IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

FIRSTBANK PUERTO RICO, Plaintiff, vs. **EDMOND WEBSTER** a/k/a **EDMOND R. WEBSTER, BERNICE WEBSTER, CLEVE E. WEBSTER** a/k/a **CLEVE WEBSTER, OASIS DEVELOPMENT, LLC, and TRIUMPH DEVELOPMENT, LLC,** Defendants.	Case No. ST-12-CV-239 ACTION FOR DEBT, FORECLOSURE OF LIENS, and SPECIFIC PERFORMANCE
NOVELLE JOSEPH, Intervenor/Plaintiff, vs. **EDMOND WEBSTER** a/k/a **EDMOND R. WEBSTER, BERNICE WEBSTER, CLEVE E. WEBSTER** a/k/a **CLEVE WEBSTER, OASIS DEVELOPMENT, LLC, and TRIUMPH DEVELOPMENT, LLC,** Defendants.	ACTION FOR REPLEVIN, CONVERSION, ACCOUNTING, DEBT, UNJUST ENRICHMENT, and PUNITIVE DAMAGES
FIRSTBANK PUERTO RICO, Counterclaimant, vs. **NOVELLE JOSEPH and the OFFICE OF THE VIRGIN ISLANDS MARSHAL,** Counterclaim Defendants.	

MEMORANDUM OPINION

Plaintiff FirstBank moves for the Court to reconsider this Court's March 5, 2018 Order that granted Intervenor Plaintiff Joseph's Motion for Return of Marshal's Sale Proceedings (the "March 5 Order"). The issue before the Court is whether Intervenor Joseph is entitled to the return of money he paid as a third-party buyer for property at a Marshal's sale. Joseph paid value for the property, but before receiving title, the underlying foreclosure judgment was reversed. That money, the sale proceeds, passed to FirstBank as the judgment creditor after confirmation of the foreclosure sale. FirstBank contends that Joseph is not entitled to a return of the money, and consequently seeks reconsideration. For the reasons set forth below, the Court will grant the motion for reconsideration but will not reverse the March 5 Order that directed First Bank to return the funds to Joseph. The Court finds Joseph is entitled to restitution, and FirstBank shall immediately restore the proceeds to Joseph.

FACTUAL AND PROCEDURAL BACKGROUND

On May 11, 2012, FirstBank filed a complaint against defendants Edmond Webster, Bernice Webster, Cleve Webster, Oasis Development, LLC, and Triumph Development, LLC (collectively the "Websters") seeking a judgment of debt and foreclosure. The complaint alleged that the Websters had defaulted on a series of construction loans and loan modifications FirstBank had issued the Websters from 2007 to 2010 (collectively, the "Loan"). The Websters filed counterclaims against

First Bank for breach of fiduciary duty, misrepresentation, breach of duty of good faith and fair dealing, duress, and intrusion upon seclusion. After protracted litigation, the Court entered final judgment in favor of FirstBank with respect to the Loan in the principal amount of $1,531,212.80, plus interest, and ordered the mortgaged properties[1] (collectively, the "Property") sold by the V.I. Marshal at Marshal's sale.

Prior to the Marshal's sale, the Websters filed an appeal with the Supreme Court on or about July 18, 2016. The Marshal's sale ("Sale") took place on December 14, 2016, and Joseph was the winning bidder at that sale, in the amount of $1,705,000,000. Joseph paid $170,500.00 on December 14, 2016, and the remaining $1,534,500.00 on January 11, 2017, to the Cashier of the Superior Court, for a total of $1,705,000.00 (the "Sale Proceeds"). The Court entered an order confirming the sale on February 24, 2017, and shortly after the Sale Proceeds were turned over by the Office of the V.I. Marshal to FirstBank as the judgment creditor.[2] The redemption period was scheduled to expire on August 24, 2017.

In the interim, however, the Supreme Court issued an opinion on April 24, 2017 vacating the judgment and order of foreclosure and all the Superior Court's dispositive rulings on the parties' claims. *Webster v. FirstBank P.R.*, 66 V.I. 514 (2017). The Supreme Court remanded the matter and referred it back to mediation

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1 The mortgaged properties were identified in the judgment and order as: "Parcel No. 1-143-5 Estate Wintberg, No. 3 Great Northside Quarter, St. Thomas ("Parcel 1-143-5") and Parcel Nos. 1X-1-A, 1X-1-D, 1X-1-H, and 1X-1-J Estate Wintberg, No. 3 Great Northside Quarter."

