STATE OF MICHIGAN

COURT OF APPEALS

STERLING BANK & TRUST, F.S.B., Plaintiff-Appellant, v CITY OF PONTIAC, Defendant-Appellee.	UNPUBLISHED August 23, 2005 No. 249689 Oakland Circuit Court LC No. 2002-042097-CZ

Before: Wilder, P.J., and Sawyer and White, JJ.

SAWYER, J. (*dissenting*).

I respectfully dissent.

Articles IV and V of the Michigan Housing Law, MCL 125.401 *et seq.*, establish requirements for building maintenance and improvements, while article VII governs enforcement of those requirements. In particular, MCL 125.538 and MCL 125.539 prohibit and define "dangerous building." Notice of a hearing to determine whether a structure is a "dangerous building" is governed by MCL 125.540(2) ("§ 140"), which states:

> The notice shall be served on the owner, agent, or lessee that is registered with the enforcing agency under section 125[, MCL 125.525]. If an owner, agent, or lessee is not registered under section 125, the *notice shall be served on each owner of or party in interest in the building or structure in whose name the property appears on the last local tax assessment records*. [Emphasis added.][1]

Plaintiff concedes that § 140(2), by its express terms, only requires notice to the taxpayer of record, which in this case was Shull, the land contract vendee. Nonetheless, plaintiff argues that because it had a significant, recorded property interest in the property, defendant's demolition of the property without notice to it violated its right to procedural due process. I agree.

[1] Plaintiff does not claim to have registered with the enforcing agency, i.e., defendant's building department. Under the plain language of § 125(2), only "[t]he owners of a multiple dwelling or rooming house containing units which will be offered to let, or to hire, for more than 6 months of a calendar year" have an obligation to register.

The determination whether there has been a violation of procedural due process requires a dual inquiry: "(1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient." *Jordan v Jarvis*, 200 Mich App 445, 448; 505 NW2d 279 (1993).

A titleholder of record such as plaintiff has a significant interest in property and, therefore, is entitled to notice of proceedings affecting the property. *Dow v Michigan*, 396 Mich 192, 202-204; 240 NW2d 450 (1976). As our Supreme Court in *Dow* stated:

> Real property interests of record are readily identifiable. Accordingly, the titleholder, Smith, was entitled to have the state employ such means "as one desirous of actually informing [her] might reasonably adopt" to notify her of the pendency of the proceedings. *Mullane v Central Hanover Bank & Trust Co* [339 US 306, 315; 70 S Ct 652; 94 L Ed 2d 865 (1950)].
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> It does not appear whether the land contract purchaser's interest of the Dows was of record. Ordinarily, a land contract purchaser of a residence is in actual possession and readily identifiable. The Dows were not in possession. The typical land contract requires the purchaser to pay taxes. It does not appear whether the tax assessor or treasurer were aware of the Dows' interests, or indeed, to whom tax bills had been sent. If their interests were of record or if the assessor or treasurer was aware of their interests, they too were entitled to have the state employ such means "as one desirous of actually informing [them] might reasonably adopt" to notify them of the pendency of the proceedings. [*Id*. at 210-211.]

The Court stated that, while notice by mail is adequate, "[m]ailed notice must be directed to an address reasonably calculated to reach *the person entitled to notice*." *Dow*, *supra* at 211 (emphasis added). "[I]t would satisfy constitutional requirements if the state were to adopt a procedure providing for (i) ordinary mail notice before sale to the person to whom tax bills have been sent and to 'occupant,' and (ii) after sale to the state, formal notice to all owners of significant property interests of the constitutionally required opportunity for hearing and redemption."[2] *Id*. at 212. The Court further stated that "[t]he burden required by the Constitution is manageable." *Id*.

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[2] Plaintiff raises an issue concerning the timing of the notice. *Dow* indicates that, "[p]utting aside the questions that might arise if the cost to the owner of redeeming after a sale were substantially in excess of the pre-sale cost of curing a delinquency," *post-deprivation* notice would be sufficient for those having a recorded ownership interest in the property. *Dow*, *supra* at 212. However, *Dow* recognized that additional due process concerns might arise in other cases. In contrast with the tax redemption involved in *Dow*, this case involves the actual destruction of a structure owned by plaintiff. Thus, it is apparent that post-deprivation notice would be inadequate to allow plaintiff to protect its interests. See *United States v James Daniel Good Real Property*, 510 US 43, 54-56; 114 S Ct 492; 126 L Ed 2d 490 (1993) (absent exigent circumstances, the seizure of real estate without prior notice is unconstitutional); see also *Himes*

(continued…)

Dow supports the conclusion that because plaintiff had a significant, recorded interest in the property in question, it was entitled to notice. Moreover, *Dow* recognizes that not all such interests will be listed in a municipality's tax rolls. Here, plaintiff's interest was recorded and, as observed in *Dow*, could easily be identified, particularly considering that plaintiff was also listed as an interested party in defendant's tax rolls. Therefore, although the notice provided by defendant complied with § 140, it was not constitutionally adequate with respect to plaintiff's recorded property interest.

The majority's reliance on *Smith v Cliffs On The Bay Condominium Ass'n*, 463 Mich 420; 617 NW2d 536 (2000), to distinguish *Dow* is misplaced. First, the Court concluded that the notice method followed was in compliance with *Dow* and therefore "constitutionally sound." *Smith, supra* at 428-429. The majority is correct that *Smith* directs the focus to whether the statutory procedure is constitutionally adequate rather than whether notice in a particular case was received and if more could have been done in such a case to make actual receipt more certain. *Id.* at 431. But this does not change the basic requirement, as recognized by *Dow, supra* at 211, that the notice must be "reasonably calculated to reach the person entitled to notice."

Smith, as well as another case relied upon by the majority, *Republic Bank v Genessee Co Treasurer*, 471 Mich 732; 690 NW2d 917 (2005), dealt with the question whether the governmental entity was obligated to seek out a more up-to-date address to which to send notice. The case at bar, however, is not concerned with whether defendant could rely upon the address appearing on the tax rolls as being the correct address to send notice to plaintiff. Rather, in this case notice was never sent to plaintiff. As actual owner of the property, plaintiff was entitled to notice.

To the extent that MCL 125.540(2) provides that notice only needs to be sent to the taxpayer of record in a "dangerous building" action and not to actual owners of record, I would hold that the statute fails to meet the minimum constitutional requirements to satisfy procedural due process requirements as discussed in *Dow*.

For these reasons, I would reverse.

/s/ David H. Sawyer

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v Flint, 38 Mich App 308, 315; 196 NW2d 321 (1972). In this case, however, *no* notice was provided to plaintiff.