

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Gordon G. Cooper, Master-in-Equity

Case No. 2019-CP-42-01210
Ct. App. 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.

FINAL BRIEF OF RESPONDENT

Suzanne Taylor Graham Grigg
Nexsen Pruet, LLC
Post Office Drawer 2426
Columbia, SC 29202
(803) 540-2026

*Attorneys for Respondent
Founders Federal Credit Union*

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STATEMENT OF THE ISSUES ON APPEAL

- I. Whether the Master-in-Equity correctly ruled that Founders Federal Credit Union's judgment lien has priority over Joe Hand Promotions, Inc.'s judgment lien because S.C. Code Section 15-35-810 and well-settled case law require judgment liens be given priority based solely on the judgments' recording dates.

- II. Whether the Master-in-Equity correctly ruled that Joe Hand's pre-foreclosure actions were not sufficient to warrant application of the superior diligence doctrine to elevate its third-in-line judgment lien to first priority.

STATEMENT OF THE CASE

Respondent Founders Federal Credit Union (“Founders”) has reviewed the Statement of the Case set forth in Appellant’s Initial Brief. (Appellants’ Initial Br. at 2-10.). Founders contends the Appellant’s Statement of the Case does not comply with South Carolina Appellate Court Rule 208(b)(1)(C) because it contains arguments, contested matters and does not provide citations to specific documents listed in the Appellant’s Initial Designation of Matter. Founders’ Statement of the Case is as follows:

This appeal centers on the Master-in-Equity’s (the “Master”) ruling that Founders’ judgment lien has priority over Appellant Joe Hand Promotions, Inc.’s (“Joe Hand”) judgment lien on certain real estate owned by judgment debtor Christopher Michael Ruegsegger (“Mr. Ruegsegger”). (R. pp. 12-15 (Order Granting Motion to Reconsider, Alter or Amend filed September 24, 2019 (“September 2019 Order”)); R. pp. 16-20 (Order Granting in Part and Denying in Part Plaintiff’s Motion to Reconsider, Alter or Amend filed November 22, 2019 (“November 2019 Order”)).)

On March 29, 2019, Joe Hand filed its Complaint to foreclose its judgment lien against real estate owned by Mr. Ruegsegger located at 721 Jordan Creek Road, Inman, South Carolina. (R. pp. 32-35 (Complaint at ¶¶ 4-14).) Joe Hand named other judgment lienholders as Defendants in the action, and acknowledged those judgment liens were recorded before Joe Hand’s judgment lien. (R. p.33-34 (*Id.* at ¶¶ 5, 10-11).) Specifically, on April 18, 2014, Defendant Springleaf Financial Services

recorded its judgment against Mr. Ruegsegger in the original principal amount of \$3,721.44 with the Spartanburg County Clerk of Court. (R. p.34 (*Id.* at ¶ 11).) On June 4, 2014, Founders recorded its judgment against Mr. Ruegsegger in the original principal amount of \$23,057.63 with the Spartanburg County Clerk of Court. (R. pp. 36-38 (Founders' Answer ("Answer") at ¶ 6).)¹ On March 2, 2015, Joe Hand recorded its judgment against Mr. Ruegsegger in the original principal amount of \$37,757.50 with the Spartanburg County Clerk of Court. (R. p. 33 (Complaint at ¶ 5).)

In its Complaint, Joe Hand alleged it is entitled to first priority in payment of the sale proceeds realized from a foreclosure sale of the Subject Property under the equitable doctrine of superior diligence because "(1) it instituted supplementary proceedings against [Mr.] Ruegsegger, which resulted in his filing for bankruptcy protection; and (2) [Joe Hand], acting alone, objected to the discharge of the judgment liens against the [Subject Property] and was successful in obtaining a Bankruptcy Court Order excluding such real property from the discharge of liens, including the liens of the Plaintiff and the creditor-Defendants." (R. p. 34 (Complaint at ¶¶ 12-13).) On May 9, 2019, Founders filed its Answer, wherein it denied Joe Hand is entitled to elevate its lien priority from third-in-line to first-in-line. (R. p. 37 (Answer at ¶¶ 8-9).) Founders specifically stated that its judgment

¹ Joe Hand's Complaint erroneously alleges that Founders recorded its judgment against Mr. Ruegsegger on February 14, 2014. (R. pp. 33-34 (Complaint at ¶ 10).)

lien has priority over Joe Hand's because its judgment lien was filed first in time. (*Id.*)

On July 17, 2019, the Master conducted a bench trial in this judgment lien foreclosure hearing. (R. pp. 41-57 (Jul. 17, 2019 Hr'g Tr.).) On July 24, 2019, the Master signed and filed his Master's Order and Judgment of Foreclosure and Sale (the "July 2019 Order"). (R. pp. 2-11 (July 2019 Order).) In the July 2019 Order, the Master granted Joe Hand's request to foreclose its judicial lien, and he elevated Joe Hand's judgment lien priority to first position under the superior diligence doctrine. (R. pp. 5-6 (July 2019 Order at ¶¶ 14-18).) Specifically, relying on *Ex parte Roddey*, 171 S.C. 489, 172 S.E. 866 (1934) and *FCX, Inc. v. Long Meadow Farms, Inc.*, 269 S.C. 202, 237 S.E.2d 50 (1977), the Master concluded that Joe Hand was entitled to first priority because it instituted supplementary proceedings against Mr. Ruegsegger, and acted alone in obtaining an order from the Bankruptcy Court excluding the Subject Property from the discharge of liens. (R. pp. 5-6 (July 2019 Order at ¶¶ 14, 17).)

