

Mortgage Assignments vs. Condominium Liens: Contrasting Opinions in the Sixth Circuit

by Jonathan L. Engman

A legal battle has broken out in our own backyard over an issue many thought was an established area of the law. The battle is pitting mortgagees against condominium associations and opinions are split amongst judges in the Oakland County Circuit Court because of the lack of appellate law. The basic issue involves the priority of lenders who have obtained first-mortgage interests by assignments and condominium associations that have placed liens on the properties after the original mortgage was recorded, but prior to the assignments. Despite the apparent confusion, a methodical analysis of our long-established property laws and some important cases should provide the basis for a unified decision.

Michigan's Statutory Law

Michigan is a "race-notice" state pursuant to MCL §565.29, which states, in pertinent part:

Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.

Two key words and phrases in the statute are "conveyance of real estate" and "any subsequent purchaser." These phrases identify what is being protected when the conveyance is recorded pursuant to this chapter. The Legislature defined the key words within the chapter so we would know who or what was subject to the statute. MCL §565.34 states, "The term 'purchaser,' as used in this chapter, shall be construed to embrace every person to whom any estate or interest in real estate, shall be conveyed for a valuable consideration, and also every assignee of a mortgage, or lease, or other conditional estate (*emphasis added*)." In addition, MCL §565.35, in pertinent part, states, "The term 'conveyance,' as used in this chapter, shall be construed to embrace every instrument in writing, by which any estate or interest in real estate is created, aliened, mortgaged or assigned (*emphasis added*)..." By including assignment of

mortgages in both definitions, the Legislature was protecting mortgages and their assignments under the race-notice statute. Therefore, duly recorded mortgages and assignments would be protected against subsequent interests. Importantly, the statutes specifically confine the definitions to Chapter 565 of the Michigan statutes so those definitions are used to define the words only when they are found in this chapter.

It is important to note that there is no general requirement that assignments of mortgages be recorded under Michigan law.¹ Furthermore, it has long been held that an assignee to a mortgage interest steps into the place of, and enjoys the same rights and defenses as, the original mortgage holder even if that assignment is not recorded. In the 1896 case *Wilson v. Campbell*,² the Michigan Supreme Court held that where a duly recorded first mortgage has been assigned but the assignment has not been recorded, the purchaser of a subsequent interest in the property is junior to the assigned mortgage. The court reasoned that a recorded mortgage "is a lien in the hands of any person to whom it may have been legally transferred, and that the record of such transfer is not necessary to its validity ... but rather that one purchasing the premises ... would take them subject to the lien of the mortgage, irrespective of the ownership of it."³ The Michigan Supreme Court also held in 1933 that an assignee of a mortgage has the same priority rights as the original mortgagee from which it purchased the lien.⁴

The Michigan Condominium Act governs condominium associations and the associations' right to place liens on condominium units for unpaid assessments.⁵ Under the Act, unpaid assessments against a condominium owner constitute a lien on the condominium unit, which has priority over other liens except tax liens and any unpaid sums on a "first mortgage of record."⁶ Because of the language in this section, the meaning of "first mortgage of record" becomes very important. The Act states, "record means to record pursuant to the laws of this state relating to the recording of deeds."⁷ In an unpublished case, the Court of Appeals provided an insightful analysis

when it held that the correct determination of the "first mortgage of record" under the Condominium Act is properly determined by the race-notice statute.⁸ In other words, the race-notice statute is paramount in first determining priority.

Circuit Court Conflict

There have been several cases filed in Oakland County Circuit Court over the past several years asking the court to decide the question of whether the priority date for an assigned first mortgage on a condominium unit is the date the original mortgage was recorded or the date the assignment was recorded. In these cases, the relevant recording timeline has been in this order: first mortgage is recorded, condominium lien is recorded next, and finally an assignment of the first mortgage is recorded after the condominium lien. The issue is important because, if the answer is the date the assignment was recorded, the assignee of a duly recorded first mortgage may be subject to all of the condominium association's assessments against that unit even though the association's lien was recorded after the mortgage. Unfortunately, these multiple cases have led to conflicting holdings regarding the issue of priority – some judges ruling that the condominium lien is superior to the assignment and some ruling that the mortgage assignees stand in the position of the original mortgagee.

