Replaces request for judicial notice
filed 7/9/19 at 8:00 am

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.

APPELLANT'S AMENDED REQUEST FOR JUDICIAL NOTICE

Melissa A. Huelsman, WSBA #30935
Attorney for Jose Diaz
Law Offices of Melissa A. Huelsman, P.S.
705 Second Avenue, Suite 601
Seattle, WA 98104
206-447-0103

Appellant Jose Diaz, by and through his attorney, Melissa A. Huelsman, Law Offices of Melissa A. Huelsman, P.S., hereby requests that the Court take judicial notice pursuant to ER 201 of the following:

Exhibit 1: *Jose Diaz v. Northstar Trustee, LLC, et al.*, Case No. 18-2-05864-3, Order Granting Plaintiff's Partial Summary Judgment

Exhibit 2: *Diaz v. Northstar Trustee,* Order Denying Motion for Discretionary Review

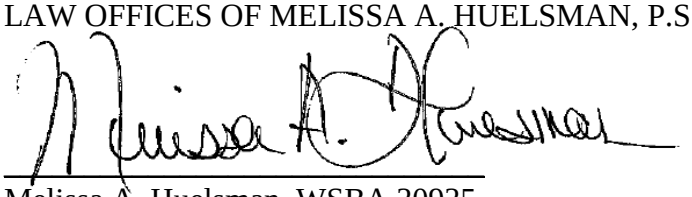
Exhibit 3: *Mears vs. Condo Group,* Case No. 72659-5-I, Wash. Ct. App., (Div. I, October 19, 2015);

Exhibit 4: *Morgan Court Owners Association vs. Deutsche Bank,* Case No. 71913-1-I, Wash. Ct. App. (Div. I, June 29, 2015).

Exhibit 5: *Liu v. U.S. Bank,* 179 A.3d 871, 878 (D.C. Cir. 2018)

Respectfully submitted this July 9, 2019

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



Melissa A. Huelsman, WSBA 30935
Attorney for Appellant Jose Diaz
705 Second Avenue, Suite 601
Seattle, WA 98104
Telephone: (206) 447-0103
Facsimile: (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:

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	□ Legal Messenger ☒ Electronic Mail □ Federal Express □ Other: Regular U.S. mail, postage prepaid
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	□ Legal Messenger ☒ Electronic Mail □ Federal Express □ Other: Regular U.S. mail, postage prepaid
Russell M. Odell Attorney at Law 251 153rd Pl SE Bellevue, WA 98007-5236 (206) 708-5768 russellodell@msn.com Attorney for Appellant	□ Legal Messenger ☒ Electronic Mail □ Federal Express □ Other: Regular U.S. mail, postage prepaid

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.

Tony Dondero, Paralegal

EXHIBIT 1

Honorable Judge Sandra Widlan
Hearing re-noted: July 13, 2018 at 10:00 a.m.

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

JOSE DIAZ

Plaintiff,

v.

North Star Trustee, LLC and U.S. ROF II and all other persons or parties unknown claiming any right, title, estate, lien or interest in the real estate described in the complaint herein;

Defendants.

No. 18-2-05864-3 SEA

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

~~(proposed)~~ SW

This matter came regularly before the undersigned Judge on Plaintiff's Motion for Partial Summary Judgment. In considering this Motion, the Court heard oral argument and reviewed the following documents:

1. Plaintiff's Motion for Summary Judgment;
2. Defendant's Reply to Motion for Summary Judgment and Cross Motion for Summary Judgment;
3. Declarations and exhibits filed in the above captioned case;
4. Plaintiff's Responses in Support of Plaintiff's Motion for Summary Judgment
5. All of the pleadings, declarations, and exhibits filed in this case. SW
~~6.~~

Russell M . Odell
Attorney at Law
251 – 153rd Place Southeast
Bellevue, WA 98007
Phone/ Fax: (425) 653-3693

IT IS ORDERD ADJUDGED AND DECREED that Plaintiff's Motion for Partial Summary Judgment is granted.

Jose Diaz title is subject to Roseberg Avenue Condominium Association's Declarations as recorded under King County Recording No. 20061114001215 and any amendments thereto.

Jose Diaz's title is superior to defendants North Star Trustee's and U.S. ROF II's interest and all other persons or parties claiming any right, title, estate, lien or interest in the following real property located in King County, Washington described as follows:

UNIT 1-107, ROSEBERG, LLC, A CONDOMINIUM, SURVEY MAP AND PLANS RECORDED IN VOLUME 224 OF CONDOMINIUMS, PAGE(S) 92 THROUGH 99, INCLUSIVE; CONDOMINIUM DECLARATION RECORDED UNDER RECORDING NUMBER(S) 20061114001215 AND AMENDMENTS THERETO, IN KING COUNTY,.WASHINGTON.

ASSESSOR'S PROPERTY TAX PARCEL NUMBER: 742427-0070-07;

Common Address: 11915 ROSEBURG AVENUE S UNIT 107, SEATTLE. WA 98168

DATED IN OPEN COURT this 13th day of July, 2018

Honorable Judge Sandra Widlan

Presented by:

//S//
Russell M. Odell, WSBA# 31287
Attorney for Jose Diaz, Plaintiff

Approved as to form:

Scott D. Crawford, WSBA# 34978
Attorney for North Star Trustee, LLC and U.S. ROF II, Defendants

Russell M . Odell
Attorney at Law
251 – 153rd Place Southeast
Bellevue, WA 98007
Phone/ Fax: (425) 653-3693

ZIEVE BRODNAX & STEELE LLP

August 06, 2018 - 3:14 PM

Filing Affidavit of Service

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	Case Initiation
Trial Court Case Title:	Diaz Vs North Star Trustee Et Ano
Trial Court Case Number:	18-2-05864-3
Trial Court County:	King County Superior Court
Signing Judge:	Sandra Widlan
Judgment Date:	07/13/2018

The following documents have been uploaded:

- AFS_Affidavit_of_Service_20180806151134D1584155_3298.pdf
  This File Contains:
  Affidavit of Service
  The Original File Name was Diaz - Decl of Service of Notice of Appeal.pdf
- AFS_Other_20180806151134D1584155_4136.pdf
  This File Contains:
  Other - Order Granting Partial SJ to Plaintiff
  The Original File Name was Order granting SJ to Plaintiff on Quiet Title.pdf

A copy of the uploaded files will be sent to:

- russellodell@msn.com

Comments:

Sender Name: Scott Crawford - Email: scrawford@zbslaw.com
Address:
11335 NE 122ND WAY STE 105
KIRKLAND, WA, 98034-6933
Phone: 206-209-0375 - Extension 551

Note: The Filing Id is 20180806151134D1584155

EXHIBIT 2

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

December 20, 2018

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russellodell@msn.com

CASE #: 78779-9-I
Jose Diaz, Respondent v. North Star Trustee, LLC, et al, Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on December 20, 2018, regarding Petitioner's Motion for Discretionary Review:

> Defendants/petitioners North Star Trustee, LLC and U.S. ROF II Legal Title Trust 2015-1 seek discretionary review of a July 13, 2018 trial court order granting partial summary judgment for plaintiff/respondent Jose Diaz ruling that his title to the subject condominium is superior to North Star and U.S. ROF. Review is denied.
>
> The property at issue is a condominium known as Roseburg Avenue South #107 in Seattle, Washington. In 2007 a deed of trust was recorded memorializing a loan of $132,000.00 to Tatyana Jensen, former owner of the condo. The beneficiaries were Bank of America NA (successor in interest to BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, LP) and Mortgage Electronic Registration Systems, Inc. (MERS). When Ms. Jensen failed to pay her condo assessment dues, Roseburg Avenue Condominium Association began a foreclosure action. The Bank and MERS were named as defendants, along with a junior lienholder. On September 4, 2012, the trial court entered a default order as to the Bank and MERS when they failed to appear and an order/decree of foreclosure that the Bank's and MERS' lien was inferior and subordinate to condo association's lien and was foreclosed except for any right of redemption. MDR Appendix B.

On January 11, 2013, the court entered a stipulation and agreed order of dismissal as between the condo association and the Bank/MERS. The order provides that the Bank holds a lien on the condo under the original deed of trust, the Bank has tendered to the condo association the super priority lien amount of $1,164.00 (6 months x $194 monthly condo dues), and the association acknowledged that paying this amount reestablished the deed of trust as senior to the lien being foreclosed by the association. The order dismissed the Bank and MERS from the foreclosure action with prejudice. MDR Appendix C. On January 29, 2013, the court entered a default judgment and order of foreclosure decree. The decree awarded a default judgment to the condo association against Ms. Jensen, ordered that the lien may be foreclosed and the property sold at a sheriff's sale, that the rights of all defendants are inferior and subordinate to the association's lien subject to the one year right of redemption. MDR Appendix D.

