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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)

APPELLANT'S OPENING BRIEF

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NATURE OF THE PROCEEDINGS

Plaintiff-Below, Deutsche Bank National Trust Company, as Trustee for Wamu Mortgage Pass-Through Certificates Series 2006-AR3 Trust, Assignee of Washington Mutual Bank. F.A. (the "Bank") filed its Opening Brief in Support of Its Motion for Default Judgment or, in the Alternative, for Summary Judgment on April 17, 2017.

Defendant-Below, George Edward Kennedy ("Kennedy") filed his Response and Objection to Plaintiff's Opening Brief in Support of Its Motion for Default Judgement or, in the Alternative, for Summary Judgment on May 25, 2017.

The Bank filed its Reply Brief in Further Support of Its Motion for Default Judgment or, in the Alternative, for Summary Judgment on August 29, 2017.

The Master issued a Final Report dated November 21, 2017 (the "Final Report") recommending the Court of Chancery grant summary judgment in favor of the Bank.

Kennedy timely filed his Notice of Exceptions to Master's Final Report on December 4, 2017 and filed his Opening Brief in Support of His Notice of Exceptions on December 22, 2017. The Bank filed its Answering Brief on January 11, 2018. Kennedy filed his Reply on January 26, 2018.

The Court of Chancery issued its Order Overruling Objections and Affirming Master's Final Report on April 4, 2018.

Kennedy filed a Motion for Reargument on April 11, 2018. The Bank opposed that motion on April 17, 2018. The Court of Chancery denied Kennedy's motion by letter opinion issued April 24, 2018.

On April 27, 2018, the Court of Chancery entered the proposed final order submitted by the Bank, the Order Granting Plaintiff's Motion for Default Judgment or, in the Alternative, for Summary Judgment.

Kennedy filed his Notice of Appeal on May 29, 2018, appealing from several Court of Chancery orders: (1) Final Report Recommending the Court Grant Summary Judgment in Favor of Deutsche Bank, entered by Master in Chancery Patricia W. Griffin of the Court of Chancery of the State of Delaware, dated November 21, 2017 (Exhibit A); (2) Order Overruling Objections and Affirming Mater's Final Report, entered by Vice Chancellor Joseph R. Slights, III of the Court of Chancery of the State of Delaware, dated April 4, 2018 (Exhibit B); (3) Letter Order Denying Kennedy's Motion for Reargument, entered by Vice Chancellor Joseph R. Slights, III of the Court of Chancery of the State of Delaware, dated April 24, 2018 (Exhibit C); and (4) Order Granting Plaintiff's Motion For Default Judgment Or, In The Alternative, For Summary Judgment, entered by Vice Chancellor Joseph R. Slights, III of the Court of Chancery of the State of Delaware, dated April 27, 2018 (Exhibit D).

This is Kennedy's Opening Brief.

SUMMARY OF ARGUMENT

1. The trial court erred by failing to consider the Bank's lack of proof substantiating its standing as assignee to the mortgage and note at issue in this matter. Thus, the trial court's order should be reversed.

2. The trial court erred by not evaluating the amount of an equitable lien, if a lien is ordered. The trial court's order should be reversed and remanded for determination of a proper lien amount.

3. The trial court erred by not allowing the proceedings to progress with more discovery, which would allow Kennedy to develop the record and show that the Bank induced him to enter into the sale transaction based on the parties' negotiation of a modified note and mortgage, which the Bank later reneged on. The trial court's order should be reversed and remanded to allow Kennedy to conduct further discovery and present his defense on a complete record.

STATEMENT OF FACTS

Helene and Jeffrey Hines refinanced a loan on the real property located at 302 South Ocean Drive, South Bethany Beach, Delaware 19930 (the "Property") on December 30, 2005. (A057; A374.) Washington Mutual Bank, F.A. ("Washington Mutual") was the mortgagee for that loan. (A057; A374.) Later, JPMorgan Chase Bank, N.A. ("Chase") took over Washington Mutual. (A349; A374.)

In late August 2011, Kennedy made an offer to purchase the Property. (A374.) He worked with Doug Appling of Sandcastle Realty and made the offer to the law firm of Atlantic Law Group in Georgetown, Delaware ("Atlantic"). (*Id*.) Atlantic represented Chase, the purported owner of the Hines loan/mortgage and decision maker regarding Kennedy's offer. (*Id*.) His offer required an assumption and loan modification, for which Chase shortly thereafter gave approval to a representative at Atlantic, although the final terms of the modification were not set at that time. (*Id*.)

