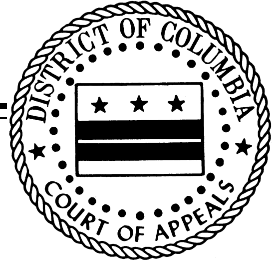
No. 22-CV-0005



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In the

District of Columbia Court of Appeals

NEW PENN FINANCIAL, LLC d/b/a Shellpoint Mortgage Servicing,

Appellant,

v.

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

Appellees.

Appeal from the Superior Court of the District of Columbia (Honorable Robert R. Rigsby, Judge)

BRIEF OF APPELLEE BRANDYWINE CROSSING I CONDOMINIUM

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August 8, 2022

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APPELLEE'S CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. App. R. 28(a)(2), Brandywine Crossing I Condominium files its disclosure statement in order to enable the judges of this court to consider possible recusal:

A. Parties and Counsel

1. **Appellant**

New Penn Financial, LLP, d/b/a Shellpoint Mortgage Servicing

Counsel:

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2. **Appellees**

Lashan Daniels, *pro se Appellee*

Tyroshi Investments, LLC

Counsel:

In This Court:	**In Superior Court:**
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B. Parent corporation for Brandywine Crossing I Condominium: None

Subsidiaries: None

Publicly held corporation holding more than 10% of stock: None

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DISTRICT OF COLUMBIA COURT OF APPEALS

NO. 22-CV-0005

NEW PENN FINANCIAL, LLC
d/b/a SHELLPOINT MORTGAGE SERVICING,
Appellant,

v.

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

Appeal from the Superior Court
of the District of Columbia
(Hon. Robert R. Rigsby, J.)

BRIEF OF APPELLEE
BRANDYWINE CROSSING I CONDOMINIUM

STATEMENT OF JURISDICTION

This appeal arises from a Final Order of the Superior Court (Rigsby, J.), disposing of all the claims in the litigation.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Superior Court properly revisit its prior Order on Defendant's Motion to Dismiss, where recent opinions from this Court mandated dismissal of

the Second Amended Complaint, where the original Order applied the standard of review for a motion to dismiss, as opposed to a motion for summary judgment, and where New Penn had the opportunity to present additional evidence in support of its claim?

2. Was New Penn's claim for wrongful foreclosure properly dismissed as a matter of law, where the claim itself was time-barred and where the record evidence demonstrates that the purchaser believed that the sale of the unit was subject to the first mortgage?

3. Should New Penn's challenge to the constitutionality of the condominium super-priority statute fail, where New Penn lacks standing to make the argument, where the change in the statute renders the issue moot, and where there is no government action sufficient to create a constitutional question?

STATEMENT OF THE CASE

Appellant, New Penn Financial ("New Penn"), filed its Complaint for Foreclosure on April 12, 2016 against Ms. Lashan Daniels only (App. 009-017). On September 25, 2018 Plaintiff filed its Second Amended Complaint, naming Tyroshi Investments, LLC ("Tyroshi") and Brandywine Crossing I Condominium ("the Association") (App. 070-083). This Second Amended Complaint added two additional counts: one count for declaratory judgment that New Penn still retained a "valid and enforceable first priority lien on the property" and one count for a

declaration that the Condo Foreclosure Sale was null and void. Both of these new counts arose from the 2014 non-judicial foreclosure of Ms. Daniels' condominium unit within the Association. That sale was advertised as subject to the first Deed of Trust, with a face amount of $204,000, and the unit was sold at foreclosure to Tyroshi for a sale price of $5,000 and the first mortgage of $204,000. With its 2018 Second Amended Complaint, New Penn apparently hoped to resurrect its Deed of Trust on the property.

On March 1, 2019, the Association filed its Motion to Dismiss (App. 149-200), which was granted in part on July 12, 2019 (App. 238-245). In that Order, the Court dismissed Count II for declaratory judgment, but did not dismiss Count III. The parties engaged in written discovery, with repeated motions by New Penn to continue the Scheduling Order. In one of those motions, dated March 3, 2020, New Penn certified that written discovery had been exchanged among all the parties except Ms. Daniels (App. 259).

On May 1, 2020, counsel for Tyroshi moved to withdraw, which motion was granted on July 20, 2020 (App. 006). A status hearing was held on November 3, 2020, at which Tyroshi's managing member, Barrett Ware appeared, and represented to the Court that new counsel would be entering their appearance "next week" (App. 265). At that hearing, mediation was set for January 12, 2021 and a status hearing for February 5, 2021 (App. 267 – 8). Although the record is silent as

to whether the mediation occurred, the court docket reflects that Tyroshi did not appear for the February 5 status hearing. A new status hearing was scheduled for April 9, 2021, which would have been an opportunity for *ex parte* proof following New Penn's planned filing of a written motion for default against Tyroshi (App. 007).

On April 6, 2021, the new counsel for Tyroshi entered his appearance; on April 7, New Penn filed for default against Tyroshi (App. 007). At the April 9 status hearing, New Penn refused to withdraw its Motion for Default, and Tyroshi was instructed to file its motion to vacate default and its opposition to the motion for default by April 28 (App. 278-9, 282). Tyroshi met that deadline, and on May 7, 2021, New Penn filed its opposition to the Motion to Vacate Default. On June 21, 2021, Lashan Daniels filed her Motion to Dismiss (App. 289-292), which New Penn opposed.

On August 2, 2021, the Court (Rigsby, J.) issued a Corrective and Omnibus Order, finding that in light of this Court's ruling in *RFB Props. II, LLC v. Deutsche Bank Tr. Co. Ams.*, 247 A.3d 689 (D.C. 2021), the sufficiency of the sale price at foreclosure had to be assessed based on the information available at the time of the foreclosure. Since the condominium unit was advertised for sale as subject to the first Deed of Trust, the Superior Court found that Tyroshi bought the property "believing that he was all-in for at least $209,000 and possibly more." As such, a

purchase price of $5,000, coupled with the apparent liability for the outstanding mortgage, did not "shock the conscience" of the Court and could not, as a matter of law, be deemed unconscionably low (App. 308-9). Given the controlling precedent from this Court, the Superior Court revised its previous Order and dismissed the Second Amended Complaint in its entirety.

New Penn filed its Motion to Alter or Amend on August 30, which was denied by Order of December 6, 2021. This appeal followed.

STATEMENT OF FACTS RELEVANT TO ISSUES ON REVIEW

Lashan Daniels purchased Unit 202 in the Association on June 7, 2007, (App. 019); the mortgage loan that she entered into with Countrywide Home Loans, Inc. was secured by a Deed of Trust for the same date (App. 022-043). At some point, the mortgage was transferred to Bank of America -- that institution issued a Notice of Intent to Accelerate on December 30, 2014 (App. 049).

On April 28, 2010, the Association recorded a Notice of Condominium Lien on Ms. Daniels' unit, claiming unpaid assessments in the amount of $6,425.73 (App. 169). A second Notice of Condominium Lien was recorded on June 24, 2011, this time in the amount of $5,455.00 (App. 172). Finally, on May 22, 2014, the Association recorded a Notice of Foreclosure Sale, with unpaid assessments in the amount of $7,838.50; the foreclosure sale itself was scheduled for June 24, 2014 (App. 174) and was advertised as being subject to superior liens (App. 224).

