047

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 80,233

BANK ONE, DAYTON, N.A.,

Petitioner,

vs

SUNSHINE MEADOWS CONDOMINIUM ASSOCIATION, INC., et al.,

Respondent.

_____/

4th District Court of Appeal
Case No. 90-0728

10/26

FILED
SID J. WHITE
SEP 28 1992
CLERK, SUPREME COURT
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Chief Deputy Clerk

ANSWER BRIEF OF RESPONDENT
PRIME BANK

GEORGE P. ORD, ESQ.,
ALLEY, MAASS, ROGERS & LINDSAY, P.A.
321 Royal Poinciana Plaza, South
Palm Beach, FL 33480
(407) 659-1770

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STATEMENT OF THE CASE AND THE FACTS

Bank One's Statement of the Facts is correct for the most part but is misleading in some significant respects.

I - On page 6 of its Statement, Bank One states that it had sought only to foreclose junior interests, those recorded after the date of the amendment to the Declaration which submitted subsequent phases to the Condominium. That portion of the Statement is supported by references to the transcript of the summary judgment hearing and Bank One's Reply Memorandum in support of its Motion. However, the pleading and the Order Granting Bank One's Motion for Partial Summary Judgment (A-575) do not reflect that limitation.

Paragraph 7 of the Second Amended Complaint (A-11) asserts that the action is of common interest to all unit owners. This must mean that the effect of the action is the same for all owners regardless of when their interests were acquired; otherwise, their interests would not be common. Paragraph A of the prayer to Count I of the Second Amended Complaint asks for a judgment of foreclosure against all the condominium units without distinction between those acquired before and those acquired after the phasing amendment. Paragraph D of the Prayer demands that the interests of **all** Defendants be found subordinate to Bank One's mortgage lien. Defendant Prime Bank's interest in the property is alleged in paragraph 31 of the Second Amended Complaint to be based upon an assignment of

mortgage recorded in Official Record Book 4593 page 1866. The Phase Amendment was recorded after that in Official Record book 5254, page 928 (A 242-255). Thus, all of Prime Bank's mortgages predated the Phase Amendment yet those mortgages are sought by the Amended Complaint to be declared subordinate to Bank One's mortgage. By Stipulation dated November 17, 1989 (A575) Bank One stipulated that mortgages held by Prime Bank and recorded **prior to the recordation of Bank One's mortgage** (not the recording of the Phase Amendment) were superior to Bank One. The Stipulation retained Bank One's position that Prime Bank mortgages recorded after Bank One's mortgage, but before the Phase Amendment, were inferior to Bank One's mortgage (¶2 and 4-A of A-575). This claim was reiterated in paragraphs 3 (u) and (v) of the Summary Judgment Motion (A 272 @ 277, 278). The following exchange occurred during hearing on the Motion for Summary Judgment. (A-336 lines 9 through 20)

THE COURT: Factually who is Prime Bank as you view it?

ROSENBLUM: They are a **junior mortgagee.** They gave mortgages on units **subsequent in time to our mortgage.** They were on notice. We're not trying to foreclose any prior mortgage and that's why if you note their whole theory, it's based upon their being prior in time. The unit owners consented to this but we're not seeking to foreclose anybody prior in time, only those who have a junior interest.

The Order Granting Bank One's Motion for Partial Summary Judgment (A-573) grants the motion as to all defendants without distinction as to time of acquisition of interest. Thus the Order went further than even Bank One now concedes is appropriate.

II - On page 6 of Bank One's Statement it asserts that the Order "reserved jurisdiction for the entry of a Final Judgment of Foreclosure **which would order a clerk's sale to be held for each condominium parcel. Thus the judgment would satisfy each condominium parcel's pro-rata share of the debt which was due to Bank One under its mortgage".** The Order contains nothing similar to this highlighted language, and it is not at all clear that each unit is to be sold separately or that each unit is, under Bank One's theory, liable for only a pro-rata share of the mortgage.

