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COURT OF APPEALS  
STATE OF NEW YORK

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ADAM PLOTCH,

Appellant,

-against-

No. 57

CITIBANK, N.A.,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
March 24, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA (By Video)

Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Number 57 on the  
2 calendar, Plotch v. Citibank.

3 MR. LEDERMAN: Good afternoon, Your Honors.  
4 Bruce H. Lederman from the law firm D'Agostino,  
5 Levine, Landesman & Lederman. With me is Paula  
6 Miller (ph.). I represent the plaintiff-appellant  
7 Adam Plotch.

8 This is a case of statutor - - -

9 CHIEF JUDGE DIFIORE: Excuse me, counsel.  
10 Are you requesting any rebuttal time?

11 MR. LEDERMAN: I'm sorry. I'd like three  
12 minutes for rebuttal.

13 CHIEF JUDGE DIFIORE: Yes, of course.  
14 Please.

15 MR. LEDERMAN: This is a case of statutory  
16 interpretation of the phrase "first mortgage of  
17 record" as that phrase appears in Section 339-z of  
18 the Real Property Law, but equally important, as that  
19 phrase is used in a judgment of foreclosure which was  
20 issued in this case, which resulted in the plaintiff-  
21 appellant purchasing the property at issue. Words  
22 can and should be given their plain meaning, and in  
23 this case, simply put, first means first. A mortgage  
24 is something very specific.

25 JUDGE STEIN: Co - - - counselor, I - - - I

1 think you - - - you have a compelling argument that  
2 if you look at the statute, if you look at the  
3 purposes of the statute, that - - - that what  
4 happened here flies in the face of that. I - - - you  
5 know, I - - - I recognize it that a consolidation  
6 agreement is not itself a mortgage. I mean, there  
7 are a lot of - - - there are a lot of arguments here.

8 What - - - what I have - - - am having  
9 trouble getting around is the fact that I don't think  
10 there's any dispute that if - - - if the first  
11 mortgage had been satisfied and a new mortgage in the  
12 exact same amount as the consolidated mortgage was  
13 here entered into and recorded, that would have first  
14 priority over the common charges lien, correct?

15 MR. LEDERMAN: That - - - I think that is  
16 correct, however - - -

17 JUDGE STEIN: So what - - - so what are we  
18 saying? So - - - so are - - - would we then be  
19 saying, if we agree with you, as a practical matter,  
20 that yes, bank and - - - and homeowner, you can do  
21 this. The only difference is, is that you have to go  
22 spend a little more money and pay some more recording  
23 fees.

24 MR. LEDERMAN: Well - - -

25 JUDGE STEIN: Is that the only difference

1 here?

2 MR. LEDERMAN: It's a matter of there are  
3 compromises which have been made in the law, and the  
4 tax law is written a certain way, and the tax law  
5 gives people options to do certain things.

6 JUDGE STEIN: As I said, I think you have a  
7 very compelling argument there, but as a practical  
8 matter, how - - - how can we - - -

9 MR. LEDERMAN: Well, as a practical matter,  
10 it's a matter of following what the law says. The  
11 law says "first mortgage of record". I faxed up to  
12 the court, so that the court could see the public  
13 record as of yesterday.

14 JUDGE STEIN: What would be the benefit of  
15 - - - to the condo association?

16 MR. LEDERMAN: Oh, there'd be a significant  
17 benefit. And that's part of the reason that the New  
18 York Council on Co-ops and Condos put in a brief.  
19 The underlying legislative purpose - - -

20 JUDGE STEIN: I understand. Let - - - let  
21 me make my question a little bit clearer. If the  
22 homeowner and the bank could get around it every  
23 single time, if - - - if we agree with you and we  
24 establish this is the rule - - - okay, a consolidated  
25 mortgage doesn't take priority, only the first filed

1 mortgage, you know, has priority - - - then all the  
2 banks say, from now on, okay, we're not going to do  
3 consolidation mortgages anymore. We're going to  
4 require that you satisfy the - - - the original  
5 mortgage and take out a whole new mortgage. And - -  
6 - and then they end up in the same position they  
7 would have been in with the consolidation mortgage,  
8 except they now have priority. Why - - - what - - -

9 MR. LEDERMAN: Well - - -

10 JUDGE STEIN: - - - how - - - how does that  
11 get prevented?

12 MR. LEDERMAN: That gets prevented if  
13 somebody wants to petition the legislature to change  
14 the tax law or petition the legislature to change  
15 Section 339-z. Section 339-z could easily be written  
16 to say condominium charges have priority over any  
17 mortgage including a consolidation agreement. The  
18 law is written the way it is. There are sometimes  
19 benefits, sometimes burdens. And in this case, we  
20 feel - - -

21 JUDGE ABDUS-SALAAM: Counsel, I'd like to  
22 go back to what you said about the letter you  
23 submitted that shows that the county clerk recorded  
24 the mortgages separately from the consolidation  
25 agreement.

1 MR. LEDERMAN: Correct.

2 JUDGE ABDUS-SALAAM: We know that agencies  
3 have their way of doing things, and no matter what,  
4 sometimes they - - - they record - - - no matter how  
5 you think things should go, as the public or a member  
6 of the public, they're going to do it their way. So  
7 that the mortgages are - - - are recorded separately  
8 from the consolidation agreement tells us what,  
9 really?

