

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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IN RE PETITION BY THE WAYNE COUNTY  
TREASURER FOR FORECLOSURE OF  
CERTAIN LANDS FOR UNPAID PROPERTY  
TAXES.

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WAYNE COUNTY TREASURER,

Petitioner-Appellee/Cross-  
Appellant,

v

WESTHAVEN MANOR LIMITED DIVIDEND  
HOUSING ASSOCIATION and MICHIGAN  
STATE HOUSING DEVELOPMENT  
AUTHORITY,

Respondents-Appellees,

and

WESTERN WAYNE REALTY, L.L.C., d/b/a  
RE/MAX SYNERGY,

Intervening Party-Appellant/Cross-  
Appellee.

FOR PUBLICATION  
February 24, 2005  
9:00 a.m.

No. 249807  
Wayne Circuit Court  
LC No. 01-120001-PZ

Official Reported Version

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Before: Neff, P.J., and Smolenski and Zahra, JJ.

ZAHRA, J. (*concurring*).

I. Introduction

I agree with the majority's conclusion that the circuit court erred in vacating its judgment of foreclosure on the Westhaven parcel and by declaring null and void the certificate of forfeiture in favor of petitioner as well as the quitclaim deed transferring the Westhaven parcel from petitioner to RE/MAX. I write separately because I conclude the circuit court lacked subject-matter jurisdiction to invalidate proceedings underlying the judgment of foreclosure and

petitioner's absolute title to the Westhaven parcel. Further, I would not remand this matter for a determination whether respondents' due process rights were violated. Respondents have not properly preserved or presented any meritorious claim that they were denied their constitutional rights to due process, and the record does not indicate that respondents' minimum due process rights were violated. *Republic Bank v Genesee Co Treasurer*, 471 Mich 732; 690 NW2d 917 (2005); *Smith v Cliffs on the Bay Condo Ass'n*, 463 Mich 420; 617 NW2d 536 (2000).

## II. Analysis

The majority validates the circuit court's jurisdiction by relying on the requirement of MCL 211.78i(2) that the owner of a property interest subject to foreclosure be provided minimum due process protection. I agree with the majority that MCL 211.78i(2) indicates that proceedings may be invalidated under the GPTA if "the owner of a property interest or a person to whom a tax deed was issued is [not] accorded the minimum due process required under the state constitution of 1963 and the constitution of the United States." *Id.* However, the record does not indicate that respondents' minimum due process rights under the state and federal constitutions were violated, and consequently the circuit court cannot rely on MCL 211.78i(2) to invalidate proceedings.

In *Smith*, our Supreme Court held "that mailing of tax delinquency and redemption notices to a corporation at its tax address of record in the manner required by the [GPTA] is sufficient to provide constitutionally adequate notice." *Smith, supra* at 421-422. More recently, our Supreme Court observed that the failure to comply strictly with statutory notice requirements alone does not give rise to a due process claim. *Republic Bank, supra* at 739-742. The critical question is whether an individual has been given a ""meaningful opportunity to be heard. . . ."" *Id.* at 742. (citations omitted).

The record reflects that petitioner sent notices of the foreclosure through certified mail to all respondents' addresses revealed by a title search of the Westhaven parcel. Admittedly, one of the two mailings to Westhaven Manor's listed addresses was returned by the post office as undeliverable, though a receipt for the other was returned as delivered. Also, the mailing to MSHDA was returned by the post office as "unknown." However, that some of the notices did not reach their intended destination "does not impose on the state the obligation to undertake an investigation to see if a new address for the [respondents] could be located." *Smith, supra* at 429. Further, "there is nothing to indicate that the [petitioner] had been informed of a new address for the [respondents]." *Id.* Petitioner served notice of foreclosure by publication on three separate occasions. And although it appears that petitioner, through its agent, failed to comply strictly with aspects of the personal visitation requirement of the GPTA, notice of foreclosure was nonetheless posted on the property. Therefore, the record does not indicate that respondents' minimum due process rights under the state and federal constitutions were violated.

The lack of merit to any due process claim is bolstered by the parties' arguments on appeal, which do not properly present or preserve any meritorious claim regarding a failure to

provide minimum due process. Specifically, MSHDA concedes in its brief on appeal that it "did not argue in the Circuit Court that [petitioner] violated its due process rights," and that "the issue in this case is not whether MSHDA's lack of notice violated due process."<sup>1</sup> Westhaven Manor likewise concedes in its brief on appeal that "[i]n no way, shape or form . . . [did] the Circuit Court [hold] that a violation of Westhaven's due process rights occurred here." Rather, respondents contend that the circuit court had authority under MCR 2.612(C) to set aside the order of foreclosure because petitioner failed to comply with the notice provisions of the GPTA, and compounded this failure by erroneously representing to the circuit court that it had fully complied with the notice provisions under the GPTA. Respondents do not assert they were denied their due process rights. Rather, respondents merely argue that they have experienced the type of injustice that MCR 2.612 is intended to remedy. However, in the absence of a due process violation, the circuit court lacked subject-matter jurisdiction to invalidate its March 4, 2002, judgment of foreclosure. Therefore, remand to the circuit court to determine whether respondents were accorded the minimum due process required under the Michigan Constitution and the United States Constitution is unnecessary.

