To be Argued by:
KARLA WILLIAMS BUETTNER, ESQ.
(Time Requested: 15 Minutes)

Appellate Division No. 531787
Court of Appeals No. APL 2022-00032

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 OFFICE
OF THE COUNTY OF SARATOGA,

Defendants-Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS

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Dated: August 23, 2022

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QUESTIONS PRESENTED

1. Is the presumption codified in RPTL §1125, as amended in 2006, which provides that certified mail and U.S. mail notices "shall be deemed received" unless both iterations of the notice are returnable by the Postal Service within 45 days, conclusive unless there are jurisdictional defects or invalidities proven?

   Yes.

2. Does a trial court possess inherent power to grant equitable relief from a tax sale when a mortgage holder proves that it was prevented from protecting its interest when there is no proof of a mistake by the taxing entity?

   No.

STATEMENT OF FACTS

This matter arises out of an in rem tax foreclosure proceeding commenced by Respondent County of Saratoga against property located at 8037 Crooked Street, Town of Galway, Saratoga County, New York, more particularly identified as tax map parcel number 185.13-1-6. (hereinafter referred to as the "Property"). On August 11, 2008, Donald H. Craig and Lois R. Craig executed an adjustable rate reverse mortgage in the principal amount of $365,107.50 with Appellant

James B. Nutter & Company, (hereinafter "Appellant") whose address on the mortgage is listed as 4153 Broadway, Kansas City, Missouri, 64111. (R.117-128)[1]. By Judgment of Foreclosure and Sale, dated June 12, 2019, entered on July 30, 2019, Appellant was granted a judgment of foreclosure and sale of the Property against the deceased Donald H. Craig and Lois R. Craig, who was then living in a nursing home, based on unpaid principal and interest in the amount of $276,785.43. (R. 52-63).

On December 16, 2016, Saratoga County and Stephen M. Dorsey as Tax Enforcement Officer (collectively "Saratoga County") filed a List of Delinquent Taxes for Tax Year 2016. (R. 160-206). The Property was properly identified in the list as Lien #410. (R. 174). The amount of delinquent taxes owing at the time was listed as $3,630.64. (R. 174). Under RPTL §1122(7), the filing of this list of parcels has the same legal effect as a Notice of Pendency. Neither Appellant nor anyone else paid the delinquent taxes and so they remained on the list.

Thereafter, on May 10, 2018, pursuant to RPTL §1123, Saratoga County filed a Petition and Notice of Foreclosure, which again included the Property. (R. 207-217). At that time, the amount of delinquent taxes was $9,330.97. (R. 212).

[1] References to the Record on Appeal are R. ____.

The Notice of Foreclosure provided the last day to answer or redeem the property was September 28, 2018. (R. 207-208).

Pursuant to RPTL§1124, Saratoga County published the Petition and Notice of Foreclosure in *The Daily Gazette* and *The Saratogian*. (R. 218-228). In accordance with the requirements of the statute, affidavits of publication were filed with the Saratoga County Clerk on July 11, 2018. (R. 218, 225).

As required by the statute, Saratoga County conducted a search and located Appellant's Reverse Mortgage from 2008. As a mortgagee of the Property, Appellant was entitled to be sent notice as specifically set forth in the statute. Therefore, on May 24, 2018, a Petition, Notice of Foreclosure and Notice of Commencement of Tax Foreclosure Proceeding were mailed to Appellant at the address listed in the Reverse Mortgage, 4153 Broadway, Kansas City, MO 64111, via first-class U.S. mail and certified mail. (R. 229-231, 236). It is undisputed that neither the first-class U.S. mailing nor the certified mailing were returned to the County Attorney's Office as undeliverable. (R. 156-157). However, two employees of Appellant have averred that Appellant has no record that the notices were received by Appellant. (R108 - R113).

