

IN THE SUPREME COURT OF OHIO

MONTGOMERY COUNTY TREASURER

Case No. 2019-1330

Plaintiff-Appellee,
vs.

On Appeal from the Montgomery County
Court of Appeals, Second Appellate District
Court of Appeals Case No. CA 28271

ISLAMIC CENTER OF PEACE, INC.

Defendant-Appellant.

**MEMORANDUM IN RESPONSE OF APPELLEE,
MONTGOMERY COUNTY TREASURER**

MATHIAS H. HECK, JR.

Prosecuting Attorney

By: MICHELE PHIPPS

Reg. No. 0069829

(Counsel of Record)

Montgomery County Prosecutor's Office

P.O. Box 972

301 W. Third Street

Dayton, OH 45422

(937) 496-7676

(937) 224-8585 – Facsimile

phippsm@mcchio.org

COUNSEL FOR APPELLEE,

MONTGOMERY COUNTY TREASURER

WORRELL A. REID

Reg. No. 0059620

(Counsel of Record)

7805 N. Dixie

Suite A

Dayton, Ohio 45414

(937) 856-7570

(937) 434-2033 - Facsimile

**COUNSEL FOR APPELLANT,
ISLAMIC CENTER OF PEACE,
INC**

TABLE OF CONTENTS

Page

WHY LEAVE TO APPEAL SHOULD NOT BE GRANTED

1

STATEMENT OF THE CASE AND FACTS

1-2

ARGUMENT

Response to Appellant's Sole Proposition of Law:

The Montgomery County Treasurer's exercise of discretion in instituting the tax delinquency foreclosure in this matter did not violate the Islamic Center of Peace Inc.'s constitutional right to due process and did not violate the uniformity contained in Article II, Section 26, Ohio Constitution.

2-8

CONCLUSION

8

CERTIFICATE OF SERVICE

9

WHY LEAVE TO APPEAL SHOULD NOT BE GRANTED

The proposition of law raised by Islamic Center of Peace, Inc. (the “Center”) does not involve a matter of public or great general interest, nor does it involve a substantial constitutional question. Rather, the proposition raises the issue of due process in a tax delinquency foreclosure and uniformity embodied in Article II, Section 26, Ohio Constitution. Due process involving a tax delinquency foreclosure and the uniformity of Ohio statutes and matters that are well-settled. A review of the Second District Court of Appeals’ decision also confirms that it did not misapply or misinterpret the law, nor did it create new law. Consequently, there are no legal issues deserving of further review by this Court.

Accordingly, because the Second District’s opinion is in line with established law and precedent. Thus, this Court should decline jurisdiction over the Center’s sole proposition of law and dismiss this appeal.

STATEMENT OF THE CASE AND FACTS

On August 22, 2017, Carolyn Rice, as Treasurer of Montgomery County, through counsel, filed a *Complaint for Foreclosure of Delinquent Real Estate Taxes* against Islamic Center of Peace Inc. In the *Complaint* the Montgomery County Treasurer stated, in part, that the Auditor of Montgomery County, filed a master tax list of delinquent tracts, which contained certain real property owned by the Center. In response to the complaint, the Center filed an Answer with Affirmative Defenses and Counter Claims, including counter claims for violations of the Ohio Constitution, violation of due process, and for retroactive abatement of real estate taxes based on nonprofit exempt status pursuant to Chapter 5709 of the Ohio Revised Code. The Montgomery County Treasurer subsequently filed a motion to dismiss the Center’s counter claims. The trial court sustained the Montgomery County Treasurer’s motion and dismissed the Center’s counter

claims. The Center filed a motion to reconsider. The trial court overruled the motion for reconsideration.

On February 12, 2018, Montgomery County Treasurer filed a motion for summary judgment. Montgomery County Treasurer also filed an affidavit in support of its motion for summary judgment. Subsequently, the Center filed a memorandum in opposition to the motion for summary judgment.

The trial court sustained the motion of summary judgment. Afterwards, the trial court issued the court's judgment entry. The Center appealed the trial court's decision to the Second District Court of Appeals, raising the following pertinent assignment of error: that the tax foreclosure violated the Center's constitutional rights because the foreclosure proceedings were instituted after the Montgomery County Treasurer received payment to do so by a private individual; his conviction was against the manifest weight of the evidence. The Second District Court of Appeals found no merit to the Center's argument and affirmed the trial court's decision to sustain the Montgomery County Treasurer's motion for summary judgment. *Rice v. Islamic Ctr. of Peace, Inc.*, 2nd Dist. Montgomery No. 28271, 2019-Ohio-3396.

