

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
Genesis Tax Loan Services, Inc. and M. Suzanne Frossard, Trustee
v.
Kody and Janet Kothmann and Kody Kothmann, Trustee.
No. 09-0828.

November 10, 2010.

Appearances:

G. Roland Love of Winstead PC, for petitioner.
Mont McClendon of McClendon Law Firm, for respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

CONTENTS

ORAL ARGUMENT OF G. ROLAND LOVE ON BEHALF OF THE PETITIONER

ORAL ARGUMENT OF MONT MCCLENDON ON BEHALF OF THE RESPONDENT

REBUTTAL ARGUMENT OF G. ROLAND LOVE ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 09-0828, Genesis Tax Loan Services v. Kody and Janet Kothmann.

MARSHAL: May it please the Court, Mr. Love will present argument for petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF G. ROLAND LOVE ON BEHALF OF THE PETITIONER

ATTORNEY G. ROLAND LOVE: Good morning, may it please the Court. My name is Roland Love. I'm with the Winstead Law Firm. Also present with me today is Suzanne Frossard, Trustee, and also the attorney that tried the case at the trial court. The matter before the Court involves Genesis Tax Loan Services, which is the petitioner and my client. Genesis Tax Loan Services was the defendant in the trial court. The respondent is Kody and Janet Kothmann and also the irrevocable trust and they were the plaintiffs in the case. Your Honors, it is my pleasure to be here on this 100th anniversary of the Amarillo Bar. This is a case that is important to the future of the electronic commerce, the use of photocopies and it's interesting that the Court of Appeals decision turned on a case that's 101 years old before there were computers, before there were photocopiers and before there were scanners and the lost document issue, I think, is the one that this Court cannot leave alone and I want

to address primarily today unless the Court wishes otherwise. In particular, just by way of background, there's only really five periods of dates that matter to this Court, I think, in looking at the facts. In 2001 and 2002, the Kothmann Group sold properties to Gary Morgan. They took back a Deed of Trust as part of the seller-financed purchase. In May of '04, there was a transfer of tax lien to Genesis Tax Loan and I will refer to them as Genesis going forward. In September of '05 and November of '05, Kothmann foreclosed on their liens on the property. The deeds of trust, I mean the substitute trustee's deeds by Kothmann refer back to October, two of them on lot 6 and lot 18, which I apologize to the Court, there is confusion in the record as to 18 and 8, but it's the same property.

JUSTICE DALE WAINWRIGHT: Is it 8 or 18?

ATTORNEY G. ROLAND LOVE: Yes, sir.

JUSTICE DALE WAINWRIGHT: Is it 8 or 18?

ATTORNEY G. ROLAND LOVE: It is 8.

JUSTICE DALE WAINWRIGHT: 8.

ATTORNEY G. ROLAND LOVE: The Kothmann deed identifies lot 18. The deeds of trust by Genesis are lot 8 and as the Court will see in the substitute trustee's deed is 8. So it's all the same property. Those foreclosures on 6 and 8 refer back to October of '04 deeds of trust and then, finally, in May of '06, Genesis post for foreclosure and we end up with this lawsuit in June of 2006. In that lawsuit, the Kothmann parties pled that their liens and deeds of trust were prior in time and superior to the Genesis Deeds of Trust. They claimed that their foreclosure cut off and rendered unenforceable each deed of trust that Genesis held. They pled that the Genesis lien was cut off by the foreclosure of a superior lien. They pled that four different times and the prayer for relief, the Genesis Deed of Trust is cut off and is not a valid lien on the property.

JUSTICE EVA M. GUZMAN: And who has the burden of proof at trial to establish the superiority of the lien?

ATTORNEY G. ROLAND LOVE: The superiority was placed into issue by the plaintiff. It was part of their case in chief. As the Court is probably well aware, the Texas Constitution says that a tax lien is a prior lien. This was an issue of priority. Additionally, the tax code 3205 says that a tax lien has priority over all other liens regardless of time or character of the lien. When the Kothmann parties pled priority, that was the issue before the Court and Judge Cherry got it right. There was the tax lien transfers and there were the deed of trust in connection with the purchases.

JUSTICE DAVID M. MEDINA: Mr. Love, you started out by saying you wanted to discuss this lost document issue.

ATTORNEY G. ROLAND LOVE: Yes, sir.

JUSTICE DAVID M. MEDINA: Let's hear that.

