

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 REPLY BRIEF OF APPELLANT

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SUBSTITUTE REPLY BRIEF OF APPELLANT

Summary

Respondents offer two arguments on appeal: (i) notice to mechanics' lien claimants of a petition for sale of real property for delinquent taxes is required by due process, Resp. Br. ¹ at 5-8; and (ii) commencement by the mechanics' lien holders of an equitable action to determine lien priorities pursuant to R.S. Mo. §429.270, et seq., precludes an action by Jackson County under the Land Tax Collection Act, R.S. Mo. §141.210 to 141.810, because the County should have intervened in that action. Resp. Br. at 14.

Appellant is aware of no case, and Respondent has cited no case, supporting the proposition that a collector of revenue is required to go outside the records of the collector's office and the records of the recorder of deeds, as the applicable statute requires, to ascertain potential claims which require written, mailed notice by due process principles. With the limited exception of recorded mortgages, no court has held or suggested that the Constitution requires the collector to examine public real estate records in order to provide notice of tax foreclosure to potential lien claimants.

In an even more extreme argument, Respondents contend that the Jackson County Collector of Revenue is required to examine Circuit Court filings in mechanics' lien enforcement actions in the county and intervene in such actions involving property which may result in delinquent real estate tax foreclosures.

¹ Respondents' Substitute Brief will be referenced as "Resp. Br."

Respondents suggest that no action is available to the Collector, other than intervention in the mechanics' lien enforcement action, for collection of delinquent taxes.

In the instant case, Respondents took no action whatsoever to protect their putative interest in the subject property. The most basic duty of parties with an "interest" in property is a proactive assurance that the taxes on that property are being paid.² With full appreciation for the fact that Jackson County collects real estate taxes on the subject property, Respondents waited four years before taking any action to apprise the Collector of their interest in the property. Respondents seek to impose a significant burden on a publicly funded office to protect their own interest, by imposing on the Collector the obligation to examine the records of the Circuit Court in order to protect Respondents from tax foreclosure actions on the property in which they claim an interest.

Due Process Requirements of Notice to Mechanics' Lien Holders

Respondents concede that there is no dispute that the Director of Collections for Jackson County, Missouri (the Collector") complied with all the statutory requirements of notice pursuant to R.S. Mo. §141.210 to 141.810. Respondents Brief at 2-3. However, without supporting authority, Respondents

² There is a reason lending institutions rely on escrow deposits to keep property taxes paid. Diligent protectors of property interests are vigilant in assuring that taxes are paid on the property in which they have an interest.

argue that they are “owners” of the subject property on which the Collector sought to foreclose, by virtue of the Notices of Mechanics’ Liens filed with the Circuit Court Administrator.

It is important to note that the Respondents had no rights in the property at the time the Collector’s Petition seeking foreclosure for delinquent taxes was filed on June and December, 2010. LF at 22. Respondents did not obtain a judgment enforcing their mechanic’s’ liens until April 12, 2011. Due process requires that notice be given only to parties who have an enforceable interest at the time of the commencement of foreclosure proceedings. There is no continuing duty to ascertain parties in interest following the commencement of the action. See, *Kornblum v. St. Louis County, Mo.*, 48 F.3d 1031, 1037 (8th Cir. 1995), where the Court observed:

The Due Process notification requirement protects the individual's opportunity to be heard, but will not place impossible or impractical obstacles in the way of the State's interest in bringing issues to a final settlement. *Mullane*, 339 U.S. at 313-14, 70 S.Ct. at 656-57. Further, the type of notice required for a particular interested party depends on whether the party is "reasonably identifiable." *Mennonite Bd.*, 462 U.S. at 798, 103 S.Ct. at 2711. The Due Process clause, which requires notification and hearing prior to actions affecting interests in property, necessarily anticipates a lapse of time between notice of a hearing, and the execution of any action taken

subsequent to the hearing. Thus, as a practical matter, whether a party is "reasonably identifiable" must relate back to reasonable identifiability when notification is given, at the commencement of an action, not when the subsequent action is taken; any other result creates the impossible burden of predicting the future.

