In The

Supreme Court of Virginia

RECORD NO: 181501

FUTURI REAL ESTATE, INC.,

Appellant,

v.

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

Appellees.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This matter involves a parcel of real property encumbered by three deeds of trust and what interpretation, with respect to the rights of a third party purchaser, to give a recorded instrument subordinating the priority of the first deed of trust to the third without mentioning the second.

I. Material Proceedings Below

This matter arises from proceedings following a real property foreclosure sale on January 19, 2017 by trustee Atlantic Trustee Services, LLC ("Atlantic") on behalf of SunTrust Bank ("SunTrust"), which held a lien on a parcel of property belonging to Milton Cortez ("Cortez").[1] Compl. ¶ 7 (J.A. at 3). After the foreclosure auction of the property and closing, a dispute arose among the buyer, Futuri Real Estate, Inc. ("Futuri"), and the lienholders SunTrust and Wells Fargo Bank, N.A. (including as relevant Wells Fargo Bank, N.A.'s predecessor in interest Wachovia Bank, N.A., "Wells Fargo"), regarding the priority of liens on the real property, and on June 15, 2017 Atlantic interpleaded the excess funds from the foreclosure sale to the Fairfax County Circuit Court and proposed its foreclosure accounting. Compl. ¶ 8-12 (J.A. at 3-4, 42-44). The dispute was regarding three loans: SunTrust had a deed of trust dated August 5, 2005 which was recorded in

[1] The property and liens were originally in the names of both Milton Cortez and Armida Cortez, but Armida Cortez was subsequently removed from all relevant title documents and was never a party to any of the proceedings at issue.

the Land Records division of the Fairfax County Circuit Court on September 30, 2005 (Fairfax Book 17806 Page 0158, J.A. at 12) (the "Suntrust Lien"); Wells Fargo had two deeds of trust, one dated August 23, 2005 and recorded September 23, 2005 (Fairfax Book 17773 Page 2161, J.A. at 54) (the "Wells Fargo 2005 Lien"), and the other dated September 23, 2006 and recorded October 25, 2006 (Fairfax Book 18859 Page 1535, J.A. at 61) (the "Wells Fargo 2006 Lien"); Wells Fargo also filed a subordination agreement dated September 23, 2006 and recorded October 26, 2006 (Fairfax Book 18863 Page 1233, J.A. at 45) (the "Subordination Agreement") making its 2005 deed of trust "subordinate and junior to" its 2006 deed of trust. Compl. ¶¶ 1-5, 11 (J.A. at 1-4), Cross-Cl. ¶¶ 1-13 (J.A. at 48-50).

Appellant Futuri filed a cross-claim/counter-claim/third party claim,[2] seeking a declaratory judgment finding "that the SunTrust Loan and its Deed of Trust are first in priority over Wells Fargo Loan #1 and #2, effective prior to the foreclosure sale." Cross-Cl. (J.A. at 47, 52).

Wells Fargo filed a Motion to Dismiss on October 24, 2017. On December 8, 2017 Judge David Bernhard heard oral argument on the Motion to Dismiss and issued a letter opinion on January 10, 2018 finding the SunTrust lien was second in line behind the hybrid partially subordinated Wells Fargo liens and calculating the

[2] The Third Party Complaint added as a party TRSTEE, Inc., the Trustee under the Wells Fargo deeds of trust, but that party was not served and did not participate before the trial court.

amounts each lien remained secured after the foreclosure sale and the amount each lien was eligible to participate in the excess funds from the sale. Op. Ltr. Jan. 10, 2018 (R. at 197-218)

Futuri filed a motion for reconsideration on February 8, 2018 and after further oral argument on February 23, 2018 Judge Bernhard vacated the January 10, 2018 Opinion Letter and Order and issued on February 27, 2018 an Opinion Letter and Order[3] granting Wells Fargo's Motion to Dismiss, with prejudice. Op. Ltr. Feb. 27, 2018 (J.A. at 149-71), Order (J.A. at 147-48). A final order resolving all remaining matters before the trial court, including the interpleader, was entered August 24, 2018. (J.A. at 175-77.) Futuri timely petitioned this Court for an appeal and this Court granted an appeal on two assignments of error. (J.A. at 178.)

