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SC Court of Appeals

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD) CIVIL ACTION NO. 2012-CP-20-132

ArrowPointe Federal Credit Union,)
Plaintiff,)
vs.)
Jimmy Eugene Bailey; Laura Jean Bailey,)
and DLJ Mortgage Capital, Inc.,)
Defendants.)

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND ORDER FOR
FORECLOSURE**

Pursuant to SCRCP Rule 53 of the South Carolina Rules of Civil Procedure, and by Order dated September 5, 2012, this case was referred to the undersigned to make appropriate findings of fact and conclusions of law with authority to enter a final judgment in the case.

This matter came before the Court for hearing on the Plaintiff ArrowPointe Federal Credit Union's ("AFCU" or "Plaintiff") Motion for Summary Judgment, Defendant DLJ's Motion to Substitute Defendant and Amend Caption, and Plaintiff and Defendant DLJ's merits hearing for foreclosure of each party's mortgage lien. Plaintiff filed this action to foreclose a mortgage given to Plaintiff by Defendants Jimmy Eugene Bailey and Laura Jean Bailey ("Baileys"). Defendant DLJ Mortgage Capital, Inc. ("DLJ") filed an Answer, asserting that its mortgage has priority over the Plaintiff's mortgage. DLJ filed a Motion for Summary Judgment that its mortgage loan was entitled to priority over Plaintiff's mortgage loan, which was denied by the Court.

After considering the pleadings, affidavits, Plaintiff's Motion for Summary Judgment, as well as memoranda and arguments presented at the hearings on the motion, this Court finds that

(1) [Signature]

the Plaintiff is entitled to judgment as a matter of law that its mortgage lien has priority over DLJ's mortgage lien. Plaintiff is also entitled to foreclosure of its mortgage lien by and through the sale of the property described in the Lis Pendens. Further, U.S. Bank National Association not in its individual capacity but solely in its capacity as Indenture Trustee for WVUE 2015-1 is hereby substituted in place of DLJ as the proper defendant in this case by virtue of an assignment of the DLJ mortgage to it during the pendency of this case.

Pursuant to the Order of Reference, a hearing on Plaintiff's Motion for Summary Judgment was held, and then a merits hearing concerning each party's debt on their respective loans was held and was attended by attorneys as noted in the Record of Hearing. Evidence was offered and received as shown in the Record of Hearing. Based on the evidence, I find and conclude as follows:

FINDINGS OF FACT

The parties have stipulated to facts in the Joint Stipulation filed March 13, 2017 with the Fairfield County Clerk of Court's Office ("Joint Stipulation"). The Court acknowledges the Joint Stipulation and incorporates those stipulated facts as its findings in this Order, and incorporates the defined terms from the Joint Stipulation into this Order.

1. The Baileys are in default on repayment of the loan secured by the Line of Credit Mortgage as shown by the affidavit of default filed with the Court. According to the affidavit filed herein, no Defendant in default is in the military service of the United States of America, as contemplated under the Servicemembers' Civil Relief Act, 50 U.S.C. App. §501, *et seq.* and any amendments thereto.

2. All parties were notified of the time, date, and place of the hearing in this matter.

3. Payment due on the Note for AFCU's loan has not been made as provided in the note, and AFCU has elected to require immediate payment of the entire amount due thereon and has placed the Note and Line of Credit Mortgage in the hands of the attorney herein for collection by foreclosure.

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4. The sum of \$2,795.00 is a reasonable fee to allow as attorneys' fees for Plaintiff's attorney for services performed and anticipated to be performed until final adjudication of the within action, under the terms of the Note and Line of Credit Mortgage.

5. The amount due and owing on the Note secured by the Line of Credit Mortgage, with interest at the rate provided in the Note, and other costs and expenses of the within action, including an attorney's fee, secured by the Note and Line of Credit Mortgage, is as follows:

a. Principal due	\$100,105.00
b. Interest from July 4, 2011, at 6% per annum	39,910.21
c. Insurance premiums	5,880.00
d. Costs of collection prior to hearing (service, filing, etc.)	804.76
e. Taxes, insurance, etc. not included above	37,706.63
f. Attorney's fees and collection costs	2,795.00
Total debt secured by Note and Line of Credit Mortgage	\$187,201.60

Interest for the period from the date shown in (b) above through the date of this judgment at the above stated rate to be added to the above stated "Total Debt" to comprise the amount of the judgment debt entered herein and interest after the date of judgment at the rate of 6.00% per annum (pursuant to the terms of the Note and Line of Credit Mortgage) on the judgment debt should be added to such judgment debt to comprise the amount of AFCU's debt secured by the Mortgage through the date to which such interest is computed.

