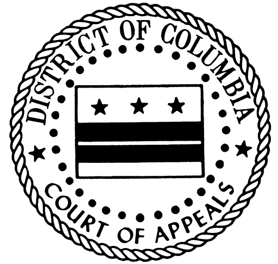
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NO. 22-CV-0005

DISTRICT OF COLUMBIA COURT OF APPEALS

NEW PENN FINANCIAL, LLC D/B/A
SHELLPOINT MORTGAGE SERVICING,

Appellant,

v.

LASHAN DANIELS; TYROSHI INVESTMENTS, LLC;
AND BRANDYWINE CROSSING I CONDOMINIUM,

Appellees.

Appeal from the District of Columbia Superior Court
2016 CA 002755 R(RP)

BRIEF OF APPELLANT NEW PENN FINANCIAL, LLC D/B/A SHELLPOINT MORTGAGE SERVICING

Andrew J. Narod (D.C. Bar No. 1006083)
Benjamin W. Perry (admitted *pro hac vice*)
BRADLEY ARANT BOULT CUMMINGS LLP
1615 L Street NW, Suite 1350
Washington, DC 20036
(202) 719-8271 (Narod direct)
(615) 252-3515 (Perry direct)
anarod@bradley.com
bperry@bradley.com

June 9, 2022

Counsel for Appellant New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing

RULE 28(a)(2) STATEMENT

Pursuant to D.C. Ct. App. R. 28(a)(2)(A), Appellant lists the following parties and counsel that were part of the proceedings in the D.C. Superior Court in Case No. 2016 CA 002755 R(RP), and parties and counsel in this appeal:

Andrew J. Narod
Benjamin W. Perry
BRADLEY ARANT BOULT CUMMINGS LLP
Counsel for New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing

Matthew Cohen
Joseph Zanelotti
Shiyu Wang
Patrick Decker
BWW LAW GROUP, LLC
Counsel for New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing

David Hornstein
Katelyn Brady
Jennifer Jackman
Thomas Mugavero
WHITEFORD, TAYLOR & PRESTON, LLP
Counsel for Brandywine Crossing I Condominium

Tracy Buck
Ian Thomas
OFFIT KURMAN
Counsel for Tyroshi Investments LLC

Michael Brand
John Callahan
Peggy Marquardt
BRAND, MARQUARDT, & CALLAHAN PLLC
Counsel for Tyroshi Investments LLC

Caroline Van Zile
Counsel for the District of Columbia

Lashan Daniels
Pro se defendant

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Ct. App. R. 26.1, Appellant New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing makes the following corporate disclosure statement:

Appellant New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing is a Delaware limited liability company and is a wholly-owned subsidiary of Shellpoint Partners LLC, a Delaware limited liability company. Shellpoint Partners LLC's members are NRM Acquisition LLC and NRM Acquisition II LLC, both of which are wholly owned by New Residential Mortgage LLC, a Delaware limited liability company. New Residential Mortgage LLC is a wholly owned subsidiary of New Residential Investment Corporation, a Delaware corporation. New Residential Investment Corporation is incorporated in Delaware with its principal place of business in New York. New Residential Investment Corporation is publicly traded on the New York Stock Exchange under ticker symbol "NYSE:NRZ."

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JURISDICTIONAL STATEMENT

This appeal arises from a final judgment disposing of all claims between the parties. The trial court had jurisdiction over this case under D.C. Code § 11-921. On August 2, 2021, the trial court sua sponte entered a "Corrective and Omnibus Order" entering summary judgment in favor of the appellees on all claims. AA297–311. Appellant New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing ("Shellpoint") timely filed a motion to alter or amend the order on August 30, 2021, AA312–20, and the court entered an order denying that motion on December 6, 2021. AA331–37. On January 5, 2022, Shellpoint timely filed this appeal from the December 6, 2021 final order of the Superior Court of the District of Columbia (Honorable Robert R. Rigsby). AA338–39.

ISSUES PRESENTED

1. Whether the trial court violated Super. Ct. Civ. R. 56(f) by sua sponte entering summary judgment in favor of non-moving parties and on issues not raised by any party without allowing Shellpoint a meaningful opportunity to conduct discovery, present its evidence, or submit briefing on the relevant issues?

2. Whether the trial court erred in holding that Shellpoint could not establish any set of facts that the condominium association foreclosure sale at issue (the "COA Sale") should be set aside on equitable grounds of fraud, oppression, and unfairness?

3. Whether the notice provision of the District of Columbia's applicable version of the since-amended nonjudicial foreclosure statute for condominium associations, codified at D.C. Code § 42-1903.13 (1992) (the "COA Statute"),[1] is facially unconstitutional because it allowed extinguishment of prior-recorded first mortgage liens without requiring notice of the foreclosure sale to those lienholders or providing compensation for the taking?

STATUTES AND REGULATIONS

The full text of the relevant COA Statute appears in the Addendum.

STATEMENT OF THE CASE

This appeal raises the question of whether a condominium owners' association ("COA") sale should be set aside on equitable grounds because the foreclosing trustee affirmatively misrepresented to all involved parties that the condominium was being sold subject to Shellpoint's prior-recorded first deed of trust securing an original principal balance of $204,000.00 (the "Deed of Trust"), resulting in a sale price of $5,000.00 (less than four percent of its tax-assessed value).

---

[1] Although the COA Statute has been amended several times, the 1992 version of the COA Statute was in effect at the time that the COA mailed the applicable notices of sale. *See* D.C. Code § 42-1903.13 (1992). The COA Statute was amended on June 21, 2014—three days before the COA Sale at issue, *see* AA091—but the substantive notice provisions remained the same in both versions. *Compare* D.C. Code § 42-1903.13(c)(4) (1992) with D.C. Code § 42-1903.13(c)(4) (2014). For purposes of this brief, any references to the COA Statute refers to the 1992 version in effect when the applicable notices were sent.

This appeal also raises issues regarding the trial court's erroneous sua sponte entry of summary judgment in favor of appellees in violation of Super. Ct. Civ. R. 56(f) and whether the 1992 COA foreclosure statute then in effect is unconstitutional under either the Due Process Clause or the Takings Clause of the Fifth Amendment to the U.S. Constitution.

The underlying action involves a judicial foreclosure sale initiated by Shellpoint and a request for declaratory judgment regarding the effect of the COA Sale on Shellpoint's prior-recorded Deed of Trust. Tyroshi Investments, LLC ("Tyroshi"), the purchaser of the property at the COA Sale, contends that it received free-and-clear title because, under District of Columbia law, properly conducted COA foreclosure sales may in some instances extinguish other liens, including first-priority deeds of trust, notwithstanding that Brandywine advertised that the COA Sale was being conducted—and the subject condominium was being sold—subject to Shellpoint's Deed of Trust.

However, before any meaningful discovery was conducted, and without notice or an opportunity to fully brief the issues, Judge Rigsby sua sponte entered summary judgment in favor of Brandywine and Tyroshi notwithstanding that discovery remained to be conducted, no summary judgment motion was pending, and Brandywine's prior motion for summary judgment addressed only one of the two bases supporting Shellpoint's claims. The trial court held that the COA Sale

could not be set aside on equitable grounds solely because the purchase price, as measured by this Court's decision in *RFB Properties II, LLC v. Deutsche Bank Tr. Co. Americas, as Tr. for Residential Accredit Loan, Inc. Mortg. Asset-Backed Pass-Through Certificates, Series 2005-QA8*, 247 A.3d 689, 696–97 (D.C. 2021), was the price paid at the COA Sale. Thus, the trial court reasoned, the purported fair market value (as measured by *RFB Properties II*) was dispositive without regard to any other factors warranting setting aside the sale. This appeal followed.

STATEMENT OF FACTS

A. Background of the Mortgage Loan and COA Sale

This case involves the Deed of Trust securing a $204,000.00 promissory note (the "Note", together with the "Deed of Trust," the "Loan") on the condominium unit located at 713 Brandywine St. SE, Unit 202, Washington, DC 20032-3568 (the "Property"). AA088–108. The Deed of Trust, recorded on June 14, 2007, lists Lashan D. Daniels as the borrower, Countrywide Home Loans, Inc. as the lender, and Mortgage Electronic Registration Systems, Inc. ("MERS") as beneficiary. AA090. On June 5, 2012, MERS recorded an assignment of the Deed of Trust to Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP ("BANA"). AA178–79. BANA recorded an assignment of the Deed of Trust to Shellpoint on August 18, 2015. AA109–10.

On April 28, 2010, Brandywine recorded a Notice of Condominium Lien for Assessments Due against the Property in the amount of $6,425.73. AA169–70. Brandywine recorded a second Notice of Condominium Lien for Assessments Due on June 24, 2011, stating that the lien consisted of $5,455.00 for amounts owed to Brandywine by Daniels. AA172–73. On May 22, 2014, Brandywine recorded a Notice of Foreclosure Sale stating that the Property would be sold at public sale on June 24, 2014. AA174. According to a Trustee's Deed recorded on September 15, 2015, Brandywine foreclosed on its lien on June 24, 2014, selling the Property to Tyroshi for $5,000.00 (the "COA Sale"). AA199–200. Brandywine represented to all involved, and the Trustee's Deed stated, that the Property was being sold "subject to the balance on a first deed of trust in the face amount of $204,000.00." AA199.

