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IN THE CIRCUIT COURT, OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

LEASE INVESTORS, LLC,

Plaintiff,

v.

CASE NO: 16-2011-CA-000617-XXXX
DIVISION: FC-D

THREE JOSEPHS, LLC, JOE JOSEPH,
THE PANTRY INC.,

Defendants.

**CHAFFEE FOOD STORE, INC.'S AMENDED
NOTICE OF APPEAL OF NON-FINAL ORDER**

NOTICE IS GIVEN that Intervenor Defendant/Counter Plaintiff, Chaffee Food Store, Inc. ("Chaffee"), appeals to the First District Court of Appeal of the State of Florida the Amended Order on Motions Relating to Foreclosure Judgment and Sale ("Amended Order"). The Amended Order is immediately appealable pursuant to Rules 9.030(b)(1)(B) and 9.130(a)(3)(C)(ii), Florida Rules of Appellate Procedure, because it determines the immediate right of possession to property.¹ A copy of the Amended Order being appealed is attached hereto in accordance with Rule 9.130(c), Florida Rules of Appellate Procedure.

¹ The Amended Order is arguably a *final order* appealable under Rule 9.030(b)(1)(A), Florida Rules of Appellate Procedure, because it is an order entered after a final judgment and no further judicial labor is contemplated as to that portion of the case. However, Chaffee has claims against several parties after entry of a final judgment in the original action between Lease Investors, LLC, and Three Josephs, LLC, Joe Joseph, and The Pantry, Inc. Accordingly, in an abundance of caution and because judicial labor remains as to Chaffee's counter-, cross- and third-party-claims, Chaffee appeals the Amended Order as a non-final order pursuant to Rule 9.030(b)(1)(B) and 9.130(a)(3)(C)(ii), Florida Rules of Appellate Procedure.

Dated this 20th day of July, 2017.

DURANT, SCHOEPPPEL,
DECUNTO & RATCHFORD, P.A.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 20, 2017, I electronically filed the foregoing with the Clerk of Courts using the Florida Courts E-Filing Portal, which will send a Notice of Electronic Filing to:

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IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2011-CA-000617
DIVISION: FC-D

LEASE INVESTORS, LLC,

Plaintiff,

vs.

THREE JOSEPHS, LLC, JOE JOSEPH,
THE PANTRY INC.,

Defendants,

_____/

CHAFFEE FOOD STORE, INC., a Florida
corporation,

Intervenor Defendant
Counterclaim/Cross-Claim/Third Party
Plaintiff,

CLAUDE MOULTON, MIKE WILLIAMS IN
HIS OFFICIAL CAPACITY AS THE
SHERIFF OF DUVAL COUNTY, FLORIDA,
and TOMMY E. HOPSON,

Third Party Defendants.

_____/

**AMENDED ORDER ON MOTIONS RELATING
TO FORECLOSURE JUDGMENT AND SALE**

This case came before the Court on (i) the Amended Emergency Motion to Set Aside the Foreclosure Sale Conducted on April 12, 2016, Vacate the Certificate of Sale, Certificate of Title, Amended Certificate of Title and Writ of Possession Issued Thereunder and Objection to Disbursement of Foreclosure Sale Funds, Vacate the Foreclosure Judgment and Dismiss the Action (the "Joseph Motion") filed by Defendants, Joe Joseph ("Joseph") and Three Josephs, LLC ("Three Josephs"); (ii) the Amended Motion to Vacate Judgment, Set Aside Sale, Vacate

Certificate of Title and/or Dissolve Writ of Possession (the "Chaffee Motion") filed by Chaffee Food Store, Inc. ("Chaffee"); (iii) the Motion to Strike (the "Lease Investors Motion") filed by Lease Investors, Inc. ("Lease Investors"), and (iv) the Motion to Limit Pending Motions Directed to Final Judgment of Foreclosure and/or Foreclosure Sale to Claims for Monetary Damages Against Lease Investors, LLC Under Section 702.036, Florida Statutes (the "Durga Motion") filed by Durga Shakti, LLC ("Durga"). The Court conducted evidentiary hearings on August 16, 2016, and December 16, 2016, and based upon the evidence presented and the arguments of counsel on the Joseph Motion, the Chaffee Motion, the Lease Investors Motion, and the Durga Motion, the Court makes the following findings of fact and conclusions of law:

1. This foreclosure action was originally filed on January 19, 2011. Three Josephs and Joseph were properly served with a summons and the Complaint.

