNC’s evidence regarding the Town’s error was at the least sufficient to forestall summary judgment on whether there was a mistake that could form the basis for equitable relief from the tax sale at issue in this case. Indeed, there was no evidence to counter JBNC’s proof that the Town erred.

This Court is of course the final arbiter of the meaning of its own precedents and of New York law. The Third Department has now interpreted *Guardian Loan* in

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<sup>60</sup> R-10-11.

<sup>61</sup> 195 A.D.3d at 1361, 149 N.Y.S.3d at 375.

a way more restrictive than the decision's plain language suggests. Moreover, the Third Department's interpretation is profoundly unfair to property owners like JBNC that have made every effort to protect their property interests but been thwarted by a mistake by a taxing authority. JBNC asks this Court to step in to confirm the original holding in *Guardian Loan* and to provide a measure of equity to JBNC.

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JBNC submits that the Third Department has misinterpreted RPTL § 1125 in a way at odds with the language of the statute, due process and prior judicial interpretations. That interpretation drew a well-considered dissent, and the Fourth Department appears to interpret the statute differently than did the Third Department's majority. There is a need for this Court's intervention to bring certainty and uniformity to the interpretation of the statute.

JBNC similarly submits that the Third Department ignored the plain language of this Court's decision in *Guardian Loan* and that this Court should step in to confirm that a judicial sale may be equitably set aside when it has been caused by the taxing entity's mistake.

JBNC respectfully requests that the Court grant this motion and allow leave to appeal.



**RULE 500.1(f) DISCLOSURE**

Appellant James B. Nutter & Company (“JBNC”), by its attorneys, K&L Gates LLP, hereby discloses and certifies that it does not have a parent corporation and that there is no publicly held corporation that owns 10% or more of its stock.

JBNC acknowledges that it is obligated to promptly file a supplemental statement upon any change in the information that this statement requires.

Dated: New York, New York  
October 20, 2021

Respectfully submitted,

**K&L GATES LLP**

By: /s/ Gregory N. Blase

Gregory N. Blase

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*Attorneys for Plaintiff-Appellant  
James B. Nutter & Company*

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**Court of Appeals**  
**OF THE STATE OF NEW YORK**

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JAMES B. NUTTER & COMPANY,

*Plaintiff-Appellant-Movant*

-against-

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

*Defendants-Appellees-Respondents.*

*(see inside cover for continuation of caption)*

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**Affirmation in Support of Motion for Leave to Appeal**

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K&L GATES LLP  
*Counsel for Plaintiff-Appellant-Movant*  
599 Lexington Ave.  
New York, NY 10022  
(212) 536-3900  
gregory.blase@klgates.com

**Saratoga County Clerk's Index No. 2019-3177**  
**Supreme Court, Appellate Division (Third Department) No. 531787**

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**THE STATE OF NEW YORK  
COURT OF APPEALS**

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JAMES B. NUTTER & COMPANY, <i>Plaintiff-Appellant-Movant,</i>	:	Appellate Division – Third Department Appeal No. 531787
	:	
- against –	:	
	:	From Supreme Court
COUNTY OF SARATOGA, STEPHEN M. DORSEY, IN HIS OFFICIAL CAPACITY AS TAX ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA and TOWN OF GALWAY,	:	County of Saratoga Index No. 2019-3177
	:	
	:	
<i>Defendants-Appellees.</i>	:	

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**AFFIRMATION OF GREGORY N. BLASE  
IN SUPPORT OF MOTION FOR LEAVE TO APPEAL  
TO THE NEW YORK STATE COURT OF APPEALS**

STATE OF NEW YORK

ss.:

COUNTY OF NEW YORK

GREGORY N. BLASE, an attorney duly admitted to practice before the courts of the State of New York, being duly sworn, deposes and says:

1. I am a partner at the law firm of K&L Gates LLP, counsel to Plaintiff-Appellant James B. Nutter & Company (“JBNC”). I am familiar with the pleadings and proceedings in this action and with the matters set forth herein. I submit this affirmation based on my personal knowledge and in support of Plaintiff-Appellant’s motion for leave to appeal to the Court of Appeals.

2. On July 2, 2020, JBNC filed a timely appeal of the Order of the Honorable Ann C. Crowell, J.S.C. dated April 28, 2020, and entered in the office of the County Clerk of Saratoga County on May 4, 2020. A true and correct copy of JBNC's notice of appeal is attached as Exhibit 1.

3. On December 22, 2020, JBNC filed a memorandum of law in support of its appeal. A true and correct copy of the memorandum of law is attached as Exhibit 2.

4. On January 15, 2021, Defendants-Appellees Saratoga County and Stephen M. Dorsey filed a memorandum of law in opposition to the appeal. A true and correct copy of the memorandum of law is attached as Exhibit 3.

5. On January 25, 2021, JBNC filed a reply memorandum of law in further support of its appeal. A true and correct copy of the memorandum of law is attached as Exhibit 4.

6. On June 24, 2021, the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department (the "Third Department") issued a Memorandum and Order denying JBNC's appeal. The Honorable Justice Stan L. Pritzker dissented from the Memorandum and Order. JBNC seeks leave to appeal from each and every part of the issued by the Memorandum and Order dated June

24, 2021, and entered by the Clerk of the Court on June 24, 2021. A true and correct copy of the Memorandum and Order is attached as Exhibit 5.

7. JBNC was served with notice of entry of the Court's Memorandum and Order on July 6, 2021. A true and correct copy of the notice of entry is attached hereto as Exhibit 6.

8. On August 5, 2021, JBNC filed a timely motion with the Third Department seeking leave to appeal the Memorandum and Order to the Court of Appeals. A true and correct copy of JBNC's motion, which was unopposed, is attached hereto as Exhibit 7.

9. On September 13, 2021, the Third Department issued an order denying JBNC's motion for leave to appeal the Memorandum and Order to the Court of Appeals. The Honorable Justice Stan L. Pritzker dissented from the Third Department's order denying the motion for leave to appeal. A true and correct copy of the Third Department's September 13, 2021 order is attached hereto as Exhibit 8.

10. On September 24, 2021, JBNC was served with notice of entry of the Third Department's September 13, 2021 order. A true and correct copy of the Notice of Entry is attached hereto as Exhibit 9.

11. JBNC seeks permission to appeal to the Court of Appeals on the following two questions:

a. Whether, when RPTL § 1125, as amended in 2006, provides that certified mail and U.S. Mail notices “shall be deemed received” unless both iterations of the notice are returned by the Postal Service within 45 days, the resulting presumption is rebuttable or irrebuttable; and

b. Whether a trial court possesses inherent power to grant equitable relief from a tax sale when a mortgage holder proves that it was prevented from protecting its interest because of a mistake by the taxing entity.

12. As addressed in further detail in the accompanying memorandum of law, with respect to the first question, JBNC respectfully submits that the Court of Appeals should have an opportunity to definitively interpret RPTL Section 1125 given the first-impression nature of the Third Department’s determination, Justice Priztker’s dissent, the apparent conflict between the departments of the Appellate Division and the importance of the issue.

13. As addressed in further detail in the accompanying memorandum of law, with respect to the second question, JBNC respectfully submits the Court of Appeals should have an opportunity to clarify whether a trial court has authority to provide an equitable remedy when, as the undisputed evidence demonstrates occurred in this case, a taxing entity mistakenly fails to provide required information to allow a party to avoid a tax foreclosure.

Dated: New York, New York  
October 20, 2021

/s/ Gregory N. Blase  
Gregory N. Blase

# Exhibit 1



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SARATOGA

<p>-----X</p> <p>JAMES B. NUTTER &amp; COMPANY,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">-vs-</p> <p>COUNTY OF SARATOGA; STEPHEN M. DORSEY, IN HIS CAPACITY AS TAX ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA; TOWN OF GALWAY; GALWAY CENTRAL SCHOOL DISTRICT; STEVEN ABDOO; AND SENSIBLE PROPERTY HOLDINGS, LLC</p> <p>"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, described in the complaint,</p> <p style="text-align: right;">Defendants.</p> <p>-----X</p>	<p><b><u>NOTICE OF APPEAL</u></b></p> <p><b>INDEX NO. 2019-3177</b></p>
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**PLEASE TAKE NOTICE**, that the above-named Plaintiff, by its attorneys, RAS Boriskin, LLC, hereby appeal(s) to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, from each and every part of the annexed Order of the Honorable Ann C. Crowell, J.S.C., dated April 28, 2020, and entered in the office of the County Clerk of Saratoga County on May 4, 2020, and from each and every part thereof.

Date: July 2, 2020  
Westbury, New York

RAS Boriskin, LLC  
Attorney for Plaintiff



\_\_\_\_\_  
Joseph Battista, Esq.  
RAS Boriskin, LLC  
900 Merchants Concourse, Suite 310  
Westbury, NY 11590  
516-280-7675



TO:

SARATOGA COUNTY ATTORNEY'S OFFICE  
ATTN: STEPHEN M. DORSEY, ESQ.  
40 MCMASTER STREET  
BALLSTON SPA, NY 12020  
*ATTORNEYS FOR COUNTY OF SARATOGA AND STEPHEN M. DORSEY, IN HIS CAPACITY  
AS TAX ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA*

HORIGAN, HORIGAN & LOMBARDO, P.C.  
ATTN: TIMOTHY HORIGAN, ESQ.  
49 EAST MAIN STREET  
AMSTERDAM, NY 12010  
*ATTORNEY FOR TOWN OF GALWAY*

GALWAY CENTRAL SCHOOL DISTRICT  
5317 SACANDAGA ROAD  
GALWAY, NY 12074

STEVEN ABDOO  
3824 FOUNTAIN STREET  
CLINTON, NY 13323

SENSIBLE PROPERTY HOLDINGS, LLC  
99 WASHINGTON AVENUE  
ALBANY, NY 12210

# Supreme Court of the State of New York

## Appellate Division: Third Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

<b>Case Title:</b> Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.		<b>For Court of Original Instance</b>	
<b>JAMES B. NUTTER &amp; COMPANY,</b>		  Date Notice of Appeal Filed	
- against -		<b>For Appellate Division</b>	
COUNTY OF SARATOGA; STEPHEN M. DORSEY, IN HIS CAPACITY AS TAX ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA; TOWN OF GALWAY; GALWAY CENTRAL SCHOOL DISTRICT; STEVEN ABDOO; AND SENSIBLE PROPERTY HOLDINGS, LLC  <small>"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, described in the complaint,</small>		  	
<b>Case Type</b>	<b>Filing Type</b>		
<input checked="" type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration	<input type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278	
<input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review			
<b>Nature of Suit:</b> Check up to three of the following categories which best reflect the nature of the case.			
<input type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input type="checkbox"/> Commercial	<input type="checkbox"/> Contracts
<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law	<input type="checkbox"/> Estate Matters
<input type="checkbox"/> Family Court	<input checked="" type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous	<input type="checkbox"/> Prisoner Discipline & Parole
<input type="checkbox"/> Real Property (other than foreclosure)	<input type="checkbox"/> Statutory	<input type="checkbox"/> Taxation	<input type="checkbox"/> Torts

Appeal	
Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.
<input type="checkbox"/> Amended Decree <input type="checkbox"/> Amended Judgement <input type="checkbox"/> Amended Order <input type="checkbox"/> Decision <input type="checkbox"/> Decree	<input type="checkbox"/> Determination <input type="checkbox"/> Finding <input type="checkbox"/> Interlocutory Decree <input type="checkbox"/> Interlocutory Judgment <input type="checkbox"/> Judgment
<input checked="" type="checkbox"/> Order <input type="checkbox"/> Order & Judgment <input type="checkbox"/> Partial Decree <input type="checkbox"/> Resettled Decree <input type="checkbox"/> Resettled Judgment	
<input type="checkbox"/> Resettled Order <input type="checkbox"/> Ruling <input type="checkbox"/> Other (specify):	
Court: <b>Supreme Court</b>	County: <b>Saratoga</b>
Dated: <b>04/28/2020</b>	Entered: <b>05/04/2020</b>
Judge (name in full): <b>Ann C. Crowell, J.S.C.</b>	Index No.: <b>2019-3177</b>
Stage: <input type="checkbox"/> Interlocutory <input checked="" type="checkbox"/> Final <input type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury
Prior Unperfected Appeal and Related Case Information	
Are any appeals arising in the same action or proceeding currently pending in the court? <span style="float: right;"><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</span> If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.	
Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:	
Original Proceeding	
Commenced by: <input type="checkbox"/> Order to Show Cause <input checked="" type="checkbox"/> Notice of Petition <input type="checkbox"/> Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	
Proceeding Transferred Pursuant to CPLR 7804(g)	
Court: <b>Choose Court</b>	County: <b>Choose County</b>
Judge (name in full):	Order of Transfer Date:
CPLR 5704 Review of Ex Parte Order:	
Court: <b>Choose Court</b>	County: <b>Choose County</b>
Judge (name in full):	Dated:
Description of Appeal, Proceeding or Application and Statement of Issues	
Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.	
Order denying Plaintiff's motion for summary judgment and granting defendant's cross-motion.	

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Whether Plaintiff's motion for summary judgment should have been granted and the cross-motion denied.

**Party Information**

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	JAMES B. NUTTER & COMPANY	Plaintiff	Appellant
2	COUNTY OF SARATOGA	Defendant	Respondent
3	STEPHEN M. DORSEY, IN HIS CAPACITY AS TAX ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA	Defendant	Respondent
4	TOWN OF GALWAY	Defendant	None
5	GALWAY CENTRAL SCHOOL DISTRICT	Defendant	None
6	STEVEN ABDOO	Defendant	None
7	SENSIBLE PROPERTY HOLDINGS, LLC	Defendant	None
8			
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**Attorney Information**

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: RAS BORISKIN, LLC

Address: 900 MERCHANTS CONCOURSE, SUITE 310

City: WESTBURY State: NY Zip: 11590 Telephone No: 516-280-7675

E-mail Address: jbattista@rasboriskin.com

Attorney Type:  Retained  Assigned  Government  Pro Se  Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name: SARATOGA COUNTY ATTORNEY'S OFFICE

Address: 40 MCMASTER STREET

City: BALLSTON SPA State: NY Zip: 12020 Telephone No:

E-mail Address:

Attorney Type:  Retained  Assigned  Government  Pro Se  Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No:

E-mail Address:

Attorney Type:  Retained  Assigned  Government  Pro Se  Pro Hac Vice

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Attorney/Firm Name:

Address:

City: State: Zip: Telephone No:

E-mail Address:

Attorney Type:  Retained  Assigned  Government  Pro Se  Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

SUPREME COURT  
STATE OF NEW YORK

COUNTY OF SARATOGA

COPY

JAMES B. NUTTER & COMPANY,

Plaintiff,

- against -

**DECISION and ORDER**

RJI # 45-1-2020-0128

Index #2019-3177

COUNTY OF SARATOGA; STEPHEN M. DORSEY,  
in his capacity as Tax Enforcement Officer of the County  
of Saratoga; TOWN OF GALWAY; GALWAY CENTRAL  
SCHOOL DISTRICT; Steven Abdo; 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, described in the complaint,

Defendants.

---

APPEARANCES

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900 Merchants Concourse, Suite 310  
Westbury, New York 11590

Saratoga County Attorney's Office  
Attorneys for the Defendants Saratoga County and  
Stephen Dorsey as Tax Enforcement Officer  
40 McMaster Street  
Ballston Spa, New York 12020

Goldberg Segalla  
Attorneys for the Proposed Interveners  
665 Main Street  
Buffalo, New York 14203

ANN C. CROWELL, J

Plaintiff James B. Nutter & Company ("plaintiff") requests an Order: (1) granting a

default judgment against defendants Steven Abdo, Sensible Properties Holdings, LLC and Galway Central School District pursuant to CPLR § 3215; (2) granting summary judgment against the defendants County of Saratoga and Stephen M. Dorsey, in his capacity as Tax Enforcement Officer of the County of Saratoga ("Saratoga County") and the Town of Galway on plaintiff's first cause of action pursuant to CPLR § 3212; (3) vacating the tax judgment as it pertains to the subject premises; (4) vacating the tax foreclosure deed transferring title of the property to Saratoga County; (5) vacating the deed transferring title of the property to Sensible Holdings, LLC; and (6) allowing the plaintiff to redeem the property for the amount of the tax lien.

Plaintiff's motion was made returnable on February 21, 2020. In opposition, Saratoga County served a document entitled a "Notice of Cross-Motion" on February 14, 2020 (seven days before plaintiff's return date), but designated the return date as March 2, 2020. Defendant Saratoga County's designation of a different return date in its "Notice of Cross-Motion" was procedurally improper. *See, CPLR § 2214(b)*. However, the procedural impropriety did not prejudice the plaintiff. The cross motion was served seven days before the original return date pursuant to CPLR § 2214(b). The improper cross-motion return date provided plaintiff with additional time to respond, which would otherwise not have been available without an adjournment request. Defendant Saratoga County's procedural impropriety shall be disregarded. *CPLR § 2001*. Defendant Saratoga County's motion for summary judgment requests an Order dismissing the Complaint in its entirety. Defendant Town of Galway filed an Answer in the action, but has not submitted any papers in opposition to the motion. Defendants Steven Abdo, Sensible Property Holdings, LLC and Galway Central School District have defaulted in the action.



On August 11, 2008, Donald H. Craig and Lois R. Craig ("Craig") delivered a note and mortgage to the plaintiff to secure the principal sum of \$365,107.50. The address listed for the plaintiff in the first paragraph of the mortgage is: "James B. Nutter & Company, 4153 Broadway, Kansas City, Missouri, 64111." In a related mortgage foreclosure action under Index Number 2015-2241, plaintiff was granted a Judgment of Foreclosure and Sale against Craig dated June 12, 2019, and entered July 30, 2019. The Judgment of Foreclosure and Sale determined that \$276,785.43 was due and owing as of January 31, 2019.

While the plaintiff was prosecuting its foreclosure action, a tax foreclosure proceeding was concurrently proceeding against the property. On December 16, 2016, Saratoga County commenced its tax foreclosure proceeding to foreclose delinquent 2016 tax liens under Index Number 2016-3304. Saratoga County's filing of the list of parcels has the same effect as the filing of a Notice of Pendency against the property. *See, RPTL § 1122(7)*.

Valerie Roach ("Roach") is a Vice President of James B. Nutter & Company. Roach avers that plaintiff did not receive a tax bill, delinquent tax notice or notice of a tax foreclosure for this property. Kenneth Lee, Jr. ("Lee") is a Compliance Specialist for plaintiff. Lee also avers that plaintiff has no record of having been served with a tax bill, delinquent tax notice or tax foreclosure notice in connection with the property. Roach also avers that on March 19, 2018 an undisclosed member of her team contacted the Town of Galway to confirm the amounts necessary to bring the real property taxes current. The Town of Galway provided plaintiff with a tax statement, updated as of March 9, 2018, showing \$3,309.92 due for the 2018 County & Town taxes. By checks dated March 13, 2018, plaintiff paid the Town of Galway the outstanding 2018 County and Town taxes. By

receipt dated March 20, 2018, the Town of Galway acknowledged receipt of the payment. The receipt did not indicate any additional taxes were outstanding on the property.

