

**FILED**

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SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By Chief Deputy Clerk

BANCFLOIDA, a federal savings bank, )

Petitioner, )

vs. )

ROBERT T. HAYWARD and DORA HAYWARD, his wife, et al, )

Respondents. )

CASE NO. 86,646

THIRD DCA CASE NO. 94-01586  
94-00665

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This is a petition by defendant, BancFlorida, seeking review of and answer to the following question certified by the Third District Court of Appeal as being of great public importance:

Where a lender requires a pre-qualified contract purchaser before it will lend on the construction loan which creates a purchase money mortgage, does the contract purchasers prior equitable lien against the purchase money mortgagor have priority over the lender's subsequent purchase money mortgage?

BancFlorida has also sought review of the opinion of the Third District Court of Appeal, filed on September 6, 1995, alleging that the opinion is in direct and express conflict with previous decisions of the Third District Court of Appeal and of this tribunal. Their appeal is brought pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv).

The Petitioner, BancFlorida, a Federal Savings Bank, shall be referred to in this brief as "BancFlorida". The Respondents, who are intervening Plaintiffs, Robert T. Hayward, et al., shall be collectively referred to in this brief as the "Contract Purchasers".

The Plaintiffs who are not parties to this appeal, Shores Contractors, Inc., et al., shall be individually and collectively referred to herein as "Developer". A non-party, American Newland Associates, a California General Partnership, shall be referred to in this brief as "American Newland". For the convenience of the court, this brief will refer to the Appendix filed by BancFlorida, which contains pleadings, transcripts of hearings and affidavits.

All references to the Appendix filed by BancFlorida shall be designated as (A. ). The Contract Purchasers annex hereto an Appendix containing documents not in the Appendix filed by BancFlorida. All references to the Appendix annexed hereto shall be designated as (R. ).

STATEMENT OF THE FACTS AND OF THE CASE

Pursuant to the Rules of Appellate Procedure, Contract Purchasers will only distinguish for the Court those statements of facts and case set forth by BancFlorida with which they disagree and where they wish to supplement BancFlorida's statement.

Contract Purchasers dispute the allegations of BancFlorida that the loans from BancFlorida to the Developer were for acquisition purposes. All of the loan documents were identified as "construction loans" and did not reference therein any provisions for the acquisition of land. Contract Purchasers dispute that BancFlorida's mortgages with the Developer are purchase money mortgages. (B. 1)

Although BancFlorida had actual knowledge of the Contract Purchaser's equitable liens, BancFlorida did not name the Contract Purchasers as parties to its counter claim of foreclosure against the Developer. (R. 18)

The Third District Court of Appeal affirmed the lower Court's ruling granting Summary Judgment to the Contract Purchasers by opinion dated March 29, 1995. Thereafter, BancFlorida filed a Motion for Rehearing which resulted in opinion dated September 6, 1995, which certified a question of great public importance to this Court.

### SUMMARY OF THE ARGUMENT

Regardless of whether or not the BancFlorida mortgages at issue are purchase money mortgages they remain inferior to the contract purchasers equitable liens. Florida has adopted a notice provision as the benchmark for assessing the priority of liens on real property and "[a] grantee taking title to land with knowledge of prior claims is bound by those claims." Moyer v. Clark, 72 So. 2d 905,906 (Fla. 1954). As such, BancFlorida who by its own admission had actual notice of the Contract Purchasers' equitable liens, is bound by the claims of the Contract Purchasers. Caribank v. Frankel, 525 So. 2d 942 (Fla. 4th DCA 1988).

BancFlorida has alleged that in four instances purchase money mortgages were given to acquire four lots. Although BancFlorida's representative clearly testified below that those mortgages were in fact satisfied and released, BancFlorida argues that it has subrogation rights to the priority of lien. The Contract Purchasers' equitable liens were intervening and take priority under Florida law. Again, BancFlorida had actual notice of the Contract Purchasers and their equitable liens.



