98804-8

No. 80399-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KELLIE MARIE DAVIS, CHARLES L.F. PAULSON, ERICK J.C. PAULSON, Individually, and as Trustees of the CHESTER L.F. PAULSON REVOCABLE TRUST,

Appellants,

v.

FRED FINDAHL,
Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE KAREN DONOHUE

PETITION FOR REVIEW

ROBERT E. ORDAL, PLLC
Robert E. Ordal, WSBA #2842 Attorney for Kelie Marie Davis, Charles L.F. Paulson, and Erick J.C. Paulson, individually and as Trustees of the Chester L.F. Paulson Revocable Trust
1000 Second Ave., Suite 1750
Seattle, WA 98104
(206) 624-4225
ordal@ordallaw.com

HAGEN O'CONNELL LLP
Joseph T. Hagen, WSBA #32187
Attorney for Kelie Marie Davis, Charles L.F. Paulson, and Erick J.C. Paulson, individually and as Trustees of the Chester L.F. Paulson Revocable Trust

8555 SW Apple Way, Suite 300
Portland, Oregon 97225
(503) 227-2900
jhagen@hagenoconnell.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

STATE CASES

STATUTES

OTHER AUTHORITIES

A. Introduction

For over 90 years the law of this State has been that when a senior lienor forecloses its lien, the rights of a junior lienor on real property are not foreclosed unless that junior lienor is made a party to the senior lienor's foreclosure. The Court of Appeals erroneously held that a foreclosing senior lienor may obtain a decree of foreclosure foreclosing a junior lienor's lien without making that junior lienor a party to the senior lienor's foreclosure.

Petitioners Kellie Marie Davis, Charles L.F. Paulson, Erick J.C. Paulson, Individually, and as Trustees of the Chester L.F. Paulson Revocable Trust, appellants below, [1] ask this Court to grant review and reverse the Court of Appeals.

B. Court of Appeals Decision

The Court of Appeals filed its unpublished opinion on 22 June 2020. *Findahl v. Davis, 2020 Wash. App. LEXIS 1737* (attached)

C. Issue Presented for Review

When a homeowner's association forecloses its assessment lien, must the association name and serve a junior judgment creditor in order to eliminate that junior judgment creditor's interest in the real property?

D. Statement of the Case

This case arose out of a homeowner's association's foreclosure of multiple liens on a condominium owned by Thomas Mino in King County, WA. The facts, as summarized by the Court of Appeals, are not disputed.

---

[1] Chester and Jacqueline Paulson are deceased. Their children are the appellants. For ease of reference appellants use the name "Paulsons" in this petition

In 2011 the Yarrow Hill Owners Association (Yarrow Hill) sued to foreclose its assessment liens on Thomas Mino's condominium. (CP 319-324) On 22 December 2011, the trial court entered a decree of foreclosure, a default judgment for $23,012.71, and an order directing that the property to be sold at a sheriff's sale. (CP 336-340) On 6 June 2012 the Paulsons filed an Oregon judgment against Mino in King County, thus obtaining a judgment lien on Mino's condominium. (CP 342-345) RCW 4.56.200.

On 27 February 2014, Yarrow Hill filed a motion in its lien foreclosure action seeking a supplemental judgment and decree of foreclosure for the amount of unpaid assessments that had accrued since the 2011 default judgment against Mino and also seeking to eliminate the redemption period. (CP 349-352) Yarrow Hill did not name or serve the Paulsons with its motion. In March 2014, the trial court entered a $27,095.30 supplemental judgment for those assessments and modified the original judgment and decree of foreclosure to eliminate any right of redemption. (CP 361-363) The trial court scheduled a sheriff's sale for 23 May 2014. (CP 365-382)

Fred Findahl bought the property at the sheriff's sale on 23 May 2014 and thus acquired title to the real property. (CP 365-382) On 18 August 2014, Findahl filed a quiet title action against multiple defendants, including the Paulsons, claiming that the Paulsons'

judgment lien had been eliminated by the sheriff's sale. (CP 1 - 8) In February 2018, Findahl filed a second amended complaint. (CP 294-299) The Paulsons' answer alleged that they had never been named or been foreclosed on in Yarrow Hill's foreclosure. (CP 300-304) On cross motions for summary judgment Findahl prevailed and the trial court adjudicated that the sheriff's sale eliminated the Paulsons' 2012 judgment lien. (CP 305-314, 423-444, 679-683)

The Court of Appeals affirmed. The Court of Appeals reasoned that there is no legal authority supporting the proposition that a foreclosing party must give notice to lienholders who record their interest after the foreclosure action commences. The Court of Appeals remarked that a homeowner's assessment lien's priority relates back to the date the association records its CCRs which was 1986, long prior to the filing of Paulsons' judgment in 2012. Slip Op. at 7-8.

