

FILED
Court of Appeals
Division I
State of Washington
7/9/2019 9:20 AM

FILED
SUPREME COURT
STATE OF WASHINGTON
7/9/2019
BY SUSAN L. CARLSON
CLERK

Replaces petition filed 7/8/19 at 4:58 pm

97399-7

Case No. 77771-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JOSE DIAZ,

Appellant,

v.

ERIC HSUEH.; EASTSIDE FUNDING, LLC. & PACIFIC CENTER
CONDOMINIUM OWNERS ASSOCIATION; and all other persons
unknown claiming any right, title, estate, lien or interest in the real
estate described in the complaint herein,

Respondents.

AMENDED APPELLANT JOSE DIAZ'S
PETITION FOR REVIEW

Melissa A. Huelsman, WSBA #30935
Attorney for Jose Diaz
Law Offices of Melissa A. Huelsman, P.S.
705 Second Avenue, Suite 606
Seattle, WA 98104
206-447-0103

TABLE OF CONTENTS

I. IDENTITY OF PETITIONERS.....1

II . CITATION TO COURT OF APPEALS DECISION.....1

III. ISSUES PRESENTED FOR REVIEW.....1

IV. STATEMENT OF THE CASE.....1

V. STANDARD ON REVIEW.....8

VI. ARGUMENT.....8

VII. CONCLUSION.....15

ATTACHMENT A.....Unpublished Opinion, April 22, 2019

**ATTACHMENT B.....Order Denying Motion for Reconsideration,
.....June 6, 2019**

TABLE OF AUTHORITIES

Cases

<i>BAC Home Loans Servicing, L.P. v. Fulbright</i> , 328 P.3d.....	7, 9, 14
<i>Bank of America v. Owens</i> , 173 Wn.2d 40, 49 (2011)	10, 11
<i>Diaz v. Northstar Trustee, supra</i>	14
<i>Grand Investments v. Savage</i> , 49 Wn.App. 364, 369 (1987)	11, 12
<i>Jose Diaz v. Northstar Trustee, LLC, et al.</i> , Case No. 18-2-05864-3.....	13
<i>Linden Park Homeowners Ass’n v. Mears</i> , Wash. Ct. of App. Case No. 72659-5-I (Oct. 15, 2015)	12
<i>Liu v. U.S. Bank</i> , 179 A.3d 871, 878 (D.C. Cir. 2018)	13
<i>Mears vs. Condo Group</i> , Case No. 72659-5-I, Wash. Ct. App., (Div. I, October 19, 2015)	14
<i>Morgan Court Owners Association v. Deutsche Bank</i> , Wash. Ct. of App., Case No. 71913-1-I (June 29, 2015)	13
<i>Morgan Court Owners Association vs. Deutsche Bank</i> , Case No. 71913-1- I, Wash. Ct. App. (Div. I, June 29, 2015)	14
<i>Singly v. Warren</i>	11, 12
<i>Singly v. Warren</i> , 18 Wash. 434, 438-39, 51 P. 1066 (1898)	11
<i>Swanson v. Graham</i> , 27 Wash.2d 590, 597, 179 P.2d 288 (1947)	10

Statutes

RCW 4.56.190.....	10
RCW 61.24, <i>et seq</i>	8,11
RCW 61.24.040(1)(b)(vi)	6
RCW 61.24.040(6).....	6
RCW 61.24.040(10).....	6
RCW 64.34, <i>et seq</i>	8, 10
RCW 64.34.030	13
RCW 64.34.364	5
RCW 64.34.364(2)(b)	5, 7, 9
RCW 64.34.364(2)(b) and (3).....	7
RCW 64.34.364(3).....	passim

I. IDENTITY OF PETITIONERS

Petitioner Jose Diaz is the owner of the subject property and the Plaintiff and Appellant in the underlying litigation.

II. CITATION TO COURT OF APPEALS DECISION

Mr. Diaz seeks review of the decision of Division I of the Court of Appeals in this case (hereinafter the “Decision”), Case No. 77771-8-I. The unpublished Opinion was filed on April 22, 2019 (Att. A) and Motion for Reconsideration was denied on June 6, 2019 (Att. B).

III. ISSUES PRESENTED FOR REVIEW

1. The correct manner in which to interpret the requirements of the plain language describing the six-month priority lien in RCW 64.34.364(3).

2. Whether the six-month priority lien description in RCW 64.34.364(3) allows for manipulation of the timing of the payment by a condominium association and junior lien holders to the detriment of innocent Sheriff’s Sale bidders.

IV. STATEMENT OF THE CASE

Division I’s Opinion is predicated upon an absolute refusal to require adherence to the plain language of the statute and this Court’s binding decisions. The Court refused to allow oral argument on the case and instead rendered a decision that did not meaningfully address any of Mr. Diaz’ arguments, allowing for a decision which will be used to deprive Mr. Diaz and other unsuspecting purchasers at condominium foreclosure auctions to

be defrauded by subsequent non-judicial foreclosure by former lienholders whose interests were extinguished by the Association judicial foreclosure.