Appellant did not file an Answer in the Tax Foreclosure proceeding and did not redeem the property prior to September 28, 2018. As a result, the Property was included in the Order and Judgment Pursuant to RPTL §1136 filed on December 4,

2018. (R. 69-75). A deed was filed that same day, conveying the Property to Saratoga County. (R. 76-77). On March 19, 2019, Saratoga County held an auction selling the foreclosed properties, and by Resolution 110-2019, adopted by the Saratoga County Board of Supervisors, the highest bids were approved and confirmed, and the Chairman of the Board was authorized to convey the Property to Steven Abdoo for a purchase price of $142,500. (R. 78-81). By deed dated May 8, 2019, the Property was conveyed to Sensible Property Holdings, LLC. (R. 82-83).[2]

The Town of Galway (the "Town") held the tax lien against the parcel for tax year 2018. It is undisputed that Appellant contacted the Town and requested information related to taxes outstanding and due to the Town, which the Town provided. (R. 64-65). Appellant paid the taxes for the parcel for tax year 2018 only. (R. 68). At the time that the 2018 taxes were paid, the 2016 and 2017 taxes had been turned over to Saratoga County for collection. In that circumstance Saratoga County makes the Town whole by paying the amount of the delinquent taxes, and Saratoga County acquires the tax lien giving it the right to collect back taxes or foreclose if necessary. (R158 - R159). The Saratoga County Treasurer's Office has no record of Appellant contacting it requesting a certificate of

[2] Steven Abdoo requested that the deed be conveyed to Sensible Property Holdings, LLC. (R.152).

redemption or any inquiry as to whether the 2016 and 2017 taxes were unpaid. (R. 158-159).

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. (R. 16). 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 Property 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. (R. 24). Saratoga County filed a Verified Answer on November 6, 2019. (R. 89-94). The Town of Galway filed an Answer on October 31, 2019. (R.137-140). Appellant filed a motion for Summary Judgment on January 21, 2020. (R. 98-99). Saratoga County cross-moved for Summary Judgment on February 14, 2020. (R. 145-146). A Notice of Motion to intervene was filed by Rostantin Kruczowy, Michelle Bozzi and Adirondack Trust (collectively "intervenors") on March 17, 2020. (R. 265-267).

On April 28, 2020, the Supreme Court (Crowell, J.S.C.) deniedAppellant's motion for summary judgment, granted Saratoga County's cross-motion for summary judgment, and denied the motion to intervene (without prejudice) as

academic. (R. 4 - 13). On appeal, the Appellate Division, Third Department, affirmed Supreme Court's decision, with one dissent (Pritzker, J.). (R. 323-328). Appellant moved before the Appellant Division for permission for leave to appeal to the Court of Appeals, which motion was denied. (R. 329). Appellant then moved before the Court of Appeals for permission for leave, which motion was granted. (R. 330).

ARGUMENT

POINT I

THE PRESUMPTION CODIFIED IN RPTL §1125, AS AMENDED IN 2006, WHICH PROVIDES THAT CERTIFIED MAIL AND U.S. MAIL NOTICES "SHALL BE DEEMED RECEIVED" UNLESS BOTH ITERATIONS OF THE NOTICE ARE RETURNABLE BY THE POSTAL SERVICE WITHIN 45 DAYS, IS CONCLUSIVE UNLESS THERE ARE JURISDICTIONAL DEFECTS OR INVALIDITIES PROVEN.

As this Court is aware, tax foreclosure proceedings enjoy the presumption of regularity, such that "[t]he tax debtor has the burden of affirmatively establishing a jurisdictional defect or invalidity in [such] proceedings." (*County of Sullivan [Matejkowski]*, 105 A.D.3d 1170, 1171 [3d Dept. 2013], *appeal dismissed*, 21 N.Y.3d 1062 [2013]; *quoting Kennedy v. Mossafa*, 100 N.Y.2d [2003]). Contrary to the argument of Appellant and the dissent in the Court below, the Appellate Division in this case did not hold that the presumption was conclusive at all times.

The case before the Court revolves around the plain language and legislative history behind RPTL §1125(1)(b) and its application to the facts herein. This subsection states, in pertinent part:

(b) Notification method. (i) Such notice shall be sent to each such party both by certified mail and ordinary first class mail . . . 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. In that event, the enforcing officer or his or her agent shall attempt to obtain an alternative mailing address from the United States postal service. . ."

Here, it is undisputed that Saratoga County mailed the Notice and Petition of Foreclosure to the address identified by Appellant in the Reverse Mortgage by both first-class and certified mail. (R. 229-231, 236). It is further undisputed that neither the first-class mailing or the certified mailing were returned to Saratoga County within 45 days. (R. 156-157). It is therefore undisputed that Saratoga County strictly followed the language set forth in Section 1125(1)(b).

