No. 23-CV-492 & 23-CV-669

In the District of Columbia
Court of Appeals

SARAH STAAB

Defendant-Appellant,

v.

WELLS FARGO BANK, N.A.

Plaintiff-Appellees.

On Appeal from the Superior Court of the District of Columbia
Case No. 2015-CA-004100 R(RP) before the Hon. Fern F. Saddler and the Hon. Maurice A. Ross

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APPELLANT'S OPENING BRIEF (REDACTED)

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal because the D.C. Superior Court entered a final judgment against the Defendant below, Sarah N. Staab, after it granted the motion for summary judgment filed by Plaintiff Wells Fargo Bank NA ("Wells Fargo" or the "Bank"), and denied the motion for summary judgment filed by Ms. Staab. These rulings disposed of all claims by all parties. Ms. Staab then timely invoked this Court's appellate jurisdiction.

ISSUES PRESENTED FOR REVIEW

1. Whether the lower court erred by granting the Bank leave to amend its complaint more than five years after the foreclosure sale at issue in this case, where the Bank failed to justify its delay in seeking the amendment, the amendment alleged facts which should have been included in its original complaint, and asserted entirely new legal theories?

2. Whether the state law claims alleging invalidity of the foreclosure sale were timely?

3. Whether the Bank's claim that a portion of the D.C. Condominium Act is pre-empted by federal law was timely?

4. Whether the condominium association which conducted the foreclosure sale at issue in this case was a necessary party?

STATEMENT OF THE CASE

This judicial foreclosure action was filed by the Bank more than eight years ago in 2015. This action is based on a loan default by the Bank's borrower that occurred in 2011, more than a dozen years ago.

Plaintiff alleges that it is the holder of a promissory note secured by a deed of trust on the property at issue in this case, which is a residential condominium unit located at 601 Pennsylvania Avenue NW, Unit No. 308, Washington, DC 20004 (the "Property"). When the Bank filed this action, the obligor on the deed of trust, Defendant William J. Sutcliffe, who is the former property owner, had been in default on his mortgage for approximately four years.

During that four year period Sutcliffe also failed to pay condominium assessments owed to the governing condominium association, known as the Residential Association of the Pennsylvania, a Condominium (the "Association"). This led the Association to foreclose on the Property to enforce its statutory lien rights for all condominium assessments owed to it. The foreclosure sale took place on October 15, 2013. Ms. Staab was the winning bidder at the foreclosure sale.

Among the lien rights that the Association enforced was its statutory "super-priority" lien for the most recent six months of unpaid assessments owed. Under D.C. Code § 42-1903.13, the foreclosure of a super-priority lien has the effect of extinguishing even a purchase money deed of trust on the foreclosed property.

Chase Plaza Condominium Association, Inc. v. JPMorgan Chase Bank, N.A., 98 A.3d 166, 178 (D.C. 2014). Therefore, when the Association foreclosed on its super-priority lien, that sale extinguished Plaintiff's deed of trust. Ms. Staab's purchase of the Property was therefore not subject to the lien of the Bank's mortgage.

In 2019, at a time when discovery was nearly completed, the Bank requested leave to amend its complaint. Ms. Staab opposed the amendment. The lower court granted the motion to amend, and the Bank was given leave to file its amended pleading. The Bank then filed its Amended Complaint.

The Amended Complaint asserted for the first time materially different facts (as distinguished from new or recently discovered facts), as well as different legal theories. For example, the Bank alleged for the first time that Fannie Mae had acquired the loan which is the subject of this foreclosure action in 2006, thirteen years before it amended its pleading. (JA216 at ¶ 11). In the original complaint the Bank alleged that *it* owned the note which is secured by a deed of trust on the Property (JA032 at ¶ 3), but it turns out that allegation was false. As a consequence of its new legal theories, in its amended pleading the Bank alleged that Ms. Staab never owned the Property and that the Association's foreclosure sale was invalid. (JA215-JA237, *passim*).