II. Statement of Facts

Appellant Futuri Real Estate, Inc. acquired the land and residence at 6614 Quander Lane, Alexandria, Virginia 22307 in a properly noticed foreclosure sale on January 19, 2017. Compl. ¶ 7 (J.A. at 3). Atlantic, trustee for SunTrust, offered the property at the foreclosure auction as foreclosure of a first mortgage that was superior to two Wells Fargo deeds of trust and Wells Fargo participated in the auction sale as a bidder. Cross-Cl. ¶ 14, 16 (J.A. at 50-51).

[3] Titled a Final Order but not resolving the interpleader.

The property had been owned by Cortez, who had entered into the three line of credit loans secured by deeds of trust on the property, the SunTrust Lien, the 2005 Wells Fargo Lien, and the 2006 Wells Fargo Lien. Wells Fargo also filed a subordination agreement dated September 23, 2006 and recorded October 26, 2006 making its 2005 deed of trust "subordinate and junior to" its 2006 deed of trust. Compl. ¶¶ 1-5, 11 (J.A. at 1-4), Cross-Cl. ¶¶ 1-13 (J.A. at 48-50). At the time it entered the first of its deeds of trust, Wells Fargo had notice of the unrecorded SunTrust deed of trust. Cross-Cl. ¶ 11 (J.A. at 50). The operative text of the subordination agreement is as follows:

SUBORDINATION AGREEMENT

> KNOW ALL MEN BY THESE PRESENTS THAT, WHEREAS, on the 23 day of AUGUST, 2005, MILTON CORTEZ & ARMIDA CORTEZ ("Borrower(s)"), executed a Security Instrument to WACHOVIA BANK, N.A. ("Lender"), to secure payment of FOUR HUNDRED FIFTEEN THOUSAND dollars ($415000), which Security instrument was duly recorded in the County of FAIRFAX, on 23, SEPTEMBER, 2005, as Document No. 2005009219.009, (the "Original Security Instrument") and conveyed the real estate known as:
>
> 6614 QUANDER RD., ALEXANDRIA, VA 22307
> Parcel/Tax ID#: 0931010052
> (hereinafter referred to as the "Property")
>
> AND WHEREAS, on the 23, SEPTEMBER, 2006, Borrower granted to Wachovia Bank, N.A. a Security Instrument on the Property to secure payment of TWO HUNDRED FIFTY THOUSAND Dollars ($250000), which Security Instrument will be recorded in the Count of FAIRFAX on this date or shortly thereafter (the "Subsequent Security Instrument"),

> WHEREAS, Lender has been requested to and has agreed to subordinate the lien of the Original Security Instrument to the lien of the Subsequent Security Instrument,
> NOW, THEREFORE, for a good and valuable consideration, the receipt of which is hereby acknowledged, Lender hereby agrees that the lien of the Original Security Instrument is subordinate and junior to the lien of the Subsequent Security Instrument and that the lien of the Subsequent Security Instrument shall also have a prior and superior right over the lien of the Original Security Instrument.
> IN WITNESS WHEREOF, the said officers of Lender have hereunto set their hands and seals this on the 23 day of SEPTEMBER, 2006.

Compl. Ex. H (J.A. at 45).

Not known to Futuri or SunTrust before Wells Fargo responded to discovery, Wells Fargo had internal communications indicating an awareness of the SunTrust lien before recordation of the 2005 Wells Fargo lien, internal documents stating prior to recordation of the Subordination agreement that the SunTrust lien was superior to both Wells Fargo liens, and internal documents showing Wells Fargo continued in that belief through the time of the January 2017 SunTrust foreclosure sale. Mot. Reconsider. at 2-5 (J.A. at 76-79). In addition, Wells Fargo's internal documents showed confusion as to which property the liens attached to. *Id.*

ASSIGNMENTS 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.

This issue was preserved for appeal in the following locations: Futuri Real Estate Inc.'s Objects. to the Final Order Dated Feb. 27, 2018 (J.A. at 172-73, preserved J.A. at 177), Futuri Real Estate Inc.'s Objects. to the Final Order (J.A. at 143-44).

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.

