

Town of Niskayuna v Joll
2020 NY Slip Op 32408(U)
May 4, 2020
Supreme Court, Schenectady County
Docket Number: 2019-2498
Judge: Michael R. Cuevas
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STATE OF NEW YORK
COUNTY OF SCHENECTADY

SUPREME COURT

**PRESENT: HON. MICHAEL R. CUEVAS
JUSTICE OF THE SUPREME COURT**

TOWN OF NISKAYUNA,

DECISION AND ORDER

Petitioner,

Index No.: 2019-2498

-against-

POMPEI A. JOLL and DONALD R. JOLL,

Respondents.

PROPERTY SUBJECT TO 1019 Van Antwerp Road
ABANDONMENT: Niskayuna, New York 12309

NOTICE:

PURSUANT TO ARTICLE 55 OF THE CIVIL PRACTICE LAW AND RULES, AN APPEAL FROM THIS JUDGMENT MUST BE TAKEN WITHIN 30 DAYS AFTER SERVICE BY A PARTY UPON THE APPELLANT OF A COPY OF THE JUDGMENT WITH PROOF OF ENTRY EXCEPT THAT WHERE SERVICE OF THE JUDGMENT IS BY MAIL PURSUANT TO RULE 2103 (B)(2) OR 2103 (B)(6), THE ADDITIONAL DAYS PROVIDED SHALL APPLY, REGARDLESS OF WHICH PARTY SERVES THE JUDGMENT WITH NOTICE OF ENTRY.

APPEARANCES:

Alexis E. Kim, Esq., Deputy Town Attorney, Town of Niskayuna, New York (Petitioner)

MICHAEL R. CUEVAS, J.

INTRODUCTION

The Town of Niskayuna (“Niskayuna”) seeks relief pursuant to Real Property Actions and Proceeding Law (“RPAPL”) Article 19-A. Niskayuna specifically requests that this Court declare 1019 Van Antwerp Road, Niskayuna, New York 12309 (“the premises”)

abandoned, and vest title in fee simple absolute to Niskayuna under RPAPL Section 1974.

FACTUAL AND PROCEDURAL BACKGROUND

Niskayuna alleges in its verified complaint that Donald R. Joll and Pompei A. Joll (the “Jolls”) are deceased individuals and are the documented owners of 1019 Van Antwerp Road, Niskayuna, New York 12309. *Verified Petition* ¶6. The property was conveyed to the Jolls by deed dated August 12, 1984, recorded on or around August 20, 1984. *Verified Petition* ¶10. Donald R. Joll died in March 2006, leaving Pompei A. Joll as the sole owner of the property. *Verified Petition* ¶7. In April, 2017, Pompei A. Joll was found dead inside the premises. *Verified Petition* ¶8.

Niskayuna alleges the premises has been vacant since April 2017, when it was condemned by the Building Department for the Town of Niskayuna and deemed unfit for human occupancy due to property maintenance violations.¹ *Verified Petition* ¶2. The premises were boarded up and padlocks were installed on the doors. *Verified Petition* ¶2. The premises have been guarded since that time. *Verified Petition* ¶2.

Niskayuna further contends that property taxes are due for 2017, 2018, and 2019. *Verified Petition* ¶2. They also note that the value of the property has declined by 73% in three years and that the condition of the premises is harming the community and driving down surrounding property values and burdening taxpayers. *Verified Petition* ¶2.

Niskayuna commenced a special proceeding *via* a verified petition sworn to on February 13, 2020. *Kim Aff.* ¶23. Niskayuna alleges that it served notice of abandonment and that no party served with notice of abandonment has taken any actions under RPAPL. *Kim Aff.* ¶2. RPAPL Section 1972 (1) mandates that a copy of the certification of abandonment be filed with the county clerk where the dwelling is located with a notice of

¹ Niskayuna also prepared a statement of findings and facts to support the Building Departments designation that the premises was abandoned. *Petition* ¶19, Ex. C.

intention to commence a special proceeding. *Kim Aff.* ¶3. The notice is required to contain the names of every individual to be served under RPAPL Section 1972, including the owner of the dwelling. *Kim Aff.* ¶3. This includes: “each mortgagee, lienor and lessee of record” and “claimant as shown on records maintained by any city official required by any local law to maintain records of persons entitled to notice or process in connection with the maintenance of *in rem* foreclosure actions.” RPAPL §§1972 (2), 1972 (3). Such notice is to comply with the mandates detailed in CPLR Section 6511 (b).