10 MR. LEDERMAN: Well, it tells us two  
11 things, Judge. One, if you look at the document,  
12 it's not a mortgage. And there's a reason it's not a  
13 mortgage; there's a historical reason. Article 11 of  
14 the Tax Law imposes a tax on mortgages, so there is  
15 purposeful decision not to call it a mortgage. If  
16 you call it a mortgage, it ha - - - you have to pay a  
17 tax on it. A mortgage under Section - - - I believe  
18 it's 250 of the tax law - - - is defined as an  
19 instrument that imposes a lien.

20 The way the tax law has been interpreted  
21 for the last, I believe, very long time - - - I'm not  
22 sure when it was enacted - - - is if you have  
23 mortgage A, mortgage A imposes lien. Mortgage B,  
24 mortgage B imposes a lien. And there's a long line  
25 of cases which I cited to this court in the briefs

1           that a consolidation is an instrument for the  
2           convenience of the parties.  And that's because it's  
3           not just the county clerks or the registers of the  
4           respective counties making a decision, they're  
5           following the tax law.

6                         And again, one could argue that it's  
7           rational or irrational the way the tax lien is - - -  
8           the tax law is written.  I can advise the court, I do  
9           a lot of transactional work.  New York State is the  
10          only state in the country that has this system of  
11          consolidation, and there are a lot of more  
12          complicated transactions where people around the  
13          country call it a "New York style transaction" and it  
14          becomes very unwieldy, but that's the way the tax law  
15          is written.

16                        There have been proposals to change it, but  
17          it's not - - - the tax law's actually - - - it's  
18          revenue positive for the State of New York and the  
19          State of New York does not want to change it.  So  
20          going back to your point, it's not even just a matter  
21          of the county clerk saying we'll call it this.  If it  
22          was a mortgage, there would be a different - - - it  
23          would be subject to a different tax.  There are - - -  
24          in the tax world, S corporations are treated  
25          differently than C corporations.  You call them

1 different things, but they have significantly  
2 different effects.

3 Now coming back to this case, what I submit  
4 is most important, because this is actually a case  
5 about one individual, the plaintiff-appellant Adam  
6 Plotch purchased a piece of property at a foreclosure  
7 sale. He goes to the foreclosure sale. There is a  
8 judgment of the Supreme Court that says he is taking  
9 subject to the first mortgage of record. That's what  
10 it says. It doesn't say subject to a consolidated.

11 JUDGE RIVERA: But could we talk about 339-  
12 aa, about the - - - the lien being effective from the  
13 filing? Why - - - why doesn't that make - - - let -  
14 - - let's say we agreed with your argument about the  
15 mor - - - first assigned mortgage. But don't you  
16 actually have to have a lien that's been - - - that -  
17 - - that's effective in accordance with 339-aa that  
18 is one that has been filed that - - - so that you've  
19 got notice?

20 MR. LEDERMAN: Well, here there was  
21 foreclosure of a filed lien. The - - - they - - -

22 JUDGE RIVERA: But isn't it after the  
23 consolidation? Am I - - - am I wrong about the facts  
24 in this case?

25 MR. LEDERMAN: The lien was filed after the



1 consolidation; however, the declaration of  
2 condominium was filed before. And it's the  
3 declaration of condominium that creates, if you want  
4 to call it an inchoate lien, that someone who files  
5 the document is - - - someone who files a  
6 consolidation is on notice that there could be. And  
7 it stills brings you back. The argument becomes  
8 circular.

9 JUDGE RIVERA: Well, I know - - - I  
10 understand what you're saying that the declaration  
11 recognizes that - - - that the board has these liens  
12 again - - - against unpaid charges. I understand  
13 that.

14 MR. LEDERMAN: It - - -

15 JUDGE RIVERA: But until you act - - - I  
16 thought 339-aa was saying that - - - the - - - the  
17 lien means nothing other then yes, it says in the  
18 declaration you would have this lien. It's not  
19 effective. It has no meaning until you actually  
20 notice the lien. That is to say, you have really no  
21 effective lien for purposes of this statute until  
22 someone doesn't pay their charges, because that's the  
23 only time - - -

24 MR. LEDERMAN: Well - - -

25 JUDGE RIVERA: - - - there's a debt to you

1 - - -

2 MR. LEDERMAN: Well, my - - - my - - -

3 JUDGE RIVERA: - - - to the board, to the -

4 - -

5 MR. LEDERMAN: - - - my client is

6 purchasing at a foreclosure sale. The - - -

7 JUDGE RIVERA: Well, I'm say - - - no, but

8 I'm talking for purposes of the - - - the existing

9 lien.

10 MR. LEDERMAN: But for purposes of the  
11 existing lien, the question is, what does 339-z say?

12 It's say subject to the first mortgage of record.

13 The co - - - the fact that the lien is filed - - -

14 JUDGE RIVERA: No, no, no, I know, but it  
15 say - - -

16 MR. LEDERMAN: - - - or not, doesn't change

17 - - -

18 JUDGE RIVERA: All right, let me interrupt

19 you, counsel. Counsel, but it says shall have a

20 lien, right, for unpaid charges. But 339-aa is

21 assuming there's got to be some unpaid charge, not

22 merely the right to have this lien - - - if there is

23 an unpaid charge. Until you've got unpaid charges,

24 there's nothing you're going to collect on or - - -

25 see, I'm sorry. The board would collect on it; the

1           condo would collect on it.