III - In five places in Bank One's Brief [1/] it uses

[1/] page 9: "The District court also failed to realize and give effect to the record notice resulting from the recording of Ban One's mortgage prior to the submission of the property to condominium"; pages 18 and 19, "Anyone who desired to purchase a unit with Sunshine Meadows or any lender securing a mortgage on property within the condominium had clear notice that the development was a phase condominium with plans to submit future phases. Furthermore, Bank One's mortgage had been duly recorded in the Public Records of Palm Beach County, Florida and Bank One signed a consent for the submission of the land which was encumbered by the mortgage to the condominium form of ownership"; page 19 "Unit owners and prospective unit owners in a phase condominium are also given protection by Section 695.01 Florida Statutes, which forces mortgagees to record their mortgages in the public records. In the case at bar, it is undisputed that the mortgage on the phased-in 1.43 acres was duly recorded."; page 26: "All of the unit owners and mortgagees knew of Bank One's mortgage by either actual or constructive notice."; and page 29: "The District Court also overlooked the fact that the mortgage in dispute was of record

careless language which could be read to suggest that Bank One's mortgage was of record at the time of filing of the original submission to condominium. This is not the case. The sequence of filings is as follows:

1. Original Declaration (submission of Phase I)
   June 24, 1983 - ORB 3974, page 1161.

2. Bank One Mortgage
   June 13, 1984 - ORB 4266, page 1892.

3. Phase Amendment
   April 23, 1987 - ORB 5254, page 928

IV Although this issue was not addressed by the Fourth District in its opinion, Prime Bank, Sunshine Meadows and the 5000 corporation had also argued that the unit owners whose interests Bank One was attempting to foreclose were indispensable parties to the action. Sunshine Meadows had filed a Motion to Dismiss for Failure to Join indispensable Parties (A 79). The trial court's Order Granting Bank One's Motion for Summary Judgment declared that motion to be "moot" (A-573).

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in the Public Records of Palm Beach County, Florida".

SUMMARY OF ARGUMENT

A careful analysis of principles of condominium property and common law rules of real estate conveyancing compels a conclusion different from that annunciated by the Fourth District majority opinion or by the dissent and different from that advocated by either Bank One or Sunshine Meadows Association, Inc. Portions of each of these positions have merit; however, each of them also contains grievous flaws in logic and each would be disastrous from an equitable and public policy standpoint.

Unfortunately, Sunshine Meadows is restrained from offering the correct legal analysis because that analysis would accrue to the benefit of some of its members and to the detriment of others. Sunshine Meadows' position as class representative of all unit owners in this mortgage foreclosure action involves it in an inherent and irreconcilable conflict of interest. Allowing such representation was the first error committed by the trial court. [2/] To obtain a beneficial result for all of its members Sunshine Meadows must support the position announced by the Fourth District notwithstanding its flaws.

[2/] Although raised on appeal, this issue was not addressed by the Fourth District's opinion because of the reversal on other grounds.

Likewise, Bank One, having prevailed in the trial court, is unlikely to advance any position other than the one successfully asserted there, even though the correct position would result in Bank One's mortgage being currently and adequately enforceable.

Bank One's mortgage does not, as Bank One would have it, attach to each unit in **each phase** of the phase Condominium. Nor does it, as Sunshine Meadows and the Fourth District's opinion would have it, effectively evaporate and remain dormant and unenforceable until the unlikely event of termination of the condominium. Rather, Bank One's mortgage attaches to those units created within the phase of which its mortgage holdings were a part and to those units only.

In contradistinction to the consequences advanced by the other positions advocated in this case, the correct result derogates no vested rights, violates no valid expectation interests and is consistent with the Condominium Act, the documentary language and the common law of real estate conveyancing and mortgaging.

The structures of the opposing arguments advocated by the Fourth District opinion and Sunshine Meadows on the one hand and by Bank One on the other hand break down at crucial points. To allow either position to become the law of this State would spin off a defective stitch from the fabric of the condominium law which, when pulled in other cases, could unravel the entire cloth.

ARGUMENT

I A MORTGAGE ON ANY PART OF LAND SUBMITTED TO CONDOMINIUM ATTACHES TO EACH UNIT CREATED AS PART OF THE SAME SUBMISSION.

In analyzing this case it is helpful to first consider the ordinary simple case of a single phase (non-phase) condominium and then extrapolate principles applying there to the situation of a phased condo. In doing so, we will observe that these principles require confining the effect of mortgages to the phase containing the land on which the mortgages were originally impressed. They also compel impressing such mortgages on all units within the phase even if the mortgages did not encumber the entire property being phased in.

