

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

THE BANK OF NEW YORK MELLON TRUST
COMPANY, NATIONAL ASSOCIATION,
fka The Bank of New York Trust Company, N. A.
as successor to JPMorgan Chase Bank,
as Trustee for Residential Asset Mortgage Product, Inc.,
Mortgage Asset-Backed Pass Through Certificates,
Series 2003-RS5,
Plaintiff-Respondent,

v.

Zahid SULEJMANAGIC, et al,
Defendants,
and

TANGLEWOOD HILLS
CONDOMINIUM ASSOCIATION,
Defendant-Appellant.

Clackamas County Circuit Court
CV13071012; A163269

Michael C. Wetzel, Judge.

Argued and submitted December 5, 2017.

Ryan D. Harris argued the cause for appellant. Also on the briefs was Vial Fotheringham LLP.

Shannon K. Calt argued the cause for respondent. On the brief was Peter J. Salmon.

Before Ortega, Presiding Judge, and Egan, Chief Judge, and Powers, Judge.*

POWERS, J.

Affirmed.

* Egan, C. J., *vice* Garrett, J. pro tempore.

POWERS, J.

In this foreclosure action, defendant Tanglewood Hills Condominium Association appeals from a general judgment of foreclosure, asserting that its lien was superior to plaintiff's deed of trust. Plaintiff Bank of New York Mellon (BONY) filed the underlying action to foreclose a trust deed recorded against a condominium unit within the Association. At the time of the foreclosure, the unit owner owed unpaid assessments that by operation of law placed a lien against the unit. On cross-motions for summary judgment, the issue was whether a judicial foreclosure action initiated before a condominium association gives notice of its lien for unpaid assessments must remain active to maintain its priority under the statutory framework. As explained below, we conclude that the trial court correctly granted BONY's motion for summary judgment and denied the Association's cross-motion and, therefore, affirm.

STANDARD OF REVIEW

We review a judgment disposing of cross motions for summary judgment to determine whether there are any disputed issues of material facts and whether either party was entitled to judgment as a matter of law. *Vision Realty, Inc. v. Kohler*, 214 Or App 220, 222, 164 P3d 330 (2007); see also ORCP 47 C (setting out standards for summary judgment).

BACKGROUND

The relevant facts are undisputed. In 2003, Zahid Sulejmanagic obtained a loan from Aegis Wholesale Corporation to purchase a unit in the Tanglewood Hills Condominiums. The loan was secured by a promissory note and deed of trust, which was later endorsed to BONY. In 2011, Sulejmanagic defaulted on his loan. When Sulejmanagic also stopped paying assessments to the Association in 2013, which funded maintenance and other obligations, the Association filed a continuing claim of lien for assessments owing at that time and for additional unpaid assessments, attorney fees, and late charges as they would become due.

Also in 2013, BONY filed this foreclosure action against Sulejmanagic and other defendants not relevant to this appeal. At that time, the Association was not listed as a

named party. BONY and Sulejmanagic reached a stipulation subject to a final judgment. BONY then filed an amended complaint following entry of a stipulated limited judgment adding the Association among the named defendants.

The trial court later dismissed BONY's amended complaint for lack of prosecution under UTCR 7.020,¹ and entered a general judgment dismissing the case without prejudice against all defendants except for Sulejmanagic. The Association then sent notice of lien under ORS 100.450(7) to Aegis Wholesale Corporation, the lender of record. After taking no action for seven months, BONY moved under ORCP 71 B for relief from dismissal and asserted its priority over the Association's lien. The trial court granted the motion for relief from dismissal and reinstated the matter for 60 days.

The Association moved for summary judgment arguing that its lien was superior to BONY's deed of trust under ORS 100.450(7) because BONY's foreclosure action was not pending within 90 days following the Association's notice of lien. The Association argued that the sole issue "is whether the reinstatement of a foreclosure suit[] relates back to its original filing date for purposes of priority under ORS 100.450(7)." The trial court denied the Association's motion, concluding that BONY initiated its foreclosure action prior to the Association's notice of lien, ORS 100.450(7) did not require a lender to keep an earlier filed case active to maintain its statutory priority, and the legislative history of ORS 100.450(7) supported its conclusion because the Association had the opportunity to be involved in the proceeding to protect its interest.

BONY later moved, and the Association filed a cross-motion, for summary judgment. In its motion, BONY argued that, as holder of the promissory note and deed of trust that secured Sulejmanagic's loan and because the loan was in default and the trial court previously determined that

¹ After serving notice of a complaint, the serving party must file the return or acceptance of service with the trial court. UTCR 7.020(1). The case may be dismissed for want of prosecution if no return or acceptance of service is filed within 63 days after filing the complaint and the plaintiff fails to provide proof of service within 28 days after written notice is given to the plaintiff. UTCR 7.020(2).

BONY's deed of trust had priority over the Association's lien, there was no genuine issue of material fact to be resolved. Therefore, BONY argued, BONY was entitled to a judgment of foreclosure as a matter of law.

In its cross-motion, the Association argued that, under ORS 100.450(7), its lien gained priority over BONY's deed of trust when BONY failed to reinstate its lawsuit or initiate a new judicial foreclosure action within 90 days after the Association giving notice of its lien. The Association argued that the sole issue is whether reinstatement of a foreclosure action, more than 90 days after an association's notice of lien, is sufficient to satisfy the statutory requirement under ORS 100.450(7)(c) to initiate a judicial foreclosure action "prior to the expiration of 90 days following" an association's notice of lien. Further, the Association argued, the trial court's dismissal of BONY's action was a final judgment, no judicial action was maintained during the 90 days following the Association's notice of lien, and no legal authority supports the position that, because BONY's original action was initiated *prior* to the beginning of the statutory 90 days following the Association's notice of lien, BONY's deed of trust retains priority status over the Association's lien.

The trial court granted BONY's motion and denied the Association's cross-motion concluding, among other things, that BONY's deed of trust was superior to the Association's lien and that the deed of trust was foreclosed. The trial court entered a general judgment of foreclosure based on its order of default against the other defendants and order granting BONY's motion for summary judgment and denying the Association's cross-motion for summary judgment. The Association appeals from the general judgment of foreclosure.

DISCUSSION

On appeal, the issue is whether the Association's lien jumps priority over BONY's deed of trust as provided by ORS 100.450(7)(c) when BONY failed to act within 90 days following the Association's notice of lien even though BONY previously filed a foreclosure proceeding before the Association's notice. Before setting out the parties'

arguments in more detail, we begin with a brief overview of the statutory framework.

Under ORS 100.450(1), if an owner of an individual condominium unit fails to pay assessments, the condominium association may levy assessments against that unit and hold a lien upon that unit and the undivided interest for the unpaid assessments. ORS 100.450 further provides, in part:

“(7) Notwithstanding the priority established for a lien for unpaid assessments and interest under subsection (1) of this section, the lien shall also be prior to the lien of a first mortgage or trust deed of record for the unit and the undivided interest in the common elements, if:

“*****

“(c) The lender has not initiated judicial action to foreclose the mortgage or requested issuance of a trustee’s notice of sale under the trust deed or accepted a deed in lieu of foreclosure in the circumstances described in ORS 100.465 prior to the expiration of 90 days following the notice by the unit owners’ association.”

Thus, except in circumstances not relevant in this case, an association’s lien can attain priority over a lender’s first mortgage or deed of trust if the association gives proper notice that the owner of the condominium has unpaid assessments and if the lender has not initiated a judicial foreclosure action “prior to the expiration of 90 days following the notice” given by the association. ORS 100.450(7)(a), (c). It is this latter requirement that is at issue in this case, *viz.*, whether BONY initiated a judicial foreclosure action prior to the expiration of 90 days following the Association’s notice.

The Association contends that the plain language of ORS 100.450(7)(c) requires a foreclosure action to be filed after an association’s notice of lien and, specifically, within 90 days following that notice. Because BONY’s foreclosure action was filed before, rather than after the Association’s notice, and because no foreclosure action was pending at the time the Association sent its priority-jumping notice, BONY did not meet the statutory requirement to maintain its priority. Analogizing to the Supreme Court’s reasoning in *Welker v. TSPC*, 332 Or 306, 27 P3d 1038 (2001), the Association

claims that ORS 100.450(7) establishes a window of time within which a party must act.

For its part, BONY argues that the Association's interpretation of ORS 100.450(7) effectively rewrites the statutory language rather than interprets its plain meaning. *See* ORS 174.010 (providing that the court's role in statutory interpretation "is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted"). BONY submits that the Association's interpretation of the statute adds a requirement that BONY needed to reinstate its dismissed foreclosure action or commence a new action within 90 days following the Association's notice of lien. BONY reasons that, although ORS 100.450 allows an association to obtain priority over a lender's deed of trust if no action is initiated within 90 days of receiving an association's notice, the statute does not alter the commencement date of an action initiated prior to the notice, especially when, as in this case, BONY's reinstated foreclosure action maintained the original case number.

