72659-5 72659-5

CASE NO. 72659-5-I
COURT OF APPEALS
DIVISION I OF THE STATE OF WASHINGTON

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

vs.

BANK OF AMERICA, N.A.,
RESPONDENT

RESPONDENT BANK OF AMERICA, N.A.'S APPELLATE BRIEF

Appeal from Judgment of King County Superior Court
Case No.: 12-2-19776-8 SEA
Honorable Dean S. Lum

Robert W. Norman, Jr., WSBA No. 37094
Sakae S. Sakai, WSBA No. 44082
HOUSER & ALLISON, APC
1601 5th Avenue, Suite 850
Seattle, WA 98101
Telephone: (206) 596-7838
Facsimile: (206) 596-7839

Attorneys for Respondent Bank of America, N.A.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 MAR 19 AM 9:41

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
I. INTRODUCTION 1
II. COUNTERSTATEMENT OF ISSUES 3
III. COUNTERSTATEMENT OF THE FACTS 4
IV. ARGUMENT 8

A. Standard of Review..... 8

B. The Trial Court Properly Granted Summary Judgment in favor of Bank of America..... 9

i. The evidence establishes that the Condo Group owed a duty of inquiry based upon the information it had prior to purchasing the Property. 10

ii. The initiation of the foreclosure bidding process does not terminate the duty of inquiry..... 16

iii. An inquiry by Condo Group would have revealed Bank of America's payment of the super priority lien. 20

C. Bank of America's actions in the COA foreclosure are irrelevant to the analysis of whether the Condo Group is bona fide purchaser..... 22

V. CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Albice v. Premier Mortg. Services of Washington, Inc., 157 Wn. App. 912, 239 P.3d 1148 (2010)..... 11, 12, 18
Albice v. Premier Mortg. Services of Washington, Inc., 174 Wn.2d 560, 276 P.3d 1277 (2012)..... 10, 17, 18, 20
Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 769 P.2d 298 (1989)..... 9
Glaser v. Holdorf, 52 Wn.2d 204, 352 P.2d 212 (1960)..... 11
Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 753 P.2d 517 (1988)..... 14
Guntheroth v. Rodaway, 107 Wn.2d 170, 727 P.2d 982 (1986)..... 14
Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 115 P.3d 262 (2005)..... 8
Hendricks v. Lake, 12 Wn.App. 15, 528 P.2d 491 (1974)..... 15, 16, 17
Levien v. Fiala, 79 Wn. App. 294, 902 P.2d 170 (1995)..... 9
Matter of Marriage of Leslie, 112 Wn.2d 612, 772 P.2d 1013 (1989)..... 23
Miebach v. Colasurdo, 102 Wn.2d 170, 685 P.2d 1074 (1984)..... 12
Seven Gables Corp. v. MGM/US Entm't Co., 106 Wn.2d 1, 721 P.2d 1 (1986)..... 9
Stewart v. Good, 51 Wn.App. 509, 754 P.2d 150 (1988)..... 11
Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 109 P.3d 805 (2005)..... 8, 14

Statutes

RCW 64.34.364(3)..... 1, 5

Rules

CR 56(c)..... 8
CR 56(e)..... 14

I. INTRODUCTION

This appeal involves a sheriff's sale where a real estate investor and appellant, the Condominium Group, LLC ("Condo Group"), purchased a property at a fraction of the underlying Judgment amount and the assessed property value. The issue on appeal is whether the Condo Group qualifies as a bona fide purchaser. Application of well-settled Washington law to the proven facts establishes that the trial court properly granted summary judgment in favor of respondent Bank of America, N.A. ("Bank of America").

A sheriff's sale is a judicial process where real estate is sold at an auction to satisfy a judgment. The Condo Group was aware of Bank of America's mortgage encumbering the property, and intended to purchase the property free and clear of the mortgage pursuant to the super priority lien codified under RCW 64.34.364(3).

