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James G. Clawson and Joan M. Clawson, his wife;
Tex R. Oldsen and Monna Lee Olsen, his wife; and
Ken Chamberlain and Jeannine W. Chamberlain,
his wife v. Bruce L. Moesser and Ruth Anne
Moesser, husband and wife : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT,

BRIEF

13653

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JOAN M. CLAWSON, his wife;
TEX R. OLSEN and
MONNA LEE OLSEN, his wife; and
KEN CHAMBERLAIN and
JEANNINE W. CHAMBERLAIN,
his wife,
Plaintiffs and Respondents,

DEC 9 1975

BRIGIAM YOUNG UNIVERSITY
J. Reuben Clark Law School

Case No.
13653

vs.

BRUCE L. MOESSER and
RUTH ANNE MOESSER,
husband and wife,

Defendants and Appellants.

APPELLANTS' BRIEF

Appeal from the Judgment of the
District Court of Sanpete County,
Honorable Don V. Tibbs, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES G. CLAWSON and
JOAN M. CLAWSON, his wife;
TEX R. OLSEN and
MONNA LEE OLSEN, his wife; and
KEN CHAMBERLAIN and
JEANNINE W. CHAMBERLAIN,
his wife,

Plaintiffs and Respondents,

Case No.
13653

vs.

BRUCE L. MOESSER and
RUTH ANNE MOESSER,
husband and wife,

Defendants and Appellants.

APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action to quiet title to certain real property located in Sanpete County, State of Utah. Both Appellants and Respondents have claimed legal title in the property.

DISPOSITION IN LOWER COURT

The case was heard by the Honorable Don V. Tibbs, District Judge for the District Court of Sanpete County, State of Utah. The matter came on before the court on the 16th day of January, 1974, at Manti, County of Sanpete, State of Utah, on Motion for Summary Judgment filed by Plaintiffs (R. 9) and by the Defendants (R. 74), each representing that there are no disputed issues of fact, and each of which motions was supported by affidavits, documentary exhibits, and supporting briefs. The court granted plaintiffs' Motion for Summary Judgment and denied Defendants' Motion for Summary Judgment. The court also held that the redemption by C. H. Spaulding was valid and terminated the rights of Walker Bank under their trust deed and foreclosure proceedings. The Plaintiff was further ordered to reimburse Defendant for the amounts Defendant had paid on 1973 property taxes on the subject property (R. 97).

RELIEF SOUGHT ON APPEAL

Defendants-Appellants seek reversal of the judgment entered by the lower court against them and seek judgment in their favor as a matter of law, and an order of the court quieting title to the property in the Defendants-Appellants, hereinafter referred to as Appellants, and against the Plaintiffs-Respondents, hereinafter referred to as Respondents.

STATEMENT OF FACTS

The property in question is located in Sanpete County, and is described as follows:

"The N.E. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the S.E. $\frac{1}{4}$ of Section 31, Township 15 So. Range 15 E., Salt Lake Base and Meridian, Containing 240 Acres."

The property is sometimes described as the following lots under the recorded plat of Spring City Rancheros:

"Lots 1 through 6; 8 through 12; 14 through 17; 19 through 22; 24; 25; 29 through 32; and 37 through 44, all numbers inclusive."

Stanley Title Co. held fee simple title in the subject property, and on October 1, 1965 conveyed title to C. H. Spaulding and Mid-Continent Construction Co. (R. 44).

Mid-Continent Construction Co. conveyed a warranty deed for Lot No. 2 to the Nielsons on September 6, 1966 (R. 45).

Two days later, Mid-Continent Construction Co. entered into a trust deed agreement with Walker Bank and Trust Co., on September 8, 1966, with Mid-Continent Construction Co. as the trustor and Walker Bank and Trust Co. as the trustee, and beneficiary (R. 46).

On April 10, 1969, the Clawsons had executed on a judgment against C. H. Spaulding, and a Sheriff's sale was had on the property at which time the Clawsons purchased the subject property (R. 50).

