

**Justice Court Precinct 1
Collin County Texas**



MEMORANDUM

TO: Collin County Commissioner's Court
DATE: December 7, 2021
SUBJECT: Sale of Property at Courthouses Steps

I request this item be placed on the Commissioner's Court Agenda so we can discuss the location of the sale of "Foreclosed Property" on the courthouse steps.

Currently the manor and operation of these sales are disruptive to business operations and restrict employees and the public from entering and exiting the building.

I ask the Commissioner's Court name a designated area for these sales away from the entrance and exit doors - and included the statute that give the Court the authority to act.

Respectfully Submitted

Judge Paul Raleeh

A handwritten signature in black ink, appearing to be "Paul Raleeh", written over the printed name.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated
Property Code (Refs & Annos)
Title 5. Exempt Property and Liens
Subtitle B. Liens
Chapter 51. Provisions Generally Applicable to Liens

V.T.C.A., Property Code § 51.002

§ 51.002. Sale of Real Property Under Contract Lien

Effective: September 1, 2017

Currentness

(a) Except as provided by Subsection (a-1), a sale of real property under a power of sale conferred by a deed of trust or other contract lien must be a public sale at auction held between 10 a.m. and 4 p.m. of the first Tuesday of a month. Except as provided by Subsection (h), the sale must take place at the county courthouse in the county in which the land is located, or if the property is located in more than one county, the sale may be made at the courthouse in any county in which the property is located. The commissioners court shall designate the area at the courthouse where the sales are to take place and shall record the designation in the real property records of the county. The sale must occur in the designated area. If no area is designated by the commissioners court, the notice of sale must designate the area where the sale covered by that notice is to take place, and the sale must occur in that area.

(a-1) If the first Tuesday of a month occurs on January 1 or July 4, a public sale under Subsection (a) must be held between 10 a.m. and 4 p.m. on the first Wednesday of the month.

(b) Except as provided by Subsection (b-1), notice of the sale, which must include a statement of the earliest time at which the sale will begin, must be given at least 21 days before the date of the sale by:

(1) posting at the courthouse door of each county in which the property is located a written notice designating the county in which the property will be sold;

(2) filing in the office of the county clerk of each county in which the property is located a copy of the notice posted under Subdivision (1); and

(3) serving written notice of the sale by certified mail on each debtor who, according to the records of the mortgage

servicer of the debt, is obligated to pay the debt.

(b-1) If the courthouse or county clerk's office is closed because of inclement weather, natural disaster, or other act of God, a notice required to be posted at the courthouse under Subsection (b)(1) or filed with the county clerk under Subsection (b)(2) may be posted or filed, as appropriate, up to 48 hours after the courthouse or county clerk's office reopens for business, as applicable.

(c) The sale must begin at the time stated in the notice of sale or not later than three hours after that time.

(d) Notwithstanding any agreement to the contrary, the mortgage servicer of the debt shall serve a debtor in default under a deed of trust or other contract lien on real property used as the debtor's residence with written notice by certified mail stating that the debtor is in default under the deed of trust or other contract lien and giving the debtor at least 20 days to cure the default before notice of sale can be given under Subsection (b). The entire calendar day on which the notice required by this subsection is given, regardless of the time of day at which the notice is given, is included in computing the 20-day notice period required by this subsection, and the entire calendar day on which notice of sale is given under Subsection (b) is excluded in computing the 20-day notice period.

(e) Service of a notice under this section by certified mail is complete when the notice is deposited in the United States mail, postage prepaid and addressed to the debtor at the debtor's last known address. The affidavit of a person knowledgeable of the facts to the effect that service was completed is prima facie evidence of service.

(f) Each county clerk shall keep all notices filed under Subdivision (2) of Subsection (b) in a convenient file that is available to the public for examination during normal business hours. The clerk may dispose of the notices after the date of sale specified in the notice has passed. The clerk shall receive a fee of \$2 for each notice filed.

(f-1) If a county maintains an Internet website, the county must post a notice of sale filed with the county clerk under Subsection (b)(2) on the website on a page that is publicly available for viewing without charge or registration.

(g) The entire calendar day on which the notice of sale is given, regardless of the time of day at which the notice is given, is included in computing the 21-day notice period required by Subsection (b), and the entire calendar day of the foreclosure sale is excluded.

