

CURING TITLE DEFECTS

By

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Curing defects in the chain of title begins with the examination of the title report. Specifically, “Schedule B” of the title report list the exceptions to title. It should be noted that title exceptions exist in practically every parcel of land within the State of New Jersey. Accordingly, the issue becomes identifying which exceptions are “permitted” and which exceptions are “non-permitted.” The title commitment should contain copies of all instruments that give rise to the exception in order to assist with this determination.

A “permitted” exceptions is a condition of title, which is generally voluntarily imposed by a predecessor in title in order to either benefit or burden the property being conveyed. Generally, permitted exceptions cannot be extinguished through the satisfaction of pre-determined requirements. Examples of permitted exceptions to title include easements, licenses, restrictive covenants, permits and certain leases. Once a permitted exceptions is identified, the attorney should carefully review the instrument creating the exception in order to determine the nature, extent and duration of either the burdens or benefits created by the exception.

In contrast to permitted exceptions, generally, a non-permitted exception can be removed of record. Accordingly, non-permitted exceptions should be eliminated prior to closing. Common examples of non-permitted exceptions include mortgages, mechanic’s liens, tax liens, security interests in fixtures, environmental liens, survey and boundary disputes, and judgments.

Discharging Old Mortgages:

Generally, there are four standard methods of removing a title exception created by the existence of an open mortgage of record which include discharge, release, cancellation and court order. In order to obtain a discharge, the mortgagee executes an instrument called a “discharge of mortgage.” The discharge of mortgage references the date, book number and page number of the recorded mortgage which effectively evidences the satisfaction of the mortgage. The discharge of mortgage is presented to the County Clerk for recording and effectively discharges the mortgage.

In order to obtain a cancellation, the mortgagee who is in possession of an original mortgage endorses the original mortgage as fully paid and satisfied and the original instrument is presented to the County Clerk for cancellation of record which effectively extinguishes the mortgage interest.

In those instances where there is a blanket mortgage over several parcels of land, which is common in developments, it is appropriate to obtain a release. In order to obtain a release, the mortgagee executes a separate instrument evidencing the release of the subject property from the lien of the blanket mortgage. The release is then presented to the County Clerk for recording.

In cases where the holder refuses to execute the appropriate instrument, or where the holder cannot be located, an action to quiet title may be necessary. The Superior Court has authority to enter an Order which is then recorded with the County Clerk extinguishing the lien of a mortgage.¹ The authority for a quiet title action is found in N.J.S.A. 2A:62-1 et seq. The statute allows a party in possession of lands to settle title to such lands and to clear up all doubts or disputes concerning the same. Quiet title actions are purely statutory in nature and therefore the substantive and procedural requirements of the statute must be adhered to in order for the plaintiff to be successful. Pursuant to the statute, the complaint in a quiet title suit must assert that the plaintiff is in “peaceable possession” of the land, that the defendant is contesting the plaintiff’s title, and that no action is pending to enforce defendant’s claim of title. If the plaintiff can’t meet these jurisdictional requirements, the court must dismiss the complaint. If the plaintiff is successful in meeting these requirements, the burden then shifts to the defendant to overcome the plaintiff’s title.

Resolving Description Errors, Survey and Boundary Disputes

In order to resolve description errors, the survey must be compared to the legal description. Typically, boundary line disputes are not revealed from a simple review of the property survey. Occasionally, however, a careful surveyor will note the difference between descriptions in the chain of title and depict the difference on the survey plan.

¹ See N.J.S.A. 46:18-11.2 and 11.3 for statutory penalties for the delay in delivering mortgage endorsed for cancellation, discharge or release.

Examples of common boundary line disputes includes misallocated wall, misallocated fences, and encroachment of improvements (including setback encroachments, property line encroachment onto neighboring land, property line encroachment onto subject property, and prohibited encroachment into easement area). In order to resolve boundary line disputes, the attorney must make a detailed comparison of the legal description as indicated in the title commitment against the survey. Also, it may be necessary to make the same detailed comparison against old surveys for the property obtained in prior transactions.

Boundary lines are frequently areas of concern for both title insurers and property owners, for various reasons, overlaps between adjacent land owners may occur. Boundary line disputes can be solved in one of or two ways, the adjacent land owners can enter into a boundary line agreement clearly defining the title to the land. The agreement will be recorded in a deed book to impact notice on the rest of the world. If the parties can not reach agreement it will be necessary for one of the parties to commence a quiet title suit. When the subject matter of a quiet title suit is establishing boundary lines, the Court has power to appoint boundary line commissioners.

Clearing Judgment Liens, Tax Liens, Mechanic's Liens and Other Liens

Clearing judgments and liens present a special set of challenges to the attorney in order to close the conveyance of the property. Common issues that arise under this category include judgment liens, tax liens and mechanic's liens. These exceptions often

prove to be special challenges since it may take a substantial degree of time and effort in order to obtain the information necessary to resolve the issue. For example, clearing a judgment lien may prove to be a frustrating task. Generally, the law firm that has filed the lien is included in the exception. Depending on the age of the judgment and record keeping practices of the firm, it may take a substantial degree of time and effort to get information regarding the judgment. Once the required information regarding the judgment has been obtained, the amount required for the judgment is identified and a warrant of satisfaction is prepared evidencing the satisfaction of the judgment. It is common practice for the firm to permit the title company or the closing attorney to hold the warrant of satisfaction in escrow until the closing in order to disburse the funds necessary to satisfy the judgment and file the warrant immediately at the conclusion of the closing.