Respondents argue that mechanics' liens are "superior" liens, more important than mortgages and deeds of trust, and are entitled to even more due process than the common mortgage. Resp. Br. at 5. In support of that position, Respondents cite *Drilling Service Co. v. Baebler*, 484 S.W.2d 1 (Mo. 1972); *Bob DeGeorge Assocs., Inc. v. Hawthorn Bank*, 377 S.W.3d 592, 599 (Mo. 2012); and *Kranz v. Centropolis Crusher, Inc.*, 630 S.W.2d 140, 149 (Mo. App.W.D. 1982). None of these cases supports the argument that there is anything superior about a mechanic's lien. Rather, each holds that deeds of trust filed before the work on the property begins are senior to subsequent mechanic's liens, but lenders with actual knowledge of the work commencing on the property may be deemed to have waived their priority by acquiescence in the improvements to the property in which the lender had an interest. See, e.g. *Drilling Services Co., supra* 484 S.W.2d at 10 (Prudential knew that the employment of subcontractors and workmen was contemplated, and that mechanics and materialmen whose labor and materials were to create the improvements might be expected to file mechanics liens against the property if their bills were not paid).

To support its position that an entity which has filed a Notice of Mechanic's Lien under the statute in the Circuit Court is entitled to notice of tax foreclosure, Respondents rely principally on *In re Foreclosure of Liens for Delinquent Land Taxes by Action in rem v. Frey*, 328 S.W.3d 728 (Mo. App. 2011). Nothing in *Frey* deals with the issue of whether due process requires notice to claimants in a pending action to enforce mechanics' liens.

The *Frey* case involved an undelivered notice to an owner. The County itself sought to set the tax foreclosure sale aside, asserting that it had an incorrect address in its records. Nonetheless, the Court of Appeals remanded the case to the trial court to determine whether the Collector could have reasonably ascertained the correct address from its records. Nothing in *Frey* supports Respondents' position.

Indeed, a mechanic's lien may only be enforced when all of the statutory requirements for perfecting a mechanic's lien have been completed. Until judgment, the holder of a potential mechanics lien claim has merely an expectancy. See: *Teerling Landscaping, Inc. v. Chicago Title and Trust Co.*, 649 N.E.2d 538, 544, 271 Ill.App.3d 858 (Ill.App. 2 Dist., 1995), where the Court of Appeals noted:

Plaintiff's reliance on Mullane and Mennonite is also misplaced because the interests in those cases were already perfected when notice by publication was made, while in this case plaintiff's interest

was not yet perfected. A mechanic's lien is only valid if each of the statutory requirements is scrupulously observed.

Next, Respondents cite *Schlereth v. Hardy*, **280 S.W.3d 47 (Mo., 2009)**, for the proposition that compliance with statutory notice provisions in tax foreclosure matters may be insufficient. Resp. Br. at 6-7. *Schlereth* addressed the question of whether a taxing authority must do more than send notice by certified mail where the certified notices are returned. Judge Wolff observed:

Was the certified mail method of notice "substantially less likely to bring home notice than other of the feasible and customary substitutes?" It is undisputed that the tax collector and Schlereth knew Hardy's correct address. Under *Jones*, the least that could be expected is that a regular-mail letter be sent; if not returned, the sender could presume that it was received where there is no question about the correctness of the address.

280 S.W.3d 51-52. Plainly, in *Schlereth*, the taxing authority was fully aware of the correct address of the party interested in the subject property. Nothing in that decision addresses or resolves the issue of whether notice to an unknown mechanic's lien claimant is required by due process.

Respondents argue that the filing of Seal-O-Matic's Notice to the Owner recorded with the Jackson County Recorder of Deeds [L.F. 28] is notice of the filing of mechanic's liens. It is not. First, only Seal-O-Matic filed the owner's notice; Beemer Construction filed nothing with the Recorder. More importantly,

R.S. Mo. §429.110 is merely a substitute method of serving the owner with the notice required by R.S. Mo. §429.100 of intent to file a subcontractor's mechanic's lien when the owner is a nonresident or conceals himself from service. Filing a notice with the recorder of deeds is only permitted when "the owner of the property so sought to be charged shall not be a resident of this state, or shall have no agent in the county in which said property is situate, or when such owner shall be a resident of the state, but conceals himself, or has absconded, or absents himself from his usual place of abode, so that the notice required by section 429.100 cannot be served upon him." R.S.Mo. §429.110. There is no showing in this case that the requirements for filing under §429.110 were met.