No party sought to redeem the property. On November 3, 2015, the sheriff issued a notice of sale.

On January 15, 2016, the condo was sold at a sheriff's sale pursuant to a judicial foreclosure action. Jose Diaz, as the highest bidder, purchased the condo for $17,571.21. ADR Appendix 7. Again no party sought to redeem the property. On August 23, 2017, the order confirming sheriff's sale and deed to Mr. Diaz were filed.

In November 2017, U.S. ROF II, as the assignee/successor in interest of the deed of trust from Bank of America, through North Star, sought to foreclose under chapter 61.24 RCW. ADR Appendix 3.

In March 2018, Mr. Diaz filed a complaint against U.S. ROF and North Star for damages, quiet title and to enjoin the foreclosure. Mr. Diaz asserted, among other things, that any claims U.S. ROF and North Star may have against Ms. Jensen by virtue of a deed of trust for a debt owed could not be enforced against the condo now owned by Mr. Diaz and that the attempted wrongful foreclosure action is in violation of the Consumer Protection Act.

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 mortagee), 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.

North Star and U.S. ROF seek discretionary review under RAP 2.3(b)(1), obvious error that renders further proceedings useless, and (b)(2), probable error that substantially alters the status quo or substantially limits their freedom to act. RAP 2.3(b)(2) is not applicable here. For the court to grant interlocutory review, petitioners must meet the very strict standard of RAP 2.3(b)(1).

They have not done so. They have not demonstrated that the trial court committed obvious error in granting partial summary judgment for Mr. Diaz and ruling that his title is superior to North Star's and U.S. ROF's interest. Moreover, North Star and U.S. ROF cannot show that further proceedings are useless. The only claim remaining for trial is Mr. Diaz's CPA claim. Trial is set for March 2019. Any appeal must come from a final judgment.

Therefore, it is

ORDERED that discretionary review is denied.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

c: Hon. Sandra Widlan

EXHIBIT 3

LINDEN PARK HOMEOWNERS ASSOCIATION, a Washington Non-Profit Corporation, Plaintiff,

v.

DUSTIN M. MEARS, an individual and JANE DOE or JOHN DOE MEARS, an individual, Spouses or domestic partners, and the marital or quasi marital community composed thereof; and BANK OF AMERICA, N.A., a federally chartered banking association, Defendants.

CONDO GROUP, LLC, Intervening Plaintiff/Appellant

v.

BANK OF AMERICA, N.A., a federally chartered banking association, and DOES 1 through 10, Intervening Defendants/Respondent

No. 72659-5-I

Court of Appeals of Washington, Division 1

October 19, 2015

UNPUBLISHED OPINION

Spearman, C.J.

The issue in this case is whether the successful bidder at a foreclosure auction is a bona fide purchaser ("BFP") when he is an experienced investor and the opening bid is substantially lower than the judgment amount. The trial court found that the discrepancy between the amount of the judgment and the opening bid created a duty of inquiry and, because the purchaser failed to satisfy that duty, he was not a BFP. Finding no error, we affirm.

FACTS

The Linden Park Condominium Owners' Association ("Linden Park") held a lien on a condominium for unpaid homeowner's dues and assessments. A portion of Linden Park's lien had super priority over two deeds of trust previously recorded by Bank of America. Chapter 64.32 RCW. Linden Park filed a complaint to foreclose its lien and joined Bank of America.

Bank of America did not answer or appear. The trial court entered an order of default against the homeowner, a default judgment against Bank of America, and a foreclosure order. The court declared a principal judgment against the homeowner of $11, 419.14.[1] The judgment stated that Bank of America's interest "will be forever and fully extinguished" at the foreclosure sale. Clerk's Papers (CP) at 61. The foreclosure sale was set for January 25, 2013 and the notice of sheriff's sale was duly published.

Condo Group, LLC, (Condo Group) purchases about 20 properties a year, and specializes in condominiums sold at judicial foreclosure sales under super priority liens. Ray Stevenson, a principal of the Condo Group, saw the notice of foreclosure sale for the Linden Park condominium. Condo Group investigated by driving by the property, reviewing the court records, checking the grantors index and the tax assessments, and making sure that Bank of America had not filed a notice of appearance. Condo Group was aware that the total amount due Linden Park was $11, 419.14 and that the super priority portion of the lien was about $1, 800. Stevenson estimated that the opening bid would be somewhat higher than the judgment amount, perhaps around $13, 000. Condo Group concluded that the property would be a good investment and decided to bid on it.

The day before the foreclosure sale, Bank of America paid Linden Park the amount of the super priority lien. Bank of America took no action to notify the court of its payment or postpone the sale. Linden Park sent an email to the sheriff's office requesting

that notice be given at the sale that Bank of America had paid the super priority lien and that a stipulation to that effect would be filed within the next several days.

Immediately before the sale, Stevenson reviewed the docket and confirmed that no amendments, stipulations, or notices of appearance had been filed. The sheriff's deputy did not give notice to those attending the foreclosure sale of the payment to Linden Park. The deputy announced an opening bid of $1, 000. Stevenson was surprised that the opening bid was so low. He bid $2, 000. No other bids were entered and the deputy declared the property sold to Condo Group.

Following the sale, Stevenson delivered Condo Group's cashier's check to the sheriff's office and spoke with the administrative head of the civil unit, Eva Cunio. Stevenson referred to the sale and said "Hey, what went on here? That's an odd one." Cunio told him that Linden Park had requested that the sheriff announce that the lender had preserved its interest. She stated that she had discussed the request with some of her associates and decided that they could not make the announcement because they hold sales pursuant to orders from the court, not according to instructions from the parties.

On February 26, 2013, Linden Park filed a motion to confirm the Sheriff's Sale. Condo Group intervened and sought a declaration that the sale took place according to the foreclosure order and that Bank of America's interest had been extinguished at the sale. Bank of America filed a motion to vacate the default order and judgment. The trial court granted Bank of America's motion to vacate the default judgment. The parties agreed to a stipulated order confirming the foreclosure sale but leaving open the question of whether Condo Group was a BFP and took free of Bank of America's interest.

Condo Group and Bank of America filed cross motions for summary judgment. The trial court found that Condo Group had actual knowledge of the judgment amount prior to the Sheriff's Sale and, given that the foreclosed property is sold to satisfy the judgment, the discrepancy between the judgment amount and the opening bid would have caused an ordinarily prudent person to inquire further. It thus found that Condo Group was not a BFP and granted summary judgment for Bank of America. Condo Group appeals.

DISCUSSION

This court reviews a summary judgment order de novo. *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 693, 317 P.3d 987 (2014). Summary judgment is appropriate if the evidence in the record demonstrates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Becker v. Washington State Univ.*. 165 Wn.App. 235, 245-46, 266 P.3d 893 (2011). We consider all facts in the light most favorable to the nonmoving party and review all questions of law de novo. *Erickson v. Chase*, 156 Wn.App. 151, 156, 231 P.3d 1261 (2010).

The Trial Court's Ruling Should Be Affirmed

A BFP is one who purchases property for valuable consideration in good faith, without notice of another's claim of right to the property. *Albice v. Premier Mortg. Servs. of Washington. Inc.*, 174 Wn.2d 560, 573, 276 P.3d 1277 (2012). Notice of another party's claim of right may be actual or constructive. *Id.* A buyer receives constructive notice when the facts and circumstances surrounding the sale "would cause an ordinarily prudent person to inquire further." *Id., See also, Paganelli v. Swendsen*, 50 Wn.2d 304, 308-09, 311 P.2d 676 (1957) (discussing constructive notice). A circumstance that creates a duty of inquiry provides "'only notice of what a reasonable inquiry would reveal.'" *Albice*, 174 Wn.2d at 577 (quoting *Paganelli.* 50 Wn.2d at 309).

A buyer's experience as a real estate investor carries "substantial weight" in determining whether the events surrounding the sale created a duty to inquire into possible defects in the title or sale of the property. See *Albice*. 174 Wn.2d at 573; *Miebach v. Colasurdo.* 102 Wn.2d 170, 176, 685 P.2d 1074 (1984). Whether a purchaser is a BFP is a mixed question of law and fact, as "[w]hat a purchaser knew is a factual question but the legal significance of what he knew is a legal question." *South Tacoma Way. LLC v. State*. 146 Wn.App. 639, 652-53, 191 P.3d 938 (2008) *rev'd on other grounds*. 169 Wn.2d 118, 233 P.3d 871 (2010) (citing *Peoples Nat'l Bank of Wash, v. Birnev's Enters., Inc.*, 54 Wn.App. 668, 674, 775 P.2d 466 (1989).

