

# Title Policies

## Who's On First?

### Claiming Conspiracy and Fraud, Bank Tries to Prime Judgment Creditor

*A bank filed a declaratory judgment action against a judgment creditor claiming that judgment creditor's judgment, which was entered seven days before the bank's mortgage was signed, should be subordinated to the bank's mortgage as a result of the judgment creditor's fraud and civil conspiracy. The judgment creditor filed preliminary objections seeking to dismiss several counts of the bank's complaint contending that those counts failed to state proper claims against the judgment creditor. HELD: The Court overruled the preliminary objections holding that the claims asserted in the bank's complaint, if proven, would form a basis for the court to declare that lien of the judgment should be subordinated to the lien of the mortgage. Indymac Bank v. Arczip, Inc., 2006 WL 3460033 (C.C.P. Phila. Co., November 28, 2006).*

This case is a lien priority dispute between a bank, Indymac Bank, and a judgment creditor, Arczip, Inc. and Michael Kovarik (collectively "Arczip"). Indymac filed a declaratory judgment action against Arczip in the Court of Common Pleas of Philadelphia County. Indymac's complaint contained four counts which each sought declaratory judgment against Arczip. Arczip filed preliminary objections to, and sought to dismiss, the first three counts of Indymac's complaint contending that those counts failed to state proper claims against Arczip.

Indymac and Arczip are creditors of Daniel and Marina Kogan (the "Kogans") who owned a property in Bucks County which was subject to a mortgage recorded on April 8, 2002. On January 5, 2004, Arczip obtained an \$800,000 consent judgment against the Kogans in a California court action. The judgment was entered by agreement as part of a settlement agreement between Arczip and the Kogans. Under the terms of the Settlement Agreement, the Kogans agreed to pay \$30,000 immediately and \$210,420 over time to Arczip. However, if the Kogans defaulted, Arczip reserved the right to seek the entire judgment amount of \$800,000. On April 23, 2004, Arczip transferred the California judgment to the Court of Common Pleas of Bucks County.

On April 30, 2004, just seven days after Arczip transferred its judgment to Bucks County, the Kogans obtained a mortgage loan from Indymac's predecessor-in-interest, Money Warehouse, Inc., to refinance the 2002 mortgage. The new loan was secured by two mortgages against the Bucks County property which were recorded on June 2, 2004. From the proceeds of the new loan, the 2002 mortgage was paid off and the balance distributed to the Kogans. Indymac claimed that, at the time of the new loan, Money Warehouse had no knowledge of Arczip's judgment -- the Kogans never disclosed to Money Warehouse the existence of the judgment and the Prothonotary in Bucks County apparently did not index the judgment until after the closing on the refinancing.

In May, 2005, the Kogans defaulted on their settlement payments to Arczip and filed for bankruptcy. In the bankruptcy, Arczip and Indymac agreed that the Bankruptcy Trustee would sell the Kogans' property and put the net proceeds (\$725,702.83) into escrow pending resolution of Arczip's and Indymac's lien priority dispute.

In Count I of its complaint, Indymac claimed that Arczip's judgment was filed in violation of the Uniform Enforcement of Foreign Judgments Act, 42 Pa.C.S.A. §4306, et seq., because the judgment did not include the docket entries from the California action when the judgment was transferred to Bucks County. In its preliminary objections, Arczip argued that Indymac does not have standing to bring a separate action to attack the judgment, and that Indymac should have sought to intervene in the Arczip's Bucks County judgment action.

The Court rejected that argument, finding that Indymac has a "substantial, direct, and immediate interest in the determination of whether Arczip's apparently superior lien was not properly perfected in accordance with the statutory requirements of the act" and, therefore, has standing to bring a collateral action to attack Arczip's judgment. The Court also found that Indymac could not have intervened in the Bucks County action because Indymac never received notice of that action. The Court noted that Arczip simply filed its judgment with the Prothonotary's office after giving the required notice to the Kogans. According to the Court, Indymac could only attack Arczip's judgment lien in a separate action.

In Count II of the complaint, Indymac claims that Arczip "conspired" with the Kogans to defraud Indymac alleging that Arczip filed its judgment against the Kogans one week before Indymac refinanced the Kogans' 2002 mortgage, and that Arczip did so "with knowledge that the judgment would not appear in any title search performed in the ordinary course of business by reason of a delay in the indexing in recording of documents in the office of the Bucks County Prothonotary". Indymac claimed that Arczip's "tactical use of known filing delays" amounted to fraud and/or civil conspiracy, a claim which Arczip disputed in its preliminary objections.

In rejecting Arczip's arguments, the Court held that, although Indymac has not alleged sufficient facts to state a claim for fraud against Arczip, Indymac has sufficiently pled a claim for civil conspiracy. The Court noted that a claim for civil conspiracy requires "that two or more persons combine or enter into an agreement to commit an unlawful act or to do an otherwise lawful act by unlawful means." The Court pointed out that Indymac's complaint alleges that, by filing its judgment just seven

days before the refinancing, such that it would not appear of record, Arczip "knowingly assisted the Kogans to defraud Indymac". According to the Court, that allegation is sufficient to plead a claim for civil conspiracy against Arczip.

The Court also stated that Count II of the complaint is based upon "principles of equity and estoppel" and, although the priority of liens is usually based on the order in which they appear of record, a court may change the lien priority based upon such principles. The Court held that Arczip's alleged tactical use of Bucks County's known filing delays may give rise to a claim for "equitable estoppel".

The Court also stated that other equitable rules, such as the doctrine of "equitable subrogation", may apply. According to the Court, equitable subrogation is a "widely recognized exception to the 'first in time' rule" . . . and permits a person who pays off an encumbrance to assume the same priority position as the holder of the previous encumbrance". The Court held that, because money from Indymac's mortgages was used to pay off the 2002 mortgage against the property, "it is possible that Indymac's lien is entitled to the same priority as the prior mortgage".

Lastly, in Count III of the complaint, Indymac claimed that Arczip should be limited to receiving the amount it agreed to accept from the Kogans in settlement (\$210,420) rather than the full amount of the judgment (\$800,000). In its preliminary objections, Arczip argued that Indymac may not challenge the judgment amount. The Court rejected that argument holding that "a junior creditor may require a senior creditor to explain how the amount it claims due was calculated." Consequently, Indymac is entitled to "demand the Arczip produce evidence to show that the amount it claims under the judgment is correct."

It is important to point out that the Court merely overruled Arczip's preliminary objections to Indymac's complaint. The Court did not determine that Indymac's claims were valid or that Indymac would ultimately prevail on those claims at trial. The Court merely determined that Indymac, based solely upon the allegations of its complaint, properly stated claims against Arczip. The case remains pending in the Court of Common Pleas of Philadelphia County. ■

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