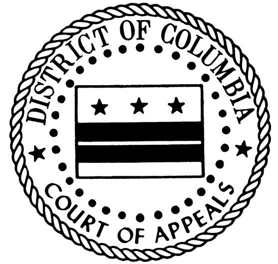

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Nos. 23-CV-0150; 23-CV-0151

In the

District of Columbia Court of Appeals

CHASTLETON COOPERATIVE ASSOCIATION,

Appellant,

v.

KAWAMOTO NOTES, LLC,
FEDERAL HOME LOAN MORTGAGE CORPORATION,
RFB PROPERTIES II, LLC, BAYVIEW LOAN SERVICING, LLC,

Appellees.

Appeal from the Superior Court of the District of Columbia,
Civil Division No. 2019 CA 008500-B *(Hon. Ebony Scott, Judge)*

BRIEF OF APPELLANT

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Case No. 23-CV-0150 (Consolidated with 23-CV-0151)

Appellant/Defendant	**Chastleton Cooperative Association, Inc.,**
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Appellee/Plaintiff	**Kawamoto Notes, LLC**
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Case No. 23-CV-0151 (Lead Case)

Appellant/Plaintiff	**Chastleton Cooperative Association, Inc.,**
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Appellee/Defendant	**RFB Properties, II, LLC**
Counsel for Appellee/Plaintiff	Bryan Wallace

RULE 26.1 DISCLOSURE STATEMENT

Chastleton Cooperative Association, Inc. has no parent corporation.

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STATEMENT OF SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION

This is a consolidated appeal from two separate but related cases in the Superior Court of the District of Columbia. In each case, the Court awarded partial summary judgment that is appropriate for review under D.C. Code § 11-721(a)(2)(c) because the orders change or affect the possession of property.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court erred when it granted partial summary judgment in favor of Appellee RFB Properties II, LLC where the record shows that Appellant Chastleton Cooperative Association, Inc., did not receive proper notice of or approve the foreclosure sale as required by the District of Columbia Code or the operative contracts.

2. Whether the Superior Court erred when it granted summary judgment in favor of RFB Properties II, LLC and interpreted the rights of the parties under the Recognition Agreement even though RFB Properties II, LLC was not a party to the Recognition Agreement, was not an assignee of the Recognition Agreement, and had no standing to enforce the Recognition Agreement.

3. Whether the Superior Court erred when it issued a declaratory judgment in favor or RFB Properties II, LLC even though RFB Properties II, LLC contends it has assigned its rights relating to this dispute to its sole member, who is not a party to this litigation.

4. Whether the Superior Court erred when it granted Kawamoto Notes, LLC partial summary judgment and declared the rights of the parties under a Recognition Agreement when Kawamoto was not a party to the Recognition Agreement and there is a genuine dispute over whether the Note or the Recognition Agreement were assigned to Kawamoto.

5. Whether the Superior Court erred when it issued a money judgment in favor of Kawamoto for $240,750 for breach of fiduciary duty when there is a genuine dispute whether:

    a. Chastleton owed any duty to Kawamoto;

    b. Kawamoto has any rights under the Recognition Agreement;

    c. Chastleton has a duty to use rent proceeds to pay the cooperative; and because

    d. The statute of limitations precludes Kawamoto from seeking alleged damages incurred before December 31, 2016.

STATEMENT OF THE CASE

A. The Chastleton Housing Cooperative

The Chastleton Cooperative Association, Inc. (the "Chastleton") is a housing cooperative that owns a historic building at 1701 16th Street, NW. A20. On June 12, 2007, Stephanie Sipek ("Sipek") obtained membership shares of capital stock in Chastleton for Unit 654 (the "Unit"). A21. Sipek financed the purchase of the shares through a mortgage-like security interest from Bank of America ("BOA"). A148. As part of this transaction, Sipek, Chastleton, and BOA executed a three-party Recognition Agreement that is central to this dispute. A173-76.

The Recognition Agreement requires Chastleton to issue two documents evidencing Sipek's ownership interest in the Chastleton: a Stock Certificate and an Occupancy Agreement. A173. Together, the Stock Certificate and the Occupancy Agreement are referred to as the "Proprietary Documents." A173. Chastleton issued the Stock Certificate to Sipek for the Unit, and Chastleton and Sipek entered into the Occupancy Agreement, which authorized and governed Sipek's use of the Unit. A178; A180-88.

That same day, Sipek and BOA executed a Note (A166-68) and a Loan Security Agreement to finance her purchase. A169-71. The Loan Security Agreement provides BOA with a security interest in the Stock and the

Occupancy Agreement (referred to as the Lease), and required Sipek to give possession of both the Stock Certificate and the Lease to BOA to hold as Security:

> Borrower has simultaneously, with this Agreement, deposited with the Lender the Stock and the Lease and as security for the payment of the debt, Borrower hereby grants to the Lender a security interest in, and a general lien upon, said Stock and Lease and all personal property and fixtures (other than household furniture and furnishings) of the debtor now or hereafter attached to, or used in connection with, the apartment (collectively called the "SECURITY").
>
> A169.

The Stock and the Lease, along with certain personal property and fixtures in the Unit constituted the collateral, or Security, for the loan. A169.

Section IV of the Loan Security Agreement provided that, "if an event of default has occurred . . . [BOA] may . . . sell the Security at public or private cash sale . . ." A169. The Loan Service Agreement does not reference the Recognition Agreement, or make the Recognition Agreement part of the Security. A169-71. This is consistent with the Recognition Agreement provision in which Chastleton "consents to the pledge and assignment to Lender by Borrower of the *Proprietary Documents* issued by the Corporation, and relating to the Unit, as collateral for the Loan." (emphasis added) A173. Under both the Recognition Agreement and the Loan Security Agreement, the

collateral for Sipek's loan is limited to the Stock, the Lease, and personal property. A173; A169.

The Recognition Agreement provides BOA a right to foreclose on Sipek's Stock and Lease in the event of a default, but limits that right to certain conditions. A174. Critically, the Recognition Agreement precludes BOA from foreclosing on Sipek's collateral unless it first obtains approval from Chastleton:

> Without the approval of [Chastleton] (if such approval is required by the Operative Documents or the Proprietary Documents), Lender shall have no power or right to transfer, sell or assign or dispose of the Proprietary Documents or to sublease the Unit.

A174.

The Recognition Agreement also recognizes that Chastleton "is the owner in fee simple of the land and improvements thereon of which said Units are a part. . ." A173. And that "[Chastleton] has a right of first refusal in case of sale or foreclosure of the Unit." A173. Chastleton's right of first refusal is also addressed on the second page of the Recognition Agreement, which allows Chastleton to "exercise an option to purchase any Proprietary Documents obtained and sold, assigned or transferred by Lender pursuant to foreclosure or other proceedings related to enforcement of the Loan obligations. . ." A174.

