

This action was filed on October 4, 2018 as a foreclosure of an HOA lien by Bridgepoint. Lawsin has owned the subject property since September 1, 2006. She also owns another unit in the same condominium complex. When Lawsin received the lawsuit, she believed that it was filed in error because she had just paid the bill in September of 2018 in the amount of \$4,873.00. Since she believed it was current, she didn't answer the suit. She also paid One Thousand and 00/100 (\$1,000.00) Dollars in February of 2019, another One Thousand and 00/100 (\$1,000.00) Dollars in April of 2019 and One Thousand Two Hundred (\$1,200.00) in May of 2019. HHR purchased the property at the foreclosure sale for Two Thousand Five Hundred and One (\$2,501) Dollars. While the matter was pending for sale, the Plaintiff accepted the above stated sums from Lawsin; when the property was sold on May 28, 2019, Lawsin believed that she was up to date with all of the dues that were owed on her two units in Bridgepoint.

In addition to sending payment to Bridgepoint Lawsin was also paying her mortgage to Wells Fargo in the amount of One Thousand One Hundred and Twenty-One (\$1,121.) Dollars per month. (EXHIBITA) She continues to make that payment and has paid it ever since the property was sold in May of 2019. At the time this Order is written, she has paid seventeen payments since the property was sold. That amount totals Nineteen Thousand and Fifty-seven (\$19,057) Dollars.

As of January of 2020, the amount owed to Wells Fargo was One Hundred Twenty-Six Thousand and Thirty-Five (\$126,035.) Dollars. The property is worth, according to the Beaufort County tax assessor, the sum of One Hundred Seventy-three Thousand Three Hundred (\$173,300.00) Dollars. (EXHIBIT B) Lawsin has a little over Forty-Seven Thousand (\$47,000.00) Dollars in equity in this property.

At some point after the Respondent, HHR Rentals, LLC purchased the property, it made contact with Lawsin. The Respondent's position is that they requested that Lawsin tell them what she would be willing to pay them to deed the property back to her. Lawsin denies this. Over the

course of the last eleven months the Respondent has benefited by collecting rent while the Defendant and Petitioner continues to make her monthly mortgage payments.

This Order examines the balancing of the equities of the three parties. The controlling case law requires that the senior lien amount must be factored into the court's examination of the adequacy of the sales price. HHR Rentals argues that the senior lien to Wells Fargo should be added to HHR Rentals bid amount and then taken together as a percentage of the property value. That isn't what has happened here. Instead of paying the mortgage, HHR Rentals hasn't paid any money toward the debt on the property. It has collected rent while Lawsin pays the debt. HHR Rentals is in error to argue that it should receive credit for the debt that is owed when it hasn't paid any funds toward the debt.

On the other hand, Lawsin argues that the bid amount calculated by the equity method as described in *Winrose*. This calculation would result as follows: the approximate amount of Wells' mortgage on the property subtracted from the appraisal or fair market value of the property equaling Lawsin's equity is approximately \$47,000. HHR Rental's bid amount would then be divided by Lawsin's equity amount would result in a 5.3% bid of the value of the property. This is half of the threshold of what would shock the conscience of this court, ten per cent being that threshold.

FORECLOSURE PROCESS & POLICIES

While foreclosure law has developed over the centuries to reflect the changing market and government oversight, two things have remained constant. One, the lender is entitled to repayment of the mortgage debt, but no more. The lender does not have a right to claim any surplus or equity in the property. *See* Robert Kratovil & Raymond J. Werner, Real Estate Law §§ 561, 563 (7th ed. 1979). Two, the owner's right to redeem their home equity is allowed after the debt is paid. *Id.*

Similarly, when the equity battle shifted to contracts for deed, installments sales contracts, equitable type mortgages etc., the court developed a series of questions required to determine if the owner had no equity in the property which required termination of contract; some equity which allows for a period to redeem or pay-off debt; or if sufficient equity, the ability to sell property just like a legal mortgage. *See* Andrew S. Radeker, Esq., *Installment Land Sales Contracts, Pleading Special Property Matters* (Master-in-Equity Bench Bar October 10, 2008) at pages 45-49.

