ficiently adverse effect on either the plaintiff's revenues or traffic congestion. Therefore, the court concluded that the plaintiff had no standing to contest the development.

Village of Riverwoods v. Village of Buffalo Grove, 159 Ill.App.3d 208, 110 Ill.Dec. 349, 511 N.E.2d. 184, (1987).

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WHAT MATRIMONIAL LAWYERS SHOULD KNOW ABOUT FORECLOSURE LAW

by Harold I. Levine

Frequently, in the course of defending foreclosures, we will be told by the defendant to the foreclosure action that there is no real problem because, under the judgment for dissolution, the other spouse agreed to pay the mortgage or indemnify the defendant spouse against foreclosure. The defendant has a great deal of pain when we explain that the undertaking in itself is of absolutely no assistance and if they don't pay, they lose the house.

Often, a judgment for dissolution of marriage provides that one spouse gets a deed to the marital home, and the other spouse agrees to make the mortgage payments; or the judgment will provide that the house will remain in joint tenancy, and the spouse who is not granted possession of the marital residence will pay and indemnify the other spouse as to the mortgage.

A lawyer in this situation has an obligation to tell his or her client that quit-claiming, or otherwise conveying real property in a judgment for dissolution of marriage, does not relieve the grantor from responsibility on the mortgage, utilities, taxes, etc. The judgment should order the grantee to make all necessary payments, indemnify the grantor and hold him/her harmless.

The lawyer has a further obligation to tell his client that as far as the lender is concerned, these guarantees are worthless. A petition for a rule will not prevent the spouse in possession from losing the house. When the foreclosure is filed, the party who agreed to indemnify may well be insolvent, out of the state, or otherwise unavailable. See *Bell Federal v. Belcastro*, 115 Ill.App.3d 281, 450 N.E.2d 830.

Similarly, the grantor who deeded the mortgage residence to his spouse and thought that he was free of the obligation may be less than happy when he is sued for a deficiency judgment on the note that he signed secured by the mortgage.

Also, if the property is in joint tenancy, and one spouse scrapes up the money to cure or redeem from the foreclosure, that spouse may find that he is redeeming for both spouses since, in Illinois, the mortgage is only a lien until the sheriff's deed issues, and payment to the lender increases the equity for the benefit of both the spouses.

Next, assume the following situation:

Husband and wife acquire marital residence and incur first mortgage of $75,000. Home is worth approximately $100,000.

Husband and wife file for dissolution of marriage. Subsequent judgment for dissolution provides:

(a) Wife gets title to marital home;

(b) Wife agrees to sell home within three years of judgment and pay husband $15,000 from proceeds. If marital home not sold within three years, husband gets judgment for $15,000 plus interest.

Creditor of wife obtains judgment against wife, files judgment against her real property, i.e., the marital home, within three years.

Lender forecloses and creditor files intervening petition or counterclaim to foreclose his judgment lien.

How does husband protect his rights under the judgment for dissolution in this situation?

The first concept is that the husband must record his judgment at once in the county in which the property is located. To fail to do so is to invite malpractice, because if the judgment is not recorded, the following may happen:

1. The husband's interest in the property is wiped out because the judgment creditor has acquired priority. He will set himself up in the mortgage decree as a creditor subordinate only to the first mortgage, and three things will happen:

(i) The mortgage foreclosure will wipe everybody out;

(ii) The creditor will survive because he is set up in the decree and he will appear at the sheriff's sale and bid on the house, taking credit for his judgment and only paying out the first mortgage;

(iii) The husband may never find out about the foreclosure because, when the lender searches the title for necessary parties, there is no record of his interest because the judgment was not recorded. Husband will not have standing to contest the foreclosure.

So, the first rule is: always record the judgment as fast as possible in the county or counties where the real estate is located.

In the situation where one spouse gets title and the other spouse is to receive cash out of the sale, what is to prevent the party obtaining possession from obtaining a second mortgage immediately after recording and wiping out the other spouse's interest? The answer is, very little.

The way to prevent this situation and protect the judgment is to insist that the property be conveyed to an Illinois Land Trust, and the nonowning spouse should be given a joint power of direction, so that the property cannot be encumbered without his written consent.

LESSEE'S TITLE OBJECTIONS MUST BE SPECIFIC

A prospective lessee's objections to the lessor's title must be sufficiently specific to excuse performance of a lease, and evidence as to the real estate practices in the area may establish what is sufficient.

