

67608-3

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NO. 67608-3-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BANK OF AMERICA, N.A.

Appellant,

v.

MICHAEL FULBRIGHT,

Respondent.

BRIEF OF RESPONDENT

MICHAEL FULBRIGHT

APPEAL FROM KING COUNTY SUPERIOR COURT

The Honorable Suzanne Barnett, Case No. 11-2-16855-7 SEA

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I. INTRODUCTION

This appeal concerns redemption rights following judicial foreclosure of a condominium association's assessment lien against a condominium unit (the "Unit"). Appellant, Bank of America, N.A. ("Bank of America"), is the beneficiary of a deed of trust against the Unit at the time of the Sheriff's sale enforcing the assessment lien. Respondent Michael Fulbright ("Fulbright") (a licensed attorney representing himself in this matter) purchased the Unit at the Sheriff's sale.

The key facts are undisputed and the controlling statutes are straightforward. In March of 2007, Bank of America made a loan that was secured by a deed of trust recorded against the Unit (the "2007 Deed of Trust"). The Unit owner stopped paying monthly condominium assessments in May of 2008 and appears to have ceased making loan payments in February of 2009. Under the Washington Condominium Act (RCW Ch. 64.34), condominium associations have a lien for delinquent assessments "from the time the assessment is due". RCW 64.34.364(1).

In January of 2009, Tanglewood at Klahanie Condominium Association (the "Tanglewood Association") filed a judicial foreclosure action on its lien for the assessment delinquency that commenced in May of 2008. The Washington Condominium Act gives condominium assessment liens a limited priority over deeds of trust recorded before the

assessment lien arises. RCW 64.34.364(3). The priority generally equals six months of condominium assessments, which is the case here. *Id.* Because of this priority, Bank of America was included as a defendant in the foreclosure action, and served with the summons and complaint in February of 2009. Bank of America could have satisfied the limited priority with a payment to the Association of either \$1,866.12 or \$3,027.02, depending upon when the payment was made.

Both Bank of America and the Unit owner failed to respond to the foreclosure action, resulting in a default judgment against them. Because Bank of America failed to respond to the foreclosure suit or pay the limited priority amount, the 2007 Deed of Trust was extinguished by the resulting Sheriff's sale. Fulbright purchased the Unit at the Sheriff's sale on May 7, 2010, with a high bid of \$14,481.83. Bank of America does not contest the validity of either the default judgment or the Sheriff's sale.

The default judgment that resulted in the foreclosure sale provided for a one-year redemption period for those authorized to redeem. Redemption rights after a Sheriff's sale are strictly statutory, not equitable. The language of the applicable statute is clear and unambiguous. The relevant portion of the applicable Washington statute only grants redemption rights to the owner and persons with deeds of trust and other liens or encumbrances that are "subsequent in time" to the lien foreclosed

upon. RCW 6.23.010(1). Because the 2007 Deed of Trust is not “subsequent in time” to the lien foreclosed at the Sherriff’s sale (the 2008 assessment lien), Bank of America is not authorized to redeem from the Sheriff’s sale.

In order to avoid the consequences of failing to respond to the foreclosure suit or pay the limited priority amount before the Sheriff’s sale, Bank of America is asking this Court to grant it a redemption right not otherwise granted by the plain and unambiguous language of the applicable statutes. Neither Washington case law nor policy considerations warrant ignoring the plain language of the applicable statutes to relieve Bank of America from the consequences of failing to respond to the foreclosure suit. This Court of Appeals should affirm Judge Barnette’s order denying Bank of America’s claim to a redemption right.

II. ASSIGNMENTS OF ERROR

Fulbright accepts Judge Barnett’s order in this case. Fulbright does not make any assignments of error.

III. STATEMENT OF THE CASE

A. Establishment, Ownership, Encumbrance & Defaults.

Tanglewood at Klahanie, a Condominium (the “Tanglewood Condominium”) is a condominium that was established in accordance with the Washington Condominium Act, RCW Ch. 64.34, by the recording of a condominium declaration on December 20, 2006, under King County Recording No. 2006122000983 (including any amendments, the “Tanglewood Declaration”), along with the recording of a survey map and plans for the property (CP 40-98). Tanglewood at Klahanie Condominium Association (the “Tanglewood Association”) is the homeowners association for the Tanglewood Condominium (CP 353).

On or about March 9, 2007, Jeanne Lewis (“Ms. Lewis”) acquired ownership of a unit in Tanglewood Condominium commonly known as 25025 SE Klahanie Blvd, Unit D201, Issaquah, Washington (the “Unit”) (CP 380-86). Ms. Lewis obtained a loan from Bank of America that was secured by a deed of trust recorded against the Unit on March 9, 2007, under King County Recording No. 20070309001521 (the “2007 Deed of Trust”) (CP 138, 141-58). The beneficiary’s interest under the Deed of Trust was assigned to BAC Home Loan Servicing, L.P. (“BAC”) pursuant to an Assignment of Deed of Trust recorded on April 26, 2011, under King County Recording No. 20110426000087 (CP 159). BAC merged

into Bank of America, effective July 1, 2011. Bank of America's Opening Brief ("Opening Brief"), p. 5.

Commencing in May of 2008, Ms. Lewis defaulted in the payment of Unit assessments. CP 370. Although not entirely clear from Bank of America's submissions in this matter, it appears that Ms. Lewis stopped making her loan payments to Bank of America in February of 2009 (CP 139, ¶8).

