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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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89 PINE HOLLOW ROAD REALTY CORP. and YVONNE PETTINEO, as Administrator of the ESTATE OF FRANK PETTINEO,

Plaintiffs,

-against-

AMERICAN TAX FUND, FOOTHILL, GKB TAX LIEN SERVICES INC., JUMBO INVESTMENT, INC. COUNTY OF NASSAU, OFFICE OF THE COUNTY TREASURER, TOWN OF OYSTER BAY, RECEIVER OF TAXES, AFAFB, INC., GREENPOINT MORTGAGE FUNDING, INC., ANDREW WERTZ and LEHMAN BROTHERS BANK, FSB, as Assignee of GREENPOINT MORTGAGE FUNDING, INC.,

Defendants.

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Michele M. Woodard, J.S.C.
TRIAL/IAS Part 12
Index No. 1565/04
Motion Seq. Nos.: 06, 08 & 09

DECISION AND ORDER

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In motion sequence number six (6), attorneys for defendants Lehman Brothers Bank, FSB ("Lehman") n/k/a/ Aurora Bank FSB ("Aurora"), in its capacity as successor in interest by assignment from the defendant, Greenpoint Mortgage Funding, Inc. ("Greenpoint") move for an order pursuant to CPLR §3212 for summary judgment in favor of the defendants, Greenpoint, Lehman and Aurora (as their interest may appear) dismissing the Amended Complaint asserted

against them and canceling the Notice of Pendency filed by plaintiffs on February 5, 2004 against the premises located at 89 Pine Hollow Road, Oyster Bay, NY (subject property) as extended by Order of this Court.

In motion seq. number eight (8) the plaintiffs move for an order vacating the November 9, 2006 mortgage recorded against the subject property made by Greenpoint Mortgage Funding, thereafter assigned to Lehman Brothers Bank, FSB, which is now knows as Aurora Bank, FSB and pursuant to CPLR §5523, ordering restitution to plaintiffs by placing title to the premises back in the name of 89 Pine Hollow Road Realty Corp. and vacating the mortgage recorded against the premises.

In motion sequence number nine (9), American Tax Fund, ("ATF") Foothill, GKB Tax Lien Services, Inc., AFAFB, Inc. and Andrew Wertz move for an order pursuant to CPLR §3212 granting summary judgment and dismissing the Summons and Complaint of the plaintiffs in all respects on the grounds that no triable issue of fact exists and the moving defendants are entitled to judgment as a matter of law.

Plaintiff 89 Pine Hollow Road Realty Corp. ("Corporation") was the owner of real property located in Oyster Bay, NY (the subject property). The decedent Frank Pettineo was the corporation's sole shareholder until his death on March 11, 2002. (U.S. Corporate Income Tax Return Schedule E, Exhibit B of plaintiffs' Notice of Motion) The relevant facts are set forth below in *89 Pine Hollow Road Realty Corp. v American Tax Fund,* 41 AD3d 771, 772-73 [2nd Dept. June 26, 2007].

> In or about July 2000 the Nassau County Treasurer (hereinafter the County Treasurer) notified the Corporation that taxes for the subject property were overdue, and additional notices were sent

to the Corporation in October 2000 and October 2001. The validity and effectiveness of these notices are not challenged.

On or about February 20, 2001, the County Treasurer sold a tax lien on the subject property to the defendant American Tax Fund, Foothill (hereinafter ATF), at public auction. The tax lien certificate stated that the sale was "held pursuant to the provisions of the Nassau County Administrative Code." Prior to the sale, the County Treasurer was required, pursuant to Nassau County Administrative Code (hereinafter NCAC) § 5-37.0(d), to "cause notice of such tax lien to be sent by first class mail to the name and address of the record owner or occupant and mortgagee, as shown on the assessment records or on the records kept by the receiver of taxes for the town or city in which the property is located, of each tax lien to be sold." The plaintiffs do not suggest that this statutory requirement was not duly fulfilled by the County Treasurer.

