In the District of Columbia Court of Appeals

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted] [redacted]

Appellants,

v.

WELLS FARGO BANK, N.A.,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA CIVIL DIVISION

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

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LIST OF INTERESTED PARTIES

Parties: [redacted] Appellant;

[redacted] Appellant;

Wells Fargo Bank, NA, Appellee. Wells Fargo Bank, NA is 100% owned by Wells Fargo & Company, a financial holding company whose shares are publicly traded on the New York Stock Exchange (WFC).

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STATEMENT OF THE CASE AND FACTS

I. Introduction

Appellants, [redacted] and [redacted] bring this appeal from a summary judgment in favor of WELLS FARGO BANK, N.A. (the "BANK") on a theory never pled by the BANK and despite significant contradictory facts in the record. The BANK initiated this litigation asserting that a Deed of Trust in its favor—which purports to encumber a home jointly owned by [redacted] and [redacted] as husband and wife—contained a "clerical and/or scrivener's error."[1] Specifically, the BANK declared that, even though [redacted]—not [redacted]—borrowed the BANK's money, "both [redacted] and [redacted] should have been listed as 'Borrowers' on the Wells Fargo First Deed of Trust,"[2] rather than just [redacted]

The BANK's request that the Deed of Trust be reformed so that a non-borrower be listed as a "Borrower" on the Deed of Trust, while counterintuitive at first blush, expressly recognizes that the term "Borrower" (with an uppercase "B") is a defined term that is controlling throughout the document. The Deed of Trust in this case is a standardized form, or "Uniform Instrument," drafted by the

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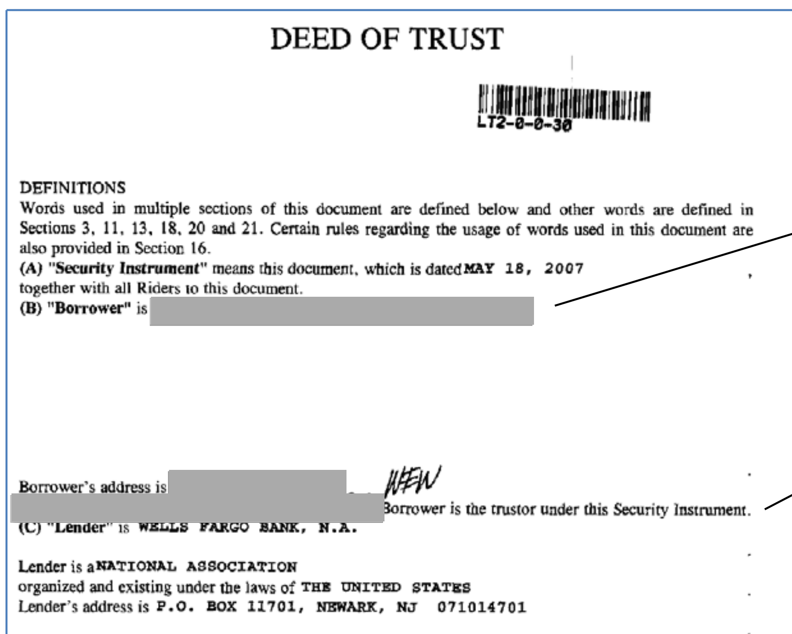
[1] Complaint, dated April 20, 2010, ¶14 Appendix ("A.__"), p. 5.

[2] Complaint, ¶15 (A. 5); see also Transcript of hearing Before the Honorable Gregory E. Jackson, June 30, 2011, p. 7 (A. 142) (in which the BANK's counsel concedes that [redacted] did not sign the note).

banking industry powerhouses, Fannie Mae and Freddie Mac.[3] In the "DEFINITIONS" section on the first page of the instrument, "Borrower" is defined as the "trustor under this Security Instrument"—i.e. the property owner granting the encumbrance. Here, still as part of the definition, the Deed of Trust specified only one such trustor, the actual borrower, [redacted]. It did not include the other property owner, [redacted]:



DEED OF TRUST

LT2-0-0-30

DEFINITIONS
Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.
(A) "Security Instrument" means this document, which is dated MAY 18, 2007 together with all Riders to this document.
(B) "Borrower" is [redacted]

Borrower's address is [redacted]
Borrower is the trustor under this Security Instrument.
(C) "Lender" is WELLS FARGO BANK, N.A.

Lender is a NATIONAL ASSOCIATION organized and existing under the laws of THE UNITED STATES
Lender's address is P.O. BOX 11701, NEWARK, NJ 071014701

ON

Borrower is the trustor under this Security Instrument.

In bringing this action, the BANK represented to the court that it could not enforce the instrument "until the scrivener's error on the Wells Fargo First Deed of Trust is corrected, re-executed by both [redacted] and recorded with the

[3] See footer of Deed of Trust, p. 1 (A. 14). Fannie Mae is the government sponsored enterprise Federal National Mortgage Association. Freddie Mac is the Federal Home Loan Mortgage Corporation.

