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COURT OF APPEALS

STATE OF NEW YORK

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ALTSHULER SHAHAM PROVIDENT FUNDS, LTD.,

Appellant,

-against-

No. 115

GML TOWER LLC, ET AL.,

Respondents.

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20 Eagle Street  
Albany, New York 12207  
May 02, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA

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CHIEF JUDGE LIPPMAN: 115, Altshuler.

Counselor, do you want any rebuttal time?

MR. LEDERMAN: Yes, I'd like to reserve five minutes for rebuttal.

CHIEF JUDGE LIPPMAN: Five minutes, sure. Go ahead.

MR. LEDERMAN: Good afternoon, Your Honors. Bruce H. Lederman for the appellant.

CHIEF JUDGE LIPPMAN: Counselor, what's wrong, from a policy perspective, about the mechanic's liens having priority here? Why is that a bad thing, putting aside - - - we'll get into the statute and what it says - - -

MR. LEDERMAN: As a matter - - -

CHIEF JUDGE LIPPMAN: - - - what's wrong with that?

MR. LEDERMAN: As a matter of policy, it is exceptionally important for the State of New York that there be certainty in lending. Lending fuels the economy. The Lien Law has a balanced approach which has protection for the lienors in Lien Law trust covenant theories that when money's been advanced before a mortgage is recorded, or at the time of the mortgage, lienors mechanics have

1 extensive protection under Article 3-A.

2 The issue that you ask, what's wrong with  
3 it, is it would undermine lending very significantly  
4 if lenders believed and didn't have certainty that  
5 they could lend money for construction in New York  
6 State and - - -

7 JUDGE SMITH: Well, but all they have to do  
8 is file the thing to be protected.

9 MR. LEDERMAN: Well, in this case the  
10 filing would make no sense, and I'll explain it this  
11 way, Your Honor. At the moment you record a  
12 mortgage, if there are no advances in the future, you  
13 would record a statement; in this case, for example,  
14 saying in 2008 when we recorded a mortgage, a year  
15 ago we intended to make a building loan.

16 JUDGE GRAFFEO: Well, why not record the  
17 2007 loan agreement? That's what it was called, loan  
18 agreement.

19 MR. LEDERMAN: It was called a loan  
20 agreement. A loan agreement is an agreement to make  
21 a loan. The law was changed in 1930. Prior to 1930  
22 the law was very clear; it said an agreement to make  
23 a loan needed to be recorded within ten days of its  
24 execution. That was the law before 1930. After - -  
25 - in 1930 there was a major revision to the law, and

1 the law was changed to say that a building loan  
2 contract only needed to be recorded before - - - at  
3 or before the time of a mortgage made pursuant  
4 thereto.

5 Judge Rivera, just two days ago, issued a  
6 decision, the Canadian Bank case, where she wrote in  
7 a decision that it's a basic tenet of New York law,  
8 both in the rules of construction and common law,  
9 that where there is an amendment in the law, it is  
10 intended that it have an effect. And I submit this  
11 case - - -

12 JUDGE GRAFFEO: You had the loan agreement,  
13 you had the memorandum of understanding, and you had  
14 amendment number 1.

15 MR. LEDERMAN: Correct.

16 JUDGE GRAFFEO: So none of those got filed.

17 MR. LEDERMAN: Correct.

18 JUDGE GRAFFEO: Yet there's money being  
19 lended.

20 MR. LEDERMAN: Correct. There is nothing  
21 wrong in the State of New York, since 19 - - -

22 JUDGE GRAFFEO: So didn't you take a risk,  
23 if you didn't want to file something at that point,  
24 that you'd lose priority over the mechanic's liens?

25 MR. LEDERMAN: The risk that the lender

1           took was in not filing a mortgage. Its loan was  
2           unsecured. There is nothing wrong, since 1930, with  
3           making an agreement to make a loan and then lending  
4           money on an unsecured basis.

5                    JUDGE PIGOTT: What's the purpose of Lien  
6           Law Section 22, in your view?

7                    MR. LEDERMAN: The purpose of Lien Law  
8           Section 22 - - - thank you for asking that question -  
9           - - is so that a contractor goes to the public  
10          record, he sees a mortgage, he sees a mortgage that  
11          says it's a building loan, he has an interest in  
12          knowing what he has to do to be entitled to future  
13          advances. If there are no future advances, there is  
14          no purpose to a filing under Lien Law 22.

15                   JUDGE SMITH: You keep saying he sees a  
16          mortgage, but the cov - - - the statute seems, to me,  
17          to say he's got to file a contract at the same time  
18          or before he files the mortgage.

19                   MR. LEDERMAN: Well, the statute - - -  
20          there are really three things that go into every  
21          loan, or almost every loan. There's a commitment;  
22          when there is a mortgage, there is a note and a  
23          mortgage, an agreement.

24                   JUDGE GRAFFEO: I thought the statute says  
25          "building loan contract". That's the terminology

1 used.

