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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GEORGE EDWARD KENNEDY, Defendant-Below, Appellant, v. DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-AR3 TRUST, ASSIGNEE OF WASHINGTON MUTUAL BANK, F.A., Plaintiff-Below, Appellee.	No. 285,2018 Appeal from the Court of Chancery of the State of Delaware C.A. No. 10361-MG (VCS)

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal from an action seeking the equitable enforcement of an unsealed mortgage ("Mortgage") and note ("Note") on a property ("Property") located in Bethany Beach, Delaware. The Property is a beach house that has been in the possession of Defendant-Below Appellant, George Kennedy ("Kennedy"), since 2011, and has been subject to foreclosure proceedings since 2009. The most recent appraisal, conducted in May 2016, valued the Property at $2,150,000. (A271-306). Although Kennedy knew that the Property was in foreclosure at the time he took possession of it, he has failed to satisfy the Mortgage or Note; indeed, Kennedy paid at most $10,500 for his interest in the Property. The Court of Chancery entered a final order in favor of the Bank recognizing the Bank's equitable lien on the Property. (A438). Kennedy has appealed that order in a vain attempt to wrongfully retain control of the Property. This is the Bank's Answering Brief.

I. THE SUPERIOR COURT FORECLOSURE PROCEEDINGS COMMENCE IN 2009

This case has a long procedural history. Plaintiff-Below Appellee, Deutsche Bank National Trust Company, as Trustee for WaMu Mortgage Pass-Through Certificates Series 2006-AR3 Trust, Assignee of Washington Mutual Bank, F.A. ("Appellee" or the "Bank") filed a mortgage foreclosure complaint on April 30, 2009 in the Superior Court against Helene Hines and Jeffrey Hines, who were, at

that time, owners of the Property. *See* B0107, September 17, 2015 Master's Report (the "2015 Master's Report"). A default judgment was entered in the Superior Court foreclosure action against both Hines parties on October 6, 2009. (*Id.* at B0109). Several sheriff's sales were scheduled but were ultimately stayed. *Id.*

After the default judgment had been entered, on October 14, 2011, Helene conveyed the Property to an entity known as 302 S. Ocean Drive, LLC ("302 LLC"). *Id.* At some point thereafter, Kennedy obtained an interest in the 302 LLC. *Id.* Kennedy then moved to intervene in the Superior Court proceeding, but his motion was denied. *Id.* Ultimately, it was discovered that the mortgage was not under seal, which led to the case being transferred to and prosecuted in the Court of Chancery. *Id.* The Superior Court approved Appellee's election to transfer the matter to the Court of Chancery on January 2, 2015, and entered an order to that effect on January 5, also vacating the default judgment. (*Id.* at B0114-15).

II. THE COURT OF CHANCERY PROCEEDINGS COMMENCE IN 2014

The action underlying this appeal ("Action") was filed in the Court of Chancery on November 17, 2014. (A001-48). A default judgment was entered against both Helene Hines and Jeffrey Hines on May 14, 2015 in the principal amount of $1,718,748.18 plus fees and interest. (B0056-59).

In the first half of 2015, Appellee filed a motion for summary judgment (B0001) and Kennedy filed a motion to dismiss (B0060). In his motion to dismiss, Kennedy asserted: (i) laches; (ii) unclean hands; (iii) that the complaint was improperly transferred; (iv) that the Bank violated the automatic stay imposed by his bankruptcy; and (v) that equity will not enforce a lien against a successor to a mortgagor. (*Id.* at B0068-69). This Court denied Kennedy's motion, holding:

> The only ground asserted by Kennedy that falls within the scope of Rule 12(b)(6) is the last one, i.e., [Kennedy's argument] that a court of equity will not impress an equitable lien against a successor to the original mortgagor. The other grounds raised by Kennedy are simply defenses to the complaint that were not pled – or not effectively pled as such – in Kennedy's original *pro se* answer.

(*Id.* at B0070-71).

The 2015 Master's Report also denied Appellee's motion for summary judgment. (B0107). The Court stated, "Whether Kennedy would be unjustly enriched if the Court were to dismiss Appellee's *in rem* foreclosure action is a material fact that cannot be determined without a thorough investigation into the circumstances surrounding the recent conveyances of the Property." (B0119).

Kennedy moved for summary judgment on June 9, 2016. (B0133). The Court denied the motion by a Master's Report dated November 30, 2016, which became final on December 21, 2016. (B0525, 0554, 0564). The Court again noted, "there remains a genuine issue of material fact whether Kennedy would be

unjustly enriched if the mortgage is not enforced as an equitable lien on the Property." (B0533).