B. Sipek defaults under the Occupancy Agreement and the Note.

Around January 2013, Sipek failed to pay her monthly Rent and Maintenance to Chastleton and defaulted under the Occupancy Agreement. A21; A313. Given Sipek's default, on April 17, 2013, Chastleton initiated a landlord and tenant action against Sipek, and on August 3, 2013, Sipek surrendered possession of the Unit to Chastleton. A230. Sipek also failed to pay her monthly obligations to BOA and defaulted on that agreement. A37; A51; A61; A230; A373.

Under the Recognition Agreement, upon a default, BOA had the right to request that Chastleton cancel Sipek's Proprietary Documents and issue new ones in the name of BOA or its agent:

> in the event there is a default under the Loan, and Lender becomes owner of the Proprietary Documents pursuant to remedies provided in the Loan instruments or otherwise, [Chastleton] will recognize and approve such ownership, and within thirty (30) days *after receipt of written notice and delivery of the Proprietary Documents from Lender* (as executed by Borrower and pledged or assigned to Lender), *the Corporation will cancel such Proprietary Documents and reissue such Proprietary Documents to Lender or Lenders' non-corporate designee* as appropriate. . .

A174 (emphasis added).

There is no document in the record showing that BOA provided Chastleton with written notice or delivered the Proprietary Documents to Chastleton.

Instead, it appears that at some point BOA assigned the Note to M&T Bank, as evidenced by a stamp on the bottom of the Note stating, "Pay to the

Order of M&T Bank Without Recourse." A168. Above that stamp is another stamp stating "PAY TO THE ORDER OF:" followed by a blank line above the words "WITHOUT RECOURSE." A168. The stamp is not dated but is signed by Meghan A. Halpin, Assistant Vice President for M&T Bank. A168. The Note is not endorsed to Freddie Mac, and it is unclear how or when Freddie Mac obtained any interest in the Note. *See* A168.

Freddie Mac has alleged that it "and Bayview previously held an interest in the Property at issue in the action as the former investor and servicer respectively, of a mortgage loan held by the previous owner, Stephanie Sipek." A26. But no party has provided any documents establishing this allegation. Freddie Mac also alleged "that Bank of America transferred its interest in the underlying Sipek mortgage loan to Freddie Mac, and that Bayview subsequently serviced said loan." A29. There are no documents in the record establishing this allegation either.

Neither Freddie Mac nor any other party submitted evidence establishing that Freddie Mac owned this Note. RFB contends that in 2015, Bayview, purportedly on behalf of Freddie Mac, initiated foreclosure proceedings for Sipek's shares in the cooperative and her occupancy agreement. A71. RFB

has submitted no documents or affidavits substantiating this allegation, and it is unclear when, how, or what interest Freddie Mac may have obtained.[1]

Nonetheless, it appears Freddie Mac or Bayview hired Harvey West Auctioneers to conduct a foreclosure sale, and that Harvey West prepared and published a notice for sale by auction to take place on June 9, 2015. A262. There are no documents in the record showing that Freddie Mac, Bayview, or any other entity provided notice to or obtained consent from Chastleton before the foreclosure sale. The notice of sale advertising the auction makes clear that the purported sale was limited to Sipek's Shares in the Chastleton, and her rights under the Occupancy Agreement:

> ***All the membership shares*** described in said Security Agreement being Chastleton Cooperative Association, Inc. shares of Capital Stock of the Chastleton Cooperative Association, Inc. allocated to 1701 16th Street, NW, Apt. #654, Washington, DC 20009, ***together with all rights, duties and obligations under the terms of a certain Occupancy Agreement dated June 2, 2007, between Stephanie Suzanne Sipek and the Chastleton Cooperative Association, Inc.*** Subject to the terms, provision and conclusions contained in the Articles of Incorporation, By-Laws, Occupancy Agreement and House Rules of the Chastleton Cooperative Association, Inc.

(emphasis added). A262.

[1] On September 7, 2018, RFB allegedly entered into a confidential settlement agreement with Freddie Mac and Bayview, in which RFB released all claims against them. A137. Freddie Mac and Bayview then moved to dismiss the cross-claims filed against them, which the Court granted on December 3, 2020.

The foreclosure notice did not include sale of the underlying Note, nor did it include any rights under the Recognition Agreement. A262-64. The Memorandum of Purchase indicates that RFB Properties II, LLC, by its member Russell Brown, was the winning bidder in the amount of $151,000 and a deposit of $10,000. A262.

The Memorandum of Purchase provides that "[t]he property is sold in "as is" condition without any warranties, express or implied, and subject to all easements, liens, covenants, and restrictions of record. A263. The Notice further provided the sale was subject to all conditions, liens, restrictions and agreements of record affecting same and subject to any assessments including assessments pursuant to DC Code Sections 12-19-3.13. A262; A331. The sale was also subject to the terms, provisions and conclusions contained in the Articles of Incorporation, By-Laws, Occupancy Agreement and House Rules of the Chastleton Cooperative Association, Inc. *Id.* Under Chastleton By-Laws, "No assignment of the Proprietary Documents is effective without Board approval." A420.

C. Freddie Mac did not provide notice to or obtain the consent of Chastleton before conducting a foreclosure sale.

The Recognition Agreement and the Occupancy Agreement prohibit any foreclosure unless the BOA (or its successor) first provides notice to Chastleton, and obtains Chastleton's approval. A452; A460.

There are no documents in the record regarding any notice that anyone provided to Chastleton about the foreclosure. To the contrary, the record is clear that Freddie Mac failed to provide notice to Chastleton. On January 10, 2019, Brown, on behalf of RFB, signed a document acknowledging that: (1) Article V of the Occupancy Agreement required Chastleton to be provided with notice of any foreclosure sale; (2) the Recognition Agreement required Chastleton's prior approval to any foreclosure; and (3) that RFB acknowledges that Freddie Mac did not provide notice or obtain approval from Chastleton:

> RFB Properties further acknowledges that Article V of the Occupancy Agreement that Stephanie Sipek ("Sipek") and Chastleton Cooperative Association, Inc. (the "Cooperative") entered into on or about June 12, 2007 requires that the Cooperative be provided with notice of any sale or transfer of the Property. In addition, Section C of the Recognition Agreement that Bank of America, N.A., the Cooperative, and Sipek entered into in connection with the Property states that the Cooperative must approve any transfer or sale of the Stock Certificate and Occupancy Agreement that were issued in connection with the Property. RFB Properties understands that Freddie Mac did not obtain this approval from the Cooperative before conveying its interest in the Property to RFB Properties, and RFB Properties hereby releases and waives any claims that it may possess against Freddie Mac based upon Freddie Mac's failure to obtain any approvals from the Cooperative before conveying its interest in the Property to RFB Properties.

A279.

