

ORIGINAL

IN THE SUPREME COURT OF OHIO

Vanderbilt Mortgage Finance, Inc.	:	SUPREME COURT
	:	CASE NO. 13-0713
	:	
Appellant	:	
	:	ON APPEAL FROM THE
v.	:	FIFTH DISTRICT COURT
	:	OF APPEALS CASE NO. 2012 CA 001
Janette Donaker,	:	
Coshocton County Treasurer, et al	:	
	:	
Appellees	:	

Merit Brief of Appellant Vanderbilt Mortgage Finance, Inc.

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I. Introduction

This is a tax foreclosure action brought by the Coshocton County, Ohio Treasurer, in which a mortgage holder attempted to exercise its statutory right to protect its mortgage by redeeming the real property and preventing the tax foreclosure sale from being confirmed by paying in full the delinquent tax bill. In this case, the Fifth District Court of Appeals reversed the Coshocton County Common Pleas Court's decision which accepted Defendant/Appellant, Vanderbilt Mortgage and Finance Inc.'s (hereinafter "Vanderbilt"), redemption of the subject property and which vacated the tax foreclosure sale. In this appellate court decision, the Fifth District Court of Appeals became the first court in Ohio to interpret the language contained in Ohio Revised Code §5721.25, which permits the redemption of delinquent land from a tax foreclosure sale by the payment of the delinquent tax bill "by any person entitled to redeem the land". The Fifth District Court of Appeals determined that a mortgage holder is not a "person entitled to redeem the land" pursuant to Ohio Revised Code §5721.25. Yet Ohio Revised Code §5721.18 requires that in all tax foreclosure actions a Notice with specific statutory language set forth in Ohio Revised Code §5721.181 be sent to the Owner of the Parcel and Those with Interest in the Parcel informing them that "[a]t any time prior to the filing of an entry of confirmation of sale, any owner or lienholder of, or other person with an interest in, a parcel may redeem the parcel..."

This is the first time the Ohio Supreme Court has been requested to look at this issue of statutory construction and this Court is in the unique position of clarifying this important area of Ohio law. The facts of this case illustrate the shocking mischief that can be wreaked upon mortgage holders if a mortgage holder is not deemed a "person entitled to redeem the land."

It is clear from both a public policy standpoint and as a matter of statutory construction that Ohio Revised Code §5721.25 must be read together, *in pari material*, with Ohio Revised Code

§5721.18 and Ohio Revised Code 5721.181 which requires that notice be sent to mortgage holders informing them that they can redeem the land at any time prior to the confirmation of sale.

The Court should adopt this proposition of law:

- (a) The phrase “any person entitled to redeem the land” contained within Ohio Revised Code §5721.25 includes mortgage holders, as a mortgage holder has a right to redeem land from a tax foreclosure sale which is independent and distinct from the rights of the delinquent property owner.

II. Statement of Facts

II(A) Summary of the Case

This tax foreclosure action was brought by Plaintiff, Janette Donaker, the Coshocton County Treasurer, against her own step daughter, Defendant, Brandi Donaker, nka Brandi Wagner, the record owner of the subject property. (Supp. 90, Tr. 13). The subject property was purchased at a tax foreclosure sale and the proposed new owners of Brandi Wagner's property were to be none other than her step mother, Janette Donaker and her father, Appellant, Alan Donaker. (Supp. 45). When the secured mortgage holder, Defendant/Appellee, Vanderbilt, tried to protect its mortgage lien and redeem the property post-sale by paying in full the delinquent taxes, Janette Donaker, in her official capacity as Coshocton County Treasurer, opposed that redemption; knowing full well that if the tax foreclosure sale was confirmed it would effectively terminate her step-daughter's mortgage lien to Vanderbilt and protect Janette Donaker's own prospective titled interest in the property. (Supp. 53).

II(B) Vanderbilt's Interest in the Subject Property

On June 14, 2003, Brandi L. Wagner and Troy Wagner (hereinafter collectively referred to as "the Wagners") executed a Retail Installment Contract-Security Agreement in the principal amount of \$85,271.49 in favor of Defendant/Appellant, Vanderbilt. See Answer and Cross-claim of Vanderbilt filed August 29, 2011, Ex "A," (Supp. 19). On the same day, to secure payment of the Retail Installment Contract, the Wagners executed the Mortgage in favor of Vanderbilt encumbering the subject property, commonly known for street numbering purposes as 19601 TWRD 383 Walhonding, Ohio 43843 (the "Property"). *Id.* at Ex. "B." (Supp. 24).

Payments on the Note were not made as agreed resulting in a default under both the Note and the Mortgage prior to the initiation of this tax foreclosure action. (Sup. 15-16).

II(C) The Tax Foreclosure Action

On April 19, 2011, Janette Donaker, the Coshocton County Treasurer, filed a Complaint for Foreclosure against her step daughter, Brandi L. Wagner fka Brandi L. Donaker for unpaid property taxes due on the subject Property. (Supp. 1). A preliminary judicial report was filed in this case, which shows that Vanderbilt has an interest in the property owned by Brandi L. Wagner fka Brandi L. Donaker by virtue of the mortgage she delivered to Vanderbilt. (Supp. 3). Vanderbilt was served with the Tax Foreclosure Complaint because the Complaint sought to extinguish all liens on the Property and Vanderbilt held a mortgage on the subject Property. Vanderbilt was also served by certified mail with a Notice to Owner of a Parcel And Those with Interest in Parcel. (Supp.7). This Notice states in pertinent part that Vanderbilt is an owner, lienholder or other person with an interest in the subject Property and as such may redeem the Property at any time prior to the filing of an entry of confirmation of sale. (Supp.8).

Default judgment was granted in favor of Janette Donaker, the Coshocton County Treasurer, on July 15, 2011 after no responsive pleadings were filed by any of the defendants. (Supp. 11). On the same day, Janette Donaker, the Coshocton County Treasurer, quickly filed a Pracepie for Order of Sale; the effect of said sale would be the extinguishment of Vanderbilt's mortgage encumbering her step daughter's property. (Supp.41).

However, on August 25, 2011, the trial court allowed Vanderbilt to intervene and file an answer and cross-claim. (Supp.14). In its Answer and cross claim, Vanderbilt plead that the Wagners had defaulted on the Note and Mortgage in 2010, prior to the initiation of this tax

foreclosure action. (Supp. 15 – 16). Nonetheless, Janette Donaker, the Coshocton County Treasurer, went forward with her scheduled sale of the Property on October 21, 2011. (Supp. 44). The Property was sold and it was designated that the Property be titled to Janette Donaker and her husband, Appellant, Alan Donaker. (Supp. 45). The property was purchased for the paltry sum of \$15,100.00 (free and clear of her step daughter's mortgage obligation to Vanderbilt) by virtue of Janette Donaker's own tax foreclosure action brought in her capacity as Coshocton County Treasurer. (Supp. 45).

II(D) Vanderbilt's Attempt to Redeem the Property

On November 2, 2011, prior to the judge signing any entry of confirmation of the sale, Vanderbilt deposited a \$6,000.00 Redemption Check with the Clerk of Courts (to pay in full the Coshocton county tax bill and satisfy Coshocton County's interest in the property) along with a Notice of Redemption and a Motion to Stay Confirmation of the October 21, 2011 Sheriff's Sale. (Supp. 46 – 50). On November 2, 2011, the trial court issued a Judgment granting the Stay of Confirmation, Vacating the October 21, 2011 Sheriff's Sale and ordering that Vanderbilt's deposit be accepted by the Coshocton County Treasurer as a redemption of the Property. (Supp. 51). On November 4, 2011, Janette Donaker, in her capacity as the Coshocton County Treasurer, had her Special Prosecutor, James R. Skelton, file a Memorandum opposing Vanderbilt's Notice of Redemption, refusing to accept the money that would pay off the Coshocton County tax bill, and instead argued for the result that Vanderbilt's \$85,271.49 mortgage on her step-daughter's property be released because the Property was purchased at Sheriff's Sale and that said Sale proceeds would pay off the tax bill and allow her and her husband to own her step daughter's

Property free and clear of Vanderbilt's mortgage. (Supp. 53). On November 4, 2011, the trial court issued a Judgment Entry which stated in part:

The Court received a telephone call from Alan Donaker demanding an explanation as to why the court allowed Vanderbilt to redeem. Donaker and his spouse, Janette Donaker, who is the Coshocton County Treasurer, are listed on a "Real Estate Judicial Sale Purchase Information Form" Under Section D, "Property is to be Deeded To" This Document is not filed stamped, but is attached to the Sheriff's Return. Upon Receipt of the Telephone Call from Donaker, the Court refused to engage in any ex-parte communication... (Supp. 69 – 70).

Immediately after this attempted ex-parte communication, the trial court on November 4, 2011, vacated its November 2, 2011 entry permitting redemption of the Property by Vanderbilt and set the matter for an oral hearing on Vanderbilt's Motion to Redeem. (Supp. 68 – 71). On November 23, 2011, Alan Donaker filed a Motion to Intervene as a party to this case; the trial court permitted intervention pursuant to Ohio Rule of Civil Procedure 24; and, Alan Donaker filed a Memorandum In Opposition to Redemption (Supp. 72 – 77).

