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SUPREME COURT
STATE OF WASHINGTON
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No. 97399-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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.

ANSWER TO PETITION FOR REVIEW

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Eastside Funding, LLC

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I. INTRODUCTION

The decision of the Court of Appeals presents no issues of substantial public interest, and merely affirmed the dismissal of a frivolous lawsuit on summary judgment and an award of sanctions against Appellant and his counsel.

In his lawsuit, Appellant / Plaintiff Jose Diaz (“Diaz” or “Appellant”) sought to quiet title in a condominium where he was the successful bidder at a sheriff’s sale. Unfortunately for Diaz, prior to obtaining a sheriff’s deed, his interest in the condominium was eliminated at a nonjudicial trustee’s sale that foreclosed a senior lien deed of trust. The facts are undisputed and are evidenced by court documents and orders from a condominium assessment lien foreclosure lawsuit, and recorded instruments documenting the nonjudicial foreclosure process and sale. Respondents Eric Hsueh (“Hsueh”) and Eastside Funding, LLC (“Eastside”) were granted summary judgment dismissing Plaintiff’s Complaint on the basis that the undisputed facts clearly showed that Plaintiff’s interest in the subject condominium was eliminated by the trustee’s sale at which Hsueh was the successful purchaser. The trial court also awarded five thousand dollars (\$5,000.00) in attorney’s fees as sanctions against Diaz and his counsel to Hsueh

and Eastside under CR 11 and RCW 4.84.185—the frivolous action statute.

II. STATEMENT OF ISSUES

1. Whether this Court should deny the petition for review when the Appellants have failed to establish that any of the four tests set forth in RAP 13.4(b) have been met?

2. Whether this Court should deny the petition for review when the Appellants have failed to present an issue of substantial public interest, as the undisputed facts evidenced by court orders and recorded real estate documents dictated the dismissal of a frivolous lawsuit on summary judgment and an award of sanctions against Appellant and counsel?

III. STATEMENT OF THE CASE

A. Initiation of Condominium Lawsuit to Foreclose Delinquent Assessments.

On April 2, 2015, Pacific Center Condominium Owner’s Association (“Condo Plaintiff”) filed a foreclosure lawsuit (“Condo Lawsuit”) to collect delinquent assessments on real property commonly known as 321 10th Ave, S., Unit 615, Seattle, WA (the “Condo”). CP 100–06. Named in the Condo Lawsuit was First Horizon Home Loan Corporation (“First Horizon”). As alleged in

the Condo Lawsuit, First Horizon held the beneficial interest in the first and second lien deeds of trust on the Condo. CP 101.

B. Payment of Super Priority Lien and Dismissal of First Horizon from Condo Lawsuit with Prejudice.

On June 22, 2015, a stipulated court order was entered by the trial court dismissing First Horizon from the Condo Lawsuit with prejudice. CP 108–09. The stipulations, which were incorporated into the trial court’s order, stated that First Horizon had paid the Condo Plaintiff an amount equal to six months of assessments as contemplated by RCW 64.34.364(3) and that this payment satisfied the Condo Plaintiff’s lien priority with respect to First Horizon’s deeds of trust. First Horizon was dismissed from the Condo Lawsuit with prejudice. The stipulated court order specifically provided that First Horizon’s “deeds of trust are fully superior to Plaintiff’s lien unless the unit is sold at sheriff’s sale and the unit is subsequently redeemed.” CP 108–09. A sheriff’s sale was eventually held but no redemption rights were exercised. CP 109.

C. Decree of Foreclosure Entered against Condo Owner and Junior Lien Bail Bond Company.

Consistent with the stipulated order referenced in section B above, the decree of foreclosure in the Condo Lawsuit affected only

the owner of the condominium unit and a Bail Bond company that had a junior lien. CP 111–15. First Horizon was no longer a party to the Condo Lawsuit.

D. Nonjudicial Trustee’s Sale noted on First Horizon’s First Lien Deed of Trust.

On October 27, 2015, a Notice of Trustee’s Sale was recorded on behalf of First Horizon, under King County Recorder’s No. 20151027001764. CP 117–20. As stated in the Notice of Trustee’s Sale, the deed of trust being foreclosed was recorded on May 22, 2007, under King County Recorder’s No. 20070522002358. The Trustee’s Sale was scheduled for February 26, 2016. At the time the Notice of Trustee’s Sale was issued and recorded, Plaintiff Diaz had no interest, record or otherwise, in the Condo.

