NO. 23-CV-0977

DISTRICT OF COLUMBIA COURT OF APPEALS

TYROSHI INVESTMENTS, LLC,

Appellant,

v.

U.S. BANK, N.A., SUCCESSOR TRUSTEE
TO LASALLE BANK, N.A.,

Appellee.

Appeal from the District of Columbia Superior Court
2020-CA-001727-B
(Honorable Robert Rigsby)

BRIEF OF APPELLANT TYROSHI INVESTMENTS, LLC

November 14, 2024

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DISCLOSURE STATEMENT

Appellant (Tyroshi Investments, LLC)

- Tyroshi Investments, LLC is represented by Ian G. Thomas and Tracy Buck of the law firm Offit Kurman. Tyroshi Investments, LLC is a privately held company that does not have a parent company or a publicly held corporation that is a member of the company.

Appellee (U.S. Bank, N.A., Successor Trustee to LaSalle Bank, N.A.)

- *U.S. Bank, N.A., Successor Trustee to LaSalle Bank, N.A.* is represented by Melissa O. Martinez of the law firm McGuireWoods, LLP.

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INTRODUCTION

The present appeal is a tale of two foreclosures. The first foreclosure was of a super priority condominium lien pursuant to D.C. Code § 42-1903.13 and, at that foreclosure, Appellant Tyroshi Investments, LLC ("Tyroshi") was the wining bidder. This foreclosure took place in 2014 prior to this Court's seminal decision in *Chase Plaza Condo. Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166 (D.C. 2014), which confirmed that a super-priority lien foreclosure extinguishes a first deed of trust that is encumbering the property. Thus, at the time of the foreclosure, it was unclear as to whether Tyroshi purchased a property that was subject to a first deed of trust, but ultimately, it was determined that Tyroshi's title was free and clear of any encumbrances.

The second foreclosure occurred two years later in 2016. This foreclosure, which was of the same condominium unit, was pursuant to the power of sale contained a first deed of trust. At that sale, Appellee U.S. Bank Trust, N.A. ("US Bank"), who was the owner of the deed of trust being foreclosed upon, purchased the condominium unit for a credit bid and accepted a deed that purported to vest it with title. However, based on this Court's ruling in *Chase Plaza*, the deed of trust that US Bank foreclosed upon had already been extinguished and thus the foreclosure US Bank conducted was invalid as a matter of law.

Four years later, US Bank, for the first time, challenged Tyroshi's title to the condominium unit in question. US Bank's challenge was based solely on equitable grounds and premised on the claim that Tyroshi had purchased the condominium unit for an unconscionably low sales price. After nearly three years of litigating these equitable claims, on the eve of trial, US Bank for the first time alleged that Tyroshi's purchase should be invalided under a federal statute that is colloquially referred to as the Federal Foreclosure Bar (12 U.S.C. § 4617(j)(3)). After initially denying US Bank's request to pursue the cause of action, the lower court ultimately (and without warning) allowed US Bank to assert the claim at trial.

At the conclusion of trial, the lower court entered judgment in favor of US Bank and voided Tyroshi's purchase of the condominium at issue. In doing so, the Court failed to correctly assess the timeliness of US Bank's claims and made significant legal errors concerning the application of the Federal Foreclosure Bar and this Court's post-*Chase Plaza* jurisprudence. As discussed more herein, each of these errors in and of themselves requires reversal of the judgment below.

STATEMENT OF ISSUES ON APPEAL

I. WERE US BANK'S CLAIMS AGAINST TYROSHI UNTIMELY UNDER THE RELEVANT STATUTES OF LIMITATIONS.

II. DID US BANK HAVE STANDING TO ASSERT THE FEDERAL FORECLOSURE BAR AND WAS THE STATUTE EVEN APPLICABLE TO THE SALE OF PROPERTY THAT WAS NOT OWNED BY THE FEDERAL NATIONAL MORTGAGE ASSOCIATION.

III. DID THE TRIAL COURT ERR IN HOLDING THAT TYROSHI'S PURCHASE PRICE WAS UNCONSCIONABLE UNDER THIS COURT'S DECISIONS IN *RFB PROPERTIES II* AND ITS PROGENY.

IV. DID THE TRIAL COURT ERR IN HOLDING THAT TYROSHI'S FAILURE TO RECORD ITS DEED RENDERED US BANK A BONA FIDE PURCHASER AT ITS SUBSEQUENT FORECLOSURE AND THUS VESTED IT WITH SUPERIOR TITLE TO THE UNIT.

STATEMENT OF THE CASE

The present appeal arises out of competing claims for title to a condominium unit located at 1391 Pennsylvania Avenue SE, Unit 366, Washington, DC 20003 ("Unit") that was the subject of two separate foreclosures. As discussed in more detail below, the first foreclosure occurred in June 2014 and was on a super-priority condominium lien pursuant to D.C. Code § 42-1903.13. JA 936-937. The second foreclosure occurred in 2016 and was a judicial foreclosure sale conducted by a first deed of trust holder. JA 950; JA 1004. The baseline question in the trial court was whether the 2014 super-priority lien foreclosure extinguished the first deed of trust that encumbered the Unit and thus rendered the subsequent foreclosure invalid as a matter of law.

This matter was commenced on March 11, 2020, when Tyroshi filed a Complaint and request for Temporary Restraining Order against the Jenkins Row Condominium Unit Owner's Association ("Association"), alleging that it had wrongfully evicted Tyroshi from the Unit. In response, the Association took the position that, *inter alia*, it was justified in its steps to prohibit Tyroshi from accessing

the Unit because Tyroshi was not its actual owner, and that title to the Unit was instead vested with US Bank. JA 22.[1]

On September 17, 2020, US Bank filed a Motion to Intervene in this matter seeking a declaration that it was the true owner of the Unit and quieting title to the Unit in its favor against Tyroshi. JA 41 ("Third Party Complaint"). In doing so, the Third Party Complaint asserted five claims against both Tyroshi and the Association:

(1) Count I: quieting title on the grounds that the sale to Tyroshi was unlawful and void under D.C. Code § 42-1903.13;

(2) Count II: seeking declaratory relief that the sale to Tyroshi was void because the sale was "commercially unreasonable" based on the sales price;

(3) Count III: seeking declaratory relief that Tyroshi's deed was ineffective against US Bank because it was unrecorded at the time that US Bank purchased the Unit;

(4) Count IV: declaring that D.C Code § 42-1903.13 was unconstitutional[2]; and

(5) Count V: seeking alternate relief under a theory of unjust enrichment for amounts paid by US Bank to the Association when it believed it was the owner of the Unit.

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[1] Tyroshi's wrongful eviction claims against the Association were ultimately dismissed by the lower court and this court affirmed the dismissal on appeal in a per curium opinion. The issues on this appeal solely focus on the claims assert between US Bank and Tyroshi.

[2] The record below indicates that US Bank abandoned this claim as it was not raised in summary judgment briefing, in the parties' Joint Pretrial Statement, or at trial.

JA 59. As discussed more *infra*, the Third Party Complaint did not reference any federal statute prohibiting the sale to Tyroshi, nor does it reference Federal National Mortgage Association ("Fannie Mae") at all. The lower court granted US Bank's request to intervene on October 21, 2020, and the Third Party Complaint was deemed filed as of the date of the Order. JA 201.

