STATE OF MICHIGAN

COURT OF APPEALS

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs-Appellants,

v

VILLAGE OF CAPAC,

Defendant-Appellee,

and

DEPARTMENT OF TREASURY,

Defendant.

UNPUBLISHED
June 29, 2006

No. 259536
St. Clair Circuit Court
LC No. 04-000508-CC

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs-Appellees,

v

VILLAGE OF CAPAC,

Defendant-Appellant,

and

DEPARTMENT OF TREASURY,

Defendant.

No. 259540
St. Clair Circuit Court
LC No. 04-000508-CC

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

In docket number 259536, plaintiffs appeal as of right and challenge the trial court's grant of summary disposition to defendant Village of Capac (defendant) on counts II through V of plaintiffs' complaint. In docket number 259540, defendant appeals as of right and challenges

the trial court's grant of summary disposition to plaintiffs on count I of their complaint and removal of a demolition lien defendant had placed on plaintiffs' property. For the reasons set forth in this opinion, we affirm the trial court's granting of summary disposition to defendants but reverse the trial court's grant of summary disposition to plaintiff.

This case arises from the demolition of a building that was damaged by a fire in November 1999. Plaintiffs owned the land where the building was located, but had entered into a land contract for its sale with Sam Dado, Luay Jeddo, and Salah Hermiz in 1997. In 1998, the vendees' land contract interest was assigned to Holmes Enterprises Incorporated (Holmes). After the fire, repairs were not made to the building and at a village council hearing in March 2002, the building was declared a dangerous building that was to be repaired, demolished, or otherwise made safe. Notice of the hearing was sent to Holmes and posted at the location. Plaintiffs were not sent notice of the hearing.

Holmes unsuccessfully appealed defendant's dangerous building determination to the circuit court. The court entered a judgment against Holmes, allowed the building to be demolished, and awarded a lien against the property for the costs of demolition. On October 23, 2002, defendant had the building demolished. On February 19, 2002, defendant recorded a lien for $51,239 against the property, listing plaintiffs as the owners of the property, subject to Holmes' land contract interest. On March 26, 2003, plaintiffs received possession of the property after a land contract forfeiture action based on non-payment. On March 1, 2004, plaintiffs filed this action against defendant to quiet title and for damages for constitutional violations, inverse condemnation, violation of substantive due process, and trespass.[1] The trial court granted defendant summary disposition on all of plaintiffs' claims except the quiet title claim. Subsequently, the trial court determined that the demolition lien was extinguished by plaintiffs' land forfeiture action and removed the lien from plaintiffs' title. Plaintiffs and defendant now appeal.

Plaintiffs argue that the trial court erred in granting summary disposition for defendants on their claims for damages. This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). Additionally, "whether constitutional due process applies and, if so, has been satisfied are legal questions reviewed de novo." *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005).

All of plaintiffs' claims for damages are based on an allegation that plaintiffs were deprived of their procedural due process rights when defendant demolished the building without notice to them. Plaintiffs claim due process requires notice be given to a land contract vendor. Plaintiffs also claim that the village ordinance and the state statute that defendant relied on to give notice are unconstitutional.[2] Plaintiffs' assert that despite the fact Holmes appeared on the

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[1] The Complaint also listed the Department of Treasury as a defendant, as apparently the Department filed tax liens against Holmes in January and May 2002. The Department never filed an answer and was defaulted by the trial court.

[2] The village ordinance is based on MCL 125.540 and has similar notice requirements. (continued…)

tax rolls, and notice of demolition was sent to Holmes and allegedly posted on the building, the village could have easily discovered plaintiffs were the actual title holders and accordingly sent them notice. Failure to undertake this simple step violated plaintiffs' constitutional guarantee of due process.

"The federal and Michigan constitutions guarantee that persons may not be deprived of life, liberty, or property without due process of law." *Hanlon v Civil Service Comm*, 253 Mich App 710, 722; 660 NW2d 74 (2002), citing US Const, Am V; Const 1963, art 1, § 17. The Michigan Constitution provides no greater due process protection than the federal due process guarantee. *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 459; 688 NW2d 523 (2004). When evaluating a due process claim, courts are to first determine "'[w]hether any procedural protections are due' and then decide[] 'what process is due.'" *Dow v Michigan*, 396 Mich 192, 203; 240 NW2d 450 (1976), quoting *Morrissey v Brewer*, 408 US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972). The United States Supreme Court has determined that the phrase "due process of law" entitles individuals whose property interests are at stake "to 'notice and an opportunity to be heard.'" *Dusenbery v United States*, 534 US 161, 167; 122 S Ct 694; 151 L Ed 2d 597 (2002), quoting *United States v James Daniel Good Real Property*, 510 US 43, 48; 114 S Ct 492; 126 L Ed 2d 490 (1993). When determining whether the notice given is sufficient for due process purposes, courts are to determine whether the notice was "'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.'" *Id*. at 168, quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314, 319; 70 S Ct 652; 94 L Ed 865 (1950).

