[Cite as *Rokakis v. Midtown Indus. Warehouse*, 2010-Ohio-5594.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94250

JAMES ROKAKIS, AS TREASURER, ETC.

PLAINTIFF-APPELLEE

vs.

MIDTOWN INDUSTRIAL WAREHOUSE, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-578544

BEFORE: Rocco, P.J., Stewart, J., and Jones, J.

RELEASED AND JOURNALIZED: November 18, 2010

ATTORNEYS FOR APPELLANT, CITY OF CLEVELAND

Robert J. Triozzi
Director of Law

BY: Shirley A. Tomasello
Assistant Law Director
City of Cleveland
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE JAMES ROKAKIS, TREASURER

William D. Mason
Cuyahoga County Prosecutor

BY: Colleen Majeski
Anthony Giunta
Erin O'Malley
Gregory B. Rowinski
Adam D. Jutte
Assistant Prosecuting Attorneys
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE 1146 EAST 152ND CORP.

Lee A. Koosed
Stotter & Koosed Co., L.P.A.
75 Public Square
Suite 1225
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE MIDTOWN INDUSTRIAL WAREHOUSE, INC.

William F. Snyder
Snyder Associates Co., L.P.A.
20800 Center Ridge Road
Suite 211
Rocky River, Ohio 44116

ATTORNEYS FOR APPELLEE OHIO DEPARTMENT OF TAXATION

Richard Cordray
Ohio Attorney General

BY: Joseph T. Chapman
Assistant Attorney General
Collections Enforcement Section
150 East Gay Street
21st Floor
Columbus, Ohio 43215

ATTORNEY FOR APPELLEE WILLIAM F. SNYDER

Edward F. Cleary
20800 Center Ridge Road
Suite 217
Rocky River, Ohio 44116

ATTORNEY FOR AMICUS CURIAE ROBERT J. BARNES III

Clement Kollin
Kollin & Associates
4053 East 71st Street
Cleveland, Ohio 44105

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant, the city of Cleveland, appeals from a common pleas court order overruling its motion for relief from a judgment of foreclosure. The city argues, first, that the court should not have denied the city relief on the ground that the city failed to join necessary parties, but instead should have joined them. Second, the city asserts that the court's decision was erroneous because the city met the requirements for relief from judgment. Finally, the city contends that the denial of its motion deprived it of due process. We find the court erred by denying the city's motion because the underlying judgment was void for lack of personal jurisdiction. Therefore, we reverse and remand for further proceedings.

Procedural History

{¶ 2} On December 1, 2005, Cuyahoga County Treasurer James Rokakis filed his complaint for collection of delinquent taxes and for foreclosure. The complaint asserted that a delinquent land tax certificate had been filed by the county auditor that claimed a good and valid first lien in the amount of $127,114.41 for taxes, penalties, assessments, and interest due and unpaid on property located at 1146 East 152nd Street, Cleveland, Ohio. The complaint stated that Midtown Industrial Warehouse, Inc.; 1146 East 152nd Corp.; William F. Snyder; the State of Ohio, Department of Taxation;

and the city of Cleveland also claimed interests in the property that were inferior to the county's.

{¶ 3} The record discloses that the county treasurer's sole attempt to serve the city was sent by certified mail to the following address, where it was accepted by Linda McGarry on December14, 2005:

> City of Cleveland
> c/o Paul Janis
> GCRTA
> 12040 West 6th Street
> Cleveland, Ohio 44113

{¶ 4} On May 2, 2007, the magistrate entered a decision which found that "all necessary parties to this action have been duly served with summons or have entered their appearance herein or have been served by publication, which is hereby approved according to law, and are properly before the Court; and, that such defendants who have failed to answer to the complaint have by reason thereof, confessed the allegations therein contained to be true." The magistrate found the county's lien for taxes, assessments, penalties, interest, and other charges was the first and best lien and ordered the foreclosure and sale of the premises. No objections were filed. The court accepted and adopted the magistrate's decision in an order entered July 10, 2007.

{¶ 5} The property failed to attract a minimum bid at two court-ordered sales. On the county treasurer's application, the court ordered the property to be forfeited to the state pursuant to R.C. 5723.01 on March 14, 2008.

{¶ 6} On November 5, 2008, the county treasurer sought to vacate a sale of the premises that allegedly occurred on August 27, 2008, and to vacate the judgment of foreclosure entered July 10, 2007. The treasurer argued that he had failed to perfect service on the city. The purchaser, Robert Barnes, III, responded to the treasurer's motion. He argued that the city had actual notice and that there was no evidence that the city was not given proper notice. The court struck Barnes's response because he was not a party. The court further denied the treasurer's motion on July 15, 2009, finding that the city was served via certified mail, and any irregularity in service was waived when the city filed an affidavit determining that the property in question should not be classified as "non-productive land" under R.C. Chapter 5722.

{¶ 7} The city next filed a motion for relief from judgment on August 5, 2009. Its motion, like the county's, asserted that the city had not received the summons and complaint. Affidavits attached to the city's motion averred that the city's ordinary place of business was 601 Lakeside Avenue, Cleveland, Ohio, not the address to which the summons and complaint were sent. Furthermore, the city presented evidence that Paul Janis had been employed as an assistant law director for the city of Cleveland but was no longer employed there when the city filed its judgment lien against the property on February 1, 2005 or when this action was filed. The

commissioner of the city's department of community development averred that he and his staff reviewed tax delinquent properties to determine which were eligible for the city's land reutilization program and determined that this property was not eligible because of potential environmental contamination. He denied any knowledge that the city had a judgment lien on the property.

