

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

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May 15, 2019

FILE COPY

Case Name: **Richard Polonsky v Town of Bedford**
Case Number: **216-2015-CV-00388**

You are hereby notified that on May 14, 2019, the following order was entered:

RE: COURT ORDER:

See copy of Order attached. (Nicolosi, J.)

W. Michael Scanlon
Clerk of Court

(923)

C: Richard Polonsky; Barton L. Mayer, ESQ; Corey M. Belobrow, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Richard Polonsky

v.

Town of Bedford

Docket No. 216-2015-CV-00388

ORDER

The instant action arose out of the Town of Bedford's conveyance of plaintiff's property to the Town on May 31, 2011 by tax deed after he failed to pay his real estate taxes. The Supreme Court in Polonsky v. Town of Bedford, 171 N.H. 89 (2018) resolved the legality of the Town's title and remanded the case to this court. The Town now wishes to sell the property, which appears to be in both parties' best interests. Should the parties be unable to reach agreement, the Town may petition the court to lift the injunction that was issued by agreement at the start of the case.

The central issue before the court on remand is whether the statutory scheme, which, pursuant to RSA 80:90, VII, relieves a municipality, three years after the recording of the tax deed, of its duty to distribute to the former owner the "excess proceeds" of a sale, is unconstitutional under Part I, Article 12 of the NH Constitution.

By way of background, plaintiff inherited the property located at 21 Wentworth Drive in Bedford, New Hampshire in 2008. Plaintiff thereafter became delinquent on his property taxes and, in February 2009, the Town mailed him a notice of impending tax lien. The Town issued tax liens in 2009 and 2010 and, following plaintiff's continued non-payment, the Town acquired the property via tax deed on May 31, 2011. Between

2013 and 2015, plaintiff made multiple offers to repurchase the property through payment of the back taxes only—not the corresponding costs and penalties—and the Town declined each offer. Being unable to reach agreement, Mr. Polonsky filed this lawsuit challenging the validity of the Town’s title and alternative to recover the excess proceeds from any sale. At the time of the tax deed, the property had substantial value over the amount due the town.

The New Hampshire Supreme Court recently held that the express language of RSA 80:89 demonstrates that “the legislature did not intend to allow a former owner to recover excess proceeds from a municipality after the three-year period has lapsed.” Polonsky v. Town of Bedford, 171 N.H. at 96. Here, it is undisputed that the Town acquired the property via tax deed on May 31, 2011, and, because the property was not sold, the three-year period for Mr. Polonsky to recover excess proceeds has lapsed. The court must determine whether applying RSA 80:89 in the instant case, which would result in plaintiff being deprived of a \$300,000 property for a \$90,442.42 tax lien, without compensation, constitutes an unconstitutional taking, as plaintiff contends. The Town counters in opposition that the legislature, via RSA 80:89, placed reasonable restrictions on a former owner’s ability to challenge a government taking and provided an adequate opportunity for a former owner to repurchase. It faults plaintiff for either failing to repurchase the property or to seek equitable relief from the court to compel a sale before the three-year period lapsed.

“Part I, Article 12 of the New Hampshire Constitution provides that ‘no part of a man’s property shall be taken from him, or applied to public uses, without his consent, or that of the representative body of the people.’” Thomas Tool Servs., Inc. v. Town of

Croydon, 145 N.H. 218, 220 (2000), as amended (Feb. 1, 2001). “This provision requires just compensation in the event of a taking.” Id. “Because the right to property is a fundamental right in our State, all subsequent grants of power, including the taxing power, are limited as to how they adversely affect it.” Id.

The Supreme Court identified two preliminary questions to be addressed on remand: 1. “whether the plaintiff has a vested property right that was taken from him without his consent[?]” and [2.] “if so, when [did] the taking occur[?]” Polonsky v. Town of Bedford, 171 N.H. at 97. The court answers the first question in the affirmative. There is no dispute Mr. Polonsky was the record owner of the home with significant equity in it at the time it was deeded to the Town without his consent. Secondly, again without dispute, the court finds the taking occurred when the tax deed was issued and no compensation was received by Mr. Polonsky. At that point, although he had a right to repurchase and to excess proceeds of a sale should it be sold within the three-year period, the statutory scheme allows the Town to utilize the property, after the tax deed issues, as fee owner, including leasing or encumbering the property or retaining it forever. RSA 80:91. Mr. Polansky’s right to repurchase is more akin to an option to purchase, without any right to enjoy, encumber, lease or convey the real estate.

