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## Due Process Supreme Court Rockland County

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**DUE PROCESS**

**SUPREME COURT**

**ROCKLAND COUNTY**

United States Trust Co. of New York v. Town of Ramapo<sup>318</sup>  
(decided July 3, 1996)

Plaintiff, United States Trust Company of New York, as mortgagee, sought a declaratory judgment against Defendant, the State of New York, to hold the Board of Appeals of the Town of Ramapo [hereinafter referred to as "Town"] liable for failing to provide actual notice of the hearing for a demolition permit. The plaintiff alleged that the Town's failure to provide actual notice of a hearing regarding a demolition permit violated both the Federal<sup>319</sup> and New York State<sup>320</sup> Constitutional guarantees of Due Process.<sup>321</sup> Procedural due process requires a process whereby the parties, whose rights are to be affected, are entitled to be heard.<sup>322</sup> The New York State Supreme Court, Rockland County, held that due process, pursuant to federal and state law, requires more than constructive notice for a variance application where the Town Zoning Board of Appeals intended to grant the application for demolition of the building on the property to an entity, as opposed to the owner of the property.<sup>323</sup> Subsequently, the Supreme Court found the demolition permit "void *ab*

318. 168 Misc. 2d 931, 645 N.Y.S.2d 396 (Sup. Ct., Rockland County 1996).

319. U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." *Id.*; U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." *Id.*

320. N.Y. CONST. art. I, § 6. This section provides in pertinent part: "No person shall be deprived of life, liberty or property without due process of law." *Id.*

321. *U.S. Trust*, 168 Misc. 2d at 932, 645 N.Y.S.2d at 396.

322. *Id.* at 933, 645 N.Y.S.2d at 397.

323. *Id.* at 935, 645 N.Y.S.2d at 398-99.

*initio*.”<sup>324</sup> Plaintiff’s application for summary judgment, however, was denied because the issue could not be determined based upon the papers that the plaintiff submitted.<sup>325</sup>

Plaintiff held a mortgage on property located in Monsey, New York.<sup>326</sup> The mortgage was executed when the property was certified as a one-family home located on one-third of an acre.<sup>327</sup> Defendant, not the owner of record of the property, applied to the Town to build a house of worship on the property.<sup>328</sup> Defendant, who was denied the application, sought a variance and advised the Zoning Board that “the existing building would have to be demolished” prior to erecting a new building.<sup>329</sup> The Zoning Board sent notice to neighboring property owners through the mail, posted a notice on the premises and placed notice in the local newspaper regarding the variance.<sup>330</sup> Subsequently the variance granting demolition, was issued.<sup>331</sup> The one-family house was then demolished and construction began on the house of worship.<sup>332</sup> Plaintiff, however, contended that “the Town’s method of giving notice was insufficient to [provide] proper notice to a mortgagee[,]” thereby substantially impairing the mortgagee’s security interest in the property.<sup>333</sup>

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324. *Id.* at 935, 645 N.Y.S.2d at 399 (noting that the town’s failure to notify plaintiff of the hearing deprived plaintiff of an opportunity to be heard, therefore, the demolition permit was declared “void *ab initio*”). “Void *ab initio*” is defined as “[n]ull from the beginning if it seriously offends law or public policy in contrast to a contract which is merely voidable at the election of one of the parties to the contract.” BLACK’S LAW DICTIONARY 1574 (6th ed. 1990).

325. *U.S. Trust*, 168 Misc. 2d at 935, 645 N.Y.S.2d at 399.

326. *Id.* at 932, 645 N.Y.S.2d at 397.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.* (finding that proper notice would have given the plaintiff an opportunity to be heard regarding his security interest in building on the premises. Instead, the plaintiff was never given notice and was thus deprived of his security interest. The plaintiff, without proper notice, was unaware of the demolition permit regarding land on which plaintiff had a security interest.

