EFiled: Sep 30 2026 08:06AM EDT
Filing ID 80783353
Case Number 306,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

REO TRUST 2017-RPL1'S MEMORANDUM OF LAW ON REMAND FROM THE SUPERIOR COURT

McCabe, Weisberg & Conway, LLC

/s/Janet Z. Charlton
Janet Z. Charlton, Esquire (No. 2797)
Email: JCharlton@mccabeesq.com
Chase N. Miller, Esquire (No. 5363)
Email: ChaseMiller@mccabeesq.com
1415 Foulk Road, Suite 100
Foulkstone Plaza
Wilmington, Delaware 19803
(302)409-3520
Attorney for Appellant REO Trust 2017-RPL1

Dated: September 30, 2026

Introduction

Plaintiff, REO Trust 2017-RPL1 ("Plaintiff"), by its undersigned counsel, hereby submits this memorandum to address the factual findings and legal conclusions contained in the Order on Remand Following Evidentiary Hearing ("Order on Remand") and states as follows:

1. The Supreme Court remanded this action for fact findings on waiver, standing and jurisdiction and how the facts surrounding the assignment of bid may impact them:

> [t]he Court should not resolve issues that the parties have waived or lack standing to assert. The legal merits of the parties' claims on appeal cannot be resolved until this Court addresses the attendant waiver, standing, and jurisdictional issues, which may turn on the unusual circumstances under which the appellees' motions came before the Superior Court.
> Accordingly, this matter is remanded to the Superior Court so that the parties may develop the factual record regarding the circumstances underlying the Second Sheriff's Sale, the assignment, and the parties' interests in the outcome of the proceedings. After receiving the parties' evidence, the Superior Court shall make factual findings transmit the same to this court. The Superior Court also may reconsider any aspect of its decision on which those factual findings bear.[1]

Proceedings on Remand

2. After discovery and two days of hearings, the facts underlying the

---

[1] Opinion of the Supreme Court dated June 18, 2024

relationship between the bidder at the sale, Short Sale, LLC ("Short Sale") and the assignee of the bid, FCS Lending LLC ("FCS") has been established. Mr. Frank Stella ("Stella") is the managing member of both entities.[2] He first learned that the foreclosure against Short Sale, who owned the property, a condominium unit, may have been defective on December 3, 2020.[3]

3. The goal at the sheriff sale was to buy this condominium unit to add to his inventory of units that Short Sale owned in this complex.[4] When he registered to bid, his company Short Sale, had already been assigned a bidder number by the sheriff, so for expediency, he registered to bid using that number.[5] His intent was always to assign the bid to FCS to ultimately own the property. [6]

4. Then, after the sale, he followed through and assigned the bid to FCS, as intended. As Stella is the only principle of both entities, his knowledge of the

---

[2] June 30, 2025 transcript page 20. " Q: And so, sir, you were managing member of these two entities; is that correct? A: Yes." , Appendix, tab 2, Answer to Interrogatory 4 "Mr. Stella is the member of both Defendant and Interested Party.."

[3] Answer to Interrogatory 2, Appendix, tab 3.

[4] June 30, 2025 hearing transcript page 18, "A: I think I own 90 units out of 111. Q: When you say I, you're saying Short Sale? A: Short Sale.", Appendix, tab 2.

[5] Transcript June 30, 2025 page 27, "I carry my bidding card. My bidding card is under one name, so you have to bid under that name.", Appendix, tab 2.

[6] Answer to Interrogatory 15, "The intention in assigning the bid for the Property from Defendant to Interested Party was to put such bid, and the possible ownership of the Property, if the Sale was confirmed, into the hands of the Interested Party, the holder of the senior mortgage on the Property.", Appendix, tab 3.

history of these proceedings can be imputed to both entities.[7]

Superior Court Findings Regarding Waiver, Standing and Jurisdiction

5. The Superior Court found that "there was no good reason for the delay [in challenging the foreclosure], especially now knowing that the owner of Short Sale and FCS are one and the same",[8] resulting in in a waiver of all applicable challenges, other than jurisdiction, which the court must entertain.

