Bond Case Briefs

Municipal Finance Law Since 1971

Florida Banks and Mortgage Servicers: Claims Following Tax Deed Sales Must Now be Filed Early

While banks and other mortgage holders have recently been obtaining windfalls on dormant mortgages, recent changes to Florida Statute Section 197.582 will require early filing of claims following tax deed sales.

What does this change mean?

The new rules apply the same procedure to tax deed sales that now apply to ordinary foreclosure sales: lienholders must make a timely post-sale administrative claim or it's lost. The new amendments still require administrative notice to go to all lienholders. From there, recipients have "120 days from the date of the notice to file a written claim with the clerk for the surplus proceeds." Fla. Stat. § 197.582 (3). The most important change, however, is that "[e]xcept for claims by a property owner, claims that are not filed on or before close of business on the 120th day after the date of the mailed notice as required by Section 197.582(2), are barred. A person, other than the property owner, who fails to file a proper and timely claim is barred from receiving any disbursement of the surplus funds." Fla. Stat. § 197.582(5).

What do banks and servicers need to know about the new system?

Under the new system, the clerk still has the right to institute an interpleader action in the case of competing claims, but this is likely to occur much less often, because competing claims will appear less often because many will be barred by the failure to file a timely administrative claim. Fla. Stat. § 197.582(6). While the legacy procedures will apply for a short while longer, the new statutory bar applies to "tax deed application filed on or after October 1, 2018." 2018 Fla. HB 1383 § 4. This change does not allow mortgagees to passively await a clerk's interpleader action, as they might have in recent years. If they fail to institute new procedures to monitor and respond to notices related to tax deed surpluses, they will lose and the owners, who long ago defaulted on the record, will get the last laugh, as they do not face the same 120 bar as lienholders and could obtain the entire surplus for themselves.

Background on Florida's tax deed surplus law

In the deepest depth of the economic crisis of 2008–2012, many banks and mortgage servicers in Florida abandoned their residential foreclosure lawsuits, often dismissing a case before, or even after, a final judgment was obtained. Frequently, economics dictated the course. More than being merely undersecured—"upside down"—certain assets were negative value when the cost of repairs, taxes, curing code violations and past-due homeowners' assessments were taken into account. Under these circumstances, a successful foreclosure would be a Pyrrhic Victory at best.

Following dismissals, the moribund, defaulted mortgages remained public records and valid liens. They provided an opportunity for compensation to the mortgage holder if the homes were ever sold. In the meantime, homeowners often remained in their homes, because Florida is a "lien theory" state, where the homeowner's rights of ownership and possession usually continue until the

finalization of a foreclosure.

The “free house” deal usually came to an end. When homeowners stop paying their mortgages, they typically defaulted on tax obligations as well. The normal procedure is straightforward. After paying past due taxes, outside investors obtain tax certificates, which can be sold at a judicial sale after two years; the winning bidder obtains the property through a tax deed. The tax deed wipes out nearly all other liens, including first position mortgages and homeowners association liens. *See A to Z Props. v. Fairway Palms II Condo. Assoc.*, 137 So. 3d 453 (Fla. 4th DCA 2014)

After the tax certificates and accrued interest are paid at the tax deed judicial sale, the remainder is deemed a tax deed surplus. The mortgagee (or other lienholders) historically were entitled to that tax surplus in their order of lien priority; their liens, which formerly attached to the property, now attached to the surplus, while the property itself would be owned free and clear by the winning bidder.

Historically, when there were competing liens in a property generating a tax deed surplus, parallel and slightly contradictory mechanisms were set in motion for asserting lien rights. Initially, the tax collector was supposed to send out notice of the surplus to all the known and possible lienholders, who would then file a claim within 90 days. Fla. Admin. Rule 12D-13.065(4). However, in the case of competing liens—including overlapping mortgages, judgment liens, and homeowner association lien claims—the clerk of the court was obliged to begin an interpleader action and send notice again to the lienholders.

In these lawsuits, regardless of whether or not a claim had earlier been filed, lien priority controlled. *See generally DeMario v. Franklin Mortg. & Inv. Co., Inc.*, 648 So. 2d 210, 214 (Fla. 4th DCA 1994) (holding that in spite of failure to file administrative claim, mortgagee “as superior lienholders, their claim must be recognized and they are entitled to the excess proceeds of the tax sale.”); *Kerr v. Broward Cnty.*, 718 So.2d 197 (Fla. 4th DCA 1998). This lien priority rule allowed lienholders to obtain recompense, even though they had not responded within the 90 day administrative claim filing deadline and may have otherwise sat on their rights for many years.

The changes to the statute now require swift action at the administrative level in order to secure the benefits of the rising housing market.

Adams and Reese LLP

byChristopher A. Roach

August 20, 2018