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ATTORNEY GENERAL OPINION NO. 80-76

Rubie M. Scott
Register of Deeds
Johnson County Courthouse
Olathe, Kansas 66061

Re: Taxation--Mortgagee Registration--Exemption from Payment of Mortgage Registration Fee

Synopsis: If a mortgagee discovers that, due to an error of fact, it has released a mortgage of real property once of record, upon tender of the mortgage of real property for re-recording, verified by affidavit that the consideration stated therein is principal indebtedness which was covered by and included in the released mortgage of real property, upon which the registration fee was paid, the register of deeds may not collect or require that any mortgage registration fee be paid.

The mortgage of real property tendered for filing can be the mortgage instrument that was previously released or a newly executed mortgage. However, if the mortgage tendered for filing is a new mortgage, the records in the register of deeds office should be examined to insure that the mortgage registration fee was in fact previously paid, and the mortgage tendered for filing is consistent with the mortgage previously released.

The register of deeds cannot be held liable in any action based upon recordation of a legally proper release of mortgage. K.S.A. 1979 Supp. 79-3102 construed herein.

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Dear Mrs. Scott:

In a letter to this office, you explain that on two different occasions you have been confronted with the following situation:

(1) A mortgagee (lender) has filed of record a mortgage of real property and has paid the mortgage registration fee due upon said mortgage.

(2) Thereafter, the mortgagee has filed a release of mortgage. The release filed is proper in every regard.

(3) Subsequently, however, the mortgagee has returned to your office asking you to re-record the original mortgage because the mortgagee has discovered that the release was "filed in error."

Based upon these circumstances, you ask:

> "1. If the above mentioned release was filed in their error and the mortgagee wishes to have the lien put back on the books, do I have the right to charge mortgage registration tax again?"
>
> "2. If someone checking shows the record clear and it really isn't, who is liable? I would think the mortgagee."
>
> "3. If mortgage registration is due, do I charge on the original full amount, or do I charge on the amount due at the time?"
>
> "4. Should a new mortgage be filed or can they refile the original mortgage?"

In K.S.A. 1979 Supp. 79-3102, the legislature declares:

> "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. In any case where interest has been precomputed, the register of deeds may require the person filing the mortgage to state the amount of the debt or obligation owed before computation of interest. No registration fee whatsoever shall be paid, collected or required for or on any mortgage or other instrument, (1) given solely for the purpose of correcting or perfecting a previously recorded mortgage or other instrument, (2) given for the purpose of providing additional security for the same indebtedness, where the registration fee herein provided for has been paid on the original mortgage or instrument, (3) upon that portion of the consideration stated in the mortgage tendered for filing which is verified by affidavit to be principal indebtedness covered or included in a previously recorded mortgage or other instrument with the same lender upon which the registration fee herein provided for has been paid . . . ."

The Kansas Supreme Court has stated repeatedly that the cardinal canon of statutory construction, to which all other rules of interpretation are subordinate, is that the legislative intent, when ascertained, governs. See The State v. Bancroft, 22 Kan. 170, Syl. 3 (1879); Wenger v. Taylor, 39 Kan. 754, 757 (1888); and Jolly v. Kansas Public Employees Retirement System, 214 Kan. 200, 204 (1974). In addition, it is well settled that the intent of the legislature should be determined, if possible, from the language expressed in the statute itself. That is, when the purpose and intent of the legislature can be ascertained from the provisions of the statute, that purpose and intent governs. See Easom v. Farmers Ins. Co., Inc., 221 Kan. 415 (1977) and State v. Dumler, 221 Kan. 386 (1977).

Due to the express provisions of K.S.A. 1979 Supp. 79-3102(3), it is our opinion the legislative intent was to exempt from payment of the mortgage registration fee all mortgages to the extent of

> "that portion of the consideration stated in the mortgage tendered for filing which is verified by affidavit to be principal indebtedness covered or included in a previously recorded mortgage . . . with the same lender upon which the registration fee herein provided for has been paid . . . ." K.S.A. 1979 Supp. 79-3102.

In addition, the statute provides that the fee is to be imposed upon only "the principal debt or obligation which is secured by such mortgage, and upon which no prior registration fee has been paid."

Based upon the foregoing expressions of legislative intent contained in the statute itself, it is our opinion that if a mortgagee discovers that, due to an error, it has released a mortgage of real property once of record, upon tender of the mortgage for re-recording, verified by affidavit that the consideration stated therein is principal indebtedness which was included in the previously released mortgage of real property upon which mortgage registration fee was in fact paid, the register of deeds may not collect or require that any mortgage registration fee be paid.

In addition, it is our opinion that the foregoing conclusion is applicable irrespective of whether the mortgage of real property tendered for filing is the mortgage instrument which was previously released or is a newly executed mortgage of real property.

However, either of such mortgages must be accompanied by a verified affidavit declaring that the consideration stated herein was included in and covered by a previously recorded mortgage, and that the mortgage registration fee was paid on the principal debt or obligation secured by said mortgage.

In addition, if the mortgage tendered for filing is a newly executed mortgage, certain procedural safeguards should be followed to insure, as much as is possible, that payment of the mortgage registration fee is not being evaded. First, the records in the register of deeds office should be examined to verify that the mortgage tendered for filing is merely a replacement for the mortgage previously released and that the mortgage registration fee was in fact paid on the mortgage so released. Second, the previously released mortgage should be compared to the new mortgage to insure that the mortgage tendered for filing is consistent with the mortgage previously released. For example, both mortgages must name the same lender or an assignee thereof and give the same legal description of the mortgaged property. If such is not the case, mortgage registration fee is due.

The above discussion answers all of your inquiries except the question concerning your potential liability for recording a release of mortgage, if said release is filed in error by the mortgagee. In regard to this question, please be advised that you are required, under the provisions of K.S.A. 1979 Supp. 58-2308, to record, at full length, every instrument, and the proof or acknowledgment thereof, which discharges a mortgage of real property and which is executed in accordance with the provisions of K.S.A. 1979 Supp. 58-2306. You may not be held liable for doing that which you are required by statute to do.

Very truly yours,

Robert T. Stephan

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