NO. 23-CV-0267

DISTRICT OF COLUMBIA COURT OF APPEALS

FLAGSTAR BANK, FSB

Appellant

v.

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

Appellees

Appeal from the Superior Court of the District of Columbia
Civil Action No. 2017-CA-000373-R(RP) (Hon. Shana Frost Matini, presiding)

BRIEF OF APPELLEE NEW HAMPSHIRE HOUSE CONDOMINIUM UNIT OWNERS ASSOCIATION

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D.C. COURT OF APPEALS RULE 28(a)(2)(A) STATEMENT

Pursuant to D.C. Ct. App. Rule 28(a)(2)(A), below is a list of the parties and their counsel in the lower court and in this appellate proceeding:

Parties

Flagstar Bank, FSB (Appellant)
Salvador Rivas (Appellee)
Advanced Financial Investments, LLC (Appellee)
New Hampshire House Condominium Unit Owners Association (Appellee)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

Statement of Jurisdiction

This Court has jurisdiction to hear the appeal of Appellant *Flagstar Bank, FSB v. Salvador Rivas, et al*, because on October 10, 2019 and on September 1, 2020 the Superior Court of the District of Columbia issued orders disposing of all of Flagstar's claims against New Hampshire House Condominium Unit Owners Association, and on April 5, 2023 the Superior Court of the District of Columbia issued a final order disposing of Flagstar's claims against Advanced Financial Investments, LLC.

Statement of Issues

1. Whether the lower court properly determined that Flagstar's causes of action set forth in the Amended Complaint against New Hampshire House Condominium Unit Owners Association are barred by limitations because these claims accrued on December 23, 2014.
2. Whether the lower court correctly determined that Flagstar failed to plead a valid claim for foreclosure against New Hampshire House Condominium Unit Owners Association.

Standard of Review

A complaint "must present sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. More specifically, a claim has facial plausibility when the plaintiff pleads factual content that allows the court to

draw the reasonable inference that the defendant is liable for the misconduct alleged." *Fourth Growth, LLC v. Wright*, 183 A.3d 1284, 1288 (D.C. 2018). An appeal from the granting of a motion to dismiss is reviewed *de novo*. *Papageorge v. Zucker*, 169 A.3d 861, 863 (D.C. 2017).

Statement of the Case

The plaintiff, Flagstar Bank, N.A. ("Flagstar"), filed a foreclosure action in 2017 against defendants Advanced Financial Investments, LLC ("AFI"), and Salvador Rivas "Rivas"). On March 12, 2018, AFI filed its answer and asserted an affirmative defense averring that Flagstar's lien was extinguished at the time of the foreclosure sale pursuant to D.C. Code § 42-1903.03. AFI Answer, ¶ 29 [Appellant's App'x, 89]. Eight months later, Flagstar moved to amend its complaint to add claims of declaratory judgment (Count II), breach of fiduciary duty (Count III), and unjust enrichment (Count IV) and to add defendant New Hampshire House Condominium Unit Owners Association (the "Association") to the lawsuit. Flagstar's Motion for Leave to File Amended Complaint [Appellant's App'x, 91]. Flagstar filed the Amended Complaint on April 17, 2019. Amended Complaint [Appellant's App'x, 175]. In the Amended Complaint Flagstar asserted the foreclosure (Count I) and the "declaratory judgment," (Count II) against all defendants.

The Association moved to dismiss Counts III and IV on the basis that Flagstar failed to state a claim upon which relief could be granted because, *inter alia*, these

claims were untimely. Specifically, the Association argued that the claims of breach of fiduciary duty and unjust enrichment, respectively Counts III and IV, accrued when the foreclosure sale occurred on December 23, 2014, yet Flagstar waited five years to file suit against the Association. August 23, 2019 Motion to Dismiss, 5-7 [Appellant's App'x, 257-259]. The court agreed and dismissed Counts III and IV. October 10, 2019 Order, 7 [Appellant's App'x, 284].