On November 12, 2020, the Association moved to dismiss US Bank's Third Party Complaint on the grounds that the claims against the Association were barred by the three-year statute of limitations. JA 204. US Bank opposed, arguing that its claims were not time-barred because the appropriate limitations period was either the 15-year limitations period that governed the recovery of lands in D.C. Code § 12-301(a)(1) or the 12-year limitations period for instruments under seal pursuant to D.C. Code § 12-301(a)(6). JA 243.

On January 13, 2021, the trial court granted the Association's motion to dismiss finding that US Bank's claims that sought to invalidate the sale to Tyroshi were time-barred. JA 287. The lower court expressly rejected US Bank's argument that the limitations period was either a 12-year period for instruments under seal or a 15-year period to reclaim lands. JA 291-295. Instead, the lower court applied the three-year limitations period that governs wrongful foreclosure claims. *Id.* The lower court went on to find that US Bank was on inquiry notice of its claims as early

as April 29, 2014, the date that the Association recorded its notice of foreclosure, at which time its claims began to accrue. *Id.*

With only Tyroshi and US Bank remaining in the case, on March 18, 2022, Tyroshi and US Bank filed cross motions for summary judgment against one another. JA 321; JA 481. In support of its motion for summary judgment, Tyroshi argued that US Bank's claims were time-barred and that the Association's foreclosure extinguished US Bank's deed of trust consistent with *Chase Plaza* and its progeny. JA 481. Conversely, US Bank argued that it was entitled to summary judgment because Tyroshi's corporate registration was revoked at the time of its purchase of the Unit and thus, Tyroshi was unable to purchase the Unit as a matter of law.[3] JA 321. US Bank also argued that the sale was void because Tyroshi paid an unconscionably low sales price. *Id.* On August 1, 2022, the trial court denied each of the cross dispositive motions, but did not address Tyroshi's statute of limitations argument in its Order. *Compare* JA 481 *with* JA 599.[4]

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[3] This argument was US Bank's primary argument for a majority of the time that this case was pending in the lower court. However, while the case was pending but before trial, this Court rendered its decision in *RFB Properties, LLC v. Fed. Nat'l Mortg. Ass'n*, 284 A.3d 381, 385 (D.C. 2022), which expressly rejected this argument. After the decision in the aforementioned case, US Bank stopped attacking Tyroshi's title to the Unit based on a lack of registration and the lower court did not rely on that fact in entering judgment after trial.

[4] In light of the decision in *RFB Properties, LLC v. Fed. Nat'l Mortg. Ass'n*, *see supra*, Tyroshi submitted a renewed motion for summary judgment on January 6, 2023, which the lower court also denied. This order also failed to consider the limitations issue. JA 705.

On June 29, 2023, the parties submitted a Joint Pretrial Statement to court in preparation for trial. JA 718. In its portions of the Joint Pretrial Statement, US Bank expressly stated that it was seeking to void Tyroshi's purchase of the Unit because the purchase price was unconscionably low, and that US Bank had superior title to the Unit because Tyroshi's deed was unrecorded at the time that US Bank recorded its deed. JA 721. Critically, US Bank did not include a single reference to any federal statute, any statute preventing the sale to Tyroshi, and did not reference the fact that Fannie Mae owned the subject loan at the time of Tyroshi's purchase. JA 718. Stated differently, the "Federal Foreclosure Bar" (defined below), and any factual element to support a claim thereunder, was not included in the Joint Pretrial Statement. *Id.*

On July 28, 2023, US Bank filed a Motion to Amend its Third Party Complaint. JA 754. The proposed pleading, which was filed three days before the start of trial, asserted for the first time that Fannie Mae was the owner of the subject loan at the time that Tyroshi purchased the Unit. US Bank further argued that, as a result Fannie Mae's ownership, Tyroshi's purchase of the Unit was barred by 12 U.S.C. § 4617(j)(3), which is commonly referred to as the Federal Foreclosure Bar (hereinafter, "Federal Foreclosure Bar"). JA 769. US Bank never previously indicated that Fannie Mae was the prior owner of the subject loan and there is no recorded assignment in the District of Columbia land records showing Fannie Mae's

ownership interest.[5] Likewise, US Bank never asserted the Federal Foreclosure Bar as a basis for any of its claims nor had it attempted to add Fannie Mae as a party to the case. *See, e.g.,* JA 41; JA 243; JA 313; JA 321; JA 501; JA 544; JA 634; JA 718.

That same day, Tyroshi filed a Motion to Preclude Claim, which sought to preclude US Bank from asserting the Federal Foreclosure Bar as a claim at trial. JA 849. The motion argued that US Bank had never previously raised the Federal Foreclosure Bar as a claim and to allow such a claim on the eve of trial would be "highly prejudicial" to Tyroshi. As a result, Tyroshi expressly requested that US Bank be precluded "from asserting at trial a claim that the foreclosure sale at which Tyroshi purchased the [Unit] was ineffective due to a violation of the Federal Foreclosure Bar." *Id.*

That same day, the lower court denied US Bank's Motion to Amend the Third Party Complaint. JA 854. In doing so, the lower court found that US Bank's attempt to change the operative pleading at the eleventh hour was prejudicial to Tyroshi. *Id.* The lower court also denied Tyroshi's Motion to Preclude Claim as "moot" based on its denial of US Bank's request to amend. *Id.*

On July 31, 2023, a bench trial commenced in this matter. JA 1251. At trial, US Bank called four witnesses who testified to the foreclosure process through

[5] One of US Bank's witnesses would go on to testify at trial that Fannie Mae intentionally conceals its ownership interest and intentionally does not record documents demonstrating that it is the owner of a loan. JA 1299-1304.

which US Bank purchased its interest in the subject loan and the Unit, that Fannie Mae was the owner of subject loan at the time Tyroshi purchased the Unit, and who opined on what the fair market value of the Unit was at the time it was sold to Tyroshi. *See generally* JA 1251-1722. Tyroshi offered one witness, its managing member, who testified about the how Tyroshi valued the Unit at the time of purchase and the facts surrounding Tyroshi's purchase. *Id.*

On October 24, 2023, the lower court (Judge Rigsby) rendered its decision on the merits of the dispute.[6] JA 2086. In doing so, the lower court rejected Tyroshi's argument that US Bank's claims were time-barred under the three-year statute of limitations. Instead, the lower court found that US Bank's claims were subject to the 15-year statute of limitations for the reclamation of lands under D.C. Code § 12-301(a)(1). JA 2100. The decision of the lower court was inconsistent with its previous ruling in which it applied a three-year statute of limitation to dismiss the exact same causes of action that US Bank had asserted against the Association. JA 287.

The lower court went on to find that Fannie Mae was the owner of the Loan from 2009-2015, and that as a result, the Association's foreclosure was barred by the Federal Foreclosure Bar. JA 2090-93. The lower court reached this ruling despite

[6] The October 24, 2023 ruling is an amended order, which was purportedly amended to correct a scrivener's error.

the fact that it denied US Bank's request to amend to incorporate that claim and that it denied Tyroshi's motion to preclude the claim as "moot." The rationale provided by the lower court for this ruling was that the application of the Federal Foreclosure Bar was simply a theory in support of US Bank's claims for declaratory relief and thus, it was not required to be pled under SCR-Civ. 8(a).

