

SHORT FORM ORDER

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

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X TRIAL/IAS PART 12

**FOREST GLEN REALTY LLC and GLEN COVE
PHARM LLC,**

INDEX # 609334/2017

Plaintiffs,

-against-

**Mot. Seq. 2,3
Mot. Dat 7.20.18
Submit Date 8.24.18**

T11 FUNDING, COUNTY OF NASSAU, BEAUMONT A. JEFFERSON, in his official capacity as the Treasurer of Nassau County and its Chief fiscal Officer, JAMES E. DAVIS, in his official capacity as the acting ASSESSOR OF NASSAU COUNTY and the head of the NASSAU COUNTY DEPARTMENT OF ASSESSMENT and JOHN DOE #1 through JOHN DOE #20, the last twenty names being fictitious and unknown to the plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, that may claim some right in, title to, or claim or demand against, or lien or encumbrance upon the premises, described in the Complaint.

XXX

Defendants.

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The following papers were read on this motion:

E File Docs Numbered

Notice of Motion/Cross Motion, Affidavits (Affirmations), Exhibits Annexed...	49, 60
Answering Affidavits (Affirmations).....	61, 77, 79
Reply Affidavit.....	80

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Plaintiffs Forest Glen Realty LLC and Glen Cove Pharm LLC move pursuant to CPLR 3212 for an order granting summary judgment in their favor on the first, third and fifth causes of action asserted in their verified complaint and setting aside the tax deed that was acquired by defendant T11 Funding. Defendant T11 Funding cross-moves for summary judgment in its favor, striking the complaint and all claims asserted against this defendant.

This declaratory judgment action arises out of a tax lien sale whereby defendant T11 Funding purchased tax liens on plaintiffs' property from the County of Nassau, which were subsequently converted into a tax deed by the Nassau County Treasurer. On November, 13, 2017, this court granted plaintiff's motion for a preliminary injunction, staying the action pending in District Court under the caption *T11 Funding v. Forest Glen Realty LLC, et al.*, Index No. LT-003218-17. An order effectuating the stay was subsequently entered.

Plaintiff moves for summary judgment on three causes of action. The first cause of action seeks a declaratory judgment that T11's deed is null and void as the County failed to comply with Nassau County Administrative Code Section 5-37.0. The third cause of action seeks a declaratory judgment that plaintiffs have a right to satisfy the tax lien and set aside the tax deed pursuant to Nassau County Administrative Code Section 5-57.1(d), i.e. a right of redemption. The fifth cause of action asserts that Forest Glen's right to equal protection of the law has been violated.

It is well established that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.' (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; see also *William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 475-476 [2013]; CPLR 3212[b]). Once the movant makes the proper showing, 'the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.' (*Alvarez*, 68 N.Y.2d at 324). The 'facts must be viewed in the light most favorable to the non-moving party.' (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal quotation marks omitted]). However, bald, conclusory assertions or speculation and '[a] shadowy semblance of an issue' are insufficient to defeat summary judgment (*S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 [1974]), as are merely conclusory claims. (*Putrino v. Buffalo Athletic Club*, 82 N.Y.2d 779, 781 [1993]).

(*Stonehill Capital Management, LLC v. Bank of the West*, 28 N.Y.3d 439 [2016]; see also *Fairlane Financial Corp. v. Longspaugh*, 144 AD3d 858 [2d Dept 2016]; *Phillip v. D&D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]).

Plaintiffs argue that they are entitled to summary judgment on the first cause of action because there is no evidence of record that the County either published or actually mailed required notices of tax lien sale prior to the sale of the subject property. Plaintiffs contend that they are entitled to summary judgment on their third cause of action because they have an absolute right to redeem the tax liens in the event that the lienholder takes legal action to quiet

title or enforce his/her rights to the subject property and T11 has taken such action in the landlord/tenant summary proceeding. Finally, plaintiffs contend that the County's provisions for the collection of delinquent taxes violates plaintiff's right to equal protection of the law because the Code treats commercial property owners differently than residential property owners and because it treats property owners within Nassau County's borders differently than property owners in other counties as Nassau County has opted out of the Uniform Delinquent Tax Enforcement Act of Article 11 of the RPTL.

In support of their motion, plaintiffs submit the supporting affidavit of member Donald Cantalino, who explains that at the time that the subject property was acquired by Forest Glen by purchase money mortgage, no monies were escrowed for the payment of taxes and all tax bills were originally to be mailed to Forest Glen at the home address of one of its members, Judgee Singh, at 14 Grace Drive, Westbury, New York. As in his prior affidavit, Mr. Cantalino reiterates that he first learned of an issue concerning taxes assessed against the property on or around June 6, 2017, upon receiving T11's Ten Day Notice to Quit. Mr. Cantalino further states that prior to receiving the Ten Day Notice, plaintiffs had not received any notices from the County notifying them of any impending tax lien sale.

According to the plaintiffs, during the course of discovery in this action, the County provided copies of letters dated January 6, 2015 and April 9, 2015 purportedly giving notice of the tax lien sale in February 2015. However, the County was unable to provide any confirmation that the notices were actually mailed. Finally, Mr. Cantalino states that throughout this action, plaintiff had offered to T11 to redeem the tax lien in accordance with the statute but T11 has refused such offers.