In the simplest, most common, single-phase case, a developer will purchase an unimproved parcel of real property. Most commonly, the purchase will be financed and the purchase money financing will be secured by a mortgage encumbering the entire parcel purchased. The developer will also borrow money to construct the condominium improvements. That borrowing is usually also secured by a mortgage encumbering the entire parcel purchased and to be submitted to condominium. Frequently, the purchase money and construction money are both borrowed from a single lender in a combined acquisition/construction loan whereby all the funds lent are secured by a single mortgage. Sometimes the purchase money is advanced by the land seller taking back a purchase money mortgage which is then usually subordinated to the

later institutional construction financing. In any event, condominium projects are most often bought and constructed with mostly borrowed money, the repayment of which is secured by one or more mortgages which, immediately prior to the filing of the Declaration, encumber the entire project property as a whole.

In such a case, it is common understanding, based upon Florida Statute §718.104(6)[3/] that upon the submission of the property to condominium by recording of the Declaration, including the consent of the mortgagee(s), the ownership of the developer/declarer is converted from ownership of a single parcel of metes and bounds real estate to ownership of a multiple number of condominium parcels each of which is composed of a unit and a share in common elements. The mortgage interest of consenting mortgagees is likewise converted from a mortgage on a single metes and bounds parcel to multiple liens encumbering each one of the various units. It is not immediately obvious whether the mortgagees' liens attach to each unit in the full amount of the debt or attach to each unit in a pro-rata portion of the total debt.[4/] It could be argued that Florida Statute §718.121(3) suggests that the lien is apportioned. However, Florida Statute §718.121 applies to liens arising **subsequent** to recording the

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[3/] 708.104(6) A person who joins in, or consents to the execution of, a declaration subjects his interest in the condominium property to the provisions of the declaration.

[4/] Bank One assumes that the resulting liens are in a pro-rata amount but cites no authority and offers no reasoning for that result other than by analogy to Florida Statute §718.121(3). The result seems a fair one but as with other parts of Bank One's Argument is not supported by careful analysis.

declaration. The acquisition/construction liens arguably **arise** prior to recording the Declaration and are **converted** upon recording. Such liens certainly arise no later than **contemporaneously** with recording the Declaration. Therefore, 718.121 applying to subsequent liens does not apply. In actual practice it makes no difference because the developer and the builder always provide a contractual mechanism for partial releases of condominium parcels from the mortgage upon an agreed payment made upon the sale of a unit.

Everyone's expectations are satisfied in this circumstance. Presumably, the combined value of the condominium parcels equals or exceeds the value of the land and improvements or the Declaration would not have been filed. Therefore filing the Declaration at least maintains the developer's value and the lender's security. The purchasing unit owner presumably paid market value for what he bought - his unit and a specified percentage undivided share in the common elements. The grant of a partial release on sale of a unit insures that the unit-owners' rights cannot be affected by a later default on the mortgage and also preserves the mortgagee's security for the unpaid mortgage amount. When all units are sold the partial release payments will have discharged all liens on the condominium property. Therefore the scheme works simply, obviously and well when the pre-existing mortgage covers all the land submitted to condominium. [5/]

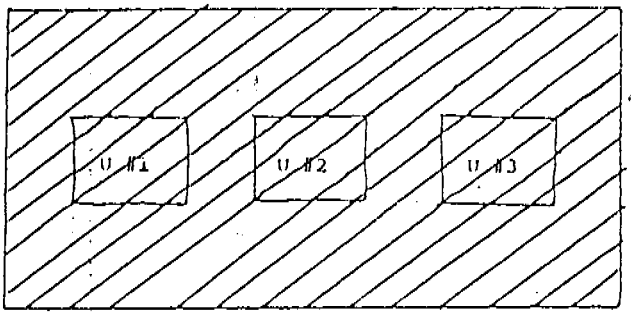
[5/] Both Bank One and Sunshine Meadows ground their arguments on Florida Statute §718.107 which provides that the undivided share

It also follows that any pre-existing mortgage on any land submitted to condominium should attach to all units then declared even if not all the units physically lie on the previously encumbered land and even if none of the units lie thereon.