STATEMENT OF POINTS ON APPEAL

POINT I

WHERE A LENDER REQUIRES A DEVELOPER TO PRODUCE A PRE-QUALIFIED CONTRACT PURCHASER BEFORE FINANCING AN ACQUISITION AND CONSTRUCTION LOAN TO BE SECURED BY A MORTGAGE, THE MORTGAGE IS INFERIOR TO THE EQUITABLE LIEN CREATED BY THE CONTRACT BETWEEN THE DEVELOPER AND CONTRACT PURCHASER AS THE LENDER HAD ACTUAL NOTICE OF THE EQUITABLE LIEN.

POINT II

BANCFLOIDA HAS NO SUBROGATION RIGHTS TO A PRIORITY OF LIEN IN INSTANCES WHERE IT HELD A FIRST MORTGAGE WHICH WAS SATISFIED.

## ARGUMENT

### POINT I

WHERE A LENDER REQUIRES A DEVELOPER TO PRODUCE A PRE-QUALIFIED CONTRACT PURCHASER BEFORE FINANCING AN ACQUISITION AND CONSTRUCTION LOAN TO BE SECURED BY A MORTGAGE, THE MORTGAGE IS INFERIOR TO THE EQUITABLE LIEN CREATED BY THE CONTRACT BETWEEN THE DEVELOPER AND CONTRACT PURCHASER AS THE LENDER HAD ACTUAL NOTICE OF THE EQUITABLE LIEN.

Under Florida law, when a creditor has actual notice of a prior unrecorded instrument, a person claiming through the unrecorded instrument has priority over the subsequent creditor. Fla.Stats. 695.01 (1989). Specifically, Florida Statute Section 695.01 (1989) provides:

[n]o conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law;...(emphasis supplied)

There have been few exceptions carved out over the years to the above general rule, none of which apply to the facts of the case at bar. As the Third District Court of Appeal stated in its opinion dated September 6, 1995 in this case:

Florida has adopted a notice provision as the benchmark for assessing the priority of liens on real property and "[a] grantee taking title to land with knowledge or prior claims is bound by those claims." (emphasis supplied) citing to Moyer v. Clark, 72 So. 2d 905,906 (Fla. 1954).

Knowledge is the key element in deciding the priority of liens in this case.

BancFlorida concedes that it had actual knowledge and notice of the Contract Purchasers' contracts, deposits and equitable interest in the subject properties before they loaned any money under the construction loans with the Developer. (A. 6) Where a person has actual knowledge of a prior unrecorded conveyance or mortgage, his knowledge is equivalent to the recording of the instrument. Real Property Sales & Exchanges, Fla. Jur.P. 2nd.

The undisputed facts presented at the hearing on the Motion for Summary Judgment were as follows:

1. The Developer paid a valuable consideration, from its business cash flow (non-borrowed funds) for option contracts to purchase lots in the Hammocks from American Newland. (B. 1)

2. The Contract Purchasers entered into contracts for purchase and sale with the Developer and at that time paid deposits. A majority of the Contract Purchasers made progress payments throughout construction on the respective lots. (A. 5)

3. The Developer provided BancFlorida with the following for each lot purchased by the Contract Purchasers at the time of the execution of the documents:

- A. A copy of the agreement for purchase and sale;
  - B. A copy of the deposit check;
  - C. Mortgage approval for the contract purchaser; and
  - D. A commitment letter.<sup>1</sup>
- (A. 7 at page 47)

4. BancFlorida, with the actual notice of the Contract Purchasers' agreements for purchase and sale and deposits, then

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<sup>1</sup>In fact, two of the Contract Purchasers, Jose & Vivian Martinez obtained an end loan commitment from BancFlorida. So not only did the bank have knowledge of the contract to purchase, BancFlorida entered into a contractual loan commitment with these individuals directly.

entered into individual construction loans with the Developer on each lot, securing the loan with a mortgage and note. (A. 6)

5. The construction loan contracts do not reference any advances for the acquisition of land. However, they specifically set forth the purpose of the loan, to wit: "The borrower will use the loan to construct the following described improvements, to wit: single family dwelling". (B. 1)

Based on the above undisputed facts, BancFlorida's actual knowledge of the prior lien of the contract purchasers has been established.

