

# Texas Case Law Update

## Mortgage Lending and Servicing Institute

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1

## 1. Mortgages/Foreclosure/Liens

### 1. Foreclosure – Strict Requirement Not Required

#### *Casalicchio v. BOKF, N.A.*

(5th Cir.) p. 2

- Deed of trust required notice of breach and 30 day cure.
  - Cure period not strictly observed.
  - 5<sup>th</sup> Circuit: minor defect did not void the foreclosure.
  - 5<sup>th</sup> Circuit: requirements of strict compliance not absolute.
  - Tex. Sup. Ct. (Hemyari): obvious mistake harmless and defect so minor that it would not void the foreclosure sale.
-  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


2

# I. Mortgages/Foreclosure/Liens

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

### *Nova Mud, Inc. v. Staley*

(El Paso, pet. denied) p. 3

- Foreclosure of mechanic's lien stayed by bankruptcy.
  - Settlement agreement provided "recovery...in full and final satisfaction of its punitive claims and **liens** against any interest of [owner] and they shall not assert or enforce any claims and **liens** against any such interest."
  - Bankruptcy proceedings generally do not affect lien.
-  Held: Settlement Agreement released all of the debt and the accompanying lien; no foreclosure right.

3

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3


# I. Mortgages/Foreclosure/Liens

## 3. Statute of Limitations

### *Perry v. CAM XV Trust*

(Houston [1<sup>st</sup> Dist.] no pet.) p. 3

- 9-3-10 default notice: "the mortgage payments will be accelerated...and foreclosure proceedings will be initiated."
- 10-3-13 was end of the cure period.
- 10-3-10 notice: "elected to accelerate the maturity."
- 10-20-10 notice: "elected to accelerate the maturity of the debt."
- 10-20-14 foreclosure suit filed.
- Perry claimed 10-3-14 was the bar date, based on 10-3-10 notice
- Deed of trust read: "Lender...may require immediate payment...**without further demand** and may invoke power of sale...."
- Held: notices (intent and actual acceleration) not waived by deed of trust provision.
- **Comment:** was 2nd (10-3-10) notice clear it was not an **actual acceleration**?

 **TIP:** Initial notice should be clear and unequivocal that acceleration will be done in a subsequent letter.

4

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4

# I. Mortgages/Foreclosure/Liens

## 4. COVID-19 Foreclosures

### Informal Guidance

p. 4

- Informal guidance letter dated August 1, 2020.
  - Issue: whether attendees at a foreclosure sale could be limited by local emergency orders.
  - Executive Order GA-28, limited outdoor gatherings in excess of 10 persons, without an exception.
  - No exceptions applicable to foreclosure sales.
- ➔ Foreclosure sale is a public sale; exclusion of anyone violates statute.
- ➔ Therefore, limits on attendance makes foreclosure suspect.

5

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5

# II. Debtor/Creditor/Guaranties/Indemnities

## 1. Description of Collateral

### Cheniere Energy, Inc. v. Parallax Enterprises LLC

(Houston [14th Dist.] pet. dismiss'd) p. 4

- Issue: whether a generic description of collateral is valid under UCC.
  - Cheniere and Parallax negotiated a potential agreement to develop LNG facilities.
  - Parallax began development with Cheniere funding, evidenced by Note & Security Agreement.
  - Cheniere stopped funding; sought foreclosure of security interest in Parallax subsidiary, Live Oak LNG LLC.
  - Held: security interest in subsidiary not adequately described by generic phrase "All other tangible and intangible property and assets of [Parallax]."
- ➔ UCC § 9.108(c): description of collateral as 'all the debtor's assets' or 'all the debtor's personal property' or words of similar import does not reasonably identify the collateral for security agreement.

6

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6

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