

No. 11-0992
(COA No. 02-10-00404-CV)

IN THE SUPREME COURT OF TEXAS

CONSOLIDATED GASOLINE, INC., and BILLY DELP III

Petitioners,

V.

G4 TRUST, GROVER GIBSON, Trustee

Respondent.

PETITIONERS' MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioners, CONSOLIDATED GASOLINE, INC., and BILLY DELP III, files this motion for rehearing.

I.

On March 11, 2012, this Court denied the Petition for Review filed by Consolidated Gasoline, Inc., and Billy Delp III, after requesting and receiving a Response from the Respondent, Grover Gibson as Trustee of G4 Trust. This motion for rehearing is timely filed pursuant to Tex. R. App. P. 64.

II.

POINTS RELIED ON FOR REHEARING

A. This Court erred in denying the Petition for Review because written notice of the foreclosure sale complied with the deed of trust and Section 51.002 of the Texas Property Code, in that the trustee's *mailing* address satisfied the statutory purpose of providing information for the debtor to contact the trustee regarding the foreclosure sale.

B. This Court erred in denying the Petition for Review because there was no evidence that the absence of a "street address" in the notice of foreclosure sale contributed to a grossly inadequate sales price at the foreclosure.

III.

ARGUMENTS AND AUTHORITIES

The Court of Appeals reversed the trial court judgment and determined that the foreclosure sale conducted by Petitioners on September 2, 2008 was invalid because the trustee under the applicable deed of trust provided only a mailing address and not his "street address" in the notice of foreclosure sale. It is undisputed in this case that the notice of foreclosure sale sent by the original trustee, George Bradford, contained a "mailing address [P.O. Box]" rather than a "street address." to contact him. (Appendix 4 to the Petition for Review). The purpose of the statute requiring notice is to provide a minimum level of protection for the debtor, and the statute provides this by calling for only constructive notice of the foreclosure. *Onwuteaka v. Cohen*, 846 S.W.2d 889, 892 (Tex. App.--Houston [1st Dist.] 1993, writ denied). *Lambert v. First Nat'l Bank*, 993 S.W.2d 833, 835-36 (Tex. App.-Fort Worth 1999, pet. denied). While not a physical "street address," the mailing address actually provided by the trustee nevertheless accomplishes the purpose of the 2005

amendments – to allow the debtor or others a means to contact the trustee regarding the foreclosure sale.¹

Moreover, the debtor, JRP Equipment, Inc.,² was not unfairly prejudiced or harmed by the notice containing only a mailing address rather than a “street address” for the foreclosure trustee. The evidence admitted at trial established that the notice of foreclosure sale (D Ex. 5) was sent to the borrower and guarantor contemporaneously with a letter (RR Vol. 2, p. 134; D Ex. 4) from George Bradford, the Trustee designated in the deed of trust dated April 1, 2004 (D Ex. 2). Further, James R. Phillips of JRP Equipment, Inc., stated that he understood that George Bradford was president of National Bank of Texas and knew of his address (RR Vol. 2, p. 37) and he knew that George Bradford was the original trustee in the deed of trust (RR Vo. 2, p. 42; D Ex. 2). James R. Phillips also confirmed the address for mailing was correct (RR, Vol. 2, p 37) but since he was not in the office (RR, Vol. 2, p. 36) in August 2008, he did not receive the notices from National Bank of Texas in person. James R. Phillips did not dispute receiving notice nor did he attempt to contact the foreclosure trustee.

While it is generally stated that strict compliance³ with the notice provisions of Tex. Prop. Code §51.002 is required, “strict compliance” does not mean deviations are not possible. *See*

¹ Curiously, the statute does not require actual notice. The debtor is not required to have received the notice for the foreclosure to be valid. *See Martinez v. Beasley*, 616 S.W.2d 689, 690 (Tex. App.--Corpus Christi 1981, no writ).

² Notably, the Respondent in this case is *not* the debtor, but is a junior lienholder, G4 Trust through its trustee, Grover Gibson, asserting debtor’s claims through an assignment. Junior lienholders are not entitled to notices of foreclosure sale from senior lienholders. *See Musick v. Burkhalter*, 415 S.W.2d 692 (Tex. Civ. App. - Beaumont 1967, no writ).

³ See e.g., *University Sav. Ass’n v. Springwoods Shopping Center*, 644 S.W.2d 705,706 (Tex. 1982) which is cited by the Court of Appeals (Appendix 3).

Sanders v. Sanders, 970 S.W.2d 721, 725-726 (Tex. App. - Austin 1999, rev. den.) (discussing substantial compliance with 1988 amendments to *Tex. Prop. Code §51.002* relating to the designated time of foreclosure sales); see also *Powell v. Stacy*, 117 S.W.3d 70, 75 (Tex. App. - Fort Worth 2003, no pet.) (discussing that incorrect statements of debt did not invalidate the notice or void the foreclosure sale); *Myrad Props. v. LaSalle Bank Nat'l Ass'n*, 252 S.W.3d 605, 615-619 (Tex. App.--Austin 2008), *rev'd on other grounds*, 300 S.W.3d 746 (Tex. 2009) (discrepancy in description of properties in notice of sale did not invalidate sale); *Diversified Dev. v. Texas First Mortg. REIT*, 592 S.W.2d 43, 44-45 (Tex. Civ. App.--Beaumont 1979, ref. n.r.e.) (inclusion in notice of description of real property that had been released from lien did not invalidate trustee's sale). Here, the original trustee's notice coupled with the Trustee's letter served upon the debtor represents compliance sufficient to satisfy the law's purpose of providing the debtor written notice of the sale and a means to contact the trustee. Further, the notice contained a telephone number for the foreclosure trustee, even though providing a telephone number is not required. The debtor was thus provided adequate notice, but the debtor simply chose not to cure its defaults. (RR, Vol. 2, p. 39-40). In a case decided prior to the 2005 amendments to §51.002 of the Texas Property Code, the Austin Court of Appeals in *First State Bank v. Keilman*, 851 S.W.2d 914, 923 (Tex. App. - Austin 1993, found no error in the notice of sale that failed entirely to disclose the foreclosing lender, an address for the lender, an address of the trustee or a phone number. The Court cited other cases⁴

⁴ See *Hutson v. Sadler*, 501 S.W.2d 728, 731-32 (Tex. Civ. App.--Tyler 1973, no writ) (notice was sufficient even though posted notice erroneously identified owner and holder of the note); *FDIC v. Myers*, 955 F.2d 348, 350 (5th Cir. [Tex] 1992)(under Texas law, posted notice sufficient despite its failure to advertise specific time of sale, the nature of the property being sold, the identity of the lender, the address and telephone number of the trustee, and other potential information which would have enabled potential buyers to learn about the property); see also *Stone v. Watt*, 81 S.W.2d 552, 555 (Tex. Civ. App.--Eastland 1935, writ ref'd); *Mortimer v. Williams*, 262 S.W. 123, 125 (Tex. Civ.

involving incomplete or erroneous information contained in the notices of foreclosure and which were determined not to invalidate the actual foreclosure sale. Here, the foreclosure notice did provide an address for George Bradford, just not a “street address.”

A foreclosure sale cannot be set aside unless the alleged irregularity resulted or caused an inadequate price to be received at the foreclosure sale. *See Am. Sav. & Loan Assn. of Houston v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975). Here, there is no evidence that any irregularity relating to the trustee providing a mailing address (as opposed to a street address) contributed to a grossly inadequate price at the foreclosure sale. Absent any evidence that the absence of a trustee’s *street address* on the notice of sale contributed to a grossly inadequate price at the foreclosure sale, the foreclosure sale was not invalid.

For these reasons, Petitioners, Consolidated Gasoline, Inc., and Billy Delp III, request that this Court grant this motion for rehearing, withdraw its denial of the petition for review, grant the petition for review and issue an opinion and judgment reversing the Judgment of the Second Court of Appeals and affirming the trial court’s judgment, together with such other and further relief, at law or in equity, to which the Petitioners may be justly entitled.

App.--Dallas 1924, no writ).

Respectfully submitted,

/s/ Avery McDaniel

Avery McDaniel 21000121
Garette M. Amis 24040425

Law Office of Avery McDaniel
1205 North Main Street
Fort Worth, Texas 76164
Telephone: (817) 810-9500
Telecopier: (817) 810-9994
Email: avery@averymcdaniel.com

ATTORNEYS FOR PETITIONERS
CONSOLIDATED GASOLINE, INC., and
BILLY DELP III

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Petition for Review was served upon the following by e-service and certified mail, return receipt requested, on the 29th day of May, 2012, addressed as:

Dustin Lee Payne
Attorney at Law
6777 Camp Bowie Blvd., Suite 215
Fort Worth, TX 76116

Via Certified Mail

/s/ Avery McDaniel

Avery McDaniel

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IN THE SUPREME COURT OF TEXAS

CONSOLIDATED GASOLINE, INC., and BILLY DELP III,

Relators,

V.

G4 TRUST, GROVER GIBSON, TRUSTEE,

Respondent.

ON APPEAL FROM THE SECOND COURT OF APPEALS
FORT WORTH, TEXAS
(Court of Appeals No. 02-10-00404-CV)

**RESPONSE OF G4 TRUST, GROVER GIBSON, TRUSTEE,
TO PETITION FOR REVIEW**

DUSTIN L. PAYNE
State Bar No. 24034618
5201 Camp Bowie Blvd., Suite 200
Fort Worth, Texas 76107
Telephone: 817-877-1969
Facsimile: 817-624-1374
Email: dpayne@dpaynelaw.com
ATTORNEYS FOR RESPONDENT

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G4 TRUST, GROVER GIBSON, TRUSTEE,

Respondent.

**RESPONSE OF G4 TRUST, GROVER GIBSON, TRUSTEE,
TO PETITION FOR REVIEW**

Respondent, G4 Trust, Grover Gibson, Trustee (“Gibson”) submits this brief in response to Petition for Review filed by Consolidated Gasoline, Inc. (“CGI”) and Billy Delp III (“Delp”).¹

STATEMENT OF THE CASE

G4 Trust, through its Trustee, Grover Gibson, intervened (CR 168) in a suit originally brought by JRP Equipment, Inc. and James R. Phillips against National Bank of Texas, Consolidated Gasoline, Inc., and Billy Delp III (CR2; CR34), seeking to set aside a non-judicial foreclosure sale conducted in September 2008. G4 Trust sought to show that the Substitute Trustee failed to provide proper notice for twenty-one (21) days

¹ All references to the Clerk’s Record will be stated as “CR”, followed by a page reference. All references to the Reporter’s Record will be stated as “RR”, preceded by a volume number and followed by a page reference. Any reference to an exhibit is to its number in the Reporter’s Record.

prior to the foreclosure sale. The Trustee and the Substitute Trustee failed to provide proper notice of the foreclosure sale by failing to strictly comply with the *Texas Property Code* by not disclosing the *name and street address* of the Trustee or the Substitute Trustee. (CR 168 through CR 176). Following a non-jury trial, visiting Judge David Cleveland sitting in the 348th Judicial District Court of Tarrant County entered judgment in favor of Relators. (CR 241 through CR 244). Further, Judge Cleveland wrote on the Court's docket sheet stating that the 2005 amendment to the *Texas Property Code* did not apply to this Deed of Trust dated April 2004. (CR 260 through CR 261). Judge Cleveland made findings of fact and conclusions of law. (CR 254 through CR 259). Gibson appealed to the Second District Court of Appeals in Fort Worth and the case was assigned to Justices Walker, McCoy and Meier. Following oral argument, the Court of Appeals reversed the trial court's judgment and remanded the case for a new trial, with Justice McCoy writing the Opinion for the Court of Appeals. The Opinion (2011 Tex. App. LEXIS 7158) was decided without publication. Relators filed a Motion for Rehearing, which was overruled on October 27, 2011.

RESPONSE TO ISSUES PRESENTED BY RELATOR

Response to Issue: CGI, through its predecessor in interest, National Bank of Texas, failed to comply with the notice requirements of Section 51.002 of the Texas Property Code, because the Trustee failed to provide his *name and "street address"* on the Trustee's Notice Of Foreclosure, as required by a 2005 amendment to Section 51.0075 of the Texas Property Code. Relator added a point of error that was not preserved in the Second Court of Appeals in that it has presented an issue for the first

time before this Court that “there was no evidence that the absence of a ‘street address’ in the notice of foreclosure sale contributed to a grossly inadequate sales price at the foreclosure.”

RESPONDENT’S STATEMENT OF ADDITIONAL FACTS

In April 2004, JRP Equipment, Inc. borrowed \$166,000.00 from National Bank of Texas (CR 3) and secured repayment of the loan with a Deed of Trust on the real property (RR Vol.2, p. 130; CR 3) and a guaranty agreement from James R. Phillips (CR 3). In April 2008, JRP Equipment, Inc. received notice that the loan was in default from National Bank of Texas. (CR 3; CR 196). JRP Equipment, Inc. cured the default by making payments to National Bank of Texas. (CR 3). On August 1, 2008, National Bank of Texas sent written notice of default and its intent to accelerate the maturity of the promissory note. (CR 3 through 4; CR 196 through 197). When the default was not cured, National Bank of Texas sent written notice of the acceleration of the maturity of the promissory note (CR 3 through 4; CR 196 through 197). George Bradford, the Trustee under the Deed of Trust and an officer at National Bank of Texas, posted and gave notice of the foreclosure sale to JRP Equipment, Inc., and James R. Phillips (CR 3 through 4; CR 196 through 197). Attached to the notice of foreclosure sale was a letter with the Trustee’s mailing address. The notice was filed and sent by Bradford on August 12, 2008.² (CR 3 through 4; CR 196 through 197).