The court began its analysis by stating that the Due Process Clause of both the Federal and New York State Constitutions require, prior to an action that will affect a property interest protected by the Due Process Clause of the Fourteenth Amendment, a state to provide notice of the pending action.<sup>334</sup> The notice requirement must convey the required information and afford the interested parties reasonable time to make an appearance.<sup>335</sup> In *Mullane v. Central Hanover Bank & Trust Company*,<sup>336</sup> the United States Supreme Court embraced a standard: “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice 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.”<sup>337</sup> Notice may be satisfied in various ways but it “[m]ust be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested parties to make their appearance.”<sup>338</sup> If this standard is met, then the constitutional requirement of due process is satisfied.

In *Mullane*, publication, which had traditionally been accepted as notice, was found insufficient to inform the necessary parties

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This court, therefore, went against the norm requiring more than constructive notice).

334. *U.S. Trust*, 168 Misc. 2d at 933, 645 N.Y.S.2d at 397.

335. *Id.*

336. 339 U.S. 306 (1950).

337. *Id.* at 314 (citations omitted). In *Mullane*, the Supreme Court emphasized the requirement that parties be notified of proceedings affecting their legally protected interests. *Id.* The general rule, as set out in *Mullane*, states that notice by publication is insufficient with respect to a person whose identity is easily ascertainable and whose legally protected interest is affected by the proceeding. *Id.* See *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (stating that notice is a vital corollary to the fundamental requisite of due process - the right to be heard). The Supreme Court of Rockland County followed this standard in its decision. See *U.S. Trust*, 168 Misc. 2d at 933, 645 N.Y.S.2d at 397. See also *Walker v. City of Hutchinson*, 352 U.S. 112 (1956).

338. *Mullane*, 339 U.S. at 314 (citations omitted). See also *Goodrich v. Ferris*, 214 U.S. 71 (1909) (finding that the requirement of notice is of no value unless it is for an adequate purpose).

of the pending action.<sup>339</sup> Notice by publication is inadequate because it is not reasonably calculated to inform interested parties who can be notified by other more effective means.<sup>340</sup> The court concluded that a publication and a posting are insufficient to provide notice when the owner's identity is ascertainable from public records.<sup>341</sup> However, where the person is missing or unknown, and it is not possible or practicable to give a more adequate warning, publication is adequate notice.<sup>342</sup> In *Mullane*, publication was sufficient because it was the best notice practicable when the beneficiaries' locality was unascertainable.<sup>343</sup> A mortgagee has a protected property right and is entitled to actual notice.<sup>344</sup> Notice by publication, though sometimes effective, is not likely to forewarn a mortgagee of a pending proceeding.<sup>345</sup>

In *Mennonite Board of Missions v. Adams*,<sup>346</sup> the Supreme Court held, without listing what types of notice are acceptable and adequate, that notice by mail, which ensures actual notice, "is a minimum constitutional precondition to a proceeding which will adversely affect the . . . property interests of *any*

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339. *Mullane*, 339 U.S. at 320.

340. *Id.* at 316.

341. *Id.* at 318. See also *Schroeder v. City of New York*, 371 U.S. 208 (1962). The general rule, followed by *Schroeder* and taken from *Mullane*, is that "[n]otice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." *Id.* at 212-13.

342. *Mullane*, 339 U.S. at 317.

343. *Id.*

344. *U.S. Trust Co. v. Ramapo*, 168 Misc. 2d 931, 935, 645 N.Y.S.2d 396, 398 (Sup. Ct. Rockland County 1996).

