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Dear Mr. Gonski:

It is my pleasure to enclose a reprint of your article, "The Importance of Recording Final Real Estate Judgments," which was published in the June real estate supplement to the Law Journal.

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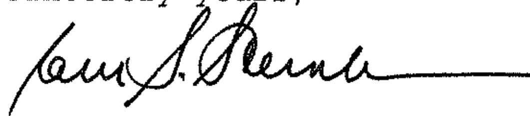
Please consider writing again for the Law Journal. You should contact associate editor Marian Raab to discuss a proposed topic.

Sincerely yours,



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Real Estate

The Importance of Recording Final Real Estate Judgments

By Dennis M. Gonski

Final judgments that influence the ownership of real estate are recordable as a muniment of title. Under New Jersey law, judgments relating to, or in any way affecting title to real property:

"May be recorded as deeds of conveyance in the office of the county recording officer of the county wherein the real estate is situate, and shall be indexed in the names of the parties to the cause as set forth in the ... judgment ... which when recorded shall from that time be notice to all subsequent judgment creditors, purchasers and mortgagees of the existence and contents thereof." N.J.S.A. 46:16-1.1

All too frequently however, such judgments are not recorded in land records. Attorneys who literally spend hundreds of hours in winning a judgment that affects title to real property then fail to spend the relatively few minutes necessary to send that judgment to the county recording office.

The Appellate Division recently considered an attorney's failure to record such a judgment, and the consequences of such inaction, in *Gibau v. Klein*, 329 N.J. Super. 227 (App. Div. 2000). In *Gibau*, the plaintiff filed a malpractice action against her former attorney, alleging a failure to record a final judgment of divorce.

The author is a member of Farifield's Dollinger, Gonski & Grossman where he represents the title insurance industry.

The *Gibau* Situation

Joan Gibau's malpractice action alleged that her former attorney, Eleanor H. Klein, failed to record a final judgment in which Gibau was awarded exclusive fee title to her former marital home in Cinnaminson. The house was originally titled in the name of both Joan and her husband, Frank, as a tenancy-by-the-entireties under N.J.S.A. 46:3-17.2, et seq.

The 1978 divorce judgment provided, among other things, that the Frank Gibau "shall forthwith transfer and convey to plaintiff all of his right, title and interest in and to the former marital residence." Frank Gibau, however, did not comply with the judgment, and Klein did not record the final judgment in the Burlington County deed books.

In 1995, when Joan Gibau attempted to sell the house to a third party, a judgment search revealed that money judgments had been entered against her former husband, after the entry of the final divorce judgment of divorce. The title company engaged by the purchaser insisted that the judgments against Frank Gibau were liens against the real property.

The title company then refused to insure the purchaser's title unless the money judgments against Frank Gibau were satisfied. In light of that development, Joan Gibau agreed to pay the judgments out of the proceeds of the sale of the house.

Joan Gibau then instituted a lawsuit against Klein, alleging that the attorney negligently failed to record the judgment of divorce in the Burlington County deed books under N.J.S.A. 46:16-1.1, thus allowing the subsequent money judgments against the ex-husband to attach to the real property as statutory liens.

The defense argued that the recording of the divorce judgment was, in theory, unnecessary because the transfer of title pursuant to the judgment occurred automatically by operation of law, and the docketing of the judgment (and not the actual recording) was "notice to the world" of the transfer of title. The trial court agreed, and the case against Klein was dismissed.

Joan Gibau appealed and the Appellate Division again ruled in favor of Klein — but this time for a different and highly controversial reason. The appeals court's opinion, authored by Judge John Keefe, affirmed the lower court's dismissal but did so based on what the Appellate Division deemed to be "the special nature of a judgment ordering the equitable distribution of property."

Keefe wrote that the court's holding, "*which is limited to judgments entered for equitable distribution of property* in disso-

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lution cases, does no violence to the Recording Act." (Emphasis added.)