More importantly, notice under §429.100 is not a notice that a mechanic's lien has been filed in the Circuit Court. Rather, it is notice to the owner of the potential for a lien filing if the debt is not paid. Respondents argue incorrectly that *Schott Elec. Distributors, Inc. v. Mac Elec., Inc.*, 998 S.W.2d 566, 68 (Mo. App. 1999), holds that notice under §429.100 is intended to give notice to "interested parties", such as taxing authorities, of the pendency of a mechanic's lien. That is not the purpose of a §429.100 filing. The Court in *Schott* held:

The purpose of RSMo section 429.100 "is to afford a property owner notice of outstanding claims of sub-contractors so that he may withhold payment from his direct contractor and thus avoid double payment." *BCI Corp. v. Charlebois Const. Co.*, 673 S.W.2d 774, 781 (Mo. banc 1984).

Respondents argue that the ease with which access to Circuit Court records may be obtained through Case.Net belies Appellant's argument that additional searches outside the Recorder's records would be burdensome. First, public access to the circuit court records through Case.Net is not public access to the actual filings in circuit court. Under Supreme Court Operating Rule No. 2, Public Access to Records of the Judicial Department, only 15 categories of data are available, none of which provides access to the actual filings. Rule 2.04. Access to the actual records in any particular case is available through Case.Net only to registered users under Court Operating Rule No. 27. Registered users must be attorneys admitted to practice in Missouri or admitted *pro hac vice*. Supreme Court Operating Rule 27.03(b). Moreover, as noted in the Case.Net website, "[t]he information available on Case.Net is provided as a service and is not considered an official court record."

If the use of Case.Net to find mechanics' liens is required, the taxing authority must engage an attorney to conduct the search in every tax foreclosure action, a significant and additional expense added to each case. The additional cost of the Case.Net search requirement Respondents suggest is not insignificant, and a change in the burdens imposed on the taxing authority, if wise, should be effected by the Legislature by amending the Land Tax Collection Act, R.S. Mo. §141.210 to 141.810.

Appellant is not aware of any case where a court has required a taxing authority to go outside the land records to find information about addresses of

owners or other interested parties as a requirement of due process. If this Court should impose that additional requirement just because a Case.Net search is “easy,” must the taxing authority also use the Secretary of State’s website to obtain current entity status and addresses, because that too is easy? Google searches could also be utilized to obtain relevant data. It is respectfully submitted that the requirements of reasonableness should not be engrafted with exponential expansion of the due process concept to require use of the information available on the internet in delinquent tax foreclosure proceedings.

Respondents dismiss the significance of the recent holding of this Court in *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), claiming that *Bhatti*’s holding that that the Collector is not 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. Respondents suggest that the land owner in *Bhatti* was negligent by (i) failing to pay his real estate taxes for three years, (ii) failing to provide the collector with his correct address, and (iii) failing to provide evidence that the taxing authority knew or should have known the notice sent was ineffective.

In the instant case, Respondents (i) failed for three years to monitor the tax records to assure that “their property” was not delinquent in real estate taxes; (ii) failed to provide the collector with information showing their interest in the property, (iii) failed to show that their very existence as claimants to the subject

property was known to the taxing authority at the time the tax foreclosure proceeding was initiated and (vi) failed to protect their interests by filing a notice of *lis pendens*. In Respondents' view, they bore no responsibility to protect their property from delinquencies in taxation.

It is respectfully submitted that the holding in *Bhatti* is dispositive of this case, because the taxing authority provided all the due process required by law.

