ORIGINAL

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON) FOR THE ELEVENTH JUDICIAL CIRCUIT

C/A No. 2014-CP-32-01270

JP

THE MILL HOA, INC.)

V COFER ET AL. DEFENDANT) **RULE 59 ORDER**

REGIME SOLUTIONS, INC)

THIRD PARTY BIDDER.)

Regime Solutions, LLC (Regime) motion to reconsider states that the narrow issue before the court is whether or not Regime is a BFP (Bonafide Purchaser for Value). Regime argues that this question has two components: (1) that it met the "for value" element necessary to qualify as a bonafide purchaser for value at the foreclosure sale, and (2) that Regime meets the without notice element.

Regime Solutions is not a BFP because the value they paid shocks the conscience of the court described in the trial order because there is no evidence that they paid the first mortgage or will pay the first mortgage. Regime bid on the property subject to the senior mortgage of record; they did not legally assume that first mortgage. A bidder buying property subject to a first mortgage could be a BFP if the actual value paid satisfied the shock the conscience criteria.

Regime is without notice to any unfiled claims at the time of the sale that the homeowner may have filed simply because Regime can't have notice of something that has not been filed at the time they bid. The trial court discussion of the possibility of sale or notice matters discussed in the Order relate to Cofer's actions and notice, not Regime's.

Regime is, however, on notice of both the shock the conscience case law and the filed pleadings and Order in the case, all of record before Regime bid. Both the Order and the Notice of Sale state that the sale is subject to a senior mortgage. Regime is on notice that there was a lien being foreclosed. Regime could have looked at this debt amount set out on Page 3 Paragraph 16 of the Order to determine the Plaintiff's debt as of the date of sale.

Similarly, while South Carolina law does not require that the first lien holder be named as a party, Regime would discover this fact through either a title search prior to sale or in the Order and Notice of sale, both of which contained the book and page of the Mortgage. Regime is on notice that there was a first mortgage in the face amount of the recorded mortgage. Regime could have used these two numbers (Order debt amount and face amount of first mortgage) to determine a bid amount that would have satisfied the shock the conscience bid amount. Or, Regime could have contacted the first mortgage to determine the pay-off amount and adjusted its bid accordingly.

Regime is not a BFP because the value paid shocks the conscience of the court. Regime is on notice of the record information that a prudent bidder would have discovered had the bidder conducted a standard title search of public information.

July 7, 2016

James O. Spence

JAMES O. SPENCE/LEXINGTON MIE

JUL112016

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP3201270

Mill Homeowners Association Inc	**Randall W Cofer** **Corey C Cofer**
PLAINTIFF(S)	**DEFENDANT(S)**
Submitted by:	**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order: (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

_____ _____ 7/11/2016
Circuit Court Judge **Judge Code** **Date**

JUL112016

For Clerk of Court Office Use Only

This judgment was entered on **7/8/2016**, and a copy mailed first class or placed in the appropriate attorney's box on **7/11/2016**, to attorneys of record or to parties (when appearing pro se) as follows:

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Beth A. Carrigg/ppb

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ORIGINAL

STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
COUNTY OF LEXINGTON)

The Mill Homeowner's Association, Inc.,)
Plaintiff,)
v.)
Randall W. Cofer and Corey C. Cofer,)
Defendants,)
Regime Solutions LLC,)
Purchaser at Foreclosure Sale)

Civil Action No.: 2014-CP-32-01270

ORDER

DATE OF HEARING: September 14, 2015;
JUDGE: The Honorable James O. Spence;
PLAINTIFF'S ATTORNEY: Stephanie Trotter;
DEFENDANTS' ATTORNEYS: Randy Davis & W. Joseph Maye;
ATTORNEY FOR REGIME SOLUTIONS, LLC: Eric Hale

This contested foreclosure sale, subject to a senior lien case, examines the respective rights of three parties: the Plaintiff, the defendant Owners, and the Third Party Purchaser. The parties dispute whether (1) proper notices were given Owners and (2) whether the bid amount shocks the conscience, requiring a resale of the property.

Plaintiff sold and advertized the property subject to a first mortgage. All parties agree that controlling case law requires that the senior lien amount must be factored into the court's examination of the adequacy of the sales price. Plaintiff and Third Party Purchaser argue that the senior lien amount should be added to the bid amount and then taken as a percentage of the

property value. Defendant Homeowners argue that the senior lien amount should be subtracted from the fair market value of their home and then the bid amount compared to their equity.

Defendants' Rule 60(b) (1) Motion seeks to set aside the March 2, 2015 Foreclosure Sale of their home located at 113 Mill Haven Lane, Lexington, South Carolina. Plaintiff and Purchaser argue that the sale should not be vacated sine the Purchaser bought the property subject to a first mortgage. The parties submitted briefs at the request of this Court on November 6, 2015. Having reviewed the materials submitted by Counsel, and having heard the arguments of Counsel, this Court vacates the sale.

