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
CA-000141-B
(Honorable Robert Rigsby)

Brief of Appellee

450101 DC HOUSING TRUST

March 5, 2024

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DISCLOSURE STATEMENT

Appellant (Wonder Twins Holdings, LLC)

Wonder Twins Holdings, LLC is represented by Ian G. Thomas and Tracy Buck of the law firm Offit Kurman.

Appellee (450101 DC Housing Trust)

450101 DC Housing Trust is represented by Brian T. Gallagher of Gallagher Law.

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STATEMENT OF THE FACTS

The property at issue in this matter is located at 450-A Southeast Condon Terrace 101, Washington, D.C. 20016 (the "Property"). The Property is located within the condominium building operated by the Highland Court Condominium (the "Association"). On November 9, 2006, a mortgage lien was placed on the Property, which lien was memorialized by a Deed of Trust recorded among the land records of the District of Columbia on January 31, 2007, as Instrument No. 2007014667 ("Deed of Trust"). The Deed of Trust was a purchase money first mortgage pursuant to which the former homeowner, Mark E. Taylor, acquired title to the Property.

In 2016, Mr. Taylor defaulted on the loan underlying the Deed of Trust and on December 9, 2016, a foreclosure action was filed in the D.C. Superior Court against Mr. Taylor to initiate foreclosure proceedings of its Deed of Trust. App. 223. On December 27, 2016, a Lis Pendens was also filed and recorded in the land records of the District of Columbia as Instrument No. 2016134926 ("Notice of Lis Pendens"). App. 223.

On December 20, 2016, the Association recorded a Notice of Lien for Assessments Due ("Notice of Condo Lien"), which was recorded as Instrument No. 2016131862 in the District of Columbia Land Records. On August 7, 11 and 16, 2017, the Association published its notice of Foreclosure Sale of Condominium Unit

in the Washington Post ("Notice of Condo Sale"), which advertised and noticed the proposed auction of the Property pursuant to D.C. Code § 42-1903.13. App. 160. The Notice of Condo Sale specifically stated as follows:

> TERMS OF SALE: The property will be sold subject to any prior liens, encumbrances, and/or municipal assessments if any.

Id. Importantly, the holder of the Deed of Trust, as identified in the recorded Notice of Lis Pendens was never provided with notice of the Condo Foreclosure Sale. App. 134. Notwithstanding the invalid notice of the foreclosure sale, Appellant, Wonder Twins Holdings, LLC ("Wonder Twins") purportedly purchased the Property for $13,000 at the Condo Sale as evidenced by the Memorandum of Purchase acknowledged and signed by a representative of Wonder Twins. App. 223. The Memorandum of Purchase expressly refers to and incorporates the Notice of Condo Sale and states three distinct times that the purchase is subject to the conditions of the Notice of Condo Sale:

1) "the undersigned purchasers hereby acknowledge that I (or We) have this day purchased the property described in the attached advertisement, **subject to the conditions stated therein**";
2) "I (or We) agree to complete the purchase **in accordance with said conditions in the advertisement**"; and

3) "The above offer is accepted subject to the conditions of the sale in said advertisement, and I (or We) agree to deliver title as therein stated to complete the sale, **subject to the conditions herein set forth**"

App. 168. The substitute trustee thereafter executed the Trustee's Deed of Foreclosure for Unpaid Condominium Assessments (the "Condo Foreclosure Deed"). App. 169-170. The Condo Foreclosure Deed expressly states in two separate places that the Property is conveyed to Wonder Twins "subject to any prior liens and mortgages, including the first mortgage lien." Id. At the time of the Condo Sale on August 17, 2017, the tax-assessed value of the Property was $107,170.00. App. 171.

On January 11, 2018, Wilmington Savings Fund Society, FSB, as Trustee for Stanwich Mortgage Loan Trust A, sub-party Surf City Investors, LLC through the substitute trustees, conducted a foreclosure sale on the Property pursuant to a court order entered on December 4, 2017 in connection with the foreclosure on the Deed of Trust. App. 172-175. Notice of the time, place, manner and terms of the foreclosure sale was mailed certified and first class to Wonder Twins in accordance it the applicable foreclosure statute. App. 178. Wonder Twins never objected to the foreclosure sale and Housing Trust purchased the Property on January 11, 2018 for $80,000. App. 172-175. The Report of Sale was served on Wonder Twins and, after receiving no objection from Wonder Twins, the court ratified the sale to the Housing

Trust on March 14, 2018. App. 192-193. The Trustee's Deed was recorded with the land records of the District of Columbia at Instrument No. 2018028578 on March 20, 2018. App. 194-196. Housing Trust filed an eviction action against Mr. Taylor for possession of the Property on June 8, 2018.[1] On May 21, 2019, Housing Trust was granted possession of the Property and a Writ of Possession was entered by the Court on August 14, 2019. App. 197. In violation of the Writ of Possession, Wonder Twins and/or its members, including Barrett Ware, illegally entered the Property in December 2019. App. 224. Housing Trust again took steps to obtain possession of the Property and filed a lawsuit for possession against Defendants Barrett Ware, Ivory Ette and All Occupants. The Court issued a Show Cause Order on September 16, 2020 to Wonder Twins to show cause why it was not in breach of the Writ of Possession. App. 022.

