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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' REPLY BRIEF ON CROSS-APPEAL

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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. Merits of Argument.

The argument of FCS and Short Sale, the Appellees herein,[1] is straight forward: The consequence of the Superior Court's conclusion in the Decision that there was a "defect in the *scire facias* process"[2] and that the Estate was a necessary party in a writ of *scire facias sur* mortgage foreclosure action should have been a determination that the Court never had jurisdiction over this matter in the first instance.[3] Yet, the Superior Court failed to explain why that was not the case.[4] That failure to address the issue and to conclude that it had no subject matter jurisdiction requires the reversal of the Court's Decision on this matter.

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[1] All defined terms used herein are as set forth in Appellee's Answering Brief on Appeal and Opening Brief on the Cross Appeal (cited herein as "Answering Brief"). REO's Reply Brief will be cited as "Reply Brief."

[2] A249.

[3] Answering Brief, pp. 30-34.

[4] Despite REO's bold contention to the contrary (Reply Brief, p. 13), the Superior Court **never** explained why the Court had subject matter jurisdiction given that it had concluded that there had been a "defect in the *scire facias* process." Indeed, the arguments made in the Answering Brief and herein, the same as made below (A174-181), were never addressed by the Superior Court.

The *scire facias* mortgage foreclosure complaint in this matter, as the Superior Court correctly determined, was defective.[5] REO's failure to name the Estate as a defendant on the writ of *scire facias sur* mortgage complaint divested 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 or to permit the sale to occur. As explained in the Answering Brief, this failure at the point of initiation of the statutorily permitted mortgage foreclosure proceedings makes anything done in the litigation in the Superior Court, including a resulting sheriff's sale, void *ab initio*.[6]

REO's argument in response is not to challenge the fact that a violation of the Mortgage Foreclosure Statute of the type that the Superior Court found existed renders the action void *ab initio*. Rather, REO contends that it actually complied with the Mortgage Foreclosure Statute such that there was, according to it, no statutory violation at all.[7] Specifically, REO contends that this Court must "liberally

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[5] A249.

[6] Answering Brief, p. 33 (*citing Imbraguilo v. Unemployment Ins. Appeals Bd.*, 223 A.3d 875, 880 (Del. 2019) (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).

[7] Reply Brief, pp. 13-15.

construe" the Mortgage Foreclosure Statute, and that, in doing so, it will conclude that Short Sale, who was named by REO in its mortgage foreclosure complaint, is the statutory "successor," such that the statute's command to name the mortgagor or its successor has been met.[8]

REO's argument is decidedly without merit and would, if accepted, jettison this Court's long-standing directive that "protection of the rights of the defaulting mortgagor is of paramount importance in reviewing a sheriff's sale . . . ."[9]

The salient point of the Mortgage Foreclosure Statute is to allow those who are signatories to the mortgage, the mortgagors, and, if deceased, their heirs, executors, administrators or successors,[10] as well as those who are owners of the land which is bound by the mortgage, to be able to protect their rights and respond to a statutorily authorized action which permits a mortgagee to seek both (i) to validate the debt owed pursuant to the mortgage and (ii) to foreclose upon the mortgage that secures that validated debt.

Here, although the mortgagor passed, and there was no executor or administrator, there was a successor, the Estate. The Estate became the legal

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[8] *Id.*, p. 14.

[9] *Burge v. Fidelity Bond and Mortgage Co.*, 648 A.2d 414, 418 (Del. 1994).

[10] A249 (*citing* 2 Woolley, Victor B., *Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware,* § 1360 (1906)).

successor to the mortgagor, upon the death of the mortgagor where there was no executor or administrator named. Short Sale is, in such case, not a "successor," as it does not, as the Superior Court concluded, step into the shoes of mortgagor.[11] Thus, even if a "liberal" interpretation of the Statute is somehow needed for a statute that is unambiguous on its face, there is no manner in which the Mortgage Foreclosure Statute could be interpreted to make Short Sale a successor to the mortgagor, as Short Sale is not a party that has legal obligation regarding that mortgage, such as would be the case with an heir, executor, administrator or successor to the mortgagor. The Superior Court correctly concluded as much.[12]

Moreover, REO's argument is undercut by the Statute itself. The Mortgage Foreclosure Statute contemplates that title holders, like Short Sale here, are not automatic successors to the mortgagor, as they are specifically to be named as "additional" necessary parties to the mortgage foreclosure action.[13] There would

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[11] A249.

