

72659-5

72659-5

No. 72659-5-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

THE CONDO GROUP, LLC, a Washington limited liability company,

APPELLANT

v.

BANK OF AMERICA, N.A., a federally chartered bank association,

RESPONDENT

BRIEF OF APPELLANT

KING COUNTY SUPERIOR COURT
Case No. 12-2-19776-8 SEA

Jordan M. Hecker, WSBA #14374
HECKER WAKEFIELD & FEILBERG, P.S.
321 First Avenue West
Seattle, WA 98119
Phone: (206) 447-1900
Fax: (206) 447-9075
Attorneys for Appellant


FILED
2012 OCT 17 PM 5:12

I. TABLE OF CONTENTS

I.	<u>INTRODUCTION</u>	1
II.	<u>ASSIGNMENT OF ERRORS</u>	3
III.	<u>ISSUE PERTAINING TO ASSIGNMENT OF ERRORS</u>	6
IV.	<u>STATEMENT OF THE CASE</u>	7
V.	<u>ARGUMENT</u>	11
	A. Standard of Review.....	11
	B. The Trial Court's Decision Should Be Reversed As Condo Group Is A Bona Fide Purchaser As A Matter Of Law.....	12
	1. <u>The Inception Of Bidding At The Sheriff's Sale Did Not Trigger The Duty Of Inquiry</u>	12
	2. <u>Condo Group Could Not Have Made A Reasonable And Diligent Inquiry Given The Nature Of The Bidding Process</u>	15
	3. <u>The Court Should Not Reward BANA's Failure To Protect Its Rights</u>	18
VI.	<u>CONCLUSION</u>	20

II. TABLE OF AUTHORITIES

A. CASES

Albice v. Premier Mortgage Serv. Of Washington, Inc.
174 Wn.2d 560, 276 P.3d 1277 (2012).....5,6,13,16,17

Biles-Coleman Lumber Co. v. Lesamiz, 49 Wn.2d 436, 302 P.2d
198 (1956).....13

Casa Del Rey vs. Hart, 110 Wn.2d 65, 750 P.2d 261 (1988).....13

Frisino v. Seattle School Dist. No. 1, 160 Wn.App. 765, 249 P.3d
1044 (2011).....11

Glaser v. Holdorf, 56 Wn.2d 204, 352 P.2d 212 (1960).....13

Hendricks v. Lake, 12 Wn. App. 15, 528 P.2d 491 (1974).....16

Miebach v. Colasurdo, 102 Wn.2d 170, 685 P.2d 1074 (1984)13

Murray v. Carlton, 65 Wn. 364, 118 P.332 (1911).....18

Tanner Electric Cooperative v. Puget Sound Power & Light Co.,
128 Wn.2d 656, 911 P.2d 1301 (1996).....11

B. STATUTES

RCW 6.21.110(2).....8

RCW 64.34 *et seq.*.....7

III. APPENDIX

Appendix A: Order Granting Defendant Bank of America, N.A.'s
Motion For Summary Judgment

Appendix B: Order Denying The Condo Group, LLC's Motion For
Summary Judgment

I. INTRODUCTION

The dispute between Appellant The Condo Group, LLC (hereinafter “Condo Group”) and Respondent Bank of America, N.A. (hereinafter “BANA”) is narrowly focused on whether Condo Group is a bona fide purchaser. Condo Group purchased real property at a Sheriff’s Sale that was initiated by a homeowners association to foreclose a lien for delinquent condominium dues. Before the sale, BANA paid the super priority portion of the lien, but failed to give any notice of its payment or otherwise protect its rights by filing a Notice of Appearance or some other pleading with the trial court.

Prompted by a Motion to Confirm the Sheriff’s Sale, BANA first appeared to defend its rights approximately ten months after the judicial foreclosure was initiated and months after the Sheriff Sale concluded. BANA revealed for the first time that it paid the super priority amount and alleged Condo Group was not a bona fide purchaser, taking the Property subject to the rights of BANA. BANA’s entire case rests upon establishing that Condo Group was not a bona fide purchaser, a proposition for which BANA bears the burden of proof. If Condo Group is a bona fide purchaser, it owns the subject property free and clear of BANA’s lien.

The gravamen of BANA's bona fide purchaser argument is that the duty of inquiry was triggered by a low opening bid of One Thousand Dollars (\$1,000.00). BANA claims that a reasonable and diligent inquiry regarding the low opening bid would have revealed BANA's payment of the super priority portion of the lien prior to the sale. Since Condo Group did not inquire about the opening bid, it is not a bona fide purchaser. Significantly, BANA does not claim that the duty of inquiry was triggered before the inception of bidding at the Sheriff's Sale.

