



See 12 Kan. App. 2d
704 (1988)

STATE OF KANSAS

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May 29, 1986

ATTORNEY GENERAL OPINION NO. 86- 79

Jacqueline Webb
President
Kansas Register of Deeds Assoc.
P.O. Box 15
Iola, Kansas 66749

Re: Taxation--Mortgage Registration and Intangibles--
Assessment of Tax on Future Advances Clause

Synopsis: A recorded mortgage imparts constructive notice of its contents and of unrecorded instruments to which it refers. Thus, an exhibit which is attached to, or which is referred to by, a recorded mortgage may be sufficient to strike a future advances clause appearing in the mortgage. It must be clear, however, that the future advances clause is actually stricken by the exhibit. If the future advances clause is sufficiently stricken, the mortgage will not secure any future advances which may be given. The mortgagee may later secure future advances by filing a new mortgage. The mortgagee will have priority for purposes of the future advances as of the filing of the mortgage securing those advances.

If the future advances clause is sufficiently stricken, mortgage registration fees may not be charged on the amount stated in the stricken future advances clause. If the mortgagee later files a new mortgage to secure future advances, a mortgage registration fee shall be charged based on the maximum amount stated in that mortgage. Cited herein: K.S.A. 58-2221; 58-2222; 58-2303; 58-2336; K.S.A. 1985 Supp. 79-3102.

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Dear Ms. Webb:

As President of the Kansas Register of Deeds Association, and on behalf of the Register of Deeds for Meade County, you request our opinion regarding a particular mortgage offered for filing.

The instrument in question is entitled "Open-End Mortgage and Deed of Trust," and contains a future advances clause which states:

"Section 1.1 This instrument is executed and delivered by the Grantor to secure and enforce the indebtedness below described (all of which shall be referred to herein as the 'Secured Indebtedness'):

. . . .

"(g) Any and all future advances which the Bank may hereafter make to the Grantor (which future advances shall not, however, exceed \$12,000,000.00 in the aggregate) and any and all future changes in or with respect to the indebtedness now or hereafter secured hereby (including but not limited to changes in interest rate) which may hereafter be agreed upon by the Grantor and the Bank or any holder or holders of the Note."

Attached to the instrument is an exhibit which states, in part:

"This instrument covers future advances, except that the future advances clause applicable to the counterpart of this instrument to be filed and recorded in Kansas has been stricken."

You question whether this instrument should be filed as written in Kansas, and if so, what amount of mortgage registration fee should be collected upon filing.

Regarding your first question we note that K.S.A. 58-2221 provides, in part:

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

The Supreme Court of Kansas has stated that "[i]t is elementary that a real estate mortgage is a written instrument affecting real estate and subject to recordation." Davis-Wellcome Mortgage Co. v. Long-Bell Lumber Co., 184 Kan. 202, 205 (1959). K.S.A. 58-2222 provides:

"Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the register of deeds for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice."

According to the author of Recording Statutes: Their Operation and Effect, at 17 W.L.J. 615, 616, 617 (1978)

"Three statutes, Kansas Statutes Annotated (K.S.A.) sections 58-2221, 58-2222, and 58-2223, play a primary role in establishing Kansas as a 'notice' jurisdiction. Under a notice recording act, a purchaser takes priority over all prior unrecorded interests if he had no notice of such unrecorded interests when he took title. The Kansas Recording Act has two purposes: first, to impart notice to purchasers interested in a particular piece of real estate; second, to protect bona fide purchasers who acquire an interest in real estate without notice of any prior interest in, or encumbrance upon, such real property." (Footnotes omitted.)

Thus, the main purpose of the Kansas recording statutes, and the recording of mortgages, is to impart notice of the existence of such mortgage and the contents thereof to persons potentially interested in the property covered by the

mortgage. Recording also is evidence of priority of rights to a particular piece of property. The answer to your first question thus hinges upon whether the instrument in question is sufficient to impart such notice, or whether it is so misleading as to defeat the notice purpose.

The form a mortgage must take is stated in K.S.A. 58-2303 as follows:

"Any mortgage of lands, worded in substance as follows: 'A.B. mortgages and warrants to C.D. (here describe the premises), to secure the payment of (here insert the sum for which the mortgage is granted, or the notes or other evidences of debt, or description thereof, sought to be secured, also the date of payment),' the said mortgage being dated, and duly signed and acknowledged by the grantor, shall be deemed and held to be a good and sufficient mortgage to the grantee, his or her heirs, assigns, executors and administrators, with warranty from the grantor and his or her legal representatives of a perfect title in the grantor, and against all previous encumbrances; and if in the above form the words 'and warrants' be omitted, the mortgage shall be good without warranty."

The courts have consistently held that no particular form of instrument or words are required to create a mortgage as long as the elements listed above are contained therein. See, e.g. Hall v. Goldsworthy, 136 Kan. 247, 249 (1932) and Assembly of God v. Sangster, 178 Kan. 678, 680 (1955). The mortgage in question contains these elements and states that part of the debt to be secured by the mortgage is "[a]ny and all future advances which the Bank may hereafter make to the Grantor. . . ." As stated previously, however, Exhibit A (which is presumably to be attached to and filed with the mortgage instrument) provides that the future advances clause is to be "stricken" for purposes of filing the instrument in Kansas. This Exhibit A is referenced in the body of the mortgage instrument in the section which describes the mortgaged property. It is not mentioned in the future advances clause of the instrument or anywhere in Article I of the instrument, which describes the secured indebtedness.