This issue was preserved for appeal in the following locations: Futuri Real Estate Inc.'s Objects. to the Final Order Dated Feb. 27, 2018 (J.A. at 172-73, preserved J.A. at 177), Futuri Real Estate Inc.'s Objects. to the Final Order (J.A. at 143-44).

ARGUMENT AND AUTHORITIES

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.

A. Standard of Review

Where there is no evidence taken on a motion to dismiss,[4] it is treated similarly to a demurrer: on appeal, the Court must accept as true all properly pled facts and all inferences fairly drawn from those facts,[5] including those of exhibits to the pleadings. *Bragg v. Bd. of Supervisors*, 295 Va. 416, 423, 813 S.E.2d 331, 334 (2018). This Court then reviews *de novo* the circuit court's decision to dismiss

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[4] Although the trial court heard argument of facts not in the pleadings and saw documents attached to motions memoranda, *e.g.*, Tr. Dec. 8, 2017 p.10:7-16 (R. at 500), Mot. Reconsider Ex. 4 (J.A. at 109-125), it did not take evidence and Appellant does not contend it made its decision on the basis of those facts proffered outside the pleadings except those for which judicial notice is appropriate, particularly land records.

[5] The trial court appears to have hybridized a test from the federal Motion to Dismiss and Summary Judgment tests for the present Motion to Dismiss, asking (1) whether there are any issues of fact not yet adduced which remain genuinely in dispute, and (2) if not, what legal interpretation the Court is to derive therefrom. Op. Ltr. Feb. 27, 2018. There is not at present an articulated test applicable to all motions to dismiss in Virginia Statutes or this Court's rules or decisions.

the pleading. *Id*. A demurrer tests whether the allegations of a complaint are sufficient to state a cause of action. *Harris v. Kreutzer*, 271 Va. 188, 195, 625 S.E.2d 24, 28 (2006). While this Court has not distinguished a demurrer from a motion to dismiss in detail, a motion to dismiss appears to differ from a demurrer by examining whether the allegations on their face survive a particular legal bar rather than whether they state a cause of action. *See Va. Marine Res. Comm'n v. Clark*, 281 Va. 679, 686-87, 709 S.E.2d 150, 154-55 (2011) (facial challenge to standing) (overruled on other grounds, *Woolford v. Va. Dep't of Taxation*, 294 Va. 377, 390, 806 S.E.2d 398, 405 (2017)).

B. The trial court erred in dismissing the cross claim because the Subordination Agreement should be read to subordinate the first in time lien completely behind the third in time lien.

1. Virginia Law supports literal interpretation of documents recorded in land records, which in this case means applying the complete subordination described by the Subordination Agreement.

In deciding priority of otherwise identically classed liens on real property, Virginia is a race jurisdiction,[6] that is, the first such lien properly recorded with the Clerk of the Circuit Court where the real property lies has priority over subsequently recorded claims. *Deutsche Bank Nat'l Trust Co. v. Arrington*, 290

[6] With a limited exception regarding advances under Line of Credit Deeds of Trust made after notice of other liens recorded after the Line of Credit Deed of Trust which was not raised below. Va. Code § 55-58.2(C)(i) (effective Oct. 1, 2019, § 55.1-318(C)(i)).

Va. 109, 118-19, 772 S.E.2d 571, 576 (2015), Va. Code § 55-96(A)(1) (effective Oct. 1, 2019, § 55.1-407(A)(1)). In the present matter, there were three liens at issue, the SunTrust Lien, the 2005 Wells Fargo Lien, and the 2006 Wells Fargo Lien. A deed of trust sold in foreclosure extinguishes all subsequent liens but remains subject to prior liens. *Schmidt & Wilson, Inc. v. Carneal*, 164 Va. 412, 415-6, 180 S.E.2d 325, 326 (1935). Other than the Subordination Agreement, none of the three liens had any claim to priority over one another deviating from the order of recording, such as could have been the case with a mechanic's lien. *See generally* § 55-96(B) (effective Oct. 1, 2019, § 55.1-407(B)). Accordingly, the amount and identification of liens remaining on the property after the foreclosure sale under the SunTrust deed of trust here is dependent on the effect the Subordination Agreement has on the order of priority.

