Rel: September 21, 2018

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2018

1170484

GHB Construction and Development Company, Inc.

v.

West Alabama Bank and Trust

Appeal from Walker Circuit Court
(CV-17-900006)

PARKER, Justice.

GHB Construction and Development Company, Inc. ("GHB"), sued West Alabama Bank and Trust ("WABT") seeking a judgment declaring that its materialman's lien against property owned by Penny Guin was superior to WABT's mortgage lien secured by

the same property owned by Guin. Upon motion by WABT, the Walker Circuit Court ("the circuit court") dismissed GHB's complaint. GHB appeals. We reverse and remand.

Facts and Procedural History

On April 8, 2015, Guin purchased real property located in Jasper. On the same day, Guin executed in favor of WABT a promissory note and an optional future-advance mortgage[1] secured by the property in the amount of $410,870; WABT did not advance any money to Guin on that day. WABT recorded the mortgage in the Walker Probate Court ("the probate court") on April 10, 2015. The promissory note states, in pertinent part, that "[t]he conditions for future advances are at the request of [Guin] and the approval of the loan officer." (Capitalization omitted.)

On April 9, 2015, Guin entered into a contract with GHB in which GHB agreed to construct a house on the property. GHB's complaint states that, "[a]fter execution of the [c]ontract, [GHB] commenced with the construction of Guin's home on the [p]roperty and contributed various materials and

[1]A future-advance mortgage is defined as "[a] mortgage in which part of the loan proceeds will not be paid until a future date." Black's Law Dictionary 1165 (10th ed. 2014).

labor that were used, consumed, and otherwise incorporated into the property." Nothing in the record indicates the specific date on which GHB delivered materials to Guin's property or commenced construction of Guin's house.

On October 16, 2015, WABT issued the first advance under the promissory note and mortgage in the amount of $105,000 to Guin.

GHB's complaint states:

> "In May of 2016, [GHB] met with [WABT and Guin] prior to beginning the work representative of the final invoice and presented [WABT and Guin] with a description of the items to complete the construction of Guin's home and an estimated cost of completion of construction. After the meeting, Guin informed [GHB] that [GHB] was authorized to complete the construction of Guin's home pursuant to the description of the items and estimated cost of completion given by [GHB] to Guin and [WABT]. Pursuant to that authorization, [GHB] began and completed the work as described in the meeting."

On July 25, 2016, GHB, having completed construction of Guin's house, submitted to Guin its final bill for the work completed. GHB alleges that Guin has not paid the total amount of the final bill. As a result, on December 20, 2016, GHB filed in the probate court a "verified statement of lien" recording its lien against Guin's property in the amount of $106,556.16.

On January 6, 2017, GHB sued WABT, Guin, and several fictitiously named parties. Most of the claims in GHB's complaint were asserted against Guin in an effort to collect on the outstanding balance of the construction contract. Concerning WABT, GHB sought a judgment declaring that its materialman's lien on Guin's property had priority over WABT's mortgage lien.

On August 11, 2017, WABT filed a motion to dismiss GHB's claim against it pursuant to Rule 12(b)(6), Ala. R. Civ. P. WABT argued that its mortgage was recorded with the probate court before GHB delivered materials to Guin's property or began construction of Guin's house. Accordingly, WABT argued, its mortgage lien has priority over GHB's materialman's lien. On September 5, 2017, GHB filed a response to WABT's motion to dismiss. GHB argued that WABT's mortgage did not "secure" until WABT actually advanced money to Guin, which, GHB argued, did not occur until after GHB had delivered materials to Guin's property and commenced work on Guin's house. Both WABT and GHB made additional arguments.

On November 8, 2017, the circuit court granted WABT's motion and dismissed GHB's claim against WABT. On December 5,

2017, WABT filed a motion requesting that the circuit court certify its November 8, 2017, order as a final judgment pursuant to Rule 54(b), Ala. R. Civ. P. On January 5, 2018, GHB filed a motion to alter, amend, or vacate the circuit court's November 8, 2017, order. On January 12, 2018, the circuit court entered an order denying GHB's postjudgment motion and certifying its November 8, 2017, order as final pursuant to Rule 54(b). GHB appealed.

