IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ALESSIO M. BAFFONE, Jr. and NANCY M. BAFFONE,	)	C.A. No. 09L-07-212 JAP
Plaintiffs,	)	IN REM Sci.Fa. Sur Mortgage Mortgage Record 20070705-0059650
v.	)	
DONNA BRADY, DEAN W. MILLER, WARREN BRADY,	)	IN PERSONAM
Defendants,	)	PLAINTIFFS DEMAND THAT DEFENDANTS ANSWER THE ALLEGATIONS OF THE COMPLAINT BY AFFIDAVIT PURSUANT TO 10 *Del.C.* § 3901
ANGELO GALANTINO AND MARY GALANTINO,	)	
Intervenors.	)	

MEMORANDUM OPINION

Appearances:

Theodore F. Sandstrom, Esquire, Newark, Delaware
Attorney for Plaintiffs Alessio M. Baffone, Jr. and Nancy M. Baffone

Defendants Donna Brady and Warren Brady
906 W. 5th Street, Delaware City, Delaware 19706

Defendant Dean W. Miller, 977 Port Penn Road, Middletown, Delaware 19709

Brett Bendistis, Esquire, Wilmington, Delaware
Attorney for Intervenors Angelo Galantino and Mary Galantino

JOHN A. PARKINS, JR., JUDGE

This case arises out of foreclosure proceedings upon commercial property located at 869 South DuPont Highway, New Castle, Delaware. At issue here is the priority of two mortgages secured by the DuPont Highway property.

Factual Background

On May 9, 2007, Defendants Donna Brady, Warren Brady and Dean Miller, (the "Buyers")[1], agreed to purchase the property from Intervenors Angelo and Mary Galantino, (the "Sellers"), for $1,050,000. According to the original Agreement of Sale the buyers were to deposit $100,000 and obtain a $740,000 mortgage from a financial institution. The Galantinos were to make up the shortfall, $210,000, by agreeing to take a purchase money mortgage on the property in that amount. Perhaps not surprisingly, the Galantinos agreed to subordinate their purchase money mortgage--without a subordination from the Galantinos it would have been virtually impossible for the buyers to obtain the required $740,000 financing.

The buyers eventually obtained outside financing, but the terms of that financing were so onerous that the buyers' attorney, Vance Funk IV, advised them not to accept the financing. The deal was now on the precipice of falling apart. In order to save it, Mr. Funk sought substitute financing for his clients. He was familiar with plaintiff Alessio Baffone, a local resident who, along with his wife, sometimes provides financing for real estate deals. Mr. Funk approached Mr. Baffone who, after visiting the property with his son and satisfying himself that the property had sufficient value, agreed to provide $550,000. Mr. Baffone testified that his agreement was contingent upon his lien being first priority. Under the restructured deal, the Galantinos loan was to increase from $210,000 to $400,000.

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[1] A default judgment was entered against the buyers, and they did not participate in this litigation.

The Galantinos were advised of the proposed new deal by their real estate agent, Gregorey Ellis. They testified that they agreed to the modification but, because they were taking on more risk, Mrs. Galantino told their agent on the telephone they were no longer willing to subordinate their purchase money mortgage. The agent does not recall Mrs. Galantino's instruction, and there is no evidence the Galantinos took any further steps to insure that there mortgage had priority over the Baffone mortgage. Notably, even though they were giving a $400,000 mortgage, they did not hire an attorney to assist them in protecting their interests.

Apparently there was some friction between the buyers and the Galantinos, so Mr. Funk held the settlement in two sessions on July 3, 2007. As is customary, the Baffones, as lenders, did not attend either session of the closing. Mr. Funk testified that he reviewed the changes in the transaction with each of the parties to the agreement and had the Galantinos initial the hand written changes to the Agreement of Sale. The most notable changes in the agreement, are the changes in the principal amount of the Galantinos' mortgage from $210,000 to $400,000 and a change in the interest rate from 8 per cent to 8.5 per cent. There is nothing in the revised agreement changing the Galantinos' earlier agreement to subordinate their mortgage. Indeed the Galantino mortgage was described as a "2nd Mortgage" in the Agreement of Sale.

The marked up Agreement of Sale was never retyped and resigned. Rather, the document simply contains the handwritten changes which are accompanied by what appears to be the handwritten initials of the Galantinos. They insist their initials are forged and that they never agreed to subordinate their mortgage to the Baffone mortgage. Nonetheless, they did not present any expert testimony that their initials are forgeries.

