IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,242

HOLLY LAKE ASSOCIATION, INC.,

Petitioner,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Respondent.

PETITION FROM THE FOURTH DISTRICT COURT OF APPEAL, CASE NO. 93-0750

ANSWER BRIEF OF RESPONDENT

HOLLAND & KNIGHT

Steven L. Brannock
Julia S. Waters
Post Office Box 1288
Tampa, Florida 33601
(813) 227-8500

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INTRODUCTION

Petitioner, a mobile home park homeowner's association, seeks review of a decision of Florida's Fourth District Court of Appeal in favor of Federal National Mortgage Association (the "Bank") in a lien priority dispute arising out of a mortgage foreclosure and foreclosure counterclaim action below. Petitioner claims that its 1991 claim of lien "relates back", for lien superiority purposes, to a document filed in 1974. Under this novel theory, petitioner seeks to convince this Court that its 1991 recorded Claim of Lien is actually superior to the Bank's 1983 recorded mortgage lien on the subject property.

The Bank will show in its brief that the Fourth District Court of Appeal correctly rejected petitioner's attempt to defeat the priority of the Bank's mortgage lien. The court correctly relied on the plain language of the 1974 document in determining that the 1974 document failed to create any automatic, continuing "super-priority" lien which would allegedly transform appellant's inferior 1991 lien to a position of superiority under the caselaw. Instead, the 1974 document did nothing more than grant a conditional right to impose a lien in the event of a nonpayment of mandatory assessment fees. Neither the record nor the caselaw relied upon in petitioner's brief support the alleged superiority of petitioner's lien under the facts of this case.

In this answer brief, petitioner, Holly Lake Association, Inc., will be referred to as "Holly Lake." Respondent, Federal National Mortgage Association, will be referred to as "the Bank."

Holly Lake's initial brief will be referred to as "IB." The record will be referred to as "R."

STATEMENT OF THE FACTS AND THE CASE

This petition arises from a decision of the Fourth District Court of Appeal reversing the trial court's grant of summary judgment in favor of Holly Lakes in a mortgage foreclosure action below (R 109). The Bank brought the foreclosure suit against owners of property located in Holly Lakes, a mobile home park (R 1-5). Petitioner, Holly Lakes, the mobile home park's homeowner's association, filed a counterclaim asserting an allegedly superior lien against the property for unpaid maintenance assessments (R 25-29). The past due assessment amount at issue in the counterclaim was $935.05, plus any subsequently accruing unpaid assessments (R 111).

Holly Lake's Claim of Lien, however, was not filed until 1991, after the property owners' first default on their monthly maintenance assessment (R 18). Thus, Holly Lake's Claim of Lien was not recorded until eight years after the Bank's mortgage was recorded in 1983 (R 10-17).

Although the parties to this appeal agree that "first in time, first in right" is the applicable rule of law in determining the superiority of their respective liens, both the Bank and Holly Lake filed respective motions for summary judgment below, each asserting the superiority of its lien (R 43, 60).

The Bank claimed that its 1983 mortgage lien was superior because it was recorded first, eight years before Holly Lake's lien was recorded. Holly Lake claimed its 1991 lien was superior, asking the trial court to disregard the actual 1991 date of the lien filing and instead "relate back" the recording date of the lien to the earlier recording date of certain documents giving rise to Holly Lake's right to institute a lien for past due maintenance fees. These documents, the Declaration of Covenants, Restrictions, Limitations, Conditions, Charges and Uses Covering Real Property Described Herein ("Declaration") were recorded in 1974 (R-72).

The Declaration states, in relevant part, that

> In the event the monthly mobile type home site charge is not paid when due, Owner, or its designee, shall have the right to a lien against said site and the improvements contained thereon for any such unpaid charges; and shall have the right to enforce said lien in any manner provided by law for the enforcement of mechanics' or statutory liens, but Owner shall not be restricted to such procedure in the collection of said overdue charges.

(R-73).

A later related document, recorded in 1978, similarly permitted a property management firm to "effectuate a lien upon said property" in the event of nonpayment of "the current monthly assessments". This general right to execute a lien on the property for nonpayment was assigned to Holly Lake in 1989 along with the other rights contained in the Declaration of Covenants and subsequent related documents.

The trial court determined that the Declaration giving rise to Holly Lake's right to file the 1991 lien was recorded in 1974, thereby putting the Bank "on notice" in 1983 of appellee's right to the instant 1991 lien (R-110). Summary final judgment in favor of Holly Lake was entered by the trial court in the foreclosure and counterclaim against the Bank.

