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SUPREME COURT OF FLORIDA

CASE NO.: 86,646

THIRD DCA CASE NO.: 94-0665
94-1586

BANCFLORIDA, a federal
savings bank,

Petitioner,

vs.

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

Respondents.

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

References to the parties, record on appeal, and Appendix to the Initial Brief of Appellant, BANCFLORIDA, shall follow the format set forth in the Initial Brief. References to the Initial Brief will be designated as "IB ___", and references to the Answer Brief of Appellees, ROBERT T. HAYWARD et al., shall be designated "AB ____"

Finally, references to the Appendix served with the Answer Brief shall be designated as "B____". All emphasis is supplied unless otherwise noted.

ARGUMENT

I. A PURCHASE MONEY MORTGAGE HELD BY A LENDER WHICH REQUIRED A PRE-QUALIFIED CONTRACT PURCHASER BEFORE IT FINANCED THE ACQUISITION AND CONSTRUCTION LOAN SECURED BY THE MORTGAGE IS PRIOR AND SUPERIOR IN DIGNITY TO ANY EQUITABLE LIEN CLAIMED BY THE CONTRACT PURCHASER BUT ONLY AS TO THE AMOUNT OF THE PROCEEDS USED TO ACTUALLY ACQUIRE THE LAND AND EXISTING IMPROVEMENTS.

Florida law mandates purchase money mortgages take priority over any other prior or subsequent claims or liens that attach to the property through the mortgagor. Cheves v. First Nat. Bank, 83 So. 870 (Fla. 1920). Since 1920, this precedent has been consistently followed:

> "a purchase money mortgage made simultaneously with the conveyance to the mortgagor, takes precedence over any lien arising through the mortgagor, even though the latter is prior in point of time."

National Title Ins. Co. v. Mercury Builders, 124 So.2d 132 (Fla. 3d DCA 1960) citing Van Eepoel Real Estate v. Sarasota Milk Co., 129 So. 892 (Fla. 1930).[1]

However, purchase money mortgage priority applies only to the amount of the loan proceeds which are used to actually acquire

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[1]This exception is applicable to "any lien arising through the mortgagor". See Van Eopoel, supra. The exception has been applied to claims of dower and homestead, Id., prior judgment liens, Associates Discount Corp. v. Gomes, 338 So.2d 552 (Fla 3d DCA 1976), welfare liens, County of Pinellas v. Clearwater Fed.Sav. & L. Assn, 214 So.2d 525 (Fla. 2d DCA 1968), and prior mortgages, Credithrift, Inc. v. Knowles, 556 So.2d 775 (Fla. 1st DCA 1991) and Bruner v. Lamper, 555 So.2d 935 (Fla. 4th DCA 1990).

the land and the existing improvements. Carteret Sav. Bank v. Citibank Mortg., 632 So.2d 599 (Fla. 1994). To the extent loan proceeds are used to construct further improvements, those funds do not have priority over prior claims and liens. Id.

Here, the record unequivocally demonstrates that proceeds from BANCFLORIDA mortgages were used by the DEVELOPER to simultaneously acquire eighteen properties from American Newland. To the extent those funds were used to acquire the subject lots, then BANCFLORIDA has priority over any equitable lien claims made by the Contract Purchasers.

The Contract Purchasers string together five responses to this point. Each is ineffective, uncompelling, and insufficient to change the rule of priorities set forth above.

First, the Contract Purchasers complain the BANCFLORIDA mortgages are not purchase money mortgages. This argument is directly and completely refuted by the record evidence. The BANCFLORIDA loans, in fact and by law, are clearly purchase money mortgages.

Indeed, the Third District Court of Appeal clearly overruled the trial court and specifically found BANCFLORIDA to be a purchase money mortgagee. In fact, the Third District Court of Appeal stated it was undisputed that "when the bank made the construction loan to the developer it deducted the cost of purchasing the land from the loan proceeds and gave the developer the balance of the

loan proceeds."

Incredibly, the Contract Purchasers argue that "no funds from BancFlorida were used to acquire the subject lots". (AB 15) To the contrary, the record reveals the exact opposite is true and this supposition is flatly wrong.

