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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

ASHOK KAUSHAL,

Appellant-Petitioner/Cross-Respondent,

v. **No. S-1-SC-40119**

SANTA FE COMMUNITY HOUSING TRUST,

Appellee-Respondent/Cross-Petitioner.

PETITIONER-APPELLANT'S BRIEF IN CHIEF

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Oral Argument Requested

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STATEMENT OF COMPLIANCE

This brief complies with Rule 12-318(F)(3) NMRA because it uses a proportionally-spaced typeface and its body contains 6631 words. This word count was obtained with Microsoft Word for Mac version 16.80.

By: /s/ David A. Ferrance

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I. INTRODUCTION

This case began in 2014 when Plaintiff sued to foreclose on a home owned by Linora Pacheco, who had died. Plaintiff also named as a defendant the Santa Fe Community Housing Trust ("Trust"), a junior lienholder. In 2017, Plaintiff obtained a foreclosure judgment and was the successful bidder at the sale.

Mr. Kaushal ("Kaushal") and the Trust each sought to redeem. Kaushal had obtained rights from Pacheco's two surviving children; the Trust relied on its rights as a junior lienholder. In 2018, the district court denied Kaushal's petition, reasoning that he could not redeem unless he owned the rights of all of the heirs.[1] The court awarded the Property entirely to the Trust. The Court of Appeals reversed, holding that the statutory right of redemption required neither a unified interest nor title to the property being redeemed. *See Kaushal v. Santa Fe Cmty. Hous. Trust* ("*Kaushal I*"), 2021-NMCA-010, 484 P.3d 1020.

On remand, the Trust argued that *Kaushal I* had awarded the Property to Kaushal and the Trust as tenants in common. Kaushal

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[1] Though the identity of the heirs was never determined, Pacheco's heirs may include children of her deceased sons, in addition to her two living sons.

responded that ownership had not been at issue in the appeal and had not been decided, that the district court needed to decide the issue of ownership in the first instance, and that the Trust, as a junior lienholder, had no right to redeem. The district court again sided with the Trust, and the Court of Appeals again reversed, holding that the junior lienholder could not redeem. *See Kaushal v. Santa Fe Cmty. Hous. Trust* (*"Kaushal II"*), No. A-1-CA-39814 (May 16, 2023) (non-precedential). But the court went further, holding that (1) Kaushal and the non-redeeming heirs owned the Property jointly as tenants in common, (2) the heirs had a right to contribution which only Kaushal could enforce, and (3) the Trust could still enforce its foreclosed lien against the Property.

The law is not nearly so complicated as the *Kaushal II* court made it out to be. After redeeming, Kaushal took title to the property free and clear of any encumbrance from the Trust or the heirs. Kaushal asks this Court to reverse the Court of Appeals and clarify that (1) a successful redeemer takes title clear of any foreclosed liens and (2) the non-redeeming heirs have no rights in the redeemed property.

II. SUMMARY OF FACTS AND PROCEEDINGS

This is a factually simple case with a complicated procedural history. After a foreclosure and competing redemption petitions, the case has made two trips to the Court of Appeals. Each is described below.

A. After the foreclosure, both Kaushal and the Trust sought to redeem

In 2014, Plaintiff filed this lawsuit for foreclosure against the former defendant owner Linora Pacheco.[2] **[RP 1]** The complaint also named the Trust, which held a second-position lien on the house. **[*Id.*]** Pacheco died in Sept. 16, 2015, survived by her four sons. **[RP 386]**

The parties stipulated to a judgment of foreclosure, which the court entered on June 29, 2017. **[RP 280]** In it, the court awarded judgment in rem to Plaintiff in the amount of $161,768.62. **[RP 283 ¶ D]** It also awarded judgment in rem to the Trust. **[*Id.* ¶ C]** On October 24, 2017, the district court approved the special master's report and confirmed the foreclosure sale. **[RP 301]** Plaintiff was the winning bidder, having bid $153,410 (slightly less than the amount of its judgment). **[RP 302]**

Because of Pacheco's death, the personal representative of her estate and her heirs each had a statutory right to redeem. Kaushal

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[2] Bank also named Pacheco's ex-husband, who was later dismissed because he had no interest in the Property. **[RP 142-49]**

purchased the right to redeem the Property from Pacheco's two surviving sons[3] and petitioned to redeem. **[RP 307-12]** The Trust subsequently filed its own redemption petition based on its status as a junior lienholder. **[RP 317]** The district court denied Kaushal's petition to redeem and granted the Trust's petition. **[RP 573]** Kaushal appealed, starting this case's lengthy journey through New Mexico's appellate courts.

