

FILED
COURT OF APPEALS
DIVISION II

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NO. 46208-7-II STATE OF WASHINGTON

BY 
DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

SEVEN SALES LLC, Appellant

v.

BEATRICE OTTERBEIN, Respondent

and

PIERCE COUNTY, Respondent

BRIEF OF RESPONDENT PIERCE COUNTY

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ORIGINAL

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Legislative History

Senate Bill Rep. on Engrossed Substitute H.B. 1564, 58th
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I. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

Did the trial court correctly rule that Seven Sales could not garnish surplus proceeds from the foreclosure sale of Beatrice Otterbein's real property because RCW 84.64.080 provides: (1) that the surplus proceeds "shall be refunded" to Otterbein as the record owner of the property, and (2) that Otterbein, as the record owner, has a three-year period to apply for the proceeds, and she has yet to make an application for the proceeds?

II. STATEMENT OF THE CASE

Beatrice Otterbein owned real property in Pierce County. CP 67 – 68. By March 2012, Otterbein had fallen behind in paying her monthly sewer service charges to the County. CP 71. By operation of statute, this failure to make payments caused the County to have a lien against her property for the unpaid amounts. RCW 36.94.150.

On August 7, 2012, the Pierce County Public Works and Utilities Department issued a certificate of delinquency concerning Otterbein's failure to pay her sewer service charges, and on August 10, 2012, the County filed the certificate in the superior court to initiate a foreclosure action against her property. CP 96. Many other properties were also included in this foreclosure action for delinquent sewer charges.

The County is required to conduct a title search of parcels subject

to foreclosure to verify the identities of the record title holders. RCW 84.64.050. In September 2012, Pierce County obtained a title report confirming that Otterbein was the record title holder. CP 96. The report also revealed she had other liens on her property, including a judgment in favor of Heritage Rehab in the amount of \$8,860.63. CP 97.

On March 15, 2013, the County obtained a judgment of foreclosure and order of sale against the properties that were still delinquent in payment of sewer charges, and this order included Otterbein's property. CP 97.

On April 26, 2013, Pierce County held its auction of foreclosed properties. CP 97. Appellant Seven Sales bought Otterbien's real property for \$36,500.00. CP 74. The County subtracted the amount Otterbein owed in delinquent charges, which was \$2,176.46; and the remaining money, \$34,323.54, constituted surplus proceeds from the sale. CP 58-9.

Pierce County sent Otterbein an informational packet on how to apply for the surplus proceeds from the foreclosure sale, and this packet included an application form for her to fill out and return. CP 59, 77-78. The packet was sent certified mail to Otterbein's last known address, which was in the State of Georgia. CP 59, 82. Postal Service tracking records indicate Otterbein received the County's packet on August 2,

2013. CP 59, 79-83. Otterbein, however, has not made an application to Pierce County for the surplus funds.

Meanwhile, on or about May 14, 2013, Heritage Rehab assigned to Appellant Seven Sales its judgment against Otterbein. CP 4-5. In November 2013, Seven Sales obtained a writ of garnishment against Pierce County in the amount of \$10,708.93 seeking to garnish Otterbein's surplus proceed to satisfy Seven Sales' assigned interest in the Heritage Rehab judgment. CP 60. Pierce County answered the writ by asserting that Seven Sales could not garnish the excess proceeds. CP 60.

On April 4, 2014, the case came before the Honorable Thomas J. Felnagle. The facts were not in dispute. Report of Proceedings (RP) 4. Seven Sales argued that Pierce County was holding funds that belonged to Beatrice Otterbein, and that those funds were subject to garnishment by Seven Sales. RP 4.

The court disallowed the garnishment and reasoned as follows:

Here, [Seven Sales'] argument makes a lot of practical sense when you have a situation like this, but I think what it does is it ignores what the statutory scheme is under [RCW] 84.64, and I think that it's an obligation to follow the more specific directive, which is the one that is set out in [RCW] 84.64 for a situation like this. So, I don't think you can just jump into the application of garnishment generally, that you have to follow the procedures set out here, which means that Ms. Otterbein needs to make a request if she's going to get control of the property, even though she's the owner, even though there's a debt, even

though the debt is held in another's hands. Until we get through this [RCW] 84.64 requirement, I don't think the property is reachable through garnishment.

