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CASE LAW UPDATE

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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 an emphasis on 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 571 S.W.3d through 589 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.

TABLE OF CONTENTS

I. MORTGAGES/FORECLOSURES/LIENS.

1. Foreclosure – Strict Requirement Not Required.

Casalicchio v. BOKF, N.A., 951 F3d 672 (5th Cir. 2020), involved the issue of strict compliance with the thirty (30) day default notice on a residential deed of trust foreclosure. The facts were simple and undisputed. The lender, following payment defaults by the borrower, sent a notice of default dated September 5, 2016, but which was not mailed until a week later on September 12, 2016. The applicable deed of trust was clear in this requirement and provided that the notice of breach must specify "a date, not less than 30 days from the date the notice is given . . . by which the default must be cured." Such time period for cure was clearly not observed and Casalicchio alleged such failure voided the foreclosure sale, likening it to a sky diver who jumps without a parachute. On the other hand, the lender argued the default was non-material and had no harmful effect on the borrower because: (1) the borrower admitted to not having funds sufficient to cure the default within either the actual cure period or the required 30 day cure period; and (2) actual acceleration did not occur immediately after the lesser cure period and that the lender offered other loan modifications on numerous occasions over the next nine months before acceleration actually occurred. The Fifth Circuit held that such a minor defect in an otherwise valid foreclosure sale did not void the foreclosure, based upon prior Texas Supreme Court decisions. The first case was University Sav. Ass'n. v. Springwoods Shopping Center, 644 S.W.2d 705 (Tex. 1982) (holding that the requirement to record a notice of appointment of substitute trustee would not invalidate the foreclosure when the appointment was recorded two days after the foreclosure sale, but with the debtor having previously received actual notice of the substitute trustees appointment). The second case was Jasper Fed. Sav. & Loan Ass'n. v. Reddell, 730 S.W.2d 672 (Tex. 1987) (holding that failure to comply with a deed of trust provision requiring notice of a right to reinstate and right to bring a court action to assert defenses to acceleration or foreclosure would not void the foreclosure sale where the debtor had actual notice of such rights

by prior consultation with legal counsel and that the notice of right to reinstate and bring court actions are not statutory requirements). The Fifth Circuit concluded that any requirement of strict compliance with deed of trust provisions was not absolute, based on Hemyari v. Stephens, 355 S.W.3d 623 (Tex. 2011). In Hemyari, the deed of trust and substitute trustee's deed failed to include the debtor partnership's actual name, erroneously naming each partnerships general partner instead. This court approved the Supreme Court's holding that the mistake was so obvious on its face as to be harmless and that the defect was so minor that it would not void the foreclosure sale. Consequently, the failure to comply with a deed of trust provision, which causes no harm or prejudice to the debtor, will not void the foreclosure sale.

2. Mechanic's Lien – Extinguished by Settlement Agreement.

Nova Mud, Inc. v. Staley, 583 S.W.3d 728 (Tex. App.—El Paso 2019, pet. denied), involved the interpretation of a settlement agreement and whether it extinguished the claimed mechanic's lien debt. Nova Mud performed work at a drilling site for Heritage Standard Corporation. The work was not paid and a mechanic's lien was asserted by Nova Mud against Heritage. Staley obtained a co-working interest in the well pursuant to a farm-out agreement with Heritage. Suit to foreclose the mechanic's lien was initiated in state court, which action was stayed when Heritage filed for bankruptcy.

Nova Mud filed a proof of claim in the bankruptcy but eventually entered into a settlement agreement with Heritage. That settlement agreement specifically provided that "Nova Mud acknowledges and agrees that its recovery hereunder shall be in full and final satisfaction of its punitive claims and **liens** against any interest of Heritage . . . in the [working interest in the well], and they shall not assert or enforce any claims and liens against any such interest . . . ." (emphasis added). The settlement agreement was approved by the bankruptcy court and the automatic stay was lifted allowing the state court proceeding to proceed. In the state court, Staley argued that the debt had been fully extinguished and that the lien securing such debt was dissolved as a matter of law. Though bankruptcy proceedings generally do not affect the lien, which continues against the property, allowing an *in rem* recovery against the collateral. Nevertheless, the court concluded that Nova Mud elected to proceed with the claim in bankruptcy (as opposed to a foreclosure suit on the mechanic's lien), and the settlement agreement released all of the debt and the accompanying lien. Therefore, Nova Mud lost its right to foreclose the mechanic's lien claim against the working interest of Staley.