SUMMARY OF ARGUMENT

Wonder Twins' argument that "[b]inding precedent from this Court confirms that the lower court should have quieted title in [its] favor" is flawed because this Court has never had occasion to consider a similar case under the 2017 Amendments to the Condo Act (as defined below). The 2017 Amendments to the Condo Act make clear that a condominium association may elect to foreclose on its assessment lien

[1] Contrary to Housing Trust, which made immediate efforts to obtain possession, Wonder Twins made no attempt to gain possession of the Property for nearly a year after their purported claim to title arose.

"subject to the first deed of trust" on a property and notice the foreclosure sale accordingly. Here, the association did just that and reinforced that decision by publishing a notice of its foreclosure sale explicitly stating that the sale was "subject to any prior liens, encumbrances and/or municipal assessments, if any." The subsequent Memorandum of Purchase and Condo Foreclosure Deed memorializing the foreclosure sale reiterated and incorporated that term and condition. As a result, Wonder Twins took title "subject to" the Deed of Trust and its purchase did not extinguish it.

Additionally, as a result of this repeated, express notice, Wonder Twins cannot be deemed a bona fide purchaser of the Property in light of the prior-recorded Deed of Trust.

Accordingly, the Superior Court properly entered summary judgment in favor of Housing Trust finding that it is the fee simple title holder to the Property and that its title is free and clear of any claim of right, title or interest held by Wonder Twins. The judgment should be affirmed.

RULE 26.1 CORPORATE DISCLOSURE

Appellee Housing Trust is a privately held trust and does not have any members or shareholders that are a publicly traded company.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT THE CONDOMINIUM SALE DID NOT EXTINGUISH THE FIRST MORTGAGE

The lower court correctly granted summary judgment in the Housing Trust's favor finding that Wonder Twins' purported purchase of the condo unit was subject to the existing Deed of Trust representing the superior lien on the condominium unit. Here, as Wonder Twins recognizes, the issue involves the interpretation and application of the District of Columbia Condominium Act, which governs the creation and operation of condominiums. *See* D.C. Code § 42-1901.01 *et seq.* (the "Condo Act"). The Condo Act provides that a condominium association may impose a lien against a unit for non-payment of assessments. The Condo Act further sets forth the relative priorities of liens against a condo unit and provides that the assessment lien is "prior to any other lien or encumbrance except . . . [a] first mortgage . . . or [first] deed of trust . . . recorded before the date on which the assessment sought to be enforced became delinquent." D.C. Code § 42-1903.13(a)(1)(B). Here, the record unequivocally demonstrates, and the Superior Court correctly found, that the Deed of Trust was recorded before the date on which the assessment the Association sought to enforce became delinquent.[2]

[2] Wonder Twins' claim that the recordation of its assessment lien dates back to the recording of the Association's governing documents is without merit. D.C. Code § 42-1903.13(b) merely absolves a condominium association of the requirement of filing a lien for each delinquent assessment. It does not allow it to jump in line in front of a duly recorded first mortgage.

The Condo Act also splits the lien for unpaid assessments into "two liens of differing priority." *See Chase Plaza Condo. Ass'n, Inc. v. JP Morgan Chase Bank, N.A.,* 98 A.3d 166, 173 (D.C. 2014). First, an association is granted a lien for the most recent six months of unpaid assessments, which lien is higher in priority than a first mortgage (also referred to as a super-priority lien). *Id*. (*see also* D.C. Code § 42-1903.13(a)(2) (providing that an association's lien "shall [] be prior to a mortgage or deed of trust … to the extent of the common expense assessments … which would have become due … during the [six] months immediately preceding institution of the action to enforce the lien.") Second, the Condo Act grants an association another lien for any remaining unpaid assessments beyond the most recent six-month period that is "lower in priority than the first mortgage or first deed of trust." *See Liu v. U.S. Bank Nat'l Ass'n*, 179 A.3d 871, 877 (D.C. 2018) (citing *Chase Plaza*, 98 A.3d at 173.