Notice of the foreclosure was sent to Bank of America, the holder of the Deed of Trust, by certified mail (App. 182; *see also* App. 192-97). Unit 202 was sold at the foreclosure to Tyroshi Investments, LLC "for the amount of $5,000.00 and subject to the balance on a first deed of trust in the face amount of $204,000.00" (App. 199).

On August 28, 2014, this Court issued its opinion in *Chase Plaza Condominium Association, Inc.*, 98 A.3d 166 (D.C. 2014), holding that the non-judicial foreclosure on a super-priority lien extinguished the underlying deed of trust.

On June 8, 2015, a member of the BWW Law Group Title Department e-mailed the Association's counsel on behalf of Bank of America, asking if the Bank could redeem Ms. Daniels' unit. Counsel responded on June 9, 2015 that the unit had been sold in foreclosure "about a year ago." (App. 226). On July 29, 2015 – more than a year after the foreclosure sale – the Deed of Trust was assigned from Bank of America to New Penn. Nine months later, on April 12, 2016, New Penn filed its suit for foreclosure. Although not reflected on the record, it appears that Ms. Daniels filed for bankruptcy protection, which stayed the case until 2018.

On March 1, 2018, this Court issued its opinion in *Liu v. U.S. Bank Nat'l Assn.*, 179 A.3d 871 (D.C. 2018), holding in part that a condominium association could not, as a matter of law, foreclose on a super-priority lien while leaving the

property subject to the unsatisfied balance of the first mortgage. On September 13, 2018, this Court issued its opinion in *4700 Conn 305 Trust v. Capital One N.A.*, 193 A.3d 762 (D.C. 2018), holding that a condominium's foreclosure retained its super-priority lien status – and thus wiped out the first deed of trust – even if the association were foreclosing for more than the last six months of unpaid assessments. Two days later, New Penn filed its Second Amended Complaint.

As described above, the lawsuit proceeded as between New Penn, Brandywine and Tyroshi; Ms. Daniels did not participate in the litigation. After the filing of her motion to dismiss, and pursuant to the precedent set in *RFB Props. II, LLC*, the Superior Court revised its previous Order and dismissed the lawsuit.

SUMMARY OF ARGUMENT

In issuing its Corrective Omnibus Order, the Superior Court was amending an Order granting in part Brandywine's motion to dismiss under Rule 12(b)(6), in order to conform to recent precedent set by this Court. As such, the Court had full discretion to amend or correct an order which disposed of less than all the issues in the case. Moreover, because the Court was not ruling on a motion for summary judgment from Brandywine, the requirements of Rule 56(f) did not control. The fact that the Court treated Ms. Daniels' *pro se* motion as one for summary judgment is immaterial, because any claim for foreclosure against her was non-viable, as she no longer owned the unit in question.

Too, New Penn had an opportunity to present additional arguments in its Motion to Alter or Amend. In so doing, New Penn did not either seek additional discovery nor proffer an affidavit suggesting that more discovery would be necessary. New Penn had had ample opportunity to conduct discovery against both Brandywine and Tyroshi – with repeated consent motions to extend the discovery deadlines – and the record shows that written discovery had been exchanged between those parties. There is nothing to suggest that New Penn was hampered in its efforts, or that additional information existed that might have changed the Court's ruling.

On the merits, New Penn does not now appeal the dismissal of Count Two of the Second Amended Complaint, and only challenges the dismissal of Count Three on New Penn's belief that the foreclosure sale price was unconscionably low. In any event, Count Two was properly dismissed because the condominium association's foreclosure extinguished the underlying mortgage. Count Three was also properly dismissed for two reasons. First, the claim is time-barred, because it was brought more than three years after New Penn was on notice of the foreclosure sale. Second, any analysis of whether a sale price is unconscionably low is made based on the facts existing at the time of the foreclosure. In 2014, both the advertisement for the sale and the Trustee's Deed state that the property was sold

subject to the first mortgage, so the apparent price to Tyroshi was $209,000. This price could not, as a matter of law, be unconscionably low.

Finally, New Penn lacks standing to bring any constitutional claims, because it – or rather, its assignor – received actual notice of the foreclosure sale here. Moreover, any challenge to the statute as it existed in 2014 is moot, because the law has been amended to correct the alleged defect. Finally, there is no governmental action inherent in this foreclosure, and therefore no basis for a claim of "taking" under the U.S. Constitution.

ARGUMENT[1]

A. Standard of Review

The standard of review for dismissal on a motion to dismiss or on a motion for summary judgment is *de novo*. For a motion to dismiss, the complaint must present "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Fourth Growth, LLC v. Wright*, 183 A.3d 1284, 1288 (D.C. 2018). For a motion for summary judgment, appellees "must demonstrate that there is no genuine issue of material fact and that

[1] Appellant Brandywine also adopts by reference the arguments made by co-Appellees here, to the extent not inconsistent with the arguments in this Brief.

it is entitled to judgment as a matter of law." *Davis v. D.C.*, 258 A.3d 847, 854 (D.C. 2021).

B. The Court's Corrective and Omnibus Order Was Not Procedurally Incorrect, and Thus Does Not Justify Reversal

Appellant argues that summary judgment should not have been granted because: New Penn did not have notice that Ms. Daniels' motion to dismiss would be treated as one for summary judgment; (2) Brandywine had not renewed its dispositive motion, nor argued that Count Three should have been dismissed; and (3) Tyroshi never moved for summary judgment. Appellant, however, errs in failing to take into account the entire history of the case. Within the context of that history, it is clear that New Penn was not denied an opportunity to present its case.

1. The Corrective Order Was Based on the Motions to Dismiss

First, the Corrective Omnibus Order was not, in fact, a ruling on summary judgment, as it corrected, and was thus referred back to, the initial July 12, 2019 Order on Brandywine's motion to dismiss. Certainly, that original motion was titled a Motion to Dismiss or, in the Alternative, for Summary Judgment, and Brandywine did attach additional exhibits (and New Penn did so as well in its Opposition). Nonetheless, those documents were all referenced or otherwise relied on in the Second Amended Complaint. As such, they could be considered without transforming the motion to dismiss into one for summary judgment. *See*, *e.g.*, *Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1025 (D.C. 2007). More

importantly, the Court, in ruling on the motion, applied the standard for a motion to dismiss, rather than for summary judgment (*see* App. 240-41; *see also* App. 242-245, discussing each of the Counts and taking the Plaintiff's allegations as true). With the issuance of that Order, therefore, Count Two had been dismissed pursuant to Rule 12(b)(6), while Count Three remained against either Brandywine or Tyroshi.

The Corrective and Omnibus Order on August 2, 2021 did cite to both the standard for a motion to dismiss and for summary judgment (as well as the standard for mootness) (App. 302 - 304). Nonetheless, in its ruling the Court did not consider any material outside of the pleadings or extraneous to the prior dispositive motions – on the contrary, the only "facts" that the Court relied on in dismissing Count Three were those contained in New Penn's Opposition to Brandywine's Motion to Dismiss (*see* App. 308-9). Essentially, the Corrective Order undertook the same analysis as the original July, 2019 order – that is, an analysis under a Rule 12(b)(6) motion to dismiss.