2                   MR. LEDERMAN:   But the board collects  
3           subject to the right of a first mortgage of record.

4                   JUDGE PIGOTT:   Are you saying - - - are you  
5           saying, though, that - - - that there's got to be a  
6           search of, you know - - - in other words, when you're  
7           - - - when you're going to foreclose or when you're  
8           going to buy a property, that if it says condominium,  
9           even though there's no lien filed and there's no - -  
10          - you still have to know that somewhere out there,  
11          there may be something that takes priority over this  
12          pro - - - prospective con - - - consolidation?

13                   MR. LEDERMAN:   Of - - - yes, I would agree  
14          with that.

15                   JUDGE PIGOTT:   I don't think that's true at  
16          all.   What - - - I mean, that - - - that'd be like -  
17          - -

18                   MR. LEDERMAN:   For you - - -

19                   JUDGE PIGOTT:   - - - that'd be like saying,  
20          and you got to make sure they don't have credit  
21          cards, because, you know, credit cards can be turned  
22          into judgments, and that would be - - - that would  
23          pro - - - precede your - - - your consolidation.

24                   I don't think that's what we - - - we - - -  
25          we really - - - we - - - the State of New York really

1 doesn't care about this stuff. I mean, so there's so  
2 condos, that's great. There's real houses out there.  
3 There's farms, there's factories. Mortgages get  
4 filed, and when they get consolidated, they're one  
5 mortgage.

6 And you want to say, well, we've got this  
7 fifty-cent lien, and therefore we can buy it at  
8 foreclosure and knock off, you know, two-thirds of  
9 the consolidated mortgage because they didn't know  
10 that we had this fifty-cent lien and we're going to  
11 foreclose on it and cut off their right of  
12 redemption.

13 MR. LEDERMAN: Well, I would respectfully  
14 suggest looking at it differently. You have someone  
15 like the plaintiff who comes in and purchases  
16 property at a foreclosure sale. Regardless of what  
17 the lien is, he - - - the plaintiff is - - - the  
18 plaintiff in this case is not part of the board. The  
19 plain - - -

20 JUDGE PIGOTT: No, but he - - -

21 MR. LEDERMAN: He - - -

22 JUDGE PIGOTT: - - - he knew that there was  
23 this - - - there was this mortgage on this property.

24 MR. LEDERMAN: He knew from the public  
25 record that there were two mortgages on the property

1 and he was justified in saying, I will take subject  
2 to the first mortgage of record - - -

3 JUDGE PIGOTT: He made that calculation,  
4 and - - - and apparently other people disagree and  
5 say when you consolidate a mortgage, it - - - it  
6 remains the first mortgage. And that's good for  
7 homeowners, you know, who want to enhance their  
8 property or, you know, borrow more money so they can  
9 send their kid to college or something.

10 And you want to say the bank and the owner  
11 do that at their peril, because I've got this - - -  
12 this 1,500-dollar lien on - - - on condo charges  
13 that's going to knock that - - - that 50,000-dollar  
14 consolidation out.

15 MR. LEDERMAN: Well - - -

16 JUDGE PIGOTT: And I don't think that's the  
17 law at all.

18 MR. LEDERMAN: Again, it's not the - - -  
19 it's the purchaser who is at the foreclosure sale who  
20 sets a price and decides what to bid - - -

21 JUDGE PIGOTT: He gambled. He tried - - -  
22 you know, he said, aha, I can get beyond this; I - - -  
23 - I know I get - - - the first mortgage's got to go,  
24 but I can - - - I can get out of the other one,  
25 because even though everyone seems to think that it's

1 one mortgage that's been consolidated, it's actually  
2 two and I'm going to be able to knock that off,  
3 right?

4 MR. LEDERMAN: Well, we are saying, I  
5 think, very candidly, it's what the law says. It's  
6 the plain meaning of the law, and it - - - to put a  
7 judicial gloss on the word "first mortgage of  
8 record", to reach a purpose that might - - - is  
9 something the legislature should do.

10 JUDGE PIGOTT: Are - - - are you then  
11 saying, that if you have a first mortgage on your  
12 property, that you cannot increase that mortgage  
13 under any circumstance, you know, it - - - that it -  
14 - - that any increase in that mortgage is subject to  
15 any subsequent judgment or lien that's filed on the  
16 property?

17 MR. LEDERMAN: Well, in the context of  
18 condominiums, if you - - - if the procedure used - -  
19 -

20 JUDGE PIGOTT: Why condominium? Why not -  
21 - - why not somebody's home?

22 MR. LEDERMAN: Because there are no common  
23 charges on somebody's home.

24 JUDGE PIGOTT: No, but there's taxes.  
25 There - - - there's - - - there's debt, and - - - and

1 they all line up. And - - - and - - - and if this  
2 was - - - if this was a homeowner who had  
3 consolidated a mortgage, you're argue - - - that - -  
4 - a homeowner's argument, you know, the person who  
5 bought the home at foreclosure would then say, well,  
6 the homeowner may have increased his first mortgage  
7 by fifty grand, thinking that by - - - by doing that,  
8 he was - - - he was getting that money and they had a  
9 first lien, when in fact, because that's a  
10 consolidation of two loans, that second 50,000  
11 dollars doesn't count.

