

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

FALLON RAHIMA JALLALI,
Appellant,

v.

KNIGHTSBRIDGE VILLAGE HOMEOWNERS ASSOCIATION, INC.,
Appellee.

No. 4D15-2036

[January 4, 2017]

Appeal of a non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Michael Gates, Judge; L.T. Case No. CACE 12-009353 (12).

Cyrus A. Bischoff, Miami, for appellant.

Michael J. Villarosa of Kaye Bender Rembaum, P.L., Pompano Beach, for appellee.

ON MOTION FOR REHEARING

PER CURIAM.

We deny appellee's motion for rehearing and rehearing en banc, but withdraw our prior opinion and substitute the following opinion in its place.

Fallon Rahima Jallali appeals a non-final order denying her motion to vacate the final judgment of foreclosure obtained by her property's homeowners' association, Knightsbridge Village Homeowners Association ("the Association"). Jallali asserted three reasons for reversal. We affirm as to all three, but write to distinguish *U.S. Bank National Ass'n v. Quadomain Condominium Ass'n*, 103 So. 3d 977 (Fla. 4th DCA 2012).

We hold that the filing of a notice of lis pendens by a first mortgagee does not bar the foreclosure of an association's subsequent lien for unpaid assessments against the owner, although that action is inferior to the foreclosure of the first mortgage, where the association's subsequent lien

was imposed under the association's declaration of covenants recorded before the first mortgagee recorded its notice of lis pendens.

In 2007, the holder of the first mortgage on Jallali's property ("the Lender") filed a foreclosure action against Jallali and recorded its notice of lis pendens against the property. The Lender named the Association as a defendant.¹ The Association's Declaration of Covenants and Restrictions had been recorded in the public records prior to both the first mortgage and the notice of lis pendens.

In 2011, while the Lender's action was still pending, the Association recorded a claim of lien for delinquent maintenance fees against the same property. In 2012, the Association sued Jallali to foreclose that lien and obtained a default final judgment, which this Court affirmed. *See Jallali v. Knightsbridge Vill. Homeowners' Ass'n*, 185 So. 3d 1251 (Fla. 4th DCA 2014). Subsequently, the Lender's successor obtained a final judgment of foreclosure.²

After the mortgage foreclosure concluded, Jallali filed a motion under Florida Rule of Civil Procedure 1.540(b)(4) to vacate the Association's 2012 final judgment of foreclosure. Jallali relied on *Quadomain*, 103 So. 3d at 978-80, and section 48.23, Florida Statutes (2012). The trial court denied the motion and this appeal followed.

The question presented is whether the filing of the notice of lis pendens by the first mortgage holder constitutes a bar to the Association's foreclosure action based upon a claim of lien for unpaid assessments filed after the notice of lis pendens. Because the Declaration of Covenants, which included provisions with respect to the Association's right to lien and foreclose on the property, was a recorded "interest" at the time of the filing of lis pendens, we conclude that, even though the lien was inferior to the mortgage, section 48.23, Florida Statutes, constitutes no bar to the enforcement of the lien between the Association and Jallali.

¹ Before the Lender sued, the Association had obtained a judgment of foreclosure against Jallali's property based on its lien for unpaid maintenance fees. The Lender alleged, and the Association acknowledged, that the Association's lien was inferior to the Lender's mortgage. The Association's judgment was satisfied in 2008 and is not relevant to this appeal.

² This Court recently reversed that final judgment for lack of standing of the plaintiff at the time suit was filed. *Jallali v. Christiana Tr.*, 200 So. 3d 149 (Fla. 4th DCA 2016).

A lis pendens serves two main purposes: (1) to give notice to and thereby protect any future purchasers or encumbrancers of the property; and (2) to protect the plaintiff from intervening liens. See *Fischer v. Fischer*, 873 So. 2d 534, 536 (Fla. 4th DCA 2004).

One of several purposes underlying the doctrine of lis pendens is that, when a suit is filed that could affect title in property, some notice should be given to future purchasers or encumbrancers of that property. *DePass v. Chitty*, 90 Fla. 77, 105 So. 148 (1925). This serves the purposes of protecting those purchasers or encumbrancers from becoming embroiled in the dispute, and of protecting the plaintiff from intervening liens that could impair any property rights claimed and also from possible extinguishment of the plaintiff's unrecorded equitable lien. In sum, unlike a typical injunction, a lis pendens exists as much to warn third parties as to protect the plaintiff; and the procedural requirements associated with lis pendens should advance both of these important purposes.

Chiusolo v. Kennedy, 614 So. 2d 491, 492 (Fla. 1993) (footnote omitted).