ATTORNEY G. ROLAND LOVE: Your Honor, and I appreciate the question because that is really where I want to get to. The Court turned its decision; the 7th Court of Appeals turned its decision on a *White v. McCullough* case. *White v. McCullough* is from 1909. This was at a time when the clerks kept journals. They didn't have copies. They didn't have photocopies or anything else. They entered on a journal a type of document and the *White v. McCullough* case, the only thing the Court had was a journal entry that says that there was an affidavit and the affidavit says, there's testimony that the affidavit says there was a deed. *White v. McCullough* was a trespass to try title case and in that case, the Court said that an affidavit where we haven't seen the contents, we haven't see the document, we don't know anything about the document, that that is insufficient evidence. So

this Court then says we're going to use Chapter 19 of the Texas Civil Practice and Remedies Code, which deals with a lost record and if the Court will look at Chapter 19 of the Texas Civil Practice and Remedies Code, it is clearly dealing with a record, such as judgment, and as the Houston Court in the In re Taylor case, if the record's been lost. If it's been recorded and lost, if we're trying to prove a document where we don't know, we don't have that document. That's what White v. McCullough's about. That's what Chapter 19 is about.

JUSTICE DEBRA H. LEHRMANN: Can I ask you, why didn't you get a new document?

ATTORNEY G. ROLAND LOVE: I'm sorry, Your Honor.

JUSTICE DEBRA H. LEHRMANN: Why didn't you get a new document from the tax collector when you learned that it was lost?

ATTORNEY G. ROLAND LOVE: Because, Your Honor, that is a remedy that was unknown and created by the Court of Appeals. It has been the practice in Texas for years and years if the document is lost and we have a photocopy, the Texas Property Code 12.0011(b) provides that we can put an affidavit on photocopy and we can record the photocopy and that will act as an original of that document. Additionally, Chapter 15 of the Texas Property Code points out that an optical copy is an electronic document and that an electronic document may be filed and is treated, is to be treated as an original. So the necessity to go back to the Court, I mean back to the tax assessor collector and get an original could be done. Would have required, it's a one-page document, so you're going to have to also go back to the borrower, get the borrower to sign the authorization. Go back to the tax assessor collector, have them sign the transfer and then you could record a new original. That certainly was one option. It was an unknown option because that had never been the practice. All through our deed records, when documents are lost and we have photocopies, we record photocopies with an affidavit proving out that it's a true and correct copy.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is there room for fraud or manipulation if we're talking not about the original document, but about copies as the alternate?

ATTORNEY G. ROLAND LOVE: Your Honor, that is a great question. There is room for fraud in connection with any electronic recording. There is an opportunity for fraud with an original. It's really no different. I can forge an original. I can make a photocopy and record it with an affidavit. That is an original document. I can send it in by electronic recording over the internet. It may be a fraudulent document. It's really a red herring. That is not the issue that we're looking at today. What we're talking about is when do I need to prove up the contents of a document or when do I need to prove up a document that has been lost before it's been recording. Chapter 19 says -- Your Honor?

JUSTICE NATHAN L. HECHT: What about the requirement of the seal, of a seal?

ATTORNEY G. ROLAND LOVE: Your Honor, the Respondent has raised that requirement of the seal. The statute says that the tax assessor collector shall place the seal, Epi Acuirre the Lubbock County tax assessor collector testified they didn't have a seal, that they used a notary. In addition, I'd point out to you --

JUSTICE NATHAN L. HECHT: A notary stamp or a --

ATTORNEY G. ROLAND LOVE: They just had a notarized signature by the tax assessor collector on their affidavit, but the Court of Appeals decision did not turn on that, Justice. That is not part of the foundation of the Court of Appeals' opinion. The only issue they found is that this was a lost document that could not be handled by an affidavit with the photocopy, that you had to go use Chapter 19. So that I would respectfully submit to the Court that this is not an issue before this Court. Additionally, Your Honor, 3206(d) which is the transfer of tax lien which says that to be enforceable, it must be recorded, doesn't say anything about having to have an original document from the tax assessor collector that you have to go record. That word "original" was written in by

the Court of Appeals. It's nowhere in the statute and as I've already advised the Court here, the statutes, the property code in Chapter 12 and Chapter 15 already says we can use a photocopy.

JUSTICE DAVID M. MEDINA: So if you complied with the statute, does that end the inquiry?

ATTORNEY G. ROLAND LOVE: Yes, sir. We have an issue here on the affirmative defense, but as I pointed out to the Court that that was placed in issue. That was pled. The plaintiff pled priority and superiority and that the lien was not valid. It was placed in issue by Kothmann. Additionally, Your Honor, it is not an affirmative defense. An affirmative defense is like in the Texas Beef and Cattle case, which this Court decided where it's an avoidance. Even this Court, Justice Pirtle borrowed from an earlier decision in the Peachtree case. In the Peachtree case, that was all about a negligence case and sovereign immunity, clearly an affirmative defense because in that case, the defendant says, yes, I was negligent, but I'm immune because of the statutory exception for sovereign immunity. All of those cases, the estoppel, ratifications, those are all, yes, plaintiff prove your case, but I still can avoid your case. This was not a confession in avoidance case. The plaintiff pled priority and superiority and your lien is no good. Those were the issues before the Court. Those were the issues that were tried by the Court and Judge Cherry got it correct.

