

4D 24-0079

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In the Fourth District Court of Appeal

Rapid Surplus Refund LLC

Appellant

v.

Weeeee LLC, James M. Stanger,
Ryan & Rick, LLC; Penthouse
North Association, Inc.; and
Peter Berkman Attorney at Law

Appellee

Appeal Jurisdiction

Appeal from the Final Order for the County Court for the Seventeenth
Judicial Circuit in and for Broward County, Florida

L.T. # COSO22005719

Appellant's Initial Brief

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STATEMENT OF THE CASE AND FACTS

The Plaintiff below, Peter Berkman, Esq., filed an action to foreclose his second mortgage. [R. 9-33] Exhibit "A" to the Complaint is a copy of that second mortgage recorded on March 8, 2022 as Instrument # 117991526. Three Final Judgment(s) of Foreclosure were entered. [R. 34-36, 37-39, 40-42]. The foreclosure sale held on May 19, 2023 resulted in surplus funds of \$54,953.34 [R. 44-45]

Appellee, Rapid Surplus Refund, LLC ("Owner") filed a motion to intervene on behalf of James M. Stanger as owner Weeee, LLC by virtue of an assignment of rights authorized by §45.033, Fla. Stat. [R. 46-55]

Appellee, Ryan & Rick, LLC ("First Mortgage") filed a Motion to Intervene and to Disburse Surplus Funds [R. 101-117] alleging that it was inappropriately left out of the foreclosure case as its mortgage recorded on May 18, 2021 as Instrument # 117279550 was subordinate to the second mortgage. [R. 101-117 paragraph 2 and paragraph 8]. First Mortgage claimed it was owed almost \$60,000 just in interest. [R. paragraph 10]. First Mortgage correctly recited the proper recording information for its mortgage recorded in 2021 yet then argued that this mortgage was subordinate to plaintiff's mortgage recorded a year later in 2022.

Appellee, Penthouse North Condominium Association (“Association”), filed its Intervenor Penthouse North Association, Inc.’s Motion for Summary Judgment on Verified Claim for Disbursement of Foreclosure Surplus Funds [R. 56-67] alleging it was a subordinate lienholder due to the Association’s covenants so was equitably entitled to the surplus funds for unpaid assessments. The Association has relinquished its claim to the surplus funds, albeit for a different reason than priority. [R¹] The trial court vacated its order disbursing funds to the Association on April 17, 2024. [R¹] As the Association corrected its incorrect disbursement there will be no discussion as to the trial court’s error regarding this disbursement.

The Association requested that First Mortgage’s claim “be summarily denied as a matter of law since it is at all times material the senior and first mortgagee of record under Section 695.11, Florida Statutes” [R. 56-67, paragraph 5].

The trial court granted all motions to intervene. [R. 132-133]

The trial court granted First Mortgage’s and the Association’s motion to disburse surplus funds while denying Owners. [R. 160-161]

¹ Appellant filed a Motion to Supplement Record and Extend Time for filing Initial Brief on May 6th (The lower court did not transmit the Record on Appeal until April 30th). The Initial Brief is due today, May 7th, so in an abundance of caution Appellant is filing the Initial Brief with these two record citations omitted.

While, Appellee, Association no longer claims any of the surplus funds, Appellee, First Mortgage, refuses to confess error.

ISSUE ON APPEAL

WHETHER THE TRIAL COURT IMPROPERLY GRANTED SURPLUS FUNDS FROM THE FORECLOSURE OF A SECOND MORTGAGE TO THE FIRST MORTGAGE HOLDER WHO WAS NOT SHOWN ON THE FACE OF THE PLEADINGS AND WHO INTERVENED AFTER THE FORECLOSURE SALE

SUMMARY OF ARGUMENT

The trial court reversibly erred in post foreclosure proceedings by awarding the surplus funds to senior lienholders Penthouse North Association, Inc. (“Association”) and Ryan & Rick, LLC (“First Mortgage”).

The trial court’s order is wrong for three reasons.

