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

BRIEF OF APPELLEE ADVANCED FINANCIAL INVESTMENTS, LLC

October 30, 2023

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RULE 28(a)(2) STATEMENT

Pursuant to DC Ct. Ap. Rule 28(a)(2), Appellee lists the following counsel who were part of the proceedings in DC Superior Court in Case No. 2017 CA 000373 R(RP), and parties and counsel in this appeal

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to DC C App. R. 26.1, Appellee Advanced Financial Investment, LLC makes the following corporate disclosure statement:

Appellee Advanced Financial Investment, LLC is a limited liability company organized under the laws of the District of Columbia. It has no parent corporation and no corporation owns any part of its stock. It is wholly owned by its sole member, Milton Campbell.

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JURISDICTIONAL STATEMENT

The Appellee agrees with the jurisdictional statement of the Appellant that this case arises from a final judgment entered on February 27, 2023 after granting the Motion to Dismiss and/or Motion for Summary Judgment filed by Appellee Advanced Financial Investments, LLC ("AFI"). Appellant filed a timely appeal on March 29, 2023. Jurisdiction is vested in this Court from final judgments entered in the Superior Court for the District of Columbia under DC Code §11-721(a).

STATEMENT OF FACTS

The instant appeal involves two (2) foreclosure proceedings for the real property known as 3540 Rock Creek Church Road, Washington, DC ("the property"). The original mortgagor, Salvador Rivas ("Rivas"), acquired the property in 2007. (AA 186) In 2009, Rivas obtained a mortgage on the property that was subject to a Deed of Trust. (AA 171, 187, 201) Moreover, the property is part of a condominium association known as the New Hampshire House Condominium Unit Owners' Association ("the Association"). Rivas defaulted on his payments to the Association and in 2014, the Association initiated foreclosure proceedings in accordance with the D.C. Condominium Act, §§ 42-1901.0, et seq. (AA 171-172, 219-222) Prior to the condo foreclosure sale, the Association's attorney circulated a notice stating the foreclosure would be subject to the mortgage company's first deed of trust. (AA 171-172) AFI was the successful mortgage purchaser. (AA 172) AFI

became the record owner in February 2015, and continues to own the property up to the present time. (AA 183)

Flagstar Bank, N.A. ("Flagstar") is the note holder on the property. (AA 215) In January 2017, based on Rivas' default in his mortgage payments, Flagstar filed a one-count Complaint for judicial foreclosure against Rivas and AFI. (AA 55) In April 2019, Flagstar filed an Amended Complaint adding an additional party ("the Association") together with three (3) additional causes of action. The Amended Complaint pled the following claims: Count 1 - Judicial Foreclosure; Count 2 - Declaratory Relief; Count 3 - Breach of Fiduciary Duty; and Count 4 - Unjust Enrichment. (AA 169)

A central issue in this case is whether Flagstar's claims are barred by the Statute of Limitations. Therefore, it is important to understand the chronology of events that has led us to this Court, as will be delineated below:

August 28, 2014

The Court of Appeals decided the case of *Chase Plaza Condominium Association, Inc. v. JPMorgan Chase Bank*, 98 A.3d 166 (D.C. 2014). In *Chase Plaza*, this Court said that a mortgage holder's deed of trust could be extinguished by a condominium foreclosure proceeding. Under the Condominium Act, six (6) months of condominium dues are entitled to a super-priority, and under traditional principles

of foreclosure law, any junior lien is extinguished if the foreclosure sale fails to yield sufficient proceeds to satisfy its debt.

September 29, 2014

The Association filed a lien for its unpaid condo fees with the DC Recorder of Deeds based on Rivas' default. (AA 219)

November to December 2014

The Association provided notice of the condo foreclosure sale and published an advertisement in a local newspaper in accordance with the Condominium Act. (AA 220, 223)

December 23, 2014

The Association held the condominium foreclosure sale. AFI was the successful bidder (for the sum of $26,000). This was a non-judicial foreclosure. (AA 172, 224)

February 3, 2015

The Trustee's Deed was recorded with the Recorder of Deeds, vesting title in AFI. The Deed says that "the hereinafter described property is sold subject to a deed of trust recorded in the Office of the Recorder of Deeds at Instrument # 2010038535." (AA 183)

January 19, 2017

Flagstar filed its Complaint for judicial foreclosure. (AA 55)

March 1, 2018

This Court decided *Liu v US Bank, NA*, 179 A.3d 871 (DC 2018) holding that the mortgage lender's deed of trust was extinguished at a condominium foreclosure sale notwithstanding language in the sale notice and the Deed stating that the sale was subject to the underlying mortgage.

March 12, 2018

AFI filed its Answer in this case stating that the Flagstar lien was extinguished by virtue of the December 23, 2014 sale. (AA 81)

April 17, 2019

Flagstar filed an Amended Complaint for judicial foreclosure; declaratory relief, breach of fiduciary duty and unjust enrichment. (AA 169) This was Flagstar's first attempt to challenge the December 2014 condo foreclosure sale.

October 10, 2019

The Superior Court (Epstein, J.) granted the Association's Motion to Dismiss Counts 3 and 4 of the Amended Complaint because Flagstar's claims were barred by limitations, i.e., the Amended Complaint was filed more than three (3) years after the December 2014 foreclosure sale. (AA 272)

September 1, 2020

The Superior Court (Matini, J.) granted the Association's Motion to Dismiss Counts 1 and 2. As to Count 1, the court found that Flagstar's lien had been extinguished. As to Count 2, the court found that Flagstar's claim for declaratory relief was (like Counts 3 and 4) barred by limitations. (AA 324)

February 27, 2023

The trial court granted AFI's motion to dismiss/motion for summary judgment. The court dismissed Count 1 (as to judicial foreclosure) because Flagstar's lien was extinguished at the time of the December 2014 condominium foreclosure sale. The court dismissed Counts 2 and 4 based on limitations and adopted the findings from the Orders entered on October 10, 2019 and September 1, 2020. (AA 388)

March 29, 2023

Flagstar filed the appeal to this Court. (AA 396)

SUMMARY OF THE ARGUMENT

The trial court granted AFI's Motion to Dismiss and/or Motion for Summary Judgment. The trial court's ruling was correct for the following reasons:

1. Flagstar filed an initial single-count Complaint for judicial foreclosure on January 19, 2017. Flagstar then filed an Amended Complaint on April 17, 2019 - more than three (3) years after the December 23, 2014 sale. In the Amended

Complaint, Flagstar alleged new causes of action – in addition to its claims for judicial foreclosure – in an attempt to challenge the propriety of the December 2014 condominium foreclosure sale. In response to the three-year statute of limitations issue, Flagstar alleges that its claims did not accrue at the time of the December 2014 sale because it was not aware that it had suffered an injury in 2014. Specifically, Flagstar claims it was unaware that its lien was in jeopardy until AFI filed its Answer to the Complaint in March 2018. The trial court resolved the statute of limitations issue on motions to dismiss. There were no facts in dispute for the trial to court to adjudicate. Flagstar's argument - that its cause of action accrued on March 2018 - is a question of law for the court, not a factual issue. The trial court acted appropriately in granting the Motion to Dismiss based on the pleadings.

