

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

2646 MAYFIELD, LLC, ET AL.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 112039
CUYAHOGA COUNTY TREASURER, ET AL.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED

RELEASED AND JOURNALIZED: July 27, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-926904

Appearances:

David N. Patterson, *for appellants.*

Michael C. O'Malley, Cuyahoga County Prosecuting
Attorney, and Brendan D. Healy and Adam D. Jutte,
Assistant Prosecuting Attorneys, *for appellees.*

SEAN C. GALLAGHER, J.:

{¶ 1} Lakeview Holding (OH), LLC, and 2646 Mayfield, LLC, appeal the
judgment entered in favor of Cuyahoga County, the Cuyahoga County Treasurer,

and the Cuyahoga County Executive (collectively “County”). For the following reasons, the final judgment is affirmed.

{¶ 2} This case involves the purchase and purported assignment of tax certificates issued by the County for the residential properties located at 2646 Mayfield Road (parcel no. 685-09-008), 1148 Prospect Avenue Unit E (parcel no. 101-37-305), 12014 Iowa Avenue (parcel no. 111-06-037), 7407 Cedar Avenue (parcel no. 118-25-096), 2517 East 55th Street (parcel no. 124-03-003), and 15203 Kinsman Road (parcel no. 130-19-002) (collectively “subject properties”).

{¶ 3} According to the County’s concise description of the statutory framework:

In 1997, the General Assembly passed a law permitting counties to collect delinquent real property taxes through the sale of tax lien certificates to third party investors by public auction or negotiated sale. *See* R.C. 5721.30 *et seq.* A county treasurer may, at the treasurer’s discretion, negotiate the sale or transfer of any number of tax certificates with one or more persons. *See* R.C. 5721.33. Cuyahoga County has elected to sell tax certificates using the negotiated sales approach pursuant to R.C. 5721.33.

When tax liens are sold utilizing the negotiated sale model, the applicable law is a hybrid of statutory and contract law. For example, the tax certificates that are the subject matter of [the underlying] lawsuit were purchased pursuant to a purchase agreement and consist of the following: (1) base tax lien certificates that were sold in bulk negotiated sales in 2009 and 2010, and (2) subsequent tax certificates sold on the same certificate parcels.

A tax certificate vests, in the certificate holder, the first lien previously held by the state and its taxing districts under R.C. 5721.10. *See* R.C. 5721.35. Moreover, a security interest in a tax certificate may be perfected by: (1) possession of the tax certificate; (2) registration of the tax certificate with the county treasurer in the name of the secured party, or its agent or custodian, as certificate holder; or (3) by recording

the name of the secured party in the tax certificate register in the office of the county treasurer of the county in which the certificate parcel is situated. *See* R.C. 5721.35 (B)(2).

* * *

There are statutory requirements to reduce a certificate to judgment once the certificate holder establishes ownership of the tax certificate. Any time after one year from the date shown on the certificate as the date the tax certificate was sold, and not later than the end of the certificate period, a certificate holder may file a Notice of Intent to Foreclose (“Notice of Intent”). *See* R.C. 5721.37. The Notice of Intent must be submitted on a “form prescribed by the tax commissioner.” *See* R.C. 5721.37. When the Notice of Intent to foreclose is filed, the certificate holder must submit payment to the county for outstanding taxes on the tax duplicate. *Id.* After a Notice of Intent has been filed, and the payment required has been paid, the county treasurer must certify the notice to that effect to the attorney for the certificate holder. *See* R.C. 5721.37(C)(2). The private attorney must then commence a foreclosure proceeding to enforce the lien vested in the certificate holder not later than 120 days after the notice is certified. *Id.*

Failure to follow the statutory framework leads to expiration of the tax certificates. If the certificate holder fails to file with the county treasurer a request for foreclosure or Notice of Intent within the certificate period or fails to commence foreclosure proceedings, the certificate holder’s lien is voided. *See* R.C. 5721.37(E)(1). If the holder submits a Notice of Intent but fails to file a foreclosure action, the liens represented by all tax certificates — and for which the deadline for filing a Notice of Intent has passed — are canceled and the certificates voided. R.C. 5721.37(E)(3).

(Factual citations omitted); *see also Plymouth Park Tax Servs., LLC v. Natl. Apt. Complex*, 8th Dist. Cuyahoga No. 94145, 2010-Ohio-4356, ¶ 11.

{¶ 4} Lakeview Holding remitted a payment of \$115,545.05 to the County for delinquent taxes in connection with the subject properties. In an attempt to connect the payment to the subject properties and the tax certificates held by

Lakeview Holding, a spreadsheet was attached to the second amended complaint, which identifies the six subject properties by parcel number and identifies an amount representing the “delinquent tax,” the 2014 taxes split into the first and second half amounts, and an amount for the “taxes as of 4/27/15” for each parcel.