The Court's principal consideration in reviewing statutory language is to give effect to the Legislature's intention. As this Court held in 2012, "the text of a provision is the clear indication of legislative intent and courts should construe unambiguous language to give effect to its plain meaning." (*Matter of Albany Law School v. N.Y. State Off. Of Mental Retardation & Dev. Disabilities*, 19 N.Y.3d 106 [2012] [*internal citations omitted*]). This inquiry must include looking "into the spirit and purpose of the legislation, which requires examination of the

statutory context of the provision as well as its legislative history." (*Id.*) While a single statute must be construed as a whole, with it sections in reference to one another, (*Id*), "[p]ertinent also are the history of the times, the circumstances surrounding the statute's passage . . . ." (*Consedine v. Portville Cent. School Dist.*, 12 N.Y.3d 286 [2009]). Here, following the decision of the U.S. Supreme Court in the *Jones v. Flowers* case (547 U.S. 220 [2006]), the state legislature reviewed the RPTL statute and included additional provisions for the specific purpose of making certain sufficient safeguards were in place to protect due process.

The Senate bill (S.B. 8217) was proposed by Senator Elizabeth Little of the 45th District. In her letter to Governor George Pataki asking for his consideration of the bill, Senator Little stated

> "[t]his 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 [*Jones v. Flowers*]. . . [where] the Court held that when mailed notice of foreclosure is returned unclaimed the tax district must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so. This bill builds upon current procedures and details steps to be taken to supplement mailed notice that is returned as undeliverable or other ineffective notice."
>
> (New York Bill Jacket, 2006 S.B. 8217, Ch. 425)

The legislative history demonstrates that the state legislature reviewed the "balancing of interests" analysis provided in the U.S. Supreme Court decisions from *Mullane v. Central Hanover Bank & Trust Co.* (339 U.S. 306 [1950]) through

and including *Mennonite Board of Missions v. Adams*. (462 U.S. 792 [1983]). In reviewing and analyzing the *Jones* decision and the impact it would have on the in rem tax foreclosure proceedings in New York, the legislature made the decision to require notices to be sent by both certified and regular mail, as opposed to the prior statutory scheme of regular mail on owners and certified on lienholders. In addition, in order to enlarge due process protections, the legislature added the obligation that if both are returned within 45 days, the taxing district is required to take additional steps to provide notice. The attorney memo in support of the amendment to Section 1125 demonstrates that the legislature took a long, hard and deliberate look into this matter and the due process considerations placed by the Supreme Court:

"Of course, no one can be certain how section 1125 as so revised would fare before the Supreme Court, but the bill does seem carefully calibrated to adhere to Flowers. Tax districts would have to do what can be done within the limits of practicality to make owners and lienors aware of foreclosure proceedings that may affect them. Gestures of a perfunctory nature would not be tolerated, nor would labors of a Herculean nature be demanded."

(New York Bill Jacket, 2006 S.B. 8217, Ch. 425 [Memorandum dated July 7, 2006 by Joseph K. Gerberg, Esq. to Richard J. Sinnot, Executive Department, Office of Real Property Services]).

Even the Supreme Court did not require states to go through extreme circumstances to make certain each and every party entitled to notice actually received it. In *Jones v. Flowers*, Justice Roberts refused to extend the onus placed on the taxing authority to require an "open-ended" search of outside sources (i.e.

telephone directories, income tax records) as he found such process as "unduly onerous." (547 U.S. at 235–236). Based on the legislative history and the *Jones* case, the statute does not violate due process.[3]

