

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT
STATE OF FLORIDA

Case No.: 4D24-0489

MANATEE LIEN AND
INVESTMENTS, LLC,

LT Case No. 502020CA003791XX

Appellant,

v.

FREEDOM MORTGAGE
CORPORATION, CLARENCE A.
BEDNAR, and REAL PROP
HOLDINGS, LLC,

Appellees.

_____ /

INITIAL BRIEF

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PRELIMINARY STATEMENT

In this Initial Brief, Appellant, MANATEE LIEN AND INVESTMENTS, LLC, will refer to itself as “Appellant” or “Manatee”.

Appellee, FREEDOM MORTGAGE CORPORATION, will be referred to as “Appellee” or “Freedom Mortgage”.

References to the Record on Appeal are designated as “ROP ____ [page number(s)]”.

STATEMENT OF THE CASE AND FACTS

This is an appeal of a Final Judgment of Foreclosure in the lower tribunal case being appealed (the “Mortgage Foreclosure”). [ROP 2] The property that is the subject of the Mortgage Foreclosure is identified as: 1598 SW 13th Terrace, Boynton Beach, FL 33425 (the “Property”). [ROP 3] The Property is governed by the Declaration or Restrictions recorded in OR Book 2328 at Page 1565 (the “Declaration”), and is administered by the homeowner’s association: Palm Beach Leisureville Community Association, Inc. (the “Association”).

The Public Record of Palm Beach County reveals that on or about July 18, 2016, the (then) owners of the Property tendered a note and a mortgage securing the same to Mortgage Research Center, LLC d/b/a/ Veterans United Home Loans. [ROP 3]. The mortgage’s originator did not obtain Association approval of the subject mortgage as required by the Declaration.

On June 21, 2019, the subject mortgage was modified and by its terms created a novation. (*See, Pijuan v. Bank of Am., N.A.*, 253 So. 3d 112, 114 (Fla. 3d DCA 2018).

Subsequently, the Property was foreclosed by the Association (see, *Palm Beach Leisureville Comm. Assn. Inc.*, Palm Beach County Circuit Court Case No.

2019 CA 016334). At the foreclosure auction, Alberto Serize (a non-party) was the highest and successful bidder for the Property and received a Certificate of Title from the Clerk of Courts on July 14, 2022. Alberto Serize then conveyed his interest in the Property to Real Prop Holdings, LLC. Manatee then extended Real Prop Holdings, LLC a loan via a promissory note, which is secured by the mortgage on the Property recorded in OR Book 33310 at Page 220.

Freedom Mortgage claims to own and hold the subject note and mortgage by way of assignment and initiated the Mortgage Foreclosure naming Manatee as a defendant. [ROP 3] Freedom Mortgage claimed that its mortgage is superior in right, title and dignity to that of Manatee.

Manatee pleaded affirmative defenses in connection with the above-stated facts. After a trial, the lower tribunal rendered a Final Judgment of Foreclosure in favor of Appellee. This appeal followed.

SUMMARY OF THE ARGUMENT

ARGUMENT I – The Final Judgment of Foreclosure should not have been rendered because the Declaration contained deed restrictions requiring Association approval for the subject mortgage and such approval was never obtained by the originator or any subsequent holder/assignee of the mortgage.

ARGUMENT II – Appellee lacks standing to foreclose because it took its assignment of the mortgage from the wrong entity (novation by way of loan

modification was made by an entity other than the assignee prior to Freedom's assignment.)

STANDARD OF REVIEW

This Court is asked to determine whether a mortgage is valid when a mortgagee records it without first complying with existing deed restrictions. Because this is a legal issue, the standard of review is de novo. *BMG Realty Group, LLC v. U.S. Bank Nat'l Ass'n*, 291 So.3d 165, 166 (Fla. 2d DCA 2020.)

ARGUMENT

ARGUMENT I – The Final Judgment of Foreclosure should not have been rendered because the Declaration filed in the official records of Palm Beach County contained deed restrictions requiring Association approval for the subject mortgage and such approval was never obtained by the originator or any subsequent holder/assignee of the mortgage.

The mortgage that the Appellee seeks to enforce does not conform to the covenants and restrictions on the Property and was never approved by the Association as required pursuant to the Declaration. Florida is a "Notice" jurisdiction. *See Lesnoff v. Becker*, 135 So. 146, 147 (Fla. 1931) ("Under our recording statutes, subsequent purchasers, acquiring title without notice of a prior unrecorded deed, mortgage, or transfer of real property, or any interest therein, will be protected against such unrecorded instrument, unless the party claiming thereunder can show that such subsequent purchaser acquired the title with actual notice of such unrecorded conveyance or mortgage..." (quoting *Rambo v.*

Dickenson, 110 So. 352, 353 (Fla. 1926)); *Morris v. Osteen*, 948 So. 2d 821, 826 (Fla. 5th DCA 2007) "Generally, competing interests in land have priority in the order in which they are created;" "[t]he important caveat to this rule is that those acquiring rights later will have priority if they took without 'notice of the first created rights.'" (citation omitted)); *F.J. Holmes Equip., Inc. v. Babcock Bldg. Supply, Inc.*, 553 So. 2d 748, 750 (Fla. 5th DCA 1989) ("The first rule is that competing interests in land have priority in order of their creation in point of time;" "[t]his rule is subject to the important exception created by the recording statute that notice of the first created rights must be available to those later acquiring rights in the same land;" and "[t]his normally means that unrecorded rights, titles or lien interests, such as the equitable rights of the beneficiaries of resulting trusts, constructive trusts and equitable liens, are generally held to be inferior to rights subsequently acquired without actual notice of the earlier created but unrecorded rights" (footnotes omitted)).

