Affirmed and Opinion filed April 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01249-CV

PAUL T. YOUNG, Appellant

V.

BANCPLUS MORTGAGE CORP., Appellee

On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Cause No. 94CV0224

O P I N I O N

In this trespass to try title case, Paul Young appeals a judgment entered in favor of BancPlus Mortgage Corporation ("BancPlus") on the grounds that the trial court erred in: (1) allowing BancPlus to collaterally attack the previous lien foreclosure proceeding; (2) failing to find that the foreclosed maintenance association lien was superior to the BancPlus lien; (3) granting BancPlus summary judgment on the issues of ownership and possession of the subject property; and (4) failing to find that maintenance association fees are analogous to tax assessments and should therefore have liens which take priority over all other liens. We affirm.

Background

Young purchased a condominium at a foreclosure sale in March of 1993. The foreclosure sale had been conducted pursuant to a default judgment entered in favor of The Wharf at Clear Lake Maintenance Association, Inc. (the "maintenance association") and against Ronald D. Hooker for unpaid maintenance association dues. BancPlus was a lienholder of the property under a deed of trust dated January 5, 1989 (the "deed of trust"). Young defaulted on payment of the mortgage debt secured by the deed of trust, and BancPlus posted the property for foreclosure sale. Young initiated a suit against BancPlus seeking a temporary restraining order and a temporary and permanent injunction against the scheduled foreclosure. However, no injunctions were issued and BancPlus subsequently foreclosed on the property. Young contested eviction, and BancPlus filed a trespass to try title action against him.[1]

BancPlus filed a motion for partial summary judgment, asserting that its foreclosure proceeding against the property was valid and that it was the true and legal owner of the property with a superior right to possession. After the trial court granted that motion, BancPlus filed a second motion for partial summary judgment, asserting that the maintenance association's lien was subordinate to the BancPlus lien and that Young had failed to establish his claims for unjust enrichment, slander of title, and conversion. The trial court granted BancPlus's second motion and dismissed Young's remaining counterclaims. After a brief trial to the court, wherein Young did not appear, BancPlus obtained a final judgment against Young for $24,500.00 for loss of the fair rental value of the property and attorney's fees.

Superiority of Liens

The first three of Young's four issues contend that the trial court erred in failing to find that the lien held by the maintenance association was a vendor's lien which was superior to the BancPlus lien, and thus that BancPlus had collaterally attacked the foreclosure proceeding wherein Young purchased the property. Young further contends that it was error to grant BancPlus a summary judgment on the issues of ownership and possession of the property.

A developer of a subdivision, as owner of the land subject to declarations of covenants and restrictions, is entitled to create liens on his land to secure payment of assessments. *See Inwood North*

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[1] BancPlus had initially filed a trespass to try title action against Young as a counterclaim in the injunction suit and then, after Young resisted eviction, BancPlus filed a separate trespass to try title action against him. These suits were later consolidated.

Homeowners Ass'n, Inc. v. Harris, 736 S.W.2d 632, 634 (Tex. 1987). Such provisions creating maintenance association fees are characterized as contractual liens[2] which run with the land. *See id*. at 634-36. We construe assessment provisions and their liens as a whole and not contrary to the clear and explicit intentions of the parties. *See id*. Any subsequent purchaser is bound by the terms of the instruments in his chain of title. *See id*. at 635.

Foreclosure of a lien cuts off the rights of junior lienholders but does not terminate interests in the foreclosed real estate that are senior to the mortgage being foreclosed. *See Richards v. Suckle*, 871 S.W.2d 239, 242 (Tex. App.–Houston [14th Dist.] 1994, no writ); *Conversion Properties, L.L.C. v. Kessler*, 994 S.W.2d 810, 813 (Tex. App.–Dallas 1999, pet. denied). A purchaser at a foreclosure sale obtains only such title as the trustee had authority to convey. *See First Southern Properties, Inc. v. Vallone*, 533 S.W.2d 339, 341 (Tex. 1976). Moreover, a purchaser who has knowledge that his rights are subject to a senior lienholder takes title subject to the rights and lien of the senior lienholder. *See Mercer v. Bludworth*, 715 S.W.2d 693, 698 (Tex. App.–Houston [1st Dist.] 1986, writ ref'd n.r.e.), *overruled on other grounds*, *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 894 (Tex. 1991).

In this case, the Declaration of Covenants, Conditions, and Restrictions pertaining to the subject property ("the Declarations"),[3] filed of record in 1978, provide in part:

> These easements, covenants, restrictions, and conditions shall run with the real property and be binding on all parties having or acquiring any right, title or interest in the . . . properties or any part thereof . . . .
> * * * *

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[2] The creation of a contractual lien depends only on evidence apparent from the language of the agreement that the parties intended to create a lien. *See Inwood*, 736 S.W.2d at 634.

