NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR

OCTOBER 2016

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SAME-SEX MARRIAGE

Prior to 2015, same-sex couples could not marry in Mississippi, and marriages of same-sex couples under the laws of other states were not recognized in Mississippi. The Mississippi legislature made this point unequivocally in 1997 when it passed Section 93-1-1(2) of the Mississippi Code, which provided in part that "any marriage between persons of the same gender is prohibited and null and void from the beginning." In 2015, the Supreme Court of the United States, in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), held that the United States Constitution requires a state to license marriages between two people of the same sex, and to recognize a marriage between two people of the same sex when their marriage was lawfully performed in another state. The Mississippi Supreme Court followed *Obergefell* in allowing a same-sex couple that had been married in another state to petition for divorce in Mississippi. *Czekala-Chatham v. State*, 195 So. 3d 187 (Miss. 2015).This change in the law extends to same-sex married couples benefits and burdens of laws in Mississippi real property law that formerly applied only to married couples. For example, a tenancy by the entirety can only be created between married persons. Presumably now married persons of the same sex can own land as tenants by the entireties. Certain homestead tax exemptions are available only to married couples. *See, e.g.*, Miss. Code Ann. § 27-33-3. Same-sex married couples presumably are eligible for this exemption after *Obergefell*. Similarly, the homestead protection of a spouse in Miss. Code Ann. § 89-1-29 should now be available to same-sex married couples.

RECENT CASES

Trustee Owes No Duty to Third-Party Purchaser at Foreclosure Sale

Thrash v. Deutsch Kerrigan & Stiles, LLP, 183 So. 3d 838 (Miss. 2016). U.S. Capital loaned money to Coastal. The loan was secured by a deed of trust on land to Blackledge as trustee for U.S. Capital. The borrowers defaulted on the loan. At U.S. Capital's direction, Blackledge posted and published the notice of sale, and conducted the sale on August 30, 2007. Thrash purchased the land at the sale for $5.6 million. He transferred the purchase money to his attorney's trust account. On September 6, (a) Blackledge delivered the trustee's deed to Thrash; (b) Thrash authorized his attorney to transfer the purchase money to U.S. Capital; (c) Coastal filed for bankruptcy at 11:26 am; (d) Coastal's attorney sent Thrash's attorney an email at 12:46 pm notifying her that Coastal had filed bankruptcy; and (e) Thrash's attorney transferred the funds to U.S. Capital at 1:21 pm. Thrash's attorney subsequently discovered that the trustee had made an error in foreclosing, and that the foreclosure sale was void. Following litigation with Coastal in the bankruptcy court, Thrash purchased the land (for the second time) from Coastal for $11 million. In an action in the Circuit Court of Harrison County, Thrash asserted claims of negligence and breach of fiduciary duty against the trustee's law firm (it's not clear from the opinion whether the trustee was a party or just his firm). The circuit court granted the trustee's law firm's motion for summary judgment. On appeal the Mississippi Supreme Court, in a unanimous *en banc* opinion by Justice Pierce, affirmed. The court wrote that the trustee had duties to the grantor and the beneficiary of the deed of trust, but no legal or fiduciary duty to a third-party purchaser at the foreclosure sale.

Note 1: The foreclosure sale was void because the trustee made an error in the publication. He published the notice of sale on August 15, 22 and 29, and then held the sale on August 30. It's not clear from reading Section 89-1-55 of Mississippi Code that this schedule of publications doesn't work, but this is a trap for the unwary and inexperienced. Section 89-1-55 has to be read together with Section 1-3-69, which provides that there must be at least three weeks between the date of the first publication and the sale and that the date of the first publication is not included. *See Donald v. Commercial Bank*, 97 So., 12 (1923). One can (a) publish on the same day of the week for three consecutive weeks and then conduct the sale on the same day of the next week (e.g., publish three Tuesdays in a row and then conduct the sale on the fourth Tuesday), or (b) publish on four consecutive Tuesdays and then conduct with sale within seven days of the fourth publication. Publishing three Tuesdays in a row and then conducting the sale on the day after the third publication doesn't work. *See Osborne v. Neblett*, 65 So. 3d 311 (Miss. Ct. App. 2011).

