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

BRIEF OF PETITIONER

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INTRODUCTION

This appeal is from a decision of the Fourth District Court of Appeal that overturned a Summary Final Judgment of Foreclosure in favor of the defendant/petitioner, Holly Lake Association, Inc., and against plaintiff/respondent, Federal National Mortgage Association. In this Brief, the defendant/petitioner, Holly Lake Association, Inc., will be referred to as the "Association." The plaintiff/respondent, Federal National Mortgage Association, will be referred to as "FNMA". The original mortgagee, and the developer of the property, Holly Lake Properties, will be referred to by its full name. References herein to the pages of the original Record are prefaced by the letter "R".

STATEMENT OF THE CASE

FNMA filed this suit for foreclosure of a mortgage against the property owners and against the Association, a homeowners' association. (R.1-5). The Association filed a Counterclaim for the foreclosure of its maintenance assessment lien. (R.25-29).

The Association filed its Motion for Summary Judgment, based upon the affidavit of Theresa S. Ross which established that the Declarations of Restrictive Covenants providing for a maintenance lien were recorded before FNMA's Mortgage. (R.65-68). The affidavit further demonstrated that FNMA had constructive notice of the Association's lien provisions since FNMA's assignor was the developer and creator of certain of the declarations. Because the mortgage of FNMA's predecessor (the former developer) was recorded after the Association's declarations, the trial court granted the Association's Motion for Summary Final Judgment. (R.109-114). The trial court then denied FNMA's Motion for Rehearing. (R.119). FNMA timely appealed to the Fourth District Court of Appeal.

Despite the fact that FNMA's assignor had created some of the declarations and had agreed to be bound by the declarations, the Fourth District Court of Appeal in a written opinion reversed the trial court ruling and held that FNMA's later recorded mortgage took priority over the Association's lien rights created by the declarations, ruling that the declarations did not contain clear language that the lien rights related back to the previously recorded declarations.

The Fourth District certified the following question as one of great public importance:

> WHETHER A CLAIM OF LIEN RECORDED PURSUANT TO A DECLARATION OF COVENANTS BY A HOMEOWNER'S ASSOCIATION HAS PRIORITY OVER AN INTERVENING RECORDED MORTGAGE WHERE THE DECLARATION AUTHORIZES THE ASSOCIATION TO IMPOSE A LIEN FOR ASSESSMENTS BUT DOES NOT OTHERWISE INDICATE THAT THE LIEN RELATES BACK OR TAKES PRIORITY OVER AN INTERVENING MORTGAGE."

The Fourth District denied the Association's motion for rehearing and motion for rehearing en banc. The Association timely filed a notice to invoke the discretionary judisdiction of this Court to review the Fourth District Court of Appeal's decision because the decision passes on a question certified to be of great public importance.

STATEMENT OF THE FACTS

The record of material facts upon which the Association relied in support of its Summary Judgment Motion and in opposition to FNMA's Summary Judgment Motion in the trial court is simple, encompassing only a few basic matters that serve to isolate the question of law the motions present.

The affidavit of Theresa S. Ross, the Association's First Request for Admissions, and the exhibits attached thereto, established these undisputed facts:

(a) The various declarations of covenants and restrictions, as well as various management contracts and agreements were recorded in the Public Records of Broward County as early as 1974, nine years before the time the mortgage of FNMA's assignor, Holly Lake Properties, the developer of the property, was recorded. (R.65-68).

(b) The mortgage of FNMA's assignor was not recorded until December 14, 1983. (R.10-17).

(c) The various declarations that were recorded before the mortgage of Holly Lake Properties, FNMA's assignor, contain the following provision:

> "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 enforce-

ment of mechanics' or statutory liens, but Owner shall not be restricted to such procedure in the collection of said overdue charges."

(d) FNMA and its predecessor had constructive notice of the Association's lien provisions before FNMA's predecessor granted a mortgage on the property. Indeed, FNMA's predecessor, Holly Lake Properties, even had actual knowledge of the Association's lien provisions, since Holly Lake Properties was the developer of the property and responsible for recording certain of these declarations.

(e) In addition to maintaining common property for the benefit of all the owners of Holly Lake, the assessment charges also specifically benefitted the property that is the subject of this action, by providing garbage and trash collection for the mobile home site and providing lawn maintenance (grass cutting) for the mobile home site.

(f) Maintenance charges for the property that is the subject of this action had not been paid to the Association for the months beginning from August, 1990. (R.65-68).