In its Amended Complaint the Bank also joined the Association as a new party to this action. The Association moved to dismiss the claims against it in the Amended Complaint, which the Bank opposed. The Bank later voluntarily dismissed the Association from this action.

Ms. Staab answered the Amended Complaint. After the completion of discovery both parties moved for summary judgment. The lower court resolved those motions in favor of the Plaintiff, and entered final judgment. Ms. Staab timely noticed this appeal.

PROCEDURAL BACKGROUND

The foreclosure sale by the Association took place on October 15, 2013. The Bank filed its single-count judicial foreclosure complaint on June 3, 2015. The Complaint alleged that Mr. Sutcliffe defaulted in making payments on his mortgage beginning in July of 2011. (JA033 at ¶¶ 12, 15). Other than alleging that Ms. Staab was the record owner of the property, and referencing the deed of conveyance to her from the Association, the Complaint failed to assert any claims about the foreclosure sale itself, including any allegations of its invalidity.

In her Answer to the Complaint, Ms. Staab asserted an affirmative defense based on the *Chase Plaza* decision, alleging that the condominium association foreclosure sale extinguished the Bank's interest in the property. (JA103 at ¶ 5).

In 2019, more than five years after the Association's foreclosure sale, the Bank filed its Amended Complaint. The Amended Complaint retained the Bank's only original claim as Count 1, which sought judicial foreclosure. The Amended Complaint joined the Association, as an additional defendant. The Amended Complaint also asserted the following new claims: Declaratory Judgment (Count 2); Quiet Title (Count 3); Declaratory Judgment to invalidate the foreclosure sale to Ms. Staab and quiet title (Count 4); Unjust Enrichment against the Association (Count 5); Unjust Enrichment against the Association (Count 6); Equitable Estoppel against the Association (Count 7); and Breach of Contract against the Association (Count 8).

The Association moved to dismiss the claims against it, arguing that, among other things, the new claims were untimely based on a foreclosure sale in 2013. The Bank then voluntarily dismissed all of its claims against the Association on August 20, 2019. Accordingly, only Counts 1 through 4 against Ms. Staab remained for adjudication.

STATEMENT OF FACTS

On February 22, 2006 Defendant William Sutcliffe purchased the Property, which is a residential condominium unit located at 601 Pennsylvania Avenue NW, Unit No. 308, Washington, DC. (JA216 at ¶ 8; JA245-JA263). The Property is located in a Condominium known as "The Pennsylvania." (JA248).

To finance his purchase of the Property, Sutcliffe executed a promissory note (the "Note") to memorialize his loan of $193,000.00 (the "Loan") from Wells Fargo. (JA216 at ¶ 9; JA242-JA244).

Sutcliffe encumbered the Property with a deed of trust dated February 22, 2006 (the "Deed of Trust") to secure the Note. (JA216 at ¶ 10; JA245-263).

Beginning on July 1, 2011, Sutcliffe stopped paying his mortgage on the Property, and failed to cure the default. (JA217 at ¶¶ 15, 18; JA319 at 10:21-11:5; 13:5-10).

Sutcliffe also failed to pay assessments imposed by the Association on the Property. By February of 2011 Sutcliffe had become delinquent on his assessments. On June 2, 2011, the Association gave notice of its intent to record a lien against the Property based on failure to pay the assessments. (JA330-JA333).

On January 13, 2012 the Association recorded a lien against the Property based on Sutcliffe's failure to pay condominium assessments for the period of February 1, 2011 through December 31, 2011. (JA335-JA339).

On March 9, 2012 the Association again gave notice of its intent to record another lien against the property based on Sutcliffe's failure to pay assessments. (JA341-JA344). The Association then filed a complaint to enforce its liens for unpaid assessments, styled *Residential Association of the Pennsylvania v. William J. Sutcliffe*, 2012 CA 8010 R(RP).

On June 1, 2012, a Notice of Condominium Lien for Assessments Due was recorded against the Property based on Sutcliffe's failure to pay assessments. (JA273).

