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The Race to Erase Recording Mistakes

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To protect the integrity of this nation's property transfer system, the robo-signing controversy must result in a better system of transferring property and loans. Beneath this public debacle exists another old timer in the world of recording: property transfer mistakes. Improper, mistaken, or wrongly executed and indexed instruments have existed since the birth of the first recording system and have had our courts both provide and fail to deliver justice for the victors and victims of these follies. Although the title industry does an enormous job of limiting these problems and fighting them from the trenches, a number still squeeze under the radar and enter our court system.

There are three common mistakes whereby buyers and lenders lose the priority they should otherwise have under the recording statutes: (i) improperly executed documents, (ii) improperly indexed documents, and (iii) untimely submitted documents. To these ordinary errors, the courts have had a variety of responses. The use of modern technology, however, could eliminate most of these human caused problems, and, when dealing with assets as valuable as real property, a relatively minor investment of governmental funds in creating such a technology could pay back enormous gains in modernizing the system.

In **Lend-Mor Mortgage Bankers Corp. v. Nicholas**,1 the Appellate Division, Second Department reaffirmed that the state of New York is a "race-notice" jurisdiction, in which the deed or mortgage recorded first, without notice of any other deed or mortgage, will obtain priority (Real Property Law §291).

Recording a deed or a mortgage first, however, without notice of any potentially unrecorded prior interest, does not necessarily mean that the buyer's interest is safe. In fact, something as simple as an improper notarization in a mortgage has resulted in the lender losing priority. Practitioners need to know the nuances of the rules of real estate in order to avoid making these landmine mistakes.

Improper Execution

In the New York state, a mortgage is required to contain an acknowledgment or certification before it can be recorded effectively.2 The fact that an instrument is recorded in the chain of title is of no avail if that instrument was not "entitled" to recordation due to a defective execution.

For example, a clerk might record a mortgage showing an illegible Notary Public's signature, with an absent or illegible accompanying notary stamp or the lack of any other indication of even the first name of the alleged Notary Public. In these situations, the New York courts unequivocally have held that such a deed or mortgage is not properly acknowledged in the manner required by law, the instrument is not entitled to be recorded, and a subsequently recorded deed or mortgage will take priority.3

Thus, even though a subsequent buyer or lender is on notice of a previously recorded deed or mortgage, since the previously recorded document is improperly executed, (and therefore without the right to be recorded), it will be deemed invalid as against the subsequently recorded instruments, and the subsequent buyer or lender will unfairly acquire priority.

Improper Indexing

Knotty questions of priority arise when the parties to the transaction did everything they were supposed to do at the transaction table, but the recording officer made an error in indexing the deed or mortgage, and the presenter did not check to make sure the indexing was proper. A deed or a mortgage recorded under an incorrect property address, thus not coming up in a title search, could lose the priority to which it was otherwise entitled.4

Although not always the case historically, an error in indexing, present-day, prevents the record of that mortgage from constituting constructive notice. If a recording clerk improperly indexes a mortgage, therefore, that mortgage is generally rendered void as against a subsequent good faith buyer or lender, whose conveyance or lien is properly recorded and indexed first.5

If the court determines, however, that a diligent title search should have led to the discovery of the improperly indexed document, then the subsequent buyer or lender's interest in the property will sit second to the prior lien.6

For practical example, in **Astoria Federal S&L Assn. v. June**,7 a prior mortgage was erroneously recorded in the wrong chain of title, but a properly recorded deed made an express reference to the mortgage, and the court found that a diligent title searcher should have discovered the existence of the mortgage from a basic review of the deed.

It is relevant to note here that if the indexing error was not the fault of the buyer or lender, the buyer or lender may have an action in misfeasance or negligence against the clerk for damages resulting from the loss of priority.8 Conversely, if the prior, improperly indexed mortgage maintains its priority position because the court finds that a diligent title search should have discovered the mortgage, the subsequent buyer or lender may have an action against the title searcher for the resulting damages incurred.

