

IN THE CIRCUIT COURT FOR HILLSBOROUGH COUNTY, FLORIDA  
THIRTEENTH JUDICIAL CIRCUIT

M.A.M.C., Inc., et al.

v.

Case No. 07-014284  
Division C

PROFESSIONAL STAFFING, et al.

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**DEFENDANT FLORIDA'S FINEST LANDSCAPE SERVICE, INC.**  
**MEMORANDUM OF LAW IN OPPOSITION TO**  
**PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

NOW COMES the Defendant, Florida's Finest Landscape Services, Inc. ("Florida's Finest") and files this Memorandum of Law in opposition to Plaintiff's Motion for partial summary judgment, and in support thereof would state:

1. Defendants, Florida's Finest, and several other subcontractors, each hold perfected construction liens claims filed pursuant to Florida Statutes Sec. 713.001, *et seq.*, the Florida Construction Lien law (the "Liens").

2. The Liens of Florida's Finest, and other subcontractors, each have a secured priority which relates back to the date of the filing of the Notice of Commencement filed in Hillsborough County, Florida, by DB Tampa, LLC, the owner of the construction project upon which the loans in this case, including Plaintiff's loans, were secured.

3. Defendant, Florida's Finest, suggests that it is undisputed by any of the parties that the Notice of Commencement was recorded on 5/17/06 at O.R. Book 16486, Page 0332, Public Records of Hillsborough County, Florida.

4. The Liens which were perfected, including the lien of Florida's Finest, are considered perfected as of the date of the Notice of Commencement, or 5/17/2006 pursuant to F.S. §§ 713.05,

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713.06, and 713.07.

5. Although Defendant, Florida's Finest, has a perfected construction lien pursuant to F.S. 713 as of 5/17/06, Florida's Finest acknowledges that its claim of lien raises priority issues related to the secured claims created by the two (2) mortgages and amendments to the two (2) mortgages granted by the owner, DB Tampa, LLC, during the construction project prior to recording the Notice of Commencement, as follows:

- a. That certain Mortgage And Security Agreement dated October 13, 2004, and recorded 10/16/2004 at O.R. Book 14318, Pages 0658-666, Public Records of Hillsborough County, Florida, in favor of the Mortgagee, Great Florida Bank (herein "Great Florida"), in the original amount of \$2,560,000; and
- b. That certain Second Mortgage And Security Agreement dated October 13, 2004, and recorded 10/16/2004 at O.R. Book 14318, Pages 0674-682, Public Records of Hillsborough County, Florida, in favor of the Mortgagee, Albert J. Kaplan Irrevocable Trust et al, collectively referred to as "Berman Mortgage Corporation d/b/a BMC Loan Servicing" (herein "BMC"), in the original amount of \$800,000;
- c. That certain 7/11/05 - Modification of Note and Mortgage by Great Florida recorded at O.R. Book 15226, Page 0091 - which revised repayment terms; but did not increase in note amount;
- d. That certain 4/26/06 - Modification of Notice of Future Advance Limitations by Great Florida recorded at O.R. Book 16397, Page 1391 - notice of increased future advances by BMC/MAMC; and

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- e. That certain 4/26/06 - First Notice of Future Advance; and Modification of Note and Mortgage; and Related Loan Documents by BMC recorded at O.R. Book 16397, Page 1393 - increased original \$800,000.00 note by an additional \$1,250,000.00 loan by BMC/MAMC (total second \$2,050,000.00).
6. There were additional mortgage modification agreements made after the recording of the Notice of Commencement, which purport to relate back the the original recording date for the mortgages, as follows:
  - a. That certain 9/12/2006 - Second Notice of Future Advance and Modification of Note and Mortgage and Related Loan Documents by BMC recorded at O.R. Book 16935, Page 1416 - increased original \$800,000.00 note by an additional \$250,000.00 loan by BMC (total second \$2,300,000.00); and naming M.A.M.C. Incorporated (herein MAMC) as successor in interest servicing agent;
  - b. That certain 10/14/06 - Modification of Mortgage and Receipt of Future Advance Agreement by Great Florida recorded at O.R. Book 17061, Page 1043 - increased original \$2,560,000.00 by an additional \$450,000.00 loan by Great Florida (total first \$3,010,000.00);
  - c. That certain 10/14/06 - Modification of Notice of Future Advance Limitation by MAMC recorded at O.R. Book 17061, Page 1049 - notice of increased future advances by MAMC; no increase in note amount;
  - d. That certain 10/14/06 - Third Notice of Future Advance and Modification of Note and Mortgage and Related Loan Documents by BMC/MAMC recorded at O.R. Book

