

Texas Case Law Update

Mortgage Lending and Servicing Institute

September 17-18, 2020

J. Richard White
Amanda R. Grainger

Austin | Charlotte | Dallas | Fort Worth | Houston | New Orleans | San Antonio | The Woodlands | Washington, D.C.

WINSTEAD PC | ATTORNEYS


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.
 - 5th Circuit: minor defect did not void the foreclosure.
 - 5th 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

WINSTEAD PC | ATTORNEYS

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

WINSTEAD PC | ATTORNEYS

3

I. Mortgages/Foreclosure/Liens

3. Statute of Limitations

Perry v. CAM XV Trust

(Houston [1st 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

WINSTEAD PC | ATTORNEYS

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

WINSTEAD PC | ATTORNEYS

5

II. Debtor/Creditor/Guaranties/Indemnities

1. Description of Collateral

Cheniere Energy, Inc. v. Parallax Enterprises LLC

(Houston [14th Dist.] pet. dism'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

Cont'd

WINSTEAD PC | ATTORNEYS

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Case Law Update

Also available as part of the eCourse

[2020 William W. Gibson, Jr. Mortgage Lending and Servicing eConference](#)

First appeared as part of the conference materials for the
54th Annual William W. Gibson, Jr. Mortgage Lending and Servicing Institute session
"Case Law Update - Part I"