JUSTICE PHIL JOHNSON: There was no question about the fact that the document, a photocopy of which was filed, no one contested the propriety?

ATTORNEY G. ROLAND LOVE: There was no issue as to the contents. There was no issue as to authenticity. Kothmann could have raised authenticity. That was not part of this lawsuit. The whole point was that you had to literally comply with 32.06 and literal compliance meant that you had to have that original document like that document was some sort of lien. Well, as the Court knows, a lien is an inchoate interest. It's not created by that document. The lien exists because the Constitution and the Tax Code says that taxes are supported by a lien. The transfer is a document and it was proven up with the affidavit and the photocopy and was recorded appropriately.

CHIEF JUSTICE WALLACE B. JEFFERSON: Who owns the properties now? Is that clear from the record?

ATTORNEY G. ROLAND LOVE: I'm sorry, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Who owns the property?

ATTORNEY G. ROLAND LOVE: At this point in time, Kothmann has foreclosed on those property. It's not in the record as to whether those properties have been sold or not.

JUSTICE DON R. WILLETT: And who owned them in '04?

ATTORNEY G. ROLAND LOVE: In '04, Mr. Morgan owned the properties and we see that in October of '04, by reason of the trustee's deeds and that deed of trust, two of the properties, 6 and 8, or 6 and 18 were sold to Mr. Neubauer, who gave a new deed of trust to Mr. Kothmann in connection with those two properties and those are the two that were foreclosed on for 6 and 18 and that was one of the points I made, Your Honor, is that Court of Appeals missed that whole point altogether that even if they were just going to focus on priority and time, then on 6 and 18, the Genesis deed of trust were prior in time, even on those two lots. So if you want to just deal with priority and time, 6 and 18, Genesis wins, but that's not what the case is about. The case is about priority and superiority, validity of the lien and who stands in line first. It's important to the commerce of this state that we have a tax lien by which the government can collect its taxes and finance its operations. Your Honor, also I wanted to point out to the Court that the Attorney General's opinion, which we have briefed, clearly assumes that this is a common practice. The Clerk of Guadalupe County says this is common practice. How do you want me to index these documents? The last thing I want to point out to the Court, I'm going to finish a few minutes early, I just want the Court to understand that the importance going forward, this state has led in

the area of electronic commerce. We must be able to record photocopies or electronic images. We will completely take a step backwards. The Court of Appeals' decision needs to be dealt with because left alone, it undoes or is inconsistent with Chapter 15, Chapter 12 of the Texas Property Code and it's really inconsistent with Chapter 19 because even in 19.007 of the Texas Civil Practice and Remedies Code, it says this is not an exclusive means. So even there, the statute says if you're going to go with Chapter 19, it's saying well this is not the exclusive way to prove out the lost document.

JUSTICE NATHAN L. HECHT: So you think you could have used Chapter 19, you could have used it?

ATTORNEY G. ROLAND LOVE: I think you could, Your Honor. Particularly though, I think where you would use Chapter 19 is if that transfer had been lost altogether. That's really what 19 is all about. It's wanting to prove up a lost recorded document. If there's no way to prove up the contents, you're going to have to go with Chapter 19 to have that testimony to prove up what that document was. That's not the issue here. The issue here is we have a photocopy with an affidavit that was used appropriately.

JUSTICE DALE WAINWRIGHT: Chapter 19 involves a court proceeding where there's a contest about the contents and you have to have a factual finding. If you had to do that with every document where you need to file a copy, that's going to be burdensome and expensive and slow the process down wouldn't it?

ATTORNEY G. ROLAND LOVE: That is one of the points here, Your Honor, is that even like in this case, there was over 100 that were lost. I mean what are we going to do? Are we going to now go around the state, not only are we going to have to prove up documents with court proceedings and then we burden the court, but what about all the change of title out there already that are dependent on this affidavit with recording with the photocopy. We have now turned upside down chains of title throughout the deed records in the State of Texas if we are going to now say that that process was no good. You're also going to say that all the tax liens here in Lubbock County are bad.

CHIEF JUSTICE WALLACE B. JEFFERSON: Gary Morgan signed four affidavits authorizing transfer of tax liens.

ATTORNEY G. ROLAND LOVE: Yes, sir.

CHIEF JUSTICE WALLACE B. JEFFERSON: And in each one, he said that the property was his homestead. How does that happen?

ATTORNEY G. ROLAND LOVE: It tells me the Court's been reading the record. I don't think the homestead is a relevant issue here, Your Honor. A tax lien transfer can occur for either homestead or for non-homestead property. The legislature has implemented a procedure sort of novel to Texas where we won't allow third parties to loan money and take an assignment of that lien. A tax lien is good under the Constitution against homestead. It's also obviously good against non-homestead property.

JUSTICE DON R. WILLETT: Are there other inaccuracies in the record? You mentioned the lot numbers that were misidentified. Are there other inaccuracies in the record where the parties agree like dates or anything else?