² Consolidated Gasoline, Inc., relied upon the notice of the foreclosure sale sent by National Bank of Texas and posting by the original Trustee, George Bradford. The notice of foreclosure was defective in that the notice did not contain the name and street address of the Trustee as required by the Texas Property Code. The Substitute Trustee did not cure the defect in the notice

On August 28, 2008, National Bank of Texas notified JRP Equipment and James R. Phillips that it had sold its interest in the Promissory Note and Deed of Trust to Consolidated Gasoline, Inc. and Billy Delp, III. (CR 4; CR 196 through 197). On August 29, 2008, Billy Delp, III filed an Appointment of Substitute Trustee appointing Billy Delp, Jr., Annette Vanicek or Frederick J. Willis as Substitute Trustees to sell the property. (CR 196). On September 2, 2008, Billy Delp, Jr., acting as Substitute Trustee, sold the property at foreclosure and filed the Trustees Deed conveying the property to Consolidated Gasoline, Inc. (CR 196 through 197). On September 5, 2008, JRP Equipment, Inc. and James R. Phillips assigned the causes of action regarding the property to the G4 Trust, Grover Gibson, Trustee. (CR 105).

The Substitute Trustee, Billy Delp, Jr., relied on the notice of foreclosure sale sent by the original Trustee, George Bradford, on August 12, 2008, to JRP Equipment, Inc. and James R. Phillips. (CR 197). The original Trustee's notice of foreclosure sale was defective because it did not contain the *name and street address* of the Trustee as required by the Texas Property Code. (CR 197 through 198). The Substitute Trustee did not cure the defect in the notice of foreclosure prior to the foreclosure sale on September 2, 2008. (CR 196). The notice of foreclosure sale did not contain the name and street address of the Substitute Trustee for twenty-one (21) days prior to foreclosure as required

of foreclosure. See *Tarrant Sav. Assn. v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965) (holding that when an original Trustee properly posts the notices required by law, there is no necessity for re-posting for a valid sale by the Substitute Trustee). See also *Koehler v. Pioneer American Ins. Co.*, 425 S.W.2d 889, 891-892 (Tex. Civ. App.—Fort Worth 1968, no writ); *Loomis Land & Cattle Company v. Diversified Mortgage Investors*, 533 S.W.2d 420, 424 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.)

by the Deed of Trust and the Texas Property Code, breaching his duty to comply with the terms of the Deed of Trust and the statutory requirements of the Texas Property Code. (CR 197- 198).

After the bench trial on August 17, 2010 to the Honorable David Cleveland, the Court made the following conclusions of law:

6. Notice of the Trustee's Sale dated August 12, 2008 and the letter of same date sent to JRP[] Complied with Texas law and the provisions of the Deed of Trust.
7. Notice of Trustee's Sale served with George Bradford's letter complied with the requirement of Tex. Prop. Code [Ann.] § 51.002.
8. [CGI] was not required to provide additional 21 day written notice of the foreclosure sale to [JRP] after it purchased the Note on August 28, 2008.

Following oral argument, the Court of Appeals reversed the judgment of the trial court finding that the Deed executed in 2004 expressly acknowledges the potential for change in the law, and, the 2005 amendment to the Texas Property Code applies to notice sent under the 2004 Deed.

SUMMARY OF THE ARGUMENT

Texas Property Code § 51.002, § 51.0075, and the Deed of Trust require the Trustee or Substitute Trustee to provide the Trustee or Substitute Trustees' *name and street address* on the notice of foreclosure sale. The original Trustee did not provide his name and street address on the notice of foreclosure sale. The Relator, as Substitute Trustee, relied on the original Trustee's defective notice of foreclosure sale. Relator did not correct the original Trustee's defective notice of foreclosure sale prior to the

foreclosure sale on September 2, 2008. The foreclosure sale was properly set aside by the Court of Appeals.

ARGUMENT AND AUTHORITIES

Response to Issue (restated): CGI, through its predecessor in interest, National Bank of Texas, failed to comply with the notice requirements of Section 51.002 of the Texas Property Code, because the Trustee failed to provide his *name and “street address”* on the Trustee’s Notice Of Foreclosure, as required by a 2005 amendment to Section 51.0075 of the Texas Property Code. Relator added a point of error that was not preserved in the Second Court of Appeals in that it has presented an issue for the first time before this Court that “there was no evidence that the absence of a ‘street address’ in the notice of foreclosure sale contributed to a grossly inadequate sales price at the foreclosure.”

Argument and Authorities: The Court of Appeals determined that the 2005 amendments³ to Chapter 51 of the Texas Property Code, which require that the *name and*

³ The 2005 amendments to the Texas Property Code apply to the foreclosure sale conducted under the Deed of Trust dated April 1, 2004. The Deed expressly incorporates § 51.002’s notice requirements. Tex. Prop. Code Ann. § 51.002. Section 51.0075(e), pertaining to the authority of a Trustee or Substitute Trustee, requires that the name and street address for the Trustee or Substitute Trustee “shall be disclosed on the notice required by Section 51.002(b).” *Id.* 51.0075(e). The enabling legislation for the applicable 2005 amendment provided for transactions effective on or after the effective date and for transactions prior to the effective date:

“[Ch. 1231, H.B. No. 1234] SECTION 2. The changes in law made by this Act apply to a security instrument or other contract executed on or after the effective date of this Act and to a security instrument or other contract executed before the date of this Act that does not conflict with the changes in law made by this Act. A security instrument or other contract executed before the effective date of this Act that conflicts with the changes in law made by this Act is governed by the law in effect at the time the security

street address for a Trustee or Substitute Trustees shall be disclosed on the notice required by Section 51.002(b), applied to the Trustee's notice of foreclosure sale under the Deed of Trust dated April 1, 2004. The notice sent by the original Trustee, George Bradford, did not contain his *name and street address*. Relator argues that contemporaneously with the notice of foreclosure sale sent to the debtor was a letter from George Bradford, the Trustee designated in the Deed of Trust, containing the original Trustee's *mailing address*. Relator argues that this correspondence satisfied the purposes of the 2005 amendments even though the notice itself did not contain the *name and street address* of the Trustee as required by the 2005 amendments to the Texas Property Code.

Because a Trustee's power to sell the property is derived from the Deed of Trust⁴ and statute, strict compliance with these requirements is considered a prerequisite to the Trustee's right to make the sale." See *Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 768 (Tex. 1983); *Childs v. Hill*, 49 S.W. 652, 653-53 (Tex. Civ. App.—1898, no writ); *Texas Sav. & Loan Assoc. v. Seitzler*, 34 S.W. 348, 349 (Tex. Civ. App.—1896, writ ref'd). The language and legal effect of a statute may require its strict construction, meaning a limited, narrow, or inflexible reading and application of it where statute infringes upon private property. *Cain v. State of Texas*, 882 S.W.2d 515, 519 (Tex. App.—Austin, 1994). It is a rule of statutory construction that every word of a statute

instrument or other contract was executed, and the former law is continued in effect for that purpose." (Acts 2005, 79th Leg., Ch. 1231, § 2). [Appendix 1].

⁴ The Deed of Trust dated April 1, 2004, contemplates amendments to the Texas Property Code:

"The event of default, it shall be the duty of the Trustee, at the request of Lender (which request is hereby conclusively presumed) to invoke power of sale as required by Section 51.002 of the Texas Property Code, **as then amended**." (Appendix 2).

must be presumed to have been used for a purpose, likewise, we believe every word excluded from a statute must also be presumed to have been excluded for a purpose. *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981, reh. denied). These guidelines for interpreting statutory intent point to only one result in the instant case. A duty is created in the Trustee under the statute to invoke a power of sale and the Trustee's authority is derived from the statute. Since the power and the authority of the Trustee involve the deprivation of property from the individual granting the power of sale under the Deed of Trust, the Trustee must strictly adhere to the statutory requirements of the foreclosure sale.

The Trustee, in his notice of the foreclosure sale dated August 12, 2008, failed to disclose his *name and street address*. Subsequently, when the Substitute Trustee was appointed on August 29, 2008, five (5) days before the foreclosure sale, and conducted the sale relying on the prior Trustee's notice of sale and posting, the defect in the notice was not cured. To comply with the statute, the Substitute Trustee would have had to re-post and send a new notice disclosing his name and street address for twenty-one (21) days prior to the foreclosure sale for a valid sale by the Substitute Trustee. *See Gamble v. Martin*, 129 S.W. 386, 60 Tex. Civ. App. 517, 521-22 (Tex. Civ. App.—1912) (previous advertisement of foreclosure sale by the original Trustee was valid under similar provisions of Deed of Trust when sale was actually conducted by Substitute Trustee); *see also Tarrant Sav. Assn. v. Lucky Homes, Inc.*, 390 S.W.2d 473 (Tex. 1965) (holding that when an original Trustee properly posts the notices required by law, there is no necessity for re-posting for a valid sale by the Substitute Trustee); *see also Koehler v. Pioneer*

American Ins. Co., 425 S. W.2d 889, 891-892 (Tex. Civ. App.—Fort Worth 1968, no writ); see also *Loomis Land & Cattle Company v. Diversified Mortgage Investors*, 533 S.W.2d 420, 424 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.). The Substitute Trustee did not send a new notice. The trial court erred in granting Defendant's claim that the prior Trustee properly noticed the sale and posting required by law for a valid sale by the Substitute Trustee.

The Relator further argues, in his footnote 7, that the 2005 amendments to the statute do not apply to the Deed of Trust because the Deed of Trust was executed in April 2004, prior to the 2005 amendment. The 2005 amendment to the Texas Property Code applies to deeds of trust that do not conflict with the 2005 changes in the law. (See Respondent's footnote 3.)

The Deed expressly incorporates the notice requirements of Section 51.002 of the Texas Property Code. Section 51.0075(e), pertaining to the authority of a Trustee or Substitute Trustee, requires that the name and street address for the Trustee or Substitute Trustee "shall be disclosed on the notice required by Section 51.002(b)." *Id.* § 51.0075(e). This addition does not conflict with the Deed's express notice requirements, but merely supplements the list of items required for foreclosure notice that the Deed requires by incorporating Section 51.002 and does not impair the Deed holder's right to foreclose. See *Mellinger v. City of Houston*, 68 Tex. at 45, 3 S.W. at 253; see also *Fix v. Flagstar Bank, FSB*, 242 S.W.3d 147 (Tex. App.—Fort Worth 2001); *Deacon v. City of Euless*, 405 S.W.2d 61 (Tex. 1966). Because it does not conflict with the Deed or impair vested rights – the banks right to foreclose did not vest until JRP defaulted in 2008 – the

2005 amendment applies to notice sent under the Deed. *Id.* at 61; see also *Praeger v. Wilson*, 721 S.W.2d 597, 601 (Tex.App.—Fort Worth 1968, writ ref'd n.r.e.) (refusing to read a qualifying restriction into a contract clause's plain language when doing so would alter the ordinary meaning of the contract clause).

The Deed requires the Trustee to notice the debtor of the foreclosure sale and bounds the Trustee to the terms of the Deed and to the statutory requirements of the State of Texas. Since the deprivation of private property is at stake, courts have consistently held that strict adherence to the statutory scheme is mandated. *Slaughter v. Qualls*, 162 S.W.2d 671 (Tex. 1942); *Michael v. Crawford*, 193 S.W. 1070 (Tex. 1917). If the written instrument is so worded that it can be given a certain meaning or interpretation, then it is not ambiguous and the court will construe the instrument as a matter of law. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). When construing an agreement, the words and phrases used therein are given their “plain and ordinary meaning” and the court “presumes that the parties intended every clause thereof to have some effect”. *Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). Strict compliance with the terms of the Deed and statutory requirements is considered a prerequisite to the Trustee's right to make the sale. Furthermore, failure to strictly comply will give rise to a cause of action to set aside the Trustee's deed. *Slaughter*, 162 S.W.2d at 706 (Tex. 1942). Paragraph 15 of the Deed can be given certain meaning when providing the power of sale to the Trustee when it states that “it shall be the duty of the Trustee, . . . , to invoke power of sale as required by Section 51.002 of the Texas Property Code, *as then amended*.” The parties, by signature, agreed to the terms contained in this Deed forming the basis of

a contract between the Debtor and the Trustee in the event of a forced sale. To ignore the parties' use of this plain and ordinary term would cause the referenced paragraph to have no effect. The notice provisions in the Deed intended for the Trustee and Substitute Trustee to follow Texas Law at the time a power of sale was invoked.

Relator has presented for the first time before this Court a point of error that was not preserved in the Second Court of Appeals, that is, "there was no evidence that the absence of a 'street address' in the notice of foreclosure sale contributed to a grossly inadequate sales price at the foreclosure." Relator states that "a foreclosure sale cannot be set aside unless the alleged irregularity resulted or caused an inadequate price to be received at the foreclosure sale", citing *Am. Sav. & Loan Assn. of Houston v. Musick*, 351 S.W.2d 581, 587 (Tex. 1975). What the holding in this case actually states is "Mere inadequacy of consideration is not grounds for setting aside a Trustee's sale *if the sale was legally and fairly made*; There must also be evidence of irregularity, though slight, which irregularity must have caused or contributed to cause the property to be sold for a grossly inadequate price." *Id.* At 587. The cited case discusses the inadequacy of the sales price and there was an attempt to show that there was some irregularity in the appointment of the Substitute Trustee. Respondent is confident that if the Relator is required to re-post the notice of foreclosure sale, the subsequent sale will produce a larger sales price than was obtained in the prior foreclosure.

In the case before the Court, the violation of the foreclosure provisions of the Texas Property Code and Deed of Trust would cause the sale to be set aside because the sale was not legally made by the Trustee. The case cited by Relator does not address the

legality of the notice provisions of the statute and the Deed of Trust, but irregularities involving the actual foreclosure sale. The facts have not changed. The original Trustee, George Bradford, did not comply with the notice requirements of Section 51.002 of the Texas Property Code and the Deed of Trust, when notice of the foreclosure sale was sent to the debtor. The Substitute Trustee relied on the original Trustee's defective notice of foreclosure sale at the time of the foreclosure sale. The foreclosure sale should be set aside until the Substitute Trustee has cured the defect in the original notice by re-noticing the foreclosure sale to the debtor.

CONCLUSION AND PRAYER

For the reasons stated in this Response to the Petition for Review, G4 Trust, Grover Gibson, Trustee, respectfully prays that this Court deny the Petition for review, and thereupon sustain the issues presented by Respondent, affirm the Judgment of the Second Court of Appeals in favor of G4 Trust, Grover Gibson, Trustee, and grant such other and further relief, both general and special at law or in equity, to which the Respondent may be justly entitled.

