Court of Appeals No. APL 2022-00032

To be Argued by:
GREGORY N. BLASE
(*Time Requested: 30 Minutes*)

Court of Appeals
of the
State of New York

JAMES B. NUTTER & COMPANY,

Plaintiff-Appellant,

- against -

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

Defendants-Respondents,

(See inside cover for continuation of caption)

BRIEF FOR PLAINTIFF-APPELLANT

David R. Fine
(pro hac vice)
K&L GATES LLP
Market Square Plaza
17 North Second St., 18th Fl.
Harrisburg, Pennsylvania 17101
(717) 231-4500
david.fine@klgates.com

Gregory N. Blase
Priya Chadha
K&L GATES LLP
599 Lexington Ave.
New York, New York 10022
(212) 536-3900
gregory.blase@klgates.com
priya.chadha@klgates.com

Attorneys for Appellant James B. Nutter & Company

Saratoga County Clerk's Index No.: 3177/2019
Appellate Division, Third Department Docket No.: 531787

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- and -

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, decribed in the complaint,

Defendants.

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RULE 500.1(f) DISCLOSURE STATEMENT

Appellant James B. Nutter & Company ("JBNC") discloses and certifies that it does not have a parent corporation and that there is no publicly held corporation that owns 10 per cent 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.

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STATEMENT

The trial judge wrote that this is a troubling case that "cries out for" a remedy, and so it is. Appellant James B. Nutter & Company ("JBNC") did all it could to protect its mortgage interest in the property at issue here. It diligently asked local taxing authorities about any unpaid tax liens and then paid them. But one taxing authority, the Town of Galway (the "Town"), failed to tell JBNC about an outstanding lien even though the law required it to make that disclosure. And when the County of Saratoga (the "County") placed the property up for a tax sale because the undisclosed lien had not been paid, the County's notice did not reach JBNC and allow it an opportunity to protect its rights. The notice the County sent by certified mail was delivered to the wrong address, a fact confirmed by the U.S. Postal Service.[1] JBNC sought to assert its property interest after the sale. Yet the trial court held that the County was entitled to a conclusive presumption that JBNC received notice of the tax foreclosure and that equity could afford no relief—notwithstanding the Town's failure to alert JBNC to the outstanding lien, and the failure of the County's notices to reach JBNC. The Appellate Division, Third Department, affirmed. That result is indeed troubling. It also violates the Real Property Tax Law, runs counter to this Court's authority, deprives JBNC of its due-process rights and

[1] JBNC also did not receive the notice the County contends it mailed by first-class mail.

is, simply, fundamentally unfair.

Tax sales affect all manner of parties with interests in property, from those like JBNC that have mortgage interests to individuals whose financial circumstances may prevent them from timely paying their property taxes. All of them have a common interest: because their property is involved, the government must afford them due process before it seizes it or, at the least, after the seizure. By that process, New York law provides that those interested parties may demonstrate that their property interest should not be taken or should not have been taken.

New York has codified those protections in the tax foreclosure law found in Article 11 of the Real Property Tax Law ("RPTL") §§ 1120, *et seq*. In general, the statute permits the taxing authority to take a deed to property that is subject to a delinquent tax lien by filing a petition in the county where the property is located and notifying interested parties of the impending foreclosure. Thus, New York's tax foreclosure law gives the taxing authority the ability to foreclose on a delinquent tax lien through an abbreviated legal proceeding. But in doing so the statute builds in an important protection, namely, that the taxing authority's deed, and all of the proceedings that go into securing it—including the notices to interested parties—are only presumptively valid, and the presumption can be rebutted by competent evidence.

As amended in 2006, RPTL § 1125 states that the County's notices to an interested party (including a mortgagor like JBNC) "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. The Appellate Division construed the phrase "shall be deemed received," to create a conclusive presumption of delivery in favor of the County.

JBNC asks the Court to reverse the Appellate Division's judgment.

First, the Appellate Division construed the phrase "shall be deemed" in isolation, but New York law directs courts to read statutory language in the context of the entire statutory framework. Implying a conclusive presumption in § 1125's use of the words "shall be deemed" would undermine the other sections of the tax foreclosure law in which an aggrieved party may rebut the presumptive validity of the tax sale with competent evidence.

Second, reading the phrase "shall be deemed" as creating a conclusive presumption would lead to absurd results, including in this very case where the record evidence establishes that the notices did not reach JBNC. Unless this Court reverses the Appellate Division's holding, similarly absurd and unfair results will surely be visited upon others.

Third, in analogous contexts New York courts have found the phrase "shall be

deemed" to imply a rebuttable presumption.