6. It further found that the Superior Court did have jurisdiction by virtue of a statute conferring jurisdiction over all foreclosures.[9]

---

[7] *BrandRep LLC v. Rusky*, 2019 Del. Ch. LEXIS 3 * at 12*, 2019 WL 117768 (Del. Ch. January 7, 2019) *citing Carr v. New Enter. Assocs., Inc.*, 2018 Del. Ch. LEXIS 100, 2018 WL 1472336, at *16 (Del. Ch. Mar. 26, 2018) ("A director's knowledge and participation in a breach may be imputed to a non-fiduciary entity for which that director also serves in a fiduciary capacity."); *Cumming v. Edens*, 2018 Del. Ch. LEXIS 54, 2018 WL 992877, at *26 (Del. Ch. Feb. 20, 2018) (describing scheme facilitated through various "subsidiaries named as aiders and abettors" and concluding that "[u]nder basic principles of agency, all of their knowledge is imputed to the [] entities they served as agents"); *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, 2009 Del. Ch. LEXIS 88, 2009 WL 1387115, at *16 (Del. Ch. May 18, 2009) ("Eastern also is liable for aiding and abetting because the knowledge and conduct of Elliott, its controlling officer, are imputed to it."); *see also Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 638 (Del. Ch. 2013) (finding the knowing participation element was adequately pled because knowledge of fiduciaries who were alleged to have breached their duties could be imputed to other entities where the fiduciaries also served as officers, agents, or principals).

[8] Paragraph 26 of Order on Remand, Appendix, tab 1

[9] Paragraph 33 of Order on Remand *citing* 21 Del C. §2101 [SIC] intended as 25 Del. C. §2101 ("(b) A mortgage in the above form duly executed, acknowledged and recorded shall operate and be effective as a valid mortgage lien upon the entire interest of the mortgagors in the premises therein described, and irrespective of whether the mortgage is under seal, it may be foreclosed in the Superior Court pursuant to Chapter 49 of Title 10"). This citation was erroneously typed as 21 Del. C.§2101–(Operation of unregistered motor vehicles exceptions)

7. Finally, the Order on Remand found that while FCS, as the successful bidder, had standing to object to confirmation of the sale,[10] "nothing was presented to suggest Short Sale or FCS has standing to challenge this sale on behalf of the Estate.[11]

8. The court below also revisited its finding regarding the distribution of proceeds following a sale. It held that the proceeds of a sale be distributed in order of priority of lien "unless the sale is made subject to any prior mortgage encumbrances."[12] The court based its ruling on *dicta* in *Cedar Inn v. Kings Inn*,[13] where the court noted that the parties in that case had agreed that the first mortgage would not partake in the distribution of proceeds.[14]

Argument

Jurisdiction

9. The findings of the Superior Court on the issues of waiver and jurisdiction were correct.

10. The Delaware Code gives the Superior Court jurisdiction over all

---

[10] Paragraph 35 of Order on Remand
[11] Paragraph 29 of Order on Remand
[12] Paragraph 51, *see also* Paragraph 50 of Order on Remand
[13] 269 A.22d 781 (Del. Super. 1970)
[14] Paragraph 44 and 48 of Order on Remand

foreclosures.[15] Its jurisdiction is not based on 10 Del. C. § 5061 et. seq. as argued by the Movants. Rather, 25 Del. C. § 2101 is a separate conferral of jurisdiction. 10 Del. C. § 5061 et. seq. merely sets forth procedural rules for conducting foreclosures. Thus, any argument that there was not strict compliance with 10 Del. C. §5061 et. seq. is not a defect in jurisdiction, but in procedure.[16]

11. Short Sale waived the defense that the foreclosure failed to name a necessary party. Short Sale did not assert any defenses to the foreclosure and allowed a default judgment to be entered against it. It belatedly asserted that Plaintiff failed to name a necessary party, rendering the foreclosure defective, after foreclosure judgment and the sheriff sale to execute on that judgment.