Respectfully submitted,

/s/ Dustin L. Payne

DUSTIN L. PAYNE

State Bar No. 24034618

5201 Camp Bowie Blvd., Suite 200

Fort Worth, Texas 76107

Telephone: 817-877-1969

Facsimile: 817-624-1374

dpayne@dpaynelaw.com

ATTORNEYS FOR RESPONDENT

G4 TRUST, GROVER GIBSON,

TRUSTEE

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2012, a true and correct copy of the foregoing Response of G4 Trust, Grover Gibson, Trustee, to Petition for Review was served via First Class Mail on the following:

Consolidated Gasoline, Inc.
c/o Avery McDaniel
Law Offices of Avery McDaniel
1205 N. Main Street
Fort Worth, TX 76164
Attorneys for Relator Consolidated Gasoline, Inc.

Billy Delp III
c/o Avery McDaniel
Law Offices of Avery McDaniel
1205 N. Main Street
Fort Worth, TX 76164
Attorneys for Relator Billy Delp III

Annette R. Vanicek
1112 E. 1st Street, Suite A
Fort Worth, TX 76102
Attorneys for Relator in Trial Court and in Court of Appeals

JRP Equipment, Inc.
James R. Phillips
3381 Tinsley Lane
Fort Worth, TX 76179
Pro Se

National Bank of Texas
c/o Thomas J. Henry
Thomas J. Henry, P.C.
550 Bailey Avenue, Suite 310
Fort Worth, TX 76107
Defendant's counsel

/s/ Dustin L. Payne
Dustin L. Payne

APPENDIX 1

1. Act of May 25, 2005, 79th Leg., R.S., Ch. 1231, § 1, sec. 51.0075, 2005 Tex. Gen. Laws 3980 (current version at Tex. Prop. Code Ann. § 51.0075(e) (Westlaw current through 2012)).
2. House Comm. on Fin. Institutions, Bill Analysis, Tex. H.B. 1234, 79th Leg., R.S. (2005).
3. Senate Comm. on Bus. & Com., Bill Analysis, Tex. H.B. 1234, 79th Leg., R.S. (2005).
4. House Reseach Org., Bill Analysis, Tex. H.B. 1234, 79th Leg., R.S. (2005)
5. Fiscal Note, Tex. H.B. 1234, 79th Leg., R.S. (2005)

61.822, Education Code, as amended by this Act. Each public institution of higher education in this state shall revise its core curriculum as necessary to conform to the requirements of Section 61.822, Education Code, as amended by this Act, and shall require students to comply with the institution's revised core curriculum beginning with the 2008 fall semester, except that an institution shall permit a student who was enrolled in the institution before the 2008 fall semester to comply with the core curriculum requirements applicable to that student before that semester. Each institution of higher education shall issue course catalogs that reflect the applicable core curriculum under Section 61.822, Education Code, consistent with this subsection. This subsection expires at the beginning of the 2010 fall semester.

(d) The change in law made by this Act to Subsection (c), Section 61.822, Education Code, applies to students who transfer between institutions of higher education beginning with the 2008 fall semester. Students who transfer between institutions of higher education before the 2008 fall semester are covered by Subsection (c), Section 61.822, Education Code, as that subsection existed before its amendment by this Act, and that law is continued in effect for that purpose.

SECTION 20. The Texas Higher Education Coordinating Board shall, as necessary, adopt rules consistent with Sections 52.91, 56.463, and 56.465, Education Code, as amended by this Act, as soon as practicable after this Act takes effect. For that purpose, the coordinating board may adopt the rules in the manner provided by law for emergency rules.

SECTION 21. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2005.

Passed by the House on May 3, 2005, by a non-record vote; the House concurred in Senate amendments to H.B. No. 1172 on May 26, 2005: Yeas 140, Nays 0, 2 present, not voting; passed by the Senate, with amendments, on May 24, 2005: Yeas 31, Nays 0.

Approved June 18, 2005.

Effective June 18, 2005.

CHAPTER 1231

H.B. No. 1234

AN ACT

relating to the appointment of substitute trustees in certain foreclosures.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Section 51.0075, Property Code, is amended by amending Subsection (c) and adding Subsections (d) and (e) to read as follows:

(c) *Notwithstanding any agreement to the contrary, a [A] mortgagee may appoint or may authorize a mortgage servicer to appoint a [perpetual] substitute trustee or substitute trustees to succeed to all title, powers, and duties of the original trustee. A mortgagee or mortgage servicer may make an appointment or authorization under this subsection by power of attorney, corporate resolution, or other written instrument. [The power of attorney or written instrument must be signed by the mortgagee's representative, acknowledged, and sworn to with a jurat.]*

(d) *A mortgage servicer may authorize an attorney to appoint a substitute trustee or substitute trustees on behalf of a mortgagee under Subsection (c).*

(e) *The name and a street address for a trustee or substitute trustees shall be disclosed on the notice required by Section 51.002(b).*

SECTION 2. The changes in law made by this Act apply to a security instrument or other contract executed on or after the effective date of this Act and to a security instrument or other contract executed before the date of this Act that does not conflict with the changes in

law made by this Act. A security instrument or other contract executed before the effective date of this Act that conflicts with the changes in law made by this Act is governed by the law in effect at the time the security instrument or other contract was executed, and the former law is continued in effect for that purpose.

SECTION 3. This Act takes effect September 1, 2005.

Passed by the House on May 13, 2005, by a non-record vote; passed by the Senate on May 25, 2005: Yeas 31, Nays 0.

Approved June 18, 2005.

Effective September 1, 2005.

CHAPTER 1232

H.B. No. 1238

AN ACT

relating to distribution of certain child support payments by the state disbursement unit.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Section 234.008, Family Code, is amended by amending Subsection (a) and adding Subsections (d) and (e) to read as follows:

(a) Except as provided by Subsection (c) or (d), not later than the second business day after the date the state disbursement unit receives a child support payment, the state disbursement unit shall distribute the payment to the Title IV-D agency or the obligee.

(d) *Subject to Subsection (e), the signature of an obligee on a final order in a suit affecting the parent-child relationship, or another order under this title, that designates an individual or entity for the purpose of receiving, disbursing, and monitoring child support payments constitutes written consent by the obligee to the distribution of the child support payments by the state disbursement unit to the designated individual or entity. The state disbursement unit shall distribute each child support payment to the designated individual or entity by the date required by Subsection (a). The designated individual or entity shall deduct any amount of the individual's or entity's authorized fee from the payment and promptly disburse the remainder of the amount to the Title IV-D agency or obligee.*

(e) *If the Title IV-D agency is notified by the Federal Office of Child Support Enforcement that Subsection (d) results in the Title IV-D agency's failure to meet the requirements of 42 U.S.C. Sections 654a(e) and 654b related to the establishment and operation of the state case registry and state disbursement unit, Subsection (d) is null and void and the Title IV-D agency shall publish in the Texas Register notice that Subsection (d) is not effective.*

SECTION 2. Section 234.008, Family Code, as amended by this Act, applies to a payment distributed by the state disbursement unit on or after the effective date of this Act. A payment distributed before that date is governed by the law in effect on the date the payment is distributed, and the former law is continued in effect for that purpose.

SECTION 3. This Act takes effect September 1, 2005.

Passed by the House on May 11, 2005, by a non-record vote; the House concurred in Senate amendments to H.B. No. 1238 on May 27, 2005, by a non-record vote; passed by the Senate, with amendments, on May 25, 2005: Yeas 31, Nays 0.

Approved June 18, 2005.

Effective September 1, 2005.

BILL ANALYSIS

C.S.H.B. 1234
By: Paxton
Financial Institutions
Committee Report (Substituted)

BACKGROUND AND PURPOSE

In 2003, the Texas Legislature amended Chapter 51, Property Code, which governs the process of foreclosing real property, to allow mortgage servicers to administer the foreclosure process. A mortgage servicer is the last person to whom a mortgagor has been instructed by the current mortgagee to send payments for the debt secured by a security instrument. A mortgagee may be the mortgage servicer.

Typically, mortgage servicers, not mortgagees, are responsible for all day-to-day, loan-level administration responsibilities for a borrower's loan. This practice is consistent with the federal Real Estate Settlement Procedures Act, 12 U.S.C. § 2605, which recognizes a mortgage servicer as having the responsibility for the daily administration of a borrower's loan.

The purpose of this bill is to alter the method by which mortgagees or mortgage servicers appoint trustees. Due to technological changes in the mortgage banking industry, the bill permits electronic appointment or any other legitimate type of communication to designate the substitute trustee.

C.S.H.B. 1234 allows for the appointment of substitute trustees in certain foreclosures

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 1234 amends Section 51.0075, Property Code, as follows:

The substitute provides that, notwithstanding any agreement to the contrary, a mortgagee may appoint, or may authorize a mortgage servicer to appoint a substitute trustee or substitute trustees to succeed to all title, powers, and duties of the original trustee. It also provides that a mortgagee or mortgage servicer may make an appointment or authorization by power of attorney, corporate resolution, or other written instrument.

The substitute provides that a mortgage servicer may authorize an attorney to appoint a substitute trustee or substitute trustees on behalf of the mortgagee.

The substitute requires the name and a street address of the trustee or substitute trustees to be disclosed in a notice of foreclosure sale.

The substitute makes the changes in law made by this Act apply to a security instrument or other contract executed before the effective date of this Act if the security instrument or other contract does not conflict with the former law. If there is a conflict, the former law is continued in effect for that purpose.

C.S.H.B. 1234 79(R)

EFFECTIVE DATE

September 1, 2005

COMPARISON OF ORIGINAL TO SUBSTITUTE

C.S.H.B. 1234 modifies the original by adding new language that requires the name and a street address of the trustee or substitute trustees be disclosed in a notice of foreclosure sale.

BILL ANALYSIS

Senate Research Center
79R9438 KCR-D

H.B. 1234
By: Paxton (Harris)
Business & Commerce
5/19/2005
Engrossed

AUTHOR'S/SPONSOR'S STATEMENT OF INTENT

The 78th Legislature, Regular Session, 2003, amended Chapter 51 (Farm, Factory, and Store Worker's Liens), Property Code, to allow mortgage servicers to administer the foreclosure process. A mortgage servicer is the last person to whom a mortgagor has been instructed by the current mortgagee to send payments for the debt secured by a security instrument. A mortgagee may be the mortgage servicer.

Typically, mortgage servicers, not mortgagees, are responsible for all day-to-day, loan-level administration responsibilities for a borrower's loan. This practice is consistent with the federal Real Estate Settlement Procedures Act, 12 U.S.C. 2605, which recognizes a mortgage servicer as having the responsibility for the daily administration of a borrower's loan.

H.B. 1234 alter the method by which mortgagees or mortgage servicers appoint trustees. Due to the technological changes in the mortgage banking industry, the bill permits electronic appointment or any other legitimate type of communication to designate the substitute trustee.

H.B. 1234 allows for the appointment of substitute trustees in certain foreclosures.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 51.0075, Property Code, by amending Subsection (c) and adding Subsections (d) and (e), as follows:

(c) Provides that, notwithstanding any agreement to the contrary, a mortgagee is authorized to appoint or authorize a mortgage servicer to appoint a substitute trustee or substitute trustees to succeed to all title, powers, and duties of the original trustee, rather than a perpetual substitute trustee. Permits a mortgagee or mortgage servicer to make an appointment or authorization as specified. Deletes text which set forth requirements regarding power of attorneys and other written instruments.

(d) Authorizes a mortgage service provider to authorize an attorney to appoint a substitute trustee or substitute trustees on behalf of a mortgagee under Subsection (c).

(e) Requires the name and a street address for a trustee or substitute trustees to be disclosed on the notice required by Section 51.002(b).

SECTION 2. Makes application of this Act prospective.

SECTION 3. Effective date: September 1, 2005.

SUBJECT: Appointing substitute trustees in certain foreclosures

COMMITTEE: Financial Institutions — committee substitute recommended

VOTE: 6 ayes — Solomons, McCall, Flynn, Guillen, Orr, Riddle
0 nays
1 absent — Chavez

WITNESSES: For — Tommy Bastian; Robert Doggett, Texas Low Income Housing Information Service; (*Registered but did not testify*: Karen Neeley, Independent Bankers Association of Texas)
Against — None

BACKGROUND: HB 1493 by Solomons enacted by the 78th Legislature in 2003 allows a mortgage servicer to administer a foreclosure on real property on behalf of the lender. A sale of real property under a power of sale conferred by a deed of trust or other contract lien must be a public sale at an auction at the county courthouse. The mortgage servicer must serve the borrower a notice of the date, time, and place of the foreclosure sale. A mortgage servicer also may obtain authorization from the mortgagee to appoint a substitute trustee to post the notice and conduct the foreclosure sale.

DIGEST: CSHB 1234 would allow a mortgagee to appoint or authorize a mortgage servicer to appoint a substitute trustee or substitute trustees to succeed to all title, powers, and duties of the original trustee. This authorization could be made by power of attorney, corporate resolution, or other written instrument.

A mortgage servicer could authorize an attorney to appoint a substitute trustee or substitute trustees on behalf of a mortgagee. The name and street address of the trustee or substitute trustees would be disclosed in a notice of foreclosure sale.

The bill would take effect September 1, 2005, and would apply only to security instruments and other contracts executed on or after this date.

HB 1234
House Research Organization
page 2

**SUPPORTERS
SAY:**

Currently, a mortgagee must authorize a mortgage servicer by power of attorney to appoint substitute trustees. This is a cumbersome process that must occur every time the trustee is changed. CSHB 1234 would clarify that the appointment of a substitute trustee by a mortgage servicer could occur by a power of attorney, corporate resolution, or any other instrument. The bill does not remove any protection or any step in the foreclosure process. It only would simplify the process by which an agent of the mortgage servicer could be authorized to conduct the foreclosure process.

**OPPONENTS
SAY:**

No apparent opposition.

NOTES:

The original bill would not have required that the name and street address of the trustee or substitute trustees be disclosed in a notice of foreclosure sale.

The companion bill, SB 1154 by Harris, has been referred to the Senate Business and Commerce Committee.

