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

REPLY BRIEF OF APPELLANT

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RESPONSE TO APPELLANT'S PRELIMINARY STATEMENT

Appellee Wells Fargo Bank, N.A. (the "Bank") misapprehends Appellant Sarah N. Staab's position in this appeal. On the first page of its brief the Bank alleged that "Ms. Staab abandons her merits position." (Brief of Appellee p. 1). Nothing could be further from the truth. In her motion for summary judgment in the Superior Court, Ms. Staab argued that the foreclosure sale conducted by Residential Association of the Pennsylvania, a Condominium (the "Association"), operated to extinguish the Bank's deed of trust because the Association's lien was a priority lien under D.C. law. (JA306-JA309).

The Bank's opposition to Ms. Staab's summary judgment motion on the issue of priority of the Association's lien relied on its federal pre-emption argument, and did not even address the issue of lien priority under D.C. law. (JA424-JA425). Other than its argument that the foreclosure sale was voidable based on the sale price (JA441), the Bank relied entirely on its federal preemption argument as its litigation strategy below, and failed to present any argument that its lien was superior to the Association's lien under D.C. law. Consequently, if Ms. Staab were to prevail on any of her defenses to the Bank's preemption theory, the Bank has no defense to Ms. Staab's state law lien priority arguments, other than to argue that the purchase price was unconscionably low. By failing to present

argument about lien priority under state law below, the Bank has failed to preserve this issue.

RESPONSE TO THE BANK'S STATEMENT OF FACTS

The Bank acknowledges and concedes that the date of the notice of foreclosure in this case is September 10, 2013. (Brief of Appellee p. 9).

The Bank asserts that Ms. Staab did not pay anything toward Fannie Mae's lien. (Br. Appellee p. 10). However, nothing in the land records disclosed Fannie Mae's ownership interest in the Property. Moreover, nothing in the record below establishes the existence of privity between Ms. Staab and the Bank. Ms. Staab never had any contractual obligation to the Bank relating to the Property.

SUMMARY OF ARGUMENT

In its summary of argument the Bank makes the remarkable assertion that "Ms. Staab does not contest the Superior Court's merits holding" that HERA voids the Association's foreclosure sale and preserves Fannie Mae's lien. (Appellee's Brief p. 10). This is demonstrably false. The Bank then goes on to categorize Ms. Staab's arguments as "largely procedural." (*Id.*). Whether procedural or substantive, it is fair to say that for the reasons set forth in her opening brief and herein that Ms. Staab *does* challenge the Superior Court's ruling that HERA voids the Association's foreclosure sale. That is the entire point of this appeal.

ARGUMENT

I. THE LOWER COURT ERRED GRANTING LEAVE TO AMEND

The Property at issue was sold at foreclosure on October 15, 2013. On June 3, 2015 the Bank filed its single-count complaint for judicial foreclosure. In 2019, more than five years after the foreclosure sale, the Bank sought leave to amend. (JA106-JA109).

No justification was provided for the more than five year delay in pursuing leave to amend. No justification was really possible, since the statutory scheme on which the Bank relies, the Housing and Economic Recovery Act of 2008 ("HERA"), was enacted in 2008. (Brief of Appellee p. 6). Fannie Mae was placed into conservatorship that same year. (*Id.* at 7). Fannie Mae had previously acquired the loan at issue in 2006. (*Id.* at 8). According to the Bank, Fannie Mae owned the loan at the time of the foreclosure sale in 2013, and when this action was filed. However, the Bank did not see fit to disclose Fannie Mae's ownership until 2019, until it became beneficial for its new litigation strategy.

The reason given by the Bank for the amendment in its motion was conclusory. The explanation consisted of: "Plaintiff wishes to pursue a supplemental claims [sic] for declaratory relief regarding the Condo Lien Sale and, in the alternative, to void the Condo Lien Sale pursuant to D.C. Super. Ct. Civ. R. 57 and monetary relief. Therefore, Plaintiff respectfully seeks leave to amend its

Complaint." (JA106-JA107). In sum, the Bank only stated what it wished to accomplish. The Bank failed to provide any explanation *why* it could not have asserted its claims earlier.

