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Legal Principles, Procedures Affecting Title

By Judon Fambrough

Mention lawsuits to real estate agents and they are likely to think of the Texas Deceptive Trade Practices Act (DTPA). While the DTPA pervades the field, other types of legal procedures also affect land titles and transactions.

This discussion covers the effect of judgment liens on titles to homesteads and three legal procedures for clearing title to land.

Homesteads and Judgment Liens

Texas homestead laws protect a person's residence from general (unsecured) creditors. Secured liens can be placed on the homestead in three situations: for the original purchase money, for improvements and for taxes.

General creditors acquire liens on nonexempt property by securing a judgment against the debtor. The judgment is then recorded (abstracted) in the county or counties where the debtor owns property, automatically casting a lien on the debtor's nonexempt assets. If the judgment is not paid, the nonexempt assets can be seized (levied on or attached) and sold by the sheriff on behalf of the creditor.

But what happens when the judgment lien is recorded in the county of the debtor's homestead? Is the lien latent, attaching to the homestead property when the residence is sold? If so, the judgment lien becomes a valid lien upon sale. Either the buyer or seller must satisfy the lien as a condition for clear title.

The general rule in Texas is that no enforceable lien can be created against the homestead by recording a judgment, nor can the existence of the recorded judgment lien prevent a purchaser from taking title free of the lien. Only when the debtor continues to own the property, but no longer uses it as a homestead, does the judgment lien become valid.

Two 1992 appellate case decisions appear to refine the general rule. In the first case, the facts are complex, but they are simplified here.

A lender loaned money to a private individual. The borrower defaulted. The lender obtained and recorded a judgment in the county where the borrower's homestead was located.

The borrower subsequently sold the homestead to the defendant on May 15, 1985. The defendant-buyer did not record the deed until nearly six months later on October 29, 1985. In the meantime, the plaintiff-lender levied and

sold the property because it remained in the borrower's name but was no longer used as a homestead.

The plaintiff-lender then sued the defendant-buyer in a **trespass-to-try title** suit (discussed later) to determine who owned the property. The basic issue was whether the judgment lien attached to the property during the five-and-one-half month interim. If it did, the lien (sale) was valid, and the plaintiff had title.

The trial court found in favor of the defendant-buyer. The judgment lien never attached during the intervening months. The lien or sale was null and void. The plaintiff-lender appealed.

The appellate case reversed the trial court. Texas law allows a subsequent purchaser to claim homestead protection against a prior judgment lienholder. Nevertheless, a prior judgment lienholder's interest attaches if there is a gap between the time of sale and the recording of the subsequent purchaser's interest.

The Texas Property Code states that an unrecorded interest "is void as to a creditor . . . unless the instrument has been acknowledged, sworn to, or proved and

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filed for record as required by law" (Section 13.01). A judgment creditor's lien takes precedence over a prior unrecorded deed holder so long as the lienholder levies on the property before receiving notice of the outstanding unrecorded deed. *Intertex, Inc. v. Kneisley*, 837 S.W. 2d 136.

In the second case, a bank secured a judgment against the Millers for a delinquent car loan. The judgment lien was recorded in Brown County where the Millers resided. When the Millers attempted to sell their home, the title company refused to issue an owner's title policy without a partial release of the bank's judgment lien. The bank refused, arguing a release was unnecessary. A recorded judgment lien does not affect the debtor's title to homestead property.

The home sale failed because of the nonrelease. The Millers sued the bank for **slander of title** (also discussed later).

The trial court held that the lien should have been released and entered a judgment for \$28,086.50 for the Millers. The bank appealed.

The appellate court affirmed the trial court, stating, "Because the lien is unenforceable as to the homestead does not mean that the lien does not cast a cloud on title. To so hold would mean that enforceable claims could create a cloud."

The court did not say the lien was enforceable. The lien simply clouded title to the degree that the transaction failed and damaged the plaintiff. *Tarrant Bank v. Miller*, 833 S.W. 2d 666.

Slander of Title

The *Miller* case introduced a little-known legal procedure called *slander of title*. Generally, the terms *libel* and *slander* are familiar. Libel is defamation caused by publishing printed material. Slander is defamation caused by oral statements. But can title to property be defamed?

No Texas statutes address the issue. All Texas law is generated by appellate case decisions. Here is a brief synopsis.

The term *slander of title* is a misnomer. Legally, it means an "action for damages caused by cloud on title." Rarely does someone write or make disparaging remarks about another's title to land, as the name implies.

Perhaps the case of *Pampell Interests, Inc. v. Wille*, 797 S.W. 2d 392, summarizes it best. Two remedies exist for a cloud on title. The person can sue either in *equity to quiet title*, (discussed later), from which no damages are sought, or, alternatively, sue in torts for *slander of title*, from which damages are recoverable.

