

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CACH, LLC,)	
)	
Appellant, Plaintiff-Below,)	
)	
v.)	C.A. No. N10A-08-015 WCC
)	
EASTERN SAVINGS BANK, FSB)	
)	
Appellee, Defendant-Below.)	

On appeal from a Decision of the Court of Common Pleas - REVERSED

Submitted: June 29, 2011
Decided: September 30, 2011

OPINION

Patrick Scanlon, Esquire; Law Offices of Patrick Scanlon, P.A., 203 NE Front Street, Suite 101, Milford, DE 19963. Counsel for CACH, LLC.

Brett Bendistis, Esquire; The Matlusky Firm, LLC, 1423 N. Harrison Street, Wilmington, DE 19806. Counsel for Eastern Savings Bank, FSB.

CARPENTER, J.

This appeal from the Court of Common Pleas presents the question of whether the holder of a judgment lien is entitled to have its judgment satisfied out of the proceeds of a foreclosure sale on the affected property where the judgment lien predates the foreclosing mortgage. For the reasons set forth in this Opinion, the Court finds that Delaware law requires the discharge of all general liens on property sold at foreclosure sale when they are senior in priority to the foreclosing mortgage. Accordingly the decision of the Court below is REVERSED.

FACTS

The undisputed facts of this case revolve around residential property located at 19 Sanford Drive in Newark, Delaware (“19 Sanford Drive” or “the property”). On December 7, 2006, the Appellant CACH, LLC (“CACH”) obtained a judgment lien against Aaron Johnson, Jr., (“Johnson”) then the sole record owner of 19 Sanford Drive, to satisfy a deficiency balance on Johnson’s automobile loan. CACH properly transferred the judgment from the Court of Common Pleas to this Court and recorded its judgment as a lien on 19 Sanford Drive on December 21, 2006.

In the meantime, Johnson conveyed the property to himself and his wife Angela Johnson as tenants by the entirety on December 19, 2006.¹ That same day, Johnson and his wife also mortgaged the property to Eastern Savings Bank (“Eastern”) for \$168,000. The transfer of the property and the mortgage were recorded on December 29, 2006.

Eastern filed a foreclosure action on its mortgage against Johnson and his wife on August 26, 2008. An attorney for CACH notified Eastern’s counsel for the foreclosure proceeding that it held a lien on the property that was senior to Eastern’s mortgage, but the record does not show that CACH ever attempted to intervene in the foreclosure sale. At the time the foreclosure action was filed, the balance on the judgment lien was \$16,041.28.²

In April 2009, the property was sold at a sheriff’s sale to a third party for \$133,000. Following the sale, the sheriff sent the entire proceeds, less the costs of the sale, to Eastern’s counsel. CACH repeatedly sent letters to Eastern’s counsel seeking to have its judgment lien satisfied out of the proceeds of the sale and received no response.³ While it is unclear from the record, the Court believes

¹ The parties have not asserted this conversion to a property jointly owned by Johnson and his wife affects the status of the liens against the property.

² Complaint ¶ 9.

³ Complaint ¶¶ 14-15.

there were no excess proceeds from the sale after costs and the satisfaction of Eastern's mortgage.

PROCEDURAL HISTORY

On November 30, 2009, CACH filed a complaint in the Court of Common Pleas against Eastern alleging misappropriation of funds and unjust enrichment. CACH filed a motion for summary judgment and Eastern filed a motion to dismiss, which the Court treated as a motion for summary judgment. The Court below heard oral arguments on the parties' cross-motions and granted summary judgment in favor of Eastern in a written opinion issued June 11, 2010. CACH subsequently filed a motion for reargument, which the Court denied on July 27, 2010, after reviewing the parties' briefs.

STANDARD OF REVIEW

This Court reviews an appeal from a decision of the Court of Common Pleas as the Supreme Court would consider an appeal from a decision of this Court.⁴ When reviewing a grant of summary judgment by the trial Court, this Court views all facts in the light most favorable to the non-moving party and reviews the decision for legal error *de novo*.⁵

⁴ *Fletcher v. Shahan*, 2002 WL 499883, *2 (Del. Super. Mar. 6, 2002) (citing *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985)).

