NO. 22-CV-0005

DISTRICT OF COLUMBIA COURT OF APPEALS

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

Appellant,

v.

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

Appellees.

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

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

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I. The Trial Court Correctly Held that Shellpoint's Claims are not Barred by the Statute of Limitations.

The Court should affirm the trial court's judgment that Shellpoint's claims are not time-barred for four reasons. First, the trial court correctly held that the statute of limitations did not begin to run until Shellpoint was on notice of the claim—which occurred, at the earliest, on March 1, 2018, when this Court issued its opinion in *Liu v. US Bank, NA*. *See* AA242 (citing *Liu*, 179 A.3d 871, 883 (D.C. 2018)). The Court may also separately affirm the trial court's judgment for three additional reasons: (1) equitable remedies such as unconscionability are not subject to statutes of limitations, (2) to the extent any statute of limitations applies, the applicable statute of limitations for Shellpoint's claims is fifteen years, (3) if a three-year statute of limitations applies, Brandywine is estopped from asserting a statute of limitations defense because it prevented Shellpoint from filing suit earlier.

A. The Trial Court Correctly Held that Shellpoint's Claim is Timely Even Under a Three-Year Statute of Limitations.

Assuming, *arguendo,* a three-year statute of limitations applies, Counts II and III of the Second Amended Complaint were timely raised. Although the trial court improperly characterized Shellpoint's declaratory judgment claims as subject to a three-year statute of limitation, the court correctly held that the statute of limitations

did not begin to run until this Court's decision in *Liu*, which put Shellpoint on notice that the Deed of Trust could have been extinguished by the COA Sale. AA242.

Brandywine asserts that the statute of limitations began to run on June 9, 2015, when Bank of America learned of the COA Sale from Brandywine, and that *Liu* is irrelevant to the limitations period. BAB 22–23. Specifically, Brandywine argues that if Brandywine and Tyroshi knew the COA Sale would extinguish the Deed of Trust, then Shellpoint should have known as well. Alternatively, if neither were aware, Tyroshi argues that Shellpoint's claims fail as a matter of law. *Id.*

As an initial matter, Brandywine undisputedly did not believe that the Deed of Trust had been extinguished by the COA Sale, as evidenced by the June 9, 2015 correspondence with Bank of America cited by Brandywine, *see* BAB 22, AA 226–27, nor is such belief necessary for Shellpoint's claim. *See* discussion *infra* Section II at 10–11. Brandywine's intent is irrelevant to the unconscionability analysis because Brandywine undisputedly falsely stated that the Property was being sold subject to the Deed of Trust. Moreover, even if Tyroshi believed the Deed of Trust remained a valid encumbrance on the Property, the trial court should have determined whether that was the result of the unsettled state of the law at the time.

Finally, there is no evidence in the record to support either of these hypotheticals, and if the trial court applied a motion to dismiss standard, Brandywine Answering Br. ("BAB") 10–13, Tyroshi Answering Br. ("TAB") 14–19, then the

trial court should have construed the facts in the light most favorable to Shellpoint. The only reasonable inference from the facts alleged in the Second Amended Complaint is that Shellpoint could not have known that the Deed of Trust could be extinguished as a matter of law until this Court's decision in *Liu*.

B. There is No Statute of Limitations for Equitable Claims.

Counts II and III of the Second Amended Complaint are equitable in nature because they seek a declaratory judgment regarding the effect of the COA Sale on the Deed of Trust. Therefore, under this Court's precedent, there is no statute of limitations for Shellpoint's claim, regardless of whether they are framed as wrongful foreclosure (as Brandywine argues) or common law principles of unconscionability.

This Court has made clear specifically that the statutes of limitations set forth in section 12-301 are inapplicable to a claim that is "equitable in nature." *See, e.g., Interdonato v. Interdonato*, 521 A.2d 1124, 1137 (D.C. 1987). In addition, a request for declaratory judgment seeking to set aside a condominium foreclosure sale on unconscionability grounds "is a plea for equitable relief." *RFB Properties II, LLC v. Deutsche Bank Tr. Co.*, 247 A.3d 689, 696 (D.C. 2021). Indeed, in construing wrongful foreclosure claims not involving damages, this Court has stated, albeit in dicta, that "the three-year statute of limitations may well not be applicable" to such

claims seeking equitable relief from a condominium foreclosure sale. *See Johnson v. Fairfax Vill. Condo. IV Unit Owners Ass'n*, 641 A.2d 495, 502 n.10 (D.C. 1994).[1]

Here, Shellpoint's declaratory judgment claims—which seek a judgment declaring that the Deed of Trust was not extinguished by the COA Sale, or alternatively, to declare the COA sale void *ab initio*—are plainly a "plea for equitable relief." *RFB Properties II*, 247 A.3d at 696. Brandywine does not dispute that Shellpoint's declaratory judgment claim sounds in equitable relief; and instead argues that Shellpoint seeks "an equitable remedy for wrongful foreclosure" that falls within the "catch-all" three-year statute of limitations, D.C. Code § 12-301(8). BAB 20. But Shellpoint does not seek damages in the Complaint, instead requesting only a declaration as to the Deed of Trust (Count II), or alternatively, a declaration as to the COA Sale (Count III). *See* AA080–82. The relief sought is plainly equitable in nature, and as a result, no statute of limitations applies to Shellpoint's claim.

