

**NEWSLETTER OF THE REAL PROPERTY SECTION
OF THE MISSISSIPPI BAR**

APRIL 2018

2017-2018 REAL PROPERTY SECTION OFFICERS

Chair	Lane Greenlee
Vice-Chair	Charles Greer
Secretary/Treasurer	Kenneth Farmer
Past Chair	Eric Sappenfield
Members at Large	Andrew Marion
	Barry Bridgforth
	Robert Bass

NEW LEGISLATION

Leases

SB 2473 makes landlord-friendly changes to the Residential Landlord Tenant Act in Section 89-8-1 *et seq.* of the Mississippi Code, and to the statutes addressing eviction of tenants in Sections 89-7-1 *et seq.* Changes to the eviction statutes include protecting the landlord's rights to collect late fees as well as rent; permitting the landlord to evict for any event for which the lease provides eviction as a remedy, rather than only for holding over or failure to pay rent; and adding that notice of default may be sent by email or text if the parties have agreed in writing to these methods of notice. Changes also have been made to speed up the eviction proceeding by limiting adjournments of the hearing and requiring the court to act within a certain number of days. Changes to the Residential Landlord Tenant Act include adding late fees to the definition of rent, permitting notice to the tenant by email or text, and permitting termination of the lease in fourteen days rather than thirty days. Also, any judge "presiding over a hearing in which a landlord seeks to remove a tenant for nonpayment of rent shall abide by the provisions of the rental agreement that was signed by the landlord and the defaulting tenant." So if the landlord is seeking to remove a tenant for reason other than nonpayment of rent, the judge does not have to abide by the provisions of the lease? SB 2473 becomes effective on July 1, 2018.

Emotional Support Animals

HB 944 amends the Mississippi statutes addressing support dogs, Miss. Code Ann. § 43-6-153 and Section 43-6-135. Under current Mississippi law, a person who is blind, mobility impaired or hearing impaired is entitled to bring a dog “or other animal specifically trained as a guide, leader or listener” into any place where the public in general is invited. HB 944 amends current law to apply to “support animals”, provides that a support animal must be a dog or miniature horse, and provides a list of tasks that the animal can do to qualify as a support animal under the statute. HB 944 also broadens the category of people who can use a support animal to include armed services veterans with post-traumatic stress disorder. Mississippi laws regarding support animals are broader than similar federal laws in that Mississippi law provides access to public places to trainers of support animals, and gives children with disabilities the right to bring a support animal to school. HB 944 becomes effective July 1, 2018.

Mobile Homes

There have been many attempts over the years to try to fix conflicting laws regarding mobile homes (aka manufactured housing), and finally one of them passed. HB 827, drafted and introduced by Greg Snowden, former chair of the Real Property Section, makes many changes to the laws affecting the licensing and taxation of mobile homes. Under revised Section 63-21-30, if the same person owns both the land and the mobile home, the owner can have the mobile home become part of the real estate by filing with the chancery clerk an affidavit of affixation that states that the axles have been removed and the mobile home has been permanently attached to utilities, an application to retire the certificate of title that the clerk will record and then forward to the Department of Revenue, and other information. Once this has been done, the mobile home shall be deemed to be part of the real estate to which it is affixed for all purposes. The mobile home can only be conveyed by deed and no separate security interest can be created in the mobile home. If owner later wants to remove the mobile home, he has to file an affidavit of severance. If the mobile home is destroyed or become uninhabitable, the owner can file an affidavit of destruction. HB 827 includes forms for an affidavit of affixation, affidavit of severance, and affidavit of destruction. The owner alternatively can elect to have the mobile home continue to be considered as personal property but have it treated as real property for ad valorem taxes only under revised Section 27-53-15 by anchoring the mobile home and removing the wheels and axles. Once this is done to the satisfaction of the county tax assessor, the tax assessor files in the land records a certificate that the mobile home has been classified as real property for ad valorem tax purposes only. In this case the mobile home will still be considered personal property for purposes of creating a security interest in the mobile home. HB 827 will become effective on January 1, 2019.

