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SEE 12 Kan. App.
2d 704 (1988)
and A.G. Op. No.
86-79

ATTORNEY GENERAL OPINION NO. 83- 119

Fred W. Johnson
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1712 Broadway
Parsons, Kansas 67357

Re: Taxation--Mortgage Registration--Instruments
Subject Thereto and Exemptions Therefrom

Synopsis: (1) A mortgage registration fee must be collected before any mortgage of real property can be filed for record in the register of deeds' office.

(2) An executory contract for the sale of real property which has the characteristics described in K.S.A. 79-3101 is a mortgage of real property for purposes of the mortgage registration fee statutes. Consequently, no such contract can be filed of record without payment of a mortgage registration fee. Moreover, since the law does not permit that to be done by indirection which cannot be done directly, a document, which incorporates by reference, or which gives notice of the existence of the provisions of an executory contract for the sale of real property, cannot be filed of record without payment of a mortgage registration fee on the executory contract, unless such document is an affidavit of equitable interest as described in K.S.A. 1982 Supp. 79-3102(5).

(3) To qualify for exemption under K.S.A. 1982 Supp. 79-3102(5), an instrument must be: (A) an affidavit; (B) signed and sworn to (or affirmed) by a purchaser of real property under an executory

contract having the characteristics described in K.S.A. 79-3101; and (C) given solely for the purpose of providing notification by a purchaser of real property under an executory contract for the sale of real property of his or her interest in the real property.

(4) A written instrument which gives notice of a purchaser's equitable interest in real property and which also creates a lien on that equitable interest is not an instrument described in the fifth exemption of K.S.A. 1982 Supp. 79-3102. Such an instrument is not given solely for the purpose of giving notice of a purchaser's equitable interest in real property.

(5) Since the exemption provided for in K.S.A. 1982 Supp. 79-3102(5) is available only to a purchaser of real property under an executory contract for the sale of real property having the characteristics described in K.S.A. 79-3101, the exemption is not available to a person who lends money to a purchaser of real property under an executory contract for the sale of real property and claims a lien on the purchaser's interest in the real property as security for repayment of the money loaned.

(6) If an instrument by which the purchaser of real property under an executory contract for the sale of real property mortgages his or her interest in the real property references the executory contract through which the purchaser acquired his interest in the property, instead of referencing an affidavit of equitable interest filed by such purchaser, then the instrument cannot be filed of record without a mortgage registration fee being paid on both the mortgage thereby created and on the executory contract through which the purchaser acquired his interest in the real property.

(7) A mortgage of real property may secure both current indebtedness and future advances. However, a mortgage of real property which contains a future advances clause secures only the maximum amount stated in the mortgage. Consequently, the mortgage registration fee due on any such mortgage should be based upon the maximum amount stated in the mortgage. Cited herein: K.S.A. 58-2221, 58-2336, 79-3101, K.S.A. 1982 Supp. 79-3102, K.S.A. 79-3107.

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Dear Mr. Johnson:

You seek our opinion on whether certain written instruments may be filed of record in the real estate records of the Labette County Register of Deeds' office, without payment of the mortgage registration fee. The instruments about which you inquire involve purchasers of real property under executory contracts for the sale of real property and financial institutions that have lent money to those purchasers. One of the instruments is entitled: "AFFIDAVIT OF EQUITABLE INTEREST IN REAL ESTATE." It provides, among other things, that if two individuals:

"are unable to complete the financial transaction for purchase . . . [of certain real property, the legal description of which is given], and fall into default as specified in the purchase contract for said property; [sic] they assign all rights held by them necessary to complete said purchase to . . . [a bank, on whose stationery these provisions are typed] and further agree to allow the . . . Bank to take over any and all pertinent portions of the contract and agrees [sic] to support said Bank in any efforts of this endeavor.

"Any interest . . . [the individual purchasers] may have in the above described real estate is further assigned and pledged to the . . . Bank. This interest in the property is pledged for collateral securing a loan that had proceeds used for improvements on said property."
(Emphasis added.)