C. If Shellpoint's Claim is Subject to a Statute of Limitations, the Applicable Period is Fifteen Years.

If any statute of limitations applies, the applicable statute of limitations would be fifteen years for an action for the recovery of lands. D.C. Code § 12-301(1). Shellpoint seeks a declaration that the COA Sale is void under principles of equity.

[1] Notably, the Court also cited the fifteen-year statute of limitations set forth in D.C. Code 12-301(1), suggesting that the statute of limitations, if any, would be fifteen years. *Id.; see* discussion *infra* Section II(D)(1).

AA081–82 ¶¶ 70–78. Shellpoint's claims were timely as they were filed on September 25, 2018—well within fifteen years, regardless of their accrual date.

Pursuant to D.C. Code § 12-301(1), actions "for the recovery of lands" are subject to a fifteen-year statute of limitations. *Id.* The U.S. District Court for the District of Columbia's holding in *Lancaster v. Fox,* 72 F. Supp. 3d 319 (D.D.C. 2014), is instructive. There, the plaintiff, "Lancaster," brought quiet title and declaratory judgment claims to obtain title to a property allegedly conveyed through fraud. *See id.* at 324–25. The court held that the fifteen-year statute of limitations in D.C. Code § 12-301(1) applied to Lancaster's claims. *See id.* at 325. The same has been held true elsewhere, as well. *See Zere v. D.C.,* 209 A.3d 94, 99 (D.C. 2019) (prescriptive easement claim); *In re Hardy,* No. 16-00280, 2018 WL 1352674, at *2 n. l (Bankr. D.D.C. Mar. 13, 2018) (actions in foreclosure or for the redemption of property subject to the same 15-year statute of limitations as recovery of land); *cf. Sim Dev., LLC v. D.C.,* No. l:19-CV-03383 (CJN), 2020 WL 3605831, at *2 (D.D.C. July 2, 2020) (15-year statute of limitations does not apply where there is no cloud on Plaintiff's title or question as to Plaintiff's ownership of the property).

In this case, Shellpoint seeks to recover its lien rights in the Property, or alternatively, to set aside the COA Sale on equitable grounds. AA081–82 ¶¶ 70–78. There is a cloud over whether Shellpoint has any interest in the Property. *See Lancaster,* 72 F. Supp. 3d at 325; *Sim Dev., LLC,* 2020 WL 3605831, at *2. If

Shellpoint's claims are successful, Shellpoint would "recover rights to the underlying property." *Lancaster,* 72 F. Supp. 3d at 325. To the extent Shellpoint's claim is subject to a statute of limitations at all, the Court should find that a fifteen-year statute of limitations under D.C. Code § 12-301(1) applies.

D. Brandywine is Estopped from Asserting a Limitations Defense.

To the extent a statute of limitations would apply, Brandywine is estopped from asserting such a defense because its misrepresentations prevented Shellpoint and Bank of America from joining Tyroshi and Brandywine at an earlier date.

Estoppel applies neatly to the facts of this case. Brandywine misrepresented to both Bank of America and Shellpoint that the Property was being sold subject to the Deed of Trust. Indeed, as late as June 2015, Brandywine continued to represent to Bank of America that the Deed of Trust remained a valid encumbrance upon the Property. *See* AA226–27. Brandywine's misrepresentations lulled Bank of America into inaction, and Bank of America could not have known that a condominium may not sell a property subject to a first lien pursuant to the COA Statute until *Liu* was decided in 2018. *See* 179 A.3d at 883. Under these facts, Brandywine is estopped from asserting limitations period as a defense to Shellpoint's claims.

II. The Trial Court Erred in Presuming that Inadequate Purchase Price is Required for a Finding of Unconscionability.

At the outset, the trial court improperly dismissed Shellpoint's claim because it determined that purchase price alone was the sole consideration for

unconscionability. In *RFB Properties II*, the sole issue before the Court was whether the purchase price was "unconscionably low." 247 A.3d at 696. In concluding that *RFB Properties II* was dispositive of this case, the trial court did not consider factors other than the reasonableness of the purchase price that would warrant setting aside the COA Sale regardless of the purchase price. *See* Shellpoint Opening Br. 29–35.

As a threshold matter, Tyroshi incorrectly states that a party seeking to set aside a contract "must prove the existence of ***both*** procedural and substantive factors." TAB 23 (citing *Urban Investments, Inc. v. Branham*, 464 A.2d 93, 99 (D.C. 1983) (emphasis in original). But *Branham* does not support this proposition; rather, "[a]lthough both elements usually are present in unconscionability cases, [this Court] ha[s] indicated that 'in an egregious situation, one or the other may suffice.'" *Branham*, 464 A.2d at 99 (quotation omitted). The purpose of the unconscionability doctrine is to prevent "oppression and unfair surprise." *Urb. Invs., Inc. v. Branham*, 464 A.2d 93, 99 (D.C. 1983). "A contract may be unconscionable either because of the manner in which it was made or because of the substantive terms of the contract or, more frequently, because of a combination of both." *Bennett v. Fun & Fitness of Silver Hill, Inc.*, 434 A.2d 476, 480 (D.C. 1981). Numerous courts have applied the doctrine of unconscionability without regard to the purchase price. *See* Shellpoint Opening Br. 30–35.