First, this Court has already held that a senior lienholder has no right to share in the surplus proceeds arising from the foreclosure of a subordinate lien.² Owner filed a copy of this case with the lower court prior to the evidentiary hearing.

² *Garcia v. Stewart*, 906 So.2d 1117, 1121 (Fla. 4th DCA 2005). Trial court counsel also filed *Goetz v. AGB Tampa LLC*, 335 So.3d 228 (Fla. 2d DCA 2022) and *Pineda v. Wells Fargo Bank, N.A.*, 143 So. 3d 1008 (Fla. 3rd 2014) [R. 139-159]

Second, intervenors are not shown on the face of the pleadings so are excluded from claiming surplus per §45.032(2), Fla. Stat., unless the intervenor is an assignee of the owner pursuant to §45.033 Fla. Stat.

Third, senior lienholders are not proper parties to the foreclosure of a junior lien as their interests are not affected so the trial court erred in granting their motion to intervene.

JURISDICTION

The lower court rendered the Order Disbursing Funds on December 28, 2023. (R. 160-161). Appellants timely filed their notice of appeal within thirty days of that order on January 9, 2024. (R. 162-164). This Honorable Court has jurisdiction. Rule 9.110(b), Fla. R. App. P. (Jan. 1, 2024)

STANDARD OF REVIEW

The standard of review for the first two errors of the trial court is *de novo* as these issues present a pure question of law on interpreting the statutory scheme to disburse surplus funds. *Saulnier v. Bank of Am., N.A.*, 187 So.3d 854, 860 (Fla. 4th DCA 2015)

The standard of review for the last error in granting intervention to a senior lienholder is abuse of discretion. *De Sousa v. JP Morgan Chase, N.A.*, 170 So.3d 928, 929 (Fla. 4th DCA 2015).

ARGUMENT

I. A SENIOR LIENHOLDER HAS NO RIGHT TO SHARE IN THE SURPLUS PROCEEDS ARISING FROM THE FORECLOSURE OF A SUBORDINATE LIEN

In 2006, the Florida legislature created §45.032 and §45.033, Florida Statutes to govern the distribution of surplus funds arising from foreclosure sales.

§45.032(2) Fla. Stat. as in effect since 2018 provides:

There is established a rebuttable legal presumption that the owner of record on the date of the filing of a lis pendens is the person entitled to surplus funds **after payment of subordinate lienholders** who have timely filed a claim. A person claiming a legal right to the surplus as an assignee of the rights of the owner of record must prove to the court that such person is entitled to the funds. [emphasis added]

§ 45.032(1)(b) Fla. Stat. defines "Subordinate lienholder" as "the holder of a subordinate lien **shown on the face of the pleadings** as an encumbrance on the property." [emphasis added]. In the instant case there were no subordinate lienholders shown on the face of the pleadings as none existed.

Determining who is a subordinate lienholder should be very simple. The common law rule governing priority of lien interests is first in time is first in right. *Guaranty Title & Trust Co. v. Thompson*, 113 So. 117, 120 (Fla. 1927) and *Holly Lake Ass'n v. Fed. Nat'l Mortg. Ass'n*, 660 So.2d 266, 268 (Fla.1995). This common law rule is codified under §695.11 Fla. Stat. (sequence of official register number determines priority).

However, as the numerous appellate court cases involving distributing surplus foreclosure funds show, the pool of money sitting in the court registry is too tempting to some creditors. Some creditors blatantly ignore the statutory distribution rules instead crafting equitable arguments as to why they should be paid instead of the foreclosed homeowner per the statutes. In the instant case, First Mortgage just blatantly falsely represented to the trial court that its mortgage was recorded after the foreclosed mortgage so that it was a subordinate lienholder. [R 101-117, paragraphs 2 and 8].

