

IN THE CIRCUIT COURT OF SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DISTRICT
CIVIL DIVISION VII

FILED
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2022 MAR 23 PM 3 28
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FIRST NATIONAL BANK OF
FORT SMITH

V. CASE NO: CV-2021-318

BOLDING CONSTRUCTION COMPANY, INC.;
MAX A. RODRIGUEZ a/k/a MAXIMUS TYRANNUS
AVERY, Individually;
UNITED FEDERAL CREDIT UNION; and
SRS DISTRIBUTION, INC. d/b/a SOUTHERN SHINGLES DEFENDANTS

UNITED FEDERAL CREDIT UNION

V.

MAX A. RODRIGUEZ a/k/a CROSS/COUNTER-
MAXIMUS TYRANNUS AVERY, Individually; DEFENDANTS;
SRS DISTRIBUTION, INC. THIRD-PARTY
d/b/a SOUTHERN SHINGLES; DEFENDANT
FIRST NATIONAL BANK OF FORT SMITH;
And FORWARD FINANCING, LLC.

ORDER FOR SUMMARY JUDGMENT AND FORECLOSURE

NOW, on this day, comes on for hearing the Motion for Summary Judgment of the Cross/Counter and Third Party Plaintiff, United Federal Credit Union (“UFCU”), by and through its attorneys of record against the Cross/Counter and Third-Party Defendants Max A. Rodriguez a/k/a/ Maximus Tyrannus Avery (“Avery”); SRS Distribution, Inc. d/b/a Southern Singles (“SRS”); Forward Financing, LLC (“Forward Financing”) and First National Bank of Fort Smith (“First National”) (collectively, the “Defendants” herein); and the Court, after having examined

Collins
Hattabaugh
Forsman

the pleadings and exhibits thereto, and other matters of proof and law and being well and sufficiently advised, finds and orders as follows:

1. This suit is an action, *inter alia*, for foreclosure of mortgage liens on a parcel of real property located in Sebastian County, Arkansas.
2. That the Court has jurisdiction over the Parties and of the subject matter of this action.
3. That the Servicemembers Civil Relief Act, as amended, does not apply to any of the Defendants herein.
4. In determining that Summary Judgment is proper and should be entered, the Court notes that First National Bank of Fort Smith, did file a response to UFCU's Motion for Summary Judgment. In said Response, First National Bank of Fort Smith, did not dispute the priority of UFCU's Mortgage 1 recorded at Document No. 2018-16049.
5. In determining that Summary Judgment is proper and should be entered, the Court notes that the Defendants, Avery, SRS, and Forward Financing did not file any response to UFCU's Motion for Summary Judgment. However, while the Court did not grant UFCU's Motion solely upon such failure, the Court notes and finds that the Defendants have failed to "meet proof with proof" as required by the Arkansas Rules of Civil Procedure.
6. Accordingly, after viewing all facts and proof submitted in a light most favorable to the Defendants, and after resolving all doubts and inferences against UFCU, UFCU is hereby entitled to an entry of Summary Judgment as set forth herein as a matter of law pursuant to Arkansas Rule of Civil Procedure 56.
7. On July 13, 2018, Maximus Tyrannus Avery fka Max Rodriguez (the "Borrowing Defendant" or "Avery"), for consideration received, executed, and delivered that certain

Promissory Note ("Note 1") in favor of UFCU whereby UFCU loaned the Borrowing Defendant the sum of Five Hundred Forty-Five Thousand and no/100 Dollars (\$545,000.00). A true and correct copy of Note 1 is attached to UFCU's Cross/Counterclaim and Third-Party Complaint as an Exhibit.

8. By the terms of Note 1, Avery waived presentment for payment, notice of dishonor, all rights of homestead, dower, curtesy, appraisement, and statutory redemption rights relating to the Real Property under the laws of Arkansas. Avery further agreed that he would pay all attorneys' fees, costs, and other expenses incurred by UFCU in the collection and enforcement of Note 1.

9. Under the terms of Note 1, the Borrowing Defendant was to pay UFCU the entire unpaid principal and accrued interest on demand, but if no demand was made, then the entire unpaid principal and accrued interest was due and payable on August 1, 2048.

