NO. 23-CV-0267

DISTRICT OF COLUMBIA COURT OF APPEALS

FLAGSTAR BANK, FSB,

Appellant,

v.

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

Appellees.

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

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

Andrew J. Narod* (D.C. Bar No. 1006083)
David T. Long, Jr. (D.C. Bar No. 90002637)
BRADLEY ARANT BOULT CUMMINGS LLP
1615 L Street NW, Ste. 1350
Washington, DC 20036
(202) 719-8271 (Narod direct)
(202) 719-8239 (Long direct)
anarod@bradley.com
dlong@bradley.com
Counsel for Plaintiff/Appellant Flagstar Bank, FSB n/k/a Flagstar Bank, N.A.

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INTRODUCTION

In its opening brief, Flagstar Bank, N.A. ("Flagstar") explained the many errors underlying three orders entered by the Superior Court of the District of Columbia in the above-styled action, each of which independently require this Court to reverse the Superior Court's orders. Flagstar outlined how the Superior Court erred by impermissibly drawing inferences against it at the motion to dismiss stage; by making factual findings at the motion to dismiss stage; by misapplying the discovery rule; and by misapplying the doctrine of equitable estoppel. These errors became the law of the case, and thus were repeated and expanded upon in the Superior Court's later summary judgment orders. Yet the Appellees—Advanced Financial Investments, LLC ("AFI") and New Hampshire House Condominium Unit Owners Association ("the Association")—curiously fail to meaningfully address any of these issues. They opt instead to respond to other arguments not made by Flagstar, and in doing so they mischaracterize the arguments put forth in Flagstar's opening brief and fail to refute the arguments Flagstar actually did advance.

Other than repeatedly insisting that Flagstar should have forecast future developments in the law surrounding super-priority liens back in 2014, an argument this Court has already rejected, neither AFI nor the Association provide a sound explanation for why Flagstar's claims were time-barred or otherwise without merit. The Appellees' attempts to distinguish the authorities relied on by Flagstar fail. And

their newly crafted arguments are waived in some instances, and without merit in other instances. For those reasons, and the reasons outlined in Flagstar's opening brief, this Court should reverse the Superior Court's erroneous orders and remand for further proceedings.

ARGUMENT

I. FLAGSTAR'S CLAIMS ARE NOT TIME-BARRED.

A. Application of the Discovery Rule Shows that Flagstar's Claims are not Time-Barred.

The discovery rule tolls the accrual of a cause of action when an injury is not readily discernable. *E.g.*, *Ehrenhaft v. Malcom Price, Inc.*, 483 A.2d 1192, 1201 (D.C. 1984). Here, the discovery rule applies because Flagstar could not know it was injured until March 1, 2018, when this Court decided *Liu v. U.S. Bank, N.A.*, 170 A.3d 871 (D.C. 2018). *See* Appellant's Br. at 32-35. The parties agree that Flagstar did not have actual notice of its injury at the time of the foreclosure sale. Appellant's Br. at 30-31; AFI's Br. at 12; Association's Br. at 15. Thus, the question at issue becomes whether Flagstar had inquiry notice. It did not, because it could not have had inquiry notice.

The Appellees claim that Flagstar was on notice of its claims in 2014 because it was aware of facts surrounding the foreclosure sale. *See* AFI's Br. at 12 ("Flagstar did not become aware of any new fact" between 2014 and 2018."); Association's Br. at 14 ("Flagstar's position is that it was not aware of the legal consequences of

events for which it was contemporaneously aware."). They contend that Flagstar's failure to timely file its claims was purely a result of a failure to diligently pursue its rights. AFI's Br. at 14 ("Flagstar was obligated to pursue its claims with reasonable diligence."); Association's Br. at 15 ("There is a duty to act reasonably given the circumstances to investigate matters affecting one's affairs to determine whether a cause of action exists."). But these arguments miss the mark.

