

Tax Resales: Invisible and Invincible Liens That
May Be Surviving The Sale

By: Kraettli Q. Epperson

Introduction

Because of certain "invisible" and "invincible" liens, anyone considering acquiring title to real property located in Oklahoma through a County-held Tax Resale auction should "think twice" before bidding high enough to offer either the "assessed" value or the fair market value. (68 O.S. §§ 3125 et seq) Legislative reform in this area is long overdue.

Such Tax Resales are conducted by every County Treasurer in June each year to sell lands with delinquent ad valorem taxes owed on them to satisfy the taxes. A Tax Resale is held only if the earlier initial Tax Certificate Sale (held over two years earlier in October) resulted in the County acquiring a Tax Certificate on the property and if the delinquent owner failed to redeem the property in the following two years. The County would acquire the initial Tax Certificate only if no third party placed a bid on the tract. (68 O.S. §§ 3101 et seq; especially § 3108)

Notice Risk

A prospective buyer should "think once" because of the uncertainty as to whether the County Treasurer met the statutory and constitutional notice requirements at both the initial Tax Certificate Sale, and the subsequent Tax Resale. Even slight irregularities in the notice portion of these sale proceedings have frequently been used by the Courts to invalidate a Tax Resale Deed. (*Boone v. Claxton*, 269 P.2d 980 (Okla. 1954); *Jenkins v. Frederick*, 208 Okla. 583, 257 P.2d 1058 (1952); *Lawrence v. Ayres*, 206 Okla. 218, 242 P.2d 142 (1952); *Allgood v. Wetsel*, 275 P.2d 317 (Okla. 1954); *City of Tulsa v. Edwards*, 111 Okla. 251, 239 P. 572 (1925).

Therefore, in order to confirm the adequacy of the notices given during the tax sales, the successful completion of a separate court action to quiet title in the tax deed holder, after the Tax Resale, continues to be a necessity before a knowledgeable new buyer or lender will be willing to

buy any interest which is based on a Tax Resale Deed.

Invisible and Invincible Liens

A prospective buyer should "think twice" before bidding high enough to reach either "assessed" or fair market value, because there are several types of seemingly "invisible" liens that might not be discovered during the title search leading to the giving of actual notice, and there are also several other types of liens that arguably are "invincible" because their formidable holders (e.g., the FDIC) claim their interests survive such tax sale, even if the lienholders receive actual notice in advance. A quiet title suit cannot be used to defeat a holder of an unextinguished lien, if the lienholder has a senior lien and chooses to fight.

There are 4 sets of liens that might be "invisible" or "invincible", which include: (1) State Liens, (2) City Liens, (3) FDIC Liens, and (4) "Personal" Liens.

By State statute, the minimum bid at a Tax Resale must be for a sum equal to the lesser of either (a) the total of the taxes, penalties, interest and costs (i.e., the "Taxes Due") or (b) 2/3 of the County-computed "assessed value". (68 O.S. § 3129) However, when a third party computes their maximum bid, such bid will need to be reduced by the amount of any liens which will survive the Tax Resale. This reduction might reduce the "net" value to "zero". Therefore, a prospective buyer would be willing to buy the tract only if it is available for "nothing".

However, the common current practice is for the Counties to continue to offer all the tracts with no disclosure or representation as to whether they are free of liens or are so heavily encumbered as to be worthless to any buyer. It is likely that the tracts which are sold and are heavily encumbered will be neither properly maintained nor fully developed to their highest potential, and, therefore, such tracts will probably be abandoned and again go into the pool of properties available at a later tax sale. Surely, the creation of strong incentives favoring the permanent abandonment of useable property was not the legislature's original intent, nor is that

result in the public's best interest.

However, until the tax sale procedures are reformed (a) to allow tax deed holders to avoid the delay, expense and uncertainty arising from the need to conduct quiet title suits after every tax sale, and (b) to allow tax deed purchasers to buy the land free of all claims, it appears that the bidding at tax sales will continue to be "chilled" (i.e., dramatically reduced) because of the known and unknown risks involved including the "invisible" and "invincible" liens.

State Liens: An Invincible Lien

The State's position is that, by statute, lands sold to pay for delinquent ad valorem taxes at a Tax Resale are sold subject to all mortgages and other liens (e.g., tax or judgment liens) held by the State of Oklahoma. 68 §§ 3118 & 3142. Apparently, unlike other lienholders, the State cannot be forced to buy the property to protect its own lien. An additional argument for the continuation of such State liens after a tax sale is found in the Oklahoma Constitutional provisions prohibiting the forgiveness of any debts owed to the State. (Ok. Const. Art. 5, § 53)

Therefore, any prospective buyer should avoid bidding on a tract with a State lien on it where the amount of the Taxes Due, plus the State's lien, exceeds the property's fair market value.

