

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
IN AND FOR THE THIRD JUDICIAL DISTRICT

MARSDREAMLAND LP.,

L.T. Case No.: 12-50246 CA-22

Appellant,

Appellate Case No.: 3D23-0784

v.

MTGLQ INVESTORS LP.,  
**CATALINA HOMEOWNERS  
ASSOCIATION, INC.,**

Appellees,

\_\_\_\_\_ /

**ANSWER/CROSS-INITIAL BRIEF OF APPELLEE/CROSS-APPELLANT**

**CATALINA HOMEOWNERS ASSOCIATION, INC.**

**ROBERT E. PAIGE, ESQ.**

Paige Law Group P.A.

Attorney for Appellee/Cross-Appellant,

*Catalina Homeowners*

*Association, Inc.*

9500 South Dadeland Boulevard

Suite 550

Miami, FL 33156

Telephone: (305) 670-0020

Email: *email@paigelawgroup.com*

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## **INTRODUCTION**

Catalina Homeowners Association, Inc. was a Defendant below and is referred to herein as “Appellee/Cross-Appellant” or “Catalina”.

Marsdreamland LP. (“Appellant”) was a Defendant below and is referred to herein as “Appellant” or “Marsdreamland”.

References to documents in the Appendix filed by Marsdreamland shall be identified as “Marsdreamland Appendix entry”. References to documents in the Appendix filed by Catalina shall be identified as “Catalina Appendix entry”. References to docket entries for filings in proceedings below shall be identified as “DE-”.

## **STANDARD OF REVIEW**

The standard of review for trial court orders determining entitlement to and amount of disbursements from a surplus of foreclosure sale proceeds is *de novo*. Catalina HOA adopts the standard as described by Marsdreamland:

The standard of review for a question of law concerning interpretation of "the statutory scheme for the disbursement of surplus funds, we review the trial court's order *de novo*". See *Corey v. Unknown Heirs by Neuffer*, 301 So.3d 380, 383 (Fla. 2d DCA 2020); Accord *Pineda v. Wells Fargo Bank, N.A.*, 143 So. 3d 1008, 1011 (Fla. 3d DCA 2014) (citing *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000))

More specifically from *Pineda, supra* at 110: "Because the issue before this court is purely a question of law, our review is *de novo*."

Additionally, the absence of transcripts from the two post-judgment bench hearings below will not preclude appellate review now where "only legal issues are before us on review" *Fed. Nat'l Mortg. Ass'n v. Wild*, 164 So.3d 94, 95 (Fla. 3<sup>rd</sup> DCA 2015).

See also, *Rollet v. De Bizemont*, 159 So. 3d 351, 357-58 (Fla. 3<sup>rd</sup> DCA 2015) ("As there were no disputed issues of fact for the trial court to resolve, and only legal argument to be presented at the hearing, our *de novo* review is unimpeded by the absence of the hearing transcript."), and *Miami Dade Coll. v. Nader + Museu I, LLLP*, No. 3D20-663, at \*7 n.1 (Fla. 3<sup>rd</sup> DCA Oct. 18, 2023) ("the issue presented here is a pure question of law and the absence

of a transcript is not fatal to our review.”)

## STATEMENT OF CASE AND FACTS

The course of events in the case below prior to the October 22, 2022 foreclosure sale on the first mortgagee's foreclosure judgment are of no matter to this appeal. The foreclosure sale generated a surplus of funds after the sums due the first mortgagee were disbursed by the Clerk of Court (DE-139). Catalina, a homeowners association, is a junior secured interest holder on the foreclosed property by virtue of its statutory lien pursuant to FS §720.3085 and lien rights pursuant to its recorded Declaration of Covenants.

In its Initial Brief, Marsdreamland confirms the underlying lawsuit was filed on December 28, **2012** (page 6). Marsdreamland also confirms it took title to the subject property on May 15, **2014** (Initial Brief at page 7, Marsdreamland Appendix 9 at page 49). Marsdreamland does not contest in its Initial Brief that Catalina has a superior position and claim to the surplus proceeds.

Catalina filed its Motion for Surplus Foreclosure Funds to recover sums from the surplus proceeds (DE-129, Catalina Appendix entry #2). Catalina thereafter filed its Amended Motion for Surplus Foreclosure Funds (DE-140, Catalina Appendix entry #3). Catalina sought a recovery from the surplus in the amount of \$6,923.70.