Recorder of Deeds…"[4] The BANK asked the trial court to exercise its equitable powers to "order and to execute a corrected original" or to appoint a Trustee to do so.[5] Alternatively, the BANK asked for an equitable lien to take the place of the defective Deed of Trust, or for equitable subrogation to an earlier lien.

The trial court, however, granted summary judgment on a different theory, one that claimed that the Deed of Trust was not, in fact, defective *ab initio*, because it unambiguously included as a trustor by virtue of her signature on the final page. Alternatively, the court found the BANK was entitled to an equitable lien because 's retention of an interest in the property was not "intended."[6]

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[4] Complaint, ¶15 (A. 5).

[5] Complaint, ¶23 (A. 6).

[6] Order Granting Plaintiff's Motion for Summary Judgment, July 12, 2011, p. 7 (A. 202).

II. Statement of the Issues Presented for Review

One of the issues under review, therefore, is whether the trial court erred in interpreting the Deed of Trust as unambiguously including as a trustor, particularly when the BANK itself pled that the instrument was defective in that regard.

Another overlapping issue is whether the trial court may, at summary judgment, make findings of fact on a disputed issue of intent—specifically, whether intended to encumber her own property interest when she signed 's Deed of Trust.

III. Appellants' Statement of the Facts

A. The BANK drafted a Deed of Trust for each of two loans which were different as to the trustors identified both in the granting clause and the signature page.

 and , a married couple, contracted to buy a home. To help finance the purchase, applied for, and obtained, two loans from the BANK, one for $417,000.00 and another for $86,500.00.[7] At the same settlement, two different Deeds of Trust were executed, one for each of the two loans. With respect to the larger loan, the first page of the instrument identifies as the

[7] Complaint, ¶ 6 (A. 3).

"Borrower" (the trustor). executed the document, signing above his typewritten name which is followed by the designation "-Borrower."[8]

initialed all the pages and signed her name on one of several available blank lines associated with the property address. 's name is not typewritten below her signature or anywhere else on the page (or anywhere in the fifteen page instrument):

In contrast, the first page of the Deed of Trust for the smaller loan identifies both and as the "Borrower." Additionally, both and

[8] Exhibit B to Complaint (A. 14).

executed the instrument by signing above their printed names (which also identified each of them as a "Borrower") on the final page:[9]

B. The BANK avers that its failure to identify as a trustor prevents foreclosure of her interest.

Because and were unable to remain current with their mortgage payments, the BANK recorded a Notice of Foreclosure Sale of Real Property or Condominium Unit.[10] At some later point, however, the BANK recognized that "the Wells Fargo First Deed of Trust only lists as a 'Borrower', thereby failing to include the other tenant owner of the Subject

[9] Exhibit C to Complaint (A. 44).

[10] Document No. 2009108287 Official Records of the Washington DC Recorder of Deeds. Appellate courts may take judicial notice of public records. *See Bostic v. Dist. of Columbia*, 906 A.2d 327, 332 (D.C. 2006).

Property, .”[11] Because of this deficiency, the BANK recognized that it “does not have a perfected secure interest against the Subject Property because the Wells Fargo First Deed of Trust, due to a clerical and/or scrivener’s error, only lists as a ‘Borrower’.”[12] The BANK acknowledged that, despite ’s signature and initials on the instrument, it could not foreclose “until the scrivener’s error on the Wells Fargo First Deed of Trust is corrected, re-executed by both and and recorded with the Recorder of Deeds as a valid Deed of Trust securing a first lien positions [sic] against the Subject Property.”[13]

Accordingly, on April 20, 2010, the BANK brought this action for declaratory judgment averring that “ executed [the first] Deed of Trust…” while “ and executed [the second] Deed of Trust…”[14] The BANK further averred that, because it intended that be bound by the first Deed of Trust, “both and should have been listed as ‘Borrowers’ on the

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[11] Complaint, ¶ 9 (A. 4).

[12] Complaint, ¶ 14 (A. 5).

[13] Complaint, ¶ 15 (A. 5).

[14] Complaint, ¶¶ 7, 10 (A. 4).

Wells Fargo first Deed of Trust…"[15] The BANK describes the second Deed of Trust as "correctly list[ing] the Borrowers as both and ."[16]

As a result of this defect in the first Deed of Trust, the BANK asked the trial court to exercise its equitable powers to declare the Deed of Trust to be a "valid lien against the Subject Property" and to force " and to execute a corrected original … as borrowers."[17] The BANK asked that, should and fail to cooperate, the court appoint a Trustee to execute the documents in their stead.[18]

Alternatively, the BANK asked the court to find that , along with and the BANK, intended that the loan be secured by the property.[19] The BANK urged the court to declare an equitable lien to comport with the intent of the parties.[20] Lastly, the BANK asked to be equitably subrogated to a previous lien it alleged was satisfied with the funds that the BANK advanced to .[21] Once

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[15] Complaint, ¶ 13 (A. 5).

