

BURR ALERT

Hop, Skip and Jump Through the Thorns of Justice

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Every so often, we might not realize that, by our actions, we are doing exactly what the opposing party wants us to do. Perhaps we do not have an appropriate amount of time for each and every decision to consider 'the forest' for the 'trees' or in this case, we might assume that our aggression will make the opposing party feel the 'thorns' of justice. With this in mind, here are a few points that judgment creditors should consider in Florida before they decide to throw 'Burr' rabbit into the proverbial 'briar patch.'

A) Hopping Over a Junior Lien Holder

A day before the foreclosure sale, a third party purchases a final judgment of foreclosure ("Foreclosure Judgment") from a senior lien holder that filed the foreclosure lawsuit. Pursuant to equitable subrogation, the third party obtains all rights, interests and claims of the senior lien holder. The Foreclosure Judgment purchased by the third party extinguishes any claims of all junior lien holders, right? Wrong.

Prior to the enactment of § 45.0315, Fla. Stat., under the common law in Florida, the granting of summary final judgment of foreclosure to a party eliminated any junior lien holder interests. Now, under the statute, a junior lien holder's interest cannot be extinguished before the issuance of a certificate of sale.

As noted by the Third District Court of Appeal in Florida on March 5, 2013, if the foreclosure judgment self-extinguished any interest held by the junior mortgage holder, any excess funds from the sale would go to the debtor owner of the underlying property; instead, the first senior lien position should transfer to the second, which would allow the surplus funds to be received by the junior lien holder. See AG Group Investments, LLC v. All Realty Alliance Corp., 2013 WL 11712 (Fla. 3d DCA). (where a third party purchased a final judgment of foreclosure a few days before the scheduled foreclosure sale, then three (3) years later sued on its equitable lien for foreclosure arguing that the prior junior lien holders were extinguished by the final judgment of foreclosure). Because there was no certificate of sale issued and filed with the circuit court in the prior foreclosure action, the trial court in *AG Group Investments* erred in its finding that the junior lien holder held no interest in the subject property.

B) Skipping By a Third Party Defendant

A final judgment of foreclosure contains a general reservation of jurisdiction. The general reservation of jurisdiction allows a Plaintiff to file a supplemental complaint for re-foreclosure in that same action if the Plaintiff inadvertently 'skipped' over a third party defendant, right? Wrong.

In general, a trial court loses jurisdiction when it renders a final judgment if the time allotted for altering, modifying or vacating the judgment has expired; *unless* the court retains jurisdiction to the extent that it is specifically reserved within the final judgment, provided for by statute or included in a rule of procedure. On February 13, 2013, the Third District Court of Appeal for Florida held that the circuit court lacked subject matter jurisdiction over a re-foreclosure proceeding. See Ross v. Wells Fargo Bank, 2013 WL 514558 (Fla. 3d DCA).¹ The Third District Court of Appeals noted that the original final judgment contained only a general reservation of jurisdiction: “The Court retains jurisdiction of this action to enter further Orders that are proper including, without limitation, writs of possession and deficiency judgments.” This language failed to retain jurisdiction to allow a supplemental complaint for an omitted party post-judgment. In permitting such a supplemental post-judgment proceeding, the trial court acted in the absence of jurisdiction. As a consequence, orders granting leave to Wells Fargo to file a supplemental complaint to add the third party defendant, dismissing the re-foreclosure for lack of prosecution and vacating that dismissal, each were considered a nullity.

As a practical matter, creditors should seek an updated title policy prior to the entry of a final judgment of foreclosure to ensure that no other activities occurred to the subject collateral or real property in question. In *Ross*, the Third District Court of Appeal noted that its decision was without prejudice regarding Wells Fargo’s ability to file a separate foreclosure action against the previously omitted defendant.

C) Jumping Past Tax Certificates

Creditors must concern themselves with drop dead dates for any outstanding tax certificates (Ad Valorem taxes) associated with collateralized property in default of a loan or in foreclosure. Assume the following items were outstanding on a creditor’s collateral:

- 1) Individual Tax Certificate 2010 – 241652.0000. Face Amount \$14,084.49 – Bid 7.25%. Holder 0060437.
- 2) Individual Tax Certificate 2011 – 243891.0000. Face Amount \$14,081.06 – Bid 7.00%. Holder 0060568.
- 3) Real Estate – Reminder – 2553.0000. Ad Valorem & Non-Ad Valorem Assessments Owed By April 30, 2012 - \$13, 318.00

Thus, the total outstanding obligation owed is \$41,483.55. As a creditor, what should you pay? Will you, as a creditor, get notice of the application for the tax deed? What if you, as a creditor, did not get notice of the sale of the tax deed? You still may claim an interest, right? Wrong.