The parties do not dispute that the foreclosure order declared that Bank of America's interest would be extinguished at the sale or that Bank of America failed to enter a stipulation, request a postponement, or give notice to the court after it paid Linden Park. They also do not dispute that Condo Group, as a sophisticated investor, diligently investigated the property prior to the sale and knew that Linden Park's total lien was over $11, 000, of which the super priority portion was about $1, 800. There is no dispute that the opening bid was $1, 000 and that Stevenson was surprised that the opening bid was so low. The issue is the legal significance of these facts.

Bank of America argues that, given Condo Group's knowledge of the judgment amount and its experience with foreclosure sales under super priority liens, the opening bid, which was lower than even the super priority portion of Linden Park's lien, triggered a duty of inquiry. Condo Group argues that it reasonably relied on the court records, which declared that Bank of America's interest would be extinguished at the sale. We agree with Bank of America. While we do not condone Bank of America's apparent negligence in protecting its rights, Condo Group's argument fails because its presale diligence does not mean it can turn a blind eye to the circumstance that arose when the opening bid was called. Because the foreclosed property is sold to satisfy the judgment, the discrepancy between the judgment and the opening bid, particularly for the sophisticated real estate investor, was a circumstance that "would cause an ordinarily prudent person to inquire further." *Albice*, 174 Wn.2d at 573.

Condo Group also asserts that it had no information indicating that the opening bid was low because Bank of America had made a payment. Condo Group states that, in its experience, opening bids may be low for many reasons and sales are customarily postponed when payment has been made. However, the duty of inquiry does not require actual knowledge that a third party has a claim of right or a circumstance that can only be explained by a third party's claim. All that is required to trigger the duty of inquiry is "'information ... which would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry." *Paganelli*, 50 Wn.2d at 308 (quoting *Daly v. Rizzutto*. 59 Wash. 62, 65, 109 P. 276 (1910)). In the circumstances present here, we hold that the discrepancy between the opening bid and the judgment amount was information that would prompt a prudent investor to make inquiry.

Condo Group next argues that, even if the opening bid triggered a duty of inquiry, it could not reasonably or diligently conduct an investigation to determine why the opening bid was low in the context of an auction in progress. A circumstance that creates a duty of inquiry provides "'only notice of what a reasonable inquiry would reveal.'" *Albice*, 174 Wn.2d at 577 (quoting *Paganelli.* 50 Wn.2d at 309). Condo Group relies on *Hendricks v. Lake*, 12 Wn.App. 15, 22, 528 P.2d 491 (1974), to assert that the time frame must be considered, and contends that no reasonable inquiry is possible in the "minutes, if not seconds" between opening bid and purchase. Brief of Appellant at 15-16. *Hendricks*, however, merely points out that for a circumstance to trigger a duty of inquiry, it must be known to the buyer before he purchases the property. *Hendricks*, 12 Wn.App. at 22. Here, there is no dispute that the discrepancy between the opening bid and the judgment amount was known to Condo Group before it purchased the property.

Moreover, in this case a reasonable inquiry would have involved only a question to the deputy calling the sale. The sheriff's office had information that the opening bid was low because the lender had paid the super priority lien. Had Stevenson asked, there is no reason to believe that the deputy would have withheld that information. Accordingly, we conclude that on the facts of this case Stevenson had a duty to inquire and a reasonable inquiry would have revealed Bank of America's interest.

The judgment of the trial court is affirmed.

WE CONCUR: Cox, J.

Notes:

[1] The super priority portion of the lien was approximately $1, 800.

EXHIBIT 4

MORGAN COURT OWNERS ASSOCIATION, Respondent,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for MORGAN STANLEY ABS CAPITAL I INC. TRUST 2007-NC2 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-NC2 Appellant.

No. 71913-1-I

Court of Appeals of Washington, Division 1

June 29, 2015

UNPUBLISHED OPINION

Spearman, C.J.

Morgan Court Owners Association foreclosed on a first position lien and purchased a condominium unit for an amount substantially below market value. Deutsche Bank had a junior lien for $240, 000 on the unit that was extinguished by the foreclosure sale. Deutsche Bank appeals, contending the trial court erred when it failed to grant Deutsche Bank's request for equitable relief from the foreclosure sale. Deutsche Bank argues that because the sale price was grossly inadequate, Morgan Court was not a bona fide purchaser and other indications of unfairness regarding the sale were present, the trial court should have ordered Morgan Court to sell the unit to Deutsche Bank. Finding no error, we affirm.

FACTS

In 2008, respondent Morgan Court Owners Association (Morgan Court) initiated a judicial foreclosure action on its statutory lien for unpaid condominium assessments on the property commonly known as 10935 SE 187th Lane, Renton, Washington 98055 (Unit) and legally described as:

UNIT 10935, BUILDING F, MORGAN COURT, A CONDOMINIUM, ACCORDING TO THE DECLARATION RECORDED UNDER RECORDING NO. 20001 030001942, AND ANY AMENDMENTS THERETO, AND 4 SURVEY MAP AND PLANS IN VOLUME 169 OF CONDOMINIUM PLATS, ON PAGES 38 THROUGH 44, RECORDS OF KING COUNTY, WASHINGTON; SITUATE IN THE COUNTY OF KING, STATE OF WASHINGTON-----Tax Parcel Acct No. or Account Number: *563590-0170-07*.

Clerk's Papers (CP) at 44. At the time the Unit was owned by Carol Obeng. Obeng had taken out a loan with New Century Mortgage Corporation and executed a promissory note and deed of trust in favor of Mortgage Electronic Registration Systems (MERS) in November, 2006. Obeng defaulted on the Note as early as January 2009. New Century Mortgage Corporation endorsed the Note to appellant Deutsche Bank National Trust Company, as trustee for Morgan Stanley ABS Capital I Inc., Trust 2007 NC2 Mortgage Pass-Through Certificates, Series 2007-NO2 (Deutsche Bank).

Morgan Court filed a lawsuit on July 25, 2008, naming MERS and CitiFinancial as defendants in the judicial foreclosure action. MERS was served on August 6, 2008. On February 10, 2009, Morgan Court obtained a default judgment against Obeng for $8, 817.17 in outstanding assessments and an order granting Morgan Court a lien on the Unit, with priority over all interests except the statutory right of redemption. Morgan Court attempted to collect on the judgment by garnishing Obeng's wages. Obeng filed for Chapter 13 bankruptcy in May 2009. On May 20, 2009, Saxon Mortgage (Saxon), as servicing agent for Deutsche Bank, filed proof of secured claim in the Obeng bankruptcy and requested notice of service. This was the first appearance of MERS or Deutsche Bank in either the state or the bankruptcy court, a full nine months after being served with the complaint for judicial foreclosure.

On May 27, 2009, Morgan Court filed a motion for relief from stay to proceed with the foreclosure. Copies of the motion were mailed to Saxon on that date. No objections were made to Morgan Court's request for relief from stay, and the bankruptcy court entered an order granting relief on June 23, 2009.

Obeng entered into a purchase and sale agreement for the Unit on or about August 31, 2009. The proposed buyer had been approved for a home loan at that time for the purchase price of $210, 000. In the meantime, Morgan Court obtained an order of sale on October 14, 2009. Notice of the sheriff's sale scheduled for December 4, 2009 was mailed to the judgment debtors but not to MERS or Saxon. Saxon approved the short sale on November 24, 2009 and agreed to accept $175, 332.71 of the sale proceeds in exchange for release of the lien.

Correspondence in the record shows that as of November 23, 2009, Morgan Court had been made aware of the proposed short sale and had considered postponing the sheriff's sale. Obeng also contacted Morgan Court on December *2*, 2009, in an attempt to postpone the sheriff's sale. Morgan Court declined to postpone and the sheriff's sale took place as scheduled. At the sale, Morgan Court was the highest bidder at $8, 818.17, the amount of its judgment.

Nothing in the record shows that Deutsche Bank, Obeng, Saxon, or MERS made any effort after December 2, 2009, to sell or purchase the Unit or to pay any amount toward Morgan Court's judgment lien in order to redeem the Unit. The statutory redemption period expired on December 4, 2010. On January 18, 2011, the sheriff issued a deed conveying the Unit to Morgan Court. On May 6, 2011, a year and a half after the Unit had been sold, MERS assigned the deed of trust to Deutsche Bank. The assignment was recorded on July 25, 2011.

