DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

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DOROTHEA S. GOETZ,

Appellant,

vs.

AGB TAMPA LLC; MEB LOAN TRUST IV, U.S. BANK NATIONAL ASSOCIATION, as trustee; and RIDGEMOOR MASTER ASSOCIATION, INC.,

Appellees.

No. 2D21-1561

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March 18, 2022

Appeal from the County Court for Pinellas County; John Carassas, Judge.

Roy C. Skelton, Esquire, Clearwater, for Appellant.

Matthew D. Weidner of Weidner Law, P.A., St. Petersburg, for Appellee AGB Tampa, LLC.

William Nussbaum III of Law Offices of Gary I. Gassel, P.A., Sarasota, for Appellee MEB Loan Trust IV, US Bank National Association, as trustee.

No appearance for Appellee Ridgemoor Master Association.

LABRIT, Judge.

This appeal stems from a lien foreclosure action initiated by Appellee/Plaintiff Ridgemoor Master Association, Inc. (the Association). Appellant/Defendant Dorothea Goetz challenges an order awarding surplus funds from the foreclosure sale to Appellee/Intervenor MEB Loan Trust IV, U.S. Bank National Association (the Bank), which held a first mortgage on Ms. Goetz's property, the lien of which was superior to the Association's lien. We reverse.

## Background

The Association sued to foreclose a lien on Ms. Goetz's property for approximately $1,100 in unpaid assessments. After a clerk's default was entered against Ms. Goetz, the Association moved for final summary judgment of foreclosure. The trial court granted the Association's motion and entered final judgment scheduling a public sale of the property. Appellee AGB Tampa LLC (the Purchaser) was the successful bidder and purchased the property for $160,100, leaving approximately $154,000 of surplus proceeds in the court registry after the Association's judgment was

satisfied.[1]

Immediately following the foreclosure sale, the Purchaser filed a motion in which it sought to "back out from the deal" because it had learned that the Bank held a mortgage lien on the property, but it withdrew that motion a week later. The Bank then filed a motion to intervene, alleging that it held a first mortgage on the property, which was the subject of a separate foreclosure action. The Bank's motion included a copy of the mortgage, which had been recorded eleven years before the Association recorded its claim of lien and notice of lis pendens in this action. The motion also appended an affidavit of indebtedness in which the Bank asserted that Ms. Goetz had defaulted on the mortgage loan and owed the Bank over $118,000. The Bank requested that it be allowed to intervene as a defendant and assert a claim to the surplus.

The trial court granted the Bank's motion, directed the clerk to remit $125,149.93[2] of the surplus to the Bank, and directed that

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[1] Inclusive of costs, subsequently accruing assessments, and attorneys' fees, the judgment amount exceeded $5,000.

[2] This amount included $6,230 in attorneys' fees and costs.

the remaining surplus be remitted to the trust account of Ms. Goetz's counsel. Ms. Goetz moved for rehearing, arguing that the Bank—as a superior lienholder to the Association—had no right to the surplus proceeds generated by foreclosure of the Association's subordinate and inferior lien. The Bank opposed Ms. Goetz's motion and sought consolidation of its foreclosure action with the Association's foreclosure action.[3] The Bank admitted that its mortgage lien was superior to the Association's lien and conceded that Ms. Goetz's "arguments [we]re well-taken." Nonetheless, the Bank argued that awarding the surplus to Ms. Goetz would create an inequitable result for the Purchaser.

After filing her rehearing motion, Ms. Goetz separately moved for an order directing that the surplus funds be paid to her instead of to the Bank. The Purchaser then filed a motion to intervene that included various arguments in opposition to Ms. Goetz's motions. Following a hearing, the trial court entered an order granting the

[3] For reasons that are unclear to us, the Bank apparently abandoned its request to consolidate the two actions and the trial court never ruled on that request.