12. The failure to join a party is a defense that must be asserted once the complaint is served. Superior Court Civil Rule 12(b).[17] Short Sale waived this

---

[15] 25 Del. C. 2101(b) A mortgage in the above form duly executed, acknowledged and recorded shall operate and be effective as a valid mortgage lien upon the entire interest of the mortgagors in the premises therein described, and irrespective of whether the mortgage is under seal, it may be foreclosed in the Superior Court pursuant to Chapter 49 of Title 10.

[16] Paragraph 32 of Order on Remand "The Court's entertainment of this challenge here may unfortunately allow opportunity for nefarious gamesmanship in the future, in that a party can simply repackage a procedural challenge by raising a jurisdictional challenge."

[17] (b) How presented. -- Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. (emphasis added)

defense,[18] by failing to assert it in the matter set forth in Superior Court Rule 12(h), prior to judgment.[19] Under Rule 12 (h) this defense could have been asserted in the answer, a motion for judgment, or at trial.[20] Rule 12(h) does not permit this defense post-trial after execution. Short Sale sat silent during all these stages of the foreclosure proceedings.

13. It is not in the interest of judicial economy for a defendant to fail to defend an action, then wait until after the judgment is entered, appeal periods expire and execution process is almost concluded, before coming forward for the first time to assert defenses to essentially reopen the case. Rule 12(h) was designed to prevent such dilatory tactics.[21]

14. Short Sale argued to this Court that this was a challenge to the

---

[18] *see Tydings v. Loewenstein*, 505 A.2d 443, 446 (Del. Supr. 1986); *City of Wilmington v. Spencer*, 391 A.2d 199, 203 (Del. Supr. 1978) (affirmative defenses must be pled or the defense is waived)

[19] Superior Court Civil Rule 12(h). Waiver or preservation of certain defenses. -...(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

[20] Superior Court Civil Rule 7(a). (a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is served under the provisions of Rule 14; and a third-party answer, if a third party complaint is served. No other pleading shall be allowed, except that the Court may order a reply to an answer or a third-party answer.

[21] *See Plummer v. Sherman*, 861 A.2d 1239, 1243 (Del. Supr. 2004).

jurisdiction of the Superior Court, in that failure to name the Estate deprived the Superior Court of jurisdiction. However, Short Sale's reliance on 10 Del. C. § 5061 is misplaced, as 25 Del. C. § 2101 gives this Court jurisdiction over ALL foreclosures. Thus, its belated challenge was not based on lack of jurisdiction at all, but on a procedural defect that could have been raised at the time the complaint was filed, as it was obvious which Defendants were named in the foreclosure and which were not.

15. This knowledge of the proceedings and waiver can be imputed to FCS as Stella is the principle of both companies.

Standing and Waiver

16. The Superior Court ruled that the owner and successful bidder do have standing to challenge the validity of the foreclosure,[22] but did not decide whether they waived that right, when the alleged errors occurred prior to the sale and could have been brought at that time. Mr. Stella was notified by the sheriff that the first mortgage holder would not receive proceeds immediately after the sale on April 13, 2021,[23] prior to the assignment of bid. FCS bought the bid from Short

---

[22] Paragraph 35 Order on Remand

[23] June 30, 2025 transcript page 78, "Q: Did there come a time when you understood the Sheriff's office had a difference of opinion on that with you? A: Yes. Q: Can you tell the Court when that came about? A: Um – Q: Was that the time of the sheriff's sale? A: Right after the sale. Uh-huh. Q: Did you explain your position to the Sheriff? A: Absolutely. Q: What was your understanding of the Sheriff's position? A: Opposite mine. That the second would get paid before the first.", Appendix, tab 2.

Sale on May 10, 2021[24] after the sale on April 13, 2021, knowing that: (1) the Estate was not named as a party in the underlying foreclosure, (2) Short Sale did not raise any defenses during the foreclosure and (3) knowing that the sheriff took the position that it would not be entitled to proceeds from the sale.

17. FCS cannot hide behind the corporate veil and come to this Court seeking relief as an innocent "Interested Party" who has just stepped into a legal mess of which it had no knowledge. Not only did it have knowledge, it actively bought the bid knowing of the legal proceedings that awaited.