This shows Freddie Mac violated Article V of the Occupancy Agreement and Section C of the Recognition Agreement by failing to provide notice or obtain approval from the Chastleton. A279; A452; A460. Because Freddie

Mac did not notify Chastleton about the foreclosure or obtain the Chastleton's consent to proceed with a foreclosure, the purported sale was wrongful.

D. Chastleton's efforts to resolve the contract violations.

Despite the lack of notice and improper foreclosure proceedings, the Chastleton was willing to allow the sale to proceed, provided the sales proceeds were used to satisfy the amounts owed by Sipek. RFB refused to agree to these terms, did not pay the purchase price, and did not proceed to settlement on the Shares or the Occupancy Agreement. This litigation ensued.

E. Chastleton's suit to declare the wrongful foreclosure sale invalid.

In its Complaint against Freddie Mac, Bayview, and RFB, Chastleton sought an order declaring the foreclosure improper, or, in the alternative, that Chastleton was entitled to enforce its lien for unpaid assessments, and fees from the sales proceeds. A20-25.

F. RFB's Counterclaim to enforce the Recognition Agreement.

RFB filed a counterclaim and cross-claims seeking an order declaring the sale to be valid, and asking the Court to declare the rights of the parties under the *Recognition Agreement*. A36. Although RFB asks the Court to interpret the Recognition Agreement in its favor, it does not allege that it acquired any rights to enforce the Recognition Agreement, or explain how it has standing to enforce the terms of that document. *See* A35-42. Instead, RFB side steps this

critical omission, and requests *inter alia* an order under the "Proprietary Documents and associated Proprietary Lease (free of all liens excepting a proportional share of any underlying mortgage upon the entire building) of Brown, FHLMC, Bayview, Chastleton, and, if any, Sipec (sic)." [2] A41-42.

RFB's claim is even more baffling because it concedes that any rights it may have had under the documents were assigned to its principal, Russell. F. Brown: "RFB is a District of Columbia limited liability company, whose interest in the property and proceedings subject to this action have been assigned to Russell F. Brown, individually." A36. RFB repeats this allegation, stating "Subsequent to such foreclosure action, RFB Properties, the successful bidder, assigned its as purchaser rights to Brown." A39. Although RFB repeatedly asserts that Brown is the property party in interest, he is not a party to this litigation.

G. RFB's Motions for Summary Judgment and Reconsideration

On August 27, 2018, RFB filed a Motion for Summary Judgment, which the Court denied on November 15, 2018. On September 21, 2019, RFB filed a Motion for Partial Summary Judgment arguing essentially the same points it argued in its first motion, which the Court denied again on June 21, 2021.

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[2] RFB again confuses the significance of the key documents-- the "Proprietary Documents" include the Shares and the Occupancy Agreement; there is no document called a "Proprietary Lease."

On November 16, 2022, RFB filed a Motion for Reconsideration, making two major arguments. RFB first argued the Court erred in denying Summary Judgment because the Court's order did not focus on "the fundamental issues" of the "rent and maintenance" charges. It also argued denying summary judgment would "set a very bad precedent for all Cooperative Association and Lender transactions going forward." A144. Both arguments lack merit, but more importantly, they fail to establish that the underlying foreclosure sale was proper.

RFB argues that "there is no dispute but that [Freddie Mac] properly instituted foreclosure proceedings against Sipek due to her default in her payment under the Note." A46. This is not true. Chastleton sued RFB *because* the Freddie Mac foreclosure proceedings were not proper. A22; *see also* A59. In addition, Freddie Mac has conceded that it failed to provide notice or obtain permission as required under the By-Laws and the Recognition Agreement. A279.

RFB does not address this admission, nor does it support its conclusory statement that "[a]fter notice and advertising, the foreclosure was conducted in the ordinary course . . ." A46-47. RFB's position is further strained because it wants to "limit" Chastleton's right to recover unpaid assessment based on the Recognition Agreement to which RFB has no rights to enforce. A46.

RFB ignores the critical issues that undermine its claims. It fails to address whether Chastleton received notice or provided consent to the foreclosure. It also fails to establish that RFB has standing to enforce the Recognition Agreement.

RFB further conflates the issues by making policy arguments about why the Court should enforce the Recognition Agreement to RFB's benefit, ignoring the fact that RFB has no rights under the Recognition Agreement. RFB argues (without any support) that the Recognition Agreement is a "Standard" agreement entered into between Buyers, Lenders, and Associations during the real estate transaction." A144. RFB further argues that "Lenders will not lend to Buyers of a Cooperative Association, if in the case of buyer default, the Lender is subject to unlimited maintenance and fees tacked on by the Association (who has taken over physical possession), as well as Attorney's fees tacked on by the Cooperatives Attorneys." A145. Any policy arguments compelling the Court to rule in RFB's favor to benefit Lenders is misplaced because RFB is not a Lender and the lender is not even a party to this case.[3] This case is not only about Lender's rights. It is about whether the foreclosure sale violated Chastleton's By-Laws, the Occupancy Agreement, the

[3] The Court dismissed BOA's putative successor-in-interest Freddie Mac on December 3, 2020.

Recognition Agreement, or the District of Columbia Code. It is also about whether RFB has any right or interest in the Recognition Agreement.

RFB provides no evidence showing that it stands in the shoes of BOA or its successors. Both RFB's Counterclaim and the Memorandum of Sale from the purported foreclosure sale, make clear that RFB bid only on the Sipek Stock Shares, and the Occupancy Agreement, which were the Security under the Note. A331-32. RFB did not purchase the Note or any interest in the Recognition Agreement. As RFB acknowledges in its Counterclaim, the "Note Holder" was another entity to which RFB "provided notice" that it was prepared to close on the sale. A39. So while RFB's motion and its case generally depends on having the Court limit Chastleton's right to recover unpaid fees based on RFB's interpretation of the Recognition Agreement, the undisputed facts show that RFB was not a signatory to that agreement, and that neither BOA, nor its successors, transferred any right in the Recognition Agreement to RFB. *See* A340-43.

H. Kawamoto's arguments

On December 6, 2019, Kawamoto filed a Motion to Intervene in the initial litigation and to be substituted for Freddie Mac, alleging that it had acquired ownership of the Note and was the proper party in interest. The Court denied Kawamoto's request on January 19, 2021. On December 30, 2019, Kawamoto filed a Complaint for Breach of Fiduciary Duty, Breach of Contract, Tortious Interference, and Declaratory Judgment. A371-79. Kawamoto's case rests on a few unsupported facts that Chastleton strongly disputes. First, Kawamoto claims it is "the assignee of all rights and obligations under the Recognition Agreement," A376. Kawamoto provides no document showing it acquired any right under the Recognition Agreement. Its claim is instead based on its allegation that "in or about January 2019, the original lender, Bank of America, assigned all its rights and related indebtedness to Kawamoto." A428. In its Motion for Summary Judgment Kawamoto claims documents attached as Exhibit P show that BOA assigned all its rights and related indebtedness to Kawamoto. But those documents relate to a transaction between RFB and Freddie Mac and provide no information about any transaction between BOA and Kawamoto. *See* A554-58. The only document relating to Kawamoto's claim is a copy of a Note that

makes no reference to Kawamoto or any purported agreement between BOA and Kawamoto. *See* A444-46.