It is well settled law in this Court that a senior lienholder has no right to share in the surplus proceeds arising from the foreclosure of a subordinate lien. *Garcia v. Stewart*, 906 So.2d 1117, 1121 (Fla. 4th DCA 2005). *Garcia v. Stewart* is cited favorably to by all districts that have decided this issue; see *Wells Fargo Bank, N.A. v. Rutledge*, 148 So.3d

533, 535 (Fla. 2nd DCA 2014); *U.S. Bank Nat'l Ass'n v. Bevans*, 138 So.3d 1185 , 1185 (Fla. 3rd DCA 2014); and *Branch Banking & Trust Co. v. Tomblin*, 163 So.3d 1229, 1230-1231 (Fla. 5th DCA. 2015) (confirming that senior lienholders have no right to participate in surplus funds arising from a foreclosure sale).

In an almost factually identical case, the Second District Court of Appeals found that the trial court erred in awarding surplus funds to the first mortgage instead of the property owner. *Goetz v. AGB Tampa LLC*, 335 So.3d 228 (Fla. 2d DCA 2022) In *Goetz*, a homeowner association foreclosed its lien. After the foreclosure sale the first mortgage holder intervened and claimed the surplus. The Second District Court of Appeal repeated long established law citing to this Court's opinion in *Garcia v. Stewart* that because senior lienors' rights are unaffected by foreclosure, holders of liens which are senior in priority have no right to share in surplus produced by the foreclosure of a junior mortgage.

The Third District refused to allow surplus funds arising from the foreclosure of a second mortgage foreclosure be paid to the first mortgage in *Pineda v. Wells Fargo Bank, N.A.*, 143 So. 3d 1008 (Fla. 3rd 2014). In *Pineda*, there was over \$99,000 in surplus funds. The third party purchaser requested that these funds be applied to the first mortgage.

The trial court after saying that it did not see any law permitting this still ordered the funds paid to the third party so they could pay the first mortgage holder. In reversing the trial court, the Third District said “While we are sympathetic to Nocari's equitable argument, the fact remains that distribution of surplus foreclosure proceeds is governed by a plain and unambiguous statutory procedure which clearly provides that the owner of record is entitled to the surplus proceeds. Where the legislature has provided such a process, courts are not free to deviate from that process absent express authority.” *Id.* at 1011.

II. INTERVENORS DO NOT SATISFY THE STATUTORY DEFINITION OF A “JUNIOR LIENHOLDER” AS THE MOTION FILED BY AN INTERVENOR IS NOT A PLEADING

The cardinal rule of statutory construction is that the courts will give a statute its plain and ordinary meaning.” *Weber v. Dobbins*, 616 So.2d 956, 958 (Fla. 1993). § 45.032(1)(b) Fla. Stat. defines “Subordinate lienholder” as “the holder of a subordinate lien shown on the face of the **pleadings** as an encumbrance on the property.” [emphasis added]. Complaints, answers, and counterclaims are pleadings pursuant to Fla. R. Civ. Pro. 1.100(a). Motions are applications to the court for an order pursuant to Fla. R. Civ. Pro. 1.110(b). This Court in *Garcia* held “the Association's

post judgment motion to disburse funds, filed after it had been dismissed as a defendant in the lawsuit, was not a **pleading** sufficient to invoke the jurisdiction of the court to adjudicate its right to the funds. The trial court was therefore without jurisdiction to disburse the funds so that its order disbursing the funds was void.” *Garcia*, 906 So. 2d at 1123 [emphasis added]

The legislature in drafting §45.032 Fla. Stat. by requiring that a “pleading” be filed in a foreclosure case recognized that surplus funds were not a free for all for anyone owed a debt by the foreclosed homeowner. The funds are reserved to those whose liens were eliminated against the property and then for the owner. When a subordinate lien is foreclosed while it is eliminated as a lien against the real property the lien is transferred to the surplus money. *Garcia*, 906 So.2d at 1120 and *JP Morgan Chase Bank v. U.S. Bank Nat.*, 929 So.2d 651, 653 (Fla. 4th DCA 2006) (surplus funds stand in the place of the land with respect to liens).