III. THE BANK'S DISCOVERY EFFORTS

The Bank attempted to proceed with discovery. Kennedy thwarted the Bank's discovery efforts, and in response, the Bank filed three discovery motions:

(i) Motion to Compel Discovery Responses (B0263);

(ii) Motion to Compel Kennedy To Attend His Deposition (B0535); and

(iii) Motion for Sanctions (B0574).

The Court granted the two motions to compel and awarded attorneys' fees in connection therewith. (B0551, 0565, 0600). The attorney's fees awarded to the Bank by the Court of Chancery have not been paid.

On January 24, 2017, the Court issued the Master's Final Report on the Motion to Compel. (B0565). In that report, the Court warned, "Kennedy's failure to comply with this schedule may result in further sanctions, including further fee shifting and entry of a default judgment against Kennedy." *Id.* This observation by the Court is one of many indications of Kennedy's bad faith litigation tactics to delay and obstruct these proceedings.

On January 30, 2017, Kennedy's wife filed a Request to Reinstate Case in the United States Bankruptcy Court ("Bankruptcy Court"). (B0605). A hearing on the Request was held on March 8, 2017. (*See* A210). At the hearing, the U.S.

Trustee asked Kennedy if he filed the bankruptcy to avoid his deposition. (A226-27 at 17:3-18:16). Kennedy responded, "in part." *Id.* The Bankruptcy Court found that "the case itself, when it was filed in December, was not filed in good faith. It was to stop, to further delay the foreclosure proceedings with respect to this property over in Delaware, and to stop discovery related to the foreclosure." (A259 at 50:19-24). The Bankruptcy Court denied the Request. (A259-62 at 50:14-53:4).

On April 3, 2017, the Court held a scheduling teleconference. During the teleconference, the Court noted, "under the circumstances, one could argue that a motion for default judgment should be granted." (A082 at 9:10-12). The Court requested that Appellee submit an appropriate motion, and indicated that the Court would entertain a motion for default judgment. *Id.*

On April 6, 2018, Kennedy appeared for his deposition. (*See* A146-73). In advance of his deposition, Kennedy produced certain profit and loss statements from his realtor, Sandcastle Realty. During the deposition, Kennedy testified that he never entered into a written agreement with the original lender regarding any modification or assumption of the Mortgage or Note. (A171, Kennedy dep. 196:3-18).

IV. THE COURT OF CHANCERY GRANTS THE BANK'S MOTION FOR SUMMARY JUDGMENT RECOGNIZING THE BANK'S EQUITABLE LIEN ON THE PROPERTY

On April 17, 2017, Appellee filed the Motion for Default, Or In The Alternative, Summary Judgment ("Dispositive Motion"). (A049-71). Briefing on that motion was completed on August 29, 2017. (*See* A012-13).

On November 21, 2017, Master Griffin issued the final report on the Dispositive Motion ("Final Report"). (A348-67). Kennedy took exceptions to the Final Report, which were briefed by the parties. (A368-411).

On April 4, 2018, the Court entered an Order Overruling Objections and Affirming Master's Report. (A412-415). Kennedy moved for reargument and the Bank opposed such motion. (A416-421). On April 24, 2018, the Court denied the motion for reargument. (A435-37).

On April 27, 2018, the Court entered an Order Granting Plaintiff's Motion for Default Judgment or, In the Alternative, for Summary Judgment ("Final Order"). (A438-40). Among other things, the Final Order states that the Bank has an equitable lien on the Property. *Id.* It also states that "Defendants and all other parties who may have an interest in the subject property are hereby enjoined from taking any action inconsistent with Plaintiff's rights as determined herein. . . ." *Id.* at ¶ 5.

On May 17, 2018, the Bank attempted to schedule a sheriff's sale of the Property through the filing of a Praecipe for issuance of a Writ of Levari Facias. After seeking clarification from the Clerk's office, the Register in Chancery explained that if she accepted the filing of the Praecipe, she could not prepare or execute the writ until the appeal deadline passed. On May 30, 2018, Kennedy filed a Notice of Appeal to the Supreme Court of Delaware. (B0731). Notwithstanding the entry of the Final Order, Kennedy has refused to vacate the Property and, in fact, has listed the Property for rent through his realtor, Sandcastle Realty. According to the Listing, the Property is being rented for $1,900 to $9,000. On July 20, 2018, the Bank filed a Motion to Enforce Judgment in the Court of Chancery seeking an order that, among other things, will permit the Bank to proceed with foreclosure of the Property. (B0734).

SUMMARY OF ARGUMENT

1. Denied. The trial court accurately determined that the Bank is assignee of the Mortgage and Note and, accordingly, has standing to bring its foreclosure action.

2. Denied. The trial court found that the Bank holds an equitable lien on the Property and entered an order recognizing the Bank's lien. The lien is enforceable to the same extent as the Mortgage and Note, as is explicitly noted on the effectuating order.