12 MR. LEDERMAN: The - - - it's well  
13 established in this court that the consolidated  
14 mortgages maintain their priorities at the time.  
15 Nothing changes. It's only because you have certain  
16 statutory situations where there are superpriority  
17 liens. Taxes are a superpriority lien. And in this  
18 case, condominium liens are a superpriority lien with  
19 very specific statutory words, "a first mortgage of  
20 record".

21 And again, you know, I've - - - if I could  
22 just have a moment more to finish the thoughts I had,  
23 fir - - -

24 CHIEF JUDGE DIFIORE: You may.

25 MR. LEDERMAN: First means first.

1 Mortgage, as we've discussed - - -

2 JUDGE ABDUS-SALAAM: But counsel, the - - -  
3 the lawyer that first represented your client didn't  
4 think so. He didn't think first meant first, or - -  
5 -

6 MR. LEDERMAN: Well - - -

7 JUDGE ABDUS-SALAAM: - - - a consolidated  
8 mortgage was a first mortgage.

9 MR. LEDERMAN: Mr. Sharrow wrote some  
10 articles interpreting what this court had said, but  
11 he ultimately took this case because he believed, as  
12 I understand it - - - I didn't meet him; he's  
13 unfortunately passed away - - - but I believe he  
14 believed this case was meritorious, which is why he  
15 took that case.

16 I'd like to conclude, subject to my  
17 rebuttal, by just pointing out that Citibank in this  
18 case has tried to color the record by calling Mr.  
19 Plotch a speculator seeking to take equity. He's  
20 not. He's someone who bid. He was the high bidder.  
21 People could have bid more. He bid, understanding  
22 what was in the public record, based upon what was in  
23 the judgment.

24 It - - - this court has spoken numerous  
25 times about the importance of the public record.



1 Even if people have misinterpreted in the past, and  
2 some courts - - - and we believe the Societe Generale  
3 case is correct - - - even if people have  
4 misinterpreted it, the language of the statute is  
5 clear. First mortgage of record is first mortgage of  
6 record, and we submit Citibank could have protected  
7 its interests. Citibank could have paid off the  
8 lien, it was a few thousand dollars, and then bought  
9 the property. It was foreclosing its own lien  
10 simultaneously.

11 If you look in the record, Citibank's own  
12 foreclosure complaint - - - which was never  
13 consummated - - - describes at page, if I'm correct,  
14 152 of the record, its action as an action to  
15 foreclose a first mortgage and a second mortgage.  
16 Citibank went - - - when it went to foreclose, knew  
17 that it had a first mortgage and a second mortgage.  
18 That's in Citibank's own complaint.

19 So I'd submit the words of the statute  
20 should be given their meaning, the court should err  
21 on the side of the sanctity of the public record and  
22 the plain words of a judgment so that people can rely  
23 on them. Thank you.

24 CHIEF JUDGE DIFIORE: Thank you, sir.

25 Counsel?

1 MR. LEVINE: Thank you. Thank you, Judge.  
2 Paul Levine, Lemery Greisler, for Citibank. With me  
3 at counsel table is my colleague, Peter Damin.

4 I - - - I agree with Judge Stein that we  
5 should look at the language of the statute, but I  
6 look at it a different way. There's nothing in the  
7 statute that says a first mortgage of record cannot  
8 be consolidated or modified.

9 JUDGE STEIN: Well, does it have to say  
10 that? I mean, doesn't it seem like the purpose of  
11 the statute is pretty clear?

12 MR. LEVINE: No, I - - - I think the  
13 purpose of the statute is clear, but I - - - I look  
14 at it a - - - a different way. Quite - - -

15 JUDGE STEIN: But let me just ask you about  
16 that. Is - - - is a consolidation agreement even a  
17 mortgage?

18 MR. LEVINE: It's - - - it's a - - - what  
19 it does is it consolidates a first mortgage and a  
20 second mortgage to - - -

21 JUDGE STEIN: But not recorded as a  
22 mortgage.

23 MR. LEVINE: - - - to change the lien of  
24 the first mortgage by changing the contract of the  
25 parties to increase its amount and - - - and - - -

1 and change the payment terms.

2 JUDGE STEIN: Okay. So it's an agreement  
3 between the parties - - -

4 MR. LEVINE: Yes.

5 JUDGE STEIN: - - - for their convenience,  
6 and it adds another mortgage to the lien,  
7 essentially.

8 MR. LEVINE: It - - - it - - - it combines  
9 them into a single lien by the expressed terms of the  
10 - - -

11 JUDGE STEIN: But when you go to the county  
12 clerk's office - - -

13 MR. LEVINE: Yes.

14 JUDGE STEIN: - - - and you ask them to  
15 record that document, do you record it as a mortgage?

16 MR. LEVINE: I think it depends on what  
17 county clerk you go to. I - - - I - - -

18 JUDGE STEIN: Did - - - are there any  
19 county clerks where you would actually record it as a  
20 mortgage? It would be - - - it would be listed as a  
21 mortgage so for all people coming to see it, they'd  
22 see that there's a mortgage there?