B. Tanglewood Foreclosure & Sheriff's Sale.

Under the Washington Condominium Act, delinquent condominium assessments are a lien against the condominium unit from the time of delinquency, and such lien has priority over deeds of trust recorded before the lien arises, to the extent of six months of assessments. RCW 64.34.364(1), (2) and (3).

Pursuant to the Condominium Act and the Tanglewood Declaration, the Tanglewood Association filed a judicial foreclosure action against Ms. Lewis, John Doe Lewis (her husband, if any) and Bank of America on January 27, 2009, under Cause No. 09-2-05222-1 SEA (the "Foreclosure Suit") (CP165-69). As the record beneficiary of the 2007 Deed of Trust and because Tanglewood Association's lien had priority, Bank of America was included as a defendant in the Tanglewood Foreclosure (*Id.*). A lis pendens concerning the Tanglewood Foreclosure

was recorded against the Condominium on February 2, 2009, under King County Recording No. 20090202000178 (CP 389). Bank of America was served with the summons and complaint for the Foreclosure Suit on February 3, 2009 (CP 390).

Because none of the defendants responded, an order of default was entered against all defendants, including Bank of America, on May 18, 2009 (CP 391-92). A Default Judgment, Order and Foreclosure Decree was entered against all defendants, including Bank of America, on June 24, 2009 (the "Foreclosure Judgment")(CP 170-74). The Foreclosure Judgment provided in relevant part as follows:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the rights of each of the defendants and persons claiming by, through or under them, including mortgage lenders, be adjudged inferior and subordinate to plaintiff's lien and be forever foreclosed except only for the statutory right of redemption allowed by law, if any;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the period of redemption shall be one year from the date of the Sheriff's sale after which time the Sheriff shall issue the Sheriff's deed to the purchaser;

(Emphasis added.) (CP 173.)

Pursuant to the Foreclosure Judgment, the Unit was levied upon by the King County Sheriff on March 24, 2010, pursuant to documentation recorded under King County Recording No. 20100324000819 (CP 393-98). On May 7, 2010, the King County Sheriff sold the Unit at public

auction to Fulbright for \$14,481.83 (the “Sheriff’s Sale”), paid to the Sheriff by cashier’s check promptly following such sale (CP175-76, 369). The Sheriff’s Sale was subsequently confirmed by order of the Court entered on June 15, 2010, and Tanglewood Association’s judgment amount was paid in full (CP 201-03).

At the time of the Foreclosure Judgment, the monthly assessment amount for the Unit was \$311.02 and increased to \$543.20 in 2010 (CP 370, 372, and 379). Bank of America only needed to pay the Association either \$1,866.02 or \$3,027.02, depending upon when paid, to satisfy the amount of the assessment lien priority (CP 351-52). If it had done so, the Sheriff’s sale would not have extinguished or otherwise affected the 2007 Deed of Trust.

C. Redemption Effort.

On April 29, 2011, BAC (now Bank of America) notified the Sheriff’s office of its intent to redeem the Unit, demanded a verified accounting of net income from the Unit during the redemption period, and requested an itemized redemption quote good through May 6, 2011 (CP 204-05). BAC’s notice and demand was promptly forwarded to Fulbright by the sheriff’s office (CP 375). As set forth in a letter dated May 2, 2011, Fulbright declined to provide the materials demanded by BAC because BAC is not an authorized redemptioner under applicable statutes (CP 228-

29). After BAC's efforts to force the Sheriff's office to allow BAC to redeem failed, BAC filed the present action (CP 1-8). Fulbright answered and counterclaimed for a quiet title declaration against BAC (CP 106-13).

D. Similar Appeal.

Fulbright is acting as counsel for another party, Plumblin Management Corporation Profit Sharing Plan ("Plumblin") in another case with an appeal pending before this Court. *GMACM, LLC v. Summerhill Village Condominium Association* (Appeal No. 66455-7-1). That case also involved the question of a lender's redemption rights following judicial foreclosure of a condominium assessment lien. As in this case, the trial court ruled that the lender in that case did not have the right to redeem because its deed of trust was not "subsequent in time" to the condominium association's assessment lien. That case and appeal involves additional facts and issues not present in this case or appeal.

Bank of America sought leave to file a Brief Amicus Curiae in that appeal, but its request was denied by the Panel for that appeal. Oral argument is scheduled for January 5, 2012.

The appeal for this other case may or may not affect the outcome of this appeal. That case may be decided based upon the same issue involved in this case and that decision may be published. But the decision on the other case may not be published, even if it is based on the common

issue. It is also possible that the other case will be decided based on additional facts and issues not present in this appeal.

IV. ARGUMENT

The ultimate question in this appeal is whether Bank of America has the legal standing or right to redeem from the Sheriff's Sale resulting from the Foreclosure Judgment. The answer to that question involves the application of two statutes: RCW 6.23.010 (referred to herein as the "Redemption Statute") and RCW 64.34.364 (referred to herein as the "Condominium Lien Statute"). The Redemption Statute controls who is authorized to redeem from a sheriff's sale. The Condominium Lien Statute controls when a lien for condominium assessments is created or arises, as well as its priority relative to deeds of trust.