PROCEDURAL BACKGROUND

A lien for homeowner's association dues was placed on Defendants' property on April 22, 2013. A Summons and Complaint for foreclosure was filed by the Plaintiff, The Mill Homeowner's Association, Inc., (herein after referred to as the homeowner's association or Plaintiff) on April 2, 2014, against the Defendants (herein after referred to as Defendants or the Cofers), and the Cofers were thereafter served. A foreclosure hearing was conducted on January 26, 2015. A Judgment of Foreclosure and Sale was granted on January 29, 2015, with the total secured debt calculated by Plaintiff to be $4,619.84, inclusive of all principal, interest, late fees, costs, and attorney's fees. The Defendants' home was subsequently sold for $4,857.00 to a third party purchaser, Regime Solutions, LLC, at public auction held on March 2, 2015. On May 19, 2015, Defendants filed a Motion pursuant to South Carolina Rule of Civil Procedure 60(b)(1) to overturn the sale and vacate the judgment against them. This Motion was then amended on July 17, 2015, to include the mortgage company as an interested party.

STATEMENT OF FACTS

Defendants Randall and Corey Cofer purchased their home located at 113 Mill Haven Lane, Lexington, South Carolina on July 31, 2006. The Cofer's purchase price was $236,388.00. (See Defendants' Exhibit 6, Submitted at September 14, 2015 hearing). As of August 13, 2015, the remaining balance of Defendants' mortgage was $124,799.32. (See Defendants' Exhibit 9, submitted at September 14, 2015 hearing). This leaves approximately $111,000.00 of equity in the home earned by Defendants since purchasing the property in 2006. The Lexington County tax assessor's office list the "taxable land" and "taxable building" for 2015 as $30,000 and $193,857, respectively. (See Defendants' Exhibit 7, submitted at September 14, 2015 hearing). This property was subject to homeowner's association dues, enforced by the Plaintiff in this action, The Mill Homeowner's Association, Inc. The yearly dues at all times relevant to this action were for $517.00. (See Defendant's Exhibit 3, submitted at September 14, 2015 hearing). In the beginning of 2013, Defendants Randall and Corey Cofer failed to make the requisite $517.00 payment for homeowner's association dues and a lien was placed on their home shortly thereafter. In 2014, foreclosure was sought by Plaintiff.

The foreclosure hearing was scheduled initially for November 4, 2014, and then rescheduled for January 26, 2015. The Cofers claim that they never received the two Notice of Hearings, dated September 22, 2014 and December 19, 2014, respectively. Plaintiff has provided the Court with properly executed proof of service by US mail for both Notices.

At the January 26, 2015 foreclosure hearing, the charges sought against the Defendants were itemized by Plaintiff and a total debt of $4,619.84 was presented to the Master in Equity. (See Statement of Indebtedness, Defendants' Exhibit 5.) The itemized debt asserted against the Defendants by Plaintiff is as follows:

a. *Principal due*.....*$1247.30*
b. *Interest from 1/1/13 through 1/15/15 at 18% per annum*.....*$294.74*
c. *Late Fees and Other Charges*.....*$460.00*
d. *Costs of collection prior to hearing(service, filing, etc.)*.....*$542.80*
e. *Attorney's fees*.....*$2075.00*

A Judgment of Foreclosure and Sale for the total debt of $4,619.84 was awarded on January 29, 2015. The Cofers argue that they did not receive notice of the sale until the afternoon of Friday, February 27, 2015, wherein they immediately attempted to contact Plaintiff's counsel regarding the impending sale, but counsel could not be reached. Plaintiff again has provided the Court with a properly executed proof of service demonstrating the Notice of Sale was sent via US mail to the Cofer's home address. The Cofers' property was sold the following Monday morning, March 2, 2014, to Regime Solutions, LLC for the sum of $4,857.00.

ISSUES PRESENTED

1. Was Plaintiff's service of the disputed Notices of Hearings and Notice of Sale proper in this matter?

2. Do the facts of this case present irregularities with this foreclosure sale as well as an inadequate bid price, such that this Court deems it proper to overturn the foreclosure sale to the third party purchaser?

3. Given the circumstances and facts of this particular matter, how should the sale price be calculated and compared to the value of the foreclosed home when determining whether the foreclosure sale price shocks the conscience of the Court?

4. Do the circumstances of this case demonstrate a foreclosure sale price so low as to shock the conscience of the Court?

5. Does the need for fundamental fairness to a debtor outweigh the public policy concerns for the rights of third party buyers and the desire for finality of sale?

4-

6. What remedy is proper for compensating a third-party purchaser who has paid a winning bid for property sold at public auction, but has subsequently had their foreclosure sale overturned as a result of insufficient sale price?

LEGAL STANDARD

The review of a judicial foreclosure sale is equitable in nature and is left to the discretion of the trial court. *Fed. Nat'l Mortgage Ass'n v. Brooks*, 304 S.C. 506, 512, 405 S.E.2d 604, 607 (Ct.App.1991) (citing Spillers v. Clay, 233 S.C. 99, 102, 103 S.E.2d 759, 760 (1958)). Whether a judicial sale should be set aside is a matter within the discretion of the trial court. *Investors Sav. Bank v. Phelps*, 397 S.E.2d 780, 303 S.C. 15 (S.C. App., 1990).

DISCUSSION

While foreclosure law has developed over the centuries to reflect the changing market and government oversight, two things have remained constant. One, the lender is entitled to repayment of the mortgage debt, but no more. The lender does not have a right to claim any surplus or equity in the property. Raymond J. Werner & Robert Kratovil, Modern Mortgage Law and Practice, 32, (Prentice Hall PTR, 2d. 1981). Two, the owner's home and equity is guarded.