2 MR. LEDERMAN: Yes, the statute uses - - -

3 JUDGE GRAFFEO: It doesn't only say  
4 mortgage.

5 MR. LEDERMAN: The statute uses "building  
6 loan contract", which is defined, in Lien Law Section  
7 2, as an agreement to make advances - - -

8 JUDGE PIGOTT: If you filed - - -

9 MR. LEDERMAN: - - - plural.

10 JUDGE PIGOTT: If you filed this thing  
11 under Lien Law 22, wouldn't you be putting notice to  
12 all materialmen and workmen that there's a contract  
13 in place that I'm going to advance money on, so just  
14 so you folks know, there may be money that comes  
15 after your work but it's going to get a priority over  
16 any lien you may file. And if it's not there, they  
17 have no reason to think that there is that kind of  
18 priority, and therefore their liens will be prior to  
19 anything that's not filed.

20 MR. LEDERMAN: Well - - -

21 JUDGE PIGOTT: Does that make any sense?

22 MR. LEDERMAN: There are two answers to  
23 that question, Judge.

24 JUDGE PIGOTT: No, it doesn't, or yes, it  
25 does.

1 MR. LEDERMAN: I don't think it makes  
2 sense, with all respect. In 2007, had you filed - -  
3 - had Altshuler filed the loan agreement, it would  
4 mislead the public record. The loan - - -

5 JUDGE SMITH: Are you saying - - - was it a  
6 building loan contract at that point or not?

7 MR. LEDERMAN: In 2007, it was an agreement  
8 to make - - -

9 JUDGE SMITH: Well, can we do yes or no on  
10 that? Was it a building loan contract - - - loan  
11 contract?

12 MR. LEDERMAN: No.

13 JUDGE SMITH: Okay. Why not?

14 MR. LEDERMAN: Because - - -

15 JUDGE SMITH: Because - - - because the  
16 building loan portion of it was not secured by the  
17 mortgage?

18 MR. LEDERMAN: Correct, it was an agreement  
19 to make a loan in the future. That - - -

20 JUDGE SMITH: So your theory is that no - -  
21 - that Section 22 didn't apply. But then it gets  
22 amended in 2008, and the mortgage is - - - is  
23 increased, so that at that point it does cover the  
24 building - - - is it a building loan contract at that  
25 point?

1 MR. LEDERMAN: No, because at that point,  
2 when it's amended, it becomes a straight mortgage.  
3 It becomes a mortgage which is funded.

4 JUDGE SMITH: What becomes a mortgage?

5 MR. LEDERMAN: The agree - - - the loan is  
6 a traditional mortgage.

7 JUDGE SMITH: I mean, the loan - - - I mean  
8 - - - I mean, you keep talking as though the loan  
9 agreement and the mortgage are different things.  
10 Aren't - - - are the same thing. Aren't they  
11 different things? There's a mortgage and there's a  
12 loan agreement; they're two different pieces of  
13 paper.

14 MR. LEDERMAN: The loan agreement, as of  
15 2008, became a - - - was not a building loan  
16 contract. It was - - -

17 JUDGE SMITH: Well - - -

18 JUDGE GRAFFEO: How - - -

19 JUDGE SMITH: - - - which part of the  
20 definition of building loan contract does it not - -  
21 - does it not fit?

22 MR. LEDERMAN: It is not an agreement to  
23 make advances; it's an agreement to fund at the  
24 table. It's a project loan at that point.

25 JUDGE SMITH: How is an agreement to fund

1 not the same as an agreement to make an advance? I  
2 take them both to mean give me some money.

3 MR. LEDERMAN: The difference, and this is  
4 very important in how construction functions in New  
5 York, is there are many mortgages where at the time  
6 you make a loan you give the lend - - - you give the  
7 borrower the money. They have the money. That is  
8 not a building loan contract. It becomes a building  
9 loan contract when you record the mortgage and in the  
10 future - - -

11 JUDGE RIVERA: You're saying - - -

12 MR. LEDERMAN: - - - there are going to be  
13 advances.

14 JUDGE RIVERA: - - - when you have  
15 installments.

16 MR. LEDERMAN: Excuse me?

17 JUDGE RIVERA: When you have installments.

18 MR. LEDERMAN: When you have installments,  
19 after the mortgage.

20 JUDGE RIVERA: But what - - -

21 MR. LEDERMAN: That's the whole purpose - -  
22 -

23 JUDGE SMITH: But wait a second.

24 MR. LEDERMAN: - - - of Lien Law 22.

25 JUDGE GRAFFEO: Where's that limitation in

1 the statute?

2 JUDGE RIVERA: Yeah.

3 MR. LEDERMAN: It's in two places, Judge.  
4 First, in Lien Law Section 22, where it talks about  
5 that the building loan contract must be recorded on  
6 or before the date of recording the building loan  
7 mortgage made pursuant thereto.

8 JUDGE SMITH: But what does that have to do  
9 with whether the advances are made in a lump sum or  
10 in stages?

11 MR. LEDERMAN: In the definition, in  
12 Section 13, building loan contract, it says "agrees  
13 to make advances". "Advances" is in plural.

14 JUDGE SMITH: So you say if it's a single  
15 advance, the building loan contract - - - it's not a  
16 building loan contract?

17 MR. LEDERMAN: Correct. If the loan is  
18 fully funded as of the time the mortgage is recorded,  
19 the protection - - - the balance protection of the  
20 Lien Law is that - - -

21 JUDGE SMITH: You take that from the plural  
22 form of the noun? What if it's an agreement to make  
23 - - - to loan twenty million dollars to be funded a  
24 year from now?