[16] Complaint, ¶ 11, 13 (A. 4, 5).

[17] Complaint, ¶¶ 22, 23 (A. 6).

[18] *Id.*

[19] Complaint, ¶ 25 (A. 7).

[20] Complaint, ¶ 26 (A. 8).

[21] Complaint, ¶¶ 27-35 (A. 8-10).

again, the BANK alleged that the purchase loan "was intended" to be secured by the first Deed of Trust.[22]

[redacted] and [redacted] answered the Complaint contesting the request for declaratory judgment and denying that there was any error in the Deed of Trust.[23] [redacted] and [redacted] alleged that it accurately reflected that [redacted] was the only trustor, and further, that [redacted] signed the instrument and initialed each page for the specific purpose of signifying her agreement that only [redacted] was encumbering his interests.[24] [redacted] and [redacted] alleged that they were also assured by the settlement agent that the granting clause on the first page, rather than the signature page, would control the rights being relinquished.[25]

C. The BANK files a motion for summary judgment asserting a new theory—that the Deed of Trust actually does name [redacted] a trustor.

Approximately four months after the BANK filed the Complaint in this case, a Tennessee bankruptcy judge issued an opinion in the case of *In re Surti*, 434 B.R. 515 (Bankr. M.D. Tenn. 2010). In that case, as here, the Deed of Trust failed to identify a spouse as the "Borrower." The judge there was persuaded that another

[22] Complaint, ¶ 28 (A. 8).

[23] Amended Answer of Defendants, deemed filed by order dated July 23, 2010, ¶¶ 1-2 (A. 63).

[24] *Id*. at ¶¶ 2-3 (A. 63).

[25] *Id*. at ¶ 3 (A. 63).

provision in the Deed of Trust (that defined a "co-signer" as a "Borrower" who did not execute the Note) meant that the word "Borrower" had an unambiguous "dual use" in the document. *Id*. at 517-21. Coupled with Tennessee's loosening of the traditional rule (that a deed is void as to a signatory not named as a grantor) and the Surtis' own uncontested declaration that they both intended to encumber their interests, the judge opined that the lien would survive the attack of a junior lienholder. *Id*. at 521-29.

In March of the following year, the BANK moved for summary judgment and presented an affidavit of its agent that the BANK intended that its loan would be fully secured by the property.[26] Departing from its allegation that only executed the first Deed of Trust, the BANK now posited that "[t]here is no dispute that and each executed the Wells Fargo First Deed of Trust…"[27] Rather than arguing, as it had pled, that the documentation was defective and needed to be re-executed, the BANK now argued—relying primarily on the rationale expressed *In re Surti*—that the Deed of Trust unambiguously conveyed 's interest.[28]

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[26] Plaintiff's Memorandum in Support of Motion for Summary Judgment dated March 7, 2011, p. 5 (A. 67).

[27] *Id*. at 4 (A. 66).

[28] *Id*. at 9-15 (A. 71-77).

D. While relying on one bankruptcy decision, the BANK does not advise the court of a later, contrary bankruptcy decision.

Approximately three weeks after the BANK filed its summary judgment motion, but about three months before the hearing on the motion, an Ohio bankruptcy judge issued an opinion explicitly rejecting the reasoning of the *In re Surti* judge. *In re Payne*, 450 B.R. 711 (Bankr. S.D. Ohio 2011). Finding that a provision discussing "co-signers" could not broaden the express definition of "Borrower," the judge in *Payne* held that a spouse's signature on the last page of the mortgage did not, by itself, encumber her interest in the property. *Id*. Although [redacted] and [redacted] were representing themselves *pro se*, the BANK never advised the trial court about the countervailing opinion in *Payne*, either in its Reply Memorandum in support of its motion[29] or at the hearing.

[redacted] and [redacted] did file a response to the Motion for Summary Judgment in which they disputed the key factual elements of the BANK's motion.[30] Among other things, [redacted] specifically disputed that she intended

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[29] Reply Memorandum to Defendants' Opposition to Plaintiff's Motion for Summary Judgment dated April 26, 2011 (A. 125).