At any time after the expiration of 21 months from the date of the sale of the tax lien, ATF, as the lien holder, had the right to notify the Corporation of its intent to accept conveyance of the subject property from the County Treasurer (*see* NCAC §§ 5-51.0 and 5-53.0). The notice had to include, inter alia, a date certain on or after which conveyance of the subject property could take place, which date could not be less than three months from the day of service or filing of the notice, whichever was later (*see* NCAC § 5-51.0[b][4]). Insofar as relevant to this appeal, service of the notice could validly be made by certified mail, postage paid, return receipt requested, and "[t]he receipt of the postmaster for such certified mail and the return card by the post office and the affidavit of the person mailing it, setting forth the means by which the last known address was ascertained, shall be sufficient evidence of the service of the notice" (NCAC § 5-51.0[c]).

Here, the notice in question was sent to the Corporation by ATF's agent, the defendant GKB Tax Lien Services, Inc., at the address of the subject property, on November 22, 2002, 11 days after the death of the Corporation's officer and sole shareholder, Frank Pettineo. The notice stated, in relevant part, that "[a]nyone interested in protecting his property interest can do so by paying this tax lien before 2/27/03 which is the first day of [sic] the tax lien buyer has the right to apply for a tax deed" (emphasis in original). The certified mail receipt card, however, was returned unsigned with the word "Refused" handwritten on

it, and the envelope containing the notice was returned unopened. According to the plaintiffs, the tenant at the subject premises refused to accept receipt of the notice on behalf of the Corporation. No further attempt was made to contact the Corporation.

By deed dated June 13, 2003, the County Treasurer conveyed the subject property to ATF, and, on February 10, 2005, ATF conveyed the property to a related entity, the defendant AFAFB, Inc. (hereinafter AFAFB). This litigation ensued.

On this record, AFAFB established its prima facie entitlement to judgment as a matter of law by tendering evidence that it secured conveyance of the subject property in compliance with the procedure set forth in the NCAC. In opposition, however, the plaintiffs raised a triable issue of fact as to whether the notice requirements of the NCAC, as applied to the particular facts of this case, satisfied the Corporation's constitutional right to sufficient notice (*see Jones V Flowers*, 547 US 220, 126, S. Ct. 1708, 164 L.Ed. 2d 415).

ATF and AFAFB contend, in essence, that the notice required under NCAC § 5-51.0 is irrelevant for due process purposes, because it occurs only after the owner has been notified of its tax delinquent status, and after the County's tax lien has been sold to a third party. We disagree.

A lien holder in Nassau County has up to 15 years to apply to the County Treasurer for a deed (*see* NCAC § 5-51.0[h]), and the owner of the delinquent property has an open-ended right to satisfy such lien "at any time" before the property is actually conveyed to the lien holder (*see* NCAC § 5-50.0 [a], [b]). Critically, without the notice pursuant to NCAC § 5-51.0, the owner does not-and cannot-know the date certain on or after which its property may be conveyed to the lien holder. Hence, general knowledge by the Corporation that ATF had purchased a tax lien on the subject property and therefore held a security interest in it cannot be equated with knowledge that the subject property would actually be conveyed to ATF on or after a date certain. Thus, a notice sent pursuant to NCAC § 5-51.0 must meet constitutional due process requirements, and therefore must be " 'reasonably calculated, under all the circumstances,' " to apprise the property owner of the impending conveyance and afford it an opportunity to present its objections *(Jones V Flowers, supra* at 226, quoting *Mullane v Central Hanover*

Bank & Trust Co., 339 US 306, 314, 70 S.Ct. 652, 94 L.Ed. 865).

> Under the unusual circumstances presented, including the death of the Corporation's officer and sole shareholder just 11 days before service of the notice by ATF, the constitutional adequacy of the notice ought not to be determined in this case without the benefit of a full evidentiary record.

The Notice of Pendency was reinstated with leave to renew after completion of discovery. *89 Pine Hollow Road Realty Corp. v American Tax Fund, supra.*

Prior to the above decision on April 6, 2006, plaintiffs had filed a Notice of Appeal. In April and May 2006, plaintiffs' application for a stay to have the Notice of Pendency remain in effect pending a decision on appeal were denied by the Appellate Divison. On Nov. 9, 2006 the defendant AFAFB took out a $400,000 mortgage from defendant Greenpoint.