2. Flagstar maintains that its claims did not accrue in December 2014 when the condo foreclosure sale occurred because it was unaware of the legal implications of the sale (i.e. Flagstar says that it did not know its lien was extinguished, notwithstanding the fact that this Court had decided *Chase Plaza Condo Assn v JP Morgan Chase Bank*, 98 A.3d 166 (2014) in August 2014). Flagstar was on notice of the condo foreclosure sale and all the facts concerning the sale in December 2014. Thus, Flagstar's cause of action accrued as a matter of law on December 23, 2014.

3. Flagstar's claims are not saved by the discovery rule. The discovery rule applies when a plaintiff is not in possession of all the facts necessary to put them on inquiry notice that they have a possible claim. As of December 2014, Flagstar was in possession of all facts that would allow a reasonable person to inquire whether their lien was in jeopardy. The discovery rule does not apply to a situation where a party claims that they were not on notice of their legal rights.

4. Flagstar's claims are not saved by the doctrine of equitable tolling. Flagstar did not act with reasonable diligence in pursuing a claim to set aside the December 2014 foreclosure. Also, equitable tolling does not apply where a party has a mistaken belief as to the law, just as it is not applicable when a party has a mistaken belief as to the facts. It would also be unfair and prejudicial to set aside the condo foreclosure sale several years after it occurred. AFI is not aware of any authority in the District of Columbia wherein the discovery rule or the doctrine of equitable tolling has been applied in the manner urged by Flagstar in this case.

5. The trial court properly determined that Flagstar's Deed of Trust was extinguished when the Association foreclosed on the six-month super priority lien in accordance with DC Code §42-1902.13(a)(2) as well as *Chase Plaza Condo Ass'n v JP Morgan Chase Bank*, NA 98 A.3d 166 (DC 2014) and its progeny. Flagstar lost its right to challenge the sale by waiting too long to assert its claims. Also, as an alternative basis for its decision, this Court can affirm the trial court's order

dismissing the judicial foreclosure complaint against AFI based on the summary judgment motion. In pretrial discovery, Flagstar had adduced no admissible evidence to challenge the propriety of the sale. In any event, the foreclosure proceeding was properly dismissed where Flagstar had no enforceable lien on which to foreclose.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THE COMPLAINT BASED ON THE STATUTE OF LIMITATIONS

A. Flagstar's Claims Accrued in December 2014 at the time of the Sale

Flagstar's claims are barred by the general three-year statute of limitations under DC Code §12-301(8). For purposes of the record below (and on appeal), there is no dispute that Flagstar filed its Amended Complaint on April 17, 2019 - more than three (3) years after the December 2014 foreclosure sale. Thus, Flagstar can overcome the limitations defense only if it can demonstrate that this case fits within an exception. In that regard, Flagstar argues that the following exceptions apply: (1) its claims are saved by virtue of the discovery rule; and (2) its claims are salvaged by equitable tolling. Flagstar has not shown that its claims are saved by the discovery rule because Flagstar was on inquiry notice as of December 2014. This inquiry notice is sufficient to start the running of the statute of limitations clock. Moreover, Flagstar's claims are not saved by the doctrine of equitable tolling

because that doctrine is not applicable and (even so) it did not act with reasonable diligence. Finally, Flagstar attempts to leverage its argument because the lower court decided the limitations issue based on the pleadings and without reference to the record. All facts necessary to resolve the limitations issue can be garnered from a reading of the Amended Complaint. To the extent that this Court disagrees, however, AFI maintains that the summary judgment record shows that there is no material dispute of fact and the trial court correctly ruled as a matter of law.

In order to address the limitations issue, the threshold question is when Flagstar's claims accrued for limitations purposes. In *Medhin v Hailu*, 26 A.3d 307 (DC 2011) this Court said as follows:

> In general, a "claim ... accrues for statute of limitations purposes when injury occurs." *Doe v. Medlantic Health Care Grp., Inc.*, 814 A.2d 939, 945 (D.C.2003). We have stated that "[w]hat constitutes the accrual of a cause of action is a question of law; the actual date of accrual, however, is a question of fact." *Brin v. S.E.W. Investors*, 902 A.2d 784, 800–01 (D.C.2006) (alteration in original) (internal quotation marks and citation omitted). Courts determine the accrual of a claim from the moment a party has either "actual notice of her cause of action," or is deemed to be on "inquiry notice" by failing to "act reasonably under the circumstances in investigating matters affecting her affairs," where "such an investigation, if conducted, would have led to actual notice." *Harris v. Ladner*, 828 A.2d 203, 205–06 (D.C.2003) (citation omitted). *Medhin v Hailu*, 26 A.3d at 310

Flagstar's argument is that its claims accrued for limitations purposes on March 12, 2018 when AFI filed its Answer, asserting its defense that Flagstar's deed of trust was extinguished. (Appellant's Brief, pp. 17-19) If true, the Amended

Complaint would be deemed to be timely because it was filed within three (3) years, i.e., on April 17, 2019. Flagstar is patently clear in its position that its claim accrued when it had actual knowledge of the legal effect of the 2014 foreclosure sale. Flagstar's argument is that it was not aware that the first Deed of Trust was in jeopardy until AFI filed an Answer. Before that date, Flagstar was blissfully unaware of the legal implications of the condo foreclosure sale. (Brief at pp. 19, 21) Flagstar argues that it had no reason to believe that its lien was in jeopardy before March 2018. (Appellant's Brief, pp. 9, 17, 20, 21)

B. The Discovery Rule does not save Flagstar's untimely claims

The discovery rule affords a party the right to pursue a claim that would otherwise be barred by limitations when there is an obscure or latent injury. Under the discovery rule, "accrual occurs ... when a party knows or by the exercise of reasonable diligence should know: (1) of the injury; (2) the injury's cause in fact; and (3) of some evidence of wrongdoing." *Capitol Place I Assocs. L.P. v. George Hyman Constr. Co.*, 673 A.2d 194, 199 (D.C. 1996), superseded in part on other grounds by D.C. CODE § 16-4406(c). The discovery rule is an equitable doctrine; its purpose is to preserve claims in circumstances where the fact of injury or breach "may not be readily discernible' at the time when actually incurred." *Ehrenhaft v Malcolm Price, Inc,* 483 A.2d 1192, 1202 (DC 1984) (quoting *Wilson v. Johns-Manville Sales Corp.* , 684 F.2d 111, 116 (D.C. Cir. 1982) The discovery rule

operates to allow a party sufficient time to discover *the facts* underlying his claim – rather than the *legal basis* for the claim itself. For example, in *Kuwait Airways v American Security Bank* 890 F.2d 456 (D.C. Cir. 1990), the DC Circuit Court of Appeals addressed the discovery rule in the context of an employee theft, where the employee siphoned company funds into his own private bank account. "Unlike many medical or legal malpractice cases and latent-disease cases in which the injury is not manifested until long after the unlawful act, see, e.g., *Burke v. Washington Hosp. Center*, 293 F.Supp. 1328 (D.D.C.1968), the injury to the payee in a conversion case manifests itself at the time the wrongful act occurs--that is, when the forger deposits or cashes the check." *Kuwait Airways v American Security Bank* 890 F.2d at 461 The *Kuwait Airways* Court reviewed the history of the discovery rule, noting that it had been applied in cases involving medical malpractice, latent disease, legal malpractice, breach of contract and warranty for deficient design and construction, and fraudulent concealment or misrepresentation) (citations omitted); *Kuwait Airways Corp. v. American Sec. Bank, N.A.,* 890 F.2d 456, 461 (D.C.Cir.1990); *Johnson v Long Beach Mortgage Trust,* 451 F.Supp.2d 16, 41 (the discovery rule applies "[i]n a restricted class of cases ... where the relationship between the fact of injury and the alleged tortuous conduct [is] obscure ...") *The Plan Comm. v. Pricewaterhouse Coopers,* LLP, 335 B.R. 234, 252 (D.D.C.2005) (same).