Although entitled "Affidavit of Equitable Interest," this document does not contain a certification by an appropriate public official that the statements made therein were given under oath or affirmation. Consequently, this document is not an affidavit.

The other instruments about which you inquire are companion documents which were prepared as part of a single transaction whereby a lending institution loaned money to a husband and wife who, prior to obtaining this loan, had entered into an executory contract for the sale of real property as the purchasers thereof. Apparently, as a condition of making the loan, the financial institution required the borrowers to sign a document entitled: "CONDITIONAL ASSIGNMENT OF VENDEE'S INTEREST IN REAL ESTATE CONTRACT FOR SALE AND PURCHASE OF REAL ESTATE."

This instrument, in part, provides that, for value received, the purchasers of the real property "conditionally assign, transfer and set over," to the financial institution, "all of their right, title and interest in and to the certain real estate contract," dated on a specified date and covering certain real property which is described. The instrument then prescribes that the assignment is executed and delivered to the financial institution "as collateral security to secure indebtedness now due by the undersigned and to secure such future advancements as may be made from time to time" to the borrowers.

The other document submitted for filing is captioned "AFFIDAVIT OF INTEREST." It is a sworn statement by an employee of the financial institution that the financial institution is "the conditional equitable purchaser" of the real estate described in the "Conditional Assignment of Vendee's Interest" (i.e., the real property being purchased under contract by the borrowers), and that the affidavit:

". . . is given for the purpose of providing notification that . . . [the financial institution] has a conditional equitable interest in the real estate described above arising by reason of the conditional assignment . . . of the interest of Purchaser(s)" (Emphasis added.)

This document concludes with a signed, sealed statement by a notary public that the document was subscribed, sworn to, and acknowledged before her.

The financial institutions that have tendered these documents for filing claim that these documents may be filed without payment of a mortgage registration fee because these instruments are affidavits of equitable interest and thus come within the fifth exemption of K.S.A. 1982 Supp. 79-3102. You question the claim of the financial institutions and believe that these instruments cannot be filed of record without a mortgage registration fee being paid. You are uncertain, however, as to the amount of mortgage registration fee that should be paid in regard to these instruments and ask us to give our opinion on this matter. In addition, you inquire, generally, as to what constitutes an affidavit of equitable interest under the provisions of K.S.A. 1982 Supp. 79-3102(5).

Before considering your inquiries under the provisions of the mortgage registration fee statutes, K.S.A. 79-3101 et seq., we feel obliged to first call your attention to K.S.A. ~~58-2221~~.

This statute specifies those instruments affecting real property which may be filed of record in the real estate records of the register of deeds' office. The statute, in relevant part, provides:

"Every instrument in writing that conveys real property . . . or whereby any real estate may be affected, proved or acknowledged, and certified in the manner hereinbefore prescribed, may be recorded in the office of the register of deeds of the county in which such real estate is situated" (Emphasis added.)

On numerous occasions, the Kansas Supreme Court has held that, under the provisions of this statute, only written instruments that convey or affect real estate, and which are acknowledged or proved, and certified as required by law are eligible for filing in the real estate records. See, e.g., Assembly of God v. Sangster, 178 Kan. 678, 682 (1955) and Horney v. Buffenbarger, 169 Kan. 342 (1950) and the cases cited therein at 347-348. We note that the document entitled "Affidavit of Equitable Interest" does not meet the requirements of K.S.A. 58-2221. Thus, this document is not eligible for recording, even if a mortgage registration fee in regard thereto is tendered.

Having mentioned this related matter, we turn our attention to the provisions of the mortgage registration fee statutes. In K.S.A. 79-3101, the term "mortgage of real property" is defined as follows:

"The words 'mortgage of real property' shall include every instrument by which a lien is created or imposed upon real property, notwithstanding that the debt secured thereby may also be secured by a lien upon personal property. An executory contract for the sale of real estate, or a bond for a deed, the complete performance of which is deferred for a longer period than ninety days from its execution, under which the grantee or vendee is entitled to the possession of such real estate, by the terms of which the grantor holds the legal title as security for the unpaid purchase money, shall for the purpose of this act be

treated as a mortgage of real property to secure the balance of the unpaid purchase price." (Emphasis added.)