On November 30, 2011, the matter came before the trial court upon oral hearing and a transcript of said hearing was filed with the Fifth District Court of Appeals in Case No. 2012CA0001. (Supp. 78 – 108, Tr. 1 – 31). Following oral argument, on December 5, 2011, the trial court accepted Vanderbilt's Notice of Redemption and vacated the Sheriff's Sale. (Supp. 109 – 112). On January 3, 2012 Janette Donaker, the prospective co-owner of the Property, in her capacity as the Coshocton County Treasurer had her Special Prosecutor, James R. Skelton, file a Joint Notice of Appeal. (Supp. 113 – 115). This joint Notice of Appeal was also brought by Alan Donaker, in his capacity as the other prospective co-owner of the Property. (Supp. 113).

II(E) The Fifth District Court of Appeals Decision

Despite the joint Notice of Appeal, only Appellant, Alan Donaker filed an Appellant's Brief in *The Matter Of The Foreclosure of Liens For Delinquent Taxes vs. Parcels of Land Encumbered With Delinquent Tax Liens*, (Fifth District Case No.2012 CA0001). Yet, both Special Prosecutor, James Skelton, and Alan Donaker's own attorney presented oral arguments before the appellate court on behalf of the prospective co-owner of the Property, Alan Donaker. Alan Donaker assigned a single error on appeal and the sole issue before the Fifth District Court of Appeals was whether Vanderbilt had the right to redeem the Property prior to confirmation of the Sheriff's Sale pursuant to R.C. §5721.25. See Opinion of Fifth District Court of Appeals issued March 29, 2013 page 3 {¶ 7} (Supp. 119). The Fifth District Court of Appeals noted that R.C. §5721.25 does not define the phrase "any person entitled to redeem the land." *Id.* at {¶ 9} (Supp. 120). The Fifth District Court of Appeals made their determination on the appeal based on their perception of the equities of this case and their determination that the property owner, Brandi Wagner (daughter of the prospective new owners of the Property) had no interest in redeeming the property and intended to allow the property to be sold at the sheriff's sale. *Id.* at {¶ 12} (Supp. 120). But Brandi Wagner was present at the November 30, 2011 oral argument before the trial court and despite being offered an opportunity to speak by the trial court, Brandi Wagner did not testify that she had no interest in redeeming the property and did not testify that she intended to allow the property to be sold at sheriff's sale. (Supp. 106 – 107, Tr. 29 – 30).

Ultimately, the Fifth District Court of Appeals held that mortgage holders, such as Vanderbilt, are not persons entitled to redeem the land under Ohio Revised Code §5721.25. See Opinion of the Fifth District Court of Appeals issued March 29, 2013, page 4 {¶ 9} (Supp. 120).

III. Argument

Appellant's Proposition of Law

Proposition of Law: The phrase “any person entitled to redeem the land” contained within Ohio Revised Code §5721.25 includes mortgage holders, as a mortgage holder has a right to redeem land from a tax foreclosure sale which is independent and distinct from the rights of the delinquent property owner

A. The Contours of the Analysis

Tax foreclosure sales conducted under the authority of Chapter 5721 of the Ohio Revised Code are for the exclusive purpose of collecting delinquent taxes, assessments, recoupment charges, penalties and interest, due and unpaid, charged against real property. The issue in this case is who has the right to pay the amounts due to the County Treasurer in order to redeem real property after a tax foreclosure sale but prior to the filing of an entry of confirmation of sale. The County Treasurer’s interest in conducting the tax foreclosure sale is satisfied regardless of whom ultimately pays the amounts due it. The Ohio legislature has mandated that Notice be sent to all owners, lienholders or other persons with interests in the real property advising them that they have a right to redeem the real property prior to confirmation of sale. O.R.C. §5721.181. Thus it is illogical to interpret the phrase “any person entitled to redeem the land” contained within Ohio Revised Code §5721.25 to exclude a mortgage holder with a lien encumbering the land. To aid this Court in resolving this issue, this Brief will address the following legal issues:

- + Mortgage holders are lienholders, in general, and have an interest in real property and also have the right by, both contract and statute, to redeem real property prior to the filing of an entry of confirmation of sale.
- + Mortgage holders, specifically, have vested legal title to real property when the loan is in default and as such may redeem real property from a tax foreclosure sale as a legal owner.

- + The Fifth District Court of Appeal's reliance upon the case of *Wilke, Treasurer v. Secretary of Housing and Urban Development* is misguided and does not change Vanderbilt's statutory right to redeem property as a lienholder generally or specifically as a mortgage holder whose mortgage is in default.
- + As a matter of statutory construction, Ohio Revised Code §5721.18 and §5721.181 and §5721.25 must be read together and when done so, it is perfectly clear that mortgage holders are persons entitled to redeem the land

B. Mortgage holders and lienholders, in general, have an interest in real property and have the right, by both contract and statute, to redeem real property prior to the filing of an Entry of Confirmation of Sale.

Vanderbilt is the holder of a note and mortgage executed and delivered by the Wagners which encumbers the subject Property. (Supp. 15, Exhibits A and B). The Wagners defaulted on their obligations under Vanderbilt's Note and Mortgage before the Treasurer filed this tax foreclosure action. (Supp. 15 – 16). Under R.C. §5301.233, a mortgagee, in order to protect the mortgaged real property, may secure unpaid balances of advances made to pay taxes and assessments, if the mortgage states that it shall secure those unpaid balances. Paragraph 24 of Vanderbilt's Mortgage includes a provision allowing Vanderbilt to advance sums necessary to pay real estate taxes and assessments which have attached to the subject property:

24. Certain Other Advances. In addition to any other sum secured hereby, this Security Instrument shall also secure the unpaid principal balance of, plus accrued interest on, any amount of money loaned, advanced, or paid by the Lender to or for the account and benefit of the Borrower, after this Security Instrument is delivered to and filed with the Recorder's Office, Tuscarawas County [sic], Ohio, for recording. *Lender may make such advances in order to pay any real estate taxes and assessments*, insurance premiums plus all other costs and expenses incurred in connection with the operation, protection or preservation of the Property, including to cure Borrower's defaults by making any such payments which Borrower should have paid as provided in this Security Instrument, it being intended by this Section 24 to acknowledge, affirm and comply with the provision of Section §5301.233 of the Revised Code of Ohio. (Emphasis added). (Supp. 36).

Further, Vanderbilt was named as a party to this action because the Preliminary Judicial Report filed in this case (Supp. 3) shows that Vanderbilt has an interest in the Property recognized by the Ohio legislature as being significant and which requires Notice of a right to redeem. O.R.C. §5721.18 and O.R.C. §5721.181. Vanderbilt was served by certified mail with a Notice to Owner of a Parcel And Those with Interest in Parcel. (Supp. 7 – 8). This Notice states in pertinent part that Vanderbilt is an owner, lienholder or other person with an interest in the subject Property and, as such, may redeem the Property at any time prior to the filing of an entry of confirmation of sale. (Supp. 8).

Regardless of any interpretation of O.R.C. 5721.181 and 5721.25, when Vanderbilt filed its Notice of Redemption (Supp. 46 – 48), it was properly exercising its rights according to the mortgage contract it entered into with the Wagners and further afforded to Vanderbilt by Ohio Revised Code §5301.233 by advancing funds due for unpaid taxes and assessments in order to protect its mortgage lien. And, Vanderbilt was also relying on the Notice it had received pursuant to Ohio Revised Code §5721.181 informing Vanderbilt that it had a right to redeem the Property after the sale but before the filing of an entry of confirmation of sale.

The Third District Court of Appeals has held that the primary purpose of Ohio Revised Code §5721.25 is similar to the primary purpose of Ohio Revised Code § 2329.33 and that is to protect the interests of the taxing authority and those with a right to redeem the real property regardless of any objections made by the purchaser at tax sale. *Cole v. Benedict*, 113 Ohio App.3d 561, 681 N.E.2d 942 (1996) citing to *Ohio Sav. Bank v. Ambrose* 56 Ohio St. 3d 53, 563 N.E.2d 1388 (1990). But in this case, the Fifth District Court of Appeals stands the primary purpose behind Ohio Revised Code §5721.25 on its head in order to protect the interests of the

purchaser at tax foreclosure sale; regardless of the attempted redemption efforts made by a party with a vested interest in the real property, Vanderbilt, the mortgagee.

C. Mortgage holders specifically have vested legal title to real property when the loan is in default and, as such, may redeem real property from a tax foreclosure sale

The Fifth District Court of Appeals decision in this case holds that the intent of Ohio Revised Code §5721.25 is to provide only the owner of real property with an opportunity to redeem that property. This decision ignores the language contained in other sections of Chapter 5721 of the Ohio Revised Code, which provides that at the beginning of a tax foreclosure action, notice is required to be sent to all those with an interest in the property advising them that they may redeem the property at any time prior to the filing of an entry of confirmation of sale. Ohio Revised Code §5721.18 and §5721.181. But, Vanderbilt believes that even if the Fifth District Court of Appeals analysis stands, mortgage holders, whose note and mortgage are in default, have the rights of an owner to redeem the property.