The Property, which was considered a 'teardown', needed considerable and costly repairs. (*Id*.) Fifty percent of the rental revenue derived from the Property had been lost because of many years of owner neglect. (*Id*.) Kennedy had secured a full inspection report detailing all the issues with the Property and provided that

report to Chase in September 2011; all parties were aware of the problems with the Property. (A374-375).

The broker's price option – that was obtained by Chase – revealed that the actual value of the Property in its distressed condition was approximately $1.4MM, not the approximate $1.9MM outstanding on the Hines Note at the time. (A407.) In October 2011, Chase was faced with the Property being approximately $500K underwater, in a deteriorated 'teardown' condition, and with its yearly rental revenue declining by about 50% based on its dilapidated state. (*Id*.)

Chase was faced with a situation where it could foreclose on the Property and take a substantial loss, or it could induce Kennedy to take title to the Property, wait for him to make substantial repairs to it, and then either proceed with foreclosure for a higher realized sale price or pressure him into making an offer. (A408.) Kennedy was induced by Chase's promises to modify the current mortgage and note, expended his own funds to rehabilitate the Property, and then refused to back down when Chase attempted to benefit unjustly from his efforts. (*Id*.).

The parties scheduled settlement, but shortly thereafter, Chase represented that it could not complete the necessary modification and assumption paperwork by the scheduled settlement date. (A374.) So, the parties moved the settlement date to October 14, 2011. (*Id*.)

Repair work had to be underway by mid-October 2011 for Sandcastle Realty agents to be successful in securing new tenants for the upcoming year's rental season. (A375). However, the timing was an issue for all parties. (*Id.*) Sandcastle Realty could not successfully rent to weekly vacationers without major repairs to the Property; Kennedy would not invest considerable money and repair into the Property without having the documentation completed and his name on the title; and, Chase could not complete the assumption/modification paperwork in time for the October 14th settlement. (*Id*.)

The parties were able to reach a resolution though. (*Id*.) In exchange for Kennedy agreeing to assume a modified loan and immediately performing major repairs, he was given 20% ownership of a newly-formed LLC to which title to the Property was granted. (*Id*.) That allowed Chase time to complete its assumption/modification paperwork, Kennedy the opportunity to immediately begin investing in the Property to complete much needed repairs, and with Kennedy's position as the LLC Managing Member, he could engage Sandcastle Realty to begin getting commitments from weekly renters for the upcoming year. (*Id*.)

The Property was transferred on Friday, October 14, 2011 into 302 S Ocean Drive, LLC of which Kennedy was the Manager and a 20% Member. (A375-376). On the following Monday, October 17, Kennedy had a new 50-year roof installed

on the house, which was desperately needed to fix major, active leaks causing ongoing damage to the Property's interior. (A376). By December, Kennedy had performed major repairs and upgrades, at a cost of approximately $50,000, when Chase reported that it had no intention of following through with the modification and assumption. (*Id*.) Chase suggested that Kennedy should just walk away from the deal and the Property, or make a cash buyout offer. (*Id*.)

Now, the Bank obtained an equitable lien on the Property, with the intent to foreclose on it. (*Id*.) If the Bank's equitable lien is upheld in the full amount it claims due on the Hines Note, the Bank will benefit from Kennedy's years of hard work and reinvestment of rental income into the Property, which he only provided based on an inducement by Chase that he could acquire the Property with a modified note and mortgage. (*Id*.) Factual disputes remain as to the Bank's standing to assert the equitable lien, the value of any such lien if one is allowed, and Kennedy's claims that he was induced to acquire the Property with the expectation that Chase would revise the loan terms. (*Id*.)

ARGUMENT

I. THE COURT ERRED BY FAILING TO CONSIDER THE BANK'S LACK OF PROOF SUBSTANTIATING ITS STANDING AS ASSIGNEE TO THE MORTGAGE AND NOTE ATI ISSUE IN THIS MATTER.

A. Question Presented

Did the trial court err in holding that the Bank had standing as assignee to the Hines mortgage and note at issue in this matter? (A368; A378.)

B. Scope of Review

This Court reviews a trial court's ruling on a motion for summary judgment *de novo*. *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002) (citing *Stroud v. Grace*, 606 A.2d 75, 81 (Del. 1992)). The Court analyzes the entire record and treats all facts in a light most favorable to the non-moving party. *Stroud* at 81.

