STATE OF MICHIGAN
IN THE SUPREME COURT

2 CROOKED CREEK LLC, an Indiana limited liability company, and RUSSIAN FERRO ALLOYS, INC., an Indiana corporation,

Plaintiffs-Appellants,

v

TREASURER OF THE COUNTY OF CASS,

Defendant-Appellee.
_____/

Michigan Supreme Court No. 159856

Court of Appeals No. 342797

Court of Claims No. 14-000181-MZ

REPLY IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL OF 2 CROOKED CREEK LLC AND RUSSIAN FERRO ALLOYS, INC.

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INTRODUCTION

The parties agree on two important points. Most significantly for whether the Court should grant the application, the parties agree that this case presents a jurisprudentially significant issue, because it concerns the interpretation of an important state statute that applies in all tax foreclosures in Michigan. To her credit, the Treasurer's answer did not deny the importance of the case or attempt to retreat from statements in her publication request (Appl'n App 39–40) that emphasize the statewide importance and recurring nature of the issue. And the parties also agree that under the Court of Appeals' interpretation, owners of extinguished property interests who have been provided constructive notice cannot bring an action under MCL 211.78*l*. Answer, p 20 (arguing that actions under § 78*l* may be brought only by individuals who did not receive "the notice required by the due process clauses"), p 28 ("the notice required by the Act (constructive notice)").

Given the importance of this issue, the Court should grant the application to resolve the remaining area of disagreement: whether the Legislature intended to create a cause of action in § 78*l* that would be useless.

ARGUMENT

I. The Treasurer's answer confirms that § 78*l* has become mere surplusage under the Court of Appeals' interpretation.

Although the Treasurer asserts that § 78*l* is not a dead letter, she is unable to point to any signs of life for § 78*l*. In her answer, she had the opportunity to refute the application's primary argument—that the Court of Appeals has turned § 78*l* into surplusage—by describing circumstances where § 78*l* would still do some

work even under the Court of Appeals' now-binding interpretation. But she has declined that opportunity: she has failed to identify even a single instance where § 78*l* would still apply. Nor could she. After all, § 78*l* applies only after foreclosure has occurred (a point she does not dispute), and a foreclosure that did not provide at least constructive notice would violate due process and so be invalid even without § 78*l* (a point she also does not dispute). Taken together, those two points demonstrate that the Legislature intended § 78*l* to come into the picture only after a foreclosing government has *already* provided constructive notice, and that context means that the Legislature must have intended the phrase "any notice" in § 78*l* to mean more than just constructive notice. Yet the Treasurer never addresses this point that flows from the plain text and structure of the statute.

Nor does the Treasurer offer any response to the multiple examples in the application, Appl'n, pp 17–19, that demonstrate that the phrase "any notice" is often understood to mean actual notice. Instead, she merely emphasizes that 2CC and RFA were not deprived of due process. E.g., Answer, p v (rewriting the question presented to add a due-process question not included in the application); Answer, p 18. But that is beside the point, because the statute offers a remedy to those who were provided constructive notice but did not receive actual notice, a remedy that extends beyond the constitutional requirement of due process: "MCL 211.78*l* provides in such cases a damages remedy that is not constitutionally required." *In re Treasurer of Wayne County for Foreclosure*, 478 Mich 1, 10 (2007); *see also Gillie v Genesee Cty Treasurer*, 277 Mich App 333, 353 n 10 (2007) ("The Supreme Court

noted that MCL 211.78*l* provides 'a damages remedy that is not constitutionally required.' This is because statutory notice rights can be violated, giving rise to an action for money damages, yet minimum due process may have been satisfied.") (quoting *In re Treasurer of Wayne Co*, 478 Mich at 10)).

The Treasurer does not explain how the Legislature could have intended § 78*l* to provide a cause of action only for those deprived of due process—i.e., only for those who do not need a statutory cause of action because the state and federal constitutions already provide a remedy, Appl'n, p 23. Instead, the Treasurer doubles down on her insistence that § 78*l* is inapplicable whenever a property owner has received sufficient constructive notice, by arguing that § 78(2) shows that only constructive notice is necessary and that § 78*l* must be read together with § 78(2).

But reading the two provisions together confirms the Legislature's intent to create a separate cause of action in § 78*l*. Section 78(2) states that "[i]t is the intent of the legislature that the provisions of this act relating to the *return, forfeiture, and foreclosure* of property for delinquent taxes satisfy the minimum requirements of due process" and that "*those provisions* do not create new rights beyond those required under the state constitution of 1963 or the constitution of the United States." (Emphasis added.) But § 78*l* is not one of "those provisions." Section 78*l* does not relate to the "return, forfeiture, and foreclosure" of the property; quite the opposite, it expressly disclaims any relationship to the *return* of the property by saying it does not authorize "an action for possession of the property against any subsequent owner," and it provides no mechanism for undoing the *forfeiture* of the

property or the *foreclosure* because it applies only after "a judgment of foreclosure is entered" and because it authorizes only money damages, not a reversal of the foreclosure and forfeiture. In short, § 78*l* does not relate to the act's "return, forfeiture, and foreclosure" provisions but rather provides a separate *post*-foreclosure cause of action.

