

STATE OF MICHIGAN
COURT OF APPEALS

UNITY APOSTOLIC CATHEDRAL, JOYCE
HADDON, and DR. CLARENCE B. HADDON,

UNPUBLISHED
April 22, 2008

Plaintiffs-Appellees,

v

WAYNE COUNTY TREASURER and LARONE
GARRETT,

No. 263499
Wayne Circuit Court
LC Nos. 02-220192-PZ;
03-341658-PZ

Defendants,

and

SYNERGY ACQUISITIONS, L.L.C.,

Third-Party Defendant-Appellant.

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

Third-party defendant Synergy Acquisitions, L.L.C. (“Synergy”) appeals as of right from the circuit court’s judgment in favor of plaintiffs setting aside a previous judgment foreclosing real property under the General Property Tax Act (GPTA), MCL 211.1 *et seq.* We affirm.

Synergy first argues that the circuit court lacked subject-matter jurisdiction to reconsider the tax foreclosure judgment and abused its discretion by granting relief from the judgment. We disagree. Issues of statutory interpretation, constitutional law, and subject-matter jurisdiction are questions of law that this Court reviews de novo on appeal. *In re Petition by Wayne Co Treasurer* (“*Wayne Co Treasurer II*”), 478 Mich 1, 6; 732 NW2d 458 (2007); *Polktown Charter Twp v Pellegrom*, 265 Mich App 88, 98; 693 NW2d 170 (2005). In addition, this Court reviews for an abuse of discretion a circuit court’s decision on a motion to set aside a prior judgment. *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999). An abuse of discretion occurs when a decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Moreover, the circuit court’s findings of fact are reviewed for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

At the time of the March 10, 2003, judgment of foreclosure, MCL 211.78k(6) provided:

Except as otherwise provided in subsection (5)(c) and (e),^[1] 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).*^[2] [Emphasis added.]

Subsection (7) provides that “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.” Further, MCL 211.78l states 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.

¹ It is undisputed that subsection (5)(c) and (e) are not applicable in this appeal.

² MCL 211.78k(6) has since been amended by 2003 PA 263 and 2006 PA 611 and now provides:

Except as otherwise provided in subsection (5)(c) and (e), 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 on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property under this section, or in a contested case within 21 days of the entry of a judgment foreclosing the property under this section, shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property, including all interests in oil or gas in that property except the interests of a lessee or an assignee of an interest of a lessee under an oil or gas lease in effect as to that property or any part of that property if the lease was recorded in the office of the register of deeds in the county in which the property is located before the date of filing the petition for foreclosure under section 78h, and interests preserved as provided in section 1(3) of 1963 PA 42, MCL 554.291. 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) or (9).

In accordance with these provisions, Synergy argues that because plaintiffs never appealed the judgment of foreclosure and the time for filing such an appeal expired, their sole remedy was limited to filing an action for monetary damages in the Court of Claims, and the circuit court was without subject-matter jurisdiction to set aside the foreclosure judgment and grant the relief that it ordered.

In *Wayne Co Treasurer II*, *supra* our Supreme Court addressed the GPTA and noted that it “does not provide an exception for property owners who are denied due process.” *Wayne Co Treasurer II*, *supra* at 9. Specifically, the Court indicated that:

the plain language of the [GPTA] simply does not permit a construction that renders the statute constitutional because the statute’s jurisdictional limitation encompasses all foreclosures, including those where there has been a failure to satisfy minimum due process requirements, as well as those situations in which constitutional notice is provided, but the property owner does not receive actual notice. [*Wayne Co Treasurer II*, *supra* at 10.]

The Court then noted that:

[i]n cases where the foreclosing governmental unit complies with the GPTA notice provisions, MCL 211.78k is not problematic. Indeed, MCL 211.78l provides in such cases a damages remedy that is not constitutionally required. However, in cases where the foreclosing entity fails to provide *constitutionally adequate* notice, MCL 211.78k permits a property owner to be deprived of the property without due process of law. Because the Legislature cannot create a statutory regime that allows for constitutional violations with no recourse, that 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. [*Id.* at 10-11 (Internal footnote omitted; emphasis in original).]