In simple schematic form the various possibilities can be demonstrated as follows:

CASE I - Most Common Case

(cross-hatched area = Mortgaged Land)



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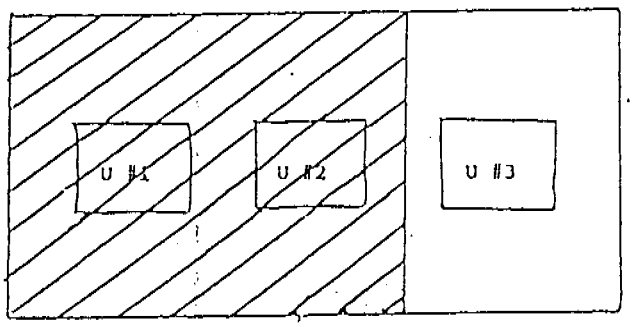
in the common elements shall not be separated from the unit to which they are apportioned. From this they both conclude that the mortgage cannot be foreclosed on the parcels as described in the mortgage. Both confuse "undivided share in the common elements" with "a physical portion of the common elements". These two things are not the same. The "undivided share in the common elements" is each unit owner's share in the total common elements whatever the common elements happen to be. If a unit owner has a 10% interest in the common elements and the common elements consist of a pool and a tennis court, he still has a 10% interest in the common elements if the tennis court is taken away, e.g. by condemnation. There is nothing in Florida Statute §718.107 which compels the conclusion that a chunk of the common elements may not be removed from the condominium. What prevents a mortgagee from foreclosing a chunk is his 718.104 consent.

In this case the mortgage is on the entire land and therefore encumbers all units. This is the ordinary simple case discussed previously.

CASE II - Fewer than all units on Mortgaged Land

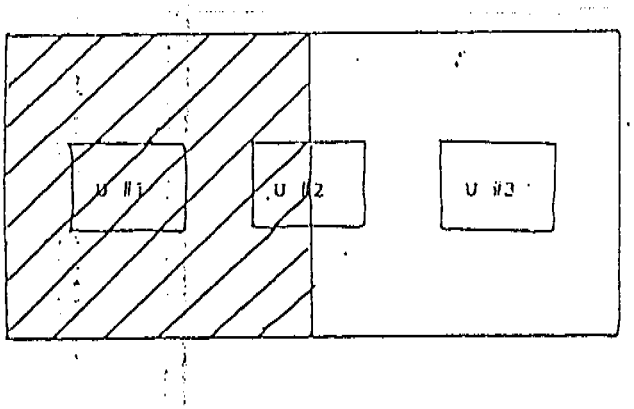


In this case three possibilities exist: (1) - the mortgage encumbers all units; (2) - the mortgage encumbers only units 1 and 2; or (3) the mortgage encumbers no units. An argument that the mortgage encumbers only units 1 and 2 requires an adherence to the metes and bounds description of the property interests which applied prior to the submission to condominium. That ownership regime disappeared with the submission. After the submission, Unit 3, through its undivided share in the common elements, has an ownership interest in the "Mortgaged Land". Why then should it escape the impress of the mortgage? The answer is - it shouldn't. The mortgage should attach to all three units. No one can validly complain of this because all of the parties affected must have consented, pursuant to Florida Statute §718, with full knowledge of the circumstances. Otherwise the condo has not been validly created.

Quite frankly, it never occurred to this writer that anyone would argue that the mortgage would not attach to **any** units in this hypothetical. (This writer reads the Fourth District opinion to preclude foreclosure on units "based upon a mortgage secured only by the common elements" 17 FWL D1045 - first paragraph of opinion). Yet Sunshine Meadows argued exactly this when this hypothetical was addressed in memorandum on Motion for Rehearing before the 4th District Court of Appeal (See Appendix). Apparently under Sunshine Meadows' analysis a mortgage cannot attach to a unit unless its original description is congruent to the legal description of the resulting unit. This is obviously impossible.

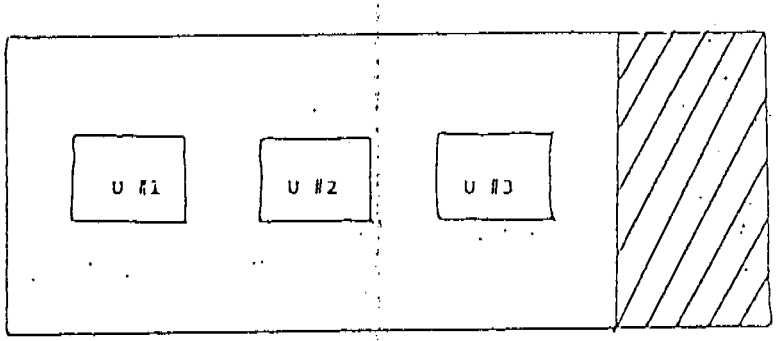
That Sunshine Meadows could conclude that the mortgage is completely unenforceable in this circumstance points out the lack of logic and equity in its position.