6. AFCU is seeking the usual foreclosure of the Line of Credit Mortgage and has in the Complaint, or subsequent thereto in writing, expressly waived the right to a personal or deficiency judgment should the proceeds of sale not be sufficient to satisfy the judgment debt.

7. Payment due on the Second Note has not been made as provided in the Second Note, and DLJ has elected to require immediate payment of the entire amount due thereon and has placed the Second Note and Second Mortgage in the hands of attorneys appearing herein for collection by foreclosure.

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8. The amounts in the Attorneys' Fees affidavits submitted at the hearing and filed by DLJ's attorneys are reasonable fees to allow as attorneys' fees for DLJ's attorneys for services performed and anticipated to be performed until final adjudication of the within action, under the terms of the Second Note and Second Mortgage.

9. The amount due and owing on the Second Note secured by the Second Mortgage, with interest at the rate provided in the Second Note is as stated in an Affidavit of Verified Statement of Account, which is Exhibit V of the Joint Stipulation and as entered into evidence at the hearing, along with other costs and expenses of the within action, including an attorneys' fees, secured by the Second Note and Second Mortgage, in the collective amount of:

Total debt secured by Second Note and Second Mortgage	\$436,609.23
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Interest from March 13, 2017 through the date of this judgment at 4.875% to be added to the above stated "Total DLJ Debt" to comprise the amount of the judgment debt entered herein and interest after the date of judgment at the rate of 4.875% per annum (pursuant to the terms of the Second Note and Second Mortgage) on the judgment debt should be added to such judgment debt to comprise the amount of DLJ's debt secured by the Second Mortgage through the date to which such interest is computed.

10. DLJ is seeking the usual foreclosure of the Second Mortgage and has in the pleadings, or subsequent thereto in writing, expressly waived the right to a personal or deficiency judgment should the proceeds of sale not be sufficient to satisfy the judgment debt.

ISSUES

AFCU argues that its Line of Credit Mortgage was recorded prior to DLJ's Second Mortgage, and therefore the AFCU's Line of Credit Mortgage is entitled to priority under race-notice. DLJ argues that its Second Mortgage is a replacement mortgage, which replaced its First

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Mortgage. DLJ argues that because its Second Mortgage is a replacement mortgage, intervening lienholders such as AFCU are not entitled to the normal priority granted according to the date that the competing mortgages are recorded.

DLJ also argues that its First Mortgage contains language allowing its Second Mortgage to increase the amount it secures with priority over the Line of Credit Mortgage. DLJ argues that AFCU was on record notice by virtue of the recorded First Mortgage that the balance secured by the First Mortgage could increase. The pertinent part of the First Mortgage states that it secures the instant Note and "any renewal, extension or modification." DLJ argues that this language gives notice to the public, including other lenders such as AFCU, that the amount the First Mortgage secures can increase. Alternatively, to the extent the language did not put AFCU on such notice, then DLJ argues it is still entitled to lien priority through the doctrine of replacement mortgage up to the amount that its First Mortgage secured.

CONCLUSIONS OF LAW

The theory of replacement mortgage is espoused not in the case law or statutory law of South Carolina, but in the Restatement Third of Property. According to the Restatement, a replacement mortgage can retain the original priority of the mortgage that is being replaced, except to the extent that the replacement mortgage changes the terms of the original mortgage or if the replacement mortgage is materially prejudicial to any existing subordinate lienholders. REST 3d PROP-MORT § 7.3.

The terms of the First Note and First Mortgage are different than the terms of Second Note and Second Mortgage. The principal balance is \$39,450.00 greater. The Baileys cashed out supposed equity, using a loan-to-value ratio that did not include the Credit Union's mortgage loan.

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There were substantial closing costs associated with the Second Note and Second Mortgage Loan.

Affidavit of James R. Price, ¶ 19.

1. South Carolina Does Not Recognize Replacement Mortgage

DLJ's argument is based on the Restatement and not existing precedent. The Restatement is not the law of South Carolina, and no appellate court has yet adopted the concept of replacement mortgages. Therefore, DLJ cannot use this principal to claim priority over an earlier mortgage lien.

2. First Mortgage Language Would Not Allow Secured Balance to Increase in a Subsequent Replacement Mortgage

Even if South Carolina courts recognize Replacement Mortgage, which this Court rejects, then the aforementioned language in the First Mortgage would not allow DLJ to increase the balance secured by its First Mortgage in a subsequent replacement mortgage.