As the Court made clear in its Corrected Order, the impetus for the new ruling was not any motion by the parties, but the decision by this Court in March 2021 in *RFB Props., II, LLC., supra*. The trial court is empowered to revisit its prior orders. *See* Rule 54(b). In this case, such revision was required. As argued more fully below, the reasoning in *RFB Props. II, LLC* led ineluctably to the

conclusion that the purchase price was not unconscionably low; as such, there were no grounds upon which to void the foreclosure sale, and Count Three failed as a matter of law.

New Penn also complains that Brandywine did not raise, in its initial Motion to Dismiss, the grounds upon which the Court ultimately based its Corrective Order. This objection can be quickly set aside: when Brandywine filed its dispositive motion, this Court had not yet issued its decision in *RFB Props. II, LLC*. Just as the trial court could not have anticipated that opinion in issuing its original 2019 ruling, so Brandywine could not have known to raise the issue in argument. Nonetheless, in 2021 the trial court found itself duty-bound to apply this Court's recent precedent.

Appellant's reliance on *Tobin v. John Grotta Co.*, 886 A.2d 87 (D.C. 2005) is thus misplaced. In that case, the plaintiff had filed a claim under the Equal Pay Act and the D.C. Human Rights Act, a claim for hostile work environment, and a claim for defamation. The defendant's motion for summary judgment was denied, and defendant filed a motion for reconsideration on the defamation claim only. As the *Tobin* Court noted, at that point appellant had "chang[ed] the procedural posture of the case" (886 A.2d at 90). Thus, when the trial court summarily reversed itself and granted summary judgment on all the claims, the plaintiff was effectively caught off guard as to the claims not raised in the motion for

reconsideration. Similarly, in *Radbod v. Moghim*, 269 A.3d 1035 (D.C. 2022), only one defendant moved for summary judgment, but the court granted judgment to both defendants on grounds of lack of personal jurisdiction – which was not argued by the parties. After noting the failure to follow Rule 56, this Court nonetheless addressed the issues on the merits. Neither of these cases, however, mandate any specific procedure when the trial court *sua sponte* revisits a Rule 12(b)(6) motion to dismiss in light of new controlling precedent.

Second, it is true that the trial court treated Ms. Daniels' motion as one for summary judgment. However, as she was a *pro se* defendant, the trial court has the discretion to construe her pleadings liberally, and the court was well within its discretion to treat her motion as one for summary judgment. Even so, the additional facts which Ms. Daniels raised in her motion mainly concerned her own financial status (App. 290-91). New Penn does not appear to argue that it had any evidence at hand to rebut Ms. Daniels' contentions. Moreover, whether New Penn had notice or not, it could not have mattered, as Count One (for foreclosure) was clearly not viable. Because Ms. Daniels no longer owned or lived in the unit, and because New Penn had no relationship to Tyroshi, New Penn had no basis upon which to foreclose on the condominium unit.

Finally, New Penn complains that Tyroshi was dismissed from the case without notice to New Penn, and that the Court summarily ruled on the Motion for

Default. Again, these objections are groundless. Having ruled on Brandywine's motion that Counts Two and Three could not proceed as a matter of law, it would be pointless to require Tyroshi to file a separate motion to dismiss just to achieve the same end. The decision to dismiss those two counts necessarily applied to both Brandywine and Tyroshi. Moreover, once Counts Two and Three were properly dismissed, no grounds existed upon which to order default against Tyroshi, and that motion was properly denied as moot.

2. New Penn Was Denied Neither an Opportunity to Argue its Case, Nor Any Requested Discovery

As noted above, the trial court was well within its discretion to revisit the Order on Brandywine's motion to dismiss, and to correct that Order in light of this Court's recent rulings. The fact remains, moreover, that New Penn had an opportunity to present its arguments in full in its Motion to Alter or Amend. As such, any procedural misstep by the trial court would be harmless error. *See Night and Day Mgt., LLC v. Butler*, 101 A.3d 1033, 1038 (D.C. 2014) (where plaintiff was given notice of the dispositive issue and an opportunity to submit a motion for reconsideration, plaintiff did not suffer any prejudice).

In its Motion to Alter or Amend, New Penn only made two arguments. First, it argued that there was no evidence "of what portion of its lien Brandywine foreclosed upon at the Condo Sale." (App. 317). As the trial court properly found, however, this is not a material issue, because under *Liu* and *4700 Conn*, as long as

the six-month super-priority lien was part of the foreclosure, the underlying mortgage would be extinguished. Thus, it did not matter whether Brandywine was foreclosing on the last six months, or the last eighteen months: the result would be the same.

Second, New Penn argued that there was a question of fact as to whether Tyroshi "undoubtedly purchased the Property erroneously believing it to be the [*sic*] subject to the balance on a first Deed of Trust" (App. 318). However, New Penn never proffered any evidence to suggest that Tyroshi was working under any impression other than what was stated in the Trustee Deed. Moreover, New Penn never sought additional discovery on that point. Rule 56(f) "affords protection against the premature or improvident grant of summary judgment by permitting a nonmovant to file an affidavit stating how discovery would enable him or her to effectively oppose the summary judgment motion." *McAllister v. District of Columbia*, 653 A.2d 849, 852-53 (D.C.1995); *see gen'lly Beegle v. Restaurant Mgmt., Inc.*, 679 A.2d 480, 487 n. 8 (D.C.1996) ("[f]iling of the affidavit is required to preserve the Rule 56(f) contention that disposition of the motion should be delayed pending discovery and to avoid the premature grant of summary judgment"); *see also Strang v. United States Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.C.Cir. 1989) . The party, however, must take advantage of that opportunity – here, New Penn did not.

In addition to submitting the required affidavit under Rule 56(f), a party must have been diligent in pursuing discovery before the summary judgment motion it is opposing was filed. *See Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 921 (9th Cir.1996), *cert denied* 522 US 950 (1997); *Ben Ezra, Weinstein, & Co., Inc., v. America Online, Inc.*, 206 F.3d 980, 987 (10th Cir.), *cert denied* 531 US 824 (2000) ("the party must demonstrate precisely how additional discovery will lead to a genuine issue of material fact."); *Dowling v. Philadelphia*, 855 F.2d 136, 139–40 (3d Cir.1990). To the extent that New Penn might have lacked any evidence, it was because New Penn had not diligently pursued the necessary discovery.

Nor does it suffice simply to argue, as New Penn does, that the case was delayed because of the pandemic and because of Ms. Daniels' bankruptcy case. Without an affidavit detailing exactly what discovery would be required, the issue was waived in the trial court. Too, the record in this case simply does not bear out New Penn's contention. Ms. Daniels did not participate in the case at all until the last few months, and her bankruptcy did not necessarily stay proceedings against Brandywine or Tyroshi. There is also no indication that the foreclosure moratorium mandated by the COVID-19 crisis prevented New Penn from requesting discovery from Tyroshi. Moreover, by the time that Tyroshi's original counsel had withdrawn, New Penn, Brandywine and Tyroshi had all exchanged

written discovery responses (App. 259). There is nothing in the record to suggest that, after New Penn sought once again to extend discovery in March, 2020, it sought to depose any Tyroshi corporate representative.

New Penn had the opportunity not only to address the trial court's conclusions under *RFB Props. II, LLC*, but to seek an opportunity for additional discovery as to Tyroshi's thought processes on the date of the foreclosure. It did neither. Since, as argued below, Count Three was properly dismissed as a matter of law, any procedural misstep was harmless error.

