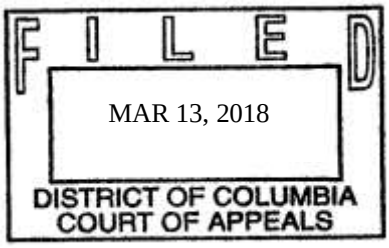
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 16-CV-842

U.S. BANK, N.A., APPELLANT,

v.

GREEN PARKS, LLC, *et al*., APPELLEES.



Appeal from the Superior Court
of the District of Columbia
(CAR-5631-15)

(Hon. Jeanette Jackson Clark, Trial Judge)

(Argued December 5, 2017 Decided March 13, 2018)

Before BLACKBURNE-RIGSBY, *Chief Judge*, and FISHER and THOMPSON, *Associate Judges*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: This case raises several questions about the legal and equitable effect of Green Parks LLC's purchase of a condominium unit at a foreclosure sale. We do not answer these substantive questions, however, because this case reaches us after a procedurally deficient entry of summary judgment. We reverse the decision on procedural grounds while providing guidance on how the court should proceed on remand.

I. The Factual and Procedural Background

Arpad Lengyel obtained a loan to purchase a condominium unit (the "Unit") which served as collateral for repayment. U.S. Bank, N.A. (the "Bank") eventually acquired the loan and the deed of trust that secured it. In 2011 Mr. Lengyel defaulted on the loan and, in 2015, the Bank filed this suit seeking to foreclose. However, before the Bank initiated that action, the condominium association foreclosed on Mr. Lengyel's unit because he had failed to pay association dues. Green Parks, LLC ("Green Parks") claims to have purchased the Unit at the association's foreclosure sale. Language inserted in the advertisement for the sale,

the Memorandum of Purchase memorializing the sale, and the deed granted to Green Parks stated that, after the foreclosure, the Unit would remain "subject to" the Bank's first deed of trust.

The sale to Green Parks occurred in 2013, before we issued our opinion in *Chase Plaza Condo. Ass'n v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166 (D.C. 2014). However, the Bank filed this action after that decision and Green Parks relied on *Chase Plaza* to assert a counterclaim seeking to quiet title, contending that it acquired the Unit free and clear of the Bank's first deed of trust despite the "subject to" language mentioned above. The Bank responded to the counterclaim by filing an answer that raised affirmative defenses—including unconscionability of the terms of the sale and unclean hands. The answer also denied, among other things, Green Parks' allegation that the association foreclosed on its super-priority lien. Green Parks subsequently amended its answer to add a second counterclaim. In response, the Bank filed a motion to dismiss the counterclaims, attaching the Memorandum of Purchase and a copy of the advertisement that the association published to promote its sale of the Unit.

The court responded by issuing an order that contained three rulings. First, the court converted the Bank's motion to dismiss the counterclaims into a motion for summary judgment and denied it. Second, the court dismissed the Bank's complaint. Finally, the court entered summary judgment *against* the Bank, granting Green Parks' counterclaim to quiet title "as a matter of law." Green Parks did not move the court to convert the Bank's motion, to dismiss the Bank's complaint, or to enter judgment against the Bank;[1] the court took each of these actions *sua sponte* and, crucially, failed to alert the parties before doing so.

Additionally, the court stated that it construed "the allegations in [Green Parks'] Counterclaim in the light most favorable to the nonmoving party, Green Parks." This approach was proper when the court considered the Bank's motion to dismiss, *see Pajic v. Foote Props., LLC*, 72 A.3d 140, 148 (D.C. 2013) (crediting non-moving parties' allegations when reviewing motion to dismiss a counterclaim); in that context, Green Parks was the party facing an adverse

[1] We disagree with Green Parks' assertions that two of its oppositions to the Bank's motions essentially constituted motions for summary judgment. The Superior Court Rules of Civil Procedure detail how a party must format a motion for summary judgment; none of Green Parks' filings met these requirements. Super. Ct. Civ. R. 12-I (d), (e), and (k).

judgment. When the court turned its attention to the viability of the Bank's complaint and the merit of Green Parks' counterclaim, however, the *Bank* became the party facing adverse judgment. Yet the court gave no indication that it adjusted its view of the evidence. To the contrary, when the Bank challenged the court's order by filing a motion to alter or amend judgment pursuant to Civil Rules 59 (e) and 60 (b), the court made clear that it entered judgment against the Bank after considering the facts from Green Parks' perspective: "[I]n construing the allegations in the Counterclaim *in the light most favorable to the nonmoving party, Green Parks*, this Court dismissed the Complaint against both defendants and . . . granted judgment, as a matter of law, to Quiet Title of the Property in Green Parks' name . . . ." (Emphasis added.)

After the trial court denied its motion to alter or amend, the Bank timely appealed from the entry of summary judgment.