A deed of trust in Virginia can be subordinated to another deed of trust, notwithstanding order of recordation, by recording language setting forth that subordination. *See Schmidt & Wilson, Inc.*, 164 Va. at 414, 180 S.E.2d at 325 (1935) (subordination language determined order of priority of deeds of trust recorded the same day). A subordination agreement can only be entered into to the extent of the authority of the noteholder, and where such a subordination agreement has been entered, the courts "cannot make a more equitable agreement for one who has voluntarily contracted to his detriment," even though "ordinarily a

lienor agrees to subordination… only if he retains an equal security position." *Tuscarora Inc. v. B.V.A. Credit Corp.*, 218 Va. 849, 857, 241 S.E.2d 778, 783 (1978) (party bound by inadvisable unconditional lien subordination).

What has not been directly addressed in Virginia law, to the knowledge of the trial court or any counsel in this matter, is what occurs with respect to the priority of a deed of trust recorded between the original deed of trust and the deed of trust being subordinated to, particularly where, as here, the subordination document is silent as to the treatment of other liens. The present matter is further complicated because the subordination agreement might be considered inadvisable to the original lienholder if construed literally, and it involves deeds of trust held by the same lender. *See* Op. Ltr. Feb. 27, 2018 (J.A. at 150).

Particularly because of the importance of third parties being able to rely on recorded land records, in interpreting the deeds, "the true inquiry is not what the Grantor meant to express, but what the words themselves do express." *Goodson v. Capehart*, 232 Va. 232, 236, 349 S.E.2d 130, 133 (1986). In particular, a Court should look to the granting language over any non-granting language. *Id*. The first granting language use by Wells Fargo in the Subordination Agreement is that the first in time 2005 Wells Fargo lien would become "subordinate and junior" to the third in time 2006 Wells Fargo lien; that is, taking the words literally, it was giving up the place of its 'Original' deed of trust in favor of its subsequent and as yet

unrecorded deed of trust. As a consequence of this grant of subordination, the 2006 Wells Fargo Lien would have a "prior and superior right" to the 2005 Wells Fargo Lien. Nothing in the Subordination Agreement states that such yielding is to result in trading places only to the extent of the first loan or without yielding to other liens, and if there were only the two Wells Fargo loans the subordination agreement would be treated as a complete subordination allowing the entire subsequent lien to take priority over the entire subordinated lien regardless of the comparative amounts of such liens.

This is not to say that a Subordination Agreement could not be drafted and recorded in Virginia which detailed how other liens were to be treated or how the subordination was to be interpreted. But that is not what the subordination agreement contains here. Instead this case asks, where the parties on the face of the document create a complete subordination and are silent as to the existence of any partial subordination or any permission of the named subsequent lienholder to step into some portion of the prior lienholder's shoes, whether a court will 'blue pencil' that omission and nonetheless judicially create a partial subordination.

"The guiding light in the construction of a contract is the intention of the parties as expressed by them in the words they have used;" Virginia courts "cannot read into contracts language which will add to or take away from the meaning of the words that are already contained therein." *Wilson v. Holyfield*, 227 Va. 184,

187, 313 S.E.2d 396, 398 (1984). "In determining the intent of the parties, courts will generally not infer covenants and promises which are not contained in the written provisions." *Pellegrin v. Pellegrin*, 31 Va. App. 753, 759, 525 S.E.2d 611, 614 (2000). Here Wells Fargo did nothing to indicate in the document it executed and filed that it intended to reserve the priority of its first lien in part or otherwise create the complex scheme it now claims it should benefit from. Instead it filed a simple statement that it was moving its first priority lien to a junior position behind its other lien.

2. The reasoning used in Virginia's sister states' decisions on the question of priority of liens not mentioned in subordination agreements supports applying complete subordination in the present matter.

Other states appear divided in their approach to the handling of a subordination agreement in the presence of other liens not a party to the subordination agreement and recorded in time or priority between the two liens to which the subordination agreement applies.

