No. 89805-7

SUPREME COURT OF THE STATE OF WASHINGTON

No. 69135-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DANIEL PASHNIAK

Petitioner,

v.

SIXTY-01 ASSOCIATION OF APARTMENT OWNERS,

Respondent.

PETITION FOR REVIEW

Robert J. Henry, WSBA #6171
LASHER HOLZAPFEL
SPERRY & EBBERSON, P.L.L.C.
Attorneys for Petitioner Daniel Pashniak
601 Union St., Suite 2600
Seattle, WA 98101
(206) 624-1230

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A. IDENTITY OF PETITIONER

Petitioner Daniel Pashniak was the successful bidder on March 9, 2012 at two sheriff's sales, and he was the intervenor opposing the two motions to confirm the sales. He was appellant in the case in which Judge Laura Inveen confirmed one sale and he was respondent in the case in which Judge Ronald Kessler vacated the other sale and ordered that Pashniak's money be returned.

B. COURT OF APPEALS DECISIONS

Mr. Pashniak seeks review of the Court of Appeals decision of October 21, 2013, ___ Wn. App. ____, ____ P.3d ____ (2014), copy attached as Appendix A. The Court of Appeals by an Order entered December 13, 2013 granted the motion of Sixty-01 Association of Apartment Owners to publish the October 21, 2013 decision. Because the published opinion is in conflict with another decision of the Court of Appeals and because the case involves an issue of substantial public interest, Mr. Pashniak asks the Court to review that portion of the decision reversing the trial court (Judge Kessler) and to remand that portion of the decision affirming the trial court (Judge Inveen) for consideration of the equities.

C. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals err:

(1) In failing to defer to the trial court's decision regarding the confirmation of a judicial sale, which rests within the discretion of the trial court and will not be reviewed except for manifest abuse of discretion? *See Braman v. Kuper*, 51 Wn.2d 676, 681, 321 P.2d 275 (1958); *Casey v. Chapman*, 123 Wn. App. 670, 678, 98 P.3d 1246 (2004).

(2) In holding that the explicit exercise by the trial court of its equitable authority to vacate the sale was an abuse of discretion? *See Arnold v. Melani*, 75 Wn.2d 143, 152, 449 P.2d 800 (1968); *Thisius v. Sealander*, 26 Wn.2d 810, 817, 175 P.2d 619 (1946); *Wilhelm v. Beyersdorf*, 100 Wn. App. 836, 848, 999 P.2d 54 (2000).

(3) In holding that another published opinion of the Court of Appeals which held that a successful bidder at a Sheriff's sale may withdraw his bid and may not be compelled to purchase does not apply in this case? *See Davies v. Davies*, 48 Wn. App. 29, 737 P.2d 721 (1987).

(4) In construing RCW 6.21.110(3) too narrowly to apply only to irregularities in the conduct of the Sheriff? *See* RCW 6.21.110.

(5) In relying on constructive notice to resolve the trial court's examination of a sheriff's sale for substantial irregularities?

(6) In failing to reverse an order confirming a Sheriff's sale entered by the trial court by default without weighing the equities? *See Columbia Community Bank v. Newman Park LLC*, 177 Wn.2d 566, 304

P.3d 472 (2013); *Pardee v. Jolly*, 163 Wn.2d 558, 182 P.3d 967 (2008); *Davies v. Davies*, 48 Wn. App. 29, 737 P.2d 721 (1987).

D. STATEMENT OF THE CASE

This statement of facts is based upon the Court of Appeals decision, the three trial court decisions reviewed in the Court of Appeals, and the substantial evidence submitted by the parties in the trial court.

By two separate actions filed in the King County Superior Court, the Sixty-01 Association of Apartment Owners ("the Association") sued two condominium owners -- Virginia Parsons and Maria Mallarino – for unpaid condominium assessments. The Association took default judgments against both owners, who had apparently abandoned their condominium units.[1] The Association then scheduled a Sheriff's sale of each unit for March 9, 2012.

It is undisputed that both of the condominium units were encumbered by significant obligations owed to Bank of America, evidenced by recorded deeds of trust. (Opinion, p. 1 and n.2.) However, the Association took steps which hid from any prospective bidders the fact that the units were worthless. The two default judgments presented unopposed to the Ex Parte Department of the King County Superior Court both

[1] Both default judgments were entered on November 3, 2011 in the Ex Parte department of King County Superior Court. Mallarino CP at 122-28; Parson CP at 16-21. The Mallarino judgment was recorded with the King County Recorder on November 8, 2011 under recording number 20111108002242. The Parsons judgment was recorded on November 9, 2011 under recording number 20111109000583.

identically and falsely stated:

> ORDERED, ADJUDGED and DECREED that all right, title, claim, lien, estate or interest of the Foreclosed Defendants, each and all of them, and of all persons claiming by, through, or under them, in and to the Property or any part thereof is inferior and subordinate to Plaintiff's lien and is hereby foreclosed;

Mallarino CP at 126; Parsons CP at 120.

