

New York Court of Appeals: No Due Process Violation Where Municipality Fails To Give Property Owners Notice of Buyback Rights in a Tax Lien Foreclosure Sale

6 April 2012

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On February 21, 2012, New York state's highest court unanimously refused to extend due process protection to property owners challenging a tax lien foreclosure sale on grounds that they did not receive notice of their repurchase rights. Consequently, New York property owners, who were unapprised of their repurchase rights, will be unable to challenge the foreclosure on that basis. In *Matter of the Foreclosure of Tax Liens by Proceeding in Rem Pursuant to Article Eleven of the Real Property Tax Law, by Orange County Commissioner of Finance v. Helseth*, 2012 NY Slip Op 01324 (Ct. App. Feb. 21, 2012), the Court of Appeals held that a couple's due process rights were not violated when Orange County took possession of their two-acre lots without informing the couple directly of the opportunity under a local law to repurchase the property "back from the County through the release of the County's interest" (the "release option"). *Id.* at *2.

Defendant-property owners, the Helseths, purchased a four-acre parcel of land in Orange County in 1997. They subdivided the parcel into two-acre lots and constructed a home on one of the lots, while the other lot remained unimproved. In 2000, the Helseths sold the lot with the house and relocated to an apartment on Amity Road. The Helseths relocated again in 2002, and placed the unimproved lot for sale. In 2004, the Helseths learned that they were still receiving mail at the Amity Road address, including a real property tax bill. The Helseths made two attempts to correct their address with the county: (1) filing a change of address form and (2) directly informing the Orange County Commission of Finance. Starting in 2006, the Helseths stopped paying taxes on the unimproved lot, and that November, the county filed a list of delinquent tax parcels that included the property. In October 2007, the county commenced a tax lien foreclosure on the property. The county gave notice of the foreclosure action by (1) publishing the notice in five newspapers for three nonconsecutive weeks over a two-month period; (2) posting the notice at offices of the Department of Finance, the Orange County Clerk, and the Orange County courthouse; and (3) mailing the notice by regular first-class mail and certified mail to the Helseths' prior Amity Road residence.

The Helseths did not answer, exercise their redemption right, or otherwise appear in the foreclosure action, resulting in a default judgment of foreclosure, which conveyed title to the county of the unimproved lot. Subsequently, the county sent a letter by certified mail, return receipt requested, to the Amity Road address, notifying the Helseths that the county had acquired title and advised the Helseths of the release option. The letter was returned as “not deliverable as addressed.” *Id.* at *3.

The Helseths learned of the foreclosure action through their real estate broker, and, failing to obtain a temporary restraining order staying the property auction, appeared at the auction to submit the winning bid. However, the Helseths failed to remit the remaining balance and the county auctioned the lot to another party.

As an initial matter, the Supreme Court and the Appellate Division, as well as the Helseths, agreed that the county provided adequate notice of the foreclosure action. At issue was whether the county provided sufficient notice, to satisfy constitutional due process, of the release option offered under local law. Both lower courts concluded in the negative on the basis that the county “was obligated to take reasonable steps to ascertain a correct address for the [Helseths] .” *Id.* The Court of Appeals disagreed.

The Helseths primarily relied on *Jones v. Flowers*, 547 US 220 (2006) for the proposition that repeated notice during a foreclosure is required to satisfy a property owner’s due process rights. The Court of Appeals distinguished *Jones* on the facts because in that case, the public tax sale constituted a government taking that required reasonable due process. In contrast, the release option in the instant case was “not the underlying taking or an extension of such action, but a subsequent, optional measure” offered after the county had lawfully foreclosed and already obtained title. *Id.* at *5 (emphasis added). The court reasoned that the release option was merely a courtesy and “did not establish or extend a property right entitled to due process protection ...” *Id.*

Accordingly, the Court of Appeals reversed the Appellate Division’s order permitting the Helseths to exercise the release option.

In sum, it seems New York property owners will be unable to rely on due process arguments to challenge notice deficiencies related to redemption and buyback rights, arising from a tax lien foreclosure. Parties and their counsel should consider structuring their pleadings to contend that



the redemption right was the underlying taking, or an extension of the foreclosure, meriting due process protection.

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