(C)(1) Mortgages Have Always Been Considered Quasi-deeds to Land

There exists an unbroken, century-old line of cases that stand for the proposition that a mortgage holder obtains legal title to real property encumbered by its mortgage once there is a breach, by the mortgagor, of that mortgage. Here Vanderbilt's Note and Mortgage were breached by the Wagners even before this tax foreclosure action was filed. (Supp. 15 & 16). The mortgage being, in equity, regarded as a mere security for the debt, the legal title to the mortgaged premises remains in the mortgagor, as against all the world, except the mortgagee, and also as against him until condition broke; but, after condition broken, the legal title, as between mortgagor and mortgagee, is vested in the mortgagee. *Kerr v. Lydecker* 51 Ohio St. 240

(1894) citing to *Allen v. Everly*, 24 Ohio St. 97; *Ely v. McGuire*, 2 Ohio, 223; *Hibbs v. Insurance Co.* 40 Ohio St. 543; *Martin v. Alter*, 42 Ohio St. 94. While today, most people consider a mortgage to be an instrument or contract whereby a debt or duty is acknowledged to be due or owing to another, this was not always the case. A mortgage was originally an absolute sale of the lands by the mortgagor to the mortgagee, subject to be determined by performance of the conditions contained in the mortgage within the time therein specified, and, upon failure to perform by the day named, the title to the lands became absolute in the mortgagee. *Kerr v. Lydecker*, 51 Ohio St. 240 (1894). In the early days of Ohio law, on condition broken, the only remedy of the mortgagee was to take the lands for the debt, peaceably, if possible; otherwise by ejectment. *Id.* Later on, courts of chancery began to regard the mortgage as a mere security for the debt, and to grant relief to the mortgagor by allowing him a certain time, to be fixed by the court, usually six months, in which to pay the debt and redeem the land. *Levin v. Carney*, 161 Ohio St. 513 (1954); *Kerr v. Lydecker*, 51 Ohio St. 240 (1894). The decree in such cases provided that, in case the mortgagor should fail to pay the debt within the time so fixed, his right to redeem should be forever cut off and barred, or as it was usually expressed, foreclosed. *Id.* citing to *Wilcox, Ohio Forms & Pr.* (2nd Ed.) 794. Upon his failure to pay the debt within the time so fixed, the mortgagee became the absolute owner of the lands in fee, and thereby the debt was discharged. *Id.* Still later on, and about the beginning of the nineteenth century, courts of chancery, by degrees, adopted a further rule of practice, whereby the mortgagee was allowed, at his election, to either foreclose his mortgage and take the land for the debt, or to have the mortgage foreclosed, the equity of redemption then cut off, and then have a master sell the land by order of the court, and apply the proceeds to the payment of the debt, rendering any surplus to the mortgagor, and, in case of a deficiency, have execution awarded in his favor. *Id.* This was

the beginning of the modern mortgage foreclosure action, but it did not change the longstanding law holding that upon default, the legal title to the real property, as between mortgagor and mortgagee, became vested in the mortgagee. *Id.*

(C)(2) It is only because of changes to Ohio's statutes that a mortgage holder needs to file a foreclosure lawsuit after default, but that does not change the nature of the mortgage as a sort of a deed.

In Ohio, the right to foreclosure a mortgage after condition broken, either by a strict foreclosure or by a foreclosure and sale of the mortgaged property, continued down to the adoption of the Code of Civil Procedure in 1853. *Kerr v. Lydecker* 51 Ohio St. 240 (1894). By section §374 of the Code it was provided that, "when a mortgage is foreclosed, a sale of the premises shall be ordered." This Code, for the first time in Ohio history, prohibited a strict foreclosure in Ohio, and since 1853, after condition broken, the mortgagee was required to sue the borrower in court to enforce his mortgage. *Id.* This provision requiring foreclosure was subsequently included in Section §5316, Revised Statutes, Section §11588, General Code, and Section §2323.07, Revised Code. *Levin v. Carney*, 161 Ohio St. 513 (1954). Since 1853, a mortgagee in Ohio could sue for the recovery of the possession of the land in a real estate action in the nature of ejectment, using his mortgage to prove his title, or he could sue for a foreclosure of his mortgage, and a sale of the mortgaged premises, but he had to bring suit. *Id.*

This analysis of the history of Ohio mortgage foreclosure actions is crucial to a determination of Vanderbilt's right to redeem under the Fifth District Court of Appeals' interpretation of Ohio Revised Code §5721.25. For well over a hundred years, after condition broken, the title to real property encumbered by a mortgage is vested in the mortgagee, as between him and the mortgagor. *Kerr v. Lydecker* 51 Ohio St. 240 (1894) citing to *Heighway v. Pendleton*, 15 Ohio 735; *Allen v. Everly*, 24 Ohio St. 97; *Hibbs v. Insurance Co.*, 40 Ohio St.

543-559. These cases make clear that while the mortgagor's right to redeem is cut off by the foreclosure action, no title is thereby recovered by the mortgagee through the foreclosure action, because the title, as between him and the mortgagor, is already in the mortgagee once there has been a default in the terms of the note or mortgage. *Id.* A mortgage foreclosure sale ordered and made by virtue of Ohio statute is only an additional step added to a strict foreclosure (and not a change of the nature of the action), and thereby a transfer is made of the title and possession of both the mortgagor and *the mortgagee* to a purchaser for value. *Kerr v. Lydecker* 51 Ohio St. 240 (1894). The deed of the sheriff as completely transfers to the purchaser the title and right of possession as would a joint deed made by both mortgagor and mortgagee. *Id.* When the property secured by a mortgage is sold to a third party purchaser at a mortgage foreclosure sale, instead of a recovery of the title to or possession of the secured property by the mortgagee, all title and possession already in the mortgagee, under the defaulted mortgage, is transferred to the purchaser. *Id.* This is crucial, because this means that, even prior to a foreclosure action, the mortgagee has vested legal title to real estate encumbered by his mortgage if the note and mortgage are in default.

While it's true, that when the mortgagee buys in the land at a mortgage foreclosure sale made by the sheriff, the land is transferred to the mortgagee by the sheriff's deed, this transfer is made to him as a purchaser, and not as a mortgagee. *Kerr v. Lydecker* 51 Ohio St. 240 (1894). In such case the mortgagee no more recovers the title or possession than would a purchaser who is a stranger to the suit. *Id.* This is because, even today, legal title to real estate encumbered by a mortgage passes, as between the mortgagor and mortgagee, to the mortgagee after the mortgagor defaults and this legal title is not dependent upon the mortgagee purchasing the property at mortgage foreclosure sale. *Hausman v. City of Dayton* 73 Ohio St.3d (1995).

Thus if the Fifth District Court of Appeals decision rendered in this case requires one to be an owner in order to redeem the property pursuant to Ohio Revised Code §5721.25, Vanderbilt as the holder of a mortgage in default holds legal title to the subject property. Brandi Wagner is the holder of an equity of redemption. An “equitable owner” is one who is recognized in equity as the owner of the property, because the real and beneficial use and title belong to her, although the bare legal title is invested in another. *Wells Fargo Bank N.A. v. Sessley* 188 Ohio App.3d 213 (10th Dist. 2010). A “legal owner” is one in whom the legal title to real estate is vested, but subject to the rights of any equitable owner. *Id* citing to *Levin v. Carney* (1954), 161 Ohio St. 513, 518. Vanderbilt is the “legal owner” of the Property and as such has a right to redeem even under the Fifth District Court of Appeals’ analysis as memorialized in *The Matter Of The Foreclosure of Liens For Delinquent Taxes vs. Parcels of Land Encumbered With Delinquent Tax Liens*, (Fifth District Case No.2012 CA0001) (Supp. 119-120) which requires one to be an owner in order to redeem the property pursuant to Ohio Revised Code §5721.25.

D. The Fifth District Court of Appeals’ reliance upon the case of *Wilke, Treasurer v. Secretary of Housing and Urban Development* is misguided and does not change Vanderbilt’s statutory right to redeem the property as a mortgage holder and lien holder in general or specifically as a mortgage holder whose mortgage is in default

The Fifth District Court of Appeal’s analysis in this case relied on the holding in *Wilke, Treasurer v. Secretary of Housing and Urban Development* (1st Dist. No. C-840077) 1984 Ohio App LEXIS 11971, 1984 WL 7141 (December 26, 1981) to determine that only the property owner is “a person entitled to redeem” and that Vanderbilt, as a mortgagee, is prohibited from redeeming the land. See Opinion of Fifth District Court of Appeals issued March 29, 2013 {¶ 10} (Supp. 120). Not only is that determination impracticable, it is also contrary to the case law

and statutes, and potentially detrimental to the ability of Ohio County Treasurers to efficiently receive payment of taxes from mortgagees.

As stated above, R.C. §5301.233 allows a mortgagee to advance sums to pay real estate taxes to protect its interests in the property. It is widely known that mortgagees often must pay real estate taxes to protect their mortgage interests in real estate. In 1885, the Ohio Supreme Court held that mortgagees have a right of redemption in property that is the subject of a foreclosure action. See *Hollinger v. Bates*, 34 Ohio St. 437 and *Pinney v. National Bank*, 71 Ohio St. 173 at 180 (1904). Yet in this case (Fifth District Case No.2012CA0001), the Fifth District Court of Appeals relied on the *Wilke* decision for the proposition that only the former owner has a right of redemption under O.R.C. §5721.25 as any other conclusion would undermine the integrity of tax foreclosure sales. *Id.* at {¶ 12} (Supp. 121).

But the facts of the *Wilke* case are distinguishable from the facts in the within matter. In the *Wilke* case, a third party who had no recognizable interest in the real estate prior to the tax foreclosure sale waited until after the sale and then paid the delinquent property owner and received an assignment of the delinquent property owner's right to redeem and a quit claim deed to the real property. *Wilke, Treasurer v. Secretary of Housing and Urban Development* (1st Dist. No. C-840077) 1984 Ohio App LEXIS 11971, 1984 WL 7141 (December 26, 1981). Thus in *Wilke*, at the time the tax foreclosure action was initiated and, even later in the case, at the time of the tax foreclosure sale, this third party was not an "owner or lienholder of, or other person with an interest" in the real estate entitled to notice of rights to redeem pursuant to Ohio Revised Code §5721.18 and §5721.181. The *Wilke* court noted that any interest in the subject property that was obtained by the third party who attempted to redeem the property after the tax foreclosure sale was an interest obtained only after the sale. *Id.* Unlike the third party in *Wilke*,

Vanderbilt held its interest in the Property prior to the initiation of this instant tax foreclosure sale and Vanderbilt received the Ohio Revised Code §5721.181 Notice to Owner of a Parcel And Those with Interest in Parcel informing Vanderbilt that it had a right to redeem (Supp. 7 – 10).