Fourth, nothing in the legislative history to the 2006 amendment supports a restrictive reading of the phrase "shall be deemed." Rather, the Legislature added that phrase in response to *Jones v. Flowers*, 547 U.S. 220 (2006), in which the U.S. Supreme Court struck down Arkansas' statute—which allowed proof of mailing to be conclusive even if the taxing entity knew the notice was never received—as violating due process under the Fourteenth Amendment. The legislative history demonstrates that the Legislature amended § 1125 to strengthen the notice requirement and to be more protective of due process.

Finally, the Court should correct the Appellate Division's holding regarding the authority a court has to employ equity to address mistakes such as the Town's failure to notify JBNC of the outstanding tax lien and the failure of the notices to reach the correct address. In *Guardian Loan Co. v. Early*, 47 N.Y.2d 515, 521 (1979), the Court held that a tax sale could be equitably set aside if the evidence showed "one of the categories integral to the invocation of equity such as fraud, *mistake*, or exploitive overreaching." (emphasis added). The Appellate Division cited *Guardian Loan*, but then incorrectly held that the case requires evidence of fraud, misrepresentation, deception or misconduct by the defendants—somehow leaving out the word "mistake" and ignoring the Court's holding that equity could correct a

mistake.

JBNC asks the Court to hold that (1) § 1125 establishes only that, if a taxing authority offers evidence of mailing without return by the Postal Service, there is merely a rebuttable presumption of receipt and (2), under *Guardian Loan*, a trial court has authority to provide an equitable remedy when a tax sale has resulted from a mistake by, for example, a taxing authority in giving statutorily required notice.

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 conclusive.[2]

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 mistakes in the tax foreclosure process.[3]

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[2] JBNC preserved this issue in the trial court in its motion for summary judgment. R-106. It preserved the issue in the Appellate Division in its opening brief in that court. *See* Blase Aff., Ex. 2 (Brief for Plaintiff-Appellant) at 4 (attached to Motion for Permission to Appeal filed with the Court of Appeals on October 20, 2021).

[3] JBNC preserved this issue in the trial court in its motion for summary judgment. R-106. It preserved the issue in the Appellate Division in its opening brief in that court. *See* Blase Aff., Ex. 2 (Brief for Plaintiff-Appellant) at 4 (attached to Motion for Permission to Appeal filed with the Court of Appeals on October 20, 2021).

JURISDICTION

The Court has jurisdiction over this appeal pursuant to CPLR § 5602(a)(1)(i) and CPLR § 5611 because the underlying action originated in the Supreme Court, Saratoga County (R4), the decision below is an order of the Appellate Division, Third Department, entered on June 24, 2021, that finally determines the action and is not appealable as a matter of right (R-323), and this Court granted leave to appeal on March 17, 2022 (R-330).

STATEMENT OF THE CASE

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.[4] The note is secured by a mortgage on property located in Galway, New York (the "Property").[5] JBNC filed a foreclosure action in the Supreme Court of Saratoga County in July 2015.[6] In July 2015 and again in March 2018, JBNC filed notices of the pendency of the foreclosure action.[7]

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

[4] R-6.

[5] R-101, 116-28.

[6] R-101.

[7] R-43-51.

to determine what tax payments might be outstanding.[8] Before that call, JBNC had received no notice from the Town or any other governmental entity regarding the status of the taxes on the Property.[9] During the call, a Town employee provided a statement for County and Town taxes in the amount of $3,309.92.[10] JBNC immediately paid that amount.[11] The Town provided to JBNC a receipt that acknowledged payment of the County and Town taxes and that failed to indicate that there remained an additional outstanding tax lien on the Property.[12] That was despite the requirement in New York law that, if earlier tax liens remain unredeemed after payment of outstanding 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, the County filed with the county clerk's office a petition

[8] R-6, R-101-102, R-109-110.

[9] R-109, R-113.

[10] R-6, R-64, R-65.

[11] R-6, R-66, R-67, R-102, R-110.

[12] R-7, R-68, R-102, R-110.

and a notice of foreclosure asserting a $9,330.97 lien against the Property.[13]

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. The County submitted affidavits of service asserting that it sent the required notices by certified and first-class mail to: "James B. Nutter & Company, Legal Dept, 4153 Broadway, Kansas City, MO 64111."[14]

But JBNC never received the notices,[15] and the undisputed evidence casts serious doubt on the County's assertion that it complied with § 1125. The certified mail receipt does not bear an official postmark.[16] The Postal Service's records contradict the County's affidavits and establish that the notice sent by certified mail was actually delivered to an unknown post office box in Kansas City, Missouri, that

[13] R-7, R-102, R-207.

[14] R-299-236.

[15] R-7, R-108-109, R-113, R-243-244, R-262.

