NO. 23-CV-0267

DISTRICT OF COLUMBIA COURT OF APPEALS

FLAGSTAR BANK, FSB,

Appellant,

v.

SALVADOR RIVAS; ADVANCED FINANCIAL INVESTMENTS, LLC; NEW HAMPSHIRE CONDOMINIUM UNIT OWNERS' ASSOCIATION,

Appellees.

Appeal from the District of Columbia Superior Court
2017 CA 000373 R(RP)

BRIEF OF APPELLANT FLAGSTAR BANK, FSB n/k/a FLAGSTAR BANK, N.A.

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October 6, 2023

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. 2017 CA 000373 R(RP), and parties and counsel in this appeal:

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Ct. App. R. 26.1, Appellant Flagstar Bank, FSB makes the following corporate disclosure statement:

Appellant Flagstar Bank, FSB, is now known as Flagstar Bank, N.A. Flagstar Bank, N.A. is a federally chartered national bank, and is wholly owned by New York Community Bancorp Inc., a publicly traded entity incorporated and validly existing under the laws of the State of Delaware. According to the schedules filed with the Securities and Exchange Commission (SEC), BlackRock, Inc., and The Vanguard Group are holders of 10% or more of the stock of New York Community Bancorp Inc., and are therefore indirect holders of an equity interest of 10% or more in Flagstar Bank, N.A.

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JURISDICTIONAL STATEMENT

This is an appeal of three orders entered in Case No. 2017 CA 00373 R(RP) from the Superior Court of the District of Columbia. On October 10, 2019, the Superior Court issued an order granting Defendant-Appellee New Hampshire House Condominium Unit Owners Association's (the "Association") partial motion to dismiss, disposing of Plaintiff-Appellants Flagstar Bank, FSB n/k/a Flagstar Bank, N.A.'s ("Flagstar") breach of fiduciary duty and unjust enrichment claims against the Association (the "2019 Order"). On September 1, 2020, the Superior Court issued another order granting the Association's motion to dismiss, disposing of Flagstar's judicial foreclosure and declaratory judgment claims against the Association (the "2020 Order"). On April 5, 2023, the Superior Court issued a final order, granting Defendant-Appellee Advanced Financial Investments, LLC's ("AFI") motion for judgment on the pleadings, disposing of Flagstar's claims against AFI ("2023 Order").

Flagstar timely appealed each of these orders when it filed its notice of appeal on March 29, 2023.

ISSUES PRESENTED

1. Did the Superior Court err by deviating from the standard of review for a motion to dismiss when it failed to accept Flagstar's allegations as true and draw all reasonable inferences in Flagstar's favor?

2. Did the Superior Court err by determining that Flagstar's claims were time-barred on the face of the complaint?

3. Did the Superior Court err by determining when Flagstar's causes of actions accrued, a contested factual issue, on a motion to dismiss?

4. Did the Superior Court err by failing to consider the discovery rule invoked by Flagstar, thereby applying the incorrect standard for what constituted the accrual of Flagstar's cause of actions, resulting in the dismissal of Flagstar's causes of action as time-barred?

5. Did the Superior Court err by failing to consider each discovery rule factor, *i.e.*, when Flagstar knew or should have known of (1) its injury, (2) the injury's cause in fact, and (3) of some evidence of wrongdoing by Appellee's, before determining what constituted the accrual of Flagstar's cause of actions?

6. To the extent the Superior Court considered the discovery rule, did it err in its application?

7. Did the Superior Court fail to assess Flagstar's allegation independently in its 2020 Order, instead relying on conclusions in the 2019 Order that did not properly consider or apply the discovery rule and erroneously held that Flagstar's claims were, in part, time-barred?

8. Did the Superior Court fail to assess Flagstar's allegation independently in its 2023 Order, instead relying on conclusions in the 2019 Order

that did not properly consider or apply the discovery rule and erroneously held that Flagstar's claims were, in part, time-barred?

9. Did the Superior Court err in its 2023 Order in finding Flagstar's unjust enrichment claim against AFI was time-barred?

10. Did the Superior Court err in determining that Flagstar's lien was extinguished as a matter of law when it failed to consider this Court's rulings in *Liu v. U.S. Bank National Ass'n*, 179 A.3d 871 (D.C. 2018), *4700 Conn 305 Trust v. Capital One, N.A.*, 193 A.3d 762 (D.C. 2018), and *U.S. Bank Tr., N.A. v. Omid Land Grp., LLC*, 279 A.3d 374, 379 (D.C. 2022), which expressly permit the holder of a first deed of trust to seek avoidance of the extinguishment of its lien under D.C. Code § 42-1903.13 by challenging the price and terms of the sale?

STATEMENT OF CASE

In a 2019 Order, the Superior Court incorrectly ruled that Flagstar's claims were time-barred. The Superior Court's Order relied on several incorrect assumptions, and as a result, it failed to apply the discovery rule or the principle of equitable tolling in the manner required under the law of the District of Columbia. These errors had a cascading effect on future proceedings in this case, as each of the later orders appealed from relied on portions of the 2019 Order to support the erroneous findings made therein. The cascading errors of the Superior Court ultimately resulted in the erroneous dismissal of all of Flagstar's claims against

both Appellees. As a result, the Superior Court erroneously provided AFI free and clear title to a property purchased at a condominium foreclosure sale that was (1) sold at an unconscionably low price and (2) containing patently false terms of sale, without adjudicating claims concerning those irregularities on their merits.

Flagstar filed for judicial foreclosure against AFI and Appellee Salvador Rivas ("Mr. Rivas") on January 19, 2017. Mr. Rivas defaulted on the mortgage encumbering 3540 Rock Creek Church Rd. NW, Apt 102, Washington, D.C. 20010 (the "Property"). The Superior Court entered default judgment against Mr. Rivas. AFI filed an answer to Flagstar's complaint. In its answer, AFI stated that it owned the Property in 2014 following the Association's foreclosure on its condominium lien, and, for the first time, asserted that Flagstar's lien was extinguished under D.C. Code § 42-1903.03. As a result, Flagstar amended its complaint, adding the Association as an indispensable party and asserted claims that addressed the validity of the Association's foreclosure sale.

The Association filed a partial motion to dismiss Flagstar's breach of fiduciary duty and unjust enrichment claims, both of which pertained to the validity of the Association's foreclosure sale, as time barred. On October 10, 2019, the Superior Court granted the Association's partial motion to dismiss, finding that Flagstar possessed sufficient facts about its claims in 2014, around the time of the Association's foreclosure sale, which triggered the three-year statute of limitations

applicable to its claims against the Association, and Flagstar failed to assert those claims against the Association by 2017. The Superior Court further "put[] aside Flagstar's contention that the Association" misrepresented that the condominium sale was subject to Flagstar's Deed of Trust, implying that the Association could not be liable for misrepresentation and therefore could not violate Flagstar's rights because the Association could not anticipate that the condominium sale would extinguish Flagstar's Deed of Trust in 2014. Instead, the Superior Court concluded that Flagstar had the same ability as the Association to anticipate a change in the law.

The Association subsequently filed a motion to dismiss Flagstar's judicial foreclosure and declaratory judgment claims, with both claims also pertaining to the validity of the Association's foreclosure sale, as time-barred and on the basis that Flagstar's lien was extinguished. On September 1, 2020, the Superior Court granted the Association's motion to dismiss, disposing of all claims against the Association. In dismissing the judicial foreclosure and declaratory judgment claim the Superior Court determined that the Association's condominium foreclosure sale extinguished Flagstar's Deed of Trust as a matter of law, ignoring Flagstar's contentions as to the validity of the sale based on the inadequacy of the sale price and the misstatements in the condominium foreclosure sale advertisement, pursuant to *4700 Conn 305 Trust*. Additionally, the Superior Court, relying on the

2019 Order, determined that the facts underpinning the declaratory judgment claim, including the inadequacy of the sale price, were time-barred because Flagstar had "the same ability as the Association to anticipate a change in the law."

AFI subsequently filed a motion to dismiss and/or motion for summary judgment to dispose of Flagstar's judicial foreclosure, declaratory judgment, and unjust enrichment claims, alleging therein that the claims were time-barred and that Flagstar's lien was extinguished under D.C. Code § 42-1903.03. On February 27, 2023, the Superior Court granted AFI's motion, disposing of all claims against AFI. In disposing of Flagstar's claims, the Superior Court cited the 2019 and 2020 Order, finding that it previously determined that Flagstar's claims against the Association were time-barred and applied the same reasoning to the claims against AFI. In fact, the Superior Court's 2023 Order was void of any substantive analysis of the claims against AFI.