On May 10, 2018, Saratoga County filed a Petition and Notice of Foreclosure with the amount of the lien against the property listed as \$9,330.97. On May 24, 2018, Charles Pasquarell also served a Notice of Foreclosure upon plaintiff by first class mail pursuant to RPTL § 1125(1)(b) addressed to "James B. Nutter & Company, Legal Dept, 4153 Broadway, Kansas City, MO 64111." On May 24, 2018, Charles Pasquarell served a Notice of Foreclosure upon plaintiff by certified mail pursuant to RPTL § 1125(1)(b) addressed to "James B. Nutter & Company, Legal Dept, 4153 Broadway, Kansas City, MO 64111." The notice listed the total outstanding taxes as \$9,330.97. The Certified Mail Receipt does not have an official United States Post Office postmark on it. The date "5/24/18" is handwritten in the postmark area of the receipt. The United States Postal Service tracking information for the certified mailing (#7017 3380 0000 3222 5801) inexplicably shows it was delivered on May 29, 2018 to "PO Box, KANSAS CITY MO 64111."

The Petition and Notice of Foreclosure were published in the Daily Gazette on May 30, 2018, June 13, 2018 and June 27, 2018. The Petition and Notice of Foreclosure were published in the Saratogian on May 30, 2018, June 13, 2018 and June 27, 2018. On July 11, 2018, affidavits of such publication were filed with the Saratoga County Clerk. On December 4, 2018, Saratoga County recorded a deed transferring the property to itself pursuant to the tax foreclosure proceeding. By resolution dated April 16, 2019, Saratoga County passed Resolution 110-2019 authorizing the sale of the property to Steven Abdo for the sum of \$142,500.00. Steven Abdo designated Sensible Holdings, LLC to receive the deed for the property. By deed dated May 8, 2019, and recorded May 16, 2019, Saratoga

County deeded the property to Sensible Holdings, LLC.

On or about September 11, 2019, proposed interveners Rostantin W. Kruczowy and Michelle N. Bozzi purchased the property from Sensible Property Holdings, LLC for \$155,000.00. On October 7, 2019, the deed transferring title was filed with the Saratoga County Clerk. On October 7, 2019, proposed intervener Adirondack Trust Company filed a mortgage encumbering the property. The instant action was commenced by filing on September 23, 2019.

Janet L. Sabin ("Sabin") is a Legal Assistant-Real Estate in the Saratoga County Attorney's Office. Her duties are exclusively devoted to the tax foreclosure process. Sabin receives any certified or first class mailings which are returned to the County Attorney's Office as undeliverable by the United States Postal Service. Sabin's February 14, 2020 affidavit avers that neither the certified mailing nor the first class mailing to plaintiff was returned as undeliverable.

Cynthia J. Baker ("Baker") is the Deputy County Treasurer in the Saratoga County Treasurer's Office. Her duties include overseeing delinquent real property tax liens and assisting with their collection. When the property taxes for years 2016 and 2017 were not collected for the property by the Town of Galway by April 15<sup>th</sup> for the year they were due, Saratoga County paid the taxes owed to the Town of Galway and the County took over collection of those monies. The Town cannot accept payment for those taxes, since the Town has already been paid by the County. Baker's February 14, 2020 affidavit avers that James B. Nutter & Company did not contact the Saratoga County Treasurer's office to inquire about the 2016 and 2017 taxes and did not make any payment on those delinquent taxes to the Saratoga County Treasurer.

“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 [Matejkowski]*, 105 AD3d 1170, 1171 [3d Dept. 2013], quoting *Kennedy v Mossafa*, 100 NY2d 1, 8 [2003]. Property owners and lienors of record are entitled to notice of a tax foreclosure proceeding by both certified mail and first class mail. RPTL § 1125(1)(b) states, in part:

“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.”

Charles Pasquarell’s affidavit, sworn to May 24, 2018, establishes that Saratoga County mailed a Notice of Foreclosure upon plaintiff by first class and certified mail on May 24, 2018 to “James B. Nutter & Company, Legal Dept, 4153 Broadway, Kansas City, MO 64111.” Pasquarell’s affidavit distinguishes this case from *T.D. Bank, N.A. v Leroy*, 121 AD3d 1256, 1258 [3d Dept. 2014] where there was no affidavit from someone with personal knowledge of the mailing. While the unexplained tracking information for the certified mailing is troubling, Sabin’s February 14, 2020 affidavit establishes that neither the first class mailing nor the certified mailing were returned as undeliverable by the United States Post Office. Accordingly, notice of the proceeding was deemed received by plaintiff pursuant to RPTL § 1125(1)(b); see, *Matter of County of Sullivan [Matejkowski]*, *supra*; *Matter of Clinton County [Greenpoint Assets, LTD.]*, 116 AD3d 1206 [3d Dept. 2014]. Saratoga County has established that notice of the tax foreclosure proceeding was provided to plaintiff pursuant to the governing statutes. Saratoga County’s filing of the tax foreclosure proceeding, publishing notice of the tax foreclosure proceeding in two newspapers and mailing a notice to the plaintiff by certified mail and first class mail provided plaintiff sufficient due process. *Matter of Clinton County [Greenpoint Assets,*

*LTD.*], *supra*; *Matter of County of Sullivan [Matejkowski]*, *supra*. Plaintiff's claims of procedural inadequacies regarding Saratoga County's tax foreclosure process are denied and dismissed.

While the Town of Galway has not submitted any opposition to plaintiff's motion, Saratoga County has addressed plaintiff's claims of being misled by the Town of Galway.

RPTL § 1112, **Redemption of property subject to more than one tax lien**, states:

"1. When a tax district holds more than one tax lien against a parcel, the liens need not be redeemed simultaneously. However, the liens must be redeemed in reverse chronological order, so that the lien with the most recent lien date is redeemed first, and the lien with the earliest lien date is redeemed last. Notwithstanding the redemption of one or more of the liens against a parcel as provided herein, the enforcement process shall proceed according to the provisions of this article as long as the earliest lien remains unredeemed.

"2. (a) When one or more liens against a parcel are redeemed as provided herein, but the earliest lien remains unredeemed, the receipt issued to the person redeeming shall include a statement in substantially the following form: "This parcel remains subject to one or more delinquent tax liens. The payment you have made will not postpone the enforcement of the outstanding lien or liens. Continued failure to pay the entire amount owed will result in the loss of the property." (b) Failure to include such a statement on the receipt shall not invalidate any tax lien or prevent the enforcement of the same as provided by law.

3. When all of the liens against the parcel have been redeemed, a certificate of redemption shall be issued upon request, as provided by section eleven hundred ten of this article."

The Town of Galway receipt issued to plaintiff for the 2018 taxes indisputably failed to contain the statement required by RPTL § 1112(2)(a). The inclusion of this statement, as required by law, presumably would have prompted plaintiff to cure the remaining tax delinquencies on the property. The undisputed failure to include the statement required by law, combined with plaintiff's assertion that it did not receive notice of the tax foreclosure proceeding, cries out for an equitable remedy. Saratoga County collected over \$130,000 in excess of the taxes due on the property. The Saratoga County Attorney has

been steadfast in his position he would not recommend any equitable settlement to the County Board. The Court does not have the authority to require or enforce an equitable resolution of this action. In the absence of equity, the Court must adhere to the statutory language which specifically provides that the failure to provide the language on the tax receipt “shall not invalidate any tax lien or prevent the enforcement of the same as provided by law.” *RPTL § 1112(2)(b)*. The plaintiff did not request a certificate of redemption pursuant to *RPTL § 1112(3)*. If plaintiff had requested a certificate of redemption plaintiff would have been made aware of the outstanding taxes from 2016 and 2017 that were paid to the Town of Galway by the County and remained due and owing.

The Town of Galway providing plaintiff with only the 2018 taxes owed to the Town of Galway and its failure to provide the statement required by *RPTL § 1112(2)(a)* is not a sufficient showing of “fraud, misrepresentation, deception, or similar misconduct” to invoke equitable estoppel to invalidate the tax foreclosure sale or hold the municipality liable. *See, Matter of Regan v. DiNapoli*, 135 AD3d 1225 [3d Dept. 2016]. Having searched the record and considered the arguments presented by Saratoga County on the Town of Galway’s behalf, plaintiff’s claims against the Town of Galway are dismissed.

Plaintiff’s cause of action seeking a share of the surplus monies generated from Saratoga County’s tax sale is without merit. *Sheehan v County of Suffolk*, 67 NY2d 52 [1986]; *Keybank v County of Broome*, 116 AD2d 90 [3d Dept. 1986]. Such claim is similarly dismissed.

Whether this action is governed by the statute of limitations requiring commencement within one month of the entry of the tax foreclosure judgment provided by *RPTL § 1131*, or commenced within the two year period from the recording of a tax deed provided *RPTL § 1137* need not be addressed.

Plaintiff's claims against defendants Steven Abdo, Sensible Property Holdings, LLC and Galway Central School District are also dismissed. In the absence of any basis to vacate the tax foreclosure deed, there is no basis for liability against these defendants, even when they remain in default. Proposed interveners Rostantin W. Kruczowy and Michelle N. Bozzi and Adirondack Trust Company's motion to intervene is deemed academic and denied without prejudice.

Plaintiff's motion for summary judgment is denied. Defendant Saratoga County's motion for summary judgment is granted. Plaintiff's Complaint is dismissed as to all named defendants. The proposed intervenor's motion to intervene is denied. Any relief not specifically granted is denied. No costs are awarded to any party. This Decision shall constitute the Order of the Court. The original Decision and Order shall be forwarded to the attorney for the defendant Saratoga County for filing and entry. The underlying papers will be filed by the Court.

Dated: April 28, 2020  
Ballston Spa, New York



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ANN C. CROWELL, J.S.C.

cc: Horigan, Horigan & Lombardo, P.C.

Papers received and considered:

Notice of Motion, dated January 21, 2020

Affirmation of Joseph F. Battista, Esq., dated January 21, 2020, with Exhibits A-P

Affidavit of Valerie Roach, sworn to July 29, 2019

Affidavit of Kenneth Lee, Jr., sworn to July 26, 2019

Notice of Cross Motion, dated February 14, 2020

Affidavit of Stephen M. Dorsey, Esq., sworn to February 14, 2020, with Exhibits A-I

Affidavit of Janet L. Sabin, sworn to February 14, 2020

Affidavit of Cynthia J. Baker, sworn to February 14, 2020

Affirmation of Joseph F. Battista, Esq., dated February 27, 2020, with Exhibits A-K

Notice of Motion, dated March 12, 2020

Affirmation of Marc W. Brown, Esq., dated March 12, 2020, with Exhibits A-E

Memorandum of Law, dated March 12, 2020



Index # 2019-3177

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SARATOGA

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JAMES B. NUTTER & COMPANY,

Plaintiff,

-vs-

COUNTY OF SARATOGA; STEPHEN M. DORSEY, IN HIS CAPACITY AS TAX  
ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA; TOWN OF GALWAY;  
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 described in the complaint,

Defendants.

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**NOTICE OF APPEAL**

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RAS Boriskin, LLC  
Attorney for Plaintiff  
900 Merchants Concourse, Suite 310  
Westbury, NY 11590  
516-280-7675

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SARATOGA

<p>-----X</p> <p>JAMES B. NUTTER &amp; COMPANY,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-vs-</p> <p>COUNTY OF SARATOGA; STEPHEN M. DORSEY, IN HIS CAPACITY AS TAX ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA; TOWN OF GALWAY; GALWAY CENTRAL SCHOOL DISTRICT; STEVEN ABDOO; AND SENSIBLE PROPERTY HOLDINGS, LLC</p> <p>"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 described in the complaint,</p> <p style="text-align: center;">Defendants.</p> <p>-----X</p>	<p style="text-align: center;"><b><u>AFFIDAVIT OF SERVICE</u></b></p>  <p style="text-align: center;"><b>INDEX NO. 2019-3177</b></p>
--	--

**STATE OF NEW YORK**

**COUNTY OF NASSAU**

I, Amberly Wilson, being sworn, says: I am not a party to this action, am over 18 years of age.

On July 2, 2020, I served the Notice of Appeal, Order and Informational Statement on:

SARATOGA COUNTY ATTORNEY'S OFFICE  
ATTN: STEPHEN M. DORSEY, ESQ.  
40 MCMASTER STREET  
BALLSTON SPA, NY 12020  
*ATTORNEYS FOR COUNTY OF SARATOGA AND STEPHEN M. DORSEY, IN HIS CAPACITY AS TAX ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA*

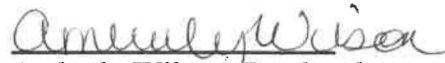
HORIGAN, HORIGAN & LOMBARDO, P.C.  
ATTN: TIMOTHY HORIGAN, ESQ.  
49 EAST MAIN STREET  
AMSTERDAM, NY 12010  
*ATTORNEY FOR TOWN OF GALWAY*

GALWAY CENTRAL SCHOOL DISTRICT  
5317 SACANDAGA ROAD  
GALWAY, NY 12074

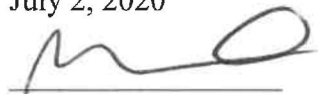
STEVEN ABDOO  
3824 FOUNTAIN STREET  
CLINTON, NY 13323

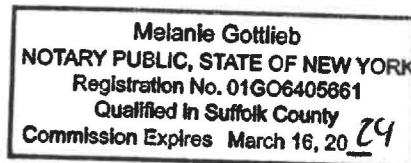
SENSIBLE PROPERTY HOLDINGS, LLC  
99 WASHINGTON AVENUE  
ALBANY, NY 12210

By depositing a true copy of same enclosed in a post-paid, properly addressed wrapper, in an office-official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

  
Amberly Wilson, Paralegal

Sworn before me on:  
July 2, 2020

  
\_\_\_\_\_  
Notary Public



## Exhibit 2

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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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**BRIEF FOR PLAINTIFF-APPELLANT**

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K&L GATES LLP  
*Attorneys for Plaintiff-Appellant*  
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gregory.blase@klgates.com

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

APPELLATE INNOVATIONS  
(914) 948-2240



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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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Appellant James B. Nutter & Company respectfully submits this brief on 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**

This appeal concerns a property tax foreclosure undertaken by Saratoga County in violation of New York law requiring notice and an opportunity to cure to all interested parties. The trial court identified several facts that warranted entry of summary judgment against the County. Among those issues is the undisputed fact that the County sent the legally-required notices to the wrong address, thereby depriving JBNC of its lawful opportunity to cure the purported tax delinquency. R-7.

JBNC initiated mortgage foreclosure proceedings on the subject Property (defined below) in July 2015. R-101. In March 2018, JBNC contacted the Town of Galway to inquire as to the amount of unpaid taxes owed on the Property. R-101, 109-10. The Town informed JBNC that the outstanding tax bill was \$3,309.92. R-102, 110. JBNC promptly tendered that amount and believed, as it had every reason to do, that it had brought the property current on all unpaid taxes. *Id.* Unbeknownst to JBNC, however, the Town had failed to advise JBNC that the 2016 taxes for the Property remained unpaid. *Id.*

In December 2016, Saratoga County initiated a tax foreclosure proceeding against the Property with respect to the 2016 taxes. R-102, 160, 174. Contrary to the County's representations, evidence obtained from the United States Postal Service establishes that the County mailed the requisite notice to the wrong address, thereby depriving JBNC of notice and an opportunity to pay the outstanding tax bill. R-7, 243-244, 262. There can be no dispute that JBNC would have paid the bill if it had received notice.

Despite its failure to provide proper notice, Saratoga County obtained a default judgment in a tax foreclosure proceeding for approximately \$9,000 in unpaid taxes. R-7, 69, 103. The County sold the Property at auction and pocketed over \$130,000 in excess value. *Id.*

JBNC initiated this action in the lower court, seeking to vacate (a) the tax judgment, (b) the deed transferring title to Saratoga County, and (c) the subsequent deed transferring title to the buyer at auction. R-14-84. JBNC argued that Saratoga County had failed to comply with its obligations under RPTL § 1125, which required the County to provide JBNC with written notice of the tax foreclosure proceeding by certified and first-class mail. R-98-144. In support of its claims, JBNC submitted affidavits from two employees, both stating under oath that JBNC never received notice from the County, and providing evidence from the United States Postal Service establishing that the statutorily required notice was delivered to an unknown

P.O. box, *and not to JBNC*. R-7, 108-113, 262. Despite this undisputed evidence demonstrating that, at minimum, there is an unresolved issue of material fact as to whether Saratoga County complied with the mandatory pre-foreclosure notice requirements under RPTL § 1125, and despite the lower court finding the absence of compliance “troubling,” the court nevertheless granted Saratoga County’s cross-motion for summary judgment. R-9, 12. And although the lower court conceded that this action “cries out for an equitable remedy,” it failed to implement any such remedy, holding that it lacked the power to provide any form of equitable relief. R-10.

The lower court’s ruling has deprived JBNC of all of its rights and interest in the Property, including its own right to foreclose as the priority lien holder and seek repayment for the unpaid loan secured by the Property, even though the undisputed record shows that JBNC did not actually receive proper notice of the County’s tax foreclosure proceeding, which the County mailed to the wrong address, and JBNC made active efforts to determine the amount of taxes owed and pay them. At the same time, Saratoga County was awarded with a windfall of over \$130,000 from its tax foreclosure sale despite its failure to comply with the notice obligations under New York law. There is no basis in law or fact for this outcome. JBNC respectfully seeks a reversal of the lower court’s ruling granting summary judgment in Saratoga

County's favor, or in the alternative, a ruling that the lower court has discretion to fashion an equitable remedy.

### **STATEMENT OF QUESTIONS PRESENTED**

1. Can a county be deemed to have complied with RPTL § 1125's requirement that a mortgage holder be sent notice of tax foreclosure proceedings via certified and first-class mail if the undisputed evidence establishes that the notice was delivered to the incorrect address?

*Answer:* The trial court held that Saratoga County complied with RPTL § 1125 despite the fact that the publicly available tracking information for the notice sent via certified mail establishes that it was delivered to the incorrect address.

2. Does a trial court possess power to grant equitable relief when the mortgage holder did not receive the requisite notice of tax foreclosure proceedings?

*Answer:* The trial court held that it lacked the power to grant equitable relief.

### **FACTS**

#### **I. JBNC Commenced a Mortgage Foreclosure Action in July 2015**

Donald H. Craig and Lois R. Craig executed a promissory note in the original principal amount of \$365,107.50 in favor of JBNC. R-6. To secure repayment of the Note, the Craigs granted a mortgage to JBNC on the property located at 8037 Crooked Street, Broadalbin, NY 12025 a/k/a 5732 Crooked Street, Galway, NY 12025 (the "Property"). R-101, 116-128. When the Craigs defaulted under the terms of the Note and Mortgage, JBNC commenced a foreclosure action in the Supreme Court of Saratoga County (the "Mortgage Foreclosure Action"). R-101. In

connection with the Mortgage Foreclosure Action, JBNC filed notices of pendency on July 17, 2015 and March 30, 2018. R-43-51. In June 2019, JBNC obtained a judgment of foreclosure and sale, which determined that \$276,785.43 was due and owing on the Craigs' loan as of January 31, 2019. R-52, 58.

