

## **Ruling Puts Banks On Hook For Fla. Real Estate Back Taxes**

By **Carolina Bolado**

Law360, Miami -- When a mortgage company loaned money to a Miami buyer in 2007, the lender didn't know the homeowner would improperly claim a homestead property tax exemption. It wasn't until seven years later that the county would file a lien for the unpaid taxes, a lien that a Florida appeals court now says applies retroactively and takes priority over the mortgage.

The decision, issued Oct. 18, could cause headaches for lenders and title insurers who will now need to worry about priority liens popping up after closing and applying retroactively.

"When you look at the tax rolls, everybody can quickly confirm how much is owed, but here, how much is owed is something that is decided on in the future," said Anthony Carriuolo, a partner at **Berger Singerman LLP**. "How the heck are you supposed to guard yourself against that risk?"

In the ruling, the Third District said a tax lien filed by the county in 2014 after the property appraiser found that the homeowner was improperly claiming the homestead exemption takes priority over the mortgage recorded by Lansdowne Mortgage LLC in 2007.

The appeals court said Section 197.122(1) of the Florida Statutes, which makes all tax liens superior to other liens, is unambiguous and gives the county's homestead tax lien priority.

But attorneys say this puts lenders and title insurers in an impossible situation, because they cannot know at closing about tax liability from an improperly claimed homestead that won't be determined until years later.

"It would be an inordinate burden for banks to have to check this," said Manuel Farach, a partner at **McGlinchey Stafford PLLC**. "Sure, they could get an affidavit, but even then that isn't going to protect them."

The property at issue was purchased by a homeowner using a Lansdowne mortgage in September 2007. In January 2014, the county's tax assessor determined that the homeowner had been improperly claiming the homestead tax exemption, which gives owners a break on property taxes if they are using the home as their primary residence.

Lansdowne filed a foreclosure suit against the county in May 2015, alleging that because its mortgage was recorded before the recording of the tax lien, it had priority over the county's lien. The trial court concluded that the mortgage took priority, but the Third District reversed it.

The biggest issue with the decision is its retroactive nature, which could, depending on the property and how long the homeowner wrongly claimed the exemption, lead to liabilities of hundreds of thousands of dollars, according to Farach. By law, a tax assessor can claim up to 10 years' worth of back taxes for improper homestead exemptions.

**"Florida has always been a first in time, first in right state, with one exception: that government liens are superior,"** said Marko Cerenko, a partner at **Kluger Kaplan Silverman Katzen & Levine PL**.

**“But this means you can go back in time and prioritize a subsequent lien.”**

Lansdowne argued that in this case, Section 197.122(1) does not apply to the county’s tax lien because there is a more specific statute, Section 196.161, that addresses the priority of liens imposed to fix any improperly granted homestead tax exemption. But the Third District said 196.161 does not affect the priority of homestead tax liens over other liens.

“When read in context, it is clear that the statute covers the subject of when and how such a lien attaches to a given property,” the appeals court said.

Vivian Jaime of Ritter Zaretsky Lieber & Jaime LLP, who represented Lansdowne in the litigation, said that to reach that conclusion the court had to decide that a mortgage lender is not a purchaser for value, a common law term used to describe an innocent party who buys property without notice of any other party’s claim to the title.

“The statute provides an exception to a purchaser for value, but the court didn’t want to interpret a mortgage lender as a purchaser for value,” Jaime said.

An attorney for the county could not be reached for comment.

Jaime said Lansdowne is declining to appeal the decision to the Florida Supreme Court. She said the amount of back taxes at issue in the case is about \$33,000, and her client is not inclined to spend additional money on litigation for the relatively small sum, which means the decision will stand for now.

Cerenko said that though the decision is controlling in just the Third District, which covers Miami-Dade and Monroe counties, it likely will have a statewide effect because of the lack of jurisprudence on the issue from any other courts.

“It is the only decision of its kind right now in the state,” Cerenko said. “It’s persuasive authority for the rest of the state. If in Duval, for example, the same issue pops up, the local government there can point to this decision and say, ‘look at what the Third District did.’”

Miami-Dade is represented by Abigail Price-Williams, Michael J. Mastrucci and Jorge Martinez-Esteve.

Lansdowne is represented by Vivian Jaime of Ritter Zaretsky Lieber & Jaime LLP.

The case is Miami-Dade County v. Lansdowne Mortgage LLC, case number 3D16-1046, in the Third District Court of Appeal of the State of Florida.

--Editing by Brian Baresch and Breda Lund.