

## **INTRODUCTION**

The lien divestiture process is initiated by a sale of real property, usually a court ordered judicial sale or a statutory tax sale. The most common real estate sales are conducted by the various sheriffs in the 67 counties in Pennsylvania and are known generically as Sheriffs Sales. Most of the properties sold for mortgage and judgment defaults are processed through the Sheriff's Office. These sales are usually held monthly in the courthouse by the county sheriff. A listing of the properties being sold is available by contacting the sheriff's office or, more recently, by checking online listings posted by the sheriff. The sheriff's sale process is generally set forth in the Pennsylvania Rules of Civil Procedure (Rules 3101 through 3159). Sales are advertised by posting the property involved and by publication in a newspaper of general circulation in the county and in the legal publication designated by rule of court for publication of notices. The published notices are once a week for three (3) successive weeks prior to the date of the sheriff's sale.

Tax sales are conducted to sell properties for delinquent taxes and are generally processed through the county tax claim bureau. In 1947, the Pennsylvania legislature enacted the Real Estate Tax Sale Law (72 P.S. §5860.101 through §5860.801), referred to as RETSL. RETSL comprises a complete statutory scheme and method for the management and disposition of properties by the tax claim bureaus of each county (except Philadelphia and Allegheny counties) to enforce the collection of delinquent real estate taxes. RETSL deals mainly with the procedure for entering liens against real property for delinquent taxes, and the subsequent sale of the real estate for the satisfaction of those liens. The law was intended to provide speedy, efficient procedures for enforcing tax liens and to improve the quality of titles obtained at a tax sale. Real estate is sold pursuant to RETSL first at an Upset Tax Sale where properties are sold subject to mortgages and other liens, and, thereafter, at a Judicial Tax Sale where properties are sold free and clear of all liens. The Upset Tax Sale generally divests the record owner of title to the property exposed to sale, regardless of whether the property is actually purchased by a third party.

Another type of tax sale conducted under Pennsylvania law is sometimes referred to as a "tax foreclosure" under the Municipal Claims and Tax Lien Act (53 P.S. §7101 through §7505) and also known as the MCTLA. Sales of real estate pursuant to the MCTLA are initiated as the procedure to collect delinquent taxes in counties of the first and second class. In other locales in Pennsylvania, municipalities and school districts collect delinquent real estate taxes using third party contractors who use the MCTLA statute. These tax foreclosure sales are generally conducted by the county sheriff at the monthly sheriff's sale. The MCTLA

provides a two-step procedure for conducting judicial sales when executing upon a municipal lien. First, there is an initial upset sale and then, if the property is not sold at the upset sale, a sale pursuant to a court order authorizing the sale free and clear of all liens and encumbrances is held. In the case of an upset sale, the upset price is the amount sufficient to pay all of the municipalities' claims in full. If the upset price is not obtained, the municipality may petition the trial court to issue a rule to show cause why the property should not be sold free and clear of all claims, mortgages, charges and estates.

A significant difference between properties sold under RETSL and properties sold under MCTLA is the right of redemption set forth in §7293 of the MCTLA. Under RETSL, there is no right of redemption and a property owner's recourse is limited to petitioning the court to have the sale set aside based upon some irregularity such as failure of notice. Also, since sales under the MCTLA are conducted as judicial sales by the Sheriff, under certain circumstances mortgage or judgment liens may be divested at the "upset sale."

PRACTICE POINT. Be familiar with the procedural rules which govern the conduct of sheriffs sales and the statutory language that governs the conduct of tax sales under both RETSL and MCTLA. It is, however, most important to consult directly with the official conducting the particular sale, whether it be the Sheriff or the Tax Claim Bureau Director, as significant differences in practice and procedure exist in the various counties. Some of these differences regard how the bidding at the sale is conducted, what monies are needed if you are a successful bidder and what other costs may be owed by the successful bidder. Other differences include the procedure, basis and timing for setting aside these different types of sales. The importance of preparation and investigation prior to a sale cannot be overemphasized, especially conducting a title search and confirming that all conditions for a proper sale have been completed (notice requirements).

### **Sheriff's Sales**

First Union Nat'l Bank vs. Estate of Shevlin, 897 A.2d 1241 (Pa. Super. 2006) Holding that a petition to set aside a sheriff's sale may only be granted when the petition is filed before the sheriff's delivery of the deed.

