

<b>Mittelmark v County of Saratoga</b>
2010 NY Slip Op 34043(U)
July 13, 2010
Supreme Court, Saratoga County
Docket Number: 2010649
Judge: Frank B. Williams
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK

SUPREME COURT - COUNTY OF SARATOGA

-----  
MARC MITTELMARK,

Plaintiff,

-against-

COUNTY OF SARATOGA, RIVERVIEW  
REALTY, LLC and VICTORY MILLS  
HOLDING COMPANY, LLC,

Defendants.  
-----

**ORIGINAL**

**DECISION AND ORDER**

Index No. 2010649  
RJI No. 45-1-2010-0484

**APPEARANCES:**

**HOFFMAN & NAVIASKY, PLLC**  
(Laurence Naviasky, Esq., of Counsel)  
Attorneys for Plaintiff

**SARATOGA COUNTY ATTORNEY**  
(Mark M. Rider, Esq., of Counsel)  
Attorneys for Defendant County of Saratoga

**JULES A. EPSTEIN, ESQ.**  
Attorney for Defendant Riverview Realty, LLC

**FRANK B. WILLIAMS, J.**

This action concerns real property located at 42 Gates Avenue, Victory, Town of Saratoga, New York. The complaint seeks a judgment cancelling the deed delivered by defendant Saratoga County to Riverview Realty, LLC (hereinafter referred to as Riverview), following the County's tax foreclosure of the premises. The deed conveying title to the

2010 JUL 20 PM 1:25  
SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY

**FILED**

premises to Riverview was dated and recorded in the Office of the Saratoga County Clerk on February 28, 2008. The complaint alleges that this action arises out of the tax lien foreclosure proceeding commenced in the year 2000 by Saratoga County to foreclose tax liens on the premises under Saratoga County Index No: 03514/2000.

On August 23, 2007, a judgment of foreclosure and sale was entered in the tax foreclosure proceeding. Pursuant to the terms of the judgment, Saratoga County established a bidding process soliciting bids from persons or entities interested in acquiring the premises from Saratoga County. Riverview was the successful bidder. Riverview's successful bid of \$50,000.00 to acquire the premises was accepted by Saratoga County. The \$50,000.00 consideration was paid by Riverview to Saratoga County, and the deed was executed, delivered and recorded conveying the premises from Saratoga County to Riverview.

Plaintiff commenced this action to cancel the deed nearly two years after the deed was recorded. The complaint alleges that the sale of the premises to Riverview violates RPTL 1136 (2) (a) and that the sale by Saratoga County to Riverview was unlawful and in violation of the judgment.

Riverview argues that the complaint should be dismissed pursuant to CPLR 3211 (a) (3) on the grounds that plaintiff lacks the standing to sue. Plaintiff was not a party in the underlying tax foreclosure, plaintiff did not submit a bid to purchase the premises from Saratoga County, and plaintiff held no interest in the premises at any time prior to entry of the judgment and conveyance of the deed to Riverview.

In opposition to the motion, plaintiff argues that the complaint establishes that defendant Victory Mills Holding Company, LLC (hereinafter referred to as Victory Mills) conveyed the subject premises by deed and that prior to the conveyance to plaintiff, title to the subject premises was never divested from defendant Victory Mills due to the wrongful and unlawful conduct in the tax foreclosure proceeding which purportedly attempted to convey title to defendant Riverview.

Plaintiff alleges that he was conveyed all of defendant Victory Mill's interest in the subject premises by virtue of the conveyance of a deed dated August 13, 2008 from defendant Victory Mills to plaintiff which was recorded with the Saratoga County Clerk on October 8, 2008. Plaintiff's predecessor in title, defendant Victory Mills, became the owner of the subject premises by deed from Martin Mittelmark dated July 27, 2006 and recorded with the Saratoga County Clerk on July 27, 2006. Accordingly, plaintiff argues, he holds the right and title to the subject premises and seeks the removal of the cloud on plaintiff's title associated with the Riverview deed.

Plaintiff argues that the sale of the subject premises to defendant Riverview was in violation of RPTL 1136 (2) (a) because the tax enforcing officer failed to convey title in the subject premises to defendant County of Saratoga as specifically directed by RPTL 1136.

Plaintiff further argues that the sale conducted by the Tax Enforcing Officer was unlawful because it was in violation of the judgment, which required that the subject premises be sold at auction by sealed bids "to the highest bidder, subject to the approval of

the Saratoga County Board of Supervisors.” Plaintiff states this did not occur because the Tax Enforcing Officer prohibited defendant Victory Mills and its principal Martin Mittelmark from bidding on the subject premises notwithstanding the fact defendant Victory Mills and Martin Mittelmark were ready and able to submit a bid in excess of \$50,000.00. Furthermore, the sale of the subject premises was defective due to the failure of the Tax Enforcing Officer to provide written notice of public sale to defendant Victory Mills, the owner of the subject premises at that time.