Procedural History

<u>Date</u>	<u>Filing/Description</u>
3/6/17	Mr. Diaz filed a complaint in King County Superior Court on March 6, 2017 in Case No. 17-2-05160-8 against Eric Hsueh (“Hsueh”), Eastside Funding, LLC (“Eastside”), and Pacific Condominium Owners Association (“Association”). CP 1-4.
3/6/17	Complaint related to Mr. Diaz’ purchase of a condominium at a judicial foreclosure auction in a separate lawsuit initiated by the Association against the property owner, Case No. 15-2-08119-5 SEA and his rights resulting therefrom.
8/1/17	Eastside filed its Answer and Counter-Claim. CP 5-8.
8/1/17	Hsueh filed his Answer and Counter-Claim. CP 9-12.
8/24/17	Mr. Diaz filed Motion for Summary Judgment and Declaration in support thereof by his attorney Russell Odell. CP 13-83.
9/26/17	Defendants Hsueh and Eastside filed a Motion for Summary Judgment and Declarations of Brian Jessen and Michael Malnati in support thereof. CP 84-133.
10/11/17	Association filed MSJ Response and Declaration of Kylee Klineberger in support thereof. CP 134-153.
10/26/17	Mr. Diaz filed a Response to Defendants’ Motion for Summary Judgment and Declaration of Russell Odell. CP 154-192.
10/27/17	Hsueh and Eastside Funding filed a Response to Mr. Diaz’ Motion for Summary Judgment. CP 193-197.
11/3/17	Hsueh and Eastside Funding filed a Reply in Support of their Motion for Summary Judgment. CP 198-200.

- 11/3/17 Mr. Diaz filed a Reply/Rebuttal in Support of his Motion for Summary Judgment. CP 201-233.
- 11/9/17 The Court entered an Order Granting Summary Judgment to Defendants Hsueh and Eastside and Denying Mr. Diaz' Motion for Summary Judgment. CP 234-235.
- 12/8/17 Hsueh and Eastside filed a Motion for Attorney Fees under CR 11 and RCW 4.84.185 with a supporting Declaration of Michael Malnati. CP 239-270.
- 12/11/17 Mr. Diaz filed his Notice of Appeal. CP 271-272.
- 12/15/17 Mr. Diaz filed a Reply in Opposition to Defendants' Motion for Attorney Fees. CP 275-280.
- 12/19/17 Hsueh and Eastside Funding filed a Reply in Support of their Motion for Attorney Fees. CP 281-284.
- 1/19/18 The Court entered an Order Granting the Defendants' Motion for Attorneys' Fees. CP 236-238.
- 5/14/18 Mr. Diaz filed his Opening Brief in the Appeal.
- 7/27/18 Respondents filed their Answering Brief.
- 9/17/18 Mr. Diaz filed his Reply Brief.
- 4/18/19 Non-Oral Argument Date before the Court of Appeals, Division I panel.
- 4/22/19 Court of Appeals, Division III, issued Opinion in favor of Defendants.
- 5/13/19 Mr. Diaz filed Motion for Reconsideration.
- 6/6/19 Court of Appeals, Division III, issued Order denying Mr. Diaz's Motion for Reconsideration.

A. The Junior Lienholders' Liens were Extinguished by the Judicial Foreclosure and Subsequent Sheriff's Sale.

The relevant facts are clear:

- (1) Complaint filed by the Association on **April 8, 2015**, alleged that the property owner, John Post, had been delinquent since April 2014; Case No. 15-2-08119-5 SEA (“Foreclosure case”). CP 102, ¶3.4. Defendants included Post’s first mortgage lienholder, through servicing agent First Horizon.
- (2) The Association and First Horizon entered into a Stipulation and Order of Dismissal relating to payments made to the Association by First Horizon **less than two months** after the case was filed.
- (3) When the Stipulation and Order of Dismissal was entered on **June 22, 2015**, the arrears totaled fifteen (15) months. CP 108-109.
- (4) Final judgment entered on **October 9, 2015**. CP 111-115.
- (5) The Association’s ledger after entry of the Final Judgment on **October 9, 2015** makes clear that assessment amounts for the months of November and December 2015 and January 2016 were added to the total amount due. CP 55. The only credits to the account come from receivership rental income during the litigation. *Id.* Thus, First Horizon did **not** pay the six-month priority lien prior to the Sheriff’s Sale.
- (6) **The Sheriff’s Sale occurred on January 8, 2016**. CP 43-

44.

(7) First Horizon's payment to the Association made more than **eight months** prior to the Sheriff's Sale date on **January 8, 2016**, did **not** constitute payment of the six month priority lien under RCW 64.34.364(3) because it was not made on amounts that "would have become due during the six months **immediately** preceding the date of the sheriff's sale in an action for judicial foreclosure by [] the association . . . RCW 64.34.364(3) (emphasis added). The Association's ledger makes this abundantly clear. CP 55.

(8) The Association's lien was prior to any mortgage liens (RCW 64.34.364(2)(b)) for said assessments. RCW 64.34.364(3).

(9) The Sheriff's Notice of Return on Sale of Real Property was signed confirming the same. The Clerk sent its Notice of Return on Sale of Real Property and the Sheriff's Notice was recorded on **January 15, 2016**. CP 46-47.

(10) Mr. Diaz was the successful bidder at the Sheriff's Sale and paid the Sheriff's Office his bid amount of \$12,181.64. CP 37-38.