{¶ 8} The court denied the city's motion on the ground that the city had not asked to join the state auditor or the purchaser of the property as parties, so they had had no notice or opportunity to respond. The city now appeals from this decision.

Law and Analysis

{¶ 9} The city's motion alleged that the judgment upon which the sale was based was void ab initio because the court did not have personal jurisdiction over the city. This motion was a direct attack upon the judgment. Consequently, the city did not need to comply with the requirements of Civ.R. 60(B), which governs only collateral attacks upon a judgment. See, e.g., *Lincoln Tavern, Inc. v. Snader* (1956), 165 Ohio St. 61, 133 N.E.2d 606, *Rokakis v. Estate of Thomas*, Cuyahoga App. No. 89944, 2008-Ohio-5147, ¶9.

{¶ 10} "Service of process must be made in a manner reasonably calculated to apprise interested parties of the action and to afford them an

opportunity to respond." *Estate of Thomas*, supra, at ¶11. "It is not necessary that service be attempted through the most likely means of success * * *; it is sufficient that the method adopted be 'reasonably calculated' to reach its intended recipient." *Akron-Canton Regional Transit Auth. v. Swinehart* (1980), 62 Ohio St.2d 403, 406, 406 N.E.2d 811. Under Civ.R. 4.2(N), a municipal corporation must be served "by serving the officer responsible for the administration of the office, department, agency, authority, institution[,] or unit or by serving the city solicitor or comparable legal officer."

{¶ 11} The record in this case discloses that the city was served "c/o Paul Janis" at "GCRTA." As noted above, Paul Janis was formerly an assistant law director for the city. GCRTA is an acronym commonly used to refer to the Greater Cleveland Regional Transit Authority, a regional entity with no organizational relationship to the city. To further confuse matters, the address listed, 12040 West 6th Street, is not the publicly listed address for either the Regional Transit Authority or the city. Service provided in this manner was not "reasonably calculated" to reach the city, nor did it conform to Civ.R. 4.2(N). Therefore, the court failed to obtain personal jurisdiction over the city.

{¶ 12} Furthermore, we disagree with the trial court's conclusion that the city "waived" any irregularity in the service of process by filing an

affidavit concerning the land's eligibility for the city's land reutilization program. While the affidavit was prepared by a city employee, there is no evidence that the city actually filed the affidavit with the court.[1] In its motion to vacate, the city claims that the county prosecutor filed the affidavit. Therefore, the affidavit cannot be viewed as an appearance in the action that waived service of process.

{¶ 13} More important, even if the affidavit was filed by the city, we do not believe it constituted an appearance that waived service. "The only way in which a party can voluntarily submit to a court's jurisdiction * * * is by failing to raise the defense of insufficiency of service of process in a responsive pleading or by filing certain motions before any pleading. [*Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 157-58, 464 N.E.2d 538.] Only when a party submits to jurisdiction in one of these manners will the submission constitute a waiver of the defense." *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 870 N.E.2d 714, 2007-Ohio-3762, ¶13. Here, the affidavit does not constitute either a responsive pleading or a motion before pleading. Therefore, it did not waive service.

---

[1]We are not aware of any provision under R.C. Chapter 5722 that requires the city to file an affidavit or other document in a foreclosure proceeding concerning delinquent land it wishes to acquire under its land reutilization program. Rather, R.C. 5722 appears to require the city to notify the prosecutor of its selections, and this notification affects the manner in which the property is then offered for sale.

{¶ 14} Because the county treasurer failed to obtain service on the city and the city did not waive service of process, the trial court never obtained personal jurisdiction over the city. Therefore, the judgment was void. *Lincoln Tavern*, 165 Ohio St. 61. The court erred by denying the city's motion to vacate a void judgment. "Since the sale of [the] property was based on the judgment and the judgment is void on the face of the record, the sale made thereunder is also void." Id. at 69.

{¶ 15} Finally, we agree with the city that the court erred by denying its motion on the ground that it failed to join necessary parties, rather than ordering the joinder of those parties. Assuming that the state auditor and the buyer are necessary parties, Civ.R. 19 requires their joinder, if feasible. Dismissal was appropriate only if joinder is not feasible and the court determines that the party is indispensable. See *Ohio Fair Plan Underwriting Assn. v. Goldstein* (1982), 2 Ohio App.3d 313, 441 N.E.2d 1146. While joinder in a post-judgment setting is somewhat unusual, there is precedent for post-judgment intervention under Civ.R. 24. *Village of Boston Hts. v. Cerny*, Summit App. No. 23331, 2007- Ohio-2886, ¶45; *Norton v. Sanders* (1989), 62 Ohio App.3d 39.

{¶ 16} The common pleas court erred by denying the city's motion to vacate. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

It is ordered that appellants recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, PRESIDING JUDGE

MELODY J. STEWART, J., and
LARRY A. JONES, J., CONCUR