VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 236-3-20 Cncv

The Vermont House Condominium vs. Salese IV et al

DECISION ON MOTION TO AMEND JUDGMENT

In this foreclosure action, Plaintiff Vermont House Condominium Association, Inc. ("Association") submitted a proposed judgment and decree of foreclosure that extends its statutory "super-priority" lien to all common expense assessments that become due from the defaulting unit owner not only during the six months before it filed this action but also during the pendency of the action. The court, having previously entered judgment by default, approved the form of judgment without awaiting response from any other party. The first mortgagee, Defendant Everbank, promptly filed a motion to amend the judgment, accompanied by its objection to the proposed judgment. The court allows the objection, grants the motion, and vacates the judgment.

The court first addresses the timeliness of Everbank's objection. Rule 80.1(g) requires that a plaintiff file and serve on all parties who have appeared a form of judgment. Rule 58(d) then allows those parties seven days to object. Everbank had appeared, and then did file a timely objection. No provision of law requires it to have made this objection any sooner. Indeed, until the Association filed its proposed judgment, nothing in any of its filings in the case had put Everbank on notice of the extent of its claim to a super-priority position. Thus, the Association's protest to the contrary notwithstanding, Everbank's objection was timely—indeed, made almost on the instant that the Association first asserted its claim to a super-priority lien that extended beyond six months. Rather, it was the court that acted in an untimely fashion—but early, not late. The court therefore proceeds to consider the merits of the objection.

The super-priority lien derives from the Vermont Common Interest Ownership Act ("VCIOA"). VCIOA is derived from the Uniform Common Interest Ownership Act ("UCOIA"), a model law originally proposed in 1982 to promote rules and procedures regarding common interest ownership communities that are consistent from state to state. The model law was amended in 1994, 2008, 2014, and 2021. In 1998, the Vermont Legislature adopted the 1994 version of UCIOA verbatim (to create

VCIOA); then, in 2010, it amended the statute by adopting the 2008 version of the model act. *See* 1997, No. 104 (Adj. Sess.) (eff. Jan. 1, 1999); 2009, No. 155 (Adj. Sess.) (eff. Jan. 1, 2012). Section 3-116(a) of VCIOA gives a condominium association a lien for any common expense assessments owed by or attributable to a condominium unit, as well as for a variety of fees, charges, and fines against the unit owner (including attorney's fees and legal costs incurred to enforce the lien). *See* 27A V.S.A. § 3-116(a). The association's lien "is prior to all other liens and encumbrances on a unit," but it is not prior to "a first mortgage or deed of trust on the unit recorded before the date on which the assessment to be enforced becomes delinquent." *Id*. § 3-116(b)(2). That rule is in keeping with the "first in time, first in right" common-law rule. *See First Twinstate Bank v. Hart*, 160 Vt. 613, 613 (1993) (mem.). In "[a] significant departure from existing practice," 27A V.S.A. § 3-116, Unif. Law Comment 2, however, the VCIOA gives an association's lien priority over the first mortgage "to the extent of the common expense assessments based on the periodic budget adopted by the association . . . that would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the [association's] lien." 27A V.S.A. § 3-116(c).

The question Everbank presents here—whether § 3-116(c) extends "super-priority" to assessments that become due during the pendency of a foreclosure action—is not novel. Several Civil Division decisions have addressed it, with a clear split in approach and outcomes. *Compare Vt. Hous. Fin. Auth. v. Coffey*, No. S0367-11 CnC, 2011 WL 8472908 (Vt. Super. Ct. Aug. 11, 2011) (Toor, J.) (siding with first mortgagee based on plain language), and *EverHome Mortgage Co. v. Murphy*, No. 115-3-10 Bncv, 2011 WL 8472972 (Vt. Super. Ct. Dec. 6, 2011) (Hayes, J.) (same), *with Wells Fargo Bank v. Schunck*, No. 193-4-10 Wmcv, 2011 WL 8472973 (Vt. Super. Ct. Apr. 28, 2011) (Wesley, J.) (siding with the association); *Chase Home Fin., LLC v. Maclean*, No. 424-6-10 Rdcv, 2012 WL 1979217 (Vt. Super. Ct. Jan. 31, 2012) (Teachout, J.) (same), and *Bank of Am., N.A. v. Morganbesser*, No. 676-10-10 Wrcv, 2013 WL 9792479 (Vt. Super. Ct. Jan. 16, 2013) (Eaton, J.) (same).