25 MR. LEDERMAN: Because it's after the loan

1           - - - after the mortgage is recorded. That's the  
2 whole purpose, that it's after, that it's advances  
3 after - - -

4           JUDGE GRAFFEO: Is there - - -

5           JUDGE RIVERA: Didn't you make  
6 installments? I thought there were installments.

7           MR. LEDERMAN: There were payments before,  
8 but they weren't be - - - as of the time the mortgage  
9 was recorded, there were no future advances. If you  
10 look at all the cases and all the definitions which  
11 are cited in the brief, a building loan mortgage is a  
12 mortgage to be paid in advances after the mortgage.

13          JUDGE GRAFFEO: Doesn't this - - -

14          JUDGE RIVERA: But - - -

15          JUDGE GRAFFEO: - - - turn the purpose of  
16 the whole Lien Law upside down?

17          MR. LEDERMAN: No, it - - -

18          JUDGE GRAFFEO: Because the purpose is the  
19 give the materialmen and the subs and the contractors  
20 notice of what money is owed on the property.

21          JUDGE RIVERA: And what money's going to  
22 come in.

23          MR. LEDERMAN: No, what it - - - what it  
24 does here is it allows the - - - the bank to know - -  
25 - if there are going to be advances in the future,

1 the bank has to record a building loan contract in  
2 accordance with Section 22. If as of the moment the  
3 mortgage is recorded there are no future advances,  
4 the bank complies with the Lien Law by having a Lien  
5 Law Section 13 covenant.

6 JUDGE GRAFFEO: What case says this? What  
7 case agrees with your interpretation?

8 MR. LEDERMAN: The case - - - the In re  
9 Admiral Walkers (sic) case, which is a case by the  
10 chief judge of the bankruptcy court of the Western  
11 District of New York, goes through a very careful  
12 analysis of the Lien Law and Article thirt - - - and  
13 Article Lien Law 22 and explains that there are very  
14 few - - - in the words of the chief judge of the  
15 bankruptcy court, there are very few reported cases  
16 on this.

17 JUDGE SMITH: But what about - - -

18 MR. LEDERMAN: And the judge - - -

19 JUDGE SMITH: But Judge Graffeo's question,  
20 I think, is where in there does it say that advances  
21 means it's got to be more than one?

22 MR. LEDERMAN: Well, it's got to be after  
23 the mortgage is recorded, and that's what's inherent  
24 - - -

25 JUDGE SMITH: Where does it say that in

1 Admiral's Walk?

2 MR. LEDERMAN: In - - - Admiral's Walk  
3 talks about the requirement for recording preliminary  
4 agreements. And the change in the law in 1930  
5 applies this.

6 I see my time is up, but I do have one  
7 other very important point that I'd like - - -

8 CHIEF JUDGE LIPPMAN: Counselor, make it  
9 quickly.

10 MR. LEDERMAN: There is an equally  
11 important issue of whether or not the split between  
12 the federal court, the Northern District of New York  
13 chief judge saying that even if a building loan is  
14 invalid, it does not taint a separate acquisition  
15 portion in the First Department.

16 JUDGE SMITH: That's the Yankee Bank case?

17 MR. LEDERMAN: The Yankee Bank case. And  
18 I'd like to bring to this Court's attention two cases  
19 which I found preparing for oral argument today.

20 CHIEF JUDGE LIPPMAN: Do it, counsel, and  
21 then you're - - -

22 MR. LEDERMAN: In the Raymond (ph.) case -  
23 - - I'll give the case to the court officer - - -  
24 this court said that the penal provisions of the Lien  
25 Law have to be strictly applied and that the liberal

1 interpretation should not be extended beyond its  
2 scope. Judge McCurn, in the Yankee Bank case, said  
3 the purpose of the Lien Law is to deal with building  
4 loans, and there's no purpose - - -

5 CHIEF JUDGE LIPPMAN: Okay. What's - - -

6 MR. LEDERMAN: - - - to subordinate.

7 CHIEF JUDGE LIPPMAN: What's the other  
8 case?

9 MR. LEDERMAN: The other case is in 2010 in  
10 the Glassman v. ProHealth case, this court drew a  
11 distinction between malum prohibitum and malum in se  
12 violations for purposes of severance. The mortgages  
13 here have an express severance clause. This court, I  
14 believe - - - and the lower court considered this  
15 issue and rejected it - - - should allow a severance  
16 of the mortgage - - -

17 CHIEF JUDGE LIPPMAN: Okay, counselor.

18 MR. LEDERMAN: Okay.

19 CHIEF JUDGE LIPPMAN: You'll - - -

20 MR. LEDERMAN: - - - because it would be an  
21 unfair windfall - - -

22 CHIEF JUDGE LIPPMAN: You'll have your  
23 rebuttal.

24 MR. LEDERMAN: - - - on that issue. Thank  
25 you.

1 CHIEF JUDGE LIPPMAN: Thanks, counselor.

2 Counselor?

3 MR. BITTEL: May it please the Court. My  
4 name is Tim Bittel. I'm from Cleveland, Ohio. Thank  
5 you for allowing me to attend and argue before you.

