

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION



CHAMBERS OF
KENNETH C. MACKENZIE
PRESIDING JUDGE
(MORRIS AND SUSSEX COUNTIES)

MORRIS COUNTY
COURT HOUSE
MORRISTOWN, NEW JERSEY 07963-0900
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February 4, 1993

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RE: Fortune Savings Bank v. Von Glahn, et al.
Docket No. SSX F-3991-90

Gentlemen:

Plaintiff ("Fortune") has moved for a turn-over Order as to the fund which had been escrowed by Fortune and the Kostages at their closing of title on February 28, 1992. The fund of \$2500 was placed in escrow as the result of a claim having been asserted on behalf of Highland Lakes Country Club and Community Association ("Highland Lakes") for dues and late charges assessed against the prior property owners, Mr. and Mrs. Von Glahn. As of the date of the Kostage closing, these fees totaled \$1989.31. According to Highland Lakes, the charges had to be paid before the Kostages could enjoy the benefits of Club membership, i.e. use of the beaches and recreation areas, garbage collection, etc.¹ The

¹Highland Lakes is a private, single-family residential lake community which is governed by a not-for-profit corporation. Its By-Laws were adapted in 1936. All property owned in the community are required to join the Club and to abide by its By-Laws. The membership covenants are contained in paragraphs (s) and (t). The By-Laws have been upheld as valid and enforceable by the Appellate Division in consolidated actions known generally as Thomas v. Highland Lakes, Docket No. C-1955-80. The judgment upholding the membership covenants were recorded in the Sussex County Clerk's

Kostages bought the property for the express purpose of using all facilities which are available to Highland Lakes members. When they learned of Highland Lakes' contentions, they insisted at closing that sufficient moneys be escrowed to cover past due charges.

The turnover order application arises out of what had been a mortgage foreclosure action. The Von Glahns defaulted, but Highland Lakes challenged the priority of the Fortune mortgage. On cross-motions for summary judgment, the Court found for Fortune and against Highland Lakes. This judgment was upheld on appeal. Thereafter, the property at issue was sold by the Sussex County Sheriff to Fortune. Fortune later contracted to sell the property to the Kostages.

The Fortune motion is the only pending application. In their written and oral submissions, the Kostages asked the Court to deny the motion unless Fortune was also ordered to pay the arrears to Highland. Alternatively, the Kostages asked the Court to order the escrowed moneys paid directly to Highland Lakes to ensure their membership status.² Highland Lakes also opposes the motion, on both procedural and substantive grounds.

Arguably, this is not the appropriate forum to resolve the discrete issue presented. This was/is a mortgage foreclosure case, which had proceeded to completion, with finality. Who is entitled to the escrowed funds arising out of a third-party sale, subsequent to a sheriff's sale which had, in turn, taken place after a judgment of foreclosure was entered, is not an appropriate question for this Court. The issue is not germane to the foreclosure action. Nevertheless, I will accept the responsibility out of considerations of economy of judicial and attorneys' time.

Plaintiff contends that Article III, section VIII of the By-Laws cannot be enforced against the Kostages because the effect of the final judgment of foreclosure was to cut off Highland Lakes lien against the realty. The Court disagrees. The underlying action was contested only on the issue of priority of lien as between Highland Lakes and Fortune. The priority issue was

office in 1983 and again in 1985.

²Article III, Section VIII of the Highland Lakes By-Laws provides:

"Membership privileges in the Club will not be granted on resale of property until all Club dues, assessments and initiation fees in arrears are paid in full."

resolved in favor of Fortune.³ Enforceability of the By-Laws was not involved in the decision by the trial judge. The Appellate Division addressed enforceability only in a tangential and nonadjudicatory fashion. As of now, all the By-Laws are regarded as enforceable.

What was the consequential effect on the By-Laws resulting from entry of the final judgment of foreclosure? None in my opinion. The By-Laws retained their vitality after the judgment. The By-Laws continue to bind all property owners in the Highland Lakes community, including anyone who purchases the foreclosed property. At the Sheriff's sale, Fortune was the highest bidder and took title to the mortgaged premises by the Sheriff's deed of August 2, 1991. The By-Laws became binding upon Fortune when it became a property owner in Highland Lakes. The foreclosure purchaser takes subject to all equities, liens or other similar interests which existed against the mortgaged land prior to the execution of the foreclosed mortgage. See, e.g. Hartshorne v. Hartshorne, 2 N.J.Eq. 349, 356 (Ch. 1840); Locustwood Land Co. v. Locustwood Cemetery Ass'n, 147 Atl. 628 (E & A. 1929). An equitable servitude, such as the membership covenants at issue here, is not destroyed by the foreclosure judgment. Fortune was chargeable with knowledge of, and is bound by, the membership covenants by virtue of its actual knowledge acquired during this litigation and by constructive knowledge of recorded documents which are in the Fortune's chain of title.

Accordingly, I determine that Fortune owes Highland Lakes for the delinquent fees and charges left unpaid by the Van Glahns. A calculation of the precise amount due will be made by counsel and incorporate in an Order to be submitted by Mr. Vanecek. The Order will also include a priority that the sum so determined shall be paid out of the escrow fund, with the balance to be turned over to Fortune.

Very truly yours,



Kenneth C. MacKenzie, P.J.Ch.

KCM/lt

³Highland Lakes' equity of redemption was extinguished by the judgment. The underlying obligation of the Von Glahns' which gave rise to Highland Lakes' lien was not extinguished, i.e. their obligation to pay dues and assessments to Highland lakes which arose out of the membership covenant.