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The plaintiff, owner of 180 acres of land, entered into an agreement with the defendant, an oil company, to lease the land for one year for oil exploration. The lease and the full one year's rent payment were placed in escrow with a note stating that the deposited proceeds were to be given to the plaintiff upon completion of title examination by the defendant's attorney. The attorney had a title search done by an abstract company and compiled some title notes. He then wrote the plaintiff and advised that he found the title to be unmerchantable due to some outstanding oil and gas leases and assignments of record. The plaintiff's attorney wrote back indicating that he was ready to attempt cure of any title defects and asked for the specific curative measures desired. The defendant's attorney mailed the plaintiff's attorney his notes and searches of record. The plaintiff's attorney again wrote and asked for specific objections. There was no further communication until approximately 18 months later, when the plaintiff requested release of the funds. The plaintiff then filed suit seeking a declaratory judgment that she was entitled to the rent money in escrow.

The plaintiff's witness, a local attorney with several years experience in oil and gas real estate transactions, testified that the practice in the area was for those examining on behalf of a purchaser or lessee to make specific objections and then suggest curative measures. He also advised that reference to the document giving rise to the objection would be helpful to the attorney for the vendor or lessor.

The appellate court noted that the title notes sent by the defendant's attorney were not specific as to what was objectionable and contained no reference to specific documents requiring correction. The court acknowledged that the specificity with which a vendee or lessee must designate objection to title to real estate in order to require correction has not been ruled on in Illinois. But since the only testimony given was that the practice in the area was that they be specific and designate suggested methods of correction, the objections in this case lacked that specificity. Further, the defendant's attorney had made a statement that he did not consider any of the objections very substantial. Therefore, the court held, the prospective lessee's objections to the lessor's title were insufficiently specific to excuse performance of the lease.

Henrick v. Ginco Oil & Gas of Texas, Inc., 158 Ill.App.3d 752, 110 Ill.Dec. 361, 511 N.E.2d 196 (1987).

ATTORNEY LIABLE TO THIRD PARTY FOR MALPRACTICE

A federal court applying Illinois law recently upheld a district court ruling that an attorney may be liable to a third party for both professional malpractice and negligent misrepresentation.

Defendant-attorney's client, being in financial straits requested a loan from plaintiff. Plaintiff agreed to the loan, using the borrower's farm machinery as collateral, on the condition that his attorney submit a letter verifying that he had conducted a UCC search which revealed no existing liens on the machinery. Defendant-attorney delivered the letter, the loan was executed and later defaulted on, and plaintiff subsequently discovered that no search had been conducted. Since the machinery had been encumbered prior to plaintiff's loan, plaintiff received only a small return from the ensuing foreclosure sale.

The court noted initially that defendant-attorney's conduct could have been classified as deliberate rather than negligent. The court was therefore uncertain as to why the plaintiff chose to sue under a negligence theory instead of fraud.

Defendant-attorney argued that he could not be liable since he had no duty of care toward plaintiff. But the Illinois Supreme Court held in 1982 that privity of contract is no longer necessary for a client to sue an attorney for professional malpractice. The limitation on this holding was that the third party's success in the suit depended on his ability to prove that the purpose of the attorney-client relationship was to benefit the third party. This is exactly the situation at hand, since the defendant-attorney was hired for the purpose of convincing plaintiff that the proposed collateral was unencumbered. Defendant-attorney was therefore held liable for professional malpractice. Alternatively, the court noted that defendant could have been held liable on a negligent misrepresentation theory which would parallel the theory of professional malpractice.

Greycas, Inc. v. Proud, 826 F.2d 1560 (7th Cir. 1987).

SUIT TAXES NEIGHBORS' FRIENDSHIP

When an owner of real estate pays property taxes on his neighbor's property, the owner is entitled to recover the amount under an unjust enrichment theory. However, whether the assessment would have been reduced had the neighbor been properly assessed and then objected to the amount, and whether the neighbor would have been able to deduct the taxes on his federal income tax returns are questions of fact which preclude summary judgment.

An owner of real estate paid over $26,000 in assessed real estate taxes for the years 1977, 1978 and 1979 for certain improvements located on his neighbor's property. When the error was discovered, the owner sued the neighbor for restitution under the theory of unjust enrichment. The trial court entered summary judgment in favor of the plaintiff.

On appeal, the court noted that Illinois courts have implied a contract in law based upon the defendant's receipt of a benefit which would be unjust for him to retain without paying for it. The term "unjust" does not mean "unlawful." The fact that there is an adequate remedy at law (see *Ill.Rev.Stat.*, c.120, ¶¶597, 598, 675) is not a defense, nor is the innocence of the person benefited. However, the court ruled that where the defendant is no more at fault than the plaintiff, he has no duty to pay more than he would have paid had the improvements been properly assessed to his property. Therefore, whether the assessment

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