Morgan Court filed this action to quiet title on March 21, 2013.[1] Deutsche Bank was served on April 30, 2013. On July 2, 2013, Morgan Court obtained an order of default and an order quieting title. Deutsche Bank appeared on July 19, 2013, and on August 7, 2013. The parties stipulated to set aside the order of default and vacate the order to quiet title. Deutsche Bank filed an answer and affirmative defenses on September 9, 2013.

Morgan Court filed a motion for summary judgment and order to quiet title on February 24, 2014. Deutsche Bank filed a motion to amend its answer to add a counterclaim for declaratory relief to invalidate the statutes for failure to require a foreclosing lienholder to provide additional notice of sale or redemption period. In its opposition to summary judgment, Deutsche Bank argued that its equitable interest was superior to Morgan Court's, and that the trial court should apply equitable principles to fashion the appropriate relief. The trial court denied Deutsche Bank's motion to amend and granted summary judgment in favor of Morgan Court on April 4, 2014.

In its oral ruling, the trial court found that MERS, as the beneficiary of the deed of trust and Deutsche Bank's predecessor in interest, had adequate notice of the sheriff's sale, and that Deutsche Bank had not shown that any additional notice was required. The trial court found that "defendants failed to protect the deed of trust before this sheriff's sale, and that - that the deed of trust was eliminated because of defendant's inaction to protect it." Verbatim Report of Proceedings (VRP) at 31.

Deutsche Bank appealed the trial court's order granting summary judgment and quieting title, and the order denying its motion to amend. Deutsche Bank later elected not to pursue its appeal of the denial of the motion to amend.

DISCUSSION

The question of whether equitable relief is appropriate is a question of law to be reviewed de novo. *Niemann v. Vaughn Comm'ty Church*, 154 Wn.2d 365, 374, 113 P.3d 463 (2005). The fashioning of the remedy is reviewed for abuse of discretion. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172(2006). Here, the trial court granted summary judgment in favor of Morgan Court, which is also a question of law, and declined to grant equitable relief. Review is therefore de novo.

Deutsche Bank asked the trial court to fashion an equitable remedy in lieu of quieting title. Deutsche Bank correctly states that the courts are authorized to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable. *Proctor v. Huntington*, 169 Wn.2d 491, 500, 238 P.3d 1117 (2010). In *Proctor* the Huntingtons made a good-faith mistake and built their $300, 000 home on an acre of Proctor's adjoining property. Instead of forcing the Huntingtons to move their home, the trial court required Proctor to sell the underlying acre to the Huntingtons for $25, 000. *Id*. at 495. On appeal, the Supreme Court affirmed. The Court set forth a five part test for when a court may forego enforcement of a traditional property rule, such as the absolute right to ejectment in encroachment cases, and instead utilize a liability rule that permits "the exchange of damages for a transfer of a legal right." *Id*. at 496-500. Deutsche Bank asks that we invoke our equitable powers in a similar manner that "transcends the mechanical application of property rules."[2] *Id*. at 501 (citing *Arnold v. Melani*. 75 Wn.2d 143, 449

P.2d 800 (1968)); Brief of Appellant at 15.

The parties agree that the standard for invalidating a foreclosure sale provides the appropriate legal framework. In *Miebach v. Colasurdo*, 102 Wn.2d 170, 175, 685 P.2d 1074 (1984), the court held that a foreclosure sale may be set aside on equitable grounds where (1) the buyer or his successor is not a bona fide purchaser, (2) the price paid for the property is grossly inadequate, and (3) there are "irregularities" surrounding the sale, such as a failure on the part of the creditor to seek satisfaction of the debt from personal property before executing on real property. Morgan Court concedes that it was not a bona fide purchaser and that the price was grossly inadequate. Brief of Respondent at 13. Thus, the only point of contention is whether there were circumstances indicating unfairness that would require the sale to be set aside on equitable grounds.

Deutsche Bank cites the rule from *Casa Del Rey v. Hart*, 110 Wn.2d 65, 71-72, 750 P.2d 261 (1988), that states if the purchase price is "grossly inadequate, " and there is no bona fide purchaser, then a party need only show "'slight circumstances indicating unfairness'" to justify the imposition of an equitable remedy. Br. of Appellant at 23-24. But Morgan Court argues that in those cases where the sales have been set aside, the slight circumstances indicating unfairness always involved the failure of the judgment creditor to comply with statutory requirements or in which the creditor engaged in some sort of misconduct. In *Casa Del Rey* and *Miebach*, the judgment creditors failed to abide by the statutory requirement that before resorting to foreclosure, efforts must first be made to satisfy the judgment out of personal property. Morgan Court argues, and Deutsche Bank concedes, that Morgan Court first sought to satisfy its lien out of Obeng's personal property but was thwarted when she filed for bankruptcy. And Deutsche Bank does not contend that Morgan Court otherwise violated any statutes.

Nonetheless, Deutsche Bank argues slight circumstances indicating unfairness exist in this case that warrant equitable relief. Deutsche Bank points out that Morgan Court failed to provide notice of the sheriff's sale to anyone but the judgment debtor, and failed to agree to delay the sale when it knew that there was a private third party buyer willing to purchase it for an amount that would pay off the Deutsche Bank loan. Deutsche Bank points to email correspondence between Morgan Court and Morgan Court's counsel demonstrating that Morgan Court chose to go forward with the sale as scheduled in order to protect its priority of lien, instead of postponing so that Deutsche Bank's lien could be paid from the proceeds of a short sale.

According to Deutsche Bank, although Morgan Court "technically complied] with the [foreclosure] statute, " the fact that Morgan Court sought to deliberately pursue its own interests at the expense of Deutsche Bank is sufficient reason to set aside a sale. Br. of Appellant at 23. The only authority Deutsche Bank offers in support of this proposition, however, is dicta from *Mellen v. Edwards*. 179 Wash. 272, 283-84, 37 P.2d 203 (1934). In that case, the state Supreme Court reversed an order setting aside a sale, because there were no circumstances indicating unfairness that would warranted the court's intervention. The *Mellen* court pointed out that "it [did] not appear that the appellant has taken advantage of [conditions] to further his own interests." 179 Wash, at 284. The court also held that there was nothing in the record that "indicate[d] a deliberate and willful attempt upon the part of the appellant to take advantage of the general situation to further a selfish purpose and to enrich himself at the expense of the respondents." *Id.* Deutsche Bank argues that *Mellen* also stands for the converse - that "a foreclosing party that deliberately enriches itself at the expense of others has engaged in precisely the type of conduct that warrants equitable intervention." Reply Brief, at 16. The argument is unavailing.

Morgan Court had a judgment lien with priority and it was entitled to foreclose on that lien regardless of whether there were any intervening liens, for any amount. Deutsche Bank argues that Morgan Court's exercise of that right was unfair, because Morgan Court could have delayed the foreclosure to make sure that everyone was paid. But Morgan Court's claim that it received no assurance (1) that the short sale would actually occur, or (2) that if it did occur, its lien would be satisfied, is well taken. The documents Morgan Court received showed that the approval from the buyer's lender had expired at the end of October and there was no evidence that the approval had been renewed.

In addition, Saxon's approval of the transaction expressly precluded any of the proceeds from going toward Morgan Court's judgment lien. The approval listed the sale price of $210, 000, broken out into $175, 332.71 to pay Deutsche Bank's first lien, total closing costs not to exceed $22, 567.29, realtor sales commissions not to exceed $10, 500, and only $1, 600 to pay toward any subordinate lien. Any funds over and above the listed amounts (totaling $210, 000 exactly) would go to Saxon. There was no allocation for Morgan Court's lien, even though Obeng and Saxon had full knowledge of the lien and the pending foreclosure sale. On this record, Deutsche Bank's claim that Morgan Court's efforts to protect its own interests constituted misconduct rings hollow.

Deutsche Bank also argues Morgan Court misused its "super lien" status when it purchased the unit for a fraction of its value. Brief of Appellant at 24-25. According to Deutsche Bank, the purpose of the super lien statute was to protect condominium associations' rights to recover up to six months of outstanding association fees, not to provide a vehicle for them to purchase the

units for the amount of fees owed. Deutsche Bank also claims that the statute provided Morgan Court with an unfair advantage and that Morgan Court used its priority to take the entire property, instead of only the amount of outstanding dues.[3]

Morgan Court responds that based on Deutsche Bank's own conduct, there was nothing unfair about it exercising its statutory right. It points out, and Deutsche Bank does not dispute, that Deutsche Bank could have paid Morgan Court's lien before the sale, but did not do so. Under RCW 61.12.060, payment of the mortgage debt, with interest and costs, at any time before sale, shall satisfy the judgment. Saxon had notice of Morgan Court's intent to foreclose as early as May 2009, when Morgan Court moved for relief from stay. Deutsche Bank, through its agent, had at least six months' notice before the foreclosure sale took place, during which time it could have paid the amount owed to Morgan Court. There is also nothing in the record indicating that Deutsche Bank was precluded from bidding at the trustee's sale. Deutsche Bank also had the chance to exercise its redemption rights during the one year period after the sale, and failed to do so.