The *Wilke* court heavily relied on the principles set forth in *Wayne Savings & Loan Company v. Young* 49 Ohio App.2d 35 (9th Dist. 1976), which involved a mortgage foreclosure action (not a tax foreclosure pursuant to O.R.C §5721) and held that the equity of redemption under R.C. §2329.33 is an inalienable personal privilege held only by the property owner (debtor in the mortgage foreclosure action). In the *Wayne* case, a junior lien holder attempted to purchase the equity of redemption from the homeowner (debtor in the mortgage foreclosure action) after a mortgage foreclosure sale was held. *Wayne Savings and Loan Company v. Young*, 49 Ohio App.2d 35 (9th Dist. 1976). The *Wayne* court held that, after a Sheriff's Sale, the statutory equity of redemption is a personal privilege held by the homeowner and cannot be transferred to third parties. *Id.* But Ohio Revised Code §2329.33 (mortgage foreclosure redemption statute) is significantly different from Ohio Revised Code §5721.25 (tax foreclosure redemption statute) in that O.R.C. §2329.33 specifically provides that only the debtor (owner) of the real property can redeem said real property after a foreclosure sheriff's sale, while the explicit language of Ohio Revised Code §5721.25 is broader and provides that “any person entitled to redeem the land may do so...”. Further Ohio Revised Code §5721.18 and §5721.181 clarify that those people entitled to redeem real estate from a tax foreclosure sale pursuant to O.R.C. §5721.25 include the owner or lienholder of, or other person with an interest” in the real estate.

In this instant case, Vanderbilt, in its efforts to redeem the property, merely advanced the sums due for unpaid real estate taxes, *on behalf of the property owner*, so that it could protect its mortgage interest in the subject property and maintain the status quo. Brandi Wagner gave

Vanderbilt the right to do this, on her behalf, when she signed the Mortgage. (See Mortgage ¶24.) (Supp. 36). The Ohio legislature has recognized this important right for mortgage holders to make these types of advances in order to protect their interest in the real property, which is the security for their loan. Ohio Revised Code §5301.233. Even if, as the Fifth District Court of Appeals believes, Vanderbilt does not have its own independent right to redeem the property pursuant to Ohio Revised Code §5721.25, Vanderbilt clearly has the right to provide funds necessary to redeem the property *on behalf of Brandi Wagner*. There is no doubt that the owner of the property is a person entitled to redeem the land under R.C. §5721.25 and that Vanderbilt has the contractual and statutory right to advance these funds on behalf of the owner. If the Coshocton County Treasurer will accept the funds tendered by Vanderbilt, title to the property will revert to Brandi Wagner and Vanderbilt's mortgage will remain in place. This represents a proper redemption of the property by the property owner. The fact that Vanderbilt provided the funds on behalf of the property owner does not make the redemption void.

- E. **As a matter of statutory construction, Ohio Revised Code §5721.18 and §5721.181 and §5721.25 must be read together and when done so, it is perfectly clear that mortgage holders are persons entitled to redeem the land from tax foreclosure sales.**

As stated above, this case involves an interpretation of Ohio Revised Code R.C. §5721.25 because this is an action for forfeiture of land due to delinquent real estate taxes and assessments. Ohio Revised Code §5721.25 provides that *any person entitled to redeem* may do so by tendering to the Treasurer the amount due for unpaid taxes and assessments. The language of this statute is different than that of R.C. §2329.33, which is the statute governing redemption by judgment debtors in mortgage foreclosure actions. Under R.C. §2329.33, *only the judgment*

debtor may redeem the property prior to confirmation of sale. That the language limiting who may redeem property under R.C. §5721.25 is different than that under R.C. §2329.33 is of great significance to this case. The primary goal in statutory interpretation is to give effect to the intent of the legislature. *Christe v. GMS Mgt. Co., Inc*, 88 Ohio St.3d 376, 377, 726 N.E.2d 497, 499 (2000). In determining legislative intent, the court first looks to the language of the statute. *Provident Bank v. Wood* 36 Ohio St.2d 101, 105, 65 O.O.2d 296, 298, 304 N.E.2d 378, 381 (1973). In considering the statutory language, it is the duty of the court to give effect to the words used in a statute, not to delete words used or to insert words not used. *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St.3d 50, 524 N.E.2d 441 (1988). If the meaning of the statute is unambiguous and definite, it must be applied as written. *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545, 660 N.E.2d 463, 465 (1996). If it was the legislature's intent in drafting R.C. §5721.25 that redemption could be accomplished only by the delinquent property owner, then the legislature would have put that specific language in the statute. But by using the broader language "any person entitled to redeem" clearly the legislature contemplated a situation where someone other than the delinquent property owner would have a right to redeem the property after a tax foreclosure sale.

The legal doctrine of *Pari Materia* has been incorporated into Ohio law since the inception of the Code. It is a well established rule of construction that sections and statutes in *pari materia* should be construed together as if they were a single statute. *Kenwood Country Club v. Bd. of Liquor Control*, 122 N.E.2d 425 (1953). Sections of the same chapter of the Code are considered *pari material* and should be construed together. *Id.* The doctrine of *in pari materia* is, of course, applicable only when the terms of the statute to be construed are ambiguous or their significance doubtful. *In re Estate of Friedman*, 154 Ohio St. 1 (1950). The doctrine of *pari materia* is not to

be applied to effect a construction contrary to the clearly manifested intent of the legislature as expressed in the statute. *Id.* But all statutes pertaining to the same general subject matter must be read *in pari materia*. *Hughes v. Registrar, Ohio BMV*, 79 Ohio St.3d 305 (1997) citing to *Maxfield v. Brooks*, 110 Ohio St. 566, 144 N.E. 725 (1924). In construing these provisions together, courts must harmonize and give full application to all provisions "unless they are irreconcilable and in hopeless conflict." *Id.* citing to *Couts v. Rose*, 152 Ohio St. 458, 461, 40 Ohio Op. 482, 484, 90 N.E.2d 139, 141 (1950). Here there is no manifested intent by the legislature to read the notice requirements statutes (5721.18 and 5721.181) of the tax foreclosure code (Chapter 5721) separate from the redemption statute (5721.25). In fact, reading these statutes together makes perfectly clear the intent of the legislature as to whom has a right to redeem property from a tax foreclosure sale.

Pursuant §5721.181(B) and (C) when the Treasurer files a tax foreclosure action, a notice must be sent to the owner of the property along with all lienholders informing the property owner and lienholders that they have a right to redeem the real property from tax foreclosure sale at any time prior to the confirmation of said sale. The specific language of Ohio Revised Code §5721.181 is reproduced in relevant part:

At any time prior to the filing of any entry of confirmation of sale, any owner or lienholder of, or other person with an interest in, a parcel may redeem the parcel by tendering to the treasurer the full amount of the taxes, assessments, charges, penalties, and interest due and unpaid on the parcel, together with all costs incurred in the proceeding instituted against the parcel under section 5721.18 of the Revised Code. (Ohio Revised Code §5721.181(C)).

The controlling law concerning the redemption of delinquent land for which taxes, assessments, penalties, interest or charges have become delinquent is R.C. §5721.25. Under this statute, real property may be redeemed at any time before the filing of an entry of confirmation

of sale by “*any person entitled to redeem the land*” by tendering to the county treasurer an amount sufficient to pay the taxes, assessments, penalties, interest and charges then due and unpaid and the costs incurred in the proceeding. When §5721.25 is read in *pari materi* with O.R.C. §5721.18 and §5721.181 it becomes clear that as a person with a vested mortgage interest in the real property, Vanderbilt, the mortgagee, is a person entitled to redeem under Ohio Revised Code §5721.25.

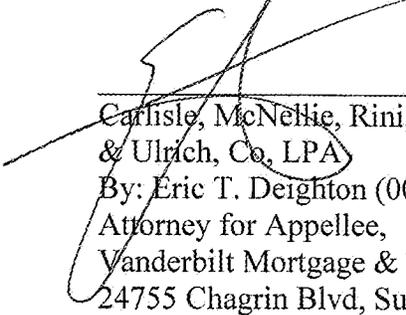
The facts of this instant case are extreme. Admittedly, not all tax foreclosure actions are brought against a Treasurer’s own family member and result in the delinquent property being retained within the family after stripping away all mortgage liens. But, the facts of this case illustrate the damage that is possible to wreak upon mortgage holders, if mortgage holders are denied the opportunity to redeem their secured property from tax foreclosure sales. And, it is not inconceivable that a mortgagor, having already been discharged in Chapter 7 Bankruptcy, might attempt to purge mortgage liens from her property by purposefully not paying her real estate taxes and allowing her property to go through tax foreclosure only to purchase her own property (or have her father purchase the property for her) from tax foreclosure sale. So, if the Fifth District Court of Appeals interpretation of O.R.C. 5721.25 is the law of the land, mortgagors, such as Brandi Wagner, have the incentive to stop paying their real estate taxes in an attempt to enjoy their mortgage-encumbered property responsibility-free by having their property re-purchased at tax foreclosure sale and thus strip the mortgage from the property. While this result is easier to achieve if the mortgagor’s step mother happens to be the County Treasurer and, as such, can use County resources to oppose any attempts by the mortgage holder to redeem the property post sale, these results could be duplicated by any mortgagor. And, if the Fifth District Court of Appeals decision is left standing, mortgagees, such as Vanderbilt, have less means of

protecting themselves against Mortgagors, such as Brandi Wagner, that engage in these shenanigans. Worse yet, the Fifth District Court of Appeal's analysis in this case (Fifth District Case No.2012 CA0001), denies mortgage holders the right to redeem real estate from tax foreclosure sales despite clear legislative intent to provide them that very right.

