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Real Property—Validity of Tax Sales

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the guarantor should not be bound beyond the express terms of his guarantee.⁴² The defendant guaranteed "expenses of foreclosure" and that means only such things as costs, fees and publication charges.

In dissenting, Judge Dye maintained that "payment of principal" means payment of the principal mortgage debt, which includes taxes paid by mortgagee. That this was the true intent of the clause is further indicated by the promise to pay "all expenses of foreclosure." Since Civil Practice Act §1087 makes all taxes which are a lien on the property sold an expense of sale, the defendant's guarantee included such taxes and assessments. Judge Dye felt that to exclude taxes which have been paid (and so are no longer a lien) would penalize the diligent mortgagee and so should not be permitted.

Although not an issue before the Court, the defendant's claim of laches on the part of the mortgagee in waiting seventeen years to foreclose was considered and rejected by the Appellate Division.⁴³ If the plaintiff had acted sooner, the amount of taxes and assessments would have been much less; the entire principal sum of the mortgage was only \$19,000.00, while the amount of taxes and assessment (and interest thereon) was \$24,442.40. The majority apparently felt that the guarantor never intended to be liable for such an amount, especially since the size of the amount was due largely to plaintiff's delay in acting.

Validity of Tax Sale

In another case involving Suffolk County, a taxpayer assailed the legality of the action of the County Board of Supervisors in buying land sold for delinquent taxes and then selling it back to the former owner for less than the amount of back taxes. Taxpayer claimed that since the mortgagee of the land had not been given notice to redeem, the County did not have title in fee and so could not convey to the former owner. The Court held, that even though the action of the Board of Supervisors was illegal, the plaintiff did not prove waste and injury to public interest, and affirmed the dismissal of the complaint.⁴⁴

Although the County purportedly was acting under statutory authority to sell⁴⁵ rather than permitting the former owner to redeem, it did not comply with the statutory requirement that a mortgagee must be notified of the right of redemption.⁴⁶ The mortgagee's right of redemption can not be cut off without

42. See *Flyer v. Elms Realty Co.* 241 App. Div. 828, 271 N. Y. Supp. 181 (1934); *aff'd* 267 N. Y. 618, 196 N. E. 608 (1935).

43. 283 App. Div. 1020, 131 N. Y. .S. 2d 141 (1st Dep't 1954).

44. *Hurley v. Tolfree*, 308 N. Y. 358, 126 N. E. 2d 279 (1955).

45. L. 1920, c. 311, §46, as added by L. 1929, c. 152, as amended by L. 1937, c. 175, §2; N. Y. Tax Law §154.

46. N. Y. TAX LAW §139.

timely notice to redeem.⁴⁷ Therefore, the mortgage continued as a lien, and the County acted illegally in selling the land.

However, the Court held that the illegality of the sale was not enough; the taxpayer was authorized to bring the action,⁴⁸ but must adduce proof of waste and injury to the public interest.⁴⁹ Since the record did not show the amount of taxes involved or the value of the land, the burden of proof of waste was not met.

Tax Deeds

The Suffolk County Tax Act⁵⁰ makes the recording of a tax deed conclusive evidence of the validity of a conveyance under a tax sale after six years from such recording. This poses no problem where a defect in the tax sale was only *procedural*; e.g., not advertising in proper newspapers.⁵¹ However, a different problem arises when there is a jurisdictional defect, such as actual payment of the allegedly "unpaid" taxes.

A statute of limitations may also bar claims based on *jurisdictional* defects, provided a reasonable time is given for the assertion of the right which may be foreclosed before the statute becomes operative.⁵² In *Cameron Estates v. Deering*,⁵³ the Court chose not to apply this rule and held, that where the original owner actually has paid the assessed taxes he may attack a tax deed even after the six year period of limitation has run. In this case, the plaintiff admittedly paid all taxes. Through error, part of the land was also assessed to others. The erroneously assessed taxes were sold to Suffolk County, which took and recorded tax deeds more than six years before this suit. The Court distinguished between a tax deed voidable for failure to comply with mandatory procedural requirements and a tax deed wholly void because the right to hold the sale never existed; i.e., there was no "non-payment" of taxes.

47. *Barzler v. Fischer*, 272 App. Div. 665, 75 N. Y. S. 2d 97 (3d Dep't 1947).

48. N. Y. GENERAL MUNICIPAL LAW §51.

49. *Western N. Y. Water Co. v. City of Buffalo*, 242 N. Y. 202, 151 N. E. 207 (1926).

50. "Every such conveyance shall be attested by the county treasurer and the seal of the county treasurer attached thereto, and when so executed shall be presumptive evidence that the sale was regular, and also presumptive evidence that all proceedings prior to the sale, . . . were regular and according to law. After six years from the date of record of any such conveyance in the Suffolk County clerk's office, such presumption shall be conclusive." SUFFOLK COUNTY TAX ACT § 53, as added by L. 1929, c. 152.

51. See *Matter of Kantor*, 280 App. Div. 605, 117 N. Y. S. 2d 110 (2d Dep't 1952).

52. *Saranac Land and Timber Co. v. Comptroller of New York*, 117 U. S. 318 (1899); see *Dunkum v. Macek Bldg. Corp.*, 256 N. Y. 275, 285, 176 N. E. 392, 396 (1931).

53. 308 N. Y. 24, 123 N. E. 2d 621 (1954).