Notwithstanding the trial court's finding that the Association's sale to Tyroshi was void under the Federal Foreclosure Bar, the trial court proceeded to analyze the other arguments that were raised by the parties. In doing so, the lower court found that the sale of the Unit to Tyroshi was void due to an unconscionably low sales price. JA 2093. The lower court also found that US Bank was a bona fide purchaser of the Unit and had superior title to Tyroshi because US Bank recorded its deed before Tyroshi. JA 2094. Finally, the lower court reasoned that because Tyroshi had not recorded its deed at the time of US Bank's foreclosure, it was not entitled to notice of the foreclosure sale to US Bank nor was it required to be named as a party in any foreclosure proceeding. The lower court reached this conclusion notwithstanding the fact that US Bank admittedly knew of Tyroshi's interest in the Unit during the pendency of its foreclosure action. Based on these findings, the lower court entered judgment in favor of US Bank.

On November 14, 2023, Tyroshi timely filed a notice of appeal from the trial court's judgment. JA 2103.

STATEMENT OF FACTS

A. Purchase of the Condominium Unit

On September 28, 2007, Diana Gaines purchased the Unit which is located in the Jenkins Row Condominium Building. *See* JA 59. Ms. Gaines financed her purchase of the Unit through a loan from First Savings Mortgage Corporation, which was memorialized in a promissory note ("Note") in the amount of $271,100. JA 862. The Note was secured by a Deed of Trust ("Deed of Trust") that was recorded amongst the District of Columbia Land Records on October 5, 2007. JA 865. The Note and the Deed of Trust are each signed under seal, and collectively referred to hereinafter as the "Loan."

After extending the Loan to Ms. Gaines, on July 6, 2009, First Savings Mortgage Corporation assigned the Loan to Wells Fargo, which serviced the loan on behalf of Fannie Mae. JA 2087. Fannie Mae was the owner of the Loan from 2009-2015. *Id.* While it owned the Loan, Fannie Mae received monthly reports on the Loan and monitored it regularly. JA 1308; JA 2087. In late 2015, the Loan was subsequently transferred from Fannie Mae to US Bank. JA 1355-58.

B. Ms. Gaines Defaults on Condominium Obligations

The Association governs the Jenkins Row Condominium pursuant to the Jenkins Row Bylaws ("Bylaws"), a copy of which is recorded amongst the District of Columbia Land Records. JA 104. Among the Association's responsibilities is to

ensure the financial security of the Jenkins Row building. In furtherance of that obligation, the Bylaws allow for the Association to impose a monthly assessment upon each unit in the Jenkins Row Condominium to collect funds necessary to maintain and operate the building. If an owner defaults on their obligation to pay monthly assessments, the Association is vested with a lien on the delinquent owner's unit, which can be foreclosed upon pursuant to D.C. Code § 42-1903.13 ("Super-Priority Lien Statute"). The Super-Priority Lien Statute provides that the first six-months of the Association's lien is given priority over any first deed of trust that encumbers the property. D.C. Code § 42-1903.13(a)(2). Under common law foreclosure principles, in the event of a foreclosure on a super-priority lien, a first deed of trust is extinguished if the sales proceeds are insufficient to satisfy the lien. *Chase Plaza Condo. Ass'n, Inc. v. JPMorgan Chase Bank, NA*, 98 A.3d 166, 175 (D.C. 2014).

In or around 2013, Ms. Gaines failed to pay numerous monthly condominium assessments and, as a result, the Association recorded a notice of lien on March 7, 2014. Ms. Gaines failed to resolve the delinquency and on April 29, 2014, the Association recorded a Notice of Intent to Foreclose on its lien on the Unit. The Association conducted the foreclosure sale of the Unit on June 10, 2014. There were seven to ten bidders at the auction, and Tyroshi was the highest bidder that purchased the Unit for $10,000 ("Condo Foreclosure"). JA 2088. At the time of the Condo

Foreclosure there was approximately $364,000 owed on the Loan to Ms. Gaines, which was secured by the Unit. JA 953. A Trustee's Deed ("Trustee's Deed") was issued to Tyroshi on July 2, 2014, which Tyroshi recorded four years later on July 6, 2018. JA 941.

C. The State of District of Columbia Law at the Time of Sale

In June 2014, when the Unit was sold to Tyroshi, the import of a foreclosure sale conducted pursuant to the Super-Priority Lien Statute was unclear. On the date of the Condo Foreclosure, this Court had yet to issue its ruling in the seminal case *Chase Plaza Condo. Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 172-176 (D.C. 2014), which held for the first time that a foreclosure under the Super-Priority Lien Statute extinguishes a first deed of trust. Prior to that decision, the effect of a super-priority lien foreclosure was unknown, and in fact, generally thought to carry with it the indebtedness on the foreclosed property. *Id.* This legal uncertainty existed at the time that Tyroshi purchased the Unit.

In the wake of *Chase Plaza*, this Court rendered several subsequent decisions further clarifying the application of the Super-Priority Lien Statute. In *Liu v. U.S. Bank National Association*, 179 A.3d 871, 878 (D.C. 2018), this Court held that a condominium association could not waive the super-priority status of its lien, and in *4700 Conn 305 Trust v. Capital One, N.A.*, 193 A.3d 762, 765 (D.C. 2018), this Court found that a foreclosure of more than six months of assessments owed retained its

super-priority status. More recently, in *RFB Properties II, LLC v. Deutsche Bank Trust Company Americas*, 247 A.3d 689, 697 (D.C. 2021), this Court clarified the unconscionability analysis and held the sales price of super-priority lien foreclosures must be assessed on the conditions of the sale at that time. When evaluating a purchase price from a super-priority lien foreclosure that occurred pre-*Chase Plaza*, at a time when the import of the Super-Priority Lien Statute was uncertain, the purchase price must be evaluated as if the entire indebtedness on the property survived the sale. This ruling has since been expanded to also include sales that occurred prior to the Court's decision in *Liu* and *4700 Conn*. *See New Penn Financial, LLC v. Daniels*, 319 A.3d 997, 1004-05 (D.C. 2024).

D. Ms. Gaines Defaults on the Loan

In or around October 10, 2010, Wells Fargo sent a letter to Ms. Gaines declaring her in default of her payment obligations under the Loan and demanding that the full outstanding amount of the debt be paid. At this time, and at all times relevant to this dispute, Wells Fargo was purportedly servicing the Loan on behalf of Fannie Mae. After Ms. Gaines failed to cure the default for many years, on May 28, 2015, Wells Fargo filed an action in the Superior Court styled *Wells Fargo Bank, NA v. Gaines*, Case No. 2015 CA 003885 R(RP) ("Foreclosure Action"), which sought to judicially foreclose on the Unit pursuant to the Deed of Trust. JA 950. Ms. Gaines failed to timely respond to the Complaint in the Foreclosure Action and a

default was entered against her on November 13, 2015. Soon thereafter, Fannie Mae transferred ownership of the Loan to US Bank. As a result, US Bank substituted in as the proper party plaintiff in the Foreclosure Action on February 19, 2016.

On June 23, 2016, the Superior Court entered a judgment in favor of US Bank in the Foreclosure Action, authorizing the foreclosure of the Deed of Trust. US Bank auctioned the Unit on August 30, 2016, at which time US Bank purchased the Unit through a credit bid. US Bank filed a motion to ratify the sale on October 26, 2016, and for the first time, served a copy on Tyroshi, notwithstanding the fact that it was not a party to the case. JA 1070. US Bank would purport to send copies of all subsequent filing in the Foreclosure Action to Tyroshi, but never added Tyroshi as a party to the proceeding.