As will be shown below, Condo Group is a bona fide purchaser as a matter of law. The duty of inquiry was not triggered by the low opening bid. BANA's also failed to protect its rights by filing a Notice of Appearance or other type of pleading with the trial court prior to the sale.

Indeed, Condo Group had conducted its due diligence pre-sale and there are many reasons for low opening bids at Sheriff's Sales. Even if the Court were to agree with BANA, there was not enough time to conduct a reasonable and diligent inquiry in the minutes, if not seconds of the bidding process.

Furthermore, BANA is a sophisticated lien holder that failed to protect its rights. The bona fide purchaser doctrine should not protect the party ultimately responsible for its own harm.

Accordingly, the Court should reverse the trial court's decisions on Summary Judgment and grant Summary Judgment in favor of Condo Group. Alternatively, there are genuine issues of material fact that preclude Summary Judgment for BANA and the decision whether Condo Group is a bona fide purchaser should be remanded for trial.

II. ASSIGNMENTS OF ERROR

On October 24, 2014, the trial court ruled on the parties' respective Motions for Summary Judgment by entering two (2) Orders. *See* Appendices A & B; *see also* CP 509-511 & 512-515. The trial court granted BANA's Motion for Summary Judgment and denied Condo Group's Motion for Summary Judgment.

Condo Group assigns error to the trial court's decision to grant BANA's Motion for Summary Judgment and deny Condo Group's Motion for Summary Judgment. *See* Appendices A & B; *see also* CP 509-515.

Insofar as necessary, Condo Group also assigns error to the following findings and decisions on Summary Judgment:

1. The trial court erred by finding that "The Condo Group had actual knowledge of discrepancies between the judgment amount and the opening bid amount prior to the sheriff's sale." *See* Appendix A, p. 2, ¶ 2; *see also* CP 509-511.

2. The trial court erred by finding that “The Condo Group had actual knowledge of the discrepancies between the judgment amount and the opening bid amount prior to purchasing the property at issue at the sheriff’s sale.” *See* Appendix B, p.2 ¶ 2; *see also* CP 512-515.

3. The trial court erred by finding that “An ordinarily prudent person would have inquired further upon discovery of such a discrepancy given that the foreclosed property is sold to satisfy the judgment.” *See* Appendix A, p. 2 ¶ 3 & Appendix B, p. 2 ¶ 3; *see also* CP 509-515.

4. The trial court erred by finding that “The facts establish that Condo Group failed to satisfy this duty of inquiry and that had the Condo Group satisfied its duty of inquiry, such inquiry would have led to the discovery of Bank of America’s payment of the super priority portion of the Plaintiff’s lien.” *See* Appendix A, p. 3. ¶ 4 & Appendix B, p. 2 ¶ 4; *see also* CP 509-515.

5. The trial court erred by finding that “The Court finds that the Condo Group had inquiry notice of Bank of America’s super priority lien payment.” *See* Appendix A, p. 3 ¶ 5 & Appendix B, p. 2 ¶ 5; *see also* CP 509-515.

6. The trial court erred by determining that “The Condo Group is not a bona fide purchaser and purchased the Property subject to Bank of America’s Deed of Trust.” *See* Appendix Exhibit A, p. 3 ¶ 1 &

Appendix B, p. 3 ¶ 1; *see also* CP 509-515.

7. The trial court erred by determining that “Bank of America’s Deed of Trust was not extinguished by the sheriff’s sale. *See* Appendix A, p. 3 ¶ 2 & Appendix B, p. 3 ¶ 2; *see also* CP 509-515.

8. The trial court erred by determining that “Bank of America’s Motion for Summary Judgment is GRANTED.” *See* Appendix A, p. 3 ¶ 3; *see also* CP 509-511.

9. The trial court erred by determining that “Bank of America, N.A. is hereby DISMISSED WITH PREJUDICE. *See* Appendix A, p. 3, ¶ 4; *see also* CP 509-511.

10. The trial court erred by determining that “The Condo Group, LLC’s Motion for Summary Judgment is DENIED.” *See* Appendix B, p. 3 ¶ 3; *see also* CP 512-515.

