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Supreme Court No. 95476-3

Court of Appeals No. 76106-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KLAHANIE ASSOCIATION,
Plaintiff/Respondent,

v.

KRYSTAL MCCORD; RICHARD E. MILLER & EVELYN E.
MILLER., and the marital community comprised herein: BANK OF
AMERICA, N.A.,
Defendants,

SUNDANCE AT KLAHANIE CONDOMINIUM ASSOCIATION, a
Washington nonprofit corporation,
Defendant/Appellant.

**ANSWER OF RESPONDENT KLAHANIE ASSOCIATION TO
PETITION FOR DISCRETIONARY REVIEW**

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I. INTRODUCTION

The Court of Appeals correctly applied the Supreme Court's precedent set forth in BAC Home Loans Services LP v. Fulbright, 180 Wn.2d 754, 762, 328 P.3d 895 (2014), as it held that under the Washington Condominium Act ("WAC"), and specifically RCW 64.34.364(2)(a), Respondent Klahanie Association's ("Klahanie") lien had priority over the Sundance at Klahanie Condominium Owners Association's ("Sundance") lien, as the Klahanie Declaration ("an encumbrance") was recorded prior in time to the recording of the Sundance Declaration. The Court of Appeals further correctly recognized that the BAC Court noted the similarity between a WCA lien and a lien for future advances. *Id.* at 763, and accordingly reasoned that it was persuasive as to non-WCA assessments liens, as well.

In short, the Court of Appeals correctly held that the Klahanie CC&Rs were an incumbrance recorded before the 1995 Sundance CC&Rs. Therefore, consistent with the CC&Rs and BAC, the Klahanie lien, which arises out of that encumbrance, should be treated as a mortgage for future advances. As such, it relates back to the recording date of the CC&Rs, and

pursuant to the exception found in RCW 64.34.364(2)(a) had priority over the Sundance lien. Thus, the Trial Court properly granted summary judgment and its decision was properly affirmed by the Court of Appeals.

Moreover, the Court of Appeals further correctly dismissed the Sundance argument that it was merely a creditor, not the debtor, so therefore it was not liable for costs and reasonable attorney fees under the Klahanie CC&Rs.

II. STATEMENT OF FACTS

Klahanie is a homeowners association validly existing under the Declaration of Covenants, Conditions and Restrictions of Klahanie Association, recorded in King County, Washington, under Recorder's Number 8502060789 (hereinafter the "Declaration"). *CP 1 and CP 47.*

Defendants Krystle McCord and Evelyn E. Miller own real property commonly known as 25235 SE Klahanie Blvd #N-201, Issaquah, WA 98029 and legally described as:

UNIT N-201, SUNDANCE AT KLAHANIE,
A CONDOMINIUM, ACCORDING TO
DECLARATION THEREOF, RECORDED
UNDER KING COUNTY RECORDING
NO. 9505010788, AND ANY
AMENDMENTS THERETO; SAID UNIT IS
LOCATED ON SURVEY MAP AND

PLANS FILED IN VOLUME 123 OF
CONDOMINIUMS, AT PAGES 86
THROUGH 92, IN KING COUNTY,
WASHINGTON. *CP 46.*

The property was acquired by Krystle McCord, a single woman and Richard E. Miller and Evelyn E. Miller, husband and wife, as community property, which interest by operation of law, title vested in Defendant Evelyn E. Miller upon Richard Miller's death. *CP 28 and CP 37.*

Such Defendants fell behind in the payment of assessments due Klahanie and Klahanie instituted the subject action to foreclose its lien. *CP 1-5 and CP 67.* The Klahanie lien was a floating continuing lien from 2012 onward. *CP 457-459.*

Named in the subject action was Sundance as the Defendants had further failed to pay assessments due Sundance and Sundance had filed a judgment by stipulation against such Defendants in King County Superior Court under cause number 15-2-11567-7 SEA. *CP 12 and CP 304-305 and CP 894-899.*

Klahanie noted a motion for order of default and default judgment as against Defendants Krystle McCord and Evelyn E. Miller, the owners of the Subject Property being foreclosed in the above entitled matter. That

motion also sought to foreclose the interest of such Defendants and the lien of Sundance. *CP 26-32.*