2. Also on January 19, 2011, Lease Investors filed a Notice of Lis Pendens relating to this action and the property located at 11167 W, Beaver Street, Jacksonville, Florida 32220 (the "Property"), which was recorded in the Official Records for Duval County, Florida at Book 15489, Pages 1692-1693.

3. On June 8, 2011, a Final Judgment of Foreclosure ("Foreclosure Judgment") was entered in this action and recorded in the Official Records for Duval County Florida at Book 15623, Pages 1440-1443. In the Foreclosure Judgment, this Court scheduled a foreclosure sale of the Property for July 26, 2011.

4. On July 26, 2011, Three Josephs filed a Chapter 11 bankruptcy case (the "2011 Bankruptcy Case"), causing the foreclosure sale of the Property to be cancelled.

5. In the 2011 Bankruptcy Case, Lease Investors filed a Proof of Claim reflecting that its claim was based on the Foreclosure Judgment.

6. On June 14, 2012, the bankruptcy court entered an order confirming a Plan of

Reorganization in the 2011 Bankruptcy Case ("2011 Confirmation Order"). The 2011 Confirmation Order stated that

Secured creditors shall retain any lien on property in which the estate has an interest to the extent of the value of such creditor's interest in the estate's interest in such property. Except as modified by the Plan or this Order, all terms of the loan documents shall remain in full force and effect.

At that time, by virtue of merger and as reflected in Lease Investors' proof of claim, Lease Investors' "loan document[]" was the Foreclosure Judgment.

7. With respect to the treatment of Lease Investors' claim, the Plan of Reorganization ("2011 Plan") confirmed by the 2011 Confirmation Order provided:

Class 2 will be paid the full amount of their claim subject to the below treatment.

The Debtor will pay the regular contract payment to this creditor and will cure any arrearages over 60 months in equal monthly payments. The contract payment is \$2,300.22.

The Debtor may payoff this loan with no pre-payment penalty and a twelve (12) day grace period shall apply to all payments. All other default provisions of the original note & mortgage will continue to apply to this class except for the ones dealt with above.

The 2011 Confirmation Order and 2011 Plan did not state that the mortgage underlying the Foreclosure Judgment was reinstated or otherwise unwind the mortgage's merger into the Foreclosure Judgment.

8. On or about May 1, 2012, after the Notice of Lis Pendens was recorded and the Foreclosure Judgment was entered, Chaffee and Three Josephs entered into an Agreement of Lease for the Property. Based upon the recorded Notice of Lis Pendens and Foreclosure Judgment, Chaffee was at a minimum on constructive notice of this action and the Foreclosure Judgment.

9. In 2014, Three Josephs filed another bankruptcy case (the "Second Bankruptcy Case"). In the Second Bankruptcy Case, the bankruptcy court entered an order confirming a Plan of Reorganization (the "2014 Plan") on October 10, 2014. In the 2014 Plan, the parties included the following term with respect to Lease Investors' claim: "If Debtor shall fail to pay the full unpaid principal balance of the loan, including any past due interest, fees and/or other charges, within fifteen days of the February 28, 2015 due date, then *the Automatic Stay shall thereupon be automatically lifted so that a pending foreclosure can proceed*" (emphasis added). Thus, the 2014 Plan reflects the parties understanding that, the Foreclosure Judgment was not void—if the Foreclosure Judgment had been voided, no pending foreclosure could ever proceed on it.

10. On July 21, 2015, the Second Bankruptcy Case was dismissed.

11. On August 13, 2015, Lease Investors filed a Motion to Reset Sale Date, requesting a new date for a sale under the Foreclosure Judgment. The Certificate of Service for the Motion to Reset Sale Date reflected service on Joseph and Three Josephs.

12. On September 9, 2015, Joseph filed a handwritten paper titled "Answer to Plaintiffs [sic] Motion"—presumably the Motion to Reset Sale Date—in which he raised issues relating to the payoff amount, but did not raise any issue relating to the Foreclosure Judgment being void.

13. On September 11, 2015, this Court granted the Motion to Reset Sale Date, and re-set the sale under the Foreclosure Judgment for October 27, 2015.

14. On October 26, 2015, the day before the re-scheduled sale date, Three Josephs filed another bankruptcy case (the "Third Bankruptcy Case"). There is no evidence that Three Josephs asserted to the court in the Third Bankruptcy Case that Lease Investors' pursuit of a foreclosure sale based on the Foreclosure Judgment was improper. On February 19, 2016, the

bankruptcy court dismissed the Third Bankruptcy Case and barred Three Josephs from filing another Chapter 11 bankruptcy case for one year.