The Condo Group's testimony establishes that prior to purchasing the property, it had (1) actual notice of a major discrepancy between the judgment amount and the minimum bid figure, and (2) actual notice of the fact that the minimum bid was less than the super priority portion of the COA lien. The evidence establishes that the Condo Group made a business decision to purchase the Property notwithstanding the discrepancies, and waited until after the sale to inquire about the irregularities.

The Condo Group argues that it had no duty to inquire into the discrepancies given the limited time available to tender a bid in the auction process. There is no authority for this statement. Washington case law regarding the bona fide purchaser doctrine imposes upon a purchaser, a duty to inquire based on information known prior to purchasing a property. Whether the bidding has started is irrelevant.

This Court should disregard the Condo Group's attempt to utilize the auction process as a sword to eviscerate the bona fide purchaser doctrine. While the Condo Group may have had limited time to bid on the property, it had unlimited time to conduct an inquiry into the discrepancies it was aware of prior to the purchase. The business decision to make a bid on the property notwithstanding the known discrepancies, was voluntary.

The evidence establishes that had the Condo Group pursued an inquiry with reasonable diligence, it would have discovered the fact that Bank of America paid off the super priority portion of the foreclosing condominium association's lien.

The undisputed facts establish that the Condo Group cannot qualify as a bona fide purchaser as a matter of law. Accordingly, Bank of America respectfully requests this Court affirm the trial court's order granting summary judgment in favor of Bank of America.

II. COUNTERSTATEMENT OF ISSUES

1. Whether the evidence establishes that the Condo Group, LLC had knowledge or information that would cause an ordinarily prudent person to inquire further prior to purchasing the property.

2. Whether the evidence establishes that the Condo Group, LLC owed a duty of inquiry given the inconsistencies it was aware of prior to purchasing the property.

3. Whether the evidence establishes that the Condo Group, LLC failed to satisfy the duty of inquiry.

4. Whether the evidence establishes that such inquiry, reasonably diligently pursued, would lead to the discovery of Bank of America's rights in the Property, including the payment of the super priority lien.

5. Whether the trial court properly gave substantial weight to the Condo Group, LLC's real estate investment experience when determining whether it had inquiry notice of Bank of America's rights.

6. Whether the trial court correctly ruled that there was no genuine issue of material fact regarding the Condo Group, LLC's failure to qualify as a bona fide purchaser of the property.

III. COUNTERSTATEMENT OF THE FACTS

Dustin Mears Mortgage Loan. On or about February 26, 2007, in consideration for a $130,400.00 mortgage loan, Dustin M. Mears executed a deed of trust ("Deed of Trust") in favor of Bank of America encumbering real property located at 13717 Linden Avenue North, Unit # 116, Seattle Washington, 98133 (the "Property"). The Deed of Trust was recorded on February 28, 2007 with the King County Auditor's Office as Ins. No. 20070228002977. (CP 362–363)

Judicial Foreclosure. On June 6, 2012, Linden Park Homeowners Association (hereinafter "COA") filed a Complaint for Lien Foreclosure and for Monies Due against Dustin Mears, Jane or John Doe Mears, and Bank of America, initiating the underlying proceeding. (CP 1). The action was initiated to foreclose a lien for delinquent assessments recorded by the COA on May 23, 2012. (CP 3).

On October 30, 2012, an Order of Default and Default Judgment ("Judgment") was entered against Dustin Mears, Jane or John Doe Mears, and Bank of America. (CP 59–62). On October 30, 2012, the trial court entered a Decree of Foreclosure. *Id.*

Payment of Super Priority Lien. On January 23, 2013, Bank of America, through counsel, sent a check to counsel for the COA,

representing payment of the super priority portion of the COA lien as provided by RCW 64.34.364(3). (CP 247–251).

