

IN THE COURT OF APPEALS OF IOWA

AUG 26 1982

CLERK SUPREME COURT

UNITED STATES BANK,

Plaintiff-Appellee,

vs.

WILSON INVESTMENT COMPANY, A
Partnership; LARRY WILSON;
BURDETTE WILSON;

ESTATE OF ANNA S. BRADLEY,

Appellant,

MICHAEL LEE FORD; ST LUKE'S
METHODIST HOSPITAL and THE REIT
CORPORATION,

Defendants.

Filed August 26 1982

$\frac{2-115}{2-67057}$ 451

Appeal from Linn District Court, Clinton E. Shaeffer, Judge.

Defendant estate, the second mortgagee, appeals from judgment for plaintiff bank, the first mortgagee, in this real estate mortgage foreclosure action. The first mortgage contained a future advance clause. On appeal, defendant asserts that plaintiff, the first mortgagee, had actual knowledge of the second mortgage when it made advances under the clause and that the advances are therefore not entitled to priority over the second mortgage. The trial court found that plaintiff did not have actual knowledge of the second mortgage and that the advances had priority over the second mortgage. AFFIRMED.

Stephen A. Swift, Cedar Rapids, for defendant-appellant Estate of Anna S. Bradley.

Gregory J. Epping and Richard D. Raymon, Cedar Rapids, for plaintiff-appellee United States Bank.

H. Nick Gloe, Cedar Rapids, for defendants Wilson Investment Company, Larry Wilson and Burdette Wilson, Cedar Rapids, for defendant Reit Corporation.

Heard en banc.

On July 15, 1977, defendants, Wilson Investment Company, Larry Wilson, and Burdette Wilson, purchased property from the estate of Anna S. Bradley. Defendants gave to United States Bank, plaintiff, a mortgage upon this property and also upon other property owned by the defendants. This mortgage was in the sum of \$20,000, and contained a provision for possible future advances up to \$20,000. The future advances (or dragnet) provision was not binding upon the bank.

On July 17, 1977, defendants gave to appellant estate a second mortgage covering the property purchased from the estate. Appellant had actual knowledge of the existence of the first mortgage, and officers of the bank were aware that a second mortgage was to be executed by the defendants, Wilson Investment, Larry Wilson, and Burdette Wilson, to the estate.

On April 18, 1979, plaintiff made an advance to the defendants of \$5000 for improvement of the properties on the real estate mentioned in the mortgage.

Following default by the three defendants named supra, the bank, as first mortgagee, foreclosed. The estate, as second mortgagee, was brought in as a co-defendant, and claimed that its lien was superior to any advancements made by the plaintiff after July 17, 1977.

On May 22, 1981, the trial court rendered judgment giving priority to plaintiff's advance, dated April 18, 1979, over the estate's mortgage, dated July 17, 1977.

The issue is whether a second mortgage on real property of which the first mortgagee has notice is inferior to subsequent advances made by the first mortgagee under a future advancement clause.

The trial court found that the bank did not have actual notice of the estate's second mortgage. We agree. Knowledge that a mortgage is to be executed is not the same as knowledge that a mortgage has been executed. Even though two of the bank's employees were aware of the intention of the other parties to enter into a second mortgage, they were never informed by any of them that such a mortgage was executed. The bank had no obligation to inquire further into the matter, for the burden is upon the second mortgagee to establish actual notice. Everist v. Carter, 202 Iowa 498, 501, 210 N.W. 557, 559 (1926) citing Corn Belt Trust & Savings Bank v. May, 197 Iowa 54, 196 N.W. 735 (1924). In Corn Belt, the court said, "The prior mortgagee is not required to search the record before each advancement," and has adhered to that principle ever since. Citing Everist and Corn Belt, the court recently reiterated its view on this matter by saying that the prevailing rule is that the prior mortgage is affected only by actual notice. Mere constructive notice of a later encumbrance will not defeat the priority of a lien for advancements made by a first mortgagee after the execution and recording of a subsequent encumbrance. Freese Leasing v. Union Trust & Savings Bank, 253 N.W.2d 921, 925 (Iowa 1977).

Where the advances are of the same kind and quality or relate to the same transaction or series of transactions as the principal obligation secured by the mortgage, such advances will be construed as being included in the dragnet clause. Freese Leasing, supra, at 927. Since the bank made the advance to the defendants for improvement of the properties on the real estate mentioned in the mortgage we conclude that that test has been met. Inasmuch as the bank did not have actual notice of the second mortgage, and had made the later advancements to the defendant for improvements of the properties mentioned in the mortgage, we hold that the second mortgage is inferior to the advancements made by the first mortgagee under the future advancements clause, and affirm the judgment of the trial court.

AFFIRMED.