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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEUTSCHE BANK NATIONAL)
TRUST COMPANY, AS)
TRUSTEE FOR MORGAN)
STANLEY ABS CAPITAL I)
INC. TRUST 2005-HE2,)
Plaintiff-Below))
Appellant,)
v.	No. 506, 2012
)
NANCY GOLDFEDER c/o)
EMIL MIKHAIL, Guardian ad)
Litem,)
Defendant-Below)
Appellee.)

APPELLEE'S ANSWERING BRIEF

Appeal from the Superior Court for New Castle County (The Honorable Mary M. Johnston)

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TABLE OF CONTENTS

Table of	of Authorities	iii
Nature	of the Proceedings	1
Summa	ary of Argument	2
Statem	ent of the Facts	4
Argum	ent	9
I.	The Superior Court properly set aside the Sheriff's sale in light of Defendant's incompetence, lack of actual knowledge of the Sheriff's sale and lack of prejudice to the plaintiff	9
	A. Question Presented	9
	B. Standard and Scope of Review	9
	C. Merit of Argument	10
II.	Superior Court has authority to consider a motion to set aside a Sheriff's sale after Confirmation when notice to the defendant is deficient	13
	A. Question Presented	13
	B. Standard and Scope of Review	13
	C. Merit of Argument	14
	Defendant's delay was reasonable under the circumstances	14
	2. Plaintiff improperly provided this Court with documentation outside of the scope of the lower court's record	15

III.	Plaintiff failed to comply with the notice requirements of Superior Court Civil Rule 96(g)	18
	A. Question Presented	18
	B. Standard and Scope of Review	18
	C. Merit of Argument	18
Conclu	sion	23

TABLE OF CITATIONS

Cases

<i>Burge v. Fidelity Bond and Mortgage Co.</i> , 648 A.2d 414 (Del. Super. Ct. 1994)
Deibler v. Atlantic Properties Group, Inc., 652 A.2d 553 (Del. 1995)
Firestone Tire & Rubber Co. v. Adams, 541 A.2d 567 (Del. 1988)
Fitzsimmons v. New Castle County, 827 A.2d 30 (Del. 2003)
Household Bank v. Daniels & Clark, 2005 WL 1953035 (Del. Super. Ct.)
Shipley v. New Castle County, 975 A.2d 764 (Del. 2009)
Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361 (Del. 1995)
Rules
Superior Court Civil Rule 69(g)

NATURE OF THE PROCEEDINGS

This is the Defendant-Below (now Appellee), Nancy Goldfeder c/o Emil Mikhail, Guardian Ad Litem's Answering Brief to the appeal by the Plaintiff- Below (now Appellant) seeking review of an Order of the Superior Court for New Castle County dated August 23, 2012 granting Defendant's Motion to Vacate Sheriff's Sale, Vacate Confirmation and Set Aside Sheriff's Sale in an *In Rem Scire Facias Sur* mortgage action.

SUMMARY OF ARGUMENT

- 1. Denied. The Superior Court had broad discretion to set aside the Sheriff's Sale. Plaintiff did not establish actual service of the Defendant or comply with the notice requirements of Superior Court Rule 69(g) that required separate notice to the owner of the property as well as any tenant.
- 2. Denied. The Superior Court has broad discretion to set aside the Sheriff's Sale based on the totality of the circumstances. The Superior Court reasonably concluded that the delay in disputing the sale was caused by lack of actual notice, the Defendant's inquiry with the State of Delaware Department of Justice, and the Defendant's infirmity that necessitated a Guardian ad Litem to pursue this action.
- 3. Denied. The Superior Court properly set aside the sale based on the totality of the circumstances, the lack of actual service, and the Defendant's infirmity that necessitated a Guardian ad Litem to pursue this action. The Superior Court also concluded that there

was only limited prejudice to the Plaintiff based on what had transpired following the subject sale. Furthermore, the Plaintiff failed to comply with Superior Court Rule 69(g), which required separate notice being provided to the Defendant, who was the record owner of the property.

