

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

THE CARTER-JONES LUMBER	:	O P I N I O N
COMPANY, d.b.a. CARTER		
LUMBER CO., ASSIGNEE	:	
OF FIRSTMERIT BANK, N.A.,	:	CASE NO. 2011-P-0049
	:	
Plaintiff-Appellee,	:	
	:	
- VS -	:	
	:	
FAIRWAYS AT BOULDER CREEK –	:	
PORTAGE COUNTY, LLC, et al.,	:	
	:	
Defendants,	:	
	:	
FAIRWAY PARTNERS,	:	
	:	
Defendant-Appellant.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2009 CV 1121.

Judgment: Affirmed.

John A. Daily and Sidney N. Freeman, Sidney N. Freeman Co., L.P.A., 2475 Massillon Road, Akron, OH 44312-5316 (For Plaintiff-Appellee).

Chad E. Murdock, 228 West Main Street, P.O. Box 248, Ravenna, OH 44266 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is based upon a final judgment of the Portage County Court of Common Pleas. Appellant, Fairway Partners, challenges the merits of the trial court's

decision overruling its objections and adopting the magistrate's recommendation as to the final disposition of the underlying civil action. Specifically, appellant asserts that the trial court should have found that it had an equitable lien on certain real property which was entitled to priority over a bank mortgage.

{¶2} For the entire time period relevant to the facts of this case, Howard Bohrer and Carl Balla were the only two shareholders of Concept Communities, Inc. During the early 2000's, Concept Communities was primarily engaged in the business of planning the development of condominium communities in northeastern Ohio. After selecting a new location for a condominium development, Bohrer and Balla would form a separate partnership entity through which they would control the purchase of the property and the construction of the various buildings. Under this procedure, Concept Communities was never directly connected to each individual development.

{¶3} In early 2005, Bohrer and Balla found a location for a new development in Kent, Ohio. As a result, they created a new partnership, Crossings at Golden Pond, LLC, to handle this particular project. Acting through the partnership, Bohrer and Balla first sought to obtain financing for the project. Ultimately, they decided to procure two loans through FirstMerit Bank. Their primary contact at the bank was Jeff Skronieczny, a loan officer.

{¶4} As part of the contractual negotiations, Skronieczny informed Bohrer that the loans would not be approved unless the partnership, i.e., Crossings at Golden Pond, had obtained sufficient "start-up" cash through separate investors. In order to meet this requirement, Bohrer contacted William Beechler and Frank Sorace. Upon agreeing to become investors in the Kent development, Beechler, acting through his own trust, and

Sorace formed their own partnership entity, Kent Partners, LLC.

{¶5} As a means of facilitating the transfer of the initial investment capital, the two partnerships, Crossings at Golden Pond and Kent Partners, executed two “Unit Purchase” agreements. Under each of these contracts, Kent Partners basically agreed to buy a condominium for a specific price. The agreements further provided that, once the two condominiums had been built, Bohrer and Balla would use the units as models upon which to base future sales in the Kent development. In addition, the agreements stated that, following a certain period of time, Kent Partners would either take ownership of the model condominiums or receive the proceeds from the sale of the units.

{¶6} In March 2005, a meeting was conducted to execute the loan agreements between FirstMerit and Crossings at Golden Pond. Besides Skronieczny, Bohrer, and Balla, Beechler was present in behalf of Kent Partners. As part of the discussions in the meeting, Skronieczny informed Bohrer that it was the practice of FirstMerit to require the investors in the project, such as Beechler, to sign any loan agreements as guarantors. In response, Bohrer indicated that if FirstMerit did not waive that requirement in regard to the Kent development, he would seek financing at another bank. Skronieczny chose not to pursue the matter any further, and the loan papers were signed without benefit of any guarantor. Furthermore, over the ensuing months, construction of the units in the Kent development went forward.

{¶7} In early 2006, Bohrer and Balla chose a location for a new condominium development in Streetsboro, Ohio. Consistent with the procedure they had followed in the Kent project, Bohrer and Balla formed a new partnership entity, Fairways at Boulder Creek-Portage County, LLC (“Boulder Creek”), to manage this particular project. Bohrer

again contacted Skronieczny at FirstMerit about financing the Streetsboro development, and also contacted Beechler and Sorace about investing in the project.

{¶8} Consistent with their prior actions in the Kent development, Beechler and Sorace formed their own separate partnership entity for the Streetsboro project, Fairway Partners, LLC. As the means for providing the investment capital, the two new entities, Boulder Creek and Fairway Partners, executed two “Unit Purchase” agreements. The terms of these agreements were identical to the terms of the contracts which had been employed in relation to the Kent project; i.e., the two condominiums would be used as models, and Fairway Partners would either take ownership or the sale proceeds at the end of the process. The two agreements were signed by Bohrer and Balla, in behalf of Boulder Creek, on March 26 and 28, 2006.

