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# SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

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GHB Construction and Development Company, Inc.

v.

West Alabama Bank and Trust

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

On Application for Rehearing

SELLERS, Justice.

This Court's opinion of September 21, 2018, is withdrawn, and the following is substituted therefor.

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GHB Construction and Development Company, Inc. ("GHB"), appeals from an order of the Walker Circuit Court ("the trial court") dismissing GHB's action against West Alabama Bank and Trust ("WABT") seeking a judgment declaring that its materialman's lien against property owned by Penny Guin is superior to WABT's mortgage lien secured by the same property. We affirm.

#### Facts and Procedural History

On April 8, 2015, Guin purchased an unimproved lot of real property located in Walker County. That same day, Guin executed a promissory note in the amount of \$410,870 secured by a future-advance mortgage<sup>1</sup> in favor of WABT on the purchased property and any improvements. WABT did not advance Guin any money on the date the note and mortgage were executed, and there were no prior-existing advances. 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."

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<sup>1</sup>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).

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On April 9, 2015, Guin contracted with GHB to construct a house on the property. At some time after the contract was executed, GHB "commenced with the construction of Guin's home on the property and contributed various materials and labor that were used, consumed, and otherwise incorporated into the property." Notably, GHB's complaint does not indicate the specific date on which GHB first delivered materials to the property or commenced construction of the house.

On April 10, 2015, WABT recorded the mortgage in the Walker Probate Court ("the probate court"). On October 16, 2015, WABT issued the first principal advance under the promissory note in the amount of \$105,000 to Guin.<sup>2</sup>

GHB's complaint alleges that, in May 2016, it met with WABT and Guin prior to completing construction of the house and presented them "with a description of the items to complete the construction ... and an estimated cost of completion of construction." GHB's complaint further alleges that, following the meeting, it completed construction of the house pursuant to Guin's authorization and, after having completed construction of the house, submitted to Guin its

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<sup>2</sup>WABT eventually issued a total of \$384,257.82 in principal advances under the promissory note.

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final bill for the work completed. GHB's complaint alleges that Guin failed to pay the final amount owed. On December 20, 2016, GHB filed a "verified statement of lien" in the probate court against Guin's property claiming "to secure an indebtedness in the amount of \$106,556.16, with interest, from August 2, 2016."

On January 6, 2017, GHB filed its complaint against WABT, Guin, and multiple fictitiously named parties. Most of the claims asserted by GHB in its complaint were asserted against Guin in an effort to collect the outstanding balance of the construction contract. In regard to WABT, GHB sought a judgment declaring that its materialman's lien on Guin's property had priority over WABT's mortgage lien.<sup>3</sup>

WABT filed a motion to dismiss GHB's claim against it pursuant to Rule 12(b)(6), Ala. R. Civ. P., for failure to state a claim upon which relief can be granted. WABT argued

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<sup>3</sup>GHB's complaint states, in pertinent part:

"[GHB] is entitled to a lien superior to any mortgage of [WABT] where the mortgage is securing any promissory note payments made by the bank to Guin after the date [GHB] began work on the Property and [GHB] is entitled to a lien superior to any equity remaining in Guin and any mortgages subsequent to the date [GHB] began work on the Property."

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that GHB failed to plead that it delivered materials to the property or began construction on the house before the date WABT's mortgage was recorded in the probate court. Accordingly, WABT argued, GHB's claim was due to be dismissed as a matter of law. WABT asserted that, under Alabama law, a materialman's lien cannot take priority over a mortgage if the mortgage was recorded before the materials were furnished or construction began.

GHB filed a response to WABT's motion to dismiss, arguing that the priority of WABT's mortgage lien was not established on the date it was recorded because WABT had yet to make any advances on the promissory note. GHB further argued that WABT was not unequivocally bound to make any future advances under the terms of the promissory note. Likewise, GHB argued that WABT's mortgage lien was not secure until WABT made its first advance to Guin; GHB claimed this did not occur until after GHB had delivered materials to the property and had commenced work on the house. Thereafter, WABT and GHB each filed supplemental responses with the trial court.

On November 8, 2017, the trial court granted WABT's motion and dismissed GHB's claim against WABT. WABT filed a

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motion requesting that the trial court certify its order as a final judgment under Rule 54(b), Ala. R. Civ. P. GHB filed a motion to alter, amend, or vacate the trial court's order. The trial court denied GHB's motion and certified the order as final. 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) 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 her to relief. In making this determination, this Court does not consider whether the plaintiff will ultimately prevail, but only whether she 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.""