Home equity is also protected from judgment creditors during a statutory Supplemental Proceeding action. S.C. Code Ann. § 15-41-30 (2012) requires the Economic Research Section of the Office of Research and Statistics of the State Board and Control to adjust each dollar amount in §15-41-30(A)(1)–(14). The amount of home equity in 2008 was \$50,000. The adjusted amount on January 24, 2014 was \$58,225.00.¹

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

These examples represent our state's efforts to equitably address these issues in the battle between the owner/debtor and the lender/creditor. Now the examination has shifted to a determination of whether the owner's equity should be protected from a stranger to the transaction, a third-party bidder, in a sale subject to a senior lien.

The primary focus of the bid process is to pay off the plaintiff/creditor and protect equity in property so that in the event the third party bidder's bid generates surplus money, then those funds

¹This Homestead Exemption has not been argued, nor is it normally available in the context of a foreclosure. The example is offered to show South Carolina's policy of careful examination and protection of an owner's equity as one of the factors considered by this Court in reaching this decision.

representing the owner's equity would, by law, go first to the other entitled creditors, and then to the owner. South Carolina recognizes that the owner's equity, arguably at least to 10%, has a protected position in a first mortgage sale scenario as explained in the "shock the conscience" cases.

The question here is if the same protection extends against a third-party bidder's profit expectations in a sale where the third-party is taking property subject to a senior lien. Notices of sale contain property sold "subject to" language. It is critical to understand the difference between assuming a senior mortgage and taking subject to a senior mortgage. An "assumption of mortgage" is defined as "[t]he acquisition of real property coupled with the assumption of personal liability for debt secured by that property." Black's Law Dictionary (10th ed. 2014). Thus, a purchaser may assume or take over the mortgage of the seller. Often this requires permission of the mortgagee. This is distinguishable from taking equity of redemption subject to a mortgage because in the latter case, the grantee is not contractually bound to pay the mortgage. If the grantee assumes the mortgage, he is bound to the mortgagee to pay the mortgage and to fulfill all other terms and conditions.

Assumption is also defined as "... the difference between the purchaser of land assuming a mortgage on it and simply buying subject to the mortgage, is that in the former case the purchaser makes himself personally liable for the payment of the mortgage debt, while in the latter case he does not. When he takes the conveyance subject to the mortgage, he is bound only to the extent of the property. . ." Black's Law Dictionary (5th ed. 1979). Because the third-party bidder in this case took the property **subject to** and did not assume the senior loan debt, it can simply choose not to pay the senior lien and walk away with only its bid at risk.

HOMEOWNERS' ASSOCIATION ISSUES

In a typical homeowners' association foreclosure fact pattern, the owner has a first and/or second mortgage, which may or may not be in default and/or in active foreclosure. Those owners appearing in court routinely complain that the (1) attorney fees are more than the amount owed to the association and that (2) they are bewildered they can be current on their mortgage and still be foreclosed for a homeowners' association lien, evicted from their home, and lose all their equity. The owner learns that the property was bought subject to covenants, restrictions, and bylaws that allow for (1) foreclosure and eviction, and that (2) attorney fees, if authorized by covenants and deemed reasonable by court review, can be greater than the amount of the debt to the association.

A homeowners' association foreclosing its lien is similar to a second mortgagee foreclosing subject to a first mortgage which is ahead of the homeowners' association lien. A second mortgage has an advantage in that it made its business decision to lend money on knowledge that the first mortgage amount was based on the fair market value of the property.

The court has reviewed substantial relevant homeowners' association documents relating to assessments, ability to foreclose, attorney fee clauses, interest, and fee sections when hearing foreclosure cases and recognizes the tremendous pressure homeowners' associations face when an owner stops paying assessments. When an owner defaults on the homeowners' association assessments, the homeowners' association loses part of the counted-on revenue stream needed to maintain common amenities such as lights, security, trash pick-up, and other common area amenities.