An examination of South Carolina law consistently reflects this policy. Professor Robert Felix, a contributor to Madam Chief Justice Jean Hofer Toal of South Carolina, notes that Toal, when addressing the theories of liability in residential housing in a case that reversed the Court of Appeals opinion that "appears to be a seamless web of proper legal analysis" by noting that the "result is repugnant to the South Carolina policy of protecting new home buyers." Robert Felix, Madam Chief Justice: Jean Hoefer Toal of South Carolina 97 (W. Lewis Burke, Jr. & Joan P. Assey ed., The University of South Carolina Press 2015 (2015).

Similarly, when the equity battled shifted from standard mortgage foreclosures to contracts for deed, installments sales contracts, equitable type mortgages, etc, the court developed a series of questions required to be examined to determine what amount of equity the owner had in the property. If the owner had no equity, termination of the contract was required; the possession of some equity allowed for a period to redeem or pay-off debt, or if sufficient equity, the ability to sell property just like a legal mortgage. See Andrew S. Radeker, Esq., " Pleading Special Property Matters: Installment Land Sales Contracts, in 08-41 MASTER-IN-EQUITY BENCH/BAR 45-49 (October 10, 2008).

Some owner's home equity is also protected from judgment creditors during a statutory Supplemental Proceeding action. S.C. CODE ANN. § 15-41-30 (1990). requires the Economic Research Section of the Office of Research and Statistics of the State Board and Control to adjust each dollar amount for each subsection of debtor's interests. See S.C. CODE ANN§ 15-41-30(A)(1)-(14) (1990). The amount of home equity in 2008 was $50,000. The adjusted amount January 24, 2014 was $58,225.00. (This Homestead Exemption has not been argued, nor is it available in the context of a foreclosure.) The example is offered to show the state's policy of careful examination and protection of owner's equity, and its consideration by this court as one of factors in reaching this decision.

A fourth example of policy reflecting equity protection occurs during a tax sale. A defaulting taxpayer has the right to redeem property from a third party bidder when it provides for a post tax sale time limit to allow the defaulting taxpaying to redeem property sold at tax sale. S.C. CODE ANN § 12-51-90 & 100 (1976 as amended).

A final illustration of home related public policy is that the state taxes a home at a lower rate than non- home property. S.C. CODE ANN § 12-43-220(c)(1) (1975).

Here, the examination has shifted to a determination if the owner's equity should be protected from a stranger to the transaction, a third party bidder, in a sale subject to a senior lien.

The primary focus of the bid process is to pay off the plaintiff/creditor and protect equity in property so that in the event the third party bid generates surplus money, those funds representing the owner's equity would, by law, go first to the other entitled creditors, and then to the owner. South Carolina recognizes that the owner's equity, arguably at least to 10%, has a protected position in a first mortgage sale scenario as explained in the "shock the conscience" cases. The question here is if the same protection extends versus a third party bidder's profit expectation in a sale where the third party is taking property subject to a senior lien.

Notices of sale contain property sold subject to language. There is a critical difference between assuming a senior mortgage and taking subject to a senior mortgage. Black's Law Dictionary Sixth Edition (1990): "Assumption of mortgage. To take or acquire a mortgage or deed of trust from some prior holder. Accordingly, a purchaser may assume or take over the mortgage of the seller; often this requires permission of the mortgagee. This is distinguishable from acquiring property *subject to* a mortgage, because in latter case, the grantee is not contractually bound to pay the mortgage, whereas if he assumes the mortgage, he binds himself to the mortgagor to pay the mortgage and to fulfill all other terms and conditions." Black's Law Dictionary 123 (6th. Ed. 1990).

A person not assuming a loan, but buying it subject to the loan is a radically different proposition. "...The difference between the purchaser of land assuming a mortgage on it and simply buying subject to the mortgage, is that the former case he makes himself personally liable for the payment of the mortgage debt, while in the latter case he does not. When he takes the conveyance subject to the mortgage, he is bound only to the extent of the property..." *Id.* Since

the third party bidder took the property subject to the outstanding mortgage and did not assume the senior loan debt, he can simply choose to not pay the senior lien and walk away with only his bid at risk.

Given that this matter involves a homeowner's association foreclosure on property with an outstanding mortgage balance, this distinction is critical. A typical homeowner's association foreclosure fact pattern, the owner has first and/or a second mortgage, which may or may not be in default and or in active foreclosure. Homeowners are bewildered that they can be current on their mortgage, yet be foreclosed on for a homeowner's association lien, evicted from their home, and lose all their equity. The owner learns that the property was bought subject to restrictions, bylaws, etc that allow for their homeowner's association to seek foreclosure and eviction, and that attorney fees, if authorized by covenants and deemed reasonable by court review, can be greater than the initial debt owed to the homeowner's association.

A homeowner's association foreclosing its lien is most often in a similar situation to a second mortgage foreclosing subject to a first mortgage ahead of the homeowner's association lien. A second mortgage has an advantage in that it made its business decision to lend money based on knowledge of the first mortgage amount contained on mortgage and of the fair market value of the property.

The court has reviewed substantial amounts of relevant homeowner's association documents relating to assessments, ability to foreclose, attorney fee clauses, and interest and fee sections when hearing foreclosure cases and recognizes the tremendous pressure a homeowner's association faces when an owner stops paying assessments. When an owner defaults on their assessments, the homeowner's association loses part of the anticipated revenue stream needed to maintain such common areas as lights, security, trash pick-up, common area amenities, etc.