## **II. The County of Saratoga Filed a List of All Parcels with Unpaid 2016 Taxes in December 2016**

Unbeknownst to JBNC at the time, a year and a half after it commenced the Mortgage Foreclosure Action and filed the first notice of pendency regarding the Property, Saratoga County filed a list of all parcels with unpaid 2016 taxes in the Saratoga County Clerk's Office on December 16, 2016 (the "Tax Foreclosure Action"). R-6, 102, 160, 174. The list of parcels included the Property. *Id.*

## **III. JBNC Contacted the Town of Galway and Paid Outstanding Property Taxes in March 2018**

On March 19, 2018, while the Mortgage Foreclosure Action was still pending, JBNC contacted the Town of Galway to inquire about the status of the property taxes for the Property and to determine the amount of any outstanding property tax payments. R-6, 101-102, 10910. Prior to this conversation, JBNC had not received any notice of tax delinquency from the Town of Galway or any other governmental entity. R-109, 113. The Town of Galway provided a statement for County and Town Taxes, including re-levied school taxes, in the amount of \$3,309.92. R-6, 64-65, 102, 110. JBNC promptly remitted the full amount of property taxes it was told were

outstanding to the Town. 6, 66-67, 102, 110. The Town of Galway provided a receipt dated March 20, 2018, which receipt acknowledged payment of the County and Town Taxes and did not indicate that there were any additional outstanding tax liens on the Property. R-7, 68, 102, 110. New York law, however, requires that if earlier liens remain unredeemed after payment of delinquent tax liens against a property, the receipt reflecting payment must expressly state: “This parcel remains subject to one or more delinquent tax liens. The payment you have made will not postpone the enforcement of the outstanding lien or liens. Continued failure to pay the entire amount will result in the loss of the property.” RPTL § 1112(2)(a). The receipt that the Town of Galway provided to JBNC failed to include this required language despite the fact that earlier 2016 tax liens were unredeemed. R-7, 68, 102, 110.

#### **IV. Without Notice to JBNC, the County of Saratoga Obtained a Tax Foreclosure Judgment on the Premises in December 2018**

On May 10, 2018, Saratoga County filed a petition and notice of foreclosure with a \$9,330.97 lien against the property with the Saratoga County Clerk’s Office. R-7, 102, 207. Pursuant to RPTL § 1125(1)(a), the County was required to provide a copy of the notice of foreclosure proceeding to any “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.” JBNC, as a holder of a senior mortgage on the Property, was



entitled to receive notice. Under RPTL § 1125(1)(b), the County is required to send notices of foreclosure by *both* certified mail and ordinary first class mail. Notwithstanding this requirement, JBNC did not receive any notice of the Tax Foreclosure Action whatsoever, even though Saratoga County was aware of JBNC's first priority mortgage lien on the Property. R-7, 108-109, 113, 243-244, 262.

Saratoga County submitted affidavits of service by mail, stating that the requisite notice was sent to JBNC via certified and first-class mail to the following address: "James B. Nutter & Company, Legal Dept, 4153 Broadway, Kansas City, MO 64111."<sup>1</sup> R-229-236. The certified mail receipt, which does not have an official United States Post Office postmark on it, bears tracking number 7017 3380 0000 3222 5801. R-231. The United States Postal Service's records contradict Saratoga County's affidavits, and establish that the requisite notice was actually delivered to an unknown P.O. box in Kansas City, Missouri. R-262. Consistent with the Postal Service's records, JBNC's business records confirm that it never received any notice of the County's tax foreclosure proceedings by either certified or first class mail. R-109, 113.

Notwithstanding the fact that (1) JBNC had no notice of the Tax Foreclosure Action, (2) the Mortgage Foreclosure Action had been pending since 2015, and

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<sup>1</sup> The address listed for JBNC on the mortgage is: "James B. Nutter & Company, 4153 Broadway, Kansas City, Missouri, 64111." R-117.

(3) JBNC had made good-faith efforts to bring the property taxes on the Property current, Saratoga County proceeded to obtain a judgment granting the foreclosure pursuant to RTPL § 1136 on December 4, 2018 (the “Tax Judgment”), which effectively wiped out JBNC’s first priority mortgage. R-7, 69-70. Stephen M. Dorsey, as Tax Enforcement Officer of the County of Saratoga, executed and recorded a deed for the Property to the County on December 4, 2018. R-76-77, 103. The Saratoga County Board of Supervisors then passed Resolution 110-2019 authorizing the sale of the Premises to Steven Abdo for the sum of \$142,500. R-78-81, 103. The County then sold the property to Sensible Holdings, LLC by deed dated May 8, 2019 and recorded on May 16, 2019. R-82-83, 103. The County made a profit of over \$130,000 on the foreclosure of the 2016 tax lien, which was for only \$9,330.97, and it has refused to disburse those profits to any other entity, including JBNC, who also had a lien interest in the Property. R-7, 103.

## **V. Procedural History**

JBNC brought an action in the lower court against Saratoga County and the Town of Galway, among others, on September 23, 2019, seeking to vacate the Tax Judgment and the subsequent sale of the Property to Sensible Holdings, LLC, or in the alternative, to be awarded money damages. R-14. JBNC filed a motion for

summary judgment, and Saratoga County cross-moved for summary judgment. R-98, R-145.

By order dated April 28, 2020, the lower court denied JBNC's motion for summary judgment and granted Saratoga County's cross-motion. R-4-13. The lower court held that Saratoga County complied with its obligation to provide notice of the tax foreclosure proceeding under RPTL § 1125 based solely on the Saratoga County's unsupported affidavits of mailing. R-9. Notwithstanding its holding, the court agreed that it was "troubling" that JBNC's business records demonstrated it never received any notice from the County and that the County's tracking information showed that its notice was not actually delivered to JBNC, but, instead, to an unknown P.O. box. *Id.* The court also ruled that this dispute "cries out for an equitable remedy," but that its hands were tied because it lacked the authority to fashion an equitable resolution for the parties. R-10-11. Both rulings were error and should be reversed.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

On review of a motion for summary judgment, a court's "function on a motion of this kind is issue finding, as opposed to issue determination, necessitating the denial thereof where a material issue of fact is found to exist 'or even arguably exist.'" *Hayes v. Niagara Mohawk Power Corp.*, 261 A.D.2d 748, 750 (3rd Dep't

1999) (internal citations omitted); *Marinello v. Dryden Mut. Ins. Co. Inc.*, 237 A.D.2d 795, 797 (3rd Dep’t 1997). During an appeal involving a motion for summary judgment, the Court “may search the record on appeal . . . and grant relief, where appropriate.” *99 Realty Co. v. Eikenberry*, 242 A.D.2d 215, 217 (1st Dep’t 1997); *Ins. Co. of Evanston v. Mid-Hudson Co-op. Ins. Co.*, 271 A.D.2d 651, 652 (2nd Dep’t 2000) (same).

## POINT I

### **THE LOWER COURT ERRED WHEN IT CONCLUDED THERE WAS NO ISSUE OF MATERIAL FACT REGARDING SARATOGA COUNTY’S COMPLIANCE WITH RPTL § 1125**

Tax foreclosure proceedings can result in a harsh penalty: namely, the taking of privately held property for nonpayment of taxes even where those taxes represent only a small portion of the total value of the property. For that reason, the Real Property Tax Law and New York case law put great weight on ensuring that property owners are given actual notice of tax foreclosure proceedings. That is, “[g]iven the substantial property interests at stake,” courts are tasked with “safeguard[ing] the due process rights of those whose property is threatened by ensuring that notice” of the tax foreclosure proceeding is “adequate.” *Matter of Foreclosure of Tax Liens*, 165 A.D.3d 1112, 1122 (2d Dept. 2018). Indeed, “[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.” *Law v. Benedict*, 197 A.D.2d 808, 809–10 (3d Dept. 1993) (acknowledging “goal” of tax foreclosure notice provisions is to provide interested parties with “actual notice”).

RPTL § 1125 requires counties to send notice to owners and anyone else whose right, title, or interest in the property may be affected by a tax foreclosure proceeding provided that such addresses are in the public record or known from material submitted to the enforcing officer. RPTL § 1125(1)(a). Notices must be sent by certified and first-class mail, and if both of the notices are not returned by the USPS within 45 days of mailing, “the notices shall be deemed received.” RPTL § 1125(1)(b). Even if the notices are not returned, however, courts have held that the County’s assertion that it provided the requisite notice only creates a rebuttable presumption that can be challenged. Such a rebuttal “must consist of more than a mere denial of receipt” and can include “evidence which would cast doubt on the mailing of the notice to the proper address” or evidence indicating “some other reason why the [interested party] would not have received a properly mailed and addressed notice.” *Law v. Benedict*, 197 A.D.2d 808, 810 (3d Dept.1993).

Here, the undisputed record demonstrates that an unresolved issue of material fact exists regarding whether Saratoga County complied with its notice obligations under RPTL § 1125 prior to foreclosing on the 2016 tax lien. In support of its motion

for summary judgment, JBNC submitted ample evidence demonstrating the County had not provided it with any notice whatsoever of the Tax Foreclosure Action:

- The United States Postal Service tracking information establishes that the notice of foreclosure that the County purportedly sent to JBNC by certified mail was never delivered to JBNC, but was instead delivered to an unknown P.O. Box in Kansas City, Missouri. R-262.

- This evidence is buttressed by the sworn affidavits from two JBNC employees, both of whom stated that, upon review of JBNC's business records, no bill, delinquent tax notice, or notice of a foreclosure proceeding was ever served upon or received by JBNC. R-109-113.

- And it is further bolstered by the fact that the record established that JBNC made active and good-faith efforts to identify *and pay* any unpaid tax liens on the Property by contacting the Town of Galway on March 19, 2018 and, upon receiving notice of the unpaid 2018 taxes, paying the delinquent taxes in full. R-6-7, 68, 101-103, 109-110.

- The Town of Galway failed to advise JBNC of the existence of other tax liens which eventually became the subject of the Tax Foreclosure Action, about which the County failed to advise JBNC. R-7, R-68, R-110.

In short, there is no dispute that JBNC would have also paid the 2016 tax lien, thereby protecting its first priority lien on the Property, and the only reason it did not

pay the 2016 taxes is that it did not know of them. *Id.* And the unbiased and undisputed evidence from the United States Postal Service confirms that the requisite notice was never delivered to JBNC.

By contrast, the County set forth a self-serving affidavit without any explanation for the USPS tracking information, including any justification for its failure to check the tracking information at any stage of the foreclosure process. R-229-236. The trial court was not required to accept such affidavits at the summary judgment state. *Gagen v. Kipany Prods., Ltd.*, 27 A.D.3d 1042, 1044, (3d Dep't 2006) (holding that "it was appropriate to disregard the self-serving affidavit" at the summary judgment stage because it was contradicted by documentary evidence).

The Court acknowledged that the undisputed evidence created an issue of fact when it conceded that the "unexplained tracking information for the certified mailing" was "troubling." R-9. However, even though the Court recognized that the tracking information showed that the certified mail did not actually deliver the notice of foreclosure to JBNC, it inexplicably ruled that "notice of the proceeding was deemed received by plaintiff pursuant to RPTL § 1125(1)(b)" because "neither the first class mailing nor the certified mailing were returned as undeliverable by the United States Post Office." *Id.*

The Court's ruling is the equivalent of ignoring the elephant in the room. Even if neither mailing was returned to the County, the undisputed tracking

information establishes that it was sent to the wrong address and thus never actually delivered to JBNC. R-262. Surely, if there is undisputed evidence (which was available to the County) that the notice was sent to an incorrect address, the fact that the notice was not returned as undeliverable is irrelevant to confirming the County's compliance with its notice obligations under New York law. The fact that the County's notice was delivered to *someone other than JBNC* is not enough to satisfy RPTL § 1125, which requires notice of foreclosure to any party whose "right, title or interest will be affected by the termination of the redemption period." In essence, whether a notice is returned as undeliverable is a proxy for whether it was delivered to the correct address at all. Here, the undisputable evidence demonstrates that it was not, and thus summary judgment in favor of the County was improper.

Unsurprisingly, courts that have considered this exact issue have consistently held that the requirements of RPTL § 1125(1)(b) were not satisfied when the evidence showed that a tax foreclosure notice was delivered to the wrong address. In *Matter of Foreclosure of Tax Liens By County of Erie*, for example, the Fourth Department set aside a judgment of foreclosure and sale because the property owner submitted evidence showing that the County mailed the notice to the wrong address. 225 A.D.2d 1089, 1089 (4th Dep't 1996); *see also West Branch Realty Corp. v. County of Putnam*, 293 A.D.2d 528, 529 (2nd Dep't 2002) (setting aside judgment



of foreclosure and sale where notice not sent to owner's address as listed in public records).

Further, courts have also held that RPTL § 1125 requires the County to provide *actual* notice before proceeding with foreclosure. *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 to all parties ‘whose right, title, or interest in the property was a matter of public record as of the date the list of delinquent taxes was filed.’ Such notice, to satisfy due process, must be given to identifiable parties at the address shown on the tax and real property records.”) (emphasis added); *Matter of Foreclosure of Tax Liens By County of Erie*, 225 A.D.2d at 1089 (“Before property may be sold in a foreclosure sale, the owner is entitled to *actual notice* of the sale.”) (emphasis added).

Here, the lower court incorrectly granted summary judgment in favor of Saratoga County because, at minimum, there was clearly an open issue of material fact as to whether JBNC had received actual notice of the foreclosure proceeding where the tracking information for the certified mail notice confirmed that it was delivered to the wrong address. R-262. And this evidence is further bolstered by the fact that JBNC made reasonable efforts to pay outstanding taxes, and has confirmed that it never received either tax notice from the County. R-68, 109-110, 113. This evidence is sufficient to rebut the County's self-serving affidavit.

Thus, based upon the undisputed record evidence, the lower court would have had valid basis to hold that JBNC did not receive any notice of the Tax Foreclosure Proceeding, and granted its motion for summary judgment. However, even if it did not reach that conclusion, it should have, at minimum, denied the County's cross-motion for summary judgment where there remains an unresolved issue of material fact as to whether JBNC received such notice as required by RPTL § 1125(1)(b). Its failure to do so was erroneous and should be reversed.

## **POINT II**

### **THE LOWER COURT WRONGLY HELD THAT IT LACKED AUTHORITY TO ENFORCE AN EQUITABLE RESOLUTION**

In the alternative, the lower court should have used its equitable powers to fashion a remedy to compensate JBNC for its monetary losses resulting from the County's improperly noticed tax foreclosure. The lower court recognized that its ruling led to an unfair result for JBNC. Specifically, the lower court noted that the receipt that the Town of Galway issued to JBNC for its payment of the 2018 taxes should have included a statement regarding the unpaid 2016 taxes as required by RPTL § 1112(2)(a) because "the inclusion of this statement, as required by law, presumably would have prompted [JBNC] to cure the remaining tax delinquencies on the property." R-10. It further stated that "the undisputed failure to include the statement required by law, combined with [JBNC's] assertions that it did not receive notice of the tax foreclosure proceeding, cries out for an equitable remedy,"

particularly because not only was Saratoga County able to cure the delinquent 2016 tax lien, it collected and retained over \$130,000 in profits from the foreclosure sale of the Property. *Id.* Despite these unfair circumstances, the lower court claimed that its hands were tied, and that it lacked authority to remedy JBNC's losses that resulted through no fault of its own through any equitable solution. R-11. It did not, however, cite to any legal authority barring it from entering an equitable remedy.

Contrary to the lower court's holding, courts in its position do have power to create an equitable remedy. In fact, courts have used their broad equitable "discretion to set aside a judicial sale where fraud, collusion, mistake, or misconduct casts suspicion on the fairness of the sale." *Long Island Sav. Bank of Centereach, F.S.B. v. Jean Valiquette, M.D., P.C.*, 183 A.D.2d 877, 877 (2nd Dep't 1992). Here, both the Town of Galway and Saratoga County made major mistakes casting doubt on the fairness of the tax sale. Specifically, the Town of Galway failed to include the language mandated by RPTL § 1112(2)(a), which naturally led JBNC to believe it had paid off all of the taxes it owed. R-68. Had the Town of Galway included the statutorily-mandated language, there is no reason to doubt that JBNC would have paid the 2016 taxes prior to the tax foreclosure. Similarly, Saratoga County's failure to provide JBNC with actual notice of the tax foreclosure proceedings and, instead, mailing of the notice to an unknown P.O. box meant that JBNC was unable to contest the foreclosure proceedings or simply resolve them by paying the amount of taxes

owed. R-262. And there is no evidence in the record demonstrating that the County ever tried to remedy its error with the delivery of the certified mailing to the unknown P.O. Box. These mistakes deprived JBNC of due process, prevented it from taking all necessary steps to protect its first priority interest in the Property, and calls the fairness of the sale into question. Accordingly, an order setting the foreclosure judgment aside or providing JBNC monetary relief is appropriate.

Further, courts can and have used their broad equitable powers to vacate default judgments. In *In re Foreclosure of Tax Liens*, for example, the Fourth Department reversed an order denying a motion to vacate a default judgment of foreclosure where the judgment in question concerned the property owner's failure to pay approximately \$24 in interest on overdue property taxes. 59 A.D.3d 1065, 1065 (4th Dep't 2009). The owner had paid the actual taxes owed, and there was a dispute regarding whether he had received notice that he owed interest on the delinquent taxes as well. There, like the lower court in this action, the trial court mistakenly held that it "lacked the inherent authority" to vacate the default judgment. *Id.* The appellate court, however, held "that the entry of a default judgment based on the failure to pay that minor amount of interest would result in a disproportionately harsh result" and therefore concluded "that this is an appropriate case in which to exercise our broad equity power to vacate [the] default judgment." *Id.* Similarly, JBNC has suffered a "disproportionately harsh result," particularly

given that Saratoga County has also pocketed over \$130,000 in excess of the amount JBNC owed on the 2016 tax lien. This Court should either exercise its own equitable powers as it deems fit or remand this matter back to the lower court for that court to determine how to best resolve this on an equitable basis.

### 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  
December 22, 2020

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## **PRINTING SPECIFICATIONS STATEMENT**

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

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

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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 record cover for complete caption)*

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1. The index number of the case in the court below is 2019-3177.
2. The full names of the original parties are set forth above. There have been no changes.
3. This action was commenced in Supreme Court of the State of New York, Saratoga County.
4. The action was commenced on or about September 17, 2019 by filing of a Summons and Complaint. Issue was then joined on or about November 4, 2019 by service of a Verified Answer.
5. This is an action to vacate a tax foreclosure proceeding.
6. The proceeding is from the Decision and Order of the Honorable Ann C. Crowell, Dated April 28, 2020 and entered on May 4, 2020.
7. The appeal is being perfected on a full reproduced record.

