

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-10828
Summary Calendar

IN THE MATTER OF: THOMAS L. FREYTAY and
 SHARON N. FREYTAG,

Debtors.

THOMAS L. FREYTAG, ET AL.

Appellants,

versus

AMERICAN FEDERAL SAVINGS BANK fka
AMERICITY FEDERAL SAVINGS BANK,

Appellee.

Appeal from the United States District Court
For the Northern District of Texas

(3:93-CV-2261-R)

(March 3, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

This appeal arises from a bankruptcy adversary proceeding in

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

which Thomas and Sharon Freytag challenge the foreclosure of a deed of trust lien against their homestead. The Freytags, appellants,¹ claim that their 1988 refinancing transaction with the foreclosing bank, appellee Americity Federal Savings Bank ("Americity")², constituted an invalid encumbrance on their homestead. On February 12, 1993, the bankruptcy court entered summary judgment in favor of Americity on this issue, finding that the 1988 transaction was a permissible restructuring of an enforceable construction lien obligation under Texas homestead law. The Freytags appealed to the federal district court for the Northern District of Texas, which on June 27, 1994 affirmed the decision of the bankruptcy court. This appeal followed.

Because we agree that, at the time of the foreclosure, Americity held a valid lien enforceable under Texas law against the Freytags' homestead, we AFFIRM the decision of the district court.

FACTUAL BACKGROUND³

Thomas and Sharon Freytag, who are both attorneys, bought an

¹The original plaintiffs in this adversary proceeding, and appellants before the district court, were Thomas Freytag, Sharon Freytag and James W. Cunningham, the bankruptcy trustee (Thomas and Sharon Freytag filed their bankruptcy petition in January 1990). Sharon Freytag has since assigned her interest in this lawsuit to the trustee, so the only Thomas Freytag and trustee James Cunningham remain as appellants before the Fifth Circuit. For simplicity, this opinion refers to appellants as "the Freytags."

²"Americity" is used in this opinion to refer to Americity Federal Savings Bank (with which the Freytags dealt), its successor, American Federal Bank, F.S.B., and its successor, Guaranty Federal Bank, F.S.B.

³Our factual account draws heavily from the bankruptcy court opinion, In re Freytag, 155 B.R. 150 (Bankr. N.D. Tex. 1993).

unimproved lot in Dallas's Preston Hollow neighborhood in 1978. By 1983, they had paid off the \$70,000 note on the lot and obtained a release of the accompanying purchase-money lien. In October 1983, the Freytags began to build a home on their lot. They signed a \$700,000 deed of trust note for construction costs in 1983, and in 1985 they borrowed an additional \$130,000 to finish construction. Both the \$700,000 note and the \$130,000 note were secured by construction liens on the property. In July 1985, the Freytags and their children moved into the new house, known as One Dorset Place. The following month, the Freytags executed a new deed of trust note to InterFirst Bank Park Cities ("InterFirst")⁴ for \$830,000 to renew, extend, and consolidate the two construction notes.⁵

By March 1988, after various extensions and modifications, the InterFirst note had an outstanding balance of \$872,675.76. Because of declining income and cash flow problems, the Freytags decided to refinance One Dorset Place with appellee Americity. Americity offered a refinancing program whereby mortgagors in certain wealthy neighborhoods of Dallas could obtain some "breathing room" in their mortgage payments. Americity would allow the Freytags to pay monthly interest-only payments at the rate of 1 percent per annum for approximately 14 months. Meanwhile, interest would accrue at a

⁴This opinion uses the name "InterFirst" to refer to both the now-defunct InterFirst Bank Park Cities and its successor, First Republic Bank.

⁵The two construction notes had, at that time, aggregate outstanding balances of \$821,700. The total amount of the consolidated loan, \$830,000, included an origination fee of \$8,300.

variable rate.⁶ Accrued but unpaid interest became "deferred interest," which was to be added monthly to the principal balance of the loan.

On March 29, 1988, in preparation for the refinancing, the Freytags signed two new deed of trust notes to InterFirst. The first note, for \$872,675.76, renewed and extended the term of the existing consolidated construction note held by InterFirst. The second was a new loan for \$30,000, to be used for various items such as "points," taxes, insurance premiums, and attorney's fees. The Freytags also executed two deeds of trust on One Dorset Place, in favor of InterFirst, to secure the two respective notes. Both deeds recited the fact that the \$30,000 note was to be inferior in priority to the \$872,675.76 note. InterFirst assigned the lien securing the \$872,675.76 note to Americity.⁷

The following day, the Freytags signed a promissory note to Americity in the principal amount of \$915,000. The \$915,000 represented the following amounts:

⁶The variable rate, to be adjusted semiannually, was the six-month U.S. treasury bill rate, rounded upwards to the nearest one-eighth of one percent, plus 4.25 percent.

