2011 IL App (1st) 103457
No. 1-10-3457

FIFTH DIVISION
August 5, 2011

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN THE MATTER OF THE APPLICATION OF THE COUNTY TREASURER AND EX-OFFICIO COUNTY COLLECTOR OF COOK COUNTY, ILLINOIS, FOR ORDER OF JUDGMENT AND SALE OF LANDS AND LOTS UPON WHICH ALL OR PART OF THE GENERAL TAXES FOR TWO OR MORE YEARS ARE DELINQUENT, INCLUDING GENERAL AND SPECIAL TAXES, COSTS AND INTEREST DUE THEREON, PURSUANT TO SECTION 35 ILCS 200/21-45 & 200/21-260 (FORMERLY SECTION 235a OF THE REVENUE ACT OF 1939, AS AMENDED) (Metro Capital Investors, Petitioner-Appellant, v. CITY OF CHICAGO AND MARIA PAPPAS AS TREASURER OF COOK COUNTY AND EX-OFFICIO COLLECTOR, Respondent-Appellee).	)	Appeal from the Circuit Court of Cook County No. 06 COTD 001159 Honorable Mark J. Ballard, Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Joseph Gordon concurred in the judgment.

ORDER

Held: The circuit court erred in not ordering the County Collector to refund to petitioner all of the amounts delineated in section 22-80(a) of the Property Tax Code (35 ILCS 200/22-

80(a) (West 2006)) without a factual finding that petitioner had actual knowledge that the City of Chicago owned the subject property at the time petitioner applied for a tax deed, and that petitioner intentionally withheld the information from the court. Reversed and remanded with directions.

¶ 1 This appeal arises from an order of the circuit court: (1) vacating its prior order that had directed issuance of a tax deed to petitioner, Metro Capital Investors, LLC (Metro); and (2) ordering a refund to Metro of the certificate of purchase amount only, with no other relief. Metro contends the court erred in not granting Metro its costs and interest, in contravention of section 22-80(a) of the Property Tax Code. 35 ILCS 200/22-80(a)(West 2006). We reverse and remand with directions.

¶ 2 BACKGROUND

¶ 3 This case involves real estate identified by Permanent Index Number (PIN) 16-24-207-036-0000, commonly known as 1357 South Fairfield, Chicago, Illinois (the subject property). At all times relevant, the last deed recorded on the subject property was on June 8, 1965, by Arthur Dye and his wife Virginia.

¶ 4 On September 3, 1980, the City of Chicago (the City) recorded a lien against the property in the amount of $1,300. On January 29, 1991, the City filed a condemnation action against various defendants, No. 91 L 50105, seeking to condemn several parcels, including the subject property, and for the ascertainment of just compensation to be paid for the taking. On the same day, the City recorded a *lis pendens* notice against the subject property. On May 22, 1991, the City recorded a Redevelopment Agreement regarding the subject property.

¶ 5 On May 15, 1992, the court entered judgment in the condemnation case granting the City fee simple title to the subject property upon payment of the condemnation award. On June 25,

1992, the City deposited $2,590.14 with the Cook County Treasurer for the condemnation award plus interest, and became owner of the subject property. Apparently, the City never took or recorded a judicial deed.

¶ 6 The City filed an application for a tax exemption that was granted in 1992 and the subject property was listed on the Cook County tax assessment rolls as 100% exempt from taxation for the tax year 1992. There is no record of any other tax exemption certificate. The City did not apply for tax exemption for any year except tax year 1992 and failed to file an annual affidavit of exemption. Thus, Respondent, the Cook County Treasurer and *Ex Officio* Collector (the Collector) continuously assessed the subject property for taxes. The Collector applied for, and obtained, a judgment from the circuit court of Cook County, for the delinquent taxes and for sale of the subject property.

¶ 7 On November 4, 2005, the Collector sold the property for the 2001 delinquent real estate taxes totaling $16,415.83 to Petitioner, Metro Capital Investors, LLC (Metro). The sale to Metro included the 1991 and the 1993-2000 delinquent tax years. Metro was issued a certificate of purchase evidencing its successful purchase of the tax lien.

¶ 8 On February 16, 2006, Metro had a tract index search conducted on the subject property. The tract index search listed the 1980 lien, the 1991 *lis pendens* notice, the 1991 condemnation action, and the City's redevelopment agreement. The last recorded deed was to Arthur Dye and his wife in 1965.

