

THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION

MELO ENTERPRISES LLC,	:	
Plaintiff	:	
vs.	:	NO: 10-3538
	:	
FOX FUNDING, LLC,	:	
Defendant	:	
vs.	:	
	:	
1400 MARKET STREET, LLC,	:	
Intervenor	:	
Anthony Roberti, Esquire		Counsel for Plaintiff
Scott M. Rothman, Esquire		Counsel for Intervenor
Fox Funding, LLC		Unrepresented

Nanovic, P.J. - February 15, 2012

MEMORANDUM OPINION

In real estate conveyancing, the language of a document is often critical, and the consequences of making an error far-reaching. This case illustrates such consequences, with one error compounding another, and little attention being paid to the most basic of detail - the correct name of a mortgagor.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case begin on October 21, 2005, when Dennis and Elsie Waselus (the "Waseluses"), husband and wife, transferred title to property owned by them located along the Maury Road in Penn Forest Township, Carbon County, into the name

of Fox Funding, LLC, a New Jersey limited liability company. To finance this purchase and to make anticipated improvements to the property, Fox Funding, LLC ("Owner"), borrowed \$1,075,000.00 from The Town Bank ("Bank").<sup>1</sup> This amount was to be secured by a first lien mortgage on the property from the Owner to the Bank. Instead, both the note evidencing this debt and the mortgage securing its repayment were executed under the name of Fox Funding PA, LLC. Fox Funding PA, LLC is a Pennsylvania limited liability company which exists separate and apart from Fox Funding, LLC. James Harrison, who owned and controlled both limited liability companies, executed the note and mortgage in his capacity as the managing member of Fox Funding PA, LLC.

The deed from the Waseluses to the Owner is dated October 21, 2005, as is the mortgage from Fox Funding PA, LLC to the Bank (the "Bank mortgage"). Also dated this same date and secured by the same property described in the Waseluses' deed is a mortgage from the Owner to the Waseluses in the amount of

---

<sup>1</sup> Fox Funding, LLC, in fact, borrowed \$1,300,000.00 from The Town Bank to purchase and improve property being acquired from both the Waseluses and another party. Before closing, it was agreed to split this amount into two loans: one for \$1,075,000.00, secured by a first lien on both the property being purchased from the Waseluses and that being purchased from the other party, and one for \$225,000.00. A mortgage to secure this second loan was to be a third lien on the Waseluses' property, behind a \$372,000.00 purchase money mortgage taken back by the Waseluses, and a second lien against the remainder of the property being purchased by Fox Funding, LLC.

Because the existence of this additional collateral and the division of the loan proceeds received from the Bank do not affect the issues before us, they are not considered further in this opinion. We do note, however, that the \$225,000.00 mortgage was also executed by Fox Funding PA, LLC and not Fox Funding, LLC, the true borrower and entity to which title was transferred.

\$372,000.00 (the "Waselus mortgage"). This second mortgage expressly states that it is "under and subject, in both lien and payment, to a construction and purchase loan mortgage to secure the payment of the principal sum of \$1,075,000.00 given by [Owner] to Town Bank dated October 21, 2005, and intended to be recorded forthwith." All three documents - the deed from the Waseluses to the Owner, the mortgage from Fox Funding PA, LLC to the Bank, and the mortgage from the Owner to the Waseluses - were recorded on October 25, 2005, in the sequence just mentioned. Significantly, the Bank mortgage was indexed by the Recorder of Deeds Office under the Owner's name, and not that of Fox Funding PA, LLC.

On January 2, 2009, the Bank commenced a mortgage foreclosure action naming Fox Funding PA, LLC, the designated mortgagor in the Bank mortgage, as the defendant. This action is docketed to No. 09-0006 in the Carbon County Court of Common Pleas. Judgment was taken on August 31, 2009, and a writ of execution was issued on September 1, 2009. On November 6, 2009, the property was sold at sheriff's sale to 1400 Market Street, LLC (the "Buyer"), to whom the Bank's loan, note, mortgage, and judgment were assigned on November 3, 2009, three days before the sheriff's sale. No objections or petitions to set aside the sheriff's sale of the mortgaged property to Buyer were asserted

or filed at any time. A sheriff's deed dated November 30, 2009, and purporting to convey title to the property to Buyer, was recorded on December 7, 2009.