Finally, Deutsche Bank argues that Morgan Court should not receive equitable consideration because it waited over two years to bring the quiet title action. Laches is an equitable principle that in a general sense relates to neglect for an unreasonable length of time, under circumstances permitting diligence, to do what in law should have done. *Arnold*, 75 Wn.2d at 147-48. It also requires an intervening change of condition, making it inequitable to enforce the claim. *Id*. Deutsche Bank has made no showing of an intervening change of condition that would make it inequitable to enforce the claim. Deutsche Bank or its predecessors in interest failed to pay the lien, bid at the sale, or exercise any redemption rights.

We conclude that the trial court did not err in granting summary judgment and quieting title in favor of Morgan Court.

Affirmed.

Notes:

[1] Morgan Court initially named both MERS and Deutsche Bank, along with Obeng, as defendants, but dismissed MERS as it no longer had any interest in the Unit.

[2] In opposition to summary judgment, Deutsche Bank submitted only the *Proctor* test as a basis for equitable relief and did not argue that the trial court should have applied the standard of misconduct required for invalidating a foreclosure sale.

[3] Deutsche Bank also makes an argument suggestive of estoppel, claiming that Morgan Court cannot contend that Deutsche Bank is not prejudiced, when, according to Deutsche Bank, the emails show that Morgan Court's stated purpose of pressing forward with the sale was to gain an advantage over it. Because the argument is unsupported by any authority, we do not address it. RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*. 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

EXHIBIT 5

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 16-CV-262

ANDREA LIU, APPELLANT,

v.

U.S. BANK NATIONAL ASSOCIATION, APPELLEE.

Appeal from the Superior Court of the
District of Columbia
(CAR-6539-14)

(Hon. Ronna L. Beck, Motions Judge)

(Argued January 31, 2017 Decided March 1, 2018)

Robert C. Gill for appellant.

S. Mohsin Reza for appellee.

Before BLACKBURNE-RIGSBY, *Chief Judge*,[*] and GLICKMAN and THOMPSON, *Associate Judges*.

BLACKBURNE-RIGSBY, *Chief Judge*: In the District of Columbia, condominium associations are granted a "super-priority lien" over first mortgage lienholders, which permits an association to collect up to six months of unpaid

[*] Chief Judge Blackburne-Rigsby was an Associate Judge at the time this case was argued. Her status changed to Chief Judge on March 18, 2017.

assessments upon foreclosure on a condominium unit.[1] In *Chase Plaza Condominium Ass'n v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 172 (D.C. 2014), this court was asked to determine whether a condominium association's foreclosure on its super-priority lien could extinguish an otherwise first-priority deed of trust or mortgage when the proceeds of the foreclosure sale were insufficient to satisfy the deed of trust or mortgage. We held in the affirmative—that "a condominium association is permitted to foreclose on [its] six-month [super-priority] lien and [to] distribute the proceeds from the foreclosure sale first to satisfy [its super-priority] lien and then to satisfy any remaining liens in order of lien priority." *Id.* We clarified that in such circumstances "[a]ny liens [including a first mortgage or first deed of trust] that are unsatisfied by the foreclosure-sale proceeds are extinguished, and the foreclosure-sale purchaser acquires free and clear title." *Id.*

The present case requires this court to determine a similar issue. We must decide whether, prior to the 2017 amendment to D.C. Code § 42-1903.13,[2] a

[1] D.C. Code § 42-1903.13 (a)(2) (2012 Repl.).

[2] Effective April 7, 2017, D.C. Code § 42-1903.13 was amended to add a provision requiring that the foreclosure sale notice expressly state whether the foreclosure sale is for the six-month priority lien and not subject to the first deed of (continued…)

condominium association could choose to sell the condominium unit "subject to the first mortgage or first deed of trust" on the property, while at the same time enforcing its super-priority lien. We conclude that a condominium association could not foreclose on its super-priority lien while leaving the property subject to the unsatisfied balance of the first mortgage or first deed of trust—to find otherwise would contravene our holding in *Chase Plaza*. Accordingly, we reverse the trial court's order granting summary judgment to U.S. Bank, which concluded that a condominium could foreclose on its super-priority lien while leaving the underlying mortgage lien intact, and remand for further proceedings consistent with this opinion.

I. Factual Background

On March 9, 2007, Jon Michael Lucas obtained a mortgage loan in the amount of $589,750 to finance his purchase of condominium unit 1003, located at 301 Massachusetts Avenue, N.W., in the Sonata Condominium complex. Mr. Lucas also executed a deed of trust and promissory note, which secured the loan on

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(. . . continued)
trust, or for more than the six-month priority lien and subject to the first deed of trust. D.C. Code § 42-1903.13 (c)(4)(B)(ii).

the condominium. Mr. Lucas's mortgage loan was originally from Vanguard Mortgage and Title, Inc. ("VMT") and the deed of trust and note were executed in VMT's favor. The deed of trust was recorded in the land records of the District of Columbia. Mr. Lucas's mortgage loan was later assigned to U.S. Bank ("Bank"), which also took possession of the note.

In 2009, Mr. Lucas stopped paying both his monthly mortgage payments and his condominium assessments, the latter of which prompted the Sonata Condominium Unit Owners Association ("Sonata") to seek foreclosure on the condominium, pursuant to D.C. Code § 42-1903.13 (a)(2), which entitles condominium associations to a super-priority lien for the most recent six months of unpaid condominium assessments. Between 2011 and 2014, Sonata scheduled several foreclosure sales for the condominium, but the sales were all cancelled after the Bank paid Mr. Lucas's unpaid assessments. The Bank paid the assessments on Mr. Lucas's behalf in order to preserve its lien on the condominium. These payments were secured under Mr. Lucas's loan by the deed of trust.[3]

[3] The "Condominium Rider," which was signed by Mr. Lucas on March 9, 2007, and which supplemented the deed of trust, states that Mr. Lucas and his Lender agreed that "[i]f [Mr. Lucas] does not pay condominium dues and (continued…)

On May 1, 2014, Mr. Lucas was in default for unpaid condominium assessments, prompting Sonata to file a "Notice of Foreclosure Sale of the Condominium Unit for Assessments Due" with the District's Recorder of Deeds. The notice stated that Mr. Lucas was in arrears to Sonata for $11,503.67.[4] Sonata sent the notice of the foreclosure sale to Mr. Lucas and all other interested parties, including the Bank; the notice stated that the foreclosure sale would not be held until thirty-one days past the date on which the notice was mailed, and that if the past due amounts were not paid in full by that time, the condominium would be sold at a public auction on June 4, 2014. On May 23, Sonata also sent the Bank a letter stating the amount that needed to be paid in order to stop the scheduled foreclosure sale.

(. . . continued)
assessments when due, then [the] Lender may pay them. Any amounts disbursed by [the] Lender . . . shall become additional debt of [Mr. Lucas] secured by the [deed of trust]."

[4] The amount Mr. Lucas owed was accelerated through 2014. According to the attorney conducting the foreclosure sale, Elizabeth Menist, if a unit is sold to a third-party, an adjustment is made so that the foreclosed unit owner is not charged for future assessments given that he or she no longer owns the unit. The third-party purchaser is then responsible for the monthly assessments as they become due.

Sonata publicly advertised the sale of the condominium in the Washington Post on May 23, May 28, and June 3, 2014. The advertisement stated that the condominium would be sold pursuant to D.C. Code § 42-1903.13, and that it would be "[s]old subject to a deed of trust for approximately $589,750.00 (as of 03/09/2007)[,]" referencing the Bank's deed of trust for Mr. Lucas's mortgage loan.

On June 4, Sonata held a public auction for the foreclosure sale and the condominium was sold to appellant Liu, the highest bidder at the auction, for $17,000. An accounting of the foreclosure sale, included in the record, demonstrates that, of the $17,000 purchase price for the condominium, Sonata deducted almost six months of unpaid condominium assessments, totaling $5,195.28, as well as interest on the assessments, attorney's fees, and other expenses from the foreclosure sale.[5]

The Bank attempted to pay the assessments owed to Sonata in order to stop the foreclosure sale. Sonata, however, did not receive the check from the Bank

[5] Ultimately, there was a surplus of $7,512.92 after Sonata collected the assessments ($5,192.28), interest ($216.45), attorney's fees and reimbursable costs ($2,788.93), advertising costs ($885.08), the auctioneer's commission ($425), and the lienholder's portion of interest on unpaid balance from buyer ($30.04).

until June 5, 2014, the day after the foreclosure sale. Accordingly, the Bank's check was returned with a letter indicating that the condominium had already been sold to a third-party purchaser. Ms. Liu recorded the deed of trust, dated July 1, 2014, which included a provision inserted by Sonata, stating: "The hereinafter described property is sold subject to a deed of trust recorded in the Office of the Recorder of Deeds at Instrument Number 2007035647."