On May 30, 2013 a Notice of Condominium Lien for Assessments Due was recorded against the Property based on Sutcliffe's failure to pay assessments. (JA274).

On July 12, 2013 the Association obtained a judgment against Sutcliffe on its complaint for unpaid assessments in the amount of $17,999.19. (JA346-JA347).

On September 10, 2013 the Association executed and filed its Notice of Foreclosure sale for the Property. (JA277-JA278).

By the time of the foreclosure sale on October 15, 2013, Sutcliffe owed a total of $20,428.43 to the Association in unpaid assessments. (JA275-JA278). The $20,428.43 included the amounts represented by the July 12, 2013 judgment.

Consequently, the Association sought to recover its most recent six months of assessments on the Property, in addition to the older unpaid assessments which dated back to February 1, 2011. The foreclosure sale was based on both the Association's lien rights under D.C. Code Section 42-1903, and on the Association's rights as a judgment creditor based on the judgment it obtained against Sutcliffe in the lower court on July 12, 2013.

The Bank reviewed a title search that was performed on the Property in 2015, which revealed a lien on the Property in favor of the Association. (JA324 at 42:3-19). However, several liens and a judgment in favor of the Association also had been entered against Sutcliffe and recorded against the Property in the land records as well, as indicated above.

In its Amended Complaint filed in 2019, the Bank alleged for the first time that Fannie Mae acquired the Loan in 2006, thirteen years before. (JA216 at ¶ 11). The Bank made no effort to explain in the briefing on its motion to amend its Complaint why, if Fannie Mae's ownership of the Loan was important, the fact of its ownership of the Loan was not disclosed before 2019, or why it had not previously asserted its new claims.

In its deposition the Bank admitted that it did not file a formal assignment document in the D.C. land records evidencing a transfer of the Loan from Plaintiff to Fannie Mae. (JA320-JA321 at 25:4-9; 33:3-8). Consequently, Fannie Mae's alleged ownership of the Loan is not a matter of public record which can be determined from a search of the land records.

Nonetheless, the Bank claimed in its Amended Complaint that no foreclosure sale of the Property could extinguish Fannie Mae's interest in the Property because consent to such a sale was required, but not granted by FHFA. (JA224-JA226 at ¶¶ 52-63; ¶¶ 74-75). Because Fannie Mae's alleged interest in

the Property was never publicly disclosed, neither the Association nor the rest of the world were on notice of Fannie Mae's alleged interest in the Property. The Association also was without notice of any facts giving rise to any duty to investigate Fannie Mae's interest in the Property, or to obtain such consent.

The Bank alleges that it "has authority to protect and enforce Fannie Mae's interest in the Property." (JA224 at ¶ 55). This conclusory statement is not correct. To be precise, the Bank had a contractual duty to protect Fannie Mae's interest in the Property. The Fannie Mae Servicing Guide serves as an agreement between Fannie Mae and its servicers. The Fannie Mae Servicing Guide provides generally that "the borrower will pay special assessments directly, but if he or she fails to do so, the servicer must advance its own funds to pay them if that is necessary to protect the priority of Fannie Mae's lien." (JA349-JA351 at pp. 302-1 and 302-2).

Fannie Mae's Servicing Guide acknowledges that jurisdictions which have adopted the Uniform Condominium Act (UCA), the Uniform Common Interest Ownership Act (UCIOA), or a similar statute (like the District of Columbia) have laws which provide that up to six months of delinquent condominium assessments have lien priority superior to that of a mortgage lien. Fannie Mae requires that once a borrower is 60 days' delinquent in payment of these assessments that the

servicer advance the monies necessary to protect the priority of Fannie Mae's mortgage lien. (JA351).

In its deposition the Bank admitted that it had the obligation as servicer of the Loan to respond to any liens against the Property. (JA324 at 44:6-11).

The Bank alleges that it pays real estate taxes on real property which is pledged as security for loans. (JA326 at 50:3-16).

The Bank also admitted that, as a general matter, it does *not* proactively pay condominium association fees. (JA326 at 50:17-51:5). The Bank also admitted that it made no effort to pay condominium assessments due on the Property in this case. (JA326 at 52:4-8).

