THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2024-001510

Elizabeth M. Ferraro, James T. Ferraro, Edward J. Przybyl, Marcella Gleie, John E. Gleie, Jr., Thomas Bowes, Connie Bowes, Moataz Alasadi, Virginia Kirkwood, Bob Kirkwood, Paul Vichroski, Nydza Vichroski, James Montellese, and Roxann Montellese, Individually, Derivatively, and on Behalf of All the Mount Vintage Homeowners Association Members . . . . . Respondents,

v.

LL of SC, LLC, Raiford Topsail Island Investments, LLC, TR Sales Plantation, LLC, and Mount Vintage Plantation Homeowners Association, Inc. *a/k/a* Mount Vintage Homeowners Association, Inc. . . . . Defendants,

Of which LL of SC, LLC, Raiford Topsail Island Investments, LLC, and TR Sales Plantation, LLC are the . . . . . Appellants.

APPELLANTS' INITIAL REPLY BRIEF

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ARGUMENT IN REPLY

Appellants will endeavor to address only the few salient aspects of Respondents' argument.

I. A MORTGAGEE CAN PURSUE RELIEF THROUGH FORECLOSURE AND DEED IN LIEU.

There is no dispute that LLSC was the senior lienholder with respect to the mortgage that its predecessor in developer rights—K&H Development Company, LLC—gave as security in exchange for a $2.5 million loan. There is no dispute that the mortgage pledged the entirety of K&H's property interests in the Mount Vintage community, including K&H's developer rights, as security. There is no dispute that K&H defaulted on its obligations to LLSC, that LLSC commenced foreclosure proceedings against K&H, that K&H gave a deed in lieu to LLSC in satisfaction of the mortgage, or that the entirety of the property interests pledged as security by K&H—to include developer rights within Mount Vintage—were conveyed by the deed in lieu.

However, to succinctly state what has already been presented in Appellants' Opening Brief, the acceptance of a deed in lieu is not necessarily a complete solution for a creditor—even the senior secured creditor—dealing with the fallout of a mortgagor's default. Certainly, in the context of foreclosure, when a senior secured creditor takes ownership of property pledged as security for the debt which is in default through a deed in lieu, the aspect of foreclosure regarding ownership of that collateral should be resolved.[1] Often, and depending on the language of the deed in lieu, the aspect of foreclosure dealing with any deficiency that may remain against the debtor is resolved (usually by the creditor waiving deficiency against the debtor).

[1] Though this is the very matter that forms the substance of these appellate proceedings.

What is not resolved, though, is the pendency of any adverse, albeit subordinate, claims of third parties, who purport to have interests in the very-same property conveyed by deed in lieu. On this point, the law is crystal clear: the acceptance of a deed in lieu does not extinguish third-party liens or encumbrances that are subordinate to those of the recipient of a deed in lieu; the creditor who takes a deed in lieu does so subject to any junior encumbrances that may exist. See, e.g., McCraney v. Morris, 170 S.C. 250, 170 S.E. 276 (1933).

Happily, it does not seem that the parties dispute this proposition. What is apparently disputed, however, is whether the mechanisms of foreclosure and deed in lieu are mutually exclusive. Respondents' argument seems to be that a mortgagee can pursue foreclosure, or it can pursue satisfaction of its debt through deed in lieu, but it can't do both. (Resps.' Op. Br. at § II.a.) Respondents did not support this assertion with any citation to legal authority. And that is not surprising, because no such authority exists.

Appellants have been candid in their confession that there seem to be few reported cases on this point. This, too, is unsurprising, simply because the procedural circumstances under which a foreclosure case, which also involves a deed in lieu, could arise that would yield a reported decision would seem rare.

Regardless, Appellants have cited Federal Land Bank of Wichita v. Colorado National Bank of Denver for the very proposition advanced: that an experienced and careful lender may, and probably should, conclude a mortgage foreclosure action, even after accepting a deed in lieu, specifically to clear out the risk of persistent junior encumbrances. 786 P.2d 514 (Colo. Ct. App. 1989); see also Decon Group, Inc. v. Prudential Mortg. Cap. Co., 227 Cal. App. 4th 665, 670 (Cal. Ct. App. 2014).

Respondents' position on these cases is to simply claim that they don't mean what they say. That is a curious criticism, in light of the dearth of authority to support Respondents' position.

