THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master in Equity for Spartanburg County

Case No. 2019-CP-42-01210

Appellate Case No. 2019-002071

Joe Hand Promotions, Inc., Appellant,

v.

Christopher Michael Ruegsegger a/k/a Chris Ruegsegger, Founders Federal Credit Union and Springleaf Financial Services, Defendants,

Of which Founders Federal Credit Union is the Respondent.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

This is a judgment foreclosure action. Appellant, Joe Hand Promotions, Inc. (hereinafter referred to "**Joe Hand**") instituted suit to foreclose its judgment in Spartanburg County against certain real property known as 721 Jordan Creek Road, Inman, South Carolina.

Other than Joe Hand, the only participant in this case was Respondent, Founders Federal Credit Union (hereinafter referred to as "**Founders**"), which also held a judgment encumbering said real property.

There are actually three judgments affecting the title to said real property, to wit:

1. **Defendant, Springleaf Financial Services**, in default, holds a Judgment against Chris M. Ruegsegger, in the amount of $3,721.44, which Judgment was filed in the Office of the Clerk of Court for Spartanburg County on April 18, 2014, in Case No. 2014-CP-42-01592. By date of filing, this Judgment is in a first-lien position against the subject real property.

2. **Founders** holds a Judgment against Chris M. Ruegsegger, in the amount of $23,057.63 (less the proceeds from the sale of the Hyundai), which Judgment was filed in the Office of the Clerk of Court for Spartanburg County on June 4, 2014, in Case No. 2014-CP-42-0553. By date of filing, this Judgment is in a second-lien position against the subject real property.

3. **Joe Hand** holds a Judgment against Upstate Recreation d/b/a Leeg's Nightclub and Chris Ruegsegger, in the amount of $37,757.50, which was filed in the United States District Court for the District of South Carolina on February 18, 2015, in Case No. 6:13-cv-2467-TMC; and this Judgment was transcribed to Spartanburg County and filed in the Office of the Clerk for Spartanburg County on March 2, 2015, in Case No. 2015-CP-42-0942. [R.p. 58] By date of filing, this Judgment is in a third-lien position against the subject real property.

In March 2015, Joe Hand sent an Execution to the Sheriff for Spartanburg County, who promptly returned the Execution marked "nulla bona." [R.p. 59]

Neither of the other two judgment-creditors took any steps whatsoever to try to collect their judgments.

All three judgments were entered against Chris Ruegsegger (Christopher Michael Ruegsegger, Defendant). At the time of entry of each of these judgments, Mr. Ruegsegger owned an undivided one-half interest in the said real property. The other one-half interest was owned by his wife, Tiffany J. Ruegsegger, whose undivided interest was not encumbered by any of these

judgments.

When these judgments were entered, the said real property was encumbered by a large first mortgage. Especially when viewed from the standpoint that this real property was the residence of the judgment-debtor (calling into play the homestead exemption), considering the large mortgage loan debt and the fact that these judgments only encumbered a one-half interest, there was absolutely no equity in this real property to be pursued by the judgment-creditors.

The circumstances changed in, and after, 2016. First, the house at said address was extensively damaged by a fire. Next, the proceeds of the hazard insurance policy, which insured said house, paid in full the mortgage debt, resulting in the satisfaction of said mortgage. Next, the marriage of Christopher and Tiffany Ruegsegger dissolved; and in June 2017, Tiffany deeded her undivided one-half interest in the property to Christopher, who from that date to the present held sole ownership of the subject property.

In early-2018, Joe Hand began performing its due diligence in trying to collect its judgment, and it learned of these occurrences and decided to make the effort to press Mr. Ruegsegger to pay its judgment-debt. On March 27, 2018, Joe Hand filed its Petition for Supplementary Proceedings, seeking to examine Mr. Ruegsegger regarding his assets, specifically the said real property, and to have a receiver appointed.

There is no evidence whatsoever that the other two judgment creditors, at this point, had any knowledge about the circumstances: the fire, the payoff of the mortgage loan, the divorce and transfer of ownership or the supplementary proceedings filed by Joe Hand. Founders has not claimed it had such knowledge; Springleaf Financial Services is in default.

To counter Joe Hand's supplementary proceedings, Mr. Ruegsegger, on March 30, 2018, filed for bankruptcy protection. In these proceedings, Mr. Ruegsegger, in addition to discharging

these judgment debts against him personally, raised "homestead exemption" with regard to the subject real property, which exemption, if allowed, would have resulted in his avoiding these judgments as liens upon this real property as they impaired his homestead exemption.

Joe Hand filed an Objection to Discharge of Judgment Lien [R.p. 61], which it pursued to hearing. Not only did the other two judgment-creditors make no effort whatsoever to enforce their judgments, by execution, supplementary proceedings or other collection tactics, they also made no effort whatsoever to oppose the Debtor's claim to the homestead exemption.

To the contrary, when Joe Hand's counsel asked Founder's counsel to participate in the bankruptcy case on its own objection or in support of Joe Hand's Objection [R.p. 61], Founders' counsel declined, stating that Founders ". . . concluded it's not worth the time, money and effort to go fight the homestead. We were going to lose if he had taken the action, regardless." [R.p. 52]

On June 26, 2018, a lengthy hearing was held in the Bankruptcy Court on Joe Hand's Objection; and on July 18, 2018, an Order Sustaining Objection to Homestead Exemption was filed. [R.p. 62] Joe Hand had saved the judgments from avoidance. The real property still remains encumbered by the three judgments.

