

No. 72659-5-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

THE CONDO GROUP, LLC, a Washington limited liability company,

APPELLANT

v.

BANK OF AMERICA, N.A., a federally chartered bank association,

RESPONDENT

APPELLANT'S REPLY BRIEF

KING COUNTY SUPERIOR COURT
Case No. 12-2-19776-8 SEA

Jordan M. Hecker, WSBA #14374
HECKER WAKEFIELD & FEILBERG, P.S.
321 First Avenue West
Seattle, WA 98119
Phone: (206) 447-1900
Fax: (206) 447-9075
Attorneys for Appellant

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 MAY 12 PM 2:56

11

I. TABLE OF CONTENTS

I. INTRODUCTION.....1

II. THE DUTY OF INQUIRY WAS NOT TRIGGERED AS A MATTER OF LAW.....4

A. BANA Ignored Condo Group’s Extensive Pre-Sale Due Diligence.....4

B. BANA Mischaracterized The Deposition Testimony Of Ray Stevenson.....7

C. BANA Did Not Substantively Oppose Ray Stevenson’s Declaration Testimony.....9

III. CONDO GROUP COULD NOT PERFORM A REASONABLY DILIGENT INQUIRY.....10

IV. BANA FAILED TO GIVE NOTICE OF ITS CLAIM.....13

V. CONCLUSION.....14

II. TABLE OF AUTHORITIES

A. CASES

Albice v. Premier Mortg. Serv. Of Washington, Inc.,
157 Wn. App. 912, 239 P.3d 1148 (2010).....11,12,13

Albice v. Premier Mortgage Serv. Of Washington, Inc.
174 Wn.2d 560, 276 P.3d 1277 (2012).....11,12,13

BFP v. Resolution Trust Corp., 511 U.S. 531,
114 S.Ct. 1757 (1994).....12

Murray v. Carlton, 65 Wn. 364, 118 P.332 (1911).....13

B. OTHER AUTHORITIES

CR 56(e).....2,10

I. INTRODUCTION

In its Respondent's Brief, the Respondent Bank of America, N.A. (hereinafter "BANA"), misconstrues the facts of this case and the law concerning the bona fide purchaser doctrine. In short, BANA failed to raise genuine issues of material fact that the duty of inquiry was triggered at the inception of bidding or that a reasonably diligent inquiry could have been performed under the circumstances.

BANA overlooks the importance of Condo Group's extensive pre-sale due diligence. It is undisputed that prior to the sale, Condo Group performed an extensive and thorough investigation which confirmed there were no procedural irregularities with respect to the foreclosure process and no suggestion in the record that BANA might have paid off the super priority lien. This investigation included checking the court files minutes before the auction was held to confirm nothing had changed.

It is also undisputed that BANA did not attempt to notify any potential purchasers or otherwise alter the appearance that it had failed to payoff the super priority lien prior to the sale. BANA continues to insist that the Court analyze the issue in a vacuum, focusing only on the amount of the opening bid to the exclusion of all other considerations. However,

the Court should consider the totality of Condo Group's knowledge and thorough pre-sale due diligence, including the lack of any pleading or other notice that suggested the super priority lien amount had been paid.

As noted by BANA, the only event that could have triggered the duty of inquiry was the low opening bid. Even if the Court were to focus its analysis solely on the amount of the Plaintiff Linden Park Homeowners Association's (hereinafter "HOA") opening bid, BANA failed to show there are genuine issues of material fact that the amount of the opening bid, however low, triggered the duty of inquiry.

BANA did not offer any substantive challenge to Condo Group's argument that there are a variety of reasons why the bidding process may have started with a lower than anticipated opening bid aside from an undisclosed payment of the super priority lien amount. Instead, BANA makes a procedural argument that Condo Group's declaration testimony is inadmissible under CR 56(e).

However, BANA's argument is contradictory. If BANA claims that Condo Group is a sophisticated real estate investor for purposes of the bona fide purchaser doctrine, then Condo Group's testimonial evidence

about customary procedure in Sheriff's Sales must have some finality and validity. BANA cannot have one without the other.

Additionally, BANA did not provide any argument or facts to establish that a "reasonably diligent inquiry" could have taken place within the minutes, if not seconds, between the announcing of the opening bid and the conclusion of the Sheriff Sale. It would be impossible for anyone to reinvestigate the situation during the seconds between the opening bid and conclusion of the auction. Any suggestion that Condo Group could have telephoned BANA or the HOA, reached a live representative, explained the situation, made an inquiry, and obtained an accurate substantive response, in the few seconds between the announcement of the opening bid and the auctioneer's demand for any high bids is laughable and disingenuous.