¶ 9 On April 13, 2006, Metro filed its petition for tax deed. Metro attempted to serve Arthur Dye and his wife, but service was unsuccessful because they had moved and the subject property

was a vacant lot.

¶ 10 Metro also named and served the City, both the City Clerk and the City's Law Department. On August 4, 2006, the City filed its appearance in the tax deed case and also filed an objection to the issuance of a tax deed to Metro. The City alleged it was entitled to reimbursement of a demolition lien in the amount of $1,300 plus interest, pursuant to section 22-35 of the Property Tax Code, before any tax deed could be issued. The City did not claim to have an ownership interest in the property at the time it filed its objection. The period of redemption for the tax sale expired on September 8, 2006 without a redemption being effectuated. On September 14, 2006, Metro filed an application for an order directing the county clerk to issue the tax deed. The tract index search was attached to the application. Also attached was an affidavit from Metro's attorney referencing the tract index search.

¶ 11 On January 17, 2007, the circuit court heard the prove up of Metro's petition for the tax deed. The tract index search was entered into evidence. Although the tract index search listed the City's 1991 *lis pendens* notice, the 1991 condemnation, and a 1991 redevelopment agreement, these were not discussed during the hearing. Metro's attorney advised the court that corporate service had been had on the City Clerk "because the city [had] a demolition lien in the amount of $1300 claimed." Metro's attorney also told the court that, in addition to the City Clerk, Metro had served the City of Chicago Law Department.

¶ 12 On February 27, 2007, Metro filed a motion for a declaratory order that the City's 1980 demolition lien was no longer an interest because the City had never taken the required action to foreclose the lien as required under the Illinois Unsafe Buildings Act. On March 14, 2007, the

circuit court ruled, over the City's objection, that the City's demolition lien was not a reimbursable interest and that Metro did not have to reimburse the City before a tax deed could be issued. The court also directed Metro to record the court order in the office of the Cook County Recorder of Deeds on the same day Metro's tax deed was recorded.

¶ 13 On August 1, 2007, the circuit court entered an order directing the Cook County clerk to issue a tax deed to Metro and, on the same day, the Cook County clerk issued the tax deed. Metro recorded its tax deed on August 15, 2007 with the Cook County recorder of deeds. The tax deed grantee was incorrectly listed as Metro *Capitol* Investors, LLC, rather than Metro *Capital* Investors, LLC. Metro did not record the circuit court's March 14, 2007 order finding the City's demolition lien not a reimbursable interest, despite having been directed to do so by the court. The record shows, however, that the failure to record the order was inadvertent. Metro also inadvertently paid the demolition lien that the court had ruled it did not have to pay.

¶ 14 On February 8, 2010, almost three years later, the City filed a complaint to vacate Metro's tax deed. The complaint alleged that the property was exempt from taxation because the City had owned the property since 1992. The City requested that the circuit court vacate the August 1, 2007 order directing the issuance of the tax deed and have Metro's tax deed declared void.

¶ 15 On August 25, 2010, the Collector filed a brief objecting to Metro's claims of costs and interest, which included an objection to any award of interest "[i]n the event that the tax deed [was] vacated under Section 22-80 of the Property Tax Code." Metro filed its response brief and the Collector filed its reply brief.

¶ 16 On October 15, 2010, the circuit court heard arguments from the parties but the record

contains no transcript of the proceeding. On October 18, 2010, the court entered its written order granting the City's motion to vacate the August 1, 2010 order and finding the tax deed void. The court further ordered that Metro was "entitled to a refund of $16,415.83, as a refund for its Certificate of Purchase and no other relief." Metro now appeals the October 18, 2010 order.

¶ 17 ANALYSIS

¶ 18 The Collector argues that this appeal should be dismissed based on Metro's failure to include a jurisdictional statement pursuant to Supreme Court Rule 341(h)(4) (eff. July 1, 2008). This court has jurisdiction over this appeal pursuant to Supreme Court Rule 301 (eff. Feb, 1, 1994) and Supreme Court Rule 303 (eff. May 30, 2008), which the Collector concedes. Thus, we shall consider this appeal.

