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Forced Sale Remedies

By Judon Fambrough

Foreclosure sales for delinquent mortgage payments and, to a lesser extent, tax sales for delinquent property taxes are commonplace in Texas. Not so commonly known, however, is an owner's right to avoid a foreclosure sale and even the right to redeem (or repurchase) property sold at a tax sale.

Equity of Redemption

One way to avoid a foreclosure sale is an equity of redemption. Designed by the courts to promote fairness, the equity of redemption allows the debtor to stop foreclosure anytime between the acceleration of the underlying note and the foreclosure sale. To do so, the debtor must pay the lender the entire underlying indebtedness, interest and other costs due at that time.

Although the equity of redemption was intended to aid the debtor, in reality it did little because of the magnitude of resources required. If sufficient resources had been available to retire the underlying indebtedness, the debtor probably would not have defaulted on a much smaller installment payment. More protection was needed.

Rights to Cure

Consequently, in 1987, Texas legislators passed a law permitting the residential mortgage debtor a second way to stop foreclosure. It differs from the equity of redemption because it arises before the debt is accelerated and only the amount in arrears must be paid the lender.

Effective January 1, 1988, the Texas Property Code provides that if the deed of trust or other contract lien is on real property used as the debtor's residence, the foreclosing creditor must give the debtor at least 20 days to cure the default before acceleration may occur. This gives the residential debtor-mortgagor an opportunity to stop the foreclosure process by curing the amount in arrears only.

Rules governing tax sales differ from those governing mortgage sales. There is no equity of redemption for delinquent taxes primarily because property taxes are not paid in installments, and thus cannot be accelerated. However, a tax sale can be avoided if the owner pays the delinquent taxes plus any interest and penalties due before the sale.

Right of Redemption

The primary protection afforded delinquent property taxpayers comes after the tax sale under a concept known as a *right of redemption*. It gives the former property owner the right to repurchase (or redeem) the property for a given time after the tax sale. The redemptive price generally is the purchase or bid price plus penalties, interest and other associated costs.

The right of redemption arises solely by statutory authority. It gives an incentive to the bidders to purchase the property at its fair market value, thus lessening the chances of the former owner's redeeming it. In Texas, the right of redemption applies only to delinquent tax sales. There is no right of redemption for mortgage foreclosure sales.

Anyone contemplating purchasing property at a tax sale should be aware of the provisions in the Texas Constitution and the Texas Property Code as amended.

Bidders and Purchasers at Tax Sales

Effective October 1, 2003, not everyone is eligible to purchase property at a tax sale. According to Section 34.0445 of the Texas Civil Practice and Remedies Code (CPRC), the officer conducting the tax sale may not execute and deliver a deed to the successful bidder unless he or she exhibits an unexpired written statement from the local county assessor-collector showing the person has no delinquent county, school or municipal property taxes. The statement must comply with the information specified in Section

34.015(c) of the Texas Tax Code (TTC).

Also, effective October 1, 2003, the officer conducting a tax sale must name the successful bidder as the grantee in the deed. The officer cannot execute the deed to any other person in any other name. This means no one may act as the agent for another at a tax sale. However, the statute specifically allows taxing units and anyone acting on their behalf to bid at the sale.

Effective September 1, 2005, the requirements set forth previously in Section 34.0445 that took effect in 2003 apply only to counties with a population of 250,000 or more or with a population of less than 250,000 if the commissioners court has adopted these requirements for tax sales.

Distribution of Proceeds

The TTC directs that proceeds from the tax sale to be distributed in the following manner and in the following order. If the proceeds are insufficient to cover all categories, then the entities included in the last category to receive funds must share them in proportion to their entitlement:

- costs of advertising the tax sale,
- fees ordered paid to an appointed attorney ad litem,
- original court costs payable to the clerk of the court,
- fees and commissions payable to the officer conducting the sale,
- expenses incurred by a taxing unit in determining the necessary parties to the action and in procuring necessary legal descriptions of the properties,
- taxes, penalties, interest and attorney fees due under the judgment,
- the amount, if any, awarded to the taxing unit under the judgment and
- the excess, if any, will be tendered to the clerk of the court issuing the order authorizing the sale. This will

be done within 10 days after the sale.

A new statute, effective Sept. 1, 2009, addressed how the excess proceeds will be distributed after a court hearing. Basically any person, including a taxing unit, may file a petition in the court that issued the order authorizing the sale setting forth a claim for the excess proceeds. The petition must be filed within two years after the date of the sale.

At the hearing, the court will order the excess proceeds distributed per the following priorities to each party that establishes a legitimate claim.

- The purchaser at the tax sale gets a refund of the purchase price if the sale has been adjudged void.
- The taxing unit that filed the order for the sale will get any taxes, penalties or interest that became due or delinquent subsequent to the sale or that was omitted from the judgment by accident or mistake.
- The lienholders on the property are satisfied next in accordance with the priorities established by applicable law.
- The taxing unit that filed the order for the sale receives any unpaid taxes, penalties, interest or other amounts adjudged due under the judgment and were not satisfied from the initial proceeds of the sale.
- Finally, each former owner of the property receives the final payment, if any, according to their interest in the property.

However, a former owner of the property must meet several qualifications to be eligible for any excess funds. First, he or she must have been a named defendant in the initial judgment for the unpaid taxes. If not, he or she must be within the third degree of consanguinity or affinity to the named defendant. Alternatively, the person must have acquired an interest in the property by will or by intestate succession from the former owner who was a named defendant.

The statute requires that any person acquiring an interest from the former owner cannot claim any excess proceeds if the interest was acquired after the judgment ordering the sale was rendered. If the interest was acquired by deed, the deed must have been recorded prior to the date of the judgment.

