

## Creditors' Rights Bulletin - Getting Paid and Keeping It

December 11, 2017

by John M. August

*First, the case and the question is may the transfer of property in connection with a property tax foreclosure conducted in accordance with New Jersey State law be set aside as a preferential payment under the Bankruptcy Code? Surprisingly, the answer to that question was YES in a recent case.*

In [\*Hackler v. Arianna Holdings Company, LLC\*, 571 B.R. 662 \(Bankr. D.N.J. 2017\)](#), debtors, who were serial bankruptcy filers and living in their home without paying real property taxes, utilities or insurance, were able to set aside a property tax foreclosure of their home as a *preferential transfer*. Pleadings filed in the bankruptcy case revealed that the debtors had been living in the real property without paying any of the carrying costs, while the tax sale certificate holder paid delinquent taxes, utility charges and even homeowner's insurance to protect its lien. The bankruptcy petition indicated they were solvent. The debtors were serial filers, having filed a bankruptcy petition earlier in 2017 in an effort to stay the foreclosure action. This earlier bankruptcy was dismissed.

Notwithstanding this history, the debtors were successful in having a property tax sale of their property avoided as a preferential transfers. The driving fact behind the decision appears to be that the apparent \$335,000 value of the property exceeded the approximately \$45,000 due to redeem the tax foreclosure judgment and the \$89,000 of other judgment liens. The Bankruptcy Judge reconized that the Supreme Court has held that foreclosure sales that comply with State law may not be set aside as *fraudulent transfers*, and that New Jersey law expressly exempts tax foreclosures from the reach of New Jersey's *fraudulent transfer law*. The Bankruptcy Judge found this law irrelevant to the question of whether the tax sale foreclosure could be set aside as a *preferential transfer* under the Bankruptcy Code. The Bankruptcy Judge noted that, as all of the elements of a preferential transfer were present in the case and the tax sale certificate holders' attorney did not specifically contest any of the elements, she was just applying the plain meaning of the language of the Bankruptcy Code.

The troubling aspect of this case for creditors is that, although the elements of the preferential transfer were met, there was no preference here. The preferential transfer section of the Bankruptcy Code was enacted to allow the avoidance of pre-bankruptcy transfers preferring one creditor to the detriment of others. The debtors here were certainly not attempting to prefer the tax sale certificate holder. Interestingly, New Jersey's Assignment for the Benefit of Creditors statute (the "*State Court Chapter 7*") requires proof of an intent to prefer before a transfer may be set aside as preferential. Accordingly, the property tax sale could not have been avoided under New Jersey state law.

*The take-away from this case is that you may not be done when you recover property at a foreclosure sale. More work may be required to keep what you got and, to do that you need to be familiar with Bankruptcy Law.*

***Second***, did you know that it is not sufficient to simply file a judgment as a lien on the judgment-debtors' real property with the Superior Court to perfect your judgment lien?

New Jersey law gives priority to judgment-creditors that pursue collection and levy on real and personal property. Therefore, you can get paid before previously filed liens if you are proactive with your collection efforts. Moreover, bankruptcy trustees have “strong-arm powers” that allow them to avoid the pre-petition liens of judgment-creditors that have not levied, leaving the judgment-creditors unsecured.

*The take away here is if you want to retain your judgment lien and get paid first, you must be proactive.*