In *Coffey*, the court supported its reading of the plain language by observing that Section 3-116 was intended to "'strike an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of secured interests of lenders.'" *Coffey*, slip op. at 3-4 (quoting 27A V.S.A. § 3-116, Unif. Law Comment 2). It reasoned that "it would be presumptuous to introduce new policy considerations to the mix that could add significant additional assessments to the secured lender's tab." *Id*. at 5. And in *Murphy*, the court reasoned that because the super-priority lien was an exception or limited carve-out to the general "first in time, first in right" rule, the exception should be narrowly construed. In contrast, in *Schunck*, *Maclean*, and *Morganbesser*, the court reasoned

that—as a matter of fairness—the court should not read the statute to make other member-owners of a condominium association responsible for common assessments that become due from the defaulting owner during the pendency of the foreclosure action. The courts reinforced their conclusion with the observation that foreclosure actions typically take at least a year (and often far longer) before the judicial sale, with mortgage lenders—whose loan collateral is benefitted by the other members' ongoing payments of the defaulting owners' share of common assessments—having little incentive to speed such cases toward conclusion, especially if the fair market value of the unit falls below the mortgage loan balance. Further, the *Maclean* and *Morganbesser* courts concluded that even under the narrower reading of the statute, an association could theoretically preserve its super-priority of lien by initiating new foreclosure actions at successive six-month intervals. Rather than allowing such a "nonsensical" and wasteful result, they construed the association's super-priority lien to include the assessments that become due during the pendency of the association's foreclosure action.

This court finds the *Coffey*/*Murphy* approach more persuasive. The courts' reasoning is clear, and does not warrant repeating here. There are, however, at least four additional considerations that support their conclusion. First, VCIOA itself requires that its substantive provisions be construed strictly, in relation to pertinent principles of the common law. Section 1-108 provides that "[t]he principles of law and equity, including . . . the law of real estate . . . supplement the provisions of this title, except to the extent these principles are inconsistent with the title." 27A V.S.A. § 1-108. Thus, VCIOA "displaces existing law relating to common interest communities *and other law* only as stated by specific sections and by reasonable implication therefrom." *Id*., Unif. Law Comment 1 (emphasis added). That rule of construction is critical. After all, Section 3-116 is wholly silent on the question whether the super-priority of the association's lien extends beyond the filing date of the association's foreclosure action. *See Maclean*, No. 424-6-10 Rdcv, slip op. at 2 ("The statute is actually silent as to this period."); *Morganbesser*, 2013 WL 9792479 at *2 (same). Further, the background against which Section 3-116 was adopted is also undisputed; the settled common law rule is that whoever is first in time is first in right. *See First Twinstate Bank*, 160 Vt. at 613 (first mortgage has priority over homeowner association's lien for assessments); *Morganbesser*, 2013 WL 9792479 at *2 (by filing an action to enforce the association's lien "certain charges of the condominium association are elevated to a priority they would not otherwise enjoy"); 27A V.S.A. § 3-116, Unif. Law Comment 2 ("the six months' priority for the assessment lien" over the "first security interests recorded before the date the assessment became delinquent" is "[a] significant departure from existing practice"). Accordingly, when taken together—*i.e.*, the combination of Section 1-108's rule of construction and Section 3-116's

silence in the face of the established common law rule— these provisions compel the conclusion that the association's lien does not have super-priority beyond the ordinary assessments that became due during the six months preceding the association's action.

This result would hold even in the absence of Section 1-108's rule of construction. As the *Murphy* court noted, statutes passed " 'in derogation of the common law are to be construed narrowly.' " *Murphy*, No. 115-3-10 Bncv (quoting 3 *Sutherland Stat. Const.* § 61.01 (5th ed. 1992)); *see also In re Ambassador Ins. Co.*, 2008 VT 105, ¶ 18 ("[W]hen a statute encompasses an area previously governed by the common law, the intent to change common law rules 'must be expressed in clear and unambiguous language.'") (quoting *Swett v. Haig's*, 164 Vt. 1, 5 (1995)); *United States v. Texas*, 507 U.S. 529, 534 (1993) (applying same rule in the federal context). Section 1-108's rule has additional significance, however, given the novel rule of construction announced in *Maclean* and *Morganbesser*—that when the Legislature adopts a uniform model law but fails to provide its own legislative history or some other indicia evidencing attention to a specific policy choice made within that uniform law, "courts are left with the task of interpreting the statute in a manner that makes sense of the language and furthers the statutory purpose." *Maclean*, No. 424-6-10 Rdcv, slip op. at 2; *see Morganbesser*, 2013 WL 9792479 at *2 ("In all likelihood this specific issue was not considered by the Legislature when it adopted the statute."). Section 1-108 directly rebuts such a rule of construction. It commands adherence to settled common law principles—including "first in time, first in right"—in the face of any ambiguity or silence found in Section 3-116 (or any other substantive provisions of the statute).