On December 3, 2010, Melo Enterprises, LLC (the "Plaintiff") commenced the present action in mortgage foreclosure against the Owner seeking to foreclose on the Waselus mortgage. Plaintiff acquired this mortgage from the Waseluses by assignment dated November 8, 2010, and recorded on November 12, 2010. By agreement of the parties, Buyer was permitted to intervene as an interested party pursuant to Pa.R.C.P. 2327(4).

Buyer claims ownership of the property both by virtue of the sheriff's deed dated November 30, 2009, and a quit claim deed from the Owner dated November 29, 2010 (recorded December 27, 2010), and further claims that the Waselus mortgage on the property was extinguished by the sheriff's sale held on November 6, 2009. It is undisputed that the Waseluses received notice of this sale in accordance with Pa.R.C.P. 3129.2 and filed no objections. In response, Plaintiff claims the Bank mortgage was void *ab initio* having been given by a party, Fox Funding PA, LLC, who held no title to the property and, therefore, foreclosure on this mortgage can not serve as the basis for transferring title of the property to Buyer. Plaintiff further

claims that because the Bank mortgage has been the subject of foreclosure and execution proceedings, it has been extinguished in the process, and that Buyer is without recourse to resurrect or reform this mortgage.

The above facts are not in dispute. They form the basis of both Buyer's motion for summary judgment and Plaintiff's cross-motion for summary judgment, which are now before us for disposition.

#### DISCUSSION

At its most basic level, Buyer argues that the foreclosure proceedings on the Bank mortgage, a first mortgage, discharged the Waselus mortgage, a second and junior mortgage, and hence, Plaintiff's complaint for mortgage foreclosure is premised upon a mortgage which no longer exists. The strength of this argument hinges on the validity of the Bank mortgage, which Plaintiff claims was invalid from its inception since Fox Funding PA, LLC possessed no legal interest in the property upon which to grant a mortgage. Plaintiff acknowledges that if the Bank mortgage created a valid first mortgage lien, its mortgage has been divested. See 42 Pa.C.S.A. §§ 8141, 8152; Irwin Union Nat. Bank and Trust Co. v. Famous, 4 A.3d 1099, 1104 n.3 (Pa.Super. 2010) ("A junior lienholder's rights are divested

when a senior lienholder sells the property at sheriff's sale."), *appeal denied*, 20 A.3d 1212 (Pa. 2011).

As to the validity of the Bank mortgage, we agree with Plaintiff's position that Fox Funding PA, LLC had neither the power nor the authority to grant this mortgage. Fox Funding PA, LLC held neither title nor any other legal interest in the property at the time the mortgage was given. As such, it was a stranger to title and without the capacity to convey or encumber property owned by another. *Cf. Pines v. Farrell*, 848 A.2d 94 (Pa. 2004) (holding that a mortgage is a conveyance of land, granting title to the mortgagee). Nor is this a case where the name of the claimed intended mortgagor - Fox Funding, LLC - was misspelled, or where the mortgagor actually named - Fox Funding PA, LLC - was a non-existent entity, such that it can be fairly said that Fox Funding, LLC and Fox Funding PA, LLC are one and the same; Fox Funding PA, LLC did in fact exist and was a separate, independent entity from Fox Funding, LLC.

In its simplest terms, the Bank mortgage was not executed by either the real or record owner of the property. Further, the *in rem* judgment which the Bank sought to obtain in its mortgage foreclosure action against Fox Funding PA, LLC was against an entity which never held interest in the property. It necessarily follows that the sheriff's deed which issued upon

execution on this judgment and which purported to convey such title in the property as was held by Fox Funding PA, LLC to Buyer, in reality conveyed nothing. A sheriff's deed can convey no better title than that held by the judgment debtor. Tonge v. Radford, 156 A. 814, 815 (Pa.Super. 1931) ("A purchaser of land at sheriff's sale buys at his own risk and acquires only the interest which the defendant in the execution had, and no more.") (construing Weidler v. Farmer's Bank of Lancaster, 11 Serg. & Rawle 134, (Pa. 1823)). Consequently, the Waselus mortgage, which was properly executed and recorded, was not extinguished in the sheriff's sale and remains as an open, viable lien on the property.