Bank of America makes two arguments. First, it contends that under the "plain, unambiguous and unequivocal" terms of the Condominium Lien Statute, it qualifies as a redemptioner under the terms of the Redemption Statute. Second, Bank of America contends it should be allowed to redeem even if the plain meaning of the Condominium Lien Statute and the Redemption Statute indicate otherwise.

As summarized in *Lake v. Woodcreek Homeowners Ass'n*:

Statutory interpretation begins with the statute's plain meaning. Plain meaning "is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision

is found, related provisions, and the statutory scheme as a whole." *State v. Engel*, 166 Wash.2d 572, 578, 210 P.3d 1007 (2009). While we look to the broader statutory context for guidance, we "must not add words where the legislature has chosen not to include them," and we must "construe statutes such that all of the language is given effect." *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wash.2d 674, 682, 80 P.3d 598 (2003). If the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end. *State v. Armendariz*, 160 Wash.2d 106, 110, 156 P.3d 201 (2007).

168 Wn.2d 694, 704, 229 P.3d 791 (2010).

A. Case Law and Statutory Background.

1. Equitable and statutory redemption.

There are two types or categories of redemption under Washington law: equitable and statutory. *Fidelity Mutual v. Mark*, 112 Wash.2d 47, 51, 767 P.2d 1382 (1989). Equitable redemption is somewhat outdated terminology for the right to redeem a property from the lien of a mortgage or other encumbrance before a foreclosure sale occurs. In modern parlance, equitable redemption concerns the right to pay off a lien or encumbrance before a foreclosure sale ever occurs. Statutory redemption, on the other hand, refers to redeeming a property from and after an otherwise valid foreclosure sale has occurred. Some cases just refer to redemption, without specifying whether they are dealing with equitable or statutory redemption. But the facts in such cases readily reveal which type of redemption is involved.

This appeal concerns statutory redemption rights.

2. Authorized Redemptioners.

Redemptions from a sheriff's sale are governed by the Redemption Statute (RCW 6.23.010), which provides:

(1) Real property sold subject to redemption, as provided in RCW §6.21.080, or any part thereof separately sold, may be redeemed by the following persons, or their successors in interest:

(a) The judgment debtor, in whole or any part of the property separately sold.

(b) A creditor having a lien by judgment, decree, deed of trust, or mortgage on any portion of the property, or any portion or any part thereof, separately sold, **subsequent in time** to that on which the property was sold. The persons mentioned in this subsection are termed redemptioners.

(2) As used in this chapter, the terms "judgment debtor", "redemptioner," and "purchaser," refer also to their respective successors in interest.

(Emphasis added.) Bank of America incorrectly suggests that the recording statutes were not a factor when the Redemption Statute was first adopted in 1899. *Opening Brief*, p. 18. In fact, the initial recording statute dates back to 1854, with five revisions before the initial version of the Redemption Statute was adopted. Laws of 1897, ch. 5, §1; Code of 1881, §2314; Laws of 1877, p. 312, §4; Laws of 1873, p. 465, §4; Laws of 1863, p. 430, §4; Laws of 1860, p.2 99, §4; Laws of 1858, p 28, §1; Laws of 1854, p. 403, §4.

The Redemption Statute is not just a definition section, it establishes the redemption right itself for certain persons. But for the Redemption Statute, there is no redemption right for anyone after a sheriff's sale. Bank of America is only an authorized "redemptioneer" if the 2007 Deed of Trust is "subsequent in time" to the Tanglewood Association's 2008 assessment lien that was foreclosed by the Sheriff's Sale.

As noted in *Gesa Federal Credit Union v. Mutual Life Ins. Co. of New York*:

The right to redeem property sold under statute depends on the provisions of the statute creating the right. *Graves v. Elliot*, 69 Wash.2d 652, 419 P.2d 1008 (1966); *Kuper v. Stojack*, 57 Wash.2d 482, 358 P.2d 132 (1960). Where the language of the statute is plain, unambiguous, and certain, there is no room for judicial construction because the meaning will be discovered from the wording of the statute itself. *People's Org. for Wash. Energy Resources v. Utilities & Transp. Comm'n.*, 101 Wash.2d 425, 679 P.2d 1922 (1984). Accord, *Rhoad v. McLean Trucking Co.*, 102 Wash.2d 422, 686 P.2d 483 (1984).

105 Wash.2d 248, 252, 713 P.2d 728 (1986). The *Gesa* Court went on to draw a distinction between substantive rights granted by the redemption statutes and procedural requirements for the exercise of substantive redemption rights. *Gesa* held that equitable considerations apply to procedural matters, but not to substantive rights. *Id.* at 254-56. The *Fidelity* case specifically held that RCW 6.24.130, the direct predecessor

to the current Redemption Statute, was substantive, not procedural.

Fidelity Mutual v. Mark, 112 Wash.2d 47, 55, 767 P.2d 1382 (1989).

3. General lien priority principles.

As a general rule in Washington, the priority of competing lien claims is based upon the relative times when the competing claims arise; first in time, first in right. See *Homann v. Huber*, 38 Wn.2d 190, 198, 228 P.2d 466, 470 (1951); and *Hollenbeck v. City of Seattle*, 136 Wn. 508, 514, 240 P. 916 (1925).

The first in time, first in right principle is qualified or limited by RCW 65.08.070:

A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.