Ad Valorem Taxes

The 2018 Legislature passed several bills that affect ad valorem taxation of real property. HB 693 amends Section 11-51-77 to give a political subdivision the right to appeal from an

assessment for taxes. Currently only “a person aggrieved” by an assessment has the right to appeal. HB 1217 decreases the population requirements for municipalities to grant exemptions from ad valorem taxes in business improvement districts, and authorizes municipalities to grant exemptions in residential renewal districts and residential renovation districts. SB 2479 reduces from \$100 million to \$60 million the amount that a project must total in order to enter into a fee-in-lieu agreement.

Construction Contracts

HB 1306 provides that any provision in a contract for construction of improvements in Mississippi that requires litigation, arbitration or other dispute resolution in another state is void.

Many bills that would have affected real estate practice died in committee. There were the bills that are introduced every year and that die an early death at the first opportunity; for example, bills to abolish adverse possession, cause title to undeveloped minerals to revert to the surface owner, and require actual notice to owners before non-judicial foreclosures. There were other bills that, in the editor’s opinion, are good ideas, but their time apparently has not yet come; for example, bills to authorize public-private partnerships, overhaul the receivership statutes, and give purchasers of residential lots in subdivisions some protections. Finally, there were some bills that were introduced and died but are of interest in terms of identifying gaps in the law. For example, HB 410 would have given school boards the authority to construct new roads and improve existing roads for access to sixteenth-section lands; HB 727 would have required the loan amount and date of maturity on deeds of trust; HB 1176 would have provided owners of commercial property the ability to recover civil damages from persons knowingly gaining access to non-public areas of the property; SB 2065 would have authorized sale of sixteenth-section lands for commercial as well as industrial uses; and SB 2422 would have permitted schools districts to use eminent domain to obtain easements for access to sixteenth-section lands that did not have direct access to a public road.

QUALIFIED OPPORTUNITY ZONES IN MISSISSIPPI

The federal Tax Cut and Jobs Act passed at the end of 2017 permitted states to nominate low-income areas to be designated as Qualified Opportunity Zones. Investments in Qualified Opportunity Zones can enjoy federal tax benefits, including potentially tax-free appreciation of the value of the asset. The Department of the Treasury recently has identified Qualified Opportunity Zones in Mississippi. The list of Qualified Opportunity Zones in Mississippi and other states, and a map showing the location of the zones, are at <https://www.cdfifund.gov/Pages/Opportunity-Zones.aspx>.

RECENT CASES

Contractor's Lien Had Priority Over Construction Deed of Trust

Whitney Bank v. Triangle Construction Co., 2017 WL 4456799 (Miss.Supreme Ct., Oct. 5, 2017)(*en banc*). Knight Properties borrowed money from Hancock Bank to purchase undeveloped land in Harrison County. Hancock subsequently issued a line of credit in 2007 to Knight Properties to finance construction of improvements on the land. Knight Properties had a construction contract with Triangle, a copy of which was provided to the bank. The bank also checked Triangle's contractor's license. Knight Properties conveyed the property to Reunion and Reunion assumed the loan. When Reunion made a request for the first construction draw, the bank's attorney confirmed that no notices of liens had been filed and prepared an affidavit for signature by the owner and the contractor. The affidavit stated that all subcontractors had been paid, that the contractor waived any liens, and that the owner did not have any interest in the contractor. Chad Knight, the president of Reunion, signed the affidavits as both owner and contractor. Apparently a misunderstanding existed between the bank and its attorney about who was the contractor. Part of the proceeds of the first draw, \$966,872, was used to pay off the loan to Hancock that used to purchase the land. Hancock advanced nine draws on the loan through May 2009 for a total of \$1,704,660. Each time the bank's attorney checked for recorded notices of liens and obtained the same affidavit, each of which was signed by Chad Knight on behalf of Reunion as both owner and contractor. Before the last draw, a Hancock employee inspected the site, found that Triangle had pulled off the project, and that no work had been done. The bank nevertheless made the last draw. Triangle filed a notice of construction lien in the amount of \$214,314 in December 2009. Hancock then filed for a judicial foreclosure and sold the property to a third party at the sale for \$800,000. Triangle filed a counterclaim in the judicial foreclosure for \$214,314 and claimed that its lien had priority to the proceeds of sale over the interest of the bank. Under case law that governed at the time, the construction lender's deed of trust had priority over the contractor's lien only to the extent that (a) the loan proceeds actually went into construction, or (b) the construction lender used reasonable diligence in disbursing the construction loan. Hancock argued that it was entitled to priority over the contractor's lien because its initial draw went to pay the loan to acquire the land, which as part of the construction. Hancock also argued that it used reasonable diligence by checking the land records for recorded liens and by obtaining affidavits prior to each draw. The Chancery Court of Harrison County held that the first disbursement of the loan to pay off the prior loan to acquire the land did not go into "construction," and thus did not have priority over Triangle's construction lien. The Chancery Court also held that the bank did not use reasonable diligence in disbursing the construction proceeds. On appeal, the Mississippi Supreme Court, in an opinion by Justice King, affirmed. The Mississippi Supreme Court's opinions on whether loan proceeds used to purchase the raw land should have priority over construction liens go both ways, according to the court. Because of this, the court determined not to adopt a bright-line rule about whether loans to purchase the land would have priority over liens of contractors. "We find that the better rule is to allow a chancery court to examine the facts and equities of each case and determine whether purchase money for the land can be claimed as a cost of construction that fairly prioritizes a construction lender's line over those of materialmen." In this case, the court did not find any reversible error or abuse of discretion by the chancellor, and therefore affirmed the chancellor's

