

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC

Filed March 28, 2008

SUPERIOR COURT

STOCK BUILDING SUPPLY, INC. et al.,

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v

C.A. No.: NM-2006-0495

FREEDOM BAY COTTAGES, LLC, et al.

DECISION ON HSH NORDBANK AG NEW YORK BRANCH'S MOTION FOR SUMMARY JUDGMENT WITH REGARD TO PRIORITY OF ITS RECORDED MORTGAGE LIENS

THUNBERG, J. Before this Court for decision is HSH Norbank AG New York Branch's ("HSH Nordbank") motion for summary judgment with regard to "the issue of priority of HSH Nordbank's prior recorded mortgage liens, to wit, the so called Land Loan Mortgage and Construction Loan Mortgage, respectively, over all other claims, liens, mortgages, and/or encumbrances, including without limitation any and all Mechanics' Lien Claims in connection with the above-identified proceeding."

HSH Nordbank argues that the application of the rule of priority, "first in time, first in right" results in the undisputable conclusion that it stands "first in line" with respect to all mechanics' liens (but for those attempting to argue statutory priority). Petitioner's Memo, p. 16.

HSH Norbank's land loan mortgage, evidenced by a promissory note in the amount of twelve million dollars (\$12,000,000), and utilized to pay off a prior purchase money mortgage on the property, was duly recorded in the Land Evidence Records for the Town of Portsmouth on June 3, 2004. The second mortgage, in like principal amount as the aforementioned, constituted security for sums expended in the construction and development of the subject project, and was duly recorded on December 20, 2004. Thus, the mortgage recordings clearly predated the

filing of any of the mechanics' liens.

The pertinent provision of the Mechanics' Lien law defines a "mortgage" as a construction mortgage "given to secure the payment of a sum certain which is to be advanced at stated times or intervals." G.L. 1956 § 34-28-34(b). [emphasis supplied]. HSH Norbank argues that because priority may only be applied to construction mortgages, "all Mechanic Lienors will forever 'stand behind' [its] allowed and approved Land Loan Claim in the amount of \$10,795,138.63 . . ." (Petitioner's memo, p. 15): i.e., the latter "mortgage" is not subject to subordination.

Although HSH Nordbank has styled and entitled the land loan as a mortgage, this self-designation alone does not bring it within the embrace of a "mortgage" within the meaning and intent of the Mechanics' Lien law. The Court is of the opinion that because the sums comprising the land loan mortgage were utilized for the purchase of the property, and not for construction upon same, the mortgage does not constitute a mortgage entitled to priority under the mechanics' lien law's clear definition.

This conclusion does not preclude Petitioner from seeking relief under the statutory section affording protection to anyone "with a claim . . . lien . . . or like encumbrance to or in the property." § 34-28-16. However, lack of adherence to the strict time requirements imposed by this section result in subordination to those claimants making a timely appearance. The statute mandates that claimants file an entry of appearance within 20 days (unless additional allowance is accorded by the Court per Rule 60(b) of the Superior Court Rules of Civil Procedure) in order to preserve their rights. Here, HSH Norbank's first response to the citation was filed 33 days after the return date and in the form of a "Motion to Intervene." Although the motion to intervene can be regarded as tantamount to an entry of appearance, its lack of specificity

precludes it from constituting a claim according to the requirements of § 34-28-16(a)(2) relating to “particulars” and “prayers for relief.”

Finally, HSH Norbank neither sought nor was granted the time relief afforded to claimants in § 34-28-16(a) (referencing Super. R. Civ. Proc. 60(b)) which would allow the Court to extend the 20 day deadline for “mistake, inadvertence, surprise, or excusable neglect.” Super. R. Civ. Proc. 60(b)(1).

Because the standing of each HSH Nordbank mortgage is controlled by the provisions of § 34-28-16 and HSH Nordbank failed to file a timely claim, its position is subordinate to those of the lien claimants who comported with the mandatory provisions of the statute.

Therefore, HSH Norbank’s motion for summary judgment with regard to priority of its recorded mortgage lien is denied and all objections thereto are hereby sustained.