INDIANA COURT OF APPEALS

The Provident Bank v. Tri-County Southside Asphalt, Inc.

806 N.E.2d 802 (Ind. Ct. App. 2004) · No. No. 49A02-0304-CV-341 · Decided April 14, 2004

SUMMARY

On rehearing, the Indiana Court of Appeals addressed the proceedings required after determining that Provident Bank's mortgage had priority over Tri-County's mechanic's lien. The court held that Bank One's mortgage was also superior, while permitting Tri-County to foreclose and recover the lien's value and statutory attorney fees after the mortgages were satisfied. Tri-County retained priority to proceeds from the sale of the driveway, subject to reduction of any foreclosure recovery by those proceeds.

CASE DETAILS

COURT	Indiana Court of Appeals
WRITING FOR THE COURT	Baker; Brook, Senior Judge; Sharpnack
JURISDICTION	Indiana
DECIDED	April 14, 2004
DOCKET	No. 49A02-0304-CV-341
DISPOSITION	other
PROCEDURAL POSTURE	Tri-County petitioned for rehearing after the court's February 27, 2004 opinion determined that Provident's mortgage was senior to Tri-County's mechanic's lien. The rehearing addressed the consequences of that priority ruling for foreclosure, damages, attorney fees, and proceeds from the sale of a driveway.
PRECEDENTIAL VALUE	Published Indiana Court of Appeals opinion
PARTIES	The Provident Bank v. Tri-County Southside Asphalt, Inc.

TOPICS

mechanics liens · mortgages · foreclosure · appellate procedure · remedies

PRACTICE AREAS

construction law · real estate · commercial litigation · remedies

QUESTIONS PRESENTED

1. Whether Bank One's mortgage was superior to Tri-County's mechanic's lien even though Bank One did not join Provident's appeal.
2. Whether Tri-County could commence foreclosure proceedings and recover the value of its mechanic's lien and attorney fees.
3. Whether Tri-County had priority to proceeds from the sale of the driveway.

HOLDINGS

1. Bank One's mortgage was superior to Tri-County's mechanic's lien because Bank One recorded its mortgage on February 5, 1999, even though Bank One did not join Provident's appeal.
2. Because the validity of Tri-County's mechanic's lien was not contested, Tri-County could commence foreclosure proceedings and recover the value of its lien and the attorney fees provided by the mechanic's lien statute, but only after Provident's and Bank One's mortgages were satisfied.
3. Tri-County was entitled to priority as to proceeds from the sale of the driveway, and any recovery in foreclosure proceedings had to be reduced by the proceeds from that sale.

KEY QUOTATIONS

> *"Consequently, Tri-County is entitled to commence foreclosure proceedings and recover the value of its lien and the attorney fees provided for in our mechanic lien statute after Provident and Bank One's mortgages are satisfied."* (803)

> *"Further, as we stated in our original opinion, Tri-County is entitled to priority as to any proceeds from the sale of the driveway, and, as noted by Tri-County, any recovery from foreclosure proceedings will be reduced by the proceeds from the driveway's sale."* (803)

FACTUAL BACKGROUND

Tri-County held a mechanic's lien relating to a driveway improvement. Provident and Bank One held mortgages affecting the property, and Bank One recorded its mortgage on February 5, 1999. The parties disputed the priority of the security interests, but the validity of Tri-County's mechanic's lien itself was not contested. The driveway could be sold, with proceeds applied to the lien, and any foreclosure recovery would be reduced by those proceeds.

PROCEDURAL HISTORY

The trial court granted summary judgment in favor of Tri-County and awarded damages, attorney fees, authorization to commence foreclosure proceedings, and priority over proceeds against Provident and Bank One. In its original opinion, the Indiana Court of Appeals determined that Provident's mortgage was senior to Tri-County's mechanic's lien. On rehearing, the court held that Bank One's mortgage was likewise superior because Bank One recorded its mortgage on February 5, 1999, and clarified that Tri-County could foreclose and recover its lien value and statutory attorney fees only after the superior mortgages were satisfied.

DISPOSITION

other

REMAND INSTRUCTIONS

On remand, the trial court was to apply the ruling that Provident's and Bank One's mortgages were superior to Tri-County's mechanic's lien, allow Tri-County to commence foreclosure proceedings and recover its lien value and statutory attorney fees only after those mortgages were satisfied, and account for proceeds from any sale of the driveway.

CASES CITED

- The Provident Bank v. Tri-County Southside Asphalt, Inc., 804 N.E.2d 161 (Ind. Ct. App. 2004)

OPINION

PER CURIAM.

806 N.E.2d 802 (2004) The PROVIDENT BANK, Appellant-Defendant, v. TRI-COUNTY SOUTHSIDE ASPHALT, INC., Appellee-Plaintiff. No. 49A02-0304-CV-341. Court of Appeals of Indiana. April 14, 2004. *803 A. Donald Wiles, II., Mark W. Pfeiffer, Harrison & Moberly, Indianapolis, IN, Douglas Haman, Cincinnati, OH, Attorneys for Appellant. Robert G. Elrod, Jonathan R. Elrod, Elrod & Mascher, Indianapolis, IN, Attorneys for Appellee.