[12] *Id.*

[13] Short Sale would have been, of course, an appropriate **additional** party mandated to be named a "necessary party," as it was the party holding title to the property. 10 *Del. C.* § 5061(b)(1) ("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 ….**" (emphasis added).

have been no need to have listed them separately and specifically required them to be named as a necessary party as the Mortgage Foreclosure Statute does if all subsequent title holders are already included as "successors," as argued by REO. Thus, REO's attempt to argue otherwise is to no avail.

In all events, that "successor" under the Statute must include the Estate cannot be credibly challenged. As this Court has held, "the only defenses available in a mortgage foreclosure action [are] payment of the mortgage money, satisfaction or a plea in avoidance of the mortgage."[14] Given this, it is clear why the mortgagor, or its direct successor, here, the Estate of, must be named as a defendant in this *scire facias mortgage* complaint action where the mortgagor is deceased because the only potential party capable of asserting any of those defenses was the Estate, **the only party** available and in the position (i) to gather and consider the financial records of the decedent regarding the mortgage and the mortgagor's payments on the debt, (ii) to determine the assets, debts and liabilities of the deceased mortgagor, including what might still be owed on the debt covered by the mortgage, and, ultimately, (iii) to arrange for the payment of all remaining obligations of the mortgagor's estate following his or her death.[15] A titled property owner, who has no access to the

[14] *Shrewsbury v. Bank of N.Y. Mellon*, 160 A.3d 471, 475 (Del. 2017).

[15] *See* A39-40 (describing the terms of the mortgage and the amounts borrowed and owed under the mortgage note between REO and the mortgagor, predecessor of the

finances of the mortgagor or authority on behalf of the deceased mortgagor, is not a successor to the mortgagor.

REO's further assertion that "Section 5061 does not mandate that the person or entity that owes the money (borrower) be a party to the foreclosure"[16] is belied by the Statute itself. Indeed, the Statute clearly mandates that the mortgagor, the person who owes the money, and such "**mortgagor's heirs, executors, administrators or successors,"** be named.[17] The Estate, given the death of the sole mortgagor, is the only party obligated under the mortgage, a fact conceded by REO.[18]

Estate). Short Sale, as only a record title holder of the Unit, had no knowledge of the terms or the remaining balance of the note between REO and the mortgagor.

[16] Reply Brief, p. 15.

[17] "[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).

[18] Reply Brief, p. 15; *see, e.g.*, *In re Mortg. of Leslie*, 1994 Del. Super. LEXIS 46, at *5 (Del. Super. Ct. Mar. 7, 1994) (*quoting Black's Law Dictionary* 1009 (6th ed. 1990)) ("A mortgage is defined as an interest in land created by a written instrument providing security for the **performance of a duty or the payment of a debt**.") (emphasis added).

It is inconceivable that a "mortgage foreclosure" by writ of *scire facias mortgage* could ever proceed without the named party to the mortgage (or, here, her successor) or the legal party, following the death of the mortgagor, that is legally responsible for paying the debt under that mortgage following the decedent's passing. Indeed, such alternative position espoused by REO completely undercuts the authority of this Court in scrutinizing the entire mortgage foreclosure process, a scrutiny that is to "assure that the defaulting obligor has received just treatment in the execution process."[19] How can "just treatment" be assured if the successor to the defaulting mortgagor has not even been brought before the Court? REO's argument that Short Sale is the successor of the Estate is just legally incorrect.

REO's final argument poses a question: "who is a successor to the mortgagor who would be a proper defendant to a *sci fa. sur* mortgage action[?]."[20] The more appropriate and statutorily mandated question would be: Who are the parties who are required to be **defendants** to such an action? 10 *Del. C.* § 5061(b) provides that answer, and required REO to name the mortgagor, but if deceased, her executor, administrator or successor, **as well as** the party holding title to the property to which the mortgage attached. While REO did name Short Sale, as holder of the legal title,

[19] *Burge*, 648 A.2d at 418 (*citing Girard Trust Bank v. Castle Apts., Inc.*, 379 A.2d 1144, 1147 (Del. Super. Ct. 1977)).

[20] Reply Brief, p. 14.

it failed to name the successor to the deceased mortgagor, and because it did not do so, it made its unamended complaint defective.

