

SC93982

IN THE SUPREME COURT OF MISSOURI

IN THE MATTER OF FORECLOSURE LIENS FOR DELINQUENT TAXES BY
ACTIONS IN REM: COLLECTOR OF REVENUE, BY AND THROUGH THE
DIRECTOR OF COLLECTIONS FOR JACKSON COUNTY, MISSOURI

Respondent,

vs.

PARCELS OF LAND ENCUMBERED WITH DELINQUENT LAND TAX LIENS;
REALTY ACQUISITION, LLC,

Appellant.

On Appeal from the Circuit Court of Jackson County
Honorable Michael W. Manners, Circuit Judge
Case No. I2010-00296

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STATEMENT OF FACTS

This action involves a parcel of real property located in Blue Springs, Missouri (the “Property”). (LF 5). At all times relevant to this action, the Property was owned by Sunnypointe, LLC. (LF 19-20).

In 2006, Beemer Construction Co., Inc. (“Beemer”) was hired to install sanitary sewers, storm sewers and part of the water mains on the Property. (LF 43). In 2007, Seal-O-Matic Paving Company (“SOMP”) was hired to install curbs and asphalt for streets on the Property. (LF 43). When they were not paid, Beemer filed a mechanic’s lien for \$164,879.76 and SOMP filed a mechanic’s lien for \$187,494.80. (LF 43). In accordance with § 429.080, RSMo, both mechanic’s liens were filed with the Clerk of Court for Jackson County, Missouri. (LF 43). Although not required to do so, SOMP additionally recorded a Notice of Claim of Mechanic’s Lien pursuant to § 429.100, RSMo, for \$187,494.80 with the Recorder of Deeds for Jackson County, Missouri as document No. 2007E0155342 on December 7, 2007. (LF 21, 28-31); (A1-4).

On October 26, 2007, an equitable mechanic’s lien foreclosure action under § 429.270, RSMo, was filed – Case No. 0716-CV30716 – wherein Beemer and SOMP (collectively “Respondents”) sought to enforce their mechanic’s liens against the Property. (LF 20). A Consent Judgment was entered in favor of Beemer and SOMP on their mechanic’s lien claims on August 27, 2010. (LF 21). A Final Judgment of Foreclosure regarding the mechanic’s lien claims was then entered on April 12, 2011. (LF 21).

In the meantime, the underlying tax foreclosure action was filed on May 24, 2010, while the equitable mechanic's lien action was still pending. (LF 21-22). The only unpaid taxes involved in the underlying action was the amount of \$341.47 for 2007, which did not become delinquent until after December 31, 2007.¹ (LF 1, 21). A Judgment regarding the delinquent taxes was entered on November 12, 2010. (LF 22). The tax sale then occurred on August 22, 2011, at which time Appellant Realty Acquisition, LLC ("Appellant" or "Realty Acquisition") purchased the Property for \$51,000. (LF 1, 20).

The parties stipulated before the circuit court that no notice of the tax foreclosure action filed in May 2010 or the tax sale that occurred in August 2011 was provided to Beemer or SOMP. (LF 22). As a result, Beemer and SOMP entered their appearances in the tax foreclosure action on November 9, 2011 and opposed confirmation of the tax sale. (LF 7-8). The circuit court agreed with Beemer and SOMP and set aside the tax sale, after which Realty Acquisition appealed.² (LF 155-61).

¹/All taxes were paid up through 2006, meaning that no taxes were delinquent at the time the mechanic's liens were filed or when the mechanic's lien foreclosure action was filed in October 2007. (LF 21).

²/Although the Collector of Revenue for Jackson County (the "County") commenced the underlying tax foreclosure action and is listed as a respondent here, the County has not participated in this appeal.

ARGUMENT AND AUTHORITIES

Respondents challenged the tax sale on two grounds. First, Beemer and SOMP were not provided notice of the tax foreclosure action when it was filed in May 2010 or when the Property was sold in August 2011, which is required under Due Process where – as here – Respondents had (a) properly filed mechanic’s liens and (b) there was a pending mechanic’s lien foreclosure action. Second, the pending equitable mechanic’s lien action was the “exclusive method of litigating liens and other claims pertaining to the particular property” and thus precluded the tax foreclosure action under § 429.300, RSMo. For either of these reasons, the circuit court’s Judgment setting aside the tax sale should be affirmed.

