In The

Supreme Court of Virginia

RECORD NO: 181501

FUTURI REAL ESTATE, INC.,

Appellant,

v.

ATLANTIC TRUSTEE SERVICES, LLC, *et al.*,

Appellees.

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Contrary to the assertion of Wells Fargo Bank, N.A. ("Wells Fargo"), this case is not about "whether a lienholder can subordinate its first-in-priority lien to [its] third-in-priority lien without waiving such priority with respect to any intervening liens." (Opp. Br.[1] at 1.) Wells Fargo's own brief shows that this *can* be done in any state, even in Idaho, the jurisdiction most restrictive of lien subordinations, at least with the consent of the intermediary lienholder whose rights in the property are implicated. (Opp. Br. at 14-15); *see Blickenstaff v. Clegg*, 97 P.3d 439, 448 (Idaho 2004). The question presented in this case is rather whether a party is bound to the language it actually records in the land records or whether a court will treat the recorded language differently than it states so as to save that party from what it recorded after a third party purchase in good faith.

[1] In this Reply Brief, references and citations to the Opposition Brief are to Wells Fargo's brief in opposition. While Atlantic Trustee Services, Inc. ("Atlantic") also filed a brief in opposition, Atlantic's was directed at one factual matter and did not present argument. Atlantic Trustee Services, Inc. states that the Trustee's Deed (J.A. at 37) shows Atlantic held out the foreclosure sale as "subject to all liens of record" (*see* Atlantic Opp. Br. at 1), while Futuri Real Estate, Inc. ("Futuri") alleged in the Cross-Claim that Atlantic affirmed the Wells Fargo deeds of trust were inferior to the SunTrust of trust (J.A. at 51, ¶ 16). For purposes of appellate review of the Motion to Dismiss here, all allegations in Futuri's Cross-Claim are treated as true. *See Bragg v. Bd. of Supervisors*, 295 Va. 416, 423, 813 S.E.2d 331, 334 (2018).

ARGUMENT

I. Assignment of Error 1: In a matter of first impression before this Court on which Virginia's sister states appear divided, the trial court erred in ruling that where the holder of a lien recorded first in time on real property then subordinates that lien to a third in time lien the first lien still holds or partially holds its position as against the holder of a second in time lien recorded between those first and third liens, particularly where the recorded subordination refers to itself as "subordinate and junior" to the third lien and where at best the intent of the parties at the time of the subordination was ambiguous, and thereupon granting Appellee Wells Fargo's Motion to Dismiss and dismissing Appellant's Cross-Claim. [2]

A. If Complete Subordination as a Default Rule Results in Longer and More Complicated Subordination Agreements, that Serves the Purpose of the Land Records System.

Wells Fargo argues that requiring a description of the treatment of intervening liens' priority in subordination agreements will create subordination agreements "far longer and more complicated" than at present. (Opp. Br. at 14, n.2.) But for documents recorded in the land records, which includes subordination agreements, it is nothing new or unusual to require a document to be as long or as complicated as required to describe with certainty the thing to be conveyed. "All property not within the description of a deed is excluded from it." *Conner v. Hendrix*, 194 Va. 17, 16, 72 S.E.2d 259, 265 (1952) (land "to the side"

[2] Wells Fargo states that Futuri has "failed to identify a single error" of the trial court. (Opp. Br. at 6.) Futuri respectfully suggests that if this is true, it is because this is a matter of first impression for this Court, and the conclusions of the trial court, while *in* error, were not in direct contradiction of a decision of this Court.

not conveyed by a grant of land "in front of" described property). When the granting language fails to include a particular enough description, a deed can fail. *See Sovran Bank, N.A. v. Creative Indus., Inc.*, 245 Va. 93, 96, 425 S.E.2d 504, 506 (1993) (deed of lease of "3,088 square feet" failed to describe *which* 3,088 square feet), *Harris v. Scott*, 179 Va. 102, 105, 18 S.E.2d 305, 306 (1942) (land description as 20 acres and the names of the adjoining parcel owners insufficient even with the surveyor identified). Contrary to Wells Fargo's fear, if a recorded document is longer and more complicated and therefore more clearly describes its effect, it only serves the purpose of recording the document: to provide notice to third parties of the thing done.

B. Partial Subordination, Particularly As Applied By Wells Fargo in the Present Matter, Does Impact the Intermediary Lienholder.