Here, the HOA Sale contained both procedural and substantive elements of unconscionability to warrant setting it aside. Brandywine's misrepresentations regarding the title being conveyed resulted in an artificially depressed price of only $5,000.00. *See Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 366 P.3d 1105, 1110–11 (Nev. 2016) (noting that "an HOA's representation that the foreclosure sale will not extinguish the first deed of trust" may justify unwinding the sale.). These misrepresentations affected the procedural fairness of the COA Sale, as Brandywine lulled Bank of America into a false sense of security and chilled bidding on the Property. Once Brandywine began making representations regarding the existence of a senior lien, "a duty exists to make sure that the additional information, if material, is substantially accurate." *Goldberg v. Frick Electric Co., Inc.*, 770 A.2d 182, 194–95 (Md. 2001). Brandywine plainly violated this duty.

Neither Brandywine nor Tyroshi meaningfully distinguishes the cases applying unconscionability outside of the *RFB Properties II* decision. Brandywine first notes that the Court did not invalidate the sale in three of the cases cited by Shellpoint, thus rendering them inapplicable in Brandywine's view. BAB 27 (citing *Fitzgerald v. Fitzgerald*, 2 Mackey 240, 1872 WL 15271 (D.C. 1872); *Hotel Lafayette v. Pickford*, 85 F.2d 710, 66 App. D.C. 211 (D.C. Cir. 1936); *BWI MRPC Hotels, LLC v. Schaller*, 2017 WL 605037 (Md. App. 2017)). Simply because the facts in those cases did not result in invalidating sales does not render them "entirely

inapposite" as Brandywine suggests. *Id.* Brandywine fails to even acknowledge this Court's statement in *Fitzgerald* that, in the event of a misrepresentation regarding the title being conveyed, "this court would undoubtedly set aside the sale and order a resale and, perhaps, make the trustees pay the costs of a resale." 7 D.C. at 243.

Additional cases cited by Shellpoint are applicable here because, in Brandywine's view, the factual backgrounds did include misrepresentations regarding the title being conveyed. BAB 28 (citing *Carozza v. Peacock Land Corp.*, 231 Md. 112, 188 A.2d 917 (Md. 1963); *Goldberg v. Frick Elec. Co.*, 363 Md. 683, 770 A.2d 182 (2001)). Brandywine attempts to distinguish *Carozza* and *Goldberg* by arguing, inexplicably, that "in the instant foreclosure there was no misinformation tainting the sale." *Id.* But, the same fact pattern was presented in *Carozza* and *Goldberg*. Both *Carozza* and *Goldberg* involved innocent errors regarding the misinformation that was conveyed, with all parties to the sale believing those statements. In both cases, the court affirmed judgments setting aside foreclosure sale.

At bottom, the trial court erred in failing to consider these other bases for setting aside the COA Sale and dismissing Shellpoint's claims as a matter of law. For that reason alone, the Court should reverse the trial court's judgment.

III. The Trial Court Erred in Dismissing Shellpoint's Remaining Claim in Light of Intervening Law.

The trial court erroneously dismissed Shellpoint's claims on the basis of *RFB Properties II* for another reason: subsequent decisional law from this Court

interpreting *RFB Properties II* confirms that the foreclosure sale price itself is not the de facto fair market value of the property at condominium foreclosure sales.

A. This Court's Omid Decision Confirms that RFB Properties II Did Not Mandate Dismissal of Shellpoint's Claim.

After the trial court entered judgment in Tyroshi and Brandywine's favor, this Court issued an on-point decision clarifying that *RFB Properties II* is not dispositive of a lienholder's claims under a case with virtually identical facts. *See U.S. Bank Tr., N.A. v. Omid Land Grp., LLC*, No. 19-CV-0737, 279 A.3d ----, 2022 WL 3093734, at *6–7 (D.C. Aug. 4, 2022). The trial court's decision was clearly erroneous in light of *Omid*, which clarifies how fair market value is analyzed in the context of an unconscionability claim seeking to set aside a condominium foreclosure sale.

In *Omid*, this Court reversed the trial court's decision entering summary judgment in favor of the COA purchaser that was entered on the basis of *RFB Properties II* and remanded the case "to allow the parties to allow the parties to present evidence relevant to the temporal analysis required *by RFB Properties*." *Id.* at *6. Specifically, the Court found that "[t]he record currently contains virtually no evidence of the parties' beliefs and expectations at the time of the foreclosure sale regarding the likely effect of the sale on U.S. Bank's first deed of trust," such that "additional evidence will assist its consideration of the risks facing the parties at the time of the sale and, ultimately, of the reasonableness or unreasonableness of the sale price." *Id.* at *6. The Court further noted that the "***amended complaint alleged***

… that the condominium foreclosure sale was invalid because of Capital Park's erroneous statements in the Advertisement of Sale and what U.S. Bank contended was the insufficient and unconscionable sale price paid by Omid," referring to the same language contained in the Trustee's Deed here. *See id.* (emphasis added).

The facts here are even more egregious than in *Omid*. The purchaser in *Omid* paid $63,000.00 for its purchase of the property at that condominium sale, which the Court noted was only 20% of the initial mortgage amount. *Omid*, 2022 WL 3093734, at *5. Here, by contrast, Tyroshi paid only $5,000.00, which the trial court noted was barely more than 2% of the original Deed of Trust amount. AA308. The uncertainties regarding whether the Deed of Trust would survive the COA Sale were created not by the state of the law at the time, but by the COA's misrepresentations regarding the title being conveyed when considered in connection with applicable law.