Contrary to the Appellees' characterizations, Flagstar does not argue that the discovery rule applies because, through a failure of its diligence, Flagstar *failed to comprehend* the legal significance of the 2014 foreclosure sale. Instead, the discovery rule applies because at the time of the sale, Flagstar *could not have known* it was injured. Appellant's Br. at 32. The Appellees are correct that Flagstar had a duty to exercise reasonable diligence. What they fail to acknowledge, however, is that no amount of diligence could alert Flagstar to the fact that a later decision by this Court would place its lien in jeopardy. Not until this Court's decision in *Liu* could Flagstar know that the Association's waiver of its right to a super-priority lien was ineffective. *Id.* at 34-35. And shortly after Flagstar learned of the *Liu* decision, it amended its complaint. *Id* at 35. So, Flagstar acted with all possible diligence to protect its rights in this case.

AFI attempts to refute this argument by claiming that "[t]his Court expressed skepticism" about the waiver of a super-priority lien in *Chase Plaza*. AFI's Br. at

15-16. And "the test is not whether the law was crystal clear but rather, the test is whether Flagstar was on inquiry notice as of 2014," which AFI claims Flagstar "clearly" was. *Id.* at 18. *See also* Association's Br. at 12-15, 18-19. But this Court has already foreclosed the Appellees' argument on this point. As the Court explained just last year, "[b]ecause we had not yet decided either *Liu* or *4700 Conn* as of the date of the sale[1], it was unknown to the parties at the relevant time whether the sale would extinguish [the bank's] first deed of trust even though the Advertisement of Sale said the sale was subject to all prior liens." *U.S. Bank Tr., N.A. v. Omid Land Grp., LLC*, 279 A.3d 374, 380 (D.C. 2022). So, too, here. Prior to this Court clarifying the impact of waivers like the one at issue in this case, Flagstar could not know that the foreclosure sale would extinguish its deed of trust, even though all parties at the time of the sale believed Flagstar's deed of trust would remain. Therefore, Flagstar could not know it was at all injured at the time of the sale in 2014. The Appellees' strained reading of *Chase Plaza*, which contradicts this Court's view as to the status of this legal issue prior to a decision in *Liu*, provides no basis to avoid application of the discovery rule here. *See id.*

[1] The foreclosure sale in *U.S. Bank Trust, N.A. v. Omid Land Group., LLC* occurred in January 2017. 279 A.3d 374, 380 (D.C. 2022).

B. Even if the Discovery Rule Does Not Apply, Equitable Tolling Does.

Equitable tolling provides another, independent basis for concluding that Flagstar's claims are not time-barred. Equitable tolling is appropriate when "an uncertain state of the law" renders a party's legal rights unclear. *See* Appellant's Br. at 36-37 (discussing *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392, 403 (D.C. 1991)). This conclusion is consistent with authority from other jurisdictions and applies to the facts of this case. *Id.* at 37-38.

AFI[2] first claims that equitable tolling does not apply because "Flagstar did not diligently pursue its claims." AFI's Br. at 20. To support this argument, it cites this Court's decisions in *East v. Graphic Arts Industry Joint Pension Trust* and *Bond v. Serano*. AFI's Br. at 19, 22. In *East*, this Court held that a plaintiff could not equitably toll the statute of limitations because she "failed to file a court action within a reasonable time after she obtained—or by due diligence could have obtained—the information necessary to file her complaint." 718 A.2d 153, 155 (D.C. 1998). Similarly in *Bond*, this Court held that a plaintiff could not equitably toll the statute of limitations when he failed to timely file his lawsuit based on a good faith mistake about the proper forum in which to file. 566 A.2d 47, 48-49 (D.C.

[2] The Association did not respond to Flagstar's equitable tolling argument. It has thus conceded the argument. *See Classic CAB v. D.C. Dep't of For-Hire Vehicles*, 244 A.3d 703, 707 (D.C. 2021) (holding that a petitioner "effectively conceded" an issue by failing to respond in reply brief to argument raised in respondent's brief) (internal quotation marks omitted).