The sale was ratified by the court on November 14, 2016, and US Bank's trustee's deed was recorded on December 20, 2016. The accounting of the foreclosure sale to US Bank was approved by the Court on February 22, 2017, which resulted in the closing of the Foreclosure Action.

SUMMARY OF ARGUMENT

The lower court committed several reversible errors both in denying summary judgment to Tyroshi and in reaching its decision to enter judgment in US Bank's favor after trial. As an initial matter, the lower court incorrectly held that the 15-year statute of limitations for the reclamation of land applied US Bank's claims

against Tyroshi. The decision was not only wrong as a matter of law, but it was also directly at odds with the lower court's earlier ruling in which it dismissed the same claims against the Association based on a three-year limitations period. If the lower court had applied the correct three-year statute of limitations (or the six-year limitations period that applies to the Federal Foreclosure Bar), US Bank's claims are time-barred.

The lower court also erred when it allowed US Bank to pursue a statutory claim under the Federal Foreclosure Bar. US Bank never included a claim under the Federal Foreclosure Bar in its pleadings nor did not allege any facts necessary to support such relief under the statute. On the eve of trial, the lower court denied US Bank's request to amend its complaint to include a claim for violation of the Federal Foreclosure Bar and denied Tyroshi's motion to preclude the claim as "moot." Nevertheless, at trial, the lower court allowed US Bank to put on evidence concerning the Federal Foreclosure Bar and ultimately ruled that the statute rendered Tyroshi's purchase of the Unit null and void. The lower court's decision to allow the claims to be pursued at trial, after its pretrial rulings to the contrary, also constitutes reversible error.

The problems with US Bank's claim under the Federal Foreclosure Bar go beyond the fact that it was never pled. The lower court failed to consider the fact that US Bank did not have standing to assert a claim under the Federal Foreclosure

Bar and, even if it did, the Federal Foreclosure Bar was not applicable to the present sale because the Unit itself was never the "the property" of Fannie Mae, and thus, not protected by statute.

The decision of the lower court is also directly at odds with this Court's binding precedent on super-priority liens. Specifically, the lower court ruled that Tyroshi purchased the Unit for an unconscionably low sales price but did not evaluate the purchase price based on the uncertainty in the Super-Priority Lien Statute that existed in 2014, prior to *Chase Plaza*. The lower court's analysis and decision on this point run contrary to this Court's decisions in *RFB Properties II* and in *New Penn* and therefore must be reversed.

Finally, the lower court erred in ruling that Tyroshi's failure to record its deed until 2018 gave US Bank superior title to the Unit. Such a decision ignores the fact that Tyroshi's purchase of the Unit extinguished the first deed of trust, meaning that US Bank could never have purchased the Unit in the first place. Moreover, the record below made clear that US Bank was aware of Tyroshi's interest in the Unit prior to closing on its purchase and recordation of its deed. As a result, US Bank is not a bona fide purchaser.

STANDARD OF REVIEW

The issues on this appeal are all questions of law. Decisions on issues of law are reviewed by this Court *de novo*. *E.g., Washington Automotive Co. v. 1828 L*

Street Associates, 906 A.2d 869, 874 (D.C. 2006). In this instance, the questions on appeal that relate to the statute of limitations, standing, application of the Federal Foreclosure Bar, and application of this Court's decisions on super-priority liens are all issues of law that were determined by the trial court. *Yerrell v. EMJ Realty Company*, 281 A.3d 594, 597 (D.C. 2022) (expiration of the statute of limitations is a question of law); *Parcel One Phase One Associates, L.L.P. v. Museum Square Tenants Ass'n, Inc.*, 146 A.3d 394, 399 (D.C. 2016) (standing is an issue of law); *RFB Properties II*, 247 A.3d at 696 (orders granting summary judgment, particularly those concerning super-priority lien foreclosures, are reviewed *de novo*). Moreover, legal conclusions based on findings of fact, such as whether US Bank was a bona fide purchaser, are also reviewed under a *de novo* standard. *See Hickey v. Bomers*, 28 A.3d 1119, 1123 (D.C. 2011). In sum, each issue on appeal is properly considered under *de novo* standard of review.

ARGUMENT

I. US BANK'S CLAIMS ARE TIME-BARRED

The lower court erred in failing to dismiss US Bank's claims under the relevant statutes of limitation.[7] As discussed in more detail herein, each of the claims contained in the Third Party Complaint is subject to the three-year statute of

[7] Unless otherwise indicated, future references to US Bank should be read to be inclusive of it predecessors in interest, primarily Wells Fargo and Fannie Mae.

limitations contained in D.C. Code § 12-301(a)(8). While the claim was never properly asserted below, a cause of action under the Federal Foreclosure Bar is also time barred under the six-year limitations period contained in that statute. For these reasons, the judgment of the lower court must be reversed.

A. US Bank's Claims Are Barred by the Three-Year Statute of Limitations

The undisputed facts demonstrate that US Bank's claims were barred by the statute of limitations. Under District of Columbia law, claims for wrongful foreclosure or to otherwise set aside a foreclosure sale are subject to a three-year statute of limitations. *See* D.C. Code § 12-301(a)(8); *Tefera v. One West Bank, FSB,* 19 F. Supp. 3d 215, 224 (D.D.C. 2014) (J. Kentanji Brown Jackson); *see also Murray v. Wells Fargo Home Mortg.,* 953 A.2d 308, 323 (D.C. 2008) (catchall limitations period in D.C. Code § 12-301(a)(8) applies to any action in which no other limitations period is explicitly specified). This limitations period begins to accrue from the time that US Bank was on actual or constructive notice of the potential claim. *E.g., Brin v. S.E.W. Invs.,* 902 A.2d 784, 794-95 (D.C. 2006). Each of the causes of action that US Bank asserts in its Third Party Complaint carries a three-year statute of limitations. US Bank's claims seek to either void the Condo Foreclosure or to recover proceeds from the sale. A limitations period for these particular claims is not specifically identified in D.C. Code § 12-301, nor is it found in any other statute. As a result, the claims are subject to the catchall three-year

limitations period contained in D.C. Code § 12-301(a)(8). The limitations period for US Bank's claims expired three years from the date that its claims accrued.

US Bank's causes of action began to accrue in 2014 and thus, expired three years later in 2017. Accrual of a cause of action occurs when a party is on inquiry notice of their potential claim. *See Brin, supra*. When it comes to accrual of claims relating to title to real property, this Court has acknowledged that accrual occurs when there exists "circumstances which generate enough uncertainty about the state of title that a person of ordinary prudence would inquire further about those circumstances." *Clay Properties, Inc. v. Washington Post Co.*, 604 A.2d 890, 895 (D.C. 1992). The recordation of interest in real property serves to put the world on notice of any claims relating to the title of that property. *See Rafferty v. D.C. Zoning Comm'n*, 662 A.2d 191, 193 (D.C. 1995) ("The purpose of such recordation, self-evidently, is to give interested persons 'the means ... at hand,' to learn the true state of title of the affected property.") (cleaned up). The record demonstrates that the Association made it publicly known that it was going to conduct the Condo Foreclosure. On April 29, 2014, the Association recorded a Notice of Foreclosure on the Unit in the District of Columbia Land Records. JA 936. The Association also advertised the Condo Foreclosure in a local newspaper of general circulation for several weeks in advance of the Condo Foreclosure. JA 1247.

