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IN THE SUPREME COURT OF THE STATE OF DELAWARE

REO TRUST 2017-RPL1, Plaintiff Below, Appellant/Cross-Appellee, v. SHORT SALE, LLC, Defendant Below, Appellee/Cross-Appellant, FCS LENDING, LLC, Interested Party Below, Appellee/Cross-Appellant.	)	No. 306, 2023 On Appeal from the Superior Court of Delaware C.A. No. N20L-10-029 DJB

APPELLEES' ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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NATURE OF THE PROCEEDINGS

Before the Court is an appeal from an August 1, 2023 Opinion of the Superior Court following post-mortgage foreclosure sale motions filed by Defendant Below, Appellee, Short Sale, LLC ("Short Sale"), and Interested Party Below, Appellee, FCS Lending, LLC ("FCS"), relating to a *sci. fa. sur* mortgage foreclosure action filed by Plaintiff Below, Appellant, REO Trust 2017-RPL1 ("REO").

Short Sale along with FCS moved to invalidate that sale based on REO's failure to name the mortgagor's successor and to comply with the applicable statutory provisions for mortgage foreclosures that would have given the Superior Court subject matter jurisdiction over the matter. Alternatively, FCS moved, if the sale was not invalidated, for an Order that confirmed that FCS, as the "first in time" mortgage holder, would be paid the proceeds of the sale before the junior mortgage holder, REO. REO opposed both motions.

Following extensive briefing and argument, the Superior Court issued its Opinion and denied the motion to invalidate the sale, but granted FCS's motion to enforce distribution of the proceeds, ruling consistently with this Court's holding a decade ago in *Eastern Savings Bank, FSB v. CACH, LLC*, 55 A.3d 344 (Del. 2012) ("*Eastern Savings Bank*") that Delaware is a "first in time, first in line" state when determining priority relating to distribution of mortgage foreclosure proceeds.

REO thereafter took this Appeal, and Short Sale and FCS then filed their Cross-Appeal.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly held that Short Sale did not waive its right to assert defenses when the asserted defenses raised a question as to the Superior Court's subject matter jurisdiction over the action at bar.

2. Denied. The Superior Court correctly held that the Estate of Roberta Ziefert was a necessary party to REO's foreclosure action, a holding consistent with long-standing Delaware statutory law.

3. Denied. The Superior Court correctly held that the first mortgage holder, FCS, was entitled to distribution of the mortgage foreclosure proceeds after the foreclosure sale brought by the junior mortgage holder, REO, a holding consistent with Delaware's "first in time, first in line" priority of the distribution of mortgage foreclosure proceeds as confirmed by this Court in *Eastern Savings Bank*.

Defendant and Interested Party Below, Appellees/Cross-Appellants' Argument on Appeal:

1. The Superior Court erred in failing to hold that REO's failure to name the Estate of Roberta Ziefert as a necessary party to its mortgage foreclosure action divested the Superior Court of jurisdiction *ab initio* over this *sci. fa. sur* mortgage foreclosure action. A246-249.[1]

[1] Reference is to the Appendix to Appellant's Opening Brief.

2. The Superior Court erred in concluding that there was no prejudice sufficient to vacate the mortgage foreclosure sale resulting from REO's failure to name the Estate of Roberta Ziefert as a necessary party to its mortgage foreclosure action. A249-251.

STATEMENT OF FACTS

A. Parties.

REO is a Delaware statutory trust and holder of the junior mortgage on 313 S. Broom St., Wilmington, Delaware 19805 (the "Unit"). A023-031.

Short Sale is a Delaware limited liability company and the record owner of the Unit, a townhome located within the condominium community of Towne Estates. A068.

FCS is a Delaware limited liability company and the holder of the senior mortgage on the Unit. A021-022.

B. Background.

In 2018, Roberta Ziefert was the record owner of the Unit. A068. Ms. Ziefert died on August 25, 2018. A140. The Unit was, at that time, subject to two (2) mortgages: The primary or senior mortgage was then held by the predecessor of FCS, and the junior mortgage was held by REO. A021-031.

The Estate of Roberta Ziefert (the "Estate") failed to pay the assessments due as part of the Towne Estates condominium community. A069-070. Towne Estates Condominium Association (the "Association"), the governing association for the common interest community of Towne Estates, filed a debt action against the Estate for failure to pay those mandatory Association assessments. A014-016. On July 22,

2019, a judgment in the amount of $2,391.07 was entered against the Estate for failure to the pay those assessments. A079.

Days later, on July 26, 2019, with it appearing that the Estate was also not paying on the debt related to REO's mortgage on the Unit, REO brought a mortgage foreclosure action through a writ of *scire facias sur* mortgage and did so against the statutorily appropriate party: The successor to the mortgagor, the Estate. A126. Indeed, given the death of Ms. Ziefert, the mortgagor, that action was properly brought against the Estate pursuant to the specific terms set forth in the foreclosure statute, 10 *Del. C.* § 5061 *et seq*. (the "Mortgage Foreclosure Statute").[2]

Notwithstanding REO's newly filed action against the Estate, the Association proceeded to enforce its judgment by transferring it to Superior Court on August 16, 2019. A015-016. The Association thereupon filed its writ of *fieri facias* seeking to sell the Unit at a Sheriff's Sale. A015.

On December 10, 2019, the Unit was exposed for public sale by the New Castle County Sheriff's Office, and Short Sale was the winning bidder for the Unit.

[2] "[U]pon breach of the condition of a mortgage of real estate by nonpayment of the mortgage money . . . [mortgagee may] sue out of the Superior Court of the county wherein the mortgage premises are situated a writ of *scire facias* upon such mortgage directed to the sheriff of the county **commanding the sheriff to make known to the mortgagor**, and those persons described in subsection (b) of this section **and such mortgagor's heirs, executors, administrators or successors** that the mortgagor or they appear before the Court to show cause[.]" 10 *Del. C.* § 5061 (a) (emphasis added).

