Consolidated Nos. 13-CV-623 and 13-CV-674

In the

District of Columbia Court of Appeals

CHASE PLAZA CONDOMINIUM ASSOCIATION INC.
and DARCY, LLC

Appellants,

vs.

JPMORGAN CHASE BANK, N.A.

Appellee.

On Appeal from the Superior Court of the District of Columbia,
Civil Division Case No. 0005826-10 (Hon. Craig Iscoe)

BRIEF OF AMICUS CURIAE, THE COMMUNITY ASSOCIATIONS INSTITUTE, IN SUPPORT OF APPELLANT CHASE CONDOMINIUM ASSOCIATION INC. AND IN FAVOR OF REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

DISTRICT OF COLUMBIA
COURT OF APPEALS

CHASE PLAZA CONDOMINIUM ASSOCIATION, INC. AND DARCY, LLC	)	APPEALS COURT CASE NOS. 13-CV-623 AND 13-CV-674
v.	)	
JPMORGAN CHASE BANK, N.A.,	)	

I. INTRODUCTION AND STATEMENT OF INTEREST

The Amicus Curiae, the Community Associations Institute ("CAI"), is a national non-profit research and education organization formed in 1973 by the Urban Land Institute and the National Association of Home Builders to provide the most effective guidance for the creation and operation of condominiums, co-operatives and homeowner associations. CAI represents more than 17,000 homeowners, community associations, community managers and affiliated professionals and service providers in 57 local chapters. CAI's industry data estimates that as of 2012, there were approximately 63.4 million Americans living in 25.9 million housing units in more than 323,600 community associations. This number constituted roughly 21% of the population of the United States, assuming a population of 300 million.

Community associations are property developments in which a developer, or declarant, has willingly submitted an interest in real property to some form of community association regime. The regimes include, among others, condominiums, homeowner associations and co-operatives. The community association presents a unique form of ownership where responsibility for the

submitted property is shared, on some level, between the individual owner or member, on the one hand, and an association, trust or corporation, on the other. The properties governed by community associations may be commercial or residential in nature. Community associations are usually governed by not-for-profit incorporated (or sometimes unincorporated) entities pursuant to Articles of Incorporation (or a similar document) and By-laws.

The case under consideration by this Court is one of substantial import to the body of law regarding the meaning of the statutory phrase "prior to" in a foreclosure context. The significant question presented in this case is whether the valid foreclosure of a lien which is "prior to" another lien or mortgage extinguishes that subordinate lien. That issue not only has bearing on liens held by common interest communities but also on mortgages held by banks and other lenders, municipal liens and all other liens.

In keeping with CAI's long-standing interest in promoting understanding regarding the operation and governance of community associations, CAI submits this brief for the Court's consideration.

II. STATEMENT OF THE ISSUES

CAI relies upon, and incorporates herein by reference, the Statement of the Issues contained in the Brief of Appellant, Chase Plaza Condominium Association, Inc., e*t al*. ("Condominium Association's Brief").

III. STATEMENT OF THE CASE

CAI relies upon, and incorporates herein by reference, the Statement of the Case contained in the Condominium Association's Brief.

IV. STATEMENT OF FACTS

CAI relies upon, and incorporates herein by reference, the Statement of Facts contained in the Condominium Association's Brief.

V. ARGUMENT

A. THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA ERRED IN RULING THAT THE FORECLOSURE OF A PRIORITY LIEN UNDER DC ST §42-1903.13 DOES NOT EXTINGUISH THE FIRST MORTGAGE OR DEED OF TRUST.

The Superior Court's holding fails to apply the well-worn principals of law regarding the foreclosure of a priority lien by re-defining the phrase "prior to" as used in the statute. In addition, the Superior Court's decision deviates from applicable principles of statutory interpretation by failing to give the words "prior to" a plain, unambiguous and consistent definition under the law. Finally, the Superior Court's holding is contrary to the public policy underlying, and legislative purpose supporting, the enactment of DC ST §42-1903.13.

