Florida's Recording Act and Competing Priorities (Deeds and Liens)

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OLD REPUBLIC TITLE

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NOTICE: GENERAL OVERVIEW

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THREE TYPES OF NOTICE:

Actual	Implied	Constructive
• Party has actual knowledge of the facts in question.	• Party had a duty to make **inquiry** regarding facts in question and the means to do so.	• Similar to implied notice, but arises by operation of law under recording statute.

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CONSTRUCTIVE NOTICE: Relevant Florida Statutes

§695.01, F.S. Conveyances and liens to be recorded.	• *No 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 valuable consideration and without notice, unless the same be recorded according to law; . . .*
§695.11, F.S. Instruments deemed to be recorded at time of filing.	• Determines when a document is deemed to be recorded, which is at the time the consecutive official register numbers required under §28.222 have been affixed.
§28.222, F.S. Clerk to be county recorder.	• The clerk of the circuit court shall be the recorder of all instruments that are required or authorized to be recorded, which shall be recorded in the "Official Records" as one general series.

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CONSTRUCTIVE NOTICE: Relevant Florida Caselaw

- *Van Eepoel Real Estate Co. v. Sarasota Milk Co.*, 129 So. 892 (Fla. 1930)
- *Sapp v. Warner*, 141 So. 124 (Fla. 1932)
- *Argent Mortgage Co., LLC v. Wachovia Bank, N.A.*, 52 So.3d 796 (Fla. 5th DCA 2010)
- *Mayfield v. First City Bank*, 95 So.3d 398 (Fla. 1st DCA 2012)
- *Regions Bank v. Deluca*, 97 So. 3d 879 (Fla. 2d DCA 2012)

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Van Eepoel Real Estate Co. v. Sarasota Milk Co., 129 So. 892 (Fla. 1930)

- **Brief Facts:**
  - Lien priority dispute between mortgagee and mechanic's lien claimant.
  - Landowner executed mortgage on 11/25/1925, recorded on 4/21/1926
  - Mechanic's lienor, in privity with owner, commenced work on 4/12/1926, completed work on 4/16/1926 and recorded COL on 7/7/1926
- **Issue:** Whether a Purchase Money Mortgage ("PMM") recorded 5 months after its execution and delivery **and** after work commenced, was completed by a mechanic's lienor, but prior to a mechanic's lien recorded, without notice of the PMM has priority.
- **Holding:** Florida Supreme Court held in favor of mechanic's lienor based upon the established rule that [*s]ubsequent purchasers or creditors for value and without notice of a prior unrecorded deed or mortgage to a third person are not affected thereby.*

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Sapp v. Warner, 141 So. 124 (Fla. 1932)

- **Brief Facts:**
  - In guardianship proceedings for minor, minor's duly appointed guardian sold & conveyed minor's real property to third party, with court order confirming the sale.
  - Property was purchased for $20,000 split into two unrecorded (lost or misplaced) PMMs.
  - Land was subsequently subdivided into lots and blocks, which were sold to numerous (about 200) defendants whom challenged foreclosure of unrecorded mortgages.
- **Issue:** Whether a party is charged with constructive notice of an interest in land based upon matters appearing in the public records, where a deed stemming from guardianship proceedings created a duty of inquiry into those guardianship proceedings to determine whether it had been duly authorized, which would have also reflected the existence of the unrecorded mortgage(s).
- **Holding:** The Florida Supreme Court held that *implied actual notice was warranted by the fact that the persons having constructive notice of the record of the guardian's deed must in any event have looked to the proceedings which were necessary to support it, and accordingly must be charged with implied actual notice of what an inquiry suggested to a prudent man by those proceedings would have disclosed*.

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Argent Mortgage Co., LLC v. Wachovia Bank, N.A., 52 So.3d 796 (Fla. 5th DCA 2010)

- **Brief Facts:**
  - On 8/31/2004, Borrowers executed mortgage in favor of Olympus Mortgage, recorded on **1/5/2005**, and subsequently assigned to Wachovia Bank;
  - On 12/10/2004, Borrowers executed mortgage in favor of Argent Mortgage, recorded on **1/31/2005**;
  - Both mortgages went into default and both lenders filed foreclosure action, which were consolidated and dispute over priority ensued.
  - Trial court held in favor of Wachovia and declared Florida to be a race-notice jurisdiction.
- **Issue:** Whether amendment to §695.11, F.S. made Florida into a race-notice jurisdiction, or it remained a pure notice jurisdiction with regard to determining lien priority.
- **Holding:** 5th DCA held that Florida remains notice jurisdiction and therefore, Argent had priority over the Wachovia Bank mortgage because it was a subsequent mortgagee for value without notice of Wachovia's mortgage.

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Mayfield v. First City Bank, 95 So.3d 398 (Fla. 1st DCA 2012)

- **Brief Facts:**
  - In October, 2009, the Mayfields obtained title to Lot 2 via WD, together with PMM (WD and PMM recored on 11/2/2009);
  - In 2006, unbeknownst to the Mayfields, title to Lot 2 had been conveyed by their same grantor to another party ("W&A"), that also obtained PPM (hereinafter collectively referred to as the "First Deed & Mortgage");
  - On July 6, 2006, the Clerk recorded the First Deed & Mortgage;
  - Clerk realized an error made in the recording process and voided the First Deed & Mortgage from the official records about **73 minutes** after recoding it, intending to re-record, but failed to do so and mistakenly recorded similar instruments regarding another parcel of property.
  - In 2010, W&A mortgagee filed a foreclosure action, naming the Mayfields and their lender as defendants;
  - Mayfields filed a MSJ and claimed to be BFPs without notice.
- **Issue:** Whether the First Deed & Mortgage provided constructive notice, when it was only recorded and could only be found of record for 73 minutes on July 3, 2006.
- **Holding**: Unambiguous language of §695.11, F.S. controls such that constructive notice attached at time the First Deed & Mortgage were recorded on July 6, 2006. No requirement to remain recorded, rather, just need to *be recorded according to law*, which occurred.

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Regions Bank v. Deluca, 97 So.3d 879 (Fla. 2d DCA 2012)

- **Brief Facts**:
  - From June '03 – June '05, Owners A owned the "Olde Cypress Property."
  - '03 Owners A gave 1st & 2nd mortgages, in favor of AmSouth, which later merged into Regions Bank;
  - '05 Owners A obtained a new mortgage from Regions to purchase the "Bayfront Gardens Property" with the Olde Cypress Property included as collateral.
  - Mortgage was recorded and indexed, but only included the legal description for the Bayfront Gardens Property. Page 2 of mortgage omitted the legal descriptions for either property and did not reference or incorporate Exhibit A by reference. Exhibit A was located at page 12 of the mortgage, just prior to the attached Riders. It included the legal descriptions for both parcels.
  - On June 28, 2005, Owners A sold the Olde Cypress Property to the Delucas, whom obtained and recorded a PMM, in favor of JP Morgan.
  - '09 Regions Bank filed a foreclosure action of both properties and named Delucas and JP Morgan as partial defendants, whom filed affirmative defense asserting that they were BFPs w/out notice.

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Regions Bank v. Deluca, 97 So.3d 879 (Fla. 2d DCA 2012)

- **Issue**: Whether a recorded defective instrument, outside of the chain of title, can still impart constructive notice to subsequent purchasers and lenders?
- **Holding:** The Delucas and JP Morgan held to have constructive notice that the lien of the Regions Bank mortgage encumbered both properties, including the Olde Cypress Property, reversing circuit court ruling.

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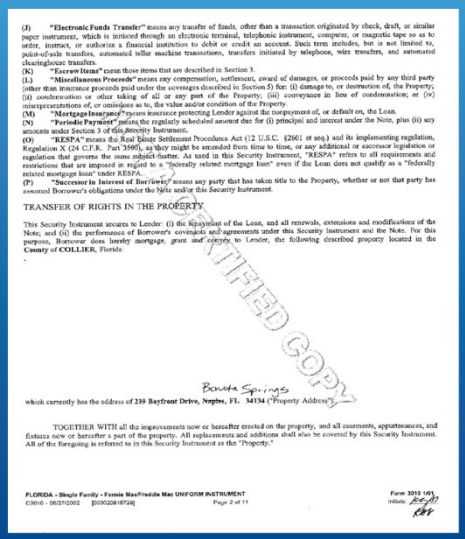
Regions Bank v. Deluca, 97 So.3d 879 (Fla. 2d DCA 2012)



(J) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.
(K) "Escrow Items" mean those items that are described in Section 3.
(L) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.
(M) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.
(N) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.
(O) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.
(P) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

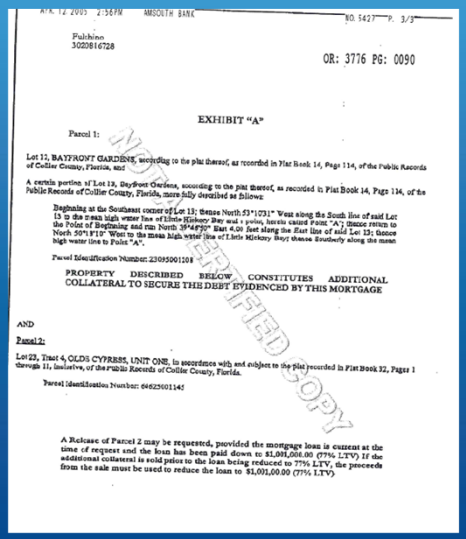
This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender, the following described property located in the County of COLLIER, Florida:

Bonita Springs

which currently has the address of 239 Bayfront Drive, Naples, FL 34134 ("Property Address");

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

FLORIDA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT
Form 3010 1/01
Page 2 of 11
Initials:



APR. 12 2005 2:56PM AMSOUTH BANK NO. 5427 P. 3/3

Fulbhino
3002816728

OR: 3776 PG: 0090

EXHIBIT "A"

Parcel 1:

Lot 12, BAYFRONT GARDENS, according to the plat thereof, as recorded in Plat Book 14, Page 134, of the Public Records of Collier County, Florida, and

A certain portion of Lot 13, Bayfront Gardens, according to the plat thereof, as recorded in Plat Book 14, Page 134, of the Public Records of Collier County, Florida, more fully described as follows:

Beginning at the Southeast corner of Lot 13; thence North 53°10'31" West along the South line of said Lot 13 to the mean high water line of Little Hickory Bay and a point, herein called Point "A"; thence return to the Point of Beginning and run North 36°49'29" East 4.00 feet along the East line of said Lot 13; thence North 50°19'19" West to the mean high water line of Little Hickory Bay; thence Southerly along the mean high water line to Point "A".

Parcel Identification Number: 23095001208

PROPERTY DESCRIBED BELOW CONSTITUTES ADDITIONAL COLLATERAL TO SECURE THE DEBT EVIDENCED BY THIS MORTGAGE

AND

Parcel 2:

Lot 23, Tract 4, OLDS CYPRESS, UNIT ONE, in accordance with and subject to the plat recorded in Plat Book 32, Pages 1 through 11, inclusive, of the Public Records of Collier County, Florida.

Parcel Identification Number: 66625001145

A Release of Parcel 2 may be requested, provided the mortgage loan is current at the time of request and the loan has been paid down to $1,001,004.00 (77% LTV). If the additional collateral is sold prior to the loan being reduced to 77% LTV, the proceeds from the sale must be used to reduce the loan to $1,001,00.00 (77% LTV).

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TYPES OF RECORDING ACT JURISDICTIONS

Pure Race
- Race to record.
- First in time, first in right.

Pure Notice
- Analysis hinges on notice, actual or constructive, not just timing of recording.
- Subsequent BFP for value without notice will prevail.

Race-Notice Hybrid
- Subsequent BFP without notice **AND** who records first will prevail.

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BASIC FLORIDA LIEN PRIORITY IN PURE NOTICE ACT JURISDICTION

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CONSTRUCTIVE NOTICE
Application in Condo Context

- Condo Act, Ch. 718, F.S.
- Recorded Condo Declaration - §718.104, F.S. & §695.01, F.S. – simply by its recordation, a condo unit owner is charged with constructive notice of the contents of the Condo Declaration, including, without limitation, use restrictions, assessments obligations, easements, amendment procedures, leasing limitations.
- NOTE: Constructive notice and lien priority are not always parallel. For example, NOC & COL

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SOME STATUTORY LIENS TO CONSIDER RE: LIEN PRIORITY

Construction Claim of Lien	Condo Claim of Lien	Super-Priority Lien
• Attach at time of recordation (§713.07, F.S.) **UNLESS** a Notice of Commencement ("NOC") is recorded.	• Relates back to recording of Condo Declaration with carve out for first mortgages of record. *See* §718.116(5)(a), F.S.	• **Examples**: Tax Liens have super-priority over other liens, including previously recorded mortgages. *See* §197.122, F.S. • PACE Financing Liens §§ 163.08 – 163.087 F.S.

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EXAMPLE 1: HOW FLORIDA'S PURE NOTICE RECORDING ACT CAN IMPACT PRIORITY

- Seller conveys real property to Buyer A on Monday, April 1, 2025;
- Buyer A does not record the deed;
- Seller fraudulently conveys the same real property to Buyer B on Wednesday, April 3, 2025;
- Buyer B immediately records the deed and had no knowledge of Buyer A.

- **Which Buyer has priority?**

EXAMPLE 1: HOW FLORIDA'S PURE NOTICE RECORDING ACT CAN IMPACT PRIORITY

- **ANSWER: Buyer B has priority if they qualify as a BFP because Buyer B:**
  - **Paid valuable consideration;**
  - **Lacked notice (actual, implied and constructive);**
  - **Recorded first.**

EXAMPLE 2: HOW FLORIDA'S PURE NOTICE RECORDING ACT CAN IMPACT PRIORITY

- 4/1/2025 – Nick Jagger signs a $100,000 mortgage to ABC Mortgage, Inc.
- 4/10/2025 – Nick Jagger signs a $75,000 mortgage to XYZ Mortgage, Inc.
- 4/11/2025 – ABC Mortgage, Inc. records the $100,000 mortgage, dated 4/1/2025
- 4/15/2025 – XYZ Mortgage, Inc., records the $75,000 mortgage, dated 4/10/2025

- **Which recorded mortgage has priority?**

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EXAMPLE 2: HOW FLORIDA'S PURE NOTICE RECORDING ACT CAN IMPACT PRIORITY

- 4/1/2025 – Nick Jagger signs a $100,000 mortgage to ABC Mortgage, Inc.
- 4/10/2025 – Nick Jagger signs a $75,000 mortgage to XYZ Mortgage, Inc.
- 4/11/2025 – ABC Mortgage, Inc. records the $100,000 mortgage, dated 4/1/2025
- 4/15/2025 – XYZ Mortgage, Inc., records the $75,000 mortgage, dated 4/10/2025

- **ANSWER: XYZ Mortgage, Inc. has priority because Florida's recording act is a pure "Notice" jurisdiction.**

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Q & A

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The 2025 Florida Statutes

695.01 Conveyances and liens to be recorded.—

(1) No 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; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded before the accruing of the right of such creditor or subsequent purchaser.

(2) Grantees by quitclaim, heretofore or hereafter made, shall be deemed and held to be bona fide purchasers without notice within the meaning of the recording acts.

(3) A lien by a governmental entity or quasi-governmental entity that attaches to real property for an improvement, service, fine, or penalty, other than a lien for taxes, non-ad valorem or special assessments, or utilities, is valid and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration only if the lien is recorded in the official records of the county in which the property is located. The recorded notice of lien must contain the name of the owner of record, a description or address of the property, and the tax or parcel identification number applicable to the property as of the date of recording.

History.—ss. 4, 9, Nov. 15, 1828; RS 1972; GS 2480; RGS 3822; CGL 5698; s. 10, ch. 20954, 1941; s. 8, ch. 85-63; s. 2, ch. 2013-241.

The 2025 Florida Statutes

695.11 Instruments deemed to be recorded from time of filing.—All instruments which are authorized or required to be recorded in the office of the clerk of the circuit court of any county in the State of Florida, and which are to be recorded in the "Official Records" as provided for under s. 28.222, and which are filed for recording on or after the effective date of this act, shall be deemed to have been officially accepted by the said officer, and officially recorded, at the time she or he affixed thereon the consecutive official register numbers required under s. 28.222, and at such time shall be notice to all persons. The sequence of such official numbers shall determine the priority of recordation. An instrument bearing the lower number in the then-current series of numbers shall have priority over any instrument bearing a higher number in the same series.

History.—s. 1, ch. 3592, 1885; RS 1977; GS 2488; RGS 3830; CGL 5708; s. 1, ch. 17217, 1935; s. 1, ch. 67-442; s. 766, ch. 97-102.

The 2025 Florida Statutes

28.222 Clerk to be county recorder.—

(1) The clerk of the circuit court shall be the recorder of all instruments that he or she may be required or authorized by law to record in the county where he or she is clerk.

(2) The clerk of the circuit court shall record all instruments in one general series called "Official Records." He or she shall keep a register in which he or she shall enter at the time of filing the filing number of each instrument filed for record, the date and hour of filing, the kind of instrument, and the names of the parties to the instrument. The clerk shall maintain a general alphabetical index, direct and inverse, of all instruments filed for record. The register of Official Records must be available at each office where official records may be filed.

(3) The clerk of the circuit court shall record the following kinds of instruments presented to him or her for recording, upon payment of the service charges prescribed by law:

(a) Deeds, leases, bills of sale, agreements, mortgages, notices or claims of lien, notices of levy, tax warrants, tax executions, and other instruments relating to the ownership, transfer, or encumbrance of or claims against real or personal property or any interest in it; extensions, assignments, releases, cancellations, or satisfactions of mortgages and liens; and powers of attorney relating to any of the instruments.

(b) Notices of lis pendens, including notices of an action pending in a United States court having jurisdiction in this state.

(c) Judgments, including certified copies of judgments, entered by any court of this state or by a United States court having jurisdiction in this state and assignments, releases, and satisfactions of the judgments.

(d) That portion of a certificate of discharge, separation, or service which indicates the character of discharge, separation, or service of any citizen of this state with respect to the military, air, or naval forces of the United States. Each certificate shall be recorded without cost to the veteran, but the clerk shall receive from the board of county commissioners or other governing body of the county the service charge prescribed by law for the recording.

(e) Notices of liens for taxes payable to the United States and other liens in favor of the United States, and certificates discharging, partially discharging, or releasing the liens, in accordance with the laws of the United States.