A070. Following that sale, the mortgages on the Unit, the primary mortgage, now held by FCS, and the secondary mortgage held by REO, remained outstanding.

On March 25, 2020, REO obtained a judgment against the Estate in its mortgage foreclosure action. A082. Inexplicably, thereafter, REO sought from the Superior Court an Order to vacate that judgment and to dismiss the case. *Id*. No explanation of this extraordinary act was offered to the Court, and the reason for that action still remains undisclosed. *Id*.

With no opposition of record, the Superior Court, on October 20, 2020, granted the Order vacating the judgment and dismissing that matter without prejudice. A144. Thus, as of October 20, 2020, no writ of *scire facias sur* mortgage case or judgment remained against the Estate relating to REO's junior mortgage.

Then, on October 30, 2020, soon after REO's judgment against the Estate was vacated and the case dismissed, REO, again as a junior mortgagee, initiated a new action in the Superior Court, a new mortgage foreclosure proceeding, again through a writ of *scire facias sur* mortgage pursuant to the Mortgage Foreclosure Statute. A013. Yet, in spite of the fact that REO was proceeding by writ of *scire facias sur* mortgage,[3] and under the Mortgage Foreclosure Statute which commanded that the

[3] A *scire facias sur mortgage* is defined as a "writ ordering a **defaulting mortgagor** to show cause why the mortgage should not be foreclosed and the property sold in execution." *Borders v. Townsend Assocs.*, 2002 Del. Super. LEXIS 453, at *5 n.3 (Del. Super. Ct. Apr. 17, 2002) (*citing Black's Law Dictionary* (7th ed. 1999) (emphasis added)).

Estate be named as a "necessary party,"[4] REO failed to name the mortgagor's successor, the Estate, as a defendant in the action. A001-013. It is unclear why REO failed to include the mortgagor's successor, the Estate, or, at the very least, an interest holder in the former owner's estate, especially where (i) the exact statutory basis upon which REO was admittedly proceeding, the Mortgage Foreclosure Statute, mandated the naming of such Estate in order to proceed to a foreclosure on the mortgagor's mortgage and where (ii) REO had already properly named the Estate in its earlier, but now dismissed, action.[5]

Nonetheless, REO, disregarding the jurisdictional and foundational defects in its action, and the actual prejudice, injury and injustice that it imposed on the Estate by divesting it of the statutorily mandated protections offered by the Mortgage Foreclosure Statute,[6] proceeded to obtain a judgment against the only party named,

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[4] **"In addition to the mortgagor, and such mortgagor's heirs, executors, administrators or successors, the following persons shall be necessary parties in every mortgage foreclosure action**: (1) Record owners acquiring title subject to the mortgage (terre tenants) which is being foreclosed upon; and (2) Persons having an equitable or legal interest of record, including an interest pursuant to a judicial sale or a statutory sale pursuant to § 8771 et seq. of Title 9." (emphasis added). 10 *Del. C.* § 5061 (b) (emphasis added).

[5] *Id.*; *see also* Footnote 2.

[6] The failure to name the Estate divested the Superior Court with any potential subject matter jurisdiction over the mortgage foreclosure action, as compliance with the Mortgage Foreclosure Statute was necessary to invest that Court, rather than the Court of Chancery, with subject matter jurisdiction. *See infra*, pp. 30-40. Moreover,

Short Sale, and thereafter moved to foreclose upon the Unit. A063. On April 13, 2021, the New Castle County Sheriff Office exposed the Unit for public sale (A084), and Short Sale was the high bidder. A155. That winning bid was subsequently assigned from Short Sale to FCS. *Id*.

Prior to the April 13, 2021 mortgage foreclosure sale, FCS placed REO on notice of its superior lien position, and that, with no general liens to satisfy, FCS would be first in line to receive proceeds from the sale. A159. REO's counsel, not surprisingly, given this Court's clear "first in time, first in right" holding in *Eastern Savings Bank*, agreed with FCS' legal position, **conceding that the "first mortgage will be paid before our mortgage**." A158 (emphasis added).

However, the New Castle County Sheriff's Office, in direct contravention of *Eastern Savings Bank*, and the confirmed pre-foreclosure expectations of both REO and FCS, proposed to release 100% of the sale proceeds to REO, the junior mortgagee. A118-119.

On May 10, 2021, prior to confirmation of the sale, Short Sale filed a Motion to Set Aside the Sheriff's Sale (A069-085), and, on that same day, FCS filed its Motion to Enforce Payment. A086-106. FCS also joined the Motion to Set Aside

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this inherent defect, the failing to name the mortgagor or its successor, robbed the "necessary" party, here the Estate, of all due process rights, including the fulsome protections offered to that named beneficiary of the processes due under the Mortgage Foreclosure Statute.

the Sheriff's Sale.

Following briefing and arguments of the parties on the two Motions, and following a motion for reargument,[7] the Superior Court rendered its final opinion on August 1, 2023 (the "Opinion"). A210-224. In granting FCS' Motion to Enforce Sale Proceeds, the Superior Court correctly held that *Eastern Savings Bank* was controlling on the issue of "first in time, first in right," concluding that FCS, as the senior mortgage holder, would be entitled to be paid all of the proceeds of the sale up to the amount owed on its debt. A252. The Court further correctly held that the Mortgage Foreclosure Statute required that the Estate be named a party to the litigation. A246-249.

Yet, the Superior Court denied Short Sale's Motion to Vacate the Sale (A249), ignoring the lack of subject matter jurisdiction of the Court which resulted from its determination that the Estate had not been named a party, and finding that, although the Estate was a necessary party, there was no prejudice sufficient to warrant vacating the sale. A219-221.