The Note merely provides the holder with an interest in the collateral of the Note. A444-46. The collateral is the Sipek Stock Shares in Chastleton, and the Sipek Occupancy Agreement. *Id*. The Note makes no mention of the Recognition Agreement, and there is no evidence that any one assigned any rights under the Recognition Agreement to Kawamoto. *Id.* Any rights Kawamoto has to enforce the Note are found not in the three-party Recognition Agreement, but in the Loan Services Agreement between BOA and Sipek. A447-49.

The Loan Security Agreement allows the holder, upon borrower's default, to sell the collateral. *Id.* The Loan Security Agreement further provides for the order of distribution of proceeds of sale, authorizing the lender to:

> first deduct all expenses of sale and delivery of the Security, including, but not limited to, reasonable attorneys' fees, brokerage commissions and transfer taxes, ***and also all sums paid to the Corporation pursuant to the terms of the Lease*** or, upon termination of the Lease, pursuant to any new lease issued in replacement of the Lease, ***and may then apply the remainder to any liability of Borrower under the Note and this Agreement***, and shall return the surplus, if any, to Borrower.
>
> (emphasis added) A447.

The Loan Services Agreement does not limit Chastleton's right to collect only three months of unpaid fees. *Id*. It allows the lender to deduct from proceeds: (1) expenses of sale and delivery of the security; (2) monies owed to the Chasleton under the Lease; (3) "***and may then apply the remainder to any liability of Borrower under the Note and this Agreement***." (emphasis added). *Id.* To the extent Kawamoto has rights to enforce the Note, its rights are governed by the Loan Services Agreement—not the Recognition Agreement—and the amounts owed under Sipek's Note are junior to amounts owed to Chastleton under the Lease. *Id*.

I. The Court's orders granting partial summary judgment.

On January 25, 2023, the Superior Court, the Honorable Ebony M. Scott, granted RFB's Motion for Reconsideration, and entered partial summary judgment in favor of RFB. A580; A592-601. The Court also granted Kawamoto's Motion for Summary Judgment, in part. A579-591. The analysis and decisions in each case are substantially the same.

The Court ruled that Kawamoto had standing to bring its claims because "Kawamoto has physical possession of the Original Note that is indorsed in blank." A586. The Court further held that "when Kawamoto took physical possession of the Unit[4], the security interest accompanied the transfer, and

[4] Kawamoto did not and has not taken possession of the Unit.

Kawamoto inherited the same rights possessed by Bank of America to enforce the instrument." *Id*. The Court then declared that the priority of the parties was governed by the Recognition Agreement. *Id*.

Judge Scott denied Kawamoto's motion for summary judgment on its Tortious Interference claim because it found a genuine dispute over whether Chastleton had notice about the purported foreclosure sale. Nevertheless, Judge Scott granted Kawamoto's motion on its claim that Kawamoto had an interest and under both the Note and the Recognition Agreement, entitling it to priority over all but three months of Chastleton's interest in the sales proceeds. A586. The Court also held that Chastleton was essentially a mortgagee in possession, and breached its duty to rent the Unit. A588-90. The Court did not discuss the Chasleton's duty to use any rental proceeds to pay the cooperative under the Sipek Occupancy Agreement *before* using those funds to discharge any of the borrower's obligations under her Note to BOA. The Court also ruled that Kawamoto had standing to enforce the Note without addressing the lack of evidence relating to how Kawamoto obtained the Note. A585-86. Instead, the Court accepted at face value Kawamoto's claim that "during the pendency of the First Case, Kawamoto purchased a Security Interest, stepping into shoes of the Lender." A429. The Court further held that "when Kawamoto took physical possession of the Unit, the security interest in the Unit accompanied

the transfer, and Kawamoto inherited the same rights possessed by Bank of America to enforce the instrument." A586.

STATEMENT OF FACTS

There are several genuine disputes over material facts that make summary judgment improper.

A. Under the Recognition Agreement, the Borrower's Proprietary Documents include the Stock Certificate and the Occupancy Agreement. A451.

B. Under the Loan Security Agreement, the security, or collateral, for Sipek's loan, were the Stock Certificate and Lease and certain personal property and fixtures. A447.

C. Article V, Section 5.1 of the Occupancy Agreement requires Chastleton to receive "due notice" before any foreclosure sale. A460.

D. The Recognition Agreement prohibits any foreclosure "without the approval of the Corporation." A452.

E. Freddie Mac did not notify Chastleton about the foreclosure. A557.

F. Freddie Mac did not request or obtain permission from the Chastleton to proceed to foreclosure. A557.

G. Chastleton is the owner in fee simple of the building located at 1701 16th Street, NW. A451.

H. Under the Recognition Agreement, Chastleton has a right of first refusal to purchase the Shares and the Lease. A451.

I. Under the Occupancy Agreement, upon Borrower's default, Chastleton has a right to purchase the Shares and the Lease. A452.

J. RFB signed an acknowledgment that Freddie Mac had an obligation, but failed, to notify Chastleton or obtain approval from Chastleton before the foreclosure making the foreclosure sale wrongful. A557.

K. Even if the foreclosure sale was not wrongful, RFB did not acquire any interest in the Recognition Agreement or the Note because the Notice of Foreclosure Sale was for the Shares and the Lease only. A540-42.

L. The Notice of Foreclosure also made clear that the purchaser was obtaining an interest subject to the Chastleton's Bylaws, House Rules, and other governing documents. A540.

M. Under Chastleton's By-Laws, membership in the Cooperative shall be limited to individuals who own (i) the shares of stock in the Cooperative evidenced by a Stock Certificate; and (ii) hold an Occupancy Agreement issued by the Cooperative for an Apartment (collectively the "Proprietary Documents"). A467.

N. RFB is not an individual and is therefore not eligible to become a member of the Chastleton, and was ineligible to purchase the Stock or the Occupancy Agreement. A467.

O. RFB attempted to overcome this deficiency by purportedly assigning its interest to Brown. A47.

P. RFB has provided no documents showing it assigned its interest to Brown.

Q. Kawamoto did not participate in the foreclosure sale and acquired no rights in the foreclosure.

R. Kawamoto's claims it acquired an ownership interest in the Note but has produced no evidence showing how it obtained the Note. See A276-80.

S. The Note does not reference and provides no interest in the Recognition Agreement. Kawamoto has produced no document showing it has any rights under the Recognition Agreement. A338.