I. THE TRIAL COURT DID NOT ERR IN SETTING ASIDE THE TAX SALE BECAUSE RESPONDENTS WERE DEPRIVED OF DUE PROCESS OF LAW IN THAT – AS MECHANIC’S LIEN HOLDERS – THEY WERE ENTITLED TO (BUT NOT PROVIDED) WRITTEN NOTICE OF THE TAX SALE.

The primary question in this case is whether Due Process requires something more than publication notice to mechanic’s lien claimants who:

- properly and timely filed mechanic’s liens with the Clerk pursuant to § 429.080, RSMo, that were of public record when the tax foreclosure action was filed and the tax sale occurred;
- also recorded a Notice of Claim of Mechanic’s Lien with the Recorder of Deeds that was of public record when the tax foreclosure action was filed and the tax sale occurred; and

- timely filed a mechanic’s lien foreclosure lawsuit pursuant to § 429.170, RSMo, that was also of public record and still pending both when the tax foreclosure action was filed and the tax sale occurred.

As Appellant concedes, there is no question that the owner of the property and a mortgage lien holder are entitled to such additional notice under the Due Process Clause. *See, e.g., Mennonite Board of Missions v. Adams*, 462 U.S. 791, 793 (1983) (Due Process requires that a mortgagee of real property receive notice at its last known address of a tax sale, even though the relevant state statute only required a *mailed* notice only to the *owner* of the property). This brief will discuss why mechanic’s lien claimants – especially those who have already properly filed liens and commenced litigation to enforce the liens – are similarly entitled to such additional constitutional notice. Before doing so, it is important to briefly review the nature and purpose of mechanic’s liens in Missouri.

Mechanic’s liens “give security to mechanics and materialmen for labor and materials furnished in improving the owner’s property.” *R.L. Sweet Lumber Co. v. E.L. Lane, Inc.*, 513 S.W.2d 365, 371 (Mo. banc 1974).³ There is no dispute here that Beemer and SOMP provided labor and materials that improved the owner’s property and are

³/This Court has also routinely held that the Missouri mechanic’s lien laws are remedial in nature and thus should be liberally construed for the benefit of mechanic’s lien claimants. *See, e.g., BCI Corp. v. Charelbois Constr. Co.*, 673 S.W.2d 774, 780 (Mo. 1984).

entitled to mechanic's lien rights against the property. Moreover, as held by Judge Torrence below, the mechanic's lien claims of SOMP and Beemer are actually *superior* to the deed of trust/mortgage under the implied waiver doctrine applicable to construction loans. (LF 46). *See also Drilling Serv. Co. v. Baebler*, 484 S.W.2d 1, 10 (Mo. 1972); *Kranz v. Centropolis Crusher, Inc.*, 630 S.W.2d 140, 147 (Mo.App. 1982). *See also Bob DeGeorge Associates, Inc. v. Hawthorn Bank*, 377 S.W.3d 592, 602 (Mo. banc 2012) (unanimously holding that mechanic's liens have priority and are superior to even a purchase money deed of trust under the so-called "First Spade" rule).⁴ Thus, if a mortgagee/deed of trust holder is entitled to more than publication notice under Due Process, then certainly a mechanic's lien claimant with rights that are *superior* to the owner and the mortgagee/deed of trust holder is likewise entitled to such additional constitutional notice.

A. Constitutional Requirements

As noted above, the United States Supreme Court in *Mennonite Board of Missions v. Adams* held that Due Process requires notice to mortgagees of tax foreclosure sales. In doing so, the Court reasoned that "prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide 'notice reasonably calculated, under all the circumstances, to apprise

⁴/Similarly, under § 429.050, RSMo, a mechanic's lien has "complete priority" over all other encumbrances as to the improvements on real estate. *Bob DeGeorge, supra*, 377 S.W.3d at 598-99.

interested parties of the pendency of the action and afford them an opportunity to present their objections.” 462 U.S. at 795 (emphasis added) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The *Menonite* Court further specifically held that this notice requirement applied to a mortgagee of real property subject to a tax foreclosure sale because “a mortgagee possesses a substantial property interest that is significantly affected by a tax sale.” *Id.* at 798.