C. Merits of the Argument

Under Rule 56(c), 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." Ch. Ct. R. 56(c). The summary judgment standard places the initial burden on the moving party to demonstrate that are no genuine issues of material facts. Once the moving party has satisfied that burden, it falls on the non-moving party to show that there are factual disputes. Mere allegations or denials in a pleading, unless backed up by

specific facts contained in admissible evidence, are insufficient to show that there is a genuine issue for trial. *E.g.*, *Wagamon v. Dolan*, 2012 WL 1388847, at *2 (Del. Ch. Apr. 20, 2012); *Wells Fargo Bank, N.A. v. Williford*, 2011 WL 5822630, at *2 (Del. Super. Ct. Nov. 17, 2011).

If a material fact exists, or the Court desires to inquire "more thoroughly into the facts to clarify" how to apply the law to the circumstances in the case, then summary judgment will not be granted. *E.g.*, *Williams v. Geier*, 671 A.2d 1368, 1388–89 (Del. 1996) (citing *Ebersole v. Lowengrub*, 180 A.2d 467 (Del. 1962); *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv. of Cincinnati, Inc.*, 1996 WL 506906, at *2 (Del. Ch. Sept. 3, 1996)). Evidence must be viewed "in the light most favorable to the non-moving party." *Williams*, 671 A.2d at 1388–89 (citing *Merrill v. Crothall–American, Inc.*, 606 A.2d 96, 99 (Del. 1992)).

The Final Report recognizes Kennedy's argument that the Bank relies on a forged or fraudulent note as the basis for its claim. (A357.) Kennedy raised the issue and the Bank's failure to produce an original of the note. (A310-311.) Kennedy questioned Plaintiff's investment in the note and mortgage (A320), thus implicating whether there is proper chain of title from Washington Mutual to the Bank. Select Portfolio Servicing has been directing this case behind the scenes, which raises the question of what role, and what standing it has, and thus what standing the Bank has if it has potentially divested its interest in this mortgage.

(A378.) If the Bank is to benefit from the imposition of an equitable lien, it must first prove that it correctly has standing to make such a request.

The Bank has not carried its burden to meet the summary judgment standard. Kennedy did not conduct any discovery prior to the lower court ruling on the Bank's motion for summary judgment despite the fact that there was no scheduling order entered in the case. All doubts should be resolved in favor of the non-moving party – Kennedy – especially when discovery in the matter had not closed. Kennedy should be allowed the opportunity to conduct discovery in the matter and present his argument on a complete record. Accordingly, the trial court's ruling was premature and the matter should be remanded.

II. THE TRIAL COURT ERRED BY NOT PROPERLY EVALUATING THE AMOUNT OF THE EQUITABLE LIEN, IF IT IS ALLOWED.

A. Question Presented

Did the trial court err in not modifying the amount of the equitable lien based on Kennedy's investments in the Property? (A368; A379-381; A408-410; A420-421.)

D. Scope of review

This Court reviews a trial court's ruling on a motion for summary judgment *de novo*. *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002) (citing *Stroud v. Grace*, 606 A.2d 75, 81 (Del.1992)). The Court analyzes the entire record and treats all facts in a light most favorable to the non-moving party. *Stroud* at 81.

E. Merits of the Argument

When Kennedy first agreed to purchase the Property and assume a modified note and mortgage, the Property was being rented, but was in a tear down condition. (A379.) Expected rental income was declining due to the deterioration of the Property, decreased rental activity, and decreased rental rates. (*Id*.) Instead of doing a tear down, however, Kennedy saw the potential in renovating the Property to restore it to its former condition, or better, and maintain a high rental rate. (*Id*.)

Discussions with Chase to purchase the Property and assume a modified mortgage and note occurred in the fall of 2011 when rentals were booking up for

the following rental season. (*Id*.) Chase told Kennedy it could not get the modification paperwork done quickly enough to complete the transaction during this crucial time, but agreed that Kennedy should proceed with the purchase of the Property and begin some immediate repairs. (*Id*.) Those repairs would protect and improve the value of the Property and help secure a full book of rentals for the upcoming season. (*Id*.) After Kennedy purchased the Property and made some initial, significant repairs, Chase backed out of its agreement to enter into a modified note and mortgage and attempted to proceed with the foreclosure on the now-improved, and more valuable, Property. (*Id*.) Chase's intent appeared to be to let Kennedy pay for some much needed repairs and then reap the benefits by being able to sell the Property for a higher value. (*Id*.)