In *Lakeside Realty LLC v. County of Sullivan*, the Third Department held that

"In a tax foreclosure proceeding, "[d]ue process does not require actual notice by the property owner, only reasonable efforts to provide notice under the circumstances" (*Matter of County of Sullivan [Fay],* 79 A.D.3d 1409, 1411, 912 N.Y.S.2d 786 [2010], *lv. dismissed* 17 N.Y.3d 787, 929 N.Y.S.2d 86, 952 N.E.2d 1081 [2011] [citation omitted]; *see MacNaughton v. Warren County,* 20 N.Y.3d 252, 255, 959 N.Y.S.2d 104, 982 N.E.2d 1237 [2012]; *Matter of County of Sullivan [Dunne—Town of Bethel],* 111 A.D.3d at 1235, 976 N.Y.S.2d 295). "Whether there has been compliance with the flexible concept of due process turns on a 'case-by-case analysis that measures the reasonableness of a municipality's actions in seeking to provide adequate notice' " (*Matter of County of Broome,* 50 A.D.3d 1300, 1302, 855 N.Y.S.2d 723 [2008], quoting *Matter of Harner v. County of Tioga,* 5 N.Y.3d 136, 140, 800 N.Y.S.2d 112, 833 N.E.2d 255 [2005]). Due process is satisfied where "notice is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the [foreclosure] proceeding and afford them an opportunity to present their objections" (*Matter of County of Clinton [Greenpoint Assets, Ltd.],* 116 A.D.3d at 1208, 984 N.Y.S.2d 216 [internal quotation marks, brackets and citations omitted]; *see Jones v. Flowers,* 547 U.S. 220, 235–236, 126 S.Ct. 1708, 164 L.Ed.2d 415 [2006]).

(140 A.D.3d 1450,1453 [3d Dept. 2016]).

Contrary to Appellant's contention, the result determined by the Appellate Division here is not "objectionable, unreasonable or absurd." (*But see, Long v.*

[3] Even though Appellant checked "no" to Question 14 in the Preliminary Appeal Statement which asked if any party was asserting a statute unconstitutional, its argument appears to be that RPTL §1125 is unconstitutional as it precludes notice under due process. (R. 336).

State of N.Y., 7 N.Y.3d 712 [2012]). RPTL § 1134 discusses the presumption of validity and permits answering defendants to raise jurisdictional defects and affirmatively establish them. That is not the same as when a defendant defaults, as is this case, and then raises – too late - a defect. In fact, the only rebuttable contention is a "jurisdictional defect or invalidity in the tax, or in the proceeding." Here, there is no argument on jurisdiction or invalidity – the argument is that even though the statute was followed to the colloquial "t", Appellant did not ultimately receive the notice and for that reason alone, the entire proceeding as it relates to them should be undone. That is an absurd result – Saratoga County did all it was required. Nothing in the law or due process require Saratoga County follow up on "actual notice." The legislature even dealt with this potentiality when it amended the statute to include the 45 day return period after and in compliance with the Supreme Court in *Jones*.

While an interesting exercise in statutory construction and interpretation, the fact remains that the statute as amended after *Jones* requires Saratoga County to provide notice in a certain manner; it is undisputed that Saratoga County provided such notice; and it is undisputed that Saratoga County followed all statutory requirements. This is not a presumption case at all – it is not "presumed" that the Saratoga County followed the statute – it is verified that Saratoga County followed the statute. It is not "presumed" that Saratoga County mailed the notice to the last

known address – it is verified. It is not "presumed" that Saratoga County published the notices as required in two newspapers – it is verified. As such, while Appellant has couched this case as a dichotomy between conclusive and rebuttable presumptions, the facts herein do not bear out that discord.

The Appellate Division properly found that "shall be deemed received" means exactly what it says – notice is deemed received unless both notices are returned within 45 days. This holding does not run afoul of an interpretation of the entire Article. If the state legislature intended to make this section into a statutory "maybe" it could have done so. Both §1134 and §1137 were in existence when the legislature amended §1125. Neither section is referred to in §1125. The Appellate Division's interpretation does not render §1134 and §1137 meaningless. Section 1134, as described above, permits answering defendants to raise jurisdictional defects and affirmatively establish them. The Appellate Division here does not say "in no case whatsoever" can a defendant raise a defense to the presumption of regularity. It says that in this case, the facts demonstrated that there were no jurisdictional defects or invalidity arguments which would invoke the permission set forth in §1134.

