Matter of Lewis County
2012 NY Slip Op 33565(U)
October 18, 2012
Supreme Court, Lewis County
Docket Number: 2010-000556
Judge: Charles C. Merrell

At a term of the Supreme Court of the State of New York, held in and for the County of Lewis at Lowville, New York, on June 14, 2012.

STATE OF NEW YORK
SUPREME COURT COUNTY OF LEWIS

In the Matter of the Foreclosure of 2009 Tax Liens by Proceeding in REM pursuant to Article 11 of the Real Property Tax Law by Lewis County

AMENDED DECISION / ORDER

Index No. CA 2010-000556

APPEARANCES: Richard J. Graham, Esq.
Lewis County Attorney
Attorney for Petitioner

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Attorney for Respondent Niagara Mohawk Power Corporation d/b/a National Grid

Merrell, C.C., J.S.C.

Before the Court is a proceeding commenced by the County of Lewis (hereinafter "County") to foreclose its tax liens pursuant to Article 11 of the Real Property Tax Law. Within the foreclosure proceeding, Respondent and property owner Niagara Mohawk Power Corp. d/b/a National Grid (hereinafter "Respondent") has moved for an order:

(1) vacating a default judgment to the extent of rescinding and refunding penalties, interest and additional costs pursuant to CPLR §5015 and RPTL §1131; and

(2) enjoining the County from further actions to collect Respondent's unpaid assessments to the Hudson River Black River Regulating District (hereinafter

"District") pursuant to CPLR §6301.

BACKGROUND

The District is a public benefit corporation created pursuant to Title 21 of the Environmental Conservation Law. The District's purpose is "regulating the flow of streams" by constructing, maintaining and operating reservoirs (ECL § 15-2103). The District regulates water flow in the Black River basin and the Hudson River basin.

Each year the District determines its costs of operations. These costs are then apportioned "among the public corporations and parcels of real property benefitted, in proportion to the amount of benefit which will incur to each parcel of real estate by reason of such reservoir" (ECL § 15 - 212 [2]). The District's assessments are levied and collected pursuant to the process set forth in ECL §15-2123.

Respondent is the owner of a parcel of real property within the County and identified as Town of Lyonsdale tax parcel number 324.00-01-28.100. The District has determined that Respondent's property is benefitted by the District's regulation of the water flow. Consequently, the District apportions a share of its operating costs against the Respondent's real property.

For the years 2004 through 2008, the District mailed to the Respondent a notice of the District's expenses apportioned to the Respondent's property. The Respondent then paid the apportioned amount to the District.

In 2009, the District sent a notice of the apportioned cost to the Respondent and the Respondent did not pay the apportioned cost.

Thereafter, on November 9, 2009, the District sent to the County a "Statement

of Regular Annual Assessment for Storage Reservoirs for the Year Ending June 30, 2010 for the Black River Area of the Hudson River - Black River Regulating District." The Statement averred that the Respondent "will pay their assessment through the local tax collector." The assessment is $368.00 plus a 1% fee of $3.68 for a total of $371.68.

The District's assessment of $371.68 was included in the property tax bill for the Respondent's property due on January 1, 2010. The tax bill total was $8,875.19 including the District assessment.

The Respondent sent a check to the tax collector in the amount of $8,503.13, the amount of the entire bill less the District assessment. The County rejected and returned the Respondent's check asserting that the County is not authorized to accept a partial payment of a tax bill.

The process was repeated the following year with respect to the District's assessment for 2010.

On October 6, 2011, the County commenced this procedure to foreclose its 2009 tax liens pursuant to Real Property Tax Law §1123 and County Local Law No. 6-2004. RPTL §1125 requires service of the notice and petition of foreclosure by ordinary mail and certified mail. The County has submitted an affidavit of mailing complying with RPTL §1125, and a signed certified mail receipt from Respondent's real estate tax department.

The Respondent did not answer the Petition of Foreclosure and did not pay the amount claimed by the County. Upon the County's motion, this Court issued a default

Final Judgment of Foreclosure on April 16, 2012, and a Deed in Foreclosure dated April 18, 2012. The Judgment and the Deed included the subject parcel and various other tax delinquent parcels.

County Local Law No. 6-2004 permits a tax foreclosed property owner to repurchase their property from the County, upon payment of the applicable taxes, penalties, interest, auctioneer's fee of 10% of the purchase price, plus 5% of the full assessed value. On May 17, 2012, the Respondent paid $67,599.29 to the County to repurchase the subject property.

On June 5, 2012, the County brought an ex parte application to discontinue this foreclosure proceeding against the subject parcel. On June 8, 2012, this Court issued an Order Vacating Judgment of Foreclosure which vacated the Judgment of Foreclosure and Deed with respect to the subject parcel.

In light of the vacating of default judgment issued in this proceeding, that portion of the Respondent's motion to vacate said default judgment is moot. The Respondent has amended its request for relief to a refund of $40,625 of the purchase price and the injunction relief.

The Respondent's motion is composed of three separate arguments. First, the Respondent seeks to vacate the default judgment only with respect to the imposed penalties. Second, the Respondent asserts various arguments regarding the authority of the Courts to include the District's assessment in the tax bill. Third, the Respondent seeks to enjoin the County from including future District assessments on tax bills.

I. MOTION FOR PARTIAL VACATURE OF DEFAULT JUDGMENT

"The New York rule of thumb is that a motion to vacate a default requires two showings: (1) an excuse for the default and (2) an "affidavit of merits; as it is commonly called, in which the defendant is required to satisfy the court that she has a meritorious defense." (Siegel, New York Practice, 5th Ed. §108, page 203 citing Benadon v. Antonio, 10 AD 2d 40 [1960]).

