

NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR

MAY 2016

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NEW LEGISLATION

Below is a list of bills passed by the 2016 Mississippi Legislature and signed by the Governor that are relevant to real estate:

SB 2211-Technical Amendments to Mississippi Uniform Trust Code and Mississippi Qualified Disposition in Trust Act. These amendments include a statement that a certificate of trust filed before July 1, 2014 continues to be constructive notice and that a new certificate of trust does not need to be filed. It also states that property can be acquired in the name of the trust.

SB 2111-Secretary of State can sell forfeited tax lands by online auction.

SB 2504-amendments to Mississippi's S.A.F.E Mortgage Act.

SB 2922-restores historic tax credits.

SB 2240-tax collectors can enter into contracts to conduct tax sales online using online bidding. Contract must be ratified by board of supervisors.

HB 767-codifies the duty of care of an owner or lessee to trespassers, and carves out attractive nuisances.

Below is a list of bills that were introduced that affect real estate but died at some point in the legislative process. Some of these are introduced every year and never make it out of committee (e.g., repeal adverse possession, reversion of ownership of minerals to owner of surface), but some are, in the editor's opinion, good ideas that have not yet gained traction but have merit (e.g., reform

of receivership laws, address homeowners associations) and hopefully will come back in some form in 2017.

HB 526, 527-change foreclosure procedures to allow borrowers a chance to amend loan documents before foreclosing.

HB 623-give state courts jurisdiction of quiet title actions for land in which United States has an interest.

HB 626-Uniform Powers of Attorney Act.

HB 627-allows powers of attorneys to become effective in the future.

HB 635-changes to contractor lien statutes.

HB 636-severed minerals revert to surface owner.

HB 644-repeal adverse possession.

HB 717-adverse possessor to notify chancery clerk.

HB 716-partition property must be sold by licensed broker.

HB 720-regulate formation and administration of homeowners associations.

HB 726-prohibits owner of life estate from renting property.

HB 729-Uniform Commercial Receivership Act.

HB 905-revise procedure for payment of tax on severed minerals.

HB 1261-authorize title companies to record notice of cancellation of deed of trust.

HB 1322-establish standard lease form for Residential Landlord/Tenant Act.

HB 1333-amend judgment lien statute to provide that judgment lien does not attach to homestead.

HB 1337-losing party in adverse possession action pays fees of prevailing party.

HB 1568-clarify details of TIF financing.

HB 1721-provides tax credit for new “livable homes”.

SB 2068-authorize transfer on death deeds.

SB 2344-limit liability of financial institutions as garnishees.

SB 2345-establish method for converting manufactured housing from personal property to real property.

SB 2442-list of liens encumbering property sold at tax sale to be provided to bidders at tax sale.

SB 2611-holder of mortgage on residential property must give ninety-day written notice of sale to mortgagor and Commissioner of Banking and Consumer Finance.

SB 2698-Uniform Partition of Heirs Property Act.

SB 2768-statute of limitations on appraisals.

Copies of all of these bills can be downloaded at the Mississippi Legislature's website at <http://www.legislature.ms.gov>.

NEW WITHHOLDING FORM FOR SELLERS

As most readers know, Miss. Code Ann. 27-7-308 was amended effective July 1, 2015 to require the seller, rather than the buyer, to withhold a portion of the seller's net proceeds and pay the amount withheld to the Mississippi Department of Revenue when the real property is worth more than \$100,000. For several months after the change became effective, no form existed for the seller to report this withholding to the Department of Revenue. The Department of Revenue recently has promulgated a new form for seller withholding. It is Form 89-386-15-1-000 (Rev. 09/15). The form can be downloaded from the Department of Revenue's website at <http://www.dor.ms.gov/Business/Documents/89-386%20affadavit%20for%20withholding%20sale%20of%20real%20estate.pdf>.

Guaranties and *Hartman* Deficiency Rule

The November 2015 Newsletter reported on *Fleisher v. Southern AgCredit*, 108 So. 3d 948 (Miss. Ct. App. 2012)(*en banc*), in which the court applied the *Hartman* deficiency test to an action on a guaranty following foreclosure. In *Hartman v. McInnis*, 996 So. 2d 704 (Miss. 2007)(*en banc*) the Mississippi Supreme Court held that in order to be entitled to a deficiency against the borrower, the foreclosing lender who purchases at the foreclosure sale must prove that it paid the fair market value of the property at the foreclosure sale. Many attorneys interpreted *Hartman* as requiring that the foreclosing lender must obtain a current appraisal before foreclosing, and bid not less than the appraised amount, in order to be entitled to a deficiency judgment. This left open the issue of whether the *Hartman* rule applied when the lender foreclosed on land securing a guaranty rather than the primary indebtedness. In *Fleisher*, in which a lender brought an action against guarantors after foreclosure, the Court of Appeals considered whether the price for which the lender purchased the property at foreclosure met the *Hartman* test for fair market value.

