



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

July 12, 2004

The Honorable Judy G. Hix
Register of Deeds, County of Greenville
301 University Ridge, Suite 1300
Greenville, South Carolina 29601

Dear Ms. Hix:

In a letter to this office you indicated that you had received a "corrective mortgage lien satisfaction affidavit". Such followed your receipt of an affidavit to cancel a mortgage which was provided pursuant to S.C. Code Ann. Section 29-3-330(e) (Supp. 2003). As a result of your receiving the affidavit, the mortgage was cancelled. The attorney who submitted the cancellation affidavit has since discovered that the effort to cancel the mortgage was in error and wants to correct the affidavit so that the mortgage cancelled will appear as an open mortgage. You have questioned whether a mortgage that has been cancelled of record by an attorney's mortgage lien satisfaction affidavit may again appear as an open mortgage by means of a corrective affidavit.

I am unaware of any State statutes that directly comment on your question. However, it is generally stated that

Relief from the consequences of a discharge of a mortgage may be obtained in equity by vacation of the discharge and reinstatement of the mortgage, at least where the rights of innocent third parties have not intervened, and provided there are adequate grounds for the reinstatement. Relief may be denied, however, where, as a matter of equity between the parties, the mortgagee is not entitled to the enforcement of the mortgage, as where the mortgagee was guilty of conduct raising an equitable estoppel against him.

55 Am. Jur.2d Section 470, p. 157. See also: 59 C.J.S. Mortgages, Section 486, pp. 583-584 ("A release or satisfaction of a mortgage may, on proper grounds, be abrogated or set aside, and thereafter,...the mortgage may be reinstated and enforced as a lien. The facts of each case will determine whether justice requires that a discharged mortgage be kept alive...."). Grounds for a court to order the vacation of an mortgage discharge and the reinstatement of a mortgage include factors such as mistake of fact and the inadvertent, accidental or unintentional release of a mortgage. 55 Am. Jur.2d Sections 473-478, pp.158-163. It is further stated that

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A proceeding to set aside a discharge of a mortgage and to have it reinstated is an equitable one and must be according to the procedure appropriate to equitable relief. In order to have the discharge of a mortgage set aside and the mortgage reinstated, it is necessary that all parties in interest be made parties to the proceedings, because relief of this character may not be granted unless all persons who would be affected by the decree setting aside the discharge and reinstating the mortgage are brought within the jurisdiction of the court.

55 Am. Jur.2d Section 479, p. 163.

Consistent with the above, it does not appear that the suggested corrective affidavit would be an adequate basis to have a satisfied mortgage reinstated. Instead, a proceeding should be brought in circuit court if reinstatement is sought. The circuit court would have equitable powers to consider such a matter. South Carolina State Constitution Article V, Section 11; Matheson et al. v. McCormac et al., 186 S.C. 93, 195 S.E.122 (1938); Strickland v. Seaboard Air Line Ry. Co., 112 S.C. 67, 98 S.E. 853 (1919).

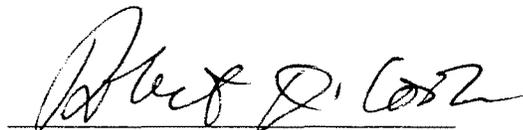
With kind regards, I am,

Very truly yours,



Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General