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Metropolitan Nat'l Bank v. Jemal

Guest Editor: R. Wilson Freyermuth
John D. Lawson Professor, Curators' Teaching Professor
University of Missouri School of Law

Metropolitan Nat'l Bank v. Jemal, Superior Court of New Jersey, Appellate Division, 2013 WL 5299489(September 23, 2013)
Link to Opinion: http://www.njlawarchive.com/20130923102507787986662/

SYNOPSIS: New Jersey appellate court rules that lender did not have notice of a prior mortgage by virtue of a cryptic (but only somewhat so) reference in a credit report obtained by the lender as part of the loan application.

FACTS: On April 29, 2003, Marvin and Robin Jemal borrowed $1.3MM from BNY Mellon (BNY), secured by a mortgage on residential property in Allenhurst, NJ. BNY failed to record its mortgage for over 7 years, finally recording November 10, 2010.

In the intervening time, Robin Jemal applied for and obtained a $3.27MM loan from Metropolitan, secured by a mortgage on the same land which was recorded on April 17, 2006. As part of its application process, Metropolitan obtained and reviewed a credit report. The credit report referred to "Alliance Mtg F," an account number, and the notations "4/03," "$1.3M," and "conventional real." Metropolitan also secured a title commitment which failed to reveal the existence of the unrecorded BNY mortgage. Robin Jemal also failed to list the BNY mortgage in the loan application or in the affidavit of title that she executed at the Metropolitan loan closing.

Jemal later defaulted on the Metropolitan loan, and Metropolitan commenced a foreclosure action in November 2010. According to Metropolitan, it became aware of the BNY mortgage when it ran a title search in preparation for filing its foreclosure complaint, and it amended its complaint to join BNY as a defendant by virtue of its alleged junior lien status. BNY filed an answer and counterclaim alleging that it had first lien status because Metropolitan had actual notice of the BNY loan at the time of its 2006 loan, by virtue of the credit report. Metropolitan argued that the credit report was not ordered for the purpose of ascertaining the existence of prior liens, and that the references in the credit report were not sufficient to provide notice of BNY's then-unrecorded mortgage.

The trial judge granted summary judgment in favor of Metropolitan, holding that Metropolitan's mortgage had priority over the BNY mortgage under New Jersey's "race-notice" recording statute.

HOLDING AND ANALYSIS: The appellate division affirmed. The court disagreed with BNY's argument that the 2006 credit report was sufficient to give Metropolitan notice of BNY's then-unrecorded mortgage under the New Jersey recording statute. The court noted that "[g]enerally speaking, and absent any unusual equity, a court should decide a question of title ... in the way that will best support and maintain the integrity of the recording system." *Palamarg Realty Co. v. Rehac*, 80 N.J. 446, 453 (1979). The court then rejected the idea that Metropolitan would have been expected to have notice of an unrecorded mortgage by virtue of a credit report:

> [B]ased on the undisputed deposition testimony and certification of Metropolitan's vice-president and real estate lending officer … the lender's sole purpose in obtaining a credit report on a borrower such as Jemal is to examine her credit history and credit score; in short, to establish her creditworthiness. Metropolitan did not obtain or review the credit report to identify liens on the property. Rather, the bank would then procure a title commitment for that purpose after a decision to lend was made. BNY offered no contrary evidence. Nor did BNY support its position with any expert opinion to establish (1) that the information customarily contained in a credit report is current, accurate, or reliable; (2) a standard of care in the industry pertaining to the review of credit reports; or (3) that the credit report is utilized to ascertain the existence of any liens on the property or, minimally, to impart a duty on the lender to inquire further as to the existence of such liens.

The court also rejected BNY's argument that the trial court should have taken judicial notice that a bank, through its employees, can review and understand credit reports and any coding on a credit report, noting the "undisputed deposition testimony" that the loan officer "did not know what the codes stood for." Moreover, the court held that "the single, isolated reference in the four-page credit report" was insufficient to constitute adequate notice of BNY's mortgage, because it identified the creditor not as BNY, but rather as the loan servicer (Alliance Mortgage), and because it did not identify the property. The court noted that the trial court had properly recognized "the potential chaos that a contrary ruling could visit upon the title insurance industry, which might then be required to canvass not only the public records but also the lender's entire loan file prior to insuring title." Further, it noted that BNY was "responsible for failing to timely record its mortgage, and was in the best position to develop procedures to verify the recording of its mortgages."

COMMENT 1: While Metropolitan's title insurer is surely happy with the decision, its reasoning seems hard to square with the concept of inquiry notice. The recording acts protect subsequent purchasers and mortgagees without notice, but that notice can come through actual knowledge, constructive (record) notice, or inquiry notice. The facts of this case seem to fit squarely within the inquiry notice concept:

> "Inquiry notice" is notice that arises from a legal inference. "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. If 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. [Powell, Property § 82.02[1][d][iii], quoted in *Bilden Properties, LLC v. Birin*, 2013 WL 4447528 (N.H. 2013).]

It is true that the information here is coming from the credit report, and the lender isn't obtaining the credit report for the purpose of title investigation. But the report has information in it (the identity of Alliance and an account number) that a reasonable loan officer ought to realize suggests the possibility of a prior mortgage. [Query: Are there "reasonable loan officers" left?] As such, arguably the loan officer ought to be expected to inquire further — and if so, Metropolitan should be deemed to have inquiry notice of the unrecorded BNY mortgage.

That might be a harsh result for Metropolitan's title insurer who (the court suggests) would have been unlikely to review the lender's credit report in the context of issuing its title commitment. But those are the risks ….

COMMENT 2: It is worth noting that the case also involved a third lender, Vaughn, who had made a $1.2MM mortgage loan to the Jemals after the Metropolitan mortgage but prior to the recording of the BNY mortgage. Thus, if the court had ruled in BNY's favor, it would have resulted in a circular priority problem: BNY would've prevailed over Metropolitan (based on Metropolitan's "notice" via the credit report), Metropolitan would've prevailed over Vaughn (based on the order of their recorded mortgages), and Vaughn would've prevailed over BNY (as it was undisputed that Vaughn did not have notice of the then-unrecorded BNY mortgage). The court's rejection of BNY's argument may have permitted the court to duck a potentially knotty priority problem that state recording statutes typically do not address.