On March 29, 2019, following the dismissal of the bankruptcy case, Joe Hand filed this suit, naming the property owner and the other two judgment-creditors as Defendants. Joe Hand's Complaint [R.p. 32] sought to have its judgment-priority elevated to a first lien under the equitable principle of superior diligence and to have its judgment foreclosed, and the subject real property sold, to pay its judgment-debt.

Importantly, although it filed an Answer [R.p. 36] and participated in this case, Founders never intended to enforce its judgment against the subject real property. "We never sought relief to sell this property. We never requested any type of relief to sell the property. We never

intimidated that we had any desire to sell this property." [R.p. 97]

Another important circumstance was that, when Joe Hand examined the title in preparation for its foreclosure suit, it learned that the subject real property had been sold at the December 2018 tax sale and that the property must be redeemed from the tax sale by early-December 2019 or it would be lost for good.

From the outset, Joe Hand was prepared to redeem the property from the tax sale in order to protect and preserve its judgment lien. Neither of the other judgment-creditors were willing to go to this expense; and even after Founders became the successful party (under the appealed order), it refused to redeem the property from the tax sale in order to preserve the encumbered asset.

Since the tax sale would put the property beyond its reach, Joe Hand, in order to pursue this appeal, advanced the monies required to redeem the property from the tax sale. The amount advanced was $2,871.11. [R.p. 40]

Now, turning to the court proceedings, there were three (3) hearings and three (3) Orders, as follows:

A. Hearing on July 17, 2019; Order filed on July 24, 2019

Joe Hand's argument was that it is entitled to first-lien priority with regard to the subject real property under the equitable principle of superior diligence, because: (1) it, alone, instituted supplementary proceedings against the Defendant, Christopher Michael Ruegsegger a/k/a Chris Ruegsegger; and (2) when Mr. Ruegsegger responded to the supplementary proceedings by filing for bankruptcy protection and asserting that the judgments impaired his homestead exemption, it, alone, objected to the exemption, and it was successful in obtaining a Bankruptcy Court Order denying Mr. Ruegsegger's claim of impairment of his homestead exemption.

Founders' argument was limited to the law. Founder's counsel indicated that he agreed

with the facts as stated at the hearing by Joe Hand's counsel. [R.pp. 48-49]

Joe Hand established its debt [R.p. 69], and the Master in Equity issued a Master's Order and Judgment of Foreclosure and Sale ("First Order") [R.p. 2], which adopted Joe Hand's argument (above); and he made the following relevant findings:

> 1. The Plaintiff has presented a compelling case that it made all the effort, and sustained all the risk and expense, of bringing the subject real property before the Court, and it appears that the other judgment-creditors took no action whatsoever to preserve this asset. [R.p. 5]
>
> 2. I find that it would be unjust that the one judgment-creditor, who sustained all the risk and expense of preserving and bringing the subject real property to this court, should have to take a junior-priority position to other judgment-creditors, who have done nothing to collect their debt against this property. [R.p. 5]
>
> 3. I further find that, under the equitable principle of superior diligence, which was announced in Ex parte Roddey, 171 S.C. 489 (1934), and which was recognized in FCX, Inc. v. Long Meadow Farms, Inc., 269 S.C. 202 (1977), the Plaintiff is entitled to a preference as a reward for its vigilance. [R.pp. 5-6]
>
> 4. I therefore find that, with regard to the subject real property, the Plaintiff's Judgment is entitled to a first-priority lien upon the subject real property, with the lien of the Judgment of the Defendant, Founders Federal Credit Union, to be in second position, ahead of the lien of the Judgment of the Defendant, Springleaf Financial Services, in default. [R.p. 6]

The Master in Equity also made the following relevant conclusion:

> 1. The Plaintiff is entitled to an elevated-priority as a reward for its superior diligence, and its Judgment shall have first-lien priority with regard to the subject real property. [R.p. 6]

The First Order directed Joe Hand to redeem the property from the 2018 Tax Sale prior to the foreclosure sale [R.p. 7]. It also anticipated that Founders might bid at the sale to protect its interest in the property. [R.p. 8] (By this time, Founders had not yet made it known that it would not participate at the foreclosure sale.)

B. Hearing on August 27, 2019; Order filed on September 24, 2019

On August 2, 2019, Founders filed the Founders Federal Credit Union's Motion to Reconsider, Alter or Amend the Court's Order and Judgment of Foreclosure and Sale. [R.p. 21]

There being no issue regarding the facts, Founders' argument was that, under the law, it would be error to reprioritize judgment liens "because those judgment liens were statutorily fixed as of the date of recording and attached to the Subject Property as of each respective date." [R.p. 13]

In this Order ("Second Order"), the Master in Equity reversed himself and determined that judgments constitute liens upon real estate in the order of their filing. He also declared that "the Subject Property is not an undiscovered asset . . . and thus the equitable doctrine of superior diligence cannot be used by Joe Hand to elevate its third-in-line judgment lien to first priority." [R.p. 14]

The Second Order was based, almost exclusively, on the case of *FCX, Inc. v. Long Meadow Farms, Inc.*, 269 S.C. 202, 237 S.E.2d 50 (1977), from which the Master in Equity quoted at length. Springleaf Financial Services, which never appeared in this case and which never did the first thing to protect or enforce its judgment from day-one, was granted first-lien position, followed by Founders' judgment and then Joe Hand's judgment.