The question for this Court in addressing the accrual issue is really a question of when the plaintiff had notice of its claims. The accrual date is triggered from the date the plaintiff has actual or imputed knowledge of its claims. Notice may be actual, constructive or inquiry. "Actual notice" is that notice which a plaintiff actually possesses. "Inquiry notice" is that notice which a plaintiff would have possessed after due investigation. *Clay Properties v. Washington Post Co.,* 604 A.2d 890, 895 (D.C.1992) Inquiry notice is triggered when a person has "knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry, [and] he will be presumed to have made such inquiry and will be charged with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued', *Manogue v. Bryant, supra*, 15 App.D.C. at 261; *Williams v. Skyline Dev. Corp.*, 265 Md. 130, 288 A.2d 333, 353 (1972); *Clay Properties v. Washington Post Co.,* 604 A.2d 890, 895 (DC 1992)

This case does not implicate the discovery rule. Indeed, Flagstar does not argue that it located the proverbial smoking gun that placed it on actual notice of the claim. This case is not analogous to a medical malpractice case where, for example, there was no way for the plaintiff to discover that the surgeon had negligently left a sponge. Instead, Flagstar argues that the cause of action accrued when it became aware that its lien had been extinguished. Flagstar did not become aware of any new fact to reach this conclusion. Rather, Flagstar became aware of the implications of

the DC Condominium Act on its lien. Flagstar is really asking this Court to use the "discovery rule" in a truly novel way. The flaw in Flagstar's argument is that the discovery rule starts the accrual clock from the point that a plaintiff has knowledge of the facts that constitute the cause of action, not when he attains knowledge of the legal significance of those facts." *Fleck v Cablevision VII*, 799 F. Supp. 187, 190 (D.D.C. 1992) The discovery rule generally affords time for a plaintiff to investigate the facts to discover the merits of a claim that he was heretofore unaware. Flagstar again does not posit any facts that it learned after 2014 - rather, Flagstar became aware of the legal effect of those facts.

This Court has generally applied the discovery rule in a conservative manner and has declined an invitation to transmute it. For example, in *Diamond v. Davis*, 680 A.2d 364 (D.C.1996) the plaintiff argued that he was unaware of a cause of action because of the defendants' fraudulent conduct, and argued that the date of accrual should be extended. This Court said that a plaintiff has a duty to investigate matters affecting his affairs with reasonable diligence and that fraudulent concealment does not create a special set of unique circumstances that serve to excuse reasonable diligence. The *Diamond* Court explained as follows.

> Thus, decisions binding on us hold that a plaintiff guilty of ordinary negligence in not earlier discovering a cause of action may not avoid the bar of the statute of limitations merely because a fraud or fraudulent concealment is involved. See *Doolin v. Environmental Power Ltd.*, 360 A.2d 493, 497 (D.C. 1976) (holding that because alleged fraud related only to the legal interpretation of terms of a document conveying interest in land, the

> "alleged misrepresentation, in the exercise of due diligence, should have been ascertained at th[e] time" of the alleged fraud); *Maddox*, supra, 160 A.2d at 800 ("**[F]raud ... is not discovered when one's prior knowledge is confirmed as correct by another."); cf.** *Brown v. Lamb*, 134 U.S.App.D.C. 314, 316 & n. 4, 414 F.2d 1210, 1212 & n. 4 (1969) (holding that there could be no tolling because "[n]o person ... could reasonably rely on the representations allegedly made by or on behalf of" the defendants). For example, in *District-Florida Corp. v. Penny*, 62 App. D.C. 268, 269, 66 F.2d 794, 795 (1933), **the court held that the plaintiff, who alleged he had been defrauded in a land transaction, was, as matter of law, on notice of the fraud because the information showing the fraud was available in the public land records at the time of the purchase.** Under our prior decisions, the presence of a fraudulent misrepresentation does not excuse the injured party from acting reasonably to protect her interests.
> *Diamond v. Davis*, 680 A.2d 364, 375-376 (DC 1996) (Emphasis Added)

Like the plaintiff in *Diamond,* Flagstar was obligated to pursue its claims with reasonable diligence. Flagstar's claims are barred because it failed to act with reasonable diligence in pursuing its claims. Flagstar argues that it relied on the language in the February 2015 Deed that it retained its first lien priority and had no knowledge that its lien was in jeopardy. Flagstar is in the same position as the plaintiff in *Diamond, supra*, urging this Court to formulate a new rule to save it from its dilatory pursuit of its claims. In analyzing whether Flagstar was on inquiry notice of its claims on December 23, 2014 when the foreclosure sale occurred, it is important to examine what this Court said in *Chase Plaza* – decided on August 23, 2014. This Court said the following:

1) The District of Columbia Condominium Act effectively splits liens into two liens of differing priority – (1) a lien for six months of assessments that is

higher in priority than the first mortgagor first deed of trust – sometimes called a superior priority lien; and (2) a lien for any additional unpaid assessments. *Chase Plaza Condominium Association, Inc. v. JPMorgan Chase Bank*, 98 A.3d at 173

2) Taking the language of the statute together with basic principles of foreclosure law, it would seem to follow that Chase Plaza's foreclosure sale extinguished JP Morgan's first deed of trust. *Chase Plaza Condominium Association, Inc. v. JPMorgan Chase Bank*, 98 A.3d at 173

3) The Condominium Act is designed to afford flexibility to condominium associations in collecting unpaid assessments, and the Committee notes from the legislation state that lenders could protect themselves by requiring escrow of six months of assessments, as lenders do with property taxes. *Chase Plaza Condominium Association, Inc. v. JPMorgan Chase Bank*, 98 A.3d at 174-175

4) This Court expressed skepticism that the provisions of the Act that create a super-priority lien) can be waived:

JP Morgan argues that Article XI 2(D) of Chase Plaza's bylaws provides that a first mortgage or first deed of trust is prior to the condominium assessment lien. It is unclear whether such a provision in a condominium association's bylaws could constitute an effective waiver of the association's right of priority. See DC Code 42-

1901.07. Except as expressly provided by this chapter a provision of this chapter may not be waived."

Chase Plaza Condominium Association, Inc. v. JPMorgan Chase Bank, 98 A.3d at178

In the case *sub judice*, the *Chase Plaza* decision (together with the December 2014 foreclosure sale involving a super-priority condominium lien) created uncertainty as to the priority of Flagstar's Deed of Trust, such that Flagstar was on inquiry notice of its claims. *Chase Plaza* provided notice to the world of the legal effects of a condo foreclosure sale. The legal issue undergirding Flagstar's claims is the priority of its security interest. That is purely a legal question. This Court has previously explained the circumstances that a party is on inquiry notice in the context of a real property dispute. In *Clay Properties, Inc. v. Wash. Post Co.*, 604 A.2d 890 (D.C.1992), this Court examined whether the purchaser of property was on notice of a leasehold interest. The *Clay* Court said: "A purchaser [of real property] is held to be on inquiry notice where he or she is aware of circumstances which generate enough uncertainty about the state of title that a person of ordinary prudence would inquire further about those circumstances.". *Id* at 895 Just like the plaintiff in *Clay, supra*, Flagstar was on notice of all facts giving rise to the extinguishment claim as of December 2014 when the condo foreclosure occurred.