23 MR. LEVINE: I - - - I've seen  
24 consolidation agreements called consolidated  
25 mortgage. I - - - so I - - - I think - - -

1 JUDGE STEIN: And would you pay the  
2 mortgage tax on it when you do that?

3 MR. LEVINE: I think - - - well, it  
4 depends; I - - - if you put in the 255 affidavit  
5 explaining that there's only a - - - a certain  
6 portion of it that's new money, you - - - you  
7 wouldn't pay the whole mortgage tax - - -

8 JUDGE RIVERA: So - - -

9 MR. LEVINE: - - - on - - - on the whole  
10 new principal amount.

11 JUDGE RIVERA: Let me - - - let me just - -  
12 - before we get to the consolidation agreement. Is  
13 there - - - wha - - - how do you - - - are there  
14 separate documents for the second mortgage before you  
15 consolidate?

16 MR. LEVINE: Yes.

17 JUDGE RIVERA: Okay.

18 MR. LEVINE: Yes, there's a - - - there's a  
19 - - -

20 JUDGE RIVERA: So do you file those before  
21 you consolidate?

22 MR. LEVINE: They're generally filed  
23 together. I think the second mortgage is filed, and  
24 then the consolidation agreement is filed.

25 JUDGE RIVERA: So they're separate

1 documents, separate signatures, separate requirements  
2 that have to be satisfied - - -

3 MR. LEVINE: Yes.

4 JUDGE RIVERA: - - - both federally and  
5 state for these documents. Is that correct?

6 MR. LEVINE: State, certainly, yes.

7 JUDGE RIVERA: State at least, but on the  
8 mortgage there may be also federal, correct?

9 MR. LEVINE: If it's a consumer mortgage,  
10 yes.

11 JUDGE RIVERA: Depending on the mortgage.

12 MR. LEVINE: Yeah.

13 JUDGE RIVERA: Okay. Is that the case in  
14 this case, do you know?

15 MR. LEVINE: It's a consumer mortgage.

16 JUDGE RIVERA: Okay.

17 MR. LEVINE: Yes.

18 JUDGE RIVERA: So there were also federal  
19 requirements - - -

20 MR. LEVINE: Yeah.

21 JUDGE RIVERA: - - - you had to satisfy.  
22 Okay. So when you go and file this - - -

23 MR. LEVINE: Yup.

24 JUDGE RIVERA: - - - okay, from your  
25 perspective and from the person who now owes you all

1           this money, they're paying only once to you, one  
2           amount? Is that the point of the consolidation to  
3           pay one amount?

4                     MR. LEVINE: Absolutely.

5                     JUDGE RIVERA: Or are they paying - - - do  
6           they have di - - -

7                     MR. LEVINE: No, they're - - - they're  
8           paying - - -

9                     JUDGE RIVERA: - - - different pay dates?

10                    MR. LEVINE: They're paying one amount at a  
11           new interest rate with a new payment amount set forth  
12           in the consolidation agreement.

13                    JUDGE RIVERA: Okay. What's set forth in  
14           the consolidation agreement, is it a different  
15           interest rate than what's in that second mortgage?

16                    MR. LEVINE: I don't - - -

17                    JUDGE RIVERA: Because obviously the amount  
18           would be different in the second mortgage, because -  
19           - -

20                    MR. LEVINE: Right.

21                    JUDGE ABDUS-SALAAM: - - - the total debt  
22           amount is different. So I understand that.

23                    MR. LEVINE: Right. I - - - the - - - that  
24           - - - I don't recall the record precisely from that.  
25           The documents are in the record. I do believe it's a

1 different rate from the first mortgage.

2 JUDGE RIVERA: If - - - if the bank was  
3 going to do exactly what Judge Stein described  
4 initially when she was asking your opponent several  
5 questions, are there any state or federal laws around  
6 being able to do what she described?

7 MR. LEVINE: No.

8 JUDGE RIVERA: No? Okay.

9 MR. LEVINE: And sometimes that is done.

10 But - - -

11 JUDGE RIVERA: Why - - - why do you need a  
12 difference - - - like a score or anything like this?  
13 Do you look at the person who's requesting the  
14 mortgage in a different way to - - - to treat the  
15 agreement as Judge Stein described, versus entering a  
16 consolidation agreement?

17 MR. LEVINE: I - - - I don't know, Your  
18 Honor.

19 JUDGE RIVERA: Okay.

20 MR. LEVINE: I - - - I don't know the  
21 answer to that. It's not - - - that - - - that's  
22 certainly not in the record.

23 JUDGE RIVERA: Okay, thank you.

24 MR. LEVINE: But I - - - I think going back  
25 to the statute, I think it's important to - - - to -

1 - - to consider. Does the word "first", when it says  
2 "first mortgage of record", does that mean "first" in  
3 time or "first" in priority? And I think if you  
4 lined up a hundred title lawyers and a hundred  
5 bankruptcy lawyers and a hundred bank - - - bank  
6 lawyers and borrower lawyers, I think everyone would  
7 say, first in priority.

8 JUDGE PIGOTT: Well, that means - - - I - -  
9 - I think what you're talking about is purchase money  
10 mortgages are most common, and they always have a  
11 priority.

12 MR. LEVINE: Well, I think the concern is,  
13 the - - - the entire purpose of the section is to set  
14 forth lien priorities, not - - - not when liens were  
15 filed, but the priorities of the lien. The title of  
16 the section is "Lien for common charges; priority;  
17 exoneration of grantor and grantee." The statutory  
18 language directs that a board of managers shall have  
19 a lien prior to all of their liens. It doesn't talk  
20 about time. It talks about priority. So I think  
21 that is an answer to Judge Stein's question.

