



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



THE WEITZ COMPANY, L.L.C. v. NICHOLAS HETH, *et al.*
CV-13-0378-PR

PARTIES:

Petitioners: Nicholas Heth, *et al.*

Respondent: The Weitz Company, L.L.C.

Amici Curiae: Land Title Association of Arizona
BMO Harris Bank and Arizona Bankers Association

FACTS:

In 2005, First National Bank of Arizona made a \$44 million construction loan to Summit at Copper Square, L.L.C. in connection with a large condominium project in downtown Phoenix. First National recorded a deed of trust securing the loan. Summit contracted with The Weitz Company to be the general contractor on the project. After commencing work on the project, Weitz served a preliminary 20-day mechanics' lien notice. A.R.S. § 33-992.01.

As construction progressed over the next two years, Weitz submitted monthly applications to Summit, and First National approved each application, releasing loan proceeds to pay Weitz. In the summer of 2007, however, a problem arose with payments to Weitz due to a "gap" in funding of the project. In an attempted solution, Summit, Weitz, and First National agreed that, if Weitz continued to work on the project, Summit and First National would pay Weitz from the sale proceeds of the individual units. In reliance on this arrangement, Weitz completed construction of the project.

In 2008, First National announced to the other parties that it would not fund the final \$4 million of construction costs due to capital requirements imposed by regulatory agencies, and that it would require Summit to apply all funds from proceeds of unit sales to repayment of First National's loan to Summit. Weitz promptly recorded a mechanics' lien on the property.

Weitz sued to foreclose its mechanics' lien. The lenders, Nichols Heth *et al.*, moved for partial summary judgment, arguing that they were equitably subrogated to the priority rights of the construction lender's (First National's) first deed of trust and thus had priority over Weitz's mechanics' lien. Weitz filed a cross-motion for partial summary judgment, asserting that its mechanics' lien had priority under A.R.S. § 33-992(A), which provides in pertinent part:

The liens provided for in this article . . . are preferred to all liens, mortgages or other encumbrances upon the property attaching subsequent to the time the labor was

commenced or the materials were commenced to be furnished except any mortgage or deed of trust that is given as security for a loan made by a construction lender . . . if the mortgage or deed of trust is recorded within ten days after labor was commenced or the materials were commenced to be furnished. . . .

The trial court granted Weitz's motion, reasoning that Weitz's mechanics' lien had priority over the lenders' deeds of trust under A.R.S. §33-992(A). In denying the lenders' motion, the trial court rejected their argument that their deeds of trust had priority over the mechanics' lien under the doctrine of equitable subrogation as interpreted by *Lamb Excavation, Inc. v. Chase Manhattan Mortgage Corp*, 208 Ariz. 478, 95 P.3d 542 (App. 2004).

The lenders appealed, asserting that the trial court erred in declining to apply the doctrine of equitable subrogation to give their deeds of trust priority over Weitz's mechanics' lien. In its published opinion in this case, the court of appeals agreed with the trial court, concluding that, because the statute expressly provides that mechanics' liens have priority over all subsequent encumbrances, the application of equitable subrogation would be inconsistent with the statute. The Arizona Supreme Court granted the lenders' Petition for Review.

ISSUE:

Whether the statute giving mechanics' liens priority over subsequently attaching liens precludes the assignment of a senior lien by equitable subrogation.

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