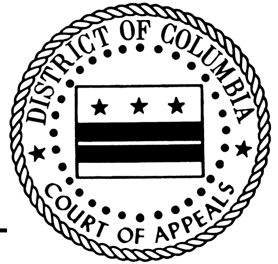

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Appeal Nos. 23-CV-0150; 23-CV-0151

IN THE DISTRICT OF COLUMBIA

COURT OF APPEALS

CHASTLETON COOPERATIVE ASSOCIATION, INC.

Appellant,

v.

KAWAMOTO NOTES, LLC,

Appellee.

On Appeal from the District of Columbia
Superior Court (Judge Ebony Scott)

Case No. 2019 CA 008500 B

THE BRIEF OF APPELLEE KAWAMOTO NOTES, LLC

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DISCLOSURE STATEMENT

Appellant (Chastleton Cooperative Association)

- Appellant Chastleton Cooperative Association is represented by Michael J. Goecke of the law firm Lerch, Early & Brewer, Chartered

Appellee (Kawamoto Notes, LLC)

- Kawamoto Notes, LLC is represented by Ian G. Thomas, Tracy Buck, and Lauren Mullin of the law firm Offit Kurman

Appellee (RFB Properties II, LLC)

- RFB Properties II, LLC is represented by Ian G. Thomas, Tracy Buck, and Lauren Mullin of the law firm of Offit Kurman, and Bryan Wallace, Esq.

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INTRODUCTION

Appellee Kawamoto Notes, LLC ("Kawamoto") should be permitted to proceed with closing on its properly conducted foreclosure sale. Kawamoto is the holder of a promissory note that is secured by shares of stock in Appellant Chastleton Cooperative Association, Inc. ("Chastleton"), which is a residential housing cooperative. The record below shows that a foreclosure sale was validly conducted, and that RFP Properties II, LLC ("RFB") was the successful bidder at auction. The record further confirms that RFB and Kawamoto are ready, willing, and able to proceed with closing, but cannot, due to Chastleton's refusal to move forward with the transaction.

The sole defense that Chastleton advanced in the trial court to Kawamoto's demand for closing was that Kawamoto lacked standing. This position is directly contradicted by well-established precedent from this Court and uncontroverted testimonial evidence. Perhaps recognizing the folly in its position before the trial court, on appeal, Chastleton has attempted to raise a series of new arguments that were never advanced below and thus are waived. Even putting waiver aside, the arguments lack legal support and are devoid of an evidentiary foundation.

For these reasons, as discussed in more detail below, the decision of the trial court should be affirmed.

RULE 26.1 CORPORATE DISCLOSURE

Appellee Kawamoto Notes, LLC is a privately held limited liability company and does not have any members or shareholders that are a publicly traded company.

STATEMENT OF ISSUES

1. WHETHER THE TRIAL COURT CORRECTLY FOUND THERE WAS NO MATERIAL FACT IN DISPUTE WHEN CHASTLETON DID NOT CITE TO RECORD EVIDENCE TO IDENTIFY A SINGLE TRIABLE ISSUE.

2. WHETHER THE TRIAL COURT CORRECTLY HELD AS A MATTER OF LAW THAT KAWAMOTO HAS STANDING TO ENFORCE THE NOTE AND ITS ACCOMPANYING SECURITY INTERESTS, INCLUDING THE LOAN SECURITY AGREEMENT AND RECOGNITION AGREEMENT, WHEN IT PHYSICALLY POSSESSES THE ORIGINAL NOTE ENDORSED IN BLANK.

3. WHETHER THE TRIAL COURT CORRECTLY DETERMINED THE PARTIES' RESPECTIVE RIGHTS TO THE FORECLOSURE SALE PROCEEDS BASED ON THE RECOGNITION AGREEMENT'S TERMS THAT GOVERN THE PARTIES' INTERESTS IN THE COOPERATIVE SHARES.

STATEMENT OF THE CASE

The present action arises out of a dispute concerning the foreclosure sale of shares in a housing cooperative located in the District of Columbia. As described more *infra,* Kawamoto is the present holder of a promissory note that is secured by shares of stock in the Chastleton, which is a residential housing cooperative located in the District of Columbia. The foreclosure sale at issue concerns the aforementioned shares and was commenced by Kawamoto's predecessor-in-interest,

the prior holder of the Note. After the foreclosure sale, but prior to closing, the promissory note was transferred to Kawamoto. Closing on the foreclosure remains pending and is the subject of this appeal.

On or about December 31, 2019, Kawamoto filed a Complaint in the District of Columbia Superior Court seeking declaratory relief ordering Chastleton to proceed to closing on a foreclosure sale for shares in the cooperative. A371-A384. The Complaint also sought an award of monetary damages for breach of fiduciary duty and tortious inference. A375-A376. At the time of filing, there was a separate matter pending in the Superior Court styled *Chastleton Cooperative Association, Inc. v. Federal Home Loan Mortgage Corp., et al.* (Case No. 2017 CA 008364 B) ("RFB Case"), in which Chastleton sought to set aside the foreclosure sale and, conversely, RFB as the foreclosure sale purchaser asserted counterclaims for an order requiring Chastleton to close on the sale. A20-A23, A35-A41. Kawamoto initially tried to intervene in the RFB Case, which Chastleton opposed. A8. The trial court eventually denied Kawamoto's request thus necessitating the commencement of its own stand-alone action against Chastleton. A4.