On July 25, 1969, a "Lis Pendens" was filed by Walker Bank and Trust Co. against C. H. Spaulding, Mid-Continent Construction Co., and the Clawsons, to prevent any further action being taken until Walker Bank & Trust Co.'s foreclosure proceedings against C. H. Spaulding, Mid-Continent Construction Co. and the Clawsons had been concluded (R. 52).

On the basis of the Clawsons' purchase at the previous Sheriff's sale, on October 16, 1969 a sheriff's deed was conveyed to the Clawsons for the subject property, (R. 54), which conveyance took place after Walker Bank's foreclosure had begun.

On October 25, 1969, the Clawsons entered into a stipulation with Walker Bank and Trust Co. whereby the Clawsons stipulated that Walker Bank and Trust Co.'s trust deed had priority over any claim the Clawsons might have to the subject property (R. 56).

On November 6, 1969, a judgment was filed in the foreclosure proceedings in favor of Walker Bank and Trust Co., and against C. H. Spaulding, Mid-Continent Construction Co., *and the Clawsons* (R. 15).

Pursuant to the judgment and the foreclosure proceedings by Walker Bank and Trust Co., on December 30, 1969 a Sheriff's sale was conducted on the subject property, and the property was sold to Keith McArthur (R. 20).

On January 22, 1970, a deficiency judgment was entered in favor of Walker Bank & Trust Co. and

against C. H. Spaulding, Mid-Continent Construction Co., and the Clawsons, the deficiency judgment being based on the previous foreclosure proceedings (R. 21).

C. H. Spaulding redeemed from the Sheriff's sale to Keith McArthur on June 30, 1970 (R. 23).

On July 28, 1971 the Clawsons, Olsens, and Chamberlains conveyed to James Clawson, Tex Olsen and Ken Chamberlain by quit claim deed (R. 66).

On February 12, 1973, Walker Bank and Trust Co. executed on their deficiency judgment based on the trust deed foreclosure proceedings against C. H. Spaulding, Mid-Continent Construction Co. and the Clawsons, and the Moessers purchased the subject property at the sheriff's sale on March 21, 1973. Six months later on September 24, 1973, a Sheriff's deed was conveyed to the Moessers, granting them title in fee simple to the subject property (R. 25, 27, 32).

ARGUMENT

POINT I.

THAT THE FORECLOSURE PROCEEDINGS INSTITUTED BY WALKER BANK AND TRUST CO. DISCHARGED ALL RIGHTS AND ENCUMBRANCES OF THE RESPONDENTS IN THE SUBJECT PROPERTY.

Both by stipulation and by law, at the time of the Walker Bank foreclosure suit against Spaulding, Mid-

Continent Construction Co., and the Clawsons; Walker Bank had an interest in the subject property superior to that of the Respondents. On October 25, 1969, Olsen and Chamberlain, as counsel for Respondents, filed a stipulation in the District Court of Sanpete County, Utah, in the case bearing Civil No. 5857, stating as follows:

“Come now the defendants, James G. Clawson and Joan M. Clawson, and by and through their attorney, Tex R. Olsen, do hereby stipulate that the plaintiffs’ trust deed has priority over any right, title or interest of said defendants in said property and the interest of the defendant was acquired subsequent to the filing of said instrument by the plaintiff. Stipulated to this 25th day of October, A.D., 1969.” (R. 56).

This stipulation signed and filed by Respondents effectively placed them in a position subordinate to that of Walker Bank and Trust Co. relating to the subject property. *When Walker Bank foreclosed on its mortgage, by law all rights of the Respondents were effectively discharged concerning the subject property.* This is the law as cited at 59 C.J.S., *Mortgages* Section 523:

“It is generally held that a complete and valid foreclosure discharges all rights, claims, mortgages, or other encumbrances acquired subsequent to the date of the mortgage foreclosed . . . and it has been held that the lien of the junior encumbrancer is not destroyed, but . . . is transferred from the land to the surplus foreclosure fund.”