B. *Kaushal I* held that a redeemer need not own the statutory rights of all of the heirs

In his first appeal, Kaushal made three arguments: (1) that a petitioner need not possess 100% of the redemption interests to redeem; (2) that a former defendant owner's heirs need not first have received title before exercising or assigning their redemption rights; and (3) that the Trust's petition was not timely filed. The court addressed those issues in three corresponding sections, concluding that (1) under the New Mexico redemption statute, Kaushal need not possess a unified redemption interest to redeem, *Kaushal I*, 2021-NMCA-010, ¶¶ 9-17, (2) the heirs of a former defendant owner did not need to possess title to

[3] Two of Pacheco's four sons had already died: Brian Pacheco, on Sept. 16, 2016, and Richard Pacheco, on October 2, 2017. **[RP 579 ¶ 6]**

assign redemption rights, *id.* ¶¶ 18-22, and (3) the Trust and Kaushal substantially complied with the statutory requirements of redemption. *Id.* ¶¶ 23-27. Having essentially undone the district court's conclusions of law as to ownership, the court remanded for further proceedings.

Notably, the Trust had, at one point, claimed to own 25% of the redemption rights via an assignment from Claudia Urioste, one of Pacheco's deceased son's children.[4] But the district court never relied on that assertion—it had allowed the Trust to redeem based on its rights as a junior lienholder. **[RP 579 ¶ 8]** The *Kaushal I* Court, limited by the record before it, therefore analyzed the matter on that basis. As a result, its only discussion of Ms. Urioste was to note that it did not need to decide whether the Trust had any rights through her. *See id.* ¶¶ 4 & 7 n.1.

C. On remand, the Trust persuaded the district court that *Kaushal I* made the Trust a tenant in common with Kaushal

On remand, the Trust filed a one paragraph motion for presentment. **[RP 660-61]** Without authority or argument, the motion simply asked the court to find that the *Kaushal I* had ruled that Kaushal

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[4] Ms. Urioste was the daughter of Pacheco's deceased son Richard Pacheco. **[RP 579 ¶ 6]**

and the Trust were each entitled to 50% of the Property as tenants in common. **[RP 663-64]** In particular, the Trust asked the district court to find that the Trust "as a junior lienholder has redeemed the remaining 50% interest in the subject property, resulting in [Kaushal] and the Housing Trust each owning a 50% tenancy in common interest in the subject property." **[RP 664]** The Trust's motion contained no discussion of Ms. Urioste; instead, it was premised entirely on the notion that the Trust's rights as a junior lienholder entitled it to take the non-redeeming heirs' share of the Property. Kaushal responded that *Kaushal I* had not decided the issue of ownership and that the Trust, as a junior lienholder, had no right to redeem. **[RP 692-95]**

The district court expressed some difficulty in understanding *Kaushal I*. For example, the court specifically noted its confusion with language in paragraph 17 that Kaushal "holds only a fifty percent redemption interest in the property." **[6-1-21 Tr. 10:30:57]** The court believed this language suggested that the *Kaushal I* court had indicated that each party had a "fractional interest" and that both sides probably had exercised redemption rights. **[*Id.* at 10:31:35-10:32:43]** The court explained that it had previously understood a redemption interest to

mean "a right to have 100% if you comply with the statute have priority or are first in time." **[*Id.* at 10:29:36 - 10:31:28]**

Despite its reservations about the Trust's arguments, the district court granted the Trust's motion. **[RP 708]** The court stated that it understood *Kaushal I* to have held that Kaushal redeemed a 50% interest in the property and that the Trust, "*as a junior lienholder*, has redeemed the remaining 50% interest … ." **[RP 708 (emphasis added)]** It ruled that both parties were entitled to redeem and that Kaushal and the Trust held title to the Property as tenants in common. **[RP 709]** Because the court's ruling was contrary to both *Kaushal I* and the redemption statute, Kaushal again appealed.

D. ***Kaushal II*** **correctly held that the Trust cannot redeem, but erred in holding that the non-redeeming heirs became tenants in common**

The Court of Appeals again reversed the district court. First, the court held that the redemption statute did not allow a junior lienholder to redeem when a former defendant owner also redeemed. *Kaushal II*, No. A-1-CA-39814, mem. op. ¶ 7. The right to redeem, the court reasoned, was the right "'to reassert complete fee simple ownership of the land … .'" *Id.* (quoting 55 Am. Jur. 2d Mortgages § 743 (2023)). As a result, the

"district court [had] erred in determining the Trust to be a cotenant with Kaushal in possession of a fifty percent interest in the property." *Id.* ¶ 12.