SUMMARY OF ARGUMENT

Various declarations of restrictive covenants and restrictions, as well as management contracts and agreements affecting this property were recorded in the Public Records of Broward County nine years before the mortgage of FNMA's predecessor, Holly Lake Properties, the developer of this property, was recorded. These declarations provided the Association with lien rights for its maintenance assessments for such services as mowing the property owners' yards and disposing of the property owners' garbage. Accordingly, the Association's lien rights have priority over the later recorded mortgage. Walter E. Heller & Co. Southeast, Inc. v. Williams, 450 So.2d 521, 532 (Fla.3rd DCA 1984), rev. denied, 462 So.2d 1108 (Fla.1985).

This Court's decision in Bessemer v. Gersten, 381 So.2d 1344 (Fla.1980) is controlling in this case. In that action the developer provided for maintenance of facilities devoted to common use. In rejecting the lot owner's contention that his claim of homestead superseded the lien provided by the developer's declaration, this Court held that the developer's lien was created at the time the declaration was recorded in the Public Records and the lien related back to the time of the filing of the declaration.

No particular words are needed in the declaration to create a priority position on behalf of a homeowners' association. Instead, all that is needed is an intention that the affirmative covenant should run with the land and constitute a lien on it. Mendrop v.

Harrell, 103 So.2d 418, 424 (Miss.1958). Because FNMA was on constructive notice of the Association's lien rights before the mortgage was placed on the property, and because FNMA's predecessor had actual notice of and agreed to be bound by such declarations, the Association's lien takes priority over the mortgage.

ARGUMENT

WHERE DECLARATIONS OF RESTRICTIVE COVENANTS PROVIDING AN ASSESSMENT LIEN FOR MAINTENANCE OF PROPERTY WERE RECORDED BEFORE A MORTGAGE ON THE PROPERTY, THE ASSESSMENT LIEN HAS PRIORITY OVER THE LATER RECORDED MORTGAGE.

The Lower Court Incorrectly Applied the Bessemer Doctrine

As the lower court recognized, claims on real property are determined by priority in time. Manufacturers & Traders Trust Co. v. First National Bank, 113 So.2d 869 (Fla.2d DCA 1959). Florida law provides that "[t]he well-established rule 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.3rd DCA 1984), rev. denied, 462 So.2d 1108 (Fla.1985); see also, Bank of South Palm Beaches v. Stockton, Whatley, Davin & Co., 473 So.2d 1358 (Fla.4th DCA 1985).

Although stating this principle, the lower court misapplied this rule and the holding of this Court in Bessemer v. Gersten, 381 So.2d 1344 (Fla.1980) by failing to uphold the priority of the Association's maintenance lien over the later recorded mortgage.

There is no question that the declarations were recorded nine years before the mortgage of FNMA's predecessor, the developer of the property. A Management Contract was recorded in the Public Records on September 6, 1974, by the owner of the property. This Management Contract specifically provided for charges upon each mobile type home site within the property. The Management Contract further provided that the owner would place of record a Declaration of Covenants, Restrictions, Limitations, Conditions, Charges and Uses Covering The Property, which were to provide:

> "That all owners of mobile type home sites shall, by the acceptance of their deeds, take subject to all the terms and conditions of this Management Contract, and the Exhibits attached hereto. Said Declarations shall further specifically provide for the payment by all mobile type home site owners of the monthly assessment or charge per mobile type home site. . . ."

The owner then recorded a declaration entitled "Declaration of Covenants, Restrictions, Limitations, Conditions, Charges and Uses Covering Real Property Described Herein" in the Public Records on September 6, 1974. (R.65-68). After providing a series of assessments and charges against each mobile type home lot and providing that the owner or its designee shall have the right to a lien against said site for any such unpaid charges, the Declaration then provided:

> "Purchasers from Owner of mobile type home sites, as same are defined herein, by the acceptance of their deeds, agree to take title subject to, and be bound by, and pay the above and foregoing charge; and said acceptance of deed shall further indicate approval of said charge as being reasonable and fair, taking into consideration the nature of Owner's project,

> Owner's investment in the recreational areas and in view of all the other benefits to be derived by site owners as provided in the Management Contract of even date."

An Agreement was further recorded in the Public Records in 1978 that once again reaffirmed the right of the declarant to make assessments against the property and property owners, and made it clear that these charges were to pay for or provide garbage and trash collection for each mobile type home site and to pay for or provide lawn maintenance for each site, as well as to pay the cost of maintaining the recreational buildings and to provide for street lighting at the property. The mortgage of FNMA's predecessor was not recorded until December 14, 1983. (R.10-17).

