

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC

Filed March 28, 2008

SUPERIOR COURT

STOCK BUILDING SUPPLY, INC. et al.,

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v

C.A. No.: NM-2006-0495

FREEDOM BAY COTTAGES, LLC, et al.

DECISION ON HSH NORDBANK AG’S PRIORITY ISSUES AND SUMMARY
JUDGMENT MOTIONS AGAINST CLAIMANTS

THUNBERG, J. On August 21, 2007, this Court entered an order (attached as Exhibit 1) requesting the Receiver’s recommendations regarding the mechanics’ lien claimants potential entitlement to, or preclusion of, priority position as against HSH Nordbank AG (“HSH Nordbank”).

It is clearly evident to this Court from reviewing the various submissions of the Receiver in this matter that the Receiver has executed his assigned tasks in an assiduous, cogent and systematic fashion. The facts and travel of the within controversy, as meticulously set forth in the Receiver’s filings of August 9, 2007, as amended August 15, 2007 and October 1, 2007, are hereby adopted and incorporated by reference.

The Receiver correctly posits that the June 11, 2007 and August 21, 2007 orders of this Court required claimants asserting priority over HSH Nordbank’s mortgages to present such claims by a formal motion or “other pleading.”

Because the following claimants failed to so assert priority, the Court is compelled to grant summary judgment on behalf of HSH Nordbank with respect to these “claimants” assertion of priority: Applied Water Management, Bayside Concrete, Fuss & O’Neill, Garcia Drywall,

Horner Millwork, Interiors by Provident, RMR Associates and Sun Dog.

Another group of claimants seeks to establish and preserve its liens through what the Receiver “colloquially” characterizes as “piggybacking.” The latter refers to the process of enforcing a lien “by joining in the lien enforcement proceedings filed by another claimant by entering an appearance as permitted under G.L. 1956 § 34-28-16 within 20 days of the return date in that proceeding, without filing their own independent enforcement action.” (Receiver’s Report 10-01-2007, pp. 6-7). Specifically, this group contends that since HSH Nordbank failed to timely file an appearance in the Hodess and S.D.I. actions, timely by claimants in those actions, i.e. those filing within 20 days enjoy priority over HSH Nordbank’s mortgages.

The Receiver correctly notes that pursuant to § 34-28-10 a claimant who neglects to file its notice of “lis pendens” and “petition to enforce” within 20 days of recording its notice of intention “wholly [loses]” its claim which would be, under such circumstances, deemed void. Our Supreme Court has declared the statutory requirement of the 120 day filing period is “clear, unequivocal, and mandatory.” Pezzuco Construction v. Melrose L.P., 764 A.2d 174, 177 (R.I. 2001) (cited in aforementioned Receiver’s Report pp. 9-11).

The application of the latter “clear, unequivocal and mandatory” language is unavoidable and in no way affords relief by way of any fictional “piggybacking” mechanism. Thus, the Court is compelled to grant HSH Norbank’s motion for summary judgment as to those lienors whose claims are “void and wholly lost” due to their failure to file, or timely file, a notice of lis pendens and a petition to enforce; viz., Applied Water Management, Bayside Concrete, Buchanan Electric, Ferguson-Daddario, Fernandes Masonry, Garcia Drywall, Stock Building Supply, and Tree Pro.

The Court is further compelled to grant summary judgment in HSH Nordbank’s favor as

against those claimants who did not timely file an appearance in the Hodess or S.D.I. enforcement actions, in which actions HSH Nordbank filed its motion to intervene. These claimants are identified in Exhibit 2 to this decision, a chart appended to the Receiver's Report and designated therein as Exh. 5.

HSH Nordbank also contends that since the Freedom Bay Project occupies real estate in two towns, Middletown and Portsmouth, it was incumbent upon claimants to record their notices in both towns in order to preserve their actions. (Not all lienors in the present action recorded in both towns.) However, our state Supreme Court has declared that in such a scenario, i.e. where a claimant records in one town only, the claim is not entirely voided, but is sustainable as to the portion in the location where the filing took place. See Receiver's Report pp. 17-18, citing Poole v. Fellows, 54 A.2d 772 (R.I. 1903).

The aforementioned group of claimants have made recordations as follows:

See Receiver's Report pp. 16-17.

Thus, the above-referenced claimants are entitled to pursue any right or remedy pursuant to notices properly filed in the venue of recordation. Contrastingly, HSH Norbank's motion for summary judgment is granted with respect to any claims for relief "concerning that portion of the Freedom Bay Project situated in the municipality in which they failed to record their notice of intention or notice of lis pendens." Receiver's Report, p 18.