ATTORNEY G. ROLAND LOVE: I think the other inaccuracy in the record, Your Honor, is the Court's finding that the Kothmann parties foreclosed on the four earlier deeds of trust because the substitute trustee's deed clearly reflects that's not the case. 6 and 18 or 6 and 8 were not foreclosed on the 2002 deeds of trust. They were foreclosed on the October, 2004 deeds of trust. The last thing I wanted to point out or request the Court here is to, obviously, I need to ask the Court what I want. I think the Court needs to deal with this lost documents issue. This cannot be left to stand. I ask the Court to reverse and render, Judge Cherry had it correct. He ruled correctly on the evidence. He found that the Genesis tax liens were properly transferred and were superior liens and I

ask the Court to reinstate Judge Cherry's finding. I thank the Court for its time and if there's any additional questions?

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Love. We will hear from you on rebuttal. The Court is now ready to hear argument from the Respondents.

MARSHAL: May it please the Court, Mr. McClendon will present argument for the Respondent.

ORAL ARGUMENT OF MONT MCCLENDON ON BEHALF OF THE RESPONDENT

ATTORNEY MONT MC CLENDON: May it please the Court.

JUSTICE PAUL W. GREEN: Mr. McClendon, it looks like your opponents seem to think that if this case is allowed to stand, it's going to overturn a lot of transactions out there. What do you say to that?

ATTORNEY MONT MC CLENDON: Well I disagree with that. I don't think the opinion finds that way at all. I think the reference to Chapter 19 began with the Court below trying to find a way to reconcile the problems with the record and quite frankly as you've seen so far, there were inconsistencies in the record. The affidavits of any fact were offered in connection with the business records affidavit that was objected to and that objection was sustained. So at the beginning of the trial, the very records of which we're talking about and we're discussing the sufficiency of were excluded from the record at that point. The other objection to being whether they should have been offered at all because from a defense issue. The reference in the opinion to Chapter 19 and the emphasis that it's been given in the Petitioner's brief I think is inappropriate. Look no further than Chapter 19 itself. In 19.007, a provision called Method Not Exclusive, the code tells us that Chapter 19 doesn't preclude any other method of proving a document.

JUSTICE PAUL W. GREEN: But you had no objection insofar as the authenticity of the contents of the document. It's just a technical objection that was not properly proved, does that?

ATTORNEY MONT MC CLENDON: I think at trial and my father tried the case. He and I practiced law together. I think at trial, the inquiry changed from [inaudible] the documents sufficiency of the procedure and the following as a whole and, therefore, the emphasis on whether or not there was a seal there, whether or not the tax receipts were appropriate, whether or not there was an independent record of the transfer of those sorts of things. I think the inquiry moved away. I also think on Chapter 19 --

JUSTICE DALE WAINWRIGHT: However, Counsel, let me put a final point on Justice Green's question. Do you have serious questions about the accuracy of the contents of the copy?

ATTORNEY MONT MC CLENDON: As photocopies, the accuracy as photocopies at this moment I don't. I do have serious concerns about whether what those photocopies provide is sufficient under the code. I think --

JUSTICE NATHAN L. HECHT: I didn't hear that.

ATTORNEY MONT MC CLENDON: I do have questions about whether what those photocopies provide is sufficient under the code.

JUSTICE NATHAN L. HECHT: What does that mean?

ATTORNEY MONT MC CLENDON: It doesn't bear a seal, Your Honor. On its face, it doesn't bear a seal. On the face, each of them together, aver to something that can't possibly be true in that.

JUSTICE DON R. WILLETT: What else could Genesis have done other than submit the documents in the form

they did?

ATTORNEY MONT MC CLENDON: They could have gone to getting another original. They could have used the --

JUSTICE DON R. WILLETT: And the original is, who knows where, gone, then what?

ATTORNEY MONT MC CLENDON: Well, I think the response that that would have been difficult for them is, the ramifications of that falls one way or the other. I mean we're talking about a document that ultimately acts as an opportunity for a forfeiture.

CHIEF JUSTICE WALLACE B. JEFFERSON: The original document has a seal?

ATTORNEY MONT MC CLENDON: No, Your Honor. The original document does not have a seal.

CHIEF JUSTICE WALLACE B. JEFFERSON: So there's no way they could prove up the document ever, original or a photocopy?

ATTORNEY MONT MC CLENDON: It is my contention that at the time and this is one of the issues that we have should this issue go back, at the time there was no seal. There was no way for that document to be sufficient.

JUSTICE EVA M. GUZMAN: Are there statutory consequences though to the failure to have a seal and meet some of the other technical requirements aside from the recording issue? There was nothing in the statute is there that spells out a consequence?

ATTORNEY MONT MC CLENDON: I think the consequence of failing to meet the requirements of the statute that provides the means of meeting those requirements and then simply not doing it, the consequence is you have a failure under the statute.

