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GINSBURG AND GINSBURG, LLC, TRUSTEE OF
THE WIYOT TRUST *v.* ALEXANDRIA
ESTATES, LLC, ET AL.
(AC 32479)

Beach, Espinosa and Flynn, Js.

Argued November 30, 2011—officially released July 3, 2012

(Appeal from Superior Court, judicial district of New Haven, Abrams, J. [judgment re: priorities]; B. Fischer, J. [judgment of strict foreclosure.]

Jennifer M. McGrath, with whom, on the brief, was *Matthew J. Donovan*, for the appellant (plaintiff).

Joseph A. DiSilvestro, with whom, was *Frank J. Kolb, Jr.*, for the appellee (defendant John Neubig).

Opinion

FLYNN, J. This case involves a determination of priorities of encumbrances in an action to foreclose an \$880,000 mortgage brought by the plaintiff, Ginsberg & Ginsberg, LLC, trustee of the Wiyot Trust, against the defendants, Alexandria Estates, LLC (Alexandria Estates), a mortgagor, and Elizabeth Mazzucco, Ben Mazzucco, Jitendra Patel, Sean Drinan, John Neubig, Empire Paving, Inc., and Statewide Construction, Inc., which was heard by the court on a short calendar motion.¹ The principal issue arises between the plaintiff and Neubig over his claimed entitlement to payment of the sum of \$35,000 for each lot that might be developed on the mortgaged premises, which, by virtue of an agreement made between Neubig and Dale Construction 01, LLC (Dale Construction), was recorded on the land records.² The trial court rendered judgment for Neubig, holding that Neubig had an interest in the land mortgaged to the plaintiff that was prior to the plaintiff's lien. We reverse that judgment of the court, and further reverse the judgment of strict foreclosure, and remand the case to the trial court for the purpose of determining lien priorities and rendering judgment consistent with this opinion.

In its brief to the trial court, the plaintiff claims that Dale Construction “never had any ownership interest in the property,” and the filing of the agreement did not “bind heirs, successors and assigns of the property . . . whether or not they were recorded prior in time to the mortgage.” In its fourth argument before the court against Neubig's claim of priority, the plaintiff argued that Neubig's claim arose by virtue of an agreement between Neubig and Dale Construction, which “never had an interest in the real estate.” Neubig further argued through counsel: “I mean, you talk about something that's outside of the chain of title, it was never in.” Because it was outside the chain of title, the plaintiff argued that “no title searcher's ever going to find that, and so what, even if they found it, it doesn't mean anything, [be]cause [Dale Construction] never owned anything.”³

On appeal, the plaintiff claims that the Dale Construction-Neubig filing was outside its chain of title and was a personal agreement that did not run with the land. Resolution of the issues depends on whether the interest Neubig claims was in the plaintiff's chain of title, and whether Neubig has an interest in the mortgaged premises that was a real, as opposed to a personal, covenant that did not run with the land, and whether such interest had priority over the plaintiff's mortgage. The trial court heard oral argument from the attorneys in which they made representations and took briefs, to which they appended documents and deposition extracts, but no evidence was taken from witnesses under oath, no documentary exhibits were marked as

exhibits, no stipulation of facts was entered, and there were no admissions in the pleadings on which the court could rely.

Our standard of review is plenary when we are required to determine the intent behind language in a deed or other written instrument by which litigants claim an interest in real estate. Under that plenary standard, we are not required to give customary deference to the trial court's factual inferences. See *Contegni v. Payne*, 18 Conn. App. 47, 51, 557 A.2d 122, cert. denied, 211 Conn. 806, 559 A.2d 1140 (1989).

The plaintiff's principal claims on appeal can be distilled down to two. First, the plaintiff claims that Neubig's claimed interest in the land cannot be prior to the plaintiff's mortgage because Neubig's interest represents only a personal contract or covenant rather than a "real covenant," which could run with the land. Leaving that argument aside for the moment, there is a second issue on appeal, namely, that the document by which Neubig claimed an interest in the land was not in the plaintiff's chain of title. Specifically, the plaintiff briefs its claim that the August, 2002 agreement, by which Neubig claims an interest, establishes that Dale Construction "never had any ownership interest in the property [T]he deed conveying the property from Neubig to Alexandria Estates made no reference to the agreements and there was no reservation in the warranty deed conveying the property to Alexandria Estates that would alert subsequent title holders of the Agreement made between Neubig and Alexandria Estates."