[16] R-231.

has nothing to do with JBNC.[17] And JBNC's business records confirm that it never received any notice of the tax-foreclosure proceedings by either certified or first-class mail.[18]

The trial court granted to the County a foreclosure judgment under RTPL § 1136. The County received a deed to the Property, which deed was recorded on May 16, 2019. The County Board of Supervisors approved the sale of the Property to Steven Abdoo for $142,500.[19] At the direction of Mr. Abdoo, the County conveyed title to the Property to Sensible Holdings, LLC, and made a profit of more than $130,000.[20] The County has since refused to share those profits with any other entity, including JBNC, despite JBNC's lien interest in the property.[21]

II. Procedural Background

JBNC filed suit in the trial court against Saratoga County and others on September 23, 2019, and sought to vacate the foreclosure judgment and the subsequent sale of the property.[22] JBNC sought damages in the alternative.[23]

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[17] R-262.

[18] R-109, R-113.

[19] R-78-81, R-103.

[20] R-7, R-103.

[21] R-7, R-103.

[22] R-14.

[23] *Id.*

JBNC and the County filed cross-motions for summary judgment.[24] JBNC offered tracking records from the U.S. Postal Service demonstrating that the certified-mail notice was misdirected to an unrelated post-office box.[25] The Postal Service does not of course First Class Mail, but JBNC offered affidavits and business records demonstrating that it did not receive either form of notice.[26] JBNC also pointed out that the certified mail receipt does not bear an official postmark.[27] And the record established that JBNC had intended to pay all outstanding tax liens when it contacted the Town. 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 cross motion for summary judgment.

On April 28, 2020, the trial court granted the County's motion for summary judgment and denied JBNC's.[28] The court held that the County's affidavits of mailing satisfied § 1125 and that was sufficient.[29] In essence, the trial court held that, once the taxing body offers evidence of the two forms of mailing, § 1125 creates a

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[24] R-98, R-145.

[25] R-262.

[26] R-113. It is also not at all clear that the Postal Service routinely returns regular mail that it cannot deliver. This case is an example.

[27] R-231.

[28] R-4-13.

[29] R-9.

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's failure to provide JBNC with the requisite notice of additional tax liens was "troubling."[30] Indeed, the trial court observed that the case "cries out for an equitable remedy"[31] where it was shown that the Property's owner 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.[32]

JBNC took an appeal to the Appellate Division, Third Department.[33] JBNC cited *Law v. Benedict*, 197 A.D.2d 808 (3d Dep't 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.[34] JBNC argued that it had offered enough evidence to create a triable issue of fact about whether the County provided sufficient notice, particularly given the U.S. Postal Service's tracking records establishing the

[30] R-10.

[31] *Id.*

[32] R-10-11.

[33] Affidavit of Gregory N. Blase, Ex. 1.

[34] Blase Aff., Ex. 2 at 11.

misdirection of the certified mail notice.[35] JBNC also argued that the trial court was mistaken in concluding that it had no authority to grant equitable relief where this Court's decision in *Guardian Loan* expressly allows for an equitable remedy from an improper tax sale brought about by mistake.[36]

The Third Department affirmed.[37] Justice Aarons wrote the majority opinion in which Presiding Justice Garry, Justice Egan, and Justice Reynolds Fitzgerald joined. Justice Pritzker dissented.

The majority opinion concluded that, as a result of the 2006 amendment, when § 1125 was changed to provide that notice "shall 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 authority's evidence is by showing that both mail pieces were actually returned to sender as undeliverable.[38] The majority concluded that any other interpretation of § 1125 would render the language about returned mail "meaningless."[39] The majority asserted, in a case of first impression, that the Third Department's previous

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[35] *Id.* at 11-13.

[36] *Id.* at 16-19.

[37] R-323.

[38] R-325.

[39] R-325.

authority providing that there was a more broadly rebuttable presumption was no longer controlling after the Legislature amended the relevant part of § 1125 in 2006.[40] 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, citing *Guardian Loan* but leaving out the word "mistake" found in the holding in that case.[41]

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.[42] 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 by RPTL 1125(1)(a)."[43] 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

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[40] R-325.

[41] R-326.

[42] R-326-27 (Pritzker, J., dissenting).

[43] R-327 (Pritzker, J., dissenting).

not intend to forfeit the property."[44]

JBNC filed in the Appellate Division a timely motion for leave to appeal, which that court denied over Justice Pritzker's dissent.[45] JBNC then filed a timely motion asking this Court for leave to appeal, which the Court granted on March 17, 2022.

ARGUMENT

I. New York's tax foreclosure statute creates a rebuttable presumption of validity, and the Appellate Division erred in treating that presumption as conclusive with respect to the County's § 1125 notices of foreclosure.

A. As a matter of statutory construction, the words "shall be deemed" suggest a rebuttable rather than a conclusive presumption.

There are a number of ways to approach the first question in this case—the proper interpretation of § 1125—but the easiest one is simple statutory interpretation.