⁵ *In re Asbestos Litig.*, 673 A.2d 159, 161 (Del. 1996).

DISCUSSION

This appeal presents the seemingly straightforward question of whether the proceeds of a mortgagee's foreclosure sale must be paid to a senior judgment lienholder before being paid to the mortgagee. Unfortunately, there is very little case law relating to this issue, and the relevant statutes were enacted years before it became common practice to write laws in clear and understandable English. As a result, the Court is confronted with poorly written statutes and the parties citing to cases from the nineteenth century. The Court hopes that this Opinion will bring some clarity to the issue.

There are two somewhat conflicting statutes that relate to this matter. The first is 10 *Del. C.* §4985, which governs the discharge of liens upon the execution of the sale by the sheriff's office. The statute provides:

Real estate sold by virtue of execution process shall be discharged from all liens thereon against the defendant [...] whose property such real estate is, except such liens as have been created by mortgage or mortgages prior to any general liens; and with respect to such, the sale shall be a discharge to the extent to which the proceeds may be applicable to a judgment or judgments obtained for the debt, to secure the payment of which the mortgage [...] appear[s] to have been given, and the real estate shall also be discharged from all right of dower and curtesy therein of any defendant in execution.

It appears to the Court that this statute was enacted to allow purchasers to take property unencumbered by judgments against the prior owner, unless those

judgments were supported by a mortgage. Applied to this case, the statute would preserve the non-mortgage judgments against Johnson, but the new owner would take the property without being subject to Johnson's prior debt. To the extent the proceeds of the sheriff's sale did not satisfy the mortgage amount, the remaining balance would continue to encumber the property.⁶ While this statute addresses the effect of a person's liens upon a subsequent sale, it does not address how the proceeds of the sale should be distributed.

The other statute cited by the parties governs the title the purchaser of lands will receive when the property is sold on a writ of *scire facias* for the non-payment of a mortgage. This statute states:

The person to whom any lands shall be sold, or delivered, under §5065 of this title, and such person's heirs and assigns, shall hold the same, with their appurtenances, for such estate, or estates, as they were sold, or delivered for, discharged from all equity or redemption, and all other incumbrances made and suffered by the mortgagor, the mortgagor's heirs, or assigns; and such sale shall be available in law.⁷

This statute also relates to the title rights of the individual who purchased the property at a sheriff's sale. Taking out the surplus language not applicable to this case, the statute states that the person who bought the property "hold[s] the [property]...discharged from all incumbrances made...by the mortgagor." This

⁶ As a practical matter, this does not occur, as the bank or mortgage company normally places a minimum bid equivalent to the mortgage amount to protect their interest.

⁷ 10 *Del. C.* §5066. *See also* 10 *Del. C.* §5065, which governs the sale of property in execution after a writ of *levari facias* has been awarded.

statute would again reflect that the property is transferred free of the debts that previously encumbered the property.

Read together, the Court finds these statutes require the discharge of all non-mortgage liens when a property is sold at foreclosure sale. The Court has consistently applied this rule in cases involving a lien on property senior to the foreclosing mortgage. In the 1841 case *Farmers' Bank v. Wallace*,⁸ which was decided before the enactment of any statute governing the rights of purchasers at a foreclosure sale, the Court held that the foreclosure sale discharged the judgment liens, regardless of whether the lien was due at the time of the sale, and that the sheriff could not legally sell the land subject to those liens. The Court noted that “the policy of the law” is to “disencumber lands as much as possible from all liens.” While the Court noted that applying sale proceeds to prior judgments may be inconvenient, it would be even less convenient to sell the land subject to prior judgments.⁹

Nearly forty years later, the Court of Chancery reached a similar result in *Sharpe v. Tatnall*.¹⁰ The defendant in that case held a mechanic’s lien on property in New Castle County that had been mortgaged to Sharpe’s predecessor in interest.