Assuming *arguendo* that the accrual date can be tied to the date that a party has knowledge of legal rights (and the legal implication of the facts), Flagstar's claim still fails. Flagstar was on inquiry notice based on the clear language from the *Chase Plaza* decision. Flagstar acknowledges that it essentially accepted the representations of the Association's lawyers to the effect that the property could be sold subject to the first Deed of Trust, even though Flagstar was on notice as of August 2014 that such a waiver is forbidden under the Act. In order to avail itself of the discovery rule, Flagstar's conduct must be reasonable and its failure to heed the ramifications in *Chase Plaza* is inexcusable. This is especially true where Flagstar says it was unaware of its claim until March 2018 – over three years after the *Chase Plaza* decision and the condo foreclosure sale. This shows a clear lack of diligence (or attention) to the situation at hand. This lack of diligence is viewed in the larger context that: (1) Flagstar could have taken steps to collect money in escrow to use for condominium association dues; (2) Flagstar could have paid the six (6) months of unpaid condominium dues to keep its priority in the deed of trust; (3) Flagstar was (or should have been) aware of AFI's position because AFI did not make any mortgage payments after it acquired the title in February 2015. The key issue is that Flagstar had inquiry notice as of December 2014, even if it did not have actual notice.

In its Brief, Flagstar says it justifiably believed that its lien was not in jeopardy in December 2014. (Brief, p. 8, 17, 19) In support of its argument, Flagstar relies in part on this Court's decision in *United States Bank Trust, N.A. v Omid Land Group*, 279 A.2d 374 (DC 2022), positing that that the state of the law was unsettled prior to this Court's decisions in *Liu v US Bank*, 179 A3d 871 (DC 2018) and *4700 Conn Ave 305 Trust v Capital One, NA, 193 A.3d 762* (DC 2018). (Appellant's Brief at 34) However, those cases were not decided based on the statute of limitations. Furthermore, the test is not whether the law was crystal clear but rather, the test is whether Flagstar was on inquiry notice as of 2014. And clearly, Flagstar was clearly on inquiry notice.

C. Flagstar's claims are not saved by the doctrine of equitable tolling

Under the doctrine of equitable tolling, the statute of limitations can be extended if the plaintiff can demonstrate that he was ignorant of his injury during the limitations period, but he acted with reasonable diligence and care in pursuing his claims. Flagstar argues that DC law was not clear until this Court decided *Liu v US Bank* in March 2018, and at that time it became aware of the change in DC law to the effect that "any attempt by a condominium association or a holder of a first mortgage or deed of trust to have a condominium association's super-priority lien waived or varied by contract is invalid as a matter of law.' Id at 877-879,

Flagstar argues that "Flagstar's statute of limitations should have been tolled based on this intervening change in prevailing law." (Appellant's Brief at p 35) As stated above, Flagstar was not diligent in taking steps to appreciate its legal position in 2014 – when *Chase Plaza* was decided and when AFI acquired title. In *East v. Graphic Arts Industry Joint Pension Trust*, 718 A.2d 153 (DC 1992), this Court rejected a plaintiff's reliance on equitable tolling to extend the limitations period in an employment discrimination lawsuit:

> East claims that she first learned of DCHRA at a social event on March 6, 1994, nearly a year after she was terminated. The next day, East telephoned the District of Columbia Department of Human Rights ("DHR") and learned of the procedure for filing an administrative complaint. She received the forms in the mail and completed and returned them in person on March 15, 1994, just days before the expiration of the one-year limitations period for filing an administrative complaint under DCHRA.5 East claimed that she was unaware at that time of her right to file a discrimination suit in court..
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> * * *
>
> In June 1994, East consulted with an attorney who informed her of her right to file a discrimination suit in a District of Columbia court. On March 3, 1995, nine months after learning from the attorney of her right to file suit and nearly two years after the alleged discriminatory event occurred, East brought this action in the United States District Court for the District of Columbia. *East v. Graphic Arts Industry Joint Pension Trust*, 718 A.2d 153, 155-156.

According to Flagstar's own pleadings, the prior owner, Rivas, was in default on May 1, 2010, but Flagstar filed the judicial foreclosure proceedings for the first time in 2017. (AA 00172, Amended Complaint, ¶¶ 14-15) Also, Flagstar was fully aware that AFI did not pay the mortgage commencing from when it acquired title in

February 2015, thus placing Flagstar on notice of the extinguishment claim. Moreover, Flagstar did not file for leave to amend the Complaint until November 12, 2018 – approximately eight (8) months after AFI filed its Answer, and almost four (4) years after the condominium foreclosure sale. (AA14) Flagstar did not diligently pursue its claims – much like the plaintiff in *East v. Graphic Arts Industry Joint Pension Trust*, *supra.*

Also, in weighing the equities of Flagstar's tolling argument, it is important to note that equitable tolling works an injustice on AFI. AFI has been the record owner of the property since the deed was filed in February 2015. There is a decided benefit to putting an end to ongoing litigation – such as the instant case - where Flagstar seeks to set aside a foreclosure sale that was in compliance with the statutory procedures.

In its Brief, Flagstar relies on *Simpson v District of Columbia Office of Human Rights, 597 A.2d 392 (DC 1991)*. In that case, this Court found that the statute of limitations was tolled because, for several years, there was judicial unclarity as to whether (and where) an appeal could be filed. Flagstar posits that there was similar uncertainty under the DC Condominium Act as to whether the super-priority status would remain in place after a sale. (Appellant's Brief, p. 37). Flagstar maintains that this is an equitable consideration that permits tolling of the limitations period.

AFI disagrees that equitable tolling is appropriate in the case *sub judice;*

First, the law pertaining to super-priority liens after *Chase Plaza* was not opaque. Flagstar could have discerned the legal principles that this Court's later decisions in *Liu v US Bank NA,* 179 A.3d 871 (2018) and *4700 Conn 305 Trust, v Capital One, NA,* 193 A.3d 762 (DC 2018)

Second, the *Simpson* case involved a pro se plaintiff who was seeking redress for her employment discrimination complaint, in a complex area of the law. Suffice it to say that Flagstar – a large bank represented by counsel - does not stand similarly situated to Ms. Simpson.

Third, the legal authority relied upon by Flagstar is inapposite. In *Garza v Burnett*, 321 P.3d 1004 (Utah 2013) the Utah Supreme Court addressed a situation where a change in federal law had shortened the statute of limitations for a plaintiff to file a civil rights claim. That court said that the plaintiff should be afforded the benefit of the prior limitations period (before the change in law). The case *sub judice* does not implicate any change in the law. Flagstar also cites *Lerner v City of Los Angeles*, where a California court said that the plaintiff's cause of action did not accrue until plaintiff's teaching certificate was reinstated. That case appears to be based more on when the plaintiff had proper standing to pursue his claims rather than on any equitable consideration. *Lerner v. Los Angeles City Bd. of Ed.*, 380 P.2d 97 (Cal. 1963) That case has no resemblance to the instant case.

