NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR

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RECENT CASES

Right to Continue Non-Conforming Use After Change in Zoning

Cleveland MHC, LLC v. City of Richland, No. 2013-CA-00286-COA, 2014 WL 4067207 (Miss. Ct. App., Aug. 19, 2014). The Cleveland Mobile Home Community, a mobile home park, was established in the 1950s in Rankin County, Mississippi, just outside of the City of Richland. The property had concrete pads for mobile homes. The pads were rented to tenants, and the tenants then moved their mobile homes to the pads. When the lease term ended, the former tenant would remove his mobile home from the pad, and a new tenant would move his mobile home to the pad. The property was annexed by the City of Richland and was classified for zoning purposes as I-1 Light Industrial. Residential uses were not permitted within the I-1 district. The City's zoning ordinance permitted non-conformities to continue, but did not "encourage their survival." The ordinance provided that the non-conformities should not be enlarged upon, expanded, extended or used as grounds for adding other structures prohibited in the same district. After the annexation the City continued to allow the owners of the park to replace mobile homes of tenants that moved out of the park with mobile homes of new tenants. On July 5, 2011, however, the City adopted an ordinance providing that if a mobile home was removed from the property, another mobile home would not be allowed to replace it. The

owner of the property, Cleveland MCH, LLC, appealed this ordinance to the Rankin County Circuit Court, which ruled in favor of the City. The owner appealed the Circuit Court's judgment. The Court of Appeals, in a decision by Justice Ishee, reversed the Circuit Court's judgment and rendered judgment for the owner. The court wrote that "under Mississippi law, the continuation of a non-conforming use is a well-established substantial right." The City argued that since the ordinance prohibited any extension of a non-conforming use, the City was entitled to prohibit any action continuing the life of the non-conforming use, re-renting vacant pads to new tenants was extending the life of the non-conforming use, and the City therefore was entitled to prohibit the re-renting of pads. The owner argued that the entire park was the non-conforming use, and that prohibiting re-renting the pads was eliminating the use through attrition. Relying on cases from Mississippi and other states, the Court of Appeals found that, in the case of mobile home parks, the non-conforming use was the park itself, and not individual lots within the park. The City's July 11, 2011 ordinance sought to apply the restrictions to non-conforming uses on a lot-by-lot basis. The court wrote, "This reflects a lack of understanding for the fundamental nature of things and a disregard for the surrounding facts and settled controlling principles. This deprives the property owner of his constitutional right to enjoy his property." The court therefore found that the City's resolution was arbitrary, capricious and illegal.

Note 1: This case has not been published yet and could be revised or appealed.

Note 2: There seems to be at trend for municipalities to try to eliminate non-conforming uses. The City of Ridgeland, for example, adopted a new zoning ordinance in March 2014 that severely limits, and in some cases prohibits the continuance of, existing non-conforming uses.

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Bank Not Entitled to File Lis Pendens When
Reforming Recorded Deed of Trust

Simmons v. Bank of America (In re Simmons), 510 B. R. 76 (Bankr. S.D. Miss. 2014). In 2003 Simmons executed a deed of trust to secure a loan. The deed of trust was intended to describe land located in Hinds County, Mississippi, but instead the legal description attached to the deed of trust was of land located in Pennsylvania. The deed of trust did include the correct street address and tax parcel number for the Hinds County property. In 2006 Simmons executed a second deed of trust to Trustmark National Bank. The Trustmark deed of trust described the real estate correctly. In 2011, the 2003 deed of trust to Full Spectrum was assigned to a securitized trust of which Bank of New York Mellon was the trustee. The correct description of the Hinds County land was attached to the assignment. On February 15, 2012 the Bank of New York Mellon filed an action in the Chancery Court of the First Judicial District of Hinds County to reform the 2003 deed of trust to correct the description. The Bank of New York Mellon also filed a lis pendens in

the land records giving notice of the action to reform its deed of trust. The lis pendens described the land correctly. On March 15, 2012, Simmons filed a Chapter 7 bankruptcy petition. [At this point Bank of America was listed as the adversary party rather than Bank of New York Mellon. A footnote to the court's opinion suggests that Bank of America was the servicer of the loan.] Simmons, Trustmark and the bankruptcy trustee filed complaints in the bankruptcy court against Bank of America alleging that because the legal description in the 2003 deed of trust was void, Bank of America did not have a perfected security interest in the property, Bank of America's interest was void, and Bank of America therefore was an unsecured creditor in the bankruptcy. Trustmark filed a motion for summary judgment.

Mississippi's lis pendens statute, Miss. Code Ann. Section 11-47-3, provides in relevant part as follows:

> When any person shall begin a suit in any court, …to enforce a lien upon, right to, or interest in, any real estate, *unless the claim be founded upon an instrument which is recorded*,…, such person shall file with the clerk of the chancery court of each county in which the real estate, or any part thereof, is situated, a notice containing the names of all parties to the suit, a description of the real estate, and a brief statement of the nature of the lien, right or interest sought to be enforced.