In most instances, the owner also has a mortgage that the homeowner's association lien is being foreclosed subject to. Normally, the homeowner's association lacks the funds, authority or financing to pay off the first mortgage. If no third party bidder comes forward, the homeowner's association is then faced with foreclosing its lien, and then evicting an owner who may or may not be current with the senior mortgage, so that the homeowner's association can attempt to recoup its lost revenue, attorney fees and costs, by renting the property during the time period before the senior mortgage forecloses on the homeowner's association's interest.

The Court also recognizes that the average third party bidder similarly has a multitude of issues to consider before bidding at a judicial sale.

> "The well-published rise in defaults of subprime mortgages has created tempting opportunities to purchase real estate at bargain prices. With foreclosure sales being scheduled on a daily basis, foreclosing attorneys frequently receive calls from clients and others wanting to be walked through the potential pitfalls in the foreclosure bidding process. There are risks, so a potential bidder should learn as much as possible about the property and process prior to placing the first bid... In order to protect against the risks discussed above, a prudent bidder interested in buying property at foreclosure sale will, prior to making a bid, spend the time and money necessary to conduct to the extent possible, the same investigations conducted by buyers in traditional real estate transactions. Otherwise, the bidder may not get the anticipated bargain. Foreclosures sales may call for the clearest application of *caveate emptor*." Clifford P. Parson and C. Joseph Roof, Prudent Bidding at a Foreclosure Sale, South Carolina Lawyer, January 2009.

This article sets out many problems third party bidders know they must face such as buying property that is subject to a first-lien mortgage. In analyzing this matter, it is critical to understand that "subject to a first lien mortgage" does not mean the third party bidder is personally liable to pay the debt, or ever will pay. The debt follows the property. The third party bidder can choose simply not to pay the senior lien if the investment gamble does not come to fruition. This commonly occurs when the third party bidder and assignee are unable to agree how to, in essence, divide the owner's equity which is being dissipated during the time period between

initial third party bid and when, if ever, the third party purchaser or ultimate assignee ever pays off the loan.

The Court takes notice of the monthly Motions and Orders to vacate a sale based upon third party bidder's failure to comply with their bid, as well as the frequency in which third party bidders assign their bid during the normal post sale foreclosure review process. Further, the third party bidder, if successful, receives a Master-in-Equity deed to the property without having to pay off the senior lien, since the third party purchasers does not have to pay off the lien until the senior lien holder completes the foreclosure process. Again, the fact illustrates the critical differences between assuming a mortgage and purchasing subject to a senior mortgage.

I. Service was proper.

The Cofer's argument that the underlying Order should be vacated because they did not receive a copy of the Notices of Foreclosure Hearing or the Notice of Foreclosure Sale is not sufficient to vacate the Order. Defendants argue that if notice had been received, they would have had an opportunity to go to the hearing to argue against the debt calculation reached by the Plaintiff, as well as the premature filing of the lien, and if they had timely received the notice of foreclosure sale, they could have delayed the sale, addressed the disputed issues, and avoided the loss of their home to a third party bidder.

The Court acknowledges the issues that could have been addressed at foreclosure hearing, but the failure to receive notice argument proffered by Defendants is insufficient to warrant a setting aside the sale. Regime Solutions, LLC and the Plaintiff both argue correctly that Rule 5, SCRCP allows service by mailing to the last known address of Defendant. Plaintiff provided properly executed proof of service for these notices and Defendant does not contend that Plaintiff failed to properly send mail; they strictly argue that notices were not received.

Defendant's arguments suggesting that their mail was lost or otherwise undelivered, even if somehow provable in this instance, would not be sufficient basis to prove improper service of these notices.

Regardless of the factual question of whether mail was or was not received, Plaintiff's Proof of Service documentation creates a rebuttable presumption that the mailing of these notices was carried out appropriately. *State v. Langston*, 275 S.C. 442, 441, 272 S.E.2d 436, 437 (S.C. 1980); *In Re Eagle Bus Mfg. v. Rogers*, 62 F.3d 730, 735 (C.A.5 (Tex.), 1995). While denial of receipt does raise a factual issue, case law requires more than the mere allegation that mailing was not received in order to successfully rebut this presumption. *Id.* Defendant, in this circumstance, is without any further evidence to prove a failure of delivery, and consequently Defendants' motion to vacate the Order cannot be granted solely on these grounds.

II. The sale should be vacated on the basis of inadequacy of bid price, coupled with other circumstances surrounding the foreclosure sale.

While not solely sufficient to warrant vacating the Order, the notice issue, when coupled with the inadequate bid amount discussed in depth below, does warrant that the sale be vacated. Defendants make a logical analysis that can, and is true sometimes - that both sides are telling the truth. This Court acknowledges the fact that Plaintiff properly mailing notices and Defendants not receiving notices are not mutually exclusive occurrences. The Cofer's argument that they did not receive the foreclosure hearing notices is not sufficient to grant any form of relief; but it establishes the sort of "additional circumstances" or "slight irregularities" contemplated by the South Carolina jurisprudence which, that when coupled with inadequate sale price, warrant vacating the sale. See also 27 S.C. Jurisprudence §8.3(c) (1996); 14 A.L.R. Digest: Mortgages § 529(6)-(7); and 59A C.J.S. Mortgages § 864; *Investors Sav. Bank v. Phelps*,

397 S.E.2d 780, 303 S.C. 15 (S.C. App., 1990); *Wells Fargo Bank, Na v. Turner*, 662 S.E.2d 424, 378 S.C. 147 (S.C. App., 2008); *Poole v. Jefferson Standard Life Ins. Co*, 174 S.C. 150, 177 S.E. 24 (S.C., 1934); and *Howell v. Gibson*, 208 S.C. 19, 37 S.E.2d 271 (S.C., 1946). This Court finds that the shockingly low sale price, coupled with the notice issues, constitutes sufficient grounds for setting aside the foreclosure sale to Regime Solutions, LLC.

