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SUPREME COURT
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No. 89805-7

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SUPREME COURT OF THE STATE OF WASHINGTON

DANIEL PASHNIAK

Petitioner,

v.

SIXTY-01 ASSOCIATION OF APARTMENT OWNERS,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR REVIEW

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

 ORIGINAL

TABLE OF CONTENTS

Appendix A – Order Vacating Sheriff’s SaleA-1 - A- 2

TABLE OF AUTHORITIES

CASES

Braman v. Kuper, 51 Wn.2d 676, 321 P.2d 275 (1958) 5
Mueller v. Miller, 82 Wn. App. 236, 917 P.2d 604 (1996)..... 1

STATUTES

RCW 6.21.110 1, 2
RCW 6.21.110(2)..... 1
RCW 61.21.110(3)..... 1

The unavoidable question presented to this Court is whether the Trial Court, Judge Ronald Kessler of the King County Superior Court, abused its discretion in deciding to vacate the Sheriff's sale and order the return to Mr. Pashniak of the money he bid at the vacated sale.

The answer to this question begins with the Legislature. More than a hundred years ago, the Legislature delegated to the Superior Court judges of this State the task of reviewing each and every Sheriff's sale conducted in the State. RCW 6.21.110(2). Each case must necessarily be considered individually, on its own facts. The Superior Court has the discretion to confirm the sale or to require the sale to be done over. RCW 61.21.110(3).

The Legislature presumably could have delegated this task elsewhere, or it could have allowed all Sheriff's sales to become final at the time of sale, without any judicial oversight. But the Legislature assigned this task to the judicial branch, and specifically to the trial court judges of this State, who are presumably trained in the law and experienced in both the application of law and the application of equity.

Each Sheriff's sale must be subjected to this judicial scrutiny. A judicial sale is not complete and the Sheriff's deed cannot issue until the sale has been confirmed by the Superior Court. *Mueller v. Miller*, 82 Wn. App. 236, 248, 917 P.2d 604 (1996).

It is significant that the Legislature provided no standards and no

guidance to the reviewing judge. The statute says only that the sale must be free of “substantial irregularities in the proceedings concerning the sale.” The statute provides no definition of an “irregularity” and no guidance on what a “substantial” irregularity would be. The Legislature did not presume to know and list all the possible irregularities which could befall a Sheriff’s sale. Instead of trying to limit, control or guide the reviewing judge, the Legislature left the analysis entirely to the discretion of the Superior Court judge in each individual case.

The Condo Association suggests, and the Court of Appeals seems to agree, that only an act of the Sheriff can result in the Superior Court refusing to confirm a sale, but can offer no authority for the proposition. No such limitation is set out in statute, and such a limitation would go entirely against the grain of the broad discretion entrusted by the Legislature to the judicial branch. It would neither be appropriate nor wise to strictly limit the Trial Court’s discretion in this fashion, and it would certainly depart radically from the broad mandate given by the Legislature.

It is expected that in the heat of battle all attorneys will argue for the result which serves their client best. That is an attorney’s job, but it is always a short-term, result-oriented decision attorneys are seeking. This Court must take the larger view. This Court must ask itself these questions. Is there anything in the language of RCW 6.21.110 to suggest a legislative

intent to limit the search for irregularities to the behavior of the Sheriff? Is there anything in the language of RCW 6.21.110 to suggest that the Legislature wants a judge to wear blinders, looking for some irregularities and ignoring others? And is there anything in the statute to suggest that the Legislature wished to impose any limits at all on the Superior Court when it is asked to review a Sheriff's sale? Mr. Pashniak submits that the answer to each of these questions is negative.

So the focus returns to this question: Did Judge Kessler abuse his discretion when he invalidated the Mallarino sale? To understand the Trial Court's decision requires an examination of two separate events.

First, on November 3, 2011, the attorneys for the Association presented a default judgment to a court commissioner in the Ex Parte Department of the King County Superior Court and the judgment was entered. Mallarino CP 122-128. That default judgment contains an utter falsehood; it states that "all persons claiming by, through, or under them, in and to the Property or any thereof is inferior and subordinate to Plaintiff's lien and is hereby foreclosed." Mallarino CP 126. This statement was not true. At least one entity claiming under Ms. Mallarino, the Bank of America, had not been served and so could not have been foreclosed. Yet the Association procured this Order and then recorded it in the public records of King County. At each level of judicial review, the Association

has failed to explain why or how it presented an order to a judicial officer for entry which was known to contain a false ruling.

