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# Court of Appeals of New York, Harner v. County of Tioga

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# COURT OF APPEALS OF NEW YORK

Harner v. County of Tioga[1]
(decided June 8, 2005)

In 2002, Tioga County instituted a tax foreclosure proceeding against Donald Harner. After Tioga County acquired title to Harner's property, Harner brought suit claiming federal[2] and state[3] constitutional violations. Harner claimed that he was denied due process because he never received proper notice.[4] Harner instituted an Article 78[5] proceeding to "[set] aside the tax deed and [declare] him the owner of the property with the right to redeem it."[6] The New York Supreme Court dismissed Harner's petition finding that "the County satisfied the notice requirements of RPTL 1125[7] and due process."[8] The Appellate Division reversed, and granted the petitioner relief, finding that the notice failed to satisfy due process.[9] However, the Court of Appeals reversed that decision, holding that

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[1] 833 N.E.2d 255 (N.Y. 2005).

[2] U.S. CONST. amend. XIV, §1 states in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

[3] N.Y. CONST. art 1, § 6 states in pertinent part: "[n]o person shall be deprived of life, liberty or property without due process of law."

[4] *Harner*, 833 N.E.2d at 257.

[5] N.Y. C.P.L.R. 78 (McKinney 2005) (defining the types of causes of action a plaintiff may sue under in a "Proceeding Against Body Or Officer").

[6] *Harner*, 833 N.E.2d at 257.

[7] *See infra* note 46-48 and accompanying text.

[8] *Id.* at 257.

[9] *Id.*

the procedures used by the county satisfied due process.[10]

Harner purchased a house in Tioga County in 1982.[11] In 1990 Harner conveyed the property to George and Glenda Winnie by land contract. [12] Although the contract provided that the Winnies' pay all real property taxes, Harner remained the owner on public tax records.[13] In 2002 Tioga County instituted a tax foreclosure proceeding.[14] In providing notice to Harner, the county sent the pertinent information via certified first class mail to the address for the Tioga County property, which Harner conveyed in 1990.[15] Harner did not respond to the mailing and the post office returned the letters as "unclaimed."[16]

The land contract placed the duty of paying all property taxes and any assessments placed on the land on the Winnies.[17] However, the Town of Spencer still had Mr. Harner as the owner of record on the tax rolls.[18] In 1993 the tax rolls showed that Mr. Harner's address was changed to "105 Auburn Road, Town of Lansing, Tompkins County."[19] One year later there was another change in the tax records as Mr. Harner's address was amended to read "Donald Harner, c/o Glenda Winnie, 34 West Tioga St, [sic] PO Box 505,

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[10] *Id.* at 257-58.

[11] *Id.* at 256 (stating that said house was located at 34 West Tioga Street, Town of Spencer, Tioga County).

[12] *Harner*, 833 N.E.2d at 256.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 256-57.

[17] *Harner*, 833 N.E.2d at 256.

[18] *Id.*

[19] *Id.*

Spencer, NY 14883." [20] Both Mr. Harner and the Winnies denied ever requesting such a change.[21] The record showed that all correspondence regarding Mr. Harner's property at 34 West Tioga was mailed to this address.[22]

Approximately two years after the tax record was changed to the c/o Glenda Winnie address, Tioga County began a series of tax foreclosure proceedings against Mr. Harner.[23] In both 1996 and 1998, Tioga County sent correspondence to Mr. Harner notifying him of his arrears.[24] In all instances, the correspondence regarding 34 West Tioga Street was sent by certified first class mail to this address "to Harner c/o the Winnies."[25] Although Mr. Harner denied having any knowledge of these foreclosure proceedings, the property was redeemed on both occasions.[26]

A third foreclosure was instituted in 2002.[27] This time the county not only sent a certified first class letter to the 34 West Tioga address, but it also "published notice of the foreclosure proceedings in a local newspaper and posted notice in the Tioga County Courthouse and the offices of the County Clerk and County Treasurer."[28] In fact, the "County later amended its petition and

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[20] *Id.*

[21] *Id.*

[22] *Harner*, 833 N.E.2d at 256.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Harner*, 833 N.E.2d at 256.