2 FirstBank admits to the facts in this paragraph in its Answer and Counterclaim.

because the parties had gone to mediation after (instead of before, as required by 28 V.I.C. § 531(b)) the Superior Court entered a series of orders granting partial summary judgment in favor the mortgagee on the loans. The Supreme Court determined that mediation having occurred after the series of dispositive orders were entered made compliance with the statutory requirement that parties pursue a "good faith effort" towards settlement, impossible. The Supreme Court found that when the matter was mediated, "First Bank was aware that if it chose not to settle through mediation, it would receive a complete recovery on all its claims." *Id.* at 520.

The Supreme Court remanded the case to the Superior Court for immediate referral to mediation and for assignment to a different judge. The Opinion did not address the foreclosure sale that had already taken place, the February 24 confirmation order, or the status of Joseph's rights following reversal,

Predictably, following the Supreme Court's reversal, counsel for Joseph served a letter on FirstBank and the Marshal demanding the return the Sale Proceeds.[3] FirstBank declined to return the proceeds to Joseph.[4] The redemption period expired, and the next day counsel for Joseph sent a letter to the V.I. Marshal demanding that the Marshal prepare the Marshal's Deed (the "Deed") for the Property and deliver it

3 August 14, 2017 Letter from Att'y Stylish Willis to Att'y Gregory H. Hodges and Acting Chief Deputy Marshal Dwane A. Callwood (attached as Ex. 6 to FirstBank's Answer and Counterclaim).

4 FirstBank admits to receiving a demand letter but refusing to return the proceeds. Answer ¶ 23. FirstBank issued its own letter in reply, submitting that Joseph should obtain the Deed from the Marshal after the redemption period, which had not yet at that point expired. August 17, 2017 Letter from Att'y Gregory H. Hodges to Att'y Stylish Willis.

by September 7, 2017.[5] Nevertheless, the Marshal did not execute and deliver the Deed to Joseph, and Joseph therefore, "has neither received a Marshal's Deed to the auctioned properties [n]or the return of the auction proceeds." Answer & Countercl. ¶ 25. Joseph alleges that the Websters continue in physical and constructive possession of the Property and have collected all rents and/or profits resulting from continued possession.[6]

On October 26, 2017, Joseph filed a Complaint in Intervention against FirstBank and the Websters, along with an Emergency Motion to Intervene as Plaintiff, and on December 14, 2017 the Court held a status conference at which FirstBank and Joseph appeared. The next day, December 15, Joseph filed an Expedited Motion for Return of Intervenor's Funds, asking for the immediate refund of the Sale Proceeds. The Court granted Joseph's motion to intervene on December 19, 2017, and the March 5, 2018 Order granted Joseph's motion for return of funds and vacated the February 24, 2017 confirmation order. The March 5 Order directed FirstBank to immediately return to Joseph the Sale Proceeds in the amount of $1,705,000.00, by no later than April 30, 2018.

Shortly thereafter, on March 23, FirstBank filed a Motion for Reconsideration of Order Granting Intervenor's Motion for Return of Marshal's Sale Proceeds and to Stay Enforcement of the Order Pending Reconsideration. By Order dated June 7,

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5 August 25, 2017 Letter from Att'y Stylish Willis to Acting Chief Deputy Marshal Dwane A. Callwood (attached as Ex. C to Joseph's Emergency Motion to Intervene as Plaintiff).
6 Compl. in Intervention ¶ 26.

2018, the Court stayed enforcement of the March 5 Order pending resolution of the pending motion for reconsideration.

ANALYSIS

The question presented by this case is rather unique: Is a bona fide purchaser entitled to property purchased at a foreclosure sale, when the purchaser has paid value for the property, but the judgment of foreclosure is vacated before the purchaser obtains title? No Virgin Islands statute addresses this topic, let alone the broader question of reversed foreclosure judgments, and the Court is unable to locate any Virgin Islands cases that have done so. Accordingly, this Court must determine which common law rule to adopt. *See Simon v. Joseph*, 59 V.I. 611, 623 (V.I. 2013). In doing so, this Court must follow the three-part analysis set forth in *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967 (2011). *Gov't of the V.I. v. Connor*, 60 V.I. 597, 603 (V.I. 2014) (per curiam) ("[T]he Superior Court, when considering a question not foreclosed by prior precedent from this Court, must perform a three-part analysis as set forth in *Banks*.").