1. The Statutory Framework Creates a Condominium Association Lien Which is Prior to a First Mortgage or Deed of Trust.

The District of Columbia ("D.C.") regulates the control and governance of condominiums by statute. This regulation includes, inter alia, the statutory creation of an association's lien on a unit for unpaid assessments, the relative priority of the lien and the procedure for foreclosing upon the lien. *See generally* DC ST §42-1903.13. The D.C. Condominium Act ("D.C. Act") provides, in relevant part, as follows:

> (a) (1) The lien shall be ***prior to*** any other lien or encumbrance except:

(A) A lien or encumbrance recorded prior to the recordation of the declaration;

(B) A first mortgage for the benefit of an institutional lender or a 1st deed of trust for the benefit of an institutional lender on the unit recorded before the date on which the assessment sought to be enforced became delinquent; or

(C) A lien for real estate taxes or municipal assessments or charges against the unit.

(2) The lien shall also be ***prior to*** a mortgage or deed of trust described in paragraph (1)(B) of this subsection and recorded after March 7, 1991, to the extent of the common expense assessments based on the periodic budget adopted by the unit owners' association which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien. The provisions of this subsection shall not affect the priority of mechanics' or materialmen's liens.

§42-1903.13(a) (emphasis added). The statute creates a "super priority" lien in favor of an association, which provides that the common expense assessments for the six months immediately preceding the foreclosure action are "prior to" a first mortgage or deed of trust. §42-1903.13(a)(2). The question in this case is whether the foreclosure of an association's priority lien extinguishes a first mortgage or deed of trust.

The Superior Court held that the Chase Plaza Condominium Association's lien foreclosure did not extinguish the first deed of trust. As discussed in-depth herein, a super priority lien that is "prior to" a first mortgage or deed of trust is a superior lien, the foreclosure of which extinguishes all subordinate liens including a first mortgage or deed of trust.

2. The phrase "prior to" has a clear and unambiguous meaning in this context.

After expressly ruling, by copying provisions of the law, that §42-1903.13 creates a lien for assessments against units and authorizes a condominium association to pursue foreclosure if payments are delinquent, the court then sets forth the statutory language of §42-1903.13(a) (cited above). The Court then went on to state as a rule of law:

> "The first step in construing a statute is 'to read the language of the statute and construe its words according to their ordinary sense and plain meaning.'" *Hospitality Temps Corp. v. District of Columbia*, 926 A.2d 131, 136 (D.C. 2007) (quoting *United States v. Bailey*, 495 A.2d 756, 760 (D.C. 1985)). "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language he [sic] has used." *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983). "[A court is] required to give effect to a statute's plain meaning if the words are clear and unambiguous." *Columbia Plaza Tenants' Ass'n v. Columbia Plaza*, 869 A. 2d 329, 332 (D.C. 2005) (quoting *Boyle v. Giral*, 820 A.2d 561, 568 (D.C. 2003)).

The Amicus agrees with that statement of the law. The phrase "**prior to a mortgage or deed of trust"** has a clear and unambiguous meaning in real estate law - especially in foreclosure law - such that foreclosure of a lien "prior to" a first mortgage or deed of trust extinguishes the first mortgage or deed of trust.

In a recent decision, the U.S. District Court, District of Nevada – analyzing language identical to §42-1903.13(a) - held that the foreclosure of a homeowner association's super priority lien extinguishes all subordinate liens including the first deed of trust. 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., No. 2:13-CV-00506-PMP-GWF, 2013 WL 5780793 (D. Nev. Oct. 28, 2013). Like the D.C. Act, the Nevada Act provides that a portion of an

association's lien is "prior to" all security interests, including a first security interest. Nev. Rev. Stat. §116.311(6)(2)(2012). The holders of the first deed of trust argued that the homeowner association's foreclosure of the lien was improper and did not extinguish the first deed of trust. Rather, they contended, a homeowner association's lien "is a payment priority lien only, and the first deed of trust continues to encumber the property" following the foreclosure of an association's lien. Id. at *2. The Court rejected this argument, concluding that the statutory language "effectively separates the [homeowners association's] lien into two separate liens." Id. at *6. The Court went on to hold that the super priority portion of an association's lien is "prior to" the first deed of trust and the remainder of the association's lien, "consisting of any charges not contained within the super priority lien … is junior to the first deed of trust" under the plain language of the statute. Id. Noting that the state's "statutory scheme is clear" and that the language "unambiguously" states that an association's super priority lien is prior to the first deed of trust, the Court concluded that a foreclosure sale on an association's super priority lien "extinguishes all junior interests, including the first deed of trust." Id.