At the insistence of Bank of America, the Association belatedly presented stipulated orders to the Ex Parte Department in both cases stating that Bank of America would have priority over any bidder at the Sheriff's sale. Parsons CP 79-84; Mallarino CP 132-156. However, those orders were not filed until March 7 and March 8, 2013 – two days and one day before the Sheriff's sales.

Daniel Pashniak is a retired college professor who resides in Spokane. At the time of the Sheriff's sales, he was 81 years old and suffering from Parkinson's disease. Mallarino CP at 222; Consolidated CP at 187. Pashniak traveled to Seattle and on March 9 was the successful bidder for both units. He paid $16,197 for the Parsons unit and $35,400 for the Mallarino unit. Pursuant to RCW 6.21.110, the money was deposited in the registry of the Court pending confirmation of the two sales.

Pashniak filed timely objections to both sales. Parson CP at 112; Mallarino CP at 184, line 22. He engaged a Seattle lawyer, but she changed

her mind just as the first confirmation motion was served. Consolidated CP at 188. Pashniak had not yet engaged counsel when the first of the two confirmation motions was decided. On June 20, 2013, Judge Laura Inveen confirmed the Parsons sale as a matter of default, having received no opposition to the motion. Parsons CP at 145-47.

However, Pashniak was able to engage counsel in time to submit evidence and briefing to Judge Ronald Kessler, opposing confirmation of the Mallarino sale.

On July 23, 2012, Judge Kessler entered an Order Vacating Sheriff's Sale. A copy is attached hereto as Appendix B. The trial court took judicial notice of the fact that pleadings filed with the King County Clerk are not accessible for up to 48 hours, so no bidder could have been aware of the stipulation between the Association and Bank of America filed at 4:04 p.m. on March 8, less than one day before the sale. Mallarino CP at 132. Explicitly exercising the Court's "equitable authority," Judge Kessler vacated the sale and ordered that Pashniak's money be returned to him.

The Association appealed Judge Kessler's Order Vacating Sheriff's Sale. Pashniak appealed Judge Inveen's Order, including a subsequent denial of Pashniak's Motion to Vacate under CR 60(b).

The Court of Appeals affirmed Judge Inveen's orders and reversed Judge Kessler's order.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Decision of the Trial Court Was Not an Abuse of Discretion and Should Have Been Affirmed.

The Legislature has commissioned the superior courts of this state to review all Sheriff's sales of real estate conducted in the state. Any such sale is reviewed upon the motion of the judgment creditor or the successful bidder. RCW 6.21.110(2). If the superior court finds "substantial irregularities in the proceedings concerning the sale," to the probable loss or injury of an objecting party, the motion will be denied and the property ordered to be resold. If the superior court finds no irregularities, the sale will be confirmed. RCW 6.21.110(3). The Legislature provided no definition of "substantial irregularities in the proceedings," thus investing the superior court with broad discretion, to be exercised on a case by case basis.

Over the years, appellate decisions have repeatedly pointed out that the confirmation of judicial sales rests within the discretion of the trial court and will not be disturbed except for manifest abuse of discretion. In *Braman v. Kuper*, 51 Wn.2d 676, 681, 321 P.2d 275 (1958), the Supreme Court, in a case involving an execution sale by the Sheriff similar to the instant case, held as follows:

> At the outset, it must be borne in mind that it is a general rule followed in this state, that confirmation of judicial sales rests

> largely within the discretion of the trial court, and will not be reviewed except for manifest abuse of such discretion. *Williams v. Continental Securities Corp.*, 22 Wn. (2d) 1, 153 P. (2d) 847 (1944), and cases cited therein.

Braman, 51 Wn.2d 681. More recently, the Court of Appeals cited *Braman* and the earlier cases cited in *Braman* for the same proposition:

> We reverse a superior court's order confirming a sale only for a manifest abuse of discretion.

Casey v. Chapman, 123 Wn. App. 670, 678, 98 P.3d 1246 (2004).

