Michigan Law Review

Volume 58 | Issue 7

1960

Mortgages - Priorities -Mechanics' Lien Attaching to Optionee's Interest in Land Superior to Purchase Money Mortgage

Roger W. Kapp
University of Michigan Law School

MORTGAGES—PRIORITIES—MECHANICS' LIEN ATTACHING TO OPTIONEE'S INTEREST IN LAND SUPERIOR TO PURCHASE MONEY MORTGAGE—The holder of an option to purchase land ordered building materials from plaintiff. The materials were delivered the same day. The option was subsequently exercised by the vendee, and a warranty deed received from the vendor. At the same time a deed of trust was executed and delivered by the vendee to the defendant to secure a loan for the purchase money. The trust deed was properly recorded. Upon a failure of payment, plaintiff filed its mechanic's lien. Defendant subsequently foreclosed its trust deed. Plaintiff commenced this action to foreclose its lien. The trial court held the mechanic's lien superior to the trust deed. On appeal, *held,* affirmed.[1] An optionee is the "owner" of property within the meaning of the statute;[2] the mechanic's lien attaches when the materials are first delivered and there is no exception, in the case of a purchase money mortgage, to the statutory language giving mechanics' liens priority over other subsequent encumbrances.[3] *Sontag v. Abbott,* (Colo. 1959) 344 P. (2d) 961.

In most jurisdictions a purchase money mortgage, given as part of the same transaction which brought the deed to the mortgagor, is superior to a mechanic's lien regardless of whether such a lien attaches prior to or subsequent to the delivery of the deed.[4] Generally the rationale employed to reach this result is that the vendee is but momentarily seised of the fee, and that during this brief period no lien could attach before the fee is conveyed to the mortgagee by the execution and delivery of the mortgage.[5]

[1] Two other materialmen were joined as defendants and the court affirmed the trial court's judgment that their liens were entitled to priority over plaintiff's purchase money mortgage. Although not absolutely clear, it appears from the opinion that the "labor and materials furnished by them in erecting improvements" were furnished after the trust deed was recorded. Colo. Rev. Stat. Ann. (1953) §86-3-6 gives priority to mechanics' liens only as to subsequent encumbrances. It is, under these circumstances, difficult to justify the holding of the court as to these parties.

[2] Colo. Rev. Stat. Ann (1953) §86-3-1.

[3] Colo. Rev. Stat. Ann. (1953) §86-3-6: "All liens established by virtue of this article . . . shall have priority over any and every lien or encumbrance subsequently intervening. . . ."

[4] Bard Constr. Co. v. Wandner Co., 12 N.J. Super. 118, 79 A. (2d) 54 (1951); Queal Lbr. Co. v. McNeal, 226 Iowa 637, 284 N.W. 482 (1939); Larson Real Property Co. v. Norris-Lyddon Produce Co., 127 Neb. 357, 255 N.W. 50 (1934); Shilowitz v. Wadler, 237 App. Div. 330, 261 N.Y.S. 351 (1932); Bridgeport Peoples Sav. Bank v. Palaia, 115 Conn. 357, 161 A. 526 (1932); Pacific Spruce Co. v. Oregon Portland Cement Co., 133 Ore. 223, 286 P. 520 (1930); Bond v. Westine, 128 Kan. 370, 278 P. 12 (1929). See authorities cited in notes 5, 7, 8 infra; WALSH, MORTGAGES §38 (1934); 1 JONES, MORTGAGES, 8th ed., §§586-588 (1928); 72 A.L.R. 1516 (1931); comment, 29 VA. L. REV. 491 at 496 (1943); Eastin, "Priorities Between Mortgages and Mechanics' Liens," 48 LAW SER. UNIV. MO. BUL. 5 (1935); comment, 36 YALE L.J. 129 at 133-134 (1926); note, 30 HARV. L. REV. 293 (1917). *Contra:* Credit Finance Corp. v. Hale & Perry, (10th Cir. 1933) 66 F. (2d) 357; Highland Lbr. Co. v. Young, (La. App. 1948) 38 S. (2d) 638; Merritt v. Dansmith Corp., 240 App. Div. 338, 270 N.Y.S. 675 (1934); Thomas v. Setliffe, 160 Tenn. 689, 28 S.W. (2d) 344 (1930); Ansley v. Pasahro, 22 Neb. 662, 35 N.W. 885 (1888).

