

DONALD F. PRIGAN
CLERK OF SUPERIOR COURT
SUPERIOR COURT OF N.J.
MERCER COUNTY
RECEIVED AND FILED
DEC 22 2006

Don Prigan
CLERK OF SUPERIOR COURT
MERCER COUNTY

ORDER PREPARED BY THE COURT

Washington Mutual Home Loans, Inc.,

Plaintiff,

vs.

Rodirigo Lima, et al,

Defendants.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
CHANCERY DIVISION-GENERAL EQUITY
DOCKET NO. F-13833-04
CIVIL ACTION

ORDER

This matter having been presented to the Court on various motions for surplus funds; and the Court having reviewed the submissions of counsel; and having heard oral argument on August 18, 2006; and for the reasons attached; and for good cause having been shown;

IT IS ON THIS 22nd DAY OF DECEMBER 2006

ORDERED that Hopewell's motion for all of the surplus funds is hereby DENIED; and it is further

ORDERED that the Condo Association's cross-motion for surplus funds is hereby GRANTED; and it is further

ORDERED that the Property Owners Association's cross-motion for surplus funds is hereby GRANTED; and it is further

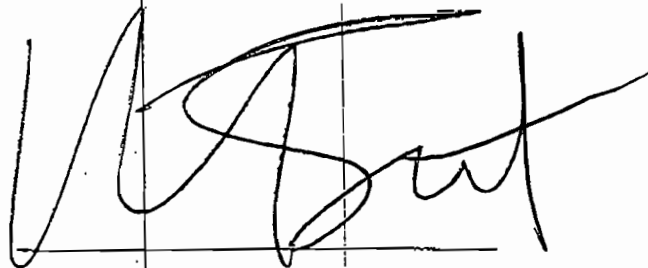
ORDERED that the State's cross-motion for surplus funds is hereby GRANTED; and it is further

ORDERED that the United States' cross-motion for surplus funds is hereby GRANTED; and

it is further

ORDERED that Hopewell shall be entitled to any surplus funds remaining thereafter.

Counsel shall confer and submit to the Court an appropriate order setting forth the manner of distribution in accordance with the standard procedures of the Superior Court Trust Funds Unit.

A handwritten signature in black ink, appearing to read "Neil H. Shuster", written over a horizontal line.

Neil H. Shuster, P.J.Ch.

**SUPERIOR COURT OF NEW JERSEY
MERCER VICINAGE**

Neil H. Shuster
Presiding Judge
Chancery Division, General Equity
(609) 292-4696
(609) 292-4697



Mercer County Courthouse
P.O. Box 8068
Trenton, NJ 08650-0068

FAX COVER SHEET

TO: Christopher Florio, Esq.
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Yanet Noble, Asst. US Attorney

FROM: Honorable Neil H. Shuster, P.J.Ch.

RE: F-13883-04

DATE: December , 2006

Order attached.

16 page(s) (including cover sheet)

WASHINGTON MUTUAL HOME
LOANS, INC.

Plaintiff,

v.

Rodrigo Lima, et al.

Defendants.

Docket No. MER-F-13833-04

MOTIONS FOR SURPLUS FUNDS

This matter arises from a foreclosure complaint filed on August 5, 2004 by the plaintiff, Washington Mutual Home Loans, Inc. ("Plaintiff"), against the defendants, Rodrigo S. Lima, et al. ("Lima") (collectively "Defendants"). On October 11, 2005 final judgment was entered. On January 4, 2006, the property was sold at Sheriff's Sale. Various parties now move before the Court with competing claims to the surplus funds.

On March 30, 2000, Defendant Lima and Defendant Krista Pappas ("Pappas") executed a note and mortgage in the amount of \$87,000.00, on real property commonly known as 141 Shrewsbury Court, Hopewell Township, New Jersey (the "Property"). Simultaneously, Lima also executed an affordable housing mortgage in favor of the Township of

Hopewell ("Hopewell"). Apparently, as a result of financial difficulties, Lima eventually defaulted on his mortgage obligations and Plaintiff filed this action to foreclose. The amount necessary to satisfy the mortgage together with costs was \$106,282.81. Thereafter, final judgment was entered and the Property was sold at Sheriff's Sale to Hopewell Township for \$150,000.00. Approximately \$35,000.00 is now available for the remaining interested parties.¹

The first party claiming an interest to the surplus funds is the Township of Hopewell ("Hopewell"). Hopewell derives its interest in the funds by way of the affordable housing mortgage it possessed on the Property.² Under the assumption that its affordable housing mortgage may be extinguished by foreclosure, and because it allegedly did not receive suitable time in which to redeem, Hopewell participated in the Sheriff's Sale of the Property and succeeded in bidding the winning price. Hopewell sought to preserve the Property for affordable housing purposes because of

¹ According to the Brandon Farms Property Owners Association, surplus funds are \$35,806.90, but the Township of Hopewell contends that the amount is \$43,717.19.