What the Appellate Division seemingly did was to create two separate classifications of unrecorded judgments: (1) judgments entered for "equitable distribution" of marital property; and (2) all "other" unrecorded judgments that affect title to real property. In the all "other" judgments category, Keefe made it clear that the failure to record under N.J.S.A. 46:16-1.1 may well be legal malpractice:

> Undoubtedly, the purpose of the statute [N.J.S.A. 46:16-1.1] is to provide a mechanism for recording instruments affecting title to property that do not meet the formality of acknowledgment or proof as is required for the documents identified in N.J.S.A. 46:16-1a to f. We agree with plaintiff that the final divorce judgment could have been recorded pursuant to N.J.S.A. 46:16-1.1, and the recording would have provided notice to judgment creditors. Klein argues that the use of the permissive phrase "may be recorded" in N.J.S.A. 46:16-1.1 makes the choice of recording optional. The argument is, however, clearly without merit ... *Stated simply, if the judgment affecting title to real property is not recorded, it may not serve as notice to subsequent purchasers for value or judgment creditors.*
>
> "Generally speaking, and absent any unusual equity, a court should decide a question of title such as this in the way that will best support and maintain the integrity of the recording system." [Citations omitted.]
>
> Therefore, *we would end the discussion at this point, as the parties' briefs have done, and reverse the judgment in Klein's favor, if the 1978 judgment was other than a judgment affecting the equitable distribution of marital property.* (Emphasis added, footnote omitted.)

However, it is the judicial creation of an exception to the application of the rules regarding the recording of judgments that gives pause to those familiar with the physical mechanics of a customary search of real estate titles. Equally so, the court's willingness to favor "equitable distribution" judgments, based on equitable considerations, is seemingly in sharp discord with the state Supreme Court's past assurances that questions of title are to be generally decided "in a way that will best support and maintain the integrity of the recording system." *Palamarg Realty Co. v. Rehac*, 80 N.J. 446, 453 (1979).

Practitioners who spend hundreds of hours winning a judgment that influences title to real property shouldn't fail to spend the relatively few minutes necessary to send that judgment to the county recording office.

The Statutory Framework of the Recording System

Under N.J.S.A. 46:20-1 et seq., various recording officers are obliged to maintain a grantor/grantee system of recording conveyancing instruments. It has only been within the last decade that the alphabetical indices maintained by each county have been judicially determined to be an integral party of the recording system. *Howard Savings Bank v. Brunson*, 244 N.J. Super. 571 (Ch. Div. 1990). See also *Manchester Fund, Ltd. v. First American Title Insurance Co.*, L-2258-99.

So too, the real property statutes (compiled in Title 46 of New Jersey's laws) provide a noninclusive list of what instruments may be recorded within the recording system (N.J.S.A. 46:16-1 et seq.), as well as the consequences of recording.

"Except as otherwise provided herein ... whenever any deed ... shall have been or shall be duly recorded ... such record shall, from that time, be notice to all subsequent ... purchasers ... of the execution of the deed ... so recorded and of the contents thereof." N.J.S.A. 46:21-1.

N.J.S.A. 46:22-1 deals with consequences of nonrecording. It states that: "Every deed ... shall, until duly recorded ... be void and of no effect against ... all subsequent bona fide purchasers ... for valuable consideration, not having notice thereof, whose deed shall have been first duly recorded."

Among the various instruments specifically designated as being "recordable" are final judgments affecting title to real property. N.J.S.A. 46:16-1.1.

New Jersey's Supreme Court has declared the state to be a notice/race jurisdiction. That means if a common grantor sells the same land to two persons, the first to record — even though he or she may have been the second to purchase — will prevail, but only so long as the recording purchaser had no actual notice of the earlier sale. *Palamarg Realty Co. v. Rehac.*

Title searching practice in New Jersey has developed, primarily through custom and practice among title searchers. *Palamarg*, supra, 80 N.J. at 461 ("the art of title searching, upon which so much of our conveyancing practice rests, has been created in very large part without the aid of legislation..."); see also *Sonderman v. Remington Construction Co., Inc.* 127 N.J. 96, 1100 (1992) (arguing there is "no reason to impose a greater responsibility on title searchers than is imposed by standard practice."); cf. Donald B. Jones, "The New Jersey Recording Act — A Study of its Policy," 12 Rutgers L. Rev. 328, 329 (1957) ("[T]he various New Jersey legislatures which have dealt with the Recording Act have spelled out a broad policy and have left it to the searchers, conveyancers, and courts to construct a system of title searching within the bounds delineated by that policy, and to maintain that system in

a good and workable order.").

