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COURT OF APPEALS
DIVISION II

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No. 49156-7-II

STATE OF WASHINGTON

BY AP
DEPUTY

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION TWO

TIMBERLAND BANK, a Washington corporation,

Plaintiff/Appellant,

v.

SHAWN A. MESAROS and JANE DOE MESAROS, individually, and
the marital community they comprise, THE STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES: 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/Respondents.

APPELLANT'S REPLY BRIEF

Kevin A. Bay, WSBA #19821
James Bulhuis, WSBA #44089
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, WA 98101

ORIGINAL

P/M: 4/28/17

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A. MESAROS ARGUED THE PROCEDURAL ERRORS TO THE TRIAL COURT.

During oral argument, Mesaros alerted the trial court to issues of procedural irregularities with the sale:

In addition, the judicial sale was initially noted for April 29th, 2016. It was postponed that day. We do know that the postponement notice was posted at the court, we do not know if it was posted at the property.

That first postponement notice indicated that it would be continued to a date to be determined, it did not state the continuance date.

A second postponement notice was posted at the courthouse indicating that the new sale date would be May 27; that notice was posted May 16.

So, in effect, the public received 11 days notice of this judicial sale.

That new notice date was not published in the Vidette. There were not four consecutive weeks of publication leading up to the ultimate sale date of May 27 of 2016.

RP 3-4.

Given the irregularities in the publication and the repeated delays and the only 11-day notice of the ultimate sale date, there were no competitive bidders who appeared at the judicial sale.

RP 5.

The procedural irregularities with this sale were raised to the trial court, and preserved for appeal. *Bennett v. Hardy*, 113 Wn.2d 912, 917-918, 784 P.2d 1258 (1990)(“Plaintiffs may have framed their arguments more clearly at this stage, but so long as they advanced the issue below, thus giving the trial court an opportunity to consider and rule on the relevant authority, the purpose of RAP 2.5(a) is served and the issue is properly before this court”). That specific statutes or court rules were not cited to the trial court does not prevent Mesaros from advancing the same arguments and theories here on appeal. *Id.* at 917 (A statute not addressed below but pertinent to the substantive issues may be considered for the first time on appeal); *Wolfe v. Legg*, 60 Wn. App. 245, 250, 803 P.2d 804 (Div. 1, 1991)(extending *Bennett* to include court rules). Mesaros raised and preserved the issues of notice, publication and timing of the sale.

In addition, Timberland put compliance with the Order of Sale and statutory compliance at issue. The confirmation of sale, which is the order on appeal, recites that the sale was made on May 27, 2016, “under and by virtue of an order of sale issued in the above-entitled action; and it appearing to the court that the notice of sale was given by posting and publication in

the form and manner required by law, ...” (CP 119). Further: “... on the 27th day of May, 2016, ... the real property was sold by the Sheriff to the plaintiff herein, pursuant to the order of sale,...” (CP 120). This is what the Court found based on the Sheriff’s Return.¹

It is because these irregularities are so damaging to Timberland’s position that it subsequently sought a new order from the trial court—after this appeal commenced—in which Timberland insisted on language stating the trial court did not consider the procedural irregularities raised by Mesaros during oral argument (Amd. CP 267). Timberland now argues that because the trial court did not consider the irregularities, they were not preserved for appeal. That is incorrect. Rather, the trial court’s refusal to consider the irregularities was an abuse of discretion.

(1) The Order Confirming Sale Was Void.

Timberland offers no explanation or argument for why the expired Order of Sale should be enforced. Instead, it simply argues Mesaros did not preserve that issue for appeal. For the reasons explained *supra*, that argument fails. Moreover, a void order may be appealed at any time.

¹ The Grays Harbor County Clerk of the Court has provided the full Sheriff’s Return in its Amended Supplemental Clerk’s Papers at CP 219-263. It appears the clerk reused previously assigned bates numbers. For the sake of clarity, Mesaros will refer to these as “Amd. CP.”

Allstate Ins. Co. v. Khani, 75 Wn. App. 317, 323-24, 877 P.2d 724 (1994)(void judgments may be vacated regardless of lapse of time); *see, also, Hazel v. Van Beek*, 135 Wn.2d 45, 52-53, 954 P.2d 1301 (1998)(A confirmation of sale can be attacked when jurisdictional, as opposed to procedural, objections are raised, such as a sale on a void judgment); *State v. Paine*, 69 Wn. App. 873, 882-85, 850 P.2d 1369 (Div. 1, 1993)(lack of authority or jurisdiction may be raised for the first time on appeal)(citing *State v. Wiley*, 63 Wn. App. 480, 482, 820 P.2d 513 (1991)); *In re Marriage of Leslie*, 112 Wn.2d 612, 772 P.2d 1013 (1989) (void judgments may be vacated at any time).