² As Hopewell asserts in its brief, the issue of whether an affordable housing mortgage is extinguished at Sheriff's Sale remains an open question. Thus, Hopewell either "possessed" or still "possesses" an affordable housing mortgage on the Property.

its on-going challenge to satisfy its constitutional obligations pursuant to the Supreme Court of New Jersey's landmark decision in Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975), and its progeny ("Mount Laurel cases").

The second party claiming an interest in the surplus funds is Brandon Farms Condominium Association, Inc. (the "Condo Association"). The Condo Association derives its interest in the funds by way of five liens it recorded on the Property as a result of unpaid assessments it was entitled to charge pursuant to deed restrictions and association bylaws. N.J.S.A. 46:8B-15; Highland Lakes Country Club & Community Assoc. v. Franzino, 186 N.J. 99, 113 (2006). According to the Condo Association, as a result of these recorded liens, it is entitled to \$15,445.63 plus additional attorneys fees.

The third party claiming an interest in the surplus funds is Brandon Farms Property Owners Association, Inc. (the "Property Owners Association"). The Property Owners Association, like the Condo Association, seeks collection of unpaid assessments that it charged pursuant to deed restrictions and associational bylaws. According to the Property Owners Association, it is entitled to \$5,953.86.

The fourth party claiming an interest in the surplus funds is the State of New Jersey (the "State"). The State claims an interest in the funds as a result of outstanding taxes owed by Defendant Lima and Defendant Krista Pappas in the amount of \$2,610.43. Although the State does not contest the priority of the other parties' liens, it requests repayment of the outstanding taxes should sufficient funds remain after payment to the other lienholders.

The final party claiming an interest in the surplus funds is the United States. The United States claims an interest in the funds pursuant to a Department of Housing and Urban Development ("HUD") loan executed on behalf of Lima. According to HUD, the amount due on the loan is \$8,406.00, which represents the principal plus interest.

Hopewell argues that it is entitled to the surplus funds in their entirety. In support of this position, Hopewell reiterates well settled public policy regarding affordable housing and the Mount Laurel decisions, and makes an interpretive argument with regard to N.J.A.C. 5:93-9.14. According to Hopewell, this COAH regulation requires all excess funds from a Sheriff's Sale to return to the municipality. Moreover, Hopewell argues, this case dictates that surplus funds return to the municipality because Hopewell was the winning bidder at the sale; a procedure it was apparently compelled to participate in so as to preserve the affordability controls. If the funds are not

returned, Hopewell would, in effect, be subsidizing the lien claims filed by the other parties.

The Condo Association rejects Hopewell's expansive interpretation of N.J.A.C. 5:93-9.14 and places great emphasis on contrary principles underlying the Condominium Act, N.J.S.A. 46:8B-1 et seq. According to the Condo Association, the obligation to pay assessments under the Condominium Act is "unconditional," The Glen, Section I Condominium Ass'n v. June, 344 N.J. Super. 371, 376 (App. Div. 2001), because such assessments and related costs are the "financial life-blood of the Association." Park Place East Condominium Ass'n v. Hovbilt, Inc., 279 N.J. Super. 319, 323 (Ch. Div. 1994). These considerations outweigh any interest of Hopewell, the Condo Association contends, because Hopewell's decision to bid at Sheriff's Sale was inequitable. Rather than redeeming the Property for the amount under Plaintiff's mortgage, the Condo Association argues, Hopewell attempted to cut off the Condo Association's rights by bidding up the price. This result, the Condo Association argues, requires the Condo Association to subsidize Hopewell's affordable housing unit.

The issue before the Court is whether Hopewell is entitled to all of the surplus funds. Rule 4:64-3 states,

Petitions for surplus moneys in foreclosure actions may be presented at any time after the sale and may be heard by the

court on motion and notice to all parties, including defaulting defendants whose claims are not directed in the execution to be paid out of the proceeds of sale. If any order is made for the payment of such surplus before the delivery of the deed, the sheriff or other officer making the sale shall accept the receipt or order of the person to whom such surplus, or any part of it, is ordered to be paid, as payment to that extent of the purchase money, or may pay the same to such person. Payments shall be made in accordance with R. 4:57-2.