We do not disagree with Buyer's argument that had reformation of the mortgage between Fox Funding PA, LLC and the Bank been sought on grounds of mutual mistake prior to the sheriff's sale, it likely would have been granted. Radnor Bldg. & Loan Ass'n v. Scott, 120 A. 804, 806 (Pa. 1923) ("[T]he right to reformation in equity, if mutual mistakes appear, is unquestionable."); see also Zurich Am. Ins. Co. v. O'Hanlon, 968 A.2d 765, 770-71 (Pa.Super. 2009). The Waseluses were not innocent third parties to this transaction: The Waselus mortgage on its face recited it was subordinate and secondary to the intended mortgage from the Owner to the Bank, and the

Waseluses indisputably were provided prior notice of the sheriff's sale and did nothing. (Plaintiff's Brief, p.6). Nor is Plaintiff an innocent third party purchaser of that mortgage: Plaintiff paid \$1,000.00 for a mortgage with a face value of \$372,000.00 and an amount owed at the time of the assignment in excess of \$360,000.00. Why? Because Plaintiff knew of the title issues and was hoping to take advantage of this error by purchasing and then foreclosing on the Waselus mortgage, rather than purchasing the property directly from Buyer.<sup>2</sup> See Uniontown Sav. & Loan Co. v. Alicia Land Co., 13 A.2d 65, 66 (Pa. 1940) ("The right, in equity, to reformation . . . when there has been a mutual mistake . . . is well settled in the absence of intervening rights of innocent third persons or other

---

<sup>2</sup> Moreover, under the Recording Act, 21 P.S. §357, a party acquiring an interest is charged with constructive notice of the contents of those instruments within the record chain of title. First Citizens Nat. Bank v. Sherwood, 879 A.2d 178, 181 (Pa. 2005) (holding that a purchaser may be deemed to have constructive notice of the existence of a mortgage when the mortgage was properly recorded, even if defectively indexed); see also Department of Public Assistance vs. Reustle, 56 A.2d 221, 223 (Pa. 1948) ("Where there is enough to put an ordinarily prudent person upon guard, inquiry becomes a duty, and if an investigation, reasonably pursued, would disclose the identity of the judgment debtor, the subsequent lienor is bound by notice of the previous judgment even though inaccurately recorded"). Here, as previously stated, the Bank mortgage was indexed under the name of the actual owner of the property, Fox Funding, LLC, and not that of Fox Funding PA, LLC.

In addition, prior to commencing its mortgage foreclosure action, Plaintiff made an agreement with Buyer to purchase the property for \$580,000.00. Sometime before closing, Plaintiff claims to have learned of the alleged defects in title with respect to the Bank's foreclosure proceedings and determined that Buyer was unable to pass good and marketable title. In depositions, Plaintiff's principal testified he was then willing to purchase the property from Buyer for \$220,000.00 (i.e., the original price of \$580,000.00, less the \$360,000.00 debt secured by the Waselus mortgage, which Plaintiff has purchased for \$1,000.00).



considerations which would make reformation inequitable." ). Nevertheless, the fact remains that Buyer did not seek to reform the Bank mortgage and this mortgage, which forms the basis of the sheriff's sale upon which Buyer premises its claim to good and marketable title unencumbered by the Waselus mortgage, was executed by a party who had no interest to give.