B. Procedural History

On April 12, 2016, Shellpoint filed a complaint for judicial foreclosure of the Property pursuant to the Deed of Trust. AA009–69. Shellpoint filed its operative Second Amended Complaint on September 25, 2018 to include claims for declaratory judgment against Brandywine and Tyroshi, seeking therein a declaration that the Deed of Trust was not extinguished by the COA Sale. AA070–135. Specifically, Shellpoint alleged that the COA Sale could not extinguish the Deed of Trust because the COA Sale was not properly noticed under D.C. law and because Brandywine misrepresented that the Property was being sold subject to the Deed of

Trust. AA078–82. A default was initially entered against Tyroshi for failing to answer the Second Amended Complaint, but the trial court vacated the default on March 23, 2018. *See* Trial Ct. Dkt. Entry (March 23, 2018).

On March 11, 2019, Brandywine filed a Motion to Dismiss, or in the alternative, Motion for Summary Judgment. As relevant here, Brandywine argued that it properly noticed the COA Sale in accordance with D.C. law because the COA Statute only mandated notice to the Property owner and the mayor of the District of Columbia, but did not mandate notice to other lienholders whose property interests could be extinguished by the COA Sale. AA162–63. Brandywine did not address Shellpoint's alternative claim that the COA Sale should be set aside due to Brandywine's misrepresentations that the Property was being sold subject to the Deed of Trust. *See* AA159–63. On July 12, 2019, the trial court entered an order granting Brandywine's motion in part and denying it in part. AA238–46. Specifically, the trial court granted the motion to dismiss as to the allegations of deficient notice because the COA Statute did not mandate notices to lienholders, but denied the motion as to Shellpoint's claim that the COA Sale should be set aside on equitable grounds due to misrepresentations by Brandywine. *Id.* Brandywine filed an Answer to the Second Amended Complaint on September 3, 2019. AA247–54.

On March 5, 2020, the trial court granted the parties' consent motion to extend the scheduling order to reflect a discovery deadline of May 4, 2020, and a dispositive

motion deadline of June 2, 2020. AA261. The parties' joint motion reflected that Shellpoint intended to conduct depositions of both Brandywine and Tyroshi. AA256. Tyroshi's counsel moved to withdraw as counsel on May 1, 2020, *see* Trial Ct. Dkt. Entry (May 1, 2020), and the court entered an order permitting the withdrawal on July 20, 2020. *See* Trial Ct. Dkt. Entry (July 20, 2020).

As the Court is well aware, the country began to shut down in March 2020 amidst the throes of a global pandemic caused by COVID-19. Shortly thereafter, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") in March 2020. The CARES Act provided that, except with respect to a vacant or abandoned property, a servicer could not initiate any judicial or non-judicial foreclosure process, move for a foreclosure judgment or order of sale, or execute a foreclosure-related eviction or foreclosure sale from March 18, 2020 through at least May 16, 2020 on any federally related mortgage loan. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub L. No. 116-136, 134 Stat. 281, 286 (2020). The relevant federal housing agencies announced continuing foreclosure moratoriums throughout the pandemic, the latest extension of which expired on July 31, 2021.

Shortly after the passage of the CARES Act, the Council of the District of Columbia unanimously passed temporary legislation entitled the Coronavirus Support Congressional Review Emergency Amendment Act of 2020 (the

"Emergency Act") on June 8, 2020. *See* Emergency Act, D.C. Act 23-328, 67 D.C. Reg. 7598 (June 8, 2020), *available at* https://code.dccouncil.us/us/dc/council/acts/23-328. Among other things, Section 408 of the Emergency Act implemented a foreclosure moratorium prohibiting residential foreclosures from "be[ing] initiated or conducted" during the state of emergency and for sixty days thereafter. *See id.* The public health emergency was terminated effective July 25, 2021. D.C. Mayor's Order 2021-096 (July 25, 2021), *available at https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page_content/attachments/Mayors-Order-2021-096.pdf*. Therefore, under District of Columbia law, the foreclosure moratorium expired on September 23, 2021.

During the pendency of the foreclosure moratoria, the trial court held two status conferences to determine how to move the case forward. The first status conference occurred on November 3, 2020, during which time the parties stated that the court had given Tyroshi until September 20, 2020 to obtain new counsel, and Tyroshi had failed to do so. AA264:19–265:13. After Tyroshi failed to obtain new counsel, the trial court entered a default against Tyroshi on February 5, 2021. *See* Trial Ct. Dkt. Entry (Feb. 5, 2021). On April 9, 2021, the trial court held another status conference during which Tyroshi's counsel appeared and sought to set aside the default against Tyroshi. AA271–87. The court noted that the dispositive deadline had passed without any further dispositive motions from the parties and that "for

[Shellpoint] to file a dispositive motion against an unrepresented LLC [Tyroshi] would not have served any particular purpose." AA285:9–13. Shellpoint's counsel also indicated that the litigation had been delayed because of a prior bankruptcy filing by Daniels and then the foreclosure moratorium implemented as a result of COVID-19, and the court recognized that the moratorium was scheduled to end in July 2021. AA281:15–282:3. The court indicated that it would schedule an additional hearing for August 6, 2021 to determine how to move the case forward. AA282:4–11. The court also directed the parties to submit briefing on setting aside the default, and the parties could subsequently submit a proposal for "a schedule or motions" following resolution of the default against Tyroshi. AA286:16–17.

Following the April 9, 2021 hearing, the parties submitted additional briefing regarding the default against Tyroshi. On June 21, 2021, Daniels filed a motion to dismiss her as a party because she had been evicted from the Property following the COA Sale and no longer possessed any interest in the Property. AA290–91. On August 2, 2021 (prior to the anticipated August 6, 2021 status conference), the trial court entered a "Corrective and Omnibus Order" (hereafter the "Omnibus Order") granting Daniels' motion to dismiss, vacating the default against Tyroshi, and entering summary judgment in favor of Brandywine and Tyroshi. The Omnibus Order awarded summary judgment in favor of Tyroshi and Brandywine without either party having a dispositive motion pending, and without prior notice or an

opportunity for Shellpoint to meaningfully brief the issues or present its evidence. AA297–311.

Although Brandywine previously filed a motion to dismiss, or alternatively, for summary judgment in March 2019 "with respect to all claims asserted against … Brandywine," Brandywine raised only two arguments: (1) all of Shellpoint's claims were barred by the statute of limitations (which the trial court rejected), and (2) Shellpoint failed to state a claim for Count II by alleging insufficient notice of the COA Sale because the COA Statute did not require notice to first lienholders. AA159–63. Brandywine did not address Count III (aside from the statute of limitations argument rejected by the trial court), which alleged that the COA Sale should be set aside on equitable grounds due to material misrepresentations regarding the title being conveyed. *See id.*; AA081–82. Brandywine did not file any further dispositive motions after filing its Answer to the Second Amended Complaint on September 3, 2019. *See* AA247–54.

Shellpoint filed a motion to alter or amend the Omnibus Order on August 30, 2021, arguing that the Omnibus Order improperly granted summary judgment in favor of Tyroshi and the COA in favor of a non-moving party on grounds not requested without any advance notice and a reasonable opportunity for Shellpoint to respond. AA312–19. On December 6, 2021, the court entered an order denying Shellpoint's motion to alter or amend. AA331–37. The court held that, to the extent

any notice and opportunity to respond should have been afforded to Shellpoint, any procedural error "must be counted as harmless against [Shellpoint]" because the record was "very well developed" in the case, AA332, notwithstanding the fact that (1) Tyroshi had only recently begun participating in the litigation, and (2) the court had envisioned additional deadlines at the April 9, 2021 status conference following an appearance by Tyroshi's counsel. The court also did not address the fact that Brandywine only submitted evidence and argument pertaining to one of two claims asserted by Shellpoint against Brandywine in its initial motion for summary judgment, *see* AA078–82, AA159–63. Shellpoint noticed this appeal on January 5, 2022. AA338–39.

SUMMARY OF ARGUMENT

There are multiple grounds for this Court to reverse the district court's grant of summary judgment in the COA and Tyroshi's favor. While this Court's decisions in *Chase Plaza Condominium Association, Inc. v. JPMorgan Chase Bank, N.A.* and its progeny have decided some of the issues raised in the recent wave of litigation over the mortgage-extinguishing power of COA liens under the COA Statute, several important and dispositive issues remain. Just as importantly, procedural errors underlying the lower court's decision require reversal of summary judgment.

First, the trial court prematurely and sua sponte entered summary judgment in favor of the COA and Tyroshi without prior notice or an opportunity for Shellpoint

(or any other party) to adequately present their arguments. This Court should reverse the trial court's entry of summary judgment on these procedural defects alone.

