

II.

The value of the above-described real estate is approximately \$198,815.

III.

In an assignment dated March 4, 1974 and recorded June 30, 1976, Willard and Terrance Smith assigned their interest in the above contract to the Debtor, Katcon, Inc. (Katcon).

IV.

In an assignment dated April 4, 1975 and recorded June 30, 1976, Katcon assigned its interest in the above contract to Pierre National Bank, as collateral for a loan from Pierre National Bank to Katcon.

V.

Pierre National Bank is the name that defendant BankWest, Inc. (Bank) was formerly known as and they are one and the same corporate entity.

VI.

In a mortgage dated March 25, 1977, and bearing a March 25, 1977, 11:42 a.m. recordation stamp, Katcon mortgaged the above-described property to Farmers Home Administration, United States Department of Agriculture (FmHA), to secure the payment of two

promissory notes payable to FmHA in the principal amounts of \$65,000 and \$220,000.

VII.

In a release (Trial Exhibit I) dated March 23, 1977, and recorded March 25, 1977 at 11:42 a.m., Bank released the April 4, 1975 assignment, for the consideration of an FmHA loan to the debtors referenced in Finding of Fact XIII.

VIII.

In an assignment dated March 25, 1977 (reassignment) and bearing a March 25, 1977, 11:42 a.m. recordation stamp, Katcon reassigned its interest in the above described contract for deed to the Bank.

IX.

In a mortgage dated and recorded October 7, 1978, Katcon again mortgaged the above-described property to Farmers Home Administration, United States Department of Agriculture, to secure the payment of a promissory note in the amount of \$100,000.

X.

In a release dated September 30, 1977, Pierre National Bank released the assignment from Katcon to Pierre National Bank dated April 4, 1975 on the above-described real estate.

XI.

The Bank has never released nor subordinated the reassignment from Katcon to the Bank that was dated and presented for recording March 25, 1977, simultaneously with FmHA's mortgage.

XII.

The Bank claims a lien or security interest in the above-described real property by virtue of the March 25, 1977 real estate reassignment.

XIII.

A loan by FmHA to Katcon of \$285,000, evidenced by two promissory notes in the amount of \$65,000 and \$220,000, was closed on March 25, 1977, at which time the mortgage was given by Katcon to FmHA and the reassignment of the Fluharty contract for deed was given by Katcon to the Bank. Loan proceeds of \$275,658.91 from this loan were paid to the Bank, which used a portion of these proceeds to pay other creditors of Katcon and used \$205,260 of these proceeds to apply on Katcon's loans with the Bank.

XIV.

Prior to the loan closing on March 25, 1977, Katcon was indebted to the Bank in the amount of \$555,260.

XV.

Richard Smith and Willard "Buddy" Smith are brothers and were officers of Katcon at the time of the March 1977 loan by FmHA to Katcon. These two officers made most of the decisions regarding the

operation and business affairs of Katcon, including financial decisions. Katcpn kept no minutes of its meetings and held no meetings other than informal discussions the officers had at the supper table and as they worked together as brothers. The Smith brothers lived at home with their other brothers and their father, Wilbur Smith, who at one time was also an officer of Katcon.

XVI.

Because of the drought, the market, and other circumstances in 1976, the financial situation of Katcon was such that it was desperate for a cash influx in the spring of 1977.

XVII.

Bank was unwilling or unable to loan Katcon additional funds in spring 1977.

XVIII.

The officers of Katcon, Richard and Willard Smith, were willing to provide FmHA with whatever mortgage position relative to Bank as was required to get Katcon the March 1977 \$285,000 loan from FmHA.

XIX.

In conversations with Bill Fisher, a Bank officer and supervisor of the employees at the Bank who handled the Bank's agricultural loans on a day-to-day basis, Richard Smith told Fisher that FmHA wanted a first lien position and Fisher responded that the Bank would do whatever was needed to get the March 1977 loan from FmHA.

XX.

The intent of Katcon as to the priority of FmHA's mortgage and the Bank's assignment was to give these instruments whatever priority was needed or required by FmHA for Katcon to get the March 1977 loan from FmHA.

XXXI.

The intent of FmHA as to the priority of its March 1977 mortgage relative to an interest of the Bank was that its mortgage would be prior to any lien the Bank would have on Katcon's land.

XXXII.

The intent of the Bank as to the priority of its March 1977 reassignment relative to any mortgage interest of FmMA was that its reassignment would have whatever priority was needed or required by FmHA for Katcon to get the loan from FmHA, to obtain the FmHA loan proceeds to reduce the Katcon debt owed the Bank.

XXIII.

Willard Smith, although he had no independent recollection of the order in which the mortgage to EmMA or the assignment to the Bank were executed at the loan closing, recalled that Attorney Chuck Schroyer was meticulous in his procedures for closing the loan and very specific about signing the instruments in a certain order; they were signed one at a time, Attorney Schroyer checked them off before they moved on to the next document, and that the

intent was for FmHA's mortgage to have a prior lien position ahead of any interest of the Bank's.

XXIV.