In reading the written opinions cited as victories by the condominium associations there is a consistent and troubling analytical flaw.⁹ In those cases the court, citing MCL §565.34 and §565.35, found that an assignee of a mortgage is a "purchaser" of the first mortgage and then records its "conveyance" after the association recorded its lien. Therefore, the court concluded that the mortgage assignee's interest is junior to the recorded interest of the association. The problem is the fact that a duly recorded security interest may be transferred to another without the underlying debt being paid off. In this regard, the assignee steps in the place of the original lender.¹⁰ Instead, the court is treating the assignment as a whole new loan or as if the first note had been refinanced and secured by new mortgage. The dangerous but logical conclusion under this rationale is that an assigned mortgage would then not only be junior to a condominium lien, but would also become junior to second and third mortgages recorded before the assignment was recorded.

To the contrary, several circuit judges have held that the priority date for an assigned mortgage is the date the original mortgage is recorded.¹¹ As the Court of Appeals did in *Wexford*, these circuit rulings have held that Michigan's race-notice statute governs the priority of interests in real property, whereas the Condominium Act simply establishes the priority of condominium assessment liens among other liens on the same property. Therefore, based on the principles of race-notice recording and assignment law, when a mortgagee assigns its interest in the security, the assignee acquires all of the rights, titles and defenses of

the original mortgagee.¹² Nothing in the Condominium Act changes those principles, nor should it.

Conclusion

Despite the conflicting rulings, none of the litigants have apparently appealed any of the Oakland County cases. Whether because the dollar amount of the liens was not great or the losing side did not want an adverse appellate ruling, until this priority issue is put before our appellate courts we will likely see increased litigation in our circuit, while each side hopes to draw the judge who will rule in their favor. As time-tested as some of our real property law is, the time is ripe to raise this issue. The danger for mortgagees is a slippery slope where, eventually, a judge will rule that priority was lost to a junior mortgagee simply because the assignment was recorded after the second mortgage. Maybe when a ruling goes this far, a mortgagee might be pressed to appeal. However, it would be better to set the precedent now when the stakes are not as high.

Jonathan L. Engman is a shareholder of Fabrizio & Brook, P.C. He is the supervising partner for the Real Estate and Litigation Departments where he oversees all foreclosure and REO files for the firm. Jon obtained his Juris Doctorate from the University of Detroit Mercy School of Law. He concentrates his law practice in the area of real estate, mortgage lending, curative title, contracts, and has extensive experience litigating foreclosure and quiet-title cases. Jon has organized and presented seminars for the National Business Institute and has given talks on property preservation, lost mitigation and foreclosures at conferences throughout the country. In addition he presents educational seminars for clients on topics related to real estate and mortgage lending.

Footnotes

- 1 *Dougherty v. Randall*, 3 Mich. 581 (1855). A real estate mortgagee's interest is a chattel interest, which may be transferred without a writing.
- 2 *Wilson v. Campbell*, 110 Mich 580 (1896)
- 3 *Wilson*, supra p. 589.
- 4 *Matosh v. Metropolitan Trust Co.*, 262 Mich 201 (1933).
- 5 MCL §559.101, et seq.
- 6 MCL §559.208(1).
- 7 MCL §559.110(1).
- 8 *Wexford Parkhomes Condominium Assoc. v. Katzman*, 2008 WL 2152653.
- 9 The cases reviewed for this article in favor of the condo associations were *Oakbrook Condominium Assoc. v. Hubbell*, et al., 05-066403-CH and *Household Finance Corp III v. Greenbrooke Parkhomes Condominium Assoc.*, 08-089457-CH.
- 10 *Matosh*, supra.
- 11 The cases reviewed for this article in favor of the mortgagees were *Country Glens Condominium Association v. Iranshahr*, 09-105078-CH and *Greenbrooke Parkhomes Condominium Association v. Household Finance Corp. III*, 10-108717-CH.
- 12 See *Wilson* and *Matosh*, supra.