But even if the Court were to consider the merits, the trial court erred by analyzing unconscionability solely on the purported fair market value as defined by *RFB Properties II*—the price paid at the COA Sale—without regard to any other factors warranting setting aside the sale.[2] In so doing, the trial court ignored equitable factors other than sales price, such as misrepresentations regarding the title being conveyed, that would warrant setting aside the COA Sale.

Finally, the COA Statute violates the Due Process Clause and the Takings Clause of the United States Constitution by appropriating a lender's property interest for a public good without notice and without just compensation. For that additional reason, the Court should find that the Deed of Trust survived the COA Sale.

For all of these reasons, the trial court's judgment should be reversed.

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[2] Shellpoint also submits that *RFB Properties II*, 247 A.3d at 692, the case upon which the district court relied in determining the unconscionability of the purchase price, delineates an improper test for fair market value rooted in the parties' mistaken beliefs rather than the circumstances as they existed at the time of the sale. As Shellpoint and the Court are aware, this panel is not empowered to overturn this Court's past precedents. *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971) ("[N]o division of this court will overrule a prior decision of this court," as "such result can only be accomplished by this court en banc."). Nonetheless, Shellpoint submits that *RFB Properties II* was wrongly decided for purposes of preserving this issue for future en banc review.

STANDARD OF REVIEW

This Court reviews both orders granting summary judgment and issues of statutory interpretation de novo. *District of Columbia v. Place*, 892 A.2d 1108, 1110–11 (D.C. 2006). "Summary judgment is only appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Ward v. Wells Fargo Bank, N.A.*, 89 A.3d 115, 126 (D.C. 2014) (internal quotation marks omitted). "In considering summary judgment, [the Court] views the facts in the light most favorable to the non-moving [parties]." *Id.* (internal quotation marks omitted).

ARGUMENT

I. The Trial Court Improperly Denied Shellpoint an Opportunity to Present Its Evidence or Arguments Before Entering Summary Judgment in Favor of the Appellees.

The trial court's judgment should be set aside on procedural grounds alone due to the premature and procedurally deficient disposition of this case. Summary judgment should be entered only when the trial court has afforded the parties an opportunity to present their evidence and argument on the issues at play. In this case, the trial court entered a sua sponte summary judgment order despite knowledge that discovery was ongoing, additional discovery had been conducted since Brandywine's initial motion for summary judgment had been filed, and discovery in this matter had been impeded by Tyroshi's failure to participate in the litigation and

foreclosure moratoria imposed by COVID-19. As a result, the trial court's deprivation of Shellpoint's opportunity to present either arguments or evidence violated Superior Court Rule of Civil Procedure 56, and by extension, Shellpoint's right to procedural due process. This decision alone constitutes reversible error.

When a trial court sua sponte grants summary judgment to a party, as the court did in this case, the non-moving party is "entitled to prior notice and an opportunity to oppose that course of action." *Tobin v. John Grotta Co.*, 886 A.2d 87, 91 (D.C. 2005). Rule 56(f) confirms as much:

> **After giving notice and a reasonable time to respond**, the court may: (1) grant summary judgment for a nonmovant; (2) grant the motion on grounds not raised by a party; or (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

Super. Ct. Civ. R. 56(f) (emphasis added). Of the three possible court actions set forth in this rule, invocation of any one of these court actions would have alone required "giving notice and a reasonable time to respond." Here, not only did the trial court take one of these possible actions, in fact the court took all three possible actions as part of its summary judgment order. As such, the trial court was required to give Shellpoint prior notice and an opportunity to respond before entering summary judgment in favor of the appellees. It did not do so here.

"A court may grant summary judgment sua sponte when it appears that a party cannot prevail on a claim or defense as a matter of law, **so long as the losing**

party was on notice that it had to come forward with all of its evidence." *Thomas v. District of Columbia*, 942 A.2d 1154, 1158 (D.C. 2008) (emphasis added). In determining whether summary judgment was properly granted sua sponte, this Court's decisions have focused on whether the losing party was provided adequate notice. *See, e.g.*, *Embassy of Pakistan, IIS v. Lenkin Co. Mgmt.*, 996 A.2d 817, 819 (D.C. 2010) (holding that Rule 56 imposes a "mandatory procedural protection" to give a party at least ten days' notice before granting a motion to dismiss that it converted into a motion for summary judgment sua sponte); *Tobin v. John Grotta Co.*, 886 A.2d 87, 91 (D.C. 2005) (holding that trial court erred in granting summary judgment sua sponte without giving losing party "prior notice and an opportunity to oppose that course of action"). Although Rule 56(c) has since been amended to remove the requirement of ten days' notice as discussed in *Lenkin*, Rule 56(f) is clear that parties must have "notice and a reasonable time to respond."

In *Tobin*, this Court reversed the sua sponte entry of summary judgment in a case with highly analogous facts. There, the defendant moved for summary judgment on all of the plaintiff's claims except for her claim for assault and battery, and the trial court denied the motion on the basis that disputes of material facts existed. 886 A.2d at 89. The defendant sought reconsideration of the summary judgment denial, but only as to one claim for defamation. *Id.* The trial court granted the defendant's motion for reconsideration, but "[s]ignificantly," the order also

granted summary judgment on the plaintiff's remaining claims even though the defendant had not sought reconsideration on those claims, and in spite of the fact that the defendant never moved for summary judgment on the assault and battery claim. *Id.* On appeal, this Court held that, "[i]n these circumstances, before the trial court could fairly exceed the requested relief and grant summary judgment *en toto*, [the plaintiff] was entitled to prior notice and an opportunity to oppose that course of action." *Id.* at 91. Thus, this Court concluded, the plaintiff "was denied that protection when the trial court, acting in effect on its own motion, granted relief well beyond that requested by [defendant] in their motion for reconsideration." *Id.* As a result, this Court vacated the entry of summary judgment in favor of the defendant and remanded for further proceedings.

In this case, all three prongs of Rule 56(f) were satisfied (even though only one would be required) such that the trial court should have given prior notice and an opportunity for Shellpoint to respond before entering summary judgment in favor of the appellees. Specifically, the trial court (1) granted summary judgment for a nonmovant (Tyroshi and Daniels),[3] (2) granted the motion on grounds not raised by all three defendants, and (3) sua sponte granted summary judgment on its own (as to all three defendants) on evidence presented before discovery was later reopened.

[3] Brandywine could also be considered a nonmoving party as its motion for summary judgment had previously been resolved and was no longer pending.

Any one of these circumstances would have mandated notice and an opportunity for Shellpoint to present its evidence and arguments; instead, all three existed, and Shellpoint was nonetheless denied that opportunity.

First, the trial court improperly granted summary judgment for nonmoving parties. Tyroshi never filed any dispositive motion, but instead was the subject of a pending motion for default judgment. *See* Trial Ct. Dkt. Entry (Feb. 5, 2021). Although Brandywine previously filed a motion to dismiss, or alternatively, motion for summary judgment, addressing only one of the two substantive merits of Shellpoint's claims, the trial court previously resolved that motion and it was no longer pending. AA238–46. Notably, the trial court's order resolved Brandywine's prior motion as a motion to dismiss rather than converting it to a motion for summary judgment, so there was never an actual summary judgment ruling prior to the subsequent and retroactive Omnibus Order. *See* AA240–45. Finally, although Daniels filed a motion to dismiss, the trial court converted that motion to a motion for summary judgment in the Omnibus Order. AA298, 310. The entirety of the Omnibus Order was prompted solely by Daniels' motion to dismiss, and the trial court did not afford Shellpoint any notice or opportunity to respond before sua sponte entering summary judgment in favor of all of the appellees based upon stale evidence presented before additional discovery had been conducted.

Second, the trial court entered the sua sponte summary judgment order on grounds not raised by any of the parties. In its initial motion, Brandywine addressed only whether notice of the COA Sale was proper. AA208. At no point did Brandywine address Shellpoint's claim regarding whether the COA Sale should be set aside on equitable grounds. *See* AA159–63. Nor did Daniels or Tyroshi move for summary judgment on the merits as to any of Shellpoint's claims.[4] Yet, despite the content of briefing actually placed before the court, the entire focus of the Omnibus Order revolved around the issue of whether the COA Sale should be set aside on equitable grounds—an issue never briefed by the parties. As such, Shellpoint was entitled to notice and an opportunity to respond before the trial court sua sponte disposed of that claim.

Third, Shellpoint was separately entitled to prior notice because the trial court undertook to dispose of the case through a sua sponte summary judgment ruling. The Omnibus Order was issued notwithstanding the fact that discovery had been reopened following Brandywine's initial dispositive motion, and no parties had submitted additional evidence to the court following that initial dispositive motion. In addition, the parties were attempting to schedule a global mediation in addition to conducting further discovery, both of which had been frustrated by Tyroshi's

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[4] Daniels' pro se motion to dismiss was instead focused on questions as to why it was a party to this proceeding in the first place. AA289–92.

repeated failure to retain counsel in accordance with the trial court's orders. *See* Hr'g Trs., AA262–88. In the absence of additional dispositive motions, the trial court could not be sure that it had all of the relevant evidence before it, much less complete argument of the parties on that issue,[5] to determine that no dispute of material fact existed. Therefore, the trial court's sua sponte entry of summary judgment under these circumstances violated Rule 56(f)'s requirement that Shellpoint be allowed notice and a reasonable time to respond before the court summarily disposed of the case on its own review of the facts.