Case III - Portion of Unit on Mortgaged Land



This demonstrates even more clearly why the metes and bounds analysis must be abandoned. If it is retained, what share of the mortgage would unit #2 bear?

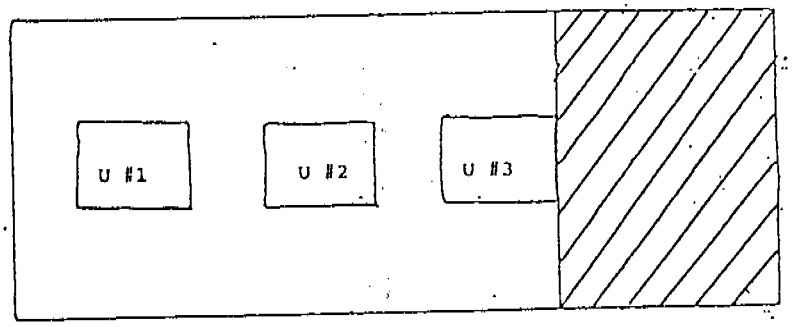
Case IV - No Units on Mortgaged Land



This is the subject case. Under the Fourth District's reasoning, the mortgage here is unenforceable until the condo is terminated. [6/] The mere fact that the mortgaged land doesn't underlie any units is no reason not to impress the mortgage on the units. To refuse to do so would be to adhere to the metes and bounds regime which we have shown does not apply. Under the Fourth District's analysis what would be the result in the following case?

[6/] The result is in no way dependent upon whether the condo is a phase condo or not.

Case V - Mortgaged Land Contiguous with Unit Boundary



Reflection on the various possibilities reveals that logic requires like treatment for each case, i.e. the mortgage attaches to each unit created by the documents declaring the mortgaged land to condominium.

II MORTGAGES ON PROPERTY BECOMING PART OF SUBSEQUENT PHASES ONLY CANNOT AFFECT UNITS IN PRIOR PHASES.

Having determined that in a single phase (or first phase) submission any mortgages attach to all units within the phase, regardless of the initial location of the mortgaged property, we must now determine what happens in similar configurations upon the submission of later phases. It is obvious from the previous argument that mortgages on any land submitted with the phasing will attach to all units within the phase. However, we need to determine whether there will be an effect on prior phases.

If a second phase is added in a phase condominium, the addition of the second phase affects first-phase ownership interests through the change in the percentage interest in the common elements and through the change in quantity of the common elements resulting from the phase addition. For example, if the number of units in Phase II equals the number of units in Phase I then the value of the Phase I parcels attributable to the common elements in Phase I is cut in half because the common elements are shared by twice as many people. However, if the common elements submitted with Phase II are of equivalent value to those in Phase I then the value of the Phase I parcels remains constant because twice the value is shared by twice the number of owners.

In essence, Phase I buyers, buying into a condo with potential future phases, contract to trade a share in the Phase I common elements for a share in the future phases' common

elements. An implicit condition of that contract is that their share of the future common elements be unencumbered. Taylor v. Day 102 Fla. 1006, 136 So. 701 (Fla. 1931).

A phase condo makes economic sense only if the ratio between the value of the common elements and the number of new units is approximately constant in each phase. If such ratio for a later phase is substantially greater than in prior phases, the prior phase unit owners receive a benefit (not a windfall. The benefit is received at no one's unconsented expense. The benefit is conferred by the parties consenting to the submission of the new phase who are free to do so or not). If the ratio for a later phase is substantially smaller than for prior phases, the prior phase owners suffer a loss in value. The prospective purchasers of the latest phase are neither adversely nor beneficially affected because they make their determination as to price based upon full knowledge of the facts.

This should make it clear that, in the subject case, the Phase I unit owners will not receive a windfall at anyone's expense by receiving an unencumbered share in the new common elements. As a result of the phasing they are sharing their unencumbered Phase I common elements with the new unit owners. In order for the value of their parcels to remain constant, Phase I owners must share in the **unencumbered** value of the new added common elements. If Phase I units become impressed with a share of a pre-phasing encumbrance on the new common elements, the owners' property rights have been adversely affected by the

phasing. This is true even if the parcel containing the new common elements is not "over mortgaged". If the mortgage equals the value of the improvements, then Phase I owners receive no value from the phasing in of the new common elements and the effect of the phasing is simply to diminish their interest in the Phase I common elements. If the new common elements are, in fact, over mortgaged the situation is even worse.