Tyroshi's and Brandywine's attempts to distinguish *Omid* do not change this result. Tyroshi first argues that there was less uncertainty regarding superpriority liens in *Omid* because that foreclosure sale occurred after this Court's decision in *Chase Plaza Condominium Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166 (D.C. 2014), in which this Court first recognized that the COA Statute allowed extinguishment of prior-recorded first liens. TAB 21. But as this Court recognized in *Omid*, the *Chase* decision did not address the issues relevant here that were clarified in *Liu* and *4700 Conn 305 Trust*, which directly affected whether the Deed

of Trust would have survived the COA Sale in both *Omid* and this case. *See Liu*, 179 A.3d at 883; *4700 Conn 305 Trust*, 193 A.3d at 766. *Liu* made clear that a condominium association cannot foreclose solely on the subpriority lien, even if advertised as such, and *4700 Conn* held that a foreclosure for more than six months of arrearages still constitutes a superpriority sale. *Chase Plaza* alone was not determinative of whether the first lien would be extinguished by the condominium sale in light of the foreclosing trustee's misrepresentations.

In addition, both Brandywine and Tyroshi argue that *Omid* is distinguishable because the trial court purportedly failed to consider evidence submitted by the lienholder before dismissing the case pursuant to *RFB Properties II*, and Shellpoint did not submit any additional evidence such that *Omid* would apply. TAB 21–22; BAB 24–25. This argument lacks merit. The evidence that this Court warranted reversal in *Omid* is already in the record in this case—namely, the Trustee's Deed and Notices of Sale advertising the sale as being subject to the Deed of Trust, and a resulting purchase price for a small fraction of the amount owed on the mortgage. *Omid*, 2022 WL 3093734, at *6. The *additional* evidence that the *Omid* court decided was necessary was the parties' beliefs at the time of the sale regarding the uncertainty surrounding the title being conveyed. *Id.* This is the evidence that would be uncovered through the deposition testimony of Brandywine and Tyroshi. The trial

court prevented Shellpoint from discovering and presenting this evidence by prematurely and sua sponte dismissing this claim.

Tyroshi cites *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 547 (1994) to support its notion that a distressed (forced-sale) price should be used to determine the fair market value of the subject property. Unlike here, however, the applicable test in *Resolution Trust* was whether a property sold for its "reasonably equivalent value" such that it might otherwise be a fraudulent transfer. *Id.* at 545. This test would only be applicable if Shellpoint had asserted that the foreclosure sale violated D.C. Code § 28-3101 *et seq.*, which is the District's statutory scheme governing fraudulent transfers. Contrary to Tyroshi's assertion, the "reasonably equivalent value" test is not the applicable test here. Moreover, Tyroshi also conveniently ignores the Supreme Court's explicit emphasis in *BFP*: "We emphasize that our opinion today covers only mortgage foreclosures of real estate." *Id.* at 537 n.3.

The trial court's dismissal of Shellpoint's remaining claim was premature in light of this Court's recent guidance in *Omid.* Regardless, even without the benefit of *Omid*, the trial court erred in dismissing Shellpoint's claim under existing law regardless of whether it applied a summary judgment or motion to dismiss standard.

B. The Trial Court Improperly and Prematurely Disposed of This Case, Regardless of the Standard it Applied.

The trial court erred in its resolution of Shellpoint's unconscionability claim under either a motion to dismiss or summary judgment analysis. Tyroshi and

Brandywine both argue that the trial court disposed of Shellpoint's remaining claim on a motion to dismiss standard. TAB 13–16, BAB 10–14. Tyroshi goes so far as to accuse Shellpoint of "mischaracteriz[ing] the record" as to whether Brandywine's motion was resolved on a motion to dismiss or motion for summary judgment. TAB 14. A closer look shows, though, that the trial court applied a summary judgment standard in dismissing Count III. Regardless of which standard is applied, however, the trial court erred in dismissing this claim as a matter of law.

1. The Trial Court Improperly Disposed of Shellpoint's Claim Under a Summary Judgment Standard.

If the Court finds that the trial court applied a summary judgment standard, Brandywine and Tyroshi have not presented any arguments to avoid reversal.

Although the Omnibus Order makes conflicting statements as to whether it is applying a motion to dismiss or summary judgment standard, the trial court plainly considered evidence outside of the pleadings such that it was applying a summary judgment standard. First, the trial court stated in its opening paragraph that it was granting Brandywine's previously filed March 11, 2019 motion to dismiss, appearing to suggest that a motion to dismiss standard would apply. *See* AA298. In a footnote within the same paragraph, the trial court then noted that Count II had been previously dismissed under a motion to dismiss standard and stated that it would not revisit that portion of the prior order. AA298 n.3. The court continued that "Count Three failed the motion to dismiss standard as applied, but here the Court

applies the standard for summary judgment."[2] *Id.* In light of the past tense language, the trial court appeared to be referring to *Count II* having previously "failed the motion to dismiss standard as applied," especially in light of the court's present tense statement that "here the Court applies the standard for summary judgment." *Id.* Thus, the only reasonable interpretation of this footnote is that the trial court believed it was applying a summary judgment standard to Count III.