The trial court's sua sponte disposition of this matter is even more troublesome in light of the fact that discovery had been impeded by both Tyroshi's failure to comply with the trial court's orders and foreclosure moratoria imposed by the District of Columbia and the federal CARES Act. The most recent order extending discovery was entered on March 5, 2020, shortly before the CARES Act and Emergency Act went into effect, effectively putting a halt to the continuation of Shellpoint's judicial foreclosure action. AA261. The trial court was also aware of these discovery restrictions imposed by the foreclosure moratoria as reflected by the

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[5] Shellpoint maintains that the Omnibus Order should have considered additional facts other than the purchase price, such as whether there was fraud, oppression, and unfairness in the foreclosure process, for purposes of determining whether Brandywine's foreclosure sale should have been set aside as a matter of equity. *See* discussion *infra* Section II(B). However, Shellpoint was not afforded the opportunity to present its full arguments on this issue or on other issues.

record of the April 9, 2021 status conference. AA281:15–282:11. Notwithstanding the court's indication that the parties would be allowed to proceed with discovery and dispositive motion briefing, the trial court issued the Omnibus Order disposing of the case in its entirety on August 2, 2021. AA297–311.

After entry of the sua sponte summary judgment order, Shellpoint moved to alter or amend the summary judgment order on the basis of Rule 56(f), noting that the trial court had improperly entered summary judgment without providing notice or a reasonable opportunity to respond. AA316. The trial court rejected this argument, finding that Shellpoint "had notice and a reasonable amount of time to respond to [Brandywine's] Motion in its opposition, which was filed on March 25, 2019." AA332. Yet, critically, the court did not address the fact that Brandywine's motion did not seek relief as to Count III of the Second Amended Complaint *at all*, or that it was granting summary judgment to Tyroshi even though it had never filed *any* responsive pleading. Instead, the trial court relied upon Super. Ct. Civ. R. 54(b), which allows a trial court to revise any order or decision before entry of a final judgment. This decision was plain error, as it ignored the other bases of Rule 56(f) that applied to require prior notice and an opportunity to respond.

In this case, just as in *Tobin*, "[b]efore the trial court expanded the relief [the defendants] had requested to include summary judgment on all the counts, [Shellpoint] was entitled to the opportunity 'to come forward with all [its] evidence'

showing triable issues of fact on any or all of them." *Tobin*, 886 A.2d at 91 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)). As this Court has stated, "summary judgment is a drastic measure that may be taken only upon strict adherence to proper procedure." and failure to comply with procedural requirements "cannot be deemed 'harmless error.'" *Tompkins v. Washington Hosp. Ctr.*, 433 A.2d 1093, 1095 (D.C. 1981).

In addition to violating Rule 56, the trial court's disposition violated Shellpoint's right to procedural due process of law. Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Robinson v. Kerwin*, 454 A.2d 1302, 1307 (D.C. 1982) (quotation marks and citation omitted). This Court has held that "violations of the Superior Court Rules which provide for notice and an opportunity to be heard have the effect of denying a litigant due process of law." *Evans v. Evans*, 441 A.2d 979, 980 (D.C. 1982) (citation omitted); *see also Doe v. D.C. Metro. Police Dep't*, 948 A.2d 1210, 1218 (D.C. 2008) (same). In this case, the trial court entered a sua sponte summary judgment order without allowing the parties to submit briefing on the relevant issues, and perhaps more egregiously, without even determining whether additional evidence would be presented since Brandywine's dispositive motion had been filed nearly three years earlier. Even at that time, Brandywine's motion sought summary

judgment in the alternative and did not address the issue of equitable balancing that was subsequently dismissed sua sponte by the Omnibus Order. The trial court's failure to allow Shellpoint an opportunity to present its evidence or arguments is exactly the sort of notice and opportunity to be heard that the Superior Court Rules of Civil Procedure and procedural due process seek to prevent. Because the district court denied Shellpoint notice or a reasonable opportunity to respond before entering summary judgment in favor of the defendants, this Court should reverse the judgment of the district court for that reason alone.

II. The Trial Court Erred in Concluding that the COA Sale Should Not Be Set Aside on Grounds of Unconscionability.

The trial court's dismissal of Shellpoint's claim that the COA Sale should be set aside on equitable grounds was based upon this Court's recent decision in *RFB Properties II*, 247 A.3d at 696–97, in which this Court stated that the purchase price at the time of the foreclosure sale should be measured by the circumstances as they existed at that time—namely, that the property was being sold subject to a first deed of trust. *Id.* at 696–98. However, the trial court did not consider that, even applying the *RFB Properties II* decision, it should have considered whether the foreclosure sale should have been set aside solely on grounds of fraud and unfairness. Nonetheless, Shellpoint also respectfully submits that the *RFB Properties II* decision

was wrongly decided[6] and premised upon flawed reasoning because there was no intervening change in the law such that the circumstances at the time of the sale are any different than they are now.[7] Either way, the trial court's award of summary judgment in favor of the appellees should be reversed due to the sale of the Property for less than four percent of its tax-assessed value and misrepresentations regarding the title being conveyed.

A. The Fair Market Value for Unconscionability Purposes Should Have Been the Value Free and Clear of the Deed of Trust.

A claim that real property was purchased at an unconscionably low price at a foreclosure sale is a plea for equitable relief. *See Holman v. Ryon*, 56 F.2d 307, 310 (D.C. Cir. 1932).[8] To prevail on such a claim, the challenger to the sale must prove that the sale price "was so grossly inadequate as to shock the conscience ... and raise a presumption of fraud." *Nat'l Life Ins. Co. v. Silverman*, 454 F.2d 899, 916 (D.C. Cir. 1971) (internal quotation marks omitted). There is no "hard and fast rule" as to

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[6] See discussion *supra* footnote regarding Shellpoint's intent to raise this issue in order to preserve it for en banc review.

[7] If there was an intervening change in the law by virtue of subsequent decisions of the D.C. Court of Appeals, as stated by this Court in *RFB Properties II*, the change in law violated the Contracts Clause of the U.S. Constitution by impairing Shellpoint's preexisting contract (the Deed of Trust). However, Shellpoint maintains that the applicable superpriority portion of the law—as set forth in the COA Statute—remained the same leading up to, and at the time of, the COA Sale.

[8] "[C]ases decided by the United States Court of Appeals for the District of Columbia Circuit (and its predecessors) prior to February 1, 1971, are part of the case law of this court." *Davidson v. United States*, 137 A.3d 973, 974 n.2 (D.C. 2016).

what sale price, relative to the fair market value of the property, constitutes an unconscionable one; each case is judged according to its own facts. *Lewis v. Jordan Inv., Inc.*, 725 A.2d 495, 500 (D.C. 1999) (internal quotation marks omitted); *see also* Restatement (Third) of Property: Mortgages § 8.3 cmt. b (Am. Law Inst. 1997) (explaining gross inadequacy is assessed by comparing the sale price to the fair market value of the real estate). By example, though, this Court has found the purchase price in a judgment execution sale to be grossly inadequate where the property sold for less than one-third of its tax assessed value. *Steward v. Moskowitz*, 5 A.3d 638, 652 (D.C. 2010).

Although the COA Statute was enacted in 1992, this Court's decision in *Chase Plaza* confirmed that COA liens are entitled to true "superpriority" status, rather than mere payment priority, such that a properly noticed COA sale may in some circumstances extinguish a prior-recorded first deed of trust on the subject property. 98 A.3d at 172–76. Subsequently, this Court clarified that the superpriority lien is not a "split lien"—in other words, a COA lien is still entitled to superpriority status even if the COA foreclosed on amounts representing more than six months of delinquent assessments. *4700 Conn 305 Tr. v. Cap. One, N.A.*, 193 A.3d 762, 764–66 (D.C. 2018). In addition to its split lien analysis, the *4700 Conn 305 Trust* court vacated the district court's judgment and remanded for proceedings to determine whether the COA sale should be set aside on equitable grounds "because … (a) the

sale price was greatly below the amount of the mortgage and apparent value of the Unit, and (b) the sale by its terms was erroneously conditioned on assumption of the first deed of trust." *Id*.

Shortly after the *4700 Conn 305 Trust* decision, this Court clarified how the purchase price should be analyzed for unconscionability purposes: "It has long been recognized in this jurisdiction that the determination of whether a contract is unconscionable is made by considering the circumstances as they existed at the time the contract was entered into." *RFB Properties II*, 247 A.3d at 696–97 (collecting cases). Specifically, this Court held that the proper determination of the fair market value of real property in the context of COA sales "should not [be] assessed in the context of circumstances existing at the time the parties were litigating the summary judgment motions—specifically in the context of the new case law, *4700 Conn 305 Trust*, making it clear that the property had been purchased for $53,000 unencumbered by any liens." *Id*. at 697. Instead, in the Court's view, "viewed through the proper temporal lens, payment of this sum should have been assessed at the time of the 2015 foreclosure sale, when the property **appeared to be** encumbered by a substantial mortgage lien." *Id.* (emphasis added). To support this fair market value determination, this Court reasoned that the *4700 Conn 305 Trust* decision represented a change in the law: "[A] court cannot set aside a foreclosure sale

because **a change in the law** transforms a market-rate purchase into a bonanza." *Id.* at 698 (citing 59A C.J.S. Mortgages § 1166 (2021)) (emphasis added).