In any event, the gravamen of Respondents' argument seems to be focused on why the completion of foreclosure would be necessary—perhaps even appropriate—after a debtor has given a deed in lieu. The authorities cited by Appellants in their Opening Brief address this question. In every foreclosure action, a foreclosing creditor has at least three critical, interrelated interests: (1) maximizing financial recovery on the unpaid indebtedness; (2) obtaining ownership of collateral pledged as security, in furtherance of maximizing financial recovery; and (3) getting as clear title to property as the law may allow. A deed in lieu may accomplish the first two interests, but may or may not advance the third—depending on whether there are any subordinate encumbrances.

Obviously, the preferred scenario when the mortgagee takes a deed in lieu is where there are no subordinate encumbrances.[2] *But what is a mortgagee to do when there are junior liens, or when a mortgagee doesn't know if there are junior liens?* It is Respondents' assertion that the mortgagee should refrain—in fact, *must* refrain—from taking a deed in lieu, otherwise he will be saddled with subordinate interests that cannot be cleared. But that is merely Respondents' opinion; it is not the law, and there is no authority that so holds.

[2] This, as discussed below, was ultimately the scenario under which LLSC was operating.

II. THE EFFECT OF THE DOCTRINE OF MERGER.

As explained in Appellants' Opening Brief, the doctrine of merger would seem to have been implicated by no later than the conclusion of the foreclosure sale.[3] As explained in the Master's Report, the winning bidder at the foreclosure sale was LLSC; LLSC's assignment of the winning bid was only after the conclusion of the foreclosure sale. And, importantly, at the time of the conclusion of the sale, by virtue of the deed in lieu, LLSC was already the record-title owner of the property interests that proceeded to foreclosure sale. In short, by no later than the time the gavel fell in LLSC's favor, there appeared to be a unity of legal and equitable interests of the property implicated in LLSC's hands.

Regardless, Respondents have asserted that, "as of September 3, 2013," "[t]here were at least three (3) pending encumbrances" that LLSC knew of that would have impaired the operation of merger: (1) LLSC's *own* lis pendens and foreclosure action; (2) HOA liens for unpaid assessments; and (3) a lis pendens and foreclosure action filed by third-party Bettis Rainsford. (Resps.' Op. Br. at § III.a.) According to what Appellants believe Respondents' argument to be, it is Respondents' contention that each of these three circumstances, or any one of them, prohibited a complete unity of legal and equitable interests in LLSC.

As an initial observation, Respondents persist in their misunderstanding of what a lis pendens is. They continue to assert that a lis pendens creates an interest in the property to which it relates. (Resps.' Op. Br. at § II.a.) And that is simply not the case.

[3] As discussed below and in Appellants' Opening Brief, because there were no encumbrances subordinate to LLSC's mortgage interest, merger was effective upon LLSC's acceptance of the deed in lieu.

A lis pendens is nothing more than a notice mechanism, designed to inform those who are considering whether to participate in a real estate transaction that there is (or imminently will be) litigation that may affect ownership rights in the property. It does not create any property rights whatsoever. The property rights asserted in a lis pendens may or may not have validity; but that is a matter for a subsequent adjudication. In any event, while the presence of a properly recorded lis pendens may create a cloud on title that would give a reasonably prudent person pause as to whether he should participate in a real estate transaction where there is a question about ownership interests in the property affected, the lis pendens itself does not impair the alienability of the property.

With respect to the lis pendens filed by third-party Bettis Rainsford, there is no merit to the suggestion that Mr. Rainsford's filing affected LLSC's property rights in any way, shape, or form. It is curious that Respondents have called attention to Mr. Rainsford's filing of a lis pendens, but failed to mention that Mr. Rainsford was not involved in LLSC's foreclosure proceedings against K&H, that Mr. Rainsford never even sought to intervene in those proceedings, and that Mr. Rainsford's lawsuit was dismissed by stipulation pursuant to a settlement, without any finding whatsoever that Mr. Rainsford had an interest in the property that was pledged to LLSC. (See Docket Report for LL of SC, LLC v. K&H Devel. Co., 2012-CP-19-00336 & Docket Report for Rainsford v. Knight, 2012-CP-19-00388.)