[28] *Id.*; N.Y. REAL PROP. TAX LAW § 1124 (McKinney 2005) which states in pertinent part:

> 1. Upon the filing of a petition of foreclosure in the office of the County clerk, the enforcing officer forwith shall cause a notice of foreclosure to be published in each of three non-consecutive weeks in a two month

notice of foreclosure, and similarly mailed the amended notice by both certified and first class mail. It also published and posted public notices."[29] Neither Mr. Harner nor the Winnies responded to this last correspondence, and the letters came back stamped by the United States Post Office as "unclaimed."[30]

After this, the county repeated its procedures by mailing, via certified first class mail, the correspondence to 34 West Tioga Street.[31] Once again, neither Mr. Harner nor the Winnies responded, as the "mailings were never returned to the County."[32] Approximately five months later, in "May of 2003, upon the failure of anyone to redeem the property, the County acquired title to the premises."[33] Harner then brought the present action.[34]

After the initial dismissal of Harner's petition by the Supreme Court, the Appellate Division heard the matter and addressed the technicality of how the letters were returned to the county.[35] The Appellate Division reasoned that when the letters came back via certified mail, marked as "unclaimed," it should have "alerted the County to the possibility of inadequate notice and thereby required it to conduct a reasonable search of the public record beyond the

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be published in each of three non-consecutive weeks in a two month period in at least two newspapers designated by him or her. 2. (a) Each newspaper designated for this purpose shall have general circulation in the tax district. An official newspaper of the tax district shall be deemed to satisfy the requirement of this provision.

29 *Id.*

30 *Id.* at 257.

31 *Id.*

32 *Harner*, 833 N.E.2d at 257.

33 *Id.*

34 *Id.*

35 *Id.*

relevant tax rolls."[36]

However, the Court of Appeals reversed, holding that the procedures used by the county satisfied due process.[37] The court stated that "generally the municipality should conduct a reasonable search of the public record when the notice is returned undeliverable."[38] The Court of Appeals reasoned that the attempted personal notice, via certified first class mail, as well as the constructive notice of postings in the two town offices, were sufficient to satisfy notice and due process.[39] The court also mentioned that it was proper to take into account the actions of the party who claimed notice was not given.[40] The court reasoned that the petitioner's previous bill payment, and failure to change his mailing address, led the county to reasonably believe that it had the correct address.[41] The court also stated that Harner's reliance on the land contract was unfounded.[42] Because the contract was private and not recorded with the county, the court concluded that it did not put the county on notice of any address change or any change in who should be paying the taxes.[43] Mr. Harner claimed he was not given sufficient notice and that therefore he was denied his federal and state constitutional rights.[44]

Tioga County followed procedures which satisfied New York

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[36] *Id.*
[37] *Harner*, 833 N.E.2d at 257-58.
[38] *Id.* at 257.
[39] *Id.*
[40] *Id.*
[41] *Id.* (quoting Kennedy v. Mossafa, 789 N.E.2d 607, 612 (N.Y. 2003)).
[42] *Harner*, 833 N.E.2d at 258.
[43] *Id.*

Real Property Tax Law section 1125(1)(a).[45] Section 1125 outlines the notice requirement in tax foreclosure proceedings.[46] Specifically, section (1)(a) requires a county to mail, by certified first class mail, notice to the owner of the property that is sought to be foreclosed by the county.[47] Section 1125 requires that the county provide notice to property owners "whose name and address are reasonably ascertainable from the public record, including the records in the offices of the surrogate of the County."[48] In *Harner*, "the County . . . mailed notices by first class mail, and both published and posted notices of the foreclosure proceeding."[49] The question then became whether the county deprived Mr. Harner of his due process right to prior notice when it failed to do any further investigation into his address, when the certified first class letters came back as "unclaimed."[50]

In *Mullane v. Central Hannover Bank & Trust Company*,[51] the United States Supreme Court interpreted the Fourteenth Amendment of the United States Constitution, as applied to notice requirements for the interested parties of a trust account in the Central Hannover Bank.[52] The issue in *Mullane* was whether the notice requirements of New York Banking Law section 100-c (12)

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[44] *Id.* at 257.
[45] *Id.* at 258.
[46] N.Y. REAL PROP. TAX LAW § 1125 (McKinney 2005).
[47] *Id.* at (1)(a).
[48] *Id.*
[49] *Harner*, 833 N.E.2d at 258.
[50] *Id.* at 257.
[51] 339 U.S. 306 (1950).
[52] *Id.* at 309, 311.