1989). In both cases, the status of the law was perfectly clear, but the plaintiff was either ignorant or mistaken about the law's application. *East* 718 A.2d at 155; *Bond*, 566 A.2d at 48-49.

Discussing *Bond*, AFI contends "[if] this Court has refused to apply equitable tolling in cases of mistake of forum, it seems equally logical to decline Flagstar's invitation to apply the doctrine to a mistake of law." AFI's Br. at 22. But Flagstar does not claim it did not file suit due to a mistake of law, nor is Flagstar similarly situated to either of the plaintiffs in *East* or *Bond*. Unlike the Plaintiff in *East*, Flagstar could not know, through any amount of diligence, the information necessary to identify its injury and file a claim to protect its rights. *See supra* at 4. Similarly, unlike the plaintiff in *Bond*, Flagstar does not contend that it made a good faith mistake. Instead, the "uncertain state of the law" rendered Flagstar's rights unclear, so it could not effectively protect its rights in the Property. *Simpson*, 597 A.2d at 403.

AFI responds by offering two reasons for why *Simpson* does not apply, neither of which are persuasive. First, AFI's repeats its flawed argument that "the law pertaining to super-priority liens after *Chase Plaza* was not opaque." AFI's Br. at 21. For the reasons already discussed, this is wrong. *See supra* at 3-4.

Second, AFI claims that *Simpson* does not apply because it "involved a pro se plaintiff who was seeking redress for her employment discrimination complaint, in

a complex area of the law" while Flagstar is "a large bank represented by counsel." *Id.* at 22. But while pro se litigants are granted leeway in some circumstances, *see, e.g.*, *MaclLeod v. Georgetown Univ. Med. Ctr.*, 736 A.2d 977, 980 (D.C. 1999), the *Simpson* court did not cite the plaintiff's pro se status as a reason for its decision. Nor does AFI provide any authority for its bold assertion that the principles of equitable estoppel are not available to a "large bank represented by counsel." AFI's Br. at 21.

Flagstar's position otherwise goes unaddressed by the Appellees. At the time of the sale in 2014, nobody knew that the Association's efforts to foreclosure on the Property "subject to" Flagstar's deed of trust would be ineffective. Appellant's Br. at 37. That was not clarified until *Liu*, when this Court implemented D.C. Code § 42-1901.07 in a novel way. *Id.* And shortly after the *Liu* Court clarified the law, Flagstar promptly moved to amend its complaint to reflect this clarification. *Id.* Equity thus requires that the statute of limitations be tolled.

C. AFI Waived its Laches Argument, and Even If It Did Not, It Is Without Merit.

In an additional bid to make Flagstar's claims time-barred, AFI argues—for the first time on appeal—that the doctrine of laches prevents Flagstar from now challenging the foreclosure sale. AFI's Br. at 27-29. But AFI's argument is waived. And even if it were not, laches clearly does not apply.

"'It is fundamental that arguments not raised in the trial court are not usually considered on appeal.'" *Iron Vine Security, LLC v. Cygnacom Sol.'s, Inc.*, 274 A.3d 328, 343 (D.C. 2022) (quoting *Thornton v. N.W. Bank of Minn.*, 860 A.2d 838, 842 (D.C. 2004)). The Court will only deviate from this fundamental principle "in exceptional situations and when necessary to prevent a clear miscarriage of justice apparent from the record." *Id.* (quoting *Thornton*, 860 A.2d at 842). In other words, the Court reviews "only for plain error" and "the burden is on [AFI] to show not only (1) that the court erred, but also (2) that the error was obvious or plain, (3) that the error affected [AFI's] substantial rights, and (4) that the error 'resulted in a miscarriage of justice or seriously affected the fairness and integrity of the trial.'" *Id.* (quoting *Jordan v. Jordan*, 14 A.3d 1136, 1153 (D.C. 2011)). This is a "demanding standard" that AFI cannot meet. *Id.*