The same fate meets liens other than those created by

mortgages, as is explained at 59 *C.J.S.*, *Mortgages* Section 800:

“As a general rule, the lien of a junior encumbrance, cut off by the foreclosure of a mortgage, is transferred in equity to the surplus foreclosure fund . . . the foregoing rules have been held to apply not only to the case of a junior mortgagee but also to a junior creditor by judgment, execution, or attachment. . . .”

It is the law in the State of Utah that a junior encumbrancer who is joined and properly served in an action by a senior mortgagee to foreclose his mortgage, loses all claims against the subject property. In *Cowan v. Stoker*, 100 Ut. 377, 115 P.2d 153 (1941), the Utah Supreme Court decided that the appellant, a junior mortgagee, could not receive certain surplus monies derived from a foreclosure proceeding which had been instituted by the senior mortgagee. In its decision, the court stated:

“A junior mortgagee who is joined and properly served in an action by a senior mortgagee to foreclose his mortgage, whether or not he appears or pleads, is bound by the decree of foreclosure *and may not thereafter assert a claim against said mortgaged property.*” [citations omitted] *Id.* at 154 (Emphasis added).

The court held that the lien of the junior encumbrancer was effectively discharged by the foreclosure on the senior encumbrance, and then continued to explain the proper procedure that a junior encumbrancer should follow:

“Upon foreclosure of the senior mortgage the lien of the junior mortgagee attaches to the surplus of the proceeds of the foreclosure sale. [Citations omitted]” *Id.* at 154.

The court then directed its attention to the question of whether the appellant had adopted the proper procedure for asserting its claim for the surplus funds—*not for the subject property*—in the courts.

In the recent Oregon decision of *Call v. Jeremiah*, 246 Ore. 568, 425 P.2d 502 (1967), the Oregon court quoted with approval the above-cited language of the Utah Supreme Court, and reaffirmed that decision. Referring back to the Oregon court’s decision in *Ulrich v. Lincoln Realty*, 180 Ore. 380, 175 P.2d 149 (1946), also cited in Respondents’ Brief the court said:

“Plaintiffs misconceived the purpose of foreclosure proceedings and the effect of the foreclosure decree. The effect of the foreclosure decree is not simply to extinguish the interest of the mortgagee bringing the suit—it is *designed to extinguish all interests which are subordinate to the foreclosing mortgagee’s interest.*” *Id.* at 504 (*Emphasis added and by the court*).

In the present situation, then, it must be held that the foreclosure of the senior mortgage—which mortgage was superior under the terms of the 1969 stipulation—effectively extinguished all rights of the Clawsons or their successors in the property. The court went on to describe the position of one who purchases at the sheriff’s sale or redeems, such as Spaulding, in relation to a junior encumbrancer, such as the Clawsons and Olsens.

“...the judgment or decree therein destroys his (the junior encumbrancer’s) lien, and upon the expiration of the time for redemption, the purchaser is entitled to the property free from the lien. The subsequent mortgagor or lienor is remitted to the fund realized in the foreclosure proceedings. . . .” *Id.* at 504.

The same rule was followed, and the Utah *Stoker* decision, *supra*, was cited as authority, in the recent case of *In Re Castillian Apartments, Inc.*, 281 N.C. 709, 190 S.E. 2d 161, 162 (1972).

As previously stated, the rule which extinguishes a junior encumbrance upon the foreclosure proceedings on a senior encumbrance applies also to executions, attachments and other types of junior encumbrances apart from mortgages. Therefore, at the time that Walker Bank foreclosed its mortgage, Respondents’ rights to the subject property were effectively discharged and Respondents had to look for any satisfaction on their debt to the surplus foreclosure fund. Any interest that the Clawsons may have had in the subject property as a junior encumbrancer to Walker Bank was effectively extinguished by Walker Bank’s foreclosure action, to which Respondents were joined (R. 15).

Also, in cases where the mortgagor redeems and the junior encumbrancer fails to redeem, as occurred here (R. 23), there is a large body of case law to the effect that:

“The lien of a junior mortgage is lost by the failure of a junior mortgagee, a party to the proceed-

ing, to redeem from the foreclosure of the senior mortgage, and . . . such lien does not again become a lien on the property, on the mortgage debtor's redemption from the senior mortgage."