With respect to whether the HOA had placed encumbrances on K&H's property for unpaid assessments that would form a barrier to merger, this is equally without merit. As referenced in the Consent Order and Judgment of Foreclosure and Sale, (entered July 19, 2013, prior to the deed in lieu), the order reflects that, to the extent the HOA "claims

or may claim a lien or interest in [the property being foreclosed upon]," the HOA "may present any such lien claims at a hearing subsequent to the sale." (Consent Or. & Judg. of Foreclosure & Sale, July 19, 2013, at ¶ 19.) There was no finding that the HOA did have a lien on the property; or that the HOA ever recorded a lien against K&H; or that the HOA ever filed a lis pendens against K&H; or that there were ever proceedings after the foreclosure sale in furtherance of the HOA presenting a lien-claim against the property foreclosed upon. And, to assuage any insinuation that LLSC somehow concealed the fact of an HOA encumbrance—if such an encumbrance were to have existed—from the court's knowledge, the order states quite clearly that the HOA was represented by separate legal counsel. (Consent Or. & Judg. of Foreclosure & Sale, July 19, 2013, at 1.) Accordingly, and in contrast to Respondents' suggestion, if there were an encumbrance on K&H's interests in the Mount Vintage property arising from obligations owed to the HOA, that encumbrance was not reflected anywhere in the public record.

Respondents even argue that LLSC's own lis pendens against K&H's Mount Vintage property interests imposed a barrier to the operation of merger. Which is nonsense.[4] As explained above, (and on many prior occasions), a lis pendens does not create an interest in property; it merely places the world on notice that the filing party claims to have an interest in real property that is the subject of pending litigation. In this case, LLSC recorded a lis pendens against K&H's property interests in Mount Vintage, specifically because LLSC was foreclosing upon those interests, which had been pledged

[4] Respondents cite to the case of Powell v. Patrick in their Opening Brief for the proposition that the acceptance of a deed in lieu in satisfaction of a mortgage implicates the doctrine of merger. 64 S.C. 190, 41 S.E. 894 (1902). It is hard to fathom how Respondents can reconcile Powell with their argument that a party's own lis pendens would prohibit merger.

as security for indebtedness, as evidenced by a duly recorded mortgage. In other words, it was LLSC's mortgage that gave LLSC an equitable interest to the ownership of K&H's Mount Vintage property, not the lis pendens.

To be certain, in the context of the transactional history between LLSC and K&H, the doctrine of merger is implicated the first time when LLSC accepted the deed in lieu from K&H. It was at this moment that there was ostensibly a unity of legal and equitable titles in the hands of LLSC. But, from LLSC's perspective (and as a consequence of being neither clairvoyant nor omniscient), LLSC did not know with certainty that it had unencumbered ownership by virtue of the deed in lieu. The Consent Order and Judgment of Foreclosure and Sale explicitly held that LLSC's mortgage "constitutes a purchase money first mortgage lien on [K&H's Mount Vintage property interests]," (Consent Or. & Judg. of Foreclosure & Sale, July 19, 2013, ¶ 12); and the deed in lieu contains an affirmation that no other person has an interest in the property rights conveyed, (Deed in Lieu, Sept. 3, 2013, at 2). Regardless, there could have been other, undisclosed third-party claims to rights in K&H's Mount Vintage property interests that LLSC did not know about—and perhaps could not have known about, arising after the mortgage given by K&H to LLSC, that would have continued to exist were LLSC to have terminated foreclosure proceedings upon receipt of the deed in lieu. It takes the fall of the gavel at the conclusion of foreclosure proceedings to ensure that no subordinate claims against the property—known or unknown—will come back to haunt title.

Once the gavel falls, though, the claims against property interests are fixed in time. No new claims can be presented; and claims subordinate to the interests of the foreclosing party are extinguished. Consequently, when LLSC became the winning

bidder at the foreclosure sale, it seemed that all legal and equitable titles to K&H's Mount Vintage property interests merged in LLSC.

But, with the benefit of hindsight, and as discussed above, we now know that LLSC achieved unity of title before the foreclosure sale; specifically, on September 3, 2013, when LLSC accepted the deed in lieu. As explained above, the lis pendens filed by Mr. Rainsford went nowhere; any claim he may have been asserting to an interest in K&H's Mount Vintage property rights was voluntarily abandoned. There were ostensibly no HOA encumbrances. If there were any third-party subordinate adverse claims of ownership rights in K&H's Mount Vintage property interests, they were never asserted. Consequently, under the circumstances of how LLSC's foreclosure sale happened, there appears to have been no junior encumbrances to extinguish. Title merged in LLSC with the deed in lieu.

Accordingly, though it was wise, prudent, and proper for LLSC to not rest merely on the deed in lieu, but to see foreclosure through to completion, Federal Land Bank, 786 P.2d 514, it was ultimately unnecessary.