STATEMENT OF FACTS

On or about July 24, 2009, Flagstar loaned Mr. Rivas the principal amount of $256,634.00 to Mr. Rivas (the "Loan"). AA171-172. In return, Mr. Rivas executed both a Promissory Note and Deed of Trust, both signed under seal. AA187-203. The Deed of Trust was recorded with the Recorder of Deeds for the District of Columbia on April 30, 2010. AA172. On October 10, 2014, Mortgage Electronic Registration Systems Inc., as nominee for Flagstar, assigned its rights

under the Note and Deed of Trust to Flagstar. AA172. This assignment was recorded with the Recorder of Deeds. AA204-206. Flagstar holds the Note and is the current beneficiary of the Deed of Trust. AA172.

On May 1, 2010, Mr. Rivas defaulted on the Note. AA172. As a result, on June 18, 2010, a demand letter was sent to Mr. Rivas, accelerating the Loan. AA172. Mr. Rivas also apparently failed to pay his condominium fees. Consequently, in November 2014, the Association noticed a foreclosure sale of the Property for six months of unpaid condominium assessments in the amount of $22,234.75. AA176. The Association scheduled a foreclosure sale date of December 23, 2014 (the "2014 Foreclosure"). AA172.

The Association, through its Attorney Elizabeth Menist, advertised the 2014 Foreclosure (the "Advertisement") in advance of the selected sale date. AA172. The Association's Advertisement of this sale contained the following:

> TERMS OF SALE: Sold subject to the first deed of trust for the amount of approximately $256,632.00 (as of 7/24/2009). . . . Also sold subject to any other prior liens, encumbrances, and municipal assessments. . . .

AA223. At the 2014 Foreclosure, the auctioneer announced that the Property was being sold subject to Flagstar's Deed of Trust. AA172.

At the 2014 Foreclosure, AFI acquired the Property for $26,000.00, receiving a Memorandum of Purchase. AA172. The Memorandum of Purchase reinforced that the purchase by AFI was subject to the first Deed of Trust "from

7/24/2009 original amount of $256,632" and subject to the terms of the Advertisement (the "Memorandum of Purchase"). AA172. Soon after the purchase, a Trustee's Deed of Foreclosure for Unpaid Condominium Assessments, stating that Property was sold subject to Flagstar's Deed of Trust, was recorded with the Recorder of Deeds for the District of Columbia as Instrument Number 2015013627 (the "Trustee's Deed"). AA172.

Flagstar believed that its Deed of Trust was protected because the Advertisement, Memorandum of Purchase, and the recorded Trustee's Deed all stated that the Property was subject to the Deed of Trust. AA172. Thus, Flagstar continued to pay property taxes on the Property, even after AFI took ownership. AA180-181.

In proceedings before the Superior Court, Flagstar alleged that the statement in the Advertisement that the Property would be sold subject to Flagstar's Deed of Trust was false. AA177. This misrepresentation suppressed the bidding price for the Property to the extent that potential bidders and Flagstar believed that the Property was subject to a $256,632.00 mortgage. As a result, AFI was able to purchase the Property for $26,000, less than ten percent of the Property's actual value.

SUMMARY OF THE ARGUMENT

The Superior Court erred in holding that AFI and the Association met its burden under Super. Ct. Civ. R. 12(b)(6) or 12(c) because Flagstar's Amended Complaint alleged sufficient facts that: (1) its claims were not time-barred under the discovery rule, and (2) that the 2014 Foreclosure was invalid.

First, the Superior Court erred when it determined that Flagstar's claims were time-barred at the motion to dismiss stage. Flagstar alleged that it was unaware that its Deed of Trust was in jeopardy, relying on the Association's statements regarding the 2014 Foreclosure and the Advertisement. AA176. However, the terms of the Advertisement were false, as AFI sought to extinguish Flagstar's Deed of Trust because of the 2014 Foreclosure. AA083. Flagstar learned of this falsity when AFI asserted its defenses to Flagstar's judicial foreclosure claim and promptly filed an amended complaint. AA085-AA146. Nevertheless, Appellees argued in their motions to dismiss that Flagstar was aware of its injury in 2014. By asserting the statute of limitations defense, Appellees created a factual dispute, one not appropriate for entertainment on a motion to dismiss.

Second, the Superior Court erred by ignoring the standard of review for a motion to dismiss when it determined that Flagstar's claims accrued in 2014, a disputed issue of fact at the motion to dismiss phase, without granting deference to Flagstar, accepting its allegations as true, and resolving inferences in its favor.

Third, the Superior Court erred by failing to address the discovery rule invoked by Flagstar before granting Appellees' motions to dismiss. Here, the Superior Court never considered Flagstar's allegations regarding its reliance on the Association's statements or the sophistication of the Association concerning condominium lien sales, both important factors in determining whether the discovery rule applies. Further to the extent the Superior Court considered the discovery rule, it failed to address all relevant factors.

Fourth, the Superior Court erred in its 2020 and 2023 Order by determining that Flagstar's claims were time-barred without engaging in an independent analysis of Flagstar's allegations, instead relying on the erroneous conclusion in the 2019 Order, which did not consider the discovery rule, that Flagstar was aware of its claims in 2014.

Fifth, the Superior Court further erred in determining that Flagstar's lien was extinguished by the 2014 foreclosure, despite prevailing law that expressly permits the holder of a first deed of trust to seek avoidance of the extinguishment of its lien under D.C. Code § 42-1903.13. Flagstar raised two genuine issues regarding the validity of the 2014 foreclosure sale, both of which should have prevented the Superior Court from granting the Association's and AFI's motions.

STANDARD OF REVIEW

"The only issue on review of a dismissal made pursuant to Rule 12(b)(6) is the legal sufficiency of the complaint." *Scott v. FedChoice Fed. Credit Union*, 274 A.3d 318, 322 (D.C. 2022). So, too, for a dismissal pursuant to Rule 12(c). *See Potomac Dev. Corp. v. Dist. of Columbia*, 28 A.3d 531, 544 (D.C.2011). This Court reviews the grant of a motion to dismiss *de novo*, applying the "same standard the trial court was required to apply." *Hoff v. Wiley Rein, LLP*, 110 A.3d 561, 564 (D.C. 2015). The same standard of review applies to the grant of a motion for judgment on the pleadings. *See, e.g., Dist. of Columbia v. Beretta, U.S.A., Corp*., 872 A.2d 633, 639 (D.C.2005) (*en banc*).

All that is required for a complaint to be sufficient is "a short and plain statement of the claim showing that the pleader is entitled to relief." Super. Ct. Civ. R. 8(a)(2); *In re Estate of Curseen v. Ingersoll*, 890 A.2d 191, 193-94 (D.C. 2006). Accordingly, the Court must accept the "allegations in the complaint as true" and view "all facts and draw all reasonable inferences in favor of the plaintiff." *Hillbroom v. Pricewaterhouse Coopers LLP*, 17 A.3d 566, 573 (D.C. 2011). All "uncertainties or ambiguities in the complaint must be resolved in favor of the pleader." *Hillbroom*, 17 A.3d at 573.

ARGUMENT

I. The Superior Court Erred In Granting The Association's Partial Motion To Dismiss The Amended Complaint By Adjudicating Disputed Factual Contentions And By Failing To Accept Flagstar's Allegations In Its Pleadings As True And Drawing All Reasonable Inferences In Its Favor, And By Incorrectly Determining When Flagstar Knew Or Should Have Known The Facts Underlying Its Claims.

A. The Superior Court erred by determining the date upon which Flagstar's claims accrued, which date was disputed amongst the parties, at the motion to dismiss stage.

In its 2019 Order, the Superior Court explained that there was no dispute over the applicable limitations period by which the timeliness of Flagstar's claims in Count III (breach of fiduciary duty) and Count IV (unjust enrichment) would be measured. Instead, per the Superior Court's Order, the issue requiring adjudication was "whether Flagstar knew or should have known around the time of the foreclosure sale in 2014 the facts that give rise to its two claims against the Association." AA275. The Superior Court then reviewed the allegations in the Amended Complaint, as well as the divergent positions of the various parties to this matter, and determined when Flagstar's claims accrued. AA276-277.

That the Superior Court determined the date of claim accrual at all, in light of the parties' dispute as to the issue of accrual, constitutes reversible error. "Generally, the statute of limitations is invoked as an affirmative defense, and the defendant bears the burden of showing that a claim is time-barred." *Logan v. LaSalle Bank Nat. Ass'n*, 80 A.3d 1014, 1019-20 (D.C. 2013). While there are

some contexts in which the statute of limitations may be adjudicated at the dismissal stage, "a court should not dismiss on statute of limitations grounds unless the claim is time-barred on the face of the complaint." *Id.*; *see also Bregman v. Perles*, 747 F.3d 873, 875 (D.C. Cir. 2014) ("[B]ecause statute of limitations issues often depend on contested questions of fact, dismissal is appropriate only if the complaint on its face is conclusively time-barred." (alteration in original) (citations omitted)). To be time-barred on the face of the complaint, a court must be able to determine when the cause of action accrued as a matter of law. *See Boyd. v. Kilpatrick Townsend & Stockton*, 164 A.3d 72, 84 (D.C. 2017) (McLeese, J., concurring in part and dissenting in part).