[7] In its original opinion, the Superior Court wrote that, to the extent there were insufficient proceeds to satisfy both FCS and REO's mortgages, REO's mortgage lien would remain on the Unit (the "Statement"). A224. Short Sale and FCS moved for reargument on that issue, as that issue was not before the Court and no party had addressed it in briefing or argument. On August 1, 2023, the Superior Court issued a revised opinion, removing the Statement from the Opinion, rendering REO and FCS's Motion for Reargument as moot. A239, A254.

REO thereupon took this Appeal. Short Sale and FCS thereafter filed their Cross Appeal.

This is the joint brief of Short Sale and FCS.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT SHORT SALE COULD ASSERT THE SUBJECT MATTER JURISDICTION DEFENSE FOR THE FIRST TIME AFTER THE MORTGAGE FORECLOSURE SALE.

A. Question Presented.

Whether the Superior Court erred in holding that Short Sale did not waive its right to assert defenses, when subject matter jurisdiction can be raised at any time by anyone during the same civil litigation?

B. Scope of Review.

Whether a Court has subject matter jurisdiction is a question of law that this Court reviews *de novo*. *Imbraguilo v. Unemployment Ins. Appeals Bd.*, 223 A.3d 875, 878 (Del. 2019) ("*Imbraguilo*").

C. Merits of Argument.

The issue of whether or not Short Sale waived its right to assert defenses is irrelevant to this Court's consideration of the defense relating to subject matter jurisdiction. FCS, who had standing as the assignee of the winning bid for the Unit, raised this identical issue having jointly moved with Short Sale on the exact same grounds as Short Sale, and thus this Court may consider all defenses, including the lack of subject matter jurisdiction issue raised in this appeal, because FCS independently raised the issue and is again raising this issue in this appeal.

Nonetheless, should the Court even wish to consider REO's argument, given FCS' absolute right to raise this jurisdictional issue independent of Short Sale, Short Sale cannot be held to have waived the right to raise a defense which questions the Court's subject matter jurisdiction.

As this Court has held that: "Section 5061 of Title 10 of the Delaware Code vests subject matter jurisdiction in the Superior Court to hear foreclosure actions at law through a writ of scire facias sur mortgage."[8] As is authorized under Section 5061, REO itself initiated a foreclosure action in the Superior Court through a writ of *scire facias sur* mortgage. However, no writ was issued as against the mortgagor or its successor, as REO only named Short Sale, the record owner, as a defendant, while inexplicably, and in contravention of 10 *Del. C.* § 5061, failing to name the mortgagor's successor, the Estate, as a defendant.

By alleging a defect in the strict procedures required by 10 *Del. C.* § 5061, which, if true, would divest this Court of subject matter jurisdiction over the matter,[9] Short Sale and FCS raised a challenge to the Superior Court's subject matter jurisdiction. Subject matter jurisdiction is critical to the Court's power and authority to consider the matter before it. As such, this Court has made it clear: Subject matter jurisdiction may be raised by a litigant at any time during civil litigation, even

[8] *Brooks v. BAC Home Loans Servicing, LP*, 53 A.3d 301 (Del. 2012) (Order).

[9] *See infra*, pp. 30-40.

initially on appeal,[10] or even if the party raising the issue did not file a cross-appeal.[11] Thus, as this Court has held, the issue may be raised "whenever it appears by suggestion of the parties or by being raised *sua sponte* that the Court lacks jurisdiction, the court must dismiss the action."[12]

Accordingly, because Short Sale and FCS both raised the issue of the Superior Court's subject matter jurisdiction, and now both raise it on this appeal, there is no basis to conclude that the Superior Court erred as a matter of law in considering the matter of the Court's jurisdiction by Short Sale and REO. REO's argument to the contrary must be denied.

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[10] *Imbraguilo*, 223 A.3d at 878 ("a litigant may raise a court's lack of subject matter jurisdiction at any time in the same civil litigation, 'even initially at the highest appellate instance.'" (*quoting Gunn v. McKenna*, 116 A.3d 419, 420-21 (Del. 2015)).

[11] *Gunn*, 116 A.3d at 420-21.

[12] *Id*.

II. THE SUPERIOR COURT CORRECTLY HELD THAT THE MORTGAGE FORECLOSURE ACTION WAS DEFICIENT FOR FAILURE TO INCLUDE THE ESTATE AS A NECESSARY PARTY.

A. Question Presented.

Did the Superior Court err in holding that the Estate was a necessary party to REO's *sci. fa. sur* mortgage foreclosure of the Unit, in accordance with 10 *Del. C.* § 5061?

B. Scope of Review.

The interpretation of statutes is a question of law that this Court reviews *de novo*. *Eastern Savings Bank*, 55 A.3d at 347 (*citing Le Van v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007)).

C. Merits of Argument.

Section 5061(b) of Title 10, the Mortgage Foreclosure Statute, provides as follows:

> **In addition to the mortgagor, and such mortgagor's heirs, executors, administrators or successors, the following persons shall be necessary parties in every mortgage foreclosure action**: (1) Record owners acquiring title subject to the mortgage (terre tenants) which is being foreclosed upon; and (2) Persons having an equitable or legal interest of record, including an interest pursuant to a judicial sale or a statutory sale pursuant to § 8771 et seq. of Title 9.[13]

The language of Section 5061(b) is clear and unambiguous: Mortgagors **and** the mortgagor's heirs, executors, administrators or successors are "necessary"

[13] 10 *Del. C.* § 5061 (b) (emphasis added).

parties to **every** foreclosure action at law brought through a writ of *scire facias sur* mortgage.

