American Bankruptcy Institute Annual Spring Meeting

Lien on Me

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Hon. Janet S. Baer
U.S. Bankruptcy Court (N.D. Ill.) | Chicago

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CONCURRENT SESSION

2025

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CLE Materials

Panelists
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ABI ANNUAL SPRING MEETING
April 24-26, 2025
Outline & Materials on Judgment Liens

I. Introduction

- Definition:

  A judgment or judicial lien is a legal claim or encumbrance placed on a debtor's property as a result of a Court judgment in favor of a creditor. It gives the creditor a right to seize or force the sale of the debtor's property in satisfaction of the unpaid debt.

  Defined in the Bankruptcy Code:

  > The term "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.
  >
  > 11 U.S.C. 101(36).

- How judgment liens arise:

  Judicial Creation – Judgment Liens typically arise from a court ruling against the debtor, typically after the creditor sues for nonpayment.

- Impact:

  Judgments are recorded against real estate, personal property, or other assets owned by the Debtor. While a bankruptcy discharge eliminates personal liability for debts, judgment liens remain unless properly addressed.

II. Judgment Liens and Bankruptcy

- Overview of **Chapter 7 vs. Chapter 13** bankruptcy
  - In Chapter 7 cases, the Bankruptcy Trustee has the status of a hypothetical judicial lien creditor. 11 U.S.C. § 544(a)(1).
  - As a result, the Trustee's interest can avoid a judgment creditor that has not yet perfected or levied on the Debtor's property. This turns on the state law requirements.
  - The Trustee can also avoid, as preferential, judgment liens that arise in the 90 days prior to the Petition date. 11 U.S.C. § 547.
- A chapter 13 bankruptcy case, a Trustee is not selling the property. A debtor in a chapter 13 case retains greater control over their assets.

- While a chapter 13 debtor can void liens pursuant to 11 U.S.C. § 522(f), a chapter 13 debtor does not have the power to void liens pursuant to 11 U.S.C. § 544(a).

III. The Debtor's Ability to Avoid Judgment Liens in Bankruptcy

- **11 U.S.C. § 522(f)(1)(A):** Lien avoidance under federal bankruptcy law
- Conditions for judicial lien avoidance:
  - Lien impairs an exemption
  - Must be a **judicial lien**, not a statutory or consensual lien
  - Is not a judicial lien due to a domestic support obligation
  - Debtor's property would be exempt if the lien didn't exist
- When the interest in property must exist? At the time of moving to avoid the lien, the time of filing for bankruptcy, or the time when the lien is "attached?"
  - *In re Chiu*, 304 F.3d 905 (9th Cir. 2002) – citing to the Supreme Court decision in *Farrey* for the holding that a debtor must have an interest in the property at the time the lien attached. *Farrey v. Sanderfoot*, 500 U.S. 291 (1991).
- When is the relevant calculation of value?
  - At the time of filing the petition. *In re Wilding*, 475 F.3d 428 (1st Cir. 2007).
  - O. Pinkas et al., *Value, Not Face Amount, of Lien Controls in a Battle of Credit Bids*, ABI Journal, July 2017, at 24, 72.

IV. Judgment Liens on Real Property

- Homestead exemptions and their role in lien avoidance.
  - Under § 522(f)(1)(A), a Debtor can strip off a judicial lien if it impairs an exemption the Debtor would otherwise be entitled.
  - One of the major such exemptions that are available in most states is the homestead exemption. A homestead exemption protects a certain amount of equity in the Debtor's residence from creditors.
  - Under § 522(f)(1)(A), a judicial lien impairs the exemption to the extent the sum of the lien, plus all other liens on the property, and the amount of the exemption that the debtor could claim exceeds the value that the debtor's interest in the property would have in the absence of any liens.
  - A larger homestead exemption increases the chance of successfully stripping a judicial lien because it increases the protected portion of the Debtor's equity.

V. Judgment Liens on Personal Property

- Cars, bank accounts, wages, and other non-real estate assets
    - Just using a car to get back and forth to work is not sufficient to exempt it as a tool of the trade. *Johnston v. Barney*, 842 F.2d 1221 (10th Cir. 1988); *In re Langley*, 21 B.R. 772 (Bankr. D. Me 1982).
- Challenges in lien avoidance for non-real estate assets

VI. Post-Bankruptcy Issues with Judgment Liens

- What happens if a lien isn't avoided during bankruptcy?
- The role of **discharge injunction** in preventing collection
- Refinancing or selling property with an unresolved lien

VII. Conclusion

- Importance of addressing judgment liens **before or during bankruptcy**
- Seeking legal assistance to maximize exemptions and protections

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta U.S. v. Mendoza-Gonzalez, 5th Cir.(Tex.), January 10, 2003

111 S.Ct. 1825
Supreme Court of the United States

Jeanne FARREY, fka Jeanne Sanderfoot, Petitioner,
v.
Gerald J. SANDERFOOT.

No. 90-350.
|
Argued March 25, 1991.
|
Decided May 23, 1991.

Synopsis
Debtor moved to avoid lien on homestead property. The United States Bankruptcy Court for the Eastern District of Wisconsin, M. Dee McGarity, J., 83 B.R. 564, denied relief, and appeal was taken. The United States District Court for the Eastern District of Wisconsin, Myron L. Gordon, J., 92 B.R. 802, reversed. The Court of Appeals for the Seventh Circuit, 899 F.2d 598, affirmed. On certiorari review, the Supreme Court, Justice White, held that Chapter 7 debtor could not avoid judicial lien in real estate awarded to former wife in divorce decree, absent showing that debtor held interest in property to which lien fixed prior to fixing of such lien.

Reversed and remanded.

Justice Scalia concurred in part.

Justice Kennedy concurred and filed opinion in which Justice Souter, joined.

Opinion on remand, 943 F.2d 679.

West Headnotes (2)

[1] Bankruptcy Judicial Liens

Bankruptcy Code provision allowing debtor to avoid fixing of judicial lien on interest of debtor in property, requires debtor to have possessed property interest to which lien attached at some point before lien attached. Bankr.Code, 11 U.S.C.A. § 522(f)(1).

384 Cases that cite this headnote

[2] Bankruptcy Lien Under Dissolution Decree or Separation Agreement

Chapter 7 debtor could not avoid former wife's judicial lien in real estate awarded to debtor in divorce decree, on ground wife's lien impaired debtor's homestead exemption in the property, absent showing that debtor held interest in property to which lien fixed prior to fixing of such lien; parties agreed that, under Wisconsin law, divorce decree simultaneously awarded debtor fee simple interest in entire property while granting lien to former wife and, even if decree only reordered parties' preexisting interests, debtor did not previously possess former wife's interest in property, to which lien attached. Bankr.Code, 11 U.S.C.A. § 522(f)(1).

381 Cases that cite this headnote

****1826** *Syllabus* *

***291** When petitioner Farrey and respondent Sanderfoot divorced, a Wisconsin court awarded each one-half of their marital estate. Among other things, the decree awarded Farrey's interest in the family home and real estate to Sanderfoot and ordered him to make payments to Farrey to equalize their net marital assets. To secure the award, the court granted Farrey a lien against Sanderfoot's real property. Sanderfoot did not pay Farrey and subsequently filed for bankruptcy, listing the marital home and real estate as exempt homestead property. The Bankruptcy Court denied his motion to avoid Farrey's lien under 11 U.S.C. § 522(f)(1)-which provides, *inter alia,* that a debtor "may avoid the fixing of a [judicial] lien on an interest of the debtor in property"-finding that the lien could not be avoided because it protected Farrey's

pre-existing interest in the marital property. The District Court reversed, and the Court of Appeals affirmed.

Held:

1. Section 522(f)(1) requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid the fixing of a lien on that interest. The statute does not permit avoidance of any lien on a property, but instead expressly permits avoidance of "the fixing of a lien on an interest of the debtor." A fixing that takes place before the debtor acquires an interest, by definition, is not on the debtor's interest. This reading fully comports with § 522(f)'s purpose, which is to protect the debtor's exempt property, and its legislative history, which suggests that Congress primarily intended § 522(f)(1) as a device to thwart creditors who, sensing an impending bankruptcy, rush to court to obtain a judgment to defeat the debtor's exemptions. To permit lien avoidance where the debtor at no point possessed the interest without the judicial lien would allow judicial lienholders to be defrauded through the conveyance of an encumbered interest to a prospective debtor. Pp. 1828-1830.

2. Farrey's lien cannot be avoided under § 522(f)(1). The parties agree that, under state law, the divorce decree extinguished their joint tenancy, in which each had an undivided one-half interest, and created new interests in place of the old. Thus, her lien fixed not on Sanderfoot's pre-existing interest, but rather on the fee simple interest that he ***292** was awarded in the decree that simultaneously granted Farrey her lien. The result is the same even if the decree merely reordered the couple's pre-existing interests, since the lien would have fastened only to what had been Farrey's pre-existing interest, an interest that Sanderfoot would never have possessed without the lien already having fixed. To permit Sanderfoot to use the Bankruptcy Code to deprive Farrey of protection for her own pre-existing homestead interest would neither follow the statute's language nor serve its main goal. Pp. 1830-1831.

899 F.2d 598 (CA7 1990), reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and MARSHALL, BLACKMUN, STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ., joined, and in all but the penultimate paragraph of Part III of which SCALIA, J., ****1827** joined. KENNEDY, J., filed a concurring opinion, in which SOUTER, J., joined, *post,* p. 1831.

Attorneys and Law Firms

Brady C. Williamson argued the cause for petitioner. With him on the briefs was *Charles J. Hertel.*

Harvey G. Samson argued the cause and filed a brief for respondent.

Opinion

Justice WHITE delivered the opinion of the Court.

In this case we consider whether § 522(f) of the Bankruptcy Code allows a debtor to avoid the fixing of a lien on a homestead, where the lien is granted to the debtor's former spouse under a divorce decree that extinguishes all previous interests the parties had in the property, and in no event secures more than the value of the non-debtor spouse's former interest. We hold that it does not.

I

Petitioner Jeanne Farrey and respondent Gerald Sanderfoot were married on August 12, 1966. The couple eventually built a home on 27 acres of land in Hortonville, Wisconsin, where they raised their three children. On September 12, 1986, the Wisconsin Circuit Court for Outagamie County entered a bench decision granting a judgment of divorce and property division that resolved all contested issues and terminated ***293** the marriage. See Wis.Stat. § 767.37(3) (1989-1990). A written decree followed on February 5, 1987.

The decision awarded each party one-half of their net $60,600.68 marital estate. This division reflected Wisconsin's statutory presumption that the marital estate "be divided equally between the parties." § 767.255. The decree granted Sanderfoot sole title to all the real estate and the family house, which was subject to a mortgage and which was valued at $104,000, and most of the personal property. For her share, Farrey received the remaining items of personal property and the proceeds from a court-ordered auction of the furniture from the home. The judgment also allocated the couple's liabilities. Under this preliminary calculation of assets and debts, Sanderfoot stood to receive a net award of $59,508.79, while Farrey's award would otherwise have been

$1,091.90. To ensure that the division of the estate was equal, the court ordered Sanderfoot to pay Farrey $29,208.44, half the difference in the value of their net assets. Sanderfoot was to pay this amount in two installments: half by January 10, 1987, and the remaining half by April 10, 1987. To secure this award, the decree provided that Farrey "shall have a lien against the real estate property of [Sanderfoot] for the total amount of money due her pursuant to this Order of the Court, i.e. $29,208.44, and the lien shall remain attached to the real estate property ... until the total amount of money is paid in full." App. to Pet. for Cert. 57a.

Sanderfoot never made the required payments nor complied with any other order of the state court. Instead, on May 4, 1987, he voluntarily filed for Chapter 7 bankruptcy. Sanderfoot listed the marital home and real estate on the schedule of assets with his bankruptcy petition and listed it as exempt homestead property. Exercising his option to invoke the state rather than the federal homestead exemption, 11 U.S.C. § 522(b)(2)(A), Sanderfoot claimed the property as exempt "to the amount of $40,000" under ***294** Wis.Stat. § 815.20 (1989-1990).[1] He also filed a motion to avoid Farrey's lien under the provision in dispute, 11 U.S.C. § 522(f)(1), claiming that Farrey possessed a ****1828** judicial lien that impaired his homestead exemption. Farrey objected to the motion, claiming that § 522(f)(1) could not divest her of her interest in the marital home.[2] The Bankruptcy Court denied Sanderfoot's motion, holding that the lien could not be avoided because it protected Farrey's pre-existing interest in the marital property. *In re Sanderfoot,* 83 B.R. 564 (ED Wis.1988). The District Court reversed, concluding that the lien was avoidable because it "is fixed on an interest of the debtor in the property." *In re Sanderfoot,* 92 B.R. 802 (ED Wis.1988).

A divided panel of the Court of Appeals affirmed. *In re Sanderfoot,* 899 F.2d 598 (CA7 1990). The court reasoned that the divorce proceeding dissolved any pre-existing interest Farrey had in the homestead and that her new interest, "created in the dissolution order and evidenced by her lien, attached to Mr. Sanderfoot's interest in the property." *Id.,* at 602. Noting that the issue had caused a split among the Courts of Appeals, the court expressly relied on those decisions that it termed more "faithful to the plain language of section 522(f)." *Ibid.* (citing *In re Pederson,* 875 F.2d 781 (CA9 1989); *Maus v. Maus,* 837 F.2d 935 (CA10 1988); *Boyd* ***295** *v. Robinson,* 741 F.2d 1112, 1115 (CA8 1984) (Ross, J., dissenting)).

Judge Posner, in dissent, argued that to avoid a lien under § 522(f), a debtor must have an interest in the property at the time the court places the lien on that interest. Judge Posner concluded that because the same decree that gave the entire property to Sanderfoot simultaneously created the lien in favor of Farrey, the lien did not attach to a pre-existing interest of the husband. The dissent's conclusion followed the result, though not the rationale, of *Boyd, supra,* *In re Borman,* 886 F.2d 273 (CA10 1989), and *In re Donahue,* 862 F.2d 259 (CA10 1988).

We granted certiorari to resolve the conflict of authority. 498 U.S. 980, 111 S.Ct. 507, 112 L.Ed.2d 519 (1990). We now reverse the Court of Appeals' judgment and remand.

II

Section 522(f)(1) provides in relevant part:

> "Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is-
>
> "(1) a judicial lien...."

The provision establishes several conditions for a lien to be avoided, only one of which is at issue. See *In re Hart,* 50 B.R. 956, 960 (Bkrtcy.Ct.Nev.1985). Farrey does not challenge the Court of Appeals' determination that her lien was a judicial lien, 899 F.2d, at 603-605, nor do we address that question here. The Court of Appeals also determined that Farrey had waived any challenge as to whether Sanderfoot was otherwise entitled to a homestead exemption under state law, *id.,* at 603, and we agree. See *Owen v. Owen,* 500 U.S. 305, 111 S.Ct. 1833, 114 L.Ed.2d 350 (1991). The sole question presented in this case is whether § 522(f)(1) permits Sanderfoot to avoid the fixing

of ***296** Farrey's lien on the property interest that he obtained in the divorce decree.

[1] The key portion of § 522(f) states that "the debtor may avoid the fixing of a lien on an interest ... in property." Sanderfoot, following several Courts of Appeals, suggests that this phrase means that a lien may be avoided so long as it is currently fixed on a debtor's interest. Farrey, following Judge Posner's lead, reads the text as permitting the avoidance of a lien only where the lien attached to the debtor's interest at ****1829** some point after the debtor obtained the interest.

We agree with Farrey. No one asserts that the two verbs underlying the provision possess anything other than their standard legal meaning: "avoid" meaning "annul" or "undo," see Black's Law Dictionary 136 (6th ed. 1990); H.R.Rep. No. 95-595, pp. 126-127 (1977), U.S.Code Cong. & Admin.News 1978, p. 5787, and "fix" meaning to "fasten a liability upon," see Black's Law Dictionary, *supra,* at 637. The statute does not say that the debtor may undo a lien on an interest in property. Rather, the statute expressly states that the debtor may avoid "the fixing" of a lien on the debtor's interest in property. The gerund "fixing" refers to a temporal event. That event-the fastening of a liability-presupposes an object onto which the liability can fasten. The statute defines this pre-existing object as "an interest of the debtor in property." Therefore, unless the debtor had the property interest to which the lien attached at some point *before* the lien attached to that interest, he or she cannot avoid the fixing of the lien under the terms of § 522(f)(1). [3]

***297** This reading fully comports with the provision's purpose and history. See *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989). Congress enacted § 522(f) with the broad purpose of protecting the debtor's exempt property. See S.Rep. No. 95-989, p. 77 (1978); H.R.Rep. No. 95-595, *supra,* at 126-127. Ordinarily, liens and other secured interests survive bankruptcy. In particular, it was well settled when § 522(f) was enacted that valid liens obtained before bankruptcy could be enforced on exempt property, see *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 582-583, 55 S.Ct. 854, 859-860, 79 L.Ed. 1593 (1935), including otherwise exempt homestead property, *Long v. Bullard,* 117 U.S. 617, 620-621, 6 S.Ct. 917, 918, 29 L.Ed. 1004 (1886). Congress generally preserved this principle when it comprehensively revised bankruptcy law with the Bankruptcy Reform Act of 1978, Pub.L. 95-598, 92 Stat. 2587, 11 U.S.C. § 522(c)(2)(A)(i). But Congress also revised the law to permit the debtor to avoid the fixing of some liens. See, *e.g.,* 11 U.S.C. § 545 (statutory liens).

Section 522(f)(1), by its terms, extends this protection to cases involving the fixing of judicial liens onto exempt property. What specific legislative history exists suggests that a principal reason Congress singled out judicial liens was because they are a device commonly used by creditors to defeat the protection bankruptcy law accords exempt property against debts. As the House Report stated:

> "The first right [§ 522(f)(1)] allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists ***298** to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions." H.R.Rep. No. 95-595, *supra,* at 126-127, U.S.Code Cong. & Admin.News 1978, pp. 6087-6088.

****1830** One factor supporting the view that Congress intended § 522(f)(1) to thwart a rush to the courthouse is Congress' contemporaneous elimination of § 67a of the 1898 Bankruptcy Act, 30 Stat. 564. Prior to its repeal, § 67(a) invalidated any lien obtained on an exempt interest of an insolvent debtor within four months of the bankruptcy filing. The Bankruptcy Reform Act eliminated the insolvency and timing requirements. It is possible that Congress simply decided to leave exemptions exposed despite its longstanding policy against doing so. But given the legislative history's express concern over protecting exemptions, it follows instead that § 522(f)(1) was intended as a new device to handle the old provision's job by "giv[ing] the debtor certain rights not available under current law with respect to exempt property." H.R.Rep. No. 95-595, *supra,* at 126, U.S.Code Cong. & Admin.News 1978, p. 6087.

Conversely, the text, history, and purpose of § 522(f)(1) also indicate what the provision is *not* concerned with. It cannot be concerned with liens that fixed on an interest before the debtor acquired that interest. Neither party contends otherwise. Section 522(f)(1) does not state that any fixing of a lien may be avoided; instead, it permits avoidance of the "fixing of a lien on an interest of the debtor." If the fixing took

place before the debtor acquired that interest, the "fixing" by definition was not on the debtor's interest. Nor could the statute apply given its purpose of preventing a creditor from beating the debtor to the courthouse, since the debtor at no point possessed the interest without the judicial lien. There would be no fixing to avoid since the lien was already there. To permit lien avoidance in these circumstances, in fact, would be to allow judicial lienholders to be defrauded through the conveyance of an encumbered interest to a prospective debtor. See ***299** *In re McCormick,* 18 B.R. 911, 913-914 (Bkrtcy.Ct. WD Pa.1982). For these reasons, it is settled that a debtor cannot use § 522(f)(1) to avoid a lien on an interest acquired after the lien attached. See, *e.g., In re McCormick, supra;* *In re Stephens,* 15 B.R. 485 (Bkrtcy.Ct. WD NC 1981); *In re Scott,* 12 B.R. 613 (Bkrtcy.Ct. WD Okla.1981). As before, the critical inquiry remains whether the debtor ever possessed the interest to which the lien fixed, before it fixed. If he or she did not, § 522(f)(1) does not permit the debtor to avoid the fixing of the lien on that interest.

III

[2] We turn to the application of § 522(f)(1) to this case.

Whether Sanderfoot ever possessed an interest to which the lien fixed, before it fixed, is a question of state law. Farrey contends that prior to the divorce judgment, she and her husband held title to the real estate in joint tenancy, each possessing an undivided one-half interest. She further asserts that the divorce decree extinguished these previous interests. At the same time and in the same transaction, she concludes, the decree created new interests in place of the old: for Sanderfoot, ownership in fee simple of the house and real estate; for Farrey, various assets and a debt of $29,208.44 secured by a lien on the Sanderfoot's new fee simple interest. Both in his briefs and at oral argument, Sanderfoot agreed on each point. Brief for Respondent 7-8; Tr. of Oral Arg. 39.

On the assumption that the parties characterize Wisconsin law correctly, Sanderfoot must lose. Under their view, the lien could not have fixed on Sanderfoot's pre-existing undivided half interest because the divorce decree extinguished it. Instead, the only interest that the lien encumbers is debtor's wholly new fee simple interest. The same decree that awarded Sanderfoot his fee simple interest simultaneously granted the lien to Farrey. As the judgment stated, he acquired the property "free and clear" of any claim "except as expressly provided in this [decree]." App. to Pet. ***300** for Cert. 58a. Sanderfoot took the interest and the lien together, as if he had purchased an already encumbered estate from a third party. Since ****1831** Sanderfoot never possessed his new fee simple interest before the lien "fixed," § 522(f)(1) is not available to void the lien.

The same result follows even if the divorce decree did not extinguish the couple's pre-existing interests but instead merely reordered them. The parties' current position notwithstanding, it may be that under Wisconsin law the divorce decree augmented Sanderfoot's previous interest by adding to it Farrey's prior interest. If the court in exchange sought to protect Farrey's previous interest with a lien, § 522(f)(1) could be used to undo the encumbrance to the extent the lien fastened to any portion of Sanderfoot's previous surviving interest. This follows because Sanderfoot would have possessed the interest to which that part of the lien fixed, before it fixed. But in this case, the divorce court did not purport to encumber any part of Sanderfoot's previous interest even on the assumption that state law would deem that interest to have survived. The decree instead transferred Farrey's previous interest to Sanderfoot and, again simultaneously, granted a lien equal to that interest minus the small amount of personal property she retained. Sanderfoot thus would still be unable to avoid the lien in this case since it fastened only to what had been Farrey's pre-existing interest, and this interest Sanderfoot would never have possessed without the lien already having fixed. [4]

The result, on either theory, accords with the provision's main purpose. As noted, the legislative history suggests that Congress primarily intended § 522(f)(1) as a device to thwart creditors who, sensing an impending bankruptcy, rush to court to obtain a judgment to defeat the debtor's exemptions. That is not what occurs in a divorce proceeding such as this. Farrey obtained the lien not to defeat ***301** Sanderfoot's pre-existing interest in the homestead but to protect her own pre-existing interest in the homestead that was fully equal to that of her spouse. The divorce court awarded the lien to secure an obligation the court imposed on the husband in exchange for the court's simultaneous award of the wife's homestead interest to the husband. We agree with Judge Posner that to permit a debtor in these circumstances to use the Code to deprive a spouse of this protection would

neither follow the language of the statute nor serve the main goal it was designed to address.

IV

We hold that § 522(f)(1) of the Bankruptcy Code requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid the fixing of the lien on that interest. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KENNEDY, with whom Justice SOUTER joins, concurring.

I agree with the Court's holding that a debtor cannot use § 522(f)(1) of the Bankruptcy Code to avoid a lien on an interest the debtor acquired after the lien attached. I agree also with the Court's determination that respondent conceded what we all now know to be the key point in the case. In describing the effect of the Outagamie County Circuit Court's decree on the real property in question, the husband stated in his brief before this Court:

> "Prior to the judgment of divorce, the parties held title to the real estate in joint tenancy, each holding a pre-existing undivided one-half interest. At the point that the divorce court issued its property division determination, those property rights were wholly extinguished and new rights were put into place." Brief for Respondent 7-8.

***302** This concession is fatal to the argument respondent must make to prevail here, which ****1832** is that the judicial lien fixed upon his pre-existing interest in the property. With the case in this posture, though, the possibility arises that later cases, whether from Wisconsin or from some other jurisdiction, could yield a different result. This would depend upon the relevant state laws defining the estate owned by a spouse who had a pre-existing interest in marital property and upon state laws governing awards of property under a decree settling marital rights.

In this case, prior to the Circuit Court decree ordering the property division, respondent had a vested, present, and undivided interest in one-half the marital property. The relevant Wisconsin statutes, enacted when the State adopted substantial parts of the Uniform Marital Property Act, provide that "[a]ll property of spouses is presumed to be marital property," Wis.Stat. § 766.31(2) (1989-1990), and "[e]ach spouse has a present undivided one-half interest in each item of marital property." § 766.31(3). Absent respondent's concession, it would seem that the state court did not divest him of his pre-existing interest. At no place in its "Findings of Fact, Conclusions of Law, and Judgment of Divorce" did the court declare that respondent's predecree interests were extinguished. Rather, the decree declared that upon its effective date sole title to the property vested in respondent. It also gave respondent's wife a lien against the home to secure the debt he owed her to equalize the property settlement. Finally, it divested each party of "any and all right, title and interest in and to the property awarded to the other." App. to Pet. for Cert. 58a. As I read these provisions, respondent obtained from his wife her one-half interest in the home, while always retaining his one-half interest as well. Because no interest in the home, other than the lien, was awarded to respondent's wife, respondent was never divested of any interest.

***303** This interpretation conforms to the result mandated if a marriage terminates without any decree for property division. Wisconsin law provides that "[a]fter a dissolution each former spouse owns an undivided one-half interest in the former marital property as a tenant in common." Wis.Stat. § 766.75 (1989-1990). So too, if one spouse were to make a voluntary transfer of his or her one-half interest to the other spouse, I should not think it could be said that the transferee's prior interest had been extinguished. Rather, the transferee would retain his or her own interest, and the two interests would be merged into a single estate. See *Thauer v. Smith,* 213 Wis. 91, 95, 250 N.W. 842, 844 (1933). A state-law scheme in this pattern is to be distinguished, of course, from a regime in which a tenancy by the entirety is recognized and is deemed a single interest owned by the marital entity, a regime in which the estate dissolves when the marriage does. See *McCormick v. Mid-State Bank & Trust Co.,* 22 B.R. 997 (WD Pa.1982) (applying Pennsylvania law). Thus, it is not at all clear that as a matter of state law the judicial lien could not attach to the husband's predecree interest in his one-half of the marital property. If so, respondent could use § 522(f)(1) to avoid at least part of his wife's lien.

The result the Court reaches consists with fairness and common sense. Since the Outagamie County Circuit Court had the power to strip the husband of his interest altogether, it can be reasoned that the court granted him the entire property

on the condition that his prior interest would terminate and that a lien would attach to a new interest in the whole. The problem with this argument, however, is that there is no indication in the record that the husband consented to the decree. A waiver of this sort may also be contrary to the nonwaiver provision of § 522(f).

Following this analysis, I believe the Bankruptcy Code may be used in some later case to allow a spouse to avoid otherwise valid obligations under a divorce court decree. ***304** Though adept drafting of property decrees or the use of court orders directing ****1833** conveyances in a certain sequence might resolve the problem, it appears that congressional action may be necessary to avoid in some future case the perhaps unjust result the Court today avoids having to consider only because of the fortuity of a litigant's concession. With these observations, I concur in the opinion and the judgment of the Court.

All Citations

500 U.S. 291, 111 S.Ct. 1825, 114 L.Ed.2d 337, 59 USLW 4483, 24 Collier Bankr.Cas.2d 841, 21 Bankr.Ct.Dec. 1160, Bankr. L. Rep. P 73,964

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Section 815.20 provides in relevant part:

> "Homestead exemption definition.
>
> "(1) An exempt homestead as defined in s. 990.01(14) selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $40,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and except as otherwise provided.... The exemption extends to the interest therein of the tenants in common, having a homestead thereon with the consent of the cotenants, and to any estate less than a fee."

2 Farrey also objected to her former husband's valuation of the home at $82,750 in his bankruptcy filings. Neither the Bankruptcy Court, the District Court, nor the Court of Appeals resolved this dispute on the merits.

3 Other provisions of the Code likewise indicate that Congress used the term "fixing" to refer to the timing of an event. Section 545(1), for example, provides:

> "The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien-
>
> "(1) *first becomes* effective against the debtor-
>
> "(A) *when* a case under this title concerning the debtor is commenced;
>
> "(B) *when* an insolvency proceeding other than under this title concerning the debtor is commenced;
>
> "(C) *when* a custodian is appointed or authorized to take or takes possession;
>
> "(D) *when* the debtor becomes insolvent;

"(E) *when* the debtor's financial condition fails to meet a specified standard; or

"(F) *at the time* of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien." 11 U.S.C. § 545(1) (emphasis added).

4 Justice SCALIA does not join in this paragraph.

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Kuiken, 9th Cir.BAP (Cal.), January 4, 2013

304 F.3d 905
United States Court of Appeals,
Ninth Circuit.

In re: Thomas Kai-Ming CHIU;
In re: Linda Luk Chiu, Debtors,
Culver, LLC, Appellant,
v.
Thomas Kai-Ming Chiu; Linda Luk Chiu, Appellees.

No. 01-56578.
|
Argued and Submitted July 11, 2002.
|
Filed Sept. 18, 2002.

Synopsis
Chapter 7 debtors moved to avoid judicial lien, as allegedly impairing homestead exemption that they possessed in real property which was subject of postpetition sale by debtors. The United States Bankruptcy Court for the Central District of California, James N. Barr, J., granted motion, and appeal was taken. The Bankruptcy Appellate Panel, Marlar, Perris, and Brandt, JJ., 266 B.R. 743, affirmed. On further appeal, the Court of Appeals, Mahan, United States District Judge for the District of Nevada, sitting by designation, held that, in order to avoid judicial lien upon their residence, on ground that it impaired homestead exemption to which they would otherwise have been entitled, Chapter 7 debtors did not need to have interest in residence when their lien avoidance motion was filed.

Affirmed.

West Headnotes (3)

[1] **Bankruptcy** Effect of Want of Stay; Conclusiveness of Sale
Bankruptcy Moot Questions

Judgment lien creditor's failure to obtain stay pending appeal of bankruptcy court order allowing debtors to belatedly avoid creditor's lien as impairing their homestead exemption, after bankruptcy case had been closed and homestead property had been sold to third party, did not moot creditor's appeal, even though escrow agent, relying upon bankruptcy court's unstayed order, had disbursed sale proceeds to debtors, where third-party purchaser was aware of lien at time of purchase, and appellate court could provide effective relief by reinstating lien on subject property.

31 Cases that cite this headnote

[2] **Bankruptcy** Homestead; Residence

In order to avoid judicial lien upon their residence, on ground that it impaired homestead exemption to which they would otherwise have been entitled, Chapter 7 debtors did not need to have interest in residence when their lien avoidance motion was filed; it was sufficient that debtors had interest in residence at time judgment lien attached. Bankr.Code, 11 U.S.C.A. § 522(f)(1).

43 Cases that cite this headnote

[3] **Bankruptcy** Purpose

Purpose of bankruptcy statute allowing debtor to avoid certain liens upon exemption impairment grounds is to provide relief to overburdened debtors. Bankr.Code, 11 U.S.C.A. § 522(f)(1).

30 Cases that cite this headnote

Attorneys and Law Firms

***906** Halli B. Heston and Richard G. Heston, Heston & Heston, Newport Beach, CA, for appellees Thomas Kai-Ming Chiu and Linda Luk Chiu.

James A. Hayes, Jr., Ashworth, Hayes & Moran, LLP, Laguna Niguel, CA; and Frederick B. Sainick and Richard P. Whitney, Sainick & Cote, Newport Beach, CA, for appellant Culver, LLC.

Appeal from the Ninth Circuit Bankruptcy Appellate Panel; Marlar, Perris, and Brandt, Bankruptcy Judges, Presiding. BAP No. CC-00-01339-MaPB.

Before: KOZINSKI and FERNANDEZ, Circuit Judges, and MAHAN, * District Judge.

OPINION

MAHAN, District Judge.

Thomas Kai-Ming Chiu and Linda Luk Chiu (hereinafter "debtors") filed a voluntary petition under Chapter 7 on July 25, 1995. Debtors scheduled their interest in a piece of residential real property (hereinafter ***907** "the subject property"). Culver [1] had a judicial lien on the subject property in the amount of $42,725.57. Debtors also claimed a homestead exemption on the subject property. However, during the bankruptcy proceedings, debtors did not take action to avoid the Culver lien under 11 U.S.C. § 522(f)(1). The debtors were granted a discharge on December 4, 1995, and the case was closed on December 15, 1995.

In December 1999, debtors sold the subject property and were notified that the lien amount would have to be paid or $48,000 would be withheld from the sale proceeds. The sale of the subject property was recorded on January 14, 2000, with the escrow company holding approximately $48,000 pending a judicial determination of debtors' liability on the lien.

On January 20, 2000, debtors filed a motion to reopen their bankruptcy case, which was granted. Debtors also filed a motion to avoid the judicial lien under 11 U.S.C. § 522(f)(1), claiming that the lien impaired their homestead exemption. Culver opposed the motion.

The bankruptcy court determined that the lien avoidance related back to the date of the filing of the bankruptcy petition and granted the motion to avoid the lien on May 24, 2000. Culver failed to seek a stay, so debtors recorded the order of the bankruptcy court. The escrow company, relying on the order, disbursed the remaining proceeds to debtors.

Culver appealed the bankruptcy court's decision to the Bankruptcy Appellate Panel (BAP). The BAP affirmed the bankruptcy court's decision. *Culver, LLC v. Chiu (In re Chiu),* 266 B.R. 743 (9th Cir.BAP 2001). Culver now appeals.

DISCUSSION

[1] **I.** Prior to addressing the merits of the case, we must determine whether it is moot. Debtors contend that the case is moot because the bankruptcy court's order was recorded and relied on by third parties. The escrow company disbursed the $48,000 it had been holding, and neither the escrow company nor the buyers are parties to this action. Debtors assert that because third parties have relied on the lower court's decision, reversing the decision without their participation would be unwieldy and unfair.

Debtors' mootness argument is without merit. The buyers of the house were not bona fide purchasers because they were aware of the lien and expressly took title subject to the lien. While the escrow company may have relied upon the bankruptcy court's order in disbursing the funds, its good-faith reliance does not affect Culver's lien. Nothing in the record suggests that this court cannot provide effective relief by reinstating Culver's lien on the subject property.

[2] **[3]** **II.** The crux of Culver's argument is that the lien-avoidance provision of the Bankruptcy Code does not allow a debtor who no longer has an interest in property to avoid a judicial lien on that property. 11 U.S.C. § 522(f)(1) provides that a debtor:

> may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is-
>
> (A) a judicial lien....

***908** The purpose of § 522(f)(1) is to provide relief for an overburdened debtor. *Farrey v. Sanderfoot,* 500 U.S. 291, 297-98, 111 S.Ct. 1825, 1829-30, 114 L.Ed.2d 337 (1991) (citing H.R.Rep. No. 95-595, at 126-27 (1977), U.S. Code Cong. & Admin. News 5963, 6087-88). "[A] principal reason Congress singled out judicial liens was because they are a device commonly used by creditors to defeat the protection bankruptcy law accords exempt property against debts." *Id.*

We have previously determined that "under § 522(f)(1), a debtor may avoid a lien if three conditions are met: (1) there was a fixing of a lien on an interest of the debtor in property; (2) such lien impairs an exemption to which the

debtor would have been entitled; and (3) such lien is a judicial lien." *Estate of Catli v. Catli (In re Catli),* 999 F.2d 1405, 1406 (9th Cir.1993). Culver concedes that the second and third prongs of this test are met, but contends that the first prong is not met because debtors did not have an interest in the property when they brought the motion to avoid the lien. Debtors do not dispute that they had no interest in the property at the time they moved to avoid. They argue, however, that to satisfy § 522(f)(1), they need only have had an interest in the property at the time they filed for bankruptcy or, in the alternative, at the time the lien attached.

Thus the issue for this court to resolve is whether, for purposes of applying § 522(f)(1), the debtor must have an interest in the exempt property at the time of moving to avoid the lien, at the time of filing for bankruptcy, or at the time when the lien "fixed," or "attached." This question has not been squarely addressed by this court. Several lower courts have addressed the issue, with varying results. *Compare In re Vincent,* 260 B.R. 617 (Bankr.D.Conn.2000) (time of fixing of the lien), *and Carroll v. Mem'l Med. Ctr., Inc. (In re Carroll),* 258 B.R. 316 (Bankr.S.D.Ga.2001) (time of filing of the bankruptcy petition), *with In re Vitullo,* 60 B.R. 822 (D.N.J.1986) (time of motion to avoid); *In re Sizemore,* 177 B.R. 530 (Bankr.E.D.Ky.1995) (same); *Riddell v. N.C.R. Universal Credit Union (In re Riddell),* 96 B.R. 816 (Bankr.S.D.Ohio 1989) (same); *(In re Kudrna), Kudrna v. Credit Bureau, Inc.,* 173 B.R. 934 (Bankr.D.Idaho 1994) (same); *In re Carilli,* 65 B.R. 280 (Bankr.E.D.N.Y.1986) (same); *In re Montemurro,* 66 B.R. 124 (Bankr.E.D.N.Y.1984) (same).

The Supreme Court interpreted § 522(f)(1) in *Farrey* as requiring that the debtor already have an interest in the property at the time that the lien attached. 500 U.S. at 299. The Court explained that § 522(f)(1) permits the avoidance of the "fixing of a lien on an interest of a debtor" only if the "fixing" took place after the debtor acquired its interest. *Id.* The Court found the critical inquiry to be whether the debtor possessed the interest to which the lien fixed, before it fixed. *Id.*

The application of the time-of-fixing rule to this case is most consistent with *Farrey.* We therefore agree with *Vincent* that the debtor need not have an interest in the property at the time it moves to avoid:

> The operation of Section 522(f) is not to avoid a "lien", *per se,* although that is its practical effect in most cases. Rather, by its terms, Section 522(f) provides for the avoidance of the "fixing" of certain liens. To "fix" means to "fasten a liability upon". Thus, Section 522(f) operates retrospectively to annul the *event* of fastening the subject lien upon a property interest. Accordingly, the fundamental question of ownership is whether the property encumbered by the subject lien was "property of the debtor" *at the time of the fixing* of that lien upon such property.

***909** *Vincent,* 260 B.R. at 620-21 (citation omitted).

It is undisputed that debtors owned the subject property before the lien fixed upon it. Culver concedes that the lien impaired an exemption to which debtors were entitled. Because debtors satisfied the requirements of § 522(f)(1), they were entitled to avoid the lien.

AFFIRMED.

All Citations

304 F.3d 905, 40 Bankr.Ct.Dec. 63, Bankr. L. Rep. P 78,719, 02 Cal. Daily Op. Serv. 9617, 2002 Daily Journal D.A.R. 10,770

Footnotes

* The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.