In the Bank's reply brief in support of its motion for leave to amend it responded to Ms. Staab's opposition to the motion. In that submission the Bank admitted that its decision to amend was based on a change in its litigation strategy. The Bank cited the decisions of this Court in *Liu v. U.S. Bank N.A.*, 179 A.3d 871, 873 (D.C. 2018) and *4700 Conn 305 Tr. v. Capital One, N.A.*, 193 A.3d 762, 764 (D.C. 2018), and conceded that "Plaintiff discovered its interest may be at risk." The word "interest" appeared to refer to the Bank's mortgage interest in the Property.

In other words, the Bank learned that the merits of its original Complaint concerning lien priority were without merit, and realized that losing the claim seemed imminent. While the *Liu* and *4700 Conn* decisions were not helpful to the Bank, they were a logical extension of the decision in *Chase Plaza Condo. Ass'n v. JPMorgan Chase Bank,* 98 A.3d 166 (D.C. 2014), which predated the commencement of this litigation. The notion that the *Liu* and *4700 Conn* decisions represented a radical change in the law is simply untrue.

The Superior Court (Hon. F. Saddler) granted the Bank's motion to amend in a conclusory ruling which failed to analyze a number of critical factors the court

was required to consider. Whether an amendment should be permitted requires consideration of 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, did not support the lower court's ruling, and the lower court so acknowledged. (JA213).

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. The lower court failed to provide any analysis on this factor.

The lower court seemed to miss the point that the amendment was for an improper purpose, because the Bank recognized that it was likely to lose on its original Complaint. The realization that the Bank's change in strategy constituted an "unacceptable dilatory approach" to amendments was apparently lost on the lower court. *Sherman* (quoting *Molovinsky v. Monterey Co-op., Inc*., 689 A.2d

531, 534 (D.C. 1996)). This is true because the motion to amend was "filed only after defeat seemed imminent." *Molovinsky*, 689 A.2d at 534.

The lower court also failed to analyze the factor concerning prejudice to the non-moving party. In this long-running case filed by the Bank against an individual purchaser of a condominium, with whom the Bank had no contractual relationship, this factor cannot be overstated. Even on appeal the Bank fails to acknowledge the prejudice to Ms. Staab from the late amendment. (Brief of Appellee at pp. 16-17).

An illustration of one way that delay has prejudiced Ms. Staab comes from the Bank's decision to include the Association as an additional defendant in its amended pleading. (*See* Section III, below). For reasons that were never publicly disclosed in writing, the Bank voluntarily dismissed the Association as a defendant only a few months after joining the Association as a party. (JA297). The Association's motion to dismiss the Bank's Amended Complaint argued that the claims were time-barred, in addition to other arguments. (The Pennsylvania's Memorandum of Points and Authorities in Support of its Motion to dismiss at pp. 5-7). Since the Bank joined the Association as a party more than three years after the foreclosure sale, it appears that the Association was voluntarily dismissed

because the Bank knew its claims were asserted more than three years after the claims accrued, and were untimely.

II. THE INVALIDITY CLAIMS ARE TIME BARRED

A. The state law invalidity claims

The Bank cited no authority to contradict the holding that 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(8)). Nor can the Bank contradict the principle that 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). Based on these principles, the claim accrued in this case on September 10, 2013, the agreed date of the foreclosure notice. (Am. Compl. at Exh. I). The limitations period therefore expired on September 9, 2016.

The Bank attempts to avoid application of these legal principles by attempting to chart new law on claim accrual. According to the Bank, its claim did not accrue until the *Liu* decision issued on March 1, 2018. (Brief of Appellee p. 26). The Bank's creative argument on this issue is unsupported by statutory or judicial authority, and cannot serve to impeach *Teferra* and *Murray*, cited above.