Hall v. Environmental Litig. Grp., P.C., 248 So. 3d 949, 957 (Ala. 2017) (quoting Lloyd Noland Found., Inc. v. HealthSouth Corp., 979 So. 2d 784, 791 (Ala. 2007), quoting in turn Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993)).

#### Discussion

The issue on appeal is whether it is possible for GHB to demonstrate that its materialman's lien is superior to WABT's mortgage lien. The priority of a materialman's lien is

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governed by § 35-11-211(a), Ala. Code 1975, which provides, in pertinent part:

"[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."

Therefore, the crux of this appeal is whether GHB can show that it commenced work on the property before WABT's mortgage was created. The phrase "commencement of work" in § 35-11-211(a) includes providing any materials or performing any labor upon the property. Greene v. Thompson, 554 So. 2d 376, 379 (Ala. 1989).

The promissory note and mortgage were executed on April 8, 2015; WABT recorded the mortgage on April 10, 2015. Although GHB's complaint does not provide the exact date it commenced work on the property, GHB does not dispute that WABT's mortgage was recorded before GHB commenced construction of the house or delivered materials to the property. But GHB does state in its brief on appeal that it "began work and delivering material to Guin's home prior to the date [WABT]

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made its first loan payment to Guin"; WABT made its first advance to Guin under the promissory note on October 16, 2015.

GHB argues that its allegations, if true, are sufficient to show that its materialman's lien is superior to WABT's mortgage lien. Citing Morvay v. Drake, 295 Ala. 174, 325 So. 2d 165 (1976), GHB argues that a mortgage is not created until a debt or obligation it secures is incurred. Likewise, GHB asserts that, in this case, WABT's mortgage was not created at the time it was executed -- April 8, 2015 -- or at the time it was recorded -- April 10, 2015 -- because, it says, the mortgage did not, at that time, secure any indebtedness or any obligation. Rather, GHB claims that WABT's mortgage was created when WABT made its first advance to Guin on October 16, 2015.

In Morvay, a mortgagor sued to enjoin the foreclosure of a mortgage on his own property and property owned by his wife. Before the circuit court, there were competing factual assertions regarding the circumstances surrounding the mortgage at issue. The assignee of the mortgage claimed that the mortgage was executed to secure \$4,050 of existing debt and an additional \$950 loan the mortgagor had failed to repay.



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The mortgagor claimed that the mortgage was executed to secure a \$5,000 loan that the mortgagee had promised to make to the mortgagor, but which the mortgagee never actually made. The mortgagor argued that the mortgage was, therefore, invalid because it did not secure any indebtedness. The circuit court ruled in the mortgagor's favor and concluded that the foreclosure should be enjoined; the assignee of the mortgage appealed.

On appeal, this Court stated:

"If [the mortgagor] gave the mortgage to secure the [allegedly] 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)."

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295 Ala. at 176-77, 325 So. 2d at 166-67. This Court concluded: "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 (citing King Lumber Co. v. Spragner, 176 Ala. 564, 58 So. 920 (1912)).

We note that the mortgage at issue in Morvay was not a future-advance mortgage. More importantly, in Morvay, the mortgagor claimed that no money was ever loaned as promised, which resulted in a complete lack of indebtedness at the time of the attempted foreclosure. Here, though, we are dealing with a future-advance mortgage where the mortgagor received advances as anticipated and those advances were secured by the mortgage.

Future-advance mortgages have long been recognized 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). In a title-theory

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state, such as Alabama, a mortgage passes legal title to the mortgagee. See BancBoston Mortg. Corp. v. Gobble-Fite Lumber Co., 567 So. 2d 1337, 1338 (Ala. 1990). As a conveyance in land, a mortgage does not require any consideration to be legally valid. See § 35-4-34, Ala. Code 1975 ("No deed or other conveyance creating or transferring any interest in land shall be invalid or ineffective because of the fact that it does not recite a good or valuable consideration or no such consideration exists or is given ....").

Nevertheless, as noted in Morvay, a mortgage that is valid at law, absent consideration, may remain a "nullity" in equity due to a lack of indebtedness. "In a 'title theory' state, a mortgage passes legal title to the mortgagee, and the mortgagor is left with the equity of redemption." Bailey Mortg. Co. v. Gobble-Fite Lumber Co., 565 So. 2d 138, 143 (Ala. 1990) (citing Trauner v. Lowrey, 369 So. 2d 531 (Ala. 1979)). The "equity of redemption" allows a mortgagor to enjoin a foreclosure action brought pursuant to a mortgage that does not secure any debt, i.e., equity will not allow a mortgagee (or an assignee of a mortgage) to foreclose on the property of a mortgagor to collect on a nonexistent debt. This

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was the precise situation addressed in Morvay; that is not the case here.