3. Denied. The action on appeal from the Court of Chancery has been pending since 2014. The final order on appeal was entered in 2018. Kennedy's contention that *four years* is inadequate time to conduct discovery is so unfounded that it is unworthy of this venerable Court's consideration. Moreover, additional time for discovery would not cure Kennedy's complaints because he testified that he never entered into a written agreement with the original lender to modify the Mortgage and/or Note.

STATEMENT OF FACTS

I. KENNEDY PURCHASED THE PROPERTY FOR, AT MOST, $10,500

On December 30, 2005, Helene ("Helene") and Jeffrey ("Jeffrey") Hines borrowed $1,598,977 from Washington Mutual Bank, F.A., and executed an adjustable rate note and a mortgage using as security the Property located at 302 South Ocean Drive, South Bethany Beach, Delaware 19930. *See* (B0108; A100-41). On April 15, 2009, the Bank was assigned its right in the Mortgage and Note. *See* (B0108; A143-44). On June 24, 2009, several months after the Bank brought the foreclosure action in Superior Court, Helene became the sole owner of the Property. (B0108-09).

In mid-August 2011, a real estate agent, Doug Appling from Sandcastle Realty, showed the Property to Kennedy. (A146-73, Excerpts of Transcript of Deposition of George Edward Kennedy ("Kennedy dep.") 78:15-79:22 (Apr. 6, 2017)). Appling represented to Kennedy that the Property was in foreclosure. (A158, Kennedy dep. 79:14-18). Kennedy resolved to pursue the purchase of the Property. *See id.*

Kennedy claims to have entered into an oral agreement with the Bank's predecessor regarding the purchase of the Property and the satisfaction of the Mortgage and Note. Kennedy describes the alleged oral agreement as such:

> I would purchase the property and fully assume the delinquent mortgage – I knew that it was in foreclosure,

> never a question of that – and that I would assume full responsibility and pay that modified – have that modified so the property could support it and pay the full cost so that the bank would not lose any money.

(A149, Kennedy dep. 34:4-12).

There was no such agreement. Kennedy admitted during his deposition (A171, Kennedy dep. 196:3-18) and in Appellant's Opening Brief ("Opening Brief" cited "O.B." at 5-7) that the alleged agreement never was committed to writing. Indeed, Kennedy admits that the Bank's predecessor informed him that there would be no modification of the Mortgage or Note *before* Kennedy purchased the Property. (O.B. 5-7). Kennedy and the Bank's predecessor never entered into any agreement relating to the Property; Kennedy purchased the Property from Helene. *Id.*

In the Opening Brief, Kennedy seems to suggest that Kennedy purchased the Property from the Bank's predecessor. (O.B. 4). As the evidence demonstrates, Kennedy purchased the Property from Helene Hines, not from the Bank. (A175-84). On or about September 9, 2011, Kennedy and Helene entered into an Agreement of Sale for Delaware Residential Property ("Sale Agreement"). (A175-84). The Sale Agreement lists the purchase price of the Property as $1,910,865. *Id.* Kennedy paid a deposit of $500 to Helene. *Id.*; *see also* A156, Kennedy dep. 72:2-7. The Bank's predecessor was not a party to the Sale Agreement. (A175-84).

On October 14, 2011, Helene conveyed the Property to the 302 LLC. (A186-87). Again, the Bank was not a party to that agreement. *Id.* That day, Kennedy obtained a twenty percent interest in the 302 LLC. Kennedy dep. (A151, Kennedy dep. 39:1-6; A153, Kennedy dep. 41:13-19). Kennedy thereafter obtained the outstanding interest in the 302 LLC. Kennedy dep. (A154-55, Kennedy dep. 42:24-43:2). Kennedy claims to have paid a total of approximately $10,000 for his interest in the 302 LLC, though he has not produced any documents reflecting the same. (A156, Kennedy dep. 72:10-15). The consideration that Kennedy paid to acquire his interest in the Property (and the 302 LLC) totaled, at most, approximately $10,500 cash and his agreement to assume the outstanding debt under the Note and Mortgage on the Property. (A160, Kennedy dep. 142:5-11).

II. THE PROPERTY GENERATES INCOME FOR KENNEDY

Kennedy has been using the Property as an income-producing rental property since 2011. Although he claimed that the Property was in "tear-down" condition when he purchased it, Kennedy conceded at his deposition that the Property was being rented at the time of his purchase. (A159, Kennedy dep. 89:8-13).

Kennedy's yearly income from renting the Property has been over $100,000 per year since 2011 ($433,886.50 total, not including 2016). (*See* B0339-40).

