

IN THE COURT OF APPEALS

FILED

May 28, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

SCHAAD'S DO-IT CENTER,

Plaintiff - Appellant

vs.

DOYLE K. WALKER and GARY KENNETH WALKER,

and

KENNETH R. KRUSHENSKI, trustee,

Defendants

and

FIRST BANK OF EAST TENNESSEE,
N. A. ,

Appellee

) KNOX CHANCERY

) C. A. NO. 03A01-9612-CH-00396

) HON. FREDERICK D. McDONALD
) CHANCELLOR

) AFFIRMED AND REMANDED

JOSEPH J. LEVITT, JR., Knoxville, for Appellant.

KENNETH R. KRUSHENSKI, Rogers, Hurst & Krushenski, LaFollette, for Appellee.

O P I N I O N

Murray, J.

The sole determinative issue in this case is whether the appellant's lien as a materialman as provided in T. C. A. § 66-11-102 is superior to a deed of trust securing a note payable to the appellee (bank).¹ The trial court determined that the deed of trust was superior to the materialman's lien. This appeal resulted. We affirm the judgment of the trial court.

The material facts are not in dispute. The Walkers were engaged in the business of constructing dwelling houses for the purpose of resale. They acquired a construction loan in the amount of \$55,000.00 from the bank, which was secured by a deed of trust on the property in question here. The deed of trust was registered in the office of the Register of Deeds for Knox County.

The appellant (Schaad) was a furnisher of materials which were used in the construction of a dwelling on the property in question. The bank's deed of trust was recorded prior to any visible construction at the construction site.

T. C. A. § 66-11-108 provides as follows:

¹Schaad's Do-It Center and First Bank of East Tennessee, N.A., are the only parties to this appeal.

66-11-108. Priority over mortgage. If the contract is made with the mortgagor, and the mortgagee has written notice of the same by certified or registered mail before the work is begun or materials furnished, and the mortgagee gives written consent thereto, the lien shall have priority over the mortgage; and if the mortgagee fails to object, in writing, within ten (10) days after receipt of the notice, the mortgagee's consent shall be implied; provided, that the person giving notice shall include a name and return address to which the written objection shall be mailed by certified or registered mail. Otherwise, the lien shall have no priority over the mortgage.

No notice was sent to the bank by Schaad under the above statute. Schaad's claim to priority is that the bank failed to meet the requirements of T. C. A. § 47-28-104 in that the deed of trust did not contain a statement identifying the mortgage as an instrument securing future advances nor a statement that the trust deed and future advances were for commercial purposes. Schaad further claims that the bank's deed of trust was improperly recorded because the acknowledgment on the deed of trust did not meet the requirements of T. C. A. § 66-22-107(c). We will first consider the issue relating to the acknowledgment.

T. C. A. § 66-22-107 provides in pertinent part as follows:

66-22-107. Form of certificate of acknowledgment.

(a) If the acknowledgment is made before a county clerk or deputy, or clerk and master, or notary public, or before any of the officers out of the state who are commissioned or accredited to act at the place where the acknowledgment is taken, and having an official seal, viz: those named in §§ 66-22-103 and 66-22-104, and, also, any consular officer of the United States having an official seal, such officer shall write upon or annex to

constitute a valid certificate of acknowledgment for purposes of this chapter and for any other purpose for which such certificate may be used under the law. It is the legislative intent that no specific form or wording be required in such certificate and that the ownership of property, or the determination of any other right or obligation, shall not be affected by the inclusion or omission of any specific words.

Further in the case of Davis v. Bogle, 58 Tenn. 315 (1872), our Supreme Court determined that substantial compliance with the statutory form is sufficient. We find that the certificate of acknowledgment on the bank's trust deed to be in substantial compliance with the statutory requirements and is sufficient for effective recordation of the instrument in the office of the Register of Deeds. We, therefore, find Schaad's argument that the trust deed is improperly recorded to be without merit.

We will next look to the question of whether the bank's failure to comply with T. C. A. § 47-28-104 defeats the bank's claim to priority.

T. C. A. § 47-28-104(b) provides as follows:

(b) All mortgages securing future advances which may be obligatory and which are for commercial purposes, in order to have priority provided in § 47-28-103 must contain a statement or other notice identifying the mortgage as securing obligatory advances and as being for commercial purposes.

Our inquiry is whether a deed of trust securing payment of a note executed as a construction loan is a mortgage securing future advances as contemplated by T. C. A. § 47-28-104(b).

The trust deed in question reflects that it is made for the purpose of securing a loan in the amount of \$55,000.00. The Tennessee recording tax was paid on \$55,000.00. The record, therefore, in the office of the Register of Deeds reflected that, at the time of the furnishing of materials by Schaad, the bank held an unqualified mortgage on the property in question. It is undisputed, however, that the loan was a construction loan and was to be paid to the borrowers in increments as the construction on the dwelling progressed.

