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RECENT DEVELOPMENT: *JULIAN V. BUONASSISSI, ET AL.*

By: Ellyn Riedl

No Supersedeas Bond Required if not a *Bona Fide* Purchaser

***JULIAN v. BUONASSISSI, ET AL.*: FAILURE TO FILE A SUPERSEDEAS BOND DOES NOT RENDER AN APPEAL MOOT WHEN THE PURCHASER IS NOT *BONA FIDE*; CERTAIN VIOLATIONS OF THE PROTECTION OF HOMEOWNERS IN FORECLOSURE ACT RENDER A DEED VOIDABLE BUT NOT VOID *AB INITIO*.**

By: Ellyn Riedl

The Court of Appeals of Maryland held that when a mortgage assignee is not a *bona fide* purchaser, the homeowner's failure to file a supersedeas bond is not fatal to an appeal. *Julian v. Buonassissi*, 414 Md. 641, 997 A.2d 104 (2010). In addition, violations of some provisions of the Protection of Homeowners in Foreclosure Act render the deed of trust conveyed voidable but not void *ab initio*. *Id.*

Harriette Julian ("Julian") faced foreclosure on her home in Waldorf, Maryland, and fell victim to a foreclosure scam initiated by Metropolitan Money Store. Julian conveyed the Waldorf property to LaShawn Wilson ("Wilson"), who acquired a mortgage from Wells Fargo Bank. After one month, Wells Fargo assigned the loan to U.S. Bank. In June 2007, the deed was recorded in Charles County. Wilson made no payments, and the substitute trustees of U.S. Bank, including Joseph V. Buonassissi, II ("Buonassissi"), initiated a foreclosure action in Charles County on August 27, 2007. That same day, Julian filed a Notice of Rescission. Buonassissi conducted a final title search and discovered Julian's Notice of Rescission. U.S. Bank purchased the property at the public sale held on September 20, 2007.

The Circuit Court for Charles County granted Julian's Motion to Intervene. Julian then filed Exceptions to the Sale, alleging, *inter alia*, that violations of the Protection of Homeowners in Foreclosure Act ("PHIFA"), under Maryland Code of Real Property Sections 7-301 through 321, rendered the deed void *ab initio*. In January 2008, the court held a hearing and granted Buonassissi's motion for a directed verdict, thus ratifying the sale.

Julian appealed to the Court of Special Appeals of Maryland, but failed to file a supersedeas bond. After an order was issued subsequent to Buonassissi's Motion to Require a Supersedeas Bond or

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Strike the Appeal, Julian again failed to file the bond. Instead, Julian appealed the bond order and the circuit court's Ratification Order.

The Court of Special Appeals of Maryland affirmed the order, holding that the violations in this case rendered the deed voidable, but not void *ab initio*, and that U.S. Bank was a *bona fide* purchaser because Julian failed to present evidence as to the supersedeas bond issue. The Court of Appeals of Maryland granted certiorari to consider: (1) whether Julian was required to file the bond; (2) whether violations of PHIFA rendered the deed void *ab initio* rather than voidable; and (3) whether the Court of Special Appeals of Maryland erred in holding that Julian had not produced sufficient evidence proving that U.S. Bank had notice of the foreclosure.

The Court of Appeals of Maryland began its analysis by reviewing Maryland Rules 8-422 and 8-423, stating that an appeal of foreclosure sale ratification is moot without filing a supersedeas bond. *Julian*, 414 Md. at 660-61, 997 A.2d at 115-16; Md. Rules 8-422(a)(1), 8-423(b)(2). The court recognized exceptions to this requirement where the mortgagee is also the purchaser of the property, or where there is collusion between the purchaser and trustee. *Julian*, 414 Md. at 661-62, 997 A.2d at 116 (citing *Baltrotsky v. Kugler*, 395 Md. at 475, 910 A.2d 1089, 1093 (2006)).