11. The trial court erred by determining that “While Bank of America could have done more to protect its rights here, this Court is compelled to follow Albince (sic) v. Premier Mortgage Services of Washington, Inc. 174 Wn.2d 560, 276 P.3d 1277 (2012) and find that the Condo Group was not a bona fide purchaser. There, as is the case here, the Court was faced with cross-motions for summary judgment and decided the matter on ‘undisputed facts’, even though the Court made a ‘reasonableness’ determination and inferred knowledge of the buyer based

on the buyer's experience and sophistication based on those facts. There, as is the case here, the buyer was experienced and sophisticated and the other party with an equity interest had failed to protect their property by recording anything or filing anything with the court. While the Albince (sic) buyer had additional pre-sale knowledge, the buyer could not know the sale price until the sale itself. At that point, the surrounding events created a duty of inquiry, and if no inquiry occurred, he cannot satisfy that duty. The fact that duty arose during the sale does not mean that no [i]nquiry could have occurred, as the buyer was under no duty to buy the property." See Appendix B, p. 4; see also CP 512-515.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERRORS

Whether, as a matter of law, Condo Group is a bona fide purchaser when:

1. The lower than expected bid failed to trigger Condo Group's duty of inquiry;
2. A reasonable and diligent inquiry had already been completed by Condo Group before the bidding occurred regarding the foreclosure proceeding;
3. Condo Group could not perform a reasonable and diligent inquiry regarding the lower than expected opening bid within the minutes, if not seconds that the bidding occurred;
4. *Albice* is distinguishable from the instant situation; and
5. BANA is a sophisticated lien holder that failed to protect its interest in the Property.

IV. STATEMENT OF THE CASE

On June 6, 2012, the Plaintiff, Linden Park Home Owners Association (hereinafter “HOA”) filed a Complaint to foreclose its lien and for monies due from Defendant Dustin Mears (hereinafter “Mears”), the owner of the subject property located at: 13717 Linden Avenue North, Unit 116, Seattle, Washington (hereinafter “Property”). CP 1-8. The lien was for overdue homeowner dues and is first in priority (“super priority lien”) over BANA’s Deed of Trust. *See* RCW 64.34 *et seq.* BANA had previously recorded a Deed of Trust on the Property to secure a mortgage loan. CP 362-363.

On October 30, 2013, the trial court through a judicial foreclosure action, ordered that the Property be sold by the Sheriff. CP 59-62. BANA had not answered, appeared or entered a Notice of Appearance with the trial court. CP 445-448; *see also* RP 23:4-6. Accordingly, the Foreclosure Order also entered a default judgment against BANA and included the following language:

It is further ORDERED, ADJUDGED AND DECREED that any and all right, title, interest, lien or estate of... Defendant BOA will be foreclosed at the Sheriff’s Sale ordered by this Decree, and that from the date of the Sale forward... Defendant BOA’s interest in the aforementioned real property will be forever and fully extinguished.”

CP 61.

The Order of Default and Default Judgment also included a money judgment against Mears for \$11,419.14. CP 59-62.

On January 25, 2013, the Property was sold at a Sheriff's Sale to Condo Group for a bid of Two Thousand Dollars (\$2,000.00). CP 81-82. On February 26, 2013, the HOA filed a Motion requesting that the trial court confirm the Sheriff's Sale and disburse funds. CP 106-130. Significantly, the Motion noted that twenty days had passed since the Sheriff's Sale and no objection to the sale had been received pursuant to RCW 6.21.110(2). CP 107.

Condo Group filed a conditional response/support brief to the HOA Motion. CP 131-138. In its Response, Condo Group revealed that after the Sheriff's Sale it had learned from the Sheriff's office that BANA had paid the super priority portion of the lien to the HOA's attorney. CP 131-138 & CP 106-130. The HOA attorney contacted the Sheriff one day before the sale and informed it of the payment. CP 131-138. However, the Sheriff decided that it could not give notice of the payment at the Sheriff's Sale as it was bound by the Foreclosure Order, which did not state that it could give such notice. CP 131-138.

Ultimately, before the sale, Condo Group did not know about the super priority payment by BANA of \$1,852.68. CP 131-138. BANA admitted this fact at the Summary Judgment hearing by arguing that the

duty of inquiry arose at the start of bidding at the Sheriff's Sale. RP 12:25-13:2 & RP 23:4-6.

Indeed, before the Sheriff's Sale began, Condo Group had performed extensive due diligence. CP 131-138 & 445-448. Ray Stevenson, the Condo Group member that bid on the Property, carefully listened to all recitals and announcements read before the bidding at the Sheriff's Sale commenced. CP 131-138 & 445-448. The Sheriff did not disclose, announce or suggest that the terms and conditions of the sale had been altered. CP 131-138 & 445-448.

Condo Group also reviewed the Court Docket, including the Foreclosure Order, which provided that BANA's lien would be extinguished at the Sheriff's Sale. CP 131-138 & 445-448. Immediately before the sale, Condo Group again reviewed the Court Docket to see if anything had changed since the initial review; nothing had changed. CP 131-138 & 445-448. It is undisputed that BANA had not filed a Notice of Appearance. RP 23:4-6.

On April 1, 2013, BANA filed a Notice of Appearance and began its defense of this matter. CP 219-220. On April 2, 2013, BANA filed a Motion to Strike/Continue the HOA's Motion to confirm the Sheriff's Sale. CP 221-223. The HOA brought a Motion to Dismiss. CP 213-218.