{¶9} As part of the foregoing “investment” transaction, Beechler and Sorace, in behalf of Fairway Partners, gave two checks to Bohrer and Balla for a total of \$360,230. Despite the fact that the funds were intended for the Boulder Creek partnership under the two agreements, Bohrer expressly requested that the two checks be made payable to his and Balla's corporation, Concept Communities. Bohrer further requested that the checks be postdated to March 31, 2006. The checks were then processed by FirstMerit on that date.

{¶10} As to the separate financing of the Streetsboro project, Boulder Creek and FirstMerit were able to negotiate a loan agreement for the purchase of the property and a loan agreement for the actual construction of the condominiums. Acting in behalf of Boulder Creek, Bohrer and Balla executed both general agreements at a meeting with Skronieczny on March 17, 2006. Under the construction loan, Bohrer and Balla signed

three documents: a promissory note, a construction loan agreement, and an open-end construction mortgage. As part of the basic terms of the construction loan agreement, Boulder Creek asserted that it had “good title” to the underlying real estate, and that it had not previously entered into any other security agreement which would give another party an interest or right in the land superior to FirstMerit.

{¶11} According to its terms, the construction mortgage was intended to secure a total possible loan of \$2,600,000. As to possible foreclosure, the mortgage provided that FirstMerit had the right to immediate repayment of the loan if Boulder Creek sold or transferred a part of, or any interest in, the underlying property without the bank’s prior notice and consent. Although the mortgage was fully executed by Boulder Creek and FirstMerit on March 17, it was not recorded until March 30, 2006.

{¶12} After holding the construction mortgage on the Streetsboro development for approximately three years, FirstMerit assigned it to appellee, Carter-Jones Lumber Company, in June 2009. At the time of this assignment, a vice president for appellee was told by a credit officer with FirstMerit that there was no other claim to the underlying property which would be superior to the mortgage. Similarly, the vice president was not aware that Boulder Creek had technically sold two of the condominium units before the construction mortgage was recorded.

{¶13} Within two months of the foregoing assignment, appellee instituted a civil action against multiple defendants, including Boulder Creek and Fairway Partners. In its first claim, appellee sought an immediate judgment against Boulder Creek, based on a cognovit note, for the sum of \$1,669,430.78. In its second claim, it sought foreclosure on parts of the development property, on the grounds that the terms of the construction

mortgage had been breached. Concerning Fairway Partners, appellee alleged that the partnership had claimed to have an interest in the subject property.

{¶14} After the trial court had granted judgment on the cognovit note, Fairway Partners filed its answer to the foreclosure claim. Referring to the two “Unit Purchase” agreements, Fairway Partners asserted that it had an equitable lien against two of the condominiums on the property. The partnership further asserted that its equitable lien took priority over the construction mortgage because: (1) the agreements were signed before the mortgage was recorded; and (2) FirstMerit had knowledge of the agreements when the construction mortgage was executed.

{¶15} In February 2010, the trial court granted summary judgment in appellee’s favor on its foreclosure claim against Boulder Creek. However, the court did not render any decision regarding the priority of the various claims on the underlying real property. Over the ensuing seven months, both appellee and Fairway Partners submitted motions for summary judgment on the priority of equitable lien on the two condominiums. In two separate judgments, the trial court denied both motions. The matter was then assigned to a court magistrate for an evidentiary hearing.

{¶16} During the abbreviated proceeding, appellee presented the testimony of its own vice president and a credit officer with FirstMerit. In response, Fairway Partners submitted the testimony of Frank Sorace, one of the two partners in that entity, and Carl Balla, a partner in Boulder Creek and a shareholder in Concept Communities. Based upon this testimony and the various exhibits, the magistrate essentially concluded that the construction mortgage was entitled to priority over Fairway Partners’ equitable lien because FirstMerit had been in the position of a bona fide purchaser when its mortgage

was recorded. Specifically, the magistrate found that, even though the “Unit Purchase” agreements had been signed before the filing of the mortgage, FirstMerit did not have any knowledge of the two agreements at that time. Thus, the magistrate recommended that final judgment be entered in favor of appellee regarding Fairway Partners’ claim of an equitable lien.

{¶17} Fairway Partners objected to the magistrate’s decision, primarily asserting that certain factual findings were against the manifest weight of the evidence. That is, Fairway Partners argued that, since a FirstMerit employee had been aware that Boulder Creek had been able to find an investor for the Streetsboro project, FirstMerit had been obligated to determine the nature of that investment. After appellee had responded, the trial court released its judgment overruling the objections and adopting the magistrate’s recommendation as to the final disposition of Fairway Partners’ “equitable lien” claim.

{¶18} As the appellant in the instant appeal from the foregoing ruling, Fairway Partners has raised the following assignment of error:

{¶19} “The trial court committed prejudicial error in finding that the FirstMerit mortgage had priority over the Fairway Partners lien because FirstMerit had no notice of such adverse interest.”

{¶20} In challenging the magistrate’s “priority” determination, Fairway Partners has advanced two arguments concerning whether FirstMerit, the original holder of the construction mortgage, had notice of the existing equitable lien. First, the partnership maintains that the bank had actual notice of the lien through a discussion an employee had with Howard Bohrer, one of the partners in Boulder Creek. Second, the partnership submits that, even if FirstMerit did not have actual knowledge, it was aware of sufficient

facts to warrant further inquiry into the nature of the financial investment.