In the context of a future-advance mortgage, the application of that concept is equally clear. A future-advance mortgage may remain valid at law absent any initial consideration, but, if the mortgagee attempted to foreclose on the property without ever advancing any funds, then the mortgagor could bring an action in equity to have the foreclosure enjoined and the mortgage voided.

This distinction, between a mortgage that is legally valid but also a nullity in equity, is material when a mortgagor is seeking to enforce his or her own equitable rights in the mortgaged property. But it is not applicable in an action by a third-party materialman seeking a judgment declaring that its materialman's lien has priority over a mortgage lien; a third-party materialman does not hold the same equitable rights as a mortgagor and cannot succeed to the equitable rights of a mortgagor to have a mortgage that is valid at law declared void. To hold that a future-advance mortgage remains void in all respects until a debt is incurred

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would undermine the legal validity of such an arrangement and is not the law in Alabama.

The future-advance mortgage Guin executed in favor of WABT was legally valid, absent any initial consideration, pursuant to § 35-4-34. As provided for under the terms of the promissory note, WABT later made advances to Guin that are secured by that mortgage. Thus, the trial court's determination that WABT's mortgage was superior to the materialman's lien filed by GHB is correct; it was undisputed that the mortgage was properly executed and recorded before the date that GHB commenced work on Guin's property. See Metro Bank v. Henderson's Builders Supply Co., 613 So. 2d 339, 340 (Ala. 1993) (stating that, under § 35-11-211, "[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 comports 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

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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) (opinion on rehearing) ("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 & Construction Loan Mortgages in Alabama, 23 Ala. Law. 398 (1962))).

#### Conclusion

The trial court correctly found that WABT's mortgage lien is superior to GHB's materialman's lien; therefore, we affirm the trial court's judgment granting WABT's motion to dismiss.

APPLICATION GRANTED; OPINION OF SEPTEMBER 21, 2018, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED.

Mendheim and Mitchell, JJ., concur.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, and Stewart, JJ., concur in the result.

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SHAW, Justice (concurring in the result).

In this case, GHB Construction and Development Company, Inc. ("GHB"), contends that its materialman's lien had priority over a future-advance mortgage in favor of West Alabama Bank and Trust ("WABT"). The trial court agreed with WABT and granted WABT's Rule 12(b)(6), Ala. R. Civ. P., motion to dismiss. GHB appealed. In this Court's original opinion, which is now being withdrawn for which and another opinion is being substituted on rehearing, this Court held that GHB could, for purposes of overcoming a Rule 12(b)(6) motion, prove a set of circumstances that would entitle it to relief, namely, that the future-advance mortgage might fail for lack of consideration. Thus, the trial court's judgment dismissing the declaratory-judgment claim against WABT was reversed. In light of the arguments before this Court on rehearing, as discussed below, I agree that the judgment of the trial court is due to be affirmed, and I concur in the result.

Alabama Code 1975, § 35-11-211(a), states that a materialman's lien "as to ... land and buildings or improvements thereon ... shall have priority over all other liens, mortgages, or incumbrances created subsequent to the

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commencement of work on the building or improvement. ... [But] all liens, mortgages, and incumbrances ... created prior to the commencement of such work shall have priority over all liens for such work." (Emphasis added.) The execution of a mortgage equates to its "creation" for purposes of § 35-11-211(a). Kilgore Hardware & Bldg. Supply, Inc. v. Mullins, 387 So. 2d 834, 836 (Ala. 1980). The execution of a mortgage also passes legal title of the property to the mortgagee. EvaBank v. Traditions Bank, 258 So. 3d 1119, 1123 (Ala. 2018). In the instant case, the future-advance mortgage was executed, created, and recorded before the materialman, GHB, commenced any work; thus, under § 35-11-211(a), the future-advance mortgage has priority over GHB's subsequently created materialman's lien.

