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CASE LAW UPDATE

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The case selection for this year's Case Law Update is the arbitrary choice of the authors, but with a guideline for cases of first impression, novel issues, detailed opinions on elements of a cause or Texas Supreme Court cases. If a case is not mentioned, it is completely the authors' fault. Cases discussed range from 516 S.W.3d through 546 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, and to the statute or code in question to determine whether there have been any amendments that might affect the outcome of any issue.

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I. Mortgages/Foreclosure/Liens

A. Foreclosure – Summary Judgment

Silver Gryphon, LLC v. Bank of NY Mellon, 529 S.W.3d 595 (Tex. App.-Houston [14th Dist.] 2017, no pet.), involved a wrongful foreclosure claim with an emphasis on motion practice. Bank of NY posted for foreclosure and Silver Gryphon obtained a temporary restraining order the day before foreclosure sale. Bank of NY claimed it never received the TRO notice and conducted the foreclosure sale. American Homes purchased the property at the foreclosure sale. The initial petition alleged wrongful foreclosure; however, a Second Amended Petition added new claims for fraudulent filing of a substitute trustee deed and that the foreclosure was void because the deed of trust lien was barred by the applicable statute of limitations. On the appeal of summary judgment in favor of the bank and purchaser, the court concluded that it lacked jurisdiction because the trial court summary judgment motions did not address all of Silver Gryphon's issues in the Second Amended Petition, and, therefore, was not a final judgment. Both Bank of NY and American Homes had failed to address the statute of limitations claims raised by Silver Gryphon.

B. Foreclosure – Servicer's Standing

Hinton v. Nationstar Mortgage LLC, 533 S.W.3d 44 (Tex. App.-San Antonio 2017, no pet.), involved a foreclosure sale challenge based on a servicer's standing to foreclosure and a Texas constitutional challenge based on an inaccurate estimate of ad valorem tax payments. Hinton defaulted on his homestead loan six months after the closing. On January 16, 2010, a notice of default and intent to accelerate letter was sent; acceleration occurred on May 2, 2010, and a judicial foreclosure was sought in June 2010. Prior to foreclosure, the note and deed of trust were assigned from the then current holder to Nationstar. Nationstar rescinded the acceleration of the debt on March 27, 2014, but subsequently accelerated the debt and intervened in the existing foreclosure suit on May 1, 2014. The assignment of the note and deed of trust to Nationstar occurred on September 17, 2013, when it received the entire collateral package including the original note. However, as is typical in many of these cases, Nationstar did not file its assignment document until July 1, 2014. Therefore, Hinton argued that Nationstar did not have standing to sue because such assignment was filed after its intervention in the foreclosure suit. The security instrument's definition of "lender" included "any holder of the note who is entitled to receive payments under the note". Based on testimony from Nationstar's employees at trial, the court concluded that the delivery of the collateral file containing the original note gave Nationstar the status as the holder of the note with the standing and authority to enforce the Note.

Hinton also alleged the four-year limitation period expired the day after the intervention by Nationstar. The statute of limitations theory was based on the concept that Nationstar could not bring a suit until the July 1, 2014, date when the transfer to Nationstar was actually filed in the county records. But the court found Nationstar's May 1, 2014, intervention filing, being within the four-year limitation period (expiring May 2, 2014), did not bar Nationstar's suit for foreclosure.

Hinton challenged the deed of trust validity based on the requirements under the Texas Constitution that the homestead owner must receive a "final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing". Tex. Const., art. XVI, § 50(a)(6)(M)(ii). It is undisputed that there was a misrepresentation of the estimated monthly tax payments since the homestead was two separate lots and estimates were based on only one of the two lots. Therefore, the question was whether estimated property taxes are covered by the constitutional requirement of disclosure of items "charged at closing". Looking primarily at Black's Law Dictionary, the court concluded that charging means to demand a fee or to bill, whereas property taxes were not charged at closing but were assessed by the property taxing authority at a subsequent time with bills due and payable on February 1st of the subsequent year. The court also found that the definition of closing in the context of a real estate home transaction, involved the final meeting of the parties at which documents are signed and delivered. Therefore, such constitutional provision did not prohibit a foreclosure of a homestead when the owner received an inaccurate estimate of ad valorem tax payments made at the time of the closing of the real estate transaction.

C. Forcible Detainer after Foreclosure

- *Due Process Challenge*

Reynoso v. Dibs US, Inc., 541 S.W.3d 331 (Tex. App-Houston [14th Dist.] 2017 no pet.), involved a forcible detainer action after a foreclosure sale. Ms. Reynoso signed a Deed of Trust against her home, which contained a clause acknowledging that (1) Reynoso's right to occupy the premises ceased upon the sale of the property, and (2) Reynoso had no rights to occupy the property without the new owner's consent. At the foreclosure sale, Dibs US, Inc. purchased the property. Dibs sent a notice to vacate and when Reynoso failed to do so, Dibs filed a forcible detainer action in the justice court, which granted right of possession to Dibs. The county court denied Reynoso's motion to dismiss and granted possession to Dibs. Reynoso appealed that ruling, claiming that the Texas forcible detainer provisions violated her due process rights and that she should be entitled to possession with her concurrently pending suit for title in a district court. Texas law is well settled on these issues, but the court dutifully walked through each of Reynoso's issues.

First, Reynoso challenged subject matter jurisdiction of the justice court and county court; however, the forcible detainer action, codified in Tex. Prop. Code § 24.004, clearly grants subject matter jurisdiction to the appropriate justice court for forcible detainer actions relating to possession of a property, and grants the county court jurisdiction for an appeal therefrom. The only exception is when the resolution of the possession issue cannot be adjudicated without determining title; however, in this case, the holdover/sufferance clause in the deed of trust specified the grantor of the deed of trust would become a tenant at sufferance, which allowed the trial court to resolve possession without resort to title. Next, Reynoso asserted due process clause violations based on the holdover/sufferance clause and the deprivation of her right to litigate possession concurrent with her wrongful foreclosure action. The court recognized that the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution has both

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