(11) Unbeknownst to Mr. Diaz, before the Sheriff's Sale even occurred, First Horizon caused to be initiated a non-judicial foreclosure which scheduled a sale date of **February 26, 2016** – approximately one month after the Sheriff's Sale. CP 60-71. Notably, the Association and all

other lienholders received notice of the non-judicial foreclosure sale, but there was no notice provided to “Occupants” of the subject Property included in the Notice of Trustee’s Sale as required by statute. RCW 61.24.040(1)(b)(vi). *Id.* Perhaps if proper Notice to Occupants had been delivered by the foreclosing trustee, Mr. Diaz might have become aware of what was happening after his purchase of the Property. Similarly, the Notice of Continuances of the sale to **March 11, 2016** and then to **March 25, 2016** were only mailed to the property owner, which is consistent with the statute. RCW 61.24.040(10) (previously RCW 61.24.040(6)). CP 72-75.

(12) When the Trustee’s Deed upon Sale was recorded on **April 7, 2016**, Mr. Diaz’ interest in the subject real Property was illegally terminated.

The Association’s decision to stipulate to the dismissal of First Horizon from its lawsuit within the first two months after filing was based upon a payment for amounts that did **not “become due during the six months immediately preceding the date of the sheriff’s sale”** as required by the statute. RCW 64.34.364(3) (emphasis added). In June 2015, consistent with the plain language of the statute, the Association only had a six-month super priority lien for the **six months of assessments due BEFORE June 2015**. *Id.* Nevertheless, the Association and First

Horizon stipulated that “Plaintiff agrees that said payment and conditions above satisfy Plaintiff’s lien priority with respect to the deeds of trust, and that the deeds of trust are fully superior to Plaintiff’s lien...” CP 58. This Stipulation was done in express contravention of the binding case law and statutory requirements. *See, BAC Home Loans Servicing, L.P. v.*

Fulbright, 328 P.3d 895, 899. The facts of this case make clear that the Association and First Horizon conspired together to violate the law, and their actions have been inappropriately endorsed by the Court of Appeals.

It is important to remember that the Association relied upon RCW 64.34.364 to allow for and facilitate the sale of the Property to Mr. Diaz, an unsuspecting bidder who relied upon the requirements of the plain language of the statute in making his bid and acquiring the Property. As it simultaneously actively sought to avoid its requirements to provide a benefit to First Horizon and to deprive Mr. Diaz of the rights which he acquired at the Sheriff’s Sale, following confirmation of the sale on **January 15, 2016**. CP 37-38.

Once the Sheriff’s Sale was complete, the lienholders whose liens were junior to the Association’s six-month priority lien were extinguished under the plain language of the statute. RCW 64.34.364(2)(b) and (3). In spite of express statutory provisions that provide for extinguishment of these liens, Division I entered a decision which permits condominium

associations to conspire with other lienholders to avoid the provisions of the very statute which those associations use to foreclose their liens, to the express detriment of innocent purchasers such as Mr. Diaz.

V. STANDARD ON REVIEW

Mr. Diaz maintains that the Appellate Court's Opinion is in conflict with this Court's binding decisions surrounding how to interpret the varying lien rights involved in judicial foreclosures and the **applicable** statutes. RCW 64.34, *et seq.* Further, the issues in this case are a matter of substantial public interest because of the effect that improper statutory interpretation will have upon innocent purchasers at Sheriff's Sales resulting from manipulation of statutory provisions by those entities with superior knowledge and power. It will also likely chill bidding by innocent third parties once they realize that they are purchasing properties which will they lose shortly after acquisition through non-judicial foreclosures of the property for which they will not receive notice.

VI. ARGUMENT

A. Division I's Decision is not supported by Washington law.

1. Standard on Review at the Court of Appeals.

Division I maintained that it engaged in a *de novo* analysis under Civil Rule 56 as to whether summary judgment was appropriate, but Mr. Diaz maintains that the Court completely ignored its mandate. Instead of

properly reviewing the facts presented to the trial court and the plain language of the statute, the Court endorsed manipulations of the statute by the Association and a lienholder to benefit themselves

B. The COA’s Opinion is in direct contravention of the plain statutory language and binding decisions rendered by this Court.

The Condominium Act splits the liens for unpaid association assessments into two liens. One lien is junior to the mortgages and the other lien is senior to all mortgages. Under RCW 64.34.364(2)(b), the “condominium association’s lien is not prior to ‘a mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent.’” *BAC Home Loans Servicing, L.P. v. Fulbright*, 328 P.3d at 899. “The Condominium Act does not stop there but extends the exception further. RCW 64.34.364(3) provides that an association’s lien shall be prior to mortgages on the unit recorded after the declaration but before the assessments sought to be enforced became delinquent, “which would have become due during the six months immediately preceding the date of a sheriff’s sale.” “In other words, the statute first alters the typical priorities, but then a condominium association regains its priority to collect six months’ worth of unpaid assessments” in a judicial foreclosure. *Id.* at 899-900.

1. The Stipulated Dismissal Order did not change the statutory requirements.

The Dismissal Order entered into between the Association and First Horizon is **not** a statutory lien because it is not a monetary award for a “sum certain.” Not every judgment of the Superior Court creates a “judgment lien.”