# Exhibit 3



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

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**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,**

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**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)<sup>1</sup>

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<sup>1</sup> (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 (3<sup>rd</sup> 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 (3<sup>rd</sup> Dept. 2014), *citing* Matter of County of Sullivan (Dunne – Town of Bethel), 111 A.D.3d 1235 (3<sup>rd</sup> Dept. 2013), Matter of County of Sullivan (Matejkowski), 105 A.D.3d 1170 (3<sup>rd</sup> 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 (3<sup>rd</sup> 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 (3<sup>rd</sup> Dept. 1986); Hoge v. Chautauqua County, 173 A.D.3d 1731 (4<sup>th</sup> Dept. 2019); County of Niagara (Collingwood Construction Corp.), 174 A.D.3d 1454 (4<sup>th</sup> Dept. 2019).

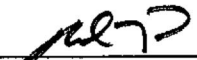
Appellant's assertion that the Town and County made "major mistakes casting doubt on the fairness of the tax sale" is quite simply not supported by the record. The evidence submitted in support of the cross-motion for summary judgement unequivocally establishes that the Tax Foreclosure proceeding was 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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# Exhibit 4

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

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**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**

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APPELLATE INNOVATIONS  
(914) 948-2240



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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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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**

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

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# Exhibit 5

Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: June 24, 2021

531787

JAMES B. NUTTER & COMPANY,  
Appellant,

v

MEMORANDUM AND ORDER

COUNTY OF SARATOGA et al.,  
Respondents,  
et al.,  
Defendants.

Calendar Date: April 20, 2021

Before: Garry, P.J., Egan Jr., Aarons, Pritzker and Reynolds  
Fitzgerald, JJ.

K&L Gates LLP, New York City (Gregory N. Blase of  
counsel), for appellant.

Michael J. Hartnett, County Attorney, Ballston Spa, for  
respondents.

Aarons, J.

Appeal from an order of the Supreme Court (Crowell, J.),  
entered May 4, 2020 in Saratoga County, which, among other  
things, granted a cross motion by defendants County of Saratoga  
and Stephen M. Dorsey for summary judgment dismissing the  
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In May 2018, defendant County of Saratoga filed a petition  
and notice of foreclosure of tax liens on a property over which  
plaintiff held a mortgage. The County ultimately obtained a

judgment of foreclosure in December 2018 awarding it title of the property. Defendant Stephen M. Dorsey, the tax enforcement officer for the County, recorded a deed transferring the property to the County. Plaintiff commenced this action seeking, among other things, to vacate the December 2018 judgment. Following joinder of issue, plaintiff moved for summary judgment. The County and Dorsey (hereinafter collectively referred to as defendants) opposed and cross-moved for summary judgment dismissing the complaint. In a May 2020 order, Supreme Court denied plaintiff's motion and granted defendants' cross motion. Plaintiff appeals. We affirm.

Defendants were required to send the notice of the tax foreclosure proceeding to plaintiff "by certified mail and ordinary first class mail" (RPTL 1125 [1] [b] [i]; see Landing Woods of Ulster, LLC v County of Ulster, 156 AD3d 1009, 1010 [2018]). The record contains documentary evidence demonstrating that the petition and notice of foreclosure were sent via certified mail and first class mail to plaintiff at "4153 Broadway" in Kansas City, Missouri – the address for plaintiff as listed on the mortgage (see RPTL 1125 [b] [1]).<sup>1</sup> The record also discloses that neither of these mailings was returned. Accordingly, defendants satisfied their burden of demonstrating that they complied with RPTL 1125.

In opposition thereto, plaintiff submitted, among other things, the tracking information sheet for the certified mailing sent by the County. This sheet indicated that the certified mailing was delivered to an unspecified post office box, as opposed to 4153 Broadway, in Kansas City, Missouri. To that end, plaintiff asserts that a material issue of fact exists as to whether it received notice of the tax foreclosure proceeding. The petition and notice of foreclosure sent to plaintiff, however, "shall be deemed received unless both the certified mailing and the ordinary first class mailing are returned by the United States [P]ostal [S]ervice within [45] days after being mailed" (RPTL 1125 [1] [b] [i]; see Matter of County of Sullivan

---

<sup>1</sup> Plaintiff does not contend that 4153 Broadway was the incorrect address.

[Dunne–Town of Bethel], 111 AD3d 1232, 1234 [2013]).<sup>2</sup> In view of this clear and explicit language, the Legislature specified what was minimally required of a party attempting to rebut the presumption of service – i.e., proof establishing that both the certified mailing and the ordinary first class mailing were returned. To permit anything less would render this part of RPTL 1125 (1) (b) (i) meaningless. Furthermore, to the extent that this level of proof leads to inequitable results or imposes an unduly high burden upon a party arguing lack of notice, the Legislature is free to amend RPTL 1125.

That said, although plaintiff's proof established that the certified mailing was delivered to a different address, delivery to a different address is not the same as the certified mailing being returned. As mentioned, there is no indication in the record that both the certified mailing and the first class mailing were returned to defendants. Even if the certified mailing had been returned to defendants, there still was no evidence demonstrating that the first class mailing was returned (see Matter of County of Sullivan [Matejkowski], 105 AD3d 1170, 1171 [2013], appeal dismissed 21 NY3d 1062 [2013]; Lin v County of Sullivan, 100 AD3d 1076, 1078-1079 [2012]). Defendants were therefore entitled to presume that plaintiff had notice of the tax foreclosure proceeding based upon its receipt of the first class mailing.<sup>3</sup> In the absence of evidence that both the certified and first class mailings were returned to defendants,

---

<sup>2</sup> We note that RPTL 1125 was amended in 2006 to add this language (L 2006, ch 415, § 1). As such, to the extent that plaintiff relies on cases that predate this 2006 amendment, such reliance is unavailing.

<sup>3</sup> As noted in the legislative materials in support of the 2006 amendment to RPTL 1125, "[i]f the certified mailing is returned within 45 days but the regular mailing is not, the tax district would be entitled to proceed with the foreclosure without making further efforts to notify that party" (New York Bill Jacket, Mem of Joseph K. Gerberg, Esq., L 2006, ch 415). Indeed, requiring notice to be sent both by certified and regular mail was thought to be "an effective and inexpensive way to reduce incidents of non-deliverability" (id.).

the petition and notice of foreclosure were "deemed received" by plaintiff (RPTL 1125 [1] [b] [i]). Consequently, plaintiff failed to raise a material issue of fact regarding whether the County complied with RPTL 1125.

Finally, plaintiff contends that Supreme Court should have exercised its authority to fashion an equitable remedy. Although the court erred in concluding that it lacked the authority to do so, in the absence of any evidence of fraud, misrepresentation, deception or misconduct by defendants, there is no basis to award such relief (see generally Guardian Loan Co. v Early, 47 NY2d 515, 520-521 [1979]).

Garry, P.J., Egan Jr. and Reynolds Fitzgerald, JJ.,  
concur.

Pritzker, J. (dissenting).

I respectfully dissent because it is my opinion that plaintiff established issues of material fact as to the compliance by defendant County of Saratoga and defendant Stephen M. Dorsey (hereinafter collectively referred to as defendants) with the procedural requirements of the foreclosure proceeding (see RPTL art 11). Although I agree with the majority that there was no proof that the relevant mailings were returned to defendants and, as such, were "deemed received" by plaintiff (RPTL 1125 [1] [b] [i]), this is merely a rebuttable presumption (see Lin v County of Sullivan, 100 AD3d 1076, 1079 [2012]). Along this same line, I disagree with the majority that the explicit language of the statute requires plaintiff "to tender proof establishing" that both mailings were returned to the County to rebut this presumption.<sup>1</sup> I also disagree that

---

<sup>1</sup> The 2006 amendments to RPTL 1125 codified the decision of the Supreme Court of the United States in Jones v Flowers (547 US 220 [2006]), which held that "the [state's] effort to provide notice [to the plaintiff] of an impending tax sale of his house was insufficient to satisfy due process" (id. at 239; see Senate Introducer's Mem in Support, Bill Jacket, L 2006, ch 415). The amendments created additional requirements for



permitting anything less would render that part of RPTL 1125 (1) (b) (i) "meaningless." In fact, precluding such additional proof to rebut the presumption leads to absurd results where, like here, proffered evidence raises core issues of fact as to whether the notices were mailed "to [the] owner," as required by RPTL 1125 (1) (a).

Although "the [plaintiff's] denial of receipt of such notice, alone, is insufficient to rebut [that] presumption" (Wilczak v City of Niagara Falls, 174 AD3d 1446, 1448 [2019] [internal quotation marks and citations omitted]), the additional evidence proffered by plaintiff did so (see Matter of County of Sullivan [Matejkowski], 105 AD3d 1170, 1171 [2013], appeal dismissed 21 NY3d 1062 [2013]). Aside from denial of receipt, plaintiff submitted the tracking information from the United States Postal Service indicating that the certified mailing was delivered to an unspecified post office box, as opposed to plaintiff's address at 4153 Broadway, Kansas City, Missouri, which raises troubling questions of fact that are best resolved at trial.<sup>2</sup> Notably, the affidavits of service by mail submitted by the County are inconsistent with this uncontested tracking information.<sup>3</sup> Moreover, evidence regarding plaintiff's inquiry and recent payment of the 2018 tax bill, approximately

---

notice, in part, to "reduce incidents of non-deliverability" (New York Bill Jacket, Mem of Joseph K. Gerberg, Esq., L 2006, ch 415). Consequently, the amendment's creation of an additional remedial layer of procedural due process for the taxpayer is legislatively inconsistent with the establishment of, as the majority asserts, an irrebuttable presumption against the taxpayer every time mailings are not returned to the sender as undeliverable, no matter where they were mailed in the first place.

<sup>2</sup> In addition, as indicted by Supreme Court in its decision, the certified mail receipt does not contain an official postmark on it.

<sup>3</sup> Although it could not be established by United States Postal Service records, a question of fact arises as to whether the regular mailed correspondence met the same fate.

two months prior to the alleged mailing of the required foreclosure proceeding notices, strongly suggests that plaintiff did not intend to forfeit the property (see Law v Benedict, 197 AD2d 808, 810 [1993]), and "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" (Carney v Philippon, 1 NY3d 333, 339 [2004] [emphasis added]; accord Matter of Priest v Mareane, 45 AD3d 1474, 1476 [2007], lv denied 10 NY3d 704 [2008]).

Finally, contrary to Supreme Court's finding, plaintiff, whose mailing address is in Missouri, was not afforded sufficient procedural due process because the County filed the tax foreclosure proceeding and published notice of the proceeding in two local newspapers. Under the circumstances, the foregoing was neither reasonably calculated to apprise plaintiff of the pendency of the tax foreclosure proceeding nor did it afford plaintiff an opportunity to present objections (see Landing Woods of Ulster, LLC v County of Ulster, 156 AD3d 1009, 1011 [2017]). As such, it is my opinion that Supreme Court should have denied defendants' cross motion for summary judgment.

ORDERED that the order is affirmed, without costs.

ENTER:



Robert D. Mayberger  
Clerk of the Court

# Exhibit 6

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

-----  
In the Matter of

**JAMES B. NUTTER & COMPANY,**  
Appellant,

NOTICE OF ENTRY

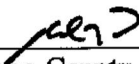
-against-

Index No.: 531787

**COUNTY OF SARATOGA, et al.,**  
Respondents,  
et al.,  
Defendants.

-----  
**PLEASE TAKE NOTICE** that attached hereto is copy of a Memorandum and Order, issued by the Supreme Court, Appellate Division, Third Judicial Department on June 24, 2021.

Dated: July 6, 2021  
Ballston Spa, New York

  
\_\_\_\_\_  
Saratoga County Attorney's Office  
By: Michael Hartnett, Esq.  
Saratoga County Attorney  
40 McMaster Street  
Ballston Spa, NY 12020  
(518) 884-4770

To: Gregory Blase, Esq.  
K&L Gates, LLP  
State Street Financial Center  
1 Lincoln Street  
Boston, MA 02111

Timothy Horigan, Esq.  
Horigan, Horigan & Lombardo, P.C.  
49 Main Street  
Amsterdam, NY 12010

Priya Chadha, Esq.  
K&L Gates, LLP  
599 Lexington Avenue  
New York, NY 10022

Sarah Washington, Esq.  
Goldberg Segalla, LLP  
665 Main Street  
Buffalo, NY 14203-1425

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: June 24, 2021

531787

---

JAMES B. NUTTER & COMPANY,  
Appellant,

v

MEMORANDUM AND ORDER

COUNTY OF SARATOGA et al.,  
Respondents,  
et al.,  
Defendants.

---

Calendar Date: April 20, 2021

Before: Garry, P.J., Egan Jr., Aarons, Pritzker and Reynolds  
Fitzgerald, JJ.

---

K&L Gates LLP, New York City (Gregory N. Blase of  
counsel), for appellant.

Michael J. Hartnett, County Attorney, Ballston Spa, for  
respondents.

---

Aarons, J.

Appeal from an order of the Supreme Court (Crowell, J.),  
entered May 4, 2020 in Saratoga County, which, among other  
things, granted a cross motion by defendants County of Saratoga  
and Stephen M. Dorsey for summary judgment dismissing the  
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In May 2018, defendant County of Saratoga filed a petition  
and notice of foreclosure of tax liens on a property over which  
plaintiff held a mortgage. The County ultimately obtained a

judgment of foreclosure in December 2018 awarding it title of the property. Defendant Stephen M. Dorsey, the tax enforcement officer for the County, recorded a deed transferring the property to the County. Plaintiff commenced this action seeking, among other things, to vacate the December 2018 judgment. Following joinder of issue, plaintiff moved for summary judgment. The County and Dorsey (hereinafter collectively referred to as defendants) opposed and cross-moved for summary judgment dismissing the complaint. In a May 2020 order, Supreme Court denied plaintiff's motion and granted defendants' cross motion. Plaintiff appeals. We affirm.

Defendants were required to send the notice of the tax foreclosure proceeding to plaintiff "by certified mail and ordinary first class mail" (RPTL 1125 [1] [b] [i]; see Landing Woods of Ulster, LLC v County of Ulster, 156 AD3d 1009, 1010 [2018]). The record contains documentary evidence demonstrating that the petition and notice of foreclosure were sent via certified mail and first class mail to plaintiff at "4153 Broadway" in Kansas City, Missouri – the address for plaintiff as listed on the mortgage (see RPTL 1125 [b] [1]).<sup>1</sup> The record also discloses that neither of these mailings was returned. Accordingly, defendants satisfied their burden of demonstrating that they complied with RPTL 1125.

In opposition thereto, plaintiff submitted, among other things, the tracking information sheet for the certified mailing sent by the County. This sheet indicated that the certified mailing was delivered to an unspecified post office box, as opposed to 4153 Broadway, in Kansas City, Missouri. To that end, plaintiff asserts that a material issue of fact exists as to whether it received notice of the tax foreclosure proceeding. The petition and notice of foreclosure sent to plaintiff, however, "shall be deemed received unless both the certified mailing and the ordinary first class mailing are returned by the United States [P]ostal [S]ervice within [45] days after being mailed" (RPTL 1125 [1] [b] [i]; see Matter of County of Sullivan

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That said, although plaintiff's proof established that the certified mailing was delivered to a different address, delivery to a different address is not the same as the certified mailing being returned. As mentioned, there is no indication in the record that both the certified mailing and the first class mailing were returned to defendants. Even if the certified mailing had been returned to defendants, there still was no evidence demonstrating that the first class mailing was returned (see Matter of County of Sullivan [Matejkowski], 105 AD3d 1170, 1171 [2013], appeal dismissed 21 NY3d 1062 [2013]; Lin v County of Sullivan, 100 AD3d 1076, 1078-1079 [2012]). Defendants were therefore entitled to presume that plaintiff had notice of the tax foreclosure proceeding based upon its receipt of the first class mailing.<sup>3</sup> In the absence of evidence that both the certified and first class mailings were returned to defendants,

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the petition and notice of foreclosure were "deemed received" by plaintiff (RPTL 1125 [1] [b] [i]). Consequently, plaintiff failed to raise a material issue of fact regarding whether the County complied with RPTL 1125.

Finally, plaintiff contends that Supreme Court should have exercised its authority to fashion an equitable remedy. Although the court erred in concluding that it lacked the authority to do so, in the absence of any evidence of fraud, misrepresentation, deception or misconduct by defendants, there is no basis to award such relief (see generally Guardian Loan Co. v Early, 47 NY2d 515, 520-521 [1979]).

Garry, P.J., Egan Jr. and Reynolds Fitzgerald, JJ.,  
concur.

Pritzker, J. (dissenting).

I respectfully dissent because it is my opinion that plaintiff established issues of material fact as to the compliance by defendant County of Saratoga and defendant Stephen M. Dorsey (hereinafter collectively referred to as defendants) with the procedural requirements of the foreclosure proceeding (see RPTL art 11). Although I agree with the majority that there was no proof that the relevant mailings were returned to defendants and, as such, were "deemed received" by plaintiff (RPTL 1125 [1] [b] [i]), this is merely a rebuttable presumption (see Lin v County of Sullivan, 100 AD3d 1076, 1079 [2012]). Along this same line, I disagree with the majority that the explicit language of the statute requires plaintiff "to tender proof establishing" that both mailings were returned to the County to rebut this presumption.<sup>1</sup> I also disagree that

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two months prior to the alleged mailing of the required foreclosure proceeding notices, strongly suggests that plaintiff did not intend to forfeit the property (see Law v Benedict, 197 AD2d 808, 810 [1993]), and "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" (Carney v Philipponne, 1 NY3d 333, 339 [2004] [emphasis added]; accord Matter of Priest v Mareane, 45 AD3d 1474, 1476 [2007], lv denied 10 NY3d 704 [2008]).

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ORDERED that the order is affirmed, without costs.

ENTER:



Robert D. Mayberger  
Clerk of the Court

# Exhibit 7

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

_____	:	
JAMES B. NUTTER &	:	
COMPANY,	:	<b>Appeal No. 531787</b>
<i>Plaintiff-Appellant-Movant,</i>	:	
	:	
- against -	:	From Supreme Court
	:	County of Saratoga
COUNTY OF SARATOGA,	:	Index No. 2019-3177
STEPHEN M. DORSEY, IN HIS	:	
OFFICIAL CAPACITY AS TAX	:	<b><u>NOTICE OF MOTION</u></b>
ENFORCEMENT OFFICER OF	:	
THE COUNTY OF SARATOGA	:	
and TOWN OF GALWAY,	:	
	:	
<i>Defendants-Appellees.</i>	:	
_____	:	

**PLEASE TAKE NOTICE** that upon the annexed affirmation of Gregory N. Blase, sworn to the 5th day of August 2021 and the accompanying memorandum of law, a motion will be made at a term of this Court to be held in the City of Albany, New York, on the 16th day of August 2021, for an order granting permission to appeal the Memorandum and Order issued by the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department Order, dated June 24, 2021 to the New York State Court of Appeals pursuant to Civil Practice Law & Rules 5602.

