IN THE COURT OF SPECIAL APPEALS OF MARYLAND

Appeal No. 02103

September Term, 2012

NATIONAL INSTITUTES OF HEALTH FEDERAL CREDIT UNION,

Appellant

v.

BAC HOME LOANS SERVICING, L.P., *et. al.*,

Appellees

Appeal from the Circuit Court for Prince George's County
(The Honorable Leo E. Green, Jr.)

Brief of the Appellees

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Statement of the Case

The Appellees accept the Appellant's statement of the case.

Questions Presented

I. Did the trial court correctly determine that the Appellees are *bona fide* lenders for value, having paid Appellant's unsecured loan in strict compliance with the payoff statement supplied by the Appellant?

II. Did the trial court err in ruling, in the alternative, that even without *bona fide* status the Appellant's lien is superior by operation of equitable subrogation?

Statement of Facts

The Appellees do not agree with the Appellant's statement of facts. The Appellant has woven characterizations and legal conclusions that constitute argument into a factual summary that prevents any simple incorporation by the Appellees. The Appellees offer their own statement of facts.

Michael C. Hill purchased the real property commonly known as 12501 Haxall Court, Fort Washington, Maryland 20744 on November 4, 2003. (E 42). The Deed is recorded in the Land Records of Prince George's County at Liber 20325, folio 327. (E 44).

Mr. Hill financed his purchase of Haxall Court with a $600,000 loan from Washington Mutual Bank, secured by a deed of trust. (E 42). The Washington Mutual Deed of Trust is recorded in the Land Records of Prince George's County at Liber 20325, folio 332. (E 44).

On or about April 8, 2005, Mr. Hill obtained a $250,000 revolving equity line of credit from National Institutes of Health Federal Credit Union, the Appellant. (E 42).

On April 8, 2005, Mr. Hill executed a Revolving Credit Deed of Trust in favor of the Appellant. (E 42). Robert Ulmer, a Vice President with the Appellant, testified that this instrument should have been recorded "right away," but it was not. (E 22).

On July 11, 2005, the Appellant issued a payoff statement to a mortgage broker.[1] (E 42). The payoff statement was issued on a standard form prepared by the Appellant. This same form is used by the Appellant to communicate payoff information for all loans. (E 21-22). The form discloses the "total amount to pay loan in full." (E 22 and 80). The form also discloses a $30 "Maryland Release

[1] Homebanc, LLC appears in the chain of events, once, in connection with this initial request for a payoff from the Appellant. It did not broker the loan made by the Appellee three months later, and there is no document in the record evidencing Homebanc's agreement with Mr. Hill.

Recording Fee" for payoffs that relate to a recorded lien instrument. (E 25 and 81).

The July 11, 2005 request for a payoff statement did not trigger any inquiry by the Appellant into whether a lien instrument was recorded in the land records. (E 22-23).

On or about September 19, 2005 Mr. Hill began working with The Loan Corporation ("TLC"), a wholesale mortgage broker in Woodland Hills, California. (E 42). The brokerage agreement says that TLC was engaged by Mr. Hill "as an agent on behalf of the borrower." (E 133 and 146). Mr. Hill did not deal directly with prospective lenders, he dealt with his broker. (E 15).

On or about October 6, 2005 Mr. Hill accepted a conditional mortgage loan commitment secured by TLC from Countrywide, d/b/a/ America's Wholesale Lender, for a refinance loan in the amount of $1,200,000. (E 42). On that same date, TLC retained ServiceLink, LLC ("ServiceLink") to, among other things, perform a title search on the Property, provide lien clearance services, and handle the closing. (E 43).

On October 6, 2005, ServiceLink ordered a full title search of the Property from an entity called Summit Abstract. (E 43). The search performed by Summit Abstract showed no lien instrument securing the Appellant. (E 43).

On October 20, 2005, ServiceLink faxed a payoff request to the Appellant, with an authorization form signed by Mr. Hill. (E 43).

On October 21, 2005, the Appellant faxed it's form payoff statement to ServiceLink. (E 43). The form disclosed the "total amount to pay loan in full." (E 22 and 86). The form also disclosed a $30 "Maryland Release Recording Fee" for payoffs that relate to a recorded lien instrument. (E 25 and 88). This request for a payoff statement did not trigger any inquiry by the Appellant into whether it had recorded a lien instrument. (E 23).

On October 26, 2005, Mr. Hill closed on the loan. He executed an Adjustable Rate Note for $1,000,000, and a deed of trust in favor of the lender (the "Countrywide Deed of Trust"). (E 43 and 103). From the loan proceeds, $609,370 was disbursed to pay off the balance of the Washington Mutual Bank purchase money loan. (E 43 and 103). The settlement officer also disbursed $250,050.02 to the Appellant. (E 18-19, 42 and 103).

A HUD-1 Settlement Statement was executed by Mr. Hill at closing. At line 1301, the disbursement to the Appellant was recorded as "Non-Collateral Payoff to NIH Federal Credit Union." (E 104).

On December 15, 2005, the Countrywide Deed of Trust was recorded in the Land Records of Prince George's County Liber 23732, folio 057. (E 43, 44 and 107).

On January 4, 2006 the Appellant's Revolving Credit Deed of Trust was recorded in the Land Records of Prince George's County. (E 43, 44 and 69).

The Appellant filed a Complaint for declaratory and injunctive relief. (Apx. 1). [2] The Complaint named Appellee BAC Home Loans Servicing, LP as the loan servicer for the Countrywide Deed of Trust. Appendix 2. The Complaint also named Appellee Bank of New York Mellon as Trustee for SAMI II Trust 2005-AR8, the owner and holder of the note secured by the Countrwide Deed of Trust. (Apx. 2). These jurisdictional allegations were admitted in the Answer to Complaint. (Apx. 12).[3] These facts were not the subject of additional testimony at trial.

On October 25, 2011, The Honorable Leo E. Green, Jr. conducted a bench trial of the consolidated cases. After receiving evidence and oral argument, he announced his findings of fact and rulings of law. (E 28-29).

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[2] The Complaint was inadvertently omitted from the Joint Extract, and is included, here, pursuant to Rule 8-501(e) and (j).
[3] The Answer was inadvertently omitted from the Joint Extract, and is included, here, pursuant to Rule 8-501(e) and (j).

On November 4, 2011, Judge Green entered a written Order memorializing his findings of fact and conclusions of law. (E 8-9).

Standard of Review

This Court "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). The judicial gloss on this Rule explains that "[a] finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Lemley v. Lemley,* 109 Md.App. 620, 628, 675 A.2d 596,599 (1996).

Under the clearly erroneous standard, the appellate court "does not sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case." Id. The appellate court must "defer to the trial court's resolution of disputed facts." *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 355 Md. 566, 587, 735 A.2d 1081, 1092 (1999) (quoting *Stevenson v. Steele*, 352 Md. 60, 69, 720 A.2d 1176, 1180 (1998)). The appellate court is limited to deciding whether the circuit court's factual findings were supported by "substantial evidence" in the record. *GMC v. Schmitz,* 362 Md. 229, 234, 764 A.2d 838, 840 (2001) (quoting *Ryan v. Thurston,* 276 Md. 390, 392, 347 A.2d 834, 835-36 (1975)). The appellate

court must view all the evidence "in a light most favorable to the prevailing party." *Id.*

The "clearly erroneous" standard applies only to Judge Green's findings of fact, not to his determination of legal questions or conclusions of law based on findings of fact. *Goff v. State*, 387 Md. 327, 338, 875 A.2d 132, 138 (2005). When the trial court's decision "involves an interpretation and application of Maryland statutory and case law" the appellate court must determine whether the lower court's conclusions are legally correct under a *de novo* standard of review." *Id.* (quoting *Nesbit v. Gov't Employees Ins. Co.*, 382 Md. 65, 72, 854 A.2d 879, 883 (2004)).

