Third District Court of Appeal

State of Florida

Opinion filed December 21, 2016.
Not final until disposition of timely filed motion for rehearing.

No. 3D15-906
Lower Tribunal No. 13-12985

Flanco Condominium Association, Inc.,
Appellant,

vs.

Tova Goldszer, et al.,
Appellees.

An appeal from a non-final order from the Circuit Court for Miami-Dade County, Jerald Bagley, Judge.

Toyne, Schimmel & Alonso and Ross B. Toyne, Michael Schimmel, and Alberto J. Alonso, for appellant.

Precluded from oral argument.

Before SUAREZ, C.J., and SHEPHERD and SALTER, JJ.

PER CURIAM.

Affirmed.

SHEPHERD, J., dissenting

I respectfully dissent because a third-party buyer at a foreclosure sale takes title subject to all encumbrances of which he could have obtained knowledge in the exercise of ordinary prudence and caution.

In this case, Flanco Condominium Association, Inc., appeals from an order vacating a judicial sale pursuant to a final judgment of foreclosure for non-payment of monthly assessments on a condominium unit. The successor bidder at the judicial sale of the Association's foreclosure action, Tri-State Yacht Management, LLC, bid $26,800, and received a certificate of title without objection. Nineteen days later, Champion Mortgage Company, whose mortgage foreclosure action was filed only two months after the Association's foreclosure action and who, unlike the Association, had recorded a lis pendens at the time it filed its foreclosure complaint, successfully bid $150,861.22 for the unit at the judicial sale in its foreclosure action and thereafter obtained a certificate of title.

Tri-State then moved to vacate the judicial sale in the Association action on equitable grounds. In its motion, Tri-State simply argued that the Association, being aware of the proceedings in the mortgage foreclosure action, should not have proceeded to a judicial sale in its own action. The trial court apparently agreed

with this argument, as it granted Tri-State's motion, vacated the judicial sale, and ordered the $26,800 returned to Tri-State. In so doing, the trial court erred.

In Florida, the doctrine of *caveat emptor* applies to buyers who purchase properties at judicial auction sales. CCC Props., Inc. v. Kane, 582 So. 2d 159, 161 (Fla. 4th DCA 1991). According to this rule of law, "[a] purchaser takes title subject to defects, liens, encumbrances, and all matters of which he has notice, or he could obtain knowledge in the exercise of ordinary prudence and caution." Cape Sable Corp. v. MacClurg, 74 So. 2d 883, 885 (Fla. 1954). In this case, Champion recorded a lis pendens on June 7, 2013, thereby putting the public on notice of its interest in the condominium unit in question. Thus, prior to the January 16, 2015, judicial sale at which it bid for the property, had it conducted a public records search, Tri-State would have become aware of the existence of a first mortgage on the property and that the mortgage was in foreclosure.

A judicial sale may be set aside only on certain well-defined grounds. Gulf State Bank v. Blue Skies, Inc. of Ga., 639 So. 2d 161, 162 (Fla. 1st DCA 1994) ("Upon a showing that a judicial sale resulted from any mistake, accident, surprise, misconduct, fraud or irregularity in the conduct of the sale, the circuit court, in the exercise of its equity jurisdiction, has discretion to set aside the judicial sale in the exercise of its right and duty to supervise the process and 'protect parties from all fraud, unfairness, and imposition' therein.") (quoting Moran-Alleen Co. v. Brown,

123 So. 561 (1929)). As the Florida Supreme Court stated long ago in Lindsley v. Phare, 115 Fla. 454, 460 (Fla. 1934):

> [T]he doctrine of *caveat emptor* applies to all judicial sales, subject to the qualification that the purchaser is entitled to relief on the ground of after discovered mistake of material fact or fraud, where he is free from negligence. He is bound to examine the title . . . . If he buys without such examination, he does so at his peril, and must suffer the loss occasioned by his neglect.

Here, the facts do not indicate that there was any irregularity in the foreclosure sale, there was no mistake of material fact which could not have been discovered by Tri-State if it had exercised due diligence, and Tri-State did not plead its claim of fraud with particularity, as required under Florida law. Fla. R. Civ. Proc. 1.120(b). No authority was cited below or before this court to support Tri-State's contention that the Association had a duty to stay the judicial sale on its foreclosure proceedings in deference to the sale in the mortgage foreclosure action, and that its failure to do so constituted fraud. Therefore, the doctrine of *caveat emptor* applies and Tri-State had no legal or factual basis to set aside the foreclosure sale.

For these reasons, I would reverse the order vacating the sale and authorizing reimbursement of the funds bid by Tri-State in this foreclosure action.