The record also establishes that US Bank was monitoring the Loan at the time of the Condo Foreclosure and that the loan had been in default for many years. Concerning the former, testimony at trial confirmed that Wells Fargo (US Bank's predecessor in interest) monitored the status of its Loan and sent monthly updates to Fannie Mae. In terms of the latter, the evidence at trial showed that the Loan was in long standing default, raising the prospect that Ms. Gaines was having financial issues and was potentially the subject of claims from competing creditor such as the Association. These facts indicate that if US Bank (or any of the prior lenders) had engaged in reasonable due diligence, it should have discovered the Association's efforts to foreclose on its lien.

The record further shows that US Bank conducted due diligence on the status of the Unit and confirmed that Tyroshi acquired title to the Unit through the Condo Foreclosure, yet declined to timely pursue its claims. The testimony at trial indicated that US Bank was aware of Tyroshi's interest in the Unit at the time it pursued its Foreclosure Action in 2015, even though Tyroshi had not recorded its deed. JA 1561-1564. During the pendency of the Foreclosure Action, US Bank even sent certain court filings to Tyroshi. *See* JA 1000. Despite knowledge of the Condo Foreclosure, US Bank did not timely assert its claims to protect its lien.

For these reasons, the record clearly demonstrates that US Bank was on inquiry notice that adverse actions that had been taken against its lien interest dating

back to April 29, 2014. These notices were placed in the public record at a time when US Bank was actively monitoring the Loan on a monthly basis. When the Association commenced its foreclosure of the Unit the Loan had been in default for over four years, creating an additional reason for US Bank to monitor against claims from competing creditors. However, US Bank took no action, and on June 10, 2014 when Tyroshi was the winning bidder at the Condo Foreclosure auction, US Bank suffered its injury in the form of the extinguishment of its interest in the Unit. US Bank was charged with constructive notice of this injury on that date, and its claims thereby began to accrue. US Bank's claims expired three years later in June 2017, prior to it taking any action. D.C. § 12-301(a)(8). Thus, US Bank's Third Party Complaint filed in 2020 was untimely.

B. Any Claim Under the Federal Foreclosure Bar is Also Time-Barred

A similar analysis applies to any claim that is asserted under the Federal Foreclosure Bar.[8] The Federal Foreclosure Bar is subject to its own statute of limitations, which is, on contract claims, six years or the applicable state law limitations period, whichever is longer. *See* 12 U.S.C. § 4617(b)(12)(A)(i). On claims that are based in tort, the statute of limitations is either three years or the

[8] As discussed in more *infra*, the Federal Foreclosure Bar was not properly before the Court for a number of reasons. However, as discussed more in this section of the brief, even assuming *arguendo* that the claim was before the Court, it was still untimely.

applicable state law limitations period, whichever is longer. *Id.* at (b)(12)(A)(ii). The limitations period begins to run on the date of accrual. *Id.* at (b)(12)(B). While the claims asserted by US Bank are largely equitable in nature, and thus do not fall nicely into either category of contract or tort, at best, US Bank had six years to assert any claim.[9]

US Bank failed to timely assert the Federal Foreclosure Bar and therefore, the statute cannot serve as a basis for unwinding the Condo Foreclosure.[10] As discussed above, US Bank's claims began to accrue no later than June 10, 2014 when Tyroshi purchased the Unit and, by virtue of the Condo Foreclosure, extinguished US Bank's interest. *See supra.* Nevertheless, US Bank did not raise the Federal Foreclosure Bar as a basis to void the Condo Foreclosure until July 28, 2023, well after the six-year limitations period expired. JA 754. Even if its claim related back to US Bank's original Third Party Complaint filed in October 2020 – which was not raised below and which Tyroshi would dispute – it was still filed after the six-year limitations period expired in June 2020. The result is that any claim under the Federal Foreclosure Bar would be time-barred as well.

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[9] Other courts applying the statute of limitations to a claim seeking to set aside a super priority foreclosure sale under the Federal Foreclosure Bar have found that it is more appropriate to treat claims as contract claims and thus, subject to the six year limitations period. *See M&T Bank v. SFR Invs. Pool 1, LLC*, 963 F.3d 854, 858 (9th Cir. 2020).

[10] US Bank never actually formally asserted the Federal Foreclosure Bar in a pleading and was denied its request to amend its complaint to include such a claim. JA 854.

C. The Lower Court Applied the Wrong Limitations Period

The lower court erred when it ignored the above analysis and incorrectly applied the 15-year limitations period for the recovery of lands. Longstanding District of Columbia law is clear that the 15-year limitations period for the recovery of lands **does not** apply to claims that seek to set aside a foreclosure sale. *See Talbott v. Hill*, 261 F. 244, 245 (D.C. Cir. 1919) (15-year statute of limitations for recovery of lands "'does not apply… when a deed is foreclosed….'"). Indeed, courts have frequently acknowledged that the statute of limitations for the recovery of lands is designed to apply to claims for adverse possession, not for foreclosure disputes. *See Bd. of Trustees Grand Lodge of Indep. Ord. of Odd Fellows of D.C. v. Carmine's DC, LLC*, 225 A.3d 737, 747 (D.C. 2020) (applying 15 years limitations period to an easement created by prescription); *Sim Development, LLC v. District of Columbia*, Case No. 19-cv-03383, 2020 WL 3605831 at *2 (D.D.C July 2, 2020); *Hancock v. Homeq Servicing Corp.*, Case No. 05-0307, 2007 WL 1238746, at *4 n.4 (D.D.C. Apr. 27, 2007), *aff'd*, 526 F.3d 785 (D.C. Cir. 2008); *Johnson v. Chase Manhattan Mortg. Corp.*, Case No. 04-cv-344, 2006 WL 2506598, at *3 (D.D.C. Aug. 28, 2006). Simply put, the limitations period in D.C. Code § 12-301(a)(1) does not apply.[11]

[11] It is also worth pointing out that the 12-year limitations period that covers instruments under seal does not apply in this matter. *See* D.C. Code § 12-301(6). The foreclosure sale at issue was conducted pursuant to statute, not an instrument under seal. DC Code § 42-1903.13.

The fact that the limitations period for the recovery of lands does not apply makes sense in the context of US Bank's claims. US Bank was never the record owner of the Unit prior to Tyroshi's purchase. Instead, at the time of the Condo Foreclosure, US Bank (or its predecessor in interest) held a lien on the Unit, which is a contract based right, not a possessory or ownership right in the Unit itself. *See Chase Plaza,* 98 A.3d at 173 (describing the common law principle of lien foreclosures); *see also* Restatement (Third) of Property (Mortgages) § 4.1 (1997) ("**A mortgage creates only a security interest in real estate and confers no right to possession of that real estate on the mortgagee**") (emphasis added). Stated differently, US Bank's claims do not seek the "recovery of lands;" rather, the claims seek to reinstate a contractual right to security for the Loan.

Importantly, the lower court itself acknowledged this fact when it dismissed US Bank's claims against the Association, which were the same claims that were made against Tyroshi. In granting the Association's request to dismiss, the lower court directly analyzed the question of what was the appropriate statute of limitations. JA 287. The lower court found that the limitations period was the three-year period in D.C. Code § 12-301(a)(8) and not the 15-year period for recovery of lands or the 12-year period for instruments under seal. JA 290-295. That decision has not been appealed and is thus a final ruling on the merits. The claims US Bank asserted against the Association were the identical claims that it made against

Tyroshi, and the same limitations period should govern. JA 59. The lower court's failure to consistently apply the statute of limitations constitutes clear error.