Supporting Futuri's position is Alabama's *AmSouth Bank, N.A. v. J & D Financial Corp.*, 679 So. 2d 695 (Ala. 1996). There the court noted that the first in line lienholder, while it could have transferred, assigned, or subrogated its rights to structure a transaction preserving priority of the lien, instead subordinated the lien, thereby voluntarily moving in the order of priority behind the lender it was subordinating to. *Id.* at 698. As with the Alabama matter, Wells Fargo could have

structured their transaction in any of a number of ways that laid out how they were preserving their lien priority, but instead Wells Fargo left the matter in complete silence.

Similarly, Idaho held the right of the second lienholder over the third lienholder to be one which even the first lienholder does not have a right to bypass, at least by bare subordination, since the language on its face attempts a complete subordination. *Blickenstaff v. Clegg*, 97 P.3d 439, 448 (Idaho 2004). In other words, because the first lienholder lacks the power to move the third lienholder above the second without the first ceding to the second, and because the first lienholder did not otherwise structure the transaction to state it was doing so, the first lienholder must have moved to behind the third lienholder so as not to add language the drafter did not include.

Georgia allows for the parties to create subordinations with limited or special effect if within the power of the parties, but where the language is unlimited or general the default rule is that the subordinating lien yields priority to all intervening liens. *Old Stone Mortg. & Realty Trust v. New Georgia Plumbing, Inc.*, 236 S.E.2d 592, 593 (Ga. 1977). While Delaware does not appear to have decided the relative priority of an intermediate lienholder, it does state the effect of a subordination agreement is to "relinquish statutory priority," not move the otherwise junior party forward in whole or in part. *Galantino v. Baffone*, 46 A.3d 1076, 1082 (Del. 2012).

The trial court described in some detail the California decision *Bratcher v. Buckner*, 90 Cal. App. 4th 1177 (Cal. Ct. App. 2001) as the most in-depth discussion supporting partial subordination. Of note in that case, however, is language in the subordination agreement expressly excluding creation of a change in priority of any other lien, such that the California court's partial subordination solution is necessary to effect that language: "The clear terms of the subordination agreements specify that they are to change priority only as between the [1st, 2nd, and 4th] liens." *Id.* at 1186. This is in sharp contrast to the language used by Wells Fargo here, which includes no clear terms relating to changes in priority as to other liens.

The Arizona case quoted by the trial court likewise followed partial subordination where the parties did not reference any third party liens and had expressly stated the subordination was "only insofar as would affect the priority between the deeds of trust hereinbefore specifically described," to avoid a 'windfall' to intermediate lienholders, noting that in that case the result "appears fully equitable," and "a partial subordination occurred from the subordination agreement *in this matter*." *In re Price Waterhouse Ltd.*, 46 P.3d 408, 412 (Ariz., 2002) (emphasis added). No such limiting language can be found in the Subordination Agreement in the present matter.

The Utah case *VCS, Inc. v. Countrywide Home Loans, Inc.*, 379 P.3d 704 (Utah 2015) on its face does appear to wholeheartedly endorse partial subordination under any circumstance, but the facts of that case differ markedly from the present matter. There, VCS held a mechanic's lien that was recorded later in time than five deeds of trust connected by four subordination agreements, all recorded before the mechanic's lien. *See Id.* at 706-07. The court neither recites the language used by the subordination agreements nor addresses how the after-recorded mechanic's lien was to have gained priority over any of the other previously recorded liens nor discusses the relative amounts of the liens and what effect the satisfaction and release of some of the liens had on the priority of the remaining liens or whether some portion of the subordinated liens did become junior to the mechanic's lien. Further, a mechanic's lien being an exception to priority and timing, depending on the provisions of that state's statutes, presents something of a different issue from the deeds of trust of identical class in the present matter.[7]

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[7] With due respect to Judge Posner of the 7th Circuit Court of Appeals and his defense of partial subordination of Uniform Commercial Code financing statements in *Caterpillar Fin. Servs. Corp. v. Peoples Nat'l Bank, N.A.*, 710 F.3d 691 (7th Cir. 2013), his discussion is entirely dicta as the matter is decided *in favor of the third party* because the purported lienholder never put into evidence the security agreement it was claiming priority under. 710 F.3d at 696. The court does not lay out the terms of the subordination agreement, and while the court notes there "we can't think why [the subordinating lienholder] would have insisted on complete subordination," the effect of this rhetorical statement is reduced by the

Consistent with Alabama's 'complete subordination' approach and Virginia's own preference set out *supra* for using the actual language in a recorded document, and not inconsistent with the use by California and Arizona of 'partial subordination' where called for by the parties as seen in the cases cited above, Virginia should take the position that it will look at the language used by the parties. If the parties expressly exclude a change in priority as to other liens, partial subordination would be used to put into effect this express language; in the absence of any mention of how such subordination would operate with respect to other liens, as is the case here, complete subordination can be inferred by such unlimited language and the earlier recorded lien simply moved in the order of priority to immediately after the lien it is subordinating itself to.

