IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WILMINGTON SAVINGS FUND SOCIETY, FSB, Plaintiff,	)	
v.	)	C.A. No.: 08L-04-047 FSS
	)	**E-FILED**
SAINT ANNES CLUB, LLC, Defendant.	)	

Submitted: October 22, 2009
Decided: January 29, 2010

MEMORANDUM OPINION AND ORDER

Upon Intervenor, Bernardon Haber Holloway Architects, P.C.'s, Motion for Declaratory Judgment

SILVERMAN, J.

This case is about the priority of several construction loans, a purchase money mortgage, and a mechanic's lien. The parties seemingly agree that generally, a purchase money mortgage comes first, but a purchase money mortgage can be voluntarily subordinated. The core question, therefore, is whether the mechanic's lien qualifies as a mortgage under the subordination clause in the purchase money mortgage here. Because the clause specifically refers to "the lien of any mortgage," not all liens, and because subordination clauses are strictly construed, the court concludes that the purchase money mortgage is not subordinate to the mechanic's lien. Even though mortgages and mechanic's liens have similarities, they are not the same.

I.

Middletown Greenways, LLC, conveyed property to Defendant, Saint Annes Club, LLC, on September 29, 2004. Defendant paid the purchase price largely with a non-recourse note for $1,574,560.75, secured by a purchase money mortgage. Additionally, Wilmington Savings Fund Society, FSB, loaned Defendant $3,000,000.00, secured by a mortgage.

On March 6, 2006, WSFS increased its loan to Defendant to $3,500,000.00. On May 18, 2006, WSFS further increased the loan to $4,000,000.00, and made an additional loan of $1,600,000.00 to Defendant.

Bernardon Haber Holloway Architects, P.C., an architectural services provider, entered into an agreement with Signature Golf Management, LLC, to assist in constructing a golf course on Defendant's property. Beginning in May 2005, Bernardon designed two buildings for Defendant's golf course. Signature Golf failed to pay Bernardon's fee of $522,349.79, resulting in Bernardon's filing of a Complaint and Statement of Claim for Mechanics' Lien on September 1, 2006.

After Defendant defaulted on its mortgage, WSFS foreclosed on April 11, 2008. On May 28, 2008, WSFS moved for default judgment, and judgment was subsequently entered against Defendant.

On May 30, 2008, Greenways moved to intervene as a party defendant to protect the priority of its purchase money mortgage. Under Delaware law, a purchase money mortgage has "priority over any judgment against the mortgagor or any other lien created or suffered by him."[1] Bernardon also intervened as a party defendant on June 19, 2008. On July 23, 2008, a mechanic's lien in favor of Bernardon was entered for $175,000.00, which relates back to May 20, 2005.[2]

A hearing was held on July 25, 2008 regarding the priority of WSFS's

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[1] *See* 25 *Del. C.* § 2108.

[2] *See Di Mondi v. S. & S. Builders, Inc.*, 124 A.2d 725, 728 (Del. 1956) ("[A] judgment for the plaintiff in a mechanics' lien proceeding shall be a lien upon the structure relating back to the day when the furnishing of labor or material was commenced."); 25 *Del. C.* § 2718(a).

construction loans and the Greenways purchase money mortgage. On August 1, 2008, WSFS and Greenways settled. As a result, Greenways withdrew its answer and counterclaim, and allowed its claim–that it had complete priority over WSFS's loans–to be dismissed with prejudice. In exchange, WSFS purchased the Greenways mortgage.

After the court approved the settlement on August 4, 2008, counsel for Defendant claimed that WSFS had failed to notify approximately 200 members of the Saint Anne's Homeowner's Association, Inc. of an August 12, 2008 sheriff's sale of the undeveloped golf course. Subsequently, certain Saint Annes homeowners filed a motion to set aside the sheriff's sale for allegedly failing to properly notify the homeowners under Superior Court Civil Rule 69(g). This is discussed in the companion decision issued in this case today. Meanwhile, on August 12, 2008, Defendant filed for bankruptcy under Chapter 11 of the Bankruptcy Code, resulting in a temporary stay of the instant lawsuit.