Counsel for the COA acknowledged receipt of the check on January 24, 2013 and asked counsel for Bank of America if a stipulated dismissal would be sent. (CP 253). On the same day, through counsel, the COA reached out to the King County Sheriff's Office to provide instructions for the foreclosure sale of the Property scheduled for January 25, 2013. (CP 255). The COA requested that the deputy calling the sheriff's sale be provided with specific language regarding Bank of America's payment of the super priority lien and that a stipulation and dismissal of Bank of America would be filed in the next several business days. *See id.*

The Condo Group, LLC. The Condo Group is a sophisticated real estate investor which almost exclusively purchases condominiums at judicial foreclosures which allow for a purchase that is free and clear of any mortgages due to the statutory super priority lien codified in RCW 64.34.364(3). (CP 387 at 14:1–14:25; CP 389 at 25:11–25:17).

Prior to the sheriff's sale, the Condo Group was aware that the super priority portion of the COA lien was approximately $1,800. (CP 403 at 81:14 –81:24). The Condo Group had no knowledge of any payment towards the $1,852.68 super priority portion of the COA's lien. (CP 149–

150). As part of the due diligence performed by the Condo Group prior to any foreclosure sale, the Condo Group reviewed the Judgment, orders, and other court filings in the docket. (CP 149).

Sheriff's Sale. On January 25, 2013, the King County Sheriff's Office conducted the sheriff's sale of the Property. (CP 81). When the bidding was started for the sheriff's sale of the Property, the crier of the sale announced a minimum bid of $1,000. (CP 400 at 66:8–66:12). The Condo Group was the only bidder at the sheriff's sale of the Property. (Verb. Rpt. of Proc. at 16:14–16:16).

When the sheriff set an opening bid amount of $1,000, the Condo Group was "surprised" as it expected the opening bid amount to be approximately $13,000. (CP 400 at 66:3–66:12). The Condo Group had an expectation, prior to the sale, that the minimum bid amount would be around the low "teens" based upon the amount set forth in the Judgment. (CP 403 at 81:14–81:20).

In response to the $1,000 minimum bid cried by the sheriff's office, the Condo Group calculated a $2,000 bid amount based upon its experiences with other bidders who bid at $100 or $1,000 increments. (CP 400 at 68:6–68:13). After calculating the bid, the Condo Group placed a $2,000 bid on the Property. (CP 81). The Condo Group's bid was the prevailing, and only, bid.

The Condo Group's inquiry to the sheriff's office. On the same day of the sheriff's sale of the Property, after the purchase, the Condo Group asked Eva Cunio, a representative of the King County Sheriff's Office, "Hey, what went on there? That's an odd one." (CP 150, 400 at 66:15 –66:21). The Condo Group was informed at that point that COA's counsel had contacted the King County Sheriff prior to the sale to inform them of the super priority lien payment by Bank of America. (CP 392 at 36:4–36:22).

Confirmation of Sale and Vacation of Judgment. On May 17, 2013, the trial court entered an order vacating the Judgment against Bank of America. (CP 301–302). On July 26, 2013, the trial court entered a stipulated order confirming the sheriff's sale of the Property. (CP 316–318).

Declaratory Relief action. On August 22, 2013, the Condo Group filed a Complaint for Declaratory Relief to Quiet Title ("Declaratory Relief claim") in the Property against Bank of America. (CP 323–326). Through the Declaratory Relief claim, the Condo Group seeks an order stating that Bank of America had no interest in the Property, the Deed of Trust was foreclosed and extinguished by the sheriff's sale, and that title to the Property would be quieted in favor of the Condo Group. *Id.*

Summary Judgment hearing. On August 15, 2014, Bank of America filed a Motion for Summary Judgment on the Condo Group's claim for Declaratory Relief. (CP 361–378). The Condo Group filed a Motion for Summary Judgment on its claim for Declaratory Relief on September 19, 2014. (CP 438–444).

On October 27, 2014, the trial court entered an Order granting Bank of America's Motion for Summary Judgment. (Op. Br., Appx. A). On the same day, the trial court entered an Order denying the Condo Group's Motion for Summary Judgment. (CP 512–515).

