

TUTE Fall 2023

Description

The Unknown Title Examiner

House Bill 2184 added Â§Â§ 55.1-3100, et seq., to the Code of Virginia, allowing settlement agents to release a judgment lien against property if the notice proscribed therein was given to the judgment creditor:

Â§ 55.1-3101. Release of judgment lien by settlement agent; notice to lien creditor.

A. A settlement agent may release property from a judgment lien in accordance with the provisions of this section if (i) the settlement agent has made a written request for a payoff amount from the lien creditor and his counsel of record, if any, as reflected in the judgment, judgment abstract, or any certificate of extension filed in the land records; (ii) the lien creditor (a) has not responded to such request within 15 days or (b) is unable to be located by the settlement agent after attempts at notice are made as provided in subsection B; (iii) the settlement agent has delivered or attempted to deliver a notice of intent to release pursuant to subsection C and the lien creditor has not responded as required by this section; and **(iv) the owner of the property attests in an affidavit that (a) the owner has paid all or a portion of the judgment but in good faith does not have knowledge of the judgment balance** [emphasis added] or (b) the owner is not the judgment debtor and has no knowledge of the judgment balance. In such affidavit, such owner shall attest that he has exercised due diligence to locate the creditor and obtain a payoff amount, if the judgment is outstanding, and that all attempts to reach such creditor have been unsuccessful.

B. A settlement agent intending to release a specific piece of property from a judgment lien pursuant to this section shall deliver or attempt to deliver to the lien creditor and his counsel of record, if any, by certified mail, commercial overnight delivery service, or the United States Postal Service, a notice of intent to release and a copy of the release to be recorded.

Weâ??ll stipulate here that the judgment debtor is in fact the property owner and that the property owner honestly believes he or she has no idea how much money is owed. Settlement agent duly sends out the notice and copy of intent to release as specified in Subsection B. What could go wrong?

Letâ??s start with whatâ??s considered the seminal case on notice, [*Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 \(1983\)](#).^[1] Alfred Jean Moore executed a mortgage in favor of Mennonite, duly recorded in Elkhart, Indiana. By the terms of the mortgage, Moore was obligated to pay the property taxes. When she^[2] failed to do so, the County moved to sell the property for the delinquent taxes. The procedure at that time required the County to give notice to the property owner, to post notice at the courthouse, and to publish in the paper.^[3] Nothing in the law required notice to lien holders. When the tax sale purchaser filed suit to quiet title, Mennonite opposed on the basis that it had not received constitutionally adequate notice such as to allow it to protect its property interest. The Federal District Court and the Court of Appeals ruled in favor of the tax sale purchaser, but the Supreme Court of the United States agreed with Mennonite and reversed.

Closer to home, West Virginia tax sale statutes are similar to the Indiana statute in *Mennonite*, and in *Plemons v. Gale*, 396 F.3d 569 (2005), the Fourth Circuit Court of Appeals similarly rejected the West Virginia “shrug then publish” approach if notice by certified mail is returned undeliverable. One year later, the Supreme Court of the United States, in *Jones v. Flowers*,^[4] 547 U.S. 220, 126 S. Ct. 1708 (2006), upheld the definitions of adequate notice set forth in the prior cases, citing the Fourteenth Amendment’s prohibition against taking of property without due process of law^[5].

But, you say, those decisions involved state action; the settlement agent release statute involves an action by a non-state actor. Indeed, similar principles have been enunciated by the courts in cases involving private persons or companies. See, for example, *Linn Farms and Timber Ltd. Partnership v. Union Pacific R. Co.*,^[6] 661 F.3d 354 (2011); *Evans v. Evans*, 300 Va. 134 (2021); *Toma v. Devaul*, 2023-Ohio-2163 (2023).^[7]

The settlement agent release act doesn’t require publication if the mailed notice is returned, nor does it require any effort more than “due diligence.” As the opinions have held, that interpretation of due diligence, as alleged and defined in the cited cases, may not be enough to satisfy the requirements of the Fourteenth Amendment when a property right is at risk of being taken—whether it’s by the state or a private actor.

Moreover, the Code of Virginia already provides a remedy:

Â§ 8.01-456. Satisfaction of judgment when judgment creditor cannot be located.

Whenever a judgment debtor or anyone for him or any party liable on the judgment wishes to pay off and discharge a judgment, of record in any clerk’s office in this Commonwealth, when the judgment creditor cannot be located, he may do so by paying into the court having jurisdiction over such judgment an amount sufficient to pay the principal, interest, and all costs due thereupon, together with the cost of entering necessary orders, and other service attendant upon the proceeding herein provided for, and satisfaction upon such judgment. Upon such payment, the court, by an order entered of record shall direct the clerk to deposit the same at interest in any bank which is a member of the Federal Deposit Insurance Corporation and is designated in such order; to file evidence of such deposit in the office of the clerk in an appropriate file and shall be payable to the court entering the order for the benefit of the judgment creditor; and to enter upon the judgment docket, where the judgment is docketed, the date of such deposit, the date of the entry of the order of the court receiving same, referring to the number and page of the order book in which it is entered.

The judgment creditor or his attorney may have the money, so paid, to which he is entitled, upon application to the court therefor whenever it may appear to the court that it should be paid to him.

From and after the time of such payment, into the court, as aforesaid, the property of the defendant shall be free and clear of any lien created by any such judgment, or any execution issued thereupon.

From this grizzled old veteran title person’s point of view, there is potential substantial liability on the settlement agent who only performs minimal “due diligence” and relies on the affidavit of the person owing the money. Yes, the release only affects the property but leaves the judgment itself intact; still, the judgment creditor may be able to pursue the settlement agent (and any title insurer involved in the transaction) for the loss of the interest in the real estate. The argument, of course, is that the settlement agent facilitated the judgment debtor escaping liability, which would be exacerbated if

the judgment debtor, say, were to file bankruptcy after the property is sold.

Is it possible that the agent's E&O carrier and/or underwriter will not provide a safe haven even if the Virginia statute is followed exactly but the creditor deprived of a property right files suit? Is it worth taking that risk when there are other, safer, remedies?

[1] *Mennonite* cited and expanded upon *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950)

[2] Yes, Alfred was female.

[3] Citing to *Mullane*, the Court said,

Neither notice by publication and posting, nor mailed notice to the property owner, are means "such as one desirous of actually informing the [mortgagee] might reasonably adopt to accomplish it." Because they are designed primarily to attract prospective purchasers to the tax sale, publication and posting are unlikely to reach those who, although they have an interest in the property, do not make special efforts to keep abreast of such notices.

[4] On certiorari from the Supreme Court of Arkansas.

[5] In relevant part: *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

[6] Appeal to the United States Court of Appeals, Eighth Circuit, from the Federal District Court of the Eastern District of Arkansas.

[7] In *Toma* the owners of the property interest were known to have resided in an adjacent county, yet Plaintiff's counsel only searched the public records in the county in which the property was located. When there was no record of the owners in that county, Toma petitioned the court to quiet title. Like *Plemons* and *Jones*, that effort or lack thereof didn't pass judicial scrutiny.

Category

1. Title Examination
2. Uncategorized

Date Created

2023/09/21

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