II. Entering Summary Judgment Was Procedurally Improper

Summary judgment is proper when no "genuine issue of material fact exists and . . . the prevailing party [is] entitled to judgment as a matter o[f] law." *Evans v. Med. Inter-Ins. Exch.*, 856 A.2d 609, 612 (D.C. 2004). When applying this standard, courts "must view the facts in the light most favorable to the party against whom the judgment was directed." *Howard v. Riggs Nat'l Bank*, 432 A.2d 701, 703 n.1 (D.C. 1981). We review grants of summary judgment de novo. *Pajic*, 72 A.3d at 146.

A court may, in certain circumstances, convert a motion to dismiss into a motion for summary judgment. *Francis v. Rehman*, 110 A.3d 615, 620 (D.C. 2015). It may also enter summary judgment *sua sponte*. *Thomas v. District of Columbia*, 942 A.2d 1154, 1158 (D.C. 2008). But in either case, the court must first ensure that "the losing party was on notice that it had to come forward with all of its evidence." *Id.*; *see also Francis*, 110 A.3d at 620.

The Bank argues that the court deviated from these rules, first when it converted the Bank's motion to dismiss into one for summary judgment and, second, when it entered judgment against the Bank. We decline to address the Bank's first challenge because the second provides an independent basis for reversal.

To start, when the court entered judgment against the Bank, it construed the evidence in favor of the wrong party. In both its order entering judgment and its

order denying reconsideration, the court stated that it viewed the evidence "in the light most favorable to the nonmoving party, Green Parks." Construing the record in this manner was proper when the court was assessing the Bank's 12 (b)(6) motion: in that context, Green Parks deserved favorable inferences because its counterclaims faced dismissal. *See Pajic*, 72 A.3d at 148. However, once the court considered entering summary judgment against the Bank, the Bank became the party facing a potential adverse judgment. At that point, Rule 56 (c) required the court to examine the record from the Bank's perspective, *see Howard*, 432 A.2d at 703 n.1; yet the court continued viewing the facts in the light most favorable to Green Parks. Thus, the court entered judgment and drew inferences in favor of the same party, an obvious misapplication of Rule 56 (c).

The court further erred by not alerting the parties of its *sua sponte* decision to consider entering summary judgment against the Bank. Nothing in the record mitigated this error by providing the Bank constructive notice. It is true that, when the Bank decided to attach documents to its motion to dismiss, it should have known that the court could convert that 12 (b)(6) motion into a motion for summary judgment, *see Scoville St. Corp. v. Dist. TLC Tr., 1996*, 857 A.2d 1071, 1074–75 (D.C. 2004); however, Green Parks does not explain how attaching the documents could have warned the Bank that it faced an adverse judgment on Green Parks' counterclaims.

The surprise entry of judgment was not harmless, for it deprived the Bank of "an adequate opportunity to dodge the bullet." *Tobin v. John Grotta Co.*, 886 A.2d 87, 91 (D.C. 2005) (quoting *Berkovitz v. Home Box Office*, 89 F.3d 24, 29 (1st Cir. 1996)). To start, the Bank asserted unclean hands, unconscionability, and several other defenses in its answer to Green Parks' original counterclaim. The court should have considered these defenses. Alternatively, if the court concluded that Green Parks' amended pleading made the Bank's answer nugatory, it should have allowed the Bank to file a new answer after denying its motion to dismiss. *See* Super. Ct. Civ. R. 12 (a)(4)(A) (stating that party may file answer after denial of motion to dismiss). What the court could not do is what it did: enter judgment against the Bank without considering most of its defenses, including the ones articulated in its answer to Green Parks' original counterclaim.[2] *Cf. Flax v.*

[2] The trial court purported to distinguish the Bank's unconscionability argument from the one made in *Chase Plaza* because there, the plaintiff asserted the contention in its complaint while the Bank did not. This analysis is erroneous: unconscionability "is generally applied as an affirmative defense," *Falconi-Sachs*

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Schertler, 935 A.2d 1091, 1100, 1108 (D.C. 2007) (reversing summary judgment on claim that judge "overlooked").

The Bank also was deprived of a fair opportunity to investigate factual issues pertinent to defeating Green Parks' counterclaims, including whether the condominium association's foreclosure collected more than the most recent six months of unpaid dues. This factual question may be relevant to determining whether the association exercised its super-priority lien and extinguished the Bank's first deed of trust. *See Liu v. U.S. Bank Nat'l Ass'n*, No. 16-CV-262, 2018 WL 1095503, at *6 (D.C. Mar. 1, 2018) (concluding that a condominium association that foreclosed on only the most recent six months of unpaid assessments enforced its super-priority lien). Yet the court entered judgment before the end of discovery, and its failure to provide notice deprived the Bank of the opportunity to complete its investigation of the case.