Similarly, the Court of Appeals of Washington recently considered the issue of lien priority in the context of a condominium association's foreclosure. Summerhill Village Homeowners Ass'n v. Roughley, 289 P.3d 645 (Wash. Ct. App. 2012). In Summerhill Village, the condominium association foreclosed on a condominium unit in accordance with the Washington Act. Consistent with the D.C. Act and Nevada Act, the Washington Act establishes a super priority lien for

the portion of an association's assessment comprised of the common expense assessments for the immediately preceding six months. The Washington Act states, in similar verbiage, that an association's super priority lien is "prior to" mortgages on the unit that were "recorded before the date on which the assessment sought to be enforced became delinquent." Wash. Rev. Code § 64.34.364 (2013). Citing legislative intent, the Court held that the association's assessment lien had priority over the previously recorded mortgage to the extent of the super priority lien. Summerhill Village, 289 P.3d at 648. Thus, the first mortgage may be categorized as a lien prior in time, but junior in priority. *See* id. at 649. Thus, the condominium association's foreclosure sale of the unit properly extinguished the junior lien on the unit. Id.

While not in the condominium and homeowner association context, this jurisdiction has also considered what constitutes priority of a lien and has consistently held that the foreclosure of a superior and senior lien, i.e. a lien "prior to" junior liens, extinguishes all junior liens. Generally, "priority of liens or security interests is determined according to the well-known principle of 'first in time, first in right.'" Malakoff v. Washington, 434 A.2d 432, 434 (D.C. 1981). There are exceptions to this rule, however, such as mechanics' liens and condominium associations' liens created by virtue of the D.C. Act. *See* Wolf v. Sherman, 682 A.2d 194, 197 (D.C. 1996). In establishing a statutory lien, it is in the discretion of the legislature whether to confer "super priority" status. *See* Malakoff, 434 A.2d at 435 (discussing the preferential treatment that the legislature may afford to taxes). If the legislature confers such super priority

status, the legislature's intent "must clearly appear from a strict construction of the statute." Id. Once such super priority is established, as it is for a condominium association's six month common expense assessment immediately preceding the foreclosure action, general foreclosure principles apply.[1] "[W]here a valid foreclosure sale yields proceeds insufficient to satisfy a priority lien, the result is extinguishment of subordinate liens." Pappas v. Eastern Sav. Bank, FSB, 911 A.2d 1230, 1234 (D.C. 2006).[2]

It is also to be noted that §42-1903.13 was adopted from the Uniform Common Interest Ownership Act (UCIOA). In the comments, the Commission stated:

> A foreclosure sale of the association's lien (whether judicial or nonjudicial) is governed by the principles generally applicable to lien foreclosure sales, i.e., a foreclosure sale of a lien entitled to priority extinguishes that lien and any subordinate liens, transferring those liens to the sale proceeds. Nothing in the Uniform Laws establishes (or was intended to establish) a contrary result.

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[1] It is undisputed that the Chase Plaza Condominium Association holds a super priority lien. Judge Iscoe's Order explicitly provides that "the condominium's lien of six-months [sic] immediately prior to the foreclosure action takes priority over a first Deed of Trust."

[2] In Limbwood, the Nevada Court concluded that even if the statutory language was ambiguous, in the absence of legislative intent otherwise, "settled foreclosure principles" would control. Such principles provide that "foreclosure of a superior lien extinguishes junior security interests." 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., No. 2:13-CV-00506 PMP-GWF, 2013 WL 5780793, at *6 (D. Nev. Oct 28, 2013). The absence of language exhibiting an intent that something other than normal foreclosure principles would apply to the foreclosure of the super priority lien, the Court reasoned, was evidence that the senior lien extinguishes all junior liens. "[T]he Nevada Legislature presumably was aware of the normal operation of foreclosure law when it enacted [the Nevada Act]. If the Legislature intended a different rule to apply … , it could have said so." Id. The analysis is apt in this circumstance as well, as discussed herein above.