By order dated March 20, 2008, this Court granted plaintiffs' motion for an extension of the Notice of Pendency and plaintiffs' leave to serve an Amended Complaint adding Greenpoint and its successors in interest as party defendants. In the sixth cause of action of the Amended Complaint against Greenpoint, the plaintiffs' request that the court discharge the November 9, 2006 mortgage in the amount of $400,000 given by Greenpoint to AFAFB and direct that the County Clerk remove the mortgage as a lien against the property. Greenpoint assigned the note and mortgage to defendant Lehman Brothers Bank, FSB. The assignee changed its name from Lehman Brothers Bank, FSB to Aurora FSB. As an assignee, Lehmn n/k/a/ Aurora stands in the shoes of its assignor, Greenpoint.

Discovery is complete. With a full evidentiary record the court will consider the adequacy of the Notice. On November 21, 2002 two Notices to Redeem were mailed; one

addressed to 89 Pine Hollow Road Realty Corp. and another to "John Doe" tenant in possession of the upstairs apartment. Someone had handwritten the word "refused" on the certified letter containing the Notice of Pendency. Plaintiff claims it was written by the tenant at the premises on November 22, 2002. Defendants assert there is no proof the tenant wrote the word "refused." One thing is certain. "Refused" was not written by Frank Pettineo, the sole shareholder of 89 Pine Hollow Road Realty Corp., since he died on November 11, 2002. Unlike the facts in *Matter of American Cars "R" US, Inc. v Chu,* 147 AD2d 797 (3d Dept 1989) cited by the defendant's attorney, there are no affidavits from a postal service employee providing evidence to support a finding that the letter was refused by an agent for the corporation. Copies of the envelopes mailed by certified mail are Exhibits F & G to plaintiffs' motion papers (seq. no. 8). The court notes the box marked "refused" is not checked on either envelope. There was no mailing of the Notice to Redeem by regular mail. Nor was there a posting of the Notice to Redeem by regular mail. The courts's inquiry does not stop with proof of mailing. Mr. Pettineo's death on November 11, 2002 is incontrovertible proof that he did not receive the Notice to Redeem. *See Matter of Ruggerite, Inc. v State Tax Commission,* 97 AD2d 634, 635 (3d Dept 1983). There was no effort to serve the Corporation by first-class mail or posting of the Notice at the premises. Gaspar Chiarenza, the original Administrator of the Estate of Frank Pettineo, states in his affidavit that he went to the premises three or four days after Frank Pettineo's death - On November 14th or 15th, 2002, and found that the building was locked up and that the entire place was a mess with papers scattered all around with a lot of garbage. Chiarenza states that he went back to the premises seven months later in July 2003 with Joseph S. Vona, Esq., the attorney for the Estate of Frank Pettineo.

Chiarenza states that the building continued to be locked up. When he went inside, the place was a mess with papers and garbage scattered all over the place. He states that the premises were in the same condition on November 14 or 15, 2002 as when he came back to the premises in July 2003. Supplemental Affidavit of Gaspar Chiarenza, sworn to on February 23, 2010, Exhibit A to the Reply Affidavit of Robert L. Dougherty, sworn to on February 24, 2010. It is the determination of this Court based on the full evidentiary record that the notices sent pursuant to NCAC § 5-51.0 did not meet the constitutional due process requirements reasonably calculated under all the circumstances to afford the corporation an opportunity to present its objections. *Jones v Flowers*, 547 US 220 (2006).

On or about February 10, 2005, ATFH Real Property LLC conveyed the premises to AFAFB, Inc. by quitclaim deed for $150,000. American Tax Fund paid $94,791.98 in taxes and interest to the Nassau County Treaser with respect to the subject property. A 2006 appraisal of the subject property indicated a value of $680,000. AFAFB paid approximately $530,000 less than the appraised value of the property with knowledge that an action had been filed seeking to vacate the deed and return title to the premises.