In opposition to plaintiff's motion, the County contends through an affirmation of counsel that the required notices concerning the tax lien sale were mailed in the ordinary course of business as exhibited by the copies of these notices attached to T11's cross-motion. Further, the County contends that under County Administrative Code Section 5-54.0(b)(1), the conveyance of a Treasurer's Deed is presumptive evidence that the tax lien sale was regular.

Moreover, the County argues that the plaintiff's reliance on redemption contemplated in Code Section 5-57.1 is misplaced because that section provides that an owner of a tax deed may, but is not required to commence, an action to compel determination of any claim. If no such action is commenced, the right to redeem is not triggered.

Finally, as to the fifth cause of action, the County contends that the differing treatment between residential property owners and commercial property owners is grounded upon a legitimate state interest in protecting individual residential homeowners.

By its cross-motion for summary judgment, defendant T11 contends that it provided all notices that it, as the tax lien purchaser, was required to provide and submits proof of mailing thereof. In addition, T11 attaches copies of the notices obtained from the County of Nassau

Office of the County Treasurer, all addressed to Forest Glen Realty or Current Owner, 11 Branding Iron Lane, Glen Cove NY 11542. T11 also argues that the conveyance of the tax lien gave rise to a presumption of regularity pursuant to Code Section 5-54.0.

T11 contends that plaintiff has no right to redeem based upon the landlord/tenant action because the post-deed right of redemption attaches only where the lien purchaser commences an action to quiet title as contemplated by Code Section 5-57.1, citing *In re R.A. Hendrickson Real Estate, Inc.*, 395 BR 565, 573-574 [Bankr EDNY 2008]). Finally, T11 contends that the plaintiff can establish neither an equal protection nor a due process violation on the facts of this case. T11 asserts that plaintiffs' equal protection argument is a nonstarter because service on the LLC pursuant to LLC Law Section 307 would result in mailing to the 20 Forest Ave., Glen Cove address in any event.

By its prior decision, the court set forth the relevant legal requirements concerning notice of a tax lien sale. In particular, the court noted that Nassau County Administrative Code § 5-37.0 requires that "[t]he County Treasurer *shall*, prior to the commencement of the publication required by subdivisions (b) and (c) of this section, cause notice of tax liens to be sent by first class mail to the name and address of the record owner or occupant and mortgagee of real estate on which the tax liens are to be sold" Significantly, "[a]n owner cannot be deprived of title to his property unless there has been 'strict compliance with the provisions of the tax statutes, and these statutes are to be liberally construed in the owner's favor.'" (*Liotta v. L & L Assocs. Holding Corp.*, 23 Misc. 3d 1124(A) [Sup. Ct. Nassau County 2009] [collecting cases]).

Nonetheless, Nassau County Administrative Code Section 5-54.0(b) provides that the conveyance of a tax deed by the County Treasurer shall be presumptive evidence that the sale of the tax lien was regular and that all proceedings prior to such sale were regular. Contrary to plaintiffs' contentions, such presumption has been found to be conclusive rather than rebuttable. (*Conklin v. Jablonski*, 67 Misc.2d 286 [Sup. Ct. Nassau County 1971] ["Nothing but the change in form itself indicates any intent to change the scope of the conclusive presumption [of regularity]."]]). On this basis, plaintiff's first cause of action must fail.

With respect to the plaintiffs' right of redemption, Nassau County Administrative Code Section 5-57.1, codifying an action to establish the regularity of a tax sale and the right of redemption where the lien purchaser commences an action provides:

"a. The owner, including the County, of any specific real property in the County . . . whose ownership or interest originated in or is founded upon a deed of conveyance executed by the County Treasurer pursuant to section 5-53.0 of the code, may maintain in the supreme court or in the county court of the County an action to compel the determination of any claim which any person makes or which, as appears, from the public records, any person might make to any legal or equitable estate or interest in such real property. . . .

“d. [A]ny defendant shall have the right, **and the plaintiff must in such action specially plead that he extends such right to such defendant** to set aside the deed of the Country Treasurer and to satisfy the tax lien on which such deed was based by making a satisfaction pursuant to the terms of section 5-50.0 of the code as if no deed had been issued. In addition, such defendant shall pay to the plaintiff such actual disbursements as in the judgment of the court shall be fairly attributable to such lots or parcels, the tax lien on which has been thus satisfied. Such right of satisfaction **shall terminate and cease upon the granting of final judgment.**” (emphasis supplied).

With respect to the landlord/tenant summary proceeding, the court notes that RPAPL 713(4) provides:

“A special proceeding may be maintained under this article after a ten-day notice to quit has been served upon the respondent in the manner prescribed in section 735, upon the following grounds:

“4. The property has been sold for unpaid taxes and a tax deed has been executed and delivered to the purchaser and he or any subsequent grantee, distributee or devisee claiming title through such purchaser has complied with all provisions of law precedent to the right to possession and the time of redemption by the former owner or occupant has expired.