For all of the foregoing reasons, the lower court erred when it denied Tyroshi's motion for summary judgment based on the statute of limitations and when it ultimately entered judgment in US Bank's favor after trial. Had the lower court applied the appropriate statute of limitations in either instance, the only result would have been entry of judgment in Tyroshi's favor. Accordingly, this court should reverse the lower courts decisions on the statute of limitations.

II. THE LOWER COURT COULD NOT INVALIDATE THE FORECLOSURE SALE BECAUSE THE ASSOCIATION WAS DISMISSED FROM THE CASE AND NOT A PARTY TO THE JUDGMENT

The absence of the Association from the case, by virtue of its dismissal with prejudice by the lower court, prevented entry of judgment invalidating Tyroshi's title to the Unit. It is well settled that in a suit to set aside a transaction, all parties to that transaction must be joined in the proceeding. *See Young v. Swafford*, 102 A.2d 312, 313 (D.C. 1954). The District of Columbia has also recognized that "'rescission of a contract, or declaration of its invalidity, as to some of the parties, but not as to others, is not generally permitted.'" *Ward v. Deavers*, 203 F.2d 72, 75 (D.C. Cir. 1953). More recently, this Court has questioned in *dicta* whether a super-priority lien foreclosure sale could be set aside if the condominium association was not a party to the proceeding. *See RFB Properties II, LLC v. Deutsche Bank Tr. Co.*

Americas, 247 A.3d 689, 693 n. 2 (D.C. 2021). It should resolve this question in the negative.

This line of legal reasoning and precedent is consistent with decisions from other courts recognizing the proposition that you cannot void a transaction if all affected parties – in particular, buyer and seller – are not included in the proceeding. It has long been recognized in this jurisdiction (and others) that "an action seeking rescission of a contract must be dismissed unless all parties to the contract, and others having a substantial interest in it, can be joined." *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 788 (D.C. Cir. 1983) (emphasis added) (collecting cases from various federal circuit courts confirming this proposition); *see also U.S. Bank Nat'l Ass'n v. Collins- Fuller T.*, 831 F.3d 407, 410 (7th Cir. 2016) (finding that the absence of a junior lienholder on the property from the suit required dismissal); *Wilbur v. Locke*, 423 F.3d 1101, 1113 (9th Cir. 2005) ("[I]t is a 'fundamental principle' that 'a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract.'") abrogated on other grounds by *Levin v. Com. Energy, Inc.*, 560 U.S. 413 (2010). Here, there are two parties to the Condo Foreclosure, Tyroshi and the Association. The latter has been dismissed with prejudice because the lower court found that the claims against it were time-barred. In the absence of the Association, particularly when it has been dismissed from the case on the merits, US Bank is unable to proceed against Tyroshi.

III. THE LOWER COURT IMPROPERLY APPLIED THE FEDERAL FORECLOSURE BAR

The lower court committed clear error when it relied on the Federal Foreclosure Bar as the basis for invalidating the Condo Foreclosure. The decision of the lower court to apply the statute was itself a clear error insomuch as that basis for invalidating the Condo Foreclosure was never pled and US Bank lacks standing to assert the statutory right. Even if neither of the aforementioned were true, the lower court's application of the Federal Foreclosure Bar is at odds with the plain language of the statute. As discussed more *infra*, each of these errors serves as a basis for reversal.

A. Federal Foreclosure Bar was Never Pled

The lower court erred by considering the Federal Foreclosure Bar as a basis to set aside the Condo Foreclosure because a claim under the statute was never pled. It is a well settled rule of pleading that a plaintiff must set forth a short and plain statement of facts demonstrating that it is entitled to the relief that is sought. *See* SCR-Civ. 8. While a pleading is not required to detail every potential legal theory upon which the pleader may rely, "it is fundamental that a plaintiff must disclose sufficient information to put the defendant on notice of the claim against him." *D.C. v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 661 (D.C. 2005) (citing *Keranen v. Nat'l R.R. Passenger Corp.*, 743 A.2d 703, 713 (D.C. 2000)). Thus, US Bank was required to allege facts sufficient to put Tyroshi on notice of the basis upon which it sought

to void the Condo Foreclosure, and in particular, that it was relying on the Federal Foreclosure Bar.

US Bank did not make such an assertion in its pleading. The original pleading asserted claims to set aside the Condo Foreclosure based on unconscionability and equity. JA 59. The pleading does not once mention the Federal Foreclosure Bar. *Id*. The Third Party Complaint also does not allege any fact through which one could discern that the Federal Foreclosure Bar is potentially at issue. There is no allegation that Fannie Mae was the owner of the Loan at the time of the Condo Foreclosure, nor is there any reference to the fact that it ever had an interest in the Loan. *Id.*[12] The dearth of any factual allegations concerning Fannie Mae's ownership and absence of any reference to the Federal Foreclosure Bar means that any claim under the statute was not properly pled and as a result, cannot be pursued.

The absence of any assertion of the Federal Foreclosure Bar continued for almost the entirety of this dispute. In the briefing on cross motions for summary judgment, US Bank did not once mention the Federal Foreclosure Bar or Fannie Mae's ownership of the Loan in support of this request for judgment or in opposition to Tyroshi's request for same. *See* JA 321; JA 501; JA 544. Likewise, after both dispositive motions were respectively denied, U.S. Bank submitted a Joint Pretrial

[12] There is also nothing in the District of Columbia Land Records stating that Fannie Mae was ever the owner of the Loan. This was confirmed by testimony at trial stating that Fannie Mae generally attempts to conceal its ownership interest in mortgage loans. JA 1299-1304.

Statement that did not contain a single reference to either the Federal Foreclosure Bar or Fannie Mae's purported ownership of the Loan. JA 718. Simply put, US Bank made no assertion that it intended to pursue any claim under the Federal Foreclosure Bar at trial.

The first time US Bank raised the Federal Foreclosure Bar was three days before trial, when it sought to amend its complaint to add allegations relating to the statute and Fannie Mae's ownership. However, the lower court properly denied that request and, in doing so, acknowledged that it would be prejudicial to Tyroshi to allow US Bank to assert new claims through an eleventh hour amendment to its complaint.[13] JA 854. The existence of this prejudice was especially apparent considering the lack of any prior reference to the Federal Foreclosure Bar or facts that would support any relief under the statute.

It is also important to note that Tyroshi moved to preclude US Bank from pursuing a claim under the Federal Foreclosure Bar on the same day that US Bank sought to amend its pleading. While the lower court denied that motion, it did so on the basis that the request for relief was "MOOT" because the requested amendment was denied. JA 856 (emphasis original). A request for relief is "moot" when the

[13] The lower court did not consider the issue of whether a claim under the Federal Foreclosure Bar was time-barred. As discussed *supra*, the statute of limitations had run on these claims which created an independent basis for deny the amendment. *E.g., Farris v. District of Columbia.*, 257 A.3d 509, 517 (D.C. 2021).

issue presented is no longer live and the parties lack interest in the outcome. *Settlemire v. D.C. Off. of Emp. Appeals*, 898 A.2d 902, 904 (D.C. 2006). Thus, the lower court's denial of Tyroshi's motion to preclude as "moot" made clear that the Federal Foreclosure Bar would not be an issue at trial.

