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CASE LAW UPDATE

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2022 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 623 S.W.3d through 644 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/FORECLOSURES/LIENS.

1. Limitations Tolled by Bankruptcy and Abandonment of Acceleration.

Citibank, NA v. Pechua, Inc., 624 S.W.3d 633 (Tex. App.—Houston [14th Dist.] 2021, no pet.) involved the foreclosure of a home loan that was contested on the basis of the lapse of the statute of limitations. An original home mortgage loan was made in 2003, but on March 4, 2009, the lender filed an application for Rule 736 foreclosure. After this, the debtor filed three subsequent bankruptcies. The periods of duration of each bankruptcy filing until foreclosure being approximately 17 months, 38 months and 4 months or nearly 5 years in the aggregate. On July 20, 2015, the lender notified the debtor that they were in default, and issued a notice of default on March 2, 2016, and accelerated the debt on April 29, 2016, and filed a second Rule 736 application for foreclosure on July 26, 2016. The new property owner, Pechua, claimed the creditor could not foreclose based on the expiration of the 4 year limitation period.

On appeal, the bank raised two issues. The first issue was that the 3 bankruptcy filings tolled the running of the limitation period. In analyzing the first issue, the court noted that the automatic stay in bankruptcy does not statutorily provide for the tolling of the running of limitations. Neither the Texas Supreme Court nor this court had previously addressed this issue, but such issue had been addressed by prior decisions in various Fifth Circuit and non-precedential opinions issues by its sister courts. Those cases generally held that Texas common law allowed for the tolling of limitations where the exercise of legal remedies was prevented by pending legal

proceedings. Based on such authority, the court held that bankruptcy tolled the running of limitations which extended the creditor's right of foreclosure.

The other issue was that the subsequent 2015 and 2016 notices of default effectively abandoned the prior acceleration of the loan. The court addressed whether the acceleration had been abandoned by the subsequent notices of default sent in 2015 and 2016; however, the court never addressed the 2015 notice of default and relied solely upon the language of the second notice of default in March 2016, which the court determined to be clear and unequivocal language relating to the unilateral abandonment of acceleration. Four critical elements of the notice of default were applicable to a determination of its prior abandonment of acceleration. These four elements were: (1) the current notice allowed for a cure of the note by paying current past due amount, (2) a statement that the loan would be accelerated if the outstanding payments were not brought current, (3) that the loan might be accelerated in the future, and (4) that the notice was entitled "Notice of Intent to Accelerate," which represented a forward looking statement negating that a prior acceleration was still effective. In following these lines of cases, the court did notice and distinguish its holding in Swoboda v. Ocwen Loan Servicing, LLC, 579 S.W.3d 628 (Tex. App.—Houston [14th Dist.] 2019, no pet.), in which it held that abandonment was not proved because the notice contained no suggestion that the original maturity date had been restored after the prior acceleration. The court also distinguished Pitts v. Bank of New York Melon Trust Co., 583 S.W.3d 258 (Tex. App.—Dallas 2018, no pet.) in which both a monthly statement and delinquency notice were analyzed but rejected because neither contained language that indicated a future acceleration for non-payment of the noticed amount, thereby not negating the prior acceleration.

In a final effort, the homeowner contended that the creditor's waiver of acceleration (and the consequential reinstatement of the original maturity date) was inconsistent with the non-waiver clause in the existing Deed of Trust: "**Forbearance by Lender Not a Waiver** . . . any forbearance by Lender in exercising any right or remedy . . . shall not be a waiver of or prejudice the exercise of any right or remedy." This position was rejected with the court citing favorably from Ocwen Loan Servicing, L.L.C. v. REOAM, L.L.C., 775 F. App'x 354, 357 (5th Cir. 2018)(*per curium*) which held "the provision's preservation of [the] lender's right to accelerate in the future did not affect its ability to abandon an existing acceleration."