On August 2, 2019, Founders filed its Motion to Reconsider, Alter or Amend the Court's Order and Judgment of Foreclosure and Sale ("Founders' Rule 59 Motion"). (R. pp. 21-26 (Founders' Rule 59 Motion).) In this Motion, Founders argued (1) the case law addressing the superior diligence doctrine does not support a finding that Joe Hand's judgment lien should be elevated to first priority; (2) Joe Hand's pre-foreclosure actions do not trigger the superior diligence doctrine; and (3) Founders' judgment lien on the Subject Property is entitled to first priority

pursuant to S.C. Code Ann. § 15-35-810 because it is recorded prior to Joe Hand's judgment lien. (*Id.*)

On August 27, 2019, the Master conducted the hearing on Founders' Rule 59 Motion. (R. pp. 70-82 (Aug. 27, 2019 Hr'g Tr.)) After hearing oral arguments on the issues, the Master granted Founders' Rule 59 Motion and entered the September 2019 Order on September 24, 2019. (R. p. 12 (September 2019 Order at 1).) Specifically, the Master concluded "[b]ased 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." (R. p. 13 (September 2019 Order at 2).)

The Master quoted the South Carolina Supreme Court's opinion in *FCX v. Long Meadow Farms, Inc.* in reaching the conclusion that the superior diligence doctrine should be "sparingly applied" and cannot be used to elevate Joe Hand's lien priority for an asset that was known to the public upon a search of public records. (R. pp. 13-14 (September 2019 Order at 2-3).) In further following *FCX*, the Master ruled that Joe Hand was entitled to reimbursement of its attorney's fees and costs of \$2,500 as a priority expense to be paid from any foreclosure sale proceeds prior to payment to any of the judgment lienholders. (R. p. 14 (September 2019 Order at 3).) Lastly, the Master ruled that pursuant to *FCX* and S.C. Code Section 15-35-810, the lien priorities for the judgment liens are in the following order, based on the time the judgments were recorded: (1) Springleaf Financial Services; (2) Founders

Federal Credit Union; and (3) Joe Hand Promotions, Inc. (R. pp. 13-14 (September 2019 Order at 2-3).)

On October 3, 2019, Joe Hand filed its Motion to Reconsider, Alter or Amend the Court's Order Granting Founders Federal Credit Union's Motion to Reconsider ("Joe Hand's Rule 59 Motion"). (R. pp. 27-31 (Joe Hand's Rule 59 Motion).) In its Motion, Joe Hand argued fourteen exceptions to the September 2019 Order, primarily seeking the court award it first lien priority under the super diligence doctrine. (*Id.*)

On November 12, 2019, the Master conducted the hearing on Joe Hand's Rule 59 Motion. (R. pp. 83-106 (Nov. 12, 2019 Hr'g Tr.)) After hearing oral argument, the Master issued his November 2019 Order. The November 2019 Order does not grant Joe Hand's Rule 59 Motion in any material respects, but it did grant the requests of Joe Hand that the Master add the particular code section supporting his September 2019 Order (Section 15-35-810), and listed the specific types of litigation costs and amounts incurred by Joe Hand that would be given payment priority if a sale takes place. (R. pp. 17-19 (November 2019 Order at 2-4).) Notably, the Master also added conclusions that Joe Hand's pre-foreclosure efforts did not warrant implication of the superior diligence doctrine. (R. pp. 17-18 (*Id.* at 2-3).)

Joe Hand filed its Notice of Appeal on December 19, 2019.

STATEMENT OF FACTS

On April 18, 2014, Springleaf Financial Services recorded its judgment against Mr. Ruegsegger in the original principal amount of \$3,721.44 with the Spartanburg County Clerk of Court. (R. p. 34 (Complaint at ¶ 11); R. pp. 42-43 (July 17, 2019 Hr'g Tr. 2:24-3:2).) On June 4, 2014, Founders recorded its judgment against Mr. Ruegsegger in the original principal amount of \$23,057.63 with the Spartanburg County Clerk of Court. (R. p. 37 (Answer at ¶ 6); R. pp. 42-43 (July 17, 2019 Hr'g Tr. 2:24-3:2).) On March 2, 2015, Joe Hand recorded its judgment against Mr. Ruegsegger in the original principal amount of \$37,757.50 with the Spartanburg County Clerk of Court. (R. p. 33 (Complaint at ¶ 5); R. pp. 42-43 (July 17, 2019 Hr'g Tr. 2:24-3:2).)

Prior to June 2, 2017, Mr. Ruegsegger owned a one-half interest in the Subject Property with Tiffany J. Ruegsegger. (R. pp. 167-68 (Quit Claim Deed, recorded June 8, 2017); R. p. 43 (July 17, 2019 Hr'g Tr. 3:17-20).) On June 8, 2017, Mr. Ruegsegger recorded a Quit Claim Deed in the Office of the Spartanburg County Register of Deeds, wherein Tiffany J. Ruegsegger conveyed all of her right, title and interest in the Subject Property to Mr. Ruegsegger. (R. p. 167 (Quit Claim Deed at 1); R. p. 43 (July 17, 2019 Hr'g Tr. 3:20-23).) After seeking to execute on its judgment and receiving a *nulla bona* return, Joe Hand initiated supplementary proceedings on March 27, 2018 (R. p. 43 (July 17, 2019 Hr'g Tr. 3:3-8).)