6 CHIEF JUDGE LIPPMAN: Pleasure to have you,  
7 counselor.

8 MR. BITTEL: Thank you.

9 CHIEF JUDGE LIPPMAN: Go ahead.

10 MR. BITTEL: Thank you, Your Honor. Your  
11 Honors, I believe that this is a very simple case,  
12 and to grant the relief sought by the appellant would  
13 require this court to ignore Section 22 - - -

14 CHIEF JUDGE LIPPMAN: What's the policy  
15 reason why we shouldn't grant his relief? Why is  
16 what he's proposing not right?

17 MR. BITTEL: Because they violated the  
18 statute. They violated the statute and they're  
19 misrepresenting - - -

20 CHIEF JUDGE LIPPMAN: But is it a good  
21 thing or a bad thing that they should get priority?  
22 Why is it a bad thing, from a policy stand - - - put  
23 the statute on the side.

24 MR. BITTEL: From a policy standpoint, as  
25 has been enunciated by this court and has - - - is

1 shown in Section 23 in the definitions, these  
2 statutes are to be construed in favor of the  
3 materialmen and the mechanics.

4 JUDGE PIGOTT: Assuming for a minute that  
5 we don't understand everything about the construction  
6 industry, would you tell me how Lien Law 22 fits into  
7 the scheme of things in terms of liens and buildings  
8 and contracts?

9 MR. BITTEL: Yes, Your Honor. The Lien Law  
10 Section 22 simply requires that the building loan  
11 contract be filed, and if it is not filed, then the  
12 statute, for over 100 years, and has been followed by  
13 this court in P.T. McDermott and in Nanuet, the  
14 statute then requires that the mechanic's liens get  
15 priority over any mortgages that are claimed, period,  
16 pure and simple.

17 JUDGE SMITH: But why - - -

18 MR. BITTEL: That's what the statute says.

19 JUDGE SMITH: Why should not your priority  
20 be limited, as he says, to the building loan portion  
21 of the advance?

22 MR. BITTEL: Because - - - because the  
23 statute - - - number one, the statute says that the  
24 interests of all parties shall be taken without - - -  
25 without making that distinction. The statute

1 specifically prohibits the bifurcation of the  
2 mortgage liens.

3 JUDGE SMITH: It specifically prohibits it?  
4 I mean, I understand it doesn't provide for it; where  
5 does it specifically prohibit it?

6 MR. BITTEL: It - - - well, it prohibits it  
7 by saying that the interests of each party - - - "if  
8 not so filed, the interests of each party to such  
9 contract in the real property shall be affected  
10 thereby".

11 JUDGE SMITH: And I understand, but is it -  
12 - - it's not - - - it seems to me it's not impossible  
13 to read it as saying the interest in the contract,  
14 insofar as it is a building loan contract. I mean,  
15 if you have - - - you have here, and I guess you have  
16 fairly commonly, a single agreement that has  
17 basically two loans or two tranches of the same loan,  
18 an acquisition portion and a building loan portion.  
19 Why shouldn't - - - I mean, even though literally you  
20 can read the language to say yeah, the whole  
21 contract's a building loan contract - - -

22 MR. BITTEL: Judge - - -

23 JUDGE SMITH: Why shouldn't we read it to  
24 say only the building loan part is the loan - - -

25 MR. BITTEL: Because, Judge Smith, the

1 definition in the Lien Law Section 2, paragraph 5,  
2 includes in the cost of improvement - - -  
3 specifically includes in the cost of improvement  
4 "sums paid to take by assignment, prior existing  
5 mortgages which are consolidated with building loan  
6 mortgages".

7 JUDGE READ: So you say Judge McCurn was  
8 wrong in Yankee Bank?

9 MR. BITTEL: Yes, absolutely. And Judge  
10 Karalunas - - - Judge Karalunas - - -

11 JUDGE READ: She thought that, yes.

12 MR. BITTEL: - - - clearly dealt with that.

13 JUDGE GRAFFEO: So if you're - - - if  
14 you're paying - - -

15 MR. BITTEL: What that - - -

16 JUDGE GRAFFEO: - - - if you're borrowing  
17 money to pay off a purchase-money mortgage, that's -  
18 - - that's part of the building loan agreement?

19 MR. BITTEL: Yes, by definition. By Sect -  
20 - - as I said, in Section - - -

21 JUDGE SMITH: If there's a provision for  
22 improvements in the loan. You're not saying every  
23 acquisition loan is a building loan.

24 MR. BITTEL: Oh, of course not - - - of  
25 course not. And this case, I submit to you several

1 things. I think - - - Judge Graffeo, I think you  
2 asked - - - if it wasn't, that I think you did - - -  
3 there's been some confusion here, and throughout the  
4 pleadings in this case, the submittals to this court,  
5 appellant has massacred the - - - the issue - - - the  
6 definition of building loan contract - - -

7 CHIEF JUDGE LIPPMAN: Did the contractors  
8 have any notice here as to what was going on when  
9 they entered the picture?

10 MR. BITTEL: They had - - - they had no  
11 notice - - - they had no notice of - - - as required  
12 by Section 22. They did not have any notice.

13 CHIEF JUDGE LIPPMAN: As required by  
14 Section 22, but could you argue that the contractor  
15 kind of gets a windfall here based on a technicality?