The circuit court also lacked subject-matter jurisdiction to invalidate the foreclosing government's absolute title to the Westhaven parcel. The circuit court specifically ordered that "the Certificate of Forfeiture . . . as well as the subsequent quitclaim deed purporting to transfer [the Westhaven parcel] from [petitioner] to [RE/MAX] . . . are declared to be null and void and of no effect . . . ." At all times relevant to this dispute, MCL 211.78k(6), provided:<sup>2</sup>

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<sup>1</sup> Near the end of its brief on appeal, MSHDA claims that "MSHDA was denied due process of law because [petitioner] failed to strictly comply with the [GPTA]." However, as mentioned, the failure to comply strictly with statutory notice requirements alone does not give rise to a due process claim. *Republic Bank, supra* at 739-742. MSDHA acknowledges the existence of a line of cases that are contrary to its argument that due process requires strict compliance, and yet fails to distinguish the present case from those cases.

<sup>2</sup> I am not persuaded that recent amendments to the GPTA, specifically those of 2003 PA 263, alter the manner in which we interpret and apply the GPTA to this case. Our Supreme Court has stated:

"The controlling test as to the meaning of a statutory provision is always the legislative intent when fairly ascertainable. But the 'intent' referred to is the one entertained by the legislature at the time of the passage of the act, and not the intent expressed by a subsequent amendment. In the instant case, to interpret the subsequent amendment as an indication of the legislature's original intent would be mere speculation, not judicial construction." [*Detroit Edison Co v Dep't of Revenue*, 320 Mich 506, 519; 31 NW2d 809 (1948), quoting *Iron Street Corp v Unemployment Compensation Comm*, 305 Mich 643, 655; 9 NW2d 874 (1943).]

Thus, recent amendments of the GTPA offer only speculation in regard to the Legislature's intent in enacting the statutes at issue.

Fee simple title to property set forth in a petition for foreclosure filed under section 78h on which forfeited delinquent taxes, interest, penalties, and fees are not paid within 21 days after the entry of judgment shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property. *The foreclosing governmental unit's title is not subject to any recorded or unrecorded lien and shall not be stayed or held invalid except as provided in subsection (7).* [Emphasis added.]

Subsection 7 provided that a "person claiming to have a property interest under section 78i in property foreclosed under this section may appeal the circuit court's judgment foreclosing property to the court of appeals." MCL 211.78k(7). Read together, these provisions dictate that the circuit court may not hold invalid the foreclosing governmental unit's absolute title to the property.<sup>3</sup> Therefore, the circuit court was without power to invalidate petitioner's absolute title to the Westhaven parcel.<sup>4</sup>

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<sup>3</sup> The majority notes that the appeal provision, MCL 211.78k(7), required the aggrieved party to take an appeal within twenty-one days after the circuit court's judgment of foreclosure. The majority concludes that "[t]o do so, the interested person must have had actual knowledge of the judgment's entry." *Ante* at \_\_\_\_. However, our Supreme Court made it clear that due process does not require actual notice be provided to an interested party to a foreclosure action. *Dow v Michigan*, 396 Mich 192, 211; 240 NW2d 450 (1976).

<sup>4</sup> Although not addressed by the majority, there are a number of arguments advanced by respondents that are without legal merit. Respondents argue that MCL 211.78k(6) does not bar the circuit court from considering a postjudgment motion under MCR 2.612(C) because the GPTA does not explicitly divest the circuit court of jurisdiction. Although a statute divesting a circuit court of jurisdiction is to be strictly construed, the divestiture of jurisdiction can be accomplished under a clear mandate of law. *Wikman v City of Novi*, 413 Mich 617, 645; 322 NW2d 103 (1982). While MCL 211.78k(6) does not expressly state the circuit court is barred from considering postjudgment motions, it does state that "[t]he foreclosing governmental unit's title . . . shall not be stayed or held invalid except as provided in subsection (7)." This language plainly provides that a circuit court cannot order RE/MAX's title to the Westhaven parcel invalidated, regardless whether the case is considered as one on a postjudgment motion.

