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Tallahassee, Florida 32399-1927

CARTERET SAVINGS BANK, F.A.,

Petitioner,

v.

CITIBANK MORTGAGE CORPORATION,

Respondent.

_____/

CASE NO: 81,375

District Court of Appeal,
4th District-No. 91-2185

PETITIONER'S REPLY BRIEF

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PREFACE

Petitioner, Carteret Savings Bank, F.A. (Carteret) and Respondent, Citibank Mortgage Corporation (Citibank) will be referred to by name.

POINT ON APPEAL

CARTERET'S ACQUISITION AND DEVELOPMENT MORTGAGE WAS ENTITLED TO PURCHASE MONEY MORTGAGE PRIORITY

Citibank's feeble attempt to explain away the Bob Brown/Sam Smith hypothetical ("Sam Smith has a new building on the property and Bob Brown's building is not", Answer Brief, pg. 11), merely points up the logical indefensibility of the Fourth District's holding.

The general policy which favors lenders who have enabled the creation or improvement of property over general creditors who lent nothing to the creation of the security, is embodied in the purchase money mortgage priority, the U.C.C. Article IX preferences, and elsewhere in the law. This principle demands recognition of the priority of this acquisition and development loan.

The Florida legislature's recognition and approval of this principle by its adoption of the U.C.C. Article IX, merely reinforces the correctness of Carteret's position. Of course, it is true that Article IX by its terms does not apply to these facts, but the principle underlying the Article IX priorities certainly does apply by analogy.

The legal fiction which underlies the purchase money mortgage

priority further supports application of the priority to the facts at bar, given that these purchase and construction monies were lent as part of a single transaction, and thus Citibank's lien had no opportunity to attach ahead of Carteret's lien, to any extent.

Most important in this Court's consideration of this question of first impression, should be the underlying policy considerations. Fairness alone demands that Carteret prevail. In essence, Citibank is asking to be unjustly enriched by the collateral which Carteret paid for.

In its brief Citibank acts like it has somehow been victimized by Carteret. Yet, it fails to explain how it is any worse off today than before this loan transaction occurred. Carteret did nothing to interfere with Citibank's collection of its judgment debt. Of course, Carteret did nothing to aid Citibank, but it had no legal or moral obligation to do so.

Citibank's position seems to be that lenders owe some duty to the prior judgment creditors of their borrowers, to insist that the borrowers satisfy their outstanding judgment debts before the lender can deal with them. Obviously, where a purchase money mortgage priority exists, the lender need not insist upon prior satisfaction of outstanding judgments. In fact, one of the policies which underlies the purchase money mortgage priority is the avoidance of this very impediment to lending activity. County of Pinellas v. Clearwater Federal Savings and Loan Association, 214 So.2d 525, 529 (Fla. 2nd DCA 1968). Returning to the hypothetical, one must ask why Sarasota Savings must concern itself with its

borrowers unsatisfied judgment debts, whereas Bradenton Bank does not have to concern itself with such debts at all? Citibank offers no satisfactory answer to this question, because there is none. The fact that Sam Smith's building is newer than Bob Brown's is immaterial from a policy perspective, and again merely proves the prejudicial effect of the Fourth District's holding, favoring lending for the purchase of existing structures over lending for the purchase and construction of new buildings.

Citibank essentially concedes that the economic policy justification which underlies the priority doctrine is aimed at encouraging "commercial and real estate transactions generally", County of Pinellas, supra, at 529. What Citibank fails to explain is why this policy does not apply fully in the acquisition and construction context. Assuming that an economically sound lending transaction is offered by a borrower to a lender, why should the lender have to concern itself (or its title insurers) with the unrelated debts of the potential borrower. More importantly, why should there be any difference based upon whether the building is already standing on the property or yet to be constructed.

Who knows how many economically justifiable development opportunities have been foregone because acquisition and development lenders refused to risk the uncertain state of the law as it existed prior to the Fourth District's decision, where the borrower had substantial outstanding judgment liens which the borrower could not satisfy. Unless this Court acts to reverse the Fourth District's holding, such borrowers will have been

effectively shut out of the acquisition and development loan market (but not the acquisition loan market), notwithstanding the fact that in an individual case acquisition and development may make far more economic sense than the purchase of an existing structure.

