No. 88853-1

SUPREME COURT
OF THE STATE OF WASHINGTON

BANK OF AMERICA, N.A.,

Petitioner,

vs.

MICHAEL FULBRIGHT, et ux.,

Respondents.

AMICUS MEMORANDUM OF AMERICAN COLLEGE OF MORTGAGE ATTORNEYS IN SUPPORT OF PETITION FOR REVIEW

Re: Published Decision of
the Court Of Appeals (Division One) No. 67608-3-I

Douglas J. Smart
GRAHAM & DUNN
Pier 70
2801 Alaskan Way ~ Suite 300
Seattle, Washington 98121-1128
(206) 340-9829
dsmart@grahamdunn.com

Attorneys for American College of Mortgage Attorneys

TABLE OF AUTHORITIES

Cases

First Nat. Bank & Trust Co., Woodbury v. MacGarvie
22 N.J. 539, 126 A.2d 880 (1956) 9

Geo. M. McDonald & Co. v. Johns
62 Wash. 521, 523 P. 175 (1911) 6

Hart v. Peoples Nat'l Bank
91 Wn.2d 197, 588 P.2d 204 (1978) 4

Malm v. Griffith
109 Wash. 30, 186 P. 647 (1919) 10

Salsberry v. Ritter
48 Cal. 2d 1, 306 P.2d 897 (1957) 9

Scott, et al. v. Patterson
1 Wash. 487, 20 P. 593 (1889) 7

Skach v. Sykora
6 Ill.2d 215, 127 N.E.2d 453 (1955) 8

Summerhill Village Homeowner's Association v. Roughley
166 Wn. App. 625, 270 P.3d 639,
amended, ___ Wn. App. ___, 289 P.3d 645 (2012) 3

United States v. Ellis
714 F.2d 953 (9th Cir. 1983) 9

Statutes

RCW 6.23.010 2

RCW 6.23.020(1) 2

RCW 61.12.093 2

RCW 61.24.050(1) 10

RCW 64.34.364(1) 3

RCW 64.34.364(5) 9

RCW 64.34.364(9) 9

RCW 65.08.070 7

Laws

Session Laws of 1869-1875, ch. 32, § 365 5

Laws of 1899, ch. 53, § 7 5

Laws of 1987, ch. 442, § 701 5

Laws of 2013, ch. 53, § 1 (SB5541) 5

Other Authorities

Statutory Redemption Rights, 3 Wash. L. Rev. 177 (1928) 8

This case, *BAC Home Loan Servicing, LP v. Fulbright*, ___ Wn. 2d ___, 298 P.3d 779 (2013) ("*BAC Home Loans*") arises from a very simple fact pattern.

A condominium association had been formed by the recording of its condominium declaration. One of the residential "units" created by the formation of the condominium was later sold to a consumer, who financed the acquisition of her unit with a $277,000 mortgage loan from an institutional lender, Bank of America. The home mortgage[1] was duly recorded. The homeowner later defaulted on her condominium dues. The condominium association elected to bring a judicial foreclosure of their lien and obtained a judgment of foreclosure. A sheriff's sale was held, and the unit sold to a third-party bidder, Fulbright, for only about $14,500, being the assessment amount plus attorneys' fees and costs.

It is uncontested that the purchase money mortgage held by the consumer's lender, Bank of America, had been extinguished by the association's foreclosure sale. Under the Condominium Act, if a condominium association elects to judicially foreclose its lien for homeowners' assessments, the association's lien priority (for up to six months of assessments) is measured from the original date when the

[1] For ease of discussion, the word "mortgage" will include deeds of trust, except when the context otherwise requires

condominium was created (by recordation of its declaration).[2] Bank of America, whose own lien priority was measured from the subsequently-occurring recordation of its mortgage, was junior to the association's lien, and thus the mortgage was extinguished. The mortgage lender made a timely effort to redeem, but this was resisted by the successful bidder at the sheriff's sale, Fulbright.

