

Memorandum 81-5

Subject: Study D-800 - Debtor-Creditor Relations (Summary Removal of Liens on Real Property)

The Commission has been authorized to study whether "a summary procedure should be provided by which property owners can remove doubtful or invalid liens from their property, including a provision for payment of attorney fees to the prevailing party." 1980 Cal. Stats. res. ch. 37. This was added to our list of topics by Assemblyman McAlister as a result of a problem concerning a *lis pendens* which was filed against the property of a constituent of his in a partition action. However, recent legislation appears to have solved the most pressing problems in this area (see discussion below). Accordingly the staff recommends that the Commission not attempt to develop legislation on this subject. However, we probably ought to retain this subject on our authorized list of topics in case any problems under the new legislation come to our attention.

RECENT LEGISLATION

Three bills were enacted at the 1979-1980 session of the Legislature which appear to go a long way toward ameliorating problems created by doubtful or invalid liens:

(1) A new summary procedure was enacted for removing the encumbrance created by a mortgage or deed of trust when it has been paid and the mortgagee or beneficiary either cannot be located after diligent search or refuses to execute a certificate of discharge or a request for reconveyance. (The procedure also includes the case where a specified balance remains due and the mortgagee or beneficiary cannot be located.) The lien is released when the mortgagor or trustor records a corporate bond in a specified amount and a declaration setting forth specified facts. See 1980 Cal. Stats. ch. 529 (codified at Civil Code § 2941.7).

(2) A new summary procedure was enacted for releasing property from a mechanic's lien. A mechanic's lien generally expires 90 days after its recording unless within that time an action to foreclose the lien is brought. Civil Code § 3144. If no such action is brought, after the

90-day period expires the owner may petition the court for a decree releasing the property from the lien on the ground that the 90-day period has expired and the lien claimant is unable or unwilling to execute a release of the lien or cannot be found with reasonable diligence. Civil Code § 3154 (enacted by 1979 Cal. Stats. ch. 332).

(3) A new provision was enacted to require that (i) when an abstract of judgment is recorded as a lien against real property, the abstract shall contain the address of the judgment debtor or the judgment debtor's attorney of record; (ii) when an abstract of judgment or other document creating an involuntary lien affecting title to real property is recorded and the abstract or document contains the address of the person against whom the lien is recorded or of a judgment debtor's attorney of record, the county recorder shall mail notice of the recording to such person; and (iii) when a state agency records a notice of state tax lien, the agency must mail notice of the recording to the tax debtor. 1980 Cal. Stats. ch. 1281 (codified at Civil Code § 2885; Code Civ. Proc. § 674; Gov't Code 27297.5).

PRESENT STATE OF THE LAW

With the enactment of these new procedures, the law with respect to summary removal of the various types of real property liens may be summarized as follows:

1. Liens created by mortgage or deed of trust. The problem of the cloud on title created by a lingering mortgage or deed of trust which has been paid has been solved by the new procedure for obtaining release by recording a bond and declaration (see discussion above).

2. Equitable liens. Ordinarily equitable liens do not appear on record because an equitable lien is not judicially recognized until a judgment declares its existence. 2 A. Bowman, Ogden's Revised California Real Property Law § 19.5, at 973 (Cal. Cont. Ed. Bar 1975). A bona fide purchaser for value without actual or constructive notice of an equitable lien will be protected. Id. § 19.5, at 974. However, there may be matters in the record chain of title that would disclose a possible right to an equitable lien. Examples of these are imperfectly executed mortgages, covenants and agreements to give a lien, agreements indicating an intent to charge or to appropriate land or proceeds of land as security,

recitals in deeds that a mortgage or other lien is to be given, or a certificate of redemption reciting redemption from foreclosure sale by one cotenant. Id. § 19.7, at 974. For most of these situations, there is no summary procedure for clearing title. The property owner would have to bring a quiet title action, an action to remove cloud on title, or an action for declaratory relief. See generally 3 B. Witkin, California Procedure Pleading §§ 522, 525, 535, 710 (2d ed. 1971).

3. Judgment liens. Under existing law, when a judgment is satisfied but the judgment creditor fails or refuses to acknowledge satisfaction, the court in which the judgment is entered may upon motion compel the judgment creditor to acknowledge satisfaction or may order the entry of satisfaction to be made without the judgment creditor's acknowledgment. Code Civ. Proc. § 675(a). This provision is to be continued under the Commission's enforcement of judgments recommendation.

4. Attachment liens. When real property has been attached under Code of Civil Procedure Section 488.310, the defendant may apply by noticed motion for an order that the right to attach order be set aside, the writ of attachment quashed, and any property levied upon pursuant to the writ be released. Code Civ. Proc. § 485.240.

