



May 07, 2019

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The First Filed Real Estate Interest Has Priority, Sometimes

Uncounted dollars in money, goods and services are routinely transferred in reliance on the priority of a non-ownership interest in real property.

Often that is a mortgage, but the real property interest could be a mechanic's lien, tax lien^[1], judgment lien, leasehold, lien for condo association fees, etc. Ohio generally applies what is known as a "race/notice" rule when determining the priority of competing real property interests. That rule arises, in part, from Ohio Revised Code 5301.25(A) which provides, in part:

All deeds . . . and *instruments of writing properly executed for the conveyance or encumbrance of lands . . .* shall be recorded in the office of the county recorder of the county in which the premises are situated. *Until so recorded or filed for record, they are fraudulent insofar as they relate to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of that former deed . . . or instrument.* (italics added).

"Under this statute, a bona fide purchaser for value is bound by an encumbrance upon the property only if he has constructive or actual knowledge of the encumbrance." Cox v. Estate of Wallace, 12th Dist. Butler No. CA97-06-078, 1987 WL 32746, *2 (Dec. 31, 1987), citing Tiller v. Hinton, 19 Ohio St.3d 66, 482 N.E.2d 946 (1985). Recordation gives constructive notice to the world dealing with the land of properly recorded instruments in the chain of title. Deutsche Bank Natl. Trust Co. v. Hill, 5th Dist. Perry No. 14CA00021, 2015-Ohio-1575, ¶ 29.^[2]

With that background I want to discuss certain "exceptions that make the rule."^[3] The first well-known exception is property taxes. Unpaid property taxes become a lien and that lien has priority over a previously recorded mortgage or other property interest. See Ohio Rev. Code Section 5721.10 titled *State to have first lien; foreclosure proceedings; partial payment of delinquent taxes*, related statutes and cases thereunder including *Williams v. Schneider*, 109 N.E. 124 (Cuyahoga Cty. App. 2018) at paragraphs

83–87. The priority property taxes can include special assessments by local government. *Id.* at paragraph 42.

A second common, sometimes, exception is mechanic's liens. In the right situation, a mechanic's lien's priority can relate back to when work started and take priority over liens filed after work began but before the mechanic's lien was filed. *Panzica Construction Co. v. Bridgeview Crossing LLC*, 39 N.E.3d 529 (Cuyahoga Cty. App. 2015) at paragraph 29 ("The mechanic's lien statute states that regardless of when work was performed, a lien against the property takes effect for priority purposes as of the first date of visible work on the project. [R.C. 1311.13\(A\)\(1\).](#)")[\[4\]](#)

Those two exceptions to the "race/notice" rule bring me to a recent case intended to determine if there was a third common exception: unpaid condominium association dues and assessments. Earlier this year the Cuyahoga County Court of Appeals was asked to determine if a lien for unpaid condo association fees and assessments has priority from the date that the condo declaration was filed regardless of when the unpaid assessments arose and the related lien was filed. *Harbour Condominium No. 3 Association v. Gentile et al.*, 2019 WL 645207 (Cuyahoga Cty. App. Feb. 14, 2019).

In a foreclosure case brought by the condo association, the magistrate and trial court judge each held that the condo association fees lien provided for in Ohio Revised Code 5311.18(B)(1) and related provisions had priority over a mortgage filed before the condo association's lien but after the declaration that created the condo development. The trial court then ordered distribution of the sheriff sale proceeds in accord with that decision. Citibank as mortgagee appealed from the trial court decisions.[\[5\]](#) The appellate court reversed the lower court's decision concerning priority of the mortgage lien that was recorded after the condo declaration but before the condo association's lien for unpaid fees and assessments.

The magistrate and trial court determinations versus the appellate decision are based on differing interpretations of Ohio Revised Code section 5311.18 which states in part:

(A)(1) Unless otherwise provided by the declaration or the bylaws, the unit owners association has a lien upon the estate or interest of the owner in any unit and the appurtenant undivided interest in the common elements for the payment of any of the following expenses that are chargeable against the unit . . .

(3) The lien described in division (A)(1) of this section is effective on the date that a certificate of lien in the form described in division (A)(3) of this section is filed for record in the office of the recorder . . .

(B)(1) The lien described in division (A)(1) of this section is prior to any lien or encumbrance subsequently arising or created except liens for real estate taxes and assessments of political subdivisions and liens of first mortgages that have been filed for record . . .

The magistrate and trial court^[6] based their determinations of subsection (B) quoted above and the preliminary judicial report that appeared to show Citibank held a second mortgage. The appellate court instead focused on subsection (A) saying “Harbour Light’s lien that was established under R.C. 5311.18(A)(1) is not automatic upon filing a declaration as Harbour Light contends. Rather, according to the plain language of R.C. 5311.18(A)(1), a lien that arises from common expenses, . . ., does not arise until the expenses ‘remain unpaid for ten days after any portion has become due and payable[.]’ Thus, Harbour Light’s lien on the property did not arise until Gentile’s expenses remained unpaid for ten days.” *Harbour Lights* at paragraph 23.