[5] Smith Builders Supply, Inc. v. Rivenbark, 231 N.C. 213, 56 S.E. (2d) 431 (1949); Green v. Saxton, 196 Iowa 1086, 196 N.W. 27 (1923); N.H. Sav. Bank v. Varner, (8th Cir.

This theory, however, will not serve in lien states where the title remains in the grantee-mortgagor.[6] In these states two theories have been advanced to give preference to the purchase money mortgage. The first is that the mortgage is merely a continuation in changed form of the vendor's common law lien for the purchase price and since the vendor's lien would be prior, the mortgage, when executed, enjoys the same priority.[7] The second view is that the title comes to the grantee already burdened with the mortgage;[8] thus a mechanic's lien attaching to this interest would be attaching to an *already* encumbered interest. Applying this to the principal case, the mechanic's lien would be superior insofar as it attaches to the optionee's equitable property interest[9] but would be inferior to the purchase money mortgage with respect to the fee.[10] The holding of the principal case that one who has an option to purchase land may be considered the "owner"[11] thereof is supported by many cases.[12] An optionee therefore would meet the ownership requirement which is a prerequisite to subjecting the property to a mechanic's lien. The question of when the lien attaches varies greatly from jurisdiction to jurisdiction depending upon the statute and its interpretation.[13] There is no theoretical objection to a rule, such

1914) 216 F. 721, affd. 240 U.S. 617 (1916); Rochford v. Rochford, 188 Mass. 108, 74 N.E. 299 (1905); Hillhouse v. Pratt, 74 Conn. 113, 49 A. 905 (1901); Birmingham Bldg. & Loan Assn. v. Boggs, 116 Ala. 587, 22 S. 852 (1897); N.J. Bldg. Co. v. Bachelor, 54 N.J. Eq. 600, 35 A. 745 (1896); Russell v. Grant, 122 Mo. 161, 26 S.W. 958 (1894); Tritch v. Norton, 10 Colo. 337, 15 P. 680 (1887); Stewart v. Smith, 36 Minn. 82, 30 N.W. 430 (1886); Virgin v. Brubaker, 4 Nev. 31 (1868); In re Campbell's Appeal, 36 Pa. St. 247 (1860); Guy v. Carrirere, 5 Cal. 511 (1855). See OSBORNE, MORTGAGES §213, p. 558 (1951).

[6] In Colorado a mortgage is deemed a lien, not a conveyance. See Colo. Rev. Stat. Ann. (1953) §118-6-17.

[7] Reed & Sherwood Mfg. Co. v. Jones, 202 Minn. 274, 278 N.W. 30 (1938); Moody v. Tschabald, 52 Minn. 51, 53 N.W. 1023 (1892); Thrope Bros. v. Durbon, 45 Iowa 192 (1876).

[8] Sisemore v. Voelke, (Okla. 1957) 312 P. (2d) 922; Joplin Cement Co. v. Greene County Bldg. & Loan Assn., 228 Mo. App. 883, 74 S.W. (2d) 250 (1934); Prichard Bros. v. Causey, 158 Tenn. 53, 12 S.W. (2d) 711 (1929); Golner v. Bede, 11 Ohio App. 137 (1919); Wilson v. Lubke, 176 Mo. 210, 75 S.W. 602 (1903); Oliver v. Davy, 34 Minn. 292, 25 N.W. 629 (1886). See OSBORNE, MORTGAGES §213, p. 559 (1951).

[9] An optionee's interest in the land may be likened to that of a vendee under a land sale contract where the vendor has not yet conveyed title. Both may get specific performance of their agreement in a court of equity.

[10] Colo. Rev. Stat. Ann. (1953) §86-3-3 provides that the lien "shall extend to and embrace any additional or greater interest . . . acquired by such owner at any time. . . ." Thus when the grantee-mortgagor receives the title to the property this inures to the benefit of the lien. However, under the analysis presented, the title comes to the grantee-mortgagor already burdened with the purchase money mortgage and it is only this encumbered fee which inures to the benefit of the lien.

[11] 1 CORBIN, CONTRACTS §272 (1950); 2 id., §418; 1 TIFFANY, REAL PROPERTY, 3d ed., §307 (1939). See London & S.W. Ry. Co. v. Gomm, 20 Ch. Div. 562 (1882). Cf. Albert S. Eastwood Lbr. Co. v. Britto, 51 R.I. 406, 155 A. 354 (1931).

