IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

		No. 66103-5-I
In re the Trustee's Sale of the Real Property of:	)	DIVISION ONE
	)	UNPUBLISHED OPINION
THOMAS R. ARRINGTON and SUSAN ARRINGTON, husband and wife.	)	FILED: March 26, 2012

Appelwick, J. — The Arringtons appeal the trial court's order disbursing surplus funds from the nonjudicial foreclosure sale of their house. They argue the trial court erred by ruling Susan could not avail herself of the homestead exemption. They argue the trial court erred by ruling Bank of America had a valid lien against the property despite failing to publically record its interest after a 2004 merger. And, they argue that absent proper notice from the trustee to BOA, the foreclosure sale did not eliminate BOA's interest in the property so it is not entitled to surplus funds. We hold that Susan abandoned the property and relinquished her homestead claim, and BOA was the most senior remaining lien creditor, with priority as to the surplus funds. We affirm.

FACTS

Susan and Thomas Arrington owned real property in Marysville, Washington.[1] When their marriage dissolved in 1999, the court awarded

Thomas occupancy and 50 percent equity in their house. It awarded Susan the remaining 50 percent equity. Despite the dissolution, Susan continued to live at the house. Between 2002 and 2008, Susan embezzled money from Visual Graphics, the company where she worked. Visual Graphics obtained a judgment against Susan for $330,023.20 in August 2009. She pleaded guilty to first degree theft, and the court sentenced her to 24 months in prison on November 2009, which she began serving shortly thereafter.

In 2001, Thomas and Susan entered into a line of credit agreement with Fleet National Bank. A deed of trust secured the line of credit on the property. In 2004, Bank of America (BOA) acquired Fleet and its assets in a merger and became the holder of the promissory note secured by a deed of trust.

In June 2010, the house was subject to a nonjudicial foreclosure sale, which yielded $57,381.30 in excess of what was necessary to satisfy the obligation owed to the primary lien holder. The trustee deposited this surplus into the court registry of the Snohomish County Superior Court in accordance with RCW 61.24.080. As of July 21, 2010, the total amount due and owing under BOA's promissory note and deed of trust was $25,533.61. The address listed on the deed of trust was for Fleet, as neither Fleet nor BOA updated the address following the 2004 merger. Before the foreclosure sale, the trustee sent notice of the sale to the listed addresses for the no longer existent Fleet.

The trial court ruled that BOA was Fleet's successor in interest and

[1] We refer to the Arringtons by their first names for clarity. No disrespect is intended.

awarded it the first $25,533.61 of the surplus funds in satisfaction of its lien. It awarded 50 percent of the remaining funds to Thomas for his share of equity in the house. And, it awarded the remaining 50 percent of the funds to Visual Graphics, rather than to Susan. It ruled that Susan could not avail herself of the homestead exemption, since she was incarcerated and not living on the property and Visual Graphics was the victim of her crime. The Arringtons appeal the trial court's order disbursing the surplus funds.

DISCUSSION

I. Homestead Exemption

The Arringtons argue the trial court erred by ruling Susan could not avail herself of the homestead exemption.[2] RCW 61.24.080(3) provides, in relevant part: "Interests in, or liens or claims of liens against the property eliminated by sale under this section shall attach to the surplus in the order of priority that it had attached to the property." But, as this court held in Sweet, a home owner's interest attaches to the surplus proceeds from a nonjudicial foreclosure sale under a deed of trust such that a judgment creditor's claim is limited to funds in excess of the homestead, if any. In re Trustee's Sale of the Real Prop. of Sweet, 88 Wn. App. 199, 200, 944 P.2d 414 (1997); see also In re Trustee's Sale of the Real Prop. of Upton, 102 Wn. App. 220, 223, 6 P.3d 1231 (2000) ("Generally, a property owner's homestead interest in property takes priority over the interests of other creditors.").

[2] The homestead exemption is limited here to the lesser of (1) the total net value of the land, or (2) the sum of $125,000. RCW 6.13.030.

While a judgment creditor generally loses out to a property owner with a homestead interest under Sweet, the trial court concluded that Susan could not assert the homestead exemption in the first place. The court stated first that Susan was not entitled to the funds, because her "incarceration was based upon a voluntary act and therefore her absence from the property eliminates her homestead exemption." And, second, the court reasoned "that a party claiming a priority based upon a homestead [exemption] may not do so against the specific creditor that was the victim of her crime." The Arringtons contest both of these reasons.

We review questions of statutory interpretation de novo. Dot Foods, Inc. v Dep't of Revenue, 166 Wn.2d 912, 919, 215 P.3d 185 (2009). RCW 6.13.040 automatically protects property that constitutes a homestead by the exemption "from and after the time the real or personal property is occupied as a principal residence by the owner." But, RCW 6.13.050 provides:

> A homestead is presumed abandoned if the owner vacates the property for a continuous period of at least six months. However, if an owner is going to be absent from the homestead for more than six months but does not intend to abandon the homestead, and has no other principal residence, the owner may execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of nonabandonment of homestead.

Susan was a co-owner of the property. She lived in the house as her sole and exclusive residence before being incarcerated in mid-November 2009. Susan did not execute a declaration of nonabandonment. Thus, in mid-May 2010, six months after Susan had vacated the property, a presumption of abandonment arose. The nonjudicial foreclosure sale occurred in June 2010, approximately

seven months after her incarceration. Susan had abandoned the house and relinquished her right to assert the homestead exemption by then.

At the trial court hearing, Susan relied on the case of Nelsen v. McKeen, 165 Wash. 274, 5 P.2d 333 (1931), for the proposition that one who is imprisoned has not abandoned his or her homestead. But, as Visual Graphics points out, Nelsen does not support that proposition. In that case, both Mr. and Mrs. Nelsen filed declarations of homestead, and Mrs. Nelsen continued to reside on the property after Mr. Nelsen was incarcerated. Id. at 276-77. The court determined Mrs. Nelsen was entitled to exercise the homestead exemption based on her continued residence at the property: "[I]t is of no concern to appellants what has become of John Nelsen or what his intention was. It is evident that Carla Nelsen lives upon the premises declared as a homestead." Id. at 279-80. Thus, it was not Mr. Nelsen's involuntary incarceration that allowed the Nelsens to assert the homestead exemption, but simply Mrs. Nelsen's continued residence at the property.

Nelsen provides no support to the Arringtons' argument. Here, Thomas and Susan were no longer married, so she could not rely on his continued residence to establish her homestead. She had not filed a declaration of homestead. She had not lived on the premises for more than six months before the foreclosure sale. Under these facts, RCW 6.13.050 establishes her abandonment of the homestead. Visual Graphics does not rely on this provision in its briefing.[3] Nonetheless, this statutory presumption of abandonment is a

[3] Visual Graphics instead contends Susan was required to execute a declaration

proper legal basis to affirm the trial court's conclusion that Susan's "absence from the property eliminates her homestead exemption."

We affirm the trial court's order on this basis. We need not address the trial court's alternate equitable basis for reaching this result.

II. BOA's Lien Interest as Successor

The Arringtons next argue that BOA did not have a valid lien against the property, because it did not have a recorded interest for purposes of notice. At the time of the foreclosure sale, the address for notice was Fleet's defunct address, rather than BOA's. The Arringtons contend that for the deed of trust to remain valid, BOA was required to comply with Washington's recording statute and record an assignment of deed of trust so as to alert any third parties that it had purchased Fleet's interest. We reject that argument.

BOA's interest in the property was the result of its being the successor in interest to Fleet. RCW 23B.11.060(1) describes the effect of a merger in part as follows:

> (a) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases;
>
> (b) The title to all real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment.

Here, Fleet's surviving interests thus vested automatically with BOA, without

---

of homestead under RCW 6.13.040(2). That provision states that an owner selecting land not yet occupied as a homestead must execute a declaration of homestead. Id. Since Susan occupied the homestead prior to her incarceration, it appears the abandonment provision is more on point.

reversion or impairment.

Even if BOA should have received and recorded an assignment of Fleet's deed of trust, an unrecorded assignment will still not cause the assigned mortgage to lose priority as against subsequent mortgages or other liens. See Miller v. Frybers, 119 Wash. 243, 250, 205 P. 388 (1922). What is relevant for later purchasers of mortgages is notice that an earlier mortgage exists, not that it has been assigned. Id. BOA's lien priority was thus established by Fleet's properly recorded deed of trust. BOA's failure to record its own interest in the property does not impact its assumption of Fleet's interest. We hold the trial court did not err by finding BOA was entitled to assert Fleet's interests as a successor.

III. Notice of the Foreclosure Sale

The Arringtons suggest the trustee conducting the foreclosure sale failed to give the proper notice required under RCW 61.24.040(1). Under that statute, the trustee must, at least 90 days before the sale, send notice as proscribed by subsection (f) to "[t]he beneficiary of any deed of trust . . . or any person who has a lien or claim of lien against the property, that was recorded subsequent to the recordation of the deed of trust being foreclosed and before the recordation of the notice of sale." RCW 61.24.040(1)(b)(ii). Notice must be transmitted via both first class and certified or registered mail, to the address stated in the recorded document evidencing the party's lien interest. RCW 61.24.040(1)(b).

Here, the trustee followed these criteria. Since Fleet appears in the record of title as the beneficiary of the deed of trust, the trustee properly

transmitted notice to the Fleet addresses listed. And, as BOA's status was not in the public record, the trustee was not required to notify BOA of the sale in order to comply with RCW 61.24.040(1)(b).

The Arringtons argue that the trustee was required to provide actual notice to Fleet or BOA, which was not accomplished here. While the deed of trust act requires strict compliance with its provisions, its plain language in RCW 61.24.040 does not require actual notice. The Arringtons rely on Amresco Independence Funding, Inc. v. SPS Props., LLC, 129 Wn. App. 532, 119 P.3d 884 (2005), to support their argument. In that case, Amresco similarly argued the Trustee failed to comply with statutory notice provisions, having sent notice of sale not to Amresco's address, but to the address of its attorney. Id. at 535, 538. While Amresco, the creditor, claimed it did not receive actual notice, the court found that no actual notice was required, and that a mailing to the legal agent was sufficient to meet the trustee's duty of notification under RCW 61.24.040(1)(b). Id. at 540. Thus, Amresco does not support the Arringtons' argument, but supports the opposite conclusion. What was required was not actual notice, but rather compliance with the requirements of RCW 61.24.040(1)(b). That compliance occurred here, when the trustee mailed notice to the addresses of record.

IV. BOA was not an Omitted Lien Holder

As an extension of their argument above, the Arringtons contend that under RCW 61.24.040(7), BOA is an omitted lien holder by virtue of the deficient notice. Under RCW 61.24.040(7), if the trustee fails to give the required notice

to "any person entitled to notice. . . . The lien or interest of such omitted person shall not be affected by the sale and such omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding." Accordingly, the Arringtons argue that since BOA was omitted and did not receive notice, its interest was not affected by the nonjudicial foreclosure. They further assert that, because BOA did not prove its lien was eliminated by the operation of the trustee sale, BOA is not entitled to obtain disbursement of the surplus funds under RCW 61.24.080(3). We reject this argument as well.

The trustee was only obligated to notify those parties "entitled to notice." RCW 61.24.040(7). Because BOA was not identified in the public record as having a lien interest in the property, it was not a party entitled to receive notice, nor could it assert the protection afforded under RCW 61.24.040(7). BOA was not an omitted lien holder.

BOA's lien was properly extinguished by the trustee's sale, and the trial court was correct in ruling that BOA thus remained entitled to first priority in the distribution of the surplus funds. Again, under RCW 61.24.080(3), the liens and claims to such a surplus attach in the same order of priority that they would have attached to the property itself. Here, BOA's interest, as Fleet's successor, had statutory priority to the interests of the Arringtons. The homestead act contains an exception to its applicability, which provides the homestead exemption is not available against an execution or forced sale in satisfaction of judgments obtained on debts secured by "mortgages or deeds of trust on the premises."

RCW 6.13.080(2). And, BOA's interest at execution was on a debt secured by the deed of trust on the premises granted to its predecessor and acquired in the merger.[4] Disbursement to BOA was proper.

We affirm.

Appelwick, J.

WE CONCUR:

Cox, J.

Becker, J.

[4] BOA also notes that its interest is senior to that of Visual Graphics, based on the principle of first in time, first in right. Homann v. Huber, 38 Wn.2d 190, 198, 228 P.2d 466 (1951). BOA's deed of trust was recorded in 2001, while Visual Graphics' was recorded in 2009. Visual Graphics does not dispute that BOA had priority as the senior lien interest.