A judgment may create either a statutory lien or an equitable lien on the judgment debtor's property. Under RCW 4.56.190, "[t]he real estate of any judgment debtor, and such as the judgment debtor may acquire, not exempt by law, shall be held and bound to satisfy any judgment of the ... superior court ... of this state." Our case law makes clear that, in order to create a statutory lien, the monetary award must be for a sum certain. See, e.g., Swanson v. Graham, 27 Wash.2d 590, 597, 179 P.2d 288 (1947) (" In order to create a statutory lien, there must be a judgment for a specific amount.").

Bank of America v. Owens, 173 Wn.2d 40, 49 (2011). The Dismissal Order is limited to having its terms apply **only** to the stipulating parties, the Association and First Horizon. CP 57-58. “The terms and conditions stipulated to herein will continue to bind and inure to the stipulating parties and to their successors and assigns.” Yet, it simultaneously seeks to restructure the lien rights of the stipulating parties even though not permitted under the law (RCW 64.34, *et seq.*) and directly impacting persons who are not parties to the stipulation, including Mr. Post, the property owner, and Mr. Diaz, who was the successful bidder at the Sheriff’s Sale. *Id.*

“Where a statutory lien is unavailable, a court may also create an

equitable lien. Such an order must be express.” *Owens*, 173 Wn.2d at 49. Nothing in the Dismissal Order creates an equitable lien for anyone and instead, falsely reads that First Horizon retains its lien rights in **two separate deeds of trust**, in spite of the fact that it did **not** pay the assessments that became due six months **prior** to the Sheriff’s Sale date and instead made payments before June 2015 on assessments overdue at that time. RCW 64.34.364(3).¹ CP 55.

The Court of Appeals held in *Grand Investments v. Savage*, 49 Wn.App. 364, 369 (1987), quoted to *Singly v. Warren*, 18 Wash. 434, 438-39, 51 P. 1066 (1898) and its holding that a purchaser at sheriff’s sale was a bona fide purchaser because no lis pendens or supersedeas bond was filed. Further, a sheriff’s deed issued to purchaser despite superior court’s orders later being reversed. Just like in *Singly v. Warren*, Mr. Diaz is a “stranger to the record” and “it would be unjust to require such purchasers to suffer loss on account of errors of the trial court of which they had no knowledge, and which they were nowise instrumental in producing.” *Id.* This analysis is particularly instructive to this Court, as this is precisely

¹ It is also notable that the Dismissal Order makes clear that payment to the Association was made “by or on behalf of First Horizon” (¶3) and it related to First Horizon being a “party in interest to **two** deeds of trust” (emphasis added) (¶2). There are no provisions under any Washington real estate law that allows a “party in interest” to a deed of trust to have the power to do anything affecting that lien. *See*, RCW 61.24, *et seq.* and 64.34, *et seq.* Further, there is nothing in RCW 64.34.364(3) which allows an entity to make **one payment** of the alleged six month priority lien in order to avoid an association’s lien on behalf of **two separate** lienholders.

the position that Mr. Diaz finds himself in. The Association and First Horizon conspired to have the trial court enter a stipulated order which expressly contravened the requirements of the statute to benefit themselves to the detriment of future bidders, like Mr. Diaz. In particular First Horizon took steps to actively deceive future bidders into purchasing the Property at auction, only to deprive them on title to that property at a future date.

B. The Court of Appeals Continues to Issue Unpublished Opinions on this Issue and This Court Must Determine the Correct Interpretation of the Law.

There have been other unpublished Opinions issued by the Court of Appeals which provide guidance on interpretation of the statute irrespective of the fact that they are unpublished. The decision in *Linden Park Homeowners Ass'n v. Mears*, Wash. Ct. of App. Case No. 72659-5-I (Oct. 15, 2015) did not address the impact of the *Grand Investments* or *Singly v. Warren* decisions and therefore has limited precedential value, but is consistent with the Opinion in this case, which ignores the plain language of the statute and other case law. Six months prior to writing the *Linden Park* decision, Judge Spearman authored another unpublished case holding that the mortgage bank slept on its rights when it failed to bid at the Sheriff's Sale foreclosing a condominium lien, and again slept on its rights when it failed to redeem the property. *See, Morgan Court Owners*

Association v. Deutsche Bank, Wash. Ct. of App., Case No. 71913-1-I (June 29, 2015). In both unpublished cases, Judge Spearman did not have the benefit of the published decision in *Liu v. U.S. Bank*, which held that a Condominium Association must foreclose its super-priority lien under language identical to RCW 64.34.030. *Liu v. U.S. Bank*, 179 A.3d 871, 878 (D.C. Cir. 2018) (holding anti-waiver language “precludes a condominium association from exercising its super-priority lien while also preserving the full amount of the Bank's unpaid lien.”).

The Court of Appeals in this case did have the benefit of the *Liu* decision, but was apparently disregarded by the Court.

C. There was No Basis for Entering Civil Rule 11 Sanctions against Mr. Diaz and His Counsel as Other Trial Courts Have Held in His Favor.