finding that Hancock's deed of trust did not have priority over Triangle's contractor's lien as to the money that Hancock advanced to purchase the land. On the question of whether the bank used reasonable diligence in disbursing the proceeds of the construction loan, the Mississippi Supreme Court found that, while Hancock did check for recorded liens and get affidavits, Hancock knew or should have known that materialmen and contractors were not being paid. The affidavits that the bank's attorney obtained were "suspect" because Chad Knight signed as both owner and contractor, while also stating that the owner had no interest in the contractor. Also, Hancock knew through its employee's inspection and report that Triangle had abandoned the project and that work was not proceeding. The Supreme Court found that the chancellor did not abuse his discretion in finding that the bank did not exercise reasonable diligence in disbursing the construction loan. The Supreme Court therefore affirmed the holding of the chancellor. Justice Chamberlin, joined by Justice Maxwell, dissented.

Note 1: This case has not been published yet, but the Mississippi Supreme Court heard the case *en banc* and denied rehearing on February 8, 2018.

Note 2: The construction lien laws were amended effective April 11, 2014 to, among other things, give subcontractors liens and enhance the protections of construction lenders. Miss. Code Ann. Sections 85-7-401 to -433. This case was decided under the law that existed prior to April 11, 2014. Under the new law, Hancock would have prevailed. The new law provides that a construction lien has priority from the date of filing of the lien, and that a construction lender's deed of trust has priority over any subsequently filed construction lien. Miss. Code Ann. Section 87-5-405(2)(b). In addition, the new law provides that the priority of a construction deed of trust includes the cost of the acquisition of the land. *Id.* Section 87-5-405(2)(c).

Note 3: While the new lien law became effective on April 11, 2014, at what point in the life of a construction lien dispute does the new law control-when the lender's deed of trust is filed, when the contractor's notice of lien is filed, when the bank files a lawsuit to foreclose? According to the Mississippi Supreme Court in the *Whitney* case, in footnote 7 of its opinion, the new law did not apply because it was not in effect at the time that Triangle filed its notice of lien, which was December 2009. Assuming this is correct, then as far as the effect of this case going forward, the case's holding should be limited to similar cases in which the notice of construction lien was filed before April 11, 2014. Surely this is a small number of cases, if any.

Note 4: What about the fact that Triangle waited until seven months after the bank had made the last draw to file its notice of lien? The consequence of this delay in this case was...a gentle admonishment from the Mississippi Supreme Court. According to the Mississippi Supreme Court, in footnote 8 of its opinion, it would have been "more prudent" for Triangle to file its notice of lien earlier, but the failure to file earlier did not change the fact that Hancock had knowledge that Triangle may not have been paid, and thus the contractor nevertheless prevailed.