On October 16, 2014, the Bank filed a claim for judicial foreclosure against Mr. Lucas, as the mortgagor in default under the note, and later joined Ms. Liu, the new record owner of the condominium, as a defendant in the action. In its claim, the Bank asserted its rights as the beneficiary of the deed of trust, and also notified the court that Mr. Lucas's loan had been accelerated, and that he owed $799,034.23 under the note.[6] In her defense, Ms. Liu maintained that she purchased the condominium at the foreclosure sale, free and clear of the Bank's mortgage lien, pursuant to both D.C. Code § 42-1903.13 (a)(2) and this court's

[6] In May 2014, the Bank sent Mr. Lucas a demand letter, and attached a "Payoff Quote" at the back of the letter. According to the Bank's quote, Mr. Lucas owes $589,749.85 for the principal balance on the note, $10,487.96 for an escrow advance, $62,873.59 for a corporate advance, $135,855.25 in interest, and $67.58 in late charges. These charges equate to $799,034.23, the total amount the Bank is currently seeking under the note.

decision in *Chase Plaza*.[7] Both Ms. Liu and the Bank moved for summary judgment before the trial court.

On February 3, 2016, the trial court granted the Bank's motion for summary judgment and denied Ms. Liu's motion for summary judgment. The trial court acknowledged that, at the time of Sonata's foreclosure sale, the law was unclear regarding the effect of a condominium association's foreclosure sale, pursuant to its super-priority lien, on a bank's first-priority mortgage lien.

Despite this lack of clarity in the law at the time of Ms. Liu's purchase, the trial court emphasized that the advertisements, the memorandum of sale to Ms. Liu, and the deed of trust all specified that the property was sold to Ms. Liu subject to the Bank's mortgage lien. Thus, it was "abundantly clear" that Ms. Liu was purchasing the property subject to the Bank's lien. Furthermore, the court noted that Ms. Liu had testified at a deposition that the property was worth between

[7] On August 28, 2014, a few months after Ms. Liu's purchase of the condominium at the foreclosure sale, we issued our decision in *Chase Plaza*. Relying on the plain language and legislative history of the super-priority lien provision, as well as general principles of foreclosure law, we held that "a condominium association can extinguish a first deed of trust by foreclosing on its six-month super-priority lien under D.C. Code § 42-1903.13 (a)(2)." *Chase Plaza, supra*, 98 A.3d at 178.

$700,000 and $750,000, and that the District of Columbia Office of Tax and Revenue assessed the condominium at a value of $719,930. The court stated that the $17,000 purchase price "obviously reflected the understanding that the Property was subject to [the Bank's] lien." Accordingly, the trial court concluded that "[i]t would be an inequitable windfall and contrary to the parties' expectations to permit Ms. Liu to disavow [the Bank's] mortgage . . . and would impose an enormous foreclosure deficiency on [] [Mr.] Lucas if Ms. Liu's purchase is not subject to [the Bank's] lien, as was contemplated at the foreclosure sale." This appeal followed.

II. Discussion

We review a trial court's order granting summary judgment *de novo*. *Chase Plaza*, *supra*, 98 A.3d at 172. In determining whether summary judgment was appropriate, we view the evidence in the light most favorable to the non-prevailing party and we draw all reasonable inferences in that party's favor. *See Woodland v. Dist. Council 20*, 777 A.2d 795, 798 (D.C. 2001). "Summary judgment is only appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Chase Plaza*, *supra*, 98 A.3d at 172 (citation and internal quotation marks omitted).

A. *Chase Plaza*

In *Chase Plaza*, this court was asked to, for the first time, address the proper interpretation of a condominium association's super-priority lien for unpaid assessments under D.C. Code § 42-1903.13 (a)(2), and the impact of an association's foreclosure, pursuant to a super-priority lien, on a bank's first deed of trust or first mortgage. We explained that, under the District of Columbia Condominium Act, condominium association liens for unpaid assessments are "split[] . . . into two liens of differing priority[.]" *Chase Plaza, supra*, 98 A.3d at 173. First, the condominium association is granted a lien for the most recent six months of unpaid condominium assessments, which is "higher in priority than the first mortgage or first deed of trust[,]" and commonly referred to as a "super-priority lien." *Id.*; *see also* D.C. Code § 42-1903.13 (a)(2) (stating that a condominium association's lien "shall [] be prior to a mortgage or deed of trust . . . to the extent of the common expense assessments . . . which would have become due in the absence of acceleration during the [six] months immediately preceding institution of an action to enforce the lien . . ."). Second, the Act grants the condominium association a lien for any remaining unpaid assessments beyond the most recent six-month period. *See* D.C. Code § 42-1903.13 (a). However, this

second lien is "lower in priority than the first mortgage or first deed of trust." *Chase Plaza*, *supra*, 98 A.3d at 173.

Thus, under the circumstances presented here, where a condominium unit owner defaults on both his mortgage payments and his condominium assessments, the condominium association's super-priority lien for the most recent six months of assessments, is higher in priority than the first mortgage or first deed of trust on the condominium unit. *See* D.C. Code § 42-1903.13 (a)(2); *Chase Plaza*, *supra*, 98 A.3d at 173. Importantly, the Act also expressly prohibits "variation by agreement," which prevents parties from contracting around the statute: "Except as expressly provided by this chapter, a provision of this chapter may not be varied by agreement and any right conferred by this chapter may not be waived." D.C. Code § 42-1901.07.

Chase Plaza involved facts similar to those presented in this case and therefore, is central to our consideration. In *Chase Plaza*, Chase Plaza Condominium Association, Inc. instituted foreclosure proceedings against a condominium unit owner to collect six months of unpaid assessments, pursuant to its super-priority lien under D.C. Code § 42-1903.13 (a)(2). *Chase Plaza*, *supra*, 98 A.3d at 168. Chase Plaza's notice of the foreclosure sale "specified that the

foreclosure sale would not be subject to the first deed of trust" and thus, the bank's first deed of trust, as a lien lower in priority than the condominium association's super-priority lien, would not be protected by the foreclosure sale. *Id.* After the condominium was sold to the highest bidder at the sale, JPMorgan Bank, as holder of the note for the first deed of trust, filed a complaint against Chase Plaza and the new record owner, requesting that the trial court set aside the foreclosure sale and declare that JPMorgan Bank held title to the unit. *Id.* at 169. The trial court granted summary judgment to JPMorgan Bank on the basis that "Chase Plaza could not lawfully extinguish [JPMorgan Bank's] first deed of trust[.]" *Id.* Accordingly, the trial court voided Chase Plaza's foreclosure sale "because the unit had not been sold subject to the first deed of trust." *Id.*

We reversed the trial court's decision, recognizing the general and well settled principle of foreclosure law that "liens with lower priority are extinguished if a valid foreclosure sale yields proceeds insufficient to satisfy a higher-priority lien[.]" *Id.* at 173. We observed further that the plain language of the super-priority lien provision, under D.C. Code § 42-1903.13 (a)(2), did not suggest that the Council of the District of Columbia intended to deviate from this general principle. *Id.* at 174. Upon a review of the legislative history of the super-priority lien provision, we noted that the Council intended for the super-priority lien to give

condominium associations "maximum flexibility in collecting unpaid condominium assessments." *Id.* (citing D.C. Council, Report on Bill 8-65, at 3 (Nov. 13, 1990)). We also noted that our super-priority lien provision had been modeled after similar provisions from the Uniform Common Interest Ownership Act ("UCIOA") and the Uniform Condominium Act ("UCA"), and that the drafters' official comments under those Acts indicated that they understood that a condominium association's foreclosure on its super-priority lien would extinguish a first mortgage or first deed of trust. *Id.* However, the drafters "expected that mortgage lenders would take the necessary steps to prevent that result, either by requiring payment of assessments into an escrow account or by paying assessments themselves to prevent foreclosure." *Chase Plaza*, *supra*, 98 A.3d at 174-75; *see also* UCIOA § 3-116, cmt. 2; UCA § 3-116, cmt. 2. For these reasons, we concluded that the condominium association's foreclosure pursuant to its super-priority lien effectively extinguished JPMorgan Bank's first deed of trust. *Chase Plaza*, *supra*, 98 A.3d at 175, 178.

