New Rules for Tax Foreclosures and Limited Liability Companies

Tax Lien Foreclosures

On April 26, 2006, the United States Supreme Court ruled in the case, Gary Kent Jones v. Linda K. Flowers, 126 S. Ct. 1708 (2006), that the State of Arkansas violated Mr. Jones's due process rights when it sold his property for his failure to pay real property taxes when the only notice of the sale which the State Provided to Mr. Jones was by certified mail which was returned unclaimed. Chief Justice Roberts wrote "We hold that when notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling the property".

Although the Court said that it is not [the Court's] responsibility to prescribe the form of service that the [government] should adopt, the Court did make two helpful suggestions. First, once the postal service returned the certified letter unclaimed, the State of Arkansas could have resent the notice by regular mail. The Court reasoned that a property owner was less likely to receive notice by certified mail since the property owner had to be at home to receive the mail or to have the time to go to the post office to pick up the letter. A letter sent by regular mail would be in the mailbox waiting for the homeowner. The homeowner (and the curious neighbors) would certainly see a legal notice posted on the front door. However, the Court specifically found that due process did not require the State to search the phone book or other governmental records such as the income tax rolls to find Mr. Jones's new address.

Current New York State tax foreclosure law only requires that a taxing authority give notice of a tax taking by certified mail to the property owner and by regular mail to any other person whose rights in the property may be adversely affected by the taking-normally lenders. (See Real Property Tax Law Section 1125). In light of Jones v. Flowers, in regard to property owners, New York's law is probably constitutionally insufficient. If the taxing authority sends a notice of tax taking and/or redemption by certified mail, and the postal service returns the notice as unclaimed, then due process requires that the taxing authority either resend the notice by regular mail or post the notice on the property. This requirement does not apply to tax takings by the City of New York provided the City or the tax lien purchaser takes title through a judicial foreclosure action.

Limited Liability Companies

Chapter 767 of the Laws of 2005 ("Chapter 767") amended the publication requirements for domestic and foreign limited liability companies, domestic and foreign professional limited liability partnerships, domestic and foreign limited partnerships and domestic and foreign limited liability partnerships (each an "Entity") effective on June 1, 2006.

The Governor has signed further legislation (the "New Chapter") making (as stated in the "Introducer's Memorandum of Support") "technical and clarifying amendments to Chapter 767". The New Chapter makes the changes discussed below, each of which is also effective June 1.

Chapter 767 required that notice of the formation of an Entity be published once a week for four successive weeks in two newspapers of the County in which the office of the Entity is "intended to be located", instead of for six weeks as the law had provided. The New Chapter changes the number of publications required to be made back to six weeks in the County of which the office of the Entity "is located". The New Chapter also requires that the notice of formation set forth the principal business location, if any, of the Entity.

Chapter 767 required that the notice of formation set forth the names of the ten persons, or such lesser number of persons, who are actively engaged in the business and affairs of, and have the most valuable membership, or general and limited partnership interests, as applicable, in the Entity. This requirement has been deleted by the New Chapter.

Chapter 767 provides that if an Entity formed on or after June 1, 2006 does not, within 120 days of the date of its formation, meet the publication requirements and file its certificate and affidavits of publication with the Department of State and authority of the Entity to carry on, conduct or transact any business in New York is suspended until there is substantial compliance. Neither the failure to comply with the requirements for publication nor the suspension of the Entity's authority to conduct business impairs or limits the validity of any contract or act of the Entity, or its right to defend in any action or special proceeding brought against it in New York State. This has not been changed by the New Chapter.

The New Chapter further provides that the failure to comply with publication and filing requirements will **not** result in the member, manager, partner or agent of the Entity becoming liable for the contractual obligations or other liabilities of the Entity.

Chapter 767 provides that an Entity formed prior to June 1, 2006 that has complied with the publication and filing requirement in the effect when it was formed is not required to comply with the new requirements. However, an Entity formed prior to June 1, 2006 which did not comply with publication and filing requirements under prior law has 18 months to comply with the new publication and filing requirements. The New Chapter changes the 18 month period for compliance to 12 months.