Despite the straightforward nature of this rule, the existence of the affordable housing mortgage implicates additional statutes and regulations, which the Court must also consider before ordering the Sheriff to pay surplus funds.

The purpose and circumstances surrounding affordable housing regulations are well understood. As a result of the Mount Laurel decisions, the Legislature created the Council on Affordable Housing ("COAH") in order to implement the strong public policy surrounding affordable housing and satisfy the constitutional obligations as dictated by the Supreme Court. According to COAH, its mission is to "facilitate the production of sound affordable housing for low and moderate income households by providing the most effective process to municipalities ... to address their constitutional obligation within the framework of sound comprehensive planning."³ In furtherance of this planning, COAH has promulgated a number of

³ COAH mission statement available at <http://www.state.nj.us/dca/coah/>.

regulations specific to the extinguishment of affordable housing restrictions and the usage of surplus funds following foreclosure. For example, N.J.A.C. 5:93-9.14 states as follows:

In the event of a foreclosure sale, the owner of the affordable housing unit shall be personally obligated to pay to the administrative entity responsible for assuring affordability, any surplus funds, but only to the extent that such surplus funds exceed the difference between the sales price at the time of foreclosure and the amount necessary to redeem the debt to the financial institution, including costs of foreclosure.

Under a plain reading of this regulation, a unit owner is responsible to the municipality for the difference between the amount owed on the mortgage and price paid for the unit at Sheriff's Sale. In promulgating N.J.A.C. 5:93-9.14, COAH undoubtedly sought to ensure that delinquent property owners did not reap an unjust windfall from an increase in the property value of their unit.

Another relevant restriction governing the foreclosure of affordable housing units is N.J.A.C. 5:80-26.5(e). Under this regulation, "affordability controls ... shall remain in effect despite the entry and enforcement of any judgment of foreclosure with respect to restricted ownership units." N.J.A.C. 5:80-26.5(e). In promulgating N.J.A.C. 5:80-26.5(e), COAH sought to implement a mechanism whereby affordable housing mortgages could be protected from a diminishing number of affordable housing units in

a given municipality.⁴ By adopting this procedure, COAH disregarded long established foreclosure principles favoring the establishment and disposal of liens encumbering a property, Highland Lakes Country Club & Community Assoc. v. Franzino, 186 N.J. 99, 113 (2006) (citing Norfolk Bldg. & Loan Ass'n v. Stern, 113 N.J. Eq. 385, 387 (Ch. 1933)), in favor of the preservation of affordable housing units.⁵

Assuming N.J.A.C. 5:80-26.5(e) is operative on the Property retroactively, and assuming such retroactive application is not a violation of the United States Constitution's Contracts Clause or the Fourteenth Amendment's Due Process Clause (neither issue is before the Court), Hopewell's decision to bid on the Property at Sheriff's Sale in order to preserve its affordable housing unit seems to have been an unnecessary and improper procedure. Under N.J.A.C. 5:80-26.5(e), affordable housing controls cannot be extinguished by a foreclosure proceeding and the

⁴ Another example of the protection provided to affordable housing mortgages is priority. Under N.J.A.C. 5:93-9.3(f), "[t]he deed restriction, including the repayment clause, and the mortgage lien shall have priority over all mortgages on the property except for a first mortgage placed on the property by the mortgagee prior to the expiration of resale controls."

⁵ The regulation also states that "[a]ny unit that, prior to December 2004, received substantive certification from COAH, was part of a judgment of compliance from a court of competent jurisdiction or became subject to a grant agreement or other contract ... shall have its control period governed by said grant of substantive certification, judgment or grant agreement or contract." N.J.A.C. 5:80-26.5(a)2.

affordable housing unit remains available for the municipality's affordable housing pool. Hopewell's decision to participate in the Sheriff's Sale and compete against other parties runs contrary to the intent of the COAH regulations and artificially increased the sale price of the Property. This process severed the rights of the remaining interested parties while failing to convey any benefit to Hopewell.

Hopewell's decision to bid on the Property was also avoidable because, pursuant to the Brandon Farms Affordable Housing Plan (the "Plan"), Hopewell could also have redeemed the Property. According to Section 18.00 of the Plan,

The Agency may, at its option, advance and pay all sums necessary to protect, preserve and retain the unit as an Affordable Condominium.... ... In the event any First Mortgagee or other creditor of an Owner of an Affordable Condominium exercises its contractual or legal remedies available in the event of default or nonpayment by the Owner of an Affordable Condominium, the Owner shall notify the Agency ... and the Agency shall have the option to purchase, redeem, or cure any default upon such terms and conditions as may be agreeable to all parties in interest....

