

Understanding Pennsylvania Mortgages

[On behalf of Dornish Law Offices, PC](#) | Jun 15, 2009 | [All, Real Estate Practice](#)

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I. The Legal Nature of Mortgages

A mortgage is the most common lien found on real estate. The title search will provide information on the date of the mortgage, the date of the recording of the mortgage and the original or face amount of the loan. In order to obtain additional information about the mortgage, it is necessary to review the recorded mortgage document itself. For example, you cannot determine from the original or face amount of the mortgage what the payoff is at any given time. However, you can distinguish from the mortgage document if it is an open-ended line of credit subject to fluctuating balances, or a conventional mortgage paid over a normal amortization schedule.

Although not too common, it is possible for the amount outstanding on the mortgage to exceed the original mortgage balance in several ways. First, if the mortgagor does not make the payments on time, it is possible for unpaid interest and late fees to accrue and exceed an initial loan balance, even on a conventional mortgage. Second, it is possible to have a negative amortization mortgage which means scheduled payments do not necessarily keep up with the accruing interest. With a negative amortization mortgage, it is possible for the account balance to exceed the face amount of the mortgage even if every payment due is made on time. However, other than these special situations, it is normal to anticipate that the outstanding balance of a recently executed mortgage will not exceed the face amount, and that the outstanding balance on a seasoned mortgage will be somewhat less than the face amount.

II. Rights and Responsibilities of Mortgagors and Mortgagees

The relative rights and responsibilities of mortgagors and mortgagees depend on the type of mortgage involved. There are several different types and each will be examined.

a. Purchase Money Mortgages

One of the most common types of mortgages is a purchase money mortgage, which can be a mortgage given by a buyer to a seller in consideration for the purchase of the premises conveyed and executed at the same time as the deed. A purchase money mortgage can also be given by the buyer to a non-seller mortgagee to the extent the money loaned is actually advanced to pay any portion of the purchase price of the property. However, to qualify as a purchase money mortgage under Pennsylvania law, a non-seller financed mortgage must expressly state that it is a purchase money mortgage. 42 Pa.C.S.A. § 8141(1)(ii).

One interesting fact about a purchase money mortgage, whether to a seller mortgagee or a third party mortgagee, is that the date of the lien is the date of execution and delivery of the mortgage, not the date of recording, provided that the mortgage is recorded within ten (10) days after execution. 42 Pa.C.S.A. § 8141(1). This means that a mortgage executed at the same time as a deed conveying the property, which mortgage meets the requirements of a purchase money mortgage, can take priority over a lien against the mortgagor filed a day after the closing, even if the purchase money mortgage is not recorded until over a week later. The practical rationale for this law is that purchase money mortgagees need to be able to rely on the first lien position of their mortgages. It is often not possible to record the mortgage on the same day it is given. Therefore, there would be a greater risk that the mortgage would not be first lien priority in the absence of the ten (10) day window for recording.

Another problem sometimes encountered with purchase money mortgages is when more than one mortgage is given at the time of purchase. This is common in an 80/10/10 program, where a first mortgage is given for 80% of the value of the property, and a second mortgage is given for 10% of the value of the property requiring the buyer to pay only 10% down but giving the buyer the advantages of an 80% first mortgage. This can also be the case when the first mortgage lender permits subordinate seller financing for part of the purchase price. In either situation, with two purchase money mortgages, the Pennsylvania lien priority law provides that both purchase money mortgages are in equal lien position if recorded within ten (10) days of delivery unless one of the purchase money mortgages indicates on its face that it is intended to be second in line to the other purchase money mortgage. 42 Pa.C.S.A. § 8141. This is significant because if there is no notation on the smaller mortgage, a sheriff's sale on either of the mortgages

will divest the other and each mortgagee will share equally in the proceeds of the sale even though by doing so, they may both receive less than the amount actually due.

