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Despite 'Jones,' Ambiguities In Title Chain Can Be Cured

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When the Supreme Court decided *Jones v. Flowers*,[1] it exacerbated a nagging problem for the title insurance industry - the necessity to do constitutional analysis when examining chains of title. With the current state of the economy, tax foreclosures are increasing. Thus, more properties have these ambiguities in their chains of title, leaving underwriters with the decision whether to except these conveyances and purchasers with the decision to forego insured protection.

In response to *Jones*, New York amended its statutes to account for the new level of taxpayer protection constitutionally mandated, but only partially addressed the *Jones* concerns. But, while we recognize that many titles come with problems from tax foreclosures in the chain of title, we do not find the need to reject such titles. Instead, one can take measures to make these transactions as safe as any other.

The 'Jones' Dilemma

Jones involved a foreclosure stemming from unsatisfied tax liens. Examining whether the taxing authority took sufficient steps to notify the taxpayer of the pendency of the foreclosure procedure in an Arkansas based case, *Jones* enunciated two standards applicable to governments when foreclosing on property. The first is that "the government (is required) to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case."[2] The second is that the government must behave as "a person who actually desired to inform a real property owner of an impending tax sale."[3] The result of these two standards is that "when the government learns its attempt at notice has failed, due process requires the government to do something more before real property may be sold in a tax sale."[4]

These standards are hazardous for the title industry because they introduce uncertainty into the validity of a link in the chain of title. If there is, in that chain, a recent referee's

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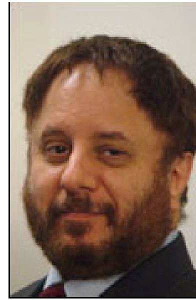

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deed, an insurer and purchaser will lack the certainty that this was a valid conveyance because its validity turns on what *Jones* calls "unique information" that rarely appears in the public record and cannot be gleaned by any of the normal research methods.

For example, in *89 Pine Hollow Road Realty Corp. v. American Tax Fund, Foothill*,[5] in an action by the delinquent tax payer against a remote purchaser down the chain from the foreclosure, the Second Department found that *Jones* created an ambiguity that eluded summary judgment and required a trial on the question of who knew what about how to reach the delinquent taxpayer.

Initial reactions to *Jones* in the title industry sounded the claxon. One author referred to "the *Jones v. Flowers* nightmare."[6] However, these same authors were quick to point out that there had long been a problem with due process in tax foreclosures.[7] *Jones* did not really create a problem, they noted, but rather made the ongoing problem more severe. In reaction both to *Jones* and these early commentaries, New York, like many of its sister states amended its tax foreclosure procedures, but insufficiently to remove the Jones concerns.

An Exception to 'Jones'

A case highlighting the title underwriters' discomfort with *Jones* is *NYCTL 1999-1 Trust v. 114 Tenth Ave. Assoc. Inc*.[8] *Jones* was the basis of 114 Tenth's motion for renewal to vacate the foreclosure. The Appellate Division found that a trust formed by New York City for the collection of its tax liens was not bound by the *Jones* standards because this municipally created trust was not itself municipal, but a private actor. Both the state Court of Appeals and the U.S. Supreme Court refused to hear the case.[9]

In *114 Tenth*, the attack on the constitutionality of the notice given to the foreclosed owner came immediately after the foreclosure sale, but before the closing on that sale and its consequent deed. When it came time for the closing, the title company was unwilling to insure the title of the property because it did not believe that the owner would stop pursuing its claim. The title company issued an exception to the title policy and avoided having to defend the constitutionality of the title. Had the foreclosed owner not stepped in prior to the execution of the deed at the foreclosure sale, this deed would have been merely in the chain of title and many title underwriters would have either taken an exception, like the insurer in *114 Tenth*, or declined to issue a policy altogether.

The case also provides an example of the failure of the taxing authority to use unique knowledge in its possession. In it, the taxpayer continued to pay current taxes while the proceedings were going on to foreclose on the delinquent taxes without the city questioning why it was receiving current taxes but not old ones. Since *114 Tenth* had ruled the city-created trust not a governmental authority, the Jones "unique information" standard was also rendered inapplicable.

Service of Process

Jones is only a problem if the taxpayer was foreclosed upon by default. If the taxpayer participated in the foreclosure proceeding, anyone examining the title that included such

a referee's deed can rely on the due process of New York's contested litigation system.

However, if the foreclosure proceeding went forward on the default of the delinquent taxpayer, one must inquire further, starting with how process was served.

