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Feature

FLORIDA TAX DEED SALES ARE GETTING RISKY

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Each year tax collectors and circuit court clerks across the state conduct tax deed sales to collect unpaid ad valorem real property taxes. Occasionally, successful bidders at these sales acquire tax deeds to valuable properties worth far more than the taxes owed against them. But some of these fortunate purchasers may be in for a rude surprise if the notice of sale failed to actually reach the former owners of the property. Two recent decisions applying due process protection to tax deed sales have imposed more stringent notice requirements than have prevailed in prior years,¹ tilting the playing field to the advantage of property owners challenging tax deed sales due to a lack of notice.

Notice of Tax Deed Sales

Under Florida law, a parcel of real property becomes eligible for a tax deed sale when ad valorem property taxes become more than two years past due. The Florida Statutes divide responsibility for giving notice of tax deed sales between a county's tax collector, who must identify the persons entitled to notice, and the clerk of the circuit court, who sends the notices.² The tax collector must search the county's official real estate records to identify legal title holders of record, mortgagees, and other persons who are entitled to receive notice that their property is about to be sold for unpaid taxes.³ The tax collector must also review the property appraiser's latest assessment roll to identify the person to whom the property in question was last assessed, who is also entitled to notice.⁴

Once the tax collector determines who is entitled to notice, he or she must prepare a statement identifying those persons and their addresses, then deliver the statement to the clerk of the circuit court.⁵ The clerk must send notice of the upcoming tax deed sale by certified mail return receipt requested to each of the persons listed on the tax collector's statement.⁶

In the past, Florida courts routinely upheld tax deed sales despite challenges brought by property owners who never actually received notices mailed by the clerk. If the tax collector prepared the required statements and the clerk mailed notice to the persons so identified, courts upheld the sale, even if the notices were misdirected due to errors by the tax collector or were sent to outdated addresses still reflected on the property appraiser's rolls.⁷ In these cases, the courts focused on the fairness of the statutory scheme generally and upon the information available to the clerk at the beginning of the process. Courts also made frequent reference to the duty imposed on every property owner to know that his or her property is subject to ad valorem taxes that become due and payable each year, as additional support for upholding sales where notice had failed to reach the property owner.

In fact, courts upheld tax deed sales even when the clerk received returns from the postal service clearly stating *46 that the notice had failed to reach the property owner who was about to lose his or her property.⁸ Thus, even when the clerk conducting the sale was fully aware the notice had failed to reach the property owner, courts upheld the sales, holding that the notice satisfied the Florida statute and also met the basic requirement of due process that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action."⁹

When Notice of Sale Is Returned Undelivered

A property owner's prospects for overturning a tax deed sale due to lack of notice improved dramatically in 2006, however, with the Supreme Court's decision in *Jones v. Flowers*, 547 U.S. 220 (2006). There, the court squarely rejected the premise that merely sending notice of a tax deed sale satisfied due process if that notice is returned undelivered before the sale occurs.¹⁰

Faced with a property owner's challenge to an Arkansas tax sale, the court granted certiorari to determine "whether the due process clause requires the government to take additional steps to notify a property owner when notice of a tax sale is returned undelivered."¹¹ The court explained it had upheld the sufficiency of failed notices in the past because the notices had been "reasonably calculated to reach the intended recipient" when sent.

In each of the cases, the government attempted to provide notice and heard nothing back indicating that anything had gone awry But [the court had] never addressed whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed.¹²

Although the court acknowledged that states are not required to establish a notice procedure that provides for return receipts, the court determined that if return receipts were used, and a "mailed notice of a tax sale is returned unclaimed, the state must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so."¹³

The court also considered and rejected arguments that the sale should be upheld because 1) the taxpayer had provided the address to which the notice had been mailed; 2) it was up to the taxpayer to keep his or her address updated; and 3) the taxpayer was charged with notice that his or her property was subject to taking if he or she failed to pay taxes. While the court agreed that the taxpayer had each of these duties, the court determined that "none of these contentions relieves the state of its constitutional obligation to provide adequate notices."¹⁴ Although the court declined to specify what "additional reasonable steps" are required, several appellate courts have suggested additional public records searches may be necessary when a taxing authority receives a return receipt showing that delivery of a notice of sale has failed.¹⁵

Unique Circumstances May Require Additional Action

The Florida Supreme Court has also signaled the need for a more rigorous review of the sufficiency of tax deed sale notices, beginning with the decision of *Delta Property Management, Inc. v. Profile Investments, Inc.*, 875 So. 2d 433 (Fla. 2004). There, the court reversed a summary judgment upholding a tax deed sale for further proceedings, because the notice mailed to the property owner may have relied on an outdated address taken from an old assessment roll rather than from the latest available assessment roll as required by [F.S. §197.502\(4\)\(a\)](#). The court also announced that henceforth, merely complying with the statutory notice procedure may not always satisfy due process, stating: "While the clerk should use the tax collector's statement when preparing the tax sale notices, circumstances may warrant some additional action by the clerk"¹⁶

