NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
Teasa K. Weaver, Master in Equity

Case No. 2019-CP-46-02929

Byron A. Chavarria, ...Appellant,

v.

Wilmington Savings Fund Society, FSB
As Trustee of Stanwich Mortgage Loan
Trust I; and Laure E. Kephart, ...Respondents.

EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF YORK Wilmington Savings Fund Society, FSB, as Trustee of Stanwich Mortgage Loan Trust I, PLAINTIFF, vs. Laura E. Kephart; 1st Franklin Financial Corporation, DEFENDANTS.	IN THE COURT OF COMMON PLEAS CASE NO. 2019-CP46-02929 **ORDER DISBURSING SURPLUS FUNDS**

This matter came before me for a hearing on March 28, 2024 regarding surplus funds in the amount of $37,561.08, resulting from a foreclosure sale. Present at the hearing was Defendant Laura E. Kephart, appearing pro se. Also present was Byron Chavarria with his attorney, Andrea Solorzano Johnson. No other party or claimants appeared.

At the hearing, the Affidavit of Byron Chavarria, filed on February 13, 2024, was received into evidence. Also, the court took judicial notice of a quitclaim deed recorded with the York County Register of Deeds in Book 18118 at page 245.[1] At the court's request, Kephart provided testimony. No other witnesses were called.

After due notice of surplus funds was served, two claims of entitlement were filed: one by the mortgagor, Kephart; and the other by Chavarria. Along with his surplus claim, Chavarria filed a motion to intervene pursuant to Rule 24, SCRCP.

FINDINGS OF FACT

1. Plaintiff filed a Lis Pendens, Summons and Complaint on August 28, 2019.
2. Plaintiff instituted this action to foreclose upon a note and mortgage executed by Kephart in October 2015 regarding real property located at 3785 Saluda Road, Rock Hill, South Carolina, with Tax Map No. 526-00-00-022 (hereinafter "property").

[1] A copy of the deed is in the record as exhibit A to a brief filed on February 26, 2024 regarding a writ of assistance.

3. As shown in an affidavit of non-service, the process server attested that the property was vacant. Kephart was later served by publication.
4. On February 12, 2020, an order was filed granting a judgment of foreclosure and sale in favor of Plaintiff (hereinafter "Order").
5. The sale was scheduled to occur on April 6, 2020, but was stayed due to the statewide moratorium.
6. At the time judgment was entered in February 2020, Kephart was the record owner of the property.
7. A few weeks following the Order, a quitclaim deed was recorded on March 6, 2020 with the York County Register of Deeds in Book 18118, page 245. This deed shows that Kephart conveyed the property to Robin Hood Investments, LLC ("LLC") in exchange for $5.00.
8. According to Kephart's testimony, Dennis Lepka, on behalf of the LLC, approached her claiming that he could assist her with keeping her home by negotiating on her behalf with Plaintiff.
9. Kephart does not remember signing the above referenced deed, but admitted that she signed several documents brought to her by Lepka. Kephart testified that no one else was present when she signed these documents, such as a notary. Kephart received a total of $1,000.00 from the LLC. Kephart was not residing in the home at this time.
10. On March 5, 2020, Chavarria, and the LLC, executed a contract to purchase the property. The contract is entitled "LEASE AGREEMENT WITH OPTION TO PURCHASE REAL ESTATE", and was received into evidence along with Chavarria's affidavit (hereinafter "lease or "agreement").
11. According to the lease, the purchase price was $125,000.00, to be paid by a deposit of $30,000.00, and monthly payments of $1,000.00. Chavarria paid the LLC a total of $85,000.00. This amount includes the $30,000.00 deposit.
12. Section 10 of the lease agreement notified Chavarria there was a mortgage on the property in the amount of $80,000.00.
13. Section 10 further provides: "The [LLC] further agrees to keep all mortgages, liens, taxes or other encumbrances on the property, current and in good standing. [Chavarria] shall have the right to make payment on same in the event that [LLC] becomes delinquent or otherwise defaults on such payments, and subtract the amount of payments from the balance due [the LLC]."