(h) For the purposes of Subsection (a), the commissioners court of a county may designate an area other than an area at the county courthouse where public sales of real property under this section will take place that is in a public place within a reasonable proximity of the county courthouse as determined by the commissioners court and in a location as accessible to the public as the courthouse door. The commissioners court shall record that designation in the real property records of the county. A designation by a commissioners court under this section is not a ground for challenging or invalidating any sale. A sale must be held at an area designated under this subsection if the sale is held on or after the 90th day after the date the designation is recorded. The posting of the notice required by Subsection (b)(1) of a sale designated under this subsection to take place at an area other than an area of the courthouse remains at the courthouse door of the appropriate county.

(i) Notice served on a debtor under this section must state the name and address of the sender of the notice and contain, in addition to any other statements required under this section, a statement that is conspicuous, printed in boldface or underlined type, and substantially similar to the following: "Assert and protect your rights as a member of the armed forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately."

Credits

Acts 1983, 68th Leg., p. 3525, ch. 576, § 1, eff. Jan. 1, 1984. Amended by Acts 1984, 68th Leg., 2nd C.S., ch. 18, § 3(b), eff. Oct. 2, 1984; Acts 1987, 70th Leg., ch. 540, § 1, eff. Jan. 1, 1988; Acts 1993, 73rd Leg., ch. 48, § 5, eff. Sept. 1, 1993; Acts 2003, 78th Leg., ch. 554, § 2, eff. Jan. 1, 2004; Acts 2005, 79th Leg., ch. 533, § 1, eff. June 17, 2005; Acts 2005, 79th Leg., ch. 555, § 1, eff. Sept. 1, 2005; Acts 2007, 80th Leg., ch. 903, § 2, eff. June 15, 2007; Acts 2011, 82nd Leg., ch. 252 (H.B. 1127), § 2, eff. Jan. 1, 2012; Acts 2011, 82nd Leg., ch. 592 (S.B. 101), § 1, eff. Sept. 1, 2011; Acts 2013, 83rd Leg., ch. 52 (H.B. 584), § 1, eff. Sept. 1, 2013; Acts 2013, 83rd Leg., ch. 161 (S.B. 1093), § 17.001, eff. Sept. 1, 2013; Acts 2013, 83rd Leg., ch. 642 (H.B. 699), § 2, eff. Oct. 1, 2013; Acts 2017, 85th Leg., ch. 133 (H.B. 1128), § 3, eff. Sept. 1, 2017.

Notes of Decisions (903)

O'CONNOR'S NOTES

Source: TRCS art. 3810.

O'CONNOR'S CROSS REFERENCES

See also Prop. Code §51.0025; TRCP 309, 735, 736; *Texas Forms * Real Estate*, "Commentary on Foreclosures," ch. 4, §1 et seq.; *Texas Forms * Real Estate*, FORMS 4A:1 to 4A:17, 4B:1 to 4B:10.

O'CONNOR'S ANNOTATIONS

Generally

Mercer v. Bludworth, 715 S.W.2d 693, 697 (Tex.App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.), *disapproved on other grounds*, *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890 (Tex.1991). "It is fundamental that a judgment lien on the land of a debtor is subject to every equity that existed against the land at the time of judgment. [¶] It is undisputed that [purchaser] acquired his judgment lien when [creditor's] deed of trust lien of record was not barred by limitations. Therefore, [purchaser] is not a bona fide third person entitled to the presumption that the debt was paid and that the lien became void and ceased to exist. *At 698*: [Purchaser] acquired his interest with knowledge that his rights were subject to the rights of a senior lienholder, and therefore took title subject to the rights and the lien of [creditor]. [¶] [Creditor's successor] introduced deeds and deeds of trust into evidence which proved his chain of title out of ... the common source of title. [¶] We hold that, as a matter of law, [successor's] title is superior to that of [purchaser]."

Bateman v. Carter-Jones Drilling Co., 290 S.W.2d 366, 370 (Tex.App.--Texarkana 1956, writ ref'd n.r.e.). "It is the contention of [Ps] that [TRCS art. 3759, now Prop. Code §51.002(a)] provides for the sale of lands in a different county from that in which it is situated only in case the land is contiguous to the tract or tracts of land in the county in which the sale is held. [W]e do not believe that to be a proper construction. Surely the Legislature, when [it] made the provision for the sale of land where the greater portion thereof is situated and if in equal quantities the notice shall designate in which of said counties the sale is to be made, did not anticipate that land could be situated in a half-dozen or more counties and likely to be contiguous, one tract to the other, making a complete chain back to the county in which the sale was to be held." *See also*

Segal v. Emmes Capital, L.L.C., 155 S.W.3d 267, 295 (Tex.App.--Houston [1st Dist.] 2004, pet. dismissed) (Legislature intended to adopt Bateman interpretation).