b. Advanced Money Mortgages

A second special type of mortgage is the advanced money mortgage, which is given by the mortgagor to secure payment of future advances to be made by the mortgagee after the mortgage is given. Advanced money mortgages are used in relation to construction and open-ended lines of credit. Under common law, the lien of the mortgage attaches from the date of each advance, in the amount of the advance. *Housing Mortgage Corp. vs. Allied Construction, Inc.*, 97A.2d 802, 806 (Pa. 1953). This rule applies unless there is an obligation imposed upon the mortgagee to make all advances, in which event the advances relate back to the time of recording of the advanced money mortgage and take priority as of that time, even over a subsequently entered judgment. *Batten v. Jurist*, 158 A. 557, 559 (Pa. 1932). Under common law, if no money is ever advanced, an advanced money mortgage does not become a lien because of failure of consideration. The exception to this rule is if the mortgage is assigned by a mortgagee to a bona fide purchaser for value without notice, at which time it becomes an absolute and valid lien as to the mortgagor because recording of the mortgage gives it apparent validity upon which the innocent and bona fide purchaser may rely. *Johnson v. McCurdy*, 4 W.N.C. 285 (Pa. 1877). Most open-end mortgages in Pennsylvania are statutory open-end mortgages, governed by 42 Pa.C.S.A. § 8143. To obtain lien priority protection pursuant to the statute, the mortgage must be identified at the beginning as an open-end mortgage, and it must disclose that it secures future advances which the lender has a contractual obligation to make. Under these circumstances, the lien of the mortgage dates to the time when the mortgage is left for recording, regardless of when advances are made. One exception to this is if notice of a junior lien is provided to a senior open-end lien holder, and there are non-obligatory advances not used to improve the property made by the senior open-end lien holder after such notice. In that case, those advances do not have lien priority over that junior lien. 42 Pa.C.S.A. § 8143(b).

Another unusual provision under the statutory scheme is that the borrower/mortgagor may record with notice to the lender, a document which limits the dollar amount of the lien to the then outstanding balance by certain procedures set forth in 42 Pa.C.S.A. § 8143(c). It can become

important in a title search if such a document has been recorded, since the amount of the lien of the outstanding mortgage is thereby limited.

The second form of advanced money mortgage is a construction mortgage. In 2007, Pennsylvania initiated several changes to its Mechanics' Lien Law, located at 49 P.S. § 1101. The greatest amendment gave a huge advantage to banks by subordinating the liens of the contractors and subcontractors to the banks' purchase money and open end mortgage liens on the property, provided that the proceeds of the open end mortgage are used for construction. 49 P.S. § 1508(c).

c. Mortgage Liens Without Mortgages

There are other circumstances in which a lien of mortgage arises without the normal recording of the mortgage document. A court can create an equitable mortgage when, either due to a technical requirement or formality, a mortgage document recorded cannot operate as a legal mortgage but a lender has nonetheless relied on that mortgage in advancing funds to a borrower. For example, if the mortgage description improperly identified the wrong property, the lender could seek a court order equitably placing that mortgage against the correct property. This type of mortgage is discoverable only by reviewing the court orders. In some cases, the court order placing an equitable mortgage gets recorded in the mortgage index so that additional notice of its existence is available in a title search. However, sometimes an equitable order is only available on the Prothonotary's dockets and not in the Recorder of Deeds' office.

A second type of mortgage lien arising without a traditional mortgage being recorded within the chain of title is an equitable estoppel mortgage. This type of mortgage can be created when someone mortgages property not owned by them, but to which they subsequently obtain title. The mortgage they have recorded is therefore outside the chain of title and would not likely be found by a title searcher, causing the lien of this mortgage to not effect subsequent lien holders with adequate notice. *Gallagher v. Stern*, 95 A. 518 (Pa. 1915). However, the mortgagee is not prohibited from asserting the lien against the property or enforcing the mortgage against the borrower. *Clark v. Martin*, 1865 WL 4738 (Pa. 1865).

A third type of mortgage lien created by a non-mortgage document is an installment sale contract. When an installment land contract, subject to the provisions of the Installment Land Contract Act, 68 P.S. § 901 et seq., is executed by a buyer to a seller in consideration for purchase of real estate by the buyer, the legal title remains in the seller until the provisions of the

contract for the payment of purchase price and conveyance of the title are met by the buyer, but the buyer acquires equitable title at the commencement of the contract. Such a contract is considered to be the equivalent of a mortgage if it falls within the provisions of Act 6 and Act 91 (41 P.S. § 403; 35 P.S. § 1680.403c). In these circumstances, the lien of that type of recorded installment land contract would have to be discharged either by satisfaction or by court order following ejectment, equivalent to a foreclosure on a mortgage.