The Declaration of Covenants, Restrictions, Limitations, Conditions, Charges and Uses Covering Real Property Described Herein recorded on September 6, 1974, further contained the following provision establishing the Association's lien rights:

> "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."

Other declarations also contained this language. FNMA's predecessor, Holly Lake Properties, specifically agreed to pay the Association's predecessor these precise maintenance charges:

> "HOLLY [Holly Lake Properties] agrees to pay MANER for its services, the sums payable per month per mobile home site as defined herein."

Holly Lake Properties further agreed to the declarations:

> "HOLLY [Holly Lake Properties] has accepted and has agreed to comply and comport with the Declarations of covenants, restrictions, limitations, conditions, charges and uses covering The Property as originally filed and supplemented and accordingly, has further agreed with MANER to fully comply with the intent of said restrictions. Accordingly, HOLLY has agreed that MANER shall collect the monthly assessments or charges per mobile home site and that MANER may utilize said monies collected to pay to MANER for the management and improvement of The Property."

These declarations that provided the Association's lien rights were recorded by at least 1974; the mortgage of Holly Lake Properties, FNMA's predecessor, was not recorded until 1983. Therefore, the Association's lien rights were "first in time" and the lower court thus erred in ruling that the Association's lien was not superior as being "first in right." A mortgagee is to be regarded as a purchaser to the extent of his interest in the mortgaged property. Broward v. Hoeg, 15 Fla.370 (1875); Lee County Bank v. Metropolitan Life Insurance Co., 126 So.2d 589 (Fla.2d DCA 1961). FNMA's mortgage, like the right of a purchaser, is thus clearly inferior to the Association's earlier recorded declarations.

The lien of the Association's declarations and agreements takes priority over any other subsequent claims or liens attaching to the property, since these documents were recorded prior in time

to the interests of the plaintiff. These recordings constitute adequate constructive notice to put all persons dealing with the property involved on inquiry as to the identity of the property on which the lien was created. Sickler v. Melbourne State Bank, 118 Fla.468, 159 So.678 (1935).

Every person who has either actual or constructive information and notice sufficient to put him on inquiry is bound, for his own protection, to make that inquiry which such information or notice appears to direct him to make. Thus, a mortgagee has the duty of making reasonable inquiry to ascertain the existence of other encumbrances on the property. First Federal Savings & Loan Association v. Fisher, 60 So.2d 496 (Fla.1952). Furthermore, because FNMA's interest in the mortgage is derived from Holly Lake Properties, the developer of the property who specifically agreed to such declarations, FNMA actually had actual notice of these declarations and of the Association's lien rights. FNMA therefore constructively agreed to the assessment and lien provisions of the declarations.

As the trial court specifically held, this Court's decision in Bessemer v. Gersten, 381 So.2d 1344 (Fla.1980) is controlling in this case. In that action, as in this case, the developer of a residential subdivision provided for services to the subdivision and for the maintenance of facilities devoted to common use. This type of system was specifically authorized by this Court:

> "A developer, in carrying out a uniform plan of development for a residential subdivision, may arrange for the provision of services to the

> subdivision or for the maintenance of facilities devoted to common use, and may bind the purchasers of homes there to pay for them."
>
> 381 So.2d at 1347.

In rejecting the lot owner's contention that his claim of homestead superseded the lien provided by the declaration, this Court held that the lien of the developer was created at the time the declaration was recorded in the Public Records. On that issue this Court stated:

> "We hold that the respondents, in accepting the deed with actual or constructive notice of the lien provision of the declaration of restrictions, manifested the intent to let the real property stand as security for the obligation. An affirmative covenant can be entered into by acceptance of a deed embodying same. Thus a valid contractual lien was created at that time."
>
> 381 So.2d at 1348.

After declaring that the principle of record notice is fundamental in the law of property, this Court then continued:

> "We hold further that the creation of the lien by acceptance of the deed relates back to the time of the filing of the declaration of restrictions. Thus with regard to the time of attachment of the lien, this case is to be treated as if the respondents had taken title subject to a valid pre-existing lien." (emphasis added).
>
> 381 So.2d at 1348.

This Court's decision in Bessemer that the creation of the lien relates back to the time of the filing of the declaration of restrictions so as to defeat a claim of homestead exemption, a concept created by the Florida Constitution, is even more

applicable to a mortgage, which has no constitutional support.

The homeowner in Bessemer accepted the deed and thereby consented to the lien provision. Here the trial court found that Holly Lake Properties, FNMA's predecessor, accepted and consented to the lien provisions by recording its agreement in the public records.