C. The Claims in the Second Amended Complaint Were Properly Dismissed

1. Counts One and Two – Foreclosure and Declaratory Judgment

Appellant does not challenge, in its Brief, the dismissal of Counts One or Two of the Second Amended Complaint. As such, any challenge on those issues has been waived. *See*, *e.g.*, *Jones v. United States*, 999 A.2d 917, 928 (D.C. 2010) (irregularities in criminal trial is waived when not addressed in appellate brief); *In re Shearin*, 764 A.2d 774, 778 (D.C.2000) ("A claim not argued in the appellant's brief is waived.").

Nonetheless, it is clear that Count Two could not survive as a matter of law, and was properly dismissed. In that Count, New Penn alleged that the liens recorded against Ms. Daniels' unit cover a period of unpaid assessments "in excess of six months" (App. 78 ¶ 50), that the sale was advertised as "subject to the

balance on a first deed of trust in the face amount of $204,000" (App. 079, ¶ 58), and that the Association "conducted its sale in such a manner that Plaintiff's Deed of Trust survived the Condo Foreclosure Sale." (App. 80, ¶ 63). Count Two thus sought a declaratory judgment that New Penn still has a "valid and enforceable first priority lien against the entire Property" (App. 80).

By the time that Plaintiff had filed its Second Amended Complaint, this Court had already invalidated each of these arguments. With *Chase Plaza Condominium Assn, Inc. v. JP Morgan Chase Bank, N.A.*, 98 A.3d 166 (D.C. 2014), the Court held that "a lien for six months of assessments … is higher in priority than the first mortgage or first deed of trust", and that under "a general principle of foreclosure law … liens with lower priority are extinguished if a valid foreclosure sale yields proceeds insufficient to satisfy a higher-priority lien." (98 A.3d at 173). *Liu v. U.S. Bank Nat'l Assn.*, 179 A.3d 871 (D.C. 2018) held that, under the super-priority lien statute as it existed in 2014, "§ 42-1901.07 precludes a condominium association from exercising its super-priority lien while also preserving the full amount of the Bank's unpaid lien." (179 A.3d at 878).[2] Finally,

[2] As the *Liu* Court noted, § 42-1903.13 was amended in 2017 to require that any foreclosure sale expressly state whether the foreclosure was for the super-priority lien (and thus superior to the first deed of trust) or for more than the six-month lien and subject to the first deed of trust. *Liu*, 179 A.3d at 874 n.2. Because the foreclosure here was in 2014, this amendment did not apply.

in *4700 Conn 305 Trust v. Capital One N.A.*, 193 A.3d 762 (D.C. 2018), this Court held that, even where the condominium association foreclosed on more than the six-month super-priority lien, the foreclosure still extinguished the deed of trust on the mortgage. To conclude otherwise, the Court noted, would run afoul of the "no-waiver provision … strictly enforced in *Liu*." 193 A.3d at 765-6.

By September, 2018, when New Penn filed its Second Amended Complaint, the law in the District of Columbia was clear: any foreclosure sale based, even in part, on the condominium's super-priority lien extinguished the first deed of trust on the property, and any attempt to foreclose on unpaid assessments "subject to the first deed of trust" was ineffective as contrary to the anti-waiver provision of the D.C. Condominium Act. As a matter of law, no "valid and enforceable first priority lien" could have survived the Association's foreclosure on Ms. Daniels' unit, and Count Two was properly dismissed.

2. Count Three – Declaratory Judgment to Quiet Title and Void Sale

Count Three sought to nullify the foreclosure sale on two bases: (1) it was conducted "inconsistent with a material term of the advertisement" (*i.e.*, it was not sold subject to the first mortgage), and (2) the sales price was "insufficient and/or unconscionable". *See* App. 82. The first contention is contrary to the case-law described above: as *Chase Plaza*, *Liu* and *Capital One* establish, the foreclosure sale could not have been conducted subject to the first mortgage, because such

would have violated the non-waiver provision of the D.C. Condominium Act. Again, New Penn does not argue on appeal that this part of Count Three should have survived, and the argument is waived.

a. New Penn's Claims Are Barred by the Statute of Limitations

Regardless of the factual circumstances surrounding the foreclosure, any claim that the sale should be set aside is barred by the statute of limitations. The statute of limitations for wrongful foreclosure is three years. *See Tefera v. Wells Fargo Bank, N.A.*, 19 F.Supp.3d 212, 215 (D.D.C. 2014); D.C. Code § 12-301(8). The cause of action accrues when the claimant knows or should know of the injury, its cause and of some evidence of wrongdoing. *Beard v. Edmondson & Gallagher*, 790 A.2d 541, 546 (D.C. 2002). In the trial court, Appellant argued that § 308(a)(1) applies – the 15-year limitation for "recovery of lands, tenements, or hereditaments". However, New Penn's alleged harm does not relate to the possession of the land itself, but to the interest in the Deed of Trust, which is neither "lands, tenements or hereditaments." That provision thus does not apply. *See*, *e.g.*, *Sim Dev., LLC v. D.C.*, No. 1:19-CV-03383 (CJN), 2020 WL 3605831, at *2 (D.D.C. July 2, 2020). Nor, for that matter, does § 12-301(6) apply (breach of contract under seal), because neither Bank of America nor New Penn had any contract with the Association. Their contract is with Ms. Daniels – but she did not

foreclose on her own property, and therefore could not be held liable for any claim for wrongful foreclosure.

Further, the Court is not "bound by a plaintiff's characterization of an action." *Rice v. D.C.*, 626 F.Supp.2d 19, 24 (D.D.C. 2009). Count Three of the Second Amended Complaint does not seek to clear New Penn's title to the condominium unit – it was never the owner of that unit. Nor does it seek to enforce a contract under seal, because there is no such contract between New Penn and the Association. Even though Count Three is styled as "Declaratory Judgment," its import is clear: Appellant seeks an equitable remedy for wrongful foreclosure, which is a tort under the law of the District of Columbia.

Too, New Penn was assigned the Deed of Trust on July 29, 2015, long after the foreclosure sale had been completed. To the extent, therefore, that it is seeking relief for that foreclosure, it must stand in the shoes of its assignor, Bank of America, and the statute of limitations would run against New Penn as against Bank of America. *See*, *e.g.*, *Fox-Greenwald Sheet Metal Co. v. Markowitz Bros., Inc.*, 452 F.2d 1346, 1357 n. 69 (D.C.Cir. 1971) ("the statute of limitations continues to run against the assignee as it had against the assignor before").

As noted in the Statement of Facts, Bank of America received the Notice of Foreclosure in May, 2014, and thus knew at that point that the foreclosure would proceed. In addition, a representative for Bank of America asked on June 8, 2015

for the redemption amount for the unit, and was told a day later that the unit had already been sold at foreclosure. Even were the prior Notice of Foreclosure insufficient, by June 9, 2015 Bank of America was undeniably on actual notice of the foreclosure sale. Because the deed to Tyroshi was recorded in the Land Records Office in 2014, Bank of America was also on record notice of the sale price for that foreclosure. Any claim that the amount of the sale was unconscionably low had to be brought, at the very latest, on or before June 9, 2018. The Second Amended Complaint was not filed until September 25, 2018, over three months too late.