On March 30, 2018, Mr. Ruegsegger filed his Chapter 7 bankruptcy petition in the Bankruptcy Court for the District of South Carolina. (R. p. 44 (July 17, 2019 Hr'g Tr. 4:2-5).) At some time prior to Mr. Ruegsegger's bankruptcy filing, the home on the Subject Property suffered severe fire damage, leaving the home uninhabitable. (R. p. 2 (July 17, 2019 Hr'g Tr. 2:21-22); R. p. 89 (Nov. 12, 2019 Hr'g Tr. 7:22-24).) Joe Hand believed the structure to have negative value during the foreclosure action in 2019. (R. p. 45 (July 17, 2019 Hr'g Tr. 5:18-20).) Mr. Ruegsegger or Tiffany Ruegsegger used the insurance proceeds from the fire damage to pay off the only mortgage on the Subject Property, leaving only the judgments as liens against the Subject Property. (R. p. 43 (*Id.* at 3:23-25); R. pp. 89-90 (Nov. 12, 2019 Hr'g Tr. 7:25-8:5).) In his bankruptcy Schedules and Statements, Mr. Ruegsegger claimed the homestead exemption in his subject property; however, he never filed a motion in his bankruptcy case seeking to avoid the judicial liens at issue in this appeal. (R. p. 44 (July 17, 2019 Hr'g Tr. 4:2-5).)

During Mr. Ruegsegger's bankruptcy case, Joe Hand objected to Mr. Ruegsegger's homestead exemption on the Subject Property, and obtained an order from the Bankruptcy Court sustaining its objection. (R. p. 44 (July 17, 2019 Hr'g Tr. 4:7-10).) Founders did not object to the homestead exemption because it believed the homestead exemption to be legally irrelevant based on its assertion that Mr. Ruegsegger could have used the "wild card" exemption to avoid judicial liens under S.C. Code Ann. § 15-41-30(a)(7) and 11 U.S.C. § 522(f) had he chosen to file a motion to avoid liens under 11 U.S.C. § 522(f). (R. pp. 51-52 (*Id.* at 11:19-12:23); R. p. 81 (Aug.

27, 2019 Hr'g Tr. 12:17-23).) Mr. Ruegsegger discharged his personal liability for his scheduled debts through the Chapter 7 bankruptcy discharge he received on August 2, 2018. (R. p. 44 (July 17, 2019 Hr'g Tr. 4:16).) Thereafter, on March 29, 2019, Joe Hand filed the instant foreclosure action. (R. pp. 32-35 (Complaint).)

SUMMARY OF ARGUMENT

The Master-in-Equity correctly ruled that Founders' judgment lien has priority over Joe Hand's judgment lien because: (1) S.C. Code Section 15-35-810 and well-settled case law require judgment liens be given priority based solely on the judgments' recording dates; and (2) Joe Hand's pre-foreclosure actions are not sufficient to warrant application of the superior diligence doctrine to elevate its third-in-line judgment lien to first priority.

ARGUMENTS

I. THE MASTER-IN-EQUITY CORRECTLY RULED THAT FOUNDERS FEDERAL CREDIT UNION'S JUDGMENT LIEN HAS PRIORITY OVER JOE HAND PROMOTIONS, INC.'S JUDGMENT LIEN BECAUSE S.C. CODE SECTION 15-35-810 AND WELL-SETTLED CASE LAW REQUIRE JUDGMENT LIENS BE GIVEN PRIORITY BASED SOLELY ON THE JUDGMENTS' RECORDING DATES.

Joe Hand argues that the Master erred in granting Founders' lien priority over Joe Hand's lien by holding that the well-established case law and statutory law provides that priority of judgment liens on real estate are statutorily fixed as of the date of recording and attach to the Subject Property as of each respective date. (Appellant's Initial Br. at 11-18). Analysis of the below statutory and case law relied on in the Master's November 2019 Order shows that the Master's ruling should be affirmed. (R. pp. 17-18 (November 2019 Order at 2-3).)

A. S.C. Code Section 15-35-810 clearly and unambiguously states that competing judgment liens are given priority based on the order in which each judgment is recorded.

Section 15-35-810 provides:

Final judgments and decrees entered in any court of record in this State . . . shall constitute a lien upon the real estate of the judgment debtor situate in any county in this State in which the judgment or transcript thereof is entered upon the book of abstracts of judgments and duly indexed, **the lien to begin from the time of such entry on the book of abstracts and indices and to continue for a period of ten years from the date of such final judgment or decree.**

S.C. Code Ann. § 15-35-810 (1976, as amended) (emphasis added). It would be erroneous to use equitable arguments or maxims to contradict a clear and

unambiguous statutory mandate. See *Key Corporate Capital, Inc. v. Cnty. of Beaufort*, 373 S.C. 55, 59, 644 S.E.2d 675, 677 (2007). The legislature clearly and unambiguously intended for a judgment “lien to begin from the time of such entry.” S.C. Code Ann. § 15-35-810 (1976, as amended). Moreover, the case law is clear that Section 15-35-810 prioritizes competing judgment liens as first-in-time, first-in-right. See *FCX, Inc. v. Long Meadow Farms, Inc.*, 269 S.C. 202, 206, 237 S.E.2d 50, 52 (1977) (“If Long Meadow Farms 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.”); see also *In re Fleishman-Wilson*, 72 B.R. 30, 30-31 (Bankr. D.S.C. 1987).