C. Hearing on November 12, 2019; Order filed on November 22, 2019

On October 3, 2019, Joe Hand filed the Plaintiff's Motion to Reconsider, Alter or Amend the Court's Order Granting Founders Federal Credit Union's Motion to Reconsider. [R.p. 27]

This Motion enumerated many specific exceptions, several of which were not addressed by the Master in Equity's final (appealed) Order, as follows:

3. The Master erred in concluding that judgment liens on real property are

entitled to fixed (i.e. absolute; inalterable) priority based upon the filing date, when numerous cases have held to the contrary that, under common law and in equity, [1] the date of filing of a judgment can be ignored and that a judgment can be assigned a lower-priority, two examples of which are: a judgment filed before as purchase money mortgage can be subordinated to the mortgage, and a judgment, the debt upon which it was entered being antecedent to the creation of a mortgage obligation, can be subordinated to the mortgage. In other words, in equity, the court can ignore the filing dates of judgments and rearrange the priorities. [R.pp. 27-28]

4. The Master erred in concluding (at least by implication) that *FCX, Inc. v. Long Meadow Farms, Inc.*[2] denies the applicability of the superior diligence doctrine to judgment liens on real property, when that case had no involvement whatsoever with real property owned by the judgment-debtor, but involved a judgment-debtor, who was a purchaser under a contract of sale (i.e. installment land contract) and held only an equitable interest in real property. [R.p. 28]

5. The Master erred in relying upon dictum in *FCX, Inc. v. Long Meadow Farms, Inc.,* which commented, without any cite of authority, that there would be no question of priority as "the judgments would constitute a lien upon the real estate in the order of their filing," which comment was manifestly a mere dictum, as no such question was presented in that case. [R.p. 28]

6. The Master erred in failing to conclude that *Crown Central Petroleum v. Elmwood Properties*[3] and *In re Knight,*[4] cases actually involving judgment liens on real estate, were applicable as precedents in this case, particularly since the Court in these cases did not conclude that the superior diligence doctrine was inapplicable or that judgment lien priority was inalterable simply because the judgment liens were on real property. [R.p. 28]

7. The Master erred in ordering, without a related finding or any citation of authority, that, as "the Subject Property is not an 'undiscovered asset' . . . and thus the equitable doctrine of superior diligence cannot be used." [R.p. 29]

8. The Master erred in failing to rely upon *Freedman's Saving & Trust Co. v. Earle,*[5] the United States Supreme Court case cited with approval by *Ex*

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[1] An action to establish lien priorities is an action in equity.
[2] 269 S.C. 202, 237 S.E.2d 50 (1977)
[3] 244 S.C. 588, 138 S.E.2d 38 (1964)
[4] 2017 Bankr. LEXIS 3845, 16-00584 (S.C. 2017)
[5] 110 U.S. 710, 4 S.Ct. 226, 28 L.Ed. 301 (1884)

parte Roddey[6] and *Ryttenberg v. Keels*[7] ("so full and satisfactory that we need only to refer to that case as containing the argument and authorities upon which we rely;" and "where the whole subject is elaborately considered"). That case made no mention of a requirement that an asset be "discovered." Instead, *Freedman's Saving*, a case involving an equitable interest (not real property), speaks of remedies by way of execution upon legal estates being "imitated by a corresponding analogy as to equitable estates" . . . "judgment creditor being bound to subject an equitable estate "to an execution, as if it were legal" . . . "the distinction between legal and equitable assets has ceased to be important" (clearly intertwining legal and equitable estates/assets). That case is clearly the seminal case for the grant of "a preference as the reward of his vigilance" **when a judgment-creditor's "legal diligence has pursued the property into this court,"** and "it would 'seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination, should in the end be obliged to divide the avails thereof with those who have slept upon their rights.' " (emphasis added) [R.p. 29]

9. The Master erred in reversing himself on Plaintiff's entitlement to a preference under the equitable doctrine of superior diligence, after specifically making the following findings: (a) Plaintiff brought the property before the Court; (b) the other judgment-creditors took no action whatsoever to preserve this asset; and (c) it would be unjust for Plaintiff to take a junior-priority position to other judgment-creditors, who have done nothing to collect their debt against this property. [R.pp. 29-30] . . .