16 MR. BITTEL: No, there is no windfall here.  
17 I represent the general contractor who was out of  
18 three and a half, four million dollars, who paid all  
19 the subcontractors and had no windfall whatsoever,  
20 has a complete loss. He - - -

21 JUDGE SMITH: Well, but he gets a lot more  
22 money than - - - his loss is significantly mitigated  
23 because someone forgot to file a piece of paper.

24 MR. BITTEL: If - - - yes, I mean, it's  
25 mitigated if - - -

1                   JUDGE SMITH: And some people might call  
2 that a technicality. Of course I suppose when you're  
3 talking about insolvency, technicalities do count.

4                   MR. BITTEL: It's the statute, it's the law  
5 - - - it's the law that's been in existence here for  
6 100 years, and as this court has - - - was  
7 interpreted in McDermott. Also, I would also point  
8 out - - -

9                   JUDGE RIVERA: Well, it reflects a  
10 legislative choice, does it not?

11                  MR. BITTEL: It does reflect a legislative  
12 choice. And as I say, to grant the relief, I  
13 respectfully submit that the court will have to  
14 ignore the statutory scheme. If the legislature  
15 thinks that this is the wrong law, then the  
16 legislature should change it. But that's what it  
17 would - - - we now provide for.

18                  JUDGE RIVERA: I'm going to go back to the  
19 limitation on the building portion question for one  
20 moment. Does it matter how much is going to building  
21 versus improvement, or it's all or nothing, in your  
22 reading of the statute?

23                  MR. BITTEL: I'm not sure if I understand  
24 your question. The - - -

25                  JUDGE RIVERA: Well, taking out the numbers

1 in this case. Take the - - - the numbers are only  
2 one percent of the money is being spent on the  
3 improvements and the rest is the purchase of  
4 something else.

5 MR. BITTEL: As I read the statute, Your  
6 Honor - - -

7 JUDGE RIVERA: Yeah.

8 MR. BITTEL: - - - the - - - you start - -  
9 - you have to start with the definition, as did Judge  
10 Karalunas, you have to start with the definition,  
11 what is the March 29th, 2000 - - -

12 JUDGE SMITH: But I think you're implicitly  
13 saying, to Judge Rivera's question, yeah, even if  
14 it's 99 to 1, the 100 percent is subordinated.

15 MR. BITTEL: That's what the - - - that's  
16 what I - - - that's what the statute says. That's  
17 what - - -

18 JUDGE SMITH: Is there a risk of some  
19 really outrageous forfeiture, I mean, where the  
20 building loan portion of the agreement is trivial and  
21 nobody thought about it and all of a sudden the whole  
22 - - - your whole loan is subordinated?

23 MR. BITTEL: I guess, hypothetically,  
24 certainly there's a risk, but I think in a practical  
25 standpoint the - - -

1                   JUDGE SMITH: So I suppose of the  
2 construction loan is that small maybe the mechanic's  
3 liens won't be so huge, either.

4                   MR. BITTEL: I would think that's the case.  
5 But the fact of the matter is, if the court looks at  
6 the record, which I'm sure it has, this whole  
7 transaction is a poster child case. Everything they  
8 did fits the agreement. They defined it, there were  
9 express promises to construct - - -

10                  JUDGE SMITH: Well, but it's not - - - it's  
11 not typical, is it - - - or maybe it's typical, but  
12 it doesn't seem to be exactly what the statute  
13 contemplated, that originally the mortgage secured  
14 only the acquisition financing, not the building  
15 loan.

16                  MR. BITTEL: Well, I - - - I won't - - -  
17 I'm not going to accept that, because if the court -  
18 - - I won't - - -

19                  JUDGE SMITH: You say the whole thing is  
20 building loan. But if you look at the agreement, you  
21 might think it had two pieces and one of them was  
22 buildings and the other was acquisition.

23                  MR. BITTEL: I - - - that's the way it was  
24 funded. And again, as I say, as I go back here to  
25 the statute, the statute particularly and exactly

1 anticipated that in the structuring of these types of  
2 agreements. And that's why the legislature - - -

3 JUDGE SMITH: You're talking about the  
4 definition of improvements again?

5 MR. BITTEL: Yes, Your Honor. Yes, Your  
6 Honor. And further, in this particular case, the  
7 parties, really, they - - - they went ahead and made  
8 all of the advances. They amended the agreement,  
9 apparently orally, to go ahead and make these  
10 construction advances, and then filed - - - they seek  
11 to get priority of their mortgage which was filed  
12 after our clients started to do the work on the  
13 property.

14 But Judge Smith, I wanted to go back to the  
15 question that you asked. In the 2007 mortgage that  
16 was filed, I know what was asserted in the pleadings,  
17 and I know that they only paid a tax on 5.5 million  
18 dollars. But if the Court looks at the document,  
19 paragraph 1 of the grant - - - and I think it's at -  
20 - - I think it's at R-440, if I'm doing this from  
21 memory correctly.

22 JUDGE SMITH: The grant - - - yeah, Article  
23 1, mortgage grant?

24 MR. BITTEL: Right. Article 1 mortgage  
25 grant is they're granting a ten million dollar

1 mortgage. That's paragraph 1. They grant ten  
2 million dollars.

3 JUDGE SMITH: I see it says "loan". I  
4 mean, I thought it was a ten million dollar loan  
5 secured by a five and a half million dollar mortgage.

