



**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

BOB DEGEORGE ASSOCIATES, INC.;)	WD72651
Respondent,)	
)	OPINION FILED:
KD CHRISTIAN CONSTRUCTION)	
CO.,)	May 24, 2011
Respondent,)	
v.)	
)	
HAWTHORN BANK,)	
Appellant.)	

**Appeal from the Circuit Court of Jackson County, Missouri
Honorable John M. Torrence, Judge**

Before: Mark D. Pfeiffer, P.J., Victor C. Howard, and Thomas H. Newton, JJ.

Hawthorn Bank (Hawthorn) appeals from the trial court's judgment in favor of Bob DeGeorge and Associates, Inc. (DeGeorge) and KD Christian Construction Company (KD Christian) on the issue of the priority of their mechanics' liens over Hawthorn's purchase money deed of trust. We reverse and remand.

Factual and Procedural Background

Blue Springs Xtreme Powersports (Xtreme) was planning to buy a building and three tracts of land. Xtreme contracted with DeGeorge to remodel the building. Thereafter, DeGeorge subcontracted with KD Christian to perform some of the work.

On June 4, 2008, Xtreme borrowed \$2,512,500 from Hawthorn to acquire the property; it purchased the property and executed a purchase money deed of trust¹ to secure the loan. Hawthorn did not record the deed of trust at that time. On June 6, 2008, DeGeorge began work on the project. On June 17, 2008, KD Christian began work. The work was completed on July 25, 2008. Xtreme failed to pay DeGeorge amounts due for labor and materials, and DeGeorge failed to pay KD Christian.

On November 18, 2008, DeGeorge filed a mechanic's lien² on the property, seeking \$165,768.47 for labor, materials, and services, as well as pre-judgment interest.³ On November 19, 2008, Hawthorn recorded its deed of trust. On January 20, 2009, KD Christian also filed a mechanic's lien, seeking \$17,532.83.

DeGeorge sued Xtreme seeking, *inter alia*, to foreclose its mechanic's lien.⁴ KD Christian moved to intervene, seeking to foreclose its mechanic's lien and naming Hawthorn as a third-party defendant. The trial court granted the motion. DeGeorge also filed a claim against Hawthorn, seeking priority of its mechanic's lien over Hawthorn's mortgage on the property. Xtreme confessed judgment to DeGeorge, stating that \$147,883.70⁵ was owed as the value of services rendered, together with interest and attorney's fees, \$194,874.38 in the aggregate.

¹ "A deed of trust is a form of a mortgage consisting of an instrument that employs an interest in real estate as security for the performance of some obligation." *Glenstone Block Co. v. Peabworth*, 330 S.W.3d 98, 101 (Mo. App. S.D. 2010) (quoting RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 1.1 cmt. (1997)).

² "A mechanic's lien is a remedy in the nature of a charge on the land given by statute to secure a priority of payment for the performance of labor or the supply of material to buildings or other improvements to be enforced against the particular property in which they have become incorporated." *Medlin v. RLC, Inc.*, 194 S.W.3d 926, 930 (Mo. App. S.D. 2006) (internal quotation marks and citation omitted).

³ The amount sought by DeGeorge included amounts due to subcontractors.

⁴ Claims brought against additional alleged owners of interests in the property were subsequently dismissed.

⁵ Some payment had been made since DeGeorge's initial lien filing.

DeGeorge moved for summary judgment, seeking a ruling that its lien was superior to Hawthorn's mortgage. Hawthorn moved for summary judgment against DeGeorge and KD Christian contending, *inter alia*, that its mortgage was superior to the mechanics' liens. The trial court found that under "well-established law" and "section 429.010 et. seq.," Hawthorn's "interest in the property as established by its Deed of Trust, is subordinate to the liens" It granted DeGeorge's motion for summary judgment and denied Hawthorn's motion for summary judgment against DeGeorge and KD Christian. The parties filed a "Stipulation, and Submission for Summary Determination in Lieu of Trial," and the trial court subsequently entered a final judgment. Its judgment found DeGeorge and KD Christian were entitled to enforce and foreclose upon their liens in the amounts of \$147,883.70 and \$17,532.83, together with costs, pre-judgment interest, and post-judgment interest. It held that "any sale proceeds" were to be "distributed pro-rata" to DeGeorge and KD Christian, with the excess after the liens to be distributed to Hawthorn. Hawthorn appeals.