For "record" support for their supposition, the Contract Purchasers cite the Affidavit of Wayne Rosen, the principal of the DEVELOPER. (B1) However, even a cursory review of the Affidavit of Mr. Rosen reveals that no such allegation exists. In fact, no such inference can, in good faith, be derived from the language in the Affidavit. The Affidavit reveals the DEVELOPER used its own funds to acquire the option to purchase the subject lots from American Newland. It does not state the DEVELOPER used its own funds to acquire the subject lots themselves. Further, it states the form used for the construction loan agreement does not state it is a purchase money mortgage. Nowhere in the Affidavit is it even suggested that no funds from BANCFLORIDA were used by the DEVELOPER to acquire the subject lots from American Newland.

With similar lack of candor, the Contract Purchasers next insist that "BancFlorida did not file any affidavit in opposition to Wayne Rosen's Affidavit" (AB 15). That statement too is flatly wrong. In truth, BANCFLORIDA filed not one but two affidavits, the Affidavit of Brenda Jeffries (A 8) and the Affidavit of David Defibaugh (A 9), and a fifty (50) page transcript of the deposition

of Brenda Jeffries (A 6), together with all relevant exhibits.(A 7)

At the deposition of Ms. Jeffries, documents pertinent to the closing of each of the subject lots were authenticated. (A 6,7) These documents included letters signed by Wayne Rosen on behalf of the DEVELOPER which transmitted to BANCFLORIDA copies of the purchase and sale agreement between the DEVELOPER and a Contract Purchaser, the end loan commitment, a cost breakdown, a total amount for the mortgage requested and a title commitment. More importantly, in all but four instances, the transmittal letter, signed by Mr. Rosen, referenced a release fee to acquire the subject lot from American Newland.[2]

The other documents filed of record in opposition to the summary judgment motion include the closing statements for each lot acquisition which detail the total loan amount, the closing costs and the acquisition fee for the lot. The acquisition fee, in all but four instances, was funded through the closing agent to American Newland.(A 7) Each and every one of these closing statements is signed on behalf of the DEVELOPER by none other than

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[2]In the other four (4) cases, the subject lots had already been acquired by the DEVELOPER from the American Newland option inventory with the proceeds from a BANCFLORIDA mortgage. The DEVELOPER later contracted to construct a home on each lot. The BANCFLORIDA purchase money mortgage was satisfied and simultaneously replaced with another BANCFLORIDA mortgage which, in each instance, is entitled to priority over any equitable lien claim based on the doctrines of equitable subrogation and estoppel See, Argument II, infra.

Wayne Rosen.

In sum, the record reveals only BANCFLORIDA funds were used to acquire the subject lots. Any contention to the contrary is directly refuted by the record.

Second, the Contract Purchasers, without citation to any authority, note the "DEVELOPER held an equitable title under an option contract" (AB 9), and, suggest that knowledge by a creditor of a judgment lien in general is different and distinct from the knowledge of BANCFLORIDA of these specific equitable liens because a "judgment lien... attaches later" whereas the equitable liens held by the Contract Purchasers "arose at the time of purchase before the bank committed any money" (AB 13). BANCFLORIDA believes the Contract Purchasers are trying to say their equitable liens attached (are subrogated) to the equitable title of the DEVELOPER before the BANCFLORIDA mortgage attached to the legal title of the DEVELOPER. No authority is cited for this argument because the statements used to support it are incorrect pronouncements of Florida law.

Under Florida law, an option to purchase real property creates neither an equitable interest nor an equitable remedy in the option holder. Wolfe v. Doughtery, 137 So. 717 (Fla. 1931). See also, Mathews v. Kingsley, 100 So.2d 445, 446 (Fla. 2d DCA 1958) ("An option contract is different from a contract to purchase and gives optionee no equitable interest in land until he exercises his

option to purchase"). The DEVELOPER, therefore, held no interest, legal or equitable, in the real properties at the time it promised to convey to the Contract Purchasers[3]. As an option holder, the DEVELOPER could create neither an equitable interest nor an equitable remedy, including an equitable lien in favor of the Contract Purchasers. In sum, the foundation for this argument is built on quicksand.