III. Determining the Order and Priority of Multiple Mortgages

There are two considerations taken into account in order to determine the priority of multiple mortgages—the type of mortgage and the time of recording. 42 Pa.C.S.A. § 8141 details how liens against real property should be ordered, with purchase money mortgages having the highest priority, followed by other mortgages and defeasible deeds in the nature of mortgages. Purchase money mortgages have priority from the time they are delivered to the mortgagee, if they are recorded within ten days after their date. Otherwise the priority level is determined by the time each mortgage is left for recording, with the “first in time” gaining the highest priority, as indicated by 21 P.S. § 622. All other mortgages besides purchase money mortgages also follow this “first in time rule.” This means that if two mortgages are dropped off with the recorder on the same day, priority is determined by the time each mortgage was dropped off, with the earliest mortgage taking top priority. Most recorders time stamp mortgages as they are received for this reason. The practice of mailing mortgages to recorders creates additional time risks which have to be checked and managed. Generally speaking, the order of liens as they appear on record is prima facie of the correct order. However, an opposing party can challenge the order if it can produce evidence that it is equitably entitled to priority. *Gosser v. Yohn*, 1917 WL 3419 (Pa.Super. 1917). As such, the issue of priority of liens can become a very complex issue in litigation, as demonstrated in the case study examined in Section VIII below.

IV. Identifying the Relative Rights of Mortgage Holders

Judgments are final court determinations that one person is, or is not, indebted to another for an amount of money. By entry of the judgment on

the record in the Court of Common Pleas, a general lien is created against all real property of the judgment debtor in the county where it was entered from the date of the judgment. Recording and indexing the judgment represents security for the underlying debt. *Commonwealth v. Meyer*, 82 A.2d 298, 301 (Pa.Super. 1951). The judgment creditor has the right to execute on the judgment against real estate owned by the judgment debtor in satisfaction of the debt. The existence of the judgment lien also prevents a debtor from further encumbering or conveying any property he might own in a way that would divest the effect of the judgment, while preventing later lien holders from satisfying their debt without paying the earlier lien. A lien created by a judgment is a general lien. This means that unlike a mortgage which is a specific lien against a particular piece of real property, the judgment attaches to all real property held by the debtor in the county in which the judgment is entered. 42 Pa.C.S.A. § 4303(a). A court judgment does not give a creditor a specific interest in the property, but rather the creditor is interested in the property because it has a right to seize it, sell it, and satisfy the debt from the proceeds of the sale.

Note that a judgment is not a lien against real property as to which the judgment debtor holds only bare record title and no beneficial interest. *Sill v. Swackhammer*, 1883 WL 14017 (Pa. 1883). This means that if the debtor is the trustee of a trust that holds the property, for example, and has no beneficial interest in the trust, the judgment does not attach to the property of the trust, despite the fact that such trust property is in the name of the judgment debtor as trustee. The judgment is only a lien against the real property the judgment debtor beneficially owns at the time the judgment is entered. A judgment is not a lien against real property which the debtor has previously conveyed in good faith. *Davis v. Commonwealth Trust Company*, 7 A.2d 3, 6 (Pa. 1939). A judgment is also not a lien against real property which the judgment debtor acquires after the judgment has been entered of record. The judgment can be made a lien against the after acquired property if the judgment is revived after the real property has been acquired. See *Ladner Pennsylvania Real Estate Law*, § 29.02(a) (5th Ed.); 42 Pa.C.S.A. §§ 1722, 4303.