T. The Loan Securities Agreement provides that "[i]n case of any sale, the Lender may first deduct all expenses of sale and delivery of the Security, including, but not limited to, reasonable attorneys' fees, brokerage commissions and transfer taxes, and also all sums paid to the Corporation pursuant to the terms of the Lease or, upon termination of the Lease, pursuant to any new lease issued in

> replacement of the Lease, and may then apply the remainder to any liability of Borrower under the Note and this Agreement, and shall return the surplus, if any, to Borrower. A447.

SUMMARY OF THE ARGUMENT

The underlying cases have gone on for years even though the record shows that Freddie Mac did not provide proper notice of the foreclosure sale to the Chastleton. Both of the Orders being appealed are premised on the assumption that the foreclosure was valid, but they do not address Chastleton's rights under the By-Laws, the Recognition Agreement, the Occupancy Agreement, or the District of Columbia Code to obtain Notice and provide approval before a foreclosure sale. The Court does not account for Freddie Mac's admission that it provided no notice about the foreclosure sale to the Chastleton. By failing to provide notice, Freddie Mac violated the By-Laws, the Occupancy Agreement, the Recognition Agreement, and the District of Columbia Code. The foreclosure sale was wrongful and invalid.

At a minimum, there is a genuine dispute over when Chastleton received proper notice or approved the foreclosure sale. To wit, the Court denied Kawamoto's request for summary judgment on its tortious interference claim because "there are genuine issues of material facts concerning whether Defendant was aware of RFB's purchase of shares." A587. But the Court

ignored this factual dispute as it pertains to the foreclosure sale and other issues.

Even if the foreclosure was not wrongful, RFB did not purchase or acquire any right to enforce the Recognition Agreement. RFB did not sign the Recognition Agreement (or the Bank of America Promissory Note), and neither Bank of America nor Freddie Mac (nor anyone else) assigned RFB any rights under the Recognition Agreement to RFB. Yet RFB's case is based largely on the Recognition Agreement's order of priority for distributing sales proceeds from a foreclosure sale under circumstances that do not apply here. *See* A46-47.

In addition, RFB admits that it no longer has any rights under the Proprietary Documents because it assigned them to Brown. "Subsequent to such foreclosure auction, RFB Properties, the successful bidder, assigned its as[-]purchaser rights to Brown." A36; 39; 47. Because RFB concedes that it assigned any rights it had to Brown, *RFB has no rights* under the Proprietary Documents. The Superior Court totally ignores this fatal fact.

Kawamoto's claims are equally flawed. Kawamoto purchased *nothing* at the foreclosure sale and there is no document showing Kawamoto has *any interest* in the Recognition Agreement. Kawamoto asserts an interest based on its claim that it is the holder of a Note indorsed in blank. The Superior Court

ruled that Kawamoto had standing to enforce the Bank of America Note because the Note was "indorsed in blank" and was in the possession of Kawamoto. Even if Kawamoto had rights to enforce the Note, which Chastleton disputes, the Note is silent about and makes no reference to the Recognition Agreement. Similarly, the Recognition Agreement does not address the enforceability of that document by non-parties. Nor does any document establish Freddie Mac or anyone else assigned the Recognition Agreement to Kawamoto. Even if Kawamoto can enforce the Note it still has no rights under the Recognition Agreement, and the Court erred when it declared that the priority listed in the Recognition Agreement applies here because neither RFB nor Kawamoto have standing to enforce that agreement.

As a noteholder, Kawamoto has all the rights that its assignor had under the Note. The collateral for the Note are the Shares and the Occupancy Agreement (the "Proprietary Documents") and its right to enforce them are under the Loan Securities Agreement. The Recognition Agreement was not collateral under the Note, and there is no document showing that BOA assigned its rights under the Recognition Agreement to Kawamoto or anyone else. Because Kawamato has no standing under the Recognition Agreement, it has no claim to the order of proceeds, and the Loan Securities Agreement would govern the order of distribution.

If Kawamoto does have rights under the Recognition Agreement, however, it failed to exercise them. The Recognition Agreement gave BOA the right to foreclosure on the property but BOA did not do so. It never requested that Chastleton cancel the Sipek share or issue a new one that it could sell at foreclosure. Instead, it apparently assigned the Note to M&T Bank, and M&T assigned it to Freddie Mac. Again, the record on this point is unclear and is another reason why summary judgment is improper.

ARGUMENT

1. THE COURT ERRED WHEN IT GRANTED RFB SUMMARY JUDGMENT.

When the Court awarded RFB partial summary judgment, it erred for at least three reasons. First, the Court failed to address whether the foreclosure sale was wrongful because Freddie Mac did not notify or obtain approval from Chastleton. Second, RFB had no standing to enforce the BOA's rights under the Recognition Agreement. The purported foreclosure sale was for the Proprietary Documents only; it did not involve any rights to enforce the Recognition Agreement. Third, even if RFB somehow had standing to enforce the Recognition Agreement, it assigned those rights to Russell F. Brown and cannot enforce them here.

a. Standard of review.

A Superior Court's order granting summary judgment is reviewed *de novo*. *Radbod v. Moghim*, 269 A.3d 1035, 1041 (D.C. 2022) (citation omitted). The appellate court applies the same standard the Superior Court is required to apply in considering whether the motion for summary judgment should be granted. *Id.* (citation omitted). The Court of Appeals reviews all evidentiary materials in the record, including any documents, affidavits, declarations, admissions, or interrogatory responses "in the light most favorable to the non-moving party, and draws all reasonable inferences in that party's favor." *Id. (*citing *Liu v. U.S. Bank Nat'l Ass'n*, 179 A.3d 871, 876 (D.C. 2018); Super. Ct. Civ. R. 56(c). "Summary judgment is properly granted only if the record contains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id. Liu*, 179 A.3d at 876; Super. Ct. Civ. R. 56(a). Here, when reviewing the evidentiary record in the light most favorable to the Chastleton, and drawing all reasonable inferences in its favor, there are several genuine issues of material fact that preclude summary judgment.

b. There is a genuine dispute over whether Freddie Mac breached its contractual obligations to provide notice to and obtain consent from Chastleton.

D.C. Code Property §42-815 *et seq.* governs foreclosure proceedings over residential properties. In order to sell a property through foreclosure, a

purported seller must strictly comply with several requirements to ensure that all stakeholders are notified and provided an opportunity to protect their interests. *See Independence Fed. Sav. Bank v. Huntley,* 573 A.2d 787, 788 (D.C.) (noting that "[o]ther courts have held that under trust deed foreclosure statutes similar to § 45–715(b), 'the terms of [such] statutes must be strictly complied with, in order to satisfy the due process requirements of notice and opportunity to be heard' ") (quoting *Security Pac. Fin. Corp. v. Bishop,* 109 Idaho 25, 704 P.2d 357, 359 (App.1985)), *cert. denied,* 498 U.S. 853, 111 S.Ct. 148, 112 L.Ed.2d 114 (1990). *Bank-Fund Staff Fed. Credit Union v. Cuellar*, 639 A.2d 561, 570 (D.C. 1994).

