IN THE SUPREME COURT OF FLORIDA

SECURITIES AND EXCHANGE COMMISSION, Appellee, vs. CHARLES PHILLIP ELLIOTT, ET AL, Defendants, CHARLES O. FARRAR, Receiver-Appellee, KENNETH J. DAVIS, et al., Claimants-Appellants.	)	CASE NO. 79,494

FILED
SID J. WHITE
JUN 8 1993
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

ON CERTIFICATION FROM THE UNITED STATES ELEVENTH CIRCUIT COURT OF APPEALS

REPLY BRIEF OF CLAIMANTS-APPELLANTS, HOWARD DORE, RUTH DORE, GERALD J. BRAUN AND CHRISTIE BRAUN

Mark A. Ebelini, Esq.
HUMPHREY & KNOTT, P.A.
Attorneys for Claimants-Appellants
1625 Hendry Street, Suite 301
Fort Myers, FL 33901
Telephone: (813) 334-2722

TABLE OF CONTENTS

TABLE OF CITATIONS

Constitutions

Other Authorities

ARGUMENT ON REPLY

I. FLORIDA TAX CERTIFICATES REPRESENT A LIEN ON REAL ESTATE FOR THE PURPOSES OF THE FLORIDA UNIFORM COMMERCIAL CODE SO THAT ARTICLE 9 DOES NOT GOVERN THE CREATION OF A SECURITY INTEREST THEREIN BY VIRTUE OF SECTION 679.104(10).

Section 197.102, Fla.Stat. (1991)[1] defines a tax certificate as:

> A legal document, representing unpaid delinquent real property taxes. . . issued in accordance with this chapter against a specific parcel of real property and becoming a first lien thereon, superior to all other liens.

This definition is consistent with the uniform characterization of tax certificates under Florida law presented in previous briefs in this matter. Section 679.104(10), Fla.Stat. (1991) excludes from Article 9 (Chapter 679):

> [T]he creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder.

Despite the above two sections, the Receiver, in Section I.A. of its Answer Brief, argues:

> FLORIDA TAX CERTIFICATES DO NOT REPRESENT AN INTEREST IN LAND [OR LIEN ON REAL ESTATE] FOR PURPOSES OF EXCLUSION UNDER FLORIDA'S UNIFORM COMMERCIAL CODE.

The Receiver's argument is obviously inconsistent with the above-cited sections of the Florida Statutes. The Receiver also states that the tax collector conducts the statutory sale of the real property liened by the tax certificate. This is incorrect. The Clerk of Court conducts the sale. Section 197.502(4)-(7).

---

[1] This statutory definition is merely a statement of legislative intent and does not alter or establish rights of a tax certificate holder. Therefore, the current statutory provision is referenced.

This and other inaccuracies appearing on just the first page of the Receiver's argument shows the Receiver's lack of knowledge of the governing statute of Florida tax certificates.

Despite the clear definition of tax certificates as being a lien superior to all other liens on real property, the Receiver continues to assert that tax certificates are merely "contractual rights". (Appellee's brief at 13).

As in its answer brief before the Eleventh Circuit Court of Appeals, the Receiver again cites Martyn v. First Federal Savings & Loan Ass'n of West Palm Beach, 257 So. 2d 576 (Fla. 4th DCA 1971) for the proposition that a lien is an intangible and is within Article 9. However in Martyn the issue was whether an oral contract to loan money in return for a mortgage upon realty was barred by the statute of frauds as adopted in Florida. Id. at 577. The Third District Court of Appeal reaffirmed Florida's status as a "lien state" and held:

> The mortgage lien is itself a species of intangible property. (cites omitted) It is a chose in action which creates a lien on the land but not an interest in the land Id. at 578.

The Receiver's citation of Martyn solidifies the Dores' position that a Florida tax sale certificate, like a mortgage, may be a species of intangible property, but it is also a lien on real estate expressly exempt from Chapter 679. In the instant case, the transfer of the lien for taxes by Elliott to Mr. & Mrs. Dore is similarly a transaction excluded from Chapter 679 by Section 679.104(10).

The Receiver argues:

> Nor can a tax certificate, upon analysis, be said to represent an assignment of a lien on real

property. (Appellee's brief at 13)

However, the Receiver's analysis directly conflicts with the foregoing definition of a tax certificate contained in Section 197.102. See also, Section 197.122, Fla.Stat. (1985); Gautier v. Town of Crescent City, 138 Fla. 573, 189 So. 842, 844 (1939) (the purpose of a tax certificate is to "provide a means for evidencing the assignment of the tax lien"). The Receiver also argues:

> A purchaser of a tax certificate, the so-called 'assignee' of the lien for taxes, has no right to proceed directly against the landowner or the lands to recover the amount paid for the tax certificate. §197.432(2), Fla.Stat. (Appellee's brief at 13).