JUSTICE EVA M. GUZMAN: I thought the purpose of the statute was to ensure that they were properly recorded, do you agree with that?

ATTORNEY MONT MC CLENDON: I think the purpose of the statute is to provide a procedure by which they may be transferred and lay out the exact steps by which that may be done.

JUSTICE PHIL JOHNSON: Mr. McClendon, if your position is correct, then if all of the originals from the Lubbock County tax office that have been filed do not support a proper chain of title because they do not have a seal. Am I missing something there?

ATTORNEY MONT MC CLENDON: I think the consequence of not meeting the requirements of the statute for that period of time, 2004, when they did not have a seal, is exactly that. They did not meet the requirements of the statute. If they practiced the same mistake over and over and over again, eventually it doesn't mean they're not making a mistake.

JUSTICE PHIL JOHNSON: Well how could someone who actually paid the taxes, I don't think you question the fact that Genesis paid the taxes on the property as I understand, but let's assume someone's not questioning the payment of taxes in Lubbock County and the problem is if Lubbock County doesn't have a seal, how do we allow someone to pay the taxes for people and let them stay in the properties because no one's going to do that if they're going to get an invalid lien transfer. It seems that that might be a difficulty with your position.

ATTORNEY MONT MC CLENDON: The difficulty, the only way that I can analyze that then is where does

the blame fall for that failure? The responsibility for effectuating a proper transfer, the benefit of a proper transfer falls to the tax lien lender and to the tax collector. If there's a failure in that process some place and we turn a blind eye to that failure, what we've effectuated is a forfeiture for the landholder. The blame falls all the way down to the landholder for a failure to the people that were closest to the table at the time of the transfer.

JUSTICE EVA M. GUZMAN: Is there a substantial compliance component to this process though? There was an employee from the tax collector's office that testified. They didn't have a seal during the period at issue. Don't we have substantial compliance?

ATTORNEY MONT MC CLENDON: I'm here to argue against substantial compliance in any situation that effectuates a forfeiture under the law. I think the opinion of the Court of Appeals got it exactly right when they said that we strictly [inaudible] recording statutes. I think they got it exactly right when they looked to the code construction act under 311, the government code to say that shall and must duties under a code means shall do those.

JUSTICE EVA M. GUZMAN: And do you agree when they found it that the consequences were as they found, that that was also in the statute?

ATTORNEY MONT MC CLENDON: I'm sorry, I'm not certain I understand your question.

JUSTICE EVA M. GUZMAN: The consequence of noncompliance, that is not in the statute, correct?

ATTORNEY MONT MC CLENDON: Again, I believe that consequence of noncompliance is failure to reap the benefit of what you're trying to see.

JUSTICE NATHAN L. HECHT: And I'm not clear about your answer to Justice Green. I thought his question was if that's true that the petitioner says that this is going to have a dramatic effect on lots of other titles and properties and you said that's very exaggerated and not really a problem and then it seems like an answer to all these other questions, you say well it's exactly a problem. There are going to be all these documents without seals and that's just too bad.

ATTORNEY MONT MC CLENDON: I understood the question to be about Chapter 19 of prove up lost document.

JUSTICE NATHAN L. HECHT: Well I guess my question is do you think this recording with the affidavit perfected the lien.

ATTORNEY MONT MC CLENDON: I think the recording with the affidavit gave notice of what was filed. I think what was filed was insufficient and remains insufficient and could not possibly have been sufficient based on the admissions in the brief.

JUSTICE NATHAN L. HECHT: So you think Chapter 19 doesn't have anything to do with this, that the affidavit was fine. It's just the photocopy itself that was deficient.

ATTORNEY MONT MC CLENDON: I think that Chapter 19 provides a forum for a lost document dispute and maybe I should back up and say that as the code exists now, a transfer of tax lien foreclosure one way or the other is going to get litigated. If you --

JUSTICE NATHAN L. HECHT: I'm not, I'm just not clear about that, the answer to my question, which is if you took a photocopy of a document that was otherwise you thought met the requirements of the statute and you put an affidavit on it and said the original is lost, here's a copy and recorded that, is that okay?

ATTORNEY MONT MC CLENDON: If the underlying document does everything that it needs to do, then certainly I think that is contemplated by Chapter 19. I think it was certainly left open by the opinion of the Court of Appeals, but they gave different options of what they could have done is that they could have gone to get the original. They said they could have used this opportunity. The code as it stands now is going to require a judicial examination of both that document and the process whether it be through a judicial foreclosure or non-judicial foreclosure.

JUSTICE DAVID M. MEDINA: It seems like you want them to go chase a rabbit that's not there. There's no seal so there never will be a seal. What about the impact in other counties that may be similarly situated, same situation as yours. They don't have a seal, they try to prove up a document as it was done here. Are those going to all have to be revisited if some creative lawyer goes back to challenge those deeds?