6 MR. BITTEL: There is an affidavit - - -  
7 there are multiple affidavits that they - - - that  
8 they funded through some sort of escrow trust  
9 account. They funded ten million dollars on March  
10 29th. Now, I haven't heard one comment from counsel  
11 in this argument, but two-thirds of his brief was  
12 based upon - - -

13 JUDGE SMITH: If you're right, why do they  
14 say in 2008, we're increasing the mortgage?

15 MR. BITTEL: I - - - I don't know what they  
16 were doing. I truly don't know what they were doing,  
17 and nor does anybody else. We know what they have  
18 sworn that they've done. And we also know that  
19 they've sworn that they've provided installments  
20 along the way. But pure and simple, quite simply, I  
21 submit to you that - - - that if the - - - you'll  
22 have to reverse Nanuet and P.T. McDermott to grant  
23 this relief and you'll have to ignore the statute.

24 CHIEF JUDGE LIPPMAN: Okay, counselor.  
25 Thank you, counselor.

1 MR. BITTEL: Thank you very much.

2 THE COURT: Counselor?

3 MR. PAVLUS: Good afternoon. Jordan Pavlus  
4 on behalf of Syracuse Merit Electric and TAG  
5 Mechanical.

6 I want to address a couple of points that  
7 were made by Mr. Lederman. And first I want to focus  
8 on the - - - there's two mortgages here that were - -  
9 - that are at issue. The first mortgage, which was  
10 recorded on May 3rd, 2007, that mortgage specifically  
11 refers back to the March 29, 2007 agreement; it says  
12 it's being recorded pursuant to the March 29, 2007  
13 agreement. That meets the definition of a building  
14 loan mortgage in Section 2 precisely.

15 So what we have here is we have a building  
16 loan mortgage that was filed in 2007 pursuant to a  
17 building loan contract, which was not filed. The  
18 definition of a building loan contract in Section 2  
19 does provide for a commitment and then a building  
20 loan contract filed afterwards. That's not what we  
21 had here. This wasn't a commitment. Ten million  
22 dollars was disbursed into an account pursuant to the  
23 March 29, 2007 agreement. They then filed a mortgage  
24 pursuant to that agreement. The argument that the  
25 March 29, 2007 agreement was somehow a commitment is

1 belied by the terms of it and the behavior in  
2 recording the mortgage in 2007.

3 With regard to the Admiral's Walk case that  
4 Altshuler relies on, it's distinguishable for many  
5 reasons, but the main one is that that holding relied  
6 on that definition of a building loan contract.

7 JUDGE SMITH: What holding? I guess I  
8 didn't find - - -

9 MR. PAVLUS: Well - - -

10 JUDGE SMITH: - - - I didn't fine the  
11 Admiral's Walk case totally luc - - - totally  
12 transparent.

13 MR. PAVLUS: Well, I would agree, Judge  
14 Smith, and there was a lot of dicta in that decision,  
15 sort of.

16 JUDGE SMITH: What holding were you  
17 referring to a minute ago?

18 MR. PAVLUS: Okay. Well, what I was  
19 referring to is that it held that the commitment did  
20 not have to be filed. And the reason why it held the  
21 commitment didn't have to be filed is because a  
22 building loan contract was later filed. That's  
23 exactly what Section 22 - - - Section 2, pardon me,  
24 of the Lien Law - - -

25 JUDGE SMITH: Well, so you're saying it's

1 distinguishable because you're talking here about an  
2 agreement, not a commitment.

3 MR. PAVLUS: That's right.

4 JUDGE SMITH: Yeah.

5 MR. PAVLUS: And with regard to the Yankee  
6 Bank case - - -

7 JUDGE GRAFFEO: How - - - can I just go  
8 back for a minute? How do you distinguish what's a  
9 commitment from what's a building loan agreement?

10 MR. PAVLUS: A commitment, generally  
11 speaking, is an agreement to lend money if conditions  
12 are met in the future.

13 JUDGE GRAFFEO: So because they funded the  
14 escrow, is that why you're saying it's not a  
15 commitment?

16 MR. PAVLUS: Because they funded the escrow  
17 and because they recorded the mortgage pursuant to  
18 the agreement, and it specifically refers back to the  
19 agreement and says that it's recorded pursuant  
20 thereto.

21 JUDGE SMITH: The fact that - - -

22 MR. PAVLUS: And they funded - - -

23 JUDGE SMITH: - - - that they called it  
24 loan agreement also might make you think it's a loan  
25 agreement.

1                   MR. PAVLUS: Well, yeah, that's a logical  
2 conclusion; I would agree, Judge Smith. And in  
3 addition, that agreement specifically says it's a  
4 final agreement that has an integration clause.  
5 There's no future conditions that it is subject to.

6                   JUDGE SMITH: So is this like if I'm going  
7 to the bank for a mortgage on my house, first I get a  
8 commitment, then I get a loan agreement?

9                   MR. PAVLUS: Hypothetically, yes, after you  
10 met a series of conditions in order to finalize the  
11 loan and get it funded. But they had already funded  
12 the loan here.

13                  CHIEF JUDGE LIPPMAN: Okay, counselor,  
14 thanks.

15                  MR. GIVAS: Good afternoon. Tom Givas,  
16 Pappas & Cox. We represent L.A. Painting, another  
17 one of the contractors on the project.

