

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
DENNIS MICHAEL RAJSKI,) CASE NO. 10-33182 HCD
) CHAPTER 13
)
DEBTOR.)

Appearances:

Rachel A. Kidd, Esq., counsel for debtor, James K. Tamke, PC, 922 East Jefferson Boulevard, South Bend, Indiana 46617;

Sarah Elisabeth Willms, Esq., counsel for Trustee, Post Office Box 11550, South Bend, Indiana, 46601;

Andrea Kurek Slagh, Esq., counsel for St. Joseph County Treasurer, 509 West Washington Avenue, South Bend, Indiana 46601; and

W. Russell Sanford, Esq., counsel for Ronald Dunkel for SEREN, 328 South Eddy Street, South Bend, Indiana 46617.

MEMORANDUM OF DECISION

At South Bend, Indiana, on May 18, 2011.

Before the court are the First Amended Chapter 13 Plan (“Plan”), filed by debtor Dennis Michael Rajski, and the three objections thereto, filed by the chapter 13 Trustee (“Trustee”), and two lien creditors, the St. Joseph County Treasurer (“Treasurer”) and Ronald Dunkel for SEREN (“SEREN”). At the hearing on the objections to the Plan, the parties sought, in essence, a declaratory judgment. The specific issue raised for the court’s determination was which lien creditor validly holds the right to receive payment of the 10% penalty, after the tax sale, in the debtor’s chapter 13 bankruptcy case.¹

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B), (L).

BACKGROUND

The facts in this proceeding are not in contention. Rajski failed to pay the taxes on his real property in South Bend, Indiana, for the year 2007 (payable in 2008) and other years. Consequently, on October 29, 2009, Rajski's real estate was sold at a tax sale to the St. Joseph County Commissioners for \$2,893.27. A Tax Sale Certificate was issued to the Commissioners as the purchaser of the property. On March 8, 2010, the real estate was assigned and transferred to SEREN when Ronald Dunkel paid \$1,501.00.

The Assignment contract gave notice of the right of redemption of the property:

The purchaser of the assignment of the tax sale certificate, above named, having paid the treasury of St. Joseph County said purchase money (he or she being the highest and best bidder for cash), will be entitled to a deed for the tract of land so purchased as above described at the expiration of the redemption period (Tuesday, July 06, 2010) and after said purchaser complies with the statutory requirements of IC 6-1.1-25-4 et seq., if the same shall not have been previously redeemed.

Proof of Claim No. 16, Att., Assignment at 2.

On June 28, 2010, a week before the expiration of the redemption period, Rajski filed a chapter 13 bankruptcy petition. Notice of the debtor's petition was sent to Ronald Dunkel (in care of his attorney), the St. Joseph County Commissioners, and the St. Joseph County Treasurer. Rajski's Chapter 13 Plan provided that the bankruptcy estate would pay the Treasurer its secured claim for unpaid taxes. *See* R. 6, Chapter 13 Plan, at ¶ B(4)(c), "Class Four(c)." However, the court denied confirmation of the Plan because it failed to address SEREN's objection. *See* R. 28, SEREN Objection; R. 31, Order of Dec. 1, 2010.

SEREN had filed a proof of claim asserting a secured claim in the amount of \$2,012.52 and verifying the claim with an attached Tax Sale Certificate and Assignment of the Certificate to SEREN. In compliance with the court's directive, therefore, the debtor addressed SEREN's claim and objection by including SEREN in his First Amended Plan, filed December 14, 2010. Under Class Four (c), in place of the Treasurer, the debtor listed "SEREN-Ronald Dunkel" as the creditor holding an "allowed secured claim for pre-petition real estate taxes" in the estimated amount of \$2,012.65. The Plan further provided:

The Treasurer shall retain the lien on the Debtor's real estate securing such tax claim, and to the extent that the taxes are not paid timely during the bankruptcy, upon notice to the Trustee, the estate will pay the remaining portion of the secured claim thru the Trustee. Debtors will then have the duty to increase their payments to provide for the additional claim. Unless otherwise provided in the Plan, Class Four (c) claims shall be paid concurrently with Class Six [Priority Unsecured Claims pursuant to 11 U.S.C. § 1322(a)(2) – none is listed].

R. 33, First Amended Chapter 13 Plan, ¶ B(4)(c) at 2.

Three objections were raised to the First Amended Plan; the debtor filed written responses to each one. The Trustee objected to the Plan on the ground that she was unable to verify whether the disposable income test was met. The debtor responded that he was no longer able to work in his profession as a carpenter, as a result of the recent amputation of his foot, and that his future main source of income would be his social security check. Nevertheless, he asserted, a special order could resolve the Trustee's objection. At the confirmation hearing, there was no discussion of this issue.