This Court has declined to extend the doctrine of equitable tolling in many situations, even where the plaintiff had an ostensibly meritorious claim. For example, in *Bond v Serano,* 566 A.2d 47 (DC 1989) this Court refused to toll the statute of limitations in the case of plaintiff's good faith mistake of forum (filing of a diversity action against the District of Columbia in federal court does not toll statute of limitations even where subsequent unrelated case held that federal courts lacked pendent party jurisdiction over the District of Columbia resulting in dismissal of the diversity action). 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 (where Flagstar was under the misapprehension that its lien was protected).

Flagstar argues that the 2019 and 2020 Orders are wrong because the trial court misapplied the statute of limitations. Flagstar posits that this error was carried over into the Court's 2023 Order which dismissed Counts I, II and IV against AFI. As stated above, AFI respectfully avers that the 2019 Order correctly assessed the limitations issue, and the trial court's reliance on that Order was an adequate basis to dismiss Flagstar's claims against AFI in the February 2023 Order. Finally, Flagstar relies (and incorporates by reference) the arguments raised in the Association's Brief.

D. The trial court Property Resolved the Limitations Issue on the Pleadings as there was no factual dispute for the court resolve

The trial court may dismiss a claim for failure to comply with the applicable statute of limitations under Super. Ct. Civ. R. 12(b)(6) if "the claim is time-barred on the face of the complaint." *Logan v. LaSalle Bank Nat'l Ass'n* , 80 A.3d 1014, 1020 (DC 2013). This Court conducts a *de novo* review of the trial court's dismissal of a complaint under Super. Ct. Civ. R. 12(b)(6). Id. at 1019. Flagstar argues that the facts in the Amended Complaint are treated as being true when adjudicating a 12(b)6 motion. However, even accepting these averments as true, there is still the legal question of whether Flagstar may challenge the extinguishment of its lien over three (3) years after the December 23, 2014 sale. Flagstar had knowledge of the condo foreclosure sale - and the circumstances of the sale - in 2014.

Flagstar argues that there are factual issues that need to be resolved in adjudicating the issue as to when its cause of action accrued. Indeed, there are circumstances as to when a finder of fact must decide the factual issue as to when a cause of action accrued. For example, in *P.H. Sheehy Co. v. Eastern Importing & Manufacturing Co.*, 44 App.D.C. 107 (1915), the court applied the discovery rule, in the context of a "constructive fraud." The plaintiff in that case claimed that the defendant had sold defective sardines. However, the plaintiff did not discover the defect until it received complaints from the retailers to whom it had sold the sardines.

The court said that under those facts, "the cause should have been submitted to the jury, with an instruction to the effect that the statute of limitations only began to run from the time when plaintiff, by the exercise of ordinary diligence under all the circumstances of the case, ought to have ascertained the fact of the breach of the warranty." *P.H. Sheehy Co. v. Eastern Importing & Manufacturing Co.*, 44 App.D.C. at 112. Thus, the question in *P.H. Sheehy, supra,* was when a plaintiff should be charged with knowing the facts that gave rise to his claims. However, *P.H. Sheehy* is distinguishable from the instant case. A jury could never be asked to decide the issue of when Flagstar should have become aware of the legal implication of the facts already known to Flagstar. Thus, it was a question of law for the trial court to determine whether the accrual date could plausibly be tied to the date that Flagstar had actual legal knowledge of its claims. In its Brief, Flagstar acknowledges that the date of accrual is a fact but what constitutes accrual is a question of law. (Appellant's Brief, p. 18) In addressing the accrual issue on a motion to dismiss, the trial judge had to decide whether Flagstar's "actual knowledge" date may constitute the date of accrual as a matter of law. The trial judge rejected that argument and found that Flagstar should have known of the basis for AFI's extinguishment claim in 2014 based on statutes and legal principles. (AA 277) The question, properly posed, is this: Whether, as a matter of law and viewing the allegations in the Amended Complaint as true, is the March 2018 date the date of accrual? The trial court's

adjudication of the accrual issue on a motion was correct because in this case Flagstar posits that its claim accrued when it had actual knowledge of the legal effect of the 2014 foreclosure sale. Flagstar's request that this Court remand the case to the trial court to develop a complete record makes no sense

because there are no disputed facts to address.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT FLAGSTAR'S LIEN WAS EXTINGUISHED

A. The trial court properly dismissed Count 1 (judicial foreclosure) because Flagstar was time-barred from moving to set aside the condo foreclosure sale

Flagstar argues that the lower court erred by summarily dismissing Count 1 and ruling that its lien was extinguished in December 2014. The 2023 Order relied on the prior judicial findings that Flagstar was time-barred from challenging the foreclosure sale:

> "to the extent that plaintiff argues that its claims in this matter are sufficient grounds to invalidate the foreclosure sale, the Honorable Anthony C. Epstein previously determined that these claims are time barred. Thus, this Court finds that the precedent established by *4700 Conn.* is sufficient to dismiss this claim, as Plaintiff's lien was extinguished at the time of the December 2014 foreclosure sale." .... (AA 276)

Flagstar argues that Count 1 (pertaining to judicial foreclosure) is wholly separate from Count 2 (declaratory relief) and Count 3 breach of fiduciary duty) - "even an assumption that Count II was time barred should not have impacted the adjudication of Claim I, which was not dismissed on this basis." (Appellant's

Brief, p. 43) Flagstar disagrees. Flagstar is wrong. The trial court correctly determined that Flagstar's lien was extinguished, and that dismissal of Count 1 was essentially mandated by dismissal of Count 2.[1]

AFI's legal argument can be succinctly stated in the following syllogism:

1) AFI acquired the property at a valid condo foreclosure sale.
2) A valid condo foreclosure sale extinguishes all junior liens
3) Flagstar is a junior lienholder
4) Therefore, Flagstar's lien was extinguished

Flagstar argues that the first premise is false because there must be evidence of a valid condo foreclosure sale. However, Flagstar is procedurally barred from challenging the AFI's claim that there was a valid condo foreclosure sale based on the dismissal of Count 2 (declaratory relief) and Count 3 of the Amended Complaint (based on a breach of fiduciary duty).

The trial court determined that Flagstar was precluded from litigating the issue of: (1) the adequacy of consideration/the allegedly unconscionable sales price; and (2) the propriety of the notice of the condo foreclosure sale (which Flagstar claims was misleading and caused plaintiff to believe that its lien retained priority). Indeed,

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[1] Flagstar's argument is undermined by its own attempt to amend the Complaint, adding additional Counts to set aside the condo foreclosure sale and adding the Association as a co-defendant.

Count 2 recites Flagstar's allegations as to the purported defects in the December 2014 condo foreclosure sale, and requested a finding that: (1) the December 23, 2014 also was not for a commercial reasonable amount; (2) the sale was void for lack of adequate consideration; (3) the sales price shocks the conscience; (4) the advertisement (that the sale as subject to Flagstar's lien) was false; (5) Flagstar's lien remains attached as a first lien (AA 00171-00172, Amended Complaint ¶¶ 8, 9, 13, 29-37) The dismissal of Count 1 is a necessary implication of the lower court's ruling that Counts 2 and 3 were barred by limitations. In other words, if there is no legally cognizable basis for Flagstar to set aside the condo foreclosure sale, then AFI's extinguishment claim prevails. AFI respectfully avers that the trial court was correct, and that Flagstar's claims are barred by limitations. Therefore, this Court should affirm the 2023 Order dismissing Count 1.