Foreclosure Sale

Holy Cross Ch. of God in Christ v. Wolf, 44 S.W.3d 562, 569 (Tex.2001). Property Code §51.002 “establishes the procedures for conducting a foreclosure sale. ... However, §51.002 has nothing to do with accrual or limitations; it only governs the procedures noteholders must follow if they choose to exercise their power of sale. Rather, [CPRC] §16.035 ... governs accrual, and it provides that a cause of action accrues and limitations begins to run from an installment note’s maturity date.”

Wells Fargo Bank v. Robinson, 391 S.W.3d 590, 594 (Tex.App.--Dallas 2012, no pet.). “For a party to recover damages for wrongful foreclosure and breach of the deed of trust, he must show that he has suffered a loss or material injury as the result of an irregularity in the foreclosure sale. In general, this is shown where the actions of the lender or note holder have caused the property to be sold for a grossly inadequate price. In such a case, the damages are measured by the difference between the market value of the land and the remaining balance on the outstanding mortgage debt. [¶] The recovery of damages is not appropriate, however, where title to the property has not passed to a third party and the borrower’s possession of the property has not been materially disturbed. Where the note holder obtains title to the property at the foreclosure sale and the borrower retains possession, the proper remedy is to set aside the trustee’s deed and to restore the borrower’s title, subject to the note holder’s right to establish the debt owed and foreclose its lien.”

Brown v. EMC Mortg. Corp., 326 S.W.3d 648, 654 (Tex.App.--Dallas 2010, pet. denied). “Because nothing in [Prop. Code] ch. 51 conflicts with [TRCP] 309, we must assume that the legislature intended for judicial foreclosures to continue to be conducted by sheriffs or constables even after the enactment of ch. 51.”

Myrad Props., Inc. v. LaSalle Bank Nat’l Ass’n, 252 S.W.3d 605, 615 (Tex.App.--Austin 2008), *rev’d on other grounds*, 300 S.W.3d 746 (Tex.2009). See annotation under this code section, *Notice*.

Capital Reserve Corp. v. Day, No. 2-03-264-CV, 2004 WL 2793260 (Tex.App.--Fort Worth 2004, pet. denied) (memo op.; 12-2-04). Held: The statute of frauds applies to nonjudicial foreclosure-sale auctions.

Dykes v. Cendant Mortg. Corp., No. 04-02-00383-CV, 2003 WL 1964195 (Tex.App.--San Antonio 2003, no pet.) (memo op.; 4-30-03). “A non-judicial foreclosure transfers title from the debtor to another party, but it does not put the new owner in possession; it gives him a right to possession. If a debtor remains on the property, most deeds of trust treat him as a tenant by sufferance. [¶] To remove a tenant by sufferance, the new owner must file a forcible detainer suit.”

Notice

Bauder v. Alegria, 480 S.W.3d 92, 97 (Tex.App.--Houston [14th Dist.] 2015, no pet.). Mortgagee “asserts that because [debtor’s] residence was [address 1] at the time the deed of trust was executed, she was required to give him written notice of a change in address to make [address 2] her last known address under [Prop. Code] §51.002. The deed of trust is silent with respect to whether and how the debtor should provide notice of a change of address. [¶] For the purpose of sending notices under [§51.002(b) and (d)], the debtor’s last known address is defined under [Prop. Code §51.0001(2)(A) or (B)]. If part (A) applied in the case under review, then [§51.002(b) and (d)] required the trustee to send the Notice to Cure and the Foreclosure Notice to [debtor’s] residence address[, which was address 2]. [¶] [I]f part (B) ... applied, then the notices should have been sent to [debtor’s] last known address as shown by [mortgage servicer’s] records[, which was address 2]. At 98: [Thus, regardless] of whether Part (A) or Part (B) ... applied, [debtor] was not required to give written notice that her address had changed....”

Kaldis v. Aurora Loan Servs., 424 S.W.3d 729, 732 (Tex.App.--Houston [14th Dist.] 2014, no pet.). “[T]o have given proper notice of the foreclosure sale, [mortgage servicer] was required to have served written notice on [debtors] by certified mail on or before October 13, 2008. [Mortgage servicer] asserts that notice of foreclosure was properly served on [debtors] by employees of the law firm ... on October 13, 2008. At 735-36: Even presuming that [law firm’s] customary mailing routine ... satisfied all the requirements of ... §51.002, there is no summary-judgment evidence showing that this mailing routine was actually carried out as to the foreclosure notices at issue. The business records of [law firm] contained in the

summary-judgment evidence do not reflect or recite that either foreclosure notice was mailed on October 13, 2008 or on any other date. In addition, [debtors] have testified that they did not receive these notices. ... Therefore, the trial court erred in granting summary judgment as to [debtors'] wrongful-foreclosure claims and related claims for declaratory relief."