E. Argument Why Review Should Be Granted

The Court of Appeals ignored 90 years of settled case law which holds that the interest of a junior lienor on real property cannot be foreclosed unless that junior lienor is made a party to the foreclosure. *See Spokane Sav. & Loan Ass'n v. Liliopoulos*, 160 Wash. 71, 73-74, 294 P. 651 (1930), *U.S. Bank v. Hursey*, 116 Wn.2d 522, 806 P.2d 245 (1991). This Court should grant review, reverse

and hold that the Paulsons' judgment lien survived Yarrow Hills' subsequent foreclosure. RAP 13.4(b)(1).

The Court of Appeals erroneously focused on the issue whether the Paulsons' judgment lien had priority over Yarrow Hill's assessment liens, holding that the Paulsons' 2012 judgment lien is junior to Yarrow Hill's 2012, 2013 and 2014 assessment liens:

> Paulson cites no authority in support of the proposition that a foreclosing party must give notice to lienholders who record their interest after the foreclosure action commences. Moreover, a homeowner assessment lien's priority date relates back to the date the association records its CCRs. *Klahanie Ass'n v. Sundance at Klahanie Condo. Ass'n*, 1 Wn. App. 2d 874, 880, 407 P.3d 1191 (2017), review denied, 190 Wn.2d 1015, 415 P.3d 1192 (2018).

Slip Op. at 7.

But the seniority of Yarrow Hill's lien is a separate issue from the validity of the Paulsons' lien. Even assuming the Court of Appeals is correct on the question of priority, that does not mean that the Paulsons' judgment lien may be foreclosed and eliminated without making the Paulsons parties to the foreclosure.

A hypothetical example demonstrates the point. Assume that Thomas Mino, the condominium owner, had conveyed the condominium by deed to a third party in 2012, prior to Yarrow Hill's 2012, 2013 and 2014 assessment liens which Yarrow Hill foreclosed

in its judgment and decree of foreclosure entered in 2014. Under the reasoning employed here, the Court of Appeals would hold that the third-party purchaser of the condominium lost his or her title interest in the real property by Yarrow Hill's foreclosure, even though that third party was not named or served in Yarrow Hill's foreclosure.

The Court of Appeals' reasoning contravenes common sense, basic notions of due process, and established precedent. In the hypothetical, *Hursey* would hold that the third party's title could not be foreclosed unless that third party had been made a party to Yarrow Hill's foreclosure:

> Although a junior lienor's interest will be extinguished by being joined in the foreclosure of a senior lien, a decree of foreclosure does not affect the interest of a junior who was not joined in the foreclosure action. *Spokane Sav. & Loan Ass'n v. Liliopoulos*, 160 Wash. 71, 73-74, 294 P. 651 (1930).

Hursey, 116 Wn.2d at 526 (emphasis added).

The Court of Appeals mentioned *Hursey*, and in a footnote even noted that *Hursey* holds that foreclosure of a senior lien extinguished a junior lien only when the foreclosure action names the holders of the junior lien as parties. Slip Op. p. 6. However, in its opinion the Court of Appeals then moved on to an inapposite discussion of lien priority and noted that a homeowner's association's assessment lien's priority dates back to the date the

association records its CCRs. Slip Op. 7. In this case, the CCRs were recorded in 1986, long prior to the Paulsons' 2012 judgment. (CP 569-604) The Court of Appeals' opinion then notes that all of Yarrow Hill's assessments were therefore prior to the Paulsons' lien. The Court of Appeals failed to realize that priority was not the issue, but that *Hursey* required that the Paulsons be made parties to the foreclosure in order for Yarrow Hill to foreclose the Paulsons' interest.. As the Court of Appeals pointed out in its footnote *Hursey* holds that the holder of any junior interest must be joined in order to foreclose that interest. Slip Op. at 6. The Paulsons were not joined, so the Paulsons' judgment lien could not be foreclosed.

Of course a foreclosing lienor has an easy method to avoid having to add additional lienors as parties. The foreclosing lienor need only record a *lis pendens* under RCW 4.28.320, and that recording gives notice to the world of the pending foreclosure and binds parties who acquire subordinate interests in the real property. *R.O.I., Inc. v. Anderson*, 50 Wn. App. 459, 462; 748 P.2d 1136 (1988). Indeed, recording a *lis pendens* is standard practice in judicial foreclosures. 18 *William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Transactions* § 19.8, at 382 (2d ed. 2004).