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 79TH LEGISLATIVE REGULAR SESSION

May 17, 2005

TO: Honorable Troy Fraser, Chair, Senate Committee on Business & Commerce

FROM: John S. O'Brien, Deputy Director, Legislative Budget Board

IN RE: **HB1234** by Paxton (Relating to the appointment of substitute trustees in certain foreclosures.), **As Engrossed**

No fiscal implication to the State is anticipated.

Local Government Impact

No fiscal implication to units of local government is anticipated.

Source Agencies:

LBB Staff: JOB, CL, JRO, SR, WP

APPENDIX 2

PTC 4: F-030 61206-5LT

AFTER RECORDING RETURN TO:
NATIONAL BANK OF TEXAS
P.O. BOX 161969
FORT WORTH, TX 76161-1969

FILED
TARRANT COUNTY TEXAS

2004 APR 21 3:57

PERSON
COUNTY CLERK

State of Texas

Space Above This Line For Recording Data

DEED OF TRUST

(With Future Advance Clause)

BY _____

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OF THE FOLLOWING INFORMATION FROM THIS INSTRUMENT BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

1. **DATE AND PARTIES.** The date of this Deed of Trust (Security Instrument) is 4/20/04 and the parties, their addresses and tax identification numbers, if required, are as follows:

GRANTOR: JRB EQUIPMENT INC
P.O. BOX 79410
FORT WORTH, TX 76179-0410

If checked, refer to the attached Addendum incorporated herein, for additional Grantors, their signatures and acknowledgments.

TRUSTEE: GEORGE H BRADFORD
P.O. BOX 161969
FORT WORTH, TX 76161-1969

LENDER: National Bank of Texas
P.O. Box 161969
Fort Worth, TX 76161-1969

2. **CONVEYANCE.** In consideration of Ten Dollars paid in hand, for the purpose of securing the Secured Debt (defined below) and Grantor's performance under this Security Instrument, Grantor irrevocably grants, sells, and conveys unto Trustee, in trust for the benefit of Lender, with power of sale, the following described property:

A TRACT OF LAND OUT OF THE S. C. T. FORD SURVEY ABSTRACT NO. 531, TARRANT COUNTY, TEXAS, AND BEING MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS IN EXHIBIT "A" ATTACHED HERETO AND MADE A PART THEREOF

The property is located in Tarrant (County)

1815 Hicks Field Rd (Address) Fort Worth (City) Texas 76179 (ZIP Code)

Together with all rights, easements, appurtenances, royalties, mineral rights, oil and gas rights, all water and riparian rights, ditches, and water stock and all existing and future improvements, structures, fixtures, and replacements that may now, or at any time in the future, be part of the real estate described above (all referred to as "Property").

3. **SECURED DEBT AND FUTURE ADVANCES.** The term "Secured Debt" is defined as follows:

A. Debt incurred under the terms of a promissory note, "Note," described below, with all renewals, extensions, modifications or substitutions, thereof. (When referencing the debt below, it is suggested that you include items such as borrowers' names, note amount, interest rate(s), maturity dates, etc.)

DEED OF TRUST NOTE OF EVEN DATE IN THE AMOUNT OF \$166,000.00 PAYABLE IN MONTHLY PAYMENTS @ \$2,555.49 BEGINNING MAY 20, 2004 AND MATURING ON OR BEFORE APRIL 20, 2011 AND NOTE ACCRUING AT NATIONAL PRIME PLUS 3 1/2 PERCENT ON A 360 DAY BASIS

B. All future advances from Lender to Grantor or other future obligations of Grantor to Lender under any promissory note, contract, guaranty, or other evidence of debt executed by Grantor in favor of Lender after this Security Instrument whether or not this Security Instrument is specifically referenced. If more than one person signs this Security Instrument, each Grantor agrees that this Security Instrument will secure all future advances and future obligations that are given to or incurred by any one or more Grantor, or any one or more Grantor and others. All future advances and other future obligations are secured by this Security Instrument even though all or part may not yet be advanced. All future advances and other future obligations are secured as if made on the date of this Security Instrument. Nothing in this Security Instrument shall constitute a commitment to make additional or future loans or advances in any amount. Any such commitment must be agreed to in a separate writing.

C. All obligations Grantor owes to Lender, which may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any deposit account agreement between Grantor and Lender.

EXHIBIT
1

JCB

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- D. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Security Instrument.
4. **PAYMENTS.** Grantor agrees that all payments under the Secured Debt will be paid when due and in accordance with the terms of the Secured Debt and this Security Instrument.
 5. **SUBROGATION.** Any amounts advanced by Lender to Grantor to take out outstanding liens against any or all of the Property have been advanced at Grantor's request, and upon Grantor's representations that such amounts are due and are secured by valid liens against the Property. Lender shall be subrogated to any and all rights, superior titles, liens and equities owned or claimed by any owner or holder of any outstanding liens and debts, including any interest of Contractor, regardless of whether said liens are acquired by Lender by assignment or are released by the holder thereof upon payment.
 6. **WARRANTY OF TITLE.** Grantor warrants that Grantor is or will be lawfully seized of the estate conveyed by this Security Instrument and has the right to irrevocably grant, convey and sell the Property to Trustee, in trust, with power of sale. Grantor also warrants that the Property is unencumbered, except for encumbrances of record.
 7. **PRIOR SECURITY INTERESTS.** With regard to any other mortgage, deed of trust, security agreement or other lien document that created a prior security interest or encumbrance on the Property, Grantor agrees:
 - A. To make all payments when due and to perform or comply with all covenants.
 - B. To promptly deliver to Lender any notices that Grantor receives from the holder.
 - C. Not to allow any modification or extension of, nor to request any future advances under any note or agreement secured by the lien document without Lender's prior written consent.
 8. **CLAIMS AGAINST TITLE.** Grantor will pay all taxes, assessments, liens, encumbrances, lease payments, ground rents, utilities, and other charges relating to the Property when due. Lender may require Grantor to provide to Lender copies of all notices that such amounts are due and the receipts evidencing Grantor's payment. Grantor will defend title to the Property against any claims that would impair the lien of this Security Instrument. Grantor agrees to assign to Lender, as requested by Lender, any rights, claims or defenses Grantor may have against parties who supply labor or materials to maintain or improve the Property.
 9. **DUE ON SALE OR ENCUMBRANCE.** Lender may, at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of all or any part of the Property. This right is subject to the restrictions imposed by federal law (12 C.F.R. 591), as applicable. This covenant shall run with the Property and shall remain in effect until the Secured Debt is paid in full and this Security Instrument is released.
 10. **PROPERTY CONDITION, ALTERATIONS AND INSPECTION.** Grantor will keep the Property in good condition and make all repairs that are reasonably necessary. Grantor shall not commit or allow any waste, impairment, or deterioration of the Property. Grantor will keep the Property free of noxious weeds and grasses. Grantor agrees that the nature of the occupancy and use will not substantially change without Lender's prior written consent. Grantor will not permit any change in any license, restrictive covenant or easement without Lender's prior written consent. Grantor will notify Lender of all demands, proceedings, claims, and actions against Grantor, and of any loss or damage to the Property.

Lender or Lender's agents may, at Lender's option, enter the Property at any reasonable time for the purpose of inspecting the Property. Lender shall give Grantor notice at the time of or before an inspection specifying a reasonable purpose for the inspection. Any inspection of the Property shall be entirely for Lender's benefit and Grantor will in no way rely on Lender's inspection.
 11. **AUTHORITY TO PERFORM.** If Grantor fails to perform any duty or any of the covenants contained in this Security Instrument, Lender may, without notice, perform or cause them to be performed. Grantor appoints Lender as attorney in fact to sign Grantor's name or pay any amount necessary for performance. Lender's right to perform for Grantor shall not create an obligation to perform, and Lender's failure to perform will not preclude Lender from exercising any of Lender's other rights under the law or this Security Instrument. If any construction on the Property is discontinued or not carried on in a reasonable manner, Lender may take all steps necessary to protect Lender's security interest in the Property, including completion of the construction.
 12. **ASSIGNMENT OF LEASES AND RENTS.** Grantor absolutely, unconditionally, irrevocably and immediately assigns, grants and conveys to Trustee, in trust for the benefit of Lender all title, right, title and interest in the following (all referred to as Property): existing or future leases, subleases, licenses, guaranties and any other written or verbal agreements for the use and occupancy of the Property, including any extensions, renewals, modifications or replacements (all referred to as Leases); and rents, issues and profits (all referred to as Rents). In the event any item listed as Leases or Rents is determined to be personal property, this Assignment will also be regarded as a security agreement. Grantor will promptly provide Lender with copies of the Leases and will certify these Leases are true and correct copies. The existing Leases will be provided on execution of the Assignment, and all future Leases and any other information with respect to these Leases will be provided immediately after they are executed.

Lender grants Grantor a revocable license to collect, receive, enjoy and use the Rents as long as Grantor is not in default. Grantor's default automatically and immediately revokes this license. Upon default, Grantor will receive any Rents in trust for Lender and Grantor will not commingle the Rents with any other funds. When Lender so directs, Grantor will endorse and deliver any payments of Rents from the Property to Lender. Grantor agrees that Lender will not be considered to be a mortgagee-in-possession by executing this Security Instrument or by collecting or receiving payments on the Secured Debts, but only may become a mortgagee-in-possession after Grantor's license to collect, receive, enjoy and use the Rents is revoked by Lender or automatically revoked on Grantor's default, and Lender takes actual possession of the Property. Consequently, until Lender takes actual possession of the Property, Lender is not obligated to perform or discharge any obligation of Grantor under the Leases, appear in or defend any action or proceeding relating to the Rents, the Leases or the Property, or be liable in any way for any injury or damage to any person or property sustained in or about the Property. Grantor agrees that this Security Instrument is immediately effective between Grantor and Lender and effective as to third parties on the recording of this Assignment. As long as this Assignment is in effect, Grantor warrants and represents that no default exists under the Leases, and the parties subject to the Leases have not violated any applicable law on leases, licenses and landlords and tenants.
 13. **LEASEHOLDS; CONDOMINIUMS; PLANNED UNIT DEVELOPMENTS.** Grantor agrees to comply with the provisions of any lease if this Security Instrument is on a leasehold. If the Property includes a unit in a condominium or a planned unit development, Grantor will perform all of Grantor's duties under the covenants, by laws, or regulations of the condominium or planned unit development.
 14. **DEFAULT.** Grantor will be in default if any party obligated on the Secured Debt fails to make payment when due. Grantor will be in default if a breach occurs under the terms of this Security Instrument or any other document executed for the purpose of creating, securing or guarantying the Secured Debt. A good faith belief by Lender that Lender at any time is insecure with respect to any person or entity obligated on the Secured Debt or that the prospect of any payment or the value of the Property is impaired shall also constitute an event of default.
 15. **REMEDIES ON DEFAULT.** In some instances, federal and state law will require Lender to provide certain notices before Lender may accelerate the Secured Debt and foreclose this Security Instrument in a manner provided by law if Grantor is in default.

At the option of Lender, all or any part of the agreed fees and charges, accrued interest and principal shall become immediately due and payable, after giving notice if required by law, upon the occurrence of a default or anytime thereafter. In addition, Lender shall be entitled to all the remedies provided by law, the terms of the Secured Debt, this Security Instrument and any related documents, including without limitation, the power to sell the Property.

In the event of default, it shall be the duty of the Trustee, at the request of Lender (which request is hereby conclusively presumed), to exercise power of sale as required by Sections 102 and 103 of the Texas Property Code as then amended. Trustee shall advertise and sell the Property as a whole or in separate parcels at public auction to the highest bidder for cash and convey indefeasible title to the Property with covenants of general warranty. Trustee shall give notice of sale including the time, date and place of sale and a description of the Property to be sold as required by the applicable law in effect at the time of the proposed sale.

Upon sale of the Property and to the extent not prohibited by law, Trustee shall make and deliver a deed to the Property sold which conveys absolute title to the purchaser, and after first paying all fees, charges and costs, shall pay to Lender all moneys advanced for repairs, taxes, insurance, liens, assessments and prior encumbrances and interest thereon, and the principal and interest on the Secured Debt, paying the surplus, if any, to Grantor. Lender may purchase the Property. The recitals in any deed of conveyance shall be prima facie evidence of the facts set forth therein.

All remedies are disjunctive, cumulative and not exclusive, and the Lender is entitled to all remedies provided at law or equity, whether or not expressly set forth. The acceptance by Lender of any sum in payment or partial payment on the Secured Debt after the balance is due or is accelerated or after foreclosure proceedings are filed shall not constitute a waiver of Lender's right to require complete cure of any existing default. By not exercising any remedy on Grantor's default, Lender does not waive Lender's right to later consider the event a default if it continues or happens again.

16. **FORECLOSURE.** In the event a foreclosure under power of sale should be commenced by the Trustee, Lender may at any time before the sale of the Property direct the Trustee to abandon the sale, and may then institute suit for the collection of the Secured Debt and for the foreclosure of the lien of this Security Instrument. It is further agreed that if Lender should institute a suit for the collection of the Secured Debt, and for a foreclosure of the lien of this Security Instrument, that Lender may at any time before the entry of a final judgment in said suit dismiss the same, and require the Trustee to sell the Property in accordance with the provisions of this Security Instrument. Lender, if it is the highest bidder, shall have the right to purchase at any sale of the Property, and to have the amount for which such Property is sold credited on the Secured Debt.

17. **EXPENSES; ADVANCES ON COVENANTS; ATTORNEYS' FEES; COLLECTION COSTS.** Except when prohibited by law, Grantor agrees to pay all of Lender's expenses if Grantor breaches any covenant in this Security Instrument. Grantor will also pay on demand any amount incurred by Lender for insuring, inspecting, preserving or otherwise protecting the Property and Lender's security interest. These expenses will bear interest from the date of the payment until paid in full at the highest interest rate in effect as provided in the terms of the Secured Debt. Grantor agrees to pay all costs and expenses incurred by Lender in collecting, enforcing or protecting Lender's rights and remedies under this Security Instrument. This amount may include, but is not limited to, attorneys' fees, court costs, and other legal expenses. This Security Instrument shall remain in effect until released. Grantor agrees to pay for any recordation costs of such release.