3. Statute of Limitations.

Perry v. CAM XV Trust, 579 S.W.3d 773 (Tex. App.—Houston [1st Dist.] 2019, no pet.) involved the statute of limitations for the filing of a foreclosure action based upon when acceleration of the debt occurred. The home equity loan originated in 2005 and after payment disputes, the creditor sent a September 3, 2010 notice declaring a default and establishing October 3, 2010 as the end of the cure period. The default notice specifically stated that "the mortgage payments will be accelerated . . . and foreclosure proceedings will be initiated" at the end of the cure period. On October 3, 2010 the creditor sent a second notice stating that it had "elected to accelerate the maturity" of the debt. And finally, on October 20, 2010, the creditor sent a third notice stating that the creditor had "elected to accelerate the maturity of the debt."

Foreclosure suit was filed on October 20, 2014, and Perry asserted the affirmative defense of statute of limitations, claiming October 3, 2014 was the bar date for filing an action on the debt. Perry's contention was that the deed of trust language together with the October 3, 2010 letter constituted the actual acceleration date. The relevant provisions of such deed of trust, read: "[i]f the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument **without further demand** and may invoke the power of sale . . . ." [emphasis added.] The thrust of Perry's argument was that the deed of trust provision did not require further demand and made the notice of intent to accelerate the applicable acceleration date. The court rejected this argument holding that the debtor's right to two separate notices (intent to accelerate and actual acceleration) was not waived by clear and unequivocal language in the deed of trust. Consequently, the creditor was required to give both a notice of intent to accelerate and a notice of acceleration in order to have validly accelerated the debt. Further, the optional nature of the deed of trust language was characterized as not requiring only a single notice of intent letter. The language of the first notice letter, to this author, appears clear and unequivocable as to the creditor's **intention** to accelerate, but the second letter was not so clear that it was not an **actual acceleration**. For practitioners, if deed of trust language does not require a second letter of acceleration and demand, the preliminary default notice letter and letter of notice of intent to accelerate should be clear and unequivocal that the election to accelerate will be done in a clear and unequivocable fashion in a subsequent letter.

4. COVID-19 Foreclosures.

In an informal guidance letter dated August 1, 2020 from Ken Paxton, Texas Attorney General, to Bryan Hughes, Texas Senator, the effect of state and local orders relating to the COVID-19 pandemic on nonjudicial foreclosure sales was addressed. https://www.texasattorneygeneral.gov/news/releases/informal-guidance-concerning-foreclosure-sales. The issue addressed was whether local governments could limit the number of attendees at a foreclosure sale by local emergency orders. This issue arose based on Executive Order GA-28, issued by Texas Governor Greg Abbott, which limited outdoor gatherings in excess of 10 persons, unless an exception applied or was approved by the applicable mayor or county judge.

Exceptions to the Executive Order were specified therein, but none of the exceptions to such order were deemed applicable to foreclosure sales, including, specifically, the exception for "real estate services; including settlement" under the Homeland Security's Cybersecurity and Infrastructure Workforce, Version 3.1. Therefore, because a foreclosure sale is a public sale or auction, the possible exclusion of anyone would violate the non-judicial foreclosure statutory requirements. Consequently, without local orders permitting an unlimited attendance, the Texas Attorney General believed the statutory requirements could not be satisfied.

Of course, this is only informal guidance, and it does not carry the authority of a formal opinion of the Texas Attorney General.

II. DEBTOR/CREDITOR/GUARANTIES/INDEMNITIES

1. Description of Collateral.

In Cheniere Energy, Inc. v. Parallax Enterprises LLC, 585 S.W.3d 70 (Tex. App.—Houston [14th Dist.] 2019, pet. dism'd), the court addressed whether a generic description of

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