Standard of Review

> "'"On appeal, a dismissal is not entitled to a presumption of correctness. The appropriate standard of review under Rule 12(b)(6)[, Ala. R. Civ. P.], is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [him] to relief. In making this determination, this Court does not consider whether the plaintiff will ultimately prevail, but only whether [he] may possibly prevail. We note that a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief."'"

Donoghue v. American Nat'l Ins. Co., 838 So. 2d 1032, 1036 (Ala. 2002) (quoting C.B. v. Bobo, 659 So. 2d 98, 104 (Ala. 1995), quoting in turn Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993)).

Discussion

The only issue before us is whether it is possible for GHB to demonstrate that its materialman's lien is superior to WABT's mortgage lien. The priority of liens is governed by § 35-11-211, Ala. Code 1975, which states, in pertinent part:

> "(a) [A mechanic's or materialman's] lien as to the land and buildings or improvements thereon, shall have priority over all other liens, mortgages, or incumbrances created subsequent to the commencement of work on the building or improvement. Except to the extent provided in subsection (b) below, all liens, mortgages, and incumbrances (in this section, 'mortgages and other liens') created prior to the commencement of such work shall have priority over all liens for such work."

GHB argues that its materialman's lien is superior to WABT's mortgage lien because, GHB argues, GHB's materialman's lien was created prior to WABT's mortgage lien. Guin executed the promissory note and mortgage on April 8, 2015, and those documents were recorded on April 10, 2015. It is undisputed that GHB did not deliver any materials to Guin's property or begin construction of Guin's house until after April 10, 2015. However, GHB argues that WABT's mortgage lien was not created at the time the promissory note and mortgage were executed because, it argues, the mortgage did not secure any indebtedness; WABT did not actually advance any money to GHB until months after the promissory note and mortgage were

signed and recorded. Rather, GHB argues that WABT's mortgage lien was created when WABT made its initial advance to Guin on October 16, 2015.

Although the actual date GHB delivered material to Guin's property or began construction of Guin's house is unclear from GHB's complaint, GHB does state in its brief before this Court that GHB "began work and delivering material to Guin's home prior to the date [WABT] made its first loan payment to Guin." GHB's brief, at p. 13. If GHB is correct that the mortgage lien was not created until October 16, 2015, the date WABT first advanced Guin money pursuant to the promissory note, it would be possible for GHB to demonstrate that its materialman's lien was created before WABT's mortgage lien.

In support of its argument that WABT's mortgage lien was not created until WABT first advanced money to Guin on October 16, 2015, GHB cites Morvay v. Drake, 295 Ala. 174, 325 So. 2d 165 (1976). In Morvay, a mortgagor executed a mortgage in favor of a mortgagee; the mortgage at issue in Morvay was not a future-advance mortgage. It was later alleged that the mortgagor defaulted on the terms of a loan and the mortgagee sought to foreclose. The mortgagor filed an action seeking to

enjoin the foreclosure proceedings. The mortgagor's argument was that the mortgage was not valid because the mortgagee had never actually advanced the mortgagor any money; the mortgagor argued that the mortgage did not secure any indebtedness. The question before the Court was whether the mortgage actually secured any debt and, if not, whether that fact rendered the mortgage invalid.

There were competing factual assertions in Morvay. Under one version of the facts, the mortgagee promised to loan the mortgagor $5,000, but never did so; the mortgagor alleged that he had been defrauded. Under the other version of the facts, the mortgage was used to secure $4,050 of existing debt and an additional $950 loan. Concerning the version of facts in which the loan was promised but never given, this Court stated:

> "If [the mortgagor] gave the mortgage to secure the promised loan from [the mortgagee], the defect is that the mortgagor received no consideration for the obligation which the mortgage secured. This defect renders the mortgage a nullity in equity. Alabama law has long recognized the dual character of mortgages as conveyances of estates in land at law and security for debts in equity. Welsh v. Phillips, 54 Ala. 309 (1875). The standard treatises on mortgages explain that the legal mortgage itself does not require consideration because it is simply an executed conveyance of real property. But, in

> equity, a mortgage is a nullity except insofar as it secures a valid obligation. Osborne, Handbook on Law of Mortgages, § 107 (1951); 5 Tiffany, The Law of Real Property, § 1401 (1939). The usual statement of this rule in the Alabama cases is, 'if there is no debt there is no mortgage.' Jarrett v. Hagedorn, 237 Ala. 66, 185 So. 401 (1938); Lee v. Macon County Bank, 233 Ala. 522, 172 So. 662 (1937)."