Notwithstanding this strong precedent, the Court of Appeals in the instant case reversed the order of the trial court vacating the Sheriff's sale, but did so without finding a manifest abuse of discretion, and with no basis for any such finding.

The written decision of the trial court, Judge Kessler, is attached hereto as Exhibit B. The order is explicit in its finding of irregularity and gives a detailed explanation for the finding. The order is also entirely crafted by the judge, not by counsel. Nothing in the order bespeaks an abuse of discretion. A reviewing court will only reverse a discretionary ruling if it is "manifestly unfair, untenable or unreasonable." *General Telephone v. Utilities and Transportation Commission*, 104 Wn.2d 460, 474, 706 P.2d 625 (1985).

The decision of the Court of Appeals ignored the appropriate standard of review, finding instead that the trial court decision was made

"incorrectly." (Opinion, p. 2.) Further, the Court of Appeals rejected the specific irregularity identified by the trial court as being "of no consequence." (Opinion, p. 3.) With respect, the Court of Appeals should have deferred to the discretion reasonably exercised by the trial court, and its failure to do so was error.

2. The Decision of the Trial Court Was within Its Equitable Authority to Avoid a Forfeiture.

The Association scheduled the Sheriff's sale in an attempt to collect its judgment by selling two condominium units which it knew to be worthless. This questionable action was successful; Pashniak paid a total of $51,597, not knowing that the units were worthless. Whether it was done malevolently is not germane; the loss by a retired person of $51,197 is indubitably a forfeiture. Washington courts embrace a long and robust tradition of applying the doctrine of equity. *Columbia Community Bank v. Newman Park, LLC*, 177 Wn.2d 566, 569, 304 P.3d 472 (2013). The superior courts of this State have the equitable authority to prevent forfeitures. *Arnold v. Melani*, 76 Wn.2d 143, 152, 449 P.2d (800) (1969) ("There is no question but that equity has a right to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable.") (quoting *Thisius v. Sealander*, 26 Wn.2d 810, 818, 175 P.2d 619 (1946)).

The Supreme Court has in the past set aside a Sheriff's sale on equitable grounds, where there was a great disparity (approximately $75,000) between the value of real property and the amount paid for it. *Miebach v. Colasurdo*, 102 Wn.2d 170, 177-78, 685 P.2d 1074 (1984).

In this case, the trial court, Judge Kessler, explicitly exercised the trial court's equitable authority to vacate the Sheriff's sale and return Pashniak's money to him. This decision was clearly within the discretion of the trial court.

A trial court's application of equity is reviewed for an abuse of discretion. *Willener v. Sweeting*, 107 Wn.2d 388, 397, 730 P.2d 45 (1986); *Wilhelm v. Beyersdorf*, 100 Wn. App. 836, 848, 999 P.2d 54 (2000). Here, the trial court had the authority and the discretion to vacate the sale, thereby avoiding a forfeiture, and require the Association to do its sale over. This discretion was correctly exercised and should not have been disturbed by the Court of Appeals.

3. The Court of Appeals Decision Is in Direct Conflict with the *Davies* Case.

The decision of the Court of Appeals rejected the applicability of *Davies v. Davies*, 48 Wn. App. 29, 737 P.2d 721 (1987). As a result, the decision directly conflicts with another published opinion of the Court of Appeals.

In *Davies*, Mr. Davies levied execution on his ex-wife's home and was the successful bidder at the Sheriff's sale. He purchased it for a bid of $1,000. After the sale, he moved for confirmation but then realized he was at risk of his ex-wife redeeming for the same price, so he asked the trial court to withdraw his bid. The trial court allowed the withdrawal and Division Two of the Court of Appeals affirmed.

In the instant case, the Court of Appeals sought to distinguish *Davies* by pointing out that (1) Mr. Davies was the judgment creditor as well as the successful bidder, and (2) "Davies withdrew his motion for confirmation and thus there was no sale." Opinion, p. 3. The first conclusion is technically correct but scarcely relevant. Mr. Davies was the purchaser, and he was relieved of the consequences of his successful bid. Whatever relief he was granted must be available to any purchaser at a Sheriff's sale. There is nothing in the *Davies* decision to suggest there are two classes of purchasers or that the result would have been different if Mr. Davies had not been the judgment creditor.

The second basis for distinguishing *Davies* is not correct. The *Davies* decision explicitly states "Before the sheriff's sale was confirmed, [Mr. Davies] withdrew his bid as well as the motion to confirm. . . ." *Davies*, 48 Wn. App. at 30 (emphasis added). The *Davies* decision also specifies that it was the withdrawal of the bid which was dispositive:

> We disagree, holding that only the judgment creditor or purchaser has standing to move for confirmation of a bid at a sheriff's sale, and that before confirmation, the highest bidder may be permitted to withdraw his bid.