[30] Defendants' Response in Opposition to Plaintiff's Motion for Summary Judgment, dated March 26, 2011 (A. 89).

to pledge her property interest as collateral for the loan to her husband.[31] and alleged that, at the settlement, they initially balked at providing 's signature on the Deed of Trust—an objection they say was overcome by assurances that the signature would not have the effect now urged by the BANK.[32]

and also provided the Affidavit of Michael A. Childs, a former Mortgage Consultant with Wells Fargo Bank who communicated with and about the BANK's evaluation of their individual creditworthiness.[33] He stated that "[a]t no time did I advise or disclose to or that would be required to sign any part of the W[ells]F[argo] first mortgage loan documents or have any responsibilities to support as a co-signer the only Borrower …"[34]

The hearing on Plaintiff's Motion for Summary Judgment lasted for over an hour and half.[35] The majority of the time was spent on an exchange between the

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[31] *Id*. at ¶ 7 (A. 91).

[32] *Id*. at ¶ 5, 12 (A. 90, 92).

[33] Affidavit of Michael Childs, ¶ 3 (A. 120), Exhibit E to Defendants' Response in Opposition to Plaintiff's Motion for Summary Judgment, dated March 26, 2011.

[34] *Id*. at ¶ 5 (A. 121).

[35] Transcript of hearing Before the Honorable Gregory E. Jackson, June 30, 2011 ("Transcript") (A. 136).

trial court and the *pro se* litigants, and .[36] The court reserved ruling and later issued an order granting summary judgment for the BANK.[37]

The court stated in its opinion that the analysis by the judge in *Surti* was "persuasive" and that the case involved "facts virtually identical to those in this case."[38] The court also looked to the agreements that were "contemporaneously executed" (the other Deed of Trust) and concluded that " intended to have the first Deed of Trust secured by her interest in the property at least as a "cosigner."[39] The court also found that the BANK was entitled to an equitable lien so that would not retain an interest in the property which was never "intended."[40]

and timely filed this appeal.

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[36] See Transcript, pp. 9-55 (A. 144-190).

[37] Order Granting Plaintiff's Motion For Summary Judgment, dated July 12, 2011 (A. 196) .

[38] *Id*. at 5 (A. 200).

[39] *Id*. at 6 (A. 201).

[40] *Id*. at 6-7 (A. 201-202).

SUMMARY OF THE ARGUMENT

The trial court erred in interpreting the first Deed of Trust as unambiguously including [redacted] as a trustor, particularly when the BANK itself believed and pled that the instrument was defective in that regard. The trial court relied heavily upon the reasoning of a Tennessee bankruptcy judge in a case in which the lender, using a similar standardized form, similarly failed to list a spouse as a "Borrower" on the Deed of Trust. In that case, however, the non-"Borrower" spouse stipulated that he always intended to be bound by the instrument. Additionally, the BANK did not advise the trial court of a later opinion by an Ohio bankruptcy judge which flatly rejected the reasoning of the Tennessee judge. Because the Ohio case did not involve a stipulation of intent, its analysis is far more applicable here.

Additionally, regardless of what legal theory the BANK has proposed for relief, at summary judgment, it must prove that [redacted] intended to be bound by the Deed of Trust. Intent is an issue that is very rarely appropriate for summary judgment. Here, the record is rife with disputed record facts regarding the key issue of whether [redacted] ever intended to encumber her own property interest. Accordingly, the order granting summary judgment was premature and denied [redacted] and [redacted]'s due process right to a complete presentation of the facts as they appear under the lens of cross-examination.

STANDARD OF REVIEW

The granting of a summary judgment motion is reviewed *de novo*. *Critchell v. Critchell*, 746 A.2d 282, 284 (D.C. 2000). In reviewing a trial court order granting a summary judgment motion, the appellate court conducts an independent review of the record, and the standard of review is the same as the trial court's standard in considering the motion for summary judgment. *Sherman v. District of Columbia,* 653 A.2d 866, 869 (D.C. 1995).

A motion for summary judgment is properly granted only when the pleadings and affidavits in the case show that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Super. Ct. Civ. R. 56(c); *Doolin v. Envtl. Power Ltd.*, 360 A.2d 493, 496 (D.C. 1976). The summary judgment movant has the burden of demonstrating clearly the absence of any genuine issue of fact, and any doubt as to the existence of such an issue is resolved against the movant. *Id*. In considering an appeal from a summary judgment, the appellate court must view the record in the light most favorable to the non-moving party, giving to that party the benefit of all favorable inferences that can be drawn from the evidence. *Paul v. Howard Univ.*, 754 A.2d 297, 305 (D.C. 2000).

ARGUMENT

The trial court granted summary judgment on two theories, only one of which was pled by the BANK. First, the trial court found that the absence of [redacted]'s name as a trustor on the first page did not render the contract ambiguous as to her, thus relieving the court of considering extrinsic evidence regarding the parties' intent.[41]

This theory is not only absent from the Complaint, but flies in the face of the BANK's representations there. In its Complaint, the BANK does, in fact, effectively assert that the Deed of Trust was unambiguous, but in the exact opposite sense—that, as it was executed, it unequivocally does <u>not</u> encumber [redacted]'s interest. There, the BANK represents that the execution of the Deed of Trust is so defective (because of the absence of [redacted]'s name as a trustor) that the BANK has no "perfected secure interest"[42] and cannot foreclose until the defect is corrected.[43] The execution of the Deed of Trust is, in the BANK's own

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[41] Order Granting Plaintiff's Motion For Summary Judgment, dated July 12, 2011, p. 4 (A. 199).