Westhaven Manor further argues that if MCL 211.78k(6) conflicts with MCR 2.612(C), then MCL 211.78k(6) is unconstitutional because it improperly limits the circuit court's ability to modify its own judgments and thereby infringes upon our Supreme Court's rulemaking authority under Const 1963, art 6, § 5. However, unlike mortgage foreclosure actions or civil actions to determine interests in land under MCL 600.2932, the court rules contain no special rules for tax foreclosure actions. See MCR 3.410 and 3.411. The rules of civil procedure govern procedure in all courts, "except where the limited jurisdiction of a court makes a rule inherently inapplicable or where a rule applicable to a specific court or a specific type of proceeding provides a different procedure." MCR 2.001. Here, the circuit court's jurisdiction has been limited by our Legislature. Whether analyzed under the limited appeal procedures in MCL

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Furthermore, this conclusion is required by provisions of the GPTA that specifically address the present situation and provide a legal remedy for respondents' claim that petitioner did not provide proper notice of the foreclosure proceedings. MCL 211.78l, provided in pertinent part:

(1) If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section.

(2) The court of claims has original and exclusive jurisdiction in any action to recover monetary damages under this section.

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211.78k(6) and (7) for challenging the validity of petitioner's title, or the limitations placed on notice deficiencies under MCL 211.78l, Westhaven Manor's claim that the statute must give way to MCR 2.612(C) is without legal support.

Moreover, the limitations established by our Legislature are not merely procedural rules, but reflect substantive policy considerations relating to the expeditious return to productive use of property returned for delinquent taxes. See MCL 211.78. A court rule should yield to the statute if the court rule contravenes a legislatively declared principle of public policy having some basis other than court administration. See *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999).

Also without legal merit is respondents' claim that the circuit court historically has powers in tax foreclosure cases to modify its judgments. As mentioned, the divesture of jurisdiction can be accomplished under a clear mandate of law. *Wikman, supra*. Also, a court of equity's inherent powers to correct mistakes in a judgment may be limited by the Legislature. *Cole v Auditor General*, 132 Mich 262, 265; 93 NW 890 (1903). "Courts of equity, as well as of law, must apply legislative enactments in accord with the plain intent of the legislature." *City of Lansing v Lansing Twp*, 356 Mich 641, 650; 97 NW2d 804 (1959).

I also reject respondents' attempt to justify circuit court jurisdiction under MCR 2.612(C) by claiming petitioner's failure to strictly comply with MCL 211.78i(3) amounted to fraud or misrepresentation. We are not bound a party's choice of labels because this would place form over substance. *Kostyu v Dep't of Treasury*, 170 Mich App 123, 130; 427 NW2d 566 (1988); see also *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 770; 664 NW2d 185 (2003); *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992). I agree with the majority that respondents' claim of misrepresentation merely reiterates how they were denied notice under the GPTA, and does not constitute a separate claim or action outside the GPTA.

(3) An action to recover monetary damages under this section shall not be brought more than 2 years after a judgment for foreclosure is entered under section 78k.

The Legislature's clear statement in MCL 211.781(2) that the Court of Claims has original and exclusive jurisdiction of cases involving lack of notice under the GPTA provides additional reason to conclude that the circuit court was without subject-matter jurisdiction in this case. Recent case law supports this conclusion. In *Republic Bank, supra* at 736, the defendant county treasurer obtained title to the property, and "[u]pon discovery of the loss of the property, [the plaintiff] filed [an] action seeking monetary relief in the Court of Claims . . . ." Moreover, similar to respondents' claims in this case, the plaintiff in *Republic Bank* alleged "that [the] defendant had not provided proper notice of the foreclosure proceedings." *Id.* Thus, after petitioner obtained absolute title to the Westhaven parcel, respondents' remedy lay with the Court of Claims.<sup>5</sup>

### III. Conclusion

In sum, I conclude that the circuit court lacked subject-matter jurisdiction to set aside its judgment of foreclosure and to declare null and void the certificate of forfeiture in favor of petitioner and the quitclaim deed transferring the Westhaven parcel from petitioner to RE/MAX. I would vacate the circuit court's postjudgment order dated June 20, 2003. I would not remand this case for further proceedings to address a due process issue that is not supported by the existing record, particularly inasmuch as the respondents have failed to properly preserve or present the issue on appeal.

/s/ Brian K. Zahra

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<sup>5</sup> Westhaven Manor also argues that because it has always had possession and did not seek possession of the Westhaven parcel, MCL 211.781(1) is not applicable. However, MCL 211.781(1) merely recognizes that an action for possession is not permitted against a subsequent owner, such as RE/MAX. The plain and unambiguous language of the statute expresses that the owner of the extinguished property interest is limited to a cause of action for monetary damages for the notice deficiency, which must be brought in the Court of Claims.