City Liens: An Invisible Lien

According to existing State statutes, certain City taxes will become a lien on the specific real property causing the tax to arise. (11 O.S. § 22-111(A)(6); -112(3) & (5), and -112.1(C)(4) & (C)(7)) This lien arises from three forms of city nuisance abatement taxes, i.e., weed removal taxes, dilapidated-building-removal taxes and boarding-and-securing taxes. Under the existing statutes, the County is obligated to act as the collection agent for a City and must include the amount of any such "certified" City taxes in the next available tax sale held by the County.

If the amount of the City taxes is included in the notice of the Tax Resale, the City liens will be extinguished. Otherwise, the City tax lien will arguably survive the tax sale. If the City lien is

left unpaid, the land will be sold again by the County. This City lien can turn a marginally profitable venture into a loser.

F.D.I.C. Liens

The federal government has, upon occasion, enacted statutes or rendered Court decisions exempting itself from the impact of Oklahoma's statutes which would otherwise affect real property interests held by the federal government. (28 U.S.C. §§ 3001-3008, Federal Debt Collection Procedure Act: creates a 10-year dormancy rule for money judgments from federal courts in favor of federal entities, in spite of a 5-year Oklahoma rule under 12 O.S. § 735; and USA v. Ward, 985 F.2d 500 (10th Cir. 1993): allowing in rem foreclosure of a mortgage made under a federal program, even when the debt is unenforceable due to the lapse of time, in spite of 42 O.S. § 23)

In this same vein, the FDIC has drafted and adopted a formal policy statement ("FDIC Statements of Policy", page 5359), arguably based upon a federal statute (i.e., 12 U.S.C. § 1825(b)), which policy declares that no forced sale of real property or an interest therein (e.g., at a tax or execution sale) shall affect any title or interest of the FDIC in that tract, whether held in its corporate or its receivership capacity. The FDIC claims that this rule applies unless (1) it is served with notice, and (2) it expressly consents to the sale.

Consequently, a prospective buyer of land at a Tax Resale should confirm, in advance of making a bid, that the FDIC received notice of the tax sale and that there is written evidence in the County Treasurer's file that the FDIC gave its affirmative consent to the sale.

"Personal" Liens

The "title check" made by the County Treasurer needs to identify those "interest holders" entitled to receive actual notice of an upcoming County ad valorem Tax Resale, including any non-tract-specific liens. A lien holder's interest is not extinguished, if it is not notified of the proposed sale. (68 O.S. § 3127)

Both the Internal Revenue Service ("IRS"), and judgment lien holders of all types, file written "statements" in the land records which identify the debtor, but not the targeted real property. (IRS: 26 U.S.C. § 6323(f)(1)(A)(i); and Judgments: 12 O.S. § 706) Such a filing imposes a lien upon all of the debtor's recorded land holdings in that County, and the filing gives the world notice of such lien claim. If the County Treasurer fails to locate such "personal" liens which are filed against either the current title holder, or the previous title holders, the unsuspecting tax deed purchaser is subject to losing the lands to an immediate foreclosure to satisfy an IRS or judgment lien. Unless the statute of limitations has run, these overlooked non-tract-specific liens will survive the tax sale and will present paramount claims which can be eliminated only by making full payment or by reaching a settlement agreement.

Conclusion

Tax Resales conducted by Counties in the State of Oklahoma are theoretically supposed to result in the purchaser acquiring "an absolute and perfect title in fee simple", free and clear of all prior claims of interest. (68 O.S. § 3131)

Instead, claimants from all three levels of government, as well as private judgment lien claimants, will not only block the Tax Resale Deed holder from completing a subsequent sale or securing a loan, but they will be able to foreclosure their lien claims, asserting that the Tax Resale was conducted "subject to" their claim.

In order to have a workable ad valorem tax collection system, the sale process must be reformed by the State Legislature to create a system which will (a) give actual notice to all possible claimants, preserving written evidence of such notice including the FDIC's assent, (b) ensure the land is sold for close to its fair market value to increase the funds raised to pay tax claimants and to treat the delinquent taxpayer fairly, and (c) ensure the land is sold free and clear of all claims, with the claimants shifting their search for payment to the fund generated by the sale.

In the absence of such reforms, it will continue to be accurate to declare:

"No tax deed, be it certificate deed, resale deed or Commissioners deed, standing by itself, ever constitutes a basis for merchantable title." ["Manual of Tax Titles", at 5, William J. Crowe (_____)]

C:\WP51\KQEPAPERS\TAXRESALE.PA1

(Last revised: June 27, 1995)