S&T Bank by Dalessio v. Dalessio, 632 A.2d 566 (Pa. Super 1993) Holding that the decision to set aside a sheriffs sale is within the sound discretion of the trial court.

Extraco Mortgage vs. Williams 805 A.2d 543 (Pa. Super. 2002) Holding that the failure of a senior lienholder to amend its foreclosure judgment to include amounts paid for back taxes and hazard insurance premiums did not prejudice junior

lienholder and that payments for taxes and insurance related to date of mortgage for priority.

State Street Bank v. Petrey 819 A.2d 581 (Pa. Super. 2003). Holding that a junior lienholder was entitled to proof of the validity of the senior lienholder's "selling lien" entry on proposed schedule of distribution of proceeds from foreclosure sale where the junior lienholder stood to receive something if the senior lienholder's selling lien was inflated.

### **Tax Sales**

Sale of Real Estate by Montgomery, 836 A.2d 1037 (Pa. Cmwlth. 2003). Holding that the purpose of tax sale law is to collect overdue taxes, not to punish taxpayers who omit through oversight or error to pay their taxes, and not to permit real estate speculators to obtain the property of taxpayers who are willing and able to pay their taxes.

Commonwealth v. S rock, 795 A.2d 1100 (Pa. Cmwlth. 2002). Holding that after a property is exposed to Upset Tax Sale that the County Tax Claim Bureau, as Trustee for the various taxing authorities, and not owners of record, is "owner" of the tax delinquent property. This case also includes a very succinct analysis of RETSL.

Public Sale of Properties, 841 A.2d 619 (Pa. Cmwlth. 2004) Holding that taxing districts had the authority to direct the Tax Claim Bureau to remove a taxpayer's property from a judicial sale list and that taxing districts were not precluded from entering into a negotiated settlement with a taxpayer.

East West Enterprises, Inc., Debtor, 178 B.R. 64 (U.S. Bkptcy Ct. M.D.- PA, 1993). Holding that the Debtor retained a valuable interest in property, even assuming that Debtor's right of redemption had been extinguished when the property was exposed to pre-petition upset tax sale.

Pennsylvania Land Title Ass'n v. East Stroudsburg Area School District, 913 A.2d 961 (Pa. Cmwlth. 2006). Holding that school districts were required to make returns to the county tax claim bureau under RETSL, which returns would detail all properties against which real estate taxes were levied and include descriptions of such properties, even though school districts chose to collect delinquent taxes pursuant to MCTLA.

City of Allentown v. Kauth, 874 A.2d 164 (Pa. Cmwlth. 2005). Holding that the provisions of MCTLA authorizing free and clear sale was not impliedly repealed by RETSL and that the City could sell property free and clear of all liens, including the County's tax lien.

## **Tax Foreclosures**

JP Mortgage Chase Bank v. Zellin, 2007 WL 2876112 (Pa.Com.P1.), 82 Pa. D. & C. 4th 460) An upset sale under the MCTLA is held under the auspices of the sheriff's office and is a judicial sale requiring notice to all parties in interest prior to the sale. Because the lien of the bank's mortgage did not pre-date the lien of unpaid school taxes on which judgment was taken and execution held, the mortgage was divested at the sheriff's sale held pursuant to section 31 of the Municipal Claims and Tax Liens Act.

EMC Mortgage Corp. vs. Tara I. Lentz, et al., 972 A.2d 112, A prior-in-time mortgage will not be divested by an upset sale under the Municipal Claims and Tax Lien Act (MCTLA), but will be divested at a free and clear sale.



NORRIS McLAUGHLIN P.A.  
ATTORNEYS AT LAW

## LIEN DIVESTITURE STARTS WITH A SALE

Richard Brent Somach, Esquire  
Norris McLaughlin, P.A.  
Allentown

David E. Schwager, Esquire  
Chariton Schwager & Malak  
Wilkes Barre

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## Real Estate Tax Sales – The Law

- Real Estate Tax Sale Law (72 P.S. § § 5860.101 to 5860.803), which is effective in all counties except Allegheny and Philadelphia (“RETSL”)
- The Municipal Claim and Tax Lien Act (53 P.S. § 7101 et seq.) (“MCTLA”), which is effective throughout the Commonwealth

## Real Estate Tax Sales - Process

- Unpaid real estate taxes become delinquent on January 1st of the year following the year when the taxes are due.
- The taxing authorities return a claim for unpaid taxes to the County Tax Claim Bureau by the last day of April of the year following the year when the taxes are due.
- The Tax Claim Bureau acts as the agent for the taxing authorities in a county. Delinquent taxes can be paid only to the Tax Claim Bureau, not to the local tax collectors.
- Notices of the claims for unpaid taxes are mailed to the owner of record no later than July 31. The notice advises the taxpayer that a one year grace period exists from July 1 of the year notice is given in which to fully pay the claims, interest accrual (9% per year) and costs.
- If the owner of record does not claim the certified mailing, the property is physically posted and the posting fee is assessed against the parcel.