The sheriff's sale was not held within the prescribed period of time, and therefore was void. 30 Am. Jur. 2d Executions, Etc. § 455 (2016)(“Where the time of sale is prescribed by statute, the execution officer has no authority to sell at any other time, and if he or she does sell, his or her acts are not merely irregular, but void”). Timberland offers no authority or argument to refute this. Accordingly, the trial court's

confirmation of sale was an abuse of discretion which must be reversed, and a new sale must occur.

B. THE TRIAL COURT COULD NOT CURE ITS ABUSE OF DISCRETION THROUGH A NEW ORDER.

After this appeal was filed, on July 26, 2016, the Court Clerk set this case for hearing to determine if the order was appealable as a matter of right. On August 12, 2016, this Court determined it was appealable as a matter of right. Ten days later, Timberland presented its revised order to the trial court, over Mesaros' objections. (Amd. CP 264-68). It is undisputed that neither Timberland nor the trial court sought leave from this Court to enter this revised order.

The trial court lost authority to enter a revised order once this Court accepted the appeal. RAP 7.2(e). A party can assert for the first time on appeal the lack of a trial court's authority or jurisdiction. *State v. Paine*, 69 Wn. App. 873, 882-85, 850 P.2d 1369 (Div. 1, 1993). Therefore, Timberland errs in suggesting Mesaros is barred from arguing the second order is improper.

Relatedly, Mesaros need not incur the time and expense of filing another notice of appeal of the revised order. RAP 2.4(a)-(b); *Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 505, 798 P.2d 808 (1990); *Right-*

Price Recreation, LLC v. Connells Prairie Comm. Council, 146 Wn.2d 370, 791, 46 P.3d 789 (2002)(Under RAP 2.4(b), appellate court reviewed orders or rulings not designated in the notice if they prejudicially affect the decision designated in the notice of appeal).

Timberland attempts to explain away this new order by claiming it was merely acting at the behest of this Court by seeking to have the trial court enter findings. Yet, the proposed findings were not articulated by the trial court during oral argument at the confirmation hearing, nor in the order it originally signed. They constituted entirely new findings. For instance, Timberland's new order articulated that the trial court took judicial notice of the economic conditions pertinent to the subject property and the sale. (Amd. CP 265). This is not a subject susceptible to judicial notice. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b); (CP 130). The economic conditions of this specific piece of property are not susceptible to judicial notice. The trial court refused to set an upset hearing,

at which evidence would have been offered regarding the economic conditions of the property.

In addition, the new order recited that the sale was conducted in accordance with applicable statutes. (Amd. CP 265). That was not true, and Timberland's attempt to introduce that new finding is a concession on its own part that the matter has been preserved for this appeal. The new order found the sale price of \$202,400 "constitutes fair value." (*Id.*). It found that a reasonable competitive bidder at the Sheriff's sale would not have bid more than that amount. (Amd. CP 266). The new order made a litany of findings on the usefulness of the Property, the Property's potential, unique qualities of the Property, its marketability, and economic conditions. Such findings were not (and cannot) be made in a confirmation of sale hearing. To make those findings, the trial court was obliged to set an upset hearing, which it refused to do. Therefore, it was an abuse of discretion to make findings on the fair value of the property without conducting the hearing necessary to determine fair value.

Timberland errs in suggesting to this Court that the terms "were not changed in any way" with this new order. (Resp. at 7). The new order changed a decision then being reviewed in the appellate court by making

the foregoing new findings. Accordingly, this new order violated RAP 7.2(e), and the trial court lacked authority to enter it.

C. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. MESAROS'S REQUEST FOR AN UPSET HEARING AND AN OPPORTUNITY TO CONDUCT DISCOVERY IN THE FACE OF SUBSTANTIAL EVIDENCE OF A SIGNIFICANTLY HIGHER VALUATION AND THE IRREGULARITIES OF THE SALE.

This appeal flows from the trial court's refusal to hold an upset hearing, not whether there was evidence supporting a low valuation. The fact that Timberland offered some evidence supporting its low bid and purchase of the property is not dispositive of whether the trial court abused its discretion in failing to set the matter for an upset hearing. Rather, it is the fact that Timberland's evidence differed so dramatically from Mesaros' which made the trial court's refusal to set an upset hearing an abuse of discretion. Further, the trial court abused its discretion in refusing to permit Mr. Mesaros an opportunity to test Timberland's evidence through discovery, such as deposing the authors of Timberland's appraisal reports. Instead, the trial court summarily confirmed the sale and imposed a deficiency judgment against Mesaros for \$184,000.