Under Florida law, purchase money mortgage priorities may be subject to the equities of the particular transaction. Van Eepoel Real Estate Co. v. Sarasota Milk Co., 129 So. 892 (Fla. 1930). The equities of this case cry out for a ruling by this Court that the Contract Purchasers' equitable liens are superior to the BancFlorida mortgages. Case law also mandates such a ruling.

Caribank v. Frankel, 525 So. 2d 942 (Fla. 4th DCA 1988), is a case on all fours factually and legally with the case at bar. In Caribank, Frankel entered into a contract with the developer for acquisition and construction of a home. At the time the contract was entered into, Frankel paid a \$60,000 deposit. On the same date as the Frankel contract was executed, the developer gave to Caribank a purchase money mortgage. At the time the purchase money mortgage was given, Caribank had actual constructive notice of the Frankel contract and deposit. The Fourth District Court of Appeal held that Caribank was not a bona fide purchaser for value and took

and recorded its mortgage with knowledge of and subject to the claims of Frankel. The Court determined that Frankel held an equitable lien on the subject property upon execution of their contract and upon payment of the deposit to the developer. The Frankel lien attached to the subject property prior in time to Caribank's purchase money mortgage. Frankel was awarded a judgment for the contract deposit and interest at the rate of 12%, together with costs and expenses related to the suit. The Fourth District Court of Appeal held that after the foreclosure on the subject property Caribank held a second position on the sale proceeds to that of Frankel. The reasoning of Caribank was that the actual knowledge of Frankels' equitable lien, which arose before Caribank's purchase money mortgage, gave the Frankel equitable lien priority over the purchase money mortgage.

The following factual similarities exist in the case at bar and the Caribank case:

1. The developer did not hold legal title to the property in either case when the contract was entered into with the contract purchaser.<sup>2</sup>
2. The contract for purchase and sale was entered into and a deposit made prior to any loan from the bank.
3. The banks had actual knowledge of the contracts entered into between the developer and the respective contract purchasers.

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<sup>2</sup>In the case at bar, the Developer held either an equitable title under an option contract or in four instances did own the property.

4. Both BancFlorida and Caribank claimed to hold purchase money mortgages.

It is evident that the Caribank case and the subject case are, for all intents and purposes of this appeal, identical factually and therefore, the same law and ruling should apply.

Based on the Caribank ruling, regardless of whether or not BancFlorida holds a purchase money mortgage, the equitable liens of the Contract Purchasers take priority due to the undisputed fact that BancFlorida had actual and constructive notice of the equitable interest in the property held by the Contract Purchasers. Not only did BancFlorida have actual and constructive notice, BancFlorida required the Developer to have, in hand, a contract from the Contract Purchasers prior to loaning any money. This requirement itself makes the transaction somewhat less than a true "arms length" transaction.

The Contract Purchasers also rely on the holding of Bank of Credit and Commerce International (Overseas), Ltd. v. Machado, 526 So. 2d 781 (Fla. 3d DCA 1988). In the Machado case, the contract purchaser, Machado, held an option contract to purchase two lots from a developer. The contract was executed in September of 1981 and Machado paid a deposit of \$30,000. The developer then gave a mortgage on the lots to BCCI in February of 1983. At the time the mortgages were entered into, BCCI had actual knowledge of Machado's option contract. In fact, there were references made in the mortgage to the Machado contract. Sometime thereafter, Machado paid an additional \$11,000 in progress payments on his option contract.

BCCI raised a priority of lien claim alleging that because Machado's contract to purchase was not recorded, BCCI's mortgage took priority. The Third District Court of Appeal confirmed the lower court ruling that Machado's equitable lien took priority over BCCI's mortgage interest due to the fact that BCCI had implied and actual knowledge.

The Recording Act, Fla.Stat. §695.01, provides no protection to the property interest of a creditor, like BancFlorida, who has actual notice of an earlier unrecorded contract to convey. Krantz v. Donner, 285 So. 2d 699 (Fla. 4th DCA 1973); Richmond v. Stockton, Whatley, Davin & Co., 430 So. 2d 571 (Fla. 3d DCA 1983). BancFlorida admitted actual knowledge of the contracts between the Contract Purchasers and the Developer. (A. 1,6) Therefore, BancFlorida's claims of priority are spurious and have no basis in law.

