

## WHEN IS A DOCUMENT RECORDED? – A MORTGAGE FORECLOSURE DILEMMA

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Cursory contemplation of the inquiry raised by the title might suggest that there is no problem to explore. (Nor is this the purely pedantic exercise it may appear to be.) After all, it is easy to observe that a search of the public records confirms recording dates. Then the relative priorities and the legal consequences flowing from those dates can presumably be assessed. What changes the analysis, though, is the sometimes obscure concept – and its hidden portent – that recording occurs when a document is *delivered* to the recording office. The aphorism is both a matter of statute<sup>1</sup> and established case law.<sup>2</sup> How an otherwise unrevealed recording event can then wreck havoc with neat notions of priorities is what renders the concern manifest.

### SOME STANDARD BASICS<sup>3</sup>

Just to highlight the ultimate lesson, a quick look at the recognized underpinnings can add focus.

A recorded document receives the benefit of the recording statute, RPL §291, so that an unrecorded conveyance is void as against a subsequent purchaser first recorded who obtains an interest in good faith and for valuable consideration from the same seller or assignor. Thus in more common parlance, New York is a “race notice”

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jurisdiction, that is, for a subsequent grantee to take priority over (for example) an unrecorded mortgage, he must have no notice of the prior unrecorded mortgage and must record first.<sup>4</sup>

Regarding the actual notice component, among many examples, a former owner of property who sues to impose a constructive trust on property would be subordinate to a mortgage earlier dated but filed after his lis pendens where he nevertheless had actual notice of the existence of that mortgage.<sup>5</sup>

More common is the opposite scenario where mortgage A is first executed but later mortgage B taken by a good faith lender for value – without knowledge of A – is first recorded. Mortgage B benefits from the recording statute and is superior.<sup>6</sup>

### THE DELIVERY COMPONENT

While the recording date for a document revealed by the records in the recording office (county clerk or city register as the case may be) is pleasingly symmetric, as mentioned, there is another layer. The text of the previously cited RPL §317 provides that:

“Every instrument, entitled to be recorded, must be recorded by the recording officer in the order and as of the time of its delivery to him therefor, and is considered recorded from the time of such delivery.”

Therefore, and so long as the instrument is entitled to recordation, it is deemed recorded from the moment it is delivered to the recording officer, as opposed to a later date that might appear in the records of the recording office. Once it is established that

the instrument was in a form entitling it to be recorded, and that it was delivered to the recording officer, the consequences of recording result: subsequent lienors are on constructive notice of that just delivered instrument.<sup>7</sup> It must be noted, though, that delivery does not include arrival of an instrument by mail.<sup>8</sup>

Case law then demonstrates how dramatic the effect of the delivery construct can be. In one instance,<sup>9</sup> a first mortgage was given to Madison, recorded June 1, 2004 and assigned to Countrywide on November 3, 2004. A second mortgage on the property was given to Countrywide on November 3, 2004, but not recorded until almost a year later on August 9, 2005, at which time the first and second mortgages held by Countrywide were consolidated. In April, 2006 the consolidated mortgage was assigned to Bank of America, which named as a defendant, Hamari, the holder of a claimed junior mortgage, albeit recorded July 1, 2005 – five weeks prior to the second mortgage (given to Countrywide, later consolidated and assigned). On these facial facts it would have appeared that the holder of the consolidated mortgage faced a fatal priority issue.

Because mischief is obviously afoot, after the foreclosure sale, Hamari moved to overturn the sale. That led to an exploration of the underlying factual events in the case, that is, the delivery dates of the competing mortgages to the City Register. The second mortgage, although shown as recorded after the Hamari mortgage, was actually *delivered* to the Registrar on June 10, 2005. (This was demonstrated by the cover sheet prepared by the lender's title agent dated June 9, and the check for the recording fee dated June 10 and stamped as received on that date.)

Hamari's cover sheet, however, was dated June 16, 2005, and its check was dated June 28, 2005, endorsed by the City on July 1, 2005 and paid July 5, 2005.

