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)

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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

APPELLATE INNOVATIONS
(914) 948-2240

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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.

_____

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 Court agreed to resolve two legal questions: whether the presumption of notice in RPTL § 1125 is rebuttable and whether the Appellate Division erred in failing to acknowledge that, under *Guardian Loan Co. v. Early*, 47 N.Y.2d 515 (1979), a court may provide an equitable remedy for a tax sale brought about by mistake. In disposing of these issues, JBNC[1] has proposed a workable rule that has clear support in the language and the purpose of the statute. Namely, while the County may obtain a presumptively valid tax deed upon a minimal showing, an aggrieved party with evidence consisting of more than its self-serving denial of receipt of notice may challenge the validity of the tax title in a subsequent proceeding. Consistent with the language and purpose of the statute, this rule balances the interest of the County in enforcing tax liens in an expeditious manner with that of a respondent—like JBNC—with a meritorious argument that they were denied notice.

Rather than address this contention, in its answering brief, the County devotes substantial effort to arguing against positions JBNC has not asserted and that fall outside the scope of the issues on review. For example, the County complains that a holding in favor of JBNC would place an onus on taxing entities to ensure actual

[1] JBNC uses the same defined terms in the brief as it did in its opening brief.

receipt of notices prior to taking a presumptively valid tax deed. Of course, JBNC never suggested such a result. Instead, JBNC has asserted only that, in the unusual case—such as this one—in which there is significant and competent evidence that such notices were misdirected and never reached the property owner, the property owner should have the right to demonstrate that to a court.

Thus, the County's only real legal argument regarding Section 1125 is that another provision of the RPTL, Section 1134, provides the exclusive, limited means to rebut the presumption of receipt. The County's argument misconstrues the text of Section 1134, which is broadly drawn to permit a challenge to "*any*" defect in the proceedings, including the provision of notice. Moreover, if the County's current argument were so plainly correct, one would imagine the County would have raised it in the trial court, in the Appellate Division or in its opposition to JBNC's motion for leave to appeal to this Court and that the trial court and the Appellate Division would have recognized it. None of that occurred.

On the second question, regarding the availability of an equitable remedy, the County acknowledges that the Appellate Division misstated this Court's holding in *Guardian Loan*, but the County relies principally on extra-record contentions and baseless arguments to suggest that JBNC is not deserving of equity. However, that is a determination that is appropriately left to the trial court when the case is

remanded.

JBNC asks the Court to reverse the decision 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 that JBNC received notice and (2) consider whether the mistakes demonstrated in the record warrant an equitable remedy.

ARGUMENT

I. None of the County's arguments detract from the conclusion that New York law permits JBNC's challenge in this case.

A. The County's brief ignores the facts of this case and fails to respond to many of JBNC's arguments.

Perhaps the most remarkable thing about the County's argument is that it tries to run away from the facts of this case. The County no doubt relies on its self-serving affidavit for its assertion that it complied with the statute "to the colloquial 't,'" and that "it is undisputed that Saratoga County followed all statutory requirements." But the actual undisputed facts in the record, which the County's brief largely ignores, tell a different story where (1) the Town neglected to tell JBNC about the outstanding liens owed to the County, (2) the certified mail piece the County attached to the affidavit has no post mark, (3) the certified mail tracking number supplied by the County shows that it was delivered to the wrong address, (4) JBNC never received either the certified or the first-class-mail notice, and (5) JBNC's actions demonstrate that it had the means and the desire to pay all outstanding tax liens. Based on these

undisputed facts, the finder of fact could certainly conclude that mistakes by the Town and the County denied JBNC the opportunity to pay the tax liens and protect its interest in the Property. Thus, even though it asserts as much throughout its brief, the County lacks any basis to say it is undisputed that it fully complied with the law.

Nor does the County dispute the rule that, in New York, "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).

Likewise, the County offers no response to the longstanding New York authority that has interpreted "deemed" in a tax enforcement statute to raise only a rebuttable presumption. *See In re Barbour's Estate*, 185 A.D. 445 (1st Dep't 1918), *aff'd without opinion*, 226 N.Y. 639 (1919). And, as JBNC noted, the legislature is understood to employ statutory terms with knowledge of how those same terms have been interpreted in analogous contexts by the judiciary. *See Rodriguez v. City of N.Y.*, 76 N.Y.S.3d 898, 908 (2018) The County ignores that point as well.