B. Analysis of Super-Priority Lien Provision

On appeal, neither party disputes this court's holding in *Chase Plaza*. Ms. Liu argues that the decision supports a conclusion that she purchased the

condominium at Sonata's foreclosure sale, free and clear of the Bank's mortgage lien. She contends that the anti-waiver provision of the Condominium Act precludes a condominium association from enforcing its super-priority lien at a foreclosure sale, subject to a first mortgage or deed of trust.[8]

Conversely, the Bank argues that the trial court properly granted its motion for summary judgment on equitable grounds because "the sale's advertisement, the auctioneer's statements [] at the sale, the Memorandum of Purchase signed by Ms. Liu, and the Trustee's Deed [] recorded by Ms. Liu" all demonstrate that the condominium was sold to Ms. Liu, subject to the deed of trust. The Bank argues that *Chase Plaza* is not applicable to this case because Sonata did not enforce its super-priority lien at its foreclosure sale, but instead elected to sell the condominium subject to its deed of trust. The Bank also challenges Ms. Liu's purchase at Sonata's foreclosure sale on other grounds, which we address later in this opinion.

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[8] Ms. Liu further asserts that the provisions in the advertisement, on her memorandum of sale, and in the deed of trust, which indicated that the property was sold subject to the deed of trust, were only included because of the trial court's erroneous ruling in *Chase Plaza*, which was later reversed by this court. Notably, Ms. Liu mentions the attorney who conducted the foreclosure sale of the property at issue in this case was the same attorney who conducted the foreclosure sale in *Chase Plaza*.

To begin, we agree with Ms. Liu that the anti-waiver provision of the Condominium Act, D.C. Code § 42-1901.07, precludes a condominium association from exercising its super-priority lien while also preserving the full amount of the Bank's unpaid lien. D.C. Code § 42-1901.07 states "[e]xcept as expressly provided by this chapter, a provision of this chapter *may not be varied by agreement* and *any right conferred by this chapter may not be waived*." (emphasis added). As we stated in *Chase Plaza*, none of the provisions of the chapter expressly indicate that a super-priority lien may be contracted away by the parties or waived by the condominium association.

Furthermore, permitting a condominium association to exercise its super-priority lien while also preserving the full amount of the Bank's unpaid lien, defeats the Council's purpose in enacting the super-priority lien. The super-priority lien provision effectively shields condominium associations from pressure by lenders to require foreclosure-sale purchasers to agree that the property is subject to the first mortgage, a term that could reduce the number of interested bidders and impair the condominium association's ability to recover unpaid assessments.

Here, the record demonstrates that Sonata enforced its lien for Mr. Lucas's most recent six months of unpaid assessments, when it sold the condominium to Ms. Liu at the foreclosure sale. The foreclosure notice to Mr. Lucas and Sonata's letter to the Bank indicated that Sonata was seeking to collect $11,503.67 in unpaid assessments and related costs, and that if the amount was not paid, Sonata would institute foreclosure proceedings on the unit.

The Bank argues, however, that because the terms of the sale indicated that the unit would be sold subject to its first deed of trust, Sonata did not actually enforce its super-priority lien. The Bank also maintains that a condominium association may agree to subordinate its super-priority lien to a first deed of trust during a foreclosure sale. We disagree. Such a reordering of lien priorities would effectively constitute a waiver by the condominium association of its super-priority lien, which is not permitted under D.C. Code § 42-1901.07. That section expressly states that any right conferred under the Condominium Act may not be waived. "[W]hen the language of a statute is plain and unambiguous, we are bound by the plain meaning of that language." *See Hudson Trail Outfitters v. District of Columbia Dep't of Emp't Servs.*, 801 A.2d 987, 990 (D.C. 2002) (citation and internal quotation marks omitted). Thus, any attempt by a condominium association or a holder of a first mortgage or deed of trust to have a condominium

association's super-priority lien waived or varied by contract is invalid, as a matter of law.

To be clear, we are not stating that a foreclosing condominium association is required to foreclose pursuant to its super-priority lien.[9] However, here, where Sonata collected on only the most recent six months of unpaid assessments, we are satisfied that Sonata enforced its super-priority lien at the sale.[10] Under these circumstances, if the proceeds of the sale are insufficient to cover the first deed of trust, then the first deed of trust must be considered effectively extinguished. *See*

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[9] We do not address the question of whether a lien covering a period in excess of six months prior to the 2017 amendment to D.C. Code § 42-1903.13 is properly conceptualized as a split-lien, which includes a six-month portion entitled to super-priority status, or as one lien, all of which is considered to be lower in priority to the first mortgage or deed of trust.

We also refrain from addressing the issue of whether the foreclosure sale should be set aside, given that the sole count in the complaint was one for judicial foreclosure, and in light of the Bank's statement that it "does not seek to set aside the June 4, 2014 sale in this action."

[10] The attorney conducting the foreclosure sale, Elizabeth Menist, also conducted the foreclosure sale in *Chase Plaza*. In this case, Ms. Menist testified that her intention was for Sonata to foreclose on a lien for January through December, 2014. However, given that the sale occurred on June 4, 2014, Sonata foreclosed on a lien covering slightly less than the six months entitled to super-priority status. As discussed in note 4, *supra*, an adjustment is made so that the foreclosed unit owner is not charged for future assessments.

Chase Plaza, supra, 98 A.3d at 176 (stating "the general rule that foreclosure on a lien with greater priority extinguishes liens with lower priority"). The plain language of D.C. Code § 42-1903.13 (a)(2), the super-priority lien provision, does not indicate an intent to deviate from this general principle. *Id.* at 175.

C. Equitable Estoppel

The Bank contends that the trial court properly concluded that Ms. Liu was equitably estopped from claiming that its mortgage interest was extinguished at the sale. We have recognized that "[a] party raising equitable estoppel must show that he changed his position prejudicially in reasonable reliance on a false representation or concealment of material fact which the party to be estopped made with knowledge of the true facts and intent to induce the other to act." *Nolan v. Nolan*, 568 A.2d 479, 484 (D.C. 1990) (citation and internal quotation marks omitted). In response, Ms. Liu asserts that the provisions in the advertisement, on her memorandum of sale, and in the deed of trust, which indicated that the property was sold subject to the deed of trust, were only included because of the trial court's erroneous ruling in *Chase Plaza*, which was later reversed by this court.

Here, the record does not support the trial court's application of the equitable estoppel doctrine to preclude Ms. Liu from maintaining that her purchase of the condominium was not subject to the Bank's deed of trust. To begin, the Bank has not demonstrated that it reasonably relied on the advertised terms of sale to protect its mortgage interest. To the contrary, the Bank attempted to pay the six months of condominium assessments in order to stop the foreclosure sale, but failed to make the payment on time. Moreover, although the Bank contends that it "reasonably relied upon Ms. Liu's actions in accepting the terms of the sale by not moving to vacate the sale after it occurred[,]" this argument lacks merit—the Bank was aware through its loan servicer that the state of the law on super-priority liens was in flux at the time, and that the Bank's interest could be subordinate to Sonata's interest in the event of a foreclosure sale.

Furthermore, the legislative history of the super-priority lien provisions and public policy concerns related to ensuring a condominium association's collection of unpaid assessments, also support a conclusion that equitable estoppel is not appropriate in this case. *See Sears v. Sears*, 293 F.2d 884, 887 (D.C. Cir. 1961) ("[A] court of equity, in determining whether to interpose the bar of equitable estoppel, must consider all the factors of the particular case at bar, the parties involved, the effect of the ultimate decision on third parties who are not before the

court, the nature of the rights sought to be vindicated and, as well, public policy as expressed by pertinent statutes and prior judicial declarations."). For example, in 2013, the Joint Editorial Board for Uniform Real Property Acts ("JEB")—a board established by the Uniform Law Commission ("ULC")—created a report, to in part, address the appropriate interpretation of the six-month limited priority lien provision.[11] *See* JEB Report, *supra* note 11, at 6. In its report, the JEB discussed how the depressed real estate market has led to incentives for banks to intentionally delay foreclosure proceedings, at the expense of condominium associations, which are forced to forgo timely payments of assessments, and at the expense of condominium association residents who "bear the consequences of default by a [condominium unit owner] [on] assessment obligations." *Id.* at 4. In this case, Mr. Lucas was in default on both his mortgage payments and his condominium assessments for a lengthy period, from 2009 to 2014, yet the Bank waited five years to institute foreclosure proceedings on the unit. In addition, the

[11] The JEB monitors all uniform real property acts and "provides guidance to the [ULC] and others regarding potential subjects for uniform laws relating to real estate[.]" Report of the Joint Editorial Bd. for Unif. Real Prop. Acts, *The Six-Month "Limited Priority Lien" for Association Fees Under the Uniform Common Interest Ownership Act* (June 1, 2013) ("JEB Report"). The Board is made up of representatives from the ULC, the American Bar Association's Real Property, Trust and Law Section, and the American College of Real Estate Lawyers, and liaisons from the American College of Mortgage Attorneys, the American Land Title Association, and the Community Associations Institute.

condominium association had to file several notices of foreclosure in an effort to obtain payments to cover Mr. Lucas's defaults on the assessments. It is this prejudice to condominium associations from extended delays by a bank to institute foreclosure on a condominium unit, which the super-priority lien was intended to prevent.