RP 20-21. Seven Sales timely filed an appeal.

III. ARGUMENT

The trial court correctly ruled that the surplus funds from the foreclosure sale of Otterbein's property are to be refunded to Otterbein upon her application, and they are not subject to garnishment by Seven Sales. This case involves the interpretation of applicable statutes, and it does not involve disputed facts; review is therefore de novo. *See e.g. Manary v. Anderson*, 176 Wn.2d 342, 350-51, 292 P.3d 96 (2013).

A county operating a sewer system "shall have a lien" on property when the property owner is delinquent in paying his or her sewer service charges. RCW 36.94.150. The county is required to periodically "certify" such delinquencies by issuing a certificate of delinquency, and this issuance has the legal effect of causing the lien to attach. RCW 36.94.150. The county is statutorily authorized to bring a foreclosure action against the delinquent property after filing the certificate of delinquency in the superior court. *See* RCW 36.94.150; RCW 84.64.050.

At the foreclosure proceeding, the court "shall give judgment for such taxes, interest and costs as shall appear to be due" to the county, and the court shall order "the sale of such real property against which

judgment is made. . . .” RCW 84.64.080. The county treasurer is required to sell the property to “the highest and best bidder for cash.” RCW 84.64.080. The total amount due to the county with regard to the delinquent property constitutes the “acceptable minimum bid” for the property at the sale. RCW 84.64.080. The difference between the accepted buyer’s bid and the amount due to the county on the delinquent property constitutes the surplus funds or “excess” to be refunded to the property’s former owner:

If the highest amount bid for any such separate unit tract or lot is in excess of the minimum bid due upon the whole property included in the certificate of delinquency, **the excess shall be refunded** following payment of all recorded water-sewer district liens, **on application therefor, to the record owner of the property. The record owner of the property is the person who held title on the date of issuance of the certificate of delinquency. Assignments of interests, deeds, or other documents executed or recorded after filing the certificate of delinquency shall not affect the payment of excess funds to the record owner.**

RCW 84.64.080 (emphasis added); see Appendix A (complete copy of RCW 84.64.080).

Trial court correctly relied on RCW 84.64.080 in determining that the surplus money from the foreclosure sale of Otterbein’s property was due to Otterbein upon her application for these proceeds. It is undisputed that Otterbein was the record owner of the property on the date the

certificate of delinquency was issued. The statute requires that the excess proceeds “**shall** be refunded . . . on application therefore, to the record owner of the property.” RCW 84.64.080 (emphasis added). The legislature’s use of the word “shall” is presumptively imperative and operates to create a mandatory duty. *Housing Authority of City of Pasco v. Pleasant*, 126 Wn. App. 382, 391, 109 P.3d 422 (2005).

In addition, the statute’s plain language indicates that an assignment of interest executed after the certificate of delinquency is filed “shall not affect the payment of excess funds to the record owner.” The legislature added this statutory language in 2003, and the purpose behind the amendment is:

. . . to ease the job of the county treasurer because the statute had previously been ‘ambiguous as to whether other creditors have rights to intervene and receive the refund before it goes to the record owner.’

Stephenson v. Pleger, 150 Wn. App. 658, 663, 208 P.3d 583 (2009) (quoting Senate Bill Rep. on Engrossed Substitute H.B. 1564, 58th Leg., Reg. Sess. (Wash. 2003)). This amendment was aimed at addressing the claims of creditors who obtain their interest in surplus proceeds *after* the certificate of delinquency is filed. Seven Sales is such a creditor. The County filed the certificate of delinquency regarding Otterbein’s real property on August 10, 2012. CP 56-57. Heritage Rehab assigned its

judgment to Seven Sales on or about May 14, 2013, about nine months later. CP 4. Under the plain language of the statute, Seven Sale acquired its interest in Otterbein's surplus proceeds about nine months too late to prevent payment of the excess funds to Otterbein. It should be noted that the validity of Seven Sale's interest in the Heritage Rehab judgment is not in question here, and Seven Sales may attempt to enforce the judgment against Otterbein in the event she applies for and receives the surplus foreclosure sale proceeds.

