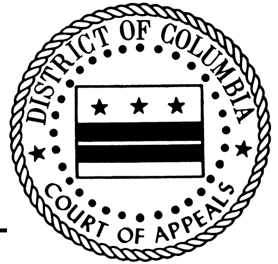
Appeal Nos. 23-CV-0150; 23-CV-0151



Clerk of the Court
Received 12/21/2023 09:51 PM
Filed 12/21/2023 09:51 PM

IN THE DISTRICT OF COLUMBIA

COURT OF APPEALS

CHASTLETON COOPERATIVE ASSOCIATION, INC.

Appellant,

v.

RFB PROPERTIES II, LLC

Appellee.

On Appeal from the District of Columbia
Superior Court

Case No. 2017 CA 008364 B

THE BRIEF OF APPELLEE RFB PROPERTIES II, LLC

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Appellee (RFB Properties II, LLC and Kawamoto Notes, LLC)

- Appellee RFB Properties II, LLC is represented by Ian G. Thomas, Tracy L. Buck, and Lauren Mullin (Offit Kurman, PA) and Bryan Wallace, Esq.
- Appellee Kawamoto Notes, LLC is represented by Ian G. Thomas, Tracy L. Buck, and Lauren Mullin (Offit Kurman, PA)

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INTRODUCTION

The record before the Court confirms that the trial court's decision ordering Appellee Chastleton Cooperative Association ("Chastleton") to move forward with closing on RFB Properties II, LLC's ("RFB") foreclosure purchase was correct. Over the span of five years, the parties to this appeal have litigated the issues before this Court. The record shows that RFB alleged facts that support its right to complete its foreclosure purchase, which were admitted by Chastleton. Unambiguous loan agreements likewise confirm the terms of sale and how the proceeds are to be distributed therefrom. In response to RFB's counterclaims and dispositive motions, Chastleton presented no evidence and scant legal argument to refute RFB's entitlement to the relief sought before the trial court. On appeal, Chastleton attempts to assert new fact disputes and raises substantive arguments that have been either waived or are unpreserved. An independent *de novo* review of the record below yields the same conclusion that that the trial court reached. RFB is entitled to complete its foreclosure purchase and summary judgment should be affirmed by this Court.

STATEMENT OF ISSUES

I. WHETHER THE TRIAL COURT CORRECTLY GRANTED PARTIAL SUMMARY JUDGMENT IN RFB'S FAVOR WHEN CHASTLETON FAILED TO RELY ON ANY RECORD EVIDENCE TO SUPPORT ITS POSITION

II. WHETHER CHASTLETON PRESERVED ANY RIGHT TO CHALLENGE THE SALE TO RFB

III. WHETHER CHASTLETON CAN IGNORE THE RECOGNITION AGREEMENT

STATEMENT OF THE CASE

The genesis of this dispute is a foreclosure sale of shares of stock associated with a residential apartment located within the Chastleton, which is a housing cooperative[1] located in the District of Columbia. As discussed more below, the former owner of the shares defaulted on a loan. The shares served as security for the loan and, as a result, the lender foreclosed upon its security interest. RFB purchased the shares at a public auction.

On or about December 15, 2017, Chastleton filed a complaint in the District of Columbia Superior Court against RFB as the foreclosure purchaser and against Bayview Loan Servicing, LLC ("Bayview") and Federal Home Loan Mortgage Corp. ("Freddie Mac") as the entities it believed conducted the foreclosure. A20-A25. The Complaint sought an order declaring the foreclosure sale to RFB void or, alternatively, an order requiring RFB to "pay all outstanding sums due and owing to

[1] Unlike fee simple ownership in a condominium unit or real property, "[a] cooperative property owner holds shares of stock in the cooperative corporation that owns the apartment." *Burgess v. Pelkey*, 738 A.2d 783, 787 n. 9 (D.C. 1999) (quoting *Lemp v. Keto*, 678 A.2d 1010, 1018 (D.C. 1996)). The cooperative corporation leases the apartment to the stockholder, and the parties execute an occupancy agreement memorializing the member's right to possess the unit. *See id.* The unit owner is then considered a member of the cooperative association and, like that of a condominium association, is subject to their governing documents, such as their bylaws. *See Burgess, supra* at 787-88.

the Chastleton as required by the [governing docs].” A23.