B. The County's brief expends unnecessary effort knocking down arguments that JBNC has not asserted in this Court.

Much of the County's efforts are spent responding to arguments that are found nowhere in JBNC's brief.

For example, the County devotes considerable attention to a straw-man

argument that JBNC is seeking to impose a substantial burden on the County and other taxing entities to confirm receipt of notice. *See* County Br. at 15-16. JBNC has never suggested that the Court impose such an obligation. Instead, JBNC has agreed that, if the Section 1125 notices are unreturned by the Postal Service, the law permits the County to file a petition to obtain a presumptively valid tax deed. And the County's affidavit will generally be sufficient to overcome a subsequent challenge *except in a case like this* where the interested party has offered competent evidence beyond its mere denial of receipt that it did not in fact receive notice. That interpretation imposes no burden on taxing entities beyond properly mailing the notices. And in the rare case—like this one—in which the notices were misdirected, it will remain the property owner's burden to rebut the presumption raised by the County's affidavit of mailing.[2] JBNC's interpretation of Section 1125 imposes no additional burden on taxing entities.[3]

The County also argues that Section 1125 does not by its terms violate due

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[2] The County criticizes statements by Justice Pritzker in his Appellate Division dissent regarding newspaper notice. *See* County Br. at 16. It is not clear why the County does so as JBNC has not itself made arguments based on Justice Pritzker's discussion.

[3] The County for some reason cites the Fourth Department's decision in *Hetelekides v. County of Ontario*, 193 A.D.3d 1414 (4th Dept. 2021), and suggests it is "similar." *See* County Br. at 17. *Hetelekides* involved the question of who is entitled to receive Section 1125 notice, an issue not relevant here since there is no question JBNC was entitled to notice of the tax proceedings related to the Craig property.

process. But again, JBNC never said that it does. JBNC is not alleging that Section 1125 is unconstitutional but rather that an incorrect interpretation of the statute would raise due-process problems. Section 1125, properly interpreted to raise a rebuttable presumption, is constitutional.[4]

C. The County's statutory construction arguments fall flat.

The Court can reject out of hand the County's assertion that Section 1134 is limited in a manner that precludes JBNC's challenge to the sufficiency of notice.[5] The County never grapples with the legislature's use of the word "any" in Section 1134. Specifically, the statute says in relevant part that an aggrieved party may allege "*any* … invalidity in … the proceeding for the enforcement" of the tax.[6] RPTL § 1134 (emphasis added). The County nowhere advances—because it cannot—any credible argument that this language imposes limitations on the type of challenge available. That is because the statute plainly permits JBNC to present competent evidence of "any" invalidity in the tax foreclosure proceedings, including in the failure to provide notice. The County tries to avoid this problem by focusing

[4] Thus, in the preliminary appeal statement JBNC answered "no" to the question of whether JBNC is asserting that a statute is unconstitutional. The County's criticism of this point is misplaced.

[5] It is worth noting that the County never raised this argument in the trial court, in the Appellate Division or in its opposition to JBNC's motion for leave to appeal.

[6] Typically the legislature signals a limitation with words such as "exclusively" or "only," not with words that have the opposite meaning such as "any."

exclusively on the phrase "jurisdictional defect," but this is another straw-man argument, because JBNC has not relied on that aspect of Section 1134.

Even if Section 1134 were exclusive—it is not—JBNC would still be entitled to relief. Section 1134 refers to challenges based on jurisdictional defects *or invalidity* in either the tax itself or of a proceeding to enforce it. RPTL § 1134. And the statute expressly includes the "notices" among the aspects of the proceedings that are merely presumptively valid and subject to challenge.[7] JBNC has argued with significant and competent evidence that it did not in fact receive the notice required by Section 1125, and that failure of notice implicates the validity of the proceeding to enforce the property tax levied on the Craig property.

Simply stated, Section 1125 raises a rebuttable presumption of receipt of notice, and Section 1134 does not purport to limit the bases for rebutting that presumption. But, even if the statute did limit those bases, JBNC's claim of invalidity is expressly contemplated by Section 1134.