The Fourth DCA reversed. Interpreting the plain language of the 1974 declaration, the court held that the declaration did not purport to create an automatic lien, but instead merely created the right to a lien in the event of non-payment. According to the court, "to give a lien super-priority in the absence of clear language to that effect would undermine the principle of notice embodied in the recordation and registration statues."[1]

The court then certified the priority question to this Court. After Holly Lake's motions for rehearing and rehearing en banc were denied, Holly Lake filed its petition seeking discretionary review in this Court.

SUMMARY OF THE ARGUMENT

Florida law determines lien priority based upon the established tenet: "first in time, first in right." Since the Bank's mortgage was recorded prior to Holly Lake's lien, the Bank's interest is superior. Alternatively the Bank's mortgage

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[1] This is not the first time the Fourth DCA has addressed this very issue. In earlier consolidated cases, Holly Lake and the Bank litigated the same priority dispute. In those cases, the Bank prevailed on summary judgment in the trial court and the Fourth DCA affirmed without opinion. Holly Lake Association, Inc. v. Federal National Mortgage Association, 615 So. 2d 168 (Fla. 4th DCA 1993).

is superior to appellant's lien based upon the Purchase Money Mortgage Rule.

Holly Lake misreads the Bessemer holding which provides that, for a claim of lien to relate back to the recording of the declaration of covenants, the declaration must contain super-priority language which would provide notice to subsequent parties. Otherwise, the integrity of the entire system of recording and constructive notice of property encumbrances is thrown into chaos. The instant Declaration merely provides for the express right to a lien, conditioned upon the property owner's failure to pay mandatory assessment fees; it does not create a continuing lien as in Bessemer. Absent the Declaration's creation of such a continuing lien, the "relation back" approach utilized in Bessemer is inapposite. The Fourth DCA's decision giving priority to the Bank's first mortgage should be affirmed.

ARGUMENT

This appeal presents a simple issue of lien superiority in the context of a mortgage foreclosure below. The material facts in this case are undisputed. The Bank recorded its mortgage on the subject property in 1983. Holly Lake's Claim of Lien was recorded in 1991, several months after the property owners first defaulted on mandatory assessment fees. The Fourth DCA held that the Bank's mortgage is superior because it was recorded first.

Although Holly Lake agrees that the superior lien in this case is the first recorded lien on the subject property, it attempts to convince this Court to disregard the actual time its lien was recorded. Instead, Holly Lake asks the Court to give its lien superiority based on an earlier recording date in 1974 of a document, the Declaration, which does nothing more than establish Holly Lake's right to effectuate its 1991 lien on the subject property for unpaid assessments.

In essence, Holly Lake argues that the 1974 declaration of covenants constitutes a "super-priority lien" of infinite amount and infinite duration taking priority over any mortgage holder, including the Bank's first mortgage. Although such a super-priority lien is permissible, the cases require far more specific language than contained in the declaration at issue here.

I. THE BANK'S PURCHASE MONEY FIRST MORTGAGE IS SUPERIOR TO HOLLY LAKE'S LIEN.

A. The Bank's Lien Is Superior Because It Was Recorded Prior In Time To Holly Lake's Lien.

It is well-settled in Florida that the rule of law governing priority of lien interests is "the first in time is the first in right." Walter E. Heller & Co. Southeast, Inc. v. Williams, 450 So.2d 521, 532 (Fla. 3d DCA 1984), rev. denied, 462 So.2d 1108 (Fla. 1985); see also Bank of South Palm Beaches v. Stock, Whatley, Davin & Co., 473 So.2d 1358 (Fla. 4th DCA 1985).

In the instant case the Bank's mortgage was recorded in 1983; Holly Lake's lien was not recorded until 1991. Therefore, the Bank is "first in time" and its mortgage was correctly determined superior as "first in right" by the court below.

Holly Lake's notion that its 1991 lien should "relate back", for purposes of lien superiority, to the 1974 recording of the Declaration is completely unsupported by the record. The express, unambiguous language of the Declaration clearly creates nothing more than the right to execute a lien on the subject property after an owner fails to pay the monthly assessment fee (R-127) ("In the event the monthly ... charge is not paid when due, [appellant] shall have the right to a lien ... for any such unpaid charges") (emphasis added). Clearly, the express language of the Declaration requires nonpayment of the monthly fees as a condition precedent to appellant's right to effectuate a lien (R-127). The "right to a lien" upon the occurrence of a future

event is a far cry from the immediate creation of a super-priority lien.