Trial Exhibit 9, which is FmHA's loan closing instructions to Chuck Schroyer, in stating that only the "contract may remain ahead of FmHA's mortgage," meant that FmHA required that only the Fluharty interest as sellers in their contract for deed could remain ahead of FmHA's mortgage and that no lien of the Bank arising out of any interest it had in the contract could remain ahead of FmHA's mortgage.

XXV.

The documents executed by Katcon at the closing of the FmHA loan in March 1977 were executed in a particular order according to the instructions given by Attorney Schroyer for the purpose of giving FmHA's mortgage a priority over any of the Bank's interest as was necessary and required by FmHA for Katcon to obtain the loan from FmHA.

XXVI.

Based upon FmHA's procedures, its knowledge of other debt owed by Katcon, and its knowledge of prior interests in Katcon's land, FmI-IA required that its March 1977 mortgage have a position prior to all other interests except Fluharty's interest as sellers in the contract for deed. Even though Attorney Schroyer's title opinion of March 16, 1977, Trial Exhibit 7, mentioned Katcon's reassignment of its interest in the Fluharty contract to the Bank, and FmHA failed to specifically state in its loan closing

instructions, Trial Exhibit 9, the priority its mortgage was to have relative to the Bank's interest, FmHA required that its mortgage have a position ahead of any other interests except Fluharty's.

XXVII.

Attorney Schroyer was responsible for recording FmHA's mortgage for FmHA and the Bank's release and reassignment for the Bank. Attorney Schroyer had conducted dozens of FmHA loan closings prior to the March 25, 1977 closing in question.

XXII.

Attorney Schroyer received from the Bank the March 25, 1977 assignment from Katcon to the Bank and at the Bank's request obtained the signatures of Katcon's officers, notarized the assignment, and delivered the assignment for recording to the Stanley County Register of Deeds.

XXIX.

Based upon the experience, habit and practice of Attorney Schroyer, he instructed the Stanley County Register of Deeds to record the documents in a certain order to establish the priority of FmHA's mortgage over the Bank's mortgage; he did not instruct the Register of Deeds to record the documents simultaneously.

XXX.

County at the time the March 25, 1977 mortgage to FmHA, the March 23, 1977 release and the March 25, 1977 reassignment to the Bank were delivered to her by Attorney Schroyer for recording.

XXXI.

The Register of Deeds of Stanley County kept a reception record and fee book (See 7-9-16) which were one and the same in this case, a portion of which is Trial Exhibit 26 showing the Register of Deeds' entry on March 25, 1977 of the mortgage to FmHA and the reassignment to the Bank.

XXXII.

Mildred Tibbs used the entries in the fee book maintained in her office, Trial Exhibit 26, to, among other things, establish the chronological order in which documents and the priority of the documents delivered to her were recorded. The method used to establish this priority was to endorse on the instruments the numbers that appear in the fee book in the sequence in which she had been instructed to record or prioritize the instruments; the Register of Deeds did not herself determine the order that the documents were to be numbered, but relied on any instructions given to her by the party delivering the instruments or made inquiries of the presenting attorney to ascertain the order for recordation. Other than the Register of Deeds' fee book, she kept no other

single source of recording information showing the priority of different types of instruments relative to each other. The Bank's release was given fee. book number 14252, the FmHA mortgage was given fee book number 14253, and the Katcon-Bank reassignment was given fee book number 14254.

XXXIII.

The Register of Deeds of Stanley County supplemented the hour and minute recording system with instrument numbers that, at least in this case, established the relative order and priority. It was Mildred Tibbs' belief that in recording the documents in the fee books in the above order, that the lower numbered documents would have priority over the higher numbered documents, and that by so numbering the documents she was following the intent of the parties regarding the priority of the documents; such intent being conveyed to her by Attorney Schroyer.

XXXIV.

Larry Coyle, who presently works for the Bank, had no personal knowledge of the March 1977 loan transaction and no knowledge of bank policies at the time of the transaction and could only speculate as to the reasons for the Bank's taking the March 1977 assignment or the order of priority it was to have relative to FmHA's March 1977 mortgage.

XXXV.

In reference to the testimony of Jeanne Ochsner, abstracter,

abstracters in South Dakota are not competent to establish and do not establish the priority of recorded documents relative to one another, but only note documents such as the March 1977 assignment and mortgage as exceptions to the title without establishing the priority of the instruments.

XXXVI.

Mr. Fisher, who was a Bank officer in March 1977, was not directly involved in the March 1977 transaction but only supervised Mr. Roland "Stub" Fineran. Although at trial Mr. Fisher indicated the Bank was to be in a second priority position behind the Federal Land Bank mortgage given by the Fluhartys, this lien position is contrary to the acts and recording instructions Attorney Schroyer gave the Register of Deeds. Mr. Fisher also failed to explain to the satisfaction of the Court why the Bank gave a complete release of its assignment if the Bank was to retain a lien position ahead of FmHA's mortgage.

XXXVII.

All Bank's testimony and documentation produced at trial is subject to speculation to explain any objective to be accomplished by recording the instruments in March 1977, other than giving the instruments the priority established by the numbers given to them by the Register of Deeds and shown in her fee book on the instruments.

