

Index

	Page No.
Authorities Cited	3
Statement of the Issues.....	4
Preliminary Statement.....	4
Argument.....	8

Authorities Cited

STATUTES:

28 U.S.C. 2001..... 5, 10, 11, 12, 13, 18

DC SUPERIOR COURT RULES:

Rule 4..... 7, 13, 17, 18, 19

Rule 12..... 6, 16, 17

Rule 22..... 10, 15, 16, 18

Rule 308..... 9, 10, 18, 19

Appellant's Statement of Issues

1. Whether the Superior Court erred in not determining the priority rights of creditors prior to a public foreclosure sale on Defendant's real estate.
2. Whether the Superior Court erred in finding the Plaintiff's Motion for Interpleader and Declaratory Judgement is not an appropriate vehicle to resolve lien holders' right prior to a foreclosure sale.
3. Whether the Superior Court erred in finding it has no authority to adjudicate the rights of Deutsche Bank, a lender to the defendant.
4. Regardless of the Appeals Court ruling on issues 1, 2, and/or 3, whether the Superior Court erred vacating the status hearing on December 11, 2020, and closing the case without a ruling when the Plaintiff had pending its demand per its Motion for Default Judgement the sale of Property.

Preliminary Statement

Appellee's issues I and IV ignores Appellant's Complaint demanding foreclosure of the consensual lien that Betty Murray entered into when Betty Murray bought her home. Appellee ignores

the transcript of the January 31, 2020 hearing where the Appellant is asking for foreclosure on the lien at page 19 of the transcript, and continues on later at page 21 through page 22 discussing with the Court the foreclosure and bringing in the other lien holder via a motion for interpleader. Appellee continues to only focus on the 1st relief requested in the Complaint and ignores the 2nd demand of the Complaint, below.

Wherefore, Plaintiff asks the Court for Judgement in the amount \$10,728.02, plus legal fees, court costs, costs of service, accruing interest from the date of Judgment,

Further, the Plaintiff asks that the Court order that the consensual lien be enforced through the foreclosure on the Property, and any other relief that this Court deems just and proper.

As to the process and what is required for foreclosure, Appellee ignores 28 U.S.C 2001 (a) in conjunction with D.C. Superior Court Rule 308. **Such sale shall be upon such terms and conditions as the court directs.**

Appellee's issues II and III regarding Due Process and their argument that they did not make a general appearance states that they never filed a Responsive Pleading. Appellee is adamant that no Responsive Pleading was filed. Appellee says that Appellee only filed an Opposition to Appellant's Motion for Interpleader and Declaratory Judgement. By their own admission they are

defeated by Rule 12 as to when a party waives its defenses.

Rule 12 says either:

- a) include the defense in your Responsive Pleading. Appellee absolutely denies filing a Responsive Pleading.
- b) File a Motion. Appellee did not file a Motion challenging lack of jurisdiction or insufficiency of process. Instead of a Motion, Appellee filed an Opposition to Appellant's Motion.

Appellee failed to address this point made in Appellant's brief at page 23.

At page 103 of the Appellant's Appendix, when counsel for Appellee made their appearance, the made no mention of limiting their appearance or a special appearance.

- Substantively, Deutsche Bank submits in its Opposition,
1. an affidavit of an expert challenging the merits of the Appellant's lien rights. See Appellant's App. Page 122 - 128,
 2. then Appellee goes on in its Memorandum supporting its Opposition to the merits of Appellant's lien. See Appellant's App. pages 137 though 139,
 3. And even now in Appellee's Brief at pages 13 though 18, they are challenging Appellant's lien rights, which again is not even an issue raised by Appellant on appeal.

Appellee went far beyond arguing due process in its Opposition by questioning the merits of Appellant's lien.

Appellee's issue V is addressed by the Court's ruling of

December 9, 2020, "Ordered that the Status Hearing set for December 11, 2020 is vacated and it is further Ordered that this matter is now closed." This was the final order and the time to appeal is 30 days from hence, Rule 4(a)(1) *Time for Filing a Notice of Appeal*. Appellant did ask the Court to Reconsider. As of today there is no indication that the Court is willing to reconsider. The Superior Court never ruled on the request, and thus final order was December 9, 2020.

What Duetsche does not address is its conflicted position of its own case against Betty Murray in 2019 CA 005556 R(RP), where they provide no service prior to the foreclosure, and only after the sale some limited form of notice with only 14 days to object - as compared to the service provided prior to the sale by Appellant and a full time and opportunity to object. And in the present case, the conflict between creditor is real as shown by the Appellee's argument as to Appellee lien rights, and thus is ripe for a ruling.