The Association later moved to dismiss the remaining claims asserted against it, *i.e.*, Count I – Foreclosure and Count II – Declaratory Judgment. On September 1, 2020, following argument, the lower court granted the Association's second motion to dismiss and dismissed Counts I and II. The court reasoned that the declaratory judgment claim was untimely, that the Association was not a proper party to the foreclosure claim and that, regardless, Flagstar's lien was extinguished. September 1, 2020 Hearing Transcript, 5-7, 12-13 [Appellant's App'x, 334-336, 341-42].[1]

With the Association out of the case, the matter proceeded against AFI only until February 27, 2023, when AFI's motion to dismiss/for summary judgment was granted. On March 29, 2023, Flagstar appealed the orders granting the Association's motions to dismiss as well as the dismissal of the claims against AFI.

[1] Herein, Flagstar apparently does not challenge the lower court's ruling that the Association was not a proper party to the foreclosure claim, Count I.

Statement of Facts

According to Flagstar's Amended Complaint, in 2009, Rivas purchased a condominium (the "Unit") in the Association. Amended Complaint, ¶¶ 3 8 [Appellant's App'x, 177, 178]. Pursuant to the Condominium Rider attached to the Deed and Trust, Rivas was required to pay condominium fee assessments. Amended Complaint, ¶ 8, Exhibit B [Appellant's App'x, 178, 202]. Rivas failed to pay the assessments owed to the Association. Amended Complaint, ¶ 50, Exhibit K [Appellant's App'x, 231]. As of September 24, 2014, Rivas owed the Association $19,109.24, a total which included $11,233.28 in unpaid monthly assessments. Amended Complaint, ¶¶ 28, 45, Exhibit K [Appellant's App'x, 181-83, 231].

The Association initiated a foreclosure action. Amended Complaint, ¶ 12 [Appellant's App'x, 178]. The Association issued a notice that the Unit was scheduled for a December 23, 2014 foreclosure sale. Amended Complaint, ¶ 12 [Appellant's App'x, 178]. An advertisement of the sale was published in the Washington Times on December 12, 17 and 22, 2014. Amended Complaint, ¶ 32, Exhibit J [Appellant's App'x, 182, 229]. The advertisement notified potential purchasers that the Unit would be "sold subject to the first deed of trust for the amount of approximately $256,637.00 . . . ." Amended Complaint, ¶ 32, Exhibit J [Appellant's App'x, 182, 229]. At auction on December 23, 2014, AFI purchased the Unit for $26,0000. Amended Complaint, ¶ 47 [Appellant's App'x, 186].

In accordance with the law of the District of Columbia, Flagstar's lien was extinguished by the foreclosure sale. October 10, 2019 Order, 5 [Appellant's App'x, 282]

Flagstar waited until November 2018 to attempt to initiate claims against the Association and the Amended Complaint was not filed until April 2019. Flagstar's Motion for Leave to File Amended Complaint; Amended Complaint [Appellant's App'x, 91, 175]. In the Amended Complaint against the Association, Flagstar alleges claims of foreclosure, declaratory judgment, unjust enrichment, and breach of fiduciary duty. Despite the various labels, Flagstar's claims are based on the same underlying facts. In summary, Flagstar alleges that the Association misrepresented the terms of the foreclosure sale in the advertisements, that the Association held a foreclosure sale on December 23, 2014, and that the Association accepted a sale price for the Unit which was significantly too low. Amended Complaint, ¶¶ 32, 34, 44 [Appellant's App'x, 182, 185]. Again, all of these alleged egregious acts of the Association are alleged to have occurred in 2014. Amended Complaint, passim. Flagstar further alleges that as a result of the Association's conduct in 2014, it was "induced" not to act at the time of the foreclosure sale. Amended Complaint, ¶ 42 [Appellant's App'x, 183].

Summary of Argument

The trial court granted the Association's Motion to Dismiss Counts III and IV on October 10, 2019 and the Association's Motion to Dismiss Counts I and II on September 1, 2020. The trial court's rulings were correct for the following reasons:

1. Flagstar filed an Amended Complaint adding the Association as a Defendant for the first time on April 17, 2019, significantly more than three years after the December 23, 2014 foreclosure sale.