Argument

I. Summary of the Appellees' argument.

The Appellees contend that Judge Green was correct, and that his declaration of the Appellee's *bona fide* lender status is supported by substantial and competent evidence in the record. The Appellees request a mandate from this court that answers the questions presented by the Appellees with a "yes." The Appellees also request that the questions presented by the Appellants be answered "no."

II. The trial court's ruling on the Appellees' *bona fide* status.

The Hon. Leo Green, Jr. announced his ruling from the bench. He made reference to the material evidence in the record during his analysis while announcing his decision:

> When one looks at the October 21, 2005 payoff statement it shows that they anticipated that their lien would be released and in this document which is in Exhibit E, it shows – it's the intention of the parties there that they would release the lien. And as such, that's the intention of what they were telling the settlement agent, telling the lender they were releasing their lien in favor of $250,000 and some change.
>
> To me, that's a statement of what NIH Federal Credit Union had at the time. That they were going to give up their position and that they were going to move it out and they were going to be – they were going to be done with. If I read this document. Then when I look at the settlement agent's, the HUD-1, which is Exhibit ….H. 1301, it states, "Non-collateral payoff of NIH Federal Credit Union." And again it gives the same amount $250,050.02. It's clear to this member of the bench that if – you're cleaning it up. You're saying goodbye to this loan.
>
> Now, the folks that are settling on this, they're in a little bit of a quandary because when their title search is done, it's not there. And no where do I see on the settlement statement, do I see an additional $30 release fee to be paid by the settlement agent to release this piece of property from there. There are no inquiry notice, It's a clean notice. They're getting the notice. This is what we want done. They did it.
>
> Now, that makes them a *bona fide* purchaser in my book.

(E 28-29).

Judge Green incorporated his findings and this oral ruling in the November 4, 2011 Order granting judgment in favor of the Appellees on Count I (declaratory relief) and Count II (Injunctive Relief) of the Complaint. (E 8-9).

III. Maryland law preserves the first lien position of the first to record without notice of another's equitable claim.

A) Mortgage lenders are given the same protection as *bona fide* purchasers.

The Appellee is a mortgage lender. This Court has held that mortgage lenders are entitled to the protection afforded a *bona fide* purchaser. *Washington Mut. Bank v. Homan*, 186 Md. App. 372, 398, 974 A.2d 376, 391-392 (2009). This Court has also instructed that when resolving a dispute between two competing interests to the same property, "the relevant inquiry is whether the *bona fide* purchaser or lender has notice of an existing interest in the property when his or her own interest is acquired." *Id*. at 399, 974 A.2d at 392. The type of notice upon which Maryland's recording statute places emphasis where two liens compete "is not the notice held by the deed holder at the time of recordation, but rather, the deed holder's notice as to competing interests when the deed is delivered." *Id.* at 399, 974 A.2d 393. In the context of a mortgage loan or refinance, the title instrument is delivered at settlement.

The analysis of a lender's *bona fide* status draws from two sections of the real property code, and a small body of cases describing what constitutes actual and inquiry notice. Each will be discussed, in turn.

B) <u>The recording statutes protect the *bona fid*e purchaser and lender.</u>

Maryland's recording statutes provide the base line for analysis of the Appellees' *bona fide* status. One provision establishes lien priority as between two liens that are promptly recorded. The second carves out an exception for the *bona fide* lender where another lien claimant files late, or does not file.

Md. Code Ann., Real Prop. §3-201 defines a land instrument's "effective date," as follows:

> The effective date of a deed is the date of delivery, and the date of delivery is presumed to be the date of the last acknowledgment, if any, or the date stated on the deed, whichever is later. Every deed, when recorded, takes effect from its effective date as against the grantor, his personal representatives, every purchase with notice of the deed, and every creditor of the grantor with or without notice.

In this case, the effective date for the Appellees' first recorded lien instrument is October 26, 2008, as evidenced by Mr. Hill's acknowledgment. (E 112). The Appellant's lien instrument, recorded after the Appellees', has an earlier effective date. It was executed and acknowledged April 8, 2005. (E 74). The analysis now moves to the second statutory provision.

Md. Code Ann., Real Prop. §3-203 shelters the *bona fide* lender, as follows:

> Every recorded deed or other instrument takes effect from its effective date as against the grantee of any deed executed and delivered subsequent to the effective date, unless the grantee of the subsequent deed has:

(1) Accepted delivery of the deed or other instrument;

(i) In good faith;

(ii) Without constructive notice under §3-202[4]; and

(iii) For a good and valuable consideration; and

(2) Recorded the deed first.

There is no dispute that the Appellees satisfy the requisites of subsections (1)(i),(iii) and (2). The only question in this case is whether the Appellees made the loan, accepted the deed of trust, and recorded first with notice of the Appellant's claimed interest in the real property.

C) The Appellees' *bona fide* status depends on the lack of actual or constructive notice of the Appellant's claim to an equitable interest in Mr. Hill's property.

The Appellant has conceded that the lack of a recorded lien instrument prevents constructive notice to the Appellees of the credit union's claimed interest in Mr. Hill's property. The Appellant argues that the factual record demonstrates actual notice, or that other circumstances triggered inquiry notice. Before addressing each contention, this brief will detail the material facts in the record on which Judge Green based his decision.

[4] Md. Code Ann., Real Prop. §3-202 is not applicable to this appeal. It addresses notice communicated by actual possession under color of an unrecorded title instrument.

i) What was known at settlement about Mr. Hill's account with the Appellant.

Judge Green considered a record containing substantial and competent evidence showing the extent of the Appellees' knowledge of Mr. Hill's loans with the Appellant at or before settlement. Mr. Hill had two active loan accounts with the Appellant when he made his loan application through his broker. Mr. Hill disclosed both accounts in his loan application, under the general heading "liabilities." (E 127). Before settlement, a title search by a professional abstracting company did not show any recorded lien benefitting the Appellant, for either account. (E 43 and 148-149).

The settlement company then made a direct written inquiry on the Appellant. (E 43). Through this request, the settlement company sought out specific notice of the terms and conditions of the Appellant's loan. The entirety of the Appellant's response is contained in the Payoff Statement, (E 83-85), a standard form of the Appellant's that contained the following representations:

- The "Amount to pay loan in full" was $250,050.02.
- A per diem of $45.84/day was due for late payment.
- A $30 recording fee was necessary to release any recorded lien.

- Lender maintained insurance on the property "cannot be canceled until final settlement is complete."
- Excess funds received by the Appellant would be applied to "the mortgagor's savings account with us."

The Appellant's statements within the payoff statement suggest only an exchange of money for a lien release (if a recorded lien existed), and cancellation of insurance maintained by the lender on the property or the loan.

By stating further that overpayment by the Appellees would be deposited "to the mortgagor's savings account," the Appellant confirmed it's intent to close the credit account. If the account were to be maintained as a revolving line of credit, excess funds would simply generate a credit balance on the existing credit account, and there would be no reason to announce the movement of funds to a separate savings account. This disclosure is only consistent with a finding that the Appellant intended to close the loan account upon receipt of the specified sum.