Critically, in April 2017, the Condo Act was amended to provide for specific notice and disclosure requirements relative to the different level of priority an association's liens may occupy and to allow it to elect which lien it will foreclose upon. Section 42-1903.13(c)(4)(B) reinforces the split-priority of the assessment liens and requires that the association notice and publish one of two disclosures depending on the priority of the lien they are seeking to enforce:

(B) The Notice of Foreclosure Sale of Condominium Unit for Assessments Due shall:

(i) State the past due amount being foreclosed upon and that must be paid in order to stop the foreclosure;

(ii) Expressly state that the foreclosure sale is for either:

(I) The 6-month priority lien as set forth in subsection (a)(2) of this section and ***not subject to the first deed of trust***; or

(II) More than the 6-month priority lien set forth in subsection (a)(2) of this section and ***subject to the first deed of trust***; and

(iii) Notify the unit owner that if the past due amount being foreclosed upon is not paid within 31 days after the date the NFSCUAD is mailed, the executive board shall sell the unit at a public sale at the time, place, and date stated in the NFSCUAD. Emphasis added.

See D.C. Code § 42-1903.13(c)(4)(B) (emphasis added) (the "2017 Amendments")

The impetus for the 2017 Amendments stem from the confusion that arose surrounding the impact of condominium foreclosures on prior recorded deeds of trusts and mortgages. The ambiguity was recognized in the cases so heavily relied on by Wonder Twins, *Chase Plaza,* 98 A.3d at 177; *Liu*, 179 A.3d at fn. 9; and *4700 Conn 305 Trust v. Capital One, N.A.*, 193 A.3d 762 (D.C. 2018). The inescapable fact that is fatal to Wonder Twin's argument is that none of these cases were analyzed under the 2017 Amendment to the Condo Act. In fact, *Liu* specifically acknowledged that its holding was not based on the 2017 Amendment but rather decided "whether, ***prior to the 2017 amendment*** **to D.C. Code § 42-1903.13**, a condominium association could choose to sell the condominium unit subject to the

first mortgage or first deed of trust on the property, while at the same time enforcing its super-priority lien." This Court was clear in *Liu* that "we are not stating that a foreclosing condominium association is required to foreclose pursuant to its super-priority lien" thereby leaving open the question of what happens when an association chooses to foreclose only on its other lien. The D.C. Council answered that question with the enactment of the 2017 Amendments to the Condo Act which specifically allowed a condominium association to conduct its foreclosure sale "subject to" existing liens.

Similarly, in *4700 Conn*, the foreclosure sale at issue took place in 2013—long before the 2017 Amendment was even contemplated—and this Court left "construction and applications of the [2017 Amendments] to another day." 193 A.3d at 766. Accordingly, the Superior Court properly rejected Wonder Twin's argument that *Liu* and *4700 Conn* dictate that the Association's liens were superior to mortgage liens recorded in time before them. App. 229. In so rejecting, the Superior Court recognized that both *Liu* and *4700 Conn* were based on an interpretation of the Condo Act prior to the 2017 Amendments and, thus were inapplicable to the issue at hand where the Condo Sale was conducted well after the effective date of the 2017 Amendments.

Consistent with the disclosure requirements set forth in the 2017 Amendments to the Condo Act, the Association noticed the Condo Sale with the following terms

and conditions: "[t]he property will be sold subject to any prior liens, encumbrances, and/or municipal assessments if any." Thus, all third parties, including Wonder Twins, were effectively on notice that the Association elected to conduct its foreclosure sale "subject to" existing liens, including the Deed of Trust. Just as the Superior Court found, this provision, when read in light of the 2017 Amendments "put [Wonder Twins] on notice that the property it purchased was subject to prior liens and encumbrances. Therefore, [Housing Trust demonstrated] that its Trustee's Deed, which stems from the foreclosure of the 2007 Deed of Trust is superior to [Wonder Twin]'s Condo Foreclosure Deed in accordance with § 42-1903.13." App. 228.

Any other interpretation of the 2017 Amendments would render them superfluous and, thus contrary to this Court's long-established jurisprudence regarding statutory interpretation. As this Court has recognized, "[t]he first step in construing a statute is to read the language of the statute and construe its words according to their ordinary sense and plain meaning." *O'Rourke v. District of Columbia Police & Firefighters' Ret. & Relief Bd.*, 46 A.3d 378, 383 (D.C. 2012). The words of the statute, however, must be read in context of the statute taken as a whole "and are to be given a sensible construction and on that would not work an obvious injustice." *Columbia Plaza Tenants' Ass'n v. Columbia Plaza Ltd. P'ship*, 869 A.2d 329, 332 (D.C. 2005). Here, the 2017 Amendments, when read plainly,