The court concluded, therefore, that the second mortgage was delivered no later than June 15, 2005 – before delivery of the Hamari mortgage. Because delivery to the recording officer controls, the second mortgage had priority so that subsequent lienholders – in this instance Hamari – are deemed to have notice of the first delivered lien.<sup>10</sup>

In another case, the clash was between a deed and a lis pendens.<sup>11</sup> There, Ibraheim owned property burdened by a tax lien. On May 27, 2004 he conveyed his title to Pitkin by deed, recorded by the City Register on July 12, 2004 at 3:27 p.m. On that same day, July 12, but earlier – at 1:50 p.m. -- plaintiff initiated a tax lien foreclosure by filing a summons and complaint – and a lis pendens with the County Clerk.

Because a lis pendens would otherwise bind all subsequent encumbrancers to the action as if they had been named and served,<sup>12</sup> it would have appeared that the foreclosure action and the judgment of foreclosure and sale bound Pitkin. However, while the Pitkin deed showed as recorded *after* the lis pendens, in actuality it had been *submitted* to the Register previously – on June 23, 2004. Delivery to the recording officer prevailed, rendering the deed holder not subject to the foreclosure. The foreclosing plaintiff could not have known of this from the public record, but was torpedoed nonetheless by the overarching maxim.

## CONCLUSION

In the end, the simple yet treacherous problem is that sometimes things are not what they appear to be. Recording data does not always tell the true story and when that happens, unexpected, dangerous, results can emerge.

1. RPL §317
2. See *inter alia*; *The President and Directors of The Manhattan Company v. Laimbeer*, 108 N.Y. 578, 15 N.E. 712 (1888); *The Mutual Life Ins. Co. of New York v. Dake*, 87 N.Y. 257 (1881); *Bank of New York v. Resles*, 78 A.D.3d 469, 912 N.Y.S.2d 35 (1<sup>st</sup> Dept. 2010); *NYCTL 1998-1 Trust v. Ibraheim*, 15 Misc.3d 294, 832 N.Y.S.2d 767 (Sup. Ct., Kings Co. 2007); *Reid v. Town of Long Lake*, 44 Misc. 370, 89 N.Y.S. 993 (Sup. Ct., 1904).
3. There is much more to these basics, including nuance, than will be reviewed here and among many sources of further review is 1 *Bergman on New York Mortgage Foreclosures*, §1.21, LexisNexis Matthew Bender (rev. 2011).
4. See *inter alia*; *Lend-Mor Mtg. Bankers Corp. v. Nicholas*, 69 A.D.3d 680, 893 N.Y.S.2d 566 (2d Dept. 2010); *Boston Trade Bank v. Kuzon*, 154 Misc. 2d 217, 584 N.Y.S.2d 994 (1992), citing *Goldstein v. Gold*, 106 A.D.2d 100, 483 N.Y.S.2d 375 (2d Dept. 1984), *aff'd*, 66 N.Y.2d 624, 495 N.Y.S.2d 32, 485 N.E.2d 239 (1985).
5. *Greenstein v. Williams*, 28 A.D.2d 813, 723 N.Y.S.2d 257 (3d Dept. 2001).
6. *Household Fin. Realty Corp. of New York v. Emanuel* 2 A.D.3d 192, 769 N.Y.S.2d 511 (1<sup>st</sup> Dept. 2003).
7. See cases cited at note 2.

8. *Security Discount Associates v. Lynmar Homes Corp.*, 13 A.D.2d 389, 216 N.Y.S.2d 543 (2d Dept. 1961).
9. *Bank of New York v. Resles*, *supra* at note 2.
10. *Bank of New York v. Resles*, *supra* at note 2, citing *Homeowners Loan Corp. v. Recckio*, 45 A.D.3d 1322, 845 N.Y.S.2d 631 (2007); *NYCTL 1998-1 Trust v. Ibraheim* 15 Misc.3d 294, 832 N.Y.S.2d 767 (2007).
11. *NYCTL 1998-1 Trust v. Ibraheim*, *supra*. at note 2.
12. The court in *Resles* cited as authority *Novastar Mtge., Inc. v. Mendoza*, 26 A.D.3d 479 (2d Dept. 2006) and CPLR §6501. For extensive further case law citation see 1 *Bergman on New York Mortgage Foreclosures*, §15.02, LexisNexis Matthew Bender (rev. 2011).