> The first step in the analysis—whether any Virgin Islands courts have previously adopted a particular rule—requires the Superior Court to ascertain whether any other local courts have considered the issue and rendered any reasoned decisions upon which litigants may have grown to rely. The second step—determining the position taken by a majority of courts from other jurisdictions—directs the Superior Court to consider all potential sides of an issue by viewing the potentially different ways that other states and territories have resolved a particular question. Finally, the third step in the *Banks* analysis—identifying the best rule for the Virgin Islands—mandates that the Superior Court weigh all persuasive authority both within and outside the Virgin Islands, and determine the appropriate common law rule based on the unique

> characteristics and needs of the Virgin Islands. *Id.* at 603 (citations omitted).

I. The *Banks* Analysis

a. A Review of Local Law.

As already said, the Court was unable to locate any instance where a Virgin Islands court addressed the particular question presented in this case, or even any cases that involved a foreclosure judgment overturned following a foreclosure sale. Local common law is therefore not instructive here.

b. Practice in Other Jurisdictions.

Moving onto the second *Banks* analysis step, the Court was similarly unable—after an extensive search—to locate a case in any other U.S. jurisdiction that discussed the apparently rare scenario where a bona fide purchaser had paid value following a foreclosure sale, but not received title before the foreclosure judgment was overturned. Courts in a clear majority of states have however relied on the Restatement (First) of Restitution (Am. Law Inst. 1937) ("First Restatement")[7], which

7 Even though the First Restatement was published in 1937, courts in a clear majority of states have continued to cite to it throughout the years since. E.g., *Department of Revenue, Child Support Enforcement Div. ex rel. P.M. v. Mitchell*, 930 P.2d 1284, 1289 (Alas. 1997); *Berger v. Dixon & Show, P.C.*, 868 P.2d 1149 (Colo. App. 1993); *Lestorti v. DeLeo*, 298 Conn. 466, 490 (2010); *Fleer Corp. v. Topps Chewing Gum*, 539 A.2d 1060, 1062 (Del. 1988); *Martin v. Lenahan*, 658 So.2d 119, 119, 121 (Fla. App. 1995); *In re Ishida-Waiakamilo Legacy Trust Dated June 27, 2006*, 138 Haw. 98, 105, (2006) (quoting *Kam Oi Lee v. Fong Wong*, 57 Haw. 137, 139-40 (1976)); *Muchmore Equip. v. Grover*, 334 N.W.2d 605, 608 (Iowa 1983); *West Suburban Bank v. Lattemann*, 285 Ill. App. 3d 313, 317-318 (1996); *Pond v. McNellis*, 2006 Ind. App. LEXIS 641, *31-38; *Plains Petroleum Co. v. First Nat'l Bank of Lamar*, 274 Kan. 74, 78 (2002); *General Motors Corp. v. Koscielski*, 80 Md. App. 453 (1989); *Keller v. O'Brien*, 425 Mass. 774 (1997); *Dumas v. Auto Club Ins. Ass'n*, 437 Mich. 521, 546 (1991); *Mathison v. Clearwater Cty. Welfare Dept.*, 412 N.W.2d 812, 813 (Minn. App. 1987); Aye v. Fix, 192 Mont. 141, 146 (1981); *Gary's Implement, Inc. v. Bridgeport Tractor Parts, Inc.*, 281 Neb. 281, 298 (2011); *Wheeler*

is instructive in these circumstances. Of the Restatement, Section 74, which is cited by courts in a number of states[8], is particularly relevant. It is entitled "Judgments Subsequently Reversed" and provides as follows:

> A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final; if the judgment is modified, there is a right to restitution of the excess.

That general rule of restitution, widely embraced by courts in several jurisdictions, is subject to a number of exceptions.[9] One of them, discussed by § 74 comment i, is in the case where a third-party bona fide purchaser has purchased property at an execution sale:

> A person, other than the judgment creditor or his attorney, who purchases at a valid execution sale upon a judgment which is not void but which is subsequently reversed is entitled to retain the subject matter if, before reversal, he has obtained the legal title and has paid value therefor . . .. Since the sale was lawful he is protected as a bona

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Springs Plaza, LLC v. Beemon, 119 Nev. 260, 267 (2003); *Wilson v. Came*, 116 N.H. 628, 631 (1976); *Bernoskie v. Zarinsky*, 394 N.J. Super. 421, 425 (N.J. Super. Ct. App. Div. 2007); *Cheesecake Factory, Inc. v. Baines*, 125 N.M. 622, 625 (1998); *Johnson City v. Glanville*, 108 Misc. 2d 531, 533-534 (N.Y. App. Div. 1981); *Gustafson v. Gustafson*, 2008 ND 233, P9; *Miller v. Miller*, 1998 Ok 24, P47 n. 70; *Transamerica Ins. Group v. Adams*, 62 Ore. App. 419, 423, (1983); *Merchants Mut. Ins. Co. v. Newport Hosp.*, 108 R.I. 86, 94 (1971); *Miga v. Jensen*, 299 S.W.3d 98, 101, 102, 104, 105 (Tex. 2009); *Reid. v. Reid*, 14 Va. App. 505; *McCullough Family P'ship*, 160 Wn.2d 586, 591 (2007); *Frost v. Eggerman*, 638 P.2d 141, 146 (Wyo. 1981).