The Court of Appeals did not, however, end its analysis there. Instead, it fashioned a new rule—one that neither party had asked for—that "Kaushal's possession of merely fifty percent of the redemption right means that he owns half of the redeemed property in cotenancy with the other owners, heirs, and assignees to the property whose rights to redeem he did not purchase." *Id.* ¶ 10. The court stated that Kaushal could demand that they contribute, and could seek to quiet title if they did not do so within a reasonable time. *Id.* ¶ 10. The court also stated that the newly created cotenancy remained subject to the Trust's foreclosed junior lien. *Id.* ¶ 10 & n.1.

Both Kaushal and the trust filed motions for a rehearing. Kaushal argued that *Kaushal II* was based on a factual error: that the heirs had been cotenants before the foreclosure. *Motion for Rehearing*, No. A-1-CA-39814, ¶ 4 (filed May 25, 2023). The district court had made no such finding. *Id.* ¶¶ 5-7. Kaushal also pointed out that the Trust's lien had been foreclosed and reduced to a judgment. *Id.* ¶ 9. After the court denied

motions for rehearing from both parties, Kaushal petitioned this Court for certiorari, and the Court granted certiorari as to three issues.[5]

III. ISSUES PRESENTED

1. *Whether the Court of Appeals erred by holding that redemption by an heir creates a tenancy-in-common with non-redeeming heirs who were never cotenants or owners?*

2. *Whether the Court of Appeals erred by holding that contribution can only be sought by the redeemer and that* Laura's *"reasonable time" to contribute does not begin until the redeemer demands contribution?*

3. *Whether the Court of Appeals erred by concluding that the redeemed property remained subject to junior liens that had already been foreclosed?*

IV. ARGUMENT

This case presents an opportunity to clarify the intersection between foreclosure, redemption, and contribution. *Kaushal II* contradicts existing law in three ways. First, it creates a new rule that converts the expired statutory redemption rights of heirs into property rights of cotenants. Second, it changes the law of contribution, depriving cotenants of the right to demand to contribute. Third, it concludes that a redeemed property remains subject to liens that were foreclosed earlier

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[5] The Trust filed a cross-petition for certiorari, which was also granted.

in the case. The result of the two new rules is that in some cases, a successful redeemer will still face years of litigation to quiet title to the redeemed property. The third error—the court's conclusion that the Trust's lien survived—is simply a misapplication of well-settled law that requires correction.

The law is not nearly as complicated as *Kaushal II* makes it out to be. Where, as here, a third party successfully redeems, he obtains the same title that the purchaser at auction obtained: title to the property free and clear of the foreclosed liens. Persons who had unexercised statutory redemption rights have no rights to the redeemed property, and no further action is necessary to quiet title.

A. Standard of Review

This case presents only questions of law. Because the facts are not in dispute, the application of the redemption statute to the facts is a question of law which this Court reviews de novo. *See Chase Manhattan Bank v. Candelaria*, 2004-NMSC-017, ¶ 7, 135 N.M. 527. And, while foreclosure and contribution are equitable remedies, both the effect of a foreclosure on title and the question of who may demand equitable contribution (and when) are also questions of law. *See United Props. Ltd.*

v. Walgreen Props., Inc., 2003-NMCA-140, ¶ 7, 134 N.M. 725 ("The question of whether, on a particular set of facts, the district court is permitted to exercise its equitable powers is a question of law, while the issue of how the district court uses its equitable powers to provide an appropriate remedy is reviewed only for abuse of discretion.").

B. As the successful redeemer, Kaushal received clear title to the Property

Whether a party purchases at a foreclosure sale or subsequently redeems, the result is the same: title is restored to its condition at the time of foreclosure, free and clear of the foreclosed liens. The Court of Appeals reached a different conclusion, holding that redemption created a tenancy in common with the non-redeeming heirs. The court was mistaken—a third-party redeemer obtains a clear title to the redeemed property.

1. The redemption statute allows for redemption by less than all of a decedent's heirs

The difficulties in this case arise because the redemption statute gives a right to redeem to a mortgagor's heirs. Under the statute, a foreclosed property sold at judicial sale may be redeemed by a "former defendant owner of the real estate ... whose rights were judicially determined in the foreclosure proceeding ... ." NMSA 1978, § 39-5-18(A)

(2007). By definition, the term "former defendant owner" includes the former defendant owner's "respective personal representatives, heirs, successors and assigns." *Id.* § 39-5-18(D). This provision is important because property is often foreclosed on when a borrower dies and stops paying a mortgage or, as in this case, the defendant dies during the foreclosure.