2. The Association initially filed a Motion to Dismiss Counts III and IV for failure to state a claim arguing, in part, that Flagstar's claims against it were time barred. The trial court granted the Association's Motion to Dismiss based solely upon the allegations set forth in the Amended Complaint, which for purposes of its ruling the court accepted as true. The lower court did not resolve factual disputes in reaching its ruling.

3. The Association later moved to dismiss the remaining claims asserted against it, i.e., Count I – Foreclosure and Count II - Declaratory Judgment. On September 1, 2020 the lower court granted the Association's second Motion to Dismiss. The court reasoned that both counts (Counts I and II) were untimely, and also that the Association was not a proper party to Flagstar's foreclosure claim. Once again, the court acted properly as there were no facts in dispute as to these issues.

4. Flagstar's causes of action asserted against the Association accrued as a matter of law on December 23, 2014. The discovery rule is inapplicable. Flagstar's claims against the Association were filed too late.

Argument

I. The Lower Court Properly Dismissed Flagstar's Claims As Time Barred

The lower court properly determined, based on the allegations in the Amended Complaint, that Flagstar's lawsuit against the Association was untimely filed. Flagstar's claims against the Association accrued at, or prior to, the time of the foreclosure sale on December 23, 2014. Flagstar filed the Amended Complaint in 2019. Incredulously, Flagstar, a commercial lender, now argues that it could not have anticipated the legal effect that the December 23, 2014 foreclosure sale had on its lien and Flagstar argues that the savvy and duplicitous the Association foresaw that Flagstar could not so anticipate. Flagstar alleges that the Association prevented it from discovering the legal effect of the foreclosure sale until much later.

It is well established that whether a claim is time barred may be determined on the complaint alone. *Logan v. Lasalle Bank Nat'l Ass'n*, 80 A.3d 1014, 1020 (D.C. 2013). "It is undisputed that the statute of limitations begins to run when a claim accrues, and that a cause of action accrues when its elements are present, so that the plaintiff could maintain a successful suit." *News World Communs., Inc. v. Thompsen*, 878 A.2d 1218, 1222 (D.C. 2005). The statute of limitations for claims of unjust enrichment, breach of fiduciary duty, wrongful foreclosure, and

misrepresentation is three years. *Boyd v. Kilpatrick Townsend & Stockton*, 164 A.3d 72, 80 (D.C. 2017); *Hillbroom v. PricewaterhouseCoopers LLP*, 17 A.3d 566, 571 n.7 (D.C. 2011); *Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 322 (D.C. 2008); *Drake v. McNair*, 993 A.2d 607, 617 (D.C. 2010); D.C. Code § 12-301. Thus, the sole remaining issue in the analysis of the timeliness of Flagstar's claims against the Association was the accrual of the claims. Here, Flagstar's Amended Complaint provided this information, and the lower court properly dismissed the Amended Complaint as to the Association on the basis of limitations.

A. Flagstar, Per Its Own Allegations, Filed Untimely Claims

The factual allegations in the Amended Complaint establish that Flagstar knew or should have known of its cause of action at the time of the foreclosure sale in December, 2014 and the lower court properly granted the Association's motions to dismiss on limitations grounds. Flagstar argues that dismissal for untimeliness required resolution of factual issues, and thus its claims should not have been resolved without factfinding. [Appellant's Brief, 15]. However, Flagstar conflates its misunderstanding of the legal significance of the foreclosure sale with unawareness of predicate facts and further ignores that it had inquiry notice of the purported injury. [Appellant's Brief, 17, 18]. *See M.M. & G., Inc. v. Jackson, 612 A.2d 186, 193 (D.C. 1992)* (no recourse available to seekers of equitable lien who, knowing facts, acted on mistaken application of law); *East v. Graphic Arts Indus. Joint*

Pension Trust, 718 A.2d 153, 159 (D.C. 1998). ("ignorance of . . . legal rights or failure to seek legal advice, [does] not toll the statute" of limitations [quoting *Kazanzas v. Walt Disney World Co.*, 704 F.2d 1527 (11th Cir. 1983)]).