Instead, BANA attempts to draw analogies to cases that are distinguishable. In fact, BANA has not cited any authority that supports its position that: (1) the duty of inquiry was triggered at the inception of bidding due to the low opening bid; (2) a reasonably diligent inquiry could take place in the minutes, if not seconds, of a Sheriff Sale process; (3) a reasonably diligent inquiry would have revealed a last minute payment,

even if there was one, when no notice of the payment was filed with the trial court until after the Sheriff's Sale.

Particularly telling is BANA's failure to substantively oppose the argument that it failed to protect its own interest. It cannot be overemphasized that BANA, which was represented by counsel, could have easily protected its interest by providing notice of its purported payment of the super priority lien. BANA is requesting that the Court protect its interest, when it failed to take simple steps that could have provided the same result and avoided the current situation.

II. THE DUTY OF INQUIRY WAS NOT TRIGGERED AS A MATTER OF LAW

A. BANA Ignored Condo Group's Extensive Pre-Sale Due Diligence.

BANA's argument that the duty of inquiry was triggered by the lower than anticipated opening bid of \$1,000.00 relies on "cherry picked" facts that misrepresent the totality of Condo Group's knowledge obtained through its due diligence prior to the sale. BANA ignores critical facts that show, as a matter of law, the duty of inquiry was not triggered at the inception of bidding.

As noted, Condo Group had extensively researched the sale and court docket prior to the inception of bidding. CP 445-448. There was nothing in the docket or through Condo Group's research that revealed that BANA had paid the super priority amount prior to the inception of bidding. CP 445-448. Significantly, BANA admitted that it did not file anything in the court docket prior to the sale and that Condo Group had no notice of the super priority payment before the bidding started.

As part of its due diligence in determining whether to bid on the Property, Condo Group reviewed the "Court Docket... and all of the various pleadings, orders, judgments, decrees, proofs of service, records, files and other papers of record in the case." CP 446. As noted, the court docket contained the Foreclosure Order, which entered a default judgment against BANA. CP 59-62. Specifically, the Foreclosure Order, entered on October 30, 2012, provided:

It is further ORDERED, ADJUDGED AND DECREED that any and all right, title, interest, lien or estate of... Defendant BOA will be foreclosed at the Sheriff's Sale ordered by this Decree, and that from the date of the Sale forward... Defendant BOA's interest in the aforementioned real property will be forever and fully extinguished.

CP 61.

The Condo Group again reviewed the court docket right before the Sheriff's Sale started. CP 445-448. Nothing had changed since the previous review. CP 445-448. It is undisputed that the default judgment in the Foreclosure Order against BANA was not vacated until May 17, 2013, approximately one year after the Complaint was filed, seven months after the default judgment was entered, and four months after the property was sold at the Sheriff's Sale. CP 301-302, CP 1-8, CP 59-62 & CP 81-82.

Armed with the knowledge that nothing in the court docket had changed, especially as to the Foreclosure Order which clearly provided that BANA's Deed of Trust would be extinguished at the sale, and that the sale had not been postponed, Condo Group did not have any information in its possession to suggest the opening bid signaled the super priority payment. CP 445-448. Indeed, Ray Stevenson, a member of Condo Group testified that:

In my experience, the customary practice when payment is made shortly before a sale, a postponement occurs to allow time for a stipulation to be prepared and entered with the court [to] put prospective bidders on notice of the payment, and only then is the sale conducted.

CP 447.

Ultimately, the possibility that the opening bid was less than Condo Group had anticipated did not eliminate Condo Group's status as a bona fide purchaser. Again, the analysis cannot be completed in a vacuum and all facts must be considered, not just the amount of the opening bid.

BANA also did not address the substance of the Foreclosure Order filed pre-sale in the trial court other than to request that the trial pleadings be wholly disregarded by the Court. Contrary to BANA's argument, the trial court's post-sale vacation of the default judgment did not strike out each and every decision of the trial court or the parties' rights. In the Order which vacated the default judgment, the trial court specifically kept all other rights and decisions intact, including the ability of Condo Group to file a lawsuit regarding this legal issue. CP 301-302. Ultimately, BANA mischaracterizes the impact of the trial court's vacation decision.

B. BANA Mischaracterized The Deposition Testimony Of Ray Stevenson.

BANA mischaracterized the deposition testimony of Ray Stevenson. In the Respondent's Brief, BANA takes out of context Condo Group's practice of contacting HOA counsel if something unusual crops up prior to the Sheriff Sale. In short, it simply is not standard procedure

for the Condo Group to contact HOA counsel unless the court docket or other public documents reveal something unusual. CP 387 (17:7-16).