In addition, following the decision in *Jones v. Flowers*, the Florida Supreme Court elaborated further on the type of unique circumstances the court had in mind that would require additional efforts by the clerk to give adequate notice of a tax deed sale in *Vosilla v. Rosado*, 944 So. 2d 289 (Fla. 2006).¹⁷ In that case, the court considered an appeal of a tax deed sale in which the property owners did not receive the statutory notice of sale, even though the property owners had taken reasonable steps to keep both the tax collector and property appraiser apprised of their new address. In fact, the evidence presented at trial established that the Rosados had given written notice of their new mailing address to both the tax collector and the clerk of the circuit court, but neither official updated the property appraiser's assessment rolls to show the new address.¹⁸ Thus, when the tax collector received an application requiring him to conduct a tax deed sale, the tax collector prepared the statement for notice using the old address, and the clerk mailed the notice to the old address.

Not surprisingly, the clerk received the return receipt back, which indicated that someone other than the Rosados had signed for the notice.¹⁹ The clerk must also have received a sheriff's return of service, which expressly stated that the Rosados no longer lived at the old address.²⁰ Nevertheless the clerk proceeded with the tax deed sale of the Rosados' property.

When the Rosados challenged the sale, the trial court upheld the sale, ruling the clerk was entitled to rely on the tax collector's statement, and even if the statement contained an old address, the sale complied with the statutory procedure.²¹ On appeal, the Fifth District reversed, and the Supreme Court affirmed the reversal, stating: "Due process requires that the clerk look beyond the tax collector's statement when there is reason to believe that the statement no longer reflects those who are entitled to notice [citation omitted] or, ... no longer reflects the titleholder's address."²²

The court reasoned further that:

The steps undertaken by the state when notifying a title holder of an impending tax deed sale of the titleholder's property must be reasonably calculated to reach the title holder under the totality of the circumstances. Such circumstances include unique information about an intended recipient that might require the taxing authority to make efforts beyond those required by the statutory scheme under ordinary circumstances.²³

Since "the clerk knew or should have known that the notice was sent to the Rosados at an incorrect address," *47 ²⁴ the court concluded that the clerk must make additional efforts to give notice of the sale.

Applying Due Process Standards to Florida Tax Deed Sales

Applying the due process standards announced in *Flowers* and *Rosado* to Florida tax deed sales dictates that clerks who learn that a notice has been returned undelivered before a scheduled tax deed sale occurs must take additional reasonable steps to give notice before selling a property, if it is practicable to do so. Simply putting return receipts in the file showing notice was sent but not received may comply with the Florida statutory notice procedure, but it will not satisfy constitutional due process requirements. Moreover, the ease and availability of electronic searches in this technological age militate strongly in favor of requiring routine Internet searches for missing taxpayers and lien holders before selling off their property. Likewise, failed notices based upon errors in the tax collector's statement identifying incorrect persons or addresses will no longer protect tax deed purchasers from having sales set aside. From now on, tax deed purchasers should expect to have to defend the clerk's failure to take additional steps to give notice of a tax deed sale when a notice is returned undelivered. Likewise tax deed purchasers must be ready to prove that the clerk had no knowledge of unique circumstances about the property owner that may have mandated special efforts beyond the statutory notice scheme. Otherwise tax deed purchases may have a very difficult time hanging on to tax deed property whenever owners come to court to challenge the sufficiency of notices they never received.

Footnotes

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[1](#) [Jones v. Flowers, 547 U.S. 220 \(2006\); Vosilla v. Rosado, 944 So. 2d 289 \(Fla. 2006\).](#)

[2](#) Under [FLA. STAT. §197.502\(4\)](#), the tax collector, is required "to: ... deliver to the clerk of the circuit court a statement ... stating that the following persons are to be notified prior to the sale of the property: (a) [a]ny legal titleholder of record if the address of the owner appears on the record of conveyance of lands to the owner. However, if the legal titleholder of record is the same person to whom the property owner was assessed on the tax roll for the year in which the property was assessed, then the notice may only be mailed to the address of the legal titleholder as it appears on the latest assessment roll; ... (e) [a]ny mortgagee of record if an address appears on a recorded mortgage." The tax collector is permitted to contract with a title company to obtain the information necessary for the tax collector to prepare the required statement identifying person entitled to notice of the tax deed sale. [FLA. STAT. §197.502\(5\)\(a\)](#).

[3](#) [FLA. STAT. §197.502\(4\)](#).

[4](#) If the legal titleholder of record and the taxpayer listed on the assessment roll are the same person, the clerk may only send notice to the addresses listed on the assessment roll.

[5](#) [FLA. STAT. §197.502\(4\)](#).

[6](#) [FLA. STAT. §197.522\(1\)\(a\)](#).