Since *Fleisher*, the Mississippi Supreme Court has addressed this issue squarely and has determined that a lender who brings an action against a guarantor rather than the borrower does not have to prove that it met the *Hartman* test in order to be able to recover a deficiency against the guarantor. In *Bosarge v. LWC MS Properties, LLC*, 158 So. 3d 1137 (Miss. 2015), the Supreme Court wrote:

Note, though, that unlike suits where the lender sues the primary borrower, an individual guaranty (as written in the contracts applicable here) does not require foreclosure or fairness of price. The guarantor is immediately liable upon the borrower's ... default. ... Thus, Bosarge [the borrower] is incorrect when she claims LWC was required to show the foreclosure sales price was fair, citing *Hartman v.*

McInnis, 996 So. 2d 704, 711 (Miss. 2007)...that “where the foreclosing creditor buys at foreclosure, it must give the debtor fair credit for the commercially reasonable value of the collateral.” Here, Bosarge is not the debtor; she is the guarantor, and no such demonstration is required.

158 So.3d at 1143 n. 4. The Court of Appeals followed *Bosarge* in *Kirby v. BancorpSouth Bank*, 2016 Miss. App. Lexis 28 (Miss. Ct. App., Jan. 19, 2016).

RECENT CASES

City Rental Ordinance Unconstitutional

Crook v. City of Madison, 168 So. 3d 930 (Miss. 2015)(*en banc*). The City of Madison, Mississippi enacted an ordinance that required one seeking to rent residential property to obtain a license. The ordinance provided, among other things, that the owner must agree in advance as a condition of obtaining the license that city building officials could enter the property at any reasonable time, and that “Should a Tenant or Owner refuse entry, the Building Official shall be authorized by virtue of the terms of the Rental License to secure a judicial warrant authorizing entry by the terms of the Rental License, lease or rental agreement.” Michael Crook did not obtain a license. The City subsequently arrested Crook for renting a property without obtaining a license. He was convicted in municipal court for violating the ordinance. He appealed to the County Court of Madison County and alleged that the rental ordinance was facially unconstitutional, and that the arrest warrants were invalid due to lack of probable cause. His conviction was affirmed by the County Court and then the Court of Appeals. The Mississippi Supreme Court granted Crook’s petition for certiorari. In an opinion by Justice Chandler and joined by four justices, the Supreme Court held that Madison’s rental ordinance was facially unconstitutional because it violated the United States Constitution’s prohibition in the Fourth Amendment on unreasonable searches and seizures. The Fourth Amendment provides in relevant part that “[t]he right of the people to be secure in their persons, houses, papers, and effects, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.” While this is a case of first impression in Mississippi, courts from other states have held that ordinances that require owners to consent in advance to property inspections are unconstitutional when they did not require the municipality to obtain a warrant if the owner refused to consent. Likewise, courts generally have found that ordinances that require the municipality to obtain a warrant do not violate the Fourth Amendment. In this case, while the City of Madison’s ordinance required a warrant, the ordinance did not require that the city establish probable cause, but provided that the city could obtain a warrant based only on “the terms of the Rental License, lease or rental agreement” rather than upon the existence of probable cause. The failure to require the city to establish the existence of probable cause made the warrant requirement ineffective, and an inspection provision with no warrant requirement is facially invalid. The Court reversed Crook’s conviction and rendered a judgment of acquittal. The ordinance contained a severability clause which provided that if any section of the ordinance is invalid, the rest of the ordinance shall remain in effect. So while the inspection provisions of the ordinance were unconstitutional, the remainder of the ordinance remained in full force and effect.

Note 1: The editor thinks that this case is significant because of the many over-the-top rental ordinances being adopted by municipalities. For example, this decision recites that the Madison ordinance required an annual licensing fee of \$100 per dwelling unit and post a \$10,000 bond or letter of credit per dwelling unit. Ordinances in other Jackson-area municipalities require owners of apartments to install sprinklers in each unit and to construct storm shelters to hold all of the residents of the complex in case of tornadoes. While municipalities claim that these ordinances are intended to protect the health of the tenants, the effect of these ordinances is to make it uneconomical to offer low-cost rental housing. Expect more litigation and more decisions from the Court of Appeals and the Supreme Court on these issues.

Note 2: Justice Coleman, joined by three justices, wrote a separate opinion, concurring in part and dissenting in part. Justice Coleman agreed with the majority that the advance consent provision in the ordinance was facially invalid because the property owner had to choose between consenting to the inspection in advance, not renting the property, or renting the property without a license and thus subjecting himself to criminal penalties. In this circumstance the owner had no reasonable alternative, and the consent is not valid. Justice Coleman disagreed that Crook's conviction should be overturned, since Crook had not obtained a license, and therefore had not given advance consent.

GENERAL

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