On November 7, 2019, Niskayuna filed with the Schenectady County Clerk’s office a notice of pendency of action against respondents Pompeii A. Joll and Donald R. Joll (“Jolls”) and the premises. *Kim Aff.* ¶¶4, 5. Niskayuna indicates that it directed the Clerk to index the notice against the Jolls, the only parties required to be served by RPAPL §1972. *Kim Aff.* ¶4. Niskayuna contends that the notice of pendency of action contains the names of all parties required to be served by RPAPL §1972, i.e. the record owners—the Jolls. *Kim Aff.* ¶¶3,7, 8, 20, Ex. H. Counsel for Niskayuna indicates that she confirmed with the Schenectady County Surrogate’s Court on August 22, 2019, that there were no cases pending involving the Jolls. *Kim Aff.* ¶9.

The Niskayuna Police Department prepared an incident report regarding the death of Pompeii A. Joll in April 2017. *Kim Aff.* ¶10, Petition Ex. C. The report identifies Christine McCabe, Lisa McCabe, and Anthony McCabe as relatives of Pompeii A. Joll. *Kim Aff.* ¶10, Petition Ex. C. Counsel for Niskayuna provided copies of the certification and notice of certification of abandonment to Christine McCabe (Hockeberger), Lisa McCabe, and Teri Lomonocco (Pompeii A. Joll’s niece). *Kim Aff.* ¶¶12, 13, 14, Exs. C, D, E. The Certification of abandonment explains the basis for the designation as abandoned, “it is crime to take, remove, or otherwise damage any fixture or part of the building structure,” and explains that the “Office of the Town Attorney will commence a proceeding in the Schenectady County Supreme Court in order to obtain a deed conveying title to the Town of Niskayuna pursuant to RPAPL Article 19-a unless the owner notifies the Building

Department that this dwelling is not abandoned.” *Verified Petition* ¶2. Niskayuna asserts that all of the individuals contacted claimed no interest in the property. *Kim Aff.* ¶¶13, 14, 15, Exs. D, E.

Niskayuna alleges that its Code Enforcement officer posted copies of the certification of abandonment in “conspicuous” places at the premises on August 23, 2019. *Kim Aff.* ¶17, Ex. G. The certificate specified that the dwelling has been found to be abandoned and stated that “it is a crime to take, remove, or otherwise damage any fixture or part of the building structure.” *Petition* ¶¶16, 17, Exs. A,B. Moreover, the certificate stated “after properly notifying all interested parties, the office of the Town Attorney will commence a proceeding in the Schenectady County Supreme Court in order to obtain a deed conveying title to the Town of Niskayuna pursuant to RPAPL Article 19-a unless the owner notifies the Building Department that this dwelling is not abandoned.” *Petition* ¶¶16, 17, Exs. A, B. The Building Department thereafter on August 26, 2019, sent a copy of the certification of abandonment by certified mail to the last known owner (the Jolls) at the last known address (“the premises”). *Kim Aff.* ¶17, Ex. F.

On November 7, 2019, Niskayuna filed a notice of pendency of action (*lis pendens*) against the Jolls and the premises. *Petition* ¶23, Ex. E. The notice of pendency indicates that Niskayuna seeks an order declaring the premises abandoned and a judgment authorizing the town to execute and record a deed conveying title in fee simple absolute. *Petition* ¶23, Ex. E. The notice of pendency was mailed to the Jolls at the premises. *Petition* ¶24. The notice of pendency was also affixed to the premises. *Petition* ¶24. The notices provide that the property owners have thirty days from the date of the notice to notify the town that the property was not abandoned. RPAPL §1972 (2). The Town of Niskayuna argues that since “[n]o person served or contacted as described herein has taken the appropriate action prescribed in response thereto” that their requested relief shall be granted. *Kim Aff.* ¶23. Further, that since all provisions of RPAPL Section 1972

have been complied with, that Section 1973 (1) allows the proceeding for declaration of abandonment and execution of title to occur.