1 Culver is successor in interest to Heritage Square. Heritage Square recorded a judicial lien on October 14, 1993, for a judgment it obtained against debtors for the breach of a commercial lease.

End of Document

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by In re Moody, Bankr.N.D.Ohio, September 30, 2021

475 F.3d 428
United States Court of Appeals,
First Circuit.

In re Donald J. WILDING, Debtor.
Donald J. Wilding, Debtor–Appellant,
v.
CitiFinancial Consumer Financial Services, Inc., Appellee.

No. 05–9011.
|
Heard June 9, 2006.
|
Decided Jan. 30, 2007.

Synopsis
Background: Chapter 7 debtor reopened case and filed motion to avoid previously unscheduled judicial lien that had been recorded against his residence. Creditor objected, asserting that its lien could not be avoided because it already had been satisfied. The United States Bankruptcy Court for the District of Rhode Island, Arthur N. Votolato, J., denied debtor's motion, and debtor appealed. The Bankruptcy Appellate Panel (BAP), 332 B.R. 487, affirmed, and debtor appealed.

[Holding:] The Court of Appeals, Woodlock, District Judge, sitting by designation, held that the Bankruptcy Code permits a debtor to avoid a judicial lien if the lien existed at the filing of the bankruptcy petition but was satisfied after the case was closed and before the debtor filed a motion to avoid.

Vacated and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (9)

[1] **Bankruptcy** Effect as to Securities and Liens

Although the unsecured portion of a secured creditor's claim may be discharged in a Chapter 7 case, its lien in the collateral normally survives the bankruptcy proceeding and the discharge, and is enforceable in accordance with state law.

[2] **Bankruptcy** Conclusions of Law; De Novo Review

Where bankruptcy court's determination involved a question of law, it would be reviewed de novo.

1 Case that cites this headnote

[3] **Bankruptcy** Lien Avoidance

Under the exemptions section of the Bankruptcy Code, a debtor may avoid the fixing of a lien if three requirements are met: (1) there was a fixing of a lien on an interest of the debtor in property, (2) the lien impairs an exemption to which the debtor would have been entitled, and (3) the lien is a judicial lien. 11 U.S.C.A. § 522(f)(1).

22 Cases that cite this headnote

[4] **Bankruptcy** Judicial Liens
Bankruptcy Operation and Effect

Bankruptcy Code permits a debtor to avoid a judicial lien if the lien existed at the filing of the bankruptcy petition but was satisfied after the case was closed and before the debtor filed a motion to avoid; although the section of the Code setting forth the requirement that the lien "impairs" the exempt property is worded in the present tense, suggesting that a lien must actually impair the exempt property at the time the judge renders the decision to avoid, the value of a lien is to be calculated as of the filing of the petition.
11 U.S.C.A. § 522(f).

32 Cases that cite this headnote

[5] **Bankruptcy** Operation and Effect

Petition date is the operative date for determining the various calculations under the section of the Bankruptcy Code governing the avoidance of liens on exemption impairment grounds. 11 U.S.C.A. § 522(f).

19 Cases that cite this headnote

[6] **Bankruptcy** Judicial Liens

Section of the Bankruptcy Code governing the avoidance of liens on exemption impairment grounds was designed to mitigate the impact of judicial liens because they are a device commonly used by creditors to defeat the protection bankruptcy law accords exempt property against debts. 11 U.S.C.A. § 522(f).

[7] **Bankruptcy** Equitable Powers and Principles

Bankruptcy Proceedings

That a court sitting in bankruptcy may deploy its equitable powers to issue an order avoiding a lien, nunc pro tunc, does not mean that it necessarily should exercise those powers to do so. 11 U.S.C.A. § 522.

1 Case that cites this headnote

[8] **Bankruptcy** Discretion

Bankruptcy Grounds and Objections

Bankruptcy Prejudice or Harm to Creditors

Bankruptcy Fraud or Collusion

Bankruptcy Time for Proceeding; Laches

Bankruptcy judge has discretion to determine, in light of such defenses as laches, fraud, detrimental reliance, and prejudice, whether to reopen a bankruptcy petition.

2 Cases that cite this headnote

[9] **Bankruptcy** Proceedings

Bankruptcy judge may establish conditions so as to avoid any demonstrable prejudice to a creditor from belated avoidance of its judicial lien. 11 U.S.C.A. § 522(f).

4 Cases that cite this headnote

Attorneys and Law Firms

***429** Christopher M. Lefebvre, with whom Law Offices of Claude Lefebvre & Sons was on brief, for appellant.

Americo M. Scungio, with whom Scungio & Priolo was on brief, for appellee.

Before Torruella and Howard, Circuit Judges, and Woodlock [*], District Judge.

Opinion

WOODLOCK, District Judge.

The question presented is whether 11 U.S.C. § 522(f) permits a debtor to avoid a judicial lien if the lien existed at the filing of the bankruptcy petition but was satisfied after the bankruptcy case closed and before the debtor filed a motion to avoid. The Bankruptcy Court and the Bankruptcy Appellate Panel below concluded that it does not. We disagree and will remand the matter to permit the Bankruptcy Court to address any equitable defenses that might be available to the creditor under these circumstances.

I.

The bare bones [1] factual background is as follows:

***430** In May 2001, appellee CitiFinancial Consumer Financial Services ("CitiFinancial") recorded a judicial lien on the residence of appellant Donald J. Wilding. Some six months later in November 2001, Wilding filed for bankruptcy under Chapter 7. He did not identify the CitiFinancial debt of approximately $10,000 as secured in his schedules; rather, he listed a debt to CitiFinancial in roughly that amount as unsecured. Wilding received a discharge, in what the Bankruptcy Judge termed "a garden variety Chapter 7

bankruptcy no-asset case" on February 7, 2002, and the case was closed on February 15, 2002.

[1] In the course of refinancing the mortgage on his residence nearly two years later in 2004, Wilding found it necessary to address CitiFinancial's lien.[2] As a matter of law, the lien remained in place because "[a]lthough the unsecured portion of a secured creditor's claim may be discharged in a Chapter 7 ... case, its lien in the collateral normally survives the bankruptcy proceeding and the discharge, and is enforceable in accordance with state law." *In re Pratt,* 462 F.3d 14, 17 (1st Cir.2006). On December 22, 2004, Wilding filed a motion to reopen his bankruptcy case for the purpose of avoiding the previously unscheduled judicial lien on his property. Before the motion to reopen was acted upon, Wilding consummated his refinancing and satisfied the lien. On December 29, 2004 a release of the lien was recorded in the Registry of Deeds.

The Bankruptcy Court granted the motion to reopen on January 5, 2005. On January 6, 2005, Wilding filed a motion to avoid the lien. In opposition, CitiFinancial, which had not opposed the motion to reopen, argued that the lien could not be avoided because it had been satisfied. Both the Bankruptcy Court and the Bankruptcy Appellate Panel concluded that since the lien was no longer in effect, there was no longer a lien which could be avoided. The Bankruptcy Court stated, "[q]uite simply, there are no rights or justiciable property interests before the Court, and it is clearly too late to raise any." The Bankruptcy Appellate Panel held that "because the lien was fully satisfied, it was no longer fixed on property of the Debtor at the time he filed his Motion to Avoid the Lien. Accordingly, it was too late to employ the benefits of § 522(f) of the Code." *In re Wilding,* 332 B.R. 487, 491 (1st Cir.BAP2005).

II.

[2] We think the Bankruptcy Court and the Bankruptcy Appellate Panel, by essentially embracing a *per se* rule, took too narrow a view of the powers of lien avoidance under 11 U.S.C. § 522(f). Because this is a question of law, we review the Bankruptcy Court's determination *de novo. See In re Lazarus,* No. 06–1982, 2007 WL 49640, at *1, 478 F.3d 12, 13 (1st Cir. Jan.9, 2007).

[3] Section § 522(f)(1) states, in relevant part:

> [T]he debtor may avoid the fixing of a lien on an interest of the debtor in property ***431** to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is —
>
> (1) a judicial lien ...

11 U.S.C. § 522(f)(1). Thus, under the statute, a debtor may avoid the fixing of a lien if three requirements are met: (1) there was a fixing of a lien on an interest of the debtor in property; (2) the lien impairs an exemption to which the debtor would have been entitled; and (3) the lien is a judicial lien. *See Culver, LLC v. Chiu,* 304 F.3d 905, 908 (9th Cir.2002).

[4] The parties do not dispute that Wilding has met the first and third requirements; Wilding had an interest in his house before the lien attached and the lien was a judicial lien. *See Farrey v. Sanderfoot,* 500 U.S. 291, 297–98, 111 S.Ct. 1825, 114 L.Ed.2d 337 (1991) (holding that the debtor must have had an interest in the property before the lien attached to take advantage of § 522(f)); *see also Patriot Portfolio LLC v. Weinstein (In re Weinstein),* 164 F.3d 677, 680 (1st Cir.1999).

As for the second requirement, the parties do not dispute that Wilding "would have been entitled to"[3] a homestead exemption.[4] The only matter in dispute is whether Wilding can take advantage of § 522(f) now that he has satisfied the lien, i.e. whether the lien "impairs the exemption" if it no longer exists when the motion to avoid is filed.

CitiFinancial contends that Wilding cannot avoid a lien that does not *currently* impair the exempt property. At first glance, the language of § 522(f) might seem to support CitiFinancial's position, because the requirement that the lien "impairs" the exempt property is worded in the present tense. Linguistically, the word "impairs" suggests that a lien must actually impair the exempt property at the time the judge renders the decision to avoid.

Wilding, on the other hand, essentially argues that § 522(f) applies as long as the lien impaired his interest in

property at the time he filed his bankruptcy petition. He relies upon several cases in which courts have held that the debtor need not have an interest in the exempt property at the time the debtor files his motion to avoid to take advantage of § 522(f). *See, e.g., Chiu,* 304 F.3d at 908–09; *In re Orr,* 304 B.R. 875, 877 (Bankr.S.D.Ill.2004) (following *Chiu*); *In re Mailhot,* 301 B.R. 774, 776 (Bankr.D.R.I.2003) (same); *In re Vincent,* 260 B.R. 617, 620–21 (Bankr.D.Conn.2000). *But see In re Sizemore,* 177 B.R. 530, 531 (Bankr.E.D.Ky.1995) (holding that debtor cannot take advantage of § 522(f) after debtor has transferred his exempt property); *In re Vitullo,* 60 B.R. 822, 824 (D.N.J.1986)(same); *In re Riddell,* 96 B.R. 816 (Bankr.S.D.Ohio 1989) (same); *In re Carilli,* 65 B.R. 280, 282 (Bankr.E.D.N.Y.1986) (same).

***432** *Chiu* and similar cases—including *Mailhot,* which was decided by the Bankruptcy Judge who decided this case—are distinguishable from the case before us. In *Chiu,* for example, the debtor sold the exempt property before filing the motion to avoid. The Ninth Circuit reasoned that the appropriate time to determine whether a debtor has an exempt interest in property is the filing of the petition, not the filing of the motion to avoid the lien. But the liens in *Chiu* and *Mailhot* were still effectively in force when the Bankruptcy Court acted upon the motion to avoid. Indeed, in both cases the debtor took care *not* to satisfy the lien in question when disposing of the exempt property; funds generated by a sale of the property were escrowed pending judicial determination of the validity of the lien. *See Chiu,* 304 F.3d at 907; *Mailhot,* 301 B.R. at 776. Thus, the liens in those cases continued to impair the equivalent of exempt property at the time the debtor filed his motion to avoid.

For reasons that do not appear on the record, Wilding failed to protect himself in that fashion. Rather, before filing his motion to avoid, Wilding consummated the refinancing transaction and satisfied the lien in full without holding the funds in escrow pending a determination by the Bankruptcy Court.

Yet although the *Chiu* line of cases is distinguishable, we conclude that the lien itself need not exist at the moment the debtor files a motion to avoid for § 522(f) to apply. CitiFinancial's position is based upon a narrow grammatical reading of § 522(f); a broader consideration of § 522 as a whole yields a different result.

[5] The textual touchstone for retrospective relief under § 522(f) is found in the definition of "value" provided for by the statute. Section 522(f)(2)(a) reads:

> For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of—
>
> (i) the lien;
>
> (ii) all other liens on the property; and
>
> (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;
>
> exceeds the *value* that the debtor's interest in the property would have in the absence of any liens.

(emphasis supplied). In § 522, " 'value' means fair market value *as of the date of the filing of the petition* or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate." 11 U.S.C. § 522(a) (emphasis supplied). It would be an odd result if the statute required the court to measure the value of the property interest as of the petition date, but to measure the value of the lien as of an unrelated point in the future, for example, when the judge actually addresses a motion to avoid. We think the petition date is the operative date for determining the various § 522(f) calculations. In order to determine whether a lien impairs an exemption, the Bankruptcy Court must calculate the value of the lien as of the filing of the petition. If the lien "impairs" the exemption on that date, the court may thereafter address whether the lien should be avoided. Consequently, it is not determinative that the lien did not exist (or, in other words, had zero value) when Wilding ultimately filed his motion to avoid.

[6] This reading comports with the mechanics of § 522(f). As the Ninth Circuit in *Chiu* noted,

> [t]he operation of Section 522(f) is not to avoid a "lien", *per se,* although that is its practical effect in most cases. Rather, by its terms, Section 522(f) provides for ***433** the avoidance of the "fixing" of certain liens. To "fix" means to "fasten a liability upon." Thus, Section 522(f) operates retrospectively to annul the *event* of fastening.

Chiu, 304 F.3d at 908 *quoting* *In re Vincent,* 260 B.R. at 617 (emphasis in original, citations omitted). We find this reasoning persuasive. Section 522(f) seeks to implement the strong public policies—in particular, "the fresh start policy of the Code which encourages the full application of the Code's exemption provisions," *In re Quackenbos,* 71 B.R. 693, 695 (Bankr.E.D.Pa.1987)—that are at play when lien avoidance is sought. As the Supreme Court has observed, § 522(f) was designed to mitigate the impact of judicial liens "because they are a device commonly used by creditors to defeat the protection bankruptcy law accords exempt property against debts." *Farrey,* 500 U.S. at 297–98, 111 S.Ct. 1825. These policies support what we conclude is the most reasonable reading of § 522: that, for the purpose of retrospective relief, the value of the lien is to be calculated as of the filing of the petition.

Thus, we hold that a debtor may avoid a judicial lien under § 522(f) even if he has satisfied the lien prior to filing a motion to avoid, so long as the lien in question impaired an exemption as of the bankruptcy petition date (or the later acquired property date) as reflected in the statutory definition of "value" under § 522.

III.

[7] **[8]** That a court sitting in bankruptcy may deploy its equitable powers under § 522 to issue an order avoiding a lien, *nunc pro tunc,* does not mean that it necessarily should exercise those powers to do so. Although § 522(f) permits a debtor to avoid a lien in cases such as this, CitiFinancial might have available equitable defenses to oppose the motion to avoid. Defenses such as laches, fraud, detrimental reliance, and prejudice are often raised in opposition to a motion to reopen. It is well-settled that a Bankruptcy Judge has discretion to determine—in light of such defenses—whether to reopen a bankruptcy petition at all. *See, e.g., First National Bank of Park Falls v. Maley,* 126 B.R. 563, 567 (E.D.Wis.1991); *In re Procaccianti,* 253 B.R. 590 (Bankr.D.R.I.2000); *In re Walters,* 113 B.R. 602, 603 (Bankr.D.S.D.1990); *In re Quackenbos,* 71 B.R. at 695–96.

In this case, CitiFinancial did not oppose the reopening. But the motion to reopen stage is not the only or perhaps even the best point at which finality concerns may be addressed and balanced against the policy of the Bankruptcy Code to provide "a fresh start" and protect exempt property. It is at the avoidance motion stage when the relative interests of the respective parties are most fully crystallized. Thus, although applying essentially the same test as that applicable for the motion to reopen, the Bankruptcy Court must be prepared to exercise its informed discretion with respect to the motion to avoid filed after bankruptcy proceedings are closed. *Cf.* *In re Levy,* 256 B.R. 563 (Bankr.D.N.J.2000) (granting a motion to reopen but denying the motion to avoid a judicial lien because relief was barred by the defense of laches).

[9] The courts below did not address or calibrate the equities of granting a motion to avoid. Rather, they concluded as a matter of law that it was too late to do so. Consequently, we leave to the Bankruptcy Court in the first instance to address any equitable defenses that might be available. In that connection, we observe that the Bankruptcy Judge may establish conditions so as to avoid any demonstrable prejudice to CitiFinancial from belated avoidance of its judicial lien. *See, e.g., In re* ***434** *Dator,* 2006 WL 2056678 at *3 (Bankr.D.Mass.2006) (conditioning reopening on satisfaction by debtors of reasonable fees and expenses, including attorneys fees, of judicial lienholders between date of closing Chapter 7 case and date of filing motion to reopen); *In re Orr,* 304 B.R. at 878 (finding no dispute over value of real estate for purposes of determining extent of impairment and consequently creditor did not need to incur cost of appraisal); *but see* *In re Levy,* 256 B.R. at 566–67 (declining to reopen Chapter 13 proceeding because delay in seeking lien

avoidance caused "difficult and costly task of hiring appraiser to offer an opinion as to the value of the debtor's property" four years earlier). We leave to the Bankruptcy Court's informed discretion such issues as how, if at all, the costs or uncertainty of *post hoc* appraisal of the property should be factored into conditioning the availability of lien avoidance. We also leave to the Bankruptcy Court's discretion the proper valuation of any impairment of the homestead exemption. *See* Note 4 *supra.*

The Bankruptcy Court's denial of the motion to avoid the CitiFinancial lien is **VACATED.** This case shall be **REMANDED** to the Bankruptcy Court for further proceedings consistent with this opinion. The parties to bear their own costs.

All Citations

475 F.3d 428, Bankr. L. Rep. P 80,841

Footnotes

* Of the District of Massachusetts, sitting by designation.

1 We join the Bankruptcy Court and the Bankruptcy Appellate Panel in lamenting the lack of factual detail to be found within the record created by the parties for this case. Nevertheless, we find in the record the information material to our disposition. We note, however, that a full record would have made this case more easily comprehensible and might have avoided the unseemly spectacle of lawyers asserting inconsistent statements about facts nowhere to be found in the record in briefing and in oral argument before this court.

2 Wilding concedes he did not disclose the related debt as being secured by the CitiFinancial judicial lien in the schedules he filed when seeking Chapter 7 discharge. Although the record does not establish whether this omission was inadvertent or intentional, his counsel suggested at oral argument that Wilding, like many Chapter 7 debtors, might have been unaware that a judicial lien had attached. Since it is not apparent how Wilding could have benefitted by failing to schedule an avoidable lien, there is no reason to assume that he intentionally misrepresented the nature of the debt.

3 In *Owen v. Owen,* 500 U.S. 305, 111 S.Ct. 1833, 114 L.Ed.2d 350 (1991), the Supreme Court held that the proper question to ask in determining what the debtor "would have been entitled to" is whether the lien impairs a state or federal exemption to which the debtor would have been entitled *but for the lien itself. See id.* at 310–13, 111 S.Ct. 1833.

4 Wilding contends he failed to value the real property properly on his schedules. He notes in his brief that he listed the property at $60,000 with a first mortgage lien of $58,000. Consequently, only a modest sum—far less than that which was the subject of the judicial lien—would be covered by the exemption. In his brief before us, Wilding's counsel contends that "[i]f valuation were truly an issue Debtor would obviously move to amend his exemptions to permit him to exempt up to $150,000 in his homestead" under the Rhode Island exemption.

End of Document

Feature

By Oscar Pinkas, Bryan Bates and Sarah Schrag[1]

Value, Not Face Amount, of Liens Controls in a Battle of Credit Bids

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In *In re Bay Circle Properties LLC*,[2] the U.S. Bankruptcy Court for the Northern District of Georgia ruled that property of the estate can be sold free and clear under § 363(f)(3) — even if the total face amount of all liens exceeds the value of the property. This proposition might be unremarkable, though there is case law on both sides, but the court's reasoning to get to the result is worth noting.

Bay Circle Properties LLC and four of its affiliates (collectively, the "debtors") commenced chapter 11 proceedings in the Northern District of Georgia on May 4, 2015.[3] Seven months before the bankruptcy, two creditors, Good Gateway LLC and SEG Gateway LLC (collectively, the "judgment creditors"), obtained state court judgments of $2.5 million and $12 million, respectively, against Bay Circle's principal and certain other nondebtor entities.[4] The judgment creditors recorded judgment liens, at which time Bay Circle's principal and his wife jointly owned two parcels of property that included large office warehouse buildings (the "property"). Because the judgment creditors held judgments only against the principal (and not his wife), their interests attached only to one-half of the property.

Just before the debtors filed for bankruptcy, Bay Circle's principal and his wife transferred their interests in the property to Bay Circle, subject to the liens of the judgment creditors and the debtors' senior secured lender, Wells Fargo.[5] The bankruptcy court approved a settlement agreement between the debtors and Wells Fargo, whereby the parties stipulated that Wells Fargo was owed more than $22 million, secured by a first-priority lien on seven parcels of property, including the property with the large office warehouse buildings.[6]

Under the settlement, the debtors were obligated to make certain milestone payments funded principally by the sale of the subject properties, and Wells Fargo agreed to certain "release prices" for each parcel.[7] Wells Fargo reserved certain rights in the event of default, including (1) foreclosure, (2) recording deeds-in-lieu of foreclosure on each of the properties subject to existing liens, or (3) recording deeds-in-lieu of foreclosure and credit the outstanding debt in the amount of the release prices.[8] The latter option required Wells Fargo to settle with any objecting party prior to crediting the outstanding debt, and to ensure that the release prices were not too low at the time that the deeds-in-lieu were recorded and that the maximum value was obtained for the subject property.[9] Wells Fargo subsequently assigned all of its interests to Bay Point Capital Partners LP.[10]

The debtors owed Bay Point a $3.5 million milestone payment on Jan. 31, 2017, and sought to sell the property for $5 million in order to cover that payment.[11] Bay Circle requested authority to sell the property free and clear of all liens pursuant to § 363(f)(2)-(5).[12] Bay Point requested and received permission to credit bid up to the $15 million that it was still owed.[13] The judgment creditors objected, claiming that Bay Circle could not meet the requirements of § 363(f) and that the debtors should be required to marshal other assets and sell other properties before selling the property, pointing to the fact that an adversary proceeding was pending concerning the property's transfer to Bay Circle.[14] The proposed purchaser represented to the bankruptcy court that it was a disinterested third party and was prepared to close that day on a sale that would net $5 million to Bay Circle, thereby satisfying the milestone payment and the requisite release price.[15]

The bankruptcy court authorized an auction between Bay Point and the proposed third-party purchaser, conducted by an attorney to the U.S. Trustee, who reported a "spirited" auction resulting in a winning credit bid by Bay Point of $5.35 million.[16] The court addressed a split of interpretations of § 363(f)(3), which authorizes a sale free and clear of any interest in property if "such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of

1 Nothing in this article constitutes an opinion or view of Dentons or its clients.
2 Supplemental Order Authorizing Sale, *In re Bay Circle Properties LLC*, Case No. 15-58440, Bankr. N.D. Ga., Doc. No. 591, 1-2 (Feb. 14, 2017).
3 *Id.*
4 *Id.* at 2 (no judgment was entered against any of debtors).
5 *Id.*
6 *Id.*
7 The release price was a set price point at which Wells Fargo would allow a parcel to be sold or released from its lien to generate cash to pay Wells Fargo.
8 *Id.* at 2-3.
9 *Id.* at 3.
10 *Id.*
11 *Id.*
12 *Id.* at 4.
13 *Id.* at 3-4.
14 *Id.* at 4. Finding that the sale qualified for free-and-clear status under § 363(f)(3), the court declined to rule on whether the requirements were met under § 363(f)(4) or (5). The debtors also requested an order that the debtors be required to marshal and sell other properties to satisfy its obligations to Bay Point first. However, the bankruptcy court postponed a decision on the marshaling of assets until after further briefing and hearing. *Id.* at 9.
15 *Id.* at 4.
16 *Id.*

continued on page 72

Value, Not Face Amount, of Liens Controls in Battle of Credit Bids

from page 24

all liens on such property." The court recognized that the Ninth Circuit Bankruptcy Appellate Panel has reasoned that § 363(f)(3) requires that the purchase price of property must exceed the *face amount* of all liens on the subject property.[17] However, the court agreed with the reasoning of other courts that § 363(f)(3) authorizes a free-and-clear sale so long as the purchase price meets or exceeds the *value* of the liens on the property.[18] The court reasoned that any sale that results in proceeds in excess of the face amount of all liens would necessarily satisfy the liens, rendering § 363(f)(3) superfluous — noting that § 363(f)(3) expressly contemplates the "value" of the subject liens.[19]

The court concluded that the $5.35 million purchase price met or exceeded the value of the liens on the property, as no evidence suggested that the property's value exceeded Bay Point's $15 million secured claim, and the existence of a third-party purchaser satisfied concerns that the purchase price was too low. Hence, the judgment creditor's subordinated liens had no value at all.[20]

The court rejected the judgment creditors' argument that the property should not be sold because it was the subject of an adversary proceeding brought by the judgment creditors alleging that the transfer of the property by the debtors' principal and his wife to Bay Circle was a fraudulent transfer.[21] First, the court noted that the judgment creditors held an interest in only one-half of the property,[22] thus the court implicitly preferred a sale of the property in full as opposed to portions — even if the judgment creditors were willing to credit bid a larger amount. Second, the court noted that the property was indisputably titled in Bay Circle's name as of the petition date, making it property of the estate until a decision had been rendered to remove it from the estate. Thus, even if the judgment creditors prevailed in the adversary proceeding, they could only avoid the transfer of one-half of the property.

Noting that § 363(h) authorizes bankruptcy courts "to sell a nondebtor co-owner's interest in property ... subject to certain protections of the co-owner's interest," the court reasoned that it had authority to dispose of the property.[23] The court's approach on this point is intriguing, as other courts have held that the avoidance claims must be determined prior to the sale absent consent, though that may not have mattered here given Bay Point's liens across the property.

Accordingly, the court authorized the sale of the property free and clear of all liens, while affording the judgment creditors the opportunity to later assert claims for any actual harm caused to them due to the fact that the debtors sold the property before selling their various other properties.[24] If the debtors sold their other properties first, Bay Point's claim potentially could have been reduced below the $5.35 million purchase price for the property, resulting in potential value in the judgment creditors' liens.[25] However, nothing in the settlement agreement between the debtors and Wells Fargo required that the debtors' property be sold in any particular order.[26] This is a third intriguing result of the decision, as the court provided a workaround of post-sale claims in a credit bid scenario to address what were effectively arguments that the sale process did not maximize the value of estate assets. abi

17 *Id.* at 5 (citing *Clear Channel Outdoor Inc. v. Knupfer (In re PW LLC)*, 391 B.R. 25 (B.A.P. 9th Cir. 2008)).
18 *Id.* (citing *In re Beker Indus. Corp.*, 63 B.R. 474 (Bankr. S.D.N.Y. 1986) (finding "value" is determined under 11 U.S.C. § 506(a) regarding secured interests); *In re Flyboy Aviation Props. LLC*, 501 B.R. 828 (Bankr. N.D. Ga. 2013) (allowing sale because § 506(a)'s value designation was met); *In re Atlanta Retail Inc.*, 456 F.3d 1277 (11th Cir. 2006) (affirming bankruptcy court's rejection of argument that § 363(f)(3) required repayment of face-value of all liens)).
19 *Id.*
20 *Id.* at 5-6.
21 *Id.* at 7.
22 *Id.*
23 *Id.*
24 *Id.* at 8-9.
25 *Id.*
26 *Id.*

Real Estate Tax Liens in Consumer Cases
Hon. Janet S. Baer[1]

- Different systems of tax collections, certificates, liens, and collections
  - New York City
    - Liens sold by city in a "competitive sale" to eligible bidders, or in a "negotiated sale." NYC Admin. Code §§ 11-319; 11-327
    - Purchaser of tax lien then stands in shoes of city. NYC Admin. Code §§ 11-332
    - If lien is not paid within one year of sale, purchaser may foreclose. NYC Admin. Code §§ 11-335
    - Surplus paid into court "for the use of the person or persons entitled thereto." NYC Administrative Code 11-341
    - State statute (which is *not* applicable to counties with a population in excess of 1 million) has special provisions for bankruptcy proceedings.
      - "Notwithstanding any law otherwise precluding the acceptance of partial payments of taxes, a partial payment may be accepted in relation to property which is the subject of a bankruptcy proceeding, provided that the payment is accompanied by satisfactory proof of the bankruptcy proceeding, such as a copy of an order or plan issued thereunder." N.Y. Real Prop. Tax Law § 1140(3)
      - "A tax district shall direct the cancellation of a delinquent tax lien to the extent such lien has been rendered permanently unenforceable as the result of a bankruptcy proceeding." N.Y. Real Prop. Tax Law § 1140(4)
    - Case explaining process: *Delafield 246 Corp. v. City of N.Y.*, 11 A.D.3d 268, 271, 782 N.Y.S.2d 441, 444 (App. Div. 2004); *Brookmar Corp. v. Tax Comm'r of N.Y.*, 2006 NYLJ LEXIS 3603 (Kings Cty. Sup. Ct. 2006)
  - Los Angeles
    - If residential real estate taxes are not paid within five years, the property may be sold by the applicable tax collector. Cal. Rev. & Tax. Code § 3691
    - Tax collector is to then sell property within four years, if practical. Cal. Rev. & Tax. Code § 3692
    - Minimum auction price is sum requisite to redeem taxes, with interests and fees, though tax collector may use a lower minimum price at subsequent sales if a property does not sell the first time. Cal. Rev. & Tax. Code § 3698.5
    - If a lower price is offered, the current owner may *not* purchase for less than the full redemption amount. Cal. Rev. & Tax. Code § 3698.5
    - Surplus paid to former owner if all senior claims and obligations are first satisfied. Cal. Rev. & Tax. Code § 4675
    - Case explaining process: *Cal. Dep't of Toxic Substances Control v. Westside Delivery, LLC*, 888 F.3d 1085, 1092 (9th Cir. 2018)

[1] Thanks to Mac VerStandig and Christianna Cathcart for their tremendous assistance in assembling these materials.

- Chicago
  - "The Illinois Tax Code provides that on January 1 of each year, a lien attaches to all non-exempt real property securing the payment of that year's taxes levied on that property. This lien has priority over all others, even those prior in time. Where property taxes go unpaid, the county may bring an action to foreclose the lien. If a judgment is rendered against such a property, the property owner is then given an opportunity to pay the delinquent taxes and interest up to and including one business day before the sale. If the taxes go unpaid still, then the county collector may proceed with the tax sale." *Gan B, LLC v. Sims*, 575 B.R. 375, 378 (N.D. Ill. 2017) (citing 35 Ill. Comp. Stat. 200/21-75; 35 Ill. Comp. Stat. 200/21-150 through 21-185; 35 Ill. Comp. Stat. 200/21-205)
  - To bid at a tax sale, a prospective purchaser must satisfy various statutory criteria, including the posting of a bond. 35 Ill. Comp. Stat. Ann. 200/21-220
  - "At the public auction, the tax buyers bid on the rate of penalty they will take at redemption. The maximum allowable rate is 18% for each six-month period or fraction thereof." *Phx. Bond & Indem. Co. v. Pappas*, 723 N.E.2d 280, 282 (Ill. App. 3d 2000) (citing 35 ILCS 200/21-215)
  - "The original property owner has between two and three years to redeem the property, depending on whether the property is a residence and whether the tax purchaser extends the statutory period." *Gan B, LLC*, 575 B.R. at 378 (citing 35 Ill. Comp. Stat. 200/21-345, 21-250, 21-385, 21-389).
  - Tax purchaser may then petition for a tax deed in state court, within six months, though deadline is stayed if there is a bankruptcy filing. *Id.*
  - "Before expiration of the redemption period, the tax purchaser holds only an interest in obtaining a tax deed. It is not a future interest in property but a 'non-recourse tax lien' – 'a mere species of personal property [that] does not give its purchaser any equity or title to the property,' only 'those rights which the statutory framework creates.' Issuance of the tax deed and transfer of title to the property does not occur unless and until the property owner fails to redeem the property by the redemption date. Therefore, a certificate of purchase has no effect on the delinquent property owner's legal or equitable title to the property before the redemption date." *Gan B, LLC*, 575 B.R. at 379 (quoting *In re LaMont*, 487 B.R. 488, 404-406, 409 (N.D. Ill. 2012); citing *In re Bates*, 270 B.R. 455, 459 (Bankr. N.D. Ill. 2001); *In re Smith*, 614 F.3d 654, 658-59 (7th Cir. 2010); *Phoenix Bond & Indem. Co. v. Pappas*, 741 N.E.2d 248, 249 (Ill. 2000)).
  - Surplus not feasible under legal structure, since tax purchaser simply petitions court for deed to property—no public auction of property is actually held. *Gan B, LLC*, 575 B.R. at 378
  - However, there does exist an "indemnity fund" that can be used to pay persons equitably entitled to compensation for the loss of their residence: "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." 35 Ill. Comp. Stat. Ann. 200/21-305
        - Cases explaining process: *Phx. Bond & Indem. Co. v. Pappas*, 723 N.E.2d 280, 282 (Ill. App. 3d 2000) *Heritage Standard Bank v. Rosewell (In re Cty. Treasurer)*, 542 N.E.2d 15 (Ill. App. 3d 1989)
    - Houston, Texas
        - Tax liens automatically arise on January 1 each year and requires no further act of perfection. Tex. Tax Code § 32.01
        - Property may be seized for sale if taxes remain unpaid for five years (or shorter if there are health and safety issues). Tex. Tax Code §§ 33.91; 33.911.
        - Seized property then sold at tax sale. Tex. Tax Code § 34.01
        - Property owner then has two years to redeem property by paying (i) amount bid by purchaser; (ii) amount of deed recording fee; (iii) taxes, penalties, interest and costs incurred by purchaser; and (iv) a redemption premium of 25% if within one year and 50% if after one year and before the close of two years. Tex. Tax Code § 34.21
        - Surplus proceeds flow to former owner after retirement of senior claims. Tex. Tax Code § 34.04
        - Case explaining process: *Avelo Mortg., LLC v. Infinity Capital, LLC*, 366 S.W.3d 258, 268 (Tex. App. 2012)
    - Pheonix, Arizona
        - County treasurer sells delinquent tax liens to party who agrees to pay taxes, interest, penalties and charges. Ariz. Rev. Stat. §§ 42-18104; 42-18114
        - Sale of liens occurs every February. Ariz. Rev. Stat. § 42-18112
        - If no one bids on a tax lien, state is purchaser of last resort. Ariz. Rev. Stat. § 42-18113
        - Tax liens may thereafter be redeemed. Ariz. Rev. Stat. § 42-18151
        - If lien is not redeemed, redemption right may be foreclosed. Ariz. Rev. Stat. § 42-18201
        - At time redemption right is foreclosed, property owner "may request the court to determine if the sale of the property to recover excess proceeds is reasonable. The court shall determine that the sale of the property for excess proceeds is reasonable if the sale price of the property is likely to be more than $2,500 above the total of the amounts" due. Ariz. Rev. Stat. § 42-18204
        - Case explaining process: *4qtkidz, LLC v. HNT Holdings, LLC*, 513 P.3d 1106 (Ariz. 2022)
- Fifth Amendment
    - "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

process of law; **nor shall private property be taken for public use, without just compensation**." U. S. Const., Amdt. 5 (emphasis added)

- *Tyler v. Hennepin Cnty.*, 598 U.S. 631 (2023)
  - Factual Background
    - 94-year-old woman leaves condominium and ceases paying taxes
    - $2,300 in taxes accrue, with an additional $13k in interest and penalties
    - Hennepin County obtains judgment against homeowner
    - Homeowner has three years to redeem the property but fails to do so
    - Under Minnesota law, title vests in state at end of three year period
    - At end of three year period, county sells condominium for $40k
    - State law allows county to retain surplus, splitting proceeds with town and school district
  - Procedural Background
    - Homeowner sues county, alleging retention of surplus to constitute a taking in contravention of the Fifth Amendment
    - District Court dismisses for failure to state a claim; Eighth Circuit affirms
  - Holding
    - Property taxes do not constitute a taking, nor do interest and penalties constitute takings
    - Retention of surplus, however, does constitute a taking
    - Constitutional prohibition on excessive takings traces to Magna Carta
    - For at least eight centuries, landowners have been entitled to receive surplus of sale proceeds
    - "The County had the power to sell Tyler's home to recover the unpaid property taxes. But it could not use the toehold of the tax debt to confiscate more property than was due. By doing so, it effected a 'classic taking in which the government directly appropriates private property for its own use.' Tyler has stated a claim under the Takings Clause and is entitled to just compensation." *Tyler*, 598 U.S. at 639 (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U. S. 302, 324 (2002))

4qtkidz, LLC v. HNT Holdings, LLC

Supreme Court of Arizona

July 27, 2022, Filed

No. CV-21-0065-PR

Reporter
253 Ariz. 382 *; 513 P.3d 1106 **; 2022 Ariz. LEXIS 237 ***; 2022 WL 2963184

4QTKIDZ, LLC; BLUE PALO SERVICING COMPANY, LLC; AND DANA H. COOK FAMILY PARTNERSHIP, LTD., Plaintiffs/Appellants, v. HNT HOLDINGS, LLC AND BETH FORD, PIMA COUNTY TREASURER, Defendants/Appellees.

Subsequent History: On remand at, Decision reached on appeal by, Remanded by *4QTKidz, LLC v. HNT Holdings, LLC, 2022 Ariz. App. Unpub. LEXIS 1027 (Ariz. Ct. App., Dec. 8, 2022)*

Prior History: [*1]** Appeal from the Superior Court in Pima County. Nos. C20192106, C20192012 and C20182065. The Honorable Charles V. Harrington, Judge, The Honorable Paul E. Tang, Judge.

Memorandum Decision of the Court of Appeals, Division Two. Nos. 2-CA-CV 2019-0187, 2 CA-CV 2019-0188 and 2 CA-CV 2019-0190 (Consolidated) Filed February 8, 2021.

4QTKIDZ, LLC v. HNT Holdings, LLC, 2021 Ariz. App. Unpub. LEXIS 131, 2021 WL 438848 (Ariz. Ct. App., Feb. 8, 2021)

Disposition: REVERSED AND REMANDED. VACATED.

Core Terms

notice, lienholder, property owner, records, foreclose, county assessor, pre-litigation, mailing address, tax lien, parcels, mail

Case Summary

Overview

HOLDINGS: [1]-Lienholders' efforts to provide notice to the property owner complied with the second method of notice under *Ariz. Rev. Stat. § 42-18202*, even if the lienholders had reason to believe the property owner never received the notice, because they were not required to take any other action to provide notice of their intent to foreclose.

Outcome
Judgment reversed and remanded.

LexisNexis® Headnotes

Real Property Law > Financing > Foreclosures

Real Property Law > ... > Mortgages & Other Security Instruments > Redemptions > Statutory Redemption

Real Property Law > ... > Mortgages & Other Security Instruments > Redemptions > Mortgagor's Right

HN1[] Financing, Foreclosures

Under *Ariz. Rev. Stat. § 42-18202*, lienholders must notify a property owner of their intent to foreclose before bringing an action to foreclose on the property owner's right to redeem the lien.