This principle is particularly true when the relationship between the fact of a party's injury and the conduct underlying that injury is obscure, such that the date of accrual is subject to the discovery rule. *See Medhin v. Hailu*, 26 A.3d 307, 310 (D.C. 2011) (discovery rule applies where relationship between injury and underlying conduct is obscure). When the discovery rule is implicated, "[t]he critical question in assessing the existence *vel non* of inquiry notice is whether the plaintiff exercised reasonable diligence under the circumstances in acting or failing to act on whatever information was available to him." *Ray v. Queen*, 747 A.2d 1137, 1141–42 (D.C. 2000). The answer to this question "is highly fact-bound and requires an evaluation of all of the plaintiff's circumstances." *Diamond v. Davis*,

680 A.2d 364, 382 (D.C. 1996). Intertwined in this analysis is also the adjudication as to when "the plaintiff either has actual notice of the cause of action or—given the obligation to discover the discoverable—has 'inquiry notice' as of the time a reasonable investigation would have led to actual notice." *Wagner v. Sellinger*, 847 A.2d 1151, 1154 (D.C. 2004) (quoting *Diamond*, 680 A.2d at 372). Thus, this Court has held that where the discovery rule is implicated, summary judgment, which requires a higher standard than a motion to dismiss, is improper—particularly when there is a disputed question about the plaintiff's diligence in investigating a possible cause of action. *See Ezra Co. v. Psychiatric Inst. of Washington, D.C.*, 687 A.2d 587, 593 (D.C.1996) (remanding case to determine whether fraudulent concealment precluded further inquiry).

More recently, in the context of adjudication of accrual date of a quiet title claim at the dismissal stage, this Court explained that "[t]he date of accrual should not have been determined at the motion to dismiss stage since the date was in dispute by the parties." *RFB Props., LLC v. Fed. Nat'l Mortg. Ass'n*, 284 A.3d 381, 384 n.5 (D.C. 2022) (citing *Brin v. S.E.W. Invr.'s*, 902 A.2d 784, 800-01 (D.C. 2006)). This Court and other courts have made similar determinations on several occasions. *See Johnson v. Long Beach Mortg. Loan Tr. 2001-4*, 451 F. Supp. 2d 16, 50 (D.D.C. 2006) (court "could not determine the dates of accrual of plaintiff's claims as a matter of law"); *Farris v. Compton*, 652 A.2d 49, 59 (D.C.

1994) (when the plaintiff knew or should have known of her injuries must be determined by the trier of fact, and cannot be resolved on a motion to dismiss the complaint); *Oparaugo v. Watts*, 884 A.2d 63, 75 (D.C. 2005) (finding "it was premature to dismiss the case … under Rule 12(b)(6) before appellant had an opportunity to prove that … [the] statute of limitations" was tolled.); *Johnson-Morris v. Santander Consumer USA, Inc.*, 194 F. Supp. 3d 757, 763 (N.D. Ill. 2016) (date upon which plaintiff could be said to be on notice of their claim "not fodder for a motion to dismiss"); *In re Nat'l Prescription Opiate Litig.*, 440 F. Supp. 3d 773, 787 (N.D. Ohio 2020) (finding that a statute of limitations defense "is more appropriately addressed in the context of a summary judgment motion").

Despite the notion that resolving factual disputes at the dismissal stage is itself improper, the Superior Court resolved certain factual disputes when issuing the 2019 Order. In particular, the Superior Court determined that it is "clear on the face of the amended complaint," that Flagstar "knew or should have known around the time of the foreclosure sale in 2014 the facts that give rise to its two claims against the Association." AA275. While the Amended Complaint does not concede Flagstar's knowledge as of 2014 that it possessed any claim, and to that end, its knowledge that it was even injured, the Superior Court appears to have concluded that both were true. Without even addressing whether this determination was correct, the fact that the Superior Court made this determination constituted error.

After all, in many analogous circumstances under District of Columbia law, the issue of a party's knowledge constitutes a fact question. *See Dist. of Columbia v. Howell*, 607 A.2d 501, 505 (D.C. 1992) (employer's knowledge of a danger is a question of a fact for a jury); *E. Penn. Mfg. Co. v. Pineda*, 578 A.2d 1113, 1120 (D.C. 1990) (user's knowledge is a question of fact for the jury for purposes of the "experienced user" exception to the duty to warn); *Brin*, 902 A.2d at 795 n.17 (when the party had notice of its claims is a question of fact to be resolved by the fact-finder).

In light of the procedural posture, the Superior Court erred in its 2019 Order by determining when Flagstar's claims accrued.

B. To the extent it was appropriate for the Superior Court to make a factual determination as to the date upon which Flagstar's claims accrued, the Superior Court also erred in failing to credit Flagstar's allegations in its pleadings as true and draw all reasonable inferences in Flagstar's favor in determining the accrual date.

The Superior Court erred because it failed to construe Flagstar's allegations in the light most favorable to Flagstar and it failed to accept the factual allegations in the Amended Complaint as true.

Flagstar's Amended Complaint asserts four causes of action: judicial foreclosure (Count I), declaratory judgment (Count II), breach of fiduciary duty (Count III), and unjust enrichment (Count IV). The latter two claims, Count III and Count IV, were dismissed as untimely as to the Association in the 2019 Order

which granted the Association's partial motion to dismiss. In adjudicating this motion, though, the Court was required to accept as true the allegations Flagstar had tendered in its Amended Complaint. *See Hillbroom*, 17 A.3d at 573.

Instead of accepting as true Flagstar's allegations, and resolving all reasonable inferences in Flagstar's favor, as required on a motion to dismiss, *see id.*, the 2019 Order attempted to adjudicate at the dismissal stage the credibility of Flagstar's position and the nature of factual information Flagstar knew or should have known in 2014 in order to determine when it became aware of its causes of action against the Association. This was facially improper.

Flagstar alleged that all of the circumstances surrounding the at-issue sale led it to believe that the Association intended to convey, and did convey, the Property subject to Flagstar's security interest. Flagstar also alleged in its Amended Complaint that no notice was ever provided to it that its lien was in jeopardy through this foreclosure sale. AA176. The reasonable inference that should have been made from these factual allegations was that Flagstar did not know it was injured at all in 2014, did not know of the cause-in-fact of any injury in 2014, and did not possess any knowledge of wrongdoing in 2014. *See, e.g., Diamond*, 680 A.2d at 381 (setting forth elements by which accrual of cause of action is measured). Indeed, the first time Flagstar learned that any party took the position its lien had been extinguished by the Association's foreclosure sale, which

suggested to Flagstar that it was at all injured in the first place, was when AFI submitted its answer of March 12, 2018 and asserted the affirmative defense that Flagstar's lien was extinguished under D.C. Code § 42-1903.03. AA083.

Despite Flagstar's factual allegations that it lacked knowledge of any facts that would have suggested it was injured in 2014, the Superior Court elected to adjudicate the merits and credibility of those allegations at the dismissal stage. Doing so was, again, improper. *See Cevenini v. Archbishop of Wash.*, 707 A.2d 768, 770–71 (D.C. 1998) ("What constitutes the accrual of a cause of action is a question of law; the actual date of accrual, however, is a question of fact.") (citations omitted); *see also RFB Properties, LLC v. Fed. Nat'l Mortg. Assoc.*, 284 A.3d 381, 384 n.5 (D.C. 2022) ("The date of accrual should not have been determined at the motion to dismiss stage since the fate was in dispute by the parties."). Yet, even if the adjudication of the merits and credibility of Flagstar's allegations were proper at the dismissal stage, the Superior Court's methodology was flawed in a way that constitutes reversible error because the Superior Court did not accept Flagstar's contentions as true, and because it resolved inferences about these factual contentions in a manner that was not favorable to Flagstar. *See Atkinson v. D.C.*, 281 A.3d 568, 570 (D.C. 2022) (court must accept the allegations of the complaint as true and construe all facts and inferences in favor of the plaintiff). Each error of this nature is addressed in turn.

