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CASE LAW UPDATE

J. Richard White
Amanda Grainger

Winstead PC
Dallas, Texas

J. Richard White
jrwhite@winstead.com

Amanda R. Grainger
agrainger@winstead.com

214-745-5400

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J. RICHARD WHITE AND AMANDA R. GRAINGER
WINSTEAD PC
DALLAS, TEXAS

This Case Law Update is a continuation of the prior work of David Weatherbie and, in fact, a significant portion of the cases discussed herein were taken (with permission) from David's most recent article. The authors are extremely indebted to David for his permission to utilize his work for this presentation. The case selection for this Case Law Update is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 515 S.W.3d.

The references to various statutes and codes used throughout this presentation are based upon the cases in which they arise. You should refer to the case, rather than to my summary, and to the statute or code in question, to determine whether there have been any amendments that might affect the outcome of any issue. The Texas Property Code and the other various Texas Codes are referred to by their respective names. A number of other terms, such as Bankruptcy Code, UCC, DTPA, and the like, should have a meaning that is intuitively understood by the reader, but, in any case, again refer to the statutes or cases as presented in the cases in which they arise.

TABLE OF CONTENTS

I. MORTGAGES / LIENS / FORECLOSURES 2
II. CREDITOR / DEBTOR / GUARANTIES. 8
III. LANDLORD / TENANT / LEASES. 11
IV. SELLER / PURCHASER. 15
V. CONSTRUCTION 21
VI. TITLE / CONVEYANCES 24
VII. HOMESTEAD / HOME EQUITY LENDING. 40
VIII. CONDOMINIUMS / OWNER ASSOCIATIONS. 43
IX. CONDEMNATION / LAND USE / ZONING / RESTRICTIONS 44
X. MISCELLANEOUS. 51

I. MORTGAGES / LIENS / FORECLOSURES.

1. Foreclosure Details.

Bauder v. Alegria, 480 S.W.3d 92 (Tex. App.—Houston [14th Dist.] 2015, no pet.). Property Code § 51.002(b) requires that a notice of foreclosure be served by certified mail addressed to the debtor's last known address. If the property is a borrower's residence, the notice must be sent to the borrower's residence address. Property Code § 51.002(d). Here, the notice address for the borrower in the loan documents was 704 Roosevelt Street. Several default or payment reminders were sent to that address. In May of 2013, the lender sent a Notice to Cure to the Roosevelt address. Before sending it, he sent the borrower a text message stating that he'd heard she sold the Roosevelt property and also stating that he assumed that her address at 1825 Neuman Street was her primary residence. There were also text messages for an extended period from the borrower for the lender to pick up payments at the Neuman address. A month later, the lender sent a Foreclosure Notice to the Roosevelt address, but none was sent to the Neuman address. The trustee foreclosed.

The borrower sued to set aside the foreclosure, claiming that she did not receive proper notice. The trial court set the foreclosure aside, finding that the lender had reasonable notice of her change of address and that notice was sent to the wrong address.

The lender argued that, because the Roosevelt address was shown in the deed of trust, the borrower was required to give written notice of a change of address. The deed of trust was silent as to the obligation to give a notice of change of address.

The court held, based upon the texting back and forth regarding the Neuman address, that the last known address of borrower as shown by the lender's records was the Neuman address.

Calvillo v. Carrington Mortgage Services, 487 S.W.3d 626 (Tex. App.—El Paso 2015, pet. denied). On December 9, the law firm retained by Carrington sent the Calvillos a notice of acceleration and a foreclosure notice. The notice was posted and filed around December 12. The notice said that one or more of the substitute trustees named in it would conduct the foreclosure sale. The notice letter was not picked up by the Calvillos.

On December 21, an appointment of substitute trustees was executed which authorized the persons named in the foreclosure notice to act as substitute trustees. The foreclosure was held January 3 of the following year.

After the foreclosure, the Calvillos sued claiming, among other things that the required 21-day notice of foreclosure had not been given. They didn't dispute that the notice letter was dated December 9, but claimed it was untimely because the substitute trustees named in it were not appointed until December 21, which was only 12 days before the foreclosure.

Although, as a general rule, a substitute trustee has no power to act prior to his appointment, it has long been settled in Texas that when a substitute trustee signs and posts a notice prior to the substitute trustee's appointment, the subsequent post-appointment acts of the substitute trustee have the effect of ratifying and affirming his pre-appointment acts. Here, the instrument appointing the substitute trustees, which was executed on December 21, was designated to be effective as of December 12. Consequently, the substitute trustee's actions in issuing the notices of foreclosure were ratified by the subsequent appointment, and thus the

notices of foreclosure sale were timely. Accordingly, the trial court did not err in granting a directed verdict.

2. **Standing**.

EverBank, N.A. v. Seedergy Ventures, Inc., 499 S.W.3d 534 (Tex. App.—Houston [14th Dist.] 2016, no pet.). In this case, the deed of trust was bought and sold several times over the years in a series of assignments. The history of those assignments is somewhat tangled. The assignment of the deed of trust to MERS was executed in 2001, but not recorded until 2013. MERS assigned it to EverBank, and its assignment was recorded a month before the assignment into MERS.

Sometime in between the assignments in and out of MERS, the homeowners defaulted in paying HOA assessments, and the HOA foreclosed and sold the property to Seedergy. EverBank then posted for foreclosure. Seedergy obtained a TRO in a lawsuit that claimed that EverBank lacked standing to foreclose.

Under the Texas Property Code, a party has standing to initiate a nonjudicial foreclosure sale if the party is a mortgagee. A mortgagee includes the grantee, beneficiary, owner, or holder of a security instrument, such as a deed of trust, or if the security interest has been assigned of record, the last person to whom the security interest has been assigned of record. Even if a party does not have a recorded interest in a security instrument, the party may still have standing to foreclose if the party is the holder or owner of a note secured by the instrument. This rule derives from the common law maxim, now codified in Texas, that the mortgage follows the note.

Seedergy argued that EverBank did not have standing to foreclose as a matter of law because (1) EverBank was not the last assignee of record of the deed of trust, (2) EverBank was not the holder of the note, and (3) EverBank was not the owner of the note with the right to enforce it.

Seedergy argued that EverBank could not be the last assignee of record of the deed of trust because there were three breaks in the chain of assignments. Any one break would be sufficient to defeat EverBank's standing to foreclose under the deed of trust because a party not named in the original security instrument must be able to trace its rights back to the original holder.

The first break alleged by Seedergy addressed the original deed of trust in favor of Kellibrook and the assignment from Kellibrook to Inland. Without citing to any authority, Seedergy argued that there was a break in the chain because the assignment predated the deed of trust. Seedergy specifically focused on the notary dates of the two instruments: December 18, 1996 for the deed of trust, and December 13, 1996 for the assignment. Seedergy's argument appears to be that an assignment of a deed of trust cannot be executed before the deed of trust itself. Even if the court assumed that this argument were legally sound, Seedergy would not be entitled to summary judgment because Seedergy did not conclusively establish that the assignment predated the deed of trust. The face of the assignment contains specific information indicating where the deed of trust was recorded in the real property records. If the deed of trust was already recorded at the time the assignment was executed, then the assignment could not have predated the deed of trust.

Seedergy argued that a second break occurred in the assignment from MERS to EverBank. In this assignment, MERS expressly transferred the deed of trust to EverBank, but no

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