BancFlorida failed to distinguish the Caribank or Machado cases its brief.

BancFlorida does cite several cases in its Initial Brief on the Merits, but not one case relied upon by BancFlorida is factually similar to the case at bar. Not one case involves a purchase money mortgage from a lender with knowledge of a purchaser's prior contract and deposit. The cases relied upon by BancFlorida, except for one which is distinguishable, involve seller purchase money mortgages. Further, the transactions reported in those case all appear to be arms length transactions.

There is a distinct difference between a seller holding a purchase money mortgage at the time of the purchase and a lender with actual knowledge giving a mortgage subsequent in time to a lot purchaser who purchases the property under a written contract, pays a deposit, all with notice to a lender who has yet to pay or advance any money toward the property. It makes no sense, logically and equitably, for a lender/financier with actual knowledge, to have priority over a contract purchaser's claim under these facts. Especially where one of the key financing requirements was that the Developer have a contract in place and a deposit from the Contract Purchaser.

A traditional purchase money mortgage is given by the seller of a property and executed as part of a transaction wherein the property is conveyed to the buyer. The seller actually has a vendor's lien and the purchase money mortgage is merely a substitute which evidences and implements that lien. With one exception, the cases cited by BancFlorida referring to purchase money mortgages are all sellers, not lenders, holding a purchase money mortgage.

The case primarily relied upon by BancFlorida is Sarmiento v. Stockton, Whatley, Davin & Co., 399 So. 2d 1057 (Fla. 3d DCA 1981). Again, this case is completely distinguishable from the case at bar. In Sarmiento, the appellant, Sarmiento, obtained a judgment lien which was recorded against Ms. Turner. Ms. Turner then purchased the subject property from a third party, executing a mortgage in favor of the lender/appellee. Turner sold the same



property to Kathleen Faulkner, who defaulted on the mortgage. The lender filed a mortgage foreclosure action. Sarmiento was named as a defendant therein because of this judgment lien. The appellant alleged that his prior recorded judgment lien took priority over the appellee's mortgage. He lost, as a summary judgment was entered in favor of appellee.

This case is totally dissimilar to the facts at hand. In the case at bar, we are not dealing with a judgment lien which attaches later, but rather an equitable lien held by the contract purchasers which arose at the time of purchase before the bank committed any money. The equitable lien gives an equitable interest in the title to the property itself. An equitable lien runs with the land whereas a judgment is a lien recorded against the land. BancFlorida herein cannot argue around the fact that it had actual knowledge of this equitable interest in the property prior to loaning any money. The Contract Purchasers do not concede that BancFlorida holds a purchase money mortgage on any of the subject lots. Assuming, arguendo, for the purposes of this argument that the BancFlorida does hold purchase money mortgages, their claim of priority is defeated based on their actual knowledge of the contract purchasers' equitable liens. Caribank v. Frankel, 525 So. 2d 942 (Fla. 4th DCA 1988).

There is a sound public policy why lenders such as BancFlorida should not be protected by the purchase money mortgage rule, based on the facts of this case. The public policy reasons in favor of a purchase money mortgage as a general rule only relate to sellers.

In this case, the only innocent parties to the litigation were the Contract Purchasers. In good-faith, they entered into a contract for purchase and sale. They did so with the Developer who either owned the land outright or had an option to purchase the land, which was duly recorded. BancFlorida insisted upon the Contract Purchasers existence. As pointed out by the Third District Court of Appeal in its decision below:

[i]n the case at issue, knowledge is part and parcel of the same transaction in which the purchase money mortgage was created. BancFlorida structured this transaction and required the existence of pre-qualified contract purchasers before it would lend any money to Shores under the construction loan line of credit. It is well settled law in Florida that purchase money mortgage priorities may be subject to the equities of the particular transaction. Van Eepoel Real Estate Co. v. Sarasota Milk Co., 129 So. 892 (Fla. 1930). Thus, we agree with the reasoning of Caribank that BancFlorida's actual knowledge of the contract purchasers' equitable liens against Shores, which arose before BancFlorida executed purchase money mortgage to Shores as part of the construction loan, and indeed, at BancFlorida's insistence, gave the equitable liens priority over the purchase money mortgages.