The principal issues to be decided, namely, whether Neubig's agreement with Dale Construction is in the plaintiff's chain of title and is a real covenant running with the land, depend necessarily upon a review of the pertinent deeds relating to the parties' claims. The concept of the chain of title is well explained and expressed in the Connecticut Standards of Title: "The 'chain of title' concept is a principle of case law, developed to protect subsequent parties from being charged with constructive notice of the existence and contents of those recorded instruments which a title searcher would not be expected to discover by the customary search of land records. . . ." Connecticut Bar Association, Connecticut Standards of Title (1999), standard 2.2.

Key to making any decision in this case is a review of the deed of conveyance from Neubig to Alexandria Estates. If this deed made the conveyance subject to the Neubig-Dale Construction agreement, it bears on the issue as to whether the Neubig agreement is prior to the plaintiff's mortgage.⁴ This deed is not in the record before us. We are unable to review this matter without it, and the court could not properly determine priorities without this document.

The judgments are reversed and the case is remanded for further proceedings to determine the order of priorities in accordance with this opinion.

In this opinion BEACH, J., concurred.

¹ The plaintiff withdrew the action against the defendants Elizabeth Mazzucco on December 3, 2008, and Empire Paving, Inc., on June 28, 2010.

² We note the following procedural history in the case. Before being made a party, the defendant Neubig, by motion dated June 18, 2008, moved to determine priorities. The plaintiff objected to that motion because Neubig was not then a party. When Neubig sought to become a party by motion dated May 5, 2008, the court, *Crawford, J.*, denied his motion on June 9, 2008. Subsequently, the plaintiff filed a motion to join Neubig and others, which was granted by the court. Service was made on Neubig on June 26, 2008, joining him and other defendants in the foreclosure action. The defendant Neubig then moved again to determine priorities by motion dated September 8, 2008. That was granted by the court, *Abrams, J.*, on February 13, 2009, and by memorandum of decision dated and filed July 31, 2009. A final judgment of strict foreclosure was rendered on June 28, 2010. The plaintiff appealed from both the July 31, 2009 order, finding Neubig's interest in the foreclosed property prior in right to the plaintiff's interest, and from the judgment of strict foreclosure rendered on June 28, 2010.

³ On appeal, the plaintiff also argued in its brief, "[l]ikewise, here, all agreements were outside the chain of title; most notably, the August 2002 agreement executed by Neubig and Dale Construction, which never had any ownership interest in the property, and the May 2005 agreement which merely attempted to remedy the fact that Dale Construction had no authority to enter a contract that could run with the land. Moreover, the deed conveying the property from Neubig to Alexandria Estates made no reference to the agreements and there was no reservation in the warranty deed conveying the property to Alexandria Estates that would alert subsequent title holders of the agreement made between Neubig and Alexandria Estates." The dissent takes no account of this claim in the appellate brief nor the argument of the plaintiff's trial counsel that the Dale Construction-Neubig agreement was outside the chain of title. It contends that the dispositive issue is whether the Neubig-Alexandria Estates agreement was a real or personal covenant. We disagree that the trial court or this court, exercising plenary review, could make the determination of priorities in title without the deed of conveyance from Neubig to Alexandria Estates. What the dissent does not contemplate is that if the conveyance from Neubig to Alexandria Estates were expressly made subject to the Dale Construction-Neubig agreement, it could burden the land and be prior to the plaintiff's later recorded mortgage. The Neubig-Alexandria Estates deed was not placed before the trial court in any manner.

⁴ The parties entered no stipulation of facts and marked no exhibits in evidence. They did attach uncertified copies of deeds and deposition extracts to their briefs, which they did not seem to disagree about, but attached no copy of the Neubig deed to Alexandria Estates. We take no position in this appeal about whether that is the proper way to present evidence bearing on who is a prior or subsequent encumbrancer on the title in question.