GHB, however, challenges the validity of the future-advance mortgage. Specifically, GHB contends that, because no money had been advanced under the future-advance mortgage at the time its own materialman's lien was created, the future-advance mortgage, at that time, GHB says, secured no indebtedness. Because it secured no indebtedness, GHB argues that it was void and was not "created" for purposes of § 35-



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11-211 before its materialman's lien was created. In support of this argument, GHB cites Morvay v. Drake, 295 Ala. 174, 325 So. 2d 165 (1976). In that case, the mortgagor sought to enjoin the mortgagee from foreclosing on a purported mortgage. The mortgagor contended that the money for the mortgage was never advanced to him and, thus, that the mortgage was "void." 295 Ala. at 176, 325 So. 2d at 166. This Court noted the general rule that if no loan proceeds or money is given for a mortgage, then the mortgagor "received no consideration for the obligation which the mortgage secured." 295 Ala. at 176, 325 So. 2d at 166. Thus, the mortgage "was a nullity in equity." 295 Ala. at 176, 325 So. 2d at 166.

In the instant case, under the rule of Morvay, any lack of consideration made the future-advance mortgage voidable in equity; that is to say, equity would allow a party to challenge the validity of the future-advance mortgage if the transaction was not supported by consideration. But this ability to challenge a mortgage for lack of consideration is restricted to the parties of the transaction. Specifically, Ala. Code 1975, § 35-4-34, states, in pertinent part:

"No deed or other conveyance creating or transferring any interest in land shall be invalid

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or ineffective because of the fact that it does not recite a good or valuable consideration or no such consideration exists or is given; provided that this section shall in no way affect any equitable rights or remedies of the parties to the deed or other conveyance."

By this law, the failure of a mortgage to be supported by consideration does not make it "invalid or ineffective." That said, "the parties to" it possess the right to challenge it in equity. This is what occurred in Morvay: a party to the purported mortgage challenged its validity in equity because the mortgage lacked consideration.

GHB is not a party to the future-advance mortgage. Under § 35-4-34, the future-advance mortgage is valid and effective despite any lack of consideration. Further, the equitable rule found in Morvay that might allow a challenge to the mortgage for lack of consideration is available only to "the parties to" the future-advance mortgage. That would include the mortgagee--Penny Guin--and the mortgagor/appellee--WABT-- but not GHB, which is a stranger to the transaction.

For purposes of § 35-11-211(a), the future-advance mortgage in this case was created at its execution, which occurred before GHB's materialman's lien was created. Thus, it has priority over the materialman's lien. Under § 35-4-34,

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the future-advance mortgage is valid despite any lack of consideration. GHB may not use the equitable rule found in Morvay to prove a set of circumstances that would entitle it to relief. Thus, WABT's motion to dismiss under Rule 12(b)(6), Ala. R. Civ. P., was properly granted by the trial court, and WABT's dismissal from the action is due to be affirmed.

On original submission, § 35-4-34 and its impact on GHB's ability to prove its case was not discussed; that Code section is invoked for the first time on rehearing. New arguments on rehearing to reverse a trial court's judgment are not considered. See Nationwide Ret. Sols., Inc. v. PEBCO, Inc., 161 So. 3d 1141, 1149 (Ala. 2014) ("A party cannot raise an issue on rehearing that was not raised in the brief the appellant originally submitted to the Court."), and Tucker v. Nichols, 431 So. 2d 1263, 1264 (Ala. 1983) ("[It is a long-standing, well-established rule that the appellant has an affirmative duty of showing error upon the record.]). But this Court may affirm a trial court's judgment on any valid legal ground presented by the record, even if the ground was not argued to this Court. See Smith v. Mark Dodge, Inc., 934

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So. 2d 375, 380 (Ala. 2006) ("[T]his Court will affirm a judgment for any reason supported by the record that satisfies the requirements of due process, even where the ground upon which we affirm was not argued before the trial court or this Court." (citation omitted)), and Tucker, 431 So. 2d at 1265 (stating that the rule that the appellant has the duty of showing error "is premised upon the fundamental proposition that an appellate court will not presume error and will affirm the judgment appealed from if supported on any valid legal ground"). If this Court on original submission could have affirmed the trial court's judgment on the basis of § 35-4-34 despite the fact that no party raised it, then this Court, in its discretion, can on rehearing affirm the trial court's judgment on that basis. Further, to reverse the trial court's judgment here and to hold that GHB may challenge the validity of the future-advance mortgage would be contrary to § 35-4-34 and would, in my opinion, create confusion and uncertainty in our mortgage law. Therefore, I concur in the Court's granting the application for rehearing, withdrawing its original opinion, and affirming the judgment of the trial court.

Bolin, Wise, Bryan, and Stewart, JJ., concur.