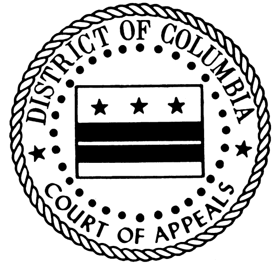

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NO. 23-CV-0719

DISTRICT OF COLUMBIA COURT OF APPEALS

WONDER TWINS HOLDINGS, LLC,

Appellant,

v.

450101 DC HOUSING TRUST,

Appellee.

Appeal from the District of Columbia Superior Court
2021-CA-000141-B
(Honorable Robert Rigsby)

REPLY BRIEF OF APPELLANT WONDER TWINS HOLDINGS, LLC

April 16, 2024

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REPLY

I. THE 2017 AMENDMENT TO THE CONDOMINIUM ACT DOES NOT ALTER THE FACT THAT THE ASSOCIATION'S CONDO SALE WAS OF A SUPER-PRIORITY LIEN.

Appellee misinterprets the 2017 Amendment of the District of Columbia Condominium Act (the "Act") in a way that contravenes this Court's prior holdings, which recognize that there has always been two condominium liens of different priority. The relevant part of the 2017 Amendment of the Act requires that the recorded notice of a condominium lien foreclosure sale ("Notice of Sale") expressly state that either the sale is of a 6-month priority lien and not subject to a first deed of trust or of the lower priority portion of the condominium lien and subject to a first deed of trust. D.C. Code § 42-1903.13(c)(4)(B)(ii). Notably, substantial compliance with this notice provision is "sufficient until new forms are made available by the Recorder of Deeds." D.C. Code § 42-1903.13(c)(4)(C). The flaw in Appellee's interpretation of the 2017 Amendment of the Act is its contention that this notice provision now allows an association to foreclose on either type of split-priority lien. App. Br. at p. 11. In actuality, a lienholder could always foreclose on either portion of its lien; the legislature merely ensured that the notices *clarified* the type of lien being foreclosed upon so that interested parties could act in accordance with their interests. *See Chase Plaza Condominium Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 173 (D.C. 2014) ("[T]he Act effectively splits condominium-

assessment liens **<u>into two liens</u>** of differing priority"); *Liu v. U.S. Bank National Association*, 179 A.3d 871, 879 (D.C. 2018) ("To be clear, we are not stating that a foreclosing condominium association is required to foreclose pursuant to its super-priority lien.").

Moreover, absent an express statement to the contrary, a condominium is presumed to be foreclosing on its entire condominium lien, which includes its super-priority portion. *See 4700 Conn 305 Trust v. Capital One, N.A.*, 193 A.3d 762, 765 (D.C. 2018). The Notice of Sale must clarify if the Association intends to foreclose only on the non-super-priority portion of its lien. D.C. Code § 42-1903.13(c)(4)(B)(ii). Mere silence does not create a waiver of the Association's right to foreclose on its super-priority position. *See Liu*, 179 A.3d at 883 (D.C. Code § 42-1901.07 "precludes a condominium association from waiving the priority of its super-priority lien… while also preserve the full amount of the Bank's unpaid lien."). Indeed, this Court has made clear that even representations made in an advertisement, which indicate that a sale is being conducted "subject to" a first deed of trust, are insufficient to waive an association's super-priority position. *See id*. Stated differently, unless there is an express statement to the contrary, this Court's prior decisions affirm the presumption that the lien being foreclosed upon is super-priority in nature. *See 4700 Conn*, 193 A.3d at 765.

The 2017 Amendment of the Act does not alter the legal import of the Notice of Sale used for the Condo Sale at issue, nor did it require an immediate change to procedure. The 2017 Amendment of the Act did require that the Notice of Sale specify whether the "foreclosure sale is for either: (I) The 6-month priority lien…and not subject to the first deed of trust; or (II) more than the 6-month priority lien and subject to the first deed of trust." D.C. Code § 42-1903.13(c)(4)(B). However, recognizing the change in procedure, the amendment went on to say that "substantial compliance with the requirements of subparagraph (B) of this paragraph shall be sufficient until new forms are made available by the Recorder of Deeds" *Id.* at (c)(4)(C). In doing so, the Association used the old Recorder of Deeds form to notice the Condo Sale, which did not specify the type of split-priority lien being foreclosed upon. *See* Appellant Br. at p. 5, n.3.[1] The absence of any contrary statement that a specific tier of the split-priority lien was being foreclosed upon resulted in the default that this Court articulated in *4700 Conn* and *Liu* being triggered. *See Liu*, 179 A.3d at 883 (holding that the anti-waiver provision precludes waiver of the super-priority position when the entire lien is being foreclosed upon). As a result, the Association foreclosed upon its super-priority lien pursuant to its Notice of Sale, and the legal import is that the Deed of Trust was extinguished as a matter of law. *Id.*

[1] The Association utilized the old Notice of Sale form, as evidenced in Instrument No. 2017076225 recorded in the District of Columbia Land Records on July 12, 2017, which was only three months after the 2017 Amendment of the Act was enacted in April of 2017.