Finally, and most importantly, we note that equitable relief is not available when granting such relief would contravene the express provision of a statute. The judicial system is charged with enforcing public policy as embodied by legislative statute. "It is a basic maxim that equity is ancillary, not antagonistic, to the law. Equitable relief is not available when the grant thereof would violate the express provision of a statute." *Dep't of Transp. v. Am. Ins. Co.*, 491 S.E.2d 328, 331 (Ga. 1997) (citation and internal quotation marks omitted); *see also T.F. v. B.L.*, 813 N.E.2d 1244, 1253-54 (Mass. 2004) (citation and internal quotation marks omitted) (stating that "[e]quity is not an all-purpose judicial tool by which the right thing to do can be fashioned into a legal obligation possessing the legitimacy of legislative enactment"). Although it may seem like Ms. Liu was able to procure the property for a relatively low amount of money through the foreclosure process, any concerns about this process are properly addressed through the legislative process. Moreover, the Bank still retains a claim against Mr. Lucas, the borrower under the

Bank's mortgage loan, from whom the Bank can seek to recover the remaining balance owed on Mr. Lucas's mortgage.

D. The Bank's Additional Claims

The Bank makes a few additional challenges to Sonata's foreclosure sale, which warrant brief discussion. First, the Bank argues that Sonata was permitted to conduct the foreclosure sale subject to the Bank's first deed of trust, because a secured party bank and a condominium association may agree to subordinate a condominium association's super-priority lien to a bank's mortgage lien under the JEB Report. However, this is a mischaracterization of the JEB Report. Example One of the JEB Report addresses an instance in which a unit owner is in default on both its mortgage with the bank and its common expense assessments, and the bank institutes foreclosure proceedings on the unit. JEB Report, *supra* note 11, at 7-8. Example One clarifies that a bank's foreclosure on the unit will not extinguish the association's super-priority lien because that lien is senior to the bank's lien. *Id.* at 7. Instead, the association's super-priority lien will transfer to the proceeds of the sale, and the buyer at the foreclosure sale will take title to the unit, subject to the association's six-month super-priority lien. *Id.* at 7-8. In this example, the JEB Report mentions that as an alternative, the bank and the association may agree that

the foreclosure sale will deliver clear title to the buyer, with the proceeds of the sale being distributed first to the association to cover its six months' worth of unpaid assessments prior to being applied to the bank's unpaid mortgage balance. *Id.* at 8. This alternative, however, does not suggest that the association may subordinate its senior lien status; to the contrary, it reinforces the principle that an association's six-month priority lien has "true priority" over the bank's subordinate lien. *See id.*

Next, the Bank argues that Sonata could only impose its six-month super-priority lien through a judicial foreclosure, and maintains that because the association conducted a non-judicial foreclosure in this case, the sale could not operate to extinguish the Bank's mortgage lien. We disagree. The Bank cites to the version of D.C. Code § 42-1903.13 (a)(2) in effect on the date of the foreclosure sale, which states that:

> [t]he lien shall also be prior to a mortgage or deed of trust . . . to the extent of the common expense assessments based on the periodic budget adopted by the unit owners' association which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien.

However, the statute also contemplates non-judicial enforcement of liens, as occurred in *Chase Plaza*—D.C. Code § 42-1903.13 (c)(1) expressly states that "[t]he unit owners' association shall have the *power of sale* to enforce a lien for

assessments against a condominium unit . . . unless the power of sale procedures are specifically and expressly prohibited by the condominium instruments." (emphasis added). Here, the condominium by-laws explicitly authorize a non-judicial foreclosure, stating that "[t]he lien for assessments may be foreclosed in the manner provided by the laws of the District of Columbia either, at the option of the Board of Directors, by a sale in a non-judicial proceeding or by suit brought in the name of the Board of Directors, acting on behalf of the Association." Moreover, effective June 21, 2014, D.C. Code § 42-1903.13 (a)(2) was amended to include language referring to "institution of an action to enforce the lien or recordation of a memorandum of lien against the title to the unit by the unit owners' association." "While the action of a later Council usually does not provide definitive evidence of the intent underlying the action of a former Council," *see Coleman v. Cumis Ins. Soc'y*, 558 A.2d 1169, 1172-1173 (D.C. 1989), the fact that the 2014 "clarif[ication]" is consistent with the official comments of the UCIOA and the UCA, discussed below, "lends some support for our view that . . . the [earlier] Council intended to" provide for foreclosure of a super-priority lien through a condominium association's power of sale. *Id.*

The official comments of the UCIOA and the UCA for the super-priority lien provisions state that an association's super-priority lien may be foreclosed in

the same manner in which a mortgage on real estate is foreclosed. *See* UCIOA § 3-116 (k)(1); UCA § 3-116 (a); *see also* JEB Report, *supra* note 11, at 9 n.8 ("[A]n association may foreclose its lien by non-judicial proceedings if the state permits non-judicial foreclosure."). In this jurisdiction, a mortgage lender may foreclose on a unit through judicial foreclosure or non-judicial foreclosure, and accordingly, Sonata had the option of pursuing either type of foreclosure in this case. *See* D.C. Code §§ 42-815, -816 (2012 Repl.). Thus, Sonata was not precluded from pursuing non-judicial enforcement of its super-priority lien.

Lastly, the Bank argues that Sonata's foreclosure sale could not have been conducted pursuant to its super-priority lien because Sonata had already previously attempted to foreclose on the unit. The Bank, relying on Example Three in the JEB Report, is correct that the super-priority lien provision "does not . . . authorize an association to file successive lien enforcement actions every six months as a means to extend the association's limited lien priority." JEB Report, *supra* note 11, at 12. Example Three in the JEB Report, however, is based on a case in which a foreclosure action is already pending at the time the association attempts to file an additional foreclosure action; as a foreclosure action had already been initiated, the additional action was not necessary to enforce the association's lien and represented an attempt to extend the association's lien priority beyond the six

months entitled to super-priority status. Although this precludes an association from obtaining super-priority status on an amount in excess of six months while a foreclosure action is pending, it does not preclude an association from enforcing another super-priority lien if there is no action pending.

In *JPMorgan Chase Bank, N.A. v. SFR Investments Pool 1, LLC*, the United States District Court for the District of Nevada stated that it could not find "any authority stating that an [association] is precluded from bringing multiple enforcement actions to enforce entirely separate liens (with super[-]priority portions) for unpaid assessments against the same parcel of property." 200 F. Supp. 3d 1141, 1167 (D. Nev. 2016). The court recognized that the JEB Report barred multiple attempts to "enforce the super[-]priority portion of its lien multiple times during the pendency of the same bank foreclosure action" but that no such bar existed for a subsequent enforcement action to enforce a separate lien when no other foreclosure action was pending. *Id.* at 1168. Similarly, in this case, although Sonata had previously collected on a separate super-priority lien, they were not barred from filing a successive foreclosure action when no such action was pending.

III. Conclusion

In sum, we conclude that a condominium association, acting on its six-month super-priority lien for unpaid condominium assessments, pursuant to D.C. Code § 42-1903.13 (a)(2), may not conduct its foreclosure sale subject to the first deed of trust. Although Sonata's foreclosure sale in this case was purportedly subject to the Bank's deed of trust, the anti-waiver provision of D.C. Code § 42-1901.07, precludes a condominium association from waiving the priority of its super-priority lien or exercising its super-priority lien while also preserving the full amount of the Bank's unpaid lien. Thus, when Sonata enforced its super-priority lien to collect six months of unpaid assessments at the foreclosure sale, the Bank's first deed of trust for the condominium was effectively extinguished and Ms. Liu purchased the condominium free and clear of the Bank's deed of trust. Accordingly, we reverse the trial court's order granting summary judgment to the Bank and remand for further proceedings.

So ordered.

LAW OFFICES OF MELISSA HUELSMAN

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Transmittal Information

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

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