This Court has held that, "[i]n matters of statutory interpretation," the "primary consideration is to discern and give effect to the Legislature's intention," *Matter of Albany Law School v. N.Y. State Off. of Mental Retardation & Dev. Disabilities*, 19 N.Y.3d 106, 120 (2012), by looking "first to the plain language of the statute[ ] as the best evidence of legislative intent." *Matter of Malta Town Ctr. I,*

[44] R-328. (Pritzker, J., dissenting).

[45] R-329. (Pritzker, J., dissenting).

Ltd. v. Town of Malta Bd. of Assessment Review, 3 N.Y.3d 563, 568 (2004). "Although statutes will ordinarily be accorded their plain meaning, it is well settled that courts should construe them to avoid objectionable, unreasonable or absurd consequences." *Long v. State of N.Y.*, 7 N.Y.3d 269, 273 (2006). And another guiding principle is that "a statute … must be construed as a whole and that its various sections must be considered together and with reference to each other." *Matter of N.Y. County Lawyers' Ass'n v. Bloomberg*, 19 N.Y.3d 712, 721 (2012).

With respect to tax foreclosures, the Court has explained 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. Philippone,* 1 N.Y.3d 333, 339 (2004). Thus the Legislature has drafted the tax foreclosure statute to permit an aggrieved party the opportunity to rebut the presumptive validity of any aspect of that tax foreclosure proceeding, including the sufficiency of the notice.[46]

[46] Under New York law, property taxes become a lien on the subject property as of January 1 of the fiscal year in which the tax is "levied and shall remain a lien until paid." RPTL § 902. If a tax lien remains unpaid after twenty-one months, the taxing authority may file a petition to foreclose the tax lien with the clerk of the county where the property is located. RPTL § 1123. The taxing authority is required to provide notice of the foreclosure petition (1) to "each owner and any other person whose right, title, or interest … will be affected by" the tax foreclosure by mailing the notice "both by certified mail and ordinary first class mail," RPTL § 1125, and (2) to the public by publishing the notice in a local newspaper, RPTL § 1124. The County is required to submit an affidavit in support of its petition attesting to its completion of the notice requirements in §§ 1124 and 1125. RPTL § 1128. Upon making this minimal showing by filing the petition and required affidavits of service,

This is demonstrated by the plain language of Sections 1134 and 1137 of the RPTL. Section 1134, titled "Presumption of Validity" states in part that

> [i]t shall not be necessary for the tax district to plead or prove the various steps, procedures and notices for the … levy of the taxes … against the parcels of real property set forth in the petition and all such taxes … and the lien thereof shall be presumed to be valid. A respondent alleging any jurisdictional defect or invalidity in the tax, or in the proceeding for the enforcement thereof, must particularly specify in his or her answer such jurisdictional defect or invalidity and must affirmatively establish such defense.

RPTL § 1134. Thus while the County was not required to "plead or prove" the sufficiency of the "steps" it took or the "notices" it issued in connection with the "levy," *i.e*. the foreclosure of the tax lien, the most it could have obtained through the ensuing tax foreclosure proceeding is a presumption that those steps were legally valid. *See id.* And the presumption is rebuttable. *Id.* Specifically, the party challenging the tax foreclosure is free to allege "*any* jurisdictional defect or invalidity in … the proceeding for the enforcement [of the tax]," *id.* (emphasis added), and that party has the burden to "affirmatively establish such defense" with competent evidence consisting of more than a self-serving denial. *Id*; *Wilczak v. City of Niagara Falls*, 174 A.D.3d 1446, 1448 (4th Dep't 2019); *Lin v. County of Sullivan*, 100 A.D.3d 1076, 1079 (3rd Dep't 2012).

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and unless the respondent files an answer to the petition, the court issues a judgment and deed in favor of the taxing authority. RPTL § 1136(3).

Section 1137 provides additional evidence of the Legislature's intention to provide an aggrieved party the opportunity to rebut any aspect of a presumptively valid tax sale. That provision states that the presumptive validity of a tax sale does not become "conclusive" until two years after the tax deed is recorded. RPTL § 1137. Here, the tax deed was recorded on May 16, 2019, R-8 and JBNC timely filed suit to challenge the presumptive validity of the tax sale on September 23, 2019. R-8. Thus, JBNC was entitled to rebut the presumptive validity of any aspect of the County's foreclosure with competent evidence.

Consider then § 1125, the provision at the heart of this appeal. As amended in 2006, that section provides that notices mailed by regular and certified mail and not returned as undeliverable "shall be deemed received." RPTL § 1125. When this provision is read in conjunction with the above-quoted sections of the tax foreclosure statute, its meaning is plain: it establishes a facially valid basis for the County to proceed on its petition to obtain a tax deed in the first instance. That is to say, so long as the notices were not returned, the County was not required to prove that the notices were delivered in order to secure a presumptively valid tax deed. But nothing in the phrase "shall be deemed" precludes JBNC from challenging the sufficiency of the County's notice to rebut the presumption of validity.