First, the Superior Court determined that Flagstar's unjust enrichment and breach of fiduciary duty claims against the Association were time-barred because Flagstar knew or should have known in 2014 "all facts [upon] which AFI bases its extinguishment claim." AA276. Here, the Superior Court failed to recognize the basis of Flagstar's breach of fiduciary duty and unjust enrichment claim against the Association in its 2019 Order. Both claims against the Association were brought soon after AFI filed its answer, at which time AFI asserted that Flagstar's lien was extinguished. AA85-86. Only then was Flagstar aware that the Association made misstatements about the 2014 Foreclosure and Flagstar's lien, an issue recognized by the Superior Court in its order granting Flagstar's Amended Complaint. AA168 ("the court will grant [Flagstar's] motion to file an amended complaint given the implications of AFI's defense."). Nevertheless, before receiving AFI's answer, Flagstar believed that its lien was superior to the Association's because the Association stated as such when it notified Flagstar that the 2014 Foreclosure was subject to Flagstar's lien. AA176-178. If the Association's statements were true, as Flagstar believed at the time of the 2014 Foreclosure, then the Association did not at that time owe Flagstar a fiduciary duty because Flagstar's lien was unaffected. *See In re Ryker*, 301 B.R. 156, 166 (D.N.J. 2003) ("purpose of a foreclosure sale … is 'to obtain the highest price for the benefit of the foreclosing mortgagee, or other junior lienholders and, perhaps, the owner-mortgagor.") (citation omitted).

Despite this fact, the Superior Court inappropriately resolved inferences about when Flagstar knew the basis for its unjust enrichment claim against Flagstar.

Second, the Superior Court determined that Flagstar failed to demonstrate "that it did not and could not have known in 2014 the statutes and legal principles that formed the basis of AFI's extinguishment claim." AA277. Yet, Flagstar alleged that no notice was ever provided to it that its lien was in jeopardy through this foreclosure sale, and the Advertisement indicated that the 2014 Foreclosure was subject to Flagstar's lien. AA176. Accepting these facts as true, the only reasonable inference is that while Flagstar was aware of the 2014 Foreclosure, it was unaware that the terms of the sale, advertised by the Association's attorney, contained a misstatement—that the 2014 Foreclosure was subject to Flagstar's lien. Yet, the Superior Court erroneously resolved these inferences in a different manner that did not favor Flagstar.

Third, the Superior Court reasoned that "Flagstar knew the same facts that the Association knew relating to the sale" and that both Flagstar and the Association "had every reason to believe that the 2014 Foreclosure would not affect Flagstar's lien." AA277. The Superior Court also found that, "Flagstar does not contend that law or equity required the Association to be clairvoyant and to conduct the 2014 foreclosure sale according to principles that it did not and could know applied at the time." AA277. The resolution of these inferences against

Flagstar was also in error, as the 2019 Order is itself contradictory on this point. To that end, the 2019 Order outlines that *Chase Plaza Condominium Ass'n,* which was issued before the 2014 Foreclosure sale, cited the anti-waiver provision in the Condominium Act (D.C. Code § 42-1901.07) and then stated that the Association had every reason to believe that the 2014 Foreclosure could be subject to Flagstar's lien. Flagstar alleged that it was unaware that its lien was in jeopardy in part because the Association "by its Attorney Elizabeth Menist advertised in the Washington Times . . . the sale of the Property . . . was subject to [Flagstar's] lien." AA176. Flagstar also alleged that it was "induced into not paying off the lien due to the false [A]dvertisement and representation of the [Association's] attorney that the sale was subject to" Flagstar's lien. AA177. Flagstar made no allegations that would support the Superior Court's findings to this end. The reasonable inference that should have been derived from Flagstar's allegations is that the Association knew or should have known that the statements made to Flagstar regarding its lien were false because the Association's attorney should have verified its assertions before drafting the Advertisement, and that Flagstar had no reason to know that the 2014 Foreclosure would affect its lien. The Superior Court, though, failed to resolve these inferences in Flagstar's favor.

Fourth, the Superior Court expressly disregarded some of Flagstar's allegations, stating that "even putting aside Flagstar's contention that the

Association's statements were and are [un]true the Association could not defraud Flagstar or otherwise violate its rights by failing to anticipate a change in the law that Flagstar itself did and could not anticipate." AA278. Yet, the Superior Court also set forth Flagstar's allegation that "the Association made false and even fraudulent statements in 2014 about the legal effect of the foreclosure sale on Flagstar's lien." AA278. Flagstar also alleged it was "induced into not paying off the lien due to the false [A]dvertisement and representation of the [Association's] attorney that the sale was subject to" its lien. AA177. Again, the Superior Court should have properly credited the inference that the Association's attorney, who drafted the Advertisement, knew or should have known that the statement in the Advertisement that the 2014 Foreclosure would be subject to Flagstar's lien would be relied on by both Flagstar and potential bidders.

In sum, given the procedural posture, the Superior Court erred by disregarding some of Flagstar's allegations and resolving inferences about other factual contentions in a manner unfavorable to Flagstar.

II. The Superior Court Erred In Granting The Association's Partial Motion To Dismiss Without Fully Adjudicating The Application Of The Discovery Rule, And To The Extent It Did Adjudicate This Issue, It Incorrectly Determined When Flagstar Knew Or Should Have Known The Facts Underlying Its Claims.

As described above, it was legally incorrect for the Superior Court to adjudicate the factual question as to when Flagstar knew or should have known the

facts underlying its claims against the Association when issuing the 2019 Order. Nonetheless, even if it were appropriate for the Superior Court to undertake this analysis at the dismissal stage, it was error for the Superior Court to disregard Flagstar's application of the District of Columbia's discovery rule. It was also error for the Superior Court to impute knowledge of injury to Flagstar as of 2014.

A. The Superior Court erred by failing to fully adjudicate Flagstar's claim that the discovery rule applied to this matter.

The question of what constitutes the accrual of a cause of action is a question of law. *See, e.g., Bussineau v. President of Georgetown College*, 518 A.2d 423, 425 (D.C. 1986); *see also Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 735 (D.C. 2000). Questions of law are afforded *de novo* review. The actual date a cause of action accrues, however, is a question of fact. *See Cevenini*, 707 A.2d at 770–71.

A claim generally accrues for statute of limitations purposes when an injury occurs. However, in cases where "'the relationship between the fact of injury and the alleged tortious conduct [is] obscure,' this court determines when the claim accrues through application of the discovery rule, *i.e.*, the statute of limitations will not run until plaintiffs know or reasonably should have known that they suffered injury due to the defendants' wrongdoing." *Mullin v. Wash. Free Weekly, Inc.*, 785 A.2d 296, 298–99 (D.C. 2001) (quoting *Colbert v. Georgetown Univ.*, 641 A.2d 469, 472–73 (D.C. 1994) (*en banc*)).

This Court clarified the discovery rule applicable to causes of action in the District of Columbia in *Diamond v. Davis*. Critically, as set forth in *Diamond*:

> (1) the statute of limitations in cases . . . begins to run when a plaintiff either has actual knowledge of a cause of action or is for some reason charged with knowledge of that cause of action; (2) a plaintiff has some duty to investigate to determine possible causes of action; and (3) if a plaintiff has not acquired actual knowledge of a cause of action only because of his failure to meet that duty to investigate, the plaintiff is nevertheless charged with that knowledge.

Diamond, 680 A.2d at 372. There are two types of notice: "actual notice" is notice which a plaintiff actually possesses; "inquiry notice" is notice which a plaintiff would have possessed after due investigation. *Cf. Clay Properties v. Wash. Post Co*., 604 A.2d 890, 895 (D.C. 1992) (*en banc*). The discovery rule was developed to redress situations where the injury "was not readily apparent and indeed might not become apparent for several years after the incident causing injury had occurred." *Ehrenhaft v. Malcolm Price, Inc.,* 483 A.2d 1192, 1201 (D.C. 1984).

Before determining whether the Superior Court's determinations in the 2019 Order were erroneous, however, this Court should review precisely what issues the Superior Court did determine. Flagstar's position that the Superior Court failed to conduct the analysis required of it pursuant to *Diamond* and its progeny. To that end, the Association's Partial Motion to Dismiss the Amended Complaint was entirely predicated on the assertion that Count III and Count IV of the Amended Complaint were barred by the statute of limitations. In response, Flagstar directly

invoked the discovery rule, arguing that it did not know, and through the exercise of due diligence could not know, of its injuries earlier than March 2018.. As a result, to the extent any analysis of the accrual date for Flagstar's claims was appropriate at the dismissal stage, it was incumbent upon the Superior Court to make the determinations needed to fully adjudicate the application of the discovery rule before dismissing Flagstar's claims as time barred. *See Commonwealth Land Title Ins. Co. v. KCI Techs., Inc.*, 922 F.3d 459, 467 (D.C. Cir. 2019) (trial court erred when it dismissed plaintiff's claim as time-barred without considering the discovery rule).

Despite Flagstar's argument, the 2019 Order does not even once mention the discovery rule by name. Setting aside mere labels, the 2019 Order also failed to make the requisite determinations that would have been necessary to overrule Flagstar's invocation of the discovery rule.

