

Question 4 – February 2015 – Selected Answer 1

1. SLI does not have a valid lien on the Bexar Co. Tract of land.

Under the Texas Property Code and the Texas Constitution, a homestead is entitled to more safeguards and protection than other property. To determine if a property is entitled to these protections you must first determine if the homestead is considered a rural or a urban homestead because there are different qualifications for each. A homestead is qualified as rural if it is outside the city limits or extra territorial jurisdiction and is not serviced by one or more city utilities or water. Furthermore, if it is not protected by the city police and firefighters. A homestead is considered urban if it is within the city limits or receives service from one or more city utilities. Here, the Bexar Tract is within the city limits of San Antonio and is served by water, electric, sewer, and high speed internet as well as fire and police protection therefore, the Bexar County tract would be considered an urban homestead. As an urban homestead, a family may not claim more than 10 acres of land as their homestead and the acreage must be contiguous to each other and used for residential or business purposes.

Now that we have determined that the Bexar County tract is entitled to the protections of a homestead because the family resides in it and it meets the qualifications of a urban homestead. We must look to see if the lien by SLI is valid based on the Bexar County Tract being a homestead. First it must be noted that generally homesteads are exempt from liens and other mortgages unless it is a tax lien or a mortgage for the purchase of the homestead, a workman's lien, or an improvement lien for the homestead. Here, the SLI lien arises from an agreement between SLI's president and Jack as to a purchase of SLI's stock. This is not one of the exceptions to liens or mortgages generally allowed on a homestead. There is no relation or benefit of the homestead from this lien so it does not meet the safeguards and protections of the homestead exemption policy although Jack signed a promissory note and the deed was properly recorded it will likely not attach to the Bexar Co. tract.

Furthermore and most importantly, a spouse may not put an encumbrance, convey and interest, or sell the homestead without the other spouse's knowledge and consent. Here, Jack did not tell Mary, his wife about the purchase of the SLI stock and Mary did not sign the deeds of trust. SLI would have at the minimum have gotten Mary's signature of consent to this deed, but that did not occur here so the lien is not valid.

2. SLI cannot foreclose on both the Bexar Tract and the Karnes Tract in a single non-judicial foreclosure sale.

While, Texas law does allow a trustee with a deed of trust to commence a non- judicial foreclosure sale there are limitations to the sales and there are strict requirements of notice and proper procedures for doing so. First, the property being foreclosed on must be sold in the county in which the property is located in and notice must be posted in that county as well. Here, the two pieces of property SLI would like to foreclose on are in two different, non-contiguous counties, so selling the properties together in one foreclosure sale would violate the requirements that the property must be sold in the county in which the property is located.

3. Karnes tract will remain subject to the oil and gas lease because the lease is an interest in the property that is recorded in the official public records of real property of Karnes City. Furthermore, there is an oil well on the Karnes tract that is currently producing in paying quantities and promises to produce in the future. Big Oil has the opportunity to purchase the Karnes tract at the foreclosure sale to maintain its operations. A lease is an encumbrance and a buyer takes the property in a foreclosure sale subject to current encumbrances.

Question 4 – February 2015 – Selected Answer 2

1. No, SLI does not have a valid lien on the Bexar tract because it constitutes a valid homestead, exempt from most liens.

The issue here is whether a lien can attach to a urban homestead property. To be a homestead in an urban area, whether single or family, the homestead cannot be more than 10 acres and it must be contiguous. A single person or a family can have only one homestead. Even if a homestead is inherited as separate property, to encumber or convey the homestead, if married, both spouses must sign and take part in the encumbrance or conveyance. Qualifying as a homestead allows the owner a protection against creditors. Creditors cannot attach liens to a homestead, with a few exceptions for purchase money mortgages, taxes, home equity lines of credit, refinancing an otherwise valid lien, materials and mechanic's liens on improvements to the homestead, etc.

Here, the Bexar tract is an urban homestead because it is served by police, fire, water, electric, sewer, etc. and it is within the city limits. Bexar qualifies as a homestead because it is urban and 10 acres. Therefore, the Bexar homestead is protected from creditors attaching liens because it does not fall into one of the limited exceptions mentioned above, and the promissory note for the purchase of the SLI stock will not validly attach to the Bexar tract deed. Moreover, Jack did not tell Mary, his wife, about the promissory note for the purchase of SLI stock and his attempted but void encumbrance of the promissory note for the stock. Therefore, even if the promissory note could justify a lien on the homestead, because Mary did not join in the encumbrance it would not attach, even though it was Jack's separate property through inheritance. Because of these facts, SLI does not have a valid lien on the Bexar tract because it constitutes a valid, protected homestead

2. No, SLI cannot foreclose on both the Bexar tract and the Karnes in one single non-judicial foreclosure sale (even aside from the question in #1 of whether SLI has a valid lien on the Bexar tract).

The issue here is whether two separate, non-contiguous properties, both given as security for one promissory note for the purchase of stock, can be foreclosed in a single non-judicial foreclosure sale.

Under Texas Property Code §51.002, the requirements for a non-judicial foreclosure sale in Texas are: trustee must give 21 days notice by (1) posting on courthouse door of county where property located; (2) filing with county clerk of county where located; and (3) serving written notice on the mortgagor and all debtors obligated to pay by certified mail. The foreclosure sale must take place publicly at the county courthouse in the county where property located. Also, if a specific location where the public sale is to take place in the courthouse has been determined by the county court, then that location should be specified in the notices. The buyer at a foreclosure sale takes the property by quitclaim deed from the mortgagor (not the trustee), "as is" without most warranties. The foreclosure sale must occur on the first Tuesday of the month after 21 days notice is satisfied, between the hours of 10am and 4pm. Because Texas is a lien theory state, the trustee never actually holds title to the property at all.