### CONCLUSION

Whether there exists any right at this time (i.e., after a sheriff's sale) to reform either the Bank mortgage or the sheriff's deed to the Buyer, or both, as Buyer claims, is an interesting question, but one which is not before us and which we do not decide.<sup>3</sup> Neither has occurred and the sheriff's sale,

---

<sup>3</sup> Buyer has not requested reformation in these proceedings. However, in a supplemental letter brief following argument, Buyer indicated it was filing a separate action seeking a decree in equity to correct and reform the deed issued by the sheriff to conform to the undisputed intentions of the Bank and Owner. Cf. Armstrong County Bldg. & Loan Ass'n of Ford City v. Guffey, 200 A. 160 (Pa.Super. 1938) (extending the right to reformation to a purchaser at sheriff's sale) and Trachtenberg v. Glen Alden Coal Co., 47 A.2d 820 (Pa. 1946) (holding, in a case where property was foreclosed upon and sold at sheriff's sale in a mortgage foreclosure proceeding, that after the sheriff's deed was acknowledged and delivered, the deed could no longer be reformed to include property which was not expressly included in the mortgage and was not included in the sheriff's advertisement of the property to be sold); see also Petrovich Appeal, 38 A.2d 709 (Pa.Super. 1944) (holding that after delivery of a sheriff's deed, a sheriff's sale may not be set aside, except for fraud or want of authority to make the sale and, if such can be proven, "then only by an action of ejectment or bill in equity to cancel it") and Mortgage Electronic Registration Systems, Inc. vs. Ralich, 982 A.2d 77 (Pa.Super 2009) (delivery of a sheriff's deed divests the court of the authority to set aside a sheriff's sale unless the sale is challenged for fraud which vitiates the transaction or a lack of authority to make the sale), appeal denied, 992 A.2d 889 (Pa. 2010). It is at least arguable that the sheriff's sale was without legal authority in that the legal and real owner of the property - Fox Funding, LLC - to whose interest Buyer has since succeeded, was not joined therein.

notwithstanding its ineffectiveness to convey title to the Buyer, remains intact. Accordingly, on the undisputed facts presented and the law applicable thereto, Buyer's Motion will be denied, as will Plaintiff's cross-motion.<sup>4</sup>

BY THE COURT:

---

P.J.

---

<sup>4</sup> In its answer to the complaint, Buyer has denied, and thus placed in issue, a number of material facts regarding the Waselus mortgage and its alleged breach, which have not been addressed in depositions, answers to interrogatories, requests for admissions, or affidavits. Consequently, the entry of summary judgment is inappropriate. Moreover, although Fox Funding, LLC's quit claim deed has now transferred title of the mortgaged property to Buyer, Plaintiff's failure to either serve Fox Funding, LLC with the complaint or release it from the liability of the debt secured by the Waselus mortgage, precludes the entry of summary judgment in Plaintiff's favor. See Pa.R.C.P. 1144(b).

THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION

MELO ENTERPRISES LLC,	:	
Plaintiff	:	
vs.	:	NO: 10-3538
FOX FUNDING, LLC,	:	
Defendant	:	
vs.	:	
1400 MARKET STREET, LLC,	:	
Intervenor	:	

Anthony Roberti, Esquire	Counsel for Plaintiff
Scott M. Rothman, Esquire	Counsel for Intervenor
Fox Funding, LLC	Unrepresented

ORDER OF COURT

AND NOW, this 15th day of February, 2012, upon consideration of the Motion for Summary Judgment of the Intervenor, 1400 Market Street, LLC, review of the parties' legal submissions, and after argument thereon, it is hereby

ORDERED and DECREED that the Motion is denied.

BY THE COURT:

---

P.J.

THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION

MELO ENTERPRISES LLC,	:	
Plaintiff	:	
vs.	:	NO: 10-3538
FOX FUNDING, LLC,	:	
Defendant	:	
vs.	:	
1400 MARKET STREET, LLC,	:	
Intervenor	:	

Anthony Roberti, Esquire	Counsel for Plaintiff
Scott M. Rothman, Esquire	Counsel for Intervenor
Fox Funding, LLC	Unrepresented

ORDER OF COURT

AND NOW, this 15th day of February, 2012, upon consideration of Plaintiff's Cross-Motion for Summary Judgment, review of the parties' legal submissions, and after argument thereon, it is hereby

ORDERED and DECREED that the Plaintiff's cross-motion for summary judgment is denied.

BY THE COURT:

---

P.J.