Morvay, 295 Ala. at 176-77, 325 So. 2d at 166-67. This Court concluded that, if the mortgage "secured a promised but unconsummated loan from [the mortgagee] to [the mortgagor], the trial [j]udge is authorized to declare the mortgage void for failure of consideration." 295 Ala. at 177, 325 So. 2d at 167.

The rule stated in Morvay is clear: A mortgage that does not secure an actual debt may be declared void for failure of consideration. However, as noted above, the Morvay Court did not consider whether this rule applies to a future-advance mortgage, as is at issue in this case. GHB does not offer any analysis or authority indicating that the rule stated in Morvay should apply in the context of a future-advance mortgage, and WABT presents no argument concerning this issue. We note that future-advance mortgages are valid in Alabama. In Collier & Son v. Faulk, 69 Ala. 58, 60-61 (1881)(overruled on different grounds), this Court stated:

> "The question has been much discussed as to how far mortgages of this character for future advances are good, and what should be the nature of their recitals. It seems to be clearly settled that, if they are not tainted with fraud, or bad faith, they are just as valid as if made to secure past indebtedness, not only as between the parties, but also as against subsequent purchasers and incumbrancers, so far, at least, as respects advances made before the equities of such purchasers or incumbrancers have attached. -- Divver v. McLaughlin, [2 Wend. 596,] 20 Amer. Dec. 653 [(1829)], and note; Hubbard v. Savage, 8 Conn. 215 [(1830)]; Lovelace v. Webb, 62 Ala. 271 [(1878)]; Summers v. Roos & Co., [42 Miss. 749,] 2 Amer. Rep. 658 [(1869)]; Bank v. Cunningham, 24 Pick. 270[, 35 Amer. Dec. 322 (1837)]; Robinson v. Williams, 22 N.Y. 380 [(1860)]; Ward v. Cooke, 17 N.J. Eq. 93 [(1864)]; 4 Wait's Act. & Def. 541-42."

(Emphasis added.) See also Lovelace v. Webb, 62 Ala. 271, 281 (1878)("But when there is a contract existing, on the faith of which and the security of the mortgage, the creditor makes advances, and promises future advances to a definite amount, or for a specified purpose, the mortgage is a valid security for all the advances the creditor has bound himself to make, and will prevail over subsequent incumbrances, whether these are created by the contract of the mortgagor, or by operation of law."); Forsyth v. Preer, Illges & Co., 62 Ala. 443, 445 (1878)("Mortgages or instruments may be taken as a security for a present debt, or against contingent liabilities, or to

cover future advances or responsibilities, when such is the agreement and intention of the parties." (emphasis added)); 1 Leonard A. Jones, A Treatise on the Law of Mortgages of Real Property § 447 (8th ed. 1928)("Formerly [future-advance] mortgages were regarded with jealousy, but their validity is now fully recognized and established."); and 2 Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 12.7 (3d ed. 1993). We further recognize that "[m]ortgages to secure future advances have always been sanctioned by the common law." 1 Jones on Mortgages § 448. Section 1-3-1, Ala. Code 1975, specifically adopts the common law of England.