In reaching its decision in this case, the trial court reasoned that the foreclosure statutes, unlike the garnishment statutes, provide specific directives that the court was obligated to follow in this instance. CP 100; RP 21. For example, RCW 84.64.080 requires that the excess proceeds "shall be refunded" to the record owner of the property "on application therefore." The statute also provides the record owner a three-year period to make this application before the record owner's claim to the funds can be deemed extinguished:

In the event no claim for the excess is received by the county treasurer within three years after the date of the sale he or she shall at expiration of the three year period deposit such excess in the current expense fund of the county which shall extinguish all claims by any owner to the excess funds.

RCW 84.64.080. "Protection of the rights of delinquent taxpayers is the

paramount policy of the statute.” *Pierce County v. Desart*, 9 Wn. App. 760, 762, 515 P.2d 550 (1973). “[T]he basic policy supporting the statutory scheme is that delinquent property taxpayers are not to be deprived of title to their property without the due process protection afforded by a public treasurer's sale.” *Pierce County v. Wingard*, 5 Wn. App. 568, 570-71, 490 P.2d 129 (1971). RCW 84.64.080’s three-year period is in accord with the policy behind the foreclosure statutes of providing due process for delinquent property owners. *Wingard*, 5 Wn. App. at 571 fn.4.

In contrast, the garnishment statutes are statutes of *general* applicability, and funds can be exempted from garnishment by operation of “any state or federal law.” RCW 6.27.060. Seven Sales argues that Pierce County is “indebted” to Otterbein because it has her surplus proceeds, and therefore the funds can be subject to garnishment. However, the garnishment statutes do not specifically address the situation present in this case, *i.e.*, a creditor seeking to intervene and receive surplus forfeiture proceeds before the record owner has either applied for or received the proceeds.

The trial court correctly reasoned that RCW 84.64.080 contained the more specific directives that addressed the situation at hand and is therefore controlling. “It is a fundamental rule that where the general

statute, if standing alone, would include the same matter as the special act and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment.” *Wark v. Wash. Nat'l Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976). Accordingly, when statutes conflict, the specific statutes control over the general ones. *Mason v. Georgia-Pacific Corp.*, 166 Wn. App. 859, 870-71, 271 P.3d 381 (2012). The trial court correctly concluded that the excess proceeds were governed by the requirements contained in RCW 84.64.080, and were not subject to garnishment by Seven Sales in this instance.

The trial court found RCW 84.64.080 applied to this case and cited the provision that the record owner needs to apply for the surplus proceeds. In its findings of fact and conclusions of law, the trial court quoted, but did not otherwise specifically reference, the statutory provision concerning a creditor who obtains an assignment of interest after the certificate of delinquency is filed. *See* CP 100. In the event Seven Sales argues that the trial court did not consider this provision, the Court could nonetheless affirm the trial court on this basis. “An appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it.” *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027

(1989).

Seven Sales argues that RCW 84.64.080 should be construed as allowing anyone, not just the record owner, to make the application for the surplus proceeds. This argument should be rejected. Statutes are construed “to effect their purpose while avoiding absurd, strained, or unlikely consequences.” *First Citizens Bank & Trust Co., v. Harrison*, 181 Wn. App. 595, 812, 326 P.3d 808 (2014). If anyone could make the application for the proceeds, then the county treasurer would be required to make a determination concerning ownership of the proceeds each time someone other than the record owner made an application and asserted an interest in the proceeds. This result would be contrary to the legislative intent behind the statute of easing the county treasurer’s job concerning creditors who intervene and attempt to receive the surplus proceeds before they go to the record owner. *See Stephenson*, 150 Wn. App. at 663 (citing Senate Bill Rep. on Engrossed Substitute H.B. 1564, 58th Leg., Reg. Sess. (Wash. 2003).

In addition, if anyone could apply for the proceeds, a record owner would not be afforded the full three-year period provided for in RCW 84.64.080 to apply for the proceeds. This result would be inconsistent with the policy behind the foreclosure statutes of providing due process protections to delinquent property owners. *See Wingard*, 5 Wn. App. at

571 fn.4. Moreover, application by anyone other than the record owner would be contrary to the statutory directive that the surplus proceeds “shall be refunded. . . . to the record owner of the property.” RCW 84.64.080. Seven Sales’ argument that anyone should be able to apply for the surplus proceeds should be rejected.