The issue was put to the Superior Court, which ruled for Fulbright. The Court of Appeals affirmed and held that the purchase money mortgage lender, Bank of America, was not a qualified "redemptioner" under Washington's redemption act, RCW 6.23.

The redemption act provides for a redemption period following a sheriff's sale conducted under a judicial foreclosure. During this period (usually one year),[3] certain "redemptioners" have the right to redeem the foreclosed property by paying the successful bidder the amount of his/her bid, with interest. Until its very recent one-word amendment,[4] the redemption act, at RCW 6.23.010, defined "redemptioners" as the judgment debtor and any "creditor having a lien by judgment, decree, deed of trust, or mortgage . . . subsequent in time to that on which the property was sold."

---

[2] RCW 65.34.364.

[3] RCW 6.23.020(1) (one year or in some cases eight months); see also RCW 61.12.093 (abandonment by mortgagor).

The Court of Appeals found that Bank of America could not redeem in this case because its purchase money mortgage was not "subsequent in time" to the foreclosed homeowners association lien. This finding was based on the same rationale as in a "factually similar" case decided last year by the Court of Appeals, *Summerhill Village Homeowners Association v. Roughley*[5] ("*Summerhill*"). Indeed, *Summerhill* involved virtually the same fact pattern, albeit a different mortgage lender, GMAC. *Summerhill* found that redemption act's wording -- "subsequent in time" -- referred to the date when a lien is "acquired" or "arise[s]."[6] The Court found in this case, *BAC Home Loans*, that "subsequent in time" referred to the date when a lien "arises," "came into existence" or "first exists."[7]

Both cases also hold that a condominium association's lien for an assessment does not arise until the assessment is due. In each case, the Court of Appeals based this conclusion upon RCW 64.34.364(1), a subsection of the Condominium Act which states that the condominium association "has a lien on a unit" for unpaid assessments "from the time the assessment is due." Since the mortgage was created before the

---

[4] Laws of 2013, ch. 53, § 1 (SB5541)
[5] *Summerhill Village Homeowner's Association v. Roughley*, 166 Wn. App. 625, 270 P.3d 639, amended ___ Wn. App. ___, 289 P.3d 645 (2012).
[6] 289 P.3d at 648 and fn. 7.
[7] 298 P.3d at 780, 781, 782.

particular delinquent assessments first became due (as will invariably be the case for a purchase money lender), the Court of Appeals concluded that the assessment lien arose later in time, and the lender had no redemption rights, at least under the Court of Appeals' analysis of the words "subsequent in time" in the redemption act.

The Court of Appeals' analysis was erroneous, because, among other reasons, the Court failed to see the obvious ambiguity in the redemption act's phrase "subsequent in time." **Time of what?**

The ambiguity of "subsequent in time" is that it could refer either to the point in time at which a lien arises, or the point in time from which its priority is measured -- which, under real property law, are not necessarily the same points in time.

The Court of Appeals should have acknowledged this statutory language for what it was – a simple ambiguity – and then should have interpreted the statute in light of its legislative purpose. *Hart v. Peoples Nat'l Bank*, 91 Wn.2d 197, 208, 588 P.2d 204 (1978) (if an act is subject to two interpretations, that which best advances the legislative purpose should be adopted). Such a proper analysis leads to only one conclusion: That the words in question, "subsequent in time," were always intended by the legislature to refer to the time from which the priority of each particular lien is measured. The recent one-word amendment to the

redemption act, clarifying that "subsequent in time" means "subsequent in priority,"[8] only confirms what the redemption act has meant all along.

The words "subsequent in time" can be traced to Washington State's original 1899 version of the redemption act.[9] Moreover, a virtually identical definition of "redemptioner" can be seen in Washington's territorial laws, *circa* 1869-1875.[10] Both before and after statehood, Washington's statutes defined "redemptioners" as the judgment debtor and any "creditor having a lien by judgment, decree or mortgage[11] . . . subsequent in time to that on which the property was sold."