Chapter 197 entitled “Tax Collections, Sales, and Liens” addresses the Ad Valorem Property Tax deadlines, assessments, deferrals, prepayments and other issues of interpretation and construction

¹ After filing a foreclosure action and obtaining a final judgment of foreclosure, Wells Fargo Bank filed a motion for leave to file a supplemental complaint asserting a cause of action for re-foreclosure against the original defendant and attempting to add a new, third party defendant. The circuit court granted Wells Fargo’s motion for filing a supplemental complaint then later vacated its order and dismissed the re-foreclosure for lack of prosecution. The third party defendant included by the supplemental complaint appealed the trial court’s order vacating the dismissal of the re-foreclosure and reinstating the re-foreclosure action, arguing that the trial court was without subject-matter jurisdiction to permit the post-judgment re-foreclosure action to proceed.

associated with the purchase of a tax deed. The holder of a tax certificate may apply for a tax deed at any time after two (2) years have elapsed since April 1 of the year of issuance of the tax certificate (and before the seven (7) year cancellation of the same) with the tax collector of the county where the property is described and located.² Consequently, the creditors should confirm payment of the 2010 Tax Certificate or pay to redeem it before March 31, 2013.³

Upon receipt of an application for a tax deed⁴, the clerk for the county shall publish a notice once each week for four (4) consecutive weeks at weekly intervals.⁵ Additionally, the clerk of the tax collector's office shall notify the clerk of the circuit court that payment has been made for all outstanding tax certificates and obligations or, if the tax certificate is held by the county, that all appropriate fees have been deposited, so that the clerk of the court may properly notify by registered mail, return receipt requested (or by registered mail if outside of the continental United States), the persons listed in the "tax collector statement."⁶

A separate notice from the clerk of circuit court shall be mailed at least twenty (20) days prior to the date of sale of the tax deed; however, *if no address is listed in the tax collector's statement, then no notice shall be required.*⁷ The form of the notice for the clerk of the circuit court is included in the statute, but the failure of anyone to receive notice as provided by Fla. Stat. § 197.522 shall not affect the validity of the tax deed issued pursuant to the notice.⁸ Thus, lack of notice does not affect the validity of the legal or equitable title of the tax deed.

After all notices have been delivered by the clerk of the court, Florida Statutes § 197.542 (2012) entitled "Sale at Public Auction" requires that the tax deed be sold at public auction to the highest bidder. Each bid must include all tax certificates in existence together with delinquent taxes accrued subsequent to the filing of the tax deed application. This public auction may be conducted online and an electronic tax deed may be issued similar to foreclosure sales. The high bidder shall post with the clerk a non-refundable deposit of five (5) percent of the bid or \$200, whichever is greater, at the time of the sale, to be applied to the sale price at the time of full payment. If full payment of the final bid and of documentary stamp tax and recording fees is not made within twenty-four (24) hours, excluding weekends and legal holidays, the clerk shall cancel all bids, re-advertise the sale as provided in this

² See Florida Statute § 197.502 entitled "Application for Obtaining Tax Deed by Holder of Tax Sale Certificate; Fees." Pursuant to § 197.482 Fla. Stat. (2012), a tax certificate does not expire until seven (7) years after the first day of the tax certificate sale as advertised under § 197.432, Fla. Stat. (2012).

³ The calculation occurs every four (4) years because of the timing of the issuance date of Ad Valorem Taxes (January 1st), the Assessment Date (November 1st), the Delinquency Date (April 1st) and the date tax collectors may begin selling tax certificates (June 1st).

⁴ See § 197.502 Fla. Stat. (2012).

⁵ The newspaper selected must follow § 197.402. See also § 197.512(1), Fla. Stat. (2012) entitled "Notice, Form For Obtaining Tax Deed By Holder." No tax deed sale shall be held until thirty (30) days after the first publication of the notice. Id.

⁶ Pursuant to § 197.502(4) this would include legal title holders of record, lien holders, mortgagees, vendees, etc., that an application for a tax deed has been made.

⁷ See § 197.522 Fla. Stat. (2012).

⁸ See § 197.522(d), Fla. Stat. (2012).

section, and pay all costs of the sale from the deposit. Any remaining funds must be applied toward the opening bid.

Creditors should confirm the address for notice purposes with the clerk of the Tax Collector's office so that the "tax collector statement" for any upcoming tax deed sale by public auction will ensure that the mandatory notice from the clerk of the circuit court - sent by certified mail, return receipt requested - goes to the appropriate address. On receipt of Notice, the Bank should immediately pay the tax deed applicant prior to the auction.⁹ If necessary, the creditor may purchase the tax deed through an electronic auction.¹⁰

So before you hop, skip, or jump past your next creditor issue, give 'Burr' rabbit a call. It just might keep you out of a sticky situation.

For more information, contact:

[Joseph T. King](mailto:jking@burr.com) in Tampa at (813) 367-5750 or jking@burr.com
or the Burr & Forman attorney with whom you regularly work.

No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.

⁹ See § 197.472(1), Fla. Stat. (2012) entitled "Redemption of Tax Certificates" ("Any person may redeem a tax certificate at any time after the certificate is issued and before a tax deed is issued or the property is placed on the list of lands available for sale. The person redeeming a tax certificate shall pay the tax collector the face amount plus all interest, costs, and charges.")

¹⁰ The holder of a tax deed may file a separate action to quiet title pursuant to Florida Statute § 65.081. The limitations period for taking action against the holder of a tax deed is addressed by Florida Statutes §§ 95.191 and 95.192. Specifically, when a tax deed has been issued to any person under § 197.552 for a period of four (4) years, no action may be brought by the former owner of the property or any claimant under the former owner. Indeed, the Florida Bar Executive Committee for Real Property, Probate and Trusts revised the Uniform Standard Guidelines for tax titles under Chapter 15.