59 *C.J.S., Mortgages* Section 875 (c).

The claim of the Clawsons would, therefore, be lost as of the date of Spaulding's redemption from the foreclosure sale.

POINT II.

THAT THE REDEMPTION BY C. H. SPAULDING WAS VALID AND VESTED TITLE TO THE SUBJECT PROPERTY IN HIM, AS WAS HELD BY THE DISTRICT COURT.

Appellants do not question the finding of the court, as expressed in the court's Order of February 4, 1974, that the redemption by C. H. Spaulding was a valid redemption (R. 97). Under the law, Spaulding was entitled to redeem from the Sheriff's sale, 59 *C.J.S., Mortgages* Section 819 (b), states, concerning redemption statutes,

"... the construction in any case of doubt or ambiguity should be in favor of the right to redeem and to the end that the property of the debtor may pay as many of his debts as possible. . . ."

Respondents claim at page 5 of the lower court Memorandum (R 82) that no re-sale for a deficiency judg-

ment can take place if the property was redeemed by the Clawsons. But the property in this case was not redeemed by the Clawsons; it was redeemed by Spaulding, the mortgagor (R 23, 97). The Clawsons made no attempt to redeem, and subsequently forfeited any alleged rights they may have had in the property. Therefore, the property may be resold for the balance of the mortgage debt owing to Walker Bank.

Spaulding's redemption was a valid redemption, and vested title to the property in him. The redemption by Spaulding should be held valid as against the Respondents for the following reasons:

1. The redemption met the statutory requirements as set out in Rule 69 (f) of the *Utah Rules of Civil Procedure*;

2. Spaulding was the mortgagor of the property redeemed;

3. Spaulding was a named defendant in the foreclosure action brought by Walker Bank (R 15);

4. The stipulation between Walker Bank and the Clawsons gave any priority to the interest held by Walker Bank in the property, including any interest in a deficiency judgment;

5. The Clawsons failed to make any attempt towards redeeming the property, thereby waiving all rights to the property;

6. Even if Spaulding had *not* been entitled to re-

deem, the acceptance of his payment by the foreclosure sale purchaser barred any claims by Respondents:

“Also, the liens of all those junior encumbrancers or judgment creditors who were parties to the suit and who might have redeemed but failed to do so have been held to be barred . . . it would seem, in case of redemption by one not authorized to redeem, when his payment is accepted as a redemption by the foreclosure sale purchaser.” 59 *C.J.S.*, *Mortgages* Section 875 (c); and

7. Spaulding was personally liable on the mortgage debt and therefore was an interested party able to redeem. Iowa law, on which Section 78-37-6 of the *Utah Code Annotated* is based, would seem applicable here. In *McLean v. Federal Land Bank of Omaha*, 130 F.2d 123 (8th Cir. Iowa, 1942), the court described the factual situation as follows:

“Here was such a [mortgage] debtor and had become personally liable for a deficiency of \$2,000.00 in consequence of this mortgage foreclosure. He had lost title through foreclosure of the second mortgage. The time for redemption as to the first mortgage had not expired when this petition was filed.” *Id.* at 128.

As will be observed, the factual situation is somewhat similar to that of the present case. The court went on to state:

“When the mortgaged land is sold by the debtor, a right of redemption passes to the buyer, but the debtor still has an equitable interest (arising from his liability for a deficiency judgment) which entitles him to intervene in a foreclosure action, and

a right of subrogation (as to redemption from a first mortgage) where deed has passed under foreclosure of a second mortgage. *It thus appears that the statute and decision law of Iowa recognizes an equity in the mortgage debtor in relation to the property and redemption, which equity exists even where he has parted with title, willingly, or through foreclosure of the junior mortgage.*" *Id.* at 127-8 (Emphasis added).

However, as the District Court stated in its Order, (R 97), the redemption by Spaulding was valid. The District Court erred by failing to recognize that the prior junior encumbrance of the Clawsons had been extinguished by the foreclosure proceedings and by the Clawsons' failure to redeem the property from the foreclosure sale.