B. Laches bars the equitable remedy of setting aside the December 2014 sale due to improper notice or unconscionability

There is yet another basis to reject Flagstar's attempt to set aside the condo foreclosure sale. "A claim that real property was purchased at an unconscionably low price at a foreclosure sale is a plea for equitable relief. To prevail on such a claim the challenger to the sale must prove that the sales price was so grossly inadequate so as to shock the conscience and raise a presumption of fraud."

RFB Props II LLC v Deutsche Bank Trust Co. Ams, 247 A.3d 689, 696 (2021) (citations omitted) To the extent that Flagstar intends to pursue an equitable claim, the defense of laches serves to bar an untimely equitable claim, much the same as the statute of limitations:

[the] doctrine of laches, [is] is founded on the principle that equity aids the vigilant rather than those who slumber on their rights, [and it] is designed to promote diligence and prevent enforcement of stale claims. *Powell v. Zuckert*, 125 U.S.App. D.C. 55, 57, 366 F.2d 634, 636 (1966).

Laches is a valid defense in circumstances where: (1) the defendant has been prejudiced by the delay; and (2) the delay was unreasonable. *Am. Univ. Park Citizens Ass'n v Burka*, 400 A.2d 737, 740 (DC 1979)

In the case *sub judice*, Flagstar is requesting that the court unwind a foreclosure sale that happened approximately nine (9) years ago. To the extent that the statute and case law affects economic rights and interests, this frankly makes no sense. 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. 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. It bears mentioning (when considering the equities) that Flagstar has no evidence of fraud. At best, Flagstar has evidence that it (and perhaps the Association) were under a misapprehension as to the law as of 2014. It would certainly be a slippery slope to permit courts to second guess established financial and contractual relations on this basis. One of the policy purposes behind limitations and laches is to prevent the litigation of stale claims, especially where witnesses disappear and other evidence dissipates. Those policy purposes are best served by affirming the trial court's decision that dismissed Flagstar's untimely claims. Indeed, Flagstar's lack of diligence in moving to set aside the condo foreclosure is a perfectly sound basis to affirm the trial court's rulings.

C. The trial court acted properly in adjudicating the extinguishment issued based on the pleadings

Flagstar argues that it was procedurally improper for the trial court to rule that the December 2014 sale was valid. Flagstar argues that the trial court erred in dismissing Count 1 because the court failed to accept the allegations in the Amended Complaint as true (as is generally required in adjudicating a motion to dismiss). (Appellant's Brief, p. 45-46) The issue of the adequacy of the sales price and the mortgage company's reliance on the advertisements and notice of sale were not

addressed in the trial court's 2023 Order because the trial court believed that the sale extinguished the lien.

Flagstar's analysis missed the point. That is, even if the allegations in Count 1 are true, Flagstar's claim fail because the deadline to challenge the condo foreclosure sale had expired. The court need not look to anything beyond the docket and the law to reach this conclusion. Also, Flagstar acknowledges this Court's prior decisions (staring with *Chase Plaza, supra*) which held that a valid condominium foreclosure sale for a super-priority lien will extinguish the first mortgage lien.

D. As an alternative, this court can affirm the judgment because there is no dispute as to any material fact and AFI is entitled to judgment as a matter of law

There is still yet another basis for the Court to affirm the trial court's ruling, even if this court rejects AFI's limitations argument. This Court may properly affirm the trial court's judgment for reasons different than the trial court. This Court has previously held that the Court may affirm the trial court's judgment on any valid ground, even if that ground was not relied upon by the trial judge or raised or considered in the trial court," so long as doing so would not be procedurally unfair. *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP,* 68 A.3d 697, 711 n. 10 (D.C.2013); ("Where there will be no procedural unfairness, "we may affirm a judgment on any valid ground, even if that ground was not relied upon by the trial

judge or raised or considered in the trial court.") accord *In re Walker*, 856 A.2d 579, 586 (D.C.2004) (citation omitted)." In *Nat'l Ass'n of Postmasters v. Hyatt Regency Washington*, 894 A.2d 471(D.C.2006), this Court explained as follows:

> In reviewing a trial court's grant of summary judgment, we make an independent review of the record and employ the same standards as does the trial court in initially considering the motion." *Croce v. Hall*, 657 A.2d 307, 309-10 (D.C.1995). "We therefore must determine whether the party awarded summary judgment demonstrated that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. We view the record in the light most favorable to the non-moving party." *Childs v. Purll*, 882 A.2d 227, 233 (D.C.2005). We can affirm the judgment on a different ground if "the appellant [will] suffer[ ] no procedural unfairness-that is, [if][it] had notice of the ground upon which affirmance is proposed, as well as an opportunity to make an appropriate factual and legal presentation with respect thereto." *In re Walker*, 856 A.2d 579, 586 (D.C.2004) (per curiam). Where there will be no procedural unfairness, "we may affirm a judgment on any valid ground, even if that ground was not relied upon by the trial judge or raised or considered in the trial court." Id. (citing *In re O.L.*, 584 A.2d 1230, 1232 (D.C.1990)). The requirement of procedural fairness is satisfied here, because the ground on which we rely was raised in the trial court and fully debated before us.
> *Nat'l Ass'n of Postmasters v. Hyatt Regency Washington*, 894 A.2d 471, 474 (D.C.2006)

The summary judgment issue was fully briefed below. (AA 339-384) Thus, it would be within the bounds of fairness to adjudicate the summary judgment issue on this *de novo* appeal. In the trial court, AFI filed for summary judgment and argued that, viewing the evidence in the light most favorable to Flagstar (the non-moving party) under Super Ct. Civ. R. 56, there was no dispute that the 2014 foreclosure sale was valid. On appeal, this Court should affirm the judgment in favor of AFI for reasons stated in the Motion for Summary Judgment.

In response to the summary judgment briefing below, Flagstar did not and could not adduce the facts necessary to set aside the condominium foreclosure sale.[2] To prevail on such its claims, Flagstar must prove that the sales price was so grossly inadequate so as to shock the conscience and raise a presumption of fraud." *RFB Props II LLC v Deutsche Bank Trust Co. Ams*, 247 A.3d 689, 696 (2021) Indeed, in responding to AFI's motion in the trial court, Flagstar did not identify any material fact that was in dispute as required by SCR 56(b)(2)(B). Thus, the summary judgment record reveals the following undisputed facts:

1) The Association properly recorded a lien for unpaid homeowners' association dues. (AA 0413)
2) The Association properly noticed the property for sale and published an advertisement. (AA 00176, Amended Complaint ¶¶ 29-33; AA 414, 417, 461)

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[2] In adjudicating a motion for summary judgment, the issue is whether there are material facts in dispute. In *Anderson v Liberty Lobby,* 106 S.Ct. 2505 (1986), the Supreme court explained as follows:

And we have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard: "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 745, n. 11, 103 S.Ct. 2161, 2171, n. 11, 76 L.Ed.2d 277 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

3) The Association held a foreclosure sale on December 23, 2014 at which AFI was the successful purchaser with a bid of $26,000. (AA 00176 Amended Complaint ¶ 34; AA 421)

