

“At the 11th Hour”: Saving Homes From Property Tax Foreclosure in NYS



RPTL Article 11 Foreclosures

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RPTL Article 11

- Article 11 of the Real Property Tax Law (“RPTL”) sets forth the procedure for property tax foreclosures in NYS
- RPTL Article 11 procedure is mandatory for all tax districts that did not “opt out” back in 1994

For a list of current “opt out” tax districts, go to:

<http://www.tax.ny.gov/research/property/legal/localop/1104.htm>

NOTE: Village “opt outs” on this list only apply to tax liens from 1995-2009

A Different Mindset...

In mortgage foreclosure actions, many deadlines are fluid. Advocates can often successfully argue for compassion toward borrowers with severe hardships.

This is NOT the case with property tax foreclosures. The procedures in RPTL Article 11 are *mandatory*, to:

- Prevent tax districts from treating some taxpayers more (or less) favorably than others
- Ensure that local governments do not become insolvent

RPTL deadlines are very strict, and in some cases, the tax district's hands will be tied (no matter how badly they feel for your client). After a certain point, even if the homeowner comes up with all the money owed, the tax district may not be allowed to accept it!

MYTH OR FACT?

“There is no defense to tax foreclosure in New York State except payment.”

MYTH!

Like mortgage foreclosure actions, property tax foreclosures in New York State must provide due process of law.

However, RPTL Article 11 is presumed to provide due process, *even if a party did not receive actual notice*, as long as the statutory procedures were followed. E.g., *Kennedy v. Mossafa*, 100 N.Y.2d 1 (2003).

Petition of Foreclosure

Tax district files its foreclosure action in either supreme court or county court. There is one action, with one index number, against *all* delinquent parcels for any given tax year.

Anyone with an interest in the property (as a matter of public record) must be served with a “Notice of Foreclosure” and Petition, stating the date to *redeem* or *answer*.

Moment of Truth: Redeem or Answer!

Date to redeem or answer is a *drop-dead deadline*, unless (miraculously) extended by a local resolution.

If your client can't redeem in time, it is critical to file and serve an answer *on or before the deadline*. "Late answers" will be rejected. A default judgment of foreclosure *will* be entered *very quickly*.

Dire Consequences

Under RPTL §1131, anyone with an interest in the property who fails to timely redeem or answer:

"shall forever be barred and foreclosed of all right, title, and interest and *equity of redemption* in and to the parcel...and a judgment in foreclosure may be taken by default...."

Once the property is sold, tax district gets to keep any surplus – the homeowner and any other lienholders get *nothing*. This is why mortgage companies usually pay the back taxes during a mortgage foreclosure action.

How to Redeem

Homeowner (or other interested party, such as mortgage company) can redeem by paying the *full* amount of tax due, plus any penalties, interest and other allowable charges.

Tax liens get redeemed in reverse chronological order – newest liens first.

EXAMPLE

John has unpaid property tax liens totaling \$1500 for 2012, \$2000 for 2013, and \$2500 for 2014.

John gets served with a foreclosure petition for the 2012 tax lien. He tries to stop the foreclosure by paying \$1500.

John's payment will be applied to his 2014 tax lien, reducing it to \$1000. Since he still owes \$1500 for 2012, the foreclosure will go forward.

Installment Agreements

If client can't afford to redeem, see if the tax district offers an installment plan. Entering into a plan *on or before the deadline to redeem or answer* stops the foreclosure.

Tax districts that offer an installment plan must notify delinquent taxpayers by first class mail, within 45 days of receiving the list of unpaid taxes for the year (or "as soon as practicable").

Terms of Installment Agreements

- Tax district can offer up to 36 months (up to 24 months starting 12/31/15)
- Down payment can't exceed 25%
- Payments due on last day of the month
- Interest (usually 1%) for each month late
- Late fee of up to 5% after 15 days
- Default = late more than 30 days OR failure to pay subsequent tax bills

How to Answer

- 1) Must be duly verified, and state nature of interest in the property (e.g., “fee simple”)
- 2) Serve on attorney for tax district by first class mail (address usually provided in the Petition)
- 3) File answer with county clerk
- 4) File affidavit of service

General Denial Insufficient

Answer must set forth defenses *in detail*, and attach any supporting documentation.

Very few people file answers, and those who do often just raise financial hardship, which is *not* a defense. The tax district will often move to strike all answers in a bulk motion, on the grounds that they fail to give sufficient detail. Don't let yours be caught up in the mix!

Burden of Proof

Tax foreclosure proceedings enjoy a presumption of regularity, such that “[t]he tax debtor has the burden of *affirmatively* establishing a jurisdictional defect or invalidity in the tax or foreclosure proceedings....” *Kennedy v. Mossafa*, 100 N.Y.2d 1 (2003).