Governments > Legislation > Interpretation

Real Property Law > Financing > Foreclosures

HN2[] Legislation, Interpretation

Compelled by the statute's text, context, and structure, delivery of a pre-litigation notice to each of the three addresses referred to in *Ariz. Rev. Stat. § 42-18202(A)(1)(a)-(c)* is sufficient, even if the lienholder has reason to believe the property owner never received the notice.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Void Judgments

HN3[] Standards of Review, De Novo Review

The Supreme Court of Arizona reviews issues of law, including statutory interpretation and whether a judgment is void, de novo. When it interprets statutes, the Court strives to effectuate the legislature's intent. Statutory terms must be considered in context. When the plain text of a statute is clear and unambiguous, it controls unless an absurdity or constitutional violation results. A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN4[] Nonmortgage Liens, Tax Liens

When a property owner becomes delinquent on property taxes, the state acquires a lien upon the property which it can then sell to a private party who becomes a lienholder. Ariz. Rev. Stat. §§ 42-1151, -18114. The lienholder may foreclose on the tax lien if certain statutory requirements are met. Ariz. Rev. Stat. §§ 42-18201. One such statutory requirement is pre-litigation notice to the property owner. Ariz. Rev. Stat. § 42-18202. Failure to comply with the pre-litigation notice requirements set forth in § 42-18202(A) renders a subsequent default judgment void.

Governments > Local Governments > Employees & Officials

Real Property Law > Financing > Foreclosures

Real Property Law > Priorities & Recording

HN5[] Local Governments, Employees & Officials

The first method, as expressed in Ariz. Rev. Stat. § 42-18202(A)(1), involves sending the notice to the property owner of record according to the records of the county recorder. The second method, as expressed in subsections (A)(1)(a)-(c), involves sending the notice to the owner according to the records of the county assessor, as well as to two additional addresses. The first method requires more than just mailing the notice to the address found in the county recorder's records, especially if the notice is returned as undeliverable.

Real Property Law > Financing > Foreclosures

Real Property Law > Encumbrances > Liens

HN6[] Financing, Foreclosures

That is, if a lienholder sends notice under the first method, the lienholder should be reasonably certain that the notice will be delivered to the owner. But as noted, compliance with Ariz. Rev. Stat. § 42-18202(A) does not guarantee actual notice. If the lien holder is not confident that the available address for the owner of record is current, the lien holder may prefer to follow the more extensive notice procedure set forth in subparagraphs 42-18202(A)(1)(a)-(c) (the second method) because that method can be reasonably satisfied and objectively proven.

Governments > Legislation > Interpretation

Real Property Law > Financing > Foreclosures

Real Property Law > Encumbrances > Liens

HN7 **Legislation, Interpretation**

Although the word "address" is absent in *Ariz. Rev. Stat. § 42-18202(A)(1)(a)* in the 2015 version of the statute, *(A)(1)(b)* and *(c)* require lienholders to send the notice to the specified addresses only if the addresses differ from the owner's address under *subdivision (A)(1)(a)*. This demonstrates the legislative intent that *(A)(1)(a)* is referring to the address of the property owner according to the records of the county assessor, rather than the property owner. By creating two separate avenues for delivering notice, the legislature intended the second method to require something different from the first. The first method is less likely to result in actual notice to the owner. Consequently, the first method requires additional effort to ensure the owner has a higher likelihood of actually receiving notice.

Real Property Law > Encumbrances > Liens

Tax Law > ... > Real Property Taxes > Assessment & Valuation > Valuation of Real Property

Real Property Law > Priorities & Recording

HN8 **Encumbrances, Liens**

The first method requires a lienholder to send the notice to the property owner of record according to the records of the county recorder, whereas the first step of the second method requires a lienholder to send the notice to the property owner according to the records of the county assessor. *Ariz. Rev. Stat. § 42-18202(A)(1)*, *(A)(1)(a)*.

Administrative Law > Governmental Information > Recordkeeping & Reporting

Real Property Law > Priorities & Recording

HN9 **Governmental Information, Recordkeeping & Reporting**

The recorder's office maintains public records and documents, such as land transactions, but is not responsible for ensuring the records reflect the current owner of a parcel of land.

Governments > Legislation > Interpretation

Tax Law > State & Local Taxes > Administration & Procedure > Assessments

Real Property Law > Financing > Foreclosures

Real Property Law > Encumbrances > Liens

HN10 **Legislation, Interpretation**

The text, context, and structure of this statute indicate that under the second method, nothing more is required of a lienholder than to send the notice, by certified mail, to the addresses on record of (a) the county assessor, (b) the situs address of the property, and (c) the tax bill mailing address of the county treasurer.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

Real Property Law > Financing > Foreclosures

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

HN11 **Procedural Due Process, Scope of Protection**

But pre-litigation notice is merely a preliminary notice to alert tax delinquent landowners of a tax lienholder's intent to foreclose. Even absent *Ariz. Rev. Stat. § 42-18202*'s mandate, lienholders must obtain sufficient service of process under *Rule 4.1* to bring property owners to court. *Ariz. R. Civ. P. 4.1*; That is, *§ 42-18202* adds an additional tier of due process not required. Moreover, when a private party purchases a tax lien, the pre-litigation notice stage of foreclosure does not involve state action. Protections contemplated by the Fourteenth Amendment, and by incorporation of the Fifth Amendment, apply only to state actors, not to private parties.

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Judges: CHIEF JUSTICE BRUTINEL authored the opinion of the Court, in which VICE CHIEF JUSTICE TIMMER and JUSTICES BOLICK, LOPEZ, BEENE, MONTGOMERY and KING joined.

Opinion by: BRUTINEL **[***2]**

Opinion

[*384] [1108]** CHIEF JUSTICE BRUTINEL, opinion of the Court:

HN1[↑] P1 Under A.R.S. § 42-18202, lienholders must notify a property owner of their intent to foreclose before bringing an action to foreclose on the property owner's right to redeem the lien. We must decide whether § 42-18202's pre-litigation-notice requirement is satisfied upon delivery to the type of addresses specified in the statute, or whether a lienholder's due diligence to obtain service of the notice is always required. *HN2*[↑] Compelled by the statute's text, context, and structure, we hold that delivery of a pre-litigation notice to each of the three addresses referred to in subsections (A)(1)(a)-(c) is sufficient, even if the lienholder has reason to believe the property owner never received the notice.

I. BACKGROUND

P2 In 2005, HNT Holdings, LLC ("HNT") purchased three contiguous parcels of real property in Oro Valley. Property tax payments on all three parcels became delinquent. The petitioners, Dana H. Cook Family Partnership, Ltd. ("Cook"), Blue Palo Servicing Company, LLC ("Blue Palo"), and 4QTKIDZ, LLC ("4QTKIDZ") (collectively, "Lienholders") each purchased a tax lien on one of the parcels and later sought to foreclose on the respective properties. Each Lienholder mailed a notice of intent **[***3]** to foreclose to the physical address for its respective parcel as well as to an address on Maverick Road, which was HNT's address according to the records of the county assessor and also the tax bill mailing address according to the records of the county treasurer. All notices were returned as undeliverable. After the statutorily mandated time, the Lienholders filed complaints to foreclose on their tax liens and attempted to serve the complaints on the HNT statutory agent, ultimately serving HNT through the Arizona Corporation Commission when initial attempts at service proved unsuccessful.

P3 Three separate trial court proceedings resulted in default judgments against HNT, which subsequently moved to set the judgments aside. One court consolidated the Cook and Blue Palo matters for purposes of the hearing and granted HNT's motions, finding the judgments "void for lack of service under [Arizona] Rule [of Civil Procedure] 4.1" as well as "exceptional additional circumstances" warranting relief because due diligence could have resulted in actual service upon HNT. Another trial court also granted HNT's motion in the 4QTKIDZ matter, reasoning that Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006), requires additional steps when notice provided is known to be defective. In **[***4]** a consolidated appeal, the court of appeals concluded that both methods of service under the statute require notice sent to the *owner*, not a specific address, so that if a lienholder receives the notice back as undeliverable without any additional effort to locate a current address, notice is not sufficient. 4QTKIDZ, LLC v. HNT Holdings, LLC, Nos. 2 CA-CV 2019-0187, 2 CA-CV 2019-0188, and 2 CA-CV 2019-0190 (Consolidated), 2021 Ariz. App. Unpub. LEXIS 131, 2021 WL 438848, at *3 ¶ 15 (Ariz. App. Feb. 8, 2021) (mem. decision).

P4 We granted review because this case presents a legal issue of statewide importance. We have jurisdiction under article 6, section 5(3) of the Arizona Constitution.

[*385] [1109] II. DISCUSSION**

HN3[] P5 We review issues of law, including statutory interpretation and whether a judgment is void, de novo. State v. Holle, 240 Ariz. 300, 302 ¶ 8, 379 P.3d 197 (2016); BYS Inc. v. Smoudi, 228 Ariz. 573, 578 ¶ 18, 269 P.3d 1197 (App. 2012). When we interpret statutes, we strive "to effectuate the legislature's intent." Welch v. Cochise Cnty. Bd. of Supervisors, 251 Ariz. 519, 523 ¶ 11, 494 P.3d 580 (2021) (quoting Stambaugh v. Killian, 242 Ariz. 508, 509, 398 P.3d 574 ¶ 7 (2017)). "Statutory terms . . . must be considered in context." Est. of Braden ex rel. Gabaldon v. State, 228 Ariz. 323, 325 ¶ 8, 266 P.3d 349 (2011). "'When the plain text of a statute is clear and unambiguous,' it controls unless an absurdity or constitutional violation results." Sell v. Gama, 231 Ariz. 323, 327 ¶ 16, 295 P.3d 421 (2013) (quoting State v. Christian, 205 Ariz. 64, 66 ¶ 6, 66 P.3d 1241 (2003)). "A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous." Nicaise v. Sundaram, 245 Ariz. 566, 568, 432 P.3d 925 ¶ 11 (2019).

A.

HN4[] P6 When a property owner becomes delinquent on property **[***5]** taxes, the state acquires a lien upon the property which it can then sell to a private party who becomes a lienholder. A.R.S. §§ 42-1151, -18114; *see generally* Title 42 Chapter 18 Article 3 (detailing process for sale of tax lien for delinquent taxes). The lienholder may foreclose on the tax lien if certain statutory requirements are met. A.R.S. § 42-18201. One such statutory requirement is pre-litigation notice to the property owner. § 42-18202. Failure to comply with the pre-litigation notice requirements set forth in § 42-18202(A) renders a subsequent default judgment void. *See* Advanced Prop. Tax Liens, Inc. v. Sherman, 227 Ariz. 528, 532, 260 P.3d 1093 ¶ 21 (App. 2011); *see also* § 42-18202(C) ("A court shall not enter any action to foreclose the right to redeem under this article until the purchaser sends the notice required by this section.").

P7 Section 42-18202[1] provides:

> A. At least thirty days before filing an action to foreclose the right to redeem under this article, but not more than one hundred eighty days before such an action is commenced or may be commenced under § 42-18101 the purchaser shall send notice of intent to file the foreclosure action by certified mail to:
> 1. The property owner of record according to the records of the county recorder in the county in which the property is located or to all of the following:

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[1] The legislature has since amended *(A)(1)(a)* as follows: "(a) The property owner, *as determined by section 42-13051, at the property owner's mailing address* according to the records of the county assessor in the county in which the property is located as determined by section 42 13051." *2022 Ariz. Sess. Laws ch. 17, § 1* (2nd Reg. Sess.). Our interpretation of *§ 42-18202* is limited to the 2015 version of the statute. We note, however, that the 2022 amendment appears to codify the interpretation we present in this opinion.

(a) The property owner according to the records of the county assessor in **[***6]** the county in which the property is located as determined by § 42-13051.

(b) The situs address of the property, if shown on the tax roll and if different from the owner's address under subdivision (a) of this paragraph.

(c) The tax bill mailing address according to the records of the county treasurer in the county in which the property is located, if that address is different from the addresses under subdivisions (a) and (b) of this paragraph.

By its terms, § 42-18202 delineates two distinct methods of satisfying the pre-litigation notice requirement. **HN5**[↑] The first method, as expressed in subsection (A)(1), involves sending the notice to the property owner of record according to the records of the county recorder. The second method, as expressed in subsections (A)(1)(a)-(c), involves sending the notice to the owner according to the records of the county assessor, as well as to two additional addresses.

P8 Here, we determine what is required of lienholders in providing valid notice under the second method, (A)(1)(a)-(c). While the **[**1110]** **[*386]** procedure for the first method is not before us, understanding the first method provides a framework for understanding the second.

P9 In Sherman, the court of appeals concluded that the **[***7]** first method "requires more" than just mailing the notice to the address found in the county recorder's records, especially if the notice is returned as undeliverable. 227 Ariz. at 532 ¶ 18. Sherman concluded that such notice must be provided to the property owner and not simply sent to the address of record. Id. at 531-32 ¶¶ 15-16. **HN6**[↑] That is, if a lienholder sends notice under the first method, the lienholder should be reasonably certain that the notice will be delivered to the owner. *See* id. at 532 ¶ 20. But as Sherman noted, "[c]ompliance with § 42-18202(A) does not guarantee actual notice." Id. ¶ 21 n.4. The court further noted that "if the lien holder is not confident that the available address for the owner of record is current, the lien holder may prefer to follow the more extensive notice procedure set forth in subparagraphs 42-18202(A)(1)(a)-(c)" (the second method) because that method can be "reasonably satisfied and objectively proven." Id. ¶¶ 19-20.

P10 This case asks us to decide whether this "more extensive notice procedure," prescribed by the second method, also requires some additional effort to ensure a higher likelihood of the owner receiving notice. We conclude it does not. **HN7**[↑] Although the word "address" is absent in subsection (A)(1)(a) in the 2015 version of the statute relevant here, (A)(1)(b) and (c) require lienholders to send the notice **[***8]** to the specified addresses only if the addresses differ from the owner's *address* under subdivision (A)(1)(a). This demonstrates the legislative intent that (A)(1)(a) is referring to the *address* of "[t]he property owner according to the records of the county assessor," rather than the property *owner*. Therefore, Sherman's due diligence requirement does not apply.

P11 The context and structure of the statute confirm our reading of subsections (A)(1)(a)-(c). By creating two separate avenues for delivering notice, the legislature intended the second method to require something different from the first. The first method, per Sherman, is less likely to result in actual notice to the owner. *See* 227 Ariz. at 532 ¶ 16. Consequently, the first method requires additional effort to ensure the owner has a higher likelihood of actually receiving notice. Id. ¶ 18.

The court of appeals here interpreted one of the three steps of the second method to mean the same thing as the first method, *4QTKIDZ, LLC, 2021 Ariz. App. Unpub. LEXIS 131, 2021 WL 438848, at *3 ¶ 15*, rendering the second method superfluous or requiring an onerous and purposeless service on the two additional addresses in (b) and (c).

P12 Our reading is also supported by the statute's designation of different county agencies under the two approaches, which further suggests that the first method is less likely **[***9]** to result in notice to the owner. The two methods are based on information obtained from different agencies with varying degrees of likelihood of having reliable contact information for property owners. ***HN8***[⬆] The first method requires a lienholder to send the notice to the "property owner of record according to the records of the county recorder," whereas the first step of the second method requires a lienholder to send the notice to the "property owner according to the records of the county assessor."[2] *§ 42-18202(A)(1)*, *(A)(1)(a)*.

HN9[⬆] P13 The recorder's office maintains public records and documents, such as land transactions, but is not responsible for ensuring the records reflect the current owner of a parcel of land. *See What We Do*, Pima Cnty. Recorder's Off., https://www.recorder.pima.gov/WhatWeDo (last visited July 21, 2022). The assessor's office "is responsible for locating, listing, and valuing all of the properties under its jurisdiction that are to be listed on the assessment rolls." *Assessment Process*, Pima Cnty. Assessor, https://www.asr.pima.gov/Assessment (last visited July 21, 2022). Although there is no statutory requirement for an owner to update an address, the Pima County Treasurer's Office instructs **[***10]** taxpayers **[**1111]** **[*387]** to change their mailing address through the Pima County Assessor's Address Change Form because "the Pima County Assessor manages property owner mailing addresses." *FAQs: How Do I Change My Mailing Address?*, Pima Cnty. Treasurer's Off., https://www.to.pima.gov/home/#faq (last visited July 21, 2022). Likewise, it is in the property owner's best interest to keep this information current for purposes of receiving assessment notices pursuant to *A.R.S. § 42-15101*. Thus, the county assessor's records are more likely to list the current address of a property owner than the county recorder's records, which means the first method is less likely to generate the owner's current address. It makes sense that the legislature intended to require some additional effort to obtain service for the method that is less likely to result in actual notice.

HN10[⬆] P14 The text, context, and structure of this statute indicate that under the second method, nothing more is required of a lienholder than to send the notice, by certified mail, to the addresses on record of (a) the county assessor, (b) the situs address of the property, and (c) the tax bill mailing address of the county treasurer.[3] No additional effort to locate **[***11]** the owner's current address is necessary under the second method.[4] Therefore, the Lienholders' pre-litigation notices to HNT were sufficient, and the default judgments are not void on that ground.

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[2] The additional phrase "of record" in *subsection (A)(1)* provides yet another textual clue indicating these provisions should have differing meanings.

[3] Notices must be sent pursuant to (b) and (c) only if the addresses differ from that in (a).

[4] At least one court has relied on the incorrect reasoning of the court of appeals below. *See Advanced Prop. Tax Liens, Inc. v. Othon, 252 Ariz. 206, 215 ¶ 26, 501 P.3d 249 (App. 2021)*. We disavow any cases that misinterpret the statute to mean that

B.

P15 The plain meaning of the statute aside, HNT argues that due process mandates the court of appeals' interpretation of *§ 42-18202*. HNT relies on *Flowers*, which held "that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *547 U.S. at 225*. ***HN11***[↑] But pre-litigation notice is merely a preliminary notice to alert tax delinquent landowners of a tax lienholder's intent to foreclose. Even absent *§ 42-18202*'s mandate, lienholders must obtain sufficient service of process under *Rule 4.1* to bring property owners to court. *Ariz. R. Civ. P. 4.1*; *see* *Roberts v. Robert, 215 Ariz. 176, 180, 158 P.3d 899 ¶¶ 16, 18 (App. 2007)*.[5] That is, *§ 42-18202* adds an additional tier of due process not required by *Flowers*. Moreover, when a private party purchases a tax lien, the pre-litigation notice stage of foreclosure does not involve state action. *See* *State v. Sharp, 193 Ariz. 414, 421 ¶ 19, 973 P.2d 1171 (1999)* ("[P]rotections contemplated by the *Fourteenth Amendment*, and by incorporation of the *Fifth Amendment*, apply only to state actors, not to private parties."). Consequently, *Flowers* is inapplicable **[***12]** here.

III. CONCLUSION

P16 The Lienholders' efforts to provide notice to HNT complied with the second method of notice under *§ 42-18202*. They were not required to take any other action to provide notice of their intent to foreclose. Accordingly, we vacate the court of appeals' decision and remand for that court to determine whether HNT received proper service of process of the foreclosure complaint under *Rule 4.1*.

End of Document

"both notice provisions pinpoint the identity of the property owner, not particular addresses to which notice must be sent." *E.g., id.*

[5] Though HNT challenges the sufficiency of service of process, and at least one of the trial courts set aside the judgment on this ground, this issue is not before this Court.

Avelo Mortg., LLC v. Infinity Capital, LLC

Court of Appeals of Texas, Fourteenth District, Houston

March 13, 2012, Opinion Filed

NO. 14-11-00463-CV

Reporter
366 S.W.3d 258 *; 2012 Tex. App. LEXIS 1965 **; 2012 WL 823197

AVELO MORTGAGE, LLC, Appellant v. INFINITY CAPITAL, LLC, Appellee

Prior History: [1]** On Appeal from the 165th District Court, Harris County, Texas. Trial Court Cause No. 2009-16068A.

Core Terms

tax lien, foreclosure sale, Sworn, recorded, notice, Authorization, foreclosure, Deed, taxes, summary judgment, property owner, See Act, transferred, redemption, undisputed, contract for payment, trial court, mortgage, substantial compliance, validity of the tax, redemption right, ad valorem tax, tax receipts, documents, voidable, argues, void, assessor-collector, foreclosed, provisions

Case Summary

Procedural Posture

Appellant mortgage company challenged a decision of the 165th District Court, Harris County (Texas), which granted summary judgment in favor of appellee limited liability company (LLC) and denied summary judgment to the company in connection with its action to recover property.

Overview

The company foreclosed on its mortgage lien on a condominium and purchased it at its foreclosure sale. Thereafter, an individual also foreclosed on her tax lien on the same condominium and sold the property to the LLC at a foreclosure sale. The company sued to recover the property. The trial court granted the LLC summary judgment and the court affirmed. Both a sworn authorization and a certified statement were recorded where the property was located, and thus the separate recordings of the documents did not invalidate the tax lien transfer. As the company was aware of the foreclosure sale and redemption rights, the notice substantially complied with *Tex. Tax Code Ann. § 32.065* prior to the 2007 amendments. The court held that where, as here, the actions required by former *Tex. Tax Code Ann. §§ 32.06* and *32.065(b)* were performed and the only alleged defects were that the contract did not contain provisions requiring those actions and the agreement was not recorded, those defects might render the foreclosure sale voidable, but did not alone render the sale void. As the company did

not timely exercise its redemption rights, any defect in the contract for tax payments was waived.

Outcome
The court affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Cross Motions

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN1 **Motions for Summary Judgment, Cross Motions**

The appellate court reviews a trial court's summary judgment de novo. When both parties move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review both parties' summary judgment evidence and determine all questions presented. The reviewing court should render the judgment the trial court should have rendered.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN2 **Nonmortgage Liens, Tax Liens**

On January 1 of each year, a tax lien attaches to property to secure the payment of all taxes, penalties, and interest ultimately imposed for the year on the property. *Tex. Tax Code Ann. § 32.01*. A property owner may authorize another person (the transferee) to pay any delinquent taxes imposed by a taxing unit by filing with the collector for the taxing unit a document sworn by the property owner authorizing transfer of the tax lien and describing the property. *Tex. Tax Code Ann. § 32.06(a-1)*. When the transferee pays the delinquent ad valorem taxes and any penalties and interest due, the tax collector issues a receipt and certifies that the taxes have been paid by the transferee and that its tax lien has been transferred to the transferee. *Tex. Tax Code Ann. § 32.06(b)*. The tax collector shall attach to the certified statement the collector's seal of office, and the tax receipt and statement may be combined into one document. *Tex. Tax Code Ann. § 32.06(b)*.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN3[] **Nonmortgage Liens, Tax Liens**

Under the relevant version of *Tex. Tax Code Ann. § 32.06* (prior to the 2007 amendments), two documents were required to be recorded in the county where the property was located in order for the tax lien transfer to be valid: (1) the sworn document authorizing the transfer under *Tex. Tax Code Ann. § 32.06(a-1)*, and *(2)* the tax collector's certified statement of payment and transfer described in *§ 32.06(b)*.

Governments > Legislation > Effect & Operation > Amendments

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN4[] **Effect & Operation, Amendments**

The Legislature amended the tax lien statutes, but the effective date of the amendments was September 1, 2007. 2007 Tex. Gen. Laws 4484-4488. Section 4 of Act of May 25, 2007 states that the amendments to *Tex. Tax Code Ann. §§ 32.06* and *32.065* only apply to tax lien transfers occurring after the effective date of the Act. 2007 Tex. Gen. Laws 4487.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN5[] **Nonmortgage Liens, Tax Liens**

See former *Tex. Tax Code Ann. § 32.06(a-1)*, *(b)*, 2005 Tex. Gen. Laws 3720, amended by 2007 Tex. Gen. Laws 4484-4487.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN6[] **Nonmortgage Liens, Tax Liens**

The tax receipt under *Tex. Tax Code Ann. § 32.06(b)* (prior to the 2007 amendments) is required to be issued only if a transferee authorized under *§ 32.06(a-1)* (prior to the 2007 amendments) pays the delinquency. In the absence of evidence to the contrary, it is presumed that official acts or duties are properly performed and that a public official discharges his duty or performs an act required by law in accordance with the law.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN7 **Nonmortgage Liens, Tax Liens**

Tex. Tax Code Ann. § 32.06(b), as it existed prior to the 2007 amendments, expressly permitted that the sworn document, tax receipt and affidavit attesting to the transfer of the tax lien may be combined into one document. Tex. Tax Code Ann. § 32.06(b), 2005 Tex. Gen. Laws 3721 (amended 2007). The court holds that where the tax collector (1) issued the certified statement that the taxes were paid and the tax lien was transferred, (2) affixed its seal of office to the certified statement, and (3) the certified statement was recorded, it is not required that the tax collector's certification and seal appear on the sworn authorization or that the sworn authorization be notarized.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN8 **Nonmortgage Liens, Tax Liens**

A court concluded that there is no requirement in Tex. Tax Code Ann. § 32.06(b) (prior to the 2007 amendments) that both documents, the sworn authorization and the certified statement, be recorded at the same time, so long as they are both recorded in the proper county records. The court agrees with the court's holding.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN9 **Nonmortgage Liens, Tax Liens**

A version of Tex. Tax Code Ann. § 32.065 required a contract for the payment of taxes entered into between a transferee and a property owner that is secured by a priority lien on the property to provide for a power of sale and foreclosure in the manner specified in Tex. Prop. Code Ann. § 51.002. Tex. Tax Code Ann. § 32.065(b), 2005 Tex. Gen. Laws 3722 (amended 2007). The contract also was required to address six other elements: (1) an event of default; (2) notice of acceleration; (3) recording of the contract; (4) recording of the sworn document and affidavit attesting to the transfer of the tax lien; (5) requiring the transferee to serve foreclosure notices on the property owner at his last known address pursuant to Tex. Prop. Code Ann. § 51.002; and (6) requiring the transferee to serve notices, which contain a specific paragraph worded substantially similar to that in the statute, on the mortgage servicer or any lien-holders. Tex. Tax Code Ann. § 32.065(b)(1)-(6), 2005 Tex. Gen. Laws 3722.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN10 **Nonmortgage Liens, Tax Liens**

Under Tex. Tax Code Ann. § 32.065(b)(3) (prior to the 2007 amendments), an agreement is to contain a provision that it be recorded. This requirement was deleted in the 2007 amendments and a new requirement to record the deed of trust or other instrument securing the contract was added. Under § 32.065(b)(6) (prior to the 2007 amendments), the foreclosure notice was required to contain a 14-point boldfaced or uppercase statement reading substantially as follows: Pursuant to Texas Tax Code Ann. § 32.06, the foreclosure sale referred to in this document is a superior transfer tax lien subject to right of redemption under certain conditions. The foreclosure is scheduled to occur on the (DATE). Tex. Tax Code Ann. § 32.065(b)(6), 2005 Tex. Gen. Laws 3722.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN11 **Nonmortgage Liens, Tax Liens**

The purposes of notice are: (1) to give those parties entitled to notice an opportunity to protect their interests and (2) to prevent surprise. Substantial compliance is adequate for notice provisions other than deadlines. The purpose of the statute here, Tex. Tax Code Ann. § 32.065, was to ensure that all interested parties were aware of the foreclosure sale and aware of their statutory rights and the priority of the tax lien.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN12 **Nonmortgage Liens, Tax Liens**

Although Tex. Tax Code Ann. § 32.065(b) requires that the contract contain certain provisions, the statute does not specifically state that the tax lien transfer or the foreclosure sale will be ineffective should the contract omit a required term. The statute in effect required only that the sworn authorization and the certified statement be filed in order for the transfer of the lien to be effective. Tex. Tax Code Ann. § 32.06(d), 2005 Tex. Gen. Laws 3721 (amended 2007). The court holds that where the actions required by Tex. Tax Code Ann. §§ 32.06 and 32.065(b) (prior to the 2007 amendments) have been performed and the only alleged defects are that the contract between the parties did not contain provisions expressly requiring those actions and the agreement was not recorded, those defects may render the foreclosure sale voidable, but do not, by themselves, render the foreclosure sale void.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN13 **Nonmortgage Liens, Tax Liens**

See 2007 Tex. Gen. Laws 4487.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN14 **Nonmortgage Liens, Tax Liens**

Tex. Tax Code Ann. §§ 32.06 and *32.065* do not define "contract," other than as a contract for the payment of taxes that is secured by a lien on the property. *Tex. Tax Code Ann. § 32.06(c)(2)*, 2005 Tex. Gen. Laws 3721 (amended 2007); *Tex. Tax Code Ann. § 32.065(a)*, *(b)*, 2005 Tex. Gen. Laws 3722.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN15 **Nonmortgage Liens, Tax Liens**

Under former *Tex. Tax Code Ann. § 32.06(c)* and *(i)*, the transferee of a tax lien was allowed to conduct a foreclosure without a court order if notice was served to the property owner and all lien-holders, and either (1) the foreclosure occurred at least one year after the lien was recorded, or (2) the contract between the owner of the property and the transferee provided otherwise. *Tex. Tax Code Ann. § 32.06(c)*, *(i)*, 2005 Tex. Gen. Laws 3721 (amended 2007).

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN16 **Nonmortgage Liens, Tax Liens**

The court agrees with another court and the court again concluded that where there is substantial compliance with *Tex. Tax Code Ann. §§ 32.06* and *32.065* (prior to the 2007 amendments), any defect in the contract regarding those sections renders the foreclosure sale merely voidable, but does not, by itself, render it void.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN17[] **Nonmortgage Liens, Tax Liens**

Tex. Tax Code Ann. § 32.06(k), as it then existed, provided a statutory right of redemption for lien-holders whose interests have been foreclosed by a tax lien. *Tex. Tax Code Ann. § 32.06(k)*, 2005 Tex. Gen. Laws 3722 (amended 2007). A purchaser at a tax sale buys with full knowledge that his title may be defeated by redemption. The redemption provision of *Tex. Tax Code Ann. § 32.06* mitigates the harsh effect of a transferred tax lien foreclosure by allowing the property owner or mortgage servicer of a prior recorded lien a specified period of time to redeem the property from the purchaser after sale upon foreclosure of the transferred tax lien.

Judges: Panel consists of Chief Justice Hedges and Justices Jamison and McCally.

Opinion by: Martha Hill Jamison

Opinion

[*260] Appellant Avelo Mortgage, LLC appeals from a summary judgment granted in favor of appellee Infinity Capital, LLC and the denial of summary judgment in favor of Avelo. The key issues before us are: (1) the validity of the tax lien transfer, and (2) the validity of the tax lien foreclosure sale of property on which Avelo held a preexisting lien. We hold that the tax lien transfer substantially complied with the applicable statutes. We further hold that the tax lien foreclosure sale was voidable by Avelo; however, Avelo allowed the statutory redemption period to expire; therefore, Infinity's title in the property is now absolute. Accordingly, we affirm the judgment of the trial court.

BACKGROUND

On August 21, 2006, Ariel Salene purchased a condominium unit in the Memorial Cove Lofts in Houston, Texas. To finance the purchase, Salene executed two separate mortgages with deeds of trust to MILA, Inc., which later transferred the mortgages to Avelo. Salene failed to pay homeowners' association dues and fees, **[**2]** and on February 6, 2007, the Memorial Lofts Homeowners' Association foreclosed on the condominium and sold the property to itself.[1]

On May 15, 2007, the homeowners' association sold the property to PERC, LLC. As the new owner of the property, PERC became liable for past-due ad valorem taxes on the property in the amount of $8,735.46. In order to pay the taxes, PERC entered into an agreement with Renata Russo whereby Russo agreed to pay the past-due ad valorem taxes in exchange for a tax lien on the property. PERC executed three documents: (1) a "Consent to Transfer of Tax Lien Pursuant to *Texas Property Tax Code Section 32.06* and Contract for Foreclosure of Tax Lien" (the **[*261]** "Sworn Authorization"); (2) an "Agreement for Ad Valorem Tax Transfer" (the "Russo Agreement"); and (3) a Deed of Trust in favor of Russo (the "Russo Deed"). The Sworn Authorization and the Russo Deed were recorded in the Harris County public records on June 28, 2007. The Russo Agreement was not recorded.

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[1] The homeowners' association foreclosure sale is not at issue in this appeal.

On July 6, 2007, Russo paid the past-due ad valorem taxes on the property. The Harris County Tax Assessor-Collector's office issued a "Certification **[**3]** of Payment of Taxes Paid by Another Person and Transfer of Lien under *Section 32.06*" (the "Certified Statement"). The Certified Statement was recorded in the Harris County public records on August 6, 2007.

Avelo moved to foreclose on its mortgage lien and, in the course of preparing for the foreclosure, became aware of the tax lien held by Russo. Avelo, through its counsel, sent a letter to Russo requesting a payoff statement so that Avelo could extinguish the tax lien before its own foreclosure sale. Russo provided the payoff statement; however, Avelo made no further efforts to pay off the tax lien prior to its foreclosure. Avelo subsequently foreclosed on its mortgage lien and purchased the condominium at its own foreclosure sale on November 6, 2007.[2]

PERC failed to make several installment payments and pay the transfer costs associated with the Russo Agreement, and Russo moved to foreclose on her tax lien. On January 15, 2008, Russo—through her substitute trustee—sent notice of the pending foreclosure sale to PERC and Avelo. Russo's trustee also posted notice at the Harris County Family Law Center and filed a copy of the notice **[**4]** with the Harris County Clerk. On February 5, 2008, Russo's trustee sold the property to Infinity at a foreclosure sale. The substitute trustee's deed conveying the property to Infinity was recorded on February 18, 2008.

Avelo filed suit on March 16, 2009, to recover the property. Avelo filed a notice of lis pendens on April 1, 2009. Infinity denied Avelo's claims and asserted counter-claims against Avelo. Infinity filed a motion for partial summary judgment with respect to all claims asserted against Infinity. Avelo filed a cross-motion for partial summary judgment. On April 13, 2010, the trial court granted Infinity's motion and denied Avelo's motion. The trial court then severed all remaining claims between Infinity and Avelo. Avelo timely appealed.

ANALYSIS

On appeal, Avelo challenges (1) the validity of the tax lien transfer between PERC and Russo and (2) the validity of Russo's tax lien foreclosure sale. We address each issue in turn.

I. Standard of Review

HN1[↑] We review a trial court's summary judgment de novo. *Mid-Century Ins. Co. of Tex. v. Ademaj, 243 S.W.3d 618, 621 (Tex. 2007)*; *Seber v. Union Pac. R.R. Co., 350 S.W.3d 640, 645 (Tex. App.—Houston [14th Dist.] 2011, no pet.)*. When both **[**5]** parties move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review both parties' summary judgment evidence and determine all questions presented. *Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 661 (Tex. 2005)*. The reviewing court should render the judgment the trial court should have rendered. *Id.*

[2] The Avelo foreclosure sale is not at issue in this appeal.

II. Validity of Tax Lien Transfer

HN2[] On January 1 of each year, a tax lien attaches to property to secure the **[*262]** payment of all taxes, penalties, and interest ultimately imposed for the year on the property. Tex. Tax Code § 32.01. A property owner may authorize another person (the "transferee") to pay any delinquent taxes imposed by a taxing unit by filing with the collector for the taxing unit a document sworn by the property owner authorizing transfer of the tax lien and describing the property. Tex. Tax Code § 32.06(a-1). When the transferee pays the delinquent ad valorem taxes and any penalties and interest due, the tax collector issues a receipt and certifies that the taxes have been paid by the transferee and that its tax lien has been transferred to the transferee. *Id.* § 32.06(b). The tax collector "shall attach to the certified **[**6]** statement the collector's seal of office," and the "tax receipt and statement may be combined into one document." *Id.*

The tax lien transfer at issue occurred in July 2007 and is governed by the statutes as they existed at that time.[3] HN3[] Under the relevant version of Section 32.06, two documents were required to be recorded in the county where the property was located in order for the tax lien transfer to be valid: (1) the sworn document authorizing the transfer under Section 32.06(a-1) (here, the Sworn Authorization), and (2) the tax collector's certified statement of payment and transfer described in Section 32.06(b) (here, the Certified Statement).

A. Section 32.06(a-1)

Avelo **[**7]** contends that there are several deficiencies with the tax lien transfer to Russo that render it void. First, Avelo argues that the transfer did not comply with Section 32.06(a-1) because there is "no evidence that the sworn document was ever filed 'with the collector for the unit.'" The relevant portions of Section 32.06 in effect at the time of the transfer stated that:

> HN5[] (a-1) A person may authorize another person to pay the delinquent taxes imposed by a taxing unit on the person's real property by filing with the collector for the unit a sworn document . . . .
>
> . . . .
>
> (b) If a transferee authorized to pay a property owner's taxes pursuant to Subsection (a-1) pays the taxes and any penalties and interest imposed, the collector shall issue a tax receipt to that transferee.

Act of May 29, 2005, 79th Leg., R.S., ch. 1126, § 13, sec. 32.06(a-1), (b), 2005 Tex. Gen. Laws 3720, *amended by* Act of May 25, 2007, 80th Leg., R.S., ch. 1329, § 1, 2007 Tex. Gen. Laws 4484-87.

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[3] HN4[] The Legislature amended the tax lien statutes, but the effective date of the amendments was September 1, 2007. *See* Act of May 25, 2007, 80th Leg., R.S., ch. 1329, §§ 1, 4, 5, 2007 Tex. Gen. Laws 4484-88. Section 4 of the Act states that the amendments to Sections 32.06 and 32.065 only apply to tax lien transfers occurring after the effective date of the Act. *Id.* § 4, 2007 Tex. Gen. Laws at 4487; WMC Mortg. Corp. v. Moss, No. 01-10-00948-CV, 2011 Tex. App. LEXIS 3853, 2011 WL 2089777, at *3 n.1 (Tex. App.—Houston [1st Dist.] May 19, 2011, no pet.) (mem. op.).

It is undisputed that Russo paid the ad valorem taxes. It is also undisputed that the tax assessor-collector issued the Certified Statement showing that the taxes were paid and the tax lien was transferred to Russo. Avelo's argument **[**8]** is simply that there is nothing demonstrating that the Sworn Authorization was ever filed with the tax assessor-collector.

HN6[↑] The tax receipt under *Subsection (b)* is required to be issued only if a transferee authorized under *Subsection (a-1)* **[*263]** pays the delinquency. *Id*. In the absence of evidence to the contrary, it is presumed that official acts or duties are properly performed and that a public official discharges his duty or performs an act required by law in accordance with the law. *Caruso v. Lucius, 448 S.W.2d 711, 716 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.)*. Avelo has presented no evidence that the tax assessor-collector acted in any way other than that required by law. Therefore, there is a presumption that Russo was an authorized transferee, as the tax assessor-collector issued a tax receipt to her. *See* Act of May 29, 2005, 79th Leg., R.S., ch. 1126, § 13, *sec. 32.06(b)*, 2005 Tex. Gen. Laws 3720 (amended 2007). We hold that Russo properly complied with *Section 32.06(a-1)*.