Clearly, absent the advances made by BANCFLORIDA to the DEVELOPER for it to acquire the properties, there would be no real property titled in the name of the DEVELOPER. Only after the DEVELOPER acquired the properties could it use the deposits and progress payments made by the Contract Purchasers to improve the properties. Logically and legally, the equitable liens to secure the return of the deposits and progress payments allegedly used to improve the real properties can only attach to those properties after the DEVELOPER acquired an interest in the properties with the BANCFLORIDA funds advanced for that purpose.

Third, the Contract Purchasers claim BANCFLORIDA never distinguished the authorities cited by the Contract Purchasers on the purchase money mortgage priority issue. To the contrary, the Initial Brief clearly contended the one cited decision of moment was distinguishable, inapplicable, and erroneously expanded by the

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[3]The Third District Court of Appeal also mistakenly assumed the DEVELOPER was an equitable title holder.

Third District Court of Appeal in its opinion below (the "Opinion"):

> "The decision in Caribank simply affirms the general rule that the recording act provides no protection to the property interest of a subsequent purchaser or creditor who has notice of an unrecorded conveyance or mortgage. Yet, the Opinion incorrectly states Caribank reasoned the purchase money mortgage exception to the recording act does not apply to an unrecorded conveyance by the mortgagor. To the contrary, importantly, the purchase money mortgage exception to the recording act was never raised, never argued and never discussed in Caribank. Accordingly, the Caribank court neither reasoned nor held that an equitable lien has priority over the lien of a purchase money mortgagee with knowledge of the conveyance."[4]

(IB 16)

The only other authority cited by the Contract Purchasers on this issue, Bank of Credit & Comm. Intern. v. Machado, 526 So.2d 781 (Fla. 3d DCA 1988), has nothing to do with purchase money mortgages. In Machado, the developer, Free Zone, already held title to the subject properties when it contracted to sell them to Machado in 1981. Thereafter, in 1983, Free Zone obtained a mortgage loan from BCCI which encumbered the properties under contract to Machado. As Free Zone already owned the subject

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[4] Moreover, BANCFLORIDA painstakingly proved the Third District Court of Appeal misread Carteret by incorrectly reasoning the case did not concern lien priority when it clearly did. (IB 16-17) Furthermore, BANCFLORIDA pointed out the Third District Court of Appeal unreasonably expected the Carteret court to distinguish Caribank because Caribank never considered the purchase money mortgage exception. Again, the exception was never raised, never argued and never discussed in Caribank. (IB 17-18)

properties since at least 1981, the 1983 BCCI loan was not a purchase money mortgage utilized to acquire the properties. Plainly, the miscited Machado decision is not applicable to the case at bar.

Fourth, the Contract Purchasers suggest a clear distinction should be made between judgment creditors, mortgagees and holders of other types of claims and liens on the one hand, and equitable lien holders on the other hand. Without legal authority, they reason the distinction is desirable because an equitable lien "runs with the land", whereas a judgment is "a lien recorded against the land." From this distinction without a difference, the Contract Purchasers then somehow deduce, without explanation, that it would be inequitable to follow the time honored exception in this instance.

To relate this specious equitable priority argument to the instant matter, BANCFLORIDA is vilified as an "unscrupulous" bank[5] Then, the Contract Purchasers are praised as "the only innocent parties" here who, from their pedestal, lament: "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

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[5]As BANCFLORIDA never received or took one thin dime from any of the Contract Purchasers, this characterization is presumably "deserved" because BANCFLORIDA seeks to recover a portion of the mortgage loans it made to the DEVELOPER from the sale of BANCFLORIDA's secured collateral.

title to the land."

Ignored in this childish ad hominem attack is the fact the Florida Recording Act, Fla. Stat. §695.01, confers upon everyone and anyone dealing with real property actual notice of recorded instruments and constructive notice of certain unrecorded instruments. Indeed, the statute, fairly or unfairly, applies not just to lenders but to everyone, regardless of sophistication, including vendees such as the Contract Purchasers.