⁷InterFirst kept the \$30,000 note and the lien securing it. The bankruptcy court noted, and we agree, that whether this "second lien" on One Dorset Place violated Texas homestead law is immaterial to the instant controversy between the Freytags and Americity over Americity's foreclosure of the lien, transferred to it by InterFirst, securing the \$872,675.76 note.

Paid to InterFirst on existing note \$871,419.14

Costs and fees of refinancing:

Loan origination fee	\$13,725.00
Loan broker's fee	9,150.00
Reserve for future taxes	7,107.95
Reserve for future insurance premium	6,980.49
Title insurance costs	3,927.70
Appraisal fee	800.00
Attorneys' fee	800.00
Prepaid interest	660.92
Survey costs	253.80
Settlement fee	100.00
Recording fees	45.00
Tax search fee	<u>30.00</u>

Total costs and fees of refinancing 43,580.86

Total initial principal of Americity loan \$915,000.00

Under the terms of the note, the Freytags were to enjoy their 14 months of "breathing room" and then, by July 1989, start making payments of deferred interest, principal, and interest. Instead, in June 1989 the Freytags obtained a modification of the Americity note to allow them to make reduced monthly payments of \$4,000 per month until July 1990, when regular payments would be resumed on the increased deferred interest, principal, and interest according to a 30-year amortization.

In January 1990, the Freytags filed their Chapter 7 bankruptcy petition. By February 5, 1990, the principal balance on the Americity note had grown to \$1,094,432.55. The Freytags stopped making payments, and on November 29, 1991, the bankruptcy court modified the automatic stay to allow Americity to foreclose on One Dorset Place. Americity bought the property at the foreclosure sale for \$1,300,000.

DISCUSSION

The Texas Constitution specifically protects homesteads from forced sale except to satisfy liens securing purchase money, tax, or home improvement debts. See TEX. CONST. art. 16, § 50; see also TEX. PROP. CODE ANN. § 41.002; Heggen v. Pemelton, 836 S.W.2d 145, 146 (Tex. 1992). The One Dorset Place property became the Freytags' homestead when they began building a home on the land in 1983. See Farrington v. First Nat. Bank, 753 S.W.2d 248, 250 (Tex. App.--Houston [1st Dist.] 1988, writ denied)(holding that "a homestead exemption may be established on unoccupied land if the owner presently intends to occupy and use the premises in a reasonable and definite time in the future, and has made ... preparations toward actual occupancy."). The liens securing the original construction notes for \$700,000 and \$130,000 were enforceable under Texas homestead law because they secured debts "for work and material used in constructing improvements" on the Freytags' homestead. See TEX. CONST. art. XVI § 50. The Freytags' subsequent consolidation, extensions, and renewals of those liens with InterFirst did not affect their characterization as enforceable construction liens on a homestead. See Gregory v. Sunbelt Sav., F.S.B., 835 S.W.2d 155, 160 (Tex. App.--Dallas 1992, writ denied)("If the [homestead improvement] debt is later extended by giving new notes, the old lien may be perpetuated without losing its validity."). By direct contractual assignment from InterFirst, Americity thus became the owner and holder of a valid construction lien on the homestead property of the Freytags. Americity's

\$915,000 loan, as a further renewal, rearrangement, and readjustment of an obligation encumbering a homestead property, was likewise permissible under Texas law. Machicek v. Barcak, 170 S.W.2d 715, 717 (Tex. 1943).

"[The homeowner] must necessarily have the right to renew, rearrange, and readjust [an] encumbering obligation; otherwise he might lose the homestead through foreclosure proceedings, and the very purpose of the constitutional inhibition against encumbering the homestead be defeated. In accomplishing this purpose [the homeowner] may change the form of the obligation so long as he acts in good faith and does not intentionally increase the burden on the homestead for purposes other than are necessary for the readjustment of the outstanding obligation."

Machicek, 170 S.W.2d at 717. The bankruptcy and district courts below concluded that Americity's adjustment of the payments to be made upon the note, the mode of interest calculation, and the additions of loan fees and other fees and expenses were all an integral part of the extension and renewal of the note to be acquired by Americity. We agree. There was no new advance of cash to the Freytags, and no alteration of the basic debt obligation; the renewal merely involved adjustment of the payments of interest and principal over a period of time, and necessarily included Americity's costs in effectuating the transaction. The Freytags and Americity acted in good faith to preserve the Freytags' rights in One Dorset Place and did not "intentionally increase the burden on the homestead for purposes other than are necessary for the readjustment of the outstanding obligation." Machicek, 170 S.W.2d at 717.

Therefore, because we agree that, at the time of the foreclosure, Americity held a valid lien enforceable under Texas law against the Freytags' homestead, we AFFIRM the decision of the district court.