The Court of Appeals gives carte blanche to creditors to eliminate the interests of junior lienors without providing the rudimentary foundations of due process – notice and the opportunity to be heard. Its decision not only conflicts with established law, RAP 13.4(b)(1), but also presents an issue of substantial public concern that should be addressed by this Court. RAP 13.4(b)(4)

F. Conclusion

The Court of Appeals' decision conflicts *Hursey* and case law that has been settled for 90 years by holding for the first time that a senior lien may foreclose a junior lienor's lien without making that junior lienor a party to the foreclosure. This Court should grant review and reverse the Court of Appeals' decision.

Dated this 22nd day of July, 2020.

ROBERT E. ORDAL, PLLC

By:/s/_____
Robert E. Ordal
WSBA No. 2842

HAGEN & O'CONNELL

By:/s/_____
Joseph Hagen
WSBA No. 32187

Attorneys for Petitioners

FILED
6/22/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FRED FINDAHL, a single man, Respondent, v. KELLIE MARIE DAVIS, CHARLES L.F. PAULSON, and ERICK J.C. PAULSON, Individually and as Trustees of the CHESTER L.F. PAULSON REVOCABLE TRUST, Appellants, WELLS FARGO BANK, N.A.; and TOLIN NICHOLS, JANE DOE NICHOLS, and their marital community, Defendants, DANIEL and RANDELL WALTON, husband and wife, and their marital community, Intervenor Defendants.	No. 80399-9-I DIVISION ONE UNPUBLISHED OPINION

BOWMAN, J. — Jacqueline Paulson, individually and as the personal representative of the estate of Chester L.F. Paulson, appealed the trial court's order granting summary judgment in a quiet title action in favor of Fred Findahl. Paulson challenged the trial court's conclusion that a homeowner association's foreclosure on a residential property extinguished her judgment lien against the

property. Because Paulson failed to establish a genuine issue of material fact for trial and Findahl is entitled to judgment as a matter of law, we affirm.[1]

FACTS

The Yarrow Hill Owners Association (Yarrow Hill) manages a development of homes in Kirkland. Yarrow Hill's Covenants, Conditions, and Restrictions (CCRs), recorded in 1986, authorize it to levy annual and special assessments to pay for common expenses. Homeowners who fail to pay assessments are subject to a lien on their property.

In 2004, Thomas Mino bought residential property in the Yarrow Hill development. At some point, he stopped paying the required assessments. On February 15, 2011, Yarrow Hill filed an action to foreclose on the assessment lien, naming Mino, Bank of America N.A., and several "John Does" as defendants. Mino did not appear or respond to the lawsuit. On December 22, 2011, the court entered a decree of foreclosure, a default judgment of $23,012.71, and an order directing the property to be sold. The judgment provided that it was "a first and paramount lien upon the above-described real estate."

On April 9, 2012, Chester Paulson obtained a judgment against Mino in Oregon in an unrelated action for $380,923.57. On June 6, 2012, Chester

[1] Appellant Jacqueline Paulson died while this appeal was pending. Her children and heirs, Kellie Marie Davis, Charles L.F. Paulson, and Erick J.C. Paulson, both individually and as trustees of the Chester L.F. Paulson Revocable Trust, filed a motion to change the designation of parties under RAP 3.2(a), which allows substitution of the real party in interest upon the death of an appellant. Respondent Findahl did not file an opposition to the motion. We grant the motion to substitute the children and heirs of Jacqueline Paulson as the appellants in both their individual capacities and as trustees of the Chester L.F. Paulson Revocable Trust.

executed an exemplification certificate to enforce the Oregon judgment in Washington.[2]

On June 7, 2012, Yarrow Hill voluntarily moved to dismiss the lien foreclosure action against the remaining defendants without prejudice. In an accompanying declaration, the attorney for Yarrow Hill stated:

> 2. On December 22, 2011, a Default Judgment was entered in this action against Defendants Thomas Mino and Jane Doe Mino.
> 3. No other Defendants were served, have appeared, or have answered.
> 4. This case as against all remaining Defendants should be dismissed without prejudice and without costs and fees.

The trial court's order of dismissal, drafted by Yarrow Hill, states, "Now, therefore, it is hereby ORDERED, ADJUDGED, AND DECREED that this case shall be and hereby is dismissed without prejudice and without costs and fees."