Next, despite the fact that the Court took this case to determine whether the statute provides for a rebuttable presumption, the County offers arguments that

[7] Section 1134 states that the aspects of the tax foreclosure that are presumed to be valid, and subject to rebuttal, include the "various steps, procedures *and notices* for the assessment *and levy of the taxes* or other lawful charges against the parcels of real property set forth in the petition and all such taxes or other lawful charges and the lien thereof." RPTL § 1134; *see also* JBNC's opening brief at 16.

misperceive this issue. Specifically, the County contends that this is "not a presumption case at all" because it is "not 'presumed' that Saratoga County followed the statute—it is verified that Saratoga County followed the statute." County Br. at 11. Thus, the County asserts that, "[i]f the state legislature intended to make this section into a statutory 'maybe' it could have done so." County Br. at 12. But a rebuttable presumption is, by definition, not a "maybe." A rebuttable presumption is treated as fact if it is unrebutted. *See, e.g., Oneida County Dept. of Social Services on Behalf of Dawn C. v. Ryan R.*, 234 A.D.2d 1003, 1004 (4th Dept. 1996) (if unrebutted, rebuttable presumption becomes conclusive). JBNC's proffered interpretation does not create a "maybe." In the vast majority of cases in which a taxing entity mails notice, it will likely be received and there will be no evidence to rebut the presumption. In such a case there would be no "maybe," and the taxing entity would face no uncertainty. This case is the presumably rare example in which there is significant, competent evidence to rebut the presumption.

The legislative history that the County cites supports JBNC's argument that the legislature was clarifying the minimum level of due process that must be afforded prior to obtaining a presumptively valid tax deed, without disturbing the ability of an aggrieved party to later rebut the presumption of receipt of notice. For example, Senator Little's statement confirms the legislature's understanding that *Jones v.*

Flowers and the resulting 2006 amendment deal with the process that must be followed "before" a tax sale. The County has not presented anything in the legislative history that gives even the slightest hint that the 2006 amendment was concerned with the ability to rebut a presumptively valid title after a tax sale.

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JBNC has demonstrated that the proper and constitutional interpretation of Section 1125 is that it raises a rebuttable presumption that, if the required notice was mailed, it was received. In most cases, the notice will be received, there will be no evidence to the contrary and the taxing entity will be able to proceed unburdened. But there are cases—this one among them—in which there is actual evidence beyond just a party's assertion that notice was misdirected. In that circumstance, Section 1125 allows that party to present its evidence in an attempt to rebut the presumption of receipt. Both the trial court and the Appellate Division misinterpreted Section 1125, and JBNC asks this Court to correct those errors, confirm that Section 1125's presumption is rebuttable and then remand the case to the trial court to allow JBNC to offer its evidence.

III. The County's response on the availability of an equitable remedy largely avoids the legal issue on which the Court granted review and relies instead on inaccurate and unsupported factual assertions to contend that JBNC does not deserve equity.

The County's response on JBNC's second issue—regarding the availability of

an equitable remedy—tries to evade the legal issue on which the Court granted review. The County makes no meaningful effort to challenge JBNC's principal point: that *Guardian Loan* allows a court to fashion equitable relief from a tax sale when there has been a mistake and that the Appellate Division erred when it excluded mistakes from the list of permissible bases for such relief. There were at least two mistakes here: (1) when the Town gave JBNC a receipt for payment of liens on the Craig property, the Town did not meet its statutory obligation under RPTL § 1112(a) to include on that receipt notice that there remained an unpaid lien; and (2) there was a mistake, whether by the County or others, that prevented the notice of the foreclosure from reaching JBNC. Notably, in its merits brief, the County seems to ignore that second mistake.

The only legal argument the County offers with respect to the first mistake is its suggestion that Section 1112(2)(a) by its terms precludes an equitable remedy. The County misreads the statute. Section 1112(2)(a) provides that a taxing entity's failure to include the required language would not invalidate "any tax lien or prevent the enforcement of the same as provided by law." JBNC is not suggesting that the failure to include the required information on the receipt is a basis for invalidating the tax lien or holding it to be unenforceable; to the contrary, JBNC has always sought the opportunity to pay off the lien, as it had several others on the Property, to

avoid an improper tax sale and the wrongful loss of JBNC's property interest. The County's argument challenges a position JBNC has never asserted.

