

STATE OF MICHIGAN
COURT OF APPEALS

REPUBLIC BANK, a/k/a D & N BANK,

Plaintiff-Appellee,

v

GENESEE COUNTY TREASURER,

Defendant-Appellant.

UNPUBLISHED

April 27, 2004

No. 251072

Court of Claims

LC No. 02-000160-MZ

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) and denying defendant's motion for summary disposition. We affirm.

The central issue of this appeal is whether defendant provided sufficient notice of tax foreclosure proceedings on a piece of property on which plaintiff was the mortgagee. Defendant contends that the court of claims erred in deciding that defendant gave insufficient notice and, as a result, granted plaintiff's motion for summary disposition. We disagree.

We review de novo the trial court's decision granting summary disposition and matters of statutory construction. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30; 651 NW2d 188 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In evaluating a (C)(10) motion, a trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the opposing party. *Id.*; *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West, supra* at 183.

Defendant's first issue centers on the notice defendant sent out in January 2002. Defendant sent this notice to the address listed on the mortgage document filed with the register of deeds. However, this address was for the predecessor in interest to plaintiff (D & N Bank), which had merged with plaintiff effective December 1, 2000. Although plaintiff had a bank branch at this address in the Upper Peninsula, it was no longer plaintiff's principal place of

business. Defendant contends that this notice was sufficient to satisfy all legal requirements. We disagree.

The General Property Tax Act (GPTA), MCL 211.1 *et seq.*, states in pertinent part:

It is the intent of the legislature that the provisions of this act relating to the return, forfeiture, and foreclosure of property for delinquent taxes satisfy the minimum requirements of due process required under the constitution of this state and the constitution of the United States but that those provisions do not create new rights beyond those required under the state constitution of 1963 or the constitution of the United States. The failure of this state or a political subdivision of this state to follow a requirement of this act relating to the return, forfeiture, or foreclosure of property for delinquent taxes *shall not be construed to create a claim or cause of action against this state or a political subdivision of this state unless the minimum requirements of due process accorded under the state constitution of 1963 or the constitution of the United States are violated.* [MCL 211.78(2), emphasis added.]

The GPTA section regarding notice, MCL 211.78i(2), states in part:

The foreclosing governmental unit . . . shall determine the address reasonably calculated to apprise those owners of a property interest of the pendency of the show cause hearing . . . and the foreclosure hearing . . . and shall send notice . . . to those owners . . . by certified mail, return receipt requested, not less than 30 days before the show cause hearing . . . The failure of the foreclosing governmental unit to comply with any provision of this section shall not invalidate any proceeding under this act if the owner of a property interest or a person to whom a tax deed was issued is accorded the minimum due process required under the state constitution of 1963 and the constitution of the United States.

Under the GPTA, no cause of action exists for failure to provide the notice required unless the interested party is not afforded minimum due process. Generally, due process requires notice of the nature of the proceeding, “that the notice given be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Vincencio v Ramirez*, 211 Mich App 501, 504; 536 NW2d 280 (1995). Thus, the central question here is whether notice sent to the address for D & N Bank listed on the mortgage document was reasonably calculated to apprise plaintiff of the pendency of this action. Under the unique facts of this case, we conclude that it was not.

Three factors are considered in determining what is required by due process: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of the private interest through the procedures used, and the probable value of alternate safeguards; and, 3) the government’s interest including fiscal and administrative burdens of the alternate means or safeguards. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993), citing *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976). These factors weigh against defendant. The private interest at issue here is a substantial property interest. In contrast, the burden sought to be placed on defendant is not excessive. This is particularly true

considering the fact that defendant could have found an updated address in the local tax records. Plaintiff paid the property taxes on the property for the winter of 1999, the year 2000, and the summer of 2001, all before the foreclosure action. Thus, the nonpayment of taxes for the summer of 1999 was inconsistent with the taxpayer's payment history. Although tax payments were not paid directly to defendant but to the municipality, a search of the tax records would have given defendant an easily attainable updated address.

Defendant cites *Smith v Cliffs on the Bay Condominium Ass'n*, 463 Mich 420; 617 NW2d 536 (2000), in support of his argument. In *Smith*, the Supreme Court upheld the statutory procedure set forth in the GPTA as constitutionally sound and addressed the requirements of notice under the GPTA. The Court held that mailing tax delinquency and redemption notices to the condominium association at its last known tax address of record, in compliance with the GPTA statutory procedure, was sufficient to provide constitutionally adequate notice, even though the notice was returned as undeliverable. The *Smith* Court concluded that, "[T]he fact that one of the mailings was returned to the post office as undeliverable does not impose on the state the obligation to undertake an investigation to see if a new address for the association could be located," *id.* at 429, even though the Court noted that the state could have easily ascertained the association's new address because it would have been listed with the Corporation and Securities Bureau. *Id.* at 426, 430. However, in so holding, the *Smith* Court expressly noted that "[i]n this case there is nothing to indicate that the township, county, or state had been informed of a new address for the association." *Id.* at 429. By contrast, in the instant case, it is undisputed that the municipality was informed of a new address through the fact that plaintiff paid taxes on the property under the new name and address.

Additionally, we note that plaintiff did not receive the County Treasurer's notice under MCL 211.78f, which might have alerted it to the threatened forfeiture. While this would not, standing alone, give rise to a due process claim, it is an important factual consideration in our conclusion that the later notice failed to satisfy the requirements of due process.

In sum, under the unique circumstances of this case, the court of claims did not err in concluding that the notice given did not satisfy due process requirements.¹

Defendant also raises two issues on appeal on which he prevailed below. Namely, defendant contends that the court of claims correctly determined that the time period between the notice and the foreclosure proceedings was not so short as to raise due process concerns and that the various forms of notice in the tax act did not violate equal protection. Given that these issues were decided in defendant's favor, it is not possible for this Court to grant defendant relief, and

¹ Defendant is correct in stating that plaintiff's merger does not affect defendant's duty or rights. Nonetheless, defendant's duty to provide notice complying with due process remains the same. Further although defendant, citing MCL 211.78a(4), implies that it is plaintiff's duty to keep defendant updated regarding any address change, MCL 211.78a(4) is an optional program and does not negate the obligation to provide notice that complies with due process.

thus, these issues are moot. *City of Jackson v Thompson-McCully Co LLC*, 239 Mich App 482, 493; 608 NW2d 531 (2000).

Affirmed.

/s/ Richard Allen Griffin

/s/ Helene N. White

/s/ Pat M. Donofrio