[12] See 2 A.L.R. 778 at 794 (1919); 95 A.L.R. 1085 at 1095 (1935). *Contra:* Hayward Lbr. & Invest. Co. v. Starley, 124 Cal. App. 283, 12 P. (2d) 66 (1932); Martin-Welch Hardware & Plumbing Co. v. Moor, (Mo. App. 1929) 16 S.W. (2d) 667.

[13] OSBORNE, MORTGAGES §214, p. 567 (1951). See 1928 HANDBOOK OF COMMISSIONERS ON UNIFORM STATE LAWS 495; 4 AMERICAN LAW OF PROPERTY §16.106F (1952). Most often

as that adopted in the principal case,[14] that the lien attaches at the moment of delivery of the materials to the real estate.[15] Since the mechanics' lien is strictly a creature of statute, it is difficult to make meaningful generalizations based on the decided cases without considering the statute under which the decision was made. Although the language of the Colorado statute[16] gives the court a solid basis for its decision, there are other factors which should be considered. To deny to the purchase money mortgagee priority over other claimants may well undermine the very security upon which he relied. Without the advance made by the money-lending mortgagee, vendees often would be unable to acquire the property at all. Had this been the situation in the principal case, plaintiff's mechanic's lien would have attached only to the mortgagor's equitable interest.[17] The theory that the fee came to the mortgagor already encumbered[18] is not seriously affected by the fact that the mortgage in the principal case was given to a third party.[19] Such a series of events has been held to be one continuous plan, the instruments being interpreted as a contemporaneous operation in order to promote the intent of all the parties.[20] Thus in the principal case the court could have given the mortgage priority, even with the statutory language present, by finding the fee, when acquired, was already encumbered.[21] Although mechanics' liens are generally favored over all other claims,[22] there is no compelling reason to do so in a situation such as the principal case presents.[23] Such a decision may seriously interfere with land sale transactions by putting prospective vendors in fear

used are (1) the commencement of the building, meaning in some places the actual start of physical work, while in others the mere piling of materials so that they may be seen, and (2) the commencement of the services or furnishing of materials.

[14] See principal case at 964.

[15] See note 13 supra.

[16] See note 3 supra.

[17] See note 9 supra.

[18] See note 8 supra.

[19] The fact that the mortgage is given to a person other than the grantor who supplies the funds with which the purchase price is paid does not affect the mortgage's character as being a purchase money mortgage. Smith Builders Supply, Inc. v. Rivenbark, note 5 supra; Joseph v. Donovan, 116 Conn. 160, 164 A. 498 (1933); Protestant Episcopal Church v. Lowe Co., 131 Ga. 666, 63 S.E. 136 (1908); N.J. Bldg. Co. v. Bachelor, note 5 supra; Laidley v. Aikin, 80 Iowa 112, 45 N.W. 384 (1890); Stewart v. Smith, note 5 supra. See OSBORNE, MORTGAGES §213, p. 555 (1951).

[20] See Stewart v. Smith, note 5 supra.

[21] Some jurisdictions have attempted to divide the priorities so as to give the purchase money mortgage priority as to the land and the mechanic's lien priority as to the improvement. This would appear to be an equitable solution since there is no reason to give the mortgagee additional security, on which he did not rely, at the expense of the materialman. However, there are practical problems, such as the severability of the improvement from the land, which must be considered in the application of the statute to any given fact situation. See OSBORNE, MORTGAGES §215, pp. 571-572 (1951).

[22] See 10 THOMPSON, REAL PROPERTY §5186, pp. 270-271 (1957).

[23] See Credit Finance Corp. v. Hale & Perry, note 4 supra; OSBORNE, MORTGAGES §213, p. 561 (1951).

of giving options to purchase land, lest they be faced with the additional burden of searching the land to be sure that the optionee has not commenced building operations prior to the exercise of the option. It seems more reasonable that materialmen be required to ascertain the correct state of title to property before deliveries are started and to refrain from making deliveries if they do not want to have a contemplated purchase money mortgage given priority.[24]

Roger W. Kapp

[24] It may be proper to distinguish between the purchase money mortgage to the vendor and the purchase money mortgage to a third-party money lender. It does not appear so unreasonable to require the third-party money lender to bear the burden of searching the premises since ordinarily he is in the business of money lending.