To that end, AFI has not even attempted to explain how the Superior Court's failure to address its newly crafted laches argument amounts to a "miscarriage of justice," nor could it. The Superior Court did not err in not addressing an equitable argument that was never raised nor argued by the parties. Ironically, AFI contends that "[the] doctrine of laches, [is] founded on the principle that equity aids the vigilant rather than those who slumber on their rights." AFI's Br. at 28 (quoting *Powell v. Zuckert*, 366 F.2d 634, 636 (D.C. 1966)). But AFI failed to raise this equitable defense below, thus slumbering on its own right to assert the argument.

Even if the argument were not waived—which is not the case—laches does not apply here, and AFI's attempt to argue it further shows its misunderstanding of Flagstar's arguments. "For a successful defense of laches, the trial court must find 'an undue and unexplained delay on the part of one party which works an injustice to the other party.'" *Lasche v. Levin*, 977 A.2d 361, 367-68 (D.C. 2009) (*Amidon v. Amidon*, 280 A.2d 82, 84 (D.C. 1971)). The party asserting the defense of laches bears the burden of proving its applicability. *Id.* at 368. AFI has not met its burden.

As to the reason for Flagstar's delay, AFI's argument is more of the same. *See* AFI's Br. at 28 ("Flagstar did not timely move to challenge the condo foreclosure sale even though it had full knowledge of the circumstances of the sale as well as the statute and the *Chase Plaza* decision."). As explained *supra* at 3-4, Flagstar did not need to challenge the validity of the foreclosure sale in 2014 because at that time, Flagstar's rights were seemingly secure. A challenge was only required after this Court determined the impact of a "subject to" sale in 2018 and AFI attempted to eliminate Flagstar's deed of trust. At that point, Flagstar acted swiftly.

AFI also fails to meet its burden in proving prejudice. Its entire prejudice argument is the following sentence: "The delay in prosecuting the extinguishment claim is prejudicial to AFI, especially because AFI has expended funds to maintain the property over these last several years." *See* AFI's Br. at 28. But costs do not constitute prejudice. *Cf. Wolfe v. Fine*, 618 A.2d 169, 174 (D.C. 1992) ("[I]ncreased

litigation costs do not constitute prejudice in the sense of damage to the presentation of a defense."). Nor may prejudice "be readily inferred from the length of delay alone." *Id.* AFI does not explain how unspecified maintenance costs overcome the windfall it received from buying the Property for pennies on the dollar, especially in light of the fact that Flagstar had paid multiple years of real property taxes to the benefit of AFI. AFI is certainly in a better financial position now regarding the Property than it would be if the foreclosure sale never occurred. It other words, it has not suffered prejudice.

II. AT THE VERY LEAST, A GENUINE DISPUTE EXISTED ABOUT WHEN FLAGSTAR'S CLAIMS ACCRUED.

At the very least, a genuine dispute exists concerning when Flagstar's claims accrued, thus, the dismissal of Flagstar's claims was inappropriate. Dismissal of a complaint based on a statute of limitations is only appropriate when a "claim is time-barred on the face of the complaint." Appellant's Br. at 13 (quoting *Logan v. LaSalle Bank Nat. Ass'n*, 80 A.3d 1014, 1019-20 (D.C. 2013)). That only occurs when the court can determine when the cause of action accrued as a matter of law. *Id.*

To determine when Flagstar's claims accrued, the Superior Court needed to determine what information Flagstar knew or should have known in 2014. *Id.* at 13-14. Not only is this inquiry "fact-bound and requires an evaluation of all of the plaintiff's circumstances," *id.*, (quoting *Diamond v. Davis*, 680 A.2d 364, 382 (D.C. 1996)), but it is also disputed by the parties in this case. *Id.* at 15; AFI's Br. at 12;

Association's Br. at 15. Nevertheless, the Superior Court resolved this factual dispute at the motion to dismiss stage and concluded that Flagstar possessed knowledge it specifically alleged it did not. Appellant's Br. at 16; AA176. To do so, the court drew inferences *against* Flagstar rather than in its favor. That alone constitutes reversible error. *See* Appellant's Br. at 15-22.