On or about January 13, 2020, Kawamoto caused the Summons, Complaint, and Initial Order to be served upon Chastleton. A352. By rule, the Answer to the Complaint was due on February 3, 2020, but Chastleton failed to comply with this filing deadline. SCR-Civ. 12(a). More than seven (7) months later, Chastleton

filed a Motion to Late File an Answer to the Complaint, which was granted by the trial court. A355-A356. The trial court expressly ordered that Chastleton "shall file the Answer to the Complaint by October 16, 2020." A355. Chastleton never complied with the trial court's directive and never filed an Answer. *See generally* A350-A369.[1]

On July 11, 2022, Kawamoto filed a Motion for Summary Judgment. A420-A573. The motion argued that Kawamoto was entitled to close on the foreclosure sale to RFB and that proceeds from the sale were to be distributed in accordance with the plain language of the Recognition Agreement (defined below). A431-A434. Kawamoto advanced its position that the Recognition Agreement allowed for three months of "rent and maintenance" to be given first priority from the proceeds of sale, that the proceeds then are to be applied to satisfy Kawamoto's Note, and that the remainder (if any) be distributed amongst Chastleton, Sipek, or any other creditors. *Id.* Kawamoto also argued that it was entitled to a money judgment against Chastleton because it was in possession of the unit at issue but failed to take steps to make the Unit profitable for Sipek's creditors; in particular, Kawamoto. A439-A441.

[1] It is important to note the dilatory nature to which Chastleton approached this litigation, which existed from start to finish. With regularity, Chastleton would ignore important deadlines in the case, including its deadlines to respond to the Complaint and to respond to summary judgment. While these regular improprieties are not necessarily dispositive of any issue, the pattern is particularly alarming considering the preservation issues that exist in this appeal (discussed more *infra*).

The motion was filed pursuant to a briefing schedule that the parties mutually agreed to at a June 10, 2022 status hearing. A364. Notwithstanding the agreed upon timeframe for briefing, Chastleton did not comply with its deadline. Instead, on November 16, 2022, three months after its original deadline, Chastleton filed its opposition to Kawamoto's Motion for Summary Judgment.[2] A409-A410. The opposition was two pages long and argued only that Kawamoto was not the assignee of the Note and that it thus did not have standing to file its claim. *See id.* In support, Chastleton appended several documents all of which showed a transfer of the various aspects of the security for the Note to RFB, but none of which contradicted Kawamoto's assertion that it was the holder of the Note. A412-A419.

In reply to Chastleton's sole argument on standing, Kawamoto submitted an affidavit from Russell Brown, who is the authorized corporate representative of the company. A579. Mr. Brown testified that he had physical possession of the Note and that he has maintained physical possession of the Note throughout the entire pendency of the case. *Id.* Kawamoto further cited to authority confirming that physical possession of the Note was sufficient to vest it with standing to enforce the foreclosure. A575-A576.

On January 25, 2023, the trial court granted Kawamoto's Motion for Summary Judgment in part. In doing so, the court acknowledged that there was no dispute of

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[2] *See supra* at n. 1.

material fact concerning how proceeds from the foreclosure sale were to be apportioned and thus ordered that the parties proceed to closing within thirty days. A590. The court further held that Chastleton breached its fiduciary duty to make the relevant unit profitable while it maintained physical possession of the property, and therefore, entered a judgment for $240,750 in favor of Kawamoto. *Id.* The court however denied Kawamoto's request for summary judgment on its claim for tortious interference, finding that disputes of material fact existed concerning Chastleton's general awareness of RFB's purchase. A587.

As a result of the court's ruling, a pretrial was set on Kawamoto's last remaining claim. A367. Leading up to the pretrial, Chastleton filed this notice of appeal pursuant to D.C. Code § 11-721(a)(2), which allows for interlocutory review of an order that results in the change of ownership of property.

STATEMENT OF FACTS

The Chastleton is a cooperative apartment building that is located at 1701 16th Street NW, Washington, D.C. A371. On or about June 12, 2007, Stephanie Sipek ("Sipek") entered into a contract to purchase an apartment in the Chastleton, Unit 654 ("Unit"). A372. Sipek obtained her interest in the Unit through the purchase of shares of stock that were issued to her by Chastleton, and which were reflected in a stock certificate ("Shares"). *Id.* As part of the transaction, Chastleton also entered into a Deed of Lease ("Lease") with Sipek for the Unit, which, along with the

building bylaws, obligated Sipek to pay monthly rent and maintenance for the Unit. A373.