The ability to redeem the Property was implemented because the Plan was approved at a time when extinguishment of an affordable housing mortgage at foreclosure was a possibility:

A judgment of foreclosure or deed in lieu of foreclosure to a financial institution regulated by State and/or Federal law or to a lender on the secondary mortgage market (including, but not

limited to, the Federal National Mortgage Association, the Home Loan Mortgage Corporation, the Government Mortgage Association or an entity acting on their behalf) shall extinguish controls on affordable housing units provided there is compliance with N.J.A.C. 5:93-9.14.

N.J.A.C. 5:93-9.13 (emphasis added). In light of Hopewell's failure to proceed by the procedures set forth in the Plan or its failure to rely on N.J.A.C. 5:80-26.5(e), one questions whether the remaining parties should be prejudiced.

Hopewell reads N.J.A.C. 5:93-9.14 beyond its intended limits. Hopewell is correct to assert that N.J.A.C. 5:93-9.14 protects against Lima reaping a financial windfall, but it is incorrect when it claims that this regulation obligates the Court to award Hopewell the remaining surplus funds. First, in promulgating N.J.A.C. 5:93-9.14, it is unlikely that COAH contemplated Hopewell's self-induced predicament because, pursuant to the Brandon Farms Affordable Housing Plan, Hopewell could also have redeemed the Property. Second, if the Court were to adopt Hopewell's position, the regulation would unnecessarily frustrate the purpose of the Condominium Act, which grants a condominium association a lien on "each unit for any unpaid assessment duly made by the association for a share of common expenses[.]" N.J.S.A. 46:8B-21; see also Park Place East Condominium Ass'n, supra, 279 N.J. Super. at 323 (noting that unpaid

assessments are the “financial life-blood of the Association”). As the Supreme Court stated in Ramapo River Reserve Homeowners Ass’n v. Borough of Oakland, 186 N.J. 439 (2006):

When reviewing two separate enactments, the Court has an affirmative duty to reconcile them, so as to give effect to both expressions of the lawmakers’ will. In other words, it is our obligation to make every effort to harmonize separate statutes, even if they are in apparent conflict, insofar as we are able to do so.

Statutes that deal with the same matter or subject should be read in *pari materia* and construed together as a “unitary and harmonious whole.”

Id. at 451 (quoting St. Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 14-15 (2005) (citing In re Adoption of a Child by W.P. and M.P., 163 N.J. 158, 182-83 (2000) (Poritz, C.J., dissenting)) (citations and footnote omitted)). Although this principle most commonly applies to two statutory enactments, it is no less applicable when a Court is confronted with an interpretation of a regulation, which by at least one account, is at odds with the Condominium Act. Therefore, the Court will read N.J.A.C. 5:93-9.14 so as not to conflict with the Condominium Act or frustrate its intended purpose. Accordingly, Hopewell’s failure to proceed by the procedures set forth in the Plan or its failure to rely on N.J.A.C. 5:80-26.5(e) should not be to the detriment of the remaining interested parties.

In essence, Hopewell chose, for whatever tactical or strategic reasons, to proceed as it did. At least from this Court's perspective, Hopewell had various methods available to it to protect its rights in having the property/unit, which is the subject of this foreclosure, remain as an affordable housing unit. It chose none of those potential options but chose to protect its right in this unit by bidding at a sheriff's sale as any third-party bidder. Hopewell's strategic decision to do so, which resulted in surplus funds, should not be to the detriment or prejudice of the other lienholders. The Court has found no case law, statute, administrative regulation or public policy, as discussed supra, which would now entitle Hopewell, the successful bidder at sale, to retain all the surplus funds to the exclusion of the other lienholders under the facts and circumstances presented here.

Therefore, for the abovementioned reasons, Hopewell's motion for all of the surplus funds is hereby DENIED; the Condo Association's cross-motion for surplus funds is hereby GRANTED; the Property Owners Association's cross-motion for surplus funds is hereby GRANTED; the State's cross-motion for surplus funds is hereby GRANTED; and the United States' cross-motion for surplus funds is hereby GRANTED. Hopewell shall be entitled to any surplus funds remaining thereafter.

Counsel shall confer and submit to the Court an appropriate order setting forth the manner of distribution in accordance with the standard procedures of the Superior Court Trust Funds Unit.