The overarching principle of law stated in the *RFB Properties II* decision—namely, that the proper fair market value assessment should be measured by the circumstances existing at the time of a COA sale—is a correct statement of the law. Shellpoint does not dispute that principle. But *RFB Properties II*'s application of that principle of law to the facts in that case was based upon flawed reasoning: namely, that the deed of trust remained a valid encumbrance following the COA's foreclosure sale until this Court's decisions concluding that a properly noticed COA sale may extinguish a first deed of trust. While it is also true that "a court cannot strike down a contract 'simply because the vicissitudes of time proved it to be a 'bad' bargain for one of the parties,'" *Id.* at 697–98 (quoting *Weisel v. Beaver Springs Owners Ass'n*, 272 P.3d 491, 501 (Idaho 2012)), the COA Sale was not "an agreement for which the parties freely bargained" between Shellpoint and any other party in this case, as was the case in *Weisel*. 272 P.3d at 502. Nor did *Chase Plaza* or its progeny represent a change in the law, as suggested by this Court in *RFB Properties II*.

This is also not a case where one party conducted a sale of property to another party that turned out to be more valuable than one party to the contract believed it to be. This case involves a non-judicial foreclosure sale of property for a small COA

lien, pursuant to a statute imposing certain duties upon the trustee conducting that sale, where the trustee made affirmative misrepresentations to all parties with an interest or seeking to obtain an interest in the Property—Daniels, Tyroshi, Shellpoint, and other bidders at the COA Sale—that resulted in an artificially depressed sale price as a direct result of the trustee's misrepresentations of the title being conveyed. Regardless of the unsettled nature of the law regarding the effect of the COA Statute, the parties' expectations were formed not from that legal uncertainty but from Brandywine's affirmative misrepresentations regarding the title being conveyed.

At bottom, *RFB Properties II*'s proposed litmus test of fair market value—the fair market value that all parties mistakenly believed was being conveyed—effectively renders the doctrine of unconscionability a nullity. As this Court has stated, "the salient consideration in a substantive unconscionability analysis is not what the defending party 'felt' the value was." *Urb. Invs., Inc. v. Branham*, 464 A.2d 93, 101 (D.C. 1983). Instead, "the proper focus is the commercial setting, purpose, and effect of the contract." *Id.* That focus is the title being conveyed at the COA Sale, which was free and clear of the Deed of Trust while Brandywine was actively representing it to be otherwise.

A recent South Carolina Supreme Court decision also provides some guidance on the proper calculation of the fair market value of a property following a

homeowners' association sale. In that case, a third party purchased the subject property at the association sale *subject to* the first deed of trust on the property, but the borrower presented evidence that the purchaser's business model was to either allow the senior lienholder to foreclose or resell the property back to the borrowers for a hefty fee. *Winrose Homeowners' Ass'n, Inc. v. Hale*, 837 S.E.2d 47, 49–50 & n.4 (S.C. 2019). To analyze whether the purchase price was unconscionable, the court assessed two separate methods for calculating the percentage of the sales price in proportion to the fair market value: the debt method and the equity method. *Id.* at 48. The debt method "focuses on the amount of debt a foreclosure purchaser must incur before gaining a free-and-clear title to the foreclosed property," whereas the equity method "focuses on the amount of equity the foreclosure purchaser stands to gain through the foreclosure sale." *Id.* at 51. Despite the fact that the deed of trust in that case did survive the association's sale, the court applied the equity method to set aside the association's sale because "it would be absurd under these circumstances to apply the Debt Method and give [the purchaser] credit for assuming the amount of the outstanding mortgage" when it had no apparent intention to do so. *Id.* at 52.

Here, either method of measuring the fair market value of the Property would result in a grossly inadequate price. Unlike in *Winrose*, Tyroshi posits that it acquired title to the Property free and clear of the Deed of Trust (and without any other

encumbrances). Neither *Chase Plaza* nor its progeny changed the express terms of the COA Statute; instead, those cases simply clarified the effect of an already-existing statute. Regardless of whether the fair market value were measured by the debt required to be paid to satisfy superior liens (none) or the amount of equity Tyroshi stands to gain, the analysis is the same: Tyroshi paid $5,000.00, barely more than 3.8% of the tax-assessed value of the Property ($131,380.00) and barely more than 2% of the original value of the Deed of Trust ($204,000.00).[9] AA206–07.

B. Even Accepting *RFB Properties II*'s Fair Market Value Determination, The Foreclosure Sale Should be Set Aside Without Reference to the Purchase Price.

The *RFB Properties II* decision dealt only with how the purchase price should be measured for purposes of an unconscionability decision. *See* 247 A.3d at 696–97. It did not, however, summarily enter judgment in favor of the appellee, but rather vacated the award of summary judgment in favor of the lender and remanded the case for further proceedings. Thus, regardless of how the purchase price should be measured, the trial court erred here by entering judgment in favor of the defendants based solely upon the *RFB Properties II* decision and the purported adequacy of the purchase price.

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[9] This calculation is premised upon these amounts as analyzed by the trial court. Notably, Shellpoint was precluded from offering expert testimony as to the actual fair market value due to the trial court's premature sua sponte disposition of this case. *See* discussion *supra* Section I.

Longstanding D.C. precedent on this issue confirms that price is but one aspect of an unconscionability analysis. One early case applies neatly to the facts at issue here, albeit in reverse: "If the [foreclosure sale] trustees stepped aside from their duty and declared to bidders upon the property that it was free from all incumbrances and that the purchaser would receive a title in fee simple, and it subsequently turned out that there were incumbrances on the property, this court would undoubtedly set aside the sale." *Fitzgerald v. Fitzgerald*, No. 1148, 1872 WL 15271, at *3 (D.C. 1872). The *Fitzgerald* court declined to set aside the sale, but solely because no misrepresentations as to title were made in that case. *Id.* The logical extension of *Fitzgerald* supports setting aside the COA Sale in this case: if marketing an encumbered property as conveying free and clear title warrants setting aside a sale, then marketing an unencumbered property as subject to several hundred thousand dollars of debt and depressing bidding to the detriment of a first lienholder should similarly warrant setting aside the sale.

The COA Sale may also be set aside on the grounds of surprise. In *Hunt v. Whitehead*, the borrower on a mortgage loan planned to obtain a loan to pay off her mortgage balance and prevent the impending mortgage foreclosure sale from proceeding. 19 App. D.C. 116, 122 (D.C. Cir. 1901). The borrower learned at the last minute that her financing to pay off the mortgage had fallen through, and although the borrower believed an arrangement had been reached to postpone the

foreclosure sale, the property was then sold at a foreclosure sale to a third party. *Id.* at 122–23. The borrower appealed the order ratifying the sale and argued that the sale should be set aside on the grounds of surprise and grossly inadequate price—namely, a purchase price of $17,600 when the borrower averred that the property was worth $26,000. *Id.* at 123. On appeal, the court ordered that the sale should be set aside solely on the grounds of surprise. *Id.* at 128. In so doing, the court stated: "[T]here are other circumstances in the case, apart from the alleged inadequacy of price, which must be allowed to have some force, **independently of the supposed inadequacy of the price received**." *Id.* at 127 (emphasis added); *see also Hotel Lafayette v. Pickford*, 85 F.2d 710, 714 (D.C. Cir. 1936) (noting that "A foreclosure sale may be set aside where there has been misconduct on the part of the trustees affecting its fairness"); *cf. Auerbach v. Wolf*, 22 App. D.C. 538, 542 (D.C. Cir. 1903) ("[I]n determining the question whether the sale shall be ratified or rejected as reported, any circumstances showing that the sale as proposed would be injurious to the parties concerned, or that a better sale might reasonably and probably have been made, will be regarded as sufficient to induce the court to refuse ratification.").

In addition, in the absence of additional dispositive District of Columbia law outlining the particular circumstances appropriate to set aside a foreclosure sale on equitable grounds, the Court may look to Maryland law to guide its decision as "especially persuasive authority when the District's common law is silent."

Napoleon v. Heard, 455 A.2d 901, 903 (D.C. 1983).[10] Maryland decisions have held that "[i]rregularities sufficient to deny ratification of a foreclosure sale include insufficient advertising, advertisements that misdescribe the property, the prevention or chilling of bidding, and an unconscionable sale price." *BWI MRPC Hotels, LLC v. Schaller*, No. 2180, 2017 WL 605037, at *6 (Md. Ct. Spec. App. Feb. 15, 2017) (citing *Bates v. Cohn*, 9 A.3d 846, 857 (Md. 2010)); *see also Carozza v. Peacock Land Corp.*, 188 A.2d 917, 920–21 (Md. 1963) (setting aside a foreclosure sale "where there ha[d] been misrepresentation, intentional or otherwise, on the part of the trustee" regarding the square footage to be conveyed).