Here, Appellee was on notice of the Declaration and the deed restriction contained therein when its predecessor in interest originated the mortgage loan, and Appellee itself was on notice of the restrictions when it acquired the mortgage loan by assignment. According to all authorities, including those cited to the lower tribunal by Appellee, it is the act of recording a lien in the official records that is the source of imputing constructive knowledge of prior lien claims to subsequent

purchasers. *CCM Pathfinder Palm Harbor Mgmt., LLC v. Unknown Heirs*, 198 So. 3d 3, 9 (Fla. 2d DCA 2015) ("Recordation is also the source of imputing constructive knowledge of claims to subsequent purchasers."). Any purchaser of the Property can see from reviewing the Declaration that the mortgage is, and was, invalid, as no approval has ever been recorded.

In *King v. L & L Inv'rs, Inc.*, 133 So. 2d 744 (Fla. 3d DCA 1961), the Defendants to a foreclosure proceeding raised, as an affirmative defense, the invalidity of a mortgage that was alleged to have preceded the defendants' title. *Id.* More specifically, "[t]hey contended therein that the mortgage sought to be foreclosed was invalid for want of title in the mortgagor. *Id.* In avoidance, the plaintiff seeking foreclosure in the case argued, as does Plaintiff in this case, that defendants "were estopped to assert the invalidity of the mortgage because the property was reconveyed to them subject to the mortgage."¹⁰ *Id.* at 745. At the hearing on summary judgment, defendants made a showing that the mortgage at issue was invalid because the conveying entity no longer owned the property at the time of conveyance, and did not thereafter reacquire title. "The defendants' answering claim of invalidity of the second mortgage was substantiated by the showing on the record that the mortgagor had divested itself of title before the mortgage was given, and did not acquire any title to the property thereafter through that transaction or otherwise." *Id.* at 74.

As such, under Florida law, where "[r]ecordation is also the source of imputing constructive knowledge of claims to subsequent purchasers," the recordation of documents that demonstrate that a mortgage is invalid are also, and should also be, accorded the same weight and effect as those showing it to be valid. See e.g., *CCM Pathfinder Palm Harbor Mgmt.* at 9 ("A maturity date is 'ascertainable from the record of it' if the maturity date can be determined by reading the public records."). Inasmuch, this Court, in determining the validity of the Bednar Mortgage in this case, can no more ignore the requirements of the Declaration found in the official records (and the absence of an approval) than it could ignore a duly recorded satisfaction of the Bednar Mortgage. Manatee is "no wise estopped to assert," as it has in this case, "the invalidity of the [mortgage] which [is] evident on the face of the documents involved." See *King*. The mortgage's invalidity can be determined by reading the public records of Palm Beach County. For the forgoing reasons, Plaintiff's Motion to Strike should be denied as to Manatee's Third Affirmative Defense.

ARGUMENT II – Appellee lacks standing to foreclose because it took its assignment of the mortgage from the wrong entity (novation by way of loan modification was made by an entity other than the assignee under Freedom's assignment.

Plaintiff's burden of proof to establish standing was not met at trial. As one court observed, "[b]ecause the Bank already had the burden to present evidence

establishing its standing, it cannot claim it is prejudiced by Appellant's defense challenging the sufficiency of that evidence." *Morgan v. Bank of N.Y. Mellon*, 200 So. 3d at 795-96.

Appellee contends that the loan modification was not a novation. Under prevailing Florida law, however, "[W]hen a loan modification agreement has been reached, a lender can foreclose only by both pleading and proving a breach of the modification agreement." *Pijuan v. Bank of Am., N.A.*, 253 So. 3d 112, 114 (Fla. 3d DCA 2018). Although the language of the "Loan Modification Agreement" suggests that it is not a novation--it must be. This is because it is an entirely new obligation, between different parties, and all of the most important terms are different, and wholly replace those of the original note. The loan modification was between the original borrowers of Appellee's loan and Pingora Loan Servicing, LLC by LoanCore, LLC, Authorized Representative for Flagstar Bank, FSB, attorney in fact under Limited POA. Yet, the assignment of mortgage on which Appellee relies to base its standing is from a non-party assignor named: "Mortgage Electronic Registration Systems, Inc. as Nominee for Mortgage Research Center, LLC dba Veterans United Home Loans." There is no record or other evidence of an assignment of the mortgage from Mortgage Electronic Registration Systems, Inc. as Nominee for Mortgage Research Center, LLC dba Veterans United Home Loans to Appellee. Thus, standing was never established.

CONCLUSION

The Final Judgment of Foreclosure should not have been rendered due to Appellee's failure to establish that the mortgage it seeks to foreclose was actually approved by the Association in accordance with the Declaration. Further, Appellee has not established standing as the assignment it received is from an entity other than the mortgage's successor in interest (as evidenced by the loan modification, novation). Accordingly, this Court should reverse the decision of the lower tribunal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-service this 1st day of August 2022 to:

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CERTIFICATE OF COMPLAINT

THE UNDERSIGNED CERTIFIES that this Initial Brief complies with the font requirements of Fla.R.App.P. 9.210(a).

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