Note 5: The court's holding that whether loan proceeds used to acquire the undeveloped land are entitled to priority over liens of contractors should be determined by the chancellor as a matter of the equities of each case leaves construction lenders in a bad place. Even a lender who followed the old lien law scrupulously could lose its priority to a contractor if a chancery court later second-

guessed the lender and in hindsight found the equities favored the contractor. This is a tough rule for lenders because the Mississippi Supreme Court also stated in this case the common-law principle that the equities usually favor the contractor. This rule reminds the editor of the rule that the lender must prove that it is equitably entitled to a deficiency following foreclosure. It is this kind of uncertainty in the law, among other things, that motivated lenders to support the new lien law.

Note 6: In his dissent, Justice Chamberlin reviewed the cases relied upon by the majority, and concluded that the cases supported the bank's position that the loan proceeds used to acquire the land should be considered to be a part of the project and entitled to priority over a contractor's lien. Justice Maxwell joined this dissent. On the point of whether the cost of the land is part of the project for purposes of priority of liens, the editor's reading of the applicable cases is consistent with Justice Chamberlin's reading.

Note 7: The Supreme Court stated that "Hancock using a "generic 'line of credit'" to pay itself the balance of the original loan" made the land loan look as if it was not part of the construction. The editor reads this statement to mean that if Hancock had characterized the line of credit as a construction loan, or somehow otherwise tied it to construction, rather than as a "generic line of credit", then the payment of the loan to buy the land would have looked more like part of the construction. This sounds like a good take-away for drafters of construction loan documents.

Note 8: Section 89-1-45 of the Mississippi Code provides that every mortgage given to secure the payment of the purchase money of the land shall be entitled to priority over all other judgments and other debts of the owner. There may be some simple answer to this question, but why didn't this statute provide a basis holding that Hancock was entitled to priority as to the loan proceeds used to purchase the land?

Deed of Trust With Name of Beneficiary Left Blank
Was Valid, Does Not Provide Constructive Notice,
But May Provide Actual Notice

Borries v. Goshen Mortgage, 219 So. 3d 593 (Miss. Ct. App. 2017). Michael and Mary Ann Rogers owned land in Jackson County. In June 2005 they executed a deed of trust to Coastal Mortgage, which was filed. In August they executed a second deed of trust to secure a loan from Borries, but the deed of trust did not identify the beneficiary of the deed of trust. Nevertheless, the chancery clerk recorded the Borries deed of trust. In October 2005 the Rogers executed a third deed of trust to the SBA, which was recorded. In 2007 the Rogers refinanced with First Choice Mortgage. The attorney who closed the loan for First Choice ordered a title search. The title search showed the first deed of trust to Coastal and the third deed of trust to SBA, but not the Borries deed of trust. At the closing of the refinancing, First Choice paid off the loans to Coastal and the SBA only. First Choice then assigned the loan and deed of trust to Goshen Mortgage. In 2008, Borries re-recorded his deed of trust with his name added as the beneficiary. Borries then foreclosed on his deed of trust, bought the land at the foreclosure sale, and executed a deed of trust to First Federal. Goshen brought an action in the Chancery Court of Jackson County against Borries and First Federal and