K.S.A. 1982 Supp. 79-3102, in part, provides:

"Before any mortgage of real property, or renewal or extension of the same shall be received and filed for record there shall be paid to the register of deeds of the county in which such property or any part thereof is situated, a registration fee of twenty-five cents (25¢) for each one hundred dollars (\$100) and major fraction thereof, of the principal debt or obligation which is secured by such mortgage, and upon which no prior registration fee has been paid. As used herein 'principal debt or obligation' shall not include any finance charges or interest." (Emphasis added.)

K.S.A. 79-3107 provides:

"Any mortgage of real property executed on or after March 1, 1925, on which the registration fee as herein provided has not been paid, shall not be filed for record by any register of deeds, and such mortgage shall not be received in evidence in any suit, action or proceedings, and no judgment, decree or order for the enforcement thereof shall be rendered, made or entered in or by any court in this state." (Emphasis added.)

K.S.A. 1982 Supp. 79-3102, after providing for the imposition of the mortgage registration fee, prescribes five exemptions from payment thereof. This portion of the statute, in part, provides:

"No registration fee whatsoever shall be paid, collected or required for or on any mortgage or other instrument . . . (5) given in the form of an affidavit of equitable interest solely for the purpose of providing notification by the purchaser of real property of his or her interest therein."

In Attorney General Opinion No. 81-180, we concluded that this fifth exemption was added to the statute in order to provide a means whereby a purchaser of real property under an executory contract for the sale of real property could give notice of his or her equitable interest in the real property, without being required to pay a mortgage registration fee. Also, in Attorney General Opinion No. 82-207, we concluded that the affidavit of equitable interest provided for in K.S.A. 1982 Supp. 79-3102(5) must be given by the purchaser of real property under an executory contract for the sale of real property, and cannot be given by the seller or some other person who is not the purchaser. Id. at Synopsis. We adhere to our prior opinions and now emphasize that the fifth exemption clause of K.S.A. 1982 Supp. 79-3102(5) applies only to an affidavit subscribed and sworn to (or affirmed) by a purchaser of real property under an executory contract for the sale of real property having the characteristics described in K.S.A. 79-3101. Additionally, we think the language of K.S.A. 1982 Supp. 79-3102(5) is quite clear in requiring that the purchaser of real property give the affidavit "solely for the purpose of providing notification . . . of his or her interest therein." (Emphasis added.)

The provisions of this clause of the statute provide an exemption from taxation. Consequently, those provisions must be construed strictly. See Meadowlark Hills, Inc. v. Kearns, 211 Kan. 35, Syl. ¶2 (1973) and First Nat'l Bank v. Lovitt, 158 Kan. 535, Syl. ¶1 (1944). As a result, this clause must be construed as providing that the affidavit is to be given exclusively for the purpose of giving the notice specified therein. If the affidavit provides notice of anything else, it does not meet the requirements of this clause, and may not be recorded without payment of a mortgage registration fee.

Applying these principles to the documents about which you inquire, it will be noted that while the document entitled "Affidavit of Equitable Interest" is subscribed by the purchasers of real property under an executory contract for the sale of real property, the document is not limited to giving notice of those purchasers' interest in the real property being purchased. Thus, it does not meet the "single-purpose" requirement of K.S.A. 1982 Supp. 79-3102(5).

The other document, entitled "Affidavit of Interest" is subscribed and sworn to by a person acting as an agent for a lending institution. The lending institution, however, is not purchasing the real property described in the document under an executory contract for the sale of real property having the

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characteristics described in K.S.A. 79-3101. Thus, this document is not the affidavit of a purchaser of real property under an executory contract and, therefore, is not within the exemption provided in K.S.A. 1982 Supp. 79-3102(5).