The appellate court then went on to quote and discuss the *Settler’s Walk* case cited in the footnote above. The appellate court noted that an unfiled lien arising from the statute and condo declaration was not a lien at all and there was no possibility of a lien until there was a debt to be secured by that lien. *Harbour Lights* at paragraph 26.^[7] The *Settler’s Walk* case is based on this general rule:

A lien on real property for payment of a debt is a right to have the debt satisfied out of the land, if not otherwise paid. However, as the Ohio Supreme Court has stated, “there can be no lien unless there is a debt [.]” *Choteau, Merle & Sandford v. Thompson & Campbell*, 2 Ohio St. 114, 124 (1853). “Thus, a lien cannot exist in the absence of

the debt, the payment of which it secures.” Westin Hills West Three Townhome Owners Ass’n v. Federal Nat. Mortg. Ass’n, 283 Neb. 960, 966, 814 N.W.2d 378 (2012), citing Dean Realty Co. v. City of Kansas City, 85 S.W.3d 83 (Mo.App.2002). In other words, although there are many types and classes of liens, “all have this characteristic of being secondary to an existing obligation, usually a debt. If there is no debt the lien ceases to have life or existence for its function has vanished[.]” Hughes Plumbing and Heating, Inc. v. Rhoad, 3d Dist. Hancock Nos. 5–79–4 and 5–79–5, 1979 WL 207953, *2 (May 22, 1979).

Settler’s Walk at paragraph 18.

The idea that a lien is incidental to the debt it secures and has no life unless it secures a debt underlies decisions like *U.S. Bank v. Marcino*, 181 Ohio App.3d 328 (Jefferson Cty. App. 2009) (“For nearly a century, Ohio courts have held that whenever a promissory note is secured by a mortgage, the note constitutes the evidence of the debt and the mortgage is a mere incident to the obligation. Therefore, the negotiation of a note operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered.” (citations omitted)).

The lessons from the *Harbour Lights* case are simple: for condo associations, file your liens as soon as possible even if there is a history in your locality of granting priority to your liens for unpaid association fees and assessments; and for counsel, do not assume that an untested rule of general acknowledgement is in fact the proper result.

Vince Mauer has a master’s degree in Business Administration and passed the CPA exam. Licensed in Ohio and Iowa, he has represented financial institutions in litigation matters for over 30 years. For more information on this topic, contact Vince Mauer at vmauer@fbtlaw.com.

[1] See, IRS Liens, After Acquired Property and the Doctrine of Choateness (5/4/18) <https://www.blockchainandbanking.com/irs-liens-after-acquired-property-and-the-doctrine-of-choateness>

[2] See, Settlers Walk Home Owners Assn. v. Phoenix Settlers Walk, Inc., 12th Dist. Warren Nos. CA2014-09-116, CA2014-09-117, and CA2014-09-118, 2015-Ohio-4821, 2015 WL 7430296, *discretionary appeal not accepted*, 145 Ohio St.3d 1444, 2016-Ohio-1596, 48 N.E.3d 583 at paragraphs 16-18.

[3] This idiom may arise from a Roman legal principle: *exceptio probat regulam in casibus non exceptis* ("the exception confirms the rule in cases not excepted").

[4] Although beyond the scope of this post, it should be noted that some possession-based artisans' liens on personal property can have priority over previously perfected liens. See 83 O. Jur. 3d Secured Transactions Section 183 which includes this "[a] possessory lien has priority unless the lien is created by a statute which expressly provides otherwise. By definition, any possessory lien created by a rule of law (other than a statute) will always have priority since it was not created by a statute that expressly provides otherwise. [The] Perishable Agricultural Commodities Act (PACA) statutory trusts were created by Congress to correct the perceived inequity to unsecured produce sellers caused by financing arrangements between produce purchasers and their lenders, by giving the sellers precedence over the claims of secured creditors."

[5] The sheriff's sale proceeds were not distributed during the appeal despite Citibank not obtaining a stay of the order of distribution. The appellate court noted that this was lucky for Citibank because distribution of the sale proceeds in accord with the trial court order would have mooted Citibank's appeal. I am surprised a well-heeled appellate like Citibank would take that risk. See, Appeals in a Foreclosure Case, an Empty Right in Ohio? (5/30/18) at <https://www.blockchainandbanking.com/appeals-in-a-foreclosure-case-an-empty-right-in-ohio> and Update and Expansion: Appeals in a Foreclosure Case, an Empty Right in Ohio? (11/21/18) at <https://www.blockchainandbanking.com/update-and-expanded-appeals-in-a-foreclosure-case-an-empty-right-in-ohio>

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[6] The *Harbour Lights* appellate court acknowledged that at least two other Cuyahoga County common pleas (trial court) decisions

agreed with the magistrate and trial court in this case. In short, the reversed trial court's determination in this case was not an aberration. *Id.* at paragraph 30. I am aware of other counties where the general rule is to give priority to condo association's liens that are unwarranted if those counties' courts were to adopt the reasoning of the *Harbour Lights* appellate court. See generally, Kuehnie and Williams *Ohio Condominium Law* Chapter 32 titled Liens and Lien Foreclosures (Nov. 2018 update).

[7] The *Harbour Light* appellate court described the *Settler's Walk* case thusly: "In *Settlers Walk*, the court addressed whether a purchaser of 50 lots in a residential planned community, where all property owners are mandatory members of a homeowners' association and subject to the association's declaration and bylaws, was liable for unpaid assessments and fees that had accrued on the property before the purchaser bought the property. The homeowners' association did not record the unpaid assessments in the county recorder's office. Similar to what Harbour Light is arguing here, the association in *Settlers Walk* argued that its lien against the property 'ran with the land by simply recording the Declaration itself without ever recording a separate instrument notifying any potential bona fide purchaser that [the association] had a lien on the property resulting from the unpaid assessments.' The Twelfth District disagreed with the association in *Settlers Walk* and held that the purchaser was not liable for the unpaid assessments and late fees that accrued prior to its purchase."

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