On April 4, 2013, BANA brought a Motion to Vacate the Default Judgment. CP 243-246. On April 19, 2013, the trial court issued an Order regarding the flurry of motions filed by the parties setting oral argument and to allow the parties to supplement their briefs. CP 275-276. True to form, all of the parties filed supplemental briefs and replies thereto. CP 227-281, 282-287 & 288-299.

On May 17, 2013, the trial court issued its decision on the Motion to Dismiss, Confirm the Sheriff's Sale and Vacate the Default Judgment. CP 301-302. The trial court vacated the default judgment against BANA and denied the Motion to Confirm the Sheriff's Sale. CP 301-302. Significantly, the Order allowed for Condo Group to bring a Complaint addressing the issues regarding whether the Condo Group took title to the Property subject to BANA's Deed of Trust. CP 302.

On July 26, 2013, the foreclosure sale was confirmed by stipulated order between Condo Group, BANA, and the HOA. CP 316-318. The Order was without prejudice as to whether BANA's Deed of Trust was foreclosed. CP 316-318. The Order specifically included the following provision:

(3) This Order shall not prejudice any claims Defendant Bank of America, N.A. may have regarding whether its lien against the real property survived the Sheriff's Sale due to its claim that it paid the super priority lien timely as set forth further in other pleadings filed herein.

CP 317.

On October 17, 2014, the trial court heard the parties' Cross Motions for Summary Judgment regarding the bona fide purchaser defense. CP 509-515. The trial court decided to deny the Condo Group's Motion and grant BANA's Motion. *See* Appendices A & B. The trial court's decision was that the Condo Group was not a bona fide purchaser and took the Property subject to BANA's Deed of Trust. *See* Appendices A & B.

V. ARGUMENT

A. **Standard of Review.**

Condo Group seeks review of the trial court's decisions contained in the Summary Judgment Orders. Motions for summary judgment are reviewed de novo. *Frisino v. Seattle School Dist. No. 1*, 160 Wn.App. 765, 776, 249 P.3d 1044 (2011) (citation omitted). The appellate court engages in the same analysis as the trial court. *Tanner Electric Cooperative v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 668, 911 P.2d 1301 (1996) (citations omitted). In the trial court, summary judgment is proper if there are no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Id.*

B. The Trial Court's Decision Should Be Reversed As Condo Group Is A Bona Fide Purchaser As A Matter Of Law.

1. The Inception Of Bidding At The Sheriff's Sale Did Not Trigger The Duty Of Inquiry.

Before providing argument, it is undisputed that BANA had not appeared or filed any notice of its intent to defend in the foreclosure lawsuit prior to the Sheriff's Sale. RP 23:4-6. It is also undisputed that BANA did not file any notice of its payment of the super priority portion of the lien prior to the Sheriff's Sale. RP 23:4-6. The parties' disagreement stems from whether the lower than expected opening bid of One Thousand Dollars (\$1,000.00) triggered Condo Group's duty of inquiry.

A [bona fide purchaser] is one who purchases property without actual or constructive knowledge of another's claim of right to, or equity in, the property, and who pays valuable consideration. But if the purchaser has knowledge or information that would cause an ordinarily prudent person to inquire further, and if such inquiry, reasonably diligently pursued, would lead to discovery of title defects or of equitable rights of others regarding the property, then the purchaser had constructive knowledge of everything the inquiry would have revealed. Thus, in considering whether a person is a [bona fide purchaser], we ask: (1) whether the surrounding events created a duty of inquiry, and if so, (2) whether the purchaser satisfied that duty. In this determination, we consider the purchaser's knowledge and experience with real estate.

Albice v. Premier Mortgage Serv. Of Washington, Inc. 174 Wn.2d 560, 573, 276 P.3d 1277 (2012) (citing *Miebach v. Colasurdo*, 102 Wn.2d 170, 175-176, 685 P.2d 1074 (1984)).

"The burden of establishing that a purchaser had prior notice of another's claim, right, or equity, rests upon the one who asserts such prior notice." *Glaser v. Holdorf*, 56 Wn.2d 204, 209, 352 P.2d 212 (1960) (citing *Biles-Coleman Lumber Co. v. Lesamiz*, 49 Wn.2d 436, 439, 302 P.2d 198 (1956)). The triggering of the duty to make a reasonable diligent inquiry begins "... where a purchaser has knowledge or information of facts which are sufficient to put an ordinary prudent man upon inquiry...." *Casa Del Rey vs. Hart*, 110 Wn.2d 65, 71, 750 P.2d 261 (1988) (citing *Miebach*, 102 Wn.2d at 175-176). The obvious corollary is that there is no need for a reasonable inquiry if there are no facts or information available to the purchaser that an interest exists that could jeopardize the benefit of the purchase.