requested a declaratory judgment that its deed of trust was a first-priority lien on the property. Goshen argued that the Borries deed of trust was void when it was filed because of the lack of a beneficiary; that under Miss. Code Ann. Section 89-5-37, the deed of trust was not entitled to be recorded and could not provide constructive notice; and that there was no actual notice by Goshen of the Borries deed of trust. Section 89-5-37 provides that a chancery clerk will not record a deed of trust that does not disclose the name of the beneficiary, and that “if such an instrument is recorded it will not impart notice to anyone.” In support of its claim that no actual notice existed, Goshen submitted an affidavit from the closing attorney in which he stated that he ordered a title search and the title search did not show the Borries deed of trust. A copy of the title search was attached to the affidavit. Borries and First Federal did not submit any evidence that Goshen or First Choice had actual knowledge of the existence of the Borries deed of trust. The chancellor granted Goshen’s motion for summary judgment. On appeal by Borries and First Federal, the Mississippi Court of Appeals, in an opinion by Justice Barnes, affirmed. Borries and First Federal argued that the evidence submitted by Goshen of the absence of actual notice was insufficient for summary judgment. Goshen argued that the failure to designate a beneficiary made the Borries deed of trust void. The Court of Appeals found that, despite the error in designating the beneficiary, the Borries deed of trust was valid as between the parties and not void. The deed of trust identified the trustee and the secured note by date and included a payment schedule, so, according to the Court of Appeals, the beneficiary could have been ascertained with reasonable certainty. While Section 89-5-37 provides that a deed of trust that does not identify the beneficiary does not provide notice, the court interpreted this to mean constructive notice only, and not actual notice. In other words, the priority of a creditor who had actual notice of the existence of an existing deed of trust that did not identify the beneficiary would be subordinate to that existing deed of trust. The burden of proof therefore was on Goshen to offer proof of the absence of actual notice, and if Goshen did so, the burden of proof would shift to Borries and First Federal to prove actual notice. The Court of Appeals found that the closing attorney’s affidavit that the title report did not show the Borries deed of trust as an encumbrance on the property was sufficient to shift the burden of proof to Borries and First Federal to prove a genuine material issue of fact. Since Borries and First Federal did not submit any evidence that Goshen or First Choice had actual knowledge of the Borries deed of trust, summary judgment was appropriate.

Note 1: Borries and First Federal did not attempt to argue that the Borries deed of trust, when it was filed without identifying the beneficiary, gave constructive notice. The only issues were whether the deed of trust was valid and whether First Choice, the predecessor in title to Goshen, had actual notice.

Note 2: Why didn’t the title search show the Borries deed of trust? Regardless of who was identified as the grantee of the deed of trust, shouldn’t a search of the land records have shown a deed of trust granted by the owners of the land (the Rogers)? Assume that the search was defective. Should Goshen have been protected if it relied on a defective search?

Note 3: This appears is a case of first impression on the issue of whether Section 89-5-37 applies to actual notice as well as constructive notice. To recap, Section 89-5-37 provides that a deed of trust that does not identify the beneficiary does not give notice. The Court of Appeals in this case

found that Section 89-5-37 only prevents the deed of trust from giving constructive notice. Another creditor who has actual notice of the deed of trust will take subject to the deed of trust.

Note 4: While Goshen eventually prevailed, the Court of Appeals rejected its argument that the Borries deed of trust was void *ab initio* because of the failure to identify the beneficiary. Borries and First Federal relied in part on cases that held that the failure to identify the grantee of a deed made the deed void, and cases from other states involving mortgages, when the mortgagee was not identified. The Court of Appeals found these cases inapplicable because a deed is between two parties, the grantor and grantee, and a mortgage is between two parties, the mortgagor and the mortgagee, but a deed of trust is between three parties, the grantor, the trustee and the beneficiary. In this case the grantor and the trustee were clearly identified, and that was sufficient to make the deed of trust valid between the parties.

This Newsletter is a publication of the Real Property Section of The Mississippi Bar for the benefit of the Section's members. Members are welcomed and encouraged to send their corrections, comments, articles or news to the editor, Rod Clement, by mail to 188 East Capitol Street, Suite 400, Jackson, Mississippi 39201, or by email to rclement@bradley.com. Although an earnest effort has been made to ensure the accuracy of the matters contained herein, no representation or warranty is made that the contents are comprehensive or without error. Summaries of cases or statutes are intended only to bring current issues to the attention of the Section's members for their further study and are not intended to and should not be relied upon by readers as authority for their own or the client's legal matters; rather, readers should review the full text of the cases or statutes referred to herein and make their own conclusions before relying on these cases or statutes in their own matters or in advising clients. All commentary reflects only the personal opinion of the editor (which is subject to change) and does not represent the position of the Real Property Section, The Mississippi Bar or the editor's law firm.