

Summary of SC91897, *Bob DeGeorge Associates Inc., KD Christian Construction Co. v. Hawthorn Bank*

Appeal from the Jackson County circuit court, Judge John M. Torrence
Argued and submitted Jan. 11, 2012; opinion issued Sept. 11, 2012

Attorneys: Hawthorn Bank was represented by Clay Britton, John T. Coghlan and Brett J. Coppage of Lathrop & Gage LLP in Kansas City, (816) 292-2000. DeGeorge was represented by Amy J. Tillery, Danne Webb and Ande S. McMurtry of Horn, Aylward & Bandy LLC in Kansas City, (816) 421-0700; and KD Christian was represented by G. Stephen Ruprecht and David A. Meyers of Brown & Ruprecht PC in Kansas City, (816) 292-7072.

Three groups filed briefs as friends of the Court. The Missouri Bankers Association was represented by Duane E. Schreimann and Michael Smidt of Schreimann, Rackers, Francka & Blunt LLC in Jefferson City, (573) 634-7580; and The Builders' Association and The American Subcontractors Association-Kansas City Chapter were represented by Lee B. Brummitt and Patrick C. Guinness of Dysart, Taylor, Cotter, McMonigle & Montemore PC in Kansas City, (816) 931-2700.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A bank appeals a trial court's judgment finding that mechanic's liens filed against certain property take priority over the bank's later-recorded purchase-money deed of trust securing a mortgage loan for the same property. In a 7-0 decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri affirms the trial court's judgment. Together, the recording statutes governing deeds of trust and the statutes governing mechanic's liens apply to give priority to a mechanic's lien that arises to secure work done on land that begins before a deed is recorded. To the extent that certain cases of the court of appeals have cited one of this Court's cases as authority for holding that unrecorded purchase-money deeds of trust are entitled to priority over mechanic's liens that arise after transfer of legal title, they are overruled.

Judge T. Bennett Burkemper Jr., an associate circuit judge in Lincoln County (in the 45th Judicial Circuit), sat with the Court by special designation in place of Judge William Ray Price Jr.

Facts: In June 2008, Blue Springs Xtreme Powersports took out a loan of more than \$2.5 million from Hawthorn Bank to purchase a building and three tracts of land. The bank secured the loan by taking a purchase-money deed of trust on the property. Neither the warranty deed to Xtreme nor the bank's deed was recorded at that time. Pursuant to a contract into which Xtreme entered before purchasing the property, general contractor Bob DeGeorge Associates Inc. began work on a project to remodel a building on the property two days after the sale. DeGeorge's subcontractor, KD Christian Construction Co., began work 11 days later. DeGeorge and KD Christian completed the project, but Xtreme never paid the nearly \$148,000 it owed to DeGeorge and, as a result, DeGeorge never paid the more than \$17,500 it owed to KD Christian. In November 2008, DeGeorge filed a mechanic's lien against the property. The next day, the warranty deed to Xtreme and Hawthorn's purchase-money deed of trust were recorded. KD Christian filed a mechanic's

lien in January 2009. To foreclose on its mechanic's lien, DeGeorge sued Xtreme, and KD Christian intervened to do the same. They then brought claims against the bank, seeking to enforce their mechanics' liens by establishing the priority of those liens over the bank's purchase-money deed of trust. DeGeorge and the bank ultimately each sought summary judgment. In May 2010, the trial court found that DeGeorge's mechanic's lien is superior, granted its motion for summary judgment and entered judgment allowing DeGeorge and KD Christian to foreclose on their liens. The bank appeals.

AFFIRMED.

Court en banc holds: (1) A trial court's judgment overruling a motion for summary judgment generally is not subject to appellate review. But here, the merits of the bank's and DeGeorge's motions for summary judgment are intertwined completely because they involve the relative priority of two mechanic's liens and a purchase-money deed of trust. It is appropriate, therefore, for this Court to review the propriety of the trial court's grant of summary judgment to DeGeorge, which will include review of the denial of the denial of summary judgment for the bank.