Here, the inception of the bidding process at the Sheriff's Sale did not trigger the duty of inquiry as a matter of law. As noted, Condo Group admits the opening bid of One Thousand Dollars (\$1,000.00) was lower than expected. CP 374 & CP 402 (76:25-77:3). However, a lower than expected bid would not trigger an ordinary prudent person to inquire.

Indeed, there are many reasons for a bid to be low. For instance, it is not uncommon for bids to be low if the hope of obtaining the property

while preserving a deficiency judgment or to encourage more bids. CP 448. In Condo Group's experience, when the super priority portion of the lien is paid the sale is usually postponed and a stipulation is filed in the court docket. CP 447.

Moreover, the analysis regarding the trigger of Condo Group's duty of inquiry cannot be undertaken in a vacuum. In determining whether Condo Group's duty of inquiry was triggered at the inception of bidding, the due diligence already performed must be considered. As noted, before the opening bid was announced at the Sheriff Sale, Condo Group had performed an extensive investigation into the status of the foreclosure action. CP 131-138 & 445-448.

As part of its due diligence in determining whether to bid on the Property, Condo Group reviewed the "Court Docket... and all of the various pleadings, orders, judgments, decrees, proofs of service, records, files and other papers of record in the case." CP 446. As noted, the court docket contained the Foreclosure Order which entered a default judgment against BANA, which provided:

It is further ORDERED, ADJUDGED AND DECREED that any and all right, title, interest, lien or estate of... Defendant BOA will be foreclosed at the Sheriff's Sale ordered by this Decree, and that from the date of the Sale forward... Defendant BOA's interest in the aforementioned real property will be forever and fully extinguished.

CP 61.

The Condo Group reviewed the court docket again right before the Sheriff's Sale started. CP 445-448. Nothing had changed since the previous review. CP 445-448. The Foreclosure Order had not been amended, no motions or other documents had been filed requesting to change or rescind the Foreclosure Order, and nothing had been filed to indicate any payment had been made by BANA. CP 445-448. Again, BANA admitted that a Notice of Appearance had not been filed prior to the sale. RP 23:4-6.

Armed with the knowledge that nothing in the court docket had changed, especially as to the Foreclosure Order which clearly provided that BANA's Deed of Trust would be extinguished at the sale, and that the sale had not been postponed, Condo Group did not have any information in its possession that would suggest the opening bid signaled the super priority payment. The fact that the possibility existed when the bidding began did not eliminate Condo Group's status as a bona fide purchaser.

2. Condo Group Could Not Have Made A Reasonable And Diligent Inquiry Given The Nature Of The Bidding Process.

Assuming the Court accepts the argument that the duty of inquiry was triggered by the low opening bid, there can be no dispute that once the bidding began Condo Group could not reasonably or diligently conduct an

investigation to determine the rationale for the reduced opening bid. It is impossible to pursue any investigations in the minutes, if not seconds required to determine whether to bid and purchase the Property.

Indeed, the time frame and circumstances of the situation should not be overlooked. *See Hendricks v. Lake*, 12 Wn. App. 15, 22, 528 P.2d 491 (1974). In *Hendricks*, the court stated:

Inquiry notice requests proof that the purchaser had knowledge of facts or circumstances that would lead a reasonably prudent purchaser to make inquiry... **[a]lso pertinent to our inquiry is the time frame that may be considered in determining the presence of inquiry notice.**

Id (emphasis added).

Again, Condo Group had already completed extensive due diligence by the time the bidding started. As noted, BANA does not dispute that it failed to give notice of the payment prior to the Sheriff's Sale.

Additionally, with all due respect to the trial court, *Ablice* is distinguishable from the instant situation. In *Ablice* unlike the current situation, there were many more pre-sale events that had triggered the inquiry duty on part of the purchaser. 174 Wn.2d at 574.

The issue in *Ablice* was whether the purchaser had constructive knowledge of the defects in the trustee's sale. *Id.* at 574-575. The court

determined that the purchaser did have constructive knowledge and was not a bona fide purchaser because the purchaser: (1) was a sophisticated real estate investor; (2) had researched the notice of trustee's sale which showed a small amount in arrears, indicating substantial equity in the property; (3) spoke to the owner and offered to buy the property, but the owner intended to keep the property; and (4) kept track of the numerous continuances of the trustee's sale. *Id.* at 573-574.

Unlike the current situation, the key events in *Albice* occurred within a 5-month period. 174 Wn.2d at 574. Here, the triggering event at the inception of the bidding process happened within a matter of minutes, if not seconds. CP 447-448. The trial court merely glossed over the significant time frame distinction. CP 515.