The term conveyance includes any written instrument that creates a mortgage or lien on real property. RCW 65.08.060(3). A party who fails to record can lose his first in time right to someone with a later conveyance without actual knowledge of the earlier conveyance. *Tacoma Hotel, Inc. v. Morrison & Co.*, 193 Wash. 134, 140, 74 P.2d 1003 (1938).

An unrecorded conveyance is still valid against anyone with actual knowledge of the unrecorded conveyance.

4. Creation & priority of a condominium assessment lien.

Condominium assessment liens are statutory creatures, created and governed by the Condominium Lien Statute (RCW 64.34.364). The Condominium Lien Statute does not completely adhere to the normal first in time, first in right principle, or recording requirements. Relevant portions of the Condominium Lien Statute provide:

(1) The association has a lien on a unit for any unpaid assessments levied against a unit **from the time the assessment is due.**

(2) A lien under this section shall be prior to all other liens and encumbrances on a unit except: (a) Liens and encumbrances recorded before the recording of the declaration; (b) a mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent; and (c) liens for real property taxes and other governmental assessments or charges against the unit. ...

(3) Except as provided in subsections (4) and (5) of this section, the lien shall also be prior to the mortgages described in subsection (2)(b) of this section to the extent of assessments for common expenses, excluding any amounts for capital improvements, based on the periodic budget adopted by the association pursuant to RCW §64.34.360(1) which would have become due during the six months immediately preceding the date of a sheriff's sale in an action for judicial foreclosure by either the association or a mortgagee, ...

(7) Recording of the declaration constitutes record notice and perfection of the lien for assessments. While no further recording of any claim of lien for assessment under this section

shall be required to perfect the association's lien, the association may record a notice of claim of lien for assessment under this section in the real property records of any county in which the condominium is located. Such recording shall not constitute the written notice of delinquency to a mortgagee referred to in subsection (2) of this section.

(15) The association upon written request shall furnish to a unit owner or a mortgagee a statement signed by an officer or authorized agent of the association setting forth the amount of unpaid assessments against that unit. The statement shall be furnished within fifteen days after receipt of the request and is binding on the association, the board of directors, and every unit owner, unless and to the extent known by the recipient to be false.

(Emphasis added). Under RCW 64.34.020(27), the term "mortgage" includes a deed of trust.

RCW 64.34.364(1) clearly and unambiguously says an association has a lien for unpaid assessments "from the time the assessment is due". Conversely and obviously, there is no lien for an assessment before it is due. In this case, the earliest assessment subject of the Sheriff's sale was not due before May 2008, well after the 2007 Deed of Trust. Given RCW 64.34.364(1), RCW 64.34.364(2)(b) is consistent with the typical first in time, first in right principle. A deed of trust generally has priority over assessments that become due after recording of the deed of trust because the lien for the subsequent assessment does not arise or exist until later when the assessment is first due.

RCW 64.34.364(3) goes on to provide a limited exception to a deed of trust's priority over a subsequent assessment lien. Even though an assessment lien arises after or subsequent in time to a RCW 64.34.364(2)(b) deed of trust, RCW 64.34.364(3) gives it a limited priority over earlier deeds of trust for up to six months of assessments. This is sometimes referred to as a super-priority lien. The lien for real property taxes and improvement assessments is another example of a super-priority lien. RCW 84.60.010. This limited super-priority created by RCW 64.34.364(3) is an exception to the typical first in time, first in right principal. Because of this exception and Bank of America's failure to respond to the Foreclosure Suit and pay the limited priority amount, the 2007 Deed of Trust was eliminated by the Sheriff's Sale.

B. Bank of America's 2007 Deed of Trust Is Not "Subsequent in Time" to the 2008 Assessment Lien as a Matter of Fact.

Bank of America would have this Court turn the Condominium Lien Statute on its head by having the Court ignore RCW 64.34.364(1) and rule that under RCW 64.34.364(7) the Tanglewood Association's lien for assessments due on or after May of 2008 was "created" when the condominium declaration was recorded in 2006 (Opening Brief, pp. 14,15, 25), approximately 2 years before the first assessment at issue here became due. This argument is so strained that it did not even occur to

Bank of America to include it in its briefing for the summary judgment motion subject of this appeal (CP 114-33, 399-403). Under RCW 64.34.364(7), recording of the condominium declaration provides record notice and perfection of future assessment liens, but it does not accelerate when the lien for a given assessment first arises, comes into existence, or is “created”. That is dictated by RCW 64.34.364(1).

Without RCW 64.34.364(7), an association would have to record monthly lien notices as assessments became due to avoid losing its lien priority under RCW 65.08.070. Bank of America argues that lenders must be able to rely on the public record (*Opening Brief*, p. 16). While generally true, that is not what the Condominium Lien Statute provides. Instead of looking to the recording records for a unit’s lien status at any given time, RCW 64.34.364(15) requires associations to provide statements about unpaid assessments to owners and lenders upon request. Recording of a condominium declaration provides record notice of a property’s condominium status and the potential for future assessment liens, but lenders must look to the association statements, not the recording records, to ascertain the existence of actual assessments liens at any given time.

Bank of America mistakenly cites *Mira Owners Ass’n v. Lawrence* in support of its argument about the effect of RCW 64.34.364 (7). No.