III. Bid price adequacy should be evaluated by comparing the Cofer's equity to Regime Solutions' bid price.

This case is distinguishable from first mortgage foreclosure shock the conscience cases. In those cases, all parties agree that South Carolina has no fixed bright line test to determine if a bid should be set aside for shocking the conscience. *E. Sav. Bank FSB v. Sanders*, 644 S.E.2d 802 (Ct. App. 2007). South Carolina case law has allowed a sale price at least 10% of the property value on a first mortgage case. *Investors Sav .Bank v. Phelps*, 397 S.E.2d 780 (S.C. App. 1990).

Here, however, the property was sold subject to a senior lien creating additional factors to be considered. Case law does dictate that if property is sold subject to a senior lien, the bidder must receive *some* type of credit for the lien amount outstanding; the parties to this action are in agreement as to this necessity. See *Arrow Bonding Co. v. Warren*, 732 S.E.2d 622 (2012); *Federal Nat. Mortg. Ass'n v. Brooks*, 405 S.E.2d 604 (S.C. App., 1991). In *Arrow Bonding*, the Court of Appeals affirmed the Master's decision to *add* the mortgage balance to the sale price in its analysis of whether the bid shocked the conscience of the court. The court notes specifically that "*under the circumstances of this case*" it disagreed with Appellant's argument that the mortgage should not be considered. *Id.* at 624 (emphasis added). In doing so the Court in *Arrow*

Bonding established that evaluation of judicial sale price adequacy is to be conducted on a case-by-case manner.

The Cofer's argue that the circumstances of this matter require a departure from the *Arrow Bonding* calculation. Instead, the facts at hand oblige the Court to consider the equity gained in the home against the bid price paid by the third party buyer. Regime Solutions and Plaintiff favor the calculation used in *Arrow Bonding*, and argue that the proper analysis should be to add the balance of the outstanding mortgage to their bid, and then determine the percentage by comparing this total to the full market value of the Cofer's property. The argument of Plaintiff and Regime Solutions fails scrutiny, both factually and legally.

First, there was no evidence at the hearing that Regime Solutions, LLC paid or will pay the senior mortgage still outstanding on the Cofer's property. Under the circumstances presented in *Arrow Bonding,* the Court of Appeals inferred that the third party buyer has, or will pay off the debt. Certainly if a third party buyer actually pays off a senior mortgage, it should get credit for doing so in the analysis. In that situation, a court would have to consider the owner's equity as against a percentage of the third party buyer's actual expenses paid.

Here, however, there is no evidence that the mortgage has been paid off or ever will be paid off. Regime Solutions, LLC is asking to receive credit for an *expense* it has not incurred. Regime Solutions has purchased the Cofer's property *subject to* the outstanding mortgage, and consequently Regime Solutions is not obligated to pay the senior lien. Paying off a lien and being subject to a lien are two different matters, and acquiring property subject to a lien under these circumstances does not afford a party the right to claim the lien *as part of its bid price*.

When a third party buyer bids on such property with intent to acquire the property subject to senior lien, it has several options. It may choose to pay off the senior lien, negotiate and then

assign its bid to another person who then must pay off the lien, evict the owner and rent the property until the first mortgage completes the foreclosure process, or simply default in complying with the bid, thereby forfeiting the initial bid fee. The court takes judicial notice of the number of monthly bid assignments and forfeited bids that the court encounters during the sales process. The court also takes notice of foreclosures wherein a senior lien holder forecloses on a homeowner's association that obtained title at a previous foreclosure. These occurrences are the result of calculated efforts. Savvy homeowner's associations and third party buyers perform calculated analyses as to whether or not they will be able to rent or sell the newly acquired property fast enough to recoup their respective debts or expenditures before the senior lien holder forecloses. It is very much a calculated business risk for those involved in the foreclosure sale process.

The Cofer's argue that Regime Solutions should get credit for the senior lien balance, but not by giving them credit as having paid the mortgage. Instead, credit for the mortgage should be provided by subtracting the amount of the senior lien from the fair market value of the property, which places the proper focus of inquiry back on owner equity, rather than on theoretical investments by the third party buyer in the property.

The Cofer's argue the basic position illustrated by *Federal Nat. Mortg. Ass'n v. Brooks*, and by the Restatement (Third) of Property8.3(b) (1996).

The Restatement (Third) sets out the following example:

> "Mortgagee foreclosed a mortgage on Blackacre by judicial action. The foreclosure is subject to a senior lien in the amount of $50,000.00. Blackacre is sold at the foreclosure sale for $19,000.00. The fair market value of Blackacre free and clear of liens at the time of the sale is $150,000.00. The foreclosure proceeding is regularly conducted in compliance with state law. A state court is warranted in finding the sale price grossly inadequate and in refusing to confirm the sale." (Note Restatement also advocates a 20% ratio which South Carolina has

not adopted, but the principle rule is the same.) Restatement (Third) of Property § 8.3(b) (1996).

