

NO. A11-0322

State of Minnesota
In Court of Appeals

Slattengren & Sons Properties, LLC,

Respondent,

vs.

RTS River Bluff, LLC, et al.,

Defendants,

The RiverBank, a Banking Corporation
Under the Laws of the United States of America,

Appellant.

**RESPONDENT SLATTENGREN & SONS PROPERTIES, LLC'S
BRIEF AND ADDENDUM**

COLEMAN, HULL
& VAN VLIET, PLLP
Katherine M. Melander (#180464)
Steven R. Little (#0304244)
Brian W. Varland (#0339763)
8500 Normandale Lake Boulevard
Suite 2110
Minneapolis, MN 55437
(952) 841-0001

Attorneys for Appellant

JOSLIN & MOORE LAW
OFFICES, P.A.
Clark A. Joslin (#0052802)
221 N.W. Second Avenue
Cambridge, MN 55008
(763) 689-4101

Attorneys for Respondent

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF LEGAL ISSUES	1
STATEMENT OF THE CASE AND FACTS	2
ARGUMENT	2
CONCLUSION	13
STATUTORY ADDENDUM	RSA-1- RSA-3
ADDENDUM (SUPPLEMENTAL RECORD)	R APP 1-R APP 10

TABLE OF AUTHORITIES

MINNESOTA CASES

<i>Schweich v. Ziegler, Inc.</i> 463 N.W.2d 722, 729 (Minn. 1990)	1
<i>Fletcher v. St. Paul Pioneer Press</i> 589 N.W.2d 96, 101 (Minn. 1999)	2
<i>Porch v. Gen. Motors Acceptance Corp.</i> 642 N.W.2d 473, 477 (Minn. App. 2002)	2
<i>Schoch v. Birdsall</i> 48 Minn. 441 51 N.W. 382 (1892)	4, 5, 6, 7, 8, 10
<i>Landford Tool and Drill Co. v. Phenix Biocomposites, LLC</i> 668 N.W.2d 438, 442 (Minn. App. 2003)	6
<i>Rehn v. Fischley</i> 557 N.W.2d, 328, 333 (Minn. 1997)	6
<i>Olson v. Olson</i> 203 Minn. 199, 280 N.W. 640 (1938)	7
<i>In re Ocwen Financial Services, Inc.</i> 649 N.W.2d 854 (Minn. App. 2002)	8, 9, 10
<i>Citizen State Bank v. Raven Trading Partners, Inc.</i> 786 N.W.2d 274, 278 (Minn. 2010)	10
<i>Anderson v. Graham Inv. Co.</i> 263 N.W.2d 382, 384 (Minn. 1978)	10

STATUTES

Minn. Stat. § 386.41 9

Minn. Stat. § 508.54 9

Minn. Stat. § 507.34 10, 12

LEGAL ISSUE

Whether the District Court properly concluded that Respondent's mortgage as to the subject real property is prior, paramount, and superior to the mortgage of Appellant.

The trial court held that it is.

Apposite Authority:

Schoch v. Birdsall, 48 Minn. 441, 51 N.W. 382 (1892)

STATEMENT OF THE CASE AND FACTS

This case involves a dispute between the holders of competing Purchase Money Mortgages as to the priority of their respective mortgages upon certain real property located in Chisago County, Minnesota. Respondent accepts the Findings as set forth in the District Court's Findings of Fact, Conclusions of Law, Order for Judgment and Judgment dated and filed in this proceeding on November 1, 2010 as amended pursuant to the Court's subsequent Order dated and filed December 30, 2010. Said Findings of Fact, Conclusions of Law, Order for Judgment and Judgment dated and filed on November 1, 2010, together with said Order dated December 30, 2010 are set forth in their entirety in the Addendum to Appellant's brief in this matter (Appellant's Addendum pages 1-31), and are hereby adopted by Respondent in lieu of a separate statement of the case and facts.

ARGUMENT

I. Standard of Review

The applicable standard of review in this matter is whether the evidence supports the findings and the findings support the conclusions of law set forth in the trial Court's Order for Judgment in this matter. A reviewing court must

determine whether the District Court's findings are clearly erroneous and whether it erred in its conclusions of law. *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990). Findings of fact are considered clearly erroneous only if they are not reasonably supported by the evidence. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

In an appeal from a bench trial, the Appellate Court does not reconcile conflicting evidence. The Appellate Court gives the District Court's factual findings great deference and does not set them aside unless clearly erroneous. The Appellate Court is not bound by and need not give deference to the District Court's decision on a purely legal issue, however when reviewing mixed questions of law and fact, the Appellate Court will correct erroneous applications of law, but accord the District Court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard. *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002), review denied (Minn. June 26, 2002).

