Priority Contests Involving Deeds of Trust After Hausman v. Hausman

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HAUSMAN V. HAUSMAN

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On March 6, 1987, the Virginia Supreme Court announced its shocking decision in Hausman v. Hausman, 233 Va. 3, 3 VLR 1835 (Mar. 6, 1987). The case involved a priority contest between a bank holding a recorded deed of trust executed by only one tenant by the entirety and an ex-spouse with a judgment lien for child support. In deciding that the judgment lien had priority over the deed of trust, the Court reached a decision that appears to upset prior law or at least accepted interpretations of that law. This article explores some of the problems raised by the Hausman decision.

The Controversy in Hausman

Under the facts in Hausman, husband and wife acquired realty as tenants by the entirety. Subsequently, after husband and wife separated, husband alone executed a deed of trust on the entirety property to secure a loan made by a bank. The bank recorded the deed of trust shortly after its execution. A few months later, husband and wife were divorced and wife received a judgment for child support. About a week after the divorce decree was entered, wife docketed the support judgment, creating a lien against husband's real estate.

Two days after entry of the divorce decree, husband filed an action seeking a partition of the entirety property. The bank intervened, and the action was referred to a commissioner in chancery. The commissioner concluded that the support judgment had priority over the bank's deed of trust. The commissioner reasoned that the deed of trust's effectiveness depended on the entry of the divorce decree. Because that decree granted the support judgment, the judgment had priority over the deed of trust.

The trial court overruled the commissioner's findings, holding that the deed of trust had priority over the support judgment. The trial court apparently accepted the bank's argument that its lien attached to the husband's interest in the property when the divorce decree severed the entireties interest and that when the support judgment was recorded almost a week later the bank's lien was prior in time and therefore superior. Wife then appealed to the Virginia Supreme Court.

The Decision of the Virginia Supreme Court

On appeal, the Virginia Supreme Court reversed the trial court and held instead that the child support judgment had priority over the bank's deed of trust. In reaching this decision, the Court first defined the effectiveness of the husband's deed of trust at the time of its execution. According to the Court, "[w]hen spouses hold title to property in fee simple as tenants by the entirety, neither spouse can convey any part of the property by his or her sole act." 3 VLR at 1836. Thus, "[a]n effort on the part of one spouse, acting alone, to create a lien against entirety property creates no lien at all." Id. at 1837.

Having concluded that the deed of trust did not create a lien when executed, the Court then focused on the effectiveness of the deed of trust upon entry of the divorce decree. The bank had argued that once the decree was entered its deed of trust became a viable lien under the estoppel by deed or after-acquired property doctrine. As codified in section 55-52 of the Virginia Code, that doctrine provides:
When a deed purports to convey property, real or personal, describing it with reasonable certainty, which the grantor does not own at the time of the execution of the deed, but subsequently acquires, such deed shall, as between the parties thereto, have the same effect as if the title which the grantor subsequently acquires were vested in him at the time of the execution of such deed and thereby conveyed. Any such deed, which shall have been executed by the consort of the grantor, shall bar the contingent right of dower or curtesy of such consort of the grantor therein.

Va. Code § 55-52 (1986). Under the bank's argument, its lien outranked the support judgment lien because the judgment was not docketed until almost a week after entry of the divorce decree.

In rejecting the bank's argument, the Virginia Supreme Court concluded that the bank misconstrued the estoppel by deed or after-acquired doctrine found in section 55-52. More specifically, the bank's interpretation "ignore[d]" the statutory language which clarifies that the doctrine only applies "as between the parties thereto." 3 VLR at 1837-38. As the Court explained, section 55-52 prevents "the grantor from denying that title has actually passed to the grantee. Thus, as between the parties, the statute permits the passage of title." Id. at 1838. The statute, however, does not affect or "prejudice the rights of third parties." Id.

In the instant case, then, the third party interest, the judgment lien, had priority over the section 55-52 interest, the deed of trust. In the words of the Court, the bank's deed of trust was "void as to...[the wife] and the children." Id.