IV. ARGUMENT

A. Standard of Review.

When reviewing an order granting summary judgment, we engage in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). Summary judgment is proper if, in view of all the evidence, reasonable persons could reach only one conclusion. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

Mere allegations or conclusory statements of facts unsupported by evidence are not sufficient to establish a genuine issue. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). Nor may the nonmoving party rely on "speculation, argumentative assertions that unresolved issues remain, or in having its affidavits considered at face value." *Seven Gables Corp. v. MGM/US Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

B. The Trial Court Properly Granted Summary Judgment in favor of Bank of America.

The trial court's decision should be affirmed as application of the proven facts to Washington law establishes that there was no genuine issue for trial and Bank of America was entitled to judgment as a matter of law. Based on the evidence and the Condo Group's own actions, a reasonable person could only reach one conclusion: the Condo Group was not a bona fide purchaser.

The bona fide purchaser doctrine provides that a good faith purchaser for value, who is without actual or constructive notice of another's interest in real property purchased, has a superior interest in the property. *Levien v. Fiala*, 79 Wn. App. 294, 298, 902 P.2d 170 (1995).

But if the purchaser has knowledge or information that would cause an ordinarily prudent person to inquire further, and if such inquiry,

reasonably diligently pursued, would lead to discovery of title defects or of equitable rights of others regarding the property, then the purchaser has constructive knowledge of everything the inquiry would have revealed. *Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d 560, 573, 276 P.3d 1277 (2012) ("*Albice*").

In this case, the evidence establishes that (1) the Condo Group had knowledge and information, prior to purchasing the property, that would cause an ordinarily prudent person to inquire further, and (2) such inquiry, reasonably diligently pursued, would have led to the discovery of Bank of America's payment of the super priority portion of the COA's lien. Accordingly, the trial court's decision should be affirmed as it properly disregarded the Condo Group's speculative and contradictory defenses and granted summary judgment in favor of Bank of America.

i. The evidence establishes that the Condo Group owed a duty of inquiry based upon the information it had prior to purchasing the Property.

The Condo Group argues that it owed no duty of inquiry as a lower than expected bid would not trigger an ordinarily prudent person to inquire. (Op. Br. at 13). This argument is unavailing and contradictory. The minimum bid did in fact cause Condo Group to set forth an inquiry to the sheriff's office on the very day of the sheriff's sale regarding the discrepancy between the Judgment amount and the minimum bid price.

(CP 150, 400 at 66:18–21). A review of the evidence and well-established case law reveals that the Condo Group owed a duty of inquiry, which it ultimately failed to satisfy prior to the purchase.

A purchaser is on notice if he has knowledge of facts sufficient to put an ordinarily prudent man on inquiry and a reasonably diligent inquiry would lead to the discovery of title or sale defects. *Stewart v. Good*, 51 Wn.App. 509, 513, 754 P.2d 150 (1988) (citations omitted).

"Notice to a purchaser of real estate that parties other than the seller (or encumbrancer) have a claim of interest in the property need not be actual nor amount to full knowledge, but it should be such information as would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry…". *Glaser v. Holdorf*, 52 Wn.2d 204, 209, 352 P.2d 212 (1960).

In determining whether a purchaser has a duty to inquire, Washington courts consider the purchaser's knowledge and experience with real estate. *See, e.g. Albice v. Premier Mortg. Services of Washington, Inc.*, 157 Wn. App. 912, 930, 239 P.3d 1148 (2010) ("We give substantial weight to a purchaser's real estate investment experience when determining whether a purchaser had inquiry notice.").