E. Sheriff’s Sale held in Condo Lawsuit.

The Condo Plaintiff continued with its foreclosure for sums remaining unpaid after payment of the six months of assessments by First Horizon. As evidenced by the Sheriff’s Deed to Real Property ultimately delivered to Plaintiff Diaz, a sheriff’s sale was held on January 11, 2016. Plaintiff Diaz was the high bidder at

twelve thousand one hundred and eighty-one dollars and eighty-five cents (\$12,181.85). CP 131–33.

F. Diaz Condo Purchase Subject to Recorded Notice of Lis Pendens.

Following the Sheriff's Sale, the Condo Plaintiff recorded a Release of Lis Pendens, that released that certain Notice of Lis Pendens that had been filed with regard to the Condo Lawsuit on April 3, 2015, under King County Recorder's No. 20150403001065. CP 142. When Diaz purchased the Condo at the sheriff's sale in January of 2016, his purchase was subject to the recorded Notice of Lis Pendens.

G. Trustee's Sale held on First Horizon Deed of Trust with Hsueh as Successful Purchaser.

The Trustee's Sale on the First Horizon deed of trust was held on March 26, 2016. Defendant Hsueh was the successful purchaser with a bid of two hundred and seventeen thousand dollars (\$217,000.00). A Trustee's Deed Upon Sale was recorded on April 7, 2016, under King County Recorder's No. 20160407001331. CP 122–24. Eastside Funding was a lender who provided financing to Hsueh to bid at the sale, and no longer held an interest in the Condo when sued by Diaz. CP 95-98.

H. Sheriff's Deed issued to Plaintiff Diaz.

On January 26, 2017, Plaintiff Diaz recorded a Sheriff's Deed to Real Property under King County Recorder's No. 20170126000969. CP 131-33. No one exercised any rights of redemption. CP 109. The recording of the Sheriff's Deed was ten months after the First Horizon Trustee's Sale was held and the Condo purchased by Hsueh.

I. Frivolous Litigation.

At the inception of this Lawsuit, Diaz and his counsel were provided with documentary evidence that showed that their Complaint had significant factual errors and was without legal merit and were given multiple opportunities to dismiss the lawsuit without an award of fees and costs. CP 247-64; CP 266-67. Plaintiff and his counsel elected to proceed with their lawsuit and filed and contested motions for summary judgment.

J. Award of Attorney Fees.

The Court awarded these Respondents five thousand dollars (\$5,000.00) in attorney fees as sanctions under CR 11 and RCW 4.84.185, and made the following findings:

i. Plaintiff's Complaint, Plaintiff's Motion for Summary Judgment and motion documents submitted in opposition

to Defendant's Motion for Summary Judgment were not in conformity with the requirements of CR 11. This court would not sanction Mr. Odell if it was just the complaint filed in violation of CR 11.

ii. The Complaint and summary judgment motion documents filed by Plaintiff were not well grounded in fact and were not warranted by law.

iii. Plaintiff's counsel Russell Odell failed to make a reasonable inquiry into the factual and legal basis for the Complaint and summary judgment motion documents filed by Plaintiff, specifically the failure to make an inquiry into the pleadings and court orders filed in the condominium foreclosure lawsuit in King County Cause No. 15-2-08119-5. Mr. Odell was informally counseled by defense counsel, failed to voluntarily dismiss this matter, and then proceeded to seek summary judgment, racking up fees for defendant and wasting this Court's time.

iv. Plaintiff's Complaint and summary judgment motion documents were frivolous and advanced without reasonable cause. CP 236-38.

K. Trial Court Affirmed on Appeal.

The unpublished opinion of the Court of Appeals and the order denying Appellant's motion for reconsideration are attached to Appellant's petition for review.

IV. LAW AND ARGUMENT

A. The Undisputed Facts, Confirmed by Court Order, Show Unequivocally that after Payment of the Super Priority Lien, the First Horizon Deeds of Trust were in Senior Lien Priority Positions on the Condo.