Note 2: Purchasing land at a foreclosure sale is only slightly less risky than purchasing at a tax sale. An alternative is to let the foreclosing lender purchase the property, as happens 99.99% of the time, purchase from the foreclosing lender after confirming that the foreclosure sale was conducted properly and some due diligence, and obtain title insurance. This alternative might not be feasible if there is competitive bidding at the foreclosure sale, or if the land is going to

disappear into the black hole of a big bank's REO bureaucracy after the sale and reappear six months later with a much higher asking price and a broker's commission attached.

Note 3: One interesting (to the editor) issue that is murky in this case is the extent to which the trustee's law firm has liability if the trustee is negligent. It appears that the trustee's law firm, and not the trustee individually, was the party in the circuit court proceedings.

Note 4: Given the line of cases holding that the trustee of a deed of trust has very limited duties, the court's holding in this case is not surprising. Attorneys who do foreclosures regularly know that it's not a question of if an error will take place but when, and should find this case comforting.

Note 5: The reason that a trustee in a deed of trust in Mississippi has such limited liability is that the trustee's duty is so narrow: the trustee's sole duty and authority is to conduct a non-judicial foreclosure of the land if the beneficiary requests him to do so. So if a deed of trust gives a trustee more authority, as deeds of trusts drafted by attorneys from other states often do, is the trustee at risk of losing this limited liability?

Tenant's Insurer's Duty to Landlord

Emerald Coast Finest Produce Co. v. Sunrise Fresh Produce, LLC, 2015 U.S. Dist. LEXIS 171191, 2016 WL 1718386 (S.D. Miss., Dec. 23, 2015), motion for reconsideration denied, 2016 U.S. Dist. LEXIS 75411, 2016 WL 1718386 (April 29, 2016), appeal to Fifth Circuit filed July 7, 2016. A lease for a warehouse required the tenant to provide property insurance equal to the replacement value of the building. The warehouse burned down in a fire. The landlord claimed that the value to rebuild the building was $15 million, but the tenant's insurance policy provided only $5 million in coverage. The landlord brought an action against the tenant's insurance company and the agent that placed the policy, asserting that the landlord was a third-party beneficiary of the insurance policy, and that the insurer and the agent had a duty to the landlord to determine the replacement cost of the warehouse and procure insurance coverage equal to the replacement value. The agent and insurer argued that they had provided the coverage requested by their insured, and that they had no duty to the landlord. United States District Court Judge Keith Starrett granted a motion for summary judgment filed by the insurer and the agent. Judge Starrett wrote that, assuming that the landlord was a third-party beneficiary of the policy, no authority exists for a claim arising from the procurement of the policy, as opposed to claims arising out of the fulfilment of the policy. Since the landlord's claim was based on the procurement of the policy rather than the fulfillment of the policy, the landlord did not have a valid claim.

Note 1: This case is on appeal to the Fifth Circuit and so the result is not final. But it would be a pretty radical change in the law for a court to hold that the tenant's insurance agent and insurance company are liable to a landlord because the amount of the insurance procured by the tenant is less than the amount required under the lease.

Note 2: From the description in the opinion, this appears to be a lease of an entire building to a single tenant. In this circumstance, leases for commercial property usually require the tenant to provide the landlord with proof of the existence of property insurance in an amount equal to the cost of replacing the building after total destruction, with the landlord being named as an additional insured. The landlord usually requires the tenant to provide proof of the existence of the insurance and proof of payment of the annual premium upon renewal. In the editor's experience, savvy landlords usually don't rely entirely on tenants to carry the property insurance, and carry their own property policies as a back-up.

Subtenant Cannot Assert Anti-Assignment Clause in Prime Lease

Kleyle v. Deogracias, 195 So. 3d 234 (Miss. Ct. App. 2016)(*en banc*). Alabama Great Southern Railroad ("AGS") leased property in Pearl River County to Kleyle. The lease provided that Kleyle could not assign or sublease the premises without AGS's consent, and that any sublease made without AGS's consent would be void. Kleyle subleased the property to Deogracias without getting AGS's consent. Deogracias defaulted under the lease, and Kleyle brought an action in the Circuit Court of Pearl River County against Deogracias for past due rent and other damages. Deogracias argued that the sublease was void under the terms of the prime lease between AGS and Kleyle because Kleyle did not obtain the consent of ACS to the assignment, and therefore Deogracias did not owe any rent to Kleyle. Kleyle argued that the anti-assignment provision was for the benefit of AGS and that the subtenant, Deogracias, did not have standing to assert the anti-assignment provision as a defense to payment of rent. The Circuit Court granted Deogracias' motion to dismiss the complaint. On appeal by Kleyle, the Mississippi Court of Appeals, in an *en banc* decision by Justice Wilson, reversed the Circuit Court's judgment and remanded the case back to the Circuit Court. Justice Wilson wrote that this was a case of first impression, and that the prevailing rule in other jurisdictions is that the anti-assignment clause was only for the benefit of, and could only be asserted by, the original landlord, and could not be asserted by the subtenant.