C10-630RAJ, 2011 WL 677425 (W.D. Wash., Feb. 16, 2011). That case involves the relative priorities of a condominium assessment lien and a federal tax lien against the same unit. There was a federal tax assessment levied against a unit owner before the condominium assessment delinquency began, but notice of the federal tax lien was not recorded until later. The condominium delinquency began before recording of the federal tax lien and continued after such recording. A federal tax lien has priority over an unperfected lien under state law from the time the federal tax lien is assessed. The *Mira* Court cited RCW 64.34.364 (7) of the Condominium Lien Statute for the proposition that “The lien need not be recorded to be perfected.” *Id.*, Section III. C.

With respect to perfected, choate liens, the federal tax lien priority commences upon recording of the federal tax lien. *Id.*, Section III. C. The *Mira* Court went on to hold that the lien for condominium assessments due before recording of the federal tax lien had priority, but that the federal tax lien had priority over the lien for condominium assessments due after recording the federal tax lien. The *Mira* decision is based on RCW 64.34.364(1) and the date the various assessments became due, not when the condominium declaration was recorded. If recording of the declaration controlled, all of the condominium assessment liens would

have priority over the federal tax lien. The decision in *Mira* is completely consistent with Fulbright's position, not Bank of America's argument.

Moreover, application of RCW 64.34.364(7) in the manner proposed by Bank of America would render a portion of RCW 64.34.364(1) meaningless. Bank of America effectively asks the Court to place a period after unit and delete the phrase "from the time the assessment is due". Bank of America is asking the Court to interpret the Condominium Lien Statute as if RCW 64.34.364(1) only said "The association has a lien on a unit for any unpaid assessments levied against a unit." As noted in *G-P Gypsum Corp. v. State of Washington*, "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous". 169 Wn,2d 304, 309, 237 P.3d 256 (citations omitted, 2010).

Contrary to Bank of America's first argument in this appeal, it is clear that the assessment lien subject of the Sheriff's Sale did not exist before May of 2008. Under the clear and unambiguous terms of the Condominium Lien Statute, the 2007 Deed of Trust is not "subsequent in time" to the 2008 assessment lien subject of the Sherriff's Sale.

C. Bank of America's 2007 Deed of Trust Is Not "Subsequent in Time" to the 2008 Assessment Lien as a Matter of Law.

1. Plain Meaning of Condominium Lien Statute and Redemption Statute does not authorize Bank of America Redemption.

Bank of America next argues that even if RCW 64.34.364(7) does not accelerate the existence of the assessment lien in this case, the statutory grant of the super-priority lien (RCW 64.34.364(3)) automatically renders the 2007 Deed of Trust "subsequent in time" to the 2008 assessment lien. Opening Brief, pp. 13, 25-26. Neither the statutory language nor the legislative history contain any statements or language to that effect. While Bank of America makes a mistaken argument for plain meaning when it comes to RCW 64.34.364(7) alone, it would have this Court ignore the plain meaning of the rest of the Condominium Lien Statute and the Redemption Statute to relieve it from the consequences of its failure to respond to the Foreclosure Suit. In other words, Bank of America argues that even though its 2007 Deed of Trust is prior in time to the May 2008 assessment lien subject of the Sherriff's Sale and even though the Redemption Statute only authorizes redemptions by creditors with deeds of trust "subsequent in time" to the lien foreclosed at a sheriff's sale, the Court should torture, construe or rewrite the statues in a manner that permits redemption by Bank of America.

The Washington courts have consistently refused to extend the right of redemption to parties not expressly authorized by statute. In *Fidelity Mutual v. Mark*, the court did not allow a party with an express assignment of an owner's right of redemption to redeem; the assignee was not a successor in interest to the owner because the title interest of the owner was not conveyed to the assignee. 112 Wash.2d 47, 53, 767 P.2d 1382 (1989). In *Graves v. Elliot* the court specifically found that the holder of mortgage recorded prior to the lien foreclosed upon at a sheriff's sale was not entitled to redeem from such sale on his own behalf or on behalf of the owner or judgment debtor. 69 Wn.2d 652, 655 and 657, 419 P.2d 1008 (1966). In *Capital Investment Corp. of Washington v. King County*, the Court held that the naked assignment of a redemptioner's redemption right, without an assignment of the judgment and judgment lien giving rise to the redemption right, did not give the assignee the status or rights of a redemptioner. 112 Wn.App. 216, 228, 47 P.3d 161 (2002). See also *Seelye v. North Pacific Mortgage Co.*, 189 Wash. 297, 65 P.2d 218 (1937).

Rustad Htg. & Plbg Co. v. Waldt is arguably the only exception to the Washington courts' refusal to extend redemptions right beyond the express text of the Redemption Statute. 91 Wn.2d 372, 588 P.2d 1153 (1979). The prior version of the Redemption Statute did not list deeds of

trust along with mortgages and other liens. In *Rustad*, the Court ruled that deeds of trust were a “species” of mortgages under a prior version of the redemption statutes. *Id.* at 376. It is not at all uncommon to use the term “mortgage” to include deeds of trust. See RCW 64.34.020(27). *Rustad* did not disregard any plain, unambiguous language or rewrite any statute as now requested by Bank of America.

2. Enforcing the plain and unambiguous language is consistent with the policy and purpose of the Condominium Lien Statute.

Bank of America argues that no public policy is served by denying it redemption rights. Opening Brief, p. 19. As noted when the super priority for condominium assessments was established,

“As a practical matter, the mortgage lenders will most likely pay the assessments demanded by the association which are prior to its mortgage rather than having the association foreclose on the unit and eliminate the lender’s mortgage lien....”