Dated: New York, New York  
August 5, 2021

Respectfully submitted,  
**K&L GATES LLP**

By: /s/ Gregory N. Blase

Gregory N. Blase  
K&L GATES LLP  
State Street Financial Center  
One Lincoln Street  
Boston, MA 02111  
Direct: (617) 951-9059  
Direct: (212) 536-3902  
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Email: [gregory.blase@klgates.com](mailto:gregory.blase@klgates.com)

Priya Chadha  
K&L GATES LLP  
599 Lexington Ave.  
New York, NY 10022  
Telephone: (212) 536-3905

*Attorney for Plaintiff-Appellant  
James B. Nutter & Company*

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

---

JAMES B. NUTTER & COMPANY, <i>Plaintiff-Appellant-Movant,</i>	:	
	:	<b>Appeal No. 531787</b>
	:	
- against -	:	From Supreme Court
	:	County of Saratoga
COUNTY OF SARATOGA, STEPHEN M. DORSEY, IN HIS OFFICIAL CAPACITY AS TAX ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA and TOWN OF GALWAY,	:	Index No. 2019-3177
	:	
	:	
<i>Defendants-Appellees.</i>	:	

---

**AFFIRMATION OF GREGORY N. BLASE  
IN SUPPORT OF MOTION FOR LEAVE TO APPEAL  
TO THE NEW YORK STATE COURT OF APPEALS**

COMMONWEALTH OF MASSACHUSETTS

ss.:

COUNTY OF SUFFOLK

GREGORY N. BLASE, an attorney duly admitted to practice before the courts of the State of New York, being duly sworn, deposes and says:

1. I am a partner at the law firm of K&L Gates LLP, counsel to Plaintiff-Appellant James B. Nutter & Company (“JBNC”). I am familiar with the pleadings and proceedings in this action and with the matters set forth herein. I submit this affirmation based on my personal knowledge and in support of Plaintiff-Appellant’s motion for leave to appeal to the Court of Appeals.

2. On July 2, 2020, JBNC filed a timely appeal of the Order of the Honorable Ann C. Crowell, J.S.C. dated April 28, 2020, and entered in the office of the County Clerk of Saratoga County on May 4, 2020. A true and correct copy of JBNC's notice of appeal is attached as Exhibit 1.

3. JBNC seeks leave to appeal from each and every part of the Memorandum and Order issued by the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, dated June 24, 2021, and entered by the Clerk of the Court on June 24, 2021. A true and correct copy of the Memorandum and Order is attached as Exhibit 2.

4. JBNC was served with notice of entry of the Court's Memorandum and Order on July 6, 2021. A copy of the notice of entry is attached hereto as Exhibit 3.

5. JBNC seeks permission to appeal to the Court of Appeals on the following two questions:

a. Whether, when RPTL § 1125 provides that certified mail and U.S. Mail notices "shall be deemed received" unless both iterations of the notice are returned by the Postal Service within 45 days, the statute significantly limits the means by which an interested party may rebut the presumption of receipt of notice solely to presenting evidence that both forms of notice were returned by the Postal Service as undelivered; and

b. Whether a trial court possesses inherent power to grant equitable relief from a tax sale when a mortgage holder proves that it was prevented from protecting its interest because of a mistake by the taxing entity.

6. As addressed in further detail in the accompanying memorandum of law, with respect to the first question, JBNC respectfully submits that the Court of Appeals should have an opportunity to definitively interpret RPTL Section 1125 given the first-impression nature of this Court's determination, the dissent, the apparent conflict between the departments of the Appellate Division and the importance of the issue.

7. As addressed in further detail in the accompanying memorandum of law, with respect to the second question, JBNC respectfully submits the Court of Appeals should have an opportunity to clarify whether a trial court has authority to provide an equitable remedy when, as the evidence demonstrates occurred in this case, a taxing entity mistakenly fails to provide required information to allow a party to avoid a tax foreclosure.

Dated: Boston, Massachusetts  
August 5, 2021

/s/ Gregory N. Blase  
Gregory N. Blase



# **EXHIBIT 1**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SARATOGA

<p>-----X</p> <p>JAMES B. NUTTER &amp; COMPANY,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">-vs-</p> <p>COUNTY OF SARATOGA; STEPHEN M. DORSEY, IN HIS CAPACITY AS TAX ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA; TOWN OF GALWAY; GALWAY CENTRAL SCHOOL DISTRICT; STEVEN ABDOO; AND SENSIBLE PROPERTY HOLDINGS, LLC</p> <p>"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, described in the complaint,</p> <p style="text-align: right;">Defendants.</p> <p>-----X</p>	<p><b><u>NOTICE OF APPEAL</u></b></p> <p><b>INDEX NO. 2019-3177</b></p>
---	--

**PLEASE TAKE NOTICE**, that the above-named Plaintiff, by its attorneys, RAS Boriskin, LLC, hereby appeal(s) to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, from each and every part of the annexed Order of the Honorable Ann C. Crowell, J.S.C., dated April 28, 2020, and entered in the office of the County Clerk of Saratoga County on May 4, 2020, and from each and every part thereof.

Date: July 2, 2020  
Westbury, New York

RAS Boriskin, LLC  
Attorney for Plaintiff



\_\_\_\_\_  
Joseph Battista, Esq.  
RAS Boriskin, LLC  
900 Merchants Concourse, Suite 310  
Westbury, NY 11590  
516-280-7675



TO:

SARATOGA COUNTY ATTORNEY'S OFFICE  
ATTN: STEPHEN M. DORSEY, ESQ.  
40 MCMASTER STREET  
BALLSTON SPA, NY 12020  
*ATTORNEYS FOR COUNTY OF SARATOGA AND STEPHEN M. DORSEY, IN HIS CAPACITY  
AS TAX ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA*

HORIGAN, HORIGAN & LOMBARDO, P.C.  
ATTN: TIMOTHY HORIGAN, ESQ.  
49 EAST MAIN STREET  
AMSTERDAM, NY 12010  
*ATTORNEY FOR TOWN OF GALWAY*

GALWAY CENTRAL SCHOOL DISTRICT  
5317 SACANDAGA ROAD  
GALWAY, NY 12074

STEVEN ABDOO  
3824 FOUNTAIN STREET  
CLINTON, NY 13323

SENSIBLE PROPERTY HOLDINGS, LLC  
99 WASHINGTON AVENUE  
ALBANY, NY 12210

# Supreme Court of the State of New York

## Appellate Division: Third Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

<b>Case Title:</b> Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.		<b>For Court of Original Instance</b>
<b>JAMES B. NUTTER &amp; COMPANY,</b>  <p style="text-align: center;">- against -</p> COUNTY OF SARATOGA; STEPHEN M. DORSEY, IN HIS CAPACITY AS TAX ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA; TOWN OF GALWAY; GALWAY CENTRAL SCHOOL DISTRICT; STEVEN ABDOO; AND SENSIBLE PROPERTY HOLDINGS, LLC  <small>"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, described in the complaint,</small>		Date Notice of Appeal Filed
		<b>For Appellate Division</b>
Case Type	<input checked="" type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration	<input type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding
Filing Type	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278	<input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review
<b>Nature of Suit:</b> Check up to three of the following categories which best reflect the nature of the case.		
<input type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input type="checkbox"/> Commercial
<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law
<input type="checkbox"/> Family Court	<input checked="" type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous
<input type="checkbox"/> Real Property (other than foreclosure)	<input type="checkbox"/> Statutory	<input type="checkbox"/> Taxation
		<input type="checkbox"/> Contracts
		<input type="checkbox"/> Estate Matters
		<input type="checkbox"/> Prisoner Discipline & Parole
		<input type="checkbox"/> Torts

Appeal	
Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.
<input type="checkbox"/> Amended Decree <input type="checkbox"/> Amended Judgement <input type="checkbox"/> Amended Order <input type="checkbox"/> Decision <input type="checkbox"/> Decree	<input type="checkbox"/> Determination <input type="checkbox"/> Finding <input type="checkbox"/> Interlocutory Decree <input type="checkbox"/> Interlocutory Judgment <input type="checkbox"/> Judgment <input checked="" type="checkbox"/> Order <input type="checkbox"/> Order & Judgment <input type="checkbox"/> Partial Decree <input type="checkbox"/> Resettled Decree <input type="checkbox"/> Resettled Judgment <input type="checkbox"/> Resettled Order <input type="checkbox"/> Ruling <input type="checkbox"/> Other (specify):
Court: <b>Supreme Court</b>	County: <b>Saratoga</b>
Dated: <b>04/28/2020</b>	Entered: <b>05/04/2020</b>
Judge (name in full): <b>Ann C. Crowell, J.S.C.</b>	Index No.: <b>2019-3177</b>
Stage: <input type="checkbox"/> Interlocutory <input checked="" type="checkbox"/> Final <input type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury
Prior Unperfected Appeal and Related Case Information	
Are any appeals arising in the same action or proceeding currently pending in the court? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.	
Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:	
Original Proceeding	
Commenced by: <input type="checkbox"/> Order to Show Cause <input checked="" type="checkbox"/> Notice of Petition <input type="checkbox"/> Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	
Proceeding Transferred Pursuant to CPLR 7804(g)	
Court: <b>Choose Court</b>	County: <b>Choose County</b>
Judge (name in full):	Order of Transfer Date:
CPLR 5704 Review of Ex Parte Order:	
Court: <b>Choose Court</b>	County: <b>Choose County</b>
Judge (name in full):	Dated:
Description of Appeal, Proceeding or Application and Statement of Issues	
Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.	
Order denying Plaintiff's motion for summary judgment and granting defendant's cross-motion.	

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Whether Plaintiff's motion for summary judgment should have been granted and the cross-motion denied.

**Party Information**

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	JAMES B. NUTTER & COMPANY	Plaintiff	Appellant
2	COUNTY OF SARATOGA	Defendant	Respondent
3	STEPHEN M. DORSEY, IN HIS CAPACITY AS TAX ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA	Defendant	Respondent
4	TOWN OF GALWAY	Defendant	None
5	GALWAY CENTRAL SCHOOL DISTRICT	Defendant	None
6	STEVEN ABDOO	Defendant	None
7	SENSIBLE PROPERTY HOLDINGS, LLC	Defendant	None
8			
9			
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20			

### Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: RAS BORISKIN, LLC

Address: 900 MERCHANTS CONCOURSE, SUITE 310

City: WESTBURY      State: NY      Zip: 11590      Telephone No: 516-280-7675

E-mail Address: jbattista@rasboriskin.com

Attorney Type:       Retained     Assigned     Government     Pro Se     Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name: SARATOGA COUNTY ATTORNEY'S OFFICE

Address: 40 MCMASTER STREET

City: BALLSTON SPA      State: NY      Zip: 12020      Telephone No:

E-mail Address:

Attorney Type:       Retained     Assigned     Government     Pro Se     Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City:      State:      Zip:      Telephone No:

E-mail Address:

Attorney Type:       Retained     Assigned     Government     Pro Se     Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City:      State:      Zip:      Telephone No:

E-mail Address:

Attorney Type:       Retained     Assigned     Government     Pro Se     Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City:      State:      Zip:      Telephone No:

E-mail Address:

Attorney Type:       Retained     Assigned     Government     Pro Se     Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City:      State:      Zip:      Telephone No:

E-mail Address:

Attorney Type:       Retained     Assigned     Government     Pro Se     Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

SUPREME COURT  
STATE OF NEW YORK

COUNTY OF SARATOGA

COPY

JAMES B. NUTTER & COMPANY,

Plaintiff,

- against -

**DECISION and ORDER**

RJI # 45-1-2020-0128

Index #2019-3177

COUNTY OF SARATOGA; STEPHEN M. DORSEY,  
in his capacity as Tax Enforcement Officer of the County  
of Saratoga; TOWN OF GALWAY; GALWAY CENTRAL  
SCHOOL DISTRICT; Steven Abdo; 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, described in the complaint,

Defendants.

---

APPEARANCES

RAS Boriskin, LLC  
Attorneys for the Plaintiff  
900 Merchants Concourse, Suite 310  
Westbury, New York 11590

Saratoga County Attorney's Office  
Attorneys for the Defendants Saratoga County and  
Stephen Dorsey as Tax Enforcement Officer  
40 McMaster Street  
Ballston Spa, New York 12020

Goldberg Segalla  
Attorneys for the Proposed Interveners  
665 Main Street  
Buffalo, New York 14203

ANN C. CROWELL, J

Plaintiff James B. Nutter & Company ("plaintiff") requests an Order: (1) granting a



default judgment against defendants Steven Abdo, Sensible Properties Holdings, LLC and Galway Central School District pursuant to CPLR § 3215; (2) granting summary judgment against the defendants County of Saratoga and Stephen M. Dorsey, in his capacity as Tax Enforcement Officer of the County of Saratoga ("Saratoga County") and the Town of Galway on plaintiff's first cause of action pursuant to CPLR § 3212; (3) vacating the tax judgment as it pertains to the subject premises; (4) vacating the tax foreclosure deed transferring title of the property to Saratoga County; (5) vacating the deed transferring title of the property to Sensible Holdings, LLC; and (6) allowing the plaintiff to redeem the property for the amount of the tax lien.

Plaintiff's motion was made returnable on February 21, 2020. In opposition, Saratoga County served a document entitled a "Notice of Cross-Motion" on February 14, 2020 (seven days before plaintiff's return date), but designated the return date as March 2, 2020. Defendant Saratoga County's designation of a different return date in its "Notice of Cross-Motion" was procedurally improper. *See, CPLR § 2214(b)*. However, the procedural impropriety did not prejudice the plaintiff. The cross motion was served seven days before the original return date pursuant to CPLR § 2214(b). The improper cross-motion return date provided plaintiff with additional time to respond, which would otherwise not have been available without an adjournment request. Defendant Saratoga County's procedural impropriety shall be disregarded. *CPLR § 2001*. Defendant Saratoga County's motion for summary judgment requests an Order dismissing the Complaint in its entirety. Defendant Town of Galway filed an Answer in the action, but has not submitted any papers in opposition to the motion. Defendants Steven Abdo, Sensible Property Holdings, LLC and Galway Central School District have defaulted in the action.

On August 11, 2008, Donald H. Craig and Lois R. Craig ("Craig") delivered a note and mortgage to the plaintiff to secure the principal sum of \$365,107.50. The address listed for the plaintiff in the first paragraph of the mortgage is: "James B. Nutter & Company, 4153 Broadway, Kansas City, Missouri, 64111." In a related mortgage foreclosure action under Index Number 2015-2241, plaintiff was granted a Judgment of Foreclosure and Sale against Craig dated June 12, 2019, and entered July 30, 2019. The Judgment of Foreclosure and Sale determined that \$276,785.43 was due and owing as of January 31, 2019.

While the plaintiff was prosecuting its foreclosure action, a tax foreclosure proceeding was concurrently proceeding against the property. On December 16, 2016, Saratoga County commenced its tax foreclosure proceeding to foreclose delinquent 2016 tax liens under Index Number 2016-3304. Saratoga County's filing of the list of parcels has the same effect as the filing of a Notice of Pendency against the property. *See, RPTL § 1122(7)*.

Valerie Roach ("Roach") is a Vice President of James B. Nutter & Company. Roach avers that plaintiff did not receive a tax bill, delinquent tax notice or notice of a tax foreclosure for this property. Kenneth Lee, Jr. ("Lee") is a Compliance Specialist for plaintiff. Lee also avers that plaintiff has no record of having been served with a tax bill, delinquent tax notice or tax foreclosure notice in connection with the property. Roach also avers that on March 19, 2018 an undisclosed member of her team contacted the Town of Galway to confirm the amounts necessary to bring the real property taxes current. The Town of Galway provided plaintiff with a tax statement, updated as of March 9, 2018, showing \$3,309.92 due for the 2018 County & Town taxes. By checks dated March 13, 2018, plaintiff paid the Town of Galway the outstanding 2018 County and Town taxes. By

receipt dated March 20, 2018, the Town of Galway acknowledged receipt of the payment. The receipt did not indicate any additional taxes were outstanding on the property.

On May 10, 2018, Saratoga County filed a Petition and Notice of Foreclosure with the amount of the lien against the property listed as \$9,330.97. On May 24, 2018, Charles Pasquarell also served a Notice of Foreclosure upon plaintiff by first class mail pursuant to RPTL § 1125(1)(b) addressed to "James B. Nutter & Company, Legal Dept, 4153 Broadway, Kansas City, MO 64111." On May 24, 2018, Charles Pasquarell served a Notice of Foreclosure upon plaintiff by certified mail pursuant to RPTL § 1125(1)(b) addressed to "James B. Nutter & Company, Legal Dept, 4153 Broadway, Kansas City, MO 64111." The notice listed the total outstanding taxes as \$9,330.97. The Certified Mail Receipt does not have an official United States Post Office postmark on it. The date "5/24/18" is handwritten in the postmark area of the receipt. The United States Postal Service tracking information for the certified mailing (#7017 3380 0000 3222 5801) inexplicably shows it was delivered on May 29, 2018 to "PO Box, KANSAS CITY MO 64111."

The Petition and Notice of Foreclosure were published in the Daily Gazette on May 30, 2018, June 13, 2018 and June 27, 2018. The Petition and Notice of Foreclosure were published in the Saratogian on May 30, 2018, June 13, 2018 and June 27, 2018. On July 11, 2018, affidavits of such publication were filed with the Saratoga County Clerk. On December 4, 2018, Saratoga County recorded a deed transferring the property to itself pursuant to the tax foreclosure proceeding. By resolution dated April 16, 2019, Saratoga County passed Resolution 110-2019 authorizing the sale of the property to Steven Abdo for the sum of \$142,500.00. Steven Abdo designated Sensible Holdings, LLC to receive the deed for the property. By deed dated May 8, 2019, and recorded May 16, 2019, Saratoga

County deeded the property to Sensible Holdings, LLC.

On or about September 11, 2019, proposed interveners Rostantin W. Kruczowy and Michelle N. Bozzi purchased the property from Sensible Property Holdings, LLC for \$155,000.00. On October 7, 2019, the deed transferring title was filed with the Saratoga County Clerk. On October 7, 2019, proposed intervener Adirondack Trust Company filed a mortgage encumbering the property. The instant action was commenced by filing on September 23, 2019.

Janet L. Sabin ("Sabin") is a Legal Assistant-Real Estate in the Saratoga County Attorney's Office. Her duties are exclusively devoted to the tax foreclosure process. Sabin receives any certified or first class mailings which are returned to the County Attorney's Office as undeliverable by the United States Postal Service. Sabin's February 14, 2020 affidavit avers that neither the certified mailing nor the first class mailing to plaintiff was returned as undeliverable.

Cynthia J. Baker ("Baker") is the Deputy County Treasurer in the Saratoga County Treasurer's Office. Her duties include overseeing delinquent real property tax liens and assisting with their collection. When the property taxes for years 2016 and 2017 were not collected for the property by the Town of Galway by April 15<sup>th</sup> for the year they were due, Saratoga County paid the taxes owed to the Town of Galway and the County took over collection of those monies. The Town cannot accept payment for those taxes, since the Town has already been paid by the County. Baker's February 14, 2020 affidavit avers that James B. Nutter & Company did not contact the Saratoga County Treasurer's office to inquire about the 2016 and 2017 taxes and did not make any payment on those delinquent taxes to the Saratoga County Treasurer.

