WESTIN HILLS WEST THREE TOWNHOME OWNERS ASSOCIATION, APPELLANT, V. FEDERAL NATIONAL MORTGAGE ASSOCIATION, DOING BUSINESS AS FANNIE MAE, APPELLEE.

814 N.W.2d 378

Filed June 1, 2012. No. S-11-817.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Deeds.** Neb. Rev. Stat. § 76-238 (Reissue 2009) was designed to protect a subsequent purchaser even though there was a prior conveyance or transaction concerning the property, provided the subsequent purchaser recorded his or her title first, and provided further that the subsequent purchaser was a bona fide purchaser without notice of any other claims to the property.
4. **Deeds: Liens: Time.** Because Neb. Rev. Stat. § 76-238(1) (Reissue 2009) reflects "first in time" jurisprudential concepts, it is critical to determine when each of the competing liens became choate. A lien becomes choate when there is nothing more to be done when the identity of the lienor, the property subject to the lien, and the amount of the lien are established.
5. **Liens.** A lien cannot exist in the absence of the debt, the payment of which it secures.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Ben Thompson, of Thompson Law Office, P.C., L.L.O., for appellant.

Donald J. Pavelka, Jr., and Patricia D. Schneider, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

NATURE OF CASE

Westin Hills West Three Townhome Owners Association (the Association) appeals the order of the district court for

Douglas County which entered summary judgment in favor of the owner of the property, Federal National Mortgage Association, doing business as Fannie Mae (FNMA). In this foreclosure of lien case, the Association claims that the recording of its declaration of covenants before the deed of trust (the Deed of Trust) gave the assessment lien recorded after the Deed of Trust first priority. The district court rejected this claim, as do we. We affirm the district court's order.

STATEMENT OF FACTS

The Association was formed pursuant to a declaration of covenants, conditions, and restrictions (the Declaration) for a townhome community in the Westin Hills West subdivision in Douglas County, Nebraska. The Declaration imposed duties on the Association to provide maintenance service to townhome owners and included a covenant for assessments to fund the costs of the Association. The Declaration was recorded with the Douglas County register of deeds on March 29, 2002, and the Association made its first assessment on April 10.

Mary K. Pichler bought a property in the townhome community subject to the Declaration. In order to secure certain indebtedness, Pichler executed and delivered a Deed of Trust encumbering the property. The Deed of Trust was recorded with the register of deeds on May 6, 2003. The original creditor later assigned the Deed of Trust to U.S. Bank, and the assignment was recorded on January 14, 2009.

Pichler failed to pay the Association's assessment of September 1, 2008. On January 28, 2009, the Association recorded with the register of deeds a notice of assessment lien naming Pichler as the person against whom the interest was claimed.

Pichler also became delinquent on her indebtedness to U.S. Bank, and the trustee of the Deed of Trust filed a notice of default with the register of deeds on November 4, 2009. U.S. Bank elected to proceed with a nonjudicial foreclosure of the Deed of Trust pursuant to the Nebraska Trust Deeds Act. The trustee held a trustee's sale on May 6, 2010. U.S. Bank submitted the winning bid and later assigned its bid to FNMA.

The trustee's deed to FNMA was recorded on June 14. On August 23, the Association recorded with the register of deeds a notice of assessment lien naming FNMA as the entity against which the interest was claimed.

On February 11, 2011, the Association filed a second amended complaint in this case. The second amended complaint named FNMA as the sole defendant and alleged that FNMA had failed to pay assessments when due since June 2010 and that the previous owner had failed to pay assessments since November 2008. At oral argument on appeal, the parties agreed that subsequent to the district court's judgment but prior to oral argument, FNMA paid all assessments which had come due during the period of FNMA's ownership, and that therefore, the only assessments at issue on this appeal are those that Pichler failed to pay between November 2008 and the trustee sale in May 2010. Essentially, the priority to be accorded the lien filed January 28, 2009, attributable to Pichler's delinquency is at issue before us. In its controlling complaint, the Association sought an order establishing and confirming its assessment lien "as a paramount lien upon the real estate . . . senior and superior to the rights, title, interests, liens or claims of" FNMA.