After considering the unambiguous language of the Mortgage Foreclosure Statute, the Superior Court correctly held that the Estate was a necessary party pursuant to the Mortgage Foreclosure Statute,[14] and, indeed, that Court could not have reasonably come to a different conclusion due to the clear and unambiguous language of Section 5061(b). When a statute is clear and unambiguous, this Court has long been consistent on the role of the Court: Our courts are bound to apply the "plain meaning of the statute."[15] Here, the plain meaning of Section 5061(b) is that the Estate is a "necessary" party to the mortgage foreclosure action.

Nonetheless, in support of its contention that the Estate was not a necessary party to REO's foreclosure action, REO cites to *Wilmington Savings Fund Society v. Gillette*.[16] Yet, that case, as the Superior Court concluded, is factually distinguishable.

As the Superior Court correctly noted in the Opinion, the facts of *Gillette* are wholly different than the facts of the matter at bar. In *Gillette*, the decedent, by her

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[14] A246-249.

[15] *Chrysler Corp. v. State*, 457 A.2d 345, 349 (Del. 1983).

[16] *Wilmington Savings Fund Society v. Gillette*, 2017 WL 1191088 (Del. Super. Mar. 29, 2017), *aff'd*, *Gillette v. Wilmington Savings Fund Society*, 245 A.3d 498 (Del. 2017).

will, **left her portion of the mortgaged property to the surviving mortgagor.** The *Gillette* Court found that the decedent's estate was not a necessary party to that action because the property at the time of the foreclosure action had only one true owner, **an owner who was also a party to the original mortgage** (*i.e.*, the mortgagor) and who was also named as the party to the mortgage foreclosure action. As the Superior Court noted in its Opinion, this determinative issue in *Gillette* is not present in the matter at bar, as no party representing the Estate is a party to this mortgage foreclosure action, and as the *Gillette* Court made clear, such issue was determinative in its ruling.[17] Thus, in *Gillette*, the mortgagor was in fact a named party, and compliance with the statutory requirements had been achieved.

Gillette, therefore, does not stand for or support the contention that a *sci. fa. sur* mortgage complaint permits the exclusion of the mortgagor or successor thereto. In any event, even though *Gillette* is easily distinguishable, as the Superior Court correctly concluded, this Court is not bound by REO's reading of *Gillette*, nor should it be. The Mortgage Foreclosure Statute is a statute in derogation of the common law, as mortgage foreclosure actions are inherently equitable in nature. Thus, strict construction and compliance with the statute is required.[18]

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[17] A248.

[18] *Colonial School Bd. v. Colonial Affiliate, NCCEA/DSEA/NEA*, 449 A.2d 243, 247 (Del. 1982) ("It is axiomatic that statutes in derogation of the common law are to be strictly construed.").

The critical party to a mortgage foreclosure, the successor to the party bound by the debt covered by the mortgage, was not named, and because such party was a "necessary" party as provided for under the Mortgage Foreclosure Statute, the Superior Court was correct that the Estate was a necessary party to the *sci. fa. sur* mortgage action brought pursuant to the Mortgage Foreclosure Statute. Thus, even if this Court could read *Gillette* in the manner desired by REO, this Court must eschew such reading in favor of construing the statute according to its plain meaning, a meaning here that leads to the only conclusion possible: The Estate is a necessary party.

The Superior Court did not err in holding that the Estate was a "necessary party" and "should have been noticed and as a result, there has been a defect in the scire facias process."[19] REO's argument to the contrary must be rejected, and the Superior Court's decision on this issue must be affirmed.

[19] A246-249.

III. THE SUPERIOR COURT CORRECTLY GRANTED FCS' MOTION FOR DISTRIBUTION OF PROCEEDS.

A. Question Presented.

Did the Superior Court err in holding that the first mortgage holder, FCS, was entitled to distribution of Sheriff's Sale proceeds following the mortgage foreclosure sale brought by the second mortgage holder, REO?

B. Standard of Review.

The interpretation of statutes is a question of law that this Court reviews *de novo*. *Eastern Savings Bank*, 55 A.3d at 347 (*citing Le Van v. Independence Mall, Inc.*, 940 A.2d at 932).

C. Merits of Argument.

1. The Superior Court correctly held that first mortgage holder FCS is entitled to distribution of the sale proceeds produced by second mortgage holder REO's foreclosure sale.

Short Sale and FCS are at a loss to understand why this issue is now before this Court. In the November 12, 2020 letter (the "Letter"), REO agreed, through its counsel, that REO's lien position was junior and therefore second in line behind FCS to receive proceeds from any Sheriff's Sale.[20] Now in direct contravention of what REO knew to be the law and knew to be the results of any foreclosure sale brought by it, REO wishes to take a contrary position before this Court, and hopes to carve

[20] A158 ("We are aware that the first mortgage will be paid before our mortgage.").

out an exception for itself and evade this Court's clear direction in *Eastern Savings Bank* on the distribution of mortgage foreclosure sale proceeds. REO's inequitable change of legal position is unavailing.

It is settled Delaware law that, for mortgages, Delaware is a "first in time, first in right" state.[21] The direct result of such priority under Delaware's race recording statute, 25 *Del. C.* § 2106, is that a mortgage holder in a senior lien position is paid the proceeds from a Sheriff's Sale, up to the limit of the senior lien, before a junior lien is paid a single dollar. Indeed, this issue of the distribution of foreclosure sale proceeds is controlled by this Court's holding in *Eastern Savings Bank*, and that decision, providing that the time of recording is determinative of the priority of competing creditors and to the disposition of proceeds, is dispositive of the issue.

In *Eastern Savings Bank*, CACH, LLC was a judgment creditor who recorded its judgment lien days before mortgagee Eastern Savings Bank recorded its mortgage.[22] Thereafter, Eastern Savings Bank, in a junior position to CACH, LLC, initiated foreclosure proceedings by *scire facias sur* mortgage.[23] The property

[21] *Eastern Savings Bank v. CACH, LLC*, 124 A.3d 585, 589 (Del. 2015) (internal quotation marks omitted).