Wells Fargo cites to the Colorado case *Tomar Dev., Inc. v. Friend*, 410 P.3d 578, 582 (Colo. App. 2015) as holding partial subordination to be "less likely" than complete subordination to impact the security interests of an intermediary lienholder. (Opp. Br. at 13.) However, "less likely" to impact is different than not impacting, and that potential impact is precisely why the parties attempting to reorder the lien priorities, not the innocent third party lienholder, should bear the burden of ensuring they do so adequately, particularly in a race recording jurisdiction such as Virginia. This protection of third parties is likely one policy reason why Idaho does not permit *any* subordination without the

consent of intermediary lienholders. (*See* Opp. Br. at 14-15.) Contrary to the assertion of Wells Fargo that the holding of the trial court "does not change the rights of SunTrust," it would not make sense for Wells Fargo to have filed the subordination agreement it entered with itself if it did not increase the security of Wells Fargo relative to SunTrust.[3] Not only does the subordination allow Wells Fargo to apply all payments under both notes to the lower priority portions of the split liens, but functionally the debtor now has to treat both Wells Fargo notes as a higher priority than SunTrust's note if not all can be paid at a given time. If Wells Fargo foreclosed both deeds of trust, it can treat not only the full outstanding principal up to the security amount as having priority, but also "lawful interest" on both. Va. Code § 55-59.4 (§ 55.1-324 effective October 1, 2019). Further, if Wells Fargo did foreclose under one deed of trust but not the other, the same labyrinthine circuity of priorities, payoff orders, and potentially unreleased liens or partial liens would apply to the purchaser without warning in the land records of the complexity of the ordering. As the trial court noted, the purpose of Wells Fargo in the subordination agreement was to "enhance the collectability of its loans by ensuring that, in the event of a foreclosure of the SunTrust loan, both Wells Fargo loans would remain secured by the subject

[3] In contrast to arm's length subordination agreements such as would allow for improvement to the property, where the subordinating party stands to gain security by increasing the value of the property securing payment.

property." (J.A. at 159). A complete subordination approach as a default rule would thus serve the public by making that labyrinthine circuity, if desired by the parties, one of record.

If Judge Posner in his dicta treatment of subordination "can't think why" a party would agree to complete subordination, *see Caterpillar Fin. Servs. Corp. v. Peoples Nat'l Bank, N.A.*, 710 F.3d 691, 693-94 (7th Cir. 2013), equally one can't think why a subordinating party – particularly one who holds all the liens described in the subordination agreement – would omit even mention of an intermediary lienholder except to make an end run on that intermediary lienholder's priority position.

II. Assignment of Error 2: The trial court erred in finding the Subordination Agreement unambiguous on its face when ambiguities exist as to what was secured and which loans were subordinated and being subordinated to, and thereupon granting Appellee Wells Fargo's Motion to Dismiss and dismissing Appellant's Cross-Claim.

Wells Fargo complains that Futuri fails to identify any ambiguity on the face of the Subordination Agreement. (Opp. Br. at 18.)

The first ambiguity is that Wells Fargo recorded in the Subordination Agreement that it was filing the same day a Security Instrument securing by the property payment of $250,000.00. (J.A. at 45.) No such Security Instrument was filed. The Trial Court held that the Security Instrument securing payment of $252,000.00 was that instrument and reduced Wells Fargo's lien priority by the

$2,000.00 difference, but nothing on the face of the document resolves the fact that the descriptions to not match, and the trial court had to go outside the four corners of the document to adjudicate this question.

Second, in the absence of a default rule of construction for subordination agreements in Virginia, and given Wells Fargo's constructive knowledge of the existence of SunTrust's loan, Wells Fargo's omission of mention of the SunTrust deed of trust, adoption of the terms "the Original Security Instrument" and "the Subsequent Security Instrument" (not "a Subsequent" or other such recognition of the intermediary lien), and statement that Wells Fargo's Original deed of trust was becoming "junior and subordinate" to its Subsequent deed of trust and also that the Subsequent would have "prior and superior" right over the Original all point to a lack of clarity that makes its application to third parties ambiguous and at least unanticipated within the four corners of the document.

As the drafting party and only party to the document it presently intends to apply to the detriment of SunTrust's position and the third party purchaser Futuri, Wells Fargo cannot complain if the language of the Subordination Agreement is construed against the drafter or if the ambiguities are resolved on the taking of evidence rather than within the four corners of the document.

CONCLUSION

For the above reasons and those stated in its Opening Brief, Appellant Futuri Real Estate, Inc. requests that the decision of the lower court dismissing Appellant's Cross-Claim with prejudice be reversed and a judgment entered declaring the lien of SunTrust in this matter senior to the liens of Wells Fargo, and the liens of Wells Fargo extinguished by the foreclosure sale by SunTrust to Futuri Real Estate, Inc., or in the alternative reversing the trial court's grant of Wells Fargo's Motion to Dismiss and remanding this matter for further proceedings consistent with this Court's order.

Respectfully Submitted,

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CERTIFICATE

I hereby certify, pursuant to Rule 5:26(h), that on this 30th day of August, 2019, I electronically filed the foregoing Reply Brief of Appellant with accompanying Appendix via VACES, with the required paper copies set to be delivered within the prescribed one business day. I certify that on this 30th day of August, 2019, the Reply Brief were served via e-mail upon the following:

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Exclusive of the portions exempted by Rule 5:26(h), this brief does not exceed 15 pages.

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