Sipek financed her purchase of the Unit through borrowed funds from Bank of America, N.A. ("Bank of America"). A372. The funds were loaned pursuant to a promissory note dated June 12, 2007 ("Note"). A444-A446. To secure its loan, Bank of America acquired a mortgage-like security interest (the "Security Interest") in the Shares and Lease as collateral for Sipek's indebtedness, which was duly recorded pursuant to a UCC filing. A372. To induce Bank of America to loan the purchase funds, Bank of America, Sipek, and Chastleton entered into a Recognition Agreement. *Id.* The Recognition Agreement memorialized the obligations of the parties concerning Bank of America's security interest. A451-A454.

The Recognition Agreement also outlines the parties' respective rights in the event that Bank of America, or its successors and assigns, were to enforce its rights under the Security Interest. If Bank of America were to initiate foreclosure proceedings, the Recognition Agreement requires Chastleton to re-issue a certificate for the Shares to the lender. A452 at ¶ (C)(1). In the event that the Shares are sold at auction, the Recognition Agreement defines the following priority for how the sales proceeds are to be applied to any outstanding indebtedness on the Unit:

> [Chastleton's] lien for sums due from the Borrower under the Proprietary Documents with respect to the portion of such sums which are attributable to any payments due on any blanket mortgage on the Property, current real estate

> taxes and special assessments and up to three (3) months unpaid rent and maintenance expenses is prior to the security of Lender. [Chastleton's] lien for any other unpaid rent or maintenance expenses and other sums due under the Proprietary Documents (the "Subordinated Sums") is subordinated to the security interest of Lender.

A452 at ¶ (C)(1)(c).

Sometime following her June 12, 2007 purchase, Sipek defaulted on her loan obligations to Bank of America as well as on her rent and maintenance obligations to Chastleton. A373, A426. On April 17, 2013, Chastleton initiated an action against Sipek for possession of the Unit in the District of Columbia Superior Court Landlord-Tenant Branch (Case No.: 2013 LTB 009830). A373. On August 3, 2013, Sipek surrendered possession of the Unit to Chastleton, along with all her right, title, and interest in the Shares. *Id.* However, Chastleton's right to possess the Unit and its interest in the Shares remained subject to the Security Interest and the terms of the Recognition Agreement. A373, A451-A454.

As a result of Sipek's default on her obligations to Bank of America, Bayview, as its loan servicer, instituted foreclosure proceedings on the Shares in an effort to recover on Sipek's indebtedness. A374. On or about June 9, 2015, an auction was held, and at that time, RFB placed the highest bid to purchase the Shares. *Id.*

As the successful purchaser at auction, RFB attempted to go to settlement for the Shares. However, Chastleton refused to go to closing until RFB paid Chastleton all of Sipek's unpaid rent and maintenance that she owed on the Unit. A374.

Chastleton's position was inconsistent with the terms in the Recognition Agreement, which only entitled it to three (3) months' worth of rent and maintenance that was superior to Bank of America's indebtedness under the Security Interest. A375. Chastleton also insisted that RFB pay its attorneys' fees and demanded that such a line item be included on the HUD-1 Settlement Statement for any closing in which the Shares were transferred. A550-A553. RFB refused to close on the Shares while the Chastleton demanded monies that it was not entitled to under the Recognition Agreement. A375. In response, the Chastleton filed its complaint, seeking to void the sale to RFB or, alternatively, to force RFB to pay all of Sipek's outstanding cooperative fees that were owed to the Chastleton.

In or around January 2019, Bank of America assigned its rights in the Note and all rights associated therewith to Kawamoto. A375. At or around that time, Kawamoto took physical possession of the Note, which was endorsed in blank. *Id.* As the possessor of the Note endorsed in blank, Kawamoto is entitled to enforce all collection rights to the indebtedness of the Note and stands in the shoes of the original beneficiary of the Security Interest.

SUMMARY OF THE ARGUMENT

The record below confirms that the trial court properly entered summary judgment in Kawamoto's favor. In support of its motion for summary judgment, Kawamoto put forth evidence to support its ownership of the Note and its ability to

enforce the rights associated therewith. Conversely, Chastleton did not put forth any record evidence that created a dispute on this point, but rather attached assignments that related to other documents that did not have any bearing on Kawamoto's position as the holder of the Note.

Likewise, Chastleton did not put forth any record evidence to dispute the application of the Recognition Agreement to the sale to RFB. The Recognition Agreement is plain and unambiguous on its face. None of the evidence or argument advanced by Chastleton created any ambiguity that would cause the trial court to divert from applying the plain language of the document. As a result, the trial court correctly awarded summary judgment in Kawamoto's favor.

Beyond the issue of ownership of the Note, Chastleton did not raise any other substantive arguments below and thus the additional arguments that are raised in this appeal are waived. There is no basis for the Court to depart from its well settled precedent that arguments need to be preserved below to be considered on appeal. The result is that the court should disregard Chastleton's newly minted arguments in their entirety.

However, even if Chastleton's new arguments are considered, the trial court's decision should still be affirmed. Chastleton's new position fails to account for clear legal authority that confirms that Kawamoto's status as the holder of the Note entitled it to all rights associated with the indebtedness including those relating to

the security. Such a position allows Kawamoto to enforce the terms of the Recognition Agreement and entitles it to receive proceeds from the foreclosure sale as set forth in the document.

