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Summary of Dep't of Taxation v. Kawahara., 131 Nev. Adv. Op. 42 (June 25, 2015)

Janine Lee
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REAL PROPERTY: LIEN PRIORITY OF TAX LIEN AND DEED OF TRUST

Summary

A recorded tax lien has the effect of a judgment lien under NRS 360.473(2)² and therefore, cannot have the effect or priority of a mortgage lien. The common law rule of “first in time, first in right” applies to lien priority when a valid deed of trust is attached to a property, thus creating a security interest, prior to the recording of a tax lien; even if not recorded until after the tax lien.

Background

The United States Bankruptcy Court for the District of Nevada (the “Bankruptcy Court”) certified two questions to the Nevada Supreme Court regarding two liens competing for priority regarding the proceeds of a property sale authorized by the Bankruptcy Court.

In 2009, Wayne and Gail Allison (the “Allisons”) executed a note to John T. Kawahara and Barbara J. Kawahara (the “Kawaharas”), secured by a deed of trust on a Reno property, for a note in the amount of \$400,000 (the “Note”). The Note, however, was not recorded until 2011.

The Allisons, through guarantees arising from debt of their automotive business, became delinquent in taxes to the State of Nevada Department of Taxation (“NDOT”) and signed a payment agreement in the amount of \$438, 044.68 with NDOT. In 2010, NDOT recorded certificates of tax lien against the Allisons.

The Allisons filed bankruptcy in 2011 and the Bankruptcy Court approved the sale of their Reno property, in order to satisfy outstanding liens attaching to the sale proceeds. The Bankruptcy Court then certified the following two questions to the Nevada Supreme Court, due to a dispute between the Kawaharas and NDOT over the priority of their respective liens:

- 1) Do certificates of tax lien have the effect and priority of a non-consensual judgment lien or of a consensual mortgage lien; and
- 2) Does a tax lien, created and filed in 2010, have priority over a deed of trust, created in 2009, but recorded in 2011.

Discussion

Do the filings of tax lien certificates by the Department of Taxation create a mortgage?

The purpose of recording statutes is to provide subsequent purchasers with knowledge of a property’s state of title. NRS 111.312(1)³ lists requirements necessary to record a mortgage or real property lien in Nevada, which includes formalities such as including the grantee’s address and the county-assigned parcel number. Alternately, NRS 360.473(1)⁴, which governs the filing

¹ By Janine Lee.

² NEV. REV. STAT. § 360.473(2) (2013).

³ NEV. REV. STAT. § 111.312(1) (2013).

⁴ NEV. REV. STAT. § 360.473(1) (2013).

of a certificate of tax lien, simply requires that the certificate state the amount due, name and address of the debtor and a statement of compliance by NDOT.

Therefore, allowing the filing of tax lien certificates to have the effect and priority of a mortgage would defeat the purpose of recording statutes, by protecting people who file the wrong liens. The tax lien certificates filed by NDOT did not comply with NRS 111.312(1)⁵; nor would a third party reviewing the property's public records see a mortgage on the property; therefore their tax lien cannot be recognized as a mortgage lien, regardless of the existence of personal guarantees.

Does a tax lien, created and filed in 2010, have priority over a deed of trust, created in 2009, but recorded in 2011.

Because NDOT's tax lien is given the effect of a judgment lien under NRS 360.473(2)⁶, and in accordance with a prior holding of the Nevada Supreme Court, the tax lien certificates filed by NDOT are not protected by Nevada's recording statutes.⁷ Therefore, the common law rule of "first in time, first in right," is applicable to these facts. As a result, the deed of trust created in 2009 has priority over the tax lien, created and filed in 2010.

Conclusion

Nevada Revised Statutes set forth specific requirements pertaining to both the recording of mortgage liens against a property and tax liens against a property. Because a tax lien certificate is considered a judgment lien, it cannot have the effect or priority of a mortgage lien. Further, the recording statutes against unrecorded conveyances do not protect a judgment creditor lien. Therefore, the common law of "first in time, first in right," applies to lien priority in this situation. As a result, a deed of trust created in 2009, but recorded in 2011, has priority over a tax lien created and filed in 2010.

⁵ NEV. REV. STAT. § 111.312(1) (2013).

⁶ NEV. REV. STAT. § 360.473(2) (2013).

⁷ *Sturgill v. Indus. Painting Corp. of Nev.*, 82 Nev. 61, 64, 410 P.2d 759, 761 (1966).