18. **ENVIRONMENTAL LAWS AND HAZARDOUS SUBSTANCES.** As used in this section, (1) Environmental Law means, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.), and all other federal, state and local laws, regulations, ordinances, court orders, attorney general opinions or interpretive letters concerning the public health, safety, welfare, environment of a hazardous substance; and (2) Hazardous Substance means any toxic, radioactive or hazardous material, waste, pollutant or contaminant which has characteristics which render the substance dangerous or potentially dangerous to the public health, safety, welfare or environment. The term includes, without limitation, any substances defined as "hazardous material," "toxic substances," "hazardous waste" or "hazardous substance" under any Environmental Law.

Grantor represents, warrants and agrees that:

- A. Except as previously disclosed and acknowledged in writing to Lender, no Hazardous Substance is or will be located, stored or released on or in the Property. This restriction does not apply to small quantities of Hazardous Substances that are generally recognized to be appropriate for the normal use and maintenance of the Property.
- B. Except as previously disclosed and acknowledged in writing to Lender, Grantor and every tenant have been, are, and shall remain in full compliance with any applicable Environmental Law.
- C. Grantor shall immediately notify Lender if a release or threatened release of a Hazardous Substance occurs on, under or about the Property or there is a violation of any Environmental Law concerning the Property. In such an event, Grantor shall take all necessary remedial action in accordance with any Environmental Law.
- D. Grantor shall immediately notify Lender in writing as soon as Grantor has reason to believe there is any pending or threatened investigation, claim, or proceeding relating to the release or threatened release of any Hazardous Substance or the violation of any Environmental Law.

19. **CONDEMNATION.** Grantor will give Lender prompt notice of any pending or threatened action, by private or public entities to purchase or take any or all of the Property through condemnation, eminent domain, or any other means. Grantor authorizes Lender to intervene in Grantor's name in any of the above described actions or claims. Grantor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property. Such proceeds shall be considered payments and will be applied as provided in this Security Instrument. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

20. **INSURANCE.** Grantor shall keep Property insured against loss by fire, flood, theft and other hazards and risks reasonably associated with the Property due to its type and location. This insurance shall be maintained in the amounts and for the periods that Lender requires. What Lender requires pursuant to the preceding two sentences can change during the term of the Secured Debt. The insurance carrier providing the insurance shall be chosen by Grantor subject to Lender's approval, which shall not be unreasonably withheld. If Grantor fails to maintain the coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property according to the terms of this Security Instrument.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard "mortgage clause" and, where applicable, "loss payee clause." Grantor shall immediately notify Lender of cancellation or termination of the insurance. Lender shall have the right to hold the policies and renewals. If Lender requires, Grantor shall immediately give to Lender all receipts of paid premiums and renewal notices. Upon loss, Grantor shall give immediate notice to the insurance carrier and Lender. Lender may make proof of loss if not made immediately by Grantor.

Unless otherwise agreed in writing, all insurance proceeds shall be applied to the restoration or repair of the Property or to the Secured Debt, whether or not then due, at Lender's option. Any application of proceeds to principal shall not extend or postpone the due date of the scheduled payment nor change the amount of any payment. Any excess will be paid to the Grantor. If the Property is acquired by Lender, Grantor's right to any insurance policies and proceeds resulting from damage to the Property before the acquisition shall pass to Lender to the extent of the Secured Debt immediately before the acquisition.

21. **ESCROW FOR TAXES AND INSURANCE.** Unless otherwise provided in a separate agreement, Grantor will not be required to pay to Lender funds for taxes and insurance in escrow.

22. **FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS.** Grantor will provide to Lender upon request, any financial statement or information Lender may deem reasonably necessary. Grantor agrees to sign, deliver, and file any additional documents or certifications that Lender may consider necessary to perfect, continue, and preserve Grantor's obligations under this Security Instrument and Lender's lien status on the Property.

23. **JOINT AND INDIVIDUAL LIABILITY; CO-SIGNERS; SUCCESSORS AND ASSIGNS BOUND.** All duties under this Security Instrument are joint and individual. If Grantor signs this Security Instrument but does not sign an evidence of debt, Grantor does so only to mortgage Grantor's interest in the Property to secure payment of the Secured Debt and Grantor does not agree to be personally liable on the Secured Debt. If this Security Instrument secures a guaranty between Lender and Grantor, Grantor agrees to waive any rights that may prevent Lender from bringing any action or claim against Grantor or any party indebted under the obligation. These rights may include, but are not limited to, any anti-deficiency or anti-action laws. Grantor agrees that Lender and any party to this Security Instrument may extend, modify or make any change in the terms of this Security Instrument or any evidence of debt without Grantor's consent. Such a change will not release Grantor from the terms of this Security Instrument. The duties and benefits of this Security Instrument shall bind and benefit the successors and assigns of Grantor and Lender.

24. **APPLICABLE LAW; SEVERABILITY; INTERPRETATION.** This Security Instrument is governed by the laws of the jurisdiction in which Lender is located, except to the extent otherwise required by the laws of the jurisdiction where the Property is located. This Security Instrument is complete and fully integrated. This Security Instrument may not be amended or modified by oral agreement. Any section in this Security Instrument, attachments, or any agreement related to the Secured Debt that conflicts with applicable law will not be effective, unless that law expressly or impliedly permits the variations by written agreement. If any section of this Security Instrument cannot be enforced according to its terms, that section will be severed and will not affect the enforceability of the remainder of this Security Instrument. Whenever used, the singular shall include the plural and the plural the singular. The captions and headings of the sections of this Security Instrument are for convenience only and are not to be used to interpret or define the terms of this Security Instrument. Time is of the essence in this Security Instrument.

25. **SUCCESSOR TRUSTEE.** Lender or Lender's approved may from time to time remove trustee and appoint a successor trustee without any objection from the designation in writing. The successor trustee without conveyance of the Property, shall succeed to all the powers, duties, and obligations of the trustee by this Security Instrument and applicable laws.

26. **NOTICE.** Unless otherwise required by law, any notice shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1 of this Security Instrument, or to any other address designated in writing. Notice to one grantor will be deemed to be notice to all grantors.

27. **USURY SAVINGS.** In no event shall any provision of this Security Instrument or any other instrument evidencing or securing the Secured Debt obligate Grantor to pay or allow Lender to collect interest on the Secured Debt at a rate greater than the maximum non-usurious rate permitted by applicable law.

In the event any portion of the sums intended to be secured by this Security Instrument cannot be lawfully secured hereby, payments in reduction of such sums shall be applied first to those portions not secured hereby. In the event that any law is interpreted so that any charge provided for in this Security Instrument and/or together with any instrument evidencing the Secured Debt, violates such law by reason of the acceleration of the Secured Debt or otherwise, such charge is hereby reduced to eliminate such violation. Any amounts paid to Lender in excess of the amounts permitted by applicable law shall be applied to reduce the principal of the Secured Debt, or, at Lender's option, be refunded.

28. **WAIVERS.** Except to the extent prohibited by law, Grantor waives all appraisal relating to the Property.

29. **OTHER TERMS.** If checked, the following are applicable to this Security Instrument:

- Line of Credit.** The Secured Debt includes a revolving line of credit provision. Although the Secured Debt may be reduced to a zero balance, this Security Instrument will remain in effect until released.
- Fixture Filing.** Grantor grants to Lender a security interest in all goods that Grantor owns now or in the future and that are or will become fixtures related to the Property. This Security Instrument suffices as a financing statement and any carbon, photographic or other reproduction may be filed of record for purposes of Article 9 of the Uniform Commercial Code.
- Riders.** The covenants and agreements of each of the riders checked below are incorporated into and supplement and amend the terms of this Security Instrument. [Check all applicable boxes]
 - Condominium Rider
 - Planned Unit Development Rider
 - Other
- Purchase Money; Vendor's Lien; Contractor's Lien; Renewal and Extension.**

SIGNATURES: By signing below, Grantor agrees to the terms and covenants contained in this Security Instrument and in any attachments. Grantor also acknowledges receipt of a copy of this Security Instrument on the date stated on page 1.

[Signature] PRESIDENT (Date) (Signature) (Date)
(Signature) JAMES R PHILLIPS JR (Date) (Signature) (Date)

ACKNOWLEDGMENT

(Individual) STATE OF TEXAS, COUNTY OF Tarrant,) ss.
This instrument was acknowledged before me this 29 day of April, 2004

My commission expires
BRITAN TOWNSEND
Notary Public
STATE OF TEXAS
My Comm. Exp. 12/18/2004

EXHIBIT A

Being a portion of the S. C. T. FORD SURVEY, ABSTRACT NO. 533, in Tarrant County, Texas, and being a part of that certain 56.1 acre tract conveyed to W. J. LaForge by deed recorded in Volume 2441, Page 1197, Deed Records, Tarrant County, Texas, which is a part of that certain tract designated as Tract No. 8, as described in partition deed to Robert C. Noble, recorded in Volume 3364, Page 2, Deed Records, Tarrant County, Texas, described by metes and bounds as follows:

Commencing at a 7/8 inch iron pin 1 foot East and 5 feet South of a railroad tie fence corner, a re-entrant corner of said LaForge tract, in the North line of said Tract No. 8;

Thence South 88 degrees 45 minutes 00 seconds West, with the South line of said Hicks Field Road East and a North line of said LaForge tract, 1267.7 feet to a 5/8 inch iron pin

stamped Hancock and the Point of Beginning of this tract hereli described;

Thence North 01 degrees 15 minutes 00 seconds East, 441.21 feet to a 5/8 inch capped iron pin stamped Hancock;

Thence South 08 degrees 45 minutes 00 seconds West, 573.30 feet to a 5/8 inch capped iron pin stamped Hancock, just East of a chainlink fence in a West line of said LaForge tract and the West line of said No. 8 tract;

Thence North 06 degrees 51 minutes 11 seconds West, generally with a chainlink fence, 426.58 feet to a 1 inch iron pin 0.3 feet East and 1 foot South of a steel fence corner, a Northwest corner of said LaForge tract, in the South line of Hicks Field Road East;

Thence with the South line of said road and the North line of said LaForge tract, North 33 degrees 02 minutes 00 seconds East, 167.30 feet to a 5/8 inch capped iron pin stamped Hancock and North 88 degrees 45 minutes 00 seconds East, 449.09 feet to the POINT OF BEGINNING and containing 6.000 acres of land, more or less.

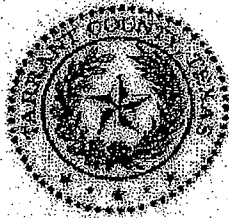
Signed for identification,

JRP Equipment Inc

By: *[Signature]*
President

DUPLICATE

UNRECORDED



NATIONAL BANK OF TEXAS
POB 761969

FT WORTH TX 76161

Submitter: RATTIKIN TITLE CO

SUZANNE HENDERSON
TARRANT COUNTY CLERK
TARRANT COUNTY COURTHOUSE
100 WEST WEATHERFORD
FORT WORTH, TX 76196-0401

DO NOT DESTROY
WARNING - THIS IS PART OF THE OFFICIAL RECORD.

Filed For Registration: 04/21/2004 03:56 PM
Document No.: D204120815
DT 6 PGS \$12.00

L

By: _____



D204120815

ANY PROVISION WHICH RESTRICTS THE SALE, RENTAL OR USE
OF THE DESCRIBED REAL PROPERTY BECAUSE OF COLOR OR
RACE IS INVALID AND UNENFORCEABLE UNDER FEDERAL LAW.

DO NOT DESTROY

No. _____

IN THE SUPREME COURT OF TEXAS

CONSOLIDATED GASOLINE, INC., and BILLY DELP III

Petitioners,

V.

G4 TRUST, GROVER GIBSON, Trustee

Respondent.

ON APPEAL FROM THE SECOND COURT OF APPEALS
FORT WORTH, TEXAS
(Court of Appeals No. 02-10-00404-CV)

PETITION FOR REVIEW
(Including Appendix)

FILED BY CONSOLIDATED GASOLINE, INC., and BILLY DELP III

Avery McDaniel
State Bar No. 24000121
Law Offices of Avery McDaniel
1205 North Main Street
Fort Worth, TX 76164
Telephone: (817) 810-9500
Telecopier: (817) 810-9994
Email: avery@averymcdaniel.com

ATTORNEY FOR PETITIONERS

IDENTITY OF PARTIES AND COUNSEL

Petitioners provide this List of Parties to the Judgment in the trial court and in the Court of Appeals, and their respective counsel:

Petitioners	Consolidated Gasoline, Inc. c/o Avery McDaniel Law Offices of Avery McDaniel 1205 N. Main Street Fort Worth, TX 76164
	Billy Delp III c/o Avery McDaniel Law Offices of Avery McDaniel 1205 N. Main Street Fort Worth, TX 76164
Petitioners' counsel in Supreme Court of Texas	Avery McDaniel Law Offices of Avery McDaniel 1205 N. Main Street Fort Worth, TX 76164
Petitioners' counsel in Trial Court and in Court of Appeals	Annette R. Vanicek 1112 E. 1 st Street, Suite A Fort Worth, TX 76102
Respondent ¹	G4 Trust, Grover Gibson, Trustee c/o Dustin Lee Payne Law Offices of Dustin Payne 6777 Camp Bowie Boulevard, Suite 215 Fort Worth, TX 76116

¹ Respondent was an Intervenor- Plaintiff in the trial court, filing claims against Consolidated Gasoline, Inc., and Billy Delp III. (CR 168)

Respondent's counsel	Dustin Lee Payne Law Offices of Dustin Payne 6777 Camp Bowie Boulevard, Suite 215 Fort Worth, TX 76116
Plaintiff	JRP Equipment, Inc. ² , James R. Phillips 3381 Tinsley Lane Fort Worth, TX 76179 <i>Pro Se</i>
Defendant	National Bank of Texas ³ P. O. Box 161969 Fort Worth, TX 76161-1969
Defendant's counsel	Thomas J. Henry Thomas J. Henry, P.C. 550 Bailey Avenue, Suite 310 Fort Worth, TX 76107

² JRP Equipment, Inc., appeared without counsel and only through its representative, James R. Phillips. JRP Equipment, Inc., and James R. Phillips were represented by Ronald L. Clower at the time suit was filed, and Mr. Clower withdrew from representation in 2009. Thereafter, JRP Equipment, Inc., and James R. Phillips was represented by John R. Lively and Lively & Associates, LLP. Mr. Lively and Lively & Associates, LLP withdrew from representation in May 2010. JRP Equipment, Inc., and James R. Phillips appeared at trial without counsel.