Importantly, the Maryland Court of Appeals has also held that misrepresentations regarding the terms of the sale are a violation of the trustee's duties, even in the absence of any express statutory requirements on point. In *Goldberg v. Frick Electric Co., Inc.*, 770 A.2d 182 (Md. 2001), a judgment creditor advertised a foreclosure sale pursuant to its judgment lien but neglected to include one of the prior liens in the advertisement. *Id.* at 184. The statute governing the Sheriff's sale at issue required only that the notice of sale contain the time, place,

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[10] "The common law of the District of Columbia encompasses all common law in force in Maryland in 1801, unless expressly repealed or modified." *United States v. Jackson*, 528 A.2d 1211, 1215 (D.C. 1987) (citing, *inter alia*, D.C. Code § 49–301). Thus, "Maryland authorities expounding the common law of that state constitute powerful precedent in [the District of Columbia]." *Little v. United States*, 709 A.2d 708, 711 (D.C. 1998) (citing *Napoleon*, 455 A.2d at 903).

and terms of the sale. *Id.* at 190 (citing Md. Rules 2-644(b)). The notice at issue contained not only those terms, but also a purported list of all encumbrances upon the property. *Id.* The court held that, to the extent the sale trustee includes additional information other than that required by statute, "a duty exists to make sure that the additional information, if material, is substantially accurate." *Id.* at 194–95. The court then concluded that the misrepresentation of the existence of a lien upon the property constituted a material misrepresentation and "made the sale unfair," requiring the sale to be set aside in equity. *Id.* at 195. Here, just as in *Goldberg*, the COA Statute did not require Brandywine to announce the existence of any other liens on the Property. But once Brandywine did so, it had a duty to make sure those representations were accurate. Its material misrepresentations on this point warrant setting aside the COA Sale.

Nevada law also provides some applicable persuasive authority regarding the circumstances constituting sufficient unfairness to set aside a superpriority sale. As in the District of Columbia, Nevada courts "retain the power to grant equitable relief from a defective foreclosure sale when appropriate despite [Nevada's superpriority statute]." *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 366 P.3d 1105, 1110–11 (Nev. 2016). A year after rendering the *Shadow Wood* decision, the Nevada Supreme Court issued *Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641 (Nev. 2017). *Shadow Canyon* solidified *Shadow Wood*'s

conclusion that a court may set aside a foreclosure sale where there is fraud, unfairness, or oppression resulting in an inadequate sales price.[11] *Id.* at 642–43. *Shadow Canyon* also provided a non-exhaustive list of irregularities that may rise to the level of fraud, unfairness, or oppression to set aside the foreclosure and sale. *Id.* at 648 n.11. As relevant here, the court determined that "an HOA's representation that the foreclosure sale will not extinguish the first deed of trust" may justify unwinding the sale. *Id.*

Numerous courts, including the Ninth Circuit Court of Appeals, have applied *Shadow Canyon* to set aside superpriority foreclosure sales where the foreclosing entity misrepresented that the property was being sold subject to the first deed of trust. *See, e.g.*, *Shirehampton Drive Tr. v. JPMorgan Chase Bank, N.A.*, 835 F. App'x 181, 184 (9th Cir. 2020); *San Florentine Ave. Tr. v. JPMorgan Mortg. Acquisition Corp.*, No. 73684, 427 P.3d 125 (Table), 2018 WL 4697260, at *1 (Nev. 2018) (unpublished); *Mortg. Fund IVC Tr. 2016-RN5 v. Brown*, No. 2:17-CV-2309-KJD-BNW, 2019 WL 4675757, at *6 (D. Nev. Sept. 24, 2019); *U.S. Bank Nat'l Ass'n v. Saticoy Bay LLC Series 1915 Autumn Sage*, No. 218CV642JCMPAL, 2019

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[11] Contrary to this Court's discussion in *RFB Properties II*, Nevada law measures the fair market value in these circumstances as the property value free and clear of the first deed of trust, even though there was similar uncertainty under Nevada law regarding the effect of superpriority homeowners' association sales. *See, e.g.*, *Shadow Canyon*, 405 P.3d at 750.

WL 3366559, at *5 (D. Nev. July 25, 2019). In some of those cases, those misrepresentations were made only to the lender and not announced at the sale, but the court nonetheless set aside the sale on equitable grounds. *See, e.g.*, *San Florentine Ave. Tr.*, 2018 WL 4697260, at *1; *Autumn Sage*, 2019 WL 3366559, at *5.

It is highly unlikely that a court in any jurisdiction would hesitate to set aside a deed of trust foreclosure sale if the trustee represented that the property were being sold subject to another lien worth more than $200,000.00, thereby resulting in a purchase price of only $5,000.00 to the detriment of the borrower. That would be the case regardless of whether any of the parties actually believed that to be true if it later turned out that such lien did not actually exist. This case should be no different. There is ample unfairness associated with the COA Sale to set it aside, with or without regard to the alleged "fair market value" of the Property as determined by the *RFB Properties II* standard.

III. The Applicable Version of the Statute is Facially Unconstitutional Because It Extinguishes Junior Lienholders' Interests Without Notice or Just Compensation.

The 2014 COA Foreclosure Statute's failure to require notice to the deed of trust's beneficiary prior to extinguishing its first lien is facially unconstitutional under both the Due Process and Takings Clauses of the U.S. Constitution. For that

additional reason, the Court should find that the Deed of Trust was not extinguished by the COA Sale.

A. The Due Process Clause Requires that Lienholders Receive Notice Prior to Foreclosure of Real Property.

The due process provisions of the U.S. Constitution require that "at a minimum, [the] deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The United States Supreme Court has established the well-settled rule that state action affecting real property must be accompanied by notice of the action. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484 (1988).

In *Mullane,* the Supreme Court recognized that, prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause, a state must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane,* 339 U.S. at 314. The Court found unconstitutional a New York statute that allowed trust companies to provide notice by publication in actions to settle the accounts of trust funds, because it was

insufficient to inform the beneficiaries whose names and addresses were known. *Id.* at 320. Rather, personal service or a mailed notice was required. *Id.* at 318. Nor is a token effort acceptable; "a mere gesture" with regard to notice "is not due process." *Id.* at 315.

In *Mennonite Bd. of Missions v. Adams*, the Supreme Court elaborated on this fundamental due process obligation, holding that any party with an interest in real property subject to deprivation must receive "actual notice" of the event that causes the deprivation. 462 U.S. 791, 795 (1983). Moreover, "[n]otice by mail or other means as certain to ensure actual notice is a **minimum constitutional precondition** to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice." *Id.* at 798 (emphasis added). While the extent of the required diligence may differ depending on the context, *Mennonite* requires that reasonable steps be taken by the party seeking to convey or burden the real property to provide actual notice to interested parties. *See id.* at 795–800.

The precise form of notice and the precise kind of hearing required depends upon a balancing of the competing public and private interests involved, as defined by the now familiar *Mathews* factors: (1) the private interest affected by the government action; (2) the risk of erroneous deprivation and the value of additional safeguards; and (3) the government's interest, including the fiscal and financial

burdens that additional or substitute procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *see also Connecticut v. Doehr*, 501 U.S. 1, 11 (1991). "Nevertheless, **however weighty the governmental interest may be in a given case, the amount of process required can never be reduced to zero**—that is, the government is never relieved of its duty to provide some notice and some opportunity to be heard prior to final deprivation of a property interest." *Propert v. D.C.*, 948 F.2d 1327, 1332 (D.C. Cir. 1991) (emphasis added) (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982)).

Liens are constitutional when they impair a property right with notice and an opportunity to be heard—not when they deprive an individual of property without notice or a hearing, as the 2014 COA Statute did to Shellpoint here. The basic rule in lien law is first in time, first in right, meaning that a recorded interest has priority over later recorded interest. *U.S. By & Through I.R.S. v. McDermott,* 507 U.S. 447, 449 (1993) ("Absent provision to the contrary, priority for purposes of federal law is governed by the common-law principle that 'the first in time is the first in right.'"). There are, of course, exceptions to this rule. Certain liens, such as property tax liens, can have priority over previously recorded interests. *See, e.g.*, *McDermott*, 507 U.S. at 449. Yet when the government forecloses on a property tax lien, it is required to give notice to the party whose property interest will be erased by that foreclosure. *See, e.g., Mennonite,* 465 U.S. at 791 (1983); *Covey v. Town of*

Somers, 351 U.S. 141 (1956). And under the District's replevin statute, this Court "question[ed] seriously whether due process would be afforded … in the absence of any provision for 'reasonable' notice to a chattel mortgagee." *Franklin Inv. Co. v. D.C.*, 462 A.2d 447, 450 (D.C. 1983).