[42] Complaint, ¶ 14 (A. 5).

[43] Complaint, ¶ 15 (A. 5).

opinion, so defective that it asked the court to compel [redacted] and [redacted] to execute a corrected Deed of Trust.[44]

Leaving aside whether these statements are judicial admissions by the BANK, *see*, *Royall v. Weitzman*, 125 A.2d 680, 682 (D.C. 1956), it is entirely illogical to hold that the Deed of Trust unambiguously encumbered [redacted]'s property interest, when the BANK itself believed and pled that the Deed of Trust did not have that legal effect. The BANK itself was so convinced that the Deed of Trust did not encumber her interest in the home that it brought this very action to resolve the problem by reforming the document.

Second, the Court found, in the alternative, that it should impose an equitable lien so as to accomplish what was "intended" in the transaction. Of course, it is highly probably that the BANK's intent was to encumber the interests of both of the owners of the property. The issue here, however, is whether [redacted] so intended. Even if understanding of the transaction as a consumer runs counter to the expectations of the financial industry, or even those of the legal professionals sorting out the confusion, her intent is still highly relevant to the formation of a binding agreement in this case. It was incumbent upon the BANK, particularly as the drafter of the documents, to make it abundantly clear to her and

[44] Complaint, ¶ 15, 23 (A. 5, 6).

anyone else[45] that she was relinquishing a property right so that her husband could borrow money.

I. The trial court erred in interpreting the Deed of Trust as unambiguously including [redacted] as a trustor.

A. Paragraph 13 of the Deed of Trust does not unambiguously rewrite the granting clause to include [redacted].

The trial court's analysis as to whether the Deed of Trust was ambiguous rested entirely on that presented in *In re Surti*, 434 B.R. 515 (Bankr. M.D. Tenn. 2010). Although the trial court believed that *Surti* was "virtually identical" to this case, it differed in the most crucial respect. *Surti* involved a junior lienholder attempting to invalidate a senior lienholder's lien. The trustors themselves, the Surtis, never disputed that it was "their understanding and intention to encumber their combined interests in the Property…" *Id*. at 527. The bankruptcy judge in *Surti* expressly bolstered his decision with this fact, finding that, even if the mortgage were found to be ambiguous, the extrinsic evidence of the Surtis' intent removed any doubt as to its interpretation. *Id*.

More importantly, the legal analysis of the bankruptcy judge in *Surti* was simply wrong. The error is perhaps best articulated in the decision of a sibling

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[45] Notably, District of Columbia official records do not index the subject mortgage to [redacted]'s name. Appellate courts may take judicial notice of public records. *See Bostic v. Dist. of Columbia*, 906 A.2d 327, 332 (D.C. 2006).

court, an Ohio bankruptcy judge, in *In re Payne*, 450 B.R. 711 (Bankr. S.D. Ohio 2011)—a decision which the BANK never brought to the attention of the court below. In *Payne*, the court specifically rejected the theory proposed by the bank in *Surti* (and the BANK here) that Paragraph 13 of the uniform Deed of Trust unambiguously broadens the defined term "Borrower" to include signers not included in the granting clause.

Paragraph 13, entitled "Joint and Several Liability; Co-signers; Successors and Assigns Bound" provides a definition of "co-signer" as a "Borrower" who signs the Deed of Trust but does not execute the promissory note:

> preclude the exercise of any right or remedy.
>
> **13. Joint and Several Liability; Co-signers; Successors and Assigns Bound.** Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.
>
> Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain

The court in *Payne* recognized that parties are free to select a defined term and to ascribe to it the meaning they choose—a meaning which overrides a meaning established by a dictionary or by common usage. *Id.* at 719. Because "Borrower" (capitalized) is defined in the granting clause, its appearance in Paragraph 13 (also capitalized) must be given the same meaning. Thus, the *Payne*

court concluded that a person who did not fall within the definition of "Borrower" could not, as *Surti* suggested, become a "Borrower" who co-signs the Deed of Trust:

> This conclusion [of the judge in *Surti*], however, essentially ignores the definitions of Borrower and co-signer set forth in the mortgage at issue in *Surti.* As explained above, the Court cannot ignore the meanings the parties ascribed to the terms used in the Mortgage. The Court also cannot accept the *Surti* court's conclusion that the term Borrower is "used in two different senses" in the mortgage at issue. *Surti,* 434 B.R. at 520. Quite simply, that conclusion is inconsistent with the generally-accepted principle of contract interpretation discussed above under which a defined term has the same meaning wherever it appears.

