NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR

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PENDING BILLS REGARDING REAL PROPERTY

The following pending bills affecting real property are still alive in the Mississippi Legislature as of March 13, 2023.

HB 280 would create a committee to study the purchase of agricultural lands in Mississippi by foreign governments and require the committee to submit a report to the Legislature by December 1, 2023.

HB 685 would amend Section 81-1-7 to provide that a conveyance to a married couple of property used as their primary residence would create a rebuttable presumption that the property interest is a joint tenancy with right of survivorship unless the deed otherwise specifies. [Editor's note: Since the presumption is limited to married couples, should the conveyance be presumed to create a tenancy by entireties?]

HB 894 would amend Section 17-1-27 of the Mississippi Code to permit local governments to impose administrative and civil penalties (i.e., fines) for violation of zoning ordinances. Section 17-1-27 currently permits only criminal fines of $100 per day.

SB 2164 would amend Section 37-7-473 to allow school districts to sell land for residential and mixed-use development. Section 37-7-473 currently allows school districts to sell land only for industrial development. This bill has been passed by both houses of the Legislature and has been sent to the Governor for his signature.

SB 2392 amends Section 19-5-22 to provide that garbage liens will be recorded in the chancery clerk's office and shall include all information needed for recording and filing. This bill has been passed by both houses of the Legislature and has been sent to the Governor for his signature.

SB 2647 would amend Section 73-35-4.1 and Section 89-1-505 to provide that brokers are not liable to any party for information provided by the seller in a Property Condition Disclosure Statement. SB 2647 also would amend Section 89-1-505 to provide that a seller would not have any liability for an error in a Property Condition Disclosure Statement if the error was not within the personal knowledge of the seller, was based on information provided by public agencies, and the seller exercised ordinary care in providing the information. Finally, SB 2647 would amend Section 89-1-503 to provide that if the seller failed to complete a part of the Property Condition Disclosure Statement, the purchaser was on notice to make inquiry of the seller about the failure to disclose.

SB 2751 would amend Miss. Code Ann. § 29-3-132 to provide that city and county zoning and land use laws do not prohibit the use by school districts of sixteenth-section lands for education or extracurricular facilities. This bill has been passed by both houses of the Legislature and has been sent to the Governor for his signature.

The following bills made it all the way through the legislative process until they died at the March 8 deadline:

HB 246 would have enacted a new statute providing that a right of first refusal ("ROFR") in real property is extinguished upon the death of the grantee of the option unless (a) the ROFR or a memo of the ROFR is filed in the land records, and (b) the recorded ROFR or memo or ROFR states that the ROFR inures to the benefit of the heirs and assigns of the grantee.

HB 821 would have amended Section 25-34-9 to permit persons who are not residents of Mississippi to be notary publics in Mississippi if their place of employment is in this state.

HB 1155 would have allowed a majority of homeowners in a residential subdivision to file a petition in the chancery court to enact or amend restrictive covenants for the subdivision.

DOES FORECLOSURE OF A DEED OF TRUST EXTINGUISH RESTRICTIVE COVENANTS?

Loblolly Properties LLC v. Le Papillon Homeowner's Ass'n, Miss. Court of Appeals No. 2021-CA-00767, 2022 WL 4478395 (Sept. 27, 2022)(rehearing denied Jan. 31, 2023)(not released for publication yet). In a case of first impression, the Mississippi Court of Appeals has held that the foreclosure of a deed of trust did not extinguish covenants filed subsequent to the deed of trust. The Chattel Group ("Chattel") owned land in Lamar County and subdivided the land into thirty-five lots. In March 2008, Chattel executed a deed of trust covering the lots to First State Bank. In December 2008, Chattel filed restrictive covenants on the land that provided for, among other things, the establishment of a homeowner's association ("HOA") with the right to levy assessments on the lots for the upkeep of the subdivision. The bank did not subordinate its deed of trust to the covenants. In 2009, the bank foreclosed on its deed of trust and purchased the lots at the foreclosure sale. In 2013, the bank brought an action against the HOA regarding the validity of the covenants. An agreed judgment documenting a settlement stated that the covenants were valid and enforceable. The settlement agreement was not recorded. The bank began and continued paying a portion of the assessments to the HOA. In 2018 the bank sold some of the lots to Loblolly Properties. The deed conveying title to Loblolly stated that "this conveyance and the warranty hereof is subject to any and all Covenants and Restrictions of record." Loblolly took the position that the 2009 foreclosure extinguished the covenants, and that Loblolly did not have any obligation to pay dues to the HOA. The HOA filed a notice of lien against Loblolly's lots. Loblolly filed an action in the Lamar County Chancery Court against the HOA to set aside the notice of lien and for slander of title and seeking a declaratory judgment that the covenants did not bind Loblolly's lots. The Chancellor held that, while the foreclosure may have extinguished the covenants, the bank's agreement to pay the assessments and the exception in the bank's deed to Loblolly for "any and all Covenants and Restrictions of record" made the covenants enforceable against Loblolly. The Chancery Court therefore granted the HOA's motion for summary judgment.