B. *Section 32.06(b)*

Next, Avelo argues that the tax lien transfer did not comply with *Section 32.06(b)* because the tax collector combined the tax receipt and certification in one document, did not place its **[**9]** certification on the Sworn Authorization and did not attach its seal of office to the Sworn Authorization or have the document notarized, and the Sworn Authorization and the Certified Statement were not filed of record on the same date. *See id*. § 13, *sec. 32.06(b)*, 2005 Tex. Gen. Laws at 3720-21. The tax collector's Certified Statement—which was recorded—contains the statements regarding payment of taxes and the transfer of the tax lien required by the statutes. *See WMC Mortg. Corp. v. Moss, No. 01-10-00948-CV, 2011 Tex. App. LEXIS 3853, 2011 WL 2089777, at *4 (Tex. App.—Houston [1st Dist.] May 19, 2011, no pet.)* (mem. op.). Moreover, the Certified Statement is marked with the tax collector's seal of office, as required under *Section 32.06(b)*. *See id*. ***HN7***[↑] *Section 32.06(b)*, as it existed prior to the amendments, expressly permitted that "the sworn document, tax receipt and affidavit attesting to the transfer of the tax lien may be combined into one document." *See* Act of May 29, 2005, 79th Leg., R.S., ch. 1126, § 13, *sec. 32.06(b)*, 2005 Tex. Gen. Laws 3721 (amended 2007); *see also id*. We hold that where, as here, the tax collector (1) issued the Certified Statement that the taxes were paid and the tax lien was transferred, **[**10]** (2) affixed its seal of office to the Certified Statement, and (3) the Certified Statement was recorded, it is not required that the tax collector's certification and seal appear on the Sworn Authorization or that the Sworn Authorization be notarized.

Avelo also argues that the tax lien transfer was invalid because the Sworn Authorization and the tax collector's Certified Statement were not recorded contemporaneously. This argument also lacks merit. The court in Moss was faced with an identical argument and ***HN8***[↑] concluded that there is no requirement in *Section 32.06(b)* that both documents be recorded at the same time,

so long as they are both recorded in the proper county records.[4] 2011 Tex. App. LEXIS 3853, 2011 WL 2089777, at *4. We agree with the Moss court's holding. Here, it is undisputed that both the Sworn Authorization and the Certified Statement were recorded in the county where the property is located. Therefore, the separate recordings of the Certified Statement and the Sworn Authorization do not invalidate the tax lien transfer.

C. Section 32.065(b)

Next, Avelo argues that there **[**11]** was a failure to comply with Section 32.065(b). **HN9**[↑] The version of Section 32.065 in effect at **[*264]** the time of the tax lien transfer required a contract for the payment of taxes entered into between a transferee and a property owner that is secured by a priority lien on the property to provide for a power of sale and foreclosure in the manner specified in Section 51.002 of the Property Code. *See* Act of May 29, 2005, 79th Leg., R.S., ch. 1126, § 14, sec. 32.065(b), 2005 Tex. Gen. Laws 3722 (amended 2007). The contract also was required to address six other elements: (1) an event of default; (2) notice of acceleration; (3) recording of the contract (here, the Russo Agreement); (4) recording of the sworn document and affidavit attesting to the transfer of the tax lien (here, the Sworn Authorization and Certified Statement); (5) requiring the transferee to serve foreclosure notices on the property owner at his last known address pursuant to section 51.002 of the Property Code; and (6) requiring the transferee to serve notices, which contain a specific paragraph worded substantially similar to that in the statute, on the mortgage servicer or any lien-holders. *Id.* § 14, sec. 32.065(b)(1)-(6), 2005 **[**12]** Tex. Gen. Laws at 3722.

Avelo argues that the Russo Deed was the alleged "contract for the payment of taxes" and that it did not contain all the required provisions and did not provide for the recording of the contract for the payment of taxes and the Sworn Authorization. *See id.* § 14, sec. 32.065(b)(3)-(b)(4), 2005 Tex. Gen. Laws at 3722. Infinity counters that "reading [together] the [Russo Deed] and all the documents forming the basis of the transfer tax lien" satisfies all of the requirements of Section 32.065(b).

We hold that the Russo Agreement constitutes the agreement for the payment of taxes in this matter. We agree with Avelo that the Russo Agreement, even if read together with the Russo Deed and the Sworn Authorization, did not explicitly comply with the requirements of 32.065(b). **HN10**[↑] Under Section 32.065(b)(3), the Russo Agreement was to contain a provision that it be recorded.[5] Under Section 32.065(b)(6), the foreclosure notice was required to contain a 14-point boldfaced or uppercase statement reading substantially as follows:

> Pursuant to Texas Tax Code section 32.06, the foreclosure sale referred to in this document is a superior transfer tax lien subject to right of redemption **[**13]** under certain conditions. The foreclosure is scheduled to occur on the (DATE)."

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[4] The court in *Moss* also considered the version of Section 32.06 as it existed prior to the 2007 amendments. 2011 Tex. App. LEXIS 3853, 2011 WL 2089777, at *3.

[5] We note that this requirement was deleted in the 2007 amendments and a new requirement to record the deed of trust or other instrument securing the contract was added.

Id. § 14, sec. 32.065(b)(6), 2005 Tex. Gen. Laws at 3722. The notice given by Russo's substitute trustee did not contain this language. Instead, the notice stated that the foreclosure sale was "Pursuant to the authority conferred upon me by that certain [Russo Deed]. . ." and provided that the foreclosure sale would be held on February 5, 2008. The statement was not boldfaced or uppercase. The Russo Deed required the trustee to give notice "as required by the Texas Property Code as then amended" and stated that "this lien shall remain superior . . . ." These statements likewise were not boldfaced or uppercase.

HN11[↑] The purposes of notice are: (1) to give those parties entitled to notice an opportunity to protect their interests and (2) to prevent surprise. Wesco Distribution, Inc. v. Westport Grp., Inc., 150 S.W.3d 553, 559 (Tex. App.—Austin 2004, no pet.). Substantial compliance is adequate for notice provisions other than deadlines. United Fire & Cas. Co. v. Boring & Tunneling Co. of Am., 321 S.W.3d 24, 28 (Tex. **[*265]** App.—Houston [1st Dist.] 2010, pet. denied). **[**14]** Here, correspondence sent by Avelo's attorneys to Russo dated October 8, 2007, demonstrates that Avelo was aware of both the Sworn Authorization, which they refer to as a Transfer Tax Lien, and the Russo Deed. It is undisputed that Avelo received actual notice of the impending foreclosure sale. Moreover, Avelo has not alleged surprise.[6] Because the purpose of the statute here was to ensure that all interested parties were aware of the foreclosure sale and aware of their statutory rights and the priority of the tax lien, and as it is undisputed that Avelo was aware of the foreclosure sale and its redemption rights,[7] we hold that the notice sent by Russo's substitute trustee to Avelo substantially complied with the statute. *See* Redland Ins. Co. v. Sw. Stainless, L.P., 181 S.W.3d 509, 512-13 (Tex. App.—Fort Worth 2005, no pet.) (holding that because surety received actual notice, need of subcontractor to comport with statutory requirement that notice be sent certified mail was negated); Richardson v. Mid-Cities Drywall, Inc., 968 S.W.2d 512, 515 (Tex. App.—Texarkana 1998, no pet.) (upon determining that there was no allegation of a lack of notice created by an omission, and therefore **[**15]** no one had been misled to his prejudice, the court held that the claimant had substantially complied with the statute); Mustang Tractor & Equip. Co. v. Hartford Accident and Indem. Co., 263 S.W.3d 437, 444 (Tex. App.—Austin 2008, pet. denied) (where parties did not dispute that the notices were timely received, lien affidavits that omitted the date and method by which notice was sent to the property owner—which were both required by statute—substantially complied with requirements for a valid lien affidavit, and the omission was merely a technical defect that did not prejudice the property owner).

We further conclude that Avelo's arguments about the lack of contractual provisions dealing with the recording of the contract for the payment of taxes and the Sworn Authorization raise only minor defects not affecting the validity of the transfer. HN12[↑] Although Section 32.065(b)

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[6] The letter from Avelo states, "In the course of our foreclosure, we have identified a Transfer Tax Lien held by you, said lien being recorded . . . . Our client has instructed us to obtain payoff information on your Transfer Tax Lien . . . . If you will please have the payoff statement faxed to my attention . . . we will make arrangements to have your lien satisfied in full." Avelo accordingly had knowledge of the senior priority of the tax lien, was aware of the steps required to extinguish the lien, and therefore there was no surprise.

[7] In another letter from Avelo's attorneys to Russo's **[**16]** substitute trustee dated October 31, 2008, the law firm notes that they represent Avelo, as Avelo was "the owner of [the property] at the time of the foreclosure sale which transferred title to the subject property to [Infinity]." The letter also notes that the firm was "retained to assist [Avelo] in the redemption process for the property [Infinity] purchased from you at the February 5, 2008 foreclosure sale . . . ."

requires that the contract contain certain provisions, the statute does not specifically state that the tax lien transfer or the foreclosure sale will be ineffective should the contract omit a required term. *See* Moss, 2011 Tex. App. LEXIS 3853, 2011 WL 2089777, at *6. As mentioned previously, the statute in effect at the time required only that the Sworn Authorization and the Certified Statement be filed in order for the transfer of the lien to be effective. *See* Act of May 29, 2005, 79th Leg., R.S., ch. 1126, § 13, sec. 32.06(d), **[**17]** 2005 Tex. Gen. Laws 3721 (amended 2007). We hold that where, as here, the actions required by Sections 32.06 and 32.065(b) have been performed and the only alleged defects are that the contract between the parties did not contain provisions expressly requiring those actions and the Russo Agreement **[*266]** was not recorded, those defects may render the foreclosure sale voidable, but do not, by themselves, render the foreclosure sale void. *See id.*

We hold that Russo complied with the requirements of Section 32.06(a-1), that the requirements of Section 32.06(b) were substantially met when Russo recorded both the Sworn Authorization and the Certified Statement, and that any defects in the contract with regard to Section 32.065(b) merely rendered the foreclosure sale voidable. As discussed below, because the statutory redemption period now has passed, the tax lien transfer is no longer voidable and Infinity's title in the property is absolute. Accordingly, we conclude that the tax lien transfer substantially complied with the requirements of Sections 32.06 and 32.065, and therefore the tax lien transfer was effective to transfer the lien to Russo.

III. Validity of Tax Lien Foreclosure Sale

Avelo also **[**18]** challenges the validity of the tax lien foreclosure sale, arguing alternatively that (1) the Russo Deed was void for the reasons argued above, with the result being that the foreclosure sale was void as a matter of law, or (2) the foreclosure sale was not conducted in accordance with the tax lien transfer statutes—specifically, that non-judicial foreclosure was not available because there was no contract that required foreclosure proceedings to comply with Sections 32.06 and 32.065 of the Texas Tax Code. Because we already have determined that the Russo Deed was not void, we only consider the second argument.

The amendments to the tax lien transfer statutes provided that:

> HN13[↑] The change in law made by this Act . . . applies to all foreclosures . . . that occur on or after [September 1, 2007], *other than a foreclosure under a . . . lien that was transferred before* [September 1, 2007] *pursuant to a contract that provided for specific foreclosure procedures under the law in effect at the time the contract was executed*. [Such] a foreclosure . . . is governed by the law in effect at the time the contract was executed, and the former law is continued in effect for that purpose.

Act of May 25, 2007, **[**19]** 80th Leg., R.S., ch. 1329, § 4(b), 2007 Tex. Gen. Laws at 4487 (emphasis added). Here, the foreclosure took place after September 1, 2007, but the tax lien was transferred before September 1, 2007. HN14[↑] Sections 32.06 and 32.065 do not define "contract," other than as a "contract for the payment of taxes" that is "secured by a lien on the property." Act of May 29, 2005, 79th Leg., R.S., ch. 1126, § 13, sec. 32.06(c)(2), 2005 Tex. Gen. Laws 3721 (amended 2007); *id.* § 14, sec. 32.065(a), (b), 2005 Tex. Gen. Laws at 3722. Infinity

argues that the Sworn Authorization and the Russo Deed should be read together to form the contract. We held above, however, that the Russo Agreement constitutes the contract for the payment of taxes in this matter. The Russo Agreement states that it is secured pursuant to Sections 32.06 and 32.065 of the Tax Code[8] and is additionally secured by the Russo Deed. The Russo Deed provides for an event of default, allows acceleration, and provides that notice of the foreclosure sale shall be given "as provided by the Texas Property Code as then amended." We conclude that these documents may be read together. We further conclude that, when read together, the contract "provided **[**20]** for specific foreclosure procedures under the law in **[*267]** effect at the time the contract was executed." *See* Act of May 25, 2007, 80th Leg., R.S., ch. 1329, § 4(b), 2007 Tex. Gen. Laws 4484, 4487. Therefore, the prior law applies.

HN15[↑] Under former Section 32.06, Subsections (c) and (i), the transferee of a tax lien was allowed to conduct a foreclosure without a court order if notice was served to the property owner and all lien-holders, and either (1) the foreclosure occurred at least one year after the lien was recorded, or (2) "the contract between the owner of the property and the transferee provide[d] otherwise." *See* Act of May 29, 2005, 79th Leg., R.S., ch. 1126, § 13, sec. 32.06(c), (i), 2005 Tex. Gen. Laws 3721 (amended 2007); Moss, 2011 Tex. App. LEXIS 3853, 2011 WL 2089777, at *5. Here, it is undisputed that notice was served on PERC and Avelo. The foreclosure occurred less than a year after the lien was recorded—the lien was recorded on August 6, 2007, and the foreclosure sale occurred on February 5, 2008—but the contract between Russo and PERC provided that "[the] [t]ransferor **[**21]** hereby waives the one-year restriction of foreclosure of the tax lien as set forth in section 32.06(i and j) of the Texas Property Tax Code."[9] We hold that Russo was allowed to conduct a foreclosure sale without a court order.

HN16[↑] We agree with the *Moss* court, and we once again conclude that where, as here, there is substantial compliance with Sections 32.06 and 32.065, any defect in the contract regarding those sections renders the foreclosure sale merely voidable, but does not, by itself, render it void. *See* 2011 Tex. App. LEXIS 3853, [WL] at *4-5. Even if the requirements of Section 32.065(b) were not specifically spelled out in one of the recorded documents, it is undisputed that the Sworn Affidavit, Certified Statement, and Russo Deed were in fact recorded, that notice of the foreclosure was given to Avelo, and that Avelo was aware of the tax lien transfer, the foreclosure sale, and the redemption period.

HN17[↑] Subsection 32.06(k), as it then existed, provided a statutory right of redemption for lien-holders **[**22]** whose interests have been foreclosed by a tax lien. *See* Act of May 29, 2005, 79th Leg., R.S., ch. 1126, § 13, sec. 32.06(k), 2005 Tex. Gen. Laws 3722 (amended 2007). A purchaser at a tax sale, such as Infinity, buys with full knowledge that his title may be defeated by redemption. ABN AMRO Mortg. Grp. v. TCB Farm and Ranch Land Invs., 200 S.W.3d 774, 780 (Tex. App.—Fort Worth 2006, no pet.). The redemption provision of Section 32.06 mitigates the harsh effect of a transferred tax lien foreclosure by allowing the property

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[8] The Russo Agreement does not reference Section 32.065 by number; however, it references its caption, "Contract for Foreclos[ure] of Tax Lien."

[9] The Sworn Authorization also provides that, "[t]he right to foreclose the transferred tax lien (s) [sic] shall exist immediately in the Transferee and may be exercised by Transferee at any time there is a default . . . ."

owner or mortgage servicer of a prior recorded lien a specified period of time to redeem the property from the purchaser after sale upon foreclosure of the transferred tax lien. *Id*.

Avelo's interest in the property was not extinguished by the tax lien foreclosure sale; rather, the interest then became subject to the right of redemption. *See* ABN, 200 S.W.3d at 781. Therefore, the foreclosure sale was voidable at Avelo's insistence had it exercised its right of redemption during the statutory redemption period. Here, because it is undisputed that the property involved was not a homestead, the statutory right of redemption was exercisable during a period lasting 180 days **[**23]** from the date on which the purchaser's deed was recorded. *See* Act of May 29, 2005, 79th Leg., R.S., ch. 1126, § 13, sec. 32.06(k), 2005 Tex. Gen. Laws 3722 (amended 2007). As Infinity's deed was **[*268]** recorded on February 18, 2008, Avelo's statutory redemption period expired on approximately August 16, 2008. We hold that Avelo did not timely exercise its rights during the redemption period, and therefore any defect in the contract for the payment of taxes has been waived. Accordingly, Infinity's title in the property is now absolute.

CONCLUSION

We overrule Avelo's first issue. We do not reach Avelo's second issue—that the trial court should have granted its cross-motion for partial summary judgment against Infinity—because we have concluded that the trial court properly granted summary judgment in favor of Infinity. Accordingly, we affirm the judgment of the trial court.

/s/ Martha Hill Jamison

Justice

End of Document

Brookmar Corp. v. Tax Comm'r of N.Y.

Supreme Court of New York, Kings County

September 18, 2006, Published

37131/95, 1994/95

Reporter
2006 NYLJ LEXIS 3603 *

BROOKMAR CORP. v. TAX COMMISSIONER OF THE CITY OF NEW YORK

(KINGS COUNTY SUPREME COURT, NYLJ, Sep. 18, 2006 at Pg. 36, (col. 4))

Core Terms

taxes, tax lien, refund, foreclosure, foreclosure sale, certiorari proceeding, extinguished, bid, auction sale, tax payment, pay tax, overassessment, summary judgment, outstanding tax, assignor, rights, dismiss a petition, foreclosure action, foreclosed, purchaser, liens

Judges: [*1] Justice Pesce

Opinion

KINGS COUNTY SUPREME COURT

Decision of Interest

Purchaser at Foreclosure Sale Purchased Property With Clean Slate; Liable for Current Taxes Only

BROOKMAR CORP. v. TAX COMMISSIONER OF THE CITY OF NEW YORK, 37131/95

Upon the foregoing papers in these tax certiorari proceedings instituted by Brookmar Corp. (Brookmar) and Marina Development Associates (Marina) (who are named as the petitioners herein), respondents the Tax Commissioner of the City of New York and the Commissioner of Finance of the City of New York (respondents) move for summary judgment dismissing the petitions with respect to the premises known as 4302 Westshore Avenue, in Brooklyn, New York (Block 6944, Lot 480).

Brookmar was the owner of real property located at 4302 Westshore Avenue in Brooklyn, and Brookmar, subsequently, conveyed that property to Marina. Beginning in February 1994, no real estate taxes whatsoever were paid on the property. By petitions filed from October 6, 1995 through October 22, 2003, Brookmar and Marina instituted these RPTL article 7 tax certiorari

proceedings to challenge the real property tax assessments on the property for the 1994/95 tax year and each year thereafter.

Since the real property taxes due **[*2]** and accruing from February 1994 and thereafter remained unpaid, these unpaid taxes, pursuant to Administrative Code of the City of New York '11-301, became liens upon the property. On May 21, 1996, the NYCTL 1996-1 Trust (the Trust) purchased the tax liens on the property. The Trust, on February 13, 1998, then commenced a tax lien foreclosure action against Marina. Marina failed to timely appear or answer in the foreclosure action, and a final judgment of foreclosure and sale, dated August 10, 1999, was entered on September 14, 1999. The foreclosure sale of the property was stayed by Marina's filing for bankruptcy relief. Following resolution of Marina's bankruptcy case, the foreclosure auction sale of the property was held on May 22, 2002.

At the May 22, 2002 foreclosure auction, the upset price of the property was $7,448,010. No one bid this sum at the foreclosure sale, and the Trust was, therefore, required to Abid in and become the successful bidder. On August 10, 2004, the Trust entered into an Assignment and Assumption of Bid Agreement with Westshore Development, LLC (Westshore), whereby the Trust and Westshore agreed upon a purchase price for the assignment of the bid to Westshore **[*3]** in the amount of $10,650,000. The closing of the bid assignment and transfer of title to Westshore took place on December 10, 2004. From the time of the May 22, 2002 auction to the closing of the bid assignment, the amount of additional tax liens which had been sold on the property, interest, and other charges had accrued, resulting in the sum of $13,396,839 due and owing on the property. Consequently, at the closing of the bid assignment, the $10,650,000 payment was allocated to pay transfer taxes, HPD charges, the current real estate taxes in the amount of $230,879, and the various Trusts, most recent first, which held subsequent liens on the property. The proceeds of $10,650,000 were insufficient to fully satisfy all of these owed sums, with a shortfall of $1,653,043 remaining on a 1998-1 Trust (sold 7/16/97) and the foreclosed lien of $1,201,601 remaining completely unsatisfied.

By assignment dated April 26, 2006, Brookmar and Marina assigned all of their rights, title, and interest to the claims asserted by them in these tax certiorari proceedings to Westshore, and Westshore authorized Brookmar and Marina to prosecute these proceedings in its name, place, and stead. Brookmar and **[*4]** Marina are presently prosecuting these tax certiorari proceedings on behalf of Westshore. Brookmar and Marina contend, in opposition to respondents' instant motion for summary judgment dismissing the petitions, that they have standing to pursue these proceedings on Westshore's behalf based upon Westshore's status as the present owner of the property and by virtue of their April 26, 2006 assignment to Westshore.

Respondents, in support of their motion for summary judgment dismissing the petitions, contend that no taxes were ever paid on the subject property by Westshore (the current owner of the property) or its assignors, Brookmar and Marina, and that Marina's title was extinguished by the foreclosure sale before it purported to assign its RPTL article 7 rights to Westshore. They argue that as a result, Westshore has no standing to maintain this RPTL article 7 proceeding.

It is well established that all rights, including the right to redeem to satisfy the tax obligation, are terminated at the time of the foreclosure auction sale (see *Nutt v Cuming, 155 NY 309, 313, 49 N.E. 880 [1898]*; *Basile V. Erhal Holding Corp., 148 AD2d 484, 486, 538 N.Y.S.2d 831 [1989]*;

Belsid Holding Corp. v. Dahm, 12 AD2d 499, 500, 207 N.Y.S.2d 91 [1960]). Thus, the ability of the owner of the property to satisfy the tax obligation no longer exists and is extinguished once the property is struck down at the auction (see *GMAC Mortgage Corp. v. Tuck, 299 AD2d 315, 316, 750 N.Y.S.2d 93 [2002]*; Finance **[*5]** Investment Co. [Bermuda] *Ltd. v. Gossweiler, 145 AD2d 463, 463, 535 N.Y.S.2d 632 [1988])*.

Pursuant to the decretal paragraph of the judgment of foreclosure and sale, it was ordered, adjudged and decreed, that each and all of the defendants in this action and all persons claiming under themare hereby forever barred and foreclosed of all rights, claim, lien, title, interest and equity of redemption in thepremises. The foreclosure auction sale of the premises effectuated this language and cut off Marina's title and its right to pay the taxes owed to redeem the property (see *Nutt, 155 NY at 313*; *GMAC Mortgage Corp., 299 AD2d at 316*; *Basile, 148 AD2d at 486*; Finance Investment Co. [Bermuda] *Ltd., 145 AD2d at 463*; *Dulberg v. Ebenhart, 68 AD2d 323, 327, 417 N.Y.S.2d 71 [1979]*; *Belsid Holding Corp., 12 AD2d at 500*; 1 Bergman on New York Mortgage Foreclosure 2.21 [3], 4.07 [Matthew Bender & Co., Inc. rev 2005]). It is undisputed that at the time of the auction sale, neither Brookmar nor Marina had paid the taxes. Consequently, Marina's title and ability to satisfy the outstanding tax obligation no longer existed once the auction sale was held on May 22, 2002.

It is beyond cavil that an assignor could only assign a right that it legally possessed (*Case v. Filmtrucks, 118 AD2d 749, 752, 500 N.Y.S.2d 141 [1986])* and an assignee's rights are no greater than those of the assignor (see Matter of International Ribbon Mills [*Arjan Ribbons], 36 NY2d 121, 126, 325 N.E.2d 137, 365 N.Y.S.2d 808 [1975]*; *TPZ Corp. v. Dabbs, 25 AD3d 787, 789, 808 N.Y.S.2d 746 [2006]*; *Carla Realty Co. v. County of Rockland, 222 AD2d 480, 481, 635 N.Y.S.2d 67 [1995]*; *GMAC Commercial Credit v. J.C. Penny Co., 186 Misc 2d 701, 702, 720 N.Y.S.2d 747 [2001])*. Thus, since no taxes were paid by Brookmar or by Marina, the prior owner, at the time **[*6]** of the auction sale and Marina's title and the ability to pay the taxes were extinguished at that time, Brookmar and Marina possessed nothing left to assign to Westshore. Westshore, as the assignee of Brookmar and Marina, could not, by its subsequent purchase of the property, resurrect that extinguished right of Marina to pay the taxes, as it could not possess any greater right than Marina, its assignor (see *TPZ Corp., 25 AD3d at 789*; *Carla Realty Co., 222 AD2d at 481*).

Brookmar and Marina argue that the tax lien foreclosure could not have extinguished any rights under the tax certiorari proceeding because a tax lien foreclosure action is an in rem action which affects property interests, and the right to a tax refund in the event of an overassessment is a monetary claim, not a claim against the property itself. Brookmar and Marina rely upon the fact that a RPTL article 7 tax certiorari proceeding is the exclusive procedure for review of property assessments (see *Niagara Mohawk Power Corp. v. City School Dist. of City of Troy, 59 NY2d 262, 268, 451 N.E.2d 207, 464 N.Y.S.2d 449 [1983])*. They point out that as result, the challenges to the assessments could not have been litigated in the Trust's foreclosure action. Brookmar and Marina cite the briefs of respondents in other proceedings, contending that respondents have consistently asserted that challenges to real property tax **[*7]** assessments must be made in a RPTL article 7 proceeding. Indeed, Brookmar and Marina reiterate, throughout their opposition papers, that the City has successfully argued, in other proceedings,

that RPTL article 7 is the exclusive procedure by which a party may seek review of an improper assessment.

Such argument, however, is unavailing. Respondents do not dispute this well established legal principle. Rather, respondents contend that once a foreclosure sale has taken place, foreclosing the right of the owner to pay the tax, the owner can no longer pursue a RPTL article 7 proceeding to obtain a refund of a tax which was never paid.

An irrefutable element of entitlement to a refund is an actual payment of money as taxes to the taxing authority. It is only that money or some portion thereof which can be refunded as excess taxes paid pursuant to *RPTL 726 (1) (b)*. If [an] assessment is vacated or reduced after the tax has been paid, [the] refund must be made to the person entitled thereto (*People ex rel. Ambroad Equities v. Miller, 289 NY 339, 342, 45 N.E.2d 902 [1942]*). Where a person has not paid the tax, that person is not entitled to receive a refund.

While a right to a refund may not be dependent on the actual ownership of the property at the time the refund is sought (see *Matter of Mack v. Assessor of Town of Ramapo, 72 AD2d 604, 605, 421 N.Y.S.2d 109 [1979]*), a party must be entitled to receive a refund due **[*8]** to its payment of taxes (see *RPTL 726 [1] [b]*). A claim of overassessment, without having ever paid such alleged overassessment, cannot result in a party's recovery against the taxing authority. Thus, a pending tax certiorari proceeding cannot proceed following a tax foreclosure where, since no taxes were ever paid, no party is entitled to a refund of such taxes.

Here, Westshore's assignors, Brookmar and Marina, never paid any tax to respondents and, thus, had no claim to a refund. Similarly, Westshore paid no taxes, but only paid an amount for an assignment of a bid at a foreclosure sale. Consequently, Westshore cannot seek a refund of a tax which was never paid (see *In re Sixth Ave. Elevated R.R. in City of New York, 55 NYS2d 236, 239-240 [1945]*).

Brookmar and Marina, in opposing respondents' motion, also point to the fact that Justice Marsha L. Steinhardt, in the foreclosure action against Marina, stated in her December 9, 2002 decision and order that [t]he proper method for correcting any errors in assessment is a [RPTL a]rticle 7 proceeding. The recitation of this basic legal principle in that decision and order, however, similarly does not further Brookmar's and Marina's argument. Such dictum was expounded by Justice Steinhardt in the context of denying a motion by Marina to vacate **[*9]** its default and cancel the foreclosure sale. It was set forth to support the court's holding that Marina could not defeat the Trust's right to foreclose by virtue of the alleged overassessment of the property. Thus, this statement did not in any way indicate that Marina could still pursue a refund following the foreclosure sale where it had not paid the taxes prior to such foreclosure sale.

Brookmar and Marina additionally rely upon a private placement memorandum for the Trust, pursuant to which the monies to purchase the tax liens on the property were raised. They argue that this memorandum acknowledges the distinct possibility of a reduction of taxes following a tax lien foreclosure. This argument is unavailing. The memorandum, which was created solely for the benefit of purchasers of bonds, simply sets forth the risk factors involved, in the interests of full disclosure, so that the investment could be evaluated. Specifically, it acknowledges that the tax lien amounts, which are represented in the schedules, may be subject to reduction for a

variety of reasons, including a reduction brought about by a successful RPTL article 7 proceeding. Since this would affect the final sum due either as calculated **[*10]** by the referee or with respect to the upset price at the foreclosure sale, this unremarkable issue is disclosed so that the purchasers cannot later void the transaction based upon a misrepresentation.

Here, the taxes were not reduced as the result of this RPTL article 7 proceeding prior to the payment to these bondholders, who loaned the funds to the Trust to enable them to purchase the tax liens from the City. Thus, this disclosed information, which does not address the issue of the effects of a foreclosure judgment and sale in a case where taxes have not been paid, is irrelevant to this pertinent issue that is raised in the present case.

Brookmar and Marina also argue that *RPTL 706(2)* provides that the petition in a RPTL article 7 proceeding is only required to state that the petitioner is or will be injured by an excessive assessment, and the phrase will be injured implies that a RPTL article 7 proceeding may proceed before the taxes have actually been paid. Such argument is without moment. Even if a RPTL article 7 proceeding may be commenced prior to the payment of taxes, once such right to effectuate payment is forever extinguished by a foreclosure sale, a petitioner can no longer assert a right to a refund of taxes which were never paid.

Brookmar **[*11]** and Marina additionally argue that to grant respondents summary judgment herein would facilitate a windfall to the City by endorsing the overassessment of real property without review. Such argument is rejected. It is well established that one challenging a tax assessment must continue to pay [its] taxes and that the commencement of an assessment review proceeding does not stay the collection of taxes or enforcement procedures instituted by the taxing authority (*W.T. Grant Co. v. Srogi, 52 NY2d 496, 515-516, 420 N.E.2d 953, 438 N.Y.S.2d 761 [1981]*; see also *Matter of County of Fulton v. State of New York, 76 NY2d 675, 678-679, 564 N.E.2d 643, 563 N.Y.S.2d 33 [1990]*; *Dimovich v. Talev, 248 AD2d 951, 952, 670 N.Y.S.2d 290 [1998]*; *Singer v. Department of Finance of City of New York, 191 AD2d 320, 321, 594 N.Y.S.2d 774 [1993]*). This is because [a] government must function and to that end it must have funds and should not be denied or delayed in the enforcement of its right to collect the revenues upon which its very existence and the general welfare depends (*W.T. Grant Co., 52 NY2d at 516*; see also *Matter of County of Fulton, 76 NY2d at 679*; *Singer, 191 AD2d at 321*).

Where the taxpayer elects not to pay the disputed revenue charges while disputing the taxes in a RPTL article 7 proceeding, it runs the risk of the loss of the property through tax foreclosure prior to a determination of its overassessment claim and a possible tax reduction. Such tax foreclosure also cuts off the delinquent taxpayer's ability to pay the taxes and to thereafter seek a refund in such RPTL article 7 proceeding. Thus, there is no inequitable denial of review to the taxpayer since **[*12]** the taxpayer did not pay the tax which was allegedly overassessed, resulting in no fund against which such taxpayer can seek a refund.

Brookmar and Marina further argue that the City has been unjustly enriched because it received compensation for the taxes owed. Such compensation, however, did not derive from a payment by Westshore, but by a sale of the tax liens to the Trust. Brookmar and Marina contend that the sale of the tax liens by the City to the Trust, pursuant to Administrative Code '11-319, constituted a payment of taxes. It has been held, though, that a purchaser of a tax lien does not pay the tax (*Matter of Blatnicky v. Ciancimimo, 1 AD2d 383, 388 [1956]*, affd *2 NY2d 943, 142 N.E.2d 211,*

162 N.Y.S.2d 38 [1957]). Rather, as explained in the affirmation of James McSpiritt, the Deputy Chief of the Municipal Finance Division of the Office of the Corporation Counsel of the City of New York, the City creates a statutory trust, which raises funds to purchase the tax liens by selling bonds to private investors using the liens as collateral. The statutory trust, in turn, compensates the City for the liens, partly in cash, representing the amount borrowed from investors, and the remainder through the ownership by the City of the residual interest in the trust. The payment to the City is **[*13]** simply the consideration for the sale of all right, title, and interest in and to the tax liens and all payments representing collections in respect of the tax liens. Thus, here, the sum paid to the City by the Trust did not constitute payment of the taxes by the Trust, but, instead, was a negotiated contractual sum which did not compensate the City for all outstanding taxes due upon the tax liens sold.

Brookmar and Marina also rely upon *City of Buffalo v. Cargill, Inc. (44 NY2d 7, 13-14, 16, 374 N.E.2d 372, 403 N.Y.S.2d 473 [1978])*. They contend that the Court of Appeals, in Cargill (*44 NY2d at 13-14*), held that when the tax lien is sold, the effect of a purchase is that the taxes are considered paid by operation of law even if they have not actually been paid.

The reliance by Brookmar and Marina upon Cargill (*44 NY2d at 13-14*), however, is misplaced. The Court of Appeals, in Cargill (*44 NY2d at 14*), merely created the legal fiction that taxes are deemed paid upon the sale of a tax lien for the sole purpose of shielding a property owner from personal liability in a lawsuit when the taxing authority had elected to acquire a tax sale certificate and to own the property. It did not rule that there was an actual payment of taxes by the sale of the tax liens, but only that no outstanding tax delinquency could be further pursued. **[*14]** The narrowness of the holding in Cargill (*44 NY2d at 14*) is confirmed by later cases citing it for the holding that the purchase of the tax lien certificate extinguishes a taxpayer's personal liability for the unpaid taxes (*Corvetti v. Fidelity Nat. Title Ins. Co. of N.Y., 258 AD2d 32, 34, 691 N.Y.S.2d 645 [1999]*; see also *Canino v. Engelstein, 43 NY2d 922, 924, 374 N.E.2d 627, 403 N.Y.S.2d 733 [1978])*.

Such legal fiction has no bearing upon this case as Westshore is not being pursued by the City personally for failure to pay taxes. Rather, here, as in Cargill (*44 NY2d at 14*), there is deemed to be no outstanding tax delinquency for which Westshore may be held responsible. Westshore purchased the property anew and derived title free of any claim for prior taxes.

Brookmar and Marina additionally contend that when Westshore paid consideration to obtain the foreclosure bid, that sum was a payment of taxes. Such contention is without merit. The sum paid by Westshore merely constituted its purchase price for the property, which was independent of the tax liabilities of the prior owners and the payment of those taxes. As noted above, the extinguishment of the right to redeem terminated any possibility for a prior owner to pay the taxes. Thus, inasmuch as Marina could no longer pay the taxes on the property following the auction sale, Westshore could not, through means of a legal fiction, **[*15]** acquire a right greater than that of its assignor. Westshore's purchase price for the property, therefore, cannot be deemed to be the payment of the prior owners' outstanding tax obligation.

Moreover, as discussed above, the sum paid by Westshore was insufficient to fully satisfy all of the tax liens upon the property. While Westshore argues that the City's own tax records do not show that any real estate taxes for the years in question are due and owing, such argument is

unavailing. According to the affirmation of Margaret Donadio, the Tax Lien Ombudsmen for the Department of Finance of the City of New York, the account history of the property does not show that due to the sale of tax liens, there was a payment of taxes. Instead, the account history merely reflects that Westshore, as the purchaser at the foreclosure sale, purchased the property with a clean slate free from the prior foreclosed tax lien, and that it was responsible only for the payment of the $230,879 in current taxes paid by it on December 16, 2004 and those taxes accruing thereafter (see *Lee v. Farone, 261 App Div 674, 674, 27 N.Y.S.2d 585 [1941]*, affd *288 NY 517, 41 N.E.2d 927 [1942]*). The fact that there is no outstanding tax delinquency with respect to the property for which further collection remedies **[*16]** may be pursued is not tantamount to a payment of taxes.

In order to have standing to challenge a tax assessment of property in a RPTL article 7 tax certiorari proceeding, the petitioner must be aggrieved by the assessment (*RPTL 704 [1]*). A person is aggrieved within the meaning of *RPTL 704 (1)* when its 'pecuniary interests are or may be adversely affected by an assessment (*Matter of Mack, 72 AD2d at 605*, quoting *People ex. rel Bingham Operating Corp. v. Eyrich, 265 App Div 562, 565, 40 N.Y.S.2d 33 [1943]*; see also 98 NY Jur 2d, Taxation and Assessment '396). Thus, to fall within the definition of an aggrieved party, one must have paid the taxes challenged as excessive (see *Matter of Mack, 72 AD2d at 605*).

As discussed above, Westshore, as the purchaser of the property, did not pay and never assumed responsibility for payment of any real property taxes which are the subject of this RPTL article 7 proceeding. Consequently, Westshore cannot claim status as an aggrieved party for the years in question (see *RPTL 704 [1]*). Westshore, therefore, lacks standing to maintain this RPTL article 7 proceeding, and Brookmar and Marina lack standing to maintain this RPTL article 7 proceeding on Westshore's behalf. Summary judgment dismissing the petitions must, therefore, be granted (see *CPLR 3212 [b]*).

Accordingly, respondents' motion for summary judgment dismissing the petitions with respect to the subject premises is granted.

This constitutes the decision, **[*17]** order, and judgment of the court.

Delafield 246 Corp. v. City of New York

Supreme Court of New York, Appellate Division, First Department

October 12, 2004, Decided ; October 12, 2004, Entered

3911

Reporter
11 A.D.3d 268 *; 782 N.Y.S.2d 441 **; 2004 N.Y. App. Div. LEXIS 11823 ***

In the Matter of Delafield 246 Corp., Respondent, v. City of New York et al., Appellants, et al., Respondent.

Subsequent History: Appeal denied by *Delafield 246 Corp. v City of New York, 4 N.Y.3d 703, 825 N.E.2d 133, 2005 N.Y. LEXIS 81, 792 N.Y.S.2d 1 (N.Y., Jan. 18, 2005)*

Prior History: *Delafield 246 Corp. v City of New York, 2004 N.Y. App. Div. LEXIS 2315 (N.Y. App. Div. 1st Dep't, Feb. 26, 2004)*

Core Terms

installments, tax lien, delinquent taxes, foreclosure, taxes, accrued interest, tax bill, foreclosing, delinquent, quarterly, notice, liens

Case Summary

Procedural Posture
In a proceeding under N.Y. C.P.L.R. art. 78, respondents, a city and its collection agent, appealed from a judgment of the Supreme Court, New York County (New York), that granted an injunction to petitioner property owner permanently enjoining them from selling or foreclosing on tax liens to which the owner's property was subject.