It is a fundamental tenet of our law that a party owning property cannot have his rights diminished by subsequent unilateral actions to which he does not concurrently consent. This principle is embodied in the Fifth Amendment to the Constitution of the United States; in Article I, Section 9 of the Florida Constitution, in the recording acts Chapter 695 F.S.; and generally throughout the common law.

A good example of the principle can be found in a line of cases concerning mortgage subrogation agreements. It is common in purchase and sale agreements of large tracts of land intended for development by the buyer, for the seller to contract to subordinate any purchase money financing (which is also common in these transactions) to later construction financing to be obtained by the seller. There is a long line of cases and commentaries to the effect that such agreements should not be enforced unless they are very specific and contain terms that will define and minimize the risk that the subordination will impair or destroy the seller's security. Handy v. Gordon, 422 P.2d 329 (Cal. 1967); Lahaina-Maui Corporation v. Tau Tet Hew,

362 F.2d 419 (9th Cir. 1966); Stenehjem v. Kyn Jin Cho, 631 P.2d 482 (Alaska, 1981) and Roskamp Manley Associates, Inc. v. Davin Development and Investment Corporation, 229 Cal. Rptr. 185 (Cal. App. 1986). Universally included among the required terms is an agreed limitation on the amount of the lien to which the seller will be required to subordinate. Under Bank One's argument no such limitation exists.

Judge Farmer's dissent to the Fourth District Court of Appeal opinion was factually incorrect when he stated that all prospective buyers in Phase I were told by the land records that "part of a future phase was already encumbered with a mortgage on what could become common elements some day". At least six Phase I units were sold and mortgaged before Bank One's mortgage was even created (see paragraph 1 of Stipulation A-575). These buyers could not possibly have expected that they would be saddled in the future with a mortgage which didn't even exist when they bought. Bank One in the stipulation (A 575) conceded that these **mortgages** are superior to Bank One's mortgage. By the same analysis (notice) the **owners** of those units must take free of Bank One's mortgage. Now, suppose one of these prior unit owners pays off his first mortgage and then sells his unit. Presumably the purchaser of that unencumbered unit also takes title free of the Bank One encumbrance. It would not make sense to assert otherwise. There is no event causing the mortgage to attach. If the mortgage did then attach, other unit owners who previously paid a pro-rata share of the Bank One mortgage will

have paid an excessive share because when they paid the mortgage the debt was apportioned among fewer units. Therefore, the units having previously paid are entitled to a rebate. But who gets it? The person who paid or the current owner of the unit for which it was paid? Applying the Bank One mortgage to Phase I creates a due process and economic morass.

Obviously then, the owners and successor owners of units mortgaged prior to the recording of the Bank One mortgage and their successors must take free of the Bank One mortgage. If owners with prior mortgages take free then it logically follows that owners of unmortgaged units take free because there is no valid reason to distinguish between mortgaged and unmortgaged units for these purposes. It further follows, by definition, that if all prior mortgaged units and all unmortgaged units in the prior phase take free of Bank One's mortgage, then all units in prior phases take free of that mortgage.

Under Bank One's theory in this case, each Phase I unit would be burdened with a lien created after the creation of the unit and in an amount over which the owner of the unit had no control. Under such a situation, the property interest of a unit owner is at the complete mercy of the later actions of any person who holds the smallest part of any property which may be phased into the condominium. Equity simply will not allow that and the law, if properly interpreted, does not require it. [7/]

[7/] Bank One states several times that unit owners share ownership and "liabilities" implying an agreement to share this mortgage. The statement is too broad. Unit owners share liability for "common expenses" which are defined as expenses

All objections disappear, however, if only units in the new phase are affected. The statute requires all persons having record interests in the property to join in the execution of the Amendment. Florida Statute §718.403(7). The owner of the property being declared to condominium will therefore be concurrently consenting to the imposition of the mortgage lien on the newly introduced units thereby eliminating the objection of an ex-post facto derogation of rights.[8/] The mortgage holder's lien will extend to each unit in the phase, a result to which he will have consented by his joinder. Each Phase II participant has notice of the mortgage, the exact amount thereof and its economic effect. The total value of the various condominium parcels contained in the new phase will also equal or exceed the liens on the properties being submitted to Phase II or, by definition, the Phase II properties are over mortgaged. Just as the Phase I purchasers together discharged all liens on Phase I properties, the Phase II unit owners will expect together to discharge all liens on Phase II properties. In practice, this

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incurred by the Association for the condominium. Florida Statute §718.103(8). This mortgage was not incurred by the Association for the condominium.