In light of the conjunctive nature of the discovery rule, a plaintiff's claims do not accrue even if a Court determines that a party was aware of its injury, "until the plaintiff discovers or in the exercise of reasonable diligence should have discovered . . . that his injury may have been caused by the defendant's wrongful conduct." *Bussineau*, 518 A.2d at 433 (citing *Brown v. Mary Hitchcock Memorial Hospital*, 117 N.H. 739, 378 A.2d 1138 (1977)); *see also Doe v. Medlantic Health Care Grp., Inc.,* 814 A.2d 939, 948 (D.C. 2003) (plaintiff did not determine that

the defendant's negligence in disclosing his medical status was the cause of his injury, until after the injury occurred). This reasoning even applies "where a plaintiff might know, or be deemed to know, of wrongdoing on the part of one defendant, accrual of his action against another, unknown defendant responsible for the same harm is not automatic, unless the two defendants were closely connected, such as in a superior-subordinate relationship." *Medlantic Health Care Grp., Inc*., 814 A.2d at 946 (internal citations omitted).

Contrary to these principles, the Superior Court concluded that Flagstar was aware of its injuries in 2014 because it was "aware of all the facts regarding the foreclosure, [but] was just not aware of the legal effect of the foreclosure sale to AFI." AA277. The Superior Court did not consider the "confidence reposed by [Flagstar] in the [Association]" or the Association's statements, through its attorney, that the 2014 Foreclosure was subject to its Deed of Trust. *See Diamond*, 680 A.2d at 374. Nor did it consider Flagstar's reliance on the Association's statements, through its attorney, regarding Flagstar's lien and the disparate expertise of the Association's attorney and Flagstar. *See Commonwealth Land Title Ins. Co.*, 922 F.3d at 467-68. In sum, the Superior Court determined that Flagstar was aware of certain facts, but being aware of facts differs from being aware of an injury. *Id.* (recognizing that the plaintiff was aware of the facts involving the survey but was unaware of its injury until a claim was asserted against it).

In light of the foregoing, the Superior Court erred by failing to address and consider all requisite discovery rule factors before determining that Flagstar's claims were time-barred.

B. As a result of this failure to fully adjudicate the application of the discovery rule, the Court may elect to remand this matter in order to develop a complete record.

While it is possible that the Superior Court impliedly adjudicated the discovery rule's application in the 2019 Order, based on the foregoing, it appears that the Superior Court failed to make all of the necessary findings to fully adjudicate the merits of the discovery rule—to the extent it was appropriate for it to even reach that issue at all.

In light of the Superior Court's failure to fully address Flagstar's arguments about the discovery rule, this Court may elect to dismiss this appeal and instruct the Superior Court to address Flagstar's arguments on remand. "An aggrieved party may appeal as of right from a 'final order or judgment' of the Superior Court. *Davis v. Davis*, 663 A.2d 499, 502 (D.C. 1995) (quoting D.C. Code § 11-721(a)(1)). "'To be final, and therefore reviewable, an order must dispose[ ] of the whole case on its merits so that the court has nothing remaining to do but to execute the judgment or decree already rendered.'" *Id.* (*quoting Dyer v. William S. Bergman & Assocs*., 635 A.2d 1285, 1287 (D.C. 1993)). As a result, appeals of

non-final orders are subject to possible dismissal. *Khawam v. Wolfe*, 84 A.3d 558, 574 (D.C. 2014); *see also Rolinski v. Lewis*, 828 A.2d 739, 745 (D.C. 2003).

An order may be treated as non-final if it fails to address all the arguments raised by a party. For example, in *Khawam v. Wolfe*, a party advanced three theories in support of its contention that it was entitled to an award of attorney's fees. 84 A.2d at 574. The Superior Court granted an award under one theory but did not rule on the other theories. *Id.* This Court dismissed the appeal of the award of fees as non-final, concluding that such treatment by the Superior Court did not satisfy D.C. Code § 11-721(a)(1). *Id.* at 575.

The same is true here. Flagstar argued below that its claims against the Association did not accrue until 2018. It based this argument, in part, on the discovery rule. Yet, in its 2019 Order granting the Association's motion to dismiss, the Superior Court did not even mention the discovery rule, let alone directly explain why it did not apply to Flagstar's claims. That failure renders the court's order to be potentially non-final.

Federal law reinforces this conclusion. "D.C. Code § 11–721 is modeled after and [is] 'virtually identical' to 28 U.S.C. § 1291–92 (2012)." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1037 n.7 (D.C. 2014) (quoting *Brandon v. Hines*, 439 A.2d 496, 509 (D.C. 1981)). Under 28 U.S.C. § 1291, a trial court's order disposing of a case is not final when the order does not address every argument raised by the

nonmoving party. *See, e.g.*, *Cincinnati Ins. Co. v. All Plumbing, Inc.*, 812 F.3d 153, 157-59 (D.C. Cir. 2016). This is especially true when the basis for the disposal is a statute of limitations defense because that inquiry is fact-intensive and usually not appropriate for summary dismissal. *See Dicks v. Bishop*, 844 F. App'x 678, 679 (4th Cir. 2021) (determining that a district's court's dismissal of a petition as time-barred was not a final order because the district court did not address all the petitioner's arguments and "[a]dditional factfinding [was] necessary").

To the extent the Superior Court failed to adjudicate the discovery rule in full in its 2019 Order, that order is not a final order or judgment. It would be appropriate in that instance for this Court to vacate the Superior Court's order, remand the case, and instruct the Superior Court to address all of Flagstar's arguments. To that end, the same is true for the Superior Court's 2020 Order, which dismissed a declaratory relief claim (Count II) by adopting the logic from the 2019 Order as to the statute of limitations AA277-AA278, as well as the Superior Court's 2023 Order, which expressly dismissed Counts I, II, III, and IV based upon the 2019 Order's logic AA276-277. Thus, if this Court elects to remand for further findings as to the 2019 Order, it would be equally necessary for further findings to be made as to the 2020 and 2023 Orders.

C. The Superior Court erred by misapplying the discovery rule in determining that Flagstar knew or should have known of its injury in 2014.

Even if it were appropriate for the Superior Court to determine the date of claim accrual at the dismissal stage in light of disputed facts, and even if the Superior Court actually did conduct the complete inquiry required to adjudicate the application of the discovery rule, the Superior Court's determination as to when Flagstar knew or should have known of its injuries was itself also erroneous. Where the court's holding results in erroneous legal conclusions, those legal conclusions are afforded *de novo* review. *See Yates v. United States Dep't of the Treasury*, 149 A.3d 248, 250 (D.C. 2016).

In determining whether the discovery rule applies, the court must first consider whether Flagstar had either actual or inquiry notice of its injury before a cause of action can accrue. Flagstar alleged that it did not have actual notice in 2014 that its Deed of Trust was in jeopardy, *i.e.,* the requisite injury in this case. *See City of Oberlin, Ohio v. FERC,* 937 F.3d 599, 604 (D.C. Cir. 2019) (recognizing the loss of interest in property is a cognizable injury). To that end, the Advertisement for the 2014 Foreclosure expressly stated that the sale was to be made subject to Flagstar's Deed of Trust. AA223. Thus, at issue here is whether Flagstar had inquiry notice of its claims.

A plaintiff is charged with inquiry notice of a claim when she knew of (1) an injury, (2) its cause in fact, and (3) some evidence of wrongdoing by defendants. *See Cevenini*, 707 A.2d at 771; *Diamond*, 680 A.2d at 379. A person is held to have notice where he or she is aware of circumstances that generate enough uncertainty about the state of title that a person of ordinary prudence would inquire further about those circumstances. The purchaser is on inquiry notice of all facts and outstanding interests, which a reasonable inquiry would have revealed. *See, e.g., Rosenthal v. J. Leo Kolb, Inc*., 97 A.2d 925, 927 (D.C. 1953) ("'[t]he knowledge of facts or circumstances reasonably sufficient to put a person of ordinary prudence upon inquiry which, if pursued with proper diligence, would lead to the discovery of the actual condition of the title, is equivalent to knowledge direct and certain.'").

Flagstar was unaware of its claims in 2014 because it was unaware of its injury, *i.e.*, the potential extinguishment of its Deed of Trust, or the Association's wrongdoings that caused its injury, *i.e.*, the misrepresentations in the Advertisement related to the 2014 Foreclosure and subsequent Trustee Deed, both stating that the Property was subject to its Deed of Trust. Neither was it aware of its declaratory judgment claim and breach of fiduciary duty claim until AFI asserted its defense that Flagstar's Deed of Trust was extinguished. The Superior Court recognized this when it granted Flagstar leave to file its Amended

Complaint. Nevertheless, the Superior Court dismissed Flagstar's claims as being time-barred. In reaching its conclusion, the Superior Court misapprehended Flagstar's allegations and ignored the discovery rule's elements.