Both a titleholder and a land contract purchaser have a due process interest in the property that is the subject of the land contract. *Brandon Twp v Tomkow*, 211 Mich App 275, 282; 535 NW2d 268 (1995). Therefore, it is clear that plaintiffs have a due process interest in the land. However, due process does not require actual notice to an interested party, only that the effort in giving notice be reasonably calculated to apprise interested parties of the action. *Dusenbery*, *supra* at 170-171. The question becomes whether defendant's notice to Holmes was constitutionally sufficient.

In this case, defendant sent notice pursuant to, and in compliance with, MCL 125.540 and the trial court found that compliance with the statute was constitutionally sufficient to protect plaintiffs' due process rights. MCL 125.540(2) states that notice must be served on "each owner of or party in interest in the building or structure in whose name the property appears on the last local tax assessment records." Further, MCL 125.540(5) provides that notice should also be posted at the building or structure. No one disputes that defendant complied with the statute. However, plaintiffs claim that because they had an interest in the property, they should have received actual notice. We conclude that defendant's compliance with the statute adequately protected plaintiffs' due process rights.

Recently, in *Jones v Flowers*, 547 US ___; 126 S Ct 1708; 164 L Ed 2d 415 (No. 04-1477, decided April 26, 2006), the United States Supreme Court addressed what notice is due to

(…continued)

Defendant, however, appeared to have relied on MCL 125.540 when providing notice in this case.

an owner before a state can take property pursuant to a tax sale. In *Jones*, Arkansas sent notice of a delinquency in taxes to the owner by certified mail to the address on the tax records. The notice was returned to the state as unclaimed, and the state sent no further notice to the plaintiff before selling the land in a private sale. *Id*., slip op at 1-2. *Jones* held "that the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id*., slip op at 4. In reaching this holding, the Court noted that the facts in the case were distinguishable from prior Supreme Court precedent because in the prior cases "the government attempted to provide notice and heard nothing back indicating that anything had gone awry." *Id*., slip op at 5. The Court also stated that when the government received the certified letter returned as undeliverable, the government should have taken additional steps to notify the owner, "if practicable to do so." *Id*., slip op at 12. The Court noted that there were reasonable options for the government in *Jones* to provide notice, such as resending the notice by regular mail, or posting the notice at the property addressed to the occupant. *Id*., slip op at 13-14. However, the Court also concluded that the government is not required to search for a new address for the property owner. "An open-ended search for a new address—especially when the State obligates the taxpayer to keep his address updated with the tax collector . . .—imposes burdens on the State significantly greater than the several relatively easy options outlined above." *Id*., slip op at 14.

Defendant complied with MCL 125.540 by mailing notice to Holmes and posting notice at the building location. Unlike *Jones*, where the state received the notice returned to it as unclaimed, in this case Holmes received the notice and appeared at the hearing. There was nothing to alert defendant that it needed to provide any further notice to another party. Although plaintiffs assert that "[f]or the simple cost of $190.00, [defendant] could have obtained title work and determined the title to the property," the statute does not require defendant to do this. *Jones* stands for the proposition that a governmental entity does not have the obligation to search government records for a new address, and by inference is not required to perform a title search.[3] MCL 125.540 provides for a means of giving notice that is reasonably calculated to give notice to interested parties, and defendant did not have any indication that the notice it sent did not notify the proper parties. The fact that plaintiffs had an interest in the property and did not receive actual notice is insufficient to demonstrate that the notice requirements of MCL 125.540 are constitutionally insufficient.[4]

Therefore, because plaintiffs' claims for damages were all based on alleged violations of due process and because we determine that defendant complied with constitutional standards of due process when sending notice, the trial court properly granted defendant summary

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[3] While we hold that plaintiffs'' constitutional guarantees of due process were met by defendant, we are sympathetic to plaintiffs' argument that the village should be mandated to perform a simple title search. Based on current case law, such change must emanate from the legislature.

[4] The record is not entirely clear how plaintiffs did receive notice, however we note that plaintiffs attempted to intervene in the underlying action, but according to plaintiffs'' counsel, by the time plaintiffs discovered the proceeding, the trial court had already ruled that the village was entitled to demolish the building.

disposition.[5] To the extent that plaintiffs raise a facial challenge to the constitutionality of MCL 125.540, we conclude that in most instances notice provided pursuant to the statute will provide actual notice to the property owner, and therefore, plaintiffs' facial challenge fails. See *Council of Organizations v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997) (noting that a party challenging the facial constitutionality of a statute must show that there are no circumstances in which the statute would be valid).

