

NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR

OCTOBER 2008

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A MESSAGE FROM PAUL GUNN

With approximately 450 current members, the Real Property Section is the second largest section of The Mississippi Bar, behind only the Litigation Section. As the incoming Chair of the Real Property Section, I encourage each of you to communicate to the officers of the Section your thoughts and suggestions as to how our Section can be improved.

Our officers are interested in providing services that benefit our membership. As you are aware, one such service is this Real Property Newsletter, which is assembled by Rod Clement. We appreciate Rod's continued efforts in compiling our annual Newsletter. Past Newsletters can be viewed on The Mississippi Bar/Real Estate Section webpage.

Additionally, our officers will continue to monitor proposed pieces of legislation that carry potential effects to the real estate practice, and we will work with the Director of Governmental Relations for The Mississippi Bar, Jimmy Reynolds, to address our concerns. In the legislative arena this year, we will explore once again the proposal for a Fractional Interest Act, as well as an amendment to our existing Condominium Act or, alternatively, the adoption of a new Condominium Act.

The officers of our Section are brainstorming other services that would benefit our membership. One such proposal is the coordination of several one-hour continuing legal education programs on related real estate issues to be provided via the internet or by teleconference. These programs would provide our members with an opportunity to obtain CLE hours without ever leaving the office. Presently, Mississippi attorneys may earn up to three CLE hours each year via internet or teleconference.

Presently under consideration by our officers is the establishment of a law student scholarship, which would be tied to academic performance in the area of real property law. Several other sections of The Mississippi Bar currently fund annual law student scholarships.

Please contact your Section officers if you have an interest in the proposed agenda for the year or to communicate your suggestions.

Finally, I would like to recognize and thank Blake Teller, our Past Chair, and the other officers of the Real Property Section. We certainly appreciate all of your hard work and leadership over the past year.

RECENT CASES

Tenant's Right To Abate Must Be Waived Expressly

Kmart Corp. v. Realty Trust Co., United States District Court for the Southern District of Mississippi, 2007 WL 892362 (March 21, 2007). Kmart leased land and improvements for a store in Long Beach. The lease did not provide for an abatement of rent in the event of destruction of the improvements. The lease provided that the rent was due “unless abated or diminished as hereinafter provided.” The improvements were completely destroyed by Hurricane Katrina. After the destruction, Kmart informed the landlord that no further rent payments would be made pursuant to Miss. Code Ann. § 89-7-3. This statute provides in relevant part, “A tenant shall not be bound to pay for rent for buildings after their destruction by fire or otherwise, ...unless in respect to the matters aforesaid there was negligence or fault on his part, or unless he has expressly stipulated to be so bound.” Kmart filed an action for declaratory relief and argued that the language that rent was due “unless abated or diminished as hereinafter provided” did not meet the requirements of Section 89-7-3 that the waiver be express. The landlord argued that the fact the lease permitted Kmart to abate rent in other circumstances but not for destruction of the premises, together with the statement that rent would not be abated except as provided in the lease, constituted an express waiver. The landlord also argued that the obligation to pay rent was consistent with the long-term nature of the lease, and that since Section 89-7-3 was in derogation of the common law, it should be narrowly construed. The United States District Court for the Southern District of Mississippi, in a decision by Judge Guirola, held that in the absence of an express stipulation in the lease that the tenant would remain liable for rent in the event of destruction of the premises, Kmart was entitled to invoke Section 89-7-3 and abate the rent.

Seller Does Not Have Obligation To Tell Buyer That Land Is In Flood Plain

Morgan v. Green-Save, Inc., Miss. Court of Appeals No. 2006-CA-01174-COA, 2008 WL 1795027 (April 22, 2008). Green-Save was looking for land to purchase for industrial use and contacted Morgan, who was developing land for sale as a commercial subdivision. Green-Save's representative told Morgan that Green-Save intended to use natural gas in its manufacturing rather than electricity. Morgan told a representative of Green-Save that all utilities would be available to the land. Green-Save did not inquire with Morgan about whether the land was in a flood plain, and Morgan did not make any representation about this issue. Green-Save purchased the land without financing and built its industrial facility on the property. After the facility had been built, Green-Save sought financing. The lender required a flood certificate, which showed that the property was located in a flood plain. Green-Save had to purchase flood insurance. The local gas utility refused to run a natural gas line to the property because there was not enough development in the area to make it economically feasible. Green-Save filed an action against Morgan in the Circuit Court of Lee County asserting that Morgan fraudulently concealed that the land was in a flood plain and