Further, § 1137 states that the "deed . . . shall be presumptive evidence that the proceeding . . . and all notices required by law were regular." The language

goes on to state that "[a]fter two years from the date of the recording of such deed, the presumption shall be conclusive." This is merely a statute of limitations, indicating that no one can bring a proceeding to set aside the deed later than years after the deed has been recorded.[4] As indicated above, the argument is not whether the County failed provide notice under the statute – it did provide notice, by certified mail, by regular mail, neither of which were returned – and by publication. This is not a *Jones* case, nor a *Mennonite* case. *Sullivan* states that "actual notice" is not required; only "notice reasonably calculated, under all the circumstance, to apprise [him] of the pendency of the [proceeding] and afford [him] an opportunity to present [his] objections." (*In re County of Sullivan, [Matejkowski]* 105 A.D3d at 1172 [*internal citations omitted*]). Due process needs to be reviewed on a case-by-case basis, and here, Saratoga County provided due process. If it had not mailed both ways; if it had received both back within 45 days and done nothing; if it had failed to publish – those would be jurisdictional defects considered under §1134 and §1137. That is not the case before the Court.

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[4] It must be noted that this is not an action to set aside the deed. This is an action to vacate the tax judgment, vacate the deed to Saratoga County and the deed to Sensible Property Holdings, LLC, declaring time to redeem still open, and monetary damages. In other words, this is an attempt to vacate the default judgment, which statute of limitations is governed by the one month time frame of RPTL 1131. (*Matter of County of Clinton [Greenpoint Assets, Ltd.]*, 116 A.D.3d 1206, 1207 [3d Dept. 2014]). Supreme Court decided not to address this defense.

Appellant's argument that this case is the same as if Saratoga County watched the postman drop the notices in the storm drain is melodramatic at best, disingenuous at worst. Teasing that scenario out, if Saratoga County watched the postman drop the notices and do nothing, there would be fraud, deception, etc., which would "cry out" for equity and would indeed be "troubling." That is not a valid comparison. There, the County employee knew – by his own actions and omissions – that the notices did not go. Here, Saratoga County did not know.

Appellant goes on to present outrageous scenarios of disasters (fire in a post office, e.g.) to prey on the sympathy of the Court. Dropping notices in a storm drain and fire in a post office are extraordinary circumstances, and no statute can envision each and every possibility. Even the Supreme Court used the term "reasonably practical" and did not extend to onerous requirements. If necessary, Saratoga County could counter with its own unreasonable and unrealistic situations. For example, what if a disgruntled mailroom employee at the lending company saw the envelope and for nefarious reasons shredded it before it got to the proper person in the company? What if a property owner was in the hospital for six months and the individual responsible for reviewing the mail just threw it out before giving it to owner? Under Appellant's interpretation, Saratoga County would be liable for violating due process rights in both situations because a third-party over whom Saratoga County had no control stepped in and caused the

individual not to receive the notice. This is what the Appellate Division was guarding against, and what the legislature believed it was protecting when it amended Section 1125.

Further, the statute does not require proof of actual receipt. The statute requires proof that the taxing authority properly followed the notice procedure. That occurred here. That is undisputed. Appellant says even though Saratoga County did follow the procedure, because Appellant did not receive the notice, Saratoga County violated its due process. That is not the standard. The standard is not that Appellant did not receive actual notice; the standard is that Saratoga County followed the statute in providing notice. Contrary to Appellant's argument, the Appellate Division's decision does not "preclude[s] 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." (Appellant's Brief at 26). If a property owner can show that Saratoga County did not mail it by first class mail, did not mail it by certified mail, did not have the proper address in the public records, or did not publish property, that is an entirely different set of facts that both Sections 1134 and 1137 envision. Those are not the facts here, and Appellant's interpretation should not be accepted.

In his dissent, Judge Pritzker did not take issue with any of the actions of Saratoga County. Instead, he took issue with the language of the statute. Judge Pritzker "agree[s] with the majority that there was no proof that relevant mailings were returned to defendants and, as such, were 'deemed received' by plaintiff" but opines that this is a rebuttable presumption. Judge Pritzker further attempts to impose an obligation on all taxing authorities to scour the country – possibly the world – to find a newspaper near each and every owners' and lienors' billing address. That is not the requirement in the statute, and the legislature could have imposed it when it revised §1125 and added the further layer of protection in a realistic attempt to "reduce incidents of non-deliverability." It did not, as it was aware that, with all of the caselaw and legislative history available at the time, it was not necessary nor mandatory and that the protections it placed were appropriate.

Appellant creatively shifts the burden from itself to Saratoga County. Contrary to its statement in the brief, §1125(1)(a) requires Saratoga County to give notice of the foreclosure proceeding – to give notice only. It does not on its face or in its application require Saratoga County to follow up on each and every mailing to make certain they went into the literal hands of the parties. While it could be argued it is a difference without distinction, here it is the main distinction.