The record before Judge Green also shows what was **not provided** to the Appellees at or before settlement. The Appellant never provided the settlement company or the Appellees with a copy of the underlying note identifying the Appellant's loan as a line of credit agreement that could not be closed without

the borrower's authorization, and was subject to future advances. (E 117- 124). This document only surfaced during the discovery phase of the litigation, in response to formal discovery requests filed by the Appellees.

The Appellant has mentioned three additional items in the record that it contends were not fully considered by Judge Green. Appellant's Brief 12. The Appellant argues that inquiry notice was triggered by 1) direct disclosures by Mr. Hill to Bank of America; 2) reference to Appellant's loan as a mortgage liability on Mr. Hill's loan application; and 3) the notation "H/E" in Mr. Hill's credit report. These items are discussed, here, because the Appellees do not believe the record is correctly cited by the Appellant.

The disclosure attributed to Mr. Hill as a direct statement made to Bank of America is actually a statement made by counsel during Mr. Hill's direct exam, about his communications with a different company. The Appellant asserts that Mr. Hill directly stated to the lender his intent to maintain "a home equity line of credit, secured by the Haxall Court Property." (E 17). The actual question/answer exchange between Mr. Hill and Appellant's counsel follows:

> Q: Did you have any communications directly with Service Link?
>
> A: Absolutely. That's customary. It's any information that they needed from me to expedite closing. And sometimes I would call and say, when are we closing. So the idea that there was communication is absolute.
>
> Q: Did any of those communications involve discussion of the NIHFCU loan?

A: Yes. Yes. I said, hey look, we're trying to get NIH to subordinate so make sure that works out for me and, you , now, do whatever you have to do because I need to keep my line of credit after this deal is done. That was expressed clearly, adamantly, and repeatedly because that was my objective, you know, I needed to have a reusable line of credit at the end of this process. That was my number one priority after getting the loan itself.

Q: So you described it then as a home equity line of credit, secured by the Haxall Court property?

A: Yeah.

(E 17).

If the Appellant is arguing some sort of agency and imputed knowledge between the broker and the lender, the record shows that Service Link was engaged by TLC, (E 42), which was the broker working on behalf of Mr. Hill, as "agent for the borrower." (E 42 and E133). There is no evidence, anywhere in the record, of agency between these entities and the Appellees. Agency was not only absent, but it was not argued at trial.

The Appellant also argues that the record shows the loan account was identified as a "mortgage liability" on Mr. Hill's loan application. To the contrary, it is listed in a column marked "liabilities," along with a second credit account in the Appellant's name. (E 127).

Finally, the Appellant points out that the designation "H/E" appears next to one or more credit accounts with the Appellant shown in Mr. Hill's credit report. Mr. Hill actually testified in response to the court's questions from the

bench that he had been banking with the Appellant since 1993, and that his credit report would reflect multiple accounts. (E 16). Mr. Hill acknowledged later in his cross-examination that the first two pages of his credit report showed six different accounts with the Appellant. (E 19 and 135-137).

Mr. Hill then testified that he executed an authorization for the Appellant to release, without limitation, all information about his accounts to the settlement company. (E 19 and 42). Judge Green considered this evidence, and concluded from the payoff statement provided by the Appellant in response to the settlement company's request, that "[t]here are [sic] no inquiry notice, It's a clean notice. They're getting the notice. This is what we want done. They did it." (E 28-29).

ii) <u>It was not clearly erroneous for Judge Green to find a lack of actual notice of the Appellant's claimed interest in the real property.</u>

The Appellant is not correct in it's assertion that "[t]he concept of actual notice has never been precisely defined by the Maryland appellate courts." Appellants Brief 11. Several of the cases doing this exact thing are cited by the Appellant, albeit only for general propositions. The "notice" described in each case as sufficient to defeat a purchaser's *bona fide* status is very fact specific, but all the opinions share one requirement—there must be full information, directly

received by the party to be charged with actual notice. A closer look at the cases will demonstrate the good sense of Judge Green's decision.

In *Grayson v. Buffington*, 233 Md. 340, 196 A.2d 893 (1964), the Maryland Court of Appeals held that actual knowledge of a claimed equity in real property defeated the *bona fide* status of a second purchaser of the same real property. The second purchaser took title to a farm parcel that included within it's description approximately twenty thousand square feet of land already sold to a church by the common vendor. Before completing the purchase, the second purchaser was fully advised by it's own counsel of the church's continued right to the twenty thousand square feet. More importantly, the second purchaser promised to complete the intended conveyance to the church. The second purchaser later refused to sign a deed granting the smaller parcel to the church. The common vendor then sued to compel execution of the deed. The second purchaser claimed priority through the first recorded deed.

The trial court determined that the second purchaser was not *bona fide*. The appellate court affirmed, beginning with the general proposition that

> …one who purchases real property, with actual knowledge of prior equities, is not protected as a bona fide purchaser, but such a purchaser takes the property subject to the known equities which are enforceable against him to the same extent that they are enforceable against the vendor.

Id. at 343, 196 A.2d 896.

The actual knowledge was born of the specific disclosures made by the vendor to the second purchaser. The second purchaser was told that a portion of the farm had been sold to the church. The second purchaser even received advice of counsel on the church's entitlement to the land. The party to be charged with notice had full information, directly received, about the church's interest.

In *Fertitta v. Bay Shore Dev. Corp.*, 252 Md. 393, 250 A.2d 69 (1969), the appellate court examined the legal effect of a second deed that was intended to replace a first deed given to the State of Maryland for a road widening project in Ocean City, Maryland. The first deed's description of the property conveyed was not properly surveyed, and so a second deed was exchanged to correct the error. This left a gap between the constructed roadway, and several building lots, ranging from .3 to 1.9 feet over the length of an entire street. The son of the original grantor claimed title to this sliver of land. The lot owner, Bay Shore, claimed it as part of it's deed description.

The failure of the State to pass title to the entire parcel back to the original grantor, which then could have made the correct grant to the State, gave rise to a later claim by Bay Shore Development against the State for title to the sliver of land between several lots and the roadway. The State granted a quit claim deed to Bay Shore to close the gap. The original grantor's son then sued Bay Shore in

ejectment for title to the sliver of land, which he claimed through his father's title. The trial court held for Bay Shore, and against the original grantor's son.

The appellate court discussed the general proposition that a replacement deed among the original parties operates as an agreement to accept the changed survey description of the land conveyed. But that did not end the inquiry. At issue was the effect of the second deed on Bay Shore, and whether it took with notice of the corrective deed:

> It does not appear from the record whether Bay Shore had actual notice of the second deed from Fertitta's father to the Commission. Some of the memoranda filed in the proceeding by Fretitta state Bay Shore had notice and a comment to that effect during trial by Fertitta's counsel was not disputed, but there appears to be no such evidence in the case and no actual concession to that effect.

Id. at 400, 250 A.2d 74.

The appellate court then remanded the case for further fact finding on the issue, directing that "[t]he trial court should then determine what, if any, notice Bay shore had of the claim of Fertitta under the second deed to the [State] Commission." *Id*. at 404, 250 A.2d 76. The job of making factual findings on whether full information was actually received by the party to be charged with notice was left to the trial judge. In this case, Judge Green has already fulfilled this function.

In *Lewis v. Rippons*, 282 Md. 155, 383 A.2d 676 (1978), the appellate court was asked to determine the validity of a sheriff's sale where one parcel was sold twice. The deed for the second sale was recorded first, creating the dispute. The first purchaser was deemed the true owner, but for a reason that had nothing to do with "notice" and the recording statutes. The appellate court instructed that title vested by operation of law upon the completion of the first sheriff's sale. "Accordingly, the subsequent deeds had no effect upon that title, other than to confirm it." *Id*. at 162, 383 A.2d 681.