However, at trial, the lower court ignored its prior rulings and allowed evidence in support of a claim under the Federal Foreclosure Bar. The lower court's 180 degree turn on the subject was unquestionably prejudicial to Tyroshi, which had no notice of the change in position, and did not have any pretrial notice of the claim. JA 718; JA 854; JA 1265-1266. The decision to include the unpled issue of the Federal Foreclosure Bar at trial and to rely on it to invalidate the Condo Foreclosure constitutes reversable error.

Any claims by US Bank that the Federal Foreclosure Bar was properly considered is undermined by the record. In attempting to amend its pleading, US Bank argued that it was simply clarifying the nature of its claims. JA 754. This position is at odds with the plain fact that Fannie Mae's purported ownership of the Loan is not referenced once in US Bank's entire original complaint. JA 59. Fannie Mae's ownership is a necessary element to any claim under the Federal Foreclosure Bar, and without out it, the statute is not applicable. To put it another way, US Bank's last-minute amendment to its pleading added previously undisclosed facts that

implicated a statutory right that was unavailable, as a matter of law, under the facts as previously pled.

There is also no means through which Tyroshi could have anticipated the Federal Foreclosure Bar as a claim. At no point in time was a document demonstrating Fannie Mae's ownership of the Loan recorded amongst the District of Columbia Land Records. To the contrary, notice of transfer of ownership of the Loan to Wells Fargo was recorded, but that notice did not disclose Fannie Mae's ownership interest or that Wells Fargo was acting only as a servicer. JA 884. Thus, not only were the facts supporting a claim under the Federal Foreclosure Bar not pled, the information was also not publicly available.

Under the above circumstances, it was improper for the lower court to consider, let alone rule, on a claim under the Federal Foreclosure Bar. The decision to enter judgment based on that statute must be reversed.

B. US Bank Lacks Standing to Assert the Federal Foreclosure Bar

US Bank did not have standing to assert any rights under the Federal Foreclosure Bar. A party seeking to assert a right under a statute must be vested with "statutory standing" to bring that particular claim. *See Richman Towers Tenants' Ass'n, Inc. v. Richman Towers LLC*, 17 A.3d 590, 597 (D.C. 2011) (plaintiff must prove that it has the right to seek to enforce a statutory right). It has been noted that "statutory standing is nothing more than an inquiry into whether the statute at issue

conferred a 'cause of action' encompassing 'a particular plaintiff's claim.'" *United States v. Emor*, 785 F.3d 671, 677 (D.C. Cir. 2015) (internal citation omitted). As part of establishing the Federal Foreclosure Bar as a basis to invalidate the Condo Foreclosure, US Bank is required to demonstrate that it has authority to assert the Federal Foreclosure Bar in the first place.

The plain text of the Federal Foreclosure Bar demonstrates that it applies to claims made by Fannie Mae and not to third parties. The text of the Federal Foreclosure Bar indicates that it applies to "property" belonging to Fannie Mae. 12 U.S.C. § 4617(j)(3). The same statutory scheme vests the conservator or receiver appointed over Fannie Mae with the authority to exercise all rights on behalf of the entity and does not vest any third party with the right to pursue a claim under the statute without agency approval. *See* 12 U.S.C. § 4617(b)(2)(A)-(D). Here, there is nothing in the record indicating that Fannie Mae has approved or authorized US Bank to assert a claim or right under the Federal Foreclosure Bar. Fannie Mae is not a party to this case and there is nothing in the record vesting US Bank with authority to act on Fannie Mae's behalf. In the absence of Fannie Mae as a party, or without its authorization, US Bank did not have standing to assert a claim under the Federal Foreclosure Bar.

C. The Federal Foreclosure Bar Does Not Apply

Assuming *arguendo* that the Federal Foreclosure Bar was properly at issue in the proceeding below, the statute still does not apply to the Condo Foreclosure because the Unit was not Fannie Mae "property." It is well settled that in interpreting a statute, the Court must start with the plain language of the statute as the best evidence of congressional intent. *E.g.*, *Wemhoff v. District of Columbia*, 887 A.2d 1004, 1008 (D.C. 2005); *United States v. Saffarinia*, 424 F. Supp. 3d 46, 73 (D.D.C. 2020). If the statutory language is plain and unambiguous, the Court's analysis is concluded, and it must apply the plain meaning of the statutory text. *Id.* In this instance, the Federal Foreclosure Bar uses clear and unambiguous language to describe its scope, stating: "No property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor shall any involuntary lien attach to the property of the Agency." 12 U.S.C. § 4617 (emphasis added). The language of the statute makes clear that it is solely limited to "property of the Agency," not property of private parties. *Id.* The statute also makes clear that it protects "property of the Agency" from certain legal actions, including foreclosure, attachment, and a forced sale. *Id.*

However, at no point in time was the Unit the "property" of Fannie Mae and therefore, it cannot be the subject to the Federal Foreclosure Bar. The undisputed facts clearly demonstrate that, at the time of Tyroshi's purchase, the Unit belonged

to Ms. Gaines. At no point in time has Fannie Mae, or any agent of Fannie Mae, owned the Unit or had an ownership interest in the Unit. As such, at the time of Tyroshi's purchase, the Unit was not "property of the Agency," which was protected by the Federal Foreclosure Bar; rather, it was the property of Ms. Gaines, which was not entitled to similar statutory protection. The result is that the Federal Foreclosure Bar does not apply to this transaction.

The fact that Fannie Mae owned a lien interest on the Unit at the time it was sold to Tyroshi does not alter the above analysis. It is well settled that the existence of a lien on real property does not vest the lienholder with title to the property itself. *See Chase Plaza*, 98 A.3d at 173 (describing the common law principle of lien foreclosures); *see also* Restatement (Third) of Property (Mortgages) § 4.1 (1997) ("A mortgage creates only a security interest in real estate and confers no right to possession of that real estate on the mortgagee"). A lienholder's rights in the real property that serves as security to the record owner's indebtedness are limited to enforcement of their lien through foreclosure of the collateral. *See id.* Courts in this jurisdiction have confirmed this principal, stating that "the mortgage conveys nothing in the land," and that a lender is "only considered as a trustee, and the mortgage [ ] but a security for the money lent." *Asnake v. Deutsche Bank Nat'l Tr. Co.*, 313 F. Supp. 3d 84, 88 (D.D.C. 2018). This is consistent with our common understanding of property ownership where, notwithstanding the presence of a lien,

the owner of real property is still free to transfer title to the property or further encumber property regardless of the presence of a lien (which would travel with the property to the subsequent owner until satisfied or released). *See Chase Plaza, supra*. Thus, while Fannie Mae's lien did vest it with certain contractual rights relating to the Unit, the lien itself did not make the Unit Fannie Mae's "property."