Joint Editorial Board for Uniform Real Property Acts, *The Six Month "Limited Priority Lien" For Association Fees Under the Uniform Common Interest Ownership Act*, at pg. 9. (See copy attached hereto). In the matter presently before this Court, §42-1903.13(a) clearly and unambiguously provides that the Chase Plaza Condominium Association's super priority lien was "prior to" the first deed of trust on the condominium unit. The statutory scheme is clear, as acknowledged by the Superior Court, that the Chase Plaza Condominium Association's lien is prior to the first deed of trust. The foreclosure of the Condominium Association's lien must therefore extinguish any subordinate liens including the first deed of trust. This result is in accord with legislative intent and the plain language of the statute, as evidenced by other jurisdictions that have interpreted identical statutory language in this same manner.[3] Moreover, even if the statutory language were not explicit, the extinguishment of the first deed of trust would still occur under the settled principles of foreclosure law. Accordingly, the Condominium Association's lawful foreclosure of its undisputed super priority lien extinguishes the first deed of trust. A ruling otherwise is in contravention of the unambiguous statutory scheme and the settled law of this jurisdiction.

[3] The Superior Court's Order discusses at length the absence of express language stating that the legislature intended the foreclosure of a super priority lien to extinguish a first mortgage or deed of trust, and it concludes that the absence of such language must mean that the legislature intended a different result. It is worth noting that Courts in other jurisdictions reaching the opposite conclusion have characterized the identical language as "unambiguous" and "clear" on its face. That is, other Courts have considered this very statutory language as "express language" that foreclosure of an association lien extinguishes a first mortgage or deed of trust.

Therefore, when the Court ruled that, "…while the Association was statutorily authorized to institute a foreclosure proceeding on the property, the foreclosure sale is invalid because the property was not sold subject to the first mortgage," the Court was plainly in error.

3. The Superior Court's holding does not comport with controlling principles of statutory interpretation and must be reversed.

The Superior Court's analysis must be rejected as it ascribes a meaning to the words "prior to," as used in §42-1903.13(a)(2), which could not be consistent with the use of those same phrase in §42-1903.13(a)(1), the immediately preceding section of the statute. In this circumstance, it is manifest that (1) the legislature intended that the foreclosure of an association's lien pursuant to §42-1903.13(a)(1) would extinguish all liens which it was "prior to" and (2) there is no statutory basis to give the words "prior to" in §42-1903.12(a)(2) a different meaning.

Section 42-1903.13(a)(1) provides as follows:

> (1) The [association's] lien shall be prior to any other lien or encumbrance except:
>
> (A) A lien or encumbrance recorded prior to the recordation of the declaration.
>
> (B) A first mortgage for the benefit of an institutional lender or a first deed of trust for the benefit of an institutional lender on the unit recorded before the date on which the assessment sought to be enforced became delinquent; or
>
> (C) A lien for real estate taxes or municipal assessments or charges against the unit.

Stated affirmatively, §42-1903.12(a)(1) provides, inter alia, that an association's lien is prior to (1) any lien or encumbrance recorded after the recordation of the declaration and (2) a first mortgage or deed of trust recorded after the date on which the assessment sought to be enforced became delinquent. There is no reasonable dispute that the foreclosure of an association's lien would extinguish a lien or encumbrance recorded after the declaration. Pappas, 911 A.2d at 1234 ("The general rule in this jurisdiction is that where a valid foreclosure sale yields proceeds insufficient to satisfy a priority lien, the result is extinguishment of subordinate liens."); District of Columbia v. Hechinger Properties Co., 197 A.2d 157, 160 (D.C. 1964) ("It has long been regarded as a universal principle that a prior lien gives a prior legal right which is entitled to prior satisfaction out of the subject it binds.").