15. On February 24, 2016, Lease Investors filed another Motion to Reset Sale Date requesting a new date for a sale under the Foreclosure Judgment. The Certificate of Service for the second Motion to Reset Sale Date reflected service on Joseph and Three Josephs.

16. On March 3, 2016, this Court granted the second Motion to Reset Sale Date, and re-set the sale under the Foreclosure Judgment for April 12, 2016.

17. On March 4, 2016, the Clerk of Court entered a Notice of Sale reflecting that a foreclosure sale of the Property was scheduled for April 12, 2016. The Notice of Sale reflects service on Joseph and Three Josephs.

18. On April 12, 2016, the foreclosure sale of the Property went forward. The Property was sold to Florida Land Trust No 11167 W Beaver St., Jacksonville FL, Fla Trust Services LLC as Trustee Only, With Full Power and Authority to Protect, Conserve, Sell, Lease, Encumber or Otherwise Manage and Dispose of The Property Under Florida Statutes Section 689.071, which assigned its bid to Durga.

19. On April 12, 2016, the Clerk of Court issued a Certificate of Sale reflecting that the foreclosure sale took place on April 12, 2016.

20. On April 27, 2016, the Clerk of Court issued an Amended Certificate of Title of the Property to Durga.

21. No objections to the foreclosure sale were filed between the date the Court scheduled the foreclosure sale and the date the Amended Certificate of Title was issued.

22. In the Joseph Motion and Chaffee Motion, Three Josephs and Chaffee attack the foreclosure sale in this case in two ways: (i) by arguing the Foreclosure Judgment was void and thus no foreclosure sale could proceed on the Foreclosure Judgment and (ii) by arguing that

defects with the foreclosure sale require the Court to unwind the sale. These arguments fail for multiple reasons.

23. Most, if not all, of Three Josephs' and Chaffee's arguments are barred by their failure to timely object and the subsequent issuance of a Certificate of Title. Section 45.031(5), Florida Statutes, provides that objections to a foreclosure sale must be "filed within 10 days after filing the certificate of sale" or else the clerk will file a certificate of title. Under Section 45.031(6), once the certificate of title is issued, "the sale shall stand confirmed, and title to the property shall pass to the purchaser named in the certificate without the necessity of any further proceedings or instruments." Thus, "[i]ssuance of the certificate of title confirms the sale, curing 'all irregularities, misconduct and unfairness in the making of the sale.'" *Straub v. Wells Fargo Bank, N.A.*, 182 So. 3d 878 (Fla. 4th DCA 2016).

24. The concept of laches is similarly applicable here. Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. *Ticktin v. Kearin*, 807 So. 2d 659, 663 (Fla. 3d DCA 2001); *see also In re Biddiscombe Intern., LLC*, 392 B.R. 909, 917 (Bankr. M.D. Fla. 2008) (explaining that under Florida law, laches bars a claim in equity where the party has unreasonably delayed in enforcing a right and such delay has worked to the disadvantage of the person against whom the right is sought to be asserted). Here, Three Josephs unreasonably delayed in seeking to unwind the foreclosure sale based on the Foreclosure Judgment by, *inter alia*, filing an Answer to Lease Investors' first Motion to Reset Sale without raising the issue, filing the Third Bankruptcy Case without raising the issue, and still not raising the issue after the Third Bankruptcy Case was dismissed until after the foreclosure sale and entry of the Certificate of Title. Three Josephs' delay will prejudice Durga inasmuch as Durga paid \$292,300.00 for the Property and has incurred expenses to establish and operate a business on the Property.

25. Separately, assuming Three Josephs' and Chaffee's arguments had merit, Section 702.036, Florida Statutes, prevents this Court from unwinding the foreclosure sale and limits any such claims to monetary damages against Lease Investors. Section 702.036 was enacted to protect bona fide purchasers of property at foreclosure sales and ensures the validity of title obtained where a party seeks to set aside or challenge a final judgment of foreclosure. When Section 702.036's four requirements are met, it limits challenges to the validity of a final judgment of foreclosure after a foreclosure sale to claims solely for monetary damages. Here, the Court finds that the four requirements of Section 702.036 are met.