Accordingly, the Master correctly ruled that Section 15-35-810 is the sole determining factor in adjudicating the lien priorities between Springleaf Financial Services, Founders and Joe Hand. (R. p. 17 (November 2019 Order at 2).)

B. Well-settled case law clearly holds that the equitable doctrine of superior diligence should not be applied to contradict Section 15-35-810 or elevate Joe Hand’s third-in-line judgment lien to first priority.

The Master correctly held that *Ex parte Roddey* and *FCX v. Long Meadow Farms, Inc.* provide binding case law precedent against Joe Hand’s claim to contradict Section 15-35-810 and elevate its lien priority under the superior diligence doctrine. (R. p. 17 (November 2019 Order at 2).)

1. *Ex parte Roddey*.

Looking at these two Supreme Court opinions in chronological order, *Ex parte Roddey* is a 1934 opinion where the Court first recognized the superior

diligence doctrine in South Carolina. *Ex parte Roddey*, 171 S.C. 489, 172 S.E. 866, 868 (1934).² This case involved three judgment creditors who sought that the sale proceeds from certain securities owned by the debtor be paid among the three creditors *pro rata*. *Id.* at 866-67. The trial court ruled that the third-in-line judgment lienholder, Mr. Seabury, was entitled to first priority from the securities' sale proceeds because it was through Mr. Seabury's examination of the debtor in supplementary proceedings that the securities located in New York were discovered and levied upon. *Id.* at 867. The other two judgment creditors appealed. *Id.*

At the outset of its analysis, the Court noted that a judgment creditor may only attach its lien to a debtor's **personal property** through levy against that specific property. *Id.*; see also *State Farm Mut. Auto Ins. Co. v. Hamilton*, 326 F. Supp. 931, 937 (D.S.C. 1971) ("A judgment in this State does not create a lien upon the personal property of a judgment debtor until an actual levy is made upon such personal property."); compare S.C. Code Ann. § 15-35-810 (1976, as amended) with S.C. Code Ann. 15-39-100 (1976, as amended) ("Executions shall not bind the personal property of the debtor, but personal property shall only be bound by actual attachment or levy thereon for the period of four months from the date of such levy."). This distinction between automatic liens on real property and the additional diligence to perfect a lien on personal property is a critical point in this appeal.

² On Westlaw, pin citations are not available for the South Carolina Reporter pages. Only the pin citations for the Southeastern Reporter are available.

The Court in *Roddey* went on to say that the trial court “had 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.” *Roddey*, 172 S.E. at 868. The Court not only held that the trial court had this authority, but that it was properly granted under this set of facts. *Id.* at 869-70.

Roddey is distinguishable from this appeal for two reasons: (1) it dealt with personal property that has a separate judgment lien perfection statutory process, and (2) it dealt with a judgment creditor that discovered a debtor’s ownership of securities located in another state, not real estate where ownership is on public record for the world to see.

2. *FCX v. Long Meadow Farms, Inc.*

In 1977, the South Carolina Supreme Court again had an opportunity to address the superior diligence doctrine in the context of competing judgment creditors. *FCX v. Long Meadow Farms, Inc.*, 269 S.C. 202, 237 S.E.2d 50 (1977). Here, five judgment creditors, including FCX, were competing in priority for sale proceeds of real estate in which the debtor held an equitable interest. *Id.* at 205, 237 S.E.2d at 51. The debtor held an equitable, rather than legal, interest because its rights in the property were as a payee on a land sale contract, rather than a conveyance to it by deed. *Id.* Prior to the institution of the action, the debtor assigned its rights in the contract to FCX, for FCX to sell the real estate to satisfy as

much of the debts owed that the sale will generate. *Id.* at 205-06, 237 S.E.2d at 51. Essentially, FCX was acting as a quasi-receiver. *Id.* at 208, 237 S.E.2d at 52.

The lower court ruled that the sale proceeds must be paid to the judgment creditors based on the first-in-time, first-in-right rule of Section 15-35-810; however, the Supreme Court reversed that finding because a debtor's equitable interest in real estate is not subject to the lien provided to judgment creditors under Section 15-35-810. *Id.* at 206-07, 237 S.E.2d at 52. It is here that the Supreme Court provided the conclusion that the Master correctly quoted and relied on in his November 2019 Order:

If Long Meadow Farms 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.

Id. at 206, 237 S.E.2d at 52. Because the debtor's equitable ownership interest in the real estate made Section 15-35-810 inapplicable, the Court looked to additional case law. Because FCX "expended considerable sums in making current payments to the [land sale contract holders] to prevent forfeiture of the sales contract," FCX asked the Court to elevate its priority from second (out of five) to first based on *Ex parte Roddey* and the superior diligence doctrine. *Id.* at 208-09, 237 S.E.2d at 53.