The Treasurer objected that the debtor's Plan did not provide for full payment of all priority claims and thus was proposed in bad faith.² The debtor responded that his Amended Chapter 13 Plan proposed to pay the owed taxes and to redeem the real estate by paying the debts in full. However, he believed that both the Treasurer and SEREN had filed priority claims on the same tax debt and sought clarity on which party to pay and how much to pay. In SEREN's Objection, the creditor pointed out that the debtor did not redeem the property after the tax sale or when he filed bankruptcy. Consequently, SEREN insisted that the debtor was required to pay a 10% interest annual payment. The debtor responded that he had no objection to paying SEREN the statutorily required 10% on the debt. He asked the court to allow the parties to submit an agreed Order which would resolve the objection.

At the hearing on confirmation of the debtor's amended Plan, however, no agreed order was submitted. No agreement had been reached. Instead, the debtor emphasized his intention to redeem the real

² The Treasurer's original proof of claim, in the amount of \$1,211.80, was withdrawn and a new proof of claim was filed, seeking \$1,619.15 as a priority claim and \$1,211.80 as an unsecured claim. *See* Proof of Claim # 18-1, filed December 27, 2010. The Treasurer based the claim on real estate taxes for 2007-2009, penalties, interest, and tax sale costs. In his Objection to Confirmation, the Treasurer stated that the debtor owed \$3,120.25 in taxes and \$1,211.80 in petition penalties and costs. *See* R. 41, ¶ 4.

estate and to pay the delinquent and current taxes through his Plan. His dilemma was to which party – the Treasurer, who represented the tax sale purchaser, or SEREN, the tax sale assignee – should the pre-petition 10% payment of \$150.10 be made. Dunkel argued that, had the debtor redeemed the property, Dunkel would have been entitled to \$1,501.00 plus costs and a penalty of 10%, or \$150.10. The specific issue raised for the court’s determination, therefore, was which tax lien creditor validly holds the right to receive the 10% penalty payment in this bankruptcy. The court took the matter under advisement.

DISCUSSION

“[S]tate law governs the validity of most property rights, and except when the bankruptcy code specifies otherwise, bankruptcy courts must apply the relevant state law.” *In re Jafari*, 569 F.3d 644, 648 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1077 (2010) (citing *Butner v. United States*, 440 U.S. 48, 54 (1979)). Under Indiana law, when real property taxes are not paid, that property is placed on a delinquent tax list and may be sold by the county to satisfy the tax obligation. *See In re 2007 Tax Sale In Lake County*, 926 N.E.2d 524, 527 (Ind. App. 2010). “The tax sale process is purely a statutory creation and requires material compliance with each step of the governing statutes, Indiana Code sections 6-1.1-24-1 through -14 (sale), and 6-1.1-25-1 through -19 (redemption and tax deeds).” *Id.* (describing the tax sale process, affirming that Auditor failed to provide sufficient notice). At the tax sale, once someone bids at least the amount of the delinquent taxes and miscellaneous costs, the highest bidder becomes the purchaser. He or she receives a Tax Sale Certificate and “acquires a lien against the real property for the entire amount paid.” Ind. Code § 6-1.1-24-9(b); *see also Tax Certificate Invs., Inc. v. Smethers*, 714 N.E.2d 131, 133 (Ind. 1999). That lien is superior to all other liens then existing against that real property. *See id.*; *see also ATFH Real Property, LLC, v. Stewart*, 879 N.E.2d 1184, 1186 (Ind. App. 2008).

After the Certificate is issued, a one-year redemption period begins. *See* Ind. Code § 6-1.1-25-1; *Tax Certificate Invs., Inc.*, 714 N.E.2d at 133. “The one year redemption period is a grace period in which

persons with interests in tax sale property may protect those interests.” *Atkins v. Niermeier*, 671 N.E.2d 155, 157 (Ind. App. 1996) (citation omitted). However, “if the owners fail to redeem the property during that year, a purchaser who has complied with the statutory requirements is entitled to a tax deed.” *In re 2002 Lake County Tax Sale*, 818 N.E.2d 505, 508 (Ind App. 2004) (citing *Tax Certificate Invs., Inc.*, 714 N.E.2d at 133; *see also* Ind. Code § 6-1.1-25-4.6).

Indiana imposes a penalty on delinquent taxes, as well. Section 6-1.1-37-10(a) provides that, “[i]f an installment of property taxes is not completely paid on or before the due date, a penalty shall be added to the unpaid portion in the year of the initial delinquency.” The penalty amount, usually ten percent of the amount of delinquent taxes, is charged for each delinquent installment thereafter until the taxes are completely paid.³ Ind. Code § 6-1.1-37-10(a)(3), (b). Those penalties are imposed only on the principal amount of the delinquent taxes. *See* Ind. Code § 6-1.1-37-10(c).