Where the purchaser is an experienced investor, Washington Courts have assessed whether the knowledge or information would cause

an ordinarily prudent investor to inquire further. *See, e.g., Miebach v. Colasurdo*, 102 Wn.2d 170, 176, 685 P.2d 1074 (1984) ("Miebach had within his knowledge sufficient facts to put an experienced businessman, as himself, on inquiry notice."); *Albice v. Premier Mortg. Services of Washington, Inc.*, 157 Wn. App. at 931–932 ("A reasonably prudent real estate investor concerned with protecting his assets would have inquired into the particulars of the Teccas' default...").

The Condo Group's testimony establishes that the information it had prior to the purchase would, and in fact did, cause apprehension which would prompt a person of average prudence to make inquiry. This apprehension is based on the Condo Group's experience as a real estate investor specializing in condominium foreclosures and its own due diligence and investment strategy prior to the auction process.

In reviewing the Judgment and Decree of Foreclosure prior to the sheriff's sale, the Condo Group's testimony establishes that it had actual knowledge of the total debt owed to the Condominium Association pursuant to the Judgment, as well as the total super priority amount:

> **Q**: But going into the foreclosure process and having done your due diligence, you were at least aware of the stated judgment amount and the stated amount of the monthly dues owed; is that correct?
> **A**: We had an expectation that we would see a minimum bid in the teens, somewhere in the low teens, and yes, so based upon the judgment amount, that's correct.

> **Q**: So before the foreclosure sale The Condo Group was aware that the Super Priority portion of the lien was somewhere around $1,800?
> **A**: Yes.

(CP 403 at 81:14–81:24).

Additionally, prior to purchasing the Property, the Condo Group had no knowledge of any payment towards the $1,852.68 super priority portion of the Judgment. (CP 149–150). Going into the auction process, the Condo Group had an expectation of the minimum bid price based on the Judgment and knowledge of the super priority lien amount.

When the sheriff set an opening bid amount of $1,000, the Condo Group testified that it was "surprised" as it expected the opening bid amount to be approximately $13,000. (CP 400 at 66:3–66:12). This surprise was based on the Condo Group's expectation that the minimum bid amount would be around the low "teens" based upon the amount set forth in the Judgment. (CP 403 at 81:14 –81:24).

The Condo Group's surprise and concern over the $1,000 opening bid amount is predictable, even to the ordinary person who is not a sophisticated real estate investor. The $1,000 opening bid price was <u>less than 10%</u> of the $11,419.14 Judgment amount and <u>less than 1%</u> of the 2012 assessed property value. (CP 397, 426–427 at 56:20–57:14). The minimum bid price of $1,000 did not even cover the $1,852.68 super

priority lien amount, an amount the Condo Group was aware of prior to the sale.

Notably, the Condo Group argues that "there are many reasons for a bid to be low." (Op. Br. at 13 and CP 448). This argument is supported solely by testimony violating CR 56(e), because it is based on speculation, opinion, and supposition. (CR 475–477).

CR 56(e) is explicit in its requirements which serve the ultimate purpose of a summary judgment motion. Affidavits must (1) be made on personal knowledge, (2) shall set forth such *facts* as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein. CR 56(e); *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) (*emphasis* in original). A fact is an event, an occurrence, or something that exists in reality. *Id* (citations omitted). It is what took place, an act, an incident, a reality as distinguished from supposition or opinion. *Id.* (citations omitted). It is not enough that the affiant be "aware of" or be "familiar with" the matter; personal knowledge is required. *Guntheroth v. Rodaway*, 107 Wn.2d 170, 178, 727 P.2d 982 (1986). The affiant's "understanding" of a fact is similar to his being "aware" of it. It says nothing about personal knowledge and is inadmissible. *Id.*

The testimony cited by the Condo Group sets forth speculative assertions as to why an opening bid could be "low". The testimony is an after the fact opinion based on the affiant's familiarity with judicial foreclosures in general. (CP 477). This argument serves to emphasize the fact that the Condo Group ultimately did not know why the opening bid was a fraction of the Judgment and less than the super priority lien amount.