18                  Just to amplify what Mr. Pavlus was saying,  
19 this was not a commitment. This was a signed loan  
20 agreement. The loan was funded. There was a  
21 promissory note that was signed. The monies were  
22 advanced in accordance with that loan agreement.  
23 That loan agreement never expired.

24                  JUDGE PIGOTT: Well, 5.5 of that went - - -  
25 was to pay off Oak Park, right?

1                   MR. GIVAS: 5.5 went to take out the first  
2 mortgage, yes.

3                   JUDGE PIGOTT: If that - - - if there was  
4 an assignment of that first mortgage, your argument  
5 would be different, I assume.

6                   MR. GIVAS: There was an assignment of that  
7 first mortgage.

8                   JUDGE PIGOTT: So wouldn't that always  
9 relate back to the purchase money aspect of it?

10                  MR. GIVAS: It doesn't - - - according to  
11 the Lien Law, that becomes part of the improvement.  
12 And I was - - -

13                  JUDGE PIGOTT: So that's where we get back  
14 to what was being asked before - - -

15                  MR. GIVAS: Right.

16                  JUDGE PIGOTT: - - - even if it's 1,000  
17 dollars - - -

18                  MR. GIVAS: This was not a purchase-money  
19 mortgage.

20                  JUDGE PIGOTT: It was.

21                  MR. GIVAS: No, it wasn't.

22                  JUDGE PIGOTT: Oak Park was.

23                  MR. GIVAS: The owner already owned the  
24 property. What happened was they refinanced the  
25 first part of - - - the first mortgage.

1 JUDGE READ: You mean the developer?

2 MR. GIVAS: The - - -

3 JUDGE READ: You said - - -

4 MR. GIVAS: - - - owner GML Tower or - - -  
5 owned the property - - - it already owned the  
6 property.

7 JUDGE SMITH: But when the Illinois bank  
8 made the original loan, was that acquisition  
9 financing?

10 MR. GIVAS: At that point in time, yes.

11 JUDGE PIGOTT: Yeah, that was a purchase-  
12 money mortgage.

13 MR. GIVAS: At that point in time.

14 JUDGE PIGOTT: Right, '05 - - - in  
15 September of '05.

16 MR. GIVAS: Right, but at the point in time  
17 when the plaintiff comes in, they already own it.

18 JUDGE READ: You mean at the point in time  
19 2007?

20 MR. GIVAS: 2007.

21 JUDGE PIGOTT: They own it, but they own it  
22 subject to a purchase-money mortgage by Oak Park.

23 MR. GIVAS: Which they then assigned.

24 JUDGE PIGOTT: That then was assigned to -  
25 - -

1 MR. GIVAS: Right.

2 JUDGE PIGOTT: Yeah, okay.

3 MR. GIVAS: Yes. And briefly, Your Honor,  
4 just to make a couple of other points. My client is  
5 in a slightly different position because my client  
6 has a judgment. It's my understanding that it is a  
7 summary judgment, which probably would not be  
8 affected at all by this proceeding, and I wanted to  
9 just make that point.

10 JUDGE PIGOTT: You're just sawing off your  
11 partners here in case we rule - - -

12 MR. GIVAS: No, I wanted to make it crystal  
13 clear so that - - -

14 JUDGE SMITH: If God forbid they should  
15 lose, you still win?

16 MR. GIVAS: No, if for some reason - - -  
17 well, to - - - if I have to go down that path, Your  
18 Honor, if for some reason the court reopens  
19 everything, this was on a summary judgment motions.  
20 There are additional defenses which were not  
21 addressed because of the summary judgment motions.  
22 So I believe everything would have to go back and we  
23 would be back at square one doing discovery. And I  
24 was just basically trying to avoid being - - - going  
25 through round two.

1 CHIEF JUDGE LIPPMAN: Okay, counselor.

2 MR. GIVAS: Thank you, Your Honor.

3 CHIEF JUDGE LIPPMAN: Thank you.

4 Counselor, rebuttal?

5 MR. LEDERMAN: Yes. First, I'd like to  
6 address the question of the funding when this - - -

7 CHIEF JUDGE LIPPMAN: Go ahead.

8 MR. LEDERMAN: - - - loan was done. This  
9 was a document done in Israel under Israeli law. And  
10 the money, the ten million dollars was placed in the  
11 lender's attorney's account. It wasn't a bank. It's  
12 simply they put the money so they knew it - - - it  
13 was there.

14 JUDGE SMITH: Does it come out differently  
15 if it was done in New York?

16 MR. LEDERMAN: It wouldn't make - - - I  
17 don't think it would make any difference. The money  
18 was in escrow. Having the money in escrow - - -

19 JUDGE SMITH: Why are you telling - - -

20 MR. LEDERMAN: - - - is not advancing.

21 JUDGE SMITH: What's the point of telling  
22 us it's done in Israel? What has that have - - -

23 MR. LEDERMAN: Well, that - - -

24 JUDGE SMITH: - - - to do with the case?

25 MR. LEDERMAN: That's just physically what

1           happened. That's just physically what happened. The  
2           money was in escrow; it had not been released.