On February 27, 2014, Yarrow Hill filed a motion in the lien foreclosure action seeking a supplemental judgment for the amount of unpaid assessments that had accrued since the 2011 default judgment against Mino. Yarrow Hill also sought a finding that Mino had abandoned the property and asked the court to terminate the redemption period under RCW 61.12.093.[3] Yarrow Hill sent notice

---

[2] We refer to Chester and Jacqueline Paulson by their first names when necessary for clarity and mean no disrespect in doing so.

[3] RCW 61.12.093 provides:

> In actions to foreclose mortgages on real property improved by structure or structures, if the court finds that the mortgagor or his or her successor in interest has abandoned said property for six months or more, the purchaser at the sheriff's sale shall take title in and to such property free from all redemption rights as provided for in RCW 6.23.010 et seq. upon confirmation of the sheriff's sale by the court. Lack of occupancy by, or by authority of, the mortgagor or his or her successor in interest for a continuous period of six months or more prior to the date of the decree of foreclosure, coupled with failure to make payment upon the mortgage obligation within the said six month period, will be prima facie evidence of abandonment.

of the motion for supplemental judgment to Mino by certified mail. In March 2014, the court entered a supplemental judgment of $27,095.30 against Mino and modified the original judgment to eliminate the right of redemption. The supplemental judgment provided that aside from the modification to the redemption period, the "default judgment dated December 22, 2011 remains in full force and effect."

The court scheduled a sheriff's sale for May 23, 2014. Fred Findahl bought the property at the sheriff's sale. On August 18, 2014, Findahl filed a quiet title action against multiple defendants, including Chester and "Jane Doe" Paulson and their marital community "by reason of a judgment against" Mino entered in 2007.[4] Findahl moved for partial summary judgment, seeking a determination that the sheriff's sale eliminated Chester's 2012 judgment lien. Findahl also requested that the 2012 order of voluntary dismissal be corrected nunc pro tunc to reflect that the court dismissed the remaining defendants, not the Yarrow Hill foreclosure action as a whole.

Chester died during the litigation and his spouse, Jacqueline Paulson, became the personal representative of his estate. Jacqueline, individually and as personal representative of Chester's estate (Paulson), filed a cross motion for summary judgment dismissal of the quiet title action.

The trial court granted summary judgment for Findahl, finding that the execution and sheriff's sale of the property extinguished Paulson's judgment

[4] The trial court at first entered a default judgment quieting title as to the Paulsons but later vacated the judgment due to lack of proper service.

lien.[5] The trial court also found that Paulson had no right to notice during the 2011 execution process because Chester filed the lien judgment in 2012, after the foreclosure action commenced. The trial court denied Paulson's motion for summary judgment dismissal. Paulson appeals the grant of summary judgment for Findahl.

ANALYSIS

Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Cotton v. Kronenberg, 111 Wn. App. 258, 264, 44 P.3d 878 (2002). We review a trial court's order granting summary judgment de novo. Mohr v. Grantham, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). In doing so, we engage in the same inquiry as the trial court and consider the facts and reasonable inferences in a light most favorable to the nonmoving party. Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001).

Paulson acknowledges she had no right to notice of Yarrow Hill's 2011 judicial foreclosure action because she was not a lienholder of record when Yarrow Hill filed the action. And Paulson does not challenge the adequacy of notice during the execution process. Instead, Paulson makes several arguments about why she had a right to notice of Yarrow Hill's 2014 motion for supplemental judgment. Citing U.S. Bank of Washington v. Hursey, 116 Wn.2d 522, 806 P.2d 245 (1991), she argues that because she was not given notice, the sheriff's sale

[5] The record contains a quitclaim deed signed by Mino on August 11, 2017 conveying his interest in the property to Paulson. The trial court found that Mino could not have conveyed any interest in the property to Paulson through the 2017 quitclaim deed because the 2014 sheriff's sale extinguished his interest. Paulson does not challenge this finding.

did not extinguish her judgment lien, and so the trial court erred in granting summary judgment in Findahl's quiet title action.[6]

Paulson first argues that the voluntary order of dismissal dismissed Yarrow Hill's lien foreclosure action as a whole. She contends that the voluntary dismissal of a complaint renders the proceedings "a nullity," and thus Yarrow Hill could obtain a supplemental judgment only by filing a new action and serving all lienholders of record. But the court entered the order dismissing the entire lien foreclosure action without prejudice in error. It is clear from Yarrow Hill's motion that the relief they requested was to dismiss the action only as to any remaining defendants. At the summary judgment hearing, the trial court entered an order correcting the dismissal order nunc pro tunc to reflect the court's intention. "[W]here the record demonstrates that the court intended to take, and believed it was taking, a particular action only to have that action thwarted by inartful drafting," it properly enters a nunc pro tunc order to reflect that intention. In re Pers. Restraint of Hendrickson, 165 Wn.2d 474, 479, 198 P.3d 1029 (2009). Paulson does not challenge the trial court's authority to do so.