10. That to secure the indebtedness evidenced by Note 1, Avery did duly execute, acknowledge, and deliver that certain Mortgage to UFCU on July 13, 2018 (the "Mortgage 1") on that certain real property situated in Sebastian County, Arkansas more particularly described as

**LOTS 11 AND 12 AND THE NORTH HALF OF LOT 10, BLOCK 1,
FITZGERALD, AN ADDITION TO THE CITY OF FORT SMITH,
SEBASTIAN COUNTY, ARKANSAS.**

**More commonly known as 302 and 304 South 14th Street, Fort Smith, AR
72901**

(the "Real Property").

11. Mortgage 1 was duly acknowledged and filed with the Office of the Ex-Officio Clerk and Recorder of Sebastian County, Arkansas, on July 19, 2018, in Book 2018 at Page 16049. A true and correct copy of Mortgage 1 is attached to UFCU's Cross/Counterclaim and Third-Party Complaint as an Exhibit.

12. Mortgage 1 contains a waiver by Borrowing Defendant of all rights of homestead exemption in, dower and curtesy, statutory redemption of, and right of appraisal relating to the Real Property under the laws of the State of Arkansas.

13. Mortgage 1 grants to UFCU a first priority, perfected mortgage lien with respect to the Real Property.

14. On May 21, 2019, Borrowing Defendant, for consideration received, executed, and delivered that certain Home Equity Credit Line Agreement and Truth-In-Lending Disclosure Statement ("Note 2") in favor of UFCU whereby UFCU allowed the Borrowing Defendant the sum of One Hundred Forty-One Thousand and No/100 (\$141,000.00) in credit. A true and correct copy of Note 2 is attached to UFCU's Cross/Counterclaim and Third-Party Complaint as an Exhibit.

15. Note 2 incorporates by reference, as an additional event of default, the Borrowing Defendants' failure to comply with any term, obligation, covenant, or condition contained in any agreement, between the Borrowing Defendants and UFCU.

16. By the terms of Note 2, Avery agreed that he would pay all attorneys' fees, costs and other expenses incurred by UFCU in the collection and enforcement of Note 2.

17. Under the terms of Note 2, Avery was to pay UFCU in monthly installments with the entire unpaid principal and all accrued interest and fees due and payable on May 25, 2029.

18. That to secure the indebtedness evidenced by Note 2, Avery did duly execute, acknowledge, and deliver that certain Home Equity Line Mortgage to UFCU on May 21, 2019 (the "Mortgage 2") on that certain real property situated in Sebastian County, Arkansas and more particularly described in the Mortgage and as the Real Property described herein above. A true and

correct copy of Mortgage 2 is attached to UFCU's Cross/Counterclaim and Third-Party Complaint as an Exhibit.

19. Mortgage 2 was duly acknowledged and filed with the Office of the Ex-Officio Clerk and Recorder of Sebastian County, Arkansas, on June 7, 2019, in Mortgage Book Number 2019 at Page 11899.

20. Mortgage 2 contains a waiver by Avery of all rights of homestead, dower, curtesy, appraisement, and redemption rights relating to the Real Property under the laws of Arkansas.

21. The Borrowing Defendant has defaulted under the Notes by, among other defaults, failing to make payments when due.

22. Pursuant to the terms of the Mortgage, UFCU has lawfully elected to accelerate the indebtedness due on the Notes and to foreclose on the Real Property through judicial foreclosure proceedings.

23. Pursuant to the terms of the Notes, UFCU has properly demanded all unpaid charges, interest, and principal balances under the Notes immediately due and payable.

24. After proper notice and demand by UFCU to Avery, such defaults by Avery have not been cured.

25. Pursuant to the terms of the Notes, the Borrowing Defendant is obligated to UFCU for the accruing interest and all reasonable costs incurred to collect under the Notes, including attorneys' fees, court costs and other legal expenses.

26. There is now due thereon, pursuant to Note 1 and Mortgage 1, Five Hundred Forty-One Thousand Five Hundred Forty-Three and 26/100 Dollars (\$541,543.26) in outstanding principal, Twenty-Eight Thousand Two Hundred Eighty-One and 57/100 (\$28,281.57) in accrued but unpaid interest, further daily accruing interest from January 21, 2022 at a rate of \$72.79 per

day, plus late fees in the amount of Two Thousand Two Hundred Eighty-Two and 84/100 Dollars (\$2,282.84), Eleven Thousand Five Hundred Eighty-Eight and 63/100 Dollars (\$11,588.63) in other contractual charges, including real estate taxes and insurance, plus accruing interest on said amounts and all costs associated with and related to this action and attorneys' fees.