On March 16, 2018, RFB filed an Answer that generally denied the basis for Chastleton’s claims and asserted a number of affirmatives defenses. A33-A35. RFB also asserted a counterclaim against Chastleton, alleging: (i) that the foreclosure sale was properly held; (ii) that RFB was the prevailing purchaser; (iii) that RFB was ready willing, and able to close; and (iv) that the Chastleton had refused to close on the sale without good cause. A35-A42. As a result, RFB requested that the Superior Court validate its foreclosure purchase, direct Chastleton to re-issue new proprietary documents in RFB’s name, award RFB possession of the unit at issue, and award monetary damages. A41-A42. Chastleton did not file an Answer in response to RFB’s counterclaims. A10-A14. Bayview and Freddie Mac also answered the Complaint, generally denying that Chastleton had any basis for the relief sought. A26-A32.

In or around September 21, 2019, RFB filed a Motion for Partial Summary Judgment against Chastleton (“Motion for Judgment”), which sought a declaratory judgment forcing Chastleton to go to closing on the foreclosure sale in compliance with the terms of the documents that governed the transaction. A43-A56. Appended to the Motion for Judgment were copies of the Note, Notices of the Foreclosure Sale, and the Recognition Agreement that outlined the parties’ obligations in the event of a foreclosure, including how the proceeds from such sale were to be apportioned.

A51-A53.

Chastleton submitted a two-page opposition to RFB's dispositive motion ("Opposition to Judgment"). A104-A105. In its filing, Chastleton asserted that the foreclosure sale was conducted without its knowledge and without proper notice. A105. Importantly, Chastleton's opposition was not supported by a single piece of record evidence, nor did it cite to any other legal authority that would support its position. A104-A105.

RFB filed a timely reply to the Chastleton's Opposition to Judgment on October 22, 2019. A108-A114. In the reply, RFB noted that Chastleton failed to create a dispute of material fact through record evidence and that it failed to address the substantive issue of how the foreclosure proceeds were to be apportioned. A109. RFB further elaborated on its position in a supplemental reply brief submitted on January 20, 2020. A119-A125.

On June 21, 2021, the trial court, Judge Jackson, issued an order denying RFB's Motion for Judgment (the "Jackson Order"). A140-A143. In doing so, Judge Jackson did not make any ruling on whether the foreclosure sale was properly noticed and conducted. *Id.* Judge Jackson partially ruled on the issue of how the proceeds from the sale were to be apportioned, stating that: "It is clear to the Court that the recognition agreement does not limit plaintiff's lien for sums due **to only three months of special assessments**." A142 (emphasis added). This holding was

problematic because the dispute did not center on "special assessments" but rather, on "unpaid rent and maintenance expenses." A73-74. This issue in the court's ruling was brought to Judge Jackson's attention at a status hearing on June 25, 2021 – four days after his decision. A3. In response, Judge Jackson stated that he intended to issue an order clarifying his ruling. *Id.* However, no such clarifying ruling was ever made, and Judge Jackson subsequently retired. Upon Judge Jackson's retirement, the case was transferred to Judge Ebony Scott. *Id.*

On November 16, 2022, RFB filed a motion for reconsideration of the Jackson Order ("Motion for Reconsideration"). A144-A305. In its filing, RFB pointed to the fact that the Jackson Order did not focus on the appropriate part of the Recognition Agreement and therefore, did not rule on the issue that was actually before the court when he denied the motion. A159-A160. RFB also highlighted the important policy considerations that were implicated by Judge Jackson's denial. A157. Appended to the Motion for Reconsideration were numerous pieces of record evidence that supported RFB's position. A165-A305.

Chastleton filed an opposition to the Motion for Reconsideration on December 1, 2022 ("Opposition to Reconsideration"). A306-A307. The opposition is sparse, only two pages in length, of which less than half is argument. *Id.* The opposition incorrectly claims that reconsideration is governed by SCR-Civ. 7 and states that the motion for reconsideration should be denied because it "fails to allege

any of the applicable factors/standards for reconsideration under the Rules governing proceedings in this Court." A307. The opposition also does not address any of the substantive argument contained in the motion for reconsideration nor did it append a single piece of record evidence to support its position. A306-A307.

On January 25, 2023, the trial court granted RFB's Motion for Reconsideration in part. A312-A321. The court noted the untimeliness of RFB's Motion for Reconsideration but found good cause to nevertheless consider the motion based on Judge Jackson's representation that he was going to issue a clarifying order. A317. The court went on to confirm that RFB's position on the priority of how the sales proceeds are to be applied at closing was correct. A317-A318. As a result, the trial court ordered that closing on RFB's purchase was to occur within 30 days and the court declared how the proceeds from the sale were to be distributed. A320.

