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Texas Case Law Update

Mortgage Lending and Servicing Institute

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I. Mortgages/Foreclosure/Liens

1. Forcible Detainer after Foreclosure Sale

- **Procedural Matters**

Isaac v. CitiMortgage, Inc.

(Houston) p. 1

- Typical post-foreclosure forcible detainer action.
- Deed of Trust contained tenant-at-sufferance clause (if possession not surrendered, then borrower is a tenant-at-sufferance and may be removed by writ of possession).
- Lender pled to jurisdiction; Borrower claimed 1) no continuity/privity in documents, 2) pleadings were improperly verified, and 3) no refusal to vacate.
- Forcible detainer elements: 1) conveyance by trustee; 2) LL/T relationship; 3) notice to vacate; 4) refusal to vacate.
- Proof of title not required in any Forcible Detainer elements; therefore Lender had right to possession.
- Pleadings verified by Lender's attorney satisfied Tex. R. Civ. P. § 510.3(e).
- Refusal to vacate evidenced by appeal bond, service at property, sworn complaint by LL and tacit admission by T prosecuting appeal.

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- **LL-Tenant Relationship v. Title Issues**

Jelinis, LLC v. Hiran

(Houston) p. 2

- Lender foreclosed on home equity note and sold property to Jelinis.
- Hiran alleged title issues in District Court (Lender changed pages: 2% fixed to 8% adjustable note).
- Jelinis alleged Justice Court has exclusive jurisdiction for possession (if exclusive of title issues).
- Based on tenancy-at-sufferance clause in Deed of Trust, creating a LL/T relationship, Justice Court has jurisdiction as to possession.
- Negating the void Deed of Trust argument, the court distinguished:
  - *Yarbrough v. Household Fin. Corp.* (Deed of Trust alleged to be forged)
  - *Wade v. Household Fin. Corp.* (no allegation of forgery or validity of tenancy-at-sufferance clause)

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2. Foreclosure – *Res Judicata* Defense

McKeehan v. Wilmington Sav. Fund Soc'y, FSB

(Houston) p. 3

- After home equity default, parties signed Forbearance Agreement.
- Upon resumption of monthly payments, borrower defaulted and Lender filed for and was granted judicial foreclosure.
- In a 2013 prior suit, McKeehan alleged the home equity loan was unconstitutional, but did not present evidence of payment compliance.
- Wilmington asserted res judicata not as an affirmative defense, but to prevent McKeehan's assertion of payment.
- Court held:
  - Wilmington was not required to raise foreclosure right as compulsory counterclaim in 2013 suit
  - As matter of 1st impression, res judicata could **not** (correct paper) be used to prevent assertion of payment defense

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3. Tax Lien Transfers

Fenlon v. Harris County

(Houston) p. 4

- 2003-2007 delinquent property taxes paid by Propel Financial who got tax lien transfer documents: 1) authorization; 2) tax authority certification; 3) note; and 4) deed of trust.
- 2008-9 taxes paid by Propel who only got certification.
- Tax authority filed suit for 2010-16 taxes.
- Fenlon challenged 2008-9 tax lien to Propel for lack of evidence of transfer.
- Propel filed affidavit including: 1) transferred Tax Lien Pay-Off Statement; 2) Tax Lien Transfer Account Statement; 3) tax lien Note and Deed of Trust; and 4) Authorization for payment by owner, BUT did NOT include an authorization filed with the tax authority per Tex. Tax Code 32.06(a-1).
- Court held evidence was sufficient for tax lien transfer; assumed filing with tax authority.
- Fenlon, as assignee, was not personally liable for delinquent taxes; taxes are in rem as of Jan. 1st.

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4. Priority of Lien

- ***Construction Termination; Tax Lien Subrogation***

Lyda Swinerton Builders, Inc. v. Cathay Bank

(Houston) p. 5

- Bank made construction loan in middle of construction.
- 4 mechanics liens were filed.
- Dispute as to the date the "indebtedness accrued."
- Tex. Prop. Code 53.053(b): last day of month contract was terminated, completed, settled or abandoned.
- Trial court determined the "constructive termination" date, as 1-4-08 not 10-4-07 (work suspension date).
- Appellate court held Tex. Prop. Code does not recognize "constructive termination"; case remanded.
- Bank also alleged subrogation to tax liens it paid-off with first advance.
- For subrogation of tax lien, must additionally prove non-prejudice.
- Trial court erred by only considering prejudice to contractor; must consider "all appropriate equities" (such as unjust enrichment of contractor).

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