Standard of Review

We review the trial court's grant of summary judgment *de novo* under the standard set forth in *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. banc 1993). *Rothermich v. Weber's St. Charles Lanes, Inc.*, 957 S.W.2d 509, 510 (Mo. App. E.D. 1997). For a summary judgment, the moving party has the burden to show it was entitled to judgment as a matter of law and there were no genuine disputes as to material facts. *Id.* If the moving party makes this showing, the burden shifts to the non-moving party to establish a genuine dispute of material fact by proffering "competent materials beyond the mere allegations contained in its pleadings." *Id.*; see also Rule 74.04(c). Because mechanics' lien

statutes are remedial, they are to be liberally interpreted in favor of the lien claimant. *BCI Corp. v. Charlebois Const. Co.*, 673 S.W.2d 774, 780 (Mo. banc 1984).

Legal Analysis

Hawthorn argues the trial court erred because pursuant to Missouri common law, its purchase money deed of trust (hereinafter “the mortgage”) had priority over a mechanic’s lien. DeGeorge and KD Christian, however, assert that because the mortgage was recorded subsequent to the liens arising, under Missouri recording statutes and the “first spade” rule, the mortgage is subordinate to the liens.⁶

Under the “first spade rule,” mechanics’ liens attach “with the first delivery of material or commencement of work.” *Glenstone Block Co. v. Pebworth*, 264 S.W.3d 703, 715 -716 (Mo. App. S.D. 2008) (internal quotation marks and citation omitted). If a lender makes a secured loan *after* a mechanic has commenced work, the mechanic’s lien is held superior because the lender is on notice of the mechanic’s lien. *Id.* However, “[m]echanic’s liens do not take precedence over a purchase money deed of trust which secures repayment of funds used to purchase land upon which the improvements giving rise to the lien claims are erected.” *Westinghouse Elec. Co. v. Vann Realty Co.*, 568 S.W.2d 777, 781 (Mo. banc 1978). Otherwise stated, purchase money deeds of trust have a priority of interest in the land over mechanics’ liens.⁷ *Id.*

⁶ DeGeorge and KD Christian also argue in the alternative that if Hawthorn had priority, its failure to record resulted in a waiver. Waiver is an affirmative defense that DeGeorge and KD Christian failed to assert in their answer. Consequently, it was not preserved for our review. *Westinghouse Elec. Co. v. Vann Realty Co.*, 568 S.W.2d 777, 781 (Mo. banc 1978).

⁷ The priority of the purchase money deed of trust also extends to improvements on the land at the time of purchase. *See Trout’s Invs., Inc. v. Davis*, 482 S.W.2d 510, 515 (Mo. App. 1972) (“[W]hen a prior mortgage is given upon land and an existing structure, and such structure is improved or repaired, the mechanic's liens arising incident to such improvement or repair are given no priority.”).

This priority for purchase money mortgages is generally based on a theory of fundamental fairness: absent the value given by the purchase money mortgagee, the mortgagor would never have held title to the property encumbered by the lien. *See* 5 RICHARD R. POWELL, POWELL ON REAL PROPERTY, § 38.16[2] at 38-122 (Michael Allan Wolf, ed. 2000). “The theory is that a given owner would have no interest at all in the acquired property without the credit extended by the purchase money mortgagee.” Priority to purchase money mortgages is thus granted to avoid conferring a windfall on lien claimants, as well as to encourage purchase money financing. *See* RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.2 cmt. b (1997).

In the instant case, Hawthorn’s mortgage was executed, DeGeorge and KD Christian’s construction work commenced, and Hawthorn’s mortgage was subsequently recorded. Relying on Missouri statutory law, DeGeorge and KD Christian assert that because Hawthorn’s mortgage was not recorded prior to their lien arising, it was subsequent in time, does not benefit from the rule of purchase money priority, and was therefore inferior to DeGeorge and KD’s liens. DeGeorge and KD Christian maintain that granting priority to the unrecorded mortgage conflicts with sections 429.060, 442.380, and 442.400.

Section 429.060⁸ provides in relevant part that the mechanic’s lien “shall be preferred to all other encumbrances which may be attached to or upon such buildings, bridges or other improvements, or the ground, or either of them, subsequent to the commencement of such buildings or improvements.” This section grants priority to mechanics’ liens over subsequently attaching encumbrances and grants this priority in the buildings, bridges or other improvements, and in the realty itself. *See Dave Kolb Grading, Inc. v. Lieberman Corp.*, 837 S.W.2d 924, 934 (Mo. App. E.D. 1992). Section 442.380 requires that “[e]very instrument in writing”

⁸ Statutory references are to RSMo 2000.

conveying or affecting real estate conveyances “shall be recorded.” Section 442.400 provides that:

No such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record.