The new statute concludes by discussing how assignments of an interest for excess proceeds are handled. In no event may the court order an assignee or transferee to receive more than 125 percent of the amount they paid for the assignment or transfer.

Redemptive Price

The successful bidder takes title subject to the former owner's right to redeem (repurchase) the property for a limited time. The Texas Constitution establishes two redemptive periods depending on the type of property. A constitutional amendment that passed in September 2003 sets a third two-year redemptive period for mineral interests.

If the property is the residence homestead of the delinquent taxpayer as defined in Section 11.13 of the TTC, or if the land is designated agricultural use (ag use) as defined in Section 23.51 of the TTC, the redemptive period is two years. For all other property, the redemptive period is six months.

The redemptive price for residential or ag-use property (and possibly mineral interests) depends on when the redemption occurs and if the property is sold to a third party at the tax sale. If the property is sold, the redemptive price during the first year is the total of:

- the amount bid at the sale;
- the recording fees for the deed;
- the amount paid by the purchaser as taxes, penalties, interest and "costs" and
- a 25 percent redemptive premium based on the aggregate total of the first three items.

If the same property is redeemed the second year, the redemptive price remains constant except a 50 percent, not 25 percent, redemptive premium is assessed.

The term "costs" is defined in Section 34.21 of the TTC to mean the reasonable amount the purchaser spent for maintenance, preservation and safekeeping of the property during the redemption period including the cost of:

- insurance;
- repairs or improvements required by local ordinance or building code, or by a lease in effect on the date the property was sold;

- discharging a lien imposed by a municipality to remedy a health or safety hazard on the property and
- impact or standby fees imposed under the Texas Local Government or Water Code that are paid to a political subdivision.

If the residential or ag-use property is not sold at the sale because of an insufficient bid, it is "bid off" to a taxing unit that is a party to the judgment (Section 34.01 of the TTC). The property may still be redeemed. The price though, is the total of:

- the amount of the judgment against the property or the market value as specified in the judgment, whichever is less;
- the recording fees for the documents and
- the amount of the "costs" outlined earlier.

Finally, if the residential or ag-use property is "bid off" to a taxing unit and the taxing unit sells it to a third party, the redemptive price is a total of:

- the amount paid the taxing unit by the purchaser,
- the recording fees for the documents;
- the amount paid by the purchaser as taxes, penalties, interest and "costs" and
- a 25 percent redemptive premium during the first year on the first three items or a 50 percent redemptive premium during the second year.

The redemptive price for all other property parallels that paid for residential or ag use. The only exceptions are:

- the redemptive period is 180 days after the deed is filed and
- a redemption premium to a purchaser other than a taxing unit cannot exceed 25 percent (Section 34.21[d]).

Note. The statute contains some discrepancies between Section 34.21(d) cited above and Section 34.31(b). The latter provides that if property other than residential or ag use is sold at the tax sale, the redemptive price is the greater of:

- the amount of the judgment,
- the "costs" and
- an amount equal to 25 percent of the first two items, or

- the amount of the bid price and
- an amount equal to 25 percent of the bid price.

If the first list of items exceeds the second and the purchaser receives more than 125 percent of the bid price, the excess goes to the taxing units.

When redeeming the property, the redemptive price will be paid to the purchaser. However, if the purchaser cannot be located or is uncooperative, the former owner may tender the necessary amount to the county assessor-collector along with a required affidavit. The affidavit signed by the former owner must state the following:

- the period granting the owner the right to redeem the property has not expired.
- the owner has made a diligent search in the county and has failed to find the purchaser.
- the purchaser is not a resident of the county.
- the owner and purchaser cannot agree on the amount of the redemption money due or
- the purchaser refuses to give the owner a quitclaim deed to the property.

The assessor-collector receiving the affidavit and payment will assume that all the assertions contained in the affidavit are true and correct.

The assessor collector will then give the former owner a signed receipt witnessed by two persons. The recording of the receipt gives notice to all persons that the property has been redeemed. Thereafter, the assessor-collector will pay

to the purchaser on demand the money received from the former owner. The assessor-collector will not be liable for relying on the assertions contained in the affidavit or performing any duties required by the statute.

The right of redemption is a nonpossessory interest in the land. It does not give the former owner the right to use or possess the property nor the right to receive rents, income or other benefits from the property while the redemptive right exists.

Not addressed is the purchaser's right to recover the value of improvements added to the property during the redemption period not included in "costs." No constitutional, statutory or case law appears to authorize such recovery. Consequently, the purchaser should be hesitant to add improvements until the redemptive period ends.

Texas residential mortgage debtors can save their homes from foreclosure in two ways. They must act before the foreclosure sale occurs, however. After a tax sale of a residential homestead or agricultural land, prior owners have up to two years to repurchase their property. The redemption period for all other property is six months.

During the 77th and 78th Texas Legislatures, two new rights of redemption were added. The first deals with the foreclosure of residential property by a property owners association for nonpayment of assessments. The other grants landowners the right to repurchase condemned land when the public use expires.

Redemption from Property Owners Associations

Effective January 1, 2002, owners whose residences are taken by foreclosure for nonpayment of assessment fees have 180 days to redeem the property after receiving notice from the property owners association. The redemptive price depends on whether the property owners association or a third party purchases the property at the sale. For more information, see Center publication number 1548, "Legislature Limits POA Power."

Redemption from Condemnors

Effective January 1, 2004, landowners whose real property is condemned by a political subdivision have the right to repurchase if the public use for which it was taken expires within ten years. The landowner must repurchase within nine months after receiving notice of the expiration of the public use. The redemptive price is the fair market value of the land at the time of the reacquisition. For more details, see Center publication number 394, "Understanding the Condemnation Process in Texas."

This article is for information only; it is not a substitute for legal counsel. ♣

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