Kennedy asserts that he has made several improvements to the Property in the time he has owned it. (O.B. 7). After three motions to compel, Kennedy finally produced profit and loss statements, without supporting documentation, prepared by Sandcastle Realty. (A202-08). Notably, the profit and loss statements include legal expenses incurred in connection with the dispute at issue in this Action. (*See id.*; A162-63, Kennedy dep. 161:16-162:2; A167, 166:3-4). The Court of Chancery found that Kennedy earned six figures of net rental income from 2011 to 2016. (A362).

Kennedy expected that the Property would generate between $125,000 and $130,000 in rental income in 2017. (A168, Kennedy dep. 182:4-7). The Property currently rents for as much as $9,000 per week, and is actively being advertised on vacation rental websites. (B0742; *see also* A161, Kennedy dep. at 156:4-7).

III. KENNEDY'S DISCOVERY TACTICS IMPROPERLY DELAYED THE ACTION

A. Kennedy Did Not Produce Documents Or Written Discovery In Violation of The Court of Chancery's Order

Kennedy complains that he did not have an adequate opportunity to engage in discovery in the Action. That contention is wholly without merit. Indeed, Kennedy attempted to thwart the Bank's discovery efforts and necessitated the filing of three discovery motions. Moreover, in the four years that the Action was

pending before the Court of Chancery, Kennedy never served discovery requests upon the Bank.

On March 25, 2016, the Bank served upon Kennedy Requests for Production, Interrogatories, and Requests for Admissions. (B0120). At the request of Kennedy's then-counsel, the Bank agreed to extend Kennedy's time to respond to the Discovery Requests until May 19, 2016. (*See, e.g.*, B0125). On May 27, 2016, Kennedy's counsel moved to withdraw. (B0122). On June 1, 2016, the Court informed Kennedy's counsel that the discovery responses must be served upon the Bank before the Court would grant the motion to withdraw. (B0127).

On June 4, 2016, Kennedy belatedly served his discovery responses. (*See* B0128, 0129, 0130). The motion to withdraw was granted on June 7, 2016. (B0131). On June 23, 2016, Appellee sent a letter to Appellant describing some of the deficiencies in Defendant's Objections and Responses and requesting supplemental discovery responses within ten days. (B0363). Kennedy did not respond.

The Bank subsequently filed its Motion to Compel Discovery Responses. (B0263). On January 24, 2017, the Master's Final Report on the Motion to Compel recommended that the Court grant the motion and award the Bank its fees. (B0565). No exceptions were taken and the report became final on February 8, 2017. (B0600).

The order required Kennedy to complete his document production and to supplement his discovery responses within thirty days of the entry of the order. *Id.* Kennedy failed to comply with that order.

B. Kennedy Delayed Appearing For His Deposition In Violation of The Court of Chancery's Order

Kennedy repeatedly refused to appear for his deposition. Kennedy's deposition originally was scheduled for September 28, 2016. (B0516). Because Kennedy had not produced sufficient discovery responses, and because the motion to compel such responses was pending, the Bank suggested that the parties delay the deposition. Kennedy agreed to appear for his deposition on November 10, 2016. Kennedy did not appear for his deposition on November 10, 2016. Twenty minutes after the deposition was to have commenced, counsel for the Bank contacted Kennedy by telephone, and Kennedy represented that he had forgotten that his deposition was to be held that day.

The deposition was rescheduled for November 18, 2016. (B0519). On November 15, 2016, Kennedy informed counsel for the Bank that he would have to conclude the deposition at 1:30 p.m., leaving the Bank only three hours to conduct the deposition. The deposition was rescheduled for November 30, 2016. (B0522). On November 28, 2016, Kennedy informed counsel that he could not attend his November 30 deposition due to a doctor's appointment. Kennedy did not provide alternative dates for his deposition.

On December 1, 2016, the Bank filed a Motion to Compel Defendant George Kennedy to Attend His Deposition. (B0535). On December 21, 2016, the Court entered the Order granting the Motion to Compel Deposition Attendance. (B0551). The Order required Kennedy to appear for his deposition upon 10 days' notice by the Bank. *Id.* The order also awarded fees and costs to the Bank. *Id.*

The Bank continued to attempt to schedule Kennedy's deposition. Kennedy reportedly was admitted to the hospital on or about December 17, 2016 and released on or about January 21, 2017. (B0605).

On February 10, 2017, after Kennedy had returned home from the hospital, counsel for the Bank spoke with Kennedy regarding his deposition. Kennedy would not provide a date to appear for his deposition, apparently in the hope that the Bankruptcy Court would reinstate his bankruptcy petition and stay this Action. (B0601).