AFI's only direct response to this argument is to claim that "there are no disputed facts to address." AFI's Br. at 25. But AFI cannot simply ignore the four disputed facts Flagstar outlined in its opening brief, each of which would be cause alone for reversal. *See* Appellant's Br. at 19-22. As Flagstar outlined in more detail there, the dispute over these facts made adjudicating the accrual of Flagstar's claims impossible at the motion to dismiss stage in this particular case. *Id.* at 19-22.

For its part, the Association claims that the "allegations in the Amended Complaint establish that Flagstar knew or should have known of its cause of action at the time of the foreclosure sale." Association's Br. at 8. It claims that "Flagstar conflates its misunderstanding of the legal significance of the foreclosure sale with unawareness of predicate facts and further ignores that it had inquiry notice of the purported injury." *Id.* (citing cases relating to ignorance of and/or mistake of the law). It then outlines a host of facts irrelevant to Flagstar's position including that Flagstar was aware of the foreclosure proceedings, the advertisements, and the sale

amount in 2014, Association's Br. at 10-11, none of which show that Flagstar knew or should have known that it was injured at that time.

Neither appellee meaningfully rebuts Flagstar's contentions that the Superior Court drew inferences against it. AFI's response is to simply claim that no disputed facts exist. AFI's Br. at 25. The Association's response is to just repeat its failed arguments about the discovery rule and the impact of *Chase Plaza*. *See supra* at 3-4; AFI's Br. at 12.

In sum, the Appellees' responses do not meaningfully refute Flagstar's argument that the Superior Court impermissibly drew inferences against Flagstar. Instead, they respond to a caricature of Flagstar's argument. The fact remains, on the date of the foreclosure sale, no one believed the Association's foreclosure posed a threat to Flagstar's deed of trust, especially Flagstar who alleged the opposite. AA176. Yet, the Superior Court made findings to the contrary. That was an error, and this Court should reverse.

III. THE SUPERIOR COURT ERRED IN DISMISSING FLAGSTAR'S UNJUST ENRICHMENT CLAIM.

Even if some of Flagstar's claims were time-barred (which should not be the case), its claims for unjust enrichment against were certainly not.

AFI was unjustly enriched because it agreed to purchase the Property subject to Flagstar's deed of trust; to AFI's benefit, Flagstar paid taxes on the Property amounting to $24,000 without compensation; and Flagstar has since lost its interest

in the Property. Appellant's Br. at 40-41. That claim was not time-barred because the tax payments continued past the foreclosure sale. *Id.*

AFI "concede[s] that there could plausibly be a basis for a timely unjust enrichment claim," but then claims that this Court should nevertheless affirm the Superior Court because there is no evidence to support the claim. AFI's Br. at 41-42. Specifically, AFI claims that Flagstar did not produce evidence about its payment of taxes on the Property. *Id.* at 42. But AFI's own brief defeats its argument. AFI correctly notes that Flagstar's answers to interrogatories indicated that it paid taxes on the subject property. *Id.* That is enough to overcome a motion for summary judgment. *See* Super. Ct. Civ. R. 56(c) ("A party asserting that a fact . . . is genuinely disputed must support the assertion by citing to particular parts of materials in the record" including "interrogatory answers").