The merits of this lawsuit basically begin and end with the *Stipulated Order Dismissing Defendant First Horizon* entered in the Condo Lawsuit. Even a cursory review of the Condo Lawsuit pleadings would have revealed that the interest Plaintiff Diaz purchased at the sheriff's sale was junior and subordinate to the deed of trust liens of First Horizon.

The Stipulated Order had already determined all the issues that Diaz sought to litigate in his lawsuit. Did First Horizon pay the six months of assessments to satisfy the super priority lien contemplated by RCW 64.34.364(3)? Answer: Yes. Were First Horizon's deed of trust liens fully superior to the Condo Association lien yet to be foreclosed? Answer: Yes. Was First Horizon dismissed from the Condo Lawsuit with prejudice so that

its deed of trust liens could not possibly be affected by the subsequent Condo lien foreclosure? Answer: Yes.

B. Appellant has failed to establish that any of the tests under RAP 13.4(b) exist.

A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

In the present case, the Petitioners fail to offer any argument or explanation why the Court of Appeals' decision (1) conflicts with a decision of the Supreme Court; (2) conflicts with another decision of the Court of Appeals; (3) is a significant question of law under the Constitution of the State of Washington United States; or (4) involves an issue of substantial public interest.

Appellant attempts to frame his version of the interpretation of the super priority lien statute as a matter of

substantial public interest. This argument ignores the reality that, in this case, the issue of whether the six months of assessments were paid to satisfy the super priority lien contemplated by RCW 64.34.364(3) had been decided and incorporated into a valid and final court order that Diaz either failed to look at or failed to understand. The petition for review attempts to portray Diaz as an “innocent purchaser”, when the record establishes that Diaz was an “uninformed purchaser” who failed to do the necessary due diligence required of an investor electing to participate in the high-risk field of foreclosure sale bidding.

RCW 64.34.364 balances the competing interests of mortgage lenders versus condominium associations by giving a limited priority to association liens for delinquent assessments over the lien of a prior recorded mortgage. This limited priority (“super priority lien”) is limited to six months of assessments.

RCW 64.34.364 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, 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, the date of a trustee's sale in a nonjudicial foreclosure by a mortgagee, or the date of recording of the declaration of forfeiture in a proceeding by the vendor under a real estate contract.

(Emphasis added)

First, under subsection (2)(b), the statute provides that the condominium's lien for unpaid assessments does not have priority over mortgages on the unit recorded before the date on which the assessment sought to be enforced becomes delinquent. Subsection (3) then carves out a limited exception to this priority rule. The statute grants priority over the prior mortgage, limited to six months

of common assessments based on the association's common periodic budget that would be due prior to a foreclosure sale.

The *Stipulated Order Dismissing Defendant First Horizon* tracks exactly how this statutory scheme works in practice. That Order established the following: (1) Payment by First Horizon satisfied the super priority lien contemplated by RCW 64.34.364(3); (2) The First Horizon deeds of trust were "fully superior" to the lien of the Condo Plaintiff; and (3) First Horizon was dismissed from the Condo Lawsuit with prejudice.

First Horizon was no longer a party in the Condo Lawsuit and the condominium foreclosure could not affect its prior deed of trust liens. *Valentine v. Portland Timber & Land Holding Co.*, 15 Wn.App 124, 128, 547 P.2d 912 (1976). In *Davis v. Bartz*, 65 Wash. 395, 401, 118 P. 334 (1911), the court held that a prior party who has a record interest is not affected by a lien foreclosure action to which it is not made a party. The decree of foreclosure in the Condo Lawsuit confirmed this obvious conclusion: The Condo Plaintiff was not seeking and did not foreclose the senior lien interests of First Horizon who was no longer a party to the lawsuit.

First Horizon's actions were fully consistent with the statutory scheme created by the legislature. The Court of Appeals

in *Summerhill Vill. Homeowner Ass'n v. Roughly*, 166 Wn. App. 625, 648, 289 P.3d 645 (2012) set forth the legislative history of the super priority lien statute:

The official comments to RCW 64.34.364 reveal the expectation of the legislature:

As a practical matter, 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. (Citing 2 *Senate Journal*, 51st Leg. Reg. Sess., App A at 2080 (Wash. 1990).