The above reasoning supports a sound public policy reason why innocent contract purchasers should be protected from unscrupulous banks who, although having actual knowledge of the equitable lien of the contract purchasers, would attempt to seek priority over these equitable liens, cut them off and avoid payment of their valid claims.

In the lower court, on appeal to the Third District and again on petition here, BancFlorida relies on the holding of Citibank Mortgage Corporation v. Carteret Savings Bank, 612 So. 2d 599 (Fla. 4th DCA 1992), 632 So. 2d 599 (Fla. 1994). The Carteret case is

distinguishable from the case at bar. Carteret was a mortgage foreclosure suit commenced against joint venture purchasers which used loan proceeds to acquire and develop real property as against the holder of a previously recorded judgment lien. Carteret Savings Bank made an "acquisition and construction loan" secured by a mortgage to a joint venturer to finance a development. The lower court ruled that the entire loan given to the joint venture purchaser was a purchase money mortgage which received priority over a prior judgment lien. The Fourth District Court of Appeal reversed and remanded finding that the loan constituted a purchase money mortgage only to the extent that the funds were disbursed for acquisition of land. Therefore, the purchase money mortgage protection applied only to the amount of loan proceeds used to acquire the land.

In Carteret, the parties stipulated that a portion of the loan proceeds were advanced for land acquisition costs and thus constituted, to that extent, a purchase money mortgage. In the case at bar, the Developer, by and through its president, Wayne Rosen, filed an Affidavit (B. 2) in support of the Contract Purchasers' Motion for Summary Judgment providing that no funds from BancFlorida were used to acquire the subject lots. This fact alone distinguishes the Carteret case from the case at bar. Further, the loans from BancFlorida to the Developer were construction loans and not acquisition and construction loans like the loan in Carteret. (B. 1) BancFlorida did not file any affidavit in opposition to Wayne Rosen's Affidavit. (B. 2) The Developer did not oppose the

Motion for Summary Judgment filed by the Contract Purchasers and in fact, the Developer's attorney announced their agreement to the Contract Purchasers' position in open court. (A. 1 at page 17) Curiously, the only affidavit filed in support of BancFlorida's argument that the mortgages are purchase money mortgages was made by Brenda Jefferies. (A. 8) Ms. Jefferies' Affidavit should have been disregarded by the lower courts as it is inconsistent with testimony given by her in her deposition. (A. 6)

In her deposition, Ms. Jefferies was asked the following questions and gave the following answers:

Q. Do you refer to any of the mortgages or notes, being the subject matter of this lawsuit, as purchase money mortgages in your affidavit?

A. No. (P. 27, L. 12-15)

Q. On the schedule [schedule attached to her affidavit] you have a column entitled lot acquisition disbursement, why is it entitled lot acquisition disbursement?

A. These were checks that were disbursed from the construction loans to the closing agent for acquiring the lot. But also these amounts I should add, are closing costs.

Q. Do you know from your personal knowledge whether any of those monies went to the acquisition of the lots?

A. No.

Q. Who at the bank would have knowledge if that was a fact?

A. I don't think anyone. (P.28, L. 8-21)

Obviously, Ms. Jefferies did not have any personal knowledge as to whether any of the monies loaned from BancFlorida to the Developer were to acquire land. Counsel for BancFlorida attempted on cross-examination to rehabilitate the witness with leading questions but

the admissions are clear, she did not have the requisite personal knowledge to support the affidavit which she executed. (A. 8)

The Third District Court of Appeal considered the holding of Carteret Sav. Bank v. Citibank Mortg., 632 So. 2d 599 (Fla. 1994) which was argued extensively below by both sides. The Third District agreed with the Contract Purchasers that the legal issue presented and the facts of Carteret were very different from the undisputed facts of the case at bar. An important distinguishing fact between the case at bar and Carteret is that it was a judgment creditor rather than an equitable lien holder. An equitable lien runs with the land whereas a judgment is a lien recorded against the land. It would be unequitable for BancFlorida to rely upon the contracts entered into by the innocent Contract Purchasers, together with their deposit checks and their mortgage approvals, to then extend money to the Developer and take priority. BancFlorida had full knowledge of the Contract Purchasers whereas the Contract Purchasers had no knowledge of BancFlorida and would never have entered into contracts unless they were guaranteed free and clear title to the land. Additionally, in at least one instance, BancFlorida had given an end loan commitment to two of the Contract Purchasers. (A. 7 at P. 47)