The Uncertainty of Hausman

The Court's decision in Hausman raises numerous questions and problems. At the very least, the decision upsets settled expectations and understandings about the priority rules governing mortgage or deed of trust liens. In addition, the decision creates considerable uncertainty about the effectiveness of such liens. Most of the uncertainty arises from the Court's failure to define more precisely and comprehensively the bases of its decision.

Several readings of the Court's decision in Hausman are plausible, depending on the interpretation given various parts of the opinion. See J. Madison, B. Madison & D. Rendleman, 1987 Supplement to Enforcement of Judgments and Liens in Virginia § 4.4, at 39-40 (1987). One possibility is to interpret Hausman primarily as an estoppel by deed or after-acquired property case. This approach reads Hausman as requiring a party with a section 55-52 interest in realty to record the interest after the party's grantor subsequently acquires the property in order for the party's interest to be effective against third parties. Under the first approach, the bank's deed of trust would remain ineffective against third parties, even after the divorce decree was entered, until the bank rerecorded the deed of trust.

A second possibility focuses on the nature of tenancy by the entirety property and the impact of a divorce decree on that property. This approach interprets Hausman as limiting the effect of a divorce decree on entirety property. The divorce decree would not effectively sever the tenancy by the entirety against parties other than the husband and wife until the decree was recorded.
A third possibility focuses on the nature of a divorce action. This approach interprets Hausman as applying the relation back doctrine to a spouse's recording of a divorce decree, allowing that recording to relate back to the date of the decree. Under this interpretation the Court in Hausman would, in effect, be giving the wife a grace period within which to record the divorce decree.

All three interpretations could have far-reaching implications. To an extent, those implications would appear to be more limited for the second and third interpretations than the first approach. Because the second and third approaches focus on the nature of entirety property and a divorce action, not all section 55-52 interests would be affected by those approaches to the Hausman decision. Only section 55-52 mortgage liens in entirety property could be affected, and then only if the mortgage is executed by one spouse and the tenants by the entirety subsequently divorce. In contrast, the first interpretation would appear to prevent all section 55-52 interests from being effective against third parties, regardless of whether the interest is held in entirety property, until after the party granting the interest actually acquires the property and the grantee then records.

On the other hand, the first reading permits a party with a section 55-52 interest in entirety property to acquire priority over liens arising from a divorce decree if the party records after the divorce decree is entered but before it is docketed. The other two interpretations, however, would never permit a party with a section 55-52 interest in entirety property to acquire priority over a support judgment lien. Under the second interpretation, a section 55-52 interest in entirety property could not possibly become effective until the divorce decree was recorded; the divorce decree would not effectively sever the entirety interest for third parties until recordation of the decree. Further, under the third approach, the recording of the divorce decree would relate back to the date of the decree, thus preventing the section 55-52 interest from ever being prior in time to the support judgment lien.

Whether the Court in Hausman intended any of the three interpretations is difficult to determine. On the one hand, the Court focuses on the nature of entirety property in defining the effectiveness of the deed of trust. On the other hand, the Court's treatment of the after-acquired doctrine suggests that that doctrine was crucial to the Court's decision. Particularly persuasive is the Court's conclusion that the doctrine did not apply to the bank's deed of trust and that therefore the bank's interest was "void" as to the wife and children.

But regardless of the approach taken, the Court's decision, especially its treatment of the after-acquired doctrine, raises serious questions about its interpretation and application of Virginia law. Some of those questions are discussed now.

