

WHOOOPS MOMENTS



COUNSEL'S CORNER

Case One

In 2007 the Charles R. Tips Family Trust and the Hazel W. Tips Family Trust signed a Note to Patriot Bank. The Note was secured by Harris County real estate pursuant to a Deed of Trust and Security Agreement. Charles Watkins, Trustee of both Trusts, also guaranteed the debt.

The Note, Deed of Trust and Guaranty Agreement all described the principal amount of the loan as:

ONE MILLION SEVEN THOUSAND AND NO/100 (\$1,700,000.00)
DOLLARS.

This language appears five times in the three documents, in exactly the same format each time.

The Trusts made Note payments of approx \$600,000. The bank sold the note to PB Commercial, LLC, who sold the property at foreclosure auction for \$874,125.

PB, as plaintiff in the lawsuit against the Trusts and Watkins, filed a Motion for Summary Judgment. Assuming an initial principal balance of \$1.7 million, PB calculated a deficiency balance of \$815,214.

The Trusts and Watkins responded by claiming that the original principal amount was \$1,007,000, and that words prevail over numbers when there is a conflict. According to the Trusts and Watkins, after application of the past payments and foreclosure proceeds, the note was fully satisfied and PB collected a surplus of \$189,111, which amount should be returned to the Trusts.

The trial court granted PB's Motion and awarded PB damages of \$815,214 plus interest, court costs and attorney's fees. The Trusts and Watkins appealed.

After concluding that the loan documents were ***not*** ambiguous, the Appellate Court found that the written words control over the numerals – a difference of \$693,000. The Appellate Court made this conclusion even after reviewing PB’s evidence that the borrowers had received the full \$1.7 million from Patriot Bank in 2007, not \$1,007,000.

Conclusion: The amount due was determined by the written words, not the numerals. The trial court’s Judgment was reversed and replaced with a new Judgment that the principal amount of the loan was \$1,007,000. See *Charles R. Tips Family Trust v. PB Commercial, LLC*; No. 01-13-00449-CV; Texas Court of Appeals, 1st District; March 25, 2015.

Case Two

On December 15, 2008, David Duckworth borrowed \$1.1 million from the State Bank of Toulon. The Note was dated and signed December 15, but the Security Agreement was dated two days earlier – December 13, 2008.

The Security Agreement properly reflected the debt to be secured, but the identification had a critical mistake. The Security Agreement said that it secured a Note dated December 13, 2008. But there was no Note of that date.

Duckworth filed a Chapter 7 bankruptcy petition in 2010. The bankruptcy court held that the mistaken date in the security agreement did not defeat the bank’s security interest. The trustee appealed, claiming that the mistaken date in the Security Agreement defeated the bank’s collateral interest.

The bank contended that the Security Agreement is enforceable, and extrinsic testimony will show clearly that the parties intended the Security Agreement to reflect the proper date of the Note. And that the Security Agreement could easily be changed by the Court – we call this ‘reformed’ – to reflect the proper date.

The Federal Court then concluded, and I’ll spare you the gory details, that the mistaken identity of the debt to be secured cannot be corrected against the bankruptcy trustee. The judgments of the district court were reversed. The Trustee wins; the Bank loses. See *In Re: David L. Duckworth; State Bank of Toulon v. Charles E. Covey, Trustee*; No. 1:13-cv-01258-JBM and 1:13-cv-01087-JES; US Court of Appeals, 7th Circuit; November 21, 2014.

Lessons learned:

1. In the past, I followed the ancient tradition of using both words and numerals in the docs I prepared. I quit that practice. Now I just use numerals - \$1,245,882. No more words. Too many opportunities for a mistake by using words. And inevitably when there is a mistake, it’s in the words – not the numerals.

2. Proofread your Leases, Contracts, correspondence, emails, texts, listings, buyer and tenant rep agreements, brokerage contracts, commission agreements, everything. Read it all closely. Then wait at least one hour before you read it again.
3. Practice Point: On the really important stuff, enlist the help of a buddy to proofread too.

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