Nothing about the 1974 declaration or the 1991 Claim of Lien gives any hint of the creation of a super-priority lien. The 1991 lien does not mention its alleged superiority, nor does the 1974 Declaration make any provision for assessment liens to relate back to the recording date of the Declaration. In short, Holly Lake cannot and does not point to any record evidence supporting its contention that the parties to the Declaration "intended" the instant covenant to create a lien at any point in time prior to the property owner's failure to pay the monthly assessment fees. Under the instant facts, the necessary failure to pay did not occur until 1991, some eight years after the Bank recorded its mortgage lien.

B. Bessemer Does Not Control This Case.

Holly Lake mistakenly relies on this Court's decision in Bessemer v. Gersten, 381 So. 2d 1344 (Fla. 1980) to support its lien superiority theory in this appeal. Holly Lake's argument for the blind application of the relation back holding of Bessemer, without regard for the critical differences in the specific declaration provisions of the two cases, as well as the facts in general, is meritless.

In Bessemer, the superiority of competing third party liens was not even at issue.[2] In sharp contrast, Bessemer determined

[2] Holly Lake's reliance on Oceanside Community Ass'n v. Oceanside Land Co., 147 Cal. App. 3d 166, 195 Cal. Rptr. 14 (Cal. App. 1983) is similarly misplaced. IB at 14. As in Bessemer,

the competing interests of the defaulting property owner --- instead of a third party mortgage lender like the Bank --- against a homeowner's association with a clearly defined continuing lien against the property --- instead of Holly Lake's grant of the mere right to effectuate a lien in the event of default.

The Bessemer court held that the Bessemer declaration created a lien for assessments at the time the landowner accepted the deed to the property, and further, that the lien related back to the filing of the declaration. The language of the declaration at issue in Bessemer, however, is readily distinguishable from the language at issue in this appeal. The relevant declaration provision in Bessemer stated that the developer:

> shall have a lien on such owner's lot for the aforesaid amount of $10.00 per month until such amount is paid, and that such lien, where the same remains unpaid for a period of thirty days of more, may be foreclosed in equity in the same manner as is provided for the foreclosure of mortgages upon real property.

Bessemer, 381 So.2d at 1346 (emphasis added). This clear and unambiguous language effectively establishes an ongoing, "automatic" lien on subject properties in Bessemer, continuing until the owner's payment of the fees on a monthly basis. The Bessemer covenant is materially distinguishable from the language in the instant Declaration which merely provides for a "right to a lien" in the future if maintenance fees are not paid.

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the superiority of competing third party liens was not at issue before the Oceanside court.

Holly Lake, in fact, cites to no Florida case supporting its assertion of a superior lien. Like the Bessemer court, other jurisdictions permitting super-priority of an assessment lien over a mortgage have involved declaration provisions which, like the Bessemer lien, but unlike the instant Declaration, create a continuing lien (not a right to a lien) which secures future assessments. See e.g., Kell v. Bella Vista Village Property Owners Ass'n, 528 S.W.2d 651, 654 (Ark. 1975) (the declaration provision provided that assessments "shall be a continuing lien upon the property against which each such assessment is made"); Inwood North Homeowners' Ass'n, Inc. v Harris, 736 S.W. 2d 632 (Tex. 1987) (the declaration provision provided that assessments are "a charge on the land and shall be secured by a continuing Vendor's lien upon the Lot against which such assessments or charges are made"); Leisuretowne Association, Inc. v. McCarthy, 475 A. 2d 62, 64 (N.J. App. 1984) (the declaration provision provided that common expenses were "chargeable to a member and his family unit [and] shall constitute a lien against [it] in favor of the Association"); Boyle v. Lake Forest Property Owners Ass'n, 538 F. Supp. 765, 769 (S.D. Ala. 1982) (although the relevant declaration provision was not quoted in the opinion, the court apparently construed the provision to create a continuing lien, as evidenced by its conclusions that the relevant declaration created "a charge or lien upon the subject real property" and that the declaration "by its terms imposes a lien on the property for payment of the recreational assessment fee")

(all emphasis added). The court in In re Lincoln, 30 B.R. 905 (Bkrtcy. Colo. 1983), similarly did not recite the declaration provision it was construing, but obviously construed the provision to create a continuing lien dating back to the time the declaration was recorded.

These cases in no way suggest a different result below. In contrast to these cases, the instant Declaration does nothing but establish the right to a lien upon default on the monthly assessment fee. The court below correctly relied upon the absence of any such clear language in the Declaration creating a super-priority lien.