Similarly, it is beyond question that the foreclosure of an association's lien in such circumstance would extinguish a subsequently recorded first mortgage or deed of trust.[4] Pappas, 911 A.2d at 1234. In fact, §42-1903.13(a)(1) would have virtually no meaning if the Superior Court's definition of "prior to" in this case were imported into §42-1903.13(a)(1). If "prior to" in that section were given the Superior Court's meaning, a condominium lien foreclosure would not even extinguish (1) a lien which was recorded after the declaration or (2) a first

[4] The Superior Court stresses and relies upon the fact that the statute does not state that the six-month priority lien is a "senior lien." Neither does the statute indicate that the Condominium Association's priority lien as established under §42-1903.13(a)(1)(B) is a senior lien. However, there is no doubt that the legislature intended the foreclosure of an association's lien to extinguish liens recorded after the recordation of the declaration. The absence of language identifying an association's lien as a "senior lien" is meaningless.

mortgage or deed of trust recorded after the date an assessment became delinquent. Such interpretation of the phrase "prior to" must be rejected because it would lead to an absurd result which is flatly inconsistent with the legislature's purpose in enacting §42-1903.13. Grayson v. AT&T Corp., 15 A.3d 219, 237-238 (D.C. 2011) ("[W]e eschew interpretations that lead to unreasonable results.") (quoting In re C.L.M., 766 A.2d 992, 996 (D.C. 2001)); *see also* Ruffin v. United States, 76 A.3d 845, 858 (D.C. 2013) (a court must construe a statue so as to avoid unjust and absurd results); Capitol Hill Hosp. v. District of Columbia State Health Planning & Dev. Agency, 600 A.2d 793, 801 (D.C. 1991) (it is a judicial function to construe statutes so as to avoid results glaringly absurd); Howard v. Riggs Nat'l Bank, 432 A.2d 701, 709 (D.C. 1981) (within the context of entire legislative scheme, a statute should be read and construed as a whole, particularly where different provisions within same statute would result in inconsistent results).[5]

As discussed further below, there is no clear basis to give a different meaning to the phrase "prior to" as used in §42-1903.13(a)(1) and §42-

[5] The absurd consequences of such interpretation are amplified by analyzing the impact of foreclosing a first mortgage or deed of trust secured by a condominium unit. Under the Superior Court's analysis, what becomes of the unit owner association's priority lien in the event of a foreclosure of the first mortgage or deed of trust? As the unit owner association's lien is "prior to" the first mortgage or deed of trust any foreclosure of a first mortgage or deed of trust must presumably be "subject to" an association's lien. The Superior Court's holding would, therefore, require an association's lien to be foreclosed subject to a first mortgage or deed of trust and the first mortgage or deed of trust to be foreclosed subject to the association's super priority lien. That the legislature intended such an absurd result is doubtful and that the law could accomplish that result employing no more than the language in §42-1903.13(a) is impossible.

1903.13(a)(2). Controlling principles of statutory interpretation, therefore, require the phrase be given the same meaning.

Section 42-1903.13(a)(2) provides as follows:

> (2) The lien shall also be prior to a mortgage or deed of trust described in paragraph (1)(B) of this subsection . . ..

There is no indication in the statute that the phrase "prior to" in §42-1903.13(a)(2) should be given a meaning distinct from the meaning the same phrase has in the immediately preceding statutory section. "[W]e do not read statutory words in isolation; the language of surrounding and related paragraphs may be instrumental to understanding them." In re C.G.H., 75 A.3d 166, 171 (D.C. 2013) (quoting District of Columbia v. Beretta, U.S.A., Corp., 872 A.2d 633, 652 (D.C. 2005) (en banc)). Absent some clear indication to the contrary, the phrase "prior to" in these two separate sections should be given the same meaning. Dupont Circle Citizens Ass'n v. D.C. Bd. of Zoning Adjustment, 749 A.2d 1258, 1262-1263 (D.C. 2000) (standing for the proposition that different provisions within a statute should be construed together, and words should be read to have a consistent meaning throughout the statute). "Prior to" is a term of art, purposefully chosen, and as such it should be given a consistent meaning and interpretation so that the statute can be read as a harmonious whole. O'Rourke v. D.C. Police & Firefighters' Ret. & Relief Bd., 46 A.3d 378, 383 (D.C. 2012) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious

whole." (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

Furthermore, that "prior to" should be given the same meaning in both sections is clear when considering the broader text of the reference in §42-1903.13(2) which paragraph begins "[t]he lien shall **also** be prior to a mortgage or deed of trust **described in paragraph (1)(B)**." (emphasis added). It is clear that although (a)(2) establishes a separate priority – by using the word "also" and by referencing "paragraph (1)(B)" – the legislature was simply identifying another class or category of encumbrance over which an association's lien has priority. It is difficult, without some tortuous analysis of (a)(1)(B) and (a)(2), to articulate how the meaning of the phrase "prior to" could be different in these two paragraphs. Principles of statutory interpretation do not support an approach which rejects the plain, common-sense interpretation of the statutory text in favor of some interpretation which, while possible, is implausible and inconsistent with the over-arching goal of the legislation. W.H. v. D.W., No. 11-FM-1334, 2013 WL 5745933, at *6 (D.C. Oct. 24, 2013) (words used by the legislature are interpreted "according to their ordinary sense and with the meaning commonly attributed to them." (quoting Peoples Drug Stores, Inc. v. District of Columbia, 470 A. 2d 751, 753 (D.C. 1983))); Dobyns v. United States, 30 A.3d 155, 161 (D.C. 2011) ("Plain meaning is the general rule, and 'a court should look beyond the ordinary meaning of the words of a statute only where there are "persuasive reasons" for doing so.'" (quoting Peoples Drug Stores, Inc., 470 A.2d at 755)); Grayson v. AT&T Corp., 15 A.3d 219, 237-238 (D.C. 2011) ("In construing a

statute the primary rule is to ascertain and give effect to legislative intent and to give legislative words their natural meaning." (quoting Banks v. United States, 359 A.2d 8, 10 (D.C. 1976))). The legislature's language, therefore, requires that the phrase "prior to" be given the same meaning in both sections.

In the event the legislature had intended that the first mortgage or deed of trust would survive a foreclosure of a unit owner association's lien, it could have clearly expressed such intent by using different language. In fact, there is nothing in §42-1903.13 that creates or addresses "superior" or "junior" liens; that directs that an association's lien under (a)(2) be paid from the proceeds of a foreclosure without extinguishing the first mortgage or deed of trust; or that the purported "split" nature of the priority lien mandated a different interpretation of the words "prior to" in (a)(2). There were numerous methods for the legislature to express its intent that the foreclosure of a unit owner association's lien would not extinguish the first mortgage or deed of trust.[6] In the first instance, one would have expected the legislature to use different words in describing the drastically different legal consequences of foreclosing pursuant to (a)(1)(B) and foreclosing pursuant to (a)(2). That is, one would not have expected the legislature to include language which specifically provides that an association's lien is "prior to" the first mortgage or deed of trust.

[6] For instance, if a unit owner association really was not intended to have a true priority lien – but simply a right of payment – there would have been no statutory need to create the so-called split priority. The unit owner association's lien could have remained wholly subordinate to the first mortgage or deed of trust and the statute could have either allowed six months of proceeds from an association's foreclosure to be retained by an association or imposed upon the foreclosing lender a duty to pay six months of common expense fees.

The very expression by the legislature of the concept that an association's lien is "prior to" the first mortgage or deed of trust must be given significance. In re C.G.H., 75 A.3d 166, 171 (D.C. 2013) (the primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language used). "Where the plain meaning of the words of the statute is unambiguous, that is dispositive, and we have 'no occasion to examine [the statute's] legislative history for guidance.'" Hammond v. United States, No. 11-CF-1484, 2013 WL 3940826, at *2 (D.C. Aug. 1, 2013) (quoting Newby v. United States, 797 A.2d 1233, 1239 (D.C. 2002)). In fact, but for the contemplation of extinguishing subordinate liens, there would be no legitimate legislative purpose in creating a super priority over the first mortgage or deed of trust.