(f) Certified copies of petitions, with schedules omitted, commencing proceedings under the [1]Bankruptcy Act of the United States, decrees of adjudication in the proceedings, and orders approving the bonds of trustees appointed in the proceedings.

(g) Certified copies of death certificates authorized for issuance by the Department of Health which exclude the information that is confidential under s. 382.008, and certified copies of death certificates issued by another state whether or not they exclude the information described as confidential in s. 382.008.

(h) Copies of any instruments originally created and executed using an electronic signature, as defined in s. 695.27, and certified to be a true and correct paper printout by a notary public in accordance with chapter 117, if the county recorder is not prepared to accept electronic documents for recording electronically.

(i) Any other instruments required or authorized by law to be recorded.

(4) The county recorder shall remove recorded court documents from the Official Records pursuant to a sealing or expunction order.

(5) Any reference in these statutes to the filing of instruments affecting title to real or personal property with the clerk of the circuit court shall mean recording of the instruments.

(6) The clerk of the circuit court may maintain a separate book for maps, plats, and drawings recorded pursuant to chapters 177, 253, and 337.

(7)(a) All instruments recorded in the Official Records [2] must remain open to the public, under the supervision of the clerk, for the purpose of inspection thereof and of making copies therefrom.

(b) The clerk is not required to perform any service in connection with such inspection or making of copies without payment of service charges as provided in s. 28.24.

(c) The clerk, in his or her capacity as county recorder, must retain the service charge payments under s. 28.24, except that those service charge payments that relate to court records or functions and meet the description of court-related functions in s. 28.35(3)(a) must be distributed for those court-related functions.

History.—ss. 2, 4, ch. 71-4; s. 24, ch. 81-259; s. 2, ch. 84-114; s. 2, ch. 92-25; s. 1, ch. 93-42; s. 100, ch. 94-119; s. 11, ch. 94-348; s. 1324, ch. 95-147; s. 2, ch. 95-214; s. 83, ch. 97-237; s. 3, ch. 99-259; s. 2, ch. 2013-109; s. 18, ch. 2019-71; s. 1, ch. 2021-116; s. 1, ch. 2021-215.

[1] **Note.**—Replaced by the 1978 Bankruptcy Code.

[2] **Note.**—As amended by s. 1, ch. 2021-116. The amendment by s. 1, ch. 2021-215, uses the word “are” instead of the words “must remain.”

Van Eepoel Real Estate Co. v. Sarasota Milk Co.

Supreme Court of Florida, Division A

August 1, 1930; Petition for rehearing denied September 3, 1930

[NO DOCKET NUMBER]

Reporter
100 Fla. 438 *; 129 So. 892 **; 1930 Fla. LEXIS 1015 ***

THE VAN EEPOEL REAL ESTATE COMPANY, a Corporation, *Appellant,* V. THE SARASOTA MILK COMPANY, a Corporation, et al., *Appellees*

Prior History: [*1]** An Appeal from the Circuit Court for Sarasota County; Hon. Paul C. Albritton, Judge.

Affirmed on rehearing.

Case Summary

Procedural Posture
The Circuit Court for Sarasota County (Florida) entered judgment for appellee mechanic's lienholder (mechanic), holding that a mechanic's lien was superior to appellant mortgagee's purchase money mortgage in certain real estate. The trial court's decree was originally reversed by the Florida Supreme Court, but the state supreme court reconsidered the case on a petition for rehearing.

Overview
The mechanic commenced and completed his work after the execution of the purchase money mortgage (mortgage) but before its recordation, without knowledge or notice of the existence of the mortgage. The mortgagee was the first in time to record. Further, the mortgagee had no notice, either actual or constructive, of the mechanic's claim when the mortgage was recorded. The court found that (1) it was the duty of a purchase money mortgagee to promptly record his mortgage to preserve his priority over the rights of innocent purchasers or creditors subsequently arising; (2) where a purchase money mortgagee elects to withhold his mortgage from record and to permit others to innocently deal with the property in ignorance of his unrecorded mortgage, the same rules of estoppel are applicable to him as to any other mortgagee; and (3) the mortgagee permitted the mechanic to change his position by performing his work in ignorance of the mortgage. Thus, the mechanic was entitled to a first lien upon the property under the state's recording statutes.

Outcome
The former judgment of reversal was vacated, and the decree appealed from was affirmed.

LexisNexis® Headnotes

Real Property Law > Priorities & Recording > Elements > Bona Fide Purchasers

Real Property Law > Deeds > General Overview

Real Property Law > Priorities & Recording > General Overview

HN1 **Elements, Bona Fide Purchasers**

No conveyance, transfer or mortgage or real property, 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. 1927 Fla. Laws ch. 5698.

Governments > Courts > Clerks of Court

Real Property Law > Priorities & Recording > Elements > Bona Fide Purchasers

Real Property Law > ... > Liens > Nonmortgage Liens > Mechanics' Liens

HN2 **Courts, Clerks of Court**

As against the owner of the property, real or personal, upon which a lien is claimed, the lien hereinbefore provided for shall be acquired by any person, in privity with such owner, by the performance of the labor or the furnishing of the materials. Any purchaser or creditor

whose title, interest, lien or claim in or to the property shall be created, or shall arise, while the construction or repair of such property as aforesaid is in process, shall be deemed and held to be a purchaser or creditor with notice. As against the purchasers and creditors of such owner without notice, such lien shall be acquired upon real estate only from the time of the recordation in the office of the clerk of the circuit court of the county where the real estate lies of a notice of such lien. 1927 Fla. Laws ch. 5380.

Real Property Law > Priorities & Recording > Elements > Bona Fide Purchasers

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagor's Interests

Real Property Law > ... > Liens > Nonmortgage Liens > Mechanics' Liens

HN3 **Elements, Bona Fide Purchasers**

1927 Fla. Laws ch. 5380 provides that as against purchasers and creditors of the owner without notice a mechanic's lien upon real estate shall be acquired only from the time of the record in the clerk's office of a notice of such lien.

Real Property Law > ... > Liens > Nonmortgage Liens > General Overview

Real Property Law > Deeds > General Overview

Real Property Law > Financing > Secondary Financing > Lien Priorities

HN4 **Liens, Nonmortgage Liens**

In a contest between persons having only equitable interests, however, priority of time is the ground of preference last resorted to. If one has on different grounds a better equity than the other, priority of time is usually subordinated to other equitable considerations.

Real Property Law > Priorities & Recording > Elements > Bona Fide Purchasers

Real Property Law > Financing > Secondary Financing > Lien Priorities

HN5 **Elements, Bona Fide Purchasers**

Subsequent purchasers or creditors for value and without notice of a prior unrecorded deed or mortgage to a third person are not affected thereby.

Real Property Law > Priorities & Recording > Elements > Bona Fide Purchasers

Real Property Law > Priorities & Recording > Recording Acts

HN6 **Elements, Bona Fide Purchasers**

When one purchases for value and without notice of a prior unrecorded deed the rights acquired under the junior deed are superior to those held under the senior deed, even though the senior deed be recorded prior to the record of the junior deed.

Civil Procedure > Judgments > Enforcement & Execution > Writs of Execution

Contracts Law > Personal Property > Bona Fide Purchasers

Real Property Law > ... > Liens > Nonmortgage Liens > General Overview

Real Property Law > Priorities & Recording > Elements > Bona Fide Purchasers

HN7 **Enforcement & Execution, Writs of Execution**

If at the time a lien is acquired by a judgment creditor he has no notice actual or constructive of equities of third persons in real estate the title to which stands in the name of the judgment debtor as the apparent absolute owner, the purchaser at the execution sale, whether such purchaser be the judgment creditor or another, takes a good title and is protected as a bona fide purchaser, even though the creditor or purchaser had notice of such equities at the time of the sale.

Real Property Law > Priorities & Recording > Elements > Bona Fide Purchasers

HN8 **Elements, Bona Fide Purchasers**

A creditor who obtains judgment or sues out an attachment after the record of a valid mortgage is not entitled to protection under the statute as an innocent purchaser, although the debt upon which the judgment or attachment is based was contracted after the execution of the mortgage and before its record.

Real Property Law > Priorities & Recording > Elements > Bona Fide Purchasers

HN9 **Elements, Bona Fide Purchasers**

The registry statute does not operate to convey title or to create a lien upon property; but records made under such statute may operate as an estoppel where persons without actual knowledge and without circumstances to put them upon inquiry reasonably may have taken substantial steps relying upon the record; and those who by their conduct or neglect in permitting the record to mislead others must bear any consequent loss rather than the one who in good faith may have acted with reference to the record as being in accord with actual facts.

Real Property Law > Deeds > General Overview

HN10 **Real Property Law, Deeds**

A mortgagee must act with diligence, and avoidable delays are at his peril.

Real Property Law > Financing > Mortgages & Other Security Instruments > General Overview

Real Property Law > Deeds > General Overview

HN11 **Financing, Mortgages & Other Security Instruments**

There being no fraud or duress, a notary's certificate of acknowledgment in the form prescribed by law, when the notary has acted within his jurisdiction, is conclusive of the facts and acts recited, and can not be questioned collaterally. Even where fraud is alleged proof thereof must be of the clearest, strongest and most convincing character.

Counsel: *Jackson, Dupree & Cone,* for Appellant; *Early & Arnest,* for Appellees.

Judges: STRUM, J., TERRELL, C. J., AND BROWN AND BUFORD, J. J., concur; ELLIS, J., dissents.

Opinion by: STRUM

Opinion

[*440] **[**893]** STRUM, J. -- This is a contest for priority between a mortgagee and a mechanic's lien-claimant asserting liens upon the same land.

The mortgage was executed by the owner of the property November 25, 1925. It was recorded April 21, 1926.

The mechanic's lien-claimant dealt directly with and was therefore in privity with the owner. The mechanic's work was commenced on April 12, 1926, and completed on **[*441]** April 16, 1926. Notice of the mechanic's lien was filed in the office of the clerk of the circuit court on July 7, 1926.

The following statutes are pertinent to the controversy:

HN1 "No conveyance, transfer or mortgage or real property, * * * 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 * * * ."

Sec. 5698, C.G.L. **[***2]** 1927.

The statute just above quoted is usually referred to as the recording statute.

[894]** The following statutes are found in the Chapter relating to the acquisition and enforcement of mechanic's liens:

"Liens prior in dignity to all others accruing thereafter shall exist in favor of the following persons, upon the following described real estate, under the circumstances hereinafter mentioned, to-wit:"

Then follows provisions affording liens to persons performing labor upon or furnishing materials in the construction or repair of buildings. Secs. 5349, 5350, 5353, C.G.L. 1927.

HN2 "As against the owner * * * of the property, real or

personal, upon which a lien is claimed, * * * the lien hereinbefore provided for shall be acquired by any person, in privity with such owner, by the performance of the labor or the furnishing of the materials. Any purchaser or creditor whose title, interest, lien or claim in or to the property shall be created, or **[*442]** shall arise, while the construction or repair of such property as aforesaid is in process, shall be deemed and held to be a purchaser or creditor with notice.

"As against the purchasers and creditors of such owner **[***3]** without notice, such lien shall be acquired upon real estate only from the time of the recordation in the office of the clerk of the circuit court of the county where the real estate lies of a notice of such lien. * * *." Sec. 5380, C.G.L. 1927.

The chancellor held that the mechanic's lien was superior. That decree was originally reversed by this court. Upon further consideration it appears that the chancellor's ruling was correct, and should be affirmed.

The lien of the mortgagee was not created, nor did it arise, during the progress of the mechanic's work, so as to charge the mortgagee with notice on that account.

The mechanic commenced and completed his work after the execution of the mortgage but before its recordation, without knowledge or notice of the existence of the mortgage. Neither does it appear that the mortgage had notice, either actual or constructive, of the mechanic's claim when the mortgage was recorded.

The mortgage came into existence and was a valid lien as between the mortgagor and the mortgagee upon its execution and delivery on November 25, 1925, several months prior to the time the mechanic commenced work. It was of no effect, however, as "against **[***4]** creditors or subsequent purchasers" for value and without notice, until recorded, which recording occurred on April 21, 1926. Meanwhile, and while there was no mortgage of record, the mechanic commenced and completed his work, thereby acquiring a statutory lien upon the property as against the owner. Thus the mortgagee and the mechanic each held valid and effective liens upon the property so far **[*443]** as the interest of the mortgagor-owner was concerned, the lien of the mortgagor dating from November 25, 1925, the date of the delivery of the mortgage, and the statutory lien of the mechanic dating from April 12, 1926, the date of the commencement of the work, so that, as against the owner, the lien of the mortgage was first in point of time. On April 16, 1926, when the mechanic's work was completed, neither the mortgagee nor the mechanic held a lien good as against the other, since neither had recorded his lien in the public records, and neither had actual notice of the other's lien. Up until April 21, 1926, when the mortgage was recorded, and which was five days after the completion of the mechanic's work, the liens of the mortgagee and of the mechanic, as between themselves **[***5]** as creditors' were merely *in posse.* On that date, however, the mortgage was recorded, and thereby became first in time of recording as against the mechanic's lien, notice of which was not recorded until July 7, 1926.

HN3 Sec. 5380, C.G.L. 1927, provides that "as against purchasers and creditors of the owner without notice" a mechanic's lien upon real estate shall be "acquired" only from the time of the record in the clerk's office of a notice of such lien. The mechanic acquired a lien as against the owner from the commencement of the work, but at the time the notice of such lien was *recorded* the mortgage had been executed, delivered and previously recorded, and was fully effectual both as against the mortgagor and against creditors and purchasers. In the absence, therefore, of an estoppel operating against the mortgagee under the circumstances stated, the mortgage would constitute a prior lien, being first in time of execution and of recording. See Guaranty Trust Co. v. Thompson, 113 So. R. 117; Annotation, Ann. Cas. 1912A 193. ***HN4*** In a contest between persons having only equitable interests, however, priority of time **[*444]** is the ground of preference last resorted to. **[***6]** If one has on different grounds a better equity than the other, priority of time is usually subordinated to other equitable considerations. Myers v. Van Buskirk, 119 So. R. 123.

HN5 Subsequent purchasers or creditors for value and without notice of a prior unrecorded deed or mortgage to a third person are not affected thereby. *Stewart v. Mathews, 19 Fla. 752*, *Feinberg v. Stearsns, 56 Fla. 279*, 48 So. R. 36; *West Coast Lbr. Co. v. Griffin, 56 Fla. 878*, 48 So. R. 36; *Hopkins v. O'Brien, 57 Fla. 444*, 49 So. R. 936; Myers v. Van Buskirk, 119 So. R. 123; Rambo v. Dickenson, 110 So. R. 352; *Edwards v. Thom, 25 Fla. 222*, 5 So. R. 707; *Lusk v. Reel, 36 Fla. 418*, 18 So. R. 581; *Doyle v. Wade, 23 Fla. 90,* **[**895]** 1 So. R. 516. See also *Spellman v. Beeman, 70 Fla. 575*, 70 So. R. 589. ***HN6*** When one purchases for value and without notice of a prior unrecorded deed the rights acquired under the junior deed are superior to those held under the senior deed, even though the senior deed be recorded prior to the record of the junior deed. The senior grantee having failed to record his deed, thereby permitting the junior grantee to purchase

without notice of the senior deed, is estopped to claim priority **[***7]** over such junior grantee under those circumstances. Accordingly, it is generally held in states having recording statutes similar to ours, that if A conveys lands to B, a *bona fide* purchaser for value, who does not go into possession and who failed to record his deed until after A conveys the same land to C, a second *bona fide* purchaser for value without notice of B's interest, and B then records his deed before C records his, the title of C shall nevertheless prevail as between C and B, because it is the fault of B that he did not immediately record his deed, thereby permitting C to deal with the property and part with his consideration without knowledge of B's interest. So B is estopped and the equities are with c. *Fallas v. Pierce, 30 Wis. 443, 458*; Randall v. Hamilton, 119 So. E.R. 595, *32 A.L.R. 342*; see also Ann. Cas. 1912 A, 194; Ann. Cas. 1916 B, 632.

In *Mansfield v. Johnson, 51 Fla. 239*, 40 So. R. 196, it was held: ***HN7*** "If at the time a lien is acquired by a judgment creditor he has no notice actual or constructive of equities of third persons in real estate the title to which stands in the name of the judgment debtor as the apparent absolute owner, the **[***8]** purchaser at the execution sale, whether such purchaser be the judgment creditor or another, takes a good title and is protected as a *bona fide* purchaser, even though the creditor or purchaser had notice of such equities at the time of the sale." In that case the true owner of a part interest was held estopped to assert his title as against the judgment creditor because of his failure to record the evidence of his title. See also *Doyle v. Wade, 23 Fla. 90*, 1 So. R. 516.

Miller v. Berry, 78 Fla. 98, 82 So. R. 764, is not in conflict with *Mansfield v. Johnson, supra*, since in Miller v. Berry it affirmatively appeared that the judgment creditor, contrary to the situation in Mansfield v. Johnson, did not extend credit or acquire his rights on the strength of the record showing title to be in the judgment debtor, so that in Miller v. Berry the true owner was held not estopped to assert his title against the judgment creditor. In *Rogers v. Munnerlyn, 36 Fla. 591*, 18 So. R. 699, it was held that ***HN8*** a creditor who obtains judgment or sues out an attachment after the record of a valid mortgage is not entitled to protection under the statute as an innocent purchaser, although tho debt **[***9]** upon which the judgment or attachment is based was contracted after the execution of the mortgage and before its record. In that case, however, it appears that the creditor in question was a creditor at large, and therefore not within the protection of the recording statute (see *Southern Bank & Trust Co. v. Mathers, 90 Fla. 542*, 106 So. R. 402), until his attachment was levied, thereby affording **[*446]** him a lien, which levy occurred *after* the record of the mortgage therein held to be superior to the attachment lien. The right of priority of the attaching creditor was held to date from the levy of his attachment, prior to which time he was merely a creditor at large.

The following principle, enunciated in *Hunter v. State Bank, 65 Fla. 202*, 61 So. R. 497, is applicable to the case now before us: ***HN9*** "The registry statute does not operate to convey title or to create a lien upon property; but records made under such statute may operate as an estoppel where persons without actual knowledge and without circumstances to put them upon inquiry reasonably may have taken substantial steps relying upon the record; and those who by their conduct or neglect in permitting the record to **[***10]** mislead others must bear any consequent loss rather than the one who in good faith may have acted with reference to the record as being in accord with actual facts."