STATEMENT OF THE FACTS

Defendant Nancy Goldfeder ("Ms. Goldfeder") has been a patient of Dr. Emil Mikhail ("Dr. Mikhail") since 2000 with various diagnoses, including dementia. (B- 8) In January, 2012, Dr. Mikhail became aware of notices posted on Ms. Goldfeder's real property located at 1610 N. Union Street (the "Property"). (B-3) The notices claimed that the Property had been sold at "Trustee's Sale" and that Bank of America was the owner. (B-72, B-73) Dr. Mikhail was concerned because he felt that Ms. Goldfeder was incapable of handling her financial affairs due to her dementia, and he filed a complaint with the office of the Attorney General on January 24, 2012. (B-93, B-94)

Dr. Mikhail eventually learned that Deutsche Bank National Trust Company, as Trustee (not Bank of America), had foreclosed on a 2004 mortgage, resulting in a Sheriff's Sale in November 2012. (B-3, B-4) Dr. Mikhail obtained a copy of the 2004 mortgage, and became convinced that the lender had taken advantage of Ms. Goldfeder, as the terms of the 2004 mortgage were very onerous. (B-6) Dr. Mikhail

concluded that Ms. Goldfeder had been a victim of predatory lending in 2004. (B-6)

For instance, according to a notice from Wilmington Trust Company, dated September 21, 2004, Ms. Goldfelder's principal balance was only \$100,061.61, and the interest rate on her 1999 conventional ARM was scheduled to decrease to 5.125% in 2004. (B-50) Despite the decreasing interest rate, Ms. Goldfeder was convinced to pay off her 1999 conventional ARM with a new loan. Plaintiff's new 2004 mortgage with Home Funding Direct (the one at issue in this action) started with an interest rate of 8.999% and a principal balance of \$177,100.00. (B-24, B-42) All of the ARM terms (change dates, frequency of changes, change caps, life of loan change caps, margins, index) in the 2004 mortgage were far more detrimental to Ms. Goldfeder in the 2004 loan as compared to the prior 1999 conventional ARM. (B-4) Had Ms. Goldfeder been competent, it is likely she would not have refinanced in 2004.

Dr. Mikhail attempted to protect Ms. Goldfeder in light of the public known concerns with the sub-prime lending market, leading to

the real estate and banking crashes of the late 2000s, and he filed a complaint with the Attorney General's Office. (B-94) When the Attorney General did not act, Dr. Mikhail moved to be appointed Ms. Goldfeder's Guardian Ad Litem for this litigation on July 5, 2012. (B-1 to B-4) The Superior Court granted the Guardian Ad Litem Motion on July 26, 2012. (A-2)

On August 9, 2012, Dr. Mikhail filed his Motion to Vacate Sheriff's Deed, Vacate Confirmation and Set Aside Sheriff's Sale (the "Motion"), asserting, among other things, that plaintiff failed to comply with Superior Court Rule 69(g) ("Rule 69(g)") in failing to properly send a Notice to Lien Holders, Tenants, Record Owners, and Persons Having an Interest of Sheriff's Sale. (B-54 to B-97)

Specifically, the plaintiff sent just one Notice of Sale to "Nancy Goldfeder and/or Occupant/Tenant, 1610 N. Union Street, Wilmington, DE 19806," via certified mail. (B-66) Further, service of process was allegedly accomplished under Superior Court Civil Rule 4(f)(4), with two *non este* returns and an unclaimed certified mail to 1610 N. Union Street. (A-4) The notation on the docket for the April 19, 2011 return of

the Alias process is that Ms. Goldfeder "No Longer Lives Here Per Current Occupants". (A-4)

However, in the body of the foreclosure Complaint, the plaintiff alleged that Ms. Goldfeder resided at a different address: 205 E. Ayre Street, Wilmington, DE. (A-6) In fact, Ms. Goldfeder was never personally served with process.

Further, on January 18, 2012, barely two months following the Sheriff's Sale, Bank of America, N.A., claiming to be the "LENDER", sent an OMB Form 1099-A to Ms. Goldfeder, this time addressed to 710 N. West St Apt 10, Wilmington, DE 19801-1576. (B-70) Notice was not properly sent to either address. In fact, plaintiff had two additional, and better, addresses for Ms. Goldfeder and plaintiff should have mailed the Notice of Sale to those better addresses. (B-64 to B-65)

Lastly, plaintiff sent only one certified mail envelope with the Notice of Sale, addressed to both the Occupant/Tenant and to the record owner. (A-19) In failing to send separate notices, plaintiff failed to comply with Rule 69(g).

The Superior Court granted the Motion to Vacate, finding that Ms. Goldfeder's incompetence coupled with a lack of prejudice to the Plaintiff justified vacating the Sheriff's Sale. (Tr. at 9)

ARGUMENT

I. The Superior Court properly set aside the Sheriff's sale in light of Defendant's incompetence, lack of actual knowledge of the Sheriff's sale and lack of prejudice to the plaintiff.