In most instances, the owner also has a mortgage to which the homeowners' association being foreclosed on is subject. Normally, the homeowners' association lacks the funds, authority, or financing to pay off the first mortgage. So, if no third-party bidder comes forward, the homeowners' association is then faced with foreclosing its lien and evicting an owner who may or may not be current with the senior mortgage. The ultimate goal of the homeowners' association

would then be to recoup its lost revenue, attorney fees and costs, by renting the property before the senior mortgage forecloses on the homeowners' association's interest.

THIRD-PARTY BIDDER ISSUES

The average third-party bidder similarly has a multitude of issues to consider before bidding at a judicial sale.

“The well published rise in defaults of subprime mortgages has created tempting opportunities to purchase real estate at bargain prices. With foreclosure sales being scheduled on a daily basis, foreclosing attorneys frequently receive calls from clients and others wanting to be walked through the potential pitfalls in the foreclosure bidding process. There are risks, so a potential bidder should learn as much as possible about the property and process prior to placing the first bid. . . . In order to protect against the risks discussed above, a prudent bidder interested in buying property at a foreclosure sale will, prior to making a bid, spend the time and money necessary to conduct, to the extent possible, the same investigations conducted by buyers in traditional real estate transaction. Otherwise, the bidder may not get the anticipated bargain. Foreclosure sales may call for the clearest application of *caveat emptor*.” Clifford P. Parson & C. Joseph Roof, *Prudent Bidding at a Foreclosure Sale*, South Carolina Lawyer, January 2009 at 12, 15.

The above article sets out many problems third-party bidders know they must face such as buying a property that is subject to a first-lien mortgage. It is critical for this analysis to understand that subject to a first lien mortgage does not mean the person is personally liable to pay the debt or will ever pay it. The debt follows the property. The third-party bidder can choose simply to not pay the senior lien if the investment gamble does not come to fruition because the third-party bidder and assignee are unable to agree how, in essence, to divide the original property owner's equity that is being dissipated during the time period between the initial third-party bidder's bid and when, and if ever, the third-party bidder or ultimate assignee pays off the loan.

The Court takes notice of the monthly Motions and Orders to vacate a sale based upon a third-party bidder's failure to comply with their bid, together with the third-party bidder's assignments of bid during the normal post sale foreclosure review process. Further, the third-party bidder receives the Master-in-Equity deed to the property without having to pay off the senior lien.

The third-party bidder does not have to pay off the lien until the senior lien starts and completes the normal 5-6 months minimal to 2-3 years maximum process of filing the senior lien foreclosure, going through pre-hearing and post hearing loss mitigation efforts before going to sale. Again, this fact illustrates the critical difference between “paying off” versus being “subject to” a senior lien.

PROCEDURAL FACTS

Ms. Lawsin has owned the property located at Building 18, Unit 102 since September, 2006. During her ownership of the property, she incurred fees owed to Bridgepoint when Bridgepoint filed an action for foreclosure for the purpose of collecting fees owed. Ms. Lawsin didn't formally answer the Complaint, but she paid the fees as described above. Unbeknownst to her, a Judgment of Foreclosure and Sale was subsequently entered on February 15, 2019. The property was sold at public sale on May 28, 2019. HHR, according to their argument at the hearing on July 16, 2020, notified Ms. Lawsin of the result of the sale. The sale of the property was made subject to a first lien mortgage on record in the amount of \$126,035. Ms. Lawsin has at all times been current on her mortgage. Ms. Lawsin testified that she believes the property has a value of One Hundred Seventy-Five Thousand Dollars. This court takes judicial notice of the fact that the assessors office for Beaufort County has the property assessed at \$173,300. This court also takes judicial notice of the fact that the assessed amount by the county is generally less than the appraised amount.

Ms. Lawsin filed a Motion pursuant to Rule 60(b) SCRCP seeking to vacate the sale on December 20, 2019. A hearing was held on July 16, 2020.

I. Lawsin continued making payments to Bridgepoint after the suit was filed and Bridgepoint accepted those payments without any communication to Lawsin.

Lawsin testified at the July 16, 2020 hearing that Bridgepoint accepted her HOA payments throughout the litigation, including her paying One Thousand (\$1,000.00) Dollars the month the

property was sold. Bridgepoint did not dispute her statement. Ms. Lawsin's confusion or misunderstanding of why the Plaintiff continued to accept her payments without comment or communication is justified.

