



APPELLATE

MICHIGAN SUPREME COURT CONFIRMS THAT WHEN PROPERTY IS SOLD PURSUANT TO A FORECLOSURE BY ADVERTISEMENT, THE HOLDER OF A PRIOR RECORDED MORTGAGE IS STATUTORILY ENTITLED TO PRIORITY OVER THE EXPENSES OF A COURT-APPOINTED RECEIVER

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On July 30, 2012, the Michigan Supreme Court addressed the priority of "competing liens between a court-appointed receiver and the holder of a first-recorded mortgage on real property," concluding that the holder of a prior recorded mortgage is statutorily entitled to priority unless it gives an explicit and unequivocal waiver. The case is *In re Receivership of 11910 South Francis Road*, ___ Mich ___ (Docket No. 143123, July 30, 2012).

In *11910 South Francis Road*, Dart Bank held a mortgage on a piece of property located in DeWitt, Michigan. After the owner, Lori Jean Kosmalski, defaulted on the mortgage in March 2008, Dart as mortgagee initiated foreclosure proceedings by advertisement and eventually purchased the property at the sheriff's sale for approximately \$170,000, which was the balance due on the mortgage. Dart received a sheriff's deed on June 5, 2008, subject to a one-year redemption period.

In the meantime, Nastassia Price and Erin Duffy-Price had obtained a judgment against Kosmalski in an unrelated lawsuit, and requested the appointment of a receiver to seize and sell the property to satisfy their judgment. The circuit court agreed and entered an order on April 18, 2008, authorizing the receiver to take possession of the property and to "keep, manage, operate and preserve it until further order of the circuit court." The court also extended the redemption period to give the receiver an opportunity to try and sell the property.

When Dart eventually received title to the property effective August 2009, the receiver claimed that Dart was liable for payment of \$41,847.47 in receivership costs and fees. The trial court agreed, finding that Dart had acquiesced in the receivership and the receiver's expenditures, and the Court of Appeals affirmed, concluding that although Dart did not explicitly consent to the receiver's appointment, Dart "could nevertheless be required to pay the receiver's costs and fees because it benefited from the receivership."

The Supreme Court, however, reversed in a 4-3 decision. In an opinion authored by Justice Mary Beth Kelly, the Court held that Dart had a statutory right to first priority under MCL 600.3236, which the Court found to "render[] absolute the mortgagee's title to the property it purchased in a foreclosure proceeding," extinguishing any prior "right, title, and interest" in the property created after the execution of the mortgage. The Court concluded that because the receiver's lien arose after Dart's mortgage, Dart was entitled to priority.

In reaching its decision, the Court acknowledged a longstanding common-law rule "that a receiver is entitled to be paid for his or her services on a first-priority basis," but held that such a rule could not be applied "despite the imperative of the plain statutory language, providing the holder of a prior recorded mortgage with a right of priority over *all* subsequently created interests property."

The Court also rejected the Court of Appeals' conclusion that Dart's acquiescence to and benefit from the receivership was sufficient to justify imposing liability for the receiver's expenses. Finding no support for such a rule under Michigan law, the Court held that the only way that the statutory priority afforded by MCL 600.3236 can be avoided would be if the mortgagee were to "unequivocally waive" its statutory right. Because Dart did not "explicitly waive its statutory right of priority," the Court found that the receiver was precluded from recovering his expenses from Dart.

Justice Michael Cavanagh, joined by Justices Marilyn Kelly and Diane Hathaway, dissented. The dissent would have held that a mortgagee "may waive its superior priority rights of the mortgagee acquiesces to and benefits from the receivership."

The Supreme Court's decision in *11910 South Francis Road* is significant for a few reasons. *First*, the Court continued its trend of enforcing plain statutory language as enacted by the Legislature and declining to create judicial exceptions. *Second*, the Court's decision clarified a lien priority issue that is sure to recur in this era of mortgage foreclosures by advertisement. *Finally*, the Court offered guidance for lower courts and parties in addressing receiver compensation. The Court noted that under MCR 2.622(D), a circuit court has discretion to "require the party requesting the receivership to bear the costs associated with it." The Court observed that had the circuit considered MCR 2.622(D), "the receiver might nonetheless have received compensation for the expenses it incurred in the administration of the receivership," because the parties requesting the receivership "might have been liable for payment of the receivership expenses out of their own funds." "But regardless of whether the circuit court chooses to exercise its discretion under the court rule," the Court cautioned, "the circuit court, at the time it appoints a receiver, should nevertheless make provisions for the payment of receivership expenses and should be aware of the order of priority of any competing interests and other relevant collateral issues that could affect a receiver's compensation."

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