Sundance was not defaulted as it filed an Answer to Klahanie's Complaint, which Answer denied Klahanie's lien priority and sought an award of actual attorney fees and costs. *CP 84-86.* After entry of default judgment and order of foreclosure, the only issue remaining for the Court was the determination of priority between the liens of Klahanie and Sundance. *CP 105.*

Thereafter Klahanie sought a stipulation of priority from Sundance and Sundance's legal counsel failed to respond to multiple inquiries regarding the same. Instead he chose to file a motion to exclude witnesses at the upcoming trial and contemporaneously Klahanie filed a motion for an order setting a pre-trial conference, or in the alternative continuing trial date to allow for the filing of a motion for summary judgment before the Court. *CP 105 and CP 250-258 and CP 558-583.*

The Honorable Monica Benton ordered a pre-trial conference, denied Sundance's motion to exclude witnesses and continued the trial date, thereby allowing the parties to file summary judgment motions. At the time of the pre-trial conference, which was held via telephone conference, Judge Benton indicated that she may be reassigned and that prior to scheduling a

summary judgment hearing date, the parties should wait until June 2016, at which time it would be determined if the matter was to be reassigned or not. *CP 106 and CP 628-632.*

The subject action was subsequently reassigned from Judge Benton to Judge Bruce Heller. Sundance filed an affidavit of prejudice against Judge Heller and the matter was subsequently reassigned to Judge Jean Rietschel. *CP 634 and CP 930-933.*

The issue presented to Judge Rietschel was a narrow issue; specifically, whether the Klahanie lien for assessments which had been reduced to judgment was a superior lien to Sundance's judgment lien entered by stipulation and attaching to the Subject Property on March 12, 2015, and any existing statutory lien of Sundance accruing for assessments becoming due within the 3-year statute of limitations set forth in RCW 64.34.364(8). *CP 92-103 and CP 304-305.*

Klahanie's argument was based on the fact that its Declaration was recorded 10 years before the Sundance Declaration and provided constructive notice to all parties with subsequently recorded liens and encumbrances that Klahanie had a lien for any and all assessments which may become due in the future; and that lien when it attached, was superior to any and all liens except for liens for general taxes, utility liens, and for

any mortgage extended for purposes of construction or to secure payment of the purchase price of a lot or living unit. *CP 92-103*.

The Klahanie argument was premised upon the Supreme Court's holding in BAC Home Loans Services LP v. Fulbright, 180 Wn.2d 754, 762, 328 P.3d 895 (2014), a decision which recognized that a Declaration recorded prior in time could provide constructive notice of a lien for future advances securing the obligation of the owner/obligor which had yet to be incurred; specifically, future assessments which became delinquent. *CP 92-103*.

Sundance argued at the Trial level that the Court's holding applied only to condominiums and therefore was not relevant, notwithstanding the Supreme Court's clear recognition that a Declaration recorded prior in time was akin to a mortgage for future advances. See BAC supra. at 762 and 763. *CP 99-100 and CP 460-471*.

Klahanie further argued that the existing Sundance lien, based upon the 3-year statute of limitations set forth in RCW 64.34.364(8) was subsequent in time to the Klahanie lien. *CP 97-98*.

Judge Rietschel granted Klahanie's summary judgment relying upon the Supreme Court holding in BAC supra. and denied Sundance's

motion for summary judgment based upon the superiority of the Klahanie lien. CP 543-545, which decision was affirmed by the Court of Appeals.

III. ARGUMENT

A. Sundance's Claim That The Court Extinguished The Statutory Lien Of Sundance Permanently By Its Decision Misstates The Decision And Is Without Basis.

Sundance's primary argument advanced before this Court is singularly a strained argument which is frivolous.

Sundance argues that the condominium lien created by its Declaration and RCW 64.34.364 as a statutory lien has been permanently foreclosed by the Trial Court and the decision of the Court of Appeals. However, a simple examination of RCW 64.34.364 reveals that Sundance's statutory lien only attaches to the condominium unit for assessments when they become due.