5. Execution liens. Real property may be levied upon after judgment and may be released from execution in the same manner as in the case of attachment. Code Civ. Proc. § 688(b). Thus the property may be released from execution upon motion of the judgment debtor. See Code Civ. Proc. § 485.240.

6. Mechanic's liens. After expiration of the 90-day effective period for a mechanic's lien, if no action has been brought to enforce the lien, the lien may be released on petition of the owner. Civil Code § 3154 (enacted by 1979 Cal. Stats. ch. 332).

7. Oil and gas liens. The Oil and Gas Lien Act (Code Civ. Proc. §§ 1203.50-1203.66) has a purpose and effect similar to the mechanic's lien law. Under the act, a person who furnishes material or performs labor in connection with drilling or operating an oil or gas well may obtain a lien. See Code Civ. Proc. § 1203.52. The act contains a provision for release of the lien by the owner recording a bond equal to 150% of the amount of the claimed lien. Code Civ. Proc. § 1203.60. The

bond when recorded takes the place of the property. The lien claimant may sue on the bond within 180 days. If the property owner ultimately prevails, the bond premium would appear to be a recoverable cost of suit. See Code Civ. Proc. § 1035.

8. Special assessment liens. Special assessments are levied for the cost of specific local improvements such as streets, sewers, irrigation, drainage, and off-street parking. Under Civil Code Section 2911, a lien for a public improvement assessment is presumed to be extinguished after four years have elapsed after the due date of the last installment. In such a case, a special action may be brought to remove the cloud on title created by the special assessment lien which is presumed extinguished. See Code Civ. Proc. §§ 801.1-801.15. However, there is no summary procedure for the removal of invalid special assessment liens.

9. Tax liens. Liens may arise from local property taxes (Rev. & Tax. Code § 2187), state tax liens covered by the new, Commission-recommended state tax lien statute (Gov't Code §§ 7150-7191), state tax liens not within the new legislation but covered by individual provisions,¹ and federal taxes. None of these statutes make provision for the summary release of tax liens. Presumably a writ of mandamus will lie when the tax debt has been fully paid and the taxing agency fails or refuses to release the lien. See 5 B. Witkin, California Procedure Extraordinary Writs § 70, at 3848 (2d ed. 1971); 5 B. Witkin, Summary of California Law Taxation § 200, at 4173 (8th ed. 1974). If the taxpayer disputes the tax debt, the taxpayer may pay under protest, obtain release of the lien, and then sue to recover payment. See e.g., Rev. & Tax. Code § 5136 (property taxes); 5 B. Witkin, Summary of California Law Taxation §§ 194-198, at 4168-71 (8th ed. 1974).

10. Lis pendens. A lis pendens is not really a lien; rather it is a notice of pending litigation affecting real property. There are two methods for expunging a lis pendens by motion in the pending action.

1. The state tax liens that are not governed by the new legislation are the following: private car tax (Rev. & Tax. Code § 11495), insurance company tax (Rev. & Tax. Code § 12491), public utility tax (Cal. Const. art. 13, § 19; Rev. & Tax. Code §§ 867, 2187, 2191.4), and inheritance tax (Rev. & Tax. Code § 14301).

The first method entails a motion on the ground that the action does not affect the described real property or that the action is brought for an improper purpose and not in good faith. When the motion is made, the burden shifts to the party who filed the lis pendens to show that the action does affect the described real property and that the action has been brought for a proper purpose and in good faith. The court has discretion to require the party seeking expungement to give an undertaking. Code Civ. Proc. § 409.1.

The second method does not require an allegation of improper use of the lis pendens, but merely requires the moving party to furnish an undertaking to indemnify the other party from all damage resulting from expungement if the moving party does not prevail in the action. The amount of the undertaking is fixed by the court. Code Civ. Proc. § 409.2.

Both methods of expungement provide for an award of reasonable attorney's fees and costs in favor of the prevailing party. Code Civ. Proc. § 409.3.

RECOMMENDATION

With the enactment of the new legislation at the 1979-1980 legislative session, the most serious problems relating to invalid liens on real property appear to have been solved. However, there is still no summary procedure for removing equitable liens disclosed by the record (must bring quiet title, action to remove cloud, or declaratory relief), special assessment liens (must bring special action under CCP § 801.1-801.15), or tax liens (must bring mandamus proceeding). It would be difficult to develop a summary procedure for removing equitable liens because of their variety and frequent difficulty of valuation. A procedure could be developed for summary removal of invalid special assessment liens and for tax liens which have been satisfied, but this appears to be a marginally productive use of staff resources. Accordingly, the staff recommends that the Commission not attempt to develop legislation on this subject.

Respectfully submitted,

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