Other trial court which have looked at these issues have entered orders which contradict the holding made by the trial court in this case and the Court of Appeals’ decision. In *Jose Diaz v. Northstar Trustee, LLC, et al.*, Case No. 18-2-05864-3, King County Superior Court Judge Sandra Widlan granted partial summary judgment to Mr. Diaz, finding that his title to the subject property was superior to that of the foreclosing trustee and the successful bidder at the subsequent non-judicial foreclosure. A true and correct copy of the Order Granting Plaintiff’s Partial Summary Judgment is attached to the Request for Judicial Notice as Exhibit “1”.

When the Defendants in the *Northstar Trustee* case sought discretionary review, it was denied by the Commissioner in Division I and she used the following language in her Order:

Mr. Diaz moved for partial summary judgment, arguing in part that in January 2015 when the Bank paid condominium dues, it reestablished its lien as senior only as to the dues then owed. Mr. Diaz relied on RCW 64.34.364(3) (a condo association has a lien on a unit for unpaid assessments, the lien is prior to all other liens on a unit (with certain exceptions), and the lien also is prior to mortgages to the extent of common expenses that would have become due during the six months immediately preceding the date of the sheriff's sale in an action for judicial foreclosure by either the association or a mortgagee), and *BAC Home Loans Servicing, LP v. Fulbright*, 180 Wn.2d 754, 328 P.3d 895 (2014) (when an association records its declaration, it establishes its lien priority to secure future obligations to make payments of condo assessments even though payments are not actually due at the time the declaration is recorded). The trial court granted Mr. Diaz's motion for partial summary judgment, ruling that his title is superior to North Star's and U.S. ROF's interest.

Diaz v. Northstar Trustee, supra, Order Denying Motion for Discretionary Review, attached to the Request for Judicial Notice as Exhibit "2". *See also*, Unpublished Opinions entered in the following cases: Exhibit "3", *Mears vs. Condo Group*, Case No. 72659-5-I, Wash. Ct. App., (Div. I, October 19, 2015); and Exhibit "4", *Morgan Court Owners Association vs. Deutsche Bank*, Case No. 71913-1-I, Wash. Ct. App. (Div. I, June 29, 2015).

Given that other judges interpreting the same statutory language

correctly found that requiring a superior lienholder to make payment of the amount that “**would become due during the six months immediately preceding the date of the sheriff’s sale**” RCW 64.34.364(3) (emphasis added) did not allow for the same result determined in this case, it is clear that Mr. Diaz did not violate Civil Rule 11. This Court is reminded that there were no appellate decisions specifically dealing with this issue at the time that the sanctions were entered, and Mr. Diaz is engaged in arguing for a statutory interpretation not expressly addressed by the Courts. Advocating for a new legal theory, especially one which is based upon the plain language of a statute, cannot constitute an abuse of civil proceedings.

Not only is it clear that Mr. Diaz should have prevailed at the trial court and at the Court of Appeals based upon the plain language of the statute, but it is also clear now that this litigation was not frivolous. This Court must accept review of this decision and provide the citizens of Washington with the proper method of interpreting the plain meaning of the relevant statutory language. This is especially true in light of the very significant implications that these unpublished decisions have upon the rights of innocent bidders at Sheriff’s Sales.

VII. CONCLUSION

Mr. Diaz respectfully requests that the Supreme Court accept review of this Opinion, and some other similar Opinions issued by

Division I, because they have resulted in a body of case law, irrespective of whether they are unpublished or not, upon which trial courts can and will rely to deprive innocent Sheriff's Sale purchasers from being defrauded.

Respectfully submitted this 8th day of July, 2019.

LAW OFFICES OF MELISSA A.
HUELSMAN, P.S.

/s/ Melissa A. Huelsman
Melissa A. Huelsman, WSBA 30935
Attorney for Appellant Jose Diaz
705 Second Avenue, Suite 606
Seattle, WA 98104
P (206) 447-0103 / Fax (206) 673-8220
Email:
mhuelsman@predatorylendinglaw.com

CERTIFICATE OF SERVICE

I, Tony Dondero, declare under penalty of perjury as follows:

1. I am over the age of eighteen years, a citizen of the United States, not a party herein, and am competent to testify to the facts set forth in this Declaration.

2. That on Tuesday, July 9, 2019, I caused the foregoing document attached to this Certificate of Service plus any supporting documents, declarations and exhibits to be served upon the following individuals via the methods outlined below:

<p>Michael C. Malnati REED LONGYEAR MALNATI & AHRENS PLLC 801 Second Avenue, Suite 1415 Seattle, WA 98104-1517 mmalnati@reedlongyearlaw.com Attorney for Eric Hsueh and Eastside Funding, LLC, Respondents</p>	<p><input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Other: <u>Regular U.S. mail, postage prepaid</u></p>
<p>Valerie Farris Oman Condominium Law Group, PLLC 10310 Aurora Avenue N Seattle, WA 98133-9228 valerie@condolaw.net Attorney for Pacific Center Condominium Owners Association, Respondents</p>	<p><input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Other: <u>Regular U.S. mail, postage prepaid</u></p>
<p>Russell M. Odell Attorney at Law 251 153rd Pl SE Bellevue, WA 98007-5236 (206) 708-5768 russellodell@msn.com Attorney for Appellant</p>	<p><input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Other: <u>Regular U.S. mail, postage prepaid</u></p>

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

Dated this Tuesday, July 9, 2019, at Seattle, Washington.