Islamic Center of Peace Inc. now seeks leave of this Court to appeal further.

ARGUMENT

Response to Appellant's Sole Proposition of Law:

The Montgomery County Treasurer's exercise of discretion in instituting the tax delinquency foreclosure in this matter did not violate the Islamic Center of Peace Inc.'s constitutional right to due process and did not violate the uniformity contained in Article II, Section 26, Ohio Constitution.

At issue under the Islamic Center of Peace Inc.'s sole proposition of law is whether in the exercising its discretion to institute a tax delinquency foreclosure under the Montgomery County

Treasurer's Depositor Foreclosure Program violated the connotational rights of the real estate owner. It should be noted that in the appellate court, the Center did not challenge, whether premised on due process or any other grounds, the regularity of the foreclosure proceedings themselves. Instead the Center challenges the treasurer's decision to commence foreclosure proceedings against its real estate. The Center argues that its constitutional right to due process was violated by the treasurer's exercise of discretion.

In holding that the Montgomery County Treasurer had the discretion to foreclose on the Center's real estate as a result of delinquent real estate taxes, the Second District Court of Appeals stated:

Every year, “[o]n or before the fifteenth day of February,” the treasurer of each county in the state “shall settle with the county auditor for all taxes and assessments that the treasurer has collected on the general duplicate of real and public utility property at the time of making the settlement,” and “[o]n or before the tenth day of August,” the treasurer must further “settle with the auditor for [any such] taxes and assessments [that were] not included in the preceding February settlement.” R.C. 321.24(A) and (C). Immediately “after each settlement required by [R.C. 321.24(C)],” the “county auditor shall compile, * * *, a list [in] duplicate of all delinquent lands in the * * * county.” R.C. 5721.011. The “original list shall be kept in the office of the auditor, and the duplicate shall be certified and delivered to the county treasurer within [30] days.” *See id.* In the event that “taxes charged against an entry on the tax duplicate, or any part of those taxes, are not paid within [60] days after delivery of the delinquent land duplicate to the county treasurer * * *, the county treasurer shall enforce the [state's] lien for the taxes by civil action [seeking] the sale of [the] premises [identified in the duplicate] in the same way [that] mortgage liens are enforced * * *.” R.C. 323.25.

At first glance, the combined provisions of R.C. 321.24, 323.25 and 5721.011 appear to imply that 60 days “after [receiving] delivery of the delinquent land duplicate” from the county auditor, the county treasurer has a non-discretionary obligation to pursue a foreclosure action against any property for which taxes remain unpaid, in whole or in part. The provisions of R.C. 321.24, 323.25 and 5721.011, however, must be construed in *pari materia* with the provisions of R.C. 5721.13, 5721.18 and 5721.31-5721.33.

Under R.C. 5721.13(A), “[o]ne year after certification of a delinquent land list, the county auditor shall make in duplicate a certificate, to be known as a delinquent land tax certificate, of each delinquent tract of land, * * *, upon which the taxes,

assessments, charges, interest, and penalties have not been paid.”⁵ These certificates “shall be signed by the auditor or [by the auditor's] deputy, and the original [copies] shall be filed with the [county] prosecuting attorney.” *Id.* Upon receipt of a delinquent land tax certificate, the county prosecuting attorney “shall institute a foreclosure proceeding * * * in the name of the county treasurer to foreclose the [state's] lien” on the tract identified in the certificate, “unless a foreclosure * * * action has been or will be instituted under [R.C.] 323.25, * * * 323.65 to 323.79, or * * * 5721.14.”⁶ (Emphasis added.) R.C. 5721.18(A).

Although R.C. 323.25 seems to suggest, when read in isolation, that a county treasurer must initiate foreclosure proceedings against every delinquent parcel for which taxes have not been paid within two months of the county auditor's certification of the “delinquent land duplicate,” the provisions of R.C. 5721.18(A) prohibit the county prosecutor from pursuing foreclosure against any parcel on which the county treasurer plans to foreclose under R.C. 323.25 but has not initiated proceedings, even 12 months after certification of the duplicate. The county treasurer, then, must have some discretion over the filing of tax foreclosure actions; the foregoing limitation on the county prosecutor's duty to initiate foreclosures would otherwise be unnecessary.