In its opening discussion, the trial court appears to apply a motion to dismiss standard. *See* AA305. The trial court then cited the lack of evidence of fair market value submitted by the parties even though it was supposedly reviewing Brandywine's motion under a Rule 12(b)(6) standard. *See* AA309. Notably, not once did the trial court reference the motion to dismiss standard that the facts should be construed in the light most favorable to Shellpoint, much less apply that standard.

Here, the trial court's primary basis for dismissal of Shellpoint's unconscionability claim centered around whether the purchase price was unconscionably low, and according to the trial court, "it is here that [Shellpoint] fail[ed] as a matter of law."[3] AA308. Specifically, the trial court found that "Tyroshi

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[2] This footnote immediately followed a reference to the prior order granting in part and denying in part Brandywine's motion to dismiss, or alternatively for summary judgment. *See id.* As a result, it is clear that the court was referring to Shellpoint's claims against Brandywine rather than Daniels' motion to dismiss.

[3] As set forth above, the trial court erred in not considering other bases for setting aside the COA Sale. *See* discussion *supra* Section II.

undoubtedly purchased the Property erroneously believing it to be subject to the balance on a first Deed of Trust in the face amount of $204,000.00 as advertised in the Notice of Foreclosure and announced at the Condo Foreclosure Sale." *Id.* To support this conclusion, the trial court looked not to the face of the complaint, but to Shellpoint's opposition to the motion to dismiss, in which Shellpoint stated that the HOA's misrepresentations regarding the title being conveyed at the HOA Sale chilled potential bidding on the Property. *See id.* (citing AA213).

In reaching this conclusion, the trial court looked outside of the face of the complaint such that the trial court was applying a summary judgment analysis. Moreover, regardless of the standard being applied, the court drew unwarranted inferences from Shellpoint's opposition. Specifically, Shellpoint's opposition did not reference Tyroshi's state of mind generally regarding whether or not *Tyroshi* believed that it was obtaining encumbered title, but rather noted only that these misrepresentations chilled bidding as to *potential bidders* such that the HOA Sale resulted in a grossly inadequate price. *See* AA208. Furthermore, Tyroshi would not have to be "clairvoyant," as Brandywine suggests, BAB 26, for Tyroshi to have identified the COA Sale as an opportunity to take free-and-clear title. Without the benefit of discovery on this issue, the trial court was resolved to speculate on that issue, as it ultimately did in dismissing Shellpoint's claim. *See* AA309. Tyroshi's primary argument on this point—that the trial court's "ruling was limited to the

[Second Amended Complaint] and not an evaluation of record evidence," TAB 15—is unsupported by the record.

Brandywine attempts to argue that the second provision requiring notice and an opportunity to respond under Rule 56(f)—ruling on grounds not raised by any party—does not apply because "Brandywine could not have known to raise the issue in argument" because *RFB Properties II* had not yet been issued. BAB 12. That is irrelevant. Brandywine effectively concedes that it did not raise this argument, and moreover, Rule 56(f) does not turn on whether the argument was available at the time of the initial motion. Indeed, the fact that *RFB Properties II* had not yet been issued at the time of the original motion to dismiss briefing further reinforces that the parties should have had an opportunity to address the effect of this decision.

Brandywine then argues that Shellpoint never proffered a Rule 56(d) affidavit explaining why more discovery was necessary. BAB 15–16. However, the availability of such a remedy is dependent upon a motion for summary judgment being pending. Here, no summary judgment motion was pending, and the court sua sponte dismissed the case without a summary judgment motion being pending and without an opportunity to present evidence.

Brandywine and Tyroshi then argue that Shellpoint failed to timely conduct discovery prior to the withdrawal of Tyroshi's counsel. TAB 16, BAB 16–17. As Shellpoint noted in its Opening Brief, however, the transcript of the April 9, 2021

status conference reflects the opposite: the parties indicated that the litigation and attempts to mediate had been delayed several times as a result of the pandemic, Daniels' bankruptcy, and Tyroshi's delays in retaining counsel. *See* AOB 8–9 (citing AA281:15–282:3). It was clear that all parties were anticipating the ability to conduct additional discovery, *see* AA264:8–11; AA281:15–282:3, and Shellpoint would be prejudiced by its inability to complete discovery on these issues.

2. The Trial Court Erred in Dismissing Count III Under a Motion to Dismiss Standard.

Even if the Court finds that the trial court applied a motion to dismiss standard to Count III, the trial court erred in not construing the facts in the light most favorable to Shellpoint and also misapplied *RFB Properties II* as a matter of law. The court found that "[n]o Party has asserted a fair market value for the Property at the time of the Condo Foreclosure Sale," AA309, and thus concluded that the fair market value was $209,000.00—the $5,000.00 purchase price plus the original principal balance of the Deed of Trust ($205,000.00). AA309. Although Shellpoint did not allege the fair market value of the Property, it did generally allege that the purchase price was unconscionably low. AA082 ¶ 77. In addition, the trial court failed to take into consideration the legal uncertainties and the parties' beliefs at the time of the COA Sale, as clarified in *Omid*, or the effect of Brandywine's misrepresentations upon the purchase price. Shellpoint's allegation that the COA Sale price "was insufficient and/or unconscionable," AA082 ¶ 77, can only be logically construed as a

comparison to the fair market value of the Property conducted at a condominium sale that was free from irregularities and misrepresentations. The logical inference is that the Property was worth substantially more than the COA Sale price, and at the motion to dismiss stage, the trial court erred in concluding that Shellpoint "cannot prove any set of facts entitling [it] to relief." *Francis v. Rehman*, 110 A.3d 615, 620 (D.C. 2015).