Unlike a subordinate lienholder, a senior lienholder’s lien is not eliminated. Instead, the debt owed to them remains and it should be calculated in the price paid by the third party purchaser. *Garcia*, 906 So.2d at 1120. The legislature by requiring a “pleading” recognized that the surplus funds were for defendants to the action whose lien/interest was

affected by the foreclosure action and the owner. Surplus funds are not an unrestricted source of funds like lottery winnings for anyone the owner is indebted to.

Appellate case after appellate case after appellate case has followed the clear language of the statute. The Second DCA awarded the surplus funds to a foreclosing plaintiff who was still legally the “owner” instead of the foreclosed decedent’s children because pursuant to §45.032(1)(a), Fla. Stat. the surplus funds went to the “owner”. *Corey v. Unknown Heirs*, 301 So.3d 380 (Fla. 2nd DCA 2020). In *Corey* the children of a decedent who held equitable title by virtue of an agreement for deed were denied the surplus funds arising from the foreclosure of their father’s property. The children argued that an agreement for deed was in essence a mortgage and the plaintiff/holder of the agreement for deed the equivalent of the bank. In an agreement for deed, title does not transfer until the final payment is made. Had the plaintiff in this foreclosure action sold the property to the decedent taking back a purchase money mortgage, the decedent’s heirs would have received the surplus. In all other surplus distribution cases, the foreclosing plaintiff is not entitled to receive any of the surplus. See §45.032(1)(b) Fla. Stat (“....The lien held by the party filing the foreclosure lawsuit is not a subordinate lien.”) Yet, in *Corey* the

Second DCA said that the legislature presumably does not act in ignorance and is presumed to be acquainted with judicial decisions concerning the subject when it subsequently enacts a statute so “owner” means “owner”. *Corey*, 301 So.3d at 385.

The Fifth District Court of Appeals refused to allow surplus funds to be distributed to subordinate lienholders who were not named on the face of the complaint. *Rodriguez v. Fed. Nat'l Mortg. Ass'n*, 220 So.3d 577, 578 (Fla. 5th DCA 2017). In *Rodriguez*, the third party purchaser requested that some of the surplus funds be used to pay omitted junior lien holders. The Fifth DCA held that the only parties entitled to surplus funds were the owner of record, an assignee of the owner, or a named subordinate lienholder because when the legislature has provided a process, courts are not free to deviate from that process absent express authority.

This Court in *Saulnier v. Bank of Am., N.A.*, 187 So.3d 854, 860 (Fla. 4th DCA 2015) citing to the plain language of § 45.031(1)(a) Fla. Stat. held that a subordinate lienholder who was named in the foreclosure complaint was not entitled to any of the surplus when their claim for surplus funds was filed two (2) weeks after the 60 day time frame established by § 45.032(2), Fla. Stat. This Court gave two reasons for this finding. The first was that that statute is clear on its face. A subordinate lienholder has

60 days after the sale to file a claim. The second reason is that "equity follows the law and cannot be used to eliminate its established rules." *Id.* at 860.

The plain language of "§ 45.032(1)(b), Fla. Stat. defines subordinate lienholder as "the holder of a subordinate lien **shown on the face of the pleadings** as an encumbrance on the property." [emphasis added]. In the instant case, the First Mortgage holder never filed any pleadings; just a motion after the foreclosure sale. Further, the First Mortgage could never properly file any pleading in the underlying case because as a superior lienholder it has no interest in the case. A trial court simply cannot ignore the statutory mandate as to who can obtain surplus funds.

Had First Mortgage been a named defendant the attempt to foreclose its superior interest would be void and of no force and effect. *Bank of N.Y. Mellon v. Sperling*, 201 So.3d 697 (Fla. 4th DCA 2016) (final judgment of foreclosure by a condominium association purporting to eliminate the lien of a first mortgage is void); *Bank of Am., N.A. v. Kipps Colony II Condo. Ass'n, Inc.*, 201 So.3d 670, 675 (Fla. 2nd DCA 2016) (first mortgage entitled to set aside a final judgment of foreclosure by an association 1½ years after final judgment because the trial court lacked jurisdiction). Case law is abundantly clear that First Mortgage had no interest in the underlying

foreclosure case. If it been improperly named as a junior lienholder, any purported elimination of its lien would be void. Therefore, the surplus funds could not substitute for the non-eliminated lien.