Presumption applies to all respondents, even “infants, incompetents, absentees or non-residents of the state.” RPTL §1134. See also *Matter of Foreclosure of Tax Liens by County of Sullivan*, 82 A.D.3d 1560, 920 N.Y.S.2d 450 (3rd Dep’t 2011) (inability to speak English).

“Pro Se” Answer Form

A “pro se” answer form is provided with the materials for this webinar.

However, the defenses are very technical. Most likely, you will need to visit the county clerk to see if there are any defenses, then help your client fill out the answer form.

Expect Blank Stares...

Many tax districts aren't used to being challenged in tax foreclosure actions. Each county clerk's office has its own system – some do not even index them in their civil action database! The files may be stuffed in some cubby-hole that only a supervisor knows about. Others allow the tax district or its counsel to store files in their offices.

Be persistent! Go up the chain of command until you find someone who knows where the records are kept. Remind them this is *public* information. You have a right to see it!

Defense: Amount Owed

Your client has the right to dispute the amount owed. For example:

- Taxes, penalties, interest, and/or charges calculated incorrectly
- Foreclosure charges of more than \$150 (must be substantiated and approved by the court)
- Improper denial of exemption(s)
- Payments not credited properly

In *Matter of Foreclosure of Tax Liens by County of Ulster*, 121 A.D.3d 111, 990 N.Y.S.2d 337 (3rd Dep't 2014), court held that: 1) summary judgment had been improper, where there was material issue of fact as to amount owed; 2) taxpayer had right under RPTL to an evidentiary hearing on this defense; and 3) amount claimed by county did not comply with RPTL. Excellent analysis of how interest, fees and charges should be calculated.

Defense: Premature Filing

The "lien date" for unpaid property taxes is January 1 of the year when taxes were due (unless local law sets a different date). If non-relevied school taxes are being enforced together with other property taxes, and the lien dates differ, the *latest* lien date controls.

The normal redemption period is 2 years from the "lien date". Tax districts can choose to allow 3 or 4 years for residential or farm property. Tax districts can also choose to allow 4 or 5 years for veterans of the armed forces who have been on active duty for 6 or more months in a row, or killed in action.

Check your local laws to see what redemption periods are in force.

Premature Filing (cont'd)

Foreclosure Petition is premature if filed:

- Less than 21 months after lien date (2-year redemption)
- Less than 33 months after lien date (3-year redemption)
- Less than 45 months after lien date (4-year redemption)
- Less than 57 months after lien date (5-year redemption)

If client is being denied 3 or 4 year redemption because property is not classified as "residential" (1-3 family dwelling) or farm property, client can assert this as a defense and provide proof.

Defense: Defective Petition

Petition must be *subscribed AND affirmed under penalty of perjury* by the *enforcing tax officer*. RPTL 1123(4).

Unless otherwise provided by local law, “enforcing officer” is as follows:

County = county treasurer or commissioner of finance

City = whoever is designated in city charter

Town = town supervisor

Village = village treasurer

NOTE: Some counties enforce taxes on behalf of their cities, towns and villages

Defense: Improper Notice

Tax district must publish “Notice of Foreclosure” in 2 newspapers in general circulation in tax district, for 3 non-consecutive weeks within a 2-month period. Copy must also be posted in enforcing officer’s office and county courthouse.

On or before the first date of publication, “Notice of Foreclosure” and copy of Petition must be sent to anyone whose right, title or interest is a matter of public record, as well as anyone who has applied for “third party notification” per RPTL §1126. Notice must be substantially in format set forth in RPTL §1125(2).

Tax district only held to addresses that are “reasonably ascertainable from the public record.” “Public record” = county clerk’s records, county surrogate court records, tax rolls and changes of address affirmatively filed by taxpayers.

Improper Notice (cont'd)

- Must be sent by first class mail AND certified mail.
- If BOTH are returned undeliverable within 45 days, tax district must try to get updated address from USPS.
- If alternative address found, must serve again by first class AND certified mail. Client has 30 days after this mailing (or until original deadline, whichever is later) to redeem/answer.
- If no alternative address found for owner, must post "Notice of Foreclosure" on the property (on a door or a vertical surface visible from the road). Client has 30 days after posting (or until original deadline, whichever is later) to redeem/answer. If occupant found of suitable age and discretion, may serve occupant in addition to (or in lieu of) posting.
- If owner listed as "unknown" on tax roll, must serve "occupant" by first class mail and posting.

Defense: Defective Tax List

RPTL §1122 requires tax district to file a "List of Delinquent Taxes" with the county clerk. The list must be filed 10 months after the lien date, or "as soon thereafter as practicable" (but no sooner than 1 month after the lien date). Copies must be filed with the tax district's attorney and any other tax districts involved.

It is critical to go to the county clerk's office and review the "List of Delinquent Taxes." Missing information on the list can be grounds to dismiss the Petition, at least as against your client. *Matter of Foreclosure of Tax Liens by County of Delaware*, 10 A.D.3d 761, 781 N.Y.S.2d 788 (3rd Dep't 2004).