In New York, in addition to the normal means of service of process on individuals, for property owned by corporations, limited liability companies, and condominiums, service of process may be had, even in the first instance, by serving the secretary of state under BCL §306, Limited Liability Company Law §301 or Real Property Law §339-n(7), respectively. When the secretary of state receives the process under any of the authorizing sections, the secretary's office sends the process along to the business entity by certified mail addressed to whatever address the Secretary has on file. It is well known that delivery often fails.10

Alternative Procedures

In *Jones*, the Arkansas procedure called for service on a natural person being made by a governmental authority using certified mail. New York has a similar procedure under Real Property Tax Law (RPTL) §1125, which was amended in the wake of *Jones*.11

Prior to *Jones*, RPTL §1125 called for notification to the delinquent taxpayer by certified mail. The statute had no provision for the event that the mail bounced back to the government as unclaimed. Under the post-*Jones* amendment, the critical *Jones*-compliant provision of the statute reads,

(b) Notification method. (i) Such notice shall be sent to each such party both by certified mail and ordinary first class mail, subject to the provisions of paragraph (iv) of this paragraph. The notice shall be deemed received unless both the certified mailing and the ordinary first class mailing are returned by the United States postal service within forty-five days after being mailed. In that event, the enforcing officer or his or her agent shall attempt to obtain an alternative mailing address from the United States postal service.

Note that the statute only requires the enforcing officer to check the postal service for a forwarding address, but nothing else. It does not require that the enforcing officer attempt to use other addresses of which it may have some actual notice.

Thus, this newer form of the statute complies with that provision of *Jones* that says, "when the government learns its attempt at notice has failed, due process requires the government to do something more before real property may be sold in a tax sale."12

However, it fails to comply with that portion of *Jones* that says, "the government (is required) to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case."13

In that failure, the revised §1125 still fails to provide a conveyance of the property sufficiently *Jones*-compliant to allay the concerns about title.

Further, under RPTL §1104(2), municipalities, like the City of New York actually has, have the power to opt out of even these enhanced procedures.

Desire to Inform

Jones requires that a government act like a person who actually desires to inform but gives no guidance as to what such behavior would look like. There have been no New York state rulings setting forth minimum standards, but the recent Second Circuit opinion in Miner v. Clinton County14 gives an excellent glimpse of what kind of behavior would qualify. In it, the county treasurer received a mailing receipt with an illegible signature from the certified mail that was sent to the delinquent taxpayer.

She testified that, pursuant to standard practice for confirming illegible signatures, the County Treasurer's Office confirmed, by checking the United States Postal Service Website, that the Notice was delivered . . . within the zip code applicable to the Tupazes' residence. After comparing the "signature" on the . . . delivery receipt to previous delivery receipts for notices of foreclosure that had been sent to the [delinquent's] address, she concluded that previous notices had been accepted with equally indecipherable markings. According to [her], it was "not at all unusual to receive a certified mail receipt with an illegible signature or simply a mark in the signature box indicating its receipt."

With an affidavit like that in the court file, anyone researching the validity of the chain of title can rest assured that *Jones* has been satisfied. Indeed, Miner ruled it had. Where a taxing authority concludes that notice has actually been received and that conclusion is "objectively reasonable," according to Miner, it is sufficient under *Jones*.

Older Foreclosures

Note our repeated reference to "recent" tax foreclosures. This is because the kind of title flaw we are talking about - due process - is one that is peculiarly susceptible to counter-arguments of waiver, estoppel, and laches when the delinquent taxpayer asserts due process violations. Courts strongly prefer stability in real property transactions.15

They are therefore only willing to entertain challenges to a foreclosure raised reasonably diligently by the delinquent taxpayer, but are unlikely to entertain such a challenge more than a few months after title has passed under the proceeding. Note, we are not talking here about the so called "right of redemption,"16 which carries its own due process notification standards,17 but rather a litigant's duty to come to court promptly with any challenge to the judicial process. No matter how badly constitutional rights are trampled, courts are unwilling to vacate their own judgments unless litigants move promptly to vacate their defaults.

"Promptly" however, is measured from when the defaulting litigant first learned that something was amiss.

In the case of income-producing properties, the successful bidder at the foreclosure sale is likely to make nearly immediate contact with the current occupants of the property that should alert the delinquent to the realization that it no longer owns the property. The delinquent can then be expected either to move promptly to undo the sale or simply go away. Thus, the presence of a recent tax foreclosure presents a far greater hazard to insurable title than does an older one. The old claim of violation of due process may be eminently meritorious, but will itself be foreclosed by the simple passage of some relatively small amount of time. Just how much time it takes to extinguish such a claim from the point of view of realism is a judgment call, but one can say with reasonable certainty that most judges will refuse to entertain a challenge for income producing property, after more than a year. For non-income producing property where there is no predictable signal to the delinquent taxpayer that title has been lost, it may be that the due process claim has as much as another year of viability, but not much more. Absentees are expected to check in on even their non-income producing property at least occasionally. One can expect title underwriters to vary as to how old a tax foreclosure must be for it to be old enough to make the title insurable. Completely undeveloped land may prove the most difficult to insure because it is the land least likely to draw the owner's attention to something be-

ing amiss, thus being the least likely cut off the delinquent by laches.