Following those initial repairs, Kennedy performed routine maintenance on the Property as well as completed major renovations. (A380.) As highlighted in the Final Report (A361-362), Kennedy produced profit and loss statements for the Property showing the expenditures he made for routine maintenance and for major renovations. (A380.) While the Bank claims that Kennedy was receiving more than $100,000 per year in rental income, the net income was substantially lower. (*Id*.) In years 2011 through 2015, the net income was actually less than half of that. (A362). And then, in 2016, with the major repairs and renovations

performed on the Property, there was a loss of $93,425. (*Id*.) Much of the rental income generated by the Property was reinvested in it. (A380.)

When Kennedy took over the Property in October 2011, it had a tear down value of approximately $1,400,000 (as determined by a broker's price opinion obtained by Chase). (*Id*.) The amount outstanding at the time was $1,910,865. (*Id*.) The Property was severely underwater and the bank stood to lose a significant sum through the foreclosure process. Since that time, however, the value of the Property has risen significantly. (*Id*.) The appraisal of the Property conducted in May 2016 valued the Property at $2,150,000. (*Id*.) The Property's value has risen over the years as the result of Kennedy's continual ownership, maintenance, and major renovations. (*Id*.) He has poured the rental income back into the Property so that its value was not only maintained, but has substantially increased. (A380-A381.) He has personally overseen the care of the Property this entire time, devoting significant amounts of time to the endeavor. (A381.)

When Kennedy agreed to take an interest in the Property, it was done on his reliance of Chase's promise that the Hines note and mortgage would be modified. (A408.) His reliance on that promise was reasonable given that the Property was valued (by Chase's own broker's price option) at approximately half-a-million dollars less than the outstanding loan amount. (*Id*.) Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or

property of another against fundamental principles of justice or equity or good conscience." *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999) (*quoting Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988)).

If the Bank maintains an equitable lien in the full amount it claims, it will benefit from Chase inducing Kennedy to acquire the Property without following through on its agreement to modify the loan and mortgage and will unjustly obtain and retain the benefit of Kennedy's efforts to his detriment. Kennedy's hard work and investment will turn a profit for the Bank, which will get a Property that was once ripe for tear down, but now is worth at least $750,000 more. Kennedy will not be able to reap the benefits of his labor even though he had continually maintained his desire and willingness to complete a loan modification with the Bank.

Plaintiff attempts to capitalize on Kennedy's investment to his detriment and would be unjustly enriched if it obtained an equitable mortgage for the full value it seeks. Rather, if the Court orders an equitable lien, it should be for an amount that accounts for the value imparted by Kennedy. Accordingly, a factual dispute remains as to the fair value of an equitable lien if one is allowed to stand.

III. THE TRIAL COURT ERRED BY DISMISSING KENNEDY'S ARGUMENT THAT THE MORTGAGE LENDER WAS TO NEGOTIATE A MODIFIED NOTE AND MORTGAGE WITH KENNEDY AS PART OF HIS AGREEMENT TO PURCHASE THE PROPERTY.

A. Question Presented

Did the trial court err in finding there was no material issue of fact regarding Kennedy's argument that the mortgage lender was to negotiate a modified note and mortgage as part of his agreement to purchase the Property? (A369; A381-382; A410-411; A418-420).

B. Scope of Review

This Court reviews a trial court's ruling on a motion for summary judgment *de novo*. *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002) (citing *Stroud v. Grace*, 606 A.2d 75, 81 (Del.1992)). The Court analyzes the entire record and treats all facts in a light most favorable to the non-moving party. *Stroud* at 81.

C. Merits of the Argument

The Final Report (A357; A364) recognizes Kennedy's argument that the Bank refuses to allow him to assume a modified loan for the mortgage. As Kennedy argued, the consideration he gave for the Property included the payment of $10,500 and the assumption of a modified note and mortgage, so that the bank could avoid the hassle of foreclosure and have a capable owner maintaining and running the rental Property. (A312-313; A319.) The amount owed on the Property

when Kennedy acquired it was $1,910,865. (A361.) While that amount was outstanding at the time, the distressed sale value of the Property was actually around $1,400,000 as determined by Chase's own broker's price opinion. (A382). It was only based on Chase's representations that the modification would be forthcoming that Kennedy proceeding with acquiring the Property and performing the immediate, necessary repairs. There remains a factual dispute regarding Chase inducing Kennedy to acquire the Property and its failure to follow through with that agreement, regardless of whether a modified mortgage and note can be ordered.

CONCLUSION

For the foregoing reasons, factual disputes remain in this case, which precludes entry of summary judgment in favor of the Bank. Accordingly, this Court should overrule the trial court's order and remand the case.

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Dated: July 16, 2018

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