(2) The trial court properly found that the mechanic's liens took priority over the purchase-money deed of trust. The relative priorities of a mechanic's lien and a purchase-money deed of trust are governed by operation of Missouri's recording statutes and the statutory rules of priority for mechanic's liens.

Section 442.380, RSMo 2000, requires that any written instrument conveying or affecting real estate must be recorded in the recorder's office of the county in which the real estate is located. Pursuant to section 442.400, RSMo 2000, such an instrument is not effective against a third party who does not have actual notice until the instrument is recorded. These statutes protect persons who acquire interest in real property without notice of prior encumbrances and establish a system of statutory priorities for encumbrances affecting real property. The purchase-money deed of trust here is a written instrument conveying to the bank an interest in Xtreme's real estate used to secure the unpaid balance of the purchase price. As such, the bank's purchase-money deed of trust falls within the requirements of Missouri's recording statutes.

Mechanic's liens, however, are not governed by the recording statutes but rather arise pursuant to section 429.010, RSMo Supp. 2011, which allows those who work to improve real property or who provide materials for such work to attach a lien to the structure and any improvements to that structure as well as to the land on which the structure is located. Pursuant to section 429.080, a mechanic's lien cannot be enforced until it is filed properly with the circuit clerk in the county in which the property is located. Two statutory provisions govern the priority of a mechanic's lien against other encumbrances on real property. The "first spade rule" of section 429.060, RSMo 2000, provides that so long as a mechanic's lien attached to land is filed properly, it will have priority over any third-party encumbrance attaching to the land after the date the work secured by the mechanic's lien began. In contrast, section 429.050, RSMo 2000, provides that a mechanic's lien attached to a structure or improvements on land rather than to the land itself has priority over all other encumbrances, including a mechanic's lien against land.

Together, the recording statutes governing deeds of trust and the statutes governing mechanic's liens apply to provide that a deed of trust recorded after work on a project on the land begins is inferior to any mechanic's liens arising on the land from that work. Here, although the bank obtained its purchase-money deed of trust before the contractors began their work, it failed to record the deed for more than five months. Pursuant to section 442.400, the bank's deed was not valid against third parties until the deed was recorded in November 2008. Because DeGeorge and KD Christian began their work in June 2008, the operation of the recording statutes and the first spade rule provides that their mechanic's liens are superior in priority to the bank's purchase-money deed of trust as to both the land and the building on it. Because both mechanic's liens have priority over the bank's deed, it is unnecessary to determine the extent to which DeGeorge and KD Christian would be entitled to priority for the improvements on the land under section 429.050.

(3) To the extent that *Glenstone Block Co. v. Pebworth*, 264 S.W.3d 703 (Mo. App. 2008); *Butler v. Coon's Creek, Inc.*, 999 S.W.2d 748 (Mo. App. 1999); *Allied Pools, Inc. v. Sowash*, 735 S.W.2d 421 (Mo. App. 1987); or other cases have cited *Westinghouse Electric Co. v. Vann Realty Co.*, 568 S.W.2d 777, 781 (Mo. banc 1978), as authority for holding that unrecorded purchase-money deeds of trust are entitled to priority over mechanic's liens that arise after transfer of legal title, they are overruled. The result in *Westinghouse* is consistent with the general application of recording and mechanic's lien statutes because the purchase-money deed of trust in that case was recorded before the contractor began work on the property – not after work began, as is the case here. Further, although Missouri recognizes the exception in section 7.2(b) of the Restatement (Third) of Property (Mortgages) – which protects a purchase-money mortgage from preexisting liens or claims against the mortgagor that would attach simultaneously to the newly acquired real estate and otherwise would be entitled to priority – comment b to that section affirms the general rule that a purchase-money deed of trust must be recorded to protect that deed against liens or other interests that arise after the mortgagor acquires title.