were constitutional under the Due Process Clause, as it only required notice by newspaper publication.[53] The Central Hannover Bank provided notice to members of the trust whose addresses where unknown to the bank, via newspaper once a week for four consecutive weeks.[54] The Supreme Court found this notice to satisfy the Due Process Clause stating that, "in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final degree foreclosing their rights."[55] The Supreme Court stated that constructive notice via publication was sufficient notice to a person whose address could not reasonably be ascertained.[56]

The Court went on the state that there must be a balancing of the state's interest of practicality as well as the individual's interest of being provided with reasonable notice before being deprived of life, liberty or property.[57] The Court in *Mullane* stressed that it was not outlining a rigid due process test.[58] In striking a balance, the Court noted that "[p]ersonal service [is] not in all circumstances . . . indispensable to [due process] . . . [b]ut . . . process which is a mere gesture is not due process."[59] Overall, the Court set forth a

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[53] *Id.* at 310.
[54] *Id.* at 309-10.
[55] *Id.* at 317 (citing Jacob v. Roberts, 223 U.S. 261, 265-66 (1912); Blinn v. Nelson, 222 U.S. 1, 6-7 (1911); Cunnius v. Reading Sch. Dist., 198 U.S. 458, 477 (1905)).
[56] *Mullane*, 339 U.S. at 317.
[57] *Id.* at 313-14.
[58] *Id.* at 314.
[59] *Id.* at 314-15.

reasonableness standard.[60] Due process will be satisfied so long as the means employed by the actor giving notice, are reasonably calculated to achieve such notice.[61] This standard ensures that the state is not unduly burdened by strict requirements, while at the same time, it provides notice to individuals that will be, at the least, adequate.

The New York Court of Appeals, in *Zaccaro v. Cahill*, addressed the issue of whether the notice provisions of the New York Department of Environmental Conservation (hereinafter "DEC") in designating "a landowner's property as a wetland" were constitutionally sufficient.[62] The DEC first developed a tentative map, to which it notified all affected property owners, as per the latest tax records.[63] These property owners were supplied with written notice of a public hearing where a discussion of the proposed map would take place.[64] Along with the written notice, the DEC provided notice via publication "in two local newspapers at least once" as required by statute.[65] After the final map was completed, the DEC once again provided written notice to all property owners as well as publication in a local newspaper.[66] Zaccaro, however, did not receive written notice because his property was not properly located

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[60] *Id.* at 315.

[61] *Mullane*, 339 U.S. at 315.

[62] Zaccaro v. Cahill, 800 N.E.2d 1098, 1097 (N.Y. 2003).

[63] *Id.*

[64] *Id.*

[65] *Id.* (citing N.Y. ENVTL. CONSERV. LAW § 24-0301 [4] (McKinney 1972)).

[66] *Id.* at 1097-98. The DEC also provided notice to the local government whose landowners were affected, and also filed "the final map in the office of the clerk of affected local governments." *Id.* at 1098.

on the most recent tax maps.[67] Yet the court reasoned that the local government was not required to search the tax records to make sure all affected property owners were in fact notified, as it would be a "very substantial burden on the City."[68] The court further held that the notice provided was sufficient to meet the minimal standards of due process, especially when combined with the fact that the property owners themselves had "some obligation to maintain their records with the City for tax billing purposes."[69]

Further, the New York Court of Appeals, in *Kennedy v. Mossafa*,[70] was faced with a situation similar to the one in *Harner*, as it dealt with the issue of "whether the procedures used by a county to foreclose on a property following a tax delinquency satisfied constitutional due process even though the owner never actually learned about the proceeding."[71] In *Kennedy*, the plaintiff claimed notice was not sufficient for two reasons: that a reasonable search of the public records would have provided the town with her address and that her new address was located on the envelope and check she mailed to the town to pay the taxes of her property, as well as in a letter she allegedly sent to the town regarding her address change.[72] The court rejected these arguments as the plaintiff supplied no proof of sending this letter; nor did she prove that a reasonable search of the records would have supplied the town with her new address, and

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[67] *Zaccaro*, 800 N.E.2d at 1099.

[68] *Id.* at 1100 (quoting ISCA Enters v. City of New York, 572 N.E.2d 610, 616 N.Y. 1991)).

[69] *Id.*

[70] *Kennedy*, 789 N.E.2d 607.

