

New York Court of Appeals Issues Mortgage Lien Priority Opinion

May 10, 2016 |

Today, May 10, 2016, the New York Court of Appeals issued a lien priority opinion in connection with common charges of a condominium board in the context of prior consolidated mortgages.

When a mortgage loan borrower needs additional funds, it has long been the practice in New York to issue a new note and mortgage only for the amount of the additional funds and then consolidate the original note and mortgage with the new note and mortgage. The vehicle for such a transaction is commonly called a consolidation, extension and modification agreement ("CEMA"). Mortgage lenders and borrowers follow this arcane procedure to avoid paying mortgage tax twice on the original mortgage amount. But, these transactions also have the unintended consequence of increasing priority disputes. For example, the New York Condominium Act provides that a lien for common charges by the condominium board of managers has priority over all liens except (1) certain tax liens, (2) liens for certain state agency loans, and (3) *all sums unpaid on a first mortgage of record*. N.Y. Real Prop. Law § 339-z.

In *Plotch v. Citibank, N.A.*, the original owner obtained both a first and a second mortgage loan secured by the condominium, and consolidated the mortgages, recording the CEMA on the same date as the second mortgage. The condominium board filed the common charge lien seven years later and foreclosed on its lien. The purchaser in foreclosure took title to the condominium subject only to "all sums unpaid on a first mortgage of record." The plaintiff purchaser asserted that the first mortgage of record was the original unconsolidated mortgage. The defendant bank asserted that the CEMA effectively consolidated the two mortgages of record into one first lien mortgage. The Court of Appeals, New York's highest court, held for the defendant bank, affirming the lower court's decision and stating that to hold otherwise places form over substance. This decision resolves a conflict in positions on the issue in the lower courts.

Opinion

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