By way of example of how the 20% ratio is calculated, the Restatement demonstrates that the fair market value, minus the senior lien, equal $100,000 in equity. The sale price of $19,0000, represents only 19% of the equity, and fails the 20% ratio test advocated as the baseline for finding gross inadequacy. *Id.*

In the *FNMA v. Brooks* case, the Special Referee's initial Order setting aside the judicial sale found the third-party purchaser's $875 bid to constitute gross inadequacy as would shock the conscience of the court. *Id.* at 605. The Special Referee also found additional circumstances of noncompliance further allowing for the sale to be set aside. *Id.* This decision was appealed, and The Court of Appeals specifically evaluated the inadequacy of the judicial sale price by using a "real estate equity v. sale price" method of analysis. *Id.* at 606.

The value of the foreclosed *FNMA* property was determined to be $52,500. *Id.* at 607. The balance of the remaining first mortgage was $24,720.00. *Id.* at 605. This left $27,780.00 of equity in the property. Even though the Appellant argued that the outstanding mortgage, *if added*, would raise the sale price to 49% of the property value, the Court of Appeals affirmed the Special Referee's decision, and stated as follows: "In cannot be gainsaid that the payment by Brooks of $875 for equity over $27,000 was adequate, albeit, it is no so grossly inadequate as to shock the conscience of the court." *Id.* at 605-606.

Stated more clearly, the Court of Appeals found that the sale price of $875 was not adequate when compared to the established equity in the property. The Special Referee and the Court of Appeals did not find it necessary to add the mortgage balance to the sale price before conducting an analysis of the bid. *Id.* They instead subtracted the mortgage balance from the

property value and evaluated the sale on the basis of the equity the third-party buyer was receiving. *Id.* at 606. This is precisely the method of evaluation proposed by the Cofers.

The Court of Appeals reached the conclusion that the price paid for the equity received, in conjunction with the circumstances of noncompliance in the foreclosure decree, was a sufficient basis for setting aside the foreclosure sale and affirming the decision of the Special Referee. *Id.* at 607. Admittedly, the Court noted that it did not find this particular inadequacy one that would shock the conscience of the court; however, the circumstances of the case provided the Court of Appeals with a less stringent avenue for setting aside the sale, and the Court did not need to argue the shock the conscience standard in order to find grounds to affirm the Special Referee's Order. *Id.* at 606-607.

The decision in *FNMA v. Brooks* is a clear precedent for using real estate equity as the comparative measure for determining the inadequacy of a judicial sale price. Given the circumstances of this case this approach is proper as it affords due credit for the mortgage balance to the third party buyer, but does not presumptively allocate the mortgage balance as an expenditure that can be added to their bid and classified as the "sale price" for the auctioned property. As Regime Solutions acquired the Cofer property subject to the outstanding mortgage, adding that mortgage value to the bid value would be improper, as it does not reflect Regime Solutions' actions, or their legal obligations. While adding the value may be the proper analysis in certain circumstances, it is not proper in this instance, and this Court adopts the equity analysis used in *FNMA v. Brooks*.

IV. Regime Solutions' bid price is grossly inadequate, so as to shock the conscience of the Court and require a setting aside of the sale.

This Court finds that the bid price of $4,857.00 is grossly inadequate and the foreclosure sale should be set aside.

The Cofers are current on their mortgage, and as of August 2015, the outstanding mortgage balance totaled $124,799.32. The Cofers paid $236,388.00 for their property in 2006, and the Court finds this figure to be the fair market value of the property. Defendant's bolstered their support for this figure by showing that the tax assessment for the combined home and property totals a similar value of $223,857.00. Therefore, the Cofers have established $111,588.68 of equity in their home.

At public sale, Regime Solutions successfully bid for the property with a bid amount of $4,857.00. This bid fully satisfied the lien held by Plaintiff against the property, and resulted in surplus funds of $140.31 which have been held in trust by this Office of this Court during the pendency of this litigation.

While there is no bright line rule for determining gross inadequacy of sale price, South Carolina courts have consistently found any sale price representing 10% or less of the value of the property to be grossly inadequate and warranting a setting aside of the sale. *Investors Sav. Bank v. Phelps*, 397 S.E.2d 780, 303 S.C. 15 (S.C. App., 1990); *Wells Fargo Bank, Na v. Turner*, 662 S.E.2d 424, 425-26, 378 S.C. 147 (S.C. App., 2008). Applying the analysis of *FNMA v. Brooks*, the Court finds that Regime Solutions' bid represents only 4.35% of the equity value they acquired in the Cofer's home, and as such this sale should not stand. This Court finds that the March 2, 2015 sale of the Cofer's 113 Mill Haven Lane property should be set aside.

V. Public policy and the need for finality of sale do not outweigh the need for ensuring fundamental fairness to the debtor.

Regime Solutions also argues that adopting the Cofer's argument to focus solely on the owner's equity and not their possible expenditures would impair the sale process. While the court agrees that there is a strong policy for finality of sale and the desirability of a bright line shock the conscience ruling, Regime Solutions' argument is not compelling. As noted in the above Parson and Roof South Carolina Law review article, third party buyers know the risks of bidding at a judicial sale. A third party buyer can conduct pre-sale research to obtain a better idea of the fair market value to debt ratio simply by reviewing tax assessments, the principal amount stated on the mortgage, and reviewing any foreclosure file jackets to determine if the party in default or foreclosure with their mortgage. The Complaint will contain allegations of note and mortgage terms (often containing a copy of the note with debt amount, interest rate and terms, etc) that a prospective bidder can then make some educated guess as to balance of debt since they know they are taking property subject to maximum first mortgage amount as stated on recorded mortgage.