¶ 19 The issue in this appeal is Metro's right to receive a refund of all of the amounts delineated in section 22-80(a) of the Property Tax Code (35 ILCS 200/22-80(a) (West 2006)), an issue of statutory construction. Questions of statutory interpretation are questions of law subject to *de novo* review. *In re County Treasurer*, 378 Ill. App. 3d 842, 850 (2007). "The cardinal rule of statutory construction is to ascertain and give effect to the legislature's intent." *In re Application of County Collector for Judgment and Sale Against Lands and Lots,* 367 Ill. App. 3d 34, 40 (2006). The language of the statute is the best evidence of the legislature's intent and, when possible, a court should interpret the statute's language according to its plain and ordinary meaning. *Id.* If possible, a statute should be construed so that no part of the statute is rendered superfluous or meaningless. *In re Tax Deed*, 311 Ill. App. 3d 440, 443 (2000). A court "must construe the statute as written and may not, under the guise of construction, supply omissions,

remedy defects, annex new provisions, add exceptions, limitations, or conditions, or otherwise change the law so as to depart from the plain meaning of the language employed in the statute." *In re Application of County Collector*, 356 Ill. App. 3d 668, 670 (2005).

¶ 20 Section 22-8(a) of the Property Tax Code states:

"Order of court setting aside tax deed; payments to holder of deed.

(a) Any order of court vacating an order directing the county clerk to issue a tax deed based upon a finding that *the property was not subject to taxation* or special assessment, or that the taxes or special assessments had been paid prior to the sale of the property, or that the tax sale was otherwise void, *shall declare the tax sale to be a sale in error pursuant to Section 21-310 of this Act*. The order shall direct the county collector to refund to the tax deed grantee or his or her successors and assigns (or, if a tax deed has not yet issued, the holder of the certificate) the following amounts:

(1) all taxes and special assessments purchased, paid, or redeemed by the tax purchaser or his or her assignee, or by the tax deed grantee or his or her successors and assigns, whether before or after entry of the order for tax deed, with interest at the rate of 1% per month from the date each amount was paid until the date of payment pursuant to this Section;

(2) all costs paid and posted to the judgment record and not included in paragraph (1) of this subsection (a); and

(3) court reporter fees for the hearing on the application for tax deed and

> transcript thereof, cost of certification of tax deed order, cost of issuance of tax deed, and cost of recording of tax deed." (Emphasis added.) 35 ILCS 200/22-80(a) (West 2006).

There is no dispute that the subject property was "not subject to taxation." Under the clear statutory language, the circuit court should have declared the sale to be a sale in error, and Metro should be entitled to a refund from the Collector of all of the amounts delineated in section 22-80(a). The Collector's argument that a tax deed purchaser is not entitled to a refund if the purchaser was never entitled to the tax deed in the first instance is misplaced. The argument ignores the plain language of section 22-80(a) and relies instead upon an inapposite case interpreting section 22-80(b).

¶ 21 The Collector further contends, however, that the trial court had inherent authority to vacate its own void order and limit Metro's relief to a refund of $16,415.83 for its certificate of purchase with no further relief for its costs and interests. We disagree. The plain language of section 22-80(a) states that "[a]ny order of court vacating an order directing the county clerk to issue a tax deed based upon a finding that the property was not subject to taxation *** *shall* direct the county collector to refund to the tax deed grantee [certain delineated amounts which include costs and interest.] (Emphasis added) 35 ILCS 200/22-80(a). The use of the word "shall" in a statute generally indicates a mandatory requirement. *Illinois Dept. of Healthcare and Family Services ex rel. Wiszowaty v. Wiszowaty*, 239 Ill. 2d 483, 487 (2011). Where the word "shall" is used in reference to any right or benefit to anyone, and the right or benefit depends on giving a mandatory meaning to the word, it cannot be given a permissive meaning. *Andrews v.*

Foxworthy, 71 Ill. 2d 13, 21 (1978).

¶ 22 In *Wiszowaty* the Illinois Supreme Court held that the plain language of the controlling statutes required interest to be paid on delinquent child support payments and rejected the argument that the trial court had discretion as to the award of interest if warranted by equitable considerations. As the *Wiszowaty* court stated:

> "We do not know of any power existing in a court of equity to dispense with the plain requirements of a statute; it has been always disclaimed, and the real or supposed hardship of no case can justify a court in so doing. When a statute has prescribed a plain rule, free from doubt and ambiguity, it is as well usurpation in a court of equity as in a court of law, to adjudge against it; and for a court of equity to relieve against its provisions, is the same as to repeal it." [Citations.]" (Internal quotation marks omitted.) *Id.* at 489-90.

