



## RUSHMORE LOAN MANAGEMENT SERVICES v. SOLORIO

2022 OK CIV APP 33

Case Number: 119697

Decided: 09/01/2022

Mandate Issued: 10/05/2022

DIVISION IV



THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION IV

Cite as: 2022 OK CIV APP 33, \_\_\_ P.3d \_\_\_

RUSHMORE LOAN MANAGEMENT SERVICES, LLC, Interested Party/Appellant,

v.

TIMOTHY K. SOLORIO, Defendant/Appellee,

and

STRATFORD PLACE CONDOMINIUM OWNERS' ASSOC. INC., Plaintiff,

v.

TIMOTHY K. SOLORIO, FIRST MORTGAGE COMPANY, LLC, an Oklahoma Limited Liability Company, SPOUSE, IF ANY, OF TIMOTHY SOLORIO, and OCCUPANTS, TENANTS and OTHERS, Defendants.

APPEAL FROM THE DISTRICT COURT OF  
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE ALETIA HAYNES TIMMONS, TRIAL JUDGE

### **REVERSED AND REMANDED WITH DIRECTIONS**

Blake C. Parrott, BAER TIMBERLAKE, P.C., Oklahoma City, Oklahoma, for Rushmore Loan Management Services, LLC

Floyd James, III, LAW OFFICES OF FLOYD JAMES III, Oklahoma City, Oklahoma, for Defendant Timothy K. Solorio

STACIE L. HIXON, JUDGE:

¶1 Rushmore Loan Management Services, LLC (Rushmore) appeals a June 7, 2021 order granting Timothy K. Solorio's (Solorio) motion for disbursement of surplus funds. Based on our review of the record and applicable law, we reverse the order and remand to the trial court with directions to hold an evidentiary hearing to determine the rights of Rushmore, Solorio, and any other claimant to the surplus funds.

### **BACKGROUND**

¶2 On December 30, 2004, Paul A. Solorio (Borrower) executed a promissory note to First Mortgage Co., LLC (First Mortgage) in the sum of \$24,500.00, as well as a mortgage to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for First Mortgage, encumbering real property located in Oklahoma County, Oklahoma. Borrower died on February 22, 2009. A Petition for Probate and Letters of Administration was filed on March 31, 2010. A Notice to Creditors was issued. No claim was filed in relation to the real property. Subsequently, in the decree of distribution of Borrower's estate, the real property encumbered by First Mortgage's mortgage was distributed to Diane M. Solorio and Solorio. On November 23, 2016, Diane executed and delivered a quitclaim deed conveying her interest in the property to Solorio.

¶3 Stratford Place Condominium Owners' Association (COA) filed suit on July 10, 2018 against Solorio, First Mortgage, and any occupants or tenants of the condominium, seeking to foreclose an assessment lien.<sup>1</sup> After the Defendants failed to answer or otherwise appear, the court granted COA's motion for default judgment. The court entered a journal entry of judgment on November 1, 2018, finding COA's assessment lien was a valid first lien upon the real property, and that First Mortgage was in default and was forever barred, foreclosed, and enjoined from asserting any right, title, interest, estate, lien or right of redemption in and to the real property. After the real property was sold at sheriff's sale for \$32,000.00, the court entered an order on February 15, 2019, confirming the sheriff's sale and disbursing \$10,222.84 to COA in full satisfaction of its assessment lien. After expenses were paid, the balance of \$21,477.16 was deposited with the Court Clerk of Oklahoma County.

¶4 On September 20, 2019, Rushmore entered an appearance and filed a Notice of Claim to Funds, requesting disbursement of the surplus funds. Rushmore asserted it was assigned the mortgage on March 6, 2019, that it was entitled to enforce the note and mortgage, the note was in default, and that the balance due under the note exceeded the surplus funds deposited with the Court Clerk.<sup>2</sup> On March 5, 2021, Solorio filed a motion for distribution of funds, requesting the court disburse the surplus funds to him. After additional briefing, the trial court entered an order on June 7, 2021, directing the disbursement of the surplus funds to Solorio.

¶5 Rushmore appeals.

### STANDARD OF REVIEW

¶6 Foreclosure proceedings are equitable in nature. The trial court's judgment in an equity case will be affirmed on appeal "unless it is found to be against the clear weight of the evidence or is contrary to law or established principles of equity." *Abboud v. Abboud*, 2000 OK CIV APP 116, ¶ 4, 14 P.3d 569.

### ANALYSIS

¶7 On appeal, Rushmore contends the trial court erred in granting Solorio's motion for disbursement of funds, asserting it has priority to the surplus funds as an assignee of First Mortgage's mortgage.

¶8 The record provides Borrower executed a note and mortgage to First Mortgage on December 30, 2004, encumbering the real property at issue. On July 10, 2018, COA filed suit to foreclose its assessment lien. See 60 O.S.2011, § 524. COA named First Mortgage as a defendant. First Mortgage failed to answer or otherwise appear. A journal entry of judgment was entered on November 1, 2018, finding COA's assessment lien was a valid first lien upon the real property, and that First Mortgage was in default and was forever barred, foreclosed, and enjoined from asserting any right, title, interest, estate, lien or right of redemption in and to the real property. The judgment was not appealed and is now final.