[8/]And also limiting any conflict with the purported general principle cited by the Fourth District Court of Appeal that a lien of a mortgage covers only the property included in its description. 17 FLW D1045 @ 1046. Caples v. Taliaferro, 144 Fla. 1, 197 So. 861 (1940) and Alabama-Florida Co. vs. Mays, 111 Fla. 100, 149 So. 61 (1922) simply stand for the proposition that a mortgage will not encumber land which the owner thereof does not consent to be encumbered by the mortgage. That necessary consent is given by the submission. Florida Statute § 697.02 is inapposite. It simply establishes that Florida applies lien theory not title theory to mortgages.

will be done by partial releases on parcels in the same manner as partial releases are given in either a one-phase condo or the first phase of a phase condo. (In the real world the consuming unit owner never pays development loans directly, they are paid by the developer by application of unit sale proceeds to partial release payments.) Under this interpretation, each party's rights are protected. [9/]

It is perfectly reasonable, consistent with due process, consistent with the statutory language and consistent with economic expectations, to subject the Phase II parcels and only those parcels to the Bank One mortgage. Bank One's rights would clearly be protected in this case. It will have improved its position from holding a mortgage on 1.43 acres of land to holding a mortgage on 8 units located upon 6.86 acres. At the same time, only persons consenting with full knowledge of the circumstances will be affected by the mortgage.

[9/] All the arguments asserted in Bank One's brief are satisfied if the mortgage attaches only to Phase II units. Bank One never attempts to argue why the mortgage should be spread to Phase I. Its argument is logically limited to the principle that the mortgages must attach to **some** unit(s).

III THE UNIT OWNERS ARE INDISPENSABLE PARTIES TO THIS ACTION

Defendant, Sunshine Meadows Condominium Association, Inc., filed a Motion to Dismiss for Failure to Join Indispensable Parties (A-79) asserting that the unit owners were indispensable parties to the action to the extent the suit seeks to foreclose upon each of the individual units. Plaintiff argued at the summary judgment hearing that the Association represents each of the unit owners pursuant to F.R.C.P. 1.221 and therefore the unit owners themselves are not indispensable parties. The Order Granting Bank One's Motion for Partial Summary Judgment declared the Motion to be "moot" as a result of the grant of summary judgment as to Count I. That was clear error because it is inconceivable that the grant of summary judgment rendered the motion moot.

In Paragraph 1 of the Order, the Court granted Plaintiff's Motion for Partial Summary Judgment. In Paragraph 2 of the Order, the Court found the allegations of Count II of the Second Amended Complaint (the Count which sought foreclosure only of the 1.43 acres) to be moot. This necessarily means that the Court granted summary judgment on Count I. Count I of the Complaint asks for an imposition of the Plaintiff's mortgage lien against each of the units in the condominium. This portion of the Court's Order necessarily affects each of the unit owners. An inconsistency arises in Paragraph 3 of the Order which states

that the Association's Motion for Dismissal for Failure to Join Indispensable Parties (the unit owners) is deemed moot by rendition of the Order. A ruling that an issue is moot determines that a decision on the merits of the issue is no longer necessary as a consequence of other events. It is a finding that the issue does not have to be reached.

The only order on Plaintiff's Motion for Partial Summary Judgment which could have rendered the motion on indispensable parties moot would have been an order **denying** the imposition of the lien against the individual units. The attempt to spread the mortgage over all the units was the basis for the Motion to Dismiss for Failure to Join the unit owners. Had summary judgment been rendered in **Defendants'** favor on that issue, then the unit owners would not be affected and the issue of joinder would have been truly rendered moot. To the contrary, the **granting** of summary judgment in favor of Plaintiff on Count I is the only circumstance under which the Motion for Failure to Join Indispensable Parties would **not** be moot. The practical effect of the ruling is, accordingly, to have denied the Motion. This is error because the unit owners are indispensable parties to Count I. The principle that the owner of the legal title of the land being foreclosed is a necessary and indispensable party to a suit to foreclose a mortgage is basic. Fla. Jur. 2d Mortgages §296; Jordon v. Sayre, 24 Fla. 1, 3So. Mortgages (1888); W.S.C. Co. v. Anniston National Bank, 140 Fla. 213, 191 So. 330 (1989).

