Coates' Canons Blog: Appellate Court Upholds In Rem Foreclosures (Again)

By Chris McLaughlin

Article: https://canons.sog.unc.edu/appellate-court-upholds-in-rem-foreclosures-again/

This entry was posted on August 26, 2010 and is filed under Finance & Tax, Property Taxes

The Machinery Act describes the in rem tax foreclosure procedure in NCGS 105-375 as a "simple and inexpensive" alternative to the full-blown civil action required by the "mortgage-style" foreclosure procedure in NCGS 105-374. That description might be overly optimistic in light of the diligent title search most tax offices undertake before starting the process. But it is true that in rem foreclosures are usually quicker than mortgage-style foreclosures, in part because they can be accomplished without meddlesome attorneys like me.

In a nutshell, the in rem procedure permits a local government to docket a judgment against real property for delinquent taxes and proceed with an execution sale of the property three months later. The expedited nature of in rem foreclosures has been the source of numerous court challenges to the process in its sixty-plus year history. Owners and lienholders have repeatedly alleged that the in rem procedure fails to provide constitutionally adequate notice to interested parties before property is sold and their interests terminated. The most recent of these challenges, *Da Dai Mai v. Carolina Holdings, Inc.*, produced an opinion from the N.C. Court of Appeals last month that may be the strongest ever issued in support of the in rem procedure.

Although none of the legal challenges predating *Da Dai Mai* succeeded in completely invalidating NCGS 105-375, several of them identified weaknesses in the in rem procedure that were subsequently remedied by the General Assembly. For example, the statue originally required that notice be provided only to the taxpayer that originally listed the property for taxation even if that taxpayer no longer owned the property. The statute now requires that notice be given to the current owner of the property, a much more logical and constitutionally sound approach.

Additional amendments to the statute were motivated by court rulings in other jurisdictions. Most notable was a 1983 U.S. Supreme Court decision, *Mennonite Board of Missions v. Adams*, that struck down part of a similar Indiana tax foreclosure statute because it did not require that notice be provided to lienholders. The Court held that lienholders, like property owners, "must be notified by that form of notice reasonably calculated, under all of the circumstances" to inform the lienholder of the government's intent to deprive that party of a property interest. After *Mennonite*, lienholders such as mortgagees are entitled to notice of the foreclosure by mail rather than simply by publication if their addresses can be easily obtained.

The appellant in the recent *Da Dai Mai* case attempted to rely on *Mennonite* to invalidate an in rem foreclosure sale conducted by the city of Charlotte for unpaid demolition costs. Carolina Holdings held a lien on the property in question. As required by the NCGS 105-375, the city sent letters to the property owner and to Carolina Holdings prior to docketing a judgment against the property. Months later, the city mailed notice of sale to the property owner but not to Carolina Holdings, in accord with the statute's requirements. The city also published notice of the sale in a local newspaper, but Carolina Holdings claimed it didn't learn of the sale to Mai until a full year later. It then challenged the in rem procedure in court alleging that the failure to provide personal notice to lienholders of record violates the due process clauses of the Unites States and North Carolina constitutions.

Carolina Holding's argument fell on deaf ears. The N.C. Court of Appeals found that the *Mennonite* standard was more than satisfied by NCGS 105-375's requirement that lienholders receive notice of the intent to docket a judgment via registered or certified mail months before a foreclosure sale. Relying in part on language from a 1976 N.C. Supreme Court case, *Henderson County v. Osteen*, 289 N.C. 614**,** that spoke approvingly of the in rem procedure, the N.C. Court of Appeals concluded that the absence of a second notice to lienholders prior to the actual foreclosure sale does not render the entire process constitutionally inadequate. Essentially, the court found that Carolina Holdings ignored the initial notice of the foreclosure at its peril and could not legitimately complain that it was harmed by its failure to learn of the specific sale date.

The importance of the *Da Da Mai* decision lies not only in its substantive holding—it's okay to mail a single notice to lienholders—but also in its unqualified adoption of the N.C. Supreme Court's language in *Henderson County v. Osteen* that previously was viewed as mere dicta and not as a conclusive blessing of the in rem foreclosure procedure. Assuming it is not reversed on appeal, the *Da Da Mai* decision should provide great comfort to local governments that rely on the in rem procedure.

Courts surely will continue to scrutinize in rem foreclosures to ensure that local governments dot all of their i's and cross all of their t's. And it is always recommended to go beyond the required notice when it can be done so without great effort—e.g., send a second notice to lienholders if you have their addresses. But in general, the in rem procedure stands on solid constitutional ground.

Links

- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_105/GS_105-375.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_105/GS_105-374.html
- appellate.nccourts.org/opinions/?c=2&pdf=6781
- supreme.justia.com/us/462/791/