22 JUDGE PIGOTT: Well, it's - - - it's sort  
23 of like a semi-purchase money situation, because it's  
24 - - - it's your home, your - - - you know, this - - -  
25 this - - - you're paying money on your home - - -



1 MR. LEVINE: Right.

2 JUDGE PIGOTT: - - - much like you're  
3 paying money on your purchase money mortgage. Their  
4 - - - their point is that - - - that later on,  
5 there's another mortgage. And that does - - - that  
6 is not entitled to the dignity of the first mortgage,  
7 the purchase money mortgage, and - - - and their - -  
8 - and their lien, and when they foreclosed, you were  
9 on notice that - - - you know, and you could have bid  
10 it in for your entire amount and paid them off, and  
11 everybody would have gone home.

12 MR. LEVINE: We - - - we could have, but  
13 under the statute, we don't believe we have sta - - -  
14 an obligation to do that.

15 JUDGE PIGOTT: Which is why we're here.

16 MR. LEVINE: Which is why we're here.

17 CHIEF JUDGE DIFIORE: Counsel, if the  
18 scenario was mortgage, lien, second mortgage and  
19 consolidation, would you be here?

20 MR. LEVINE: If the - - - I'm sorry. So  
21 the first - - - first mortgage - - -

22 CHIEF JUDGE DIFIORE: So there was  
23 mortgage, lien, second mortgage and consolidation,  
24 would you be sitting here be - - -

25 MR. LEVINE: I don't think so. I don't

1 think so. But - - - but - - - and - - - and the  
2 court's Website says don't say that, but that's not  
3 this case.

4 CHIEF JUDGE DIFIORE: I understand.

5 MR. LEVINE: But - - - but no. The answer  
6 to your question is no. I don't think - - - I don't  
7 think we would be.

8 JUDGE RIVERA: So we're going back to the  
9 question I was asking the opponent before about 339-  
10 aa.

11 MR. LEVINE: I - - - I agree with Your  
12 Honor. It - - -

13 JUDGE RIVERA: Or when that lien is  
14 actually effective.

15 MR. LEVINE: I mean, it's ba - - - it's a  
16 basic concept that - - - that to have a lien, you  
17 have to have debt, because the lien has to attach to  
18 something. When it - - - when there is no debt,  
19 there is no lien.

20 JUDGE RIVERA: So what - - - what does 9-b  
21 what - - - what is that referring to when it's  
22 talking about the lien? What is that referring to?

23 MR. LEVINE: Your Honor's refer - - -

24 JUDGE RIVERA: I mean, I know what 339-aa  
25 is referring to. That's my point about the effective

1 date, right. 9-b, "The board of managers of the  
2 condo, on behalf of the unit owners, shall have a  
3 lien on each unit for the unpaid common charges  
4 thereof" et cetera, et cetera, et cetera. What is  
5 that referring to, because it's obviously not  
6 referring to what 339-aa is referring to, or do you  
7 think it is referring to the same thing?

8 MR. LEVINE: I - - - I - - - when there's  
9 unpaid common charges, they have a lien, and aa tells  
10 us how they get the lien. They have to put - - -  
11 they have to file the lien - - -

12 JUDGE RIVERA: So - - -

13 MR. LEVINE: - - - to become effective.

14 JUDGE RIVERA: - - - okay. So this - - -  
15 the - - - what he's referring to, the declaration  
16 that - - - that talks about having a lien - - -

17 MR. LEVINE: Right.

18 JUDGE RIVERA: - - - you say that is not  
19 notice?

20 MR. LEVINE: No, well, it's not - - -

21 JUDGE RIVERA: It's not notice?

22 MR. LEVINE: It's - - - it's - - - no, it's  
23 - - -

24 JUDGE RIVERA: There is no lien unless  
25 there's an unpaid - - -

1 MR. LEVINE: Right.

2 JUDGE RIVERA: - - - charge?

3 MR. LEVINE: I - - - I - - - I would call  
4 it - - - again, I'm a bankruptcy lawyer, primarily -  
5 - - it's - - - it's an unperfected lien, you know.  
6 It's - - - and 339-aa tells us how the condo board  
7 has to perfect its lien to make it valid. And until  
8 they file that lien, it's not effective.

9 JUDGE PIGOTT: And your - - - and both your  
10 mortgages preceded that?

11 MR. LEVINE: Oh, yes, by years.

12 JUDGE RIVERA: I see. But - - - but - - -  
13 I'm sorry. But an unperfected lien, from what you're  
14 describing, is still - - - still requires that there  
15 is an unpaid - - -

16 MR. LEVINE: Absolutely. So - - -

17 JUDGE RIVERA: - - - charge? You're not  
18 talking unperfected because someone is not yet in  
19 debt.

20 MR. LEVINE: Correct.

21 JUDGE RIVERA: Okay.

22 MR. LEVINE: Right. So in this case, to  
23 have an effective lien, there has to be debt, and it  
24 has to be filed as the statute says. Neither of  
25 those occurred in this case when Citi consolidated

1 the mortgages.