In response to FCX's argument, the Supreme Court held that the superior diligence doctrine in *Ex parte Roddey* should be "sparingly applied," and it noted the distinguishing fact from *Roddey* that "the case at bar does not involve the

uncovering of an unknown asset.” *Id.* It summarized FCX’s actions in relation to the law by stating:

While the action of FCX in preserving this asset is to be commended, we do not feel that it is sufficient justification for granting it a preference in the payment of its judgment not otherwise sanctioned by law.

Id. at 209, 237 S.E.2d at 53.

In conclusion, the Court held:

Since it is our opinion that no judgment creditor had a lien upon the equitable interest involved herein, the proceeds received from this asset should be distributed ratably among all judgment creditors.

Id. at 208, 237 S.E.2d at 52. No party, however, appealed the trial court’s ruling that FCX be given priority for reimbursement of its expenses paid for preserving the asset. *Id.*

3. Application of *FCX* and *Roddey*.

At trial on July 17, 2019, Joe Hand argued before the Master that *FCX* and *Roddey* are the two cases that apply to the doctrine of superior diligence. (R. p. 42 (July 17, 2019 Hr’g Tr. 2:10-21).) The Master correctly relied on *FCX* as binding precedent to deny Joe Hand’s attempt to exercise the superior diligence doctrine. (R. pp. 17-18 (November 2019 Order at 2-3).) First, the Master correctly noted that the Supreme Court in *FCX* concluded that there is no question as to priority where a debtor’s legal interest in real estate is at issue – Section 15-35-810 governs with the statutory rule of first-in-time, first-in-right. (*Id.*)

Second, the Master correctly found that Joe Hand did not discover an unknown asset in supplementary proceedings like the successful judgment creditor in *Roddey* who found securities located in New York. (R. p. 18 (*Id.* at 3).) Joe Hand had the same information available to it from the Spartanburg County real property records that was available to Springleaf Financial Services, Founders and the public as a whole. (*See id.*) Lastly, as noted in more detail in Founders' second argument below, the Master held that Joe Hand's pre-foreclosure efforts, like those of FCX, were worthy of providing priority for its fees and costs expended in the action, but not worthy of elevating the priority of the principal and interest of its judgment debt above the prior-recorded liens of Founders and Springleaf Financial Services. (R. pp. 18-19 (*Id.* at 3-4).)

C. The case law cited by Joe Hand to support its argument that liens are often re-prioritized is distinguishable because those cases either involved fraudulent judgment creditors or lien competitions not governed by Section 15-35-810.

Joe Hand argues that South Carolina case law provides that judgment liens on real property are routinely re-prioritized. (Appellant's Initial Br. at 17-18). To support that argument, it uses cases that do not involve competing judgment liens subject to Section 15-35-810, and one case where the other judgment liens were obtained by fraud.

Joe Hand argues *SunTrust Bank v. Bryant* supports its position, wherein this Court held that a purchase-money mortgage has priority over a previously recorded judgment lien. *SunTrust Bank v. Bryant*, 392 S.C. 264, 269, 708 S.E.2d 821, 823 (Ct.

App. 2011). *Bryant* does not involve competing judgment lienholders subject to Section 15-35-810. Moreover, Joe Hand is not a purchase-money lender.

Joe Hand also relies on *Atlas Supply Co. v. Davis*. (Appellant's Initial Br. at 18). In *Atlas Supply*, the South Carolina Supreme Court determined who had priority between a mortgage lienholder and judgment lienholder where both were recorded at different times on the same day. *Atlas Supply Co. v. Davis*, 273 S.C. 392, 393, 256 S.E.2d 859, 859 (1979). In this case, the court held that the subsequently recorded mortgage had priority over the prior recorded judgment based on S.C. Code Section 30-7-10. *Id.* at 394-95, 256 S.E.2d at 860. Again, this case does not involve competing judgment lienholders subject to Section 15-35-810.

Joe Hand also cites *Prudential Ins. Co. v. Wadford*, which is a nearly identical predecessor case to *Atlas Supply*. *Id.* at 393-94, 256 S.E.2d at 860. *Wadford* also involved a mortgage lienholder competing with a judgment lienholder, and its decision in favor of the subsequently recorded mortgage lienholder was the predecessor statute to S.C. Code Ann. § 30-7-10. *Prudential Ins. Co. v. Wadford*, 232 S.C. 476, 478-80, 102 S.E.2d 889, 890-91 (1958). Likewise, this case does not involve competing judgment lienholders subject to Section 15-35-810.

Lastly, Joe Hand cites *Crown Central Petroleum Corp. v. Elmwood Properties*; however, this case involved one judgment creditor with clean hands seeking to set aside two prior judgment liens that were obtained fraudulently through collusion with the judgment debtor. *Crown Central Petroleum Corp. v. Elmwood Props.*, 244 S.C. 588, 591, 138 S.E.2d 38, 39 (1964). In this case, the judgment debtor engaged in

“multifarious litigation” where he secretly and collusively created entities and had one of those entities obtain judgments prior to Crown Central Petroleum to obstruct Crown Central Petroleum from collecting the debt owed. *Id.* at 593, 138 S.E.2d at 40. Accordingly, the Court granted priority to Crown Central Petroleum over the fraudulent judgment liens recorded before it. *Id.* at 596, 138 S.E.2d at 41.

None of these cases contradict Section 15-35-810, and the Master correctly ruled that Section 15-35-810 is outcome determinative in this case.