Finally, any efforts by Chastleton to challenge the money judgment that the trial court entered against it are improper as it is a non-final judgment and therefore not appealable at this time. To the extent the Court were to consider the arguments that Chastleton advances, those arguments are without merit. The record below and before this Court confirm that Chastleton is not entitled to any offset on the judgment, nor did it raise offset as a defense any time in the trial court. Chastleton's arguments concerning the statute of limitations are similarly deficient as the affirmative defense was not raised any time before the court below.

STANDARD OF REVIEW

The Court of Appeals reviews the trial court's granting of summary judgment *de novo*, applying the same standard of analysis the trial court performed in considering the motion. *E.g., Perkins v. District of Columbia*, 146 A.3d 80, 84 (D.C. 2016) (internal citation omitted). On a *de novo* review, although the Court may base its decision on reasons not relied upon by the trial court, those grounds must be apparent from the record and they must have been briefed by the parties below. *Fairman v. D.C.*, 934 A.2d 438, 445 (D.C. 2007).

ARGUMENT

I. <u>The Trial Court Record Supports Entry of Declaratory Judgment</u>.

The trial court properly entered declaratory relief in favor of Kawamoto. Summary judgment is proper when the moving party shows that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. SCR-Civ. 56(a). The moving party bears the initial burden of demonstrating the absence of a fact dispute through the use of record evidence. *E.g., Malcolm Price, Inc. v. Sloane*, 308 A.2d 779, 780 (D.C. 1973). Upon such a showing, the burden shifts to the non-moving party to present "sufficient evidence" to substantiate a fact dispute. *Kibunja v. Alturas, L.L.C.*, 856 A.2d 1120, 1127 (D.C. 2004) (internal citation omitted).

To meet this requirement, the non-moving party must cite to "some significant probative evidence" within the record "so that a reasonable fact-finder could return a verdict for the non-moving party." *1836 S St. Tenants Ass'n v. Estate of Battle*, 965 A.2d 832, 836 (D.C. 2009) (internal citation omitted). This Court has repeatedly held that general denials and unsworn statements are insufficient to satisfy the non-moving party's burden on summary judgment. *See, e.g., Tobin v. John Grotta Co.*, 886 A.2d 87, 90 (D.C. 2005). The mandatory evidentiary requirements that are imposed on a party opposing summary judgment require that:

> A [party] cannot "stave off the entry of summary

> judgment" through "[m]ere conclusory allegations." Similarly, a [party's] mere unsworn statement of material facts in dispute is insufficient to defeat a motion for summary judgment. And "[w]here the moving party supports the motion for summary judgment with ... deposition responses or other evidence submitted under oath, the opposing party may not rely on general pleadings or a denial, but rather must respond similarly by [providing] material facts under oath which raise genuine issues of fact for trial….

Maupin v. Haylock, 931 A.2d 1039, 1042 (D.C. 2007) (cleaned up). When this Court applies these principles, a review of the record below confirms the merits of the trial court's ruling.

A. The Record Confirms Kawamoto's Standing to Enforce the Note.

The material facts concerning the Lender's transfer of the Note are undisputed. The holder of a negotiable instrument, such as an original promissory note, which is endorsed in blank, is entitled to enforce it. *Chase Plaza Condominium Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 169-70 (D.C. 2014) (citing D.C. Code § 28:3-301). An endorsement in blank does not specify a particular party that the instrument is made payable to; but rather, the transfer of the physical instrument alone vests the holder with the rights to enforce it. *See id.* The record is clear that amid the years-long stalemate over settlement on RFB's purchase of the Property, the Lender transferred possession of the Note to Kawamoto. A428, A446. Kawamoto currently possesses the original Note, a fact that was supported by sworn

testimony and not disputed by Chastleton. A579, A606. The record shows that Kawamoto has physical possession of the Note, and thus has standing to enforce it.

Chastleton did nothing in the trial court to refute this point. *See*, *e.g.*, *Kibunja v. Alturas, L.L.C.*, 856 A.2d 1120, 1127 (D.C. 2004) (non-moving party on summary judgment must prove the existence of a dispute of fact through record evidence). In opposition to the Motion for Summary Judgment, Chastleton alleges that Kawamoto has not shown that it is the "holder of any interest" because there is no formal assignment of the Security Interest directly to Kawamoto. A409-410. However, the existence of a formal assignment is not dispositive of one's legal interest in a secured instrument. *See Rose v. Wells Fargo Bank, N.A.*, 73 A.3d 1047, 1052 (D.C. 2013) (reiterating that "security interests accompany the transfer of a note, even when no 'formal assignment' has taken place."). As a matter of law, Kawamoto's mere possession of the Note endorsed in blank establishes its standing to enforce its rights under the loan. *Chase Plaza Condominium Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 169-70 (D.C. 2014). Chastleton's reliance on a lack of formal written assignment does not create a fact dispute concerning Kawamoto's standing to assert its claims.