It is undisputed that BONY commenced a foreclosure action before the Association sent notice of its lien. Thus, as framed by the parties' arguments, we must determine whether ORS 100.450(7)(c) provides a fixed window of time within which a lender must initiate a judicial action (*i.e.*, 90 days following an association's notice of lien) or whether "prior to the expiration of 90 days" language sets a deadline by which a lender must act in which case a lender could act any time prior to an association's notice of lien to maintain its priority.

To resolve that issue, we turn to the familiar statutory interpretation framework. "In interpreting a statute, the court's task is to discern the intent of the legislature." *PGE v. Bureau of Labor Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). As described in *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009), we examine the statute's text, context, and any pertinent legislative history to discern the legislature's intended meaning. As explained below, we conclude that ORS 100.450(7)(c) creates a deadline by which a lender must act to maintain its priority.

First, to the extent that the Association relies on the fact that no foreclosure action was pending when it sent its notice, there is nothing in the plain language of ORS 100.450(7)(c) that requires such an action to be pending. Indeed, the statute does not comment on the status of any judicial action; rather, the operative language in ORS 100.450(7)(c) turns on whether the lender has or has not “initiated judicial action.” Moreover, the Association’s argument does not grapple with the fact that, at the time it filed its notice of lien, not only had a foreclosure action been previously filed, but the foreclosure action had also been adjudicated as to Sulejmanagic even though it had been dismissed as to the Association. Thus, because the statute is silent on the status of the required judicial action, we reject the Association’s invitation to read into the statute an additional requirement that the foreclosure action be pending at the time a notice is sent.

Second, the Supreme Court’s decision in *Welker*, which involves the interpretation of *former* ORS 19.026(2) (1995), *renumbered as* ORS 19.255(2) (1997), does not compel a contrary result. In *Welker*, the plaintiff filed a notice of appeal while a motion for new trial was pending. The court noted that, under *former* ORS 19.026(2) (1995), the filing of a motion for new trial tolled the period to timely file a notice of appeal until an order ruling on the motion was entered or until the motion was deemed denied. *Welker*, 332 Or at 312. Because the plaintiff filed his notice of appeal before the court disposed of the motion for new trial, as opposed to “within 30 days after,” pursuant to *former* ORS 19.026(2) (1995), the court determined that it lacked jurisdiction to consider the appeal. *Id.* at 312-13. The court interpreted the time frame of “within 30 days after” a motion for new trial to be a window of time within which a party must act. Thus, if a notice of appeal was filed before resolution of the motion for new trial, the notice was “ineffective to confer jurisdiction on the appellate court to decide the merits of the appeal.” *Id.* at 313. The statutory language in *Welker* is not analogous to the statute at issue in this case. That is, unlike the statute in *Welker* that contained a “within 30 days after” formulation, there is nothing in ORS 100.450(7)(c) that creates a necessary order of operations as the Association’s argument

suggests. The language of the statute requires a lender to have initiated (or more precisely, not to have initiated) judicial action but does not explicitly specify whether that judicial action must come before or after an association's notice of its lien. Thus, the court's reasoning in *Welker* provides no support for the Association's claim.

Finally, the Association contends that the legislative history of ORS 100.450(7)(c) demonstrates that the legislature intended to protect condominium associations from absorbing the costs of delinquent assessments by requiring lenders to act in response to an association's notice of lien. The Association insists that the legislative history supports the conclusion that, to maintain priority over a lien, a lender must initiate a foreclosure action after an association gives notice of its lien.

As an initial matter, we are mindful that "whatever the legislative history may show the legislature intended by the enactment of a statute, the wording ultimately enacted must be capable of carrying out that intention. If the legislature's intentions as revealed in legislative history do not find expression in the actual wording of the statute, that legislative history is entitled to 'no weight.'" *State v. Rainey*, 294 Or App 284, 291, 431 P3d 98 (2019) (quoting *Gaines*, 346 Or at 173). It is true that a review of the legislative history provided by the parties shows that ORS 100.450(7)(c) was amended to alleviate the hardship imposed upon condominium unit owners when, as here, one owner stops paying assessments. That history, however, does not show an intention to account for situations where a lender initiates a judicial foreclosure action, the action is dismissed, and the action is later reinstated after 90 days following an association's notice of lien.

In short, we conclude that the trial court correctly determined that BONY's deed of trust remains superior to the Association's lien. Accordingly, the trial court did not err in granting summary judgment for BONY and denying summary judgment for the Association.

Affirmed.