Plaintiff tries to avoid this basic principle by claiming that the Condominium Association can represent the unit owners. That is incorrect.

A condominium Association cannot under Rule 1.221 be named as the defendant representative of the unit owners in a mortgage foreclosure action directed against the individual units. Rule 1.221 allows the Association to represent the unit owners "concerning matters of common interest."

The matter of the effect of a mortgage on the various units in the condominium is not a matter of common interest. Each unit is by definition a distinct piece of real property separately owned. The various units will have been purchased at different times (some before and some after Bank One's mortgage and the phase amendment making the 1.43 acres part of the condominium property) and each unit will have mortgage liens created at different times. The timing of acquisitions of the various interests goes to the heart of a mortgage foreclosure action. The variety of circumstances under which the various unit interests were created requires that each of the unit owners be before the Court. Because these circumstances are not common, the Association is not in a position to adequately know and raise the defenses arising therefrom as it would be, for instance in a suit involving a construction defect in the roof. It is the "roof-type" suit which is common and covered by Rule 1.221; mortgage foreclosures are not.

The arguments raised on the merits in this case demonstrate that the interests of the various unit owners are not common. Phase I unit owners would want to raise the arguments made by Prime Bank in this brief. Owners in Phase II would prefer Bank One's argument to Prime Bank's argument because if Bank One is correct, Phase I owners must share the payment of the mortgage. This distinct difference in interests prevents the Association from being an appropriate representative of all of the owners.

CONCLUSION

The portion of the Fourth District opinion reversing the Order Granting Bank One's Motion for Summary Judgment should be affirmed. However, the portion of the opinion declaring that the Bank One mortgage cannot be foreclosed against Phase II units should be quashed.

This Court should also overrule Judge Lupo's declaration that the Motion to Dismiss for Failure to Join Indispensable Parties is moot and require the joinder of all Phase II unit owners.

Respectfully submitted,

ALLEY, MAASS, ROGERS & LINDSAY, P.A.
321 Royal Poinciana Plaza, So.
Palm Beach, FL 33480
(407) 659-1770

By: _____
GEORGE P. ORD
Florida Bar No. 177808

CERTIFICATION

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to all attorneys on the attached Service List by placing a copy of same with United States Postal Service on this the 25th day of September, 1992.

ALLEY, MAASS, ROGERS & LINDSAY, P.A.

BY: _____

GEORGE P. ORD
Florida Bar No. 177808
Attorneys for Prime Bank
321 Royal Poinciana Plaza
Post Office Box 431
Palm Beach, Florida 33480
(407) 659-1770

SERVICE LIST

MARK B. KLEINFIELD, ESQ.
JONES, FOSTER, ETC.
Post Office Drawer E
West Palm Beach, Florida 33402

EDWARD B. COHEN, ESQ.
SCHWARTZ, GOLD, COHEN & ZAKARIN
Barnett Bank Building
1800 Corporate Boulevard, North West
Boca Raton, Florida 33431

DANIEL S. ROSENBAUM, ESQ.
Reflections Building, Suite 720
450 South Australian Avenue
West Palm Beach, Florida 33401

K.T.I. CORPORATION
c/o The Corporation Trust Company
1209 Orange Street
Wilmington, DE 19801

WILLIAM McPHARLIN, ESQ.
One East Broward Blvd.
Penthouse Suite
Ft. Lauderdale, FL 33301

ANTHONY H. PELLE, ESQ.
Suite 700
2699 South Bayshore Drive
Miami, FL 33133

HARRIS R. ANTHONY, ESQ.
Southern Bell Telephone & Telegraph Co.
Museum Tower, Suite 1910
150 West Flagler Street
Miami, FL 33130

FRANCIS X. SEXTON, JR., ESQ.
Conception, Degrandy et al
999 Ponce de Leon Blvd., #1015
Coral Gables, FL 33134

KEVIN D. WILKINSON, ESQ.
Wilkinson & Wilkinson
Northbridge Centre
515 Flagler Drive
West Palm Beach, FL 33401