## Real Estate Tax Sales - Process

- Section 311 - On the first day of January next following the notice hereinbefore prescribed, if the amount of the tax claim referred to in the notice has not been paid, or no exceptions thereto filed, **the claim shall become absolute.**
- Section 601. Date of Sale.--(a) The bureau shall schedule the date of the sale no earlier than the second Monday of September and before October 1.
- Three types of sales:
  - 1) Upset
  - 2) Judicial
  - 3) Repository

## Real Estate Tax Sales – Upset Sale

- Sale scheduled no earlier than the second Monday of September and before October 1, and the sale may be adjourned, readjourned or continued. No additional notice of sale is required when the sale is adjourned, readjourned or continued if the sale is held by the end of the calendar year.
- Amounts included in the Upset Price –
  - (a) the tax liens of the Commonwealth (Primarily if property owned by Corp, LP or LLC);
  - (b) the amount of the claim absolute and interest;
  - (c) the amount of any other tax claim or tax judgment due on such property;
  - (d) the amount of all accrued taxes including taxes levied for the current year
  - (e) the amount of the municipal claims against the property; and
  - (f) the record costs and costs of sale
- No sale of property shall be made at the upset sale unless a bid equal to the upset price is made. If no bid equal to the upset price is received, the sale shall be continued without further advertisement in order to give the bureau a chance to sell the property at private sale, or to petition court for an order to sell the same (Judicial Sale)

## Real Estate Tax Sales – Upset Sale

- After the sale, notice shall be given by the bureau within thirty (30) days of the actual sale to each owner by certified mail, at his last known post office address that the property was sold and that the owner may file objections or exceptions with the court relating to the regularity and procedures followed during the sale no later than thirty (30) days after the court has made a confirmation nisi of the consolidated return.
- After confirmation of the sale by the court, the Bureau deeds the property to the purchaser.
- **Every upset sale shall convey title to the property under and subject to the lien of every recorded obligation, claim, lien, estate, mortgage, ground rent and Commonwealth tax lien not included in the upset price with which said property may have or shall become charged or for which it may become liable.**

## Real Estate Tax Sales – Judicial Sales

### In the event the property does not sell at Upset Sale:

- The sale shall be continued, but not beyond the end of the calendar year, without further advertising, and the bureau may, at any time during or after the continuance, and shall, immediately at the written direction of a taxing district, file its petition in the court of common pleas of the county to sell the property pursuant to a Judicial Sale.
- Upon petition of the Bureau, the court issues a Rule To Show Cause why a decree should not be made that said property be sold, freed and cleared of their respective tax and municipal claims, liens, mortgages, charges and estates, except separately taxed ground rents. The rule shall be made returnable in not more than thirty (30) days from the date the petition was presented or as otherwise determined by the court.
- Confirm proper service has been made and, if personal service not accomplished, an order authorizing alternative service was granted. Also confirm that if the judicial sale is to be held three (3) months or more after the upset sale that it was re-advertised.
- If upon hearing the court is satisfied proper service has been accomplished, it shall order and decree that said property be sold at a subsequent day to be fixed by the court, freed and cleared of all tax and municipal claims, mortgages, liens, charges and estates, except separately taxed ground rents, to the highest bidder.

## Mortgage Foreclosures

- **Pre-Foreclosure Notices Act 6/91:**
- New form as of 9/1/2016
- An Act 6 Notice is not required if an Act 91 Notice is being sent. Act 91 expressly states that an Act 91 Notice is in lieu of any other notices. 35 P.S. § 1680.403c.
- Must be given 33 days before commencing foreclosure (30 days plus 3 days for mailing) a Must be sent in English with Spanish translation (other languages available if necessary)
- Mailing of notice triggers 30 day period to apply for Homeowners' Emergency Mortgage Assistance Program (HEMAP)



# Mortgage Foreclosures

## Foreclosure Checklist:

- ✓ Pre-Foreclosure Notices properly given?
- ✓ Lien Priority
  - 1. Is our mortgage in first position?
  - 2. Review lien priority as set forth in 42 Pa. Cons. Stat. Ann. § 8141
  - a. Purchase Money Mortgages from the time they are delivered to the mortgagee, if they are recorded within ten days after their date; otherwise, from the time they are left for record.
  - b. Others generally by recording or in case of adverse judgments when rendered
  - 3. If mortgage not in first position, senior liens or judgments probably not divested even with notice.