THE LAW AND DISCUSSION

A. FAILURE TO OBTAIN PERSONAL JURISDICTION

Petitioner has the burden to establish personal jurisdiction over a respondent. *OCI Mortgage Corp. v. Omar*, 232 A.D. 2d 462 (2d Dept. 1996), *Janko Pool Service, Inc. v. Berelson*, 145 A.D. 2d 897 (3d Dept. 1988), *Skyline Agency, Inc. v. Ambrose Coppotelli, Inc.*, 117 A.D. 2d 135 (2d Dept. 1986). When an individual dies, personal jurisdiction over that deceased individual cannot be obtained. *1 Warren's Weed New York Real Property §3.05 (2020) (Executors and Administrators)*, citing to *EPTL §11-3.3*. In the case of a real property action, the lawsuit survives the death, but the executor or administrator of the decedent's estate, in a representative capacity, becomes the proper party to the action. *Id.*

“It is fundamental that the representative party must actually be appointed prior to the commencement of the action.” If a party defendant dies during the pendency of an action, his personal representative may be substituted upon application of any party; in order for jurisdiction to be acquired properly, the personal representative must then be served with process in the action.”

Id., citing to *Hemphill v. Rock*, 87 A.D. 2d 836 (2d 1982), *CPLR§1021*. Where the party petitioning for the appointment of an administrator for a deceased party is unable to identify the next of kin willing to serve as a personal representative, the county administrator of the county, in which the decedent died a resident, is the appropriate party to nominate as personal representative of the decedent. *Id.*, citing to *SCPA §311*. The Surrogate's Court is the proper venue to decide what happens to a deceased individual's property, and for appointment of a personal representative.² Where the Court finds that

² See, <http://www.nycourts.gov/courthelp/WhenSomeoneDies/index.shtml>;
<http://www.nycourts.gov/courthelp/WhenSomeoneDies/Intestacy.shtml>.

jurisdiction is not proper, it may dismiss a proceeding *sua sponte*. *Robinson v. Oceanic Steam Nav. Co.*, 112 N.Y. 315, 324 (1889), *CPLR*§1021. Because Petitioner failed to obtain personal jurisdiction by applying for a personal representative through Surrogate's Court, dismissal is warranted.

B. FAILURE TO COMPLY WITH RPAPL ARTICLE 19-A AND DUE PROCESS

In this special proceeding, the Town of Niskayuna seeks an order and judgment of the Court declaring the real property owned by Pompei A. Joll at the time of her death in 2017, as abandoned. Additionally, the Town seeks an order directing fee simple absolute title in favor of the Town, pursuant to RPAPL 1975. In order for the declaration of abandonment and grant of fee simple absolute title to occur, RPAPL Article 19-a requires the moving party to follow several procedural steps. Niskayuna alleges it followed this procedure.

Under the facts asserted, Niskayuna alleges it complied with RPAPL 1971(1) by making a finding that the subject dwelling was abandoned, and with RPAPL 1971(2) by making and filing a certification of that determination in its records, and by posting the certification conspicuously on the building. Next, RPAPL 1972 (1) requires moving party to file a copy of the certification and a notice of intention to commence a proceeding in the office of the clerk of the county in which the dwelling is located. This notice must contain the names of all persons required to be served pursuant to this section, including the owner. Niskayuna claims it complied with the filing component on November 7, 2019, two years after Pompei A. Joll's death, by listing the names of the deceased record owners, Pompei A. Joll and Donald R. Joll and no one else. Niskayuna thereby ignored the settled law in New York which holds ("title to real estate upon the death of the owner vests immediately in his heirs and devisees." (*Kingsland v. Murray*, 133 N.Y. 170 (1892); *see also, In re Estate of Fry*, 28 Misc.2d 949, 950 (N.Y.Sur.1961) (*stating* "[o]n death, title

to all real property of a decedent which is not disposed of by will, vests immediately in the distributees entitled to take under the statute.”); see also, *Kraker v. Roll*, 100 A.D.2d 424, 429, (2d Dept. 1984) (finding that “vesting by descent occur[s] by operation of law, irrespective of the apparent failure to appoint an administrator or to file new deeds”).