¶9 Although First Mortgage did not appear in the foreclosure action and the court entered a default judgment against it, it could still assert a claim as a junior encumbrancer to the surplus funds. The Court in *Resolution Trust Corp. v. Sudderth*, 1993 OK CIV APP 53, ¶ 9, 854 P.2d 375, stated:

We hold that a defendant's failure to plead or otherwise defend against a plaintiff's petition wherein, *inter alia*, foreclosure of a mortgage and sale of the property involved is sought, does not, in itself constitute a waiver by the defendant of any claim he or she may have to possible surplus funds resulting from the sale. Such default does not deprive the trial court of jurisdiction to conduct an evidentiary hearing to determine proper ownership of the surplus funds.

See *e.g. Household Fin. Servs., Inc. v. Bank of Am., N.A.*, 883 So. 2d 346, 348 (Fla. Dist. Ct. App. 2004) ("A default admits only the well pled allegations of the complaint. Thus, when the Bank defaulted, all it admitted was the superiority of Federal's lien to its own and Federal's right to foreclose the Bank's lien interest in the property."); *Schroth v. Cape Coral Bank*, 377 So.2d 50, 51 (Fla. 2d DCA 1979) (holding a property owner who did not appear in a mortgage foreclosure action until after the sale could still assert a claim to any surplus).

¶10 In determining who is entitled to surplus funds in a foreclosure, the general rule is that all encumbrances on mortgaged premises inferior to the mortgage or lien on which the sale is based must be paid in order of time in which they respectively became liens, if the claims have been asserted in the foreclosure proceedings. See *e.g. Russell v. Freeman*, 1949 OK 257, ¶

17, 214 P.2d 439 (junior mortgagee or lienor has an interest in any surplus funds); 59A C.J.S. Mortgages § 1316 (2022) ("Holders of liens and encumbrances other than the foreclosed mortgage generally share in the proceeds of the sale in accordance with their relative priority, if the claims have been asserted in the foreclosure proceedings."); 59A C.J.S. Mortgages § 1324 (2022) ("As a general rule, the holder of a junior lien extinguished by the foreclosure of a mortgage is entitled to satisfaction out of the surplus proceeds of the foreclosure sale."); Foreclosure by Suit or Action--Proceeds of Sale, 5 Tiffany Real Prop. § 1529 (3d ed.) ("[T]he proceeds of sale are substituted for the land itself, and become subject to outstanding liens and claims to the same extent and in the same order as the land itself was subject thereto."); *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 731 S.E.2d 547 (S.C. 2012) (Extinguishment of second mortgagee's lien on real property by virtue of foreclosure sale on first mortgage did not extinguish mortgagee's interest in surplus funds from sale, and therefore, assignment of second mortgage after foreclosure sale did not preclude assignee from claiming surplus funds from sale).

¶11 Solorio contends, however, that Rushmore does not have standing to pursue a claim to the surplus funds. We disagree. Under Oklahoma law, an assignee acquires all rights to which the assignor was entitled at the time of the assignment. See e.g., *Redcorn, Jr. v. Knox*, 2014 OK CIV APP 109, ¶ 47, 345 P.3d 392 (citing *Wood & Co. v. Sutton*, 1936 OK 667, ¶¶ 8-9, 61 P.2d 700; *Oklahoma Oxygen Co. v. Citizens State Bank & Trust Co. of Kilgore, Tex.*, 1954 OK 228, ¶ 5, 274 P.2d 372). See also *Chicago R.I. & P. Ry. Co. v. Bankers' Nat. Bank*, 1912 OK 166, ¶ 4, 122 P. 499 ("The assignment was absolute, and is such as to vest in the assignee the whole legal title. He [the assignee] had such a beneficial interest in the proceeds of the judgment that he could bring an action in his own name, without joining other parties, who by collateral agreement might be entitled to a share of the proceeds." (quoting *Walburn v. Chenault*, 43 Kan. 352, 23 P. 657 (Kan. 1890))). Accordingly, by virtue of the assignment to Rushmore on March 6, 2019, properly filed on March 26, 2019, Rushmore was entitled to claim an interest in the surplus funds.

¶12 Solorio further asserts Rushmore's claim is against Borrower and not him. Thus, he is entitled to the surplus funds.

¶13 The record provides the real property was distributed to Solorio by succession. Under Oklahoma law, a mortgage follows real property passing by succession or will. See 46 O.S.2011, § 5; *In re Estate of Carlson*, 2016 OK 6, ¶ 16, 367 P.3d 486; *International Bank of Commerce v. Franklin*, 2019 OK CIV APP 56, ¶ 11, 451 P.3d 207. While Solorio would have had to assume the note and mortgage to be personally liable on the debt, his interest in the real property is subject to the existing mortgage.

