

Daily Development for Monday, October 29, 2012

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(with thanks to Bob Brown of Denver for calling the case to my attention)

In re Rivera
--- P.3d ----, 2012 WL 1994873
Colorado Supreme Court, June 4, 2012

Synopsis: A deed of trust with only a street address as a property description is not properly recorded and provides no constructive notice of its contents.

Anthony Rivera owned a condominium unit. He executed a note and deed of trust to the Cygans in 2006. The deed of trust referred to an attached legal description, but the description page was omitted when the deed of trust was recorded. Hence, the only description in the recorded version of the document was a street address, which was admittedly accurate and which included the unit number of the condominium.

Rivera subsequently filed Chapter 7 bankruptcy, and the bankruptcy trustee claimed priority over the deed of trust pursuant to the “strong-arm” powers of Bankruptcy Code Sec. 544, which permits the trustee to have the rights of a bona fide purchaser of the debtor’s property. The bankruptcy judge referred to the Colorado Supreme Court the question whether the recorded deed of trust would have been effective against a subsequent BFP of the property.

The court held that the recording was improper and void, and imparted no constructive notice of the contents of the deed of trust. It referred to a section of the recording statute, Colo.Rev.Stat. Sec. 38-35-122(1)(a), which provides that

“All documents of title to real property ... shall include as an aid to identification immediately preceding or following the legal description of the property, the street address or comparable identifying numbers.”

The court found that the statute necessarily assumed that there would be a legal description, and that a street address standing alone was insufficient to satisfy the recording statute.

Comments:

1. This seems a departure from previous Colorado decisions, which have been quite liberal in accepting questionable or erroneous legal descriptions. For example, in *Guar.*

Bank v. LaSalle Nat'l Bank, 111 P.3d 521 (Colo.App. 2004), the court sustained the recording of a deed of trust in which the block number was omitted from the legal description, where the lot number was included and was unique to the entire subdivision (rather than repeating lot numbers in each block). More striking is *In re Taylor*, 422 B.R. 270 (Bankr. D. Colo. 2009), upholding a deed of trust that contained the correct street address but in which the legal description had the wrong block number.

2. The court attempted to show that street addresses sometimes do not conform precisely to legal descriptions. For example, a street address might apply to an entire apartment building or only a portion of it, or to all or part of a large ranch. Likewise, real property might include mineral rights, easements, or other appurtenances which would appear in the legal description but would not be evident from a street address.

This may be true, but it seems to have no relevance to the present case. This was a condo unit, and the unit number was included in the street address. A title examiner, coming upon the recorded deed of trust, would almost certainly know the street address of the property being searched and would immediately recognize the address in the document as coinciding with it. Since the unit number was included, there could be no confusion as to whether the entire building or some other portion of it was encumbered. Likewise, there are almost certainly no mineral interests involved.

The court points out that the condo unit in this case did indeed have appurtenances: an undivided fractional share as a tenant in common in the project's common areas, and easements for ingress, egress, parking, and common area use. These were obviously not mentioned in the street address. But so what? There's a familiar principle that appurtenances to fee title pass with that title, whether they are mentioned in the conveyance or not. It may be customary to mention them in the legal description of a condominium unit, but it isn't essential. Moreover, they're all spelled out in the declaration, which is recorded and easily found, if a title searcher wishes to review them.

3. The dissenting judge argued that a street address is a legal description, if not an ideal one, and fully satisfies the demands of the recording statute.

4. Nobody would argue that using a street address as the sole description of property in a conveyance is a good practice, but that's not the question here. Is it enough to alert a title examiner that the deed of trust encumbers the property being examined? Here, where the condo unit number is included, the answer is almost certainly yes.

5. The court doesn't address the validity of the deed of trust as between its parties (since this issue wasn't relevant in the context of the bankruptcy case). If bankruptcy had not intervened and there were no junior liens, would the court have upheld a foreclosure by the beneficiaries of the deed of trust?