Critically, the record shows that the discrepancy caused enough apprehension to result an inquiry to the sheriff's office. The Condo Group did in fact inquire further on the day of the sheriff's sale, after it bid on the Property. (CP 400, 66:22–67:3). This is the hallmark of inquiry notice.

To the extent the Condo Group focuses on the due diligence it performed prior to the sale, this analysis presents only a piece of the temporal pie. What is critical is the knowledge the Condo Group had at all times prior to the purchase. *See Hendricks v. Lake*, 12 Wn.App. 15, 22, 528 P.2d 491 (1974). While the Condo Group argues that it was under no duty of inquiry based on its due diligence prior to the initiation of the sheriff's sale, this argument contradicts its own actions.

Overall, in light of the evidence and the Condo Group's own actions, the trial court's ruling should be affirmed as a reasonable person

could only reach one conclusion: the discrepancies known to the Condo Group prior to the purchase of the Property created a duty of inquiry.

ii. <u>The initiation of the foreclosure bidding process does not terminate the duty of inquiry.</u>

The Condo Group argues that once the bidding began, it could not reasonably or diligently conduct an investigation, given the time constraints presented in the bidding process. (*See* Op. Br. at 15–16). There is no basis in law or fact for this argument. The facts establish that the Condo Group was the only bidder and that it had the time to take notice of the discrepancy and formulate a competitive bid for the Property. The law establishes that the requisite time frame applicable to inquiry notice is any time prior to the <u>purchase</u> of the property. A review of Washington case law and the evidence establishes that the trial court's ruling should be affirmed.

The Condo Group cites *Hendricks v. Lake*, 12 Wn.App. 15, 528 P.2d 491 (1974) for the authority that the time frame and circumstances should not be overlooked in the duty of inquiry analysis. (*See* Op. Br. at 16). The citation is misleading.

The Condo Group omits the sentence in the opinion that articulates the exact time frame that may be considered in determining the presence of inquiry notice. This omitted sentence eviscerates the Condo Group's

argument: "It is well established that facts or circumstances giving rise to inquiry notice by a purchaser must be within his knowledge Prior to and not after he purchases the property." *Hendricks v. Lake*, 12 Wn.App. 15, 22, 528 P.2d 491 (1974) (emphasis added).

Hendricks is factually distinguishable as the underlying facts did not involve a foreclosure or any type of auction. The opinion addresses whether an entity should be imputed with another party's knowledge concerning a restrictive covenant at the time the property at issue was transferred. *See Hendricks v. Lake*, 12 Wn.App. at 21–22.

The *Albice* opinion issued by the Washington Supreme Court cited by the trial court is enlightening and on point. In *Albice*, the borrower Karen Tecca ("Tecca") defaulted under the terms of her $115,000 mortgage loan and received a notice of trustee's sale for the foreclosure of her residence. *See Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d, 560, 563–564, 276 P.3d 1277 (2012). Tecca subsequently negotiated and entered into a forbearance agreement with the mortgagee, Option One Mortgage Corporation ("Option One"), to cure the default. *Id.* at 564.

Although Tecca tendered each payment late, Option One accepted each late payment, except for the final February 2007 installment. *Id.* While the forbearance agreement required 10-day written notice upon

default, no notice was sent to Tecca for the February 2007 installment and the residence was foreclosed and sold to the high bidder, Ron Dickinson. *See id.*

Dickinson subsequently brought an unlawful detainer action against Tecca and moved for summary judgment to establish he was a bona fide purchaser and entitled to quiet title. *Id.* at 565. Tecca also moved for summary judgment. *Id.*

The Supreme Court agreed with, and affirmed, the Court of Appeal's bona fide purchaser analysis. *Id.* at 573. The low auction price relative to the fair market value should have alerted Dickinson to the discrepancy between the underlying debt obligation and Tecca's remaining equity in the property. *Albice v. Premier Mortg. Services of Washington, Inc.*, 157 Wn.App. 912, 931, 239 P.3d 1148 (2010). Among other factors, the Supreme Court noted that Dickinson had a copy of the notice of sale, which listed the amount in arrears as only $1,228.03, suggesting Tecca had substantial equity in the property. *Albice*, 174 Wn.2d at 574.