8 E.g., *Cheyenne Res., Inc. v. Elk Horn Coal Corp.*, 265 S.W.3d 184, 186 (Ky. 2008); *Stockman Bank v. AGSCO, Inc.*, 2008 ND 74, P5; *Lytle v. Payette-Oregon Slope Irr. Dist.*, 175 Ore. 276, 290 (1944); *Herkert v. Stauber*, 127 Wis. 2d 87, 90 (1985); *Ehsani v. McCullough Family P'ship*, 160 Wn.2d 586, 591-92 (2007) ("In terms of generally accepted common law principles, this court has indicated that Restatement of Restitution § 74 is an appropriate source to be used in construing RAP 12.8[, Effect of Reversal on Intervening Rights].").

9 *Ehsani*, 160 Wn.2d at 592 ("As explained by [U.S. Supreme Court] Justice Cardozo, exceptions to the general rule of restitution embodied in section 74 arise in circumstances where to require a party to make restitution would not serve the purpose of remedying unjust enrichment . . . These exceptions and others, together with the general rule of section 74, make up the common law of restitution . . ..").

> fide purchaser . . .. Restatement (First) of Restitution § 74 cmt. i, Restitution from the Purchaser at Execution Sale (AM. LAW. INST. 1937).

Two illustrations accompanying § 74 cmt. i clarify the distinction under the rule between a purchaser who has obtained title and paid value, and one who has not:

> 22. A obtains a valid judgment against B. Execution is levied and C purchases B's land at the execution sale for $ 3000 which he pays to the sheriff, receiving a deed thereto and going into possession. The judgment is reversed. B is not entitled to restitution of the land from C.
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> 23. Same facts as in Illustration 22, except that C did not receive the deed before reversal of the judgment. B is entitled to restitution from C.[10]

The rule offered by § 74 cmt. i finds support well into the earlier days of American jurisprudence. As far back as 1864, the U.S. Supreme Court wrote:

> It is a well-settled principle of law, that . . . although the judgment or decree may be reversed, yet, all rights acquired at a judicial sale, while the decree or judgment were in full force, and which they authorized, will be protected. It is sufficient for the buyer to know, that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made and authorized the sale. *Gray v. Brignardello*, 68 U.S. 627, 634.

Gray remains good law, as does the rule it articulated. *See also, e.g.*, *United States v. Vassallo*, 1960 U.S. Dist. LEXIS 4491, *5 (D. Del.) ("When a person who is a stranger to litigation buys property at a judicial sale under a judgment which the court had jurisdiction to render, the title obtained during the pendency of an appeal from the judgment will be protected . . . even though the judgment is subsequently reversed.")

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10 Several courts have cited to the illustrations or adopted a similar rule. E.g., *State ex rel. Horine Farms, Inc. v. Jones*, 1992 Mo. App. LEXIS 919, *9; *Spahi v. Hughes-Northwest, Inc.*, 27 P.3d 1233, 1236-37 (Wash. Ct. App. 2001); *United States v. Vassallo*, 1960 U.S. Dist. LEXIS 4491, *5-6 (D. Del) ("When a person . . . buys property at a judicial sale . . . the title obtained during the pendency of an appeal from the judgment will be protected . . . even though the judgment is subsequently reversed.").

(citing *Gray*); *Harjo v. Johnston*, 187 Okla. 561, 572 (1940) ("The rights of bona fide purchasers of property sold under the authority of a judgment not void on its face, will not be affected or prejudiced by either the vacation of such judgment by the court rendering it, or a decree in equity annulling, evading, or restraining its further enforcement.") (citation and internal quotations omitted). The rule of the protected bona fide purchaser appears widespread in U.S. jurisdictions, and this Court found no caselaw contradicting the principles espoused by § 74 cmt. i. Several courts have in fact cited to comment i.[11] The basic rule has been codified by at least one state legislature[12], and adopted as an appellate rule of procedure by at least one state.[13]