Another typical scenario involving improperly indexed documents occurs when a deed or mortgage is recorded under a misspelled grantee or borrower's name.9 In New York state, county clerks are only statutorily required to provide alphabetical lists of recorded mortgages, searchable by the names of the mortgagors and mortgagees.10 As with all other improperly indexed documents, courts will not impute constructive notice of an improperly indexed mortgage under a misspelled name, unless it is found that a diligent title searcher would have uncovered the document despite the indexing

error.11

Many counties, however, impose more expansive indexing requirements on their recording clerks. For example, the county clerks inside New York City are required to maintain a block index of recorded deeds and mortgages.12 With the exception of Richmond County, which recently launched its own electronic database,13 a title searcher in New York City counties can, from any internet enabled computer in the world, electronically search the Automated City Register Information System (ACRIS) for the chain of title attached to a specific property address.

In these counties, even if a mortgage is recorded under a misspelled mortgagor's name, it is highly likely that the mortgage will still be discovered, as the search options include searches by party name, property address, borough/block/lot, and even document type. Consequently, in these counties, indexing errors of this nature rarely occur, but this means, of course, that anyone searching titles for such properties, in the exercise of due diligence, should employ all search options, as opposed to just one.

Awaiting Recordation

New York's Real Property Law §317 states: "Every instrument, entitled to be recorded, must be recorded by the recording officer in the order and as of the time of its delivery to him therefor, and is considered recorded from the time of such delivery."

Simply mailing a deed or mortgage to the recording clerk for recordation does not necessarily secure the priority of that interest. In **Security Discount Assoc. Inc. v. Lynmar Home Corp.**,14 the Second Department made it clear that mailing a document to the recording clerk for recordation does not automatically constitute "delivery" of that document.

The court distinguished between the time that mail is received and the time that mail is opened, and held that even though a mailed-in mortgage may be first in time to reach the clerk's office, if a second mortgage is walked-in and recorded with the clerk before the day's mail is opened and inspected, then the second mortgage will take priority, even though the first mortgage was physically on the clerk's desk first, although unopened.

Another variation on this fact pattern arises when an individual files a notice of pendency to protect his interest in premises, but is unaware that a third party has already delivered a document to the clerk for recording, even though the document was not actually recorded yet. For example, in **Avila v. Arsada Corp.**,15 the court held that filing a notice of pendency before a buyer records his deed does not negate the buyer's bona fide status, so long as the deed was delivered to the clerk for recording before the notice of pendency was filed.

Recommendations

Real Property Law §316 should be amended to mandate statewide, electronic tract indexing, as opposed to the vastly outdated alphabetical indices. If the land records in every county were converted electronically and made searchable, not only by grantee or borrower's name, but by street address and/or block and lot as well, priority disputes arising from improperly indexed documents would become as antiquated as conducting land surveys with a rope-stretcher or a Gunter's Chain.

Statutes should be amended so as to forbid "old oak tree" property descriptions for recording purposes and to require that any new instruments presented for recording include metes and bounds descriptions only. Studies and pilot programs should be implemented for computer generated county maps based on electronically filed property descriptions so as to prohibit both under-inclusive and over-inclusive metes and bounds descriptions.

In or about August 2010, the New York City Department of Finance implemented a new program intended to notify property owners in the five boroughs when a deed, mortgage, or any instrument affecting title is recorded against their properties.16 Even though this program is designed to limit the harm caused by the recording of fraudulent documents, an ancillary effect will be the immediate discovery of erroneously indexed documents, so long as the property owner at the incorrect address is registered for the program.

A statewide directive should also be imposed requiring the county clerks to record all letters they issue rejecting documents submitted for recording, thereby putting the world on notice that a new buyer or lender is attempting to record an interest in the property.