With respect to the county auditor's duty to prepare delinquent land tax certificates, R.C. 5721.13(B)(2) states that if “the auditor determines that the delinquent taxes, assessments, charges, interest, and penalties levied against [a] tract of land exceed its fair market value, [the auditor] shall include a statement of that fact * * * in the delinquent vacant land tax certificate” for the tract. This requirement would serve little or no purpose were the county treasurer affirmatively obligated to pursue foreclosure in every instance of tax delinquency. Furthermore, upon receipt of the “duplicate of the delinquent land list compiled under [R.C.] 5721.011,” the county treasurer “may select” delinquent land tax certificates, corresponding to properties on the delinquent land list, to be sold at public auction or, “in the treasurer's discretion,” to be sold to a specific purchaser on negotiated terms. *See* R.C. 5721.31-5721.33.

2019-Ohio-3396, ¶¶ 11-15.

In the case at hand, as previously stated the Montgomery County Treasurer had the discretion to foreclose on the Center's real estate as a result of delinquent real estate taxes. The Center argues that the Montgomery County Treasurer's Depositor Foreclosure Program violates its connotational rights, results in oppression and discriminates against minorities and those whose views are different, regardless of faith color creed or national origin. As noted in the opinion of the Second District Court of Appeals, the Center in the trial court, in its Answer to the foreclosure

complaint raised the issue of violation of its constitutional rights to due process. 2019-Ohio-3396, ¶19. Accordingly, the Center bore the burden to present evidence, of the types listed in Civ.R. 56(C), in support of its affirmative defenses. *See JPMorgan Chase Bank, N.A. v. Parker*, 2d Dist. Miami No. 2014-CA-17, 2014-Ohio-5806, 2014 WL 7463142, ¶ 17-18. “The mere fact that a defendant has asserted various affirmative defenses in his answer does not preclude summary judgment.” *Id.* at ¶ 17. “Once a plaintiff presents evidence sufficient to satisfy entitlement to summary judgment, the burden shifts to the defendant to set forth specific facts demonstrating that a genuine issue of material fact remains to be litigated, either on the main claim or on the defendant's affirmative defenses.” *Id.* at ¶ 17. Thus, the Center, in the trial court had every opportunity to produce and introduce evidence into the record to support its allegation that the treasurer had improper motives for initiating foreclosure proceedings.

However, the only item the Center introduced was an Affidavit from Ismail Gula. Gula “an Officer of the Islamic Center [o]f Peace, Inc.,” averred in the affidavit, among other things, that he “believes that the Islamic Center [o]f Peace, Inc., and [its] lands, were target[ed] on account of [its] religion, [its] presence in the community” and the “value of [its] lands.” Affidavit of Ismail Gula ¶ 2 and 8, Feb. 22, 2018. As well, Gula refers to Case No. 2016 CV 06075, in which the Treasurer previously sought to foreclose on property owned by the Center, albeit property other than that at issue in this case; he avers to his further belief that the Treasurer filed the instant complaint “in retaliation for [the Center's assertion of] affirmative defenses” and “counterclaims * * * in Case No. 2016 CV 06075.” *Id.* at ¶ 9.

As the Second District Court of Appeals noted “Gula's personal belief, standing alone, is not evidence that the Treasurer decided to initiate foreclosure proceedings for constitutionally impermissible reasons, and Montgomery C.P. No. 2016 CV 06075 was dismissed by the Treasurer

after the Center paid the taxes alleged to be due. Moreover, Gula himself refers to an entirely appropriate motive for the filing of the complaint in this case: “the value of [the Center's] lands.” Gula Affidavit at ¶ 8. The Treasurer would collect no tax revenue through the foreclosure and sale of the Center's property, if the property were worth less than the amount of the tax delinquency. *Compare with* R.C. 5721.13(B)(2), 5721.14 and 5721.18.” 2019-Ohio-3396, ¶¶ 17-18. The Center failed to introduce any other evidence that the treasurer in the exercise of discretion in instituting the real estate tax delinquency foreclosure in this matter violated the Center’s constitutional right to due process.

