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Liens reattaching after foreclosure:

*DMC v Downey Sav. & Loan, 2002*

Roger Bernhardt

When original owner of property, who transferred it to others who then defaulted, repurchases it after foreclosure with new purchase money loan, that lien has priority over wiped-out junior lien that revives and reattaches to property.

*DMC, Inc. v Downey Sav. & Loan Ass’n* (2002) 99 CA4th 190, 120 CR2d 761

After obtaining two loans secured by deeds of trust on her property, Sharon Henry transferred the property to her parents. When they defaulted on the first loan, the lender foreclosed and acquired title, thereby extinguishing the lien attributable to the second loan, then owned by DMC. Two months later, Henry obtained a new loan, secured by a trust deed on the property from Downey S & L, to repurchase the property. About one year later, DMC sued to judicially foreclose its second lien. The trial court granted Downey’s motion for summary judgment, holding that even if DMC’s second trust deed reattached to the property, it remained junior to Downey’s new purchase money trust deed.

The court of appeal affirmed. Despite California’s “first in time, first in right” approach to lien priority, under an equitable analysis, “the new senior lien holder would not have advanced the substantial funds necessary for the repurchase if it was not assured that it would have the rights and remedies associated with lien priority.” 99 CA4th at 199. The foreclosure extinguished DMC’s lien, and without Downey’s new loan DMC would have been left holding a wiped-out junior lien without any legal claim to repayment. It was only because of the money advanced by Downey, therefore, that DMC’s lien was revived, thereby retaining its original place in the order of priority.

**THE EDITOR’S TAKE:** I quite agree with the result reached by the court, but I am rather uncomfortable with its reasoning.

First, and parenthetically, the definition of “purchase-money” is all mixed up. The court cites CC §2898, but then uses instead the language of CCP §580b on this point. Under CCP §580b, the definition of purchase money is confined to owner-occupied, one-to-four-unit dwellings, but no such limitation appears in CC §2898, which requires only that the mortgage be given “for the price of the property.” And there is no reason to apply the narrow scope of CCP §580b—which is intended to protect small homebuyers—to the general priority principles of CC §2898, which deals with the priority of rival lienors and has nothing to do with debtor protection. (This point would hardly seem worth making except that the opinion indicates that one of the contested issues was whether this was a single-family residence.)

Second, the opinion merely assumes what I regard as an entirely unresolved issue: whether and under what circumstances a previously extinguished mortgage reattaches when the debtor reacquires the property. We used to have a statute providing for such revival following statutory redemption by the mortgagor (after judicial foreclosure sale), but it has since been amended to now say just the opposite. See CCP §729.080(e); see also Dyer,
Judicial Foreclosure After the Revised Enforcement of Judgments Act, 6 CEB RPLR 53 (Apr. 1983). That statute puts this decision in the odd position of reviving a junior lien if, after a nonjudicial foreclosure sale, the mortgagor repurchases the property, but not if she redeems it after a judicial foreclosure sale.

Revival after a senior trustee sale is not self-evident. An extinguished junior mortgage lien is not like an unsatisfied money judgment waiting to attach to all after-acquired assets of the judgment debtor (making the logic of out-of-state opinions not too relevant). Reattachment would be easy if the sold-out junior obtained a money judgment and then recorded that, but none of that occurred here (nor could it occur if the junior lien were a purchase money mortgage subject to CCP §580b).

If these liens really do reattach, they may be difficult to find and insure against. There is no judgment lien against the named mortgagor anywhere in the records, and a chain-of-title search will not be all that helpful. Here, for instance, Sharon Henry was the record owner and trustor, but she then transferred title to her parents, who are the ones who defaulted; thus, the foreclosure sale (trustee sale?) was conducted against Henry’s parents, the Finleys, who had been the owners of record for the previous 30 months; finally, Henry, rather than her parents, borrowed funds and (re)purchased the property three months after that. If you were now purchasing the property from Henry, would you expect your title company to know that a mortgage lien wiped out by a foreclosure against the Finleys had since been revived?

Third, as for the priority issue itself, it is clear that new purchase money mortgages should trump revived old mortgages. After the senior foreclosure, the junior mortgage was gone and any claim the mortgagee still had was clearly only against the debtor rather than against her former property. Purchase money priority does not displace existing liens against the property, only liens “against the purchaser.” So, making a loan to a judgment debtor to enable her to buy a house will make your purchase money mortgage prior to the judgment lien against her, but junior to the existing mortgage on the house. This mortgage attached because Henry was the one who purchased the house, not because it was still fastened to the house itself; thus, it was far more a lien against the purchaser than against the property. Superpriority was proper, even if the old lien reattached. —Roger Bernhardt