A handwritten signature in black ink, appearing to read "Tony Dondero". The signature is written in a cursive style with a large initial "T" and "D".

Tony Dondero, Paralegal

ATTACHMENT A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOSE DIAZ ,

Appellant,

v.

ERIC HSUEH, EASTSIDE FUNDING,
LLC & PACIFIC CENTER
CONDOMINIUM OWNERS
ASSOCIATION; and all other persons or
parties unknown claiming any right, title,
estate, lien or interest in the real estate
described in the complaint herein,

Respondents.

No. 77771-8-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: April 22, 2019

DWYER, J. — Jose Diaz appeals the dismissal of his lawsuit seeking to quiet title to property he purchased at a sheriff's sale after a condominium association foreclosed on a lien. However, the property Diaz purchased was subject to the mortgage holder's superior lien and his interest was eliminated when the mortgage holder foreclosed on that lien. Because no genuine issues of material facts exist as to whether the mortgage holder protected its senior lien position, the trial court properly granted summary judgment. The court also acted within its discretion in imposing sanctions under CR 11. We affirm.

I

On April 2, 2015, the Pacific Center Condominium Owners Association (the Association) commenced a foreclosure action against condominium owner John Post, seeking to foreclose on a lien for delinquent assessments. The

Association also named First Horizon Home Loan Corporation as a defendant because First Horizon held a beneficial interest in two deeds of trust on the property.

Approximately three months later, on June 22, 2015, the trial court entered an order dismissing First Horizon from the Association's lawsuit and confirming the superior lien position of its deeds of trust. The "Stipulated Order Dismissing Defendant First Horizon" provides, in relevant part:

3. The sum of \$1,842.89 has been paid to Plaintiff by or on behalf of First Horizon. This amount equals six months of assessments as contemplated by RCW 64.34.364(3).
4. [The Association] agrees that said payment and conditions above satisfy [the Association's] lien priority with respect to the deeds of trust, and that the deeds of trust are fully superior to [the Association's] lien unless the unit is sold at a sheriff's sale and the unit is subsequently redeemed.
5. The terms and conditions stipulated to herein shall continue to bind and inure to the stipulating parties and to their successors and assigns.

The Association proceeded to judicially foreclose on its lien for the debt remaining after the payment of eight months' of assessments by First Horizon. In October 2015, the court entered an order of default and decree of foreclosure as to the two remaining defendants—the condominium owner and an unrelated junior lien holder. Approximately six months later, on January 11, 2016, a sheriff's sale took place. Jose Diaz placed the highest bid at \$12,181.84 and obtained a sheriff's deed to real property. That deed conveyed to Diaz the "right, title and interest" in the property of the defendants. The court entered an order

confirming the sheriff's sale and disbursing the proceeds to satisfy the Association's lien. The Association filed a full satisfaction of the judgment.

Meanwhile, while the Association's lien foreclosure action was pending, First Horizon initiated proceedings to foreclose on a deed of trust recorded in 2007. On October 27, 2015, approximately three months before Diaz purchased the property at the sheriff's sale, Quality Loan Service Corp., acting on behalf of First Horizon, recorded a notice of a trustee's sale. The trustee's sale was scheduled for February 26, 2016.

The trustee's sale eventually took place on March 25, 2016, approximately two months after the sheriff's sale. Eric Hsueh was the successful purchaser with a bid of \$217,000. A trustee's deed was recorded shortly thereafter, on April 7, 2016. Ten months after Hsueh purchased the property at the trustee's sale, Diaz recorded a sheriff's deed to real property on January 26, 2017.

In March 2017, Diaz filed the lawsuit at issue in this appeal against Hsueh, the purchaser at the trustee's sale, Eastside Funding, LLC, an entity that provided funding to Hsueh, and the Association. Diaz sought to quiet title to the property. Diaz's complaint alleged that a portion of the proceeds from the sheriff's sale was applied to assessments that accrued during the six-month period preceding the sheriff's sale and that "unpaid condominium assessments for the six months preceding the Sheriff's sale are afforded super-priority over any and all mortgage liens including the first and second mortgages on the subject property." Diaz contended that all preexisting liens were subordinate to the Association's lien and were extinguished by the judicial foreclosure.

Hsueh and Eastside Funding answered the complaint. Eastside Funding claimed to have no interest in the property because Hsueh repaid the bridge loan shortly after the sale and Eastside released its security interest. Both defendants asserted that First Horizon's deed of trust was superior to the Association's lien and was, therefore, unaffected by the foreclosure and sheriff's sale, and that Diaz's interest in the property was eliminated by the foreclosure of the deed of trust. The defendants also asserted that Diaz's lawsuit was frivolous in view of the court orders entered in the Association's lawsuit and recorded real estate documents.

The parties filed cross motions for summary judgment.¹ Following a hearing, the court granted the defendants' motion, denied Diaz's motion, and dismissed the complaint. The court also awarded \$5,000 in attorney fees as a sanction against Diaz and his attorney.²

II

This court reviews summary judgment orders de novo. King v. Rice, 146 Wn. App. 662, 668, 191 P.3d 946 (2008). Summary judgment is appropriate only if, viewing the facts in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Scrivener v. Clark Coll., 181 Wn.2d 439, 444, 334 P.3d 541 (2014). "By filing cross motions for summary judgment, the parties concede

¹ It does not appear that the Association filed an answer or moved for summary judgment, but the Association appeared in the case and filed a response in opposition to Diaz's motion for summary judgment.