A primary objection of the foreclosure requirements is to protect property owners and ensure they have due process. For this reasons, the Code prohibits foreclosure if a lender fails to provide proper notice to the property owner:

> ***(c)(1)(A) A foreclosure sale under a power of sale provision contained in any*** deed of trust, mortgage, or other ***security instrument, shall not take place unless the holder of the note*** secured by the deed of trust, mortgage, or security instrument, ***or its agent, gives written notice of the intention to foreclose, by certified mail, postage prepaid, return receipt requested, and by first-class mail, of the sale*** to the borrower and, if different from the borrower, ***to the person who holds the title of record, of the real property encumbered by the*** deed of trust, mortgage, or ***security instrument*** at his last known address.

(emphasis added) D.C. Code Ann. § 42-815.

Where a bank or other creditor fails to provide proper notice, the foreclosure is wrongful, and can subject the creditor to liability. In *Independence Fed. Sav. Bank v. Huntley,* the court affirmed a judgment of liability against a bank for wrongful foreclosure and wrongful eviction because it did not provide the homeowner written notice by certified mail thirty days in advance of the foreclosure. The foreclosure was wrongful notwithstanding actual notice to the homeowner sixteen days before the foreclosure sale and the homeowner's presence at the sale. 573 A.2d at 788.

The dispute in this case involves a residential mortgage and Chastleton is the "owner in fee simple of the land and improvements thereon of which said Units are a part, subject only to loan(s) secured by mortgages or Deeds of Trust, if applicable." A451. Under the Code, Chastleton was entitled to notice as "the person who holds the title of record, of the real property encumbered by the security instrument." In addition to its statutory obligation, the Noteholder also had a contractual obligation to provide notice to Chastleton. The operative documents also entitle Chastleton to notice and the right to approve or deny a potential sale. The Recognition Agreement provided BOA with certain rights upon Sipek's default under Section C. It allows BOA to cancel the proprietary documents and request that Chastleton issue new ones in favor of BOA. A382. Once that happens, BOA may then proceed with foreclosure

procedures, subject to certain limitations. Specifically, it must provide Notice to the Chastleton. Here, there is no evidence that BOA (or its successors) requested Chastleton to cancel and issue new shares, or that it notified Chastleton about a foreclosure auction. Sellers must strictly comply with Notice requirements so property owners receive due process to protect their interest. Here, the Chastleton has a right of first refusal to purchase any of Sipek's Proprietary Documents. A382. In addition, there is no right to assign or transfer the Proprietary Documents without the Chastleton's approval. A382.

It is undisputed that Chastleton did not receive proper notice because Freddie Mac admits that it did not provide notice to Chastleton. A279. Freddie Mac did not comply with Article V Section 5.1 of the Occupancy Agreement, which required "due notice to the Cooperative of [an involuntary] transfer," or Section C of the Recognition Agreement. At a minimum, there is a factual dispute over whether Chastleton received proper Notice that precludes summary judgment. *See*, *Bank-Fund Staff Federal Credit Union v. Cuellar*, 639 A.2d 561 (D.C. 1994). MORTGAGES AND DEEDS OF TRUST 1723 (finding that "a foreclosure notice that erroneously stated that mortgagors did not have right to cure, and which did not include amount necessary to cure as required

by recorder of deeds' standard form, was defective as a matter of law even though mortgagors had actual notice of amount needed to cure.").

c. RFB has no standing to enforce the Recognition Agreement.

It is axiomatic that a party may not sue to enforce rights it does not have. RFB's Counterclaim seeks to enforce and declare the rights of the parties under the Recognition Agreement, and the Superior Court awarded summary judgment and declared the parties' rights under that contract. But the Court does not explain how or why RFB can enforce that agreement. In addition, RFB does not expressly allege or establish that it has any rights under the Recognition Agreement. The record is clear that RFB was not a party to the Recognition Agreement, did not purchase the Recognition Agreement at the foreclosure auction, and was not an assignee of that document by BOA or anyone else.

The Recognition Agreement was between Sipek, Chastleton, and BOA. In contrast to Sipek's Propriety Documents (the Shares and the Occupancy Agreement), which ***were*** collateral under the Note, the Recognition Agreement ***was not*** collateral under the Note. Even if the foreclosure sale had not been wrongful, RFB still acquired no rights or interest in the Recognition Agreement, and has no standing or right to enforce that contract.

As Chastleton argued below, RFB's "focus on the Recognition Agreement "was an attempt to direct the Court from analyzing whether RFB could even enforce the Recognition Agreement." A324. Chastleton emphasized that "the Note (and the accompanying Recognition Agreement) was never sold to RFB, the collateral was." *Id*. Judge Scott's order does not address Chastleton's arguments that the foreclosure was invalid because Freddie Mac failed to provide proper notice, merely noting that "[Chastleton] further disputes the sale of the promissory note and the circumstances of the foreclosure sale," but without addressing this point further. While the Court correctly notes that "Sipek, Chastleton, and [BOA] executed a Recognition Agreement . . .", it never explains how BOA's interests in the Recognition Agreement were transferred to RFB. 593. Judge Scott simply concludes without explanation that "Pursuant to the Recognition Agreement, the Lender instituted foreclosure proceedings, and on June 9, 2015, a foreclosure auction was held." A593. The Court then adopted RFB's interpretation of the Recognition Agreement, finding that "the Recognition Agreement provides, and the Court finds, that Plaintiff is entitled only to current real estate taxes and special assessments and up to three (3) months of unpaid rent or maintenance expenses prior to the security of the Lender, and that Plaintiff's outstanding unpaid rent or maintenance expenses addition to other sums due under the

Proprietary documents are subordinate to the security interests of the Lender." A595.

The Order determining the rights of the Chastleton and the "Lender" are misplaced because the "Lender" is not a party to the litigation. The Court glosses over this critical fact, and instead focuses on how to apply the Recognition Agreement as it pertains to the "Lender" and the Chastleton. But RFB does not stand in the shoes of the "Lender," and the "Lender" is not even a party to these proceedings. The Court erroneously adopted RFB's framing of the issues and ignored the arguments, allegations and factual disputes regarding RFB's lack of standing to enforce the Recognition Agreement. It fails to address, much less establish, the threshold matter of whether RFB has any rights under the Recognition Agreement.[5]

RFB cites *Ward v. Wells Fargo* to argue it has "equitable title" to enforce the Recognition Agreement. This reliance is misplaced. In *Ward*, Mortgagee brought action against mortgagors for foreclosure and possession. Mortgagors brought separate action challenging the foreclosure against mortgagee and law firm that participated in foreclosure. The *Ward* Court found that because the

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[5] The Court also erred by considering the Motion for Reconsideration at all. RFB filed its Motion for Reconsideration on November 16, 2022, which was nearly 17 months after the Court denied RFB's Motion for Summary Judgment. Judge Scott explained that "in considering the entire record herein, and in the interest of justice, the Court deems the Motion timely filed."

parties did "not dispute that the memorandum of purchase is a valid, enforceable contract that affects real property," it held that "[u]nder the doctrine of equitable conversion, Wells Fargo therefore obtained equitable title to the property on March 23, 2010. *Ward v. Wells Fargo Bank, N.A.*, 89 A.3d 115, 122 (D.C. 2014) (referring generally). *Lindsey,* 921 A.2d at 786 & n. 4, (holding that an enforceable contract affecting real property immediately vests equitable title in purchaser)). The facts in *Ward* are distinguishable from this matter.