ATTORNEY MONT MC CLENDON: The code did change to allow for notaries and seals, I believe, in 2005. So we're talking about a very narrow window of opportunity for documents to fail for that specific failure to meet the requirements. But I think when you look at the trajectory of the changes of the statute as a whole, you'll find that the statute continues to build in protections both for first mortgage lienholders and for landowners. You went from a one-page statute in 32.06 to a three-page statute now. Before you just filed a non-judicial foreclosure to Chapter 51 and you went forward with it. Now you're required to file a petition as we do with reverse mortgages and home equity loans under 736.6. You are required under 32.06 to affirmatively plead that it's a tax lien. So when we get to the Court's determination of the affirmative defense argument whether or not someone coming forward trying to foreclose one of these liens bears the burden of pleading. He bears a burden of proof. The statute is absolutely clear that in a judicial foreclosure, absolutely they do. In a non-judicial foreclosure now, absolutely they do.

JUSTICE PHIL JOHNSON: Yours is a declaratory judgment suit as I understand. There's a declaratory, you filed suit to have your lien declared superior to Genesis' lien and you pled as opposing counsel read here to start within your pleadings you pled that they had a lien. You weren't disputing that they had a lien somehow, but your position was yours was superior so it seems as though their failure to say that we have a tax lien is somewhat of a confusing because they didn't sneak up on you. You knew exactly what the issues were. Why would it be that they could not prove up that lien when you pled they had a lien? That's a little puzzling to me.

ATTORNEY MONT MC CLENDON: Certainly, in addressing the affirmative defense issue, we went to trial on the proposition that our liens are superior.

JUSTICE PHIL JOHNSON: But that they had a lien and they had had a tax lien. That's their position all along. No other position have then taken so your position had to be they had a tax lien that they were claiming, but your lien's better.

ATTORNEY MONT MC CLENDON: Unlike what was required under the code now, which is a notice to the first lienholder, a notice to the landowner and default in notice of acceleration and notice of foreclosure where you're specifically required to tell that person under 32.065 and under 32.06 that you have a tax lien. Nowhere in the notice of foreclosure at the time was the tax lien mentioned.

JUSTICE PHIL JOHNSON: But we're talking about a declaratory judgment suit where you file pleadings to have your lien determined to be superior to theirs and now that the Court of Appeals said because they did not affirmatively plead their tax lien, they could not, the trial court could not consider the evidence of it, but it seems as though where you have actually pled that they have a lien and the only lien they had was a tax lien, it seems strange that they would not be able to prove up their tax lien because you claim it's an affirmative defense as opposed to simply part of the case that you have pled.

ATTORNEY MONT MC CLENDON: The declaratory judgment action was filed in response to a notice of foreclosure that my client received so the existence of a lien as according to the notice of foreclosure was where

this thing began, but that notice of foreclosure was silent as to the tax lien nature.

JUSTICE PHIL JOHNSON: So you didn't plead it was tax lien when you filed suit?

ATTORNEY MONT MC CLENDON: We did not. I do not believe we did.

JUSTICE PHIL JOHNSON: But you did plead they had a lien?

ATTORNEY MONT MC CLENDON: We pled that they had posted a lien for foreclosure and that they shouldn't have because we had already --

JUSTICE PHIL JOHNSON: So whatever type of lien they had, you agreed that they had a lien, claiming a lien.

ATTORNEY MONT MC CLENDON: And when we showed up at trial and the tax lien stuff began, we did what any, I think Counsel should do which is object and attack their evidence.

JUSTICE PHIL JOHNSON: While we're on liens, let me ask you another question. Opposing counsel in the Court of Appeals say that as to tracts 3 and 4, Kothmann produced a substitute trustee's deed reflecting foreclosure of another deed of trust, which was executed and filed subsequent to Genesis Deed of Trust. So your position would be even though you executed, yours was executed and filed later on both of these two that their lien was invalid so it doesn't matter. Is that?

ATTORNEY MONT MC CLENDON: I think on the first in time issue with those two tracts, my response needs to be and has to be that we approached the bench that day. We approached the trial that day.

JUSTICE PHIL JOHNSON: I'm sorry, I didn't hear you.

ATTORNEY MONT MC CLENDON: That we approached the trial that day and objected to the existence of any lien based on the filings and received a ruling on that from the court. Much of how this Court rules on those other two properties is going to depend on whether or not that evidence should have been excluded on the affirmative defense issue. My argument has to be that they had their day.

JUSTICE DALE WAINWRIGHT: On the affirmative defense issue to ask Justice Johnson's question a different way. You're pleading that your lien was superior. Doesn't that necessarily include trying the question of the validity and the strength of the Genesis lien?

ATTORNEY MONT MC CLENDON: I think it puts a --

JUSTICE DALE WAINWRIGHT: I mean if you claim yours is superior, it has to be superior to something and that something is necessarily included in your case and the pleading isn't it?