Nor can New Penn seek to assert a viable claim independent of its relationship with Bank of America (assuming that such a cause of action would exist). The Deed of Trust was assigned to New Penn on July 29, 2015. Again, at that point the foreclosure sale to Tyroshi had been recorded, and New Penn was on record notice of both the foreclosure and the sale price. Any claim for wrongful termination had to be brought before July 29, 2018; yet, the Second Amended Complaint was not filed until the end of September. Under any scenario, New Penn's claim that the sale price was unconscionably low came too late, and is time-barred.

Finally, Appellant argued below that the limitations period should be tolled because it was not until the decision in *Liu* that New Penn could have known that

its deed of trust did not survive the foreclosure. Appellant cannot, however, have it both ways. Count Three of the Second Amended Complaint is premised specifically on the allegation that the Association *knew* that the foreclosure would extinguish the first deed of trust, but falsely advertised otherwise, as well on the allegation that Tyroshi *knew* that its purchase price did not include any responsibility for the mortgage. If those Defendants *knew* in 2014 what would be the future effect of the ruling on *Liu*, then New Penn should have known as well and timely filed its claims. If, by contrast, New Penn had no reason to believe that its mortgage interest had been affected by the foreclosure sale until *Liu*, then neither could the Association nor Tyroshi have known, and Count Three fails on its facts. Whether because it is time-barred or because it has been gutted by controlling precedent, Count Three was properly dismissed as a matter of law.

b. There is No Basis to Void the Sale Because of an "Unconscionable" Price

The Appellant Brief focuses entirely on the second contention in Count Three: that the sales price was "insufficient and/or unconscionable" and the sale should thus be nullified. This claim was properly dismissed for a number of reasons. First, this Court has rejected that argument in *RFB Properties II, LLC v. Deutsche Bank Tr. Co. Americas*, 247 A.3d 689 (D.C. 2021). In that case, a condominium unit was subject to a first deed of trust of $541,900; at the time of foreclosure, the outstanding balance on the mortgage was approximately $505,000

(247 A.3d at 692). When the condominium association foreclosed in 2015, the unit was sold for $53,000 (*id.*). In *RFB Props. II*, as here, the sale was advertised as being subject to the first mortgage. The *RFB Props. II* Court held that "the price RFB II paid … should have been assessed at the time of the 2015 foreclosure sale, when the property appeared to be encumbered by a substantial mortgage lien." *Id.* at 697). As such, the sale price for the unit "cannot be deemed unconscionable as a matter of law." (*id.*).

On August 4, 2022, the Court issued its opinion in *U.S. Bank Trust, N.A. v. Omid Land Group, LLC*, ___ A.3d ___, No. 19-CV-0737 (D.C., August 4, 2022), remanding a foreclosure case for further review. That case is distinguishable from the instant litigation, and remand is not necessary here. First, in *Omid*, the plaintiff sought, through a motion to amend the complaint, to submit additional allegations and evidence. In denying the motion to amend, the trial court refused to consider those allegations, which this Court found to be error. Here, by contrast, New Penn never sought to introduce additional evidence after the Corrective Order; thus, there is no evidence that the trial court failed to consider. Second, the *Omid* trial court issued its ruling before *RFB Props II* decision was issued, and its decision was not informed by that case-law. This Court stated in *Omid*, therefore, that "[i]t is for the trial court to determine, … based on an accurate understanding of the summary judgment record and the governing law" whether summary judgment

should be entered. (*Omid* at 15, emphasis added). In this case, by contrast, the Superior Court based its opinion on *RFB Props II*, and therefore explicitly took that case-law into account.

Finally, as the *Omid* Court noted, "the record currently contains virtually no evidence of the parties' beliefs and expectations at the time of the foreclosure sale …" (*id*.). By contrast, New Penn's Second Amended Complaint specifically stated that the condominium unit was sold subject to the first deed of trust (App. 81); attached to the motion to dismiss, as well, was the Trustee's Deed, which sold the unit to Tyroshi "for the amount of $5,000.00 and subject to the balance on a first deed of trust in the face amount of $204,000.00" (App. 199). Both New Penn's own assertions and the record evidence clearly show that, at the time of the foreclosure, Tyroshi purchased the unit subject to the underlying mortgage. The trial court specifically concluded this: "Tyroshi undoubtedly purchased the Property erroneously believing it to be subject to the balance on a first Deed of Trust" (App. 308). Since, under *RFB Props.II*, the price should be assessed at the time of the foreclosure, the record evidence here clearly shows that the purchase price for the unit was $209,000 – hardly unconscionably low. Again, that might have proved to be a windfall for Tyroshi given the Court's later case-law, but that is not a reason to set aside the sale. *RFB Props. II*, 247 A.3d at 697 – 8 (*citing Weisel v. Beaver Springs Owners Ass'n*, 152 Idaho 519, 272 P.3d 491, 501 (2012)).

In its brief, New Penn concedes that the principle enunciated in *RFB Props II* is a "correct statement of the law" (Brief at 26), but seeks to avoid its consequences through mental gymnastics. New Penn argues first that, because of the Court's 2018 decisions in *Liu* and *4700 Conn*, the foreclosure in 2014 was not subject to the first mortgage, and therefore Tyroshi could not have figured the outstanding mortgage balance into its calculations in bidding on the condominium unit. This makes no sense: the foreclosure took place in 2014, four years before either of those opinions were issued. Just like the purchaser in *RFB Props II*, Tyroshi understood at the time of its 2014 purchase that there was, at a minimum, a significant risk that its exposure in buying the condominium unit was not only for the $5,000 purchase price but also for the outstanding mortgage balance of $204,000 – for a total purchase price of $209,000. There is no evidence that Tyroshi was particularly clairvoyant.

New Penn also argues that Tyroshi's actions after buying the unit were inconsistent with a belief that it was subject to the first mortgage. There are, however, two problems with this. First, there is nothing actually in the court record to suggest what Tyroshi did or did not do after the foreclosure – except, that is, for Ms. Daniels' statements that they pressured her to vacate the unit. Again, New Penn neither put the necessary evidence into the record, nor suggested that additional discovery might uncover such evidence. Also, the question is not what

Tyroshi concluded in the months after the foreclosure, but what it thought on the day of the foreclosure. At that date and time, all the evidence indicates that Tyroshi reasonably believed it was taking the unit subject to the first mortgage.

Appellant then argues that, given how the law in the District of Columbia ultimately developed, "the COA Sale was not an agreement for which the parties freely bargained between Shellpoint and any other party in this case …" (Brief at 26). This argument is even less availing, for the simple fact that in 2014, Shellpoint (or New Penn, as "Shellpoint" is a d/b/a) was a stranger to the entire transaction. It did not acquire the deed of trust until 2015, a year later. Given that its predecessor, Bank of America, ignored the foreclosure process at its peril, New Penn has no basis upon to complain that it "freely bargained" for anything.

Appellant also seeks to claim that the foreclosure sale might be set aside on the basis of other grounds, namely surprise or misinformation. The cases upon which it relies, however, are entirely inapposite. In *Fitzgerald v. Fitzgerald*, 2 Mackey 240, 1872 WL 15271 (D.C. 1872), *Hotel Lafayette v. Pickford*, 85 F.2d 710, 66 App.D.C. 211 (D.C. Cir. 1936) and *BWI MRPC Hotels, LLC v. Schaller*, 2017 WL 605037 (Md.App. 2017), the court found that there was no reason to nullify the foreclosure sale. In *Hunt v. Whiteford*, 19 App. D.C. 116 (D.C. Cir. 1901), the sale was set aside because the owner/debtor believed that she had arranged to stop the proceedings, and did not realize that the foreclosure would still

continue. In *Auerbach v. Wolf*, 22 App. D.C. 538 (D.C. Cir. 1903), the sale was set aside not because of irregularities in the proceedings, but because a better, more substantial offer was submitted before the court could ratify the sale. None of these cases provide any support for New Penn's argument that the instant foreclosure sale should be set aside.