12. The Master erred in failing to consider that, through Plaintiff's efforts alone, the Court is able to "reach property not accessible to execution" (also quoted from *Freedman's Saving*), which is absolutely this case, as but for Plaintiff's actions, all of the judgment liens would have been discharged in bankruptcy. Under these circumstances, as provided in *Freedman's Saving*, "a legal preference is acquired." [R.p. 30]

13. The Master erred in concluding that the Subject Property is subject to judgment liens with priority based solely upon the respective filing dates of the judgments when, even if that theory were applicable, an undivided one-half interest in the Subject Property would have become subject to <u>all</u> already-filed judgment liens <u>simultaneously</u> when the deed from Tiffany J. Ruegsegger conveying her undivided one-half interest to Christopher Michael Ruegsegger was subsequently recorded (June 8, 2017). [R.p. 30]

14. Defendant Founders Federal Credit Union failed to disclose to the Court that it has <u>no intention</u> of protecting its judgment by taking the steps

[6] 171 S.C. 489, 172 S.E. 866 (1934)
[7] 39 S.C. 203, 17 S.E. 441 (1893)

> necessary to pursue its interests through the foreclosure sale of the Subject Property, which will require that it, first, redeem the property from the 2018 tax sale. All three of the judgments will be rendered worthless, if the Subject Property is not redeemed timely from the tax sale. This lack of full disclosure reflects a disingenuous position by this Defendant, which is contrary to a typical secured-creditor's debt collection strategy; and its silence in this regard should be troubling to the Court, which is trying to make decisions, which, in equity, are appropriate to the collection of the litigants' respective judgments out of the proceeds of the sale of the Subject Property. [R.pp. 30-31]

This Order ("Third Order") confirmed the Second Order without much relevant alteration. As before, the primary authority cited is *FCX, Inc. v. Long Meadow Farms, Inc.* Interestingly, the Master in Equity now orders that, "the actions and efforts of Joe Hand fail to warrant application of the "Superior Diligence Doctrine" or the "Creditor Diligence Doctrine." [R.pp. 17-18] In his First Order, following the only hearing where the facts were discussed at length, the Master in Equity stated that "Plaintiff has presented a compelling case that it made all the effort, and sustained all the risk and expense, of bringing the subject real property before the Court, and it appears that the other judgment–creditors took no action whatsoever to preserve this asset . . . [and] that, under the "equitable principle of superior diligence," which was announced in Ex parte Roddey, 171 S.C. 489 (1934), and which was recognized in FCX, Inc. v. Long Meadow Farms, Inc., 269 S.C. 202 (1977), the Plaintiff is entitled to a preference as a reward for its vigilance." [R.pp. 4-5] This stark change in the construction of the matters of fact is most interesting as no new facts were presented by the parties after the initial hearing and no new finding of facts (not presented in the First Order) were made in the Third Order (or the Second Order).

STANDARD OF REVIEW

"An action to establish lien priorities is an action in equity . . . [and] the appellate court's standard of review in equitable matters is [its] own view of the preponderance of the evidence." *Suntrust Bank S/B/M Nat'l Bank of Commerce v. Bryant*, 392 S.C. 264, 267, 708 S.E.2d 821, 822-23 (Ct. App. 2011) (internal citations omitted).

Nevertheless, "the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009). "The burden is on the party appealing from the order to demonstrate the trial court abused its discretion." *Halverson v. Yawn*, 328 S.C. 618, 621, 493 S.E.2d 883, 884 (Ct. App. 1997).

ARGUMENTS

I. THE "SUPERIOR DILIGENCE DOCTRINE" IS APPLICABLE TO JUDGMENT LIENS ON REAL PROPERTY AS WELL AS CLAIMS UPON PERSONAL PROPERTY, AND THE PRIORITY OF A JUDGMENT LIEN IS SUBJECT TO BEING CHANGED BY THE APPLICATION OF EQUITABLE PRINCIPLES.

A. Roddey

As stated by Founders' counsel at the second hearing, the South Carolina case of *Ex parte Roddey* is the point of focus. She summarized that case as follows:

> So the Supreme Court of South Carolina in 1934 in **the Ex Parte Roddey case establishes the doctrine of superior diligence** and essentially what the Court says - - and I'd just like to read it into the record. Judgment creditor who obtains judgment and executed in seeking to subject debtor's property in hands of third party or to **reach property not accessible to execution** has legal preference enforceable in a court of chancery. [R.p. 72] (emphasis added)

Ex parte Roddey, 171 S.C. 489, 495, 172 S.E. 866, 868 (1934), is important for the

following propositions:

> It is patent that supplementary proceedings are equitable in their nature and designated to aid the enforcement of rights which cannot be enforced by the legal process of execution. That being so, it must follow that **[the court has] authority to direct the payment of the proceeds of the sale of the debtor's property to the judgment creditor whose diligence had discovered the property of the judgment debtor and brought it into Court.** (emphasis added)
>
> We incline to think that **the judgments and executions may properly be regarded as separate**, and the proceeds should go to those whose vigilance made the discovery and whose activity instituted the proceedings." (emphasis added)

Ryttenberg v. Keels, 39 S.C. 203, 214, 17 S.E. 441, 445 (1893), cited in *Roddey*, held that, "as the plaintiffs are the only creditors who have taken the proper steps to subject such property, or rather the proceeds of its sale, to the payment of debts, they were entitled to a judgment that the same be paid to them."

The seminal case on "superior legal diligence" is *Freedman's Sav. & Trust Co. v. Earle*, 110 U.S. 710, 4 S.Ct. 226, 28 L.Ed. 301 (1884). That case is referred to in *Roddey* and *Ryttenberg* with glowing admiration (quoted from both: "[T]he opinion of Mr. Justice Matthews in the case of *Freedman's Saving & Trust Co. v. Earle, supra*, is so full and satisfactory that we need only to refer to that case as containing the argument and authorities upon which we rely.").