Purchaser's motion to intervene, denying Ms. Goetz's motion for rehearing, and denying Ms. Goetz's motion for the surplus proceeds as moot on the basis that "no funds remain in the Court's registry."[4]

Ms. Goetz timely appealed. She primarily argues that the trial court erred by awarding surplus proceeds to the Bank; she also challenges the award of attorneys' fees and costs to the Bank. Because our reversal of the award of surplus proceeds to the Bank moots Ms. Goetz's challenge to the fee/cost award, we don't address her arguments on that issue.

**Discussion**

Ms. Goetz argues that because the Bank's lien was superior to that of the Association, the Bank was not entitled to surplus proceeds resulting from foreclosure of the Association's lien. Ms. Goetz maintains that as the owner of record, she should have received the entire surplus. Because this case presents a pure

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[4] It is true that the clerk issued checks to the Bank and to Ms. Goetz for the entire surplus. But in its response to Ms. Goetz's rehearing motion, the Bank's counsel represented that the clerk's check to the Bank had not been cashed and was "in the possession of [the Bank's] counsel." In other words, the surplus proceeds payable to the Bank presumably *were* in the registry when the trial court disposed of Ms. Goetz's rehearing motion.

question of law concerning interpretation of "the statutory scheme for the disbursement of surplus funds, we review the trial court's order de novo." *See Corey v. Unknown heirs by Neuffer*, 301 So. 3d 380, 383 (Fla. 2d DCA 2020); *accord Pineda v. Wells Fargo Bank, N.A.*, 143 So. 3d 1008, 1011 (Fla. 3d DCA 2014) (citing *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000)).

The Purchaser does not address the merits of Ms. Goetz's primary argument. Instead, the Purchaser exclusively contends that the record is insufficient to support reversal because there is no transcript of the hearing at which the trial court granted the Bank's motion to intervene and ordered disbursement of surplus proceeds to the Bank. The Purchaser's argument fails because "the absence of a transcript does not preclude reversal where an error of law is apparent on the face of the judgment." *See Chirino v. Chirino*, 710 So. 2d 696, 697 (Fla. 2d DCA 1998); *see also Ronbeck Constr. Co. v. Savanna Club Corp.*, 592 So. 2d 344, 348 (Fla. 4th DCA 1992) (noting that the rule requiring affirmance based on the absence of a transcript "applies only where the trial court's decision turns on its resolution of contested facts"). This case turns on legal error, not the propriety of the trial court's resolution of any disputed facts, so

a transcript is unnecessary. *See Audio Visual Innovations, Inc. v. Spiessbach*, 119 So. 3d 522, 526 (Fla. 2d DCA 2013).

The Bank primarily opposes Ms. Goetz's arguments by contending that she failed to preserve them. It echoes the Purchaser's unavailing "missing transcript" argument and further contends that affirmance is appropriate because the trial court "utilized its discretion in refusing to hear new arguments" raised in Ms. Goetz's motion for rehearing. This contention is refuted by the transcript of the hearing on Ms. Goetz's motion for rehearing. The trial court had discretion to entertain—and did entertain—the arguments presented in that motion. *See Fitchner v. Lifesouth Cmty. Blood Ctrs., Inc.*, 88 So. 3d 269, 278 (Fla. 1st DCA 2012). And even where a point is raised for the first time on rehearing, it is still "properly presented to the trial court . . . and thus preserved for appellate review." *See Waksman Enters. v. Oregon Props., Inc.*, 862 So. 2d 35, 42 (Fla. 2d DCA 2003).