The final two cases cited by Appellant do, in fact, deal with misinformation in the foreclosure sale. *Carozza v. Peacock Land Corp.*, 231 Md. 112, 188 A.2d 917 (Md. 1963) involved the sale of land that was advertised as larger than it actually was: approximately 0.83 of an acre had been previously deeded to Baltimore County (231 Md. at 116). In *Goldberg v. Frick Elec. Co.*, 363 Md. 683, 770 A.2d 182 (2001), the sheriff's sale as advertised failed to list an outstanding deed of trust of over $100,000. The *Goldberg* Court held that, although the sheriff was not required to provide any information as to the property, once it did, that information had to be accurate. By contrast, in the instant foreclosure there was no misinformation tainting the sale. In 2014, both the Association and the bidders on the property honestly believed that the foreclosure could in fact be subject to the first deed of trust. That subsequent case-law invalidated that belief did not render it false at the time of foreclosure.

Moreover, each of the cases upon which Appellant relies here involves some allegation of misrepresentation to a party to the sale – either the buyer or the seller.

Again, New Penn was, in 2014, unaffiliated with any aspect of this sale. It was a stranger to the entire proceeding; if there were any misrepresentations in the foreclosure advertising, New Penn was not affected thereby. Further, although New Penn stands as the assignee of Bank of America, the latter did not participate in any way in the foreclosure sale, and could not complain now. *See Bayvue Apartments Joint Venture v. Ocwen Fed. Bank FSB*, 971 F.Supp. 129, 132 (D.D.C. 1997).

A "plaintiff cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). A suit for wrongful foreclosure is not the opportunity for any third party to raise general objections to the process of sale. On its own, New Penn had no interest that might have been injured by how the foreclosure was conducted, and cannot challenge that foreclosure. *See Rose v. Wells Fargo Bank, N.A.*, 73 A.3d 1047, 1053 (D.C. 2013) (mortgagor lacked standing to challenge text in power of attorney form because "she asserts no interests that fall within the zone … to be protected or regulated by the statute in question") (*citing Culhane v. Aurora Loan Servs.*, 708 F.3d 282 (1st Cir. 2013)). If any participant in the 2014 foreclosure might have been misinformed, it was not the Appellant, and New Penn has no standing to complain of that now.

D. <u>Appellant's Constitutional Arguments Cannot Prevail</u>

Finally, New Penn seeks to avoid the logical results of the 2014 foreclosure sale by arguing that the super-priority lien statute is unconstitutional. The Office of the Attorney General has indicated that it intends to file an *amicus* brief on the constitutionality issue, and the Association adopts by reference any arguments contained in that brief, to the extent that such arguments do not conflict with the arguments herein.

1. <u>Appellant Lacks Standing To Bring This Challenge</u>

In its Brief, Appellant lodges a facial challenge to the foreclosure statute. The crux of Appellant's argument is that the super-priority lien statute did not contain any requirement that a mortgagee be notified of the impending foreclosure, and therefore fails to afford the proper due process to that mortgagee. It is undisputed, however, that in this particular case, Bank of America did in fact receive notice of this particular foreclosure. Not only are the certified mail receipts in the record, along with the affidavit attesting to the fact that the letters were sent out, but Bank of America voluntarily asked in 2015 for the redemption amount to prevent foreclosure (the fact that the Bank was so woefully late in asking does not change the fact that it was timely notified of the sale).

The District of Columbia Courts "generally adhere to the case and controversy requirements of Article III as well as prudential principles of

standing." *Riverside Hosp. v. District of Columbia Dep't of Health*, 944 A.2d 1098, 1103-04 (D.C. 2008). In order to demonstrate standing, a plaintiff must show "an actual or imminently threatened injury that is attributable to the defendant and capable of redress by the court." *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1206 - 7 (D.C. 2002). Under the principle of prudential standing, a plaintiff "may only assert its legal rights, and may not attempt to litigate generalized grievances." *Padou v. Dist. of Col. Alcoholic Bev. Ctrl. Bd.*, 70 A.3d 208, 211 (D.C. 2013); *see also Laroque v. Holder*, 650 F.3d 777, 791-92 (D.C. Cir. 2011) (stating the principle of prudential standing); *Anderson v. Holder*, 647 F.3d 1165, 1172 (D.C. Cir. 2011) (a person "may not challenge [a] statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court."); *Williams v. Lew*, 819 F.3d 466, 475 (D.C. Cir. 2016).

Neither New Penn nor its predecessor in interest, Bank of America, can show an actual injury arising from the lack of any requirement of notice to the mortgagee, because Bank of America received notice of the proposed foreclosure on Ms. Daniels' unit. Again, Bank of America did not act on that notice, but that does not suffice to create standing to challenge the constitutionality of the statute. On the contrary, that merely meant that Bank of America slept on its rights. Moreover, there may very well have been, before 2017, other mortgagees who

never received notice of any condominium foreclosure, and therefore could not have acted to protect their interests. Bank of America, however, was not such a mortgagee, and by extension neither was its assignee, New Penn. Appellant does not have standing to bring a constitutional challenge on behalf of those other, unnamed mortgagees.

2. Any Challenge Based on Lack of Notice is Moot

Even apart from Appellant's lack of standing, the fact remains that there is no justiciable controversy here. In 2017, D.C. Code § 42-1903.13 was amended to add a requirement that the holder of the first mortgage be notified of any foreclosure proceeding under that statute. The Court must consider the issue in light of the law as it now stands, not as it stood at some prior time. *Diffenderfer v. Central Baptist Church of Miami*, 404 U.S. 412, 414, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972); *see also U.S. Dept. of Treasury v. Galioto*, 477 U.S. 556, 559, 106 S.Ct. 2683, 91 L.Ed.2d 459 (1986) (appeal is moot where legislation had changed during the pendency of the lawsuit).

The constitutional infirmity that Appellant alleges has be eliminated; any issue as to the constitutionality of the prior version of the statute is, therefore, moot. *See*, *e.g.*, *District of Columbia v. The American Univ.*, 2 A.3d 175, 181-2 (D.C. 2010) (where legislation was amended to eliminate the right to grant the relief sought, the issue is moot) (*citing Thorn v. Walker*, 912 A.2d 1192, 1195

(D.C. 2006)); *see also Public Media Lab, Inc. v. District of Columbia*, 276 A.3d 1 (D.C. 2022) (on appeal from denial of an Anti-SLAPP motion, where the Act was amended to exempt the District Government, the appeal was moot "by removing the statutory basis for the relief appellants seek").

