The Title Examiner

Ticor Title

An Informational Newsletter Provided Courtesy of Ticor Title Insurance Company

From the Editor

Where has summer gone? It seems to be flying past, and we're already facing hurricanes, kids back to school, and, dare I say, the end of the first-time home buyer tax credit! Maybe it's the heat in the Clerk's Office, but the County Clerks have less and less patience dealing with poor quality instruments submitted for recording! In this edition of the Title Examiner, we include an article that tacitly asks you to help us calm their ire. We also have an article on the use of a mortgage instrument as a fixture filing (be a hero, save your client the filing fee), an article on Assignments of Leases and Rents, and an article on the oft-forgotten Half-Road Automatic Grant Rule.

We title folks have seen a rare event, the withdrawal of an endorsement! Effective August 15th, the Fairway Endorsement has been de-commissioned, and is no longer available in New York State. It helps though that the expanded definition of "Insured" in the ALTA 2006 policy had left that now-extinct endorsement with little or no utility.

When you did a will, did you throw in the POA for free? Now, do a POA and throw in the Will! We're sure you've heard by now, but the Power of Attorney changed effective September 1, 2009, and the old forms are obsolete for new POA's after the effective date. The new POA includes a special Major Gifts Rider that can be tricky to deal with, must be witnessed like a will, and adds several levels of complexity to what was historically a simple process.

Of special import to the real estate bar, is that the execution of a new POA (even a simple, non-statutory closing authorization, for example) extinguishes all prior POA's! (Hopefully that will change when the Legislature reconvenes). Also, the "Agent" must now sign the POA too, and the statute prescribes the manner in which the Agent must sign on behalf of the donor--now called the "Principal"--when operating under the POA.

The non-durable POA has been eliminated, but you can make the POA non-durable by filling in the "modifications" section properly. The new forms, with instructions, are available on the NYSBA website, at www.nysba.org/poaform. Your Lender clients are sure to be calling for guidance on when and whether to accept a POA-signed instrument.

Fall brings with it lots of changes, and our industry is not immune, so stay sharp, get your flu shot, and keep a keen eye open for the next edition of the Title Examiner! Wishing you and yours the best of the season!

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Mortgage Effective as a Fixture Filing

By
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Perfection of a security interest in fixtures by the filing of a financing statement as a fixture filing in the county clerk's office is not the only method of perfecting a security interest in fixtures. A security interest in fixtures may be perfected by the recording of a mortgage, if the mortgage also creates a security interest in the fixtures and complies with the requirements of Uniform Commercial Code § 9-502(c).

Section 9-502(c) provides that "a mortgage is effective, from the date of recording, as a financing statement filed as a fixture filing . . . if" (1) it indicates the collateral covered by the mortgage; (2) the goods are or are to become fixtures related to the real property described in the mortgage; (3) the mortgage satisfies the requirements of a financing statement in § 9-502 other than the requirement that it is to be filed in the real property records; and (4) the mortgage is duly recorded. *See* N.Y. U.C.C. § 9-502(c).

For a financing statement filed as a fixture filing to be sufficient, § 9-502 requires that the financing statement must provide the following:

(a) the name of the debtor/mortgagor;
(b) the name of the secured party/mortgagee;
(c) that it covers fixtures;
(d) that it is to be filed in the real property records;
(e) in the case of a cooperative interest, the number or other designation and street address of the cooperative unit; and
(f) a description of the real property to which the collateral is related, including the location of the real estate by reference to a book and page number in a deed or mortgage index maintained by the county clerk's office or the street and number and town or city, or if the real estate is in the City of New York, by county. Additionally, if the real estate is in the city of New York or the counties of Nassau or Onondaga, where the block system of recording or registering and indexing conveyances is in use, the statement must also specify the block and lot number in which the real estate is situated. *See* N.Y. U.C.C. 9-502(b), (c).


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A mortgage that contains a provision creating a security interest in fixtures will generally satisfy the requirements for the mortgage to be effective as a fixture filing. However, the mortgage must describe the real property by reference to a deed or mortgage book and page number or street address and town and city, and county if the real property is in New York City.

Additionally, the mortgage must also describe the real property by reference to a block and lot number if the real property is located in New York City, Nassau County or Onondaga County where the block system of recording or registering and indexing conveyances is in use.

Pursuant to § 9-515(g) the usual five year effectiveness of a financing statement is inapplicable to mortgages recorded as a fixture filing. The recording of a mortgage as a fixture filing is effective until the discharge of the mortgage.

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Use Of Subordination, Nondisturbance, Attornment Agreements In Mortgage Transactions

By

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One of the documents routinely used in commercial real estate mortgage transactions is a Subordination, Nondisturbance and Attornment Agreement often referred to as an SNDA. The requirement of these agreements can often create enormous problems and delays in the closing of mortgage refinancings.