Turning to the merits, Ms. Goetz correctly argues that the trial court reversibly erred by awarding surplus proceeds from the Association's lien foreclosure sale to the Bank. Section 45.032, Florida Statutes (2020), prescribes the procedure for disbursing

surplus funds after a judicial sale. In relevant part, subsection 45.032(2) establishes "a rebuttable legal presumption that the owner of record on the date of the filing of a lis pendens is the person entitled to surplus funds after payment of subordinate lienholders who have timely filed a claim." Although this "presumption is 'rebuttable,' section 45.032(2) expressly delineates the circumstances under which the presumption may be rebutted, i.e., where the owner has assigned such surplus funds . . . pursuant to section 45.033(2)(a)." *See Pineda*, 143 So. 3d at 1010. There is no suggestion that Ms. Goetz assigned the surplus funds, and her contention that she did not do so is unrebutted. And it is undisputed that (1) Ms. Goetz was "the owner of record" on the date the Association filed its lis pendens and (2) the Bank was not a "subordinate lienholder" to the Association. Applying the plain language of the statutory text to these facts, Ms. Goetz—not the Bank—is entitled to the surplus. *See Pineda,* 143 So. 3d at 1011; *see also Garcia v. Stewart*, 906 So. 2d 1117, 1121 (Fla. 4th DCA 2005) ("Because senior lienors' rights are unaffected by foreclosure, holders of liens which are senior in priority have no right to share in a surplus produced by the foreclosure of a junior mortgage.").

In its brief, the Bank fleetingly argues that awarding the surplus to Ms. Goetz is "inequitable" since the Purchaser will "lose" the purchase money funds and the Bank's mortgage loan will remain unpaid, creating a windfall to Ms. Goetz. To the extent the Bank could properly present the "equity" argument on the Purchaser's behalf, it lacks merit.[5] Our record—including the mortgage and the separate foreclosure complaint the Bank filed against Ms. Goetz and the Association, in which the Bank specifically alleged the details of the mortgage's recordation—confirms that the Bank's mortgage had been recorded in the public records twelve years before the Purchaser acquired the property, so the Purchaser had constructive notice of the Bank's mortgage. *See generally Whitburn, LLC v. Wells Fargo Bank, N.A.*, 190 So. 3d 1087, 1091 (Fla. 2d DCA 2015) (explaining that recordation of an instrument "constitutes constructive notice of a prior encumbrance

[5] We question the Bank's capacity to make this argument on behalf of the Purchaser, and we further note that the Purchaser has waived the argument because the Purchaser did not brief this issue on appeal. *See Simmons v. State*, 934 So. 2d 1100, 1117 n.14 (Fla. 2006).

on the property which is the subject of the instrument," that such notice is "a legal inference," and that constructive notice is "imputed to creditors and *subsequent purchasers*").[6]

We appreciate but reject the Bank's "windfall" argument because the text of section 45.032(2) is plain and unambiguous, and we are not free to disregard it. *See Pineda*, 143 So. 3d at 1011. The statute establishes a "rebuttable legal presumption that the owner of record on the date of the filing of a lis pendens is the person entitled to surplus funds after payment of subordinate lienholders who have timely filed a claim." § 45.032(2). The Bank was neither an owner of record nor a subordinate lienholder, and it made no attempt to rebut the statutory presumption in favor of Ms. Goetz, who undisputedly was the owner of record on the date the Association filed its notice of lis pendens. Consequently, Ms. Goetz is entitled to the surplus proceeds as a matter of law. We reverse

[6] The Purchaser has not argued that it lacked notice of the Bank's mortgage. Nor would any such argument be credible given that the Purchaser sought to "back out" when it learned of the Bank's mortgage lien, then withdrew that request.

and remand for further proceedings consistent with this opinion.[7]

Reversed and remanded.

BLACK and LUCAS, JJ., Concur.

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Opinion subject to revision prior to official publication.

[7] As previously mentioned, in a written filing dated March 11, 2021, the Bank's counsel represented that he had the clerk's check payable to the Bank for $125,149.93 and that the check had not been cashed. Beyond that, our record is silent as to the status of the check/the proceeds of the check. Because the parties have not discussed the status of the check or proceeds thereof, nor have they presented argument regarding distribution of the surplus funds in the event of remand, the trial court is best situated to assess the status of the surplus proceeds and ensure compliance with our decision.