On February 24, 2023, Chastleton appealed the trial court's ruling.[2]

STATEMENT OF FACTS

The Chastleton is a cooperative apartment building that is located at 1701 16th Street NW, Washington, D.C. A36. On or about June 12, 2007, Stephanie Sipek

[2] Prior to filing its Notice of Appeal, Chastleton filed a Motion for Reconsideration, which, amongst other things, sought to back fill the record with evidence and argument that it had never previously raised to the Court. A322-A328. That motion was denied and importantly, it is not on appeal. *See Perry v. Sera*, 623 A.2d 1210, 1214-15 (D.C. 1993); *See also* A2 (denial of reconsideration occurred **after** this appeal was noted). The Motion and attachments should not be considered by this Court.

("Sipek") entered into a contract to purchase an apartment in the Chastleton, Unit 654 ("Unit"). *Id.* 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. *Id.*

Sipek financed her purchase of the Unit through borrowed funds from Bank of America, N.A. ("Bank of America"). A36-A37. The funds were loaned pursuant to a promissory note dated June 12, 2007 ("Note"). A166-A168. 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. A169-A171. To induce Bank of America to loan the purchase funds, Bank of America, Sipek, and Chastleton entered into a Recognition Agreement. A37. The Recognition Agreement memorialized the parties' obligations concerning Bank of America's security interest. A129-A131.

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. A130. 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. A130 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.

A130 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. A37. 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). A21. On August 3, 2013, Sipek surrendered possession of the Unit to Chastleton, along with all her right, title, and interest in the Shares. A22. 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. A129-A131.

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. A37-A38. On or about June 9, 2015, an auction was held, and at that time, RFB placed the highest bid to purchase the Shares. A38.

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. A40. 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. A130. 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. A132-A135. RFB refused to close on the Shares while Chastleton demanded monies that it was not entitled to under the Recognition Agreement. In response, 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. A20-A25.

In or around January 2019, Bank of America assigned its rights in the Note and all rights associated therewith to Kawamoto Notes, LLC ("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.

STANDARD OF REVIEW

This appeal is taken from a decision of the trial court that granted a motion for reconsideration and in reconsidering its prior ruling, ultimately granted a motion for partial summary judgment. A decision on a motion for reconsideration is reviewed for abuse of discretion. *E.g., In re Estate of Derricotte*, 885 A.2d 320, 324 (D.C. 2005). This Court reviews a decision on a motion for summary judgment *de novo*. *E.g.*, *Perkins v. District of Columbia*, 146 A.3d 80, 84 (D.C. 2016).

SUMMARY OF ARGUMENT

The trial court's decision to reconsider the Jackson Order and enter summary judgment on RFB's claim for declaratory relief is well supported by the record below. To obtain summary judgment, RFB submitted record evidence to support its request for relief, all of which was considered by the court below. The burden then shifted to Chastleton to demonstrate the existence of a fact dispute through the use of record evidence, which it did not do. Instead, Chastleton submitted two separate oppositions to the trial court that were each respectively two pages in length, and neither of which appended any evidentiary support. On this record, the trial court correctly entered summary judgment in RFB's favor.

Perhaps recognizing its deficiencies at the trial level, Chastleton makes a series of new arguments on appeal that were not raised in the court below.

Chastleton's failure to preserve these arguments at the trial level allows this Court to decline to consider them on appeal based on well-established precedent.

Finally, even if Chastleton's newly minted arguments are considered, they do not form a basis to disturb the trial court's ruling. Chastleton argues that there were defects in how the foreclosure sale was noticed but relies on inapplicable statutory authority to support its position. Chastleton similarly asserts that RFB lacks standing to enforce the Recognition Agreement. This argument likewise fails to account for legal precedent vesting RFB with equitable title to the Shares and status as a third-party beneficiary to the Recognition Agreement. Finally, Chastleton's argument that RFB is not the proper party in interest because it assigned its rights to a third-party not only lacks evidentiary support but is also directly at odds with the Superior Court Rules. The trial court's ruling should be affirmed.