The present case concerns whether Flagstar's claims, accepting its allegations as true, accrued on or before the December 23, 2014 foreclosure sale. This is a question of law. *Medhin v. Hailu*, 26 A.3d 307, 310 (D.C. 2011). Flagstar had all the necessary predicate facts available to it as of December 23, 2014. Flagstar's failure to realize its lien was extinguished through the December 23, 2014 sale did not result from events or actions which were unknown to it, but rather the same resulted from Flagstar's ignorance of the law. *See Lynch v. Meridian Hill Studio Apts., Inc*., 491 A.2d 515, 518 (D.C. 1985) (generally, mistake of fact receives greater leniency than mistake of law).

Specifically, Flagstar alleges in its Amended Complaint that the Association advertised the sale in 2014, that the foreclosure sale occurred in 2014, and that an auction occurred. Amended Complaint, ¶ 12-13, 28-37, 39-42. [Appellant's App'x, 183]. Flagstar, per its own allegations, concedes that it was aware of the happening of these events. These three events, notice of the foreclosure sale by the Association, advertisement of the terms of the sale and the fact of the sale for $26,000 on December 23, 2014 form the basis of its claims against the Association in the present

matter. Accordingly, the untimeliness, *vel non*, of the claims against the Association can be determined based on the allegations of the Amended Complaint alone.

The lower court's October 10, 2019 ruling was based on an acceptance of Flagstar's own allegations. Flagstar alleges in the Amended Complaint that the Association "chilled" the bidding on the Unit through its advertisements in the Washington Times stating the sale was subject to Flagstar's lien. Amended Complaint, ¶ 39 [Appellant's App'x, 183]. Flagstar alleges the sale was not for a commercially reasonable amount, and the Association did not obtain the highest or best price for Unit. Amended Complaint, ¶ 41 [Appellant's App'x, 183]. Plainly, all these alleged wrongful acts – the flawed advertisement, the faulty sales price, and the misguided acceptance of AFI's offer, occurred in 2014. Flagstar was aware of the occurrence of these alleged wrongful acts in 2014. By its own allegations, Flagstar knew of the sale price at the time of the foreclosure in 2014; Amended Complaint, ¶ 44 [Appellant's App'x, 185]; Flagstar, as the holder of the mortgage, was in a position to compare the proposed sale price to fair market value in 2014. Id. Flagstar acknowledges that it was "induced," in 2014, to not submit a bid at the foreclosure auction, thereby conceding awareness of all the foregoing—the advertisements, that the Association was foreclosing on its lien and the sale price at auction. In 2014, Flagstar affirmatively *chose* inaction because it calculated that its lien would survive the foreclosure sale. Amended Complaint, ¶ 44 (h) [Appellant's

App'x, 185]. Likewise, Flagstar knew that the Association retained the proceeds from the sale. Amended Complaint, ¶ 51 [Appellant's App'x, 186].

Flagstar argues on appeal that its claims against the Association were timely filed by relying on its conclusory allegations that it was unaware of its purported fiscal injury or that it was unaware its lien was in jeopardy until AFI filed its Answer to the original complaint. [Appellant's Brief, 17]. Flagstar's argument continues averring that in granting the Association's motions, the lower court resolved factual issues, which is not permitted when reviewing a motion to dismiss. [Appellant's Brief, 19-22].

This self-serving position is contradicted by a review of Flagstar's actual factual allegations in its Amended Complaint. As detailed above, the underlying basis of Flagstar's claims against the Association include that Flagstar, at the time of the Association's foreclosure proceeding, was aware of both the advertisements and the sale amount. Flagstar's failure to timely realize its purported causes of action against the Association is not, and cannot be, based on a contention that the underlying facts were unknown or hidden.

Flagstar's argument that the lower court erred because it ignored the allegations that Flagstar was unaware of the legal significance of the foreclosure sale until much later does not withstand scrutiny. What Flagstar mislabels as "fact finding" by the lower court is really the simple application of what *facts* Flagstar

alleges it knew in its complaint to the then existing applicable law. *Chase Plaza Condo. Ass'n v. JP Morgan Chase Bank, N.A.*, 98 A.3d 166, 174 (D.C. 2014) was decided on March 1, 2014, more than nine months before the foreclosure auction of December 2014. With the publishing of the *Chase* opinion, Flagstar is deemed to have been aware that any foreclosure on an assessment lien, including the instant foreclose sale, was an action on a super-priority lien that terminated all junior liens. *Id*. To accept Flagstar's assertion that it was unaware of its fiscal injury until after AFI filed the affirmative defenses in its Answer would require absolving Flagstar of any obligation to investigate.