A ruling prior to the sale would be a savings in time and energy by the parties and the Court and would give more clarity to the bidders at the foreclosure.

The Appellee did not file its own appeal and the issues it is arguing are not the same issues that the Appellant filed the appeal on.

Argument

1. Whether the Superior Court erred in not determining the priority rights of creditors prior to a public foreclosure sale on Defendant's real estate?

On page 6 of Appellee's Brief, the Appellee is correct about the Appellant's repeated reference to "Foreclosure."

The title of the Appellant's Complaint itself says, "Action Involving Real Estate"

The Appellant asked in the Complaint "that the Court order that the consensual lien be enforced through the foreclosure of the Property."

The consensual lien referenced is the Appellant's lien filed in the land records and which the Appellee attached a copy in their Opposition to argue the merits of in the lower court.

- a) Declaration of Covenants at Appellant's App. 107 which was included as part of Appellee's Opposition to Appellant's Motion,
- b) the Appellee's proposed expert's affidavit regarding the lien at Appellant's App. 128,

both of which were included in Appellee's Opposition at

Appellant's App. 129.

And, if you read the transcript from January 31, 2020 at page 21, the Court says "So, as to the, not being familiar with a situation like this, how do you propose that we go about dealing with the matter of the foreclosure....."

Even in Appellee's Brief in this Appeal, Statement of Facts, pg. 4-5, they are arguing against the correctness of the Appellant's consensual lien.

Appellant's position is that Rule 308 gives the Court the authority to determine the priority rights of creditor prior to a public sale.

Appellee cites Rule 308 where they concluded that "Any person receiving notice of the sale thus has notice ... and should thus appear and protect their interest by bidding or otherwise..." But this "notice" takes place after the foreclosure.

In the present case, all of the creditors received notice before the proposed foreclosure. Otherwise, Appellee would not have this opportunity to object to the Appellant's lien priority.

The Appellee failed in their Brief to address the fact that in their case against the same defendant, Betty Murray, and regarding the same property, they make NO allowance for notice before the sale. See 2019 CA 005556 R(RP). In Appellee case, "Any person" means anyone lucky enough to read the back page of the local newspaper of the Notice by Appellee can "appear and

protect their interest by bidding or otherwise....”

Appellee fails to address how Deutsche Bank has 2 separate law firms arguing exact opposite positions.

Appellant cites Rule 308 for the power of the Court to conduct such sales “...upon such terms and conditions as the court directs.”

Rule 308. Court Sale of Real and Personal Property states, This court shall be governed by the provisions of Title 28 Section 2001.”

(a) Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. **Such sale shall be upon such terms and conditions as the court directs.**

Appellee argues on page 7 of its Brief that Rule 308 does not specifically allow for pre sale determination. But of course Rule 308 does not preclude the determination either. The language of Rule 308 is broad.

On page 7, Appellee is arguing that Appellee should file an action to Quiet title. In Appellee’s case 2019 CA 005556 R(RP), Appellee proposes no such thing.

On page 8 of the Appellee's Brief it is argued that there is no law for foreclosure of a money judgment and refers to fieri facias.

This statement totally ignores the Appellant's consensual lien that the Appellant has against Betty Murray's real property. Appellee fails to explain why Appellant cannot pursue foreclosure on Appellant's consensual lien, and yet Appellee is pursuing foreclosure based on a consensual lien in their case 2019 CA 005556 R(RP). Further, Appellee is contradicted by their own Statement of Fact at page 4-5 of their Brief that the Appellant's consensual lien was not property recorded. If Appellant does not have a consensual lien, then why are they arguing it was not properly filed?

On page 6 of the Appellee's brief they have misconstrued 28 U.S.C. §2001 by saying "The only additional "procedure" provided in Section 2001 is the requirement of a hearing if Southern Court chooses to sell via private sale." Private sales are referred to in 2001(b). Appellee has decided to **ignore** 2001(a).

§ 2001 (a) addresses public sales in which "such sales shall be upon the terms and conditions as the court directs."

The Court has the authority to determine the priority rights of creditors prior to foreclosure as a "term and

condition" to the sale.

2001 (a) Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. Such sale shall be upon such terms and conditions as the court directs.

And to be clear, the Appellant is asking for a public sale.

However if you look at 2001(b) all that is required in a private sale is notice and a hearing before the sale. No separate summons, no Complaint or Motion to Quiet title, and no Rule 4 service. And would not the standard for a private sale be higher than a public sale? In a private sale the hearing is **before** the sale.

So if a hearing before the foreclosure is an acceptable term and condition for a private sale, why cannot the Court via

1. Notice (Appellant's Motion for Interpleader and Declaratory Judgment),
2. Service as per the Affidavit of Service (Appellant's App. Pg. 72-104), and
3. a hearing determining creditor right **before** a public sale?