Montenegro v. Ocwen Loan Servicing, LLC, 419 S.W.3d 561, 570 (Tex.App.--Amarillo 2013, pet. denied). "The only defect in the foreclosure proceeding that [P] claimed in his live pleading was that [D] failed to give him notice of default and an opportunity to cure under ... §51.002(d). ... The summary judgment evidence conclusively establishes that [P] did not use the subject property as his residence. Rather, the evidence established that [P's] mother, father, sister, and nephew lived in the subject property. As such, §51.002(d) did not require [D] to give written notice of default and opportunity to cure to [P]."

Montgomery v. Aurora Loan Servs., 375 S.W.3d 617, 620 (Tex.App.--Dallas 2012, pet. denied). "[P] contends that [§51.002(b)(2)'s] filing requirement is actually a recording requirement. [P] contends that the notice of foreclosure sale must be recorded in the deed records and because [D] did not record the notice of foreclosure sale, the sale is void. *At 621*: The plain language of §51.002(b)(2) requires a party to file the notice of sale with the county clerk in which the property is located. It does not require the notice of sale to be recorded in the permanent deed records. This construction of subsection (b)(2) is supported by subsection (f), which states that the county clerk must keep the notices filed under subsection (b)(2) 'in a convenient file that is available to the public for examination during normal business hours.' Subsection (f) also allows the clerk to 'dispose of the notices after the date of sale specified in the notice has passed.' Based on the statute's plain language, we conclude that the legislature did not intend subsection (b)(2) of §51.002 to require a party to record a notice of foreclosure sale in the permanent deed records of the county in which the property is located." See also *Givens v. Midland Mortg. Co.*, 393 S.W.3d 876, 882 (Tex.App.--Dallas 2012, no pet.).

Myrad Props., Inc. v. LaSalle Bank Nat'l Ass'n, 252 S.W.3d 605, 615 (Tex.App.--Austin 2008), *rev'd on other grounds*, 300 S.W.3d 746 (Tex.2009). "The statutory notice provisions of §51.002 seek to not only protect the debtor by affording him a lengthy notice period in which he may cure, but also adequately inform the third party public in order to maximize the likelihood of a profitable public sale at market value in which the debtor may recover his equity in his property.' [N]oncompliance with these requirements can render a foreclosure sale void. [¶] The notice of the foreclosure sale must provide a description or other identification of the property to be sold."

Stanley v. CitiFinancial Mortg. Co., 121 S.W.3d 811, 817-18 (Tex.App.--Beaumont 2003, pet. denied). Section 51.002(e) "requires constructive notice; there is no requirement of actual notice. ... The affidavit does not state facts pertaining to the statutory requirements, i.e., whether the debt holder's records contain the last-known address of the debtor, and whether such notice was deposited in the U.S. Mail, certified mail, return receipt requested. Non-compliance with these two requirements must be shown to establish lack of notice." See also *WTFO, Inc. v. Braithwaite*, 899 S.W.2d 709, 719-20 (Tex.App.--Dallas 1995, no writ); *Onwuteaka v. Cohen*, 846 S.W.2d 889, 892 (Tex.App.--Houston [1st Dist.] 1993, writ denied). *Compare First Gibraltar Bank v. Farley*, 895 S.W.2d 425, 429-30 (Tex.App.--San Antonio 1995, writ denied) ("forwarding address expired" notice shows good-faith effort to comply), and *Johnson v. First S. Props., Inc.*, 687 S.W.2d 399, 402 (Tex.App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.) (notice was sufficient because it was proper in all respects except for wrong address), with *Mitchell v. Texas Commerce Bank*, 680 S.W.2d 681, 682-83 (Tex.App.--Fort Worth 1984, writ ref'd n.r.e.) (harm even if actual notice received and present at sale).