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11 E.g., *Vassallo*, 1960 U.S. Dist. LEXIS 4491, *5-6 ("When a person who is a stranger to litigation buys property at a judicial sale under a judgment which the court had jurisdiction to render, the title obtained during the pendency of an appeal from the judgment will be protected, in the absence of a supersedeas, even though the judgment is subsequently reversed.") (citing cmt. i); *State ex rel. Horine Farms, Inc. v. Jones*, 830 S.W.2d 894, 897 (Mo. 1992); *2DP Blanding, LLC v. Palmer*, 2017 UT 62, P24 (2017) ("It has long been held that '[a] person, other than the judgment creditor or his attorney, who purchases at a valid execution sale upon a judgment . . . which is subsequently reversed is entitled to retain the subject matter if, before reversal, he has obtained the legal title and has paid value therefor.'") (quoting cmt. i); *Ehsani*, 160 Wn.2d at 592 ("Similarly, a person who purchases a judgment debtor's property 'at a valid execution sale upon a judgment which is not void" is entitled to retain the property *"if, before reversal, he has obtained the legal title* and has paid value therefor.'") (quoting cmt. i). (emphasis added)

12 ORC Ann. 2325.03, Bone Fide Purchaser Unaffected (Ohio) ("The title to property, which title is the subject of a final judgment or order sought to be vacated, modified, or set aside by any type of proceeding or attack and *which title has, by, in consequence of, or in reliance upon the final judgment or order, passed to a purchaser in good faith*, shall not be affected by the proceeding or attack; nor shall the title to property that is sold before judgment under an attachment be affected by the proceeding or attack. 'Purchaser in good faith,' as used in this section, includes a purchaser at a duly confirmed judicial sale.") (emphasis added).

13 Wash. RAP 12.8 ("If a party has voluntarily or involuntarily partially or wholly satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, or in appropriate circumstances, provide restitution. An interest in property acquired by a purchaser in good faith, under a decision subsequently reversed or modified, shall not be affected by the reversal or modification of that decision.").

Turning to the Restatement (Third) of Restitution and Unjust Enrichment (Am. Law Inst.) ("Third Restatement"), published in 2011 and intended as a replacement of the 1937 Restatement[14], the Court finds a similar rule for purchasers at execution sales. Section 18, Judgment Subsequently Reversed or Avoided, reads at comment f:

> In most American jurisdictions, except as modified by statute, title to property acquired at an execution sale is governed by the following rules:
>
> 1. A purchaser at an execution sale, other than the judgment creditor and those in privity with him, is exempt from what would otherwise be the consequences of the doctrine of lis pendens. This means that if a purchaser at an execution sale is also a "stranger to the record," the subsequent reversal or avoidance of the underlying judgment does not affect the purchaser's rights, notwithstanding actual or constructive notice to the purchaser that an appeal of the underlying judgment is pending or that the underlying judgment remains subject to attack, by appeal or otherwise.

While the Third Restatement is relatively new, and section 18 relatively un-cited by courts in any jurisdiction[15], the rule parallels the rule of § 74 of the First Restatement. Additionally, section 66 of the Third Restatement, entitled Bona Fide Purchaser, states that a, "purchaser of real property at a judicial sale is usually treated" as a bona fide purchaser who acquires property, "free of equitable interests that a restitution claimant might have," "if the judicial sale purchaser acquires title and gives value without notice of" any equitable claims. § 66, general rule and cmt. c. Section 66 adds:

14 Restatement of the Law Third, Restitution and Unjust Enrichment, The American Law Institute, https://www.ali.org/publications/show/restatement-law/ (last visited July 12, 2018).
15 The Court, after a cursory search, was able to locate only a dozen or so cases that had.

> [T]o attain protection as a purchaser for value the transferee of an interest in property must (i) complete the transaction of purchase to the point at which the transferee acquires title and (ii) give [sic] value before (iii) receiving notice (§69) of the equitable interest that would be cut off. Cmt. f.

This language is similar to the language of §74 of the First Restatement that says a "purchaser at execution sale," "is protected as a bona fide purchaser," "if, before reversal, he has obtained the legal title and paid value therefor . . .." A review of the relevant restatements then, paired with a look at the way other jurisdictions approach the issue presented by this case, suggests to the Court that the rule found at § 74, comment i of the First Restatement best reflects the prevailing law in the United States. The Court nonetheless must determine if that rule is the best rule for the Virgin Islands.

c. The Prevailing Rule in the U.S. Is the Best Rule for the Virgin Islands.