Mesaros raised legitimate objections to the credibility of Timberland's valuation, which the trial court did not address nor resolve. Mesaros showed that the appraisal report which Timberland relied upon was

created two weeks *after* the judicial sale. RP 4:21-23. Therefore, Timberland's representation that it relied upon the appraisal when setting its bid price lacks credibility. The testimony from the realtor Timberland purportedly retained to advertise the sale "contains no information as to what efforts he took to publicize or market the sale." RP 5. Yet, the trial court did not address or resolve this objection. Instead, it merely confirmed the sale. RP 8. The trial court abused its discretion in disallowing Mesaros an opportunity to conduct this discovery.

Timberland repeatedly argues that Mr. Mesaros has a one year period to redeem the Property, as if that somehow justifies the trial court's error. It does not. It is not surprising that a debtor is unable to redeem foreclosed property. Timberland's evidence of an offer it made to Mesaros does not justify the trial court's refusal to order an upset hearing; instead it illustrates the reason why an upset hearing should be ordered: to protect the defendant-debtor from creditors taking advantage of market conditions in a non-competitive sale. *Lee v. Barnes*, 61 Wn.2d at 585-86, 379 P.2d 362 (citing *Farmers and Mechanics Sav. Bank of Lockport v. Eagle Building Co.*, 271 N.Y.S. 306 (1934); *Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 924, 506 P.2d 20 (1973) ("the purpose of fixing an upset price is to assure the mortgagor of a fair price")). Here, Timberland's offer to

Mr. Mesaros to satisfy the judgment for \$364,000 plus interests, costs and expenses, is nearly double what it bought the property for at the Sheriff's Sale. (Resp. 3). Such a disparity warrants setting an upset hearing.

Twice Timberland's underwriting department felt the property was worth in excess of \$375,000. Otherwise it would not have loaned \$450,000 and \$375,000 to Mr. Mesaros. Timberland does not acknowledge its own actions and valuations of the Property. Instead, it cryptically disputes Mr. Mesaros' testimony of what Timberland's previous appraisals found. Yet, Timberland refused to turn over its previous appraisals when asked for them by Mr. Mesaros. Hence, Mesaros requested a short period to conduct discovery before an upset hearing to obtain those. The trial court abused its discretion in not allowing Mr. Mesaros an opportunity to obtain the appraisals that Timberland already possessed. Similarly, it was an abuse of discretion to confirm the sale and impose a deficiency judgment when Timberland's own actions showed on two separate occasions it valued the Property was worth double what it sold for.

Timberland correctly states that evidence of assessed value cannot be used to set a property's fair market value. However, Mesaros did not offer the assessed value as the number the trial court should use for an upset price; he offered it to show the trial court yet another source of a much

higher valuation. The trial court was confronted with a wide variation of valuations from multiple sources, and rather than determine the fair number by setting it at an upset price hearing, the trial court simply confirmed the sale and side stepped the whole process. This was an abuse of discretion.

D. THE CONFIRMATION OF SALE MUST BE REVERSED AND A NEW SALE WITH AN UPSET HEARING SHOULD BE ORDERED.

For all of the foregoing reasons, Mr. Mesaros respectfully requests this Court reverse the trial court's confirmation of sale. A new sale should be ordered with all of the statutorily-required notices so that the property may be competitively bid. In addition, the trial court should hold an upset hearing, either before or after this new sale. In advance of this upset hearing, Mr. Mesaros should be permitted to conduct some basic discovery to receive the previous appraisals on the property that Timberland possesses, and to test Timberland's evidence of current valuation of the Property.

Because the confirmation of sale must be reversed, so too should the trial court's orders permitting collections on the Judgment be reversed. The confirmation of sale created a deficiency judgment which Timberland has taken actions to collect on. Timberland has done so through garnishments and obtaining a charging order on Mr. Mesaros' interest in a LLC.

Timberland made these collection efforts while knowing this appeal was pending. All orders permitting such collections must be voided.

DATED this 28th day of April, 2017.

TOUSLEY BRAIN STEPHENS PLLC

By: *James Bulthuis*
Kevin A. Bay, WSBA #19821
Email: kbay@tousley.com
James Bulthuis, WSBA #44089
Email: jbulthuis@tousley.com
1700 Seventh Avenue, Suite 2200
Seattle, WA 98101
Tel: (206) 682-5600
Fax: (206) 682-2992
Attorney for Shawn A. Mesaros

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CERTIFICATE OF SERVICE STATE OF WASHINGTON

I, Nadine Morin, hereby certify that on the ~~28th~~^{AP} day of April, 2017, DEPUTY

I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

James T. Parker	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Parker, Winkleman & Parker, PS	<input type="checkbox"/>	Hand Delivered
813 Levee Street	<input type="checkbox"/>	Overnight Courier
P.O. Box 700	<input type="checkbox"/>	Facsimile
Hoquiam, WA 98550	<input checked="" type="checkbox"/>	Electronic Mail

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 28th day of April, 2017, at Seattle, Washington.



Nadine Morin

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