



## Presumption of Note Expiration Limited

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In *Falk v. Fannie Mae*, No. CDA 12-764 (March 5, 2013), the North Carolina Court of Appeals addressed several issues relating to the relative lien priority of two deeds of trust encumbering a Guilford County apartment complex (the "Property"). In October of 1994, Michael Falk, as Trustee of the Charlotte Falk Irrevocable Trust (the "Trust"), loaned \$600,000 to Quicksilver, LLC ("Quicksilver") evidenced by a demand note, and secured by a deed of trust on the Property (the "Trust's deed of trust"). The Trust made demand on the note in December of 1994. Quicksilver never paid the demand note in full but did continue to make payments in some amounts from time to time. In 1999, Quicksilver obtained financing for the Property from Wachovia Bank, and the Trust subordinated its deed of trust to a deed of trust securing Wachovia's note ("FNMA's deed of trust"). In 2001, Quicksilver obtained a new loan from Lend Lease, which paid off Wachovia but not the debt to the Trust. Lend Lease sold its note to FNMA. When Quicksilver defaulted on FNMA's note, FNMA foreclosed and acquired the Property at the foreclosure sale in 2011. The Trust then made demand on FNMA for payment of the Quicksilver note which, by then, had a balance of approximately \$3.4 million including interest. The Trust then filed suit seeking a declaration that it held a first lien on the Property and, in a separate action, sought to foreclose its deed of trust. The Clerk allowed the Trust's foreclosure to proceed, and FNMA appealed the Clerk's ruling. FNMA also responded to the declaratory judgment action by seeking an order restraining the foreclosure. The court ordered both matters to be joined for hearing, and FNMA moved for summary judgment. Hearing all matters together, the trial court granted FNMA a summary judgment and reversed the Clerk's order of foreclosure. The basis for the court's ruling was that (i) although the Trust's deed of trust was recorded prior to the deed of trust in favor of FNMA, N. C. General Statute Section 45-37(b) applies so that the lien of the Trust's deed of trust expired, or (ii) equitable subrogation barred the Trust's claim. The Trust appealed.

The Court of Appeals ruled in favor of the Trust and held that the Trust's deed of trust had not expired as to FNMA and was not barred by equitable subrogation.

The Court of Appeals' analysis included several important and noteworthy points:

1. N.C. General Statutes Section 45-37(b) creates a presumption that the secured debt has been paid, and the lien of the deed of trust securing the debt expires 15 years after the

maturity date of the debt as stated in the security instrument (or, as in this case, 15 years after the date of the note if the note is payable on demand). The Court of Appeals concluded that these presumptions only benefit creditors and purchasers for value if their transaction occurred after the expiration of the fifteen-year period. Because FNMA's deed of trust was executed and recorded less than 15 years after the Trust's deed of trust was executed and recorded, FNMA was not entitled to rely on N.C. General Statutes Section 45-37(b) for the presumption that the Trust's deed of trust expired 15 years after the date of the deed of trust.

2. N. C. General Statutes Section 45-36.24, passed in 2011, creates a similar presumption that the lien expires 15 years after the stated maturity date, and the Court of Appeals distinguished the language in N.C. General Statutes Section 45-36.24 from the language in N.C. General Statutes Section 45-37(b) and concluded that the 45-36.24 presumption would apply, notwithstanding that FNMA's deed of trust lien was created within the 15-year period, but for the fact that the retroactive application of this statute would deprive the Trust of a vested contract right and. Therefore, would be unconstitutional if enforced against the Trust. Even though new statutes that apply retroactively are not automatically unconstitutional, they may be unconstitutional as to a particular set of facts if a party would be deprived of a vested property right.
3. The Court of Appeals reminded us that in some cases the maturity date of a demand obligation will be deemed to be the date of the creation of the demand debt obligation.
4. The Court of Appeals rejected FNMA's equitable subrogation arguments because FNMA had constructive notice of the Trust's deed of trust since the Trust's deed of trust was validly recorded, and, therefore, FNMA was not "excusably ignorant of the Trust's deed of trust."

## **Related People**

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