A. Question Presented

Whether the Superior Court properly set aside the Sheriff's sale, where (i) the defendant's incompetence pre-dates the underlying mortgage as well as the sheriff's sale; (ii) where there is no evidence that either the defendant or his subsequently appointed Guardian Ad Litem had actual prior notice of the Sheriff's sale and (iii) where there is no prejudice to the plaintiff.

B. Standard and Scope of Review

The Superior Court has "broad discretion ... to confirm or set aside sheriff's sales. The court's equitable power derives from the inherent control of the Court over its own process 'for the correction of abuses or the prevention of injury." *Burge v. Fidelity Bond and Mortgage Co.*, 648 A.2d 414, 420 (Del. Super. Ct. 1994).

The standard of review for this Court is deferential to the Superior Court's broad discretion to grant Defendant's Motion. *Deibler v.*

Atlantic Properties Group, Inc., 652 A.2d 553, 558-559 (Del. 1995)

("Judicial discretion is the exercise of judgment directed by conscience and reason, and when a court has not exceed the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused."), citing Firestone Tire & Rubber Co. v. Adams, 541 A.2d 567, 570 (Del. 1988); see also Fitzsimmons v. New Castle County, 827 A.2d 30 (Del. 2003) ("This Court applies a deferential standard of review to the Superior Court's determination to deny a motion to set aside a sheriff's sale and such a determination will be set aside only in a case of abuse of discretion.") (citations omitted).

C. Merit of Argument

The Superior Court held that, under the totality of the circumstances, the sheriff sale must be set aside. (Tr. 8-9) Significant to the Court was the incompetence of Ms. Goldfeder and the "relatively limited prejudice" to the plaintiff. (Tr. 9) It does not appear from the transcript that the Court set the sale aside based upon an argument that the Plaintiff failed to comply with Rule 69(g), but rather the Court

properly set the sale aside based upon "unfairness or other extraneous matter demonstrating unfairness to one of the interested parties." *Burge*, 648 A.2d at 420.

Prior to the hearing of August 23, 2012, the Superior Court had heard the defendant's Motion for Appointment of Guardian Ad Litem.

(B-1 to B-53) This motion established that Ms. Goldfeder was not only then currently incompetent to address matters relating to the Sheriff's Sale, but it also alleged that Ms. Goldfeder had been incompetent due to her dementia since 2000. (B-2, B-8 to B-9)

In 2004, Ms. Goldfeder was convinced to refinance her mortgage, to her detriment. The 2004 mortgage, which is being foreclosed upon, contains all the hallmarks of predatory lending. The 2004 mortgage paid off a prior 1999 mortgage, that had an original principal balance of \$106,300. (B-11 to B-21) In the 2004 mortgage, Plaintiff's principal balance started at \$177,100. (B-23 to B-47) The 1999 mortgage was an ARM based upon the US Treasury index with an initial interest rate of 7.0% and no change date for the first 5 years. (B-11 to B-21) The 1999 mortgage had yearly changes after 5 years, a 2% cap on any one change

with a 5% cap overall, and a 3% margin. *Id*. At the time the 2004 mortgage was taken out, the 1999 mortgage was approaching its first change date, and the interest rate was scheduled to *decrease* to 5.125%. *Id*.

The 2004 mortgage is also an ARM, but has an initial interest rate of 8.99%. (B-23 to B-47) The 2004 mortgage is based upon the LIBOR index, with a first change date at 5 years, changes every 6 months thereafter, interest rate change caps over any given 12 months of 3%, and a 7% life of loan cap. *Id*. Most notably, the 2004 mortgage contains a provision that the interest rate could never be lower than the initial rate of 8.999%, and a 7.499% margin. *Id*.

Given the overbearing terms of the 2004 mortgage and Ms. Goldfeder's inability to understand the mortgage, the Superior Court did not abuse its discretion in setting the sale aside for the "correction of abuses or prevention of injury." *Burge*, 648 A.2d at 420.

II. Superior Court has authority to consider a motion to set aside a Sheriff's sale afterConfirmation when notice to the defendant is deficient.

A. Question Presented

Whether the Superior Court has the discretion to consider a motion to set aside Sheriff's sale, filed post confirmation, where the movant alleges a lack of notice of the sale at any time before confirmation occurred.

B. Standard and Scope of Review

The Superior Court has "broad discretion ... to confirm or set aside sheriff's sales. The court's equitable power derives from the inherent control of the Court over its own process 'for the correction of abuses or the prevention of injury." *Burge*, 648 A.2d at 420.