3. Material Prejudice

Even if South Carolina courts recognize Replacement Mortgage, which this Court rejects, then AFCU would be materially prejudiced by the Second Note and Second Mortgage because the Second Mortgage purports to secure sums higher than the debt secured by the First Mortgage. I have considered whether South Carolina courts would interpret the Replacement Mortgage doctrine to allow the Second Mortgage to hold priority over the Line of Credit Mortgage, but only to the extent of the debt secured by the First Mortgage. I believe and hold that South Carolina courts would reject this interpretation and, rather, would hold that any material prejudice is fatal to Replacement Mortgage.

Because DLJ advanced significant, additional money to the borrowers in its Second Note secured by the Second Mortgage in excess of the debt secured by the First Mortgage, AFCU was

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substantially and materially prejudiced. (Affidavit of James R. Price, Exhibit A). An increase in the principal amount secured by a replacement mortgage is generally deemed to be materially prejudicial to an intervening lienholder such as AFCU. Restatement (Third) of Property; Mortgages § 7.3(a)(2), comment b. When the "replacement" mortgage has materially prejudiced an intervening lienholder, the "replacement" mortgage is not entitled to the priority of the mortgage it is hoping to replace. Restatement (Third) of Property; Mortgages § 7.3.

Based upon the record herein I conclude as follows:

Plaintiff should have judgment of foreclosure of the Line of Credit Mortgage, and the Subject Property should be ordered sold at public auction after due advertisement.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. There is due to the Plaintiff on the obligation and the Line of Credit Mortgage set forth in the Complaint the sum of \$187,201.60 representing the total debt due Plaintiff as set out in Findings of Fact above, together with interest at the rate provided therein on the balance of principal from the date aforesaid to the date hereof.

2. The amount due in the preceding paragraph (the "total debt") and later accrued interest on the principal shall constitute the total judgment debt due the Plaintiff and shall bear interest hereafter at the rate of 6.00% per annum.

3. Any Defendants liable for the aforesaid Line of Credit Mortgage debt shall on or before the date of sale of the property hereinafter described, pay to the Plaintiff, or Plaintiff's attorney the amount of Plaintiff's debt as aforesaid, together with the costs and disbursements of this action.

4. On default of payment at or before the time herein indicated, the Subject Property shall be sold by the undersigned Special Referee at public auction, at the location, and upon the date and time set forth in the Notice of Sale, and should the regular day of judicial sales fall on a legal holiday, then and in such event, the sales day shall be on Tuesday next succeeding such holiday, on the following terms, that is to say:



(a) FOR CASH: The undersigned Special Referee will require a deposit of five (5%) percent on the amount of the bid in cash or equivalent (unless Plaintiff is the successful bidder) the same to be applied to the purchase price upon compliance with the bid. In case of non-compliance within the time specified in the Notice of Sale, the deposit will be forfeited and applied to the costs and Plaintiff's debt.

(b) Interest on the balance of the bid shall be paid to the day of compliance at the rate of 6.00% per annum.

(c) The sale shall be subject to property taxes and assessments, existing easements and restrictions and easements and restrictions of record and any other senior encumbrances.

(d) Purchaser shall pay for deed preparation and costs of recording the deed and deed stamps.

5. If the Plaintiff's representative does not appear at the sale, the property will be withdrawn by the selling officer and the property will be sold on the next available sales date, after due advertisement.

6. If Plaintiff is the successful bidder at the sale for a sum not exceeding the amount of costs, expenses and the indebtedness of Plaintiff, Plaintiff may pay to the Special Referee only the amount of the costs and expenses, crediting the balance of the bid on Plaintiff's indebtedness.

7. Personal or deficiency judgment being waived, the bidding will not remain open after the date of sale, but compliance with the bid must be made immediately.

8. That the Special Referee will, by advertisement according to law, give notice of the time, and place of such sale, and the terms thereof; and will execute to the Purchaser, or Purchasers, a deed to the premises sold. The Plaintiff, or any other party to this action, may become a purchaser at such sale. If the Purchaser or Purchasers at the sale should fail to comply with the terms thereof, then the Special Referee may advertise the said premises for resale on the next, or some other subsequent sales day, at the risk of the highest bidder, and so from time to time thereafter until a full compliance shall be secured.

9. That the Special Referee will apply the proceeds of the sale as follows:

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FIRST: To the payment of the amount of the costs and expenses of this action, including any Guardian Ad Litem fee or fees of attorneys appointed under Order of Court;

NEXT: To the payment to the Plaintiff or Plaintiff's attorney, of the amount of the Plaintiff's debt and interest or so much thereof as the purchase money will pay on the same.