II. The District Court correctly determined that the Slattengren mortgage is entitled to priority over the RiverBank mortgage.

The District Court found that both the Slattengren mortgage and the RiverBank mortgage constitute valid Purchase Money Mortgages upon the subject real property (Findings of Facts 19 and 23, Appellant's Addendum (hereinafter A.Add.) pages 5 and 8) The District Court carefully analyzed the

facts and the law pertaining to the relative priority of competing purchase money mortgages and correctly concluded pursuant to that analysis that: “While both the Slattengren and the RiverBank mortgages were Purchase-Money Mortgages, this does not mean that they should enjoy equal priority.” The District Court set forth its analysis at paragraph 2 of its Conclusions of Law as follows: “In *Schoch v. Birdsall* [48 Minn. 441, 51 N.W. 382 (1892)] the Minnesota Supreme Court considered facts that are very similar to the present case.

‘On May 24, 1887, a third party loaned \$400.00 to a buyer and her husband and took as security on the loan a mortgage on a lot the buyer intended to purchase from the seller for \$757.00. The third party’s mortgage was recorded on May 25, 1887. The buyer paid only \$375.00 at the time of the purchase and the remaining balance was secured by a mortgage delivered to the seller simultaneously with the delivery of the Deed to the buyer. The seller’s mortgage was recorded on May 28, 1887, i.e., subsequent to the date of recording of the third party’s mortgage’ *Schoch v. Birdsall*, 51 NW 382 (Minn. 1892).

In analyzing the facts, and making its decision as to the priority of the respective mortgages, the Minnesota Supreme Court in *Schoch* stressed knowledge in determining priority between the subject mortgages. Based upon the facts of the case, the *Schoch* Court determined that:

‘The mortgage to the Defendant (third party lender) had not attached before the conveyance by Plaintiff (seller) to Botman (buyer); neither did the lien thereof intervene between the conveyance to her and her purchase-money mortgage back to Plaintiff. The seizen being instantaneous, the lien of Plaintiff’s

(seller) mortgage took precedence of any lien, general or specific, created by her (the buyer).'

Schoch, Id. After distinguishing the nature of the seller's purchase-money mortgage from the third party's lender mortgage, the Schoch court concluded that no knowledge could be imputed to the seller by virtue of the prior recording of the third party lender's mortgage:

'On the other hand, the prior record of the Defendants (third party lender's) mortgage did not avail as notice to the Plaintiff (seller), because, under the circumstances, the Plaintiff was not bound to search for conveyances made by his grantee while the latter was a stranger to the title, and before the execution of his deed, and the Defendant whose mortgage was recorded before Plaintiff's conveyance was not a subsequent bona fide mortgagee within the meaning of the recording act. In no view of the case is her (the third party lender's) mortgage entitled to priority'

Id.

The Schoch court's determination was based upon a simple understanding of the timing of the competing transactions. Since the third-party mortgage cannot attach to land that is not seized or owned by the mortgagor until the mortgagor possesses an interest to mortgage, executing or delivering a mortgage to the third-party lender does not attach to the real property until some point after the mortgagor acquires title. Since the vendor's mortgage attaches instantaneously with the delivery of the deed, the vendor's mortgage must attach before any third-party mortgage. In fact the Supreme

Court emphasized that ‘In no view of the case is the (third party’s) mortgage entitled to priority.’ Id.

The Schoch case clearly establishes a long-standing principal of Minnesota law that a seller’s purchase-money mortgage is given priority over a competing purchase-money mortgage of a third party lender, where the seller’s purchase-money mortgage is taken in good faith and without notice of the existence of the third party’s prior mortgage. This is true even when the third party’s mortgage is recorded prior to the seller’s mortgage.”

The District Court went on to clearly explain its analysis of the evidence received at trial in reaching its conclusion that notwithstanding the Slattengrens’ knowledge that, at some point in time, there may be a mortgage to the RiverBank, they were never advised that there was going to be a Purchase-Money Mortgage given to the bank. Conversely, however, as concluded by the Court, the RiverBank knew or should have known that the carry-back mortgage to the Slattengrens would be a competing purchase-money mortgage, and armed with that knowledge RiverBank did nothing but rely on Burnet Title to file the mortgages in a certain order. (Conclusions of Law, A.Add.-17).