Additionally, the Center claims that when the Montgomery County Treasurer initiated the tax delinquency foreclosure it violated Article II, Section 26 of the Ohio Constitution. Specifically, the Center alleges if a private citizen paid for the foreclosure to be initiated, then, R.C. 5721 has not been applied uniformly though the State of Ohio in violation Article II, Section 26 of the Ohio Constitution. As noted by the Second District Court of Appeals, the Center failed to offer any “analysis and provides no citation to authority in support of its argument.” 2019-Ohio-3396, ¶

Article II, Section 26 of the Ohio Constitution is the Uniformity Clause and states:

All laws, of a general nature, shall have a uniform operation throughout the State; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly, except as otherwise provided in this Constitution.

Pursuant to Ohio Revised Code 5721.18, the Montgomery County Treasurer seeks to foreclose certain real estate parcels for delinquent real estate taxes and assessments. Islamic Center of Peace, Inc. makes a broad conclusory statement, seemingly, alleging that R.C. 5721.18 is not applied uniformly across the State.

In reviewing legislation under the Uniformity Clause, Ohio courts use a two-part test: (1) whether the subject matter at issue is one of general or special nature, and, if one of general nature,

(2) whether the legislation operates uniformly throughout Ohio. *See, Desenco Inc., v. Akron*, 84 Ohio St.3d 535, 542, 706 N.E.2d 323 (1999). “If the subject does or may exist in, and affect the people of, every county, in the state, it is of a general nature. A subject matter of such general nature can be regulated and legislated upon by general laws having a uniform operation throughout the state.” *In re Foreclosure of Lien for Delinquent Taxes by Actions in Rem*, 2008-Ohio 1173, 2008 WL 697622 (7th Dist. Jefferson Co. 2008).

The Montgomery County Treasurer, did not, and has no authority to enact Ohio Revised Code 5721.18. Defendant makes no claim that the law itself is not general for the State of Ohio and specifically only affects one region. Ohio’s Uniform Clause does not ensure that all laws are followed uniformly across a jurisdiction. Finally, the Center only cites conclusory statements and gives no facts or allegations to support such claim that the Montgomery County Treasurer does not follow R.C. 5721.18 across its jurisdiction.

Finally, the Center claims that the Depositor Foreclosure violates the notice provisions under Chapter 57 of the Ohio Revised Code. The Center claims that the Depositor Foreclosure did not provide the Center with notice that a tax foreclosure was imminent. The Center also claims that it was denied time to locate funds to pay the delinquent real estate or sell the real estate. The Center claims that Montgomery County needs a program that assists real estate owners in the payment of the delinquent real estate taxes.

First, it should be noted that the Center failed to raise the issue that it had not been given notice of the tax foreclosure in the trial court or the appellate court. Accordingly, this Court should not consider the issue for the first time. Second, the foreclosure complaint in this case was filed on August 22, 2017; therefore, the Center has had and still has ample opportunity to locate funds to pay the delinquent real estate taxes or sell the real estate. Third, R.C. 5721.25 provides that

after a real estate tax foreclosure has been instituted, said real estate owner may enter into a delinquent tax contract with the treasurer's office to pay the delinquent real estate taxes; preventing the foreclosure.

CONCLUSION

In rejecting the Center's claims that the real estate tax delinquency proceedings in the case violated its constitutional right to due process and violated the uniformity under Article II, Section 26 of the Ohio Constitution, the Second District Court of Appeals did not misapply or misinterpret the law, nor did it create new law. As such, Appellee, Montgomery County Treasurer respectfully requests that this Court find the Islamic Center of Peace Inc.'s sole proposition of law not well-taken and deny the Center jurisdiction to appeal.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: /s/ Michele Phipps
Michele Phipps, #0069829
Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
301 West Third Street
Dayton, Ohio 45422
Telephone: (937) 496-7676
Facsimile: (937) 224-8485
E-mail: phippsm@mcOhio.org
ATTORNEY FOR PLAINTIFF-APPELLE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum in Response to Jurisdiction* was sent by first class mail, postage pre-paid, to the following persons on October 24, 2019.

/s/ Michele Phipps.
MICHELE PHIPPS
Reg. No. 0069829

Worrell A. Reid
7805 North Dixie, Suite A
Dayton, Ohio 45414
Counsel for Defendant-Appellant

RECORDER OF MONTGOMERY
COUNTY OHIO
Nathaniel S. Peterson
Assistant Prosecuting Attorney
301 West Third Street
P.O. Box 972
Dayton, OH 45422

AMERICAN TAX FUNDING, LLC
c/o Jon Zomolda, Jr.
Town One Square
40 South Main Street
Poland Ohio 44514