Once the untruthful order was entered and recorded, any successful bidder at the Sheriff's sale could argue that his title was clear of all encumbrances, by virtue of the Court Commissioner's Order. Certainly Bank of America was worried about this result, because the Bank's attorneys approached the Association lawyers and required them to stipulate to a second order to be presented in the Ex Parte Department. Mallarino CP 132-136. This second order went too far in the opposite direction. Not only did it say Bank of America was not foreclosed, it went further and decreed that whoever bought the condo at the Sheriff's sale would necessarily take subject to the interest of Bank of America. Mallarino CP 133. In other words, a party and a non-party stipulated to an order giving the non-party bank priority over all other claimants and creditors. Without any opposition present, the order was signed.

It is this second order which troubled Judge Kessler, because it was presented and entered late in the afternoon the day before the sale. The Trial Court took judicial notice that an order entered at 4:04 p.m. the day before a Sheriff's sale cannot reach the court file and become public record within the next 24 hours. For that reason, the Mallarino Sheriff's sale was vacated and the Clerk was directed to refund the purchase money to Mr. Pashniak.

The Court drafted its own Order, copy attached as Appendix A.

In vacating the sale, the Trial Court fulfilled the duty it was charged with by the Legislature. A close look was taken at the proceedings leading up to the sale and they were found to be wanting. The problem identified by the Trial Court is clearly a result of multiple irregularities in the proceedings. It has long been the rule in this jurisdiction that confirmation of judicial sales such as this one are reviewed for abuse of discretion.

Braman v. Kuper, 51 Wn.2d 676, 681, 321 P.2d 275 (1958), held:

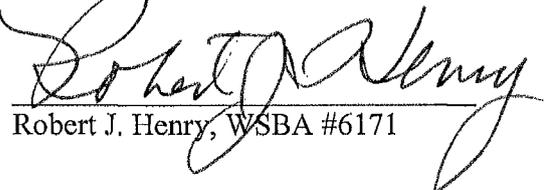
... it is a general rule followed in this state, that confirmation of judicial sales rests largely within the discretion of the trial court, and will not be reviewed except for manifest abuse of such discretion.

There was no manifest abuse of discretion by Judge Kessler.

The decision of the Court of Appeals, reversing Judge Kessler but without identifying any abuse of discretion, is an unnecessary and unwarranted interference which will leave Superior Court judges in doubt about the scope of their review. The Court of Appeals should be reversed and the Trial Court should be affirmed.

Respectfully submitted this 2nd day of May, 2014.

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



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CERTIFICATE OF SERVICE

I certify that on May 2, 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
Law Offices of James L. Strichartz
201 Queen Anne Avenue N., Suite 400
Seattle, WA 98109



Lee Brewer

JUL 23 2012

SUPERIOR COURT CLERK

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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

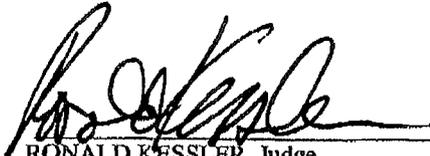
ORDERED that plaintiff's motion to confirm the sheriff's sale is denied and that intervenor's motion to vacate the sheriff's sale is granted. The clerk shall refund to intervenor

APPENDIX A-1

1 \$35,400, less clerk's fees, c/o his counsel, Robert J. Henry; Lasher Holzapfel Sperry & Ebberson
2 PLLC; 601 Union Street, Suite 2600; Seattle, WA 98101.

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DATED 23 July 2012.


RONALD KESSLER, Judge

APPENDIX A-2

OFFICE RECEPTIONIST, CLERK

To: Lee Brewer
Cc: Robert J. Henry
Subject: RE: Pashniak v. Sixty-01 Association of Apartment Owners, No. 89805-7 - Daniel Pashniak's Supplemental Brief in Support of Petition for Review

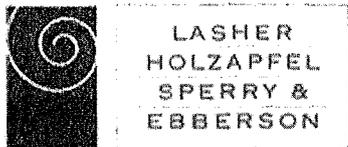
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Dear Sir or Madam: Attached is Mr. Pashniak's Supplemental Brief. Please file with the court. Thank you.

Lee Brewer
Legal Assistant
DIRECT 206 654-5611



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