But the appellate court still presented a lengthy discussion of whether the second purchaser could have been *bona fide*. It advised that the second purchaser could not be *bona fide*, under the circumstances. The court's discussion included reference to trial testimony demonstrating that the second purchaser admitted to actual knowledge of the prior sale. In the second purchaser's own words, "I told the Sheriff he couldn't sell it twice, but it was sold twice." *Id*. at 160, 383 A.2d 679. This admission against interest, coupled with the second purchaser's participation in the auction process defeated his claim to *bona fide* status. Like the other cases, the court found that full information about the first sale had been directly received by the party to be charged with notice.

These cases are entirely consistent with the treatise cited by the Appellant, 4 Am. Law of Property §17.11 (5th ed.). The Appellant cites to this treatise only for the general proposition that notice defeats *bona fide* status, Appellant's Br. 10, but the direct reference to what constitutes actual notice is specific:

> Where notice of a fact is by full information directly received, it amounts to knowledge of it.

4 Am. Law of Property §17.11, fn. 11 (5th ed.).

The citations tied to this statement include a Maryland case, *Dawson v. W. M. R.R.*, 107 Md. 70, 68 A. 301 (1907). The appellate court was asked to determine whether a contract vendee for a waterfront warehouse would be bound by use restrictions imposed by the predecessor of it's contract vendor. The appellate court determined that the use restrictions were not covenants running with the land, and so they might only bind the purchaser if it had actual notice of the restrictions. The issue was framed in this way:

> …the question would be, not whether the covenant ran with the land, but whether the party should be allowed to use and appropriate the land in a manner wholly at variance with the contract entered into by its assignor, and with notice of which it purchased.
>
> *Id.* at 88, 68 A. 303.

The decision went against imposing the restriction, not because there was notice, but because the party that first agreed to accept the restriction had not been compensated. *Id.* at 95, 68 A. 306.

The cases discussed, above, showthat Maryland has defined the concept of "actual notice." The cases require a showing of full information, directly received by the party to be charged with notice. The cases show that this condition can be satisfied where the trial court finds:

- Specific disclosures made by the party asserting the equitable interest;
- Participation in events giving rise to the equitable interest by the party to be charged with notice;
- Advice of counsel given to the party to be charged with notice;
- Admissions or statements against interest by the party to be charged with notice.
- And where the trial court has not made a sufficient finding of facts, the case must be remanded for factual inquiry.

In this case, Judge Green considered all of the evidence, and correctly discerned that full information of the Appellant's claimed interest had not been actually received by the Appellees. Judge Green chose to highlight the specific written disclosures made by the Appellant, and he determined that they were inconsistent with a claim to a lien in the real property. The Appellant offered a release, and cancellation of insurance in exchange for a lump sum payment. It further promised that any excess funds would be deposited in Mr. Hill's savings

account. Judge Green also found that the Appellant's disclosures were consistent with the absence of a recorded instrument in the land records. Judge Green did not commit error, and his decision should be affirmed.

iii) It was not clearly erroneous for Judge Green to find a lack of inquiry notice.

The Appellant cites to *Washington Mut. Bank v. Homan*, 186 Md. App. 372, 974 A.2d 376 (2009), for the proposition that a lender is *bona fide* only if it is not on "inquiry notice" of facts that would trigger additional investigation into the claimed equitable interests of the Appellant. It is true that this proposition is stated in the case, *Id.* 396, 974 A.2d 391, but no finding of fact was made by the trial court, or the appellate court, and so no facts were discussed in the decision. The trial court's grant of summary judgment was reversed and remanded for factual findings on the issue of inquiry notice:

> Appellees argue that appellant cannot be a bona fide purchaser or mortgagee for value because it should have known, at the time it was granted the deed of trust, that Moriarty was conveyed the Property through a "secret, no-consideration deed" from HGNC. Appellees further assert that appellant should have been aware that the Property was partially improved by a home under construction and that HBNC was a commercial residential builder in the business of selling homes.
>
> The circuit court did not base its ruling on any of these arguments in denying appellant's motion for summary judgment. We will not ordinarily sustain a grant of summary judgment on a ground not ruled upon by the trial court, unless that alternative ground is one that the trial court had no discretion to deny summary judgment [citation omitted] We do not believe that the circuit

> court was without such discretion as to the determination of appellant's notice at the time it was granted its deed of trust. We decline to uphold the grant of summary judgment on this alternative ground.
>
> * * * *
>
> The above analysis of the circuit court on this point does not expressly state whether the circuit court considered and decided whether appellant was, as it claims to be, a *bona fide* mortgagee or lender for value. Thus, in light of our reversal, we shall remand the case for the circuit court to consider the issue of whether appellant in this case was, in fact, a bona fide mortgagee or lender for value without notice, consistent with the legal authority that we have discussed…

Id. at 402-03, 974 A.2d 394-95.

In this case, Judge Green did make specific findings of fact, and expressly stated his finding that the Appellees were *bona fide* after examining the payoff statement, and after considering the testimony of several witnesses, including a vice president of the Appellant. (E 28-29). His findings are not clearly erroneous, and no remand is necessary.

The Appellant raises three items in the record that it contends triggered inquiry notice, and which defeat the Appellees' *bona fide* status. Appellant's Br. 12. The Appellant argues that inquiry notice was triggered by 1) direct disclosures by Mr. Hill to Bank of America; 2) reference to Appellant's loan as a mortgage liability on Mr. Hill's loan application; and 3) the notation "H/E" in Mr. Hill's credit report. The Appellees have discussed, *supra,* how these statements do not accurately reflect the evidentiary record. Those remarks are

adopted by reference, here. In summary, the remarks attributed to Mr. Hill were made to another entity, and were not disclosed to the Appellees; The loan application only disclosed two general "liabilities" in the name of the Appellant, and; Mr. Hill's credit report listed five different accounts in the name of the Appellant.

Judge Green did not rely solely only on circumstantial evidence to define the scope and breadth of the Appellees' knowledge. He honed in on the settlement company's direct request, in the face of these circumstances, that the Appellant disclose the terms of a payoff. Judge Green properly focused on the express written instructions of the Appellant. The Appellant cannot complain that the Appellees' relied upon it's incomplete or mistaken disclosures.

iv) <u>There is no evidence that the Appellees knew the secret terms of the line of credit.</u>

The Appellant argues that the terms of the credit agreement with Mr. Hill prevented closure of the account. Appellants Br. 14. It may be true that the contract required Mr. Hill's signed instructions to close the account, but that statement begs the question of whether the Appellees had actual or inquiry notice that this term existed, and that it would affect a change in lien priorities.

This is not *Egeli v. Wachovia Bank, N.A.*, 184 Md. App. 253, 965 A.2d 87 (2009), where the refinance lender was charged with notice of language in a **recorded** lien instrument requiring the borrower's signature to close a revolving line of credit account. In this case, the private note containing this secret term was not recorded, and was only disclosed in pre-trial discovery. There is no evidence that the private note was disclosed with the Appellees at any time before the refinance loan to Mr. Hill. That makes the secret terms of the private note irrelevant to any analysis of notice.