Importantly, in St. Paul Federal Bank for Savings v. Wesby, 501 N.E.2d 707, 716 (Ill. App. Ct. 1987), the court distinguished Bessemer and refused to permit an assessment lien to take priority over a mortgage. The court held that a declaration that provided for a lien to secure assessments but did not specify that the lien was a continuing lien that related back did not adequately put mortgagees on notice of the possibility of such a relation back. The same distinction and reasoning apply to this case.[3]

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[3] Holly Lake attempts to dismiss the supportive analysis of Wesby. Although the declaration in Wesby contained a provision subordinating the association's lien to a first mortgage lien for common expenses incurred before the filing of the foreclosure action, the court's analysis focused on the issue of priorities other than the priorities controlled by the subordination provision. See Wesby, 501 N. E. 2d at 711-13. The Wesby court properly distinguished continuing, automatic liens from liens, like the instant lien, which do not arise until assessments are not paid.

Thus, where the instant Declaration expressly requires the event of nonpayment of the fees to trigger Holly Lake's right to effectuate a lien against the subject property, no automatic, continuing Bessemer lien was created by the instant landowners' acceptance of the deed. The issue of whether Holly Lake's lien "relates back" to the 1974 recording date of the Declaration is therefore never even reached under Bessemer, in the absence of Declaration language creating a Bessemer continuing lien.[4]

C. Public Policy Considerations Distinguish Bessemer.

There are also distinct policy considerations that distinguish Bessemer from the instant case. In Bessemer, the landowner was attempting to assert his constitutional homestead protection to defeat his own failure to pay assessments. Significantly different, the instant case relates to relative priority of claims of a third party mortgagee and homeowner's association.

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[4] Though Holly Lake urges this Court to adopt the reasoning of a Mississippi court in Mendrop v. Harrell, 231 Miss. 679, 103 So. 2d 418 (1958), to read an implicit continuing covenant into the express language of the Declaration, Mendrop, like Bessemer, is completely distinguishable on its facts. The Mendrop declaration contained a bare covenant to pay expenses for sidewalk and street improvements. The Mendrop court reasoned that a bare covenant to pay was meaningless without some means of enforcement of the obligation, thereby finding an implicit continuing lien on the subject property to secure the paving expenses.

In sharp contrast, the instant Declaration provision contains an express enforcement provision for assessment liens conditioned specifically upon the event of an owner's default on the assessment fees, thereby creating a clear right to a lien upon nonpayment on the face of the document. The Fourth DCA below correctly relied on the plain language of the Declaration.

Further, the provision on which Holly Lake relies for its lien for assessments is buried in a comprehensive declaration encompassing many subjects. As a matter of sound policy, nothing but clear and specific language in such a comprehensive document should be held adequate to put the world on constructive notice of a continuing lien with super-priority. Holly Lake's Declaration fails to provide such adequate notice, detailing only the right to effect a lien after a default takes place. At the time the Bank extended its mortgage, no such default had occurred. The plain language of the Declaration thus gave no constructive notice nor, indeed, even any hint that the parties to the Declaration intended that Holly Lake's 1991 Claim of Lien should be superior to the Bank's prior recorded 1983 mortgage.[3]

Lenders such as the Bank are entitled to rely on the integrity of the public records and the underlying system of constructive notice of pre-existing encumbrances of record. Permitting assessment liens to relate back where such super-priority is not clearly expressed in the declaration would effectively require lenders to make critical lending decisions

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[3] In construing the Declaration, the Court should attempt to effectuate the intent of the parties thereto. Moore v. Stevens, 90 Fla. 879, 106 So. 901 (1925). In so doing, restrictions imposed by a grantor/seller should be strictly construed in favor of the grantee/buyer. Id.; Washingtonian Apartments Hotel Co. v. Schneider, 75 So.2d 907 (Fla. 1954); Norwood-Norland Homeowners' Ass'n v. Dade County, 511 So.2d 1009 (Fla. 3d DCA 1987). These principles should prevent any construction of the "right to a lien" language in the Declaration as creating a continuing lien for assessments that relates back to the filing of Declaration. The Declaration itself is bare of any such intent and, in fact, expressly requires default on the assessment fees as a pre-condition of imposing such a lien (R 73).

without fair record guidance regarding existing liabilities against the subject property.

If courts permit homeowners' association assessment liens to relate back to the filing of declarations without regard for the precise language in the declaration, institutional lenders, as well as any other parties that rely on the public records, will be uncertain of their priority. Lenders will likely refuse to lend where the debt is secured by property subject to assessment liens. To the extent lenders will lend, borrowers will be forced to bear the burden of the lenders' increased risk resulting from the inability to rely on record priority. Certainly, it is a better policy to strictly interpret assessment lien provisions to permit relation back only where it is clearly and expressly provided in the declaration, thereby preserving the integrity and fairness of our system of constructive notice.