On appeal RiverBank would have this Court reverse the District Court on the premise that the District “got it backwards” asserting that Slattengrens knew or should have known of the bank’s purchase-money mortgage. The evidence

adduced at trial however, as noted by the District Court in its conclusions of law, made clear that “the RiverBank was aware that there were carry-back mortgages being taken by the three vendors and knew or should have known that, by operation of law, if they did nothing to protect their priority each of those vendors would enjoy standing as a vendor purchase-money mortgagor, having priority over third party mortgages that were even filed first. (See Schoch, Id.) Even with this knowledge, as to the Slattengren parcel, the RiverBank relied entirely upon the filing order of mortgages to protect their priority. Had they taken the step of securing a subordination agreement, as they did with (the) Plumley parcel, there would be no issue of priority.”

In applying the facts to the law with regard to determining which purchase-money mortgage was entitled to priority over the other, the Court properly exercised its discretion in its ultimate conclusion that the Slattengren mortgage is entitled to priority over the RiverBank mortgage. The Appellate Courts accord the District Court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard. *Landford Tool and Drill Co. v. Phenix Biocomposites, LLC*, 668 N.W.2d 438, 442 (Minn. App. 2003 (quoting *Rehn v. Fischley*, 557 N.W.2d, 328, 333 (Minn. 1997)).

RiverBank argues that Schoch v. Birdsall (Id.) is no longer controlling as to the issue pertinent in this case, i.e. “which of the two competing purchase-

money mortgages is entitled to priority under the facts of this case?” To this end, RiverBank argues that *Olson v. Olson*, 203 Minn. 199, 280 N.W. 640 (1938), *modified on other grounds*, 203 Minn. 199, 281 N.W. 367 (1938) reverses the effect of the Schoch case on the facts of our present case and establishes the order of recording as the determining factor where priority between two competing mortgages is at issue.

Respondent asserts that such an interpretation is incorrect and is an oversimplification of the facts presented by Olson. In Olson there was a “secret” unrecorded mortgage *of which the third party purchase-money mortgage holder had no knowledge* (emphasis added) and which remained unrecorded for more than four years following the closing. The Olson court found that under such facts the holder of the “secret, unrecorded agreement” “cannot defeat the intended mortgagee’s rights by clothing his son with record title and then encumbering the property by a secret, unrecorded agreement” Olson, Id. at 203 Minn. 199, 202, 280 N.W. 640, 641. The facts as found by the District Court and clearly supported by the evidence adduced at trial show that the RiverBank was aware or should have been aware that Slattengrens were receiving a purchase-money mortgage. (Conclusions, A.Add.-18) Thus the facts in Olson are clearly distinguishable from the facts in both Schoch and in our present case.

The RiverBank also argues that the more recent case of *In re Ocwen Financial Services, Inc.*, 649 N.W.2d 854 (Minn. App. 2002) also serves as authority for overruling the holding in Schoch, as applicable to the facts of our case. It is clear that the District Court carefully considered the RiverBank's argument that Ocwen should control the outcome of the present case, and in the District Court's analysis set forth in the Conclusions of Law (A.Add. 18-19) the Court notes that the Ocwen facts are clearly distinguishable from the present case, and thus the holding in Ocwen is not applicable to the present case. Further, the Court finds that the holding in Ocwen is not inconsistent with the holding in Schoch v. Birdsall where, as in the present case, the vendor receiving the purchase-money mortgage had no knowledge of the third party mortgage. (A. Add.-19) Accordingly, the District Court correctly found that Schoch v. Birdsall controls.

The RiverBank also argues that Ocwen should control anyway, based upon the fact that its purchase-money mortgage, although filed on the same date, and at the same hour, minute and second, based on the Registrar of Title's reception time stamp, was given a lower document number, and thus entitled to priority. The RiverBank argues that the priority given to the order of recording under torrens system statutory provisions should be equally applicable to the order of recording as to non-torrens property. The RiverBank fails to note,

however, that there is a clear distinction under Minnesota law between torrens filings and non-torrens recordings. Minnesota Statutes Section 386.41 provides

Every county recorder shall endorse upon each instrument recorded, over the recorder's official signature, the time when it was received and the book and page in which it was recorded; and every instrument shall be considered as recorded at the time so noted.

