THE NC CONNECTION

AN INVESTORS TITLE COMPANY PUBLICATION

Just a Few Things...

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Click here for Ryan's bio.

Investors Title Company
INNOVATIVE BY INSTINCT

It is hard to believe that the end of 2012 is right around the corner. It has certainly been a better year for the real estate industry here in North Carolina. Following the election in November and provided the world survives the end of the Mayan long calendar on December 21st, I expect a hectic year-end. In the interest of time, I only want to note a couple of quick things that are on my mind as we prepare for the year-end crush.

"...the right to take an elective share is subject to a purchase money deed of trust..."

Purchase Money Financing

Nine years ago, I authored an article entitled, "Get your Priorities Straight: A Look at Purchase Money Financing." The premise of the article was that a purchase money deed of trust (seller financing or third-party financing) has priority over any other interest in real property which is created by or claimed through the buyer. I opined that this would include a non-titled spouses' marital interest that arises under NC General Statute 29-30. Until earlier this year, I had not given that position another thought. That all changed this summer when the NC Administrative Office of the Clerks (AOC) let it be known that it was the opinion of that office that the elective share of the non-titled spouse potentially had priority over third-party purchase money financing. Specifically, the AOC's position seems to be that, absent a statute or case directly on point, the clerks would be advised that a non-titled spouse who did not join in the purchase money deed of trust to a third-party lender could take their elective share free of the interest of that lender. Is this opinion correct? I don't think so. Is this opinion wrong? I can't unequivocally say that either. Does current case law support one view or another? I think the answer is certainly "yes." In my opinion, current NC case law supports the position that the right to take an elective share is subject to a purchase money deed of trust in favor of a third-party lender.

In the midst of these varying opinions, what is a real estate practitioner to do? I would recommend you proceed as follows:

1. Require the non-titled spouse to sign.

(Continued on page 2)

The New Mechanics' Lien Law in NC On-Demand Course—Details on Page 4

In This Issue:

Just a Few Things... continued from page 1

2. Disclose the potential issue to the lender.

Call the title company to see if there are any available alternatives for dealing with the non-titled spouse in the event they are not available or are unwilling to sign.

In 2013, I hope that I can update you on a statutory fix for this issue put in place during the long session of the NC legislature. Another possibility is for case law to specifically address the issue. As a title insurer, I would prefer the statutory fix. In any event -- stay tuned for updates.

General Title Exceptions

A second article that I previously authored is also in need of an update. In 2005 I wrote "A Cautionary Tale for the Residential Real Estate Practitioner." That article was republished again in 2011. The article described a hypothetical set of facts in which the certifying attorney performed a shortened (but allowable for purposes of issuance of a title policy) search for a rush closing. After closing, a utility easement was discovered on the property in question and a subsequent review of the title policy revealed an exception for "easements and rights of way of record." As it turned out, while the search was allowable by the issuer of the title policy, when such a search is performed, general exceptions for easements, rights of way, and restrictive covenants are included on the policy issued. The buyer had no coverage under their policy for the issue, and the attorney found themselves in hot water. The moral of the story was to be wary of shortened searches even if they are allowed by the title insurer. Make sure the underwriting requirements do not include the use of general exceptions for the owner. If they do, make sure your client understands the ramifications and is able to make an informed decision on whether to delay the rush closing and have a longer search performed.

More recently, a different but related issue has come across my desk. This involves a set of facts where a title search is performed; an opinion of title is given for the purpose of the issuance a title commitment; and that title opinion contains an exception for "easements and rights of way of record" or "restrictions of record." Under my set of facts, the title has been searched and specific easements have been found and reported. Where did that general exception on the opinion come from, and what is the title insurer to do with it? Under North Carolina law, in order to issue a title insurance policy NCGS 58-26-1 requires "the opinion of an attorney, licensed to practice law in North Carolina and not an employee or agent of the company, who has conducted or caused to be conducted under the attorney's direct supervision a reasonable examination of the title." We could debate all day whether a general exception for easements, rights of way, or restrictions of record has any place in a title opinion based on a reasonable search; however, there is no debating that closing attorneys in North Carolina are fighting to maintain their place in the closing process against a host of outside influences including lay settlement shops and overreaching federal regulations. In the face of these influences, the real estate bar is always looking for ways to show that they are a valuable part of the process and a staunch advocate for their client's best interest. Providing a title opinion with a general exception for easements and rights of way of record that results in the issuance of a title policy with the same exception negates much of the hard work that was done on behalf of the client. Leave the general exceptions to the lay settlement providers. If you have performed a reasonable examination of the title, don't include the general exception as a matter of course.