IV. CONCLUSION

Tax foreclosure actions comprise a significant portion of the civil dockets in Ohio and the law on whom is entitled to redeem property from a tax foreclosure sale needs to be clear. This Court should hold that O.R.C.5721.18 and 5721.181 when read together with O.R.C. 5721.25 clearly establishes that mortgage holders enjoy a right of redemption. This Court should hold that the mortgage holder's right of redemption is independent and distinct from the rights of redemption possessed by the delinquent property owner. In doing so, the Court should overturn the Fifth District Court of Appeals decision in this case.

Respectfully Submitted,



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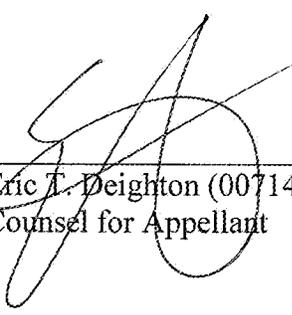
CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief of Appellant was sent by ordinary U.S. Mail to the undersigned counsel on November 4th, 2013

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Attorney for Coshocton County Treasurer

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By: 

Eric T. Deighton (0071456)
Counsel for Appellant

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Foreclosure
Of Liens for Delinquent Taxes

APPELLEE

v.

Parcels of Land Encumbered
With Delinquent Tax Liens, et al

APPELLANTS

ON APPEAL FROM THE COSHOCTON
COUNTY COURT OF APPEALS,
FIFTH APPELLATE DISTRICT

13-0713

COURT OF APPEALS
CASE NO. CA. 2012 CA 0001

NOTICE OF APPEAL OF VANDERBILT MORTGAGE AND FINANCE, CO.

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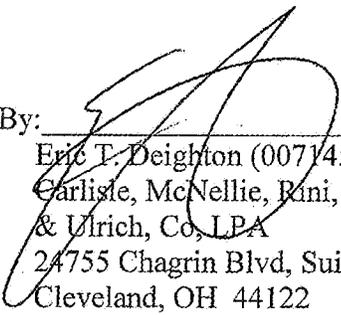
FILED
MAY 08 2013
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLEE
Vanderbilt Mortgage and Finance, Co

Appellee, Vanderbilt Mortgage and Finance, Co., hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Coshocton County Court of Appeals, Fifth Appellate District, entered in Court of Appeals, Case No. 2012CA0001, on March 29, 2013.

This case raises an issue of public or great general interest.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

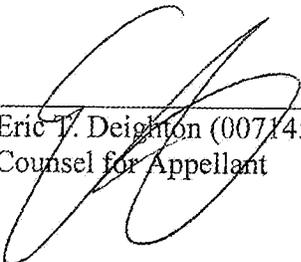
I certify that a copy of this Notice of Appeal was sent by ordinary U.S. Mail to counsel for Appellant on April 23rd, 2013

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By: _____


Eric T. Deighton (0071456)
Counsel for Appellant

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF THE
FORECLOSURE OF LIENS FOR
DELINQUENT TAXES

Plaintiff-Appellee

-vs-

PARCELS OF LAND ENCUMBERED
WITH DELINQUENT TAX LIENS, ET
AL.

Defendants-Appellants

JUDGES:

Hon. Patricia A. Delaney, P. J.
Hon. John W. Wise, J.
Hon. Julie A. Edwards, V.J.

Case No. 2012CA0001

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Coshocton County Court
of Common Pleas, Case No. 11 CI 0249

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

FILED
DATE: MAR 29 2013
FIFTH DISTRICT COURT OF APPEALS
STATE OF OHIO
COUNTY OF COSHOCTON, OHIO

APPEARANCES:

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Wise, J.

{¶1} Appellant Alan Donaker appeals a judgment of the Coshocton County Common Pleas Court vacating a Sheriff's sale. Appellee is Vanderbilt Mortgage and Finance, Inc.

STATEMENT OF FACTS AND CASE

{¶2} On April 19, 2011, the Coshocton County Treasurer filed the instant foreclosure action for unpaid property taxes on a parcel of real estate. The property in question was owned by Troy and Brandi Wagner. Appellee was served with the complaint because they held a mortgage on the real property and the mobile home located on the property. Default judgment was granted to the county on July 15, 2011. However, on August 25, 2011, the court allowed appellee to intervene and file an answer and a cross-claim seeking judgment against the Wagners in the amount of \$70,475.35.

{¶3} A sale of the property was conducted by the Coshocton County Sheriff on October 21, 2011. The highest bidder was James M. Matchett, who offered a bid of \$15,100.00. Matchett designated that the property be deeded to appellant. At a sale held later the same day, appellee successfully purchased the mobile home.

{¶4} The Coshocton County Treasurer submitted an entry for confirmation of the sale to the trial court. On November 2, 2011, appellee filed a motion to stay confirmation of the sale and a notice of redemption. Appellee deposited \$6,000.00 with the Clerk of Courts to pay off the county tax bill and satisfy the county's interest in the property.

{¶15} The trial court allowed appellant to intervene in the action on November 23, 2011. Following oral argument, the trial court accepted appellee's notice of redemption on December 5, 2011, and vacated the sheriff's sale. Appellant assigns a single error on appeal:

{¶16} "THE TRIAL COURT'S DECISION GRANTING THE NOTICE OF REDEMPTION FILED BY VANDERBILT MORTGAGE AND FINANCE, INC. WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND CONTRA TO EXISTING LAW."

{¶17} The sole issue before this Court is whether appellee had the right to redeem the property prior to the confirmation of the sheriff's sale pursuant to R.C. 5721.25, which provides in pertinent part:

{¶18} "After a foreclosure proceeding has been instituted under Chapter 323. or this chapter of the Revised Code with respect to delinquent land, but before the filing of an entry of confirmation of sale pursuant to the proceeding or before the expiration of the alternative redemption period as may apply under section 323.78 of the Revised Code, any person entitled to redeem the land may do so by tendering to the county treasurer an amount sufficient, as determined by the court, to pay the taxes, assessments, penalties, interest, and charges then due and unpaid, and the costs incurred in any proceeding instituted against such land under Chapter 323. or this chapter of the Revised Code, and by demonstrating that the property is in compliance with all applicable zoning regulations, land use restrictions, and building, health, and safety codes."

{¶9} The statute does not define the phrase "any person entitled to redeem the land." In the instant case, the trial court found that appellee was a person entitled to redeem the land. We disagree.

{¶10} In *Wilke v. Secretary of Housing and Urban Development*, 1st Dist. No. C-840077, 1984 WL 7141 (December 26, 1984), Gateway, a third party who was not the owner of the property in question, attempted to redeem the property following a sheriff's sale for delinquent taxes. The record was devoid of any indication of the nature or extent of Gateway's interest in the land. The court held that the clear meaning and intent of the second paragraph of R.C. 5721.25 is that only the former owner has the right of redemption, and this is a nontransferable personal privilege. *Id.* The court noted that any other conclusion would undermine the integrity of sheriff's sales for delinquent taxes. *Id.*

{¶11} In the instant case, appellee had a valid lien on the property, and unlike Gateway in the *Wilke* case, appellee was not a stranger to the title. However, we find that the intent of the statute is to provide the owner with an opportunity to redeem the property if they so desire. Appellee was notified of the sale of the land and in fact purchased the mobile home located on the property. Appellee had an opportunity to protect its interest in the land by bidding at the sale.

{¶12} Appellee argues that pursuant to the terms of the mortgage and R.C. 5301.233, they have the right to advance taxes to the property owner. However, that is not what appellee did in the instant case. Rather than advancing taxes on behalf of the property owners, appellee attempted to exercise the right to redeem the property for taxes owed by the property owner, not by appellee. Based on representations

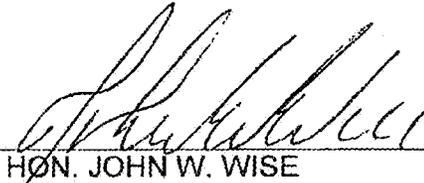
made to the trial court in oral argument, it appears that the property owner had no interest in redeeming the property and intended to allow the property to be sold at the sheriff's sale. To allow appellee to sit on their hands and fail to protect their interests at the sheriff's sale and then redeem the property for the lower amount of the unpaid property taxes, in the instant case \$825.84 on the land, undermines the integrity of sheriff's sales for tax delinquencies.

{¶13} The assignment of error is sustained. The judgment of the Coshocton County Common Pleas Court is reversed. This cause is remanded to that court with instructions to confirm the Sheriff's sale. Costs to appellee.

By: Wise, J.

Delaney, P.J. and

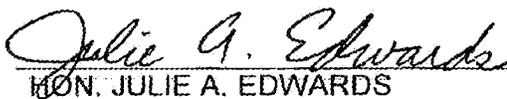
Edwards, V.J. concur.