The *Heletiekides* case is instructive. In that case, the County of Ontario proved that it followed the statute, both the prior statute and the 2006 revision, in providing both first-class and certified mailing and both were not returned within forty-five days. In reversing the trial court, the Court held that that "the evidence established that defendants fully complied with all of the statutory and due process requirements related to this tax foreclosure proceeding and that any determination to the contrary could not be reached under any fair interpretation of the evidence." (*Hetelekides v. County of Ontario*, 193 A.D.3d 1414 [4th Dept. 2021]). A similar result is found here.

Further, the postal service records do not, as Appellant contends, contradict the affidavits of service of Charles Pasquarell. The affidavits have the proper address on them. (R. 299-236). The records indicate that the notices were *delivered* by a third-party not under control of Saratoga County to an unknown post office box. (R. 262). However, it is undisputed that Saratoga County did not receive either the first-class mail or the certified mail returned, which, under the *Jones* case and the RPTL, would have required Saratoga County to delve into different external sources to find a proper address. Contrary to the facts in the *Jones* case, here Saratoga County at no time had any indication that notice was not received. It was not until after the Property had been sold twice over, and within

two (2) months after Appellant obtained its Judgment of Foreclosure of the Property, did Appellant first claim it never received notice.

"The 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 [3d Dept. 1993] [*internal citations omitted*]). Although cited by Appellant for its interpretation that the presumption is rebuttable as opposed to conclusive, the Third Department in that case was faced with facts dissimilar and, in fact, opposite to the facts herein. There, the issue was whether the county's use of two regional newspapers that, while circulated in Essex County, were not published in Essex County, violated RPTL §1124(1). Here, there is no dispute regarding the publication in the papers. (R. 218-228). Further, in *Law*, the owner received actual notice, and therefore the Court held that regardless of the technical violation of the statute, there were no grounds to set aside the foreclosure and subsequent sale. (*Id.* at 809). Moreover, that decision took place in 1993, thirteen years before the 2006 amendment of 1125 which added the 45 day protective language. As a result, that case is inapplicable and non-precedential here.

Appellant wants this court to read into the statute an obligation – a legal doctrine – that the legislature did not intend. Specifically, Appellant wants this Court to find that the statute creates a presumption that the taxing authority abided by the mandates which can be rebutted by any allegation, not, as the statute provides, the limited allegation of jurisdictional defect or invalidity. In other words, even though Saratoga County proves that it followed each and every part of the law, Appellant wants to be able to say that is not enough because it never received notice. It claims that this all-encompassing rebuttable presumption is already "built in" to the statute but fails to produce any caselaw that supports this allegation.

In fact, a reading of the plain language of the statute refutes this allegation. The statute uses the word "shall be deemed." It does not state "may be deemed" or "shall be presumed unless rebutted." The legislature added this language in 2006 when it reviewed the statute, and if it wanted to impose this additional burden on the taxing authorities it could have done so. It did not. Instead, it chose to use the mandatory word "shall."

Further, this is not an "absurd" result, as stated by Appellant. Appellant is a nationally recognized mortgage company, having been in the home lending business since 1951. (https://nutterhomeloans.com/sense-of-history). It cannot

claim ignorance of the law, even in New York, as it is licensed to do business in this state and has been involved in litigation regarding foreclosures in this state. As such, it is incumbent on Appellant to have known the tax foreclosure law, and it should not be able to use the court system to fix its failure to do so.

The language of §1125 is plain, and read in conjunction with the entire statute, it provides the appropriate due process protections required under *Jones*. The interpretation provided by the Appellate Division should be affirmed.