The County suggests that the Town was not mistaken with respect to the receipt issue because of the timing of the Town's turning over the tax liens to Saratoga County. County Br. at 21. The County makes little effort to explain why that factual matter—for which the County offers no record support—matters. The statute required the Town to notify JBNC of outstanding liens; it does not suggest that the obligation disappeared when the Town transferred the liens to the County for foreclosure. RPTL § 1112(2)(a). Rather, as logic would dictate, the tax liens that the Town had already conveyed to the County are precisely the liens that the Section 1112 required the Town to disclose to JBNC. Moreover, the County is inconsistent in its argument since, on the same page of its brief in which it suggests that the Town was not mistaken, it concedes that the Town did not include information "required" by the statute. County Br. at 21.

Relying on unsupported factual assertions belied by the record, the County suggests that JBNC is underserving of equitable relief. While the application of this Court's holding will be a matter for the trial court on remand—a trial court that has already make clear that this is a case that cries out for a remedy—JBNC will respond

briefly to the County's arguments.[8]

The County hints that JBNC has unclean hands because it somehow should have done more to learn of the outstanding lien. But the unrebutted evidence of record is that JBNC diligently contacted the Town to learn of any outstanding liens and then paid promptly those of which it was informed. Moreover, Section 1112 of the RPTL imposes on the Town the obligation to include on the receipts for those payments notice of any other, unpaid liens. JBNC had a right to rely on the Town to meet that responsibility. There is every reason to believe that, had the Town met its statutory obligation, JBNC would have paid that lien just as it did the others. There is no plausible basis to fault JBNC.

The County makes much of JBNC's being an out-of-state mortgage lender, but that does not lessen JBNC's legitimate interest in protecting its property rights. JBNC loaned money in New York and, after a default on that loan, JBNC took all appropriate steps to preserve its rights by paying off tax liens. There is nothing

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[8] JBNC recognizes that this Court will decide the issues presented on the basis of the law and the facts of record and not on the basis of a party's extra-record, heated rhetoric. For that reason, JBNC does not in this reply brief respond to certain of the County's contentions. That said, JBNC notes that the County's statement that the loan at issue in this case was an example of "predatory lending," County Br. at 23, is particularly egregious in that it is entirely unsupported and untrue. The County makes no effort to point to any record evidence in support its assertion. Counsel have a duty to avoid making unsupported and untrue assertions.

inequitable in that scenario and, indeed, New Yorkers benefit from their ability to take out mortgage loans and New York taxing entities benefit from having their tax liens satisfied by any party in interest—including the lien holder. Moreover, the County does not seem to appreciate that this Court decides legal issues with an eye toward a wide range of potential applications. In this case, JBNC has suffered from what it believes to be an incorrect decision by the Appellate Division. In the next case, it might be a retired teacher in the Bronx, a single parent in Potsdam, or any number of other innocent individuals in a range of circumstances who, like JBNC, find that their properties are sold at tax sale without proper notice.

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The trial court recognized the inequity in JBNC's loss of its property interest in this case, but it believed itself to be without authority to provide an equitable remedy. The Appellate Division held that there was in fact legal authority to provide an equitable remedy for tax sales brought about in certain ways, but the appeals court somehow left out that one of the circumstances that can justify equity is a mistake. JBNC asks this Court to reach what JBNC believes is a particularly straightforward conclusion compelled by *Guardian Loan*, that a trial court may grant an equitable remedy for a tax sale brought about by a mistake, and for the Court to remand the case to the trial court for it to determine whether the mistakes at issue here warrant

an equitable remedy.

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 that JBNC received notice and (2) consider whether the mistakes demonstrated in the record warrant an equitable remedy.

Dated: New York, New York
September 15, 2022

Respectfully submitted,

K&L GATES LLP

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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 3,403 words.

This brief was prepared on a computer using:

- Microsoft Word
- Times New Roman, a proportionally spaced font.
- 14-point size.

Dated: September 15, 2022

/s/ Gregory N. Blase
Gregory N. Blase

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)
COUNTY OF WESTCHESTER)

Arnold Dennis, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at 212-04 99th Avenue, 2nd Floor, Queens Village, New York 11429.

That on the 15th day of September, 2022, deponent served the within:

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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

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Sworn to before me this
15th day of September, 2022

Notary Public

IVAN DIAZ
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Arnold Dennis

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