The section cited for support by the Receiver for the above statement provides as follows:

> A lien created through the sale of a tax certificate may not be enforced in any manner except as prescribed in this Chapter. (emphasis added) §197.432(2), Fla.Stat.

This section does not restrict the right of the tax certificate holder to proceed against the land to recover the amount paid for the tax certificate. It merely restricts the holder to the remedies provided in Chapter 197. The tax certificate holder has the right under Chapter 197 to proceed for a tax deed on the land liened by the certificate, which results in the sale of the property at public auction by the Clerk of Court pursuant to Section 197.502. The Receiver is correct in stating that the tax certificate holder has no right to proceed against the landowner, as there is no personal obligation by the landowner, only a first lien on the land.

The Receiver notes that if the tax collector (actually, the Clerk of Court) refuses to conduct a tax deed sale, the holder's

only remedy would be to obtain a writ of mandamus against the tax collector. Similarly, if the Clerk of Court failed to conduct a foreclosure sale, the mortgage holder would, presumably, proceed in the same manner to force the Clerk of Court to proceed with the sale of the property secured by the mortgage.

The Receiver's citation to State ex rel Seville Holding Co. v. Draughon, 127 Fla. 528, 173 So. 353, (Fla. 1937) further reinforces the Dores' position that a tax certificate is a statutory lien on real property, governed exclusively by Chapter 197 and expressly exempt from Chapter 679. The Receiver cites Draughon for its statement that:

> A tax certificate is a contract between the state and the purchaser thereof who is granted by such certificate the benefit of the laws of the state in force at the time securing and defining his rights under it. Id. at 354.

However, the court continued:

> At the time the particular tax certificate involved in this case was issued, such certificate constituted an enforceable statutory lien upon the delinquent taxpayer's property capable of being redeemed by him, upon certain specified conditions, and only on such specified conditions, as were at the time of the issuance of such tax certificate prescribed by the statutes. (emphasis added) Id.

In Draughon, a tax certificate was issued and sold to the Seville Holding Company while a certain section of the Florida Statutes governing the rights, privileges, duties and burdens of the holder of a tax certificate was in full force and effect. However, subsequent to the issuance of the tax certificate, the Legislature repealed the particular section, establishing no effective substitute or equivalent provision to the law repealed. The court found that the statutory section repealed added

materially to the legal value of the tax certificate as an investment at the time it was offered for sale by the State. Id. The Legislature's repeal of the section, subsequent to the sale of the certificate, impaired the substance of the certificate itself and, therefore, the court held that repeal was ineffective as to the rights of a prior holder of a tax certificate. Id. The court held that the rights of the holder are to be determined according to the law in force at the time the tax certificate was acquired. Id.

The Draughon court did not characterize a tax certificate as merely a contractual right, as presented by the Appellee. See also, Cape Sable Corporation v. Metropolitan Dade County, 437 So. 2d 728, 730 (Fla. 3d DCA 1983) (contractual rights of purchaser of tax certificate under statute existing at time of purchase of tax certificate could not be changed by subsequent amendment to statute to subject a tax deed to any recorded lien claimed by the County).

The Legislature's amendment of the tax certificate statute in Draughon can be analogized to the enactment by the state of a law which retroactively impairs the rights of a holder of a mortgage or other lien on real property. This would be prohibited by the contract clause of Article I, Section 10 of the U.S. Constitution and Article I, Section 10 of the Florida Constitution.[2]

---

[2] Just such a case confronted the Second District Court of Appeal in Sarasota County v. Andrews, 573 So. 2d 113 (Fla. 2d DCA 1991) where the court affirmed the trial court's summary judgment declaring a portion of a county ordinance unconstitutional as applied to a bank mortgagee. The court held that the ordinance provision, purporting to make the County's code enforcement liens "superior to all other liens except the lien for taxes", substantially impaired the prior mortgage lien of the bank mortgagee by subordinating it to the County's lien.

In both Cape Sable and Draughon, the courts held that the purchaser of a tax certificate acquires certain contractual rights when it purchases a certificate and those rights cannot be changed by a subsequent change in the tax law. See Cape Sable at 729 and Draughon at 354. However, the contractual rights referred to in both Draughon and Cape Sable are the rights of the tax certificate holder to a statutory first lien on real property pursuant to Chapter 197.

