

2011 IL App (2d) 100957-U  
No. 2—10—0957  
Order filed August 9, 2011

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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JERRY M. COLANTUONO,	)	Appeal from the Circuit Court
	)	of Du Page County.
Petitioner-Appellant,	)	
	)	
v.	)	No. 99—TD—65
	)	
JOHN LOTUS NOVAK, County Treasurer,	)	
As Trustee of the Indemnity Fund Created By	)	
Illinois Property Tax Code	)	
35 ILCS 200/21—295 through 21—305,	)	Honorable
	)	Thomas C. Dudgeon,
Respondent-Appellee.	)	Judge, Presiding.

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JUSTICE SCHOSTOK delivered the judgment of the court.  
Justices McLaren and Hudson concurred in the judgment.

**ORDER**

*Held:* The trial court did not abuse its discretion in finding that the petitioner was not equitably entitled to recover from the county's tax deed indemnity fund.

¶ 1 The petitioner, Jerry Colantuono, lost his home because he failed to pay his property taxes. He then filed a petition under section 21—305 of the Property Tax Code (35 ILCS 200/21—305 (West 2004)) against the Du Page County treasurer, seeking an award from the county's tax deed indemnity fund. On August 31, 2010, following a hearing, the trial court denied the petition, finding

that the petitioner was not equitably entitled to recover from the fund. The petitioner appeals from that order. We affirm.

¶ 2 In 1974, the petitioner purchased a townhome in Hanover Park. In 1997, the petitioner refinanced his home. Under the terms of the refinancing, no escrow account was provided and the petitioner was obligated to pay his own property taxes. The petitioner failed to pay either the 1998 or the 1999 taxes. The unpaid taxes were sold at a tax sale on December 6, 1999.

¶ 3 On April 24, 2001, the petitioner refinanced the subject property with A.J. Smith Federal Savings Bank (A.J. Smith Bank). At the time of refinancing, the amount needed to redeem the 1998 and 1999 taxes was approximately \$5,266.07. On the HUD—1 RESPA Settlement Statement prepared by Chicago Title Insurance Company (Chicago Title), the \$5,266.07 settlement amount was erroneously described as “2<sup>nd</sup> of 2000 Taxes to Du Page County Collector.” The petitioner questioned that amount and was told by the title agent “that’s got to be for the back taxes.” The petitioner did not insist that the title agent correct the description. Pursuant to the terms of the refinancing, A.J. Smith Bank was to pay the petitioner’s taxes from an escrow account.

¶ 4 Shortly thereafter, the petitioner received a copy of his 2000 tax bill. It included a notice: “BACK TAX SOLD—CALL COUNTY CLERK 630-682-7035.” The petitioner did not contact the county clerk or Chicago Title to see why the back taxes had been sold.

¶ 5 In 2002, the petitioner received a copy of his 2001 tax bill. It included a notice: “TAX LIEN EXISTS ON THIS PARCEL—CALL COUNTY CLERK 630-682-7035.” The petitioner did not contact the county clerk, Chicago Title, or A.J. Smith Bank to determine why a tax lien existed on his property.

¶ 6 On June 24, 2002, a take notice was filed which notified the petitioner that his property had been sold for delinquent taxes, that a petition for a tax deed had been filed, and that he had until November 15, 2002, to redeem his taxes. The petitioner acknowledged that he had received notice that a petition for a tax deed had been filed. Neither the petitioner nor Chicago Title redeemed the taxes prior to the expiration of the redemption period.

¶ 7 On April 11, 2003, the trial court entered an order directing the issuance of a tax deed to National Tax Assistance Corp. The petitioner filed a petition pursuant to section 2—1401 of the Code of Civil Procedure (735 ILCS 5/2—1401 (West 2002)). The trial court dismissed the petitioner's petition, and this court affirmed the trial court's decision on appeal.

¶ 8 The petitioner subsequently filed a petition seeking relief under section 21—305 of the Property Tax Code (35 ILCS 200/21—305 (West 2004)). The petitioner alleged that as of the tax deed date, the fair cash value of the subject property was \$132,000; the outstanding mortgage lien was \$87,504.39; and the lien for the 1998 and 1999 taxes was \$4,285.23. The petitioner therefore requested an equitable indemnity award of \$40,210.29 ( $\$132,000 - \$87,504.39 - \$4,285.32 = \$40,210.29$ ).