In fact, the testimony cited by BANA specifically deals with what Condo Group would do if it had found, through extensive review of the court file and other public documents, that a lender had filed a Notice of Appearance.

Q: So if there is a notice of appearance what would you typically do?

A: Typically in that instance we would contact the HOA counsel to say, “[t]here’s a notice of appearance in this file. Is there anything going on?”

Q: Okay. So if there’s ever anything unusual do you usually contact the HOA counsel to get more information or is there any other kind of source you go to to (sic) get information about the sheriff’s sale?

A: If there’s something unusual we would contact the HOA counsel, although, you know, we believe that the court records, you know, provide the record of what’s being sold.

CP 387 (17:7-16).

Ultimately, BANA is attempting to turn testimony regarding post-sale events into critical pre-sale facts. BANA admitted that the post-sale events should not be considered by the court. RP 13:19-22; *see also* Respondent’s Brief, p. 15. The relevant inquiry focuses on what happened prior to the sale. Interestingly, BANA ignored its own admission when it

relied on Ray Stevenson's testimony regarding his post-sale discussion with the Sheriff. *See* Respondent's Brief, p. 15.

In the Respondent's Brief, BANA claimed that Condo Group's apprehension was sufficiently triggered pre-sale because Ray Stevenson testified that he inquired about the low opening price after bidding on the property. *See* Respondent's Brief, p. 15 (citing CP 400, 66:22-67:3). However, Stevenson's testimony concerned a conversation that happened after the Sheriff Sale had completed. CP 400 (66:25-67:3) & CP 447. In short, BANA is contradicting itself and the law by relying on post-sale events to establish possible pre-sale knowledge that was not available.

C. BANA Did Not Substantively Oppose Ray Stevenson's Declaration Testimony.

BANA did not substantively oppose Ray Stevenson's testimony regarding procedures at Sheriff Sales or reasons for low opening bids. Again, Ray Stevenson testified that there are many reasons for opening bids to be low. CP 448. It is not uncommon for bids to be low in the hope of obtaining the property while preserving a deficiency judgment or to encourage more bids. CP 448. Stevenson also testified that sales are usually postponed so stipulations can be filed with the court if a super priority lien amount is paid. CP 447.

Rather than oppose the substance of Ray Stevenson's testimony, BANA argued that Ray Stevenson's testimony should be disregarded pursuant to CR 56(e). *See* Respondent's Brief, pp. 14-15. Interestingly, BANA claimed that the testimony of Ray Stevenson based on Condo Group's experience in purchasing properties as Sheriff Sales should not be considered, yet also claimed that the Condo Group is a sophisticated real estate investor for purposes of the bona fide purchaser doctrine.

BANA's argument should be disregarded by the Court. If the Court were to consider BANA's argument, its position is clearly contradictory. If Condo Group is a sophisticated real estate investor for purposes of the bona fide purchaser doctrine, then it should be allowed to testify about its experience at Sheriff's Sales.

III. CONDO GROUP COULD NOT PERFORM A REASONABLY DILIGENT INQUIRY

As noted, BANA did not provide any argument regarding whether a "reasonably diligent inquiry" could have taken place in the minutes, if not seconds, between the time the opening bid was announced and the Sheriff Sale was concluded. Instead, BANA attempts to draw analogies to the *Albice* cases which are distinguishable from the instant situation.

In other words, BANA misconstrued the analysis by the Washington Supreme Court in *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012) and the Division II of the Wahsington State Court of Appeals in *Albice v. Premier Mortg. Serv. Of Washington, Inc.*, 157 Wn. App. 912, 931, 239 P.3d 1148 (2010). In short, the gravamen of the courts' decisions did not turn on the triggering of the duty of inquiry due to a lower than anticipated opening price as compared to the value of the property. It was but one factor cited by the Court of Appeals.

Again, the Supreme Court in *Albice* determined that the purchaser did have constructive knowledge and was not a bona fide purchaser because the purchaser: (1) was a sophisticated real estate investor; (2) had researched the notice of trustee's sale which showed a small amount in arrears, indicating substantial equity in the property; (3) spoke to the owner and offered by buy the property, but the owner intended to keep the property; and (4) kept track of the numerous continuances of the trustee's sale. *Id.* at 573-574.

Even though the Supreme Court upheld the decision of the Court of Appeals in *Albice* and agreed that the purchaser was not a bona fide

purchaser, the decision did not turn on the low sale price compared to the market value of the property. *Albice*, 174 Wn.2d at 574. In contrast to BANA's claim, the Court of Appeals in *Albice* determined that the low sale price compared to the property's high value was only but one factor to be considered. *Albice*, 157 Wn. App. at 931.

