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Bank of New York v. Langman

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Bank of New York v. Langman, 986 N.E.2d 749 (Ill. Ct. App. March 20, 2013)

SYNOPSIS: The Illinois Court of Appeals disproves the adage "Two wrongs don't make a right."

FACTS: In 1999, Vincent Langman ("Langman") obtained a mortgage loan from GN Mortgage Corporation (GN), secured by a mortgage on a home in Batavia, IL. This loan was later securitized and assigned to Bank of New York (BONY). In August 2000, a forged release of the GN mortgage was recorded (although Langman continued making payments on the GN loan).

In December 2001, Langman obtained another mortgage loan from Matrix Financial Services (Matrix), which assigned the loan to Deutsche Bank. After the Matrix loan went into default, Deutsche Bank commenced a foreclosure action, but did not join GN or BONY (apparently concluding that the GN mortgage had been released). Deutsche Bank obtained a foreclosure judgment against Langman, and the home was sold at foreclosure to Abdul and Joyce Hamidani (the Hamidanis).

In the meantime, Langman had continued making payments on the GN mortgage loan, but eventually defaulted in February 2003. Several years later, in March 2006, BONY learned through its servicer that there was a forged release of the GN mortgage on record. BONY obtained an affidavit confirming the forgery, and then filed a foreclosure complaint and notice of lis pendens in July 2006.

Shortly thereafter, in August 2006, the Hamidanis obtained a line of credit from Washington Mutual Bank (WaMu), secured by a mortgage on the home. When the Hamidanis defaulted, WaMu filed a foreclosure action in March 2008. A foreclosure judgment was entered in June 2008 (by this point, JP Morgan Chase had acquired the Hamidanis' mortgage after WaMu was placed into receivership).

Meanwhile, litigation was proceeding in BONY's foreclosure action on the GN mortgage. In July 2008, the trial court granted summary judgment for BONY, holding that the release of the GN mortgage was forged. In March 2009, JP Morgan Chase sought to intervene, arguing that it had an enforceable mortgage lien on the home that was entitled to priority over any lien BONY was entitled to claim under the GN

mortgage. The trial court ruled that BONY's lien under the GN mortgage was entitled to priority over JP Morgan Chase's mortgage from the Hamidanis.

JP Morgan Chase appealed, arguing that the Hamidanis had taken title to the home free of the GN mortgage because they were bona fide purchasers entitled to rely upon the recorded release of the GN mortgage. Alternatively, JP Morgan Chase argued that BONY should be equitably estopped from enforcing its lien under the GN mortgage because it had failed to record an affidavit of correction once it discovered that the GN mortgage release had been forged.

HOLDING: The court of appeals affirmed, but it was a bumpy ride. The court began its analysis by addressing BONY's argument that the Hamidanis could not qualify as bona fide purchasers because the release of the GN mortgage was forged. The court rejected this argument, noting that the cases cited by BONY only addressed "forged deeds or deeds delivered without authorization, not forged releases." The court thus held that the bona fide purchaser doctrine could apply to forged releases under Illinois law.

In this regard, JP Morgan Chase argued that unless the Hamadanis had a reason to suspect the authenticity of the recorded release of the GN mortgage, the Hamadanis would have taken title to the home unencumbered by the GM mortgage. The court seemed to accept the argument, but held it to be irrelevant. The court reasoned that while the argument would have been relevant if the dispute had been "a title dispute between the Hamadanis and BONY or a lien priority dispute between Matrix and BONY," the dispute instead involved a lien priority dispute between BONY and JP Morgan Chase (as the assignee of WaMu). As a result, the court held, BONY's lien under the GN mortgage was entitled to priority over JP Morgan Chase because at the time WaMu took the mortgage from the Hamadanis, WaMu had constructive notice of BONY's lien by virtue of BONY's lis pendens. For the same reason, the court also rejected JP Morgan Chase's equitable estoppel argument, ruling that WaMu could not have reasonably relied upon the recorded release of the GN mortgage in the face of BONY's lis pendens.

REPORTER'S COMMENT: Where to begin? The court ultimately reaches the correct result, but the court's reasoning getting there is something of a train wreck.

First, the court's suggestion that the bona fide purchase doctrine could protect the Hamadanis even though the GN mortgage was forged is both wrong and troubling. It's hornbook law that a forged instrument of conveyance transfers no interest. For a transfer, there must be intent, delivery, and acceptance. If the actual mortgagee has not executed and delivered the release, and instead the release bears a forged signature, there is no intent on the part of the mortgagee for the mortgage lien to be released, and the forged release can have no legal effect. There is no reason or justification to distinguish between deeds and releases in this regard. If it's forged, it's void. The

Hamadanis might have relied, and probably did rely, on the authenticity of the release, but that doesn't matter. The recording act and the bona fide purchase doctrine don't protect a buyer from the risk that the apparent record title is void due to a forged instrument in the chain of title. This is one of the reasons you buy title insurance.

The court cited a 1901 decision, *Lennartz v. Quilty*, 60 N.E. 913, and an 1881 decision, *Ogle v. Turpin*, 102 Ill. 148, in support of its conclusion that "the bona fide purchaser doctrine does apply to forged releases under Illinois law." But the cases cited do not in fact stand for that proposition. *Lennartz* involved an unauthorized release by the trustee under the deed of trust. *Ogle* involved a case where the assignee of a mortgage did not record an assignment of the mortgage, and the assignor (and record mortgagee) fraudulently released the mortgage. Neither case involved a forgery. In *Lennartz*, the release was actually signed (albeit improperly) by the trustee, who certainly has the power to execute a release. In *Ogle*, the release was actually signed (albeit fraudulently) by the apparent record holder of the mortgage. In such cases, the bona fide purchase doctrine could operate to protect someone who relied upon the release. See 1 Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 5.34. But neither cited case involved a forged release, and thus the court's suggestion that the BFP doctrine does apply to forged releases is simply wrong.

Second, if the court was prepared to treat the Hamadanis as bona fide purchasers — and the court at least implies that the Hamadanis were BFPs — then BONY's subsequent lis pendens would be irrelevant. If the Hamadanis were protected as bona fide purchasers and thus took free of BONY's lien claim, then under the shelter principle, anyone claiming through the Hamadanis, including JP Morgan Chase, would stand in the Hamadanis' shoes.

Having said all that, the court ultimately reached the right end result, as BONY prevailed. But the court should have said that the GN mortgage was not validly released, and thus had retained its record priority. The foreclosure of the Matrix mortgage may have passed title to the Hamadanis, but it did so subject to the lien of the GN mortgage (even though the Hamadanis may have believed that the GN mortgage had been released). Likewise, the GN mortgage would have also retained priority over the later mortgage of WaMu.

As mentioned in the synopsis, two wrongs make a right. But the wrongs matter. If this decision stands, and other Illinois courts follow it (let's hope not!), mortgage lenders could find themselves having their liens extinguished by virtue of forged releases.