The Supreme Court, itself, in *Palamarg*, aptly refers to "the art of title searching."

How a Title Search Works

The principal goal of a title search is to first develop a chain of title. As with all chains, a chain of title is composed of "links." In real estate conveyancing, each "link" consists of the period of time during which an owner holds his or her interest in the real property.

The searcher puts together all of the "links" in chronological order so that they interconnect — the result being the "chain of title." To ensure the interconnection of each link with the next, *Palamarg* stated that each "link" begins with the date on which the interest is conveyed to a specific individual in the chain and ends with the date in which a conveyance from that individual is recorded. The end product of the chain is a chronological succession of conveyances, all interconnected, which link the current title holder to a "reliable" root title.

Under the "grantor/grantee" system created by statute, the search starts with the present owner and "granteeing" that present owner's name to discover the "predecessor" from whom the present owner obtained his title. Milton N. Lieberman, *New Jersey Practice, Abstracts and Titles*, Sec. 1644 et seq. (1966); John A. Celentano, *New Jersey Practice, Real Estate Law and Practice*, Sec. 31.16 (1991).

This search process is then repeated for each prior holder of title (each "link" in the chain of title) until, hypothetically, the year 1664 when Charles II of England deeded all of New Jersey to the Duke of York. According to 2 Rufford G. Patton and Carrol G. Patton, *Land Titles*, Sec. 307 (2d ed. 1957), there has been no successful challenge to Charles II's source of title.

As a practical matter, however, the chain of title is "guaranteed" back only 60 years. See N.J.S.A. 2A:14-30; see also *Pioneer Title Insurance Co. v. Lucas*, 155 N.J. Super. 332 (App. Div. 1978), certif. granted, 77 N.J. 472 (1978), aff'd 78 N.J. 320 (1978).

Although the "chain" may be considered complete; the "search of the title" however is far from complete. A search must still be made as to each title holder in the chain to ascertain if any conveyances were made by such owner to other grantees or lienors prior to the conveyance to the next person — or link — as developed in the chain of title.

A title searcher must confirm or prove the chain of title that has been assembled. This is done by a search of the chain of title in a forward chronological order, through the "grantor" index, and by a search into other areas, such as money judgments that may have acquired statutory lien status.

In *Gibau v. Klein*, the Appellate Division considered a legal malpractice action stemming from an attorney's failure to record a final divorce judgment that awarded the ex-wife exclusive fee title to the former marital home.

What efforts a searcher must expend to check for liens, grants and encumbrances concerning a "grantor" in the chain of title has also been left to "custom and usage." In *Security Pacific Finance Corp. v. Taylor*, the Chancery Division wrote:

> The usual method of examining a title is to search against the party who holds the record title up until the time he parts with the title and then search against the person who holds the title so long as he has the title.
>
> *The significance of the determination ... of the "usual method of examining a title" is that such a methodology has established the standard of "reasonableness" for purposes of construction of the Recording Act.*
>
> As to the ... conclusion ... that a purchaser be charged only with such notice from the records as can be ascertained by a reasonable search of those records, *our courts have taken a very practical approach which has produced favorable results. They have limited the record notice to conform with the existing mechanics and methods of search.* When a question has arisen as to what constitutes record notice, they have first looked to the practice of the searchers and conveyancers to draw their conclusions, in much the same manner as the earlier courts of England had looked to the custom of merchants to establish the commercial law, and had looked to the practices and opinions of the conveyancers as the best evidence of the existing state of the land law. 193 N.J. Super. 434, 441 (Ch. Div. 1984) (quoting *Wack v. Collingswood Extension Realty, Co.*, 114 N.J. Eq. 253 (E. & A. 1933) and Donald B. Jones, supra). (Emphasis added.)