A judgment against the purchaser who has an agreement of sale for the purchase of real property is a lien against the purchaser's equitable interest in the real property and binds the legal estate the moment that the buyer's equitable interest and legal title merge. *Commonwealth v. Mars*, 8 Pa. D.&C.2d 745, 747 (Pa.Com.Pl. 1956). Although there is a rule that a

judgment entered against one spouse individually is not a lien against real property held by both spouses as tenants by the entirety, the lien may attach in the event of divorce for the debt of the other spouse. *Constitution Bank v. Olsen*, 620 A.2d 1146, 1153 (Pa. Super. 1993). Upon divorce, spouses who previously held real property as tenants by the entirety become tenants in common. 23 Pa.C.S.A. § 3507(a). A judgment entered against one spouse prior to the divorce becomes a lien against that spouse's interest in the property as tenants in common upon the entry of the divorce decree and real property held as tenants in common is lienable by judgment creditors of the separate tenants. *Wirtz v. Phillips*, 251 F.Supp. 789, 810 (D.C.Pa. 1965). It also follows that the entirety tenancy is destroyed by the death of either spouse. If the spouse against whom the judgment is entered dies, the real property becomes the sole property of the surviving spouse free and clear of the judgment. However, if the spouse against whom there is no judgment dies, the property becomes the sole property of the surviving spouse against whom the judgment has been entered. At that point in time, the judgment attaches to the property of the surviving judgment debtor as long as the judgment was entered or revived during the time the property was held as entirety property. As to a joint tenancy with right of survivorship, such a tenancy can be severed by a judgment creditor making it a tenancy in common and causing the judgment thereby to attach to the judgment debtor's interest in the property at any time.

A judgment lien must be revived to maintain its priority against real property within five (5) years after entry. 42 Pa.C.S.A. § 5526 (1). When it is revived after five (5) years has expired, the judgment can remain effective but the judgment creditor can lose his priority against intervening third parties. *Mercer County State Bank v. Troy*, 27 D.&C.3d. 751 (Pa.Com.Pl. 1983). Searching a title, one should look for release, satisfaction or discharge of a judgment lien. The release is used when a judgment creditor desires to release the lien of the judgment as to a particular piece of property without affecting the lien against other real property of the debtor. A satisfaction is to be filed pursuant to 42 Pa.C.S.A. § 8104, ninety (90) days after written notice that the judgment is satisfied. The judgment can also be discharged without release or satisfaction by an order of court, such as a mortgage foreclosure with notice to the judgment lien holder on a mortgage prior to the judgment.

V. Locating Mortgage Holders

An important issue that is often not thought about extensively, but is extremely important, is following a chain of assignments to locate mortgage holders. The determination of record title holder is vital in order to send the proper notice to junior lien holders in the event of foreclosure. Due to the fact that many mortgages are assigned or sold on the secondary market, often changing ownership from the initial date of recording, there can be issues as to whom to send notice and where to send notice. To help address the problem, a company called MERS was formed. MERS, which stands for Mortgage Electronic Registration System, was created by the banking industry with the objective to register every mortgage in the US on their system. Any loan that is registered with MERS is protected against future assignments because MERS continues to be the mortgagee even when servicing changes.

In the event that a loan is not registered with MERS, litigation can arise if notice is not sent to the proper mortgagee, as required by Pa.R.C.P. 3129. As seen in the case study in Section VIII, there can be issues if a subsequent assignment of the mortgage is not timely recorded, leaving another mortgagee with no way of knowing of the correct party to send notice in the event of foreclosure.

VI. Effect of Foreclosure Action and Sale

Unique problems arise when a mortgage has been foreclosed and title is taken through the Sheriff's deed. The most common concerns involving foreclosed properties are proper notice to all mortgagors, which must be verified to assure the validity of the foreclosure against their ownership interests in the property, and proper notice to other subordinate lien holders, which must be verified to assure the divestiture of their liens. For example, foreclosures often follow the divorce of the homeowner mortgagors. Lenders serve both of the now divorced mortgagors at the property address, but the Sheriff gets personal service on only the ex-wife who lives there, not on the ex-husband who resides elsewhere. Without service on the ex-husband at his new residence, the foreclosure will not divest his interest, although it appears to do so.

Similarly, the lien of a lien holder to whom a Pa.R.C.P. 3129 notice was not sent is not divested by the Sheriff's sale. Thus, the improperly noticed lien holder can make the title unmarketable without satisfaction of that lien.

This may require an expensive and time consuming quiet title action to clear a defectively noticed lien.

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