Another factual difference is that in Carteret the parties stipulated that a portion of the loan was for the purpose of acquisition. In the case at bar there was no such stipulation. In fact throughout this litigation the Contract Purchasers have argued that no portion of the loan monies from BancFlorida were for

acquisition purposes. The Affidavit of Wayne Rosen supports the Contract Purchasers' contentions as does the deposition testimony of BancFlorida's own representative, Brenda Jefferies. (A. 8; B. 1)

On this issue, BancFlorida argues that to find the Contract Purchasers have a superior lien would be a finding in conflict with several cases in other Districts. However, each case cited by BancFlorida is distinguishable. Not one case cited by BancFlorida involves the same issues of priority or type of liens. Cheves v. First Nat. Bank, 83 So. 870 (Fla. 1920)(judgment creditor); Van Eopel Real Estate v. Sarasota Milk Co., 129 So. 892 (Fla. 1930)(claims of dower and homestead); Associates Discount Corp. v. Gomes, 338 So. 2d 552 (Fla. 3d DCA 1976)(prior judgment liens); County of Pinellas v. Clearwater Fed.Sav. & L. Assn., 214 So. 2d 525 (Fla. 2d DCA 1968) (welfare liens); and Bruner v. Lamper, 555 So. 2d 935 (Fla. 4th DCA 1990)(prior unrecorded mortgage). The type of knowledge which exists in the case at bar does not exist in any of the cases cited by BancFlorida. As there is no direct or express conflict between the Third District's ruling below and the above cited cases, this Court should not review this matter on the basis of conflict within the district courts. Fla.R.App.P. 9.030(a)(2)(A)(iv).

In conclusion, following the reasoning of the Third District Court of Appeal, BancFlorida's mortgages are inferior to the equitable liens held by the Contract Purchasers. As BancFlorida had actual and constructive notice of the agreements for purchase and sale entered into between the Contract Purchasers and Developer

prior to extending the construction loans and entering into mortgage and note agreements with the Developer, they are precluded from seeking a priority under Fla.Stat. §695.01 and the cases cited above.

## POINT II

BANCFLORIDA HAS NO SUBROGATION RIGHTS TO A PRIORITY OF LIEN IN INSTANCES WHERE IT HELD A FIRST MORTGAGE WHICH WAS SATISFIED.

BancFlorida argues that in four instances, the Developer already held legal title to the specific property that the Contract Purchasers entered into agreements to purchase. BancFlorida argues that it held first mortgages on these four lots, having financed the Developer's purchase of same from American Newland under the terms of an option contract. Those lots were contracted for purchase and sale by the following Contract Purchasers, Fatjo, Cupido, Camacho and Ventura.

For the first time at the hearing on the Contract Purchasers' Motion for Summary Judgment, BancFlorida argued that the first disbursement for construction loans given by BancFlorida to the Developer on the above-referenced lots went to satisfy the first mortgages on these four lots. The only documentation relied upon by BancFlorida to substantiate this argument are self-serving schedules prepared by BancFlorida in this litigation. BancFlorida's representative, Brenda Jefferies, testified in her deposition that the first mortgages were in fact satisfied and the construction loans for those four lots were entered into. Brenda Jefferies testified that the mortgages were in fact released. (A 6, p. 18,22) Also see the argument at page 15-16 of this brief.

BancFlorida admits that it had knowledge of the Contract Purchasers and their equitable liens prior to entering into the



construction loans and the recordation of satisfactions of the subject mortgages. In fact, BancFlorida's representative Brenda Jefferies testified that prior to the construction loan being extended, BancFlorida insisted that the first mortgage be satisfied and the property released. BancFlorida's construction loans cannot be considered purchase money mortgages.

