

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF CHEBOYGAN

**IN RE: 2013 UNPAID
REAL ESTATE TAXES,**

Plaintiff,

v.

File No. 15-8534 CZ

JOHN DOE,

Defendant,

OPINION AND ORDER

This matter is before the Court pursuant to Arkona, LLC's Motion for Relief from Judgment. Arkona is seeking relief from a judgment of foreclosure issued on February 29, 2016, in the Circuit Court for Cheboygan County, wherein, Arkona's interest in four parcels of real estate located in Cheboygan County, were awarded to the Cheboygan County Treasures Office for unpaid taxes.

Arkona is seeking relief under MCR 2.612 (C) (1) (a) (e) (f). It is Arkona's position in this motion that it was unaware that it had any delinquent taxes on the property in question and it did not receive adequate notice of the tax sale or foreclosure proceedings and consequently, the judgment should be set aside.

Arkona purchased five large parcels of property in Cheboygan and Presque Isle Counties in December 2012. One parcel was located in Presque Isle County and the other four were located just across the Presque Isle County line in Cheboygan County. Arkona is an LLC, with its sole owner being Mr. Andrew Hetzel, Jr. who is a Wisconsin resident. At all relevant times to this action Arkona's resident agent was Daniel Hartman an attorney with offices in Emmet County, Michigan.

The address on Arkona's 2012 deeds listed its address as 2115 US 31 North, Petoskey, which was Mr. Hartman's office address at the time.

The problems with this case began at the onset when an error occurred at the Benton Township Treasurer's Offices mistakenly listing the address associated with this property for notice purposes as 1115 US 31 North, Petoskey, rather than the correct address of 2115.

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Consequently, the Benton Township Treasures Office sent the initial tax billings to the wrong address.

In 2014, the Cheboygan County Treasurer corrected the address and began sending notices of the tax delinquency to Arkona at 2115 US 31 North, Petoskey; and sent notices for each parcel on April 1, 2014, May 29, 2014, August 28, 2014, January 5, 2015, and January 13, 2015.

In this intervening time period Mr. Hartman moved offices and his mailing address changed to P.O. Box 307, Petoskey, MI.

Between January 2015, and March 2, 2016, the Treasurer's Office sent 6 first class mailings to Arkona, LLC. C/O Andrew Hetzel, Jr., 2115 US 31 North, Petoskey, Michigan. None of these mailings were claimed. The Treasurer also sent two certified mailings to the same addressee and address on January 20, 2015 and November 17, 2015. Neither of these mailings were received.

During this same time frame the Treasurer's Office also sent to Arkona, LLC. C/O Daniel J. Hartman, P.O. Box 307, Petoskey, Michigan mailings on October 28, November 10, 2015, which were not returned. On November 17, 2015, a certified mailing was sent containing notice of the upcoming foreclosure proceedings and this notice was signed for and accepted by Mr. Hartman's secretary Cathy Bond. There was also a certified follow up sent first class and not returned on January 18, 2016.

The judgment of foreclosure which was issued on February 29, 2016; provided that all taxes had to be paid on or before March 31, 2016; otherwise, title would vest to the Treasurer's Office. The taxes were not paid, the title vested and the Treasurer subsequently, sold this property to a third party.

Petitioner's pleadings indicate that Mr. Hetzel first became aware of the tax delinquency issue in May 2016. Petitioner then filed a motion to set aside the judgment on August 5, 2016; however, this motion was never noticed or scheduled for a hearing.

On December 28, 2016, a substitution of attorneys was filed and an order of substitution entered relative to counsel for the petitioner. The petitioner then filed this motion for relief on February 15, 2017. Oral argument was held March 2, 2017.

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It is petitioner's contention that the notice given in the present case was inadequate to satisfy the minimum due process standard required by law, and consequently, Mr. Hetzel never had adequate notice that taxes were delinquent or that foreclosure proceedings were pending and therefore, the judgment of February 29, 2016, should be set aside.

For purpose of this hearing, the Court accepts petitioner's representation that Mr. Hetzel never had actual knowledge of the foreclosure proceedings until May 2016.

The property in question was owned by Arkona, LLC, and Andrew Hetzel was the sole owner of Arkona LLC. The address on the deed was that of Mr. Hartman's office who was the resident agent for Arkona, LLC, and Mr. Hetzel's Wisconsin address did not appear on the deed.

In the present case the Petitioner also contends that the Cheboygan County Treasure failed to comply with the posting requirements of MCL 211.78 i (3). The parties agree that the property in question is located on Bates Road which is a private road that was closed off by a locked gate when the posting occurred. The locked gate was some distance north of petitioner's property and the agent hired by the treasure for the purpose of posting taped the notices on this gate. Posting is required if the premises are occupied. The issue of whether or not the property in question was occupied was not resolved on the record in this case. There are allegations that two of the parcels had seasonal cabins and apparently two parcels had no structures.