POINT III. THAT REGARDLESS OF ANY INTERESTS OF RESPONDENTS IN THE SUBJECT PROPERTY AFTER THE FORECLOSURE PROCEEDINGS INSTITUTED BY WALKER BANK, WALKER BANK HAD THE RIGHT TO EXECUTE ON SPAULDING'S REDEEMED PROPERTY BY REASON OF ITS DEFICIENCY JUDGMENT.

Regardless of the priorities between the parties in the subject property, Walker Bank still had the right to execute on Spaulding's redeemed property as a junior lien holder at least. It is generally recognized law that a junior lien holder has the right to execute on his lien. Therefore, if after the Walker Bank deficiency judg-

ment was entered, Walker Bank assumed the position of a junior lien holder, subordinate to the interests of the Respondents in the property, then Walker Bank still had the ability to foreclose as a junior lien holder. 59 C.J.S., *Mortgages* Section 522 explains the relative rights of the part is:

“As a general rule, the rights of a senior mortgagee or other encumbrancer are not affected by the foreclosure of a junior mortgage; the sale must be made subject to the lien of his mortgage or encumbrance, and he retains the right to enforce it as before.”

Therefore, even if Walker Bank should be held to be a junior lien holder at the time the deficiency judgment was entered, Walker Bank still retained the right as a junior lien holder to foreclose on its junior lien.

POINT IV. THAT THE WALKER BANK DEFICIENCY JUDGMENT ON THE SUBJECT PROPERTY HAD PRIORITY OVER ANY INTEREST OF THE RESPONDENTS.

Not only were the interests of Respondents in the subject property extinguished by Walker Bank's foreclosure proceedings, and by Respondents' failure to redeem; but the inerests of Walker Bank in the subject property never ceased throughout the various proceedings. From the date that Walker Bank instituted its foreclosure proceedings, it had retained a superior interest in the property, up to and including the time of sale on the deficiency judgment.

Plaintiffs-Respondents rely heavily on the Oregon court's opinion in *Ulrich v. Lincoln Realty Co.*, *supra*, as authority for the theory that their judgment lien must be superior to the deficiency judgment following the foreclosure sale. However, the holding of the Oregon court specifically excludes the type of situation found in the present case. That court explained that its holding would probably not be applicable in a situation, like the present one, where the judgment creditor—Respondents here—has been made a party to the foreclosure suit.

“One of the consequences of this doctrine is that a party obtaining a judgment against the mortgagor while the foreclosure suit is pending would, in case of redemption by the mortgagor or his grantee, have a lien superior to that of a deficiency judgment rendered in the foreclosure suit. *At least this is true if such judgment creditor has not been made a party to the foreclosure suit.*” *Id.* at 150 (Emphasis added).

In view of the fact that Respondents have specifically been made parties to the foreclosure suit (R 15), the *Ulrich* decision, by its own specific language, is irrelevant to the present situation.

In addition, the Clawsons have previously stipulated in their action with Walker Bank that the interests of Walker Bank in the subject property were superior to those of the Clawsons (R 56). That stipulation is evidence of the fact that the interests of Walker Bank were intended by both Walker Bank and the Clawsons to be superior to any interests claimed by the Clawsons.

Such a relationship would apply not only to the original foreclosure proceedings but also to the deficiency judgment. This court must hold that the superior interest of Walker Bank was retained throughout the deficiency judgment proceedings not only by virtue of the stipulation entered into by the parties, but also by virtue of law. Although Respondents would have the court believe that no jurisdiction recognizes a redemption as reviving the original mortgage lien to the extent of the deficiency, such is simply not the case. *Osborne on Mortgages*, Section 309 (2nd Ed. 1970), states that the authorities hold that after redemption by the mortgagor, "even the lien of the mortgage under which the property was sold revives as to the unpaid deficiency." *Id.* at 642. *Osborne* goes on to state:

"Although the cases holding that redemption revives the original lien under which the property was sold, except to the extent that the purchase price on the sale discharged it, are those involving judgment liens, no distinctions between them and mortgage liens can be upheld. New York is, perhaps, the leading jurisdiction for this doctrine. [citations omitted]" *Id.* at 642, Note 63.