Davies, 48 Wn. App. at 31 (emphasis added).

Furthermore, the Court of Appeals in the *Pashniak* decision ignores the most critical holding by the *Davies* court, that a Sheriff's sale cannot be confirmed over the objection of the purchaser:

> We adopt the reasoning of *American Fed. Sav. & Loan* that nothing in the confirmation statute, RCW 6.24.100, authorizes the trial court to confirm a sale over the objection of the judgment creditor or purchaser.

Davies, 48 Wn. App. at 31-32.

Under this precedent, Pashniak may not be compelled to purchase, and must be allowed to withdraw his bid. The failure of the Court of Appeals to follow the *Davies* case was error.

4. The Search for Irregularities Is Not Limited to the Actions of the Sheriff.

Throughout its briefing, the Association argued that under the confirmation statute, RCW 6.21.110(3), only the conduct of the Sheriff can be considered an irregularity. That limitation cannot be found in the statute, which specifies "irregularities in the proceedings concerning the sale." RCW 6.21.110(3). The Court of Appeals appears to adopt the narrow definition advanced by the Association, stating "Pashniak cannot cite to any

irregularity in the sheriff's sale." Opinion, p. 2.

Pashniak cited the trial court to several substantial irregularities in the proceedings, including the procuring of untruthful default judgments which stated falsely that all parties claiming under the owner had been foreclosed. When recorded in the public records, those judgments created false constructive notice, which could only deceive anyone researching title. Another substantial irregularity was the recording of a stipulation with Bank of America regarding priority less than 24 hours before the sale. This is the irregularity upon which the trial court relied to invalidate the sale.

If the Association's position were correct, and only the conduct of the Sheriff can create an irregularity, the sale in the *Davies* case, *supra*, could not have been invalidated, because the Sheriff conducted the sale normally but the purchaser opposed confirmation.

5. The Court of Appeals' Reliance on Constructive Notice Is Misplaced.

The Court of Appeals decision relies heavily on the doctrine of constructive notice:

> Because the purchaser is deemed to have constructive notice of recorded deeds of trust, we affirm the trial court's decision confirming the sale of one condominium and reverse the trial court's decision vacating the sale of the other condominium.

(Opinion, p. 1.) While it is true that a subsequent purchaser, such as Pashniak, has constructive notice of the existence of previously recorded

encumbrances, that does foreclose the trial court's duty to examine a judicial sale for irregularities. Furthermore, the recording of an encumbrance gives no constructive notice of its priority in relation to other recorded encumbrances. In some cases, condominium liens take priority over bank deeds of trust, and a purchaser at a condominium lien foreclosure sale may take free and clear of bank mortgages and deeds of trust. *See Summerhill Village HOA v. Roughley*, 166 Wn. App. 625 (2012) (First mortgagee Deutsche Bank foreclosed by condominium lien foreclosure sale).

In this case, the due diligence suggested by the Court of Appeals decision would not have disclosed the priority of the Bank of America liens, only their existence. However, there was also other constructive notice regarding these two parcels at the time of their sale. It is well established that a judgment entered by a court creates a judgment lien, and the entry of a judgment results in constructive notice to the world of the judgment. *Young v. Davis*, 50 Wash. 504, 506, 97 Pac. 506 (1908). In this case, the Association presented default judgments to the superior court for entry which (1) decreed foreclosure of the condominium liens against both properties and (2) stated (falsely) that the effect of the judgments was to foreclose all other claimants. These judgments were constructive notice, as soon as they were filed, which contradicted the recorded deeds of trust.

Furthermore, both these judgments were recorded with the King County Recorder, creating additional constructive notice.[2]

Therefore, if Pashniak had exercised greater diligence, as the Court of Appeals suggests he should have, he would have learned of the two Bank of America deeds of trust, but he would also have learned of the two recorded judgments, both fulsomely representing that all claimants had been eliminated by the foreclosure. A party should not be allowed to rely on one instance of constructive notice, but avoid the import of other contrary constructive notice of its own making. Where a party takes one position in a court proceeding, as the Association did when it presented and recorded judgments which incorrectly described the state of title, the doctrine of judicial estoppel will preclude that same party from later taking a contrary position for its advantage, as the Association has done here. *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 861 (2012).