The Tax Sale Certificate is assignable and, if properly endorsed, acknowledged, and registered in accordance with the requirements of that provision, “the assignee acquires the same rights and obligations that the original purchaser acquired.” Ind. Code § 6-1.1-24-9(c). If the owner of the property fails to redeem the property during the one-year redemption period, the Certificate holder or assignee who has complied with the statutory requirements is entitled to a tax deed. *See* Ind. Code § 6-1.1-25-1; *see also* *ATFH Real Property, LLC*, 879 N.E.2d at 1186 (stating that anyone may redeem the property but that the purchaser or assignee may petition the court to issue a tax deed if no redemption is made).

With this outline of the statutory requirements for tax sales in Indiana as guidance, the court can consider the claims of the parties to the Rajski real property until the time he filed bankruptcy. Some crucial criteria is missing, but the court’s assumptions are not risky ones. Rajski failed to pay past real estate taxes; thus, his real property was eligible to be sold at a tax sale. The court surmises that, at the tax sale, no private purchaser came forward to offer a minimum bid covering the amount of the delinquent taxes and some

³ In some circumstances, the penalty is five percent of the amount of the delinquent taxes. *See* Ind. Code § 6-1.1-37-10(a)(1), (2).

additional expenses. Consequently, the County Commissioners acquired the lien in the amount of the minimum sale price, received a Tax Sale Certificate, and were granted the same rights as any purchaser of the property. *See* Ind. Code § 6-1.1-24-6; *see also Dempsey v. Auditor of Marion County*, 871 N.E.2d 1031, 1034 (Ind. App. 2007). When the Tax Sale Certificate was issued, the County Commissioners acquired a lien against the real property that was superior to all existing liens against that property.

Four months later, SEREN took assignment of the Certificate by paying the Commissioners \$1,501.00. The statute provides that “an assignment is not valid unless it is endorsed on the certificate of sale, acknowledged before an officer authorized to take acknowledgments of deeds, and registered in the office of the county auditor.” Ind. Code § 6-1.1-24-9(c). Evidence that these requirements were accomplished was not presented to the court; in fact, the Assignment attached to the SEREN proof of claim is not acknowledged. However, if these criteria were fulfilled, “the assignee acquires the same rights and obligations that the original purchaser acquired.” *Id.* Therefore, (a) if the assignment was valid; (b) if SEREN, as assignee, had complied with the statutory requirements of Indiana Code § 6-1.1-25-4 *et seq.*; (c) if neither Rajski nor anyone else had redeemed the property; and (d) if Rajski had not filed his intervening bankruptcy petition, then SEREN would have been entitled to a deed for the property at the expiration of the redemption period, on July 6, 2010.

However, Rajski filed his chapter 13 petition before the redemption period expired and announced that he intended to redeem the property by paying the amounts required for redemption through his chapter 13 Plan.⁴ The debtor’s filing of the bankruptcy petition gave rise to the automatic stay. *See In re American Lodging, Inc.*, 397 B.R. 906, 911 (concluding that pre-petition tax sale did not violate automatic stay); *ATFH Real Property, LLC*, 879 N.E.2d at 1187 (concluding that post-petition purchase of tax lien violated automatic stay); *Dempsey*, 871 N.E.2d at 1038 (concluding that petition for tax deed violated automatic stay). The bankruptcy filing stayed “any act to obtain possession of property of the estate or of

⁴ The amount required to redeem the property includes interest, taxes, special assessments, penalties and costs. *See* Ind. Code § 6-1.1-25-2; *Hall v. Terry*, 837 N.E.2d 1095, 1099 (Ind. App. 2005).

property from the estate or to exercise control over property of the estate.” 11 U.S.C. § 362(a)(3). Once the petition was filed, therefore, any act to obtain possession of real property from a tax sale violated the automatic stay.

. . . [T]he purchase of the tax lien, even though not resulting in immediate possession, clearly qualifies as an act to obtain possession of that property. It should also be borne in mind that allowing such a sale to take place in spite of a stay would hardly advance the goal of providing the debtor a respite. Were such tax sales allowed, debtors such as Stewart would be in the position of having to redeem their property or lose it, all when their creditors are supposed to be kept at bay. As such, the tax sale and all proceedings flowing therefrom are void as violative of the automatic stay.

ATFH Real Property, LLC, 879 N.E.2d at 1187 (citing *Dempsey*, 871 N.E.2d at 1035).