The legislature's use of the phrase "prior to" is of particular significance in a race-notice jurisdiction, such as the District of Columbia. §42-401. An instrument which is recorded prior in time or "prior to" a subsequent instrument has a meaningful legal status under the law. District of Columbia v. Franklin Inv. Co., 404 A.2d 536, 540 (D.C. 1979) ("It is axiomatic that a prior lien gives a prior legal right[.]"). Under common law – and without some statutory exception – the rights granted and the interests secured by a valid prior recorded instrument cannot be undermined, avoided or extinguished by subsequently recorded instruments. *See* id. To be recorded "prior to," or to be treated in the eyes of the law as having been recorded "prior to," is outcome determinative in the District of

Columbia.[7] District of Columbia v. Hechinger Properties Co., 197 A.2d 157, 160 (D.C. 1964). In §42-1903.13 the legislature created a statutory exception to the general rule for an association's lien but it did so by employing words which require an association's lien to be treated as if it were recorded "prior to" certain other liens and encumbrances. The legislature's reference to "prior to" was purposeful because a legislative body knows what it means when it uses the phrase in a race-notice jurisdiction. That is to say, when the legislature in a race-notice jurisdiction establishes that a lien should be treated as a matter of law as if it is "prior to" one must presume that it will be treated for all intents and purposes as if it were recorded "prior to" the lien identified as subordinate. The adoption in a race-notice jurisdiction of the phrase "prior to" to identify interests and encumbrances which take precedence – which interests and encumbrances cannot be extinguished – is not a coincidence, and the Superior Court's attempt to avoid that legal significance should be rejected. W.H. v. D.W., No. 11-FM-1334, 2013 WL 5745933, at *6 (D.C. Oct. 24, 2013); Dobyns v. United States, 30 A.3d 155, 161 (D.C. 2011); Grayson v. AT&T Corp., 15 A.3d 219, 237-238 (D.C. 2011).

4. Public Policy Demands That The Lien Priority Extinguishes All Liens To Which It Is Prior And Render The Holders Thereof Unsecured.

While the Appellee Bank may be unhappy with the outcome being sought by Appellants, the ancient maxim "*Dura lex sed lex*" ("The law is hard, but it is the law") certainly applies to the case at hand.

[7] It is that meaning of "prior to" which is employed by the legislature in (a)(1)(A) which provides "[a] lien or encumbrance recorded prior to the recordation of the declaration." Such reference is entirely temporal.

Where are the teeth in a statute designed to help an association where the purportedly prior lien is subject to the bank's mortgage? Who would want to bid at an auction, especially where there is no right of the bidder to recoup amounts bid and expenses incurred, in a situation where the lender could then foreclose its mortgage? What would the bidder at a condominium foreclosure own after the sale?

The answer the Appellee asks this court to accept is that regardless of how underwater the unit may be, the successful bidder at an auction takes title subject to the first mortgage. Therefore, to preserve its title interest that successful bidder would have to pay the principal amount, accrued interest and late charges, penalties, attorney's fees, prior advances to cover insurance, and all other costs.

How can it be that the legislature went to the bother of declaring a priority that has no practical value? When the six-month priority was established, lenders were not foreclosing, not paying common fees and allowing mortgages on property that were "under water" to languish. In creating the statutory lien the legislature was no doubt aware that when a unit owner fails to pay common fees due on a unit, the debts of the association must be paid by innocent neighbors as a matter of law. There is no other type of real estate where a homeowner is obligated to pay the debts of his neighbor.

The phrase "prior to" must have meaning. The effect is that the limited priority lien works a statutorily crafted equitable subordination. If a lender is going to sit on its rights to the detriment of what would otherwise be a subordinate lienholder, equity and public policy demand that the foreclosure of

the priority lien extinguish the security of the first mortgage, leaving the holder of that mortgage to the surplus, if any.

Respectfully submitted,

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Dated: December 30, 2013

District of Columbia Court of Appeals
Nos. 13-CV-623 and 13-CV-674

CHASE PLAZA CONDOMINIUM
ASSOCIATION INC. and DARCY, LLC
Appellants,
vs.
JPMORGAN CHASE BANK, N.A.
Appellee.

CERTIFICATE OF SERVICE

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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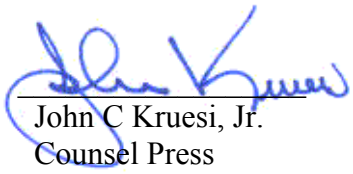
December 30, 2013



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