27. There is now due thereon, pursuant to Note 2 and Mortgage 2, One Hundred Forty One Thousand Dollars (\$141,000.00) in outstanding principal, Eight Thousand One Hundred Ninety-Nine and 09/100 Dollars (\$8,199.09) in accrued but unpaid interest, further daily accruing interest from January 21, 2022 at the rate of \$18.35 per day, late fees in the amount of Three Hundred Sixty-Two and 21/100 Dollars (\$362.21), plus accruing interest on said amounts and all costs associated with and related to this action and attorneys' fees.

28. That on or about January 23, 2019, the Separate Defendant First National Bank of Fort Smith filed its Second Mortgage against the above-described Real Property, which lien was recorded with the Office of the Ex-Officio Clerk and Recorder of Sebastian County, Arkansas, on January 23, 2019 in Book No. 2019 at Page 01527, and re-recorded on March 5, 2019 in Book 2019 at Page 04491 which First National Bank of Fort Smith reduced to a Judgment herein on November 23, 2021. Said mortgage/judgment lien is subject to and inferior to Mortgage 1 of UFCU described above and should be forever barred and foreclosed.

29. That the judgment liens of SRS Distribution, LLC and Forward Financing, LLC are subject to and inferior to Mortgage 1 and Mortgage 2 of UFCU described above and should be forever barred and foreclosed.

30. The Court finds no evidence of any valid affirmative defenses or valid claims by the Defendants against UFCU that would support any credit or setoff against the judgments herein granted or award in favor of the Defendants against UFCU.

31. The right of UFCU to foreclose on the Real Property has become absolute.

32. Therefore, the Real Property shall be foreclosed pursuant to the provisions set forth below, free, and clear of any and all ownership interests, mortgages, liens, interests or claims of any kind or nature by any of the parties to this case or any other person or party whose rights attach or are perfected after UFCU's *Lis pendens* was filed in this case.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

a. That UFCU, does have and recover judgment, *in personam* against Maximus Tyrannus Avery fka Max Rodriguez, *in rem* against the Real Property, pursuant to Note 1 and Mortgage 1 in the principal amount of Five Hundred Forty-One Thousand Five Hundred Forty-Three and 26/100 Dollars (\$541,543.26) in outstanding principal, Twenty-Eight Thousand Two Hundred Eighty-One and 57/100 (\$28,281.57) in accrued but unpaid interest, further daily accruing interest from January 21, 2022 at a rate of \$72.79 per day until entry of this Decree, plus late fees in the amount of Two Thousand Two Hundred Eighty-Two and 84/100 Dollars (\$2,282.84), Eleven Thousand Five Hundred Eighty-Eight and 63/100 Dollars (\$11,588.63) in other contractual charges, including real estate taxes and insurance, title costs of Two Hundred Dollars (\$200.00), filing fees in this action of Fifty-Nine and 50/100 Dollars (\$59.50), service and other costs of Twenty-Four and 17/100 Dollars (\$24.17) plus costs and attorney's fees and for the amount of Four Thousand Six Hundred Twenty Dollars (\$4,620.00), and for any additional costs which UFCU will be expelled to expend for taxes, insurance, recording costs, title costs, and foreclosure sale costs incurred after the entry of this Order and Decree or otherwise satisfaction of said Judgment, with post-judgment interest on all of the above sums constituting this Judgment at the rate of 5.25% per annum (the "Mortgage 1 Judgment");

b. Said judgment by virtue of Mortgage 1 in favor of UFCU constitutes a first lien on the Real Property;

c. That UFCU, does have and recover judgment, *in personam* against Maximus Tyrannus Avery fka Max Rodriguez, *in rem* against the Real Property, pursuant to Note 2 and Mortgage 2 in the principal amount of One Hundred Forty One Thousand Dollars (\$141,000.00) in outstanding principal, Eight Thousand One Hundred Ninety-Nine and 09/100 Dollars (\$8,199.09) in accrued but unpaid interest, further daily accruing interest from January 21, 2022 at the rate of \$18.35 per day until entry of this Decree, late-fees in the amount of Three Hundred Sixty-Two and 21/100 Dollars (\$362.21), and for any additional costs which UFCU will be expelled to expend for taxes, insurance, recording costs, title costs, and foreclosure sale costs incurred after the entry of this Order and Decree or otherwise satisfaction of said Judgment, with post-judgment interest on all of the above sums constituting this Judgment at the rate of 5.25% per annum (the "Mortgage 2 Judgment");