2. Bankruptcy Abuse.

In re Parson, 632 B.R. 613 (N.D. Tex. 2021) involved an attempt by a debtor to avoid a foreclosure by filing a bankruptcy proceeding, but such proceeding was dismissed with prejudice to the refiling of bankruptcy for three (3) years. Bridget Parson filed a Chapter 13 bankruptcy proceeding *pro se*, to prevent the execution upon a default judgment entered in favor of Becky Cole. Additionally, Parson was delinquent in payments on a non-homestead residential property in Dallas, occupied by her adult son. But, based on her actions in this bankruptcy proceeding and the two prior bankruptcy proceedings and state court proceedings, the bankruptcy court determined it had cause under Bankruptcy Code §1307(c) to dismiss the filing based on the following factors: filing deficient schedules, ignoring requirements for providing critical documents, refusing to cooperate with the court Trustee or her creditors during hearings, filing of patently unconfirmable plan of reorganization, and numerous other actions detailed in the Opinion.

On appeal, the court addressed the dismissal with prejudice and three year ban on refiling future bankruptcy cases, which it found was appropriate under the circumstances of Parson's actions, based on Parson's willful misuse of the Chapter 13 process to delay payment of creditors and avoid foreclosure. In support, the court noted Parson's plan of reorganization failed to address existing creditor claims (being those of Becky Cole who held a judgement) and the mortgage creditor on the second non-exempt home. Additionally, she had filed numerous frivolous objections, claimed the court held illegal hearings, and appealed virtually every order of the court. Further, the court reviewed her two prior bankruptcy proceedings, one filed in January 2015 in the Northern District of Texas, in which she filed five motions for continuance, six requests to stay further proceedings, thirteen notices of appeal, and totaling 389 docket entries. The case was dismissed June 5, 2018, and Parsons filed a second bankruptcy case on July 11, 2018 in the Eastern District of Texas. In the second bankruptcy filing, Parson had a total of 311 docket entries, including thirteen notices of appeal, two requests for reconsideration, six motions for inability to pay fees, four motions for continuance, six motions to strike, six requests to stay further proceedings and one writ of mandamus. Additionally, in each of the two bankruptcy cases, Parson filed motions for recusal claiming that each bankruptcy judge was prejudiced against Parson. In virtually each case, Parson failed to present any substantive evidence at any of the hearings and refused to acknowledge documents presented by the other parties at the hearing. These tactics continued in the current case, which justified its dismissal with prejudice. Although the Chapter 13 Trustee asked for a five year bar to refiling bankruptcy, the court, giving grace to a *pro se* debtor, only ordered a 3 year ban on bankruptcy filing even though Parson was not a legitimate debtor under the bankruptcy code which had a purpose "to afford a fresh start to the *honest* but unfortunate debtor."

3. Foreclosure – Right of Reverter.

Ridgefield Permian, LLC v. Diamondback E&P LLC, 626 S.W.3d 357 (Tex. App.—El Paso 2021, pet filed), related to a judicial foreclosure and sheriff's deed with respect to certain mineral interests. Mrs. Griffith died intestate with the subject property (636.3 acres), and her interest was conveyed as a 121st interest to her husband, Mr. Griffith, and her two sons, David and Albert. The Griffith heirs executed the Merriweather oil and gas lease, effecting a severance of the mineral and surface estates, at which time the Griffith lessors owned the 121st interest in the surface estate, a 121st royalty interest in the 1/8th of the minerals produced under the Merriweather lease and a possibility of reverter to a 121st interest in the minerals. Later Mr. Griffith died and his interest went to David and Albert equally. The taxing authorities for the subject property initiated a suit for tax liens upon the unpaid royalties under the Merriweather lease. The suit included the royalties payable to Albert and Mr. Griffith. Following judgment on the tax lien suit, a sheriff's deed conveying the royalty interest foreclosed upon was executed and delivered to the purchaser at such foreclosure sale. Then, there was a termination of the Merriweather lease because production of oil and gas had ceased. Therefore, the existing mineral owners executed a termination of the Merriweather lease. Ridgefield was the successor by conveyance to the Griffiths and claimed the reversionary interest of 121st interest in the mineral estate. On the other hand, the successor to the foreclosure purchaser, Diamondback, argued that the right of reversion was foreclosed upon and passed with the foreclosure of the royalty interest in the subject property.

The trial court found in favor of Diamondback, but the appellate court reversed and rendered in favor of Ridgefield. In its analysis, the court noted that upon execution of an oil and

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