

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, 00296

Respondent

v.

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

Appellant

No. SC93982

Appeal from the Circuit Court of Jackson County, Missouri
Honorable Michael Manners

SUBSTITUTE BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

The question raised in this appeal is whether the Jackson County Collector of Revenue is required to provide notice of a foreclosure suit for delinquent real estate property taxes pursuant to R.S. Mo. §141.440 to the holder of a mechanic's lien on the subject property. This case does not involve the construction of the revenue laws of this state; rather, the issue presented is whether due process requires the Collector of Revenue to provide notice of foreclosure or sale to mechanic's lien holders. The due process requirements in tax foreclosure actions have been adjudicated by the Supreme Court in many cases, including *In the Matter of Foreclosures of Liens For Delinquent Land Taxes By Action In Rem Collector of Revenue v. Bhatti*, 334 S.W.3d 444 (Mo. banc 2011). Where the question on appeal involves the application of principles previously established by the Supreme Court respecting the revenue laws of the state, such as delinquent tax foreclosure proceedings, the Court of Appeals has jurisdiction of an appeal involving the application of such legal principles. *Maryville Properties, L.P. v. Nelson*, 83 S.W.3d 608, 610 (Mo. App. 2002); *State ex rel. 401 North Lindbergh Associates v. Ciarleglio*, 807 S.W.2d 100, 102 (Mo. App. 1990). Accordingly, the Missouri Court of Appeals for the Western District of Missouri had original jurisdiction of this appeal. The Court of Appeals issued its Opinion in this matter on December 24, 2013. App. at 2.

On March 25, 2014, this Court ordered the matter transferred on application of the Appellant. App. at 1. Accordingly, jurisdiction of this appeal is proper in the Supreme Court of Missouri.

STATEMENT OF FACTS

This appeal arises from the Final Judgment of the Circuit Court of Jackson County, Missouri, entered on June 4, 2012, setting aside the tax foreclosure sale of a certain parcel of real estate in Blue Springs, Jackson County, Missouri. L.F. at 164-66.¹ At the time of the sale, the computer database of Jackson County, Missouri utilized for the purpose of assessment and collection of real estate taxes reflected that the owner of the Real Estate was Sunnypointe LLC, 2505 SW. 19th Street, #B, Blue Springs, MO 64015. L.F. at 3-5.

In August, 2006, Respondent² Beemer's Construction Company ("Beemer") installed sanitary sewers and storm sewers and water mains on the Real Property. L.F. at 43. In January, 2007, Objector Seal-O-Matic Paving Company ("Seal-O-Matic") installed curbs and asphalt for streets on the Real Property. L.F. at 43. In October, 2007, when their invoices were not paid, Respondents commenced a mechanic's lien foreclosure action against the Real Property. L.F. at 20. Jackson County, Missouri was never joined as a party in the proceedings brought by Beemer and Seal-O-Matic to enforce the Respondents' mechanic's liens. L.F. at 20-21. Neither Beemer nor Seal-O-Matic filed a

¹ The property at issue in this appeal will be referred to as the "Real Estate."

² At the first hearing scheduled on the confirmation of the sale of the Real Estate on November 9, 2011, attorneys for Beemer Construction Company and Seal-O-Matic Paving Company appeared and objected to the confirmation of the sale. L.F. at 6-8.

notice of lis pendens with respect to the mechanic's lien foreclosure proceedings. L.F. at 21.

Jackson County filed a petition to foreclose on the Real Estate for unpaid real estate taxes and served notices of the foreclosure and sale in June and December, 2010, on Sunnypointe LLC at the address listed in the County records [2505 SW. 19th Street, #B, Blue Springs, Missouri]. L.F. at 22. On November 12, 2010, the trial court in the instant action entered a Judgment of Foreclosure of Lands for Delinquent Land Taxes against the Real Property in the tax foreclosure lawsuit. L.F. at 22. The parties stipulated that Sunnypointe received all of the tax foreclosure sale notices sent by the County. L.F. at 22.

