

### Transfer Of Property To Avoid A Creditor's Lien

By Stephen B. Fainsbert, Esq.

Assume you own a personal residence with your significant other, each of you owning a one-half interest. You learn that a third party, who obtained a judgment against you, is about to record with the county recorder a judgment lien which will place a lien on your interest in the property. You quickly convey the property to your co-owner of the property by a deed which records with the county recorder before the judgment lien is recorded by your creditor. What happens now? This is essentially what occurred in the case of **Fidelity National Title Insurance Company v. Gordon Schroeder, et al.** (the "Fidelity Case") which was decided by one of the California Appellate Courts on November 24, 2009.

What occurred in the Fidelity Case is in a sense bizarre because of the errors apparently made by the title company. The specific facts of this situation are that Gordon Schroeder and Toni Richardson ("Gordon and Toni"), who were not married, purchased a residence in Fresno, California (the "Fresno Property") in which they cohabited. It is not clear exactly when Gordon and Toni purchased the Fresno Property but in its decision the Appellate Court noted that in 1996 a judgment was recorded in Fresno County for \$73,298 by Elizabeth Schroeder ("Elizabeth"), Gordon's former wife, for unpaid court-ordered spousal support. Even though the Fresno Property was purchased after this judgment lien was recorded by Elizabeth, it did not show up on the title report when Gordon and Toni purchased the Fresno Property. This judgment lien should have been discovered by the insuring title company when Gordon and Toni first purchased the Fresno Property.

In 2002 Gordon and Toni refinanced their loan on the Fresno Property. Fidelity National Title Insurance Company ("Fidelity") provided title insurance on behalf of the new lender, Long Beach Mortgage. It is not clear from the Appellate Court's decision if Fidelity was the insuring title company when Gordon and Toni first purchased the Fresno Property. If Fidelity was not the insuring title company when Gordon and Toni originally purchased the Fresno Property, it is possible that Fidelity relied on the title search by the prior insuring title company when the Fresno Property was originally purchased by Gordon and Toni and Fidelity only updated the title search from the time after the purchase.

Because Fidelity failed to discover the existence of Elizabeth's prior judgment lien against Gordon's interest in the Fresno Property when the Fresno Property was refinanced by Gordon and Toni in 2002, Fidelity was required by the lender to pay the \$73,298 to Elizabeth. In the process of settling this matter with Elizabeth, Fidelity was assigned all the rights under Elizabeth's judgment lien. Subsequently, to compound the original error, Fidelity inadvertently released Elizabeth's original recorded judgment lien, leaving Fidelity as an unsecured judgment creditor against Gordon. In other words, the judgment that Elizabeth had against Gordon was completely eliminated as a lien against the Fresno Property.

On December 14, 2006, Fidelity filed a lawsuit against Gordon and Toni on various legal theories. Once again it is noted that Fidelity had no lien against Gordon's one-half interest in the Fresno Property at this time. On September 3, 2007, Gordon executed a deed in which Gordon conveyed to Toni all of his right, title and interest in the Fresno Property, which deed was recorded with the county recorder on September 4, 2007. Meanwhile, Fidelity obtained a judgment based on Elizabeth's unsecured claim against Gordon and Toni. The judgment lien was not recorded until October 10, 2007, over a month after Gordon had conveyed all of his interest in the Fresno Property to Toni.

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While there are several complicated legal theories that one may use to recover money in a situation like this, the primary legal principle to be followed is that when you are conveying your property to a third party where you have knowledge that some other person has a claim against you or a potential claim for a monetary obligation you owe or may owe in the future, a conveyance of your property may be considered a conveyance in fraud of creditors. A fraudulent conveyance in accordance with the Uniform Fraud and Transfer Act involves “a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.” The transfer of property means “property of the debtor”.

What is important to know is that anytime that you have knowledge of a creditor or potential creditor, a transfer of your property may permit a creditor, when finally obtaining a judgment against you, to set aside the transfer of the property. However, if you sell property to what is called a bona fide purchaser for value, i.e., someone that is without knowledge that you have a creditor problem and that person pays you fair value for the property, the buyer of your property, will not have his property acquisition set aside since the judgment lien will not attach to the property.

In this particular situation (the Fidelity Case), it turned out that there was in effect a race to the county recorder's office between Gordon to record the deed on his one-half interest in the Fresno Property to Toni before Fidelity recorded its judgment lien. However, Gordon recorded the deed to Toni with knowledge that since the judgment was rendered against him, a judgment lien would be filed creating a lien on his interest in the Fresno Property. Under the circumstances this probably constituted a conveyance and fraud of creditors. The Appellate Court in this situation, however, used the legal concept of a *resulting trust* which has been defined in one case as follows: “A *resulting trust* arises by operation of law from a transfer of Property under circumstances showing that the transferee was not intended to take the beneficial interest.” The courts in such a situation may impose a *resulting trust* on the interest in the Fresno Property that Gordon conveyed by a deed to Toni. The Appellate Court actually sent the case back to the Trial Court to make the determination whether Fidelity proved, or could prove, that Toni held Gordon's one-half interest in this Fresno Property in trust for Gordon, i.e., that the real intent was that she was holding it as “a caretaker” for Gordon to be ultimately transferred back to Gordon when his financial problems were resolved.

If the Trial Court determines that there should be a *resulting trust imposed*, the one-half interest in the Fresno Property transferred by Gordon to Toni is an asset from which to collect the judgment. Aside from the Fresno Property upon which this lien is imposed, Fidelity has the ability to attach Gordon's wages, bank accounts, or any other assets that Gordon may have subject to certain debtor protections by state law or Federal Bankruptcy Law. It is a potential problem when a person conveys his or her property to a person other than a bona fide purchaser at a reasonable price when that person has an actual or potential creditor. The reason for this is that you can be sued for conveying your property in fraud of creditors which can result in not only having the sale of the property set aside but also result in an additional judgment for fraud which can result in punitive damages being awarded against that person. When one finds themselves in a situation like this, there are attorneys who can help you convey your property in a manner that keeps you out of such trouble.

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