B. <u>The Trial Court Correctly Declared the Distribution of the Sale Proceeds.</u>

Based on the undisputed fact that Kawamoto holds the Note, the Court correctly held that Kawamoto is entitled to collect upon it from the foreclosure sale

proceeds as set forth in the Recognition Agreement. A431-434. It is well recognized that a court is required to apply the plain and unambiguous language of a contract. *See Dyer v.* Bilaal, 983 A.2d 349, 355 (D.C. 2009). The Recognition Agreement governs the parties' lien priority in stating that:

> [Chastleton's] lien for sums due from the Borrower under the Proprietary Documents with respect to the portion of such sums which are attributable to any payments due on any blanket mortgage on the Property, current real estate taxes and special assessments and up to three (3) months unpaid rent and maintenance expenses is prior to the security of Lender. [Chastleton's] lien for any other unpaid rent or maintenance expenses and other sums due under the Proprietary Documents (the "Subordinated Sums") is subordinated to the security interest of Lender.[3]

A452. Put another way, the Recognition Agreements creates a two-tiered lien for Chastleton. The first tier encompasses up to three (3) months of Sipek's unpaid rent and maintenance expenses owed to Chastleton, which is superior to the indebtedness under the Note and related Security Interest. The second tier encompasses all other amounts owed to Chastleton, which are subordinate to Kawamoto's lien. Chastleton submitted no evidence that would render the language of the Recognition Agreement

[3] The 3 months of unpaid rent and maintenance expenses owed to Chastleton mirror that of the super-priority lien a condominium association maintains pursuant to D.C. Code § 42-1903.13(a)(2). Here, the Recognition Agreement preserves only a 3-month priority status of cooperative rent and maintenance over a Lender's security interest, whereas for condominiums, an association maintains a 6-month priority lien to that of a first mortgage or deed of trust. *Compare* A452 at § C(1)(c), *with* D.C. Code § 42-1903.13(a)(2).

ambiguous or subject to a different interpretation. A409-A410. The plain language of the Recognition Agreement is consistent with the trial court's ruling.

Based on the trial court record, declaratory judgment as to Kawamoto's standing, and entitlement to the foreclosure sale proceeds was proper and should be affirmed. A590.

II. <u>Chastleton Cannot Cure its Trial Court Deficiencies on Appeal</u>.

In light of the above, Chastleton attempts to improperly raise a litany of new arguments on appeal that were not made below, and thus, not properly preserved. "It is a well established principle of appellate review that arguments not made at trial may not be raised for the first time on appeal." *E.g., District of Columbia v. Califano*, 647 A.2d 761, 765 (D.C. 1994). Appellate review is confined to the factual disputes raised before the lower court and a party "cannot raise new factual disputes for the first time on appeal." *See Futrell v. Dept. of Labor Federal Credit Union*, 816 A.2d 793, 802 n. 10 (D.C. 2003). Deviation from this rule is appropriate only in "exceptional situations" and to prevent "a clear miscarriage of justice from the record." *Id.* (quoting *Williams v. Gerstenfeld*, 514 A.2d 1172, 1177 (D.C. 1986) (internal quotations omitted)). These exceptional circumstances generally occur when "the issue is purely one of law, particularly if the factual record is complete and a remand for further factual development would serve no purpose, the issue has been fully briefed, and no party would be unfairly prejudiced." *Fairman v. D.C.*,

934 A.2d 438, 446 (D.C. 2007) (internal quotations omitted). In short, absent exceptional circumstances, this Court's review is limited to evidence and argument that was advanced below.

Chastleton ignores these limitations and attempts to argue the existence of disputed facts that were not actually disputed below. Appellant Br. at pp. 20-22. Indeed, the trial court expressly acknowledged that Chastleton failed to properly submit a statement of material facts that were in dispute, but nevertheless declined to accept Kawamoto's position as being conceded. A585. On appeal, Chastleton attempts to obtain a do-over on this procedure by listing out a series of facts that it contends are in dispute. Appellant Br. at pp. 20-21. None of the purported factual disputes were alleged below and thus, cannot be asserted at this juncture. As such, Chastleton's refashioned Statement of Facts does not create a dispute of fact.

Chastleton also raises a series of new substantive arguments that were also not preserved. *See* Appellant Br. pp. 38-43. Nowhere in the two-page opposition does it contain any argument on: (i) Kawamoto's inability to enforce the Recognition Agreement; (ii) Chastleton having no duty to Kawamoto as a mortgagee in possession; and (iii) any defense of offset or statute of limitations to limit the monetary judgment. *Compare* A409-A410, *with* Appellant Br. at pp. 38-43. Likewise, Chastleton's opposition contained a complete lack of evidentiary support

for these arguments, so these positions could not have even been gleaned from the record that the trial court considered.

There is also no reason for the Court to deviate from its well-established rule that it will only consider arguments raised below. *E.g., District of Columbia v. Califano*, 647 A.2d 761, 765 (D.C. 1994). Such an exception to this rule of preservation does not apply here because the newly raised issues are factual in nature. As discussed *supra*, the underlying facts concerning the foreclosure sale and Kawamoto's possession of the Note are not in dispute. Kawamoto would also be unfairly prejudiced if this case were remanded to the trial court to essentially allow Chastleton a do-over on an issue it hardly put effort into initially. *See* A409-410 (the two-page Opposition); *see also supra* at n. 1. The Court should not consider any of the new arguments that are raised by Chastleton.