Here, because the strict requirements for a non-judicial foreclosure sale cannot be met for two different properties, located in two different counties in one single non-judicial foreclosure sale, they cannot be foreclosed in the same action. If one piece of property extends into more than one county, the property can be foreclosed on in either of the county courthouses where the property is located, but the notice and posting requirements must still be satisfied in all counties the property extends into. Therefore, SLI cannot foreclose on both the Bexar tract and the Karnes in one single non-judicial foreclosure sale.

3. Yes, the Karnes tract will remain subject to Big Oil's oil and gas lease after a properly noticed and conducted non-judicial foreclosure sale because the lease was in effect and recorded before the promissory note attached and was recorded.

The issue here is whether the Big Oil lease will be extinguished by a non-judicial foreclosure on the Karnes tract.

Texas is a notice theory state, so because SLI had record notice of the existing lease with Big Oil, it will remain subject to the lease. Under the notice theory requirement for subsequent conveyances, if a lease was already in effect and recorded before a security interest such as a promissory note attached, then the foreclosing creditor/holder of a later promissory note will take the property subject to the lease. Because the lease was recorded, it gives SLI constructive notice/record notice that the lease was in existence, and could be in existence indefinitely for so long as oil, gas, and other minerals are produced thereon. This means that SLI cannot be deemed a bona fide purchaser, for good faith value, without notice.

On the other hand, if the lease had been entered into and/or recorded after the promissory note had attached and been recorded, then SLI might not have been deemed to have notice and the non-judicial foreclosure of the Karnes tract would extinguish the lease as a junior interest because SLI might have qualified as a bona fide purchaser "for good faith value, without notice."

For the Karnes tract, it does not matter that Mary did not sign the promissory note because it is not protected from creditors and liens as a homestead, and it is Jack's separate property. Therefore, SLI could successfully foreclose on the Karnes tract after a properly noticed and conducted non-judicial foreclosure sale, and SLI would hold the Karnes tract subject to the terms of the lease with Big Oil.

Therefore, the Karnes tract will remain subject to Big Oil's oil and gas lease after a properly noticed and conducted non-judicial foreclosure sale because the lease was in effect and recorded before the promissory note attached and was recorded.

Question 4 – February 2015 – Selected Answer 3

1. SLI does not have a valid lien of the Bexar Tract. In issue is whether a lien may encumber a homestead without consent of both spouses. In Texas, homestead law is separated into two categories: rural homestead, and urban homestead. Because the law is vastly different with regards to which type of homestead is in issue, it must be decided which type of homestead Jack and Mary have. First, it is important to note, that Jack and Mary reside on the Bexar Tract in their family home. Thus, we must decide, with relation to the Bexar property, what type of homestead they couple has. An urban homestead is generally considered to be one within the city limits that is serviced by the city with regards to water, electric, sewer, and fire and police protection. It appears that these factors make the Bexar Tract a urban homestead. An urban homestead is limited to 10 acres in size and must be contiguous. Here the tract is 10 acres exactly and there is no mention of any of the property being non-contiguous. Thus, the entire Bexar Tract qualifies as a homestead.

Homesteads receive special protections from encumbrances. One such protection is that, generally, no lien may attach to a homestead unless it falls into the limited list enumerated by law. Here the promissory note does not qualify as one of those exceptions to the general rule. Further, if a married couple claims a property as their homestead, no lien against the property may attach without both parties signing the transaction. Here, Mary was never told about the agreement or lien, thus no attachment could occur.

Therefore, there is no valid lien on the Bexar property.

2. No, SLI may not foreclose on both the Bexar County and Karnes Tract in a single non-judicial foreclosure sale. A non-judicial sale has many factors that must be complied with to be legal. At issue is whether two properties from different counties may be sold within the same sale. When a property is being non-judicially foreclosed upon, proper steps must be taken. Notice must be provided, both publicly by placing a notice at the county courthouse of the county where the property sits, and to the county clerk. Notice must also be given to the owner of the property, at least 21 days in advance. The sale must occur at the county courthouse on the first Tuesday of the month between the hours of 10am and 4pm. The notice to the landowner must tell them where in the courthouse the sale is to occur if there is such a designated area, and the notice must state the earliest the sale may occur. The sale may not

take place more than three hours after the time stated in the notice. In this case, the two non-judicial foreclosures would have to occur in different counties. The Bexar county would occur at the Bexar County courthouse, while the Karnes tract sale would occur in Karnes county.

3. Yes, the Karnes Tract will remain subject to Big Oil's oil and gas lease. If an oil and gas lease in on a property before a lien is placed on that same property, the lien is subject to the oil and gas lease. However, if the lien occurs before the oil and gas lease begins, the lien may foreclose on the property without being subject to the lease; however, the surface estate assets must be sold off first in order to satisfy the lien before the mineral estate is sold. In this case, the oil and gas lease occurred first and was filed in the Office of Public Records of Real Property of Karnes County, Texas. This put SLI on record notice of the lease. SLI's lien on the property occurred and was filed subsequent to the Big Oil lease. Therefore, the oil and gas lease will remain with the property and will be unaffected by the foreclosure.