JBNC's reading of the phrase "shall be deemed"—and only this reading—

gives effect to, among other provisions: (1) § 1134's instruction that the County's "notices" shall be presumptively and not conclusively valid; (2) § 1134's provision that an aggrieved party may challenge "*any* jurisdictional defect or invalidity in … the proceeding for the enforcement" of the tax lien (emphasis added); (3) § 1134's silence as to any limits on the evidence that JBNC could produce to rebut the presumptive validity of the sale; and (4) § 1137's provision that the sale is not "conclusively" established until the expiration of two years after the tax deed is recorded. *Compare* RPTL § 1125; *with* RPTL §§ 1134; 1137.

The majority in the Appellate Division erroneously took the phrase "shall be deemed received" to mean that, unless a challenger could show that both forms of notice were returned marked "undeliverable," there would be a conclusive presumption that notice had been received.[47] The majority wrote that any other interpretation would render the notice provision of § 1125 "meaningless."[48] Yet in reaching this conclusion, the Appellate Division failed to heed this Court's rule that a statutory term should be construed as part of the entire statute and not purely in isolation. *Mtr. of N.Y. County Lawyers' Ass'n*, 19 N.Y.3d at 721. And as discussed above, it is the majority's construction of this single phrase in isolation that, if allowed to stand, would render parts of the tax foreclosure statute meaningless,

[47] R-325.
[48] R-325.

including Sections 1134 and 1137, which codify JBNC's right to challenge any aspect of the sale—including the failure to provide notice—within two years. RPTL §§ 1134; 1137.

The Appellate Division majority's interpretation would also lead to absurd results and this Court has made clear that statutes should be interpreted to avoid absurd or unreasonable results. *See People v. Garson*, 6 N.Y.3d 604, 614 (2006). Here, an agency of the United States government has confirmed that at least one of the notices—the one sent by certified mail—was misdirected. But the Appellate Division's interpretation would require that compelling evidence to be ignored.

Indeed the Appellate Division's ruling would make any challenge based on improper notice virtually impossible to assert in the first place. That is because only the taxing authority would know if notices were returned; the property owner would have no way of knowing whether it has a valid challenge.

It is not difficult to imagine any number of unfair and unconstitutional scenarios the Appellate Division's interpretation could engender. In *Jones v. Flowers*, Chief Justice Roberts, considering the due-process implications of Arkansas' proceeding to a tax sale even though the Postal Service returned the notice sent to the property owner, wrote that such a scenario did not demonstrate that Arkansas actually desired the owner to receive notice, and he offered a hypothetical:

> If the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried." Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman.

547 U.S. at 229. The Appellate Division's interpretation of § 1125 would lead to a similarly unreasonable result. Notices dropped into a storm drain would neither reach JBNC (or other innocent taxpayers for that matter) nor be returned to the County as undeliverable, but the Appellate Division would treat receipt as having been shown conclusively. Indeed, Chief Justice Roberts' hypothetical assumes the taxing entity actually knows the notices were lost, and the Appellate Division's interpretation of § 1125 would allow a conclusive presumption even in that circumstance.

But the hypothetical need not involve knowledge by the taxing entity. Assume that the County sends out the notices to JBNC by regular and certified mail and a fire destroys the nearby post office before the notices left it. Of course, the notices would not reach JBNC and provide to it the necessary information to protect its rights, but neither would the notices be returned to the County as undeliverable. Again, the Appellate Division would refuse even to consider evidence of the fire.

On the other hand, JBNC's interpretation would avoid the absurdity and allow the party with a property interest to offer competent evidence of the storm drain accident or the fire to rebut the presumption of receipt, and that would be only reasonable.

Finally, while the Appellate Division treated "shall be deemed" as synonymous with "conclusively proven," they are not the same. Indeed, for more than a century, New York courts have recognized that the phrase "shall be deemed" when found in a tax-enforcement statute that gives the taxpayer the right to challenge the state's determination, connotes a rebuttable, and not a conclusive, presumption. In *In re Barbour's Estate*, the First Department construed the statute governing taxation of probate estates. 185 A.D. 445 (1st Dep't 1918), *aff'd without opinion*, 226 N.Y. 639 (1919). The statute in question stated that

> every person *shall be deemed* to have died a resident and not a nonresident of the state of New York if and when such person shall have dwelt or shall have lodged in this state during and for the greater part of any period of twelve consecutive months in the twenty-four months next preceding his or her death.