{¶ 5} Importantly, there is no evidence demonstrating that a Notice of Intent was filed for any of the subject properties.¹ Shortly after submitting the payment, Lakeview Holding purportedly assigned its interest in “the Tax Certificates” attached to the second amended complaint, to 2646 Mayfield. *See* T.d. 21, Second Amended Complaint, at ¶ 23. Under R.C. 5721.36(A)(1), when assigning a certificate to another qualified person or corporate entity, “[t]he transferor of a tax certificate shall endorse the certificate and shall swear to the endorsement before a notary public or other officer empowered to administer oaths.” None of the tax certificates attached to the second amended complaint bear any indication of the certificates being transferred to 2646 Mayfield.

{¶ 6} Sometime after purportedly assigning its interests to 2646 Mayfield in 2015, Lakeview Holding filed a notice of dissolution. The effective date of the

¹ The allegations in the second amended complaint seem to confuse the respective obligations of the parties within the statutory framework. According to Lakeview Holding and 2646 Mayfield, they “paid” for Notices of Intent but the County “failed and/or refused said Notices.” T.d. 21, Second Amended Complaint, at ¶ 21-22. Under R.C. 5721.37(A), it was Lakeview Holding’s burden to file the Notice of Intent for each of the subject properties to be accompanied with the requisite amount under division (B). Once the Notice of Intent was received, the County was required to certify the Notice of Intent to enable the foreclosure proceedings. In consideration of the entirety of the second amended complaint, there is no allegation that Lakeview Holding ever filed a Notice of Intent for each subject property.

dissolution is not part of this appellate record. It is undisputed that after Lakeview Holding remitted the check to the County and assigned its interest, 2646 Mayfield took no action to secure its interests until after the expiration of the tax certificates.

{¶ 7} In 2019, Lakeview Holding and 2646 Mayfield filed a second amended complaint setting forth 18 counts against the County, all of which are based on the allegation that the County erroneously failed to fulfill its obligation under R.C. 5721.37(C) for the purposes of permitting foreclosure proceedings with respect to the subject properties.

{¶ 8} The County has maintained an objection to the plaintiffs' standing to prosecute these claims. According to the County, Lakeview Holding lacks capacity to sue in light of the corporate dissolution and 2646 Mayfield has not demonstrated an assignment of Lakeview Holding's interest in the tax certificates for the purposes of demonstrating its ability to seek the requested relief. Although it was alleged that 2646 Mayfield was assigned Lakeview Holding's interest in the tax certificates for the subject properties, no documentation of that assignment was ever produced demonstrating that 2646 Mayfield possesses the expired tax certificates. The result of that argument would be that neither party possesses authority to prosecute the underlying claims. We need not resolve that question.

{¶ 9} Lakeview Holding, for its part, conceded that it filed a notice of dissolution, terminating its corporate existence. That is of no consequence according to Lakeview Holding, based on R.C. 1705.44, which was repealed effective January 1, 2022. That provision, so says Lakeview Holding, provided authority to

pursue this litigation despite its formal dissolution: “[u]pon application of any member of a dissolved limited liability company or his legal representative or assignee, the court of common pleas may wind up the affairs of the company or may cause its affairs to be wound up by a liquidating trustee appointed by the court.” That statute has no bearing on whether Lakeview Holding maintains standing to pursue this action. Lakeview Holding did not file an application to judicially wind up Lakeview Holding’s affairs for the purposes of its dissolution; it filed an action against the County based on several theories of liability claiming an entitlement to money damages.

{¶ 10} We recognize that a “corporation may sue and be sued[,]” and that entity’s “capacity to sue is dependent upon the legal existence of the corporation.” *Grimmer v. Shirilla*, 2016-Ohio-5423, 76 N.E.3d 363, ¶ 31 (8th Dist.), citing R.C. 1701.13(A). A corporation “exists” for a period of five years following the dissolution for the purpose of winding up corporate affairs. *Id.*, citing R.C. 1701.04(D) and 1701.88(A). “Winding up affairs is ‘the process of settling the accounts and liquidating the assets of a partnership or corporation, for the purpose of making distribution of net assets to shareholders or partners and dissolving the concern.’” *Parmater v. Internet Brands, Inc.*, 10th Dist. Franklin No. 14AP-391, 2015-Ohio-253, ¶ 14, citing *Consol. Freightways Corp. v. Allred*, 10th Dist. Franklin No. 91AP-747, 1991 Ohio App. LEXIS 6045 (Dec. 10, 1991), and *Black’s Law Dictionary* (5th Ed.1979). Although the County claims that Lakeview Holding lacks standing to prosecute the underlying action based on its dissolution, no one presented evidence

of the date that the corporation dissolved, nor has there been any discussion about whether the allegations in the second amended complaint fall under the ambit of R.C. 1701.88 (providing for the winding up of affairs or obtaining reinstatement). *See App.R. 16(A)(7)*. It is not this court's responsibility to ferret out underdeveloped arguments. Accordingly, we presume that either Lakeview Holding or 2646 Mayfield has standing to pursue this action at this juncture, solely based on the arguments and record presented for appellate review.