However, even though future-advance mortgages are valid in Alabama, we have not discovered a single Alabama case involving a future-advance mortgage that did not initially secure some indebtedness. The treatises and authority from other jurisdictions that address this issue uniformly indicate that a future-advance mortgage does not create a mortgage lien until some indebtedness is incurred by the mortgagor. For instance, Jones on Mortgages § 462 states: "A mortgage to secure future advances can only take effect as a lien from the time some debt or liability secured by it is created." Jones

on Mortgages cites Freutel v. Schmitz, 299 Ill. 320, 132 N.E. 534 (1921), as support for this principle of law. Freutel states, in pertinent part:

> "A mortgage is security for a debt, and without a debt it has no effect as a lien. Schultze v. Houfes, 96 Ill. 335 [(1880)]; Rue v. Dole, 107 Ill. 275 [(1883)]; Fischer v. Tuohy, 186 Ill. 143, 57 N.E. 801 [(1900)]; Schaeppi v. Glade, 195 Ill. 62, 62 N.E. 874 [(1902)]. A mortgage may be taken to secure future advances, but it can only take effect as a lien from the time some debt or liability secured by it is created. If there is no mortgage debt or obligation in existence, there is nothing for the mortgage to operate on, and the lien begins only when money is advanced or the contemplated debt comes into existence in the course of dealing between the parties. The lien is measured by the extent of the advances and the amount of the debt. Collins v. Carlile, 13 Ill. 254 [(1851)]; Darst v. Gale, 83 Ill. 136 [(1876)]."

299 Ill. at 323, 132 N.E. at 535. See also Guaranty Title & Trust Co. v. Thompson, 93 Fla. 983, 991, 113 So. 117, 120-21 (1927)(applying the above-quoted principle from Freutel); Ladue v. Detroit & Milwaukee R.R., 13 Mich. 380, 407 (1865)("It is held that a mortgage to secure future advances, which are optional, does not take effect between the parties as a mortgage or incumbrance until some advance has been made ...."); George E. Osborne, Mortgages § 114, 180-81 (2d ed. 1970)("Even in the exceptional case where for lack of

consideration the promise to repay all the advances, made when the mortgage is executed, is not binding, the very first advance made would be sufficient to sustain the creation of the entire obligation at that time. ... [I]n the optional advance cases, no mortgage can arise until the advance is made because before then there exists no debt to secure. Of course in an occasional case where there is no consideration until the later advance is made this view would be correct." (footnote omitted)); and 2 Real Estate Finance Law § 12.7, p. 209 ("There are many transactions in which it is desirable from a business viewpoint for the parties to enter into a present mortgage even though some portion of the loan funds is not to be advanced to the mortgagor until some future date." (emphasis added)). Further, 59 C.J.S. Mortgages § 256 (2009) states:

> "A mortgage to secure a future loan or advance becomes a lien from the day the loan or advance is made,[7] but not until then,[8] and does not create a lien if no advance is ever actually disbursed.[9]
>
> "_____
>
> "[7]La. -- Langfitt v. Brown, 5 La. Ann. 231 ... (1850).
>
> "[8]Mich. -- Ginsberg v. Capitol City Wrecking Co., 300 Mich. 712, 2 N.W.2d 892 (1942).

> "[9]Ill. -- Freutel v. Schmitz, 299 Ill. 320, 132 N.E. 534 (1921)."

The parties have not directed this Court's attention to any authority to the contrary.

Based on the rule set forth in Morvay, we conclude that a future-advance mortgage does not create a mortgage lien until some indebtedness is incurred by the mortgagor under the future-advance mortgage.

Applying this rule to the present case, WABT's mortgage lien was not created when Guin executed the promissory note and mortgage or when WABT recorded those documents. Instead, WABT's mortgage lien was created on October 16, 2015, when WABT made its initial advance to Guin. The exact date GHB delivered materials to Guin's property or began construction of Guin's house, thereby creating GHB's materialman's lien, is not stated in the complaint. However, nothing in the complaint indicates that GHB's materialman's lien was created after October 16, 2015. Therefore, when the allegations set forth in the complaint are read in GHB's favor, as they must be under our standard of review, it is possible for GHB to demonstrate that its materialman's lien was created before

WABT's mortgage lien.[2] Accordingly, we hold that the circuit court erred in granting WABT's motion to dismiss.