Id. at 449 (quoting Tax Law § 243 (1916)) (emphasis added). The evidence established that the decedent had been a resident of New Jersey for his entire adult life. *Id.* at 449-50. Yet, he also owned a residence in New York City where, it was also undisputed, he had resided for the "greater part" of 12 consecutive months

within the two years before he died. *See id.* The Comptroller for the State of New York argued that the statute established a conclusive presumption that could not be rebutted by the extensive evidence of the decedent's New Jersey residence. But the First Department rejected that argument and found that the phrase "shall be deemed" implied a rebuttable presumption. *Id.* at 451-52. The court reasoned that, by imposing the burden of proof on the party contesting the state's determination of an estate's domicile, the legislature intended to create a rebuttable presumption. *Id.* ("The provision of the statute … that 'the burden of proof … shall be upon those claiming exemption …,' would seem strongly to indicate that the Legislature, in using the words 'shall be deemed,' intended merely to create a presumption of residence …, and that, at most, the word 'deemed' created a disputable presumption.").[49] As the court concluded, "the statute does not make the fact otherwise than it is. At most, it creates a presumption which may be overcome by evidence to the contrary." *Id.* at 457. This Court affirmed the First Department's decision without opinion. 226 N.Y. 639 (N.Y. 1919).

The plain language of § 1125, when read in harmony with the other sections

[49] Likewise, 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 this 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 Dep't 2002); *Beringer v. B.C.P. Management Corp.*, 280 A.D.2d 414, 415 (1st Dep't 2001).

of the tax foreclosure law and when giving effect to each of the statute's provisions, supports JBNC's interpretation and provides a basis for the Court to reverse the decision of the Appellate Division.

B. Nothing in the legislative history of the 2006 amendment to § 1125 suggests that the Legislature intended to eliminate the rebuttable presumption in favor of a conclusive presumption.

There is likewise no indication that, when the Legislature added the "deemed received" language in 2006, it intended to narrow the protections § 1125 provided to those with property interests.

Prior to this case, the Third Department correctly understood the pre-2006 version of § 1125, along with the other sections of the tax foreclosure law, to create only a rebuttable presumption that notice had properly been given to those with interest in the property to be sold. *See Law v. Benedict*, 197 A.D.2d 808, 810 (3d Dep't 1993). The only limitation on the proof an interested party could offer to show non-receipt was that it could not rely solely on its own self-serving testimony. *Id.*

In 2006, the U.S. Supreme Court decided *Jones v. Flowers*. In that case, Gary Jones failed to pay taxes on property he owned in Little Rock, Arkansas. The State of Arkansas sent Mr. Jones a certified letter notifying him of the tax delinquency, his right to redeem the property and the state's right to sell the property if it were not redeemed within two years. The Postal Service returned the letter marked "unclaimed," and, other than a public notice in a newspaper, the state took no further

steps to provide notice before selling the property. 547 U.S. at 223-224.

The Supreme Court held that Arkansas violated Mr. Jones' due-process rights. It explained that due process does not require that property owners receive actual notice before a sale, it does mandate that the government provide notice reasonably calculated to provide notice to the owners so they have an opportunity to lodge any objections. 547 U.S. at 226. Since Arkansas knew that the certified letter to Mr. Jones had been returned, it could not have reasonably believed Mr. Jones received notice. Thus, the state had not met its due-process obligation. 547 U.S. at 227.

The New York Legislature responded to *Jones* with the amendment to § 1125 described above. *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 that the Legislature intended to narrow the due-process rights of those with property interests. To the contrary, the Legislature intended to broaden the notice requirements and establish the minimum

level of process a County must afford to avoid the problem Arkansas encountered in *Jones* and, so, to be more protective of property rights rather than less so.

And there is no indication in the legislative history that the Legislature intended the word "deemed" to create the conclusive presumption the Appellate Division drew from that word. Had the Legislature intended to create a conclusive presumption, surely there would be some hint of it in the legislative history. There is none.

Moreover, "[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. When the Legislature enacted the 2006 amendment to § 1125, it was charged with knowing about, and will be found to have legislated within the context of (1) the other sections of the tax foreclosure law that expressly permit the aggrieved party to rebut the presumptive validity of "any" aspect of the foreclosure within two years of the tax deed, *e.g.* RPTL §§ 1134 and 1137; (2) cases such as *Law* recognizing that § 1125 provides for a rebuttable presumption and (3) cases such as *In re Barbour's Estate* holding that the phrase "shall be deemed" connotes a rebuttable presumption when used in a tax enforcement statute that permits the aggrieved party to challenge the state's determinations. Accordingly, the Court should presume that, if the Legislature

intended to supersede these precedents, it would have done so expressly.

The legislative history does not support the Appellate Division's interpretation and instead supports JBNC's. That bolsters the case for reversal.