Is there Gas in the Mower?

I would estimate that nearly 25 percent of my phone calls and emails originate from or have some connection to a foreclosure. In many cases, the property is now being sold out of REO, and I am discussing the effect of the foreclosure on junior liens such as deeds of trust or judgments. Recently though, I have seen an uptick in calls relating to another kind of lien. These calls are about a lien that, in most cases, originates after completion of the foreclosure, the grass-cutting lien.

Pursuant to NCGS 160A-193, entitled Abatement of Public Health Nuisances, a city has the ability to remedy matters that are dangerous or prejudicial to the public health or public safety in an area within the city limits or within one mile of the city limits. The owner of the property at the time is charged with payment of the expense of removal. If not paid, the expense becomes a lien on the land where the nuisance occurred. The lien on the land where the nuisance occurred shall have the same priority as and be collected like unpaid ad valorem taxes. In addition, pursuant to subsection (b) of NCGS 160A-193, the expense of the action is a lien on ***any other real property owned by the person in default within the city limits or within one mile of the city limits, except for the person's primary residence.*** A lien established pursuant to subsection (b) is inferior to all prior liens and shall be collected as a money judgment. So, with respect to the property that is the subject of the nuisance, the lien is treated like unpaid taxes but, with respect to all other properties within the city limits or within a mile of the city limits, it is treated like a judgment.

Bank-owned properties are ripe for these liens as not only does the bank own numerous properties, but the properties are unoccupied. When the city remedies the nuisance, the costs associated with the removal become a

(Continued on page 3)

Just a Few Things... continued from page 2

lien under 160A-193 on the subject property and other bank-owned property located both within the city and within one mile of the city limits. My understanding is that enforcement of these liens may vary by locality, but the fact always remains that they are liens on the title no matter the approach to enforcement. If you find a lien filed under 160A-193, and the bank owner is refusing to pay, you should contact the title insurer to discuss available options.

Happy holidays to everyone. I wish you a safe and prosperous 2013.

NC FUN FACTS

Airlie Gardens, the pride of Wilmington, is a destination spot for garden lovers throughout the world. Airlie's holiday light show, Enchanted Airlie, begins the Friday after Thanksgiving and runs select days until the Saturday before Christmas. Enjoy beautiful holiday flowers, festive lights, live musical entertainment, and a LEGO display!

Excerpt and photo courtesy of www.airliegardens.org

Think Your Client has a Valid Easement? You Don't Know Unless You Have Searched the Servient Property.

by Mike Kelley, Esq.

In 2003, Jack grants an easement to his neighbor Claire. It is properly recorded and Claire begins using the easement daily. In 2005, Claire sells her property, with the recorded easement, to Charlotte. Soon thereafter, Charlotte attempts to use her easement but finds that it has been blocked. Charlotte goes next door to talk to her new neighbor, Jacob. Jacob has recently bought the property out of foreclosure and tells Charlotte he knows nothing of her easement and he does not intend to let her or anybody else cross his property for any purpose. A search of the public records indicates that Jacob is correct – the easement is gone. Why?

The easement has been wiped out because, in 2001, Jack granted a deed of trust to Frank's Bank. When Jack fell into financial difficulty, the bank foreclosed, and then sold the property to Jacob. Because Jack never obtained a release for the easement from the bank, the bank had superior title and foreclosed not just on Jack's property, but on Charlotte's easement interest as well.