d. Said judgment by virtue of Mortgage 2 in favor of UFCU constitutes a lien on the Real Property;

e. Pursuant to and under its Mortgage 1, UFCU has a first priority lien to secure the payments noted above in subsection (a), upon the Real Property and all fixtures, improvements, tangible, and intangible personal property of the Defendants located on, at, or in the Real Property. Said lien is prior and paramount to any right, title, claim, interest, equity, or estate of any party in this proceeding, including but not limited to First National Bank of Fort Smith, SRS Distribution, LLC, Forward Financing, LLC, and Maximus Tyrannus Avery fka Max A. Rodriguez and any party obtaining or claiming any interest in the Real Property and all fixtures, improvements,

tangible and intangible personal property after the date UFCU's *Lis Pendens* was filed, or anyone claiming by, through, or under them;

f. Pursuant to and under its Mortgage 2, UFCU has a priority lien above SRS Distribution, LLC and Forward Financing, LLC to secure the payments noted above, upon the Real Property and all fixtures, improvements, tangible, and intangible personal property of the Defendants located on, at, or in the Real Property. Said lien is prior and paramount to any right, title, claim, interest, equity, or estate of SRS Distribution, LLC and Forward Financing, LLC, and any party obtaining or claiming any interest in the Real Property and all fixtures, improvements, tangible, and intangible personal property after the date UFCU's *Lis Pendens* was filed, or anyone claiming by, through, or under them;

g. The above findings of fact are incorporated by reference and made a part of this Decree and Judgment;

h. That if the foregoing judgments are not paid within ten (10) days, that a Commissioner be appointed by this Court to sell the above-described Real Property and any improvements and personal property thereon at public sale to the highest bidder at the Courthouse of Sebastian County, Arkansas, Fort Smith Division;

i. The lien upon the Real Property should be and hereby is ordered foreclosed by the court; that pursuant to such foreclosure of liens, the Circuit Clerk of Sebastian County, Arkansas (or the Circuit Clerk's designee) is hereby appointed Commissioner of the Court for purposes of selling all interests of the parties herein;

j. That UFCU have execution of Writs of Garnishment and other Writs in the form as upon a Judgment at law for the same or any portion of this Judgment which may remain unpaid

after the proceeds of the sale hereinafter provided for shall have been credited to the amount that is adjudged to be due;

k. Upon such sale all rights, titles, interest, estates and equity or possibilities of dower, redemptions, courtesy, homestead or appraisement of the Defendants, or anyone claiming by, through or under them or any other person or party whose rights attach or are perfected after UFCU's *Lis pendens* was filed in this case, in the Real Property and any improvements and personal property thereon shall be foreclosed and forever barred;

l. The Commissioner will give notice of such sale ten (10) days prior to the sale by publication in some newspaper having a *bona fide* circulation in the Fort Smith District of Sebastian County, Arkansas, by at least one (1) insertion;

m. The Real Property and any improvements and personal property thereon shall be sold on cash or upon a credit of ninety (90) days; provided that if the sale is upon credit, a good and sufficient surety to secure the payment of the purchase price shall be given to the Commissioner; the payment of said purchase price to be secured by a lien upon the purchased property; provided, however, that if UFCU becomes the purchaser at the sale for an amount equal to or less than the Mortgage 1 Judgment, in lieu of giving bond as herein required, it may, upon the confirmation of the sale, credit the amount of its bid less the costs to be paid by the Defendants, and the fees allowed the Commissioner for executing this Decree, which shall be an extinguishment of the amount herein adjudged to be due to the extent of such credit, and that if UFCU's bid shall exceed the amount of the Mortgage 1 Judgment with interest and costs, UFCU shall be required to execute a bond only for the excess;

n. The costs of this action shall be paid by Defendant, Maximus Tyrannus Avery fka Max A. Rodriguez;

o. The proceeds from such shall be applied first to the cost of the sale, next to the Mortgage 1 Judgment of United Federal Credit Union, said Mortgage recorded as Document No. 2018-16049, second to the mortgage lien of First National Bank of Fort Smith recorded as Document No. 2019-01527 and No. 2019-04491, third to the subsequent Mortgage 2 lien of United Federal Credit Union recorded as Document No. 2019-11899, and the balance thereof, if any, shall be retained by the Registry of the Court, the disposition of said balance, if any, to be determined at future hearing.

