THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph M. Strickland, Master-In-Equity

Appellate Case No. 2016-00958

Wells Fargo Bank, N.A., Plaintiff,

v.

William R. Hudspeth, Marcia E. Hudspeth; TD Bank, N.A. s/b/m to Carolina First Bank; The Lender Group, Inc.; Business Carolina, Inc.; South Carolina Department of Revenue; Carapace, LLC; Wurth Wood Group, Inc.; The Estate of Harry William Boyd, by Joan L. Boyd, Personal Representative; Adecco USA, Inc., Defendants,

Of Whom TD Bank, N.A. successor by merger to Carolina First Bank is the Appellant,

and Of Whom The Lender Group, Inc. is the Respondent.

FINAL REPLY BRIEF OF APPELLANT, TD BANK, N.A., S/B/M TO CAROLINA FIRST BANK

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Appellant, TD Bank, N.A., s/b/m Carolina First Bank ("***TD Bank***") responds to the arguments presented by Respondent, The Lender Group, Inc. ("***Lender Group***"). Lender Group's arguments fail to advance their position in three ways:

(1) Lender Group's interpretation of Rule 71 contradicts the plain language of this Rule, which provides junior lienholders the right to claim surplus funds in the order existing at the time of the foreclosure sale;

(2) No merger exists because TD Bank did not purchase the Property at a foreclosure of its lien and because the Lender Group fails to address the distinction between a property lien interest, which TD Bank does not claim, and a lien interest in surplus proceeds, which TD Bank is claiming; and

(3) Lender Group's public policy argument is internally inconsistent because the Lender Group agrees that junior lienholders should bid at foreclosure sale to protect their interest, but then concludes that TD Bank should not have bid.

I. ARGUMENT

A. Lender Group's Interpretation of Rule 71(c) Contradicts The Plain Language of the Rule.

Lender Group's "plain language" argument is notably void of any quotation or citation to any specific language in Rule 71. To the contrary, Rule 71(c) supports TD Bank's position in four ways.

First, Rule 71 instructs that parties who have a lien "***at the time of the sale***" will have a claim to any surplus funds. S.C.R.C.P. 71(c). "[A]t the time of the sale[,]" TD Bank held a second-position lien in the Property by virtue of its Second Mortgage. The Lender Group does not dispute that its third position judgment lien was subordinate to TD Bank's Second Mortgage at the time of sale.

After the foreclosure sale, the liens junior to Wells Fargo, including those of TD Bank and the Lender Group, were ***extinguished*** from the Subject Property, and instead, attached to the sale proceeds in the order existing before the sale. *See* (Third) Restatement of Property: Mortgages, § 7.4 ("the surplus is applied to liens and other interests terminated by the foreclosure in order of

their priority . . . "); S.C.R.C.P. 71(c) ("the original order of reference in a foreclosure action shall be considered to extend to the disposition of the surplus fund"). Accordingly, TD Bank enjoyed a priority in the proceeds superior to that of the Lender Group.

Second, Rule 71(c) sets forth the procedures that a lienholder must follow to claim the proceeds according to the resulting interests, but does not grant discretion to ignore a properly filed claim. Lender Group does not challenge that TD Bank filed a timely, proper claim to the funds in accordance with Rule 71(c)'s claim procedure. Instead, the Lender Group contends, without any support, that "it is within the discretion of the officer conducting the sale to determine each" of the surplus claimants' entitlement to the surplus funds. Lender Group Brief at 10. But, the actual language of Rule 71 (c) authorizes no such discretion.

> In the event of a surplus fund resulting from the sale, the master or other officer conducting the sale shall at the time he makes his report to the court on the sale and disbursements, cause to be furnished to all parties appearing in the action a notice advising of the surplus fund. Unless otherwise provided therein, ***the original order of reference in a foreclosure action shall be considered to extend to the disposition of the surplus fund***.