The standard for accrual of actions is what is known or should have been known. *Diamond v. Davis*, 680 A.2d 364, 372 (D.C. 1996). In testing the timeliness of Flagstar's Amended Complaint, consideration of more than Flagstar's actual knowledge was appropriate. As evidenced by the affirmative defense, AFI plainly knew the consequence of the super-priority lien sale. Flagstar, too, was on notice of the same law and Flagstar cannot use its ignorance of the law as justification to extend the limitations period. There is no evidence that the lower court "found facts" in granting the Association's Motions.

B. The Discovery Rule is Inapplicable to the Present Case.

The discovery rule is not appropriate for the present case. As to Count IV, Unjust Enrichment, the discovery rule is facially inapplicable. For unjust

enrichment, "the statute of limitations begins to run when the . . . last service has been rendered *and* compensation has been wrongfully withheld." *News World Communs., Inc., v. Thompsen*, 878 A.2d 1218, 1219, 1224-25 (D.C. 2005). *See also*, *Fort Lincoln Civic Ass'n v. Fort Lincoln New Town Corp*., 944 A.2d 1055, 1076 (D.C. 2008). Although the claim of unjust enrichment against the Association is patently ill-suited,[2] any such claim accrued when the Association retained the proceeds from the 2014 sale. Flagstar alleges merely that it did not receive funds from the December 2014 sale of the Unit and that the Association wrongfully kept the funds. Amended Complaint, ¶¶ 49, 51 [Appellant's App'x, 186]. That is the extent of the allegations related to the unjust enrichment claim against the Association. As Count IV was not asserted within three years of the Association's retention of the proceeds from the foreclosure sale, and Count IV was properly dismissed as time barred.

Regarding the additional claims against the Association, the discovery rule is equally not a salvation for Flagstar's untimely filing. The discovery rule may be applied to determine when a cause of action accrues only in cases "where the

[2] "Unjust enrichment occurs when (1) the plaintiff conferred a benefit on the defendant; (2) the defendant retains the benefit; and (3) under the circumstances, the defendant's retention of the benefit [without paying] is unjust." *Pearline Peart v. D.C. Hous. Auth.*, 972 A.2d 810, 813 (D.C. 2009) (quoting *News World Communs*, *Inc. v. Thompsen*, 878 A.2d 1218, 1222 (D.C. 2005)). Flagstar does not allege it conferred a benefit on the Association. The claim of unjust enrichment is not validly pleaded.

relationship between the fact of injury and the alleged tortious conduct is obscure when the injury occurs." *Murray v. Wells Fargo Home Mortg*., 953 A.2d 308, 321 (D.C. 2008) (quoting *Bussineau v. President & Directors of College*, 518 A.2d 423, 425 (D.C. 1986)). The discovery rule does not permit a plaintiff, armed with knowledge of injury and wrongdoing, "to defer institution of suit and wait and see whether additional injuries come to light." *Colbert v. Georgetown Univ.*, 641 A.2d 469, 473 (D.C. 1994). Flagstar does not assert that the Association hid its conduct or that Flagstar was, despite reasonable diligence, unaware of the Association's actions. Flagstar's reliance on the discovery rule concentrates on developments in the law, not obscurity between the actions themselves and the purported injury. *See East v. Graphic Arts Indus. Joint Pension Tr*., 718 A.2d 153, 157 (D.C. 1998) (action accrues with "*general* knowledge," not learning of "*precise* legal remedies"). The discovery rule is designed to delay accrual in cases, unlike the present matter, where there is latency between the alleged wrongdoing and the manifestation of injury, such as the "exposure to a dangerous product that manifests itself in disease only years later, like asbestos [or a] negligent surgery whose ill effects are manifested only years later." *Ehrenhaft v. Malcolm Price, Inc*., 483 A.2d 1192, 1202 (D.C. 1984) (citations omitted). Flagstar's position is that it was not aware of the legal consequences of events for which it was contemporaneously aware. *East v. Graphic Arts Indus. Joint Pension Trust*., 718 A.2d 153, 157 (D.C. 1998) ("The discovery

rule does not apply to circumstances . . . where the plaintiff has failed to discover the relevant law . . . ."). Flagstar tellingly does not identify one purported fact that it became aware of after the 2014 foreclosure sale.