Consequently, it is undisputed that the Bank failed to satisfy its contractual obligations as servicer of the Loan to pay delinquent condominium assessments for the Property. This failure by the Bank was the cause of the foreclosure sale.

THE APPLICABLE STANDARD OF REVIEW

The issue of whether the lower court erred in permitting the Bank to amend its Complaint is subject to an abuse of discretion standard on review. *Gordon v. Raven Systems & Research, Inc.*, 462 A.2d 10, 13 (D.C. 1983).

All other issues arose in the context of a disposition below on summary judgment. Accordingly, this Court "conducts a *de novo* review of the record and

applies the same principles employed by the trial court in initially considering the motion." *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 437 (D.C. 2013).

SUMMARY OF THE ARGUMENT

The lower court erred in granting the Bank leave to amend more than five years after the foreclosure at issue, and more than three years after the filing of the original Complaint. The new facts alleged and new claims asserted could have been included in the original Complaint. The Bank offered no good justification for its delay in seeking the amendment in its motion to amend. Given that success appeared unlikely on the single claim originally asserted, the amendment appears to have been a new strategy designed to avoid imminent defeat. The amendment was particularly unjust here, where the Bank was contractually obligated to pay both real estate taxes and condominium assessments on the Property under the terms of its servicing agreement with Fannie Mae. If the Bank had satisfied its contractual obligation to pay the delinquent condominium assessments, which the Bank admits it was aware of, this litigation could have been avoided in its entirety.

Actions alleging wrongful foreclosure in D.C. are subject to a three year statute of limitations. Actions for wrongful foreclosure by Fannie Mae or those acting for it under the Housing and Economic Recovery Act of 2008 also are subject to a three year statute of limitations. The Amended Complaint which first

asserted such wrongful foreclosure claims was not filed until more than five years after the foreclosure at issue, and was not timely.

Although the Bank joined the Association as a party below, it inexplicably dismissed the Association from the case shortly after the Association was joined through the Amended Complaint. Since the deed to the Property came from the Association as grantor, the Association is an indispensable party to an action seeking to rescind the foreclosure sale.

ARGUMENT

I. THE LOWER COURT ERRED GRANTING LEAVE TO AMEND

The Property was the subject of the Association's foreclosure sale on October 15, 2013. On June 3, 2015 the Bank filed its single-count complaint for judicial foreclosure. The Complaint alleged that Mr. Sutcliffe defaulted in making payments on his mortgage beginning in July of 2011. (JA033 at ¶¶ 12, 15). Other than alleging that Ms. Staab was the record owner of the property, and a passing referencing to the deed of conveyance to her from the Association, the Complaint failed to assert any claims about the foreclosure sale itself, including any allegations about its validity.

The Bank filed its Amended Complaint on March 11, 2019. The Amended Complaint included the same count for relief that was contained in the original Complaint. In addition, the Bank alleged for the first time that Fannie Mae

acquired the Loan in 2006, thirteen years before. (JA216 at ¶ 11). The Amended Complaint also asserted for the first time additional claims where the Bank alleged that the foreclosure sale to Ms. Staab was invalid. (*See, e.g.*, Counts 2, 3 and 4). The Bank could have asserted these new claims, and could have joined the Association as a party, when it filed its original Complaint.

Whether "justice so requires" allowing an amendment is determined with reference to five factors: "(1) the number of requests to amend made by the movant; (2) the length of time the case has been pending; (3) bad faith or dilatory tactics on the part of the movant; (4) the merit of the proffered pleading; and (5) prejudice to the nonmoving party." *Sherman v. Adoption Ctr. of Washington, Inc.*, 741 A.2d 1031, 1037-38 (D.C. 1999) (citing *Johnson v. Fairfax Village Condo. IV*, 641 A.2d 495, 501 (D.C. 1994)).

