



170.0008.950

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

LEGAL DIVISION (MIC:82)
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May 19, 1997

REDACTED TEXT

Re: REDACTED TEXT

Dear Mr. REDACTED TEXT:

The Board's Legal Section has been asked to respond to your request that the Board issue a partial lien release for real property presently owned by REDACTED TEXT and REDACTED TEXT and located at REDACTED TEXT. A sale of this property is pending. The REDACTED TEXT, serving as escrow officer, has advised interested parties that it intends to disburse \$151,745.02 from the proceeds of the sale of this property to REDACTED TEXT based on a purported deed of trust recorded in REDACTED TEXT County on October 5, 1992. The Board's lien attaching to this property was recorded in REDACTED TEXT County on April 7, 1994. If the deed of trust in favor of REDACTED TEXT was valid, the distribution of the funds to her as prior lienholder would be proper. We have concluded, however, that the deed of trust is invalid and it will be our recommendation to the Board's Special Procedures Section that the requested partial lien release not be issued.

On or about June 1, 1990, REDACTED TEXT and REDACTED TEXT took title to the real property located at REDACTED TEXT in their names. Title to this property was not recorded in the name of the REDACTED TEXT Trust.

On or about May 13, 1992, REDACTED TEXT received a personal injury settlement in the gross sum of \$500,000.00 and a net amount to her of \$300,000.00. Pursuant to California law, this settlement constituted her separate property.

On some date in May of 1992, REDACTED TEXT executed a promissory note to REDACTED TEXT in which Mr. REDACTED TEXT promised to pay the sum of \$100,000.00 to Mrs. REDACTED TEXT. The note stated that REDACTED TEXT advanced \$100,000.00 to her husband from the proceeds of the personal injury settlement and the note bound REDACTED TEXT to repay this sum "solely from the separate property funds of the undersigned or his one-half (1/2) share of any community property funds." The note stated that:

"This note is secured by:

"(a) a trust deed on the real property located at REDACTED TEXT . . ."

The REDACTED TEXT Trust was not a party to the promissory note.

On October 5, 1992, a deed of trust was recorded in REDACTED TEXT County in which “REDACTED TEXT and REDACTED TEXT, Trustees of the REDACTED TEXT Trust dated December 1, 1986” was identified as Trustor and “REDACTED TEXT, as her sole and separate property” was identified as Beneficiary. The purported deed of trust sought to secure a promissory note “executed by Trustor in favor of Beneficiary” in the principal sum of \$100,000.00.

We believe that the deed of trust was intended to hold a community property asset, the residence at REDACTED TEXT, in trust in such a manner that if REDACTED TEXT did not repay the \$100,000.00 borrowed (with interest), with his separate property funds or from his one-half share of any community property funds, REDACTED TEXT could somehow obtain title to the property as her sole and separate property through “foreclosure” of the deed of trust.

If this was the intent of the recorded deed of trust, we believe the deed of trust cannot be valid because even if the property was somehow deemed to have been transferred to the REDACTED TEXT Trust, there is no record notice of said transfer and subsequent lienholders (such as the Board) do not, and could not, have actual or constructive notice of said transfer to the Trust. In your letter to the Board dated May 8, 1997, you state:

“Even if you claim that the trust deed was defective, you, nevertheless, had notice of it as reflected on any preliminary title report or property profile.”

If you have information that the Board had knowledge prior to the recordation of the Board’s Notice of State Tax Lien in REDACTED TEXT County that the property located at REDACTED TEXT was owned by a party other than as indicated on the grant deed recorded in the REDACTED TEXT County Recorder’s Office, please advise us. The purpose of the recording statutes is to prevent property owners from claiming that their property is owned by a party other than as indicated in the records of the Recorder’s Office and, thereby, attempt to defeat the rights of those who rely on those records.

There is no reason that the REDACTED TEXT Trust should be listed as Trustor on the deed of trust. The REDACTED TEXT Trust did not borrow funds from Mrs. REDACTED TEXT, did not sign a promissory note agreeing to repay borrowed funds and is not liable to Mrs. REDACTED TEXT for the funds borrowed by Mr. REDACTED TEXT.

We believe that the deed of trust is also invalid because it seeks to grant a lien on real property to a person who is listed as a record owner of that property. We realize that your clients contend that the property has been transferred to the REDACTED TEXT Trust but we believe that the purported deed of trust was designed to grant to REDACTED TEXT the one-half community property interest of REDACTED TEXT in the property if the loan was not repaid. As stated in *Lee v. Joseph* (1968) 267 Cal.App.2d 30, “it is axiomatic that the owner of a piece of property cannot have a lien upon it.” Under California law, one spouse may mortgage his or her separate property to the other spouse but cannot create a lien on community property by mortgage. *Freiermuth v. Steigleman* (1900) 130 Cal. 392.

Mr. REDACTED TEXT

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We also do not believe that a transmutation of the community property residence to Mrs. REDACTED TEXT's separate property could be effected by operation of law at a trustee's sale.

Very truly yours,

Thomas J. Cooke
Tax Counsel

TJC/cmm

cc: Mr. Rick A. Slater (MIC:55)
Ms. Kathleen M. Silva (MIC:55)