The parties filed competing motions for summary judgment. In an order filed August 31, 2011, the district court denied the Association's motion and granted FNMA's motion. The court concluded that the Association's lien recorded on January 28, 2009, was subsequent and inferior to the Deed of Trust that was recorded on May 6, 2003. The court rejected the Association's argument that its recording of the Declaration on March 29, 2002, gave the Association's lien attributable to Pichler's delinquency priority over the Deed of Trust. The court reasoned that the Declaration only gave notice of potential future assessments and that no lien arose until the owner became delinquent on payments, which did not occur until after September 1, 2008. In addition to concluding that the Association's assessment lien recorded on January 28, 2009, was subsequent and inferior to the Deed of Trust that was recorded on May 6, 2003, the court further concluded that the trustee's sale of the real estate in May 2010 effectively

extinguished and terminated all junior liens and encumbrances. In its order on summary judgment, the court ordered (1) that the Deed of Trust recorded on May 6, 2003, was senior as against the Association's Declaration recorded on March 29, 2002; (2) that the Deed of Trust recorded on May 6, 2003, was senior as against the Association's assessment lien recorded on January 28, 2009; and (3) that FNMA was entitled to a first lien position as against the Association and its assessment lien attributable to Pichler's delinquent Association dues. In reaching its conclusions, the court referred to both Neb. Rev. Stat. § 76-238 (Reissue 2009) and Neb. Rev. Stat. § 52-2001 (Reissue 2010).

The Association appeals the district court's order.

ASSIGNMENTS OF ERROR

The Association assigned four errors generally claiming that the district court erred when it denied the Association's motion for summary judgment and granted FNMA's motion for summary judgment. One of the assignments of error pertained to priorities of liens during the period of FNMA's ownership, which issue is no longer before us on appeal and about which we make no comment.

Summarized and restated, the Association's three remaining assignments of error each claim for a variety of reasons that the district court erred when it concluded that the Deed of Trust recorded May 6, 2003, was superior to the assessment lien mentioned in the Declaration filed March 29, 2002, and the lien created by Pichler's delinquency.

STANDARDS OF REVIEW

[1] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Howsden v. Roper's Real Estate Co.*, 282 Neb. 666, 805 N.W.2d 640 (2011).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party

against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Doe v. Board of Regents, ante* p. 303, 809 N.W.2d 263 (2012).

ANALYSIS

In this foreclosure of lien case, the district court concluded, inter alia, that the Deed of Trust filed May 6, 2003, was "senior" to the right to a lien described in the Declaration of the Association recorded March 29, 2002, and entered summary judgment accordingly. The Association claims this ruling was error. The Association proffers numerous arguments, including that the assessment lien was entitled to priority under the Nebraska Trust Deeds Act, specifically, Neb. Rev. Stat. § 76-1002 (Reissue 2009); that the Deed of Trust should be subordinated pursuant to the terms of the Declaration; and that the actual assessment it charged and which became delinquent after the filing of the Deed of Trust should enjoy a priority date through relation back to the date the Declaration was filed. We find no merit to these arguments. Although our reasoning differs in part from that of the district court, we find no error in the court's summary judgment ruling.

As an initial matter, we observe that at the time the underlying facts occurred, Nebraska had no statute governing homeowners' association assessments. Subsequent to these events, the Legislature passed 2010 Neb. Laws, L.B. 736, effective March 4, 2010, and codified at § 52-2001, which deals with homeowners' association liens and their priority in relation to other encumbrances. Both parties contend that § 52-2001 does not apply to this case, and we agree. We, therefore, do not refer to that statute as a rationale for our resolution of this appeal.

The Association contends on appeal that the Nebraska Trust Deeds Act—specifically § 76-1002(1), (2), and (3)(a)—controls the priority issue in this foreclosure of lien case. The provisions upon which the Association relies concern the priority accorded future advances necessary to protect that secured property and debts and obligations created simultaneously with the Deed of Trust. These items are not at issue in this

case, and we conclude that the Nebraska Trust Deeds Act is not applicable.

In the absence of a specific statutory framework applicable to this case, we look to the general recording statutes to determine the priority of the liens involved.

Section 76-238(1) provides:

> All deeds, mortgages, and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering such instruments to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice. All such instruments are void as to all creditors and subsequent purchasers without notice whose deeds, mortgages, or other instruments are recorded prior to such instruments. However, such instruments are valid between the parties to the instrument.