The fact that more than five years had elapsed since the foreclosure, and that more than three years had elapsed since the Bank filed its Complaint, do not support the lower court's ruling. Nor does the fact that discovery was nearly completed (except for the Bank's refusal to provide a designee for deposition). The fact that the Bank could have included all of the claims made in its Amended Complaint in its original Complaint is perhaps the most unhelpful fact. Taken together, all of these facts weighed heavily against granting the amendment. *See Sherman*, 741 A.2d at 1038 (finding that delay of one year and eight months

between filing of complaint and motion to amend, and that motion was filed after close of discovery, supported denial of the requested amendment).

It is appropriate for the court to examine the "proffered explanation for the lengthy delay," as well as the timing of the request, which can suggest an "unacceptable dilatory approach." *Id.* (quoting *Molovinsky v. Monterey Co-op., Inc*., 689 A.2d 531, 534 (D.C. 1996)). This is particularly true when the motion to amend is "filed only after defeat seemed imminent." *Molovinsky*, 689 A.2d at 534.

The Bank did not offer any explanation why it did not assert the claims in its Amended Complaint in its original Complaint. The fact that its original claim lacked legal merit is the most likely explanation.

The Association foreclosed on the Property by enforcing its liens for condominium assessments under D.C. Code §42-1903.13 and its judgment, including its "super-priority" lien for the most recent six months of assessments established by D.C. Code §42-1903.13(a)(2). When the Association foreclosed on its super-priority lien, the Bank's Deed of Trust on the Property was extinguished. The Bank was contractually obligated to and could have paid and satisfied the liens for unpaid condominium assessments before the foreclosure sale, and in doing so could have prevented the foreclosure sale from going forward.

D.C. Code §42-1903.13(a)(2) states, in relevant part, that a lien for unpaid condominium assessments shall:

> be prior to a mortgage or deed of trust . . . recorded after March 7, 1991, 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 or recordation of a memorandum of lien against the title to the unit by the unit owners' association.

D.C. Code § 42-1903.13(a)(2). The statute "effectively splits condominium-assessment liens into two liens of differing priority: (1) a lien for six months of assessments that is higher in priority than the first mortgage or first deed of trust—sometimes called a 'super-priority lien'—and (2) a lien for any additional unpaid assessments that is lower in priority than the first mortgage or first deed of trust." *Chase Plaza,* 98 A.3d 166, 173 (D.C. 2014).

Chase Plaza, which was decided approximately 10 months after the foreclosure sale in this case, 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)." *Id.* at 178. It is "[a] general 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 (citing *Pappas v. Eastern Sav. Bank, FSB,* 911 A.2d 1230, 1234 (D.C. 2006)).

In *Liu v. U.S. Bank, N.A.*, 179 A.3d 871 (D.C. 2018), this Court reaffirmed its holding in *Chase Plaza* that foreclosure of a super-priority lien extinguishes a first-position mortgage, and also held that a condominium association cannot

contract away or waive the superior lien position granted by statute. *Id.* at 876-79. To hold otherwise would effectively allow lenders to pressure condominium associations into waiving their rights to their super-priority lien, defeating the purpose of the statute, and violating the statute's anti-waiver provision. *Id.* at 878-79. This holding about the anti-waiver provision serves to defeat the claim asserted by the Bank in Count 4 that the sale was advertised as being subject to the Deed of Trust, and that Ms. Staab agreed to those terms, and that the terms are binding. (JA229-JA230 at ¶¶ 78-86). The super-priority condominium lien enjoys its priority status by statute, and that statutory priority may not be altered by agreement.

Chase Plaza and *Liu* involved situations where the condominium association had foreclosed only on its super-priority lien, and not the "lien for any additional unpaid assessments that is lower in priority than the first mortgage or first deed of trust." *Chase Plaza*, 98 A.3d at 173; *see id.* at 168; *Liu*, 179 A.3d at 879. But the Court of Appeals also held that a deed of trust will be extinguished where a condominium association enforces its lien for *more* than just the six months of assessments which are given priority by statute, as explained below.

