

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 21

HAMID KAHEN-KASHI and
SARINA KAHEN-KASHI,

Plaintiffs,

INDEX NO.: 019607/2001
MOTION DATE: 08/16/2002
MOTION SEQUENCE: 03, 04,
05 & 06

- against -

FLORENCE RISMAN, VILLAGE OF GREAT
NECK, COUNTY CLERK OF NASSAU COUNTY,
THE BANK OF NEW YORK AS TRUSTEE FOR
CHAMPION HOME EQUITY LOAN TRUST 1996-3,

Defendants.

The following papers read on this motion:

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| Notice of Cross Motion, Affirmation & Exhibits Annexed..... | 2 |
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| Affirmation in Opposition..... | 5 |
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This motion by defendant, Florence Risman, for an order pursuant to CPLR 3211(a)1 dismissing the cross-claim asserted by co-defendant, Bank of New York as Trustee for Champion Home Equity Loan Trust 1996-3 (the Bank), on the grounds of documentary evidence, and the cross-motion by plaintiffs for leave to serve an amended complaint and for an order granting summary judgment in favor of plaintiffs on the constitutional claim asserted by the Bank, and the cross-motion by the defendant Bank for an order pursuant to CPLR 3212 granting summary judgment on the claims asserted in the Bank's pleadings, and, finally, the cross-motion by defendant, Village of Great Neck, (the Village), for an order pursuant to CPLR 3212 granting summary judgment in favor of the Village dismissing the first and third cross-claims asserted by the Bank are determined as follows.

Plaintiffs commenced this action seeking a declaratory judgment that a tax deed issued by the Village conveying title to plaintiffs' residence at 62 Rose Avenue, Great Neck, (the Premises) to defendant Risman is void. The Bank, by assignment, is the mortgagee of the Premises and has instituted an action to foreclose on the mortgage given by plaintiffs. Under the present circumstances in which this case presents it is arguable that the conveyance of the Premises to Risman by tax deed, for the price of a tax lien approximating \$1,692.81 dollars, defeats the lien of the Bank and extinguishes the debt owed the Bank, approximating \$300,000, and divests plaintiffs of title to a residential property now valued at approximately \$600,000.

The issue to be determined in the motion sub judice is whether the Village's statute pursuant to which that municipality may sell a tax lien having given notice only by publication for three weeks in a local newspaper is constitutional or is violative of the right of due process granted under the Federal and State Constitutions.

Plaintiffs entered into a mortgage loan agreement with Champion Home Equity Loan and Trust in March of 1996. Apparently the mortgage was duly recorded and was assigned to the Bank on October 25, 1996, but the assignment was not recorded until May 12, 1997.

On April 10, 1997 the Village sold a Tax lien on the Premises to defendant Risman for \$1,692.81 pursuant to RPTL §1452.

On May 9, 2000 Risman filed a Notice of Redemption of the tax lien, pursuant to RPTL § 1464. Not hearing from anyone with right or interest in the Premises, the Village conveyed title on February 28, 2001. The Risman deed was recorded on November 14, 2001.

As stated above, the sole issue with which the court is here concerned is whether the statute governing the procedure for selling the aforesaid tax lien is constitutional in the respect that it affords sufficient notice to affected persons, with an interest in the property, to satisfy due process concerns. The court finds that it does not.

The tax lien sold on the Premises was conducted under Title Three, Article 14 of the Real Property Tax Law of the State of New York. That law was repealed by the Laws of 1993, Chapter 602, effective January 1, 1995. The new law, named the new Uniform Delinquent Tax Enforcement Act (RPTL Art 11) provided that tax liens would be foreclosed by judicial proceedings. However, there was an opt out provision whereby a municipality could continue to collect delinquent property taxes pursuant to Title Three of Article 14 of the Real Property Tax Law. By the enactment of Local Law 6, in 1994, the Village did indeed opt out of the new law and proceeded according to Article 14 which required only that notice of a tax lien sale be provided by publication.

All parties rely upon Menonite Board of Missions v Adams, 462 U.S. 791 (1983). Therein the court held:

Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending

tax sale. Citations omitted. When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service.

Id at 798. The holding has been affirmed twice by the highest court of this State. See Congregation Yetev Lev D'Satmar, Inc. v County of Sullivan, 59 N.Y.2d 418 (1983) (in tax deed case due process requires notice to person with substantial interest in the property who is identifiable) and McCann v Scaduto, 71 N.Y.2d 164 (1987) (due process requires actual notice to property owner whose interest shall be substantially affected by act of government). The law as it has come down requires that the tax lien sale have a substantial or adverse effect on the property interests of a party, that the party has a substantial interest in the property, and the name and address of such party be readily ascertainable. Contrary to Risman's assertions, it is notice to the mortgagee of record which is here in issue, not notice to the Bank. The Bank, holding in trust for Champion, was a fiduciary and assignee of the mortgagee of record and was bound by the conduct of Champion. In short, actual notice is not here the concern.

This case does not involve a challenge to adherence of the prerequisites of RPTL § 1452 and Local Law # 6 by either Risman or the Village. As stated several times earlier it is strictly a challenge to the constitutionality of Local Law # 6 of 1994. In light of the holding of Mennonite Board of Missions which requires notice to a mortgagee of record, Local Law # 6 falls far short of passing constitutional muster since it requires only notice to a mortgagee of record by publication.

As a final matter, the defendant Village asserts that the Bank has no standing to assert a constitutional challenge as it has suffered no express injury. The court takes the opposite view and finds that because the Bank's mortgage lien is exposed to defeat by the lack of notice provided to the assignor of the mortgage it can show actual injury arising from the constitutionally deficient statute. Whether the Bank would have ultimately

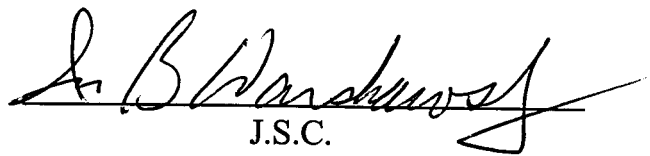
received notice is not the subject of this lawsuit. Without notice to Champion, there was only the most serendipitous of chances that the Bank would discover a tax lien sold on property to which it held a \$300,000 mortgage. Such factual scenario is violative of due process.

On the basis of the foregoing, defendant Bank's motion is granted. It is the decision of the court that Local Law 6 of 1994 is unconstitutional as violative of due process in the conduct of a tax lien sale without giving notice by mail to mortgagees of record and the tax sale deed issued to Risman relative to that certain property situate at 62 Rose Avenue, Great Neck, New York and known on the land and tax map of the County of Nassau as S 2, B 179, L138-139 is void and is hereby vacated.

Plaintiff's motion for leave to serve an amended pleading is denied as being moot. All other requests for relief not expressly addressed are denied.

Submit judgment on notice.

Dated: August 27, 2002


J.S.C.

ENTERED
SEP 05 2002
NASSAU COUNTY
COUNTY CLERKS OFFICE