Bessemer has been followed by numerous courts across the country which have ruled that a declaration which provides a mechanism for assessments normally provides for a lien that relates back to the date the declaration was recorded. Kell v. Bella Vista Village Property Owners Association, 528 S.W.2d 651 (Ark 1975); In Re Lincoln, 30 B.R.905 (Bkrtcy D.Col.1983). In Inwood North Homeowners' Association, Inc. v. Harris, 736 S.W.2d 632 (Tex.1987), the Court noted that it could find no reported case in any jurisdiction which reached a result other than its result, and that these decisions upheld homeowners' associations' rights to foreclose for delinquent assessments. The Court further favorably cited Bessemer's holding that subsequent parties with actual or constructive notice of the lien provisions were bound by such provisions, and that the creation of the lien related back to the time of filing of the declaration of restrictions.

Similarly, the Court in Boyle v. Lake Forest Property Owners Association, 538 F.Supp.765 (S.D.Ala.1982), recognized that a valid contractual lien is created when a party has actual or constructive notice of provisions in a declaration of restrictions which imposes a lien on the property for payment of assessments, citing Bessemer.

The Court in In Re Lincoln, 30 B.R.905 (Bkrtcy D.Col.1983), stated that it could find no authority contrary to the above decision and thus held that the existence of the lien was established by a prior recording of which the bankrupt had constructive notice. Also see Leisuretowne Association, Inc. v. McCarthy, 475 A.2d 62 (N.J.App.1984).

In Oceanside Community Association v. Oceanside Land Company, 147 Cal.App.3d 166, 195 Cal.Rptr.14 (Cal.App.1983), the Court made it clear that an obligation imposed by a declaration of restrictive covenants took priority over a later recorded mortgage. The declaration in that case restricted property next to a residential community to be used as a golf course for ninety-nine years. Even though the present owner of the golf course purchased the property at a foreclosure sale, the court held the owner had constructive knowledge of the restriction, which was senior to the foreclosed liens. Accordingly, the Court held it would be inequitable to allow the owner to escape the restriction.

It is interesting to note that the lien provision in the declaration in Bessemer was quite similar to the language contained in Holly Lake's declarations:

> "Each owner agrees that Behring Corporation, its successors or assigns, shall have a lien upon 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 or more, may be foreclosed in equity in the same manner as is provided for the foreclosure of mortgages upon real property."

The trial court properly found there is no significant

difference between the language used in the declaration in Bessemer and the declaration in this case. In Bessemer the declaration provided that the developer "shall have a lien upon such owner's lot", while the instant declaration provided that the owner or its designee "shall have the right to a lien against said site and the improvements contained thereon for any such unpaid charges." It is significant that this Court did not refer to the specific language used in the declaration. Instead, this Court recognized that the elements for a covenant running with the land had been established. This Court further stated that Florida courts recognize and enforce covenants without regard to the technical legal requirements for covenants running with the land. This Court then matter of factly stated that the creation of the lien related back to the time of the filing of the declaration of restrictions. This Court simply stated:

> "We hold further that the creation of the lien by acceptance of the deed relates back to the time of the filing of the declaration of restrictions."
>
> 381 So.2d at 1348.

Although the lower court ruled that the lien of a homeowners' association takes priority over a mortgage lien only where the declaration contains clear language that the lien relates back to the declaration, it is clear that no particular words are needed in the declaration to create a priority position on behalf of a homeowners' association. Instead, all that is needed for the relation back principle is the following: 1) an intention of the

party creating the restriction to determine whether the declaration provided for a common scheme of maintenance and 2) whether it can be determined, whether or not it was specifically stated in the declaration, that it was the intent of the declaration of restrictions to create a lien.

A leading commentator in the field of real property recognized that the key element in a declaration of restrictive covenants is the intention of the parties and whether the parties intended the covenant to run with the land and constitute a lien on it. As this commentator stated:

> "Promises in deeds for the grantee to perform some act may be expressly or impliedly made a lien upon the land which is subject to foreclosure on breach and which binds the land through constructive notice even in the hands of innocent purchasers. (emphasis added).
>
> 7 Thompson, Real Property (1962 Grimes Replacement) Section 3157 (p.93).

