

SUBURBAN TITLE & ABSTRACT, INC.

FROM OUR EXPERIENCE

UNDERSTANDING THE NEW JERSEY INDEXING SYSTEM

The accepted mode of examining the public records to determine the soundness of a chain of title is to trace the title from the present purported owner far enough back until an apparently firm beginning point is located. Then the process is reversed and a search is made as to each owner to determine what each of the various owners did with or to the title during the period of his apparent ownership. To best facilitate these individual searches on each owner the index is used, whereas in the earlier days the process required thumbing through the records. Thus it becomes evident that without a proper indexing the recording of the document loses its effectiveness.

The New Jersey Recording Act (R.S. 46:21-1) is titled "Operation, Effect and Use of Records" and provides under the first paragraph that whenever any deed or other instrument of the nature or description set forth in section 46:16-1, which shall have been or shall be duly acknowledged or proved or certified, shall have been duly or shall be duly recorded, or lodged for record with the county recording officer, such record shall be notice.

Revised Statute 46-22-1 is titled "Failure to Record Deeds or Instruments." This section sets forth the consequences which follow the failure to record as against subsequent judgment creditors without notice and subsequent bona fide purchasers and mortgages for valuable consideration, not having notice, whose deed or mortgage shall have been first recorded. Here also the key words are "duly recorded or lodged for record."

Nothing in the act regarding indexing makes it a part of the recording plan, so that a purchaser who is misled by the failure to index or by improper indexing is not saved if the deed or other instrument is recorded or lodged with the proper official for recording. The accepted rule appears to be that had he consulted the record (the index was not considered part of the record) he would have discovered the document. The index allowed by statute may save the searcher the laborious task paging the books page by page, but it is indeed an illusion to feel that relying on the use of the index as a guide to the record assures a safe title.

More to the point is the fact that under the recording act the grantee or mortgagee is not completely in the clear by the mere act of lodging his instrument with the recording office. It is essential that it be recorded in the proper book. Twenty years ago we had to accept the ruling that the index is not part of the record. Thus there is a hole in the safety net - the recording system. A simple legislative amendment making the index a part of the record would resolve the problem. The rationale for an amendment was well expressed in 29 New Jersey Practice, Law of Mortgages, page 435 wherein the author stated "a mortgage can not be deemed "duly recorded" unless it is properly indexed, if we are to take seriously the many statements by New Jersey Courts to the effect that the object of the recording statutes is to prevent imposition upon subsequent bona fide purchasers and mortgages, for without an index, searching for a mortgage in the public records would be like searching for the proverbial needle in a haystack.

An error or omission in the index deludes the searcher relying upon the indexes for a safe title. A prior recorded instrument not found in the index prevails over the subsequent purchasers, mortgages and judgment creditors. An amendment making the index a part of the record would repair the hole and provide safety for the searcher relying on the index. But it will create a burden for the party lodging the instrument for recording. He will have to determine that his instrument is properly indexed before he is assured it constitutes notice of his interest. The burden is fair when weighed against the impossible burden of the subsequent purchaser, mortgagee or judgment creditor searching for a recorded that is not indexed or improperly recorded.

The deluge of recordings in the past 15 years has created a noticeable increase in indexing deficiencies particularly in the larger counties. The recent decision in Howard Savings Bank v. Brunson (244 N.J. Super. 571, Chancery Division 1990) has answered the question of whether or not the index is part of the recording system resoundingly in the affirmative. In that case, a mortgage was not discovered by a searcher because it was not indexed, although it had been recorded. The court noted the impracticality of requiring a subsequent bona fide purchaser or mortgagee to search without relying on the indices, and held that the phrase "lodged for record", as used in the Recording Act, included proper indexing.

Thus, the court cast the burden on the party claiming the benefit of a recorded instrument to ascertain that it has not only been recorded but also indexed. The court did not decide, however, what constitutes proper indexing. Therefore, future cases may arise in which the court is compelled to determine the status of mis-indexed (as opposed to non-indexed) documents vis-à-vis the Recording Act. In fact, in a recent decision it was held that a mis-indexed instrument was not part of the public record for purposes of providing constructive notice under the Recording Act. (Manchester Fund, Ltd. V. First Am. Title Ins. Co., 322 N.J. Super. 336, Law Division 1999)

The problems became very evident in Bergen County after 1997 when the county brought a new computer system. A multitude of problems arose when they began indexing condominiums three or four different ways and they began indexing corporations and LLC's in a variety of ways. The problem was made even greater due to the mis-indexing or non-indexing of documents by the people doing the indexing and the multitude of mistakes that were being made by the attorneys submitting the documents for lodging or recording. The problem was partially solved by the institution of the new computer system that was bought in 2008. It appears that most of the old mistakes have been rectified but only time will tell if they have all been rectified. In the mean time it is comforting to have title insurance available.

The main problem that now exists appears to be teaching the attorneys and bank personnel who prepare documents to make sure that the documents are correct and that the descriptions are correct. They also need to make sure that the names match in all parts of the document. Until we make a better effort in sending correct documents for recording to the county recording offices the problems will continue to arise.

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