II. ARTICLE 9 DOES NOT APPLY TO THE ASSIGNMENT OF TAX CERTIFICATES.

The Receiver characterizes the Dores' rights as "mere possession of tax certificates given to them as collateral." (Appellee's brief at 14). However, the Receiver ignores that the tax certificates were fully endorsed by the holder, Elliott, in blank on the reverse side. (A: 3,6) This assignment is absolute on its face:

> I hereby transfer all my right, title and interest in the foregoing tax certificate number _____, to _____.
>
> /s/
> (Signature of transferor)

Nevertheless the Receiver argues:

> The Dores and Brauns miss the mark when they argue that the assignment in blank by Elliott on the reverse side of the tax sale certificates created a perfected security interest in favor of them as of the date of such assignment and delivery. (Appellee's brief at 14)

The Receiver's evaluation of the Dores' argument is contrary to Chapter 197. Section 197.462, Fla.Stat. (1985) provides that all tax certificates issued to an individual may be transferred by endorsement at any time before they are redeemed or a tax

certificate is issued thereunder.

The Receiver further argues that Chapter 197 does not provide a procedure for filing notice of a claimed security interest in a tax certificate on the tax collector's official rolls. However, on the face of the instruments, the Dores rights in the certificates are absolute under Chapter 197. The Dores are holders of a statutory first lien on the properties referenced in the respective tax certificates by assignment from Elliott.

While the tax collector is required to keep a list of tax certificate holders, the main purpose of this list is to enable the tax collector notify the holder when a tax certificate is redeemed. See e.g., Rule 12D-13-051(2)(a). The redemption proceeds will only be issued to a person who has possession of the certificate itself and surrenders the certificate to the tax collector for cancellation, in whole or in part, depending upon whether the entire property liened has been redeemed. See Section 197.156(2), Fla.Stat. (1985). Similarly, as cited in the Dores' initial brief, only the holder of a tax certificate may file an application for a tax deed with the tax collector. Section 197.502 (1985).

The only exception to the absolute rights of a holder of a tax certificate is an application for a duplicate if the original certificate has been lost or destroyed. Section 197.433(1), Fla.Stat. (1985). However, in that event the claimed holder is required to give an affidavit to the tax collector stating that the affiant is the owner of the tax certificate and that the original certificate has been lost or destroyed. Id. The issuance of a duplicate certificate also requires approval by the Board of County Commissioners of the county in which the land liened is located.

Id. Furthermore, when the tax collector issues the duplicate certificate, it must plainly mark or stamp on the certificate that it is a duplicate. Id. This ensures the rights of the holder an original certificate in the event the purported holder had actually transferred the original certificate.

The Receiver responds to the Dores' citation of this court's recent decision in United States of America v. McGurn, 17 Fla. L.W. 208 (April 2, 1992) arguing that no comprehensive statutory counterpart to Chapter 561, pertaining to liquor licenses, is found in Chapter 197 with regard to tax certificates. The Dores are mystified as to how the Receiver could allege that Chapter 197, which exclusively governs the creation, sale, transfer, redemption and enforcement of the first lien of tax certificates, is not comprehensive in nature. The obvious reasons for the lack of a counterpart to Section 561.65(4), regarding liens on liquor licenses, in Chapter 197 is that tax certificates are exempt from Article 9 as liens on real property and that the rights afforded by tax sale certificates are absolute in the holder.

Once the Dores came into possession of the fully endorsed tax certificates they had full rights as holders of the certificates to transfer the certificates, receive redemption monies or, after approximately two years from the date of issuance of the certificate, file for a tax deed.[3]

The Receiver argues that if Article 9 is inapplicable to tax certificates, there would be no statutory guidance for lenders

---

[3] Note 4 on Page 6 of the Appellants' initial brief sets forth what Mr. & Mrs. Dore actually did upon learning of the SEC action against Elliott.

wishing to be certain of their secured status and priority. However, the Receiver's statement ignores the reality that the rights of a tax certificate lie solely with the holder under Chapter 197. Therefore, if a lender agreed to accept an interest in a tax certificate without receiving either possession or endorsement of the tax certificate itself, the lender would have no "secured rights" to payment of the funds received by the tax collector and no right to file an application for a tax deed.

The Receiver's argument that Section 679.102(3) brings the Dores' tax certificates back within the purview of Chapter 679 is without merit. First, as stated above and in their initial brief, the Dores, as holders of the tax certificates by endorsement, have all of the rights of the original holder. Elliott assigned his first lien on the real property described in the tax certificates to the Dores.