These recording statutes “protect[] a subsequent bona fide purchaser unless he has actual notice of a prior unrecorded instrument.” *Obernay v. Chamberlin*, 506 S.W.2d 446, 450 (Mo. 1974); *see also Trigg v. Vermillion*, 20 S.W. 1047, 1048 (Mo. 1892). DeGeorge and KD Christian assert that under the first spade rule and Missouri recording law, because Hawthorn’s purchase money deed of trust was not valid until it was recorded, it was an encumbrance attaching subsequent to their mechanics’ liens and consequently inferior under section 429.060.

Our research reveals competing views as to whether the failure to record a purchase money mortgage executed prior to a mechanic’s lien subordinates the purchase money mortgage to the lien, or whether purchase money mortgage priority applies independent of recording. *See, e.g., M.L.C., Annotation, Purchase-money mortgage as within provision of statute defeating or postponing lien of unrecorded or unfiled mortgage*, 137 A.L.R. 571 (1942) (Supp. 168 A.L.R. 1164 (1947)). For example, in *Shade v. Wheatcraft Industries, Inc.*, the Kansas Supreme Court addressed statutes with language similar to ours: K.S.A. 58-2223, “which provides that an unrecorded mortgage is valid only between the parties until it is recorded” and K.S.A. 60-1101, “which provides that a mechanic’s lien has priority over all liens or encumbrances which are subsequent to the commencement of the mechanic’s work.” 809 P.2d 538, 542 (Kan. 1991). The Court reasoned that a purchase money mortgagee had as much duty to record its interest as any other lender and that it was “not an onerous requirement for the protection of priority.” *Id.* at 543. Absent actual notice by the lienholders of the mortgage, it held, the mechanic’s lien took

priority between a purchase money mortgagee and a mechanic's lienholder whose lien attached after execution but before recording of the purchase money mortgage. *Id.* at 546.

Our case law, however, does not support this view. We have not found that the failure to record creates an exception to purchase money mortgage priority.⁹ In *Westinghouse*, the purchase money deed of trust was recorded prior to execution of the construction contract on the land and prior to the mechanic's lien being filed. 568 S.W.2d at 779. *Westinghouse* did not consider the effect of a purchase money deed of trust being unrecorded or such a deed being recorded subsequent to the mechanic's lien arising or being filed. In *Butler Supply, Inc. v. Coon's Creek, Inc.*, relying on the Missouri Supreme Court's opinion in *Westinghouse*, we stated that "[m]echanic's liens do not . . . take precedence over purchase money deeds of trust that secure repayment of funds used to purchase land upon which the improvements giving rise to the lien claims are erected." 999 S.W.2d 748, 750 (Mo. App. W.D. 1999). In *Butler*, construction work commenced prior to the recording of *non*-purchase money deeds of trust. We determined that the liens arising from the work "attached" under the first spade rule and section 429.060 when the work commenced, which was prior to the recording of the deeds, and that *because the deeds were not purchase money deeds*, the liens took precedence. *Id.* at 750.

In *Allied Pools, Inc. v. Sowash*, construction began prior to a deed of trust's execution or recordation. 735 S.W.2d 421, 423-24 (Mo. App. W.D. 1987). We determined that if the deed of trust were a purchase money deed of trust, the mechanic's lien would be inferior "as to the real

⁹ We also note that Missouri follows the Third Restatement of Property, which disregards the issue of recording when determining the priority of a purchase money mortgage as against a prior claim against the mortgagor. *See Sutton Funding, LLC v. Mueller*, 278 S.W.3d 702, 704-05 (Mo. App. E.D. 2009) (holding that pursuant to the Third Restatement, a judgment lien arising prior to a purchase money mortgage was inferior to the subsequent mortgage). Section 7.2(b), Purchase Money Mortgage Priority, states: "A purchase money mortgage, *whether or not recorded*, has priority over any mortgage, lien, or other claim that attaches to the real estate but is created by or arises *against the purchaser-mortgagor* prior to the purchaser-mortgagor's acquisition of title to the real estate." *Id.* at 704 (emphasis added). While we find the rationale supporting this rule analogous to the present issue, we do not find this section directly applicable as it is limited to those mortgages, liens, or claims arising against *the mortgagor* prior to the mortgagor's acquisition of title, whereas a deed of trust and mechanics' liens are interests against the realty.

property,” despite construction commencing before the deed was executed or recorded. *Id.* at 427. We found this to be “true even if the deed of trust was executed after construction of the pool was commenced.” *Id.* We then remanded to determine whether the deed of trust at issue was a purchase money deed of trust in order to resolve the question of priority. *Id.* Similarly, in *Joplin Cement Co. v. Green County Building & Loan Association*, the portion of a loan which represented money advanced to pay the purchase price for the realty was deemed superior to a mechanic’s lien, despite the work commencing before the deed of trust was executed and recorded. 74 S.W.2d 250, 251 (Mo. App 1934).¹⁰ “[S]uch liens would not be superior to a purchase-money mortgage, for the purchase of the lot itself upon which the improvements were erected, although such mortgage was given after the improvements were commenced.” *Id.* Consequently, if a deed of trust not even executed until after the work commences has priority as to the realty, it cannot be said that a deed of trust executed but not recorded until after the work commences does not also have priority. As a result, the trial court erred in finding “that Hawthorn’s interest in the property, as established by its Deed of Trust, [was] subordinate to the liens.”