C. Flagstar Had Inquiry Notice

Even if the present case were suited for application of the discovery rule, Flagstar's allegations establish that at a minimum, it had inquiry notice for its claims at the time of the December 2014 foreclosure sale. A "cause of action [accrues] once a plaintiff has knowledge of 'some injury,' its cause in fact, and 'some evidence of wrongdoing.'" *Morton v. National Med. Enters*., 725 A.2d 462, 468 (D.C. 1999) (quoting *Colbert v. Georgetown Univ.*, 641 A.2d 469, 473 (D.C. 1994)). Accrual of a cause of action requires only "inquiry notice that wrongdoing may be involved." *Bussineau v. President & Directors of College*, 518 A.2d 423, 428 (D.C. 1986); *Murray v. Wells Fargo Home Mortg*., 953 A.2d 308, 321 (D.C. 2008) ("even under the discovery rule, 'any appreciable and actual harm flowing from the [defendant's] conduct is sufficient' for a cause of action to accrue" [quoting *Hendel v. World Plan Exec. Council*, 705 A.2d 656, 661 (D.C. 1997)]). There is a duty to act reasonably given the circumstances to investigate matters affecting one's affairs to determine whether a cause of action exists. *Harris v. Ladner*, 828 A.2d 203, 205-06 (D.C. 2003). The discovery of certain details at a later point in time does not "excuse . . . inaction." *Id*., 206.

The issue in the present case is not when the events giving rise to Flagstar's purported claims occurred. That is undisputed. The issue Flagstar cannot overcome is that, even accepting the allegations in the Amended Complaint, Flagstar's claim accrued on December 23, 2014 because Flagstar, at a minimum, had inquiry notice at the time of the foreclosure sale.[3]

If in Count I, Flagstar is alleging that the Association's foreclosure sale was a "wrongful foreclosure," that claim is time barred. It cannot be disputed that the Association completed the foreclosure sale in December 2014, more than three years before Flagstar initiated claims against the Association. *Murray v. Wells Fargo Home Mortgage*, 953 A.2d 308, 322 (D.C. 2008) (three-year statute of limitations regarding foreclosures begins to run on receipt of notice of foreclosure).

In Count II, Flagstar appears to seek a declaration that the foreclosure was wrongful and/or that the Association falsely advertised the sale and made false

[3]Flagstar's reliance on *Cevenini v. Archbishop of Washington*, 707 A.2d 768 (1998) [Appellant's Brief, 18], is misguided and intimates that a commercial lender should be held to a lower standard of inquiry notice than a minor victim of priest abuse. In *Cevenini*, the plaintiffs, adults filing claims against the Archbishop of Washington, asserted that they did not realize the full extent of either their injuries resulting from alleged priest abuse suffered as minors or the Archdiocese's alleged involvement. *Id.*, 772-73. The claims were properly dismissed as time barred because when plaintiffs reached 18 years of age, their claims accrued, and they were obliged to investigate. *Id*., 773. This onus, at the motion to dismiss stage, was sufficient to render any claims time barred on the face of the allegations despite attempts to rely on the discovery rule and fraudulent concealment. *Id.*, 775.

representations that the Unit was for sale subject to Plaintiff's lien, which, in turn, chilled the bidding process and led to a commercially unreasonable sale price that shocks the conscience. Amended Complaint, ¶ 42 (a)-(g) [Appellant's App'x, 183]. Flagstar knew all the essential facts regarding any alleged false advertisement or purportedly false representation by the Association at the time of, or prior to, the foreclosure sale in December 2014. These allegations were asserted against the Association after the applicable statute of limitations of three years had passed. D.C. Code § 12-301 (7), (8); *Drake v. McNair*, 993 A.2d 607, 617-618 (D.C. 2010).

