Buffalo Law Review

Volume 5 | Number 2 Article 61

1-1-1956

Real Property—Foreclosure Expenses

Alan H. Levine

here is not confided to the courts. The result suggests the need of legislation liberalizing the right of redemption, or giving to city officials the power to ameliorate such extreme hardships in appropriate cases."

The right of redemption in an in rem tax foreclosure action is exclusively statutory.[32] The Administrative Code of the City of New York provides that in the event of an owner's failure to redeem or answer by a prescribed date, he will be forever barred and foreclosed of all his right title and interest and equity of redemption in the land and a judgment of foreclosure may be taken by default.[33] The courts seem to consider the redemption provision under the State Tax Law,[34] which is in the nature of a statute of limitations,[35] analogous to that of the Administrative Code of the City of New York.[36] They will not, under either law, reopen a default judgment.[37] This is true though the property owner received no actual notice of the foreclosure action,[38] or was in fact incompetent.[39]. It appears that once the procedural requirements imposed upon the City of New York by the Administrative Code are substantially fulfilled and a default judgment obtained, that judgment is valid and no longer subject to attack.[40]

Foreclosure Expenses

Civil Practice Act §1087 provides that taxes and assessments which are liens upon the property sold at a foreclosure sale are deemed expenses of the sale. In *Wesselman v. Engel Co.*,[41] the guarantor of a mortgage had guaranteed payment of principal and interest of mortgage together with any and all "expenses of foreclosure." The Court held, the guarantee did not include back taxes paid by the mortgagee. The majority pointed out that §1087 refers to "expenses of the sale," not "expenses of foreclosure," and that the purpose of this section is to protect the purchaser on a foreclosure sale, who is entitled to a clear title, rather than the mortgagee. Therefore, it refers to *unpaid* taxes which are liens on the property. In no event can the statute control the meaning of a private guarantee;

32. *Keely v. Sanders*, 99 U. S. 441 (1878); *Levy v. Newman* 130 N. Y. 11, 28 N. E. 660 (1891).
33. Administrative Code of the City of New York, tit. D, c. 17-6.0.
34. N. Y. TAX LAW §§ 161-168-d.
35. *City of Peekskill v. Perry*, 272 App. Div. 940, 72 N. Y. S. 2d 351 (2nd Dept. 1947).
36. *City of New York v. Lynch*, 281 App. Div. 1038, 121 N. Y. S. 2d 392 (2nd Dept. 1953); *aff'd*, 306 N. Y. 809, 118 N. E. 2d 821 (1954).
37. *City of New York v. Jackson—140 Realty Corp.*, 279 App. Div. 668, 108 N. Y. S. 2d 986 (2d Dep't 1951); see also notes 35 and 36 *supra*.
38. See note 36 *supra*.
39. *Town of Somers v. Covey*, 283 App. Div. 883, 129 N. Y. S. 2d 537 (2nd Dept. 1954); *aff'd*, 308 N. Y. 798, 125 N. E. 2d 862 (1955); U. S. Supreme Court Appeal pending.
40. See note 36 *supra*.
41. 309 N. Y. 27, 127 N. E. 2d 736 (1955).

the guarantor should not be bound beyond the express terms of his guarantee.[42] The defendant guaranteed "expenses of foreclosure" and that means only such things as costs, fees and publication charges.

In dissenting, Judge Dye maintained that "payment of principal" means payment of the principal mortgage debt, which includes taxes paid by mortgagee. That this was the true intent of the clause is further indicated by the promise to pay "all expenses of foreclosure." Since Civil Practice Act §1087 makes all taxes which are a lien on the property sold an expense of sale, the defendant's guarantee included such taxes and assessments. Judge Dye felt that to exclude taxes which have been paid (and so are no longer a lien) would penalize the diligent mortgagee and so should not be permitted.

Although not an issue before the Court, the defendant's claim of laches on the part of the mortgagee in waiting seventeen years to foreclose was considered and rejected by the Appellate Division.[43] If the plaintiff had acted sooner, the amount of taxes and assessments would have been much less; the entire principal sum of the mortgage was only $19,000.00, while the amount of taxes and assessment (and interest thereon) was $24,442.40. The majority apparently felt that the guarantor never intended to be liable for such an amount, especially since the size of the amount was due largely to plaintiff's delay in acting.

Validity of Tax Sale

In another case involving Suffolk County, a taxpayer assailed the legality of the action of the County Board of Supervisors in buying land sold for delinquent taxes and then selling it back to the former owner for less than the amount of back taxes. Taxpayer claimed that since the mortgagee of the land had not been given notice to redeem, the County did not have title in fee and so could not convey to the former owner. The Court held, that even though the action of the Board of Supervisors was illegal, the plaintiff did not prove waste and injury to public interest, and affirmed the dismissal of the complaint.[44]

Although the County purportedly was acting under statutory authority to sell[45] rather than permitting the former owner to redeem, it did not comply with the statutory requirement that a mortgagee must be notified of the right of redemption.[46] The mortgagee's right of redemption can not be cut off without

42. See *Flyer v. Elms Realty Co.* 241 App. Div. 828, 271 N. Y. Supp. 181 (1934); *aff'd* 267 N. Y. 618, 196 N. E. 608 (1935).
43. 283 App. Div. 1020, 131 N. Y. .S. 2d 141 (1st Dep't 1954).
44. *Hurley v. Tolfree,* 308 N. Y. 358, 126 N. E. 2d 279 (1955).
45. L. 1920, c. 311, §46, as added by L. 1929, c. 152, as amended by L. 1937, c. 175, §2; N. Y. Tax Law §154.
46. N. Y. TAX LAW §139.