The mechanic here is in the status of the junior grantee in the illustrations hereinabove mentioned. When the mortgage was recorded, the mechanic was not a creditor at large of the owner, as ws the creditor in *Rogers v. Munnerlyn, supra.* By performing the work in privity with the owner this mechanic acquired a specific lien, good as against the owner, and therefore was within the class of creditors contemplated by the recording statute. His status as a creditor was the same as that of a mortgagee holding an unrecorded mortgage. Te mechanic dealt with the property and acquired his lien as against the owner prior to the recording of the mortgage, and without notice of the existence of the mortgage. The mechanic's lien, like the title of the junior grantee above mentioned, was good as against the owner, but subject to postponement in favor of the rights of subsequent innocent purchasers or creditors, against which rights he could protect his lien by recording notice thereof or by some other effective form of notice. **[***11]** Like **[*447]** the junior grantee above, the mechanic by failing to promptly record notice of his lien, incurred the hazard of having his rights postponed in favor of an innocent purchaser or creditor who may have subsequently dealt with the property without notice of the mechanic's rights. See Peoples Bank v. Virginia Bridge Co., 113 So. R. 680, 685. **[**896]** But as to one who had previously dealt with the property and who had already changed his position with reference thereto but who had failed to record notice of his interest, as was the case with the senior grantee in

the above illustrations, thereby permitting the mechanic, like the junior grantee, to acquire an interest without notice of the senior interest, the principles of estoppel must be considered in settling the priorities of these two conflicting interests.

If after the mechanic had completed his work but before he had filed notice of his lien, an innocent purchaser had acquired a valid conveyance of the property, such latter purchaser would prevail over the mechanic's lien because the mechanic, by failing to record his notice of lien, assumes the hazard of the intervening rights of those who deal with the property **[***12]** in ignorance of the mechanic's unrecorded claim. It being the duty of the mechanic to record his notice of lien if he would protect his priority, having failed to do so he would be postponed to the rights of one who was mislead into purchasing the property in reliance upon the record as the mechanic elected to leave it. Such a case is *Axtel v. Smedley, 59 Fla. 430*, 52 So. R. 710. See also *Smith v. Gaudy, 43 Fla. 142*, So. R. 683. In the Axtel case, the materialman, dealing directly with the owner, completed the furnishing of his materials, but recorded no notice of his lien for nearly three months. Meanwhile, Axtel, an innocent purchaser, purchased and received a conveyance of the premises, which he recorded. Axtel dealt with the property and changed his position in **[*448]** reliance upon the record as the materialman elected to leave it, and having thus acquired his title, he prevailed over the materialman. In the case now before us, however, the mortgagee has not changed his position to his prejudice in ignorance of the mechanic's claim and through the fault of the mechanic. The mortgagee acted in acquiring its mortgage lien long prior to the origin of the mechanic's claim **[***13]** and elected to place of record no notice thereof to those who might subsequently deal with the property, thus permitting the mechanic to thereafter change his position by performing his work in ignorance of the mortgage, and under such circumstances, so far as the record disclosed, as would afford the mechanic a first lien upon the property under the statutes. Even if it could be said that the mechanic was remiss in not recording his notice of lien, that fact did not mislead the mortgagee to his prejudice. It merely subjected the mechanic to the risk of being subordinated to the rights of those dealing with the property without notice of the mechanic's claim. On the other hand, the failure of the mortgagee to record is prior mortgage *did* permit the mechanic to deal with the property without the knowledge of the mortgage or of circumstances to put the mechanic on injury.

When the mechanic thus changed his position with reference to the property there was nothing of record to indicate that his lien could be subordinate to a prior mortgage, nor did he have actual knowledge of the mortgage. When the mechanic performed his work, he acquired a valid lien as against the owner. The **[***14]** mortgagee, by failing to record its mortgage, permitted the record of the title to indicate a situation not in accordance with the facts. By withholding its mortgage from record and permitting the mechanic to bestow his labor upon the property in reliance upon the title as it appeared upon the record, the mortgage, like **[*449]** the grantee in the senior unrecorded conveyance hereinabove referred to, and like the true owner of the property in *Mansfield v. Johnson, supra*, is estopped to claim priority over the mechanic's lien, the conflicting priorities being occasioned solely by the voluntary omission of the mortgagee to record its mortgage. *Elizabethport Cordage Co. v. Whitlock, 37 Fla. 190*, 20 So. R. 255; *Root v. Bryant, 57 Calif. 48*; 40 C.J. 300; 41 C.J. 570; 21 C.J. 1166, 1172. Under an early statute, the courts of Minnesota took a contrary view, on the theory that mechanics' liens were not within the protection of their recording statute. *Oliver v. Peterson, 25 N.W.R. 629*; *Miller v. Stoddard, 52 N.W.R. 895*; *Noremberg v. Johnson, 52 N.W.R. 1069*. See also *Gately v. Gately, 169 N.Y.S. 280*.

Of course, some time may necessarily elapse between the execution and filing **[***15]** of a mortgage. See *Karst v. Gane, 32 N.E.R. 1073*. But ***HN10*** a mortgagee must act with diligence, and avoidable delays are at his peril. Here the elapsed time between the execution and filing of the mortgage is nearly five months, which is unreasonable.

The view herein adopted does not give any retroactive effect to the act or recording the notice of the mechanic's lien. See *Axtel v. Smedley, supra.* It is not held that the notice of lien recorded on July 7, 1926, relates back to the commencement of the work, nor would it have any effect upon intervening rights of purchasers or creditors without notice acquired after the completion of the work and before the record of the notice. The mortgage here in question is admittedly prior in time of both delivery and recording, but the mortgagee by its omission to record its mortgage has estopped itself to assert priority over a junior creditor, entitled to the protection of the recording statutes, who has changed his position and dealt with the property in reliance upon the title as it existed of record by the **[*450]** voluntary omission of the mortgagee to record its mortgage. Under the circumstances, it would be inequitable to afford **[***16]** the unrecorded mortgage

priority over the mechanic, even though the mechanic, **[**897]** prior to recording his notice, would have no standing or priority as a lienor as against other creditors not affected by an estoppel.

If the mechanic had recorded no notice of his lien within three months from the completion of the work (See Sec. 5380, Comp. Gen. Laws, 1927), a different question might be presented. That aspect of the matter is not now considered.

The situation here presented differs essentially from that in *Parker v. Gamble, 96 Fla. 343*, 118 So. R. 21, involving priorities between a mortgage and a materialman's lien upon an estate by the entireties. Under the controlling statute in that case no lien whatever accrues or comes into existence for any purpose, against the owner of other persons, until the filing of the required notice of lien. Unlike the situation now before us, when an estate by entireties is involved materialmen have no status as lienors for any purpose, even as against the owners, until the requisite notice is filed, and consequently have no standing whatever in determining priorities. Until the notice is filed they are merely creditors at large and not **[***17]** entitled to the protection of the recording statutes. Moreover, it does not appear in Parker v. Gamble that the mortgage was executed and delivered before work commenced, but withheld from the record until after the materials were furnished, as is the case here.

The mortgage here involved is a purchase money mortgage. The views herein expressed, affording the mechanic's lien priority, do not conflict with the general rule that a purchase money mortgage, made simultaneously with the conveyance to the mortgagor, takes precedence over any **[*451]** lien arising through the mortgagor, though the latter be prior in point of time. See Jones on Liens (3rd Ed.), Sec. 1458; 19 R.C.L. 416; also *Strong v. Van Duersen, 23 N.J. Eq. 369*; *Middletown Savings Bank v. Fellowes, 42 Conn.36*; *Thorpe Bros. v. Durbom, 45 Iowa 192*; *McIntosh v. Thurston, 25 N.J. Eq. 242*; *National Bank v. Sprague, 20 N.J. Eq. 13*; *Ettridge v. Bassett, 136 Mass. 314*; *Guy v. Garriere, 5 Calif. 511*; Warren Mtge. Co. v. Winters, 146 Pac. R. 1012; Ann. Cas. 1916 C. 956.

Examination of the cases just cited discloses that the rule last above stated, holding the purchase money mortgage superior to the mechanic's lien, is **[***18]** applied in cases where the mechanic's lien is acquired for work done at the instance of the purchaser, and without the acquiescence of the vendor, *prior* to the execution of the mortgage. Thus, when A, the owner, enters into an executory contract to convey to B, and during the pendency of the contract and before a conveyance is executed, work is done upon the premises by a mechanic under a contract with B, the vendee, and without the knowledge or acquiescence of A for which work the mechanic acquires a perfected lien, after which A executes a conveyance to B and simultaneously takes back a purchase money mortgage, the mortgage is superior to the mechanic's lien, because B takes the title charged with the incumbrance of the purchase money mortgage. A's vendor's lien is merged into the purchase money mortgage, being merely an exchange of one form of security for another, and as the mechanic's lien could attach only to B's interest, which acquired subject to the mortgage, and which is subordinate to A's vendor's lien and consequently to a purchase money mortgage substituted for that lien, the mortgage is superior to the mechanic's lien. This rule is consistent with our own holding **[***19]** as to the superiority of a purchase money mortgage over the dower interest of a **[*452]** wife of the grantee-mortgagor (*McMahon v. Russell, 17 Fla. 698*; *Taylor v. Mathews, 53 Fla. 776*, 44 So. R. 146,), and over the lien of judgments against the grantee-mortgagor existing at the time of the conveyance to him (see *Cheeves v. First National Bank, 79 Fla. 34*, 83 So. R. 870), and over a claim of homestead exemption to the property conveyed. *Porter v. Teate, 17 Fla. 813*. See also Jones on Mortgages (4th Ed.) 464, (6th Ed) 468. Where the vendor has knowledge of the work being done by the mechanic, and acquiesces therein, the rule may be otherwise. See Jones on Liens (3rd Ed.), Sec. 1487; *Bohn Mfg. Co. v. Kountze, 46 N.W.R. 1123*; 12 L.R.A. 33.

But the situation here presented differs essentially from any of those just above mentioned. Here the conveyance and purchase money mortgage had both been executed, and that transaction was at an end, before the mechanic commenced his work. No mechanic's lien existed when the mortgage was executed and delivered. Thereafter however, and while the mortgage was withheld from record by the mortgagee, the mechanic's lien arose by virtue of work **[***20]** done for the new owner, the mortgagor, *after* the execution and delivery of the purchase money mortgage. It is as much the duty of a purchase money mortgagee, as of any other mortgagee, to promptly record his mortgage if he would preserve his priority over the rights of innocent purchasers or creditors subsequently arising, and where a purchase money mortgagee elects to withhold his mortgage from record

and to permit others to innocently deal with the property in ignorance of his unrecorded mortgage, the same rules of estoppel are applicable to him as to any other mortgagee. Western Tire Co. v. Campbell, 169 S. W.R. 253; Ann. Cas. 1916C, 943, 953; 41 C.J. 528, 571.

As opinion prepared for filing herein on re-hearing, in which the former order of reversal is adhered to is postulated **[*453]** upon the theory that although the mortgage was signed **[**898]** by Sarasota Milk Company, the mortgagor, on November 25, 1925, the seal of said mortgagor was not affixed thereto until after this mechanic's work was commenced, and probably not until April 21, 1926, the date upon which the mortgage was recorded, so that the mortgage did not actually come into existence until after the **[***21]** mechanic's work was commenced.

That premise is grounded upon the testimony of mr. Van Eopoel, an officer of the *mortgagee,* not of the mortgagor, who testified in substance that on November 25, 1925, the mortgage in question was left with an attorney to be recorded as soon as the sale was completed and closed, because the mortgagor, the Sarasota Milk Company, had not yet received its seal "and they were to put this seal on the instrument, and then have it recorded, and it was some little time before they got their seal." The witness further testified, immediately thereafter, that he "did not know when they put the seal on there of Sarasota Milk Company, * * * just when they put their seal on there I do not know." Therefore, a finding that the seal was not placed upon the mortgage until April 21, 1926, would rest upon nothing more substantial than conjecture. There is nothing in that testimony to establish the affixing of the seal at any definite time. From November 25, 1925, to April 21, 1926, practically five months, would be an unreasonably long period of time to wait for a corporate seal which ordinarily can be procured within from one week to ten days.

On the other hand, **[***22]** the mortgage itself, which is in evidence, recites "that it was executed (not merely signed) this 25th day of November, 1925, by the Sarasota Milk Company," the mortgagor. Execution of the mortgage was acknowledged by the President of the mortgagor before **[*454]** a notary public, who is also a member of the Bar of this Court, on "this 25th day of November, A.D. 1925." The notary's certificate recites that W.K. Kuhns, President of the mortgagor, on the 25th day of November, 1925, acknowledged that the "executed" said instrument as the free act and deed of the mortgagor, and "that the seal, affixed to said instrument is its corporate seal and that he executed said instrument *'and affixed the corporate seal'* (Italics supplied) by authorization of the directors of said corporation." All of that is certified by the notary to have been acknowledged before him as done on November 25, 1925.

The testimony of Mr. Van Eeppel above referred to, though no doubt given in the best of faith, is not enough to overcome the force of the notary's official certificate that the mortgagor on November 25, 1925, acknowledged the execution of the instrument and that was them affixed thereto. ***HN11*** There **[***23]** being no fraud or duress, a notary's certificate of acknowledgment in the form prescribed by law, when the notary has acted within his jurisdiction, is conclusive of the facts and acts recited, and can not be questioned collaterally. Even where fraud is alleged -- and none is alleged in this case -- proof thereof must be of the clearest, strongest and most convincing character. *Bank of Jennings v. Jennings, 71 Fla. 145*, 71 So. R. 31; *Hutchinson v. Stone, 79 Fla. 157*, 84 So. R.151; *Green v. First National Bank, 85 Fla. 51*, 95 So. R. 231; *Hall v. Foreman, 94 Fla. 682*, 114 So. R. 560.

Moreover, there being no palpable violation of a constitutional or statutory command which would constitute a fundamental error in the decree appealed from (see F.E.C. Ry. v. Eno. 128 So. R. 622), the case should be determined here upon the theory presented by the pleadings and upon which it was decided below. New issues of fact **[*455]** should not be made here. The bill alleges that the notes secured by the mortgagee "were dated November 25, 1925," and that the mortgagor, Sarasota Milk Company, "on the date aforesaid, also 'executed and delivered' to the Tampa Stock Farms Company" the mortgage **[***24]** in question. That allegation appears in paragraph 3 of the bill, and it is admitted as true by the answer of Armstrong Cork & Insulation Company, the mechanic hereinabove referred to. the briefs and arguments are also based upon that theory.

Even if Mr. Van Eepoel is correct in his statement that the seal was not actually affixed to the mortgage on November 25, 1925, it is clear that the parties to the judgment intended that the act of affixing the seal, when performed, should relate back to November 25, 1925, the date of the mortgage. If those be the true facts then the parties to the mortgage are charged with the consequences of voluntarily conducting the mortgage transaction in that manner. The consideration for the mortgage certainly passed on November 25, 1925, and

the security was *then* determined upon and executed as of that date. An equitable mortgage unquestionably existed between the parties. The parties fixed their rights of that date. The situation is unlike one wherein a creditor subsequently, and in a new and separate transaction, takes security for a pre-existing debt, acting upon the faith of the record title as he finds it as of the date the security is **[***25]** taken. In that event, it may be, though it is not so decided, that such a creditor might prevail over an intervening latent lien, not of record.

Upon further consideration on rehearing, the court recedes from its opinion heretofore expressed herein (120 So. R. 841). The former judgment of reversal is vacated, and the decree appealed from is hereby affirmed.

TERRELL, C. J., AND BROWN AND BUFORD, J. J., concur.

ELLIS, J., dissents.

Dissent by: ELLIS

Dissent

[899]** **[*456]** ELLIS, J. (on rehearing, dissenting):

The question presented is one of priority of liens. The facts are as follows:

On November 25, 1925, the Tampa Stock Farms Dairy Company, a corporation, owned the west fifty feet of Lots 2, 4, 6 and 8 of Block 23 in the city of Sarasota. The corporation had completed a building on the west fifty feet of Lot 2 and installed machinery for the purpose of operating a "milk plant" on the property. It engaged in the business of pasteurizing, bottling and distributing milk in Sarasota. It was engaged in the same business in Tampa. In Sarasota the business was conducted in the name of Sarasota Milk Company.

The corporation, that is to say the Tampa Stock Farms Dairy Company, **[***26]** had been operating the Sarasota "plant" about a month when it entered into negotiations with W. B. Kuhns to sell the property. These negotiations resulted in a sale of the property on the above state date. Kuhns intending to operate a milk business in the name of The Sarasota Milk Company. It is not clear when the corporation was organized nor when it became authorized to transact business as a corporation. On that date, however, it had not acquired a seal. Part of the purchase price of the lot was paid and the remainder, $ 2u,000, was evidenced by two promissory notes in the sum of $ 10,500 each, one **[*457]** payable on or before one year after date and the other on or before two years after date. These notes were secured by a mortgage on the property. No copies of the notes are attached to the bill but they appear in the evidence. They were signed as follows: "The Sarasota Milk Co. By W. B. Kuhns Treas." The mortgage was signed on the same day as follows: "The Sarasota Milk Company By W. B. Kuhns, Pres." The corporate seal of the mortgagor company was not attached to the mortgage when it was executed nor does it appear that it adopted a seal for the purpose, but the mortgage **[***27]** was left in the hands of attorneys for the Tampa Stock Farms Dairy Company, mortgagee, to be completed by having the Sarasota Milk Company attach its seal so soon as it should be obtained and then immediately to be recorded. The mortgage was recorded on April 21, 1926.

The Tampa Stock Farms Dairy Company and The Van Eepoel Real Estate Company are corporations but they are officered by the same individuals and have practically the same stockholders. Mr. August Van Eepoel is secretary and treasurer and "actively in charge of both corporations. In order to separate the real estate business from the dairy business the Tampa Stock Farms Dairy Company transferred to the Van Eopoel Real Estate Company all the former's real estate, including the Sarasota Milk Company's notes and mortgage. This assignment occurred some time in June, 1926. The assignment is undated and the certificate of acknowledgment does not state the day of the month when it was made, nor does it appear that the assignment was recorded although the bill alleges in general terms that it was and the special master reported that it was filed on June 28, 1928.