Overview
When the owner bought the property in a foreclosure sale, it bought it subject to large property tax arrearages, and it reached an agreement with the city regarding a payment schedule. When the owner fell behind on its payment schedule, sought to proceed with subdivision of the property, and discovered that the property was subject to tax liens, some of which had already been sold by the city, the owner claimed to have had a different understanding of the payment agreement and sought to enjoin further sales of tax liens and the foreclosure of any of them. The trial court credited the owner's account of its claimed misunderstanding, but the appellate court held that the trial court lacked the power to enjoin the sales and foreclosures just as the city would have lacked the authority to enter such an agreement. New York's Constitution forbade the bestowal of private gifts by government, and what amounted to interest-free financing of delinquent taxes would have amounted to just such a gift. Unless a statutory exemption existed, taxes simply had to be paid.

Outcome
The court reversed the judgment, denied the petition for injunctive relief, and dismissed the proceeding.

LexisNexis® Headnotes

Tax Law > ... > Real Property Taxes > Assessment & Valuation > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN1[] **Real Property Taxes, Assessment & Valuation**

A N.Y. C.P.L.R. art. 78 proceeding may be used to challenge an assessment when a taxing authority has exceeded its power.

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN2[] **State & Local Taxes, Real Property Taxes**

All real property in New York State is taxable unless specifically exempted by statute. *N.Y. Real Prop. Tax Law § 300*.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

Tax Law > ... > Real Property Taxes > Collection of Tax > General Overview

HN3[] **Nonmortgage Liens, Tax Liens**

New York City, New York, and specifically the city's Department of Finance, are charged by statute with the assessment, levying and collection of real property taxes, and are further specifically directed to charge interest on unpaid taxes. New York City, N.Y., *Admin. Code § 11-224*. The interest rate to be charged is established by statute. New York City, N.Y., *Admin. Code §§ 11-332(b)*, § 11-319(b)(6). Further, there can be no reduction of the rate of interest to be charged. New York City, N.Y., *Admin. Code § 11-302*. All real property taxes and assessments and the interest imposed thereon are, by operation of law, liens upon the real estate and shall continue to be, until paid. New York City, N.Y., *Admin. Code § 11-301*; *N.Y. Real Prop. Tax Law § 102(21)*. The sale of tax liens by the city and the right of a purchaser to foreclose those liens has been upheld by the Supreme Court of New York, Appellate Division.

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

Tax Law > ... > Real Property Taxes > Collection of Tax > General Overview

HN4 **Nonmortgage Liens, Tax Liens**

While New York City, N.Y., *Admin. Code § 11-405* authorizes the city's department of finance, at its discretion, to enter into a forbearance agreement with delinquent taxpayers, these agreements do not settle or reduce the tax liability but rather set up a payment plan that postpones foreclosure for so long as the required payments are made.

Governments > Local Governments > Duties & Powers

Real Property Law > ... > Liens > Nonmortgage Liens > Tax Liens

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN5 **Local Governments, Duties & Powers**

A city lacks the authority to forgive or compromise a real property tax debt. *N.Y. Real Prop. Tax Law § 1182*. Any agreement to do so would be invalid and unenforceable since it would effectively grant a property owner an unconstitutional gift. *N.Y. Const. art. III, § 17*; *art. VII, § 8(1)*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Governments > Local Governments > Claims By & Against

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

Tax Law > ... > Real Property Taxes > Collection of Tax > General Overview

HN6 **Defenses, Demurrers & Objections, Affirmative Defenses**

Estoppel is not generally available against a government agency to prevent it from carrying out its statutory duties, especially when the duty involves taxation.

Real Property Law > Deeds > General Overview

Real Property Law > Purchase & Sale > General Overview

HN7[] **Real Property Law, Deeds**

As a matter of well-settled law, a purchaser of real property is chargeable with notice, by implication, of every fact affecting the title, which would be discovered by an examination of the deeds or other muniment of title of his vendor, and of every fact, as to which the purchaser, with reasonable prudence or diligence, ought to become acquainted.

Headnotes/Summary

Headnotes

Taxation--Tax Liens, Tax Sales and Tax Titles.--Petitioner real estate development corporation, which purchased property at mortgage foreclosure sale, was not entitled to have respondent city permanently enjoined from selling or foreclosing on certain tax liens apportioned against petitioner since court did not have authority to invalidate decade-old tax lien, notwithstanding alleged ambiguity of agreement respondent drafted and entered into with prior owner in effort to avoid foreclosure; all real property taxes and assessments and interest imposed thereon were, by operation of law, liens upon real estate and "shall continue to be, until paid" (*Administrative Code § 11-301*)--while *Administrative Code § 11-405* authorized forbearance agreements with delinquent taxpayers, these agreements set up payment plan that postpones foreclosure for so long as required payments are made--estoppel is not generally available against government agency to prevent it from carrying out its statutory duties, especially when duty involves taxation.

Taxation--Tax Liens, Tax Sales and Tax Titles.--Allegedly ambiguous clause of agreement which petitioner allegedly relied upon to its detriment when it purchased property at foreclosure sale should not be construed against city since city was not party to judgment of foreclosure and sale whereby petitioner assumed obligations of agreement, agreement did not purport to be statement of property's tax account at time of purchase of property, petitioner's title company representative was sent tax bill reflecting arrears of principal and accrued interest as of day prior to closing, and all tax bills and delinquency notices sent to petitioner since it purchased property showed exact amount of arrears which differed from any computation that could be made pursuant to petitioner's interpretation of agreement.

Counsel: Michael A. Cardozo, Corporation Counsel, New York (Lonica L. Smith of counsel), for appellants.

Bleakley Platt & Schmidt, LLP, White Plains (Robert D. Meade of counsel), for respondent.

Judges: Concur--Tom, J.P., Saxe, Ellerin, Marlow and Catterson, JJ.

Opinion

[*269] [442]** Judgment, Supreme Court, New York County (Louis B. York, J.), entered April 10, 2003, which granted the petition to permanently enjoin respondent, the City of New York, from selling or foreclosing on certain tax liens apportioned against petitioner, unanimously reversed, on the law, without costs, the petition denied and the proceeding dismissed.

This *CPLR article 78* proceeding, brought pursuant to an order to show cause, involves a 24 lot (of a total of 33) subdivision in a partially developed private residential community in Riverdale, Bronx County. Petitioner-respondent Delafield 246 Corp. (hereinafter Delafield), a real estate development corporation, purchased the property at a mortgage foreclosure sale in August 1991. Prior to the purchase the property had become tax delinquent. In an effort to avert foreclosure, **[***2]** ROC Century Associates (hereinafter ROC), one of the mortgagees, entered into an in rem installment agreement (hereinafter Agreement) with respondent-appellant, **[**443]** New York City, through its Department of Finance, on March 14, 1990. The Agreement covered the tax period from January 1, 1988 through June 30, 1990. The tax arrears of $ 889,933 for that period comprised delinquent taxes and interest accrued as of March 14, 1990, the date of the Agreement.

Under the provisions of the Agreement, ROC, in addition to paying current taxes, agreed to make an initial down payment of $ 133,485, followed by 32 quarterly installments of $ 23,638. The Agreement provided in part: "A portion of each installment payment will be applied to interest, which continues to accrue on any unpaid balance of principal. The balance of principal and accrued interest remaining at the end of the stated number of installments shall be paid in a lump sum, or in additional installments . . . as may be agreed to by the Bureau of City Collections." ROC made the initial down payment followed by six quarterly payments of $ 23,638 before foreclosing its mortgage on the property in 1991. The **[***3]** property's listed assessed value for that tax year indicates a full market value of $ 4.78 million.

Delafield purchased the property at the foreclosure sale in August 1991 for $ 1 million. Delafield did not pay the delinquent taxes at closing but bought the property "subject to all unpaid taxes, assessments and water rates . . . together with such interest or penalties as may have lawfully accrued thereon to the date of payment including, but not limited to, all obligations and payments required to be made with respect to the mortgaged premises, as provided in the In Rem Agreement." Neither the City nor the City Department of Finance was a party to the mortgage foreclosure judgment, nor did either entity expressly **[*270]** agree to Delafield's assumption of the installment agreement. Delafield, however, did receive confirmation from the City's Law Department that so long as Delafield paid the taxes then due for the period from July 1, 1991 through December 31, 1991, the Agreement would remain "in full force and effect."

On the day prior to closing, Delafield's title company representative requested and received from the City the property tax bill which showed that the amount of delinquent **[***4]** taxes and interest outstanding, as of that date, was $ 838,114. This was the amount outstanding after ROC had paid a total $ 275,313 (the initial down payment and six quarterly installments). [1]

Delafield paid 26 quarterly installments over the next seven years, making its final payment in January 1998, even though, according to the City, the delinquent charges had not been paid in full. Indeed, a status report requested by Delafield in mid-1997 established that, at that time, Delafield still owed approximately $ 1,128,000. Nevertheless, Delafield made only three more payments, those being the last three of the specified 26 installments of $ 23,638. Delafield failed to make the "lump sum" payment required by the Agreement to settle the balance of the

[1] Had the agreement contemplated the entire amount of $ 889,933 being paid off by the initial down payment and 32 installments, then the amount of the tax bill, in August 1991, would have shown an outstanding amount of only $ 614,620.

principal **[***5]** as well as the interest which had accrued over the seven-year period during which Delafield was paying the delinquent taxes in quarterly installments. Nor did Delafield make any other arrangement to settle these arrears.

In November 1998, the property was subdivided by Delafield into 24 separate tax lots and the total arrears were apportioned among those 24 new lots. Tax bills and delinquency notices **[**444]** listing the proportionate shares of the arrears were sent to Delafield. Delafield, however, did not make any payments towards the arrears.

The Agreement specifically provided that "failure to pay current or delinquent taxes or other charges as agreed shall result in cancellation of the agreement . . . and the property shall become eligible for foreclosure." Therefore, the City's Department of Finance authorized the sale of four tax liens in June 2001. JER Revenue Services, which services the City's sale of and foreclosure on tax liens, sent Delafield notice that if the tax liens were not paid or settled within one year then the four tax **[*271]** lots would be subject to foreclosure. [2] The City then scheduled the sale of 20 of the Delafield tax liens to a tax lien **[***6]** trust in May 2002 with a notice of the tax lien sale being published in the Daily News in March 2002. Delafield then commenced an article 78 proceeding by order to show cause to enjoin the City from selling or foreclosing on any of the liens. The sale of the 20 liens (as well as any action to sell or foreclose on the other four liens) was stayed by the order to show cause granted by the Supreme Court on May 28, 2002.

The Supreme Court adopted Delafield's interpretation of the agreement wherein Delafield's principal claimed that he understood the Agreement to mean that he would be "fully paid up to the last installment except for any payment which had not been made or was only partially made." The court accepted the claim **[***7]** of Delafield's principal that "had [he] thought that the accrued interest would amount, at this point, to over $ 3 million dollars, he would never have bought the premises." The court concluded that the clause of the Agreement ("balance of principal and accrued interest remaining at the end of the stated number of installments shall be paid in a lump sum") was ambiguous, and therefore had to be construed against the City as drafter of the Agreement. We disagree, and reverse on the grounds that the court below was without authority to invalidate a decade-old tax lien.

HN1[↑] An *article 78* proceeding may be used to challenge an assessment when a taxing authority has exceeded its power (*Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg, 78 N.Y.2d 194, 204-205, 577 N.E.2d 34, 573 N.Y.S.2d 43 [1991]*). It is arguable that this is not such an instance and that the *article 78* proceeding was improperly brought to challenge the plain meaning of the underlying agreement. In any event, even had this proceeding been properly brought as an *article 78* under Delafield's theory, such proceeding would have been time-barred given that, since the purchase of the subject property, Delafield was in regular receipt of tax bills reflecting the exact amounts **[***8]** of the unpaid delinquent taxes and accruing interest. At the heart of the issue is Delafield's claim that the Agreement can only be read to mean that after the 32nd and final installment the delinquent taxes and interest

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[2] Although the City sold the four liens, it subsequently repurchased them as the City did not give adequate notice to Delafield regarding the sale of the liens. After updating its information on all 24 lots, the City's Department of Finance resumed its efforts to collect on the liens.

would be fully paid, and thus nothing more would be owed to the City under the Agreement. However, Delafield's reliance on its interpretation of the Agreement is irrelevant **[*272]** because the court acted outside the scope of its authority in stopping the City's statutory sale of tax liens, absent evidence that the taxes and interest had been paid in full.

[445]** HN2[] All real property in the state is taxable unless specifically exempted by statute (RPTL 300). Further, HN3[] the City, and specifically the City's Department of Finance, are charged by statute with the assessment, levying and collection of real property taxes, and are further specifically directed to charge interest on unpaid taxes (Administrative Code of City of NY § 11-224). The interest rate to be charged is established by statute (*see Administrative Code § 11-332 [b]*; § 11-319 [b] [6]). Further, there can **[***9]** be no reduction of the rate of interest to be charged (*Administrative Code § 11-302*). All real property taxes and assessments and the interest imposed thereon are, by operation of law, liens upon the real estate and "shall continue to be, until paid" (Administrative Code § 11-301; *see also* RPTL 102 [21]). The sale of tax liens by the City and the right of the purchaser to foreclose these liens have been upheld by this Court (NYCTL 1996-1 Trust v Railroad Maintenance Corp., 266 A.D.2d 39, 698 N.Y.S.2d 27 [1999], *lv dismissed 94 N.Y.2d 899, 728 N.E.2d 339, 707 N.Y.S.2d 143 [2000]*).

In the instant case, it is undisputed that the delinquent taxes for the years at issue were lawfully assessed and levied. Consequently, it would be impossible to construe the Agreement as an installment payout plan that effectively would have reduced the tax obligation that arose by operation of law rather than as a forbearance agreement which contemplated a final balloon payment. Indeed, HN4[] while Administrative Code § 11-405 authorizes the City's Department of Finance, at its discretion, to enter into a forbearance **[***10]** agreement with delinquent taxpayers, these agreements do not settle or reduce the tax liability but rather set up a payment plan that postpones foreclosure for so long as the required payments are made. The judgment on appeal effectively excused Delafield not only from paying a portion of the delinquent taxes and interest owing at the time of purchase but also granted Delafield a retroactive 0% interest loan on the outstanding 26 installments assumed by Delafield. This was error since HN5[] respondent-appellant lacked the authority to forgive or compromise a real property tax debt (RPTL 1182). More significantly, any such agreement would be invalid and unenforceable since it would effectively grant Delafield an unconstitutional gift (NY Const, art III, § 17; art VII, § 8 [1]; *see also* 13 Warren's Weed, New York Real Property, Taxes Affecting Real Property § 6.04 [1] [4th ed]).

Finally, HN6[] estoppel is not generally available against a government agency to prevent it from carrying out its statutory duties, **[*273]** especially when the duty involves taxation (Matter of Frye v Commissioner of Fin. of City of N.Y., 62 N.Y.2d 841, 844, 466 N.E.2d 151, 477 N.Y.S.2d 611 [1984] *see also* Matter of Parkview Assoc. v City of New York, 71 N.Y.2d 274, 282, 519 N.E.2d 1372, 525 N.Y.S.2d 176 [1988], **[***11]** *cert denied 488 U.S. 801, 102 L. Ed. 2d 9, 109 S. Ct. 30 [1988]* [government agency cannot be estopped from carrying out statutory duty even where there are harsh results]). In any event, we reject the determination by the court that the allegedly ambiguous clause of the Agreement which Delafield allegedly relied upon to its detriment should be construed against the City. In the first place, the City was not a party to the judgment of foreclosure and sale whereby Delafield assumed the obligations of the Agreement; second, the Agreement did not purport to be a statement of the property's tax

account at the time of Delafield's purchase of the property; third, Delafield's title company representative was sent a tax bill reflecting arrears of principal and accrued interest as of the day prior to closing; and fourth, all tax bills and delinquency notices sent **[**446]** to Delafield since it purchased the property showed the exact amount of arrears which differed from any computation that could be made pursuant to Delafield's interpretation of the Agreement. Indeed, even if Delafield's principal had no knowledge of the amount of the tax arrears outside of the Agreement, he would still **[***12]** be hard-pressed to explain why he ignored the Agreement's incorporation by reference of the provisions of *Title 11, Chapter 4 of the Administrative Code*. These provisions specifically state, inter alia, that such agreements cannot settle or reduce tax liability. Ultimately, ***HN7***[↑] as a matter of well-settled law, Delafield is "chargeable with notice, by implication, of every fact affecting the title, which would be discovered by an examination of the deeds or other muniment of title of his vendor, and of every fact, as to which the purchaser, with reasonable prudence or diligence, ought to become acquainted" (*Cambridge Val. Bank v Delano, 48 N.Y. 326, 336 [1872]*).

Concur--Tom, J.P., Saxe, Ellerin, Marlow and Catterson, JJ.

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Gan B, LLC v. Sims

United States District Court for the Northern District of Illinois, Eastern Division

June 13, 2017, Decided; June 13, 2017, Filed

Case No. 17 C 385

Reporter
575 B.R. 375 *; 2017 U.S. Dist. LEXIS 91266 **

GAN B, LLC, Appellant, v. JEROME SIMS, JR., Debtor-Appellee.

Prior History: *In re Sims, 2017 Bankr. LEXIS 130 (Bankr. N.D. Ill., Jan. 10, 2017)*

Core Terms

automatic stay, purchaser, real estate tax, bankruptcy court, tax deed, tax sale, redemption, lift, bankrupt estate, inheritance, redemption period, post-petition, adequate protection, property taxes, equitable, intestate, mortgagee, probate, secured claim, declaration, arrearages, confirmed, adequately protect, expiration, taxes, certificate of purchase, property owner, legal error, sale-in-error, delinquent

Case Summary

Overview

HOLDINGS: [1]-The bankruptcy court properly denied the creditor's *11 U.S.C.S. § 361* motion for relief from the automatic stay, determining that upon the intestate death of his wife, debtor obtained a vested equitable interest a residential property that was rightly included in the bankrupt estate under *11 U.S.C.S. § 541*, so it was immaterial that debtor lacked full legal title and was not the property's sole owner prior to tolling of a tax sale redemption date, and the tax sale creditor's secured claim was properly capable of being paid over the life of debtor's Chapter 13 plan; [2]-The creditor's risk that the county might acquire a superior tax lien for post-petition taxes was adequately protected under *11 U.S.C.S. § 361* by the Illinois property tax code's sale-in-error provision, *35 ILCS 200/21-310(b)(1)* and (d).

Outcome

Decision was affirmed.

LexisNexis® Headnotes

Tax Law > ... > Real Property Taxes > Collection of Tax > Tax Deeds & Tax Sales

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN1[] **Collection of Tax, Tax Deeds & Tax Sales**

The Illinois Tax Code provides that on January 1 of each year, a lien attaches to all non-exempt real property securing the payment of that year's taxes levied on that property. *35 ILCS 200/21-75*. This lien has priority over all others, even those prior in time. *35 ILCS 200/21-75*. Where property taxes go unpaid, the county may bring an action to foreclose the lien. *35 ILCS 200/21-75* and *35 ILCS 200/21-150 through 21-185*. If a judgment is rendered against such a property, the property owner is then given an opportunity to pay the delinquent taxes and interest up to and including one business day before the sale. *35 ILCS 200/21-165*. If the taxes go unpaid still, then the county collector may proceed with the tax sale. *35 ILCS 200/21-205*.

Tax Law > ... > Real Property Taxes > Collection of Tax > Tax Deeds & Tax Sales

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN2[] **Collection of Tax, Tax Deeds & Tax Sales**

A sale pursuant to *35 ILCS 200/21-205* occurs at an auction in which potential buyers offer to pay the delinquent taxes due on the day of the tax sale, and they do so by bidding on the lowest amount of penalty premium that they will accept to redeem the property within the prescribed redemption period. *35 ILCS 200/21-215 (2009)*. The winning bidder pays to the county the outstanding taxes on the property and receives in return a certificate of purchase. *35 ILCS 200/21-240*, 21-75. When the court confirms the sale, the county's lien is extinguished, and a new lien arises by operation of law in favor of the purchaser. Notwithstanding elimination of the county's lien, the delinquent property owner remains personally liable to the county for taxes. *35 ILCS 200/21-440*.

Bankruptcy Law > ... > Automatic Stay > Scope of Stay > Liens

Tax Law > ... > Real Property Taxes > Collection of Tax > Tax Deeds & Tax Sales

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN3[] **Scope of Stay, Liens**

An original property owner has between two and three years to redeem a foreclosed property, depending on whether the property is a residence and whether the tax purchaser extends the statutory period. *35 ILCS 200/21-345*, *21-250*, 21-385, 21-389. Redemption requires payment of the unpaid taxes plus the penalty percentage, subsequent taxes paid by the tax purchaser plus 12 percent interest per annum, and various costs and fees permitted by statute. *35 ILCS 200/21-355*. (If the tax purchaser pays delinquent taxes subsequent to the sale, then the redemption amount increases accordingly. If the property owner fails to redeem by the redemption date, the tax purchaser has the right to petition for a tax deed in the circuit court of

the county where the certificate was acquired. This petition must be filed within six months of expiration of the redemption period. *35 ILCS 200/21-260(f)*, *21-350*. The tax purchaser has one year from the redemption date to act on its petition by applying for an order on the petition, taking the order to the county clerk to obtain a tax deed, and recording the deed. If there is a court order preventing the tax purchaser from doing so - such as the automatic stay in a bankruptcy proceeding - the one-year period is tolled during the pendency of the order. 35 Ill. Compt. Stat. 200/22-85.

Tax Law > ... > Real Property Taxes > Collection of Tax > Tax Deeds & Tax Sales

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

HN4 **Collection of Tax, Tax Deeds & Tax Sales**

Before expiration of the redemption period in *35 ILCS 200/21-345*, the tax purchaser holds only an interest in obtaining a tax deed. It is not a future interest in property but a non-recourse tax lien - a mere species of personal property that does not give its purchaser any equity or title to the property, only those rights which the statutory framework creates. The lien amounts to a right to payment, or alternatively, a right to an equitable remedy against the debtors' property. Issuance of the tax deed and transfer of title to the property does not occur unless and until the property owner fails to redeem the property by the redemption date. Therefore, a certificate of purchase has no effect on the delinquent property owner's legal or equitable title to the property before the redemption date.

Bankruptcy Law > Claims > Types of Claims > Claim Classification

Bankruptcy Law > Estate Property > Redemption of Property
Business & Corporate Compliance > Bankruptcy > Estate Property > Redemption of Property

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Rights of Secured Creditors

Bankruptcy Law > Individuals With Regular Income > Estate Property

Bankruptcy Law > ... > Governmental Entities > Governmental Claims > Priority of Tax Claims

HN5 **Types of Claims, Claim Classification**

The holder of a certificate of purchase upon a tax lien foreclosure has the right to receive the redemption amount, which gives the tax purchaser a claim in the event that the property owner files for bankruptcy before expiration of the redemption period. When an Illinois property owner who owes delinquent taxes files for bankruptcy prior to the redemption date, his interest in the property (including the right to redemption) passes to the bankruptcy estate, pursuant to *11 U.S.C.S. § 541(a)*, and the tax purchaser holds a lien which qualifies as a secured claim in

bankruptcy. Debtors may use the Chapter 13 device to pay such tax debt over time because they are not exercising their right to redeem but instead are using their Chapter 13 plan to pay a secured claim over time, as they are entitled to do under *11 U.S.C.S. § 1322(b)(2)*. A debtor may satisfy its tax delinquency obligations if its Chapter 13 plan pays the county in full for the back taxes, interest, and penalty, which funds in turn rebound to the tax purchaser.

Bankruptcy Law > Estate Property > Redemption of Property
Business & Corporate Compliance > Bankruptcy > Estate Property > Redemption of Property

Tax Law > ... > Real Property Taxes > Collection of Tax > Tax Deeds & Tax Sales

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Rights of Secured Creditors

HN6[] **Estate Property, Redemption of Property**

A holder of a certificate of purchase upon a tax lien foreclosure facing an onerous confirmed Chapter 13 plan does not lack recourse. If the property owner files for bankruptcy after the tax purchaser obtains the certificate of purchase but before issuance of a tax deed, the tax purchaser may not want to take its chances on receiving the redemption amount or a deed to the property. Instead, the tax purchaser may petition the circuit court to declare the sale a sale in error. Upon such a declaration, the county collector, on demand of the certificate holder, refunds the purchase price and other taxes paid along with certain costs and interest, and cancels the certificate insofar as it relates to the property at issue. *35 ILCS 200/21-310(b)(1)*,(d). The statute does not obligate the tax purchaser to seek a sale-in-error declaration within a certain period of time after learning of the debtor's bankruptcy.

Bankruptcy Law > ... > Automatic Stay > Scope of Stay > Liens

Bankruptcy Law > Estate Property > Redemption of Property
Business & Corporate Compliance > Bankruptcy > Estate Property > Redemption of Property

HN7[] **Scope of Stay, Liens**

Once a debtor files a petition in bankruptcy, an automatic stay takes effect and precludes certain actions against the debtor or property of his estate. *11 U.S.C.S. § 362*. Along with providing the debtor with a breathing spell, the stay prevents creditors from cutting in line to take property that will be treated in the plan. For example, the stay bars a tax purchaser's attempt to enforce its lien by petitioning for an order to issue a tax deed. This is the case because, even after expiration of the redemption period and until the tax deed is issued, the debtor holds title to the property.

Bankruptcy Law > ... > Automatic Stay > Scope of Stay > Liens

Bankruptcy Law > ... > Automatic Stay > Relief From Stay > Relief for Cause

Bankruptcy Law > Estate Property > Redemption of Property
Business & Corporate Compliance > Bankruptcy > Estate Property > Redemption of Property

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Rights of Secured Creditors

HN8[] Scope of Stay, Liens

Generally, the bankruptcy statute requires that a creditor be granted relief from the automatic stay for cause, including the lack of adequate protection of an interest in property. 11 U.S.C.S. § 362(d)(1). However, a tax purchaser may not seek relief for cause based purely on the running of the redemption period, at least where that period did not expire before the bankruptcy filing and the tax purchaser's secured claim is treated in the debtor's Chapter 13 plan. If, however, the debtor fails to comply with the plan treating the tax purchaser's secured claim, then the latter's equitable remedy survives and he may proceed to seek an order to issue a deed once the stay is lifted.

Bankruptcy Law > ... > Automatic Stay > Scope of Stay > Liens

Tax Law > ... > Real Property Taxes > Collection of Tax > Tax Deeds & Tax Sales

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Rights of Secured Creditors

Bankruptcy Law > Estate Property > Redemption of Property
Business & Corporate Compliance > Bankruptcy > Estate Property > Redemption of Property

Bankruptcy Law > Individuals With Regular Income > Plans

HN9[] Scope of Stay, Liens

Where a debtor files for bankruptcy after a tax sale but before the end of the redemption period, subsequent expiration of the redemption period tolls the tax purchaser's time to obtain a tax deed during the pendency of the automatic stay. But it does not affect the validity of the plan treating the purchaser's claim, nor does it necessitate modifying the stay - so long as the debtors remain compliant with the plan.

Bankruptcy Law > ... > Judicial Review > Standards of Review > Abuse of Discretion

Business & Corporate Compliance > ... > Administrative Powers > Automatic Stay > Judicial Review
Bankruptcy Law > ... > Relief From Stay > Procedural Matters > Judicial Review

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

HN10 **Standards of Review, Abuse of Discretion**

The Bankruptcy Code entrusts bankruptcy courts with discretion when granting a creditor relief from the automatic stay. 11 U.S.C.S. § 362(d)(1). The court is required to grant relief only after making a for cause finding. Since the statute commits the decision of whether to lift the stay to the discretion of the bankruptcy judge, his decision may be overturned only upon a showing of abuse of discretion. The standard of review of such a ruling is governed by Fed. R. Bankr. P. 8013, which mandates that the court accept the bankruptcy court's findings of fact unless they are clearly erroneous and apply de novo review to issues of law.

Business & Corporate Compliance > Bankruptcy > Estate Property > Contents of Estate
Bankruptcy Law > Estate Property > Contents of Estate

HN11 **Estate Property, Contents of Estate**

11 U.S.C.S. § 541(a) provides for the creation of an estate upon commencement of a case under 11 U.S.C.S. §§ 301, 302, or 303. 11 U.S.C.S. § 541(a). Under § 541(a), the estate is comprised of property wherever located and by whomever held, provided that it falls within various enumerated categories. 11 U.S.C.S. § 541(a)(1) mandates inclusion in the bankrupt estate of all legal or equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C.S. § 541(a)(1). The reach of this provision is broad, including every conceivable interest of the debtor, future, nonpossessory, speculative, and derivative that the debtor held on the petition date. Even a property interest that the debtor did not have as of the petition date may be included in the bankrupt estate if it falls within the ambit of subsection § 541(a)(5).

Business & Corporate Compliance > Bankruptcy > Estate Property > Contents of Estate
Bankruptcy Law > Estate Property > Contents of Estate

HN12 **Estate Property, Contents of Estate**

The word "inheritance" includes property received from an ancestor under the laws of intestacy. The category of estate property om 11 U.S.C.S. § 541(a)(5) is also known as after-acquired property. While § 541 determines the scope of the estate's property, state law usually determines the nature and extent of a debtor's interests as of the petition date.

Business & Corporate Compliance > Bankruptcy > Estate Property > Contents of Estate
Bankruptcy Law > Estate Property > Contents of Estate

HN13 **Estate Property, Contents of Estate**

Application of the after-acquired property provision in *11 U.S.C.S. § 541(a)(5)* does not depend on the testator's will being admitted to probate before the 180-day period expired. The will's becoming operative, not its admission to probate, activates the statutory provision, and this occurs upon a testator's death.

Estate, Gift & Trust Law > Wills > Bequests & Devises

Estate, Gift & Trust Law > Estate Administration > Intestate Succession

HN14 **Wills, Bequests & Devises**

Illinois law does not distinguish between when interests in devised property vest in devisees and when interests in intestate property vest in heirs: both occur upon the decedent's death.

Business & Corporate Compliance > Bankruptcy > Estate Property > Contents of Estate
Bankruptcy Law > Estate Property > Contents of Estate

Estate, Gift & Trust Law > Estate Administration > Probate > Probate Proceedings

HN15 **Estate Property, Contents of Estate**

Probate proceedings do not create (but only vindicate) legal entitlements, and so their pendency does not affect whether an interest in property otherwise falls within a bankrupt estate. Illinois courts have always recognized the marked distinction between the vesting of an estate and the right to enjoy possession of that estate. The latter is effected by probate proceedings, while the former is not.

Business & Corporate Compliance > Bankruptcy > Estate Property > Contents of Estate
Bankruptcy Law > Estate Property > Contents of Estate

Estate, Gift & Trust Law > Estate Interests > Future Interests

HN16 **Estate Property, Contents of Estate**

All *11 U.S.C.S. § 541* requires is an entitlement. *11 U.S.C.S. § 541(a)(1)* embraces every conceivable interest of the debtor, including future interests.

Bankruptcy Law > Administrative Powers > Adequate Protection

Bankruptcy Law > ... > Automatic Stay > Relief From Stay > Relief for Cause

HN17 **Administrative Powers, Adequate Protection**

The Bankruptcy Code provides for relief from the automatic stay for cause, including the lack of adequate protection of an interest in property. 11 U.S.C.S. § 362(d)(1). Because secured creditors cannot repossess or foreclose on their collateral while the automatic stay is in effect, adequate protection is intended to protect, during the pendency of the bankruptcy case, against loss in value of the secured creditor's interest in property of the estate. 11 U.S.C.S. § 361 describes different forms that adequate protection may take: a cash payment or periodic cash payments or an additional or replacement lien to the extent a stay results in a decrease of the value of a creditor's interest, along with other relief as will result in the realization by the creditor of the indubitable equivalent of its interest. 11 U.S.C.S. § 361.

Bankruptcy Law > Claims > Types of Claims > Secured Claims & Liens

HN18 **Types of Claims, Secured Claims & Liens**

In a bankruptcy context, a tax purchaser's claim is not even properly considered a security interest because it was not created by agreement.

Bankruptcy Law > ... > Plans > Plan Confirmation > Effects of Confirmation

HN19 **Plan Confirmation, Effects of Confirmation**

If a debt owed to a tax lien purchaser is not repaid in full, its lien remains intact throughout the bankruptcy proceeding and may be enforced after the stay is lifted. 11 U.S.C.S. § 1325(a).

Bankruptcy Law > Administrative Powers > Adequate Protection

Bankruptcy Law > ... > Automatic Stay > Relief From Stay > Relief for Cause

Bankruptcy Law > Individuals With Regular Income > Treatment of Postpetition Claims

HN20 **Administrative Powers, Adequate Protection**

The risk of any tax buyer interceding to purchase post-petition real estate tax arrearages is illusory. Tax sales occurring when the automatic stay is in effect are void ab initio. While a court may in some circumstances validate a tax sale by granting retroactive relief from the automatic stay, such relief can only be granted in accordance with equitable principles, as when a creditor did not have actual knowledge of the applicability of the automatic stay and the creditor would be unfairly prejudiced if the debtor could raise the stay as a defense.

Bankruptcy Law > ... > Automatic Stay > Scope of Stay > Claims Against Estate Property

Tax Law > ... > Real Property Taxes > Collection of Tax > Tax Deeds & Tax Sales

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Rights of Secured Creditors

HN21[] Scope of Stay, Claims Against Estate Property

Under the Illinois property tax code's sale-in-error provision, a tax purchaser can petition the circuit court to declare its tax purchase a "sale in error" and demand refund of the amount paid subsequent to the tax sale and prior to the issuance of the tax deed. 35 ILCS 200/21-310(b)(1), (d). The sale-in-error doctrine allows a tax purchaser reimbursement for everything he paid, plus interest. The sale-in-error doctrine indicates that the legislature anticipated adverse treatment of a tax purchaser's interest in bankruptcy that is, treatment as a claim among other claims.

Bankruptcy Law > Administrative Powers > Adequate Protection

Tax Law > ... > Real Property Taxes > Collection of Tax > Tax Deeds & Tax Sales

HN22[] Administrative Powers, Adequate Protection

A tax purchaser is generally adequately protected by the Illinois sale-in-error doctrine. Fundamentally, the interest in underlying property arising from a certificate of purchase is a unique creature, enjoying only the rights granted under the statutory scheme. To the extent the Illinois Appellate Court has recognized any interest in the real property, it has been limited to those rights conferred statutorily by the Illinois property tax code. The statute does not go so far as to require maintenance of insurance in order to forestall any potential loss on the property.

Bankruptcy Law > ... > Automatic Stay > Relief From Stay > Relief for Cause

HN23[] Relief From Stay, Relief for Cause

In deciding whether to grant relief from an automatic stay for cause - and adequate protection is the first example of cause the Bankruptcy Code provides - three factors guide a court's decision. The following inquiries are relevant to granting such relief: whether a) any great prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit, b) the hardship to the non-bankrupt party by maintenance of the stay considerably outweighs the hardship of the debtor, and c) the creditor has a probability of prevailing on the merits.

Counsel: [1]** For Gan B LLC, Appellant: Harold L. Moskowitz, LEAD ATTORNEY, Law Firm of Harold Moskowitz, Chicago, IL.

For Jerome Powell Sims, Appellee: Daniel Robert Kolodziej, LEAD ATTORNEY, Borovsky & Ehrlich, Chicago, IL.

Judges: Harry D. Leinenweber, United States District Judge.

Opinion by: Harry D. Leinenweber

Opinion

[*378] MEMORANDUM OPINION AND ORDER

This case comes before the Court on Appellant Gan B, LLC's appeal from a decision of the Bankruptcy Court denying its Motion to Lift the Automatic Stay. For the reasons stated herein, the judgment of the Bankruptcy Court is affirmed and relief from the stay is denied.

I. BACKGROUND

A. Legal Background

1. The Illinois Tax Sale Process

HN1[] The Illinois Tax Code provides that on January 1 of each year, a lien attaches to all non-exempt real property securing the payment of that year's taxes levied on that property. 35 Ill. Comp. Stat. 200/21-75. This lien has priority over all others, even those prior in time. *Ibid.* Where property taxes go unpaid, the county may bring an action to foreclose the lien and *Ibid.*; 35 Ill. Comp. Stat. 200/21-150 through 21-185. If a judgment is rendered against such a property, the property owner is then given an opportunity to pay the delinquent taxes and interest up to and including one business day before the sale. 35 Ill. Comp. Stat. 200/21-165. If the taxes go **[**2]** unpaid still, then the county collector may proceed with the tax sale. 35 Ill. Comp. Stat. 200/21-205.

HN2[] The sale occurs at an auction in which potential buyers offer to pay the delinquent taxes due on the day of the tax sale, and they do so by bidding on the lowest amount of penalty premium that they will accept to redeem the property within the prescribed redemption period. 35 Ill. Comp. Stat. 200/21-215 (2009). The winning bidder pays to the county the outstanding taxes on the property and receives in return a certificate of purchase. 35 Ill. Comp. Stat. 200/21-240, 21-75; *see also,* Application of Rosewell, 127 Ill. 2d 404, 537 N.E.2d 762, 765, 130 Ill. Dec. 433 (Ill. 1989) ("When the court confirms the sale, the county's lien is extinguished, and a new lien arises by operation of law in favor of the purchaser."). Notwithstanding elimination of the county's lien, the delinquent property owner remains personally liable to the county for taxes. 35 Ill. Comp. Stat. 200/21-440.

HN3[] The original property owner has between two and three years to redeem the property, depending on whether the property is a residence and whether the tax purchaser extends the statutory period. 35 Ill. Comp. Stat. 200/21-345, 21-250, 21-385, 21-389. Redemption requires payment of the unpaid taxes plus the penalty percentage, subsequent taxes paid by the tax purchaser plus 12 percent interest per annum, and various costs and fees permitted by statute. 35 Ill. Comp. Stat. 200/21-355. (If the tax purchaser **[**3]** pays delinquent taxes subsequent to the sale, then the redemption **[*379]** amount increases accordingly. *See, e.g.,* In re LaMont,

740 F.3d 397, 400 n.2 (7th Cir. 2014).) If the property owner fails to redeem by the redemption date, the tax purchaser has the right to petition for a tax deed in the circuit court of the county where the certificate was acquired. This petition must be filed within six months of expiration of the redemption period. 35 Ill. Comp. Stat. 200/21-260(f), 21-350; *see also,* In re LaMont, 487 B.R. 488, 492 (N.D. Ill. 2012) (Leinenweber, J.), *aff'd*, 740 F.3d 397 (7th Cir. 2014). The tax purchaser has one year from the redemption date to act on its petition by applying for an order on the petition, taking the order to the county clerk to obtain a tax deed, and recording the deed. If there is a court order preventing the tax purchaser from doing so - such as the automatic stay in a bankruptcy proceeding - the one-year period is tolled during the pendency of the order. 35 Ill. Compt. Stat. 200/22-85; In re LaMont, 740 F.3d at 401.