Marsdreamland filed its own and separate Motion for the balance of sur-

plus proceeds which would remain after the Clerk of Court disbursed to those lienholders with priority above it (Marsdreamland Appendix entry #13).

On February 13, 2023, Judge William Thomas held a hearing on the competing Motions for surplus funds. At the hearing (for which there is no transcript), he directed counsel to submit memoranda of law following his comments made during the hearing. Marsdreamland submitted its Memorandum of Law (DE-153, Marsdreamland Appendix entry #15). Catalina submitted its Memorandum of Law (DE-154, Catalina Appendix entry #3).

On April 4, 2023, Judge Thomas continued the hearing on the respective Motions for Surplus (DE-156). At the hearing (for which there is no transcript), Judge Thomas advised counsel for Catalina that an Order was forthcoming which granted Catalina payment from the surplus funds but only for assessments which accrued prior to the May 14, 2014 date on which Marsdreamland took title to the property at issue herein.

Following the hearing, Catalina filed its Notice of Accounting for Sums Due (DE-157, Catalina Appendix entry #4). With this filing, Catalina advised Judge Thomas that all sums it was due did in fact accrue subsequent to when Marsdreamland took title. Catalina was due no sums accruing prior to May 14, 2014.

On April 5, 2023, Judge Thomas entered his Order on Competing Mo-

tions for Surplus Foreclosure Sale Proceeds (DE-159, Catalina Appendix entry #5). Judge Thomas acknowledged Catalina's secured position, and accepted the total Catalina asserted it was due. Judge Thomas ruled, however, that Catalina could claim from the surplus funds only for sums accruing prior to May 14, 2014 when Marsdreamland took title. In light of Catalina's acknowledgment in its Notice of Accounting for Sums Due that all sums due the Association accrued subsequent to when Marsdreamland took title, Judge Thomas awarded zero dollars to Catalina from the surplus funds.

Catalina then timely filed this appeal as Appellee/Cross-Appellant.

## SUMMARY OF ARGUMENT

The trial court erred when it failed to award Catalina \$6,923.70 for sums due through issuance of the Certificate of Sale. The trial court had no authority, either statutorily or equitably, to apportion recovery based on dates when the property had previously changed hands.

## ARGUMENT

Judge Thomas provided his reasoning in the Order as to why he limited Catalina's recovery. He ruled: "CATALINA HOMEOWNERS ASSOCIATION INC. may at its election pursue recovery from MARSDREAMLAND LP. The Court makes no finding as to the viability of that effort."

Judge Thomas believed that Catalina's ability to seek a money judgment against Marsdreamland was sufficient remedy, and he limited Catalina to pursuing only that remedy. This was error.

The operative Statute for this case is FS §45.032. FS §45.032(1)(b) defines a subordinate lienholder as "the holder of a subordinate lien" which includes "a subordinate mortgage, judgment, tax warrant, **assessment lien**, or construction lien." (emphasis added) Catalina as a Florida homeowners association has lien rights for unpaid assessments.

Catalina has a claim of lien to the property herein pursuant to its recor-

ded Declaration of Covenants, recorded Official Records Book 13340, Page 3082, Public Records of Miami-Dade County, Florida (as amended from time to time). Catalina also has a statutory claim of lien on said property. See, *Calendar v. Stonebridge Gardens Section III C.A.*, 234 So.3d 18, 19 (Fla. 4<sup>th</sup> DCA 2017) (“where a declaration of condominium is recorded, such as in the instant case, recording a claim of lien is not an absolute prerequisite to the enforcement of a lien for unpaid assessments.”). See also *Gateland Village Condominium, Inc. v. Holly*, 353 So.3d 1181, 1184 (Fla. 4<sup>th</sup> DCA 2022) (“Section 718.116 clearly states that an association has a lien on each parcel...Gateland had a lien upon recording the original declaration of condominium.”)