Illustrative of this principle is the decision in Inwood North Homeowners' Association, Inc. v. Harris, 736 S.W.2d 632 (Tex.1987), where the court specifically held that the language of the declaration did not create a vendor's lien. Determinative in that decision was not the specific language used in the declaration, but whether the declaration was a covenant that ran with the land and would specifically bind the parties, their successors and assigns. The court recognized that the decision revolved around when the lien attached on the property. The court then stated that the covenant to pay maintenance assessments for the purpose of repairing and improving the common areas and recreational

facilities touches and concerns the land. Finally, the court stated that the declaration evidenced the intent of the original parties that the covenant run with the land, and the covenant specifically binded the parties, their successors and assigns. After recognizing that a purchaser is bound by the terms of instruments in his chain of title, the Court concluded that the homeowners had constructive notice of the lien and foreclosure provisions in the declarations, so as to be bound by them.

In Leisuretowne Association, Inc. v. McCarthy, 475 A.2d 62 (N.J.App.1984), the court similarly did not consider the specific language used in the declaration to create a lien. Instead, the court quoted from 7 Thompson, Real Property (1962 Grimes Replacement) Section 3157 at 93:

> "Covenants creating liens. - Promises in deeds for the grantee to perform some act may be expressly or impliedly made a lien upon the land which is subject to foreclosure on breach and which binds the land through constructive notice even in the hands of innocent purchasers." (emphasis added).

Just as this Court held in Bessemer, the trial court found that the lien of the Association was created when the declarations were recorded. Accordingly, the lien relates back to the time of the filing of the declarations, prior to the time that Holly Lake Properties' mortgage was recorded. Therefore, the Association's lien clearly has priority over that of the mortgage of FNMA's predecessor.

Holly Lake Has Priority Under
The Mendrop Doctrine

In Mendrop v. Harrell, 103 So.2d 418 (Miss.1958), the court specifically held that a lien created by a developer's covenant for sidewalk paving took priority over a deed of trust (equivalent to a mortgage) where the deed of trust was recorded after the declaration, but prior to the assessment. The declaration there simply provided that the purchaser and his successors in title agreed to bear all the expense required of them incidental to any street or sidewalk paving that may be done in the future, adjacent to the property. The declaration also provided that the covenants were to run with the land and to be binding on all parties claiming under them. No precise language creating a lien was contained within the declaration. Nevertheless, the court had no difficulty in determining that this declaration created a charge or lien upon the land. After stating that the intention of the parties is the test, the court stated:

> "The covenant provides that Harrell and his successors in title agree to bear the expenses for paving to be done in the future. At two places the deed states that this covenant is "to run with the land." Clearly the parties intended that this affirmative covenant should run with the land and constitute a lien on it."
>
> 103 So.2d at 424.

More importantly, the court specifically found that the lien provision of the declaration took priority over the deeds of trust because the lender had constructive notice of the existence of the affirmative covenant. The court stated:

> "However, the 1955 deed nevertheless constituted constructive notice to First Federal of its terms and restrictions, because, 'a subsequent grantee is required to take notice of a building restriction contained in the original deed, even though such restriction does not appear in the subsequent deeds.' Thompson, Ibid., Sections 3616, 3614. A court of equity will enforce any acceptable agreement affecting land against a purchaser with notice of it. Ibid., Section 3615. In brief, First Federal's deeds of trust, with appellee Conaty as trustee, being later in time to appellants' recorded covenant, and First Federal having constructive notice of it, are subordinate to appellants' lien." (emphasis added).
>
> 103 So.2d at 425.

The court thus held the lien of the declaration to be superior to those of the deeds of trust.

As is demonstrated by Mendrop, FNMA was on constructive notice of the Association's lien rights. Moreover, Holly Lake Properties, FNMA's predecessor and the developer of the property, agreed to pay for the services provided to the individual lots. In addition, Holly Lake Properties accepted and agreed to comply with the monthly assessments and charges on the property by recording its agreement in the public records. Accordingly, FNMA is charged with actual notice of the Association's lien rights, as well as the acceptance and agreement with such rights. Therefore, the Association's lien takes priority over Holly Lake Properties' and FNMA's mortgage.

Finally, FNMA must concede that there was no "priority" language contained in the declaration in Boyle v. Lake Forrest Property Owners Association, 538 F.Supp.765 (S.D. Ala.1982). Indeed, the court in that action was construing an ambiguous

provision of the declaration. The court stated that the parties intended to charge the land with the burden as evidenced by the covenants. It then found that these restrictive covenants constituted covenants running with the land that could be enforced by the association, which was the owner of the common facilities. The court thus recognized that a valid contractual lien is created when a party has actual or constructive notice of provisions in a declaration of restrictions which imposes a lien on the property for payment of assessments.