There are several types of tax liens that may be presented as title exceptions which include property tax liens and federal tax liens. Property tax liens arise when property taxes that are due on the property go unpaid pursuant to N.J.S.A. 54:5-1 et seq. Specifically, unpaid property taxes become a lien on the property so taxed on and after January 1 of the tax year. Taxes not yet due and payable are referred to as subject to an inchoate lien. Interest at the rate of 8.00% on unpaid amounts up to \$1,500 and the rate of 18.00% on amounts \$1,500 and up begins to accrue eight days after the due date and likewise becomes a lien. Added assessments of property tax also a lien pursuant to N.J.S.A. 54:5-7, as well as farmland rollback taxes and other municipal charges such as water charges and sewer charges. If there are any unpaid installments of taxes from the

preceding year as of July 1 of the following year, Pursuant to N.J.S.A. 54:5-19, the municipal tax collector is directed to sell the property to satisfy the lien. This is accomplished by means of a “Tax Sale Certificate”. A person having an interest in the property so sold (e.g., owner, mortgages, occupant), may redeem (in the manner prescribed by statute) the Tax Sale Certificate within two years if the holder is other than the municipality who sold to property or six months if the holder is the municipality. Arrangements for the redemption of the Tax Sale Certificate should be made through the municipal tax collector.

Additionally, another tax lien that may appear as an exception to title is a Federal Tax Lien. Specifically, N.J.S.A. 46:16-13 provides for the filling of notices of Federal Tax Liens in the County Clerk’s office. In order to obtain a discharge of the Tax Lien the party must contact the appropriate Federal Authority at the IRS in order to satisfy the lien. Once the lien is satisfied a discharge certificate must be obtained from the IRS and filed at the County Clerk’s office.

Pursuant to N.J.S.A. 2A:44A-1 et seq. A construction contractor may file a lien on real property in certain circumstances if the contractor has performed agreed upon work on the property but has not been paid by the owner under the terms and conditions of the contract. These exceptions can be removed through the filling of a discharge of the same with the County Clerk or by court order.

Another form of lien that is common in commercial real estate transactions is a lien on fixtures under the Uniform Commercial Code. Specifically, the perfection of a lien upon fixtures, materials, ect, to be affixed to real estate is accomplished through the filling of a UCC-1 financing statement which is effective for five years from the date of filling with the County Clerk. As with mortgages, these interests may either be terminated or the property may be released from the lien in the case of a blanket security interest. This termination or release is accomplished through the filling of a UCC-3 statement executed by the lien holder.

Another example of a lien that is more common in commercial real estate transactions is an environmental lien. There are two primary sources for the imposition of a “super lien” upon real estate arising from environmental liability. The Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C 59601, *et seq.* is the most far reaching federal environmental lien statute. New Jersey has the “Spill Compensation and Control Act”, N.J.S.A. 58:10-23.11, *et seq.* which can be the basic for the imposition of a lien on real property for the cost of clean-up and removal of hazardous waste. In both instances, notice of the lien is filed in the County Court Office in the County in which the property is located. Releases of these liens must be recorded in order to remove the exception.

The absence of a filed notice of environmental lien should not be construed to substitute for due diligence in connection with environmental issues surrounding the purchase of real property. Also, the agreement of the title insurer to issue an ALTA 8.0 or

8.1 environmental endorsements to a policy of title insurance is likewise not a substitute for due diligence.

Foreclosure Considerations

The present economic conditions combined with declining property values have resulted in record foreclosures in the State of New Jersey. When a borrower defaults under the terms of the obligation which is secured by the mortgage interest, the mortgagee institutes a foreclosure action. Specifically, in a mortgage upon the borrower's default under the note, the lender will institute an action in the Chancery Division, in order to foreclose the interest of the borrower and other lien holders and have the property sold in order to pay back the obligation. Immediately subsequent to the filing of the complaint, the lender must file a Lis Pendens in the county land records pursuant to N.J.S.A. 2A:15-6. The filing of this Lis Pendens is important because it puts subsequent lien holders on notice of the foreclosure action and, once the action is complete, the interests of those lien holders are divested. Accordingly, the foreclosing attorney will need to search the record for all subordinate interest up to the filing of the Lis Pendens in order to make sure all proper defendants are brought before the court. Any lien superior to the mortgage being foreclosed is not subject to foreclosure action, and therefore such lien holders are not proper parties to the litigation. This means that superior liens remain effective after the foreclosure has been concluded. Therefore, any Lis Pendens exception

must be removed before title is closed. This can be accomplished through filing a Discharge of Notice of Lis Pendens or through a court order.