

[Cite as *Plymouth Park Tax Servs., L.L.C. v. Natl. Apt. Complex*, 2010-Ohio-4356.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94145

PLYMOUTH PARK TAX SERVICES, LLC

PLAINTIFF-APPELLEE

vs.

NATIONAL APARTMENT COMPLEX, ETC.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART,
REVERSED IN PART, REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-624703

BEFORE: Gallagher, A.J., Kilbane, J., and Jones, J.

RELEASED AND JOURNALIZED: September 16, 2010

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SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, National Apartment Complex Acquisition Group, Ltd. (“National Apartment”), appeals the decision of the Cuyahoga County Court of Common Pleas that granted summary judgment in favor of appellee, Plymouth Park Tax Services, LLC (“Plymouth Park”). For the reasons

stated herein, we affirm in part, reverse in part, and remand the matter for further proceedings.

{¶ 2} National Apartment owns property located at 3550 Warrensville Road, Shaker Heights, Ohio, which is located on permanent parcel numbers 736-29-047 and 736-29-054. Plymouth Park is the owner and holder of four tax certificates, identifying parcel number 736-29-047, having purchased the tax certificates pursuant to R.C. 5721.33. Although the tax certificates list a property address of “3350” Warrensville Road, Shaker Heights, the preliminary judicial report identified the premises at “3550” Warrensville Road as comprising of both permanent parcels 736-29-047 and 736-29-054. Further, the legal description on the tax certificates identifies the same sublots identified in the preliminary judicial report for permanent parcel numbers 736-29-047 and 736-29-054. The combined purchase price for the certificates totals \$95,171.96, representing delinquent taxes on the property.

{¶ 3} On May 17, 2007, Plymouth Park filed a complaint for foreclosure and other relief against National Apartment and James Rokakis, Treasurer of Cuyahoga County. The court magistrate ordered Plymouth Park to show how the legal description in the preliminary judicial report, which identified two parcel numbers, correlated to the tax certificates. In response, Plymouth Park filed the affidavit of Kristy Neff, a supervisor for the tax certificate/collection section of the Cuyahoga County Treasurer’s Office. Ms.

Neff attested that the four tax certificates sold to Plymouth Park were with regard to tax delinquencies regarding permanent parcel number 736-29-047, which is listed together for taxing purposes with permanent parcel number 736-29-054, and taxed as a single address, being 3550 Warrensville Road, Shaker Heights, Ohio. Upon this evidence, the magistrate determined that the tax certificates encompassed both parcels identified above. National Apartment objected to this finding. The trial court judge overruled this objection.

{¶ 4} After answers to the complaint were filed, Plymouth Park filed a motion for summary judgment. In opposing the motion, National Apartment asserted that it had paid plaintiff \$26,009.54 and attached an affidavit to that effect. National Apartment also argued that no discovery had occurred in the action.

{¶ 5} The court magistrate granted summary judgment in favor of Plymouth Park. The magistrate found that Plymouth Park was a certificate holder of duly purchased tax certificates; that the certificate redemption price on each certificate was due and unpaid; that the first lien on the premises was vested in Plymouth Park; that Plymouth Park was entitled to foreclosure of its lien interest; and that the proceeds of the sale, in part, were to be applied to the amounts due for the tax certificate redemption prices.

{¶ 6} National Apartment filed objections to the magistrate's decision. The trial court overruled the objections, adopted the magistrate's decision, and issued a decree of foreclosure for Plymouth Park. National Apartment timely filed this appeal, raising two assignments of error for our review.

{¶ 7} National Apartment's first assignment of error provides as follows: "[I.] The trial court erred in granting appellee's motion for summary judgment where a genuine issue of material fact remains regarding whether appellee duly purchased tax certificates relating to appellant's property."

{¶ 8} Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 2009-Ohio-2136, 912 N.E.2d 637, ¶ 12. Under Civ.R. 56(C), summary judgment is proper when the moving party establishes that "(1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Duncan v. Mentor City*

Council, 105 Ohio St.3d 372, 2005-Ohio-2163, 826 N.E.2d 832, ¶ 9, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 9} National Apartment argues that the trial court erred in granting summary judgment because the tax certificates purchased by Plymouth Park fail to contain an accurate description of the property pursuant to R.C. 5721.30(A), 5721.31(A)(2), and 5721.011. National Apartment does not contest that it was delinquent on taxes for the property located at 3550 Warrensville Road, that the property encompasses two parcels, that the tax certificates pertain to its property, and that Plymouth Park is the owner and holder of the tax certificates. Indeed, the affidavit of Ms. Neff, who works in the treasurer's office, attests to the fact that the premises at 3550 Warrensville Road is comprised of two parcels that are taxed together and that the tax certificates issued to Plymouth Park pertain to tax delinquencies owed for that property.