[3] Section 76-238(1) is a "race-notice recording statute." See *Pederson v. U.S. ex rel. Farm Services Agency*, 78 F. Supp. 2d 1017, 1020 (D. Neb. 1999). "First in time" concepts inform our application of § 76-238(1). Fundamental to the law of registry is the principle of establishing priority of title. Section 76-238 was designed to protect a subsequent purchaser even though there was a prior conveyance or transaction concerning the property, provided the subsequent purchaser recorded his or her title first, and provided further that the subsequent purchaser was a bona fide purchaser without notice of any other claims to the property. *Miller v. McMillen*, 214 Neb. 244, 333 N.W.2d 887 (1983).

The issue before us as framed by the assignments of error is whether the Deed of Trust or the Association's assessment lien initially described in the Declaration has priority. The Association contends that its lien has priority because the Declaration of the Association was recorded before the Deed of Trust. The Declaration was recorded March 29, 2002. The Deed of Trust was recorded May 6, 2003. If the lien mentioned in the Declaration was enforceable against third parties when the Declaration was recorded, it would be superior to the Deed of Trust. If the lien in the Declaration was not enforceable as

against third parties until the assessment became delinquent and a notice of the delinquency was recorded, the Deed of Trust is superior.

[4] Because § 76-238(1) reflects "first in time" jurisprudential concepts, "it is critical to determine when each of the competing liens became *choate*." *Reed v. Civiello*, 297 F. Supp. 2d 1008, 1012 (N.D. Ohio 2003). A lien becomes choate when "there is nothing more to be done . . . when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *United States v. New Britain*, 347 U.S. 81, 84, 74 S. Ct. 367, 98 L. Ed. 520 (1954). See, also, 51 Am. Jur. 2d *Liens* § 8 (2011); 53 C.J.S. *Liens* § 43 (2005).

In its order, the district court stated that there must be a clearly established debt to which the lien can attach, and there was no debt owed by the property owner until the Association imposed an assessment, the property owner failed to pay it, and the assessment became delinquent. Somewhat similarly, in *Allied Mut. Ins. Co. v. Midplains Waste Mgmt.*, 259 Neb. 808, 612 N.W.2d 488 (2000), we indicated that as a general matter, a lien is in existence when the lienor has been identified, the property is subject to a lien, and the amount of the lien has been established.

[5] Other courts have observed that a lien does not exist until a debt is owed. A lien on real estate for payment of a debt is a right to have the debt satisfied out of the land, if not otherwise paid. Thus, a lien cannot exist in the absence of the debt, the payment of which it secures. *Dean Realty Co. v. City of Kansas City*, 85 S.W.3d 83 (Mo. App. 2002). Because a lien is a right to encumber property until a debt is paid, it presupposes the existence of a debt. *Dorr v. Sacred Heart Hospital*, 228 Wis. 2d 425, 597 N.W.2d 462 (Wis. App. 1999). Compare *First Federal Savings & Loan v. Bailey*, 316 S.C. 350, 450 S.E.2d 77 (S.C. App. 1994) (holding that it is failure of owners to pay assessment when due that actuates association's lien identified in covenants).

With respect to assessment liens mentioned in declarations of covenants, other courts have held that a homeowners' association's assessment lien is junior to a deed of trust or

mortgage. In *F.N. Realty v. Or. Shores Recreational Club*, 133 Or. App. 339, 891 P.2d 671 (1995), the association's declaration was recorded on February 13, 1978. Lots were sold and secured by deeds of trust, which were recorded. The lender foreclosed on the deeds of trust when the purchasers defaulted. The plaintiff escrow agent acting on behalf of the lender sought declaratory judgment to determine whether it was liable for delinquent assessments on the foreclosed lots. The declaration provided that a lien would exist when an annual assessment was unpaid 90 days after its due date. The court stated that no lien existed when the declaration was recorded, because no power of assessment had been exercised. The court added that under the terms of the declaration, a lien existed when an annual assessment remained unpaid 90 days after its due date. The court stated that the recorded declarations merely "provide notice of the authority to impose a lien." *Id.* at 344, 891 P.2d at 674. See, similarly, *Builders Floor Serv., Inc. v. Westchester Homes of VA, Inc.*, No. 13724, 1992 WL 884540, *1 (Va. Cir. Feb. 26, 1992) (unpublished opinion) (stating that "[t]he [a]ssociation does not have a lien merely by saying it does in the [d]eclaration").