The Superior Court erroneously endorsed the Association's argument that Flagstar's claims were time-barred because Flagstar "was aware of all of the facts regard[ing] the foreclosure" but "was just not aware of the legal effect of the foreclosure sale to AFI." This holding is both legally and factually incorrect. First, being aware of general facts associated with an event does not notify a party of its claim. Second, the Superior Court appeared to improperly shift blame onto Flagstar as to why it reasonably relied on the Association's statements as to the terms of the 2014 Foreclosure at the motion to dismiss stage. Third, the Superior Court's holding failed to apprehend the fact that the Association would not have a duty to sell the Property at the best price and protect the interest of junior lien holders if the Advertisement did not contain a material misrepresentation, one only uncovered after AFI sought to extinguish Flagstar's property interest.

Additionally, Flagstar could not have been aware of its injury until the prevailing law in the District of Columbia changed. While the 2019 Order noted that *Chase Plaza* was issued several months before the 2014 foreclosure sale at issue here, the Superior Court incorrectly interpreted the meaning of *Chase Plaza* vis-à-vis Flagstar's awareness of its injury. In *Chase Plaza*, this Court held that a

super-priority sale pursuant to D.C. Code § 42-1903.13 has the effect of extinguishing junior interests, including a first deed of trust. *Chase Plaza*, 98 A.3d at 175. In denying the mortgagee's arguments to the contrary, this Court also mentioned the existence of an anti-waiver provision in the D.C. Condominium Act, codified as D.C. Code § 42-1901.07. *Id*. at 178. The Superior Court seemingly placed great importance on this fact, as it explicitly stated in the 2019 Order that *Chase Plaza* cited this provision. AA277.

The Superior Court's reliance on the citation to D.C. Code § 42-1901.07 in *Chase Plaza*, though, was plainly improper. To that end, this Court explained quite explicitly in *Chase Plaza*—as part of its citation to D.C. Code § 42-1901.07—that "[i]t is unclear whether … a provision [that waives super-priority lien status] in a condominium association's by-laws could constitute an effective waiver of the association's statutory right to priority." *Id*. at 178. This Court did not resolve the ambiguity it identified in *Chase Plaza*, instead electing to rely on the alternate ground of language in the association's by-laws that otherwise provided for the association to foreclose on a super-priority lien. *Id*. at 178.

Thus, as of 2014, it was explicitly "unclear" under District of Columbia law whether the anti-waiver provision of the D.C. Condominium Act, D.C. Code § 42-1901.07, precluded association by-laws from altering the statutory priority afforded under D.C. Code § 42-1903.13. *Id*. at 178. It was similarly unclear whether any

other action of a condominium association—including the act of electing to hold a sale D.C. Code § 42-1903.13 subject to a first deed of trust—would be effective in light of the anti-waiver language set forth in D.C. Code § 42-1901.07. Indeed, this Court—in a more recent decision—explained just how unclear the state of the law was at this point in time. *See U.S. Bank Tr., N.A. v. Omid Land Grp., LLC*, 279 A.3d 374, 380 (D.C. 2022) ("[b]ecause we had not yet decided either *Liu* or *4700 Conn* as of the date of the sale, it was unknown to the parties at the relevant time whether the sale would extinguish U.S. Bank's first deed of trust even though the Advertisement of Sale said the sale was subject to all prior liens").

The law in the District of Columbia remained unclear on this point until March 1, 2018, when this Court issued its decision in *Liu v. U.S. Bank, N.A.*, 179 A.3d 871 (D.C. 2018). In *Liu*, this Court was first confronted with the issue as to whether a condominium association could choose to sell a condominium unit "subject to the first mortgage or first deed of trust on the property." *Id*. at 874-75. After reviewing the scope of D.C. Code § 42-1901.07, and then reviewing the Council's purpose in enacting the D.C. Condominium Act, this Court explained that "any attempt by a condominium association or a holder of a first mortgage or deed of trust to have a condominium association's super-priority lien waived or varied by contract is invalid, as a matter of law." *Id*. at 877-79. This Court held that to the extent a super-priority lien was foreclosed upon and the proceeds of the sale

are insufficient to cover the first deed of trust, "then the first deed of trust must be considered effectively extinguished." *Id*. at 879.

Flagstar learned about this clarification to District of Columbia law when this Court announced the decision in *Liu*, on March 1, 2018. This decision was also announced more than one full year after Flagstar filed its complaint, on January 19, 2017. It was only when *Liu* was published that Flagstar learned that it was at all injured by the 2014 foreclosure sale in this case. Flagstar took action shortly thereafter and moved to amend its complaint on November 12, 2018 (which motion was later granted)—well within the three-year period after it learned it was injured.

The Superior Court erred when it failed to appreciate that Flagstar's statute of limitations should have been tolled based upon this intervening change in prevailing law. "The appropriateness of equitable tolling 'is a fact-specific question that turns on balancing the fairness to both parties.'" *Neill v. D.C. Pub. Emp. Rels. Bd.*, 234 A.3d 177, 186 (D.C. 2020) (quoting *Brewer v. District of Columbia Office of Emp. Appeals*, 163 A.3d 799, 802 (D.C. 2017)). "'[W]hether a timing rule should be tolled turns on' a variety of factors, such as the benefitting party's vigilance, the presence of 'unexplained or undue delay[,]' whether 'tolling would work an injustice to the other party,' and '[t]he importance of ultimate finality in legal proceedings[.]'" *Id.* (quoting *Brewer*, 163 A.3d at 802). All these factors

favor Flagstar here. Flagstar did everything in its power to protect its rights in the Property; Flagstar acted quickly once this Court clarified the state of the law concerning super-priority liens; the adjudication of Flagstar's claims on the merits does not impose an injustice onto the Association; and the adjudication of Flagstar's claims do not disrupt a final legal proceeding.

This case is comparable in many ways to *Simpson v. District of Columbia Office of Human Rights*, in which case this Court tolled the statute of limitations for an employee's civil rights claim. In *Simpson*, an employee filed claims against her employer with the Office of Human Rights ("OHR") for a violation of the D.C. Human Rights Act. 597 A.2d 392, 394 (D.C. 1991). In 1981, the OHR found no probable cause for violation of the Act. *Id.* at 394-95. More than five years later, the employee sought review of the "no probable cause" determination in the Superior Court. *Id.* at 395. This Court reversed the Superior Court's dismissal of that claim, holding that the employee's complaint was not time barred because at the time the OHR made its "no probable cause" determination, the path for obtaining review of that decision was not clear. *Id.* at 400-02. This Court pointed to the "uncertain state of the law" surrounding judicial review of such determinations and "considerations of basic fairness" to conclude that the statute of limitations was tolled for the employee's claim. *Id.* at 401, 403.

The same rationale applies here. Like the employee in *Simpson* who could not be expected to anticipate the developments in the "uncertain state of the law" surrounding review of agency decisions, this Court should not require Flagstar to have anticipated future developments in the very super-priority jurisprudence that was described by this Court as "unclear" in *Chase Plaza*. *Chase Plaza*, 98 A.3d at 178. When the at-issue foreclosure occurred in 2014, and when the complaint was filed in this case in 2017, this Court has not yet opined on whether a super-priority sale purportedly made "subject to" a first deed of trust would nonetheless extinguish Flagstar's lien. And after this Court clarified that point of law, Flagstar filed its Amended Complaint. Yet, the Superior Court's 2019 Order mandates that Flagstar either argue against its own property interests in 2014 — when it had no reason to know they were in danger — or risk losing its claims by operation of the statute of limitations. Equity does not permit this "heads I win, tails you lose" approach.

Other courts outside the District of Columbia have also reached similar conclusions. *See, e.g., Garza v. Burnett*, 321 P.3d 1104, 1105 (Utah 2013) (intervening change in the law is "precisely the type of circumstance that merits equitable tolling"); *Lerner v. Los Angeles City Board of Education*, 380 P.2d 97, 101-02 (Cal. 1963) (cause of action did not accrue until an intervening clarification of the law made the plaintiff's claim possible); *cf. Plaintiffs in Winstar-Related*

Cases v. United States, 37 Fed. Cl. 174 (1997) (concluding that plaintiffs' causes of action did not accrue until newly enacted regulations came into effect because it was not until that point that the plaintiffs could assert their rights).

Here, because Flagstar could not enforce its rights until the status of the law was clarified, *Simpson*, 597 A.2d at 403; *Lerner*, 380 P.2d at 103-05, and it acted promptly after the clarification, *Garza*, 321 P.3d at 1108, its claims should not have been time-barred. Thus, the Superior Court's 2019 Order should be reversed.