The allegations forming the breach of fiduciary duty claim, Count III, address the procedure of the foreclosure, which Flagstar concedes it was contemporaneously aware. *See Murray v. Wells Fargo Home Mortg.*, 953 A.2d 208, 322 (D.C. 2008) (claimed breach of fiduciary duty premised on premature initiation and faulty notice of foreclosure sale accrued when notice issued). For accrual of a breach of fiduciary duty claim, it not necessary "that all or even the greater part of the damages . . . occur before the [right] of action arises." *Id.*, 321 (quoting *Hendel v. World Plan Exec. Council*, 705 A.2d 656, 661 (D.C. 1997)). Flagstar had notice of any claim premised on how the Association conducted the foreclosure sale. Any such claim accrued prior to, or at the time of, the December 23, 2014 sale.

It is incontrovertible that the Amended Complaint adding the Association as a party was filed on April 17, 2019. This pleading was filed more than three years

after Flagstar knew it had objections to the means and manner by which the Association conducted the foreclosure sale, as well as objections to the sale price. Hence, Flagstar was, at a minimum, on inquiry notice well before April 17, 2016 and its Amended Complaint, filed April 17, 2019, was thus untimely.

D. *Chase Plaza* & D.C. Code § 42-1903.7 Provided Notice

On appeal, Flagstar attempts to bolster its position regarding the applicability of the discovery rule arguing that it amended its Complaint following the publication of *Liu v. U.S. Bank N.A.*, 179 A.3d 871, 874 (D.C. 2018) (prior to 2017 Amendment to DC Code, condominium association could elect to sell unit "subject to the first mortgage or first deed of trust."). [Appellant's Brief, 34, 35] This is happenstance, not a justification for the untimely claims. Notably, elsewhere in its brief (at least six times), Flagstar asserts that AFI's answer, not the publication of *Liu,* prompted discovery of the purported injury and the filing of the Amended Complaint. [Appellant's Brief, 4, 9, 17, 18, 19, 31]. Further begging the question of how genuine Flagstar's argument on appeal that it "needed" the *Liu* opinion to understand its rights is a simple review of the timeline. *Liu* was published in March 2018, and Flagstar made no effort to assert claims against the Association until April 2019.

Additionally, it was not just the *Liu* decision that placed Flagstar on inquiry notice of any purported injury. At the time of the foreclosure sale, pursuant to D.C. Code § 42-1903.13, all "liens that are unsatisfied by the foreclosure-sale proceeds

are extinguished and, the foreclosure-sale purchaser acquires free and clear title." *Chase Plaza Condo. Ass'n v. JP Morgan Chase Bank, N.A.*, 98 A.3d 166, 172 (D.C. 2014). "The provision creating the six-month super-priority lien for condominium assessments was enacted in 1991." *Id.*, 174. Flagstar also should have been aware that the statutory right to a super-priority lien could not "be varied by agreement." D.C. Code § 42-1901.07. *Liu*, applying a plain meaning analysis, merely confirmed the "plain language of" § 42-1901.07 "prevents parties from contracting around the statute." *Liu v. U.S. Bank N.A.*, 179 A.3d 871, 874, 879 (D.C. 2018). In December 2014, *Chase Plaza* and § 42-1901.07 were sufficient to place Flagstar on notice that the foreclosure sale terminated its lien. If uncertainty in the law was Flagstar's true impediment to understanding its rights, it could have timely filed a declaratory judgment action, as it did in the Amended Complaint, seeking clarification resolution of any points it deemed "unclear." [See Appellant's Brief, 33, 34]. Delay due to perceived uncertainty in the law is not a sound excuse for the untimely filing, nor a recognized reason to delay accrual.