IV. Judge Green did not err finding equitable subrogation applied to the payment made to the Appellant.

As an alternate basis for his decision in favor of the Appellees, Judge Green found equitable subrogation operated to place the Appellees in a first lien position to the extent the refinance loan paid off both the prior purchase money lender, Washington Mutual, and the Appellant's outstanding balance on the line of credit. Judge Green stated his findings, as follows:

> Not as persuasive but certainly holds weight is his argument with equitable subrogation. Because you received your $250,000. In addition, Mr. Hill received the $600.000 plus to – actually, Counsel, I think it's a little bit -- $609,370.34. I may have that off a little bit because when I look at this the copy is not the best, in my view. That zero could be a different number.
>
> But be that as it may, it still – I think his strongest argument is still the one that I raise but it's not his number one, it's really my number two, but I do

> think even if all said and done the equitable subrogation places them in the first position in this case.

(E 29).

The Appellant argues that Judge Green should have only applied equitable subrogation to the Washington Mutual payoff, so that only $609,370 of the $1.2 Million Dollar loan would jump in lien priority ahead of the Appellant. The rationale stated by the Appellant is that "BAC has made it very clear that it did not view NIHFCU's loan as a 'prior encumbrance'," and that "BAC did not make the payment "for the purpose of discharging" the Appellant's prior interest.

The Appellant misses the simple logic of Judge Green's ruling.

If the Appellant is correct that the Appellees are not "*bona fide*," it will be precisely because of a finding that they took their lien with **notice** of the Appellant's claimed lien. It is the state of "knowing" that underpins Judge Green's alternate ruling in favor of the Appellees.

Put another way, if the Appellees are deemed to have known of the Appellant's claimed interest, then payments made with that knowledge raise the Appellant's claimed interest to the level of a "prior encumbrance" which the Appellees sought to pay and discharge. Equitable subrogation thus applies very neatly to the facts of the case as an alternate reason for affirming Judge Green's decision.

Conclusion

For the foregoing reasons, the Appellees request a mandate which affirms the rulings of the trial court.

Statutes and Rules

Rule 8-131. Scope of review

(a) Generally. The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.
(b) In Court of Appeals -- Additional limitations.
(1) Prior appellate decision. Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals. Whenever an issue raised in a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition.
(2) No prior appellate decision. Except as otherwise provided in Rule 8-304 (c), when the Court of Appeals issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has been rendered by that Court, the Court of Appeals will consider those issues that would have been cognizable by the Court of Special Appeals.
(c) Action tried without a jury. When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous,

and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

(d) Interlocutory order. On an appeal from a final judgment, an interlocutory order previously entered in the action is open to review by the Court unless an appeal has previously been taken from that order and decided on the merits by the Court.

(e) Order denying motion to dismiss. An order denying a motion to dismiss for failure to state a claim upon which relief can be granted is reviewable only on appeal from the judgment.

Rule 8-501. Record extract

(a) Duty of appellant. Unless otherwise ordered by the appellate court or provided by this Rule, the appellant shall prepare and file a record extract in every case in the Court of Appeals, subject to section (k) of this Rule, and in every civil case in the Court of Special Appeals. The record extract shall be included as an appendix to appellant's brief, or filed as a separate volume with the brief in the number of copies required by Rule 8-502 (c).

(b) Exceptions. Unless otherwise ordered by the court, a record extract shall not be filed (1) when an agreed statement of the case is filed pursuant to Rule 8-207 or 8-413 (b) or (2) in an appeal in the Court of Special Appeals from a criminal case or from child in need of assistance proceedings, extradition proceedings, inmate grievance proceedings, juvenile delinquency proceedings, permanency planning proceedings, or termination of parental rights proceedings.

(c) Contents. The record extract shall contain all parts of the record that are reasonably necessary for the determination of the questions presented by the appeal and any cross-appeal. It shall include the circuit court docket entries, the judgment appealed from, and such other parts of the record as are designated by the parties pursuant to section (d) of this Rule. In agreeing on or designating parts of the record for inclusion in the record extract, the parties shall refrain from unnecessary designation. The record extract shall not include those parts of the record that support facts set forth in an agreed statement of facts or stipulation made pursuant to section (g) of this Rule nor any part of a memorandum of law in the trial court, unless it has independent relevance. The fact that a part of the record is not included in the record extract or an appendix

to a brief shall not preclude an appellate court from considering it.
(d) Designation by parties. Whenever possible, the parties shall agree on the parts of the record to be included in the record extract. If the parties are unable to agree:
(1) Within 15 days after the filing of the record in the appellate court, the appellant shall serve on the appellee a statement of those parts of the record that the appellant proposes to include in the record extract.
(2) Within ten days thereafter, the appellee shall serve on the appellant a statement of any additional parts of the record that the appellee desires to be included in the record extract.
(3) Within five days thereafter, the appellant shall serve on the appellee a statement of any additional parts of the record that the appellant proposes to include in view of the parts of the record designated by the appellee.
(4) If the appellant determines that a part of the record designated by the appellee is not material to the questions presented, the appellant may demand from appellee advance payment of the estimated cost of reproducing that part. Unless the appellee pays for or secures that cost within five days after receiving the appellant's demand, the appellant may omit that part from the record extract but shall state in the record extract the reason for the omission.
(e) Appendix in appellee's brief. If the record extract does not contain a part of the record that the appellee believes is material, the appellee may reproduce that part of the record as an appendix to the appellee's brief together with a statement of the reasons for the additional part. The cost of producing the appendix may be withheld or divided under section (b) of Rule 8-607.
(f) Appendix in appellant's reply brief. The appellant may include as an appendix to a reply brief any additional part of the record that the appellant believes is material in view of the appellee's brief or appendix. The appendix to the appellant's reply brief shall be prefaced by a statement of the reasons for the additional part. The cost of producing the appendix may be withheld or divided under section (b) of Rule 8-607.
(g) Agreed statement of facts or stipulation. The parties may agree on a statement of undisputed facts that may be included in a record extract or, if the parties agree, as all or part of the statement of facts in the appellant's brief. As to disputed facts, the parties may include in the record extract, in place of any testimony or exhibit, a stipulation that summarizes the testimony or exhibit. The

stipulation may state all or part of the testimony in narrative form. Any statement of facts or stipulation shall contain references to the page of the record and transcript. The parties are strongly encouraged to agree to such a statement of facts or stipulation.

(h) Table of contents. If the record extract is produced as an appendix to a brief, the table of contents required under section (a) of Rule 8-504 shall include the contents of the appendix. If the record extract is produced as a separate volume, it shall be prefaced by its own table of contents. The table of contents shall (1) reference the first page of the initial examination, cross-examination, and redirect examination of each witness and of each pleading, exhibit, or other paper reproduced and (2) identify each document by a descriptive phrase including any exhibit number.

(i) Style and format. The numbering of pages, binding, method of referencing, and covers of the record extract, whether an appendix to a brief or a separate volume, shall conform to sections (a) through (c) of Rule 8-503. Except as otherwise provided in this section and in section (g) of this Rule, the record extract shall reproduce verbatim the parts of the record that are included. Asterisks or other appropriate means shall be used to indicate omissions in the testimony or in exhibits. Reference shall be made to the pages of the record and transcript. The date of filing of each paper reproduced in the extract shall be stated at the head of the copy. If the transcript of testimony is reproduced, the pages shall be consecutively renumbered. Documents and excerpts of a transcript of testimony presented to the trial court more than once shall be reproduced in full only once in the record extract and may be referred to in whole or in part elsewhere in the record extract. Any photograph, document, or other paper filed as an exhibit and included in the record extract shall be included in all copies of the record extract and may be either folded to the appropriate size or photographically or mechanically reduced, so long as its legibility is not impaired.