Jallali relies on *Quadomain* as standing for the proposition that the association's foreclosure against her is barred because the association did not comply with section 48.23, Florida Statutes. In *Quadomain*, the bank holding a first mortgage on a condominium unit filed a foreclosure action, recorded a notice of lis pendens, and ultimately obtained a final judgment. 103 So. 3d at 978. Because ownership of the unit had changed before the final judgment, the bank obtained leave to supplement its complaint to foreclose on the new owners. *Id.* It also filed a supplemental notice of lis pendens. *Id.* Thereafter, the association that managed the condominium recorded a claim of lien for unpaid fees against the bank, as the bank had obtained a certificate of title during the initial foreclosure. *Id.* The association filed a foreclosure action, obtained a default judgment against the bank, and the property was sold. *Id.* The bank moved to vacate, arguing the association's lien foreclosure was barred because it was filed after the bank filed its notice of lis pendens. *Id.* The trial court denied the motion and the bank appealed. *Id.*

The issue on appeal in *Quadomain* was whether the bank's supplemental lis pendens divested the trial court of jurisdiction to adjudicate the association's lien. *Id.* This Court quoted from section

48.23, Florida Statutes. *Id.* at 979. That statute, last amended effective July 1, 2009,³ provides in part as follows:

(a) An action in any of the state or federal courts in this state operates as a *lis pendens* on any real or personal property involved therein or to be affected thereby only if a notice of *lis pendens* is recorded in the official records of the county where the property is located and such notice has not expired pursuant to subsection (2) or been withdrawn or discharged.

....

(d) Except for the interest of persons in possession or easements of use, **the recording of such notice of *lis pendens***, provided that during the pendency of the proceeding it has not expired pursuant to subsection (2) or been withdrawn or discharged, **constitutes a bar to the enforcement against the property described in the notice of all interests and liens**, including, but not limited to, federal tax liens and levies, **unrecorded at the time of recording the notice** unless the holder of any such unrecorded interest or lien intervenes in such proceedings within 30 days after the recording of the notice. If the holder of any such unrecorded interest or lien does not intervene in the proceedings and if such proceedings are prosecuted to a judicial sale of the property described in the notice, the property shall be forever discharged from all such unrecorded interests and liens. If the notice of *lis pendens* expires or is withdrawn or discharged, the expiration, withdrawal, or discharge of the notice does not affect the validity of any unrecorded interest or lien.

§ 48.23(1), Fla. Stat. (emphasis added).

Based on that statute and similar cases, this Court concluded in *Quadomain* that the jurisdiction of the court conducting the mortgage foreclosure proceeding was exclusive:

[T]he only way to enforce a property interest that is unrecorded at the time the *lis pendens* is recorded is by timely intervening in the suit creating the *lis pendens*—all other actions are barred.

³ Previously, language similar to that now appearing in section 48.23(1)(d) appeared in section 48.23(1)(b), but the period of time for intervening was only twenty days. § 48.23(1)(b), Fla. Stat. (2008).

Therefore, the court presiding over the action which created the *lis pendens* has exclusive jurisdiction to adjudicate any encumbrance or interest in the subject property from the date the *lis pendens* is recorded to the date it enters final judgment.

Accordingly, the court in the Association's lien foreclosure action did not have jurisdiction to foreclose the lien. If the Association wanted to recover its unpaid Association fees, it was statutorily required to intervene in the re-foreclosure action as prescribed in section 48.23(1)(d).

Quadomain, 103 So. 3d at 979-80 (citations omitted).

In this case, Jallali relies on the language of *Quadomain*, suggesting that the final foreclosure judgment which the Association obtained in the 2012 case was void because the trial court lacked jurisdiction at that time. Jallali contends that exclusive jurisdiction to foreclose on the property was with the circuit court conducting the Lender's foreclosure action in the 2007 case.

Quadomain is factually distinguishable from this case. First, in *Quadomain*, the association was attempting to foreclose its lien against the bank, a first mortgagee, and not the homeowner. Second, *Quadomain* did not address the effect of the association's declaration of covenants, which constitute a recorded interest and thus take the case out of the purview of section 48.23, Florida Statutes. The Association's lien in the present case was imposed under the Association's Declaration of Covenants, recorded before the Lender recorded its notice of *lis pendens*. Therefore, because the Declaration provided for the imposition of a lien which related back to the filing of the Declarations, it was not an "interest . . . unrecorded at the time of recording the notice" of *lis pendens* within the meaning of section 48.23(1)(d), Florida Statutes.