¶ 9 On November 24, 2007, the Treasurer filed a third party complaint for subrogation against both Chicago Title and A.J. Smith Bank. The trial court subsequently dismissed the complaint against both Chicago Title and A.J. Smith Bank.

¶ 10 On August 31, 2010, the trial court conducted a hearing on the petitioner's petition. The petitioner testified that he was born in Italy in 1947. He came to the United States in 1960 and became a citizen in 1972. He graduated high school in 1966 and attended some junior college

through the early 1970s, but did not graduate. From 1996 through 2001, he worked in various engineering jobs. He was unemployed from 2001 through 2004.

¶ 11 The petitioner lived on the subject property and raised his family there from 1974 through 2003. The only other real estate he ever owned was a vacant lot in Galena that he had for a few years in the 1970s.

¶ 12 The petitioner's wife filed for divorce in 2001. One of the terms of the divorce settlement required the petitioner to refinance the subject property. He obtained a loan through A.J. Smith Bank and the closing on the loan took place with Chicago Title. Chicago Title took funds at the closing to pay the delinquent real estate taxes. The petitioner expected Chicago Title to get the taxes current. He did not find out that Chicago Title had failed to pay the delinquent taxes until an eviction notice was posted on his door sometime in 2003. He continued making mortgage payments right up to the time that he was evicted from his home. After losing his house to the tax deed, Chicago Title paid off the principal balance on the mortgage to A.J. Smith Bank.

¶ 13 At the time the delinquent taxes were sold, the petitioner was living with his wife, three children and his mother-in-law. His mother-in-law passed away in 2002. His wife continued living in the home even after the divorce was filed and completed. He described his home life after the divorce was filed as "a living hell."

¶ 14 At the close of the hearing, the trial court denied the petitioner's petition. The trial court explained:

"[I]n taking all of these factors into account, I come back to the question which is whether equity requires paying [the petitioner] from the indemnity fund. As I say, there are certain things that I think I can forgive, particularly his failure to initially follow up

immediately after the closing. I can understand his belief that A.J. Smith was taking care of this. But when I look at this from a cumulative standpoint, the failure to pay taxes for two years without explanation, the failure to follow up after being notified of the tax lien, the failure to follow up after receiving the tax notice, there is a tipping point ultimately where even though this statute is to be determined liberally, the Court has to say that individuals have some degree of diligence and must demonstrate some degree of diligence. And although there are explanations for certain lacks of diligence, I find they fall short of the definition \*\*\* from Black's Law Dictionary.

I've spent about forty-five minutes deliberating in this case. I've spent the time because I don't personally like the result that I've reached. That may be because deep down inside I can be a bit of a softy and I can turn around and put myself into [the petitioner's] shoes. And I know how painful the loss is. Equity in the duties of the Court, however, require something more than that. And sometimes the Court has to make decisions which are personally difficult. This is one of them for me."

¶ 15 Following the trial court's ruling, the petitioner filed a timely notice of appeal. On appeal, the petitioner argues that the trial court erred in not awarding him compensation from the county's tax deed indemnity fund.

¶ 16 In order to alleviate the harsh consequences that follow tax sale proceedings, the legislature created the tax deed indemnity fund. *Malmoff v. Kerr*, 227 Ill. 2d 118, 123 (2007). Section 21-305 of the Property Tax Code governs payments from this fund and provides in part:

“(a) Any owner of property sold under any provision of this Code who sustains loss or damage by reason of the issuance of a tax deed under Section 21—445 or 22—40 and who

is barred or is in any way precluded from bringing an action for the recovery of the property shall have the right to indemnity for the loss or damage sustained, limited as follows:

(1) An owner who resided on property that contained 4 or less dwelling units on the last day of the period of redemption and who is equitably entitled to compensation for the loss or damage sustained has the right to indemnity. An equitable indemnity award shall be limited to the fair cash value of the property as of the date the tax deed was issued less any mortgages or liens on the property, and the award will not exceed \$99,000. The Court shall liberally construe this equitable entitlement standard to provide compensation wherever, in the discretion of the Court, the equities warrant the action.” 35 ILCS 200/21—305 (West 2004).