Given that REO has not challenged the fact that a statutory violation in the initiation of a mortgage foreclosure action is void *ab initio*, and now with that glaring deficiency that, in fact exists, it must be conceded by REO that the Court has no jurisdiction, and certainly none that would have allowed either (i) the mortgage foreclosure action to have proceeded without the successor to the mortgagor being named, or (ii) the mortgage foreclosure sale to have taken place (or be confirmed) absent the statutorily mandated party having been brought before the Court pursuant to the processes set forth in that Statute.

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.[21]

[21] Again, as set forth in the Answering Brief, because the Superior Court lacked jurisdiction from the outset, 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." Answering Brief, p. 34 (*citing Imbraguilo*, 223 A.3d at 881).

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. Merits of Argument.

Should this Court conclude, for whatever reason, that the failure of REO to have ensured the issuance of a writ of *scire facias sur* mortgage against the Estate did not divest the Superior Court of jurisdiction, *ab initio*, Appellees' position, as stated in their Answering Brief, is that the Superior Court's conclusion that there was no prejudice sufficient to invalidate the Sheriff's Sale is in error and must be overturned.[22] Such prejudice is manifest, and the Sheriff's Sale must be set aside.

The standard to be applied by this Court, which is not disputed by REO, is whether or not substantial prejudice, injury and injustice exists sufficient to set aside a sheriff's sale.[23] Appellees demonstrated as much, explaining in exacting detail how the Sale prejudiced the named and unnamed parties, specifically the Estate, the public at large and, ultimately, the interested party to the Sale, FCS.[24] That harm, injury and injustice is real and exists, and was ignored by the Superior Court in its Decision.

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[22] Answering Brief, pp. 35-40.

[23] *Burge*, 648 A.2d at 418, 420.

[24] Answering Brief, pp. 35-40.

In response to that fulsome and definitive showing of actual and substantial prejudice sufficient to overturn the Sheriff's Sale, REO suggests, incredibly, that Appellee "struggles to find any party that has experienced real and concrete prejudice by this ruling."[25] Not only is such a statement belied by what was offered in the Answering Brief, but it is REO that finds itself in an uphill, and, ultimately, losing battle to undermine the actual and prejudicial harm that was demonstrated and that exists.

REO first contends that no harm exists with respect to the Estate. It claims that, despite all of the procedural protections the Mortgage Foreclosure Statute provides to such Estate, as successor to the mortgagor, it need not have named the Estate and that such Estate suffered no harm, because, it says, the action is "*in rem,*"[26] and, incredibly, because it contends the property subject to the mortgage was divested from it in a prior foreclosure action, such Estate's "interest was gone before the foreclosure proceedings commence[d]."[27] REO's position is without merit.

This Court, as stated above, in conducting a review of this and every sheriff's sale, is laser-focused on considering the protections afforded to the defaulting

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[25] Reply Brief, p. 16.

[26] *Id.*

[27] *Id.*, p. 17.

mortgagor, recognizing that such protections are of "paramount importance."[28] Indeed, this Court will "scrutinize the sale to ensure that the mortgagor is treated fairly."[29] REO's position is the antithesis of treating the mortgagor "fairly," and, indeed, guarantees that the mortgagor's successor, the Estate, will be treated unfairly and that harm to it results. Indeed, REO completely ignores the most important aspect of this matter: The fact that, following the death of the decedent, the Estate's interest **in the debt** owed by the Estate and covered by the mortgage was not "gone."[30]

Of course, simply claiming that the action is *in rem*, and that the mortgagee can avoid the procedural protections and hurdles for which it must abide under the Mortgage Foreclosure Statute, does not end consideration of the matter. If it did, under REO's view, each and every action brought pursuant to the Mortgage Foreclosure Statute, everyone one of which is *in rem*, would never have to name any mortgagor, or here, its successor, simply because the action is "*in rem*." In that light, REO's argument falls apart by its own weight.

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[28] *Burge*, 648 A.2d at 418.

[29] *Id.*

[30] Indeed, if that interest in the mortgage debt was "gone," the mortgagee would have no right to payment of the debt or rights in the mortgage securing that debt.