Andrew Wertz, the Principal of AFAFB, testified at his deposition as follows:

> Q. Were you aware prior to the purchase that an action had been commenced against the property in which the prior owner was seeking to have the tax deed reversed?
>
> A. I was aware there was some litigation. I'm not sure exactly what.
>
> Q. How did you become aware of what litigation – who told you about that?
>
> A. Alan –
>
> Q. What did he say to you?

> A. – Peseri... He said there's . . . there's a legal issue and I mean, thought we had a very good chance of winning.
>
> And the downside of the $150,000 investment was a $25,000 loss possibly. Should at least get our original taxes back.
>
> And the upside was another $150-200,000 in profit.
>
> I trusted him that he knew what he was talking about, and he evidently spoke to the lawyers and felt confident. (pgs. 11-12)

In order to establish as a matter of law that a party is a *bona fide* purchaser, that party has the burden of proving the he or she purchased the property for valuable consideration, and that he or she purchased it without "knowledge of facts that would lead a reasonably prudent purchaser to make inquiry" *(Berger v Polizzotto,* 148 AD2d 651 [2d Dept 1989], 539 N.Y.S. 2d 401 *lv denied* 74 NY2d 612). Defendant AFAFB was not a *bona fide* purchaser for value.

The attorneys for Lehman cite *Da Silva v Musso*, 76 NY2d 436 (1990) in support of their motion, and in opposition to the plaintiffs' motion arguing that the timing of the mortgage on November 9, 2006 is a decisive issue due to the fact that the plaintiffs, while they appealed this Court's orders, never obtained an order from this Court or the Appellate Division Second Department granting a stay of the effects of this Court's orders pending the disposition of the appeal. *Da Silva* concerned the rights of the parties and the operation of the notice of pendency procedures after an action seeking to affect the title to, or the possession, use or enjoyment of real property had terminated in a final judgment or order dismissing the claimant's complaint. In *Da Silva*, the Court of Appeals was asked to decide whether a purchaser for value who has actual notice that the unsuccessful claimant has appealed, may nonetheless take clear title to the property where the claimant's previously filed notice of pendency was cancelled. The Court of Appeals answered in the affirmative, holding in the

absence of an outstanding valid notice of pendency, the owner's ability to transfer clear title to the disputed property remains unimpaired.

In short, Greenpoint/Lehman argue that it was able to obtain a valid and enforceable mortgage in the window of time (November 9, 2006) prior to the June 26, 2007 reversal by the Second Department. This Court has hereinbefore determined that as a matter of law, the Notice of Tax Sale was defective, the sale void and the defendants' grantors at the tax sale were not purchaser's for value of the subject property. The attorney for the plaintiffs argue that the facts of the within action are similar to those in *Marcus Dairy, Inc., v Jacene Realty Corp.*, 298 AD2d 366 (2d Dept 2002) and that the result reached in *Marcus Dairy, Inc.* should apply to the within action. This Court agrees with the attorney for the plaintiffs. In *Marcus Dairy, Inc.*, Jacene gave a mortgage to the Marcus Dairy, Inc. ("Dairy") and later defaulted. The Dairy instituted a mortgage foreclosure action. The borrower defended, resulting in dismissal of the complaint, vacating of the *lis pendens* and a directive that the mortgage be cancelled and discharged of record - all quite a loss for the foreclosing lender. Although the judgment directing all this was entered in the county clerk's office, it was never recorded in the Division of Land Records and so the mortgage was not cancelled of record (even though it was what the court had decreed). Plaintiff Dairy, the mortgagee, appealed from the unpalatable judgment and sought a stay of the discharge of its mortgage. The stay was denied. Borrower Jacene later conveyed the property to Melissa Thomas, who then obtained a mortgage from a new lender. The title insurance company for the new lender found the Dairy's mortgage open in the Division of Land Records, but was willing to insure the mortgage despite notice of Dairy's prior lien. On appeal, the court reversed the initial

judgment and reinstated the earlier Dairy mortgage resulting in a new foreclosure action by Dairy wherein the new lender was named a party defendant as a result of its role as a subsequent mortgagee.