{¶ 11} There are two assignments of error.

{¶ 12} In the first, Lakeview Holding and 2646 Mayfield claim that the trial court erred by granting a motion for summary judgment because the County failed to file an answer to the second amended complaint, and therefore, according to the appellants, the County was in default for failing to expressly deny the allegations in the operative pleading.

{¶ 13} Following the filing of the second amended complaint, the County filed a motion for a more definite statement under Civ.R. 12(E) and a motion to dismiss one of the parties (who is no longer a party to this action pursuant to that motion to dismiss). Under Civ.R. 12(A)(2), a motion filed under Civ.R. 12 alters the time period within which a responsive pleading must be filed. The responsive pleading is generally due 14 days after the trial court acts upon the motion. The trial court never ruled upon the County's motion for a more definite statement, and

therefore, the 14-day deadline under Civ.R. 12(A)(2) was never triggered.² *See, e.g., Crenshaw v. Cleveland Law Dept.*, 8th Dist. Cuyahoga No. 108519, 2020-Ohio-921, ¶ 30; *BAC Home Loans Servicing, LP v. Kolenich*, 12th Dist. Butler No. CA2012-01-001, 2013-Ohio-155, ¶ 16; *Natl. City Bank v. Flagg*, 5th Dist. Licking No. 2003CA00036, 2003-Ohio-5168, ¶ 15. The responsive period never commenced. The County was under no obligation to file a responsive pleading, and therefore, the County cannot have been deemed to have failed to respond under Civ.R. 8 (effect of failure to deny) or defaulted under Civ.R. 55 (default of the action). The first assignment of error is overruled.

{¶ 14} In the second assignment of error, Lakeview Holding claims that summary judgment was improperly granted in the County's favor because it maintains standing to pursue claims based on the tax certificates it assigned to 2646 Mayfield. Based on that foundation, Lakewood Holding further claims that because one of the entities possessed standing, the trial court erred in failing to issue a writ of mandamus ordering the County to comply with R.C. Chapter 5721. If Lakeview Holding maintains the interest in the tax certificates, 2646 Mayfield does not, and vice versa. That issue is not one in need of resolution. Neither Lakeview Holding nor 2646 Mayfield, whichever entity possessed the interest in the tax certificates at

² Lakeview Holding and 2646 Mayfield amended their complaint several times. The County filed a motion for a more definite statement to each pleading. The trial court denied the outdated motions during the course of proceedings because "more recent, duplicate pleadings have been filed regarding this issue." There is no ruling on the motion for more definite statement filed in response to the second amended complaint.

issue, can demonstrate that the trial court erred by granting summary judgment in the County's favor.

{¶ 15} All the allegations in the complaint are derived from a single factual foundation. According to Lakeview Holding and 2646 Mayfield, a check was submitted to the County to cover outstanding tax liabilities owed on the subject properties; and therefore, the County owed a duty to act in furtherance of foreclosing on the subject properties.

{¶ 16} The evidence of the payment submitted upon summary judgment was limited to a copy of the \$115,545.05 check remitted and a spreadsheet providing limited information demonstrating from where the amount of the check was derived. Since the issue of the payment is not dispositive, we will assume for the sake of discussion that Lakeview Holding's remittance was pursuant to R.C. 5721.37(B), and that the amount included the certificate redemption prices for all outstanding tax certificates that had been sold on the subject properties, other than tax certificates held by Lakeview Holding; any taxes, assessments, penalties, interest and charges appearing on the tax duplicate charged against the parcel; and any fees to cover the County's legal costs in prosecuting the foreclosure. Whether a payment was submitted is not the right question.

{¶ 17} The more pertinent question is whether Lakeview Holding complied with R.C. 5721.37(A) by filing a Notice of Intent. The spreadsheet is not a substitute for the statutorily required form, nor does Lakeview Holding argue otherwise. *See* App.R. 16(A)(7). The foreclosure process, based on purchased tax certificates, is a

creature of statute. Before a payment is required under division (B), and importantly before the County is required to act under division (C), R.C. 5721.37(A) unambiguously requires the tax certificate holder seeking foreclosure to file a Notice of Intent, *on the form prescribed by the tax commissioner*. Neither Lakeview Holding nor 2646 Mayfield has presented any evidence demonstrating their compliance with R.C. 5721.37(A), a point the County repeatedly emphasizes.