D. The Mere Absence Of Statutory Superiority Of Mortgages Over Homeowner's Association Liens Does Not Logically Support The Superiority of Holly Lake's Lien.

Holly Lake's argument regarding the absence of statutory protection for the superiority of mortgage liens over homeowner association liens is gravely flawed. The statutory provision relating to condominium assessments, Section 718.116, Florida Statutes, is part of the Condominium Act, Chapter 718, Florida Statutes, which is a comprehensive codification of the law relevant to the creation and operation of condominiums. The mere presence of a provision in the Condominium Act providing that a condominium assessment lien is effective against a mortgage such

as the Bank's mortgage only from and after such time that a claim of lien is recorded should not be interpreted to mean that the same rule does not apply at common law (or by other relevant statute) to homeowners' association assessment liens, for which no similar comprehensive act exists.

If Holly Lake's reasoning is valid, then every provision in the Condominium Act must be considered to be contrary to the law applicable to homeowners' associations. This reasoning would lead to absurd conclusions. For example, the Condominium Act provides in Section 718.111(4) that a condominium association has the power to make and collect assessments for the maintenance of common elements. Certainly this should not be construed to mean homeowners' associations are not empowered to make assessments. Neither should the provision in the Condominium Act establishing the superiority of mortgages to condominium assessment liens be construed as support for the position that the opposite rule applies to homeowners' associations.

E. Even If The Declaration Provided That Assessment Liens Relate Back, The Bank's Purchase Money Mortgage Would Be Superior To Holly Lake's Lien for Assessments.

A purchase money mortgage lien generally has priority over judgments and liens acquired through the mortgagor. Baron v. Aiello, 319 So.2d 198 (Fla. 3d DCA 1975); Associates Discount Corp. v. Gomes, 338 So.2d 552 (Fla. 3d DCA 1976). This rule of law gives a purchase money mortgage priority even over liens arising through the mortgagor which attach prior to a purchaser's acquisition of the property. National Title Ins. Co. v. Mercury

Builders, Inc., 124 So.2d 132 (Fla. 3d DCA 1960); Van Eopel Real Estate v. Sarasota Milk Co., 129 So. 892, 897 (Fla. 1930).

As stated by the Second District Court of Appeal in County of Pinellas v. Clearwater Federal Savings & Loan Association, 214 So. 2d 525 (Fla. 2d DCA 1968):

>]i]t is a fundamental principle of law ... that where a purchase money mortgage is taken back in consideration of a conveyance ... that subsequently the rights of the purchase money mortgage holder stand as a buffer between the interest of the grantee in the land and other lien holders, even though the other liens are senior in time of acquisition.

Id. at 528-29 (citations omitted) (emphasis added). The Pinellas court explained that this legal fiction permitting the superiority of later recorded mortgages over prior liens is justified by the fact that "it is only through the contribution of the purchase money mortgagor that the security ever came into being". Id. at 529. The court further noted that otherwise "no owner of property would sell with the knowledge that the property conveyed to the grantee would be subject to paramount claims over and above his". Id.

Thus, even if the Declaration specifically provided for an "automatic" lien relating back to the filing of the Declaration, under the above purchase money mortgage rule, the Bank's purchase money mortgage retains its superiority. Although the lien may relate back to the filing of the declaration if so provided, it is a contractual lien that is not created until the purchaser manifests an intent to allow the property to stand as security by accepting the deed. Bessemer, 381 So.2d at 1348. Because liens

created through the purchaser are inferior to a purchase money mortgage even if effective prior to the mortgage, an assessment lien of appellant, even if it related back, would be inferior to the Bank's purchase money mortgage.

CONCLUSION

For all the foregoing reasons, the Bank respectfully requests that the Court affirm the decision of the Fourth District court of Appeal below confirming the priority of the Bank's first mortgage.

Respectfully submitted,

HOLLAND & KNIGHT

Steven L. Brannock
Florida Bar No. 319651
Julia S. Waters
Florida Bar No. 347310
P.O. Box 1288
Tampa, Florida 33601
(813) 227-8500

Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was furnished by U.S. Mail to **Larry A. Karns, Esquire**, 1212 Southeast Second Avenue, Fort Lauderdale, Florida 33316 on this 28th day of October, 1994.

Attorney

35079-10611
TPA2-231208