“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 [Matejkowski]*, 105 AD3d 1170, 1171 [3d Dept. 2013], quoting *Kennedy v Mossafa*, 100 NY2d 1, 8 [2003]. Property owners and lienors of record are entitled to notice of a tax foreclosure proceeding by both certified mail and first class mail. RPTL § 1125(1)(b) states, in part:

“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.”

Charles Pasquarell’s affidavit, sworn to May 24, 2018, establishes that Saratoga County mailed a Notice of Foreclosure upon plaintiff by first class and certified mail on May 24, 2018 to “James B. Nutter & Company, Legal Dept, 4153 Broadway, Kansas City, MO 64111.” Pasquarell’s affidavit distinguishes this case from *T.D. Bank, N.A. v Leroy*, 121 AD3d 1256, 1258 [3d Dept. 2014] where there was no affidavit from someone with personal knowledge of the mailing. While the unexplained tracking information for the certified mailing is troubling, Sabin’s February 14, 2020 affidavit establishes that neither the first class mailing nor the certified mailing were returned as undeliverable by the United States Post Office. Accordingly, notice of the proceeding was deemed received by plaintiff pursuant to RPTL § 1125(1)(b); see, *Matter of County of Sullivan [Matejkowski]*, *supra*; *Matter of Clinton County [Greenpoint Assets, LTD.]*, 116 AD3d 1206 [3d Dept. 2014]. Saratoga County has established that notice of the tax foreclosure proceeding was provided to plaintiff pursuant to the governing statutes. Saratoga County’s filing of the tax foreclosure proceeding, publishing notice of the tax foreclosure proceeding in two newspapers and mailing a notice to the plaintiff by certified mail and first class mail provided plaintiff sufficient due process. *Matter of Clinton County [Greenpoint Assets,*

*LTD.*], *supra*; *Matter of County of Sullivan [Matejkowski]*, *supra*. Plaintiff's claims of procedural inadequacies regarding Saratoga County's tax foreclosure process are denied and dismissed.

While the Town of Galway has not submitted any opposition to plaintiff's motion, Saratoga County has addressed plaintiff's claims of being misled by the Town of Galway.

RPTL § 1112, **Redemption of property subject to more than one tax lien**, states:

"1. When a tax district holds more than one tax lien against a parcel, the liens need not be redeemed simultaneously. However, the liens must be redeemed in reverse chronological order, so that the lien with the most recent lien date is redeemed first, and the lien with the earliest lien date is redeemed last. Notwithstanding the redemption of one or more of the liens against a parcel as provided herein, the enforcement process shall proceed according to the provisions of this article as long as the earliest lien remains unredeemed.

"2. (a) When one or more liens against a parcel are redeemed as provided herein, but the earliest lien remains unredeemed, the receipt issued to the person redeeming shall include a statement in substantially the following form: "This parcel remains subject to one or more delinquent tax liens. The payment you have made will not postpone the enforcement of the outstanding lien or liens. Continued failure to pay the entire amount owed will result in the loss of the property." (b) Failure to include such a statement on the receipt shall not invalidate any tax lien or prevent the enforcement of the same as provided by law.

3. When all of the liens against the parcel have been redeemed, a certificate of redemption shall be issued upon request, as provided by section eleven hundred ten of this article."

The Town of Galway receipt issued to plaintiff for the 2018 taxes indisputably failed to contain the statement required by RPTL § 1112(2)(a). The inclusion of this statement, as required by law, presumably would have prompted plaintiff to cure the remaining tax delinquencies on the property. The undisputed failure to include the statement required by law, combined with plaintiff's assertion that it did not receive notice of the tax foreclosure proceeding, cries out for an equitable remedy. Saratoga County collected over \$130,000 in excess of the taxes due on the property. The Saratoga County Attorney has

been steadfast in his position he would not recommend any equitable settlement to the County Board. The Court does not have the authority to require or enforce an equitable resolution of this action. In the absence of equity, the Court must adhere to the statutory language which specifically provides that the failure to provide the language on the tax receipt “shall not invalidate any tax lien or prevent the enforcement of the same as provided by law.” *RPTL § 1112(2)(b)*. The plaintiff did not request a certificate of redemption pursuant to *RPTL § 1112(3)*. If plaintiff had requested a certificate of redemption plaintiff would have been made aware of the outstanding taxes from 2016 and 2017 that were paid to the Town of Galway by the County and remained due and owing.

The Town of Galway providing plaintiff with only the 2018 taxes owed to the Town of Galway and its failure to provide the statement required by *RPTL § 1112(2)(a)* is not a sufficient showing of “fraud, misrepresentation, deception, or similar misconduct” to invoke equitable estoppel to invalidate the tax foreclosure sale or hold the municipality liable. *See, Matter of Regan v. DiNapoli*, 135 AD3d 1225 [3d Dept. 2016]. Having searched the record and considered the arguments presented by Saratoga County on the Town of Galway’s behalf, plaintiff’s claims against the Town of Galway are dismissed.


Plaintiff’s cause of action seeking a share of the surplus monies generated from Saratoga County’s tax sale is without merit. *Sheehan v County of Suffolk*, 67 NY2d 52 [1986]; *Keybank v County of Broome*, 116 AD2d 90 [3d Dept. 1986]. Such claim is similarly dismissed.

Whether this action is governed by the statute of limitations requiring commencement within one month of the entry of the tax foreclosure judgment provided by *RPTL § 1131*, or commenced within the two year period from the recording of a tax deed provided *RPTL § 1137* need not be addressed.

Plaintiff's claims against defendants Steven Abdoo, Sensible Property Holdings, LLC and Galway Central School District are also dismissed. In the absence of any basis to vacate the tax foreclosure deed, there is no basis for liability against these defendants, even when they remain in default. Proposed interveners Rostantin W. Kruczowy and Michelle N. Bozzi and Adirondack Trust Company's motion to intervene is deemed academic and denied without prejudice.

Plaintiff's motion for summary judgment is denied. Defendant Saratoga County's motion for summary judgment is granted. Plaintiff's Complaint is dismissed as to all named defendants. The proposed intervenor's motion to intervene is denied. Any relief not specifically granted is denied. No costs are awarded to any party. This Decision shall constitute the Order of the Court. The original Decision and Order shall be forwarded to the attorney for the defendant Saratoga County for filing and entry. The underlying papers will be filed by the Court.

Dated: April 28, 2020  
Ballston Spa, New York



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ANN C. CROWELL, J.S.C.

cc: Horigan, Horigan & Lombardo, P.C.

Papers received and considered:

Notice of Motion, dated January 21, 2020

Affirmation of Joseph F. Battista, Esq., dated January 21, 2020, with Exhibits A-P

Affidavit of Valerie Roach, sworn to July 29, 2019

Affidavit of Kenneth Lee, Jr., sworn to July 26, 2019

Notice of Cross Motion, dated February 14, 2020



Affidavit of Stephen M. Dorsey, Esq., sworn to February 14, 2020, with Exhibits A-I

Affidavit of Janet L. Sabin, sworn to February 14, 2020

Affidavit of Cynthia J. Baker, sworn to February 14, 2020

Affirmation of Joseph F. Battista, Esq., dated February 27, 2020, with Exhibits A-K

Notice of Motion, dated March 12, 2020

Affirmation of Marc W. Brown, Esq., dated March 12, 2020, with Exhibits A-E

Memorandum of Law, dated March 12, 2020

Index # 2019-3177

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SARATOGA

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JAMES B. NUTTER & COMPANY,

Plaintiff,

-vs-

COUNTY OF SARATOGA; STEPHEN M. DORSEY, IN HIS CAPACITY AS TAX  
ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA; TOWN OF GALWAY;  
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 described in the complaint,

Defendants.

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**NOTICE OF APPEAL**

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RAS Boriskin, LLC  
Attorney for Plaintiff  
900 Merchants Concourse, Suite 310  
Westbury, NY 11590  
516-280-7675

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SARATOGA

<p>-----X</p> <p>JAMES B. NUTTER &amp; COMPANY,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-vs-</p> <p>COUNTY OF SARATOGA; STEPHEN M. DORSEY, IN HIS CAPACITY AS TAX ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA; TOWN OF GALWAY; GALWAY CENTRAL SCHOOL DISTRICT; STEVEN ABDOO; AND SENSIBLE PROPERTY HOLDINGS, LLC</p> <p>"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 described in the complaint,</p> <p style="text-align: center;">Defendants.</p> <p>-----X</p>	<p style="text-align: center;"><b><u>AFFIDAVIT OF SERVICE</u></b></p>  <p style="text-align: center;"><b>INDEX NO. 2019-3177</b></p>
--	--

**STATE OF NEW YORK**

**COUNTY OF NASSAU**

I, Amberly Wilson, being sworn, says: I am not a party to this action, am over 18 years of age.

On July 2, 2020, I served the Notice of Appeal, Order and Informational Statement on:

SARATOGA COUNTY ATTORNEY'S OFFICE  
ATTN: STEPHEN M. DORSEY, ESQ.  
40 MCMASTER STREET  
BALLSTON SPA, NY 12020  
*ATTORNEYS FOR COUNTY OF SARATOGA AND STEPHEN M. DORSEY, IN HIS CAPACITY AS TAX ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA*

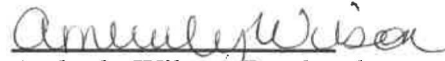
HORIGAN, HORIGAN & LOMBARDO, P.C.  
ATTN: TIMOTHY HORIGAN, ESQ.  
49 EAST MAIN STREET  
AMSTERDAM, NY 12010  
*ATTORNEY FOR TOWN OF GALWAY*

GALWAY CENTRAL SCHOOL DISTRICT  
5317 SACANDAGA ROAD  
GALWAY, NY 12074

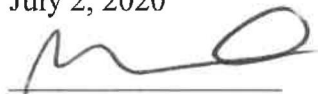
STEVEN ABDOO  
3824 FOUNTAIN STREET  
CLINTON, NY 13323

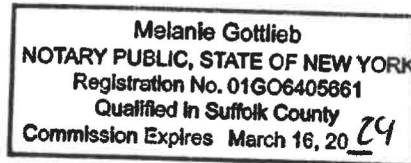
SENSIBLE PROPERTY HOLDINGS, LLC  
99 WASHINGTON AVENUE  
ALBANY, NY 12210

By depositing a true copy of same enclosed in a post-paid, properly addressed wrapper, in an office-official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

  
Amberly Wilson, Paralegal

Sworn before me on:  
July 2, 2020

  
\_\_\_\_\_  
Notary Public



# **EXHIBIT 2**

Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: June 24, 2021

531787

JAMES B. NUTTER & COMPANY,  
Appellant,

v

MEMORANDUM AND ORDER

COUNTY OF SARATOGA et al.,  
Respondents,  
et al.,  
Defendants.

Calendar Date: April 20, 2021

Before: Garry, P.J., Egan Jr., Aarons, Pritzker and Reynolds  
Fitzgerald, JJ.

K&L Gates LLP, New York City (Gregory N. Blase of  
counsel), for appellant.

Michael J. Hartnett, County Attorney, Ballston Spa, for  
respondents.

Aarons, J.

Appeal from an order of the Supreme Court (Crowell, J.),  
entered May 4, 2020 in Saratoga County, which, among other  
things, granted a cross motion by defendants County of Saratoga  
and Stephen M. Dorsey for summary judgment dismissing the  
complaint against them.

In May 2018, defendant County of Saratoga filed a petition  
and notice of foreclosure of tax liens on a property over which  
plaintiff held a mortgage. The County ultimately obtained a

judgment of foreclosure in December 2018 awarding it title of the property. Defendant Stephen M. Dorsey, the tax enforcement officer for the County, recorded a deed transferring the property to the County. Plaintiff commenced this action seeking, among other things, to vacate the December 2018 judgment. Following joinder of issue, plaintiff moved for summary judgment. The County and Dorsey (hereinafter collectively referred to as defendants) opposed and cross-moved for summary judgment dismissing the complaint. In a May 2020 order, Supreme Court denied plaintiff's motion and granted defendants' cross motion. Plaintiff appeals. We affirm.

Defendants were required to send the notice of the tax foreclosure proceeding to plaintiff "by certified mail and ordinary first class mail" (RPTL 1125 [1] [b] [i]; see Landing Woods of Ulster, LLC v County of Ulster, 156 AD3d 1009, 1010 [2018]). The record contains documentary evidence demonstrating that the petition and notice of foreclosure were sent via certified mail and first class mail to plaintiff at "4153 Broadway" in Kansas City, Missouri – the address for plaintiff as listed on the mortgage (see RPTL 1125 [b] [1]).<sup>1</sup> The record also discloses that neither of these mailings was returned. Accordingly, defendants satisfied their burden of demonstrating that they complied with RPTL 1125.

In opposition thereto, plaintiff submitted, among other things, the tracking information sheet for the certified mailing sent by the County. This sheet indicated that the certified mailing was delivered to an unspecified post office box, as opposed to 4153 Broadway, in Kansas City, Missouri. To that end, plaintiff asserts that a material issue of fact exists as to whether it received notice of the tax foreclosure proceeding. The petition and notice of foreclosure sent to plaintiff, however, "shall be deemed received unless both the certified mailing and the ordinary first class mailing are returned by the United States [P]ostal [S]ervice within [45] days after being mailed" (RPTL 1125 [1] [b] [i]; see Matter of County of Sullivan

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<sup>1</sup> Plaintiff does not contend that 4153 Broadway was the incorrect address.

[Dunne–Town of Bethel], 111 AD3d 1232, 1234 [2013]).<sup>2</sup> In view of this clear and explicit language, the Legislature specified what was minimally required of a party attempting to rebut the presumption of service – i.e., proof establishing that both the certified mailing and the ordinary first class mailing were returned. To permit anything less would render this part of RPTL 1125 (1) (b) (i) meaningless. Furthermore, to the extent that this level of proof leads to inequitable results or imposes an unduly high burden upon a party arguing lack of notice, the Legislature is free to amend RPTL 1125.

That said, although plaintiff's proof established that the certified mailing was delivered to a different address, delivery to a different address is not the same as the certified mailing being returned. As mentioned, there is no indication in the record that both the certified mailing and the first class mailing were returned to defendants. Even if the certified mailing had been returned to defendants, there still was no evidence demonstrating that the first class mailing was returned (see Matter of County of Sullivan [Matejkowski], 105 AD3d 1170, 1171 [2013], appeal dismissed 21 NY3d 1062 [2013]; Lin v County of Sullivan, 100 AD3d 1076, 1078-1079 [2012]). Defendants were therefore entitled to presume that plaintiff had notice of the tax foreclosure proceeding based upon its receipt of the first class mailing.<sup>3</sup> In the absence of evidence that both the certified and first class mailings were returned to defendants,

---

<sup>2</sup> We note that RPTL 1125 was amended in 2006 to add this language (L 2006, ch 415, § 1). As such, to the extent that plaintiff relies on cases that predate this 2006 amendment, such reliance is unavailing.

<sup>3</sup> As noted in the legislative materials in support of the 2006 amendment to RPTL 1125, "[i]f the certified mailing is returned within 45 days but the regular mailing is not, the tax district would be entitled to proceed with the foreclosure without making further efforts to notify that party" (New York Bill Jacket, Mem of Joseph K. Gerberg, Esq., L 2006, ch 415). Indeed, requiring notice to be sent both by certified and regular mail was thought to be "an effective and inexpensive way to reduce incidents of non-deliverability" (id.).



the petition and notice of foreclosure were "deemed received" by plaintiff (RPTL 1125 [1] [b] [i]). Consequently, plaintiff failed to raise a material issue of fact regarding whether the County complied with RPTL 1125.

Finally, plaintiff contends that Supreme Court should have exercised its authority to fashion an equitable remedy. Although the court erred in concluding that it lacked the authority to do so, in the absence of any evidence of fraud, misrepresentation, deception or misconduct by defendants, there is no basis to award such relief (see generally Guardian Loan Co. v Early, 47 NY2d 515, 520-521 [1979]).

Garry, P.J., Egan Jr. and Reynolds Fitzgerald, JJ., concur.

Pritzker, J. (dissenting).

I respectfully dissent because it is my opinion that plaintiff established issues of material fact as to the compliance by defendant County of Saratoga and defendant Stephen M. Dorsey (hereinafter collectively referred to as defendants) with the procedural requirements of the foreclosure proceeding (see RPTL art 11). Although I agree with the majority that there was no proof that the relevant mailings were returned to defendants and, as such, were "deemed received" by plaintiff (RPTL 1125 [1] [b] [i]), this is merely a rebuttable presumption (see Lin v County of Sullivan, 100 AD3d 1076, 1079 [2012]). Along this same line, I disagree with the majority that the explicit language of the statute requires plaintiff "to tender proof establishing" that both mailings were returned to the County to rebut this presumption.<sup>1</sup> I also disagree that

---

<sup>1</sup> The 2006 amendments to RPTL 1125 codified the decision of the Supreme Court of the United States in Jones v Flowers (547 US 220 [2006]), which held that "the [state's] effort to provide notice [to the plaintiff] of an impending tax sale of his house was insufficient to satisfy due process" (id. at 239; see Senate Introducer's Mem in Support, Bill Jacket, L 2006, ch 415). The amendments created additional requirements for

permitting anything less would render that part of RPTL 1125 (1) (b) (i) "meaningless." In fact, precluding such additional proof to rebut the presumption leads to absurd results where, like here, proffered evidence raises core issues of fact as to whether the notices were mailed "to [the] owner," as required by RPTL 1125 (1) (a).

Although "the [plaintiff's] denial of receipt of such notice, alone, is insufficient to rebut [that] presumption" (Wilczak v City of Niagara Falls, 174 AD3d 1446, 1448 [2019] [internal quotation marks and citations omitted]), the additional evidence proffered by plaintiff did so (see Matter of County of Sullivan [Matejkowski], 105 AD3d 1170, 1171 [2013], appeal dismissed 21 NY3d 1062 [2013]). Aside from denial of receipt, plaintiff submitted the tracking information from the United States Postal Service indicating that the certified mailing was delivered to an unspecified post office box, as opposed to plaintiff's address at 4153 Broadway, Kansas City, Missouri, which raises troubling questions of fact that are best resolved at trial.<sup>2</sup> Notably, the affidavits of service by mail submitted by the County are inconsistent with this uncontested tracking information.<sup>3</sup> Moreover, evidence regarding plaintiff's inquiry and recent payment of the 2018 tax bill, approximately

---

notice, in part, to "reduce incidents of non-deliverability" (New York Bill Jacket, Mem of Joseph K. Gerberg, Esq., L 2006, ch 415). Consequently, the amendment's creation of an additional remedial layer of procedural due process for the taxpayer is legislatively inconsistent with the establishment of, as the majority asserts, an irrebuttable presumption against the taxpayer every time mailings are not returned to the sender as undeliverable, no matter where they were mailed in the first place.

<sup>2</sup> In addition, as indicted by Supreme Court in its decision, the certified mail receipt does not contain an official postmark on it.