S.C.R.C.P. 71(c).

The Lender Group's assertion that disposition of the surplus is entirely within the discretion of the officer is simply incorrect. Rule 71(c) provides "a hearing to determine *such entitlement*[,]" but does not grant the officer the discretion to change the order of distribution if a party is entitled to funds. S.C.R.C.P. 71(c).

Moreover, Lender Group ignores that the Rules of Civil Procedure, including Rule 71(c), are supplemented by well-settled common law. *See Ex parte Wilson*, 625 S.E.2d 205, 209 (S.C. 2005); *Green v. Lewis Truck Lines, Inc.*, 443 S.E.2d 906 (S.C. 1994)) ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes."); *see also Abba Equipment, Inc. v. Thomason*, 517 S.E.2d 235, 238 (S.C.

Ct. App. 1999) *and Hoogenboom v. City of Beaufort*, 433 S.E.2d 875, 884 n. 5 (S.C. Ct. App. 1992) (stating that statutes are strictly construed against conflict with existing common law rights). Statutes are strongly presumed to be consonant with existing common law, and will be not be construed against such rules if another interpretation is reasonable. *Abba Equipment, Inc.*, 517 S.E.2d at 238. As explained in TD Bank's Initial Brief and above, settled South Carolina real property law states that parties' priorities *before* sale determines the parties' entitlement to the surplus, and this common law is in line with the (Third) Restatement of Property: Mortgages. (R. p. 53, lines 22-24; R. p. 54, lines 1-6); TD Initial Brief at 11-12. Lender Group fails to cite any legal support as to why South Carolina should not follow the rationale outlined in Section 7.4 (Third) Restatement, given that South Carolina has already adopted the (Third) Restatement generally regarding mortgage law principles. (R. pp. 56-58); Lender Group Brief at 9-10.

Third, without citing any authority, the Lender Group argues that the Master-In-Equity had the discretion to ignore TD Bank's lienholder status and that "TD Bank should be treated solely as a purchaser, instead of as a purchaser *and* a lienholder". Lender Group Brief at 11-12; (R. p. 14). As discussed above, Rule 71 does not grant such broad discretion. Further, this argument not only contradicts established principles of common law,[1] but also the text of Rule 71(c) itself, which states that "[a]ny party to the action, ***or any person who had a lien on the mortgaged premises at the time of the sale***" may file a claim for the surplus funds. S.C.R.C.P. 71(c). Notably, while Rule 71 disqualifies lienholders that do not file a claim under the procedure, it does not prohibit any such lienholder from claiming surplus funds based on the results of the sale or the identity of the purchaser.

[1] *See supra,* at p. 5-6.

Finally, Lender Group's argument that Rule 71 is not "self-executing" and that a party could waive its right to surplus funds has no application to the undisputed facts. The Lender Group does not and cannot argue TD Bank waived its right to claim surplus funds. Instead, the Lender Group admits that TD Bank timely requested surplus funds under Rule 71 and that TD Bank's right to those funds is superior to the Lender Group. Further, the Lender Group's reliance on *Ex Parte Johnson*, 640 S.E.2d 887, 890 (S.C. Ct. App. 2006) is misplaced because it interprets Section 12-49-60 of the Tax Code, and not Rule 71.

B. Merger Is Inapplicable To A Lien Attaching To Surplus Funds.

The Lender Group's argument that TD Bank cannot claim an interest in the surplus proceeds because TD Bank's Second Mortgage on the Property merged into the property upon its purchase at the sale fails for three reasons.

First, as Lender Group concedes, merger applies when a purchaser at a foreclosure sale is the foreclosing plaintiff. Lender Group Brief at 12-13. That is not the case here. Here, TD Bank purchased the property at the foreclosure sale to satisfy Well Fargo's first lien.