Albice is parallel to this case in multiple ways. First, like Dickinson, the Condo Group is a sophisticated real estate investor who is held to a higher standard in the bona fide purchaser analysis. Second, the Condo Group also purchased the Property at a foreclosure auction. Third,

the Condo Group also first learned of a discrepancy in the underlying figures upon the initiation of the foreclosure auction. Finally, like Dickinson, the Condo Group failed to make any attempt to investigate the discrepancy prior to making the voluntary decision to purchase the Property.

Absent from *Albice* is any analysis or holding regarding whether it was possible to "reasonably or diligently" conduct an investigation to determine the rationale for the discrepancy. A bidder at a foreclosure sale does not learn of the auction price *until the auction*. The fact that the duty of inquiry arose after the bidding started is irrelevant. The correct analysis, which the trial court correctly applied, is whether the duty of inquiry arose prior to the Condo Group's purchase of the Property.

While the Condo Group alleges that it had to act quickly in the sheriff's sale, the evidence establishes that it had the time to (1) formulate a competitive bidding figure, and (2) make a calculated business decision to place a bid on the Property. (CP 400, 68:6 –68:13). Like any bidder at a foreclosure, the Condo Group was not forced to purchase the Property. Notwithstanding its actual knowledge of discrepancies, the Condo Group took a risk and made a business decision to forego any inquiry until after purchasing the Property.

As the bona fide purchaser doctrine does not shield foreclosure auction bidders from the duty of inquiry, the trial court correctly held that the duty of inquiry arose during the bidding, but prior to Condo Group's decision to Purchase the Property.

iii. <u>An inquiry by Condo Group would have revealed Bank of America's payment of the super priority lien.</u>

The trial court's ruling should be affirmed as the evidence establishes that even the most minimal inquiry into the discrepancies known to the Condo Group prior to the purchase of the Property would have led to the discovery of Bank of America's payment of the super priority lien.

Washington case law holds that if an inquiry, reasonably diligently pursued, would lead to discovery of title defects or of equitable rights of others regarding the property, then the purchaser has constructive knowledge of everything the inquiry would have revealed. *See Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d 560, 573, 276 P.3d 1277 (2012). Critically, the Supreme Court noted in *Albice* that the investor could have contacted the property owner to determine whether the default had been cured. *Id.*

In this case, instead of making an inquiry, the Condo Group chose calculate a competitive bid and made the business decision to place the bid

on the Property. (CP 400 at 68:6–68:13). Like the investor in *Albice*, the Condo Group could have, and chose not to, inquire into known discrepancies prior to purchasing the Property at the foreclosure.

The evidence establishes that had the Condo Group made an inquiry to either the COA's counsel or the Sheriff's office, it would have discovered that Bank of America had paid off the super-priority portion of the COA lien. The inquiry to the sheriff's office would have revealed the fact that the super priority lien was paid and that a stipulation and dismissal of Bank of America would be filed. (CP 392 at 36:4–36:22). In fact, a simple inquiry did reveal the payment by Bank of America. *Id.*

Similarly, it is undisputed that counsel for the COA, the law firm handling the foreclosure, had knowledge of Bank of America's payment of the super priority lien. (CP 253). An inquiry to counsel for the COA would have revealed Bank of America's payment of the super priority lien. Notably, the Condo Group's testimony concedes that as a matter of practice, if anything unusual comes up regarding the sheriff's sale, it generally reaches out to the attorneys for the foreclosing condominium association. (CP 387 at 17:10–17:16). The proven facts show that this standard operating procedure was ignored.

