DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROBERT FABRIZIO, Plaintiff/Appellee, v. STATE OF ARIZONA ex rel. ARIZONA DEPARTMENT OF TRANSPORTATION, Defendant/Appellant.	)	1 CA-CV 09-0538 1 CA-CV 09-0593 (Consolidated) DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
NEW CENTURY, INC., an Arizona Corporation, Plaintiff/Appellee, v. STATE OF ARIZONA ex rel. ARIZONA DEPARTMENT OF TRANSPORTATION, Defendant/Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause Nos. CV2006-005833 and CV2006-006187

The Honorable Richard L. Nothwehr, Commissioner
The Honorable Michael L. Barth, Commissioner

AFFIRMED

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K E S S L E R, Judge

¶1 In this consolidated appeal, defendant/appellant Arizona Department of Transportation ("ADOT") appeals from two decisions denying its motions to set aside two default judgments foreclosing its right to redeem tax liens on two parcels of property. ADOT contends that the judgments are void because it did not receive prelitigation notice of the plaintiffs' intent to foreclose on the liens as required by Arizona Revised Statutes ("A.R.S.") section 42-18202 (2006). Because the State did receive service of process before it lost title to the two parcels in question, this decision is limited to the purely statutory requirement of notice before filing and need not address concerns of due process or constitutionally valid notice. The court found that the plaintiffs complied with the statute by sending notice to the owner as listed according to

the records of the County Assessor, although the assessor's records were incorrect. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In April 2006, plaintiffs/appellees Robert Fabrizio and New Century, Inc. (collectively "plaintiffs") separately filed complaints to foreclose tax liens on parcel numbers 219-26-096E and 219-26-096H in Maricopa County, respectively. Prior to filing the actions, the plaintiffs sent notices of their intent to foreclose the right to redeem under A.R.S. § 42-18202 to McKellips Investment Inc./McRae Group, which was listed by the Maricopa County Assessor's Office and the Maricopa County Treasurer's Office as the owner of both parcels. The complaints named as defendants McRae Investments, Inc. II (as successor in interest to McKellips Investments, Inc.) and ADOT.[1] The defendants did not answer the complaint, and default judgments were entered in favor of Fabrizio on July 10, 2006, and in favor of New Century on July 13, 2006.

¶3 In February 2009, ADOT filed motions in both actions to have the default judgments declared void and set aside pursuant to Rule 60(c)(4), Arizona Rules of Civil Procedure. ADOT explained that it had obtained title to the properties by foreclosing a judgment lien against McRae Investments II as

[1] Fabrizio's initial complaint, filed April 21, 2006, did not name ADOT as a defendant. ADOT was named in Fabrizio's amended complaint, filed April 28, 2006.

successor in interest to McKellips Investments, Inc., that the Maricopa County Treasurer never changed the ownership record on the tax rolls for tax years 2004 and 2005, that ADOT never received notice of any delinquent taxes, and that, because of the error on the County Treasurer's tax records, plaintiffs sent the prelitigation notice to the prior owner of the property but not to ADOT. ADOT argued, among other things, that A.R.S. § 42-18202 required that notice be sent to the owner of the property and that, because the plaintiffs did not give the statutorily required notice, the judgment should be declared void. ADOT also argued that A.R.S. § 42-18202(B) required that the prelitigation notice include the name of the correct owner and that, because the incorrect owner was identified, the notice itself was defective, requiring the judgment to be declared void.

¶4 The plaintiffs responded that the language of the statute gave them the option of sending notice to the property owner identified according to the records of the County Assessor, which they did.

¶5 In the action involving Fabrizio, the superior court denied ADOT's motion, rejecting several arguments made by ADOT, but not addressing ADOT's argument with respect to the prelitigation notice. ADOT filed a motion for new trial, asking

the court to consider the argument. The court denied the motion, stating:

> In this case, Plaintiff Fabrizio sued ADOT to foreclose the right of redemption on certain property. Prior to the suit, Fabrizio gave notice of the proceeding to an entity that had the recorded ownership interest in the property, although this entity was not the true owner. ADOT argues that Fabrizio's notice was improper.
>
> This Court agrees with ADOT that notice, as provided in this matter was ineffective, but the Court disagrees with ADOT's conclusion that the method utilized by Fabrizio did not comply with the law.
>
> By all accounts, it appears that Fabrizio did provide notice to the "recorded owner" of the property. This notice complied with the statutory requirements, and should end the issue. The fact that ADOT was not the "recorded owner" of the property should not be held against Fabrizio, and to the extent that ADOT has a right to complain, the complaint should be leveled at the parties responsible for the proper recordation of ownership, which includes ADOT's own responsibility for not confirming a proper record.
>
> Second, to the extent that ADOT argues that a renewed notice must be provided, upon the discovery of a true owner, ADOT's argument fails logic, and their argument should be addressed to the legislature. If the Court accepts ADOT's argument that a pre-litigation notice must be provided to a late-discovered owner, the claim would only frustrate the attempts to foreclose on the property and would discourage accurate recording of title transfers. In effect, ADOT's theory would encourage disreputable owners to transfer title without recordation

> in an effort to stall the tax lien foreclosure. Such was not the intent.
>
> It appears that the intent of the current legislation was to place responsibility upon the owners of property to protect their interests, which includes the incentive to an owner to have the property rightfully recorded in the true owner's name.

¶6 In the action involving New Century, the superior court also denied ADOT's motion to set aside the default judgment. The court found in part:

> [T]he notice requirements of the statute at issue here, A.R.S. § 42-18202, were satisfied. This Court disagrees with ADOT's position that if the County Assessor's records regarding the identity of [the] actual owner of the property in question are in error, then A.R.S. § 42-18202 mandates that notice be given to the property owner as identified in the County Recorder's records versus County Assessor's records. There is nothing in the statute even suggesting such a limitation or exception to relying on the County Assessor's records to give notice.
>
> ADOT's argument that subsection B of A.R.S. § 42-18202 imposes a notice requirement in addition to those set forth in subsection A of the statute is likewise contrary to the plain language of the statute. Subsection B simply refers back to the notice requirements of subsection A, and outlines the information to be contained in the notice to be given per subsection A, which includes the identity of the property owner, either as identified in the County Recorder's records or the County Assessor's records.

> To interpret the statute as proposed by ADOT would discourage proper recordation of title transfers, thereby forestalling tax lien foreclosure. It was clearly the intent of the legislature to place responsibility upon the actual owners of property to ensure that the property is properly recorded.

¶7 ADOT timely appealed from both orders, and this court consolidated the appeals. We have jurisdiction pursuant to A.R.S. § 12-2101(C) (2003).

DISCUSSION

¶8 We review for an abuse of discretion a trial court's decision denying a motion to set aside a default judgment. *Hilgeman v. American Mortgage Sec.*, 196 Ariz. 215, 218, ¶ 7, 994 P.2d 1030, 1033 (App. 2000) (citation omitted). If a judgment is void, a court has no discretion and must vacate the judgment. *Martin v. Martin*, 182 Ariz. 11, 14, 893 P.2d 11, 14 (App. 1994) (citation omitted). However, interpretation of a statute is an issue of law, which we review de novo. *State Comp. Fund v. Super. Ct.*, 190 Ariz. 371, 374-75, 948 P.2d 499, 502-03 (App. 1997) (citation omitted).

¶9 Under A.R.S. § 42-18202, a lienholder intending to file an action to foreclose the right to redeem a tax lien must send notice of that intent at least thirty days prior to filing the action to:

> 1. The property owner of record according to the records of the county

> recorder in the county in which the property is located *or* to all of the following:
>
> (a) The property owner according to the records of the county assessor in the county in which the property is located as determined by § 42-13051.[2]
>
> (b) The situs address of the property, if shown on the tax roll and if different from the owner's address under subdivision (a).
>
> (c) The tax bill mailing address according to the records of the county treasurer in the county in which the property is located, if that address is different from the addresses under subdivisions (a) and (b).
>
> 2. The treasurer of the county in which the real property is located.

A.R.S. § 18202 (A)(1), (2) (emphasis added). The notice must include "[t]he property owner's name." A.R.S. § 42-18202 (B)(1). The statute further provides:

> C. If the purchaser fails to send the notice required by this section, the purchaser is considered to have substantially failed to comply with this section. A court shall not enter any action to foreclose the right to redeem under this article until the purchaser sends the notice required by this section.

A.R.S. § 42-18202(C).

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[2] A.R.S. § 42-13051 sets out the duties of the County Assessor and requires the County Assessor, each year, to "identify by diligent inquiry and examination all real property in the county that is subject to taxation and that is not otherwise valued by the department as provided by law." A.R.S. § 42-13051(A) (Supp. 2009).