Repairing 'Jones' Gaps

Thus, under *Jones*, tax foreclosures create gaps in the insurable chain of title. But, in an affected transaction, the seller's and purchaser's attorney will both want to find a way to clear that exception. The title insurer should accept certain proofs to do so.

The attorneys should first examine the Supreme or County Court file for the foreclosure and determine whether the taxpayer participated in the suit. If there was any participation at all, there is no *Jones* violation to worry about.

The attorneys should next ascertain whether the tax lien in question is located in a jurisdiction that has opted in or out of RPTL §1125. It is important to realize that while in New York City there is only one real property taxing jurisdiction, in other jurisdictions in New York state, one may be paying real property tax or water and sewer taxes separately to water, school, fire, or library districts, cities, villages, towns, and counties. While it is more likely that most of these have not opted out of RPTL §1125, some may have exercised their right to do so under RPTL §1104(2).

Next, the seller's attorney will want to examine the affidavits of service in the Supreme Court or County Court's foreclosure file. If service was effected by the most ordinary means under CPLR 308, there is essentially nothing to worry about. Title is clean and proof of these facts should be sufficient to satisfy any underwriter.

Beyond the Public Record

If, however, service was by means that raise questions about whether it was likely to reach the delinquent,18 the seller's attorney, purchaser's attorney, and title company all have reasons to want to see this Jones gap repaired. This, they can achieve by reasonably diligent means.

These efforts can include searching the court files for the foreclosure proceedings to see what references there are to what efforts were made to contact the delinquent taxpayer beyond the initial mailing, contacting the foreclosing taxing authority to see if the certified mailings or the return receipts came back, performing Internet searches to see if current mailing addresses for the taxpayer match those used in the foreclosure procedure, visiting the property and seeing what information can be provided by its current occupants or neighbors.

These research efforts can be set forth in an affidavit sufficient to satisfy the title underwriter that the delinquent taxpayer has indeed abandoned all further connection to the property.

Then, even if the title insurer remains unwilling to remove the exception, the purchaser's attorney can independently evaluate for the purchaser whether it is worth the risk to allow the sale to go through.

While *Jones* exacerbated problems for those seeking to purchase property which passed through a recent tax foreclosure, it did not erect insuperable barriers. *Jones* weakened links in chains of title, but they can be strengthened by basic research followed by some elementary due diligence

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Endnotes:

1. 547 U.S. 220 (2006).

2. 547 U.S. at 230.

3. 547 U.S. at 229.

4. 547 U.S. at 227.

5. 41 A.D.3d 771, 840 N.Y.S.2d 85 (2007).

6. Marvin N. Bagwell, "Tax Sales Notice: Supreme Court Raises Bar for Due Process," NYLJ, July 12, 2006. See¸ Note 12, infra, noting that the New York State Legislature amended the appropriate statute two weeks after the publication of the Bagwell article.

7. James M. Pedowitz, "Tax Title-Would You Insure One?", New York State Bar Journal, November 1977, Vol. 49, No. 7, p. 550. See also, John E. Blyth, Esq., "Tax Titles," Chapter 12 in Pedowitz, Real Estate Titles, 3rd. ed. (2001), both cited in Bagwell, op. cit.

8. 44 A.D.3d 576 (2007). The authors' firm The firm represented the respondent in from the reargument of motion through the cases conclusion.

9. The complete case history is therefore as follows: NYCTL 1999-1 Trust v. 114 Tenth Ave. Assoc. Inc., 44 A.D.3d 576 (2007) app. dism. 10 N.Y.3d 757 (2008) recon. den. 10, . N.Y.3d 757 (2008) recon. den. 10 N.Y.3d 883 (2008) cert. den. 129 S.Ct. 458 (2008).

10. Siegel, Practice Commentaries to CPLR 5015, C5015:5 (McKinney's 1992).

11. The Supreme Court came down with Jones on April 26, 2006. On July 26, 2006, Governor Pataki signed L. 2006, Chap. 415, amending RPTL §1125, effective Nov. 23, 2006.

12. 547 U.S. at 227.

13. 547 U.S. at 230.

14. 541 F.3d 464 (2nd Cir. 2008).

15. Cf. Holy Properties Ltd., L.P. v. Kenneth Cole Productions Inc., 87 NY2d 130 (1995). It should be noted that Adam Leitman Bailey, P.C. partner Jeffrey R. Metz represented the prevailing party in this case.

16. Compare RPAPL §1352 and RPTL §§1110-1114.

17. See, for example, Orange County Commissioner of Finance v. Helseth, 875 N.Y.S.2d 754 (Sup Orange); Temple Bnai Shalom of Great Neck v. Village of Great Neck Estates, 32 A.D.3d 391, 820 N.Y.S.2d 104 (2nd Dept. 2006).

18. Matter of Foreclosure of Tax Liens by County of Sullivan, 43 A.D.3d 598, 840 N.Y.S.2d 676 (2007), found foreclosure improper under Jones absent proof that the County had checked to see if the mail was returned and acted thereon.