ARGUMENT

I. THE RECORD BEFORE THE TRIAL COURT SUPPORTS SUMMARY JUDGMENT

The record before the Court supports the entry of summary judgment in RFB's favor.[3] On a motion for summary judgment, the initial burden is on the moving

[3] Chastleton does not appear to meaningfully attack the trial court's decision to reconsider Judge Jackon's ruling. The lone objection to the court's decision to re-visit the ruling is apparently that it was out of time. Appellant Br. at p. 32 fn. 5. Regardless of timing, the court was well within its right to consider the ruling even after it was made, as it was an interlocutory order that is subject to the trial court's revisory power at any time prior to final judgment. *See* SCR-Civ. 54(b); *Williams v. Vel Rey Properties, Inc.*, 699 A.2d 416, 419-20 (D.C. 1997). The lower court is also free to extend deadlines as it deems appropriate upon a proper showing of cause. *See* SCR-Civ.

party to demonstrate the absence of a material fact in dispute and put forth a *prima facie* case to support its request for relief. SCR-Civ. 56(a); *see, e.g.*, *Landow v. Georgetown-Inland West Corp*., 454 A.2d 310, 313 (D.C. 1982). In doing so, the moving party is required to support its position with record evidence in the form of "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials…." *See* SCR-Civ. 56(c)(1). Once such a showing is made, the burden then shifts to the non-moving party to show that either a dispute of material fact exists or the moving party is not entitled to the requested relief as a matter of law. *See Landow*, 454 A.2d at 313. Like the movant, the non-moving party must support its opposition through citation to record evidence. SCR-Civ. 56(c). In reviewing the motion and opposition, this Court is only required to consider the materials cited in the briefings that was submitted. *See* SCR-Civ. 56(c)(3).

This well recognized framework confirms that the trial court reached the proper decision in granting summary judgment in RFB's favor. RFB's Motion for Judgment submitted copies of the relevant loan documents, foreclosure documents,

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6(b); *Briggs v. Israel Baptist Church*, 933 A.2d 301, 303-04 (D.C. 2007); *see also* Kawamoto Br. at p. 6 (noting that Chastleton entirely failed to respond to Kawamoto's motion for summary judgment, but nonetheless, was given a second chance to file an opposition). As such, Chastleton's complaint about the timing of reconsideration is without merit.

and the Recognition Agreement in support of its requested relief. A78-A103. The documents demonstrated that RFB was the foreclosure purchaser and that it was entitled to close on its purchase. A95. The record evidence further confirmed that the basis for Chastleton's interference was not a lack of notice, but rather an attempt to extract more out of the RFB at closing than Chastleton was otherwise entitled to under the Recognition Agreement. A89-A93. Based on these undisputed facts and unambiguous documents, RFB satisfied its initial burden for summary judgment, entitling it to proceed to closing.

In the Opposition to Judgment, Chastleton submitted nothing – by way of either evidence or argument – to undermine RFB's entitlement to relief. A104-A105. This Court has repeatedly held that general denials and unsworn statements are insufficient to defeat a motion for 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). Chastleton's Opposition to Judgment does not satisfy this burden. The filing was less than two pages long and did not cite to or appended any record evidence in support of its position. A104-A105. The opposition lacks any sort of well-developed or cogent argument in response to RFB's motion for summary judgment. The opposition generally challenges the sale to RFB as being "in dispute" and "not valid," while also claiming Chastleton "was not notified" of the sale. *Id.* These general statements are unsupported by any form of record evidence as required by SCR-Civ. 56 and therefore, do not satisfy Chastleton's burden to demonstrate the existence of a fact dispute. *See 1836 S St. Tenants Ass'n v. Estate of Battle*, 965 A.2d 832, 836 (D.C. 2009).

The same analysis applies to the record that was submitted to the Court on reconsideration.[4] RFB's Motion for Reconsideration, in addition to arguing that the court should re-visit the prior ruling, put forth record evidence and argument in support of the position that Chastleton was required to close per the terms of the Recognition Agreement. A144-A163. In the Opposition to Reconsideration, Chastleton responded in a fashion that was similar to its Opposition to Judgment: a

[4] As discussed *supra*, RFB's Motion for Summary Judgment was initially denied by Judge Jackson on June 21, 2021. A140-A143. That order is not on appeal, but it necessitated the need for RFB to file a motion for reconsideration which was ultimately granted, in part.

two-page brief with no citation to record evidence.[5] A306-A307. In short, Chastleton had multiple chances to curate a record for the court that supported its position in opposition to RFB's relief sought, and each time it declined to do so.