4) The proceeds of settlement were insufficient to satisfy Flagstar's Deed of Trust. (AA 435, 452)

5) The Association recorded the Trustee's Deed in February 2015, vesting title in AFI. (AA 170, Amended Complaint, ¶ 1; AA 423)

6) Flagstar's discovery responses stated its defense that it retained its first lien based on language contained in the Deed that conveyed the property to AFI. Specifically, in its Answers to Interrogatories, Flagstar stated as follows:

> 7. Please state all facts that support your contention, if any, that the Plaintiff's lien (and/or Deed of Trust) still remains in place, notwithstanding the foreclosure on the condominium lien.
>
> ANSWER: Plaintiff provides the following information contained in Defendant's vesting deed.
>
> *Re-recorded for purposes of correcting the instrument number of the deed of trust that property was sold subject to and referenced herein now as Instrument No. 2010038525. (AA 404)

Flagstar's discovery response quotes (*en toto*) the language from the February 2015 Deed that conveyed title to AFI after the condo foreclosure sale. Thus, Flagstar maintained that its lien was not extinguished because of the "magic language" that the condo foreclosure sale was subject to Flagstar's Deed of Trust.

This Court expressly rejected Flagstar's legal position in *Liu v US Bank Nat'l Ass'n*, 179 A3d 871 (DC 2018) In *Liu*, this Court was asked to decide whether a condominium association could choose to sell the condominium unit "subject to the first mortgage or first deed of trust" on the property, while at the same time enforcing its super-priority lien. The Court answered the question in the negative:

> We conclude that a condominium association, acting on its six-month super-priority lien for unpaid condominium assessments pursuant to DC Code 42-1903.13(a)(2) **may not conduct its foreclosure sale subject to the first deed of trust.** Although Sonata's foreclosure sale was purportedly subject to the Bank's deed of trust, the anti-waiver provision of DC Code 42-1901.07 precludes a condominium association from waiving the priority of its super-priority lien or exercising its super-priority lien while also preserving the full amount of the Bank's unpaid lien. Thus, when Sonata enforced its super-priority lien to collect six months of unpaid assessments at the foreclosure sale, the Banks' first deed of trust for the condominium was effectively extinguished and Ms. Liu purchased the property free and clear of the Bank's deed of trust.
> *Liu v US Bank Nat'l Ass'n*, 179 A3d 871, 883 (Emphasis Added)

Flagstar alleges that bidding at the condominium foreclosure auction was 'chilled" because, *inter alia* : (1) the notice of sale incorrectly stated that the property was subject to Flagstar's Deed of Trust; and (2) the auctioneer stated (incorrectly) that the purchase was subject to Flagstar's Deed of Trust. (AA 00176, Amended Complaint, ¶¶ 32, 35) Flagstar maintains that the sales price obtained was unconscionably low, and that the consideration for the sale was inadequate.

Summary judgment is and was appropriate because of the dearth of evidence

that Flagstar has to support its claims. In pretrial discovery, AFI asked Flagstar to provide information in support of its claim that the foreclosure sale was invalid:

Interrogatory #3 State in full and complete detail all facts supporting your contention (if any) that the condominium foreclosure sale is void due to inadequacy of consideration at the time of the December 13, 2014 auction.

Response #3 Plaintiff objects to this request as it requires Plaintiff to make a legal conclusion. Plaintiff further states to see the averment of facts in Plaintiff's Amended Complaint for Judicial Foreclosure, Declaratory relief, and Unjust Enrichment. Plaintiff further states that the unconscionably low sales prices received for the property did not constitute adequate consideration, Plaintiff reserves the right to alter or amend this response. (AA 404)

Flagstar relies on the allegations in its Amended Complaint in support of its claim. The Amended Complaint alleges (in pertinent part) as follows:

¶30 The Condo Board noticed the foreclosure sale for December 23, 2014

¶34 On December 23, 2014, the Condo Board sold to AFI the property subject to Plaintiff's lien as indicated in the Deed dated February 3, 2015.

¶35 The Auctioneer announced at the time of the sale that the Plaintiff was being sold subject to Plaintiff's lien.

¶36 The Memorandum of Purchase signed on the date of sale indicated that the property was sold subject to Plaintiff's lien.

¶37 The Condo Board Trustee's Deed indicates that it was conveying the Property subject to Plaintiff's lien.

¶38 Notice was not provided to Plaintiff that its lien was in jeopardy.

¶39 As the ad indicated the sale of the property was subject to Plaintiff's lien, the bidding was undoubtedly chilled.

¶40 As auctioneer announced the sale was being sold subject to Plaintiff's lien the bidding was undoubtedly chilled.

¶41 The Condo Board's foreclosure was not for a commercially reasonable amount due to the ad affirmatively stating that the sale was subject to Plaintiff's lien.

¶42 The condo board's foreclosure sale resulted in sales price that shocks the conscience.

In its discovery requests, AFI requested that Flagstar identify the witnesses who would support its allegations. Flagstar, in turn, incorporated the names of people in its Witness List. However, Flagstar failed to provide any information in discovery as to the substance of the facts that the witnesses will testify to. (AA 403, Answer #5; AA 494, Answer #4; AA 527) In its Witness List, Flagstar had identified a representative of the corporate plaintiff and its custodian or records, as well as the attorney for the Association. (AA 527) Flagstar also identified the notary on the Deed of trust and a representative of the Old Republic Title. There is absolutely no indication as to what these people know, or that they have any

evidence to offer beyond the bare-bones allegations in the Amended Complaint. Similarly, with respect in its Requests for Production of Documents, AFI requested documentation in support of Flagstar's claim that the condominium foreclosure sale was defective. The sum total of the documents produced are as follows:

(1) The Deed dated February 3, 2015 wherein AFI obtained title to the property. (AA 503)

(2) The Condominium Rider. (AA 506)

(3) The Security Affidavit. (AA 510)

(4) The Assignment of the Deed of Trust. (AA 00511)

(5) The Military Affidavit. (AA 00515)

(6) The Appointment of Substitute Trustees in this judicial foreclosure action. (AA 00215; AA 518)

None of these documents support Flagstar's allegations as to the propriety of the sales notice, the sales procedure or the "unconscionable price". None of these documents refers to or relates to the market value of the property at the time of the December 2014 sale.

In its Brief, Flagstar argues that the trial court made no findings on the issues of sales price and the validity of the sale, and that AFI should be required to demonstrate the validity of the sale. (Appellant's Brief at p. 48) Flagstar then points to this Court's prior decisions where cases were remanded to the Superior Court

because the condominium foreclosure sale was erroneously conditioned upon assumption of the first deed of Trust. Those cases are distinguishable because, unlike in this case, there had been no finding that the bank's claims were barred by limitations. In addition, the instant case is distinguishable because remand would be futile.