In re Payne, 450 B.R. at 723. Therefore, even if the term "Dog" is defined to mean "cat," it must be given that meaning throughout the instrument, as this is something to which the parties agreed.

The law of the District of Columbia is no different. The court must endeavor to ascertain what a reasonable person in the position of the parties to a contract would have thought the words of that contract meant, whether the language was superficially ambiguous or not. *See Akassy v. William Penn Apartments Ltd. P'ship*, 891 A.2d 291, 299 (D.C. 2006). A reasonable person is presumed to know, and is bound by, the usages of terms which the party knows or has reason to know. *Id*. There can be no better example of a usage which the party would have reason to know than one specifically set forth in the definition section

of the agreement. *See 2200 M St. LLC v. Mackell*, 940 A.2d 143, 153 (D.C. 2007) (where contract provision adopts the definition of terms in a statute, words in the contract would be given the statutorily defined meanings).

Here, the drafters of the uniform Deed of Trust, chose to define "Borrower" to operate as a substitute for "grantor," "trustor" or "mortgagor." In filling out the form, the BANK specifically assigned this meaning to and no other. That the BANK could have also assigned this meaning to —which would have made her a co-signer under Paragraph 13—is immaterial because the BANK never did that.

Accordingly, the trial court erred as a matter of law as to the interpretation of the Deed of Trust. and agree with the BANK's initial position, that the instrument unambiguously includes , but not , within the term "Borrower." Summary judgment, therefore, was improper and the case should be reversed and remanded for a factual determination of whether it is appropriate to order what the BANK actually requested—reformation.

B. If the Deed of Trust is ambiguous, it must be construed against the BANK.

Summary judgment in the context of contract interpretation is appropriate only when the agreement is unambiguous and where there is no question as to the parties' intent. *Gryce v. Lavine*, 675 A.2d 67, 69 (D.C. 1996); *see also Nat'l Trade*

Prods. v. Info. Dev. Corp., 728 A.2d 106, 109 (D.C. 1999). and posit that the issue in this case is not whether the Deed of Trust is ambiguous, but whether there is a question as to the parties' intent, particularly 's intent. That question arises only because her signature appears on the final page of the instrument, despite her absence from the granting clause.

The trial court below, however, approached the issue as one involving a potential ambiguity in the term "Borrower," an ambiguity it found to be resolved by Paragraph 13. However, a contract can only be unambiguous if reasonable people would not differ as to its meaning. *Gryce*, 675 A.2d at 69 (a contract is ambiguous if there is more than one interpretation that a reasonable person could ascribe to the contract).

This court is entitled to presume that bankruptcy judges are "reasonable people" so the fact that the judges in *Payne* and *Surti* disagree on the interpretation of the instrument (Paragraph 13's effect upon "Borrower") makes it ambiguous *per se*. That the BANK itself urged the court to reform the instrument, then later argued that it was perfectly enforceable without a change, is also a testament to the document's ambiguity. The choice among reasonable interpretations of an ambiguous contract is for the factfinder to make, based on the evidence presented

by the parties to support their respective interpretations. *Gryce*, 675 A.2d at 69. Accordingly, summary judgment was inappropriate.

Moreover, this ambiguity must be "construed strongly against the drafter..." *Intercounty Const. Corp. v. Dist. of Columbia*, 443 A.2d 29, 32 (D.C. 1982), quoting, *1901 Wyoming Ave. Co-op. Ass'n v. Lee*, 345 A.2d 456, 462 (D.C. 1975). Not only did the BANK require the use of a form drafted by the banking industry, it provided the typewritten information in the blanks.[46] The BANK's failure to include [redacted]'s name in the granting clause must be construed against it, at least to the extent that [redacted] was not put on notice that the BANK was asking her to relinquish her own property rights.

The blame for the failure of the parties to have a meeting of the minds in this case may be placed squarely on the BANK for its bizarre use of the term "Borrower" in a way that would very often include non-borrowers. It is no wonder that the BANK's use of a commonly understood word in a counterintuitive way would cause consumers confusion about their rights under the agreement, particularly when it fails to identify a non-borrowing property owner as a "Borrower." Having crafted its Deed of Trust with this peculiarity, the BANK

[46] See, the second Deed of Trust attached to the Complaint, showing that it was prepared by Wells Fargo Bank, N.A. (A. 14). The first Deed of Trust does not formally name the preparer, but indicates it is to be returned to WFHM Final Docs.

must be held to the strictest standard in insuring that it identifies each and every party it intends to be bound by the instrument as a "Borrower."