The Galantinos point to the HUD Form presented at the settlement table. That form contradicts the Agreement of Sale by listing the Galantino loan as a "Purchase Money Note." Its significance here, however, is dubious. Mr. Funk testified he did not know how the phrase "Purchase Money Note" made its way onto the HUD-1 form, but that its inclusion was a mistake. More importantly, the form did not mislead the Galantinos—Mr. Galantino conceded he did not read the HUD-1 form. There was apparently no discussion at the settlement table of the alleged change of the Galantinos' mortgage from a second mortgage to a purchase money mortgage. Neither Mr. Ellis, the buyers' agent Shirley Bishop, nor Mr. Funk recalled any such discussion. Significantly the Galantinos offered no testimony that the alleged change to a purchase money mortgage was discussed during the settlement.

Mr. Funk recorded the deed and the Baffone mortgage on July 5, 2007. He testified that he waited until the following day to record the Galantino mortgage because he wanted to make certain that it was second in priority to the Baffone mortgage.

The evidence weighs in favor of the Baffones. First, the Galantinos were sophisticated real estate investors, having previously been involved in thirteen real estate transactions. It strikes the court as unlikely that they would have simply have relied upon telephone instructions to their real agent to assure themselves their mortgage was first in line. Second, a good deal of money is at stake here, so the court expected that they would have called a forensic document examiner to support their contention their initials were forged. Third, Mr. Funk had no stake in this fight and therefore no motivation to prevaricate. The court also finds that his demeanor on the witness stand made him a credible witness. Finally, the Baffones' version of the facts simply rings truer to the court. It is logical that the Baffones—who are not commercial lenders – would not have wanted to invest more than a half million dollars in this transaction if they were not going to receive first priority. On the other hand, the

Galantinos could have had every motivation to invest $400,000 in exchange for a second priority lien because, unless they were willing to do so, their sale might not have gone forward. If the were to consider this extrinsic evidence, it would have little difficulty in concluding that the parties intended the Baffone lien to be superior to the Galantinos'. As discussed, below, however, the issue her can (and must be) resolved on the basis of the recorded Galantino mortgage because resort to extrinsic evidence is foreclosed by the parol evidence

Discussion

Delaware law provides that "a mortgage shall have priority according to the time of recording it in the proper office."[2] However, a limited exception to Delaware's "race statute" exists in 25 *Del. C.* § 2108 where priority is given to "subsequently recorded purchase money mortgages if such mortgages are recorded within five days after the deed . . . is recorded."[3] The statute states:

> If lands or tenements are sold and 1 or more mortgages on the same, or any part thereof, are made by the purchaser to the vendor for securing the purchase money or any part thereof, and if such mortgages are recorded within 5 days after the deed conveying such land or tenements from such vendor to such purchaser shall be recorded, the lien of the mortgages on the lands or tenements or any part thereof shall have preference to and priority over any judgment against the mortgagor or any other lien created or suffered by him, although such judgment or lien is of a date prior to the mortgages.[4]

While a purchase money mortgage generally has priority over any other liens on the property, it may be subordinated "to an anticipated subsequent construction mortgage by a provision of the purchase money mortgage."[5] It is undisputed in this case that the Galantinos mortgage

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2 *Jr & S Associates v. Pennamco, Inc.*, 515 A.2d 397, *2 (Del. 1986) (citing 25 *Del. C.* § 2106).

3 *Jr & S Associates*, 515 A.2d at *2 (citing 25 *Del. C.* § 2108).

4 25 *Del. C.* § 2108.

5 *Wilmington Sav. Fund Soc., FSB v. Saint Annes Club, LLC*, 2010 WL 663947, *3 (Del. Super. Jan. 29, 2010); *Masten Lumber & Supply Co. v. Suburban Builders, Inc.*, 269 A.2d 252, 253-254 (Del. Super. 1970) (finding that any such subordination provisions contained in purchase money mortgages must be strictly construed because if such provisions were to be construed liberally, a judicial determination would regularly be needed to decide the priority of liens, thus, putting lenders in an intolerable position; and, therefore, rejecting the claim that a mechanic's lien "flowing from the construction mortgage, which had been made superior to the purchase

was recorded within five days of the recording of the deed. Thus if the Galantinos mortgage was a purchase money mortgage and if they did not agree to subordinate that mortgage, the Galantino mortgage would have priority over the Baffone mortgage.

Most of the evidence and the argument in this matter focused upon whether the Galantinos agreed to subordinate their mortgage. As stated previously, the court believes the Galantinos likely agreed to subordinate their mortgage. But all of this overlooks a more fundamental question: Was the Galantinos' mortgage a purchase money mortgage?[6] When making this determination, this court is limited to the terms of the Galantino mortgage by the parol evidence rule.