Based on the reasoning of *Wiszowaty*, we conclude the circuit court had no authority to disregard the requirements of section 22-80(a) which requires reimbursement of costs and interest to the tax purchaser.

¶ 23 The Collector also argues, however, that "Metro should not be permitted to complain of error which [it] induced the court to make." This argument depends upon Metro's "knowledge" with respect to the City's ownership of the property. The Collector suggests that Metro intentionally concealed from the court the fact that the City owned the property. Metro asserts that nothing in the trial court record supports this argument.

¶ 24 In the circuit court, in opposing Metro's request for costs and interest, the County's brief

did not expressly allege fraud on the part of Metro, but it clearly alleged that Metro had actual knowledge of the City's ownership of the subject property. The County asserted that "at no time is the owner of the subject property identified for the court, despite *actual knowledge* as of February 16, 2006, that the City owned the subject property." (Emphasis added.) The County's brief contained additional claims that:

- the City's ownership of the subject property was "clearly evident in Petitioner's tract search";

- Metro "failed to inform [the circuit court] of the City's ownership of the subject property at the prove-up hearing";

- the affidavit in support of Metro's application for issuance of deed "failed to advise [the circuit court] of the impediments to the tax deed proceeding";

- "[c]andor to the court mandated disclosure of the City's ownership, or, at a minimum, disclosure of the condemnation proceeding";

- Metro "failed to apprise [the circuit court] of the City's condemnation and ownership of the subject property, which would have precluded the issuance of the tax deed";

- Metro "knew before filing the petition for a tax deed of the City's 1991 condemnation"; and

- Metro "seeks to enrich itself with interest and to be rewarded for failing to advise [the circuit court] of the City's ownership."

Similar statements appear in the County's appellate brief. In its reply brief, Metro "vehemently denies any allegation that it intentionally concealed facts from the court." Metro asserts that

"[s]imply put, Metro missed the City's ownership, as did the City, Cook County Clerk, Cook County Treasurer, Cook County Assessor and the trial court."

¶ 25 The Collector argues that

> "[t]he failure to inform the court of any facts that might change the court's ruling can amount to fraud for purposes of vacating tax deeds. [Citation.] Where the public record concerning a property contains information to ascertain the truth concerning persons to be notified and the purchaser fails to notice it, there is sufficient evidence of bad faith to warrant concluding the deed was procured by fraud." Citing *In re County Treasurer* (*Midwest Real Estate Investment Co*.), 347 Ill. App. 3d 769, 781 (2004).

Midwest Real Estate Investment Co. is distinguishable, as are several other cases relied upon by the Collector, because it involved the tax purchaser's failure to provide notice to a party who had an interest in the property. There is no dispute here that Metro served the City with the statutorily required notice. Moreover, the City appeared in the tax deed proceeding and did not claim to have an ownership interest in the property. Also, Metro is not disputing that portion of the circuit court's order granting the City's motion to vacate Metro's tax deed.

¶ 26 First, *Midwest Real Estate Investment Co.* is procedurally distinguishable because it did not involve section 22-80(a). Instead, the case involved a contested petition to vacate a tax deed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401)(West 2000)) and a private individual seeking to vacate a tax deed based on insufficient notice. The section 2-1401 petition relied on section 22-45(3) of the Property Tax Code (35 ILCS 200/2-45(3) (West 2000)),

which required "proof by clear and convincing evidence that the tax deed had been procured by fraud or deception by the tax purchaser or his or her assignee." As the court explained, due process concerns demanded a special interpretation of the fraud requirement of section 22-45(3) because the tax deed proceeding "involve[d] the government in taking the property of private owners of real estate." *Id.* at 780. Here, no private property rights are at issue and the tax deed is not being contested. The issue involves the payment of interest and costs. Second, *Midwest Real Estate Investment Co*. is factually distinguishable because the tax purchaser: (1) misrepresented to the court that it served all persons entitled to notice; (2) failed to serve an individual whose interest in the property could have reasonably been inferred from a mortgage; and (3) failed to inform the court of a party's potential interest. *Id.* at 782. Here, Metro: (1) *did not* misrepresent to the court that it served all persons entitled to notice; (2) *did not* fail to serve the City; and (3) *did not* fail to inform the court of the City's potential interest. With respect to the third factor, however, we recognize that Metro told the court that the City's interest was a "demolition lien" and did not inform the court of the City's ownership interest. We cannot determine from the record if the failure to inform the court of the City's ownership interest was an intentional misrepresentation or the result of a lack of actual knowledge on the part of Metro.