II. Summary judgment was improper where issues of fact remained as to [redacted]'s intent.

A. All roads lead to [redacted]'s intent.

Under all the BANK's theories of the case, [redacted]'s intent when she placed her signature on the final page of the Deed of Trust is the paramount issue. In the first count of its Complaint, the "Quiet Title" action, the BANK was, in fact, asking the court to order [redacted] and [redacted] to sign a corrected document. The actual cause of action, therefore, was one of reformation. *See Max Holtzman, Inc. v. K & T Co., Inc.*, 375 A.2d 510, 514 (D.C. 1977) (where underlying theme of the plaintiff's contract claim was that the written document was at variance with the intent of the parties, court viewed claim as one of reformation even though it was never pled); *Isaac v. First Nat. Bank of Md.,* 647 A.2d 1159, 1163 n. 10 (D.C. 1994) (reformation is an equitable remedy that is available where there is an error in reducing the agreement of the parties to a writing). The reformation of the Deed of Trust that the BANK requested is only appropriate where it conforms the instrument to the intent of the parties. *See Sanders v. Monroe*, 10 F.2d 997, 998 (D.C. Cir. 1926)

The equitable lien and equitable subrogation theories also required a finding regarding [redacted]'s intent. *See U.S. ex rel. Warren v. Ickes*, 73 F.2d 844, 848 (D.C. Cir. 1934); *Rinn v. First Union Nat. Bank of Maryland*, 176 B.R. 401, 414

(D. Md. 1995) (the right of subrogation does not exist where it appears contrary to the parties' intent). Even the trial court's order indicated that it was granting summary judgment on the basis that it had concluded intended to encumber her property interest.[47]

B. The determination of intent requires evidence and factual findings.

Where questions of intent are at issue, however, summary judgment is inappropriate. *Bank-Fund Staff Fed. Credit Union v. Cuellar*, 639 A.2d 561, 571 (D.C. 1994); *In re Estate of Corriea*, 719 A.2d 1234, 1243 (D.C. 1998) ("Intent generally is an issue ill-suited for determination as a matter of law."); *Spellman v. Am. Sec. Bank, N.A.*, 504 A.2d 1119, 1122 (D.C. 1986) (summary judgment should be granted sparingly in cases involving motive or intent).

Here, 's intent is the central issue of the case and issues of fact as to 's intent are plentiful. On many occasions, she herself stated that it was never her intent to surrender her property rights. In her Amended Answer to the Complaint, she unequivocally declared that she specifically intended not to be

[47] Order Granting Plaintiff's Summary Judgment, p. 6 (A. 201) ("The totality of the circumstances… indicates to this Court that intended to have the first Deed of Trust secured by her interest…"), p. 7 (A. 202) (equitable lien justified because it was not "intended" that retain her property interest).

included as a "Borrower" under the Deed of Trust.[48] In her response to the BANK's summary judgment motion, she specifically and repeatedly controverted those facts concerning her intent which the BANK had labeled as "Not in Dispute."[49] At deposition, testified under oath that she did not intend that her interest be used as collateral:

> Q Did you intend to permit your husband to use your interest in the property as collateral for his loan of $417,000?
>
> A No.[50]

At the summary judgment hearing, under deposition-like questioning by the court, explained that she believed it was her right to choose not to contribute her property interest towards the collateral for her husband's loan.[51]

Also under questioning by the court, stated that it was his and 's belief that her interest in the property would be separate and distinct from 's with respect to the loan. They believed that the transaction had

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[48] Amended Answer of Defendants, dated July 23, 2010, ¶¶ 2-3 (A. 204).

[49] Defendants' Response in Opposition to Plaintiff's Motion for Summary Judgment, dated March 26, 2011, ¶¶ 4, 5, 7, 12, 13, 15, and 16 (A. 89-93).

[50] Excerpt of deposition of , p. 31, Exhibit B to Defendants' Response in Opposition to Plaintiff's Motion for Summary Judgment, dated March 26, 2011 (A. 101).

[51] Transcript, p. 38 (A. 173).

been structured such that "the wife's share cannot be confiscated or taken, even if the other spouse has failed to pay or has some other problem."[52]

also stated that the only significance of 's signature on the instrument was "to show that she was there, to show that she was not unaware of what her husband was doing."[53] There was even a discussion with the settlement agents about whether would "lose some rights" by signing and he and were assured "[i]t has nothing to do with her rights."[54] Whether or not the assurances of the settlement agents has independent legal significance in this case, the conversation itself is further evidence of 's intent not to be bound by the Deed of Trust.

The summary judgment evidence established that the intent of the parties was not aligned. At best, an issue of fact remained as to 's intent. The evidentiary shortcut of summary judgment was, therefore, improper.

C. That the BANK drafted the two Deeds of Trust differently only leads to more disputed issues of fact.

The trial court agreed with the BANK that the two Deeds of Trust should be construed together because they were executed contemporaneously and because

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[52] Transcript, p. 19 (A. 154).