III. Chastleton's New Substantive Arguments Fail as a Matter of Law.

Assuming *arguendo* that the new arguments that were raised by Chastleton were preserved, they still fail as a matter of law. There are procedural and substantive deficiencies with each of Chastleton's newly minted positions. The weight of authority shows that none of these positions are viable, and in fact, some of the issues raised are not even properly on appeal. Accordingly, as set forth below, none of Chastleton's new arguments provide a basis to disturb the lower court's ruling.

A. Kawamoto has Standing to Enforce the Note.

Chastleton claims for the first time on appeal that Kawamoto cannot establish its standing unless it explains *how* it came into possession of the Note. Appellant Br. at pp. 37-38. Chastleton's position is based on a misinterpretation of the Court's ruling in *Logan v. Lasalle Bank Nat. Ass'n*, 80 A.3d 1014 (D.C. 2013). In actuality, *Logan* is both factually and procedurally distinguishable from this case for several reasons. *First*, the appeal in *Logan* was taken from a lower court's granting of a preliminary motion to dismiss. *Logan*, 80 A.3d at 1018. The lower court in *Logan* dismissed appellant's claim that appellee did not have standing to foreclose based on Superior Court Rule 12(b)(6), "or alternatively on summary judgment grounds, without elaborating its reasoning." *Id.* at 1025. Unlike in this case, where discovery was complete at the time of summary judgment, in Logan, the dismissal occurred at the infancy of the proceeding before a factual record could be developed.

Second, the factual basis that supported this Court's decision to remand in *Logan* is also distinct from the circumstances in this matter. The standing issue in *Logan* was whether appellee had possessory rights over the note endorsed in blank at the time it conducted the foreclosure sale. *See id.* Because the timing of the note's transfer remained unclear,[4] and this fact is dispositive of whether appellee had

[4] Certain facts called the timing of the note's transfer into question, such as the notice of foreclosure listed a different holder and different trustees, which contradicted appellee's production of an affidavit claiming that it had current possession of the note. *Id.*

standing to foreclose at the time of the auction, the lower court remanded the case to allow the parties to cultivate "further factual development and legal analysis" in discovery. *Id.* Conversely, the facts here are not in dispute. At no point in time has Chastleton argued or submitted evidence to suggest that Lender did not have standing to initiate a foreclose at the time of sale. Indeed, Bank of America, the original beneficiary under the Security Interest,[5] conducted the foreclosure sale on June 9, 2015, at a point in time when it was the undisputed holder of the Note. A374, A540.[6] It was only after the auction that the Lender transferred its rights in the Security Interest and Recognition Agreement. A555-A558 (assignments are dated in 2018 and 2019). Chastleton does not dispute this fact either. A606 (stating that "Bank of America assigned all of its rights in the Security Interest…."). In short, the facts concerning the foreclosure sale itself are not at issue here as they were in *Logan*. Kawamoto's standing to enforce this Note *post*-foreclosure and its entitlement to collect proceeds therefrom are entirely distinguishable from the standing issue in *Logan.*

Third, Chastleton misstates the holding from *Logan* to seemingly require that Kawamoto explain how it came into possession of the Note in order to overcome a

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[5] Bank of America is both the original Noteholder, beneficiary under the Loan Security Agreement, and party to the Recognition Agreement. App. A444-A454.

[6] In fact, Chastleton admits in its Motion for Reconsideration that the Lender was the Noteholder authorized to conduct the foreclosure sale at the time of auction. A605.

fact dispute as to its standing to enforce the Note. *See* Appellant Br. at pp. 37-38. The Court in *Logan* did not make such a sweeping ruling and rather, confined its holding to the particular facts of the particular case. Indeed, this Court noted that its decision was based on a lack of clarity in the record and a deficiency of proof that was submitted in support of the motion to dismiss. *Logan v. Lasalle Bank Nat. Ass'n*, 80 A.3d 1014, 1025 (D.C. 2013). That stands in contrast to the present record which clearly reflects that Bank of America was the holder of the Note when the foreclosure was sale was conducted, and that Kawamoto is the holder of the Note now. A579. Simply put, the factual distinctions between *Logan* and the present case render it inapplicable.

B. Kawamoto has Standing to Enforce the Recognition Agreement.

Chastleton argues for the first time on appeal that because there is no assignment of the Recognition Agreement to Kawamoto, it has no right to enforce the contract. Appellant Br. at pp. 38-39. This argument fails as a matter of law. The transfer of a note carries with it the secured interest, without the need for a formal assignment memorializing the transfer. *See Chase Plaza Condominium Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 170 n. 2 (D.C. 2014); *Rose v. Wells Fargo Bank, N.A.*, 73 A.3d 1047, 1052 (D.C. 2013); *Smith v. Wells Fargo Bank*, 991 A.2d 20, 30 n. 19 (D.C. 2010). Thus, when Kawamoto obtained physical possession of the Note, the right to enforce the Loan Security Agreement followed.