² The defendants sought an award of more than \$11,000 in fees.

there were no material issues of fact.” Pleasant v. Regence BlueShield, 181 Wn. App. 252, 261, 325 P.3d 237 (2014).

The Condominium Act, chapter 64.34 RCW, creates a scheme of lien priority that departs from the generally applicable “first in time” rule. See Homann v. Huber, 38 Wn.2d 190, 198, 228 P.2d 466 (1951). The statute carves out an exception to the usual lien priority rule by giving a condominium association’s lien for common assessments a limited priority over any preexisting recorded mortgage. RCW 64.34.364; Summerhill Vill. Homeowners Ass’n v. Roughley, 166 Wn. App. 625, 628-29, 270 P.3d 639, 289 P.3d 645 (2012). This exception, often referred to as a “super priority” lien, is limited to six months of common assessments based on the association’s periodic budget. Summerhill, 166 Wn. App. at 629. A valid foreclosure of a senior lien or mortgage extinguishes the junior interests of holders named as defendants. U.S. Bank of Wash. v. Hursey, 116 Wn.2d 522, 526, 806 P.2d 245 (1991); Worden v. Smith, 178 Wn. App. 309, 319-20, 314 P.3d 1125 (2013). This being the case, the official comments to the Condominium Act recognized that, in most cases, mortgage lenders would pay the assessments required to satisfy the “super priority” lien, “rather than having the association foreclose on the unit and eliminate the lender’s mortgage lien.” Summerhill, 166 Wn. App. at 632 (emphasis omitted) (quoting 2 SENATE JOURNAL, 51st Leg., Reg. Sess., App. A at 2080 (Wash. 1990)).

RCW 64.34.364 governs liens for assessments and provides, in relevant part:

(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. A lien under this section is not subject to the provisions of chapter 6.13 RCW.

(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, . . . 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*

(Emphasis added.)

Diaz contends that because First Horizon paid the super priority lien amount on or before June 22, 2015, and the sheriff's sale did not take place until January 2016, First Horizon's payment could not satisfy the requirements of RCW 64.34.364(3). He argues that according to statute, the amount of the six months' of assessments could not be calculated, much less paid, until the date the sheriff's sale was set because the statute requires the mortgage holder to pay the assessments that were due during the six months that immediately preceded the sheriff's sale. Diaz contends that the statute does not allow the mortgage holder to pay the priority lien amount in advance, as First Horizon did in this case.

Regardless of the merits of his interpretation of the statute, Diaz cannot avoid the legal effect of the court's orders entered in the Association's lawsuit.

Those orders established that (1) First Horizon paid six months' of assessments as contemplated by RCW 64.34.364, (2) the payment satisfied the Association's super priority lien and protected First Horizon's superior lien position, and (3) First Horizon was entitled to dismissal and was unaffected by the decree of foreclosure of the Association's lien. Diaz argues that the Association and First Horizon entered into an agreement that violated the terms of the statute. He argues extensively that the court is not bound by the parties' stipulations as to matters of law. But the trial court's orders in the condominium lawsuit have the same binding and preclusive effect, whether or not they are based upon stipulations. And this appeal is not an appropriate vehicle to challenge an order entered in the Association's lawsuit.

The property interest that Diaz purchased at the sheriff's sale was the interest of the defendants—the condominium owner and a junior lienholder. And court records established that those interests were encumbered by First Horizon's deeds of trust, and the deeds of trust were not extinguished by the foreclosure of the Associations' lien for unpaid assessments.

Neither Summerhill nor BAC Loan Servicing, LP v. Fulbright, 180 Wn.2d 754, 328 P.3d 895 (2014), advances Diaz's argument. In those cases, the mortgage holders did not appear in the condominium association's foreclosure lawsuit or take steps to protect their lien priority position. The issue was whether the mortgage holders had a statutory right of redemption.

III

Diaz contends that even assuming First Horizon's advance payment could satisfy the requirements of RCW 34.64.364(3), he was entitled to notice of the foreclosure of First Horizon's deed of trust. Diaz claims he was not notified of the foreclosure even though he owned the property "during the non-judicial foreclosure sale process." Diaz cites RCW 61.24.040, which provides, among other things, that a notice of a trustee's sale must be mailed to the grantor and others who are known to have an interest in the property. It is undisputed that Diaz had no interest in the property when the notice of the trustee's sale was issued.

In a similar vein, Diaz argues that the Association and First Horizon were required to record their stipulation because it was a "conveyance of real property" under RCW 65.08.070. Even if the stipulation had been recorded, he contends it would have had no legal effect because it omitted a legal description as required by RCW 65.04.030(1). Diaz provides no authority that supports the position that the parties' agreement with regard to the payment of assessments and satisfaction of the "super priority" portion of the Association's lien was a "conveyance" within the meaning of RCW 65.08.070.

IV

Diaz argues that the court's decision to impose sanctions is unsupported by the record and the law.

