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BAC Home Loans Servicing, LP v. Fulbright

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BAC Home Loans Servicing, LP v. Fulbright, 298 P.3d 779 (Wash. Ct. App. April 8, 2013)

SYNOPSIS: First mortgage lender's lien was extinguished in condominium association's foreclosure of its assessment lien, by virtue of Washington's six-month association lien priority rule. Further, despite extinguishment of its lien, first mortgage lender is not entitled to statutory redemption customarily allowed in Washington to junior lienholders.

FACTS: In 2006, the condominium project of Tanglewood at Klahanie was established by recorded declaration. In 2007, Jeanne Lewis purchased a condo unit at Tanglewood, using the proceeds of a $277,000 loan from Bank of America (BOA), secured by a deed of trust on the unit. [The loan was presumably serviced by BAC, though the court's statement of facts does not say so explicitly.]

In May 2008, Lewis became delinquent in paying the monthly condominium assessments to the Tanglewood homeowners' association (the Association). In 2009, the Association began a judicial foreclosure proceeding to collect the delinquent assessments, naming and serving both Lewis and BOA (again, presumably through its BAC as the servicer). Neither Lewis nor BAC responded, and in June 2009, the trial court entered a default judgment, order, and foreclosure decree against all defendants. In May 2010, the King County Sheriff's Office held a public auction at which Fulbright purchased the unit for a high bid of $14,481.83 (the total of the unpaid assessments, plus $100.00). In June 2010, the sale was confirmed by the court.

In April 2011, within the statutory time limit for redemption by a junior lienholder, BAC notified the sheriff's office of BOA's intent to redeem the unit under the Washington's statutory redemption provision, sending the sheriff a cashier's check. Fulbright objected that the bank was not a qualified redemptioner, and the sheriff's office refused to issue a certificate of redemption.

In May 2011, BAC sued Fulbright, seeking a declaratory judgment that it was authorized to redeem the unit on behalf of BOA. Fulbright counterclaimed for an order quieting title in his favor. The trial court denied BAC's motion for summary judgment and quieted title in Fulbright, after which BAC appealed.

ANALYSIS: The Washington Court of Appeals affirmed the trial court, based on its interpretation of the relationship between the Washington condominium assessment lien statute [Wash. Rev. Code Ann. § 64.34.364] and Washington's statutory redemption provision. The latter, as reflected in Wash. Rev. Code Ann. § 6.23.010, provides as follows:

(1) Real property sold subject to redemption …may be redeemed by the following persons, or their successors in interest:
(a) The judgment debtor, in the whole or any part of the property separately sold.
(b) A creditor having a lien by judgment, decree, deed of trust, or mortgage, on any portion of the property, or any portion of any part thereof, separately sold, subsequent in time to that on which the property was sold….

The court concluded that BOA did not qualify to redeem under § 6.23.010(1)(b) because BOA's lien was not "subsequent in time" to the assessment lien of the Tanglewood homeowners association. The court noted that under § 64.34.364, the association's lien does not arise until the unit owner's assessment obligation is due. BOA had argued that the association's lien arises earlier, when the declaration authorizing the assessment lien was recorded. Thus, BOA argued that because the Tanglewood declaration was recorded in 2006 and BOA's deed of trust was not recorded until 2007, BOA's mortgage was "subsequent in time." The court rejected this argument, noting that under § 64.34.364(1), the association's lien arises "from the time the assessment is due" and that before the assessment is due, the association has no lien. Thus, the court held, BOA's deed of trust lien arose prior in time to the association's assessment lien, even though BOA's deed of trust lien was subordinated under the condominium statute's six-month limited priority provision for the association's lien. As a result, BOA's lien was not "subsequent in time" within the meaning of the redemption statute and BOA could not redeem its lien.

COMMENT: The court's conclusion that the association's lien does not arise until the assessments come due is clearly correct, but the court's interpretation of the redemption statute is awful (or, as Charles Barkley would say, "turrible"). The Washington Court of Appeals had reached the same decision last year in Summerhill Village Homeowners Ass'n v Roughley, 289 P.3d 645 (2012), and rather than recognizing the reasoning in that case as misguided, the Court instead doubled down and re-embraced it in Fulbright.

There are substantial questions about whether post-sale statutory redemption serves any useful purpose. But Washington allows it. And if a state is going to allow junior lienholders to exercise it, it should be allowed to all junior lienholders, regardless of whether they are junior by virtue of time of attachment, or by subordination via contract or operation of law.

The Fulbright court's "reasoning" implies that Washington's legislature must have meant the term "subsequent in time" in the redemption statute to mean something different from "subsequent in priority." But that suggestion is ridiculous. The Washington statutory redemption statute (with its "subsequent in time" language) predated the adoption of the condominium statute (enacted in 1990). The condominium statute did expressly subordinate an otherwise first-mortgage lien to a condominium association's assessment lien to the extent of six months' worth of unpaid assessments. But there is no reason to believe that the legislature intended for that legislative subordination to deprive the now-subordinate mortgagee of the ability to exercise the right of statutory redemption available to other junior lienholders. In context, "subsequent in time" could and should be understood to mean "subsequent in priority."

Fortunately, Washington's legislature appears to have stepped in and fixed the problem. Senate Bill 5541 proposed to amend the redemption statute to change "subsequent in time" to "subsequent in priority." The bill passed 93-0 in the Washington House and 47-2 in the Washington Senate [query what story must lie behind the 2 people who voted against it], has been signed by the Governor, and becomes effective July 28, 2013.