Similarly, Beemer and SOMP here – mechanic’s lien claimants with rights that were *superior* to the rights of a mortgagee – were “interested parties” with a “substantial property interest” that was significantly affected by the tax sale. Accordingly, Beemer and SOMP were – like the mortgagee in *Menonite* – entitled to more than publication notice of the tax foreclosure action and tax sale. This Court applied *Menonite* to mortgagees in Missouri in the case of *Anheuser-Busch Employees’ Credit Union v. Davis*, 899 S.W.2d 868 (Mo. banc 1995). See also *In re Foreclosure of Liens for Delinquent Land Taxes by Action in Rem v. Maximilian Investments, LLC*, 190 S.W.3d. 416 (Mo.App. 2006) (notice to mortgagee is required under Due Process principles, even though not specified in § 141.540.5, RSMo).

This Court recently dealt with Due Process requirements in tax foreclosure actions in the case of *Schlereth v. Hardy*, 280 S.W.3d 47 (Mo. banc 2009). In that case, the Court affirmed the circuit court’s conclusion that a notice of redemption rights as prescribed by the statute did not comply with Due Process and was therefore legally deficient. *Id.* at 53. In doing so, the Court discussed and relied on the seminal United States Supreme Court case of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.

306 (1950), as well as the more recent case of *Jones v. Flowers*, 547 U.S. 220 (2006). Specifically, *Schlereth* held that “those who use governmental authority to take property, even in tax delinquency situations, will have to take heed of the notice requirements of the *Mullane* through *Jones* line of constitutional cases.” 280 S.W.3d at 53.⁵ See also *In re Foreclosure of Liens for Delinquent Land Taxes by Action in Rem v. Frey*, 328 S.W.3d 728, 734-35 (Mo.App. 2010) (“Compliance with the technical statutory requirements for providing notice does not relieve the County of its overarching obligation to insure that its efforts to provide notice satisfy the requirements of due process.”).

B. “Burden” on Taxing Authorities

Appellant spends a great deal of time decrying the alleged “burden” on taxing authorities if they are required to search for mechanic’s lien claimants and then provide notice of the tax sale. To quote Shakespeare, Appellant’s argument is “full of sound and fury signifying nothing.”

First of all, a simple search using the free online CaseNet system of “Sunnypointe” (the owner) would have disclosed the filing of mechanic’s liens by Beemer and SOMP in 2007, well before the tax lawsuit was filed in May 2010, as well as the continued pendency of the mechanic’s lien foreclosure lawsuit filed in October 2007.⁶ There was

⁵/In this regard, Judge Wolff held in his unanimous opinion: “For nearly 60 years, *Mullane* has alerted American lawyers that notice provisions prescribed in state statutes may not be constitutionally sufficient.” *Schlereth*, 280 S.W.3d at 52.

⁶/A printout of such a CaseNet search is included in the Appendix at A8.

no need to “incur the expense of obtaining an Ownership and Encumbrance Report” as claimed by Appellant on page 11 of its brief – a simple (and free) CaseNet search would have sufficed here. Similarly, there was no need “to ascertain all conceivable claims and interest in the real property being foreclosed” as claimed by Appellant on page 9 of its brief – only pending mechanic’s lien claimants (with superior claims vis-à-vis both owners and mortgagees/deed of trust holders) that – as Appellant concedes – are entitled to additional notice under the Due Process Clause.

In fact, a search for mechanic’s lien claimants through the free state-wide CaseNet system using any Internet browser is *less onerous* than a search of the records of the Recorder of Deeds. While the records of the office of the Jackson County Recorder of Deeds are available online, that’s not true of many of the other 113 counties in Missouri. Thus, in many instances, a CaseNet search for mechanic’s lien claims will be easier than heading over to the Recorder of Deeds and slugging through what might be non-electronic records.

In any event, the purpose of filing mechanic’s lien statements with the Clerk “is to provide notice to owners and other interested parties” of the claimant’s mechanic’s lien rights. *Schott Elec. Distribs., Inc. v. Mac Elec., Inc.*, 998 S.W.2d 566, 568 (Mo.App. 1999) (emphasis added). Here, the County was certainly an “other interested party” that had notice of the mechanic’s lien claims of Beemer and SOMP (and then pending mechanic’s lien foreclosure action) both at the time the tax foreclosure action was filed in May 2010 and when the tax sale occurred in August 2011. Thus, these filings and claims

by Beemer and SOMP were “readily ascertainable” by the County. *See Mennonite*, 462 U.S. at 800.