[22] *Eastern Savings Bank*, 55 A.3d at 346.

[23] *Id.*

securing Eastern's mortgage was sold at Sheriff's sale.[24] The sheriff's office initially paid all sales proceeds to Eastern Savings Bank.[25] CACH, LLC, as the first filed lien holder, filed suit claiming it was entitled to the proceeds because of its priority and because Delaware is a pure race state.[26]

Following a decision in the Superior Court finding that CACH, LLC was correct in concluding that it was entitled to payment before a junior mortgagee, this Court was confronted with the identical issue being raised in this appeal: A determination of "the order in which proceeds from the Sheriff's Sale must be distributed."[27] This Court, recognizing that Delaware has a "race recording statute," agreed with CACH, LLC and held that **"sheriff's sale proceeds are disbursed** according to a first in time, first in line priority."[28]

The Superior Court in this matter considered *Eastern Savings Bank* and correctly concluded that "*Eastern Savings* makes clear that Delaware's 'first in time,

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Eastern Savings Bank*, 55 A.2d at 349.

[28] *Id.*, 55 A.2d at 344 and 350 (emphasis added).

first in line' priority means the first party to record its lien has priority in **sale distribution.**"[29]

Yet, on this appeal, and in the face of the clear precedent of this Court, REO now contends that FCS and the Superior Court are incorrect, holding that their position "conflates lien priority to priority in the distribution of sale proceeds."[30] In seeking to overturn the Superior Court's conclusion that "FCS's first priority mortgage has priority in this sheriff's sale distribution,[31] REO argues, as it did below, that 25 *Del. C.* § 4985 and *Woolley's Practice in Civil Actions*[32] control, and asks this Court to conclude that it, rather than FCS, is entitled to the proceeds of the sale.[33] REO's quest to create as self-benefiting "first to foreclose, first to receive" alternative foreclosure proceeds distribution scheme is easily dispatched.

25 *Del. C.* § 2106 is Delaware's pure race statute.[34] 10 *Del. C.* § 4985 controls how liens are discharged upon execution sale, but 25 *Del. C.* § 2106 controls the

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[29] A252-253 (emphasis added).

[30] Appellant's Opening Brief ("OB"), p. 14.

[31] A253.

[32] 2 Woolley, Victor B., *Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware,* § 1140 (1906) ("*Woolley's*").

[33] OB, p. 14.

[34] *Id*.

order of distribution - - first in time, first in line. To follow anything other than Delaware's first in time, first in line statute, and instead endorse a scheme that allows a lower positioned lienholder to control who is paid first from the Sheriff's sale proceeds is nothing short of ignoring a statutory mandate.

In all events, REO fails to understand that this Court already has considered and rejected its identical argument. The issue of whether a general lien, judgment lien or, as here, a mortgage lien, in first position is to be paid off first has already been considered and determined by this Court. Indeed, in *Eastern Savings Bank*, this Court, in considering the order of the distribution of proceeds, recognized that a "deed," as referenced in "Delaware's pure race recording statute" included a "mortgage or judgment lien that has been recorded against a property."[35] Recognizing the type of lien was included as part of the dictates of the pure race recording statute, this Court concluded that "[b]ecause CACH has the first recorded lien, it will be first in line to receive distributions."[36] Thus, irrespective of whether the lien is a mortgage, or a judgment lien, this Court has already confirmed that "first in time first in right" to receive the distributions is the recognized order of distribution priority where, as here, a pure race recording statute is applicable.

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[35] *Eastern Savings Bank*, 55 A.2d at 349.

[36] *Id.*

Moreover, in considering *Woolley's*, this Court found that Judge Wolley rightly interpreted the predecessor or 10 *Del. C.* § 4985, noting that the hypothetical distribution cited in his treatise "follows a first in time priority consistent with Delaware's 'race to the courthouse' statute."[37]

Finally, in attempting to avoid the teachings of *Eastern Savings Bank,* REO points to this Court's consideration in that case of the Superior Court's decision in *Cedar Inn, Inc. v. King's Inn, Inc.*[38] and argues that this Court has "endorsed its interpretation of 10 *Del. C.* § 4985."[39] This Court did nothing of the sort, as confirmed by this Court's determination, already discussed above, that it is irrelevant as to whether a judgment lien or a mortgage lien is in first position. What is relevant, as this Court has concluded, under a pure race statue, is whose lien is in first position, as such lien, being first in time, is entitled to be the first in right to payment of proceeds of the sale.[40]

Notwithstanding that, this Court's reading of *Cedar Inn, Inc*. in *Eastern Savings Bank* is consistent not with a second in line, first to get paid argument being

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[37] *Id*., 55 A.2d at 350.

[38] 269 A.2d 781 (Del. Super. 1970).

[39] OB, pp. 17-18.

[40] *Eastern Savings Bank*, 55 A.2d at 349.

made by REO, but rather is consistent with what the Superior Court in this case has already held and consistent with the command of the race recording statute: the first in line, first in right rule is applicable. In fact, in considering the exact same arguments that are being made here about what was argued before this Court concerning the appropriate interpretation of the holding in *Cedar Inn, Inc*., this Court upheld the position that the Superior Court in *Cedar Inn, Inc.* applied a "first in time, first in line rule," holding that such an "interpretation to be the only reasonable interpretation because it is consistent with the race recording statute and Woolley's treatise."[41]

The issue of lien priority and distribution of proceeds, in light of Delaware's pure race recording statute has already been decided. In short, this Court's holding in *Eastern Savings Bank* controls, and consistent with the race recording statute, the proceeds of a sheriff's sale are to "be distributed according to a first in time, first in priority of recording."[42]

The Superior Court, in full recognition of the command of *Eastern Savings Bank*, confirmed that FCS, as the senior mortgagee, was entitled to foreclosure distribution proceeds before REO, as the junior mortgagee. There is no reversible error, and certainly no reason for this Court to revisit an issue that has already been

[41] *Eastern Savings Bank*, 55 A.2d at 350.