Ultimately, the trial court was left to rule on the record that was before it. In consideration of RFB's Motion for Judgment and Motion for Reconsideration that were based on legal arguments and record evidence, coupled with Chastleton's two oppositions that contained neither, the outcome is clear. In each instance, RFB made a *prima facie* case entitling it to the relief sought and Chastleton failed to meet its burden to withstand summary judgment. *See, e.g., Maupin*, 931 A.2d at 1042. Based on the record before the trial court, the decision to grant summary judgment was correct.

II. CHASTLETON WAIVED OR FAILED TO PRESERVE ALL OF THE ARGUMENTS IN ITS APPELLATE BRIEF

The arguments that Chastleton makes on appeal were not raised in the trial court and are thus waived. It is well recognized that "arguments not made [before the trial court] may not be raised for the first time on appeal." *D.C. v. Califano*, 647 A.2d 761, 765 (D.C. 1994); *see also Thornton v. Norwest Bank of Minnesota*, 860 A.2d 838, 842 (D.C. 2004). The Court of Appeals will only deviate from this fundamental principle in exceptional situations where it is necessary to prevent a

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[5] The opposition also inaccurately cited the relevant rule as being SCR-Civ. 7.

clear miscarriage of justice. *Id.* 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). Neither exception applies here and accordingly, the Court should decline to consider the substantive arguments that Chastleton raises for the first time on appeal.

As discussed *supra*, the arguments in Chastleton's Appellant Brief were never raised below and therefore, are not properly before the Court on appeal. Chastleton's two-page Opposition to Judgment makes none of the arguments that are now presented before this Court. A104-A105. For example, Chastleton spends several pages in its opening brief arguing for the application of D.C. Code § 42-815, a statute which was neither directly nor indirectly referenced in its Opposition to Judgment. Appellant Br. at pp. 26-27. Likewise, Chastleton spends a significant amount of time arguing that the lender failed to properly notice the foreclosure sale to RFB, but the only reference to such a position in the opposition is single statement that "[Sipek] was held in default and a public auction was held, without [Chastleton's] knowledge." A104. There is absolutely no record evidence appended to either the Opposition to Judgment or Opposition to Reconsideration that would support such an assertion. These arguments were not preserved.

Moreover, even assuming *arguendo* that the issues surrounding notice and the foreclosure sale were preserved, they would still be waived. The lender is the party that conducted the sale and sent notices of same. Chastleton's challenge to the manner in which the sale was conducted would require the lender to join in this matter as a necessary party to defend against this claim. SCR-Civ. 19(a). Notwithstanding, Chastleton **voluntarily dismissed** both Bayview and Freddie Mac at the October 25, 2019 hearing. A9.[6] This voluntary dismissal operated as a complete adjudication of these claims on the merits, and thus, a waiver of any future claims.

The same is true for Chastleton's arguments concerning standing to enforce the Recognition Agreement and a purported assignment of RFB's rights. Appellant Br. at pp. 30-37. The words "assignment" or "standing" are nowhere to be found in either the Opposition to Judgment or the Opposition to Reconsideration. A104-A105, A306-A307. There is no argument that articulates a legal or factual basis for those positions and no citation to record evidence that support the position that Chastleton is now attempting to assert. Simply put, questions of standing and assignment were not raised below and cannot be made for the first time on appeal.

[6] To the extent that Chastleton argues that the dismissal does not constitute a waiver because Kawamoto took assignment of the note and stood in the Lender's shoes, that argument also fails. On December 6, 2019, Kawamoto sought to intervene in the RFB case, which Chastleton opposed. A8. The Court agreed with Chastleton's position and denied Kawamoto's request to intervene. A4. Any argument against the lender is waived due to Kawamoto's purchase of the Note and would be barred by equitable estoppel. *See Nolan v. Nolan*, 568 A.2d 479, 484 (D.C. 1990).

There is also no reason for the Court to deviate from the longstanding prohibition on arguments being advanced for the first time on appeal. The arguments raised in Chastleton's brief are factual in nature. To the extent the Court were to consider these new arguments, they would undoubtedly warrant a remand for further fact finding, a point that is expressly acknowledged by Chastleton. Appellant Br. at p. 37. This case does not fall into the exception that arguments that are not raised below are waived. The Court should decline to consider the arguments contained in the Chastleton's brief.

III. THE SUBSTANTIVE ARGUMENTS RAISED BY THE CHASTLETON HAVE NO MERIT

Assuming *arguendo* that Chastleton had properly raised its arguments before the trial court and had not waived them, the position nonetheless fails. As discussed more herein, each of the substantive arguments are legally or factually deficient. Accordingly, even if the Court were to consider Chastleton's newly minted positions, none of them form a basis to disturb the trial court's ruling.