The standard of review for this Court is deferential to the Superior Court's broad discretion to hear and to grant Defendant's Motion.

Deibler, 652 A.2d at 558-559; see also Fitzsimmons, 827 A.2d 30.

C. Merit of Argument

1. <u>Defendant's delay was reasonable under the circumstances</u>.

In an ideal world, applications to set aside Sheriff's Sales would be filed before Confirmation of the sale. Recognizing that the world is not ideal, the Supreme Court has acknowledged that there are times when post Confirmation objections should be heard. Where the trial Court finds a "lack of notice or some other basis to relieve the party of the consequences of unexcused delay", the Court may consider a post Confirmation challenge. *Deibler*, 652 A.2d 553, 556; see also *Shipley v. New Castle County*, 975 A.2d 764, 769 (Del. 2009). Here, the Court had reason to hear Defendant's motion, and by ruling on the merits of the Motion, implicitly concluded the Defendant was reasonably diligent under the circumstances.

Confirmation occurred on December 28, 2011. The Guardian's first inkling that there may have been a Sheriff's Sale was the discovery of notes from Bank of America, dated January 15, 2012 and January 25, 2012, misleadingly identifying Bank of America to be the "owner" of 1610 N. Union Street. (B-72, B-73) It had been impossible for the

Guardian to file a Motion challenging the Sheriff's Sale before

December 28, 2011 because he had no prior knowledge of the Sale. To suggest that a party should file an objection to Confirmation before the Confirmation date, when that party had no knowledge of the Sale, defies logic. See *Shipley*, 975 A.2d at 769.

It is within the discretion of the Superior Court to consider the challenge to the Sale post confirmation, and to consider the defendant's reasons for any delay between the first inkling of the sale (in late January, 2012) and the filing of the Motion for Appointment of Guardian on July 5, 2012. *Id.*; *Deibler*, 652 A.2d at 556.

2. Plaintiff improperly provided this Court with documentation outside of the scope of the lower court's record.

In arguing that there was excessive delay, the Plaintiff has provided this Court with material in the Appendix which was not part of the record below. (A-38 to A-43) Guardian's Motion to Vacate included a 2-page Exhibit H, the cover page and the first page of a Complaint submitted to the Department of Justice on 1/24/12. (B-93 to B-94) However, in its Appendix, the plaintiff has submitted 6 pages (A-

38 to A-43) which the plaintiff incorrectly describes as the defendant's Exhibit H. A simple download from the LexisNexis Superior Court docket shows that the actual Exhibit H which was submitted to and considered by the Superior Court, was only 2 pages.

Further, the second page of the Exhibit H submitted to the Superior Court by Defendant includes handwritten date in the upper right hand corner, and that date is not reflected in plaintiff's Appendix. Compare B-94 and A-39.

Given that A-38 through A-43 are not part of the record submitted to the Superior Court, and that they are therefore not properly part of the record before this Court, Defendant respectfully requests that this Court strike A-38 through A-43 from plaintiff's Appendix, as well as ignoring all references to the same in the Plaintiff's Opening Brief.

In the event that the Court does consider the additional evidence submitted by Plaintiff, Plaintiff's attempt to characterize the body of the Complaint to the Attorney General incorrectly states that the Guardian alleged that "entire loan was paid in full in 2004". Op. Br. 18-19. The Guardian's reference is to the 1999 Wilmington Trust conventional

ARM, which was paid off in 2004, and not to the 2004 predatory loan issued by the plaintiff's assignor.

In granting the defendant's Motion to Vacate, the Superior Court evidently accepted as reasonable the defendant's explanation for the passage of time between January 24, 2012 and July 5, 2012, that he was awaiting action from the Department of Justice. Defendant asserts that there was a very short period of time between the granting of the Motion for Appointment of Guardian ad Litem on July 26, 2012 and the filing of the Motion to Vacate on August 9, 2012. It is within the discretion of the Superior Court to evaluate the reasons for the passage of time and determine whether the passage of time is unreasonable. *Shipley*, 975 A.2d at 769.The Superior Court did not find it unreasonable, and the Court did not abuse its discretion.

III. Plaintiff failed to comply with the notice requirements of Superior Court Civil Rule 69(g).

A. Question Presented

Whether this Court should affirm the Superior Court's ruling to set aside the Sheriff's sale where the record clearly shows that the plaintiff failed to comply with Superior Court Civil Rule 69(g) by not sending notice of the sale separately to both the occupant/tenant of the subject real property and to the defendant.