The bankruptcy court held that the statute did not authorize the lis pendens notice filed in this case, and the lis pendens notice therefore was ineffective. Relying on the italicized language, the court reasoned that since Bank of America's deed of trust was "an instrument which is recorded," the statute did not authorize the filing of a lis pendens notice, and the lis pendens notice filed by Bank of America therefore was not entitled to be recorded. The bankruptcy court found that, even if the lis pendens was authorized under state law, the filing of the lis pendens was a preferential transfer under Section 547 of the Bankruptcy Code.

Since the lis pendens was not entitled to be recorded under Mississippi law, Bank of America's deed of trust, according to the court, only gave constructive notice of an interest in land in Pennsylvania, and did not give constructive or even inquiry notice to subsequent creditors of an interest in land in Mississippi. The bankruptcy trustee as a matter of law cannot have actual notice of an existing lien. The bankruptcy court held that the bankruptcy trustee, as a hypothetical lien creditor under Section 544(a)(1) of the Banrkuptcy Code, could avoid the lis pendens under his "strong arm" powers under Section 544. The court therefore granted Trustmark's motion for summary judgment against Bank of America.

Note 1: Bank of America has appealed this decision to the Fifth Circuit. The bankruptcy court's opinion is thirty-two pages long with seventy-nine footnotes, so it is not an insubstantial opinion.

Note 2: Many real estate attorneys are surprised by the decision in this case. It is customary in Mississippi to file a notice of lis pendens any time a lender files an action to

reform a deed of trust. It is likely that the statute will be amended to address the holding of this case, regardless of whether the Fifth Circuit affirms the case.

Note 3: If the lender is not entitled to file a lis pendens when the lender files an action to reform a recorded deed of trust, then presumably a lender is not entitled to file a lis pendens when it files an action to judicially foreclose its deed of trust. It is standard practice in Mississippi for lenders to file a lis pendens when filing an action to foreclose judicially.

Note 4: The bankruptcy court's opinion states that Bank of America only named Simmons as a defendant in the action to reform its deed of trust, and therefore presumably did not name Trustmark. Suppose that Bank of America had obtained a default judgment against Simmons to reform its deed of trust. Would the action to reform have any effect on the priority of Trustmark's deed of trust?

Note 5: Bank of America argued that the 2003 deed of trust should be constructive notice because it contained the correct street address and tax parcel number for the Mississippi property. The bankruptcy court rejected this argument. The court also rejected Bank of America's argument that the fact that the 2011 assignment of the deed of trust contained the correct description of the land gave constructive notice of the deed of trust.

Note 6: The bankruptcy court's opinion contains an extensive discussion of Mississippi law regarding actual notice, constructive notice and inquiry notice.

Note 7: The editor learned a new term in the course of reading this decision: "reverse veil piercing". Traditional "piercing the corporate veil" occurs when a creditor seeks to hold a shareholder liable for the debts of a corporation. Reverse veil piercing occurs when a creditor seeks to hold a corporation liable for the debts of one of its shareholders. "Reverse veil piercing" isn't an issue in this case but was mentioned by the court in its discussion of jurisdiction.

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Noise Ordinance Not Unconstitutionally Vague

Munn v. City of Ocean Springs, 2014 WL 4066202 (5th Cir., August 18, 2014). The City of Ocean Springs, Mississippi enacted an ordinance making it unlawful to make an "unreasonable noise" in the city. The ordinance defined an "unreasonable noise" as "any unreasonably loud, raucous, or jarring sound…which, under the circumstances of time, place and manner in which it is produced…annoys, disturbs, injures, or endangers the comfort, repose, health, peace or safety of a reasonable person of normal sensibilities...." Munn was the manager of the Purple Pelican bar and nightclub located in the entertainment district of Ocean Springs. On November 21, 2011, a police officer of the City of Ocean Springs issued a citation to Munn for violating the ordinance. Although the city never sought to enforce the citation, Munn filed an action in state court to enjoin

enforcement of the ordinance on the grounds that the ordinance was unconstitutionally vague under the United States Constitution. The City removed the case to the United States District Court for the Southern District of Mississippi. The district court granted summary judgment to the City. Munn appealed the district court's judgment to the Fifth Circuit. On appeal, the Fifth Circuit, in a decision by Judge Jolly, affirmed the district court's judgment. The vagueness doctrine is based on the Due Process Clause of the United States Constitution. The Due Process Clause "requires that a law provide sufficient guidance such that a man of ordinary intelligence would understand what conduct is prohibited," according to the court. Munn relied on the United States Supreme Court's decision in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). In *Coates*, the Supreme Court found unconstitutionally vague an anti-loitering ordinance that prohibited three or more people from assembling on a sidewalk and conducting themselves "in a manner annoying to persons passing by." The Supreme Court reasoned that the ordinance was vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." Munn argued that *Coates* means that the term "annoys" is unconstitutionally vague because it is incapable of being enforced with any kind of uniformity. The Fifth Circuit wrote that the problem in *Coates* was not the word "annoys", but the subjective standard to which it was attached. The prohibited conduct annoyed "persons passing by," which was unquantifiable. The Ocean Springs ordinance, on the other hand, was tied to an objective standard: the noise must annoy a reasonable person. The Ocean Springs ordinance therefore was not unconstitutionally vague.