Presumably, the purpose of the agreed orders stipulated to by the Bank of America and the Association and presented to a court commissioner for entry was to create further constructive notice to any purchaser that the Bank of America liens were not eliminated. But these two agreed orders

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[2] Both default judgments were entered on November 3, 2011 in the Ex Parte department of King County Superior Court. Mallarino CP at 122-28; Parson CP at 16-21. The Mallarino judgment was recorded with the King County Recorder on November 8, 2011 under recording number 20111108002242. The Parsons judgment was recorded on November 9, 2011 under recording number 20111109000583.

were filed too late for anyone to learn of them. That is, of course, the reason given by Judge Kessler for vacating the Mallarino sale. Because the Association presented and recorded default judgments which gave false constructive notice, the trial court decision vacating the Mallarino sale should be affirmed.

This situation also brings into play the judicial doctrine of comparative innocence. In *Beckman v. Ward*, 174 Wash. 326, 24 P.2d 1091 (1933), two innocent parties litigated over the effect of fraud by a third party who deceived both and then disappeared. The Supreme Court noted that the purchaser of the real property, Ward, was somewhat negligent for not pursuing inquiry into the status of notes secured by a recorded mortgage. But the Supreme Court also found the holders of the notes somewhat negligent for not recording the assignment by which they took ownership of the notes. To resolve this dilemma, the Supreme Court employed the doctrine of comparative innocence to affirm the trial court decision in favor of Ward, the purchaser. *Beckman*, 174 Wash. At 332. *See also Cunningham v. Norwegian Lutheran Church of America*, 28 Wn.2d 953, 963, 184 P.2d 834 (1947), where the Supreme Court again used the rule of comparative innocence to decide which of two innocent purchasers of the same land should bear the loss.

In this case, Pashniak is decidedly more innocent than the

Association, which recorded false default judgments which represented that title was clear. Furthermore, if the two sales are invalidated, the Association is free to schedule a new Sheriff's sale. Thus, the Association is better able to bear any loss.

6. The Parsons Case Should Be Remanded for Consideration of the Equities.

In the Parsons case, the trial court, Judge Inveen, confirmed the sale as a matter of default, having received no submittals from Pashniak in support of his Objection. Parsons CP at 145-47. Pashniak concedes it was not an abuse of discretion to so order.

Subsequently, Pashniak filed a Motion to Vacate pursuant to CR 60(b). This motion was denied on September 28, 2012. Consolidated CP at 358-59. Again, it is well within the trial court's discretion to deny such a motion. However, the order did not indicate whether the court considered the equitable considerations. In *Pardee v. Jolly*, 163 Wn.2d 558, 576, 182 P.3d 967 (2008), the Supreme Court ruled that a party had failed to exercise an option timely and thus had no legal right to purchase the real property. Nonetheless, the Supreme Court remanded to the trial court to consider whether in equity the optionee should be allowed to belatedly cure his default to avoid a forfeiture. Pashniak asks that the decision confirming the Parsons sale be remanded to the trial court for consideration of whether in

equity he should receive his bid money back to avoid a forfeiture.

F. CONCLUSION

Where a trial court exercises its discretion regarding confirmation of a judicial sale, that decision will not be disturbed absent manifest abuse of discretion. Here, the trial court, Judge Kessler, reviewed a judicial sale, looking for any "substantial irregularity in the proceedings," as the legislature directed. Finding irregularity in the entry of an agreed court order, less than 24 hours before the sale, which contradicted an earlier court order, the trial court vacated the sale and ordered the Clerk to refund the bid money to Pashniak. The doctrine of constructive notice does not resolve the question of whether there was substantial irregularity. Only the trial court can answer that question, after a review of the case. The order vacating the Sheriff's sale should be affirmed.

Respectfully submitted this 13th day of January, 2014.

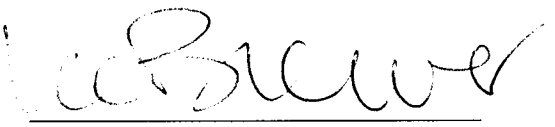
LASHER HOLZAPFEL
SPERRY & EBBERSON, P.L.L.C.