For all of these reasons, the trial court erred in dismissing Shellpoint's claim even if, as Tyroshi and Brandywine argue, the trial court applied a motion to dismiss standard. Contrary to Tyroshi's suggestion, *RFB Properties* did not "entirely foreclose[] Shellpoint's theory of unconscionability based on the price Tyroshi paid for the Property." TAB 13. Tyroshi's argument that *RFB Properties* resolved the "sole remaining issue" of unconscionability is undermined by this Court's decision in *Omid*. *See* discussion *supra* Section III(A).

3. Shellpoint Has Standing to Challenge the Validity of the COA Sale.

Brandywine's final argument to avoid application of unconscionability is that Shellpoint lacks standing to assert unconscionability because Shellpoint was not the record beneficiary of the Deed of Trust at the time of the COA Sale. As a threshold matter, Brandywine has waived this argument by failing to raise it below. *See Jonathan Woodner Co. v. Adams*, 534 A.2d 292, 295 n.7 (D.C. 1987). But even if the Court were to consider it on the merits, this argument fails.

Brandywine's argument fails because it conflates a mortgage servicer with the loan owner; both Shellpoint and Bank of America were acting as the mortgage servicers on behalf of the loan owner. Mortgage investors do not directly manage day-to-day borrower interactions. Instead, mortgage investors contract with servicers to act on their behalf; in that role, servicers administer a mortgage on behalf of the loan owner, and the rights and obligations of the loan servicer are typically established in a servicing agreement. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011) (describing servicers' role). Because Brandywine failed to raise this issue below, there is no evidence in the record regarding whether the investor at the time of the COA Sale is the same investor that owns the Loan now.

Regardless, whether the investor remained the same is immaterial because Shellpoint has standing as the current holder of the Note and record beneficiary of the Deed of Trust to challenge proceedings that purportedly extinguished the interest Shellpoint now possesses. "The *sine qua non* of constitutional standing to sue is an actual or imminently threatened injury that is attributable to the defendant and capable of redress by the court." *Friends of Tilden Park, Inc. v. D.C.*, 806 A.2d 1201, 1206–07 (D.C. 2002). Here, Shellpoint has clearly suffered an actual or imminent injury redressable by the Court sufficient to impart standing. This Court quickly disposed of a similar argument in *Chase Plaza*, finding that the holder of a

promissory note had standing to seek to set aside a condominium foreclosure sale. *See* 98 A.3d at 170–71 & n.2.

Brandywine's only authority in support of its standing argument involved a challenge by a borrower to the power of attorney executed by the lender where the court held that the borrower lacked standing to argue that the lender failed to comply with the District's power of attorney statute. BAB 29 (citing *Rose v. Wells Fargo Bank, N.A.*, 73 A.3d 1047, 1053 (D.C. 2013). That decision, however, was based upon the court's finding that the borrower "cite[d] no injury to herself fairly traceable to the violation." *Rose*, 73 A.3d at 1053. That principle is plainly inapplicable here, where Brandywine asserts that Shellpoint's current interest in the Deed of Trust was extinguished by the COA Sale. Brandywine's misrepresentations to Bank of America precluded the investor (and its servicers) from taking action to protect the Deed of Trust, and the misrepresentations to bidders chilled bidding. As a result, the Deed of Trust, which Shellpoint is entitled to enforce as the holder of the Note, risks extinguishment by the COA Sale.

IV. The Court May Properly Consider Shellpoint's Constitutional Arguments and Should Find the COA Statute Violates Due Process.

The Court can and should exercise its discretion to decide the constitutional issues in this case, which implicate matters of great public importance within the District—namely, whether first mortgages securing large loan balances may be extinguished by diminutive COA liens without proper notice.

A. The Court Should Consider Shellpoint's Constitutional Arguments Notwithstanding Potential Forfeiture.

The District first argues that the Court should not consider Shellpoint's constitutional claims because these arguments have been forfeited for failure to raise them in the trial court below. Here, though, the Court can and should exercise its discretion to consider these claims as a matter of widespread importance.

Importantly, "[t]he principle that "normally" an argument not raised in the trial court is waived on appeal is … one of discretion rather than jurisdiction. *D.C. v. Helen Dwight Reid Educ. Found.*, 766 A.2d 28, 33 n.3 (D.C. 2001). "[I]n 'exceptional situations and when necessary to prevent a clear miscarriage of justice apparent from the record,' [the Court] may deviate from the usual rule that [its] review is limited to issues that were properly preserved." *Id.* (quoting *Williams v. Gerstenfeld*, 514 A.2d 1172, 1177 (D.C. 1986)). The *Helen Dwight* court chose to exercise its discretion and consider the constitutionality arguments because the Court had all of the necessary facts before it and "[a]ll that is left is the legal significance of those facts," which would impose no risk of unfair prejudice to parties. *Id.*

Shellpoint does not dispute that its facial challenge to the constitutionality of the COA Statute was not raised in the trial court. *See* AA201–28. However, basic principles of fairness and "the interests of justice" merit consideration of these issues on appeal. No parties will be prejudiced by the Court's consideration of these purely legal issues, and the factual basis necessary for such an analysis is in the record.