In fact, we share your opinion that these documents are nothing more than attempts to give notice of a lien claimed by lending institutions, without said institutions paying the mortgage registration fee. Other such attempts are revealed in cases decided by the Kansas Supreme Court. See, e.g., Assembly of God v. Sangster, supra, holding that an instrument entitled "Certified Bond Resolution" was, for purposes of the mortgage registration fee, a mortgage of real property, and National Bank of Tulsa v. Warren, 177 Kan. 281 (1955), holding that an instrument entitled "Collateral Assignment of Production Payment," likewise, was a mortgage of real property.

In Sangster, supra, the Court explained:

"Notwithstanding the fact there is a statute (G.S. 1949, 67-303) [now K.S.A. 58-2303] which sets out a 'short form' of mortgage, it has been held that in order to create a mortgage contract no particular 'form' of instrument is necessary and no particular words are required. The 'form' of an agreement by which security is given is unimportant if the purpose plainly appears. All that is necessary is that there be a debt and that the instrument creates a lien on real property as security for the payment of the debt. [Citations omitted.]

. . . .

"As already shown, the statute (G.S. 1949, 79-3101 [now, K.S.A. 79-3101] defines a mortgage of real property as including every instrument 'by which a lien is created or imposed upon real property.'

"The word 'lien' has been variously defined as being a hold or claim which one has upon the property of another as security for a debt or charge, as a tie that binds property to a debt or claim for its satisfaction, as a right to possess and retain property until

a charge attaching to it is paid or discharged, as a charge imposed upon specific property by which it is made security for the performance of an act, and as being synonymous with a charge or encumbrance upon a thing. [Citations omitted.]" (Emphasis added.) 178 Kan. at 680.

Thus, we believe it settled that, in any financial transaction involving the creation of a debt and in which the lender, through any written instrument, claims a lien on real property in which the debtor has an interest, the written instrument, regardless of what it is called, is a mortgage of real property for purposes of the mortgage registration fee. The documents about which you inquire fit squarely into this category and, in our judgment, are mortgages of real property.

Having reached this conclusion, it is necessary that we answer your question concerning the amount of mortgage registration fee to be paid if these documents are to be allowed to be filed for record. In this regard, it must be noted that the mortgage registration "fee," in fact, is a tax upon any debt secured by a lien on real property. Missouri Pacific Railroad Co. v. Deering, 184 Kan. 283 (1959). Such a debt is created by an executory contract for the sale of real property. K.S.A. 79-3101.

Under such a contract, the seller is owed an indebtedness and repayment of that debt is secured by retention of the legal title to the property. Consequently, a mortgage of real property exists under such a contract. This mortgage cannot be made a matter of public record unless a mortgage registration fee is paid upon the indebtedness owed to the seller (see K.S.A. 1982 Supp. 79-3102 and K.S.A. 79-3107), or such notice is given in an affidavit of equitable interest as provided in K.S.A. 1982 Supp. 79-3102(5). Because of this, our office has consistently opined that a register of deeds may refuse to file an executory contract for the sale of real property or a document that incorporates, by reference, or otherwise gives notice of the provisions of an executory contract for the sale of real property, unless the mortgage registration fee has been paid on the executory contract or such notice is given in a proper affidavit of equitable interest. See Attorney General Opinion Nos. 81-180, 77-202 and 75-447. We also have said that, as a general rule, if an instrument is a mortgage of real property and it also gives notice of the existence of an unrecorded executory contract for the sale of real property, then two mortgage registration fees are payable before the instrument may be recorded. One fee is due on the

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mortgage of real property and another fee is due on the unrecorded executory contract. See Attorney General Opinion No. 75-447. This general rule, however, does not mean that two mortgage registration fees must always be paid if a purchaser of real property mortgages his equitable interest in real property.