In January, 1926, the Sarasota Milk owner of the property, **[***28]** W. B. Kuhns, treasurer and president of **[*458]** the company, procured certain work to be done upon the house by Armstrong Cork and Insulation Company by way of furnishing and installing "Cork Board Insulation", in one ice cream hardening room and ante room. The contract was completed and last work performed on April 16, 1926. The Sarasota Company paid for the materials and work all that was due for it except the sum of $ 957.75 and the Armstrong Company caused a notice of lien to be filed and recorded against the property on July 7, 1926.

In January, 1927, The Van Eeppoel Real Estate

Company begun its suit to foreclose the mortgage held by it, the first note having become due in November, 1926, and was not paid. The Armstrong Cork and Insulation Company was made a party defendant.

The ch ancellor held that the lien of the Armstrong Cork and Insulation Company was prior to that of the mortgage held by the complainant. From that decree the complainant appealed and this court reversed the decree in an opinion handed down March 20, 1929. A petition for a rehearing was granted and the cause orally argued during the last week in January, 1930.

The lien acquired by the Armstrong **[***29]** Cork and Insulation Company was acquired under the provisions of Sections 3495, 3496, 3499 and 3517, Rev. Gen. Stats. Notice of the perfected lien was filed within three months after the performance of the labor and entire furnishing of material. See Section 3517, Rev. Gen. Stats., *supra.*

Work under the contract was begun by the Armstrong Cork and Insulation Company on April 12, 1926. Material was shipped under the contract March 1, 1926, and the contract was completed on April 16, 1926. It cannot be said with any degree of certainty that on the last mentioned date the execution of the mortgage had been completed by attaching to it the seal impression of the Sarasota Milk Company. **[*459]** The sealing of an instrument of that character by a corporation is necessary to its validity. See Secs. 5660, 5665, Comp. Gen. Laws, 1927. Nor was it entitled to record until it was thus duly executed. See Sec. 5699, Comp. Gen. Laws, 1927.

The case may be determined on this point because if no mortgage came into existence until after the work upon the building was completed by the Armstrong Company but before **[**900]** the notice of its lien was filed there would be no question **[***30]** of the superiority of the mortgage lien in the absence of any fraud perpetrated upon the Armstrong Company by mortgagor and mortgagee.

While the deeds of corporations may not be required to be witnessed by subscribing witnesses, our "statute recognizes the doctrine universally obtaining, that corporations in such matters speak and set through their corporate seal." See *International Kaolin Co. v. Vause, 55 Fla. 641*, 46 So. R. 3.

Although there is no statute in this State which requires mortgages of real estate to be under seal of the mortgagor the general rule as to the mode of execution and the formalities required in the case of absolute conveyances of land are applicable to mortgages. A radical defect in the execution of a mortgage, not a trifling informality but the lack of some essential, may prevent it from being recorded or deprive it of all effect as against subsequent encumbrancers without notice, but will not destroy its validity as between the parties. *Dyson v. Simmons, 48 Md. 207*; *Beatty v. Clark, 20 Cal. 11*.

A mortgage executed without a seal, in the states where it is required is not a legal mortgage. All mortgages by corporations should be executed under the **[***31]** official seal of the corporations, which is customarily an impression upon the paper. See 1 Jones on Mortgages (8 Ed.) Sec. 100.

[*460] In equity it amounts to a compact for a mortgage and as such creates no lien as against purchasers from the mortgagor or as against his creditors without notice. *SeeErwin v. Shuey, 8 Ohio St. 509*; *Gabel Lumber Co. v. West, 95 Nebr. 394, 145 N.W.R. 849*; 41 C.J. 417.

An instrument which as shown by its own terms is designed by the parties as a security for the payment of money may be enforced as an equitable mortgage though wanting in the formal execution of it as a legal mortgage. See *Margarum v. J.S. Christie Orange Co., 37 Fla. 165*, 19 So. R. 637.

In that case, however, the mortgage was executed under the seal of the corporation. It was deficient, if at all, only in the matter of witnesses. At common law attestation of a deed or mortgage was not necessary to its validity and is therefore only necessary when required by statute. *Walker v. Heege, 78 Fla. 667*, 83 So. R. 605.

It is essential that the seal of a corporation shall be affixed to its written contracts which are required by law to be under seal. See *Grand Lodge K. of P. **[***32]** v. State Bank, 79 Fla. 471*, 84 So. R. 528.

If the instrument which was signed in the name of the Sarasota Milk Company to the Tampa Stock Farms Dairy Company before the seal of the Sarasota Milk Company was impressed upon it could be regarded or treated as an equitable mortgage and enforced as between the parties in equity it may have been entitled to record as a contract concerning real property upon proof of execution. See Sec. 5699-5779, Comp. Gen. Laws, 1927.

The informal execution of the instrument may have been a sufficient writing to satisfy the statute of frauds. See *Walters v. Miller, 70 Fla. 432*, 70 So. R. 629; *Tucker v. Gray, 82 Fla. 351*, 90 So. R. 158; *Kalil v. Nat. Bank of Gainesville, 81 Fla. 543*, 88 So. R. 383.

[*461] In the latter case delivery of the deed was the essential requisite to its validity as a conveyance of land, although it was deemed sufficient as an instrument in writing signed by the party to be charged.

In West Virginia and other states it is held that such an instrument though not effectual as a deed or mortgage at law may be treated as an equitable mortgage and entitled to record under the statute and is valid against subsequent purchasers **[***33]** and creditors when recorded. *Atkinson v. Miller, 34 W. Va. 115*, 11 So. E.R. 1007, 9 L.R.A. 554 n; *Gest v. Packwood, 39 Fed. R. 525*.

No question of that kind, however, exists in this case as there was no record or attempted record of the mortgage until it was completed as a legal mortgage. According to the testimony of Mr. Van Eepoel it was agreed to be kept off the record until the instrument was perfected as a legal mortgage by impressing upon the paper the seal of the corporation.

I these circumstances was the lien of the Armstrong Company superior or inferior to that of the unrecorded instrument called a mortgage held by the Van Eepoel Real Estate Company?

The Armstrong Company, when it furnished the material and performed the labor had no notice, actual or constructive, of the existence of the mortgage. The lien was perfected, the Armstrong Company was a creditor of the Sarasota Company with a lien against its property, before the so-called mortgage or the assignment of it to the Van Eepoel Company was recorded. The mortgage was not in existence as a legal mortgage; it was unrecorded when the Armstrong Company became a creditor and lienor of the Sarasota Company.

[*34]** A subsequent purchaser or creditor having a lien by way of judgment, mortgage or otherwise and without notice of a prior unrecorded legal mortgage or conveyance would be **[*462]** protected against such unrecorded conveyance or mortgage. See *Feinberg v. Stearns, 56 Fla. 279*, 47 So. R. 797; *Carolina Portland Cement Co. v. Roper, 68 Fla. 299*, 67 So. R. 115; *Rogers v. Munnerlyn, 36 Fla. 591*, 18 So. R. 669; *First Nat. Bank of St. Augustine v. Kirby, 43 Fla. 376*, (text **[**901]** 387) 32 So. R. 881; *Hopkins v. O'Brien, 57 Fla. 444*, 49 So. R. 936; *Myers v. Van Buskirk, 96 Fla. 704*, 119 So. R. 123.

In *Spellman v. Beeman, 70 Fla. 575*, 70 So. R. 589, where the subject matter dealt with was personal property the court held that the record of the chattel mortgage is a substitute for the possession of the property by the mortgage; that a subsequent mortgagee is on the same footing as a subsequent purchaser with regard to unrecorded mortgages under our statute and the prior unrecorded mortgage being void as to the subsequent mortgage continues to be void as to such mortgage which the subsequent record of the prior mortgage does not restore to priority over the second although recorded **[***35]** before the latter is recorded. The Court said: "The statute conclusively presumes that the effect of keeping the mortgage off the record and the failure of the mortgagee to take possession of the property, is to deceive and mislead the creditors and subsequent purchasers without notice and for a valuable consideration and declares such mortgage to be invalid as against such creditors and subsequent purchasers".

Section 3495 R.G.S. 1920 (Sec. 5349 C.G.L. 1927) provides for liens in favor of material men and laborers prior in dignity to all others accruing thereafter. Section 3517 Rev. Gen. Stats. 1920 (Sec. 5380 Comp. Gen. Laws 1927) in the second paragraph dealing with the acquisition of liens as to real estate and as against purchasers and creditors provides as follows:

[*463] "As against purchasers and creditors of such owner without notice, such lien shall be acquired upon real estate only from the time of the record in the office of the clerk of the circuit court of the county where the real estate lies of a notice of such lien. Such notice shall contain a statement of the amount claimed, a description of the property upon which the lien is claimed, and a notice of **[***36]** the intention to hold a lien for the said amount, and shall be verified by the oath of the lienor or his agent. It shall be filed only after the labor has been entirely performed and the materials entirely furnished.

"No such notice of a perfected lien shall be effectual against creditors or purchasers of the owner without notice unless it be filed within three months after the entire performance of the labor or the entire furnishing of the material".

But the recording of the lien has no retroactive effect upon a purchaser and by a parity of reasoning upon a

lien creditor who acquires his legal mortgage or judgment after the mechanic or materialman has completed his contract but before the record of his lien. See *Axtell v. Smedley & Rogers Hdw. Co., 59 Fla. 430*, 52 So. R. 710.

The recording law however, Section 3822 Rev. Gen. Stats. 1920 (Sec. 5698 Comp. Gen. Laws 1927) provides that no conveyance, transfer or mortgage of real property or of any interest therein nor any lease for a term of years or longer shall be good or effectual in law against creditors or subsequent purchasers for a valuable consideration and without notice unless the same be recorded according to law.

[*37]** That section places creditors with liens and subsequent purchasers upon the same footing in so far as prior unrecorded conveyances or liens are concerned. *Stockton **[*464]** v. Nat. Bank of Jacksonville, 45 Fla. 590*, 34 So. R. 897; Carolina Portland Cement Co. v. Roper, *Supra; Southern Bank & Trust Company v. Mathers, 90 Fla. 542*, 106 So. R. 402; *Sirkin v. Schulper, 90 Fla. 68*, 105 So. R. 151; *Hopkins v. O'Brien, supra.*

If as to such creditors and subsequent purchasers no mortgage on real estate is good or effectual in law or equity until recorded, then as to creditors and subsequent purchasers therefore the mortgage does not become a lien until recorded. But the materialman and laborer who under a contract with the owner furnishes material and performs labor upon a building is not only a creditor of the owner of the land but acquires a lien upon the land as against such owner. It follows that a mortgage executed before the acquisition of the materialman's lien but recorded after the acquisition of the lien and before the completion of the contract, or recorded after the completion of the contract and after record of notice of lien, becomes a subsequently acquired **[***38]** lien.

In the case of *People's Bank of Jacksonville v. Arbuckle, 82 Fla. 479*, 90 So. R. 458, this Court said that: "The recording of the mortgage affords notice thereof to all concerned, and gives it priority over all liens accruing thereafter". A "mortgagee must ascertain at his peril what liens have been acquired prior to the *recording* of the mortgage by persons who have begun to furnish labor or material for construction or repairs on the property."

In the Arbuckle case where there was a question of the priority of a mortgage lien over laborer's and materialmen's liens the mortgage was executed November 4, 1919, and recorded twenty-five days thereafter on November 29, 1919. One of the lienors, Jones Lumber Company, began furnishing building material to the mortgagor owner on November 14, 1919, and continued to March 16, 1920. **[*465]** There were other lienors who furnished materials and labor covering a period of several months from October, 1919, to March 15, 1920. None of them under special continuing contracts. In this connection the Court, speaking through Mr. Justice WHITFIELD, said "Where labor or material is supplied under a contract or a running open account **[***39]** that is designed to continue until the completion of the construction or repairs, the lien once acquired **[**902]** may continue until satisfied, even though other liens may be acquired after the beginning and before the completion of the contemplated transactions under the continuing contract or open account where the continuity of the contract or open account is not terminated". The furnishing of material after the *record* of the mortgage, said the learned justice, "makes the mortgage have priority".

There is no distinction in principle between the reason of the statutes relating to the recording of real estate mortgages and the statutes relating to the recording of chattel mortgages. The purpose being to prevent the misleading and deception of creditors of the owner of the property or subsequent purchasers from them. It requires no great imagination to perceive the doorway to fraud which might be opened if such was not the law.

I was definitely held in *Palm Beach Bank and Trust Company v. Lainhart et al., 84 Fla. 662*, 95 So. R. 122, that liens of laborers and materialmen are acquired individually and separately by each and attach from the moment the labor is performed **[***40]** and the material furnished, and if such labor is performed or materials are supplied upon a continuing contract to supply the same for the building the lien attaches or is acquired from the moment the first material is furnished or labor supplied under the contract and covers all material furnished or labor supplied thereunder.

[*466] Mr. Phillips, in his work on mechanics' liens, says: "A mechanic's lien is superior to all liens acquired after the work commenced, and to all prior liens of which the mechanic had no notice actual or constructive." Phillips on Mechanics' Liens, (3rd Ed.) p. 398.

It is said in 40 C.J. 300 that in a majority of jurisdictions it is held that in order for a mortgage to have priority over a mechanic's lien it must be recorded before the mechanic's lien accrues and the mere fact that it was

executed before that time will not give it priority if it is not recorded until afterward, unless according to some, but not all, authorities, claimant had actual notice of the mortgage. When a mortgage is not recorded within the time prescribed by statute it is postponed to mechanics' liens which accrued after its execution but before it was recorded although **[***41]** such liens were not perfected until after the mortgage was recorded. See O'Neill v. Lyric Amusement Co. et al., (Ark.) 178 So. W.R. 406; Small v. Foley, 8 Colo. A. 435, 47 Pac. R. 64; *Thielman v. Carr et al., 75 Ill. 385*; *City of Ortonville v. Geer et al., 93 Minn. 501, 101 N.W.R. 963*.

The question presented in this case is involved in no little difficulty, which is produced by the seeming conflict in judicial opinion. The conflict, however, is more apparent than real and grows out of the many different statutes dealing with the acquisition of materialmen and laborers' liens and the recording statutes. Pervading the law upon these subjects is the underlying principle that while the purchaser or mortgagee of real estate in good faith and for value shall be protected in his acquired rights, that protection shall not be extended to the exclusion of the rights of others who through the procrastination or lack of diligence of the first have been mislead to the latter's detriment. It is the principle of equitable estoppel.

[*467] Under the common law a mortgage upon real estate to constitute a line was not required to be recorded. O'Neill v. Lyric Amusements Co., *supra;* **[***42]** 23 R.C.L. 170.

The rule *"prior in tempore portior est in jure"* obtained at common law, but to obviate frauds arising from secret conveyances statutes were enacted in the several states requiring the registration of conveyances in order to render them valid as against subsequent bona fide purchasers. The history of the development of such statutes and their varying effect in different jurisdictions is both interesting and instructive. A full not on the subject may be found in Ann. Cas. 1912 A. p. 194.

Through them all, however, the purpose runs clear not only to preserve a record of title to lands but to protect intending purchasers and incumbrancers against the evil of secret grants. *Patterson v. DeLa Ronde, 8 Wall. 292, 19 L. Ed. 415*; *Antony v. Butler, 13 Pet. 423, 10 L. Ed. 229*; 23 R.C.L. 171.

The recording statutes of the different jurisdictions, while of the general tenor, vary in their particular provisions in each jurisdiction as to what class of persons can object to a mortgage as a superior claim on the ground of want of record. In some states the protection is accorded to subsequent purchasers of bona fide and for value. In this State, the protection is accorded **[***43]** to subsequent lien creditors as well as subsequent purchasers. The statutes of some states provide that the mortgage does not become a lien until recorded. In this State its is a lien from the date of its execution but invalids as to subsequent purchasers and subsequent lien creditors without notice until recorded. The lien laws of some states provide that the lien of a materialman or laborer does not become effective until notice of it is recorded. In this State it is effective from the moment the material is furnished or labor supplied **[*468]** against the owner and subsequent lien creditors who acquire their liens during the progress of the work or the furnishing of materials and is good for the entire value of the material and labor thereafter supplied under the contract.

The purpose fo all such lien statutes was expressed by the *Supreme Court of Massachusetts in Wall v. Robinson, 115 Mass. 429*, "The statues are designed to give to the mechanic who by his labor and skill enhances the value of an estate the security of a lien **[**903]** upon the estate to the extent he has thus added to its value."

The purpose of the recording statute of this State is to protect such **[***44]** creditors of the owner of an estate from the fraud which may follow upon the failure to record an existing mortgage upon the estate.

The materialman or laborer, when engaged to construct or repair buildings upon the land of the record owner, goes to the county record and accepts as truth what that record proclaims. If it shows that the employer is the owner of the land and no prior liens exist against it he proceeds, if he has no actual knowledge of prior liens, with the furnishing of materials and labor in the confidence of the statute that from the moment he furnishes material and labor he has lien upon the property for the material furnished and the labor performed under the contract. The filing and record of the notice of lien merely tolls the statute, which requires enforcement of the lien in a certain time, and protects the lienor against subsequent liens.

As the Tampa Stock Farms Dairy Company acquired no legal mortgage upon the properties of the Sarasota Milk Company until the mortgage was executed by impressing upon the written instrument the seal of the mortgagor corporation, it cannot be said to have acquired a lien prior to the acquisition of the

materialman's lien **[***45]** against such properties **[*469]** by the Armstrong Cork and Insulation Company. Not until the final act of executing the mortgage deed by impressing the corporation mortgagor's seal upon the document did the Tampa Stock Farms Dairy Company have a legal mortgage lien upon the property. Between the date of writing the instrument intended to be a legal mortgage and the date of the final act (attaching the seal) which made the written instrument a legal mortgage of the corporation, the Armstrong Cork and Insulation Company acquired its lien as materialman and laborer upon the properties and by completing the contract perfected its lien.

Now, if the Tampa Stock Farms and Dairy Company obtained its mortgage lien by a duly and properly executed instrument after the Armstrong Cork and Insulation Company had perfected its lien by completing its contract then the Tampa Stock Farms Dairy Company was a subsequent lien creditor to the Armstrong Cork and Insulation Company which had a lien by reason of the work done and material furnished in repairing the property. But the latter's lien was not effective against a subsequent lien creditor in good faith and without notice of the statutory **[***46]** mechanic's and laborer's lien unless the materialman or laborer had filed notice of his perfected liens as required by statute before the subsequent lien creditor of the owner of the property acquired his lien good faith and without notice. See Sec. 5380, Par. 2, Comp. Gen. LAws, 1927.