The justification for deciding the priority of the creditors before the foreclosure is all the more pertinent as Deutsche has already raised the objection to Appellant's priority this objection is the basis of the Appellant's Motion for Interpleader and Declaratory Judgment.

Please see Deutsche's Opposition to the Appellant's Motion filed on June 19, 2019, in which is attached an affidavit of their proposed expert, Nathan Bresee, claiming the Appellant's filing in the land record is not valid (A103-128). So the dispute over the creditors' priority is already present and ready to be decided.

28 USC § 2001 (b) addresses the procedure for a private sale.

(b) **After a hearing**, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale....

(Emphasis added)

In contrast, the only thing Deutsche is saying it is required to do in its case against Betty Murray is, following the foreclosure, to send "[A] copy of the [Trustee's Deed], a proposed accounting and distribution of funds, a proposed order ratifying the distribution, and 14 days to object. No Rule 4 personal service, no certified mail, and no Complaint filed to included third party creditors.

2. Whether the Superior Court erred in finding the Plaintiff's Motion for Interpleader and Declaratory Judgement is not an appropriate vehicle to resolve lien holders' right prior to a

foreclosure sale?

Appellee has no law or case that prohibits the Court from setting the conditions of sale. It is to the interest of the creditors, the interest of potential buyers, and judicial resources when there is a possible, and in this case definite, disagreement as to the creditors rights for the Court to make a determination prior to the foreclosure sale in order for there to be an efficient and effective sale of the Property.

On page 8 of their Brief, Appellee argues it has no claim against the Appellant and that there is no allegation of a "competing claim".

We know that the Plaintiff's Motion for Interpleader and Declaratory Relief at page 26 of Appellant's App. paragraph 12, and 13 specifically state that the rights of the parties to the priority of the proceeds is at issue. And Par. 14 states the liens against the Property exceed the value of the Property, so the property is underwater and some creditors are going to be unpaid.

Plaintiff's Motion for Interpleader and Declaratory Relief pleads the following:

12. *Upon review of the title report there are numerous creditors. See attached abbreviated title report and related documents.*

13. *The rights of the parties to the priority of the*

proceeds of the foreclosure sale is at issue.

14. The amount of liens against the Property exceeds the value of the Property.

Wherefore, the Plaintiff asks for a ruling on the priority of the creditors' claims against the proceeds of the foreclosure sale based on the common law rule of 'first in time, first in right', with the exception of the claims of the District of Columbia.

The Rule 22 requirement was plead in the Appellant's Interpleader as to Southern Courts priority claim being exposed to other creditors and well as sufficient grounds for a Declaratory Judgement.

If there is any doubt as to a conflict and the ripeness for a decision, read:

1. the Appellee's Statement of Facts, which is a restatement of their Opposition at page 2 of their Memorandum,
2. their proposed expert's affidavit attached to their Opposition as to Appellant's consensual lien, and
3. part III of their Appeal Brief titled "Southern Court's claim to First Priority Position Has No Substantive Merit."

Appellee argues on page 9 of its brief under Rule 22 that "these new parties have no claims against Southern Court," but the language of Rule 22 says that persons with claims (i.e. claim by Deutsche having a superior right to the proceeds of the

Property) that may expose Southern Courts to liability. It is this possibility of liability that allows the Appellee to be joined.

If Southern Courts is the successful bidder at the auction the Appellant would be exposed the Deutsche's alleged superior standing. Not only is it a possibility, but it is a realty right now. The Motion for Interpleader and Declaratory Judgment would allow the Court to decide with a declaratory judgement the rights and obligations of each party.

Rule 22 is appropriate to this case. Rule 22 states,

"Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead.

3. Whether the Superior Court erred in finding it has no authority to adjudicate the rights of Deutsche Bank, a lender to the defendant?

The Superior Court's focus was on Deutsche Bank not being a party. In Appellee's brief they make no argument against them having waived this defense when they filed their Opposition to Appellant's Motion for Interpleader and Declaratory Judgment.

Appellee waived these defenses by not either:

1. filing a Motion objecting to jurisdiction and/or process,
- or
2. file a Responsive Pleading which Appellee states strongly it

never filed.

Deutsche did not file a Motion asserting the following defenses.

Rule 12(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

- (1) lack of subject-matter jurisdiction;
- (2) lack of personal jurisdiction;
- (3) [Omitted];
- (4) insufficient process;
- (5) insufficient service of process;

Since Deutsche failed to file a Motion under 12(h) (1) (B) (i) and by their own admission their Opposition is not a responsive pleading 12(h) (1) (B) (ii), they waived their defenses.