B. Standard and Scope of Review

The Superior Court did not rule on this issue below. This Court may affirm on any grounds fairly presented to the Superior Court. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995). The interpretation of Superior Court Rule 69(g) is an issue of law, which the Court reviews *de novo. Fitzsimmons*, 827 A.2d at 30.

C. Merit of Argument

The defendant's Motion to Vacate alleges that the plaintiff did not send a Notice of the Sale to the record owner at the record owner's "last

known available or reasonably ascertainable address". (B-57 to B-58) Defendant submits that the Plaintiff did not send a certified mail Notice to the record owner at all. This alternative argument was implicit in the Motion to Vacate, but not addressed at Superior Court oral argument as it was made unnecessary by the Court granting the Motion on the grounds of the incompetence of Ms. Goldfeder, and the lack of prejudice to the plaintiff. However, it is clear from the record that proper notice was not mailed, and defendant submits that this is an alternative ground upon which this Court may affirm the Order below. *Unitrin, Inc.*, 651 A.2d at 1390.

Superior Court Rule 69(g) provides that the plaintiff must send a Notice of the Sale to 4 categories of people or entities:

- (1) Holders of liens;
- (2) Tenants holding or possessing a leasehold estate;
- (3) Record owners;
- (4) Persons having an equitable or legal interest of record.

The Rule contemplates one certified mail envelope being sent to "tenants" at the property address and a second certified mail envelope sent to the record owner.

Here, the plaintiff did not send two separate certified mail envelopes, rather the plaintiff sent one certified mail envelope, addressed to both "Nancy Goldfeder and/or Occupant/Tenant." The mailing is identified by the U.S. Postal Service reference 7011 1570 0000 7678 5012. A-19. Contrary to the requirements in Rule 69(g), plaintiff sent only one certified mail envelope, addressed to both the Tenants and the Owner.

Most notably, the plaintiff had knowledge, at least by April 19, 2010, that the Property was occupied by tenants and that Ms. Goldfeder no longer lived there (A-4). Plaintiff still failed to notify Plaintiff at her best known address.

Even assuming that a tenant remained at the Property as of October, 2011, by the plaintiff sending just one certified mail envelope, if the tenant accepted the certified mail envelope, the postmaster did not have a second envelope to forward to Ms. Goldfeder. Presumably, if

Ms. Goldfeder (or someone acting on her behalf) had been regularly coming to 1610 N. Union Street and picking up mail addressed to Ms. Goldfeder, they would not have received a certified mail envelope addressed to Ms. Goldfeder because the Tenant would have already taken the envelope. The practice of sending just one certified mail envelope, addressed to both the record owner and the occupant/tenant, does not comply with Rule 69(g). In an attempt to save the cost of one certified mailing (\$5.59), the plaintiff effectively sent a Notice to the tenant, but failed to send a Notice to the record owner.

Indeed, given that the plaintiff alleges it had not been able to find the defendant, in the interest of caution and to satisfy Rule 69(g), the plaintiff should have spent an additional \$16.77 and sent three separate envelopes addressed to Ms. Goldfeder: (i) to1610 N. Union Street, Wilmington, DE 19806 (the property address); (ii) to 205 E. Ayre Street, Newport, DE 19804 (the address to which the plaintiff alleged as the defendant's address in the Compliant, A-6), and (iii) 710 N. West Street, Apartment A, Wilmington, DE 19801 (the address to which the plaintiff's servicer sent the OMB-1099 form in January, 2012, only 2

months after the Sheriff's Sale). (B-70) And while Superior Court concluded plaintiff "acted in good faith," it did not act with "reasonable diligence" as required. *Household Bank v. Daniels & Clark*, 2005 WL 1953035, *2 (Del. Super. Ct.) (*see* B-75 to B-81)

Because there was not a separate certified mail envelope directed to the record owner, because plaintiff failed to comply with Rule 69(g), the Superior Court properly vacated the Sheriff's Sale should have been set aside. This Court should affirm the Order of the Superior Court.

CONCLUSION

The Superior Court has broad discretion to set aside a Sheriff Sale. In this instance, based on the totality of the circumstances, the Court concluded that the sale should be set aside, and that decision, for the reasons set forth above, was clearly within the discretion of the Court.

Accordingly, the ruling of the Superior Court should be affirmed.

Respectfully Submitted,

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Dated: January 4, 2013