



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

September 18, 1980

ATTORNEY GENERAL OPINION NO. 80-196

Daniel A. Young
Douglas County Counselor
7 West 11th
Lawrence, Kansas 66044

Re: Taxation--Mortgage Registration--Instruments Subject
to the Fee

Synopsis: A Uniform Commercial Code financing statement, which lists as collateral the proceeds of an executory contract for the sale of real property, may be filed in the UCC files in the office of the Register of Deeds without payment of the mortgage registration fee. However, the proper place to file such financing statements, in order to perfect the security interest, is in the office of the Secretary of State.

If the collateral listed on a UCC financing statement is so ineptly worded the Register of Deeds must guess as to whether the instrument creates a mortgage of real property or merely a pledge of personalty, the Register of Deeds should refuse to file such statement.

Attorney General Opinion Nos. 78-156 and 78-229 are withdrawn. Cited herein: K.S.A. 79-3101 et seq., K.S.A. 1979 Supp. 84-9-102(3), 84-9-104(j).

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Dear Mr. Young:

In a letter to this office, you request we review Attorney General Opinion No. 78-229, which concerns payment of the mortgage

Daniel A. Young
Page Two
September 18, 1980

registration fee prior to recording a financing statement which lists as security the proceeds of an executory contract for the sale of real property. You also enclose a copy of a financing statement recently sent to the Douglas County Register of Deeds' office, and ask whether the mortgage registration fee should be collected prior to recording the same.

The issue determined in Attorney General Opinion No. 78-229 was whether a financing statement, listing as collateral "Assignment by . . . [debtors] to . . . [a Lawrence bank, secured party] of the proceeds from the sale of a house located at . . . [a particular street address in Lawrence]," could be filed in the regular UCC file in the office of the Register of Deeds without payment of the mortgage registration fee imposed under K.S.A. 79-3101 et seq. The opinion concludes that such cannot be done. In reaching this conclusion, Attorney General Opinion No. 78-156 was cited and reaffirmed. In our judgment, both of these prior opinions are founded upon a misunderstanding of the nature of the security listed in the financing statement, and the instruments upon which the mortgage registration fee is imposed.

In Attorney General Opinion No. 78-156, it was concluded: "In our opinion your Register of Deeds should not accept for UCC filing in her office a financing statement listing as collateral an assignment of a specific and unrecorded real estate contract." (Emphasis added.) While we agree a UCC financing statement form should not be used to "assign" (transfer) an interest in real property, K.S.A. 1979 Supp. 84-9-104(j), a UCC financing statement, which lists as security for repayment of a debt "the proceeds" of an executory contract for the sale of real property, does not transfer an interest in, or create a lien upon real property. Such a statement merely shows that the secured party has a security interest in an instrument, i.e., the executory contract for the sale of real property. See note #4 of the Official UCC Comment to K.S.A. 1979 Supp. 84-9-102.

K.S.A. 1979 Supp. 84-9-102(3) specifically provides that Article 9 of the Uniform Commercial Code applies to a security interest in an instrument, even though the instrument itself is secured by a real estate mortgage. In the case of a UCC financing statement listing as security the proceeds from an executory contract for the sale of real property, the debtor is merely pledging as collateral for a loan an interest owned by it in an instrument. The UCC specifically covers such a pledge of security. K.S.A. 1979 Supp. 84-9-102(3).

Daniel A. Young
Page Three
September 18, 1980

We recently elaborated on this matter in Attorney General Opinion No. 80-29 and 80-29A. Instead of repeating that which is said in those opinions, we attach a copy of each to this opinion. Unfortunately, we did not, in either of those opinions, expressly withdraw Attorney General Opinion No. 78-156 or 78-229. However, we now hereby expressly withdraw both of those prior opinions.

Thus, in response to your first inquiry, it is our opinion that a Uniform Commercial Code financing statement, which lists as collateral "the proceeds" of an executory contract for the sale of real property, may be filed in the UCC files maintained in the office of the Register of Deeds, without payment of the mortgage registration fee. However, it must be stressed that the proper place to file such financing statements, in order to perfect the security interest, is in the office of the Secretary of State. See Attorney General Opinion No. 80-29A.

You have submitted to us a financing statement which, in relevant part, provides:

"3A. This financing statement covers the following types (or items) of property: (Describe)
House #45-sold to Mr. and Mrs. . . . -
Six acres commencing," etc.

The debtor named in the financing statement apparently is a contracting firm engaged in the business of constructing residential premises.

The above-quoted description of collateral, in our judgment, is totally inadequate to describe the property covered by the financing statement. On its face, the description lists a house as security. However, it indicates the house was sold. It is completely unclear whether the property being pledged as security is the house, or is the proceeds from an executory contract for the sale of the house. If the property being pledged as security is the house, this instrument evidences a mortgage of real property. Mortgages of real property may not be filed in the UCC files. K.S.A. 1979 Supp. 84-9-104(j).

In our judgment, the Register of Deeds properly could refuse to file this instrument. If a secured party is in doubt as to the correct manner by which to describe the collateral it is taking to secure a loan, the secured party should seek the advise and counsel of its attorney. The Register of Deeds is not required to, and, in our judgment, should not record instruments in

Daniel A. Young
Page Four
September 18, 1980

which the description of collateral is so unclear that the Register of Deeds must guess as to whether the instrument creates a mortgage of real property or is merely a pledge of personalty.

Thus, in regard to this instrument, we are of the opinion the same is so ineptly worded the Register of Deeds should refuse to file it in either the UCC files or in the real estate transaction files.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Rodney J. Bieker
Assistant Attorney General

RTS:BJS:RJB:jm
Attachment