In a situation where a purchaser of real property under an executory contract obtains a loan and secures payment of that loan by granting a lien on his equitable interest in the real property being purchased, the instrument by which the lien is granted need not incorporate, or recite, the provisions of the executory contract for the sale of real property through which the purchaser obtained his interest in the real property. The instrument can recite that the purchaser-borrower has an equitable interest in the real property, as evidenced by an affidavit of equitable interest which was filed on a certain date in a certain book and at a certain page in the register of deeds' office of the appropriate county, and that the purchaser assigns, transfers and sets-over all of his rights, title and interests in said real estate, to the lender as security for the loan. Of course, the purchaser would have to file an affidavit of equitable interest to give notice of his equitable interest in the real property prior to completing the instrument by which he mortgages his interest in the property. But, if such an affidavit is filed and the instrument by which the purchaser grants a lien on his equitable interest in the real property contains only the statements indicated above, we are of the opinion that the mortgage he is giving can be recorded without the purchaser having to pay a mortgage registration fee on the executory contract for the sale of real property through which he obtained his interest in the real property. A mortgage registration fee would be paid only on the loan being made to the purchaser and secured by his equitable interest in the real property.

If, however, a procedure other than that described above is followed, and the instrument by which the purchaser grants a lien on his equitable interest in the property gives notice of the existence of the executory contract through which the purchaser obtained his interest in the real property, then a mortgage registration fee must be paid not only on the loan currently being made to the purchaser, but also on the principal amount of the executory contract.

The instruments which you ask us to review, in addition to granting liens on real property in which the purchasers-borrowers have an equitable interest, also give notice of executory contracts through which these purchasers obtained their interests in the parcels of real property. Consequently,

we are of the opinion that these instruments may not be filed of record without a mortgage registration fee being paid on both the amount of the loan currently being made to the purchasers and the principal amount of the executory contracts. Except as prescribed in K.S.A. 1982 Supp. 79-3102(5), a financial transaction involving a mortgage of real property cannot be made a matter of public record without payment of a mortgage registration fee. K.S.A. 1982 Supp. 79-3102 and 79-3107. Thus, neither the contracts between the sellers and purchasers of this real property, nor the mortgages between the purchasers and these lending institutions can be made a matter of public record without payment of the mortgage registration fee.

In regard to the amount of mortgage registration fee to be charged, we, like you, note that one of these instruments recites that it is made not only to secure indebtedness now due by the borrowers, but also "to secure such future advancements as may be made" to the borrowers. Regarding this fact, we note K.S.A. 58-2336, which, in part, provides:

"Every mortgage or other instrument securing a loan upon real estate and constituting a lien . . . upon the real estate securing such loan . . . may secure future advances and the lien of such mortgage shall attach upon its execution and have priority from time of recording as to all advances made thereunder until such mortgage is released of record: Provided, That the lien of such mortgage shall not exceed at any one time the maximum amount stated in the mortgage."
(Emphasis added.)

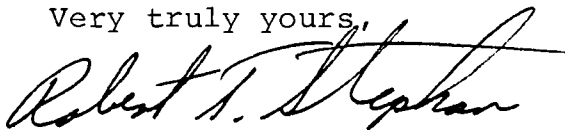
This statute makes it clear that a mortgage of real property may secure future advances and that the lien of any such mortgage attaches at the time of the mortgage's execution. This statute also makes it clear, however, that a mortgage of real property which contains a future advances clause secures only the maximum amount stated in the mortgage. This has ramifications under the mortgage registration fee statutes. Specifically, K.S.A. 1982 Supp. 79-3102 prescribes that the mortgage registration fee is to be charged on "each one hundred dollars (\$100) and major fraction thereof, of the principal debt or obligation which is secured by such mortgage." (Emphasis added.) Since the amount secured by a mortgage containing a future advances clause is the maximum amount stated in the mortgage, it necessarily follows that the maximum amount stated in the mortgage is the amount

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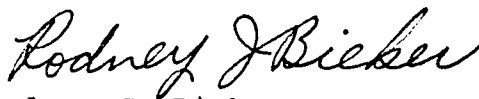
that is to be used in calculating the mortgage registration fee due on any such mortgage. This has long been the opinion of this office. See Attorney General Opinion Nos. 76-280 and 76-191.

Since this opinion has become so lengthy, we summarize it in accordance with the synopsis of this opinion.

Very truly yours,



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Attorney General of Kansas



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