¶10 ADOT argues that A.R.S. § 42-18202 is jurisdictional and therefore the failure to provide the notice required by the statute renders the court powerless to enter a judgment on an action to foreclose a lien. ADOT asserts that the statute requires a lienholder to notify the actual owner of the property and contends that the plaintiffs did not comply with the requirements because they sent notice to the owner according to the records of the County Assessor as permitted by the statute, but did not notify the actual owner because the County Assessor's records were inaccurate. It further contends that the notice itself was defective because it did not identify ADOT as the actual owner of the property.

¶11 In construing a statute, our goal is to ascertain and give effect to the intent of the legislature. *Mail Boxes, Etc. U.S.A. v. Indus. Comm'n*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995) (citation omitted). We look first to the statutory language as the most reliable index of the meaning of the statute. *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994) (citation omitted). If the statutory language is unambiguous, we must give effect to the language and do not use other rules of statutory construction. *Janson ex rel. Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991) (citation omitted). If the language is not clear, we consider other factors, such as the

context of the statute, the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose. *Wyatt v. Wehmueller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991) (citation omitted). A court cannot, however, read into a statute something that is not within the manifest intention of the legislature as shown by the statute itself. *State ex rel. Morrison v. Anway*, 87 Ariz. 206, 209, 349 P.2d 774, 776 (1960).

¶12 ADOT argues that A.R.S. § 42-18202(A) is ambiguous in cases where the County Assessor's records are inaccurate and that this court should interpret the statute as requiring a lienholder to send a second notice prior to filing an action to foreclose the lien when the lienholder could determine the actual owner by reviewing the records of the County Recorder. We disagree.

¶13 The plain language of A.R.S. § 42-18202(A) permits the lienholder to send the prelitigation notice to the owner according to the records of either the County Recorder or the County Assessor. Nothing in the statute requires the lienholder to consult both records and, upon finding a discrepancy, send a second notice. Notably, ADOT does not argue that any language in any portion of A.R.S. § 42-18202(A) is susceptible of such an interpretation. Rather, ADOT argues that the statute is not "workable" when the County Assessor's records are inaccurate and

asks this court to read the additional requirement into the statute.

¶14 We will not read such an additional requirement into the statute. It appears that the statute is an attempt to balance the interests of both the owner and the lienholder. The legislature established a clear, straightforward procedure for a lienholder to follow to provide notice of the intent to file an action to foreclose redemption. The legislature could have stated that the actual owner of the property was entitled to notice and that the identity of the owner could be found by various sources. Alternatively, the legislature could have said under subsection C that a purchaser or lienholder that failed to send notice to the actual owner did not substantially comply with the statute. The legislature did not fashion such a statute. Instead, the legislature specified the sources from which the lienholder could identify the owner to whom notice was required to be sent. The legislature made no provision that such notice would be invalid if either of those sources had inaccurate information nor did it impose on the lienholder the obligation of verifying the accuracy of those sources. In addition, in subsection C the legislature required the purchaser to send "the notice required by this section," not notice to the actual owner. A.R.S. § 42-18202 (A), (C). Consequently, it falls to the owner to ensure that the ownership of the property

is accurately reflected in the relevant records. When the lienholder follows the statutory procedure, the lienholder may bring an action; when the lienholder does not follow the procedures, the lienholder may not.

¶15 ADOT argues that it should not be expected to verify that the County Assessor had properly noted the change in ownership on the properties in its records. ADOT contends that, while a private owner subject to taxes would be put on alert of an error when the owner does not receive a tax bill, ADOT could receive no such alert because it is exempt from taxes and so would have no reason to expect a bill. Nevertheless, ADOT could, as a matter of course when it acquires property, take steps to ensure that its ownership is properly noted by the appropriate agencies.

¶16 ADOT also argues that the purpose of the statute-—to allow redemption before foreclosure-—is defeated if the statute is interpreted to mean that notice in accordance with the statute but to the wrong owner sufficiently complied with the notice requirement. We disagree. Here, the State as the real owner received service of the complaint and had the opportunity to redeem but did not act.