Thus, the instrument in question is misleading in that it appears to secure future advances when in reality it may not.

As noted by 17 W.L.J. 615 at 624, however:

"K.S.A. section 58-2222 specifically imparts constructive notice to all persons of instruments filed for record and the contents of such instruments. In applying the statute, the Kansas court has held purchasers chargeable with notice of facts appearing in the recorded instrument. When the recorded instrument refers to one that is unrecorded, notice will be imparted of the unrecorded instrument. A purchaser must exercise reasonable diligence and prudence in checking filed instruments. When he fails to do so, he will be deemed to have constructive knowledge of facts suggested in the recorded instrument which he might have ascertained." (Emphasis added; footnotes omitted.)

The instrument in question, therefore, if filed as it is, will impart constructive notice of all of its contents including Exhibit A, assuming Exhibit A is filed with the mortgage. Even if Exhibit A is not filed, the recorded mortgage refers to it, so notice of the unrecorded instrument will be imparted as well. In our opinion, the problem with this particular instrument is the language employed in Exhibit A combined with the fact that Exhibit A is not referenced in the future advances clause. As previously indicated, Exhibit A states that "the future advances clause applicable to the counterpart of this instrument to be filed and recorded in Kansas has been stricken." To begin with, the exhibit mentions a "counterpart of this instrument" which was apparently to be filed in Kansas. It appears as though the parties failed to draft a "counterpart instrument" and instead just filed a copy of the original agreement, future advances clause and all. Secondly, the Exhibit states that the future advances clause in the instrument filed in Kansas "has been stricken." This language indicates that the clause was somehow stricken in a manner other than by the exhibit. For example, the exhibit, in order to do the actual striking, could have said "the future advances clause is hereby stricken by means of this exhibit." This would have much more clearly served to do the actual striking. As it is, the exhibit does not clearly strike the

future advances clause, the clause itself has no marks indicating that it is not effective, and the clause in no way references the exhibit in a way which would show that the exhibit is intended to actually strike the clause. It is therefore our opinion that this particular instrument has not sufficiently stricken the future advances clause contained therein, and, unless corrected, mortgage registration fees should be collected based upon the maximum amount of debt stated in the mortgage as being secured.

Assuming the exhibit is sufficient to strike the future advances clause, or the clause is stricken in some other manner, the Kansas property could not be used to secure any future advances given by the mortgagee to the mortgagor. The mortgage, with the future advances clause "stricken," serves only to secure the debts currently owed as listed in the mortgage instrument.

The Supreme Court of Kansas, in Potwin State Bank v. Ward, 183 Kan. 475, 490 (1958), states that:

"According to the generally prevailing doctrine advances made under a recorded mortgage given to secure future optional advances will not be denied priority in lien merely because the intervening encumbrancer could not have determined from the mortgage, without extraneous inquiry, the true amount of the indebtedness or advances secured thereby. (138 A.L.R. 582, and numerous authorities from various jurisdictions cited therein.)

"Also, according to the generally prevailing doctrine, the recording or docketing of an encumbrance does not constitute such notice as will subordinate the lien of optional advances thereafter made under an antecedent mortgage of which the intervening encumbrancer had record or other sufficient notice. (138 A.L.R. 585, and numerous authorities from various jurisdictions cited therein.)" (Emphasis added.)

Accordingly, a recorded mortgage given to secure future advances will be given priority over subsequent liens or encumbrances. On the other hand, the mortgage in which the

future advances clause has been effectively stricken is not given to secure future advances, and so the mortgagee would have no priority over subsequent recorded liens and encumbrances except to the extent its recorded mortgage secures current debts and obligations.

Should the mortgagee wish to secure future advances, it must file a new mortgage so stating, and such mortgage will have priority from the time of its recording as to all advances made thereunder. K.S.A. 58-2336. Upon filing a new mortgage containing a future advances clause, the mortgagee must pay additional mortgage registration fees based on the maximum amount stated in such mortgage. Attorney General Opinion No. 83-119 cites that portion of K.S.A. 1985 Supp. 79-3102 stating that the mortgage registration fee is to be charged on "the principal debt or obligation which is secured by such mortgage." (Emphasis added.) The opinion then concludes that

"[s]ince 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 that is to be used in calculating the mortgage registration fee due on any such mortgage."

In conclusion, a recorded mortgage imparts constructive notice of its contents and of unrecorded instruments to which it refers. Thus, an exhibit which is attached to, or which is referred to by, a recorded mortgage may be sufficient to strike a future advances clause appearing in the mortgage. It must be clear, however, that the future advances clause is actually stricken by the exhibit. If the future advances clause is sufficiently stricken, the mortgage will not secure any future advances which may be given. The mortgagee may later secure future advances by filing a new mortgage. The mortgagee will have priority for purposes of the future advances as of the filing of the mortgage securing those advances.

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advances, an additional mortgage registration fee shall be charged based on the maximum amount stated in that mortgage.

Very truly yours,



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Attorney General of Kansas



Julene L. Miller
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