{¶ 18} Lakeview Holding and 2646 Mayfield’s sole argument pertains to the payment they allegedly submitted under R.C. 5721.37(B).³ According to the appellants, the County was required to certify that the tax certificate holder is eligible to enforce the tax certificate through a foreclosure proceeding under division (C) of that statute upon acceptance of the payment. R.C. 5721.37(C)(1) unambiguously provides, however, that the county treasurer has a duty only to certify the eligibility within five days of receiving “a foreclosure request *and* the payment required under division (B) of this section.” (Emphasis added.) *Id.* Both the Notice of Intent and the payment are statutory prerequisites to the county treasurer acting in furtherance of a foreclosure proceeding. *See, e.g., CapitalSource Bank FBO Aeon Fin., L.L.C. v. Donshirs Dev. Corp.*, 8th Dist. Cuyahoga No. 99032, 2013-Ohio-1563, ¶ 13; *Lakeview Holding (OH), L.L.C. v. Deberry*, 8th Dist. Cuyahoga No. 99033, 2013-Ohio-1457, ¶ 5. Since the entire appellate argument is focused on the alleged

³ If we do not assume the payment Lakeview Holding remitted to the County was in compliance with R.C. 5721.37(B), then the trial court’s decision granting judgment in favor of the County must also be affirmed. The only mechanism to obtain foreclosure on a tax certificate, and thus to protect the investment in that tax certificate, is through R.C. 5721.37.

payment, to the exclusion of discussing the failure to file a Notice of Intent as required under R.C. 5721.37(A), it cannot be concluded that the trial court erred in granting summary judgment in the County's favor. The County had no duty to act even if it is presumed that the \$115,545.05 check included the statutorily required amounts owed for the six subject properties under R.C. 5721.37(B).

{¶ 19} The statutory framework is unambiguous. If the certificate holder fails to file a request for foreclosure or Notice of Intent within the certificate period with the county treasurer or fails to commence foreclosure proceedings, the certificate holder's lien is voided regardless of the purchase price. R.C. 5721.37(E)(1). Nothing within that provision entitles the certificate holder to any reimbursement for the purchase price of the certificates should the lien expire. And even if the certificate holder submits a Notice of Intent but fails to file a foreclosure action, the liens represented by all tax certificates — and for which the deadline for filing a Notice of Intent has passed — are cancelled and the certificates voided, also without regard to any reimbursement. R.C. 5721.37(E)(3). Thus, even if a tax certificate holder has followed the statutory procedure by filing the Notice of Intent on the required form and remitted the required payment, if that holder fails to timely pursue the foreclosure, the tax certificate is voided and the holder is not entitled to reimbursement for its failure to act.⁴

⁴ There is a limited right to reimbursement of the certificate holder under R.C. 5721.38(B)(5) under narrow conditions. Under that provision, the county treasurer "shall reimburse the certificate holder who initiated foreclosure proceedings" if the owner of record of the property redeems the parcel by paying an amount equal to the total of the

{¶ 20} It is apparent from a plain reading of R.C. 5721.37 that regrettably, the statute does not establish authority for the government agency to provide reimbursements for amounts remitted in situations in which the tax certificate holder fails to timely assert their rights according to the statutory time frames. It also does not provide authority for the agency to disregard the statutory requirements preceding the foreclosure process. This ties the governmental agency's hands; the County could not offer the appellants any relief even if it were so inclined.

{¶ 21} Neither Lakeview Holding nor 2646 Mayfield produced evidence of having complied with R.C. 5721.37(A) in order to seek foreclosure on the subject properties, much less have they even alleged to have filed the Notice of Intent for the purpose of invoking the county treasurer's duty to act. Under R.C. 5721.37(E), any rights under the tax certificates issued were voided based on their delay in asserting their rights under the statutory procedures. The appellants' failure to timely act does not require compensation from the County. Even if several underlying assumptions were made in Lakeview Holding and 2646 Mayfield's favor for the purpose of the myriad of claims brought against the County, they have not demonstrated their compliance with the statutory requirements to create a duty for the County to act to their benefit. Because every claim is derived therefrom, the appellants have not

certificate redemption prices of all tax certificates. It is undisputed that R.C. 5721.38(B)(5) does not apply to Lakeview Holding's situation; it did not timely initiate foreclosure proceedings because it failed to file a Notice of Intent to foreclose, nor is there any suggestion that any of the subject property owners redeemed their respective parcel.

demonstrated error with the trial court's decision granting summary judgment in the County's favor upon all claims.

{¶ 22} That judgment is affirmed.

It is ordered that appellees recover from appellants the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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, JUDGE

ANITA LASTER MAYS, A.J., and
FRANK DANIEL CELEBREZZE, III, J., CONCUR