Overall, the testimony establishes that the Condo Group failed to adhere to its own business practices in reaching out to the attorney for the

association upon the discovery of unusual circumstances. Summary judgment was properly granted in favor of Bank of America as a reasonable person could only reach one conclusion: had the Condo Group made a reasonable inquiry into the circumstances, it would have discovered the fact that Bank of America made a payment towards the super priority portion of the COA lien.

C. Bank of America's actions in the COA foreclosure are irrelevant to the analysis of whether the Condo Group is bona fide purchaser.

The Condo Group argues that it should be protected under the bona fide purchaser doctrine given that Bank of America knowingly sat on its rights and did nothing to protect them. (Op. Br. at 18–20). These allegations should be disregarded as they are irrelevant to the bona fide purchaser analysis and the Judgment has been vacated against Bank of America.

In support of its argument, the Condo Group regurgitates the procedural chronology of the underlying foreclosure action, including the entry of default against Bank of America, the Judgment, and the confirmation of sale. (Op. Br. at 18–20). The Condo Group takes fault with Bank of America's defense of the lawsuit and its alleged neglect in the underlying proceeding. *See id.*

These allegations are irrelevant. The Judgment in the foreclosure action has been vacated against Bank of America. (CR 301–302). A vacated judgment is void. The rights of the parties are left as though the judgment had never been entered. *Matter of Marriage of Leslie*, 112 Wn.2d 612, 618, 772 P.2d 1013 (1989) ("*Leslie*") (emphasis added).

As the Judgment underlying the sheriff's sale has been vacated, the entry of default, confirmation sale, and the other filings in the COA's foreclosure action cited by the Condo Group have no impact on Bank of America's rights. The Court should disregard the Condo Group's attempt to re-litigate an issue that was not properly appealed.

The only issue in the bona fide purchaser analysis that is applicable to this appeal is whether the Condo Group had knowledge of facts sufficient to put an ordinarily person on inquiry, and whether a reasonably diligent inquiry would have led to the discovery of Bank of America's payment of the super priority lien. The evidence establishes that it did. Accordingly, the Condo Group's argument regarding the proper application of the bona fide purchaser doctrine should be disregarded in its entirety.

V. CONCLUSION

The evidence establishes that the Condo Group is not a bona fide purchaser. The Condo Group had actual knowledge of facts sufficient to

cause an ordinarily prudent person to inquire further prior to purchasing the Property. As the evidence confirms that a reasonably diligent inquiry would, and did, lead to the discovery of Bank of America's payment of the super priority lien, the trial court correctly granted summary judgment in favor of Bank of America. Accordingly, Bank of America respectfully requests this Court to affirm the trial court's ruling.

RESPECTFULLY SUBMITTED this 18th day of March, 2015.

HOUSER & ALLISON, APC

Sakae S. Sakai, WSBA #44082
Robert W. Norman, WSBA #37094
Attorneys for Respondent Bank of America, N.A.

No.: 72659-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

The Condo Group, LLC, Appellant, vs. Bank of America, N.A., Respondent.	**DECLARATION OF SERVICE**

STATE OF WASHINGTON, COUNTY OF KING:

I, the undersigned say: I am a person over the age of eighteen years and not a party to this action. My business address is 1601 Fifth Ave., Suite 850, Seattle, WA 98101.

On March 19, 2015, I served the following document, Notice of Association of Counsel on the following individual(s) via Legal Messenger and email as shown below:

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 MAR 19 AM 9:42

///

///

///

///

///

ORIGINAL

Valerie F. Oman
CONDOMINIUM LAW GROUP, PLLC
10310 Aurora Avenue North
Seattle, WA 98133
Valerie@condolaw.net
Attorneys for Plaintiff Linden Park Homeowners Association

Jordan M. Hecker
Lindsey Truscott
jordanh@heckerwakefield.com
HECKER WAKEFIELD & FEILBERG, P.S.
321 First Avenue West
Seattle, WA 98119
Attorneys for The Condo Group, LLC

DATED: March 19, 2015

Shawn Williams