POINT II

A TRIAL COURT DOES NOT HAVE TO GRANT EQUITABLE RELIEF FROM A TAX SALE WHEN A MORTGAGE HOLDER IS UNABLE TO PROVES THAT IT WAS PREVENTED FROM PROTECTING ITS INTEREST WHEN THERE IS NO PROOF OF A MISTAKE BY THE TAXING ENTITY

In contrast to Appellant's contention, the Appellate Division properly found that Appellant is not entitled to an equitable resolution. The main point of contention herein, other than the notice concerns explained above, is the failure of Appellant to perform its due diligence and ascertain whether all property taxes were paid. RPTL §1112(1) governs multiple liens, and provides "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." It goes on to state "[n]otwithstanding 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." (*Id.*) Here, Appellant paid the 2018 Town taxes but failed to redeem the 2016 or 2017 debt. Appellant alleges that the Town of Galway misled or mistakenly advised that only the 2018 town taxes were due. The Town of Galway spoke true. Saratoga County had received and taken over the 2016 debt by April 15th of 2016 and the 2017 debt by April 15th of 2017. Appellant paid the 2018 taxes prior to April 15th, and so when the Town told Appellant it had 2018 outstanding in Town taxes, that was entirely truthful as Saratoga County had acquired the liens for 2016 and 2017.

Notwithstanding this, it is undisputed that for reasons unknown, the Town did not include the language in the 2018 receipt required by RPTL §1112(2)(a), which states "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". However, the legislature was prescient and thought of this very situation, including language in the statute to address it. "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." (*Id.*) The language in the statute could not be any clearer: the notice "shall include a statement" but "failure to include such a

statement shall not invalidate any tax lien or prevent the enforcement of same." The Third Department reiterated this language in *Matter of Regan v. DiNapoli*. In that case, the Court held that failure of Town to provide the statement on receipt is not sufficient to show "fraud, misrepresentation, deception, or similar misconduct" necessary to invoke equitable estoppel to invalidate the tax foreclosure or hold the municipality liable. (135 AD3d 1225 [3d Dept. 2016]).

The public policy behind this statement is clear – property owners are required to pay property taxes. It is on the property owner to know this, and to pay them. The municipality sends bills, but even then failure of the municipality to send a bill or for the property owner to receive it (without it being returned to the municipality) does not relieve the property owner from the obligation to pay taxes. Mortgagees routinely include language regarding the necessity of the owners to pay such taxes, even going so far as to say that failure to pay constitutes default. Some mortgagees require an escrow account established for just this purpose. The legislature continued this principal in §1112 when it required the statement but, like the requirement to send bills, indicated that failure to include the statement does not stop enforcement. If someone is speeding down the freeway and does not get a ticket, that does not mean they should continue speeding without fear of a ticket. If someone purchases a pizza and never gets the bill, that does not relieve the person from the obligation of paying for the pizza. Further, the multiple phases

and requirements of notice of the proceeding, as well as the ability to redeem right up to the end, add multi-level layers of due process.

It must be noted that Appellant is a large corporation which has engaged in this business throughout the country since 1951. This is not an individual in their first home, who does not understand the complexities of the law. This is a corporation which deals with this every day. It must further be noted that it is not the Craigs or their representatives who have brought this lawsuit – it is their mortgage company. This is not a case where the big bad municipality is evicting the older couple from their family home. This is an out of state, multi-million dollar corporation that is trying to recoup a reverse mortgage issued in 2008, right at the end of the time of the mortgage crisis.[5]

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[5] The borrowers stopped living in the home because (1) Donald died on August 11, 2013 (a mere 5 years after they executed the mortgage) and (2) Lois stopped "occupying the subject property for at least 12 months due to physical or mental illness." (R. 33). The timeline of Appellant's foreclosure action is therefore concerning. Appellant commenced its foreclosure against the Craigs in July 2015 based solely on the fact that the Craigs no longer lived in the home. Appellant included a paragraph indicating that it may have to pay the taxes (so it could include this amount in any judgment of foreclosure), but failed to pay the taxes by April 15, 2016 or April 15, 2017. Appellant therefore knew or reasonably should have known that the taxes had to be paid, failed to pay them, failed to follow up and ask for a certificate of redemption after paying the 2018 taxes, and is using the court system to rectify its mistake. This should not be condoned.

If this were truly an argument of equity rather than law, Appellant is not on the right side of equity or fairness. Appellant argues that " [Saratoga County] has made the level of profit which if any private individual or organization made would be considered an outrageous, bordering upon criminal, windfall profit of six figures on the Property at the expense of a senior citizen's equity in her property . . . which equity would be preserved and collectible by Mrs. Craig as surplus monies in the reverse mortgage Foreclosure Action if the tax deeds are vacated." (R. 105). Ignoring the predatory lending practice that took place, the equity in this case favors the municipality, which did everything it was legally obligated to do under the law, and which now has had to spend tens of thousands of taxpayer dollars to defend its action against a financial corporation. If Appellant feels it needs more due process requirements in the statute, it can go to the legislature. Perhaps in lieu of fighting this in the courts and paying hundreds of thousands of dollars to their corporate attorneys, Appellant could lobby the state legislature to change the law to include some equity. That is where this case should be. At the Capitol, not the Courthouse.