The fact that the statute gives heirs the right to redeem raises two[6] questions. First, can a property be redeemed by less than all of the heirs? And, if so, what are the rights between the heirs (and any other persons with statutory redemption rights, such as personal representatives) when less than all of them seek to redeem?

The district court recognized these questions when it originally decided which party could redeem. But it rejected the idea that a single heir could redeem a decedent's property to the exclusion of the other heirs or the estate, observing that

> [t]he problem is that one heir has no legal right to assign the whole of the interest (an undivided interest) to a third party. Such a finding would lead to an absurd result. For example,

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[6] A third question—what happens when there are valid, competing petitions to redeem with equal priority (for example by different heirs, or by an heir and a personal representative)—is not at issue in this case.

> one can easily imagine three heirs getting paid by three different assignees for the right to redeem.[7] Which contract controls? Who gets the money: the estate, the heir?

[RP 575]

Kaushal I answered the first question, holding that an assignee such as Kaushal may redeem based on assignments from less than all of the heirs. *Kaushal I*, 2021-NMCA-010, ¶ 7. Accordingly, a petitioner may redeem even if she holds less than 100% of the priority redemption rights. Here, Kaushal was the assignee of the rights of the two surviving sons. The *Kaushal I* court held that that was enough, a holding the Trust did not appeal.

2. A third-party redeemer receives clear title to the foreclosed property

Allowing less than all of the heirs to redeem raises the second question: what rights, if any, do the non-redeeming heirs (or other statutory redemption rights holders) have? After all, their *statutory* rights expired when they did not redeem within the statutory period. *See*

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[7] The court's hypothetical is not uncommon. *See, e.g.*, *Bankers Trust Co. v. Woodall*, 2006-NMCA-129, ¶ 3, 140 N.M. 567 (husband and wife each assign their right of redemption to different parties). It might also have happened in this case had the Trust obtained the purported Urioste Assignment before the redemption period had expired.

NMSA 1978, § 39-5-19. *Kaushal II* tried to answer that question by holding, at least implicitly, that a redemption brought by less than all of the heirs results in title being held by *all* of the heirs as tenants in common. No. A-1-CA-39814, mem. op. ¶ 10. As explained below, that holding contradicts this Court's cases and finds no support in the redemption statute.

What is the state of title to a property after redemption? The *Kaushal II* court stated that "redemption restores the title to its original condition," *id.* ¶ 8, an explanation which is superficially appealing but does not explain what is meant by "original condition." This Court's precedents suggest that the correct analysis is to look at (1) how title is affected by the foreclosure sale and (2) how title is affected by the redemption.

Before a property can be redeemed, it must be foreclosed on and sold. *See* § 39-5-18 (A). Here, the Property was sold at auction to Plaintiff. The purchaser did not take title as a cotenant with the decedent's heirs. Instead, it received a special master's deed. **[RP 302]**[8] *See also Specker*

[8] Although the district court approved the Special Master's Deed, the deed itself is not part of the record.

v. Riebold, 1974-NMSC-029, ¶ 4, 86 N.M. 275 (explaining that the usual New Mexico practice is for the special master to execute a deed "which is subject to defeasance if the property is redeemed … ."). By virtue of that deed, "all of the rights of the parties merged and passed to the bank as purchaser, excepting only the sole right of the mortgagor to redeem—a right which did not arise out of the mortgage or the decree, but a right extended by statute." *Plaza Nat'l Bank v. Valdez*, 1987-NMSC-105, ¶ 11, 106 N.M. 464; *see also Gunby v. Doughton*, 1924-NMSC-063, ¶ 1, 30 N.M. 144 (same).

After foreclosure, the title is free and clear of the junior liens. As the Court of Appeals has explained,

> Once a foreclosure decree is entered in favor of a senior mortgagee and the property is sold at foreclosure sale, a junior mortgagee or other lienholder who was a party to the action would not seem to retain an enforceable mortgage lien against the property even if it had not foreclosed its own lien. A purchaser at foreclosure sale would presumably receive a deed free and clear of the liens of junior lien claimants who were parties to the mortgage foreclosure action.