Washington State Bar Association, Real Property, Probate & Trust Section, Comments to the Washington Condominium Act, Feb. 7, 1990 at 43, n.3. The quoted language makes clear that the drafters expected lenders to pay the lien priority before the sheriff’s sale occurs, not to delay payment for an additional year. Enforcing the Washington redemption statutes as written will encourage that. Relieving Bank of America from the statutory consequences of its failure to do so will not.

As a result of Fulbright's purchase, the Association was paid its entire \$14,381.83 judgment balance following confirmation of the sale and has received thousands of dollars in additional assessment payments since then (CP 369-70). Expanding those entitled to redeem from a sheriff's sale will effectively eliminate third-party bidders' interest in most condominium lien foreclosures. See *U.S. v. Stadium Apts., Inc.*, 425 F.2d 358, 365-66 (9th Cir 1970). Forcing an Association to wait up to a year for payment when a lender ignores an assessment lien foreclosure suit is certainly not in an association's best interest. Fulbright submits that enforcing the statutes as written so that associations are paid sooner rather than later is consistent with the legislative intent behind the condominium super-priority lien.

3. This Court should not assume that redemption was either intended or overlooked.

This Court should not assume the legislature was oblivious to the redemption issue when enacting the Condominium Lien Statute or intended one for Bank of America in this case. A review of the entire statute demonstrates the drafters were quite cognizant of various issues and mechanics involved when foreclosing an assessment lien. RCW 64.34.364(2) exempts an association lien from RCW Ch. 6.13 (homestead provisions). RCW 64.34.364(9) provides for foreclosure in the same

manner as a mortgage under RCW Ch. 61.12, that an association may bid at the foreclosure sale, and that an association can waive its deficiency right to reduce the redemption period. RCW 64.34.364(10) contains the right to a court appointed receiver. RCW 64.34.364(12) provides for pursuit of a personal judgment without foreclosing or waiving lien rights. The legislature could have easily provided redemption rights for lenders eliminated for failure to pay the super-priority lien portion, but did not. There is no reason to presume the legislature intended that a lender who ignored a lien foreclosure suit and failed to pay the limited, six-month priority should then enjoy a redemption right.

In fact, the Washington legislature did not give lenders any reason to assume there would be any redemption period following the foreclosure of a condominium assessment lien. As noted above, the Condominium Lien Statute provides for foreclosure like a mortgage under RCW Ch. 61.12. RCW 61.12.093 allows for the sale of property abandoned by the owner for six months or more without any redemption period. Lenders who neglect to respond to a condominium association's judicial foreclosure action do so at their own peril. It should also be noted that the condominium assessment lien is not the only super-lien where lenders do not have redemption rights. Lenders are not afforded any redemption

rights following a tax foreclosure. RCW 84.64.070 (only minors and incompetents can redeem after a tax foreclosure).

4. The Condominium Lien Statute and Redemption Statute are not absurd or irrational.

Even if this Court assumes the redemption issue was overlooked when the Condominium Lien Statute was adopted, the Washington Supreme Court “has a long history of restraint in compensating for legislative omissions.” *Millay v. Cam*, 135 Wn.2d 193, 203, 955 P. 791 (1998) (citations omitted). The Washington Supreme Court “refrains from adding to, or subtracting from, the language of a statute unless imperatively required to make it rationale.” *Id.* (citations omitted).

The overall statutory scheme in this case has both positive and negative aspects for lenders with deeds of trust recorded before an assessment lien. They benefit by having the assessment lien priority limited to just six months of assessments. That is all they have to pay before a sheriff’s sale in order to avoid the affect of the sale. By doing so, they preserve the priority of their deed of trust from the date recorded. In this case, the priority amount was \$1,866.12 when the Foreclosure Judgment was entered and \$3,027.02 by the time of the Sheriff’s sale, while the entire lien amount was \$14,381.83 (CP 351-52). Over 15 months elapsed between the time Bank of America was served with the

Tanglewood Foreclosure and the resulting Sheriff's sale (*Id.*). The negative aspect is the extinguishment of their deeds of trust, without redemption rights, when they fail to act.

Bank of America argues that Judge Barnett's decision creates two "artificial categories" of subordinate lien holders. *Opening Brief*, p. 19. The legislature, not Judge Barnett, created two classes of subordinate lien holders when it enacted the Condominium Lien Statute: one where an association priority is limited to six months and one not so limited. Deed of trust lenders like Bank of America are all too happy to take advantage of the two classes when they respond to an association foreclosure and pay just the six months before a sheriff's sale occurs. But Bank of America would have this Court ignore the distinction when it fails to respond to an association's lien foreclosure suit. In other words, the two classes are fine when they benefit Bank of America, but not acceptable when they do not.

Payment of the priority amount before the Sheriff's sale is a simple requirement to satisfy. If a lender has a valid legal reason for not responding to a condominium association's judicial foreclosure action, the recourse is a motion to have the default judgment set aside under the applicable Civil Rules. Bank of America makes no such claim in this case. There is nothing irrational about enforcing the Redemption Statute and the Condominium Lien Statute as written, in accordance with their

plain language, when a lender fails to respond to a properly filed and served assessment foreclosure suit. The only absurdity in this case is Bank of America's failure to respond to the Foreclosure Suit in the beginning. Ignoring the plain, unambiguous language of the Redemption Statute and the Condominium Lien Statute for the benefit of a lender, like Bank of America, that fails to respond to an assessment foreclosure action for more than 15 months is not warranted.