As stated above, Flagstar's discovery responses contain no evidence to support its allegations that the sale was invalid beyond what is contained in the Amended Complaint. Furthermore, to set aside the sale, Flagstar needs evidence as to what constitutes a commercially reasonable sale and how the Association failed to obtain a reasonable sales price. Expert testimony is absolutely essential if Flagstar were to somehow demonstrate that the condominium foreclosure sale was not done in a "commercially reasonable manner". Indeed, expert testimony is required when a party desires to introduce evidence as to the standard of care or as to any science, profession or occupation. *Lowery v Glassman* 908 A.2d 30 (D.C. 2006) Expert testimony is needed because Flagstar would need to demonstrate how much the property should have fetched at the condominium foreclosure sale. In a similar context, this Court addressed a case where a landowner sued a neighbor for diminution in value of his property, *Lowery v. Glassman*, 908 A.2d 30 (DC 2006):

> The owner of ... land ... is generally held to be qualified to express his opinion of its value merely by virtue of his ownership. He is deemed to have sufficient knowledge of the price paid ... and the possibilities of the land for

use, to have a reasonably good idea of what it is worth." *District of Columbia Redevelopment Land Agency v. Thirteen Parcels of Land,* 175 App.. D.C. 135, 137 n. 4, 534 F.2d 337, 339 n. 4 (1976) (citation omitted). This does not mean, however, that Lowrey could have provided testimony sufficient to establish damages in conjunction with a claim of private nuisance. **As Friendship points out, Lowrey "could not testify as to the link between any alleged actions of the Defendants and the change in value." This "link" was of utmost importance to his case because, as we have noted, "damages flowing from a nuisance are measured by the diminution of the property's value caused by the nuisance's interference with the enjoyment of the property." *Bernstein*, 649 A.2d at 1073. Without an expert witness to testify to the causation of the alleged diminution in value, there was no "significant probative evidence tending to support the complaint" which would enable a reasonable fact-finder to return a verdict for Lowrey. *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505**.

Lowrey v. Glassman, 908 A.2d 30, 37 (DC 2006)

Flagstar needs evidence that the sales price was "unconscionably low.' In order to make its case, Flagstar must be able to "connect the dots" between the condominium foreclosure notice, the condominium foreclosure auction, the ultimate sale price and the property's value at the time of sale. That is the basis for Counts 2 and 3 of the Amended Complaint. The mere fact that the sales price was "low" does not by itself demonstrate that the sale was legally defective. There must be evidence to show: (1) what constitutes a commercially reasonable sale; (2) how the December 2014 sale deviated from a commercially reasonable sale; and (3) what the outcome would have been had there been a "commercially reasonable sale". Expert testimony is necessary to show what the sales price would have or could have been under these various scenarios. See, e.g. *Wentworth v Airline Pilots Assn*, 336 A.3d 542, 543-44

(DC 1975) (Expert testimony required to show diminution in value in real property). Thus, in contrast to the authority cited by Flagstar, remand in this case would be futile because it would not change the result. In other words, the evidence demonstrates that the sale followed the statutory procedures. In the instant case, Flagstar has adduced no admissible evidence in support of its claim that the first Deed of Trust remains in place after the condominium foreclosure sale. Just as in *Lowery*, Flagstar cannot prove its case without expert testimony. Summary judgment is an appropriate remedy when the plaintiff has not identified an expert in support of an element of its case. *Prasad v George Washington University*, 390 F.Supp.3d 1 (2019) (Summary judgment granted where there was no expert witness to establish the standard of care). Thus, the foreclosure of the Association's super-priority lien extinguished Flagstar's deed of trust.

III. THE TRIAL COURT PROPERLY DISMISSED THE UNJUST ENRICHMENT CLAIMS (COUNT IV)

Flagstar argues that the lower court erred in dismissing Count (4) as to its unjust enrichment because that claim was not time-barred. Flagstar maintains that it continued to pay taxes for the property, and that these tax payments inured to the benefit of AFI. (Appellant's Brief, p. 40) The Amended Complaint contains the following allegations of unjust enrichment as to AFI:

¶ 53 Plaintiff has continued to pay the taxes on this property amounting to about $24,000.00.

¶ 54 AFI has been unjustly enriched by Plaintiff continuing to pay taxes in the amount of at least $24,000 or an amount to be determined at trial. (AA 114-115)

Flagstar's claim for unjust enrichment is not pellucidly clear. Indeed, it does not expressly state that Flagstar made payments for taxes within the limitations period (i.e. 3 years prior to April 17 2019), although Flagstar maintains that certain inferences are justified by its averments. In its Brief, Flagstar argues that the 2023 Order "does not mention and therefore does not consider . . . . whether Flagstar's payments amount to a continuous service not yet triggering the statute of limitations." (Appellant's Brief p. 41) Based on that argument, AFI would concede that there could plausibly be a basis for a timely unjust enrichment claim as to any payment made during the limitations period. However, as will be explained below, that does not end the inquiry.

In the trial court, AFI moved for summary judgment. The trial judge granted the motion to dismiss the unjust enrichment claim on limitations grounds. However, as this Court has previously held, the Court may affirm the trial court's judgment on any valid ground, even if that ground was not relied upon by the trial judge or raised or considered in the trial court," so long as doing so would not be procedurally unfair. *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP,* 68 A.3d 697, 711 n. 10

(D.C.2013); accord, *Nat'l Ass'n of Postmasters v. Hyatt Regency Washington*, 894 A.2d 471, 474 (D.C.2006).

The unjust enrichment claim should be dismissed (and the judgment in favor of AFI should be affirmed) because there is no evidence to support it. Flagstar did not adduce any evidence in discovery that could plausibly support its unjust enrichment claim. Specifically, Flagstar provided no facts beyond reference to the Amended Complaint. Flagstar produced no receipts, cancelled checks, invoices, billing statements, or other indicia that it paid taxes. (AA 497-521). In its Answers to Interrogatories, Flagstar said that it had paid taxes but it did not reference the specific dates that taxes were paid, the amount of each payment, etc. The bottom line is that there is no evidentiary basis for Flagstar's unjust enrichment claim to proceed to trial. Therefore, the trial court's dismissal of the unjust enrichment claim was proper. In other words, just like the extinguishment issue, there is a separate and completely sound basis for this Court to affirm the trial court's ruling that dismissed Count 4. It would be futile to remand this case to the trial court to address Flagstar's unjust enrichment claims.

CONCLUSION

In light of the foregoing, AFI requests that this Court affirm that trial court's decision finding that Flagstar's claims are time-barred. Flagstar was on inquiry notice of its possible claim to challenge the extinguishment of its Deed of Trust at the time of the foreclosure sale in December 2014. The circumstances of this case do not implicate the discovery rule or equitable tolling. Also, Flagstar's lien was extinguished as a matter of law in December 2014. Flagstar waited too long to assert its claims that the condominium foreclosure sale did not extinguish its Deed of Trust.

October 30, 2023

Respectfully Submitted,

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REDACTION CERTIFICATE DISCLOSURE FORM

I CERTIFY that I have reviewed the guidelines outline 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-drivers' 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 number would have been included;
(4) the year of the individual's birth;
(5) the minor's initials;
(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 abuse 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 USC 2265(dd)(3) (prohibiting the public disclosure on the internet of such information); see also 18 USC 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/ Richard Link	__23-CV-0267
Signature	Case Number
Richard Link	10/30/23
Name	Date

_rlink@karpellinklaw.com
Email Address

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Appellee's Brief was served via the Appellate e-filing system on this 30th day of October, 2023 on the following:

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I FURTHER CERTIFY that I mailed by US Postal Service a copy of the Brief to the following individuals not registered to receive service by the Appellate E-Filing Service on the 30th day of October 2023:

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__/s/__Richard Link____
Richard Link