Notwithstanding that, what REO ultimately misunderstands, and why its whole "*in rem*" action theory of no harm or prejudice is nothing more than a diversionary tactic, is that once the judgment is granted, it becomes enforceable against the Estate, meaning, if REO is correct, that debt, the subject of the Superior Court's Judgment Order upon which the foreclosure sale went forward, **in the full amount sought by the mortgagee**, is owed by the Estate. If that were not the case, there would be no ability to proceed on the mortgage, **a mortgage guaranteeing the entire debt of the Estate**.[31]

Thus, REO blithely ignores the rights of the Estate, and the profound effect of the Judgment Order in this mortgage foreclosure action had on the Estate's financial interests, not in the property upon which REO solely focuses, but rather in the actual debt -- and the amount thereof -- owed to REO by the Estate. Indeed, the Court need only understand that without the participation of the mortgagor, or its successor, the mortgagee could say the entire debt was owed, when the debt was actually paid off, and the mortgagee would be free to move forward getting a judgment on an amount

[31] REO also ignores that the amount that is achieved by the foreclosure sale directly affects the amount of the debt owed by the Estate. Precluding the Estate from participating in the Mortgage Foreclosure Action so that it can ensure for itself that the matter is being done properly and that a full and fair price is derived at the foreclosure sale, divests the Estate of its opportunity to ensure that the process is protected to guarantee that, in the end, a sale fairly obtains a fair price for the sale of the property to satisfy a portion of the debt owed by the Estate to REO, the mortgagee.

to which it was not entitled. That actually may be the case here, but this Court will never know, if it adopts REO's position, because this mortgagee chose, for whatever reason, to avoid naming the **only** party that could have validated the debt claimed, or disputed the amount of that debt.

Thus, even though the action is *in rem*, that does not mean the Estate's interests with respect to the amount of the debt secured by the mortgage are non-existent and can be ignored.

And, in all events, REO's position is simply nonsensical. The Mortgage Foreclosure Statute provides for a process. The process is there for a reason, a valid and sound public policy reason. If REO's position were to be upheld, the statutorily mandated protections that safeguard mortgagors and their successors from the unilateral actions, or here the depravations, of the mortgagees who, for whatever reason, seek to avoid the clear and essential mandates of the Mortgage Foreclosure Statute can simply be ignored. Clearly, this is not what the General Assembly sought, in mandating the obligation to name the mortgagor, and its successors, if any, up front and as a mandate in bringing such a foreclosure action.

Here, none of the mandated process protections were offered to the Estate. None of the mandated fixed protections which would have guaranteed evenhanded treatment **by the mortgagee** and allowed for a validation of the debt before rights may be taken from the Estate were granted to the Estate.

REO's position here is that the Estate was entitled to not one of these statutorily mandated protections, and that it can personally benefit from its failing to name the only party which owed it the debt and which was the only party in the position to validate or challenge the amount of the debt asserted to be owed to REO. The mortgagee, REO, is laughing all the way to the proverbial bank, given that it **never** had to account, in a court of law, to the very party from whom it is demanding payment (and seizing property to obtain payment) on that debt. It was incumbent upon the Superior Court to "scrutinize the sale to ensure that the mortgagor is treated fairly,"[32] and in the circumstances here, that scrutiny was missing, as the harm and prejudice is manifest to the party that was not named as a result of the egregious statutory violations that are evident here.[33]

[32] *Burge*, 648 A.2d at 418, 420.

[33] Not surprisingly, REO does not even bother to attempt to support the unsupportable, the conclusion of the Superior Court that found that no prejudice to the Estate was likely, based on the Estate's lack of participation to date and its perceived likelihood that it would not have participated if the statutorily mandated procedural protections had been followed. The Court never should have considered whether or not the Estate would have participated. The critical question was: Did the Estate have the appropriate protections afforded to it, a fact that the Court had already decided were never offered to it. Again, the Superior Court failed to consider whether, in failing to give the statutorily mandated notice and opportunity to participate, the Estate was harmed and suffered irremediable prejudice.

The Superior Court, having concluded that the Estate was a necessary party pursuant to the Mortgage Foreclosure Statute[34] and that a statutory violation had occurred, erred in further concluding that no prejudice existed as to that required party who never received the **command of the sheriff** to appear in this action.[35] The Superior Court should have concluded, based on that statutory violation, that an injustice had taken place, that an injury in fact has been sustained and that prejudice, substantial and irremediable prejudice, exists such that that the impact on the vested rights of the party to whom the statute was created to protect required the vacation of the sale. The failure of the Court to have recognized the absolute failure to guarantee that the Estate was "treated fairly," and of this mortgagee to argue that there was no obligation to do so, is prejudice. This alone requires a finding that the Court abused its discretion, and that the Sheriff's Sale cannot be upheld.