[71] *Id.* at 607-08.

[72] *Id.* at 611-12.

finally, that a different address on a check and envelope does not put the town on notice of an address change.[73] The plaintiff's acts of paying the taxes, except for the one which put her property in foreclosure, "gave the Town and County reason to believe that it was still the correct address."[74]

Lastly, the *Harner* court also relied on its decision in *ISCA Enters v. City of New York.*[75] In *ISCA*, the plaintiff's property was foreclosed without receipt of actual notice.[76] For the city to comply with the proper notice requirements "[p]ublication of a notice of foreclosure must [have been] made at least once a week for six successive weeks in the City Record and in two newspapers published and circulated within the relevant county."[77] The court recognized that such notice alone would be inadequate, but held however, that notice was sufficient, as the plaintiff had an obligation to make sure that her address was properly updated with the city.[78] The court also noted that the city has a duty to search records to find the property owner's address, but not to the point were it would be "onerous."[79]

Both the federal and New York State courts have relied on a key phrase in *Mullane* to determine whether notice was sufficient: "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably

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[73] *Id.* at 612.
[74] *Id.*
[75] 572 N.E.2d 610.
[76] *Id.* at 613.
[77] *Id.* at 612 (citing NEW YORK, N.Y. ADMIN. CODE tit. 11 § 11-406(a) (1997)).
[78] *Id.* at 615, 616.

calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[80] The *Harner* court held that the notice given in the case at bar was reasonable under the circumstances, and therefore satisfied the due process clause of both the federal and state constitutions.[81] In so holding, the *Harner* court stated that "[d]ue process is a flexible concept, requiring a case-by-case analysis that measures the reasonableness of a municipality's actions in seeking to provide adequate notice."[82]

With respect to due process, the Federal Constitution provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law,"[83] while the New York State Constitution states "[n]o person shall be deprived of life, liberty or property without due process of law."[84] There is no substantive difference between the constitutional due process clause of the federal and state Constitutions. Nevertheless, there is a slight difference in how the clauses are applied via case law.[85]

With regard to the constitutional adequacy of notice, New York cases analyze the conduct of the individual seeking the notice.[86] In *Harner*, the court stated that "[a] balance must be struck between the State's interest in collecting delinquent property taxes and those

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[79] *Id.* at 616.

[80] *Mullane*, 339 U.S. at 314 (*see also*, *Harner*, 833 N.E.2d at 257; *Zaccaro*, 800 N.E.2d at 1099; *Kennedy*, 789 N.E.2d at 611; *ISCA*, 572 N.E.2d at 615).

[81] *Harner*, 833 N.E.2d at 257-58.

[82] *Id.* at 257.

[83] U.S. CONST. amend. XIV, §1.

[84] N.Y. CONST. art 1, § 6.

[85] *Harner*, 833 N.E.2d at 257.

of the property owner in receiving notice."[87] The *Harner* court quoted *Kennedy* and *ISCA* stating that "[i]n striking such a balance, the courts may take 'into account the status and conduct of the owner in determining whether notice was reasonable.' "[88] The United States Supreme Court in *Mullane* did not use the conduct of the plaintiff as part of its balancing test.[89] This was an important issue in the *Harner* case because Harner asserted that he did not receive the tax foreclosure letter, for he claimed it was mailed to the wrong address.[90] In applying *Kennedy* and *ISCA*, the *Harner* court concluded that it was reasonable for the county to rely on the fact that the conduct of Harner's previous payments of the taxes, to infer that he was simply "attempting to avoid notice by ignoring the certified mailings."[91]

Although the *Mullane* court did not address the conduct and or burden to make sure the address was correct, the federal and state constitutional interpretations regarding notice and the Due Process Clause are almost identical. The *Harner* court upheld the rule of law set forth in *Mullane* that notice must only be reasonable under the circumstances, and as it was here, the notice was constitutionally adequate.

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[86] *Id.* at 258.
[87] *Id.* at 257 (citing *Zaccaro*, 800 N.E.2d at 1100; *Kennedy*, 789 N.E.2d at 611).
[88] *Id.* (citing *Kennedy*, 789 N.E.2d at 612; *ISCA*, 572 N.E.2d at 616).
[89] *Mullane*, 339 U.S. at 313-14.
[90] *Harner*, 833 N.E.2d at 256.
[91] *Id.* at 258.