



CHICAGO BULL EDITION 30

SIMULTANEOUS RECORDINGS, SUBORDINATIONS AND NEWS YOU CAN USE!

Effective October 1, 2003, Subordination Agreements will be interpreted according to the intent of the parties, not technical requirements, pursuant to revised G.S. 39-6.6. Joinder of trustee will not be required, nor will the interest rate of the new loan to which the prior lien is being subordinated. However, PLEASE NOTE:

- This does not apply to release deeds or change cancellation statutes regarding who must sign and necessary terms.
- The subordination still must be specific about the lien being subordinated and the lien to which it is being subordinated so that an examiner could determine this from the subordination as recorded on the public records.
- This is not retroactive and will not “cure” prior defective subordinations.
- This is non-exclusive and will not modify the provisions of, for example, the Planned Community Act or the Condominium Act.
- This does not affect the requirement for joinder of trustees on release deeds.

Effective October 1, 2003, Simultaneous Recording & Co-parity of liens (NCGS 47-20(a)): Legal presumptions about priority as between simultaneously recorded liens (or other instruments) has changed to what most have believed was the “common sense” rule – the first document on record, the priority of which is protected by G.S. 47-18 or G.S. 47-20, is the first in the chain of title and priority, even if clocked in at the same time as other similar types of documents. The presumption of priority will be based on first on time of recording; if recorded at the same time, then based on document number in registries which use this system; and, if simultaneously recorded and no document number, then based on chronological book and page number. This is a rebuttable presumption, for example, in situations where the documents show on their face that they are intended to have a different priority (such as *intentional* coparity or subordination provisions).

The amendment does not alter the considerable body of caselaw defining “simultaneous recording” for the purpose of applying the doctrine of instantaneous seisin. The doctrine of instantaneous seisin “is a legal fiction which provides that when a deed and a purchase money deed of trust are executed, delivered, and recorded *as part of the same transaction*, the title conveyed by the deed of trust attaches at the instant the vendee acquires title and constitutes a lien superior to all others” (*emphasis added*) Dalton Moran Shook, Inc. v. Pitt Development Company, 440 S.E.2d 585 (1994). It is plain in the caselaw that actual “simultaneous” recording is not a requirement in order to establish instantaneous seisin. Rather, it is necessary that the deed of trust be prepared, delivered and recorded as a *part of the same transaction* through which the debtor/buyer purchases the land. Accordingly, it has been held that a deed of trust recorded two minutes after the vesting deed was part of the same transaction (Slate v. Marion, 104 NC App 132). In contrast, it has been held that a deed of trust recorded eleven days after the vesting deed was not (Pegram-West, Inc. v. Hiatt Homes, Inc., 12 NC App 514).

It is always important to remember that the protections afforded the seller or the third-party lender under the doctrine are extended only to those funds actually used to purchase the property. Therefore, the protection does not extend to construction loan proceeds (See Carolina Builders, Corp., v. Howard-Veasey Homes, Inc., 72 NC App 224). Where the buyer obtains a loan for both the purchase price and for construction financing, it has been held that a materialman’s lien should be subordinated to the deed of trust but only to the extent that it secures the purchase price (Dalton, 113 NC App 707). It has also been held that a when holder of a deed of trust “intentionally” allows a construction loan deed of trust to be recorded prior to his purchase money deed of trust, then the holder “indicates an intent to forfeit the doctrine’s protection” (Carolina Builders 72 NC App 224).

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