Without argument or analysis, Appellant Diaz contends that the Stipulated Order was in contravention of binding case law, citing *BAC Home Loans Servicing, LP v. Fulbright*, 180 Wn. 2d 754, 328 P.3rd 895 (2014). That contention is simply wrong. Unlike First Horizon, who took affirmative steps to protect its interests, the senior lien lender in the *BAC Home Loans* case did not. As the Court in *BAC* noted: "Because of an internal error, Bank of America did not appear. On June 24, 2009, the superior court entered a default judgment and foreclosure decree against Lewis and Bank of America." *Id.* at 757. The issue in *BAC* was

whether Bank of America had statutory redemption rights. That is not at issue in this case as First Horizon protected its lien priority position, and was dismissed from the condominium lawsuit with prejudice after having the lien priority of its deeds of trust confirmed by court order. Appellant has not and cannot cite any legal authority that supports his argument that the First Horizon deeds of trust were subordinate to the condominium lien or were affected in any way by the sheriff's sale.

The statute does not require that the six months of payments has to be paid on the eve of one of the triggering events described in the statute. The assessments due are based on a budget adopted by the association. The "which would have been due" language in the statute clearly contemplates payment in advance. Foreclosure sales are fluid events and can be moving targets. What if a senior lien lender paid the six months of assessments within the six months prior to a scheduled foreclosure sale and then that sale was continued for some reason? Plaintiff would argue that they would have to pay it again? That isn't what the statute says, the argument defies common sense and most importantly, it flies in the face of the express language in the Stipulated Order which provided in the

clearest of terms that First Horizon paid the super priority lien in full.

The argument of Diaz boils down to the contention that the statute does not allow a mortgage holder to pay the priority lien amount in advance. Respondents believe that argument to be wrong, but as the Court of Appeals noted in its opinion:

“Regardless of the merits of his interpretation of the statute, Diaz cannot avoid the legal effects of the court’s orders entered in the Association’s lawsuit.”

B. The Undisputed Facts show that the Interest of Diaz was extinguished at the nonjudicial trustee’s sale where Hsueh was the successful purchaser.

Having been dismissed from the Condo Lawsuit and having its senior lien priority established by court order, First Horizon proceeded with a non-judicial deed of trust foreclosure on its first lien deed of trust under the Deed of Trust Act, RCW 61.24. At the time the First Horizon foreclosure notices were issued, Plaintiff Diaz had no interest, record or otherwise, in the Condo. He would not bid at the sheriff’s sale for approximately another three months. Plaintiff Diaz had, at a minimum, constructive notice of the recorded Notice of Trustee’s Sale under the Recording Act, chapter RCW 65.08. A properly recorded instrument provides the world

with constructive notice of its existence. The recording acts operate to charge subsequent purchaser with constructive notice of all instruments of record in the chain of title. *Honefenger v. Green*, 145 Wash. 39, 42, 258 P. 840 (1927).

Because the trustee's sale was noted months prior to Plaintiff Diaz acquiring any interest in the Condo, he was not entitled to any notices from the foreclosure trustee. He is charged with notice of the trustee's sale. He failed to protect his interest prior to the trustee's sale and that interest was extinguished.

C. Plaintiff Diaz is not a bona fide purchaser, failed to make a reasonable inquiry as to the condition of title, and at a minimum, had constructive notice of the court's orders and records in the Condo Lawsuit.

The bona fide purchaser doctrine provides that a good faith purchaser for value who is without actual or constructive notice of another's interest in the real property has superior interest in the property. *Levien v. Fiala*, 79 Wn.App. 294, 298, 902 P.2d 170 (1995). However, if the purchaser has knowledge or information that would cause an ordinarily prudent person to inquire further, and if such inquiry, reasonably pursued would lead to the discovery of title defects or of equitable rights of others regarding the property, then the purchaser has constructive knowledge of everything the

inquiry would have revealed. *Albice v. Premier Mortg. Services of Washington, Inc.* 174 Wn.2d 560, 573, 276 P.3d 1277 (2012).

Here, the court record was clear that First Horizon took the steps to retain first lien priority rights. The Stipulated Order was filed months before the Sheriff's Sale took place. Any ordinarily prudent person intending to bid at a Sheriff's sale would examine the court file to learn what the person would actually be bidding on.