II. THE MASTER-IN-EQUITY CORRECTLY RULED THAT JOE HAND’S PRE-FORECLOSURE ACTIONS ARE NOT SUFFICIENT TO WARRANT APPLICATION OF THE SUPERIOR DILIGENCE DOCTRINE TO ELEVATE ITS THIRD-IN-LINE JUDGMENT LIEN TO FIRST PRIORITY.

Joe Hand contends that the doctrine of superior diligence, standing alone, is a sufficient basis for the Court to reverse the Master’s ruling on appeal. (Appellant’s Initial Br. at 11-17). It is undisputed that Joe Hand relies solely on instituting supplementary (*i.e.* judgment collection) proceedings and obtaining an order sustaining its objection to Mr. Ruegsegger’s homestead exemption in the Bankruptcy Court as its basis to jump from third to first lien priority. (Appellant’s Initial Br. at 19). The statutory and case law do not support Joe Hand’s argument.

A. Analyzing Joe Hand’s specific pre-foreclosure actions shows that those actions had no real effect on the liens against the Subject Property.

1. Joe Hand’s institution of supplementary proceedings.

Joe Hand first claims its institution of supplementary proceedings on March 27, 2018, entitles it to first lien priority under the superior diligence doctrine. (Appellant’s Initial Br. at 4; R. pp. 107-08 (Petition for Supplementary Proceedings

filed March 27, 2018); R. p. 43 (July 17, 2019 Hr'g Tr. 3:3-8).) Joe Hand's supplementary proceedings were open for just a matter of days before Mr. Ruegsegger filed for Chapter 7 bankruptcy protection on March 30, 2018. (R. pp 107-08 (Petition for Supplementary Proceedings filed March 27, 2018); R. p. 112 (Chapter 7 Voluntary Petition filed March 30, 2018).)

Joe Hand did nothing outside of the ordinary by filing supplementary proceedings shortly before the judgment debtor sought bankruptcy protection. This happens frequently and is not sufficient for a judgment lien on real estate to jump from third to first lien priority. See *FCX, Inc. v. Long Meadow Farms, Inc.*, 269 S.C. 202, 209, 237 S.E.2d 50, 53 (1977); *In re Knight*, Case No. 16-00584-hb, 2017 WL 5151676, at *4 (Bankr. D.S.C. Nov. 6, 2017). This timeline also shows Mr. Ruegsegger's bankruptcy filing was likely not caused by Joe Hand's supplementary proceedings since there is no evidence of service in the supplementary proceedings prior to the March 30, 2018 petition date, and the Rule to Show Cause entered on April 6, 2018, could not have been served prior to Mr. Ruegsegger's bankruptcy filing. (R. pp. 109-111 (Rule to Show Cause filed April 6, 2018).)

2. Joe Hand's objection to Mr. Ruegsegger's homestead exemption in the Bankruptcy Court.

Next, Joe Hand contends that its objection to Mr. Ruegsegger's homestead exemption in his bankruptcy case was the only thing that kept all three judgment liens from being stripped from the property. (R. pp. 91-92 (Nov. 12, 2019 Hr'g Tr. 9:21-10:5).) Specifically, Joe Hand argues that the result of its objection to the homestead exemption was the "judgments in question were not discharged" in the

bankruptcy case. (R. p. 44 (July 17, 2019 Hr’g Tr. 4:17).) This is not correct. While a debtor discharges his personal liability in bankruptcy, liens against property pass through the bankruptcy unaffected unless the debtor obtains an order avoiding those liens. *In re Goss*, 568 B.R. 525, 529 (Bankr. D.S.C. 2017) (“The law has been settled since 1886 that a discharge in a liquidation bankruptcy case, such as chapter 7, does not discharge a lien against real or personal property; liens survive or pass through bankruptcy unaffected.”).

Moreover, a debtor claiming any form of exemption in his bankruptcy schedules does not have the legal effect of avoiding judicial liens. The debtor must file a separate motion under 11 U.S.C. § 522(f). *In re Jaber*, 406 B.R. 756, 760 (Bankr. N.D. Ohio 2009) (“Under the bankruptcy rules, a proceeding by a debtor to avoid a lien under § 522(f) is to be made by motion under rule 9014.”). Therefore, it is incorrect to say that a sustained objection to a debtor’s homestead exemption prevented the judgment liens from being avoided.

Federal Rule of Bankruptcy Procedure 4003 furthers this point by outlining a debtor’s procedure for the mere claiming of an exemption under Rule 4003(a), versus an actual motion to avoid the lien under Rule 4003(d). Rule 4003, Fed. R. Bankr. Proc. Rule 4003(d) specifies “even if a creditor does not timely object to a debtor’s claim of exemption, creditors are free to object to a claim of exemption during litigation of lien avoidance motions under § 522(f).” *In re Scannell*, 453 B.R. 36, 41 n.6 (Bankr. D.N.H. 2011). In other words, a creditor does not have to object to claimed exemptions until the debtor files a motion to avoid the liens.

It is indisputable that Mr. Ruegsegger did not file a motion to avoid liens under § 522(f) and, therefore, he never sought an order from the court stripping liens from the Subject Property. (R. pp. 51-52 (July 17, 2019 Hr’g Tr. 11:16-12:23); R. p. 81 (Aug. 27, 2019 Hr’g Tr. 12:17-23).) Also pursuant to Rule 4003(d) of the Bankruptcy Rules of Procedure, Joe Hand could have waited to object to the homestead exemption until Mr. Ruegsegger filed a motion to avoid the liens, which never happened.