With Catalina meeting the definition of a subordinate lienholder, it is entitled to be paid first from foreclosure surplus proceeds. Its secured claim of lien for unpaid assessments, together with interest, costs, and attorney fees incident to the collection process, was not extinguished by the first mortgage foreclosure judgment here. Rather, its claim of lien now attached to the foreclosure surplus proceeds. See *Waybright v. Turner*, 176 So. 424, 428 (Fla., 1937), where the Florida Supreme Court held,

The lien of Turner's second mortgage was not destroyed by the foreclosure of the first mortgage on the 'Waybright property,' but was merely removed from the land. After removal from the land,

it then attached to what had taken the place of the land in the eyes of the law, to wit, whatever remained as surplus after paying off the first mortgage and costs. The amount, resulting from the foreclosure being in excess of what was necessary to satisfy the first mortgage and all costs in connection with the foreclosure, was subject to all junior liens and claims that were upon the land at the time of the foreclosure.

See also *Household Finance Services, Inc. v. Bank of America, N.A.*, 883 So.2d 346, 348 (Fla. 4<sup>th</sup> DCA 2004) (“The lien of the junior mortgage is not extinguished in the foreclosure but is instead transferred from the property to the fund that stands in the place of the property.”); and *JP Morgan Chase Bank v. U.S. Bank Nat. Assn.*, 929 So.2d 651, 653 (Fla. 4<sup>th</sup> DCA 2006) (“Certainly, the foreclosure of the first did not extinguish the second; it merely transferred the lien from the property to the surplus funds that took its place.”)

**Catalina is the only junior lienholder to have filed a claim to the surplus proceeds.** Junior lienholders such as Catalina are to be paid from the surplus funds in the order of priority of competing secured interests, with the balance if any to be paid to the last owner of records when suit was filed. “Clearly, a surplus is payable to junior lienholders in accordance with their priority...It is the obligation of the trial court, under such circumstances, to weigh and determine the competing claims by priority.” *JP Morgan, supra* at 654.

Next, Catalina has priority to the proceeds over the last owner of record

and against Marsdreamland. “A junior mortgage lienholder has priority over the property holder for foreclosure surplus funds.” *Golindano v. Wells Fargo Bank*, 913 So. 2d 614, 615 (Fla. 3rd DCA 2005)

“It has long been the law in Florida that any surplus remaining after a foreclosure sale should be paid to the junior lienholders in accordance with the priority of their liens on the property and that only after the liens have been satisfied may any surplus be disbursed to the owner of the equity of redemption.” *Gen. Bank, F.S.B. v. Westbrooke Pointe, Inc.*, 548 So.2d 736, 736 (Fla. 3rd DCA 1989)

Judge Thomas’ decision to truncate Catalina’s recovery from surplus to zero was either based on his reading of FS §45.032, or on equitable considerations. If based on the Statute, Judge Thomas erred because no deviation in the manner he chose is possible. As this Court held in *Pineda v. Wells Fargo Bank, N.A.*, *supra* at 1011, “the fact remains that distribution of surplus foreclosure proceeds is governed by a plain and unambiguous statutory procedure... Where the legislature has provided such a process, courts are not free to deviate from that process absent express authority.”

If based on equitable principles, Judge Thomas also erred, but demonstration of the error takes three steps. First, in *Waybright*, *supra* at 319, the Supreme Court described the disbursement process as follows:

In determining who is entitled to surplus proceeds arising in a foreclosure sale, it is general rule that all incumbrances on mortgaged premises inferior to the mortgage on which the sale is based, must be paid in the order of time in which they respectively became liens, **except as some equitable right demands a different order of payment** [citing to 2 Wiltsie on Mortgage Foreclosures (4th. Ed.) 1240, § 977] (emphasis added)

Second and one year later, the Florida Supreme Court reiterated this 'equitable right' in *Tucker v. Crown Corporation*, 183 So. 740, 745 (Fla. 1938):

In determining who is entitled to surplus proceeds arising in a foreclosure sale, it is the general rule that all incumbrances on mortgaged premises inferior to the mortgage on which sale is based, must be paid in the order of time in which they respectively became liens, **except as some equitable right demands a different order of payment.** 2 Wiltsie on Mortgage Foreclosure (4th Ed.) 1240, Sec. 977; *Waybright v. Turner*, 129 Fla. 310, 319, 176 So. 424, 428. (emphasis added)