We hold that an association's declaration of covenants (or of condominium) constitutes an "interest" in property under section 48.23(1)(d), Florida Statutes. Therefore, declarations which are recorded not only prior to the filing of a notice of *lis pendens* by a first mortgagee, but prior to the mortgage itself, may constitute a prior recorded interest under section 48.23(1)(d), Florida Statutes. The filing of a *lis pendens* does not automatically preclude an association from foreclosing on a lien imposed under the declaration against parties other than a first mortgagee, although the association's foreclosure may be subordinate to the foreclosure of a first mortgage.

This is reflected in section 720.3085, Florida Statutes (2015), which controls homeowners' association liens and priority for unpaid assessments. The statute provides that the lien for unpaid assessments relates back to the recording of the declaration of community. § 720.3085(1), Fla. Stat. However, as to determining superiority over first mortgages of record, the lien is effective only from the date the claim of lien is recorded:

When authorized by the governing documents, the association has a lien on each parcel to secure the payment of assessments and other amounts provided for by this section. Except as otherwise set forth in this section, the lien is effective from and shall relate back to the date on which the original declaration of the community was recorded. However, as to first mortgages of record, the lien is effective from and after recording of a claim of lien in the public records of the county in which the parcel is located.

Id.; see also § 718.116(5)(a), Fla. Stat. (2015) (providing similarly with regard to association assessments on condominiums).

The provisions of the Declaration of Covenants recorded by the Association operate as section 720.3085(1), Florida Statutes, contemplates. The Declaration provides for the assessment of fees by the Association for maintenance of the Association and its properties. It provides that when a lien is imposed for any unpaid fees, it relates back to the recording of the Declaration, except that the lien is subordinate to the lien of an institutional mortgage recorded prior to the time a notice of lien is recorded.

The Declaration is a covenant running with the land, thus constituting an "encumbrance or interest" in property for purposes of section 48.23(1)(d), Florida Statutes. See *Bessemer v. Gersten*, 381 So. 2d 1344 (Fla. 1980) (holding that a valid contractual lien is created when a property is purchased subject to declarations of restrictions which manifest an intent to let the property stand for security for the obligations imposed in the restrictions). Further, the filing dates of any liens incurred under the Declaration, including the lien at issue, relate back to the date of the Declaration's recording. Because the Declaration was recorded prior to the Lender's *lis pendens*, a foreclosure action against anyone other than a first mortgagee based upon a claim of lien filed in accordance with the Declaration is not barred by section 48.23(1)(d), Florida Statutes.

This conclusion is not undermined by the Declaration's exception with regard to first mortgages to the relation-back provision for claims of liens for assessments. This exception is relevant in determining priority of liens, not the application of section 48.23, Florida Statutes, in actions by an association to foreclose a lien against the property owner when a foreclosure proceeding is pending. From the outset, the Association has acknowledged its lien is inferior to the mortgage; its lien foreclosure action does not purport to affect the Lender's superior interest.

That a homeowners' association can proceed against the homeowner with foreclosure of its lien for unpaid assessments imposed under its declaration, recorded before the first mortgagee recorded its notice of lis pendens, while a mortgage foreclosure proceeding is pending, is further supported by section 720.3085(5)(b), Florida Statutes. Generally, a claim of lien cannot be foreclosed by a homeowners' association without providing forty-five days' notice to the homeowner. § 720.3085(5), Fla. Stat. However, the association need not provide such notice "if the parcel is subject to a foreclosure action or forced sale of another party[.]" § 720.3085(5)(b), Fla. Stat. This implies that a claim of lien can be foreclosed even where a mortgage foreclosure proceeding is pending at the time the claim of lien is filed.

Moreover, we note that, in the context of this case, a lis pendens recorded by a mortgage holder serves to protect **the mortgage holder** from liens unrecorded at the time of the filing. Although section 48.23(1)(d), Florida Statutes, creates a "bar to . . . enforcement" and provides for extinguishment of any **unrecorded interests** or liens if the case proceeds to judicial sale, the statute is not designed to protect the delinquent homeowner. Here, not only does the Association have a prior recorded interest through its Declaration of Covenants, its action was only **against the delinquent homeowner**. Unlike *Quadomain*, the Association's suit did not involve the Lender. See *Quadomain*, 103 So. 3d at 978.

Accordingly, *Quadomain* does not control the outcome of this proceeding between the Association and the delinquent homeowner. A homeowners' association has the right to proceed in a foreclosure of its lien for unpaid assessments against the homeowner in accordance with its declaration and the statutes governing such associations.

We affirm the order denying Jallali's motion to vacate the final judgment.

Affirmed.

WARNER, GROSS and KLINGENSMITH, JJ., concur.