Jackson County did not send notice of the tax foreclosure proceedings or sale of the Real Property to Beemer or Seal-O-Matic. L.F. at 22.

On April 12, 2011, a Final Judgment was entered in favor of Beemer and Seal-O-Matic against Sunnypointe and the Real Estate, granting Beemer and Seal-O-Matic the right to sell the Real Estate in the mechanic's lien foreclosure action. L.F. at 21.

On August 22, 2011, the Circuit Court Administrator sold the Real Property to Appellant Realty Acquisition, LLC for \$51,000. L.F. at 1, 22.

On January 6, 2012, the trial court took up the issue of whether the sale of the Real Estate to Appellant should be confirmed, pursuant to R.S. Mo. §141.580. The parties agreed to try the case on a stipulated set of facts. L.F. at 18-23.

Written briefs were presented to the trial court, and, on June 4, 2012, the trial court entered its order setting aside the tax foreclosure sale. L.F. at 164-66.

POINTS RELIED ON

THE TRIAL COURT ERRED IN ENTERING ITS FINAL JUDGMENT ON JUNE 4, 2012, DECLARING THE TAX FORECLOSURE SALE OF AUGUST 11, 2011 NULL AND VOID AND BARRING APPELLANT FROM ASSERTING ANY INTEREST IN THE REAL ESTATE, IN THAT THE TAX FORECLOSURE SALE WAS LAWFUL AND VALID BECAUSE BEEMER CONSTRUCTION COMPANY AND SEAL-O-MATIC PAVING COMPANY WERE NOT DEPRIVED OF DUE PROCESS OF LAW BECAUSE THEY WERE NOT PROVIDED WRITTEN NOTICE OF THE SALE, BECAUSE THE COLLECTOR OF REVENUE IS NOT REQUIRED BY DUE PROCESS TO PROVIDE WRITTEN NOTICE OF A TAX FORECLOSURE SALE TO HOLDERS OF JUDGMENT LIENS OR MECHANIC’S LIENS

In re Foreclosure of Liens for Delinquent Land Taxes by Action in Rem:

Manager of The Division of Finance of Jackson County, Missouri

v. Maximilian Investments, LLC., 190 S.W.3d 416 (Mo. App. 2006)

In the Matter of Foreclosures of Liens for Delinquent Land Taxes By Action

In Rem Collector of Revenue v. Bhatti, 334 S.W.3d 444 (Mo. banc 2011)

R.S. Mo. §141.440

R.S. Mo. §141.580

ARGUMENT

THE TRIAL COURT ERRED IN ENTERING ITS FINAL JUDGMENT ON JUNE 4, 2012, DECLARING THE TAX FORECLOSURE SALE OF AUGUST 11, 2011 NULL

AND VOID AND BARRING APPELLANT FROM ASSERTING ANY INTEREST IN THE REAL ESTATE, IN THAT THE TAX FORECLOSURE SALE WAS LAWFUL AND VALID BECAUSE BEEMER CONSTRUCTION COMPANY AND SEAL-O-MATIC PAVING COMPANY WERE NOT DEPRIVED OF DUE PROCESS OF LAW BECAUSE THEY WERE NOT PROVIDED WRITTEN NOTICE OF THE SALE, BECAUSE THE COLLECTOR OF REVENUE IS NOT REQUIRED BY DUE PROCESS TO PROVIDE WRITTEN NOTICE OF A TAX FORECLOSURE SALE TO HOLDERS OF JUDGMENT LIENS OR MECHANIC'S LIENS

Standard of Review

In reviewing a court-tried case, the appellate court will affirm the judgment of the trial court unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The appellate court must defer to the trial court's factual determinations and view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the judgment, disregarding all contrary evidence. *Langdon v. United Rests., Inc.*, 105 S.W.3d 882, 886 (Mo. App. 2003). "Questions of law, however, are reserved for the independent judgment of the appellate court without deference to the trial court's determination."