XXXVIII.

Neither employees of FmHA, employees of the Bank, nor Attorney Schroyer have independent recollections of the circumstances surrounding the FmHA mortgage and loan, or the Bank assignment release and reassignment.

XXXIX.

Both FmHA and Bank proposed findings of fact and conclusions of law to the Court. The Court received FmHA's proposed version 1 on January 5, 1989, and the Court received FmHA's proposed version 2 on January 6, 1989. The Court received Bank's proposals January 26, 1989. The Court authored its own findings and conclusions.

CONCLUSIONS OF LAW

I.

This adversary proceeding is a core proceeding and arises under 28 U.S.C. §§ 105 and 510, together with Bankruptcy Rule 7001, and this Court has jurisdiction pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984, together with the Order of General Reference dated July 27, 1984, entered by the United States District Court, District of South Dakota. Furthermore, to the extent any issue herein decided is not a core proceeding, it is a related non-core proceeding under 28 U.S.C. §157(c), and the parties have consented to this Court exercising final decision making jurisdiction pursuant to 28 U.S.C. §157(c)

(2), by not objecting to this Courts' exercise of such final jurisdiction. (See B.R. 7008)

II.

The statute of frauds SDCL 53-8-2(1) is not applicable because any agreement between FmHA and the Bank as to the priority of their instruments was an agreement to be performed within one year. The date of recording the instruments was March 25, 1977. The agreement to give them a certain priority also was made in March 1977 and was to be performed, and the documents were to be recorded, at the time the agreement was made.

III.

The statute of frauds SDCL 53-8-2(3) is not applicable because any agreement between FmHA and the Bank is not an agreement for the sale of real estate or an interest or lease of the same. Furthermore, Bank's objections at trial based upon the parol evidence rule are overruled as there is no written agreement between FmHA, Katcon and the Bank regarding priority of the instruments in question. See SDCL 53-8-5.

IV.

Attorney Schroyer acted as agent for and represented the Bank in obtaining the signature of Katcon's officers on the March 1977 reassignment by Katcon to the Bank, and in delivering the reassignment to the Register of Deeds.

V.

Attorney Schroyer had the authority and acted as agent for the Bank in delivering to the Register of Deeds and instructing the Register of Deeds to record the Bank's reassignment in the order that would make FmHA's mortgage prior to any lien the Bank would have on Katcon's land.

VI.

Based upon the acts of the parties and the circumstantial evidence, there is an implied agreement between the Bank, Katcon, and FmHA that FmHA's March 1977 mortgage would be prior to the Bank's March 1977 reassignment.

VII.

Under SDCL 43-28-17 priority between the Katcon-Bank reassignment and the FmHA mortgage, both of which were recorded March 25, 1977, is awarded to the conveyance "first duly recorded." See also 43-25-3 and 43-28-15.

VIII.

"An instrument is deemed recorded when . . . it is deposited in the register's office with the proper officer for record." SDCL 43-28-11.

IX.

Under SDCL 43-28-11, legally, the instruments must be viewed as simultaneously recorded. When conflicting instruments affecting the same property are recorded simultaneously, the general rule is that the instruments are of equal priority, and the mortgage holders would share equally in foreclosure proceeds, unless (1) a statute provides a "tie breaking" grounds, such as affording priority to the instrument bearing the lower document number; or (2) there exists an understanding between the parties to the instruments, an intent of the parties, or an implied or expressed agreement between the parties, favoring one instrument with priority over the other. 8A G. Thompson, Real Property, § 4345, p.33-34 (1963 replacement); IV A. Casner, American Law of Property, § 17.32 (1952) ; 5 H. Tiffany, The Law of Real Property § 1460 (1939) ; III G. Glenn, Mortgages § 373 (1943); 59 C.J.S. Mortgages § 247 (1949) ; R. Patton, Land Titles § 12 (2 ed. 1957)

X.

The South Dakota Code provides for priority only via time of recordation, no statutory "tie breaker" exists.

XI.

Even if the recordation of the instruments in this case is considered to have occurred simultaneously, the intention referenced in Findings of Fact XX through XXII, or the implied

agreement referenced in Conclusion of Law VI, constitute sufficient grounds to award the mortgage given to FmHA priority over the reassignment given to the Bank.

XII.

FmHA did not persuade the Court with its evidentiary showing at trial that the Bank had engaged in sufficiently inequitable conduct to warrant equitable subordination of the reassignments to the FmHA mortgage as provided in 11 U.S.C. Section 510(c). FmHA is not granted relief on the basis of this statute.

XIII.

Neither party was able to provide the Court with any authority regarding the priority between the FmHA mortgage and the Bank reassignments.

XIV.

The Court has considered all defenses and issues raised by the defendant and counterclaimant herein and concludes they are without merit.

Dated this 10th day of February, 1989.

BY THE COURT:

Irvin N. Hoyt

Chief Bankruptcy Judge

ATTEST:
PATRICIA A. MERRITT, CLERK

By: _____
Deputy Clerk

(SEAL)