Second, the foreclosure and sale of Wells Fargo's first lien on the Property ***extinguished*** the interests of all joined junior lienholders in the property, including those of TD Bank and the Lender Group. TD Bank ***does not claim any lien interest in the Property***, because all liens junior to Wells Fargo were foreclosed as a result of the sale. *See, e.g. Stewart v. Groce*, 20 S.E. 411, 415 (S.C. 1894) ("all one acquires as a purchaser under a sale of property by virtue of a junior lien is the property sold, free from all junior liens, but still subject to the senior liens."); Restatement (Third) of Property (Mortgages) § 7.1 cmt. A ("It is a fundamental principle of mortgage law that a valid judicial foreclosure of a senior mortgage terminates not only the owner's title and equitable redemption rights, but also all other junior interests . . ."). Because TD Bank does not have any

lien interest in the Property, there is no fee title into which the lien could possibly merge. Accordingly, the doctrine of merger is wholly inapplicable.

Third, TD Bank's only lien relevant to this appeal is its lien in the surplus proceeds. As set forth above and in the Initial Brief, established South Carolina law states that when surplus proceeds result from sale, the liens of the junior creditors attach to the proceeds ***in place of*** the extinguished interests in the Property as a substitute *res*, which "represents what remains of the equity of redemption." Restatement (Third) of Property: Mortgages § 7.4, cmt. A; TD Bank's Initial Brief at 13; *see also BAC Home Loan Servicing, L.P. v. Kinder*, 731 S.E.2d 547, 549 (S.C. 2012). TD Bank undisputedly had a properly perfected second-priority lien in the property before the sale. Therefore, TD Bank's substitute lien remains in the surplus proceeds.

C. Lender Group Illogically Suggests That A Junior Lienholder Should Not Bid at a Foreclosure Sale But Instead Watch From The Sidelines and Remain "Hopeful".

Lender Group admits that there is an important public policy interest in preserving a junior lien holder's right to bid at a foreclosure sale. Lender Group Brief at 15. It further agrees that bidding is a junior lien holder's way of "protecting its interest in the property being foreclosed." *Id.* Yet, through an argument requiring mental gymnastics, Lender Group then concludes that it would best serve public policy if junior lienholders simply sat by ideally, without bidding, and remained "***hopeful*** that the foreclosure of the senior mortgage would result in a sale that would satisfy all or a portion of its junior lien." *Id* at 16.

Under this flawed logic, junior lienholders, would be left in TD Bank's current, no-win position. By sitting on the sidelines "hopeful" that someone else will protect its interests, TD Bank would be left with no remedy.

TD Bank had every incentive to bid up the sale price up to the total of the First Mortgage debt ($120,580.90) and Second Mortgage ($324,778.10) debt, which totals $445,359.00, so that

TD Bank could recover the maximum amount possible for its Second Mortgage. TD Bank's bid of $350,000.00 was under what was necessary to protect its interest. Once TD Bank's efforts to bid up the sale price did not result in a complete satisfaction of its Second Mortgage, TD Bank had Rule 71 to claim surplus funds in ***partial*** satisfaction of its Second Mortgage.

Had TD Bank sat ideally, as suggested by Lender Group, there is no guarantee that the bidding would even have covered the First Mortgage, much less any portion of any junior liens. Not only would TD Bank have had no opportunity to recover any surplus funds, but the other junior lienholders, such as Lender Group, would also be deprived of this opportunity.

CONCLUSION

For the foregoing reasons, and those set forth in TD Bank's Initial Brief, this Court should clarify for all South Carolina lienholders that attachment to surplus proceeds affixes before the foreclosure sale and regardless of the identity of the final purchaser. TD Bank requests that this Court vacate the trial court's April 29, 2016 disbursement order and the May 17, 2016 supplemental disbursement order, and remand for further proceeding with the recognition that TD Bank's claim to superior funds is greater than that of the Respondent.

RESPECTFULLY SUBMITTED,

Dated: September 26, 2016

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Reply Brief complies with Rule 211(b).

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