Several New York decisions support the position that a redemption by the mortgagor revives the original mortgage lien to the extent of the deficiency. In *Matter of Hunter v. Seery*, 206 App. Div 19 (1923), the court held that where the land sold for a sum which did not satisfy the judgment, the redemption by a subsequent grantee of the owner from the purchaser at the execution sale restored the lien of the judgment, and that the

land might be sold again to satisfy that judgment. In *Titus v. Lewis*, 3 Barb. (N.Y.) 70, 72 (1848), the court held that:

“By the very terms of this enactment, the redemption under the first sale rendered that sale null and void, and, by necessary consequence, there having been no sale in law, there was no extinguishment of the judgment lien upon the premises.”

And, according to the note at 9 *Cornell Law Quarterly* 208 (1924), “all the succeeding cases in New York have followed the construction of the statute laid down by these two cases.” The Walker Bank deficiency judgment on the property therefore had priority over any interest of the Respondents in the property, for three principal reasons:

First, Respondents Clawson had been specifically named as parties in the original foreclosure action (R 15), thereby precluding application of the rule of the *Ulrich* case;

Second, Respondents Clawson had stipulated with Walker Bank that the Clawsons' interest would be subordinate to that of Walker Bank (R 56); and

Third, there is a recognized body of law holding that a redemption of property executed upon revives the original mortgage lien to the extent of the deficiency.

The interest of the Clawsons, if it was not extinguished by the foreclosure proceedings themselves, was

and must remain subordinate to the interests of Walker Bank and, by line of title from Walker Bank, to the interests of Appellants Moesser.

CONCLUSION

The foreclosure proceedings instituted by Walker Bank in 1969 effectively discharged all encumbrances of Respondents in the subject property. The interests of Respondents in the subject property were in the nature of a junior encumbrance, by virtue of the stipulation entered into by Respondents Clawson on October 25, 1969. Such junior encumbrances are held by law to be discharged against the property by foreclosure proceedings by a senior encumbrancer. That is what happened in the present situation.

As a result, Respondents had no interests at all in the subject property when C. H. Spaulding redeemed the property from the foreclosure sale on June 30, 1970. The property vested in Spaulding, and Respondents had to look for any satisfaction to the surplus monies in the foreclosure fund, their rights to the subject property itself having been extinguished by the foreclosure proceedings. Walker Bank then executed on the property once again held by Spaulding, and the property was sold by Sheriff's sale to Appellants Moesser, in whom the title now rests in fee simple.

Even if the court should hold that Respondents retained some interest in the subject property after the foreclosure proceedings, it must also be held that Walker Bank did also, even if only as a junior encumbrancer. It is the law in the State of Utah that a junior encumbrancer may foreclose or execute on property in which it has a valid interest. In other words, at the very least Walker Bank had the right to execute on Spaulding's redeemed property by reason of the Walker Bank deficiency judgment.

Last, it must be pointed out that Respondents' argument that their judgment lien must be superior to the deficiency judgment following the foreclosure sale, is inapplicable to the present case. The Walker Bank deficiency judgment retained its vitality in the present case, and did not become subordinate to the interests of Respondents for the reasons that: (1) the Clawsons had been specifically named as parties in the original foreclosure suit; (2) the Clawsons had stipulated with Walker Bank that their interest was subordinate to that of Walker Bank; and (3) the law recognizes that a redemption of property executed upon revives the original lien to the extent of the deficiency.

In view of the facts and the law applicable to the present case, the court must find that the interest of the Appellants Moesser in the subject property is superior to that of the Respondents, if indeed the Respondents retained any interest at all in the subject property after the original foreclosure proceedings were

concluded. Therefore, judgment of the lower court must be reversed, and judgment must be entered in favor of the Appellants.

Respectfully submitted,

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