While *Freedman's* involved an equitable estate (personal property), the court analyzed the facts as though a legal estate (real property) were involved, applying the doctrine equally to legal estates and equitable estates:

> [I]f the estate is equitable merely, and therefore not subject to be levied on by an execution at law, the judgment creditor is bound nevertheless to put himself in the same position as if the estate were legal, because the action of the court converts the estate, so as to make it subject to an execution, as if it were legal. The ground of the jurisdiction therefore is, not that of a lien or charge arising by virtue of the judgment itself, but of an equity to enforce satisfaction of the judgment by means of an equitable execution. (pp. 715-16)
>
> [I]n this country generally, where the real estate of a decedent is chargeable with

> the payment of debts, and, in case of a deficiency of personal property for that purpose, may be subjected to sale and distribution as assets, by the personal representative, in the ordinary course of administration, **the distinction between legal and equitable assets has ceased to be important.** (emphasis added) (p. 719)

B. FCX, Inc.

FCX, Inc. v. Long Meadow Farms, Inc., 269 S.C. 202, 237 S.E.2d 50 (1977), is the primary (if not sole) authority relied upon by the Master in Equity – in each of the three of the hearings/Orders, to wit:

a. First Hearing: "Then I will rely on the FCX versus Long Meadow Firms and based on the due diligence or superior diligence, apply that Principal." [R.p. 55]

b. First Order: "I further find that, under the equitable principle of superior diligence, which was announced in Ex parte Roddey, 171 S.C. 489 (1934), and which was recognized in FCX, Inc. v. Long Meadow Farms, Inc., 269 S.C. 202 (1977), the Plaintiff is entitled to a preference as a reward for its vigilance. " [R.pp. 5-6][8]

c. Second Order: "Based on the well-established case law, the Court erred in reprioritizing the judgment liens because those judgment liens were statutorily fixed as of the date of recording and attached to the Subject Property as of each respective date. *See FCX, Inc. v. Long Meadow Farms, Inc.*, 269 S.C. 202, 237 S.E.2d 50 (1977)." [R.p. 13]

d. Third Order: The Master in Equity quoted the identical portions of *FCX, Inc.* as quoted in the Second Order, while citing no other case law, and finding that, in *FCX, Inc.*, "the Supreme Court of South Carolina limited the application of superior diligence." [R.p. 17]

Interestingly, Founder's counsel described *FCX, Inc.* as "the only case that's on point" [R.p. 99], even though this case did not involve judgments on real estate, and there have been two South Carolina cases involving the superior diligence doctrine and real property, one after *FCX, Inc.* and one before, as follows.

[8] Later (November 12, 2019), the Master in Equity erroneously stated: "I did not find that the facts in this case supported an implementation of the superior diligence doctrine to have the Joe Hand Promotions, Inc. judgment jump over in priority and that was the reason that I did not find that the superior diligence doctrine, as Mr. Jordan had pled, applied." [R.p. 103]

Joe Hand cited *In re Knight*, 2017 Bankr. LEXIS 3845, 16-00584 (2017), a decision by the United States Bankruptcy Court for the District of South Carolina. In *Knight*, the Court concluded that the Bankruptcy Trustee was not entitled to be preferred over a judgment creditor under the "Diligent Creditor Doctrine" because the judgment-creditor did not sleep on its rights ("nothing further was required of Apex"), but it cited *Ex parte Roddey* with approval in explaining the said Doctrine:

> [T]he creditor whose legal diligence has **pursued the property into this court**, is **entitled to a preference as the reward of his vigilance**; and it would seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination should in the end be obliged to divide the avails thereof with those who have slept upon their rights. (p. 10) (emphasis added)

Joe Hand also cited *Crown Cent. Petroleum Corp. v. Elmwood Properties.*, 244 S.C. 588, 138 S.E.2d 38 (Ct. App. 1964), which affirmed the lower court decision rewarding plaintiff's diligence, cited *Roddey* favorably when describing the lower court holdings, as follows:

> Had it not been for activities of Crown and its diligence in pursuing the matter, successfully setting the deed from Mutual to United aside, and **bringing into the court the property in question**, despite the effort of Cooper in opposition, there would be no assets in the hands of Mutual with which to pay any of its creditors. Under these circumstances, it is well settled, we think, that all claims of Crown are entitled to priority over the claims of Elmwood. *Ex Parte Roddey*, 171 S.C. 489, 172 S.E. 866, 92 A.L.R. 1430; *Gardner v. Coker*, 184 S.C. 190, 192 S.E. 151. (p. 596) (emphasis added)

Importantly, neither *Knight* nor *Crown Central* deny the application of *Roddey* to real property. These cases, both of which involved real property, had the opportunity to limit the *Roddey* Doctrine to personal property, which Founders asserts is the take-away from *FCX, Inc.*, but neither did so. To the contrary, *Crown Central* affirmed the lower court's decision awarding elevated-priority to the plaintiff with regard to real property.