3. The Super-Priority Lien Statute Does Not Constitute an Unconstitutional "Taking"

Finally, New Penn argues that the super-priority lien statute violates the Takings Clause of the United States Constitution. Again, this argument has already been rejected by this Court. In *Pappas v. Eastern Savings Bank, FSB*, 911 A.2d 1230 (D.C. 2006), the mortgagee bank conducted a non-judicial foreclosure on a specific parcel, and in so doing extinguished the junior liens of the heirs to the estate. The heirs filed suit, claiming that their liens had not been satisfied by the foreclosure sale, and sought to nullify that foreclosure (911 A.2d at 1233). One argument raised by the heirs was that the non-judicial foreclosure violated their due process rights. The *Pappas* Court noted, however, that "Only where a private actor's conduct may fairly be treated as that of the State itself can there be a violation of constitutional protections." (at 1237, *quoting Flagg Bros. v. Brooks*, 436 U.S. 149, 157, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978)). Because the "foreclosure activities were private debt collection activities … [t]hey did not constitute governmental action subject to due process requirements." *Pappas*, 911 A.2d at 1237. Similarly, here the non-judicial foreclosure was carried out by the

Association. There was no government action that might invoke constitutional protections, and thus no violation of the Takings Clause.

More generally, the state may create a "taking" only: (1) through a "direct government appropriation or physical invasion of private property"; or (2) through enacting a regulation that is "so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). Again, there was no direct government action, and thus the first prong was not satisfied.

As for the second prong, the super-priority statute merely favors one lien over the other, but does not mandate the enforcement of any lien. As the Supreme Court of Nevada ruled in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage*, 133 Nev. 28, 388 P.3d 970 (2017), “The state did not physically invade any property interest, nor did it participate in the HOA's nonjudicial foreclosure.” (388 P.3d at 975). Further, because the statute predated the creation of the deed of trust in question, the mortgagee was on notice that a super-priority lien foreclosure might occur in the future. There was, therefore, no interference with any legitimate investment-backed expectation (*id.*). The “takings” argument was thus rejected outright. There is neither direct government action here nor a mandatory regulation which is “tantamount to a direct appropriation”, and thus

there is no basis for a claim of governmental "taking." Appellant's argument must fail.

CONCLUSION

As argued more fully above, the Superior Court properly revisited its ruling on Brandywine's Motion to Dismiss in light of more recent precedent, and properly dismissed Count Three of the Second Amended Complaint. Although New Penn had an opportunity to present additional argument and seek more discovery, it failed to do either. Further, given that the foreclosure sale price must be viewed as of the date of the foreclosure itself, and given that in 2014, all reasonable parties believed that the sale was subject to the first mortgage, the sale price of $5,000 plus a $204,000 mortgage obligation was not so low as to be unconscionable.

Finally, New Penn has no standing to bring any constitutional challenge to the D.C. super-priority statute, for two reasons, First, its assignor received actual notice of the planned foreclosure, and therefore cannot complain that the statute did not require notice. Second, any challenge to the statute as it existed in 2014 is moot, because the provision has since been amended to address the alleged defect. Moreover, there was insufficient government involvement in the non-judicial foreclosure, and therefore no basis to find a "taking" in violation of constitutional protections.

For these reasons, Appellee, Brandywine Crossing I Condominium, respectfully requests that the Court affirm the judgment of the Superior Court in all respects.

Respectfully submitted,

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STATUTES AND RULES RELIED UPON

§ 12–301. Limitation of time for bringing actions.

[(a)] Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:

(1) for the recovery of lands, tenements, or hereditaments— 15 years;

(2) for the recovery of personal property or damages for its unlawful detention— 3 years;

(3) for the recovery of damages for an injury to real or personal property— 3 years;

(4) for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment— 1 year;

(5) for a statutory penalty or forfeiture— 1 year;

(6) on an executor's or administrator's bond— 5 years; on any other bond or single bill, covenant, or other instrument under seal— 12 years;

(7) on a simple contract, express or implied— 3 years;

(8) for which a limitation is not otherwise specially prescribed— 3 years;

(9) for a violation of § 7-1201.01(11)— 1 year;

(10) for the recovery of damages for an injury to real property from toxic substances including products containing asbestos— 5 years from the date the injury is discovered or with reasonable diligence should have been discovered;

(11) for the recovery of damages arising out of sexual abuse that occurred while the victim was less than 35 years of age— the date the victim attains the age of 40 years, or 5 years from when the victim knew, or reasonably should have known, of any act constituting sexual abuse, whichever is later;

(12) for the recovery of damages arising out of sexual abuse that occurred while the victim was 35 years of age or older—5 years, or 5 years from when the victim knew, or reasonably should have known, of any act constituting sexual abuse, whichever is later.

[(b)] This section does not apply to actions for breach or contracts for sale governed by § 28:2-725, nor to actions brought by the District of Columbia government.

§ 42–1901.07. Variation by agreement.

Except as expressly provided by this chapter, a provision of this chapter may not be varied by agreement and any right conferred by this chapter may not be waived. A declarant may not act under a power of attorney or use any other device to evade a limitation or prohibition of this chapter or the condominium instruments.

§ 42–1903.13. Lien for assessments against units; priority; recordation not required; enforcement by sale; notice to delinquent owner and public; distribution of proceeds; power of executive board to purchase unit at sale; limitation; costs and attorneys' fees; statement of unpaid assessments; liability upon transfer of unit.

(a) Any assessment levied against a condominium unit in accordance with the provisions of this chapter and any lawful provision of the condominium instruments, along with any applicable interest, late fees, reasonable expenses and legal fees actually incurred, costs of collection and any other reasonable amounts payable by a unit owner under the condominium instruments, shall, from the time the assessment becomes due and payable, constitute a lien in favor of the unit owners' association on the condominium unit to which the assessment pertains. If an assessment is payable in installments, the full amount of the assessment shall be a lien from the time the first installment becomes due and payable.

(1) The lien shall be prior to any other lien or encumbrance except:

(A) A lien or encumbrance recorded prior to the recordation of the declaration;

(B) A first mortgage for the benefit of an institutional lender or a 1st deed of trust for the benefit of an institutional lender on the unit recorded before the date on which the assessment sought to be enforced became delinquent; or

(C) A lien for real estate taxes or municipal assessments or charges against the unit.

(2) The lien shall also be prior to a mortgage or deed of trust described in paragraph (1)(B) of this subsection and recorded after March 7, 1991, to the extent of the common expense assessments based on the periodic budget adopted by the unit owners' association which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien or recordation of a memorandum of lien against the title to the unit by the unit owners' association. The provisions of this subsection shall not affect the priority of mechanics' or materialmen's lien.

(b) The recording of the condominium instruments pursuant to the provisions of this chapter shall constitute record notice of the existence of such lien and no further recordation of any claim of lien for assessment shall be required.

(c)(1) The unit owners' association shall have the power of sale to enforce a lien for an assessment against a condominium unit if an assessment is past due. By accepting a deed to a condominium unit, the owner shall be irrevocably deemed to have appointed the chief executive officer of the unit owners' association as trustee for the purpose of exercising the power of sale provided for herein. Any language contained in the condominium instruments that authorizes specific procedures by which a unit owners' association may recover sums for which subsection (a) of this section creates a lien, shall not be construed to prohibit a unit owners' association from foreclosing on a unit by the power of sale procedures set forth in this section unless the power of sale procedures are specifically and expressly prohibited by the condominium instruments.

(2) A unit owner shall have the right to cure any default in payment of an assessment at any time prior to the foreclosure sale by tendering payment in full of past due assessments, plus any late charge or interest due and reasonable attorney's fees and costs incurred in connection with the enforcement of the lien for the assessment.