To file a slander-of-title suit, the plaintiff first must either possess or own an interest in the land subject to the claim. Second, the plaintiff must prove that the lienholder or claimant maliciously, and for no apparent reason, refused to release the claim or lien. *Malice*, in this context, means ill will, bad or evil motive, gross indifference or reckless disregard for the rights of others.

Finally, the plaintiff must prove a monetary loss. Generally, the loss of a specific sale triggers the lawsuit. The burden of proof is easier when a transaction fails because of the cloud, as demonstrated by the *Miller* case.

However, the failure of a specific sale is not mandatory. Damages may be recovered for "impairment of vendibility" measured by the difference between the sale price with a clear title and the value actually received with a clouded title. *Reaugh v. McCollum Exploration Co.*, 163 S.W. 2d 620.

The two common causes for slander of title involve the failure to release an expired oil and gas lease and the failure to release an invalid deed of trust.

Actual monetary loss is the main recovery. In addition, though, the courts may award punitive or exemplary damages, reasonable expenses for maintaining the property, reasonable litigation expenses, the interest on the homeowner's mortgage payments and traveling expenses related to the litigation.

Case law indicates that defendants are not helpless. Claim of title does not constitute malice when made upon reasonable belief that the defendant had title to the property. *Storm Associates, Inc. v. Texaco, Inc.* 645 S.W. 2d 579. Good faith will refute a charge of malice in action for slander of title. *Wheelock v. Batte*, 225 S.W. 2d 591.

Suit-to-Quiet Title

As illustrated in the *Pampell* case, a land owner faced with a clouded title has two alternatives: sue for slander of title to re-cover damages for impaired vendibility, or sue to quiet title, judicially declaring the cloud void.

Texas case law defines the term *cloud on title* as an encumbrance apparently valid but in fact invalid. *Heath v. First Nat'l Bank*, 32 S.W. 778. When an instrument, valid on its face, purports to convey an interest in property but is for some reason ineffective, a suit to remove the cloud on title is appropriate. *DRG Financial Corp. v. Wade*, 577 S.W. 2d 349.

Several conditions trigger suits to quiet title (sometimes referred to as "a suit to remove cloud from title"). The following is a list of the more frequent issues. To declare void:

- a prior owner's title when the statutory requirements for adverse possession have been satisfied,
- a sheriff's deed acquired at a tax sale when the original owner paid the assessed taxes,
- a deed from a divested interest holder affecting the title to land and
- an abstracted judgment lien on property when the judgment has been satisfied.

To maintain a suit, the plaintiff must have an interest in the disputed property. Possession is not necessary. The plaintiff must show that the instrument casting doubt on the validity of title is, for some reason, invalid.

The successful plaintiff receives a judicial decree nullifying the disputed lien on the property. Possession may also be awarded, depending on the circumstances prompting the lawsuit.

Trespass-to-Try Title

As illustrated by the *Intertex* case, a trespass-to-try-title suit is an action to determine title and possession of land. A trespass-to-try-title suit is a statutory action authorized by Chapter 22 of the Texas Property Code. The plaintiff seeks possession against a defendant wrongfully in possession. The plaintiff prevails by proving superior title one of four ways:

- **Title from the Sovereign.** The plaintiff can trace the chain of title from the sovereign (time of patent) to the present without any breaks.
- **Title from a Common Source.** The plaintiff, in certain instances, may avoid proof from the sovereign if proof from a common source in the chain of title can be found. The plaintiff must prove that his or her title springing from the common source is superior.
- **Title by Adverse Possession.** The plaintiff may avoid all proofs dependent on the chain of title if the elements required by the 3, 5, 10 or 25 statutes of

limitation for adverse possession can be proven. (The requirements are found in Chapter 16 of the Texas Property Code.)

- **Title by Prior Possession.** Finally, the plaintiff may prove title based on peaceable prior possession. This is the weakest of all. It is founded on the principle that peaceable prior possession of land constitutes *prima facie* evidence (sufficient without contradictory evidence) of ownership against a mere trespasser.

At first glance, an action to quiet title appears similar to trespass-to-try title. The following lists the distinctions.

A suit-to-quiet title emanates from case law and affords an equitable remedy. A trespass-to-try title suit is authorized by statute and affords a legal remedy.

A suit-to-quiet title seeks to remove a cloud on title while a trespass-to-try title seeks to recover possession based on a superior title.

The plaintiff in a suit-to-quiet title must show an interest in the land but not necessarily a fee simple or uncontestable title. The plaintiff in a trespass-to-try title suit, as a central issue, must prove fee title or at least superiority to the defendant's title.

Real estate practitioners need to understand legal principles and procedures beyond the DTPA. Generally, the buyer's clear, unclouded title is a prerequisite for closing a land transaction.

This article is for information only; it is not a substitute for legal counsel. ♣

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