Robert J. Henry, WSBA #6171
Attorneys for Petitioner Daniel
Pashniak
601 Union St., Suite 2600
Seattle, WA 98101
(206) 624-1230

CERTIFICATE OF SERVICE

I certify that on January13, 2014, I caused a copy of the foregoing document to be served via first class U.S. mail, postage prepaid, to the following counsel of record:

Michael Padilla
William J. Justyk
201 Queen Anne Avenue N., Suite 400
Seattle, WA 98109



Lee Brewer

2013 WL 5743657
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

SIXTY–01 ASSOCIATION OF APARTMENT OWNERS, a Washington non-profit corporation, Respondent/Cross–Appellant,
v.
Virginia A. PARSONS and John Doe Parsons, wife and husband, or state registered domestic partners; John Doe and Jane Doe, Unknown Occupants of the Subject Real Property; and also all other persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the Complaint herein, Defendants, Daniel Pashniak, Appellant/Cross–Respondent.
Sixty–01 Association of Apartment Owners, a Washington non-profit corporation, Respondent/Cross–Appellant,
v.
Maria A. Mallarino and John Doe Mallarino, wife and husband, or state registered domestic partners; John Doe and Jane Doe, Unknown Occupants of the Subject Real Property; and also all other persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the Complaint herein, Defendants, Daniel Pashniak, Appellant/Cross–Respondent.

Nos. 69135–0–I, 69136–8–I. | Oct. 21, 2013.

Appeal from King County Superior Court; Honorable Laura Inveen, J.

Attorneys and Law Firms

Robert Jason Henry, Lasher Holzapfel Sperry & Ebberson, PLLC, Seattle, WA, for Appellant/Cross–Respondent.

Michael Alan Padilla, Attorney at Law, William John Justyk, Law Offices of James L. Strichartz, Seattle, WA, for Respondent/Cross–Appellant.

Robert Jason Henry, Lasher Holzapfel Sperry & Ebberson, PLLC, Seattle, WA, for Other Parties.

Opinion

UNPUBLISHED OPINION

GROSSE, J.

***1** A purchaser at a sheriff's sale acquires only the right, title, and interest that a debtor has at the time of the sale. Here, the two condominiums purchased at the sheriff's sale were each subject to deeds of trust previously recorded by Bank of America. Because the purchaser is deemed to have constructive notice of recorded deeds of trust, we affirm the trial court's decision confirming the sale of one condominium and reverse the trial court's decision vacating the sale of the other condominium.

FACTS

On November 3, 2011, Sixty–01 Association of Apartment Owners was awarded separate default judgments against Virginia Parsons and Maria Mallarino for failure to pay their condominium assessments. [1] Third party deeds of trust encumbering the Parsons and Mallarino units were recorded in 2007 and 2006, respectively. [2] Separate orders of sale were issued January 13, 2012. Notice of the sheriff's sale was sent to all interested parties, including Bank of America (BOA), the beneficiary under the deeds of trust for both properties. Sixty–01 and BOA entered into separate stipulations and orders, on March 7, 2012 for the Parsons property, and on March 8, 2012 for the Mallarino property. Those stipulations declared that the judgment did not affect the bank's deed of trust interest and that the purchaser at the sheriff's sale took any interest in the condominiums subject to any valid interest of the bank.

1 Parsons owned Unit No. 10 and Mallarino owned Unit No. 493 at Sixty–01 Condominiums, 6439 139th Place N.E., Redmond, WA 98052.

2 King County Recording No. 20070723000298 and No. 20060228003678.

The two condominium units were auctioned separately on Friday, March 9, 2012. Daniel Pashniak's bids of $16,200.00 and $35,400.00 for the Parsons and Mallarino units were

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accepted as the high bids. The judgment clerk received the returns on the sale of property and certificates of purchase of real estate on March 16, 2012. On the same day, the judgment clerk mailed the notices of return of the sheriff's sale on real property.

On March 22, 2012, Pashniak sent a notice of appearance and an objection to the confirmation of the sheriff's sale for the Parsons unit, claiming that the order of sale and complaint for judicial foreclosure was confusing as to whether the sheriff's sale rendered the property free of all other indebtedness. Sixty–01 moved to confirm the sale of the Parsons unit on June 6, 2012. The court confirmed the sale of the Parsons unit on June 20, 2012. Sixty–01 moved to confirm the Mallarino sale on June 14, 2012. Notice was sent to Pashniak and interested parties. Pashniak, acting pro se, did not file an objection to the Mallarino sale until April 9, 2012. Pashniak then hired counsel and filed a second objection to confirmation and moved to vacate the sheriff's sale on July 12, 2012. Judge Ronald Kessler vacated the sale on July 23, 2012.

In this consolidated appeal, Pashniak appeals from the confirmation of the sale of the Parsons unit. Sixty–01 appeals from the order vacating the sale of the Mallarino unit.