[7](#) [Hutchinson Island Realty v. Babcock Ventures, Inc., 867 So. 2d 528, 529-230 \(Fla. 4th D.C.A. 2004\)](#) (names of taxpayer and mortgagee spelled wrong, and notice sent to old address); [Kidder v. Circelli, 821 So. 2d 1106, 1107 \(Fla. 5th D.C.A. 2002\)](#) (a divided court rejected the argument that the clerk had a duty to search for the property owner when the return receipt showed "no such number."); [Eurofund Forty-Six, Ltd. v. Terry, 755 So. 2d 835 \(Fla. 5th D.C.A. 2000\)](#) (tax collector failed to update taxpayer's address in assessment roll); [Ahwani v. Slocum, 540 So. 2d 908, 909 \(Fla. 2d D.C.A. 1989\)](#) (tax collector and clerk failed to update property owner's address).

[8](#) [Bozeman v. Higginbotham, 923 So. 2d 535, 536 \(Fla. 1st D.C.A. 2006\)](#) (tax deed sale upheld even where "notice returned, stamped Return to Sender Attempted Not Known"); [Hutchinson Island Realty, Inc. v. Babcock Ventures, Inc., 867 So. 2d 528,](#)

[530 \(Fla. 5th D.C.A. 2004\)](#) (notice returned to the clerk undeliverable); [Saggese v. Dept. of Rev.](#), 770 So. 2d 1244, 1245 (Fla. 4th D.C.A. 2000) (notice returned “undeliverable as addressed”); [Bailey v. Folks](#), 182 So. 2d 477, 479 (Fla. 1st D.C.A. 1966) (notice returned marked “undeliverable”).

[9](#) [Mullane v. Central Hanover Bank & Trust Co.](#), 339 U.S. 306, 314 (1950); [Mennonite Bd. of Missions v. Adams](#), 462 U.S. 791, 797 (1983) (due process protection is extended to mortgagees when a tax agency seeks to cancel a mortgage lien in a tax deed sale).

[10](#) [Jones v. Flowers](#), 547 U.S. 220 (2006).

[11](#) *Id.*

[12](#) *Id.* at 1714.

[13](#) *Id.*

[14](#) *Id.* at 1714. The Florida Supreme Court referred to and rejected similar arguments in [Dawson v. Saada](#), 608 So. 2d 806 (Fla. 1992), and again in [Vosilla v. Rosada](#), 942 So. 2d 289 (Fla. 2006).

[15](#) For example, “[W]hen prompt return of an initial mailing makes clear that the original effort at notice has failed, the party charged with notice must make reasonable efforts to learn the correct address before constructive notice will be deemed sufficient.” [Plemons v. Gale](#), 396 F.3d 569, 576 (4th Cir. 2005). See also, [Karkoukli’s, Inc. v. Dohany](#), 409 F.3d 279, 285 (6th Cir. 2005) (due process satisfied where, after return of mailed notice, government made significant efforts to ascertain a valid address by searching the phone book and the Internet); [Small v. United States](#), 136 F.3d 1334, 1338 n.3 (D.C. Cir. 1998) (checking telephone listings); [United States v. Rodgers](#), 108 F.3d 1247, 1252 (10th Cir. 1997) (telephone and utility company listings); [Foehl v. United States](#), 238 F.3d 474, 480 (3d Cir. 2001) (after return of mailed notice, government should have obtained correct address from “obvious sources” including the driver’s license bureau).

[16](#) [Delta Property Management, Inc. v. Profile Investments, Inc.](#), 875 So. 2d at 488.

[17](#) [Patricia Weingarten Associates, Inc. v. Jocalbro, Inc.](#), 932 So. 2d 587 (Fla. 5th D.C.A. 2006) (reversed decision upholding tax deed sale to determine whether notice had been returned undeliverable to clerk, and if so whether clerk had taken additional reasonable steps to notify property owners of sale); accord [Patricia Weingarten Associates, Inc. v. Taylor](#), 936 So. 2d 772 (Fla. 5th D.C.A. 2006); [Profile Investments, Inc. v. Delta Property Management, Inc., et al.](#), Case No. 00-7788 CA, Circuit Court for Duval County, Florida (summary judgment, finding that clerk was required to take additional steps after certified mail notice of sale returned undeliverable); [Camelot Condominium Owners Association, Inc. v. Luke Investments, Inc., et al.](#), Case No. 06-9178 Circuit Court, Pinellas County, Florida (summary judgment holding that notice by certified mail of tax deed sale of timeshare project must be sent to each individual timeshare unit owner under [FLA. STAT. §192.037\(a\)](#)).

[18](#) [Vosilla v. Rosado](#), 944 So. 2d at 292.

[19](#) *Id.*

[20](#) *Id.*

[21](#) *Id.* at 293. The trial court had relied on the prior decisions of [Eurofund Forty-Six Ltd. v. Terry](#), 755 So. 2d 835 (Fla. 5th D.C.A. 2000) (tax collector had failed to update taxpayer’s address on assessment role); accord [Abwani v. Slocum](#), 540 So. 2d 908 (Fla. 2d D.C.A. 1989).

[22](#) [*Vosilla v. Rosado*, 944 So. 2d at 299-300.](#)

[23](#) *Id.*

[24](#) *Id.*

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