There was also a recorded Notice of Lis Pendens in place well before the subject Sheriff's Sale. By virtue of the recorded Lis Pendens, when Diaz elected to bid at the Sheriff's Sale, he was charged with constructive notice of the court orders and records filed in the Condo Lawsuit to the same extent as if he was a party. RCW 4.28.320.

D. The Trial Court's Award of Attorney Fees as sanctions was not an abuse of discretion and does not present an issue of substantial public interest.

Abuse of discretion is the standard of review for a violation of CR 11. *Cooper v. Viking Ventures* 53 Wn.App 739, 770 P.2d 659 (1989). If a trial court sanction does not reflect that a sanction was manifestly unreasonable or based on untenable grounds, the sanction should be upheld. *Sarvis v. Land Resources, Inc.* 62

Wn.App 888, 815 P.2d 840 (1991), review denied, 118 Wn.2d 1020, 827 P.2d 1012 (1992).

Faced with an unambiguous Court order that essentially decided the merits of his lawsuit, Diaz chose to argue to the trial court that First Horizon's deed of trust were somehow subordinate to the Condo lien and were somehow eliminated at the Sheriff's Sale.

Even a cursory review of the condominium foreclosure case file would have alerted a reasonable person, and certainly an attorney that the Complaint that was filed in this action was baseless as to the facts and the law. At the inception of the Diaz lawsuit, these Respondents provided Plaintiff and counsel with both the documentation and the analysis that spelled out how the Diaz's interest was eliminated by the senior lien deed of trust foreclosure. The facts are undisputed and the court orders in the condominium foreclosure lawsuit speak for themselves.

Plaintiff and counsel went to great lengths to create an argument to avoid what has already been decided by court order in the condominium lawsuit: the super priority lien was paid, the deed of trust liens were fully superior to the condominium lien for assessments, and the deed of trust lender was dismissed from that lawsuit with prejudice.

To get around the court orders in the condominium lawsuit, Plaintiff argued that even though the deed of trust holder was dismissed from the lawsuit with prejudice with its lien priority established, the deed of trust lien was still subject to the condominium foreclosure sale. Plaintiff and counsel represented to the trial court as a statement of fact that the order confirming the sheriff's sale "specifically names First Horizon" as a defendant whose interest was foreclosed at the sheriff's sale. CP 157. This representation was false. Only the Condo Owner and the Bail Bond Company were specifically named in the decree of foreclosure. CP 111-115. Diaz based this statement on the fact that First Horizon was still in the caption of the lawsuit pleadings. CP 157. Diaz also argued that "As a result of the sheriff's sale, under the statute, the deeds of trust were reprioritized and in that instant First Horizon Home Loan and All City Bail Bond became a subordinate junior lienholder whose lien interests were extinguished." CP 161. The "Still in the Caption" argument and the "Reprioritization" theory had no legal merit.

An award of attorney fees of five thousand dollars (\$5,000.00) was an appropriate sanction against Plaintiff's counsel for the CR 11 violations for bringing and opposing the summary

judgment motions. For the same reasons, fees were warranted under RCW 4.84.185 because the Plaintiff's action was frivolous and advanced without reasonable cause. The Court of Appeals ruling upholding the award of sanctions under these circumstances presents no issue of substantial public interest.

V. CONCLUSION.

The petition for review should be denied as this case and Court of Appeals decision involves no issues of substantial public interest. All the issues litigated by Diaz were decided before he bid at the sheriff's sale.

DATED this 7 day of August, 2019.

REED LONGYEAR MALNATI &
AHRENS, PLLC

By 

Michael C. Malnati, WSBA #13577
Counsel for Respondent Hsueh and Eastside
Funding, LLC

No. 97399-7

SUPREME COURT OF THE
STATE OF WASHINGTON

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.

CERTIFICATE OF SERVICE

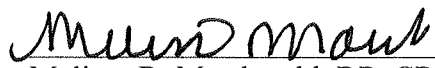
I declare under penalty of perjury, under the laws of the State of Washington, that on August 7, 2019, I caused true and correct copies of the RESPONDENTS' ANSWER TO PETITION FOR REVIEW, and this Certificate of Service, to be served to the parties and counsel of record as follows:

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DATED this 7th day of August, 2019



Melissa R. Macdonald, RP, CRP
Paralegal to Michael C. Malnati

REED LONGYEAR MALNATI AND AHRENS

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