Appellant relies heavily on the recent case of *In re Foreclosure of Liens for Delinquent Land Taxes by Action in Rem v. Bhatti*, 334 S.W.3d 444 (Mo. banc 2011), in which the owner of real property sold at a tax sale claimed that he did not receive notice of tax sale or the confirmation hearing. In upholding the sale, a sharply divided Court held that “Owner’s loss of his real estate [was] the result of his multiple acts of negligence.”⁷

Bhatti is distinguishable from this appeal. First, the issue in *Bhatti* involved the *sufficiency* of the notice, not – as here – whether notice was required at all. Here, the parties below stipulated that no notices were ever sent to Beemer and SOMP. (LF 22). Second, *Bhatti* seems to have turned significantly on the owner’s failure to establish a sufficient basis for setting aside the tax sale, even though it appears the owner *could have prevailed* in this regard. Here, in contrast, Beemer and SOMP appeared at the

⁷/Specifically, the majority in *Bhatti* noted that the owner: (a) did not pay his real estate taxes for three years; (b) provided an incorrect address for the purpose of notification of real estate taxes due and never updated his address or filed a forwarding address with the post office; and (c) failed to show that the notice sent to him was “not reasonably calculated to apprise him of the pendency of the action against him” and failed “to present any evidence to the circuit court to prove that the sheriff knew or should have known that the notice sent was ineffective.” *Id.* at 450.

confirmation hearing and properly (and adequately) contested the tax sale. Third, unlike *Bhatti*, Beemer and SOMP did not provide incorrect addresses that would have impeded the delivery of notice to them. *Cf. Schlereth*, 280 S.W.3d 47 (unanimously holding that sending notice of redemption rights to the former property owner by certified mail that was returned unclaimed was insufficient under Due Process).

C. Recording of Notice of Claim of Mechanic’s Lien with Recorder of Deeds

Appellant erroneously claims several places in its brief that Respondents did not file anything with the Recorder of Deeds regarding their claims. That is simply not true.⁸ As Appellant and the County both stipulated before the circuit court, SOMP recorded a Notice of Claim of Mechanic’s Lien with the Recorder of Deeds on December 7, 2007 that included (a) its name (Seal-O-Matic Paving Company), (b) its address (2601 N.W. Tullison Road, Riverside, Missouri 64168), and (c) its interest (a mechanic’s lien in the amount of \$187,494.80), as well as (d) the owner (Sunnypointe, LLC) and (e) a legal description of the Property. (LF 21, 28-31); (A1-4). Therefore, a search of the records

⁸/Appellant makes several misstatements regarding this matter. Specifically, at the bottom of page 8 and top of page 9 of its brief, Appellant states: “Nothing filed in the Recorder’s office or the Collector’s office would reveal the identity of Respondents as actual or potential creditors holding judgment liens or mechanic’s liens affecting the Real Property.” Similarly, Appellant implies on page 6 of its brief that SOMP and Beemer “filed nothing with the Recorder of Deeds Office to reasonably identify itself, its address or its interest”

of the Recorder of Deeds would have disclosed SOMP's mechanic's lien claim in the amount of \$187,494.80. Why, then, was notice not provided to SOMP? Appellant never answers this question.

Did the County search the records of the Recorder of Deeds and find the Notice recorded by SOMP, but just choose to ignore it or neglect to send any notice of the tax sale to SOMP?⁹ Or did the County fail to search the records of the Recorder of Deeds altogether and was completely ignorant of the Notice and claim? Either way, there was no compliance with minimal Due Process requirements.

D. Lis Pendens

Appellant's argument on page 8 of its brief regarding a lis pendens is a red-herring. Specifically, Appellant argues that SOMP and Beemer were obligated to file a lis pendens under § 527.260, RSMo, in order to be entitled to receive notice of the tax

⁹/On page 13 of its brief, Appellant states (without any citation to the Record) that "the taxing authorities searched the Real Estate Records and gave notice to all ascertainable interested parties revealed in those records" That cannot be true. First, there is no evidence in the Record that the County ever "searched the Real Estate Records." If it had, the County would have seen the Notice of Claim of Mechanic's Lien recorded by SOMP on December 7, 2007. Second, the County clearly did not "give notice to all ascertainable interested parties revealed in those records" because – as Appellant and the County stipulated – "No Notices were sent to or received by Seal-O-Matic or Beemer on or before [the tax sale on] August 22, 2011." (LF 22).

sale. First, why would Respondents record a lis pendens when they had already filed mechanic's liens with the Clerk as required by § 429.080, RSMo? A lis pendens is just a notice of a claim against the real estate due to the pendency of a lawsuit, while a mechanic's lien actually creates a lien against the real estate with superior priority to claims by the owner and a mortgagee/deed of trust holder. Therefore, a lis pendens under these circumstances creates nothing that is not already established by the filing of the mechanic's liens by SOMP and Beemer in 2007 – 2½ years before the tax foreclosure case was filed in May 2010 and nearly 4 years before the tax sale occurred in August 2011.