(3) The power of sale may be exercised by the chief executive officer of the unit owners' association, as trustee, upon the direction of the executive board, on behalf

of the unit owners' association, and the chief executive officer of the unit owners' association shall have the authority as trustee to deed a unit sold at a foreclosure sale by the unit owners' association to the purchaser at the sale. The recitals in the deed shall be prima facie evidence of the truth of the statement made in the deed and conclusive evidence in favor of bona fide purchasers for value.

(4)(A) A foreclosure sale shall not be held until at least 31 days after a Notice of Foreclosure Sale of Condominium Unit for Assessments Due is recorded in the land records and sent by a delivery service providing delivery tracking confirmation and by first-class mail to a unit owner at the mailing address of the unit, any last known mailing address, and at any other address designated by the unit owner to the executive board for purposes of notice.

(B) The Notice of Foreclosure Sale of Condominium Unit for Assessments Due shall:

(i) State the past due amount being foreclosed upon and that must be paid in order to stop the foreclosure;

(ii) Expressly state that the foreclosure sale is for either:

(I) The 6-month priority lien as set forth in subsection (a)(2) of this section and not subject to the first deed of trust; or

(II) More than the 6-month priority lien set forth in subsection (a)(2) of this section and subject to the first deed of trust; and

(iii) Notify the unit owner that if the past due amount being foreclosed upon is not paid within 31 days after the date the NFSCUAD is mailed, the executive board shall sell the unit at a public sale at the time, place, and date stated in the NFSCUAD.

(C) Substantial compliance with the requirements of subparagraph (B) of this paragraph shall be sufficient until new forms are made available by the Recorder of Deeds.

(D) The Notice of Foreclosure Sale of Condominium Unit for Assessments Due shall be accompanied by an enclosure providing the following information:

(i) A statement of the past due amount being foreclosed upon and that must be paid in order to stop the foreclosure sale;

(ii) A breakdown of the amount being foreclosed on, including amounts past due for assessments, accrued interest, late charges, all other categories of amounts past due, and the dates those amounts accrued;

(iii) A statement that the amount being foreclosed upon may not be the total amount owed to the unit owners' association and instructions on how the unit owner can request a full account statement;

(iv) Information on the availability of resources that a unit owner may utilize, which shall be in substantively the following form in at least 18-point font:
"FAILURE TO PAY AMOUNTS INDICATED IN THE ENCLOSED NOTICE OF FORECLOSURE SALE OF CONDOMINIUM UNIT FOR ASSESSMENTS DUE MAY RESULT IN SALE OF YOUR UNIT.
"YOU MAY BE ELIGIBLE FOR FREE OR REDUCED-COST ASSISTANCE.
"The D.C. Department of Housing and Community Development maintains a list of Community-Based Non-Profit Organizations that provide housing counseling services. Information on providers can be found on [Department of Housing and Community Development website for community-based non-profit organizations] or by calling [Department of Housing and Community Development's designated phone number].

"The U.S. Department of Housing and Urban Development ("HUD") sponsors housing counseling agencies that can provide advice on buying a home, renting, defaults, foreclosures, and credit issues. You can get a list of HUD-approved housing counselors at [Department of Housing and Urban Development's website] or by calling [Department of Housing and Urban Development's phone number]."; and

(v) Any other information the Mayor may prescribe by rule.

(E)(i) At least 31 days in advance of the sale, a copy of the Notice of Foreclosure Sale of Condominium Unit for Assessments Due shall besent by a delivery service providing delivery tracking confirmation and by first class mail to:

(I) The Mayor or the Mayor's designated agent;

(II) Any and all junior lien holders of record; and

(III) Any holder of a first deed of trust or first mortgage of record, their successors and assigns, including assignees, trustees, substitute trustees, and MERS.

(ii) The unit owners' association shall be in compliance with this requirement if it sends notice as provided herein to the lienholders as their names and addresses appear in land records.

(5) The date of sale shall not be sooner than 31 days from the date the notice is mailed. The executive board shall give public notice of the foreclosure sale by advertisement in at least 1 newspaper of general circulation in the District of Columbia and by any other means the executive board deems necessary and appropriate to give notice of sale. The newspaper advertisement shall appear on at least 3 separate days during the 15-day period prior to the date of the sale.

(6) The proceeds of a sale shall be applied:

(A) To any unpaid assessment with interest or late charges;

(B) To the cost of foreclosure, including but not limited to, reasonable attorney’s fees; and

(C) The balance to any person legally entitled to the proceeds.

(d) Unless the condominium instruments provide otherwise, the executive board shall have the power to purchase on behalf of the unit owners’ association any unit at any foreclosure sale held on such unit. The executive board may take title to such unit in the name of the unit owners’ association and may hold, lease, encumber or convey the same on behalf of the unit owners’ association.

(e) The lien for assessments provided herein shall lapse and be of no further effect as to unpaid assessments (or installments thereof) together with interest accrued thereon and late charges, if any, if such lien is not discharged or if foreclosure or other proceedings to enforce the lien have not been instituted within 3 years from the date such assessment (or any installment thereof) become due and payable.

(f) The judgment or decree in an action brought pursuant to this section shall include, without limitation, reimbursement for reasonable costs and attorneys' fees actually incurred by the unit owners' association.

(g) Nothing in this section shall be construed to prohibit actions at law to recover sums for which subsection (a) of this section creates a lien, maintainable pursuant to § 42-1902.09.

(h) Any unit owner or purchaser of a condominium unit shall be entitled upon request to a recordable statement setting forth the amount of unpaid assessments currently levied against that unit. Such request shall be in writing, directed to the principal officer of the unit owners' association or to such other officer as the condominium instruments may specify. Failure to furnish or make available such a statement within 10 days from the receipt of such request shall extinguish the lien created by subsection (a) of this section as to the condominium unit involved. Such statement shall be binding on the unit owners' association, the executive board, and every unit owner. Payment of a reasonable fee may be required as a prerequisite to the issuance of such a statement if the condominium instruments so provide.

(i) Upon any voluntary transfer of a legal or equitable interest in a condominium unit, except as security for a debt, all unpaid common expense assessments or installments thereof then due and payable from the grantor shall be paid or else the grantee shall become jointly and severally liable with the grantor subject to the provisions of subsection (h) of this section. Upon any involuntary transfer of a legal or equitable interest in a condominium unit, however, the transferee shall not be liable for such assessments or installments thereof as became due and payable prior to his acquisition of such interest. To the extent not collected from the predecessor in title of such transferee, such arrears shall be deemed common expenses, collectible from all unit owners (including such transferee) in proportion to their liabilities for common expenses pursuant to § 42-1903.12(c).

(j) In addition to any other right or power conferred by this section, the executive board shall have the power to suspend the voting rights in the unit owners' association of any unit owner who is in arrears in his payment of a common expense assessment by more than 30 days, and the suspension may remain in effect until the assessment has been paid in full.

Superior Court Rule 56

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(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2022, a copy of the Appellees' Brief was served on the following through the Court's electronic filing system, and by first-class mail, postage prepaid:

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/s/ Thomas C. Mugavero
Thomas C. Mugavero

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.

Signature

22-CV-0005
Case Number(s)

Thomas C. Mugavero
Name

August 8, 2022
Date

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Email Address