Apparently, the American Newland option was duly recorded. (AB 14) The Contract Purchasers each had notice that the DEVELOPER did not own the specific property at the time each purchase and sale agreement was executed. Sapp v. Warner, 141 So.2d 124, 127 (Fla. 1932) (A subsequent creditor has constructive notice of the existence and contents of any documents filed in the public records). The Contract Purchasers were then placed on inquiry notice of the BANCFLORIDA loan agreements by which the DEVELOPER would acquire title to the properties.

In the fifth and final argument mustered by the Contract Purchasers, they suggest that the "type of knowledge which exists in the case at bar does not exist in any other case cited by BANCFLORIDA" (AB 18). This argument is totally irrelevant. For priority purposes, the recording act does not discriminate based upon the manner in which the claimant or creditor received notice. One with actual notice and one with constructive notice each has

equal notice. Therefore, the fact that BANCFLORIDA had actual notice of a prior unrecorded conveyance as opposed to actual notice of a prior unrecorded mortgage as in Brunner, supra., or as opposed to constructive notice of a prior recorded lien, as in Gomes and Cheves, is of no moment. As plainly illustrated by those cited cases, the purchase money mortgage exception applies equally to subordinate both claims and liens which arose through the mortgagor that the mortgagee learned about through either actual notice or constructive notice.

In sum, under Florida law, in the event proceeds from a BANCFLORIDA mortgage were used on behalf of the DEVELOPER to pay American Newland to obtain title to a parcel under contract to a Contract Purchaser, then BANCFLORIDA has a purchase money mortgage which is superior to the equitable lien claimed by that Contract Purchaser. As such, each BANCFLORIDA purchase money mortgage is superior to all prior claims which arose through the mortgagor, the DEVELOPER, including but not limited to the alleged equitable liens arising out of the purchase and sale agreements of the eighteen Contract Purchasers, but only to the extent BANCFLORIDA loan proceeds were used to acquire the subject property. All other loan proceeds secured by BANCFLORIDA purchase money mortgages are, indeed, inferior and subordinate to the equitable liens claimed by the Contract Purchasers.

II. BY VIRTUE OF THE DOCTRINES OF EQUITABLE SUBROGATION AND ESTOPPEL, A CONSTRUCTION LENDER HAS THE ABSOLUTE RIGHT TO BE SUBROGATED TO THE PRIORITY IT HELD AS A FIRST PURCHASE MONEY MORTGAGEE IN EACH INSTANCE WHERE IT PAID OFF THAT DEBT WITH FUNDS FROM THE FIRST ADVANCE OF ITS CONSTRUCTION LOAN WITH THE DEVELOPER.

Four Contract Purchasers entered into purchase and sale agreements with the DEVELOPER after the DEVELOPER had already acquired these specific properties from American Newland and after the DEVELOPER had already encumbered each parcel with a valid first purchase money mortgage lien in favor of BANCFLORIDA. In each of these four instances, it is undisputed that once BANCFLORIDA received the purchase and sale agreement, the end loan commitment and confirmation of the occurrences of other conditions precedent, it entered into a construction loan agreement with the DEVELOPER which required that the previous BANCFLORIDA mortgage be satisfied out of funds advanced under the new first mortgage lien in favor of BANCFLORIDA which was simultaneously recorded as to each subject property.

Obviously the intention of the DEVELOPER and BANCFLORIDA was for BANCFLORIDA to have the same security, a valid first mortgage lien, when it satisfied each existing mortgage. Under these circumstances, equity will not permit a competing or intervening lien to displace the priority "lost" by the satisfaction of a purchase money mortgage. Schilling v. Bank of Sulphur Springs, 147 So. 218 (Fla. 1933).

The Contract Purchasers never distinguished the Sulfur Springs decision, which held that equity required the Bank of Sulfur Springs be subrogated to the rights of a third party purchase money mortgagee when the bank loaned money to the mortgagor to satisfy the original purchase money mortgage and recorded a new mortgage. Instead, the Contract Purchasers focus upon Federal Land Bank of Columbia v. Godwin, 145 So. 883 (Fla. 1933), a case cited with approval in Sulfur Springs.