Essentially, Appellant is conceding that the filing of a lis pendens would have required Due Process notice to SOMP and Beemer. Similarly, then, Due Process would also require such notice based on the Notice of Claim of Mechanic's Lien recorded with the Recorder of Deeds on December 7, 2007.¹⁰ Again, this is a case where no notice was provided to Beemer and SOMP at all. (LF 22).

¹⁰/On page 9 of its brief, Appellant cites cases from states other than Missouri that specifically require mechanic's lien claimants to file a lis pendens. However, these cases do not apply here because there is no such requirement in Missouri that a lis pendens be filed when a mechanic's lien is involved. In fact, the mechanic's lien statutes specifically require that mechanic's liens be filed with the Clerk of the Circuit. § 429.080, RSMo (A5). In a recent prominent bankruptcy case involving numerous mechanic's lien claims, Judge Dennis Dow specifically held that the *recording* of a mechanic's lien with the

II. ALTERNATIVELY, THE TRIAL COURT DID NOT ERR IN SETTING ASIDE THE TAX SALE BECAUSE THE COUNTY WAS PROHIBITED UNDER § 429.300, RSMO, FROM BRINGING A SEPARATE TAX FORECLOSURE ACTION IN THAT THERE WAS ALREADY A PENDING EQUITABLE MECHANIC’S LIEN FORECLOSURE ACTION UNDER § 429.270, RSMO.

The Due Process analysis above is completely dispositive of this appeal. Additionally, the setting aside of the tax sale by the circuit court was proper because there was already a pending equitable mechanic’s lien foreclosure action under § 429.270, RSMo (A6).

Under the mechanic’s lien laws, “no separate suit shall be brought upon any mechanic’s lien or claim against said property, or any of it, but the rights of all persons shall be adjusted, adjudicated and enforced in such equitable [foreclosure] suit.” § 429.300, RSMo (emphasis added) (A7). *See also Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 430 (Mo. banc 2003) (“once an equitable mechanic’s lien action is brought, it is the exclusive method of litigating liens and other claims pertaining to particular property”); *Macklind Inv. Co. v. Ferry*, 341 Mo. 493, 399, 108 S.W.2d 21, 24 (1937) (“The equitable mechanics’ lien statute clearly requires that all claims against the real estate involved be determined in the one suit”); *State ex rel. Kirkwood*

Recorder of Deeds (instead of filing it with the Clerk’s office) did not substantially comply with § 429.080, RSMo. *In re Trilogy Dev.* 468 B.R. 854, 862 (Bankr. W.D. Mo. 2011).

Excavating, Inc. v. Stussie, 689 S.W.2d 131, 135 (Mo.App. 1985) (equitable mechanic’s lien statute “assur[es] that interests against the same real estate be adjudicated in one action thereby avoiding inconsistent judgments or promoting a race to foreclose”).

Thus, it was incumbent on the County to intervene under Rule 52.12 (A9) in the pending foreclosure action filed more than 2½ years earlier in order to assert its tax lien rights, not simply file a separate foreclosure lawsuit without providing any notice to the mechanic’s lien claimants. Because it failed to do so, the County was barred from proceeding with a separate foreclosure action, especially – as here – when it wholly failed to notify the mechanic’s lien claimants in the pending lawsuit of the separate tax foreclosure action. Thus, the circuit court may be upheld for this additional reason.

CONCLUSION

For the reasons set out above, Respondents respectfully request that the judgment of the trial court be affirmed.

Respectfully submitted,

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Certificate of Compliance

I HEREBY CERTIFY that I prepared this brief using Microsoft Word 2010 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Rule 84.06(b) and that it contains 3,615 words.

/s/ Robert M. Pitkin
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Certificate of Service

I HEREBY CERTIFY that, on May 6, 2014, I filed a true and accurate Adobe PDF copy of this Substitute Brief of Respondents and its Appendix via the Court's electronic filing system, which notified the following of that filing:

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