FCX, Inc. did not limit the application of superior diligence. The following quotation from *FCX, Inc.*, which was included in the Third Order, was mere dictum, as that case had nothing

whatsoever to do with real estate:

> If the [judgment debtor] had held legal title to the real estate, then, under established law, the judgments would constitute a lien upon the real estate in the order of their filing and there would be no question of priority. [R. p. 17]

Had *FCX, Inc.* intended to limit the application of the superior diligence doctrine to, for example, clarify that it was not applicable to real property, it could have expressed that position in the decision.[9] It did not do so, and there is no indication whatsoever that the decision intended to limit the *Roddey* principle.

C. "Discover"

In the Second Order, the Master in Equity ordered that "the Subject Property is not an 'undiscovered asset' . . . and thus the equitable doctrine of superior diligence cannot be used by Joe Hand to elevate its third-in-line judgment lien to first priority." [R.p. 14] Where does "undiscovered asset" come from? That is not a term used in any of the South Carolina cases involving the subject equitable principle.

FCX, Inc. is the first and only South Carolina state court case to use the words "unknown asset" in connection with this Doctrine. That case, although acknowledging the precedent established in *Roddey,* injected a new meaning of the word "discover" (or "discovery," "discovered" or "discovering"), altering (probably negligently) the meaning of the *Roddey* principle.[10]

The word "discover" has numerous meanings and is certainly not limited to uncovering

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[9] That is not to say that that opinion would have a precedential value, as it would still have been mere dictum.

[10] *In re Inter-Pac, Inc.*, 36 B.R. 488 (S.C. 1982), similarly attempts to change the meaning of the *Roddey* principle by stating that, "a judgment creditor has been granted a preference over other judgment creditors where he initiates supplementary proceedings that uncover additional assets," citing *Ex parte Roddey* and *FCX, Inc.* (at p.490).

something which was unknown to all. According to *Roddey*, "discovery" does not mean (only) to uncover an unknown asset. In this context, "discovery" means: to reach an asset which could not be reached by execution.

According to 23 C.J. 862, as quoted in *Roddey*,

> The purpose of supplementary proceedings, as authorized by statute in many states, *is to provide a substitute for a creditors suit* whereby a judgment creditor may **obtain a discovery of property of a judgment debtor which cannot be reached by execution**. Such proceedings are not a substitute for an execution but are merely intended to supplement it by **reaching assets which cannot be reached thereby**. (p. 494) (emphasis added)

Importantly, *Freedman's* does not mention, even once, the word "discover." *Freedman's* quotes from *Edmeston v. Lyde*, 1 Paige Ch. 637-640, as follows:

> The creditor . . . **whose legal diligence has pursued the property in this court** is entitled to a preference as the reward of his vigilance; and it would seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination, should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have **intentionally kept back**[11] that they might profit by his exertions when there could no longer be any risk in becoming parties to the suit. (p. 716) (emphasis added)

The relevant statute (S.C. Code Ann. §15-39-310 – see below) does not mention the word "discovery" (other than in its title). It speaks of "an order . . . requiring such judgment debtor to appear and answer concerning his property." It also speaks about property of the judgment-debtor "which he unjustly refuses to apply towards the satisfaction of the judgment." He may be ordered "to appear . . . to answer concerning the same."

> **§15-39-310. Order for discovery of property.**
> When an execution against property of the judgment debtor or any of the several debtors in the same judgment issued to the sheriff of the county in which he resides or has a place of business or, if he does not reside in the State, to the sheriff of the county in which a judgment roll is filed is returned unsatisfied in whole or in part the judgment creditor at any time after such return is made is entitled to an order from a judge of the circuit court **requiring such judgment debtor to appear and**

[11] See Argument V, supra.

> **answer concerning his property** before such judge at a time and place specified in the order within the county to which the execution was issued. After the issuing of an execution against property and upon proof by affidavit of a party or otherwise, to the satisfaction of the court or a judge thereof, that any judgment debtor has property which he **unjustly refuses to apply towards the satisfaction of the judgment** such court or judge may by an order require the judgment debtor **to appear** at a specified time and place **to answer concerning the same**. And such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are provided upon the return of an execution. (emphasis added)

Gardner v. Coker, 184 S.C. 190, 192, 192 S.E. 151 (1937), is a case involving an equitable claim for preference by a judgment creditor, who "discovered and brought into Court" certain property owned by a then-deceased debtor, who had established a parol trust donating this property to others. The court affirmed the lower court holding that the judgment creditor had a preferred claim upon the property ". . . paramount and superior to the alleged rights and claims of the . . . [trustee] and the other defendants designated as beneficiaries of the alleged trust."

The importance of *Gardner* is that the defendants (who asserted that the property had been donated to the trust) obviously knew about the property. The property was, therefore, not an unknown or undiscovered asset, which was uncovered through the plaintiff's due diligence.

Based upon the foregoing authorities, "discovery," in this context, means identifying an asset and bringing it into court or subjecting such asset to the payment of debts. Joe Hand did, in fact, "discover" the subject real property.

II. JUDGMENTS ON REAL PROPERTY ARE ROUTINELY RE-PRIORITIZED WHEN REQUIRED IN ORDER TO DO EQUITY.

Founders' counsel stated at the second hearing that, "if it is real estate, there is not really a question as to priority because that is set . . . . " [R.p. 74] and also stated at the third hearing the following:

> While FCX does not specifically deal with real estate, it could not be clearer that had it dealt with real estate, they would have never gotten to any further analysis because the Court clearly says if Long Meadow Farms had held legal title to real estate, then under established law the judgment would constitute a lien upon the real estate in the order of their filing and there would not be no question of priority. [R.p. 99]

Founders would have the court believe that, once a judgment is filed, the filing-date is the only consideration with regard to the relative priority of creditors holding liens upon real property. The case law in South Carolina demonstrates that other considerations can come into play, and the court has routinely re-prioritized judgments in order to do justice. Examples of such re-prioritizations follow.

