

## SECTION 52.0012 RESOLVES FEW HOMESTEAD RELEASE-OF-LIEN ISSUES

by KAREN L. HART

**T**he Texas Legislature enacted Texas Property Code §52.0012 in an attempt to streamline the process for releasing a judgment lien on homestead property through the filing of a homeowner's affidavit. But, in reality, this amendment has not resolved much, and it actually may create additional issues with which creditors, debtors and title companies need to contend. Texas lawyers need to have strategies in place to effectively use and respond to this relatively new provision of Texas law.

Texas lawyers know that judgment liens do not attach to Texas homesteads, which are exempt as a matter of law.



But title companies often require a partial release of a judgment lien to complete a transaction on a homestead; the practical effect of an abstract of judgment is to tie up a homestead when it should not do so from a legal standpoint. So, judgment creditors face requests for releases of judgment liens on homesteads, and judgment

debtors must ask for these releases to complete a sale of their homestead.

Judgment creditors must decide whether to provide the release when they may not know whether the claimed property is actually a homestead — a fact-intensive question. When a judgment debtor requests a partial release, time may be short for conducting full due diligence, especially when the judgment debtor threatens to sue to remove the cloud on the title or for slander of title resulting from the abstract.

Given the right facts and circumstances, slander of title suits based on abstracts can succeed if a debtor can show that the judgment creditor, with legal malice, published disparaging words about the judgment debtor's title to property that were false and resulted in the loss of a specific sale. On the flip side, the debtor faces paying off the judgment or expending resources to sue to clear out the judgment lien. And a court may not resolve a suit to remove a judgment lien quickly enough for a waiting buyer. So, judgment creditors and debtors are between a



rock and an abstract that, legally, should not have such an effect on homestead property.

### Please Release Me

Effective Sept. 1, 2007, the Legislature amended the Texas Property Code in an attempt to solve this puzzle. Pursuant to the legislative history behind §52.0012, "the Texas Constitution protects a person's homestead from being foreclosed on by a judgment lien. However, there can sometimes be difficulty in identifying what land is a person's homestead and whether a judgment lien attaches against said property."

Hence, lawmakers adopted §52.0012 to provide a judgment debtor a way to effect a release of a judgment lien on his or her homestead through an affidavit attesting to the property's homestead status and swearing that notice of the affidavit was mailed as required to the judgment creditor and its attorney of record at least 30 days prior to its filing in the real property records in the county where the homestead is located. If the statutory requirements are met, the filed affidavit serves as "a release of record of a judgment lien" upon which "a bona fide purchaser or a mortgagee for value . . . may rely conclusively." Thus, it is not a requirement that an affidavit be given such an effect.

The judgment debtor's affidavit, however, is no longer an effective release of a judgment lien if a judgment creditor files a contradicting affidavit that asserts that the judgment debtor's affidavit is untrue or "another reason exists as to why the judgment lien attaches to the judgment debtor's property."

Significantly, the statute does not provide a time


limitation in which a judgment creditor must file such a controverting affidavit. As such, it is difficult for a subsequent purchaser, subsequent mortgagee or a title insurance company to rely conclusively on the judgment debtor's affidavit as an effective release. Title companies might be stuck paying someone else's judgments more often than they like, if title insurance was issued based on the judgment debtor's affidavit alone. After closing a sale to a subsequent buyer, following issuance of title insurance, a judgment creditor might file a controverting affidavit and make a claim to the property, resulting in a title claim, which is generally the same sort of risk that existed prior to §52.0012's enactment.

In the three-and-a-half years since §52.0012 became effective, not a single case has cited to this provision. Judgment debtors may be filing affidavits in compliance with §52.0012, but it is doubtful that anyone is relying on them conclusively.

A lawyer for a judgment debtor needs to know that jumping through the hoops set forth in §52.0012 may not resolve the perceived cloud on the client's homestead. Consequently, it may not be worth going through the motions. It may make more sense to cut to the chase and directly ask for a release, since this is what the title company likely will want to see anyway. Filing the affidavit and providing the required notice, however, may put some pressure on the judgment creditor to take action, which

may or may not be a good thing for the debtor.

A lawyer representing a judgment creditor who receives notice under the statute needs to decide as soon as possible whether he or she can and should file a controverting affidavit. If post-judgment discovery is not already under way, the lawyer may need to serve deposition notices and document requests to get to the bottom of the homestead question. A court later could construe a sloppy or insupportable controverting affidavit as false and/or malicious, a dangerous development in the event of a slander of title claim.

Accordingly, Texas lawyers should evaluate the options, risks and potential opportunities (although limited) that §52.0012 affords. 



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