Elements of Fraud

(Texas, A Break in Chain of Title)

"A plaintiff seeking to prevail on a fraud claim must prove that (1) the defendant made a material misrepresentation; (2) the defendant knew the representation was false or made the representation recklessly without any knowledge of its truth; (3) the defendant made the representation with the intent that the other party would act on that representation or intended to induce the party's reliance on the representation; and (4) the plaintiff suffered an injury by actively and justifiably relying on that representation. See De Santis v. Wackenhut Corp., 793 S.W.2d 670, 688 (Tex. 1990); Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1983)."

Barrett Daffin Frappier Turner & Engel, L.L.P. published: **"TITLE CONCERNS IN FORECLOSURE",** 18TH ANNUAL ROBERT C. SNEED TEXAS LAND TITLE INSTITUTE AND ST.MARY'S UNIVERSITY SCHOOL OF LAW, DECEMBER 5, 2008, authored by G. Tommy Bastian of Barrett Daffin Frappier Turner & Engel, L.L.P., 15000 Surveyor Blvd., Ste. 100, Addison, Texas 75001.

> Page 5, Subsection II. Background, *"To conduct a foreclosure, the chain of title to the property must be examined to identify any potential issue that may affect title…, The best practice is to review copies of the actual instruments recorded in the chain of title…"*

Texas Local Government Code §192.001; GENERAL ITEMS. The county clerk shall record each deed, mortgage, or other instrument that is required or permitted by law to be recorded. Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987.

Texas Local Government Code §192.007; RECORDS OF RELEASES AND OTHER ACTIONS. (a) To release, transfer, assign, or take another action relating to an instrument that is filed, registered, or recorded in the office of the county clerk, a person must file, register, or record another instrument relating to the action in the same manner as the original instrument was required to be filed, registered, or recorded. (b) An entry, including a marginal entry, may not be made on a previously made record or index to indicate the new action. Added by Acts 1989, 71st Leg., ch. 1248, § 53, eff. Sept. 1, 1989.

In the not so far past, lawyers for Barrett Daffin Frappier Turner & Engel, L.L.P. would notice on an "Assignment of Note and Deed of Trust" filed in public records: "MERS as Nominee for Lender and Lenders successors and assigns for Asset Backed "Whatever Security." The problem with this nomenclature, it pretty well identified the security that should be the owner/holder of the Mortgage Note and Deed of Trust. At least, this identified a purported party that MERS could be an agent for.

Today, lawyers for Barrett Daffin Frappier Turner & Engel, L.L.P. file "Assignment of Note and Deed of Trust" in public record with verbiage noting: "MERS as Nominee for Lender and Lenders successors and assigns." The problem with this nomenclature, it does not identify a purported party that MERS could be an agent for. The courts will need to sort out the legality of this nomenclature.

Now we apply the prima facie facts, the "Assignment of Note and Deed of Trust" contained within public records to the 4 elements of fraud.

(1) the defendant made a material misrepresentation;

As noted above, the court would need to opine to the validity of MERS representing as agent to an unidentified party.

(2) the defendant knew the representation was false or made the representation recklessly without any knowledge of its truth;

Filing of an "Assignment of Note and Deed of Trust" in public records noting MERS does not represent an unidentified party. Either way, it could have been done with knowledge but failure to prove up this claim, it at least would be reckless.

(3) the defendant made the representation with the intent that the other party would act on that representation or intended to induce the party's reliance on the representation; and

Where the "Assignment of Note and Deed of Trust" led to a foreclosure action, the Substitute Trustee would have acted upon this information as being valid to execute a sale of the secured property. The courts would also have acted on this instrument. If the invalid instrument is not challenged, then it would be considered valid, only challenge validity where such validity is fraudulent.

(4) the plaintiff suffered an injury by actively and justifiably relying on that representation.

Property owner would suffer loss of property by Trustee Sale if such sale could have not lawfully occurred. One needs to examine a complete chain of title. The power of sale depends upon a complete perfected chain of title, from the "Deed of Trust" to the last "Assignment of Note and Deed of Trust, all which should be recorded in public records.

For all you lawyers, judges, and law enforcement officers of this great state of **TEXAS**, questions arise. Was one of the intents of public records to prevent fraud by eliminating secret contracts? Would a secret contract be in violation of the Statues of Fraud? Would the financial institutions using the electronic MERS Registry in lieu of recording in public records be considered an electronic secret contract?

Bona Fide Purchaser

A person cannot obtain bona fide purchaser status under Texas law when one of the links in the chain of title is a forgery. See Bellaire Kirkpatrick Joint Venture v. Loots, 826 S.W.2d 205, 210 (Tex. App.—Fort Worth 1992, writ denied) (joint venturers could not obtain bona fide purchaser status with a forged deed in their chain of title); Dyson Descendant Corp. v. Sonat Exploration Co., 861 S.W.2d 942, 947 (Tex. App.—Houston [1st Dist.] 1993, no writ) (forged deed is void ab initio and no person can be an innocent purchaser of land where a link in the chain of title is a forgery); Commonwealth Land Title Ins. Co. v. Nelson, 889 S.W.2d 312, 318(Tex. App.—Houston [14th Dist.] 1994, writ denied) (stating same).

God Speed and God Bless Texas and the United States Vote in 2012