345. See *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983). The Court held that constructive notice to a mortgagee, whose identity may be ascertained through public records, does not satisfy the due process requirement as set forth in *Mullane*. *Id.* at 798-99. "Neither notice by publication and posting, nor mailed notice to the property owner are [proper]." *Id.* at 799. "Personal service or mailed notice is required . . ." *Id.*

346. 462 U.S. 791 (1983). The *Mennonite* court concluded that neither publication nor posting is reasonably calculated to inform interested parties who can be notified by more effective means. *Id.* at 798-99.

party . . . .”<sup>347</sup> The *Menmonite* court concluded that mailed notices to a property owner, including a posting in local newspaper and courthouse, was insufficient to deprive a mortgagee of his interest in the property sold.<sup>348</sup> People who have an interest in property are often unlikely to be reached by means of notice by publication and posting.<sup>349</sup> Such methods of notice, therefore, are unreasonable when more reasonable and inexpensive alternatives are available.<sup>350</sup> The *Menmonite* court concluded that a mortgagee has a substantial property interest and is therefore entitled to notice that is reasonably calculated to apprise it of the event.<sup>351</sup>

New York State courts adhere to the rules for notification mandated by the United States Supreme Court.<sup>352</sup> In 1993, the New York Real Property Tax Law [hereinafter “RPTL”]<sup>353</sup> was re-codified to include a notice provision.<sup>354</sup> The notice provision requires notice to be mailed to a mortgagee, and to any other person whose property interest may be affected by the pending proceeding.<sup>355</sup> Prior to this amendment to the RPTL, notice by

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347. *Id.* at 800.

348. *Id.*

349. *Id.* at 799.

350. *Id.* See N.Y. TOWN LAW § 267-a(7) (McKinney 1996). This section provides, in pertinent part, that the Board of Appeals procedure includes:

Hearing on appeal. The board of appeals shall fix a reasonable time for the hearing of the appeal or other matter referred to it and give public notice of such hearing by publication in a paper of general circulation in the town at least five days prior to the date thereof . . . .

*Id.*

351. *Menmonite*, 462 U.S. at 799.

352. *Schroeder*, 371 U.S. at 213. See *Walker v. City of Hutchinson*, 352 U.S. 112 (1956) In *Walker*, the appellant's land was taken in a condemnation proceeding where notice was given only by publication in a local newspaper. *Id.* at 115-16. The Court held that such notice was constitutionally insufficient because the appellant's identity could have been ascertained through public records. *Id.* at 116.

353. N.Y. REAL PROP. TAX LAW § 1125 (effective January 1, 1995, as amended) (McKinney 1995) (stating that notice is to be mailed to each owner and any other person whose right, title or interest is a matter of public record).

354. *Id.*

355. *Id.*

publication was the only notice given to a mortgagee.<sup>356</sup> Constructive notice, given prior to the amendment, was deemed unconstitutional and in violation of the Fourteenth Amendment.<sup>357</sup> The amendment to the RPTL reflects the ruling in *McCann v. Scaduto*,<sup>358</sup> wherein the New York State Court of Appeals concluded that notice by publication and posting, which is unlikely to reach all those who have an interest in the property, is insufficient.<sup>359</sup> A town's use of such indirect methods of notice is not reasonable when other inexpensive and more efficient alternatives, such as personal delivery, exist.<sup>360</sup> Where the interest of a property owner will be substantially affected by an act of the government, and where the affected party is ascertainable, due process requires that actual notice be given.<sup>361</sup>

The plaintiff, as a mortgagee with a property interest, has an interest in any governmental action that may affect the premises.<sup>362</sup> The court found, however, that the plaintiff was not irrevocably deprived of his property interest unless there had been a tax sale or condemnation proceeding.<sup>363</sup> The plaintiff's security interest, however, was substantially impaired by the

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356. *U.S. Trust v. Ramapo*, 168 Misc. 2d 931, 933-34 645 N.Y.S.2d 396, 397-98 (Sup. Ct. Rockland County 1996).

357. *Id.* See *Cooper v. Makela*, 629 F. Supp. 658 (W.D.N.Y. 1986) (holding that constructive notice to mortgagees does not fulfill the notice requirement of the Fourteenth Amendment).