C. The Appellate Division's interpretation of § 1125 runs afoul of due process.

There is yet another reason for the Court to reject the Appellate Division's interpretation in favor of JBNC's. It is well-established that courts should interpret statutes in ways that avoid rendering them unconstitutional. *See Overstock.com, Inc. v. New York State Dep't of Taxation & Fin.*, 20 N.Y.3d 586, 593 (2013)] ("courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional").

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 (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. The Appellate Division'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.

In *Jones*, the Supreme Court explained that due process requires the government to provide notice, reasonably calculated under the circumstances, to apprise interested parties of the pendency of a tax-sale proceeding so they may present their objections. The Appellate Division's interpretation of § 1125 in this case does not satisfy that requirement. It is well and good to require notice by both regular and certified mail, but a statute that presumes receipt of those notices if they are not returned and then turns a blind eye toward any contrary evidence—no matter how compelling—cannot be said to provide due process.

The U.S. Supreme Court's decision in *Vlandis v. Kline*, 412 U.S. 441 (1973), demonstrates another way in which § 1125—as the Appellate Division read it—runs afoul of due process. That case considered a Connecticut statute that required nonresidents to pay higher tuition and other fees at Connecticut state universities and that employed an irrebuttable presumption that any student with an out-of-state address at the time of application should be considered a nonresident as long as he or she was a student at the school. 412 U.S. at 442-43. Students who wished to offer evidence to rebut the presumption sued and claimed the statute's conclusive presumption violated their due-process rights.

The Supreme Court agreed with the students. It held that "[s]tatutes creating permanent, irrebuttable presumptions have long been disfavored under the Due

Process Clauses of the Fifth and Fourteenth Amendments." 412 U.S. at 446. It explained that such a presumption denied the students a fair opportunity to rebut the statutory assumption and, so, was problematic. *Id.* While the Court in *Vlandis* did not suggest that irrebuttable statutory presumptions are *per se* unconstitutional, it made clear they are disfavored. So too in this case. The lower courts' interpretation of § 1125 deprived JBNC of a fair opportunity to rebut the County's affidavit with contradictory evidence.

JBNC's interpretation of § 1125, on the other hand, avoids constitutional pitfalls. If it sends notices and they are not returned, a taxing authority may presume that it can safely put the property up for sale. But, if an interested party can demonstrate through competent evidence (like Postal Service records) that the notice was not, in fact, delivered, it may present that to a court to demonstrate that it did not receive proper notice. *See* RPTL § 1134.

JBNC submits the Court should construe § 1125 to avoid the possibility of a constitutional infirmity.

D. The Appellate Division's interpretation of § 1125 runs afoul of public policy.

While the plain text, legislative history and constitutional considerations dictate the result here, it is worth noting as well that the Appellate Division's interpretation of § 1125 is likely to engender fundamentally unfair results that run

counter to public policy.

Consider this case. There is no dispute that JBNC was diligent in protecting its mortgage interest in the Property. Neither is there a dispute that JBNC inquired of the Town about tax liens and then paid every one of which it was notified. There is no dispute that the Town failed to comply with the statutory requirement that it include on the receipt for paid tax liens information about any other, outstanding liens. There can be no question that, had the Town done as it was required to do, JBNC would have paid the remaining lien. But that lien went unpaid and, so, the County put the Property up for tax sale. JBNC proffered tracking records from the Postal Service demonstrating that the certified-mail notice did not reach JBNC, and it offered its own business records to show that the regular-mail notice did not reach it. Under the Appellate Division's interpretation of § 1125, none of that evidence matters at all. As the dissenting justice of the Appellate Division noted, JBNC gave no indication that it intended to forfeit its property interest, yet despite its diligence, it has now lost that interest.

But the problems with the Appellate Division's crabbed interpretation go beyond the scenario in this case. It is not difficult to envision similar notice problems depriving individuals of their homes without any recourse no matter how compelling the evidence that notice was misdirected.

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The Appellate Division's interpretation of § 1125 is mistaken. That court read a 2006 statutory amendment intended to provide greater protection to those with property interests in a way that significantly narrows the rights of those parties. That interpretation has no basis in the plain language of the statute, it would lead to absurd results, and it invites constitutional problems and fundamental unfairness.

JBNC asks this Court to determine that, when a taxing authority demonstrates its minimal compliance with the notice requirements of § 1125, there arises only a rebuttable presumption of receipt that can be overcome by competent evidence. If the Court agrees, JBNC submits the Court should then remand the case to the trial court for it to hear JBNC's evidence to rebut the statutory presumption of receipt of notice and provide an appropriate remedy if JBNC's objection is sustained.

II. This Court has held that a trial court may provide equitable relief to correct a tax sale brought about by mistake, and the Appellate Division erred in ignoring the word "mistake" in this Court's precedent.