BANA also overlooked that the Court of Appeals in *Albice* determined that “[a] sale price less than the fair market value at a foreclosure proceeding is not an irregularity.” 157 Wn. App. at 931 (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 538-39, 114 S.Ct. 1757 (1994)). Thus, the case law supports the Condo Group's position that a low opening bid at a Sheriff's Sale is not irregular. Certainly, it does not support BANA's position that a low opening bid triggers a duty of inquiry.

Finally, it is worth repeating that unlike the current situation, the key events in *Albice* occurred within a 5-month period. 174 Wn.2d at 574. Here, the triggering event at the inception of the bidding process happened within a matter of minutes, if not seconds. CP 447-448. Certainly, Condo Group had less knowledge for a much shorter period of time when

compared to the purchaser in *Albice*, and unlike *Albice*, no opportunity to conduct any further due diligence.

IV. BANA FAILED TO GIVE NOTICE OF ITS CLAIM

In the Respondent's Brief, BANA did not address its failure to put others on notice of its claim. Rather, BANA merely dismissed its failure to put in a timely Notice of Appearance or to file anything with the Court to show it had paid the super priority lien amount as irrelevant. However, BANA's part in creating its own harm cannot be underestimated.

Again, the balancing of the equities favors Condo Group and the law in that regard is clear. "[W]here one of the two innocent parties must suffer, the one who was the cause of the misfortune must bear the burden." *Murray v. Carlton*, 65 Wn. 364, 367, 118 P. 332 (1911). Interestingly, BANA does not address *Murray* in its brief.

Furthermore, Ray Stevenson testified that when the super priority portion of the lien is paid the sale is usually postponed and a stipulation is filed in the court docket. CP 447. BANA did not dispute the veracity of the testimony, but asked that the Court disregard it pursuant to CR 56(e). Certainly, one can assume that BANA must agree with Condo Group as it does not oppose the substance of the testimony.

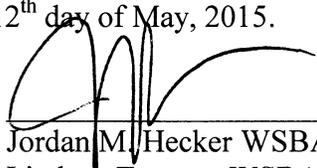
Indeed, as a bank, BANA is a sophisticated lien holder, familiar with common practice. As a sophisticated party, BANA understood that the Foreclosure Decree filed with the Court put the world on notice that its rights would be foreclosed at the Sheriff's Sale. BANA did nothing to correct the record prior to the Sheriff's Sale.

Ultimately, the situation could have been completely avoided had BANA merely filed a Notice of Appearance with the trial court or filed some type of notice of its payment of the super priority portion of the lien. BANA's failure to correct the record prior to the Sheriff's Sale cannot be overlooked. BANA alone bears responsibility for its self-created harm.

V. CONCLUSION

For the foregoing reasons, the trial court's decision to grant BANA's Motion for Summary Judgment should be reversed and the Court should grant Condo Group's Motion for Summary Judgment. Alternatively, the Court should reverse the trial court's decision to grant BANA's Motion for Summary Judgment, affirm the denial of Condo Group's Motion for Summary Judgment, and issue instructions that there are genuine issues of material fact regarding whether a new duty of inquiry was triggered at the inception of bidding at the Sheriff's Sale.

DATED this 12th day of May, 2015.



Jordan M. Hecker WSBA #14374

Lindsey Truscott WSBA #35610

HECKER WAKEFIELD & FEILBERG, P.S.

ATTORNEYS FOR APPELLANT

321 FIRST AVENUE WEST

SEATTLE, WA 98119

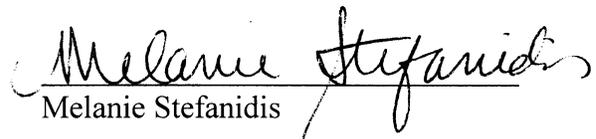
(206) 447-1900

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner indicated a copy of the within and foregoing document upon the following persons:

Sakae S. Sakai HOUSER & ALLISON APC 1601 – 5 th Avenue, Suite 850 Seattle, WA 98101-3672 Attorney for Respondent Bank of America, NA	<input type="checkbox"/> Via first class mail, postage prepaid <input type="checkbox"/> Via facsimile <input checked="" type="checkbox"/> Via Legal Messengers <input type="checkbox"/> Via Email:
Valerie F. Oman CONDOMINIUM LAW GROUP, PLLC 10310 Aurora Avenue North Seattle, WA 98133-9228 Attorney for Plaintiff Linden Park Homeowners Association	<input type="checkbox"/> Via first class mail, postage prepaid <input type="checkbox"/> Via facsimile <input checked="" type="checkbox"/> Via Legal Messengers <input type="checkbox"/> Via E-mail:

DATED this 12 Day of May, 2015.


Melanie Stefanidis