Defective Tax List (cont'd)

Required information on tax list (RPTL §1122):

- Brief description of property (e.g., address and tax map ID number)
- Name(s) of property owners from the tax roll
- Amount of each tax lien on the parcel, including charges, as of date list filed
- Subscribed AND affirmed under penalty of perjury by *enforcing tax officer*
- Filed within 2 days of execution

I Answered – Now What?

Some tax districts take no action in response to an answer for months, while others quickly file a motion to strike and/or motion for summary judgment.

If there are issues of material fact, your client has the right to a trial of the issues under RPTL §1130 before a judgment of foreclosure can be entered.

Court has authority to dismiss Petition with or without prejudice if answer is meritorious. RPTL §1136(2)(a).

Other Defense Strategies

- If client has a mortgage, alert the mortgage company – they will likely redeem
- Apply for NYS MAP program
- Apply for emergency assistance at DSS
- File for bankruptcy – if filed on or before the deadline to redeem or answer, automatic stay goes into effect. Chapter 13 will allow client to pay arrears (plus interest) over 60-month period
- Check to see if local government has enacted a resolution extending time to redeem

The Final Stage

After default judgment (or judgment after trial) is entered, tax deed executed in favor of tax district and recorded in county clerk's office.

Tax district then sells property at auction, and deeds property to third party buyer.

Claim to Surplus?

It is unclear whether taxpayer's answer can assert right to surplus from a tax sale. There is some case law indirectly suggesting this possibility, so it is included in our pro se answer. *E.g.*, *Nelson v. City of New York*, 352 U.S. 103 (1956); *Miner v. Clinton County*, 2009 U.S. Dist. LEXIS 60626 (N.D.N.Y. 2009); *Matter of Ellis*, 227 A.D.2d 904, 643 N.Y.S.2d 279 (4th Dep't 1996).

However, RPTL §1136 states that if an answer is not meritorious, judgment will be entered and a tax deed executed, upon which anyone with an interest in the property "shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption."

Motion to Reopen

If your client missed the deadline to answer, you can file an order to show cause to reopen the default judgment, *within 1 month after entry of the judgment*. This deadline is extremely strict. *E.g.*, *Matter of Foreclosure of Tax Liens by County of Sullivan*, 105 A.D.3d 1170, 964 N.Y.S.2d 266 (3rd Dep't 2013). Must show *reasonable excuse* and *meritorious defense*.

NOTE: get an *actual copy* of the judgment. Tax district personnel often do not give correct information about when the judgment was entered.

Article 78 Review

If all else fails, client can challenge tax sale by:

- Filing an Article 78 proceeding; AND
- Filing a lis pendens with the county clerk

Statute of limitations is 2 years from the date tax deed was recorded (unless fraud involved).

Due to tough standard of review, Article 78 not likely to be successful. *E.g., Matter of Johnstone, 118 A.D.3d 1378, 988 N.Y.S.2d 359 (4th Dep't 2014).*

Eviction After Tax Foreclosure

Two methods of eviction:

- Writ of assistance (RPTL §1162)
- RPAPL §713 (10 day notice + summary proceeding)

Some new owners may be open to negotiate more time, or to enter into a lease.

An Ounce of Prevention...

While defending your client's current tax foreclosure, take steps to lower their tax burden going forward:

- Make sure client is on STAR program (there was a one-time re-registration requirement for all STAR recipients in 2014 - those homeowners who did not re-register *can still do so*)
- Seniors 65+ should apply for enhanced STAR (this is *not* automatic – they must apply, and re-certify every year)
- Some tax districts have additional exemptions for:
 - Senior citizens (age 65+)
 - Veterans
 - Low-income people with disabilities
 - Farm properties

NOTE: The deadline to apply (for most tax districts) is March 1 of each year. Check the tax district's website for information about deadlines and how to apply. Tax savings can be substantial!

Other Prevention Strategies

- Help client grieve assessment. For most tax districts, "grievance day" is the 4th Tuesday in May. Check the tax district's website for deadlines and information. Support the grievance with an appraisal, if at all possible. Since the tax district has little incentive to lower assessments, make sure to appeal. For information about the appeal process, called "Small Claims Assessment Review," see "Resources" on the next page.
- Teach client how to escrow. Divide last year's total tax bill by 12 to give client an idea of how much to save each month. Encourage client to open a savings account for the deposits.

Resources

STAR Program:

<http://www.tax.ny.gov/pit/property/star/index.htm>

Other property tax exemptions:

<http://www.tax.ny.gov/pit/property/exemption/index.htm>

Contesting an assessment:

<http://www.tax.ny.gov/pit/property/contest/contestasmt.htm>

Small Claims Assessment Review (SCAR) information:

<https://www.nycourts.gov/litigants/scar/>