26. First, Three Josephs—the defendant named in the Foreclosure Judgment—was properly served in this action.¹ Second, the Foreclosure Judgment was entered as to the Property. Third, all applicable appeal periods ran from the Judgment and, more conservatively, the March 3, 2016, order granting Lease Investors' Motion to Reset the Foreclosure Sale. Fourth, Durga (which is not affiliated with any party to this action) acquired the Property at foreclosure sale for value at a time when no *lis pendens* regarding a suit to set aside, invalidate, or challenge the foreclosure appeared in the Duval County Official Records. As such, even if there was merit in Chaffee's and Three Josephs' requests that the foreclosure sale should be unwound based upon their challenge to the Foreclosure Judgment, the relief they seek is barred pursuant to Section 702.036, Florida Statutes.

¹ Although Chaffee was not served in this action, Chaffee was not a party to the Foreclosure Judgment or even named as a defendant in this action. The Court is not aware of any authority allowing a non-party to a judgment seek relief from that judgment. See Fla. R. Civ. P. 1.540(b) (allowing only "a party or a party's legal representative" to seek relief from judgment); see also *SR Acquisitions-Florida City, LLC v. San Remo Homes at Florida City, LLC*, 78 So. 3d 636, 638 (Fla. 3d DCA 2011) (explaining that only parties or their representatives have standing to seek relief from judgment). Moreover, even to the extent Chaffee is now technically a "party" through intervention, this Court declines to read Section 702.036, Florida Statutes, as requiring service of process on one who is not a party to the judgment being attacked and who was not even a party to the lawsuit at that time. To read Section 702.036 in that manner would undermine the purpose of the statute (finality of foreclosure sales) and allow negligent party-defendants to use third parties to raise issues they otherwise could not.

27. Although perhaps unnecessary in light of the preceding paragraphs, the Court rejects Three Josephs' and Chaffee's argument that the Foreclosure Judgment was voided by the 2011 Confirmation Order or 2011 Plan. Specifically, based on language in the 2011 Confirmation Order and 2011 Plan, the Court concludes that the Foreclosure Judgment was not voided and the mortgage underlying the Foreclosure Judgment was not reinstated. Before the 2011 Bankruptcy Case was filed, Lease Investors' promissory note and mortgage "merged" into the Foreclosure Judgment. *See Nack Holdings, LLC v. Kalb*, 13 So. 3d 92, 92 & n.2 (Fla. 3d DCA 2009). Since the 2011 Confirmation Order provided that the Foreclosure Judgment would remain in full force and effect except as modified by the Plan of Reorganization, the Court would expect the parties to specifically provide for reinstatement of the promissory note and mortgage if reinstatement was intended. Here, the Plan of Reorganization *did not* provide for reinstatement, but instead added payment and default terms that did not otherwise appear in the Foreclosure Judgment. Moreover, the Plan of Reorganization confirmed in the Second Bankruptcy Case evidences the parties' intent and understanding that the Foreclosure Judgment was not voided in the First Bankruptcy Case. Because the relevant promissory note and mortgage were never reinstated, the Foreclosure Judgment remained in effect even after entry of the 2011 Confirmation Order. The Foreclosure Judgment on which Lease Investors foreclosed was therefore not void.

28. Additionally, with respect to the contention that Three Josephs did not receive notice of the foreclosure sale, its contention is contradicted by the record and the applicable rules. The Notice of Sale filed March 4, 2016—over a month before the sale—reflects that it was served on Three Josephs and Joseph. Likewise, the Motion to Re-Set Sale Date reflects that

it was served on Three Josephs and Joseph.² To the extent Three Josephs and/or Joseph contend they did not receive these documents because of an address change, Rule 2.516, Florida Rules of Judicial Administration, did not require Lease Investors to ensure they actually received the documents. *See* Fla. R. Jud. Admin. 2.516(a) (providing that “[n]o service need be made on parties against whom a default has been entered, except that pleadings asserting new or additional claims against them must be served in the manner provided for service of summons”); Fla. R. Jud. Admin. 2.516(b)(2) (“Service on and by all parties who are not represented by an attorney and who do not designate an e-mail address . . . must be made by delivering a copy of the document or by mailing it to the party . . . at their last known address or, if no address is known, by leaving it with the clerk of the court. Service by mail is complete upon mailing.”). Here, Three Josephs and Joseph did not designate an e-mail address, and the relevant documents reflect service on their last known address.³

29. Further, with respect to the contention that the foreclosure sale should be vacated because Lease Investors did not update the amount due in the Foreclosure Judgment, this issue should have been raised by Three Josephs before the certificate of title was issued—for example, in a response to the Motion to Re-Set Sale Date or before the certificate of title was issued. Having not timely objected to the amount stated in the Foreclosure Judgment, the Court will not vacate the foreclosure sale on that basis.⁴ Moreover, the Court previously granted a motion to

² Although Joseph and Three Josephs were not listed on service list for the order granting the second Motion to Reset Sale Date, they were likewise not listed on the service list of the order granting the first Motion to Reset Sale Date, and successfully stopped that sale by filing the Third Bankruptcy Case

³ Indeed, the record reflects that even after Three Josephs filed the Josephs Motion, it maintained the same address that is reflected in the Notice of Sale and Motion To Re-Set Sale Date as its address with the Florida Secretary of State.