For its part, the Association claims that "Flagstar does not allege it conferred a benefit on the Association." Thus, Flagstar's unjust enrichment claim against it fails. Association's Br. at 13 n.2. But the Association's argument strains credulity. After the Association foreclosed on its super-priority lien, the proper course was to pay remaining proceeds to the next lien with priority, here Flagstar. Yet, Flagstar was not paid, and the Association wrongfully kept certain proceeds of the sale. AA107. In other words, the Association retained proceeds from the foreclosure sale that belonged to Flagstar. That constitutes unjust enrichment. *News World*

Commc'n., Inc. v. Thompsen, 878 A.2d 1218, 1222 (D.C. 2005) ("Unjust enrichment occurs when: (1) the plaintiff conferred a befit on the defendant; (2) the defendant retains the benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust."); *see also Glasgow v. Camanne Mgmt. Inc.*, 261 A.3d 208, 222 (D.C. 2021) (holding that an indirect benefit can give rise to a claim for unjust enrichment).

Because the parties agree that Flagstar's unjust enrichment claims were not time-barred, and neither appellee provides a reason to otherwise dismiss the claims, this Court should reverse and reinstate Flagstar's claims for unjust enrichment.

IV. FLAGSTAR'S LIEN WAS NOT EXTINGUISHED.

Even if Flagstar's claim for affirmative relief were time-barred, that does not impact its claim for declaratory relief. *See* Appellant's Br. at 42-44. The Superior Court erred in dismissing Count I because it erroneously concluded that Flagstar's lien was extinguished when, in fact, Flagstar sufficiently pleaded a claim for judicial foreclosure against AFI and the Association.[3]

[3] AFI fails to appreciate the distinction between Flagstar's claims. *See* Appellant's Br. at 43-44. Even so, AFI recognizes that the Superior Court's ruling precluded Flagstar from litigating issues relating to the validity of the sale once it erroneously concluded Flagstar's claims were time-barred. AFI's Br. at 26-27. Thus, by AFI's own logic, the trial court's only basis for dismissing Count I was its conclusions as to Counts II and III. As a result, if this Court reverses as to Counts II and III, it should reverse as to Count I as well.

A. The Sale of the Property was Grossly Inadequate and Shocks the Conscience.

A foreclosure sale may be set aside when the price paid is "grossly inadequate." *Id.* at 47 (collecting cases). In making this determination, courts should consider the reasonableness of the sale price and the parties' beliefs and expectations at the time of the sale, including facts and circumstances that may impact "the parties' respective assessments of the risks attendant to the sale." *Omid Land Grp.*, 279 A.3d at 380-81. The Appellees bore the burden of proving that the sale was valid. Appellant's Br. at 48 (quoting *id.*). But they did not, and cannot, carry their burden. *Id.*

AFI attempts to end-around this conclusion by asserting that there is no evidence that the price paid for the Property was grossly inadequate. AFI's Br. at 31-32. But this assertion improperly shifts the burden of proof to Flagstar. *See* Appellant's Br. at 48. And more, it is not supported by the record.

First, AFI devotes several pages of its brief reciting undisputed facts in the summary judgment record. *See* AFI's Br. at 32-37. It outlines the timeline of events surrounding the 2014 foreclosure sale including that it is undisputed that the Association advertised and conducted the sale, the auctioneer announced that the sale was "subject to" Flagstar's lien, and the Property was sold for $26,000. *Id.* at 32-34. AFI then notes Flagstar's allegations that the false statement about the sale being subject to Flagstar's lien chilled bidding and led to a sale price far below a

commercially reasonable amount. *Id.* at 36-37. But AFI spends no time explaining how these facts show that the price it paid for the Property was adequate. That is because the facts outlined by AFI do not make that showing. Flagstar's actions surrounding the 2014 foreclosure sale were predicated on the belief that the Property would remain encumbered by its deed of trust. The price paid by AFI reflects that understanding, and the irrelevant facts AFI recites make no showing to the contrary.