Like the Loan Security Agreement, the Recognition Agreement also follows the transfer of the Note. *See Rose v. Wells Fargo Bank, N.A.*, 73 A.3d 1047, 1052 (D.C. 2013); *ALH Properties Ten, Inc. v. 306-100th Street Owners Corp.*, 191 A.D.2d 1, 15-16 (1993)[7] ("The intent of the Recognition Agreement is plainly to preserve the lender's security interest in the shares and proprietary lease…."); *see also Carpenter v. Longan*, 83 U.S. 271, 275 (1872) (the transfer of the note carries with it the security as a matter of equity). Indeed, this Court has acknowledged that it generally looks to and applies the "well-settled law of mortgages" in the context of cooperative units. *See Watergate West, Inc. v. Barclays Bank, S.A.*, 759 A.2d 169, 176 (D.C. 2000). Here, the Recognition Agreement is an essential part of the collateral and therefore attaches to the Note. By its very terms, the Recognition Agreement memorializes a series of representations from Chastleton to induce the Lender to loan Sipek the purchase money funds for the Shares. A451. All of these representations relate, either directly or indirectly, to the collateral that is securing the Note. It would be entirely antithetical to the purpose of the Recognition Agreement if it becomes unenforceable upon transfer of the instrument it secures (*i.e.* the Note) as Chastleton suggests. The right to enforce the Recognition Agreement travels with the rights associated with the Note, and Kawamoto had

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[7] New York caselaw is instructive on parties' respective rights in cooperatives as they are prevalent within that state. *See First Sav. Bank of Virginia v. Barclays Bank, S.A.*, 618 A.2d 134, 137 n. 8 (D.C. 1992).

standing to enforce both.

C. The Recognition Agreement Governs the Distribution of Sale Proceeds.

Chastleton argues for the first time on appeal that the Loan Security Agreement governs the parties' entitlement to the foreclosure sale proceeds.[8] Appellant Br. at p. 39. This position is at odds with Chastleton's own governing documents. In examining the obligations that govern the parties, the Court should first consider Chastleton's own bylaws. *See Watergate West, Inc. v. Barclays Bank, S.A.*, 759 A.2d 169, 175 (D.C. 2000). Chastleton's Bylaws explicitly provide that when a recognition agreement is approved by the board as required by a Lender, "the terms of the recognition agreement prevail" if there is any inconsistency with the Bylaws. A487. Notably, the Bylaws do not reference the Loan Security Agreement nor does Chastleton proffer any legal authority to substantiate its contention that its terms control.[9] *Id.* Considering the plain language in Chastleton's own governing documents which state that the Recognition Agreement controls the rights of the parties, its terms are to govern the distribution of proceeds from the foreclosure sale. *See Dyer v. Bilaal*, 983 A.2d 349, 355 (D.C. 2009). Based on the foregoing, the trial

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[8] In its brief, the Chastleton refers to the "Loan **Service** Agreement" not the "Loan **Security** Agreement." Kawamoto is unaware of any document titled Loan Service Agreement and the portions of the record that Chastleton cites to refer to the Loan Security Agreement. Kawamoto will assume that the references to Loan Service Agreement are mere scrivener's errors.

[9] It is unclear why Chastleton would rely on the Loan Security Agreement, to which it is not a party, to govern its right to proceeds at the Lender's auction except for the fact that the sale provision has more favorable language for distribution therein. *See id.*

court correctly interpreted the Recognition Agreement to adjudicate the parties' entitlement to proceeds from the sale.

IV. **The Money Judgment is Not an Appealable Interlocutory Order.**

The money judgment is not ripe for appellate consideration. Section 11-721(a)(2) of the District of Columbia Code provides that this Court has jurisdiction to review appeals of final orders and judgments, as well as interlocutory orders that change the possession property. Final judgment has not been entered in this case. A580-91 (summary judgment was not entered on Kawamoto's claim for tortious interference). The declaratory judgment that was entered is properly before the Court because it is an interlocutory order that causes a change in possession property. A590. Conversely, the money judgment, which stems from Chastleton's breach of its fiduciary duty, does not alter the possession of any property and it is not a final judgment. D.C. Code § 11-721(a)(2); *Farrow v. J. Crew Grp. Inc.*, 12 A.3d 28, 35 (D.C. 2011) (noting that a final judgment must "dispose of all claims" and that a judgment that resolves "fewer than all claims against all parties…is not appealable"). As such, the money judgment is not ripe for appellate consideration and this Court lacks jurisdiction to review that portion of the trial court's order.