NEXT: Any surplus will be held pending further Order of this Court.

10. It is further ORDERED, ADJUDGED AND DECREED that in the event the successful bidder is other than the owner defendants in possession herein, the Sheriff of Fairfield County, upon receipt of a Writ of Assistance or other order of ejectment, is ordered and directed to eject and remove from the premises the occupant(s) of the property sold, together with all personal property located thereon, and put the successful bidder or his assigns in full, quiet and peaceable possession of said premises without delay, subject however to all existing leases, and to keep the successful bidder or his assigns in such peaceable possession.

11. It is further ORDERED, ADJUDGED AND DECREED that each Defendant named herein and all persons whosoever claiming under any one of them be forever barred and foreclosed of all right, title, interest, and equity of redemption in the said mortgaged premises so sold, or any part thereof.

12. IT IS FURTHER ORDERED that the deed of conveyance made pursuant to said sale shall contain the names of only the first-named Plaintiff and the owner Defendants, and the Defendant who was the titleholder of the Subject Property at the time of the filing of the notice of pendency of the within action, and the name of the grantee; and the Clerk of Court for Fairfield County is authorized to omit from the indices pertaining to such conveyance the name of all parties not contained in said deed.

13. The undersigned Special Referee will retain jurisdiction to do all necessary acts incident to this foreclosure including, but not limited to, the issuance of a Writ of Assistance.

14. The following is a description of the property herein ordered to be sold:

All that certain lot of land with any improvements thereon containing 0.50 acres, more or less situate at 247 Morninglow Drive, Winnsboro, Fairfield County, South Carolina and is shown and

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designated as Lot No. 137, Section 22 on that certain plat of survey for Patrick Eugene Rachels dated February 12, 1996, and recorded February 28, 1996, in Plat Slide 544 at page 1233 and has such courses and distances, metes and bounds as shown on said plat which said plat is incorporated herein by reference.

This is the same property conveyed by Patrick Eugene Rachels to Jimmy Eugene Bailey and Laura Jean Bailey by deed dated September 1, 2000, and recorded September 7, 2000, in Deed Book QM at page 349. Reference is also made to that certain deed from Jimmy Eugene Bailey and Laura Jean Bailey to Jimmy Eugene Bailey and Laura Jean Bailey as joint tenants with right of survivorship and not as tenants-in-common dated October 27, 2009, and recorded on November 4, 2009, in Deed Book 973 at page 9.

TMS #095-02-02-022-000

CURRENT ADDRESS OF PROPERTY: 247 Morninglow Drive, Winnsboro, South Carolina
29180

15. IT IS FURTHER ORDERED that if the Plaintiff or the Plaintiff's representative does not appear at the scheduled sale of the above-described property, then the sale of the property will be null, void and of no force and effect. In such event, the sale will be rescheduled for the next available sales day.

16. "U.S. Bank National Association not in its individual capacity but solely in its capacity as Indenture Trustee for WVUE 2015-1" is substituted as defendant in place of DLJ Mortgage Capital, Inc.;

17. The caption of this action is hereby amended to reflect that U.S. Bank National Association not in its individual capacity but solely in its capacity as Indenture Trustee for WVUE 2015-1 is a defendant as follows: *ArrowPointe Federal Credit Union v. Jimmy Eugene Bailey, Laura Jean Bailey, and U.S. Bank National Association not in its individual capacity but solely in its capacity as Indenture Trustee for WVUE 2015-1*, and to remove DLJ Mortgage Capital, Inc., as one of the defendants;

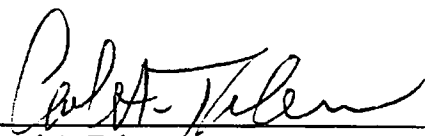
18. The Clerk of Court is instructed to make the amendments to the caption;

19. Counsel of record for U.S. Bank National Association not in its individual capacity but solely in its capacity as Indenture Trustee for WVUE 2015-1 shall be Drew B. Walker, Esquire, and the law firm of Rogers Lewis Jackson Mann & Quinn, LLC, and Sean M. Foerster, Esquire, and

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the law firm of Rogers Townsend & Thomas, PC. The Clerk of Court and any other person who may be sending notices in connection with this case are hereby instructed to serve upon the these attorneys all notices, motions, pleadings, and other documents to which Defendant U.S. Bank National Association not in its individual capacity but solely in its capacity as Indenture Trustee for WVUE 2015-1 might be entitled.

IT IS SO ORDERED.



Carol A. Tolen
Fairfield County Special Referee

1-18-18, 2017
Winnsboro, South Carolina

