

ORIGINAL

**STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE**

**In the Matter of the Foreclosure of Tax Liens
by Proceeding In Rem Pursuant to Article 11
of the Real Property Tax Law by the County
of Wayne Regarding 2007 Town/County Tax.**

Index No. 63536

2009

APPEARANCES: JORDAN S. KATZ, P.C.
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Attorney for Mortgage Electronic Registration Systems, Inc.

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Attorney for County of Wayne

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Attorney for Kathy McCarthy

MEMORANDUM - DECISION

John B. Nesbitt, J.

Mortgage Electronic Registration Systems (MERS) moves under Article 11 of the Real Property Tax Law (RPTL) and within the limitations period set forth in RPTL §1137 for an order setting aside a deed issued pursuant to a tax foreclosure proceeding under Article 11. The operative facts are uncomplicated and undisputed. The two conveyances MERS seeks to set aside were those effected by (1) Treasurer's Deed dated June 16, 2009, to the County of Wayne describing premises known as 4664 Smith Road, Town of Marion, County Of Wayne, and (2) quitclaim deed of the County of Wayne dated July 21, 20009, to Kathy McCarthy describing the same premises.

The quitclaim deed to McCarthy recites that the County acquired title to the subject property pursuant to proceedings taken under RPTL Article 11 and more particularly

"pursuant to a Judgment of Foreclosure, granted in a proceeding entitled, '*In the Matter of the Foreclosure of Tax Liens by Proceeding in Rem pursuant to Article Eleven of the Real Property Tax Law by the County of Wayne relating to the 2007 Town and County Tax*,' Index No. 63536, executed by Honorable Stephen R. Sirkin, dated May 29, 2009, and filed in the Wayne County Clerk's Office on May 29, 2009 [and that this subsequent conveyance to Kathy McCarthy is] in accordance with RPTL §1166 [and by] the Wayne County Board of Supervisors pursuant to Resolution No. 327-09, enacted on May 19, 2009, [which] authorized the sale and conveyance of said premises in the manner and upon the terms herein specified."

The Judgment of Foreclosure signed by Judge Sirkin recited that the record reflected that the County had duly published, posted, and mailed notice of the tax foreclosure proceedings to the affected property owners and other interested parties without answer and that “the County of Wayne is in compliance with Article 11 of the New York Real Property Tax Law.” A list of the properties subject to this judgment were set forth on a “Schedule A” attached to the judgment and expressly included the property subject to the instant proceeding; to wit, tax parcel 65114-00-522284, assessed to one Thomas W. Frey.

The record in the instant proceeding does not reference the deed or other source of title inuring to the owners of record at the time of the tax foreclosure proceeding. The record does reflect a Mortgage upon the subject property signed by Thomas W. Frey and Elizabeth H. Frey on June 22, 2005, who are designated in that instrument as “Borrowers.” As the “Borrowers,” under the fourth section of the Mortgage, entitled “Borrower’s Right To Mortgage The Property And Borrower’s Obligation To Defend Ownership Of The Property,” the Freys warranted their fee simple title to the “Lender,” who is expressly identified as “Wilmington Finance, a division of AIG Federal Savings Bank,” with a designated address of 401 Plymouth Road, Suite 400, Pennsylvania 19462. Also, the same Wilmington Finance is listed twice at the very top of the first page of the Mortgage as the party preparing the Mortgage and the party to whom it should be returned to once recorded. All the covenants and promises the Borrowers made under the Mortgage run directed to the Lender, which, as indicated, is clearly identified as Wilmington Finance.

There is another entity mentioned in the Mortgage, the entity that has brought the instant application, one identified in the opening section of the mortgage, entitled “Words Used Often In This Document,” as follows:

(C) **“MERS”** is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender’s successors and assigns. MERS is organized and existing under the laws of Delaware, and has an address and telephone of P.O. 2026, Flint, MI 48501-2026, tel. (888) 679-MERS. **FOR PURPOSES OF RECORDING THIS MORTGAGE, MERS IS THE LENDER OF RECORD.** (Emphasis in original).

MERS’ ostensible role under the Mortgage is addressed in the two immediately ensuing sections. The second section reads:

BORROWER'S TRANSFER TO LENDER OF RIGHTS IN THE PROPERTY

I mortgage, grant and convey the Property to MERS (solely as nominee for Lender and Lender's successors in interest and its successors in interest) and its successors in interest subject to the terms of this Security Instrument. This means that, by signing this Security Instrument, I am giving Lender those rights that are stated and also those rights that Applicable Law gives to lenders who hold mortgages on real property. I am giving Lender these rights to protect Lender from possible losses that might result if I fail to:

(A) Pay all the amounts that I owe Lender as stated in the Note including, but not limited to, all renewals, extensions and modifications of the Note;

(B) Pay, with interest, any amounts that Lender spends under this Security Instrument to protect the value of the Property and Lender's rights in the Property; and

(C) Keep all of my other promises and agreements under this Security Instrument and the Note;

I understand and agree that MERS holds only legal title to the rights granted by me in this Security Instrument, but, if necessary, to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right;

(A) to exercise any or all of those rights, including, but not limited to, the right to foreclose and sell the Property; and

(B) to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

The third section of the Mortgage references MERS as follows:

DESCRIPTION OF THE PROPERTY

I give MERS (solely as nominee for Lender and Lender's successors in interest) rights in the Property described in (A) through (G) below:

(A) The property which is located at 4664 Smith Road, Marion, New York 14505. The Property is in Wayne County. It has the following legal description: [LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF] Parcel Number: 66114-00-622284.