The court now turns to the question of whether the current statutory scheme is constitutionally offensive. The court notes the statutory scheme contains no provision for a former owner to obtain a sum representing the difference between the fair value of the property and what the Town is due, nor does it provide a mechanism to compel the Town to sell. In Thomas Tool Services, the Supreme Court held that the then-alternative tax lien procedure, which permitted the Town to keep a former owner’s

property without regard to its equity in it, violated the takings clause. Id. In that case, the Town of Croydon acquired Thomas Tool's property for \$370.26—the amount of the tax lien on the property. Id. This was despite Thomas Tool having paid at least \$65,000 for the property, an amount substantially greater than the tax lien. Id. In holding the procedure unconstitutional, the Supreme Court observed that the amount of surplus value the Town would realize would result “in an unduly harsh penalty.” Id.

This concern regarding government takings without just compensation was previously raised by Justice Horton in his concurrence in First NH Bank v. Town of Windham, 138 N.H. 319 (1994). Although the majority decided the case on due process grounds, Justice Horton took the time to analyze the takings issue, explaining that:

[He] would hold that the statutory alternative tax lien procedure is constitutional only if it is read to provide for taking of the taxable property only to the extent of the lien. Following the tax lien deeding for a period not barred by laches, I would permit an interested party, owner, mortgagee, attaching creditor, mechanic's lien holder, or other party having rights in the deeded real estate to petition in equity for an accounting by the taxing authority and for the return, in priority and as equitable, of a sum equal to the excess of the land value, at the time of taking, over the amount of the taxes and charges accrued at taking. Such a construction, combined with supplementary procedure, would permit the statutory procedure to withstand constitutional challenge and would provide for collection of taxes properly due and for the integrity of titles conveyed by tax lien deed.

Id. at 332 (Horton, J., concurring). The Town contends that amended RSA 80:89, which post-dates First NH Bank, addressed Justice Horton's concerns, because it set a reasonable period, no different from a statute of limitations, during which a former owner could repurchase the real estate or appeal to the court to exercise its equitable powers to compel a sale. The court disagrees the right to repurchase satisfies the concern, or

that a motion to compel a sale would be almost automatically granted by a court in equity, as Town counsel contends. First, even if a property owner knew to seek equitable relief, forcing a sale would be directly contrary to statute. RSA 80:91 reads: "Nothing in this chapter shall obligate a municipality to dispose of property acquired by tax deed, except as provided in RSA 80:89. RSA 80:89 contains no duty on the part of the municipality to sell, but rather sets out a procedure should the municipality decide to sell the property within the three-year period for sale and corresponding duty to distribute excess proceeds. Gordonville Corp. N.V. v. LR1-A Ltd. P'ship, 151 N.H. 371, 374 (2004). Moreover, the statute provides no mechanism for compensation of the former owner during or after the three-year period in the event there is no sale. Although the legislature could have written the law to provide a time period in which a former owner must demand just compensation or a sale, after which the former owner's rights would be lost, it did not. The legislative fix, therefore, was partial at best.

The court finds no opportunistic motive or misconduct on the part of the town of Bedford; nonetheless, the scheme in place allows a municipality to receive a benefit beyond what it is entitled by delaying a sale or retaining a property for its use whatever its motive. Although RSA 80:89 expressly creates a statutory right for the former owner to repurchase his or her property and a detailed process to do so, for one who is unable to marshal the funds to pay the taxes, interest, costs and penalties, the right to repurchase, without a corresponding right to compensation in the event no sale takes place, is hollow. Likewise, the fact that Bedford and other towns have been or might be reasonable in their negotiations with former owners for the sale to others or repurchase of a tax deeded property does not cure the deficiency. Here, the Town has not chosen

to compensate Mr. Polonsky for his remainder interest in the property, Mr. Polonsky has not paid what is owed and repurchased the property, and the parties have been unable to reach a mutually acceptable alternative arrangement.

The Town argues the statutory scheme is not unconstitutional because a former owner has an implied right to compel the sale of the property within three years of the tax deeding that can be found in the language of RSA 80:89.¹ The Town points to the statute's imposition of a duty on the municipality to distribute the excess sale proceeds to the former owner and contends that the creation of such a duty creates a corresponding right on behalf of the former owner of compelled sale. However, the municipality's duty with regard to excess proceeds is a contingent one that does not arise until a sale takes place, a decision left wholly to the discretion of the Town. Therefore, because the municipality's duty to distribute the excess proceeds is not triggered until the property is actually sold, it stands to reason that any corresponding right of the former property owner does not materialize until the same event occurs. Thus, there is no right to protect.

