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Bilden Properties, LLC v. Biring

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Bilden Properties, LLC v. Birin, Supreme Court of New Hampshire, 2013 WL 4447528 (August 21, 2013)
Link to Opinion: http://www.courts.state.nh.us/supreme/opinions/2013/2013063bilden.pdf

SYNOPSIS: Mortgage that improperly identified the grantor by a trade name nevertheless held to give notice to subsequent buyer and mortgagee of the property, at least where trade name was also used as an "AKA" name in at least one instrument within the chain of title for the property.

FACTS: On December 18, 2001, Austin James Properties, LLC (managed by Scott Desantis) acquired title to a parcel in Merrimack, NH. In 2006, to secure debts that Desantis and entities that he controlled owed to Gerald and Gail Birin (the Birins), Austin James Properties, LLC granted a $1 million mortgage on the parcel to the Birins. Although the text of the mortgage deed identified the grantor as "Austin James Properties, LLC," the caption identified the grantor as "Austin James Development, LLC." Because of the caption error, the mortgage was indexed in the grantor index under "Austin James Development, LLC" rather than "Austin James Properties, LLC."

In May and July 2007, Austin James Properties, LLC granted mortgages on the same parcel to Blackfoot Capital, LLC. The May 2007 mortgage listed the grantor as "Austin James Properties, LLC," while the July mortgage identified the grantor as "Austin James Properties, LLC a/k/a Austin James Development, LLC."

Six months later, in November 2007, Austin James Properties, LLC entered into an agreement to sell the parcel to Bilden Properties, which applied to TD Bank for a purchase money mortgage loan. TD Bank retained an attorney to certify title to the parcel, and the attorney delegated the title examination to an abstractor. The abstractor searched the grantor index under "Austin James Properties, LLC" and thus discovered the July 2007 Blackfoot Capital mortgage, which identified the grantor as "Austin James Properties, LLC a/k/a Austin James Development, LLC." However, the abstractor did not search the grantor index for conveyances by "Austin James Development, LLC" and thus did not discover the prior Birins mortgage. [The abstractor did contact the Secretary of State and confirmed that no entity named "Austin James Development, LLC" was registered.] The abstractor informed the attorney about the July 2007 Blackfoot Capital mortgage and noted that the deed referenced the current owner with an AKA of Austin James Development, LLC, and asked the attorney whether she

should "run any other names" in the grantor index, but the attorney did not instruct her to do so. Ultimately, the attorney certified that title to the property was marketable and insurable, and, in December 2007, the sale to Bilden Properties closed, with the Blackfoot Capital mortgages being satisfied and TD Bank taking a purchase money mortgage in the amount of $271,000.

In 2009, the Birins began foreclosure proceedings on the parcel. Bilden Properties and TD Bank moved to enjoin the foreclosure and sought a declaration that they were bona fide purchasers who took their interests in the parcel free of the Birins mortgage under New Hampshire's race-notice recording statute. The trial court granted a temporary injunction and, following a bench trial, concluded that Bilden Properties and TD Bank were entitled to BFP status. The Birins appealed.

ANALYSIS: On appeal, the New Hampshire Supreme Court reversed. The court acknowledged that the Birins mortgage did not properly identify the grantor by its proper legal name. Nevertheless, the court held that the fact that the Blackfoot Capital mortgage identified the grantor "Austin James Properties, LLC" using the AKA name "Austin James Development, LLC," and that because this mortgage was in the chain of title, it put Bilden Properties and TD Bank on inquiry notice of the Birins mortgage. Citing the Powell on Real Property treatise, the court stated that inquiry notice is notice of a fact that is "sufficiently 'curious' or 'suspicious,' according to normal human experience, that the purchaser should, as a matter of law, make an investigation into it" and that "[i]f upon making the investigation into this first fact a second fact, namely that another person has a claim to the title of the property, is revealed, then the purchaser is considered to have inquiry notice of the claim itself." The court reasoned that Bilden Properties and TD Bank had record notice of the AKA name because it was used in the July 2007 Blackfoot Capital mortgage, and that the existence of the AKA name was sufficiently curious or suspicious as to require further investigation, and that a reasonable investigation would have included a search of the grantor index under the AKA name. Thus, the court concluded that Bilden Properties and TD Bank were not bona fide purchasers under the recording statute.

Bilden Properties and TD Bank argued that requiring a search under the AKA was not reasonable, because information from the Secretary of State established that no entity existed by the AKA name. The court rejected this argument, holding that New Hampshire law has rejected the theory that an unregistered limited liability company does not exist for legal purposes, and concluding that "it was not reasonable, as a matter of law, to cease investigating upon learning that Austin James Development, LLC was not registered with the Secretary of State."

REPORTER'S COMMENT 1: The blow to TD Bank was softened (to the tune of about 50%) by the fact that approximately $156,000 of the closing proceeds of its loan went toward the satisfaction of two pre-2006 mortgage loans that had priority over the Birins mortgage, and the court ruled that TD Bank was equitably subrogated to the priority of those mortgages to that extent. Nevertheless, because the unpaid balance on the Birins mortgage was over $1 million, TD Bank was left effectively unsecured for the remaining balance on its mortgage loan.

REPORTER'S COMMENT 2: The court's analysis provides an interesting contrast to the treatment of this issue under UCC Article 9. Under Article 9, a financing statement that does not identify the debtor by its exact legal name is "seriously misleading" and thus fails to perfect the secured party's security interest in the collateral. UCC § 9-506(b). The only exception to this strict rule is set forth in UCC § 9-506(c), which provides that "[i]f a search of the records of the filing office under the debtor's correct legal name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the [legal] name of the debtor …, the name provided does not make the financing statement seriously misleading." Thus, if the filing office's search logic returns only exact matches, a search under the correct name "Austin James Properties, LLC" would not disclose a filing made using the incorrect name "Austin James Development, LLC" — and the incorrect filing would thus be insufficient to perfect the secured party's security interest. As the drafters of Article 9 explained, this approach:

> … balance[s] the interests of filers and searchers. Searchers are not expected to ascertain nicknames, trade names, and the like by which the debtor may be known and then search under each of them. Rather, it is the secured party's responsibility to provide the name of the debtor sufficiently in a filed financing statement. [UCC § 9-506, Comment 2.]

By contrast, the court's reasoning in this case effectively compels a title searcher to search under a trade name, at least when there is some reference to that trade name in the chain of title to the property. That's certainly more burdensome to the searcher. Is it unduly burdensome?