fraudulently misrepresented that natural gas would be available. The jury returned a verdict in favor of Green-Save. Morgan appealed. The Mississippi Court of Appeals, in an opinion by Justice Carlton, reversed and rendered judgment for Morgan. In order to prove fraudulent concealment of the fact that the land was in a flood plain, absent a fiduciary relationship, Green-Save had to show that Morgan did some affirmative act to prevent discovery of facts giving rise to the fraud claim. Green-Save did not present any evidence that Morgan affirmatively concealed that the land was in a flood plain. If a fiduciary relationship existed, then Morgan had a duty to communicate to Green-Save that the land was in a flood plain. Green-Save argued that a fiduciary relationship existed because Morgan was not a mere seller, but also because Morgan was the developer of the entire subdivision. Green-Save also argued that the restrictive covenants of the commercial subdivision created a common interest that established a fiduciary relationship. The Court of Appeals found that the fact that seller was the developer was not sufficient to establish anything more than an arm's length relationship. The court further found that any common interest created by the restrictive covenants was "ancillary to the underlying sale of the property" and distinguished these facts from a prior case in which the parties shared mutual interest in obtaining the results in a contract. In regard to Morgan's statement that all utilities would be available, the statement was a representation of future facts that depended on a number of factors outside of Morgan's predictability or control. The court noted that development in the subdivision had been hindered by a delay in the construction of a highway.

Note 1: If you are representing the buyer of land to be developed, what is your obligation to your client regarding determining the flood zone and the availability of utilities? Is your duty different if you are representing a national big-box retailer than it is for a small unsophisticated buyer?

Note 2: Some municipalities require that new improvements be built above the level necessary to avoid having to purchase flood insurance. The additional cost of raising the grade to meet municipal requirements can be substantial.

Note 3: This case has not been released for publication yet.

Negotiable Notes Have Longer Statute Of Limitations

Jordan v. BancorpSouth Bank, 964 So. 2d 1205 (Miss. 2007). Jordan signed a promissory note to the predecessor of BancorpSouth in September 1999. BancorpSouth filed an action in county court to enforce the note in April 2005. Jordan argued that the general three-year statute of limitations of Section 15-1-49 barred the bank's action. The bank argued that the six-year statute of limitations in Section 75-3-118(a), which is part of Article 3 of the Mississippi's version of the Uniform Commercial Code, applied because the note was a negotiable instrument under Section 75-3-104. The county court held that the note was negotiable and that the longer six-year statute therefore applied. Jordan appealed, and the Mississippi Court of Appeals, in a decision by Justice Chandler, affirmed.

Note 1: This distinction between the statutes of limitations for negotiable and non-negotiable notes was created when Mississippi adopted the uniform version of Article 3 of the Uniform Commercial Code. The editor thinks that this is the first reported Mississippi case to recognize this distinction.

Note 2: There are a couple of reasons why real estate lawyers need to be cognizant of this distinction between negotiable and non-negotiable notes. A deed of trust cannot be enforced after the statute of limitations runs on the note it secures, accordingly, whether the note is negotiable and has a six-year statute of limitations, or whether it is non-negotiable and has a three-year statute of limitations, directly affects the enforceability of the deed of trust. One problem that this distinction creates is that under Section 89-5-19, a deed of trust loses priority to subsequent creditors and purchasers for value without notice when it appears from the face of the deed of trust that an action to enforce the indebtedness secured by the deed of trust is barred by the statute of limitations. But one looking at the face of a recorded deed of trust cannot tell whether the secured note is negotiable or non-negotiable, so he cannot tell for sure when the deed of trust begins to lose priority.

Note 3: The distinction between negotiable and non-negotiable notes also is important because the purchaser of a negotiable note can be a holder in due course, as described in Miss. Code Ann. § 75-3-302. If the assignee is a holder in due course, then under Section 75-3-305(b), the assignee takes free of many defenses to enforcement of the note that the maker could have asserted against the original holder of the note. This doctrine has become particularly important because of allegations of fraud and misrepresentation in subprime loans that have been sold by the original lenders. A leading case in Mississippi on this issue is *Stuckey v. Provident Bank*, 912 So.2d 859 (Miss. 2005). In this case the Stuckeys refinanced their home with a mortgage company. The mortgage company sold the note and deed of trust to Provident Bank. The Stuckeys stopped making payments and Provident commenced foreclosure proceedings. The Stuckeys filed an action in the First Judicial District of Hinds County alleging, among other things, that the mortgage company that made the loan committed fraud and engaged in predatory lending. The Mississippi Supreme Court, in an *en banc* decision, held that since Provident Bank was a holder in due course, it took the note free of the defenses asserted by the Stuckeys. This holder in due course protection is a die-in-the-ditch issue for purchasers of mortgage loans. When states have attempted to reduce this protection for holders in due course, as Georgia and New York have attempted, the secondary market for mortgages in those states dried up, which means that fewer retail lenders were able to make loans.

GENERAL

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