Moreover, the provisions of the COA Statute omitting such notice were in effect from 1991 until 2014, presenting potentially widespread litigation over condominium foreclosure sales occurring during that time. Indeed, Tyroshi is currently defending virtually identical litigation pending in the Superior Court in which the first lienholder has alleged that the prior version of the COA Statute is unconstitutional for the same reasons asserted by Shellpoint.[4]

The District relatedly argues that a facial challenge is inappropriate here because Shellpoint "must establish that no set of circumstances exists under which the [COA Statute] would be valid." DAB 25 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987). But *Salerno* does not stand for the broad proposition that the District espouses. The language has been rightly criticized as it would effectively doom all facial challenges outside of the First Amendment context, because there would also presumably be at least one constitutional application of a statute. If the *Salerno* decision were intended to drastically limit facial challenges outside of the First Amendment, the Court likely would have explained its radical departure from past precedent. The Court in *Salerno*, however, purported to apply a well-established

[4] *See* Ex. A to U.S. Bank's Mem. in Supp. Mot. to Intervene at 12–13, *Tyroshi Investments, LLC v. The Jenkins Row Unit Owners' Association*, No. 2020 CA 001727 B (D.C. Super. Ct. filed Sept. 17, 2020), attached hereto as **Exhibit A**. The Court may take judicial notice of U.S. Bank's Complaint as a public filing that is not subject to reasonable dispute. *See, e.g.*, *Robert Siegel, Inc. v. D.C.*, 892 A.2d 387, 395 (D.C. 2006).

facial challenge rule. Indeed, this language in *Salerno* has been rightly criticized, with critics referring to the "no set of circumstances" test as "unwise dictum." *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175, 116 S. Ct. 1582, 1583, 134 L. Ed. 2d 679 (1996) (Stevens, J., respecting the denial of cert.). The Court can and should consider Shellpoint's constitutional challenges despite any failure to raise them in the trial court.

B. Shellpoint's Constitutional Challenge is Not Moot.

The District, Brandywine, and Tyroshi mistakenly state that Shellpoint's constitutional challenge has been mooted by the 2017 amendments. *See* District of Columbia Answering Br. ("DAB") 24–29; TAB 41 n.15; BAB 32–33. This argument lacks merit because the prior version of the COA Statute remains in effect with regard to any COA foreclosure sales conducted prior to the 2017 amendments.

"Although generally voluntary cessation of challenged activity does not moot a case, a court may conclude that voluntary cessation has rendered a case moot if the party urging mootness demonstrates that (1) 'there is no reasonable expectation that the alleged violation will recur,' and (2) 'interim relief or events have completely or irrevocably eradicated the effects of the alleged violation.'" *Nat'l Black Police Ass'n v. D.C.*, 108 F.3d 346, 349 (D.C. Cir. 1997). Where a facial challenge is alleged, the second prong of this analysis is satisfied where there is no allegation that the pre-

amendment provisions continue to have any residual effect. *See Daskalea v. Washington Humane Soc'y*, 710 F. Supp. 2d 32, 40 (D.D.C. 2010).

Here, there is clearly a "residual effect" such that Shellpoint's constitutional challenges are not moot. The 2017 amendments to the COA Statute only apply effective April 7, 2017, so the constitutionally infirm version of the COA Statute has the "residual effect" of extinguishing Shellpoint's Deed of Trust without notice. Shellpoint's claim was not rendered moot by any amendments that are inapplicable to Shellpoint's claims here.

C. Shellpoint Has Standing to Challenge the Constitutionality of the COA Statute.

All three appellees allege in some form that Shellpoint lacks standing to assert a constitutional challenge because Brandywine mailed notice to Shellpoint's predecessor, Bank of America, and MERS. BAB 30–32; None of these mailings, however, were directed in a manner reasonably calculated to provide notice to Bank of America of the potential loss of its lien for two reasons: (1) none of these mailings were addressed to Bank of America at its most recent address for the Property as designated in the land records, and (2) these mailings alone were insufficient to impart reasonable notice of the potential extinguishment of the Deed of Trust. The District recognized in its Answering Brief that due process requires "notice to persons 'who reasonably can be relied upon to inform the interested parties.'" DAB

23 (quoting *Quincy Park Condo.Unit Owners' Ass'n v. D.C. Bd. of Zoning Adjustment*, 4 A.3d 1283, 1290 (D.C. 2010)). The notice in this case falls short.

In 2017, the Council amended the COA Statute to impart what it believed to be "notice reasonably calculated, under all circumstances, to apprise interested parties" consistent with *Mullane* and *Mennonite*. That notice includes required language in the Notice of Foreclosure Sale—which must also be mailed to the first lienholder—indicating whether the subject property is either being sold subject to the first deed, or free and clear of the first deed of trust. D.C. Code §§ 42-1903.13(c)(4)(B), (c)(4)(E)(i).[5] Notably, the COA Statute also provides that a condominium association complies with this section "if it sends notice as provided herein to the lienholders as their names and addresses appear in land records." D.C. Code § 42-1903.13(c)(4)(E)(ii).

Although those requirements were not in effect in 2014, Brandywine's purported "notice" in this case was not reasonably calculated to put Bank of America on notice. By all accounts, Brandywine was actively representing that the COA Sale was being conducted subject to the Deed of Trust. In addition, although Brandywine mailed notices to Bank of America and MERS, neither notice contained the Virginia

[5] These requirements remain in the COA Statute in effect today.

address listed for Bank of America as set forth in its Assignment such that the notices would be properly routed.