HON. JOHN W. WISE



HON. PATRICIA A. DELANEY



HON. JULIE A. EDWARDS

rad/JWW

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF THE
FORECLOSURE OF LIENS FOR
DELINQUENT TAXES

Plaintiff - Appellee

-vs-

PARCELS OF LAND ENCUMBERED
WITH DELINQUENT TAX LIENS, ET
AL.

Defendants-Appellants

JUDGMENT ENTRY

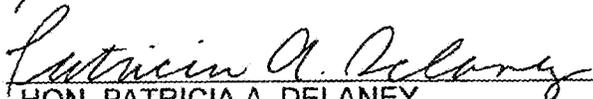
Case No. 2012CA0001

For the reasons stated in our accompanying Opinion on file, the judgment of the Coshocton County Court of Common Pleas is reversed. This cause is remanded to that court with instructions to confirm the Sheriff's sale. Costs assessed to Appellant.

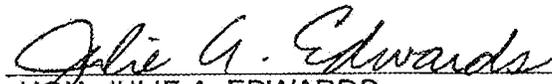
FILED
DATE: MAR 29 2013
FIFTH DISTRICT COURT OF APPEALS
STATE OF OHIO
COUNTY OF COSHOCTON, OHIO



HON. JOHN W. WISE



HON. PATRICIA A. DELANEY



HON. JULIE A. EDWARDS

IN THE COURT OF COMMON PLEAS
COSHOCTON COUNTY, OHIO

IN THE MATTER OF THE)
FORECLOSURE OF LIENS)
FOR DELINQUENT TAXES,)
Plaintiff,)

Case No. 11 CI 0249

vs.)

JUDGMENT ENTRY

PARCELS OF LAND)
ENCUMBERED WITH)
DELINQUENT TAX LIENS, et al.,)
Defendants.)

FILED
2011 DEC -5 AM 8:58
JAMES M. MATCHETT
CLERK OF COURTS
COSHOCTON COUNTY, OHIO

* * * * *

This matter came before the Court for oral hearing on the issue of redemption by mortgagee Vanderbilt Mortgage and Finance, Inc. The real property that is the subject of this case was sold at Sheriff's sale, after a tax foreclosure, to James M. Matchett on October 21, 2011. The notice of sale was filed on October 25, 2011. However, before an entry of confirmation of sale could be filed, the mortgagee (Vanderbilt) deposited a sum with the Clerk of Courts sufficient to satisfy the requirement of redemption. Matchett intervened and filed a motion and memorandum in opposition to redemption, along with the County Treasurer.

Attorneys Richard McNellie and William Rini appeared on behalf of Vanderbilt. Attorney James Skelton appeared on behalf of the County

Treasurer. James Matchett was present with counsel Van Blanchard, II. Property owner Brandi Wagner was present without counsel.

Whereupon, after hearing the arguments of counsel, and after considering the applicable law as set forth in the briefs filed by counsel, the Court makes the following FINDINGS and ORDERS:

1. Vanderbilt is a "person entitled to redeem" as set forth in R.C. 5721.25, in the sense that Vanderbilt has the right to advance taxes due on the property on behalf of the property owner.
2. Vanderbilt's right to advance taxes due on the property is codified in R.C. 5301.233, and set forth in Section 24 of the mortgage instrument.
3. Although Section 24 of the mortgage instrument speaks of the filing of the document in the Recorder's Office of Tuscarawas County, Ohio, the document was filed in the Recorder's Office of Coshocton County, Ohio, which is the county where the property is located, and the mortgagor and mortgagee intended that Section 24 comply with R.C. 5301.233.
4. Vanderbilt's Motion to Stay Confirmation and to Dismiss is GRANTED.

5. Confirmation of the Sheriff's sale previously held on October 21, 2011 is stayed, the Sheriff's sale is vacated and set aside, and the matter is dismissed with prejudice with the costs paid for from the sums deposited for redemption.

6. The Clerk of Courts shall pay any and all sums due and payable for real estate taxes, assessments, penalties and interest through 2010 for Parcel No. 031-0000080-04, and to refund to Vanderbilt Mortgage and Finance, Inc., any sum remaining after the payment of all costs and fees for this case, and all taxes, assessments, penalties and interest. Costs include costs incurred by the Prosecutor's Office for the tax foreclosure proceeding. Any refund shall be paid to Carlisle, McNellie, Rini, Kramer & Ulrich, 24755 Chagrin Blvd., Suite 200, Cleveland, Ohio 44122.

THIS IS A FINAL APPEALABLE ORDER. THERE IS NO JUST CAUSE FOR DELAY.

IT IS SO ORDERED.


Robert J. Batchelor, Judge

12-5-2011

Date

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Judgment Entry was served upon Attorney Richard McNellie, Carlisle, McNellie, Rini, Kramer & Ulrich, 24755 Chagrin Blvd., Suite 200, Cleveland, Ohio 44122; by regular U.S. mail; and upon Attorney James Skelton and Attorney Van Blanchard, II, by placing a copy in their mailboxes at the Clerk of Courts Office, this 5th day of December, 2011.


Ann Hartsock, Secretary

2329.33 Redemption by judgment debtor.

In sales of real estate on execution or order of sale, at any time before the confirmation thereof, the debtor may redeem it from sale by depositing in the hands of the clerk of the court of common pleas to which such execution or order is returnable, the amount of the judgment or decree upon which such lands were sold, with all costs, including poundage, and interest at the rate of eight per cent per annum on the purchase money from the day of sale to the time of such deposit, except where the judgment creditor is the purchaser, the interest at such rate on the excess above his claim. The court of common pleas thereupon shall make an order setting aside such sale, and apply the deposit to the payment of such judgment or decree and costs, and award such interest to the purchaser, who shall received from the officer making the sale the purchase money paid by him, and the interest from the clerk. This section does not take away the power of the court to set aside such sale for any reason for which it might have been set aside prior to April 16, 1888.

Effective Date: 08-06-1976

5301.233 Mortgage may secure unpaid balances of advances made.

In addition to any other debt or obligation, a mortgage may secure unpaid balances of advances made, with respect to the mortgaged premises, for the payment of taxes, assessments, insurance premiums, or costs incurred for the protection of the mortgaged premises, if such mortgage states that it shall secure such unpaid balances. A mortgage complying with this section is a lien on the premises described therein from the time such mortgage is delivered to the recorder for record for the full amount of the unpaid balances of such advances that are made under such mortgage, plus interest thereon, regardless of the time when such advances are made.

Effective Date: 03-18-1969

5721.18 Foreclosure proceedings on lien of state.

The county prosecuting attorney, upon the delivery to the prosecuting attorney by the county auditor of a delinquent land or delinquent vacant land tax certificate, or of a master list of delinquent or delinquent vacant tracts, shall institute a foreclosure proceeding under this section in the name of the county treasurer to foreclose the lien of the state, in any court with jurisdiction or in the county board of revision with jurisdiction pursuant to section 323.66 of the Revised Code, unless the taxes, assessments, charges, penalties, and interest are paid prior to the time a complaint is filed, or unless a foreclosure or foreclosure and forfeiture action has been or will be instituted under section 323.25, sections 323.65 to 323.79, or section 5721.14 of the Revised Code. If the delinquent land or delinquent vacant land tax certificate or the master list of delinquent or delinquent vacant tracts lists minerals or rights to minerals listed pursuant to sections 5713.04, 5713.05, and 5713.06 of the Revised Code, the county prosecuting attorney may institute a foreclosure proceeding in the name of the county treasurer, in any court with jurisdiction, to foreclose the lien of the state against such minerals or rights to minerals, unless the taxes, assessments, charges, penalties, and interest are paid prior to the time the complaint is filed, or unless a foreclosure or foreclosure and forfeiture action has been or will be instituted under section 323.25, sections 323.65 to 323.79, or section 5721.14 of the Revised Code.

The prosecuting attorney shall prosecute the proceeding to final judgment and satisfaction. Within ten days after obtaining a judgment, the prosecuting attorney shall notify the treasurer in writing that judgment has been rendered. If there is a copy of a written delinquent tax contract attached to the certificate or an asterisk next to an entry on the master list, or if a copy of a delinquent tax contract is received from the auditor prior to the commencement of the proceeding under this section, the prosecuting attorney shall not institute the proceeding under this section, unless the prosecuting attorney receives a certification of the treasurer that the delinquent tax contract has become void.

(A) This division applies to all foreclosure proceedings not instituted and prosecuted under section 323.25 of the Revised Code or division (B) or (C) of this section. The foreclosure proceedings shall be instituted and prosecuted in the same manner as is provided by law for the foreclosure of mortgages on land, except that, if service by publication is necessary, such publication shall be made once a week for three consecutive weeks instead of as provided by the Rules of Civil Procedure, and the service shall be complete at the expiration of three weeks after the date of the first publication. In any proceeding prosecuted under this section, if the prosecuting attorney determines that service upon a defendant may be obtained ultimately only by publication, the prosecuting attorney may cause service to be made simultaneously by certified mail, return receipt requested, ordinary mail, and publication.

In any county that has adopted a permanent parcel number system, the parcel may be described in the notice by parcel number only, instead of also with a complete legal description, if the prosecuting attorney determines that the publication of the complete legal description is not necessary to provide reasonable notice of the foreclosure proceeding to the interested parties. If the complete legal description is not published, the notice shall indicate where the complete legal description may be obtained.