⁴ The case cited by Chaffee on this issue—*Palacios v. Fla. Funding Trust*, 32 So. 3d 167 (Fla. 2d DCA 2010)—is inapposite. There, a third-party purchaser had won a foreclosure sale with a bid of \$41,000, but thereafter the foreclosure judgment amount was reduced from \$60,136.09 to \$16,427.28. The trial court then ordered the difference between the \$41,000 and the \$16,000 would be paid to subordinate lienholders. On the third-party purchaser’s objection, the Second District Court of Appeal found the sale—which was objected to before the

deposit the sum of \$37,160.01 of the sale proceeds into the Court's registry. As such, any issue relating to surplus proceeds can be resolved without vacating the foreclosure sale.

30. Finally, with respect to the contention that the foreclosure sale price was inadequate, Three Josephs' failure to object before the Certificate of Title bars its claim. Even if Three Josephs had timely objected on that basis, mere inadequacy of price is not a basis for setting aside a judicial sale. It is only where the inadequacy of price is gross and results from any mistake, accident, surprise, fraud, misconduct or irregularity upon the part of either the purchaser or other person connected with the sale, with resulting injustice to the complaining party, equity will act to prevent the wrong result. *U.S. Bank Nat. Ass'n v. Bjeljic*, 43 So. 3d 851, 853 (Fla. 5th DCA 2010). Here, there has been no showing that the price paid was grossly inadequate or that the alleged inadequacy in price resulted from a mistake, accident, surprise, fraud, misconduct or irregularity upon the part of either the purchaser or other person connected with the sale. Accordingly, this Court rejects inadequacy of price as a basis to set aside the foreclosure sale.

31. Regarding the effect of the foreclosure sale on Chaffee's leasehold interest in the Property, the Court concludes that Chaffee's leasehold interest was foreclosed based upon the foreclosure sale, together with the recorded Notice of Lis Pendens and Foreclosure Judgment. Since the Notice of Lis Pendens and Foreclosure Judgment were of record at the time Chaffee entered into the Agreement of Lease, Chaffee was on constructive notice thereof. *See De Sousa v. JP Morgan Chase Bank, N.A.*, 170 So. 3d 928, 930 n.1 (Fla. 4th DCA 2015) (explaining that a recorded lis pendens puts persons acquiring an interest in property on notice of the foreclosure proceedings). Under Florida law, a foreclosure sale extinguishes any interests acquired after

certificate of title was issued—should be vacated because the purchaser paid far more than was likely necessary to purchase the property. Here, although Durga may have paid more than was necessary, Durga is not objecting to the sale and no objection was filed before the certificate of title was issued.

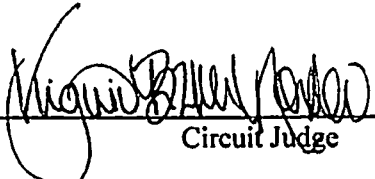
recordation of a notice of lis pendens, including those acquired after entry of the foreclosure judgment. *See, e.g., Ober v. Town of Lauderdale-by-the-Sea*, No. 4D14-4597, 2017 WL 361127, at *1-2 (Fla. 4th DCA Jan. 25, 2017) (explaining that when a foreclosure action proceeds to a judicial sale, all interests, including those acquired after the foreclosure judgment, are discharged).

Based on the foregoing findings of fact and conclusions of law, it is hereby

ORDERED AND ADJUDGED that:

1. The Josephs Motion is **DENIED**.
2. The Chaffee Motion is **DENIED**.
3. The Lease Investors Motion is **DENIED AS MOOT**.
4. The Durga Motion is **GRANTED**.
5. Durga shall remain the owner of the Property, not subject to any leasehold interest of Chaffee.

DONE AND ORDERED, in Chambers, Duval County, Florida on this 02 day of June, 2017.



Circuit Judge

Copies to:
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