C. Kennedy Filed A Bankruptcy Petition In Bad Faith To Further Delay Resolution of This Action

On January 30, 2017, Kennedy's wife filed a Request to Reinstate Case ("Request") in the United States Bankruptcy Court ("Bankruptcy Court"). (B0605). A hearing on the Request was held on March 8, 2017. At the hearing, the US Trustee asked Kennedy if he filed the bankruptcy to avoid his deposition. (A226-27 at 17:3-18:16). Kennedy responded, "in part." *Id.* Kennedy explained that he only wanted to attend the deposition if it could facilitate a resolution of the

dispute concerning the Property. *Id.* The Bankruptcy Court found that "the case itself, when it was filed in December, was not filed in good faith. It was to stop, to further delay the foreclosure proceedings with respect to this property over in Delaware, and to stop discovery related to the foreclosure." (A259 at 50:19-24). The Bankruptcy Court denied the Request. (A259-62 at 50:14-53:4).

After the hearing, Kennedy agreed to appear for his deposition. The deposition was held on April 6, 2017. During the deposition, Kennedy admitted that there exists no writing that memorializes his alleged agreement with the Bank's predecessor regarding Kennedy's assumption of the Mortgage or Note. (A171, Kennedy dep. 196:3-18).

D. Kennedy Continues to Fail To Comply With His Discovery Obligations

On April 3, 2017, the Court held a scheduling teleconference. (A074). The Court accurately observed that Kennedy's dilatory discovery conduct has rendered it impossible for the Bank to move the Action toward a resolution. "[W]e are just on this treadmill of every time Mr. Kennedy fails to meet a deadline, there's a motion for sanctions, there's a motion to compel, the motion to compel is granted, and yet the next deadline is also missed." (A083, 10:8-12).

On March 9, 2017, the Bank noticed Kennedy's deposition to be held on April 6, 2018. (*See* A018). Kennedy produced only one set of documents (the profit and loss statements) in anticipation of the deposition, and produced another

set of documents after the deposition. (A063). Kennedy never produced any writings regarding the alleged agreement between Kennedy and JP Morgan; indeed, he admitted no such writing existed. (A171, Kennedy dep. 196:3-18).

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE BANK HAS STANDING AS ASSIGNEE OF THE MORTGAGE AND NOTE TO SEEK THE FORECLOSURE OF THE PROPERTY

A. Question Presented

Did the trial court err in holding that the Bank has standing as assignee to the Mortgage and Note?

B. Scope of Review

"On appeal from a decision granting summary judgment, this Court reviews the entire record to determine whether the [Court of Chancery's] findings are clearly supported by the record and whether the conclusions drawn from those findings are the product of an orderly and logical reasoning process." *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 48 (Del. 2006) (citation omitted). "This Court does not draw its own conclusions with respect to those facts unless the record shows that the trial court's findings are clearly wrong and justice so requires." *Id.* (citation omitted). Questions of law are reviewed *de novo*. *Id.*

C. Merits of the Argument

1. Summary Judgment Standard

Summary judgment is granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ct. Ch. R. 56(c). The moving party

bears the initial burden to demonstrate that there are no genuine issues of material fact. *Wagamon v. Dolan*, 2012 WL 1388847, at *2 (Del. Ch. Apr. 20, 2012). Once the moving party satisfies this burden, the non-moving party must show that there are factual disputes. *Id.* Mere allegations or denials in a pleading, unless supported by specific facts, are insufficient to demonstrate a genuine issue for trial. *Id.*

2. There Is No Genuine Material Fact As To The Enforceability of the Mortgage and Note

The Court of Chancery thoroughly reviewed the record and correctly concluded that there is no factual dispute concerning the Bank's standing to bring the Action. (A357-64). The Mortgage was properly recorded in the Sussex County Recorder of Deeds Office on January 11, 2006. (A117-41). The Mortgage lists Washington Mutual Bank, N.A. ("Washington Mutual") as the mortgagee and Helene Hines as mortgagor. *Id.* The Mortgage also references the Note in the amount of $1,598,977.90. *Id.* The Note similarly lists Washington Mutual as the lender and Helene Hines as one of the borrowers. (A100-15). The Certificate of Assignment indicates that Washington Mutual assigned the Note and Mortgage to the Bank. (A143-44). The Certificate of Assignment was recorded in the Sussex County Recorder of Deeds on April 22, 2009. *Id.*

Under Delaware law, an assignee of a mortgagee's interest has standing to bring a foreclosure action. *See Citimortgage, Inc. v. Trader*, 2011 WL 3568180, at

*1 (Del. Super. Ct. May 13, 2011) (citing 10 *Del. C.* § 5061(a)). Thus, the Bank has standing to pursue foreclosure of the Property to the same extent as its predecessor in interest.

Kennedy asserts that the Note is "forged or fraudulent" and therefore is unenforceable. O.B. 9-10. Kennedy's basis for this contention is a letter from a purported handwriting expert who opined that Helene's signature was copy/pasted onto the Note. (B0672; *see also* A358). Kennedy does not cite to any law that suggests that an electronic signature is impermissible, and Appellee is aware of none. Indeed, in overruling Kennedy's objections and affirming the Master's Final Report, the Court of Chancery determined that Kennedy's "attacks regarding the validity of one of the signatures on the mortgage were baseless." (A414).