In *Ward*, the parties did not dispute that there was a valid foreclosure sale. Here, Chastleton initiated this action to contest the validity of the foreclosure sale. In *Ward*, the undisputed foreclosure purchaser filed an action for possession. Here, the parties filed counterclaims for declaratory judgment. This is not an action for possession and the circumstances leading to the result in *Ward* do not exist here. Nor does *Ward* establish that RFB has any right in the Recognition Agreement.

d. RFB assigned any interests it had relating to the wrongful foreclosure.

Finally, even if RFB could overcome the deficiencies described above, its counterclaim is still fatally flawed and summary judgment was improper because RFB repeatedly admits it has assigned away and holds no interest in the Proprietary Documents. In its Counterclaim, RFB alleges that "RFB is a

District of Columbia limited liability company, whose interest in the property and proceedings subject to this action have been assigned to Russell F. Brown, individually." A36 and that "Subsequent to such foreclosure action, RFB Properties, the successful bidder, assigned its as-purchaser rights to Brown." A39. Although RFB repeatedly asserts that it has assigned its interests to Brown, and that he is the property party in interest, Brown is not a party to either litigation.

"District of Columbia law evinces a policy of free assignability of claims." *National Union Fire Ins. Co. v. Riggs Nat'l Bank*, 646 A.2d 966, 971 (D.C.1994) (citing D.C. Code §§ 28–2303, –2304 (1991)). An assignee takes no greater rights than his assignor, and "a valid assignment confers upon the assignee standing to sue in place of the assignor." *Sanders v. Int'l Soc. for Performance Improvement*, (emphasis added) (citations omitted) 740 A.2d 34, 36 (D.C. 1999). When a party assigns an interest in a contract or other document, it no longer has the ability to enforce the rights it assigned, and any rights it had under the contract are extinguished. *See* 6A C.J.S. Assignments § 91 (explaining that "unless an assignment is qualified or conditioned in some way, or a contrary intent is manifest or inferable, an assignment transfers the assignor's whole interest in the thing assigned" and that "where an assignor assigns all of its interest and title to real estate and the assignee accepts the

corresponding obligations as between them, the assignee holds the identical interest the assignor did prior to the assignment (citations omitted). 6A C.J.S. Assignments § 9.

Here, RFB asserts that it has assigned its interest to Brown. RFB has provided no documents, affidavits, or other evidence establishing what it assigned to Brown, or when. Still, if RFB assigned its interest, then RFB is not the proper party in interest and violates D.C. Super. R. Civ. P. 17.

"An action must be prosecuted in the name of the real party in interest." D.C. Super. Ct. R. Civ. P. 17. "[A]n LLC, like a traditional corporation, 'is an entity distinct from its member or members.'" *Martin v. Santorini Cap., LLC,* 236 A.3d 386, 394 (D.C. 2020) (quoting D.C. Code § 29-801.04(a)). A limited liability company and its members are distinct legal entities and the real party in interest must prosecute claims in its own name. *Id. at* 396 (D.C. 2020) (affirming dismissal of claim filed by member because LLC was proper party in interest). Here, RFB is not the real party in interest because it has assigned its rights to its member, Brown. A34; A36; A39.

"A plaintiff's violation of Rule 17 can be raised by a defendant in a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted." *Martin,* 236 at 395. In addition, "[t]he court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an

objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." D.C. R. Civ. P. 17(a)(3). No motion was filed seeking to dismiss RFB because it was not the proper party in interest. Still, RFB filed its Counterclaim *more than five years ago*, on March 16, 2018, and has had ample time to allow the real party in interest to join or be substituted. Regardless, any order in favor of RFB is not proper because RFB is not the proper party in interest.

If RFB has not assigned its interest in the Chastleton to Brown, however, its claims are still fatally flawed. This is because Article II of Chastleton's By-Laws restricts who may be a member in the Cooperative, and states that a member must be an individual, and cannot be a corporation. A190.
Under the By-Laws, corporations like RFB are not permitted to be a member of the Cooperative.

The Notice of Sale provided that the foreclosure sale was subject to the Chastleton's By-Laws and other governing documents. Thus, RFB attempted to purchase the Sipek collateral even though it knew, or should have known it could not be a member. Had Freddie Mac provided Chastleton with proper notice about the foreclosure, this scenario could have been avoided. Instead, RFB attempts to overcome this deficiency by claiming that it has assigned its

interest to Brown. A47. When RFB assigned its interest to Brown it made Brown the proper party-in-interest, and RFB has no rights to pursue.

The order should be vacated, and the case remanded to the Superior Court for further proceedings to determine whether RFB is the proper party in interest or if substitution or dismissal are appropriate.

2. THE COURT ERRED WHEN IT AWARDED KAWAMOTO SUMMARY JUDGMENT BECAUSE THE FORECLOSURE SALE WAS WRONGFUL AND KAWAMOTO HAD NO STANDING TO ENFORCE THE RECOGNITION AGREEMENT.

a. There is a genuine dispute over whether Kawamoto can enforce the note.

This Court has found that when a litigant attempts to enforce a Note that is endorsed in blank, but does not establish how it came into possession of the Note, summary judgment is not proper. In *Logan v. Lasalle Bank Nat. Ass'n*, A.2d 1014, 1024-1025 (D.C. 2013), the plaintiff challenged the defendant bank's authority to enforce a Note. The bank argued that because the Note was endorsed in blank, and was in the possession of the bank's lawyer, the bank had the right to pursue foreclosure under the Note. The plaintiff contended the bank's authority was not clear because there was no evidence shown how the bank obtained the Note and because the noteholder was different than the person listed on the foreclosure documents. The Superior Court found that the bank was in possession of the Note, which was endorsed in blank, and could pursue foreclosure, and granted the bank

summary judgment. On appeal, the Court carefully examined the record and held that "the record before us, and the legal arguments presented do not demonstrate that [the defendants] were assigned [the lender's] interest in the mortgage, thus allowing them to replace the original trustees and foreclose upon appellant. *Id*. The Court explained that even though the bank was the holder of a Note endorsed in blank, there was still uncertainty about what right the holder possessed. After further discussion, the Court of Appeals remanded the case for further consideration. The same result is proper here.