Note 1: While the editor can appreciate the difference between noises "annoying to persons passing by," and noises annoying to a "reasonable person of normal sensibilities," in the real world isn't enforcement of this ordinance going to boil down to the individual policeman's opinion about whether the noise is too loud? In this case the policeman who issued the citation to Munn told a security guard for the Purple Pelican earlier in the evening that someone had complained about the noise being too loud, but that the policeman did not agree that the noise was too loud. The policeman apparently later changed his mind by the time that he gave Munn the citation.

Note 2: Couldn't a municipality could use this same "objective" standard to regulate "annoying" smells as well as annoying sounds? A smell can be annoying to one reasonable person and not annoying to another. Are sounds different from smells in this regard?

Note 3: This case only addresses federal constitutional standards. The common law of nuisance provides a basis for injunctive relief against annoying sounds also. Whether noise constitutes a nuisance under the common law is a question for the trier of fact. The test articulated by the Mississippi Supreme Court is similar to the Ocean Springs ordinance: "Noise may be a nuisance where it is of such a character as to be productive of actual physical discomfort and annoyance to a person of ordinary sensibilities." *Jenner v. Collins*, 52 So. 2d 638, 640 (Miss. 1951).

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Fifth Circuit Affirms that Title Insurance Policy is an Indemnity and not Guaranty

Amzak Capital Management v. Stewart Title Ins. Co. (In re West Feliciana Acquisition, L.L.C.), 744 F. 3d 352 (5th Cir. 2014). Amzak made a loan to West Feliciana Acquisition ("WFA") which was intended to be secured by land in Louisiana on which a paper mill was located. Stewart Title was the title agent. Amzak's mortgage was filed in the land records on September 1, 2009, but no legal description of the land was attached to the mortgage. Amzak discovered the error and informed Stewart Title, which filed an amended mortgage with the legal description on October 19, 2009. The loan went into default because the WFA missed payments. Amzak negotiated with Caoba, the majority owner of WFA, for Caoba to make an additional investment in the project that would be secured by Amzak's mortgage. Caoba discovered the defect in Amzak's mortgage and declined to make the additional investment. WFA's counsel advised WFA that it had a fiduciary duty to its unsecured creditors to file bankruptcy within ninety days after October 19, 2009 and avoid the corrected mortgage as a preference. WFA filed a Chapter 11 petition in Louisiana. Amzak extended debtor-in-possession financing to WFA, and WFA dropped its challenge to Amzak's mortgage. The bankruptcy court ordered a sale of the paper mill, and Amzak was able to credit bid the amount secured by its mortgage. After the sale, the paper mill continued to lose money, and eventually was shut down. Amzak filed an action against Stewart Title, asserting a claim under the title policy based on the failure to attach the legal description to the mortgage, and also alleging that Stewart Title was negligent. Amzak argued that but for the defect in the mortgage, Caoba would have invested in the project, that the title insurance policy insured against loan loss caused by the defective mortgage, that a breach of the title policy occurred at the time of the loan, and that the time of the loan was the proper time to measure Amzak's loss. The federal district court granted summary judgment in favor of Stewart Title against Amzak. On appeal, the Fifth Circuit, in an opinion by Judge Edith Jones, affirmed the district court's summary judgment in favor of Stewart Title. While Amzak's mortgage contained a defect, the title insurance policy did not insure against defects, but only against actual losses. The policy did not guarantee against title defects, but instead provided an indemnity against actual losses arising from title defects. The court found that the loss of Amzak's investment was not the result of the title defect, but the financial losses of the paper mill. Amzak was able to credit bid the full amount of its debt at the bankruptcy court sale despite the defect in the mortgage, so there was no loss.The court also rejected Amzak's claim of negligence on the basis that Amzak did not prove causation. Too many variables existed to be able to determine whether the lost investment by Caoba would have made any difference to Amzak's loss.

Note 1: Amzak argued that under a Seventh Circuit case applying Illinois law, *Citicorp Savings of Illinois v. Stewart Title Guaranty Co.*, 840 F. 2d 526 (7th Cir. 1988), the loss was determined at the time of that the loan was made, since that is what the parties intended at the time the policy was issued. The Fifth Circuit in *Amzak* declined to follow the Seventh Circuit case, noting that the First and Eighth Circuit Courts of Appeal also had declined to follow the Seventh Circuit case.

Note 2: This case is not earth-shattering, but instead is a welcome (to the editor) affirmation of the customary interpretation of the title insurance policy in real estate circles. Given the creative interpretations of policy language that are often offered by claimants, and the existence of some cases out there that are recognized to be outside of the mainstream, such as the *Citicorp* case from the Seventh Circuit discussed above, periodic holdings of basic principles—such as that the title insurance policy is an indemnity against loss and not a guaranty against defects—have great value.

GENERAL