SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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BIKES BY OLGA LLC,

Plaintiff, Decision and order

- against - Index No. 506816/21

THE PEOPLE OF THE STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NYCTL 2018-A TRUST, 2017-A TRUST, NYCTL 2016-A TRUST & NYCTL 1998-2 TRUST,

Defendants, October 18, 2021

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3212 seeking summary judgement on the first two causes of action. The motion essentially seeks a summary determination that plaintiff is indeed the owner of property located at 353 Berry Street in Kings County. The City of New York cross-moved seeking to dismiss the first three causes of action. The State of New York has moved seeking a determination the foreclosure sale was void ab initio and that the State of New York is the rightful owner of the property. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On June 3, 2019 the plaintiff purchased the property at a tax foreclosure auction for $2.3 million and the deed was recorded a few days later on June 13, 2019. The City of New York acknowledged the property was being used as a parking facility

for the Department of Transportation and in light of the plaintiff's ownership of the property began negotiations for the withdrawal of such use. On December 23, 2020 the City of New York presented plaintiff with a Notice of Appropriation which demonstrated that through eminent domain the State of New York had taken possession of the property in 1992. That Notice had never been recorded against the property since a clerk at the city register's office inadvertently recorded the map against a different property. Thus, neither the plaintiff, or anyone for that matter, had notice of the appropriation. The following day, on December 24, 2020, the State of New York corrected the notice and recorded the appropriation on the correct property. A dispute arose between the parties concerning the ownership of the property. The plaintiff asserts they purchased the property without any knowledge of any other ownership issues, recorded the deed in a timely manner, prior to the State's recording and thus maintains ownership of the property. The State counters that title to the property vested with the State in 1992 and notwithstanding any error concerning the proper recording of any appropriation document the State has owned the property since then, rendering the plaintiff's deed void. These motions followed.

Conclusions of Law

Where the material facts at issue in a case are in dispute, summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). However, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Derdiarian v.Felix Contracting Inc., 51 NY2d 308, 434 NYS2d 166 [1980]).

For the State to acquire property and for such property to vest pursuant to Eminent Domain law, the State must satisfy certain requirements. First, the State must file an acquisition map (EDPL §402(A)(1)). An acquisition map is defined as a "representation of the real property acquired by either a delineation of the perimeter of the particular project covering the acquisition; together with a description of the project's perimeter boundaries and of the estate, right or interest in and to such property so acquired or an individual property map representing the estate, right or interest in and to such property so acquired" (EDPL §103(B)). Next, the State must notify the condemnees that steps are being taken to acquire the property (EDPL §402(A)(2)). Lastly, and most importantly for this case, the State must "file a certified copy of such acquisition map in the office of the county clerk or register of each county in which such property or any portion thereof is

situated, and thereupon, the acquisition of the property by the state, described in such map shall be deemed complete and title to such property shall be vested in the state" (EDPL §402(A)(2)). Thus, upon the filing of such certified copy of the map the State becomes the owner of the property (Friedenburg v. State of New York, 52 AD3d 774, 860 NYS2d 214 [2d Dept., 2008]).

The defendants argue that merely filing the acquisition map with the city register thereby vests ownership in the State even where the clerk mis-indexed the map providing no notice to anyone. The plaintiffs dispute that contention and argue the State never acquired possession of the property and thus the plaintiff is the rightful owner.

The law regarding the treatment of other instruments filed on property is instructive. There is a stark division throughout the country as to which party must suffer the loss where an error is made by the officer recording a conveyance deposited with that officer for recording. Some states are of the opinion that once a grantee deposits the instrument with the proper official the grantee has no further responsibility and such instrument constitutes notice to others regardless of whether the instrument was actually recorded or recorded on the wrong property (see, Tucker v. Shaw, 158 Ill. 326, 41 NE 914 [Supreme Court of Illinois 1895], Gillespie v. Rogers, 146 Mass. 610, 16 NE 711 [Supreme Judicial Court of Massachusetts 1888]). However, other