³ Claims against National Bank of Texas were dismissed by JRP Equipment, Inc., and James R. Phillips in March 2009 (CR 81), prior to the filing of a plea in intervention by G4 Trust, Grover Gibson Trustee in May 2010 (CR 168). National Bank of Texas is not a party to the Judgment from which Respondent appealed.

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1. Final Judgment entered by 348th Judicial District Court on August 31, 2010.
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LIST OF AUTHORITIES

CASES

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<i>Diversified Dev. v. Texas First Mortg. REIT</i> , 592 S.W.2d 43, 44-45 (Tex. Civ. App.--Beaumont 1979, ref. n.r.e.)	7
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<i>Martinez v. Beasley</i> , 616 S.W.2d 689 (Tex. App. - Corpus Christi 1981, no writ)	6
<i>Myrad Props. v. LaSalle Bank Nat'l Ass'n</i> , 252 S.W.3d 605 (Tex. App.-- Austin 2008), <i>rev'd on other grounds</i> , 300 S.W.3d 746 (Tex. 2009)	7
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No. _____

CONSOLIDATED GASOLINE, INC., and BILLY DELP III

Petitioners,

V.

G4 TRUST, GROVER GIBSON, Trustee,

Respondent.

**PETITION FOR REVIEW FILED BY
CONSOLIDATED GASOLINE, INC., and BILLY DELP III**

Petitioners, Consolidated Gasoline, Inc., (“CGI”) and Billy Delp III (“Delp”) submit this Petition for Review as to the Judgment entered by the Court of Appeals in favor of G4 Trust, Grover Gibson, Trustee, (“Gibson”).⁴

STATEMENT OF THE CASE

This case involves a take-nothing judgment entered by the trial court in favor of Petitioners against Gibson (an intervenor-plaintiff) and JRP Equipment, Inc., with respect to a foreclosure sale conducted on September 2, 2008, at which CGI was the purchaser. (Appendix 2; CR 39-40). Following a non-jury trial, visiting Judge David Cleveland sitting in the 348th Judicial District Court of Tarrant County entered judgment in favor of Petitioners (CR 66-68) and made findings of fact and

⁴ All references to the Clerk’s Record will be stated as “CR”, followed by a page reference. All references to the Reporter’s Record will be stated as “RR”, preceded by a volume number and followed by page reference. Any reference to an exhibit is to its number in the Reporter’s Record.

conclusions of law (CR 258). Gibson appealed to the Second District Court of Appeals in Fort Worth and the case was assigned to Justices Walker, McCoy and Meier. Following oral argument, the Court of Appeals reversed the trial court's judgment and remanded the case for a new trial, with Justice McCoy writing the Opinion for the Court of Appeals. (Appendix 3). The Opinion (2011 Tex. App. LEXIS 7158) was decided without publication. Petitioners filed a Motion for Rehearing, which was overruled on October 27, 2011.

STATEMENT OF JURISDICTION

The Supreme Court of Texas has jurisdiction over this appeal under Sections 22.001(a)(3) and 22.001(a)(6) of the Texas Government Code. Petitioners request that this Petition for Review be granted because the Court of Appeals has committed errors of statutory law relating to real estate foreclosures sufficiently important to the jurisprudence of Texas that they must be corrected, as described in Tex. R. App. P. 56.1(a)(5).

ISSUE PRESENTED

Issue: CGI, through its predecessor in interest, National Bank of Texas, gave written notice of the foreclosure sale in compliance with both the deed of trust and Section 51.002 of the Texas Property Code, because the trustee's *mailing* address satisfied the statutory purpose of providing information for the debtor to contact the trustee regarding the foreclosure sale and there was no evidence that the absence of a "street address" in the notice of foreclosure sale contributed to a grossly inadequate sales price at the foreclosure.

STATEMENT OF FACTS

The Court of Appeals was generally correct in its review of the facts, except in the following particulars. In April 2004, JRP Equipment, Inc., borrowed \$166,000 from National Bank of Texas (D Ex. 1; RR Vol. 2, p. 130-131) and secured repayment of the loan with a deed of trust on the real property which is the subject of this suit (D Ex. 2; RR Vol. 2, p. 130) and a guaranty agreement from James R. Phillips (RR Vol. 2, p.130). JRP Equipment, Inc., defaulted in making the payments to National Bank of Texas (RR Vol. 2, p. 132), and National Bank of Texas sent written notice of default and its intent to accelerate the maturity of the promissory note on August 1, 2008 to JRP Equipment, Inc., and to J. R. Phillips, the guarantor. (D Ex. 3; RR Vol. 2, p. 132). When default was not cured, National Bank of Texas sent written notice of the acceleration⁵ of the maturity of the promissory note (D Ex. 4; RR Vol. 2, p. 64). Contemporaneously, George Bradford, the trustee under the deed of trust and an officer at National Bank of Texas, posted and gave notice of the foreclosure sale to JRP Equipment, Inc., and James R. Phillips (D Ex 5; RR Vol. 2, p. 64). Such notice of sale was filed and sent by Bradford on August 12, 2008.⁶ After CGI purchased the promissory note from National Bank of Texas, the trustee appointed by CGI conducted the foreclosure sale on September 2, 2008.

⁵ JRP Equipment, Inc., waived notice of acceleration as shown on the 2nd page of the Promissory Note (D Ex. 1).

⁶ Consolidated Gasoline, Inc., was not required to send a new notice of sale to provide JRP Equipment, Inc., another twenty-one days notice of the foreclosure sale. *Tarrant Sav. Assn. v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965) (citing *Gamble v. Martin*, 129 S.W. 386, 60 Tex. Civ. 517, 521-22 (Tex. Civ. App. - 1912); *Loomis Land & Cattle Co. v. Diversified Mortgage Investors*, 533 S.W.2d 420, 424 (Tex. Civ. App. - Tyler 1976, writ ref'd n.r.e.). CGI relied upon the notices sent by National Bank of Texas and posting by the original trustee, George Bradford.

After a bench trial on August 17, 2010 to the Honorable David Cleveland, the court found among other matters, that JRP Equipment, Inc., and James R. Phillips had no claims against Petitioners, and that because the foreclosure sale conducted on September 2, 2008 was valid, Gibson was not entitled to recover against Petitioners. (CR 258). The trial court found that the notice of sale dated August 12, 2008 was adequate. Only Gibson appealed the trial court's Judgment. (CR 272). Gibson, as trustee of G4 Trust (Respondent), was a junior lienholder to National Bank of Texas (D Ex 14). Gibson individually is also an officer of JRP Equipment, Inc. (D Ex 20-23). The original debtor and its guarantor are not parties in this proceeding.

Following oral argument, the Court of Appeals reversed the judgment of the trial court finding that notice of the foreclosure sale provided by National Bank of Texas was inadequate because it contained a *mailing address* rather than a *street address* for the foreclosure trustee (Appendix 3), and remanded for a new trial. CGI and Delp petition this court for review of the judgment entered by the Court of Appeals.

SUMMARY OF THE ARGUMENT

The trustee providing a *mailing address* rather than a *street address* satisfied the requirements of the Texas Property Code and the deed of trust. The foreclosure sale was properly and fairly conducted by Petitioners and should not have been set aside by the Court of Appeals.

ARGUMENT AND AUTHORITIES

Issue (restated): CGI, through its predecessor in interest, National Bank of Texas, gave written notice of the foreclosure sale in compliance with both the deed of trust and Section 51.002

of the Texas Property Code, because the trustee's *mailing* address satisfied the statutory purpose of providing information for the debtor to contact the trustee regarding the foreclosure sale and there was no evidence that the absence of a "street address" in the notice of foreclosure sale contributed to a grossly inadequate sales price at the foreclosure.

Argument and Authorities: The Court of Appeals determined that the 2005 amendments⁷ to Chapter 51 of the Texas Property Code, which specify the trustee to provide his or her "street address" in the notice of foreclosure sale, applied to the September 2008 foreclosure sale conducted by CGI. It is undisputed in this case that the notice of foreclosure sale sent by the original trustee, George Bradford, contained a "mailing address [P.O. Box]" rather than a "street address." to contact him. (Appendix 4) The purpose of the statute requiring notice is to provide a minimum level of protection for the debtor, and the statute provides this by calling for only constructive notice of the foreclosure. *Onwuteaka v. Cohen*, 846 S.W.2d 889, 892 (Tex. App.--Houston [1st Dist.] 1993, writ

⁷ Arguably, the 2005 amendments to the Texas Property Code do not apply to the foreclosure sale conducted under a deed of trust dated April 1, 2004, and under which a power of sale was sought to be enforced in September 2008. At the time the deed of trust was signed in April 2004, section 51.0075 of the Texas Property Code did not require a notice of foreclosure sale under §51.002(b) to contain the name and street address of a trustee or substitute trustee. In the enabling legislation for the applicable 2005 amendment, the Legislature provided that the amendment would not affect existing transactions:

“[Ch. 1231] SECTION 2. The changes in law made by this Act apply to a security instrument or other contract executed on or after the effective date of this Act and to a security instrument or other contract executed before the date of this Act that does not conflict with the changes in law made by this Act. A security instrument or other contract executed before the effective date of this Act that conflicts with the changes in law made by this Act is governed by the law in effect at the time the security instrument or other contract was executed, and the former law is continued in effect for that purpose. (Acts 2005, 79th Leg., Ch. 1231, §2; emphasis added.).

Even if the amendments do apply the trustee's notice is adequate to accomplish its purpose, as more particularly discussed herein.

denied). *Lambert v. First Nat'l Bank*, 993 S.W.2d 833, 835-36 (Tex. App.-Fort Worth 1999, pet. denied). While not a physical “street address,” the mailing address actually provided by the trustee nevertheless accomplishes the purpose of the 2005 amendments – to allow the debtor or others to contact the trustee regarding the foreclosure sale.⁸

Moreover, the debtor, JRP Equipment, Inc., was not unfairly prejudiced or harmed by the notice containing only a mailing address rather than a “street address” for the foreclosure trustee. The evidence admitted at trial established that the notice of foreclosure sale (D Ex. 5) was sent to the borrower and guarantor contemporaneously with a letter (RR Vol. 2, p. 134; D Ex. 4) from George Bradford, the Trustee designated in the deed of trust dated April 1, 2004 (D Ex. 2). Further, James R. Phillips of JRP Equipment, Inc., stated that he understood that George Bradford was president of National Bank of Texas and knew of his address (RR Vol. 2, p. 37) and he knew that George Bradford was the original trustee in the deed of trust (RR Vol. 2, p. 42; D Ex. 2). James R. Phillips also confirmed the address for mailing was correct (RR, Vol. 2, p 37) but since he was not in the office (RR, Vol. 2, p. 36) in August 2008, he did not receive the notices from National Bank of Texas in person. James R. Phillips did not dispute receiving notice nor did he attempt to contact the foreclosure trustee.

While it is generally stated that strict compliance⁹ with the notice provisions of Tex. Prop. Code §51.002 is required, “strict compliance” does not mean deviations are not possible. *See*

⁸ Curiously, the statute does not require actual notice. The debtor is not required to have received the notice for the foreclosure to be valid. *See Martinez v. Beasley*, 616 S.W.2d 689, 690 (Tex. App.--Corpus Christi 1981, no writ).

⁹ See e.g., *University Sav. Ass'n v. Springwoods Shopping Center*, 644 S.W.2d 705,706 (Tex. 1982) which is cited by the Court of Appeals (Appendix 3).

Sanders v. Sanders, 970 S.W.2d 721, 725-726 (Tex. App. - Austin 1999, rev. den.) (discussing substantial compliance with 1988 amendments to *Tex. Prop. Code §51.002* relating to the designated time of foreclosure sales); see also *Powell v. Stacy*, 117 S.W.3d 70, 75 (Tex. App. - Fort Worth 2003, no pet.) (discussing that incorrect statements of debt did not invalidate the notice or void the foreclosure sale); *Myrad Props. v. LaSalle Bank Nat'l Ass'n*, 252 S.W.3d 605, 615-619 (Tex. App.--Austin 2008), *rev'd on other grounds*, 300 S.W.3d 746 (Tex. 2009) (discrepancy in description of properties in notice of sale did not invalidate sale); *Diversified Dev. v. Texas First Mortg. REIT*, 592 S.W.2d 43, 44-45 (Tex. Civ. App.--Beaumont 1979, ref. n.r.e.) (inclusion in notice of description of real property that had been released from lien did not invalidate trustee's sale). Here, the original trustee's notice coupled with the Trustee's letter served upon the debtor represents compliance sufficient to satisfy the law's purpose of providing the debtor written notice of the sale and a means to contact the trustee. Further, the notice contained a telephone number for the foreclosure trustee, even though providing a telephone number is not required. The debtor was thus provided adequate notice, but the debtor simply chose not to cure its defaults. (RR, Vol. 2, p. 39-40).

A foreclosure sale cannot be set aside unless the alleged irregularity resulted or caused an inadequate price to be received at the foreclosure sale. See *Am. Sav. & Loan Assn. of Houston v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975). Here, there is no evidence that any irregularity relating to the trustee providing a mailing address (as opposed to a street address) contributed to a grossly inadequate price at the foreclosure sale. Absent any evidence that the absence of a trustee's *street address* on the notice of sale contributed to a grossly inadequate price at the foreclosure sale, the foreclosure sale was not invalid.