II. HHR Rentals bid at the foreclosure sale shocks the conscience of the Court

In December of 2019, the case of *Winrose vs. Hale* was decided by our Supreme Court. *Winrose v. Hale*, Op. No. 27934 (S.C. Sup. Ct. filed December 18, 2019). Until that time there was a dearth of law on what would shock the conscience of the Court and a method for determining that event. The case of Wells Fargo Bank, N.A. v. Turner, 378 S.C. 147, 151, 662 S.E.2d 424, 425 (Ct. App. 2008) set the standard here: "A judicial sale will be set aside when either: (1) the sale price is so gross as to shock the conscience; or (2) the sale is accompanied by other circumstances warranting the interference of the court." The Wells case was a mortgage foreclosure, not an HOA foreclosure. There is a difference between the two and the *Winrose* case set forth some factors for what are "other circumstances warranting the interference of the court."

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

Here, however, the property was sold subject to a senior lien creating additional factors to be considered. Case law dictates that if property is sold subject to a senior lien, then the bidder must receive some type of credit for the lien amount incurred as argued by HHR Rentals in this case. Arrow Bonding Co. v Warren, 732 S.E2d 622 (2012). In Arrow Bonding, the Court of Appeals affirmed the Master's decision to *add* the mortgage balance to the sale price in its analysis of whether the bid shocked the conscience of the court. The court notes specifically that "*under the*

circumstances of this case" it disagreed with Appellant's argument that the mortgage should not be considered. *Id.* at 624 (emphasis added). In doing so the court in Arrow Bonding confirmed that evaluation of judicial sale price adequacy is to be conducted on a case-by-case manner.

A. HHR Rentals Argument

HHR Rentals argues that the proper method to determine the sufficiency of a bid should be to add the balance of the outstanding loan to their bid and then determine the percentage of this total to the property value.

This argument fails scrutiny, both factually and legally.

First, all of the evidence shows that Ms. Lawsin is paying and has never quit paying the mortgage to Wells Fargo. Arrow Bonding infers that the third-party bidder has or will pay off the debt. Certainly, if a third-party bidder actually pays off a senior mortgage, he should get credit for doing so in the analysis. In that situation a court would have to consider the homeowner's equity against a third-party bidder's actual amount paid.

Here, however, there is no proof that the first mortgage debt has been released or will ever be released. HHR Rentals is asking to receive a credit for something it did not pay. HHR Rentals is not obligated to pay the senior lien; it has bought the property subject to the lien. As noted previously, "paying off" and being "subject to" are two different matters.

The court further notes that when a third-party bidder bids on such property, it has several options: One, pay off the senior lien; negotiate and then assign the bid to another person who then must pay off the lien. Two, evict the owner and rent the property until the first mortgagee completes its foreclosure process. Three, simply default in complying with the bid, thereby forfeiting the initial bid fee. The Court takes judicial notice of the numbers of monthly bid assignments and forfeited bids that the Court encounters during the sales process. There is a calculated analysis by third-party bidders and homeowners' associations when bidding that

involves their bet on whether or not they can foreclose or evict an owner. The analysis also takes into consideration the option of the third-party leasing the property to the defaulting owner or another tenant on monthly terms fast enough to recoup funds owed to the homeowners' association before the senior lien holder forecloses. The court takes note of foreclosures where a senior lienholder forecloses on a homeowners' association (if it takes title) or the entity that obtained title at the HOA foreclosure.

Here, HHR Rentals has been renting the property to a third party for at least seventeen months. If there is a situation where a third-party bidder has recouped its investment and made a handsome return, this case is a good model of an excellent return on investment. As noted in the above Parson and Roof South Carolina Law review article, HHR Rentals knew the risks of bidding at a judicial sale. HHR Rentals could have done pre-sale research to obtain a better idea of the fair market value-to-debt ratio simply by reviewing tax assessments, reviewing the principal amount stated on the mortgage, or reviewing foreclosure file jackets to determine if a party to the foreclosure is in default. Further, if there was a foreclosure by the first mortgage holder pending, its complaint will contain allegations of note and mortgage terms, and often will contain a copy of the note with the debt amount, interest rate, and terms. A prospective bidder can then make some educated guess as to the balance of the debt since they know they are taking property subject to a maximum first mortgage amount as stated on a recorded mortgage.