Mills v. Haggard, 58 S.W.3d 164, 167 (Tex.App.--Waco 2001, no pet.). "[A] notice-of-foreclosure on real property used as the debtor's residence is useless to the creditor unless a proper notice-to-cure has been sent pursuant to §51.002(d). [¶] 'An execution sale will be set aside upon proof that it was made for a grossly inadequate price and was accompanied by irregularities which tended to contribute to the inadequacy of price.' [¶] [T]he failure to send a notice-to-cure to the address in the holder's file is an irregularity and defeats the effect of sending the notice-of-foreclosure. Further, the failure to send any notice-to-cure to [co-debtor] is another irregularity that would justify the trial court's judgment setting aside the foreclosure." See also *Herrington v. Sandcastle Condo. Ass'n*, 222 S.W.3d 99, 102 (Tex.App.--Houston [14th Dist.] 2006, no pet.); *Powell v. Stacy*, 117 S.W.3d 70, 73 (Tex.App.--Fort Worth 2003, no pet.).

Bishop v. National Loan Investors, L.P., 915 S.W.2d 241, 245 (Tex.App.--Fort Worth 1995, writ denied). "Guarantors, as opposed to the maker, of a note secured by realty do not enjoy the right to notice of the foreclosure sale under the Property Code's notice provisions. This case ... does not involve the intermingled rights of guarantors and note makers nor a guarantor who signed the note and therefore partakes in the nature and rights of a note maker; therefore, [guarantor] was not entitled to

notice of the sale.” See also *Long v. NCNB-Tex. Nat’l Bank*, 882 S.W.2d 861, 865-66 (Tex.App.--Corpus Christi 1994, no writ) (guarantors’ rights are distinct from note maker’s right to notice of foreclosure sale).

Newman v. Woodhaven Nat’l Bank, Inc., 762 S.W.2d 374, 375-76 (Tex.App.--Fort Worth 1988, no writ). “The crux of [P’s] argument is that excluding the day of notice and the day of sale, 21 days must fall between the two days. [P’s] contention is incorrect. [F]or purposes of computing the 21 day notice period, the depositing of the notice in the mail starts the calendar running.” See also *Parker v. Frost Nat’l Bank*, 852 S.W.2d 741, 743 (Tex.App.--Austin 1993, writ dismiss’d); *Bryant v. Texas Am. Bank*, 795 S.W.2d 915, 916 (Tex.App.--Amarillo 1990, writ dismiss’d).

V. T. C. A., Property Code § 51.002, TX PROPERTY § 51.002

Current through the end of the 2021 Regular and Second Called Sessions of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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15 Tex. Prac., Texas Foreclosure Law & Prac. § 2.79



Texas Practice Series TM November 2020 Update

Texas Foreclosure: Law And Practice
W. Mike Baggett*

Chapter 2. Real Property Foreclosure
By, W. Mike Baggett

§ 2.79. Place of sale

West's Key Number Digest

West's Key Number Digest, Mortgages  350
West's Key Number Digest, Mortgages  508

Legal Encyclopedias

C.J.S., Mortgages §§ 2 to 6
C.J.S., Mortgages § 849

The sale must be held in the county where the real property is located; if it is located in more than one county, the sale may be held in the one designated in the notices.¹ Notice must be given in all counties where the property is located. The notice must indicate the county of sale. Even if the deed of trust stipulates otherwise, a sale in the county in which the realty is situated is valid.² Four non-contiguous tracts of land were secured by a single deed of trust. Tract 1, in County A, was foreclosed in County B, where the majority of all tracts of land secured by the deed of trust were situated. In *Segal v. Emmes Capital, L.L.C.*, the court held that the sale in County B was proper under section 51.002(a).²⁰⁵ Most deeds of trust indicate the courthouse door of the county designated in the notice as the public place at which the sale will be held. While § 51.002 of the Property Code and its predecessor, Article 3810, did not require sale at the courthouse steps, the uniform practice has been and is to conduct the foreclosure sale at the courthouse steps of the county where the property is located.

Effective July 17, 2005, Texas Prop. Code Ann. § 51.002(a) (Vernon 2005) authorizes the County Commissioner's Court to designate a place other than the courthouse to hold foreclosure sales.³ For any designation made after June 15, 2007, no sale may be held at the area designated by the Commissioner's Court before the 90th day after the date the designation is recorded.⁴

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Footnotes

a0 Dallas, Texas.

1 Tex. Prop. Code § 51.002 (1984); see § 1.35 note 126.

2 Wylie v. Hays, 114 Tex. 46, 60–62, 263 S.W. 563, 569–70 (Comm'n App. 1924). See Dall v. Lindsey, 237 S.W.2d
1006, 1010 (Tex. Civ. App.—Amarillo 1951, writ ref'd n.r.e.) (realty located in two counties, one of which was
designated in deed of trust, and other of which was location of sale).