Now, the Armstrong Cork and Insulation Company completed its contract with the Sarasota Milk Company on April 16, 1926. notice of the perfected lien was filed on July 7, 1926. The Sarasota Milk Company completed the execution of its mortgage to the Tampa Farms Dairy Company by impressing its seal upon what up to that time was a mere simple agreement in writing and the then legal **[*470]** mortgage was recorded on April 21, 1926, five days after the perfected lien of the Armstrong Cork and Insulation Company and two months and a half before notice of the Armstrong Company's lien was filed.

There is nothing in the evidence to show that the Tampa Stock Farms Dairy Company knew of the existence of the Armstrong Cork and Insulation Company's lien nor that the latter company knew of the former as a secured or unsecured creditor of the Sarasota Milk Company. That the Tampa Stock Farms Company delayed **[***47]** taking the mortgage lien from the Sarasota Milk Company until the latter could secure its seal did not affect the good faith of the transaction. The Tampa Company only jeopardized its own interest thereby, because other lien creditors or purchasers from the Sarasota Milk Company without notice could have obtained superior claims to that of the Tampa Company and when the Tampa Company finally acquired its mortgage lien it would be as to such other purchaser or previously acquired lien holders a subsequent lien creditor.

If the Tampa Stock Farms Dairy Company became such a lien creditor without actual or constructive notice of the Armstrong Cork Company's perfected lien, it follows that the latter's lien would be inferior to the mortgage lien of the Tampa Stock Farms Dairy Company.

The evidence leads strongly to the inference that the Tampa Stock Farms Dairy Company obtained its legal mortgage from the Sarasota Milk Company after the Armstrong Cork Company had perfected its lien by completing its contract, that is to say, after April 16, 1926.

As to the Armstrong Cork Company, therefore, the Tampa Stock Farms Dairy Company became a subsequent lien creditor of the Sarasota Milk **[***48]** Company and not affected by the Armstrong Cork Company's lien, because **[*471]** notice of that lien was not filed until two months and a half afterwards.

In this view of the case I think the Court should adhere to the former decision in this case reversing the decree of the chancellor.

KeyCite Yellow Flag
Distinguished by Chatlos v. McPherson, Fla., May 29, 1957

105 Fla. 245
Supreme Court of Florida.

SAPP et al.
v.
WARNER et al.

April 19, 1932.

Synopsis
En Banc.

Suit by Annie Lester Patterson Warner and others against William E. Sapp and others. From an adverse decree, defendants appeal.

Affirmed.

BROWN, J., dissenting.

West Headnotes (9)

[1] **Notice** Nature in general

"Notice" may be "actual" or "constructive," and actual notice may be "express" or "implied."

29 Cases that cite this headnote

[2] **Records** Actual or constructive notice in general

Record is constructive notice to creditors and subsequent purchasers not only of its own contents, but such other facts as would have been learned, if record had been examined and inquiries suggested thereby duly prosecuted.

13 Cases that cite this headnote

[3] **Guardian and Ward** Rights and liabilities of purchasers

Recording of guardian's deed imputed notice of indispensable proceedings preliminary to execution of such deed.

4 Cases that cite this headnote

[4] **Real Property Conveyances** Constructive Notice, and Facts Putting on Inquiry

If in investigating title purchaser with common prudence must have been apprised of another right, notice of that right is presumed as matter of implied actual notice.

27 Cases that cite this headnote

[5] **Notice** Constructive Notice

Means of knowledge with duty of using them are in equity equivalent to knowledge itself.

11 Cases that cite this headnote

[6] **Real Property Conveyances** Lien or incumbrance and extent thereof

Execution of new mortgages restating previous one did not change equitable effect of implied actual notice of previous unrecorded mortgage, since new mortgages did not merge, release, or discharge prior mortgage.

20 Cases that cite this headnote

[7] **Guardian and Ward** Rights and liabilities of purchasers

That guardian's warranty deed did not show orders or proceedings of county judge on which it was based did not prevent it from being constructive notice of such orders and proceedings.

1 Case that cites this headnote

[8] **Guardian and Ward** Rights and liabilities of purchasers

Proper record of guardian's deed, with concomitant necessity imposed on those relying thereon to look to records to determine whether it had been duly authorized, held to warrant

finding of implied actual notice of existence of unrecorded mortgage.

10 Cases that cite this headnote

[9] **Appeal and Error** Inferences and Conclusions Drawn from Evidence

Chancellor's inference of fact must be affirmed, in absence of clear showing that it was unwarranted under evidence and agreed stipulation of fact.

5 Cases that cite this headnote

***248** ****124** Appeal from Circuit Court, Dade County; Ira A. Hutchison, judge.

Attorneys and Law Firms

Redfearn & Ferrell, Semple & Hirschman, and T. J. Dowdell, and of Miami, for appellants.

Shackleford Ivy Farrior & Shannon, of Tampa, and Evans & Mershon and O. B. Simmons, Jr., all of Miami, for appellees.

Opinion

DAVIS, J.

From a final decree foreclosing an unrecorded purchase-money mortgage, the defendants below, William E. Sapp and Mrs. William E. Sapp, his wife, Commercial Bank & Trust Company, a Florida corporation, and Lindsey Hopkins, have entered their appeal on behalf of themselves, and all of their similarly situated codefendants, assigning as error the entry of said final decree for the complainants. The decree appealed from was arrived at on the basis of the record before the chancellor as it appeared on the final hearing, considered in connection with a special stipulation of facts which had been agreed to by all the parties, so as to directly present the one controlling point of law necessary to be determined in order to fix the equities.

The case is apparently one of first impression in this court, and in view of the number of defendants who will be affected by the ultimate decision, the question of law involved appears to be of considerable importance. ****125** Oral argument was had before Division B, where the controversy over the question was ably presented by both sides. In addition to this, the court has had the benefit of elaborate briefs convincingly prepared and filed by several of different counsel for appellants; it appearing that the parties interested on the appellants' side of the question amount ***249** to nearly two hundred in number, due to the peculiar circumstances under which this case arose.

Notwithstanding the voluminous record, the facts are not controverted, and there is but one outstanding question of law presented for decision, upon the determination of which will depend the reversal or affirmance of the decree appealed from: 'Is a person who claims under a duly recorded deed from the guardian of a minor, whose authority to make the deed is dependent upon proceedings had before the County Judge, charged with notice of the terms and conditions upon which the guardian was authorized by the County Judge to sell the minor's land, when it appears that while the grantees from the grantee of the guardian are otherwise bona fide purchasers for value without notice, the records of the County Judge, nevertheless, show that the lands involved in a foreclosure suit brought to enforce an unrecorded purchase money mortgage given to the guardian and another, by his original grantee, were lands sold by such guardian under authority of the Court, upon terms of part cash and balance to be secured by a purchase money mortgage on the land sold, it appearing that all of the defendants claim their interests under the recorded deed from the guardian, executed under and in pursuance of the County Judge's proceedings, but who were without any notice or knowledge of the unrecorded purchase money mortgage, except such as would be charged to them by virtue of what could have been ascertained by inquiry based upon the proceedings taken by the guardian before the County Judge?'

The lower court decided the question in the affirmative, and decreed that the foreclosure should proceed under complainants' unrecorded purchase-money mortgage, notwithstanding the claims of the defendants that they should be considered as bona fide purchasers for value, without notice, from the guardian's original grantee under the recorded ***250** warranty deed which the guardian had executed at the time of the guardian's sale.

The facts, stated chronologically, are as follows:

The complainant Mrs. Warner was the daughter of the complainant Mrs. Markley. Mrs. Warner (formerly Annie Lester Patterson), on June 23, 1911, and at the time of the making of the guardian's sale hereinafter mentioned, was a minor; James M. Jackson, Jr., was the legally constituted

guardian of her estate, under order of the county judge of Dade county.

The minor was originally seized and possessed of the fee-simple title to the lands involved in this suit, subject to the estate by dower of her mother, Mrs. Markley.

On June 23, 1911, the county judge of Dade county entered an order based upon a petition filed by James M. Jackson, Jr., guardian, authorizing the guardian to sell the minor's interest in the real estate involved in this suit and other lands, at private sale, for cash or upon terms. On September 6, 1932, James M. Jackson, Jr., filed his report of sale in the office of county judge of Dade county, showing that the real estate involved in this suit had been sold to George E. Merrick for the sum of $20,000 upon the following terms: $2,000 cash and $18,000 in five years, together with interest at the rate of 8 per cent. per annum, payable semiannually on all deferred payments, and that the said deferred payments were to be secured by a purchase-money mortgage on said property.

The report further shows that the property had been sold at private sale to the highest and best bidder ‘on reasonable terms' to George E. Merrick for the sum of $20,000, ‘two-thirds of which the said Annie Lester Patterson, a minor, is entitled to receive, and will receive, and the other one-third of said $20,000 being paid to Jessie B. Markley, formerly Jessie B. Patterson, widow of Samuel L. Patterson, and mother of Annie Lester ***251** Patterson, a minor,’ on certain terms and conditions as to deferred payments which contemplated and embraced the total purchase price as being subject thereto.

On Suptember 5, 1923, based upon he report of sale aforesaid, the county judge entered an order confirming the said sale and directing the guardian to execute and deliver a deed to George E. Merrick, conveying all of the right, title, and interest of the minor in and to said property, and authorizing and empowering him ‘to take back a purchase money mortgage constituting a first lien against the property for all deferred payments.’

On August 16, 1923, a deed was executed by Jessie B. Markley, joined by her husband, and James M. Jackson, Jr., guardian of Annie Lester Patterson, a minor, conveying the property to George E. Merrick. This deed was dated August 16, 1923, but it was not filed for record until September 7, 1923, the day after the county judge entered the order confirming the sale.

On August 4, 1923, George E. Merrick executed two promissory notes, bearing the date and evidencing the deferred portion of the purchase price for the land. One of the notes was for $12,000, payable to the order of James M. Jackson, Jr., as guardian of Annie ****126** Lester Patterson, and the other of the notes was for $6,000, payable to the order of Jessie B. Markley. The notes, according to their terms, were to become due on or before five years after said date.

To secure these notes, George E. Merrick executed and delivered a purchase-money mortgage upon the land he had purchased at the guardian's sale. This mortgage was executed to James M. Jackson, Jr., as guardian of Annie Lester Patterson, a minor, and to Jessie B. Markley, individually, because of her own individual interest in the same property, and was on the same date as the notes which were secured thereby. This mortgage was never ***252** recorded because it was lost or misplaced and was not found until after the bill was filed in this cause and shortly before the final hearing.

In 1926, Merrick and wife executed and delivered two mortgages, dated August 4, 1923, acknowledged September 30, 1926, one of which was executed to James M. Jackson, Jr., as guardian of Annie Lester Patterson, for the purpose of securing the note of $12,000 executed to the guardian, as aforesaid, and the other of which was executed to Jessie B. Markley for the purpose of securing the note for $6,000, payable to Mrs. Markley, as aforesaid. Each of said mortgages showed that it was a purchase-money mortgage upon the land and was given in lieu of the former mortgate of like import, tenor, and date, which had been lost prior to record. These last-mentioned mortgages were filed for record on March 4, 1927, and were recorded.

The parcel of land involved in this suit, when conveyed to Merrick, was an entire parcel, but after the purchase thereof by Merrick he caused the same to be subdivided into lots and blocks which were later sold from time to time to the numerous defendants who later appeared to resist the foreclosure here involved.

On November 1, 1924, after the record of the deed from Jackson, as guardian, and Mrs. Markley to Merrick, but before the execution and record of the two evidentiary mortgages above mentioned, Merrick executed to the appellant A. J. Orme, as trustee, a mortgage upon all of said lands and other lands, securing an indebtedness of $300,000, and after the record of the deed from Jackson, as guardian, and Mrs. Markley to Merrick, but before the filing for record of the two evidentiary mortgages above mentioned, Merrick executed deeds to certain of the defendants described in the bill, purporting to convey specified lots in the subdivision of the

property conveyed by the guardian and Mrs. Markley to him. These deeds appear ***253** to have been recorded after the deed from the guardian and Mrs. Markley to Merrick, but *before* the recording of the two evidentiary mortgages above mentioned.

Merrick later executed a deed conveying to Coral Gables Corporation all of the land, except such lots as had theretofore been conveyed by him to certain of the defendants described in the bill. This deed was also executed after the recording of the deed from the guardian and Markley to Merrick, but before the filing for record of the two evidentiary mortgages.

After Coral Gables Corporation received the deed above mentioned, it executed to certain of the defendants described in the bill, deeds conveying certain of the lots in the subdivision. All of these deeds likewise were executed after the recording of the deed from Jackson, as guardian, and Mrs. Markley to Merrick, and some of them were executed before the filing for record of the two evidentiary mortgages.

Certain of the defendants described in the bill received deeds from Coral Gables Corporation conveying specified lots in the subdivision, which deeds were executed and recorded after the filing for record of the two evidentiary mortgages above mentioned.

The bill for foreclosure was filed October 27, 1928. It sought the foreclosure of the original unrecorded and lost mortgage deed dated August 4, 1923, executed by Merrick to James M. Jackson, Jr., as guardian of Annie Lester Patterson, a minor, and Jessie B. Markley, for default in the payment of principal and interest of the secured debt. The two later mortgages executed and delivered subsequent to the execution and delivery of the original unrecorded mortgage deed appear to have been referred to in this foreclosure bill for the sole purpose of establishing the terms and provisions of the original mortgages, which at the time of the filing of the bill was not at hand, because ***254** of it having been misplaced under to circumstances hereinbefore stated.

The effect of the decree of foreclosure is to hold that the many defendants who had acquired their titles to their individual lands through the chain of title containing the recorded deed from Jackson, the guardian, and Mrs. Markley, were not bona fide purchasers for value without notice in so far as the two unrecorded purchase-money mortgages from Merrick to the guardian, and Mrs. Markley were concerned, and that by reason thereof the complainants were both entitled to enforce their mortgages by foreclosure proceedings brought and maintained not only by the minor, who had subsequently attained her majority, but by Mrs. Markley, who had taken a separate mortgage for her part of the single unpaid purchase price.

[1] It was undoubtedly the purpose of section 5698, C. G. L. section 3822 R. G. S.,[1] to ****127** require all mortgages on real estate to be recorded in a separate mortgage book kept in the office of the clerk of the circuit court (see section 4858, C. G. L., section 3077, R. G. S.) in order for same to be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration, *and without notice*. Such has been the construction consistently put upon the statute by this court. Carolina Portland Cement Co. v. Roper, 68 Fla. 299, 67 So. 115; People's Bank of Jacksonville v. Arbuckle, 82 Fla. 479, 90 So. 458; Rambo v. Dickenson, 92 Fla. 758, 110 So. 352.

But the statute also expressly recognizes that 'notice' of an unrecorded instrument may take creditors or subsequent ***255** purchasers out of the class entitled to rely on the record, or absence of a record, of a particular mortgage sought to be foreclosed as against those who claim to be subsequent purchasers for a valuable consideration without notice of property covered by an unrecorded mortgage.

Notice is of two kinds, actual and constructive. 'Constructive notice' has been defined as notice imputed to a person not having actual notice; for example, such as would be imputed under the recording statutes to persons dealing with property subject to those statutes. 'Actual notice' is also said to be of two kinds: (1) Express, which includes what might be called direct information; and (2) implied, which is said to include notice inferred from the fact that the person had means of knowledge, which it was his duty to use and which he did not use, or, as it is sometimes called, 'implied actual notice.' Cooper v. Flesner, 24 Okl. 47, 103 P. 1016, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 S. Ct. 239, 35 L. Ed. 1063; Hoy v. Bramhall, 19 N. J. Eq. 563, 97 Am. Dec. 687; Acer v. Westcott, 46 N. Y. 384, 7 Am. Rep. 355. Constructive notice is a legal inference, while implied actual notice is an inference of fact, but the same facts may sometimes be such as to prove both constructive and implied actual notice. Knapp v. Bailey, 79 Me. 195, 9 A. 122, 1 Am. St. Rep. 295.

The principle applied in cases of alleged implied actual notice is that a person has no right to shut his eyes or ears to avoid information, and then say that he has no notice; that it will not suffice the law to remain willfully ignorant of a thing readily

ascertainable by whatever party puts him on inquiry, when the means of knowledge is at hand. McQuiddy v. Ware, 20 Wall. 14, 22 L. Ed. 311; Woodruff v. Williams, 35 Colo. 28, 85 P. 90, 5 L. R. A. (N. S.) 986; Vann v. Marbury, 100 Ala. 438, 14 So. 273, 23 L. R. A. 325, 46 Am. St. Rep. 70; ***256** Webb v. John Hancock Mutual Life Ins. Co., 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632.

[2] **[3]** In the case at bar the appellees contend that since the deed dated August 16, 1923, executed by Jessie B. Markley and James M. Jackson, Jr., as guardian of Annie Lester Patterson, a minor, conveying the property to George E. Merrick, was itself duly recorded under the recording statutes, that the record of this deed constitutes notice to creditors and subsequent purchasers not only as to the existence vel non and contents of that deed, but also as to all such other facts as they would have learned from that record, had it been examined, including the proceedings before the county judge which culminated in the execution of said guardian's deed, the validity of which deed could only have been determined by an investigation of the proceedings had before the county judge, upon which the legality of the deed to convey the minor's title necessarily depended. Charles v. Roxana Petroleum Corp. (C. C. A.) 282 F. 983.

These guardianship proceedings, so it is asserted, show every fact with respect to the unrecorded purchase-money mortgage of the complainants, and defendants, being deemed to have implied actual knowledge thereof, through the inquiry suggested by the guardian's deed into the county judge's proceedings, are to be deemed charged in this case with knowledge of what was shown by the proceedings had before the county judge, since the guardian's deed, without reference to such proceedings to support its validity, would not have been effectual as proof of title in any one claiming under it. McIntrye v. Parker, 77 Fla. 690, 82 So. 253; Davis v. Shuler, 14 Fla. 438; McGehee v. Wilkins, 31 Fla. 83, 12 So. 228.