Mortg. Elec. Registration Sys. v. Montoya, 2008-NMCA-081, ¶ 17, 144 N.M. 264; *see also* 53 C.J.S. Liens § 53, Westlaw (database updated Aug. 2023) ("Generally, a senior lienholder can foreclose on property and obtain title free of a junior encumbrance … .").

The redeemer takes the same title that was obtained by the purchaser. As this Court has explained, a redeemer "takes the title of the purchaser at the foreclosure sale and free of subsequent judgment liens." *First State Bank of Taos v. Wheatcroft*, 1931-NMSC-047, ¶ 15, 36 N.M. 88 (citing *Gunby v. Doughton*, 1924-NMSC-063, 30 N.M. 144). Though *Wheatcroft* dealt with judgment liens, the rule applies equally here: the redeemer takes the same title as the purchaser. *Woodall* compressed this two-step process into one, stating that "[r]edemption acts to restore the title of property to its status before the sale." 2006-NMCA-129, ¶ 8. But that is simply a shorter way to say that the redeemer obtains what the purchaser obtained: title free of the foreclosed lien and the junior liens, as it was after the judgment of foreclosure was entered.

Applying these principles to this case, Plaintiff, as the purchaser at the sale, obtained title in fee simple to the Property, subject only to the statutory right of redemption. That title was free from the mortgage lien and the Trust's lien, both of which had been foreclosed. **[RP 283, XBIC 1]** Kaushal, as the redeemer, received the same title that Plaintiff had obtained as purchaser. The Court of Appeals held differently, concluding that the redemption created a tenancy in common with the non-

redeeming heirs. As explained next, that erroneous conclusion was based on a misapprehension of the law.

3. A redemption by one heir does not create a cotenancy between the redeemer and the non-redeeming heirs

The Court of Appeals concluded that Kaushal owned "half of the redeemed property in cotenancy with the other owners, heirs, and assignees to the property whose rights to redeem he did not purchase." *Kaushal II*, No. A-1-CA-39814, mem. op. ¶ 10. It based this conclusion on *Banker's Trust Co. v. Woodall*, which had held that "one cotenant's redemption inures to the benefit of the other cotenants." 2006-NMCA-129, ¶ 9, 140 N.M. 567. But it failed to account for the fact that in *Woodall*, unlike this case, the two competing redeemers had been cotenants before the foreclosure.

In *Woodall*, Mitchell and Robbin Woodall owned a property as tenants in common. *See id.* ¶ 9. After the property was foreclosed and sold, each assigned their right of redemption to a different assignee, and each assignee filed a petition to redeem. *Id.* ¶ 1. At the parties' suggestion, the district court ruled that each party should contribute equally to the redemption. *See id.* ¶ 4.

Tierra Casa, the assignee who had been first to file a petition to redeem, appealed, seeking the entire property for itself since it had won the race to the courthouse.[9] The court rejected its attempt. In New Mexico, a cotenancy is not terminated until the time for redemption has passed. *See id.* ¶ 8. As a result, "a redemption by one cotenant would inure to the benefit of the other cotenant, triggering the latter's right of contribution." *Id.* ¶ 9. As the court explained, "Tierra Casa's redemption inured to the benefit of the other cotenants, namely the Welches. Tierra Casa essentially redeemed the property for the benefit of other cotenants as well, and no additional redemption is necessary." *Id.* ¶ 16. This result found support in a line of cases where one cotenant had tried to take title from the other cotenants by redeeming property sold at a tax auction. *See id.* ¶¶ 8-9; *see also Chavez v. Chavez*, 1952-NMSC-050, ¶ 8, 56 N.M. 393 (wife who held as joint tenant with husband cannot take sole ownership by redeeming); *Gurule v. De Chacon*, 1956-NMSC-108, ¶¶ 2-3, 61 N.M. 488 (three sisters inherited as tenants in common); *Smith v. Borradaile*,

[9] At the time, the redemption statute did not prioritize different classes of redeemers, and the first party to successfully redeem took everything, subject only to the equitable right of contribution. *See Woodall*, 2006-NMCA-129, ¶ 15.

1922-NMSC-071, ¶ 29, 30 N.M. 62 ("The general proposition, which the cases from our state support, is that the tenant in common cannot acquire an outstanding tax title and maintain it to the exclusion of his cotenants, as the transaction amounts only to the payment of taxes for which the payor is entitled to contribution from his fellow tenants."); *Matlock v. Mize*, 1950-NMSC-065, ¶ 7, 55 N.M. 218 (redemption at tax sale by life tenant inured to the benefit of remaindermen).