{¶ 10} The record also reflects that National Apartment had notice of the delinquent status of its real estate taxes. It even claims to have made payments to Plymouth Park. Thus, National Apartment has shown no prejudice by the failure of the tax certificates to contain the technically required description of the property.

{¶ 11} The tax certificates at issue here were purchased under R.C. 5721.33 and therefore were governed by R.C. 5721.37(A)(2). That section

provides in relevant part that, “a certificate holder * * * may file with the county treasurer a notice of intent to foreclose * * * provided the parcel has not been redeemed * * * and at least one certificate respecting the certificate parcel, held by the certificate holder filing the request for foreclosure and eligible to be enforced through a foreclosure proceeding, has not been voided * * *.” R.C. 5721.37(A)(2). “[T]he tax certificate vests in the certificate holder the first lien previously held by the state * * *, superior to all other liens and encumbrances upon the parcel described in the tax certificate, in the amount of the certificate redemption price * * * .” R.C. 5721.35(A).

{¶ 12} Here, Plymouth Park attached as exhibits to its complaint two tax certificates and a notice of intent to foreclose. It later submitted two other tax certificates relative to the subject property. Those certificates are “presumptive evidence in all courts and boards of revision and in all proceedings, including, without limitation, at the trial of the foreclosure action, of the amount and validity of the taxes, assessments, charges, penalties by the court and added to such principal amount, and interest appearing due and unpaid and of their nonpayment.” R.C. 5721.37(F). Although National Apartment claimed that it had made partial payment, it did not argue or offer evidence to establish that it had redeemed the tax certificates or to rebut the presumptive validity of the certificates.

{¶ 13} Upon our review, we find that summary judgment was properly entered in favor of Plymouth Park insofar as a decree of foreclosure was issued. National Apartment's first assignment of error is overruled.

{¶ 14} National Apartment's second assignment of error provides as follows: "[II.] The trial court erred in granting appellee's motion for summary judgment when it found the appellee was entitled to the full value of the tax certificates listed on each certificate despite the fact that appellant had paid \$26,009.04 in taxes during the period described in the certificates."

{¶ 15} National Apartment argues that it made partial payment for the taxes and that the trial court awarded Plymouth Park more than their full value. Although partial payment was not asserted as an affirmative defense, National Apartment did raise the issue in the trial court in opposing summary judgment. Plymouth Park did not object to the issue of partial payment being raised and did not offer any evidence to refute the claim that partial payment was made on the certificates. Instead, the record reflects that a pretrial was conducted at which the parties clarified the dollar amount of the partial payments made to Plymouth Park.

{¶ 16} Pursuant to Civ.R. 15(B), "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Civ.R. 15(B) has been held to apply not only to cases that actually proceed to a trial

in the traditional sense, but also to summary judgment proceedings. *McGinnis, Inc. v. Lawrence Economic Dev. Corp.*, Lawrence App. No. 02CA33, 2003-Ohio-6552. Our review reflects that the issue of partial payment was treated as an issue in the case by both parties, and therefore was tried by implied consent of the parties pursuant to Civ.R. 15(B).

{¶ 17} R.C. 5721.37(F) provides that the decree for each tax certificate shall be rendered separately. The trial court awarded distribution of the proceeds of the sale for the full certificate redemption price of all tax certificates as individually set forth. No reduction or consideration was made for the partial payment that was clarified by the parties.

{¶ 18} The affidavit of Christopher Hondlik, owner of National Apartment, averred that checks for the payment of taxes were made to Plymouth Park. However, there is no suggestion that a redemption plan was entered in conformance with R.C. 5721.38. That section contemplates written notice of the plan to the applicable county treasurer and installment payments that are made to the county treasurer. Pursuant to that section, when a request for foreclosure is filed, any money paid under the plan is refunded to the person who paid the money under the plan. R.C. 5721.38(D)(2).

{¶ 19} We see no reason why moneys should not similarly be credited or refunded when payments are made directly to the certificate holder toward the redemption price of the certificate. Equity clearly requires this result.

{¶ 20} The trial court's judgment fails to reflect any credit for the partial payments that were apparently clarified by the parties during a pretrial. Upon remand, the trial court should credit the amount, if any, of partial payments made to Plymouth Park and offset this amount in the damage award against the redemption price for the certificates. We reverse the trial court's decision in this regard, and we remand the matter for further proceedings.

{¶ 21} National Apartment's second assignment of error is sustained.

Judgment affirmed in part, reversed in part; case remanded.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and

LARRY A. JONES, J., CONCUR