In addition, even after the Bankruptcy Court sustained Joe Hand’s objection to Mr. Ruegsegger’s homestead exemption, Founders contends Mr. Ruegsegger could have filed a motion to avoid the liens under his “wildcard exemption.” See S.C. Code Ann. § 15-41-30(a)(7) (1976, as amended); *see also In re Riley*, 486 B.R. 711, 717 (Bankr D.S.C. 2013) (analyzing a debtor’s motion to avoid liens based on the wildcard exemption). It is likely a motion to avoid liens under the “wildcard” exemption would have been very challenging for the judgment creditors given the relatively debtor-friendly way Congress sets the lien avoidance calculation under Section 522(f) of the Bankruptcy Code.³ In short, Joe Hand’s procurement of an

³ For purposes of Section 522(f)(2)(A):

A lien shall be considered to impair an exemption to the extent that the sum of –

- (i) the lien;
- (ii) all other liens on the property; and
- (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value that the debtor’s interest in the property would have in the absence of any liens.

order from the Bankruptcy Court sustaining its objection to Mr. Ruegsegger's homestead exemption did not prevent the judgment liens from being discharged or avoided. (R. pp. 51-52 (July 17, 2019 Hr'g Tr. 11:16-12:23); R. p. 81 (Aug. 27, 2019 Hr'g Tr. 12:17-23).)

Lastly, even if Joe Hand's actions had prevented Mr. Ruegsegger from stripping the judgment liens from the Subject Property in the bankruptcy case, which they did not, that action would still be no better than the actions taken by creditors in *FCX* and *In re Knight*. In those cases, the courts found certain acts insufficient to elevate those judgment creditors' lien priorities under the superior diligence doctrine. *FCX, Inc. v. Long Meadow Farms, Inc.*, 269 S.C. 202, 209, 237 S.E.2d 50, 53 (1977); *In re Knight*, Case No. 16-00584-hb, 2017 WL 5151676, at *4 (Bankr. D.S.C. Nov. 6, 2017).

B. The case law clearly shows that Joe Hand's pre-foreclosure actions do not warrant use of the superior diligence doctrine to elevate its lien priority.

Briefly so as to not restate the more in-depth discussion of *FCX v. Long Meadow Farms, Inc.* above, the South Carolina Supreme Court reviewed FCX's (a judgment creditor) actions in light of FCX's argument that its lien on the sale proceeds should be elevated to first position pursuant to the superior diligence doctrine. *FCX, Inc. v. Long Meadow Farms, Inc.*, 269 S.C. 202, 209, 237 S.E.2d 50, 53

In re Lloyd, 458 B.R. 295, 299-300 (Bankr. D.S.C. 2011). In this case, the three judgment lien amounts added together very likely would have exceeded the value of the Subject Property with the fire-ravaged house, so any exemption amount, even the small "wildcard" exemption, would have likely led to avoidance of all of the judgment liens. (R. pp. 51-52 (July 17, 2019 Hr'g Tr. 11:16-12:23).)

(1977). The Supreme Court specifically noted that FCX “expended considerable sums in making current payments to the [land sale contract holders] to prevent forfeiture of the sales contract.” *Id.* Despite this important undertaking by FCX, the Court found:

While the action of FCX in preserving this asset is to be commended, we do not feel that it is sufficient justification for granting it a preference in the payment of its judgment not otherwise sanctioned by law.

Id. at 209, 237 S.E.2d at 53.

The Court did, however, note with agreement the trial court’s ruling that FCX was entitled to priority from the sale proceeds for reimbursement of its amounts expended, fees and costs; however, its actions did not elevate the priority of the principal and interest of the judgment itself. *Id.*

The Master awarded the same priority for reimbursement in this case to Joe Hand. (R. pp. 18-19 (November 2019 Order at 3-4).)

Next, in *In re Knight*, an unpublished opinion by the Bankruptcy Court for the District of South Carolina, the Court held that the chapter 7 bankruptcy trustee failed to establish that the bankruptcy estate’s interest in real estate had priority over two judgments recorded prior to the bankruptcy. *In re Knight*, Case No. 16-00584-hb, 2017 WL 5151676, at *4 (Bankr. D.S.C. Nov. 6, 2017). In this case, Apex Bank secured two judgments totaling over \$1.5 million against Talmadge Knight, with one being recorded in 2012 and the other in 2014. *Id.* at *1. Mr. Knight transferred the 63.28 acres of real estate at issue to his solely owned LLC in September 2014, and filed for chapter 7 bankruptcy relief in 2016. *Id.* The

bankruptcy trustee filed an adversary proceeding, and successfully obtained an order reversing this fraudulent transfer, which brought this property back into the bankruptcy estate. *Id.*

The trustee then sought to sell the property free and clear of Apex Bank's liens, arguing the superior diligence doctrine for his efforts bringing the property back into the bankruptcy estate. *Id.* at *3. The Court starts by reciting S.C. Code Section 15-35-810 and reviewing the trustee's argument from *Ex parte Roddey*. *Id.* at *3-4. Ultimately, the Court held that Section 15-35-810 determined the outcome:

Apex's liens were perfected upon transcription of the judgments in Saluda County, giving public notice of the liens. *See* S.C. Code Ann. § 15-35-810. No further action was required of Apex to perfect or preserve its liens on the [property].