Following this logic, the *Kaushal II* court reasoned that Kaushal's redemption inured to the benefit of the non-redeeming heirs. But that reasoning was flawed, because, unlike the married couple in *Woodall*, and unlike the cotenants in the tax cases *Woodall* relied on, the heirs were never cotenants here. Here, the auction winner took the same fee simple title that the decedent had, and Kaushal, by redeeming, obtained that same title as well. There were no cotenants that Kaushal's redemption could inure to the benefit of. Thus, the only remaining question is whether the Trust or the heirs have a right to contribute.

C. Neither the Trust nor the non-redeeming heirs have a right to contribute

In an effort to stave off a third appeal, Kaushal argued to the Court of Appeals that the Trust also had no right to contribute. After concluding

that Kaushal and the non-redeeming heirs were tenants in common, the court rejected that argument. In the process, it contradicted its own prior case law and unnecessarily restricted the law of equitable contribution.

1. In *Kaushal II*, to avoid additional appeals, Kaushal made a limited argument that the Trust had no right to contribute

The district court has yet to determine whether any of the heirs in this case has a right to contribute—it has not even determined who the heirs are. In the second appeal, however, Kaushal argued the *Trust* did not have a right to contribute. **[BIC[10] 26-29; RB 9; 5-25-23 Mot. ¶¶ 4-7]** He raised this argument because he believed it was likely to arise on remand, and he wished to avoid a third appeal. **[BIC 26]**

The court rejected Kaushal's argument as premature. *Kaushal II*, No. A-1-CA-39814, mem. op. ¶ 11. Nevertheless, it went on to state that Kaushal would not have clear title until he demanded contribution from the non-redeeming heirs and either obtained it or enforced his right to contribution in further proceedings. *See id.* ¶ 12. In addition, it stated that only Kaushal could seek contribution (the non-redeeming heirs could not seek to contribute) and, because he had not done so, the court could

[10] Citations to the briefing refer to the briefing to the Court of Appeals in *Kaushal II*.

not conclude that the non-redeeming heirs had failed to seek to contribute within a reasonable time. *See id.* ¶ 11.

The issue should not arise, because, as the Court of Appeals had held in *Kaushal v. TAL Realty, LLC,* No. A-1-CA-39459, mem. op. (N.M. Ct. App. May 31, 2022) (non-precedential), the non-redeeming heirs have no right to contribute. But the court's view of contribution is also incorrect because if the non-redeeming heirs *had* been cotenants, all of them would have had the option to enforce their right to contribute.

2. The court erred in concluding that the non-redeeming heirs had a right to contribute

As far as can be discerned from this record, the only right the heirs ever had to the Property was the statutory right of redemption. The record does not show that the heirs ever held title to the Property. Because the non-redeeming heirs had no property rights, their right to contribute (if any) could only have come from the redemption statute.

The redemption statute does not give rise to a right to contribute between non-redeeming heirs, assignees, or personal representatives. The statute itself is silent both as to whether non-redeeming heirs (1) become cotenants or (2) have a right to contribute, and the courts are without power to add to it. *See, e.g., State ex rel. Helman v. Gallegos,*

1994-NMSC-023, ¶ 20, 117 N.M. 346 (affirming that courts may add words to a statute only "if it is necessary to do so to carry out the legislative intent or to express the clearly manifested meaning of the statute" (internal quotation marks and citation omitted)); *State v. Greenwood*, 2012-NMCA-017, ¶ 38, 271 P.3d 753 ("The Legislature knows how to include language in a statute if it so desires." (alteration, internal quotation marks, and citation omitted)); *Union Esperanza Mining Co. v. Shandon Mining Co.*, 1913-NMSC-059, ¶ 17, 18 N.M. 153 (explaining that redemption "is a statutory right not to be enlarged by judicial interpretation").

Adding new substance to the redemption statute would also go against prior cases. This Court has explained that statutory redemption is "a narrow right that affords a debtor … one last opportunity to reclaim his property." *Cortez v. Cortez*, 2009-NMSC-008, ¶ 32, 145 N.M. 642. New Mexico courts "routinely require debtors to comply strictly with the terms set forth by the statute as a condition of redemption." *Id.* And the courts "strictly enforce statutory redemption periods … ." *Id.* ¶ 33. Strict enforcement means that a non-redeeming party *loses* its rights if not

timely exercised, not that it *gains* valuable property rights by doing nothing.