Bernardon filed an answer and counterclaim on August 26, 2008, requesting that the court declare Bernardon's mechanic's lien senior to the mortgages. A hearing was held on April 24, 2009. Following the hearing, supplemental memoranda were submitted by Bernardon and WSFS.

The bankruptcy proceeding was dismissed on June 23, 2009, and the

sheriff's sale was rescheduled for August 11, 2009. The sheriff's sale was held, and WSFS was the only bidder, bidding $1,250,000.00. On October 22, 2009, Bernardon and WSFS presented oral argument regarding the priority of their interests.

II.

Bernardon concedes that WSFS's original $3,000,000.00 loan from September 29, 2004, has first priority. Bernardon contends, however, that its mechanic's lien, relating back to May 20, 2005, should be next in line, followed by WSFS's additional $2,600,000.00 in loans from March and May 2006, and then comes the September 29, 2004 Greenways purchase money mortgage. Bernardon tacitly concedes that, by operation of 25 *Del. C.* § 2108, the purchase money mortgage could be superior. Bernardon counters, however, that "due to the subordination agreement[,] . . . Greenways waived any super priority it may have had under 25 Del. § 2108."

Before it makes its core argument, Bernardon asserts that, because Greenways's claim was dismissed with prejudice, the Greenways purchase money mortgage is junior to Bernardon's lien. In Bernardon's words: "Greenways subordinated purchase money mortgage is junior to the entirety of the WSFS loan proceeds." Furthermore, Bernardon argues that "[t]he doctrine of 'the law of the case' precludes reconsideration of issues previously decided in this case . . . . So, as

between the remaining litigants, WSFS cannot now argue that the Greenways PMM is senior to any part of the $5.6M."

In response, WSFS claims that its original loan and the purchase money mortgage have priority over the mechanic's lien. WSFS contends that it is irrelevant whether WSFS's loan or the purchase money mortgage is "first" because WSFS purchased the Greenways mortgage. WSFS claims that both are superior to the mechanic's lien. Furthermore, WSFS contends that "[t]he Dismissal . . . did not operate as an adjudication of the merits of the dispute between Greenways and Bernardon because Bernardon never staked a claim in briefing or in pleadings and asserted its priority as to the purchase money mortgage."

A. *Does a voluntary dismissal with prejudice act as an adjudication on the merits?*

"As a general rule, a dismissal with prejudice has the effect of a final adjudication on the merits."[3] "If the parties voluntarily dismissed the action, knowing that they either received the full relief to which they were legally entitled, or that they waived their rights to seek further relief, the dismissal is tantamount to a judgment

[3] *Fields v. Frazier*, 2005 WL 3193820, at *2 (Del. Super. Nov. 21, 2005). *See also Rochen v. Huang*, 1989 WL 5160, at *1 (Del. Super. Jan. 13, 1989) ("The plaintiffs have, therefore, obtained a judgment that will operate as effectively as would a judicial adjudication after a full hearing on the merits of this claim to protect their rights."); *Hudson v. Davidson*, 1988 WL 40020, at *2 (Del. Super. Apr. 20, 1988) ("Dismissal with prejudice is a severe sanction and one which precludes the preferred disposition of a case on its merits.").

on the merits."[4] Accordingly, a party "will be barred from ever reasserting this claim against these parties."[5]

While a dismissal with prejudice generally amounts to a final adjudication on the merits, it typically precludes one party from reasserting the same type of claim against the same opponent.[6] Here, however, the settlement was between Greenways and WSFS. The current dispute is instead between WSFS and Bernardon, and so, Greenways is not reasserting any claims. This is unique in that WSFS purchased Greenways's purchase money mortgage, and has, in a sense, stepped into the shoes of Greenways.

If Greenways had, instead, settled with Bernardon, and Greenways's claims against Bernardon were dismissed with prejudice, it would be different. Greenways's settling with WSFS, however, does not automatically place the purchase money mortgage junior to all new intervening parties that come along.

B. ***Does the law of the case doctrine preclude consideration of WSFS's claims?***

"The law of the case doctrine is designed to prevent relitigation of prior determinations and inconsistent judgments. The law of the case is established when

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[4] *Fields*, 2005 WL 3193820, at *2.