It is not enough for Brandywine to show that it mailed copies of its notices to obscure offices for Bank of America, a multinational bank, in other states. It is also not enough for Brandywine to mail notices to first lienholders while simultaneously representing that its foreclosure sale would not extinguish their interests. Although Shellpoint and the Court are limited to the artificially limited record in this case, the record makes clear that Brandywine was representing at the time of the COA Sale, *see* AA199, 224, and for more than a year following the COA Sale, AA226, that the Property was being sold subject to the Deed of Trust. The 2014 COA Statute's lack of a proper notice mechanism directly resulted in the inadequate notice provided to Bank of America here. For that reason, Shellpoint, as Bank of America's successor-in-interest, has standing to assert a facial challenge to the COA Statute.

D. There is Sufficient State Action.

Brandywine and Tyroshi argue that no constitutional violation exists because there is no state action required to implicate the constitution.[6] BAB 33–35; TAB 32–36. This argument fails because the Council of the District of Columbia's enactment of the Statute satisfies the state actor requirement, and state court quiet title actions

[6] Notably, the District of Columbia, which has appeared solely to defend the claims regarding the constitutionality of the COA Statute, makes no such argument in its Opening Brief. *See generally* DAB 17–39.

following a condominium foreclosure sale are a near certainty for condominium sale purchasers to ensure free-and-clear title.

As detailed in Shellpoint's Opening Brief, the deprivation of property without notice is the result of the actions of the Council, which drafted and enacted a constitutionally infirm statute creating a superpriority right that did not otherwise exist through private contract. Opening Br. 39–41. The enactment of law is a quintessential government function that is expressly reserved to the legislature and, in some circumstances, delegated to governmental regulatory agencies. The conduct that violates the Constitution here is the direct result of the Council's enactment of a statute which does not, on its face, comport with due process. Furthermore, the Council, through the COA Statute, "authorized" and "encouraged" COA foreclosures by allowing such sales to wipe out prior-recorded liens. Without this authorization, condominium associations would be unable to conduct superpriority sales. Furthermore, Brandywine and Tyroshi's assertion that the foreclosure sale was private action misunderstands the basis of Shellpoint's due process claim. Shellpoint asserts a facial challenge to the COA Statute, as it strips lenders of their secured interests in real property without notice—all to further the stated public purpose of protecting condominium associations.

Brandywine and Tyroshi's reference to *Flagg Brothers, Inc. v. Brook*s, 436 U.S. 149 (1978) and *Charmicor, Inc. v. Deaner*, 572 F.2d 694 (9th Cir. 1978) do not

support their contention that there is no state action here. *See* TAB 36. In *Flagg Brothers* and its progeny—including the cases from other jurisdictions cited by Tyroshi, TAB 36—the authority to foreclose arose out of the parties' contractual relationship, not a legislatively enacted statute. *Flagg Bros.*, 436 U.S. at 166. The circumstances are materially different here; Brandywine would have no right or ability (contractual or otherwise) to extinguish the Deed of Trust in the absence of the COA Statute. As a result, the purported right to foreclose arises solely by virtue of the COA Statute as enacted by the Council, and not because of the parties' contractual relationship. Such legislative action constitutes sufficient state conduct.

Tyroshi correctly notes that the Nevada Supreme Court held that its homeowners' association superpriority statute does not implicate state action. *See Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 133 Nev. 28, 31, 388 P.3d 970, 973 (2017). However, the Court should decline to follow the Nevada Supreme Court's flawed decision in *Saticoy Bay* insomuch as it relies upon *Flagg Brothers* and the other non-judicial mortgage foreclosure cases cited above where states enacted procedures and restrictions governing agreed-upon contractual rights between parties. Notably, prior to *Saticoy Bay*, the Ninth Circuit held the opposite: "In this context, where the mortgage lender and the homeowners' association had no preexisting relationship, the Nevada Legislature's enactment of the Statute is a 'state action.'" *Bourne Valley Ct. Tr. v. Wells Fargo Bank, NA*, 832

F.3d 1154, 1160 (9th Cir. 2016). The *Bourne Valley* court correctly distinguished *Flagg Brothers* and *Charmicor* for the same reasons set forth above.

Finally, the actions of state courts in enforcing the COA Statute may be properly attributed to the state. In the context of state-created rights, the question is whether the legislation "'encourage[s]' or 'authorize[s]'" the challenged conduct. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 41 (1999). The nature of condominium foreclosure sales is such that a quiet title action will always be necessary to determine the effect of the sale given the various defenses that could result in a condominium foreclosure sale being conducted subject to a first deed of trust that would not otherwise be reflected in the public record. *See, e.g.*, *Omid*, 2022 WL 3093734, at *6–7. If "it [is] clear that mechanics' liens involve state action since they are created, regulated and enforced by the State," *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 353 A.2d 222, 231 (Md. 1976) (citations omitted), then the superpriority COA Statute involves state action as well.

CONCLUSION

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

Dated: September 19, 2022

Respectfully submitted,

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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/ Benjamin W. Perry
Signature

22-CV-0005
Case Number(s)

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Appellant's Opening Brief was served via the Appellate E-filing System on this 19th day of September, 2022 on the following:

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