Second, AFI contends that Flagstar failed to raise the issue of unconscionability because it did not provide expert testimony as to what constitutes a commercially reasonable sale. AFI's Br. at 38-40. Notably, AFI provides no citation for its claims that "[e]xpert testimony is absolutely essential if Flagstar were to somehow demonstrate that the condominium foreclosure sale was not done in a 'commercially reasonable manner,'" *id.* at 38, or that "Flagstar cannot prove its case without expert testimony." *Id.* at 40. Further, the cases AFI does cite are inapposite to the situation at hand. Those cases stand for the proposition that an expert is required to show that something *caused a diminution* in property value. *Lowery v. Glassman*, 908 A.2d 30, 37 (D.C. 2006) (holding that expert testimony is required to show the "link" between a nuisance and diminution of property value); *Wentworth v. Airline Pilots Ass'n*, 336 A.3d 542, 543-44 (D.C. 1975) (similar). The same is not required to show the *value* of real property. *See, e.g*, *Lowery*, 908 A.2d at 37 (D.C.

2006) ("The owner of . . . land . . . is generally held to be qualified to express his opinion of its value merely by virtue of his ownership.").

In reality, AFI failed to establish a sufficient summary judgment record as to the adequacy of the price AFI paid. And even if AFI did provide a sufficient record at summary judgment as to the price paid, that would not have been enough to entitle it to judgment as a matter of law. This is because the determination of whether the Property was "sold at a price 'greatly below the amount of the mortgage and apparent value of the unit' and pursuant to terms of sale 'erroneously conditioned on [the] assumption of the first deed of trust,'" is made at the time of the foreclosure sale, not the litigation. *Omid Land Grp.*, 279 A.3d at 379 (quoting *4700 Conn 305 Tr. v. Capital One, N.A.*, 193 A.3d 762, 766 (D.C. 2018)). Here, like in *Omid Land Group*, "it was unknown to the parties at the relevant time whether the sale would extinguish [Flagstar's] deed of trust." *Id.* at 380. Thus, the summary judgment record was devoid of evidence showing the parties' respective beliefs at the time of the sale. The Superior Court therefore erred in granting summary judgment on such an insufficient record.

Even if the Appellees had met their burden, Flagstar was not able to respond because the Superior Court summarily dismissed its claim. Appellant's Br. at 48. If given the opportunity, Flagstar would have showed that AFI paid only $26,000 for the Property when the face value of the mortgage was $256,634, the unpaid balance

on the mortgage was $449,040.90, and the tax-assessed value of the Property was $237,930. *Id.* at 48 n.2. All told, AFI paid less than 11% of the Property's actual value. *Id.* Moreover, throughout this litigation, Flagstar has maintained that at the time of the sale, it believed its deed of trust was secure. *See, e.g.*, Appellant's Br. at. 8, 17, 19. That is why Flagstar allowed AFI to pay such a de minimis price for the Property without interjecting. In other words, the sales price was insufficient, *and* the parties' beliefs and expectations at the time of sale would have demonstrated that the sale should be set aside. *Omid Land Grp.*, 279 A.3d at 379-80.

For its part, the Association claims that that Flagstar cannot maintain a claim against it simply because the Association "had a nonwaivable right to a super-priority lien." Association's Br. at 20. But the Association's argument dodges the question. The status of its lien does not excuse the improprieties surrounding the foreclosure sale or the Association's failure to pay Flagstar the proceeds it was due. While the Association was entitled to possess a super-priority lien, it most certainly was not entitled to foreclose upon the lien in a commercially unreasonable manner. Thus, its super-priority lien alone is not a basis for granting it summary judgment.

B. The Advertisement Contained a Material Misstatement.

Flagstar also presented sufficient evidence to show that the advertisement for the sale presented a material misstatement. Appellant's Br. at 49-50. It did so by showing that the advertisement indicated that the sale was subject to Flagstar's deed

of trust when it, in fact, was not. *Id.* Yet, the Superior Court failed to acknowledge this fact or draw reasonable inferences in Flagstar's favor therefrom. *Id.* Neither AFI nor the Association contest this argument. *See Classic CAB*, 244 A.3d at 707. Thus, the Court should reverse the dismissal of Count I on that basis as well.