III. MERGER IS A FLEXIBLE DOCTRINE.

In the case of McCraney v. Morris, our State Supreme Court invoked the oft-quoted phrase, "Equity delights to do justice and that not by halves." 170 S.C. 250, 170 S.E.2d 276, 280 (1933). There, in the context of a mortgage foreclosure action involving a deed in lieu, the Court declined to apply the doctrine of merger, specifically because of the inequitable results that would follow. Were the Court to have applied the doctrine of merger to a senior mortgagee who had accepted a deed in lieu, the second mortgagee would have been promoted to the position of first mortgagee, and could have foreclosed

on the plaintiff and the very same property just received in satisfaction of the plaintiff's debt. This outcome is, in fact, what Respondents have suggested should be the law of this State. (Resps.' Op. Br. at § III.c.) And it was expressly rejected in McCraney.

Instead, the Court observed that proceedings in foreclosure involve equity, and held that equity compels flexibility in the application of merger in order to achieve justice. In McCraney, the interests of justice would not have been advanced by merger, since it would have prejudiced the senior mortgagee, requiring that party to pay off junior mortgagees to avoid foreclosure on a debt incurred by the very mortgagor who defaulted. The entire mechanism of debt collection would have been turned on its head, ultimately giving the junior-most creditor the most superior position of all creditors. Which, of course, is crazy.

In withholding the application of merger in McCraney, the Court quite clearly held that a substantial factor in determining whether merger had occurred was an examination of which outcome—to merge or not to merge—was in the best interests of the senior foreclosing mortgagee. A related factor is whether the application of merger (or refraining therefrom) would cause prejudice to any third parties. The ultimate disposition of McCraney was guided by the Court's observation that withholding the application of merger arising from the plaintiff's acceptance of a deed in lieu was in plaintiff's best interests (to avoid the circumstance of facing foreclosure from junior lienholders), and that this outcome would not cause prejudice to any party; in fact, under the circumstances of McCraney, withholding merger would merely result in the parties being put in the same position they had always intended (or expected) to be.

It is obvious, then, that merger is a doctrine of some flexibility. And, to be clear, this is not merely Appellants' opinion; that very characterization is taken from the State Supreme Court. In Powell v. Patrick, the Court was presented with the question on whether a mortgagee's interests merged upon his purchase of the property encumbered at a tax sale. 64 S.C. 190, 41 S.E. 894 (1902). In resolving that question, the Court held as follows:

> At law, when a greater or lesser or a legal and equitable estate coincide in the same person, the lesser or equitable estate is immediately merged and annihilated. But this rule is not inflexible in equity; whether or not a merger takes place, depending upon the intention of the parties, and a variety of other circumstances. Notwithstanding the technical rule of law, equity will prevent or permit a merger, as will best subserve the purposes of justice and the actual and just intention of the parties; and in the absence of an expression of intention, if the interest of the person in whom the several estates have united, as shown from all the circumstances, would be best subserved by keeping them separate, the intent will ordinarily be implied.

64 S.C. 190, 41 S.E. 894 (citation omitted).

In sum, the disposition of McCraney informs the analysis that should guide the instant case. Since acceptance of the deed in lieu in 2013, LLSC has had developer rights in the Mount Vintage community. LLSC has regarded itself as developer. The HOA has regarded LLSC as developer. The homeowners of Mount Vintage have regarded LLSC as developer. It was only in the late stages of the underlying litigation—in 2024—that anyone questioned LLSC's developer status, and even then, only for the purpose of securing some tactical advantage at trial. There is no reason in law or equity that the Court should refrain from recognizing what every interested party to this dispute has believed to be the case for the past 10 years: that, since accepting the deed in lieu in

September 2013, LLSC has continuously been the holder of developer rights in the Mount Vintage community, and that no developer rights were ever transferred to RTI.[5]

CONCLUDING STATEMENT

Appellants respectfully request a decision from the Court of Appeals which reverses the trial court's order of September 10, 2025 for any of the foregoing reasons or any basis that may appear from the record, remands the case for further proceedings consistent with such decision, and provides for such other and further relief as the Court deems just and proper.

Respectfully,

s/ Steven Edward Buckingham

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[5] Even Respondents acknowledge that LLSC acquired developer rights by the deed in lieu, (Resps.' Op. Br. § IV), before lurching to the conclusion that developer rights sprung into RTI's possession.