We note that WABT argues that its mortgage lien has priority over GHB's materialman's lien. However, WABT's argument is based on authority that assumes that a mortgage lien was properly created before the creation of a materialman's lien; the issue then becomes whether future advances issued subsequent to the creation of the materialman's lien relate back to the priority date of the mortgage lien. See, e.g., City Nat'l Bank of Dothan v. First Nat'l Bank of Dothan, 285 Ala. 340, 232 So. 2d 342 (1970)(relied upon by WABT in its brief before this Court). As set forth above, based on the allegations of the complaint, because WABT's mortgage lien was created after GHB's materialman's lien, WABT's mortgage lien never had priority

[2]WABT argues that this Court should affirm the circuit court's judgment of dismissal because GHB failed to specifically allege in its complaint the date that GHB's materialman's lien was created. However, nothing in the complaint indicates that GHB's materialman's lien was created after WABT's mortgage lien. WABT, without citing any authority in support of its argument, urges this Court to abandon the well established standard of review requiring this Court to read the allegations of the complaint in GHB's favor. See WABT's brief, at pp. 14-16. WABT's argument is not supported by relevant authority and is not convincing.

over GHB's materialman's lien. The earliest date the future advances issued by WABT to Guin could relate back to is October 16, 2015, the date of the first advance to Guin. Even if WABT is correct in arguing that the advances made to Guin relate back to the date the mortgage lien was created, based on the allegations of the complaint, it is possible for GHB to prove that its materialman's lien was created before WABT's mortgage lien. Accordingly, we need not analyze WABT's argument; the authority relied upon by WABT is distinguishable from the present case.

Conclusion

We reverse the circuit court's judgment granting WABT's motion to dismiss and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Main, Wise, and Bryan, JJ., concur.

Shaw, J., concurs specially.

Stuart, C.J., and Bolin, Sellers, and Mendheim, JJ., dissent.

SHAW, Justice (concurring specially).

I concur in the main opinion. I write specially to note the following.

The issue in this appeal is whether the plaintiff below, GHB Construction and Development Company, Inc. ("GHB"), can prove any set of circumstances under the allegations of its complaint that would entitle it to relief. Specifically, GHB contends that its purported materialman's lien is superior to the purported mortgage lien held by West Alabama Bank and Trust ("WABT"). It should be noted that the main opinion does not hold that either purported lien has priority over the other.

WABT entered into a promissory note secured by a mortgage ("the advance mortgage") with Penny Guin. The note indicated a "principal sum" and "loan amount" of $410,870 and had provisions for a "Single advance" of the principal or a "Multiple advance" arrangement. The box next to "Multiple advance" was checked. The text that follows has three blank portions; the first and last are filled in and the middle one is not. It states:

> "Multiple advance: The principal sum shown above is the maximum amount of principal [the borrower] can

> borrow under this note. On 04-08-2015 [the borrower] will receive the amount of $ _____ and future principal advances are contemplated.
>
> "Conditions: The conditions for future advances are AT THE REQUEST OF THE DEBTOR AND THE APPROVAL OF THE LOAN OFFICER ."

(Capitalization in original.)

According to the note, the borrower, Guin, was advanced no funds at the time of the execution of the note on April 8, 2015. Guin could in the future request an advance of funds, but the request had to be approved by the loan officer. As far as I can tell, no provision of the note governs how the loan officer undertakes such an "approval" of future advances, and no portion of it requires that future advances actually be given. Further, there is no argument or authority before us indicating that an obligation to advance money existed. In sum, WABT's advancement to Guin of any money, for all that appears, was purely optional and at WABT's discretion.

Generally stated, a mortgage "created" prior to the commencement of work has priority over a materialman's lien, Ala. Code 1975, § 35-11-211, and a mortgage that has been created and is then recorded has priority over a subsequently created materialman's lien. BancBoston Mortg. Corp. v.

Gobble-Fite Lumber Co., 567 So. 2d 1337, 1338 (Ala. 1990). That said, our law holds that a mortgage must nevertheless actually secure an obligation or a debt to be effective. Morvay v. Drake, 295 Ala. 174, 177, 325 So. 2d 165, 167 (1976). When a note and a mortgage are executed and an advance of money is immediately made, the mortgage clearly secures a debt or obligation. Under § 35-11-211, it would have priority over a later materialman's lien.