III. The Superior Court Erred In Dismissing The Remainder Of Flagstar's Claims In The 2020 and 2023 Orders.

As described at the outset of this brief, the 2019 Order's erroneous findings set forth a cascading effect of additional erroneous rulings in this matter. For the reasons that follow, the 2020 Order and the 2023 Order also provide instances where the Superior Court erred.

A. The Superior Court erred in its 2020 Order and 2023 Order by relying on the 2019 Order to find that Flagstar's claims were time barred.

As a result of the findings set forth in the Superior Court's 2019 Order, the 2020 Order granted the Association's motion to dismiss Count II (declaratory judgment) of the Amended Complaint. In dismissing Count II, the Superior Court stated that "it's clear … that there's a time [barred] issue," citing the 2019 Order in support that "Flagstar had at least the same ability as the association to anticipate a change in the law." AA329 -330. The 2020 Order also applied the logic of the

2019 Order in finding that Flagstar and the Association had "ever[y] reason in the world to believe" that Flagstar's Deed of Trust would survive the 2014 Foreclosure. AA330.

Similarly, the 2023 Order granted AFI's motion to dismiss Counts I, II and IV against it. AA388-AA394. In granting AFI's motion, the Superior Court ruled that Flagstar failed to state a claim because its claims were time-barred. In support thereof, the 2023 Order, citing the 2019 Order on multiple occasions, relied on the reasoning "articulated" in the 2019 Order. AA392-393.

As discussed above, the findings set forth in the 2019 Order were incorrect for a number of reasons, and the Superior Court's determination that certain claims were time barred should be reversed. As the 2020 Order, with respect to Count II against the Association, and the 2023 Order, with respect to Counts I, II, and IV against AFI, relied on this erroneous determination, they too should be reversed for the same reasons set forth with respect to the 2019 Order. Flagstar incorporates its arguments made as to the 2019 Order, as set forth above, with equal force to the 2020 Order and 2023 Order. To the extent this Court reverses the determinations made in the 2019 Order, or remands for further adjudication of certain issues, the Court should also treat the statute of limitations findings in the 2020 Order and the 2023 Order in the same manner.

B. The Superior Court erred in its 2023 Order in finding Flagstar's unjust enrichment claim against AFI was time-barred.

This court reviews de novo the trial court's conclusion regarding whether an unjust enrichment has occurred. *Marsden v. District of Columbia*, 142 A.3d 525, 526 (D.C. 2016) (citation omitted). Here, an independent basis exists to find that the dismissal of Flagstar's unjust enrichment claim against AFI was in error.

The limitations period for an unjust enrichment claim begins "when the . . . last service has been rendered and compensation has been wrongfully withheld." *News World Commc'ns, Inc. v. Thompsen*, 878 A.2d 1218, 1223 (D.C. 2005). Where there is no express repudiation of any duty by the defendant to compensate the plaintiff, the question of when the unjust enrichment claim has ripened is one of fact. *See Boyd v. Kilpatrick Townsend & Stockton*, 164 A.3d 72, 80 (D.C. 2017) (vacating the trial court's order concluding that the unjust enrichment claim was time-barred and requiring the finders of fact to determine when the plaintiff should have reasonably demanded payment).

In support of its unjust enrichment claim against AFI, Flagstar alleged that AFI agreed to purchase the Property subject to Flagstar's Deed of Trust. AA176. Flagstar further alleged that it continued to pay taxes on the Property, amounting to $24,000.00, to AFI's benefit without compensation.[1] AA181. While Flagstar did

[1] While this allegation was not expressly included in the Amended Complaint, the Superior Court, if it believed Flagstar's unjust enrichment claim against AFI was

not make the tax payments directly to AFI, AFI nevertheless benefited as a result of not needing to itself make those payments. *See U.S. ex rel. Westrick v. Second Chance Body Armor, Inc*., 685 F. Supp. 2d 129, 142 (D.D.C. 2010) (holding that where a party was an "indirect recipient" of payments and retained those payments in circumstances alleged to be unjust, the plaintiff had adequately alleged a claim of unjust enrichment).

Despite these allegations, the Superior Court held that Flagstar's unjust enrichment claim was wholesale time-barred—again relying on the 2019 Order. AA393. The 2023 Order does not mention and therefore does not consider whether Flagstar was entitled to reimbursement of even some of the tax payments made to AFI's benefit, nor does it consider whether Flagstar's tax payments amount to a continuous service not yet triggering the statute of limitation. *See News World Commc'ns, Inc. v. Thompsen*, 878 A.2d 1218, 1223 (D.C. 2005).

Accordingly, the Superior Court failed to fully consider Flagstar's allegations supporting its unjust enrichment claims. This failure resulted in the erroneous conclusion that Flagstar's entire unjust enrichment claim was time barred. AA393.

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unclear, should have treated such allegation as inferred. *See Hillbroom*, 17 A.3d at 573 (All "uncertainties or ambiguities in the complaint must be resolved in favor of the pleader.")

C. The Superior Court erred in its 2020 Order and 2023 Order in finding that Flagstar's lien was extinguished as a matter of law.

The Superior Court's 2020 Order provides a finding that Flagstar's "lien was extinguished as a matter of law by the decisions of the Court of Appeals," AA328-AA329., and therefore concludes that Count I fails as a matter of law. In rendering its 2020 Order, the Superior Court set forth little additional reasoning for this finding. However, it appears that the Superior Court made this finding in a manner that did not credit Flagstar's contentions as to the validity of the sale pursuant to *4700 Conn 305 Trust*, *Chase Plaza*, and *Omid Land Grp., LLC*, based on the inadequacy of the sale price and the misstatements in the condominium foreclosure sale advertisement. Additionally, the Superior Court, relying on the 2019 Order, determined that the facts underpinning the declaratory judgment claim, including the inadequacy of the sale price, were time-barred because Flagstar had "the same ability as the Association to anticipate a change in the law." AA329-AA330. Given the dearth of reasoning in the 2020 Order, Flagstar can only assume that the Superior Court decided (based on the 2019 Order) that claims related to the validity of the at-issue foreclosure were time-barred, and therefore it could rule as a matter of law as to the extinguishment of Flagstar's lien. The Superior Court's 2023 Order relied on the 2020 Order to explain that Flagstar's lien was extinguished as a matter of law, and found once more that the 2019 Order determined challenges to the validity of this foreclosure sale to be time-barred.

AA392. As a result, Count I was dismissed both as to the Association and as to AFI through these two Orders.

The dismissal of Count I as to both parties was erroneous, though, as Count I did state a claim upon which relief could be granted. At the outset, Count I—a judicial foreclosure claim—was not dismissed as time-barred. AA328-AA329, AA392. Instead, it was dismissed because the Superior Court believed the at-issue foreclosure sale was a super-priority lien sale that had the effect of extinguishing Flagstar's lien. AA328-AA329, AA392. In conjunction with that finding, the Superior Court found that Flagstar's arguments in its declaratory relief claim—that the at-issue foreclosure sale should be set aside—were time-barred as to the Association in the 2020 Order, and as to AFI in the 2023 Order. AA329, AA393.

The Superior Court erred, though, on both occasions, as it failed to appreciate the nuanced difference between Flagstar's affirmative declaratory relief claims, in Count II, and Flagstar's judicial foreclosure claim, in Count I. To that end—while Flagstar posits quite strongly that the dismissal of Count II based on the statute of limitations was error itself, as set forth above in greater detail—even an assumption that Count II was time-barred *should not have impacted* the adjudication of Claim I, which was not dismissed on this basis.

Instead, the Superior Court should have adjudicated the validity of Count I—both in the 2020 Order and the 2023 Order—under the standard applicable at

the dismissal stage (or the motion for judgment on the pleadings stage). And, in light of that standard, Count I clearly stated a claim upon which relief could have been granted. Count I stated a judicial foreclosure claim against all other entities purporting to hold an interest in the subject property, including the purported super-priority purchaser (AFI), the purported super-priority lien holder in the event the super-priority sale was rendered invalid (the Association), and the underlying borrower on Flagstar's mortgage loan (Rivas). The Superior Court held that no such judicial foreclosure claim could exist because Flagstar's lien was extinguished, and in so finding, necessarily determined that the super-priority foreclosure sale to AFI was valid. AA328-AA329, AA392. But this finding, particularly at the dismissal stage and the motion for judgment on the pleadings stage, was erroneous—as the Superior Court failed to accept Flagstar's allegations in the Amended Complaint as true and failed to render reasonable inferences in Flagstar's favor. To that end, Flagstar was not even required to affirmatively plead a response to AFI and the Association's contentions—which were defenses to Count I—that the 2014 foreclosure sale extinguished Flagstar's lien. For the following reasons, this Court should not have found Flagstar's lien to have been extinguished at the dismissal or judgment on the pleadings stage.