The Contract Purchasers attempt to limit Godwin to its facts because the mortgagee seeking equitable subrogation in Godwin did not have knowledge of an intervening mortgage. However, the decision did not depend upon that fact. Second, the Contract Purchasers quote a treatise cited as a general rule in Godwin. The treatise, however, is not part of the Godwin holding. The Contract Purchasers argue the language quoted from the treatise mandates affirmance of the trial court here, because BANCFLORIDA not only paid off the old mortgage but its new mortgage secured future construction financing. The treatise states in pertinent part as follows:

> "...neither is the rule applicable where the new mortgage is given to a different person from whom 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."

Godwin 145 So. at 885, citing 5 Thompson on Real Property §4263.

That language is not and cannot be the holding in Godwin. If so, Godwin could not have been cited with approval in Sulfur Springs. In Sulfur Springs, the new mortgage which was equitably subrogated was given to the Bank of Sulfur Springs, not the original purchase money mortgagee.

Instead, Godwin held:

> "The doctrine of subrogation does not arise from statute or custom, but it is peculiarly a creation of equity, grounded on the proposition of doing justice to the parties without regard to form. It rests on the maxim that no one shall be enriched by another's loss, and may be invoked when and where justice demands its application. It has been greatly expanded in this country, may be employed to relieve from fraud or mistake, but is not allowed if it works any injustice to the rights of others. 25 R.C.L. §2."
>
> "Bottomed on this premise, it follows that under our system of jurisprudence there is no limit to the circumstances that may arise on which this doctrine may be applied. In Forman et al. v. First National Bank of Quincy et al. 76 Fla. 48, 79 So. 742, we held that the doctrine of subrogation has been steadily expanded and growing in importance and extent in its application to various subjects and classes of persons and that the agreement out of which it arises and upon which it rests may be express or implied."

Id. at 885. Accordingly, there are no prerequisites to application of the doctrine in this instance, as the Contract Purchasers suggest, that either (1) BANCFLORIDA to be without actual or implied notice of the purchase and sale agreements of the four Contract Purchasers, or, (2) that the two BANCFLORIDA mortgages be

in the same amount.

The application of the equitable subrogation rule has, as its focal point, a requirement that the subrogation to the place of the prior lien cannot put the holder of the second lien in any worse position than if the prior lien had not been discharged. Godwin, 145 So. at 886. Without question, that test is satisfied in this instance. If the second BANCFLORIDA mortgage is subrogated to the place of the prior BANCFLORIDA lien, indeed, these four Contract Purchasers are placed in no worse position than if the first BANCFLORIDA mortgage had never been satisfied. Here, when these four Contracts Purchasers entered into purchase and sale agreements with the DEVELOPER, BANCFLORIDA had of record a valid first purchase money mortgage lien on the properties contracted for conveyance. As such, under Florida Statute §695.01, each of these four Contract Purchasers was on record notice of the existence of a BANCFLORIDA mortgage on the subject lot. Equity, indeed, mandates application of the doctrines in this instance to prevent an unjust forfeiture.

CONCLUSION

The summary judgments rendered in favor of the Contract Purchasers which established that their equitable liens have priority over the mortgages of BANCFLORIDA must be reversed and remanded with instructions to the trial court to enter judgment in favor of BANCFLORIDA as to the priority of its mortgages as

transferred to the security of the net sale proceeds. However, the priority exists only to the extent funds advanced by BANCFLORIDA were used by the DEVELOPER to acquire the real property and existing improvements. The equitable liens take priority over funds advanced by BANCFLORIDA to improve the real properties. The matter should be reversed and remanded with instructions to determine the amount of the BANCFLORIDA priority for each subject lot.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 31st day of ~~September~~ August, 1996, true and correct copies of Reply Brief of Appellant, BANCFLORIDA were sent via U.S. mail to: Cynthia Byrne Hall, Sylvario & Hall, 44 West Flagler Stree, Suite 2450, Miami, Florida 33130 and Glenn J. Holzberg, Esq., Two Datran Center, Suite 1209, 9130 South Dadeland Boulevard, Miami, Florida 33156.

Respectfully submitted,

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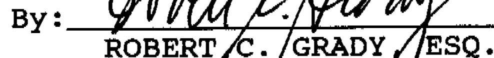

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