(j) Correction of inadvertent errors. Material inadvertently omitted from the record extract may be included in an appendix to a brief, including a reply brief. Other inadvertent omissions or misstatements in the record extract or in any appendix may be corrected by direction of the appellate court on motion or on the Court's own initiative.

(k) Record extract in Court of Appeals on review of case from Court of Special

Appeals. When a writ of certiorari is issued to review a case pending in or decided by the Court of Special Appeals, unless the Court of Appeals orders otherwise, the appellant shall file in that Court 20 copies of any record extract that was filed in the Court of Special Appeals within the time the appellant's brief is due. If a record extract was not filed in the Court of Special Appeals or if the Court of Appeals orders that a new record extract be filed, the appellant shall prepare and file a record extract pursuant to this Rule.

(l) Deferred record extract; special provisions regarding filing of briefs.

(1) If the parties so agree in a written stipulation filed with the Clerk or if the appellate court so orders on motion or on its own initiative, the preparation and filing of the record extract may be deferred in accordance with this section. The provisions of section (d) of this Rule apply to a deferred record extract, except that the designations referred to therein shall be made by each party at the time that party serves the page-proof copies of its brief.

(2) If a deferred record extract authorized by this section is employed, the appellant, within 30 days after the filing of the record, shall file four page-proof copies of the brief if the case is in the Court of Special Appeals, or one copy if the case is in the Court of Appeals, and shall serve two copies on the appellee. Within 30 days after the filing of the page-proof copies of the appellant's brief, the appellee shall file one page-proof copy of the brief and shall serve two copies on the appellant. The page-proof copies shall contain appropriate references to the pages of the parts of the record involved.

(3) Within 25 days after the filing of the page-proof copy of the appellee's brief, the appellant shall file the deferred record extract, and the appellant's final briefs. Within five days after the filing of the deferred record extract, the appellee shall file its final briefs.

(4) The appellant may file a reply brief in final form within 20 days after the filing of the appellee's final brief, but not later than ten days before the date of scheduled argument.

(5) In a cross-appeal:

(A) within 30 days after the filing of the page-proof copies of the appellee/cross-appellant's brief, the appellant/cross-appellee shall file one page-proof copy of a brief in response to the issues and argument raised on the cross-appeal and shall include any reply to the appellee's response that the appellant wishes to file;

(B) within 25 days after the filing of the cross-appellee/appellant's reply brief, the appellant shall file the deferred record extract, the appellant's final briefs, and the final cross-appellee's/appellant's reply briefs;
(C) within five days after the filing of the deferred record extract, the appellee shall file its final appellee/cross-appellant's briefs; and
(D) the appellee/cross-appellant may file in final form a reply to the cross-appellee's response within 20 days after the filing of the cross-appellee's final brief, but not later than ten days before the date of scheduled argument.
(6) The deferred record extract and final briefs shall be filed in the number of copies required by Rules 8-502 (c) and 8-501 (a). The briefs shall contain appropriate references to the pages of the record extract. The deferred record extract shall contain only the items required by Rule 8-501 (c), those parts of the record actually referred to in the briefs, and any material needed to put those references in context. No changes may be made in the briefs as initially served and filed except (A) to insert the references to the pages of the record extract, (B) to correct typographical errors, and (C) to take account of a change in the law occurring since the filing of the page-proof briefs.
(7) The time for filing page-proof copies of a brief or final briefs may be extended by stipulation of counsel filed with the clerk so long as the final briefs set out in subsections (3) and (5) of this section are filed at least 30 days, and any reply brief set out in subsections (4) and (5) of this section is filed at least ten days, before the scheduled argument.
(m) Sanctions for noncompliance. Ordinarily, an appeal will not be dismissed for failure to file a record extract in compliance with this Rule. If a record extract is not filed within the time prescribed by Rule 8-502, or on its face fails to comply with this Rule, the appellate court may direct the filing of a proper record extract within a specified time and, subject to Rule 8-607, may require a non-complying attorney or unrepresented party to advance all or part of the cost of printing the extract. The appellate court may dismiss the appeal for non-compliance with an order entered under this section.

Md. Real Prop Code Ann § 3-201. Effective date of a deed

The effective date of a deed is the date of delivery, and the date of delivery is presumed to be the date of the last acknowledgment, if any, or the date stated on

the deed, whichever is later. Every deed, when recorded, takes effect from its effective date as against the grantor, his personal representatives, every purchaser with notice of the deed, and every creditor of the grantor with or without notice.

Md. Real Prop Code Ann § 3-202. Possession under an unrecorded deed

If a grantee under an unrecorded deed is in possession of the land and his possession is inconsistent with the record title, his possession constitutes constructive notice of what an inquiry of the possessor would disclose as to the existence of the unrecorded deed.

Md. Real Prop Code Ann § 3-203. Subsequent deed; priority of deed first recorded

Every recorded deed or other instrument takes effect from its effective date as against the grantee of any deed executed and delivered subsequent to the effective date, unless the grantee of the subsequent deed has:
(1) Accepted delivery of the deed or other instrument:
   (i) In good faith;
   (ii) Without constructive notice under § 3-202; and
   (iii) For a good and valuable consideration; and
(2) Recorded the deed first.

Certificate of Compliance

I hereby certify, pursuant to Rule 8-112 and 8-504, that this brief was printed with proportionally spaced 13 point font, in the Book Antiqua style, with at least 1.5 line spacing between lines of text, except headings, indented quotations and footnotes.

Thomas C. Valkenet

Certificate of Service

I hereby certify that on June 11, 2011, two copies of this brief were served, by first-class mail, or overnight delivery, to the following persons.

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Glenwood, Maryland 21738

Attorney for the Appellant

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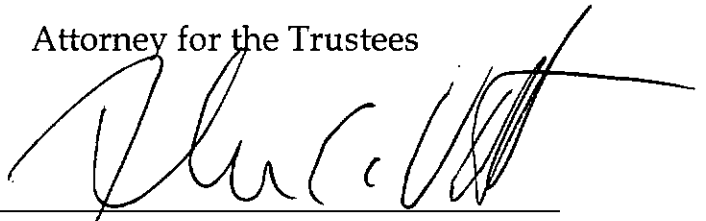
Attorney for the Trustees



Thomas C. Valkenet

Appendix

07/14/2010 08:35 3016278267 CARROLL SMITH PAGE 01

IN THE CIRCUIT COURT OF MARYLAND
FOR PRINCE GEORGE'S COUNTY

NATIONAL INSTITUTES OF HEALTH
FEDERAL CREDIT UNION
P.O. Box 6475
Rockville, MD 20849

Plaintiff,

v.

BAC HOME LOANS SERVICING, LP
6400 Legacy Drive
Plano, TX 75024

and

THE BANK OF NEW YORK MELLON, AS TRUSTEE FOR SAMI II TRUST 2005-AR8, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-AR8
48 Wall Street
New York, NY 10015

and

HOWARD N. BIERMAN, JACOB GEESING and CARRIE M. WARD, SUBSTITUTE TRUSTEES
4520 East West Hwy, Suite 200
Bethesda, MD 20814

Defendants.