[5] *Rochen*, 1989 WL 5160, at *1.

[6] *See id.*

the Court applies a legal principal to an issue based on facts remaining constant over the course of litigation."[7] "A party seeking to have the Court reconsider the earlier ruling must demonstrate newly discovered evidence, a change of law, or manifest injustice."[8]

Here, the court is not faced with an issue already decided and is not reconsidering an earlier ruling. To the contrary, the court is analyzing a similar issue–priority of the interests against Defendant–but in the context of a more recent party to the litigation. Therefore, the priority of Bernardon's lien in relation to WSFS's and Greenways's mortgages has never been litigated, much less decided. Accordingly, there is no applicable law of the case.

C. *Does the subordination clause render the purchase money mortgage junior to the mechanic's lien?*

Bernardon's final argument, the most substantive one, is that, through the subordination clause, Greenways waived the priority it would have had under 25 *Del. C.* § 2108. The Seller Subordinated Mortgage between Defendant and Greenways, dated September 29, 2004, states:

> [I]t is hereby expressly provided and agreed that this

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[7] *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 55 (Del. Super. 1995) (citation omitted); *see also Fanean v. Rite Aid Corp. of Del., Inc.*, 984 A.2d 812, 818 (Del. Super. 2009).

[8] *E.I. du Pont de Nemours & Co.*, 711 A.2d at 55.

> mortgage shall, by its terms, be subordinated to the lien of any mortgage securing financing the proceeds of which are used by Saint Annes Club, LLC in the development of the Golf Course at Saint Annes.

As mentioned, generally, a purchase money mortgage will have "priority over any judgment against the mortgagor or any other lien created or suffered by him."[9] "There is however, no prohibition against subordinating such a mortgage to an anticipated subsequent construction mortgage by a provision of the purchase money mortgage."[10]

Under Delaware law, when construing the terms of a purchase money mortgage's subordination clause, the agreement must be "strictly construed where [its] terms are unambiguous."[11] A contract will not be considered "ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[12] There is no ambiguity "where the court can determine the meaning of a contract 'without any other guide than a knowledge of the simple facts on which,

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[9] 25 *Del. C.* § 2108.

[10] *Masten Lumber & Supply Co. v. Suburban Builders, Inc.*, 269 A.2d 252, 253 (Del. Super. 1970).

[11] *Guarantee Bank v. Magness Constr. Co.*, 462 A.2d 405, 408-09 (Del. 1983).

[12] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

from the nature of language in general, its meaning depends.'"[13]

The subordination clause in Greenways's mortgage agreement is unambiguous. The clause clearly states that the purchase money mortgage "shall . . . be subordinated to the lien of any mortgage[.]" The clause does not broadly state that it will be subordinated to mechanic's liens or other types of liens, but specifies the lien of "any mortgage."

Mechanic's liens and mortgages are similar in that they are liens against the property and they protect those who rely on the property's credit, but they are different. "The general purpose of a mechanic's lien is to provide protection for contractors or other laborers who furnish labor or other services on a structure pursuant to a contract with its owners."[14] Bernardon's mechanic's lien was obtained after the developer failed to pay for services rendered. The mortgages here were used to obtain and secure financing for the property's acquisition and development. There is no reason to believe that Greenways intended that its secured interest would be subordinate not only to the project's financiers, but also to every contractor who might work on the development. In any event, the subordination clause is clear.

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[13] *Id.*

[14] *Commonwealth Constr. Co. v. Cornerstone Fellowship Baptist Church, Inc.*, 2006 WL 2567916, at *16 (Del. Super. Aug. 31, 2006); *see also In re Long*, 86 A. 104, 104 (Del. Super. 1913) ("Mechanic's lien laws are designed to protect builders and contractors and to secure them by giving them a specific lien against the building or structure for which materials have been furnished or on which labor has been expended.").

III.

For the foregoing reasons, Bernardon's mechanic's lien is junior to WSFS's original $3,000,000.00 loan and the $1,574,560.75 purchase money mortgage.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (civil)
Patrick McGrory, Esquire
Eric M. Andersen, Esquire