Further, reading § 78*l* and § 78(2) together confirms that the two provisions do not conflict but instead serve separate functions. Section 78(2) is written to prevent *courts* from rewriting the return, forfeiture, and foreclosure provisions: it provides that the failure of a foreclosing government "to follow a requirement of this act relating to the return, forfeiture, or foreclosure of property for delinquent taxes shall not be *construed* to create a claim or cause of action . . . unless the minimum requirements of due process . . . are violated." (Emphasis added.) This language about how those provisions are to "be construed" shows that the Legislature did not want the courts to create a cause of action for a government's failure to meet some technical requirement of the act, when due process was nonetheless provided. But for instances where a property owner did not receive any notice at all, the Legislature itself created a cause of action in § 78*l*. E.g., MCL 211.78*l*(1) (saying an owner of an extinguished interest may "bring an action to recover monetary damages as provided in this section"); MCL 211.78*l*(2) (referring to an "action to recover monetary damages under this section"); MCL 211.78*l*(3) (same); MCL 211.78*l*(4) (referring to "monetary damages recoverable under this section"); MCL 211.78*l*(5) (recognizing that this section creates a "*right* to sue for monetary

damages under this section") (emphasis added). And yet the Treasurer never even attempts to explain how all of those parts of § 78*l* expressly creating a cause of action could somehow be read as not creating a cause of action.

What's more, even if § 78(2) and § 78*l* did conflict, then the familiar principle that a more specific provision controls over a more general provision would apply and resolve the conflict. E.g., *Ter Beek v City of Wyoming*, 495 Mich 1, 22 (2014). Here, § 78*l* is the more specific provision, because it specifically creates both a right and a cause of action for a specific type of owner, one who received constructive notice sufficient to satisfy due-process minimums but still did not receive "any notice required under this act," MCL 211.78*l*(1), and so would control in a conflict.

II. Section 78*l*'s plain text allows RFA to bring an action even though its interest was unrecorded.

As explained in the application, Russian Ferro Alloys is entitled to bring an action under § 78*l* even though its interest in the house was not recorded when the Treasurer's agent checked the register of deeds nine months before the foreclosure became final. The plain language of § 78*l* expressly covers unrecorded interests: § 78*l* creates an action for "the owner of any extinguished . . . *unrecorded* interest" to "bring an action to recover monetary damages" if the owner "did not receive" any notice "required under the act." And RFA did not receive notice even though the Treasurer was "required under the act" to provide notice: § 78a(4) expressly provides that "[t]he county treasurer shall notify . . . holders of undischarged mortgages" if the property holder becomes delinquent on taxes.

The Treasurer agrees with 2CC that the owner of an unrecorded interest is at least sometimes entitled to notice. For example, her answer acknowledges (at 27 n 14) that she would have to give notice to the land contract vendee of an unrecorded land contract that was in her tax files, because § 78i(6)(b) requires a foreclosing government to provide notice to the owner of a property interest if that interest is identifiable by reference to tax records in the office of the county treasurer. But admitting that she is required to give notice to the holder of an unrecorded interest under § 78i does not excuse her from her obligation to provide notice to the holder of an undischarged mortgage under § 78a(4). Her duty under § 78a(4) to provide notice to Russian Ferro Alloys, the holder of an undischarged mortgage, is plain: "The county treasurer shall notify . . . holders of undischarged mortgages if delinquent taxes on the property or properties are returned within that year." MCL 211.78a(4).

Where the lower courts and the Treasurer have gone astray in this case on this issue is by reading a limitation that appears in § 78i(6) as if that limitation also applied to § 78a(4), namely the limitation that the interest owner is "entitled to notice under this section . . . if that owner's interest was *identifiable* by reference to any of the following sources *before the date* that the county treasurer records the certificate required under section 78g(2)." MCL 211.78i(6) (emphasis added); see Appl'n App, p 13 (relying on this language in § 78i). But this identifiable-before-the-date limitation does not appear in § 78a(4), and that textual difference by itself shows that the Legislature did not intend for the limitation in § 78i to apply to § 78a or to § 78*l*. E.g., *Russello v United States*, 464 US 16, 23 (1983) (a legislature is

presumed to act "intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another section of the same Act").

And here the evidence that the Legislature did not intend for the identifiable-before-the-date limitation to apply outside of § 78i is even stronger: the Legislature expressly said it was talking only about "notice *under this section*"—i.e., under § 78i—in § 78i's text, thereby confirming that this limitation applies only in § 78i. MCL 211.78i (emphasis added). Accordingly, the case relied on by the Court of Appeals, namely *First National Bank of Chicago v Department of Treasury*, 280 Mich App 571 (O'Connell, J., dissenting), adopted by reference 485 Mich 980 (2009), does not help the Treasurer, because that case involved notice that was "[u]nder MCL 211.78i," 280 Mich App 579, and so, unlike the situation here, actually implicated the identifiable-before-the-date limitation that expressly applies to notice "under this section," MCL 211.78i. Indeed, that case makes no mention of § 78a (which requires notices to be sent to holders of undischarged mortgages) or of § 78*l* (which expressly grants a right to sue to the holders of "unrecorded" interests).