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- 17061, Page 1052 - increased original \$800,000.00 note by an additional \$1,000,000.00 loan by BMC/MAMC (total second \$3,300,000.00);
- e. That certain 1/20/07 - Fourth Notice of Future Advance; and Modification of Note and Mortgage; and Related Loan Documents by BMC/MAMC recorded at O.R. Book 17352, Page 901 - increased original \$800,000.00 note by an additional \$655,000.00 by BMC/MAMA and Coconut Grove Bank as custodian of the Charles R. Gremer IRA (total second \$3,955,000.00);
- f. That certain 2/16/07 - Mortgage Modification by BMC/MAMC recorded at O.R. Book 17484, Page 445 - revised payment terms; no increase in note amount; and
- g. That certain 2/16/07 - Fifth Notice of Future Advance; Addition Of Additional Note And Modification of Mortgage; and related Loan Documents by BMC/MAMC - increased original \$800,000.00 note by an additional \$605,000.00 by BMC/MAMA and Coconut Grove Bank as custodian of the Charles R. Gremer IRA (total second \$4,560,000.00).
7. The copies of the relevant documents have been attached to Plaintiff's Complaint and were referred to by Plaintiff as documentary evidence to be relied on in its Motion for Partial Summary Judgment that is before the Court at this time.
8. Defendant, Florida's Finest concedes that the original amount of both mortgages and the initial modification, all of which were recorded prior to the notice of commencement, should be superior in interest and priority to any of the holders of perfected construction liens, including Florida's Finest, whose liens only date back to 05/16/06, the date of the recorded Notice of

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Commencement.

9. Florida's Finest asserts that the loan modifications recorded *subsequent to the* recorded Notice of Commencement, may not have a priority which relates back to the original recording date, notwithstanding the Florida laws which purport to give lien priority to future advances, including those made subsequent to the effective date of perfected construction liens. F.S. §. 697.04; Industrial Supply Corp. v. Bricker, 306 So.2d 33, (Fla. 2d DCA 1975).

10. Florida's Finest asserts that Four (4) of the loan increases and Mortgage Modifications to the Second Mortgage were made after the Notice of Commencement were recorded amount to the sum of \$2,510,000.00 (\$250,000 on 9/12/06; \$1,000,000 on 10/14/06; \$655,000 on 1/20/07; and \$605,000 on 2/16/07).

11. Florida's Finest suggests that Bowen v. American Arlington Bank, 325 So.2d 31 (Fla. 1<sup>st</sup> DCA 1976) is directly on point and should control the instant case. In Bowen the original note and mortgage amount was \$125,000, recorded 1/11/72. After the mechanic's lien attached to the owner's property on 6/6/72, the owner and the lender entered into an amendment and modification of the note and mortgage to increase the amount of the note and mortgage by \$50,000 to \$175,000, recorded 7/18/72. The Court of appeal held that the \$50,000 increase to the mortgage recorded after the claim of lien was inferior to the claim of lien.

12. Florida's Finest suggests the \$450,000 Great Florida increase and the \$2,510,000 increases are just like the \$50,000 increase in Bowen. This case is about the priority issue of the recorded claims, the Lien and the competing mortgagees.

13. Florida's Finest objects the language in Plaintiff's Motion for Summary Judgment

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which requests this Court to enter an Order completely wiping out the interest of Florida's Finest and the other holders of valid construction liens in this case.

14. The Movant in this case is the Plaintiff, who identifies itself as the loan servicer.

15. This case is subject to a *Temporary Injunction and Agreed Order Appointing Receiver*, which is part of the Receivership estate case State of Florida Office of Financial Regulation v. Berman Mortgage Corporation, et al, Miami-Dade County, Florida, Circuit Civil, Case No. 07-43672 CA 09, entered to appoint a receiver who is supposed to protect the interests of all of the claimants in this matter, not just the Plaintiff in this matter or the investors who agreed to purchase unregistered securities.

16. The Injunction granted and the Receiver appointed in the above referenced case declare that the Plaintiff is prohibited from continuing to service loans in this case.

17. The court should make certain that any order entered in this case at bar requires the Plaintiff to hold any and all assets, subject to the Lien of Florida's Finest, and the other subcontractors, pending further order of this court, in the event that any assets are generated by the instant action.

18. The Plaintiff proposes to strip off the perfected Lien of Florida's Finest without generating any cash for anyone. The Plaintiff surely proposes to submit a "credit bid" at a foreclosure auction and not a cash bid.

19. Such a process would leave the perfected subcontract Liens without any recourse and without any secured claim, should an eventual sale of the property bring in more than the amount of the first and second mortgage and advances in this case.

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20. No one knows at this time when this valuable property will be sold. To protect its interest, the Plaintiff may have to pay the first mortgage in full, or make an agreement to satisfy the first mortgage holder.

21. Florida's Finest cannot predict whether such a result is likely. And Florida's Finest believes that the law requires an order ranking the liens in order of priority, without completely striking the Liens, as Plaintiff's Motion suggests. But neither can the Plaintiff or any other interested party in the case at bar.

(Certificate of service and signature on following page)

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Florida's Finest Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment was served via US Mail and via fax on the following parties this 10th day of March, 2009:

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