ANALYSIS

Pashniak argues that he is entitled to withdraw his bid because the default judgments obtained against both Parsons and Mallarino stated that Sixty–01's lien was superior to any other lien, thus misleading him about the existence of properly recorded deeds of trust. He further argues that he was unaware of the last minute filing of the stipulations between BOA and Sixty–01 and thus was not privy to the knowledge that Sixty–01's judgments had no effect on the priority of the previously recorded deeds of trust until after the sheriff's sale.

***2** The default judgment provided:

> [A]ll right, title, claim, lien, estate or interest of the Foreclosed Defendants, each and all of them, and of all persons claiming by, through, or under them, in and to the Property or any part thereof is inferior and subordinate to Plaintiff's lien and is hereby foreclosed.

BOA was not a named party to the underlying suit resulting in the foreclosure, and Pashniak does not claim that BOA's lien was extinguished by the statement in the order that Sixty–01's lien foreclosed all liens. In essence, Pashniak argues that the default judgment order excuses his failure to exercise due diligence and search the title before entering a bid at the sheriff's sale.

RCW 6.21.110 provides:

> (2) The judgment creditor or successful purchaser at the sheriff's sale is entitled to an order confirming the sale at any time after twenty days have elapsed from the mailing of the notice of the filing of the sheriffs return, on motion with notice given to all parties who have entered a written notice of appearance in the action and who have not had an order of default entered against them, unless the judgment debtor, or in case of the judgment debtor's death, the representative, or any nondefaulting party to whom notice was sent shall file objections to confirmation with the clerk within twenty days after the mailing of the notice of the filing of such return.
>
> (3) If objections to confirmation are filed, *the court shall nevertheless allow the order confirming the sale, unless on the hearing of the motion, it shall satisfactorily appear that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting.* In the latter case, the court shall disallow the motion and direct that the property be resold, in whole or in part, as the case may be, as upon an execution received as of that date. [3]

3 (Emphasis added.)

Under the statute, it is clear that even when there are objections to the sale, unless there are irregularities in the proceedings concerning the sale, the trial court is required to confirm the sale. Pashniak cannot cite to any irregularity in the sheriff's sale. He was not entitled to withdraw the bid. The trial court correctly affirmed the sale of the Parsons unit.

The trial court incorrectly exercised its equitable powers to set aside the sale of the Mallarino unit, on the grounds that the stipulation with BOA, filed in the clerk's office the day before the sale, would not be viewable in the electronic court record for 24 to 48 hours after filing, and thus Pashniak would not have had inquiry notice regarding BOA's lien.

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But whether or not Pashniak had notice of the stipulation with BOA is of no consequence. Had Pashniak exercised due diligence, he would have discovered the duly recorded liens on both properties. Pashniak relies on *Davies v. Davies,* [4] to support his position that a purchaser can withdraw his bid any time prior to confirmation. In *Davies,* the judgment creditor and purchaser were one and the same. Davies withdrew his motion for confirmation and thus there was no sale. Statutorily, only a judgment creditor or successful purchaser has standing to move for confirmation. [5] Without confirmation there is no finality. Pashniak's argument fails because the statute says that either the judgment creditor or successful purchaser is "entitled to an order confirming the sale" where procedural safeguards have been met. [6] The statute does not entitle an investor to renege on a bid because of his failure to exercise due diligence.

4 48 Wn.App. 29, 737 P.2d 721 (1987).

5 *Davies,* 48 Wn.App. at 31 n. 1; former RCW 6.24.100(1) (1987) (recodified as RCW 6.21.110(2)).

6 RCW 6.21.110(2).

***3** Pashniak's reliance on *Miebach v. Colasurdo* [7] is equally misplaced. The facts there are markedly distinguishable. In *Miebach,* the court overturned a sheriffs sale because the judgment creditor bid $1,340.02 in full satisfaction of the default judgment. The property had equity over $77,000.00 and was only subject to a $29,000.00 senior lien. [8] Moreover, the evidence there showed that there was no attempt to collect the underlying debt. The issue here is not whether a judgment debtor received inadequate recompense for property, but whether a buyer/investor had constructive notice of the underlying deeds of trust.

7 102 Wn.2d 170, 685 P.2d 1074 (1984).

8 *Miebach,* 102 Wn.2d at 173.