While it is important that the Court confirm that § 1125 creates only a rebuttable presumption, there is another basis for the Court to reverse the Appellate Division's judgment. In *Guardian Loan Co. v. Early*, the Court held that a court may provide an equitable remedy to set aside a tax sale when there is evidence of "fraud, mistake, or exploitative overreaching." 47 N.Y.2d 515, 521 (1979).

There were, at the least, two mistakes in this case.

First, JBNC contacted the Town and asked for information about all outstanding tax liens.[50] The Town provided information about *some* outstanding taxes, and JBNC paid them.[51] But, when the Town provided to JBNC a receipt for those payments, it failed to disclose another, still-pending tax lien.[52] It omitted that information even though RPTL § 1112(2)(a) mandates that such a receipt disclose if there remain still-unpaid tax liens.

Second, the evidence establishes that the notice of foreclosure that the County sent by certified mail was delivered to the wrong address. And the fact that the notice the County sent by first class mail never made it to JBNC is highly suggestive of the fact that it was also mistakenly delivered to the wrong address. 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. The undisclosed lien and the misdirected notices of foreclosure then led to the tax-foreclosure sale that divested JBNC of its interest.

JBNC assumes for purposes of argument that these occurrences were mistakes and nothing more. But they were a particularly consequential mistakes and, as the

[50] R-6, R-101-102, R-109-110.

[51] R-6, R-64-65, R-66-67, R-102, R-110.

[52] R-7, R-68, R-102, R-110.

trial court aptly noted, the scenario in this case "cries out for an equitable remedy."[53] That court believed itself without authority to grant such an equitable remedy.

The Appellate Division disagreed with the trial court's contention that it had no authority to provide equitable relief.[54] But for reasons that remain unclear, the appellate court majority summarized the *Guardian Loan* holding incompletely, leaving out the word "mistake." Thus, the court wrote that "[a]lthough 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."[55] But *Guardian Loan* expressly allows a court to set aside a tax sale on an equitable basis when there has been a mistake, and JBNC's evidence regarding the mistakes in this case was at the least sufficient to forestall summary judgment on whether there was such a mistake. Indeed, there was no evidence to counter JBNC's proof mistake.

The Court should conclude that the Appellate Division erred in its understanding of *Guardian Loan* such that the case should be remanded to the trial court for its determination of whether the Town's error supports an equitable remedy.

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[53] R-10.

[54] R-326.

[55] R-326.

CONCLUSION

JBNC respectfully requests that the Court reverse the judgment of the Appellate Division and remand the case to the trial court for it to (1) accept and consider JBNC's evidence to rebut the statutory presumption in § 1125 that JBNC received notice and (2) consider whether the Town of Galway's mistake in failing to apprise JBNC of the outstanding tax lien warrants an equitable remedy.

Dated: New York, New York
May 13, 2022

Respectfully submitted,

K&L GATES LLP

/s/ Gregory N. Blase

Gregory N. Blase
Priya Chadha
K&L GATES LLP
599 Lexington Ave.
New York, NY 10022
Telephone: (212) 536-3905
Direct: (212) 536-3902
Fax: (212) 536-3901
Email: gregory.blase@klgates.com
priya.chadha@klgates.com

David R. Fine
(pro hac vice)
K&L GATES LLP
Market Square Plaza
17 North Second St., 18th Floor
Harrisburg, PA 17101
Direct: (717) 231-5820
Fax: (717) 231-4501
Email: david.fine@klgates.com

Counsel for Appellant
James B. Nutter & Company

WORD COUNT CERTIFICATION

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief exclusive of the material omitted under Rule 500.13(c)(3), is 7,564 words.

This brief was prepared on a computer using:

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Dated: May 13, 2022

/s/ Gregory N. Blase
Gregory N. Blase

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF WESTCHESTER)

Ivan Diaz, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at 2160 Holland Avenue, Bronx, New York 10462.

That on the 13th day of May, 2022, deponent served the within:

BRIEF FOR PLAINTIFF-APPELLANT

upon designated parties indicated herein at the addresses provided below by means of Federal Express Standard Overnight Delivery of 3 true copies of the same at the addresses of said attorney/parties with the names of each represented party:

BARTLETT, PONTIFF, STEWART &
RHODES, P.C.
One Washington Street,P.O. Box 2168
Glens Falls, New York 12801
(518) 792-2117
kwb@bpsrlaw.com

Special Counsel to:

SARATOGA COUNTY
ATTORNEY'S OFFICE
Attorneys for Appellees County of Saratoga and Stephen Dorsey as Tax Enforcement Officer of the County of Saratoga
40 McMaster Street
Ballston Spa, New York 12020
(518) 884-4770
MHartnett@saratogacountyny.gov

Sworn to before me this
13th day of May, 2022

Notary Public

ERIC R. LARKE
Notary Public, State of New York
No. 01LA5067236
Qualified in Westchester County
Commission Expires March 5, 2023

Ivan Diaz

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