It is true, as FirstBank argues, that there are important public policy considerations that support the finality of judicial sales. The finality and permanence of judicial sales is, "relied on by both purchasers and others in connection with the purchase of the property, including financial institutions, title insurers, realtors, and tenants." *Steinbrecher v. Steinbrecher*, 759 N.E.2d 509, 518 (Ill. 2001); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT ("THIRD RESTATEMENT") § 18 cmt. f ("The evident function of [rules extending special protection to purchasers at execution sales] is to enhance the effectiveness of execution sales by conferring on them a greater degree of finality."). Absent a policy supporting the finality of judicial sales, people would be less inclined to, "purchase real property involved in a judicial proceeding, if afterwards he incurred the hazard of losing the property due to facts unknown to him at the time of the sale." *Steinbrecher,* 759 N.E.2d at 529. Courts of several states agree that the finality of judicial sales is important, having adopted rules supporting such finality.

Yet at the same time, a purchaser at a judicial sale who has not yet received title is in a different position than the more common one who has. The purchaser is without "[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property; the legal link between a person who owns property and the property itself." *Title*, Black's Law Dictionary (10th ed. 2014). The purchaser incurs less hazard, or indeed no hazard at all, of losing the property which they expect to receive but do not have. This fact is demonstrated by the very facts of this case, where Joseph has paid value and is now in a situation where he has no possession, ownership, or custody of the property at issue, nor the use or value of the money he paid at Marshal Sale.

Making an alternative policy argument, FirstBank asks the Court to, "imagine this case involving a typical bona fide third-party purchaser, now living with her family in the purchased property, who is before the Court requesting a Marshal's deed for the property." FirstBank then asks, "[s]hould the Court deny her a Marshal's deed and set aside a judicially confirmed sale merely because the underlying judgment has been vacated?" FirstBank concludes, "[c]learly not." Yet the same statute cited by FirstBank at another point in its argument contemplates a scenario where a purchaser might be in possession only temporarily: V.I. Code Ann. tit. 5, § 500 says that a purchaser at an execution sale, "from the day of sale until a resale or a redemption . . . shall be entitled to the possession of the property purchased or redeemed . . .." In other words, the statute specifies that a purchaser may be in possession even during the redemption period, at any time before the end of which a debtor may "reclaim[] or regain[] possession" by paying the redemption price. *Redemption*, Black's Law Dictionary (10th ed. 2014). The Superior Court's own confirmation order in this case "entitled" Joseph to possession during the redemption period, and to a Marshal's deed, "if the Properties are not timely redeemed . . .." It is therefore not an entirely foreign scenario where a purchaser in possession might lose possession. Also, the Court does not find it is a 'mere' circumstance when an underlying foreclosure judgment has been vacated. As is evidenced by this very case, such a reversal following a foreclosure sale can lead to an array of messy circumstances—circumstances rarely convenient for any party involved.

Finally, this case demonstrates in another way the utility of adopting the § 74 cmt. i rule. Where, as here, an underlying foreclosure judgment has been vacated but the bona fide purchaser is without title, it is easier to 'unwind' and reverse the third-party transfer—hitherto not complete—and place all parties in the positions they were in before that judicial sale. Since here the third-party purchaser is without title (and ownership, possession, and custody), the rule calls for FirstBank to return the

Sale Proceeds to the third-party purchaser.[16] By leaving intact the Websters rights vis-à-vis the property, the Websters and FirstBank are in the same positions vis-à-vis each other that they were before the orders granting partial summary judgment. This was exactly what the Supreme Court intended when it remanded the case to the Superior Court and directed that it send the parties to mediation.

d. The Best Rule for the Virgin Islands

The Court's *Banks* analysis leads it to conclude that the First Restatement § 74 cmt. i rule should be adopted in the Virgin Islands in cases of judicial sales. The Court will thus adopt the following rule:

> A person, other than the judgment creditor or his attorney, who purchases at a valid execution sale upon a judgment which is not void but which is subsequently reversed is entitled to retain the subject matter if, before reversal, he has obtained the legal title and has paid value therefore.

II. Application of the Rule to this Case

Although Joseph paid value at the judicial sale in this case, he had not yet received the deed or possession and did not have title before the reversal of the underlying judgment by the Supreme Court. As such, he is not entitled to retain the Property, and would be required to restore it to the Websters if he were in possession. As it sits, Joseph is deprived of the Property and dispossessed of his funds. He is thus entitled to the amount he paid at the judicial sale for the Websters' Property. It only

16 Certainly, there are other issues that will require further consideration by the Court, such as Joseph's claims for interest on the money FirstBank has in its possession and Joseph's claim to rents earned by the Websters, assuming the parties do not resolve those issues amongst themselves. However, those issues would be present in any event because of the delay between the judicial sale and now, which are partially the result of the unusual circumstances of this case.

makes sense therefore for the Court to 'unwind' the transaction, and for FirstBank to restore to Joseph the money which Joseph paid for the Property.