The Respondent asserts as its excuse that the County has not proven that it complied with the service requirements of RPTL §1125. This statute requires service by certified mail and ordinary mail. The Respondent admits to service by certified mail, but alleges that the County has not proven service by ordinary mail.

The County has submitted an affidavit that the foreclosure petition was sent to Respondent by ordinary mail, and that it was not returned by the post office. That evidence is sufficient to create a presumption that the notice was mailed and received and the Respondent has submitted no evidence to rebut the presumptions (Matter of County of Herkimer (Jones), 34 AD 3d 1327 [4th Dept 2006]).

In light of the Respondent's failure to demonstrate an excuse for that default, the Respondent's motion to vacate partially the default judgment of foreclosure is denied.

II. RESPONDENT'S CHALLENGES TO COUNTY'S AUTHORITY TO INCLUDE THE DISTRICT'S ASSESSMENT ON THE TAX BILL

The Respondent argues that the County lacked the authority to levy and collect the District's assessment in the same manner as a property tax. The Respondent concludes that because the County lacked the authority to levy and collect the

District's assessment as a tax, the County should have accepted the Respondent's offer to pay the taxes properly assessed to the Respondent's property. The Respondent further asserts that the penalties and interest added to the Respondent's repurchase price were not authorized and should be returned.

Respondent begins by noting that the District's assessments are not taxes. The District's assessments are "benefit assessments" established pursuant to ECL §15-2121. As further evidence that the District's assessments are not taxes, the Respondent notes that the County did not reimburse the District for unpaid assessments, and the County does reimburse taxing authorities for unpaid taxes.

The County does not dispute the claim that the District's assessment is a benefit assessment and not a tax. The County's position is that it was obligated to levy and collect the District's assessments pursuant to ECL §15-2123.

The Respondent's crucial argument is that pursuant to E.C.L. §15-2123, the District can collect its assessments in two ways: (1) by the District's own administrative process or (2) by the County's property tax levy and collection procedure. The Respondent opines that these two methods are mutually exclusive. In other words, according to the Respondent, once the District chose to utilize its own administrative collection process, the District was not authorized to utilize the County's tax levy and collection procedure.

The Respondent's motion boils down to an interpretation of ECL §15-2123. In interpreting a statute, the legislative intent is to be ascertained from the language used, and when the words of a statute are clear and unambiguous, they should be

literally construed (McKinney's Cons. Laws of N.Y., Book I, Statutes, §§76, 94).

Section 15-2123(1) provides that after the apportionment process of 15-2121 is completed, the District shall prepare a "statement" of the parcels benefitted and their apportioned amount.

Section 15-2123(2) provides that a copy of the "statement" will be filed with the clerk of each municipality containing real estate "which is benefitted."

Section 15.2123(3) begins by discussing assessment of the District apportionments against municipal properties. The statute provides that a county "shall levy and assess" upon the county and each town specified in the District statement the amount of the apportionment to be borne by said county or town. Likewise each city and village shall levy and assess upon such city or village respectively the amount of the apportionment to be borne by said city or village.

Subdivision 3 continues by providing that the assessors of each town or city containing real property with a District assessment, shall enter "on a separate page of their assessment roll" a statement of each parcel assessed to District apportionment and the amount to be paid.

Finally, Subdivision 3 provides that each county containing land subject to a District apportionment "shall levy and assess against each such parcel...the amount specified in the statement and shall by their warrant direct the collection thereof in the same manner and by the same procedure as general taxes are collected."

Subdivision 4 provides that the amounts assessed shall remain liens upon the properties until paid. Subdivision 4 also provides that moneys collected under Section

15-2123 shall be paid to the County Treasurer who shall pay the funds to the State Comptroller. Finally, Subdivision 4 states that in the case of a default in payment, "the same penalties shall be collected as are provided in the case of failure to pay general taxes...and when collected shall be deemed a part of the assessment."

Subdivision 5 merely gives the District authority to make new assessments in the event that the amount appropriated is insufficient to pay the District's obligations.

Subdivision 6 states that, "notwithstanding the provisions of subdivision four," District apportionments "may be paid directly to the [District]." Such payments are to be made prior to October 31 of the year in which the assessment is levied. Upon receipt of such a payment, the District shall notify the "county treasurer to whom such payments would have been made under subdivision four." Subdivision 6 goes on to provide that moneys due the District, and not paid by October 31, "shall be payable to the county treasurer as provided under subdivision four...subject to a service fee of one percent of the total amount assessed." The statute also provides that the one percent service fee "shall be in addition to any penalties which may be imposed in the case of failure to pay general taxes."

It is clear to this Court that ECL Section 15-2123 Subdivision 3 and 4, read together, create a mandatory assessment levy and collection procedure. The directives to court's contained in the statute are clear, unequivocal and not subject to any judicial interpretation. Court's "shall by their warrant direct the collection (of District's assessments) in the same manner and by the same procedure as general taxes are collected."

It is also clear that Subdivision 6 establishes a non-mandatory procedure for the payment of District assessments directly to the District, i.e. “moneys required to be collected (as a District assessment) may be paid directly to the District.”

There is no language in the statute to indicate that the two collection procedures are mutually exclusive.

Consequently, this Court concludes that the County acted in accordance with the directives of ECL §15-2123. The Respondent's motion to vacate partially the default judgment issued in this proceeding is denied.

III. INJUNCTIVE RELIEF

In light of the decision set forth above that the Respondent's motion must be denied, this Court finds that the Respondent has not demonstrated a likelihood of success nor an irreparable injury as required by CPLR 6307. Consequently, Respondent's motion for an injunction must be denied.

The foregoing shall constitute the Decision and Order of this Court.

ENTER.

Dated: October 18, 2012

/s Charles C. Merrell
Hon. Charles C. Merrell, J.S.C.