Sundance's failed argument claims that the Court of Appeals decision affirming the Trial Court had the effect of permanently extinguishing its statutory lien. This argument is profoundly nonsensical. First of all, RCW 64.34.364(1) as well as Article 12.12.1 of the Sundance Declaration establishes that the lien only attaches to the condominium unit

when the assessment becomes due. *CP 405*. Thus, for assessments post Court Order, a new lien automatically attaches to the condominium unit.

Secondly, as a junior lien holder Sundance had the right to redeem thereby re-establishing its lien priority in the event of a Sheriff Sale. See RCW 6.23 et. seq.

Thirdly, by that same failed logic, once the super priority lien established under RCW 64.34.364(3) has been satisfied, a lender's foreclosure of a mortgage recorded prior in time to the condominium lien would also permanently extinguish the statutory lien. Moreover, post-possession if that lender sold to a third party, that third party would not be liable for any assessments accruing from the date the purchaser took title. Nothing in the law supports this argument.

In short, the only Sundance lien which was foreclosed by the Court's determination of priority was that for assessments which had already accrued.

In addition to Sundance's argument lacking any legal foundation, Sundance further fails to articulate how the Court of Appeals decision affects substantial public interest under RAP 13.4(b)(4). The Petition primarily addresses alleged errors in the Court of Appeals analysis, rather

than the “issue of substantial public interest” standard of the rule. It also misstates the Court of Appeals holding to provide for the permanent extinction of a statutory condominium lien on a unit, which it clearly does not hold. The Court of Appeals’ decision was well reasoned and based not only on clear statutory language, but the Supreme Court’s holding in BAC Home Loans Services LP v. Fulbright, 180 Wn.2d 754, 762, 328 P.3d 895 (2014).

B. The Klahanie’s Declaration Provides Constructive Notice To All Parties With Subsequently Recorded Liens And Encumbrances Of The Priority Of Its Lien As Against All Other Liens Except Mortgages Extended For Purposes Of Construction Or Purchase Of A Lot Or Living Unit Within The Klahanie Development.

Defendant Sundance’s analysis of lien priority under the Klahanie Declaration is simply wrong.

It is without question that this Declaration recorded in 1985 is a prior recorded encumbrance running with the land and controlling the rights and remedies between Klahanie and any party claiming any interest in a lot or living unit within Klahanie, including Sundance. *CP 142 and CP 147-149.*

The Declaration further provides under Article 5.1 and 5.7 that the Association lien for assessments is only subordinate to mortgages extended for construction and/or purchase of a lot or living unit (which definition includes a condominium unit). *CP 172-175.*

While it is clear that any lien assessed against a lot or living unit necessarily accrues after the recording of the Declaration, the Declaration creates a lien securing future assessments due and provides constructive notice of the priority of that lien for those future assessments as against all other liens and/or encumbrances subsequently recorded against the lot or living unit. Thus, Sundance's argument that the terms of the Declaration only define the priority of the lien when it attaches is contrary to the plain language of the Declaration. In short, the plain language of the Declaration establishes that when the lien attaches it takes priority over all other liens and encumbrances, other than those extended for construction or purchase of a lot or living unit. *CP 172-175.*

Other statutory liens affect property rights similarly. For example the assessment for general property taxes or sewer usage only attach as liens when they become delinquent. Thereafter those liens have retroactive priority as against recorded liens and mortgages, including those recorded prior to the liens.

Similarly, the Klahanie Declaration defines the priority of its lien as against other recorded liens and encumbrances of record (including those recorded prior to the lien attaching) pursuant to Articles 5.1 and 5.7. *CP 172-175*. Furthermore with respect to the Sundance lien, under RCW 64.34.364(2)(a), the Klahanie Declaration recorded prior in time takes priority over the Sundance lien.

Sundance attempts to divert the Court's attention by failing to discuss the full application of BAC Home Loans Servicing, LP v. Fulbright; 180 Wash.2d 754; 328 P.2d 895 (2014).

As the Court is aware, Condominium Declarations created under RCW 64.34 recognize the superiority of all mortgages filed prior in time to the condominium's lien save and except for 6 months of operational dues, known as the "Super Priority Lien." See RCW 64.34.364(3).

Previously, under RCW 64.32.200(2), the Horizontal Property Regime Act, there was no Super Priority Lien and mortgages recorded prior in time took priority as against the Association lien in their entirety. Thus the legislature established a mortgagee's priority over the condominium lien both under the former statute, RCW 64.32.200(2) and the present statute, RCW 64.34.364(3).