OPINIONON REHEARING BAKER, Judge. Appellant-plaintiff Tri-County Southside Asphalt, Inc. (Tri-County) brings this petition for rehearing. We grant this petition for the purpose of addressing the course of proceedings following our opinion issued on February 27, 2004.[1] Tri-County notes our opinion, reported as The Provident Bank v. Tri-County Southside Asphalt, Inc., 804 N.E.2d 161 (Ind.Ct.App.2004), determined that Provident's mortgage was senior to Tri-County's mechanic lien.

On rehearing, Tri-County notes that the trial court's order granting summary judgment in favor of Tri-County also provided for damages, attorney fees, authorization to commence foreclosure proceedings, and priority over the proceeds granted in favor of Tri-County and against Provident and Bank One. Tri-County asks that we address these issues, as the trial court will face them upon remand.

Tri-County is incorrect in its determination that its mechanic lien is superior to Bank One's mortgage. For the reasons established in our original opinion and because Bank One recorded its mortgage on February 5, 1999, its mortgage is superior to Tri-County's even though Bank One did not join Provident's appeal. Tri-County also questions the validity of its mechanic lien, damages, and attorney fees.

The validity of Tri-County's mechanic lien was never contested. The parties were contending only with the priority of the security interests in the property. Consequently, Tri-County is entitled to commence foreclosure proceedings and recover the value of its lien and the attorney fees provided for in our mechanic lien statute after Provident and Bank One's mortgages are satisfied.

Further, as we stated in our original opinion, Tri-County is entitled to priority as to any proceeds from the sale of the driveway, and, as noted by Tri-County, any recovery from foreclosure proceedings will be reduced by the proceeds from the driveway's sale.

Accordingly, we grant Tri-County's petition for rehearing on this basis. In all other respects, our original opinion stands. BROOK, Senior Judge, concurs. SHARPNACK, J., dissents with opinion. SHARPNACK, Judge, dissenting. I respectfully dissent.

In the majority's opinion on rehearing, it addresses Tri-County's claim that its mechanic's lien is superior to Bank One's mortgage because Bank One did not appeal the trial court's grant of summary judgment, and the majority concludes that Bank One's mortgage is superior to Tri-County's mechanic's lien for reasons established in its original opinion. I disagree.

For reasons consistent with my dissenting opinion, I conclude that Tri-County's mechanic's lien is superior to Bank One's mortgage up to the amount of Tri-County's mechanic's lien. The majority also notes that Tri-County may sell the driveway and use the proceeds *804 from the sale to satisfy the lien, and adds that if the mechanic's lien holder elects not to sell the improvement, it may foreclose on its mechanic's lien only after all superior mortgages are satisfied.

I disagree. As I noted in my dissenting opinion, when it is impractical and harmful to remove the improvement, the law does not require a mechanic's lien holder to forfeit its priority as to the improvement created by its efforts.

Accordingly, I would grant Tri-County's petition for rehearing. NOTES [1] We deny Tri-County's request to reconsider our February 27, 2004 opinion on public policy grounds and in light of the dissent's comments.

BAKER, J.

OPINION-ON REHEARING BAKER, Judge. Appellant-plaintiff T'ri-County Southside Asphalt, Inc. (Tri-County) brings this petition for rehearing. We grant this petition for the purpose of addressing the course of proceedings following our opinion issued on February 27, 2004.1 Tri-County notes our opinion, reported as The Provident Bank v. Tri-County Southside Asphalt, Inc., 804 N.E.2d 161 (Ind.Ct.App.2004), determined that Provident's mortgage was senior to Tri-County's mechanic lien.

On rehearing, TriCounty notes that the trial court's order granting summary judgment in favor of Tri-County also provided for damages, attorney fees, authorization to commence foreclosure proceedings, and priority over the proceeds granted in favor of Tri-County and against Provident and Bank One. Tri-County asks that we address these issues, as the trial court will face them upon remand.

Tri-County is incorrect in its determination that its mechanic lien is superior to Bank One's mortgage. For the reasons established in our original opinion and because Bank One recorded its mortgage on February 5, 1999, its mortgage is superior to Tri-County's even though Bank One did not join Provident's appeal. Tri-County also questions the validity of its mechanic lien, damages, and attorney fees.

The validity of Tri-County's mechanic lien was never contested. The parties were contending only with the priority of the security interests in the property. Consequently, Tri-County is entitled to commence foreclosure proceedings and recover the value of its lien and the attorney fees provided for in our mechanic lien statute affer Provident and Bank One's mortgages are satisfied.

Further, as we stated in our original opinion, Tri-County is entitled to priority as to any proceeds from the sale of the driveway, and, as noted by Tri-County, any recovery from foreclosure proceedings will be reduced by the proceeds from the driveway's sale.

Accordingly, we grant Tri-County's petition for rehearing on this basis. In all other respects, our original opinion stands. BROOK, Senior Judge, concurs. SHARPNACK, J., dissents with opinion.. We deny Tri-County's request to reconsider our February 27, 2004 opinion on public policy grounds and in light of the dissent's comments.