Moreover, where "doubt exists" with regard to the meaning of the plain language of a statute that is " 'taken from a model act, it is often helpful to examine the intent behind the model act,' " *Bissonnette v. Wylie*, 162 Vt. 598, 602 (1994) (quoting *State v. Papazoni*, 159 Vt. 578, 581 (1993)), and that inquiry typically entails "look[ing] to the official and published comments of the drafters" of the model act. 2B *Sutherland Stat. Constr.* § 52:5 (7th ed. 2021); *see*, *e.g.*, *Will v. Mill Condo. Owners' Ass'n*, 2004 VT 22, ¶¶ 9-15 (relying on official comments in Title 27A to interpret Section 1-113 of VCIOA); *Bissonnette*, 162 Vt. at 602 (UCC's official comments considered strong indicators of legislative intent); *Martel v. Stafford*, 157 Vt. 604, 608-09 (1991) (drafters' comments to Uniform Probate Code pertinent, even when Vermont has adopted model law with changes). Indeed, when enacting VCIOA, the Legislature indicated that the codification of the statute into a new Title 27A of the Vermont Statutes Annotated "shall include the 'official comments' of the [UCIOA] as set forth in the official text." 1997, No. 104 (Adj. Sess.) § 5. Thus, the UCIOA drafters' official comments are evidence of our

Legislature's intent in adopting VCIOA. That presumption is especially strong where, as here, the statutory language in question is adopted verbatim from the model statute. *See also In re Margaret Susan P.*, 169 Vt. 252, 264 (1999) ("We are reluctant to conclude . . . that when the Legislature uses model language it does so for a purpose different from the purpose in the model act."); 2B *Sutherland Stat. Constr.* § 52:5 (7th ed. 2021) ("A court may ascribe the intent of the drafters of the uniform law to its own legislature, even where the legislature has enacted a uniform act verbatim."). Accordingly, the absence of any special legislative history or other special indicia of intent from *our* Legislature, pertaining specifically to 27A V.S.A. § 3-116, is beside the point.

Second, and related to this latter point, the official comments accompanying the 2008 UCIOA indicate that the super-priority of the association's lien is limited to six months' worth of assessments. For example, to make it easier for associations to enforce their liens against delinquent unit owners, Section 3-116(a) of UCIOA—and later, the cognate section in VCIOA— was amended to make "reasonable attorney's fees and costs . . . enforceable in the same manner as unpaid assessments under this section." 2009, No. 155 (Adj. Sess.), § 35; *see* 27A V.S.A. § 3-116(a). Addressing this change, the UCIOA drafters explained that subsection 3-116(a) "is amended to add the cost of the association's reasonable attorneys' fees and court costs to the total value of the association's *existing* 'super lien' – *currently, 6 months of regular common assessments*." 2008 UCIOA, § 3-116, cmt. 8 (emphasis added). The drafters of the 2008 UCIOA thus indicated that the scope of the super-priority of the association's lien was limited to six months' worth of unpaid assessments.

Third, the 2014 revision to UCIOA, together with the drafters' official comments, makes clear that the 2008 and earlier versions of the model law were never intended to afford the condominium association's lien a super-priority beyond six months' worth of assessments. In 2014, Section 3-116 of UCIOA was changed significantly, to provide that the association's super-priority lien was "only to the extent of . . . the unpaid amount of assessments for common expenses, not to exceed six months for each budget year of the association, as based on the periodic budget adopted by the association . . . for the applicable year." 2014 UCIOA, § 3-116(c)(1). This was a pure policy change, made because

> [t]he real estate market facing common interest communities post-2007 is substantially different than the one contemplated by the drafters of the original UCIOA. Many units are "underwater," with values below the outstanding first mortgage balance. More significantly, long delays have developed in the completion of foreclosures. . . . Some lenders have chosen to delay scheduling or completing a foreclosure sale, fearful that they may be unable to resell the unit quickly for an appropriate return in a depressed market. During this period of delay, neither the unit owner nor the mortgage lender is paying the common expense assessments . . . . In the meantime, the association (and the remaining unit owners) bear the full financial consequences of this situation . . . .

> If other unit owners have to pay the burden of increased assessments to preserve community services or amenities, the delaying lender receives a benefit in that the value of its collateral is preserved while the lender waits to foreclose.