But with an advance mortgage, where money may not immediately be advanced, or where there is no obligation to loan money at all, as in this case, no debt or obligation is secured by the mortgage. We are thus faced with the question whether the general rule stated in Morvay requires that such a mortgage, securing no debt or obligation, should be deemed ineffective. We have no authority in this state on that issue. However, other authorities identified in the main opinion hold that a mortgage lien is not created under an advance mortgage until money is advanced and a debt is secured, or an obligation is otherwise created.

Clearly, the advance mortgage at issue in this case was executed and recorded before the work commenced and before the

materialman's lien was created. But GHB alleges that the advance mortgage secured no obligation or debt at the time it was executed and recorded. The terms of the advance mortgage, discussed above, tend to show that there was no debt at that time. In other words, no money had yet been given to Guin. Further, because of the optional or discretionary nature of WABT's contractual responsibility, under the advance mortgage, no "obligation" on its part to lend money was created. Thus, according to GHB, the advance mortgage did not secure a debt or obligation and thus did not create a mortgage-lien interest; later advances may have been given, and a debt created, but that, it is alleged, did not occur until after GHB's materialman's lien was created. If this is true, under § 35-11-211, GHB's materialman's lien would have held priority over the later created mortgage lien. GHB thus could prove a set of circumstances indicating that its purported lien is superior to WABT's interest.

It is an entirely different issue whether, once advances of money were later made and a debt was subsequently created, the mortgage lien sprang into interest and related back to the time it was either executed or recorded, despite any

obligation to lend money in the first place. If that is the law, then I would agree that the advance mortgage would have priority over the materialman's lien. However, there is no argument or authority before us addressing that issue, and I see nothing in the main opinion that would foreclose such a ruling if it were to come before us.

There is a possibility that, if WABT made certain "payments" on behalf of Guin, then such payments are considered advances of principal under the advance mortgage. Specifically, a provision states, in pertinent part: "Payments by Lender: If [the lender is] authorized to pay on [the borrower's] behalf, charges [the borrower is] obligated to pay (such as property insurance premiums) then [the lender] may treat those payments made by [the lender] as advances and add them to the unpaid principal under this note ...." A "Mortgage Tax" and a "Recording Fee" are stamped on the face of the recorded mortgage, presumably indicating that they were paid. See Ala. Code 1975, § 40-22-2. If WABT paid them, and if it was authorized to do so on Guin's behalf, then that payment arguably would be considered--under the terms of the advance mortgage--to be an advance of the principal, and we

would know that a debt came into existence and a lien was "created" no later than the point when the mortgage was recorded. Justice Sellers, in his dissent, states that WABT advanced the fee and tax, but I see nothing in the record establishing those facts. It might be customary for a bank to make such payments, but our standard of review at this point in the proceedings requires that reasonable inferences be made in favor of GHB--and not WABT. Whether WABT actually made advances, or payments that count as advances, that created a mortgage lien before the creation of GHB's purported materialman's lien is an issue that must await subsequent litigation in the trial court. In other words, each party must still prove its allegations.

BOLIN, Justice (dissenting).

I respectfully dissent. I believe the mortgage lien created by West Alabama Bank and Trust ("WABT") was superior to the materialman's lien filed by GHB Construction and Development Company, Inc. I join Justice Sellers's dissenting opinion except that part of his rationale based on his conclusion that "the payment of the mortgage tax by WABT should have been sufficient to create the mortgage." ___ So. 3d at ___.

SELLERS, Justice (dissenting).

I respectfully dissent. I would affirm the circuit court's determination that the mortgage lien created by West Alabama Bank and Trust ("WABT") was superior to the materialman's lien filed by GHB Construction and Development Company, Inc. ("GHB"). I believe that the main opinion's holding that Morvay v. Drake, 295 Ala. 174, 325 So. 2d 165 (1976), is both applicable and dispositive of the issue here is misplaced.

Future-advance mortgages have long been recognized as valid in Alabama: "Mortgages or instruments may be taken as a security for a present debt, or against contingent liabilities, or to cover future advances or responsibilities, when such is the agreement and intention of the parties." Forsyth v. Preer, Illges & Co., 62 Ala. 443, 445 (1878).