In *First Twinstate Bank v. Hart*, 160 Vt. 613, 648 A.2d 820 (1993), the Supreme Court of Vermont considered when a lien becomes choate in the context of deciding priority between a declaration of covenants and a purchase-money mortgage. In *First Twinstate Bank*, a declaration of covenants was recorded on March 25, 1970. A mortgage deed was recorded on April 21, 1986, and the bank sought to foreclose on February 25, 1991. Relying on the "first in time" rule, the court concluded that prior to the recording of the mortgage, there was no evidence of unpaid dues. The association's claim of a first priority lien based on the date of filing the declaration of covenants did not establish the amount of any lien. Thus, the bank's mortgage had priority.

In *First Twinstate Bank*, the court also considered the language of the declaration of covenants in deciding the priority issue. The court noted that the declaration lacked an express provision as to which type of encumbrances the association considered its liens to be superior. The absence of express

subordination provisions defeated the association's claim of priority based on the declarations.

Notwithstanding the foregoing jurisprudence, the Association contends that the language of the Declaration implies that the Deed of Trust should be subordinated to the assessment lien initially identified in the Declaration. We do not agree.

The Association relies on article IV, sections 1, 10, and 11, of the Declaration in support of its argument. These sections read as follows:

> Section 1. Creation of the Lien and Personal Obligation of Assessments. The Declarant, for each Lot owned within the Properties, hereby covenants, and each Owner of any Lot by acceptance of a deed therefor, whether or not it shall be so expressed in such deed, is deemed to covenant and agree to pay to the Association (1) annual assessments or charges, and (2) special assessments for capital improvements, such assessments to be established and collected as hereinafter provided. The annual and special assessments, together with interest, costs, and reasonable attorney's fees, shall be a charge on the land and shall be a continuing lien upon the property against which each such assessment is made. Each such assessment, together with interest, costs, and reasonable attorney's fees, shall also be the personal obligation of the person who was the Owner of such property at the time when the assessment fell due. The personal obligation for delinquent assessments shall not pass to his successors in title unless expressly assumed by them.
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> . . . .
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> Section 10. Effect of Nonpayment of Assessments: Remedies of the Association. Any assessment not paid within thirty (30) days after the due date shall be deemed delinquent and shall bear the maximum rate of interest allowable by law. Should any assessment remain unpaid more than sixty (60) days after the due date, the Association may declare the entire unpaid portion of said assessment for said year to be immediately due and payable and thereafter delinquent. The Association may bring an action at law against the Owner personally obligated

> to pay the same, or may foreclose the lien of such assessment against the property through proceedings in any court having jurisdiction of actions for the enforcement of such liens. No Owner may waive or otherwise escape liability for the assessments provided herein by abandonment of title or transfer of such Owner's Lot.
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> Section 11. Subordination of Assessments. The lien on the assessments provided for herein shall be subordinate to the lien of any first mortgage, and the holder of any first mortgage, on any Lot may rely on this provision without the necessity of the execution of any further subordination agreement by the Association. Sale or transfer of any Lot shall not affect the status or priority of the lien for assessments made as provided herein. The Association, if authorized by its Board of Directors, may release the lien of any delinquent assessments on any Lot as to which the first mortgage thereon is in default, if such Board of Directors determines that such lien has no value to the Association. No mortgagee shall be required to collect any assessments due. The Association shall have sole responsibility to collect all assessments due.

The Association refers us to *American Holidays v. Foxtail Owners*, 821 P.2d 577 (Wyo. 1991), in which an association's lien for a specific delinquency recorded after a mortgage was found to have priority over the mortgage based on the language of the declaration of covenants which was filed before the mortgage. In *American Holidays*, the declaration provided that "'[a]ny mortgage or other encumbrance . . . shall be subject [to] and subordinate to each and all of the provisions of this [d]eclaration . . . .'" 821 P.2d at 580. This language was relied on by the court in making its decision. No such sweeping subordination clause or comparable terms exist in the Declaration under consideration, and we decline to read in such terms. See *First Twinstate Bank v. Hart*, 160 Vt. 613, 648 A.2d 820 (1993) (declining to give priority based on declaration which failed to contain express language creating priority lien and failed to give adequate notice of agreement to subordinate subsequent liens).

In a related argument, the Association claims that the actual assessment it charged and which became delinquent after the filing of the Deed of Trust should enjoy the priority date of the Declaration by relation back to the date of the filing of the Declaration. The Association relies on cases such as *Ass'n of Poinciana v. Avatar Properties*, 724 So. 2d 585 (Fla. App. 1998), in which the court stated that given the language in the declaration, a later recorded assessment lien had priority based on relation back. The cases on which the Association relies were decided based on specific language which served as notice of relation back. No such language is found in the Declaration under consideration, and, to the contrary, article IV, section 10, suggests that it is not until an assessment remains unpaid more than 60 days that such obligation becomes a lien.