HN4[↑] Before expiration of the redemption period, the tax purchaser holds only an interest in obtaining a tax deed. It is not a future interest in property but a "non-recourse tax lien" - "a mere species of personal property [that] does not give its purchaser any equity or title to the property," only "those rights which the statutory framework creates." LaMont, 740 F.3d at 404-06, 409 (citations and internal **[**4]** quotation marks omitted) (noting that the lien amounts to a "right to payment, or alternatively, a right to an equitable remedy against the debtors' property"). Issuance of the tax deed and transfer of title to the property does not occur unless and until the property owner fails to redeem the property by the redemption date. *See, e.g.,* In re Bates, 270 B.R. 455, 459 (Bankr. N.D. Ill. 2001). Therefore, a certificate of purchase has no effect on the delinquent property owner's legal or equitable title to the property before the redemption date. In re Smith, 614 F.3d 654, 658-59 (7th Cir. 2010); *see also,* Phoenix Bond & Indem. Co. v. Pappas, 194 Ill. 2d 99, 741 N.E.2d 248, 249, 251 Ill. Dec. 654 (Ill. 2000) (same).

2. Treatment of Tax Purchasers in Bankruptcy

HN5[↑] The holder of a certificate of purchase has the right to receive the redemption amount, which gives the tax purchaser a "claim" in the event that the property owner files for bankruptcy before expiration of the redemption period. LaMont, 487 B.R. at 493-95; *accord,* In re Romious, 487 B.R. 883, 885-86 (Bankr. N.D. Ill. 2013); In re Malec, 442 B.R. 130, 135 (Bankr. N.D. Ill. 2011); Bates, 270 B.R. at 463-64. When an Illinois property owner who owes delinquent taxes files for bankruptcy prior to the redemption date, "his interest in the property (including the right to redemption) passes to the bankruptcy estate, pursuant to 11 U.S.C. § 541(a), and the tax purchaser holds a lien which qualifies as a secured claim in bankruptcy." LaMont, 487 B.R. at 495 (citing Bates, 270 B.R. at 465 n.5). Debtors may use the Chapter 13 device to pay such tax debt over time because **[**5]** "they are not exercising their right to redeem" but instead "are using their Chapter 13 plan to pay a secured claim over time, as they are entitled to do" under 11 U.S.C. § 1322(b)(2). In re Kasco, 378 B.R. 207, 213 (Bankr. N.D. Ill. 2007). A debtor may satisfy its tax delinquency obligations if its Chapter 13 plan pays the county in full for the back taxes, interest, and penalty, which funds in turn rebound to the tax purchaser. LaMont, 487 B.R. at 497.

HN6[↑] This does not mean that a certificate holder facing an onerous confirmed plan lacks recourse. If the property owner files for bankruptcy after the tax purchaser **[*380]** obtains the certificate of purchase but before issuance of a tax deed, the tax purchaser may not want to take

its chances on receiving the redemption amount or a deed to the property. *See,* Carmona-Huerta v. Zajicek (In re Carmona-Huerta), No. 07 B 73065, 2009 Bankr. LEXIS 5720, 2009 WL 3497125, at *1 (Bankr. N.D. Ill. Oct. 23, 2009). Instead, the tax purchaser may petition the circuit court to declare the sale a "sale in error." Upon such a declaration, the county collector, on demand of the certificate holder, refunds the purchase price and other taxes paid along with certain costs and interest, and cancels the certificate insofar as it relates to the property at issue. 35 Ill. Comp. Stat. 200/21-310(b)(1),(d). The statute does not obligate the tax purchaser to seek a sale-in-error declaration within a certain period **[**6]** of time after learning of the debtor's bankruptcy. *See, e.g.,* LaMont, 740 F.3d at 401.

3. *Tax Purchasers and the Automatic Stay*

HN7[] Once a debtor files a petition in bankruptcy, an automatic stay takes effect and precludes certain actions against the debtor or property of his estate. 11 U.S.C. § 362. Along with providing the debtor with a breathing spell, the stay prevents creditors from cutting in line to take property that will be treated in the plan. For example, the stay bars a tax purchaser's attempt to enforce its lien by petitioning for an order to issue a tax deed. *See, e.g.,* LaMont, 487 B.R. at 497. This is the case because, even after expiration of the redemption period and until the tax deed is issued, the debtor holds title to the property.

HN8[] Generally, the bankruptcy statute requires that a creditor be granted relief from the automatic stay "for cause, including the lack of adequate protection of an interest in property." 11 U.S.C. § 362(d)(1). However, a tax purchaser may not seek relief for cause based purely on the running of the redemption period, at least where that period did not expire before the bankruptcy filing and the tax purchaser's secured claim is treated in the debtor's Chapter 13 plan. *See,* LaMont, 487 B.R. at 497; Bates, 270 B.R. at 468. If, however, the debtor fails to "comply with the **[**7]** plan" treating the tax purchaser's secured claim, then the latter's equitable remedy survives and he may proceed to seek an order to issue a deed once the stay is lifted. LaMont, 740 F.3d at 409-410; *accord,* LaMont, 487 B.R. at 497; Bates, 270 B.R. at 465-66, 468-69; *but see,* In re Aguirre, 565 B.R. 646, 652-54 (N.D. Ill. 2017) (reversing the bankruptcy court's decision to lift the automatic stay after the debtors defaulted on Chapter 11 plan payments; noting that the tax purchaser had extinguished its pre-petition lien in favor of a right to payment under the plan, making the proper remedy a breach of contract action against the debtors) (citing Matter of Penrod, 50 F.3d 459, 463 (7th Cir. 1995)).

In sum, ***HN9***[] where a debtor files for bankruptcy after a tax sale but before the end of the redemption period, subsequent expiration of the redemption period tolls the tax purchaser's time to obtain a tax deed during the pendency of the automatic stay. But it does not affect the validity of the plan treating the purchaser's claim, nor does it necessitate modifying the stay - so long as the debtors remain compliant with the plan.

B. Factual Background

This appeal stems from the Chapter 13 bankruptcy of Jerome Sims, Jr. ("Sims"). Sims and his wife, Tammy, had four children together, and Tammy also brought to the marriage a child from a

prior union. At relevant times before her death **[**8]** on October 27, 2014, Tammy was the sole owner of a parcel of real estate located at 8738 South **[*381]** Bennett Avenue in Chicago, Illinois (the "Property"), which she had inherited from her mother. Because of non-payment of real estate taxes on the Property, Cook County held a tax sale on August 7, 2013; Gan B, LLC ("Gan") was the winning bidder. Gan holds the certificate of purchase and, in addition to paying the delinquent real estate taxes as a condition of the tax sale, continued to pay all real estate taxes owed on the Property through 2015.

After Tammy died intestate, a probate action commenced in June of 2015; Sims was appointed independent administrator. During those proceedings, the Property was appraised at the modest value of $27,000.00. Upon taking possession of the Property and winding down Tammy's affairs, Sims became aware of the real estate tax delinquencies. As a result, on February 11, 2016, Sims filed the underlying petition for Chapter 13 bankruptcy.

On Schedule A/B of his bankruptcy petition, Sims did not claim any ownership interest in real estate. On Schedule D, Sims listed the Cook County Treasurer's Office as a secured creditor for property tax arrearages, which he calculated **[**9]** at $9,080.00. On Schedule J, Sims listed $900.00 in repair and maintenance expenses associated with the Property but did not declare any real estate taxes or property insurance expenses. His original bankruptcy plan mandated that his $358.00 in excess income go to pay creditors for a 60-month period, including the Cook County Treasurer.

On February 23, 2016, Sims filed a motion to extend the automatic stay and attached two documents: an affidavit and an "estimate of redemption" prepared by Cook County. In the affidavit, Sims averred that he, his wife's child, and the couple's four children together were "set to inherit a home," that delinquent real estate taxes were due, and that he was concerned about the prospect of a tax sale if the automatic stay were not extended. The "estimate of redemption," which was prepared before the bankruptcy filing, indicated that Gan had purchased the unpaid real estate taxes. The Bankruptcy Court extended the automatic stay.

On April 29, 2016, Sims filed an amended Schedule D. In the amended schedule, Sims asserted that the previously disclosed $9,080.00 in sold unpaid real estate taxes were in fact owed to the Cook County Clerk and that the Cook County **[**10]** Treasurer was owed $936.00 in unsold back property taxes coming due in the first months of 2016. The amended schedule for the first time listed Gan as a creditor with respect to the sold unpaid real estate taxes due the Cook County Clerk. That same day, Sims also amended his original plan to indicate that the Cook County Clerk would be paid for property taxes due in 2012-2014 and the Cook County Treasurer for the unpaid 2015 property taxes. (As noted above, Gan had in fact paid all those taxes.) The amended plan was confirmed on May 16, 2016. Gan lodged no objection.

In August 2016, Sims filed a motion in probate to extinguish the interests of his and Tammy's minor children in the Property. On August 30, 2016, an agreed probate order transferred 100 percent of the interest in the Property to Sims. A deed reflecting the same was filed with the Cook County Recorder of Deeds on September 8, 2016.

On August 22, 2016, the Bankruptcy Trustee presented a motion to dismiss based on Sims's failure to make plan payments. After multiple continuances of the matter, Sims presented a

motion to defer certain plan arrearages. That motion indicated that payroll deductions did not commence on time and **[**11]** that the plan arrearages, if deferred to the end of the plan, would be paid through payroll deductions. Over **[*382]** Gan's objection, the Bankruptcy Court granted the motion on November 14, 2016.

About four weeks before Sims filed his bankruptcy petition, on January 19, 2016, Gan had filed a tax deed petition in Cook County circuit court. Gan's petition noted that the redemption period for the delinquent real estate taxes would expire on July 11, 2016. That day came and went without any redemption on the part of Sims. In order to proceed with obtaining a tax deed on the Property, Gan filed a motion in the Bankruptcy Court to lift the automatic stay. It argued that its interest in the Property was not adequately protected because, first, Sims had failed to pay post-petition real estate taxes, forcing Gan to pay them to protect its interest, and second, Sims was refusing to obtain and fund hazard insurance on the Property. Gan also contended that the Property was not subject to a claim in bankruptcy - and thus not affected by the automatic stay - because Sims did not have title to the Property, only an uncertain and unvested right to inherit it, when he filed his bankruptcy petition. Sims, on **[**12]** the other hand, opposed lifting the stay on the basis that his failure to pay post-petition real estate taxes and maintain property insurance did not amount to inadequate protection of Gan's interest. He further claimed that his interest in the Property vested immediately upon Tammy's death - that is, before he filed for bankruptcy - such that the Property was properly included in the Chapter 13 estate.

The Bankruptcy Court declined to lift the automatic stay, holding that Gan's interest was adequately protected and that, pursuant to the Illinois Surviving Spouse Statute, Sims had an (equitable) inheritance interest in one-half of the Property at the time he filed the petition. Thus, the Property was rightly included in Sims's bankrupt estate such that Gan's secured tax claim was amenable to treatment in the confirmed bankruptcy plan. The court also noted that, to the extent Gan felt aggrieved, it could petition the circuit court to declare the tax sale a "sale in error," entitling Gan to reimbursement of funds paid plus interest. Gan then filed this appeal.

III. ANALYSIS

A. Legal Standard

HN10[↑] The Bankruptcy Code ("the Code") entrusts bankruptcy courts with discretion when granting a creditor **[**13]** relief from the automatic stay. *See*, *11 U.S.C. § 362(d)(1)* (requiring the court to grant relief only after making a "for cause" finding); *Matter of Holtkamp, 669 F.2d 505, 507 (7th Cir. 1982)* ("Since the statute commits the decision of whether to lift the stay to the discretion of the bankruptcy judge, his decision may be overturned only upon a showing of abuse of discretion.") (citation omitted). The standard of review of such a ruling is governed by *Bankruptcy Court Rule 8013*, which mandates that this Court accept the bankruptcy court's findings of fact unless they are clearly erroneous and apply *de novo* review to issues of law. *See, e.g., Colon v. Option One Mortg. Corp., 319 F.3d 912, 916 (7th Cir. 2003)*.

B. Sims's Interest in the Property

Gan argues that the Bankruptcy Court's refusal to lift the automatic stay was predicated on the erroneous legal conclusion that Sims owned an interest in the Property sufficient for its inclusion in the bankrupt estate at the time of filing of his petition. Gan posits instead that Sims did not have a concrete ownership interest in the Property until after the redemption date. Invoking undisputed facts - such as Tammy's death without a will, the Property's envelopment in probate proceedings, and Sims's acquisition of a deed to the **[*383]** Property only after the redemption period had run - Gan maintains **[**14]** that the Property was not part of Sims's bankrupt estate when he filed the petition such that the confirmed bankruptcy plan does not treat Gan's secured claim. Sims replies that the Bankruptcy Court rightly rejected this argument, as his equitable interest in inheriting the Property was included within the bankrupt estate at the time he filed his Chapter 13 petition.

HN11[↑] *Section 541(a)* of the Code provides for the creation of an estate upon commencement of a case under *Section 301*, *302*, or *303*. *11 U.S.C. § 541(a)*. Under the statute, the estate is comprised of property "wherever located and by whomever held," provided that it falls within various enumerated categories. Two of these categories are relevant here. First, *subsection (a)(1)* mandates inclusion in the bankrupt estate of "all legal or equitable interests of the debtor in property as of the commencement of the case." *11 U.S.C. § 541(a)(1)*. The reach of this provision is broad, including "every conceivable interest of the debtor, future, nonpossessory, speculative, and derivative" that the debtor held on the petition date. *In re Yonikus, 996 F.2d 866, 869 (7th Cir. 1993)*, *abrogated on other grounds, Law v. Siegel, 134 S.Ct. 1188, 188 L. Ed. 2d 146 (2014)*. Second, even a property interest that the debtor did not have as of the petition date may be included in the bankrupt estate if it falls within the ambit of *subsection (a)(5)*:

> (5) Any **[**15]** interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date - (A) by bequest, devise, or inheritance . . . .

11 U.S.C. § 541(a)(5). (***HN12***[↑] According to Black's Law Dictionary, "inheritance" includes "[p]roperty received from an ancestor under the laws of intestacy." BLACK'S LAW DICTIONARY 903 (10th ed. 2014).) This second category of estate property is also known as "after-acquired property." While *Section 541* determines the scope of the estate's property, state law usually determines the nature and extent of a debtor's interests as of the petition date. *Butner v. United States, 440 U.S. 48, 54, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979)*; *Peterson v. McGladrey & Pullen, LLP, 676 F.3d 594, 598 (7th Cir. 2012)*.

The parties do not disagree on the relevant facts, and Gan concedes that, had Tammy devised the Property to Sims, it would have been rightly included within the bankrupt estate at the time of the petition's filing. *Matter of Chenoweth, 3 F.3d 1111 (7th Cir. 1993)*, establishes as much. There, the Seventh Circuit held that ***HN13***[↑] application of the after-acquired property provision in *Section 541* did not depend on the testator's will being admitted to probate before the 180-day period expired. The will's becoming *operative*, not its admission to probate, activated **[**16]** the statutory provision, and this occurred upon the testator's death. "[A]ll the after-acquired statute requires is an entitlement," which is "created by the will, and confirmed by the probate proceeding." *Id. at 1112-13*. Various cases in the bankruptcy courts are in accord. *See, e.g., In*

re Johnsson, 551 B.R. 384, 405 (Bankr. N.D. Ill. 2016); *In re Elliott, 81 B.R. 460, 462 (Bankr. N.D. Ill. 1987)*.

Gan seeks to distinguish *Chenoweth* and related bankruptcy cases purely on the grounds that they all involved property devised by will, not inherited through intestacy. Citing no legal authority, Gan contends that the Bankruptcy Court committed legal error in finding "no reason to **[*384]** distinguish between testator/testatrix who leaves a will and an intestate whose property passes according to the law of intestacy." (ECF No. 8 ("Appellant's Br.") at 21-22.) Gan points out that five other parties - Tammy's children - had interests in the Property that were only fully extinguished upon probate determinations subsequent to the redemption date. Thus, Gan's bone of contention is that it was legal error for the Bankruptcy Court to treat inheritance by intestacy the same as inheritance by devise for *Section 541* purposes.

Gan's argument rests on unsound bedrock. ***HN14***[↑] Illinois law does not distinguish between when interests in devised property vest **[**17]** in devisees and when interests in intestate property vest in heirs: both occur upon the decedent's death. *See, e.g.,* *Hagney v. Lopeman, 147 Ill. 2d 458, 590 N.E.2d 466, 467, 168 Ill. Dec. 829 (Ill. 1992)* ("Catherine Stevens died intestate on October 15, 1981. *Upon her death*, the defendant took title to 230 acres of farmland.") (emphasis added); *Glaser v. Chicago Title & Trust Co., 393 Ill. 447, 66 N.E.2d 410, 414 (Ill. 1946)* (holding that property of a testator not devised by will passed to his heirs via intestacy "and was so held by them at the time of [his] death"); *Preston v. Casner, 104 Ill. 262, 267 (1882)* ("The title to the lands remained in the intestate, and of course *at his death* descended to his heirs at law.") (emphasis added); *Sturgis v. Ewing, 18 Ill. 176, 185 (1856)* ("The moment the testator or intestate dies, then *the rights of the devisees or heirs attach at once*, for the title is then already vested. . . .") (emphasis added); *In re Estate of Monroe, 105 Ill. App. 3d 1114, 435 N.E.2d 709, 711, 61 Ill. Dec. 868 (Ill. App. 1982)* ("[P]roperty vests, either by terms of a will or *by statutory intestate succession, on the death of the decedent*.") (emphasis added); *Steiner v. Lawson, 71 Ill. App. 2d 392, 219 N.E.2d 121, 127 (Ill. App. 1966)* ("[T]he equitable titles and beneficial interests in the three parcels remained in Weil *until his intestate death, when the beneficial interests descended in equal shares to his three heirs at law*. . . .") (emphasis added).

Relatedly, ***HN15***[↑] probate proceedings do not create (but only vindicate) legal entitlements, and so their pendency does not affect whether an interest in property **[**18]** otherwise falls within a bankrupt estate. Illinois "courts have always recognized the marked distinction between the vesting of an estate and the right to enjoy possession of that estate. The latter is effected by probate proceedings, while the former is not." *In re Estate of Knight, 178 Ill. App. 3d 777, 533 N.E.2d 949, 951, 127 Ill. Dec. 867 (Ill. App. 1989)*; *see, Chenoweth, 3 F.3d at 1113*.

Nor is it damning, as Gan suggests, that Sims did not list on Schedule A/B of his petition any interest in real estate. In moving to extend the automatic stay shortly after filing the petition, Sims disclosed via affidavit his own inheritance interest and that of Tammy's children in the Property. He later filed amendments listing Gan as an interested party and the municipal real estate tax collectors as creditors. While the Bankruptcy Court noted that confirmation of the plan was inadvisably hasty, Gan had 14 days' notice yet did not object to the plan, did not subsequently ask the Bankruptcy Court to revoke it pursuant to *11 U.S.C. § 1330*, and did not seek leave to file a proof of claim. Gan's appeal cannot rest on such procedural *faits accomplis*,

which go to the plan's validity and not the Bankruptcy Court's refusal to lift the stay for Gan to pursue a tax deed.

Ergo, the Bankruptcy Court did not commit legal error in applying the ***[**19]*** *Chenoweth* rationale to the case at bar. Upon Tammy's intestate death on October 27, 2014, Sims obtained via the Illinois **[*385]** Surviving Spouse Statute a vested equitable interest in 1/2 of the Property. *755 Ill. Comp. Stat. 5/2-1(a)*. Such an interest falls within *Section 541* and was rightly included in the bankrupt estate when Sims filed his petition on February 15, 2016. *See, Chenoweth, 3 F.3d at 1113* (holding that ***HN16***[↑] all the statute "requires is an entitlement"); *Yonikus, 996 F.2d 866, 869* (noting that *section (a)(1)* embraces "every conceivable interest of the debtor," including "future" interests). It is thus immaterial that Sims lacked full legal title and was not the Property's sole owner until after the redemption date. Under *LaMont*, Gan's secured claim was fodder for Sims's bankruptcy plan and capable of being paid over the life of the plan.

C. Adequate Protection

Gan's other basis for appealing the Bankruptcy Court's denial of its Motion to Lift the Automatic Stay is a lack of adequate protection. Gan claims that its secured claim on the Property is not adequately protected because of Sims's failure to pay post-petition real estate taxes and maintain insurance on the Property. Gan argues that the former amounts to inadequate protection of its secured claim because a potential **[**20]** subsequent purchaser of the Property's outstanding tax debt would have a superior lien. With respect to Sims's failure to carry insurance, Gan invokes the specter of catastrophic damage to the Property. Sims ripostes that he need not pay post-petition real estate taxes or maintain property insurance because Gan has no security agreement or other contract with Sims.

HN17[↑] The Code provides for relief from the automatic stay "for cause, including the lack of adequate protection of an interest in property." *11 U.S.C. § 362(d)(1)*. Because secured creditors cannot repossess or foreclose on their collateral while the automatic stay is in effect, "adequate protection" is intended to protect, during the pendency of the bankruptcy case, against loss in value of the secured creditor's interest in property of the estate. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Asscs., Ltd., 484 U.S. 365, 370, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988)*. *Section 361* of the Code describes different forms that adequate protection may take: "a cash payment or periodic cash payments" or "an additional or replacement lien" to the extent a stay results in a decrease of the value of a creditor's interest, along with "other relief . . . as will result in the realization by [the creditor] of the indubitable equivalent" of its interest. *11 U.S.C. § 361*.

First, the Court acknowledges a dearth **[**21]** of authority germane to Gan's argument. Gan cites exclusively cases involving a debtor's obligation to a secured mortgage-holder or under a security agreement. *See, e.g., In re Greives, 81 B.R. 912, 969-70 (N.D. Ind. 1987)* ("[T]he Debtors, *when obligated to do so by the security instruments*, must pay current taxes and keep the property properly insured.") (emphasis added); *In re Pittman, 7 B.R. 760, 760 (S.D.N.Y. 1980)* ("The mortgage obligated the Debtor, inter alia to pay the indebtedness, to maintain fire insurance for the protection of the mortgaged property and to pay the real estate taxes and water and sewer charges as assessed."); *In re El Patio Ltd., 6 B.R. 518, 522-23 (C.D. Cal. 1980)*

(requiring the debtor to make an annual payment to its lender, a bank holding a promissory note, since "accruing property taxes as a lien ahead of the Bank erodes the value of its secured interest"). Yet each of these is of dubious relevance here. As the Seventh Circuit has recognized, ***HN18***[↑] a tax purchaser's claim is not even properly considered "a security *interest* because it was not **[*386]** created by agreement." *LaMont, 740 F.3d at 409* (citing *11 U.S.C. § 101(51)* (emphasis in original)). The Bankruptcy Court's order stressed this absence of privity between Gan and Sims - and for good reason. Unlike the mortgagee/mortgagor relationship, in which the mortgagee often insists on payment of real estate taxes **[**22]** and maintenance of property insurance as a condition of advancing funds to the mortgagor-debtor, Gan could not have predicated acquisition of its tax claim on Sims's (or Tammy's) performance of such obligations. This seems especially true with respect to post-petition real estate taxes, given Gan's effective assumption of the risk of tax arrearages on the Property and its payment of the Property's delinquent real estate taxes *after* the tax sale (from 2012-2015). Gan furnishes the Court with no authority or argument for treating a tax purchaser, who contracts with the taxing authority, the same as a mortgagee or other secured party in privity with the debtor.

Similarly, the Court's own search of adequate protection cases vis-à-vis real estate taxes and insurance coverage turned up only mortgagor-mortgagee and other security agreement scenarios. *See, e.g., In re Doug Wilson Ins. Agency, Inc., 495 B.R. 428 (Bankr. E.D. Ark. 2013)* (finding cause to lift automatic stay where mortgagee was required to self-insure mortgaged property and pay its tax arrearages); *In re Biltwood Props. LLC, 473 B.R. 70 (Bankr. M.D. Pa. 2012)* (creditor holding first, second, and third mortgage liens against debtor's commercial real estate was entitled to "for cause" relief from stay based on inadequate protection where debtor failed to pay real **[**23]** estate taxes); *In re Mitchell, 75 B.R. 593 (Bankr. E.D. Pa. 1987)* (requiring mortgagor-debtor to remit insurance check to undersecured mortgagee or suffer lifting of automatic stay); *In re Trident Corp., 19 B.R. 956 (Bankr. E.D. Pa. 1982)* (granting mortgagee relief from stay where mortgagor-debtor failed to pay real-estate taxes or maintain insurance coverage on subject property); *In re Graydon, 8 B.R. 475 (Bankr. S.D. Fla. 1981)* (conditioning continuance of automatic stay on debtor's maintaining insurance and paying monthly real-estate tax accruals, as required by security agreements); *In re Grundstrom, 14 B.R. 791 (Bankr. D. Mass. 1981)* (finding mortgagee of vacant, uncared-for, residential property inadequately protected based on absence of insurance; granting relief from automatic stay to pursue foreclosure action); *In re Vincent, 7 B.R. 866 (Bankr. M.D. Fla. 1980)* (denying mortgagee's petition for relief from automatic stay where mortgagor-debtor defaulted on real-estate tax and insurance payments, as sufficient equity cushion provided "the indubitable equivalent" of mortgagee's property interest); *In re Tucker, 5 B.R. 180 (Bankr. S.D.N.Y. 1980)* (granting mortgagee for-cause relief from automatic stay based on inadequate protection where mortgagor-debtor allowed fire and hazard insurance to lapse and made no repairs to property).

The Court did find one exception to the foregoing, *In re Scott, 449 B.R. 535 (Bankr. N.D. Ill. 2011)*, a case neither party cited that nonetheless tracks Gan's real estate tax argument. In *Scott* ***[**24]***, an assignee of a certificate of purchase sought relief from the automatic stay to pursue a tax deed in state court because the debtor was behind on post-petition real estate taxes. The bankruptcy court granted relief from the stay, finding inadequate protection under *§ 362(d)(1)* based on the debtor's inability to afford real estate taxes both pre- and post-petition

and "the great risk that another tax buyer may intercede" "at a tax sale." Scott, 449 B.R. at 536. This pre-*LaMont* case, however, does not control the disposition here.

[*387] First, unlike the debtor in Scott, Sims has indicated an ability to pay some of the tax arrearages. Although the confirmed plan's Schedule J does not expressly allocate money for tax payments, it does list $900.00 per month in property maintenance expenses. Sims's brief offers that the maintenance "currently being completed with these funds can be deferred and the amount [owed] in property taxes going forward can be paid from this sum." (ECF No. 10 ("Appellee's Br.") at 7.) Although hardly a model for bankruptcy plans in the future, reallocating available funds in this way alleviates both the *Scott* court's concern about perpetual inability to pay and Gan's preoccupation with the lack of **[**25]** provision for tax payments on Schedule J. To the extent Gan doubts Sims's sincerity, Gan can take comfort in knowing that, **HN19**[] if the debt is not repaid in full, its lien remains intact throughout the bankruptcy proceeding and may be enforced after the stay is lifted. *See*, 11 U.S.C. § 1325(a); LaMont, 740 F.3d at 409-10; LaMont, 487 B.R. at 498; Bates, 270 B.R. at 468.

HN20[] Second, the risk of any tax buyer interceding to purchase post-petition real estate tax arrearages is illusory. Tax sales occurring "when the automatic stay is in effect . . . are void *ab initio*." Ballinger v. Hickory Point Bank & Trust (In re County Collector for Deliquent Taxes), 291 Ill. App. 3d 588, 491 Ill. App. 3d 588, 683 N.E.2d 995, 997, 225 Ill. Dec. 492 (Ill. App. 1997) (citing In re Garcia, 109 B.R. 335, 340 (N.D. Ill. 1989); Richard v. City of Chicago, 80 B.R. 451, 453 (N.D. Ill. 1987)). By grounding a finding of inadequate protection in the prospect of a post-petition tax sale, *Scott*'s and Gan's rationale appears unsound where, as here, the property subject to the potential tax sale is estate property. *See*, Section III.B, *supra*. (Indeed, one of the reasons why the Bankruptcy Court extended the automatic stay in this case was Sims's consternation about a tax sale.) While a court may in some circumstances validate a tax sale by granting retroactive relief from the automatic stay, such relief "can only be granted in accordance with equitable principles," as when "a creditor did not have actual knowledge of the applicability of the automatic stay and the creditor would be unfairly prejudiced if the debtor could **[**26]** raise the stay as a defense." In re Lipuma, 167 B.R. 522, 526 (N.D. Ill. 1994). There is no indication that such circumstances are present here, and thus no appreciable risk to Gan of losing priority to a competing tax purchaser because Sims has missed post-petition tax payments.

The more cognizable risk, unmentioned by Gan and the *Scott* court, is that the county acquires a superior tax lien on post-2015 accruing tax arrearages. But, as the Bankruptcy Court noted - relying on post-*Scott* cases such as *LaMont* and *Romious* - Gan is adequately protected from any such injury by **HN21**[] the Illinois property tax code's sale-in-error provision: it can petition the circuit court to declare its tax purchase a "sale in error" and demand refund of "the amount paid" "subsequent to the tax sale and prior to the issuance of the tax deed." 35 Ill. Comp. Stat. 200/21-310(b)(1) & (d); LaMont, 740 F.3d at 401 (noting that the sale-in-error doctrine allows a tax purchaser reimbursement "for everything he paid, plus interest"). In fact, it is this "generous" provision that prompted the Clerk of Cook County to file an amicus brief in *LaMont*, imploring the Seventh Circuit not to permit tax purchasers to delay seeking a sale in error and thereby leave the county "on the hook for a significant amount of interest." LaMont, 740 F.3d at 410. The court **[**27]** noted with regret that "the risk of the county being on the hook for interest while the

time to obtain a tax deed [after the redemption period] is tolled is built into the code," and that "[a]ny solution to that problem is for **[*388]** the courts or legislature of Illinois." *Id. at 410-411*. The sale-in-error doctrine "indicat[es] that the legislature anticipated adverse treatment of a tax purchaser's interest in bankruptcy (that is, treatment as a claim among other claims)." *Id. at 405 n.10*; *see also, LaMont, 487 B.R. at 498*; *Romious, 487 B.R. at 886*.

With respect to Sims's failure to carry insurance on the Property, the Court's search turned up no cases supporting the proposition that a tax purchaser is entitled to adequate protection in the form of the debtor's maintenance of property insurance. For many of the same reasons discussed above, it was not legal error for the Bankruptcy Court to reject Gan's attempt to impose a property insurance obligation on Sims in favor of the proposition, enjoying recent support in this Circuit, that ***HN22***[↑] a tax purchaser is generally adequately protected by the sale-in-error doctrine. Fundamentally, the interest in underlying property arising from a certificate of purchase is a unique creature, enjoying only the rights granted under the statutory scheme. **[**28]** *LaMont, 740 F.3d at 405* ("[T]o the extent the Illinois Appellate Court has recognized any interest in the real property, it has been limited to those rights conferred statutorily by the Illinois property tax code."). For example, one of those rights is the right to petition for appointment of a receiver to prevent waste. *See*, *35 Ill. Comp. Stat. 200/21-80*; *accord, LaMont, 740 F.3d at 406* (noting that "Illinois has given tax purchasers an unusual tax lien," which "provides the possibility of ownership in the future . . . [and] some rights to protect that interest, including the right to petition for appointment of a receiver to prevent waste"). But the statute does not go so far as to require maintenance of insurance in order to forestall any potential loss on the property.

Attempting to fit Gan's round claim into the Code's square hole, the Bankruptcy Court analyzed *11 U.S.C. § 1326(a)(4)*, which under certain conditions obligates a debtor to carry insurance to protect a secured creditor's interest:

> Not later than 60 days after the date of filing of a case under this chapter, a debtor retaining possession of *personal property subject to a lease or securing a claim attributable in whole or in part to the purchase price of such property* shall provide the lessor or secured creditor reasonable **[**29]** evidence of the maintenance of any required insurance coverage with respect to the use or ownership of such property and continue to do so for as long as the debtor retains possession of such property.

11 U.S.C. § 1326(a)(4) (emphasis added). This Court is not convinced that *§ 1326(a)(4)* is even applicable to Gan's argument, and there would be no dice even if it were (as the Bankruptcy Court assumed). As an initial matter, the property Sims is "retaining possession of" is real estate, not Gan's personal property, even if he possesses the Property subject to Gan's secured tax lien that itself is a "species of personal property." *LaMont, 740 F.3d at 403*. Regardless, applying this insurance provision does little to advance the ball. Gan cannot be characterized as a lessor either of the Property or of the tax lien, nor does it hold a purchase-money security interest in the Property, having advanced no funds to finance its purchase. (Instead, Tammy inherited the Property from her mother, Gan purchased the delinquent taxes, and the Property then passed via intestacy to Sims.) In the best case scenario for Gan under the Code, where *§ 1326(a)(4)* classifies Sims's possession as that of "personal property," none of the listed circumstances mandating property insurance **[**30]** obtains anyway.

[*389] Because nothing in the case law, the Code, or the Illinois property tax code supports Gan's argument, the Court perceives no legal error in the Bankruptcy Court's determination that Gan is adequately protected despite Sims's failure to pay post-petition real estate taxes or carry property insurance. Obtaining a sale-in-error declaration would give Gan the "indubitable equivalent" of its interest in the Property such that it is adequately protected under *11 U.S.C. § 361*.

* * *

Finally, the Court notes an alternative means of affirming the Bankruptcy Court's ruling. ***HN23***[↑] In deciding whether to grant relief from an automatic stay "for cause" - and adequate protection is the first example of "cause" the Code provides - three favors guide a court's decision. The Seventh Circuit in *Matter of Fernstrom Storage and Van Co., 938 F.2d 731 (7th Cir. 1991)*, held the following inquiries relevant to granting such relief: whether "a) [a]ny great prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit, b) the hardship to the [non-bankrupt party] by maintenance of the stay considerably outweighs the hardship of the debtor, and c) the creditor has a probability of prevailing on the merits." *Id. at 735* (citations omitted).

Based on the undisputed **[**31]** facts the Bankruptcy Court found, *Fernstrom* militates in favor of denying Gan's motion. First, Gan's attempt to pursue a tax deed during the pendency of the stay would prejudice the bankrupt estate, because it would be a suit against the predominant piece of estate property. (*See*, Section III. B, *supra*.) The situation is not akin to one where a creditor seeks purely a declaration of liability as a predicate to recovering from insurers, sureties, or guarantors. *Fernstrom, 938 F.2d at 735-36*; *see, e.g., Matter of Holtkamp, 669 F.2d 505, 508-09 (7th Cir. 1982)*.

Second, the hardship to Sims outweighs any hardship to Gan, because the latter may simply pursue a sale-in-error declaration if it is denied relief, whereas the former must forfeit his residence if Gan is granted relief from the stay and successfully obtains a tax deed. A sale in error would allow Gan to recoup the funds it outlaid on the Property's tax arrearages; Sims, on the other hand, has no way to recoup his investment in maintaining and repairing the Property. Also worth noting is that the situation here does not involve non-bankruptcy litigation at an "advanced stage," meaning that maintenance of the stay does not force Gan to write off significant litigation expenses. *Fernstrom, 938 F.2d at 736-37*; *see, e.g., In re Sonnax Indus., 907 F.2d 1280, 1287 (2d Cir. 1990)* (declining to lift the stay in part because **[**32]** "the litigation in state court has not progressed even to the discovery stage").

Even if, under the third *Fernstrom* factor, Gan has a greater probability of prevailing in its petition for a tax deed than Sims or the bankrupt estate does in opposing, the first two factors nonetheless significantly favor maintaining the stay. Therefore, as an alternative to affirming the Bankruptcy Court's finding of adequate protection, the Court upholds its denial of Gan's requested "for cause" relief based on *Fernstrom* balancing.

IV. CONCLUSION

The Bankruptcy Court committed no legal error in finding that the Property comprised part of the bankrupt estate at the time Sims filed his Chapter 13 petition, because he inherited an equitable interest in the Property upon the prior intestate death of his wife. Gan thus has a secured claim on the Property capable of treatment **[*390]** in bankruptcy over the life of the confirmed plan, and Sims's filing of the bankruptcy petition after the tax sale but before the redemption date effectively tolled the redemption period (for as long as Sims complies with the plan). The Bankruptcy Court similarly committed no legal error in finding Gan's interest in the Property adequately **[**33]** protected despite Sims's failure to pay post-petition real estate taxes and maintain insurance on the Property.

For the reasons stated herein, the Court affirms the decision of the Bankruptcy Court denying Gan's Motion to Lift the Automatic Stay.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber

Harry D. Leinenweber, Judge

United States District Court

Dated: June 13, 2017

End of Document

Heritage Std. Bank v. Rosewell (In re Cnty. Treasurer)

Appellate Court of Illinois, First District, First Division

June 12, 1989, Filed

No. 1-87-2696

Reporter
185 Ill. App. 3d 701 *; 542 N.E.2d 15 **; 1989 Ill. App. LEXIS 849 ***; 134 Ill. Dec. 15 ****

In re APPLICATION OF THE COUNTY TREASURER OF COOK COUNTY, ILLINOIS, FOR JUDGMENT AND SALE OF REAL ESTATE FOR GENERAL TAXES FOR THE YEAR 1980 (Heritage Standard Bank, as Trustee, et al., Petitioners-Appellants, v. Edward J. Rosewell, Cook County Treasurer, as Trustee of the Indemnity Fund Created Pursuant to Section 247a of the Revenue Act of 1939, as Amended, Respondent-Appellee)

Subsequent History: [*1]** Rehearing Denied August 2, 1989.

Prior History: Appeal from the Circuit Court of Cook County; the Hon. Marjan Peter Staniec, Judge, presiding.

Disposition: Reversed and remanded.

Core Terms

redemption, tax deed, indemnification, tax sale, subject property, trial court, equitable, buyer, taxes, deducted, fair market value, calculating, certificate, indemnity, mortgages, redeem, liens, redemption period, real estate, equitable considerations, property owner, extinguished, delinquent, circuit court, Revenue Act, forfeiture, fault

Case Summary

Procedural Posture

Petitioner taxpayer sought review of an order of the Circuit Court of Cook County (Illinois), which awarded the taxpayer indemnification in the amount of the fair market value of the subject property, less the redemption amount. The taxpayer filed a petition for indemnification from respondent county collector, contending that the trial court incorrectly deducted the redemption amount.

Overview

The taxpayer filed a petition for indemnification pursuant to § 247a of the Revenue Act of 1939, Ill. Rev. Stat. ch. 120, para. 728a (1987), after the county clerk failed to process the taxpayer's redemption of a three-unit apartment building. The county collector, as trustee, admitted liability for failure to process the redemption, and the taxpayer was awarded indemnification in the amount of the fair market value of the property, less the redemption amount. The taxpayer

appealed, and the court reversed. The court held that the trial court erred in deducting the redemption amount from the fair market value of the subject property. The court stated that once the trial court determined that the taxpayer was entitled to indemnification, it had no discretion to apply equitable considerations in calculating the indemnification award and that any lien for the redemption amount was extinguished by the time the tax deed was issued and, therefore, should not have been deducted from the fair market value of the subject property. The court noted that the taxpayer's loss was not his fault and to require him to pay the redemption amounted to payment for a remedy not received.

Outcome

The court reversed and remanded the judgment of the trial court awarding the taxpayer indemnification from the county collector in the amount of the fair market value of the subject property, less the redemption amount.

LexisNexis® Headnotes

Tax Law > State & Local Taxes > Personal Property Taxes > General Overview

HN1[] **State & Local Taxes, Personal Property Taxes**

The procedures for the assessment and enforcement of property taxes, and the remedies of redemption and indemnification, are set forth in the Revenue Act of 1939, Ill. Rev. Stat. ch. 120, para. 482 et seq. (1987).