Recognizing the "notice/race" implications of the New Jersey recording system, the judicially accepted standard as to what additional inquires need be made is that which is "reasonable" under the circumstances of each case. *Palamarg*, supra; *Sonderman,* supra.; Donald B. Jones, supra.

The Judgment Lien Search Requirement

Judgment liens are creations of statute. *Brescher v. Gern, Dunetz, Davison & Weinstein, P.C.*, 245 N.J. Super. 365 (App. Div. 1991). A money lien automatically attaches to the lands of a judgment debtor. N.J.S.A. 2A:16-1.

This statute states that a money judgment lien affects and binds real estate from the time it is entered upon the judgment roll of the Superior Court:

"No judgment of the superior court shall affect or bind the real estate, but from *the time of the actual entry of such judgment on the minutes or records of the Court.*" (Emphasis added.)

Accordingly, it is no surprise that the custom and practice of a title search requires that judgment searches for the entry of money judgments (the so called "Charles Jones" searches ordered from Charles Jones, Inc.) must be obtained against each successive owner in the chain of title for the past 20 years (the statute of limitations on judgments, N.J.S.A. 2A:14-5). These judgment searches, however, only disclose the existence of "money judgments," bankruptcies and at times other miscellaneous information. See 2 Lawrence J. Fineberg, *Handbook of New Jersey Title Practice*, New Jersey Land Title Institute, Sec. 7113 (1997).

Judgment searches must be obtained against each successive owner in the chain of title for the previous 20 years. While a party is usually not searched after the date he or she conveys his interest, if a conveyance made for nominal consideration (or which otherwise appears to be fraudulent) is found, the grantor's name should be searched until the date of the next bona fide transaction.

County court judgments must still be searched because the county court was abolished less than 20 years ago. In addition, the county search will reveal miscellaneous liens such as reimbursement agreements.

Nonmoney judgments, however, will not ordinarily be entered into the Superior Court's judgment roll, and therefore will not appear in the customary judgment search. To locate and report the effect of an unrecorded nonmoney judgment upon a real property tile, a title searcher would be required to (1) Obtain independent knowledge that such a judgment exists; (2) Be given privy to the judgment itself, which may prove difficult in cases where the court record has been sealed; and (3) Determine whether any contingencies set forth in the judgment have been complied with by the parties, or otherwise.

Because a title searcher is constrained by the Supreme Court to make only a "reasonable" search of the title, the addition of these "new" searching burdens seem anything but "reasonable" given the recording statutes and the Supreme Court's stated willingness to enforce these statutes absent truly unusual equities.

To now hold as the Appellate Court has done in *Gibau*, that an unrecorded divorce judgment (in violation of the statute permitting its recording) is deemed to acquire an equitable priority over other properly perfected liens seems to violate both the Recording Act and the standard and customary title searching practices.

Conclusion

In *Gibau*, the title insurance company took a seemingly logical position based on the Supreme Court's holding in *Palamarg*. The title company reasoned that under a notice/race determination, a creditor with no notice of a prior court-ordered conveyance of title by the husband should not be bound by such an unrecorded conveyance. Logically, the title company's position seems to be the result that would "best support and maintain the integrity of the recording system."

Judge Keefe in *Gibau* however, disagree. The Appellate Division ruled that the title company was wrong about these particular judgments. Because of the court's differentiation between (1) judgments entered for "equitable distribution"; and (2) all other judgments affecting title to real property — Joan Gibau paid off judgments that she need not have paid, according to Keefe. (Query: does she now have a new claim for malpractice against the attorney representing her in the sale of the real property?)

Gibau v. Klein, is — at least until the Supreme Court decides otherwise — good law on an attorney's obligation to record a nonmoney judgment that affects the ownership of real property. Title searching practices will no doubt need to be adjusted, and the art of title searching will continue to develop as it has in the past, to accommodate new rules created by the courts.

The message to the bar, however, is one of caution. There is peril in failing to do what is permitted by N.J.S.A. 46:16-1.1. Care should be taken to avoid the "snare" presented by N.J.S.A. 46:16-1.1, and the litigation inevitably caused thereby. Prudence dictates spending the few extra minutes it takes to achieve the protection of recording a judgment under N.J.S.A. 46:16-1.1. ■