{¶21} As an initial point, this court would again note that Fairway Partners' lien on the development property was predicated upon its execution of the "Unit Purchase" agreements, under which it purchased two condominiums for \$360,230. In relation to an executory contract for the purchase of real property, the Supreme Court of Ohio has expressly held that the vendee acquires an equitable lien on the property for the amount which has already been paid. *Wayne Bldg. & Loan Co. v. Yarborough*, 11 Ohio St.2d 195, 199 (1967). The *Yarborough* court further held that such a lien is entitled to priority over a subsequent mortgage if the mortgagee had prior notice of the existence of the purchase agreement. *Id.*, paragraph one of the syllabus.

{¶22} Thus, pursuant to the *Yarborough* precedent, the holder of a subsequent mortgage can only take priority when the requirements for a "bona fide purchaser" have been satisfied. *Peck v. A & N Serv. Co., Inc.*, 8th Dist. Nos. 86524/87118, 2006-Ohio-1358, ¶13. "A bona fide purchaser has been defined as one who takes in good faith, for value, and without actual or constructive notice." *Biviano v. Edward C. Mahan Trust*, 11th Dist. No. 2002-T-0089, 2003-Ohio-6699, ¶19.

{¶23} In contending that the evidence before the court magistrate demonstrated that FirstMerit was unable to satisfy the "notice" requirement for a bona fide purchaser, Fairway Partners first submits that the bank had actual knowledge that it had previously bought two condominiums in the Streetsboro development. In support of its argument, Fairway Partners cites the conversation which the bank's loan officer, Jeff Skronieczny, had with Howard Bohrer. As was noted above, during the conversation in question, Bohrer told Skronieczny that William Beechler was the primary investor, along with

Frank Sorace.

{¶24} In regard to the disputed conversation, our review of the transcript of the magistrate's hearing shows that the main evidence on that point was provided by Carl Balla, one of the two partners in Crossings at Golden Pond and Boulder Creek. As part of his direct testimony, Balla appeared to indicate that the conversation had occurred at the March 2006 meeting, at which the two loan agreements for the Streetsboro project had been executed. However, upon cross-examination, Balla expressly stated that he had misspoken earlier, and that the disputed conversation had actually taken place one year previously, in March 2005 when the loan agreements for the Kent project had been signed. This point was critical, since the mortgage at issue in the instant case was tied to the Streetsboro project.

{¶25} The evidence at trial did establish that a separate meeting was conducted in relation to the Streetsboro project in March 2006. However, no evidence was given demonstrating that Beechler attended that particular meeting. More importantly, Balla could not recall whether any discussion was had in the 2006 meeting as to whom had provided the investment capital and what was the nature of the investment.

{¶26} In conjunction with the foregoing point, it must be emphasized that when Beechler and Sorace, in behalf of Fairway Partners, submitted their two checks for the Streetsboro development, Bohrer specifically told them to make the checks to Concept Communities, Inc. In turn, this means that when the investment capital was deposited with FirstMerit, the maker of the check was Concept Communities, a company owned solely by Bohrer and Balla. Although a reference to "Fairway Partners" was made on the "memo" line of the check, no other explanation was provided. Hence, Skronieczny

had no way of knowing that Beechler and Sorace were part of the Streetsboro deal.

{¶27} As a final point, this court would note that, while it is clear that Skronieczny was informed during the 2005 “Kent” meeting that there were separate investors, there was no evidence that he was ever told the exact nature of the investment; i.e., he was not told that the investment deal had been structured in such a manner that Beechler and Sorace had purchased two condominium units in the development. As a result, it could not be inferred that the structure used in the “Kent” deal was also being employed in the “Streetsboro” deal. When this point is considered along with the other evidence cited above, it supports the finding that FirstMerit, through Skronieczny, had no actual knowledge that Fairway Partners had an equitable lien on the underlying property.

{¶28} As a separate argument, Fairway Partners claim that, even if FirstMerit did not have actual knowledge, it was aware of sufficient facts which created an obligation to inquire into the matter further. As to this contention, this court would again indicate that it was never proven that Skronieczny was informed of the purchase of the two units as part of the “investment” deal in the 2005 Kent development. In addition, there was no evidence that the use of the “unit purchase” agreement was so prevalent in this type of property development that its use as part of the “Streetsboro” deal was a possibility. In light of this, a finding of constructive notice was not warranted because there was no logical reason for FirstMerit to inquire into the matter further.

{¶29} Taken as a whole, the transcript of the evidentiary hearing contains some competent, credible evidence supporting the magistrate’s finding that FirstMerit had no notice of Fairway Partners’ purchase of the two condominiums as part of the investment deal in the Streetsboro project. Therefore, both the magistrate and the trial court could

properly conclude that the three requirements for a bona fide purchaser had been met, thereby giving the construction mortgage, as now held by appellee, priority over Fairway Partners' equitable lien. For this reason, Fairway Partners' sole assignment does not have merit.

{¶30} It is the order and judgment of this court that the judgment of the Portage County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.