358. 71 N.Y.2d 164, 519 N.E.2d 309, 524 N.Y.S.2d 398 (1987). Petitioner lost her residence because of unpaid taxes. *Id.* at 171, 519 N.E.2d at 311, 524 N.Y.S.2d at 400. No notice was furnished regarding the tax lien sale. *Id.* Further, the property owner was afforded no right to a hearing. *Id.* at 172, 519 N.E.2d at 311, 524 N.Y.S.2d at 400. The court followed *Mullane* and held that publication was inadequate notice. *Id.* at 174, 519 N.E.2d at 313, 524 N.Y.S.2d at 402. The court found that failure to provide property owners with actual notice of tax lien sale was a deprivation of due process. *Id.* at 176, 519 N.E.2d at 314, 524 N.Y.S.2d at 403.

359. *Id.* at 175, 519 N.E.2d at 314, 524 N.Y.S.2d at 403.

360. *Id.*

361. *Id.*

362. *U.S. Trust v. Ramapo*, 168 Misc. 2d 931, 934 645 N.Y.S.2d 396, 398 (Sup. Ct. Rockland County 1996).

363. *Id.*

demolition of the home on the premises.<sup>364</sup> Although the Town argued that there was no substantial deprivation or impairment to the plaintiff, the building was demolished with the Town's approval and mere constructive notice was given to the mortgagee.<sup>365</sup> The *U.S. Trust* court stated that although the mortgagee has a security interest in the property which may exceed that of the owner, mere deprivation in value would not support a Fourteenth Amendment claim. Substantial deprivation, however, would give rise to a Fourteenth Amendment claim.<sup>366</sup>

The *U.S. Trust* court acknowledged that the Town did not have to provide notice of every minute detail.<sup>367</sup> The burden of notice, however, is not excused by the municipality's taking "reasonable steps to provide actual notice."<sup>368</sup> "When a [town] . . . intends to grant an application . . . to an entity who is not the owner of the property, to demolish the sole and primary building on the property, due process requires more than constructive notice to the mortgagee."<sup>369</sup> There is no additional burden on the town to identify the mortgagee and provide notice by mail concerning the application for the hearing on the demolition than there would be to provide such notice of a tax lien sale.<sup>370</sup> Furthermore, the *U.S. Trust* court found that notice by posting and publication was inadequate and failed to comply with due process requirements.<sup>371</sup> The Town's failure to properly notify the plaintiff of the hearing deprived the plaintiff of (1) an opportunity to be heard, and (2) the former building on the premises.<sup>372</sup> The

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364. *Id.* at 934, 645 N.Y.S.2d at 398 (stating that "[t]he demolition of the entire building on the property is not akin to a mere decline in property, which would not support a Fourteenth Amendment deprivation claim . . . but constitutes a very substantial impairment of plaintiff's security interest").

365. *Id.* at 935, 645 N.Y.S.2d at 398.

366. *Id.*

367. *Id.*

368. *Anthony v. Town of Brookhaven*, 190 A.D.2d 21, 27, 596 N.Y.S.2d 459, 462 (2d Dep't 1993).

369. *U.S. Trust*, 168 Misc. 2d at 935, 645 N.Y.S.2d at 398.

370. *Id.* at 935, 645 N.Y.S.2d at 398-99.

371. *Id.*, 645 N.Y.S.2d at 399.

372. *Id.*



court, therefore, concluded that “[t]he demolition permit is thus declared null and void *ab initio*.”<sup>373</sup>

The court in *Walker* stated that notice by publication is inadequate when one’s identity may be easily ascertained through public records. New York courts have adopted the rule enunciated in the *Mullane* case via *Walker*.<sup>374</sup> A town must give a mortgagee notice that a building may be demolished.<sup>375</sup> Although the plaintiff mortgagee was unknown to the town, the plaintiff’s identity could have been ascertained by means of public records. Therefore, publication was inadequate notice and, as such, constituted a violation of the plaintiff’s due process rights.<sup>376</sup>

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373. *Id.*

374. *See Walker v. City of Hutchinson*, 352 U.S. 112 (1956).

375. *U.S. Trust*, 168 Misc. 2d at 935, 645 N.Y.S.2d at 398-99.

376. *Id.*