In several jurisdictions the rule is that purchasers and creditors are charged only by construction with notice of the facts *actually exhibited* by the record made under the ***257** recording statutes, and not with such facts outside of the record itself, as might have been ascertained by inquiries which an examination of the record would have induced a prudent man to make. Neas v. Whitener-London Realty Co., 119 Ark. 301, 178 S. W. 390, L. R. A. 1916A, 525, Ann. Cas. 1917B, 780; Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250; Taylor v. Harrison, 47 Tex. 454, 26 Am. Rep. 304.

But the rule supported by the best authority is that the record is constructive notice to creditors and subsequent purchasers not only of its own existence and contents, but ****128** of such other facts as those concerned with it would have learned from the record, if it had been examined, and inquiries suggested by it, duly prosecuted, would have disclosed. Nolen v. Henry, 190 Ala. 540, 67 So. 500, Ann. Cas. 1917B, 792; Wetzier v. Nichols, 53 Wash. 285, 101 P. 867, 132 Am. St. Rep. 1075; Gaines v. Saunders, 50 Ark. 322, 7 S. W. 301; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 S. Ct. 239, 35 L. Ed. 1063; H. B. Claflin Co. v. King, 56 Fla. 767, 48 So. 37; Gulf Coast Canning Co. v. Foster (Miss.) 17 So. 683; Martin v. Neblett, 86 Tenn. 383, 7 S. W. 123.

[4] **[5]** If, in the investigation of a title, a purchaser, with common prudence, must have been apprised of another right, notice of that right is presumed as a matter of implied actual notice. Reeder v. Barr, 4 Ohio, 446, 22 Am. Dec. 762; Singer v. Scheible, 109 Ind. 575, 10 N. E. 616; American Inv. Co. v. Brewer, 74 Okl. 271, 181 P. 294; Cambridge Valley Bank v. Delano, 48 N. Y. 326; Blake v. Blake, 260 Ill. 70, 102 N. E. 1007. Means of knowledge, with the duty of using them, are in equity equivalent to knowledge itself. Cordova v. Hood, 17 Wall. 1, 21 L. Ed. 587. See, also, Taylor v. American Nat. Bank, 63 Fla. 631, 57 So. 678, Ann. Cas. 1914A, 309; ***258** Hunter v. State Bank of Florida, 65 Fla. 202, 61 So. 497; McRae v. McMinn, 17 Fla. 876; Figh v. Taber, 203 Ala. 253, 82 So. 495.

In the case at bar, even if the order of the county judge, dated September 6, 1923, cannot be construed to be constructive notice of any matter, contract, lien, or relationship recited therein over which the county judge had no jurisdiction, as argued by appellants, it does not necessarily follow that appellants can base their claims of title to the land in question upon the assumed validity of the guardian's deed to Merrick, and at the same time repudiate and deny notice of matters which would have been discovered by a prudent man put on inquiry, especially when those matters must unquestionably have been brought to their attention if they had examined the proceedings of the county judge which constituted the guardian's authority for the making of such a deed.

This is true because neither the proceedings before the county judge, nor the guardian's deed standing alone, was sufficient

to convey the minor's title. Both together constituted one inseparable and indivisible unit forming a single link in the title chain, because in an action of ejectment the guardian's deed alone would not have been admissible in evidence. McGehee v. Wilkins, 31 Fla. 83, 12 So. 228, and cases cited.

So recording of the guardian's deed imputed notice of the indispensable proceedings preliminary to the execution of that deed, which had been taken before the county judge to give that deed validity, and under the authorities we have heretofore cited, those who would rely upon such deed as evidence of the right they assert, must do so charged with implied actual notice of all facts appearing in the proceedings had before the county judge, and of all facts that a prudent man examining those proceedings would have learned upon reasonable inquiry from the facts disclosed there.

***259** And in this case it appears that an examination of the records of the proceedings before the county judge would have brought knowledge of both the mortgages sought to be foreclosed to the appellants, since a single consideration of $20,000 as the purchase price to be paid for the land was referred to in the guardian's report to the county judge, and from that report it is plainly deducible that the unpaid balance of $18,000 was to be extended over a period of five years, payable in deferred payments to both of the interested owners, and not to the guardian alone.

[6] Nor did the execution of the two new mortgages on September 20, 1926, change the equitable effect of the implied actual notice to appellees of the previous unrecorded mortgage. The subsequent mortgages appeared on their face to be but mere restatements of the previous one for the purpose of having the same placed on record. The execution of the two new mortgages on the same property, to cover the same debt that was secured by the misplaced and unrecorded mortgage, did not operate to merge, release, or discharge the prior mortgage, unless so intended by the parties and unless so made by them for the purpose of having them operate as a payment or satisfaction, so as to cancel the former security and substitute the latter. In such situation, the original mortgage cannot be deemed to have been discharged by the execution of the subsequent ones, in the absence of a clear showing of an intention by the parties to that effect. Such intention is affirmatively refuted in the case at bar. See 2 Jones on Mortgages (8th Ed.) 666, § 1187; 41 C. J. 806 et seq. Neither was any such merger, estoppel, payment, satisfaction, or discharge of the unrecorded mortgage by the subsequent ones pleaded by defendants. See Loomis v. Dubois, 82 Fla. 293, 89 So. 804.

[7] But it is argued also that the execution by the guardian of a warranty deed to Merrick, without mentioning any ***260** recitals whatsoever therein to show the orders or other proceedings of the county judge upon which it was based, constitutes no constructive notice of said orders and proceedings, although such warranty deed was properly recorded, because such a deed without recitals is 'not free from criticism.' 12 R. C. L. 1142, par. 36.

The answer to this proposition is that while such recitals are appropriate, and good form dictates that they should have been ****129** incorporated to render the deed 'free from criticism,' the absence of them cannot change the legal status of the instrument as being a guardian's deed whose essential validity can only be sustained when shown to be predicated upon valid preliminary proceedings before the county judge, necessary to have authorized the guardian to have legally made such a deed. The deed appears to have been executed by a guardian describing himself as such, so the absence of recitals in that deed describing the proceedings by which it was authorized is immaterial, since, as we have pointed out, the validity of that deed could only have been determined by examining the records in the office of the county judge, and if such examination had been made, the fact of the probable and likely existence of the two outstanding unrecorded mortgages must necessarily have been noticed.

[8] **[9]** The proposition we decide is not that the record of the guardian's deed constituted constructive notice per se of the entire proceedings before the county judge upon which that deed was based, but that the proper record of such deed, with the concomitant necessity imposed upon those relying on it to look to the records of the county judge to determine whether it had been duly authorized, warranted a finding by the court of implied actual notice of the existence of the two unrecorded mortgages under the facts of this case, as shown by the evidence and the stipulation. The chancellor held that as a matter of law there ***261** was such implied actual knowledge, which is an inference of fact drawn by the court as a matter of law, and not by the law itself, and in the absence of any clear showing that this inference of fact was unwarranted under the evidence and the stipulation, we must affirm the chancellor's finding on that score.

'Constructive notice,' as we have heretofore pointed out, is an inference the law itself draws, and which cannot be refuted

when the facts giving rise to it are made to appear. 'Implied actual notice,' on the other hand, is an inference of fact which may be drawn by the court as a matter of law, when warranted by the circumstances of a particular case calling for its application in order to do equity.

As has been stated by the Court of Civil Appeals of Texas, in the case of Loomis v. Cobb, 159 S. W. 305, 307: 'It is a familiar and thoroughly well-settled principle of realty law that a purchaser has constructive notice of every matter connected with or affecting his estate which appears by recital, reference, or otherwise, upon the face of any deed which forms an essential link in the chain of instruments through which he deraigns his title. The rationale of the rule is that any description, recital of fact, or reference to other documents puts the purchaser upon inquiry, and he is bound to follow up this inquiry, step by step, from one discovery to another and from one instrument to another, until the whole series of title deeds is exhausted and a complete knowledge of all the matters referred to and affecting the estate is obtained. Being thus put upon inquiry, the purchaser is presumed to have prosecuted it until its final result and with ultimate success. * * * The rule of notice thus imputed is based upon the legal presumption that information has been communicated to or acquired by a party. The presumption is not conclusive but rebuttable. * * * It may be stated as a general proposition that in all instances of constructive notice belonging ***262** to this class, where it arises from information of some extraneous facts, not of themselves tending to show an actual notice of the conflicting right, but sufficient to put a prudent man upon an inquiry, the constructive notice is not absolute; the legal presumption arising under the circumstances is only prima facie; it may be overcome by evidence, and the resulting notice may thereby be destroyed. Whenever, therefore, a party has merely received information, or has knowledge of such facts sufficient to put him on an inquiry, and this constitutes the sole foundation for inferring a constructive notice, he is allowed to rebut the prima facie presumption thence arising by evidence; and if he shows by convincing evidence that he did make the inquiry, and did prosecute it with all the care and diligence required of a reasonably prudent man, and that he failed to discover the existence of, or to obtain knowledge of, any conflicting claim, interest, or right, then the presumption of knowledge which had arisen against him will be completely overcome; the information of facts and circumstances which he had received will not amount to a constructive notice. What will amount to a due inquiry must largely depend upon the circumstances of each case. If, on the other hand, he fail to make any inquiry or to prosecute one with due diligence to the end, the presumption remains operative, and the conclusion of a notice is absolute.'

In this case the inference of implied actual notice was warranted by the fact that the persons having constructive notice of the record of the guardian's deed must in any event have looked to the proceedings which were necessary to support it, and accordingly must be charged with implied actual notice of what an inquiry suggested to a prudent man by those proceedings would have disclosed. There is nothing in the stipulation which inhibited the court from finding such implied actual notice as a matter ***263** of law from the facts before him in this case, since there was no showing that the inquiry suggested by the guardian's proceedings was made, and the ****130** facts not discovered after the exercise of due diligence.

It follows from what has been said that the interests asserted by the answers of the appellants were subordinate in equity to the right of foreclosure asserted by the appellees, and that the chancellor properly so held when he entered his decree of foreclosure, which should be and is hereby affirmed.

Affirmed.

BUFORD, C. J., and WHITFIELD, and ELLIS, JJ., concur.

BROWN, J., dissents.

TERRELL, J., not participating.

All Citations

105 Fla. 245, 141 So. 124

Footnotes

1 'No conveyance, transfer or mortgage of real property, or of any interest therein, nor any lease for a term of one 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; nor shall any such instrument made or executed by virtue of any power of attorney ney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded before the accruing be good or effectual in law or in equity purchaser.'

ARGENT MORTGAGE COMPANY, LLC

v.

WACHOVIA BANK N.A., etc.

No. 5D09-4014.

District Court of Appeal of Florida, Fifth District.

Dec 30, 2010.

52 So. 3d 796

2010 Fla. App. LEXIS 20132

2010 WL 5391527

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Jeffrey R. Dollinger, of Scruggs & Carmichael, P.A., Gainesville, for Appellant., W. David Vaughn, of W. David Vaughn, P.A., Jacksonville, for Appellee.

Griffin, Palmer, Perry.

GRIFFIN, J.

Argent Mortgage Company, LLC ["Argent"] appeals the trial court's entry of judgment in favor of Wachovia Bank National Association, as Trustee Under Pooling and Servicing Agreement Dated as of November 1, 2004, Asset Backed Pass-Through Certificates Series 2004-WWF1 ["Wachovia"]. Argent argues that the tri [*798] al court erred by finding that the mortgage now owned by Wachovia has priority over Argent's mortgage. We reverse.

On August 31, 2004, Gene M. Burkes and Ann Burkes ["the Burkes"] as borrower/mortgagor and Olympus Mortgage Company as lender/mortgagee executed a mortgage ["the Olympus Mortgage"] on real property as security for a $90,000.00 loan. The Olympus Mortgage was recorded on January 5, 2005. Subsequently, the Olympus Mortgage was assigned to Wa-chovia. As a result of default, Wachovia filed a complaint to foreclose the Olympus Mortgage and to enforce lost loan documents. Wachovia joined Argent as a defendant, alleging that Argent might claim some interest in or lien upon the subject property by virtue of a recorded mortgage.

On December 10, 2004, the Burkes as borrower/mortgagor and Argent as lender/mortgagee executed a mortgage ["the Argent Mortgage"] as security for a $65,000.00 loan on the same real property that is the subject of the Olympus Mortgage. The Argent

Mortgage was recorded on January 31, 2005. Subsequently, Wells Fargo Bank became the owner of the Argent Mortgage. An action to foreclose the Argent Mortgage was initiated as a result of default.[1]

Argent filed a motion for summary judgment in its favor, requesting that the trial court determine that the Argent Mortgage has priority over the Olympus Mortgage. Likewise, Wachovia filed a motion for summary judgment in its favor, requesting that the trial court determine that the Olympus Mortgage has priority over the Argent Mortgage. After conducting a hearing, the trial court entered an order on the competing motions for summary judgment as to priority. In the order, the trial court made findings on facts not in dispute, including the dates of execution and recordation of the two mortgages and Argent's lack of actual or constructive notice of the Olympus Mortgage at the time of execution of the Argent Mortgage. Ultimately, the trial court deemed "the Florida statutes on recordation," namely sections 695.01 and 695.11, Florida Statutes, "to be of the race-notice variety," found that the Olympus Mortgage should have priority over the Argent Mortgage, and entered a partial final judgment in favor of Wachovia.

On appeal, Argent argues that the trial court erred by finding in favor of Wacho-via on the issue of mortgage priority because the trial court erred in concluding that sections 695.01 and 695.11, Florida Statutes when read together, create a "race-notice" scheme. Argent asserts that section 695.01, Florida Statutes, alone determines which mortgage has priority, that section 695.01 is, and, for over a century, has been recognized to be a "notice" statute, not a "race-notice" statute and that, under section 695.01, the Argent Mortgage has priority over the Olympus Mortgage.

Wachovia acknowledges that section 695.01, Florida Statutes, is a "notice" type of recording statute. However, Wachovia contends that amendments made to section 695.11, Florida Statutes, have converted Florida into a "race-notice" state.

As an initial matter, it bears explaining that recording statutes are classified into three categories: race, notice, and race-notice. *See* Grant S. Nelson, William B. Stoebuck, and Dale A. Whitman, *Contemporary Property* 1004 (West Group 2d ed. 2002). These can generally be described as follows:

• Under a *race* recording statute, a subsequent mortgagee of real property will prevail against a prior mortgagee of [*799] the said real property if the subsequent mortgage is recorded before the prior mortgage.

• Under a *notice* recording statute, a subsequent mortgagee of real property for value and without notice (actual and constructive) of a prior mortgage of the said real property will prevail against the prior mortgagee.

• Under a *race-notice* recording statute, a subsequent mortgagee of real property for value and without notice (actual and constructive) of a prior mortgage of the said real property will

prevail against the prior mortgagee if the subsequent mortgage is recorded before the pri- or mortgage.

Importantly, under either a notice or a race-notice recording statute, the subsequent mortgagee cannot be without constructive notice if the prior mortgage has been recorded as of the time of execution of the subsequent mortgage. *See id.* at 1004-07.

Application of each type of recording statute to the undisputed facts here yields the following results:

• Wachovia prevails under a race recording statute because the Olympus Mortgage was recorded before the Argent Mortgage;

• Argent prevails under a notice recording statute because it is a subsequent mortgagee for value and did not have notice of the Olympus Mortgage at the time of execution of the Argent Mortgage; and

• Wachovia prevails under a race-notice recording statute because, although Argent is a subsequent mortgagee for value and did not have notice of the Olympus Mortgage at the time of execution of the Argent Mortgage, the Olympus Mortgage was recorded before the Argent Mortgage.

Commentators appear uniformly to categorize section 695.01 as a "notice" type of recording statute. *See* 2-26 Ralph E. Boyer, *Florida Real Estate Transactions* § 26.02 (Matthew Bender & Co., Inc. 2010) ("Florida has a notice type recording statute [see § 695.01, Fla. Stat.] the primary function of which is to protect subsequent purchasers (which for purposes of this discussion includes mortgagees and creditors who are within the statute's protection) against claims arising from prior unrecorded instruments .... " (citations omitted)).

Florida courts over time have described and applied Florida's recording statute in a manner that is consistent with a "notice" type of recording statute. *See Lesnoff v. Becker,* 101 Fla. 716, 135 So. 146, 147 (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; and the burden of showing such notice is upon the party claiming under such unrecorded instrument, the presumption in such case being that such subsequent purchaser acquired his title in good faith and without notice of the prior unrecorded conveyance.' " *(quoting Rambo v. Dickenson,* 92 Fla. 758, 110 So. 352, 353 (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 sub [*800] ject 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)). Florida's approach to the problem was succinctly described by the Florida Supreme Court in *Van Eepoel Real Estate Co. v. Sarasota Milk Co.,* 100 Fla. 438, 129 So. 892, 895 (1930):

> [I]t is generally held, in states having recording statutes similar to ours, that if A conveys lands to B, a bona fide purchaser for value, who does not go into possession and who failed to record his deed until after A conveys the same land to C, a second bona fide purchaser for value without notice of B's interest, and B then records his deed before C records his, the title of C shall nevertheless prevail as between C and B, because it is the fault of B that he did not immediately record his deed, thereby permitting C to deal with the property and part with his consideration without knowledge of B's interest. So B is es-topped and the equities are with C.

Section 695.01, notwithstanding, the trial court accepted Wachovia's argument that a 1967 amendment to a different statute, section 695.11, Florida Statutes, entitled, "Instruments deemed *to be* recorded from time of filing" converted Florida from a "notice" to a "race-notice" jurisdiction. The earliest version of section 695.11 dates back to 1885. Examination of the language of the 1906, 1920, and 1935 iterations of section 695.11, make clear that this statute was intended to provide a mechanism for determining the time at which an instrument was deemed to be recorded. Nothing in the case law suggests that section 695.11 modifies section 695.01.[2]

As a result of the 1967 amendment, section 695.11 now includes the following language: "The sequence of such official numbers *shall determine the priority of recordation.* An instrument bearing the lower number in the then-current series of numbers *shall have priority over any instrument* bearing a higher number in the same series." (Emphasis added). Wachovia contends that the inclusion of this language converted Florida from a "notice" state to a "race notice" state. We disagree. The amendment to section 695.11 is designed to refine the test for determining the time at which an instrument is deemed to be recorded, not to alter the recording requirement found in section 695.01.[3]

Section 695.11 also applies to indexing errors. To the extent that an instrument bears an official register number but [*801] has been indexed incorrectly, it is nevertheless deemed to be recorded. *See Anderson v. N. Fla. Prod. Credit Ass'n,* 642 So.2d 88, 89 (Fla. 1st DCA 1994) ("[A]n instrument is deemed to be 'officially recorded' when the instrument is accepted by the court clerk and is given 'official register numbers.' ... While indexing is required, priority is not contingent upon such, and the cases cited to us by appellants do not alter the plain language of th[e] statute which provides that '[t]he sequence of such official numbers shall determine the priority of recordation.' "); *see also Orix Fin. Servs., Inc. v. MacLeod,* 977 So.2d 658, 658 (Fla. 1st DCA 2008).