Other courts have examined this policy argument. The Arizona *In re Krohn* case is persuasive authority for how courts of equity should evaluate the nature of the parties involved in a dispute seeking to set aside a judicial sale. While the specific matter dealt with a setting aside of a deed of trust, the Arizona Court applied a foreclosure sale analysis that mirrors the law of South Carolina. Under Arizona law, a foreclosure sale can be overturned by a showing of gross inadequacy of sale price or by inadequacy of sale price coupled with slight irregularities in the circumstances surrounding the sale. *In re Krohn*, 52 P.3d 774, 776 (Ariz., 2002). The Court in *In*

re Krohn notes that "where there is an inadequacy of price which in itself may not be grounds for setting aside a sale, slight additional circumstances or matters of equity may so justify." *Id.*

In Re Krohn addressed the stability of the "foreclosure industry", as well as the potential for discouraging bidders and creating a "chilled market". *Id.* at 779. In response, the Arizona Court states that "we have been presented with no data indicating that the traditional judicial foreclosure market has been disrupted by existing judicial oversight to prevent grossly inadequate prices, and such a result is not self-evident." *Id.*; See also *Ballentyne v. William Smith*, 205 U.S. 285, 291 (1907) (noting that the equities involved and the meager sale price outweigh the Court's concern for impairing bidder confidence in the stability of judicial sales). The opinion goes on to say that:

> "Indeed, purchasers continue to come forward, making deed of trust purchases without certain knowledge that the trustee has fully complied with the statutory procedural obligations and thus take a risk that the sale may be set aside for that reason. For example, there was no apparent flight form deed of trust sales after we vacated such a sale when we found a ninety-day statutory notice of sale did not negate the additional thirty-day notice required in the deed of trust itself. *Schaeffer v. Chapman*, 176 Ariz. 326, 861 P.2d 611, (1993).
>
> Perhaps this is because most purchasers believe, as we do, that only the smallest minority of deed of trust sales are conducted without statutory compliance, just as we also believe that most purchasers will assume only the smallest number of deed of trust sales are concluded at a price that could shock the conscience of the court because of gross inadequacy. That said, we think it just as likely that the possibility of judicial oversight on the ground of gross inadequacy will result in higher prices. If so, we think this will serve rather than impair the public interest." *In re Krohn*, 52 P.3d at 780.

The opinion concludes that if judicial oversight of foreclosure sales has any effect at all on the bidding market, that effect would likely be to increase the sale prices reached at judicial sale, thereby promoting the public interest and promoting the actual purpose for which judicial sales are conducted. *Id.*; See *Looper v. Madison Guar. Sav. & Loan Ass'n*, 729 S.W.2d 156, 159 (Ark., 1987) (noting that "the law is such that inadequacy of price when so gross, need only be

coupled with slight circumstances to justify setting aside the sale. This is a court of equity, and foreclosure is historically an equitable proceeding to protect the debtor."). There is no reason to assume that the concerns expressed for the bidding market of South Carolina judicial sales would be subject to any greater detriment as that of Arizona, and the Arizona Court was not influenced in the slighted by this argument. The United States Supreme Court was likewise not persuaded by such a concern. *Ballentyne*, 205 U.S. at 291.

The Court acknowledges that absent special circumstances, a sale to a bona fide purchaser should not be upset by the courts. *In re Krohn*, 52 P.3d 780. However, "the status of bona fide purchaser by itself cannot insulate even a well meaning purchaser innocent of wrongdoing when other circumstances are present." *Id.* Bidders are charged with the knowledge that some difficulty in dealings exists, else a property would not be set for public auction. *Id.* The rule of caveat emptor applies, and purchasers at such sales have already assumed the risk that some unknown procedural error may arise. *Id.* "Such bidders can reasonably expect to get bargains at the expense of already troubled debtors." *Id.* "Knowledgeable purchasers can reasonably evaluate the fair market value of a property to make an appropriate bid that is not grossly inadequate." *Id.*

Fair market value cannot be realistically expected at foreclosure sale, the context of the proceeding itself inhibits it. *Id.* However, that does not excuse results that constitute gross inadequacy or even disproportionate prices coupled with very slight evidence of unfairness or irregularity. *Id.* at 782.

In re Krohn, at its core, "is a case about inequity on the one hand and unjust enrichment on the other. When these factors are present, our court has been available to give relief so long as there is no statutory prohibition." *Id.* (citing *Sparks v. Douglas & Sparks Realty Co.*, 19 Ariz.

123, 129, 166 P. 285, 288 (1917)). The importance of the nature of the parties involved in a foreclosure sale and the repugnance for allowing excessive profits at the expense of the drastic misfortune of a debtor are described by the Arizona Court in the following excerpts:

> "There are, of course, those waiting for opportunities based on individual misfortune, and we believe this makes it even more important that courts of equity are open to assure debtors receive not only procedural but fundamental fairness. Windfall profits, like those reaped by bidders paying grossly inadequate prices at foreclosure sales, do no serve the public interest and do no more than legally enrich speculators." *Id.* at 779.
>
> . . .
>
> "If the legislature believes that the doors of the courthouse should be closed and the courts forbidden to grant relief to those who are unjustly and inequitably deprived of their homes by speculators or others seeking windfall profits, it may say so. . . . [T]he dissent asserts that there is no question of unjust enrichment in the present case because the purchaser at the trustee's sale 'was not the lender, but a third party'. We are unable to understand the distinction. It makes little difference whether a lender or speculator was unjustly enriched. The important considerations are the questions of inequity on the one hand and unjust enrichment on the other. When these are present, the court may use its equitable powers." *Id.* at 782.