Finally, plaintiff claims he has standing because he took title from defendant Victory Mills as demonstrated by the Mittelmark deed and defendant Victory Mills took title to the subject premises as evidenced by Victory Mill’s deed in 2006 prior to the judgment in the tax foreclosure proceeding. Plaintiff argues that instead of following the directive of RPTL 1136 (3), the Tax Enforcing Officer bypassed the defendant Saratoga County and executed a deed directly to defendant Riverview. Courts have consistently held that all formal requirements governing tax sale proceedings must be scrupulously satisfied (*Arbor Secured Funding, Inc. v Just Assets NY 1*, 10 Misc 3d 1077(A)). Thus, in light of the language of RPTL 1136 (3), the tax foreclosure proceeding never divested title from defendant Victory Mills, and the Mittelmark deed passed to plaintiff a valid and enforceable interest in the subject premises.

In reply to plaintiff’s arguments that the Tax Enforcing Officer failed to serve notice of sale upon defendant Victory Mills, defendant Saratoga County argues that the Tax

Enforcing Officer was not required to serve a notice of sale on Victory Mills in the in rem proceeding. Victory Mills was not entitled to service of a notice of sale because the property was allegedly conveyed by deed from Mark Mittelmark to Victory Mills in July, 2006. Therefore, Victory Mills came into title three years after the tax foreclosure proceeding was commenced and notice of pendency filed. Additionally, Victory Mills did not serve an answer in the in rem tax foreclosure proceeding, therefore, it was not entitled to receive notice of sale.

Counsel for defendant Saratoga County states that it requested that the County Court modify its judgment from the usual form required by RPTL 1136 (3) due to the fact that the subject property is a NYSDEC designated hazardous waste site, and strict adherence to the requirement of RPTL 1136 (3) that the Judgment required Saratoga County to take title to the property would not be in the best interests of the public in that it would thereby become financially responsible for the cost of remediation of the property under the Environmental Conservation laws and regulations.

Saratoga County argues that in any event, RPTL 1136 (3) does not apply in this case, because an interested party, Consolidated Hydro New York, appeared and answered. RPTL 1136 (3) only applies "when no answer has been interposed."

The court finds that Saratoga County complied with RPTL 1124 requires public notice of foreclosure and plaintiff fails to offer any evidence to the contrary.

The court also finds that Saratoga County complied with RPTL 1136 (2) © which

requires the Tax Enforcing Officer to sell the foreclosed property at public auction.

The court further finds that RPTL 1136 (3) does not apply in this case, because an interested party, Consolidated Hydro New York, appeared and answered.

Finally, RPTL 1134 and 1137 create a rebuttable presumption that all proceedings through judgment and every deed given pursuant to RPTL Article 11 are regular and valid. Plaintiff's complaint and papers filed in opposition to the instant motion fail to rebut the presumption of regularity of the underlying in rem tax foreclosure proceeding. Additionally, plaintiff fails to present any evidence that defendant Victory Mills was entitled to notice of the sale, or that it was ready willing and able to tender payment of a bid in excess of \$50,000.00. Finally, there is no evidence that the County Board of Supervisors would have accepted a bid from his predecessor in light of the fact that the predecessor failed to pay the taxes being foreclosed. There is nothing in the papers demonstrating that plaintiff had any stake in the premises and accordingly, the motion to dismiss is granted in its entirety.

This decision shall constitute the order of the court.

DATED: ~~June~~ July 13, 2010

Saratoga Springs, New York

ENTERED

Kathleen A. Marchione

*Kathleen A. Marchione*


Saratoga County Clerk

Papers Considered:

1. Notice of Motion and Affirmation of Jule A. Epstein, Esq., dated march 17, 2010, with annexed exhibits.

2010 JUL 20 PM 1:25  
 SARATOGA COUNTY  
 CLERK'S OFFICE  
 BALLSTON SPA, NY

ENTERED

  
 \_\_\_\_\_  
 HON. FRANK B. WILLIAMS  
 JUSTICE OF THE SUPREME COURT

2. Affirmation in Opposition by Laurence Naviasky, Esq., dated April 1, 2010, with annexed exhibits.
3. Reply Affirmation by Jules A. Epstein, Esq., dated April 7, 2010, with annexed exhibits.
4. Affidavit in Support by Mark M. Rider, Esq., dated April 13, 2010, with annexed exhibits.
5. Supplemental Affirmation by Laurence Naviasky, Esq., dated April 13, 2010.
6. Supplemental Affirmation by Laurence Naviasky, Esq., dated April 22, 2010, with annexed exhibits.
7. Reply Affidavit of Mark M. Rider, Esq., dated April 30, 2010.

**The court is filing the original decision and order together with original papers in the Saratoga County Clerk's Office. Attorney for defendant Riverview Realty to comply with CPLR 2220.**