Wachovia relies on an earlier opinion of this Court, *Rice v. Greene,* 941 So.2d 1230 (Fla. 5th DCA 2006), in support of its contention that Florida has a race-notice type of recording

statute. In *Rice,* this Court quoted section 695.01 and found:

> In other words, "an unrecorded deed is not good or effectual in law or equity against creditors or subsequent purchasers for valuable consideration who are without notice of the transaction." *Fryer v. Morgan,* 714 So.2d 542, 545 (Fla. 3d DCA 1998). Therefore, *because Mr. Greene had no notice* of the earlier warranty deed between Mr. Rice and Mrs. Schwartz *and paid valuable consideration* for the property, *Mr. Greene's recording of his warranty deed before Mr. Rice gives Mr. Greene priority to the property.*

Id. at 1282 (emphasis added). According to Wachovia, this language proves that priority in recording is key. Notably, however, *Rice* does not mention section 695.11 and recording was not an issue. The subsequent purchaser in *Rice* (Mr. Greene) had priority to the property under a notice type of recording statute because he paid value for the property and did not have notice (actual or constructive) of the earlier warranty deed at the time of the conveyance. The fact that Mr. Greene's deed was recorded before Mr. Rice's does not affect the outcome under a notice type of recording statute. Although a portion of the sentence in *Rice,* on which Wachovia relies, mentions recording, in that case, it was superfluous.

We conclude that Florida is, and remains, a "notice" jurisdiction, and notice controls the issue of priority. Since Argent is a subsequent mortgagee for value and did not have notice of the Olympus Mortgage at the time of execution of the Argent Mortgage, the Argent Mortgage has priority over the Olympus Mortgage. As such, the trial court erred by entering partial summary final judgment in favor of Wachovia on the issue of priority.

REVERSED and REMANDED.

PALMER, J., and PERRY, B., JR., Associate Judge, concur.

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1 The trial court entered an order consolidating the two foreclosure actions.

2 Contrary to Wachovia's contention, when read together, sections 695.01 and 695.11 do not appear to be similar to the wording of New Jersey's race-notice recording statute on which the trial court relied in its decision.

3 Case law confirms that the purpose of section 695.11 is to determine the time at which an instrument is deemed to be recorded and to serve as notice. *See Broward County v. Recupero,* 949 So.2d 274, 276 (Fla. 4th DCA 2007) ("Florida Statutes section 695.11 provides that instruments are deemed to be recorded from the time of filing."); *Winn-Dixie Stores, Inc. v. Dolgencorp, Inc.,* 964 So.2d 261, 266-67 (Fla. 4th DCA 2007) ("Section 695.11, Florida Statutes (2006) states that an instrument, like a lease, which is 'authorized or required to be recorded' by the clerk 'shall be notice to all persons' once it is 'officially recorded' pursuant to the statute."); *In re Forfeiture of $91,357.12,* 595 So.2d 998, 999 (Fla. 4th DCA 1992) ("Section 695.11, Florida Statutes, specifically provides that the effective time of recording is the point at which the document is *officially* accepted and *offi-* [*801] *dally* recorded." (emphasis in original)); *Paterson v. Brafman,* 530 So.2d 499, 500 (Fla. 3d DCA 1988) ("Our reversal is founded upon the basic, irrefutable principle that those who subsequently deal with real property are placed on constructive notice of the relevant contents of a properly recorded instrument ...." *(citing* section 695.11, Florida Statutes)). Section 695.11 has an important purpose to determine the priority between judgment liens. *See Lamchick, Glucksman & Johnston, P.A. v. City Nat'l Bank of Fla.,* 659 So.2d 1118, 1119 (Fla. 3d DCA 1995); *Dollar Sav. & Trust Co. v. Soltesiz,* 636 So.2d 63, 66 (Fla. 2d DCA 1994); *Martinez* v. *Reyes,* 405 So.2d 468, 469 (Fla. 3d DCA 1981). Because a certified copy of a judgment must be recorded in order to

create a lien on real property, a judgment that is recorded earlier in time, namely one that bears a lower official register number, will win priority.

Mayfield v. First City Bank of Fla.

Court of Appeal of Florida, First District

August 2, 2012, Opinion Filed

CASE NO. 1D11-3681

Reporter
95 So. 3d 398 *; 2012 Fla. App. LEXIS 12563 **; 37 Fla. L. Weekly D 1848; 2012 WL 3115140

MICHAEL D. MAYFIELD, BONNIE J. MAYFIELD, AND BRANCH BANKING AND TRUST COMPANY, Appellants, v. FIRST CITY BANK OF FLORIDA, Appellee.

Procedural Posture
Appellants, a bank and borrowers, appealed the grant of summary judgment by the Circuit Court for Walton County (Fla.) in favor of appellee bank regarding its action for foreclosure.

Subsequent History: Released for Publication September 19,2012.

Rehearing denied by *Mayfield v. First City Bank of Fla., 2012 Fla. App. LEXIS 15733 (Fla. Dist. Ct. App. 1st Dist., Aug. 31, 2012)*

Review denied by *Mayfield v. First City Bank of Fla., 2013 Fla. LEXIS 1028 (Fla., May 21, 2013)*

Prior History: **[**1]** An appeal from the Circuit Court for Walton County. Howard LaPorte, Judge.

Overview

Appellants sought reversal of a summary final judgment of foreclosure and argued that their title and mortgage to the property in question prevaild over that of the appellee. Unbeknownst to appellants, title to the disputed property had been conveyed and a prior mortgage executed on the property. The appellate court found that the unambiguous language of *§ 695.11, Fla. Stat.*, controlled such that constructive notice attached at the time the deed and the appellee's mortgage were recorded. Although the appellants suggested that these documents had to remain in the official records to impart constructive notice, the appellate court found no such requirement in *§ 695.11*. *Section 695.01* required that, to be good and effectual against bona fide purchasers, a document had to be recorded according to law. The deed and the mortgage were recorded according to law.

Core Terms

recorded, mortgage, constructive notice, deed, official record, notice, documents, numbers, recording statute, purchasers, register

Case Summary

Outcome
The judgment was affirmed.

LexisNexis® Headnotes

Real Property Law > Priorities & Recording > Recording Acts

HN1[] **Priorities & Recording, Recording Acts**

Section 695.01, Fla. Stat., provides, in part: (1) No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of one 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. *Section 695.01* is a "notice" recording statute, the primary purpose of which is to protect subsequent purchasers (including mortgagees and creditors) against claims arising from prior unrecorded instruments. In order to prevail under *§ 695.01*, the bona fide purchaser must be without notice.

Real Property Law > Priorities & Recording > Recording Acts

HN2[] **Priorities & Recording, Recording Acts**

The Florida Supreme Court has defined constructive notice as notice imputed to a person not having actual notice; for example, such as would be imputed under the recording statutes to persons dealing with property subject to those statutes. An examination of Florida case law reveals that courts have generally concluded that, when a party complies with the recording statute, constructive notice attaches and will not be destroyed by errors committed by the clerk.

Real Property Law > Priorities & Recording > Recording Acts

HN3[] **Priorities & Recording, Recording Acts**

Constructive notice of the subject-matter of the instrument takes place from the date it is placed with the recording officer to be recorded, and that the efficacy of such notice will not be destroyed if errors are made in the recording.

Real Property Law > Priorities & Recording > Recording Acts

HN4[] **Priorities & Recording, Recording Acts**

See *§ 695.11, Fla. Stat.*

Real Property Law > Priorities & Recording > Recording Acts

HN5[] **Priorities & Recording, Recording Acts**

Under *§ 695.11, Fla. Stat.*, an instrument was deemed officially recorded when accepted by the clerk and given official register numbers.

Real Property Law > Priorities & Recording > Recording Acts

HN6[] **Priorities & Recording, Recording Acts**

Section 695.11, Fla. Stat. (1995) provides that official recordation occurs at such time as the office of the clerk of the circuit court affixes to an

instrument the official register numbers required by law and at such time shall be notice to all persons.

Counsel: T.A. Borowski, Jr., J. Scott Duncan, and Darryl Steve Traylor, Jr., of Borowski & Duncan, P.A., Pensacola, for Appellants.

Richard T. Petitt and Adam M. Wolfe of Petitt Wolfe Craine Worrell Porter LLC, Tampa; Edward P. Fleming and R. Todd Harris of McDonald, Fleming, Moorhead, Pensacola; Matthew C. Hoffman, Pensacola; Todd M. LaDoucer, Pensacola; Larry A. Wright and William H. Green, DeFuniak Springs; Wade Wallace, Miramar Beach; and Michael Wm. Mead, Ft. Walton, for Appellee.

Judges: ROBERTS, J. WETHERELL and ROWE, JJ., CONCUR.

Opinion by: ROBERTS

Opinion

[*399] ROBERTS, J.,

This appeal is a case of first impression resulting from unique circumstances involving electronic public records. Appellants Michael and Bonnie Mayfield (the Mayfields) and appellant Branch Banking and Trust Company (BB&T) seek reversal of a summary final judgment of foreclosure and argue that their title and mortgage to the property in question prevails over that of the appellee, First City Bank of Florida (First City). Although the appellants are in an unfortunate position that they did not create, we affirm because the trial court did not err in its construction of Chapter **[**2]** 695.

In October 2009, the Mayfields purchased real property (hereinafter Lot 2) in Walton County and received a warranty deed on Lot 2 from Blue water Real Estate Investments, LLC (Blue water). Simultaneously, the Mayfields granted a mortgage **[*400]** on Lot 2 to Old National Bank that was subsequently acquired by BB&T. The Mayfields' deed and mortgage were filed with the clerk of Walton County who recorded both documents in the official records on November 2, 2009.

Unbeknownst to the appellants, title to Lot 2 had been conveyed and a prior mortgage executed on the property. In 2006, Blue water conveyed Lot 2 to Wright & Associates of Northwest Florida (W&A). W&A simultaneously granted a mortgage on Lot 2 to First City. The W&A deed and First City mortgage were filed with the clerk of Walton County for recording. After receiving the documents for recording, the clerk opened a recording transaction in the computer and affixed an official register book and page number on the hard copies of the W&A deed and First City mortgage so as to record the documents in the official records on July 6, 2006. Shortly after entering the documents in the computer, the clerk independently realized that she had **[**3]** made an error in the recording process and voided the W&A deed and First City mortgage from the official records. The clerk intended to re-record the aforesaid documents after correcting the error, but failed to do so and mistakenly recorded similar instruments concerning another parcel of property instead. Thereafter, the hard copies of the W&A deed and First City mortgage bearing the official register book and page numbers were returned to the parties. However, in the Walton County electronic official records, the corresponding book and page numbers showed that the documents were voided. Once a document is voided, it no longer appears in the official records or the index to the official records and cannot be found by a person conducting a search of the official records. Thus, except for a brief period of approximately 73

minutes on July 6, 2006, the W&A deed and First City mortgage did not appear in the official records of Walton County. Furthermore, only during this window of time could a member of the general public have discovered the W&A deed and First City mortgage.

In 2010, First City filed for foreclosure on Lot 2 due to a loan payment default by W&A. The Mayfields and Old **[**4]** National[1] were named as defendants. The Mayfields moved for summary judgment based on their contention that they were bona fide purchasers without notice, and, therefore, their interests prevailed over that of First City. First City also moved for summary judgment arguing that it fully complied with the recording statute, and, as a result, the Mayfields and BB&T were placed on constructive notice of the First City mortgage. In granting a summary final judgment of foreclosure in favor of First City, the trial court found that, although the W&A deed and First City mortgage were voided from the public records, they were recorded in accordance with *section 695.11, Florida Statutes* (2011). The trial court further found that, because the documents were recorded, they provided constructive notice such that the Mayfields and BB&T were not entitled to the protection of *section 695.01, Florida Statutes* (2011).

On appeal, the parties dispute whether constructive notice could attach when the W&A deed and First City mortgage appeared in the official records for 73 minutes before being completely eradicated **[**5]** due to the clerk's error. The appellants rely on *section 695.01* and argue that it imposes a requirement that an instrument **[*401]** presently "be" in the public records in order to impart constructive notice.

HN1[↑] *Section 695.01* provides, in part:

> (1) No 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. . . .

Section 695.01 is a "notice" recording statute, the primary purpose of which is to protect subsequent purchasers (including mortgagees and creditors) against claims arising from prior unrecorded instruments. *See Argent Mortgage Co., LLC v. Wachovia Bank, N.A., 52 So. 3d 796, 799 (Fla. 5th DCA 2010)*. In order to prevail under *section 695.01*, the bona fide purchaser must be without notice, in this case, constructive notice.

In *Sapp v. Warner*, ***HN2***[↑] the Supreme Court defined constructive notice as "notice imputed to a person not having actual notice; for example, such as would be imputed under the recording statutes to persons dealing with property **[**6]** subject to those statutes." *105 Fla. 245, 141 So. 124, 127 (Fla. 1932)*. An examination of Florida case law reveals that courts have generally concluded that, when a party complies with the recording statute, constructive notice attaches and will not be destroyed by errors committed by the clerk.

For example, in *First National Bank of Brooksville v. Evans*, the appellant/mortgagee complied with the recording statute by filing a chattel mortgage for record, but the same was not recorded until later due to an omission by the clerk. *100 Fla. 740, 130 So. 18, 20 (Fla. 1930)*. The mortgage lien was recorded by the clerk on the day an attachment lien on the same property was levied. *Id.* In determining whether the lien of the chattel mortgage was entitled to priority over the attachment lien, the Supreme Court held:

> It was not the fault of the mortgagee, the appellant here, that the mortgage was not actually spread upon the record until the day the attachment was levied. Appellant had complied with the recording act in so far as it was within its power, when it filed the chattel

[1] As the subsequent purchaser of the note and mortgage, BB&T intervened in the foreclosure action.

> mortgage for record, and its lien cannot be affected by the omission of the clerk to record the mortgage as soon as it was filed. . . . Indeed, **[**7]** to hold that creditors and purchasers did not have constructive notice until the instrument was actually recorded would be to nullify our statute which reads as follows:
> 'All instruments relating to real and personal property which are authorized or required to be recorded shall be deemed to be recorded from the time the same are filed with the officer whose duty it is to record the same.' Section 5708(3830), Compiled General Laws of Florida 1927.

Id.

Similarly, in *Federal Land Bank of Columbia v. Dekle*, the Supreme Court held that, in states with statutes like section 3830, Revised General Statutes of Florida 1920, (section 5708, Compiled General Laws of Florida 1927), it was "generally held that ***HN3***[↑] constructive notice of the subject-matter of the instrument takes place from the date it is placed with the recording officer to be recorded, and that the efficacy of such notice will not be destroyed if errors are made in the recording." *148 So. 756, 758, 108 Fla. 555 (Fla. 1933)*.[2]

[*402] The current version of *section 695.11*, provides:

> ***HN4***[↑] All instruments which are authorized or required to be recorded in the office of the clerk of the circuit court of any county in the State of Florida, and which are to be recorded in the "Official Records" as provided for under s. 28.222, and which are filed for recording on or after the effective date of this act, shall be deemed to have been officially accepted by the said officer, and officially recorded, at the time she or he affixed thereon the consecutive official register numbers required under s. 28.222, and at such time shall be notice to all persons. The sequence of such official numbers shall determine the priority of recordation. An instrument bearing the lower number in the then-current series of numbers shall have priority over any instrument bearing a higher number in the same series.

Under this current version, the courts have continued to find that constructive notice attaches upon compliance with the recording statute. For example, in *Anderson v. North Florida Production Credit Association*, Anderson purchased property in Franklin County in 1985 **[**9]** and secured a mortgage on said property. *642 So. 2d 88, 89 (Fla. 1st DCA 1994)*. Unknown to Anderson at the time, a prior mortgage had been executed on the property in favor of North Florida Production Credit Association (North Florida). *Id*. The prior mortgage was recorded in 1983 and was improperly indexed by the clerk. Id. The circuit court found in favor of North Florida, concluding that indexing was not an essential element of recording and priority of competing claims was determined by *section 695.11*. Id. This Court affirmed, finding that,***HN5***[↑] under *section 695.11*, an instrument was deemed officially recorded when accepted by the clerk and given official register numbers. *Id*. This Court found that priority was not contingent upon indexing and the plain language of *section 695.11* provided the sequence of official numbers determined the priority of recordation. *Id*.

In *Orix Financial Services, Inc. v. Macleod*, Orix recorded a judgment lien on real property in Dixie County that was later acquired by the MacLeods.*977 So. 2d 658 (Fla. 1st DCA 2008)*. Orix sought to foreclose on its judgment lien, and the trial court entered summary judgment in favor of the MacLeods. *Id*. This Court reversed, **[**10]** stating:

> We adhere to the reasoning of the *Anderson*

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[2] In 1935, the Legislature amended section 3830, Revised General Statutes of Florida 1920, by adding the final clause, "and as so recorded and transcribed upon the record shall be notice to all persons." Thereafter, notice was imparted **[**8]** after documents are recorded and not after documents are filed for recording.

> court. In *Anderson*, this court viewed the dictates of *section 695.11, Florida Statutes*, as unambiguous. *See also Fed. Land Bank of Columbia v. Dekle, 108 Fla. 555, 148 So. 756 (1933)*. The statute ***HN6***[↑] provides that official recordation occurs at such time as the office of the clerk of the circuit court affixes to an instrument the official register numbers required by law "and at such time shall be notice to all persons." *§ 695.11, Fla. Stat.* (1995).

Id.