[53] Transcript, p. 21 (A. 156).

[54] *Id*.

there is no dispute that intended that her interest would help secure the second, much smaller loan.[55] The argument, however, is a two-edged sword. The fact that the two Deeds of Trust were markedly different in such an important respect supports and ’s view—one which they held even at the time of signing—that the two instruments had different effects. Because and were aware of the difference in the instruments at the settlement and discussed that difference at length with the BANK’s settlement agents, one may infer from this difference that had a different intent with regard to each instrument.

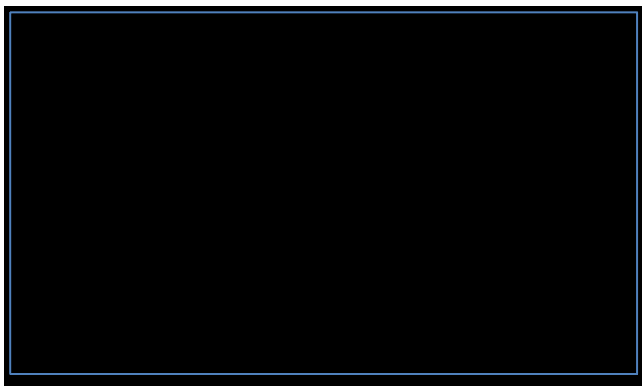
It is axiomatic that summary judgment evidence is to be viewed in the light most favorable to the nonmoving party and that the court must draw all reasonable inferences in favor of the nonmoving party. *Holland v. Hannan,* 456 A.2d 807, 815 (D.C. 1983). Accordingly, that agreed to secure a second, much smaller loan with her property interest must be viewed at the time of summary judgment as additional evidence of her intent not to do so for the larger loan. Summary judgment was inappropriate while this disputed factual issue—’ intent—remained.

[55] Order Granting Plaintiff’s Motion for Summary Judgment, dated July 12, 2011 p. 5 (A. 200).

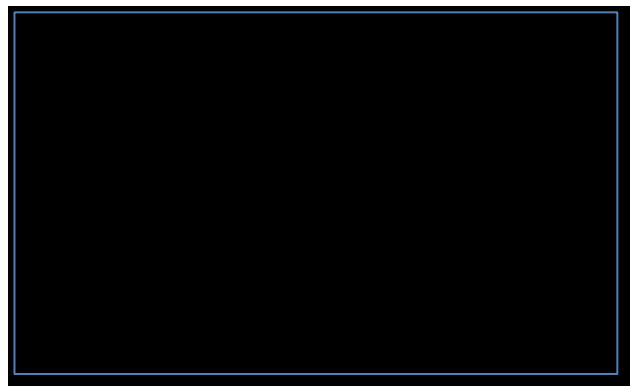
D. The inclusion of [redacted] as a "Grantor" in the legal description attached to the Deed of Trust also leads to more disputed issues of fact.

Although unmentioned by the trial court, the BANK argued that the legal description of the property, which appears on an attachment located after the signature page, was additional evidence of [redacted]'s intent to be a "Borrower" because it lists her as a "Grantor." Leaving aside the obvious difference in the terminology and whether an attachment can change the legal effect of an instrument, there is a factual issue as to whether [redacted] and [redacted] agreed to this language in the context of the larger loan.

Viewing the transaction as a whole (as the BANK would have the court do), it is apparent that the legal description attachment is identical for both loans. Most tellingly, the page that follows the legal description is identical for both instruments except for the information later imprinted by the Recorder of Deeds:



ATTACHMENT TO SECOND DEED OF TRUST



ATTACHMENT TO FIRST DEED OF TRUST

Wells Fargo, however, is not the Trustee for both Deeds of Trust. The Trustee for the first Deed of Trust is Roy L. Kaufmann, whose address is given in the instrument as 1120 20th St. NW, STE S300, Washington, DC 20036. The address given for Wells Fargo (One Home Campus, Des Moines, Iowa) appears only on the second deed of trust—aside from the attachment itself, that address appears nowhere on the first Deed of Trust.

The evidence suggests, therefore, that this final page of the after-attached documents was actually prepared for the smaller loan and attached to both Deeds of Trust. Accordingly, there is a reasonable inference that the immediately preceding page, the legal description listing as a "Grantor" was also prepared for the smaller loan, but attached to both Deeds of Trust.

Unlike every other page of the instrument itself, including the Riders, and neither signed nor initialed the legal description page. While the duplication of the legal description page may be evidence of the 's intent that the instruments have the identical legal effect, there is no evidence that and approved of applying language to the first loan that, from their perspective, was appropriate only for the second.

CONCLUSION

The summary judgment in favor of the BANK should be reversed and the case remanded for further proceedings. The Appellants request oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this June 21, 2012 to all parties on the attached service list.

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