Discussion

There is no dispute that due process requires written notice of delinquent real estate tax foreclosure proceedings to the owner, as well as to the mortgage holder of record. *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983)(when the

mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address); *Anheuser-Busch Employees' Credit Union v. Davis*, 899 S.W.2d 868, 869 (Mo. 1995)(a mortgagee, whose interest in the property is publicly recorded, has a constitutionally protected property interest in real estate, and the due process clause of the Fourteenth Amendment to the United States Constitution requires the tax authority to give written notice of a tax sale to a mortgagee by "notice mailed to the mortgagee's last known available address, or by personal service."); *In re Foreclosure of Liens for Delinquent Land Taxes by Action in Rem: Manager of The Division of Finance of Jackson County, Missouri v. Maximilian Investments, LLC.*, 190 S.W.3d 416, 420 (Mo. App. 2006) (“*Maximilian*”).

However, where a person or entity claiming to be aggrieved by the lack of written notice of a tax foreclosure sale has filed nothing with the Recorder of Deeds Office to reasonably identify itself, its address or its interest, a complaint of denial of due process is unavailing. *Maximilian*, 190 S.W.3d at 420-22, where the court observed:

A balance exists between due process and a party's obligation to protect their own property. See *Schwartz v. Dey*, 780 S.W.2d 42, 44 (Mo. banc 1989).[D]uties imposed by due process on the tax collector must be considered in balance with the duty of a landowner to preserve his property. *Id.* In other words, at some point, a property owner's presumptive duty to preserve his property will outweigh the responsibility of a tax collector to provide more extensive forms of notice.

Applying the above, it becomes clear that, in this case, constitutionally sufficient notice only required the County to personally serve notice to Credit Union or send notice to Credit Union's last known address, unless the County had some knowledge that the notice was not likely to reach Credit Union. *Id.*; *Robinson v. Hanrahan*, 409 U.S. 38, 40, 93 S.Ct. 30, 34 L.Ed.2d 47 (1972). The County contends that the address on the deed of trust where notice was sent was the last known address that it had for Credit Union.

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With regard to the County's responsibility to ascertain a delinquent owner's address beyond that recorded on the deed, the court held that Mullane and its progeny do not require the collector to ascertain whether the owner's publicly recorded address is correct: The collector is not required to make impracticable and extended searches ... in the name of due process. Nor is he required to undertake extraordinary efforts to discover the ... whereabouts of [the owner]. *Id.* at 45 (citations and internal quotation marks omitted).

Similarly, in the present case, the County is not required to take upon itself the task that Credit Union urges here by implication. Due process does not mandate that the County investigates whether Credit Union's publicly recorded address is correct, at least not without some advance knowledge that the address of record is wrong. As stated, no evidence was

admitted that the County had knowledge of Credit Union's new address or that Credit Union had actually provided its new address to the County.

Under Schwartz, the County was not required to contact the trustee named on the deed for the purpose of effectuating notice. *Id.* at 44. We do not believe that the filing of a successor trustee indicating only that a name change had taken place is sufficient to make the County aware that the notice of tax sale was unlikely to reach Credit Union, thus rendering it constitutionally insufficient.

Even if the Collector's internal records indicated Credit Union's new address, we do not believe that due process required the County to search those records to see if the mortgagee's name and address had changed.

Respondents concede that no notice of *lis pendens*³ was ever filed with the Jackson County Recorder of Deeds. *L.F.* at 21. Nothing filed in the Recorder's office or

³ R.S.Mo. 527.260 provides: "In any civil action, based on any equitable right, claim or lien, affecting or designed to affect real estate, the plaintiff shall file for record, with the recorder of deeds of the county in which any such real estate is situated, a written notice of the pendency of the suit, stating the names of the parties, the style of the action and the term of the court to which such suit is brought, and a description of the real estate liable to be affected thereby; and the pendency of such suit shall be constructive notice to purchasers or encumbrances, only from the time of filing such notice. The recorder shall

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.