C. The Association was a Proper Party to the Foreclosure Claim.

Finally, the Association argues that Flagstar failed to challenge the Superior Court's alternative basis for dismissing Count I. Association's Br. at 3 n.1, 21-22. Specifically, it contends "[t]he claim for foreclosure pursuant to Flagstar's deed of trust does not involve the Association [because t]he Association is neither a borrow nor a record title owner. *Id.* at 21-22.

The Association is mistaken. As outlined in Flagstar's opening brief to this Court, "Count I stated a judicial foreclosure claim against all other entities purporting to hold an interest in the subject property, including the purported super-priority purchaser (AFI), **the purported super-priority lien holder in the event the super-priority sale was rendered invalid (the Association)**, and the underlying borrower on Flagstar's mortgage loan (Rivas)." Appellant's Br. at 44 (emphasis added). So, in the event the sale is rendered invalid, as it should be, Flagstar will maintain a claim against the Association.

To be sure, the Superior Court held that no such claim could exist because Flagstar's lien was extinguished. *Id.* (citing AA328-AA329, AA392). But as

outlined above, this conclusion was unwarranted. *See supra* at 14. If this Court remedies that error and provides Flagstar the opportunity to argue that the sale was invalid, Flagstar will certainly have a basis to bring a foreclosure claim against the Association.

CONCLUSION

Based on the foregoing and the arguments in Flagstar's opening brief, the Superior Court erred in dismissing Flagstar's claims as time-barred. Additionally, the Superior Court erred in holding that Flagstar's deed of trust was extinguished without considering the misstatements in the Advertisement and the unconscionably low purchase price by AFI, as well as the expectations of the parties at the time of sale. In light of these errors, this Court should reverse the Superior Court's three at-issue orders and remand for further proceedings consistent with this decision.

Dated: November 27, 2023

Respectfully submitted,

/s/ Andrew J. Narod
Andrew J. Narod* (D.C. Bar No. 1006083)
David T. Long, Jr. (D.C. Bar No. 90002637)
BRADLEY ARANT BOULT CUMMINGS LLP
1615 L Street NW, Ste. 1350
Washington, DC 20036
(202) 719-8271 (Narod direct)
(202) 719-8239 (Long direct)
anarod@bradley.com
dlong@bradley.com

Counsel for Plaintiff/Appellant Flagstar Bank, FSB n/k/a Flagstar Bank, N.A.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Appellant's Reply Brief was served via the Appellate E-filing System on this 27th day of November, 2023 on the following:

Anne K. Howard
Alane Tempchin
BUDOW AND NOBLE, P.C.
12300 Twinbrook Parkway, Suite 540
Rockville, Maryland 20852
Counsel for New Hampshire Condominium Unit Owners' Association

Richard J. Link
KARPEL LINK & CAPORALETTI
77 S. Washington Street, Suite 307
Rockville, MD 20850
Counsel for Advanced Financial Investments, LLC

I further certify that I have mailed by United States Postal Service a copy of this Appellant's Reply Brief to the following individuals not registered to receive service through the Appellate E-filing System on this 27th day of November, 2023:

Salvadore Rivas
3540 Rock Creek Church Rd. NW,
Apt. 102
Washington, DC 20010
Pro Se Defendant/Appellee

/s/ Andrew J. Narod
Counsel for Plaintiff/Appellant Flagstar Bank, FSB n/k/a Flagstar Bank, N.A.

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

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

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

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

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

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

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

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

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

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

/s/ Andrew J. Narod
Signature

23-CV-0267
Case Number(s)

Andrew J. Narod
Name

November 27, 2023
Date

anarod@bradley.com
Email Address