A. There is No Basis to Set Aside the Sale

Chastleton's argument that the foreclosure sale to RFB should be set aside due to a lack of notice is flawed in several ways. As an initial matter, the argument ignores the fact that Chastleton admitted that it did receive proper notice by failing to respond to a pleading alleging that proper notice was received. A party that does not deny an allegation in a responsive pleading is deemed to have admitted the fact.

SCR-Civ. 8(b)(6). RFB alleges in its counterclaim that proper notice of the foreclosure sale was sent to all interested parties. A38. Chastleton did not respond to RFB's counterclaim and therefore, this allegation (and all others contained in the counterclaim) are deemed admitted. Stated differently, Chastleton's argument on notice is precluded as a matter of law based on its failure to respond to RFB's counterclaim.[7]

The argument is also waived by Chastleton's dismissal of Bayview and Freddie Mac from the proceeding. A claim must be brought against the proper party in interest. *See* SCR-Civ. 19(a)(1). Once a claim is asserted, a dismissal with prejudice operates as a full adjudication on the merits of all the claims that were asserted against that party. *See Molovinsky v. Monterey Co-op., Inc.*, 689 A.2d 531, 533 n. 1 (D.C. 1996). The lender that conducted the foreclosure sale is the proper party against whom any claimed defect must be asserted. *See* SCR-Civ. 19(a)(1). In this instance, Chastleton voluntarily dismissed both Bayview and Freddie Mac from the case at the October 25, 2019 hearing. A9. This dismissal operated as a full adjudication on the merits of Chastleton's claims that there was a defect in the foreclosure sale. *Parker v. Martin*, 905 A.2d 756, 762 (2006) (recognizing that a

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[7] The failure to respond to the Counterclaim is not a mere oversight but was a recurring theme of Chastleton's litigation strategy. Chastleton likewise did not file a responsive pleading to the Complaint that was filed in the Kawamoto case. *See* A350-A369. This repeated failure to file responsive pleadings is inexcusable, especially considering that Chastleton has been at all times represented by experienced counsel.

voluntary dismissal with prejudice constitutes a complete adjudication of the claims between the parties.). No appeal was taken from this dismissal, and it is a final decision. The dismissal operates to bar Chastleton's position.

Chastleton's reliance on D.C. Code § 42-815 is also misplaced. Title 42 of the District of Columbia legislates obligations relating to real property, and Chapter 8 of that title addresses "Mortgages and Deeds of Trust." By its very terms, D.C. Code § 42-815 applies to "deeds of trust, mortgages, or security interests" that constitute an encumbrance on "real property." *See, e.g., id.* at § (c)(1)(A). However, the foreclosure here is on the Shares which constituted personal property, not real property.[8] *See First Sav. Bank of Virginia v. Barclays Bank, S.A.*, 618 A.2d 134, 140 (D.C. 1992). The security that Sipek pledged for her loan was a stock certificate that was issued to her by the Chastleton. A21. The foreclosure notice very clearly indicates that the property that is being foreclosed upon are the shares of stock, not any direct interest in real estate. A101. As a result, D.C. Code § 42-815 has no application to RFB's purchase of the Shares.

Even if D.C. Code § 42-815 did apply, Chastleton's argument still fails because it lacks standing to assert any defect in notice. The express terms of D.C. Code § 42-815 provide for notice of foreclosure to be given to the owner of the

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[8] Chastleton repeatedly mischaracterized the transaction at issue as involving a mortgage and real property. *See, e.g.,* Appellant Br. at pp. 26-28. The record before the Court clearly shows that the dispute here does not constitute a residential mortgage.

property being sold. Indeed, this Court has rejected similar attempts to extend the notice requirements of D.C. Code § 42-815 to other non-owners of the property being foreclosed upon. *See Pappas v. Eastern Sav. Bank, FSB*, 911 A.2d 1230, 1238 (D.C. 2006). In *Pappas*, this Court directly addressed an attempt to enlarge the scope of the notice provisions contained in D.C. Code § 42-815 and rejected the efforts, stating:

> Nor does the statutory language give appellants a basis for complaining about appellees' failure to give them written notice of the foreclosure sale. D.C. Code § 42–815(b) requires notice only to the "owner" of the encumbered real property and to the District; there is no statutory or regulatory requirement that a foreclosing mortgagee give notice to competing lienholders, whether subordinate or superior. **At oral argument, appellants' counsel urged us to construe the statutory and regulatory mandate of timely notice of foreclosure sales to property "owners" to require that notice be given to anyone who is known to own an interest in the affected property, including junior lienholders. We note that the D.C. Circuit rejected a similar contention in S & G Inv., Inc. v. Home Fed. Savings & Loan Ass'n, 164 U.S.App. D.C. 263, 267, 505 F.2d 370, 374 (1974) (holding that a junior lienor was not entitled to notice of a foreclosure sale under D.C.Code § 42–815(b)). While we are not bound by the ruling in S & G, we find the court's reasoning persuasive, because it is consistent with the more limited legislative intent discussed above.**

Id. (emphasis added). In sum, this Court has rejected similar efforts to expand the notice requirements under D.C. Code § 42-815 and should do so here.

Moreover, Chastleton is not statutorily entitled to receive notice in advance

of this type of foreclosure sale. Foreclosures of personal property – such as the Shares – is governed by Article 9 of the Uniform Commercial Code, which is codified in the District of Columbia at D.C. Code §§ 28:9-101, *et seq*. The particular provision governing the notice rights for a foreclosure on personal property are set forth in D.C. Code § 28:9-611. That statute provides mandatory notice rights to certain categories of creditors and co-obligors but does not require that a housing cooperative receive notice prior to foreclosure. *Id.* Simply put, Chastleton has no statutory right to notice.

Chastleton's argument that it was entitled to notice under the Recognition Agreement also fails for several reasons. First, nowhere in the Recognition Agreement does it provide Chastleton a right to pre-foreclosure notice. *See* A129-A131. The Recognition Agreement provides Chastleton with the right to purchase the Shares and the right to approve of the sale to RFB,[9] but it does not set forth any notice requirement **prior** to a foreclosure auction. A130. The Recognition Agreement does not create any pre-foreclosure notice requirement that would warrant the undoing of RFB's purchase.

Beyond the lack of required notice, the record also does not reflect any sort of lack of awareness on behalf of Chastleton concerning the foreclosure of Sipek's

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[9] The rights of Chastleton to approve of a sale are severely limited, and only provide that Chastleton can reject a transfer based on "standards of creditworthiness" or on "written cooperative occupancy standards." A130.

Shares. Indeed, the record shows that Chastleton was well aware of the financial issues that Sipek was experiencing and was aware of the lender's right to enforce its Security Interest if Sipek became delinquent. A221-A223. The record also shows that Chastleton was actively involved after RFB purchased the Shares at auction and refused to approve the purchase not because of any notice defect, but rather, because RFB refused to pay more than it was required to under the operative documents. A22, A375.[10] Based on this record, the notion that Chastleton was kept in the dark and insufficiently informed about the foreclosure process is pure fiction.

B. RFB Has Standing to Enforce the Recognition Agreement

RFB also has standing to assert a claim for declaratory relief under the Recognition Agreement as both the holder of equitable title to the Shares and as a third-party beneficiary. Under either form of analysis, RFB has standing to assert rights under the Recognition Agreement and the trial court was correct to grant RFB the relief sought.[11]

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[10] As discussed supra, Chastleton failed to file a responsive pleading to either the counterclaim in the RFB case or to the complaint in the Kawamoto case. As a result, the allegations in both pleadings are deemed to be admitted. SCR-Civ. 8.

[11] Chastleton has taken the position in its brief that no one has standing to enforce the recognition agreement and therefore, it is free to disregard the contract in its entirety. According to Chastleton, RFB cannot enforce the agreement because it is not the borrower and Kawamoto cannot enforce the agreement because it is not the original lender. Appellant Br. at pp. 30-33, 38-39. This logic is at odds with the modern realities of how real estate transactions are conducted. It is now common practice for loans secured by or relating to residential real estate to be bought, sold, and transferred regularly and in due course. *See e.g.*, *Archie v. U.S. Bank, N.A. as Tr. for RMAC Tr.*, *Series 2016-CTT*, 255 A.3d 1005, 1010 (D.C. 2021). As discussed more above, it also

As the winning bidder at the foreclosure auction, RFB has standing to assert Sipek's rights under the Recognition Agreement. The purchaser at a foreclosure auction is vested with equitable title to the property at the time the memorandum of purchase is executed. *See Ward v. Wells Fargo Bank, N.A.*, 89 A.3d 115, 122 (D.C. 2014). As the holder of equitable title, the foreclosure purchaser stands in the shoes of the former owner and can exercise the rights that the former owner may have had in the security. *Id.* Sipek was a party to the Recognition Agreement and had the right to enforce the terms therein. A131. RFB was the foreclosure purchaser and by virtue of the memorandum of sale, was vested with Sipek's rights under the Recognition Agreement. A129-A131.[12] As such, RFB had standing to enforce the Recognition Agreement.