The Receiver also cites Gould, Inc. v. Hydro Ski International Corp., 287 So. 2d 115 (Fla. 4th DCA 1973) in support of this argument. However, in Gould the Fourth District Court of Appeal did not even mention the applicability of Article 9 to the issue presented. The court in Gould merely concluded that a security agreement, including, as collateral, all of the debtor's contract rights, also included the debtor's leasehold interest which contained a prohibition against assignment. Therefore, Gould does not support the Receiver's position. Furthermore, in the instant case, unlike in Gould, Mr. & Mrs. Dore would not have to bring an action to foreclose their interest in the tax certificates. Their rights to the tax certificates have been perfected by their actual possession of fully endorsed certificates. The instant case

involves nothing more than the transfer of a statutory first lien on real estate which is expressly exempt from Article 9 under Section 679.104(10). See also, Rucker v. State Exchange Bank, 355 So. 2d 171, 174 (Fla. 1st DCA 1978).

The Receiver miscites the court's holding in the landmark case of Rucker v. State Exchange Bank. The Receiver argues that the First District Court of Appeal held:

> The mortgage, as a general intangible under Article 9, could only be perfected by a filing. Section 679.302, Fla.Stat. (Appellee's brief at 17)

However, the court in Rucker held:

> [T]he assignment of a real estate mortgage securing a promissory note as collateral for a bank loan is not a secured transaction under Article 9 of the Uniform Commercial Code because it is specifically excluded by Section 679.104(10). See Rucker at 174.

The Receiver fails to recognize the Rucker court's exhaustive analysis of the significance of the 1966 amendment to Uniform Commercial Comment 4 to Section 9-102 of the Code, which illustrates the intended interplay of Uniform Commercial Code Section 9-102(3) (codified in Florida as Section 679.102(3)) with Uniform Commercial Code Section 9-104(j) (codified in Florida as Section 679.104(10)).[4] See also, In re Bristol Associates, Inc., 505 F. 2d 1056 (3d Cir. 1974) (the use of a lease as collateral for a loan is excluded from the requirements of Article 9 as a transfer of an interest in real estate); In re Shuster, 784 F. 2d 883 (8th Cir. 1986) (Article 9 does not apply to a vendor's assignment of

---

[4] Subsection (3) of the Florida Code Comments (1965 enactment) provides: "A pledge of a note secured by a real estate mortgage is within this chapter although such a mortgage is itself not governed by the code." (emphasis added)

interest in a contract for deed as collateral for a loan); In re Hoeppner, 49 B.R. 124 (Bankr. E.D. Wis. 1985).

In an attempt to avoid the Rucker decision, the Receiver cites several federal court decisions that have little relevance to the instant case. (Appellee's brief at 11). For example in In the matter of Equitable Development Corp., 617 F. 2d 1152 (5th Cir. 1976), the court held that the principal test of whether a transaction comes within the uniform commercial code is the intent of the parties. Id. at 1155. In Equitable Development, the court determined that there was "no doubt" that the parties to the assignment of contracts and accounts receivable intended to create a security interest governed by the code. Id. In fact, the court noted that the first sentence of the assignment document itself stated that the assignment "shall be governed by the Uniform Commercial Code of the State of Florida". Id.

Similarly, in In re Shams, 54 B.R. 61 (Bankr. S.D. Fla. 1985) the court was faced with characterizing the debtor's interest in a land trust agreement because the description contained in the financing statement filed by the creditor bank failed to properly identify the debtor's interest. Instead of referring to the debtor's interest as an interest in a land trust agreement, the bank's financing statement referred to the debtor's interest as an interest in real property. Id. at 62. The court held that the bank's description of the collateral was inaccurate and seriously misleading and, therefore, the bank's interest was unperfected and inferior to the lien of the trustee of the land trust. Id. The bankruptcy court recognized that in the type of land trust at issue, both the legal and equitable title of the real property was

vested in the trustee of the land trust under Florida law. Id. Therefore, the court held that the rights, privileges and obligations of the beneficiaries of the land trust were not interests in real estate. Id. Therefore, the sole issue in In re Shams was whether the bank's financing statement adequately identified the debtor's interest. It was undisputed that the interest itself was subject to Article 9. Id. at 61.

In In re ESM Government Securities, Inc., 812 F. 2d 1374 (11th Cir. 1987), another case cited by the Receiver, the creditor, Resource, claimed a perfected security interest in certain funds held by the debtor, ESM. ESM had granted Resource a security interest in all interest and other amounts payable from certain securities, which were Government National Mortgage Association certificates. In ESM, the relevant question was whether Resource had a perfected security interest in the funds held by ESM, not in any securities. Id. at 1377. The court held that Resource did not own the principal and interest at the time of ESM's bankruptcy, it only had a right to payment of these funds. Id. at 1377-1378.