The Supreme Court in BAC Home Loans Servicing, LP v. Fulbright; 180 Wash.2d 754; 328 P.2d 895 (2014) simply recognized that an Association's Declaration recorded prior in time to mortgages, provided constructive notice of the Super Priority Lien. Indeed, the Court recognized that there was no requirement to record any claim of lien to perfect this lien. Id at 763.

The Court used the constructive notice given by the Declaration of the Super Priority Lien and applied the same principle established for mortgages for future advances. Thus the Court stated:

This is, in essence, a particular application of a lien for future advances, which secures obligations the obligor has not yet incurred. 'It has...long been the rule in this jurisdiction that a mortgage to secure future advances takes priority over mechanics' and materialman's liens accruing after recordation of the mortgage' (citations omitted)... In other words, **once a lien for future advances is recorded, it takes priority over subsequently recorded liens, even where an obligation under the lien for future advances does not in fact arise until after the**

subsequent lien is recorded...Id at 763. (Emphasis Added).

As noted above, the Klahanie Association Declaration was recorded in 1985, and provided constructive notice of the priority of its lien, as against all other liens except for mortgages extended for construction and/or purchase of a lot or living unit. See Article 5.1 and 5.7. *CP 172-175*. While the Association lien attaches only when the assessment accrues, this is the same as a future advance on a mortgage. As the BAC court recognized in the cite above, “...once a lien for future advances is recorded, it takes priority over subsequently recorded liens, even where an obligation under the lien for future advances does not in fact arise until after the subsequent lien is recorded....” Id at 763 (Emphasis Added).

In spite of Sundance’s argument to the contrary, it is clear that this principle controls in the instant case. Furthermore, it makes complete sense. Why would the Master Association subordinate its right to claim a lien as against a sub-condominium association’s lien within the Master community? Moreover, under RCW 64.34.364(2)(a), the legislature recognized and established the priority of liens and encumbrances recorded prior to the recordation of the condominium association declaration. It would be indeed an anomalous result to ignore that authority and the clear

language of the Klahanie Declaration establishing its lien priority. Moreover, the application of mortgage law with respect to constructive notice of future advances is consistent with the Klahanie Declaration which provides,

“...such lien when created, shall be a security interest in the nature of a mortgage in favor of the Association...” See Article 4.10. *CP 169-170*.

Accordingly Sundance’s argument regarding first in time priority is utterly without merit.

C. RCW 64.34.435(1) Has No Application To The Subject Action.

Sundance also advances an argument that the Condominium Act requires that a prior in time construction lien be partially released when a buyer purchases a unit from the developer upon payment of the prorated portion of that construction lien. However, the subject Klahanie lien against the Defendants McCord and Miller accrued post transfer of title to Defendants McCord and Miller. In other words, the lien accrued when Defendants McCord and Miller were already in title and failed to pay their assessments accruing against their unit. Thus, the reference to a master construction lien assessed against the entire condominium has no relevance

to the issue before this Court, as the Klahanie lien regards only assessments against the Defendants McCord's and Miller's individual unit.

Assuming arguendo that Sundance is claiming that a construction lien cannot have superiority over its lien on a unit post sale to a homeowner, that is obvious because the construction lien gets paid at closing. However pursuant to the Klahanie Declaration and RCW 64.34.364(2)(a), the construction lien has priority over both a Klahanie and Sundance lien until the unit is sold to a homeowner, after which only a purchase money security mortgage has superiority (assuming no outstanding tax or utility lien) over the Klahanie lien.

D. Klahanie And Sundance Are In Privity Of Estate And Thus The Covenants Set Forth In The Klahanie Declaration Are Binding Upon Sundance And Its Decision To Contest The Priority Of The Klahanie Lien As Established By Klahanie's Declaration Entitles Klahanie To An Award Of Its Reasonable Attorney Fees And Costs.

As the record shows, Klahanie's legal counsel attempted to avoid legal fees and costs, and made multiple inquiries to defense counsel to resolve this matter based upon the clear law which the Court reviewed, and upon which the Court granted Summary Judgment to Klahanie on October 21, 2016. *CP 558-583*.