Kennedy also does not provide any information from Helene (or anyone else) to suggest that Helene did not agree to be bound by the Note. Indeed, according to Kennedy's purported expert, the Mortgage, adjustable rate rider, and second home rider, all bear Helene's ink signature. (B0672). Helene also has not appeared in the Action to dispute the enforceability of the Note or Mortgage. (*See* B0057). There simply is no evidence to question the enforceability of the Mortgage or Note. Kennedy's mere allegations, which are unsupported by facts, are inadequate to create a genuine issue of material fact.

3. There Is No Genuine Material Fact As To The Enforceability of the Equitable Lien Against Kennedy

A person who acquires a property with actual or constructive notice of an existing equitable interest or lien on that property takes the property subject to that lien. *Handler Constr., Inc. v. CoreStates Bank, N.A.*, 633 A.2d 356, 363-64 (Del. 1993). Recordation of an unsealed mortgage provides notice of a prior lien interest. *Id.* at 365.

Kennedy does not and cannot dispute that he had actual and constructive notice of the existence of the Mortgage and Note. As noted above, the Mortgage was recorded five years before Kennedy sought to acquire an interest in the Property. (A359). The Agreement of Sale between Helene and Kennedy specifically states that Kennedy agreed to assume "the full balance of the debt on the property" in the amount of "approximately $1,500,000.00." (A183). Kennedy also admitted in discovery that he knew of the existing lien on the Property. In his answer to the Bank's requests for admissions, Kennedy admitted that he was aware the Mortgage was in default at the time he assumed possession of the Property. (B0247, Response to Request for Admission No. 5). He confirmed during his deposition that he knew of the pre-existing Mortgage and Note and that he believed he was assuming responsibility for the same. (A158, Kennedy dep. 79:14-18; A172, Kennedy dep. 197:9-24).

Kennedy knew of the existence of the Mortgage and Note and he knew the Property was in foreclosure. The Bank's equitable lien on the Property therefore is enforceable against Kennedy. The Court of Chancery did not commit any error of fact or law in concluding that no genuine issue of material fact exists as to the Bank's standing to bring the foreclosure action against Kennedy.

4. Kennedy's Allegations Do Not Create a Genuine Issue Of Material Fact

Kennedy's bald assertions regarding Select Portfolio Servicing, Inc. are irrelevant and perplexing. The Bank is the Plaintiff in this Action. The Bank's interest in the Property has been recorded. Select Portfolio Servicing, Inc. is not a party and has no recorded interest in the Property. It is unclear what Kennedy seeks to gain by mentioning Select Portfolio Servicing, Inc., but the existence of Select Portfolio Servicing, Inc. does not create a genuine issue of material fact as to whether the Bank has standing. If the Bank's mortgage is recognized as an equitable lien against the Property, which it has been, then the Bank is the holder of that equitable lien. *See, e.g.*, *Monroe Park v. Metropolitan Life Ins. Co.*, 457 A.2d 734 (Del. 1983). The Final Report did not commit any error in its factual or legal findings.

Kennedy's assertion that he had inadequate time for discovery is equally perplexing. The Property has been in foreclosure since 2009. Kennedy acquired his interest in 2011 while the foreclosure proceedings were pending in the Superior

Court. He was well aware of those proceedings; in fact he attempted to intervene in that action. (B0109-10). Kennedy has always been a party to the Action under consideration. Kennedy simply cannot explain why four years was insufficient time to issue discovery requests.

The Bank had time to conduct discovery; indeed, due to Kennedy's discovery misconduct, the Bank was forced to bring three discovery motions. (B0263; B0535; B0574).

Kennedy's litigation conduct suggests that he did not believe that further discovery was necessary. On June 9, 2016, over a year before the Final Order was entered, Kennedy moved for summary judgment. (A034-35). He did not seek discovery following the denial of that motion. *See id.* Additionally, Kennedy *twice* sought an expedited trial date. (A035; A011). Indeed, Kennedy's second motion to expedite asked the Court to set a trial date within two weeks of the date the motion was filed. *Id.* In spite of requesting this highly expedited schedule, Kennedy still never issued discovery requests. *Id.*

Kennedy apparently did not believe that he needed discovery until after he lost the litigation. Kennedy only served discovery requests *after* the Court issued the opinion granting summary judgment in the Bank's favor. (*See* A002). Kennedy had more than adequate time to seek discovery during the four years the litigation was pending. He chose to not do so. That is his failing. Kennedy's post-

hoc assertion of prejudice should be disregarded. The Bank respectfully submits that this Court should not countenance Kennedy's attempt to further delay the resolution of this dispute with his dilatory discovery tactics.