Were the Court to act otherwise, the Court could not return the parties to the same position as they were before the foreclosure. Were the Court to allow First Bank to keep the Sale Proceeds and grant title to the Property to Joseph, the Websters would be denied ownership and possession of the Property. That scenario would not return the parties to the same position as they were in before the foreclosure judgment nor allow them to mediate in good faith.[17] In addition, were the Court to allow FirstBank to retain the Sale Proceeds while the matter goes back to mediation, First Bank would be in a stronger position than the Supreme Court intended because First Bank would be in possession of the remedy it seeks. In such a situation the scales would be tipped ever so slightly in favor of FirstBank. Doubtless, these results of allowing First Bank to keep the Sale Proceeds while the matter returns to mediation are not what the Supreme Court intended.

The Court's decision, contrary to FirstBank's contention, is not an issuance of injunctive relief. Nor is the Court granting partial summary judgment. The Court's decision sounds in restitution. Both the First and Third Restatements support the Court's ability to order restitution in these circumstances, on motion or *sua sponte.*

17 The Court suspects that FirstBank's contention is less with the return of the funds to Joseph than with the Property having to go to sale again, where the outcome of that sale will be uncertain. However, that eventuality is the result of a decision by the Supreme Court that this Court must uphold and enforce. Blame for this turn of events does not fall on Joseph, and the burden of being out $1.7 million should not land on the shoulders of an innocent third-party.

RESTATEMENT (FIRST) OF RESTITUTION: PROCEDURE § 74 cmt. a,[18]; THIRD RESTATEMENT: PROCEDURAL SETTING § 18 cmt. b,[19]. Courts from other jurisdictions have recognized this power of a court. Granting restitution to a party following the reversal of a judgment, a U.S. District Court in Virginia wrote in *Gerald M. Moore & Son v. Drewry & Assocs.*:

> Having established (1) that upon reversal of the original judgment Moore came under an obligation to make restitution to Drewry for monies erroneously paid on that judgment and (2) that *this Court possesses the inherent equitable power to correct its own mistake*, there are various methods which can be used for securing such restitution. The reversing tribunal can itself direct restitution or *the tribunal which is reversed can on motion or upon its own initiative direct that restitution be made.* 945 F. Supp. 117, 121 (E.D. Va. 1996) (citing the First Restatement § 74 cmt. a) (emphasis added)

Similarly, the Iowa Supreme Court in *Schwennen v. Abell* wrote:

> We adopt the Restatement rule for voluntary payment cases involving reversed judgments. We think the inherent power of the court is the basis for this rule. . . . When the district court has jurisdiction of the parties and the amount of overpayment is readily determinable or conceded, we see no reason why the court should not enter judgment. 471 N.W.2d 880, 884 (1991).

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[18] Quoting the First Restatement:

> The rule stated in this Section is applicable to cases where a judgment has been entered upon which money has been paid by the defeated party or property has been sold on execution, and *where subsequently such judgment is reversed, set aside or modified, because of lack of power in the court rendering it, because of errors of law, or for other reasons.* In such cases there are various methods which can be used for securing restitution. The reversing tribunal can itself direct restitution either with or without conditions, or *the tribunal which is reversed can on motion or upon its own initiative direct that restitution be made.* (emphasis added)

19 Quoting the Third Restatement:

> Subject to local procedural requirements, the restitution claim described in this section may be asserted in any forum having jurisdiction. Restitution may therefore be decreed by an appellate court as an incident of its power to correct errors. *It may be ordered by the original tribunal on remand (either* sua sponte *or on motion); or following reversal even without remand, as an exercise of the court's inherent equitable powers; or in response to a collateral attack on the judgment.* Restitution may also be sought in a separate action in any court having jurisdiction. (emphasis added)