2.05 Segal v. Emmes Capital, L.L.C., 155 S.W.3d 267 (Tex. App.—Houston [1st Dist.] 2004, pet denied).

3 Tex. Prop. Code Ann. § 51.002(a), (h) (Vernon 2005).

4 Tex. Prop. Code Ann. § 51.002(h).

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15 Tex. Prac., Texas Foreclosure Law & Prac. § 2.83

Texas Practice Series TM November 2020 Update

Texas Foreclosure: Law And Practice
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Chapter 2. Real Property Foreclosure
By, W. Mike Baggett

§ 2.83. Conducting the sale

West's Key Number Digest

West's Key Number Digest, Mortgages 360
West's Key Number Digest, Mortgages 514

Legal Encyclopedias

C.J.S., Mortgages §§ 2 to 6
C.J.S., Mortgages § 630
C.J.S., Mortgages § 855

After § 51.002 of the Property Code¹ notice and any notices or actions required by the deed of trust, the trustee named in the deed of trust may proceed with the foreclosure pursuant to the notices. An agent or representative of the trustee that has not been properly appointed as substitute trustee, pursuant to the deed of trust, may not conduct the foreclosure sale. A sale by other than the designated trustee is void.² The sale will not be held invalid solely because the named trustee is also the holder of the secured indebtedness,³ or because he or she has some direct or indirect interest.⁴

The power of a trustee to sell the deed for the parties is derived wholly from the trust instrument. Because a power of sale under a deed of trust is a harsh method of collecting debts and of disposing another's property, it can only be exercised by strict compliance with the note and conditions of sale. Thus, a trustee must strictly pursue the terms of the instrument, the provisions of law relative to such a sale, and the details prescribed as to the manner of the sale.⁵

In notice of federal tax lien, incorrect identification of the tax year of liability giving rise to a lien was a minor defect insufficient to render the notice void, where notice was filed in proper place and correctly identified Chapter 13 debtor-taxpayer, property and its location, amount owed, and date of assessment.⁶

Place of Sale

The sale must be held in the county where the real property is located; if it is located in more than one county, the sale may

be held in the one designated in the notices.⁷ Notice must be given in all counties where the property is located. The notice must indicate the county of sale. Even if the deed of trust stipulates otherwise, a sale in the county in which the realty is situated is valid.⁸ Most deeds of trust indicate the courthouse door of the county designated in the notice as the public place at which the sale will be held. While § 51.002 of the Property Code and its predecessor, Article 3810, did not require sale at the courthouse steps, the uniform practice has been and is to conduct the foreclosure sale at the courthouse steps of the county where the property is located.

Texas Prop. Code Ann. § 51.002(a) (Vernon 1984) has been amended, effective January 1, 1988, to require designation of the specific place of sale. The amendment requires sale “at the county courthouse” in the county in which the land is located, or if the property is located in more than one county, the sale may be made “at the courthouse” in any county in which the property is located. The amendment further provides:

The commissioners court shall designate the area at the courthouse where the sales are to take place and shall record the designation in the real property records of the county. The sale must occur in the designated area. If no area is designated by the commissioners court, the notice of sale must designate the area at the courthouse where the sale covered by that notice is to take place, and the sale must occur in that area.⁹

Conducting the Sale

Article 3810¹⁰ provides for a sale “at public vendue” and § 51.002 of the Property Code¹¹ provides for public sale at auction. Usually, the trustee, at the courthouse steps, simply reads a copy of his or her notice, states the terms of the sale (for example, cash),¹² and opens the bidding. Section 51.002 does not require registration or recordation by the mortgagee with the commercial reporting services that one normally finds congregating at the courthouse door (at least in metropolitan areas) on the first Tuesday of each month. In *Merrimac Properties, Inc. v. Combined Financial Corp.*, the court held that section 51.002 does not require a bidder for property at a foreclosure sale be personally present at the sale, if the bid is communicated to the trustee prior to the sale.^{12.05}

For sales on or before June 15, 2007 and until September 1, 2009, Tex. Prop. Code § 51.0075(f) provided that the purchase price was “payable immediately on acceptance of the bid by the trustee or substitute trustee.” After September 1, 2009, that statute was amended to require payment “without delay” or “within such reasonable time as may be agreed upon by the purchaser and the trustee or substitute trustee if the purchaser makes such request for additional time to deliver the purchase price.” In *Mitchell v. Texas Commerce Bank-Irving*,¹³ a summary judgment in favor of the foreclosing mortgagee was reversed when the successful high bidder was unable to obtain cash and the real property was thereafter sold to the bank, as mortgagee, for a lesser amount, without giving notice of reconvention of the foreclosure sale to other bidders present at the time of acceptance of the high bid. The court stated, “the error was in reconvening the sale without notice to those who had been present when it was announced that the property had been sold.”¹⁴