BancFlorida relies on Federal Land Bank of Columbia v. Goodwin, 145 So. 833 Fla. 1993. In Goodwin, the court held that one who makes a loan to discharge a first mortgage pursuant to an agreement with the mortgagor shall have a first mortgage on the same land to secure it. However, in Goodwin the lender was unaware of a second mortgage on the same property. Based on the fact that the bank had absolutely no knowledge of an unrecorded second mortgage, the lender was subrogated to the rights of the first mortgagee, notwithstanding the fact that a second mortgage existed. Goodwin cites to 5 Thompson on Real Property, §4263, page 353, as follows:

Whether a second mortgage between the same parties and upon the same land is given upon the release or cancellation of the first is taken merely as renewal or in payment and satisfaction of the first mortgage depends largely upon the intention of the parties. Where the intention of the parties is simply to make a renewal an extension of the old debt, and the satisfaction of the old mortgage and the taking of a new one are practically simultaneous acts or parts of the same transaction, the taking of the second mortgage is not considered an extinguishment of the first, but a renewal thereof, and does not give priority to the intervening judgment or mortgage creditors of the mortgage, specially where the renewal or substitution is made in good faith, without notice of the intervening lien and without any intention to release the original lien. The rule, however, does not apply where there is evidence of an intention to waive the lien of the prior mortgage, or to affect a payment

thereof, neither is the rule applicable where the new mortgage is given to a different person from who the debtor borrowed the money to pay off the old mortgage, nor where the new mortgage secures a distinct debt from the old, or an additional debt, the satisfaction in such cases operating as a complete discharge of the first mortgage at p.884-885 (emphasis supplied)

In the case at bar, BancFlorida had actual knowledge of the intervening lien and had the full intention to release the original lien. (A 6, p. 18,22)

Another distinguishing fact is that the original debt in Goodwin was for the same amount as the new debt (with the exception of accrued interest and fees) unlike the debt owed to BancFlorida which was increased and was a totally new debt. Based on the holding of Goodwin, the satisfaction of the original mortgage held by BancFlorida was a "complete discharge". At p. 284-285

The doctrine of subrogation is a creation of equity, grounded on the proposition of doing justice to the parties. Goodwin at 885. Subrogation is not allowed if it works injustice to the rights of others. Goodwin at 885. In the case at bar, if BancFlorida was allowed to subrogate to the rights of the first mortgage it had held, the result would be inequitable and do an injustice to the rights of the Contract Purchasers.

The doctrines of estoppel and equitable subrogation do not apply to the case at bar. It would be inequitable and unjust to allow BancFlorida, who had knowledge of the intervening equitable liens held by the Contract Purchasers, to have a priority. Equity mandates that the Contract Purchasers' equitable liens be superior to BancFlorida's mortgages securing construction loans. Had the

Contract Purchasers' not entered into valid contracts and paid earnest money deposits, the construction loans would never have been made. In BancFlorida's own words: "[O]f course, BANCFLORIDA had actual notice of each Contract Purchaser(s)' purchase and sale agreement prior to the execution, delivery and recordation of any respective mortgage, because, indeed, a pre-sale contract was a necessary condition precedent to any construction loan from BANCFLORIDA to the DEVELOPER ..." See BancFlorida's Initial Brief (R. 13)

In conclusion, BancFlorida's prior mortgages were satisfied and released. The Contract Purchasers' equitable liens intervened and have priority over BancFlorida's mortgages securing its construction loans with the Developer.

CONCLUSION


This Honorable Court should answer the Third District Court of Appeal's query in the affirmative. To wit: Where a lender requires a pre-qualified contract purchaser before it will lend on the construction loan which creates a purchase money mortgage, the contract purchaser's prior equitable lien against the purchase money mortgagor has priority over the lender's subsequent money mortgage. The orders of the lower court granting the Motions for Summary Final Judgment on February 25, 1994 and June 3, 1994 should be affirmed in their entirety.

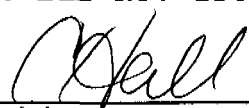
DATED this 6th day of May, 1996.

Respectfully submitted,

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