[42] *Id*.

resolved and that REO, prior to the mortgage foreclosure sale, had already conceded was the legally established way in which proceeds of such a sale are to be distributed.

2. This Court should decline to interpret laws in such a way as to make the laws conform with the deficient practice relating to said laws.

REO, having no case it can point to that asserts foreclosing junior mortgagees are entitled, as a matter of law, to first distribution of sale proceeds from a mortgage foreclosure, turns its attention to the alleged "practice" of foreclosures brought by junior mortgage holders. Relying on *Abbott Supply Co. v. Shockley,*[43] REO appears to argue the following: The Sheriff of New Castle County has, it says, distributed sales proceeds to junior mortgage holders for years, so even if this practice violates established Delaware law, why stop now? Yet, such a contention in light of the very well-established authority by this Court to the contrary is nonsensical as such a position -- essentially those who administer the law should be the final arbitrator of how that law should be construed -- is the classic example of the "tail wagging the dog". There is no reason to adopt such a position that would allow one Sheriff's office, among a total of three in the State, to ignore clear precedent of this Court.

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[43] *Abbott Supply Co. v. Shockley*, 128 A.2d 794 (Del. 1956) (internal citation omitted).

Moreover, leaving aside the fact that there is not one shred of evidence in the record or before the Court as what any one of the other two Recorder Offices in this State might do with respect to distribution of proceeds to foreclosing junior mortgage holders, REO further contends that, should this Court uphold the opinion of the Superior Court, "it will throw into question decades of sheriff sales conducted against surviving joint tenants and surviving spouses and on behalf of second mortgage holders," going so far as to say that upholding the Superior Court's decision would invalidate all foreclosures that involve a joint tenant or a surviving spouse.[44]

Such a decision by the Court will do nothing of the sort. Leaving aside the fact that no outside party representing the banking or mortgage lending industry acted to intervene in this appeal or to express any concerns about a rule that has been in place for over a decade, REO is simply wrong as a matter of law. As *Gillette*, the case relied upon by REO, made abundantly clear, surviving spouses and joint tenants become the sole owner of the foreclosed property by operation of law, and thus, the Mortgage Foreclosure Statute, and the practice thereunder, is completely unaffected by scenarios offered by REO.

[44] OB, p. 20.

REO further asserts that "there have been many foreclosures by junior mortgage holders over the years."[45] Yet, again, REO offers no support for such a statement, and the reality is that, in practice, a junior mortgage holder foreclosing on its mortgage is exceedingly rare. The reason for this rarity is as clear today as it was to REO when its counsel admitted their client's lack of distribution priority over FCS in the Letter: Junior mortgagees who are not set to receive money from a foreclosure sale, given their junior status, have no motivation to spend money necessary to get a property to such foreclosure sale.

In the end, REO's position of alleged concern about what it alone perceives to be a change in the distribution priority process as it applies to the New Castle County Sheriff's Office is simply inconsequential. Indeed, in the *Eastern Savings Bank* case itself, the Sheriff's Office was there distributing the proceeds in the exact opposite way this Court concluded was mandated by the race recording statute.[46] There were no issues and no concerns raised by the bar or the mortgage lending industry following the first in time, first in right distribution process confirmed by this Court in *Eastern Savings Bank,* and the same will be the result here. REO's

[45] *Id*.

[46] *Eastern Savings Bank*, 55 A.3d at 344 ("The Sheriff disbursed the proceeds to Eastern Savings Bank, the mortgage lien holder.").

unsupported cry of some type of untoward result here, given the operation of *Eastern Savings Bank* for the last decade, simply rings hollow.

The decision of the Superior Court upholding this Court's holding in *Eastern Savings Bank* and its application of the proceeds of the foreclosure sale in this matter was correct in all respects, and such decision must be affirmed.

ARGUMENT ON CROSS-APPEAL

I. THE SUPERIOR COURT ERRED IN FAILING TO CONCLUDE THAT THE MORTGAGE FORECLOSURE ACTION WAS VOID *AB INITIO* BECAUSE THE SUPERIOR COURT HAD NO SUBJECT MATTER JURISDICTION.

A. Question Presented.

Did the Superior Court err in failing to hold that the mortgage foreclosure action was void *ab initio* because the Superior Court had no subject matter jurisdiction?

B. Standard of Review.

Whether a Court has subject matter jurisdiction is a question of law that this Court reviews *de novo*. *Imbraguilo*, 223 A.3d at 878.

C. Merits of Argument.

As set forth in Argument II, C. above, the Superior Court correctly concluded that the Estate was a necessary party in a writ of *scire facias sur* mortgage foreclosure action. Yet, even though the Superior Court knew that Short Sale and FCS were asserting that the Court did not have subject matter jurisdiction, that Court never went on to decide whether such failure to name the Estate voided the mortgage foreclosure action *ab initio* given that there was no subject matter jurisdiction in the Court absent compliance with the mandates of the Mortgage Foreclosure Statute. The Superior Court's failure to address the issue and to conclude that it had no subject matter jurisdiction was in error and must be reversed.