See also Rogers v. Bill & Vince's, Inc., 219 Cal. App. 2d 322, 324 (1963) ("It is settled law that restitution after reversal is not governed exclusively by statute . . . and that the trial court has inherent power to afford such relief, which normally is the right of the party who secured the reversal.") (citations omitted); *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 267 (2003) ("[O]ther jurisdictions addressing the issue have held that the trial court has inherent authority to order restitution when a judgment has been reversed, even though the appellate court did not expressly order such relief.") (citing cases from multiple jurisdictions). The U.S. Supreme Court long ago recognized the equitable power of a court to correct wrongs resulting from the reversal of a decree of that court. *Arkadelphia Milling Co. v. St. Louis S. R. Co.*, 249 U.S. 134, 145-146 (1919) ("It is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process.") (citations omitted). What's more, and particularly relevant to this case, the Supreme Court in *Arkadelphia* found it irrelevant that a party seeking restitution was only an intervening party in the suit. *Id.* at 146. ("It is argued that the claimant is not in a position to invoke the principle of restitution in this proceeding because it was not a party to the original proceedings, but came in by intervening before the master. This point is unsubstantial.").

Accordingly, this Court finds it has the authority to order restitution in this instance to correct the error that occurred by virtue of improper procedure that was employed by the Superior Court. The Court has the right to exercise its authority in these circumstances especially, where there is no uncertainty about the amount to be restored to Joseph.[20] A money judgment is the appropriate form of relief. RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. e (A person entitled to restitution, "other than the mere enforcement of an equitable lien . . . can obtain a money judgment against the recipient of the benefit . . .."); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, § 49(1) ("A claimant entitled to restitution may obtain a judgment for money in the amount of the defendant's unjust enrichment.").[21]

FirstBank's remaining argument that, "Mr. Joseph has limited rights as a successful bidder at the Marshal's Sale, which rights do not include having his money refunded," is without merit. While FirstBank cites authority for the proposition that contract principals *normally* govern a purchase and sale at a judicial sale, it cites no authority for the contention that Joseph has "limited rights" to seek restoration of the Sale Proceeds under these circumstances. Also, since the underlying foreclosure judgment was reversed because there was no proof the parties mediated in good faith before partial summary judgment had been entered, as required by statute, and

[20] Again, the Court notes that the parties have between them various claims that yet require resolution. Those claims will be addressed at a later day; all the Court is now ordering is the restoration of the Sale Proceeds, which amount is not disputed.

[21] FirstBank's argument that Joseph must engage in mediation pursuant to the Supreme Court's order is without merit. Nowhere in the Supreme Court's decision does it mention Joseph, or a buyer for the Property, or even the foreclosure sale, and the decision quite obviously directed the Superior Court to order mediation only as between FirstBank and the Websters. However, this does not mean that Joseph won't be required to participate in mediation at some point prior to trial regarding his claims against the Websters and FirstBank or their claims against him. Also, the Court wonders what sort of an impact it would have on foreclosure sales to force third-party buyers into mediation to be able to restore to them equity that has been denied them by no fault of their own.

because the Court has already determined that the Sale Proceeds must be restored, the Court is persuaded that the order confirming the sale must be vacated.[22] Furthermore, as already discussed at length, since Joseph did not obtain title, the usual protection afforded to bona fide purchasers that leaves title untouched with the purchaser in case of a reversal, is not applicable here.

CONCLUSION

The Court finds it best to adopt the rule of the Restatement (First) of Restitution, which states, "a person, other than the judgment creditor or his attorney, who purchases at a valid execution sale upon a judgment which is not void but which is subsequently reversed is entitled to retain the subject matter if, before reversal, he has obtained the legal title and has paid value therefore." Because Joseph did not obtain legal title before the foreclosure judgment was reversed, Joseph is not entitled to retain the Property. Indeed, he has not received title or possession. Accordingly, it is necessary and equitable for FirstBank to restore the Sale Proceeds to Joseph. The Court shall order FirstBank to restore to Joseph the value of the Sale Proceeds.

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[22] *See First Collinsville Bank v. Johnson*, 2015 IL App (5th) 140081-U, P1 ("Where the defendant was served with an invalid summons, the circuit court was without personal jurisdiction to enter orders against him, and . . . the default judgment of foreclosure and the order confirming the sale entered against the defendant are void and must be vacated."); *Bank of N.Y. Mellon v. Karbowski*, 2014 IL App (1st) 130112, 23 ("[The bank's execution of its affidavit was not in] 'strict compliance with every requirement of the statute' . . . and, therefore, the order denying Karbowski's motion to quash must be reversed and the judgment of foreclosure and order confirming the sale must be vacated.").

All other pending claims between the parties will be resolved at a later date, if the parties do not resolve them among themselves.

An Order consistent with this Memorandum Opinion will be entered.

DATED: July 18, 2018

Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

BY:
for **DONNA DONOVAN**
Court Clerk Supervisor 7/18/2018