¶14 Finally, Solorio asserts Rushmore failed to serve him the Notice of Claim to Funds as required by 12 O.S.2011, § 2005(A) (1). Although Solorio was in default for failure to appear, he contends Rushmore asserted a new or additional claim for relief, requiring service of summons under the statute.

¶15 Title 12 O.S.2011, § 2005 provides, in relevant part:

A. SERVICE: WHEN REQUIRED. Except as otherwise provided in this title, every order required by its terms to be served, every pleading subsequent to the original petition unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party or any other person unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that:

1. Pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Section 2004 of this title;

¶16 Here, Rushmore was not asserting a new or additional claim for relief against Solorio. Rather, Rushmore, as an assignee, acquired any right First Mortgage had in the surplus funds. As previously noted, "[l]iens inferior to the foreclosed mortgage attach to the surplus proceeds in the same order and relative priority that they held before the foreclosure and must be paid in that order." 59A C.J.S. Mortgages § 1324 (2022). Accordingly, we reject this assertion of error.

¶17 The trial court therefore erred in granting Solorio's motion for disbursement of surplus funds. The matter is reversed and remanded with directions to the trial court to hold an evidentiary hearing to determine the rights of Rushmore, Solorio, or other claimant to the surplus funds.<sup>3</sup>

¶18 REVERSED AND REMANDED WITH DIRECTIONS.

FISCHER, C.J., and BARNES, P.J., concur.

## FOOTNOTES

STACIE L. HIXON, JUDGE:

<sup>1</sup> COA asserted Solorio, as an owner of the real property, was a member of the association and was delinquent in paying assessments.

<sup>2</sup> The record provides MERS, as nominee for First Mortgage, assigned the mortgage to Federal National Mortgage Association on February 21, 2019. On March 6, 2019, Federal National Mortgage Association assigned the mortgage to Rushmore.

<sup>3</sup> On appeal, Rushmore further asserts that it has a superior right to the surplus funds pursuant to the terms of the mortgage. Based on the record on appeal, it does not appear Rushmore presented this issue to the trial court. Matters not first presented to the trial court for resolution are generally not considered on appeal. *Stonecipher v. District Court of Pittsburg Cty.*, 1998 OK 122, ¶ 11, 970 P.2d 182. Accordingly, we decline to address this issue.

### Citationizer<sup>®</sup> Summary of Documents Citing This Document

**Cite Name Level**

None Found.

### Citationizer: Table of Authority

Cite Name	Level
<b>Oklahoma Court of Civil Appeals Cases</b>	
Cite	Name
<u>1993 OK CIV APP 53</u> , <u>854 P.2d 375</u> , <u>64 OBJ 1948</u> ,	<u>Resolution Trust Corp. v. Sudderth</u>
<u>2000 OK CIV APP 116</u> , <u>14 P.3d 569</u> , <u>71 OBJ 3041</u> ,	<u>ABBOUND v. ABBOUND</u>
<u>2014 OK CIV APP 109</u> , <u>345 P.3d 392</u> ,	<u>REDCORN v. KNOX</u>
<u>2019 OK CIV APP 56</u> , <u>451 P.3d 207</u> ,	<u>INTERNATIONAL BANK OF COMMERCE v. FRANKLIN</u>
<b>Oklahoma Supreme Court Cases</b>	
Cite	Name
<u>1936 OK 667</u> , <u>61 P.2d 700</u> , <u>177 Okla. 631</u> ,	<u>WOOD &amp; CO. v. SUTTON</u>
<u>1954 OK 228</u> , <u>274 P.2d 372</u> ,	<u>OKLAHOMA OXYGEN CO. v. CITIZENS STATE BANK &amp; T.</u>
<u>2016 OK 6</u> , <u>367 P.3d 486</u> ,	<u>IN THE MATTER OF THE ESTATE OF CARLSON</u>
<u>1949 OK 257</u> , <u>214 P.2d 439</u> , <u>202 Okla. 417</u> ,	<u>RUSSELL v. FREEMAN</u>
<u>1998 OK 122</u> , <u>970 P.2d 182</u> , <u>69 OBJ 4210</u> ,	<u>Stonecipher v. District Court</u>
<u>1912 OK 166</u> , <u>122 P. 499</u> , <u>32 Okla. 290</u> ,	<u>CHICAGO R. I. &amp; P. RY. CO. v. BANKERS' NAT. BANK.</u>

**Cite Name****Level**

Cite	Name	Level
<u>12 O.S. 2005,</u>	<u>Service and Filing of Pleadings and Other Papers</u>	Discussed

**Title 46. Mortgages**

Cite	Name	Level
<u>46 O.S. 5,</u>	<u>Real Property Passing by Succession or Will</u>	Cited

**Title 60. Property**

Cite	Name	Level
<u>60 O.S. 524,</u>	<u>Liens for Unpaid Share of Common Expenses - Priorities - Enforcement</u>	Cited