In light of the foregoing line of cases, we find the unambiguous language of *section 695.11* controls such that constructive notice attached at the time the W&A deed and First City mortgage were recorded on July 6, 2006. Although the appellants suggest that these documents had to remain in the official records to impart constructive notice, we find no such requirement in *section 695.11*. *Section 695.01* requires that, to be good and effectual against bona fide purchasers, a document **[*403]** must "be recorded according to law." The W&A deed and First City mortgage were recorded according to law.

We recognize the harshness of the result in the instant case where the appellants are innocent parties. Nonetheless, **[**11]** the appellants' remedy, if any, may lie against the clerk, who can make no claim of sovereign immunity. *See e.g., Orix, 977 So. 2d at 658*; *First Am. Title Ins. Co. of St. Lucie County, Inc. v. Dixon, 603 So. 2d 562 (Fla. 4th DCA 1992)*.

WETHERELL and ROWE, JJ., CONCUR.

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REGIONS BANK v. DELUCA (2012)

REGIONS BANK, Successor by Merger with AmSouth Bank, Appellant, v. Albert and Adrienne DELUCA; and JPMorgan Chase Bank, National Association, as Purchaser of the Loans and Other Assets of Washington Mutual Bank, formerly known as Washington Mutual Bank, F.A., Appellees.

No. 2D11–3828.

Decided: August 22, 2012

Cary A. Lubetsky of Krinzman, Huss & Lubetsky, LLP, Miami, and José D. Vega of Bradley Arant Boult Cummings, LLP, Birmingham, Alabama, for Appellant. Benjamin B. Brown, Andrew G. Tretter, and Kevin R. Lottes of Quarles & Brady, LLP, Naples, for Appellees.

Regions Bank, successor by merger with AmSouth Bank, appeals a final summary judgment determining that because of certain irregularities in the formatting of the legal description of the subject real property in its mortgage, Albert Deluca; Adrienne Deluca; and JPMorgan Chase Bank, National Association, were bona fide purchasers for value and without notice of Regions Bank's prior recorded mortgage. Because the irregularities in the formatting of the legal description were capable of being corrected from other parts of the same instrument, the Delucas and JPMorgan had constructive notice of the mortgage held by Regions Bank. Accordingly, we reverse the final summary judgment.[1]

I. THE FACTUAL BACKGROUND

From June 2003 through June 2005, Ralph A. Fulchino and Katheryn Y. Fulchino owned real property in Naples referred to as "the Olde Cypress property." In 2003, the Fulchinos gave AmSouth Bank a first mortgage and a second mortgage on the Olde Cypress property.

In 2005, the Fulchinos applied for a new mortgage loan from AmSouth to purchase real property in Bonita Springs referred to as "the Bayfront Gardens property." On April 12, 2005, in connection with their

purchase of the Bayfront Gardens property, the Fulchinos borrowed $1,690,000 from AmSouth and gave AmSouth a mortgage. The new mortgage was prepared on a standard Fannie Mae/Freddie Mac mortgage form document intended for use in Florida. The entire instrument consists of nineteen pages. The first eleven pages consist of the basic mortgage document. The loan number appears on the Zfirst page of the mortgage. The twelfth page is labeled "EXHIBIT 'A' "; it contains legal descriptions of the Bayfront Gardens property and the Olde Cypress property. Exhibit "A" is followed by three riders: (1) a two-page "Planned Unit Development Rider," (2) a two-page "Adjustable Rate Rider," and (3) a three-page "1–4 Family Rider."

There is a blank space approximately three inches high on page two of the form. The drafter or drafters of the form provided this space for the scrivener of the mortgage to insert the legal description of the mortgaged property. Notably, this space remains blank on the mortgage. In other words, the scrivener did not insert the legal description of either the Bayfront Gardens property or the Olde Cypress property in the space provided for that purpose. In addition, the scrivener failed to insert words to the effect of "See attached EXHIBIT 'A' for legal description." Immediately after the blank space the scrivener completed the portion of the form provided for the insertion of the address of the mortgaged property as follows: "which currently has the address of 239 Bayfront Drive, Bonita Springs, FL 34134 ('Property Address')." This is the address for the Bayfront Gardens property, not the Olde Cypress property.

The single page Exhibit "A" to the mortgage bears some examination. In the upper left hand corner of Exhibit "A" appears the name of the mortgagor, "Fulchino," and a ten-digit number that corresponds to the loan number referenced on the first page of the mortgage instrument. The designation "Parcel 1" appears below "Exhibit 'A,' " followed by the legal description and parcel identification number for the Bayfront Gardens property. Below that legal description and parcel identification number appears a legend centered and in capital letters that reads: "PROPERTY DESCRIBED BELOW CONSTITUTES ADDITIONAL COLLATERAL TO SECURE THE DEBT EVIDENCED BY THIS MORTGAGE." The words "AND Parcel 2 " appear below this legend. The legal description and the parcel identification number for the Olde Cypress property follow. Finally, Exhibit "A" concludes with a release clause for the mortgage applicable to Parcel 2, the Olde Cypress property.

The Fulchinos executed the mortgage as "Borrower" on April 12, 2005. The mortgage was recorded on April 15, 2005, in Official Record Book 3776, pages 79 through 97, of the Public Records of Collier County, Florida. At this point, the bread fell butter side down. The clerk's office properly indexed the mortgage under the names of the Fulchinos in the grantor/grantee index. But the abstract of the legal description of the property subject to the mortgage in the clerk's index included only the Bayfront Gardens property, not the Olde Cypress property.

On June 28, 2005, approximately two and one-half months after the AmSouth third mortgage was executed and recorded, the Fulchinos sold the Olde Cypress property to the Delucas for $1,200,000. In

connection with their purchase of the Olde Cypress property, the Delucas obtained a loan for $900,000 from JPMorgan's predecessor in interest.[2] This subsequent mortgage, now held by JPMorgan, was dated June 28, 2005, and recorded July 22, 2005, in Official Record Book 3850, page 3953, of the Public Records of Collier County, Florida.

Unfortunately, the title search conducted in connection with the Delucas' purchase of the Olde Cypress property from the Fulchinos did not disclose the existence of the AmSouth third mortgage. AmSouth's first and second mortgages on the Olde Cypress property were satisfied from the closing proceeds. However, because of its omission from the title search, the AmSouth third mortgage was neither satisfied nor released as to the Olde Cypress property at the closing between the Fulchinos and the Delucas. The closing statement prepared in connection with the transaction reflects that the Fulchinos received net proceeds from the closing of $517,380.28. There is no evidence in the record that either the Delucas or JPMorgan's predecessor in interest had actual notice that AmSouth claimed to hold a third mortgage on the Olde Cypress property.

At some point after the Fulchinos sold the Olde Cypress property to the Delucas, AmSouth Bank was merged into Regions Bank. In the remainder of this opinion, we will refer to the AmSouth third mortgage that was not satisfied or released at the closing between the Fulchinos and the Delucas as "the Regions Bank mortgage."

Mr. Fulchino died in December 2008. Thereafter, the Regions Bank mortgage went into default. In October 2009, Regions Bank filed an action to foreclose its mortgage on both the Bayfront Gardens property and the Olde Cypress property. Because the Delucas and JPMorgan had interests in the Olde Cypress property as owners and mortgagee, respectively, Regions Bank named them as defendants in its foreclosure action. The Delucas and JPMorgan filed an answer and affirmative defenses. They alleged as one of their affirmative defenses that they "were bona fide purchasers without notice of any interest Regions [Bank] or its predecessor may have had in [the Olde Cypress property]."

II. THE SUMMARY JUDGMENT MOTION AND THE CIRCUIT COURT'S RULING

Later, the Delucas and JPMorgan moved for summary judgment regarding Regions Bank's foreclosure of the Olde Cypress property. In support of their motion, the Delucas and JPMorgan argued "that they were bona fide purchasers of [the Olde Cypress property] without any notice of the [Regions Bank] Mortgage's alleged encumbrance, and hence, Regions [Bank] cannot foreclose the Mortgage against [the Olde Cypress property]."

At the hearing on the motion, the circuit court announced its oral ruling as follows:

[T]he Delucas were bona fide purchasers for value of [the Olde Cypress] property and . there was not sufficient notice. As was stated, the only portion of the mortgage body referred to a[n] address, and that

address was not the one that was encumbered.

It is the law, from the Court's memory, that if an address is stated and you can relate that to the legally-described property, that's what is effective. And the Court . feels that the—the only address was the one that was not encumbered by the Delucas.

In the final summary judgment, the circuit court ruled that the Delucas and JPMorgan were bona fide purchasers for value and without notice of the Regions Bank mortgage, and it dismissed Regions Bank's foreclosure action with prejudice as to the Olde Cypress property. This appeal followed.

III. THE STANDARD OF REVIEW

The pertinent facts here are essentially undisputed. The parties agree that the applicable standard of review for the final summary judgment is de novo. See Volusia Cnty. v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126, 130 (Fla.2000).

IV. THE PARTIES' ARGUMENTS

Florida's recording statute, section 695.01, Florida Statutes (2004), provides, in pertinent part, as follows:

(1) No 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.

"The act of recording an instrument in accordance with this statute constitutes constructive notice of a prior encumbrance on the property which is the subject of the instrument." Lafitte v. Gigliotti Pipeline, Inc., 624 So.2d 844, 845 (Fla. 2d DCA 1993) (citing Bank of S. Palm Beaches v. Stockton, Whatley, Davin & Co., 473 So.2d 1358, 1360 (Fla. 4th DCA 1985), abrogated on other grounds by Suntrust Bank v. Riverside Nat'l Bank of Fla., 792 So.2d 1222 (Fla. 4th DCA 2001)). "Constructive notice is a legal inference, and it is imputed to creditors and subsequent purchasers by virtue of any document filed in the grantor/grantee index—the official records." Dunn v. Stack, 418 So.2d 345, 349 (Fla. 1st DCA 1982), quashed on other grounds, 444 So.2d 935 (Fla.1984).

The Delucas and JPMorgan acquired their interests in the Olde Cypress property after the Regions Bank mortgage was executed and recorded. Thus, with regard to the Regions Bank mortgage, the Delucas and JPMorgan are subsequent purchasers for value. Section 695.01 is a "notice" type of recording statute. Argent Mortg. Co. v. Wachovia Bank N.A., 52 So.3d 796, 801 (Fla. 5th DCA 2010). Therefore, the Regions Bank mortgage has priority over the interests of the Delucas and JPMorgan in the Olde Cypress property unless the Delucas and JPMorgan were without notice of the Regions Bank mortgage when they acquired their interests in the property. Id. at 799, 801.

For the purpose of applying the recording statute, notice may take different forms:

There are three types of notice by which a party may be held to have had knowledge of a particular fact: actual notice, implied notice (or implied actual notice), and constructive notice. "Actual notice" stems from actual knowledge of the fact in question. "Implied notice" is [the] factual inference of such knowledge, inferred from the availability of a means of acquiring such knowledge when the party charged therewith had the duty of inquiry. "Constructive notice" is the inference of such knowledge by operation of law, as under a recording statute.

McCausland v. Davis, 204 So.2d 334, 335–36 (Fla. 2d DCA 1967). There is no issue here about actual notice. Instead, Regions Bank argues that the Delucas and JPMorgan had constructive notice of its mortgage on the Olde Cypress property when they acquired their interests in the property.[3] Regions Bank asserts that the description of the Olde Cypress property on Exhibit "A" was sufficient to give constructive notice that the mortgage encumbered the Olde Cypress property as well as the Bayfront Gardens property.

The Delucas and JPMorgan make two arguments in support of their claim that they were not on constructive notice that the Regions Bank mortgage encumbered the Olde Cypress property. First, Exhibit "A," which contained the legal description and parcel identification number for the Olde Cypress property, was not properly identified and incorporated into the mortgage. Second, the language of the Fannie Mae/Freddie Mac form mortgage defines the term "Property" in such a manner that only one property—the Bayfront Gardens property—is encumbered by the mortgage.

V. DISCUSSION

The lien of a mortgage only covers the property that is described in the mortgage. § 697.02, Fla. Stat. (2004); Sunshine Meadows Condo. Ass'n v. Bank One, Dayton, N.A., 599 So.2d 1004, 1007 (Fla. 4th DCA 1992). It follows that the recording of a mortgage with no description of the property or a description that would have to be reformed to be effective does not constitute constructive notice and defeats the effect and purpose of recordation. See Neves v. Flannery, 149 So. 618, 620 (Fla.1933) (quoting 41 C.J. at 564–65); Air Flow Heating & Air Conditioning, Inc. v. Baker, 326 So.2d 449, 451 (Fla. 4th DCA 1976). However, in considering the sufficiency of a legal description in a mortgage, one must examine the entire instrument:

[I]f it is apparent from the face of the record that there is a mistake or misdescription, which is capable of being corrected from other parts of the same instrument, or other details of the same description, it operates as a constructive notice.

Neves, 149 So. at 620 (quoting 41 C.J. at 564–65). Based on this principle, the Florida courts have repeatedly held descriptions of property in mortgages sufficient despite minor mistakes and irregularities

where the description of the property intended to be encumbered could be determined from a review of the entire instrument. See, e.g., Fed. Land Bank of Columbia v. Dekle, 148 So. 756, 757 (Fla.1933) (holding description of lands by government surveys and subdivisions sufficient despite reference to lands as being in Calhoun County when they were in fact in Jackson County); Neves, 149 So. at 620–21 (holding description of land by reference to lots, block number, and name of recorded plat sufficient despite erroneous statement that the land was located in "the SE 1/4 of the SE 1/4" instead of in "the S.W. 1/4 of the S.W. 1/4" of the appropriate section); Merrell v. Ridgely, 57 So. 352, 353 (Fla.1912) (holding description of land by lot and block number of named subdivision sufficient despite reference to an incorrect plat book for the subdivision); Fid. Bank of Fla. v. Nguyen, 44 So.3d 1238, 1239 (Fla. 5th DCA 2010) (holding description of land by lot and block number of a subdivision identified by name and the designation of the correct plat book sufficient despite reference to an incorrect page number of the plat book), review denied, 57 So.3d 846 (Fla.2011). With these basic principles in mind, we turn to an examination of the arguments made by the Delucas and JPMorgan on the issue of constructive notice.

The first argument made by the Delucas and JPMorgan is that the Regions Bank mortgage did not provide constructive notice concerning the Olde Cypress property because Exhibit "A" was not properly identified and incorporated into the mortgage. We disagree with this argument for two reasons.

First, the recording of the Regions Bank mortgage provided constructive notice not only of the existence of the instrument but also of its contents. See Hull v. Md. Cas. Co., 79 So.2d 517, 519 (Fla.1954); Crenshaw v. Holzberg, 503 So.2d 1275, 1277 (Fla. 2d DCA 1987). Exhibit "A" constituted the twelfth page of a nineteen-page document. Accordingly, Exhibit "A" was a part of the entire mortgage and was not extraneous to it. Anyone who examined the mortgage would necessarily read Exhibit "A." This exhibit, contained within the four corners of the mortgage, carried a legend in capital letters placed in the center of the page and reciting that the Olde Cypress property was "additional collateral for the debt evidenced by this mortgage." (Emphasis added.) These facts are sufficient to identify Exhibit "A" as part of the mortgage and to incorporate the exhibit into the mortgage.

Second, Exhibit "A" was linked to the rest of the mortgage instrument through its content, not just its placement within the four corners of the document. The name of the mortgagor, "Fulchino," appeared in the upper left hand corner of the exhibit along with a ten-digit number corresponding to the loan number on the first page of the mortgage. In addition to providing a legal description for the Olde Cypress property, Exhibit "A" had a legal description for the Bayfront Gardens property that was identified by street address on page two of the mortgage. Furthermore, Exhibit "A" contained a release clause applicable to the Olde Cypress property for "the mortgage loan." These items unmistakably linked Exhibit "A" to the remainder of the instrument.

From an examination of the Regions Bank mortgage, it would be immediately apparent to anyone with minimal knowledge of real estate practice that the scrivener of the instrument neglected to insert an

appropriate reference to Exhibit "A" in the blank space provided on page two of the document. This was clearly a mistake. However, the mistake is capable of being corrected by the placement of Exhibit "A" within the four corners of the mortgage, the particular language used in Exhibit "A," and the internal links between Exhibit "A" and the remainder of the instrument. Under these circumstances, the Regions Bank mortgage operated as constructive notice for the Olde Cypress property. See Neves, 149 So. at 620.

The second argument made by the Delucas and JPMorgan is that the language of the Fannie Mae/Freddie Mac form mortgage defines the term "Property" in such a manner as to exclude the Olde Cypress property from the lien of the Regions Bank mortgage. This argument is based on a close reading of multiple provisions of the mortgage. To make this argument, one must actually read the mortgage. One cannot reasonably read pages one through eleven and pages thirteen through nineteen of the mortgage while ignoring Exhibit "A" on page twelve. Anyone reading page twelve would necessarily read the legend placed in the center of the page announcing in capital letters that the Olde Cypress property "constitutes additional collateral to secure the debt evidenced by this mortgage." However closely one may parse the terms of the Fannie Mae/Freddie Mac form mortgage, this language is sufficient to provide constructive notice that the Olde Cypress property—as well as the Bayfront Gardens property—is subject to the lien of the Regions Bank mortgage.

VI. CONCLUSION

The dispute between the parties in this case arises from an unfortunate chain of events. Insofar as the record reveals, the Delucas and JPMorgan relied in good faith on a title search that did not disclose the existence of the Regions Bank mortgage. Nevertheless, the undisputed facts and the applicable law establish that the Delucas and JPMorgan had constructive notice that the lien of the Regions Bank mortgage encumbered the Olde Cypress property. The circuit court erred in ruling to the contrary. Accordingly, we reverse the final summary judgment and remand for further proceedings.

Reversed and remanded.

FOOTNOTES

1. The final summary judgment did not affect the other parties in the circuit court action, and those parties did not join in or oppose this appeal. In the interest of simplicity, we have omitted the names of the other parties from the caption of this case.

2. In the balance of this opinion, a reference to "JPMorgan" should be understood to refer either to that party or to its predecessor in interest, as the context may require.

3. Regions Bank also argues that the Delucas and JPMorgan had implied actual notice of its mortgage on the Olde Cypress property. Based on our disposition of the case, we need not reach the issue of

implied actual notice.

WALLACE, Judge.

VILLANTI and LaROSE, JJ., Concur.

REGIONS BANK v. DELUCA (2012)

Docket No: No. 2D11–3828.

Decided: August 22, 2012

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