In *4700 Conn 305 Tr. v. Capital One, N.A.*, 193 A.3d 762 (D.C. 2018), the condominium association foreclosed on a condominium unit in an effort to recover 11 months' of unpaid assessments. *Id.* at 763. The Court of Appeals held that the

deed of trust on the property was still extinguished, because the condominium association simultaneously foreclosed on both its super-priority lien for the most recent six months of assessments, and its lower-priority lien for the other unpaid assessments. *Id.* at 764-66. The statute "reflects no intent to nullify the super-priority lien just because both liens are enforced in the same sale." *Id.* at 765.

To hold that a condominium association would forfeit its super-priority lien by attempting to collect more than six months of assessments "would be tantamount to what the court in *Liu* held a condominium association may not do expressly or by agreement, namely, 'subordinate its super-priority lien to a first deed of trust'" in violation of the statute's no-waiver provision. *Id.* at 765-66 (quoting *Liu*, 179 A.3d at 879).

Together, *Chase Plaza*, *Liu*, and *4700 Conn* clearly establish that the Association's foreclosure extinguished the Bank's Deed of Trust on the Property. When the Association foreclosed on the Property at the October 15, 2013 public auction, Sutcliffe owed – and the Condo Association sought to recoup – $20,428.43 in unpaid condominium assessments. (JA303 at ¶ 10). This amount represented two years and eight and one-half months of regular condominium assessments, including the most recent six months of assessments. (JA303 at ¶¶ 10-11).

By seeking recovery of more than six months of unpaid condominium assessments, the Condo Association simultaneously foreclosed on its super-priority lien for the most recent six months of assessments *and* its lower priority lien for the remaining unpaid assessments. *4700 Conn*, 193 A.3d at 764-65. Because the statute confers upon a lien for the most recent six months of assessments a higher level of priority than the Bank's Deed of Trust, *see* D.C. Code § 42-1903.13(a)(2), the foreclosure on that super-priority lien extinguished the Deed of Trust. *Liu*, 179 A.3d at 879; *Chase Plaza*, 98 A.3d at 174.

Accordingly, the Bank's amendment appears to have been an effort to avoid defeat on its only original claim. Its delay in asserting its new claims is inexcusable. The fact that the Bank did not challenge the issue of lien priority under the D.C. Condominium Act in its summary judgment papers, and instead chose to rely on its federal preemption arguments, constituted a concession on this issue.

The bad faith or dilatory conduct by the movant factor operates to estop the Bank under the circumstances of this case. Despite the Bank's admission that it was aware of a condominium lien filed by the Association on the Property, the Bank made no effort to pay the assessments owed in order to preserve Fannie Mae's mortgage on the Property or to prevent the foreclosure sale. This failure was a breach by the Bank of its contractual duty to Fannie Mae as reflected in the

Servicing Guide. The Bank could have, and had an obligation to, pay the delinquent assessments in order to stop the sale. The Bank failed to do so, and then waited more than five years to file its claims seeking to invalidate the foreclosure sale. This litigation would have been necessary but for the Bank's failure.

II. THE INVALIDITY CLAIMS ARE TIME BARRED

A. State law invalidity claims

The Bank's claims that the Association's sale of the Property to Ms. Staab was invalid, and that the sale failed to extinguish the Bank's Deed of Trust, are time-barred. The limitations period for a claim alleging invalidity of a foreclosure sale in D.C. is three years. *Tefera v. One West Bank*, FSB, 19 F. Supp.3d 215, 224 (D.D.C. 2014) (citing D.C. Code §12-301). The three year limitations period accrues on the day the notice of foreclosure issues. *Tefera*. (citing *Murray v. Wells Fargo Home Mortg*., 953 A.2d 308, 322 (D.C. App. 2008). The claim accrued in this case on September 10, 2013, the date of the foreclosure notice. (Am. Compl. at Exh. I). The limitations period therefore expired on September 9, 2016.