Furthermore, in *Albice*, there were several irregularities in the trustee's sale procedure that pointed to something amiss, such as the multiple continuances of the sale. 174 Wn.2d at 574. In the current situation, there was nothing in the court docket or otherwise prior to the inception of bidding that indicated an irregularity with the foreclosure procedure.

3. The Court Should Not Reward BANA's Failure To Protect Its Rights.

BANA had a variety of ways and options to notify the world that it still claimed an interest in the Property prior to the Sheriff Sale. BANA was represented by counsel. It could have easily protected its interest by providing notice of its payment of the super priority portion of the lien. It did not take any of those steps. Condo Group should not be penalized for the BANA's inability to protect its own interest.

The balancing of the equities favors Condo Group. "[W]here one of the two innocent parties must suffer, the one who was the cause of the misfortune must bear the burden." *Murray v. Carlton*, 65 Wn. 364, 367, 118 P. 332 (1911).

The chronology of events establishes that BANA knowingly sat on its rights and did nothing to protect them. Indeed, it had been nearly ten months since the lawsuit was filed until BANA filed a Notice of Appearance, establishing its intent to defend in the case. CP 1-8 & CP 219-220.

As noted, the foreclosure lawsuit was commenced on June 6, 2012, by the HOA. CP 1-8. BANA failed to appear or answer the Complaint, so on October 30, 2013, the trial court through a judicial foreclosure action, ordered that the Property be sold by the Sheriff and

entering a default judgment against BANA. CP 59-62. The default judgment provided that BANA's interest in the Property would be foreclosed at the Sheriff's Sale and "forever and fully extinguished." CP 61.

On January 25, 2013, the Property was sold at a Sheriff's Sale to Condo Group for a bid of Two Thousand Dollars (\$2,000.00). CP 81-82. Again, Condo Group did not have notice of BANA's payment of the super priority portion of the lien prior to the sale. CP 131-138 & 447.

About a month after the sale, on February 26, 2013, the HOA filed a Motion requesting that the trial court confirm the Sheriff's Sale and disburse funds. CP 243-246. On April 1, 2013, BANA filed a Notice of Appearance. CP 219-220. Again, it was the first time any such notice had been filed. RP 23:4-6. On April 2, 2013, BANA filed a Motion to Strike/Continue the HOA's Motion to confirm the Sheriff's Sale. CP 221-223. Accordingly, it was not until the HOA filed a Motion to Confirm the Sheriff's Sale that BANA did anything to protect its rights.

Ultimately, BANA had many opportunities to timely defend in the lawsuit and alert everyone of its payment of the super priority portion of the lien. As a bank, BANA is no doubt is familiar with the foreclosure process. BANA's familiarity further shows the neglect in its inaction.

It cannot be over emphasized that BANA is a sophisticated lien holder. Condo Group is not the only experienced real estate investor in this case. BANA's position as a sophisticated lienholder should also be given serious consideration. The trial court seemingly invoked a double standard in concluding that Condo Group was a sophisticated purchaser, without giving any consideration to BANA's position as a sophisticated lien holder. CP 515.

In short, the trial court unfairly rewarded BANA for its complete failure to protect its rights by misapplying the bona fide purchaser doctrine. The situation could have been completely avoided had BANA merely filed a Notice of Appearance with the trial court or filed some kind of notice of its payment of the super priority portion of the lien.

VI. CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's decisions on Summary Judgment and grant Summary Judgment in favor of Condo Group. As a matter of law, Condo Group is a bona fide purchaser and took title to the Property free and clear of BANA's Deed of Trust. Alternatively, there are genuine issues of material fact that preclude Summary Judgment for BANA and the decision whether Condo Group is a bona fide purchaser should be remanded for trial.

RESPECTFULLY SUBMITTED this 17th Day of February, 2015.



Jordan M. Hecker, WSBA #14374
HECKER WAKEFIELD & FEILBERG, P.S.
Attorneys for Appellant

APPENDIX A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

THE HONORABLE Dean S. Lum
HEARING DATE/TIME:
FRIDAY, OCTOBER 17, 2014 @ 1:30pm

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

LINDEN PARK HOMEOWNERS
ASSOCIATION, a Washington Non-Profit
Corporation;

Plaintiff,

vs.

DUSTIN M. MEARS, an individual, and
JANE or JOHN DOE MEARS, an individual,
spouses or domestic partners, and the marital
or quasi-marital community composed thereof;
and BANK OF AMERICA, N.A., a federally
chartered banking association,

Defendants,

THE CONDO GROUP, LLC, a Washington
Limited Liability Company,

Intervening Plaintiff,

vs.