What point in time did those early legislative words, "subsequent in time," mean to refer to? Under Washington real property law, then and now, the point in time at which a lien "arises" (exists, is created, attaches), and the point in time from which its priority is measured -- are <u>not necessarily</u> the same point in time.

This can be illustrated by a very simple example: Assume that a debtor executes, acknowledges and delivers a mortgage against his real property on Day 1 in favor of Lender A. Debtor executes, acknowledges and delivers another mortgage against the same property on Day 2, in

---

[8] Laws of 2013, ch. 53, § 1 (SB5541)
[9] Laws of 1899, ch. 53, § 7 (Tab 2 of the Appendix)
[10] Session Laws 1869-1875, ch. 32, § 365 (Tab 1 of Appendix)
[11] The words "deed of trust' were added in front of the words "mortgage" by Laws of 1987, ch. 442, § 701 (Tab 3 of Appendix).

favor of Lender B. Each mortgage was given for good and valuable new consideration. Lender B records its mortgage first, on Day 3, without knowledge of Lender A's mortgage. Lender A records its mortgage on Day 4.

Under this fact pattern, there is no question in Washington but that Lender A's mortgage was the first to "arise," the first to "exist," the first to "attach" to the land. A mortgage exists when it has been executed and delivered to the creditor ("mortgagee") by the person who owns the real estate interest being mortgaged ("mortgagor"). As between the mortgagee and mortgagor, recording is not necessary to create a mortgage lien enforceable against the mortgagor and his/her real property. As the Washington Supreme Court said in 1911, and as is true today:

> The doctrine of mortgages was originally, of course, purely equitable, and is yet as between the mortgagor and the mortgagee; and as between them it makes no difference whether the mortgage is recorded or not. The recording statutes were for the purpose, as is universally understood now, of giving constructive notice to innocent purchasers and incumbrancers.

Geo. M. McDonald & Co. v. Johns, 62 Wash. 521, 523, 114 P. 175 (1911) (emphasis added).

Under the same fact pattern, however, it is also true that the mortgage of Lender A, although attaching to the land (arising, created) one day before Lender B's mortgage, would still be junior in priority to

Lender B. Because Lender B had no knowledge of Lender A's mortgage and is thus a bona fide purchaser or mortgagee under Washington's race-notice recording statute,[12] the time from which priority is measured would be the respective recording dates of the two mortgages, not the dates when the mortgages were created. Lender B, as a bona fide mortgagee who recorded without notice, clearly would have the senior lien, even though Lender A's mortgage was created first.

As in this example, there can indeed be a difference between the point in time at which a lien "arises" (exists, is created, attaches), and the point in time from which its priority is measured. Which point in time did the Washington legislature intend to refer to?

Again, in cases of statutory ambiguity, the purpose of the enactment is the best guide. *Hart v. Peoples Nat'l, supra.* Early on, the benevolent legislative purpose of statutory redemption was described in *Scott et al. v Patterson*, 1 Wash. 487, 489, 20 P. 593 (1889), as follows:

> *There is to our mind but little force in the contention of appellant, who relies upon the principle that redemption is a statutory creation, and must be strictly pursued. While this is true, it is also equally true that such statutory provisions are somewhat allied to those of exemption, and the same liberal rule of construction, for analogous reasons, should be applied to both. They are of a benevolent character, and in each the main object is the prevention of oppression or sacrifice of an unfortunate debtor. (emphasis added).*

---

[12] RCW 65.08.070.