The Town finally argues that plaintiff is not entitled to an equitable order because he does not come to the court with clean hands. It asserts plaintiff willfully ignored his obligations, including failing to pay his taxes, take any steps towards repurchasing the property, or coming to a deal with the Town. However, the court is unpersuaded by this argument. Under the statutory scheme, a former owner who does not pay his or her

¹ During the hearing, there was some discussion initiated by the court about whether a person in plaintiff's shoes could seek an equitable remedy comparable to partition, which might force a sale or payment to a former owner the fair value of his interest in the property. However, upon further reflection, the court concludes that partition is not available, because, as discussed above, once the tax deed issues, the former owner has no ownership or equitable right to partition. see First Bank, 138 N.H. at 323 ("[T]he issuance of the [tax] deed annihilates the previous owner's interest in the property [The Town] takes a 100 percent common and undivided interest in the property").

taxes and who also chooses not to repurchase his or her property suffers the loss of the property, but is still entitled to the excess proceeds of the municipality's sale of the property, as long as the sale occurs within three years of the date of the tax deed. See RSA 80:89. His same actions do not preclude relief. Therefore, the court finds plaintiff's failure to timely pay his taxes, repurchase his former property or avail himself of tax relief does not preclude him from seeking equitable relief from this court.

Accordingly, because any right of the former property owner to recover excess proceeds under RSA 80:89 is contingent upon the municipality selling the former owner's property and the former owner is otherwise unable to compel the municipality to sell the property or recover an amount representing the difference between the property value and the amount owed to the town, the court finds the statute violates the takings clause of the New Hampshire Constitution. To remedy the violation, the court holds that Mr. Polonsky is entitled to the excess proceeds of the sale after payment of the amount owed to the Town.

Having determined plaintiff is entitled to recover any excess proceeds that result from the sale of his former property, the court must determine what, if any, additional penalty should be assessed in calculating the excess. RSA 80:88, I provides that "the municipality's recovery of proceeds from the sale shall be limited to back taxes, interest, costs and penalty, as defined by RSA 80:90. The current version of RSA 80:90 (f), amended in 2016, provides for "[a]n additional penalty equal in amount to 10 percent of the assessed value of the property as of the date of the tax deed, adjusted by the equalization ratio for the year of the assessment." At the time the Town acquired plaintiff's property via tax deed in 2011, RSA 80:90 provided for a 15 percent penalty.

The 2016 amendment included an additional change to the statutory scheme. Prior to the 2016 amendment, the penalty was assessed upon a municipality's transfer of the tax-deeded property, regardless of whether the former owner exercised the right to repurchase under RSA 80:89 or upon sale. RSA 80:89, II, however, now provides an exception for former owners who repurchase. It reads:

any former owner of the property[,after receiving notice of the terms of the offering for sale and right to repurchase from the municipality,] may give notice [] of intent to repurchase the property from the municipality, and stating that such owner is ready, willing and able to pay all back taxes, interest, costs and penalty, as defined in RSA 80:90, except that if the property is the former owner's principal residence, or was the former owner's principal residence at the time of the execution of the tax deed under RSA 80:76, the additional penalty under RSA 80:90, I (f) shall not apply.

(Emphasis added).

Before oral argument, the Supreme Court remanded the case to the trial court for a decision on two points:

(1) the impact, if any, of the statutory changes contained within the laws 2016, chapter 37, upon [the trial court's] analysis of the party's rights and obligation, and (2) whether such statutory changes may be applied in this case consistent with part 16[,] article 23 of the New Hampshire Constitution.

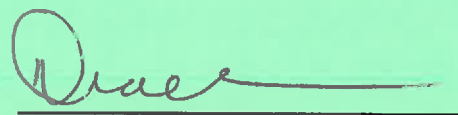
Super. Ct. Order, January 24, 2017. The trial court (Ruoff, J.), after briefing, decided the 2016 penalty exception for former owners who repurchased their tax-deed property had no application to this case, because Mr. Polonsky did not exercise his right to repurchase and the option has passed. With regard to the percentage change, the trial court found, upon sale, the 10% penalty would apply without contravening part 16, article 23 of the state constitution, which prohibits the retroactive application of certain

laws. Judge Ruoff reasoned that, because the relevant point in time for the calculation of the penalty is upon sale, which has not yet occurred, the law in effect at the time of sale would apply. Although the Supreme Court chose not to review these rulings on appeal, they remain the law of the case and will not be revisited here.

The remaining question is whether the imposition of the RSA 80:90 penalty would constitute double taxation as Mr. Polonsky contends. The court concludes it would not. A real estate tax serves the purpose to raise funds to pay for services provided by a municipality to citizens and property owners. A penalty, on the other hand, exists to encourage tax payers to meet their legal obligations and comply with the law. With regard to RSA 80:90, considering a typical sales broker's fee, the legislature reasonably determined a 10% penalty was appropriate to deter a property owner from using the alternative lien process as an alternative to a private sale process.

SO ORDERED.

5/14/2019
Date



Diane M. Nicolosi
Presiding Justice