2014 UCIOA, § 3-116, cmt. 2. These are exactly the equitable and policy considerations that motivated the decisions in *Schunck*, *Maclean*, and *Morganbesser*, but they are obviously not the motivations for the six-month limited priority for association liens as promulgated in the 1994 and 2008 versions of UCIOA. Indeed, the drafters of the 2014 UCIOA explained that the "equitable balance" struck in Section 3-116 of the prior model acts

> was premised on the assumption that, if an association took action to enforce its lien and the unit owner failed to cure its assessment default, the first mortgage lender would promptly institute foreclosure proceedings and pay the unpaid assessments (*up to six months' worth*) to the association to satisfy the association's limited priority lien. This was expected to permit the mortgage lender to preserve its first lien and deliver clear title in its foreclosure sale – a sale that was expected to be completed *within six months* . . . or a reasonable time thereafter, thus minimizing the period during which unpaid assessments would accrue for which the association would *not* have first priority.

2014 UCIOA, § 3-116, cmt. 2 (emphasis added). The drafters thus explained that the association's super-priority lien was intentionally limited to six months' of common assessments.

In addition, the drafters of the 2014 UCIOA indicated that their changes to Section 3-116 were intended to address "a split of authority [that] has developed as to whether the association may extend its six-month lien priority by filing successive lien foreclosure actions at six month intervals." 2014 UCIOA, § 3-116, cmt. 2 (comparing *Morganbesser*'s holding with *Drummer Boy Homes Association v. Britton*, No. 10—ADMS—10030, 2011 WL 2981374, 2011 Mass. App. Div. 186 (July 20, 2011)). Thus, rather than explaining why the decision in *Morganbesser* was the correct reading of the prior versions of UCIOA, the drafters of the 2014 UCIOA changed the statutory language entirely. Under that new language, the association's super-priority lien is no longer "capped at only six months of unpaid common assessments," but instead extended, "to the extent of six months of unpaid comment assessments each year." 2014 UCIOA, § 3-116, cmt. 2. Since the Vermont Legislature has yet to adopt the 2014 version of UCIOA, however, the Association here is left with a super-priority lien up to six months' worth of assessments.

Finally, the six-month limitation on the Association's super-priority lien is consistent with the legislative intent that VCIOA "shall be applied and construed to make uniform the law with respect to the subject of this title among states which enact it." 27A V.S.A. § 3-110. The broad

construction of the association's lien given in *Schunck*, *Maclean*, and *Morganbesser*, is a true outlier. *See* Christian J. Bromley, "Encouraging Cooperation: Harmonizing the Battle of Association and Mortgage Lien Priority in America's Common Interest Communities," 43 *Real Est. L.J.* 255, 258, 283-84 (2014). While a majority of the states have adopted the super-priority lien in some capacity, the court's search for any cases construing the lien to extend to assessments accruing after the date of the association's foreclosure action has come up empty. [1] Rather, the courts in a clear majority of states have adopted the narrow reading of the super-priority lien. The command of Section 1-110 of VCIOA requires a similar construction here.

ORDER

The court grants the motion to amend the judgment. The court vacates the Judgment and Decree of Foreclosure by Judicial Sale dated February 18, 2022, and orders the Association to submit a revised form of judgment with fifteen days. That form of judgment shall provide that the Association's super-priority lien is limited to those common assessments that accrued in the six-month period prior to its initiation of this action. Everbank will then have the seven days allowed by Rule 58(d) to object.

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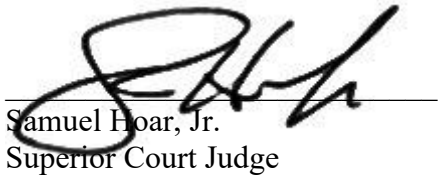

Samuel Hoar, Jr.
Superior Court Judge

[1] In *Drummer Boy Homes Association v. Britton*, 47 N.E. 3d. 400, 406-10 (Mass. 2016), the Massachusetts Supreme Judicial Court of reversed the lower court opinion (cited in the 2014 UCIOA drafters' comments) and held that associations could preserve super-priority during course of the foreclosure suit, by filing successive actions to foreclose. The Massachusetts statute's treatment of the lien, however, is dramatically different from that of the UCIOA. As one commentator has noted, "[n]either UCIOA nor the Uniform Condominium Act include language as favorable to associations as the language in the Massachusetts statute." Stewart E. Sterk, "Maintaining Condominiums and Homeowner Associations: How Much of a Priority?," 93 *Ind. L. J.* 807, 830 (2018).