make clear that the required notice must disclose the effect of the association's intended sale. It must "[e]xpressly state that the foreclosure sale is either … ***not subject to the first deed of trust***; or … ***subject to the first deed of trust***." This puts any prospective purchaser on notice of the extent of the rights and interests it may purchase and further puts the onus on such prospective purchaser to inform itself of the existence of any first deed of trust. When read in the context of the Condo Act as a whole, this interpretation permits an association to conduct a foreclosure sale "subject to the first deed of trust." Pursuant to D.C. Code § 42-1901.13(c)(4)(B), the Association elected to conduct its foreclosure sale of the Property "subject to" existing liens as disclosed in its published notice and later reflected in each document memorializing the sale to Wonder Twins. The language of the notice provided pursuant to the plain meaning of the 2017 Amendments has a single effect: Wonder Twins' purchase of the Property did not extinguish the pre-existing Deed of Trust, but rather was expressly "subject to" it. Accordingly, the Superior Court's grant of summary judgment in Housing Trust's favor was proper.

II. WONDER TWINS WAS NOT A BONA FIDE PURCHASER BECAUSE IT WAS ON NOTICE OF THE FIRST MORTGAGE PRIOR TO PURCHASING THE PROPERTY

Wonder Twins argues that it enjoys the status of a bona fide purchaser and thus has a superior claim to title to the Property. *See* Appellant Brief at 15. As is undisputed, Housing Trust's Deed of Trust was a valid and existing lien against the

Property that was duly recorded prior to the Condo Lien. Under D.C. Code § 42-401, a deed conveying an interest in real property is not effective against "subsequent bona fide purchasers" unless it is recorded. "A bona fide purchaser is one 'who acquires an interest in property for a valuable consideration and without notice of any outstanding claims which are held against the property by third parties.'" *Clay Properties v. Washington Post*, 604 A.2d 890 (D.C. 1992) (citing 6A R. POWELL P. ROHAN, THE LAW OF REAL PROPERTY ¶ 904[2][b], at 82-10 (1989)). The recordation of the Deed of Trust put the world on notice of its claim to title in the Property. As a result, any later purported purchaser of an interest in the Property is charged with inquiry or constructive notice of the pre-existing Deed of Trust. As this Court held in *Clay Properties,*

> A purchaser is held to be on inquiry notice where he or she is aware of circumstances which generate enough uncertainty about the state of title that a person of ordinary prudence would inquire further about those circumstances. The purchaser is on inquiry notice of all facts and outstanding interests which a reasonable inquiry would have revealed.

Albert v. Green Tree Servicing, LLC (In re El-Erian), 512 B.R. 391 (Bankr. D.D.C. 2014) (citing *Clay Properties*, 604 A.2d at 895.

Thus, while Wonder Twins argues that Housing Trust "assumed the risks associated with its constructive notice of Wonder Twins' claim to title from its recorded Trustee's Deed when it later bid", this argument fails to recognize that it

was Wonder Twins in the first instance that must be charged with notice of the Deed of Trust. As made clear from the Notice of Condo Sale, the Memorandum of Purchase and the Foreclosure Deed, the foreclosure sale of the Property was "subject to any prior liens, encumbrances and/or municipal assessments, if any." As a result, before Wonder Twins purportedly purchased the Property at foreclosure it on actual notice that its rights and interests would be subject to existing liens, and the recordation of the Deed of Trust put a reasonable purchaser on notice that the Property is encumbered. Taken together, Wonder Twins must be charged with notice of the Deed of Trust and that the Condo Sale was selling the Property "subject to" that pre-existing encumbrance.

Furthermore, the unconscionably low price that Wonder Twins paid for the Property is additional evidence that the purchase price was subject to existing liens and that the Property was being taken "subject to" existing encumbrances. At the time of the Condo Sale, the Subject Property had a tax-assessed value of $107,400, but only fetched a winning bid of $13,000. App. 223-224. It was clear that prospective bidders, including Wonder Twins, understood that they were not purchasing a property free and clear for nearly 10% of its appraised value. Accordingly, Wonder Twins was never a bona fide purchaser of the Property free and clear of the existing Deed of Trust.

CONCLUSION

The Superior Court's grant of summary judgement in favor of Housing Trust should be affirmed.

Respectfully submitted,

GALLAGHER LAW

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2024, the foregoing document was served on all counsel of record *via* the Court of Appeals Electronic Filing System.

/s/ Brian T. Gallagher
Brian T. Gallagher

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// Brian T. Gallagher — March 5, 2024
Signature — Date

Brian T. Gallagher — gallagher@briantgallagherlaw.com
Name — Email Address

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