Similarly, Niskayuna’s claim that it complied with the notice provisions of RPAPL 1972 (2) –(4) by posting a copy of the certification on the subject premises and by mailing the certification to the deceased former owners at the vacant subject premises as the “last known owners” is incomprehensible given Niskayuna’s knowledge that Pompei Joll died two years prior to the mailing. The fact that the instant proceeding is in the nature of an *in rem* proceeding, does not diminish the need to provide due process. In *Harner v County of Tioga*, the Court of Appeals reviewed the state of the law in such proceedings,

Under both the federal and state constitutions, the State may not deprive a person of property without due process of law (U.S. Const. 14th Amend.; NY Const., art. I, § 6). It is well settled that the requirements of due process are satisfied where “notice [is] 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.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); see also, *Kennedy v. Mossafa*, 100 N.Y.2d 1, 9 (2003). Due process is a flexible concept, requiring a case-by-case analysis that measures the reasonableness of a municipality’s actions in seeking to provide adequate notice. A balance must be struck between the State’s interest in collecting delinquent property taxes and those of the property owner in receiving notice. See, *Kennedy v. Mossafa*, 100 N.Y.2d 1, 9 (2003); see also, *Matter of Zaccaro v. Cahill*, 100 N.Y.2d 884, 890 (2003). In striking such balance, the courts may take “into account the status and conduct of the owner in determining whether notice was reasonable” *Kracker v. Roll*, 100 A.D.2d 424 (2d Dept. 1984); citing, *Matter of ISCA Enters. v. City of New York*, 77 N.Y.2d 688, 700, (1991).

Harner v County of Tioga, 5 N.Y. 3d 136 (2005).

In the instant case, the status of the “owners”, as Niskayuna defines them, is deceased. How then can Niskayuna assert that posting on the premises and mailing to the deceased “owner” is reasonably calculated to give interested parties an opportunity

to present their objections? In, *in rem* tax foreclosures, the courts have held that the statutory processes must be strictly adhered to because of the serious property interests involved. “[A]ll formal requirements governing tax sale proceedings must be scrupulously satisfied, because the result is divestiture of title to real property.” *Land v. County of Ulster*, 84 N.Y.2d 613, 616 (1994). Thus, “the failure to substantially comply with the requirement of providing the taxpayer with proper notice constitutes a jurisdictional defect which operates to invalidate the sale or prevent the passage of title.” *Matter of Byrnes v. County of Saratoga*, 251 A.D.2d 795, 797 (3d Dept. 1998).

Given the above, the Court can only conclude that Niskayuna has not complied with all of the procedural prerequisites of Article 19-A, specifically, it has failed to give proper notice to a party or parties to whom process is due. The less than statutorily required notice to some relatives of Pompei Joll is no substitute for the appointment of a personal representative of the decedent property owner when those relatives have not taken action to assume such a role.

THE COURT’S RULING

Based upon the foregoing, it is hereby

ORDERED, that The Town of Niskayuna’s special proceeding seeking to have 1019 Van Antwerp Road, Niskayuna, New York declared abandoned and to have fee simple title granted to the Town of Niskayuna is hereby DISMISSED without prejudice.

ORDERED, that this Decision and Order shall be the Order of this Court.

Dated: May 4, 2020
at Schenectady, New York



HON. MICHAEL R. CUEVAS
Supreme Court Justice

Papers Considered:**Moving Papers**

Affidavit of Alexis E. Kim

Exhibit A: Assessor Records

Exhibit B: Email correspondence between Detective Twitty of the Niskayuna Police Department and Kenneth Hassett of the Niskayuna Building Department

Exhibit C: Affidavits of Service sworn to August 23, 2019 (copies of the certification of abandonment with notice served on Kristin McCabe Hockenberger and Lisa McCabe)

Exhibit D: Kristin Hockenberger email dated August 27, 2019

Exhibit E: Affidavit of Service dated August 29, 2019 (certification of abandonment with notice served on Teri Lomonocco).

Exhibit F: Affidavit of Service dated August 26, 2019 (certification of abandonment with notice served by Building Department on the last known owner)

Exhibit G: Photograph taken by Code Enforcement

Exhibit H: Relevant Page from 2019 Final Assessment Roll for the Town of Niskayuna