Real Property Law > ... > Mortgages & Other Security Instruments > Redemptions > General Overview

Torts > ... > Multiple Defendants > Indemnity > General Overview

Real Property Law > Deeds > Types of Deeds > General Overview

Real Property Law > Deeds > Types of Deeds > Tax Deeds

Real Property Law > Title Quality > Adverse Claim Actions > Ejectment

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

Tax Law > ... > Real Property Taxes > Assessment & Valuation > General Overview

Torts > ... > Types of Damages > Property Damages > General Overview

HN2[] Mortgages & Other Security Instruments, Redemptions

Section 247a of the Revenue Act of 1939 (Act), Ill. Rev. Stat. ch. 120, para. 728a (1987), created a fund to indemnify eligible parties for losses sustained from failure to redeem their property, known as the indemnity fund. The criteria for recovery from the fund are set forth in § 247a(5) of the Act, which states: Any owner of real estate sold pursuant to any provision of this Act at a sale held subsequent to September 1, 1970, who without fault or negligence of his own sustains loss or damage by reason of the issuance of a tax deed pursuant to §§ 266 or 266a of the Act, and who is barred or in any way precluded from bringing an action for the recovery of such real estate or any owner of property containing four or less dwelling units who resided thereon the last day of the period of redemption who, in the opinion of the court which issued the tax deed order, is equitably entitled to just compensation, has the right to indemnity for the loss or damage sustained. Indemnity shall be limited to the fair cash value of the real estate as of the date that the tax deed was issued, less any mortgages or liens thereon. Ill. Rev. Stat. ch. 120, para. 728a(5) (1987).

Real Property Law > ... > Mortgages & Other Security Instruments > Redemptions > General Overview

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

Real Property Law > Deeds > Types of Deeds > General Overview

Real Property Law > Deeds > Types of Deeds > Tax Deeds

Tax Law > Federal Income Tax Computation > Valuation > Real Property

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

Tax Law > ... > Real Property Taxes > Assessment & Valuation > General Overview

Torts > ... > Types of Damages > Property Damages > Measurements

HN3[] Mortgages & Other Security Instruments, Redemptions

Any owner of real estate who without fault or negligence of his own sustains loss or damage by reason of the issuance of a tax deed or any owner of property who resided thereon the last day of the period of redemption who, in the opinion of the court which issued the tax deed order, is equitably entitled to just compensation, has the right to indemnity for the loss or damage sustained. Ill. Rev. Stat. ch. 120, para. 728a(5) (1987). The second sentence of § 247a of the Revenue Act of 1939, however, provides a mechanical formula for calculation of the award which does not mention equitable considerations: indemnity shall be limited to the fair cash

value of the real estate as of the date that the tax deed was issued, less any mortgages or liens thereon. Ill. Rev. Stat. ch. 120, para. 728a(5)(1987).

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

HN4[] **State & Local Taxes, Administration & Procedure**

The application of equitable considerations to calculating an indemnification is not followed. Instead, cases hold that the court has no discretion in determining the amount of the indemnification.

Counsel: Daniel J. Pierce, P.C., of Chicago (Daniel J. Pierce, of counsel), for appellants.

Cecil A. Partee, State's Attorney, of Chicago (Mark R. Davis and Robert O. Carroll, Assistant State's Attorneys, of counsel), for appellee.

Judges: JUSTICE O'CONNOR delivered the opinion of the court. MANNING, P.J., and BUCKLEY, J., concur.

Opinion by: O'CONNOR

Opinion

[*702] [16] [****16]** Petitioner Larry Burke (Burke) filed a petition for indemnification pursuant to section 247a of the Revenue Act of 1939 (Ill. Rev. Stat. 1987, ch. 120, par. 728a), after the county clerk of Cook County failed to process Burke's redemption of a three-unit apartment building. The respondent Cook County collector, as trustee under section 247a (the Collector), admitted liability for failure to process the redemption, and Burke was awarded indemnification in the amount of the fair market value of the subject property, less the redemption amount. Burke appeals, arguing that the circuit court incorrectly deducted the redemption amount. For the reasons below, we reverse and remand.

HN1[] The procedures for the assessment **[***2]** and enforcement of property taxes, and the remedies of redemption and indemnification, are set forth in the Revenue Act of 1939 (Ill. Rev. Stat. 1987, ch. 120, par. 482 *et seq.*). The tax sale, redemption and indemnification process is summarized below.

[*703] After property taxes are assessed for a subject property, a lien for the taxes attaches to the property. The lien is extinguished when the taxes are paid, or when the property is sold pursuant to any of the enforcement provisions in the Revenue Act, which include a tax sale, explained below; a forfeiture sale, held subsequent to the tax sale for properties that were not bid on in the tax sale; and the scavenger sale for properties over five years delinquent.

If the taxes on the subject property are not paid, they are declared delinquent. The county clerk publishes a list of delinquent properties, and notice is given to the individual owners. A judgment sale record is prepared and serves as the complaint in the circuit court. The judgment

sale record is held by the county clerk, who enters the details of any payments, sales, forfeiture, redemption, and tax deed proceedings. At the appointed time the judgment sale **[***3]** record is presented to the circuit court. The property owner is entitled to be present and present evidence at the hearing. If the court enters an order of sale, the subject property becomes subject to a tax sale. At the annual tax sale, delinquent properties are submitted in order and the sale continues until all parcels bid on are sold.

No property is forfeited at the tax sale; the tax sale buyer receives, for the amount of the delinquent taxes, plus interest and costs, a tax sale certificate. The owner may pay the taxes at any time before the tax sale is final, and the property tax lien is extinguished when the tax sale certificate is issued. The tax sale certificate does not constitute title to the property, which the owner still holds. Rather, the tax sale certificate is personal property, a form of negotiable instrument, which represents a lien on the property in favor of the tax buyer and the tax buyer's right to enforce the lien and institute tax deed proceedings after the redemption period expires.

The property owner is given a length of time after the tax sale certificate is issued, **[**17]** **[****17]** called the redemption period, in which to redeem the property. To redeem the property, **[***4]** the owner must pay an amount that varies, but is generally the amount paid by the tax buyer plus accrued interest and costs. The minimum length of the redemption period is prescribed by statute and varies depending on the type of sale from which the taxes were bought, and whether the property is residential or commercial. The redemption period may be extended by the tax buyer. Once the property is redeemed, the lien imposed by the tax sale certificate is extinguished.

If the property is redeemed, the tax buyer receives his original investment plus accrued interest and costs, and the redemption is noted on the tax sale certificate by the county clerk, so no tax deed will be **[*704]** issued on the certificate. If the property is not redeemed, the tax buyer may institute tax deed proceedings. The tax deed proceedings are conducted according to *article IX, section 8, of the Illinois Constitution* because if a tax deed is issued, the owner forfeits the property and the tax sale certificate becomes merchantable title to the property.

The legislature recognized that the forfeiture process sometimes led to harsh results, however, and created an alternative remedy to redemption. *HN2*[↑] Section **[***5]** 247a of the Revenue Act of 1939 (Ill. Rev. Stat. 1987, ch. 120, par. 728a) created a fund to indemnify eligible parties for losses sustained from failure to redeem their property (the indemnity fund). The criteria for recovery from the fund are set forth in section 247a(5), which states:

> "Any owner of real estate sold pursuant to any provision of this Act at a sale held subsequent to September 1, 1970, who without fault or negligence of his own sustains loss or damage by reason of the issuance of a tax deed pursuant to Sections 266 or 266a, and who is barred or in any way precluded from bringing an action for the recovery of such real estate or any owner of property containing four or less dwelling units who resided thereon the last day of the period of redemption who, in the opinion of the Court which issued the tax deed order, is equitably entitled to just compensation, has the right to indemnity for the loss or damage sustained. Indemnity shall be limited to the fair cash value of the real estate as of the date that the tax deed was issued, less any mortgages or liens thereon." Ill. Rev. Stat. 1987, ch. 120, par. 728a(5).

It is within the procedural context described above **[***6]** that the instant case arose. Burke failed to pay the 1980 general real estate taxes on a three-unit apartment building at 7008 South Archer Avenue in Chicago (the subject property), and the delinquent taxes were purchased at the annual tax sale on May 3, 1982. Burke learned of the sale and redemption deadline in January 1984, and the tax buyer, not a party to this appeal, gave Burke until May 11, 1984, to redeem the property.

On May 1, 1984, Burke delivered a certified check payable to the county collector for the full redemption amount of $ 13,462.83, consisting of $ 7,583.98 in unpaid taxes, $ 5,460.47 in accrued interest to the tax buyer, and $ 418.38 in costs and fees. County personnel did not process the redemption, however, and a tax deed was issued on June 15, 1984.

On October 2, 1984, Burke filed a petition for indemnity pursuant to section 247a of the Revenue Act (Ill. Rev. Stat. 1987, ch. 120, par. 728a). On May 22, 1987, Burke filed a motion for summary judgment **[*705]** on the issue of liability. The Collector admitted liability and summary judgment was entered. The parties later stipulated that the fair market value of the subject property on June 15, 1984, was **[***7]** $ 141,000. There were no liens or mortgages against the subject property on the date the tax deed issued.

On July 20, 1987, the circuit court issued an order finding that Burke was entitled to indemnification in the amount of $ 127,536.17, the fair market value of the subject property on June 15, 1984, minus the redemption amount. Burke appeals, arguing that the circuit court improperly deducted the redemption amount from the fair market value of the property.

[18]** **[****18]** Burke argues that while the court may consider equitable factors in determining whether a plaintiff is entitled to indemnification, it may not consider equitable factors in calculating the amount of indemnification. Burke's argument is supported by the plain language of section 247a, which sets forth the criteria for recovery in the first sentence, and includes the consideration of equitable factors by the court:

> *HN3*[] "Any owner of real estate * * * who without fault or negligence of his own sustains loss or damage by reason of the issuance of a tax deed * * * or any owner of property * * * who resided thereon the last day of the period of redemption who, in the opinion of the Court which issued the tax deed order, is equitably **[***8]** entitled to just compensation, has the right to indemnity for the loss or damage sustained." (Ill. Rev. Stat. 1987, ch. 120, par. 728a(5).

The second sentence of section 247a, however, provides a mechanical formula for calculation of the award which does not mention equitable considerations: "[indemnity] shall be limited to the fair cash value of the real estate as of the date that the tax deed was issued, less any mortgages or liens thereon." Ill. Rev. Stat. 1987, ch. 120, par. 728a(5).

The legislature contemplated that the interest in enforcing tax assessment through the forfeiture process would in some instances create harsh results, causing some plaintiffs to lose their property through no fault of their own, or due to a lack of sophistication or ability to understand the forfeiture process. Naturally, however, not all plaintiffs would be helpless in the face of the tax laws. Thus the most reasonable interpretation of section 247a indicates that while a court may examine the facts of a particular case to determine whether a plaintiff is fairly entitled to

indemnification, the court does not have the same latitude in calculating the amount of the award. The amount of the indemnification **[***9]** would not be influenced by equitable considerations, as both the market value of a property and any outstanding **[*706]** liens or mortgages could be determined with reasonable precision. The plain language of section 247a(5) shows that application of the statute is not, as the trial court stated, "cloaked in equity."

In deciding to deduct the redemption amount, the trial court relied substantially on *In re Application of Cook County Treasurer & Ex Officio Collector (1983), 119 Ill. App. 3d 212, 456 N.E.2d 221*, *appeal denied* (1983), *96 Ill. 2d 560* (hereinafter *Viso*), stating, "the Viso decision appears to allow trial court discretion to be somewhat creative in structuring an equitable award that justly compensates the property owner for the exact loss or damage sustained." Even had the trial court's reliance on *Viso* been proper, allowing Burke to recover less than the full value of his property was contrary to the manifest weight of the evidence.

In *Viso*, a clerical error prevented redemption, a tax deed was issued, and the petitioner, Joyce Viso, was evicted from her home. Viso petitioned for indemnification, and the **[***10]** trial court found that she was equitably entitled. The trial court awarded Viso the fair market value of her house, $ 56,000, and ordered her promptly to submit proof to the court of payment of the personal note of $ 17,126.56, which had been severed from the mortgage. The appellate court affirmed: mechanical application of section 247a(5) would have resulted in an indemnification award of $ 38,873.44, and, subtracting the amount of the personal note, left Viso with a net recovery of $ 21,746.88, a result the court found "inequitable and contrary to the spirit of the statute." *In re Application of County Treasurer, 119 Ill. App. 3d at 216*.

HN4[⬆] The application of equitable considerations to calculating the indemnification has not been followed, however. Instead, cases have held that the court has no discretion in determining the amount of the indemnification. (*In re Application of County Treasurer & Ex Officio County Collector (1983), 114 Ill. App. 3d 921, 924, 449 N.E.2d 879* ("The trial court has no discretion in computing the amount of damages and must strictly adhere to the mandate of the statute"); *In re Application of Kane County Collector **[**19]** **[****19]** (1981), 102 Ill. App. 3d 43, 48, 429 N.E.2d 590* **[***11]** ("Once [it is] determined * * * that the petitioner is [eligible for the remedy, the equities are no longer relevant;] * * * all that remains is for the trial court to make [a] determination of the amount").) Further, although the phrase "limited to" in section 247a(5) seems to allow some discretion in the calculation of the indemnification, the phrase

> "clearly is intended to prevent a property owner from recovering more than the equity in the property by requiring that the value of any liens or mortgages be deducted from the market **[*707]** value. This limiting language fixes a date certain to determine the amount of recovery and bars recovery of any other actual, consequential or punitive damages as well as fees, costs and expenses of litigation." (*In re Application of Kane County Collector (1981), 102 Ill. App. 3d 43, 49, 429 N.E.2d 590*.)

Moreover, the mandate for liberal construction upon which the Collector relies appears not to apply to the determination of the amount of compensation but to whether compensation should be made: "[the] Court shall liberally construe this Section *to provide* compensation wherever in the discretion of **[***12]** the Court the equities warrant such action." (Emphasis added.) (Ill. Rev. Stat. 1987, ch. 120, par. 728a(6).) This interpretation is consistent with the language in

section 247a(5) that allows the trial court to consider the equities to determine whether a petitioner is entitled to compensation.

The trial court's application of equitable considerations to the calculation of the indemnification was contrary to the weight of authority, but even had the application of equitable principles been proper, here any reduction from the full market value of the property was contrary to the manifest weight of the evidence. Burke made inquiries promptly after he was notified of the tax sale, and a certified check for the full amount of redemption was in the possession of the county clerk's office before the redemption period had expired. Burke did all that he could to ensure that his property was redeemed. It would be inapt to reduce the amount of Burke's loss on "equitable" principles when he suffered the loss through no fault of his own. Deducting the redemption amount would, in effect, force Burke to pay for a remedy he did not receive.

The Collector also argues that the redemption amount **[***13]** constituted a lien on the subject property and was properly deducted in any event. The Collector urges that we calculate Burke's indemnification by determining his equity in the subject property the day before the tax deed issued. Accordingly, the Collector contends, Burke's equity was the fair market value less the lien for the redemption amount held by the tax buyer. The Collector's premises has no basis, however.

Section 247a expressly states that the indemnification "shall be limited to the fair cash value of the real estate as of the date of that the tax deed was issued, less any mortgages or liens thereon." (Ill. Rev. Stat. 1987, ch. 120, par. 728a(5).) If the fair market value of the property is determined as of the date the tax deed is issued, it is logical to look to that date to determine what liens or mortgages shall be subtracted. But the lien in favor of the tax buyer for the amount of the redemption is extinguished upon redemption, or when the tax deed is **[*708]** issued. Calculating the value of the property and the setoffs as of the date the tax deed was issued, the lien representing the redemption amount no longer existed. Therefore, the lien for the redemption **[***14]** amount should not be deducted from the value of the property because it no longer exists on the date from which the owner's equity in the property is determined. A lien once extinguished cannot be revived by the device of granting a setoff. The equitable powers of a court may not be exercised in contradiction to the plain requirements of a statute. *601 W. 81st Street Corp. v. City of Chicago (1984), 129 Ill. App. 3d 410, 472 N.E.2d 827*.

The Collector finally argues that the trial court should have considered, as an equitable matter, the indemnity fund's capacity to pay out awards, and that limiting the present award increases its ability to **[**20]** **[****20]** pay out future awards. This argument has been rejected. (*In re Application of Cook County Treasurer & Ex Officio Collector (1983), 119 Ill. App. 3d 212, 456 N.E.2d 221*, *appeal denied* (1983), *96 Ill. 2d 560*.) As plaintiff points out, the indemnity fund has access to the legislature to change the laws to increase the indemnity fund, or limit the amount of a single award. It should also be noted that the legislature already has limited the amount of a single **[***15]** award: the fair cash value of the real estate, less any mortgages or liens. The instant case turns on the instant facts and not on speculation of future awards.

In conclusion, we hold that the trial court erred in deducting the redemption amount from the fair market value of the subject property. Once the trial court determined that Burke was entitled to indemnification, it had no discretion to apply equitable considerations in calculating the

indemnification award. Any lien for the redemption amount was extinguished by the time the tax deed was issued and therefore should not have been deducted from the fair market value of the subject property. We note further that here, equitable considerations militated against deducting the redemption amount from the value of the property, since Burke suffered the loss through no fault of his own, and to require Burke to pay the redemption amount would require him to pay for a remedy he did not receive. Accordingly, the ruling of the trial court is reversed, and this case is remanded with instructions that the Collector be ordered to indemnify Burke for the full market value of the subject property, $ 141,000.

Reversed and remanded.

End of Document

Phoenix Bond & Indem. Co. v. Pappas

Appellate Court of Illinois, First District, Second Division

January 25, 2000, Decided

1-98-2905

Reporter
309 Ill. App. 3d 779 *; 723 N.E.2d 280 **; 2000 Ill. App. LEXIS 35 ***; 243 Ill. Dec. 248 ****

PHOENIX BOND AND INDEMNITY CO., MIDWEST REAL ESTATE INVESTMENT COMPANY, INC., OAK PARK INVESTMENTS, INC., AND S.I. SECURITIES, Plaintiffs-Appellees, v. MARIA PAPPAS, COOK COUNTY TREASURER AND ex-officio COUNTY COLLECTOR OF COOK COUNTY, Defendant-Appellant.

Prior History: [*1]** Appeal from Circuit Court of Cook County. No. 98-CO-008. The Honorable Francis J. Barth, Judge Presiding.

Original Opinion of November 9, 1999, Reported at: *1999 Ill. App. LEXIS 774*.

Disposition: Reversed.

Core Terms

bids, auction, forfeited, circuit court, bidders, buyers, redemption, delinquent taxes, summary judgment, properties, tax sale, collection, property taxes, forfeiture, injunction, annual, powers, statutory construction, delinquent property, implied authority, public official, discovery, scavenger, redeem

Case Summary

Procedural Posture
Defendant appealed the entry of a permanent injunction preventing defendant county collector from enforcing a disputed rule from the Circuit Court of Cook County (Illinois).

Overview
Plaintiffs were tax buyers at the annual tax sale. In response to perceived anti-competitive practices among the bidders at the auction, defendant county collector instituted a rule that properties on which multiple, simultaneous, identical bids were made would not be sold at auction. Plaintiffs brought this action seeking an injunction against the enforcement of this rule. Defendant, surmising that plaintiffs might be guilty of collusion, attempted to discover materials that would support her equitable defense of unclean hands. Plaintiffs moved that the discovery requests be quashed, and the circuit court granted their motion. The parties then filed cross motions for summary judgment. The circuit court ruled in favor of plaintiffs and against defendant, entering a permanent injunction preventing the collector from enforcing the disputed

rule. The court reversed the injunction because the collector had the authority to make rules for the orderly, efficient, and fair conduct of the annual tax sale.

Outcome
Judgment was reversed. The court reversed a permanent injunction preventing collector from enforcing a disputed rule related to a county tax sale because the collector had authority to make rules for the orderly, efficient, and fair conduct of the annual tax sale.

LexisNexis® Headnotes

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Rem Actions > True In Rem Actions

Tax Law > State & Local Taxes > Administration & Procedure > Collection of Taxes

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Rem Actions > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

Tax Law > State & Local Taxes > Estate & Gift Taxes > General Overview

Tax Law > State & Local Taxes > Personal Property Taxes > General Overview

Tax Law > State & Local Taxes > Real Property Taxes > General Overview

HN1[] **In Rem Actions, True In Rem Actions**

Many procedures are available to an Illinois county collector to secure payment of delinquent property taxes. As a first step the collector generally proceeds in rem and files with the circuit court for judgment in the amount of taxes due plus costs and an order authorizing sale in satisfaction of the judgment. If the circuit court grants its approval, the delinquent property goes to a public auction. *35 Ill. Comp. Stat. 200/21-190* (1996). There, tax buyers who are registered and satisfy a bond requirement bid upon the property. *35 Ill. Comp. Stat. 200/21-220* (1996). The tax buyers pay the judgment and in exchange receive a tax lien on the property.

Business & Corporate Compliance > Contracts > Types of Contracts > Covenants
Contracts Law > Types of Contracts > Covenants

Real Property Law > Estates > Present Estates > Fee Simple Estates

Real Property Law > Deeds > Types of Deeds > Tax Deeds

Real Property Law > ... > Limited Use Rights > Easements > Public Easements

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

Real Property Law > Encumbrances > Restrictive Covenants > Covenants Running With Land

Tax Law > State & Local Taxes > Personal Property Taxes > General Overview

HN2 **Types of Contracts, Covenants**

A person possessing an interest in the property may redeem the parcel within two years of the purchase by the tax buyer. *35 Ill. Comp. Stat. 200/21-345 et seq.* (1996). In order to redeem the property, the person must pay to the tax buyer the judgment along with interest, the tax buyer's costs and a penalty which accrues at six-month intervals. Three to five months before the expiration of the redemption period, the tax buyer may file for a tax deed, which can be granted if the property is not redeemed. The tax deed gives the tax buyer ownership in fee simple subject only to certain exceptions, such as for public easements or covenants running with the land. *35 Ill. Comp. Stat. 200/22-70* (1996).

Criminal Law & Procedure > Sentencing > Forfeitures > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > Collection of Taxes

Tax Law > State & Local Taxes > Personal Property Taxes > General Overview

HN3 **Sentencing, Forfeitures**

At the public auction, the tax buyers bid on the rate of penalty they will take at redemption. The maximum allowable rate is 18% for each six-month period or fraction thereof. *35 Ill. Comp. Stat. 200/21-215* (1996). If there are no bids for a tract at the auction, the property is, in the terminology of the statute, forfeited to the State. *35 Ill. Comp. Stat. 200/21-215* (1996). The term forfeited to the State can be confusing in this context, for title to the parcel does not change hands, and the state does not acquire an interest in the property. When a property is forfeited, this simply means that other collection methods will be employed to collect the delinquent taxes.

Tax Law > State & Local Taxes > Personal Property Taxes > General Overview

Tax Law > State & Local Taxes > Administration & Procedure > Tax Liens

Tax Law > ... > Real Property Taxes > Collection of Tax > Tax Deeds & Tax Sales

HN4 **State & Local Taxes, Personal Property Taxes**

After a property is declared forfeited, it may be disposed of in several ways. First, in a rarely used provision, when the collector determines that the value of the parcel is less than the amount of delinquent taxes, she sells the property and applies any proceeds to the tax bill in a special tax sale. *35 Ill. Comp. Stat. 200/21-225* (1996). Another possibility is that the owner of

the delinquent property may redeem it from the county by paying the judgment and a penalty determined at a rate of 12% annually. Also, a tax buyer may acquire a tax lien with a forfeiture sale. A forfeiture sale is like a purchase at the public auction, except that the penalty rate is set at 12%. The county collector also has the option of proceeding in personam in a civil action against the taxpayer. *35 Ill. Comp. Stat. 200/21-440* (1996).

Tax Law > State & Local Taxes > Personal Property Taxes > General Overview

HN5[] **State & Local Taxes, Personal Property Taxes**

Property more than two years delinquent may go to a scavenger sale. *35 Ill. Comp. Stat. 200/21-260 et seq.* (1996). The scavenger sale resembles the tax sale auction, except that the penalty rates are fixed. The rate is generally 12%, but is lower if the property is redeemed in the first 2 months after the sale. Also, the rate drops after two years at 12%. The buyers bid not on the penalty rate, but instead on how much of the delinquent taxes they are willing to pay. The bidding starts at half of the delinquent taxes or $ 250, whichever is less. Long delinquent property may also be sold at a tax foreclosure sale, *35 Ill. Comp. Stat. 200/21-75* (1996), which operates similarly to a scavenger sale.

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN6[] **Standards of Review, De Novo Review**

Matters of statutory construction, are reviewed de novo.

Tax Law > State & Local Taxes > Personal Property Taxes > General Overview

Tax Law > State & Local Taxes > Sales Taxes > General Overview

HN7[] **State & Local Taxes, Personal Property Taxes**

When the General Assembly authorized the collector to hold an auction, it impliedly gave her authority to deal with problems or difficulties that may arise during the conduct of the sale. While the county collector is a statutory officer, whose powers are circumscribed by statute, the collector has implied authority to make rules for the orderly, efficient and fair conduct of the annual tax sale. Implied authority arises from the fact that a legislative grant carries with it, by implication, the powers necessary to make the grant effective.

Tax Law > State & Local Taxes > Personal Property Taxes > General Overview

HN8[] **State & Local Taxes, Personal Property Taxes**

The power to conduct an auction necessarily carries with it the power to set reasonable ground rules for the auction, provided such rules are not specified by statute.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Governments > Local Governments > Administrative Boards

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Separation of Powers > Legislative Controls > Implicit Delegation of Authority

Governments > Local Governments > Employees & Officials

HN9 **Agency Rulemaking, Rule Application & Interpretation**

Delegation of power to a public official such as the county collector is one of the most common situations in which implied authority is found. The rule of construction which extends a grant of power by implication is most often applied where powers are delegated to public officers or administrative agencies, because those implied powers may involve many functions which are discoverable only through practical experience.

Governments > Local Governments > Employees & Officials

HN10 **Local Governments, Employees & Officials**

Normally, discretionary acts of a public official in exercising his duties are not subject to review by the judiciary in an injunction action. There are exceptions to this rule, such as when the act of the public official is arbitrary or capricious, when fraud, corruption or gross injustice is shown, or when the act is outside the official's authority or unlawful.

Tax Law > State & Local Taxes > Personal Property Taxes > General Overview

HN11 **State & Local Taxes, Personal Property Taxes**

See *35 Ill. Comp. Stat. 200/21-225* (1996).

Tax Law > State & Local Taxes > Personal Property Taxes > General Overview

HN12 **State & Local Taxes, Personal Property Taxes**

See *35 Ill. Comp. Stat. 200/21-215* (1996).

Governments > Legislation > Interpretation

HN13 **Legislation, Interpretation**

In interpreting a statute, the primary goal is to give effect to the intention of the legislature, and the primary source to determine that intent is the language of the statute itself. A statute is ambiguous when it is capable of being understood in different ways by reasonably well-informed persons and thus warrants consideration of other sources to determine legislative intent.

Governments > Local Governments > Finance

Tax Law > State & Local Taxes > Personal Property Taxes > General Overview

Tax Law > State & Local Taxes > Sales Taxes > General Overview

HN14 **Local Governments, Finance**

The purpose of a tax sale is for the county to collect delinquent taxes at the lowest cost of redemption. Furthermore, the object of having a public sale is that there may be competition in bidding.

Tax Law > State & Local Taxes > Personal Property Taxes > General Overview

HN15 **State & Local Taxes, Personal Property Taxes**

Where an officer, in the exercise of a discretionary power, has considered and determined what his course of action is to be, he has exercised his discretion, and his action is not subject to review or control by mandamus; and so careful are the courts of encroaching in any manner upon the discretionary powers of public officials, that if any reasonable doubt exists as to the question of discretion or want of discretion, they will hesitate to interfere, preferring rather to extend the benefit of the doubt in favor of the officer.

Judges: PRESIDING JUSTICE COUSINS delivered the opinion of the court. GORDON and McBRIDE, JJ., concur.

Opinion by: COUSINS

Opinion

[*780] [**249] [**281]** OPINION MODIFIED UPON DENIAL OF REHEARING

PRESIDING JUSTICE COUSINS delivered the opinion of the court:

The plaintiffs are tax buyers at the annual Cook County tax sale. In response to perceived anti-competitive practices among the bidders at the auction, the Cook County treasurer and *ex officio* county collector instituted a rule that properties on which multiple, simultaneous identical bids were made would not be sold at the auction. The plaintiffs brought this action seeking an injunction against the enforcement of this rule. The circuit court granted a temporary restraining order, which this court affirmed without opinion.

The defendant, surmising that the plaintiffs might be guilty of collusion, attempted to discover materials that would support her equitable defense of unclean hands. The plaintiffs moved that **[***2]** the discovery requests be quashed, and the circuit court granted their motion. The **[*781]** parties then filed cross motions for summary judgment. The circuit court ruled in favor of the plaintiffs and against the defendant, entering a permanent injunction preventing the collector from enforcing the disputed rule.

The defendant now appeals, arguing that: (1) the trial court erred in granting summary judgment for the plaintiffs and denying her motion for summary judgment; and (2) the trial court erred in quashing her discovery requests.

BACKGROUND

HN1[↑] Many procedures are available to an Illinois county collector to secure payment **[****250]** **[**282]** of delinquent property taxes. See generally D. Karlen & R. Slutzky, *Tax Collection and Methods of Enforcement,* in Real Estate Taxation (Ill. Inst. for Cont. Legal Educ. 1997). As a first step the collector generally proceeds *in rem* and files with the circuit court for judgment in the amount of taxes due plus costs and an order authorizing sale in satisfaction of the judgment. If the circuit court grants its approval, the delinquent property goes to a public auction. *Rosewell v. Chicago Title & Trust Co., 99 Ill. 2d 407, 410, 459 N.E.2d 966, 967, 76 Ill. Dec. 831 (1984)*; **[***3]** *35 ILCS 200/21-190* (West 1996). There, tax buyers who are registered and (in Cook County) satisfy a bond requirement bid upon the property. *35 ILCS 200/21-220* (West 1996). The tax buyers pay the judgment and in exchange receive a tax lien on the property.

A ***HN2***[↑] person possessing an interest in the property may redeem the parcel within (in most cases) two years of the purchase by the tax buyer. *Ill. Const. 1970, art. IX, § 8*; *35 ILCS 200/21-345 et seq.* (West 1996). In order to redeem the property, the person must pay to the tax buyer the judgment along with interest, the tax buyer's costs and a penalty which accrues at six-month intervals. Three to five months before the expiration of the redemption period, the tax buyer may file for a tax deed, which can be granted if the property is not redeemed. The tax deed gives the tax buyer ownership in fee simple subject only to certain exceptions, such as for public easements or covenants running with the land. *35 ILCS 200/22-70* (West 1996).

HN3[↑] At the public auction, the tax buyers bid on the rate of penalty they will **[***4]** take at redemption. The maximum allowable rate is 18% for each six-month period or fraction thereof. *35 ILCS 200/21-215* (West 1996). If there are no bids for a tract at the auction, the property is, in the terminology of the statute, "forfeited to the State." *35 ILCS 200/21-215* (West 1996). The term "forfeited to the State" can be confusing in this context, for title to the parcel does not change hands, and the state does not acquire an interest in the property. When a property

[*782] is "forfeited," this simply means that other collection methods will be employed to collect the delinquent taxes. 32 Ill. L. & Prac. *Revenue* § 331 (1957).

HN4[] After a property is declared forfeited, it may be disposed of in several ways. First, in a rarely used provision, when the collector determines that the value of the parcel is less than the amount of delinquent taxes, she sells the property and applies any proceeds to the tax bill in a "special tax sale." 32 Ill. L. & Prac. *Revenue* § 336 (1957); 35 ILCS 200/21-225 (West 1996). Another possibility is that the owner of the delinquent property may redeem **[***5]** it from the county by paying the judgment and a penalty determined at a rate of 12% annually. Also, a tax buyer may acquire a tax lien with a "forfeiture sale." A forfeiture sale is like a purchase at the public auction, except that the penalty rate is set at 12%. The county collector also has the option of proceeding *in personam* in a civil action against the taxpayer. 35 ILCS 200/21-440 (West 1996).

HN5[] Property more than two years delinquent may go to a "scavenger sale." 35 ILCS 200/21-260 et seq. (West 1996). The scavenger sale resembles the tax sale auction, except that the penalty rates are fixed. The rate is generally 12%, but is lower if the property is redeemed in the first 2 months after the sale. Also, the rate drops after two years at 12%. The buyers bid not on the penalty rate, but instead on how much of the delinquent taxes they are willing to pay. The bidding starts at half of the delinquent taxes or $ 250, whichever is less. Long delinquent property may also be sold at a "tax foreclosure sale[]" (35 ILCS 200/21-75 (West 1996)), which operates similarly to a scavenger **[***6]** sale.

This case concerns the conduct of the Cook County public tax auction. The plaintiffs are tax buyers who bid in the auction of 1996 tax delinquencies, which **[****251]** **[**283]** commenced in January 1998. There were 8 to 12 bidders participating at any particular time. From the beginning of the auction, for almost every tract offered, all the bidders simultaneously bid 18%, the maximum allowable bid, and then no further bids were made. The normal practice at the auction in the case of identical bids is to award the property to the first bidder. However, since the bids were simultaneous, the auctioneer had no way to determine a winner and was forced to award the property at random.

From January 12 to January 20, 95% of the properties went in this fashion. The penalty rate was bid down in only 5% of the cases. On January 21, the auctioneer made the following announcement:

> "As you are all aware the statute provides that during this sale the property in question shall be awarded to the bidder who bids the least penalty percentage. In accordance with the statute, the following procedure will be implemented.
>
> **[*783]** Only the person offering to pay the amount due on each property for the least penalty **[***7]** percentage will be the successful purchaser of that property.
> No bid shall exceed 18% and if multiple simultaneous bids of the same percentage are made, no one of these bids being the least, none will be accepted.
> If multiple simultaneous bids are received at the same percentage, bidders will be given an opportunity to bid at a lower percentage and if no bid of a lower percentage is received, the property will be forfeited."

After this rule was instituted, only four properties were forfeited due to multiple simultaneous bids. By January 26, 1998, fewer than 1% of the properties sold were for 18% penalty, and in each case there was a clear winning bid. The four plaintiffs filed this action for an injunction to prevent enforcement of the rule. On January 27, 1998, the plaintiffs obtained a temporary restraining order blocking enforcement of the rule. Immediately thereafter the tax buyers resumed making multiple simultaneous bids at 18%. The Cook County treasurer *ex officio* county collector (the collector) appealed the grant of the temporary restraining order, but the appeal was denied without opinion. *Phoenix Bond & Indemnity Co. v. Rosewell,* slip op., No. 1-98-0324, *appeal* **[***8]** *denied* (February 3, 1998).

As an affirmative defense in the action for the permanent injunction, the collector alleged unclean hands on the part of the plaintiffs. The collector sought to discover materials which might indicate collusion on the part of the plaintiff tax buyers. The plaintiffs moved to quash this discovery request and the trial court granted their motion. The court reasoned that the case turned on a narrow issue of statutory interpretation, to which the issue of possible collusion was not relevant.

The parties filed cross-motions for summary judgment. The circuit court ruled in favor of the plaintiffs and against the defendant. The defendant now appeals, arguing that: (1) the circuit court erred in granting the plaintiffs' motion for summary judgment and denying its motion; and (2) the circuit court erred in denying the defendant's discovery request relating to its defense of unclean hands.

ANALYSIS

As the ***HN6***[⬆] matter before us is primarily one of statutory construction, we review *de novo*. *Advincula v. United Blood Services, 176 Ill. 2d 1, 12, 678 N.E.2d 1009, 1015, 223 Ill. Dec. 1 (1996)*. The first question we will consider is whether **[***9]** the collector has general authority to make rules about the auction. The circuit court's view was:

> **[*784]** "The Collector derives his authority from the statutes. The County Treasurer statute is 55 ILCS 5/3 1001 *et seq.* and the Property Tax Code.
>
> But a review of those statutory provisions reveals no authority to promulgate rules. Particularly when tax delinquent **[****252]** **[**284]** property shall be declared forfeited to the state."

The circuit court further stated that "the General Assembly, as I said, could have granted the Collector the authority to deal with problems or difficulties that may arise during the conduct of the sale, but it did not."

In our view, however, ***HN7***[⬆] when the General Assembly authorized the collector to hold an auction, it impliedly gave her authority to "deal with problems or difficulties that may arise during the conduct of the sale." While the county collector is a statutory officer, whose powers are circumscribed by statute *(People ex rel. Lord v. Shrout, 235 Ill. App. 509 (1924))*, we believe the collector has implied authority to make rules for the orderly, efficient and fair conduct of the annual tax sale. Implied authority **[***10]** arises from the fact that "'a legislative grant carries with it, by implication, the powers necessary to make the grant effective.'" *Roesch-Zeller, Inc. v. Hollembeak, 5 Ill. App. 2d 94, 107, 124 N.E.2d 662, 668 (1955)*, quoting *Euziere v. Highway*

Commissioner, 346 Ill. 131, 134, 178 N.E. 397, 398 (1931); People ex rel. County of DuPage v. Smith, 21 Ill. 2d 572, 580, 173 N.E.2d 485, 490 (1961) ("the legislative grant of power carries with it the right to use all means and instrumentalities necessary to the beneficial exercise of the expressly conferred powers"); see also 2B N. Singer, Sutherland on Statutory Construction § 55.04 (5th ed. 1992).

A leading treatise explains the rationale for implied authority thus:

> "The justification for extending the operative effects of statutes by implication and inference is that it is not practical or convenient, perhaps even possible, to specify all of the detailed operational effects that an enacted rule or principle should have in all of the various circumstances to which it may pertain. *** Peripheral matters or matters of minor detail are frequently omitted from specific mention in legislative **[***11]** enactments, and 'if these could not be supplied by implication the drafting of legislation would be an interminable process and the true intent of the legislature likely to be defeated.'" 2B N. Singer, Sutherland on Statutory Construction § 55.02 at 277-78 (5th ed. 1992), quoting Smull v. Delaney, 175 Misc. 795, 801, 25 N.Y.S.2d 387, 395 (1941).

It is our opinion that HN8[↑] the power to conduct an auction necessarily carries with it the power to set reasonable ground rules for the auction, provided such rules are not specified by statute. It was the **[*785]** opinion of the circuit court that such rules were in fact specified in the Property Tax Code (35 ILCS 200/1-1 et seq. (West 1996)).

> "And the tax sale procedures are governed very specifically by the Property Tax Code. As I indicated earlier, see 35 ILCS 200/21-205.
> That covers very specifically the tax sale procedure. So on the one hand we have no rule-making authority, and on the other hand, we have the General Assembly getting very specific as to how this tax sale procedure shall be conducted."

As we read it, however, section 21-205 provides very **[***12]** little detail as to how the sale is to be conducted. It gives the hours for the sale and says that the property will be offered "separately and in consecutive order," and "day to day, until all property in the delinquent list has been offered for sale." 35 ILCS 200/21-205 (West 1996). These minimal guidelines leave a host of decisions about the conduct of the auction to the discretion of the collector.