Id. at *4. The Court also noted that the cases cited by the trustee to support the superior diligence doctrine were distinguishable from the facts at hand.

Accordingly, *In re Knight* stands for two positions that support Founders' arguments: (1) Section 15-35-810 provides that a judgment lien is perfected upon recording and there is nothing more required of a judgment lienholder to perfect its lien, and (2) a party who singlehandedly reverses a fraudulent transfer, and brings the property back into the hands of the judgment debtor's bankruptcy estate, still cannot properly utilize the superior diligence doctrine. *Id.* at *3-4.

III. JOE HAND RAISED FOR THE FIRST TIME IN ITS RULE 59 MOTION THE ARGUMENT THAT ALL JUDGMENT LIENS ATTACHED SIMULTANEOUSLY TO THE INTEREST IN THE SUBJECT PROPERTY ACQUIRED BY MR. RUEGSEGGER AFTER THE JUDGMENTS' RECORDING DATES AND, THEREFORE, THIS ARGUMENT IS NOT PRESERVED ON APPEAL.

Joe Hand argues in the alternative to its superior diligence doctrine arguments that the parties' recorded judgments attached simultaneously to Mr. Ruegsegger's one-half interest in the Subject Property that he acquired in 2017, despite the respective judgment recording dates. (Appellant's Initial Br. at 20). Joe Hand did not raise this argument at either the July 17, 2019 trial, or the August 27, 2019, hearing on Founders' Rule 59 Motion. (R. pp. 41-57 (July 17, 2019 Hr'g Tr.); R. pp. 70-82 (Aug. 27, 2019 Hr'g Tr.).)

Joe Hand first raised this argument in its Rule 59 Motion filed on October 3, 2019. (R. p. 30 (Joe Hand's Rule 59 Motion at ¶ 13).) Prior to this time, Joe Hand's sole arguments at the July 17, 2019 trial, and August 27, 2019 hearing, were that it was entitled to first lien priority on the entirety of the Subject Property based on its pre-foreclosure efforts and the superior diligence doctrine. (R. p. 46 (July 17, 2019 Hr'g Tr. 6:19-25); R. p. 76 (Aug. 27, 2019 Hr'g Tr. 7:6-22).)

Arguments are not preserved on appeal if raised for the first time in a Rule 59 motion. *See, e.g. Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) ("The circuit court, relying on well-settled precedent, declined to reach this issue because it was improperly raised for the first time in the Rule 59(e) motion."); *Dixon v. Dixon*, 362 S.C. 388, 399, 608

S.E.2d 849, 854 (2005) (“Mother raised this issue for the first time in a Rule 59, SCRPC, motion. We hold that this issue is not preserved.”); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (“A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.”).

Accordingly, this unpreserved argument should not be considered by the Court.

IV. JOE HAND’S REMAINING ARGUMENTS RELATED TO EQUITABLE MAXIMS DO NOT SUPPORT REVERSAL BECAUSE SECTION 15-35-810 DOES NOT REQUIRE FOUNDERS TAKE ANY ACTION BEYOND RECORDING ITS JUDGMENT TO PERFECT ITS LIEN.

Lastly, Joe Hand argues that Founders’ actions show that it is not doing equity. (Appellant’s Initial Br. at 22). Founders recorded its judgment lien on June 4, 2014, it filed a fully secured Proof of Claim in Mr. Ruegsegger’s bankruptcy case, and it filed an Answer contesting Joe Hand’s claim for elevated lien priority in this case. (R. pp. 42-45 (July 17, 2019 Hr’g Tr. 2:25-3:1, 4:24-5:1); R. p. 76 (Aug. 27, 2019 Hr’g Tr. 7:7-8).)

As stated by the Bankruptcy Court in *In re Knight*, a judgment creditor’s lien is perfected upon recording in the county where the real estate is located under Section 15-35-810, and no further actions are required by a judgment creditor to perfect or preserve its liens on real estate. *In re Knight*, Case No. 16-00584-hb, 2017 WL 5151676, at *4 (Bankr. D.S.C. Nov. 6, 2017). Therefore, nothing more was required of Founders to support its lien priority being ahead of Joe Hand’s by virtue

of it being recorded first in time. Joe Hand's assertions that Founders has violated any equitable maxim are without merit.

CONCLUSION

For the foregoing reasons, the Master-in-Equity correctly concluded that Founders' judgment lien has priority over Joe Hand's judgment lien on the Subject Property because (1) S.C. Code Section 15-35-810 and well-settled case law require judgment liens be given priority based solely on the judgments' recording dates; and (2) Joe Hand's pre-foreclosure actions are not sufficient to warrant application of the superior diligence doctrine to elevate its third-in-line judgment lien to first priority.

Wherefore, Founders respectfully asks the Court to affirm the decision of the lower court.

s/ Suzanne Taylor Graham Grigg

Suzanne Taylor Graham Grigg
Nexsen Pruet, LLC
Post Office Drawer 2426
Columbia, SC 29202
Phone: (803) 540-2026
Fax: (803) 727-1440
Email: sgrigg@nexsenpruet.com
Attorneys for Respondent
Founders Federal Credit Union

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