Rule 12 (h) (1) states,

(h) WAIVING AND PRESERVING CERTAIN DEFENSES.

(1) When Some Are Waived. A party waives any defense listed in Rule 12 (b) (2) - (5)

by:

(A) omitting it from a motion in the circumstances described in Rule 12 (g) (2); or

(B) **failing to either:**

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a) (1) as a matter of course.

(Emphasis added)

Even if the Court found that Appellee did not waive service of process, Appellant served under Rule 4 notice to all creditors and property holder The Motion for Interpleader and Declaratory Relief, Proposed Order, Memorandum of Points and Authority, Order Granting Plaintiff's Second Renewed Motion for Default Judgment, and attachment of various Deeds, Deeds of Trusts, and Judgement.

And all parties had months to file objections.

Appellee on page 11 of their Brief states, "Service under rule 4 requires a summons ..."

Appellee fails to address the Appellant's argument under Rule 4(n) (1) *Jurisdiction over Property or Assets*.

There is alternative language in Rule 4n(1) "as provided in the statute". Notice is being given under the statute Title 28 Section 2001 "terms and conditions as the court directs". Although not directly on point, for private sales section (b) only required "notice" and Rule 308 which only requires for a public sale publication "once a week for 4 weeks in a daily newspaper...."

Rule 22 does require service of process. Black's Law Dictionary defines service of process as "The service of writs, complaints, summons, etc." Service of process does not require a complaint or summons, but these are examples of the type of pleadings that are typically served.

Further, most of the creditors including the Appellee were out of state. See Appellant's Affidavit of Service. See Appellants App. Pages 72-76.

And the Notice via Motion for Interpleader and Declaratory Judgement was served on Appellee, who is out of state. See page 95 of Appellant App. Certificate of Service and Evidence of Delivery on May 4, 2020.

The Notice requirement was met as permitted under Rule 308 and 28 USC 2001.

Rule 4.(a)(3) *Service Outside the District of Columbia Service in Seeking Seizure of Property in the District of Columbia.* A summons, **or notice**, or order should correspond as nearly as possible to the requirements of the statute or rule

(3) Service Outside the District of Columbia; Service in Suit Seeking Seizure of Property in the District of Columbia. A summons, **or notice**, or order in lieu of summons should correspond as nearly as possible to the requirements of a statute or rule whenever service is made pursuant to a statute or rule that provides for:

(A) service of a summons, **or notice**, or order in lieu of summons on a party not an inhabitant of or found within the District of Columbia; or

(B) service on or **notice** to a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the District of Columbia.

(Emphasis added)

Rule 4 (a)(4) allows for service via **certified mail** "Any defendant described in Rule 4(e), (f), (h),"

Rule 4(h) describes the method of *Serving a Corporation, Partnership or Association.*

Appellee is a Corporation. See the Certified Mail Receipt *Id.*

Finally in its order of March 18, 2020 the Superior Court specifically allowed for additional time to Serve the Interpleader. Appellant's App. Page 54.

If there is an issue of lack of notice as discussed in Appellee's brief at pages 11 and 12, we would simply ask the Court for additional time.

4. **Regardless of the Appeal Court ruling on issues 1, 2, and/or 3, whether the Superior Court erred vacating the status hearing on December 11, 2020, and closing the case without a ruling when the Plaintiff had pending its demand per its Motion for Default Judgement the sale of Property?**

The Appellant's position is that it is entitled to the enforcement of the demand in the addendum clause of the Complaint for Foreclosure on the consensual lien which states,

Further, the Plaintiff asks that the Court order that the consensual lien be enforced through the foreclosure on the Property, and any other relief that this Court deems just and proper.

The Appellant asks the Appeals Court to remand the matter back to the Superior Court to be set for status hearing regarding the foreclosure on the Property, and that the Court schedule discovery to decide the priorities of the parties claims against the Property prior to the foreclosure sale.

/S/ Arthur Lander

Arthur Lander
Counsel for Appellant
D.C. Bar No 421860
300 N. Washington St. #104
Alexandria, VA 22314
law@businesslegalservicesinc.com
703-486-0700

Certificate of Service

A copy of the Reply Brief for the Appellant was mailed postage prepaid first class on June 16, 2021 and via email to:

Mark Schweitzer, Esq.
Greenan & Lynch, PA
Deutsche Bank National Trust Company (Trustee)
HSI Asset Securitization Corporation
6411 Ivy Lane #200
Greenbelt, MD 20770
mschweitzer@mhlawyers.com

and mailed to prepaid 1st class:

Betty Murray
4633 6th St. SE
Washington DC 20032

/S/ Arthur Lander

Arthur Lander