In the previously-discussed case of *Crown Cent. Petroleum v. Elmwood Properties*, 244 S.C. 588, 138 S.E.2d 38 (1964), a case involving liens on real estate, the court affirmed the priority of the plaintiff's judgment (filed on February 5, 1960) over the claims/liens of the defendant, including a 1954 mortgage.

In *Suntrust Bank S/B/M Nat'l Bank of Commerce v. Bryant*, 392 S.C. 264, 267, 708 S.E.2d 821, 822-23 (Ct. App. 2011), the court held that the plaintiff's purchase-money mortgage (recorded on May 1, 2001) was entitled to priority over an earlier-filed judgment (filed on February 21, 2001).

In *Atlas Supply Co. v. Davis*, 273 S.C. 392, 256 S.E.2d 859 (1979), the court affirmed the priority of a non-purchase-money mortgage over a judgment filed two hours earlier than the mortgage.

In *Prudential Ins. Co. v. Wadford*, 232 S.C. 476, 102 S.E.2d 889 (1958), the court affirmed the priority of a non-purchase-money mortgage (recorded on June 21, 1954), ahead of an earlier-filed judgment (filed on May 24, 1954).

The point is that the priority of a judgment encumbering real property is <u>not inalterably set</u>

by its filing-date. If a judgment is, for some reason, not entitled to be ranked ahead of a later-filed lien, the court, in equity, can switch the priorities in furtherance of justice.

III. THE MASTER IN EQUITY CORRECTLY RULED (INITIALLY) THAT JOE HAND'S JUDGMENT WAS ENTITLED TO A PREFERENCE (ELEVATION TO FIRST-LIEN PRIORITY) AS A REWARD FOR ITS SUPERIOR DILIGENCE.

It is unquestioned by Founders that Joe Hand exercised significant diligence in identifying an asset of the judgment-debtor, which had enough value to warrant an action to collect a judgment-debt through the liquidation of said asset, and then in preserving such asset and bringing it into Court.

The following Chronology [R.p. 60] reflects the post-judgment actions undertaken by Joe Hand:

March 2, 2015 – Plaintiff's Judgment transcribed to Spartanburg County from U.S. Dist. Court

March 16, 2015 – Execution issued (requested by Plaintiff)

March 22, 2015 – Nulla Bona return filed

March 27, 2018 – Petition for Supplementary Proceedings filed by Plaintiff (2015-CP-42-00942)

March 30, 2018 – Bankruptcy filed by Christopher Michael Ruegsegger (18-01632-hb)

May 3, 2018 – Objection to Discharge of Judgment Lien filed by Plaintiff

May 22, 2018 – Proof of Claim filed by Plaintiff

June 26, 2018 – Hearing held on Objections of Plaintiff

July 18, 2018 – Order Sustaining Objection to Homestead Exemption filed

March 29, 2019 – Subject suit foreclosing judgment filed by Plaintiff

May 28, 2019 – Affidavits (default and non-military service) filed by Plaintiff

May 29, 2019 – Order of Reference filed

It is also unquestioned that the other two judgment creditors DID ABSOLUTELY NOTHING to protect and enforce their respective judgments. Founders, through its counsel,

admitted: "Now Founders has to concede it did not file an execution, a Writ of Execution. It did not receive a Nulla Bona return nor did it proceed with supplemental proceedings. Joe Hand . . . took the steps to go out and to do supplemental proceedings, and elevated their position based upon those actions, ..." [R.p. 72]

For the Master in Equity to change his initial ruling ("it would be unjust that the one judgment-creditor, who sustained all the risk and expense of preserving and bringing the subject real property to this court, should have to take a junior-priority position to other judgment-creditors, who have done nothing to collect their debt against this property" [R.p. 5]) and to rule that: "the efforts and actions of Joe Hand do not warrant implication of the doctrine of superior diligence" [R.p. 18], without explaining his complete about-face, is curious – to say the least. Since the Second and Third Orders are devoid of any factual findings, not found in the First Order, the reversal is completely unsupportable.

IV. ALREADY-FILED JUDGMENTS ATTACH TO REAL PROPERTY SUBSEQUENTLY ACQUIRED BY THE JUDGMENT DEBTOR AT THE TIME OF ACQUISITION; AND IN THE CASE OF MULTIPLE JUDGMENTS, THE ATTACHMENT IS SIMULTANEOUS.

In 2014 and 2015, when the three judgments were entered, the judgment-debtor owned only an undivided one-half interest in the subject real property. The three judgments initially attached to, and encumbered, this partial interest according to the order of their respective filing-dates. The judgments did not encumber the other undivided one-half interest (not owned by the judgment-debtor).

In 2017, Mr. Ruegsegger acquired the other undivided one-half interest in the real property, and the three judgments automatically attached to this other partial interest immediately upon the

recording of such ownership interest in favor of the judgment-debtor – but in what priority?