BANK OF AMERICA, N.A., a federally

Case No. 12-2-19776-8-SEA

~~PROPOSED~~ 
**ORDER GRANTING DEFENDANT BANK
OF AMERICA, N.A.'S MOTION FOR
SUMMARY JUDGMENT**


~~PROPOSED~~ ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT

Page 1

HOUSER & ALLISON, APC
1601 Fifth Ave., Ste 850
Seattle, WA 98101
PH: (206) 596-7838
FAX: (206) 596-7839

1 chartered banking association, and DOES 1
2 through 10,

3 Intervened Defendants.

4 This matter is before the Court upon Defendant Bank of America, N.A.'s ("Bank of
5 America") Motion for Summary Judgment. The Court having considered the following:

- 6 1. The Complaint;
- 7 2. The pleadings and other motions filed to date;
- 8 3. Defendant Bank of America N.A.'s Motion for Summary Judgment;
- 9 4. Declaration of Sakae S. Sakai along with the supporting exhibits;
- 10 5. The CR 30(b)(6) deposition transcript of The Condo Group, LLC;
- 11 6. Responses to the Motion for Summary Judgment and any supporting declarations
12 and exhibits thereto, if any; and
- 13 7. Bank of America N.A.'s Reply, if any.

14
15 Now, therefore enters its FINDINGS as follows:

16 I. FINDINGS

- 17 1. The Condo Group, LLC ("Condo Group") is a sophisticated real estate investor
18 specializing in the purchase of condominiums at judicial foreclosure sales.
- 19 2. The Condo Group had actual knowledge of discrepancies between the judgment
20 amount and the opening bid amount prior to the sheriff's sale.
- 21 3. An ordinarily prudent person would have inquired further upon the discovery of
22 such a discrepancy given that the foreclosed property is sold to satisfy the
23 judgment.
24

25
26 
27 [PROPOSED] ORDER GRANTING
28 MOTION FOR SUMMARY JUDGMENT
Page 2

HOUSER & ALLISON, APC
1601 Fifth Ave., Ste 850
Seattle, WA 98101
PH: (206) 596-7838
FAX: (206) 596-7839

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 4. The facts establish that Condo Group failed to satisfy this duty of inquiry and that had the Condo Group satisfied its duty of inquiry, such inquiry would have led to the discovery of Bank of America's payment of the super priority portion of the Plaintiff's lien.
- 5. The Court finds that the Condo Group had inquiry notice of Bank of America's super priority lien payment.

BASED UPON the FINDINGS of the Court as entered above, it is hereby ORDERED, ADJUDGED and DECREED as follows:

- 1. The Condo Group is not a bona fide purchaser and purchased the Property subject to Bank of America's Deed of Trust.
- 2. Bank of America's Deed of Trust was not extinguished by the sheriff's sale.
- 3. Bank of America's Motion for Summary Judgment is GRANTED.
- 4. Bank of America, N.A. is hereby DISMISSED WITH PREJUDICE.

5. *see Order Denying The Landlord's Motion for Summary Judgment*
 DATED this 24 day of September, 2014.

[Handwritten signature]

Judge Dean S. Lum

Presented by:
 HOUSER & ALLISON, APC
 /s/ Sakae S. Sakai
 Robert W. Norman, Jr., WSBA No. 37094
 Sakae S. Sakai, WSBA No. 44082
 1601 Fifth Ave., Suite 850
 Seattle, WA 98101
 Attorneys for Defendant Bank of America, N.A.

[Handwritten initials]
 [PROPOSED] ORDER GRANTING
 MOTION FOR SUMMARY JUDGMENT
 Page 3

HOUSER & ALLISON, APC
 1601 Fifth Ave., Ste 850
 Seattle, WA 98101
 PH: (206) 596-7838
 FAX: (206) 596-7839

APPENDIX B

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

LINDEN PARK HOMEOWNERS
ASSOCIATION, a Washington Non-Profit
Corporation;

Plaintiff,

vs.

DUSTIN M. MEARS, an individual, and
JANE or JOHN DOE MEARS, an individual,
spouses or domestic partners, and the marital
or quasi-marital community composed thereof;
and BANK OF AMERICA, N.A., a federally
chartered banking association,

Defendants,

THE CONDO GROUP, LLC, a Washington
Limited Liability Company,

Intervening Plaintiff,

vs.

BANK OF AMERICA, N.A., a federally
chartered banking association, and DOES 1
through 10,

Intervened Defendants.