The central question presented in the instant matter are the rights, if any, Wilmington Finance and/or MERS gained under RPTL §1125(a) by virtue of these references in the Mortgage. RPTL §1125(a) provides that the statutory notice of a tax foreclosure proceeding required to be published under RPTL §1124 must also be mailed to

“(a) each owner and any other 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, and whose name and address are reasonably ascertainable from the public record, including the records in the offices of the surrogate of the county [and] (b) any person who has filed a declaration of interest pursuant to section 1126 that has not expired...”

RPTL §1126(1) states:

“Any mortgagee, lienor, lessee or other person having legally protected interest in real property who wishes to receive copies of the notices required by this article may file with the enforcing officer a declaration of interest on a form prescribed by the state board. Such declaration shall include the name and mailing address of the person submitting such declaration, a description of the parcel or parcels in which such person claims an interest, and a description of the nature of such interest. A declaration of interest shall be effective upon filing and shall expire on the last day of the tenth calendar year commencing thereafter, unless extended or cancelled as provided herein.”

With this legal framework in mind, we turn to the events that are now a matter of judicial concern. The real property taxes on 4464 Smith Road were not being paid, eventually causing the property to be added to the parcels being foreclosed by the County under RPTL Article 11. As a matter of statutory law as well as constitutional command, taxing authorities seeking forfeiture of property for failure to pay the taxes levied thereon must give notice to a party substantially affected thereby of proceedings that may result in such forfeiture. That notice must be of a type “reasonably calculated to appraise” such party of that fact. (*Congregation Yetev Lev D'Satmar, Inc v. Sullivan*, 59 NY2d 418, 424 (1983)). The purpose of notice is to allow the affected party the opportunity to take any remedial action the law affords against forfeiture. Obviously, if notice is to achieve its purpose, it must be actually received by the party potentially affected and motivated to take remedial action. Realizing that, while constructive notice is in many cases a useful legal fiction, a fiction it nevertheless remains. The law sets the fiction aside in the context of tax foreclosure proceedings to require actual notice to the extent deemed practicable under the circumstances. Hence, while mere publication is insufficient, personal service is not required, the law being satisfied with mailed notice. Presumably, the law stopped short of personal service, because it balanced the burden of such requirement against the fact those with property interests cannot be blissfully ignorant in these matters. “Statutes taxing real property are universal and property owners are chargeable with knowledge that taxes will be levied against the property regularly and that a default may result in forfeiture of the land” (*Id.* at 423).

Turning to the facts of the instant case, it is not disputed that the County meticulously followed the statutory requirements in terms of form and manner of notice. The issue is whether the County targeted the wrong party to receive the notice. The County noticed Wilmington Finance but not MERS. Wilmington Finance did not respond to the notice, nor did anyone else with regard to 4664 Smith Road; hence the property became the County's by default.

MERS claims that the proceedings and ensuing conveyances of 4664 Smith Road were defective, because MERS was not separately noticed. There are at least two difficulties with this claim. First, the argument assumes that the County has a duty to read the Mortgage to determine whether anyone else other than the Mortgagee had a cognizable property interest warranting statutory notice under RPTL §1125. This Court does not believe this is or should be the case. The County should not have to go behind a title search to determine whether any property interests are conveyed to third parties not a party to an instrument on file. To accept MERS' argument would require the County to read every mortgage from A to Z to make sure there are no "Nominees" of the Lender entitled to notice of tax foreclosure in lieu of or in addition to the Lender. Indeed, RPTL §1126(A) provides a vehicle for someone like MERS to receive notice without requiring the County to read every mortgage to determine whether notice should be given.

Second, the Mortgage from which MERS derives its claim of right to statutory notice under RPTL §1125 is by no means crystal clear as to what MERS' involvement as "Nominee" requires after the recording of the mortgage. Indeed, MERS does not explain what role the "Nominee" plays in the recording of a mortgage, or thereafter, except perhaps as something akin to a power-of-attorney or agent, albeit with independent standing. If the later is the case, it is incumbent upon the "Nominee" to state its status as one due notice in the separate declaration of interest form required under section RPTL §1126, which the County does have a categorical duty to read.

Accordingly, the application of MERS shall be, and the same hereby is, denied.

Dated: March 24, 2010
Lyons, New York



JOHN B. NESBITT
Acting Supreme Court Justice

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SUPREME AND COUNTY COURT
WARRANTS SECTION