5. The lack of "subsequent in time" in other sections of RCW Ch. 6.23 does not support ignoring it in RCW 6.23.010.

Bank of America argues that the use of the word "prior" alone in other portion of RCW Ch. 6.23 supports ignoring the "subsequent in time" text in RCW 6.23.010(1)(b). Opening Brief, p. 21. There is nothing inherent in any of these subsequent provisions that requires ignoring the "subsequent in time" text in RCW 6.23.010(1)(b). A creditor does not even get to these other sections unless it is a qualified redemptioner, which requires satisfying the "subsequent in time" requirement.

RCW 6.23.010(1)(b) confers redemption rights on certain persons described therein, not everyone. It does not address the relative rights among multiple lien holders when there is an authorized redemption. The determination of such rights is not before this Court and will not be affected by the outcome of this case. The lack of more specific text in

later portions of RCW Ch. 6.23 does not warrant ignoring the more specific, plain text in RCW 6.23.010(1)(b). Statutes should be construed in a manner that gives effect to all the language in them. *G-P Gypsum Corp. v. State of Washington*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010); *Lake v. Woodcreek Homeowners Ass'n*, 168 Wn.2d 694, 704, 229 P.3d 791 (2010).

6. Krutz v. Gardner does not support Bank of America's position.

Bank of America argues that *Krutz v. Gardner* supports its position on the interpretation (rewriting) of the Redemption Statute. 25 Wn. 396, 65 P. 771 (1901). Although the Condominium Lien Statute was adopted well after the first adoption of the Redemption Statute, *Krutz* demonstrates that super-priority liens existed when the Redemption Statute was first adopted. *Krutz* concerns a City lien for an improvement assessment, and a mortgage recorded before the assessment lien was established. *Id.* at 397-98. While the mortgage was first in time, the City assessment lien enjoyed a super-priority over the mortgage. *Id.* at 399-400.

Although *Krutz* involved a super-priority lien, it deals with the right to equitable redemption before foreclosure of the assessment lien against the mortgage: *i.e.*, the right to pay off the assessment lien before a foreclosure sale that would extinguish the mortgage lien. *Id.* at 399-400.

Krutz did not involve statutory redemption rights. In fact, all of the relevant actions or events in *Krutz* transpired before the Redemption Statute was first adopted in 1899, although the case was reported later in 1901. Simply put, *Krutz* is not a statutory redemption case and has no bearing on this appeal.

7. The cases from other jurisdictions and secondary authorities cited by Bank of America do not support its position.

The redemption statutes in Idaho and Alaska have the same or similar language to the Washington statute, but neither the Idaho nor Alaska cases cited by Bank of America concern super lien foreclosures or redemption rights following foreclosure of a super lien. The lone Idaho case cited by Bank of America only tangentially touches on redemption issues and does not concern a super lien situation. *Eastern Id. Prod. Credit Assoc. v. Placerton, Inc.*, 100 Idaho 863, 606 P.2d 967 (1980). The language similar to our statute was not remotely involved or at issue.

The Alaska case contains some historical discussion of equitable redemption rights and a reference to the statutes applicable to judicial mortgage foreclosures, which “partially codify” the equitable redemptions right in Alaska Stat. § 09.35.250. *Young v. Embley*, 143 P.3d 936, 941 (Ak. 2006). But the case itself concerned whether a junior lien holder could exercise a statutory right to cure a deed of trust default prior to a

non-judicial trustee's sale. *Id.* at 938 and 943. The Alaska statutory language on the right to cure before a deed of trust sale is ambiguous (silent) on who has the right: just the owner/debtor or other creditors with interest in the property as well. *Id.* at 943, 947. The 2003 lien claim in *Young* arose after the 2002 deed of trust being foreclosed in that case and the statute at issue (Alaska Stat. §34.20.070(b)) does not include "subsequent in time" text or anything like it. *Id.* at 938-939. There was no super-lien or "subsequent in time" requirement remotely at issue in that case. The only reference to the statute cited by Bank of America (Alaska Stat. § 09.35.220 cited in Opening Brief, p. 24) is a statement in endnote 22 that such statute was not applicable to deed of trust foreclosures. *Id.* at 949.

Given the lack of case law on point, Bank of America relies heavily on secondary authorities. *Opening Brief*, pp. 9, 13, 19 and 23. Only the *Comments to the Washington Condominium Act* are particularly relevant to this case. Washington State Bar Association, Real Property Probate and Trust Section, Feb. 7, 1990, *Opening Brief*, p. 13. As discussed earlier (pp. 21-22), this material supports Fulbright. The *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Interest Ownership Act* discusses the condominium super lien in general, but does not address

redemption rights following foreclosure of a condominium super lien.

James L. Winokur, 27 Wake Forest L. Rev (1992); Opening Brief, p. 19.

