

STATE OF MICHIGAN
COURT OF APPEALS

AZIZ KHONDKER,

Plaintiff-Appellant,

v

WAYNE COUNTY TREASURER,

Defendant-Appellee.

UNPUBLISHED

March 23, 2004

No. 246296

Wayne Circuit Court

LC No. 02-234046-CZ

Before: Zahra, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying his motion for a preliminary injunction regarding the sale of real property. We affirm.

I. Facts and Procedure

On June 14, 2001, defendant filed a petition for the foreclosure of approximately eight thousand properties for the failure to pay property taxes for the year 1999. One of the properties included in the petition was 2001 East Grand Boulevard in Detroit, which was owned by Kevin Pitts. Plaintiff, who was a former owner of the property and claims that he again acquired interest in the property by paying taxes, cleaning, and removing debris from the property, alleges that defendant did not provide any notice of foreclosure to Pitts or him. However, defendant's process server filed an affidavit stating that she personally visited the property, which was unoccupied when she arrived. The process server stated that, in accordance with the foreclosure notice provisions of MCL 211.78i(3), she posted a notice to show cause hearing, the foreclosure petition, and other relevant documents on the property in a conspicuous manner. She also took a photograph of the house after she posted the notice. On March 4, 2002, the circuit court entered a judgment of foreclosure for approximately five thousand properties, including 2001 East Grand Boulevard. In the judgment, the trial court found that defendant provided proper notice and opportunity to be heard to all parties interested in the forfeited properties. When plaintiff subsequently approached defendant to pay the balance of unpaid taxes on the house, he was told that the property had been foreclosed and would be sold at a public auction between September 25, 2002, and September 27, 2002.

On September 25, 2002, plaintiff filed a complaint against defendant, seeking a preliminary injunction and an ex parte temporary restraining order preventing defendant from placing his foreclosed property in a public auction and compelling defendant to accept full

payment from plaintiff for the delinquent taxes. The trial court treated plaintiff's complaint as a motion and held hearings regarding the matter, where it found that defendant had complied with the forfeiture notice requirements of MCL 211.78. The court explained that in *Smith v Cliffs on the Bay Condo Ass'n*, 463 Mich 420; 617 NW2d 536 (2000), on remand 245 Mich App 73; 626 NW2d 905 (2001), the Supreme Court determined that the prior statutory notice requirements were constitutional, and because the statutory notice requirements had been expanded since the Supreme Court decision, the present notice requirements were sufficient to satisfy due process. The court also rejected plaintiff's argument that the notice statute was unconstitutional as applied to this case because the legislative purpose of the statute was frustrated. Finally, the court added that equitable relief was not available in a foreclosure context. The court then entered an order denying plaintiff's motion for a preliminary injunction. The court subsequently denied plaintiff's motion for reconsideration.

II. Analysis

Plaintiff argues that this Court should set aside the auction sale of his property and award the property to him, because defendant did not give him proper statutory notice of the foreclosure proceedings and thus violated his right to due process. In response, defendant argues that this Court lacks jurisdiction to decide plaintiff's appeal, because plaintiff is not appealing the circuit court's final order.

MCL 211.78k(7) provides for an appeal of a judgment of foreclosure:

The foreclosing governmental unit or a person claiming to have a property interest under section 78i in property foreclosed under this section may appeal the circuit court's order or the circuit court's judgment foreclosing property to the court of appeals. An appeal under this subsection is limited to the record of the proceedings in the circuit court under this section and shall not be de novo. The circuit court's judgment foreclosing property shall be stayed until the court of appeals has reversed, modified, or affirmed that judgment. If an appeal under this subsection stays the circuit court's judgment foreclosing property, the circuit court's judgment is stayed only as to the property that is the subject of that appeal and the circuit court's judgment foreclosing other property that is not the subject of that appeal is not stayed. To appeal the circuit court's judgment foreclosing property, a person appealing the judgment shall pay to the county treasurer the amount determined to be due to the county treasurer under the judgment within 21 days after the circuit court's judgment is entered, together with a notice of appeal. If the circuit court's judgment foreclosing the property is affirmed on appeal, the amount determined to be due shall be refunded to the person who appealed the judgment. If the circuit court's judgment foreclosing the property is reversed or modified on appeal, the county treasurer shall refund the amount determined to be

due to the person who appealed the judgment, if any, and retain the balance in accordance with the order of the court of appeals.^[1]

Here, plaintiff did not follow the appeal procedures set forth in MCL 211.78k(7), but instead filed the complaint in this suit, which is essentially an original action attempting to enjoin enforcement of the judgment of foreclosure. Plaintiff's original action in this case amounts to a collateral attack on the judgment of foreclosure. "[A] decision of a court having jurisdiction is final and cannot be collaterally attacked." *In re Waite*, 188 Mich App 189, 197; 468 NW2d 912 (1991). Plaintiff does not allege that the circuit court lacked jurisdiction to enter the judgment of foreclosure, so he may not attack the judgment by bringing an original suit. *SS Aircraft Co v Piper Aircraft Co*, 159 Mich App 389, 393; 406 NW2d 304 (1987).

In regard to whether plaintiff could properly file an original action against defendant for failure to provide notice of foreclosure, the General Property Tax Act, MCL 211.1 *et seq.*, provides:

The failure of this state or a political subdivision of this state to follow a requirement of this act relating to the return, forfeiture, or foreclosure of property for delinquent taxes shall not be construed to create a claim or cause of action against this state or a political subdivision of this state unless the minimum requirements of due process accorded under the state constitution of 1963 or the constitution of the United States are violated. [MCL 211.78(2).]

In *Smith*, *supra* at 428-429, our Supreme Court held that the "extensive set of procedures for notice of the steps in the tax sale process . . . meet the requirements set forth in *Dow* [*v Michigan*, 396 Mich 192; 240 NW2d 450 (1976)] and thus provide a constitutionally sound procedure for sale of property because of the nonpayment of taxes." Plaintiff does not argue that the post-*Smith* amendments to the General Property Tax Act caused the statutory notice requirements to become constitutionally inadequate.² Here, the trial court found that defendant had complied with the notice requirements of MCL 211.78 because defendant's process server filed an

¹ This version of MCL 211.78k was amended by Pub Act 2003, No. 263, imd eff January 5, 2004.

² In amending the General Property Tax Act in 2003, the Legislature stated, "This amendatory act is not intended to and shall not be construed to modify or alter the ruling of the Michigan [S]upreme [C]ourt in *Smith v Cliffs on the Bay Condominium Association*, docket no. 111587." 2003 PA 263.

affidavit stating that she followed the statutory requirements for notice under MCL 211.78i(3). Therefore, plaintiff's present suit against defendant could not permissibly challenge the judgment of foreclosure or the adequacy of notice of foreclosure.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Bill Schuette