According to the above precedent, the provision limiting a party to an action for monetary damages in the Court of Claims is unconstitutional as applied to property owners who are not provided due process. On the other hand, if a property owner is provided with constitutionally adequate notice, the circuit court is without subject-matter jurisdiction to modify or vacate a judgment of foreclosure. Thus, to determine whether the circuit court in the instant case had subject-matter jurisdiction to vacate the foreclosure judgment, we must determine whether plaintiffs were provided with constitutionally adequate notice of the foreclosure proceeding.

At the time that the circuit court entered the judgment of foreclosure, MCL 211.78i(2) provided in pertinent part:

The failure of the foreclosing governmental unit to comply with any provision of this section shall not invalidate any proceeding under this act if the owner of a property interest or a person to whom a tax deed was issued is accorded the minimum due process required under the state constitution of 1963 and the constitution of the United States.

In *In re Petition by Wayne Co Treasurer for Foreclosure of Certain Lands for Unpaid Prop Taxes* (“*Wayne Co Treasurer I*”), 265 Mich App 285, 296; 698 NW2d 879 (2005), this Court stated that, in accordance with the above provision, strict compliance with the GPTA’s notice provision is not necessary. Rather, state and federal due process standards govern the adequacy of notice under the act in lieu of the specific provisions of the act. *Republic Bank v Genesee Co Treasurer*, 471 Mich 732, 737; 690 NW2d 917 (2005). Thus, the question is whether the notice “afforded the minimum due process required by the Michigan Constitution and the United States Constitution.” *Wayne Co Treasurer I*, *supra* at 296-297.

“Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner ‘notice and opportunity for hearing appropriate to the nature of the case.’” *Jones v Flowers*, 547 US 220, 223; 126 S Ct 1708; 164 L Ed 2d 415 (2006), quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 313; 70 S Ct 652; 94 L Ed 2d 865 (1950). Courts have not interpreted Michigan’s Due Process Clause more broadly than its federal counterpart. *Wayne Co Treasurer I*, *supra* at 297. “Due process does not require that a property owner receive actual notice before the government may take his property.” *Jones*, *supra* at 226. Rather, “due process requires the government to provide ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *Id.*, quoting *Mullane*, *supra* at 314.

Here, the trial court did not err in concluding that plaintiffs were denied due process. Significantly, the record shows that there existed uncertainty regarding the church’s address. Dr. Clarence B. Haddon testified that the address of the church is 8809 Schoolcraft and that 13635 Indiana was not used as an alternative address. When the plaintiffs purchased the church property in 1989, they also purchased two lots on Indiana Street near the church. The trial court accepted that when Haddon received tax notices for properties with an Indiana Street address, he associated the notices with the two lots on that street because the church did not have an Indiana Street address.

In addition, the proof of personal service indicated that 13635 Indiana was vacant land. The process server testified that he personally served the notice by posting it on a stake in the ground because 13635 Indiana was vacant property. According to a professional surveyor, however, the stake was not within the property description of the property at issue in this case, but rather, was approximately 24 or 25 feet outside the property line. Further, although notice was provided by publication, it listed the Indiana address and not 8809 Schoolcraft. Accordingly, notice pertaining to 13635 Indiana was not reasonably calculated to apprise plaintiffs of the pendency of the foreclosure action regarding the church property. *Jones*, *supra* at 226.

Further, the only notice identifying the property as 8809 Schoolcraft was sent by certified mail, but the status of that mailing was listed as “unknown” and Haddon denied receiving such notice. Testimony indicated that it was possible that the notice was never delivered. In *Jones*, *supra* 225, 234, the United States Supreme Court held that due process requires the government to take additional steps to attempt to provide notice to property owners, if it is practicable to do so, when mailed notice of a tax sale is returned unclaimed. *Jones* is not directly on point because the notice sent to 8809 Schoolcraft was not returned, but rather, it is unknown what happened to the notice. Significantly, however, it was not identified as “delivered” on the mail log. Given

these circumstances, the Wayne County Treasurer was alerted to the possibility that something had gone awry and that the notice was perhaps never delivered. Under these circumstances, it cannot be said that the notice was reasonably calculated to apprise plaintiffs of the foreclosure action. *Jones, supra* at 226. At a minimum, the county should have attempted to send another notice to the Schoolcraft address.