2 So let - - - let's think about some of the  
3 practical imp - - - implications of appellant's  
4 argument. Under the statute, the JDA also has a  
5 priority. What if the J - - - New York Job  
6 Development Authority - - - what if the JDA had a  
7 consolidated mortgage? Is there a question there? I  
8 would say, maybe there would be. Appellant has shown  
9 a - - - an ability to make these arguments  
10 repeatedly. 339 - - -

11 JUDGE RIVERA: So does the statute say a  
12 JDA, first in time, first in right, or does the JDA -  
13 - -

14 MR. LEVINE: It does - - - no, it says  
15 mortgage. It doesn't - - -

16 JUDGE RIVERA: It just says a mortgage, so  
17 - - -

18 MR. LEVINE: It doesn't say first. But - -  
19 - but - - -

20 JUDGE RIVERA: And isn't that the point,  
21 though?

22 MR. LEVINE: Well, but I would - - - if I'm  
23 representing the JDA, I - - - I would say that's the  
24 point, but I didn't think this argument would ever be  
25 made either, so - - - Section 339 - - -

1 JUDGE RIVERA: There are surprises in life,  
2 counsel.

3 MR. LEVINE: Yes, I know. That's why we do  
4 what we do.

5 Section 339-ff gives authority to state  
6 agencies, insurers, banks and fiduciaries to make  
7 investments in condo mortgages - - - you know, to buy  
8 pools of mortgages. That section does use the word  
9 first.

10 So again, if the court rules in favor of  
11 appellant, I think all of that is thrown into doubt.  
12 Are those investments - - - you know, they were made  
13 on the basis of what all cases except one have said  
14 for um - - - decades. I'll use the word "decades"  
15 because they go back to the mid-90s.

16 JUDGE RIVERA: Is the point of doing the  
17 consolidation to avoid the tax?

18 MR. LEVINE: Yeah, I think so.

19 JUDGE RIVERA: Or there some other benefit  
20 to be gained, other than you've got one payment.

21 MR. LEVINE: Well, I - - - I think - - -

22 JUDGE RIVERA: I understand that.

23 MR. LEVINE: I think it sort of accurately  
24 reflects the transaction, you know, that I have a  
25 mortgage with you. I'd like to borrow some more

1 money against my house because there's eq from my  
2 condo, because there's equity in it, can you - - -  
3 can you give me some more money? Sure. We need to  
4 secure it, and the interest rates have changed. I'd  
5 like to maybe bring down the interest rate a bit and  
6 - - - and get a different payment.

7 Sure, we could do that too. I - - - so - -  
8 - so yes, it - - - it avoids the tax, but also it  
9 reflects the - - - the reality of the transaction  
10 that's going on.

11 JUDGE PIGOTT: Had - - - had - - - had this  
12 lien been filed in between, would you have required  
13 the - - - the - - -

14 MR. LEVINE: Absolutely.

15 JUDGE PIGOTT: Okay.

16 MR. LEVINE: Ab - - - if - - - if there's a  
17 filed - - - if there's a filed lien, it would have  
18 been paid. Either the borrower would have paid it or  
19 it - - - it would have been paid out of - - - out of  
20 the proceeds of the new loan.

21 JUDGE PIGOTT: You would have taken out of  
22 the proceeds, yeah.

23 MR. LEVINE: As happens with real property  
24 taxes or judgment liens or anything else that impairs  
25 - - -

1 JUDGE RIVERA: To lift the cloud off?

2 MR. LEVINE: I'm sorry?

3 JUDGE RIVERA: To lift the cloud from the  
4 property? Is that - - -

5 MR. LEVINE: Absolutely. So that - - - so  
6 that the bank has a first lien on the property, not -  
7 - -

8 JUDGE RIVERA: When - - - when you do this  
9 consolidation, so I - - - I owe you the money, and  
10 when I pay, I'm paying one payment. We've agreed to  
11 that. And - - - and how do you - - - does the - - -  
12 let's say the payment is a little bit less than what  
13 it should be this month. Is it going to pay off the  
14 first - - -

15 MR. LEVINE: Well, that - - - that's the  
16 quest - - -

17 JUDGE RIVERA: - - - mortgage?

18 MR. LEVINE: That's the que - - -

19 JUDGE RIVERA: What's the mechanics that  
20 way?

21 MR. LEVINE: Well, that - - - that's - - -  
22 you - - - your question raises the practical  
23 implications of if you rule in favor of appellant.  
24 What do we do? Do we foreclose the first mortgage?  
25 Do we foreclose the second mortgage? Or do we



1 foreclose the consolidation agreement? Do we  
2 foreclose all three? And how do we figure out where  
3 the payment should have been applied?

4 If I'm the appellant, I say, they should  
5 have all been applied to the first mortgage, so I can  
6 push that amount down as far as I can so the second  
7 mortgage is hanging out there unsecured. You know,  
8 so these are - - - at what interest rate do we do it?  
9 Do we apply - - - do we foreclose it subject to the  
10 interest rate in the original first mortgage, in the  
11 second mortgage or in the consolidation agreement?  
12 It's a hornet's nest. It really is.