III. The Treasurer's policy and evidentiary points are also unpersuasive.

The Treasurer also raises several arguments based on a combination of policy and evidentiary concerns. First, the Treasurer argues that reading § 78*l* to require actual notice would give any taxpayer "the option to avoid foreclosure by doing as little as refusing or failing to sign for certified mail sent to them and then denying receipt." Answer, p 19. But taking those actions would not avoid foreclosure; § 78*l* applies only after a foreclosure, and it expressly excludes regaining "possession of

the property" as remedy. Rather, it merely provides an avenue for seeking money damages. And there is no reason to think that individuals capable of paying their property taxes, if only they received some notice, would refuse to accept a tax bill, especially when, as here, the property was worth far more than the taxes due. Appl'n App 27 (noting Antipov's testimony that "he would have paid the taxes because what was due was 'nothing compared to the value of the property'").

On a related note, the answer asserts that 2CC and RFA have "completely failed to satisfy their burden in showing lack of notice," particularly given the Court of Claims' adverse credibility finding about Antipov's testimony that he did not receive actual notice. Answer, pp 24, 27. But the Treasurer's assertion is incorrect on several fronts. While the Court of Claims did make a limited adverse credibility determination—"the Court concludes that Antipov's assertion that he never received any notice of any kind at any time was simply not credible," Appl'n App 14—the adverse credibility determination simply means that the Court gave no weight to his statement. But an adverse finding about credibility is not a finding that the underlying fact is the opposite of the statement. E.g., *Bose Corp v Consumers Union of US, Inc*, 466 U.S. 485, 512 (1984) ("When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion."). (For example, if a completely blind person near a hit-and-run accident testified that he personally saw that the fleeing car was blue, not red, and the court found the witness not credible because the witness physically could not have seen

the color, then that limited adverse credibility finding would not establish that the car was in fact red.)

And the record does contain sufficient evidence that 2CC did not receive actual notice before the foreclosure. For one, Douglas Anderson also testified that he did not receive actual notice before the foreclosure. Appl'n App 27. That evidence, combined with Antipov's testimony that he would have paid if he had known—testimony not undermined by the limited adverse credibility finding—is sufficient to show that 2CC did not receive notice. After all, the record confirms that Antipov had the means to pay the taxes, e.g., Appl'n App 27 ("he did remit the funds when he found out about it"), and the most reasonable inference from those facts—that he had the means to pay a $14,000 tax bill and that doing so would prevent the otherwise certain loss of a $3.5 million dollar property—is that he must not have known that he was about to lose the multimillion dollar property. In short, this strong circumstantial evidence is more than sufficient to satisfy the burden of proof, and the Court of Claims did not cite any affirmative evidence of actual notice.

The Treasurer's answer makes other mistakes. For example, it asserts (at 7) that 2CC was "not identified anywhere in the body of the [mortgage]," but its own appendix includes the mortgage (as trial exhibit J-6, in the appendix's Exhibit 7), and the first page of the mortgage states that the "Note is to be secured by a mortgage on land owned by 2 Crooked Creek, LLC." The answer also asserts that the application makes "many misrepresentations and omissions" about the facts, Answer, p 3, but it fails to identify any actual misrepresentations or any material

facts that were omitted. The Treasurer also faults Antipov for failing to pay taxes for later years (through 2018), Answer, p 4 n 5, but she had already refused his check in 2014, Appl'n App 27, and he no longer had title to, nor possession, of the property after 2014. And the Treasurer never explains why the statutory question at issue here would be precluded by "the laws of *res judicata*, collateral estoppel and stare decisis," Answer, p 1, when there is no prior case resolving this statutory question in the Treasurer's favor; the Cass County Circuit Court case did not involve the § 78*l* claim (because § 78*l* claims must be brought in the Court of Claims, MCL 211.78*l*(2)), and this is a direct appeal from the Court of Claims case.

Finally, the Treasurer argues that there is no evidence in the record of the fair market value of the property at the time of the foreclosure. Answer, pp 29–32. But she fails to explain why a cost-plus-depreciation method for a brand new house does not provide at least *some* evidence of fair market value. After all, the cost of buying the land plus the cost of building the new house is what any other market participant would have had to pay in the market to get that new house on that property. And in any event, the Court of Claims did not base its lack-of-evidence conclusion on this theory; rather, the Court of Claims based its conclusion on its view that it could not tell what percentage of the interest 2CC and RFA respectively owned, Appl'n App, p 19, and the Treasurer says nothing to defend that conclusion.

CONCLUSION AND RELIEF REQUESTED

Because this is an important issue for Michigan's jurisprudence, this Court should grant the application and the relief requested in the application.

Respectfully submitted,

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