It is sufficient, having been made a proper party to the foreclosure proceeding, for the treasurer to allege in the treasurer's complaint that the certificate or master list has been duly filed by the auditor, that the amount of money appearing to be due and unpaid is due and unpaid, and that there is a lien against the property described in the certificate or master list, without setting forth in the complaint

any other or special matter relating to the foreclosure proceeding. The prayer of the complaint shall be that the court or the county board of revision with jurisdiction pursuant to section 323.66 of the Revised Code issue an order that the property be sold or conveyed by the sheriff or otherwise be disposed of, and the equity of redemption be extinguished, according to the alternative redemption procedures prescribed in sections 323.65 to 323.79 of the Revised Code, or if the action is in the municipal court by the bailiff, in the manner provided in section 5721.19 of the Revised Code.

In the foreclosure proceeding, the treasurer may join in one action any number of lots or lands, but the decree shall be rendered separately, and any proceedings may be severed, in the discretion of the court or board of revision, for the purpose of trial or appeal, and the court or board of revision shall make such order for the payment of costs as is considered proper. The certificate or master list filed by the auditor with the prosecuting attorney is prima-facie evidence at the trial of the foreclosure action of the amount and validity of the taxes, assessments, charges, penalties, and interest appearing due and unpaid and of their nonpayment.

(B) Foreclosure proceedings constituting an action in rem may be commenced by the filing of a complaint after the end of the second year from the date on which the delinquency was first certified by the auditor. Prior to filing such an action in rem, the prosecuting attorney shall cause a title search to be conducted for the purpose of identifying any lienholders or other persons with interests in the property subject to foreclosure. Following the title search, the action in rem shall be instituted by filing in the office of the clerk of a court with jurisdiction a complaint bearing a caption substantially in the form set forth in division (A) of section 5721.181 of the Revised Code.

Any number of parcels may be joined in one action. Each separate parcel included in a complaint shall be given a serial number and shall be separately indexed and docketed by the clerk of the court in a book kept by the clerk for such purpose. A complaint shall contain the permanent parcel number of each parcel included in it, the full street address of the parcel when available, a description of the parcel as set forth in the certificate or master list, the name and address of the last known owner of the parcel if they appear on the general tax list, the name and address of each lienholder and other person with an interest in the parcel identified in the title search relating to the parcel that is required by this division, and the amount of taxes, assessments, charges, penalties, and interest due and unpaid with respect to the parcel. It is sufficient for the treasurer to allege in the complaint that the certificate or master list has been duly filed by the auditor with respect to each parcel listed, that the amount of money with respect to each parcel appearing to be due and unpaid is due and unpaid, and that there is a lien against each parcel, without setting forth any other or special matters. The prayer of the complaint shall be that the court issue an order that the land described in the complaint be sold in the manner provided in section 5721.19 of the Revised Code.

(1) Within thirty days after the filing of a complaint, the clerk of the court in which the complaint was filed shall cause a notice of foreclosure substantially in the form of the notice set forth in division (B) of section 5721.181 of the Revised Code to be published once a week for three consecutive weeks in a newspaper of general circulation in the county. The newspaper shall meet the requirements of section 7.12 of the Revised Code. In any county that has adopted a permanent parcel number system, the parcel may be described in the notice by parcel number only, instead of also with a complete legal description, if the prosecuting attorney determines that the publication of the complete legal description is not necessary to provide reasonable notice of the foreclosure proceeding to the interested parties. If the complete legal description is not published, the notice shall indicate where the complete legal description may be obtained.

After the third publication, the publisher shall file with the clerk of the court an affidavit stating the fact of the publication and including a copy of the notice of foreclosure as published. Service of process for purposes of the action in rem shall be considered as complete on the date of the last publication.

Within thirty days after the filing of a complaint and before the final date of publication of the notice of foreclosure, the clerk of the court also shall cause a copy of a notice substantially in the form of the notice set forth in division (C) of section 5721.181 of the Revised Code to be mailed by certified mail, with postage prepaid, to each person named in the complaint as being the last known owner of a parcel included in it, or as being a lienholder or other person with an interest in a parcel included in it. The notice shall be sent to the address of each such person, as set forth in the complaint, and the clerk shall enter the fact of such mailing upon the appearance docket. If the name and address of the last known owner of a parcel included in a complaint is not set forth in it, the auditor shall file an affidavit with the clerk stating that the name and address of the last known owner does not appear on the general tax list.

(2)

(a) An answer may be filed in an action in rem under this division by any person owning or claiming any right, title, or interest in, or lien upon, any parcel described in the complaint. The answer shall contain the caption and number of the action and the serial number of the parcel concerned. The answer shall set forth the nature and amount of interest claimed in the parcel and any defense or objection to the foreclosure of the lien of the state for delinquent taxes, assessments, charges, penalties, and interest as shown in the complaint. The answer shall be filed in the office of the clerk of the court, and a copy of the answer shall be served on the prosecuting attorney, not later than twenty-eight days after the date of final publication of the notice of foreclosure. If an answer is not filed within such time, a default judgment may be taken as to any parcel included in a complaint as to which no answer has been filed. A default judgment is valid and effective with respect to all persons owning or claiming any right, title, or interest in, or lien upon, any such parcel, notwithstanding that one or more of such persons are minors, incompetents, absentees or nonresidents of the state, or convicts in confinement.

(b)

(i) A receiver appointed pursuant to divisions (C)(2) and (3) of section 3767.41 of the Revised Code may file an answer pursuant to division (B)(2)(a) of this section, but is not required to do so as a condition of receiving proceeds in a distribution under division (B)(1) of section 5721.17 of the Revised Code.

(ii) When a receivership under section 3767.41 of the Revised Code is associated with a parcel, the notice of foreclosure set forth in division (B) of section 5721.181 of the Revised Code and the notice set forth in division (C) of that section shall be modified to reflect the provisions of division (B)(2)(b)(i) of this section.

(3) At the trial of an action in rem under this division, the certificate or master list filed by the auditor with the prosecuting attorney shall be prima-facie evidence of the amount and validity of the taxes, assessments, charges, penalties, and interest appearing due and unpaid on the parcel to which the certificate or master list relates and their nonpayment. If an answer is properly filed, the court may, in its discretion, and shall, at the request of the person filing the answer, grant a severance of the proceedings as to any parcel described in such answer for purposes of trial or appeal.

(C) In addition to the actions in rem authorized under division (B) of this section and section 5721.14 of the Revised Code, an action in rem may be commenced under this division. An action commenced under this division shall conform to all of the requirements of division (B) of this section except as follows:

(1) The prosecuting attorney shall not cause a title search to be conducted for the purpose of identifying any lienholders or other persons with interests in the property subject to foreclosure, except that the prosecuting attorney shall cause a title search to be conducted to identify any receiver's lien.

(2) The names and addresses of lienholders and persons with an interest in the parcel shall not be contained in the complaint, and notice shall not be mailed to lienholders and persons with an interest as provided in division (B)(1) of this section, except that the name and address of a receiver under section 3767.41 of the Revised Code shall be contained in the complaint and notice shall be mailed to the receiver.

(3) With respect to the forms applicable to actions commenced under division (B) of this section and contained in section 5721.181 of the Revised Code:

(a) The notice of foreclosure prescribed by division (B) of section 5721.181 of the Revised Code shall be revised to exclude any reference to the inclusion of the name and address of each lienholder and other person with an interest in the parcel identified in a statutorily required title search relating to the parcel, and to exclude any such names and addresses from the published notice, except that the revised notice shall refer to the inclusion of the name and address of a receiver under section 3767.41 of the Revised Code and the published notice shall include the receiver's name and address. The notice of foreclosure also shall include the following in boldface type:

"If pursuant to the action the parcel is sold, the sale shall not affect or extinguish any lien or encumbrance with respect to the parcel other than a receiver's lien and other than the lien for land taxes, assessments, charges, interest, and penalties for which the lien is foreclosed and in satisfaction of which the property is sold. All other liens and encumbrances with respect to the parcel shall survive the sale."

(b) The notice to the owner, lienholders, and other persons with an interest in a parcel shall be a notice only to the owner and to any receiver under section 3767.41 of the Revised Code, and the last two sentences of the notice shall be omitted.

(4) As used in this division, a "receiver's lien" means the lien of a receiver appointed pursuant to divisions (C)(2) and (3) of section 3767.41 of the Revised Code that is acquired pursuant to division (H)(2)(b) of that section for any unreimbursed expenses and other amounts paid in accordance with division (F) of that section by the receiver and for the fees of the receiver approved pursuant to division (H)(1) of that section.

(D) If the prosecuting attorney determines that an action in rem under division (B) or (C) of this section is precluded by law, then foreclosure proceedings shall be filed pursuant to division (A) of this section, and the complaint in the action in personam shall set forth the grounds upon which the action in rem is precluded.

(E) The conveyance by the owner of any parcel against which a complaint has been filed pursuant to this section at any time after the date of publication of the parcel on the delinquent tax list but before

the date of a judgment of foreclosure pursuant to section 5721.19 of the Revised Code shall not nullify the right of the county to proceed with the foreclosure.

Amended by 129th General Assembly File No. 28, HB 153, §101.01, eff. 9/29/2011.

Effective Date: 10-27-2000; 2008 HB138 09-11-2008; 2008 SB353 04-07-2009

5721.181 Substance of forms.

The forms of caption, notice of foreclosure, and notice to property owners, lienholders, and other interested persons to be utilized in a foreclosure proceeding instituted pursuant to division (B) of section 5721.18 of the Revised Code shall be in substance as follows:

(A) Form of caption:

"In the court of, Ohio, in the matter of the foreclosure of liens for delinquent land taxes by action in rem.

County treasurer of county, Ohio,

Plaintiff vs .