Next, in response to argument made by FCS and Short Sale that the public has been harmed, REO simply offers its unsupported view that it believes that no harm exists to the public.[36] Of course, the Superior Court never considered the harm to the public, and that, in itself, was an abuse of discretion. Yet, it would have

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[34] A246-249.

[35] 10 *Del. C.* § 5061(a).

[36] Answering Brief, pp. 36-37.

concluded, had it undertaken such an analysis, that the harm here would have been obvious, and required that the sale be vacated.

Having found that a statutory violation existed, the Court should have considered that violation impacted every aspect of the foreclosure process, right down to the public's participation, or really, the lack of participation. The public, having concluded (as the Superior Court readily found) that a flawed process existed, would not have participated, and thus, that they were harmed in that a sale premised on a *sci fa.* deficiency continued on, thus losing out on the right to participate. No one needed to take on the risk of "buying a lawsuit," where such defective *sci fa.* process was self-evident. That harm is real, and irreparable, as it is incalculable given the direct and unknowable impact on the amount that would have been realized at the sale -- and thus the amount the Estate would owe on the debt -- or on the loss that the public had in not being able to participate in the sale.[37]

And, most distressingly, REO once again seeks to minimize the harm to the very party which owed money to it, the Estate, saying that if the sale produced money more than that owed to FCS and to REO, those proceeds would go to Short Sale.[38]

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[37] REO has no real argument in response, simply offering how itself would be harmed if the proceeds "are insufficient to satisfy the mortgage" (Reply Brief, p. 17), itself an admission of the harm that exists.

[38] *Id.*

Yet, REO is absolutely wrong, as those proceeds would go not to Short Sale, but rather would be available to the Estate, as Short Sale has no claim to monies that are payable to the Estate, when it is owed no monies by the Estate. REO's arguments against a public harm, like its arguments made against the harm to the Estate, simply accentuate its dismissive attitude to the rights of the Estate, and, actually, confirm the harm and prejudice that exists here.

Again, the Superior Court never considered the inherent pervasive prejudice that a statutory violation imposes on the entire mortgage foreclosure process, and that failure is an abuse of its discretion and must be reversed.

Finally, REO never addresses the demonstrable harm to FCS, discussed in the Answering Brief, and, thus, that prejudice remains unchallenged. For the reasons set forth in the Opening Brief,[39] the Superior Court's failure to adequately comprehend such prejudice to FCS was an abuse of discretion, and must be reversed.

Substantial prejudice, 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 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.

[39] Answering Brief, p. 39.

The Superior Court's conclusion that there was insufficient prejudice is an abuse of its discretion and is in error, and must be reversed.[40]

[40] Throughout its papers, REO complains that somehow there has been an unprecedented upheaval in the law, concluding in the last lines of its Reply Brief that the Decision "upended established Delaware procedures," and that the only way to "avoid this cloud of prejudice" is to reverse the Decision. Reply Brief, p. 18. Yet, not one iota of evidence has been offered that there is any so-called "cloud of prejudice," other than the unsupported and self-serving assertions of REO.

Not one member of the mortgage or banking industry has offered one complaint about the process and the Decision, other than REO, whose pre-foreclosure sale counsel had brought suit against the very party it knew was required to be named, the Estate (but inexplicably, and without any record reason, **dismissed such suit**). Not one of the three Sheriff's offices in this State has sought to intervene and to offer its assessment that this alleged prejudice is somehow clouding its practices. And, finally, not one of the three offices of the Recorder of Deeds, whose offices protect the "race to the courthouse" dockets, have shared or expressed any concern, let alone have offered to confirm this alleged "cloud." Appellees respectfully suggest, as the record reflects, that there is none, other than in the mind of this litigant.

CONCLUSION

WHEREFORE, Appellees and Cross-Appellants, Short Sale, LLC and FCS Lending, LLC, respectfully request that this Court enter an Order directing the dismissal of this action for lack of subject matter jurisdiction, or, in the alternative, vacating the Sheriff's Sale.

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