B. Lawsin's Arguments

Lawsin argues that HHR Rentals should get credit for the senior lien amount, except not by giving HHR Rentals credit for something not done, but by subtracting the amount of the senior lien from the full market value, which places the proper focus of the inquiry back on owner equity rather than on HHR Rentals theoretical investment in the property.

Lawsin argues the basic position illustrated in Restatement (Third) of Prop.: Mortgages § 8.3; divide the bid amount by the result of subtracting the amount of the senior lien from the full market value of the property. In Illustration 4, Mortgagee foreclosed a mortgage on Blackacre by judicial action. Id. The foreclosure is subject to a senior lien in the amount of \$50,000.00. Id. Blackacre is sold at the foreclosure sale for \$19,000.00. Id. The fair market value of Blackacre free and clear of liens at the time of the sale is \$150,000.00. Id. The foreclosure proceeding is regularly conducted in compliance with state law. Id. A state court is warranted in finding the sale price is grossly inadequate and in refusing to confirm the sale.” Id.

This court is also aware of the language in Winrose where the court stated:

A foreclosure proceeding is a last resort, not a business model to be swiftly invoked for the purpose of exploiting property owners. We do not countenance the improper use of foreclosure proceedings by the HOA, its attorney, *or* Regime. It is the utilization of the Equity Method (in terms of determining the effective sale price of the Property) that restores an objective measure of reasonableness to the facts presented and achieves a proper resolution of this matter.

This court carefully considered the arguments made by counsel on both sides of this matter including the argument concerning the timeliness and the jurisdictional question raised by HHR Rentals.

This is a court of equity and this court believes that in balancing the equities between Lawsin and HHR, this court finds that HHR Rentals has received One Thousand Two Hundred and Fifty (\$1,250.00) Dollars per month in rent from the tenant who has occupied the property before and after the sale. That rent totals Twenty-Five Thousand (\$25,000.00) Dollars. That rental income more than compensates for HHR Rentals bid of Two Thousand Five Hundred and One (\$2,501.00) Dollars.

This Court further finds that Bridgepoint has been fully paid when the sale took place in May, 2019 and does not need to refund any funds to this Court. HHR Rentals should be

responsible for paying the Homeowner's Association dues to Bridgepoint it took title in late May, 2019 through the date of the signing of this Order. Bridgepoint should advise this Court of the status of those dues.

Further, beginning March 1, 2021, any rent paid by any tenant on the property is to be sent by HHR in a check made payable to Lawsin's mortgage servicer or bank until this matter is ended here or by an appeal that may be filed by either party. THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Lawsin's Motion to set aside the sale is hereby granted.
2. This Court will issue a Master's Deed from HHR Rentals, LLC conveying the property back to Lawsin within thirty days of the execution of this Order.
3. That the Foreclosure deed recorded in Deed Book 3765 at page 0380 be vacated. This Order is to be recorded in the Office of Registrar or Deeds in the proper index to reflect proper ownership.
4. HHR Rentals, LLC will pay the dues to Bridgepoint from May of 2019 through the date of this Order.
5. Beginning March 1, 2021, any rent paid by any tenant to HHR is to be sent by HHR in a check made payable to Lawsin's mortgage servicer or bank until this matter is ended here or by an appeal that may be filed by either party. Lawsin is Ordered to give that information to HHR Rentals by March 1, 2021.

Marvin Dukes
Master in Equity, Beaufort County

Date: _____
Beaufort, SC



Beaufort Common Pleas

Case Caption: Bridgepoint Condo Owners Association Inc VS Rosen J Lawsin ,
defendant, et al
Case Number: 2018CP0701962
Type: Order/Vacate Judgment

So Ordered:

s/Marvin H. Dukes III #3069