RFB is also able to assert rights under the Recognition Agreement as a third-party beneficiary to the contract. To be a third-party beneficiary to a contract, the contracting parties must have made an "express or implied intention to benefit directly the party claiming such status." *Silberberg v. Becker*, 191 A.3d 324, 332 (D.C. 2018). Importantly, a third-party beneficiary "need not be named in the contract, as long as he or she is ascertainable from the contract and the circumstances

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ignores the purpose of the Recognition Agreement, which is to govern the rights of the parties if/when there is a foreclosure on Sipek's Shares.

[12] Chastleton concedes that Sipek is a party to the Recognition Agreement and can thus enforce it. A104.

of the contract." *Id.* (citing *Hossain v. JMU Props., LLC*, 147 A.3d 816, 820 (D.C. 2016)). A third-party beneficiary may sue to enforce the provisions of the contract to which they are the beneficiary. *See Hossain v. JMU Properties, LLC*, 147 A.3d 816, 820 (D.C. 2016).

Here there is no question that RFB (or any other foreclosure purchaser) is a third-party beneficiary to the Recognition Agreement. The Recognition Agreement is designed to outline the parties' various rights in the event of a default by Sipek. It discusses how a sale of the Shares would be conducted in the event of the default. A130. Implicit in such an agreement is that the person who is the purchaser has the right to make sure that the lender and Chastleton comply with their obligations to ensure that valid title is conveyed. As such, RFB is an intended third-party beneficiary of the Recognition Agreement and is entitled to enforce it.

C. Assignment is Not a Basis to Disturb the Ruling

Finally, Chastleton's argument that the existence of an assignment prevented the entry of summary judgment is also without merit. As an initial matter, there is no record that exists to support Chastleton's argument. The sole basis for Chastleton's position is the existence of a few allegations in RFB's counterclaim indicating that its purchase rights had been assigned. A39. However, there is no other information about the putative assignment, including when it occurred, what precise rights were assigned, whether it was qualified or conditional, and when the

assignment would take effect. *See id.* If Chastleton wanted to argue that RFB was not the proper party, the appropriate time for such an argument to be developed was in the trial court when Chastleton could have cultivated a record to support its position.

Moreover, contrary to Chastleton's assertion, the assignment is wholly irrelevant to whether the action is permissible under SCR-Civ. 17.[13] Under SCR-Civ. 17, an action may be brought without joining the "person for whose benefit the action is brought" if the claim is asserted by "a party with whom or in whose name a contract has been made for another's benefit." *Id.* at (a)(1)(F). Indeed, this Court has acknowledged various instances in which a party that lacks a direct interest in a proceeding nonetheless was the proper party in interest to pursue the action. *See Martin v. Santorini Capital, LLC*, 236 A.3d 386, 393 (D.C. 2020) (explaining the standing limitations of SCR-Civ. 17's real-party-in-interest requirement); *Solid Rock Church, Disciples of Christ v. Friendship Pub. Charter Sch., Inc.*, 925 A.2d 554, 559 (D.C. 2007). Simply put, even on this sparse record, whether or not there is an

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[13] Indeed, the notion that the assignment was a condition on closing or was to occur at closing is consistent with standard real estate practice. Under District of Columbia law, contract rights to purchase are freely assignable as a matter of right. *See Peterson v. District of Columbia Lottery and Charitable Games Control Board*, 673 A.2d 664, 667 (D.C. 1996). Indeed, the Court of Appeals has acknowledged that a right to purchase can be assigned even prior to the formation of the entity that is named in the contract. *See Koehne v. Harvey*, 45 A.2d 780, 781 (D.C. 1946). Here such a scenario – where rights are assigned at closing – would make sense, as Russell Brown is the sole owner of RFB and any re-issued shares of stock in Chastleton need to be in the name of an individual.

assignment is not dispositive of anything.

CONCLUSION

For the above reasons, the trial court correctly entered a declaratory judgment in RFB's favor. The decision should be affirmed.

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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