The agreements are intended to accomplish basically three things:

1. Establish that the lien of a mortgage will be superior to the lien of a lease.
2. Promise that the tenant's occupancy of the premises will not be disturbed in the event of foreclosure, provided that the tenant is not in default under the terms and conditions of the lease.
3. Provide that the tenant will recognize a new landlord after foreclosure and protect the new landlord from certain claims or offsets that could benefit a tenant.

Trying to obtain SNDA agreements from existing tenants during mortgage refinancing transactions can be an arduous and time consuming task. Smaller tenants don't want to read the agreements and don't want to incur legal expenses for attorneys to review and approve them. If asked to sign these agreements, some tenants will respond with complaints to the landlord, such as slow elevators, poor snow removal, leaking roofs, etc. In many cases the tenant will not respond to the request at all. Are these agreements really worth the trouble?

Are these agreements really worth the trouble?

An excellent article by Joshua Stein, published in 2003 in the Real Property Probate and Trust Journal, carefully analyzed SNDA agreements from a legal and practical point of view. He pointed out that the New York Court of Appeals has held that even with a subordination agreement, a nondisturbance agreement makes the tenant's rights to possession of the premises superior to the landlord's. **KVR Realties, Inc. v. Treasurer Star, Inc., 445 N.E.2d 641, 642(N.Y. 1983).**

If a foreclosing mortgagee cannot terminate a lease, is the concept of subordination important? As a practical matter, in most commercial mortgage foreclosure proceedings, the mortgagee would want to keep existing leases intact. Mr. Stein devotes some of his article to tracing the claim that regulators have some times required banks or insurance companies to invest
only in first mortgage liens, but his research revealed that regulatory authorities recognized that leases were not mortgages and often enhanced the mortgage investment rather than devalued it. **1891 and 1896 NY Atty. Gen. Rep**. The author concludes that a lease is not the kind of encumbrance that will result in the violation of regulatory requirements limiting investments to first mortgage liens.

Nondisturbance provisions are very important to the tenants. Tenants don't want to invest in leasehold improvements if there is a danger of dispossession in the event of foreclosure. Retail tenants don't want to invest in building customer traffic at a location only to lose the location following foreclosure. Thus, as a practical matter, the SNDA is of greater importance to the tenant than it is to the lender or landlord.

With respect to the issues relating to attornment, a tenant will often be relieved when a new landlord replaces a prior, insolvent landlord after foreclosure. If a foreclosure proceeding has taken place, there is a likelihood that the original landlord failed to uphold all of its obligations under the lease, such as building maintenance, payment of utility bills and completion of building improvements.

The tenant may be looking forward to better services under a new regime. The tenant, after foreclosure, will want to reach a satisfactory accommodation with the new owner or managing entity. Unfortunately, one drawback to the replacement of landlords after foreclosure is the likely loss of security deposits paid by the tenant to the original landlord.

Rather than entering into a new three party SNDA agreement every time a. mortgage refinancing occurs, it would be a better practice to incorporate a comprehensive SNDA into the original lease between landlord and tenant. This should suffice for the majority of small commercial tenants within a project.

The use of three party SNDA agreements should be limited to major anchor tenants only. Even if a three party agreement with a new mortgage lender is required, it should be easier to obtain if the original lease sets out the terms of a comprehensive SNDA agreement.

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The Devil is in the Details
Common Pitfalls that Delay Recording

By

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A problem discovered during the examination of title can initiate a flurry of calls and correspondence as we toil to resolve the issue so that a closing can occur. But nothing opens the floodgates of frantic phone calls like an ill-prepared closing package.

Your clients want their money. You want to close the file. Unfortunately, the title company is often caught in the middle because the parties to a transaction neglected to address the ministerial details of preparing the instruments for recording.

A closing package that is incomplete or fraught with errors may prevent instruments from being recorded in a timely manner and that has the potential to open a Pandora's Box of title problems.

The following are common closing-package pitfalls that delay recording:

1. If a Section 255 Affidavit is required, it is necessary to include the who, what, where and when of the original recorded instrument. The most common omissions from the Section 255 Affidavit are the mortgage tax that was paid in connection with each recorded instrument recited therein as well as the current unpaid principal balance;
2. Provide the title company with a breakdown of your recording fees. Whether you have provided a check payable to the county clerk or are relying on the title company to advance funds, it is more efficient for a title company to address a discrepancy in recording fees with this information in hand before the papers are recorded;
3. Fill in the blanks on TP-584 and RP-5217 forms. They are there for a reason and the county clerk will not accept incomplete forms;
4. Satisfaction and Assignment of Mortgages must contain a complete mortgage chain. The sequence of instruments must be logical or the instrument will be rejected for recording;
5. The legal description must contain a reference that can be indexed against a Farm Lot, Lot and Block or Subdivision;
6. Use current forms. The county clerk will not accept an antiquated form no matter how inconsequential the change;
7. Instruments must be labeled with a record & return;
8. Reciprocal Easement Agreements grant reciprocal rights, as can Boundary Line Agreements and Driveway Agreements. An often overlooked detail is that a TP-584 is required for each grant of rights (e.g. if in an instrument, A grants an easement to B and B grants an easement to A, two TP-584 forms will be required to record that instrument);
9. Incomplete or inaccurate acknowledgments. The current statutory form has been in effect since September 1, 1999, yet we consistently see instruments presented for recording that do not comply with the requirements. It is not acceptable for a title company to alter an acknowledgment in any form even if authorized to do so by the parties to the instrument. Title company personnel have been criminally investigated for complying with written instructions provided by the parties to the instrument to alter the language of the acknowledgment in order for it to comply with statutory requirements. Given the heightened level of scrutiny that is being afforded instruments presented for recording, what once may have been viewed as a courtesy to the customer must now be viewed as a line that may not be crossed lest there be serious consequences.