The other secondary authority cites and quotations are from general discussions, based on the general rule applicable to lien priority issues (first in time, first in right approach) and redemptions in general. 18 William B. Stoebuck and John W. Weaver, *Real Estate: Transactions* §§14.5, 19.19, (2010), *Opening Brief*, pp. 9, 22; 27 Marjorie D. Rombauer, 27 Washington Practice, *Creditor's Remedies – Debtors' Relief* §3.19(a) (2010), *Opening Brief*, pp. 13, 19, 23; Washington State Bar Ass'n, *Washington Real Property Deskbook* §46.15(2) (3d ed. 1996), *Opening Brief*, p. 23. The statements lifted from these sources may seem to support Bank of America's position in this case, but that is only because they are taken out of context. They use "subsequent in time", "subsequent in priority" and "junior lienors" interchangeably. The loose use of this terminology does not matter when a super priority lien is not at issue. It only makes a difference when considering a super priority lien. None of these secondary sources address or consider super priority liens or the application of the redemption statutes to super priority liens. Super priority liens, like the condominium assessment lien, are an exception to the general rules discussed in the secondary authorities cited by Bank of America.

8. Equitable principles do not warrant judicial expansion of statutory redemption rights.

Lastly, Bank of America argues that it should be afforded redemption rights on equitable grounds to protect the prior owner or so that Bank of America can mitigate the loss otherwise resulting from its failure to respond to the Foreclosure Suit. Opening Brief, pp. 24-25. The redemption issue presented in this case does not involve an owner's redemption rights in any way. If an owner has any assets to preserve or protect, the owner can avoid this situation altogether by paying his or her condominium assessments on time and avoiding the foreclosure altogether, or by exercising the owner's statutory redemption rights within any applicable redemption period. Enforcing the Redemption Statute as written will not limit an owner's redemption rights in any way. If an owner does not have the resources to avoid an assessment foreclosure or redeem from one, any remaining liability on an extinguished deed of trust is just theoretical, and subject to discharge in bankruptcy if a creditor foolishly pursues the owner. An owner with resources or assets who simply disregards his or her obligation for condominium assessments and then fails to exercise his or her redemption right does not merit additional protections or concessions beyond those otherwise provided at law.

Furthermore, the equities of the overall circumstances presented in this case do not favor Bank of America. Bank of America had the statutory right and privilege of avoiding the consequences of the Sheriff's Sale by paying only a small portion of the total assessment lien before the Sheriff's Sale took place. Instead, it simply ignored the Foreclosure Suit. There is no Washington authority for using equity to expand statutory redemption rights for the benefit of a negligent lender. Equitable considerations do not warrant judicially rewriting the Redemption Statute or the Condominium Lien Statute to relieve Bank of America from the consequences of its own negligence in ignoring the Foreclosure Suit.

Moreover, equitable considerations are only relevant in equitable redemption cases, not for substantive rights in statutory redemption cases like this one. *Gesa Federal Credit Union v. Mutual Life Ins. Co. of New York*, 105 Wash.2d 248, 254-56, 713 P.2d 728 (1986).

D. Tolling Order Relief Is Not Appropriate.

If it should prevail on the redemption issue, the relief requested by Bank of America includes an order requiring the Trial Court to toll the redemption period and require an accounting. A tolling order would be unnecessary in such event. Bank of America requested an accounting under RCW 6.23.090(2) before the redemption period otherwise expired (CP 204-05). Fulbright declined to provide the accounting and

redemption quote because he does not believe Bank of America has any legal right to redeem (CP 228-29). If this Court should rule that Bank of America is an authorized redemptioner, then RCW 6.23.090(2) automatically extends its redemption period until five days after Fulbright provides the accounting. Fulbright has never denied the automatic statutory extension of the redemption period if Bank of America is an authorized redemptioner (CP 367).

In *Met. Fed. Sav. & Loan Ass'n v. Roberts*, the redemptioner did not request an accounting, but tendered redemption funds before the redemption period expired. 72 Wn.App. 104, 109, 863 P.2d 615 (1993). The tender was refused by the Sheriff and the redemption period expired while the matter was litigated. *Id.* A tolling order was necessary in that case, but not here because RCW 6.23.090(2) applies if Bank of America should prevail in this case.

Under RCW Ch. 6.23, the accounting and other steps for redemption are through the Sheriff's office, not the Trial Court. A simple remand to the Trial Court for further proceedings if and as necessary is all that should be needed if Bank of America should prevail.

V. CONCLUSION

Despite Bank of America's insinuations otherwise, Fulbright has done nothing wrong or inequitable in this matter. Fulbright purchased the

Unit at a public, judicial foreclosure sale in accordance with all applicable law. Fulbright is not in any way responsible for the failure of Bank of America to do what was required under the Condominium Lien Statute to avoid the effect of the Sheriff's Sale, *i.e.*, pay the six-month priority amount. Bank of America had over 15 months to do so. They have no one to blame but themselves for allowing the Sheriff's Sale to extinguish the 2007 Deed of Trust. This Court should affirm Judge Barnett's application of the Redemption Statute and the Condominium Lien Statute in accordance with their plain and unambiguous meaning. Because the 2007 Deed of Trust is not "subsequent in time" to the 2008 assessment lien, Bank of America is not an authorized redeptioner.

RESPECTFULLY SUBMITTED this 12th day of December,
2011.

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CERTIFICATE OF MAILING

I certify that I mailed A COPY OF THE FOREGOING Brief of Respondent Michael Fulbright to the Appellant's attorneys listed below, at the addresses listed below, postage prepaid, on December 12, 2011.

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

Signed at Bellevue, Washington, on December 12, 2011.


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