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Petition for Review was served upon the following by e-service and certified mail, return receipt requested, on the 12th day of December, 2011, addressed as:

Dustin Lee Payne
Attorney at Law
6777 Camp Bowie Blvd., Suite 215
Fort Worth, TX 76116

Via Certified Mail #7010 2780 0001 8575 2076

/s/ Avery McDaniel

Avery McDaniel

APPENDIX 1

Plaintiffs or Intervenor on December 18, 2008 as Instrument No. D208144969 should be cancelled and expunged from the Public Records of Tarrant County, Texas, and that Intervenor, Grover Gibson as Trustee of G4 Trust, take nothing against Consolidated Gasoline, Inc., and Billy R. Delp III.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that JRP EQUIPMENT, INC., JAMES R. PHILLIPS and GROVER GIBSON AS TRUSTEE OF G4 TRUST, take nothing as against CONSOLIDATED GASOLINE, INC., and BILLY R. DELP III.

CONSOLIDATED GASOLINE, INC., and BILLY R. DELP III are entitled to all writs and processes for the enforcement of this Judgment. All costs of Court are taxed against Intervenor, Grover Gibson as Trustee of G4 Trust, for all of which let execution issue. All relief not expressly granted herein is denied.

This is a final judgment disposing of all claims involving all parties and is appealable.

SIGNED on this 31st day of August, 2010.


JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

see attached

Dustin L. Payne
State Bar No. 24034618
Sarah R. Martin
State Bar No. 24064602
Dustin L. Payne & Associates
6777 Camp Bowie Blvd., Suite 215
Fort Worth, TX 76116
Telephone (817) 877-1969
Facsimile (817) 877-9969

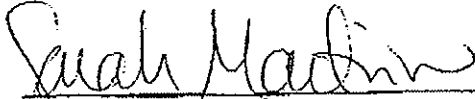
ATTORNEY FOR INTERVENOR
GROVER GIBSON AS TRUSTEE OF G4 TRUST

A. R. Vanicek

Annette R. Vanicek
State Bar No. 16731100
1112 East 1st Street, Suite A
Fort Worth, TX 76102
(817) 850-9300
(817) 850-9301 - Facsimile

ATTORNEY FOR DEFENDANTS

APPROVED AS TO FORM ONLY:



Dustin L. Payne
State Bar No. 24034618
Sarah R. Martin
State Bar No. 24064602
Dustin L. Payne & Associates
6777 Camp Bowic Blvd., Suite 215
Fort Worth, TX 76116
Telephone (817) 877-1969
Facsimile (817) 877-9969

ATTORNEY FOR INTERVENOR
GROVER GIBSON AS TRUSTEE OF G4 TRUST

Annette R. Vanicek
State Bar No. 16731100
1112 East 1st Street, Suite A
Fort Worth, TX 76102
(817) 850-9300
(817) 850-9301 - Facsimile

ATTORNEY FOR DEFENDANTS

APPENDIX 2

CAUSE NO. 348-234154-08

JRP EQUIPMENT, INC., and
JAMES R. PHILLIPS,

Plaintiffs,

vs.

CONSOLIDATED GASOLINE, INC., and
BILLY DELP, III,

Defendants

§ IN THE DISTRICT COURT

§

§

§

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§

§

§

§

§

§

§

TARRANT COUNTY, TEXAS

§ 348th JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

FINDINGS OF FACT

1. On or about April 20, 2004, JRP Equip, Inc., borrowed the sum of \$166,000.00 from the National Bank of Texas in Fort Worth and executed a promissory note ("the Note") in the original principal amount of \$166,000.00 and payable to the order of National Bank of National Bank of Texas.

2. The Note was secured with a deed of trust lien on property owned by JRP Equip., Inc., in Tarrant County, Texas and commonly known as 1815 Hicks Field Road E, Fort Worth, Texas 76179 ("the Property"), and more particularly described as:

Being a portion of the S.C.T. FORD SURVEY, ABSTRACT NO. 531, in Tarrant County, Texas, and being a part of that certain 56.1 acre tract conveyed to W. J. LaForge by deed recorded in Volume 9441, Page 1197, Deed Records, Tarrant County, Texas, which is a part of that certain tract designated as Tract No. 8, as described in partition deed to Robert C. Noble, recorded in Volume 3364, Page 2, Deed Records, Tarrant County, Texas, described by metes and bounds as follows:

Court's Minutes
Transaction # 98

ON 9/28/10 ALL SERVED VIA
HAND DELIVERY
MAIL *W. Vanick & Payne*
WHO IS TO
SERVE COPIES ON ALL OTHERS

Commencing at a 7/8 inch iron pin 1 foot East and 5 feet South of a railroad tie fence corner, a re-entrant corner of said LaForge tract, in the North line of said Tract No. 8;

Thence South 88 degrees 45 minutes 00 seconds West, with the South line of said Hicks Field Road East and a North line of said LaForge tract, 1287.7 feet to a 5/8 inch iron pin stamped Hancock and the Point of Beginning of this tract herein described;

Thence South 01 degrees 15 minutes 00 seconds East, 441.21 feet to a 5/8 inch capped iron pin stamped Hancock;

Thence South 88 degrees 45 minutes 00 seconds West, 573.90 feet to a 5/8 inch capped iron pin stamped Hancock, just East of a chainlink fence in West line of said LaForge Tract and the West line of said No. 8 tract;

Thence North 06 degrees 51 minutes 11 seconds West, generally with a chainlink fence, 426.58 feet to a 1 inch iron pin 0.3 feet East and 1 foot South of a steel fence corner, a Northwest corner of said LaForge tract, in the South line of Hicks Field Road East;

Thence with the South line of said road and the North line of said LaForge tract, North 83 degrees 02 minutes 00 seconds East, 45 minutes 00 seconds East, 449.09 feet to the POINT OF BEGINNING and containing 6.000 acres of land, more or less.

The Note was also secured by an individual guaranty agreement executed by James R. Phillips.

3. Prior to August 1, 2008, JRP Equip., Inc. defaulted in paying its loan, in failing to pay *ad valorem* taxes assessed against the Property for 2006 and 2007; and insuring the Property.
4. Taxing authorities of the Property filed a tax suit in the 236th Judicial District Court (in Cause No. L25619-08) on February 14, 2008 to collect delinquent *ad valorem* taxes assessed against the Property in 2006 and 2007 and seeking to foreclose the tax liens.
5. On or about August 1, 2008, National Bank of Texas notified JRP Equip., Inc. in writing that JRP Equip., Inc. was in default and that such default must be cured within ten days.
6. JRP Equip., Inc. failed to correct or cure the defaults within ten days.

7. On August 12, 2008, National Bank of Texas accelerated the maturity of the Note and the trustee designated in the deed of trust, George Bradford, filed a written notice of trustee's sale to be held on Tuesday, September 2, 2008, at the Tarrant County Courthouse. Written notice was provided to JRP Equip., Inc. and to James R. Phillips, but the written notice did not state Mr. Bradford's address.

8. On August 28, 2008, National Bank of Texas transferred the deed of trust lien and endorsed the Note to Consolidated Gasoline, Inc. in exchange for payment of \$115,925.86 and then gave written notice of the transfer to JRP Equip., Inc., and the guarantor, James R. Phillips.

9. Consolidated Gasoline, Inc. is not a customer of National Bank of Texas and has no business relationship with National Bank of Texas other than the purchase of the Note on August 28, 2008.

10. On August 29, 2008, Consolidated Gasoline, Inc. appointed Billy Delp, Jr. as substitute trustee to conduct the foreclosure sale on September 2, 2008.

11. On September 2, 2008, Billy Delp, Jr. conducted a foreclosure auction of the Property described in the deed of trust and sold the Property to Consolidated Gasoline, Inc. for the sum of \$116,105.00.

12. By letter dated October 1, 2008, Consolidated Gasoline, Inc., demanded possession of the Property, but JRP Equip., Inc. refused to relinquish possession.

13. On October 14, 2008, Consolidated Gasoline, Inc., filed a forcible detainer action against JRP Equip., Inc., and all occupants of the Property in the Justice Court for Precinct 4 of Tarrant County, Texas.

14. On October 23, 2008, the Justice of the Peace, Precinct 4 of Tarrant County, Texas entered judgment for possession in favor of Consolidated Gasoline, Inc. and thereafter, JRP Equip., Inc. appealed the judgment to the County Court at Law No. 1 of Tarrant County, Texas.

15. On December 3, 2008, County Court at Law No. 1 of Tarrant County, Texas (in Cause No. 08-67550-1) entered judgment in favor of Consolidated Gasoline, Inc. for possession of the Property and recovery of costs and attorneys fees.

16. In late December, 2008, JRP Equip., Inc., vacated the property and relinquished possession to Consolidated Gasoline, Inc. after this Court denied a temporary injunction preventing Consolidated Gasoline, Inc. from executing a writ of possession for the Property.

17. On or about September 8, 2008, JRP Equip., Inc., assigned to G4 Trust, whose trustee is Grover C. Gibson, any causes of action it may have or had relating to the foreclosure of the lien on the Property, and recorded the assignment in the public records of Tarrant County, Texas on December 18, 2008.

18. On or about December 18, 2008, G4 Trust filed a Notice of Lis Pendens dated September 26, 2008 in the Public Records indicating it claimed an interest in the Property.

19. Consolidated Gasoline, Inc. paid all *ad valorem* property taxes assessed against the Property on and after January 1, 2006 (\$27,505.57), by paying the Judgment sum (\$15,635.51) entered against th Property in Tax Suit Cause No. L25619-08 and by paying the 2008 property taxes (\$5,930.82) and the 2009 property taxes (\$5,939.24).

20. Consolidated Gasoline, Inc. and Billy Delp, III did not conspire with any other person or entity, including National Bank of Texas, to unfairly or wrongfully obtain the Note or purchase the Property.

21. At the time of trial in August 2010, JRP Equip., Inc., did not have any attorney of record to represent it, despite having adequate opportunity to obtain substitute counsel after withdrawal of John R. Lively and the firm of Lively and Associates on April 15, 2010.

22. Grover C. Gibson is an officer of JRP Equip., Inc. and is Trustee of G4 Trust. Gibson has an ongoing relationship to JRP Equip., Inc.

II.

CONCLUSIONS OF LAW

1. Billy Delp, III is not individually liable to the Plaintiffs or to the Intervenor, G4 Trust.
2. James R. Phillips cannot recover individually for the claims filed by Plaintiffs.
3. Judgment by default may be entered against JRP Equip., Inc. since it did not retain counsel to represent it at trial.
4. Plaintiffs have no standing to pursue claims against Defendants since Plaintiffs have assigned all claims to G4 Trust.
5. The foreclosure sale conducted on September 2, 2008 was legally and fairly made and Consolidated Gasoline, Inc. is not liable to JRP Equip., Inc. or to its assignee, G4 Trust for wrongful foreclosure.
6. Notice of the Trustee's Sale dated August 12, 2008 and the letter of same date sent to JRP Equip., Inc. complied with Texas law and the provisions of the deed of trust.
7. Notice of Trustee's Sale served with George Bradford's letter complied with the requirement of Tex.Prop. Code §51.002.
8. Consolidated Gasoline, Inc. was not required to provide additional 21 day written notice of the foreclosure sale to JRP Equip., Inc. after it purchased the Note on August 28, 2008.


9. The price received at the foreclosure sale on September 2, 2008 was not grossly inadequate.

10. Consolidated Gasoline, Inc. is the owner of the fee simple title of the Property.

11. The *Lis Pendens* filed by G4 Trust is cancelled and expunged from deed records.

12. Plaintiffs and Intervenor are not entitled to recover attorneys fees against Defendants.

SIGNED this 17 day of September, 2010.


JUDGE PRESIDING

APPENDIX 3



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-10-00404-CV

G4 Trust, Grover Gibson, Trustee § From the 348th District Court

 § of Tarrant County (348-234154-08)
v.

 § August 31, 2011
Consolidated Gasoline, Inc. and Billy
Delp, III § Opinion by Justice McCoy

JUDGMENT

This court has considered the record on appeal in this case and holds that there was error in the trial court's judgment. It is ordered that the judgment of the trial court is reversed and the case is remanded for further proceedings consistent with this opinion.

It is further ordered that Appellees, Consolidated Gasoline, Inc. and Billy Delp III, shall pay all costs of this appeal, for which let execution issue.

SECOND DISTRICT COURT OF APPEALS

By 
Justice Bob McCoy



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-10-00404-CV

G4 TRUST, GROVER GIBSON,
TRUSTEE

APPELLANT

V.

CONSOLIDATED GASOLINE, INC.
AND BILLY DELP III

APPELLEES

FROM THE 348TH DISTRICT COURT OF TARRANT COUNTY

MEMORANDUM OPINION¹

I. Introduction

In two issues, Appellant G4 Trust (G4) appeals the trial court's ruling that an extrajudicial foreclosure sale was valid and its judgment that G4 take nothing against the purchasers at the sale, Appellees Consolidated Gasoline, Inc. and Billy Delp III (collectively, CGI). We reverse and remand.

¹See Tex. R. App. P. 47.4.

II. Factual and Procedural Background

In 2004, JRP Equipment, Inc. and James R. Phillips (collectively, JRP) borrowed money from National Bank of Texas to purchase some property in Tarrant County, executing a promissory note (the Note) and securing the loan with a deed of trust (the Deed) that named the bank as beneficiary and the bank's president, George Bradford, as trustee. JRP defaulted on the loan, and on August 1, 2008, the bank gave JRP written notice of default and then accelerated the Note's maturity when JRP failed to cure the default.

On August 12, 2008, Bradford filed a written notice of trustee's sale to be held on September 2, 2008, and provided written notice to JRP. The written notice did not state Bradford's address, street or otherwise. Bradford's cover letter contained the bank's post office box number in its letterhead.

On August 28, 2008, the bank transferred the Deed, endorsed the Note to CGI, and gave written notice of the transfer to JRP. CGI appointed Billy Delp Jr. as substitute trustee to conduct the September 2, 2008 foreclosure sale, and Delp Jr. did so, selling the property to CGI. Not long after the sale, JRP assigned to G4 any causes of action it might have that related to the foreclosure, and G4 filed a notice of lis pendens, claiming an interest in the property. Notwithstanding the assignment, however, JRP filed suit in December 2008, seeking to set aside the foreclosure based on defective notice. G4 intervened in the suit in 2010.