The Bank's proposed accrual date also is unreasonable, given the 2014 holding in *Chase Plaza Condo. Ass'n v. JPMorgan Chase Bank,* 98 A.3d 166

(D.C. 2014). After Chase Plaza, the Bank could not claim that it was unaware that its deed of trust was at risk of being extinguished by a condominium association lien. Even basing knowledge on *Chase Plaza* is generous, since the basis for condominium lien priority in D.C. is statutory, and pre-dated *Chase Plaza*.

The argument that a 15 year limitations period applies to actions to recover real property is inapplicable to Ms. Staab. The Bank's claims against Ms. Staab seek to invalidate a foreclosure sale the Bank contends was invalid *ab initio*. The 15 year period would be applicable to claims to enforce the mortgage against Mr. Sutcliffe.

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 Bank's argument that the relation back doctrine embodied in Rule 15(c) applies is without merit. The Bank's action is simply based on the existence of a mortgage and a mortgage default. The Bank never alleged in its original Complaint that the foreclosure sale to Ms. Staab was invalid, or that HERA

applied. The claims alleging preemption and invalidity of the foreclosure sale do not relate back, and are therefore time-barred.

B. The federal law invalidity claims

The Bank challenges Ms. Staab's claim, based on the plain language of HERA, that the applicable limitations period is three years. The Bank claims that a longer contract limitations period applies here, even though there was no contract between the Bank and Ms. Staab. (Brief of Appellee pp. 7-8). The Bank cites to Ninth Circuit and Nevada precedent to support its position, none of which is controlling or logical in its reasoning.

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).

The case of *M&T Bank v. SFR Inv. Pool 1, LLC*, 963 F.3d 854 (9th Circuit 2020) arose from an action filed by M&T Bank and Freddie Mac to quiet title to real property purchased at foreclosure sale and for declaratory judgment. The Ninth Circuit held that the action was governed by the six year limitations period in HERA, because a mortgage lien is created by contract. *Id.* at 858. While this would be applicable for an action to enforce or foreclose on a mortgage itself

(assuming the absence of a longer state limitations period) it would not be applicable to a claim to invalidate a foreclosure sale. The district court had applied a Nevada state statute of limitations of five years applicable to actions based on title to real property, and based on that statute had found the action timely.

M&T Bank is not binding on this Court, and is not persuasive authority. There would be no point to Congress creating a statutory scheme with separate limitations periods applicable to contract and tort claims, only to apply the contract limitations period to all claims. The claims here allege wrongful conduct in the conduct of 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.

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

Count IV of the Amended Complaint the Bank seeks to completely invalidate the foreclosure sale and to declare it void *ab initio*. The conveyance of the Property to Ms. Staab was effected by deed of conveyance from the Association. If the sale were invalidated, the Association would be re-vested with title to the Property, and would be obligated to return the purchase price paid.

When the Bank sought to join the Association as a party to this action, one of the claimed benefits from the amendment was that "[i]t would serve justice and economy" to have all claims resolved in one action, since all claims involved the

Property. (JA108). The Bank then promptly dismissed the Association before the lower court could rule on the Association's motion to dismiss. (JA015-JA016).

The Bank now takes a different approach, and inconsistently asserts that "Ms. Staab remains free to pursue a separate action" against the Association. (Brief of Appellee p. 29). Any such action by Ms. Staab against the Association would be time barred. *Teferra v. One West Bank, FSB*, 19 F. Supp.3d 215, 224 (D.D.C. 2014) (J. Ketanji Brown Jackson). This illustrates why the Bank's late amendment serves to prejudice Ms. Staab. She is not fee to sue the Association.

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.

Date: March 21, 2024

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I certify that on this 21st day of March, 2024, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT** was served via the Court's electronic filing system on the following:

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