After Sharpe’s estate foreclosed on the land, the defendant attempted to foreclose

⁸ 3 Harr. 370 (Del. Super. 1841).

⁹ *Id.* at 373.

¹⁰ 5 Del. Ch. 302 (1880).

on his lien on the property, arguing that the land had been sold subject to his lien because his lien predated the mortgage. The Court of Chancery, relying on a predecessor statute to 10 *Del. C.* §4985 with identical wording, rejected the defendant’s argument that the land had been sold subject to his lien at foreclosure. The Court stated that “the only liens against a defendant not discharged by a sale of his lands under execution process against him are mortgages which are prior to any general liens.”¹¹ This Court affirmed the holding of *Sharpe v. Tatnall* in 1925 when it noted that *Sharpe* “distinctly held that a sale of real estate under a mortgage conveyed the property to a purchaser freed from the lien of a judgment recovered in a mechanic’s lien proceeding even though such mechanic’s lien judgment was of an anterior date and had priority over the mortgage lien.”¹² Furthermore, the *Sharpe* Court held that the defendant’s position that he retained a lien on the land would create a cloud on title.¹³

Unfortunately the cases discussed above and the applicable statutory law do not clarify how proceeds should be distributed where there is a general lien senior to the foreclosing mortgage. However, Judge Woolley’s venerable treatise on Delaware practice and procedure, in its discussion of the predecessor to 10 *Del. C.* §4985, states that the statute requires “the application of proceeds to and discharge

¹¹ *Id.* at 321.

¹² *In re Elder*, 129 A. 510, 510 (Del. Super. 1925).

¹³ *Sharpe*, 5 Del. Ch. at 322.

of the land ‘from all liens [...] except such liens as have been created by mortgage or mortgages *prior to any general liens.*’¹⁴ Thus, Judge Woolley explains, in a case where the property sold at execution is subject to (1) a general lien, as a judgment, recognizance, or mechanic’s lien, (2) a mortgage lien, and (3) a general lien, the proceeds of the sale would be distributed according to the priority of the liens “whether the sale is held under execution on the first, second or third lien.”¹⁵ In other words, the proceeds would be distributed “first to costs, second to taxes, third to wages, when proved, fourth to the first general lien, fifth to the mortgage lien, and sixth to the third and all succeeding liens in the order of their entry and priority, and the land is wholly discharged from all liens against the defendant in the writ, whether the proceeds are sufficient to reach all of them or not.”¹⁶

This Court has never overruled the *Farmer’s Bank* or *Sharpe* decisions. Nor has this Court ever issued a decision that would be directly contrary to Judge Woolley’s interpretation of the applicable statutory law in Section 1139 of his treatise. Accordingly, the Court concludes that the law in Delaware requires that land sold at foreclosure sale be discharged from all non-mortgage liens on the land and that proceeds from the sale are distributed in order of the liens’ priority, even

¹⁴ 2 Victor B. Woolley, *Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware* §1139 (1906).

¹⁵ *Id.*

¹⁶ *Id.*

if the foreclosing party is not the holder of the most senior lien on the land. This result is consistent with Delaware's policy of disencumbering the land.

In support of its position that the land was sold subject to CACH's lien, Eastern relies on several cases declaring that a purchaser at sheriff's sale takes title subject to all liens and encumbrances.¹⁷ However, these cases are inapposite to the question now before the Court. In *Atkinson v. B.E.T.*, for example, the Court of Chancery held that the defendant, a developer, could not escape a restrictive covenant imposed on undeveloped lots in a mobile home development by the original developer, in spite of the fact that an interim developer/owner had modified the restriction for some lots and had sold other lots without reference to any deed restrictions. Similarly, this Court's decision in *PNC Bank, Delaware v. Philben, Inc.*, which held that an easement held by a utility company did not survive the bank's foreclosure sale of the land, does not apply to the facts of the present case. Neither of these decisions addresses the question of what happens to a judgment against land that is not secured by a mortgage upon foreclosure sale. Even if this Court had agreed with the defendant that the purchaser at a sheriff's