¶ 17 When a person seeks less than \$99,000, the trial court’s focus under section 21—305(a)(1) rests on equity alone. *Malmoff*, 227 Ill. 2d at 125. Our supreme court in *Malmoff* has cited with favor the following definition of equity:

“In its broadest and most general signification, [equity] denotes the spirit and the habit of fairness, justness, and right dealing which would regulate the intercourse of men with men,—the rule of doing to all others as we desire them to do to us; or, as it is expressed by Justinian, ‘to live honestly, to harm nobody, to render every man his due.’ ” *Id.*, citing Black’s Law Dictionary 634 (4<sup>th</sup> ed. 1951).

A broad concept of fairness can be applied in a given case only if a broad range of circumstances are considered. *Id.* at 125-26. In the context of section 21—305(a)(1), those circumstances include the mental, physical, and financial status of the person seeking indemnity; the person’s comprehension of property taxes and the duty to pay them; and the person’s diligence and credibility. See *In re*

*Application of the County Collector*, 343 Ill. App. 3d 363, 369 (2003). Though not determinative, fault or negligence certainly may be considered, as part of the person's diligence, in deciding this issue. *Malmoff*, 227 Ill. 2d at 126. Each case must be decided on its own facts. *Id.* at 126.

¶ 18 A trial court has broad discretion in determining whether an owner is entitled to compensation, and its conclusions will not be disturbed on appeal absent an abuse of that discretion. *Hedrick v. Bathon*, 319 Ill. App. 3d 599, 606 (2001). Discretion is abused only where no reasonable person would take the view adopted by the trial court. *In re Application of Kane County Collector*, 135 Ill. App. 3d 796, 805 (1985).

¶ 19 Relying on *Malmoff*, *Mid America Bank v. Charter One Bank*, 232 Ill. 2d 560 (2009), and *In re Application of County Treasurer (Scott v. Sackor)*, 391 Ill. App. 3d 656 (2009), the petitioner argues that the standard of review should be *de novo*. We disagree. None of those cases involved a review of a trial court's decision, following a hearing, as to whether the petitioner was entitled to equitable relief from an indemnity fund. See *Malmoff*, 227 Ill. 2d at 126 (review of trial court's decision following a grant of summary judgment); *Mid America Bank*, 232 Ill. 2d at 565 (addressing issue of statutory interpretation); *Scott*, 391 Ill. App. 3d at 659 (same).

¶ 20 We also reject the petitioner's alternate argument that we should review the trial court's decision under a manifest weight of the evidence standard or review. In making this argument, the petitioner relies on *In re Application of County Collector (Shek v. Rosewell)*, 184 Ill. App. 3d 1048, 1052 (1989). However, that case is distinguishable because it involved a former version of the statute which explicitly provided that a property owner was not entitled to relief unless she was "without fault or negligence" in having lost her property. *Id.* at 1051-52. Here, the issue is whether the trial court properly exercised its equitable discretion in denying the petitioner's petition for relief

from the indemnity fund. Because the Property Tax Code specifically gives that discretion to the trial court, we will not disturb the trial court's decision absent an abuse of that discretion. See *Boatmen's National Bank of Belleville v. Martin*, 155 Ill. 2d 305, 314 (1993) (where discretion has been vested in the trial court, only a clear abuse of discretion or an application of impermissible legal criteria justifies reversal).

¶ 21 Turning to the merits of the petitioner's case, we agree with the trial court that this was a difficult case. The petitioner had been living in his house since 1974 and had paid his property taxes every year except 1997 and 1998. He refinanced his home in 2001 and reasonably expected Chicago Title to pay his back taxes. Nonetheless, Chicago Title failed to pay the petitioner's delinquent taxes. The petitioner subsequently received two notices from the Du Page County Clerk's office that his back taxes still had not been paid. Despite this notice, the petitioner did not contact anyone or do anything to ensure that the delinquent taxes were paid. The petitioner also did not do anything after he received notice that his property had been sold and he had less than five months to redeem the property. Based on the petitioner's repeated failures to act after learning that his delinquent taxes had not been paid, we cannot say that the trial court abused its discretion in denying the petitioner any equitable relief from the indemnity fund.

¶ 22 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 23 Affirmed.