3. Following Complete Subordination as a default rule in the absence of limiting language allows for simpler and more straightforward interpretation of recorded deeds, allowing parties to depend more reliably on such records and promoting fairness to non-parties.

The trial court's Opinion Letter sets out a partial subordination scheme, tracking detailed charts showing the amounts each loan can be secured to with respect to each other, and resulting in (in the trial court's words, borrowed from *Bratcher*) a "circuity of liens" that is "somewhat labyrinthine" in its calculations

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admission that either way the result would be the same to the subordinating party there. *Id.* at 694.

and figures, particularly in the event of foreclosure resulting in partial satisfaction and partial discharge of some of the partially subsequent liens with a portion of the surplus funds and partial preservation of those partially prior liens, that any subsequent purchaser would have to navigate and understand. Op. Ltr. Feb. 27, 2018 at 13 (J.A. at 161). The difficulty of following such language is underscored within even the present matter, as the trial court had to vacate and reissue its initial Opinion Letter in part because of a discrepancy in the amounts shown in the Subordination Agreement compared to the actual 2006 Deed of Trust, which created an error in the final amount found by the Court to be secured by each lien. *See* Op. Ltr. Feb. 27, 2018 at 2 (J.A. at 150).

By establishing implied protections outside the walls of the recorded document for parties inartfully drafting a subordination agreement, partial subordination as described by the trial court would fail utterly a party trying to depend on the documents for guidance, particularly a bona fide purchaser for value charged with knowing the contents of the land records. But if it were not for those third parties there would be little purpose in recording the subordination, as the parties could simply enforce a two-party contract regarding division of collections funds between themselves.

Partial subordination as implemented by the trial court would also make difficult the debtor's prioritization of payments, attempts to become current or

work out arrearages, and refinancing where lenders (or here, a single lender) can change the priority of portions of debts at will regardless of payment history and expect a debtor to understand and comply with this unwritten labyrinthine arrangement. This may be why Judge Posner, unlike the state courts favoring partial subordination above, specifically limits the subordination to the amount then owed rather than the face amount of the lien, which would mitigate to some extent this type of manipulation. *See Caterpillar Fin. Servs.*, 710 F.3d at 694 ("limited to the amount that the creditor… was owed before he swapped places"). The trial court here took no evidence and made no findings as to the actual amounts owed at any particular time. *See* Op. Ltr, *passim* (J.A. at 149).

Further, most protections in Virginia law against inartful or inappropriate contract language are for the protection of consumers, tenants, or similarly parties in a weakened negotiating position. *See, e.g.*, Va. Code § 59.1-196 et seq. (Virginia Consumer Protection Act), § 55-248.2 et seq. (Virginia Residential Landlord Tenant Act), § 6.2-400 et seq. (Lending Practices and Consumer Credit). If a party is involved in lending sophisticated enough to require a subordination agreement, it is not unreasonable for the Court to expect that party to understand and protect its own rights, to expect that party to set out what effect it wants its documents to have, and to hold that party to the language used.

While the term 'windfall' is used by Wells Fargo and those courts employing partial subordination as something they wish to avoid giving a non-party to the subordination, it is something of a misnomer when applied to a subordination which, as here, contains no limiting language and references no other liens. The expectation of the executing party as contained in the four walls of the document is only to be "subordinate and junior," with no express limit to that change in priority. (J.A. at 46.) As Judge Posner pointed out, that is exactly where they end up "in either case," regardless of the order the other liens end up in. *See Caterpillar Fin. Servs.*, 710 F.3d at 694. If there is a party to complain, it would be the named beneficiary expecting by the generosity of the subordinating party to rise in seniority. This rising party is thereby receiving their own benefit, whether as a result of a hard driven bargain or simply a windfall of their own, and to the extent it is bargained for, it is incumbent on them to define what it is they are receiving and particularly to understand the other lienholders of record.