The remaining cases cited by the Receiver are similarly inapplicable and none of the cases discuss the inter-relationship between 679.102(3) and 679.104(10) as does the First District Court in Rucker, which is the current law in Florida.

In its answer brief, the Receiver finally appears to agree that a tax certificate is a lien on real property:

> To hold that Chapter 197 tax certificates issued against lots or parcels of land are intended to circulate in the market place. . . (emphasis added)

However, the Receiver also now argues that tax certificates are not intended to circulate in the market place in the same way as

negotiable instruments. However, this statement belies the provisions of Section 197.462, providing for transfer of tax certificates by a holder at any time, and Department of Revenue Form DR-509, on which the tax certificates are issued, which includes two separate endorsement forms on the reverse side of the instrument for transfer by acknowledged signature of the holder. (A: 2-3)

The Receiver uses strained logic in attempting to equate the Dores' possession of fully endorsed tax certificates with the simple possession of lottery tickets, airplane certificates and similar documents. However, once again, the Dores do not merely have possession of the tax certificates, they have possession of fully endorsed certificates signed by Elliott and acknowledged by a notary public of the State of Florida in accordance with the required endorsement on the certificate form itself.

The Receiver argues that there is "no specific statute requiring liens on tax certificates to be filed". (Appellees' brief at 23). The Dores agree with this assertion. Chapter 197 does not require a separate filing of a tax certificate as these interests in land are exempt from Article 9, and possession of a fully endorsed certificate is evidence of ownership.[5] In the instant case, the Dores received a fully endorsed certificates from Elliott and placed them in their security deposit box.

---

[5] Uniform Commercial Code Comment 4 to Section 9-104(3) [679.102(3), Fla.Stat.] (1972 revision) states, in pertinent part: "This article leaves to other law the question of the effect on rights under the mortgage of delivery or non-delivery of the mortgage or recording or non-recording of an assignment of the mortgagee's interest." In the instant case, Chapter 197 does not require recordation of an assignment of a tax certificate.

The Receiver's attempt to equate the Dores' possession of assigned tax certificates with necessity of filing an assignment of mortgage in the land records in Rucker is misplaced. The assignee of a mortgage would always want to record his interest, as mere possession of the original mortgage document and an assignment by the original mortgagee, without recording, would be inferior to a subsequent, but properly recorded, assignment by the original mortgagee. However, in the instant case, Elliott could not assign his interest in the Dores' tax certificates a second time, as he no longer had possession of the certificates.

The Receiver takes issue with the Dores' assertion that under the Receiver's rationale the tax collector would have to search for financing statements with the Secretary of State prior to paying redemption proceeds to parties surrendering tax certificates. The Receiver asserts that the tax collector would have no such duty. If the Receiver is correct, why would anyone ever file a financing statement with the Secretary of State as the Receiver has claimed is necessary?

Finally, the Receiver has never produced any evidence whatsoever that the Dores or Elliott, or any parties dealing with tax certificates in the commercial world, would ever intend that their tax certificate transactions be governed by the Uniform Commercial Code.

CONCLUSION

By definition, a Florida tax certificate represents a first lien on real property. The Receiver's answer brief is totally devoid of any authority for its position that a tax certificate is not a lien on real property.

The current law in Florida is that transfers of liens on real estate or assignments of liens as collateral, as in the instant case, are not within Article 9. The Receiver has set forth no argument to refute this precedent other than to miscite the landmark decision in Florida.

Therefore, Claimants-Appellants, Howard and Ruth Dore, Gerald J. Braun and Christie Braun, request that this court inform the United States Court of Appeals for the Eleventh Circuit that tax certificates are first liens on real estate and, thus, the instant assignment of tax certificates is excluded from Article 9 by Section 679.104(10).

HUMPHREY & KNOTT, P.A.
Attorneys for Claimants-Appellants, Howard Dore, Ruth Dore, Gerald J. Braun & Christie Braun
1625 Hendry Street, Suite 301
Fort Myers, FL 33901
Telephone: (813) 334-2722

By: _____
Mark A. Ebelini
Florida Bar No. 0600210

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. mail to Marsha L. Lyons, Esq., Lyons & Farrar, 1401 Brickell Avenue, Suite 802, Miami, Florida 33131 on this ____ day of June, 1992.

By: _____
Mark A. Ebelini