Parcels of land encumbered with delinquent tax liens, defendants"

(B) Form of notice of foreclosure:

". court county, Ohio

Notice of foreclosure of liens for delinquent land taxes, by action in rem by county treasurer of county, Ohio

Public notice is hereby given that on the day of,, the county treasurer of county, Ohio, filed a complaint in the court of, Ohio, at (stating the city), for the foreclosure of liens for delinquent taxes, assessments, charges, penalties, and interest against certain real property situated in such county, as described in that complaint.

The object of the action is to obtain from the court a judgment foreclosing the tax liens against such real estate and ordering the sale of such real estate for the satisfaction of the tax liens on it.

Such action is brought against the real property only and no personal judgment shall be entered in it. However, if pursuant to the action the property is sold for an amount that is less than the amount of the delinquent taxes, assessments, charges, penalties, and interest against it, the court, in a separate order, may enter a deficiency judgment against the owner of record of a parcel for the amount of the difference; if that owner of record is a corporation, the court may enter the deficiency judgment against the stockholder holding a majority of the corporation's stock.

The permanent parcel number of each parcel included in such action; the full street address of the parcel, if available; a description of the parcel as set forth in the associated delinquent land tax certificate or master list of delinquent tracts; a statement of the amount of the taxes, assessments, charges, penalties, and interest due and unpaid on the parcel; the name and address of the last known owner of the parcel as they appear on the general tax list; and the names and addresses of each lienholder and other person with an interest in the parcel identified in a statutorily required title search relating to the parcel; all as more fully set forth in the complaint, are as follows:

(Here set forth the respective permanent parcel numbers, street addresses, descriptions, names and addresses of owners, lienholders, and other interested persons, and statements of amounts due as taxes, assessments, charges, penalties, and interest, together with the respective serial numbers assigned to each parcel if the complaint covers more than one parcel. If parcels are identified in this

notice by permanent parcel number only, instead of also with a complete legal description, as authorized by division (B)(1) of section 5721.18 of the Revised Code, here also set forth where the complete legal description of the parcel may be obtained.)

Any person owning or claiming any right, title, or interest in, or lien upon, any parcel of real property above listed may file an answer in such action setting forth the nature and amount of interest owned or claimed and any defense or objection to the foreclosure. Such answer shall be filed in the office of the undersigned clerk of the court, and a copy of the answer shall be served on the prosecuting attorney, on or before the day of, (twenty-eight days after the date of final publication of this notice).

If no answer is filed with respect to a parcel listed in the complaint, on or before the date specified as the last day for filing an answer, a judgment of foreclosure will be taken by default as to that parcel. Any parcel as to which a foreclosure is taken by default shall be sold for the satisfaction of the taxes, assessments, charges, penalties, and interest, and the costs incurred in the foreclosure proceeding, which are due and unpaid.

At any time prior to the filing of an entry of confirmation of sale, any owner or lienholder of, or other person with an interest in, a parcel listed in the complaint may redeem the parcel by tendering to the treasurer the amount of the taxes, assessments, charges, penalties, and interest due and unpaid on the parcel, together with all costs incurred in the proceeding instituted against the parcel under section 5721.18 of the Revised Code. Upon the filing of any entry of confirmation of sale, there shall be no further equity of redemption. After the filing of any such entry, any person claiming any right, title, or interest in, or lien upon, any parcel shall be forever barred and foreclosed of any such right, title, or interest in, lien upon, and any equity of redemption in, such parcel.

.....
Clerk of the Court
..... Court
....., Ohio"

(C) Form of notice to owner, lienholders, and other persons with an interest in a parcel:

"To the person to whom this notice is addressed:

You are the last known owner, according to the general tax list, or a lienholder of, or a person with another interest in, the following described parcel:

(Description as shown in complaint)

Such parcel has been included in an action instituted by the county treasurer, being case No. . . . filed in the court,, Ohio, on.,, seeking the foreclosure and sale of such parcel for the nonpayment of delinquent taxes, assessments, charges, penalties, and interest (specify which) in the amount of \$.

Any person owning or claiming any right, title, or interest in, or lien upon, such parcel may file an answer in the action setting forth the nature and amount of the person's interest and any defense or objection to the foreclosure. Any such answer shall be filed in the office of the undersigned clerk of the court, and a copy of the answer shall be delivered to the prosecuting attorney, on or before,

. . . . (twenty-eight days after the final publication of the associated notice of foreclosure in accordance with law).

If no answer is filed, a judgment of foreclosure will be taken by default and such parcel shall be ordered sold for the satisfaction of the tax lien on it.

If, pursuant to the action, the property is sold for an amount that is less than the amount of the delinquent taxes, assessments, charges, penalties, and interest against it, the court, in a separate order, may enter a deficiency judgment against the owner of record of a parcel for the amount of the difference. If that owner of record is a corporation, the court may enter the deficiency judgment against the stockholder holding a majority of that corporation's stock.

At any time prior to the filing of any entry of confirmation of sale, any owner or lienholder of, or other person with an interest in, a parcel may redeem the parcel by tendering to the treasurer the full amount of the taxes, assessments, charges, penalties, and interest due and unpaid on the parcel, together with all costs incurred in the proceeding instituted against the parcel under section 5721.18 of the Revised Code. Upon the filing of any entry confirming the sale of the parcel, there shall be no further equity of redemption. After the filing of any such entry, any person claiming any right, title, or interest in, or lien upon, the parcel shall be forever barred and foreclosed of any such right, title, or interest in, lien upon, and any equity of redemption in, the parcel.

.....

Clerk of the Court

..... Court

....., Ohio"

Effective Date: 05-09-2000

5721.25 Redemption of delinquent land.

All delinquent land upon which the taxes, assessments, penalties, interest, or charges have become delinquent may be redeemed before foreclosure proceedings have been instituted by tendering to the county treasurer an amount sufficient, as determined by the court, to pay the taxes, assessments, penalties, interest, and charges then due and unpaid, and the costs incurred in any proceeding instituted against such land under Chapter 323. or this chapter of the Revised Code.

After a foreclosure proceeding has been instituted under Chapter 323. or this chapter of the Revised Code with respect to delinquent land, but before the filing of an entry of confirmation of sale pursuant to the proceeding or before the expiration of the alternative redemption period as may apply under section 323.78 of the Revised Code, any person entitled to redeem the land may do so by tendering to the county treasurer an amount sufficient, as determined by the court, to pay the taxes, assessments, penalties, interest, and charges then due and unpaid, and the costs incurred in any proceeding instituted against such land under Chapter 323. or this chapter of the Revised Code, and by demonstrating that the property is in compliance with all applicable zoning regulations, land use restrictions, and building, health, and safety codes.

In addition, after a foreclosure proceeding has been instituted, but before the filing of an entry of confirmation of sale pursuant to the proceeding or before the expiration of the alternative redemption period as may apply under section 323.78 of the Revised Code, any person entitled to redeem the land who has not previously defaulted on a delinquent tax contract under section 323.31 of the Revised Code with respect to that delinquent land may enter into a delinquent tax contract with the county treasurer for the payment of the taxes, assessments, penalties, interest, and charges found to be due and unpaid on such land, together with the costs incurred in the proceeding as determined by the court or board of revision, upon demonstrating that the property is in compliance with all applicable zoning regulations, land use restrictions, and building, health, and safety codes. The execution of a delinquent tax contract shall not stop the prosecution of a proceeding to judgment. The delinquent tax contract shall be paid as prescribed by section 323.31 of the Revised Code over a period not to exceed five years after the date of the first payment made under the contract. The delinquent tax contract may be terminated if the court or board of revision determines that the property is not in compliance with all applicable zoning regulations, land use restrictions, and building, health, and safety codes during the term of the contract. The court or board of revision shall retain jurisdiction over the delinquent land until the total amount set forth in the delinquent tax contract is paid, notwithstanding any conveyance of the land to another owner during the period that the delinquent tax contract is outstanding.

If any payment under a delinquent tax contract is not paid when due, or if the contract is terminated because the property is not in compliance with all applicable zoning regulations, land use restrictions, and building, health, and safety codes, the county treasurer shall, at the time the payment is due and unpaid or the contract is terminated, advise the court or board of revision rendering the judgment of foreclosure, and the court or board of revision shall order such land sold for the amount of taxes, assessments, penalties, interest, and charges then due and owing on such land in the manner provided in section 5721.19 of the Revised Code, or disposed of as otherwise applicable under sections 323.65 to 323.79 of the Revised Code, without appraisal or sale.

Upon the receipt of each payment pursuant to any delinquent tax contract, the county treasurer shall enter the amount of such payment on the tax duplicate, and, upon request, shall give a receipt for the

amount paid to the person paying it. The receipt shall be in the form prescribed by the tax commissioner.

Except as otherwise provided in this section, the portion of the amount tendered under this section representing taxes, and penalties and interest thereon, shall be apportioned among the several taxing districts in the same proportion that the amount of taxes levied by each district against the delinquent property in the preceding tax year bears to the taxes levied by all such districts against the property in the preceding tax year. The portion of the payment representing assessments and other charges shall be credited to those items in the order in which they became due. To the extent that the county treasurer, under section 321.341 of the Revised Code, had made advance payments to the several taxing districts, from sources other than the later collection of such taxes, of the current year unpaid taxes or current year delinquent taxes during the year when such taxes were levied for collection, such taxes, together with the penalties and interest charged on such taxes during such year, shall, upon collection, not be apportioned among the several taxing districts, but shall be retained by the county treasurer and applied in accordance with section 321.341 of the Revised Code.

Effective Date: 03-11-2004; 2008 SB353 04-07-2009