Synergy argues that plaintiffs recently reacquired their interest in the property because of nonpayment of property taxes and provided the county with a signed acknowledgement of a balance due. In support of its argument, however, Synergy relies on exhibits that were not presented in the circuit court. This Court's review is limited to the record established in the circuit court. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Because plaintiffs were not afforded minimum due process, the circuit court had jurisdiction to set aside the judgment of foreclosure. The court also properly voided the sale to Synergy's predecessor in interest, the auction purchaser, and reinstated plaintiffs' right to redeem the property. See *Wayne Co Treasurer I, supra* at 297.

Synergy next argues that the circuit court abused its discretion by granting plaintiffs' motion for a preliminary injunction prohibiting Synergy from taking possession of the property and staying Synergy's eviction proceeding in the 36th District Court. Because plaintiffs prevailed on the merits and the circuit court's decision was not erroneous, Synergy's challenge to the preliminary injunction is moot. See *Alliance for the Mentally Ill of Michigan v Dep't of Community Health*, 231 Mich App 647, 656; 588 NW2d 133 (1998) (challenge to a preliminary injunction is moot when a final order grants a permanent injunction). An issue is moot if it is impossible for this Court to fashion a remedy. *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003). Therefore, we decline to address Synergy's challenge to the preliminary injunctive order.

Synergy next contends that the circuit court's decision violated principles of collateral estoppel and res judicata. We disagree. The application of the doctrines of res judicata and collateral estoppel presents a question of law that we review de novo on appeal. *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 510; 679 NW2d 106 (2004); *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999).

"Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). "A decision is final when all appeals have been exhausted or when the time available for an appeal has passed." *Id.* Similarly, res judicata requires (1) a prior decision on the merits, (2) that the issue was or could have been resolved in the prior action, and (3) that both actions involve the same parties or their privies. *Adair v State of Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004); *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

The doctrines of collateral estoppel and res judicata did not bar the circuit court action. Synergy argues that the district court action resolved the dispute involving possessory rights, and thus the issue complained of in the circuit court action was resolved in the district court. The district court action, however, was an action for eviction, a summary proceeding under MCL 600.5701 *et seq.*, and plaintiffs in the circuit court action sought to set aside the judgment of

foreclosure issued in the previous foreclosure action in the circuit court. The district court did not have authority to set aside the circuit court's foreclosure judgment.

Synergy relies on *Manufacturers Hanover Mortgage Corp v Snell*, 142 Mich App 548; 370 NW2d 401 (1985), in support of its argument that the district court had subject-matter jurisdiction over equitable claims and defenses regarding the foreclosure judgment. That case, however, involved foreclosure by advertisement under MCL 600.3201 *et seq.*, which is not a judicial proceeding and does not involve state action for purposes of due process. *Id.* at 552-553. Moreover, MCL 600.8302(3),³ on which this Court relied in *Manufacturers Hanover Mortgage Corp, supra* at 554, pertains to summary proceedings to recover possession of property, such as the district court proceeding, and not to the circuit court action alleging that the actions of Wayne County denied plaintiffs their minimum due process rights. Accordingly, the issues involved in the circuit court proceeding were not resolved in the district court and could not have properly been resolved in that court. Thus, the doctrines of collateral estoppel and res judicata are inapplicable.

Further, we note that the circuit court properly vacated the district court's May 5, 2004, stipulation and order pursuant to which plaintiffs purported to transfer the property to Synergy in exchange for \$600 of plaintiffs' attorney fees. By entering the order, the district court violated the circuit court's May 3, 2004, preliminary injunctive order staying proceedings in the district court. Moreover, the circuit court reasoned that because the deed received pursuant to the property auction was voidable based on the failure to afford plaintiffs minimum due process, the subsequent settlement of the tenancy action in the district court was likewise voidable. We conclude that the circuit court's reasoning is sound.

Affirmed.

/s/ William C. Whitbeck

/s/ Helene N. White

/s/ Brian K. Zahra

³ MCL 600.8302(3) provides:

In an action under chapter 57, the district court may hear and determine an equitable claim relating to or arising under chapter 31, 33, or 38 or involving a right, interest, obligation, or title in land. The court may issue and enforce a judgment or order necessary to effectuate the court's equitable jurisdiction as provided in this subsection, including the establishment of escrow accounts and receiverships.

Chapter 57, MCL 600.5701 *et seq.*, involves summary proceedings to recover possession of property.