By signing the mortgage contract on April 8, 2015, the agreement and intention of Penny Guin and WABT were to create a mortgage lien as security for any future advances up to the stated amount of the mortgage. That mortgage was properly recorded on April 10, 2015, by WABT with WABT advancing the applicable recording fee and mortgage tax. In accordance with

the mortgage contract, WABT began advancing funds for construction costs directly to Guin approximately six months later. Nevertheless, the main opinion holds, in reliance on Morvay, that the future-advance mortgage was void at the time it was executed and that it remained void until October 16, 2015, when WABT allegedly issued the first advance under the promissory note and mortgage.

This Court held in Morvay that, if a mortgage is found to have "secured a promised but unconsummated loan ..., the trial Judge is authorized to declare the mortgage void for failure of consideration." 295 Ala. at 177, 325 So. 2d at 167. The main opinion holds: "The rule stated in Morvay is clear: A mortgage that does not secure an actual debt may be declared void for failure of consideration." __ So. 3d at __. The mortgage at issue in Morvay, however, was not a future-advance mortgage, and, more importantly, the mortgagor claimed that no money was ever advanced; this case is vastly different.

Here, WABT made advances in accordance with the mortgage contract and as contemplated by the parties. There was never a failure of consideration that would warrant declaring the mortgage void; indeed the idea of nullifying the mortgage

would never have been entertained by the circuit court. To hold that a future-advance mortgage is legally void until an advance is made not only undermines the validity, but also calls into question the use, of a future-advance mortgage as part of construction lending. Thus, absent a showing that the mortgagee failed to make any advance as contemplated or had no intention of ever advancing funds, I would hold in reference to § 35-11-211, Ala. Code 1975, that a future-advance mortgage is created on the date the mortgage contract is recorded. See Metro Bank v. Henderson's Builders Supply Co., 613 So. 2d 339, 340 (noting that under this statute "[t]he date of the recording of a mortgage and the date of the furnishing of materials by the materialman control in determining the priority between the mortgage and the materialman's lien").

This result would comport with this Court's prior recognition that § 35-11-211 was drafted with the intent of providing construction lenders priority over materialmen. See Southern Sash of Birmingham, Inc. v. City Nat'l Bank of Birmingham, 351 So. 2d 873, 874 (Ala. 1977) (noting that "the legislature intended to give precedence to construction loan mortgages recorded prior to the furnishing of materials by the

materialmen"); see also Empire Home Loans, Inc. v. W.C. Bradley Co., 286 Ala. 449, 456, 241 So. 2d 317, 324 (1970) ("'The point is not that the materialman and the contractor should be denied their protection against the owner. But they should not have it at the expense of the lender without whose money there would be no job.'" (quoting Roy W. Scholl, Priorities Between Mechanics' Liens and Construction Loan Mortgages in Alabama, 23 Ala. Law. 398 (1962))).

In addition, I would affirm the circuit court's determination even under the majority's rationale. Although the main opinion makes much of the fact that no moneys were actually advanced at the time of recordation, I would hold that WABT's mortgage lien was created when it recorded the mortgage contract and paid the mortgage tax. Under the reasoning of the main opinion, the incurrence of any amount of debt, even a single dollar, on a future-advance mortgage would suffice to create the mortgage. Thus, the payment of the mortgage tax by WABT should have been sufficient to create the mortgage.

The mortgage contract between Guin and WABT contains the following provision:

> "TIMELY PAYMENT. Debtors and Mortgagors will well and truly pay and discharge all Obligations secured by this mortgage as they shall become due and payable including any renewals or extensions thereof. Mortgagors and Debtors agree that the failure of Mortgagee to timely pay any mortgage tax due as to any preexisting indebtedness, future advance or future indebtedness shall not impair the enforceability of this mortgage as to any of the Obligations. The timing of the payment of such mortgage taxes shall be in the sole discretion of the Mortgagee and at the cost of Mortgagors."

(Emphasis added.) Based on this clear and unambiguous language, the cost of the mortgage tax, although advanced by WABT, was to be collected from Guin and was secured by the mortgage. Therefore, a debt in the amount of the mortgage tax was incurred by Guin at recordation, which should be sufficient to create a valid, binding, and enforceable mortgage lien even under the main opinion's flawed reasoning.

Stuart, C.J., and Mendheim, J., concur.