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

REPLY BRIEF OF PETITIONER

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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.

Respondent, Federal National Mortgage Association (hereinafter "FNMA") does not deny that it had constructive notice of the assessment and lien provisions contained in the various declarations and other documents recorded in the Public Records prior to FNMA's and the former developer's mortgage. Furthermore, FNMA has conceded that the original mortgagee that assigned the mortgage to FNMA, Holly Lake Properties, the developer of the entire subdivision, had actual notice of these assessment and lien provisions, since it was responsible for the preparation and recording of certain of the agreements and declarations in the public records. More importantly, Holly Lake Properties, FNMA's predecessor, was the owner of the property subject to this foreclosure action before Mr. and Mrs. McKesson purchased the property. As an owner of a mobile type home site, Holly Lake Properties and FNMA thus agreed to be bound by the lien provisions of the agreements and declarations:

> "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. . . ."

Holly Lake Properties specifically agreed to pay the

Association's predecessor the 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."

The declarations that provided the Association's lien rights were recorded by at least 1974. The mortgage of the developer Holly Lake Properties, FNMA's predecessor, was not recorded until 1983. By Holly Lake Properties' acceptance of the deed, it is clear that the lien of the Association "relates back to the time of the filing of the declaration of restrictions." Thus, FNMA and Holly Lake Properties took title subject to a valid pre-existing lien. Bessemer v. Gersten, 381 So.2d 1344, 1348 (Fla.1980).

FNMA's only argument in its brief is that the lien of a homeowners' association takes priority over a mortgage lien only where the declaration of covenants contains some magical language that the lien is an ongoing lien on the property. However, a closer reading of this Court's decision in Bessemer v. Gersten, 381 So.2d 1344 (Fla.1980) and the numerous decisions around the

country that have followed this holding, Kell v. Bela Vista Village Property Owners Association, 528 S.W. 2d 651 (Ark.1975); Inwood North Homeowners' Association, Inc. v. Harris, 736 S.W. 2d 632 (Tex.1987), disclose that no particular words are needed in a declaration of restrictive covenants to create such priority position on behalf of a homeowners' association. Instead, all that is needed is to look to the intention of the party to determine whether the declaration provided for a common scheme of maintenance and whether it can be determined, whether or not specifically stated in the declaration, that it was the intent of the declaration of restrictions to create a lien. Indeed, the only reference to some special language is by FNMA's counsel in its brief. There is no support for this position in the cases.

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 in Bessemer 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 held 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.

Despite the fact that neither this Court nor any of the numerous courts across the country that have followed the holding in Bessemer have ever stated or held that any particular words are needed in a declaration of restrictive covenants to create the relation back principle of a declaration, FNMA was able to convince the lower court that some magical words are needed for a declaration to enforce the lien provisions contained in the declaration. The lower court thus clearly erred in imposing this requirement and in reversing the trial court's contrary decision.

Respondent cited Inwood North Homeowners' Association, Inc. v. Harris, 736 S.W. 2d 632 (Tex.1987), as a case in which the declaration contained super-priority language. However, the declaration there attempted to create a vendor's lien, which the court found to be invalid. The court nevertheless found that the declaration created lien provisions that related back to the recording of the declaration because it was apparent that the declaration intended to create a lien, because the declaration was a covenant that ran with the property, and because the homeowners

had notice of the assessment provisions.

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).

More significantly, the Court cited Mendrop v. Harrell, 103 So.2d 418 (Miss.1958), in support of its conclusion that property owners' associations have the ability to foreclose on liens because of unpaid assessments.

Indeed, in Mendrop v. Harrell, supra, there was no precise language creating a lien contained within the declaration. Nevertheless, the Court had no difficulty in determining that the declaration created a charge or lien upon the land. Instead, the Court recognized that the intention of the parties is the test, and since the covenant provided that the owner and successors in title agreed to bear the expenses for paving to be done in the future, and that the covenant provided that it was to run with the land, the parties intended that the covenant should constitute a lien on the land. Accordingly, 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.

Similarly, there was no "super-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 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. There is thus no support for Respondent's conclusion that the declaration contained any specific language creating a super priority lien.

In Rittenhouse Park Community Association vs. Katznelson, 539 A.2d 334 (N.J.Super.Ct. 1987), the court reviewed numerous cases which upheld lien provisions of declarations against subsequent purchasers and concluded that covenants that are part of a neighborhood scheme and that are recorded provide constructive notice to purchasers and are enforceable as equitable servitudes. The court's comments upon the recording of the association's notice of lien after the purchaser took title are instructive:

> "The community development here, however, is not a condominium and that statute is not applicable. However, the notice was not a necessary predicate

> to the foreclosure action and is to be treated as surplusage. The foreclosure action was an appropriate procedure utilized for the purpose of enforcing the lien imposed by the declaration."
>
> 539 A.2d at 336.

The court in American Holidays, Inc. v. Foxtail Owners Association, 821 P.2d 577 (Wyo.1991), on facts similar to this action held that the Association's assessment lien took priority over a mortgage because the declaration was recorded before the mortgage.

The declaration provided:

> "[E]ach Shared Owner by the acceptance of instruments of conveyance and transfer of his Shared Interest, whether or not it be so expressed in said instruments, shall be deemed to covenant and agree with each other and with the Association to pay to the Association all assessments made by the Association for the purposes provided in this Declaration."

Any subsequent mortgage, purchase, or encumbrance was made subject to the terms of the declaration.

Even though the declaration provided for recordation of written notice of lien once default occurred, the court rejected the mortgagee's argument, similar to that made by FNMA, that priority was determined when the notice was recorded. The court stated that the notice provision was designed only to provide recorded notice once the payments were in default. Citing Bessemer, the court held the lien created by the declaration came into being as soon as the owner takes his interest subject to the declaration.

Even more significantly, the court refused to follow St. Paul Federal Bank for Savings v. Wesby, 501 N.E. 2nd 707 (Ill.App.1986), the only case supporting FNMA's position, because the declaration there provided that the assessment did not become a lien until the owner failed to make a payment and because the declaration provided that the lien was subordinate to the lien of a prior recorded first mortgage.

Just as in Bessemer v. Gersten, 381 So.2d 1344 (Fla.1980), 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, the previous owner of the property.

CONCLUSION

Upon the foregoing reasons and authorities, the Association 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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was this 22nd day of November, 1994, mailed to Steven L. Brannock, Esq., Holland & Knight, Attorneys for Respondent, P.O. Box 1288, Tampa, Florida, 33601.

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