It is without dispute that the attorney fees and costs incurred could have been avoided if defense counsel simply stipulated to lien priority based upon the clear law. *CP 543-545*.

Sundance's counsel did not respond to inquiry, but decided to go down a litigious path. *CP 250-258*.

Sundance's counsel has argued that Sundance should not be exposed to an award of attorney fees and costs against it, claiming such fees and costs should only attach as a Judgment In Rem against the Subject Property. In support of this argument, defense counsel cites 4518 S, 256 LLC vs. Gibbon, et. al., 195 Wash.App. 423 (2016), which simply held that a third party was not a party to the subject Deed of Trust unless such party specifically assumed or agreed to pay the loan on acquisition of title. This is basic contract law. However, the basis for an award herein is not based upon contract, but upon the Declaration, which is a covenant running with the land.

Defense counsel further cites to RCW 4.84.330. As noted, neither the case nor the statute are applicable in the instant case, since both the case and the statute regard contracts and privity of contract. Without assumption, there is no privity of contract, and unless a third party is a party to a contract by assumption, the terms of the contract do not apply to that third party.

However, in the instant case the Klahanie Declaration is a covenant running with the land and is binding upon, pursuant to its very terms, “all parties having or acquiring any right, title, or interest in Klahanie or any part thereof.” (Emphasis Added) *CP 147-149*. By virtue of the Sundance lien, such condominium association was a party in interest, taking its interest subject to the Klahanie Declaration. This was the essence of the Court’s ruling as to why Klahanie had lien priority. Similarly, since Sundance was a party in interest, as the unsuccessful party challenging the Klahanie lien priority, Sundance is subject to the attorney fee provision set forth in Section 11.4 of the Klahanie Declaration. *CP 197*.

In short, the Declaration as a covenant running with the land is a restriction upon any party having an interest in any part of Klahanie based upon the basic real estate principle of privity of estate. The Declaration simply memorializes that real property principle.

The only basis that Sundance had in challenging the Klahanie lien priority is based upon its interest in the Subject Property arising from its lien. Its lien was subject to the Klahanie lien, it challenged that priority and lost, so pursuant to the clear attorney fee provision in the Klahanie Declaration, as the unsuccessful party Sundance should have judgment taken against it for the attorney fees and costs incurred by virtue of its unsuccessful challenge.

Lastly, Sundance misstates the Court of Appeals holding, claiming that it imposes an *in personam* award of attorney fees against a stranger to the contract. That argument ignores the fact that the Court of Appeals simply recognized that Sundance as a lien holder, has an interest in property within the Klahanie development and as such, is in privity of estate. As the Klahanie Declaration is a covenant running with the land, when Sundance was formed, its interest was subject to the Klahanie Declaration. Thus, when it chose to challenge the superiority of the Klahanie lien, it exposed itself to an award of attorney fees as a party in interest under the clear Covenants within the Klahanie Declaration.

E. Pursuant to RAP 18.1(B) Klahanie Requests Its Reasonable Attorney Fees And Costs On Appeal.

Klahanie requests that its fees and expenses incurred on appeal be awarded on the basis set forth hereinabove.

Pursuant to RAP 18.1, Klahanie will submit its affidavit of fees and expenses within 10 days after the filing of the decision.

IV. CONCLUSION

It is respectfully argued to the Court that the law regarding the priority of the Klahanie lien over the existing Sundance lien was well settled

and Sundance's advance of an argument to the contrary caused needless attorney fees and costs.

This Court should deny the Petition.

Dated this 20 day of February, 2018.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that on the date below she forwarded for filing with the Supreme Court for the State of Washington, by e-filing the original of the foregoing pleading entitled ANSWER OF RESPONDENT KLAHANIE ASSOCIATION TO PETITION FOR DISCRETIONARY REVIEW, Additionally, a true and correct copy of the aforementioned pleading was emailed pdf through e-filing and forwarded for delivery via ABC Legal Messenger, on this date to the following persons:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 20th day of February, 2018 at Bellevue, Washington.


Brittany Ferguson
Paralegal to David M. Tall

OSERAN HAHN SPRING STRAIGHT WATTS PS

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