In *Marcus Dairy, Inc.*, the Second Department held that:

> Here, the plaintiff Dairy would have no effective remedy if it were to lose its priority as the mortgagee whose mortgage was first recorded. The appellant, on the other hand, has a remedy against its title insurance company which insured title without excepting the plaintiff's mortgage. Further, the plaintiff did not fail to seek a stay, but, rather, its application was denied. Consequently, the plaintiff is entitled to restoration of the rights lost by the judgment which judgment was ultimately reversed. (298 AD2d 366, 368 [2d Dept 2002])

In *Marcus Dairy, Inc.*, the Second Department discussed the equities of ordering restitution and noted that the bank who was losing its mortgage "has a remedy against its title insurance company." The same is true here. Lehman Brothers has a remedy against IntraCoastal Abstract. The title company insured the mortgage with full knowledge of the pending appeal seeking to place title to the premises back in the name of 89 Pine Hollow Road Realty Corp.

Defendant AFAFB's motion for summary judgment (sequence number 9) seeking dismissal of the Amended Complaint and vacating of the Notice of Pendency filed against the premises is **denied**. There was insufficient service of the Notice to Redeem on 89 Pine Hollow Road Realty Corp. Under these circumstances, title to the premises should be placed back in the name of 89 Pine Hollow Road Realty Corp. Lehman Brothers' motion for summary judgment (sequence number 6) seeking dismissal of the Amended Complaint and

vacating the Notice of Pendency filed against the premises is **denied**.

The plaintiffs also seek an order directing restitution. Pursuant to CPLR §5523:

> A Court reversing or modifying a final judgment or order or affirming such a reversal or modification may order restitution of property or rights lost by the judgment or order, except that where the title of a purchaser in good faith and for value would be affected, the Court may order the value or the purchase price restored or deposited in Court.

To the extent that title to the subject property is being placed back in the name of 89 Pine Hollow Road Realty Corp. and the Greenpoint mortgage is vacated, the application (motion sequence number 8) for an order of restitution is **granted**.

The corporation was dissolved by proclamation effective June 26, 2002. A dissolved corporation has no existence, either *de jure* or *de facto*, except for the sole purpose of winding up its affairs. Business Corporate Law 1006,; see also *Lodato v Greyhawk North America, LLC*, 39 AD3d 496 (2d Dept 2007) citing *Brandes Meat Corp. v Cromer,* 146 AD2d 666 (2d Dept 1989); *Bedford Hills Supply v Hubert,* 251 AD2d 438 (2d Dept 1998); *Flushing Plaza Assoc. #12 v Albert,* 31 AD3d 494 (2d Dept 2006).

Tax Law § 203-a(7)(8) permits retroactive nullification of a corporate dissolution upon payment of accrued tax arrears. Once a corporation pays back taxes, it is reinstated to *de jure* status *nunc pro tunc* and its contracts entered into during the period of delinquency would be retroactively validated. By statute, the corporate powers, rights duties and obligations are reinstated *nunc pro tunc*, as if such proclamation of dissolution had not been made or published. Tax Law § 203-a(7)(8); *Lorisa Capital Corp. v Gallo*, 119 AD2d 99 (2d Dept

1986).

Prior to conveyance of title to the plaintiffs or their successors in interest, as a condition of this order, the plaintiffs are directed to pay past due corporate franchise taxes including interest and penalties, if determined to be due by the New York State Department of Taxation and Finance; or in the event of a monetary settlement between the respective parties, prior to the disbursements of any funds to the plaintiff. The dissolution of a business corporation for failure to pay franchise taxes does not affect the corporation's right to collect or distribute its assets. Tax Law § 203-a(10); Business Corp. Law § 1006, 1009. The tax liability survives the dissolution and attaches to the real and personal property of the dissolved corporation or of a transferee liable to pay same. See Tax Law 1092(j); also *see Matter of Estate of Sullivan,* 31 AD3d 651 (2d Dept 2006). It is hereby

ORDERED, that the attorney for the plaintiff is directed to serve a copy of this order with Notice of Entry on all counsel by regular mail and on the NYS Department of Taxation and Finance, Reinstatement Unit/Bldg.-8, Rm #958, W.A. Harriman Campus, Albany, NY 12227 by certified mail, return receipt requested.

This constitutes the Decision and Order of the Court.

DATED: April 19, 2010
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.
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