Denver Law Review

Volume 36 | Issue 4 Article 13

May 2021

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BAR BRIEFS

FORECLOSURES AND FEDERAL LIENS —SOME SUGGESTIONS

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It is axiomatic that the United States cannot be made a party to any lawsuit without the express authority of Congress. Likewise, when Congress waives the sovereign immunity of the government the conditions and limitations of the waiver statute must be strictly observed and adhered to.

Occasionally, an attempt is made by the holder of a first deed of trust to eliminate a federal lien by following the administrative foreclosure route. Many members of the bar feel that there is no justification for the exclusiveness of the method provided by Congress. But under the law as it now exists a federal lien cannot be foreclosed except in accordance with the consent statute.[1] The language of the statute provides that, "the United States may be named a party in any civil action or suit in any district court, . . . or in any state court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien."

Care should be exercised in following the procedural steps relating to pleading the interest of the government and the method of service. "The complaint shall set forth *with particularity* the nature of the interest or lien of the United States."[2]

Regardless of the jurisdiction in which the suit is filed, a copy of the summons and complaint must be served on the United States Attorney, and a copy of the summons and of the complaint must be sent by registered mail to the Attorney General of the United States at Washington, D.C.[3]

It should be remembered that the United States is allowed sixty days in which "to appear and answer, plead or demur."[4] The summons should so provide.

This consent statute also makes provisions for redemption by the government. Different results obtain when the foreclosure sale is to satisfy a lien which is inferior to that of the government than when the foreclosure is to satisfy a lien with priority over that of the government. Since the latter situation is the most common the statutory language is quoted:

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1 28 U.S.C. §2410(a) (1948).
2 28 U.S.C. §2410(b) (1948). (Emphasis added).
3 Fed. R. Civ. P. 4(d)(4).
4 28 U.S.C. §2410(b) (1948).

"Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem."[5]

The one year redemption right may discourage bidders at the foreclosure sale and it may be considered a cloud on the title until its expiration.

Thus, it may be said that there are two distasteful conditions which have been imposed by Congress: (1) compulsory *judicial* foreclosure, and (2) the one year redemption period.

In the case of federal tax liens both objections may be eliminated under certain circumstances. Congress has so provided. Although the method is not entirely new, its practicability dates from the passage of the 1954 Internal Revenue Code. The historical aspects will be left to the scholars. This is intended as a practical aid for the present.

The elimination of the two objectionable procedural provisions may be accomplished by eliminating the federal lien prior to suit, thus obviating the necessity of making the United States a party.

The Internal Revenue Code provision referred to provides:

"Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to the lien if

(A) there is paid over to the Secretary or his delegate in part satisfaction of the liability secured by the lien an amount determined by the Secretary or his delegate, which shall not be less than the value, as determined by the Secretary or his delegate, of the interest of the United States in the part to be so discharged, or

(B) the Secretary or his delegate determines at any time that the interest of the United States in the part to be so discharged has no value.

In determining the value of the interest of the United States in the part to be so discharged, the Secretary or his delegate shall give consideration to the fair market value of such part and to such liens thereon as have priority to the lien of the United States."[6]

The District Director of Internal Revenue is the "delegate" of the Secretary. The discharge can be accomplished within the office of the Director. No consultation or approval by Washington is required by law and none is involved in actual practice.

It is the understanding of the writer that there are no "rules and regulations," as such. The Internal Revenue Service has issued Form 160—Application for Discharge of Property from Federal Tax Lien—which, in effect, spells out the information required by the Director to enable him to determine the dischargeability of the fed-

5 28 U.S.C. §2410(c) (1948).
6 Int. Rev. Code of 1954, §6325(b)(2).

eral tax lien. The form may be obtained from the Special Procedures Section of the District Director's Office.

Briefly, the application must contain (1) a description of the property, (2) the reason discharge is sought, (3) a description of the federal tax lien, (4) a list of all recorded liens or encumbrances believed to be prior to the federal tax lien, (5) a list of all unrecorded deeds, etc., believed to be prior to the federal tax lien, (6) an itemization of proposed costs, commissions and expenses of any transfer or sale of the property, (7) proof of the fair market value of the property, including applicant's valuation and written appraisals by two qualified disinterested appraisers, and (8) any other information the applicant has bearing upon the determination to be made.

Except for the requirement as to the appraisals, the information which must be furnished will be available from the abstract, the file of counsel or within his knowledge. The information required is the minimum needed to form an intelligent opinion as to the value of any inferior encumbrance. The procedure is simple, expedient and effective. Its use is encouraged by both the Director's office and the Department of Justice. This procedure must precede the filing of suit, while the matter is still within the competence of the Director. After suit the Director loses jurisdiction to the Department of Justice. The provisions of the act do not grant any authority to the Department of Justice. A settlement at this point requires approval of the Chief Counsel of the Internal Revenue Service and the Attorney General.

Before leaving the subject of the administrative discharge of liens, attention should be called to the provisions of 28 U.S.C. §2410 (d) (1948). Briefly, the subsection says, paraphrased: A person having a lien on property which is superior to a government lien "other than a tax lien," may make a written request to "the officer charged with the administration of the laws in respect of which the" government lien arises, to have it extinguished. If it appears, from an investigation, that the property is insufficient to satisfy the government lien, in whole or in part, or that the claim has been satisfied or is otherwise uncollectible, such officer shall report the fact to the Comptroller General who may issue a certificate of release.

In view of the fact that by executive order the Attorney General has complete authority to compromise all claims by and against the government without suit, this subsection is not frequently employed.