Case No.: CAE10-21444

Clerk of the Circuit Court
2010 JUL 14 AM 9:22
PR GEO CO MD #72

Clerk of the Circuit Court
2010 JUL 14 AM 9:40
PR GEO CO MD #72

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff National Institutes of Health Federal Credit Union, by counsel, hereby files this Complaint seeking declaratory relief and says as follows:

PR GEO CO MD #72
2010 JUL 14 AM 9:22
Clerk of the Circuit Court

1

[redacted]

PARTIES

1. Plaintiff National Institutes of Health Federal Credit Union ("NIHFCU") is a not for profit financial cooperative with its principal place of business in Rockville, Maryland.

2. Defendant The Bank of New York Mellon, as Trustee for SAMI II Trust 2005-AR8, Mortgage Pass-Through Certificates, Series 2005-AR8 ("Bank of NYM") is the owner and holder of a note in the original principal amount of $1,000,000. The note is secured by a Deed of Trust dated October 25, 2005 in favor of America's Wholesale Lender and recorded among the land records of Prince George's County at Book 23732, Page 057. Bank of NYM is a New York corporation with its principal place of business in New York, NY. Bank of NYM is the successor in interest to originating lender of the loan secured by this deed of trust.

3. Defendant BAC Home Loans Servicing, LP (f/k/a Countrywide Home Loans Servicing) ("BAC Home Loans") is a Texas Limited Partnership with its principal place of business in Plano, Texas. On information and belief, BAC Home Loans is the loan servicer for the loan secured by the AWL Deed of Trust and is the attorney-in-fact for Bank of NYM.

4. Defendants Howard Bierman, Jacob Geesing and Carrie Ward are partners in the firm of Bierman, Geesing, Ward & Wood LLC, a Maryland limited liability company with its principal

office in Bethesda, Maryland (collectively the "BGW Defendants"). Bank of NYM appointed the BGW Defendants as Substitute Trustees for purposes of foreclosing on subject property described below.

5. The real property at issue in this action is commonly known as 12501 HAXALL COURT, FORT WASHINGTON, MD 20744 and is more particularly described as:

> BEING KNOWN AND DESIGNATED AS LOT NUMBERED 42 IN THE SUBDIVISION KNOWN AS PLAT 1, SECTION 12, TANTALION ON THE POTOMAC, AS CORRECTION PLAT THEREOF RECORDED IN PLAT BOOKNLP 103 AT PLAT 1, AMONG THE LAND RECORDS OF PRINCE GEORGE'S COUNTY, MARYLAND, BEING IN THE 5th ELECTION DISTRICT OF SAID COUNTY AND BEING THE SAME PARCEL OF LAND CONVEYED IN A DEED DATED 11-4-2003 AND RECORDED 9-16-2004 AT BOOK 20325, PAGE 327 OF THE PRINCE GEORGE'S COUNTY LAND RECORDS.

Tax ID # 05-0373613 (the "Haxall Court Property").

JURISDICTION & VENUE

6. This Court has subject matter jurisdiction to grant the declaratory relief sought in this action pursuant to Md. Code Ann., Cts. & Jud. Proc. § 3-409.

7. This Court has personal jurisdiction over the Defendants under Md. Code Ann., Cts. & Jud. Proc. § 6-102 or § 6-103.

8. Venue is appropriate under Md. Code Ann., Cts. & Jud. Proc. § 6-201 because the real property at issue in located in Prince George's County.

FACTS

9. Michael C. Hill purchased the Haxall Court Property in 2004 along with several adjacent properties as part of a development project.

10. The Haxall Court Property was initially encumbered by a $600,000 purchase-money deed of trust in favor of Washington Mutual (the "WAMU Deed of Trust").

11. In the spring of 2005 Mr. Hill obtained a $250,000 equity line of credit from NIHFCU. On April 8, 2005 Mr. Hill executed a Revolving Credit Deed of Trust in favor of NIHFCU securing the $250,000 line of credit (the "NIHFCU Deed of Trust"). Although the NIHFCU Deed of Trust was executed on April 8, 2005, it was not successfully recorded in the Prince George's County land records until January 4, 2006. A copy of the NIHFCU Deed of Trust is attached as Exhibit 1.

12. The NIHFCU loan was made with the intention and expectation that the NIHFCU Deed of Trust would be in second lien position behind the $600,000 WAMU Deed of Trust. As such, NIHFCU was meant to be in first in line as to any eventual sale proceeds exceeding $600,000 or the balance secured by the WAMU Deed of Trust.

13. Several months after obtaining the line of credit from NIHFCU, Mr. Hill refinanced the original WAMU Deed of Trust with a new $1,000,000 loan originated by Quicken Loans and

funded by Countrywide d/b/a America's Wholesale Lender.[1] As security for this new loan Mr. Hill executed a new deed of trust on October 25, 2005 in favor of America's Wholesale Lender (the "AWL Deed of Trust"). The AWL Deed of Trust was recorded on December 15, 2005. A Copy of the AWL Deed of Trust is attached as Exhibit 2.

14. Although the NIHFCU Deed of Trust had not yet been recorded when the AWL Deed of Trust was recorded, Quicken Loans and the title company it was working with, Service Link, were very much aware of the NIHFCU Deed of Trust and line of credit.

15. Prior to the closing on the new loan, Quicken Loans contacted NIHFCU and asked them to subordinate their lien to the AWL Deed of Trust. On June 23, 2005, faxed its subordination requirements to "Nikki" at Quicken Loans. Later that same day Quicken Loans faxed its formal subordination request to NIHFCU including all supporting documentation required by NIHFCU. Quicken Loans also paid NIHFCU a fee of $150 to process and review the subordination request. A copy of the subordination request from Quicken Loans and related correspondence is attached as Exhibit 3.

[1] The loan was originated by Quicken Loans but America's Wholesale Lender was ultimately funded the loan and was named as the "Lender" in the deed of trust with Mortgage Electronic Registration Systems, Inc. named as nominee. Quicken Loans acted as broker / agent on behalf of America's Wholesale Lender in this transaction.

16. NIHFCU expressly rejected the subordination request submitted by Quicken Loans. The request failed to meet NIHFCU's internal risk guidelines and criteria for subordinations. Quicken Loans apparently decided to move forward with the loan notwithstanding NIHFCU's refusal to subordinate.

17. On October 20, 2005, NIHFCU received a request for a payoff balance from Service Link, the title company handling the closing on the new loan originated by Quicken Loans. The following day NIHFCU faxed a payoff statement back to Service Link showing a payoff balance of $250,050.22. Copies of this request and the payoff statement from NIHFCU and related documents are attached as Exhibit 4.

18. NIHFCU received a check from Service Link dated October 21, 2005 in the amount of $250,050.22. This payment was not sent with the intent or expectation that the NIHFCU line of credit would be closed out. Nor was there any intent or expectation that NIHFCU's Deed of Trust would be released. The borrower, Mr. Hill, specifically instructed that he wanted the line of credit to remain open. The pay down of $250,050.22 did not reduce the balance on the line of credit to zero. A balance of $685.84 remained on the account after the funds were applied.

19. On the day of the closing on the new loan, Mr. Hill drew $2,000 on the NIHFCU line of credit. Per Mr. Hill's express instructions the line was never closed out and it

remained secured by the NIHFCU Deed of Trust. Mr. Hill subsequently maxed out the line of credit. Thereafter, Mr. Hill's development venture collapsed and he filed for bankruptcy protection on May 21, 2008.[2]

20. Eventually, the Defendants obtained relief from the automatic stay and initiated foreclosure proceedings against the Haxall Court Property under the AWL Deed of Trust. The foreclosure action docketed in the Circuit Court for Prince George's County is styled as *Jacob Geesing, et al. v. Michael C. Hill aka Michael Cyprian Hill* (Case No. CAE10-09377).