Buonassissi argued that because U.S. Bank was a *bona fide* assignee, it was also a *bona fide* purchaser. *Id.* at 663, 997 A.2d at 117. The court rejected this argument, finding U.S. Bank's assignee status distinct and separate from its purchaser status. *Id.* In holding that the trial court had erred on this issue, the Court of Appeals reasoned that although U.S. Bank may have been a *bona fide* assignee at the time of assignment, the bank must prove it was a *bona fide* purchaser at the time of the sale in order to be protected by a supersedeas bond. *Id.* at 665, 997 A.2d at 118. Because U.S. Bank failed to present evidence to prove *bona fide* purchaser status and admitted to having notice of Julian's rescission before the sale, the court found the bank's status as a *bona fide* purchaser questionable. Ultimately, the court found that Julian's failure to file a supersedeas bond was not fatal to her appeal. *Id.*

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The court next considered whether notice violations under PHIFA rendered the Deed of Trust between Julian and Wilson void *ab initio*, where the deed becomes of no legal effect and does not protect even *bona fide* purchasers. *Julian*, 414 Md. at 668, 997 A.2d at 120. A deed obtained through fraud or deceit is generally voidable, and a deed is only void *ab initio* if the deed is facially defective. *Id.* at 666-67, 997 A.2d at 119-20. The court then looked to the language of PHIFA to determine if a violation of the statute was intended to render a deed void *ab initio*. *Id.* at 673-74, 997 A.2d at 123-24. The court also considered PHIFA's legislative purpose, which was to protect financially troubled homeowners from scams. *Id.* at 673, 997 A.2d at 123. The legislature provided for certain provisions to be void *ab initio* if those sections of the act were violated, and that the section regarding notice of rescission rights did not include such language. *Id.* at 674-76, 997 A.2d at 124-25.

The Court of Appeals of Maryland agreed with the lower courts in holding that failure to notify Julian of her rescission rights rendered the deed merely voidable. *Julian*, 414 Md. at 678, 997 A.2d at 126. The court then disagreed with the intermediate appellate court, finding that notice violations should be determined at the time of sale, not at the time of the mortgage assignment. *Id.*

The court vacated the judgment made by the Court of Special Appeals of Maryland, remanding the case with directions to remand to the circuit court to determine whether Julian's Notice of Rescission was effective in putting U.S. Bank on notice of a defect at the time of sale. *Id.* at 678, 997 A.2d at 126. The Court of Appeals of Maryland assigned Julian with the burdens of production and persuasion as to whether her Notice of Rescission was effective. *Id.* The court specified that should Julian meet her burden, U.S. Bank would then be required to prove it was a *bona fide* purchaser, PHIFA did not apply in this case, and Julian's Notice of Rescission was not effective. *Id.* The court then gave Julian an opportunity to rebut U.S. Bank's arguments on the validity of her Notice of Rescission. *Julian*, 414 Md. at 679, 997 A.2d at 126.

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Judge Adkins' dissent focused on whether U.S. Bank was a *bona fide* lender. *Id.* at 679-81, 997 A.2d at 127-28. The dissent reasoned that U.S. Bank's *bona fide* lender status was questionable as a matter of law, because PHIFA requires a lender to take a mortgage with no knowledge of a foreclosure contract. *Id.* This requirement elevates the level of inquiry required before taking a mortgage; thus, U.S. Bank had an obligation to inquire whether a foreclosure contract was in effect when the mortgage loan was made. *Id.* at 682-83, 997 A.2d at 128-29. Finding no evidence that U.S. Bank made such inquiry, Judge Adkins concluded that the case should be remanded with instructions that U.S. Bank prove it was a *bona fide* lender, without knowledge of a foreclosure contract or any other PHIFA violations. *Id.* at 686, 997 A.2d at 131.

In *Julian*, the Court of Appeals of Maryland supported financially distressed homeowners by holding mortgage lenders responsible for complying with the PHIFA notice requirement. The ruling also encourages lenders to be cautious in foreclosure sales, and creates a strong disincentive to engage in deceitful transactions. The court achieved this result without restricting the rights of *bona fide* purchasers, leaving the incentive for people to bid on foreclosure sales intact. *Julian* requires those involved in foreclosure sales to thoroughly investigate possible title defects, and if defects are found, encourage attorneys to take action prior to the sale to avoid litigation.