REO's statutory obligation as the mortgagee to name the Estate as a defendant in an action brought under 10 *Del. C.* § 5061 (a) is absolute.[47] There is no dispute that Short Sale, the only party named, is not the mortgagor, or the successor to the mortgagor, nor is there any dispute that the successor after the death of the mortgagor, the Estate, was not named as a party. Because the language of 10 *Del. C.* § 5061 (a) is unambiguous, the language itself is controlling.[48]

The Estate was not a named defendant, and REO never took the necessary steps to amend the complaint by adding the Estate as a defendant, which would have satisfied the exacting requirements of 10 *Del. C.* § 5061 (a) and would have allowed the issue of the mandated writ commanding the Sheriff to make known to the mortgagor and its successor and to show cause why such mortgage should not be

[47] "[U]pon breach of the condition of a mortgage of real estate by nonpayment of the mortgage money . . . [mortgagee may] sue out of the Superior Court of the county wherein the mortgage premises are situated a writ of *scire facias* upon such mortgage directed to the sheriff of the county **commanding the sheriff to make known to the mortgagor**, and those persons described in subsection (b) of this section **and such mortgagor's heirs, executors, administrators or successors** that the mortgagor or they appear before the Court to show cause[.]" 10 *Del. C.* § 5061 (a) (emphasis added). Upon filing suit against REO only, no such writ of *scire facias* was sent to the Sheriff "commanding the sheriff to make known to the mortgagor . . . and to such mortgagor's heirs, executors, administrators or successors . . . ."

[48] "[W]here the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls." *Shrewsbury v. Bank of N.Y. Mellon,* 160 A.3d 471, 475 (Del. 2017); *Cede & Co. v. Technicolor, Inc.,* 758 A.2d 485, 494 (Del. 2000).

foreclosed.[49] The *scire facias* mortgage complaint in the matter, as the Superior Court correctly determined, was deficient as there was a "defect in the scire facias process."[50]

The failure to comply with the Mortgage Foreclosure Statute rendered the matter void *ab initio*, as it failed to vest jurisdiction with the Superior Court in the first instance. Indeed, mortgage foreclosure is an equitable remedy, and thus the Superior Court's sole ability to act outside of the inherent equitable jurisdiction of the Court of Chancery is based on the statute giving it jurisdiction.[51] Where mandatory statutory requirements for granting the Superior Court jurisdiction are ignored, the Court lacks subject matter jurisdiction.[52] Indeed, it seems axiomatic that without a party that is deemed to be statutorily required, especially one that would have the ability to contest the fundamental issues which are to be decided before a mortgage can be foreclosed upon, the Court simply does not have subject matter jurisdiction to proceed.[53]

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[49] 10 *Del. C.* § 5061 (a).

[50] A249.

[51] *See Brooks v. BAC Home Loans Servicing, LP*, 53 A.3d 301 (Del. 2012) (Order).

[52] *See Lenape Assoc. v. Callahan*, 1992 Del. LEXIS 414 (Del. Oct. 26, 1992) (Order); *see also L. v. L.*, 350 2d. 620 (Del. 1973).

[53] The Estate is the only party who could show cause as to why foreclosure under law should not occur, as the defenses belonged to it not to a simple title holder, and

REO's failure to name the Estate as a defendant on the writ of *scire facias sur* mortgage complaint took away this Court's jurisdiction to foreclose upon the Unit because the only authority of this Court to do so is by the statute, and a violation of the statute divests this Court of jurisdiction to undertake any foreclosure action. This failure at the point of initiation of the statutorily required mortgage foreclosure proceedings makes anything done in the litigation, including a resulting Sheriff's Sale, void *ab initio*.[54]

The Superior Court, which failed to even address the issue, simply did not have jurisdiction to have allowed the mortgage foreclosure to proceed without the successor to the mortgagor being named, or jurisdiction to have allowed, after a meaningless judgment which did not include the Estate, the mortgage foreclosure sale to have taken place (or be confirmed).

REO chose to foreclose upon the Unit by writ of *scire facias sur* mortgage, and by making that choice, the constraints of 10 *Del. C.* § 5061 (a) and the common law rules of our Courts were required to have been followed. 10 *Del. C.* § 5061 (a)

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the Estate was not summoned by writ to appear before the Court to plead its case. 10 *Del. C.* § 5061 (a).

[54] *Imbraguilo*, 223 A.3d at 880 (Where there was a failure to comply with the statutory mandates, this Court held that the "Superior Court lacked subject matter jurisdiction to entertain the appeal, and its decision is rendered void."); *Thompson v. Lynch*, 990 A.2d 432, 433 (Del. 2010).

required REO to name the Estate as a defendant, but REO did not, making the unamended complaint defective.

Here, because the very exacting requirements of 10 *Del. C.* § 5061 (a) were not followed, the ability to foreclose on the mortgage was beyond the jurisdiction of the Superior Court to permit or to approve. Consequently, the defective process engaged in by REO required that the Sheriff's Sale be set aside and the matter dismissed. This Court must reverse the decision of the Superior Court, and direct that the action be dismissed for the Court's lack of subject matter jurisdiction.[55]

[55] Should this Court conclude that the Superior Court lacked jurisdiction from the outset, as argued herein, this Court need not consider any of the REO's three arguments on appeal, as a finding of no subject matter jurisdiction means this Court "cannot consider the merits of [REO's] appeal." *Imbraguilo*, 223 A.3d at 881 (*citing Draper King Cole v. Malave*, 743 A.2d 672, 673 (Del. 1999)).

II. THE SUPERIOR COURT ERRED IN HOLDING THAT THERE IS NO PREJUDICE SUFFICIENT TO VACATE THE MORTGAGE FORECLOSURE SALE AS A RESULT OF REO'S FAILURE TO NAME THE ESTATE AS A NECESSARY PARTY TO REO'S FORECLOSURE ACTION.

A. Question Presented.

Whether the Superior Court erred in holding that there was not sufficient prejudice to vacate the mortgage foreclosure sale.

B. Scope of Review.

The Superior Court's decision to not set aside a Sheriff's sale is reviewed by this Court for an abuse of discretion. *Burge v. Fidelity Bond & Mortgage Co.*, 648 A.2d 414, 421 (Del. 1994).