II. Regardless of When the Purported Injury Occurred, Flagstar Does Not Have a Valid Claim against the Association

A. The Association Initiated Foreclosure on a Super-Priority Lien.

Flagstar attempts to distinguish *Chase Plaza*, and the cases following it, in the context of when the injury could have been discovered [Appellant's Brief, 32-35] while ignoring the practical effect of the holdings of these cases, to wit, Flagstar has

no claim against the Association. Flagstar's lien was extinguished in the foreclosure sale. *See Chase Plaza Condo. Ass'n v. JP Morgan Chase Bank, N.A.*, 98 A.3d 166, 172. The Association had a nonwaivable right to a super-priority lien regardless of whether the notice specified the foreclosure was for six months of assessments or more. *Id.*; *Liu v. U.S. Bank N.A.*, 179 A.3d 871, 877 (D.C. 2018); *4700 Conn 305 Trust v. Capital One, N.A.*, 193 A.3d 762, 766 (D.C. 2018). In *4700 Conn.*, which involved facts very similar to those in the instant case, the bank's mortgage on the property was extinguished when the condominium association enforced its super-priority lien on unpaid condominium assessments by foreclosing on the property and the sale was advertised as "subject to the first deed of trust." *4700 Conn 305 Trust v. Capital One*, N.A.,193 A.3d 762, 763, 766 (D.C. 2018). Although more than six months of arrearages of condominium fee assessments were sought in the foreclosure sale, the super-priority lien status was not waived. *Id.*, 765-66. Here the Association acted properly at all times and properly advertised the foreclosure sale. The ramifications of the sale are consistent with the law of the District of Columbia. Flagstar's effort, after several years of self-inflicted delay, to invalidate the December 2014 foreclosure sale is futile.[4]

[4]Flagstar notes that *Chase Plaza Condo. Ass'n v. JP Morgan Chase Bank, N.A*, 98 A.3d, 166 178 n.6 (2014), and *4700 Conn 305 Trust v. Capital One, N.A.*, 193 A.3d 762, 766 (D.C. 2018), as well as *United States Bank Trust, N.A. v. Omid Land Group*, 279 A.3d 374, 382 (D.C. 2022), were remanded to determine whether the subject foreclosure sale should be invalidated based on an unconscionably low sale price or

B. The Association Is Not a Proper Party to the Foreclosure Claim

When dismissing Count I - the foreclosure claim - the trial court noted both the untimeliness issues addressed above and that this claim was improperly directed against the Association. In its Amended Complaint, Flagstar did not allege the Association was the borrower or record title holder. The lower court's ruling was valid and apparently, Flagstar does not challenge this basis for the dismissal of Count I against the Association.

Specifically, in Count I, Flagstar seeks foreclosure of its own lien on the property under a power of sale provision by and through its Substitute Trustees. Amended Complaint, ¶¶ 16, 17, 21-24 [Appellant's App'x, 178-79]. Therefore, Count I relates solely to the borrower, *i.e.*, Rivas, or the record titleholder, AFI. Pursuant to the applicable statute, D.C. Code § 42-815 (c), the lienholder may seek "a foreclosure sale under a power of sale provision contained in any deed of trust, mortgage, or other security instrument" by providing proper written notice of the intent to foreclose to "the borrower and if different from the borrower, to the person who holds the title of record to the property encumbered by the deed of trust, mortgage, or security instrument . . . ." The claim for foreclosure pursuant to Flagstar's deed of trust does not involve the Association. The Association is neither

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equitable grounds. Notably, in those cases each claimant bank was able to timely file its challenge to the condominium super-priority sale.

a borrower nor a record title owner. Moreover, there is no allegation against or mention of the Association in Count I. The lower court's second basis for dismissing Count I should not be disturbed.

Conclusion

On the foregoing basis, the Association respectfully requests that the judgments of the Superior Court be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of November, 2023, the foregoing Brief of Appellee New Hampshire House Condominium Unit Owners Association was e-filed and e-served to the following counsel:

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I FURTHER CERTIFY that on the 6th day of November, 2023, I mailed by United States First-Class Mail, postage prepaid, a copy of foregoing Brief of Appellee New Hampshire House Condominium Unit Owners Association to the following individuals not registered to receive service by the DC Court of Appeals efiling service:

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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

23-cv-0267
Case Number(s)

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