In addition, a rule that turns non-redeeming redemption rights holders into cotenants would generate absurd results. The non-redeeming heirs are not the only parties who may have statutory redemption rights. The former owner, for example, may have assigned those rights, as was the case in *Woodall*. *See* 2006-NMCA-129, ¶ 3 (husband and wife each assigned their rights of redemption to different parties). Similarly, if there is a personal representative, that person has statutory rights as well. *See* § 39-5-18(D). Any of these parties may assign their rights, and the assignees may elect not to timely redeem. Yet if *Kaushal II* is correct, then *all* of the possible non-redeeming rights holders should become cotenants, not just the non-redeeming heirs. This would be true even if the decedent had devised the property to someone other than the heirs—the devisees would take nothing, and the heirs and PR would be cotenants. Interpreting the redemption statute to make cotenants out of some or all of the rights holders leads to endless complications which the legislature could not have intended. Such an interpretation should be avoided. *See, e.g.*, *Albuquerque Commons P'ship*

v. City Council, 2011-NMSC-002, ¶ 7, 149 N.M. 308 (explaining that courts will only add language to a statute to *prevent* absurdity).

The holding from *TAL Realty* avoids this result. Under *TAL Realty*, holders of statutory redemption rights who elect not to redeem lose all rights to the foreclosed property. No. A-1-CA-39459, mem. op. ¶ 4. They cannot redeem and they cannot contribute. *Id.* This is consistent with property law, which gives clean title to the purchaser and the redeemer. *See supra* Part IV.B.2.

The plain language of the redemption statute does not make non-redeeming rights holders into cotenants, nor does it give them a right to contribute. Rather, their rights simply expire. To hold otherwise would create absurd results not intended by the legislature and would invite the sort of protracted satellite litigation that the *Kaushal II* court suggested would be necessary on remand. Whether viewed through the lens of property law or the redemption statute, the Court of Appeal's holding that the non-redeeming heirs became cotenants was error.

3. Even if the non-redeeming heirs had a right to contribute, it was extinguished because they did not exercise it within a reasonable time

Kaushal's argument to the Court of Appeals was simply that if the Trust had a right to contribute, it lost that right by failing to exercise it

within a reasonable time. Though reasonableness is a fact question, *see Leyba v. Whitley*, 1995-NMSC-066, ¶ 28, 420 N.M. 768, Kaushal contended that no fact finder could conclude that it was reasonable for the Trust, which has been a party to this case since 2014, to wait years without attempting to exercise its right to contribute. **[BIC 28]** *See also Rodriguez v. Del Sol Shopping Ctr. Assoc.*, 2014-NMSC-014, ¶ 24, 326 P.3d 465 (courts may decide fact issues as a matter of law if a reasonable fact finder could only make the finding in one way). The Court of Appeals sidestepped this issue by concluding that only Kaushal could ask for contribution and that, until he did so, the reasonable time for contribution did not begin to run. *See Kaushal II*, No. A-1-CA-39814, mem. op. ¶ 11 (stating that "[c]ontribution is not something that must be offered; it is something that must be requested by the purchasing cotenant.").

The right to contribute must be exercised within a reasonable time. In *Laura v. Christian*, this Court explained:

> It is also a general rule that the redemption or prevention from loss by one cotenant of common property by payment of an obligation or the purchase of an outstanding interest, which should be discharged or purchased proportionately by cotenants, inures to the benefit of the cotenants at their option, subject to the right of contribution.

> However, the option *must be exercised within a reasonable time*, and what is reasonable depends upon the circumstances in each case.

Laura v. Christian, 1975-NMSC-037, ¶ 8, 88 N.M. 127 (emphasis added). It is clear from *Laura* that (1) there is a reasonableness requirement and (2) what is reasonable is a fact question.

"One of the purposes of the redemption statute is to give the property owner, or certain others listed under the redemption statute, a reasonable opportunity to redeem the property." *Chase Manhattan*, 2004-NMSC-017, ¶ 9. The statute defines that reasonable time to redeem as between one and nine months.[11] *See* NMSA 1978, § 39-5-19. The Court of Appeals has held that there is no right to contribute after the reasonable time set by the statutory time period has elapsed. *See TAL Realty,* No. A-1-CA-39459, mem. op. ¶ 4 ("Once his right to redeem the foreclosed property in this case was terminated by the statutory deadline, Petitioner had no right to participate in that redemption, whether directly or by way of contribution."). In *TAL Realty*, the roles were reversed from this case. TAL had timely redeemed; Kaushal had not, but sought to contribute

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[11] Usually, as in this case, a mortgage will shorten the redemption period to the one month minimum.

shortly after the redemption period ended. The court held that that right ended when the redemption period had passed.