In this case, SEREN has not attempted to obtain a tax deed, and neither SEREN nor the Treasurer has objected to the debtor’s proposal to redeem the property over the period of the chapter 13 plan.⁵ The state statute provides that, in order to redeem real property, the debtor must pay to the *county treasurer*, within the time limit prescribed by statute, the redemption amount set forth in the statute. *See* Ind. Code § 6-1.1-25-1 (italics added). Nevertheless, both SEREN and the Treasurer have asserted claims in the debtor’s bankruptcy that include payment of a 10% penalty, and they have asked the court to determine which party has the right to that penalty payment.

Both the Treasurer and SEREN filed proofs of claim, but only the Treasurer’s claim was timely filed. SEREN filed its proof of claim on November 16, 2010, a month after the October 16, 2010 bar date for non-governmental entities. In its “Motion to Accept Claim as Derivative of a Claim by a Government

⁵ No Indiana state court or bankruptcy court has decided whether, under Indiana law, a debtor can redeem property by providing payments in installments over the life of a chapter 13 plan. However, in Illinois, under the Illinois property tax sale laws, a chapter 13 debtor can attempt to retain real property by paying the creditors through the chapter 13 plan. *See Salta Group, Inc. v. McKinney*, 380 B.R. 515, 525 (C.D. Ill. 2008) (upholding debtor’s right under § 1322 to pay tax buyer debt through chapter 13 plan); *In re Kasco*, 378 B.R. 207, 215 (Bankr. N.D. Ill. 2007) (concluding that debtors may pay tax debt held by tax purchaser during the term of the plan); *In re Bates*, 270 B.R. 455, 467 (Bankr. N.D. Ill. 2001) (“As long as the redemption period has not expired prior to the bankruptcy filing, there is a claim that can be treated during the bankruptcy case . . . [through] plan treatment in Chapter 13 – even though the redemption period expires during the pendency of the case.”); *cf. In re Smith*, 614 F.3d 654, 660 (7th Cir. 2010) (holding that, under Illinois law, the transfer of property to tax buyer was perfected against a bona fide purchaser or against the debtor at the recording of the tax deed rather than upon the expiration of the period of redemption).

Unit or, Alternatively, for Leave to File a Late Claim,” SEREN maintained that it, as assignee of the Tax Sale Certificate, should be allowed the same claim deadline as the one given to governmental units, since the St. Joseph County Commissioners had assigned the Certificate to SEREN. It therefore requested that its proof of claim be determined to be timely. In the alternative, it asked for permission to file a late claim because it was not listed as a secured creditor on the debtor’s schedules.

The court finds that SEREN clearly is an individual creditor, not a governmental entity. The assignment of the Certificate did not transfer governmental status; it transferred a redeemable debt that was secured by a lien on the debtor’s real property. Therefore, the proof of claim cannot be deemed timely.

Nor can the SEREN proof of claim be permitted as a late claim. Rule 3002(c) of the Federal Rules of Bankruptcy Procedure permits late proofs of claim to be treated as timely if certain criteria are met. However, SEREN did not claim that any of the criteria applied to it, and the court found none. “As a general matter, late-filed claims are completely barred in a chapter 13 case.” *In re Thul-Theis*, 431 B.R. 828, 829 (Bankr. W.D. Wis. 2010) (citations omitted); *see also In re Lowe*, _B.R._, 2011 WL 1642855 at *1 (Bankr. C.D. Ill. 2011) (“The claim bar date cannot be extended to allow omitted creditors to file late claims.”). Moreover, the courts that have allowed a creditor an extension of time to file a proof of claim in a chapter 13 case have done so only when the creditor had no notice of the bankruptcy.⁶ *See id.* However, in this case, SEREN was on the debtor’s matrix and received notice of the chapter 13 filing. The court must conclude that SEREN’s untimely claim is barred in this case. Consequently, the Treasurer is the only party that holds the right to receive payment of the 10% penalty, after the tax sale, in the debtor’s chapter 13 bankruptcy case.

⁶ SEREN’s reliance on *In re Kasco*, 378 B.R. 207 (Bankr. N.D. Ill. 2007), is misplaced. In that case, the bankruptcy court found that the tax purchaser, who was not named as a creditor and did not receive notice of the bankruptcy case, in fact was a creditor. Those facts are not found in this bankruptcy case.

CONCLUSION

For the reasons presented in this Memorandum of Decision, the court denies the claim of SEREN as untimely filed and directs the debtor to pay to the claimant St. Joseph County Treasurer the 10% penalty amount at issue in this proceeding.

SO ORDERED.

/s/ HARRY C. DEES, JR.
HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT