

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

JIM THORPE NEIGHBORHOOD BANK :
formerly the Jim Thorpe :
National Bank, :
Plaintiff :
vs. : No. 18-1318
SURREAL PROPERTIES, INC., :
Defendant :
and :
THOMAS ROMANCHIK, :
Intervenor :
and :
Flagstaff Resort Land :
Holdings LTD. :
Interested Party :

Loren Speziale, Esquire	Co-Counsel for Plaintiff
Thomas Capehart, Esquire	Co-Counsel for Plaintiff
Surreal Properties, Inc.	Pro Se
David Crossett, Esquire	Counsel for Flagstaff Resort Land Holdings, LTD.
Jack Seitz, Esquire	Counsel for Thomas Romanchik

MEMORANDUM OPINION

Matika, J. - March 15, 2021

Appellant, Flagstaff Resort Land Holdings, LTD, (hereinafter "FRLH") has filed an appeal from our opinion and order entered on January 21, 2021, which denied its Petition to Set Aside Sheriff Sale as well as all prior orders.¹ This Memorandum Opinion, which

¹ Upon reviewing the concise statement filed on February 25, 2021, none of the matters complained of deal with any orders other than the one noted above.

incorporates by reference our prior opinion and order, justifies and explains this Court's rationale for ruling adversely to FRLH.² For the reasons contained herein, this Court asks the Appellate Court to deny this Appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On May 15, 2018, Jim Thorpe Neighborhood Bank, formerly Jim Thorpe National Bank (hereinafter "JTNB") filed an action in foreclosure against Surreal Properties, Inc. (hereinafter "Surreal"). Default judgment was ultimately obtained by JTNB and against Surreal on December 20, 2018 in the amount of \$326,940.23. On that same date, a writ of execution was issued and a sheriff's sale was initially scheduled for February 15, 2019. After a number of continuances of that sale, both COVID and non-COVID related, along with Surreal's filing of a Chapter 11 Bankruptcy, the sheriff sale was once again scheduled for July 10, 2020. On July 6, 2020, FRLH filed an "Emergency Petition to Intervene" in the underlying foreclosure action and an "Emergency Motion to Continue the Sheriff's Sale Without Concurrence, Join a Third Party, and Scheduled a Hearing to Determine Priority." A hearing was held on those filings on July 9, 2020. After that hearing concluded, but before a decision could be rendered, the Court was presented with a petition filed by the Carbon County Sheriff's Office requesting

² The Opinion Order dated January 20, 2021 and filed on January 21, 2021 is attached hereto and incorporated herein.

a postponement of the sheriff's sale due to Governor Wolf's order regarding foreclosures and evictions. As a result, the sheriff's sale of the subject property was continued to September 11, 2020. Consequently, FRLH's emergency motion to continue was denied as moot. Further, this Court denied FRLH's petition to intervene³ at that point. In doing so, we rendered the balance of the relief sought in the other petition moot as well.

On September 11, 2020, a sheriff's sale was finally held on the subject property. The successful bidder was Thomas Romanchik (hereinafter "Romanchik") who bid \$620,000.00 for the property. A schedule of distribution was filed by the Sheriff's Office on September 18, 2020. Timely exceptions to that schedule of distribution filed by both JTNB and FRLH are still pending.

On September 21, 2020, the "Emergency Petition to Set Aside Sheriff's Sale by Flagstaff Resort Land Holdings, LTD" was filed. A hearing was held on September 30, 2020.⁴ All parties were given the opportunity to lodge post hearing briefs. On January 21, 2021, this Court's opinion and order, referenced in footnote 2, denying FRLH's emergency petition was filed. On January 28, 2021, FRLH filed the instant appeal. Pursuant to Pa.R.A.P. 1925(b) this Court

³ While there was reference in the notice of appeal to "all prior orders" the order denying this petition is the only other order entered. However as no matter complained of on appeal deals with this issue, we attach it here to make a complete record.

⁴ At that hearing, the Court *sua sponte* raised the issue of the successful bidder, Thomas Romanchik being an indispensable party to this proceeding. Accordingly, all parties agreed and Romanchik should be permitted to intervene.

issued an order on January 29, 2021 and docketed on February 3, 2021 directing FRLH to file its concise statement of matters complained of on appeal within twenty-one (21) days thereafter. On February 25, 2021, FRLH filed that concise statement.⁵ In that statement FRLH alleged that the Court erred in the following respects:

(1) The trial court committed reversible error by denying the Emergency Petition to Set Aside Sheriff's Sale filed on September 21, 2020, where Pa.R.C.P. 3132 (sic) incorporates Pa.R.C.P. 3121(a)(3) and thus the requested relief must have been granted where, as here, Flagstaff Resort Land Holdings, Ltd. had pending property claims filed at Docket Nos. 2018-0630 and 2020-1802;

(2) The trial court committed reversible error by denying the Emergency Petition to Set Aside Sheriff's Sale filed on September 21, 2020, where the equities favored the requested relief, that is, where Flagstaff Land Resort Holdings, Ltd. was a victim of fraud by Surreal Properties, Inc. and its principal, and by the unclean hands of Jim Thorpe Neighborhood Bank; where Flagstaff Land Resort Holdings, Ltd. will incur a \$1,700,000 forfeiture without any finding of harm or substantial prejudice to the other parties and where Thomas Romanchik did not comply with the Sheriff's Terms and Conditions by depositing 10% of the bid at the

⁵ This Court will address the timeliness of this filing *infra*.

Sheriff's sale and the entire bid within 10 days after the Sheriff's sale and did not testify of any intention to consummate the transaction; equitable considerations of fairness where Flagstaff Land Resort Holdings, Ltd. articulated plans for the development of the property and invested \$2,100,000 towards such, the same being more than six times the bank's liens; where Flagstaff Land Resort Holdings, ltd. incurred substantial prejudice by the Sheriff's sale without having its junior lienholder status judicially resolved before-the-fact, because having chilled investors who were otherwise willing and able to bid-up to the combined value of the liens held by Flagstaff Land Resort Holdings, Ltd. and by Jim Thorpe Neighborhood Bank; reasonable assurances that, upon re-sale of the property after a judicial determination of the junior lienholder status, the bidding will reach the combined values of the liens held by Flagstaff Land Resort holdings, Ltd. and by Jim Thorpe Neighborhood Bank; and equitable considerations of unfairness where Thomas Romanchik will have acquired the property for an amount significantly less than its \$2,000,000 value and significantly less than the \$1,250,000 where Romanchik had previously bid for the same property;

(3) The trial court committed reversible error by denying the Emergency Petition to Set Aside Sheriff's Sale filed on September 21, 2020, where the trial court made erroneous findings,

unwarranted inferences from fact, unwarranted discounting of uncontested facts, or irrelevant considerations, or any of the foregoing, as follows: that Flagstaff Land Resort Holdings, Ltd. failed to obtain relief from an automatic stay while Surreal Properties, Inc. was in bankruptcy; that Flagstaff Land Resort Holdings, Ltd. failed to show fraud, rather than unclean hands, on part of Jim Thorpe Neighborhood Bank; that Flagstaff Land Resort holdings, Ltd. failed to show that Jim Thorpe Neighborhood Bank had knowledge of, and failed to disclose, mortgage satisfaction pieces of record while, having already reviewed the record, seeking as a matter of caution to further protect its interest through subordination agreements of mortgages held by Flagstaff Land Resort Holdings, Ltd.; that the interests of Flagstaff Land Resort Holdings, Ltd. are adequately protected under post-sale exceptions procedure in Pa.R.C.P. 3136, despite caselaw to the contrary and where the other parties conceded the inadequacy of Pa.R.C.P. 3136; and where faulting Larry Masi's testimony that he did not become aware of the improper mortgage satisfaction pieces until December of 2018, where such portion of his testimony was duly retracted and where he clearly misspoke and meant 2017 rather than 2018; and

(4) The trial court committed reversible error by denying the Emergency Petition to Set Aside Sheriff's Sale filed on September 21, 2020, where characterizing as "lay opinions" the unrebutted valuation testimony of the property by Larry Masi and William

Worthington, despite a record showing their professional experiences, and where determining that valuation was not established by expert testimony or appraisal where none of the other parties timely objected at the hearing on that ground under the *Rules of Evidence*.

Stated more succinctly for purposes of this Opinion, this Court interprets these four matters⁶ as being: 1) the trial court error in denying the petition because there remained pending other litigation of FRLH which FRLH claimed impacted the decision here; 2) the trial court erred in denying the petition in not finding that "equity" demanded that we find in favor of FRLH on its petition to set aside the sale; 3) the trial court erred in exercising its discretion by making certain factual findings adverse to FRLH, drew inferences from our findings by making other credibility determinations in a manner not conducive to FRLH's success on its petitions and 4) the trial court erred by characterizing the "unrebutted valuation testimony" of Larry Masi and William Worthington as lay opinion testimony in the absence of them being qualified as real estate valuation experts.

⁶ FRLH alleged a number of purported issues not raised in the petition itself or in its post hearing brief. To the extent not raised below and not therefore addressed in our January 20, 2021 opinion, such issues are deemed waived. See Pa. R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.")

LEGAL DISCUSSION

This Court must first note that, upon receiving a copy of the notice of appeal, it issued its 1925(b) order on January 29, 2021. This order was docketed and mailed to all counsel on February 3, 2021. Thus, by virtue of our January 29, 2021 order and Pa.R.A.P. 1925(b), FRLH had until February 24, 2021 to file this concise statement. FRLH filed this concise statement on February 25, 2021. No request to enlarge the time filing, pursuant to Pa.R.A.P. 1925(b)(2)(i) was ever made to this Court nor do we believe that Pa.R.A.P. 125(e) applies.⁷ Thus, this Court believes that FRLH's filing of its concise statement is untimely. Notwithstanding, this Court has had adequate opportunity to address the matters complained of on appeal as they are adequately addressed in our January 21, 2021 Memorandum Opinion and as supplemented herein. Accordingly, this Court believes the Appellate Court can still address the underlying issues, should it choose to do so, on the merits.⁸

As it relates to the merits of the above, this Court believes that it has adequately addressed the matters complained of in its

⁷ Pa. R.A.P. 121(e) allows for additional time to file this statement if filing by mail, however in accordance with this rule, this additional time does not apply to court orders, even had FRLH evidenced compliance with Pa. R.A.P. 1925(b)(1) pertaining to certificates of mailing.

⁸ Where a trial court finds that a concise statement is untimely, an appellate court may still address the issues raised in the appeal as no remand to allow the trial court to address these issues is needed when the trial court had adequate time to so do as is the case here. *Commonwealth v. Brown*, 145 A.3d 184, 186 (Pa. Super. Ct. 2016).

Memorandum Opinion of January 21, 2021 specifically under the heading of "III. FRLH's Claims, C. Fraud and Prejudice to FRLH's Priority Status." This Court believes it made appropriate and credible findings from the testimony and evidence presented by all parties. Great deference should be given to the trial court in the exercise of its discretion as the trier of fact in making those findings and credibility determinations. *Delahanty v. First Pennsylvania Bank, N.A.*, 464 A.2d 1243, 1255 (Pa. Super. Ct. 1983).

In furtherance of that Memorandum Opinion as it relates to the testimony on the valuation of the real estate in question, this Court likewise refers to our opinion specifically referenced on page 21 therein where it explained that this Court felt both Masi and Worthington, individuals with a stake in the outcome of the decision provided what it believes to be inflated lay opinions as to the valuations of the subject property. Other than the fact that they have engaged in many real estate dealings over the years, they provided no foundation for these lay opinions including establishing experience in valuing such a complete piece of real estate. Had they done so or had the training experience to do so, perhaps those opinions would have carried additional weight although again, their self-serving nature is still suspect. Had an "expert opinion" been proffered by an actual real estate appraiser, this Court would have placed greater weight to that valuation. This, however, was not the case. Thus, our decision

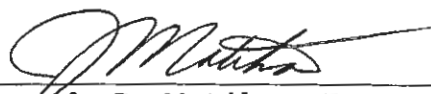
to discredit this self-serving, unsupported lay opinion testimony was proper.

Further, Pennsylvania Rule of Evidence 701, "Opinion Testimony by Lay Witnesses" reads as follows: "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witnesses' perception; helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.⁹ This Court believes that neither Masi nor Worthington's perception of the value of the subject property were ever grounded in any particular supporting evidence and could actually only be made by someone with specialized knowledge in the valuation of real estate that consists of the structure and acreage involved in this matter. Thus, both credibility and weight of this testimony did not sway this Court.

CONCLUSION

Based upon the foregoing and our January 20, 2021 opinion, this Court requests the Appellate Court deny the appeal and affirm our decision to deny the petition to set aside this sale.

BY THE COURT:



Joseph J. Matika, J.

⁹ Pa.R.E. 702.

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JIM THORPE NEIGHBORHOOD BANK :
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Land Holdings, LTD.
Counsel for Thomas Romanchik

MEMORANDUM OPINION

Matika, J. - January 20, 2021

Flagstaff Ballroom is a historic and formerly majestic structure situated on land high upon a mountain in Jim Thorpe, Pennsylvania, which hosted the likes of Frank Sinatra, Glenn Miller and the Dorsey Brothers in concert, along with hundreds of weddings and other events. Recently, the land upon which it is situated was sold at a sheriff's sale on September 11, 2020. Flagstaff Resort Land Holdings, LTD, one of the junior creditors of the owner of

[FM-2-21]

this property, Surreal Properties, Inc., has filed an emergency petition to set aside that sheriff's sale. For the reasons stated in this opinion, this Court denies that request.

FACTUAL AND PROCEDURAL BACKGROUND

Surreal Properties, Inc. (hereinafter "Surreal") is a Pennsylvania corporation which owns sprawling and vast acreage high atop a mountain overlooking Jim Thorpe Borough (hereinafter "subject property"). Jim Thorpe Neighborhood Bank (hereinafter "JTNB"), formerly Jim Thorpe National Bank, is a financial institution with its main offices in Jim Thorpe Borough. The Petitioner, Flagstaff Resort Land Holdings, LTD, (hereinafter "FRLH"), is a Pennsylvania limited partnership which was formed for purposes of developing the subject property as a destination resort. It is believed that FRLH was formed by Dominion Development Group, LLC and Timothy Markley (hereinafter "Markley"). Thomas Romanchik, (hereinafter "Romanchik") an additional party permitted to intervene in this action, was the successful bidder at the sheriff's sale held on September 11, 2020 for the subject property. The fact scenario that preceded that sale is quite extensive and convoluted at times.

On August 11, 2005, Surreal, through the execution of two mortgages in favor of JTNB, (hereinafter "JTNB Mortgages") borrowed a total of Five Hundred Thirty Thousand Dollars (\$530,000.00); Four Hundred Eighty Thousand Dollars (\$480,000.00)

through one mortgage recorded in Mortgage Book 1358, page 615 and the other in the amount of Fifty Thousand Dollars (\$50,000.00) and recorded in Mortgage Book 1358, page 628. Both mortgages encumbered the subject property identified as parcel number 83-17-J2, and were in first and second lien priority, respectively.

Thereafter, Surreal and FRLH engaged in a series of transactions which resulted in the execution and recording of four separate mortgages between these parties.¹ Upon the recording of these mortgages, they became third, fourth, fifth and sixth in priority as to the subject property.² Additionally, on June 12, 2009, FRLH and Surreal executed a Memorandum Agreement with regard to this same property.³

On or about October 29, 2013, a series of mortgage satisfaction pieces were recorded. The execution and recording of these satisfaction pieces had the effect of eliminating the FRLH

¹ At the hearing on this petition, Larry Masi (hereinafter "Masi"), President and Owner of Dominion Development Group LLC., testified about these mortgages:

- 1) a Six Hundred Thousand Dollar (\$600,000.00) mortgage dated June 3, 2009 and recorded in Mortgage Book 1771, Page 407;
- 2) another Six Hundred Thousand Dollar (\$600,000.00) Mortgage dated June 12, 2009 and recorded in Mortgage Book 1173, Page 352; and
- 3) a Five Hundred Thousand Dollar (\$500,000.00) Mortgage dated June 12, 2009 and recorded in Mortgage Book 1773, Page 357.

According to FRLH Exhibit #4, consisting of copies of all eight (8) subordination agreements between JTNB and FRLH, there is reference to another Mortgage dated March 5, 2008 in the amount of Six Hundred Thousand Dollars (\$600,000.00) and recorded in Mortgage Book 1688, page 856, however Masi never testified about this mortgage. It will be assumed for purposes of this petition that it is no longer a lien however, it was recorded as such during the time period in question surrounding the subordination of the FRLH Mortgages in 2015.

² See FRLH Exhibit #4, the Collection of Subordination Agreements between JTNB and FRLH.

³ FRLH's Exhibit #2.

mortgages recorded in Mortgage Book 1771, page 407, Mortgage Book 1173, page 352 and Mortgage Book 1773, page 357 as liens in favor of FRLH and as against the subject property at issue here. It is alleged by Masi and FRLH that the person who executed these satisfaction pieces, Tim Markley, had no legal authority to do so.⁴

On or about May 7, 2015, JTNB and Surreal entered into a "First Amendment to Mortgage and Mortgage Modification Agreement" related to both of the JTNB mortgages. The purpose of the Amendment to Mortgage and Mortgage Modification Agreement was to, *inter alia* amend the metes and bounds description of the subject property. In order for this to occur, it was necessary for FRLH to subordinate its mortgages with Surreal behind the JTNB Mortgages. As a result, the eight (8) Subordination Agreements were executed by Masi on behalf of FRLH thereby relegating certain mortgages and the Memorandum of Agreement to lien positions junior and inferior to the JTNB Mortgages.⁵

⁴ On February 8, 2018, FRLH filed an action against Surreal claiming that these satisfaction pieces should be stricken and these mortgages reinstated. This action is still pending.

⁵ See FRLH's Exhibit #4. This Exhibit contains eight (8) subordination agreements, all dated May 7, 2015. In the Order attached to this Exhibit they are:

- 1) Subordination of a fourth lien mortgage interest for a mortgage of \$600,00.00 recorded in Mortgage Book 1771, Page 407;
- 2) Subordination of a fifth lien mortgage interest for a mortgage of \$600,000.00 recorded in Mortgage Book 1773, Page 352 to be junior and inferior in the \$480,000.00 JTNB mortgage;
- 3) Subordination of a sixth lien mortgage interest for a mortgage of \$500,000.00 recorded in Mortgage Book 1773, Page 357 to be junior and inferior to the \$480,000.00 JTNB mortgage;

[FM-2-21]

On or about January 21, 2016, Kim P. McDonald filed a judgment note, indexed to 16-0133, in the amount of Five Hundred Fifty Thousand Dollars (\$550,000.00) and against Surreal.

On May 15, 2018, JTNB filed two complaints in mortgage foreclosure against Surreal on both of the JTNB Mortgages. On December 20, 2018, JTNB obtained default judgment against Surreal on both mortgages and immediately filed a praecipe to seek a writ of execution on the judgment it just obtained in the instant matter, in the amount of Three Hundred Twenty-Six Thousand, Nine Hundred Forty Dollars and Twenty-Three Cents (\$326,940.23). On February 12, 2019, Surreal filed a Chapter 11 bankruptcy in the Middle District of Pennsylvania. This filing effectively stayed any action undertaken by JTNB to execute on its judgment.

As a result, the original sheriff's sale scheduled for

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- 4) Subordination of a third lien mortgage interest for a mortgage of \$600,000.00 recorded in Mortgage Book 1688, Page 856 to be junior and inferior to the \$50,000.00 JTNB mortgage;
 - 5) Subordination of a fifth lien mortgage interest for a mortgage of \$600,000.00 recorded in Mortgage Book 1773, Page 352 to be junior and inferior to the \$50,000.00 JTNB mortgage;
 - 6) Subordination of a sixth lien mortgage interest for a mortgage of \$500,000.00 recorded in Mortgage Book 1773, Page 357 to be junior and inferior to the \$50,000.00 JTNB mortgage;
 - 7) Subordination of the Memorandum of Agreement to be junior and inferior to the \$480,000.00 JTNB mortgage; and
 - 8) Subordination of the Memorandum of Agreement to be junior and inferior to the \$50,000.00 JTNB mortgage.

Interestingly, in reviewing what mortgages were allegedly owed by Surreal to FRLH, satisfied by Markley and subordinated by JTNB, the Court took particular note the fourth subordination agreement referenced above. It suggests the subordination of a mortgage to which no mention was ever made except through this Exhibit. It therefore calls into question the priority status of the \$50,000.00 JTNB mortgage that is recorded in Mortgage Book 1358, Page 628, and not necessarily subordinated to the FRLH mortgage in the amount of \$600,000.00 which is recorded in Mortgage Book 1771, Page 407. For purposes of this petition, this is of no consequence, however, should FRLH succeed in its litigation with Surreal docketed to 18-0630 and the exceptions to the Sheriff's schedule of distribution.

February 15, 2019, at the request of JTNB, was continued until May 10, 2019. On May 9, 2019, JTNB again filed notice to continue the sale to June 14, 2019. On June 7, 2019, JTNB filed a petition to continue the sale once again. This petition was granted as was another one moving the sheriff sale from September 13, 2019 to July 10, 2020.⁶ Thereafter, as a result of the Covid-19 pandemic, the Court issued an order granting the petition of the Carbon County Sheriff's Office to continue all sheriff sales from July 10, 2020 and August 14, 2020 to September 11, 2020. This order further directed that the order continuing these sales to September 11, 2020 be conspicuously posted at the entrance to the courthouse for all, including prospective bidders, to see.

On or about September 11, 2020, the date of the sheriff sale of the subject property, notice was affixed to the entrance of the Courthouse indicating that all sheriff sales being held that day were being moved to the County Emergency Management Agency building in Nesquehoning and were still scheduled for 11:00 A.M.

Beginning at 11:00 A.M. on September 11, 2020, the sheriff sales scheduled for that day commenced. It was not until approximately 11:45 A.M. did the sale of the subject property start. Present for that sale, in addition to representatives of JTNB, were Masi, Attorney Eric Filer, counsel for FRLH, William

⁶ According to the two petitions seeking to continue the sheriff's sale, all requests to continue were due to the fact that Surreal had filed a Chapter 11 Bankruptcy on February 12, 2019 (See FRLH Exhibit #8). The orders granting the petitions were in accordance with Pa.R.C.P. 3129.3(a), where no new notice was required.

Worthington (hereinafter "Worthington"), a potential bidder for the property and Romanchik. Both Worthington and Romanchik bid on this property with Romanchik becoming the successful bidder at a price of Six Hundred and Twenty Thousand Dollars (\$620,000.00) plus costs and taxes.

On September 21, 2020, FRLH filed the instant petition to set aside this sale. On September 29, 2020, JTNB filed an answer to that petition. A hearing was scheduled and held on September 30, 2020. At that hearing, all parties agreed that Romanchik, the successful bidder at the sale should be added as an indispensable party to this action.

At this hearing, in addition to certain of the facts identified *supra*, FRLH presented several witnesses to support its petition. Masi was called to testify. In addition to testifying to some of the above facts, Masi presented additional testimony regarding the circumstances surrounding the subordination agreements with JTNB, the satisfactions pieces signed by Markley, negotiations leading up to the possible purchase and sale of the subject property as well as strategies to possibly undertake for purposes of preserving FRLH's lien status *vis-à-vis* litigation and the sheriff's sale. Masi indicated that when the monies were provided to Surreal by FRLH resulting in the 2009 mortgage being signed and recorded along with the Memorandum of Agreement, he was aware of the JTNB Mortgages and the lien positions of these mortgages.

Masi and Markley apparently had a falling out some time in 2013. It was after this occurrence that, unbeknownst to Masi, Markley, he claimed fraudulently satisfied the FRLH mortgages it had with Surreal and recorded them on October 29, 2013. Masi also testified that he did not become aware of these satisfactions until December 2018.

Masi also testified about the circumstances surrounding the subordination agreements he executed on behalf of FRLH in conjunction with Surreal's First Amendment to Mortgage and Mortgage Modification Agreement with JTNB. Masi testified that he believed JTNB's actions, vis-a-vis the subordination agreements executed in 2015, were fraudulent. To support this claim, Masi stated that he believed that the representatives of JTNB had to know that FRLH's mortgages had been satisfied as JTNB would have checked the records in the Recorder of Deeds Office before preparing these subordination agreements and further that JTNB should not have hidden that fact from Masi. Masi also testified about learning that on January 21, 2016, Kim McDonald (hereinafter "McDonald") and Markley agreed to have a Five Hundred and Fifty Thousand Dollar (\$550,000.00) judgment filed that resulted in a lien against the subject property and its owner, Surreal Properties, Inc. In conjunction with the JTNB mortgages and the satisfaction of the FRLH mortgages this lien then became third in priority behind the two JTNB Mortgages.

As a result of the actions of Markley and McDonald, FRLH filed

[FM-2-21]

three separate actions: 1) an action to quiet title filed and docketed on February 8, 2018 to 18-0630 against Surreal Properties, Inc.; 2) an action by FRLH, et al. against Markley filed on December 26, 2018 and docketed to 18-3817, an action sounding in breach of fiduciary duty and negligence; and 3) an action against McDonald, filed on August 11, 2020 and docketed to 20-1802, an action seeking a declaratory judgment that FRLH's improperly satisfied mortgages, should be reinstated and have priority over McDonald's judgment.⁷

Lastly, Masi identified a number of attempts to protect the interest of FRLH in this mortgage's vis-a-vis Surreal and the subject property. This included attempting to negotiate the purchasing of JTNB's judgment along with the strategies considered for bidding at the sheriff's sale, including bidding by a third-party investor.

On the issue of a third-party investor, FRLH called William Worthington to testify, Worthington testified that he investigated the prospect of investing in a venture on the subject property but

⁷ All three of these actions were prompted by the conduct of both Markley and/or McDonald and the negative impact that conduct had/has on the FRLH lien status vis-a-vis the subject property. In the case indexed to 18-0630, FRLH is seeking an order to strike the satisfaction pieces executed by Markley claiming Markley had no authority to satisfy those mortgages and that the mortgages have not, in fact been paid in full. Additionally, FRLH is asking that these mortgages be reinstated.

In the case indexed to 18-3817, FRLH had filed an action against Markley himself for satisfying these mortgages without authority.

Lastly, in the case indexed to 20-1802, FRLH filed a declaratory judgment against McDonald seeking to have the FRLH mortgages stand in superior lien priority as against McDonald's judgment based upon Markley's unauthorized satisfaction of those mortgages.

was likewise concerned about FRLH's priority status or bidding for the property at the Sheriff's sale. He acknowledged that he did in fact bid at the sale, however, due to the uncertainty of FRLH's status and the McDonald judgment, he ceased bidding at Six Hundred Thousand Dollars (\$600,000.00).

The third witness called by FRLH was Attorney Eric Filer (hereinafter "Filer"). Filer is counsel for a number of the legal actions referenced above. Filer was also involved in protecting FRLH's interests in Surreal's bankruptcy filed on February 12, 2019. Because of the automatic stay issued on the bankruptcy court, Filer was barred from moving forward with the quiet title action against Surreal. While an option under the bankruptcy laws, Filer could have sought relief from that stay, but did not do so on behalf of FRLH claiming that he did not see it as a viable option. Alternatively, Filer submitted a proof of claim as a creditor of Surreal. On September 19, 2019 the bankruptcy court confirmed a plan for liquidation of Surreal's assets. In that process, Surreal was given nine (9) months to try to sell the subject property privately. Additionally, the bankruptcy court in that plan, identified JTNB and FRLH as secured creditors and McDonald as an unsecured creditor. Filer testified that the confirmation of this plan was not akin to factfinding by the Court and did not believe it would have any bearing on the status of the instant litigation. Filer also testified that in a deposition of Markley conducted in the bankruptcy action, Markley acknowledged

that the monies Surreal owed to FRLH pursuant to the mortgages and notes were not in fact paid back.⁸ As to the bankruptcy, Filer testified that the stay previously issued by the bankruptcy court expired on July 4, 2020. It was not until after the stay expired did Filer, on behalf of FRLH, renew the litigation against Surreal.

Lastly, Romanchik testified on his own behalf. He indicated that he appeared at the Carbon County Courthouse for the sale at 10:45 A.M. Noticing the change in the location of the sale, he travelled to the Emergency Management Agency building in Nesquehoning and arrived there at 11:00 A.M. He further noted that the sale of the subject property did not occur until around 11:45 A.M. Romanchik was the successful bidder at Six Hundred and Twenty Thousand Dollars (\$620,000.00). He also noted that Masi and Filer were present on behalf of FRLH.

After the hearing all parties were given the opportunity to lodge briefs in support of their respective positions. All parties lodged briefs and this matter is now ripe for disposition.⁹

LEGAL DISCUSSION

FRLH has filed an emergency petition to set aside the sheriff sale of the subject property on which it claims it should have a lien and as the result of the claims it raises in this petition, those claims should allow for the sale to be set aside.

⁸ FRLH Exhibit #9, transcript pages 54-56.

⁹ FRLH also lodged a reply brief to the briefs lodged by JTNB and Romanchik.

A review of the claims raised in the petition suggest that FRLH believes that the sale should be set aside for one or more of three general reasons: 1) the Carbon County Sheriff changed the location of the sale without adequate notice to the public; 2) the sale occurred without material compliance with Pa.R.C.P. 3129.3; and 3) there was extensive fraud and material prejudice to FRLH's priority status that impacted bidders at the sale. In it's brief, FRLH concentrates more on the third reason identified above. Prior to addressing these issues, this Court must first address FRLH's standing to challenge the sheriff sale in this mortgage foreclosure action.

I. FRLH'S STANDING TO SET ASIDE THE SHERIFF'S SALE

Pursuant to Pa.R.C.P. 3132,

"upon petition of any party in interest before delivery of the personal property or of the sheriff's deed to real property, the court may, upon good cause shown, set aside the sheriff sale and order a resale or enter any other order which may be just and proper under the circumstances." "A party has standing if he is aggrieved, he can show a substantial direct and immediate interest in the outcome." *Merrill Lynch Mortgage Capital v. Steele*, 859 A.2d 788, 790 (Pa. Super. Ct. 2003).

FRLH's claim that but for the actions of the Carbon County Sheriff's Office, Markley's actions, JTNB's actions, McDonald's actions or any combination thereof, it's status as a junior lienholder behind the JTNB's mortgages, whether reinstated or not, creates a situation which warrants a finding that FRLH is a "party

in interest." Accordingly, this Court finds that FRLH has standing to file this petition.¹⁰

II. STANDARD OF COURT'S REVIEW OF PETITION

The Pennsylvania Superior Court, with respect to this Court, standard of review, had held that:

. . .the relevant inquiry is whether proper cause has been shown to set aside the sheriff's sale. The decision to set aside a sheriff's sale is based on equitable principles. The burden of proving circumstances warranting the exercise of the court's equitable powers is on the petitioner, and the request to set aside a sheriff's sale may be refused due to insufficient proof to support the allegations in this petition. Sheriff's sales have been set aside where the validity of the sale proceedings is challenged, a deficiency pertaining to the notice of the sale exists, or where misconduct occurs in the bidding process. This [C]ourt will not reverse the trial court's decision absent a clear abuse of discretion.

Irwin Union Nat's Bank & Trust Co. v. Famous, 4 A.3d 1099, 1102 (Pa. Super. 2010) (internal citations and quotation marks omitted).

III. FRLH'S CLAIMS

A. Lack of Notice Due to the Change of Location by Sheriff

FRLH's first argument centers around the fact that the Carbon County Sheriff changed the location of the sale, allegedly at the last minute, from the Carbon County Courthouse in Jim Thorpe to the County Emergency Management Agency (E.M.A.) building in Nesquehoning. FRLH contends that as of September 10, 2020, the

¹⁰ Additionally, according to the Pa.R.C.P. 3121.1 affidavit filed by JTNE, FRLH is listed as a judgment creditor worthy of a delineation of lienholder status by virtue of the judgments confessed in 2018.

sale was noticed to be at the Courthouse, however when Masi, Worthington and Filer appeared for the 11:00 A.M. sale, there was a sign on the door of the Courthouse indicating that the location changed out of concern for occupancy limits imposed by Governor Thomas Wolf and Secretary of Health, Dr. Rachel Levine. FRLH argues that "bidders were deterred where the location was changed at the last minute." This Court would agree with FRLH that grounds to set aside the Sheriff's sale would exist if this change in location the morning of the sale deterred bidders from attending if there was evidence of such claim; however FRLH failed to put forth any evidence of this assertion. In fact, a representative of FRLH, Masi himself, along with counsel and a business venture partner, Worthington, were all present prior to the start of the sale at 11:45 A.M. Even if bidders did in fact appear at the Carbon County Courthouse ready to bid, they had forty-five minutes to take the ten-to-fifteen-minute trip to Nesquehoning. There is no evidence of any such deterrent of any bidders for this property. This argument is wholly frivolous.

B. Material Noncompliance with Pa.R.C.P. 3129.3

FRLH next argues that the Court's Order of July 9, 2020 which continued all sheriff's sales of July 10, 2020 and August 14, 2020 violated the requirements of Pa.R.C.P. 3129.3. Pursuant to 3129.3, "(a)except as provided by subdivision (b) or special order of court, new notice shall be given as provided by Rule 3129.2 if a

sale of real property is stayed, continued, postponed or adjourned." (emphasis ours).

FRLH argues that the July 9, 2020 Order of Court is not the type of special order of court referenced in the rule and the explanatory comment to the rule. The explanatory comment identified by FRLH allows for a "special order of court dispensing with the requirement of new notice." This "new" exception to the rule gives the court "discretion to allow postponement of the sale without new notice in appropriate cases." (explanatory comments 1989 to Pa.R.C.P. 3192.3)

FRLH claims that the order was not docketed to this case nor is it one that allows for dispensing of a new notice under the rule. FRLH's argument is meritless.

When this Court issued the July 9, 2020 Order of Court continuing the July 18, 2020 Sheriff's sale, it did so in response to Covid-19 concerns and in particular, Pennsylvania Governor Thomas Wolf's moratorium on certain foreclosures issued that same day. Out of an abundance of caution and unaware of which Sheriff's sales scheduled for July 10, 2020 and August 14, 2020 involved foreclosures that could result in evictions, the Carbon County Sheriff's Office sought to continue all sheriff's sales scheduled for those two dates. As a result, the sheriff's petition was granted and all sales were continued "by Special Order of Court" and issued at the discretion of the Court.

In furtherance of that Order, this Court directed that notice of the postponement of the sale be posted at the entrance to the Courthouse and docketed to every case affected by the July 9, 2020 Order.¹¹ A review of the docket entries entered in this case shows that docket number #50 is a copy of this Order. This Court will take judicial notice of this filing as it pertains to this issue.

As with the argument raised on the first "lack of notice" issue, FRLH fails to show any prejudice. The fact that only two people appeared on September 11 2020 to bid, including representatives from FRLH is not evidence of prejudice.

This Court believes that the Order of Court is a "Special Order of Court" contemplated by Rule 3129.3(a), a Special Order which also provides special notices about the postponement of the July 10, 2020 sale, and the rescheduling of it.

C. Fraud and Prejudice to FRLH's Priority Status

FRLH's last contention here is that the conduct of many others affected its priority lien status *vis-à-vis* the subject property and thus equity dictates that the sale should be set aside. Equitable considerations govern the trial court's decision to set aside a sheriff's sale. *Bank of America NA. v. Estate of Hood*, 47 A.3d 1208 (Pa Super. 2012). This final claim involves a number of arguments including some involving parties to this action and some

¹¹ There was no testimony that said notice was not posted as required, so this Court will assume it was posted.

involving third parties. As a result, this Court will dissect each such claim *seriatim*.

1. Fraudulent Execution and Filing of Satisfaction Pieces by Markley

FRLH contends that the actions by Markley in improperly and fraudulently satisfying mortgages held by FRLH and owed by Surreal seriously impacted its priority status *vis-à-vis* monies owed to it by Surreal and the effect it had on the sheriff's sale. In furtherance of this argument FRLH contends that the failure of the Sheriff's Office to alert the "bidding public" about its status related to this property was also improper. Additionally, FRLH claims that JTNB, in the process of requesting FRLH to subordinate its mortgages in favor of JTNB's Mortgages, was fraudulent in not alerting Masi that these mortgages were previously satisfied several years earlier. Further, FRLH argues that JTNB's failure to notify Masi resulted in a delay in FRLH taking action against Markley and Surreal. Each of these claims are intertwined, but whether taken singularly or collectively, they failed to evidence the proper cause that needs to be shown in order to set aside a sheriff's sale. *Merrill Lynch Mortgage Capital v. Steele*, 859 A.2d 758 (Pa. Super. 2004).

FRLH claims that Markley's satisfaction of the FRLH mortgages was fraudulent and improper and cause to set this sale aside. These satisfaction pieces had the effect of removing FRLH's priority status *vis-à-vis* liens against the subject property. As

a result, FRLH claims it further impacted its interest in the proceeds of the sale because of McDonald's judgment. This Court agrees with FRLH that if Markley's satisfaction of these mortgages was in fact fraudulent, any excess monies from the Romanchick bid would be payable to the next lien holder in priority status. That may be someone other than FRLH subject to any exceptions being filed by FRLH challenging this distribution. Should FRLH succeed in having the satisfaction pieces vacated and its mortgage status reinstated, as it believes it will, that distribution may result in the relief it seeks here. Thus, in order to preserve its interest, exceptions are the proper vehicle to achieve that goal, not setting aside the sale.

FRLH also claims that the Sheriff's Office improperly refused to announce that FRLH, as a junior lienholder as it perceived itself has valid mortgages against the subject property. FRLH argues that this announcement would have benefited it in terms of the sheriff's sale as it would have noticed others as to the liens affecting the subject property. FRLH has not established how the Carbon County Sheriff's Office, in its refusal to allow such an announcement, performed an illegality or otherwise violated the law. In fact, the testimony was that only Romanchik, Worthington¹², Masi¹³ and Filer were present as potential bidders for the property

¹² Worthington testified that he only has enough money to bid Six Hundred Thousand Dollars (\$600,000.00) therefore, any argument that he could have bid up the price to protect FRLH's interests is suspect.

¹³ Neither Masi nor his attorney offered any bids.

and only Romanchik and Worthington bid on it. Thus, the refusal of the Carbon County Sheriff's Office to allow the announcement of FRLH's judgment liens is insufficient to afford any equitable relief.

FRLH next argues that JTNB's actions in requiring the subordination of the FRLH mortgages below priority status of the JTNB mortgages, at a time when JTNB knew or should have known that the FRLH mortgages, were previously satisfied and failed to tell Masi was fraudulent and a reason to set aside the sale. This argument is circular in nature and has no substance nor forms any basis to grant the relief requested.

FRLH wants the Court to believe that JTNB withheld from FRLH the fact that FRLH's mortgages were previously satisfied. This argument also assumes that JTNB in fact conducted a title search to ascertain the status of liens against the subject property. Assuming that JTNB did in fact conduct a title search and noticed the satisfaction of the FRLH mortgages, as FRLH claims, there would be no need for JTNB to seek subordination of the FRLH mortgages as, by virtue of the previous satisfactions, JTNB would have already been in first and second lien positions. This Court can only assume, accepting FRLH's argument that JTNB did not advise Masi of the satisfaction of these mortgages, that JTNB did not actually perform a search of the title to the subject property as they would have realized the satisfaction of these mortgages through a prudent title search. Conducting such a search would

have revealed these satisfaction pieces and negated the need for subordinations.

2. Inadequate Bid at Sheriff's Sale

FRLH also requests the Court to invoke its equitable powers to set aside the sale on the basis that the bid of Six Hundred and Twenty Thousand Dollars (\$620,000.00) was grossly inadequate. FRLH claims, in conjunction with this argument, the failure of the Sheriff's Office to allow FRLH to announce a junior lien holder status caused a "chilling effect on Masi and Worthington." Worthington testified that had the announcement been allowed, the bidders would have had to go above One Million, Two Hundred Thousand Dollars (\$1,200,000.00) in order to clear both the JTNB and FRLH liens. Further, it would have allowed Worthington to "use[d] his money to pay for the bank's mortgages if Flagstaff had acquired the property." (FRLH's brief, page 14). The logic in this argument is nonsensical. Regardless of how high bidding could have gone, distribution could be held up in exceptions filed by an aggrieved party and pending other underlying litigation. Further, increased bids would not guarantee that FRLH's interests of One Million, Seven Hundred Thousand Dollars (\$1,700,000.00) would be satisfied or protected unless Worthington bought it (and presumably had an agreement with Masi as he testified, he did) or

FRLH bought it. The failure of Worthington to continue bidding or Masi, who did not bid, ended that speculation.¹⁴

FRLH argues that the bid price of Six Hundred and Twenty Thousand Dollar (\$620,000.00) was grossly inadequate and as a result the sale should be set aside. There was some testimony that this property may have been worth over Two Million Dollars (\$2,000,000.00) however, this testimony came from the lay opinions of FRLH's witnesses. No expert witnesses were offered to support this opinion. We find very little credibility in this self-serving estimate without evidence as to how that figure was derived. While the price itself may constitute proper cause for setting aside a sale, [See *S&T Bank by Dalessio v. Dalessio*, 632 A.2d 566 (Pa. Super 1993)], the burden falls on FRLH to prove the same.¹⁵ FRLH has failed to meet the burden.

Additionally, FRLH had the opportunity to bid up the price but failed, for its own reasons, to do so. Lastly, the fact that the successful bid was Six Hundred and Twenty Thousand Dollars (\$620,000.00) where the outstanding mortgage debt was approximately Four Hundred Thousand Dollars (\$400,000.00) does not evidence gross inadequacy.

3. Staying of Sale to Effectuate Negotiated Settlement with JTNB or Resolution of Outstanding Litigation

¹⁴ According to Worthington, he did not even come to the sale with sufficient money to bid higher than \$600,000.00.