In this case, however, the Court of Appeals concluded differently, holding that the expiration of the statutory period made the non-redeeming heirs cotenants from whom Kaushal was required to demand contribution. That holding was error. The correct result is the rule from *TAL Realty*: that the non-redeeming heirs (or other redemption rights holders) have no right to participate if they fail to act before the statutory time limit passes.

4. In cases where a right to contribute exists, it may be demanded by any cotenant

Because there was no cotenancy here, the Court may choose not to address the matter of contribution. But if the Court does address the matter, it should hold that when there is a right of contribution, it may be enforced by any cotenant. As a result, the "reasonable time" to demand contribution began at the redemption, not when Kaushal first demands contribution from the non-redeeming heirs.

The Court of Appeals reached the opposite result, stating that contribution "must be requested by the purchasing cotenant." *Kaushal II*, A-1-CA-39814, mem. op. ¶ 11. It appears to have reached this result

by reference to a legal dictionary and to *Torrez v. Brady*, 1932-NMSC-080, ¶ 25, 37 N.M. 105. *See id.* ¶ 11.Both of these sources were focused on the case where a redeemer expends funds and wishes to recoup them from cotenants. That is not the case here.

Here, if there were cotenants, and if they believed that the Property had gained value since the redemption, the non-redeeming cotenants might wish to contribute in order to take part of the increased value. Other courts have recognized this side to contribution. For example, the Rhode Island Supreme Court explained that the "doctrine of equitable contribution is applied to prevent one of two, or more, joint obligors being required to pay more than his [or her] share of a common burden, *or to prevent one obligor from being unjustly benefited or enriched at the expense of another*." *Mellor v. O'Connor*, 712 A.2d 375, 380 (R.I. 1998) (quoting *Kerney v. Kerney*, 386 A.2d 1100, 1103 (R.I. 1978)) (emphasis added). In the latter case, the redeemer would not demand to share profits with cotenants; the cotenants would need to demand contribution from the redeemer. That would be consistent with this Court's reasoning in *Laura*, which stated that the tax redemption inured "to the benefit of

the cotenants *at their option*." 1975-NMSC-037, ¶ 8 (emphasis added). But under *Kaushal II*, it would be impossible.

This would only be relevant to this case if there were any cotenants. Kaushal only argued it because the Trust had claimed to be a cotenant, and it remains relevant if this Court concludes a cotenancy exists. In that case, the Court should also hold that cotenants may demand to contribute, and that they must do so within a reasonable time.

D. The redeemed property is not subject to any of the foreclosed liens

The *Kaushal II* court erred when it stated that the redeemed property was subject to the junior lienholder's liens. *Kaushal II*, A-1-CA-39814, mem. op. ¶ 10 & n.1. This dicta is contrary to well established law. *See Sun Country Sav. Bank v. McDowell*, 1989-NMSC-043, ¶ 23, 108 N.M. 528; *see also supra* Part IV.B.2.

Importantly, the Trust was a defendant, and its junior lien was foreclosed. **[RP 283 (giving the Trust an in rem judgment on its lien; XBIC 1 ("A stipulated default judgment was entered foreclosing ... the Trust's second mortgage.")]** Had it not been a defendant, its lien would have survived. *See Springer Corp. v. Kirkeby-Natus*, 1969-NMSC-045, ¶ 3, 80 N.M. 206; *see also Western Bank v. Fluid*

Assets Dev. Corp., 1991-NMSC-020, ¶ 13, 111 N.M. 458 ("It is a black letter proposition that a foreclosure sale is effective only against those lienholders who are given notice."). Accordingly, the purchaser did not take title subject to the Trust's lien, and neither did Kaushal. *See Turner v. Les File Drywall, Inc.*, 1994-NMSC-010, ¶ 12, 117 N.M. 7 (redeemer takes title free and clear of all liens junior to the mortgage).

V. CONCLUSION

The Court of Appeals erred by treating non-redeeming heirs with expired statutory redemption rights as cotenants with enforceable property rights. In the process, it created an uncertain new framework that will add years of litigation to many redemption cases. This Court should reverse the Court of Appeals, adopt the rule from *TAL Realty*, and remand to the district court with instructions that the Property has been redeemed by Kaushal, who owns it in fee simple, free of any liens.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 28, 2023, a true copy of this Brief in Chief was delivered via the Court's electronic filing and service system to opposing counsel of record.

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