Insofar as we have been able to determine, the issue presented here has not been addressed by the appellate courts of this state. There is authority that a lien secured by a mortgage must necessarily be prior, if the mortgage is registered, to the attachment of subsequent liens, unless the holder of the prior lien has done something to mislead, for his benefit, those dealing with his vendee to their detriment and disadvantage. See Kingsport Brick Company v. Bostwick, 145 Tenn 19, 235 S. W 70 (1921). Nothing in the record in this case, suggests that Schaad was misled or otherwise prejudiced as far as Schaad's claimed lien is concerned. Since, however, Kingsport Brick was decided long before the passage

of T. C. A. § 47-28-104(b), it is of little assistance in disposing of the issue presented here.

The trial court in its memorandum opinion reasoned as follows:

* * * *

The mechanic's lien statute was enacted before T. C. A. § 47-28-101, and expressly addressed priority at T. C. A. § 66-11-108. Under T. C. A. § 66-11-108, without consideration of T. C. A. § 47-28-101, the bank's lien would have priority over plaintiff's lien. In enacting T. C. A. § 48-28-101, did the legislature intend to modify the effect of the mechanic lien priority provision? There is no express language in T. C. A. 47-28-101 providing one way or another. . . . [T]he enactment of T. C. A. § 47-28-101 was obviously intended to address a much broader range of lending security than that addressed by the mechanic's lien statute, otherwise the provisions of T. C. A. § 47-28-101 would in all likelihood merely have been enacted as an amendment to the mechanics lien statute. Being enacted as it was, to address open end credit generally, was it intended to effect to amend or modify the mechanic's lien statute? Viewed in this light, it is concluded that the legislature did not intend to effect, modify or amend the mechanic's lien statute so as to cause a different outcome that would have occurred under the mechanic's lien statute had T. C. A. 47-28-101 not been enacted. . . .

* * * *

T. C. A. § 66-11-108, set out above, unequivocally gives priority to a mortgage unless its provisions of notice, etc., are met. T. C. A. § 47-28-104(b) arguably takes away the priority granted by T. C. A. § 66-11-108. We are of the opinion, however, that T. C. A. § 47-28-104(b) was not intended to supersede the

priority established by T.C.A. § 66-11-108. To hold otherwise would create an irreconcilable conflict between the two statutes.

The guiding principle of statutory construction is to give effect to the legislative intent. Long v. Stateline Sys., Inc., 738 S.W2d 622, 623 (Tenn. 1985). We must determine the legislative intent whenever possible from the plain language of the statute, "read in the context of the entire statute, without any forced or subtle construction which would extend or limit its meaning." National Gas Distrib. v. State, 804 S.W2d 66, 67 (Tenn. 1991). **Moreover, courts should avoid a construction which places one statute in conflict with another.** (Emphasis added). Parkridge Hosp., Inc. v. Woods, 561 S.W2d 754, 755 (Tenn. 1978). In addition, potential conflicts between statutes should be resolved in favor of each statute, if possible, to provide a harmonious operation of the laws. Id. This rule is codified at Tenn. Code Ann. § 1-3-103 (1985), which directs that conflicts among Code provisions are to be resolved so that each provision prevails as to "all matters and questions" within the special purview of the relevant chapter or title. See also Jenkins v. Loudon County, 736 S.W2d 603, 607 (Tenn. 1987).

State v. Spicewood Watershed Dist., 848 S.W2d 60 (Tenn. 1993).

T.C.A. § 1-3-103 referred to above provides as follows:

1-3-103. Conflicts within code. If provisions of different titles or chapters of the code appear to contravene each other, the provisions of each title or chapter shall prevail as to all matters and questions growing out of the subject matter of that title or chapter.

Title 66, Chapter 11 is entitled MECHANICS' AND MATERIALMEN'S LIENS. That title and chapter deals exclusively with mechanics' and materialmen's liens without reference to T.C.A. Title 47 Chapter

28. On the other hand, Title 47, Chapter 28 is entitled OPEN- END MORTGAGES AND MORTGAGES SECURING FUTURE ADVANCES and deals exclusively with such instruments without any reference to T. C. A. Title 66, Chapter 11.

Title 66, Chapter 11 establishes priorities of mortgages and mechanics' or materialmen's liens. Thus, in turning to T. C. A. § 1-3-103 for guidance, we are persuaded that T. C. A. Title 47, Chapter 28 is inapplicable and that Title 66, Chapter 11 is controlling as to the priorities of the parties to this action.

We affirm the judgment of the trial court. Costs of this appeal are taxed to the appellant and this case is remanded to the trial court for such other and further action as may be required.

Don T. Mc Murray, Judge

CONCUR:

Houston M Goddard, Presiding Judge

Herschel P. Franks, Judge

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DOYLE K. WALKER and GARY KENNETH)	
WALKER,)	
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and)	
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KENNETH R. KRUSHENSKI, trustee,)	
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and)	
)	
FIRST BANK OF EAST TENNESSEE,)	
N. A. ,)	
)	
Appellee)	

JUDGMENT

This appeal came on to be heard upon the record from the Chancery Court of Knox County, briefs and argument of counsel. Upon consideration thereof, this Court is of opinion that there was no reversible error in the trial court.

We affirm the judgment of the trial court. Costs of this appeal are taxed to the appellant and this case is remanded to the trial court for such other and further action as may be required.

PER CURIAM