The Note lists Bank of America and M&T Bank, but does not list Freddie Mac or Kawamoto. There are no agreements, affidavits, sworn statements, or other documents establishing that Freddie Mac had possession of the Note when Bayview initiated foreclosure proceedings. Nor is there any explanation as to when, how, or why Freddie Mac or Kawamoto obtained any interest in the Note. Viewing these facts in the light most favorable to Chastleton, the record does not establish the absence of a genuine dispute over a material fact. The Order should be reversed.

b. Kawamoto has no right to enforce the Recognition Agreement.

In addition to there being a genuine dispute over what rights Kawamoto may have had under the Note, the record also shows that Kawamoto has no right to enforce the Recognition Agreement. To the extent the Note is assignable and

potentially enforceable because it is endorsed in blank, those facts do not apply to the Recognition Agreement. To the contrary, the Recognition Agreement is between Sipek, BOA, and the Chastleton, and there is no evidence establishing that BOA assigned that document to anyone.

Under certain circumstances, the By-Laws allow a lender who complies with the operating documents to become a "Share Lender," but, neither BOA nor any successor-in-interest ever became a Share Lender. The operative document governing the distribution of process in the event of a sale by default of the borrower is the Loan Services Agreement. To the extent Kawamoto has rights to enforce the Note, it must do so in accordance with the Loan Service Agreement. Under the Loan Service Agreement:

> In the case of any sale, the Lender may first deduct all expenses of sale and delivery of the Security, including, but not limited to, reasonable attorneys' fees, brokerage commissions and transfer taxes, ***and also all sums paid to the Corporation pursuant to the terms of the Lease*** or, upon termination of the Lease, pursuant to any new lease issued in replacement of the Lease, ***and may then apply the remainder to any liability of Borrower under the Note and this Agreement***, and shall return the surplus, if any, to Borrower.
>
> (emphasis added) A447.

The Court erred when it declared the terms of the Recognition Agreement and not the Loan Services Agreement govern the distribution of sales proceeds.

c. Chastleton owed no duty to Kawamoto.

Kawamoto is not entitled to any sales proceeds from the purported foreclosure sale because the foreclosure was wrongful and should not proceed to settlement. Even if settlement took place, however, neither RFB nor Kawamoto have any right to enforce the Recognition Agreement. As a result, Kawamoto is not entitled to any priority over Chastleton's rights to collect Sipek's unpaid fees. In addition, the lack of any reliable evidence regarding exactly when the Note was assigned to Freddie Mac or Kawamoto creates a genuine dispute over whether Kawamoto has any rights under the Note at all. *See Logan*, *supra* at 1024-1025. If Kawamoto has no rights under the Note, Chastleton owes it no duty, and there can be no breach.

Kawamoto relies on *Watergate West, Inc. v. Barclays Bank, SA*, 759 A.2d 169 (2000) to support its argument for damages under a breach of fiduciary duty. In *Watergate*, the Court explained the general rule that a mortgagee in possession has a duty to make the property productive, and can be liable if it fails to do so. *Id*. at 177. The Court analogized the condominium in that case to a mortgagee in possession, and held that it had a duty to use reasonable efforts to rent the property. *Id*. The Court also found that the condominium association had a "right (indeed its obligation) to apply those proceeds first to the outstanding mortgage debt. *Id*. The Court emphasized that the condominium association had a duty to first "apply

those rents towards the balance of fees and assessments due on the unit, including both those fees which the [borrowers] had failed to pay during their membership, as well as those fees which accrued up until the final disposition of the apartment." *Id*. at 178. The Court explained that the rental proceeds did not belong outright to the Noteholder, but rather first had to be applied to the ***condominium association's*** interest in the Unit. (emphasis added). *Id*. The Court correctly noted that under the condominium's documents, it had priority over the bank. "[The bank]'s right to rental payments arose only after this outstanding balance was satisfied, and only to the extent those rents exceeded that amount." *Id*. The Court then calculated the amount owed to the condominium and determined the sales proceeds to be less than what was owed to the condominium. The Court concluded there was no excess funds to be distributed to the lender/judgment creditor. *Id.*

Here, the Superior Court did not balance Chastleton's interest in the Unit with any hypothetical rent payments it could have collected. *See* A580-591. The Court should have applied the terms of the Loan Services Agreement, and declared that Chastleton's right to proceeds was superior to any rights Kawamoto held under the Note and the Loan Services Agreement.

d. Kawamoto's claims are barred by the statute of limitations.

In *Watergate West*, the Court found that the lender's claim was moot because there were no excess funds to distribute. For this reason, the Court did not

address the condominium's argument that the lender's claim was barred by the statute of limitations. Here, the Superior Court did not address how the statute of limitations affected the claim for damages.

Ordinarily, the statute of limitations begins to run when the injury occurs, whether the plaintiff knows the full scope of misconduct or not, so long as he had at least "inquiry notice that [ ]he might have suffered an actionable injury." *Medhin v. Hailu,* 26 A.3d 307, 310 (D.C.2011) (internal quotation marks omitted). Sipek defaulted on the Note around the same time she defaulted on her obligations to the Chastleton. Chastleton sued Sipek for possession in April 2013. When Chastleton obtained possession of the Unit in August 2013, the lender was also on notice of its potential claims.

The statute of limitations for breach of contract and breach of fiduciary claims is three years. D.C. Code Ann. §12-301(7)(8). Kawamoto filed suit on December 31, 2019, but seeks damages dating back to August 2013. A374. Applying the three-year statute of limitations, any damages Kawamoto may have incurred before December 31, 2016 are time-barred. The Court entered judgment for $240,750.00 based on monthly rent estimated at $2,250.00 per month. This equates to 107 months of rental payments as of January 25, 2023. But there were approximately 40 months (August 2013 through November 2016) that were beyond the statute of limitations. The Court's Order awarding Kawamoto

$240,750.00 includes at least $90,000 in damages that were time-barred. Chastleton maintains that Kawamoto is not entitled to any money award, but to the extent the Court determines an award is proper, it must not include alleged damages that are beyond the statute of limitations.

REQUEST FOR RELIEF

For these reasons, the Chastleton respectfully requests this Court vacate the Court's Order granting RFB and Kawamoto partial summary judgment, and reverse and remand the case to the Superior Court for additional proceedings.

Respectfully submitted,

LERCH, EARLY & BREWER, CHARTERED

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2023, I filed the Brief of Appellant and Appendix with the Clerk of the District of Columbia Court of Appeals. I further certify that the Brief and Appendix were served this 15th day of November, 2023, via the D.C. Court of Appeals E-filing system.

/s/ Michael J. Goecke
Michael J. Goecke (D.C. Bar No.: 485999)

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

[signature]
Signature

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Email Address

Case Nos. 23-CV-150 & 23-CV-151
Case Number(s)

11-14-23
Date