Case No. 12-2-19776-8-SEA

~~PROPOSED~~ *Dec*
ORDER DENYING THE CONDO GROUP,
LLC'S MOTION FOR SUMMARY
JUDGMENT

AB
~~PROPOSED~~ ORDER DENYING
MOTION FOR SUMMARY JUDGMENT
Page 1

HOUSER & ALLISON, APC
1601 Fifth Ave., Ste 850
Seattle, WA 98101
PH: (206) 596-7838
FAX: (206) 596-7839

1 This matter is before the Court upon the Intervenor Plaintiff The Condo Group, LLC's
2 ("Condo Group") Motion for Summary Judgment. The Court having considered the Complaint,
3 the pleadings and other motions filed to date, the Motion for Summary Judgment filed by the
4 Condo Group along with the supporting exhibits, the CR 30(b)(6) deposition transcript of The
5 Condo Group, LLC, responses to the Motion for Summary Judgment if any, and reply filed by
6 the Condo Group, LLC, if any; now, therefore enters its FINDINGS as follows:
7

8 I. FINDINGS

- 9 1. The Condo Group, LLC ("Condo Group") is a sophisticated real estate investor
10 specializing in the purchase of condominiums at judicial foreclosure sales.
- 11 2. The Condo Group had actual knowledge of discrepancies between the judgment
12 amount and the opening bid amount prior to purchasing the property at issue at
13 the sheriff's sale.
- 14 3. An ordinarily prudent person would have inquired further upon the discovery of
15 such a discrepancy given that the foreclosed property is sold to satisfy the
16 judgment.
- 17 4. The facts establish that Condo Group failed to satisfy this duty of inquiry and that
18 had the Condo Group satisfied its duty of inquiry, such inquiry would have led to
19 the discovery of Bank of America's payment of the super priority portion of the
20 Plaintiff's lien.
- 21 5. The Court finds that the Condo Group had inquiry notice of Bank of America's
22 super priority lien payment.
23
24
25

26  [PROPOSED] ORDER DENYING
27 MOTION FOR SUMMARY JUDGMENT
Page 2

HOUSER & ALLISON, APC
1601 Fifth Ave., Ste 850
Seattle, WA 98101
PIE: (206) 596-7838
FAX: (206) 596-7839

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BASED UPON the FINDINGS of the Court as entered above, it is hereby ORDERED,
ADJUDGED and DECREED as follows:

- 1. The Condo Group is not a bona fide purchaser and purchased the Property subject to Bank of America's Deed of Trust.
- 2. Bank of America's Deed of Trust was not extinguished by the sheriff's sale.
- 3. The Condo Group, LLC's Motion for Summary Judgment is DENIED.

4, see page 4 *(initials)*

DATED this 24 day of October, 2014.



Judge Dean S. Lum

Presented by:

HOUSER & ALLISON, APC



/s/ Sakae S. Sakai
 Robert W. Norman, Jr., WSBA No. 37094
 Sakae S. Sakai, WSBA No. 44082
 1601 Fifth Ave., Suite 850
 Seattle, WA 98101
 Attorneys for Defendant Bank of America, N.A.

(initials)
 [PROPOSED] ORDER DENYING
 MOTION FOR SUMMARY JUDGMENT
 Page 3

HOUSER & ALLISON, APC
 1601 Fifth Ave., Ste 850
 Seattle, WA 98101
 PH: (206) 596-7838
 FAX: (206) 596-7839

While Bank of America could have done more to protect its rights here, this Court is compelled to follow Albince v. Premier Mortgage Services of Washington, Inc., 174 Wn.2d 560, 276 P.3d 1277 (2012) and find that the Condo Group was not a bona fide purchaser. There, as is the case here, the Court was faced with cross-motions for summary judgment and decided the matter on "undisputed facts", even though the Court made a "reasonableness" determination and inferred knowledge to the buyer based on the buyer's experience and sophistication based on those facts. There, as is the case here, the buyer was experienced and sophisticated and the other party with an equity interest had failed to protect their property by recording anything or filing anything with the court. While the Albince buyer had additional pre-sale knowledge, the buyer could not know the sale price until the sale itself. At that point, the surrounding events created a duty of inquiry, and if no inquiry occurred, he cannot satisfy that duty. The fact that that duty arose during the sale does not mean that no Inquiry could have occurred, as the buyer was under no duty to buy the property.

DSU

CERTIFICATE OF SERVICE

I certify that on this day I caused to be served a true and correct copy of the document to which this Certificate is attached upon counsel of record and/or pro se parties, as follows:

Via E-mail and Legal Messenger:

Sakae S. Sakai
HOUSER & ALLISON APC
1601 – 5th Avenue, Suite 850
Seattle, WA 98101-3672

Valerie F. Oman
CONDOMINIUM LAW GROUP, PLLC
10310 Aurora Avenue North
Seattle, WA 98133-9228

DATED this 17th day of February, 2015.


Lindsey Truscott