A line of cases holding lien statutes unconstitutional for lack of notice and a chance to be heard makes very clear that the COA Statute is unconstitutional. For example, Maryland's highest court struck down the nation's oldest mechanic's lien law (dating to 1791) because the statute created liens that "temporarily deprive[d] a debtor of a significant property interest" without actual notice to the party whose rights were impaired or a prior hearing. *Barry Properties v. Fick Bros.*, 242 A.2d 222, 232 (Md. 1976). Deprivation of a property interest without notice or a hearing meant the lien statute violated the Due Process Clause, and was unconstitutional. *Id.* The *Barry* court was clear that there was state action, implicating the Due Process Clause: "We think it clear that mechanics' liens involve state action since they are created, regulated and enforced by the State. *Id.* at 228 (citations omitted).

So it must be here. The Statute does not merely temporarily deprive Shellpoint of a property interest—it extinguishes it forever. The Statute did not require notice or a hearing before extinguishment, as the Due Process Clause would require. And the Statute is state action, as drafted by the District of Columbia's legislative body and construed by its courts. *See Barry*, 242 A.2d at 228; *Stop the Beach*

Renourishment, Inc. v. Florida Dep't of Envtl. Prot., 560 U.S. 702, 715 (2010) ("But the particular state actor is irrelevant. If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property…."). And the nature of COA liens is such that there will virtually always be a quiet title action to determine the validity of the sale given the various defenses that could result in a COA sale being conducted subject to a first deed of trust that would not otherwise be reflected in the public record. *See, e.g.*, *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 427 P.3d 113, 120 (Nev. 2018) (holding that first lienholder's tender of superpriority amount extinguished superpriority portion of lien and resulted in sale subject to deed of trust).

Many other courts have likewise invalidated lien statutes that, like the COA Statute, conferred power on private actors to impair other persons' property rights without notice, without a hearing, or both. Where Connecticut passed a law under which mechanic's liens could be filed and perfected "without authorization, supervision, or control by a judicial officer," and provided no right to hearing by the party whose property was liened, that law violated the Due Process Clause because it failed to provide a hearing. *Roundhouse Const. Corp. v. Telesco Masons Supplies Co.*, A.2d 393, 394 (Conn. 1976). Nevada's landlord lien laws were held unconstitutional to the extent they allowed deprivation of property by a landlord against a tenant without notice or a hearing. *Adams v. Joseph F. Sanson Inv. Co.*,

376 F. Supp. 61, 68-69 (D. Nev. 1974). California's Innkeeper's Lien Law proved unconstitutional under the Due Process Clause where it permitted a private party to create a lien without a hearing before the lien was imposed. *Klim v. Jones*, 315 F. Supp. 109, 122 (N.D. Cal. 1970). *Klim* correctly emphasized the state action in fashioning this private lien, calling it "action encouraged, indeed only made possible, by explicit state action." *Id.* at 114. Finally, Georgia's statute authorizing all liens on personalty was held unconstitutional because it did not require notice or a hearing before the lienor deprived someone of their interest in their property, and thus did not provide due process. *Mason v. Garris*, 360 F. Supp. 420, 423 (N.D. Ga.), *as amended*, 364 F. Supp. 452 (N.D. Ga. 1973).

By contrast, drafting a lien statute that does not violate the Due Process Clause is a straightforward endeavor. All the legislature need do is provide the notice and a chance to be heard for all interested parties—a crucial element that all of the foregoing invalid statutes, and the COA Statute, lacked. Maryland's condominium lien statute, for example, was deemed constitutionally valid where interested parties had notice and an opportunity to object. *Golden Sands Club Condo., Inc. v. Waller,* 545 A.2d 1332, 1338 (Md. 1988). And, while Washington and Nevada permit HOA liens to extinguish prior recorded property interests, such as a lender's interest under a mortgage, both only permit extinguishment where there is notice to the deed of trust holder and a right to redeem. *Compare* Wash. Rev. Code § § 64.34.364(4), (7)

with *BAC Home Loans Servicing, L.P. v. Fulbright,* 328 P.3d 895, 901 (Wash. 2014); *see also SFR Inv. Pool 1 v. U.S. Bank*, 334 P.3d 408, 418 (Nev. 2014) (observing that Nev. Rev. Stat. § 116.31168 (2013) incorporated Nev. Rev. Stat. § 107.090 (2013), which required that notices be sent to a deed of trust beneficiary). And it is important to note that the Council of the District of Columbia quickly amended the features of the 2014 iteration of its COA Statute that violated the Due Process Clause after this Court issued *Chase Plaza, see* D.C. Code § 42-1903.13(c)(4)(E)(i)(III) (2017), underscoring that the COA Statute was initially drafted in a way that violates constitutional and national norms of due process.

Shellpoint is aware of this Court's decision in *Harris v. Northbrook Condo. II*, 44 A.3d 293 (D.C. 2012), in which the Court rejected a borrower's due process challenge to the COA Statute where the borrower failed to receive actual notice of the sale.[12] *Id.* at 294. The Court held that there was no state action as required to implicate due process because the sale involved only private parties. *Id.* at 298. However, *Harris* and the cases cited therein are materially distinguishable from this case in a fundamental way: here, the right to extinguish a first lienholder's interest did not exist separate and apart from the COA Statute, unlike in *Harris* and other

[12] Shellpoint believes the instant case is distinguishable from *Harris* such that the Court may find a due process violation consistent with *Harris*'s holding. However, to the extent *Harris* must be overruled, Shellpoint is advancing this argument to preserve it for en banc review.

cases cited. In *Harris*, just as with deed of trust foreclosure cases often cited for the principle that no state action existed, the condominium owner had a private contract with the COA that allowed the COA to foreclose on his/her unit if the owner failed to pay dues, and the COA Statute merely governed the terms by which that could be done (similar to deed of trust foreclosure statutes). The COA's ability to extinguish a first lien, by contrast, was purely a statutory creation that would not otherwise have existed.

The COA Statute is fatally flawed insomuch as it allows the extinguishment of a lienholder's property interest without prior notice. Although this Court has not addressed the constitutionality implications of the Statute's deficient notice requirements, the Court hinted that such concerns may exist without addressing the issue because it was not previously properly brought before the Court. *See Chase Plaza Condo. Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 177 n.7 (D.C. 2014) ("We also note that JPMorgan has not argued that the lack of a notice requirement renders D.C. Code § 42-1903.13(a)(2) unconstitutional either facially or as applied to JPMorgan in this case. We therefore have no occasion to address those issues.").

As the Court seemed to imply in *Chase Plaza*, the COA Statute is unconstitutional on a facial and as-applied basis. Specifically, none of its provisions authorizing notice of foreclosure sales require notice to lenders, despite the fact that

the lenders' property rights are directly threatened by a COA's non-judicial foreclosure. The COA Statute does not require a COA to give notice to a lender of a homeowner's default. Nor does the COA Statute require the COA to give notice to the lender that it is selling the mortgage-encumbered property—or even of the amount in arrears, so that the lender could satisfy the lien (or the superpriority amount) and seek to preserve its mortgage rights. By casting a cloak of silence over a COA's extraordinary power and keeping the lender in the dark, the COA Statute thwarts the lender's ability to protect itself against the deprivation of its property rights wrought by the COA Statute.

In sum, the COA Statute here is like the five above-described lien statutes that were held unconstitutional, but even worse. It allowed the COA to place a lien, and extinguish outright and in perpetuity, Shellpoint's prior-recorded property interest, all without notice or a hearing to protect it. Meanwhile, a host of other statutes in this area comport with due process, as do lien statutes generally, for they confer notice and the chance for a hearing where they impair property rights. As a result, it is clear that the Statute violates due process.

B. The Statute Violates the Takings Clause of the United States Constitution, Rendering It Void and Unenforceable.

In addition to violating Shellpoint's due process rights, the Statute violates the Takings Clause by extinguishing the property rights of first lien holders like Shellpoint without compensation.

The Fifth Amendment to the United States Constitution[13] prohibits "private property be[ing] taken for public use without just compensation." U.S. Const. Amend. V; *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 228–29 (1897). When the government takes altogether an interest in property, "it has a categorical duty to compensate the former owner." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). Where the government effects a complete ouster of a property interest, that action serves as a *per se*, physical taking that the government must compensate under the Fifth Amendment. *See, e.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (holding that where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation); *Cebe Farms, Inc. v. United States*, 116 Fed. CI. 179, 192 (2014) (recognizing that physical takings "involve a physical occupation or destruction of property"). A lien is undeniably "property" within the meaning of the Clause. *United States v. Sec. Indus. Bank*, 459 U.S. 70, 76–77 (1982). As such, the extinguishment or destruction of a lien can be a taking under the Clause. *Id.* at 77–78.

[13] "Because [the District of Columbia] is a political entity created by the federal government, it is subject to the restrictions of the Fifth Amendment …." *Propert v. District of Columbia*, 948 F.2d 1327, 1330 n.5 (D.C. Cir. 1991) (citing *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

There was an unconstitutional taking here because: (a) Shellpoint's Deed of Trust on the Daniels home was "property" within the meaning of the Takings Clause; (b) through the COA Statute, the District of Columbia authorized the COA to extinguish altogether Shellpoint's property interest; (c) the District of Columbia's delegation to a private actor of the power to extinguish Shellpoint's property interest does not make it any less a taking given the rich history of delegated private takings law; and (d) Shellpoint received no compensation for the property interest it lost.