1. District of Columbia law provides for instances in which a purported super-priority sale will be set aside following discovery and briefing on issues pertaining to its validity.

This Court reviews the grant of a motion to dismiss *de novo*, applying the "same standard the trial court was required to apply." *Hoff v. Wiley Rein, LLP*, 110 A.3d 561, 564 (D.C. 2015). So, too, for a dismissal pursuant to Rule 12(c). *Potomac Dev. Corp. v. Dist. of Columbia*, 28 A.3d 531, 544 (D.C.2011).

D.C. Code § 42-1903.13(a)(2) provides "District of Columbia condominium associations with a 'super-priority lien' over first mortgage lienholders that permits an association to collect up to six months of unpaid condominium assessments by way of foreclosure on a defaulting unit." *4700 Conn 305 Tr. v. Cap. One, N.A*., 193 A.3d 762, 764 (D.C. 2018). However, only a valid super-priority foreclosure sale by a condominium association terminates the first mortgage lien, and in the instance of a valid sale, the foreclosure purchaser obtains the title free and clear. *Chase Plaza*, 98 A.3d at 178 at n.8 (stating that a "valid" foreclosure sale terminates lower priority liens and remanding for determination of whether the sale there should be invalidated because the sale price "was unconscionably low"); *see also U.S. Bank Tr., N.A. v. Omid Land Grp., LLC*, 279 A.3d 374, 379-381 (D.C. 2022) (remanding for adjudication as to validity of sale where amended complaint alleged that the subject condominium foreclosure sale was invalid because of

erroneous statements in the advertisement of sale and alleged an insufficient and unconscionable sale price paid by the purchaser at that condominium sale).

This Court held in *RFB Properties II, LLC v. Deutsche Bank Trust Co. Americas*, a case decided on summary judgment, that where there is a dispute over the validity of a condominium foreclosure sale based on the condominium association's first-priority lien—and thus a dispute over whether the sale extinguished the first mortgage holder's deed of trust—the reasonableness of the price paid for the unit at foreclosure must be considered as of the time of the sale rather than the time of the litigation. *RFB Properties II, LLC v. Deutsche Bank Trust Co. Americas*, 247 A.3d 689, 692 (D.C. 2021). Further, in *4700 Conn 305 Tr.*, this Court vacated the trial court's grant of a summary judgment to a condominium foreclosure purchaser remanding the case to determine the validity of the condominium foreclosure sale in light of the following considerations: "(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." 193 A.3d at 766. The Court's reasoning in *4700 Conn 305 Tr*. was again echoed *Omid Land Grp., LLC*. *See* 279 A.3d at 379.

The results above apply even more here, where the Superior Court's rulings were based on a motion to dismiss, not a motion for summary judgment. *Compare Poola v. Howard Univ*., 147 A.3d 267, 276 (D.C. 2016) (providing that a

complaint should only be dismissed where it appears that plaintiff can prove no set of facts in support of his claim which would entitle him to relief) *with Clampitt v. American Univ*., 957 A.2d 23, 28 (D.C. 2008) (providing that summary judgment should only be granted when there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law).

2. Flagstar would have demonstrated that the 2014 Foreclosure was invalid under equitable principles because the sale price was unconscionably low.

A suit for judicial foreclosure sounds in equity. *See Johnson v. Fairfax Village Condominium IV Unit Owners Ass'n*, 641 A.2d 495, 506 (D.C. 1994). The "purpose of a foreclosure sale . . . is 'to obtain the highest price for the benefit of the foreclosing mortgagee, or other junior lienholders and, perhaps, the owner-mortgagor." *In re Ryker*, 301 B.R. 156, 166 (D.N.J. 2003). Aligned with this purpose, D.C. Courts have long recognized that "[a] foreclosure sale may be set aside where . . . the consideration is grossly inadequate." *Hotel Lafayette v. Pickford*, 85 F. 2d 710, 714 (App. D.C. 1936); *see also Bailor v. Daly*, 18 D.C. 175, 178 (1889) (holding "a sale will be set aside for inadequacy of price alone" where "the price was so grossly inadequate as to shock the moral sense, and create at once upon its being mentioned a suspicion of fraud"); *In re Rothenberg*, 173 B.R. 4, 17 (Bankr. D.D.C. 1994).

In light of the discussion of District of Columbia law on this issue in the prior section, it was not Flagstar's burden to demonstrate that the purported super-priority foreclosure sale was valid such that it extinguished its lien. Instead, it was AFI's burden (and that of the Association) to demonstrate this legal conclusion. *See Omid Land Group LLC*, 279 A.3d at 380-81 ("It is for the trial court to determine, in the first instance, and based on an accurate understanding of the summary judgment record and the governing law, whether Omid has established beyond genuine factual dispute that the sale was valid so as to extinguish U.S. Bank's first deed of trust under *Chase Plaza* and its progeny."). Relevant to that analysis is a determination of "the reasonableness of the sale price paid at the condominium foreclosure sale . . . as of the time of the sale . . . rather than the time of the litigation." *Id*. at 380 (citing *RFB Properties*, 247 A.3d at 697). The Superior Court made no findings on these issues[2] in its 2020 Order or 2023 Order, instead summarily rejecting Flagstar's affirmative claims and failing to require AFI and the Association to demonstrate the validity of sale. That the procedural posture was

[2] Facts that would have been proven in this matter include the sales price to AFI at foreclosure ($26,000), the face value of the first mortgage ($256,634.00), the unpaid balance on the mortgage ($449,040.90), and that 2014 tax-assessed value of the at-issue property ($237,930). All told, AFI paid less than 11% of the property's actual value for the property at issue, which is similar to the type of purchase price that multiple other courts have held to be grossly inadequate, rendering the sale invalid. Yet, despite AFI and the Association's burden to prove that this lien was extinguished through a valid sale, the Superior Court summarily found this to be the case without adjudicating that issue at all.

at the dismissal stage, and the motion for judgment on the pleadings stage, made this error even more noteworthy—as the Superior Court should have rendered any inferences on these issues in Flagstar's favor at that stage.

3. Flagstar would have demonstrated that the 2014 Foreclosure was invalid under traditional contract principles because the advertisement contained a material misstatement.

In addition to concerns about the validity of sale based upon a grossly inadequate purchase price, the Superior Court also failed to require AFI and the Association to demonstrate the validity of sale in light of irregularities present in the sale itself, making no determination on that issue. In both *Liu* and *4700 Conn 305 Trust*, this Court remanded challenges to condominium foreclosure sales to, *inter alia*, determine whether the sale should be invalidated because the terms of the sale were erroneously conditioned on the assumption of the first deed of trust. *See Liu*, 179 A.3d at 883 (remanding case because "a condominium association, acting on its own six-month super-priority lien for unpaid condominium assessments, pursuant to D.C. Code § 42-1903.13(a)(2), may not conduct its foreclosure sale subject to the first deed of trust"); *4700 Conn 305 Trust*, 193 A.3d at 766 (remanding case because "the sale by its terms was erroneously conditioned on assumption of the first deed of trust"); *Omid Land Group, LLC*, 279 A.3d at 380 (remanding case for trial court to consider whether foreclosure sale was valid given that the "advertisement of sale said the sale was subject to all prior liens, including

the first mortgage lien," and to consider the parties' beliefs and expectations at the time of the sale). This Court has also invalidated the sale of property upon a finding of "unfairness or irregularity combined with a grossly inadequate sales price." *Steward v. Moskowitz*, 5 A.3d 638, 652 (D.C. 2010).

Like in *Omid Land Group*, the parties' beliefs and expectations at the time of sale as to the likely effect of the sale on Flagstar's lien, in conjunction with the purchase price, would have been the appropriate basis for the Superior Court to determine the validity of the 2014 foreclosure. *Omid Land Group, LLC*, 279 A.3d at 380. Again, though, the Superior Court made no findings on these issues in its 2020 Order or 2023 Order. And, once more, the procedural posture at the time of dismissal of Count I made the Superior Court's failure to render reasonable inferences in favor of Flagstar even more troublesome.

CONCLUSION

Based on the foregoing, the Superior Court erred in finding that Flagstar's claims were time-barred without considering the discovery rule on a motion to dismiss. The Superior Court also erred in holding that the Trustee Deed extinguished Flagstar's Deed of Trust without considering whether the 2014 Foreclosure was invalid due to the misstatements in the Advertisement and the unconscionably low purchase price by AFI.

Dated: October 6, 2023

Respectfully submitted,

/s/ Andrew J. Narod

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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
Signature

23-CV-0267
Case Number(s)

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October 6, 2023
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Appellant's Appendix was served via the Appellate E-filing System on this 6th day of October, 2023 on the following:

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PERTINENT STATUTORY BACKGROUND

Pursuant to D.C. App. R. 28(f), Flagstar 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.

….