This last example is extreme, but it is also indicative of a shifting stance of what is and is not acceptable to county clerks. The exposure and potential liability to title companies and their employees can be mitigated if a few moments are taken at closing to review the closing package. Furthermore, a complete closing package expedites the recording of instruments by eliminating the need to solicit additional information after the parties have left the closing table.

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The Half-Road Automatic Grant Rule
A Primer

By

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When a deed describes property as bounded by a street, road or highway, the deed is presumed to "carry" or include the title to the centerline of that street. Real estate practitioners have come to refer to this presumption as the "Half-Road Automatic Grant Rule."

For example, if I deed Blackacre bounded on the north by Gil Street, east by Jones, south by Smith and west by Johnson, the presumption is that I conveyed not just to the southerly line of Gil Street, but to its centerline.

Of course, there are many exceptions to the rule. I can't effectively convey more than I own, so when I bought Blackacre, if my deed only ran along the "southerly street line of Gil Street," that's all I can effectively convey, presumptions of law notwithstanding. Then again, if my deed included a "savings clause" like "intending to convey the same premises as were conveyed by deed at Book xxxx, Page xxx," and THAT deed would have carried to the centerline of Gil Street, maybe the title to centerline is "saved" by the recital.

Another exception would be if the municipality actually owns the fee title to Gil Street; in that case, my deed will be as unavailing as if I deeded the Brooklyn Bridge! But, let's not assume that the municipality owns Gil Street, just because they say they do (more on that in a minute). But first — if Blackacre is owned by the State or a municipality, their deed will not be presumed to convey half of the street in front of Blackacre because they would have held the street title in trust for the public. That last rule can be overcome by a deed from the municipality that clearly expresses the intent to convey the street title, as long as the municipality was otherwise legally able to convey it.

Now, back to the municipality's claim that it owns the street title. Maybe it does, by deed or by prescription. However, municipalities are notorious for selling title to abandoned streets to the first sucker, I mean person, willing to plop down their hard-earned dollars for a quit claim deed, whether they own it or not!

If the land in the street was never deeded or ceded to the municipality, then fee title is likely in the owners on both sides of the street. The municipality has a prescriptive easement, and by various statutes, the authority to control the surface and subsurface, but not ownership. So, when the municipality abandons the street, it abandons an easement, not the fee, which was and still is owned by the adjoiners.

What's left to sell? Also, keep in mind that utility companies may have installed utilities in the bed of the street, and the utility companies will typically retain the right to operate and maintain them, and private owners on both sides of the street may retain private easement rights to use the bed of the street for ingress and egress to the nearest public street. Many public highways had their origins as farm lanes, and, once abandoned by the town, the fee that remains is burdened by private easements created before the highway became public.

Subdivision maps, when filed, create an implied offer to dedicate the streets to the municipality. However, until the offer is accepted, it can be withdrawn. Also, the lot owners in the subdivision have an implied easement to use the roads shown on the subdivision map. What many real estate practitioners don't know, though, is that the conveyance of a subdivision lot on a filed map carries with it the title to half of the street in front of the lot. So, where streets haven't already been dedicated to the municipality when lots are sold off, the lot owners own the street.

This is especially troublesome when the town then orders an owners policy as a condition to accepting a dedication of the street, because the title company now is certifying title to perhaps dozens of private owners, and raising exceptions for their dozens of mortgages, judgments, bankruptcies, etc. You get the picture, and it isn't pretty. To make matters even worse, if the street happens to form a border of the subdivision, or if it runs along a navigable body of water, the conveyance of the lot carries title to the whole width of the street in front of the lot.

The problem can be easily avoided, but you have to know how: either note on the map that street title remains private until deeded to the municipality, or except title to the street in every conveyance of a lot, at least until there has been an acceptance and dedication of the street. Actually, I would do both.

There are numerous other exceptions to the Half-Road Automatic Grant Rule, involving state and federal highways, turnpike and former turnpike roads, private roads owned by homeowners associations, former railroads and so forth, but they are beyond the scope of this, um, primer. Suffice it to say, "When navigating street title, drive very carefully".

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