¶17 ADOT further argues that public policy requires that the actual owner receive the prelitigation notice. ADOT cites *Johnson v. Mock*, in which the assignees of a treasurer's

certificate of purchase sought a treasurer's deed and the treasurer sent notice to the owners as their name appeared on the tax rolls, as permitted by statute. 19 Ariz. App. 283, 284, 506 P.2d 1068, 1069 (1973). Because of an error on the tax rolls, the actual owners were not notified of the application until after the deed was issued. *Id*. In the quiet title action that followed, the court found that the treasurer's deed was invalid and the appellate court affirmed. The court found that the error in the tax rolls was not the fault of the owners and that the error should not be permitted to deprive the owners of "notice which due process of law requires they be given before their estate in the subject property is extinguished." *Id*. at 285, 506 P.2d at 1070.

¶18 *Johnson* is not applicable here. Unlike *Johnson*, a notice mistakenly sent to the wrong person in accordance with A.R.S. § 42-18202 cannot deprive the owner of its property without due process. No deed is issued based on the prelitigation notice. The owner must still be named in an action to foreclose.

¶19 We find the language of subsection (A) to be unambiguous and therefore must enforce it as written. *See Janson*, 167 Ariz. at 471, 808 P.2d at 1223 (citation omitted). We recognize an inconsistency in requiring prelitigation notice based on certain public records while requiring the actual owner

to be named defendant in a complaint to foreclose redemption. However, we are concerned with the language of the statute as written. We will not read additional terms into the statute. *See Anway*, 87 Ariz. at 209, 349 P.2d at 776. Any concerns about circumstances such as those presented here, where the owner of record is not the actual owner, should be addressed to the legislature.

¶20 ADOT does not dispute that the plaintiffs sent notice to the owner of the properties according to the records of the County Assessor. The plaintiffs therefore complied with A.R.S. § 42-18202(A).

¶21 ADOT also contends that the notice itself was defective. A.R.S. § 42-18202(B) requires that the notice include the "property owner's name." A.R.S. § 42-18202(B)(1). Because the notice in this case did not name ADOT as the owner, ADOT asserts that the notice did not meet the statutory requirement. Because subsection B does not specify that the "owner" is the owner of record according to the County Recorder or the County Assessor as in subsection A, ADOT contends that "owner" must mean the true or actual owner.

¶22 Generally, where the same words and phrases are used in different parts of the same statute, they are given a consistent meaning unless the legislature clearly expresses a contrary intent. *State v. Oehlerking*, 147 Ariz. 266, 268, 709

P.2d 900, 902 (App. 1985) *disavowed on other grounds by State v. Wilson*, 150 Ariz. 602, 724 P.2d 1271 (App. 1986). We see no reason to deviate from the general rule in this case. The legislature identified in subsection A what constitutes an "owner" for purposes of the notice and did not, in subsection B express any contrary meaning. Moreover, to interpret "owner" in subsection B as the "true owner" or "actual owner" when the legislature did not require under subsection A that the notice be sent to the "true owner" or "actual owner" would not be a reasonable interpretation. *See Gamez v. Indus. Comm'n of Ariz.*, 213 Ariz. 314, 318, ¶ 26, 141 P.3d 794, 798 (App. 2006) (Barker, J., concurring) (interpreting a statute to have a "fair, reasonable, and sensible meaning"). Had the legislature intended that the lienholder be required to investigate and determine the true owner for purposes of the content of the notice, it surely would have required that the notice be sent to that owner under subsection A, rather than provide for compliance based on notice to the owner as determined from the records of the County Recorder or the County Assessor.

¶23 Again, ADOT does not dispute that the notice contained the name of the owner of the properties according to the County Assessor's records. The plaintiffs therefore complied with the notice requirement.

¶24 Because we find that the plaintiffs complied with the statute, we need not address ADOT's argument that noncompliance with A.R.S. § 42-18202(C) deprives the trial court of jurisdiction over an action to foreclose redemption.

CONCLUSION

¶25 The plain language of A.R.S. § 42-18202 requires a lienholder intending to file an action to foreclose redemption on a lien to send a prelitigation notice to the property owner according to the records of either the County Recorder or the County Assessor. The plaintiffs sent notice to the owner as listed in the records of the County Assessor, and therefore complied with the statute. We decline ADOT's invitation to interpret the statute as requiring the plaintiff to verify the correctness of the records or to send a second notice when the records are incorrect. We also find that the requirement in subsection B that the notice include the property owner's name refers to the owner as determined under subsection A. The trial

court decisions denying ADOT's motions to set aside the default judgments are affirmed.

/s/

DONN KESSLER, Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Presiding Judge

/s/

PETER B. SWANN, Judge