Green Parks argues that the Bank could have cured any prejudice by raising defenses or proffering evidence after the court issued its ruling. To the contrary, "the opportunity required by Rule 56(c) was for [the Bank] to proffer [its] evidence before the court granted summary judgment, not after." *Tobin*, 886 A.2d at 91. Green Parks also contends that the Bank could only preserve its right to challenge the court's surprise order by filing a Rule 56 (f) affidavit stating that the court should delay deciding whether to grant summary judgment until the completion of discovery. Yet, by its terms, Rule 56 (f) applies only when a party files a motion for summary judgment, something that did not occur here.[3] Super. Ct. Civ. R. 56 (f) (referring to parties "opposing the *motion*") (emphasis added). Thus, we agree with the Bank: the trial court improperly granted summary judgment in favor of Green Parks and that error requires reversal.

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v. LPF Senate Square, LLC, 142 A.3d 550, 555 (D.C. 2016), and therefore a party may properly raise it in its answer, as the Bank did here in response to Green Parks' counterclaim seeking to quiet title.

[3] We are willing to assume that Rule 56 (f) also applies when the court enters judgment *sua sponte* but first provides the parties proper notice. That did not happen here either.

III. Issues to Be Resolved

The proceedings on remand must address at least two main issues. First, the trial court must determine whether the association foreclosed on a lien higher in priority than the Bank's first deed of trust. If the association's lien was senior to the Bank's and its foreclosure sale was valid, then the foreclosure extinguished the Bank's claim to the Unit. *See Chase Plaza Condo. Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 173 (D.C. 2014). Alternatively, if the Bank had the senior lien, then its claim survived the foreclosure. *See* Restatement (Third) of Prop.: Mortgages § 7.1 (Am. Law Inst. March 2018 Update).

The question of priority will be informed by our recent decision in *Liu v. U.S. Bank Nat'l Ass'n*, No. 16-CV-262, 2018 WL 1095503 (D.C. Mar. 1, 2018). There, we held that when a condominium association forecloses on the most recent six months of unpaid dues, it exercises the super-priority lien established by D.C. Code § 42-1903.13 (a)(2) (2012 Repl.).[4] *Liu*, 2018 WL 1095503, at *6. That lien is senior to a first deed of trust; accordingly, if the association invoked it here, its claim took priority over the Bank's. *See id.* By contrast, if the association foreclosed on a lien for *more* than the most recent six months of dues, the issue of priority is less clear. The *Liu* court expressly left open whether such a lien is entirely lower in priority than a first deed of trust or whether a portion of the lien enjoys super-priority status such that it would have extinguished the Bank's claim. *Id.* at *6 n.9. Thus, if the trial court finds that the association foreclosed on more than the most recent six months of dues, it will need to determine the legal effect of the foreclosure.

In any event, the "subject to" language in the advertisement of the foreclosure sale, the Memorandum of Purchase, and Green Parks' deed has no bearing on the priority of the liens in this case. If the Bank's claim was senior, then Green Parks purchased the property "subject to" the first deed of trust as a matter of foreclosure law; the "subject to" language would be surplusage. *See* Restatement (Third) of Prop.: Mortgages § 7.1 (Am. Law Inst. March 2018

[4] Effective 2017, D.C. Code § 42-1903.13 requires condominium associations to specify whether they are foreclosing on their super-priority lien. *Liu*, 2018 WL 1095503, at *1 n.2 (discussing § 42-1903.13 (c)(4)(B)(ii)). That amendment does not apply here because the foreclosure sale occurred in 2013. Accordingly, *Liu*, which interpreted § 42-1903.13 as it existed before the amendment, governs this case. *See id.*

Update) ("[T]itle deriving from a foreclosure sale, whether judicial or by power of sale, will be subject to all mortgages and other interests that are senior to the mortgage being foreclosed."). If, on the other hand, the association exercised its super-priority lien, then the "subject to" clauses would be unenforceable under D.C. Code § 42-1901.07. *Liu*, 2018 WL 1095503, at *5. That provision prohibits condominium associations from waiving their rights under the District of Columbia Condominium Act and, as we explained in *Liu*, an agreement allowing a first deed of trust to survive a super-priority foreclosure constitutes such a forbidden waiver. *Id.*

Although the "subject to" language is immaterial to the question of priority, it remains relevant to the second main issue on remand: whether the trial court should invalidate the foreclosure sale. Foreclosing on a senior lien extinguishes junior ones only if the foreclosure sale itself was valid. *See Chase Plaza*, 98 A.3d at 173, 178 n.8 (stating that "valid" foreclosure sale terminates lower priority liens and remanding for determination of whether foreclosure sale should be invalidated because sales price was unconscionably low). The Bank argued that the association's sale here was not valid, raising unclean hands, unconscionability, and other defenses in its answer to Green Parks' counterclaim. In *Liu*, we did not consider setting aside the foreclosure sale because the bank in that case did not attack the sale's validity. *Liu*, 2018 WL 1095503, at *6 n.9. Here, however, the Bank has raised such a challenge and, consequently, the trial court must address it on remand.

IV. Conclusion

The judgment of the Superior Court is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

(No. 16-CV-842)

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