Mistakes of Interpretation

In reaching its decision to give priority to the judgment lien, the Court in Hausman appears to commit several mistakes in interpreting and applying Virginia law. In particular, the Court appears to interpret incorrectly the estoppel by deed doctrine, which forms the basis of section 55-52. Courts of equity developed that doctrine to protect a party when he was conveyed property by a grantor who did not own the property at the time of conveyance. When the grantor subsequently acquired the same property, courts applied the estoppel by deed doctrine to conclude that the grantor's interest automatically inured to the benefit of the grantee. It only seemed fair to estop the grantor from denying that the property passed at the time of the conveyance to the grantee. See generally R. Cunningham, W. Stoebuck & D. Whitman, The Law of Property § 11.5 (1984).
If the grantor, after acquiring the title, conveys it to a second grantee, the question then becomes whether the estoppel by deed doctrine should be applied against the second grantee as well. Most courts have concluded that the doctrine should be restricted to the immediate parties to the original conveyance and should not be applied to subsequent purchasers, at least not when they are innocent. See id. A few courts, however, have adopted a contrary approach, concluding that a subsequent purchaser also may be estopped under the doctrine. See, e.g., Ayer v. Philadelphia & Boston Face Brick Co., 159 Mass. 84, 34 N.E. 177 (1893). This approach, in effect, expands the scope of a title search: to discover an estoppel by deed situation, a third party contemplating a purchase must adverse or search for conveyances by parties in his potential chain of title prior to the time that they had record title.

In section 55-52, the Virginia General Assembly included language that defines the effect of the estoppel by deed doctrine only "as between the parties thereto." By including this language, the legislature has indicated that it is following the majority approach in deciding not to apply the doctrine to third parties. But, just because the doctrine does not apply to third parties, it does not necessarily follow that the interest of the first grantee is void as against third parties. Other legal principles could nevertheless give the first grantee's interest priority over the interests of a third party.

Most notably, the principles governing recordation of documents would seem to be relevant to such priority suits. One of these principles can be found in section 55-96 of the Virginia Code, which sets forth Virginia's recording statute. Under that statute, the inquiry of a court following the majority approach to estoppel by deed should be whether the third party is a subsequent purchaser who took without notice of the adverse claim of the first grantee. See Va. Code §§ 55-96 (1986); see also R. Minor, The Law of Real Property § 1255 (2d ed. 1928). Usually a subsequent purchaser should not be on record notice of such a claim because the majority approach limits the adversing process of a title search to the time a party is record owner of the property and the first grantee's deed will look like a wild deed that is outside the chain of title. Accord R. Cunningham, W. Stoebuck & D. Whitman, supra, § 11.5. But in the context of entirety property and Hausman, a subsequent third party purchaser clearly would be on record notice of the first grantee's interest in the entirety property. Even if the first grantee recorded that interest prior to the time that his grantor actually acquired a title that he could transfer, that recording still would have occurred after the grantor became a record owner of the entirety property. From the records, then, a subsequent purchaser could discover the adverse claim of the first grantee and should not be protected under the recording statute.

Another principle of recordation relevant to priority suits involving an estoppel by deed situation is section 55-105 of the Virginia Code. That section provides that a purchaser shall not be "affected... by the record of a deed or contract made by any person under whom the title of such purchase is derived, if it was made by such person before he acquired the legal title of record." Va. Code § 55-105 (1986). Although this section appears, on its face, to support the Court's decision in Hausman, the section apparently was intended to adopt the chain-of-title reasoning used above to resolve the priority conflict between the first grantee and a subsequent purchaser. See R. Cunningham, W. Stoebuck & D. Whitman, supra, § 11.5 at n.27. The section also clarifies that the adversing process of a title search is to be limited and does not include conveyances made by a party prior to the time he became record owner. See R. Minor, supra, § 1255, at 1691. At least in the context of Hausman and entirety property, the chain-of-title reasoning would lead to a different result since the conveyance to the first grantee would be in the grantor's chain of title. Further, section 55-105 appears to protect purchasers only, and not creditors. See id. § 1319, at 1795.
Thus, in addition to problems of uncertainty, the Hausman decision also raises problems of interpretation. One such problem concerns the Court’s incorrect interpretation of the estoppel by deed doctrine and its implications for language used in section 55-52. Another closely related problem concerns the Court’s failure to consider Virginia’s recording principles. Instead of ignoring those principles, the Court should have realized that the priority contest between the bank’s deed of trust and the judgment lien ultimately became a recording act matter.