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 property." Op. Ltr. Feb 27, 2018 at 11 (J.A. at 160). The fact that there is no bargain and no arms length transaction in the present subordination agreement, but instead a self-dealing document, means that Wells

Fargo itself by asking this Court to use partial subordination as the default term, regardless of the language of the parties, seeks a windfall in terms of its collectability at the expense of SunTrust and ultimately of Futuri.

Beyond the fact that Wells Fargo would be only held to the terms it voluntarily recorded, there would be no real 'windfall' in the present matter with the application of complete subordination. Wells Fargo's 2005 deed of trust was executed subsequent to the SunTrust deed of trust, with notice of the SunTrust mortgage, and was by mere happenstance recorded before the earlier executed SunTrust deed of trust. Cross-Cl. ¶¶ 10-11 (J.A. at 50). While Wells Fargo may be content to rely on the strict rules of land records recording order when it is to their benefit, they cry foul if their failure to draft a subordination document that does what they now wish it to deprives them of no more than an identical 'windfall.'

By contrast with the interpretation of the California Partial Subordination rule put forward by Wells Fargo, the Alabama Complete Subordination rule provides certainty and clarity, and is much less given to manipulation, particularly with respect to innocent third parties such as Futuri who should be able to find reliable answers with an ordinary title search. With respect to creditors such as Wells Fargo, Virginia is a race state, and when entering any subordination agreement, the creditors would simply be charged with having the constructive

knowledge of other liens presumed by Va. Code § 55-96 (effective Oct. 1, 2019, § 55.1-407) as to all recording lienholders, which would in any event apply to that creditor.

4. Other considerations are of secondary importance to the language used by the parties, and in the present case would only support Futuri's cross-claim.

Any discussion of benefits conferred to third party beneficiaries, expectations of the lender, or orders of priority that are inadvertent or contrary to the parties' intentions are not relevant to the discussion of what Wells Fargo in fact recorded.[8] Futuri purchased as a bona fide purchaser for value all of the rights SunTrust held under the deed of trust. SunTrust obtained for consideration all of the rights Cortez could alienate, and to secure their loan held those rights as against third party claimants to the extent permitted by the recording statute. *See Miller v. Kemp*, 157 Va. 178, 195, 160 S.E.2d 203, 208 (1931). The operative question for reviewing this matter should then be what effect the subordination would have on Cortez's then-held rights and the rights of SunTrust as against other creditors. As the trial court noted, the purpose of Wells Fargo in the subordination agreement

[8] The trial court's citation to *Selden v. Klaput*, 46 Va. Cir. 104, 107 (Norfolk 1998) regarding inadvertence or contradictions to the parties' intent is beside the point: the Norfolk court had decided the matter on the plain meaning of the language as recorded, and simply added as dicta (providing further support for the general justice of its decision) this quotation from the Restatement (Third) of Property addressing matters of law not specific to Virginia with respect to notice of unrecorded liens. *Selden*, 46 Va. Cir. at 107.

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 property." Op. Ltr. Feb 27, 2018 at 11 (J.A. at 159). This is an inequitable manipulation that here works to the detriment of Futuri, and one that there is no injustice in denying to Wells Fargo on the grounds of their intent or expectation, particularly where that intent or expectation is not anywhere reflected in the actual language used in their Subordination Agreement.

For these reasons, this Court should find as a matter of first impression that a court should look to the actual language used in a subordination agreement, and in the absence of language in a subordination agreement directing how other liens are to be treated or of language otherwise expressly creating a partial subordination, the subordinating lien moves in position completely behind the lien it is subordinating itself to, reverse the trial court's dismissal with prejudice of Futuri's Cross-Claim, and enter a declaratory judgment in favor of Futuri.

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.

A. Standard of Review

The Standard of Review for this assignment of error regarding the granting of a Motion to Dismiss is the same as that detailed in Section I(A), with all factual

allegations and fair inferences therefrom in the Appellant's pleadings being presumed and review of the dismissal *de novo*.