Finally, Seven Sales asserts in its issue statement that Pierce County’s application process for the surplus proceeds is “inconsistent with the applicable statute.” Seven Sales does not present argument to support this assertion, and the court need not address it. *See Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991) (The court need not address issues unsupported by argument and relevant authority).

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IV. CONCLUSION

Pierce County respectfully requests that the court affirm the trial court's ruling. The trial court correctly determined that under RCW 84.64.080, the surplus proceeds are not subject to garnishment by Seven Sales.

DATED: October 15, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing BRIEF OF RESPONDENT PIERCE COUNTY was served this 15th day of October, 2014, via first class mail postage pre-paid and electronic service as follows:

Jonathan Baner
BANER & BANER LAW FIRM
724 S. YAKIMA AVE. #100
TACOMA, WA 98405
Jonathan@banerbaner.com

I also hereby certify that a true copy of the foregoing BRIEF OF RESPONDENT PIERCE COUNTY was served, via first class mail postage pre-paid, upon the following individual at the address below stated:

2014 OCT 15 PM 3:41
COURT REPORTERS
DEPUTY
STATE OF WASHINGTON

Beatrice Otterbein
1513 Clydette Blvd.
Vidalia, GA 30474

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is a true and correct statement.

Signed at Tacoma, Washington, this 15th day of October, 2014.



NADINE BRITTAIN

APPENDIX A

**RCW 84.64.080
Foreclosure proceedings — Judgment — Sale — Notice — Form of deed —
Recording.**

The court shall examine each application for judgment foreclosing tax lien, and if defense (specifying in writing the particular cause of objection) be offered by any person interested in any of the lands or lots to the entry of judgment against the same, the court shall hear and determine the matter in a summary manner, without other pleadings, and shall pronounce judgment as the right of the case may be; or the court may, in its discretion, continue such individual cases, wherein defense is offered, to such time as may be necessary, in order to secure substantial justice to the contestants therein; but in all other cases the court shall proceed to determine the matter in a summary manner as above specified. In all judicial proceedings of any kind for the collection of taxes, and interest and costs thereon, all amendments which by law can be made in any personal action pending in such court shall be allowed, and no assessments of property or charge for any of the taxes shall be considered illegal on account of any irregularity in the tax list or assessment rolls or on account of the assessment rolls or tax list not having been made, completed or returned within the time required by law, or on account of the property having been charged or listed in the assessment or tax lists without name, or in any other name than that of the owner, and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collection of the taxes, shall vitiate or in any manner affect the tax or the assessment thereof, and any irregularities or informality in the assessment rolls or tax lists or in any of the proceedings connected with the assessment or levy of such taxes or any omission or defective act of any officer or officers connected with the assessment or levying of such taxes, may be, in the discretion of the court, corrected, supplied and made to conform to the law by the court. The court shall give judgment for such taxes, interest and costs as shall appear to be due upon the several lots or tracts described in the notice of application for judgment or complaint, and such judgment shall be a several judgment against each tract or lot or part of a tract or lot for each kind of tax included therein, including all interest and costs, and the court shall order and direct the clerk to make and enter an order for the sale of such real property against which judgment is made, or vacate and set aside the certificate of delinquency or make such other order or judgment as in the law or equity may be just. The order shall be signed by the judge of the superior court, shall be delivered to the county treasurer, and shall be full and sufficient authority for him or her to proceed to sell the property for the sum as set forth in the order and to take such further steps in the matter as are provided by law. The county treasurer shall immediately after receiving the order and judgment of the court proceed to sell the property as provided in this chapter to the highest and best bidder for cash. The acceptable minimum bid shall be the total amount of taxes, interest, and costs. All sales shall be made at a location in the county on a date and time (except Saturdays, Sundays, or legal holidays) as the county treasurer may direct, and shall continue from day to day (Saturdays, Sundays, and legal holidays excepted) during the same hours until all lots or tracts are sold, after first giving notice of the time, and place where such sale is to take place for ten days successively by posting notice thereof in three public places in the county, one of which shall be in the office of the treasurer. The notice shall be substantially in the following form:

TAX JUDGMENT SALE

Public notice is hereby given that pursuant to real property tax judgment of the superior court of the county of in the state of Washington, and an order of sale duly issued by the court, entered the day of,, in proceedings for foreclosure of tax liens upon real property, as per provisions of law, I shall on the day of,, at o'clock a.m., at in the city of, and county of, state of Washington, sell the real property to the highest and best bidder for cash, to satisfy the full amount of taxes, interest and costs adjudged to be due.

In witness whereof, I have hereunto affixed my hand and seal this day of,

.....
Treasurer of
county.

No county officer or employee shall directly or indirectly be a purchaser of such property at such sale.

If any buildings or improvements are upon an area encompassing more than one tract or lot, the same must be advertised and sold as a single unit.

If the highest amount bid for any such separate unit tract or lot is in excess of the minimum bid due upon the whole property included in the certificate of delinquency, the excess shall be refunded following payment of all recorded water-sewer district liens, on application therefor, to the record owner of the property. The record owner of the property is the person who held title on the date of issuance of the certificate of delinquency. Assignments of interests, deeds, or other documents executed or recorded after filing the certificate of delinquency shall not affect the payment of excess funds to the record owner. In the event no claim for the excess is received by the county treasurer within three years after the date of the sale he or she shall at expiration of the three year period deposit such excess in the current expense fund of the county which shall extinguish all claims by any owner to the excess funds. The county treasurer shall execute to the purchaser of any piece or parcel of land a tax deed. The deed so made by the county treasurer, under the official seal of his or her office, shall be recorded in the same manner as other conveyances of real property, and shall vest in the grantee, his or her heirs and assigns the title to the property therein described, without further acknowledgment or evidence of such conveyance, and shall be substantially in the following form:

State of Washington |
County of > | ss.
..... |
|

This indenture, made this day of, between, as treasurer of county, state of Washington, party of the first part, and, party of the second part:

Witnesseth, that, whereas, at a public sale of real property held on the day of, pursuant to a real property tax judgment entered in the superior court in the county of on the day of, in proceedings to foreclose tax liens upon real property and an order of sale duly issued by the court, duly purchased in compliance with the laws of the state of Washington, the following described real property, to wit: (Here place description of real property conveyed) and that the has complied with the laws of the state of Washington necessary to entitle (him, or her or them) to a deed for the real property.

Now, therefore, know ye, that, I, county treasurer of the county of, state of Washington, in consideration of the premises and by virtue of the statutes of the state of Washington, in such cases provided, do hereby grant and convey unto, his or her heirs and assigns, forever, the real property hereinbefore described.

· Given under my hand and seal of office this day of, A.D.

.....

County Treasurer.

[2004 c 79 § 7; 2003 c 23 § 5. Prior: 1999 c 153 § 72; 1999 c 18 § 8; 1991 c 245 § 27; 1981 c 322 § 5; 1965 ex.s. c 23 § 4; 1963 c 8 § 1; 1961 c 15 § 84.64.080; prior: 1951 c 220 § 1; 1939 c 206 § 47; 1937 c 118 § 1; 1925 ex.s. c 130 § 20; RRS § 11281; prior: 1909 c 163 § 1; 1903 c 59 § 5; 1899 c 141 § 18; 1897 c 71 § 103; 1893 c 124 § 105; 1890 p 573 § 112; Code 1881 § 2917. Formerly RCW 84.64.080, 84.64.090, 84.64.100, and 84.64.110.]

Notes:

Part headings not law -- 1999 c 153: See note following RCW 57.04.050.

Validation -- 1963 c 8: "All rights acquired or any liability or obligation incurred under the provisions of this section prior to February 18, 1963, or any process, proceeding, order, or judgment involving the assessment of any property or the levy or collection of any tax thereunder, or any certificate of delinquency, tax deed or other instrument given or executed thereunder, or any claim or refund thereunder, or any sale or other proceeding thereunder are hereby declared valid and of full force and effect." [1963 c 8 § 2.]