The amendment to Tex. Prop. Code Ann. § 51.002(b) (Vernon 1984), effective January 1, 1988, requires a statement in the notice of sale of the earliest time at which the sale may take place. Section 51.002(c) requires the sale to be not later than three hours after the earliest time of sale stated in the notice.¹⁵

The “mortgagee is under no duty to take affirmative action beyond that required by statute or deed of trust to ensure a fair sale.”¹⁶ A trustee fulfills his duty to act with impartiality and fairness by strictly complying with the terms of the deed of trust.¹⁷ A trustee has no duty to determine the value of the property and what would constitute a reasonable bid if the deed of trust requires the trustee “to sell the property to the highest bidder.”¹⁸

Tex. Prop. Code Ann. § 51.0074(b) provides that a trustee may not be (1) assigned a duty under a security instrument other than to exercise the power of sale in accordance with the terms of the security instrument or (2) held to the obligations of a fiduciary of the mortgagor or the mortgagee.^{18.5} Section 51.0074(b)(1) and (2) apply only to the designation of a trustee under a security instrument executed on or after June 15, 2007.

Borrower suffered no compensable injury as result of allegedly improper actions of substitute trustee in conducting foreclosure sale of deed of trust property, inasmuch as note holder, which was purported purchaser at foreclosure sale, did not

interfere with peaceful possession of premises by borrower's tenants or flow of rents from tenants to borrower. Trustee becomes a special agent for both the debtor and the lienholder and must act with absolute impartiality and fairness in conducting a foreclosure pursuant to deed of trust. Similar to the duties of a mortgagee, deed of trust trustee must conduct a foreclosure sale fairly and not discourage bidding by acts or statements made before or during the sale; however, has no duty to take affirmative actions beyond that required by statute or the deed of trust to ensure a fair sale. Trustee exercising the authority to foreclose in accordance with the terms of a deed of trust does not act merely as an agent or employee of the lienholder, but has a separate capacity with a particular legal responsibility.¹⁹

A successor to deed of trust that secured acquisition loan promissory note was entitled to include its payment of delinquent ad valorem taxes in its secured indebtedness, in light of provision of deed of trust allowing original payee to pay delinquent property taxes and add the amount of the taxes to the mortgage debt.²⁰

The trustee under a deed of trust has limited authority to act as the mortgagor's agent only in the sale of the property. Although it is in the interest of both the mortgagor and the mortgagee to sell the property for the highest price available, the trustee is not responsible to obtain a good deal for the purchaser or to protect the purchaser's interests, even if that purchaser also happens to be the mortgagee. The trustee is only responsible to the mortgagee in the mortgagee's capacity as a creditor interested in satisfying the debt out of the proceeds of the sale; he is not responsible to the mortgagee in the capacity as a purchaser seeking to purchase the property for less than its fair value in opposition to the mortgagor's interest.

Once a sale is complete, there is no further express or implied authority to act as the mortgagor's agent in the cancellation or rescission of a sale. A trustee does not have the power to execute a Cancellation of Deed purporting to take back title to the property and resurrect the underlying debt. To imply a power in the trustee to nullify a sale after the sale is complete and the trustee's deed has been executed, delivered, and filed, would be to give the trustee powers never specified or contemplated by the deed of trust. There must be a certain point in time at which the sale by the trustee may be said to have been completed and his duties and authority come to an end, except to the extent that he may still be a conduit through which the proceeds of that sale pass to the proper parties. Any subsequent action to avoid the sale must be brought by the parties as a cause of action.²¹

Effective January 1, 2004, Section 51.0075 of the Texas Property Code requires as follows:

AUTHORITY OF TRUSTEE OR SUBSTITUTE TRUSTEE.

- (a) A trustee or substitute trustee may set reasonable conditions for conducting the public sale if the conditions are announced before bidding is opened for the first sale of the day held by the trustee or substitute trustee.
- (b) A trustee or substitute trustee is not a debt collector.
- (c) A mortgagee may appoint or may authorize a mortgage servicer to appoint a perpetual substitute trustee by power of attorney or other written instrument. The power of attorney or written instrument must be signed by the mortgagee's representative, acknowledged, and sworn to with a jurat.