ANALYSIS

MCL 211.78 k (5) (g) states that:

A judgment entered under this section is a final order with respect to the property affected by the judgment and accept as provided in subsection (7) shall not be modified, stayed or held invalid after March 31 immediately succeeding the entry of the judgment foreclosing the property under this section, or for contested cases 21 days after the entry of the judgment foreclosing the property under this section.

This statutory provision was modified however, by the ruling in *In Re: Petition by Wayne County Treasurer* 478 Mich. 1 (1, 2) (2007), which reads:

Under the General Property Tax Act MCL 211.1 et seq., if a property owner does not redeem the property or appeal the judgment of foreclosure within 21 days, MCL 211.78 k (6) deprives the circuit court of jurisdiction to alter the judgment of

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foreclosure, MCL 211.78 k (6) vests absolute title in the foreclosing governmental unit and, if the taxpayer does not redeem the property or avail itself of the appeal process in MCL 211.78 k (7), the governmental unit's title shall not be stayed or held invalid. The only possible remedy for such a property owner would be an action for monetary damages under MCL 211.78i based on a act does not provide relief for property owners who are denied due process. Therefore, in cases where the foreclosing governmental unit complies with the notice provisions of the act, MCL 211.78 k is not problematic. However, where the foreclosing governmental unit fails to provide constitutionally adequate notice, as in this case, MCL 211.78 k permits the property owner to be deprived of the property without due process of the law. The Legislature cannot create a statutory scheme that allows for constitutional violations with no recourse. Therefore, the portion of the statute purporting to limit the circuit court's jurisdiction to modify judgments of foreclosure is unconstitutional and unenforceable as applied to property owners who are denied due process.

Based on the above ruling the only issue remaining is this case is whether or not notice given by the treasurer satisfies the minimum requirements of due process.

“Personal service is not required. Notice by mail is adequate. Mailed notice must be directed to an address reasonably calculated to reach the person entitled to notice. Mailing should be by registered or certified mail, return receipt requested, both because of the greater care in delivery and because of the record of mailing in receipt or none receipt provided. Such would be the efforts one desires of actually informing another might reasonably employee. If the state exerts reasonable efforts, than failure to effectuate actual notice would not preclude foreclosure of the statutory lien and indefeasible vesting of title on expiration of the redemption period.” *Dow v State of Michigan*, 396 Mich. 192, 211 (1976).

In the present case the grantee on the deed was Arkona, LLC. and Mr. Hartman's address was listed as the address for the taxpayer. When the taxes were in default a search was done by an agent of the treasurer's office in accordance with MCL 211.78 I (6) which provides that for a business entity a search of business entity records filed with the Department of Labor and Economic Growth would be referred to and this search indicated that Mr. Hartman was the registered agent for Arkona with the address of P.O. Box 307, Petoskey, Michigan. Several mailings and notices of the upcoming foreclosure were sent to this address and on November 28, 2015, Cathy Bond who was Mr. Hartman's secretary signed for and received notice of the forfeiture proceedings by certified mail.

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The notice given in this instance satisfies the requirements of due process as outlined in *Dow*. It is further stated in the case of *Republic Bank v Genesee County Treasurer*, 471 Mich. 732, 739, 741, 742 (2005) as follows:

“In short, notice must be sent to an address reasonably calculated to apprise the object of notice of the pending proceedings, and this requirement must be evaluated in the context of forwarding the object of notice minimal due process.”

.....

“More importantly, this court indicated in *Smith* that due process does not impose an obligation to undertake additional investigations, when an address has been provided on a relevant document and the document address has not been changed.”

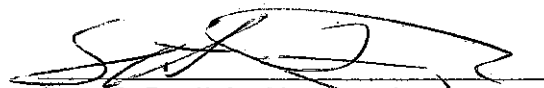
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“Here, where defendant relied on the address provided in the mortgage recorded with the Genesee County Register of Deeds, Republic Bank still operated a branch office at that address, and an employee of the bank signed the certified mail receipt card at that address, defendant not only complied with the minimum requirements of due process, but provided plaintiff with actual notice of the hearings. Defendant clearly sent notice to “address reasonable calculated to apprise” plaintiff of the hearings.”

In the present case the treasurer sent multiple notices to Arkona’s registered agent and followed up with a certified mailing that was signed for and received at the registered agents mailing address. Under these facts the due process standards were satisfied.

NOW, THEREFORE, IT IS ORDERED that Petitioner’s Motion for Relief from Judgment is hereby denied.

Dated: 4-6-17


Scott L. Pavlich, Circuit Judge
53rd Judicial Circuit Court