ATTORNEY MONT MC CLENDON: I think that averment begins with the general rule of first in time, first in right. What petitioner's asking for is to use the power of the sovereign to jump to first in line on a tax lien and the power to do that is specifically been by the statute and that statute now specifically requires you to plead and to prove that you've met the requirements of that statute. The opinion in the court below analyzed that situation in the absence of the statute as it stands now as it stood then and said well, you're trying to get around the general rule of first in time, first in right and you're trying to do so by use of a statute. You bear the burden of proof, of putting proof on that statute.

JUSTICE EVA M. GUZMAN: You are not claiming any unfair surprise or that you were not able to prepare for trial adequately since you knew going into this the nature of this litigation, correct?

ATTORNEY MONT MC CLENDON: We were prepared at trial to object to any evidence that didn't conform

with the pleadings.

JUSTICE EVA M. GUZMAN: What is the purpose of a rule 94 affirmative defense pleading as it relates to your trial prep?

ATTORNEY MONT MC CLENDON: I think it's to provide notice and to require an opponent to plead and prove as the code expects.

JUSTICE EVA M. GUZMAN: And you have no unfair surprise here is that right?

ATTORNEY MONT MC CLENDON: Your Honor, I guess my response to that is I'm worried that the anticipation argument punishes prepared counsel. We showed up at trial and made objection timely. We attacked the evidence timely.

JUSTICE EVA M. GUZMAN: And is it really an anticipation argument though when you put it in issue. It appears that you might have put it in issue yourself by filing the deck action.

ATTORNEY MONT MC CLENDON: It certainly wasn't an intent to put it in issue. I think we're responding to the fact that they had claimed a lien on a foreclosure notice that didn't say anything about taxes.

JUSTICE DALE WAINWRIGHT: Counsel, as was pointed out earlier, the purpose of pleading and affirmative defense is it's a plea in avoidance. If you confess everything the other side says, it doesn't matter. They could say everything you say is correct, but I win anyway. That's what an affirmative defense is and that's what has to be pled. Like limitations. You may have a great case on damages and liability and in a different scenario and the defendant could say, I agree with all of that, but you filed too late so you lose anyway. In this context, that's not what the lien that they're claiming was filed first. That's not the posture it's in. They're not saying even if I take everything you say in this case is correct, I win anyway. They're not saying that but if they said that, they'd lose the case. So it doesn't seem that their position is even an affirmative defense in the sense if they didn't plead an avoidance. What do you think about that argument or how do you respond to it?

ATTORNEY MONT MC CLENDON: I think your question is an extension of Justice Johnson's question in that as to those two properties where there is an issue as to first in time and, therefore, not seeking the benefit of.

JUSTICE DALE WAINWRIGHT: I'm asking more about how is Genesis' position a plea in avoidance because it does not contest your case. If it contests your case, they'd lose.

ATTORNEY MONT MC CLENDON: As to the two first in time properties, is that am I understanding you correctly? I think, again, my response has to be that they had their day to prove that. We objected to the evidence as it was presented back to the business records issue on that case. It's a much more difficult argument as to those two cases and much of it is going to turn on how this Court feels about the state of the record depending on how they find on the affirmative defense issue on the objection that was made as to the business records affidavit and all sorts of things. It's much more difficult.

JUSTICE DALE WAINWRIGHT: That's another question. The Court received a friend of the court brief from the Texas Land Title Association. It's not a party, but sometimes friends of the Court can submit what we call amicus briefs that help to write information about the industry and how it works. This friend of the court brief says it's common practice, it's been common practice since photocopies were used to file these copies the way Genesis did and says that doing that has been an accepted practice for many decades with the county clerks. Is this going to disrupt an accepted practice that is used throughout Texas and has been for many decades and you disagree with what the Texas Land Title Association says.

ATTORNEY MONT MC CLENDON: Your Honor, I notice that I'm out of time. May I take just a brief moment to answer your question?

CHIEF JUSTICE WALLACE B. JEFFERSON: You may answer the question.

ATTORNEY MONT MC CLENDON: The focus on Chapter 19, the focus on substitute or proxy filings as I would call them in my brief is a focus on the underlying document itself and our only quarrel, our largest quarrel with the underlying document itself and then with the procedure as a whole is that it wasn't met. I don't think the opinion forces you into Chapter 19. I think it preserves 12.00011. I think the code as it stands now provides an opportunity to litigate those issues, but I think what was filed back then is insufficient. I thank you for the opportunity to argue today. I ask the Court to affirm the Court of Appeals in all matters and I would ask that the Court allow me to stand by briefing issues that [inaudible]. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. McClendon.