3                   JUDGE PIGOTT: I read Lien Law 22 to  
4           protect you, to protect people who are going to loan  
5           money over time. And once you record it, these  
6           people can't say, well, you only - - - that you only  
7           loaned them 1,000 dollars then; our lien, which was  
8           filed between the first payment and the last payment,  
9           takes priority over that last payment. And it won't  
10          under Lien Law 2. You can - - - you can make ten  
11          payments and you're always going to be - - - just  
12          like a purchase-money mortgage, you're always going  
13          to be able to go back to the Lien Law 22 filing. If  
14          you don't file it, then you don't get that benefit.  
15          Am I misunderstanding - - -

16                   MR. LEDERMAN: You're - - -

17                   JUDGE PIGOTT: - - - the - - -

18                   MR. LEDERMAN: Respectfully, you're missing  
19          it. The priority is created by the mortgage, and  
20          that's what happened in this case. Altshuler - - -

21                   JUDGE PIGOTT: Only if it's recorded.

22                   MR. LEDERMAN: Only if it's recorded. Al -  
23          - - had they filed a Lien Law 22 affidavit and no  
24          mortgage, no matter what they did, if there was a  
25          mechanic's lien, New York is a race-notice state - -

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JUDGE PIGOTT: Right.

MR. LEDERMAN: - - - and it's a matter of whether the mechanic's lien is filed before the mortgage or the mortgage is filed before the mechanic's lien. So that's really, I submit - - -

JUDGE SMITH: So but having had that priority, if you violate Section 22, you're still subordinated?

MR. LEDERMAN: If it's required, you'd be subordinate.

Now, let me turn back, if I may, to the question of the acquisition mortgage. While the definitions allow a building loan mortgage to include acquisition costs, there's nothing in Lien Law Section 22 that in any way suggests that if there's a violation it should apply to acquisition mortgages.

As I started to point out, and I - - -

JUDGE GRAFFEO: What's the policy purpose of that distinction?

MR. LEDERMAN: The policy purpose is that Lien Law 22, the whole Lien Law and two, definitions only go to money for improvements. If money is for acquisition, it's completely separate; it's outside the scope. It's allowed, in the definitions, to be

1 part of a building loan, but that doesn't mean, in  
2 any way, that there should be subordination.

3 JUDGE READ: What's the practical - - - if  
4 we agree with you about that, what's the practical  
5 effect in this case?

6 MR. LEDERMAN: The practical effect is that  
7 there should - - - because - - - there were no  
8 bidders. Because of this court's final judgment  
9 rule, we had to wait till it was sold. There were no  
10 bidders. The Hayner Hoyt bid; one of its  
11 subsidiaries still holds it. The practical effect  
12 would be that the Court would remand, there'd be a  
13 new auction where it was understood that at be - - -  
14 you know, if you disagree with the first of my  
15 argument, Altshuler has priority for 5.5 million.  
16 There'd be a new mortgage. Depending on what the bid  
17 was - - - the economy's very different now; there  
18 might be money for them, there might not. So it's  
19 very easy in this case to remand. There's no reason  
20 - - - we're not going back to square one. There'd  
21 simply be a new foreclosure auction with directions  
22 pursuant to this court that there'd be priority for  
23 the lender on the first 5.5 million, and if there's a  
24 violation, which we respectfully disagree with, but  
25 if this court finds a violation, there's absolutely

1 no reason in law, policy or equity that there should  
2 be a loss of priority on the 5.5. There was an  
3 assignment.

4           Somebody asked - - - I believe it was Judge  
5 Lippman - - - where were they on notice. At page 439  
6 of the recorded mortgage, everyone who chose to  
7 review the record was on notice. The 10 million  
8 dollars had been loaned, and 5.5 was an assignment of  
9 the original purchase-money mortgage. To the extent  
10 - - - and in this case there's no evidence that  
11 anybody looked at the record; these are all lawyers  
12 jockeying for what's best for their position. But to  
13 the extent that we're asking what the public record  
14 showed, before any contractor did work, they were on  
15 notice that there was a 10 million dollar loan, 5.5  
16 million was secured from the original acquisition.  
17 So it would be a manifest injustice and distortion of  
18 the purpose of Lien Law 22 if the contractors were  
19 allowed to have priority over acquisition financing  
20 which had been in place since 2005, and then was  
21 assigned to the lender and had absolutely nothing to  
22 do with the allegedly defective building loan.

23           CHIEF JUDGE LIPPMAN: Okay, counselor.

24           MR. LEDERMAN: Again, as I pointed out,  
25 this is - - -

1 CHIEF JUDGE LIPPMAN: Go ahead.

2 MR. LEDERMAN: - - - at best, malum  
3 prohibitum, not malum in se. There's nothing  
4 inherently evil about lending money. If it's a  
5 technicality, based on what this court said - - - and  
6 I'll hand the court officer the case - - - in  
7 Glassman v. ProHealth, there should be severance - -  
8 -

9 CHIEF JUDGE LIPPMAN: Okay, couns - - -

10 MR. LEDERMAN: - - - the documents have  
11 severance provisions in them.

12 CHIEF JUDGE LIPPMAN: Thank you, counselor.

13 MR. LEDERMAN: Thank you.

14 CHIEF JUDGE LIPPMAN: Thank all of you.  
15 Appreciate it.

16 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Altshuler Shaham Provident Funds, Ltd. v. GML TOWER LLC, et al., No. 115 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

Signature: \_\_\_\_\_

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