

Can A Third Mortgage Have Priority Over A First Mortgage?

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Perhaps surprisingly, the answer is yes, at least under certain circumstances.

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Rosenthal & Rosenthal entered into a factoring agreement with a borrower. That agreement allowed Rosenthal to make optional advances in its sole discretion. On August 21, 2000 the lender recorded its first mortgage. On April 12, 2005 it recorded its second mortgage.

A law firm providing legal services to the borrower recorded its mortgage on the same property, the third mortgage on the property, on April 13, 2007. In August 2007 Rosenthal sent an email to the law firm and demanded that the law firm subordinate its mortgage to any new Rosenthal mortgages. The law firm refused. Rosenthal continued to make optional advances and the law firm continued to provide legal services.

When the borrower defaulted on its loan obligation Rosenthal filed a foreclosure action naming the law firm as a defendant. The law firm disputed the priority claimed by Rosenthal.

The trial court granted summary judgment against the law firm. The appellate division reversed and the case was appealed to the New Jersey Supreme Court.

That court held, in *Rosenthal & Rosenthal v. Benun*, 226 NJ 41 (2016) that when a lender holds a mortgage that secures optional future advances the prior lien loses priority for advances made after actual notice of an intervening mortgage.

Rosenthal had actual notice of the law firm's intervening lien (indeed requested subordination) yet continued to make optional advances. Its mortgage securing those optional future advances was subordinated

to the law firm's intervening lien.