C. Merits of Argument.

The violation of the command of the statute, through the failure of REO to have ensured the issuance of a writ of *scire facias sur* mortgage against the Estate, divests the Court of jurisdiction, *ab initio*, and thus, whether there is any or no prejudice to the Estate, or to anyone, is wholly irrelevant as neither the Superior Court nor this Court have jurisdiction in this matter until the statutory prerequisites under 10 *Del. C.* § 5061 (a) have been met.

Nonetheless, to the extent that prejudice could even be considered under these circumstances as the Superior Court concluded and considered,[56] prejudice -- substantial prejudice, injury and injustice -- is manifest and inherent in the entire process here where the mandatory statutory prerequisites are not followed, and such harm required the Court to have vacated the sale. The Superior Court's conclusion otherwise is an abuse of discretion and in error, and must be reversed.

The most obvious, and most troubling form of prejudice is how the statutory violation impacts the ultimate sale. There is absolutely no way to know how badly the public has been harmed, including potential bidders who, after considering REO's facially flawed Complaint, that named not the mortgagor or its successor, but rather the titled property owner, simply walked away and did not bid because such potential bidders did not want to risk "buying a lawsuit" with the non-named mortgagor or the successor to the mortgagor. That harm is real, and incalculable, as it has a direct and unknowable impact on the amount that would be realized at the sale.

Moreover, the public is harmed, and suffers prejudice, because the entire process was infected by REO's unexcused and inexcusable statutory violation. Prejudice, actual and verifiable prejudice, exists as to everyone and anyone who may

[56] A249-251("The Court has broad discretion to set aside a Sheriff's sale upon a finding that a party has been prejudiced.").

have been interested in the property to be sold. Thus, irremediable prejudice exists exactly because the statutory process in naming the mortgagor (or here, its successor) was violated at the outset.[57] The Superior Court never considered the inherent pervasive prejudice that a statutory violation imposes on the mortgage foreclosure process, and that failure is an abuse of its discretion.

Nonetheless, what the Superior Court did do was to look at the prejudice solely from the perspective of "the parties" (or ironically, in the case of the Estate, a non-party), and concluded that there was, with respect to either the Estate or FCS, "insufficient prejudice to warrant the vacation of the sale."[58] The Superior Court's conclusion on both accounts was flawed, amounts to an abuse of discretion and must be reversed.

As to the Estate, the Superior Court found that no prejudice to it was likely, as it concluded that, based on the Estate's lack of participation to date, it would not have participated in this matter.[59] Whether the Court correctly believed that the Estate would or would not have participated is irrelevant. The issue for the Court in

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[57] Protecting the public, through protecting the process, is why the foreclosure sale itself does not cutoff rights, but rather the foreclosure process provides for a final check, the final decision of the Superior Court – the Confirmation -- to ensure that the process was done correctly and according to the law that gives the Court jurisdiction to consider the foreclosure in the first instance.

[58] A250.

[59] *Id*.

considering whether prejudice existed with respect to the Estate is whether the Estate was given the statutorily mandated notice and opportunity to participate. That did not take place here, leading to the irremediable prejudice to the Estate.

The Mortgage Foreclosure Statute guarantees necessary parties certain procedural rights, fixed protections, including service of process mechanisms, that ensure, in the first instance, the jurisdiction of the Court over such parties and over the rights that the Court would be addressing, and which mandate evenhanded treatment **by the mortgagee** before rights may be taken from the mortgagor, or here, the Estate. The Estate was afforded none of those protections from the mortgagee, and, worse yet, the mortgagee in this appeal tells this Court, in opposing the finding that the Estate was a necessary party, that the Estate was entitled to none.

Thus, when the issue of prejudice is considered from the perspective of a guarantee of the availability of the statutory protections from the potential depravations of a mortgagee, and of whether the statutorily mandated standards that safeguard a mortgagor and its successors have been faithfully observed, it is abundantly obvious that an injustice has taken place, that an injury in fact has been sustained and that prejudice, substantial and irremediable prejudice, exists such that the Superior Court should have concluded that the impact on the vested rights of the party to whom the statute was created to protect mandated the vacation of the sale.

The existence of such substantial prejudice to the very party to whom 10 *Del. C.* § 5061 (a) was intended to protect, forecloses any doubt that the statutory violation is of such manner and severity that precludes a finding that the violation can be ignored and the sale can be upheld.

As to FCS, as the party holding the winning bid, the Superior Cour concluded that it would suffer no prejudice because the Court's processes in "confirming" the sale, would ultimately remove any of the threats to it.[60] Yet, the Court failed to comprehend that a ruling by a Court with no jurisdiction, and where the Estate was not brought into the action, does not give FCS any comfort that it would obtain the title to which it bargained for under the very statute that was violated, as such an order will not allow for any diminution of the prejudice it faces from the Estate whose claims for violation of its statutorily mandated due process rights remain outstanding and viable. That prejudice, the threat of injury from claims being made, remains, and certainly cannot be alleviated by an Order of the Superior Court which does not repose and cannot repose the claims that the Estate retains.

Thus, substantial prejudice, which includes injury and injustice, exists, to the public at large, to the non-named mandatory party, the mortgagor (or here its successor) and to the holder of the winning bid, as a result of Plaintiff's violation of

[60] A251.

10 *Del. C.* § 5061 (a). Consequently, sufficient prejudice exists from the defective process initiated by REO that requires the Sheriff's sale to be set aside.

The Superior Court's conclusion that there was insufficient prejudice is an abuse of its discretion and is in error, and must be reversed.

CONCLUSION

WHEREFORE, Appellees and Cross-Appellants, Short Sale, LLC and FCS Lending, LLC, respectfully requests that this Court enter an Order affirming the Decision of the Superior Court.

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