This statute is equally applicable to torrens and non-torrens recordings.

Minnesota Statutes Section 508.54 pertaining to when mortgages take effect on title to property registered under the torrens system reads as follows:

The owner of registered land may mortgage the same by deed or other instrument sufficient in law for that purpose and such mortgage or other instrument may be assigned, extended, discharged or released, either in whole or in part, or otherwise dealt with by the mortgagee by any form of deed or instrument sufficient in law for the purpose. *Such deed, mortgage, or other instrument, and all instruments assigning, extending, discharging, releasing, or otherwise dealing with the same, shall be registered and take effect upon the title only from the time of registration.* (emphasis added)

Thus, under the torrens system, a mortgage can only be effective after it is registered. No such requirement applies to mortgages on non-torrens registered property (*See Minn. Stat. Section 386.41*) Since the Ocwen case dealt with mortgages registered under the torrens system, and not with mortgages on non-torrens property, Ocwen is applicable only with regard to torrens registered property and not applicable with regard to mortgages recorded against unregistered property, thus the RiverBank's argument as to the applicability of

the Ocwen holding to our present case fails both because the facts are clearly distinguishable as noted above and because the property subject to the mortgages in question in Ocwen was torrens property, whereas the subject property in the present case is not.

Furthermore, as the RiverBank correctly points out in its brief, the Minnesota Recording Act (Minn. Stat. Section 507.34) has been in place in some form since Minnesota territorial days, and thus was in effect well before the decision in Schoch v. Birdsall. It has been continuously in effect ever since, protecting “those who purchase property in good faith, for valuable consideration, and who first record their interest.” A “good faith purchaser” under the recording act “is someone ‘who gives consideration in good faith without actual, implied, or constructive notice of inconsistent *outstanding* rights of others,’” (emphasis added) (*Citizen State Bank v. Raven Trading Partners, Inc.* 786 N.W.2d 274, 278 (Minn. 2010) (quoting *Anderson v. Graham Inv. Co.*, 263 N.W.2d 382, 384 (Minn. 1978))).

The District Court correctly concluded that “the Slattengrens only knew that, at some point in time, there may be a mortgage to the RiverBank. They were never advised that there was going to be a purchase-money mortgage given to the bank.

In fact it was the clear understanding of Slattengrens and of Thomas Delaney, as dual agent for RTS River Bluff, LLC, the purchaser of all of the subject land and for Slattengrens, as sellers of the Slattengren property, that the Slattengrens would at all times have a first and prior mortgage on the subject property until the Slattengrens were paid in full. (Delaney Trial Testimony, Trial Transcript 169-170, R. Add. 4-5; Linn Slattengren Trial Testimony, Trial Transcript 141-143, R. Add. 1-3) The RiverBank, however, knew or should have known that the carry-back mortgage to the Slattengrens would be a competing purchase-money mortgage. Armed with that knowledge (the RiverBank) did nothing but rely on Burnet Title to file the mortgages in a certain order. (Conclusions of Law, A. Add.-18) Furthermore, RiverBank requested and obtained a Subordination Agreement from Plumleys (Trial Exhibit 22, R. App. 6-10) The Plumley Subordination Agreement for reference purposes, refers to the Plumley mortgage as “a second mortgage” even though it was recorded on September 22, 2003, some three months prior to the date and recording of the RiverBank Mortgage (Trial Exhibit 22, 1st paragraph, R. App. 6) RiverBank could have and should have notified Slattengren of any intent it had to obtain priority for its mortgage over the Slattengren mortgage, but failed to do so.

CONCLUSION

RiverBank cannot rely on the protection of Minnesota Statutes Section 507.34 because they do not qualify as a “good faith purchaser”. RiverBank had notice of the inconsistent outstanding rights of the Slattengrens as holders of a purchase-money mortgage inconsistent with the rights of RiverBank and failed to protect their interest by leaving Slattengren without notice of RiverBank’s intent to obtain priority over Slattengrens’ mortgage. The holding of the District Court should be affirmed.

Respectfully submitted,

JOSLIN & MOORE LAW OFFICES, P.A.

Dated: May 12, 2011

By Clark A. Joslin

Clark A. Joslin, #0052802

221 NW Second Ave.

Cambridge, MN 55008

763/689-4101

Attorneys for Respondent

Slattengren & Sons Properties, LLC