[3] The original purchasers of the property, Billy and Debra Matlock, received a Special Warranty Deed which contained an express vendor's lien to secure a promissory note payable to City Federal Savings Bank, the predecessor in interest to BancPlus. A Deed of Trust executed by the Matlocks on January 5, 1989, and recorded on January 13, 1989, secured the subject promissory note to City Federal Savings Bank. BancPlus succeeded to the interest in the subject property by virtue of a Substitute Trustee's Deed dated May 3, 1994, filed for record on May 16, 1994. By Assumption Deed dated March 7, 1990, Ronald D. Hooker assumed the Matlock's obligations under the above referenced Deed of Trust. The Assumption Deed was recorded on March 14, 1990.

> [A]nnual . . . assessments, together with such interest thereon and costs of collection thereof . . . shall be a charge on the land and shall be secured by a continuing lien upon the property against which each such assessment is made.
> * * * *
> *The lien securing the assessment provided for herein shall be subordinate to the lien of any mortgage . . . granted or created by the Owner of any Lot to secure the payment of monies advanced and used for the purpose of purchasing and/or improving such Lot.* Sale or transfer of any Lot shall not affect the assessment lien. However, the sale or transfer of any Lot pursuant to a foreclosure under such purchase-money or improvement mortgages, or any proceeding in lieu of foreclosure thereof, shall extinguish the lien of such assessments as to payments thereof which became due prior to such sale or transfer.

(emphasis added).

Therefore, the Declarations expressly provide that the maintenance fee liens are binding on any party acquiring an interest in the property and are subordinate to the lien of any mortgage given to secure a purchase money loan. Because BancPlus succeeded to a purchase money lien, the maintenance fee liens were subordinate to the BancPlus lien.[4]

Young contends that because the default judgment against Hooker referred to the foreclosed lien as a "vendor's lien," its character as such was conclusively established and BancPlus's action is a collateral attack on the previous foreclosure proceeding. However, even if the maintenance fee lien were a vendor's lien, it was expressly subordinated[5] to any subsequent purchase money liens, and Young had record notice

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[4] Moreover, the Sheriff's Deed conveyed to Young the right, title, and interest of Hooker, whose interest was specifically subject to the BancPlus lien. Because Young acquired only the interest in the property owned by Hooker, he was bound by the terms of the instruments in Hooker's chain of title.

[5] Young argues that the subordinating language within the Declarations is ineffective because a subordination must be to a specific lien, which is expressly defined. However, the authority which Young cites in support of his argument does not stand for this proposition. *See McConnell v. Mortgage Inv. Co. of El Paso*, 305 S.W.2d 280, 287-88 (Tex. 1957) (rejecting the argument that by accepting an "Owner-Contractor Bond," a lender had subordinated its deed of trust lien to mechanic's and materialmen's liens which arose after the execution of the deed of trust); *Goidl v. North American Mortgage Investors*, 564 S.W.2d 493, 495 (Tex. Civ. App.--Dallas 1978, no writ) (reviewing a summary judgment and determining that the parties' intent regarding a subordination was unclear because a deed of trust securing the property had been subordinated, but a corresponding

of both the subordination language and the BancPlus lien. Therefore, the BancPlus lien was superior to the maintenance fee lien, foreclosure of the maintenance fee lien did not extinguish the BancPlus lien, Young acquired the property subject to the superior BancPlus lien, and this suit is not a collateral attack on the judgment by which Young acquired the property. Accordingly, Young's first three issues are overruled.

Maintenance Fees as Analogous to Tax Assessments

Young's fourth issue asserts that maintenance association fees are analogous to tax assessments and should therefore have priority over all other liens. Young makes this argument based on the similarities between the rights and duties of maintenance associations and those of municipalities with regard to properties within their boundaries. Because a tax lien may not be subordinated to any other lien, Young contends that a maintenance fee lien should also not be subordinated to any other liens. Moreover, because a subsequent sale by a taxing authority at a foreclosure vests superior title in the purchaser, Young asserts that the same should be true of a foreclosure of a maintenance fee lien.

Lacking any authority supporting Young's position, we decline to treat maintenance fee assessments as if they were tax assessments. Accordingly, Young's fourth point of error is overruled, and the judgment of the trial court is affirmed.

Richard H. Edelman
Justice

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vendor's lien securing the same property had not); *Pacific Mut. Life Ins. Co. v. Westglen Park, Inc.*, 325 S.W.2d 113, 116 (Tex. 1959) (examining the intent of the parties to a warranty deed and subsequent contract and concluding that the language, "agrees to subordinate the lien to construction loans to be created . . . not exceeding $14,000.00" and "agrees to subordinate to the amount of the construction loan . . ." was sufficient to establish the parties' obligation to subordinate its loan to the later arising construction loans). Apparently, Young relies on the following statement in *Pacific Mutual*: "[s]ince it cannot be said that a subordination agreement must contain more than the agreement to subordinate together with the amount of the lien thereby made superior . . . ." *Id.* However, the court's analysis in that case regarding the subordination of the deed clearly focused on the intent of the parties to the contract and not on whether another lien was designated with sufficient particularity.

Judgment rendered and Opinion filed April 20, 2000.

Panel consists of Chief Justice Murphy, Justices Hudson, and Edelman.

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