21. The Report of Sale recently filed by the Substitute Trustees states that the Haxall Court Property was sold at auction on May 25, 2010. Defendant Bank of NYM was the successful bidder and bought back the Haxall Court Property on a credit bid of $855,000. A copy of the Report of Sale is attached as Exhibit 5. The Substitute Trustees have not recorded a deed for this sale and the sale has not yet been ratified.

COUNT I
(Declaratory Relief)

22. The foregoing paragraphs 1 - 21 are incorporated by reference as if fully set forth herein.

[2] *In re: Michael Hill*, U.S. Bnkr. Ct. Dist. of Md., Case No. 08-13165 (Chp 7).

23. NIHFCU's Deed of Trust was executed 6 months prior to the AWL Deed of Trust which Defendants are foreclosing on. Due to errors and mistakes that were not attributable to NIHFCU, however, the NIHFCU Deed of Trust was recorded 3 weeks after the AWL Deed of Trust was recorded. As a result, the AWL Deed of Trust appears to have record priority.

24. At the time the AWL Deed of Trust was recorded, the Defendants and/or their predecessors in interest had specific actual knowledge of the NIHFCU Deed of Trust. Defendants' actual notice of NIHFCU's unrecorded interest is evidenced by their subordination request to NIHFCU and the paydown of the balance on the NIHFCU line of credit.

25. Defendants won the race to record, but they arrived at the clerk's office with actual notice of NIHFCU's prior unrecorded interest. Therefore, under Maryland's race-notice recording statute, Md. Code Ann., Real Prop. § 3-203, the AWL Deed of Trust is not entitled to priority over the NIHFCU Deed of Trust.

26. Defendants are asserting that the AWL Deed of Trust is in first lien position with priority over the NIHFCU Deed of Trust. NIHFCU contends that the NIHFCU Deed of Trust is in first lien position. Therefore, an actual controversy exists between the parties.

27. The foreclosure action initiated by Defendants and currently pending would theoretically wipe out the NIHFCU Deed of Trust. Therefore, a judicial declaration establishing that the NIHFCU Deed of Trust is in first lien position on the Haxall Court Property is necessary to avoid irreparable harm to NIHFCU.

WHEREFORE, for the foregoing reasons, Plaintiff National Institutes of Health Federal Credit Union requests that this Court enter an Order as follows:

(a) Declaring that the NIHFCU Deed of Trust is a valid, first-position lien on the Haxall Court Property with priority over the inferior lien of the AWL Deed of Trust;

(b) Declaring that if the pending sale of the Haxall Court Property by the Substitute Trustees to the Bank of New York Mellon is not enjoined then the conveyance to the Bank of NYM will be subject to the lien of the NIHFCU Deed of Trust; and

(c) Any further relief that the Court may deem appropriate.

COUNT II
(Injunctive Relief)

28. The foregoing paragraphs 1 - 27 are incorporated by reference as if fully set forth herein.

29. A valid lien priority dispute exists as to the respective liens of the NIHFCU Deed of Trust and the AWL Deed of Trust on the Haxall Court Property.

30. The foreclosure action and pending sale of the Haxall Court Property threaten to extinguish the lien of the NIHFCU Deed of Trust which would cause irreparable harm to NIHFCU.

31. NIHFCU has no adequate remedy at law and the benefits of obtaining the request injunctive relief far outweigh the potential harm the Defendants may possibly incur if the injunction is granted.

WHEREFORE, Plaintiff National Institutes of Health Federal Credit Union requests that this Court:

(a) Enter a preliminary injunction enjoining the ratification of the sale of the Haxall Court Property by the Substitute Trustees to the Bank of New York Mellon; and

(b) Staying the foreclosure proceedings currently pending before this Court in the action styled as *Jacob Geesing, et al. v. Michael C. Hill aka Michael Cyprian Hill* (Case No. CAE10-09377) until the lien priorities can be adjudicated; and

(c) Any further relief that the Court may deem appropriate.

Brien M. Penn
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3060 Washington Road, Suite 260
Glenwood, MD 21738
410-914-7366
443-926-0589 (fax)
brien@brienpennlaw.com

Counsel for Plaintiff NIHFCU

[redacted]

NATIONAL INSTITUTES OF HEALTH FEDERAL CREDIT UNION Plaintiff v. BAC HOME LOANS SERVICING, LP, et. al., Defendant	IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY Case No.: CAE10-21444

ANSWER

BAC Home Loans Servicing, LP and The Bank of New York Mellon, as Trustee for SAMI II Trust 2005-AR8, Mortgage Pass-Through Certificates, Series 2005-AR8, through their attorney, Thomas C. Valkenet, Answers the Complaint and says:

1. Paragraph 1 is jurisdictional and requires no response.
2. Paragraphs 2 and 3 are admitted.
3. These Defendants are without information sufficient to form a belief as to the truth of the allegations of paragraph 4.
4. Paragraph 5 is admitted.
5. Paragraphs 6, 7 and 8 are jurisdictional and require no response.
6. These Defendants are without information sufficient to form a belief as to the truth of the allegations of paragraph 9.
7. These Defendants are without information sufficient to form a belief as to the truth of the allegations contained in paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19. The Defendants will stipulate as to the authenticity of documents which appear in the Land Records for Prince George's, but otherwise deny the genuineness or authenticity of all documents attached as exhibits to the Complaint.

8. Responding to paragraph 20, these Defendants admit that a case bearing the cited caption is on the Prince George's County docket.
9. These Defendants admit the allegations of paragraph 21.
10. Responding to paragraph 22, these Defendants incorporate all prior responses.
11. These Defendants are without information sufficient to form a belief as to the truth of the allegations in paragraph 23.
12. These Defendants deny the allegations of paragraph 24.
13. These Defendants admit winning the "race to record," but deny the balance of paragraph 25.
14. These Defendants admit the allegations of paragraph 26.
15. Paragraph does not contain allegations of fact, and requires no response.
16. Responding to paragraph 28, these Defendants incorporate their prior responses.
17. These Defendants deny the allegations of paragraphs 29.
18. These Defendants admit paragraph 30 to the extent the Plaintiff's lien is extinguished, but deny the balance of the allegations.
19. These Defendants deny the allegations of paragraph 31.

First Affirmative Defense

The Complaint fails to state a claim upon which relief may be granted.

Second Affirmative Defense

Plaintiff assumed the risk of the injury alleged, having failed to perfect its lien for several months after actual notice of the Defendants' loan transaction.

Third Affirmative Defense

Plaintiff's actions constituted contributory negligence, having failed to perfect its lien for several months after receiving actual notice of the Defendants' loan transaction.

Fourth Affirmative Defense

Plaintiff is barred by estoppel.

Fifth Affirmative Defense

Plaintiff is barred by laches, having done nothing to perfect its lien for several months after actual notice of the Defendants' loan transaction.

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Attorney for BAC Home Loans Servicing, LP and
The Bank of New York Mellon, as Trustee for
SAMI II Trust 2005-AR8, Mortgage Pass-Through
Certificates, Series 2005-AR8

Certificate of Mailing

I HEREBY CERTIFY that on this 30th day of August, 2010, a copy of the foregoing was mailed via first class mail, postage prepaid to:

Brien M. Penn
Law Office of Brien Penn LLC
3060 Washington Road, Suite 260.
Glenwood, Maryland 21738

Attorney for the Plantiff

_____
Thomas C. Valkenet