First Mortgage was properly excluded from the underlying case and should have left matters alone or continued it own foreclosure action. A superior lien does not obtain super collection rights when a junior lienholder forecloses its lien. It remains exactly in the place it bargained for; a superior lien on the property with the ability to control its own destiny. That destiny can be to do nothing or commence its own foreclosure action assuming its lien is in default.

"To discern legislative intent, this Court looks first to the plain and obvious meaning of the statute's text, which a court may discern from a dictionary. If that language is clear and unambiguous and conveys a clear and definite meaning, this Court will apply that unequivocal meaning and not resort to the rules of statutory interpretation and construction." ... *Id.* at 385. *also see Hayes v. State*, 750 So.2d 1, 4 (Fla. 1999)

"§ 45.032(1)(b), Fla. Stat. is clear on its face in defining subordinate lienholder as "the holder of a subordinate lien **shown on the face of the pleadings** as an encumbrance on the property." [emphasis added]. In the instant case, the First Mortgage holder never filed any pleadings; just a

motion. Further, the First Mortgage is a superior, not subordinate, lienholder.

III. THE TRIAL COURT ERRED IN GRANTING INTERVENTION TO THE FIRST MORTGAGE HOLDER AS ITS INTEREST WAS NOT AFFECTED BY THE SECOND MORTGAGE FORECLOSING ITS JUNIOR INTEREST

The legislature has made the analysis very simple for trial court judges in whether to permit intervention in a foreclosure surplus distribution case after entry of the final judgment. There is no intervention unless the person seeking intervention is an assignee who has followed § 45.033, Fla. Stat.

Senior lienholders are neither necessary nor proper parties to a foreclosure action. *Cone Bros. Constr. Co. v. Moore*, 141 Fla. 420, 193 So. 288, 290 (1940). “[T]he general rule—universally—is that intervention may not be allowed after final judgment, save in the interests of justice.” *De Sousa v. JP Morgan Chase, N.A.*, 170 So.3d 928, 930 (Fla. 4th DCA 2015). “We are strongly inclined to the view that adherence to the rule rather than the exception will produce the best result in the great majority of cases.” *Id.* citing to *Md. Cas. Co. v. Hanson Dredging, Inc.*, 393 So.2d 595, 596 (Fla. 4th DCA 1981). Foreclosure of a subordinate lien does not

affect senior lien holders. *Garcia*, 906 So.2d at1121. If a truly subordinate lien was omitted than that lienholder can intervene before final judgment, redeem the property, or do nothing as its interest is not affected by a foreclosure action it was not a party to.

Thus, the trial court's inquiry to the First Mortgage holder should have been:

Question	Answer
- when was your mortgage recorded	2021
- When was plaintiff's mortgage recorded	2022

Ruling: Motion to Intervene denied because as a superior lienholder your rights are unaffected by this case. Sanctions in the amount of \$_____ are awarded as this is well settled law since 1940.

As First Mortgage remained a lien on the property after the foreclosure of plaintiff's second mortgage, it was completely unaffected by the pending litigation so had no right to intervene in the underlying foreclosure case.

CONCLUSION

Because §45.032 Fla. Stat. controls the disposition of surplus funds following a judicial sale of property, and because the trial court failed to follow the clear and unambiguous statutory language in awarding such funds to the record owner of the property's assignee, this Court should reverse the order on appeal and remand for the trial court to order Ryan & Rick, LLC to disgorge the improperly received funds to clerk with interest³ and then paid to Appellant consistent with this opinion.

Respectfully Submitted,

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³ *Garcia v. Stewart*, 961 So.2d 1025 (Fla. App. 2007)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been emailed this 7th day of May, 2024, to:

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CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

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