There is also something to be said for creating a database that buyers and lenders can post notifications on from a personal computer, putting the world on instant notice of a deed or mortgage that was mailed-in or dropped off for recording in a chain of title. Of course, the obvious danger in such a system is that it would readily lend itself to fraudulent abuse and would, therefore, need substantial authentication safeguards, severe penalties for abuse, failsafe detection of the identities of the users, and expiration of the notification at some specified period, together with a requirement that the actual document to be recorded is at the city register's office within that time period.

Implementing a properly constructed system along these lines could ultimately exterminate title claims arising from disputes caused by documents pending recordation, and would perhaps put some meaning back into that old proverb—"what you don't know, can't hurt you."

In these times of chronic budget shortfall, it is important to note that all enhanced recording programs and procedures can be made self-funding.

Conclusion

When New York state first adopted recording, it was state of the art for the time, but with the passage of another century, the now ancient doctrines revealed themselves, in some cases, as fostering unpredictability, unfairness, and impropriety. Our statutes do not even consider using the modern technologies that can make both title more definite and fraud vastly more difficult. Now, with this great housing crisis in front of us, the opportunity exists to build something great from the landmines and ashes left behind.

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Endnotes:

1. Lend-Mor Mortgage Bankers Corp. v. Nicholas, 2010 NY Slip Op 224 (App. Div. 2d Dept. 2010).
2. Real Property Law §§291 and 292; GOL §5-703.
3. Chamberlain v. Spargur, 86 N.Y. 603 (N.Y. 1881); Greenpoint Bank v. Parissi, 256 A.D.2d 548 (2d Dept. 1998).
4. O'Neill v. Lola Realty Corp., 264 A.D. 60 (2d Dept. 1942); Baccari v. De Santi, 70 A.D.2d 198 (2d Dept. 1979); Astoria Federal S&L Assn. v. June, 190 A.D.2d 644 (2d Dept. 1992).
5. Real Property Law §§291 and 317.
6. Fairmont Funding, Ltd. v. Stefansky, 301 A.D.2d 562 (2d Dept. 2003) ("The intended purchaser must be presumed to have investigated the title, and to have examined every deed or instrument properly recorded, and to have known every fact disclosed or to which an inquiry suggested by the record would have led. If the purchaser fails to use due diligence in examining the title, he or she is chargeable, as a matter of law, with notice of the facts which a proper inquiry would have disclosed").
7. 190 A.D.2d 644 (2d Dept. 1992).
8. Baccari, supra, 70 A.D.2d at 203.
9. Coco v. Ranalletta, 189 Misc. 2d 535 (Sup. Ct. Monroe Cty. 2001), aff'd, 305 A.D.2d 1082 (4th Dept. 2003); Fed. Nat'l Mortg. Ass'n v. Levine-Rodriguez, 153 Misc.2d 8 (Sup. Ct.

10. Real Property Law §316.
11. Astoria Federal, supra, 190 A.D.2d at 645 ("If the purchaser fails to use due diligence in examining the title, he or she is chargeable, as a matter of law, with notice of the facts which a proper inquiry would have disclosed"); First Nat'l Bank v. Riccio, 236 A.D.2d 697 (3d Dept. 1997); Coco, supra, 189 Misc. 2d at 538-9.
12. County Law, Article 24: Provisions Applicable to New York City, §919: Block indices in offices of county clerks, County Law §919 (2009); County Law, Article 24: Provisions Applicable to New York City, §919-a: Block indices in the office of the county clerk in the county of Richmond, County Law §919-a (2009); V&D Realty USA Corp. v. Mitso Group Inc., 240 A.D.2d 562 (2d Dept. 1997).
13.http://www2.landaccess.com/cgibin/homepage?County=8007 (last visited Jan. 28, 2011).
14. 13 A.D.2d 389, 393-394.
15. 34 A.D.3d 609 (2d Dept. 2006).
16.https://a836-acris.nyc.gov/nrd/default.aspx (last visited Jan. 28, 2011).