B. In the absence of a judicial presumption otherwise, the Subordination Agreement is ambiguous and the Motion to Dismiss should not have been granted.

1. The Subordination Agreement is silent as to treatment of any other liens

Unless a reviewing court creates and employs a default rule of interpretation regarding silence of a subordination agreement as to intermediary liens, there is an ambiguity in the language of the Subordination Agreement created by such absence. The trial court implied an intent to Wells Fargo in the Agreement (to which agreement it was the only party) that it was not giving up any position of priority. However, as noted above, a court "cannot make a more equitable agreement for one who has voluntarily contracted to his detriment." *Tuscarora Inc.*, 218 Va. at 857, 241 S.E.2d at 783.

The only intent shown in the document is that Wells Fargo's higher priority lien be entirely behind Wells Fargo's lower priority lien. There is no indication of any intent or even awareness of another lien, and no indication of what Wells Fargo would have wanted. As stated by the trial court, "Wells Fargo was asked [by itself] to and agreed [with itself] to subordinate its original lien to its subsequent lien, and Wells Fargo did not agree to anything else. The Agreement focuses solely on the relationship between the two Wells Fargo liens." Op. Ltr.

Feb 27, 2018 at 11 (J.A. at 159.) But following that logic as if there were no intervening lien would result not in the labyrinthine circuity created by the trial court, but a simple reordering.

Accordingly, because of the complete silence in the four corners of the document as to what Wells Fargo intended with respect to treatment of the liens of other parties, where the trial court claims to look at the intent of the parties in implying savings clauses into the Subordination Agreement it necessarily would look at parol evidence, including here documentary evidence only begun to be seen in the brief discovery conducted in the trial court. This discovery showed that Wells Fargo assumed at the time of the Subordination Agreement, and continued in that assumption through the time of the foreclosure sale, that both its liens were inferior to SunTrust's lien and accordingly would have had no reason to mention the SunTrust lien at all, as in fact they did not, or form an intent to keep that lien out of any priority position. *See* Mot. Reconsider. at 4 (J.A. at 78).[9] Omission of the terms because Wells Fargo mistakenly thought they were unnecessary certainly has a different intent from omission through carelessness.

[9] Under the test used by the trial court for a motion to dismiss, these facts would constitute "issues of fact not yet adduced which remain genuinely in dispute," and should have prevented the trial court granting the motion to dismiss under its own test.

2. Wells Fargo's internal documents create further ambiguity as to intent by bringing into question which property Cortez agreed to subject to Wells Fargo's first lien

As further noted in the Motion for Reconsideration, Cortez owned two properties next door to one another, 6612 Quander Road and 6614 Quander Road, both of which he used to secure loans from Wells Fargo, and on which there was considerable internal confusion. Mot. Reconsider. at 3 (J.A. at 77). Included in this confusion was an inadvertent recordation of a purchase money lien on both properties that should not have been applied to the property at issue in the present case and was cleared by a partial release. *Id*.

However, with respect to the intent of Wells Fargo in entering the Subordination Agreement, even if Wells Fargo had not believed its 2005 lien to be subordinate to the SunTrust lien, it did have notes indicating the 2005 lien would be second in line to its own purchase money lien which had already been released as to the present property. *Id*. This raises the question of whether the 2005 lien was even intended to attach to this property, thereby both further muddying the facts regarding the question of intent and requiring trial of the matter to resolve these material factual questions.

For these reasons, if this Court does not find pursuant to Assignment of Error 1 the subordinating lien to move in position completely behind the lien it is subordinating itself to, find the Subordination Agreement ambiguous on its face and

requiring the taking of evidence including parol evidence to resolve those ambiguities, and reverse the trial court's dismissal with prejudice of the Cross-Claim.

CONCLUSION

For the above reasons, Appellant Futuri 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.

REQUEST FOR ORAL ARGUMENT

Appellant Futuri Real Estate, Inc. does not waive oral argument, and wishes to present such argument to this Court in person.

Respectfully Submitted,

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CERTIFICATE

I hereby certify, pursuant to Rule 5:26(h), that on this 22nd day of July, 2019, I electronically filed the foregoing 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 22nd day of July 2019, the Brief and Appendix 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 **50** pages.

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