Underscoring the taking present here, the Supreme Court struck down as a prohibited regulatory taking a law that, like the COA Statute, took a bank's security interest in their collateral. See *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935). The *Radford* Court held the Frazier-Lemke Act, which allowed farmers to buy their property at its current appraised value on a deferred payment plan, unconstitutional. *Id.* at 580–81. The Act's infringement of a mortgagee's right to recover full payment before being forced to abandon its security interest was impermissible because that is "the essence" of a mortgage. *Id.* The Court held that the Act impaired substantive property rights and held that Fifth Amendment eminent domain proceedings and compensation were required to alter the mortgagee's interest in that way. *Id.*

A later Supreme Court case involving liens likewise makes clear that this Statute effects a taking. *Armstrong v. United States*, 364 U.S. 40 (1960). In

Armstrong, the Supreme Court found a statute that destroyed the entire value of a lien to be a taking. *Id.* at 48. In *Armstrong*, where materialmen delivered materials to a contractor for use in constructing navy boats and obtained liens in the vessels pursuant to state law, the Court held that the government committed a taking when it took title to and possession of the property and made it impossible for the materialmen to enforce their liens. *Id.* There, the statute gave the United States government the right to recover all unfinished work, including materials, free of encumbrances, to protect the government's property interests. The Supreme Court explained that the "total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking'...." *Id.* In other words, the lienholders had compensable property, but "[i]mmediately afterwards, they had none." *Id.* And, "[t]his was not because their property vanished into thin air," but rather because the value of the liens had been destroyed by statutory fiat. *Id.*

Although in *Armstrong* the government physically acquired the liened property, the Court subsequently clarified that this fact was not material in determining that a taking had occurred. *Sec. Indus. Bank*, 459 U.S. at 77–78. Rather, the government's "simply impos[ing] a general economic regulation," which "in effect transfers the property interest from a private creditor to a private debtor" is also a taking. *Id.* at 78. And "takings analysis is not necessarily limited to outright

acquisitions by the government for itself." *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The COA Statute here likewise effected the complete destruction of the interest of Shellpoint as a first lienholder. *Armstrong* compels the conclusion that the COA Statute effects an unconstitutional taking.

The COA Statute here effects a transfer of a property interest from the party otherwise entitled to it—here, a beneficiary under a deed of trust—to the real estate investors purchasing borrowers' homes at COA superpriority lien foreclosure sales, and for the stated public purpose of ensuring that COAs are made whole on their minimal dues and collections assessments. *Chase Plaza*, 98 A.3d at 177 (noting that the purpose of the superpriority lien is to ensure prompt and efficient enforcement of the association's lien for unpaid assessments). The result is a taking of property without just compensation.

The COA Statute thus effects a taking by extinguishing Shellpoint's property right in the name of making COAs whole on (minor) covenant violation assessments and (typically much larger) collection and attorneys' fees. There is no question that such a taking is for public use. The Council, by allowing COAs to have priority for payment, is following a policy concerning the support of COAs and the maintenance of common interest communities. Under the COA Statute, however, there is no compensation for the mortgage-holder when this public purpose is served, and a

security interest worth hundreds of thousands of dollars is taken by law. The COA Statute deprives Shellpoint of its interest in real property, thus causing it to bear not only the burden of paying COA assessments, but the burden of losing its security interest in real property that is worth many times what the COA is owed. Meanwhile, the Statute conveys what can only be described as a huge windfall—the security interest it takes from Shellpoint—to the speculators and real estate investors buying up the homes occupied by District of Columbia borrowers for comparative pennies on the dollar.

CONCLUSION

For the foregoing reasons, Shellpoint respectfully requests that this Court reverse the district court's judgment dismissing the Complaint and remand this case to the district court with instructions to enter new discovery and dispositive motion deadlines such that the parties may adequately conduct discovery and present all appropriate arguments in support of their positions upon remand.

Dated: June 9, 2022

Respectfully submitted,

/s/ Andrew J. Narod
Andrew J. Narod (D.C. Bar No. 1006083)
Benjamin W. Perry (admitted *pro hac vice*)
BRADLEY ARANT BOULT CUMMINGS LLP
1615 L Street NW, Ste. 1350
Washington, DC 20036

Counsel for Plaintiff/Appellant NewRez LLC, d/b/a Shellpoint Mortgage Servicing

REDACTION CERTIFICATE DISCLOSURE FORM

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

- An individual's social-security number
- Taxpayer-identification number
- Driver's license or non-driver's' license identification card number
- Birth date
- The name of an individual known to be a minor
- Financial account numbers, except that a party or nonparty making the filing may include the following:

(1) the acronym "SS#" where the individual's social-security number would have been included;
(2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(4) the year of the individual's birth;
(5) the minor's initials; and
(6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Andrew J. Narod	22-CV-0005
Signature	Case Number(s)
Andrew J. Narod	June 9, 2022
Name	Date
anarod@bradley.com	
Email Address	

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Appellant's Opening Brief was served via the Appellate E-filing System on this 9th day of June, 2022 on the following:

Thomas C. Mugavero
WHITEFORD, TAYLOR & PRESTON LLP
1800 M Street, N.W., Suite 450N
Washington, DC 20036-5405

Counsel for Defendant/Appellee Brandywine Crossing I Condominium

Caroline Van Zile
Office of the Attorney General
400 6th Street NW
Washington, DC 20001

Counsel for the District of Columbia

John J. Callahan
BRAND, MARQUARDT & CALLAHAN, PLLC
1325 G Street NW, Suite 500
Washington, D.C. 20005

Ian Thomas
Tracy Buck
OFFIT KURMAN
1325 G Street, NW, Suite 500
Washington, D.C. 20005

Counsel for Defendant/Appellee Tyroshi Investments, LLC

I further certify that I have mailed by United States Postal Service the document to the following individuals not registered to receive service through the Appellate E-filing System on this 9th day of June, 2022:

Lashan D. Daniels
7513 Snowbell Lane
Clinton, MD 20735

Pro se Defendant/Appellee

/s/ Andrew J. Narod

Counsel for Plaintiff/Appellant NewRez LLC, d/b/a Shellpoint Mortgage Servicing

PERTINENT STATUTORY BACKGROUND

Pursuant to D.C. App. R. 28(f), Shellpoint includes the relevant statutory provisions—D.C. Code § 42-1903.13 (1992):

(a) Any assessment levied against a condominium unit in accordance with the provisions of this chapter and any lawful provision of the condominium instruments shall, from the time the assessment becomes due and payable, constitute a lien in favor of the unit owners' association on the condominium unit to which the assessment pertains. If an assessment is payable in installments, the full amount of the assessment shall be a lien from the time the first installment becomes due and payable.

(1) The lien shall be prior to any other lien or encumbrance except:

…

(B) A first mortgage for the benefit of an institutional lender or a 1st deed of trust for the benefit of an institutional lender on the unit recorded before the date on which the assessment sought to be enforced became delinquent; …

(2) The lien shall also be prior to a mortgage or deed of trust described in paragraph (1)(B) of this subsection and recorded after March 7, 1991, to the extent of the common expense assessments based on the periodic budget adopted by the unit owners' association which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien. The provisions of this subsection shall not affect the priority of mechanics' or materialmen's lien.

(b) The recording of the condominium instruments pursuant to the provisions of this chapter shall constitute record notice of the existence of such lien and no further recordation of any claim of lien for assessment shall be required.

(c)(1) The unit owners' association shall have the power of sale to enforce a lien for an assessment against a condominium unit if an assessment is past due, unless the condominium instruments provide otherwise. Any language contained in the condominium instruments that authorizes specific procedures by which a unit owners' association may recover sums for which subsection (a) of this section creates a lien, shall not be construed to prohibit a unit owners' association from foreclosing on a unit by the power of sale procedures set forth in this section unless the power

of sale procedures are specifically and expressly prohibited by the condominium instruments.

…

> (4) A foreclosure sale shall not be held until 30 days after notice is sent by certified mail to a unit owner at the mailing address of the unit and at any other address designated by the unit owner to the executive board for purpose of notice. A copy of the notice shall be sent to the Mayor or the Mayor's designated agent at least 30 days in advance of the sale. The notice shall specify the amount of any assessment past due and any accrued interest or late charge, as of the date of the notice. The notice shall notify the unit owner that if the past due assessment and accrued interest or late charge are not paid within 30 days after the date the notice is mailed, the executive board shall sell the unit at a public sale at the time, place, and date stated in the notice.
>
> (5) The date of sale shall not be sooner than 31 days from the date the notice is mailed. The executive board shall give public notice of the foreclosure sale by advertisement in at least 1 newspaper of general circulation in the District of Columbia and by any other means the executive board deems necessary and appropriate to give notice of sale. The newspaper advertisement shall appear on at least 3 separate days during the 15-day period prior to the date of the sale.

….