Third, this Court in *General Bank, supra* at 737, construed *Tucker* to hold that this equitable right applies when determining the priorities between competing junior lienholders (horizontal priority), and NOT between junior lienholders and the last owner of record (vertical priority):

In plain language, *Tucker* holds that the equitable exception applies to competing "encumbrances." Westbrooke, as the mortgagor, clearly is not a lienholder; its equity interest does not "encumber" the property. Because the equitable exception raised by Westbrooke is not applicable in a dispute between a junior lienholder and the mortgagor, under the general rule regarding priorities to a surplus, General Bank, as third mortgagee, is entitled to priority over the mortgagor to the surplus funds. The award of surplus to the third mortgagee is to be credited against all other amounts owed on the mortgage.

Per this Court's ruling in *General Bank*, Judge Thomas erred if he used equitable principles to determine the allocation of surplus between Catalina and the last owner of record (or Marsdreamland).

## ANSWER TO MARS DREAMLAND INITIAL BRIEF

Catalina was not affected by Judge Thomas' Order below where it applies to Marsdreamland. Nor will Catalina be affected by the decision of this Court on the Marsdreamland appeal. Catalina is not affected because its lien interest has priority over the interest of both the last owner of record and Marsdreamland. Catalina has no claim to, nor standing to argue over, the surplus proceeds once Catalina has been paid in full.

For the record, though, Catalina believes that Judge Thomas was correct in his ruling as to Marsdreamland based upon FS §45.032(1)(a) ("Owner of record" means the person or persons who appear to be owners of the property that is the subject of the foreclosure proceeding on the date of the filing of the lis pendens.") It is indisputable that Marsdreamland was not the owner of record when the Lis Pendens here was filed. In its Initial Brief, Marsdreamland confirms the underlying lawsuit was filed on December 28, **2012** (page 6). Marsdreamland also confirms it took title to the subject property on May 15, **2014** (Initial Brief at page 7, Marsdreamland Appendix 9 at page 49).

Marsdreamland does not contest in its Initial Brief that Catalina has a superior position. See, *Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011) ("This argument was not raised in the initial brief filed here. Accordingly, the claim is barred.") "See *Bath Club Entm't, LLC v. Residences at Bath Club Maint.*

*Ass'n*, 355 So.3d 999, 1001 n.3 (Fla. 3d DCA 2023) ("If an appellant fails to raise an argument in its initial brief, that argument is deemed abandoned")"

*Tercier v. Univ. of Miami*, No. 3D22-1334, at \*7 (Fla. 3<sup>rd</sup> DCA Aug. 2, 2023)

Catalina is therefore entitled to priority of preference to payment from the surplus proceeds.

## CONCLUSION

Judge Thomas erred in his Order below. Catalina respectfully requests that the April 5, 2023 Order (DE-159, Catalina Appendix entry #5) be vacated as it applies to Catalina, with the case remanded. On remand, Catalina respectfully requests that the trial court be directed to order the Clerk of Court to pay Catalina \$6,923.70 from the surplus proceeds, together with attorney fees and costs accrued by the Association (a) subsequent in proceedings below to its Amended Motion for Surplus Foreclosure Funds (DE-140, Catalina Appendix entry #2) and (b) for this appeal.

Respectfully submitted,  
**PAIGE LAW GROUP P.A.**  
Counsel for Appellee/Cross-Appellant,  
*Catalina Homeowners Association, Inc.*  
9500 South Dadeland Boulevard  
Suite 550  
Miami, FL 33156  
Telephone: (305) 670-0020  
Email: [email@paigelawgroup.com](mailto:email@paigelawgroup.com)

By: *Robert E. Paige*  
**ROBERT E. PAIGE, ESQ.**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to all parties/counsel shown as used for this filing with the Florida Courts E-Filing Portal System, on this day of July 26, 2024.

*Robert E. Paige*

**ROBERT E. PAIGE, ESQ.**

**CERTIFICATE OF COMPLIANCE WITH RULES 9.045(B) AND 9.210**

I hereby certify that the foregoing Brief complies with the font requirements (Arial 14-point font) set forth in Fla.R.App.P. 9.045(b), and the Briefs requirements set forth in Fla.R.App.P. 9.210.

*Robert E. Paige*

**ROBERT E. PAIGE, ESQ.**