Faced with the above, the Appellee attempts to contort the Association's terms of the Condo Sale in two meaningful ways. First, Appellee mischaracterizes the advertisement in the Washington Post as a "Notice of Condo Sale." App. Br. at p. 6. This is an improper legal characterization of the newspaper advertisement that the Act itself does not support.[2] *See Booz Allen Hamilton Inc. v. Office of Tax and Revenue*, 308 A.3d 1205, 1210 (D.C. 2024) (noting that the plain language of a statute controls). The only form of notice that is sent to all interested parties is the statutory Notice of Sale, which is recorded amongst the land records. *See* D.C. Code § 42-1903.13(c)(4)(E). There is no statutory requirement that a copy of the advertisement be sent to any interested party as a form of notice. *Id.* at (c)(5). Appellee's reliance on the advertisement as a form of notice is improper.

Second, the terms of sale outlined in the advertisement do not support Appellee's position that the Property was sold subject to the Deed of Trust at the Condo Sale. App. Br. at p. 9. The advertisement states in relevant part that the "property will be sold <u>**subject to any prior liens**</u>, encumbrances, and/or municipal assessments <u>**if any**</u>." App. 160. Stated differently, *if any* liens encumber the

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[2] The Court in *Liu* made note of this critical fact in finding the Bank's estoppel argument wanting. *See Liu*, 179 A.3d at 880. Specifically, the Court stated that the record in that case does not support that the Bank "reasonably relied on the advertised terms of sale to protect its mortgage interest." *Id.* The record in this case is similarly nonexistent on this point to justify Appellee calling the advertisement a "Notice." This fact is aligned with the realities associated with the local newspaper in that it is "[c]hance alone [that] brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

property that are of higher lien priority than the condominium lien being foreclosed upon, the Condo Sale shall be subject to such liens. In this instance, the first Deed of Trust did not constitute a lien of higher priority, so the statement that the Appellee relies on in the advertisement is of no moment. *See Chase Plaza*, 98 A.3d at 173 (Super-priority lien is of higher priority than a first deed of trust).

At bottom, Appellee's entire argument is built upon a series of false premises. It mistakes the advertisement of sale for the notice of sale, ignores the default and anti-waiver rules surrounding super-priority liens, and fails to acknowledge that the 2017 Amendment to the Act maintained the status quo while the Recorder of Deeds created new notice forms. The result is that the Appellee's position is without merit.

II. WONDER TWINS HOLDS TITLE TO THE PROPERTY AS A BONA FIDE PURCHASER.

Housing Trust contends that Wonder Twins is not a bona fide purchaser because it bought the Property at the Condo Sale with knowledge of the recorded Deed of Trust and the advertisement's terms stating that the sale would be "subject to any prior liens…." App. Br. at pp. 16-17. A bona fide purchaser is one who purchases a property "without 'actual, constructive or inquiry' notice of the unrecorded instrument." *Molla v. Sanders*, 981 A.2d 1197, 1201 (D.C. 2009). Here, there is no dispute that Wonder Twins knew that a Deed of Trust existed on the Property prior to its purchase; however, the lien was extinguished upon the foreclosure of a higher priority lien. *See Chase Plaza*, 98 A.3d at 173. When

Wonder Twins was the highest bidder at the Condo Sale, it was a bona fide purchaser that held clear title to the Property free of all encumbrances, including the Deed of Trust, from a super-priority lien sale. *See id.*; App. 169-70.[3]

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Respectfully, submitted,

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[3] Housing Trust's unconscionability argument is similarly wanting. App. Br. at p. 17. Housing Trust argues that Wonder Twins understood it was purchasing the Property subject to the Deed of Trust based on the low purchase price at auction. Id. As this Court has made clear, "a court cannot set aside a foreclosure sale because a change in the law transforms a market-rate purchase into a bonanza." *RFB Properties II, LLC v. Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loan, Inc. Mortgage Asset-Backed Pass-Through Certificates, Series 2005-QA8*, 247 A.3d 689, 698 (D.C. 2021). Based on the foregoing, the purchase price alone is not dispositive of whether a super-priority lien sale was subject to a first deed of trust. *See id.* Moreover, the Condo Sale occurred in 2017, prior to clarity on super-priority lien sales from the decisions in *Liu* and *4700 Conn* in 2018, so the record in this case does not support Housing Trust's unconscionability defense.

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2024, the foregoing document was served on all counsel of record via the Court of Appeals Electronic Filing System.

/s/ Tracy Buck
Tracy Buck

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/ Tracy Buck, Esq. (DC Bar # 1021540)
Signature

23-CV-0719
Case Number(s)

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