Note 1: So an unauthorized sublease is not void automatically, despite the statement in the lease to this effect. Supposedly the same rule would apply to a prohibition against the tenant mortgaging its leasehold interest. Are there other clauses in a lease that might be similarly affected?

Note 2: Does this case mean that the subtenant cannot assert a breach by the tenant/sub-landlord of any covenant in the prime lease?

Note 3: Suppose that a deed of trust provides that the grantor/owner cannot transfer or lease the subject property to any third party without the consent of the beneficiary, and that any such transfer or lease is void. Doesn't this case provide precedent for arguing that this prohibition isn't self-operating, but that a breach of the covenant not to transfer has to be affirmatively asserted by the beneficiary?

Tax Sale Void as to Mortgagee When Proper Notice Not Given to Owner

Cleveland v. Deutche Bank, 2016 Miss. App. LEXIS 376, 2016 WL 3248836 (Miss. Ct. App., June 14, 2016). A home in Prentiss County, Mississippi (formerly owned by singer Jerry Lee Lewis) was sold for unpaid ad valorem taxes. The chancery clerk gave notice to the mortgagee, Deutche Bank, and attempted but failed to give proper notice to the owner of the land. A grantee from the owner, Cleveland, filed an action in the Chancery Court of Prentiss County to quiet his title to land. Cleveland argued that notice to the bank was adequate, and that even if the notice to the owner did not comply with the statute and the tax sale was void as to the owner, the sale was still good as to the lender and extinguished the deed of trust. In other words, Cleveland's position was that he owned the property free and clear of Deutche Bank's deed of trust. The Chancery Court granted the bank's motion for summary judgement. On appeal the Court of Appeals, in a decision by Justice Carlson, held that since the notice to the owner did not comply with the statutory requirements, the sale was void as to both the owner and the bank, even if the notice to the bank was adequate.

Note 1: This appears to be a case of first impression in Mississippi.

Note 2: This opinion has not yet been released for publication and so is subject to change.

Owner Who Had Access by Boat Not Entitled to Easement by Necessity

Davidson v. Collins, 195 So. 3d 825 (Miss. Ct. App. 2015)(*en banc*). Davidson owned approximately forty acres of land, including a sandbar, surrounded by the Escatawpa River on three sides and land on by Collins on the fourth side. Davidson used the land for recreation only; no improvements other than a dock were on the land and no utilities ran to it. Davidson had crossed Collins' land to get access to his land from the time that Davidson purchased the land in 1996 until 2011. In 2011 Collins closed access to the Davidson's land because of increased traffic going to the sandbar. Davidson filed an action in the County Court of Jackson County seeking a right of way across Collins' land under Miss. Code Ann. § 65-7-201. The County Court, sitting as a special court of eminent domain, found that Davidson had not proven that that easement was a necessity and held that Davidson was not entitled to an easement by necessity. On appeal by Davidson, the Mississippi Court of Appeals, in an *en banc* decision by Justice Barnes, affirmed. Relying on cases from Maine, New York and Connecticut, the court wrote that navigable waters like the Escatawpa River are considered a public highway for purposes of considering the necessity of an easement of necessity, and that since there was a public boat launch within 200 yards of Davidson's dock from which Davidson could access his property by boat, Davidson did not need an easement over Collins' land.

Note 1: The editor notes this case for two reasons. First, there's the novel finding that a navigable waterway is like a public highway for purposes of an easement of necessity, and that the plaintiff was not entitled to an easement by necessity because he could reach the subject property by boat. Mississippi courts historically have been reluctant to impose easements over

one person's land to benefit another person, and this case seems like an extreme example of this reluctance.

Note 2: Second, this reluctance to grant easements by necessity is part of a strong respect for property rights. In this case, the Court of Appeals quoted from a 2013 Mississippi case "the right to control and use of one's property is a sacred right not to be lightly invaded or disturbed." As municipalities in Mississippi become more aggressive in enacting zoning and lease control ordinances, the editor is looking forward to some interesting opinions when these ordinances are put to the test in the Mississippi courts.

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