As judgments and other liens cannot attach to an interest in real property until such interest is acquired by the judgment-debtor, when there are multiple, competing liens, all of such liens become **simultaneous liens** with regard to such interest in the real property. See *Carlson, "Simultaneous Attachment of Liens on After-Acquired Property,"* Cardoza Law Review, vol. 6, p. 505. (emphasis added)

According to *Bank of Boston v. Haufler*, 20 Mass. App. Ct. 668, 674 (1985), "the rule generally accepted is that liens already in place attach to after-acquired property at the same time and that **none of the liens has priority over the others** (with respect to such property) on the basis of its earlier creation." That case cites several cases from New York, Iowa, North Dakota and South Dakota, which follow this rule, as well as 67 A.L.R. 1301 (1930); 49 C.J.S. Judgments 924 (1947) and 46 Am.Jur.2d Judgments 494 (1969). (emphasis added)

The result of this rule would be that the judgments would have a blended priority, with each (at least initially) sharing first-lien priority on the subsequently-acquired, undivided one-half interest.

This rule comes into play only if Joe Hand's argument (that the Superior Diligence Doctrine should be applied) is not sustained. Since the appealed Order does not sustain Joe Hand's claim under the said Doctrine, the Master in Equity erred in failing to apply this rule; and if not reversed, the appealed Order should be modified accordingly.

V. A COURT OF EQUITY SHOULD PROTECT A JUDGMENT-CREDITOR, WHICH HAS EXERCISED SUPERIOR DUE DILIGENCE TO PRESERVE AN ASSET, OVER ANOTHER JUDGMENT-CREDITOR, WHICH HAS DONE NOTHING TO TRY TO COLLECT ITS DEBT AGAINST SUCH ASSET, BUT INSTEAD, ANNOUNCED THAT ITS INTENTION WAS TO TAKE NO STEPS TO PROTECT ITS INTEREST WITH REGARD TO SUCH ASSET.

"Equitable maxims are not binding legal precedent but represent notions and concepts of equity in various situations . . . we view maxims only as offers of guidance in equitable cases." *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 249, 715 S.E.2d 348, 352 (Ct. App. 2011).

According to a common equitable maxim, "he who seeks equity must do equity." *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (1994). "Plaintiffs who come into Court invoking the aid of equity should be required to do equity in order that justice might be done between the parties." *Shumaker v. Shumaker*, 234 S.C. 421, 427, 108 S.E.2d 682, 686 (1959); *Anderson v. Purvis*, 211 S.C. 255, 266, 44 S.E.2d 611, 616 (1947).

Founders' efforts were focused, not on collecting (protecting and enforcing) its judgment but on hindering the efforts of Joe Hand to collect its judgment. By doing this (willingly denying itself the opportunity to enforce its judgment so long as another judgment creditor is denied the same opportunity), Founders is not doing equity. Equity should abhor this action, when the result could be to deny another the opportunity to protect its interests. This is especially so when the other judgment-creditor has vigilantly gone the extra-mile to preserve an encumbered asset, which would be lost to all interested parties but for its efforts.

"A court of equity abhors a forfeiture, and will not lend its aid to enforce them . . . Equity does not favor forfeiture or penalties, and will relieve against them when practicable in the interest of justice." *Regions Bank, supra*, at 256.

"Courts have the inherent power to do all things reasonably necessary to insure that just

results are reached to the fullest extent possible." *Id.*, at 252.

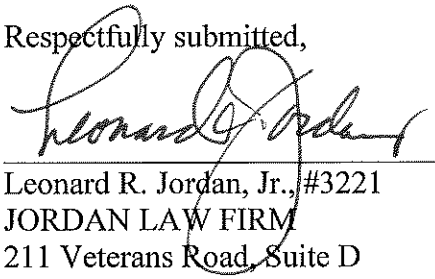
The purpose of the doctrine of superior diligence is to protect and reward a vigilant creditor. "**Equity aids the vigilant, not those who slumber on their rights.**" *Eldridge v. Eldridge*, 395 S.C. 113, 121, 728 S.E.2d 24, 28 (2012) (emphasis added). This would be especially so when another creditor intentionally decides to let the vigilant creditor take all of the risk and expend the effort while doing nothing to protect its own interests. As quoted hereinabove from *Freedman's*, it would be unjust for a vigilant creditor to "be obliged to divide the avails thereof with those who have slept on their rights, or who have **intentionally kept back** that they might profit by his exertions . . . ."

CONCLUSION

Joe Hand has factually and legally proven that it is entitled to a preference for its superior diligence by identifying, protecting, preserving and bringing into Court the subject real property. It alone has sustained all of the risk and expense of bringing this matter before the Court. It alone saved the judgments from being avoided in bankruptcy. It alone paid to redeem the property from a tax sale. All the while, Founders intentionally kept back, making no effort whatsoever to collect its judgment against the property and, instead, focusing its efforts on hindering Joe Hand from realizing the fruits of its effort and expense.

Based upon the foregoing, the Second and Third Orders, insofar as they deal with the priority of the respective judgments, should be reversed; and the Master's Order and Judgment of Foreclosure and Sale should be declared to be the final Order of the Court.

Respectfully submitted,



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