<sup>3</sup> Although it could not be established by United States Postal Service records, a question of fact arises as to whether the regular mailed correspondence met the same fate.

two months prior to the alleged mailing of the required foreclosure proceeding notices, strongly suggests that plaintiff did not intend to forfeit the property (see Law v Benedict, 197 AD2d 808, 810 [1993]), and "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" (Carney v Philippon, 1 NY3d 333, 339 [2004] [emphasis added]; accord Matter of Priest v Mareane, 45 AD3d 1474, 1476 [2007], lv denied 10 NY3d 704 [2008]).

Finally, contrary to Supreme Court's finding, plaintiff, whose mailing address is in Missouri, was not afforded sufficient procedural due process because the County filed the tax foreclosure proceeding and published notice of the proceeding in two local newspapers. Under the circumstances, the foregoing was neither reasonably calculated to apprise plaintiff of the pendency of the tax foreclosure proceeding nor did it afford plaintiff an opportunity to present objections (see Landing Woods of Ulster, LLC v County of Ulster, 156 AD3d 1009, 1011 [2017]). As such, it is my opinion that Supreme Court should have denied defendants' cross motion for summary judgment.

ORDERED that the order is affirmed, without costs.

ENTER:



Robert D. Mayberger  
Clerk of the Court

# **EXHIBIT 3**

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

In the Matter of

**JAMES B. NUTTER & COMPANY,**

Appellant,

NOTICE OF ENTRY

-against-

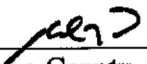
Index No.: 531787

**COUNTY OF SARATOGA, et al.,**

Respondents,  
et al.,  
Defendants.

**PLEASE TAKE NOTICE** that attached hereto is copy of a Memorandum and Order, issued by the Supreme Court, Appellate Division, Third Judicial Department on June 24, 2021.

Dated: July 6, 2021  
Ballston Spa, New York

  
Saratoga County Attorney's Office  
By: Michael Hartnett, Esq.  
Saratoga County Attorney  
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(518) 884-4770

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State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: June 24, 2021

531787

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JAMES B. NUTTER & COMPANY,  
Appellant,

v

MEMORANDUM AND ORDER

COUNTY OF SARATOGA et al.,  
Respondents,  
et al.,  
Defendants.

---

Calendar Date: April 20, 2021

Before: Garry, P.J., Egan Jr., Aarons, Pritzker and Reynolds  
Fitzgerald, JJ.

---

K&L Gates LLP, New York City (Gregory N. Blase of  
counsel), for appellant.

Michael J. Hartnett, County Attorney, Ballston Spa, for  
respondents.

---

Aarons, J.

Appeal from an order of the Supreme Court (Crowell, J.),  
entered May 4, 2020 in Saratoga County, which, among other  
things, granted a cross motion by defendants County of Saratoga  
and Stephen M. Dorsey for summary judgment dismissing the  
complaint against them.

In May 2018, defendant County of Saratoga filed a petition  
and notice of foreclosure of tax liens on a property over which  
plaintiff held a mortgage. The County ultimately obtained a

judgment of foreclosure in December 2018 awarding it title of the property. Defendant Stephen M. Dorsey, the tax enforcement officer for the County, recorded a deed transferring the property to the County. Plaintiff commenced this action seeking, among other things, to vacate the December 2018 judgment. Following joinder of issue, plaintiff moved for summary judgment. The County and Dorsey (hereinafter collectively referred to as defendants) opposed and cross-moved for summary judgment dismissing the complaint. In a May 2020 order, Supreme Court denied plaintiff's motion and granted defendants' cross motion. Plaintiff appeals. We affirm.

Defendants were required to send the notice of the tax foreclosure proceeding to plaintiff "by certified mail and ordinary first class mail" (RPTL 1125 [1] [b] [i]; see Landing Woods of Ulster, LLC v County of Ulster, 156 AD3d 1009, 1010 [2018]). The record contains documentary evidence demonstrating that the petition and notice of foreclosure were sent via certified mail and first class mail to plaintiff at "4153 Broadway" in Kansas City, Missouri – the address for plaintiff as listed on the mortgage (see RPTL 1125 [b] [1]).<sup>1</sup> The record also discloses that neither of these mailings was returned. Accordingly, defendants satisfied their burden of demonstrating that they complied with RPTL 1125.

In opposition thereto, plaintiff submitted, among other things, the tracking information sheet for the certified mailing sent by the County. This sheet indicated that the certified mailing was delivered to an unspecified post office box, as opposed to 4153 Broadway, in Kansas City, Missouri. To that end, plaintiff asserts that a material issue of fact exists as to whether it received notice of the tax foreclosure proceeding. The petition and notice of foreclosure sent to plaintiff, however, "shall be deemed received unless both the certified mailing and the ordinary first class mailing are returned by the United States [P]ostal [S]ervice within [45] days after being mailed" (RPTL 1125 [1] [b] [i]; see Matter of County of Sullivan

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<sup>1</sup> Plaintiff does not contend that 4153 Broadway was the incorrect address.

[Dunne-Town of Bethel], 111 AD3d 1232, 1234 [2013]).<sup>2</sup> In view of this clear and explicit language, the Legislature specified what was minimally required of a party attempting to rebut the presumption of service - i.e., proof establishing that both the certified mailing and the ordinary first class mailing were returned. To permit anything less would render this part of RPTL 1125 (1) (b) (i) meaningless. Furthermore, to the extent that this level of proof leads to inequitable results or imposes an unduly high burden upon a party arguing lack of notice, the Legislature is free to amend RPTL 1125.

That said, although plaintiff's proof established that the certified mailing was delivered to a different address, delivery to a different address is not the same as the certified mailing being returned. As mentioned, there is no indication in the record that both the certified mailing and the first class mailing were returned to defendants. Even if the certified mailing had been returned to defendants, there still was no evidence demonstrating that the first class mailing was returned (see Matter of County of Sullivan [Matejkowski], 105 AD3d 1170, 1171 [2013], appeal dismissed 21 NY3d 1062 [2013]; Lin v County of Sullivan, 100 AD3d 1076, 1078-1079 [2012]). Defendants were therefore entitled to presume that plaintiff had notice of the tax foreclosure proceeding based upon its receipt of the first class mailing.<sup>3</sup> In the absence of evidence that both the certified and first class mailings were returned to defendants,

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<sup>3</sup> As noted in the legislative materials in support of the 2006 amendment to RPTL 1125, "[i]f the certified mailing is returned within 45 days but the regular mailing is not, the tax district would be entitled to proceed with the foreclosure without making further efforts to notify that party" (New York Bill Jacket, Mem of Joseph K. Gerberg, Esq., L 2006, ch 415). Indeed, requiring notice to be sent both by certified and regular mail was thought to be "an effective and inexpensive way to reduce incidents of non-deliverability" (id.).



the petition and notice of foreclosure were "deemed received" by plaintiff (RPTL 1125 [1] [b] [i]). Consequently, plaintiff failed to raise a material issue of fact regarding whether the County complied with RPTL 1125.

Finally, plaintiff contends that Supreme Court should have exercised its authority to fashion an equitable remedy. Although the court erred in concluding that it lacked the authority to do so, in the absence of any evidence of fraud, misrepresentation, deception or misconduct by defendants, there is no basis to award such relief (see generally Guardian Loan Co. v Early, 47 NY2d 515, 520-521 [1979]).

Garry, P.J., Egan Jr. and Reynolds Fitzgerald, JJ.,  
concur.

Pritzker, J. (dissenting).

I respectfully dissent because it is my opinion that plaintiff established issues of material fact as to the compliance by defendant County of Saratoga and defendant Stephen M. Dorsey (hereinafter collectively referred to as defendants) with the procedural requirements of the foreclosure proceeding (see RPTL art 11). Although I agree with the majority that there was no proof that the relevant mailings were returned to defendants and, as such, were "deemed received" by plaintiff (RPTL 1125 [1] [b] [i]), this is merely a rebuttable presumption (see Lin v County of Sullivan, 100 AD3d 1076, 1079 [2012]). Along this same line, I disagree with the majority that the explicit language of the statute requires plaintiff "to tender proof establishing" that both mailings were returned to the County to rebut this presumption.<sup>1</sup> I also disagree that

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permitting anything less would render that part of RPTL 1125 (1) (b) (i) "meaningless." In fact, precluding such additional proof to rebut the presumption leads to absurd results where, like here, proffered evidence raises core issues of fact as to whether the notices were mailed "to [the] owner," as required by RPTL 1125 (1) (a).

Although "the [plaintiff's] denial of receipt of such notice, alone, is insufficient to rebut [that] presumption" (Wilczak v City of Niagara Falls, 174 AD3d 1446, 1448 [2019] [internal quotation marks and citations omitted]), the additional evidence proffered by plaintiff did so (see Matter of County of Sullivan [Matejkowski], 105 AD3d 1170, 1171 [2013], appeal dismissed 21 NY3d 1062 [2013]). Aside from denial of receipt, plaintiff submitted the tracking information from the United States Postal Service indicating that the certified mailing was delivered to an unspecified post office box, as opposed to plaintiff's address at 4153 Broadway, Kansas City, Missouri, which raises troubling questions of fact that are best resolved at trial.<sup>2</sup> Notably, the affidavits of service by mail submitted by the County are inconsistent with this uncontested tracking information.<sup>3</sup> Moreover, evidence regarding plaintiff's inquiry and recent payment of the 2018 tax bill, approximately

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two months prior to the alleged mailing of the required foreclosure proceeding notices, strongly suggests that plaintiff did not intend to forfeit the property (see Law v Benedict, 197 AD2d 808, 810 [1993]), and "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" (Carney v Philipponne, 1 NY3d 333, 339 [2004] [emphasis added]; accord Matter of Priest v Mareane, 45 AD3d 1474, 1476 [2007], ly denied 10 NY3d 704 [2008]).

Finally, contrary to Supreme Court's finding, plaintiff, whose mailing address is in Missouri, was not afforded sufficient procedural due process because the County filed the tax foreclosure proceeding and published notice of the proceeding in two local newspapers. Under the circumstances, the foregoing was neither reasonably calculated to apprise plaintiff of the pendency of the tax foreclosure proceeding nor did it afford plaintiff an opportunity to present objections (see Landing Woods of Ulster, LLC v County of Ulster, 156 AD3d 1009, 1011 [2017]). As such, it is my opinion that Supreme Court should have denied defendants' cross motion for summary judgment.

ORDERED that the order is affirmed, without costs.

ENTER:



Robert D. Mayberger  
Clerk of the Court

**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)*

---

**MOTION FOR LEAVE TO APPEAL  
TO COURT OF APPEALS IN A CIVIL CASE**

---

K&L GATES LLP  
*Counsel for Plaintiff-Appellant*  
599 Lexington Ave.  
New York, NY 10022  
(212) 536-3900  
gregory.blase@klgates.com

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

---

-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, described in the complaint.

*Defendants.*

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## STATEMENT

Appellant/Movant James B. Nutter & Company (“JBNC”) requests that this Court grant it leave to seek review in the Court of Appeals of two aspects of this Court’s June 24, 2021, memorandum and order: (1) the first-impression holding that the 2006 amendment to Section 1125 of the Real Property Tax Law (the “RPTL”) significantly restricted the means by which interested parties could rebut the presumption that they received notice of an impending tax sale and (2) the holding that a trial court may only allow an equitable remedy from the consequences of a tax sale when there has been fraud, misrepresentation, deception or a defendant’s misconduct—but not when there has been a mistake.

The Court of Appeals has written 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. *Carney v. Philipponne*, 774 N.Y.S.2d 106, 115, 1 N.Y.3d 333, 339 [2004]. In this case, however, the trial court and this Court read RPTL Section 1125 in a way that deprived JBNC of its mortgage interest in real property even though JBNC had taken all appropriate steps to protect that interest.

The RPTL requires a taxing entity seeking to foreclose on real property for failure to pay taxes to provide notice to interested parties so that they may be heard (if they wish) before foreclosure and any subsequent tax sale occurs. RPTL § 1125.

This Court long followed the rule that, if the taxing authority demonstrated that it sent notice to interested parties, it would be presumed that those parties in fact received notice. *See Law v. Benedict*, 197 A.D.2d 808, 810, 603 N.Y.S.2d 75, 77 [3d Dept. 1993]. But that presumption is rebuttable if an interested party could present credible evidence beyond merely denying receipt of the notice. *Id.* JBNC proffered not only sworn statements and copies of business records showing that it had not received notice but also tracking records from the U.S. Postal Service showing that the required form of notice for which tracking information is available was delivered not to JBNC's proper address but to an unknown post-office box.

In this case, a divided panel of this Court held that an amendment to Section 1125 that was intended to increase due-process protections for persons interested in property somehow severely narrowed the means by which such a party could rebut the presumption that it had received notice. The majority concluded that, if the taxing entity offered evidence that it sent notices by certified mail and U.S. Mail, as the amended Section 1125 requires, the presumption of receipt would be essentially irrebuttable unless the postal service returns both forms of notice. *See* Affirmation of Gregory N. Blase dated August 5, 2021 ("Blase Aff."), Ex. 2 (3rd Department Order), pp. 3-4. But neither the language of the amendment nor its

legislative history indicates any legislative intent to supersede cases like *Law*, and, to the contrary, the purpose of the amendment was to bring New York law into compliance with the due-process holding in *Jones v. Flowers*, 547 U.S. 220 [2006]—not to make it easier for taxing entities to take property or to deprive those interested in property of the means to demonstrate through competent evidence that they did not receive the most basic element of due process: notice that they might soon lose their property interest.

Justice Pritzker dissented and wrote that he believed that both the statute and due process require that a party interested in property have a fuller right to rebut the statutory presumption, that nothing in the 2006 amendment changed this Court’s precedent and that JBNC had offered sufficient evidence to withstand summary judgment on the notice issue. 3rd Department Order, pp. 4-6.

Justice Pritzker is not the only one to conclude that the Section-1125 presumption remains more broadly rebuttable. In *Wilczak v. City of Niagara Falls*, 174 A.D.3d 1446, 108 N.Y.S.3d 79 [4th Dept. 2019], a case decided after the 2006 amendment to Section 1125, the Fourth Department explained that, when the taxing authority offers proof of mailing, a presumption of receipt arises. 108 N.Y.S.3d at 83. It then held that the property owner’s evidence, which consisted solely of its own testimony that it did not receive notice, was insufficient. *Id.* But

implicit in its analysis is that the presumption could have been rebutted if there were other, more appropriate evidence—and not just the return-mail evidence the panel in this case focused on.

In the trial court, JBNC sought relief based not only on the statute but on principles of equity given that, among other things, when JBNC contacted the Town of Galway to learn about—and to satisfy—any outstanding tax liens on the property, the Town’s response failed to identify the very tax lien that was later the basis for the County’s foreclosure. The trial court held that it had no authority to provide an equitable remedy. R-10-11. On appeal, this Court disagreed with the trial court’s general statement that it lacked authority, but it nonetheless affirmed because it held no such equitable relief could be provided absent proof of fraud, misrepresentation, deception or defendant’s misconduct. 3rd Department Order, p. 4. But the authority the Court cited, *Guardian Loan Co. v. Early*, 47 N.Y.2d 515, 419 N.Y.S.2d 56, 392 N.E.2d 1240 [1979], in fact provides that an equitable remedy may be appropriate when the aggrieved party proves a mistake. Certainly, the Town’s failure to alert JBNC of the additional outstanding tax lien was at the least a mistake.

JBNC asks the Court to grant it leave to present these issues to the Court of Appeals, most particularly to obtain that court's definitive interpretation of RPTL Section 1125.

## **BACKGROUND**

### **I. Factual Background**

Donald H. Craig and Lois R. Craig signed a promissory note in favor of JBNC in the original principal amount of \$365,107.50. R-6. To secure repayment of that note, the Craigs granted to JBNC a mortgage on property located in Galway, New York. R-101, 116-28. The Craigs defaulted on the note, and JBNC filed a foreclosure action in the Supreme Court of Saratoga County in July 2015. R-101. In July 2015 and again in March 2018, JBNC filed notices of pendency of its foreclosure action. R-43-51.

In December 2016, the County of Saratoga filed in the Saratoga County Clerk's Office a list of all parcels with unpaid 2016 taxes. R-6, R-102, R-160, R-174. That list included the Craigs' property. *Id.* JBNC did not know at the time about the county's filing of the list.

In March 2018, while JBNC's foreclosure was pending, one of its employees contacted the Town of Galway to ask about the status of property taxes on the Craigs' property and to determine what tax payments might be outstanding. R-6, R-

101-102, R-109-110. Before that call, JBNC had received no notice from the Town of Galway or any other governmental entity regarding the status of the taxes on the property. R-109, R-113. During the call, a town employee provided a statement for county and town taxes in the amount of \$3,309.92. R-6, R-64, R-65. JBNC immediately paid that amount. R-6, R-66, R-67, R-102, R-110. The Town of Galway provided to JBNC a receipt that acknowledged payment of the county and town taxes and that did not indicate that there were any additional outstanding tax liens on the Craigs' property. R-7, R-68, R-102, R-110. That was despite the requirement in New York law that, if earlier tax liens remain unredeemed after payment of delinquent tax liens on a property, the receipt reflecting payment must expressly state that "[t]his parcel remains subject to one or more delinquent tax liens. The payment you have made will not postpone the enforcement of the outstanding lien or liens. Continued failure to pay the entire amount will result in the loss of the property." RPTL § 1112(2)(a).

On May 10, 2018, Saratoga County filed with the county clerk's office a petition and a notice of foreclosure with a \$9,330.97 lien against the property. R-7, R-102, R-207.

Under RPTL § 1125(1)(a), the County was required to provide a copy of the notice of the foreclosure proceeding to any "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.” As a holder of a senior mortgage on the Craigs’ property, JBNC was entitled to receive that notice. Under RPTL § 1125(1)(b), the County was required to send the notice of foreclosure by both certified and ordinary, first-class mail. Saratoga County submitted affidavits of service by mail that asserted that the requisite notice was sent to JBNC by certified and first-class mail to the following address: “James B. Nutter & Company, Legal Dept, 4153 Broadway, Kansas City, MO 64111.” R-299-236.

But JBNC never received notice. R-7, R-108-109, R-113, R-243-244, R-262. The certified mail receipt does not bear an official postmark. R-231. The United States Postal Service’s records contradict the County’s affidavits and establish that the required notice was actually delivered to an unknown post office box in Kansas City, Missouri, that has nothing to do with JBNC. R-262. And JBNC’s business records confirm that it never received any notice of the County’s tax-foreclosure proceedings by either certified or first-class mail. R-109, R-113.

The trial court granted to the County a foreclosure judgment under RTPL § 1136 on December 4, 2018, thereby effectively wiping out JBNC’s first-priority mortgage. R-7, R-69-70.

Stephen M. Dorsey, the County's tax-enforcement officer, executed and recorded a deed for the property in favor of the County, and the County Board of Supervisors approved the sale of the property to Steven Abdo for \$142,500. R-78-81, R-103. The County then sold the property to Sensible Holdings, LLC, in May 2019, and made a profit of more than \$130,000. R-7, R-103. The County has since refused to share those profits with any other entity, including JBNC, despite JBNC's lien interest in the property. R-7, R-103.

