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FINANCIAL INSTITUTION UPDATE

Gardner, Willis, Sweat & Handelman, LLP hopes you find the information in this newsletter helpful. This information is intended to be general in nature and is not a substitute for competent legal advice. Because every issue is unique, we do not recommend that you apply the information in this newsletter without first seeking appropriate legal advice.

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GARNISHMENT ANSWERS NOW REQUIRE ATTORNEYS IN SUPERIOR COURT

On September 12, 2011, the Georgia Supreme Court approved *In Re: UPL Advisory Opinion No. 2010-1*, an advisory opinion of the State Bar of Georgia Standing Committee On the Unauthorized Practice of Law. The question presented was whether the completion, execution, and filing of an Answer in a garnishment action by a non-lawyer employee of the garnishee is considered the unauthorized practice of law. The Standing Committee found, and the Supreme Court of Georgia affirmed, that such actions constitute the unauthorized practice of law.

As a means of post-judgment collection, parties who hold a judgment against a debtor may garnish the debtor's wages through his or her employer. The employer is the garnishee and must answer the garnishment within forty-five (45) days of the receipt of service of the garnishment. O.C.G.A. §18-4-62. In the same regard, a debtor's bank accounts may be garnished. The bank is served with the Summons of Garnishment and must respond within the requisite time period. Id.

The opinion reasons that a garnishment is a legal proceeding because a garnishee who is properly served must file an Answer or face a default judgment for the amount owed by the debtor, as permitted by O.C.G.A. §18-4-90. Corporations have no constitutionally protected right of self-representation in a legal proceeding. Eckles v. Atlanta Technology Group, 267 Ga. 801, 805 (1997). Only licensed attorneys may represent a corporation in a legal proceeding. Id. Therefore, when a non-lawyer answers for a garnishee other than himself in a legal proceeding it is the unauthorized practice of law. This ruling, however, does not apply to Magistrate Courts, as Uniform Magistrate Court Rule 31 expressly provides that a full-time employee or representative of a corporation may be designated as its agent for legal proceedings in Magistrate Court.

The end result of the Georgia Supreme Court's ruling is that all garnishment Answers filed in superior courts in Georgia must be signed by an attorney licensed to practice in Georgia. No longer may human resource representatives or in-house counsel answer garnishments in superior court unless they are licensed in Georgia. Violations of this rule could lead to criminal sanctions for the employee or representative who engages in such violation and a default judgment against the garnishee for the amount owed by the debtor.

FORECLOSURE NOTICE REQUIREMENT

On December 28, 2011, the Court of Appeals of Georgia decided Farris v. Fist Financial Bank et al., 2011 WL 6934389 (Ga. App.). Mr. Farris brought suit against First Financial Bank (hereinafter "Lender") and the law firm of Campbell, Martin & Manley, LLP alleging wrongful foreclosure. The trial court found in favor of the Lender on a motion for summary judgment. The issues on appeal were: (1) whether Lender complied with the notice provisions in the security deed related to the subject property; and (2) whether Lender complied with the notice requirements in O.C.G.A. §44-14-162.2 because Mr. Farris was not a debtor entitled to notice, as defined by O.C.G.A. §44-14-162.1.

The record showed that the subject property was transferred to Pauline Farris, Mr. Farris' ex-wife and Mrs. Farris assumed the mortgage with Lender. Mrs. Farris fell behind on her payments and Lender notified her that she was in default. Lender then sent a letter to Mrs. Farris via certified mail to both the subject property and Mrs. Farris' home address that demanded she cure the default or the property would be foreclosed on in thirty (30) days. Although the default was not cured, the foreclosure was stopped because Lender received correspondence, supposedly from Mrs. Farris, stating that Mr. Farris could negotiate regarding the property. Mr. Farris informed Lender he would cure the default, but he did not. Lender again sent certified letters of default to the subject property and to Mrs. Farris' home address. On the day of the foreclosure, Lender was advised that Mrs. Farris had allegedly filed for bankruptcy and the foreclosure was stopped. Mrs. Farris' attorney contacted Lender thereafter informing Lender that Mrs. Farris had not sent the letter giving authority to Mr. Farris to negotiate regarding the subject property and that Mrs. Farris had not filed for bankruptcy.

Lender sent yet another default notice via certified mail to the subject property and to the home of Mrs. Farris. Additionally, a notice of the upcoming foreclosure was published in the legal organ for four (4) consecutive weeks. Thereafter, Mr. Farris informed Lender that he had been awarded the property via quit claim deed, but said deed was not recorded until January 5, 1998, one day before the foreclosure date. Further, Mr. Farris did not cure the default. Lender purchased the property at the foreclosure sale on January 6, 1998.

The Court of Appeals, citing Giordano v. Stubbs, 228 Ga. 75 (1971), affirmed the notion that the law does not impose a duty on the holder of a mortgage to notify subsequent purchasers of the holder's intention to sell the property under the power of sale. It reasoned that advertising and selling the property as called for in the instrument is all that is required. Because the deed stated that any notice provided for in the deed would be sent certified mail to the address of the Borrower at the property address or an address the Borrower designates, the court held that Lender satisfied the notice requirements under the security deed. Additionally, the Court of Appeals found that Mr. Farris was not a party to the security deed and had no legal interest in the property when the notices were sent since his vesting deed was not recorded until the day prior to the foreclosure. There being no privity of contract, Mr. Farris lacked standing to assert claims arising from violations of the contract.

On the issue of whether Lender complied with the statutory notice requirements, the Court of Appeals cited Ray v. Atkins, which held that under O.C.G.A. §44-14-162.2, only debtors, as defined by statute, are entitled to receive any notice of foreclosure proceedings other than by advertisement. 205 Ga. App. 85 (1992). O.C.G.A. §44-14-162.1 defines "debtor" as "the grantor of the mortgage, security deed, or other lien contract." The statute also states that if a mortgage or security deed is transferred, the term "debtor" means the current owner of the property encumbered by the debt, if the identity of the owner has been made known to and acknowledged by the secured creditor prior to the time the creditor is required to give notice. Id. (emphasis added). The Court of Appeals reasoned that Lender complied with the notice requirements by sending certified letters to Mrs. Farris' home address and the subject property address. Additionally, because Mr. Farris had no legal interest in the subject property until January 5, 1998, he was not the legal owner when notice was required to be given.

The Court concluded that even if it were to determine Mr. Farris was the legal owner of the property after his divorce decree was entered, which was before the requisite notice was to be sent, there was no evidence that Mr. Farris made a written request that Lender send notice regarding the property to a different address, as required by O.C.G.A. §44-14-162.2.

The legal implications of this decision are two-fold. First, it is essential to review the notice requirements in mortgages, deeds, and other instruments when the property has been transferred to a subsequent holder. Second, if the property has been transferred, it is important to determine who the "debtor" is under Georgia law.

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