In the alternative, Paulson argues the court lacked authority to enter the supplemental judgment. Paulson contends that once Yarrow Hill voluntarily dismissed the remaining defendants, the judgment became a final order and Yarrow Hill could not seek additional relief without moving to alter or vacate the

[6] Hursey held that a foreclosure of a senior lien extinguishes junior interests only when the foreclosure action names the holders of those interests as defendants. Hursey, 116 Wn.2d at 526.

judgment pursuant to CR 59(h) or CR 60.[7] But Paulson cites no Washington authority to support this proposition. Furthermore, Yarrow Hill did not seek to alter or amend the original judgment. Rather, Yarrow Hill sought additional postjudgment relief—a second judgment for unpaid assessments that had accrued since the entry of the first judgment and waiver of the redemption period because Mino had abandoned the property since entry of the first judgment. Neither CR 59(h) nor CR 60 would apply here.

Finally, Paulson contends that once Yarrow Hill sought a judgment for unpaid assessments for the years 2012, 2013, and 2014, she had a right to notice because her 2012 judgment lien was senior in priority. But Paulson cites no authority in support of the proposition that a foreclosing party must give notice to lienholders who record their interest after the foreclosure action commences. Moreover, a homeowner assessment lien's priority date relates back to the date the association records its CCRs. Klahanie Ass'n v. Sundance at Klahanie Condo. Ass'n, 1 Wn. App. 2d 874, 880, 407 P.3d 1191 (2017), review denied, 190 Wn.2d 1015, 415 P.3d 1192 (2018). "[O]nce a lien for future advances is recorded, it takes priority over subsequently recorded liens, even where an obligation under the lien for future advances does not in fact arise until after the subsequent lien is recorded." BAC Home Loans Servicing, LP v. Fulbright, 180 Wn.2d 754, 763, 328 P.3d 895 (2014). Because Yarrow Hill recorded the CCRs

[7] CR 59(h) authorizes the trial court to alter or amend a judgment if a motion is brought within 10 days after entry of the judgment. Under CR 59(h), the trial court may "modify a judgment to make it conform to the judgment intended to be entered." Seattle-First Nat'l Bank Connell Branch v. Treiber, 13 Wn. App. 478, 480-81, 534 P.2d 1376 (1975). CR 60 provides several grounds for vacation of a judgment, including mistake, excusable neglect, fraud, or newly discovered evidence.

in 1986, all of the delinquent assessments related back to that date and had priority for foreclosure purposes over Paulson's 2012 judgment against Mino.

Because Paulson fails to establish a genuine issue of material fact to defeat Findahl's quiet title claim and Findahl is entitled to judgment as a matter of law, we affirm the trial court's summary judgment order in favor of Findahl.

Brunner, J.

WE CONCUR:

Appelwick, J.

ROBERT E. ORDAL

July 22, 2020 - 12:14 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	80399-9
Appellate Court Case Title:	Kellie Marie Davis, et al, Appellants v. Fred Findahl, Respondent

The following documents have been uploaded:

- 803999_Petition_for_Review_20200722121111D1736912_5252.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- aasher@sociuslaw.com
- dcameron@hansonbaker.com
- jbyng@hansonbaker.com
- jhagen@hagenoconnell.com
- jlaurick@kilmerlaw.com
- karlh@millcreeklaw.com
- kevans@hansonbaker.com
- lmckenzie@sociuslaw.com
- mandersson@hansonbaker.com
- meghanb@millcreeklaw.com
- tparcell@kilmerlaw.com

Comments:

Sender Name: Linda Duenas - Email: ljduenas@ordallaw.com
Filing on Behalf of: Robert Erling Ordal - Email: ordal@ordallaw.com (Alternate Email: ljduenas@ordallaw.com)

Address:
1000 Second Ave. Suite 1750
Seattle, WA, 98104
Phone: (206) 624-5823

Note: The Filing Id is 20200722121111D1736912