# Mortgage Foreclosures

- Foreclosure Checklist:
- ✓ Venue - a mortgage foreclosure action must be brought in the county in which the real property is located. Pa.R.C.P., Rule 1142.
- ✓ Foreclosure Complaint –
  - 1. Plaintiff in the foreclosure action is typically the current holder of the mortgage (mortgagee)
    - a. If not, why not? Pending Assignment? If so be sure the assignment ultimately went of record
  - 2. Defendants are the mortgagor(s), or the personal representative, heir, or devisee of a deceased mortgagor and the real owner of the property (or if unknown, the grantee in last recorded deed)
  - 3. IRS must be a named defendant if lien is filed prior to commencement of foreclosure action.
  - 4. Any person found in possession of the property subject to the mortgage foreclosure action must also be noticed. Pa.R.C.P., Rule 410(a).

# Mortgage Foreclosures

- **Foreclosure Checklist:**

- ✓ Service of Process

- 1. Defendants must be served in accordance with the usual rules applicable to civil actions. Pa.R.C.P., Rule 1141(b). Usually, defendants in Pennsylvania must be served by the sheriff. Pa.R.C.P., Rule 410(a). If personal service is not possible, defendants may be served by publication, posting, registered mail, or other methods, as the court deems appropriate.
- 2. The rules stipulate that if a defendant in a foreclosure action cannot be served under the applicable rule, the plaintiff may move the court for a special order directing the method of service, which may include service by posting a copy of the original process on the most public part of the property. The motion is to be accompanied by an affidavit stating the nature and extent of the investigation which has been made to determine the whereabouts of the defendant and the reasons why service cannot be made.
- 3. Also be aware that in addition to the mortgagor, the complaint must also be served on any person found in possession of the property subject to the foreclosure action.

# Mortgage Foreclosures

- **Foreclosure Checklist:**

- ✓ Responding to a Foreclosure Complaint - Defendants may serve and file preliminary objections or serve and file an answer, responding paragraph by paragraph to the allegations of the complaint.

- 1. Filing an answer not common, but can be helpful to alleviate notice concerns
- 2. Answer or preliminary objections may raise legitimate defenses to foreclosure

- ✓ Judgment – If plaintiff prevails in mortgage foreclosure action, either because: a) the defendant defaults in responding to the complaint; b) court grants summary judgment; or c) there is a verdict in favor of the plaintiff following a trial, the plaintiff becomes entitled to file a judgment against the defendant.

- 1. While the judgment appears as a money judgment for an amount representing the debt, interest, and other authorized costs and charges up to the time of the judgment, a judgment in mortgage foreclosure is granted for the sole purpose of effectuating a judicial sale of the property subject to the mortgage lien.
- 2. Once a judgment is entered in a mortgage foreclosure the mortgage is merged into the judgment entered.

# Mortgage Foreclosures

- **Foreclosure Checklist:**

- ✓ Confession of Judgment:

- Some lenders will bring an action to confess judgment on the Note secured by the mortgage.
- Advantage to this is confessed judgment is an in personam judgment which then allows for execution on all of defendant's assets. Pure mortgage foreclosure action only allows for execution against property encumbered by the mortgage.
- Judgment itself has priority from when it is entered, however, the lien of a judgment founded on a mortgage relates back to the mortgage.
- Execution process on mortgaged property based on a confessed judgment should be identical to that on a pure mortgage foreclosure.

# Mortgage Foreclosures

- **Foreclosure Checklist:**

- ✓ Writ of Execution – Once the judgment is entered, the plaintiff needs to secure a writ of execution from the court. The Writ has two purposes. It allows the plaintiff to proceed to Sheriff's sale on the property and also cuts off additional liens and judgments from attaching to the property.