14. Section 14(b) of the lease reads: "A TITLE SEARCH Will be ordered immediately by [Chavarria]... If the title is unmarketable [Chavarria] will then have the option to void this agreement or proceed as agreed herewith".
15. Chavarria and his family moved into the property in April 2020.
16. Chavarria made improvements to the property valued at $16,325.00.
17. Kephart testified that she was not aware of the agreement between Chavarria and the LLC, and that she received no funds from Chavarria.
18. No evidence was presented that Chavarria made payments to Kephart, or the mortgagee.
19. The property was sold at public auction on December 4, 2023.
20. Chavarria filed his motion and claim on February 13, 2024.

CONCLUSIONS OF LAW

Rule 71(c), SCRCP provides that "[a]ny party to the action, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing ... a claim of entitlement ... may have a hearing to determine such entitlement." Since Chavarria is neither a party nor a lienholder, he includes a motion to intervene with his claim. After reviewing the factors outlined in *Davis v. Jennings*[2], I conclude that Chavarria's Rule 24 is untimely.

The lis pendens was filed prior to the execution of the lease in March 2020. Almost four years have passed since Chavarria knew or should have known of his interest in this action. *See* S.C. Code Ann. § 15-11-20. The motion was made after judgment was entered, and no sufficient reason was offered for the delay. *See National Loan & Exchange Bank of Greenwood v. Gustafson*, 164 S.C. 203, 162 S.E. 264 (1932) (There must be a strong showing to justify a motion filed after final judgment.). "[F]ailure to satisfy any one of the four requirements precludes intervention". *Ex parte Reichlyn*, 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993). Nonetheless, even if the motion was granted, Chavarria has failed to prove entitlement to surplus funds.

Chavarria asserts that he is entitled to surplus funds based upon his equitable interests in the property, which include the amount he spent on improvements ($16,325.00), and the amounts paid to the LLC toward purchasing the property ($41,000.00). Equitable relief is generally available only where there is no adequate remedy at law. *Key Corporate Capital, Inc. v. County*

[2] The factors include: (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial". 304 S.C. 502, 405 S.E.2d 601 (1991).

of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007). In this case, the lease provided adequate remedy for the amounts Chavarria alleges that he is owed.

In section 10 of the lease, it was agreed that the LLC would keep any mortgage in good standing, and if not, Chavarria "shall have the right to make payment on the same ... and subtract the amount of the payments from the balance due [the LLC] at closing of the sale of the property". In section 9 of the lease, Chavarria may seek reimbursement for improvements, in the event that he exercised the option to purchase, and the LLC failed to convey the property. Moreover, Chavarria agreed in section 14, to conduct a title search, and if said search revealed the property to be "unmarketable", he had the option to void the agreement. Also, there was more than ample time for him to have pursued a remedy outlined in the lease, or remove the encumbrance before the sale. "[I]t is not proper to seek equitable relief where no pursuit has been made of available contractual remedies because equity aids the vigilant and not those who slumber on their rights". *See Nutt Corp. v. Howell Road, LLC*, 396 S.C. 323, 329, 721 S.E.2d 447, 450 (Ct. App. 2011, *citing Witmer v. Exxon Corp.*, 260 Pa.Super. 537, 394 A.2d 1276, 1286 (1978).

Furthermore, Kephart did not, by the deed or otherwise, assign or transfer her right to surplus. The property sold at foreclosure sale for $172,000.00. As shown on the face of the deed from Kephart to the LLC, the consideration paid by the LLC for the property was $5.00. This is not valuable consideration for the property. Chavarria reviewed this deed prior to entering the lease. The LLC did not assume an obligation for the debt, and no evidence was presented that the LLC transferred any funds paid by Chavarria to the mortgagee. Likewise, Chavarria did not assume personal obligation regarding the debt owed, or make payments to Kephart or to the mortgagee. Thus, I conclude that all surplus funds should be paid to Kephart, as the mortgagor. *See* Rule 71(c), SCRCP ("In the event no claims are filed against the surplus funds, the fund shall be paid over to the mortgagor".).

THEREFORE, IT IS ORDERED that Chavarria's Rule 24 motion, and his surplus claim, are denied, and the surplus funds of $37,561.08 shall be disbursed to Laura E. Kephart.

Judge's Signature Page to Follow

York Common Pleas

Case Caption:	Pingora Loan Servicing Llc , plaintiff, et al VS Laura E Kephart , defendant, et al
Case Number:	2019CP4602929
Type:	Master/Order Surplus Funds

So Ordered

s/ Teasa K. Weaver 3084