The Amended Complaint asserting the new claim to set aside the sale was not filed until March of 2019, more than five years after the claim accrued. The new claim does not relate back to the filing of the original Complaint, because the original Complaint simply asked for foreclosure based on a mortgage default, and

failed to allege any wrongful conduct with the foreclosure sale or claim invalidity of the sale. The relation back doctrine embodied in Rule 15(c) therefore does not apply. The state law claims alleging preemption and invalidity of the foreclosure sale are therefore time-barred.

B. Invalidity based on federal law

The Bank's claims about invalidity under federal law are similarly untimely. The plain language of the Housing and Economic Recovery Act of 2008 ("HERA") states that the "applicable statute of limitations with regard to any action bought by the Agency as conservator or receiver shall be . . . in the case of any contract claim, the longer of" six years or the period applicable under State law. In the case of any tort claim, the applicable period is the longer of three years or the period applicable under State law. 12 USC § 4617(b)(12)(A).

Wrongful foreclosure is not a contract claim, and no privity of contract was alleged between the Bank and either the Association or Ms. Staab. Rather, the claim is an allegation of wrongful conduct in conducting a foreclosure sale, which is more analogous to tort claim than a contract claim. As such, the claim is governed by a three year limitations period under HERA.

There is a conflict over interpretation of the statutory language in HERA about whether "any action bought by the Agency as conservator or receiver" includes actions by parties such as the Bank as servicer. This action was not

brought by the Agency as either conservator or as receiver. However, under the circumstances of this case this is a false conflict, because the result is the same in either instance. For either the Agency under HERA or a private party under D.C. law the limitations period for wrongful foreclosure is three years.

III. THE CLAIM TO INVALIDATE THE SALE IS DEFECTIVE FOR FAILURE TO JOIN AN INDISPENSABLE PARTY

Count IV of the Amended Complaint the Bank sought to completely invalidate the foreclosure sale and to declare it invalid *ab initio*. Although the Bank joined the Association as a defendant in this action, which is an indispensable party, the Bank later voluntarily dismissed the Association as a defendant. The claim is therefore defective.

Cases which seek to undo or rescind a transaction must join all necessary parties to the suit. *Young v. Swafford*, 102 A.2d 312, 313 (D.C. 1954); *see id.* at 313-14 (dismissing buyer's claim against broker to rescind contract to buy property when property owner was not a party); *Ward v. Deavers*, 92 U.S. App. D.C. 167, 170, 203 F.2d 72, 75 (D.C. Cir. 1953) (judgment granting rescission for buyer of business reversed where seller was not a party, because seller was indispensable party and relief could not awarded without affecting his interest). "Rescission of a contract, or declaration of its invalidity, as to some of the parties, but not as to others, is not generally permitted." *Ward*, 92 U.S. App. D.C. at 170, 203 F.2d at 75. Moreover, "a holder of an interest in real property is indispensable when a

judgment could destroy or substantially impair the interest at issue." *EMC Mortg. Corp. v. Patton*, 64 A.3d 182, 188 (D.C. 2013); *see id.* at 188-89 (holding that party with interest in property was indispensable party under Sup. Ct. Civ. R. 19).

The deed to Ms. Staab came from the Association, and the Association would be required to return the sale price paid for the Property if the sale were invalidated. The Association is therefore an indispensable party. For reasons that the Bank never explained, it voluntarily dismissed the Association from this case, and the lower court lost jurisdiction over the Association as a result of that dismissal. The Bank has therefore failed to join an indispensable party.

CONCLUSION

For the reasons stated above, Defendant Sarah N. Staab requests that the Court reverse the lower court's rulings which permitted the Bank to amend its pleading and which entered summary judgment in favor of the Bank, and enter judgment in favor of Ms. Staab.

Date: January 23, 2024

Respectfully submitted,

/s/ Robert C. Gill

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CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of January, 2024, a true and correct copy of the foregoing **APPELLANT OPENING BRIEF (REDACTED)** was electronically served on all counsel of record through the court's electronic filing system.

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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Robert C. Gill
Signature

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23-CV-492 & 23-CV-669
Case Number(s)

January 25, 2024
Date