If the intent of having a redemption period following a judicial foreclosure is to benefit the debtor, why then has Washington always given "redemptioner" status not only to the debtor, but also to mortgages or judgment liens "subsequent in time" to the lien on which the debtor's property was sold by the sheriff? The answer, which is particularly apt when the lien being judicially foreclosed is a relatively small amount (like mechanics liens, small consumer debts or condominium dues), is that redemption rights will force the purchaser to either bid an amount close to the fair market value of the property, or face the likelihood that junior-priority lienors, although extinguished by the judicial sale, will exercise their redemption rights to buyout the purchaser for any patently below-market bid. The salutary effect is to have an amount approaching fair market value of the debtor's real property "pay as many of his liabilities as possible." *Note, Statutory Redemption Rights*, 3 Wash. L. Rev. 177 (1928), at p. 177 (emphasis added). As astutely observed in *Skach v. Sykora*, 6 Ill. 2d 215, 127 N.E.2d 453, 456 (1955) and echoed in decisions of those states, including Washington, which have redemption statutes:

> *The purpose of the redemption statute is to give the debtor time and opportunity to avoid the loss of his property and to give his other creditors an opportunity to collect their debts from any surplus over the [foreclosed] debt. The statutes are not intended to take the landowner's property unjustly or for an inadequate consideration. . . . The statute contemplates redemption where the value of the property exceeds the sale price. The purchaser knows*

> *this when he makes his bid, whether he is the mortgagee or a stranger, and when he is repaid all that the statute allows upon redemption, that is all he is either legally or equitably entitled to receive. (emphasis added)*

Interpreting the "subsequent in time" language to refer to the time of priority fully effectuates this salutary purpose.[13]

Moreover, when the Condominium Act was enacted in 1990, there were clear indications of legislative intent to preserve the unit mortgagee's redemption rights in any judicial foreclosure of the association's super-priority assessments. RCW 64.34.364(9) expressly refers to the "period of redemption" that will apply in the association's judicial foreclosure of its assessment liens. Further, RCW 64.34.364(5) expressly abrogates the association's super-priority over mortgages if the association elects to foreclosure its assessments lien non-judicially under RCW 61.24 (where redemption rights do not exist) rather than judicially under RCW 61.12 (where redemption rights do exist). The legislative objective in this cannot be missed: If the unit is sold at a judicial foreclosure sale for the typical relatively small amount of six months' dues, then the redemption act's salutary purpose should come into play, allowing the extinguished

---

[13] *United States v. Ellis*, 714 F.2d 953, 956 (9th Cir. 1983) (applying Washington law) ("redemption rights . . . force the sale price closer to the true market value"); see also *Salsberry v. Ritter*, 48 Cal. 2d 1, 306 P.2d 897, 902 (1957) ("one of the primary purposes"); *First Nat. Bank & Trust Co., Woodbury v. MacGarvie*, 22 N.J. 539, 545, 126 A.2d 880, 883 (1956) ("drive the sale price at foreclosure to an amount approximating

mortgage lender to redeem, payout the bidder and apply the full property value to its mortgage loan, thereby reducing the overall debt burden of the debtor. On the other hand, if the association elects to foreclose non-judicially where there are no redemption rights (RCW 61.24.050), then there is no super-priority, the lender's mortgage lien is not disturbed, and the lender will still have recourse to its mortgage security (the unit), again reducing the overall debt burden of the debtor. It is thus unimaginable that the 1990 legislature understood "subsequent in time" in the same constrictive way as the Court of Appeals, so that purchase money mortgages would not have redemption rights in any condominium assessment foreclosure. If that were true, the only liens with such rights would be judgments or mortgages (e.g., hard money mortgages) filed against a financially distressed unit owner at the proverbial "last minute," after he or she has already defaulted on their condominium dues.

For the foregoing reasons, this Court should reverse.

DATED this 7th day of July, 2013.

GRAHAM & DUNN PC

By _____
Douglas J. Smart WSBA# 8579
Attorneys for American College of Mortgage Attorneys

---

fair value"). See also *Malm v. Griffith*, 109 Wash. 30, 33, 186 P. 647 (1919) (mortgage created before but recorded after another was "in effect, subsequent in time").