Respondents assert in the Statement of Facts that the mechanics' liens total over \$350,000, perhaps suggesting that the purchase price of \$51,000 in the foreclosure sale at issue here was an inadequate price. The Land Tax Collection Act requires a minimum bid for foreclosed property to be 50% of the appraised value of the land of one of three parcels. The parcel of property involved in this litigation is just a small portion of the property on which Respondents claim mechanics' liens. Compare, (i) the property on which the lien claim is asserted, which consists of three parcels of land [L.F. 21 and 28] with (ii) the property description of the property foreclosed in the delinquent tax proceeding, which is only one parcel [L.F. 1]. Respondents simply do not rebut the argument that they suffered insignificant, if any, harm from the foreclosure action. See, Appellant's Substitute Brief at 13 and R.S.Mo. §141.130. 1.

Foreclosure Barred by Failure to Intervene

In addition to arguing that the Collector is required to search beyond the records in the Recorder of Deeds office and the tax records to ascertain potential interested parties in a tax foreclosure action, Respondents claim that the Collector

must also peruse the records of the Circuit Court for the purpose of intervening in any mechanics lien actions involving real estate which may subsequently become the subject of tax foreclosure actions. Respondents assert that once their action under R.S. Mo. §429.270 was commenced, all other claims against the real estate had to be asserted in that action or be forever barred. Under Respondents' reasoning the Collector's office must intervene in every civil action to enforce a mechanic's lien in the County, or be forever precluded from pursuing a delinquent tax claim for failure to intervene.

It is conceded that the Respondents joined the City of Blue Springs in their action to enforce mechanics liens, but failed to join the Jackson County Collector. The Respondents would impose on the Collector the Respondents' own obligation to ascertain and join interested parties in a proceeding under R.S. Mo. §429.270 under the holding in *State ex rel. Erbs v. Oliver*, 237 S.W.2d 128 (Mo. 1951).

Respondents cite R.S.Mo. §429.270 and *Dunn Indus. Group v. City of Sugar Creek*, 112 S.W.3d 421 (Mo. banc 2003); *Macklind Inv. Co. v. Ferry*, 108 S.W.2d 21, 341 Mo. 493 (Mo., 1937) and *State, ex rel. Kirkwood Excavating, Inc. v. Stussie*, 689 S.W.2d 131 (Mo. App. 1985) and for the proposition that the County had an affirmative duty to intervene in the mechanics' lien proceedings initiated by Respondents. Respondents assert that having failed to intervene, the tax foreclosure action was a nullity.

In *Dunn*, this Court held that one of the mechanic's lien claimants may proceed to arbitration, rather than litigate in the action in which all the lien

claimants had been joined. 112 S.W.3d at 430-31. *Dunn* does not hold or suggest a duty on the part of other litigants to intervene in a mechanic's lien suit. *Macklind* involved a second suit initiated to enjoin the sale of property in a mechanic's lien suit by a party who was given notice of the mechanic's lien suit by the mechanic's lien claimant. The second suit was dismissed and the appeal arose from that dismissal. This Court held a second suit to enjoin the sale should have been brought in the mechanic's lien suit itself. *Macklind* provides no support for Respondents' position.

Respondents rely on the concurring opinion of Judge Smith in *State, ex rel. Kirkwood Excavating, Inc. v. Stussie, supra*, to assert the unsupportable contention that it is the obligation of those with competing claims to the subject property to intervene in a pending mechanic's lien suit or be barred from future actions. In fact, Judge Smith observed:

Minimal due process should require that before the equitable lien suit can serve as a bar to a non-lien claimant, he should be joined as a party and notified of the existence of the suit and its impact on him. *Griffin v. Griffin*, 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. 635 (1946); *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The burden of such joinder should be upon the property owner or other party which reaps the benefit of the bar from the equitable lien judgment.

689 S.W.2d at 135-36.

Conclusion

For the foregoing reasons, Appellant suggests that this Court should reverse the decision below and remand for entry of judgment confirming the delinquent land tax foreclosure sale at issue in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 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:

Jacqueline A. Sommer, Attorney for Respondent Manager of the Division of Revenue of Jackson County, Missouri

Robert T. Pitkin, Attorney for Respondent Seal-O-Matic Paving Company

Ryan Tyson Fry, Attorney for Respondent Beemer Construction Company

/s/ Michael J. Gallagher

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 3211 words as determined by the word processing program Microsoft Word 2010.

/s/ Michael J. Gallagher