V. **The Trial Court Record Supports Entry of the Money Judgment.**

Even though the issue is not properly before the Court, the record confirms Kawamoto's entitlement to a money judgment based on Chastleton's breach of

fiduciary duty. When a cooperative association regains possession of a unit due to a member defaulting on its dues, the cooperative stands as a mortgagee in possession of the unit. *See Watergate West, Inc. v. Barclays Bank, S.A.*, 759 A.2d 169, 176 (D.C. 2000). This Court has acknowledged, "[i]t is well settled that equity imposes the duty upon a mortgagee in possession or a trustee not only to account for the rents and profits actually received, but also those that could have been received had there been an exercise of reasonable care and diligence." *Id.* at 177. This means that the mortgagee in possession – in this case, Chastleton – must "manage the property in a reasonable and careful manner so as to keep it in a good state of preservation and productivity" and is liable for the "fair rental value" if it fails to do so. *Id.* Importantly, included with these obligations is the requirement that the amounts the mortgagee in possession earns from the Unit are to be applied first to the outstanding mortgage debt. *Id.* at 177-78. As this Court acknowledged in *Watergate*, failure to comply with these obligations constitutes a breach of fiduciary duty. The record below indicates that Chastleton retook possession of the Unit on August 3, 2013 and has maintained possession ever since that time. A425, A507. Chastleton readily admits that it has made no effort to make the Unit profitable, while Kawamoto submitted evidence establishing what profits for the Unit would have been earned if it was appropriately rented. A514-A515. The entry of a money judgment was thus appropriate.

In light of the above, Chastleton goes on to argue that the money judgment should have been adjusted to account for its right to certain proceeds under the operative loan agreements. Appellant Br. at p. 41. As an initial matter, this argument fails because the argument was never raised below and therefore is forfeited. *See supra* at Sec. II. However, even if that were not the case, the argument fails to account for the fact that Chastleton cancelled any leasehold on the Unit at the time it retook possession and terminated Sipek's membership in the cooperative. A225-28. The net result of that action was that Sipek was no longer a "member" of the cooperative and thus, not obligated to pay any of the costs associated with membership, including, *inter alia*, mortgage costs on the building, property taxes or insurance, repairs, maintenance, etc. A474 (noting that each "**member**" of the Chastleton pays their proportionate share of the buildings monthly expenses). Accordingly, because Chastleton was no longer entitled to collect charges from Sipek, it had no basis to offset any of the fair market rent that Kawamoto was entitled to for the use of the Unit.

Chastleton is also procedurally barred from asserting any statute of limitations defense concerning the amount of the monetary judgment award. *See* Appellant Br. at pp. 41-43. The statute of limitations is an affirmative defense that must be initially raised within a defendant's responsive pleading. *See Feldman v. Gogos*, 628 A.2d 103, 104 (D.C. 1993); SCR-Civ. 8(c). A party's failure to promptly plead an

affirmative defense constitutes a waiver of that defense. *See id.; see also George Washington Univ. v. Violand*, 940 A.2d 965, 977 (D.C. 2008) (Waiver is the "intentional relinquishment or abandonment of a known right.") (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)) (internal quotations omitted). Notwithstanding, a court may consider an untimely plead affirmative defense so long as the plaintiff has an opportunity to explore the merits of the defense in discovery to formulate a response, as appropriate, in the trial court.[10] *See George Washington Univ.*, 940 A.2d at 977-78 (noting that it may not be too late if an affirmative defense is raised in a pretrial statement or motion for reconsideration of a motion for summary judgment). Conversely, an affirmative defense raised mid-trial or "**<u>for the first time on appeal</u>**" shall be waived. *Mayo v. Mayo*, 508 A.2d 114, 116 (D.C. 1986) (emphasis added); *see George Washington Univ.*, 940 A.2d at 978. Stated differently, waiver is strictly applied when the procedural posture of the case is such that the plaintiff lacks a full and fair opportunity to cultivate a record or respond to a defendant's late invocation of a statute of limitations defense. *See Jaiyeola v. District of Columbia*, 40 A.3d 356, 362 (D.C. 2012) (waiver prevents "unfair surprise or other substantial prejudice to the plaintiff").

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[10] This Court has recognized that waiver of an affirmative defense is "neither harsh nor technical." *Atchison & Keller, Inc. v. Taylor*, 51 A.2d 297, 298 (D.C. 1947). Rather, the rule is designed to "accomplish orderly procedure and assure decisions upon the actual issues" by providing the plaintiff an opportunity to counter the affirmative defense when it is presented. *Id.*

Chastleton's failure to raise statute of limitations at any time in the lower court constituted a waiver of the affirmative defense. Chastleton did not file a responsive pleading or assert any affirmative defenses in response to Kawamoto's Complaint. *See* A350-A369 (showing no Answer filed); A355 (Order granting motion to extend time to Answer docketed on Oct. 8, 2020). Chastleton did not raise the statute of limitations defense in opposition to Kawamoto's Motion for Summary Judgment. A409-410. Chastleton also failed to raise the defense in its Motion for Reconsideration of the trial court's order on summary judgment. A602-608. In short, the statute of limitations defense is entirely absent from the trial court record and is therefore waived in its entirety.

CONCLUSION

The trial court properly considered the record before and entered the correct declaratory judgment based on the arguments and evidence that were submitted by the parties. This Court should affirm the lower court's decision.

Respectfully, submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2023, the foregoing document was served on all counsel of record via the Court of Appeals Electronic Filing System.

*/s/ Ian G. Thomas*____________

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.

/s/ Ian G. Thomas
Signature

23-CV-0150; 23-CV-0151
Case Number(s)

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