Here, the facts are more similar to *Mann v. Household Finance Corp. III.* [9] Although *Mann* involved the purchase of property at a nonjudicial foreclosure sale of a second deed of trust, its reasoning is instructive. There, like here, purchaser Mann was unaware of the existence of the first deed of trust. When the first deed of trust subsequently foreclosed on the property, Mann contended that the language in the notice of trustee's sale was misleading. The language used was in the form set forth in the statute, "The effect of the sale will be to deprive the Grantor and all those who hold by, through or under the Grantor of all their interest...." [10] That language is similar to the language used here. Pashniak, as a purchaser at a mortgage foreclosure sale, should not be relieved of his purchase simply because of his mistaken belief as to the title that he would receive where he failed to seek the information by examination or inquiry. A recorded deed constitutes constructive notice of the interest acquired to all subsequent purchasers. [11] RCW 6.21.110(3) provides that even where "objections to confirmation are filed, the court shall nevertheless allow the order confirming the sale, unless ... there were substantial irregularities in the proceedings concerning the sale." Here, there were no irregularities. The trial court erred in vacating the sale of the Mallarino unit. There are no equitable considerations that could overturn a procedurally correct sheriff's sale.

9 109 Wn.App. 387, 35 P.3d 1186 (2001).

10 *Mann,* 109 Wn.App. at 392 (quoting RCW 61.24.040(1)(f)(VIII)).

11 *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.,* 168 Wn.App. 86, 106, 285 P.3d 70, *review denied,* 175 Wn .2d 1015 (2012); *see also Tomlinson v. Clarke,* 118 Wn.2d 498, 500, 825 P.2d 706 (1992) (recorded deed of trust imparts constructive notice of such real property interest).

Attorney Fees

A party may recover attorney fees only when authorized by a private agreement, statute, or recognized ground of equity. [12] Sixty–01 argues that it is entitled to attorney fees under RCW 64.34.364(14) and the recorded declaration of condominium, which provides for recovery of attorney fees in foreclosure actions. However, both of those apply to the condominium owners not a third party investor. Pashniak is not a party to that contract and thus Sixty–01 is not entitled to attorney fees.

12 *Humphrey Indus., Ltd. v. Clay St. Assocs., LLC,* 176 Wn.2d 662, 676, 295 P.3d 231 (2013).

In sum, because Pashniak had constructive notice of the deeds of trust recorded on both properties and with due diligence would have discovered the same; we hold that Sixty–01 was entitled to confirmation of the sheriff's sale for both properties. [13] Accordingly, we affirm the trial court's confirmation of sale of the Parson's unit, and reverse the trial court's vacation of the sale of the Mallarino unit.

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13 Sixty–01 also raises procedural appellate issues with regard to Pashniak's failure to file a separate appeal on the postjudgment motion even though Pashniak filed an amended notice of appeal. Because we resolve the substantive issues, we need not address the procedural issues raised; but note that any irregularity did not result in any prejudice to Pashniak.

WE CONCUR: LEACH, C.J., and LAU, J.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

SIXTY-01 ASSOCIATION,

Plaintiff,

vs.

MARIA A. MALLARINO, *et al.*,

Defendants

Case No.: 10-2-17742-6

ORDER VACATING SHERIFF'S SALE

Plaintiff moved to confirm a sheriff's sale. Intervenor Pashniak moved to vacate the sale. The court considered the motion to vacate, declarations of Pashniak and Robert J. Henry, affidavit of Jeannette Zimmerman, the court files and records and pleadings supporting and opposing the sale. The court also took judicial notice of the fact that a document filed in the clerk's office would not be viewable in the electronic court record for 24 to 48 hours after filing, although a hard copy would be viewable during working hours if a citizen knew to ask for paper filings not yet in the electronic court file. The order filed by plaintiff at 4:04 p.m. the day before the sale would only have been viewable by a citizen who went to the clerk's office between 4:04 p.m. to 4:30 p.m., when the office closes, and between 8:30 a.m. and the time of the sheriff's sale ninety minutes later. The court, exercising its equitable authority, concludes that a reasonable citizen, and even a reasonable citizen who buys property at sheriff's sales, would not have had inquiry notice of the lien. Therefore it is hereby

ORDERED that plaintiff's motion to confirm the sheriff's sale is denied and that intervenor's motion to vacate the sheriff's sale is granted. The clerk shall refund to intervenor

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Seattle, Washington 98115

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$35,400, less clerk's fees, c/o his counsel, Robert J. Henry; Lasher Holzapfel Sperry & Ebberson PLLC; 601 Union Street, Suite 2600; Seattle, WA 98101.

DATED 23 July 2012.

RONALD KESSLER, Judge

King County Superior Court
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Seattle, Washington 98115

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