The Arizona Supreme court is not alone in its defense against the sanctioning of unjust enrichment. This is the same conclusion reached by the Supreme Court of Arkansas, wherein the Arkansas Court argues that "it is not the purpose of the law to protect one who seeks to procure valuable property for little or no outlay." *Looper*, 729 S.W.2d at 160. Collectively, the courts that have addressed "the nature of the parties" inquiry, as it pertains to setting aside of judicial sales, have concluded that the rights of a real estate speculator are far outweighed by the right of fundamental fairness owed to the debtor.

This Court acknowledges the concerns regarding public policy, the rights of a third party buyer, and the desire to have finality in foreclosure sales. However, this Court agrees with the conclusion reached in *In re Krohn*, *Ballentyne*, and *FNMA v. Brooks*: these concerns do not

outweigh the substantial injustice that would result in allowing a third party buyer to be unjustly enriched at the significant detriment of the Cofers.

VI. Regime Solutions must be reimbursed for its loss of interest of its bid money.

Defendant recognizes that fundamental fairness in these circumstances require that the purchaser should be made as whole as is possible. Defendant argues that when tax sales are overturned, the bidding party is awarded interest on its bid value as set forth by statute. Given the similarity between a redeemed tax sale and a set aside foreclosure sale, this Court finds that such a remedy is proper in this matter. Regime Solutions is entitled to interest for its bid money in accordance with the interest schedule set forth in South section 12-51-90(B).

Section 12-51-90(B) directs that 3% interest be paid to the bidder for occurring within the first three months after the public sale. The foreclosure sale of the Cofer's home was conducted on March 2, 2015. By filing their Rule 60(b)(1) motion to set aside the sale, Defendant asserted proper legal grounds for vacating the sale on May 18, 2015. Regime Solutions is therefore entitled to 3% interest on its $4,857.00 bid; Regime Solutions, LLC's interest totals $145.71.

CONCLUSION

The sale of the Cofers' home to Regime Solutions, LLC should be overturned on multiple grounds. First, the bid price of $4,857 for the $111,588.68 of equity value established by the Cofers only represents 4.35% of the value of the property. This is well below the established 10% threshold needed to constitute a gross inadequacy of sale price that shocks the conscience of this Court; on this basis alone, vacating the sale is warranted. Secondly, while service by Plaintiff for all notices of foreclosure hearing and public sale were proper, the failure of delivery issues constitute "slight irregularities" and "additional circumstances", that when coupled with the inadequate bid price, create a circumstance that allow for the sale to be vacated. This Court finds

that vacating the foreclosure sale on this basis is also proper. Regime Solutions, LLC, as the successful bidder, is entitled to 3% interest for its bid amount of $4,857.00, analogous to the tax sale redemption remedies of South Carolina Code of Laws Section 12-51-90(B).

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Defendants' Motion pursuant to Rule 60(B)(1) to set aside the sale is hereby granted.
2. Plaintiff, the Mill Homeowner's Association, issue cash or certified funds to Regime Solutions, LLC in the amount of **Four Thousand Six Hundred and Sixty-Eight Dollars and Twelve Cents ($4,668.12)**. This amount represents the net proceeds check paid to Plaintiff.
3. Defendants Corey and Randal Cofer issue cash or certified funds to Regime Solutions, LLC, in the amount of **One Hundred and Forty-Five Dollars and Seventy-One Cents ($145.71)**. This amount represents 3% interest accrued for Regime Solutions' bid amount of $4,857.00, as remedy pursuant to S.C. Code of Laws 12-51-90(B).
4. The County of Lexington issue a check to Regime Solutions, LLC in the amount of **Forty-Eight Dollars and Fifty-Seven Cents ($48.57).** This amount represents the 1% bid feed paid to County.
5. The Master-in-Equity Office issue a check to Regime Solutions, LLC in the amount of **One Hundred and Forty Dollars and Thirty-One Cents ($140.31).** This amount represents the surplus funds being held by the Master-in-Equity Office.
6. If Defendant fails to pay the stated interest set forth in item #3 within 30 days of the date of this Order, Regime Solutions, LLC may file to vacate this order, wherein they will be permitted to maintain ownership of the property.
7. If Defendant fails to pay the outstanding Homeowner's Association lien debt of **Four Thousand Six Hundred and Nineteen Dollars and Eighty-Four Cents ($4,619.84)** (See Statement of Indebtedness, Defendants' Exhibit 5.) held by The Mill Homeowner's Association within 60 days of this Order, the Plaintiff may move to have the property resold at public auction.
8. As this sale has now been vacated, the recording of Master-in-Equity Deed recorded Deed Book 17498 at Page 335 is also vacated.

IT IS SO ORDERED.

James O. Spence

The Honorable James O. Spence
Master-in-Equity for Lexington County

Lexington, South Carolina
February 16, 2016

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP3201270

PLAINTIFF(S)	DEFENDANT(S)
Mill Homeowners Association Inc	Randall W Cofer Corey C Cofer
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge Judge Code 2/18/2016 Date

For Clerk of Court Office Use Only

This judgment was entered on **2/17/2016**, and a copy mailed first class or placed in the appropriate attorney's box on **2/18/2016**, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg ppb

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.