The parol evidence rule prohibits this court from considering matters outside the Galantino mortgage. It is well-settled that absent an ambiguity, a court may not look to extrinsic evidence in construing a fully integrated agreement. "[I]f the instrument is clear and unambiguous on its face, neither this Court nor the trial court may consider parol evidence to interpret it or search for the parties' intentions."[7]

This rule applies to mortgages. The Delaware Supreme Court discussed the importance of the unambiguous terms of the recorded mortgage as controlling in *Guarantee Bank v. Magness Construction Co.*[8] There, the Court found that an agreement of sale was not relevant to an inquiry regarding the priority of a purchase money mortgage.[9] In that case, the purchase money mortgage contained a subordination provision which the Court, in strictly

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money mortgage by its terms, should be superior to the purchase money mortgage because the subordination provision in the purchase money mortgage indicated a general scheme of which the mechanics lien was a part").

[6] In their petition to intervene the Galantinos alleged that their mortgage was a purchase money mortgage, and the Baffones denied that allegation.

[7] *Pellation v. Bank of New York*, 462 A.2d 405,409 (Del. 1983); *Citadel Holding Co. v. Roven*, 603 A.2d 818, 822 (Del. 1992) ("It is an elementary canon of contract construction that the intent of the parties must be ascertained from the language of the contract").

[8] 462 A.2d 405, 409 (Del. 1983).

[9] *Guarantee Bank*, 462 A.2d at 409.

construing the provision, found neither identified plaintiff nor secured plaintiff's loan.[10] That provision clearly stated that it applied to the mortgagor and its successor or assigns, to which the plaintiff had no connection.[11] The Court, therefore, refused to consider an agreement of sale between the parties that the Court agreed "would push [the plaintiff] past this threshold issue."[12]

Turning to the instant document, there is no question that the Galantino mortgage is fully integrated. It is complete unto itself and can be construed without reference to any other document. In this regard the court notes that the property securing the mortgage is not identified by reference to a deed, but rather is described by its meets and bounds. Thus the Galantino mortgage can be understood and given effect without reference to any other document. There is also no ambiguity in the Galantino mortgage. Neither of the parties in this case point to any ambiguity, and the Galantinos expressly concede that the document is unambiguous. Consequently the court is limited to the terms of that mortgage in determining whether the parties intended it as a purchase money mortgage.

There is nothing in the mortgage which indicates it is a purchase money mortgage. The phrase "purchase money mortgage" appears nowhere in the document[13] and nothing in the mortgage identifies the Galantinos as the purchasers. No such language appears here. Indeed, there is nothing to distinguish the Galantinos' mortgage from the Baffone mortgage which was recorded the day before the Galantinos'. Based on the language of the Galantinos' mortgage, therefore, the court must included it was not intended as a purchase money mortgage.

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[10] *Guarantee Bank*, 462 A.2d at 409.
[11] *Guarantee Bank*, 462 A.2d at 409.
[12] *Guarantee Bank*, 462 A.2d at 409.
[13] In other cases the term "purchase money mortgage" appears in the mortgage. E.G., *Maston Lumbers & Supply Co. v. Suburban Builders, Inc.* 269 A.2d 252, 253 (Del. Super. 1970)(Mortgage contained the following: "THIS MORTGAGE is a purchase money mortgage. . . .")

The court realizes it might be accused of turning a blind eye to reality, but more than the result in this case is at stake here. If the court were to open up this case to consideration of extrinsic evidence, it might open up countless other real estate transactions to challenges based upon extrinsic evidence. This would in turn introduce uncertainty into our system of memorializing real estate transactions which has been reliable and predictable for hundreds of years.

One might reasonably ask what is the harm in considering the deed or other evidence which would disclose the Galantinos were the sellers? The answer is that one cannot be a little bit pregnant. Either the parol evidence rule precludes consideration of extrinsic evidence or it does not. If the court bends the rule to allow consideration of the deed, it has started down a very slippery slope, for there is no reasoned explanation why it should not consider other extrinsic evidence to construe the unambiguous mortgage. This could open the floodgates to spurious claims and disrupt the certainty so essential to our system of deed recordation.

For the forgoing reasons the court determines that the Baffone mortgage has priority over the Galantino mortgage and that the proceeds of the sale shall first be used to satisfy the Baffone mortgage.

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Judge John A. Parkins, Jr.

Date:_______________________