In any event, it is unclear exactly what discovery Kennedy thinks may have been beneficial to him. As noted, Kennedy admitted that he was aware of the lien on the Property and he knew it was in foreclosure. He admitted that he never entered into an agreement to modify the Mortgage or Note. Additional time for discovery will not be of aid to Kennedy. The Court of Chancery's order granting summary judgment in favor of the Bank should be affirmed.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT THE MORTGAGE AND NOTE OPERATE AS AN EQUITABLE LIEN ON THE PROPERTY

A. Question Presented

Did the Court of Chancery err when it determined that the Bank has an equitable lien on the Property commensurate with the Mortgage and Note?

B. Scope of Review

"On appeal from a decision granting summary judgment, this Court reviews the entire record to determine whether the [Court of Chancery's] findings are clearly supported by the record and whether the conclusions drawn from those findings are the product of an orderly and logical reasoning process." *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 48 (Del. 2006) (citation omitted). "This Court does not draw its own conclusions with respect to those facts unless the record shows that the trial court's findings are clearly wrong and justice so requires." *Id.* (citation omitted). Questions of law are reviewed *de novo*. *Id.*

C. Merits of the Argument

The absence of a seal on a mortgage is a technical defect that precludes the enforcement of the mortgage at law,[1] but "it does not affect either the validity of

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[1] As Master Ayvazian noted in her Final Report on the Bank's first motion to compel, the relevant statute was amended on June 28, 2016 to permit foreclosure actions on mortgages lacking a seal to be brought in Superior Court. (B571 n.7 (citing 25 *Del. C.* § 2101(b)). Until that date, a foreclosure action on an unsealed mortgage could only be brought in the Court of Chancery.

the document as a[n] equitable mortgage or its enforceability in the Court of Chancery." *Handler Constr., Inc.*, 633 A.2d at 363 (citing *Monroe Park v. Metropolitan Life Ins. Co.*, 457 A.2d 734 (Del. 1983)). The Court of Chancery has the "equitable power to disregard defects in the execution of a mortgage." *Id.* An equitable mortgage is enforceable to the same extent as a mortgage under seal. *Id.*

The only defect in the Mortgage is that it is not under seal. (A117). The Court of Chancery correctly found that the Mortgage is fully enforceable as an equitable lien on the Property. (A363; O.B. Ex. A).

Kennedy urges this Court to determine that the value of the Bank's equitable lien should be reduced to recognize Kennedy's purported investment in the Property. O.B. 11-14. The Court of Chancery repeatedly addressed and rejected this argument. (A437; A357-64).

Kennedy's position is untenable. The Mortgage and Note were executed long before Kennedy was involved with the Property. (A100; A117). As the Superior Court noted, "Everybody's known the property's in foreclosure." (B0112). Kennedy knew that any interest he took in the Property would be subject to the Bank's prior, superior interest. Any improvements he made to the Property were at his own risk.

Kennedy ironically criticizes the Court of Chancery for not considering the value of his improvements to the Property even though Kennedy repeatedly

refused to produce documentary evidence regarding such expenditures. (*See* B0565; B600 (granting the Bank's motion to compel Kennedy to produce documents and written discovery responses, among other things)). The Bank repeatedly requested documents sufficient to identify Kennedy's expenditures on the Property, but Kennedy flouted his discovery obligations and refused to produce the requested documents even in the face of three motions to compel. *See id.* Before the Dispositive Motion was filed, Kennedy produced only a couple of profit and loss statements, which were prepared by Sandcastle Realty and lacked underlying data. (*See* A202-08).

Kennedy also had the opportunity to describe in detail his expenditures in the many briefs he has filed in the Court of Chancery, but has never described those expenses or produced documentary evidence to the Trial Court. It cannot be factual or legal error for a Court to not consider records that are not presented to the Court. Kennedy's failures are his own.

Despite the difficulties the Bank experienced in obtaining documents regarding Kennedy's alleged improvements to the Property, Kennedy eventually produced some profit and loss statements and provided some information regarding his income from the Property in discovery responses. (A202-08; B0334). The Court of Chancery carefully considered the factual record. The Court concluded that "Kennedy received $133,000 in income from the Property between

2011 and 2016." (A362). The Court noted that Kennedy's projections for 2017 would produce an additional net income of $65,000 to $70,000. (A363). Indeed, Kennedy has continued to earn rental income from the Property during this appeal. (B0742).

The Bank will not be unjustly enriched if the Mortgage and Note are enforced as an equitable lien on the Property. Instead, as the Court of Chancery noted, it is Kennedy who would receive the inequitable benefit if the lien is not enforced. Kennedy purportedly purchased a multi-million dollar Property for at most $10,500 "at a below bargain basement rate" and has not paid a single cent toward the pre-existing Mortgage in the six years he has possessed the Property. (A363). In the meantime, he has earned six figures in net income from the Property and continues to earn income on the Property today. *Id.* Thus, the Bank will not be unjustly enriched by the enforcement of the equitable lien on the Property. The Court of Chancery did not err and the Final Order should be affirmed.