## **II. Procedural Background**

JBNC filed suit in the trial court against Saratoga County, the Town of Galway and others on September 23, 2019, and sought vacatur of the foreclosure judgment in favor of the County and the subsequent sale of the property to Sensible Holdings, LLC. R-14. JBNC sought damages in the alternative. *Id.* JBNC argued that it had not received proper notice before the foreclosure sale in favor of the County. The relevant statutory provision, RPTL Section 1125, provides the following in relevant part:

(b) Notification method. (i) Such notice shall be sent to each such party both by certified mail and ordinary first class mail, subject to the provisions of subparagraph (iv) of this paragraph. 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.



JBNC and the County filed cross-motions for summary judgment. R-98, R-145. JBNC offered tracking records from the U.S. Postal Service that demonstrated that the certified-mail notice was misdirected to an unrelated post-office box. R-262. The postal service does not of course track regular U.S. Mail, but JBNC also offered affidavits and business records demonstrating that it did not receive either form of notice. R-113. And JBNC pointed out that the certified mail receipt does not bear an official postmark. R-231. Thus, argued JBNC, there was at the least a factual question sufficient to overcome the presumption it had received the notices.

By order dated April 28, 2020, the trial court granted the County's motion for summary judgment and denied JBNC's. R-4-13. The court held that the County's unsupported affidavits of mailing satisfied Section 1125 and that was sufficient. R-9. In essence, the trial court held that, once the taxing body offered evidence of the two forms of mailing, Section 1125 created a conclusive presumption of receipt unless both forms of mail were returned by the postal service. Notwithstanding its holding, the trial court agreed that JBNC's evidence that it had not received notice was "troubling" and that the case "cries out for an equitable remedy." R-10. But the court concluded that it had no authority to fashion any sort of equitable remedy. R-10-11.

JBNC took an appeal to this Court. Blase Aff., Ex. 1. It cited *Law v. Benedict*, this Court's authority that Section 1125 merely created a rebuttable presumption of receipt limited only by the rule that a party could not prove non-receipt solely by its own testimony to that effect. JBNC argued that it had offered enough evidence to create a triable issue of fact about whether it ever received notice from the County. It also argued that the trial court was mistaken in concluding that it had no equitable authority to grant relief to JBNC.

The panel affirmed. Justice Aarons wrote the majority opinion, and Presiding Justice Garry, Justice Egan and Justice Reynolds Fitzgerald joined. Justice Pritzker dissented. The majority opinion reviewed the statute and concluded that, as a result of the 2006 amendment, when Section 1125 provides that notice will be "deemed received unless both the certified mailing and the ordinary first class mailing are returned by the United States postal service," it means that the *only* way for an interested party to rebut a taxing entity's evidence is by showing that both mail pieces were returned to the County as undeliverable. 3rd Department Order, pp. 3-4. The majority concluded that any other interpretation of Section 1125 would render the language about returned mail "meaningless." *Id.* at 3. The majority asserted, in a case of first impression, that this Court's previous authority providing that there was a more broadly rebuttable presumption was no longer

controlling since the legislature amended the relevant part of Section 1125 in 2006, after those cases were decided. *Id.* at 3 n.2. Finally, the majority disagreed with the trial court’s conclusion that it had no power to grant equitable relief, but it held that equitable relief may not be granted absent evidence of fraud, misrepresentation, deception or misconduct by the taxing entity. *Id.* at 4.

Justice Pritzker dissented. He interpreted Section 1125’s reference to notices being “deemed received” to create only a rebuttable presumption that was not limited in the way the majority held. *Id.* at 4-6 (Pritzker, J., dissenting). He disagreed that JBNC’s interpretation rendered any language in the statute “meaningless” and wrote that, “[i]n fact, precluding such additional proof [as JBNC offered] to rebut the presumption leads to absurd results where, like here, proffered evidence raises core issues of fact as to whether the notices were mailed ‘to [the] owner,’ as required RPTL 1125(1)(a).” *Id.* at p. 5. Justice Pritzker noted that the postal service tracking information and JBNC’s recent payment of another tax bill on the same property “strongly suggests that [JBNC] did not intend to forfeit the property.” *Id.* at 6.

### **JURISDICTIONAL STATEMENT**

The panel rendered its decision on June 24, 2021. The County of Saratoga served notice of entry of that decision and accompanying order on July 6, 2021.

Blase Aff., Ex. 3. Pursuant to CPLR 5602(b)(2)(i), this Court may grant permission for JBNC to take an appeal to the Court of Appeals. Pursuant to CPLR 5513(b), this motion for permission to appeal is timely as it is filed within 30 days of service on JBNC of notice of entry of the panel's decision and order.

### **STATEMENT OF QUESTIONS PRESENTED FOR REVIEW**

JBNC asks the Court to grant it leave to appeal to the Court of Appeals on the following two issues:

1. Whether, when RPTL § 1125 provides that certified mail and U.S. Mail notices “shall be deemed received” unless both iterations of the notice are returned by the Postal Service within 45 days, the statute significantly limits the means by which an interested party may rebut the presumption of receipt of notice solely to presenting evidence that both forms of notice were returned by the Postal Service as undelivered.<sup>1</sup>

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<sup>1</sup> JBNC preserved this issue in the trial court in its motion for summary judgment. R-106. It preserved the issue in this Court in its opening brief. *See* Brief for Plaintiff-Appellant at 4.

2. Whether a trial court possesses inherent power to grant equitable relief from a tax sale when a mortgage holder proves that it was prevented from protecting its interest because of a mistake by the taxing entity.<sup>2</sup>

### REASONS FOR GRANTING LEAVE

**I. The Court of Appeals should have an opportunity to definitively interpret RPTL Section 1125 given the first-impression nature of this Court's determination, the dissent, the apparent conflict between the departments of the Appellate Division and the importance of the issue.**

In this case, the Court reached a first-impression holding on an important issue of law regarding the nature of the presumption arising under RPTL Section 1125 and what evidence an interested party can offer to successfully rebut that presumption.

As noted, prior to this case, the Court held that such an interested party could rebut the presumption of receipt of notice with essentially any competent evidence so long as it was not solely its own denial of receipt. *See Law*, 197 A.D.2d at 810. Although it did not label it as such, the Court's approach was essentially to follow a burden-shifting analysis: if the taxing entity offered proof of mailing, the burden shifted to the interested party to persuade the court that the

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<sup>2</sup> JBNC preserved this issue in the trial court in its motion for summary judgment. R-106. It preserved the issue in this Court in its opening brief. *See* Brief for Plaintiff-Appellant at 4.

notice was not in fact received and to do so with competent evidence beyond just denial of receipt. *Id.*

The Court's approach was in keeping with the purpose and requirements of the statute. As the Court explained in *Law*, the purpose of Section 1125's notice provision "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." 197 A.D.2d at 809. Allowing interested parties the opportunity to prove, with competent evidence, that they did not in fact receive notice of the tax sale plainly furthers that goal. Other New York courts have explained that Section 1125 requires a taxing entity to give actual notice of an impending tax sale. *See, e.g., West Branch Realty Corp. v. County of Putnam*, 293 A.D.2d 528, 529 [2d Dept. 2002]; *Matter of Foreclosure of Tax Liens by County of Erie*, 225 A.D.2d 1089, 1090 [4th Dept. 1996]. If actual notice is required, it is even more appropriate for courts to allow interested parties to rebut the presumption that they have received notice by showing that they did not.

In this case, however, the Court concluded that a 2006 amendment to Section 1125 severely circumscribed what evidence could sufficiently rebut the presumption of receipt. That amendment provided that taxing entities are required to send notice by both certified mail and U.S. Mail and that the notice "shall be

deemed received unless both the certified mailing and the ordinary first class mailing are returned” by the U.S. Postal Service within 45 days.

JBNC believes the Court’s holding about the amendment was mistaken.

First, nothing in the history of the amendment suggests that the legislature intended to limit the proof that could be offered to rebut the presumption. The legislature was instead responding to the U.S. Supreme Court’s decision in *Jones v. Flowers*, 547 U.S. 220 [2006], which held that the tax-sale statute in Arkansas—which allowed the sale to go forward even when mailed notice to an interested party was returned by the U.S. Postal Service—was unconstitutional. The New York legislature responded with the amendment described above, specifically to try to make sure New York’s process would not be held unconstitutional under *Jones*. See New York Bill Jacket, L 2006, ch 415, Senate Introducer’s Mem in Support (“This legislation brings the state’s uniform tax enforcement procedure, under Article 11 of the Real Property Tax Law, into compliance with an April 26, 2006 United States Supreme Court decision.”) and Mem of Joseph K. Gerberg, Esq. (“This bill imposes more stringent notification requirements upon tax districts when foreclosing delinquent real property tax liens under Article 11 of the [RPTL]. It does so in order to align the statute with [*Jones*].”). Nothing in the legislative history suggests any intention to modify existing New York authority regarding

how a party interested in real property could rebut the presumption in Section 1125.<sup>3</sup> That is unsurprising since the legislature history demonstrates that the purpose of the 2006 amendment was to be more protective of those with real-property interests—not less so.

Second, nothing in the text of the amended Section 1125 supports the more restrictive approach the Court took in this case. The legislature provided that, if a taxing entity offers evidence that it mailed notice in the two ways described in the statute, the notice would be “deemed” received. But that is just another way of describing the burden-shifting analysis *Law* discussed. Courts routinely interpret the word “deemed” not to be conclusive but to establish a rebuttable presumption. For example, CPLR 3404 provides that cases that have been marked off the calendar and not restored within a year “shall be deemed” abandoned, and courts have held that to establish a presumption that a party may rebut with competent evidence that it did not intend to abandon the case. *See, e.g., McCarthy v. Jorgensen*, 290 A.D.2d 116, 118 [3d Dept. 2002]; *Beringer v. B.C.P. Management Corp.*, 280 A.D.2d 414, 415 [1st Dept. 2001].

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<sup>3</sup> That absence is even more important since “[t]he Legislature will be assumed to have known of existing statutes and judicial decisions in enacting amendatory legislation,” McKinney’s Cons. Laws of N.Y., Book 1, Statutes § 191, comment, such that the Court should presume that, if the legislature intended to supersede cases such as *Law*, it would have done so expressly.



As noted, JBNC is not alone in its contention that it should have been permitted to rebut the Section-1125 presumption with proof such as the U.S. Postal Service tracking records that demonstrated that the certified-mail notice was in fact delivered to an unrelated post-office box. Justice Pritzker dissented from the majority holding and wrote that neither the history of the 2006 amendment nor its text suggest an intent to restrict the proof permitted to rebut the presumption. 3rd Department Order, pp. 4-6 (Pritzker, J., dissenting). Moreover, in *Wilczak*, decided just two years ago and 13 years after the amendment to Section 1125, the Fourth Department analyzed the issue employing the same presumption this Court discussed in *Law*, thus suggesting that that department has not concluded that the analysis was legislatively superseded.

The issue for purposes of this motion is not whether the Court should now agree with JBNC and Justice Pritzker on the merits but whether it should agree that there is a significant and reasonably debatable question about how the amended statute should be interpreted such that the Court of Appeals should resolve it. JBNC believes this motion demonstrates at least that there is a substantial question and that the Court's conclusion may reasonably be questioned. Indeed, there is extant disagreement with the Court's holding within this department and with another department.

There can be no real question that the issue is an important one. The Court may take judicial notice that a great many New Yorkers have struggled financially in recent years, most particularly during the COVID-19 crisis. There is every reason to expect that the number of tax foreclosures will remain significant and perhaps increase. Just by way of example, at the single tax sale in Saratoga County at which the property at issue in this case was sold, 33 properties were sold. R-78-81. It takes little imagination to appreciate that, across New York, the number of tax sales in any given year must be exponentially higher. Taxing entities will have to comply with Section 1125, and those interested in the properties at issue will need to know their rights and the proper procedure should they believe notice to them was insufficient. Moreover, the very existence of Section 1125 and the 2006 amendment to it underscore the importance New York places on allowing those with interests in property to know about tax sales and to have the opportunity to protect their interests. That is not merely a public-policy matter; as *Jones v. Flowers* demonstrates, the provision of appropriate notice has very real due-process implications.

JBNC urges the Court to grant permission to appeal so that the Court of Appeals may provide definitive guidance in this important area of the law.

**II. The Court of Appeals should have an opportunity to clarify whether a trial court has authority to provide an equitable remedy when, as the evidence demonstrates occurred in this case, a taxing entity mistakenly fails to provide required information to allow a party to avoid a tax foreclosure.**

As JBNC demonstrated in its statement of the background of this case, it made every effort to protect its interest in the property at issue here. It contacted the Town of Galway and asked for information about all outstanding tax liens. R-6, R-101-102, R-109-110. The Town provided information about *some* outstanding taxes, and JBNC paid them. R-6, R-64-65, R-66-67, R-102, R-110. But, when the Town provided to JBNC a receipt for those payments, it did not include on the receipt information about another, still pending tax lien. R-7, R-68, R-102, R-110. It omitted that information even though RPTL Section 1112(2)(a) mandates that such a receipt disclose if there remain still-unpaid tax liens. Thus, JBNC, which plainly intended to satisfy all outstanding tax liens in order to protect its interest in the property, did not have the necessary and required information to do so. As described in the factual background earlier in this motion, the undisclosed lien then led to the tax-foreclosure sale that divested JBNC of its interest.

JBNC assumes for purposes of argument that the Town simply made a mistake when it omitted that crucial information. But it was a particularly consequential mistake and, as the trial court aptly noted, the scenario in this case “cries out for an equitable remedy.” R-10-11. That court believed itself without

authority to grant such an equitable remedy and this Court affirmed, holding that, while there is authority to grant an equitable remedy, it requires evidence of fraud, misrepresentation, deception or misconduct by the defendants. 3rd Department Order, p. 4. The majority relied for that holding on *Guardian Loan Co. v. Early*, 47 N.Y.2d 515, 419 N.Y.S.2d 56, 392 N.E.2d 1240 [1979].

But the majority summarized the *Guardian Loan* holding incompletely. In that case, the Court of Appeals held that a judicial sale of property may be equitably set aside when the challenging party shows “one of the categories integral to the invocation of equity such as fraud, *mistake*, or exploitive overreaching.” 47 N.Y.2d at 521, 419 N.Y.S.2d at 60, 392 N.E.2d at 1248 (emphasis added). JBNC’s evidence regarding Town’s error was at the least sufficient to forestall summary judgment on whether there was a mistake that could form the basis for equitable relief from the tax sale at issue in this case.

If this Court now understands *Guardian Loan* to exclude provision of an equitable remedy when the plaintiff offers evidence of a mistake, JBNC respectfully submits that this second issue would be an appropriate one to submit to the Court of Appeals since that court is in the best position to interpret its own precedent.

## **CONCLUSION**

Again, JBNC understands that the Court has reached its holdings on these two issues because it believes them to be correct statements of the law. At the same time, the Court should appreciate that its decision, particularly with respect to Section 1125, is subject to reasonable disagreement, a fact demonstrated by the dissent, the Fourth Department's apparently contrary approach and the analysis in this motion.

In light of those considerations and the importance of the issues, JBNC respectfully requests that the Court allow the Court of Appeals to consider the case in order to provide certainty in the jurisprudence.

Dated: New York, New York  
August 5, 2021

Respectfully submitted,  
**K&L GATES LLP**

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## **PRINTING SPECIFICATIONS STATEMENT**

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

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

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JAMES B. NUTTER & COMPANY, <i>Plaintiff-Appellant-Movant,</i>	:	<b>Appeal No. 531787</b>
	:	
- against -	:	From Supreme Court
	:	County of Saratoga
COUNTY OF SARATOGA, STEPHEN M. DORSEY, IN HIS OFFICIAL CAPACITY AS TAX ENFORCEMENT OFFICER OF THE COUNTY OF SARATOGA and TOWN OF GALWAY,	:	Index No. 2019-3177
	:	<b><u>CERTIFICATE OF SERVICE</u></b>
	:	
<i>Defendants-Appellees.</i>	:	

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The undersigned certifies that on the 5th day of August, 2021, I served a copy of the notice of motion and supporting affidavit and memorandum of law to be filed electronically and served on counsel of record via the Court's ECF Court System.

Dated: August 5, 2021

/s/ Gregory N. Blase  
Gregory N. Blase



# Exhibit 8

Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: September 13, 2021

JAMES B. NUTTER & COMPANY,  
Appellant,

v

COUNTY OF SARATOGA et al.,  
Respondents,  
et al.,  
Defendants.

DECISION AND ORDER  
ON MOTION

Motion for permission to appeal to the Court of Appeals.

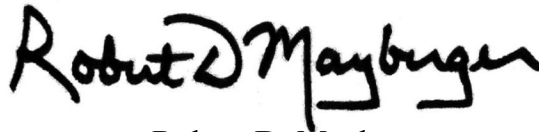
Upon the papers filed in support of the motion, and no papers having been filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

Garry, P.J., Egan Jr., Aarons and Reynolds Fitzgerald, JJ., concur.

Pritzker, J., dissents.

ENTER:



Robert D. Mayberger  
Clerk of the Court

# Exhibit 9

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION     THIRD DEPARTMENT

-----  
In the Matter of

**JAMES B. NUTTER & COMPANY,**

Index No.:     **531787**

Appellant(s),

v.

**NOTICE OF ENTRY**


**COUNTY OF SARATOGA, et al.,**

Respondent(s).  
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**PLEASE TAKE NOTICE** that attached hereto is true copy of a Decision and Order on Motion, issued by the Supreme Court Appellate Division, Third Judicial Department on September 13, 2021.

Saratoga County Attorney's Office

Dated: September 24, 2021  
Ballston Spa, New York

  
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State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: September 13, 2021

JAMES B. NUTTER & COMPANY,  
Appellant,

v

DECISION AND ORDER  
ON MOTION

COUNTY OF SARATOGA et al.,  
Respondents,  
et al.,  
Defendants.

Motion for permission to appeal to the Court of Appeals.

Upon the papers filed in support of the motion, and no papers having been filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

Garry, P.J., Egan Jr., Aarons and Reynolds Fitzgerald, JJ., concur.

Pritzker, J., dissents.

ENTER:



Robert D. Mayberger  
Clerk of the Court

**THE STATE OF NEW YORK  
COURT OF APPEALS**

JAMES B. NUTTER & : Appellate Division –  
COMPANY, : Third Department  
*Plaintiff-Appellant-Movant,* : Appeal No. 531787

- against –

COUNTY OF SARATOGA, : From Supreme Court  
STEPHEN M. DORSEY, IN HIS : County of Saratoga  
OFFICIAL CAPACITY AS TAX : Index No. 2019-3177

ENFORCEMENT OFFICER OF : **CERTIFICATE OF SERVICE**

THE COUNTY OF SARATOGA :  
and TOWN OF GALWAY, :

*Defendants-Appellees.* :

The undersigned certifies that on the 20th day of October, 2021, I caused to be served a copy of the notice of motion, supporting affidavit and accompany exhibits, and memorandum of law to be filed electronically and served on counsel of record via the Court's ECF Court System.

Dated: October20, 2021

/s/ Gregory N. Blase  
Gregory N. Blase