13 JUDGE STEIN: But you've done that in other  
14 contexts, haven't you? I - - - I thought that there  
15 was some case law. Am I - - -

16 MR. LEVINE: There's - - - my - - - my  
17 adversary cited, I think in his reply brief, a case  
18 called Altshuler v. GMI (sic). That case has no  
19 application to these facts. It - - - that case was a  
20 - - - a commercial building loan mortgage - - -

21 JUDGE STEIN: Yes, yes, but doesn't it show  
22 the ability to - - - to parse these things out?

23 MR. LEVINE: I - - - I don't think so, Your  
24 Honor. That was a single loan with different  
25 tranches of debt secured by a single mortgage, and it

1 involved an interpretation of Lien Law Section 22.  
2 The bank in that case or the lender in that case  
3 failed to file a building loan agreement with a  
4 notice of lending. There were priority concerns with  
5 regard to the mechanic's lienors. It's a completely  
6 different case, completely different set of law.

7 JUDGE RIVERA: And a different instrument?  
8 Is that sort of in part what you're saying? It's  
9 still a mortgage, but it has these tranches - - -

10 MR. LEVINE: Yeah, it wasn't a consolidated  
11 mortgage.

12 JUDGE RIVERA: Uh-huh.

13 MR. LEVINE: Your Honors, I gue - - - I  
14 guess I would conclude by arguing that - - - or just  
15 pointing out, I mean, there was nothing in the record  
16 to show that the current state of the law as the  
17 Appellate Division has determined it and numerous  
18 Supreme Court decisions have determined it, is - - -  
19 is causing any harm to condo associations or condo  
20 boards. There - - - there's no evidence in the  
21 record that - - - that that is the case.

22 And what we would request that this court  
23 do is - - - is affirm and - - - and - - - affirm the  
24 - - - the decisions below, but affirm what has become  
25 a bright line test, that "first" means a first

1 priority lien that also includes a consolidated lien.  
2 Thank you.

3 CHIEF JUDGE DIFIORE: Thank you, counselor.  
4 Counselor?

5 MR. LEDERMAN: A couple of points I'd like  
6 to make.

7 Judge Rivera, I just want to be clear, you  
8 asked, I believe, the correct question. When they do  
9 this, there's a full set of documents called  
10 "mortgage A", a full set of documents called  
11 "mortgage B", and then an agreement called a  
12 "consolidation" which goes out of its way to comply  
13 with the tax law to say, it's not a mortgage; it's an  
14 agreement.

15 JUDGE PIGOTT: Well, let's clear up the  
16 fact that when we're dealing with real property, the  
17 filings are key, aren't they? I mean, you have to  
18 file this lien timely in order to get priority over  
19 any other judgment or lien that may follow.

20 MR. LEDERMAN: New York is a Race-Notice  
21 state.

22 JUDGE PIGOTT: So - - - so if - - - if a  
23 credit card company had filed a judgment ahead of  
24 you, you - - - you would subordinate to that, right?

25 MR. LEDERMAN: Anyone would, yes.



1 this way. Let's assume mortgage - - - the first  
2 mortgage is here and then ten years later there's the  
3 second mortgage. No con - - - consolidation or  
4 anything, just two mor - - - two - - - all right.

5 MR. LEDERMAN: Correct.

6 JUDGE PIGOTT: Now you've - - - it's a  
7 condo, so - - - and all of the - - - all the condo  
8 fees are paid until year '15.

9 MR. LEDERMAN: Right.

10 JUDGE PIGOTT: You're saying that because  
11 it was - - - because it was not paid in year '15,  
12 regardless of the fact that no lien was filed, that  
13 it jumps the second - - - the second mortgage.

14 MR. LEDERMAN: Well, that's what - - -  
15 that's what the law says. The law says that it has -  
16 - -

17 JUDGE PIGOTT: It doesn't to me.

18 MR. LEDERMAN: And you know, in response to  
19 a question that was asked about splitting liens, I'm  
20 - - - I actually argued the Altshuler case in this  
21 court. You were on the panel, Judge. In that case,  
22 you had basically the same issue that mechanic's  
23 lienors said we won't be able to do work beca - - -  
24 unless we have priority over this consolidated lien.  
25 They said it was consolidated - - - I don't - - -



1 was, if you lined up a hundred title lawyers, they  
2 would tell you that's the law - - - this court has,  
3 in numerous occasions, things have gone on for  
4 awhile, then it comes to this court, and this court  
5 looks at what does the law say? There were  
6 predictions of doom and gloom when this court ruled  
7 in the Stuyvesant Town case, that for a hundred - - -  
8 that for probably twenty years, DHCR had  
9 misinterpreted. Stuyvesant Town is still there, and  
10 it's actually nicer than it was when the prior owners  
11 owned it.

12 If the law, as we submit it is, uses the  
13 word "first mortgage of record" and the precedent  
14 shows what that is, this court should apply the law,  
15 people will be guided in the future, but it would be  
16 unfair to require purchasers at a foreclosure sale to  
17 know what they thought Citibank meant. The only  
18 thing you can do as a purchaser, faced with a  
19 judgment that says you're purchasing subject to first  
20 mortgage of record, is look at the public record, and  
21 if it says there are two mortgages, you know you're  
22 purchasing subject to the first one, and not to the  
23 second.

24 For that reason, we would urge the court to  
25 reverse as a matter of law. Thank you.

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CHIEF JUDGE DIFIORE: Thank you, sir.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Plotch v. Citibank, N.A., No. 57, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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