See also: *Schwartz v. Dey*, 780 S.W.2d 42, 44 (Mo. banc 1989).

In the instant case, Respondents did not protect their inchoate lien rights in the subject property by giving notice in the real estate records of that pending litigation. The lis pendens statute affords individuals litigating interests in real property an inexpensive and effective notice mechanism to give notice of potential lien rights in the records of the Recorder of Deeds. Indeed, R.S.Mo. 527.260 provides that such litigants “shall file for record, with the recorder of deeds” a notice of lis pendens. (emphasis supplied).

Many jurisdictions, through similar statutory mandates, require a mechanic's lien claimant file a notice of lis pendens in the office where land records are kept in order to protect its interest in the property from encumbrance or sale. See, e.g. *In re Orndorff Const., Inc.*, 394 B.R. 372, 374 (Bankr.M.D.N.C., 2008); *McNair Builders v. 1629 16th Street*, 968 A.2d 505, 508 (DC, 2009); *VCS, Inc. v. La Salle Dev., LLC*, 293 P.3d 290, 292 (Utah, 2012).

There is no authority for the proposition advanced by Respondents that due process requires the Collector of Revenue to go outside the records of the Recorder and the Assessor to ascertain all conceivable claims and interests in the real property being foreclosed in order to provide adequate and constitutional notice.

note the time of receiving such notice, and shall record and index the same in like manner as deeds of real estate are required to be recorded and indexed.”

Tax foreclosure proceedings are actions in rem. R.S. Mo. §141.400.1. Upon the filing of tax foreclosure proceedings, notice of the pendency of the foreclosure must be published four times, once each week, during successive weeks, in the daily newspaper of general circulation published in the county. R.S. Mo. §141.430. That statute is intended to provide notice to “any person . . . claiming any right, title and interest in or to or lien upon such parcel of real estate” of the pending foreclosure suit, and the need to file an answer in the pending foreclosure suit. There is no claim that the required notice by publication was defective in this matter.

In addition to the notice by publication contemplated by R.S. Mo. §141.430, R.S. Mo. §141.440 provides:

The collector shall also cause to be prepared and sent by restricted, registered or certified mail with postage prepaid, within thirty days after the filing of such petition, a brief notice of the filing of the suit, to the persons named in the petition as being the last known persons in whose names tax bills affecting the respective parcels of real estate described in said petition were last billed or charged on the books of the collector, or the last known owner of record, if different, and to the addresses of said persons upon said records of the collector. The terms "restricted", "registered" or "certified mail" as used in this section mean mail which carries on the face thereof in a conspicuous place, where it will not be obliterated, the endorsement "DELIVER TO ADDRESSEE ONLY", and which also requires a return receipt or a statement by the postal authorities that the addressee refused to

receive and receipt for such mail. If the notice is returned to the collector by the postal authorities as undeliverable for reasons other than the refusal by the addressee to receive and receipt for the notice as shown by the return receipt, then the collector shall make a search of the records maintained by the county, including those kept by the recorder of deeds, to discern the name and address of any person who, from such records, appears as a successor to the person to whom the original notice was addressed.

In this case, it is conceded that notices of the foreclosure petition sale were sent to the record owner by certified mail, return receipt requested, and that the notices were actually received by the owner. L.F. at 22.

In *Matter of Foreclosures of Liens For Delinquent Land Taxes By Action In Rem Collector of Revenue v. Bhatti*, 334 S.W.3d 444, 448-49 (Mo. banc 2011), the Supreme Court rejected the notion that the Collector is obligated to utilize reasonable additional methods of providing notice to parties interested in the real estate beyond reviewing the records of the Recorder and Assessor.

Essentially, Respondents argue that the Collector must incur the expense of obtaining an Ownership and Encumbrance Report to ascertain unrecorded judgment liens and mechanic's liens before filing a delinquent tax foreclosure action, in order to assure that all potentially interested parties receive written notice. This requirement is not an obligation of the Collector required by the statute or the principle of due process.