On appeal the Mississippi Court of Appeals, in a 6-4 decision by Justice McDonald, affirmed the Chancery Court's judgment. Justice McDonald wrote that the reference in the deed to "any and all Covenants and Restrictions of record" imposed an obligation of inquiry notice on Loblolly to make inquiry about what covenants may exist, and that if Loblolly had made inquiry, it would have learned about the unrecorded settlement agreement in which the bank agreed to pay assessments. The majority opinion went further and held that the foreclosure did not extinguish the covenants. Justice McDonald wrote that the covenants ran with the land and therefore survived the foreclosure. Justice McDonald further wrote that, under prior Mississippi Supreme Court cases in other contexts such as tax sales, a foreclosure of a deed of trust would only extinguish subsequently filed covenants if the covenants impaired the value of the property. "[I]t appears that the enforcement of covenants after foreclosure is determined not just by the timing of their creation, but by the nature of their creation." Since the covenants filed by Chattel did not impair the value of the property, the bank's foreclosure did not extinguish the covenants. "Because the covenants in this case were covenants that ran with the land and benefitted the property owners, they survived First State's foreclosure."

Justice Wilson, in a dissent joined by three justices, wrote that this case should be controlled by the application of the general priority rule in Miss. Code Ann. § 89-5-5:

> This appeal should be decided based on a straightforward application of the rule that a deed of trust has priority over later-recorded encumbrances. [Chattel] granted First State Bank a Deed of Trust *before* [Chattel] recorded a Declaration of Covenants, Conditions and Restrictions…burdening the subject properties. Therefore First State Bank's foreclosure pursuant to the Deed of Trust extinguished the Covenants as they related to the subject properties.

In regard to the majority's finding that a foreclosure only terminates subsequently filed covenants that impair the value of the property, Justice Wilson wrote:

> But courts do not determine the priority of encumbrances based on ad hoc, subjective judgments about whether a particular encumbrance benefits or devalues the property. Rather, priority is established based on the date on which the instruments were recorded. Miss. Code Ann. § 89-5-5.

Note 1: The Court of Appeals usually gets real property cases right, but in this case the editor respectfully thinks that Justice Wilson's dissent is correct on every point. The editor hopes that the Supreme Court, as it has done in other recent real property cases, will adopt Justice Wilson's reasoning if this case is appealed or in a future case.

Note 2: The majority opinion analyzes cases involving tax sales and cases from other states, and quotes from general references, but does not address or cite Mississippi's priority statute, Miss. Code Ann. § 89-5-5, which provides:

> Every conveyance, covenant, agreement, bond, mortgage, and deed of trust shall take effect, as to all creditors and subsequent purchasers for a valuable consideration without notice, only from the time when delivered to the clerk to be recorded; and no conveyance, covenant, agreement, bond, mortgage, or deed of trust which is unrecorded or has not been filed for record, shall take precedence over any similar instrument affecting the same property which may be of record, to the end that with reference to all instruments which may be filed for record under this section, the priority thereof shall be governed by the priority in time of the filing of the several instruments, in the absence of actual notice.

The editor respectfully thinks that the Court of Appeals missed the forest for the trees in this case and that this statute should control.

Note 3: The practice of prudent developers is to have their mortgage lenders subordinate their deeds of trust to the developer's restrictive covenants. This is usually a win-win for the developer and the lender, since from the mortgage lender's perspective restrictive covenants usually enhance the value of their collateral. In this case, the developer (Chattel) did not have First Bank subordinate its deed of trust to the covenants.

Note 4: The finding by the Chancery Court and the majority of the Court of Appeals that the statement in the deed from the bank to Loblolly that "this conveyance and the warranty hereof is subject to any and all Covenants and Restrictions of record" made the covenants enforceable is patently wrong. This language is a standard generic exception in Mississippi to a grantor's warranty of title. Anyone could search the Lamar County land records and find hundreds of deeds with similar exception language. Having this standard exception to the Bank's warranty of title in the deed was not an express acknowledgment by Loblolly that its interest was subject to the particular restrictive covenants filed by Chattel in this case. Moreover, in regard to the finding that the exception to the bank's warranty created inquiry notice of the unrecorded settlement agreement between the bank and the HOA, how does an exception for matters of record give inquiry notice of unrecorded matters?

Note 5: The editor disagrees with Justice Wilson on one point. Justice Wilson would have reversed and remanded the case to the Chancery Court to determine if Loblolly was bound by First Bank's settlement agreement with the HOA to pay the assessments. The editor would have reversed and rendered judgment for Loblolly because the editor, in his humble opinion, thinks that it does not matter what the bank agreed to in its settlement agreement with Chattel. Loblolly did not enter into a contract to pay the assessments. Once extinguished by foreclosure, the editor thinks that the restrictive covenants could not be reinstated as a lien against the land absent a new instrument filed by the owner of the property in the land records. If the 2009 foreclosure extinguished the covenants, Loblolly's acceptance of a deed subject to "any and all Covenants and Restrictions of Record" in 2018 cannot possibly resuscitate covenants that were extinguished by foreclosure nine years earlier. Moreover, the fact that the bank agreed to the validity of the assessments in a settlement document does not settle the legal question of whether the foreclosure extinguished the covenants. There are sound business reasons why the bank may have agreed to pay the assessments that have nothing to do with the merits of the legal question of whether the foreclosure extinguished the covenants. The bank only agreed to pay a discounted amount of the assessments due. It is possible that the bank decided that it was more cost-efficient to negotiate to pay a reduced amount of assessments than to spend a greater amount of money on legal fees litigating the issue, especially if the assessments were needed to maintain the subdivision's common areas, which would benefit the value of the lots owned by the bank.

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