- ✓ Sheriff's Sale Process:

- Notice of the sheriff's sale must be given by handbills, by publication, and by written notice to all persons whose names and addresses are listed in the Rule 3129.1 Affidavit.
- A Verification of Non-Military Service and an Affidavit as to Act No. 91 must also be filed.
- Notice containing the information required in the handbill must also be given by publication by the sheriff once a week for three successive weeks in a newspaper of general circulation in the county and in the legal publication, if any, designated by rule of court for publication of notices. The first publication to be made not less than 21 days before the date of sale.
- The required written Notice of Sheriff's Sale must contain the same information as the handbill, or may consist of the handbill, and such notice must be served at least 30 days before the sale on all persons whose names and addresses are set forth in the Rule 3129.1 Affidavit.

# Mortgage Foreclosures

- **Foreclosure Checklist:**

- ✓ Sheriff's Sale Process (cont.):

- After service is complete, a Rule 3129.2 Affidavit must be filed, attesting to the completion of the required service upon all of the persons identified in the 3129.1 Affidavit.
- In the event the sale is stayed, continued, postponed, or adjourned to a date certain within 130 days of the originally scheduled sale date, and a public announcement of the new date is made to the bidders assembled at the time and place of the originally scheduled sale, no new notice is required, but there may be only two stays, continuances, postponements, or adjournments without new notice or a court order.
- On the day of the sale the property is sold to the highest bidder, in accordance with the rules of the local sheriff. Usually the attorney on the writ opens the bidding by bidding "costs," and also announces an upset price (not more than the amount of the judgment), and the bidding then proceeds. If there is no actual bidding, the property is knocked down to the attorney on the writ.

# Mortgage Foreclosures

- **Foreclosure Checklist:**

- ✓ After the Sheriff's Sale:

- Within 30 days after the sale, the sheriff is required prepare and file a schedule of proposed distribution and a list of liens for each property sold. This not required when the property is sold to the attorney on the writ for costs only.
- Ten days after the filing of the schedule of distribution, the sheriff must prepare, execute, and deliver to the Recorder of Deeds a deed to the property sold and distribute the proceeds of sale in accordance with the schedule of distribution, unless written exceptions are filed with the sheriff within ten days after the filing of the proposed schedule.
- Of course it is possible that the schedule can be modified if a petition to set aside the sale is filed and a hearing is then held by the court.

## Mortgage Foreclosures

- Foreclosure Checklist:

- ✓ What does the Sheriff's Deed get you?

- The effect of a foreclosure sale is to wipe out all junior liens **on the notice of the sale**.
- The purchaser takes title subject to encumbrances and interests of record superior to the mortgage foreclosed upon. With respect to the condition of the property, the buyer takes the property as is.
- What if there are leases on the property? If the lease was entered into before the mortgage being foreclosed, then the buyer takes title subject to the lease. If the lease was entered into subsequent to the mortgage, then the buyer has the option of continuing or terminating the lease. If the prior owner or tenant refuses to vacate the premises, an ejectment action may be required.
- Unlike tax sales, no right of redemption in any county.

## PA Department of Revenue

- Effect of Foreclosures and Tax Sales on PA Inheritance Tax Liens:

- ✓ Foreclosures –

- PA law requires that the Department of Revenue be notified of judicial sales to ensure claims are properly honored.
- The Department accepts Rule 3129 notices to be sufficient notice for any existing Department liens which may exist against the captioned defendants.
- For inheritance tax purposes, however, the Rule 3129 notices are only sufficient for those estates that are opened and have reported the real property in question. To the extent there is a tax liability it survives the foreclosure sale and is valid until paid.
- In order to clear the lien, the Department is requiring the mortgagee to report any available valuation information and their corresponding date of death mortgage balances so as to determine if there is any equity to which inheritance taxes could attach.
- Where it is not clear an estate has fully paid inheritance taxes related to a property which has been foreclosed upon, the Title Company requires a clearance letter from the Department of Revenue before insuring any property without exception for inheritance tax liens.

## PA Department of Revenue

- **Effect of Foreclosures and Tax Sales on PA Inheritance Tax Liens:**

- ✓ Tax Sales:

- The Department takes the position that its claim for inheritance taxes would not be divested under any real estate tax sale laws of the Commonwealth.
- They indicate that this interpretation is consistent with the Commonwealth's sovereign status of being the superior creditor to political subdivisions and other lienholders.
- Therefore, the title company requires that any PA state tax liens, whether inheritance tax or any other PA state tax lien, be paid in full prior to insuring any property coming out of a tax sale (even a judicial sale with a free and clear order).