In addition to arguing their liens had priority over the entirety of the property, KD Christian further argues that they “enjoy undisputed priority in the improvements they provided” pursuant to section 429.050.

“[A] mechanic’s lien claimant is also a creditor who has contributed to the enhanced value of a debtor/owner’s property by contributing to improvements on the property.” 5 Powell, POWELL ON REAL PROPERTY § 38.16(2), 38-122. While protection for the purchase money mortgagee is based on fundamental fairness because the mortgagee has given value, in the

¹⁰ It is undisputed in the instant case that the entire loan extended by Hawthorn was advanced to pay the purchase price for the property.

context of new construction, the mechanic has given value beyond that relied on by the purchase money mortgagee. *Trout's Invs., Inc. v. Davis*, 482 S.W.2d 510, 515 (Mo. App. 1972); see generally Comment, *Mechanic's Liens—Priority Over Mortgages and Deeds of Trust*, 42 Mo. L. Rev. 53, 61-66 (1977). To balance this inequity, section 429.050 grants mechanics' lien claimants priority in the improvements contributed. Section 429.050 provides in relevant part:

The lien for the things aforesaid, or work, *shall attach to the buildings, erections or improvements for which they were furnished or the work was done*, in preference to any prior lien or encumbrance or mortgage upon the land upon which said buildings, erections, improvements or machinery have been erected or put; and any person enforcing such lien may have such buildings, erections or improvements sold under execution, and the purchaser may remove the same within a reasonable time thereafter;

(Emphasis added). Section 429.050 thus provides that a lien for erections or improvements shall have a priority in interest over a prior encumbrance, but that such lien only attaches to “the buildings, erections or improvements for which they were furnished or the work was done.” Otherwise stated, section 429.050 protects lien priority in new construction over a prior mortgage on the land. See *Dave Kolb Grading, Inc.*, 837 S.W.2d at 934 (“[section] 429.050 . . . provides that mechanics' liens shall attach to the *improvements* constructed in preference to any prior lien.”). However, this section does not give the mechanic's lienholder priority in repairs. *Trout's Invs., Inc.*, 482 S.W.2d at 516.

The mechanic's lien claimant is given the right to order improvements sold or removed in certain circumstances, but the section does not grant the lien claimant priority in the land itself. *Union Elec. Co. v. Clayton Center Ltd.*, 634 S.W.2d 261, 263 (Mo. App. E.D. 1982). Some commentators have questioned the practical effect. See, e.g., *Mechanic's Liens*, 42 Mo. L. Rev. at 60. However, “[w]hether the material of which an improvement in a building is composed can

be taken out of the building without substantial damage is not the criterion prescribed”

Elliott & Barry Engineering Co. v. Baker, 114 S.W. 71, 72 (Mo. App. 1908). Rather:

A deed of trust gives the beneficiary security, not only on the ground conveyed, but also on a tenement standing on it; and the security on the tenement will not be displaced in favor of a later material man who improves or repairs the building. The case of the erection of a new and distinct structure on the ground stands on a different footing, as, it seems, do work and material done and furnished in completing a structure which was unfinished when a mortgage was taken.

Id.; see also *Trout's Invs., Inc.*, 482 S.W.2d at 515. To the extent DeGeorge's and KD Christian's liens represented "buildings, erections or improvements" as the terms are used in section 429.050, they would be entitled to the rights granted by section 429.050. See *Mechanic's Liens*, 42 Mo. L. Rev. at 61 n.59 ("improvement" has a distinct meaning under section 429.050).

Because the trial court held that DeGeorge's and KD Christian's liens had priority over the entirety of the realty, no findings were made as to whether the liens represented work with respect to repairs, or with respect to improvements. It thus cannot be determined whether DeGeorge and KD Christian's liens fall within section 429.050. Consequently, we must remand.

Conclusion

For the foregoing reasons, the trial court's summary judgment is reversed and we remand for further proceedings consistent with this opinion.

Thomas H. Newton, Judge

Pfeiffer, P.J., and Howard, J. concur.