states, including New York, hold that a subsequent purchaser is only bound by what actually appears in the record, therefore a grantee must ensure the instrument is properly recorded (Frost v. Beekman, 1 Johns.Ch. 288, 1 NY Ch.Ann. 143 [Chancery Court of New York, 1814], *reversed on other grounds*). In Frost, the court explained that "the purchaser is not bound to attend to the correctness of the registry. It is the business of the mortgagee, and if a mistake occurs to his prejudice, the consequences of it lie between him and the clerk, and not between him and the bona fide purchaser" (id). An instrument recorded incorrectly, then, does not provide any constructive notice (Gillig v. Maass, 1 Tiffany 191, 28 NY 191 [1863]). While older law seemed to carve an exception to this rule if the index was not part of the record (see, Mutual Life Insurance Company of New York v. Dake, 42 Sickles 257, 87 NY 257 [1881]), RPL §316 has essentially eliminated that exception.

There are generally three reasons offered why a subsequent purchaser is only bound by what appears in the record and the rights of that purchaser are not subject to a wrongly filed instrument. First, the individual or entity that filed the first instrument is in the best position to ascertain whether the instrument was recorded and filed properly (Federal National Mortgage Association v. Levine-Rodriguez, 153 Misc2d 8, 579 NYS2d 975 [Supreme Court Rockland County 1991]). As the court observed

in Prouty v. Marshall, 225 Pa 570, 74 A 550 [Supreme Court of Pennsylvania 1909] one "who presents an instrument that is wrongly recorded cannot hide behind the mistake of the recorder. It is an easy matter for a mortgagee, or a grantee in each particular instance, either in person, or by a representative, to look at the record, and see that the instrument has been properly entered. The instrument itself is at hand. The names of the parties are known, and comparisons are easily made. How would it be possible for a subsequent purchaser to know anything about the facts? The duty thus imposed upon the mortgagee in this respect involves no more, and no less, than is required of a mortgagee, for his own protection, when, before the money is paid out upon the loan, an inspection of the judgment indexes is necessary to see whether or not a judgment has been entered against the mortgagor upon the same day upon which the mortgage is recorded. Some care must be exercised in every such transaction. There is every reason why it should be made the duty of the mortgagee to see that his instrument is properly recorded. This will not in any way interfere with the principle that, when the instrument is certified as recorded, it shall import notice of the contents from the time of filing; but that must be understood as in connection with an instrument properly recorded" (id).

Second, the recording officer is deemed the agent of the owner of the instrument, thus, the error is really that of the

owner (Ritchie v. Griffiths, 1 Wash 429, 25 P 341 [Supreme Court of Washington 1890]).

Third, the recorded documents express the official public record and even incorrectly filed documents are deemed to comprise the record. Therefore, the public record cannot possibly provide notice for information not contained therein.

The above cited law is presented to stress the importance that notice plays as an integral component of establishing ownership of real property. Turning to eminent domain, it is well settled that after a condemnor has successfully completed the hearing stage the condemnor must commence a vesting proceeding to formally acquire the property (In re City of New York, 6 NY3d 540, 814 NYS2d 592 [2006]). While it is true the eminent domain statute does not seem to require anything other than the mere filing of the acquisition map with the city register, the filing of such map cannot by itself permit ownership to vest. The defendants assert that filing a document "means simply to deposit it with a public office authorized to receive it" (City of New York's Memorandum of Law, page 7). The defendants further argue that "the fact that a clerk at the office of the Kings County City Register may have mistakenly indexed the property against the wrong block and lot is irrelevant. The actions of that clerk, no matter how innocent, could not effect a curtailment of the public right in the

property at issue by his or her mistake" and that "the *filing* of a certified copy of the Acquisition Map" vests ownership (State of New York's Memorandum of Law, pages 11,12). However, the nature of the filing of the acquisition map is far more nuanced. A filing, of necessity, is not the robotic delivery of the documents, without regard to what may then happen to those documents after the delivery. Rather, the filing of documents, depending on the specific case, requires the recipient of the documents, to take some positive action concerning them in furtherance of the recipient's duties. Without those concomitant duties the documents cannot be said to be filed. Indeed, the case cited by the State in support of their argument actually undermines it. In People v. Van Dyne, 12 AD3d 120, 784 NYS2d 795 [4th Dept., 2004] the court did state that "a paper is filed when it is delivered to the proper official and by him [or her] received and filed" (id). However, Van Dyne, citing Stanley v. Board of Appeals of Village of Piermont, 168 Misc 797, 5 NYS2d 956 [Supreme Court Rockland County 1938] further explained that "The object of filing is to deposit the document in a public place so that it may be seen and examined by any person interested, and there can be no filing of a paper in a legal sense except by its delivery to an official whose duty is to file papers and who is required to keep and maintain an office or other public place for their deposit" (id). The Stanley decision