18. Short Sale's failure to raise the allegedly errors in the foreclosure process when it had the opportunity to do so, and which failures can be imputed ton FCS when it bought the bid, waived the standing argument.

Distribution of Proceeds

19. The Superior Court misapprehended *Cedar Inn, Inc. v. King's Inn, Inc,.*[25] The court below found that the parties' agreement that the property would be sold subject to the first mortgage was a deciding factor.[26] This is a mischaracterization of the facts in *Cedar Inn.* In that case, the foreclosing lender and the first mortgage holder each read letters stating their position which were similar, in that they both stated that the sale was subject to the first mortgage.

---

[24] Remand hearing, Exhibit 11., Appendix, Tab 4.

[25] 269 A.22 781 (Del. Super. 1970)

[26] Paragraph 44 of Order on Remand

There is no mention of any "agreement" between those parties. To the contrary, the *Cedar Inn* Court noted that "Any announcements made at the sale did not change the statutory law,"[27] "... bidders cannot have the sale set aside on account of lack of familiarity with the fine points of the statutory provisions,"[28] and no announcement at all was required.[29] What the court failed to appreciate was that the parties were merely acknowledging their collective understanding of the existing law. *Cedar Inn* makes clear that the order of distribution is purely statutory, not subject to the conduct of any party.

20. The court below appears to misapprehend the effect of a property being sold "subject to" a mortgage. This is evidenced in the following analysis:

> Therefore, unless a sale is noted to be sold subject to the first mortgage, given that mortgage liens are not discharged from a property upon execution of sale, the proceeds must be distributed in a first in time, first in line priority order. Otherwise, lien priority has no benefit.[30]

21. If a property is sold "subject to" a first mortgage, that means that first mortgage continues as a lien on that property regardless of the property sale, and the first mortgage holder may exercise its rights against the mortgage at any time in the future, i.e. the first mortgage is NOT discharged as a lien. This occurs by

---

[27] *Cedar Inn @ 786*
[28] *Id.*
[29] *Id.* "[the announcement was an] application of the provisions of statutory law to facts which were known or could have been found out by reasonable inquiry. The bank was not required to make any announcement."
[30] Paragraph 50 of the Order on Remand

operation of law, not notation by any party. Lien priority continues to have a benefit, as the first mortgagee continues to have a first priority lien on the property. In contrast, if foreclosing junior lenders or judgment holders cannot be paid when they bring a sale, their lien has no value and they have no leverage against the borrower to force payment of their debt.

22. There is no provision in either the Delaware Code or the Superior Court Civil Rules to elect to conduct a sale "made subject to any prior mortgage encumbrances."[31] It is not clear if the court would require a stipulation to this effect; or if a foreclosure proceeding could be brought with an allegation in the complaint simply asserting that any sale is subject to a first mortgage, it then being incumbent on the first mortgagee to object. This would be an unwieldly process that is not anticipated in foreclosure law and would give rise to future litigation as to what constitutes an agreement, or notation that the sale is subject to a first mortgage.

WHEREFORE the foregoing reasons, the record reflects that the Superior Court had jurisdiction of this sheriff sale, Short Sale and FCS, through their principle, waived any procedural defects surrounding the sale by not participating in the foreclosure and knowingly purchasing a bid that would be subject to controversy.

---

[31] Paragraph 51, Order on Remand

The Superior Court erred in its holding that the sheriff is to distribute proceeds in order of lien priority unless the parties otherwise agree.

McCabe, Weisberg & Conway, LLC

/s/Janet Z. Charlton
Janet Z. Charlton, Esquire (No. 2797)
Email: JCharlton@mccabeesq.com
Chase N. Miller, Esquire (No. 5363)
Email: ChaseMiller@mccabeesq.com
1415 Foulk Road, Suite 100
Foulkstone Plaza
Wilmington, Delaware 19803
(302)409-3520
Attorney for Appellant REO Trust 2017-RPL1

Dated: September 30, 2026