p. Should any successful bidder fail to perform under the instructions of the Commissioner at the time of the sale, then that bid shall be void and set aside. The Commissioner thereafter shall find that the Real Property and the improvements and personalty thereon be awarded to the next successive high bidder, until performance is rendered;

q. Such sale of the Real Property and any improvements and personal property thereon shall constitute a permanent bar to and shall foreclose all rights of redemption, dower, courtesy, homestead and appraisement and all other right, title, claim and interest in the property which the Defendants as well as their heirs, personal representatives, successors or assigns or anyone claiming by, through or under the foregoing, may claim with respect to the Real Property or any other person or party whose rights attach or are perfected after UFCU's *Lis pendens* was filed in this case;

r. The Commissioner will report to the court all actions taken hereunder; and

s. Upon confirmation of the sale herein ordered, the Commissioner hereby appointed shall execute and deliver to the purchaser a Commissioner's Deed⁷ which shall convey all title and interest of the parties therein and to the Real Property;

t. That the purchaser(s) at the sale of the Real Property and any improvements and personal property thereon be decreed to have a right to immediate possession thereof and be given a Writ of Assistance to be executed by the Clerk of this Court to enforce delivery of possession.

u. That Maximus Tyrannus Avery fka Max A. Rodriguez is hereby commanded to prepare a schedule, verified by affidavit, of all of their respective items of property, both real and personal, including moneys, bank accounts, rights, credits, and choses in action, held by him or others for him, and specify the particular property which they claim as exempt under the provisions of the law. **Such schedules shall be filed with the clerk of this court by said Defendants within forty-five (45) days of the entry of this Judgment.**

v. This Court retains jurisdiction of this cause for further orders as may be proper to enforce the rights of the respective parties hereto as herein adjudged and the rights to such hereinafter become party to this action by proper proceeding.

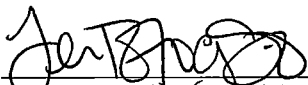
DATED this 22 day of March, 2022.

IT IS SO ORDERED.


HONORABLE DIANNA HEWITT LADD
SEBASTIAN COUNTY CIRCUIT JUDGE

PREPARED AND ENTRY REQUESTED BY:

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**DISPOSITION SHEET
STATE OF ARKANSAS
CIRCUIT COURT: CIVIL**

The civil reporting form and the information contained herein shall not be admissible as evidence in any court proceeding or replace or supplement the filing and service of pleadings, orders, or other papers as required by law or Supreme Court Rule. This form is required pursuant to Administrative Order Number 8. Instructions are available at <https://courts.arkansas.gov>.

Case ID: *CV-21-318*

1st Nat'l Bank of St Smith v Bolding Construction Co Inc

Trial Type: (J) Jury Trial (B) Bench Trial (N) Non-Trial

Was an interpreter used for this case? Yes No

For whom?

Language: Spanish Sign Language Other:

Was any party self-represented for any portion of the case? Yes No

If so, who?

Disposition Date:

Manner of Disposition (Choose one)

- (MDCO) Consolidated into case ID:
- (MDDM) Dismissed
- (MDJD) Judgment/Decree/Order
- (MDAR) Removed to arbitration
- (MDRB) Removed to bankruptcy court
- (MDRF) Removed to other federal court
- (MDTR) Transferred to another circuit court

Was a money judgment entered? Yes - Amount: Joint & Several
 No

Judgment for	Amount	Judgment against	Amount
<i>LIFCU</i>	<i>\$541,543.26</i>	<i>Maximus Avery fka Max Rodriguez</i>	<i>\$541,543.26</i>
<i>LIFCU</i>	<i>\$141,000.00</i>	<i>" " "</i>	<i>\$141,000.00</i>

CV-21-318