

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:) CASE NO. 03-65591
)
NATHANIEL LEWIS BURTON,) CHAPTER 13
)
Debtor.) JUDGE RUSS KENDIG
)
)
) **MEMORANDUM OF DECISION**
)

This matter comes before the court upon a Motion for Equitable Relief filed by Nathaniel Lewis Burton (hereafter "Debtor") on January 30, 2004.

JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and the general order of reference entered in this district on July 16, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

FACTS AND ARGUMENTS

Debtor is the owner of real property located at 410 Goebel Avenue N.E., Canton, Ohio 44706. Debtor became delinquent on taxes for this parcel. The state's lien for these delinquent taxes was sold to American Tax Funding, LLC (hereafter "American") in the form of tax certificates pursuant to R.C. § 5721.30 *et seq.*

On August 4, 2003, American filed a request for foreclosure with the Stark County treasurer (hereafter "Treasurer") under R.C. § 5721.37(A). At this time, American paid the prosecuting attorney's fee of \$2,000.00 as required by R.C. § 5721.37(B)(3). (The statute authorizes the fee but does not set forth an amount.) On August 29, 2003 a foreclosure action was commenced which was styled Zeigler v. Burton, 2003CV02761 (Stark County 2003). The state court docket reflects that Debtor was served by certified mail on September 5, 2003. Paragraph five of the complaint states that American "is the holder of the tax certificate and is vested with the first lien previously held by the State." The amount necessary to redeem the real estate in question was stated in the complaint to be \$3,193.08. This includes the \$2,000.00 fee proscribed by the county prosecutor. Exhibit A to the complaint evidences that American paid this fee to Treasurer. Although the statute requires that the action be brought in the name of the county treasurer, it is clear that the lien is owned by the certificate holder. R.C. §§ 5721.37(C)(1) and 5721.35(A).

Debtor filed his Chapter 13 petition on October 15, 2003. On November 7, 2003 American filed two proofs of claim in the amounts of \$547.77 and \$3,521.78 regarding its lien on 410 Gobel Ave for delinquent taxes. On December 18, 2003 Debtor filed a Motion to Determine Tax Obligations and for an Order Declaring Mortgage Payments Current and Other Relief (hereafter "Motion to Determine Tax Obligations"). Debtor and Treasurer signed an agreed order stating that Debtor would either agree that the amount of tax owed was \$3,193.08 or that further papers would be filed with the court arguing otherwise.

On January 30, 2004, Debtor filed his Motion for Equitable Relief alleging that the Treasurer should be denied the sum of \$2,000.00 because this amount is excessive and Debtor never received notice that the tax certificates were sold. After a hearing on the matter was held, Debtor submitted another document to the court re-alleging that he was never given proper notice of the sale of the tax certificate in 2000 in violation of R.C. § 5721.31(B)(1) because notice was sent to an incorrect address. Debtor attached an affidavit to this document averring, *inter alia*, that his address at all times material was P.O. Box 6603, Canton, Ohio and that the records of that Treasurer reflected this address. Debtor swears that he never received notice of sale of the certificates at this address and that if he had he would have paid his deficient taxes.

The Treasurer responds that notice was sent to Debtor's last known tax mailing address, 410 Gobel Ave NE P.O. Box 6502, Canton, OH, in September 2000 and December 2000. Sometime after December 2000 but before August 2004, Debtor changed his address with the Treasurer's office. The Treasurer points out that Debtor never states in his affidavit that he notified the Treasurer of his new address, only that his address was P.O. Box 6603 "at all times material." The response also states that the costs to date in the foreclosure action total \$780.27.

Debtor submitted a further response claiming that the \$2,000.00 in legal costs are unreasonable and should be disallowed. Debtor argues that \$2,000.00 is far in excess of any legal costs which have been incurred by the prosecuting attorney.

The Treasurer further responded that the fee has a rational basis for its imposition and the determination of the amount of the fee is subject to an abuse of discretion standard. The fee at issue is rationally and reasonably related to the legal costs of prosecuting the foreclosure and, therefore, is valid. The Treasurer asserts that the fee is not intended to reflect the actual costs of litigation. It is a means by which the process of selling and redeeming tax certificates is funded. It is posited that no investor would buy tax certificates unless they could recoup their costs upon redemption or sale of the parcel. Finally, Treasurer argues that the certificate holder cannot be reimbursed in any other way, except redemption or sale of the property. The \$2,000.00 has been placed into a fund and there is no legal authority to remove the money from this fund. Therefore, if the \$2,000.00 is not allowed, it is the certificate holder who will suffer.

DISCUSSION

The facts demonstrate that it is American who stands to lose money should the court grant Debtor's motion. Unfortunately, American has no way of knowing that this motion is being argued because it was never served. Debtor's Motion to Determine Tax Obligations was served on the Chapter 13 Trustee, the Stark County Treasurer and Prosecutor, Debtor, and "all creditors at the addresses as shown in debtor's petition." American is not listed anywhere in debtor's petition. The petition lists the Treasurer as a creditor in schedule D and includes them in the creditor matrix, but American is nowhere to be found. Similarly, Debtor's Motion for Equitable Relief was served on the trustee, the debtor, and the assistant prosecuting attorney for Stark County – not American.

The essence of due process is the right to be heard. *See e.g. Grannis v. Ordean*, 234 U.S. 385, 394 (1914). "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In this case, American is the party that stands to lose money should Debtor prevail on his motion. The Treasurer states in its second response that American requested foreclosure and paid the \$2,000.00 fee at that time. If this court were to find for Debtor and reduce the \$2,000.00 fee, the Treasurer would not be harmed at all – it has already received the full \$2,000.00. It is American who could potentially incur financial loss by the ruling of the court in this case.

Oddly, Debtor has not objected to American's proofs of claim, nor bought any motion to determine the validity or value of American's lien. Garden variety motions and objections have been ignored in favor of unusual requests for equitable relief without naming or serving the creditor owed the debt and owning the lien.

CONCLUSION

This court finds that American has not received due process in the matter before the court and, as such, the court cannot grant the motion before it. The Motion for Equitable Relief is hereby **DENIED**.

It is so ordered.

/s/ Russ Kendig

MAY 20 2004

RUSS KENDIG
U.S. BANKRUPTCY JUDGE

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