¹⁷ *Atkinson v. B.E.T., Inc.*, 1984 WL 159375, *2 (Del. Ch. Dec. 4, 1984); see also *PNC Bank, Delaware v. Philben, Inc.*, 1997 WL 717786 *4 (Del. Super. Oct. 1, 1997) ("The statutory law provides that a purchaser at sheriff's sale takes the property subject to any senior liens, while all junior liens are discharged.") (citing 10 *Del. C.* §§4985 and 5066).

sale takes the property subject to all liens, it does not address the issue of the payment of the liens senior to the mortgage that is being foreclosed.

Finally, in *Cedar Inn, Inc. v. King's Inn, Inc.*,¹⁸ the Court held that the senior mortgagee's decision to allow a junior mortgagee to foreclose on the land subject to the first mortgage did not preclude the senior mortgagee from seeking to apply the proceeds of the sale to a judgment bond that had been executed to secure its mortgage. The judgment bond held third priority after the foreclosing mortgage. The unsuccessful bidder had argued that the bank had waived its right for the proceeds to be applied to the judgment lien when the bank announced that the sale would be subject to the first mortgage lien. The Court's decision in *Cedar Inn* is the result of a straightforward application of 10 *Del. C.* §4985: "Under 10 *Del. C.* §4985 the bank may look to its position as a lien creditor for satisfaction of the debt. By electing to permit the sale to be made 'subject to' the first mortgage, it has in no way forfeited its right to participate in the distribution of the sale proceeds as a general lienholder in accord with its priority as an ordinary judgment creditor. The sale was indeed 'subject to the first mortgage' but under the law all or some part of the debt secured by the first mortgage might be paid off on account of the bank's additional standing as a judgment creditor."¹⁹ The *Cedar Inn*

¹⁸ 269 A.2d 781 (Del. Super. 1970).

¹⁹ *Id.* at 786.

decision does not address the question of what happens to senior non-mortgage liens upon foreclosure, and nothing in the decision suggests that land sold at foreclosure sale either remains subject to senior non-mortgage liens or that the proceeds of the sale must first be applied to the mortgage.

Requiring proceeds of a foreclosure sale to first satisfy a lien perfected before the mortgage was recorded is also a fair result. Prior to the execution of the mortgage a title search is usually performed to determine if there are any judgments against the property. If such judgments exist and the bank decides to proceed with its loan, it does so at its own risk and with full knowledge of the prior judgment. The bank should not be allowed to ignore or circumvent the prior judgment simply because it is the party instituting the foreclosure proceedings. The Court does not read the statutes here as giving a bank priority status.

After careful review of the statutory and relevant case law, the Court is satisfied that Delaware law requires the discharge of all non-mortgage liens on land sold at foreclosure sale when those liens have priority relative to the foreclosing party. At the time of the foreclosure sale, CACH held a valid judgment lien against Aaron Johnson, the defendant in the foreclosure action, and his property. The foreclosure sale discharged all liens on the property and the proceeds should have been distributed to the lienholders in the order of their

priority. As the senior lienholder, CACH was entitled to receive satisfaction of its judgment lien out of the proceeds of the sale before the balance of Eastern's mortgage was satisfied. The Court concludes that the decision by the Court below granting summary judgment in favor of Eastern Savings Bank and denying summary judgment to CACH was based on an interpretation of an extremely poorly written statute that this Court finds was in error.²⁰ Accordingly, the decision of the Court below is hereby REVERSED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.

²⁰ While we relish our historic heritage, this case is a classic example of attempting to address today's legal issues regarding financial transactions with statutes that were enacted centuries ago. The Court would encourage the Bar Association and the financial community to work together to modernize these legal principles using clear and precise language to avoid confusion in this important area.