We review sanctions under an abuse of discretion standard. Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d

1054 (1993). “A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds.” Fisons Corp., 122 Wn.2d at 339. The rules providing for sanctions are ““designed to confer wide latitude and discretion upon the trial judge to determine what sanctions are proper in a given case.”” Finsons Corp., 122 Wn.2d at 339 (quoting Cooper v. Viking, 53 Wn. App. 739, 742-43, 770 P.2d 659 (1989)).

CR 11 is intended to “deter *baseless* filings and to curb abuses of the judicial system.”³ Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). To warrant CR 11 sanctions, a court filing must “lack a factual or legal basis.” Bryant, 119 Wn.2d at 220. In addition, a court cannot impose CR 11 sanctions “unless it also finds that the attorney who signed [the filing] failed to conduct a *reasonable inquiry* into the factual and legal basis of the claim.” Bryant, 119 Wn.2d at 220. Courts should “avoid using the wisdom of hindsight and should test the signer’s conduct by inquiring what was reasonable to believe at the time the [filing] was submitted.” Bryant, 119 Wn.2d at 220.

The primary basis for Diaz’s lawsuit and motion for summary judgment is the claim that First Horizon’s payment of delinquent assessments did not satisfy the Association’s super priority lien under the statute and, therefore, First

³ CR 11(a) provides, in relevant part:

The signature of a party or of an attorney [on a filing] constitutes a certificate by the party or attorney that . . . to the best of the party’s or attorney’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; If a pleading, motion, or legal memorandum is signed in violation of this rule, the court . . . may impose . . . an appropriate sanction . . . including a reasonable attorney fee.

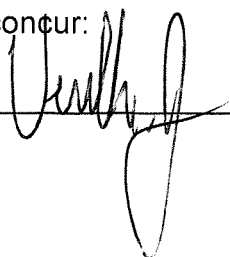
Horizon's deed of trust was subordinate to the Association's lien. Both of these issues were fully resolved by valid and final orders entered in the Association's lawsuit. As such, the court concluded that his complaint and motion for summary judgment were not "well grounded in fact and were not warranted by law."

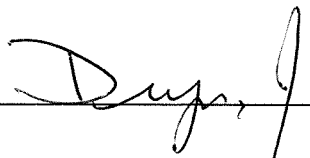
The court determined that it would not have imposed sanctions based solely on the filing of the complaint. However, the court also found that after neglecting to conduct a reasonable inquiry into prior court orders and documents prior to filing the lawsuit, counsel then failed to voluntarily dismiss the case after being informally counseled by defense counsel and provided with the controlling orders and documents. Instead, counsel "proceeded to seek summary judgment, racking up fees for defendant and wasting [the] court's time." The court's findings support the award and its decision to impose sanctions was based on tenable grounds.

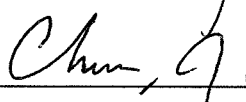
Hsueh and Eastside Funding request attorney fees on appeal. The respondents devote a single sentence to the request, citing "the same reasons" and the "same authority" under which fees were awarded below. RAP 18.1 "requires more than a bald request for attorney fees on appeal." Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998). We decline to award fees on appeal.

Affirmed.

We concur:







ATTACHMENT B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOSE DIAZ ,

Appellant,

v.

ERIC HSUEH, EASTSIDE FUNDING,
LLC & PACIFIC CENTER
CONDOMINIUM OWNERS
ASSOCIATION; and all other persons or
parties unknown claiming any right, title,
estate, lien or interest in the real estate
described in the complaint herein,

Respondents.

No. 77771-8-1

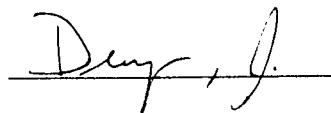
DIVISION ONE

ORDER DENYING MOTION
FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

A handwritten signature in cursive script, appearing to read "Dery, J.", is written over a horizontal line.

LAW OFFICES OF MELISSA HUELSMAN

July 09, 2019 - 9:20 AM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 77771-8
Appellate Court Case Title: Jose Diaz, Appellant v. Eric Hsueh, et al, Respondents
Superior Court Case Number: 17-2-05160-8

The following documents have been uploaded:

- 777718_Other_20190709091817D1824218_9382.pdf
This File Contains:
Other - Amended Request for Judicial Notice
The Original File Name was Amended Request for Judicial Notice FINAL.pdf
- 777718_Petition_for_Review_20190709091817D1824218_1509.pdf
This File Contains:
Petition for Review
The Original File Name was Amended Petition for Review to Supreme Court FINAL .pdf

A copy of the uploaded files will be sent to:

- mmacdonald@reedlongyearlaw.com
- mmalnati@reedlongyearlaw.com
- russellodell@msn.com
- valerie@condolaw.net

Comments:

The Amended Petition for Review with the TOA added is filed here along with the amended and updated Req. for Judicial Notice

Sender Name: Tony Dondero - Email: paralegal@predatorylendinglaw.com

Filing on Behalf of: Melissa Ann Huelsman - Email: Mhuelsman@predatorylendinglaw.com (Alternate Email: paralegal@predatorylendinglaw.com)

Address:
705 Second Ave.
Suite 601
Seattle, WA, 98104
Phone: (206) 447-0103

Note: The Filing Id is 20190709091817D1824218