An example of such a decision would be the rule that when there are multiple, identical *nonsimultaneous* bids, the property goes to the first bidder. This is not the only conceivable way one could handle the matter. One could award the property to the tie bidders randomly or in a predetermined sequence or in some other fashion. Although the rule awarding property to the first of nonsimultaneous tie bidders **[****253]** **[**285]** is not in the statute, the circuit court saw no problem with this rule. In fact, the court thought that the statute required this rule to be applied to the case of simultaneous bids as well:

> "If more than one person bids the same amount, then the auctioneer must make the call as to who was first.
>
> At least this is what the statue requires at **[***13]** this time in the Court's view."

The plaintiffs argue that the first-bidder rule is not only permitted but indeed that it must be applied in this situation, where it is not obviously appropriate. One must remember that the issue before us concerns the situation where the auctioneer *cannot tell* who is first (otherwise, the auctioneer simply awards the property to the first person.) If the auctioneer "makes the call" as to who is first when he or she cannot tell who is first, then the auctioneer is simply guessing. Given that the statute is silent on the point, why should the only permissible solution be to indulge the fiction that the auctioneer, who by hypothesis cannot tell who made the first bid, is awarding the property to the first bidder?

HN9[] Delegation of power to a public official such as the county collector is one of the most common situations in which implied authority is found. "The rule of construction which extends a grant of power by **[*786]** implication is most often applied where powers are delegated to public officers or administrative agencies, because those implied powers may involve many functions which are discoverable only through practical experience." *City of Chicago v. State & Municipal Teamsters, 127 Ill. App. 3d 328, 338, 468 N.E.2d 1268, 82 Ill. Dec. 488 (1984)*; **[***14]** see 2B N. Singer, Sutherland on Statutory Construction § 55.04 (5th ed. 1992). In our view, the calling out in unison of the highest penalty rate for each property by all the participants in the auction is exactly the type of circumstance discoverable only by practical experience for which implied authority is necessary.

HN10[] Given that the collector has general authority to make rules for the auction, we further hold that it was not appropriate to enjoin the rule in question here. "Normally, discretionary acts of a public official in exercising his duties are not subject to review by the judiciary in an injunction action." *Arnold v. Engelbrecht, 164 Ill. App. 3d 704, 707, 518 N.E.2d 237, 239, 115 Ill. Dec. 712 (1987)*. There are exceptions to this rule, such as when the act of the public official is arbitrary or capricious *(Arnold, 164 Ill. App. 3d at 707, 518 N.E.2d at 239*), when fraud, corruption or gross injustice is shown *(Arnold, 164 Ill. App. 3d at 707, 518 N.E.2d at 239*), or when the act is outside the official's authority or unlawful *(Rocke v. County of Cook, 60 Ill. App. 3d 874, 875, 377 N.E.2d 287, 289, 18 Ill. Dec. 134 (1978))*. **[***15]**

We do not regard the actions of the collector as arbitrary or capricious. The circuit court conceded that the collector put consideration into the rule and that the rule seemed to have had the desired effect. It is not unreasonable to think that such a rule would promote competition, which is in accord with the purpose of selling delinquent taxes by auction. *Boynton v. People ex rel. Kochersperger, 166 Ill. 64, 69, 46 N.E. 791, 793 (1897)*. Furthermore, there has been no allegation of fraud, corruption or gross injustice.

The plaintiffs, however, contend that an injunction will lie because the collector's act is unlawful. They argue that the Property Tax Code clearly prohibits the disputed rule. According to the plaintiffs, it is a specific mandate of the statute governing the annual tax sale that, in their words, "properties can only be forfeited if there are no bids." They point to *section 21-225* as the source of this mandate.

> "Forfeited property. Every property offered at public sale, and not sold for want of bidders, unless it is released from sale by the withdrawal from collection of a special assessment levied thereon, shall be forfeited to the State of **[***16]** **[****254]** **[**286]** Illinois." HN11[] *35 ILCS 200/21-225* (West 1996).

Of course, the above provision does not state that *only* property not sold for want of bids may be forfeited. The plaintiffs' interpretation is not necessitated by the plain language of the statute.

[*787] The defendant, for her part, contends that the statute affirmatively prohibits her from selling the property unless there is a single person making a least bid. She points to *section 21-215* as support.

> "Penalty ***HN12***[⬆] bids. The person at the sale offering to pay the amount due on each property for the least penalty percentage shall be the purchaser of that property." *35 ILCS 200/21-215* (West 1996).

The collector's position also is not without difficulties. Previously the collector has without objection awarded property when there are identical nonsimultaneous bids--the property goes to the first bidder. But it seems that this practice too would be unauthorized under the collector's reading of the statute.

HN13[⬆] In interpreting a statute, the primary goal is to give effect to the intention of the legislature, and the primary source to determine that intent is the language **[***17]** of the statute itself. *People v. Davis, 296 Ill. App. 3d 923, 926, 695 N.E.2d 1363, 1364, 231 Ill. Dec. 244 (1998)*. Despite the fact that both parties claim that their reading is mandated by the plain language of the statute, in our view, the statute is ambiguous. A statute is ambiguous when it is capable of being understood in different ways by reasonably well-informed persons and thus warrants consideration of other sources to determine legislative intent. *Davis, 296 Ill. App. 3d at 926, 695 N.E.2d at 1365*.

Implicitly acknowledging that the statute was ambiguous, the circuit court resorted to rules of construction. *People ex rel. Roan v. Wilson, 405 Ill. 122, 90 N.E.2d 224 (1950)*. The circuit court interpreted the statute as prohibiting forfeiture except for a want of bidders based on the maxim "*expressio unius est exclusio alterius,*" meaning that the expression of one thing implies the exclusion of another. *Davis, 296 Ill. App. 3d at 929, 695 N.E.2d at 1366*. In the instant case, since the legislature directed that property be forfeited when there are no bidders, but did not direct that it be forfeited in any **[***18]** other circumstance, the circuit court inferred that this was to be the only time that property could be forfeited. However, we note that this maxim is a rule of construction, not a rule of law, and should never be applied to defeat the purpose of a statute. *Davis, 296 Ill. App. 3d at 929, 695 N.E.2d at 1366*; *Paxson v. Board of Education of School District No. 87, 276 Ill. App. 3d 912, 921, 658 N.E.2d 1309, 1315, 213 Ill. Dec. 288 (1995)*.

HN14[⬆] The purpose of a tax sale is for the county to collect delinquent taxes at the lowest cost of redemption. *In re McKeever, 166 B.R. 648, 650-51 (N.D. Ill. 1994)*. Furthermore, "the object of having a public sale is [] that there may be competition in bidding." *Boynton,* 166 Ill. At 69, *46 N.E. at 793*. Clearly the annual tax sale statute, when it directs that property be awarded to the least bidder, envisions a competitive sale process. If we were to adopt the interpretation urged by **[*788]** the plaintiffs, it would defeat the entire purpose of having a tax auction. If there is no competitive bidding and the auctioneer is handing out properties at a fixed rate, there is no reason to have the **[***19]** auction rather than to proceed directly to forfeiture sales and scavenger sales, where the penalty rates are fixed.

In *People ex rel. Rossiter v. Wagemann, 293 Ill. App. 37, 12 N.E.2d 40 (1937)*, the court considered the question of whether the predecessor to *section 21-225* required the collector to conduct special sales. The portion of this section that was at issue provides that when the county collector makes assessments of property and finds that their value is less than that of the delinquent taxes, he or she is to sell the **[****255]** **[**287]** property and apply the proceeds to the delinquency. *35 ILCS 200/21-225* (West 1996). The plaintiffs in *Wagemann* sought *mandamus* to force the collector to make assessments of delinquent property and hold special sales where appropriate. The circuit court denied *mandamus,* and the appeals court affirmed, holding that the special sale was only one method by which taxing bodies could collect delinquent taxes and that the officer had the discretion to pursue some other remedy if in the judgment of the officer it was a better method of collection. *Wagemann, 293 Ill. App. at 40, 12 N.E.2d at 42*. **[***20]** The court noted:

> "'Where ***HN15***[⬆] an officer, in the exercise of a discretionary power, has considered and determined what his course of action is to be[,] he has exercised his discretion, and his action is not subject to review or control by *mandamus;* and so careful are the courts of encroaching in any manner upon the discretionary powers of public officials, that if any reasonable doubt exists as to the question of discretion or want of discretion[,] they will hesitate to interfere, preferring rather to extend the benefit of the doubt in favor of the officer," *Wagemann, 293 Ill. App. at 39-40, 12 N.E.2d at 41*, quoting *MacGregor v. Miller, 324 Ill. 113, 118, 154 N.E. 707, 710 (1926)*.

Similarly in this case, we believe that in interpreting *section 21-225* the collector must be allowed reasonable discretion in order to promote the statute's purpose.

An important consideration in interpreting this statute is the public policy in favor of redemption of property from tax sales. *Monreal v. Sciortino, 238 Ill. App. 3d 475, 478, 606 N.E.2d 328, 331, 179 Ill. Dec. 496 (1992)*. The right of redemption is guaranteed in the Illinois Constitution **[***21]** (*Ill. Const. 1970, art. IX, § 8*), and redemption is widely recognized as a favored result. *In re Application of the County Treasurer & ex officio County Collector, 301 Ill. App. 3d 672, 675, 704 N.E.2d 910, 912, 235 Ill. Dec. 337 (1998)*; see also 3A N. Singer, Sutherland on Statutory Construction § 66.08 (5th ed. 1992) ("The enforcement and collection of taxes through the sale of the taxpayer's property has been regarded as a harsh procedure, **[*789]** and therefore the policy has been to favor the rights of the property owner in the interpretation of such laws"). But the interpretation urged by the plaintiffs would tend to thwart redemption. If the tax auction is allowed to proceed without competitive bidding, this leads to a higher cost of redemption and, accordingly, fewer redemptions.

As the second district wrote with regard to a related section of the Property Tax code:

> "Our goal in interpreting [the section] is to ascertain and effectuate the legislature's intent, to which the primary guide is the statutory language itself. [Citation.] If that language is unambiguous we apply it straightforwardly. [Citation.] Insofar as we find ambiguity, we construe [the **[***22]** section] liberally, as the law looks with favor on redemptions from tax sales." *In re Application of the County Treasurer,* 301 Ill. App. 3d at 675, 704 N.E.2d at 912.

Since in construing this statute we are to protect the interest of the landowner at the time of the sale *(* Lawton v. Sweitzer, 354 Ill. 620, 627, 188 N.E. 811, 814 (1933)), we interpret it so as to allow the collector to make the rule in question in order to prevent artificially high *(i.e.* not competitively determined) redemption rates.

We are unmoved by plaintiffs' pleas of hardship for themselves. As the 1996 auction was proceeding without the disputed rule, tax buyers would get either the property, probably at a fraction of its value, or a guaranteed annual return on their investment of *at least* 36%. (The rate will probably be somewhat higher, because another 18% penalty is added at the *beginning* of every six-month period.) We do not believe that the intent of the legislature was to grant tax buyers an entitlement to this sort of windfall at the expense of property owners.

[**256]** **[**288]** The plaintiffs assert that the county will suffer from properties being forfeited. Admittedly, **[***23]** the county will suffer if property taxes are not collected. However, we note that the record indicates that during the period that the rule was in effect it resulted in only four forfeitures. Hundreds of properties, by contrast, are forfeited every year at the auction for want of bidders. Moreover, the fact that a property is "forfeited to the State" does not mean that the delinquent taxes will not be recovered. "Forfeited" simply means that the county will attempt a different means of collection. And when all the property sold at the auction is at the highest bid and a lack of competition is evident, it seems entirely reasonable for the collector to proceed to another method of collection, such as a forfeiture sale or a scavenger sale.

CONCLUSION

Accordingly, we reverse the grant of summary judgment for the plaintiffs and order entry of summary judgment for the defendant. **[*790]** Since we find summary judgment is appropriate on the record as it stands, the discovery issue is moot.

Reversed.

GORDON and McBRIDE, JJ., concur.

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Tax Liens and Bankruptcy

An Unappealing Confluence

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Let me tell you how it will be
There's one for you – nineteen for me
Cause I'm the Taxman,
Yeah, yeah, I'm the Taxman
Should 5 percent be too small
Be thankful I don't take it all
Cause I'm the Taxman
Yeah, yeah, I'm the Taxman. ohhh ohhhh.

The Federal Tax Lien

Attachment

The Federal Tax Lien (FTL) arises when any person liable to pay federal tax fails to pay after the Internal Revenue Service (IRS) demands payment. IRC 6321[1]. The lien is a "silent" or "hidden" lien. As between the person liable and the Government, the lien attaches retroactively to the date the tax liability was assessed IRC 6322.

[1] IRC refers to the Internal Revenue Code of 1986, 26 USC 1 et seq.

Duration

The FTL continues in force until the tax liability has been paid or the passage of time renders it unenforceable. The limitation period is typically 10 years from the date of the assessment. IRC 6502. This period could be extended if there is a collection agreement or an agreement to extend the period.
IRC 6502(2)(B). Once the lien attaches to the taxpayer's property, it remains on the property until the property is released. *United States v. Bess,* 357 US 51, 57 (1958).

Notice of Federal Tax Lien

Most bankruptcy practitioners are more familiar with the Notice of Federal Tax Lien (NFTL) than the "secret" lien that attaches on the taxpayer's failure to pay after assessment. When the NFTL is filed, the FTL will have priority over many competing lien interests. The FTL is valid and enforceable against the taxpayer at the time of assessment. However, for it to have priority over subsequent other liens, such as UCC liens, judgment liens, and rights and powers of a bankruptcy trustee or debtor in possession, the IRS must properly file the NFTL.

The NFTL is typically filed at the office where UCC filings are lodged. It is also filed where real estate deeds are filed to be valid against a subsequent bona fide purchaser for value. *See Hanafy v. United States,* 991 F.Supp. 794 (N.D. Tex. 1998). Ultimately, the proper place to file an NFTL is governed by state law and IRC 6323(f). Multiple filings may be required to perfect a Federal Tax Lien properly. Some jurisdictions do not have specific offices designated for filing a NFTL. Massachusetts, Puerto Rico, Guam, the US Virgin Islands, and the Northern

Mariana Islands are the only such jurisdictions. For these jurisdictions, the NFTL will be filed with the United States District Court Clerk for the district in question. Many states have adopted the Revised Uniform Federal Tax Registration Act (RUFTL), pursuant to which NFTLs get filed with the state's Office of the Secretary of State.

Substantial Compliance

Errors in the NFTL may be fatal to the IRS' priority. However, "substantial compliance" will result in the validity of an NFTL, even if there are errors in the form. Errors that might be fatal for a UCC filing may not be fatal for filing an NFTL. *E.g., Kabakjian v. United States,*267 F.3d 208 (3rd Cir. 2001),

NFTL is a Transfer for Bankruptcy Purposes

Whenever a debtor has federal tax liability, check the records of the appropriate filing office to determine if an NFTL has been filed. This is just as important as performing a judgment or UCC search. Schedules cannot be adequately prepared if the practitioner does not know whether liens have attached to the debtor's property. Moreover, if the NFTL is filed less than 90 days before the Debtor's bankruptcy case filing, the filing itself is a transfer. That transfer can be avoided as a preference as it would result in the tax claim receiving more than it would in liquidation. This is particularly true if the tax claim is not a priority tax claim, as might be the case for tax liability that arose more than 3 years before the commencement of the case. 11 USC 507(a)(8). An NFTL filed within 90 days of an order of relief can be avoided as a preferential transfer. *In re Totten*, 82 BR 402

(Bankr. W.D. Pa. 1988). Moreover, the debtor in possession or trustee can avoid even the "secret" unfiled lien under the trustee's strong-arm powers. *Id.* 11 USC 544.

Trustee's Right to Subordinate

In Chapter 7 liquidation, the Trustee has the right to (a) subordinate tax liens for administrative expenses and (b) to subordinate tax penalties to all other unsecured claims. 11 USC 724. Once avoided, the trustee preserves the lien for the benefit of the bankruptcy estate pursuant to 11 USC 551. However, the 9th Circuit Court of Appeals held in *United States v. Warfield (In re Tillman)* that a Chapter 7 trustee could not use the provisions of Bankruptcy Code section 724(a) to avoid and recover for the benefit of the estate and hence, all unsecured creditors, a lien against a debtor's homestead based on tax *penalties* as opposed to tax and interest where avoiding the lien gave rise to an exempt asset in the hands of the Debtor.

Because the debtor had a valid homestead exemption on the property subject to lien, the Ninth Circuit Court of Appeals, in a 2-1 decision, deemed that the exempt portion of the property was no longer property of the estate. Consequently, the trustee could not avoid a penalty tax lien attached to the exempt property. *United States of America v Warfield (In re Tillman)*, 53 F.4th 1160 (9th Cir. 2022) *cert. den.* ___U.S. ____ 144 S.Ct. 1392 (2024).

The dissenting opinion disagreed, stating:

> The IRS contends that a trustee can't avoid a federal tax lien on "exempt" property. Exempt property is generally the piece of the pie that a debtor gets to keep throughout the bankruptcy. However, the Bankruptcy Code creates no exception to the trustee's avoidance power for liens on exempt property. So

> we should have affirmed the trustee's avoidance of the IRS tax penalty lien here.

The Ninth Circuit again addressed section 724 of the Bankruptcy Code in *United States v. MacKenzie (In re Leite),* 112 F.4th 1246 (9th Cir. 2024). In this case, there were both taxes and penalties due to the IRS. The Chapter 7 trustee sold real estate with sufficient proceeds to pay the taxes due but not the penalties. The tax lien arose before bankruptcy.

The tax lien could be subordinated to administrative expenses if there was no other way to cover them. The trustee and the bankruptcy court suggested a pro rata distribution of the proceeds between the trustee and the IRS for both taxes and penalties. The Ninth Circuit disagreed, stating that the tax portion had to be paid first in full from the proceeds but that the penalty portion could then be subordinated so that general unsecured creditors could participate. The homestead exemption was not implicated.

A trustee may frequently administer property solely to satisfy tax claims. The interplay between the Chapter 7 bankruptcy trustee's right to subordinate a federal tax lien to administrative expenses has resulted in conflicts where doing so appears to give rise to a substantial homestead exemption. The IRS takes the position that when this occurs, the FTL nevertheless remains attached to the homestead exemption.

Federal Tax Liens may not be avoided even if it impairs a homestead exemption.

Section 522 of the Bankruptcy Code specifically precludes avoidance of statutory liens even if they impair a homestead exemption. 11 USC 522(c)(2)(B). The FTL is a statutory lien and not a judicial lien. For this reason, it cannot be avoided even if it impairs the homestead exemption. *In re Bingham*, 344 B.R. 648, 650 (Bankr. W.D. Okla. 2006); *In re Morgan*, 2000 WL 1194144 (Bankr. E.D. N.C. 2000) (federal tax liens are statutory liens, rather than judicial liens, even if the underlying tax is subsequently reduced to judgment); *In re Rench*, 129 B.R. 649, 651-52 (Bankr. D. Kan. 1991) (IRS lien is a statutory lien even if notice has not been properly filed); *In re Frengel*,115 B.R .569, 571 (Bankr. N.D. Ohio 1989).

State Law frequently governs the extent to which Federal Tax Liens attach to property.

State law governs the extent of the taxpayer's interests in property. *United States v. Butner,* 440 U.S. 48 (1979). However, once state law determines that the taxpayer has property rights, federal law determines whether these rights are "property" or "rights to property" to which the tax lien attaches. *United States v. Craft,* 535 US 274 (2002).

Married People

Tenancy in Common – The tax lien only attaches to the taxpayer's interest.
Joint Tenancy – The tax lien attaches to the entire property.

Tenancy by the Entireties – The tax lien attaches to the taxpayer's interest even if the tax debt is not a joint debt. *United States v. Craft,* 535 U.S. 274 (2002).

Community Property—The IRS considers this to be complex and refers such matters to area counsel for special treatment.

Beneficial Interests in Trusts

Spendthrift provisions do not protect against a federal tax lien, *Bank One Ohio Trust Co. v. United States,* 80 F.3d 173 (6th Cir. 1996

Exemptions

Exemptions do not protect a taxpayer from FPTL. The only exception is specific Native American Tribal Interests. A fine article concerning the interplay of the FTL and exemptions appears in Steven L. Walker, The Federal Tax Lien and Exemptions: Handling IRS Enforcement of Valid Tax Liens, XLI ABI Journal 5, 20-21, 80-81, May 2022.

Alter Ego or Third Party Transfers

Such transfers are nevertheless subject to the FTL. *Oxford Capital Corp. v. United States,* 211 F.3d 280 (5th Cir. 2000).+

Disclaimers Ineffective

Disclaimers recognized for state law purposes may nevertheless be disregarded in the face of an FTL. *Drue v. United States* 528 US 49 (1999).

Retirement Accounts

The IRS takes the position that retirement accounts that are otherwise exempt under state law will nevertheless be subject to the FTL pursuant to IRC. 6331. *In re Lyons,* 148 B.R. 88 (Bankr. D.C. 1992) and *In re Jones* [99-1 USTC paragraph 50,408], 206 B.R. 614 (Bankr D.C. 1997). However, the bankruptcy court held in *In re Keyes,* 255 B.R. 819 (Bankr. E. D. Va. 2000) that an ERISA-qualified

plan that did not give the debtor the unqualified right to withdraw funds was not subject to the FTL. A careful review of the retirement plan and its attributes is required when confronting an IRS claim that the FTL attaches to the account.

Professional Fees

The IRS takes the position that the FTL attaches to professional fees from pre-petition contingent fee agreements, even where the fee remains contingent on post-petition events such as the grant of a judgment in the client's favor or entry into a settlement. A tax lien attaches to "all property and rights to property, whether real or personal, belonging to" the taxpayer. 28 U.S.C. § 6321. The IRS also asserts that the FTL attaches to post-petition proceeds of pre-petition contingent fee arrangements. *In re Herreras*, 257 B.R. 1, 4-7 (Bankr. C.D. Cal. 2000) (federal tax lien attached to proceeds of the post-petition sale of debtor's cases in progress, including contingent fee cases). Debtors will assert that the lien only attaches to the pre-petition value of such services on a quantum meruit basis.

Prior perfected liens have priority over the FTL

- Prior filed judgment lien
- Mechanic's lien may relate back to inception of lien even if subsequently perfected by notice. ILC 6323(h)(2).
- UCC security interest

Super-priority of Certain Liens.

IRC 6323(b) affords a "super-priority" to certain categories of liens and interests

- Holders of a security interest in a security that did not have actual notice of the FTL
- Purchasers of a motor vehicle
    - Without actual notice
    - Even with actual notice, who has not relinquished possession to the seller-taxpayer or seller-taxpayer's agent
- Purchasers of tangible personal property from the taxpayer
    - At a casual sale – like a garage sale or something one-off
    - Personal property purchased at retail, but not a bulk sale or auction sale
- Personal property subject to possessory lien such as a garageman's lien
- Real estate or other special assessment liens
- Attorney's liens against client-taxpayer recoveries
- Purchase money security interest under the UCC

IRC 6323(c)(2) protects lenders with security interests under commercial transaction financing agreements, provided that the security interest was acquired more than 45 days before the NFTL. This protection to the secured lender does not extend to general intangibles.

IRC 6323(c)(3) gives lenders priority under construction loan agreements; the 45-day rule does not apply in this instance.

IRC 6323(c)(4) affords super-priority interests arising from the issuance of a letter of credit.

Competing State Liens

In general, the lien that is first in time has priority. This depends on whether the competing state lien is sufficiently "choate." The characteristics of "choateness" include these three elements:

- Identity of the lienor
- Property subject to the lien
- Amount of the lien

Absence of any of these elements is fatal to priority over the FTL. *United States v. City of New Britain,* 347 US 81 (1984).

An interesting case involving priority between federal and state tax claims is *In re Gayety Candy,* 625 B.R. 390 (Bankr. N.D. Ill. 2021). In this case, the IRS had filed an NFTL long before the commencement of the debtor's bankruptcy case; however, the State of Illinois claimed liens arising from sales, withholding, and Illinois replacement tax. None of the state's claims were based on any recorded liens. Rather, it asserted paramount rights under the State of Illinois' Bulk Sales statute, imposing successor liability for taxes in the event of a sale of all the taxpayer's assets. In *Gayety Candy,* the trustee sold all of the assets of the estate free and clear of liens with liens to attach to the proceeds, in accordance with Section 363 of the Bankruptcy Code. Since the order of sale was free and clear of all liens, encumbrances, and interests, and since the State's lien, if any, was inferior to that of the IRS, the bankruptcy court held that the FTL was superior to any lien rights or interests the State of Illinois had under the Illinois Bulk Sale Statute.

Conclusion

Federal tax liens are complex. First, the Internal Revenue Code should always be consulted. While state law frequently governs the relative priorities of liens, the Internal Revenue Code can and does provide for super-priorities in many instances. Moreover, the Bankruptcy Code provides for avoidance rights in favor of a Chapter 7 trustee. Practitioners should understand the complexity of federal tax liens in bankruptcy and treat the issue with a high degree of care.

Lien on Me: Mortgages

I. Mortgages are *Voluntary* Liens

A. Definitions

11 U.S.C. § 101(37) The term "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation.

11 U.S.C. § 101(12) The term "debt" means liability on a claim.

11 U.S.C. § 101 (5) The term "claim" means –

(A) right to payment, whether or not such right is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

11 U.S.C. § 101 (13)(A) The term "debtor's principal residence" –

(A) means a residential structure if used as the principal residence by the debtor, including incidental property, without regard to whether that structure is attached to real property; and

(B) includes an individual condominium or cooperative unit, a mobile or manufactured home, or trailer if used as the principal residence by the debtor.

11 U.S.C. § 101(28) The term "indenture" means mortgage, deed of trust, or indenture, under which there is outstanding a security, other than a voting-trust certificate, constituting a claim against the debtor, a claim secured by a lien on any of the debtor's property, or an equity security of the debtor.

11 U.S.C. § 101(50) The term "security agreement" means agreement that creates or provides for a security interest.

11 U.S.C. § 101 (51) The term "security interest" means lien created by agreement.

11 U.S.C. § 101 (54) The term "transfer" means –

(A) the creation of a lien;
(B) the retention of title as a security interest;
(C) the foreclosure of a debtor's equity of redemption; or

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with –
(i) property; or
(ii) an interest in property.

II. Types of Consumer Mortgage Liens

A. First / Primary Mortgages

- A first mortgage is the primary lien recorded on real property.
- Always secured, retains its first-recorded position.
- Treatment in Bankruptcy: Cannot be stripped or modified in Chapter 7 and is subject to anti-modification provisions in Chapter 13 for a debtor's principal residence.

B. Equity Loans (Second / Junior Mortgages, HELOCs)

- Second or junior mortgages secured by a borrower's equity.
- Subordinate to first mortgages; may be fully secured, under-secured, or wholly unsecured.
- Treatment in Bankruptcy:
  - Chapter 7: Not modifiable; debtor remains liable unless discharged.
  - Chapter 13: May be stripped if wholly unsecured per *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000).

C. FHA Partial Claim Mortgages & FHA Payment Supplement Mortgages

- HUD-administered loss mitigation programs to assist delinquent FHA borrowers.
- Creates junior liens with no ongoing payment obligations.
- Treatment in Bankruptcy:
  - Cannot be modified (tied to first mortgage satisfaction).
  - In Chapter 13: These junior liens remain secured but typically remain dormant during repayment plans.

D. Reverse Mortgages

- Available to homeowners 62+ years old.
- No monthly payment obligation, but interest accrues.
- Repayment triggers: Default (non-payment of taxes/insurance) or borrower's death.
- Treatment in Bankruptcy:
  - Retains secured status; cannot be stripped.
  - Potential foreclosure risk if obligations (e.g., taxes, insurance) are not maintained.

III. Treatment of Mortgage Liens in Consumer Bankruptcy

A. Chapter 7 Bankruptcy: Limited Options

1. Liens Survive Bankruptcy:
    - Mortgage debt may be discharged, but the lien remains.
    - If debtor defaults post-discharge, lender can foreclose.
2. Reaffirmation Agreements:
    - A debtor may choose to reaffirm the mortgage to retain ownership.
    - If no reaffirmation is executed, the debtor may continue making payments but risks foreclosure without lender liability.
3. Lien Stripping Not Permitted:
    - *Bank of America, N.A. v. Caulkett*, 575 U.S. 790 (2015), prohibits stripping of wholly unsecured junior liens in Chapter 7:

      A debtor in a Chapter 7 bankruptcy proceeding may not void a junior mortgage lien under §506(d) when the debt owed on a senior mortgage lien exceeds the current value of the collateral if the creditor's claim is both secured by a lien and allowed under §502 of the Bankruptcy Code. *Bank of Am., N.A. v. Caulkett*, 575 U.S. 790, 790, 192 L. Ed. 2d 52, 54, 2015 U.S. LEXIS 3579, *1, 135 S. Ct. 1995.

B. Chapter 13 Bankruptcy: Modification and Lien Stripping Options

1. Retaining Collateral Under 11 U.S.C. § 1325(a)(5)(B)

    - Debtors must stay current on secured mortgage obligations.
    - May require payments to unsecured creditors based on non-exempt equity in the home, or other assets retained.

2. Surrendering the Collateral Under 11 U.S.C. § 1325(a)(5)(C)

    - Allows debtors to walk away from the property without liability for the loan.
    - Lender may pursue foreclosure under applicable non-bankruptcy law.

3. Modification Options for Mortgage Liens in Chapter 13

    a) Anti-Modification Rule for *Principal Residences*

    - 11 U.S.C. § 1322(b)(2): Prohibits modification of mortgages secured solely by The debtor's primary residence.
    - First mortgages on a debtor's primary residence may be maintained, cured and maintained, either directly by the debtor or through a Trustee.

b) Lien Stripping for Wholly Unsecured Junior Mortgages

- Allowed for second/junior mortgages if the property value is less than the senior lien balance.
  - In *In re Roman*, 2015 Bankr. LEXIS 3437, the First Circuit Court of Appeals held that while in chapter 13 cases the anti-modification provision does not apply when the junior lienholder is totally unsecured. *Allende v. United States HUD (In re Allende*), 2021 Bankr. LEXIS 2811, *9-10, 2021 WL 4713534
  - *In re McDonald*, 205 F.3d 606 (3rd Cir. 2000): Chapter 13 plans can strip off wholly unsecured second mortgages.

c) Cramdown for Non-Primary Residence Mortgages

- Applies only to real estate which is not the debtor's primary residence.
  - The plain language of 11 U.S.C.S. § 1322(c)(2) authorizes Chapter 13 plans to modify claims, not just payment schedules. The specific context in which the language is used, and the broader context of the statute as a whole, establishes that Section 1322(c)(2) is best read to authorize modification of claims, not just payments, and therefore that a Chapter 13 plan may bifurcate a claim based on an undersecured homestead mortgage, the last payment for which is due prior to a debtor's final payment under a repayment plan, into secured and unsecured components and cram down the unsecured component. *Mission Hen, LLC v. Lee (In re Lee)*, 655 B.R. 340, 342, 2023 Bankr. LEXIS 2748.
  - The general rule is that a secured claim may be separated under §506(a) into secured and unsecured portions;
  - Section 1322(c)(2) carves out a narrow subset of secured claims "where the last payment of a secured claim on the original payment schedule is due before the date on which the final payment under a debtor's plan is due;
  - For these claims, a debtor may cramdown the mortgage loan under §1325(a)(5)(B). See *In re Lewis*, 607 B.R. 539, 545 (Bankr. S.D. Miss. 2019), *In re Gurnari*, 664 B.R. 104, 108, 2024 Bankr. LEXIS 1763.

IV. Factors Influencing Mortgage Lien Treatment in Bankruptcy

- Debtor's Intentions: Retain or surrender property.
- Property Type: Principal residence vs. investment property.
- Value of Property: Determines eligibility for lien stripping or cramdown.
- Local Rules: Cure and maintain conduit payment jurisdictions vs direct pay by debtors.

Faculty

Hon. Janet S. Baer is a U.S. Bankruptcy Judge for the Northern District of Illinois in Chicago, appointed on March 5, 2012. Previously, she was a restructuring lawyer for more than 25 years and was involved in some of the most significant chapter 11 bankruptcy cases in the country. The majority of her practice focused on the representation of large, publicly held debtors in both restructuring and chapter 11 matters, and she also represented companies in commercial litigation matters, including lender liability, fraud, breach of contract and breach of fiduciary duty. Prior to forming her own firm in 2009, Judge Baer was a partner at Kirkland & Ellis LLP, Winston & Strawn and Schwartz, Cooper, Greenberger & Krauss. She is the current President of the National Conference of Bankruptcy Judges and a Fellow of the American College of Bankruptcy. Judge Baer is a member of the ABI Board of Directors and its Education Committee, and a member of both the National and Chicago CARE Advisory Boards and the Chicago IWIRC Network Board. She also is a frequent speaker for the ABI, TMA, the Chicago Bar Association, IWIRC , CLLA and NCBJ. Judge Baer regularly acts as the presiding judge for the Northern District of Illinois in Naturalization ceremonies both in Chicago and at Great Lakes Naval Station. She received her B.A. from the University of Wisconsin - Madison and her J.D. from DePaul College of Law.

Michelle H. Bass is a partner at Wolfson Bolton Kochis PLLC in Troy, Mich., where she manages its consumer bankruptcy practice group. She represents both debtors and creditors in consumer bankruptcy proceedings and has represented individuals reorganizing under chapter 11, including under subchapter V. She helps with stopping foreclosures, stripping secured liens and cramming down loans on collateral for individuals seeking to reorganize under chapters 13 and 11. Ms. Bass has successfully defended appeals in the Federal Eastern District for the State of Michigan and the Sixth Circuit Court of Appeals. She is a member of ABI, the Detroit Consumer Bankruptcy Association and the Oakland County Bar Association, and she is Board Certified in Consumer Bankruptcy Law. Ms. Bass has been named by *Michigan Lawyer's Weekly* as one of 2019's 30 Women in the Law, by *Crain's Detroit* as one of 2021's Notable Women in the Law, and by *The Best Lawyers in America* from 2023-25 for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law. She also has been consistently recognized by *Super Lawyers* as a Rising Star in Consumer Bankruptcy from 2014-22, as a *Super Lawyer* in Consumer Bankruptcy from 2023-25, and by *Leading Lawyers* from 2023-25 for Individual Bankruptcy Law. Ms. Bass received her B.A. from the University of Michigan and her J.D. from the University of Detroit Mercy School of Law.

Bradley D. Jones is a partner with Stinson LLP in Washington, D.C., where his bankruptcy litigation practice focuses on advising debtors, creditors and trustees of their rights and remedies. His cases span a variety of industries and business sizes. Mr. Jones is an experienced trial attorney and an appointed chapter 11 trustee. He litigates fraudulent-transfer, preference and other recovery disputes in hearings before U.S. bankruptcy courts and defends appeals to district and appellate courts. He also represents parties in commercial disputes outside of bankruptcy. Prior to entering private practice, Mr. Jones was a trial attorney for the U.S. Trustee Program, serving as counsel of record in more than 650 bankruptcy cases representing the U.S. Trustee in cases involving health care, commercial real estate and internet technology matters. He also served as a Special Assistant U.S. Attorney, assisting with white collar criminal prosecutions involving bankruptcy. Mr. Jones is involved in the bankruptcy

bars of the Eastern District of Virginia and District of Columbia, and he has served on the local rules committees in both districts. He is regularly sought out as local counsel for landlords, liquidating professionals and convertible noteholders in nationally prominent bankruptcy cases. Mr. Jones serves on the *amicus* committee of the National Association of Bankruptcy Trustees, advising and filing briefs in support of trustees on nationally important bankruptcy issues. He also maintains an active *pro bono* practice. Mr. Jones is admitted to practice in the District of Columbia and Virginia, before the U.S. Courts of Appeals for the Fourth Circuit and the Ninth Circuit Bankruptcy Appellate Panel, the U.S. District and Bankruptcy Courts for the Eastern District of Virginia, Central District of California and District of Columbia, the U.S. Bankruptcy Court for the Western District of Virginia, and the Virginia and U.S. Supreme Courts. He received his B.S.B. in 2008 from Indiana University and his J.D. in 2011 from the University of Virginia.

David P. Leibowitz is the founder and managing member of the Law Offices of David P. Leibowitz, LLC in Chicago. He also has been a chapter 7 trustee in the Northern District of Illinois for more than 30 years. Mr. Leibowitz represents debtors in consumer and business bankruptcy cases under all chapters of the Bankruptcy Code. He is responsible for precedential decisions in the bankruptcy courts, the Northern District of Illinois and the Seventh Circuit Court of Appeals, as well as the Illinois Supreme Court. Mr. Leibowitz served on the boards of directors of ABI and the National Association of Bankruptcy Trustees, and as co-chair of the ABI task force studying individual chapter 11 cases. He also has co-chaired of ABI's Consumer Bankruptcy Committee and Commercial Fraud Committee. Mr. Leibowitz is an author and editor of the ABI's *Commercial Fraud Manual* and many articles in the *ABI Journal*. He is a frequent speaker at national, regional and local conferences. Mr. Leibowitz is Board Certified in both Consumer Bankruptcy Law and Business Bankruptcy Law by the American Board of Certification. He received ABI's Annual Service Award for having originated and organized the first two years of its annual virtual conference for consumer practitioners, the Consumer Practice Extravaganza (CPEX). Mr. Leibowitz received the Liberty Bell Award in 2010 from the Judges of the 19th Judicial Circuit, Lake County, Ill., for "Outstanding Commitment and Service" for his work in organizing that court's mortgage foreclosure help desk and producing mortgage foreclosure information videos. He also received the Excellence in Pro Bono Service Award in 2006 from the U.S. District Court for the Northern District of Illinois and the Chicago Chapter of the Federal Bar Association. Mr. Leibowitz received his B.A. in economics from Northwestern University and his J.D. *cum laude* from Loyola University of Chicago School of Law, where he was note editor of its law review.

Maurice B. VerStandig is the managing partner of The Belmont Firm in Washington, D.C., and focuses his practice on counseling individuals and companies in all manner of bankruptcy cases. The majority of his practice is focused on representing individuals and companies in the federal bankruptcy courts. Mr. VerStandig has recovered tens of millions of dollars for clients through the formation of consensual plans of reorganization, through contested stay-relief and conversion proceedings, and through adversary claims brought against third parties. He serves as outside bankruptcy counsel to some of the largest and most respected private lenders in the Washington, D.C., metropolitan area, while also maintaining a smaller creditor-focused practice in Florida and Nevada. When not advising secured creditors, Mr. VerStandig has counseled multiple law firms in connection with their own insolvency proceedings, helped a mid-sized manufacturing company efficiently liquidate through the chapter 11 process, guided the owner of a historic apartment complex through bankruptcy, and represented trustees in complex adversary proceedings. He also takes on *pro bono* clients and regularly

advises charities at no cost. Mr. VerStandig is AV-rated by Martindale-Hubbell, is listed as a "Rising Star" by *Super Lawyers* and sits on the local rules committee for the U.S. Bankruptcy Court for the District of Columbia. He regularly appears in courts throughout the U.S. Mr. VerStandig received his B.A. with honors in 2006 from the University of Wisconsin-Madison and his J.D. *cum laude* from the University of Miami School of Law in 2009.