REBUTTAL ARGUMENT OF G. ROLAND LOVE ON BEHALF OF PETITIONER

ATTORNEY G. ROLAND LOVE: Thank you, Your Honor, I think the whole argument of judicial examination is the real problem here. As Counsel suggested, each court is going to have to test every one of these transfers of tax liens, every document that's been recorded with an affidavit and there will be no integrity in the deed records. In this case, the examiner would not ever be able to look at a transfer of tax lien and know whether or not that was a good transfer of tax lien. We'd have to go back and examine the tax assessor collector every time, but I would remind the Court that Epi Aquirre did prove up the payment of taxes and the transfer of tax lien. There's no issue here but that that happened and the tax lien was there regardless whether it was held by Genesis or was held by the county. The issue being is that when we have under the tax code and the taxes are not paid, we have penalties and interest that mount significantly and very quickly. The Texas legislature has decided in its wisdom that we will allow a transfer of that tax lien to a lender who will give that borrower and that owner some breathing space.

JUSTICE DAVID M. MEDINA: Mr. Love, let me ask you this question. I may have misheard or misunderstood a comment here from opposing counsel, but I understood him to say that there was an objection to your record and it was sustained.

ATTORNEY G. ROLAND LOVE: Your Honor, what occurred at trial is that this was the superiority was pled. At trial, the court took that under advisement. There was an objection to any evidence on the tax lien transfer. Judge Cherry went ahead and heard that evidence with the objection pending, invited briefs afterwards. The initial ruling by Judge Cherry was to sustain that objection.

JUSTICE DAVID M. MEDINA: But when he did his facts, finding of fact [inaudible].

ATTORNEY G. ROLAND LOVE: And did findings of facts. We filed on behalf of Genesis a motion for reconsideration and the judge reconsidered and overruled the objection and entered the findings and that is the final judgment that went up to the Court of Appeals finding that that the tax liens were properly admissible and had superiority.

JUSTICE PHIL JOHNSON: Counsel, would you address the forfeiture question that opposing counsel said there's a forfeiture in here somewhere.

ATTORNEY G. ROLAND LOVE: I think the argument of counsel is that because the tax lien transfer gives the lender on the transfer of tax liens the same powers that the government has that it is held to a higher standard and if they have not literally and completely complied with every element of the statute that they should have

forfeiture. The code does not say that. 32.06(d) says that only the transfer of tax lien needs to be recorded to be enforceable.

JUSTICE PHIL JOHNSON: But you don't understand their argument to be that the property owner somehow suffers a forfeiture from the transfer of this tax lien and making it, giving it priority?

ATTORNEY G. ROLAND LOVE: I did understand that argument and that's the whole fallacy, Your Honor, because there's a tax lien, January 1 of every year until the taxes are paid. So until those taxes are paid, that property is at risk of being foreclosed upon either by the taxing authority or the lender to whom the transferred tax lien has now been transferred to and is being held. There's no forfeiture happening by the transfer of tax lien. In fact, what we're doing is giving some breathing space to that owner. They can now work out a longer term debt with a structure to it with the tax lender instead of dealing with the penalties and interest in the tax suit that would be brought by the taxing authority. Forfeiture is completely incorrect and inappropriate in this context. Your Honor, what I'd really like to close with is that this Chapter 19 argument is just circular because all we're going to end up with is after going through a process, we're going to end up with a court order that says yes, the photocopy is a true and correct copy.

JUSTICE NATHAN L. HECHT: Well, but I understand respondent's position that Chapter 19 is not exclusive and chapter, uhm section 12.0011 is okay and it's really just the what was attached to the affidavit that's a problem, not the use of the affidavit.

ATTORNEY G. ROLAND LOVE: Your Honor, the Court of Appeals on page 18 of its opinion --

JUSTICE NATHAN L. HECHT: I know the Court of Appeals said differently, but now, but if we're moving to what was attached, what's your response to that that the photocopy was deficient in itself and maybe the original?

ATTORNEY G. ROLAND LOVE: That is nowhere in the record. The photocopy was admitted into evidence as a certified copy attached to the affidavit. It was nothing that ever attacked the authenticity of that photocopy and Kothmann could have done that if they thought there was something wrong with that authenticity. That was never an issue in the trial court. The entire issue was the superiority of the liens and the foreclosure and I would remind this Court that they said that Genesis did not have a valid lien and that their lien was superior. That squarely puts this entire issue before the Court and I think that in the interest of public policy, the ability to maintain the integrity of records and not to require title examiners to have to call the tax assessor collector and get an affidavit every time we look at a transfer, you've got to sustain Judge Cherry's decision. The Court of Appeals' decision cannot be left alone to require that there be a court proceeding to prove up every document when we still have a photocopy and we've recorded it with a genuine affidavit attached to it. I appreciate the Court's time unless there's any questions?

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Love. Are there any further questions?

ATTORNEY G. ROLAND LOVE: Thank you very much.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

2010 WL 4663234 (Tex.)

END OF DOCUMENT



For a fully searchable and synchronized transcript and oral argument video, go to the TX-ORALARG database on Westlaw.com.