In its prior decision, the court, relying on *Weisman v. R.A. Hendrickson Real Estate Inc.*, No. 7353/2014 [Sup. Ct. Nassau County 2005] found that although the procedural mechanism used by the tax lien purchaser, T11, was a summary hold-over petition in the District Court, the right to redeem provided by the Code should not be circumvented. In *Weisman*, Justice Dunne determined that Code Section 5-57.1(d) “represents a Special Law which must be given effect in an Article 15 Proceeding [to compel the determination of a claim to real property] and requires plaintiff in such a proceeding to extend a right to redeem” and that “[t]he Nassau Legislature, in enacting § 5-57.1(d), has determined that a defaulting taxpayer should be afforded an opportunity to redeem his or her property up to and including the institution of an action.” Contrary to T11’s argument, the bankruptcy court in *In re Hendrickson Real Estate Inc.*, 395 B.R. 565, 573-74 [Bank EDNY 2008] did not “roundly criticize[]” *Weisman*. Rather, the *Hendrickson* court merely noted that “some courts have held that even if the holder of Treasurer’s Deed brings an action pursuant to Article 15 of the RPAPL, as opposed to a Code action, the complaint must still plead that the owner has a right to redeem” while other courts have disagreed.

In this case, the court is persuaded once again by the reasoning set forth by Justice Dunne in *Weisman*. Although not a “code action,” an RPAPL § 713(4) action, like an RPAPL Article 15

action, provides another possible avenue for lien purchaser to proceed with respect to the property. As in *Weisman*, the safeguard of the right of redemption should not be “circumvented by the mere expediency of instituting an action, not on the deed as provided in the special legislation contained in the Nassau County Administrative Code, but rather, under the general provisions of RPAPL Article 15” Although the Court of Appeals in *Swindler v. Knocklong Corp.*, 305 NY 527 [1953] suggests that Code Section 5-57.1(d) notice of redemption would not by necessity extend to a partition action and that the tax lien purchaser is under no obligation to bring a code action, there are distinguishing features in this case. In *Swindler*, the court noted that the former owners could, possibly, argue that the right to redeem had not expired, they “never attempted or offered to redeem and are not doing so now.” Here, it is undisputed that the plaintiffs have offered and established readiness to redeem. For these reasons, the court finds that the right to redeem attaches to the summary proceeding under RPAPL Article 7 upon a claim of title through a tax deed issued by the County Treasurer.

Based upon the plaintiffs’ right to summary judgment under the third cause of action, the court need not reach the equal protection argument raised by the fifth cause of action. However, the court notes that the plaintiffs cite no caselaw to support their position that constitutional challenges against similar statutes differentiating between residential and commercial property owners have succeeded or that there is no legitimate state interest in the County’s differing treatment of the two types of property. (*See Nordlinger v. Hahn*, 505 U.S. 1, 10-11 [1992] [“Unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.”]; *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 US 356, 360 [1973] [differential treatment that is palpably arbitrary or invidious will violate equal protection]; *see also Supreme Associates, LLC v. Suozzi*, 34 Misc. 3d 835 [Sup. Ct. Nassau County 2011]). The County indicates that the additional safeguards afforded to residential property owners are legitimately based on protecting such owners from a loss of homestead. On this record, the plaintiffs have neither established an entitlement to summary judgment on the fifth cause of action nor submitted evidence sufficient to defendants’ entitlement to summary judgment.

For the foregoing reasons, it is hereby

ORDERED, that the plaintiffs’ motion for summary judgment is **granted** as to the third cause of action and is otherwise **denied**; and it is further

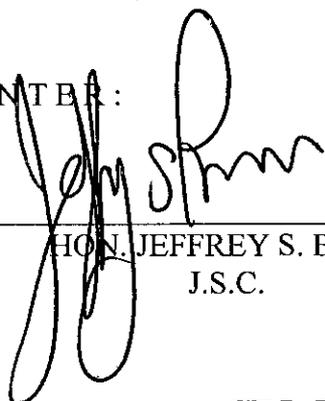
ORDERED, that the defendants' motion for summary judgment is **granted** as to the first and fifth causes of action and **denied** as to the third cause of action.

Submit judgment on notice.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
September 21, 2018

ENTERED:



HON. JEFFREY S. BROWN
J.S.C.

Attorneys for Plaintiff
Adam H. Koblenz, Esq.
Sahn Ward Coshignano, PLLC
333 Earle Ovington Blvd., Ste. 601
Uniondale, NY 11553
516-228-1300
5162280038@fax.nycourts.gov
akoblenz@swcblaw.com

Attorneys for Defendant T11 Funding
Law Office of William Yurus
25 Broadway
Pleasantville, NY 10570
914-449-6744
9144496743@fax.nycourts.gov

Attorney for County Defendants
Nicholas P. Sarandis, Esq.
Deputy County Attorney
Office of the Nassau County Attorney
One West Street
Mineola, NY 11501
516-571-3056
5165716604@fax.nycourts.gov
nsarandis@nassaucountyny.gov

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