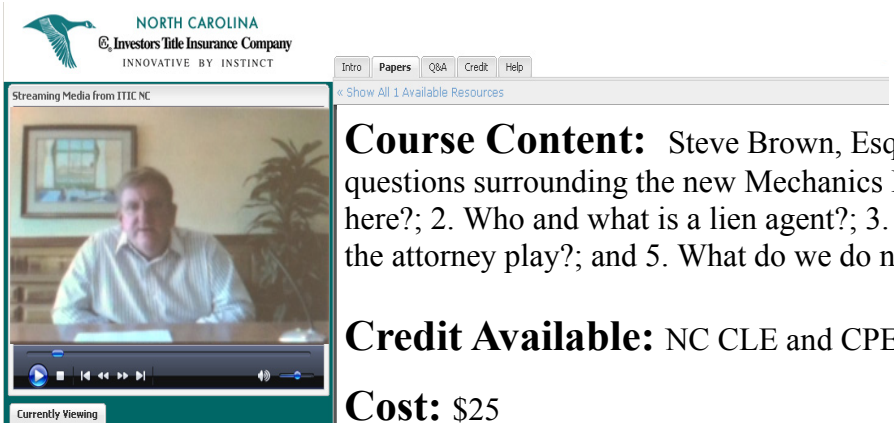
Charlotte, of course, now goes to her attorney to find out what happened and discovers that the servient estate was not searched prior to her closing. If the search had been conducted, the attorney would have discovered the foreclosure and recognized that the easement had been extinguished. Or, had the sale of Claire's property occurred prior to Jack's foreclosure, an attorney searching the servient estate would have discovered the senior deed of trust. They then would have found that the bank had not released their interest in the easement and would either have obtained the release or advised Charlotte of the danger that the easement could be wiped out by foreclosure.

Now consider this – same facts as above, but there is no lender and no foreclosure. Charlotte has recently bought Claire's property and attempts to use her easement for access across the neighboring property. The easement is blocked. Charlotte goes next door to speak with Jack and the door is opened by Jacob. Jacob tells Charlotte that he owns this property and she has no right to cross. Charlotte shows Jacob a copy of her recorded easement and learns, to her great distress, that Jack, who has, sadly, recently died, had a life estate interest in the property. Because it is only possible to grant an interest in what you have, the easement was only valid during Jack's life. Jacob, the remainderman, owns the property free and clear of any easement granted by Jack.

In both of the above cases, the problems could have been avoided by a search of the servient estate. If you are conducting a closing for a client and have only searched the dominant parcel, your client might have a valid easement – or they might not.

The New Mechanics' Lien Law in NC—On-Demand Course Available

Click here to access On-Demand content.



Course Content: Steve Brown, Esq. discusses some of the relevant questions surrounding the new Mechanics Lien Law in NC: 1. How did we get here?; 2. Who and what is a lien agent?; 3. How will it work?; 4. What role will the attorney play?; and 5. What do we do now?

Credit Available: NC CLE and CPE

Cost: $25

Investors Trust Company

Bigger v. Arnold

The North Carolina Court of Appeals has ruled that an executor lacked standing in a case that divided the decedent's assets between the surviving spouse and a named charity. The ruling came after Roy Arnold's death in 2007. Arnold left a Will that distributed most of his probate assets to a revocable trust, under which Arnold's art collection would be distributed to Johnson C. Smith University (JCSU). Many of Arnold's other assets were held in a joint brokerage account that passed to his surviving wife, Karen. In June 2009, Arnold's executor filed suit seeking a declaratory judgment that the brokerage account was not properly created. The suit named JCSU as a party to the litigation. The trial court ruled against the executor, finding that assets in the brokerage account should pass to the surviving co-owner, Karen. The executor appealed, but the appellate court dismissed, specifically ruling, "An executor cannot appeal from an order that only affects the distribution rights of the beneficiaries." In this case, the Court said, the lower court ruled that the brokerage account had been "legally created," and the assets it held therefore passed to Karen at Arnold's death. That ruling, the appellate court said, meant that the only parties that had any interest in Arnold's property thereafter were Karen and JCSU. Since distributing the brokerage assets to Karen would only prejudice the interests of JCSU, it was the only party who could appeal—the executor, having no interest in the outcome, also had no standing.

--*Bigger v. Arnold,* No. COA11-1604, N.C. Ct. App. 7/17/12

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Held Oct. 26 - 27, 2012 - Sheraton Chapel Hill Hotel

"...an event that any attorney who practices real estate cannot afford to miss!"

~Wells King, King Law Group, PLLC

Steve Brown and Ben Kuhn, Opening Remarks

Speakers

From L-R: Elizabeth Voltz, Holly Simmons, Daniel Pate, Bryant Webster, Alfred Adams, David Woods, Drew Foley, Steve Brown, Tom Steele, Troy Crawford, Daniel Taylor, John-Paul Schick, Robynn Moraites

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The Investors Title Team (from left to right): Lisa Gallimore, Rhonda Debruhl, Tracy Weekman, Beth Adams, Carol Faucette, Judy Medford, Angie Fortune, Marshall Beach, Lou Ann Craven, Kim Dean, Kathy Baum, Craig Burris, Jackie Thomas

We look forward to seeing you in 2013 for the Fall Gathering's 10th anniversary!