Appellant has failed to demonstrate that this Court – or the Courts below – were required to fashion equitable relief. The Appellate Division specifically held that "in the absence of any evidence of fraud, misrepresentation, deception or misconduct [by Saratoga County], there is no basis to award such relief." (R. 326).

Appellant's reliance on the *Guardian Loans Co. v. Early* case is misplaced. (47 N.Y.2d 515 [1979]). Even if the Court there included "mistake" in its definition of equity and for whatever reason the Appellate Division here erroneously left out that word, it is of no moment. There is no proof that Saratoga County made any mistake. Moreover, the Town of Galway's "mistake" in not including the statutory language on the 2018 receipt does not rise to a necessary equitable decision, as the legislature had already contemplated this situation and crafted language in the statute to deal with it.

Appellant tries to prey on the feelings of this Court from its first sentence, citing to the trial judge's dicta regarding equity. Contrary to statements made by Appellant, it did not do 'all it could to protect its mortgage interest in the property at issue here." (Appellant's Brief at 1). It did not reach out to Saratoga County for a certificate of redemption under RPTL §1112(3), where the legislature set out the procedure for Appellant to do "all it could to protect its mortgage interest." That section provides that when all liens are redeemed, "a certificate of redemption shall be issued upon request, as provided by section eleven hundred ten of this article." (*Id.*) Although Appellant paid the 2018 taxes, it did not take the extra step and request a certificate of redemption to verify that all taxes were paid. (R. 159). Had it done so, it would have learned that there were two additional years of taxes which were delinquent. Appellant has now spent two years and tens of thousands

of dollars, much of it taxpayer dollars, attempting to rectify its omission. This is not a case where equity should be permitted.

CONCLUSION

It is undisputed that Saratoga County properly followed the strict letter of the law at all times during the tax foreclosure proceeding against Appellant. It is undisputed that in amending Section 1125, the legislature did so to enhance and enlarge the due process protections of the owners and lienholders. Appellant asks this Court to impose an onerous and unnecessary burden on not only Saratoga County, but each and every municipality within the state that conducts tax foreclosures, a mandate that the legislature has not included in the statute. Appellant's sole argument in this case is not a legal one; rather an equitable one. It argues that it is not fair – not equitable – that taxing jurisdictions have the statutory right to foreclose on tax delinquent properties without making absolutely certain that each and every potential respondent – owners, tenants, judgment creditors, mortgagees – receive actual, physical notice. That is not the standard. It is respectfully submitted that such an argument is more properly placed before the state legislature, not the judiciary. For all of the reasons presented above, Saratoga County respectfully requests this Court affirm the decision of the Appellate Division, and for such other and further relief as to this Court seems just and proper.

Dated: August 23, 2022

Respectfully Submitted,

BARTLETT, PONTIFF, STEWART & RHODES, P.C.

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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 program used in the preparation of this brief, the total word count for all text exclusive of that specifically exempt under Rule 500.13(c)(3) is 6,507 words.

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- Microsoft Word
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- 14 point size

Dated: August 23, 2022

Karla Williams Buettner

STATE OF NEW YORK COURT OF APPEALS

JAMES B. NUTTER & COMPANY,

Plaintiff-Appellant,

-against-

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

Defendants-Respondents.

AFFIDAVIT OF SERVICE BY MAIL

Court of Appeals No. APL 2022-00032

STATE OF NEW YORK)
) SS:
COUNTY OF WARREN)

TRACEY L. HOLMES, being sworn says, I am not a party to the action, am over 18 years of age and reside in Fort Ann, New York.

On August 23, 2022, I served a three (3) copies of Brief of Defendants-Respondents by mailing the same in a sealed envelope, by First Class Mail, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

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Notary Public

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Qualified in Lewis County
My Commission Expires Dec 20, 2025