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AG Opinion Reviews

Homesteads and Judgment Liens

By Judon Fambrough

The effect of recorded judgments on title to homestead property continues to perplex the Texas courts as well as lenders and real estate practitioners. Do they cast a lien on the property contrary to Texas homestead laws? Can the party recording the judgment be sued for slander of title if not released?

These questions caught the attention of the Texas attorney general (AG). On November 20, 1995, he addressed them in Opinion No. DM-366.

Before reviewing this opinion, three things must be kept in mind. First, an AG opinion binds only state agencies. Neither courts nor private citizens are bound by the conclusions. Second, a slander of title is a legal procedure for recovering damages when a lienholder refuses to release a claim that falsely and maliciously disparages title. (See "Legal Principles, Procedures Affecting Title," *Tierra Grande*, Spring 1995.)

Finally, the case of *Tarrant Bank v. Miller (Tarrant Bank)* plays a central role in the opinion. The ruling held the bank liable for slander of title for refusing to release a recorded judgment in Brown County. For that reason, the pending sale of the plaintiff's home failed.

On the first issue, the AG concluded that a duly recorded abstract of a valid judgment **may**, depending on the status of the property when the lien is recorded, cast a cloud on the

judgment debtor's homestead. This conclusion was reached after examining the Texas Constitution, statutory law and court cases.

The Texas Constitution protects the owner's homestead from forced sales except in three instances. The exceptions include a foreclosure on a lien created to purchase the property, foreclosure on a property tax lien and foreclosure on a home-improvement lien. (Foreclosure under a federal income tax lien also is permitted.)

Judgment liens are created by statute. A judgment issued by a court, properly abstracted and recorded, constitutes a lien on the defendant's real property located in that county. The lien extends to any real property subsequently acquired by the defendant.

The use of the property when the judgment is recorded is critical. A judgment that attaches to property **before** it becomes a

Likewise, a judgment lien recorded **after** it is no longer used as a homestead is valid and enforceable. The homestead character is no longer an impediment.

But what about judgments recorded while the property is being used as a homestead? The AG reviewed three Texas cases establishing that the judgment liens are valid (not void) but unenforceable until the homestead status is removed.

Quoting from the cases, the AG opinion states, "A judgment, though duly (recorded and) abstracted, never fixes a lien on the homestead so long as it remains a homestead." A judgment lien perfected (recorded and abstracted) while the property is used as a homestead is not void. When the homestead character is removed, "the lien arises as if the record (day of recording) were made on the day of abandonment of homestead."

How do these valid, unenforceable judgment liens affect a sale of the homestead property? According to the AG's review of Texas cases, the judgment liens have no effect on subsequent transfers.

If a judgment debtor transfers the homestead property, the transferee (buyer) gets clear title against any creditors whose judgment liens were perfected (recorded and abstracted) while the property was impressed with the homestead interest. However, the judgment lienholder may seize the proceeds if not reinvested in another homestead within six months.

On the second issue, the AG concluded that a duly recorded abstract of a valid judgment does

A valid judgment
may cast a cloud
on the homestead.

homestead is valid and enforceable. The subsequent homestead use of the property does not invalidate nor toll (suspend collection of) the lien. The lienholder may foreclose even though the property is being used as a homestead at the time of sale. Such a controversy arose when an owner failed to pay the assessment fee to the homeowners association.

not subject the lienholder to damages for slander of title. This conclusion contradicts the holding in *Tarrant Bank* cited earlier.

According to the AG opinion, *Tarrant Bank* can not be interpreted as holding that creditors are obligated to release a judgment lien on demand.

Two reasons are given for this conclusion. First, the court entered the judgment without evidentiary support. The bank, during discovery, refused to respond to the plaintiff's request for admissions, refused to produce documents and failed to answer interrogations. The trial court sanctioned the bank by entering a default judgment in the plaintiff's favor.

Second, in a slander-of-title case, the plaintiff must plead and prove the disputed lien falsely and maliciously disparages the plaintiff's title, causing the plaintiff to incur damages. The

court in *Tarrant Bank* never addressed the issue of falsity.

Assuming a valid judgment, the AG concludes that a trial court would not hold a mere refusal to release a potential judgment lien against homestead property actionable for slander of title.

Perhaps this conclusion is supported, in part, by the recent case of *Frappier v. Texas Commerce Bank (TCB)*. In this case, Frappier, acting as trustee under a deed of trust, foreclosed on the Allens' homestead in Houston. The Allens' default on the mortgage lien prompted the action. The property brought \$15,000 or \$6,300 more than the mortgage. The controversy arose over entitlement to the excess.

In 1986, TCB abstracted and recorded a judgment in Harris County against the Allens for \$2,500. In 1989, the IRS filed a tax lien against the Allens in Harris

County for \$10,000 unpaid income taxes. TCB contends, because it recorded first, that it has priority and is entitled to the excess.

The IRS counters by citing *Hoffman v. Love*: "[A] judgment, though duly abstracted, never fixes a lien on the homestead so long as it remains a homestead." In contrast, a federal tax lien is enforceable immediately against property that is being used as homestead (26 U.S.C., Section 6321).

The court agreed with the IRS. The issue is not which entity recorded first but which lien is first enforceable.

For specific advice, consult an attorney. ☐

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