The distinction about what constitutes Fannie Mae's property is important because ultimately Fannie Mae's "property," which consisted of a contract-based lien, was not foreclosed upon. In interpreting a statute, the Court is to apply the plain meaning of the language used and can refer to dictionaries to assist in the interpretation of undefined terms. *See Tippett v. Daly*, 10 A.3d 1123, 1126-27 (D.C. 2010). The term "foreclosure" is defined as a "legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property." FORECLOSURE, Black's Law Dictionary (11th ed. 2019) (emphasis added). This definition is confirmed by caselaw. *See, e.g.*, *Obduskey v. McCarthy & Holthus LLP*, 586 U.S. 466, 469 (2019); *Chase Plaza Condo. Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 173 (D.C. 2014). The dictionary definition of "foreclosure" confirms that the property that was foreclosed upon was the Unit, not the Deed of Trust that Fannie Mae owned. While the Deed of Trust was ultimately extinguished

by the Condo Foreclosure, that was an ancillary result of the foreclosure, it was not due to any direct action that was taken against Fannie Mae's property.

For these reasons, the Federal Foreclosure Bar does not apply to the Condo Foreclosure, and the lower court's decision to apply the statute constitutes reversible error.

IV. THE LOWER COURT ERRED IN FINDING THAT THE CONDO FORECLOSURE WAS UNCONSCIONABLE

The lower court misapplied this Court's recent precedents in deciding to invalidate the Condo Foreclosure due to an unconscionably low sales price. Over the past three years, this Court has had several opportunities to develop the law concerning whether a sales price at a super-priority lien foreclosure sale is unconscionable. In *RFB Properties II*, this Court took steps to "clarify" that under District of Columbia law, "the inadequacy of the purchase price of a condominium unit sold at foreclosure pursuant to D.C. Code § 42-1903.13 must be assessed based on circumstances as they existed when the foreclosure sale occurred." *RFB Properties II, LLC v. Deutsche Bank Tr. Co. Americas,* 247 A.3d 689, 692 (D.C. 2021). This Court went on to find that:

> [I]n light of our precedent, the price RFB II paid for the property should not have been 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, [] making it clear that the property had been purchased for $53,000 unencumbered by any liens. Rather, 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 (one that only a few months after the sale was in excess of half a million dollars). A purchase price of what was, in effect, approximately $550,000 for this property cannot be deemed unconscionable as a matter of law so as to support a grant of summary judgment.

Id. at 697 (cleaned up). In short, the Court found that the price paid at a super-priority lien foreclosure sale conducted at a time when the law surrounding the Super-Priority Lien Statute was uncertain must be viewed to include the outstanding balance of the first deed of trust.

This Court went on to further elaborate and confirm the *RFB Properties II* decision. In *Omid*, this Court reversed and remanded a decision granting summary judgment to allow for a more fulsome review by the trial court of the parties' "beliefs and expectations" concerning the value of a property at the time of the super-priority lien foreclosure, which was conducted during this similar temporal landscape when the law was uncertain. *See U.S. Bank Tr., N.A. v. Omid Land Grp., LLC*, 279 A.3d 374, 380 (D.C. 2022). In doing so, this Court expressly recognized that the relevant manner in which to assess those "beliefs and expectations" was through consideration of the legal uncertainty that existed concerning super-priority liens at the time of sale.

Most recently, the Court affirmed a decision granting summary judgment and finding that the sales price at a super-priority lien foreclosure sale was not

unconscionably low. *New Penn Fin., LLC v. Daniels*, 319 A.3d 997, 1004 (D.C. 2024). In reaching its decision, this Court again confirmed that the assessment of a sales price for a super-priority lien foreclosure requires the trial court to consider the state of the law as it existed at the time of sale. *Id.* In doing so, this Court found that because the sale in *New Penn* was before the decision in *Chase Plaza*, it required the court to view the purchase price as including the indebtedness secured by the first deed of trust that this Court had not yet clarified would otherwise be extinguished.[14]

The lower court did not apply the correct analysis here in finding that the sales price for the Condo Foreclosure was unconscionably low. The analysis of the lower court focused solely on the amount that Tyroshi paid for the Unit in relation to the fair market value of the Unit. JA 2093. The lower court did not consider the fact that the sale occurred pre-*Chase Plaza* and therefore, it was unknown as a matter of law as to whether the first deed of trust would survive the sale of the Unit. *Id.* The lower court was required to consider the indebtedness on the Unit at the time of sale, as instructed by *RFB Properties II*, *Omid*, and *New Penn*, and add that outstanding balance to the purchase price before evaluating it for unconscionability. If such

[14] Ironically, Tyroshi was also a party to the *New Penn* case and Judge Rigsby correctly applied the decision in *RFB Properties II* in the that case.

consideration is made, the sale price is not unconscionable as a matter of law. The lower court's finding that the sale was unconscionable must be reversed.

V. US BANK IS NOT A BONA FIDE PURCHAER AND DOES NOT HAVE SUPERIOR TITLE.

The lower court erred in finding that US Bank was a bona fide purchaser and that it had superior title to Tyroshi. As an initial matter, the lower court's finding ignores the very nature of the Condo Foreclosure through which Tyroshi obtained title. A foreclosure under the Super-Priority Foreclosure Statute extinguishes the first deed of trust on the property. *See* D.C. Code § 42-1903.13; *Chase Plaza supra*. The result is simple and straightforward, the purchase of a property from a super priority lien foreclosure vests the buyer with free and clear title to the property that is not subject to a deed of trust. Thus, when Tyroshi purchased the Unit it extinguished US Bank's lien interest, which in turn prevented US Bank from obtaining title to the Unit in the first place.

However, putting aside the fact that the lower court ignored the legal impact of the Condo Foreclosure, its conclusion that US Bank was a bona fide purchaser is also incorrect. It is well settled that "[a] bona-fide purchaser is one without 'actual, constructive or inquiry' notice of the unrecorded instrument." *Molla v. Sanders*, 981 A.2d 1197, 1201 n. 6 (D.C. 2009). Even if the buyer does not have actual notice of an unrecorded interest "law may nevertheless charge him or her with notice where there is circumstantial evidence from which notice can be inferred as a fact." *Clay*

Properties, Inc. v. Washington Post Co., 604 A.2d 890, 895 (D.C. 1992). The record below clearly indicates that US Bank had prior notice of Tyroshi's ownership interest in the Unit. The testimony at trial indicated that US Bank conducted a title search during the Foreclosure Action and discovered evidence of Tyroshi's ownership interest. JA 1558-1561. Indeed, US Bank's knowledge of Tyroshi's interest is reflected in the Foreclosure Action when it began sending court filings to Tyroshi. JA 1000-1008. The filings that US Bank sent to Tyroshi all pre-date the ratification of US Bank's purchase of the Unit and the recordation of its deed, meaning that US Bank took title to the Unit knowing of Tyroshi's interest. As such, US Bank cannot be a bona fide purchaser as a matter of law.[15]

At bottom, Tyroshi's purchase extinguished US Bank's lien. The result is that US Bank is not a bona fide purchaser and does not have title to the Unit.

CONCLUSION

Tyroshi purchased the Unit at the Condo Foreclosure and in doing so took title to the Unit free and clear of any encumbrance by US Bank. There is no substantive basis for US Bank to challenge Tyroshi's purchase, and even if there was, it was never timely raised. For these reasons, the lower court erred and it must be reversed.

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[15] It is also worthwhile to not that US Bank's foreclosure would also be void for failing to include Tyroshi as a necessary party to the Foreclosure Action. *See Indep. Fed. Sav. Bank v. Huntley*, 573 A.2d 787, 787 (D.C. 1990); D.C. Code § 42-815.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2024, a copy of the foregoing was served on all counsel of record *via* the Court's e-filing system.

/s/ Ian G. Thomas
Ian G. Thomas