III. THE TRIAL COURT CORRECTLY DETERMINED THAT THE ORIGINAL LENDER DID NOT ENTER INTO A WRITTEN AGREEMENT WITH KENNEDY REGARDING HIS PURCHASE OF THE PROPERTY

A. Question Presented

Did the trial court err in finding that Kennedy never entered into a valid agreement with the Bank's predecessor to modify the Mortgage and/or Note?

B. Scope of Review

"On appeal from a decision granting summary judgment, this Court reviews the entire record to determine whether the [Court of Chancery's] findings are clearly supported by the record and whether the conclusions drawn from those findings are the product of an orderly and logical reasoning process." *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 48 (Del. 2006) (citation omitted). "This Court does not draw its own conclusions with respect to those facts unless the record shows that the trial court's findings are clearly wrong and justice so requires." *Id.* (citation omitted). Questions of law are reviewed *de novo*. *Id.*

C. Merits of the Argument

"[T]he statute of frauds bars an oral modification of a contract or document related to real estate, including a mortgage." *Wilmington Trust Co. v. Jestice*, 2012 WL 1414282, at *2 (Del. Super. Ct. Jan. 11, 2012) (citing *Quillen v. Sayers*, 482 A.2d 744, 747 (Del. 1984); 6 *Del. C.* § 2715). Thus, any valid modification of the Mortgage or Note must have been committed to writing.

Kennedy admits that neither the Bank nor its predecessor entered into a written agreement to modify the Note and/or Mortgage. (A171, Kennedy dep. 196:3-18). Kennedy argues that he entered into an oral agreement with the Bank's predecessor to modify the Mortgage and/or Note, and that such agreement induced him to purchase the Property. (O.B. 16). But Kennedy freely admits that the parties never executed a written agreement to modify the Mortgage, which, as Kennedy was aware, was already in foreclosure when Kennedy took possession of the Property. (A171, Kennedy dep. 196:3-18). Kennedy also has paid nothing toward the debt on the Property. (A364).

In 2012, Kennedy attempted to intervene in the Superior Court foreclosure proceeding on the basis of his purported oral agreement with the lender. (B0112). The Superior Court observed that no loan modification agreement existed:

> Everybody's known that this property's in foreclosure. And there is nothing that requires anybody to, basically, put their money on the table and say, we're going to lend to the new party. That's not the case. You don't have a deal until you've got something in writing, sir. . . . Unless you've got a written contract, sir, you don't have a deal.

Id. (quoting Transcript of Proceedings on November 16, 2012, *Deutsche Bank v. Hines*, C.A. No. S09L-04-115 THG (Del. Super. Ct.), at 8-9). Kennedy was not permitted to intervene in the foreclosure proceedings. *Id.* Those proceedings

ultimately were transferred to this Court when it was discovered that the Mortgage was not under seal.

Despite the fact that Kennedy admits that there is no written loan modification agreement, and that he was informed *six years ago* by a Court of this State that an oral agreement cannot modify a mortgage, Kennedy continues to propound the meritless argument that an oral agreement regarding the purchase of real property is somehow enforceable. It is not. Kennedy knew before he purchased the Property that the Property was in foreclosure and the Bank was seeking a sheriff's sale. (A149, Kennedy dep. 34:4-12 ("I knew that it was in foreclosure, never a question of that")). Kennedy has never produced any evidence that there was an agreement (oral or otherwise) to modify the Mortgage, despite the fact that litigation has been pending since before Kennedy purchased the Property. Kennedy cannot show that he was "induced" into purchasing the Property if there is no evidence that some form of agreement existed to induce him to do so. Rather, the undisputed evidence demonstrates that Kennedy purchased the Property without ever entering into a modification of the loans. (*See, e.g.*, O.B. 5-7).

Further, even if Kennedy believed that he was subject to revised payment terms, he has not made payments under those terms in the six years he has

possessed the Property.[2] Kennedy should not be heard to complain that the Bank has not honored a loan modification agreement that never existed, and which Kennedy has not attempted to satisfy. The Court of Chancery did not err in rejecting Kennedy's argument that the mortgage was orally modified or that Kennedy was induced to purchase the Property due to the promised modification.

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[2] Further, as the Bankruptcy Court acknowledged, Kennedy lacks the resources to make the payments he proposed. (A261 at 52:14-25).

CONCLUSION

For the foregoing reasons, the Bank respectfully requests that the Court affirm the Court of Chancery's order granting summary judgment in favor of the Bank.

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