In *Holly Lake Ass'n v. Federal Nat. Mortg.*, 660 So. 2d 266, 267 (Fla. 1995), the following question was certified to the Florida Supreme Court:

> "WHETHER A CLAIM OF LIEN RECORDED PURSUANT TO A DECLARATION OF COVENANTS BY A HOMEOWNERS' ASSOCIATION HAS PRIORITY OVER AN INTERVENING RECORDED MORTGAGE WHERE THE DECLARATION AUTHORIZES THE ASSOCIATION TO IMPOSE A LIEN FOR ASSESSMENTS BUT DOES NOT OTHERWISE INDICATE THAT THE LIEN RELATES BACK OR TAKES PRIORITY OVER AN INTERVENING MORTGAGE."

After considering the language of the declaration and the lack of notice as to the extent or amount of the claimed assessment lien, the Florida Supreme Court held as follows:

> We hold that in order for a claim of lien recorded pursuant to a declaration of covenants to have priority over an intervening recorded mortgage, the declaration must contain specific language indicating that the lien relates back to the date of the filing of the declaration or that it otherwise take priority over intervening mortgages.

Id. at 269. See, similarly, *St. Paul Federal Bank v. Wesby*, 149 Ill. App. 3d 1059, 1073, 501 N.E.2d 707, 716, 103 Ill. Dec. 390, 399 (1986) (stating that "we find no language in [the] declaration that would cause any lien for unpaid common

expenses to 'relate back' to the date that the declaration was filed"). We agree with the analysis of the Florida Supreme Court in *Holly Lake Ass'n* and, given the language of the Declaration, reject the Association's argument that assessment liens in this case relate back to the date that the Declaration was filed.

In the present case, the undisputed facts show that at the time the Declaration was recorded on March 29, 2002, there existed no actual lien upon the property because no assessment had been charged, much less stood unpaid or delinquent. The Deed of Trust was recorded on May 6, 2003. The assessment lien contemplated by the Declaration could not have come into existence and become enforceable against third parties until a debt was owed and became delinquent in September 2008. The terms of the Declaration do not contain an express priority provision subordinating a deed of trust, nor is there a relation-back clause.

This case is presented to us as an appeal from the granting of summary judgment. An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Howsden v. Roper's Real Estate Co.*, 282 Neb. 666, 805 N.W.2d 640 (2011). In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives such party the benefit of all reasonable inferences deducible from the evidence. *Doe v. Board of Regents, ante* p. 303, 809 N.W.2d 263 (2012). Giving all inferences in favor of the Association and finding no material fact in dispute, we agree with the district court that FNMA was entitled to summary judgment.

CONCLUSION

There are no genuine issues of material fact. We note that this case is decided without reference to § 52-2001. As explained above, the Deed of Trust was superior to any assessment lien mentioned in the Declaration of the Association, as

the district court so determined. The district court was correct when it denied the Association's motion for summary judgment and granted FNMA's motion for summary judgment. The decision of the district court is affirmed.

AFFIRMED.

MICHAEL P. FELONEY, APPELLANT, V.
ROBERT W. BAYE, APPELLEE.
815 N.W.2d 160

Filed June 1, 2012. No. S-11-879.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Easements: Words and Phrases.** An easement is an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose.
4. **Easements.** A claimant may acquire an easement through prescription.
5. **Easements: Adverse Possession.** The use and enjoyment that will establish an easement through prescription are substantially the same in quality and characteristics as the adverse possession that will give title to real estate, but there are some differences between the two doctrines.
6. **Easements.** The law treats a claim of prescriptive right with disfavor.
7. **Easements: Proof: Time.** A party claiming a prescriptive easement must show that its use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.
8. **Easements: Presumptions: Proof: Time.** Generally, once a claimant has shown open and notorious use over the 10-year prescriptive period, adverseness is presumed. At that point, the landowner must present evidence showing that the use was permissive.
9. **Easements: Presumptions.** When an owner permits his unenclosed and unimproved land to be used by the public, or by his neighbors generally, a use thereof by a neighboring landowner and others, however frequent, will be presumed to be permissive and not adverse in the absence of any attendant circumstances to the contrary.