Defendant argues on appeal that the trial court erred in concluding that plaintiffs' land contract forfeiture extinguished the demolition lien. We review a motion to quiet title de novo. *Fowler v Doan*, 261 Mich App 595, 598; 683 NW2d 682 (2004). Initially, we note that the trial court correctly concluded that MCL 125.541 governed the lien in this case. However, we conclude that the trial court erred when it found that plaintiffs' land contract interest was a prior lien or encumbrance that would take priority over defendant's demolition lien.

According to the statute, defendant's demolition lien is subject to any prior recorded lien or encumbrances. MCL 125.541(6). Our Supreme Court has defined a lien or encumbrance as follows:

> In *Post v Campau*, 42 Mich 90, 94-95; 3 NW 272 (1879), we defined an encumbrance to include anything which
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> > "constitutes a burden upon the title; a right of way, . . . a condition which may work a forfeiture of the estate, . . . a right to take off timber, . . . a right of dower, whether assigned or unassigned. . . . In short, 'every right to, or interest in the land, to the diminution of the value of the land, *but consistent with the passage of the fee by the conveyance*.'" (Emphasis supplied.)
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> Hence, although an encumbrance is typically adverse to the interest of the landowner, it does not conflict with his conveyance of the land in fee. A lien is one type of encumbrance. [*Darr v First Fed S & L Ass'n of Detroit*, 426 Mich 11, 20; 393 NW2d 152 (1986).]

Plaintiffs' interest in the land initially was that of a land contract vendor, with Holmes as the land contract vendee. Therefore, before the land contract forfeiture, plaintiffs held legal title in the land subject to Holmes' equitable interest. *Id*. at 19-20. This type of fee interest is not equivalent to a lien or encumbrance on the property. See *id*. at 21 (stating that "[a] land contract vendee's or vendor's lien is not a property right in or right to the land itself, it constitutes instead, a charge or security in the land."). Therefore, the trial court erred when it determined that plaintiffs' fee interest was a prior recorded encumbrance on the land that was superior to defendant's demolition lien.

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[5] In light of our conclusion, we also conclude that the trial court properly denied plaintiffs' motion for reconsideration.

Plaintiffs argue that the lien only attached to Holmes equitable interest and not to the land. However, defendant's lien attached to the property itself, not just Holmes' equitable interest. MCL 125.541(7); see also *Franken Investments, Inc v Flint*, 218 F Supp 2d 876, 882 (ED Mich, 2002) (stating that "[d]emolition costs are 'charged against the land' if the requirements of . . . [the statute] are met."). The land contract forfeiture proceedings removed Holmes equitable interest and any encumbrances that attached to it. It could not remove defendant's lien, which attached to the property itself.

MCL 125.541(6) states that a lien for demolition costs shall "be collected and treated in the same manner as provided for property tax liens under the general property tax act [MCL 211.1 *et seq*]." MCL 211.40 states, in part, that a lien for real estate or personal property taxes "shall continue until paid." Plaintiff argues MCL 211.40 does not apply to defendant's lien for demolition costs because it does not address "the collection" of a lien. However, MCL 211.40 does address the treatment of a lien. Further, contrary to plaintiffs' argument, MCL 211.40, combined with the language of MCL 125.541(6), does not limit its application to only special assessments or tax liens. MCL 125.541(6) states that, even though the demolition lien is not a special assessment or a tax lien, it is to be treated as provided in the General Property Tax Act. Again MCL 211.40 states that the lien is to continue until paid. Therefore, because plaintiffs have not shown a prior recorded encumbrance on the land or that the lien was attached only to Holmes' equitable interest under the land contract, defendant's lien for demolition costs was not extinguished by the land contract forfeiture action and according to MCL 211.40, continues until paid. Therefore, the trial court erred in removing the demolition lien from plaintiffs' title.

Plaintiffs argue that allowing the demolition lien to remain on their title without notice of the hearing in which the lien was issued violates their due process rights. However, we previously concluded that the notice defendant gave complied with due process. Plaintiffs also argue that MCL 125.541 is unconstitutional, making an identical challenge to the challenge discussed previously regarding MCL 125.540. Therefore, for the same reasons discussed in reference to MCL 125.540, we conclude that plaintiffs have not shown that MCL 125.541 is unconstitutional. In light of our conclusions, we also need not reach defendant's argument that res judicata barred this action.

Affirmed in part, reversed in part, and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Janet T. Neff
/s/ Stephen L. Borrello