Citibank goes on for pages about the "negligence" of Carteret's title insurer. Yet it admits, as it must, that this is "irrelevant to the issues to be decided" (Citibank brief at 13). Carteret's title insurer clearly made an error in missing this judgment lien in light of the uncertainty of the law in this area. It is prayed, however, that this will be a fortuitous error, which will allow an issue to come before this Court which the chilling effect of uncertainty might otherwise have prevented from becoming ripe for review. Perhaps through this title insurer error, future acquisition and development lenders and their title insurers can be relieved from worrying about such matters, as both fairness and economics would dictate.

The most modern and apposite authority on the question at bar is Hand Trading Co. v. Daniels, 126 Ga. App. 342, 190 S.E. 2d 560 (1972). Citibank tries to make some distinction based upon loan disbursement. What Citibank is trying to get at is hard to fathom. At bar, Citibank stipulated that all of the loan funds were used for construction and development purposes. In the Hand case, the court left no doubt as to the facts, which are fundamentally the same as those at bar:

> The fact that no house was constructed on the land at the time of the transaction will not bring about a different result as it is clear and undisputed that the loan was made for the purpose of providing purchase money for the lot and

> the construction of a house which has been accomplished. The trial court's judgment declaring that the defendant's prior judgment lien is inferior to the security instrument of the Farmers' Home Administration is
>
> Affirmed.

Id. at 561.

Citibank cites several ancient and inapposite authorities in its brief in addition to those previously distinguished or refuted in the Initial Brief.

The decision in Gorham v. Farson, 119 Ill. 425, 10 N.E. 1 (1887), does not disclose the purpose for which the excess monies were lent, and is for that reason inapposite. Again, Carteret only asks that priority be recognized where all of the loan funds are used for acquisition and development of the subject land.

The decision in Commerce Savings of Lincoln, Inc. v. Robinson, 213 Neb. 596, 331 N.W. 2d 495, 497-98 (1983), had nothing to do with anything even close to the issue posed at bar.

In re Shapiro, 35 F.Supp 579 (D. Md. 1940), involved only the question of whether the borrower had committed perjury in claiming that the entirety of the loan was to be used as purchase money, where some of the monies had been used for incidental closing expenses. The quoted language is clearly dicta, and it is highly doubtful that even Citibank would seriously contend that the legal discussion in Shapiro is, or should be, the law in Florida.

Noll v. Graham, 27 P.2d 277 (Kan. 1933), was reversed by Shade v. Wheatcraft Industries, Inc., 248 Kan. 531, 809 P.2d 538 (Kan. 1991). The issue at bar was posed to the Kansas Supreme Court, but the Court expressly avoided the issue based upon the fact that in

that case there was an express subordination agreement. Id., at 545.

C & L Lumber and Supply, Inc. v. Texas American Bank/Galleria, 110 N.M. 291, 795 P.2d 502 (Sup. Ct. 1990), involved a refinance where the second mortgage was used to purchase a separate tract of land. Also, a clearly inapposite factual scenario.

Finally, Gellas, et al. v. B.L.I. Construction Co., 148 Ga. 527, 251 S. E. 2d 800 (1978), was solely a construction loan, none of the monies going toward the purchase of the underlying real estate. That admittedly tougher case is not before the court on this appeal.

Citibank attempts to piece together from these remnants what it hails as a "modern trend". The truth is that this area is a judicial backwater, which has not been meaningfully explored by any court. It is safe to say that any thorough written exposition of the law will become the leading case in the country on this point. There is no one to follow. This court is asked to lead.

CONCLUSION

This court should answer the certified question in the affirmative, declaring the entire amount of this acquisition and development mortgage to have priority over the lien of the general judgment creditor.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to KENNETH S. HOFFMAN, ESQ., Attorney for Petitioner, 799 Brickell Plaza, Suite 702, Miami, FL 33131; JESSE H. DINER , ESQ., Atkinson, Jenne, Diner, Stone, Cohen & Klausner, P.A., 1946 Tyler Street, P.O. Drawer 2088, Hollywood, FL, 33022-2088 and ALFRED A. LASORTE, ESQ., Alfred A. Lasorte, Jr., P.A., 501 South Flagler Drive, Flagler Center, Suite 503, West Palm Beach, FL 33401 this 13th day of July, 1993.

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