The lower court's only citation for support of its super-priority concept is St. Paul Federal Bank for Savings v. Wesby, 501 N.E.2d 707 (Ill.App.1986). This decision, however, clearly has no application in this case. First, the condominium documents specifically provided that the lien would be subordinate to the lien of a prior recorded first mortgage. These documents provided, in relevant part:

> "Provided, however, that such lien shall be subordinate to the lien of a prior recorded first mortgage on the interest of such Unit Owner . . . owned or held by a bank . . . except for the amount of the proportionate share of Common Expenses which become due and payable from and after the date on which the said mortgage owner or holder . . . files suit to foreclose its mortgage."
>
> 501 N.E. 2d at 711.

Second, Wesby is probably the only decision in the country that refused to follow the holding of this Court in Bessemer. This Court should thus reject the statements in Wesby and instead reaffirm the Bessemer holding, and the decisions of a vast majority

of other courts that have followed Bessemer by stating that a declaration's lien provisions relate back to the date of the declaration's recording where the declaration demonstrates an intention to create a common scheme of mainenance and an intent to create a lien.

The different treatment accorded homeowners' documents from condominium documents by the Florida Legislature also supports Holly Lake's priority position. The Legislature has provided statutes that have modified the traditional recording principles with respect to condominium association maintenance liens. Section 718.116, Florida Statutes, specifically provides that a condominium association maintenance assessment lien is inferior to a mortgage. There is no corresponding statute, however, for maintenance liens that are created by declarations of restrictive covenants, rather than by declarations of condominiums. Accordingly, in the absence of such statutes, it must be presumed that the Legislature did not intend to modify the traditional "first in time, first in right" rule regarding priority of lien interests in real property regarding such declarations of restrictive covenants. If a mortgage lien automatically takes priority over a maintenance lien, there would have been no reason for the Legislature to enact Section 718.116, Florida Statutes. Therefore, because the Association's declarations were recorded before Holly Lake Properties' and FNMA's mortgage, the Association's lien should take priority over the mortgage.

The recent 1992 amendments to Section 718.116, Florida

Statutes, have continued to treat condominium assessment liens differently from other assessment liens. These amendments provide that a first mortgagee who acquires title to a condominium unit by foreclosure is liable for unpaid assessments that became due prior to the mortgagee's receipt of the deed, so long as this period does not exceed six months. Ch. 92-49, Section 6, Laws of Florida.

Although Sections 33 through 40 of this same statute provided certain requirements for homeowners' associations not governed by the condominium statutes, no provisions were contained in this statute regarding the priority of these homeowners' maintenance liens. Therefore, the absence of such a statute regarding homeowners' association maintenance liens clearly supports the Association's position that its maintenance lien is superior to the mortgage of Holly Lake Properties and FNMA.

The argument that FNMA's mortgage was a purchase money mortgage similarly does not provide FNMA priority. First, there was nothing in the record to establish that FNMA's mortgage was a purchase money mortgage. The affidavits submitted by FNMA reveal that the affiants did not have personal knowledge of the original mortgage transaction. Furthermore, even if the mortgage was a purchase money mortgage, the lien of the Association was not created through the mortgagor. As FNMA recognized in the trial court and the lower court, a purchase money mortgage lien only has priority over judgments and liens acquired through the mortgagor. Baron v. Aiello, 319 So.2d 198 (Fla.3d DCA 1975). The most common example of this principle is where a party has obtained a judgment

against the mortgagor, which judgment was recorded before the purchase money mortgage. In those situations, courts have appropriately ruled that the purchase money mortgage takes priority, because the lien was acquired through the mortgagor. In this case, however, the Association's lien was not created through the mortgagors, John B. McKesson and Denise R. McKesson. Instead, the lien was created by the then owner of the property prior to the time that the McKessons purchased the property, and before FNMA's mortgage was recorded. Indeed, because FNMA's predecessor was the developer of the property and specifically recorded its agreement and consent to the lien provisions of the declarations, the Association's lien was acquired more through the mortgagee than through the mortgagor. Therefore, the Association's lien takes priority over FNMA's mortgage.

CONCLUSION

Upon the foregoing reasons and authorities, Holly Lake Association, Inc., respectfully submits that the lower court erred in reversing the Summary Final Judgment of Foreclosure in favor of the Association. Holly Lake thus requests this Court to accept jurisdiction of this cause and overturn the lower court's decision and direct the lower court to affirm the Summary Final Judgment of Foreclosure in all respects.

Respectfully submitted,

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