It is important to note that the Tax Foreclosure Petition was filed on May 24, 2010. L.F. at 21-22. A Judgment of Foreclosure of Lands for Delinquent Land Taxes

against the Real Estate was entered on November 12, 2010. L. F. at 22. Five months later, on April 12, 2011, a Final Judgment was entered in favor of Respondents granting them leave to sell the Real Estate to enforce their mechanic's lien. Even if the Collector had reviewed the records of the Circuit Court on or before the date the Tax Foreclosure Judgment was entered, as Respondents have suggested, there would have been no record in the Circuit Court establishing a valid and enforceable mechanic's lien.

The Opinion of the Court of Appeals mistakenly conflates decisions such as *Armstrong v. United States*, 364 U.S. 40 (1960), holding that the taking provision of the Fifth Amendment prohibits the government from taking the lien rights of a mechanic without compensation with the holdings, such as *Maximilian*, which hold that the right to notice of a tax sale requires the balancing of the duties of the taxing authority to undertake a reasonable search of the real estate records to identify potential claimants with the responsibility of mechanic's lien holders to exercise diligence to protect their interests. The "taking" clause of the Fifth Amendment prohibits the taking of private property for public use without just compensation. In *Armstrong*, the Department of the Navy took a partially-completed ship without compensating known mechanic's lien claimants. The Supreme Court simply held that this was an unlawful taking of a property right without reasonable compensation.

Appellant does not argue that inchoate mechanic's lien rights are not property rights. Rather, Appellant's position is that the duty of the tax collector to give notice of a tax foreclosure sale does not extend to searching records outside the real property records

of the County. The Due Process Clause of the Fourteenth Amendment does not require extraordinary efforts to discover valid interests in property from all possible sources.

The Court of Appeals concluded that the definition of a property interest is broader under the Fourteenth Amendment than the property interests protected by the “taking” clause of the Fifth Amendment. This concept does not support the conclusion that the duty to give due process notice equates with the obligation to compensate known property owners before taking property.

In the instant case, the taxing authorities searched the Real Estate Records and gave notice to all ascertainable interested parties revealed in those records, and gave public notice of the tax foreclosure sale by publication. The fact that the Collector did not search the Circuit Court records is simply not a violation of the due process requirement of the Constitution. There must be some reasonable limit on the burden placed on the public authority. We submit the holdings in **Maximillian** and **Bhatti** support a reversal of the Judgment.

Finally, it should be noted that the Appellant, Realty Acquisition, purchased the Real Estate on August 11, 2011, for \$51,000. L. F. at 1. The actually tax collected was less than \$350, and a balance of over \$50,000 of the purchase price remains to be claimed by those asserting an interest in the Real Estate—in this case, the Respondents.

R.S. Mo. §141.580 contemplates that confirmation of a tax sale may be denied if an objector establishes that the sales price was inadequate. Neither Beemer Construction Company nor Seal-O-Matic Paving Company argued that the sales price was inadequate. Rather, their only argument before the Circuit Court was that they were denied due

process because of the absence of written notice to them of the foreclosure proceeding and sale. If, as Respondents apparently concede, the sales price was adequate, Respondents have suffered no harm from the alleged violation of due process.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the judgment of the trial court be reversed, and the case remanded with directions to the trial court to enter an order confirming the delinquent tax foreclosure sale.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 15, 2014, a copy of the foregoing Brief of Appellant was electronically filed using the Court's electronic filing system, which provides service upon the following registered attorneys for the Respondents, as follows:

Ryan Curtis Westhoff, Attorney for Respondent Beemer Construction Company

Ryan Tyson Fry, Attorney for Respondent Seal-O-Matic Paving Company

/s/ Michael J. Gallalgher

RULE 84.06(c) CERTIFICATION

Undersigned counsel hereby certifies that this brief complies with the requirements of rule 86.04(b) because the brief contains 3,614 words as determined by the word processing program Microsoft Word 2010.

/s/ Michael J. Gallagher