¶ 27 Although the cases cited by the Collector are distinguishable, we disagree with Metro's contentions that "its knowledge with respect to the City's ownership of the property is entirely irrelevant to this case," "[its] failure to inform the court [of the City's condemnation proceeding] is irrelevant," and "even in cases where there is actual tax purchaser fraud, the tax purchaser is entitled to a refund pursuant to section 22-80(a)."

¶ 28 Section 22-80(a) does not contain any language regarding knowledge on the part of the tax purchaser but section 21-315 of the Property Tax Code, which addresses refunds of cost and interest where there is a sale in error under section 21-310, states: "Interest shall not be paid *** where the court determines that the tax purchaser had *actual knowledge* prior to the sale of the grounds on which the sale is declared to be erroneous." (Emphasis added.) 35 ILCS 200/21-315 (West 2006). Thus, although section 22-80(a) states that the court "shall declare the tax sale to be a sale in error pursuant to Section 21-310 of this Act," an award of *interest* to a tax purchaser upon declaration of a sale in error is not absolute.

¶ 29 This court has interpreted the phrase "actual knowledge" contained in section 21-315 and held that constructive knowledge was insufficient to justify a denial of interest. *In re Application of the County Treasurer (First Financial v. Rosewell)*, 302 Ill. App. 639 (1998). Although the *First Financial* case involved a tax purchaser to whom the deed had not yet issued, we find the court's reasoning instructive. The *First Financial* court concluded that the statute's requirement of "actual knowledge" of the grounds for the sale in error, did not preclude an award of interest "for what the tax purchaser may have, should have, or could have discovered." *Id*. at 645. In the *First Financial* case, however, both the trial court and the appellate court had the benefit of an affidavit from the agent of the tax purchaser stating, among other things, that "he had no knowledge of any kind as to the property's ownership or tax-exempt status, nor was he aware of any fact that should have alerted him to make further inquiry as to the property's ownership or tax exempt status." Although the record here contains an affidavit from Metro's managing member, Chris Athanasopoulos, there is no similar definitive statement disclaiming his actual

knowledge of the City's ownership. Additionally, in *First Financial*, the tax purchaser requested leave to reopen its proofs, allowing the trial court to hear testimony from the agent disclaiming any knowledge of the property's true ownership. Here, although Mr. Athanasopoulos testified at the hearing on the application for the tax deed, there was no testimony regarding his knowledge of the property's true ownership. In sum, the record contains no findings of fact as to Metro's actual knowledge of the City's ownership of the subject property because, as Metro notes, the circuit court entered its order without conducting a factual hearing on Metro's knowledge.

¶ 30 We conclude that the circuit court erred in denying Metro a refund from the Collector of all of the amounts delineated in section 22-80(a) of the Property Tax Code (35 ILCS 200/22-80(a) (West 2006)) in the absence of a finding that Metro had actual knowledge that the City owned the subject property at the time Metro applied for a tax deed, and that Metro withheld the information from the court. Therefore, we remand this matter for a factual hearing with respect to Metro's actual knowledge for the purpose of determining whether Metro is entitled to interest. Pursuant to section 22-315 of the Property Tax Code, if the court finds that Metro had actual knowledge of the grounds for the sale in error, *i.e.*, City's ownership of the tax-exempt property, Metro shall not be entitled to interest.

¶ 31 The Collector has raised an additional argument that Metro is not entitled to any reimbursement under the Property Tax Code because the tax deed grantee was incorrectly listed as Metro *Capitol* Investors, LLC, rather than Metro *Capital* Investors, LLC. We find this argument meritless because, as Metro notes, this scrivener's error had no impact or effect.

¶ 32 CONCLUSION

¶ 33 Under the clear statutory language of the Property Tax Code, Metro was entitled to a refund from the Collector of all of the amounts delineated in section 22-80(a). If, however, the circuit court finds, after a factual hearing, that Metro had *actual knowledge* of the City's ownership of the subject property and purposefully withheld that information from the court during the application process for a tax deed, by omission or commission, the court may limit Metro's refund of interest. Should the court determine that Metro had no actual knowledge of the City's ownership of the subject property, the court shall award Metro all of the amounts delineated in section 22-80(a) of the Property Tax Code.

¶ 34 Reversed and remanded with directions.