UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

ALONZO E. BLACKMORE and
JOAN J. BLACKMORE
Debtors.

Chapter 7 Case
 # 05-12045

ORDER
DENYING RELIEF FROM STAY WITHOUT PREJUDICE
AND DIRECTING BANKNORTH TO NOTICE THE SUBORDINATE MORTGAGEE
AND THE PARTIES TO FILE MEMORANDA OF LAW,
IF BANKNORTH INTENDS TO PURSUE RELIEF

On December 14, 2005, TD Banknorth ("Banknorth") filed a motion for relief from stay (the "Motion") seeking authority to commence a foreclosure action against property located at 4078 Highbridge Road, Georgia, VT 05454 (the "Property"). The Trustee opposed the relief arguing that Banknorth had other collateral to secure the subject indebtedness, that Banknorth's right to collect against the Property was limited, and that there was equity in the Property such that the Trustee should have the opportunity to sell the Property to generate net proceeds for the benefit of the estate. The Debtors filed no opposition to the Motion; at the hearing their attorney argued that her title search did not disclose the guarantees or any indicia of the total debt due to Banknorth, and therefore that the subordinate mortgagee may not have notice of these items at the time she recorded her lien. The subordinate mortgagee, Elizabeth Martel, did not file any opposition to the Motion or appear at the hearing. After hearing the argument Banknorth, the Trustee and the Debtors presented at the hearing, the Court took the matter under advisement.

After due consideration of the record in this case, THE COURT HEREBY FINDS that the Motion is procedurally defective in that Banknorth failed to serve the subordinate mortgagee, Elizabeth Martel, as required by Vt LBR 4001-1(b).

THE COURT FURTHER FINDS that it needs evidence on the issue of notice in order to determine the extent of Banknorth's lien, and hence whether Banknorth is entitled to relief from stay. The issues presented in the Motion and the opposition thereto are (1) whether Banknorth's mortgage secures advances made after the mortgage was recorded and guaranties which were unlimited but not part of the public record, and (2) whether the subordinate mortgagee's interest was reduced as a result of the advances and guaranties, notwithstanding the language of her mortgage which limited the subordination to the principal amount of the mortgage as of the date she recorded her mortgage.

The seminal case law is more than 150 years old. See Seymour v. Darrow, 31 Vt. 122 (1858). Vermont has adopted a rule that requires subsequent purchasers or creditors to look beyond the filed mortgage, and make reasonable inquiries into all debts intended to be secured. If a filed mortgage describes the debts to be covered in general terms, "those interested must then make their inquiries in the proper quarter." Id. at 133. It specifically holds that when a party does not have full knowledge of the issues raised by a filed mortgage, but is put on inquiry notice, "he is held to have notice of all such facts as *reasonable diligence* in prosecuting his inquiry in the proper direction would bring to his knowledge" and hence is bound by the scope of the prior mortgage. Passumpsic Savings Bank v. First National Bank, 53 Vt. 82, 89 (1880), citing Seymour, 31 Vt. at 139. Thus, a party that has been put on inquiry notice is deemed to have actual notice of such facts as reasonable inquiry would disclose. Seymour, 31 Vt. at 131-137; Passumpsic, 53 Vt. at 89-90; Lamoille County Saving Bank v. Belden, 90 Vt. 535, 98 A. 1002, 1005 (1916).

However, while Vermont law protects the priority position of the holder of a mortgage that secures future advances against intervening encumbrances, it will deprive the first mortgagee of his or her superior priority if it is shown that the first mortgagee received actual notice of the intervening interest. In McDaniels v. Colvin, 16 Vt. 300 (1844), the court held that a mortgagee making future advances will be protected against intervening encumbrances that he or she has knowledge of, unless the later creditor gives the mortgagee such notice as amounts to "an intimation, at least, that no further advances are to be made on the security of the mortgage…" Id. at 306. Thus, future advances made by a mortgagee will be subordinate if made after the mortgagee has actual notice of the intervening lien. The Vermont Supreme Court has not given clear guidelines on how this notice should be given, "but it is apparent that is must contain enough to show that the junior interest objects to the making of the senior interest any larger." Patch & Co. v. First National Bank of Montpelier, 90 Vt. 4, 96 A. 423, 424 (1916). The case law does make clear that mere record notice will not be sufficient notice to subordinate future advances made by a mortgagee. See Patch, 90 Vt. 4, 96 A. at 424; McDaniels, 16 Vt. 300, 304-307 (1844). In the instant case, the record is insufficient for the Court to determine whether Banknorth had actual knowledge of the subordinate mortgage. Accordingly, it is critical that the parties provide either a stipulation of facts addressing notice or set the hearing on the Motion for an evidentiary hearing, and file memoranda of law on this issue that has not been adjudicated for so long.

THEREFORE, IT IS HEREBY ORDERED that

1. the Motion is DENIED, based on defective service, without prejudice to Banknorth's right to cure the service defect, and set the matter for hearing after it has given the subordinate mortgagee the requisite notice and opportunity to object;
2. if Banknorth serves the required notice and renews its motion, Banknorth and the Trustee shall file memoranda of law in support of their respective positions no later than 5 days prior to the hearing

set in connection with the renewed motion;

3. if the Debtors or the subordinate mortgagee wish to file memoranda of law they shall be due no later than 4 days prior to the motion; and

4. if Banknorth proceeds with a renewed motion and hearing, and the subordinate mortgagee or Trustee base their opposition to the Motion on the notice issue, the parties must either file a stipulation of facts or present evidence to establish whether, when, to what extent and under what legal theory, the mortgagees had notice of each other's mortgages.

SO ORDERED.

January 24, 2006
Rutland, Vermont

Colleen A. Brown
United States Bankruptcy Judge