In its August 31, 2010 judgment, the trial court found that JRP had assigned its claims to G4 and ordered that JRP take nothing against CGI and

Delp III. It also found that the September 2, 2008 foreclosure sale should not be set aside, removed G4's lis pendens, and ordered that G4 also take nothing against CGI and Delp III. The trial court made the following conclusions of law pertinent to this appeal:

6. Notice of the Trustee's Sale dated August 12, 2008 and the letter of same date sent to JRP[] complied with Texas law and the provisions of the deed of trust.

7. Notice of Trustee's Sale served with George Bradford's letter complied with the requirement of Tex. Prop. Code [Ann.] § 51.002.

8. [CGI] was not required to provide additional 21 day written notice of the foreclosure sale to [JRP] after it purchased the Note on August 28, 2008.

G4 now appeals.

III. 2005 Amendment and Strict Compliance

In two issues, G4 challenges the trial court's conclusion that Bradford's August 12, 2008 notice to JRP was valid because (1) the 2005 amendment to property code section 51.0075(e) applied, rendering notice defective; and (2) the bank and CGI did not strictly comply with the property code and Deed notice requirements.

A. Standard of Review

We review statutory construction de novo, and in construing statutes, we ascertain and give effect to the legislature's intent as expressed by the statute's language. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008); see also *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) (op.

on reh'g) ("Where text is clear, text is determinative of [the legislature's] intent."); *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999) (noting that courts should not adopt a construction that renders statutory provisions meaningless).

B. Property Code Sections 51.002, 51.0075, and the 2005 Amendment

Property code section 51.002 requires, for a sale of real property under contract lien, that notice be given at least twenty-one days before the date of the sale by "serving written notice of the sale by certified mail on each debtor who, according to the records of the mortgage servicer of the debt, is obligated to pay the debt." Tex. Prop. Code Ann. § 51.002(b)(3) (West Supp. 2010). Section 51.0075(e), added in 2005, requires disclosure of the "street address" of a trustee or substitute trustee in a section 51.002(b) foreclosure notice. See Act of May 25, 2005, 79th Leg., R.S., ch. 1231, § 1, 2005 Tex. Gen. Laws 3980 (amended 2009) (current version at Tex. Prop. Code Ann. § 51.0075 (West Supp. 2010)).

G4 argues that the 2005 amendment's enabling language and the language in the Deed required the trial court to retroactively apply the amendment to the Deed. The 2005 amendment's enabling language states that the amendment applies

to a security instrument or other contract executed on or after the effective date of this Act and to a security instrument or other contract executed *before* the date of this Act *that does not conflict* with the changes in law made by this Act. A security instrument or other contract executed before the effective date of this Act that

conflicts with the changes in law made by this Act is governed by the law in effect at the time the security instrument or other contract was executed, and the former law is continued in effect for that purpose.

Id. § 2, 2005 Tex. Gen. Laws 3980–81 (emphasis added).

C. Retroactivity

The legislature can retroactively amend a statute so long as it does not “take away or impair vested rights acquired under existing law” in contravention of the Texas constitution. *McCain v. Yost*, 155 Tex. 174, 284 S.W.2d 898, 900 (1955). “Whether a right may be regarded as vested depends on considerations of ‘fair notice,’ ‘reasonable reliance,’ and ‘settled expectations.’” *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 151 (Tex. 2010) (Medina, J., concurring) (quoting *Owens Corning v. Carter*, 997 S.W.2d 560, 572–73 (Tex. 1999)); see also *Mellinger v. City of Houston*, 68 Tex. 37, 45, 3 S.W. 249, 253 (1887) (stating that “until the state of facts which the law declares shall give a right comes into existence[,] there cannot be in law a right,” and that because of this, “it has been constantly held that, until the right becomes fixed or vested, . . . the [legislature may] declare that the given state of facts shall not fix it, and such laws have been constantly held not to be retroactive in the sense in which that term is used”); *Rey v. Acosta*, 860 S.W.2d 654, 656–57 (Tex. App.—El Paso 1993, no writ) (holding that 1993 provisions of section 51.002(d)—requiring written notice of intent and a twenty-day period for debtors to cure default before a note on residential real estate could be accelerated—applied retroactively to a

contract entered before the statute's effective date because the provisions were procedural and remedial and did not affect substantive rights).²

D. Analysis

The parties incorporated into their agreement the laws in force in 2004 when they executed the Deed. See *Wessely Energy Corp. v. Jennings*, 736 S.W.2d 624, 626 (Tex. 1987) (recognizing that laws existing at the time a contract is made become a part of the contract and govern the transaction). However, the Deed expressly acknowledges the potential for change in the law, stating, in relevant part:

15. REMEDIES ON DEFAULT. In some instances, federal and state law will require Lender to provide Grantor with notice of the right to cure or other notices and may establish time schedules for foreclosure actions. Subject to these limitations, if any, Lender may accelerate the Secured Debt and foreclose this Security Instrument in a manner provided by law if Grantor is in default.

.....

In the event of a default, it shall be the duty of the Trustee . . . to invoke power of sale as required by Section 51.002 of the Texas Property Code, *as then amended* Trustee shall give notice of sale including the time, terms and place of sale and a description of the Property to be sold *as required by the applicable law in effect at the time of the proposed sale.*³ [Emphasis added.]

²In *Rey*, the buyers specifically waived notice, and the statutory amendment occurred before the note-holder's action to accelerate the note. 860 S.W.2d at 658. The court held that the statute was remedial and did not alter any substantive rights when applied retroactively because the note-holder still had the right to accelerate the note. *Id.* The statutory amendment "simply required that written notice followed by a 20-day grace period precede acceleration." *Id.*

³The Deed also provides for removal of the trustee and appointment of a successor trustee through written designation. The 2005 amendment introduced

See *Deacon v. City of Euless*, 405 S.W.2d 59, 61 (Tex. 1966) (noting that laws may operate retroactively when it is apparent that the makers and adopters intended retroactive application of an amendment, provided retroactive application does not impair vested rights); *Fix v. Flagstar Bank, FSB*, 242 S.W.3d 147, 155 (Tex. App.—Fort Worth 2007, pet. denied) (same).

The Deed expressly incorporates section 51.002's notice requirements. Tex. Prop. Code Ann. § 51.002. Section 51.0075(e), pertaining to the authority of a trustee or substitute trustee, requires that the name and street address for the trustee or substitute trustee "shall be disclosed on the notice required by Section 51.002(b)." *Id.* § 51.0075(e). This addition does not conflict with the Deed's express notice requirements; rather, it merely supplements the list of items required for foreclosure notice that the Deed requires by incorporating section 51.002 and does not impair the Deed holder's right to foreclose. See *Mellinger*, 68 Tex. at 45, 3 S.W. at 253; see also *Fix*, 242 S.W.3d at 147; *Deacon*, 405 S.W.2d at 61. Thus, because it does not conflict with the Deed or impair vested rights—that is, the bank's right to foreclose did not vest until JRP defaulted in 2008—we hold that the 2005 amendment applies to notice sent under the Deed. *Deacon*, 405 S.W.2d at 61; see also *Praeger v. Wilson*, 721


a change in subsection (c) of section 51.0075 that mirrored this provision in the Deed. See Act of May 25, 2005, 79th Leg., R.S., ch. 1231, § 1, 2005 Tex. Gen. Laws 3980 (amended 2009) (current version at Tex. Prop. Code Ann. § 51.0075(c) (West 2011)) (allowing a mortgagee to appoint a substitute trustee to succeed to all title, powers, and duties of the original trustee by written instrument).

S.W.2d 597, 601 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e) (refusing to read a qualifying restriction into a contract clause's plain language when doing so would alter the ordinary meaning of the contract clause). We sustain G4's first issue. And because strict compliance with the notice requirements in a deed of trust is necessary for a trustee to invoke the power of sale in a foreclosure, and as set out above, the Notice did not strictly comply, we sustain G4's second issue as well. See *Univ. Sav. Ass'n v. Springwoods Shopping Ctr.*, 644 S.W.2d 705, 706 (Tex. 1982) ("Texas courts have consistently held that the terms set out in a deed of trust must be strictly followed."); *Myrad Props., Inc., v. LaSalle Bank Nat'l Ass'n*, 252 S.W.3d 605, 615 (Tex. App—Austin 2008) ("Because a trustee's power to sell the property is derived from the deed of trust and statute, strict compliance with these requirements is considered a prerequisite to the trustee's right to make the sale."), *rev'd on other grounds*, 300 S.W.3d 746 (Tex. 2009); see also *Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 768 (Tex. 1983) ("Compliance with the notice condition contained in the deed of trust and as prescribed by law is a prerequisite to the right of the trustee to make the sale."); *cf. Powell v. Stacy*, 117 S.W.3d 70, 75 (Tex. App.—Fort Worth 2003, no pet.) (stating that notice was valid when defect did not affect notice requirements); *Sanders v. Shelton*, 970 S.W.2d 721, 725–26 (Tex. App.—Austin 1998, pet. denied) (reasoning that the words used in the notice need not mimic the statutory

language to comply with the statute as long as the information required by the statute was actually conveyed).⁴

IV. Conclusion

Having sustained both of G4's issues, we reverse the trial court's judgment and remand this case to the trial court for further proceedings consistent with this opinion.



BOB MCCOY
JUSTICE

PANEL: WALKER, MCCOY, and MEIER, JJ.

DELIVERED: August 31, 2011

⁴CGI contends that the August 12 notice complied with Texas law, whether section 51.0075(e) applied or not, because JRP's president knew Bradford's address and because Bradford's cover letter "contains the required information." However, as discussed above, section 51.0075(e) requires disclosure of a "street address" for the trustee or substitute trustee in the notice. See Tex. Prop. Code Ann. § 51.0075(e). Neither the notice nor the cover letter contained Bradford's street address. While we are not blind to the equities of this dispute—as the note-holder, CGI was entitled to be made whole—we are constrained to hold that the sale is void because strict compliance is required to invoke power of sale under a deed of trust.

APPENDIX 4

NOTICE OF TRUSTEE'S SALE

Date: August 12, 2008

FILED
TARRANT COUNTY

2008 AUG 12 PM 1:24

Deed of Trust: 1st Lien

Date: April 20, 2004, together with all renewals, extensions and/or modifications thereof as filed of record

Grantor: JRP Equipment, Inc., a/k/a IRP Equip., Inc. BY _____

Trustee: George M. Bradford

Beneficiary: National Bank of Texas at Fort Worth

Property: Located in Tarrant County

Recorded in: Tarrant County Clerk's Office

The Promissory Note was accelerated pursuant to Notice dated August 1, 2008

Property: The Property is legally described as follows:

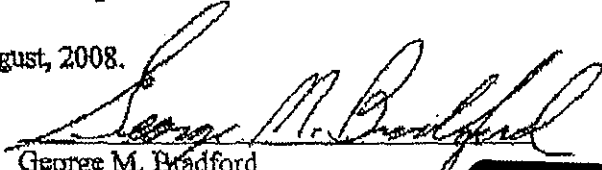
Real property and improvements located at 1815 Hicks Field Road, Fort Worth, Texas 76179, more fully described on the Exhibit A to the Deed of Trust, a copy of which such Exhibit A is attached hereto.

Date and Time of Sale of Property: Tuesday, September 2, 2008, at approximately 10:00 a.m., or within three (3) hours thereof.

Place of Sale of Property: The Courthouse Steps on the East Side of the Building, 100 W. Weatherford Street, Fort Worth, Tarrant County, Texas 76196, in the area designated by the Commissioner's Court for the conduct of such sales.

Because of default in performance of the obligations of the Deed of Trust, George M. Bradford, Trustee, will sell the Property by public auction to the highest bidder for cash at the place and date specified to satisfy the debts secured by the aforementioned Deed of Trust. Beneficiary under the Deed of Trust has specifically reserved the right to "bid in" all or parts of its indebtedness.

WITNESS MY HAND this 12th day of August, 2008.

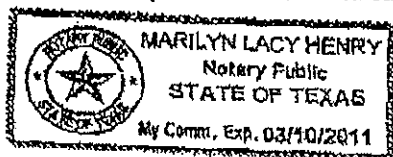

 George M. Bradford
 Trustee

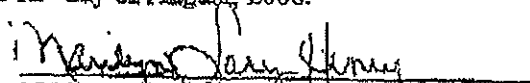
STATE OF TEXAS §
 COUNTY OF TARRANT §



Before me, the undersigned authority, on this day personally appeared George M. Bradford, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 12th day of August, 2008.




 NOTARY PUBLIC, STATE OF TEXAS

National Bank of Texas
P.O. Box 161969
Fort Worth, Texas 76161-1969
Phone 817-625-5511

address

file

August 12, 2008

James Richard Phillips, Pres.
JRP Equip., Inc. *aka*
JRP Equipment, Inc.
PO Box 79410
Fort Worth, Texas 76179

CERTIFIED MAIL NO. 7006 0810 0003 5956 3449
RETURN RECEIPT REQUESTED
AND FIRST CLASS MAIL

James Richard Phillips
PO Box 79410
Fort Worth, Texas 76179

CERTIFIED MAIL NO. 7006 0810 0003 5956 3456
RETURN RECEIPT REQUESTED
AND FIRST CLASS MAIL

RE: Floating of Note and Deed of Trust for Foreclosure

Dear Obligors:

Inasmuch as you have failed or refused to pay the amounts owed on the Note on the Property, which such Note has been accelerated, and is due and payable in full, this letter is formal notice to you that National Bank of Texas will proceed with foreclosure of the property covered by the Deed of Trust securing said Note.

Enclosed is a copy of the Notice of Substitute Trustee's Sale which has been posted for the public sale of the said Property described in the Deed of Trust securing the indebtedness. Such sale, as authorized by the said Deed of Trust, will take place on Tuesday, September 2, 2008, at approximately 10:00 a.m., or within three (3) hours thereof, at the Steps on the East Side of the old Tarrant County Courthouse Building, 100 W. Weatherford Street, Fort Worth, Tarrant County, Texas 76196, in the area designated by the Commissioner's Court for the conduct of such sales, with the said Property being sold to the highest bidder for cash. National Bank of Texas has reserved the right to bid in all or portions of the indebtedness owing to it.

Respectfully,

George M. Bradford
President

TJH/mlh
↓
Enclosure: Copy of Notice of Trustee's Sale
cc: Thomas J. Henry, Esq.