Effective as of September 1, 2015, Texas Property Code § 51.016 provides for a statutory rescission by the mortgagee, trustee or substitute trustee of a non-judicial purchase of residential real property as more specifically discussed in § 2.38.

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Footnotes

^{a0} Dallas, Texas.

¹ See § 1.35, note 131.

² Valley Intern. Properties, Inc. v. Ray, 586 S.W.2d 898 (Tex. Civ. App.—Corpus Christi 1979, no writ).

³ *Id.*

4 Tarrant Sav. Ass'n v. Lucky Homes, Inc., 390 S.W.2d 473 (Tex. 1965).

5 Bonilla v. Roberson, 918 S.W.2d 17 (Tex. App.—Corpus Christi 1996, reh' g overruled).

6 Matter of Sills, 82 F.3d 111, 96-1 U.S. Tax Cas. (CCH) P 50282, 77 A.F.T.R.2d 96-2056 (5th Cir. 1996).

7 Tex. Prop. Code § 51.002 (1984); see § 1.35, note 131.

8 Wylie v. Hays, 114 Tex. 46, 60–62, 263 S.W. 563, 569–70 (Comm'n App. 1924). Dall v. Lindsey, 237 S.W.2d 1006, 1010 (Tex. Civ. App.—Amarillo 1951, writ ref' d n.r.e.) (realty located in two counties, one of which was designated in deed of trust, and other of which was location of sale).

9 See 2.58 herein for further discussion of designation, in the notice of sale, of the area of sale at the courthouse if the county commissioners have not designated the area of sale and recorded the designation in the deed records.

10 Tex. Rev. Civ. Stat. Ann. art. 3810 (Vernon Supp. 1982 to 1983); see also § 1.35 note 126 for an explanation of repeal of art. 3810 and replacement by Tex. Prop. Code § 51.002 without substantive change.

11 Tex. Prop. Code § 51.002 (1984); see § 1.35 note 126.

12 Article 3810 stipulates no medium of payment, but most deed of trust forms provide for cash payment. Typically, a check is now allowed in lieu of cash. See First Federal Sav. & Loan Ass'n of Dallas v. Sharp, 359 S.W.2d 902, 903 (Tex. 1962). A sale on credit or a deferred payment plan is not prohibited by statute. See Valley Intern. Properties, Inc. v. Ray, 586 S.W.2d 898 (Tex. Civ. App.—Corpus Christi 1979, no writ). For example, a mortgagee may agree to extend credit to a customer to enable him or her to make the purchase. It is also clear that a mortgagee who purchases may simply apply the purchase price as a credit to the amount of indebtedness. Thomason v. Pacific Mut. Life Ins. Co. of California, 74 S.W.2d 162 (Tex. Civ. App.—El Paso 1934), writ refused.

A purchaser for cash has a reasonable time during the hours of sale to obtain the cash; *reasonable time* means “before 4:00 p.m. on the date of the sale.” Sharp, 359 S.W.2d at 903.

12.05 Merrimac Properties, Inc. v. Combined Financial Corp., 2004 WL 1126307 (Tex. App.—Waco 2004, pet. denied) (mem. op.).

13 Mitchell v. Texas Commerce Bank-Irving, 680 S.W.2d 681 (Tex. App.—Fort Worth 1984, writ ref' d n.r.e.).

14 *Id.* at 683. The court in Mitchell also reversed the summary judgment because of the improper notice. See § 2.66.

15 See § 2.58 for further discussion of the three-hour time for conducting a foreclosure sale and the place of sale within the area of the courthouse designated by the commissioners court or in the notice of sale.

16 First State Bank v. Keilman, 851 S.W.2d 914, 22 U.C.C. Rep. Serv. 2d 282 (Tex. App.—Austin 1993, application for writ filed July 27, 1993).

17 *Id.*

18 *Id.*

18.5 Tex. Prop. Code Ann. § 51.0074(b)(1) and (2).

19 Peterson v. Black, 980 S.W.2d 818 (Tex. App. San Antonio 1998, no pet.).

20 World Help v. Leisure Lifestyles, Inc., 977 S.W.2d 662 (Tex. App.—Fort Worth 1998), reh' g overruled, (Sept. 24, 1998) and rev. denied, (Mar. 25, 1999) and reh' g of pet. for rev. overruled, (May 27, 1999).

21 Bonilla v. Roberson, 918 S.W.2d 17 (Tex. App.—Corpus Christi 1996, reh' g overruled).