¹⁵ Romanchik testified that in an online auction in July, preceding the Sheriff's sale, he was the successful bidder, later withdrawn, for the subject property in an amount of \$1,250,000.00.

FRLH's next argument deals with the inability to either negotiate a settlement with JTNB, presumably to purchase its judgments, and the lack of time to resolve underlying litigation to protect its interests.

JTNB's foreclosure litigation began on May 15, 2018. Masi testified that, on behalf of Surreal and during the pendency of the foreclosure, it made payments to JTNB to protect not only Surreal's interest but that of FRLH. There was also testimony that once Surreal came out of bankruptcy in July, 2020, Masi and even Worthington attempted to negotiate with JTNB. Failed attempts to succeed in these negotiations are not bases to set aside the sale as FRLH had sufficient time prior to the filing of bankruptcy and after the stay was lifted to prevent this from occurring.

FRLH also argues that it should be given more time to litigate the action with Surreal relative to the fraudulent satisfaction of the FRLH mortgages. Masi testified that he only became aware of the recording of these satisfaction pieces in December 2018, however this testimony is quite suspect as the action that was filed by FRLH to address this issue was filed in January 2018. Thus, notwithstanding the filing of Surreal's bankruptcy in February 2019, FRLH had over a year to litigate that issue plus an additional opportunity to seek relief from the bankruptcy stay, an avenue of relief it failed to pursue. It was not until Surreal came out of bankruptcy in July, 2020, that FRLH aggressively sought to litigate its claims in that action against Surreal during the

time when the sheriff sale of the property was once again moving forward.

This Court finds that FRLH's failed attempts to bring that litigation to a more expeditious conclusion was its own doing and not the fault of anyone else. Thus, these are likewise not reasons to set aside this sale.

CONCLUSION

Based upon the foregoing, this Court enters the following:

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

JIM THORPE NEIGHBORHOOD BANK :
Formerly the Jim Thorpe :
National Bank, :
Plaintiff :

vs. :

No. 18-1318

SURREAL PROPERTIES, INC., :
Defendant :

and :

THOMAS ROMANCHIK, :
Intervenor :

and :

Flagstaff Resort Land :
Holdings LTD. :
Interested Party :

Loren Speziale, Esquire
Surreal Properties, Inc.
David Crossett, Esquire

Jack Seitz, Esquire

Counsel for Plaintiff
Pro Se
Counsel for Flagstaff Resort
Land Holdings, LTD.
Counsel for Thomas Romanchik

FILED
2021 JAN 21 AM 9:23
CARBON COUNTY
PROTHONOTARY

ORDER OF COURT

AND NOW, this 20th day of January, 2021, upon consideration of the "Emergency Petition to Set Aside Sheriff's Sale by Flagstaff Resort Land Holdings, LTD" the brief and reply brief lodged in support thereof, "Jim Thorpe Neighborhood Bank's Answer to Flagstaff Resort Land Holdings, LTD's Petition to Set Aside Sheriff's Sale" and its brief lodged in opposition to the Emergency Petition, and the brief of Thomas Romanchik, also lodged in

[FM-2-21]

opposition to the Emergency Petition and after hearing thereon, it is hereby **ORDERED and DECREED** that said "Emergency Petition to Set Aside Sheriff's Sale by Flagstaff Resort Land Holdings, LTD" is **DENIED.**

BY THE COURT:



Joseph J. Matika, J.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

JIM THORPE NEIGHBORHOOD BANK,
Plaintiff

v.

SURREAL PROPERTIES, INC.,
Defendant

No. 18-1318

Foreclosure

Thomas A. Capeheart, Esq.
Loren L. Speziale, Esq.

Counsel for Plaintiff

Surreal Properties, Inc.

Pro Se

Eric James Filer, Esq.

Counsel for Petitioner

ORDER OF COURT

AND NOW, this 9TH day of July, 2020, upon consideration of
the

- "Emergency Petition to Intervene" ("Petition to Intervene") filed by Petitioner Flagstaff Resort Land Holdings, Ltd. ("Flagstaff") on July 6, 2020; and

after hearing held thereupon, and after comprehensive review of
the record in this matter, it is hereby **ORDERED** and **DECREED** that
Flagstaff's Petition to Intervene is **DENIED**.¹

Lack of "Pending" Action.

Pennsylvania Rule of Civil Procedure 2327 permits a putative party with a recognized interest in a matter to intervene "[a]t any time during the pendency of an action." See Pa.R.C.P. 2327 ["Who May Intervene"].

The Pennsylvania Superior Court unequivocally has stated that:

"To petition the court to intervene after a matter has been finally resolved is not allowed by our Rules of Civil Procedure. It is only **during the pendency** of an action that the court may allow intervention. Pa.R.C.P. 2327. An action

BY THE COURT:


Joseph J. Matika, J.

is 'pending,' according to Black's Law Dictionary (5th Ed.),
when it is:

begun, but not yet completed; during; before the
conclusion of; prior to the completion of; unsettled;
undetermined; in process of settlement or adjustment.
Thus an action or suit is 'pending' from its inception
until the rendition of final judgment."

See *Financial Freedom, SFC v. Cooper*, 21 A.3d 1229, 1231 (2011) quoting
In re Estate of Albright, 376 Pa.Super. 201, 545 A.2d 896, 899 (1988)
(emphasis in original). See also *U.S. Bank, N.A. v. Watters*, 163 A.3d
1019, 1027 (Pa.Super. 2017).

This Court entered final judgment in this matter on December 18,
2018. Accordingly, Flagstaff's Petition to Intervene, filed on July 6,
2020, has not been filed during the "pendency" of this matter and within
the time frame during which Pennsylvania Rule of Civil Procedure 2327
provides this Court with authority to permit intervention in a case.

Disposition of Flagstaff's "Emergency Motion to Continue the Sheriff's
Sale without Concurrence, Join a Third Party, and Schedule a Hearing to
Determine Priority."

Because the Court has denied Flagstaff's Petition to Intervene,
Flagstaff's "Emergency Motion to Continue the Sheriff's Sale without
Concurrence, Join a Third Party, and Schedule a Hearing to Determine
Priority" hereby is **DENIED** as **MOOT**.