further articulated that filing demands "the paper must either be delivered to such officer with the intent that the same shall be filed by him, or delivered at the place where the same should be filed" (id). The Court of Appeals is in accord. In Albany Builders' Supply Company v. Eastern Bridge & Structural Steel Co., 235 NY 432, 139 NE 565 [1923] the court explained that "a document may properly be said to be filed with [an officer] when it is placed in his official custody, and is deposited in the place where his official records and papers are usually kept" (id). The court further explained that when a government official receives a document that must be filed such documents are entered into the requisite books and there it remains. These cases clearly contemplate that more is required than merely ceding documents to the city register.

In truth, common sense compels this conclusion. The State observes, sarcastically, that "a State employee did not leap over the Register's counter, commandeer the relevant book and index the property against the wrong block and lot number" (State of New York's Memorandum of Law, page 12). That argument was presented to highlight that the delivery of the acquisition map was satisfied and that State did "what it was required to do" (id). However, consider an innocent or lazy clerk who never even processes the delivered papers at all. Those papers are 'filed' only in a feeble and careless manner as to undermine the very act

itself. Or consider the filing of documents that are then discarded by the janitor before they are even processed. Again, in a technical and acute sense the papers have been filed, however, in a real-world and legal sense there has been no change to the property. Thus, the filing cannot, by itself, mean a simple and bare delivery since that is only the first step in any meaningful filing. Rather, the clerk must process those documents and only then has the filing been completed. Therefore, where the documents are then indexed on the wrong property no filing has ever taken place.

The defendants insist this conclusion essentially requires the recording of eminent domain acquisition maps and there is no authority for such a misreading of the eminent domain statutes. Thus, in Walsh's Inc., v. County of Oswego, 9 AD2d 393, 194 NYS2d 149 [4th Dept., 1959] the court explained that where the State holds title as a proprietor then the ownership to such property must be recorded as any private individual. However, where the State owns property as a sovereign then no such recording is necessary. To be sure, the State need not record ownership of property the State holds as a sovereign. Rather, the eminent domain statues require the documents must be 'filed' and that requires more than merely dropping off the documents at a window in a government building somewhere with no regard to what happens to them afterward. To the extent the clerk's acceptance and

proper filing of the papers amounts to the same legal result as mandated by a recording statute, such similarity is merely reflective of the similar goals embedded within each statute. Those goals, of course, are to provide notice of such ownership. A distinction between recording the documents akin to the recording statute (Real Property Law §291) and the filing of the acquisition map which necessarily demands more than merely depositing the documents is difficult to discern. Nevertheless, there can really be no dispute that in both scenarios the goal of the statutes is to provide notice and therefore an inadequate filing is no filing at all.

Indeed, the very facts of this case expose the pitfalls of the defendant's arguments. Although the defendants assert the acquisition map was properly filed in 1992 the City was unaware of such and continued to assess taxes on the property for the ensuing twenty five years. Further, the City imposed tax liens and then sold those liens. Further, the New York State Department of Taxation and Finance was a defendant in the foreclosure action of those liens (see, NYCTL 2016-A Trust et al v. Berry-Bridge Corp., et al, Index Number 2657/2017) and failed to raise any objections based upon prior eminent domain ownership. Those liens were then purchased at an auction that was scheduled with all the necessary notices and procedures. The defendants characterize all these activities as errors and

mistakes. However, the mistakes were not committed by the City or the tax lien purchasers or the entire foreclosure process or the innocent purchaser. Of course the clerk made a mistake by filing the acquisition map on the wrong property. However, that mistake must inure to the State who failed to properly file the map. Therefore, there are no questions of fact the map was not properly filed. Consequently, the plaintiff validly owned the property upon the recording of the deed. Therefore, the plaintiff's motion seeking summary judgement is granted and the defendants motion seeking summary judgement is denied.

So ordered.

ENTER:

DATED: October 18, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC