In the District of Columbia
Court of Appeals

CASE NO. [redacted]

(Circuit Court Case No. [redacted])

[redacted]

Appellants,

v.

WELLS FARGO BANK, N.A.,

Appellee.

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

REPLY BRIEF OF APPELLANTS

Respectfully submitted,

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SUMMARY OF THE ARGUMENT

Summary judgment should not have been entered here because reasonable minds can differ as to the interpretation of the term "BORROWER" in the Uniform Security Instrument used in this case. Convincingly, courts all over the country have adopted the Appellants' view of that defined term, most recently by the Southern District of Ohio Bankruptcy Court since [redacted] and [redacted] filed their Initial Brief. But because the ultimate issue turns on [redacted] intent—not that of WELLS FARGO BANK, N.A. (the "BANK")—in signing the contract, and because intent is a question of fact for the jury, the procedural shortcut of summary judgment is not appropriate in this case.

Reviewing the record *de novo*, and drawing all inferences in Appellants' favor, the only conclusion is that there is a factual question of intent that must be resolved at trial, rather than on summary judgment. This Court should therefore reverse and remand for the trial court to conduct the required fact finding.

ARGUMENT

I. Another Bankruptcy Decision Finds Ambiguity When A Person Who Signed the Lien Instrument Is Not Defined as a "Borrower."

Since the filing of the Initial Brief in this case, yet another bankruptcy judge has sided with the position advanced by [redacted] and [redacted] In *In re Doutt*, 09-64616, 2012 WL 3838767 (Bankr. S.D. Ohio Aug. 31, 2012), the Trustee

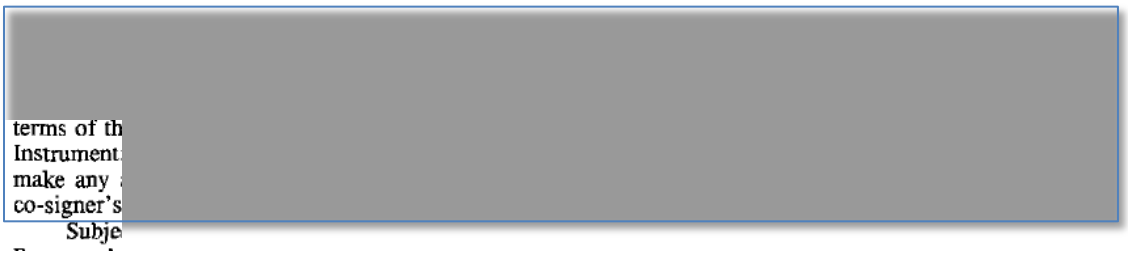
contended that "because Mrs. Doutt was not included within the defined term "Borrower" on the first page of the Mortgage, she did not grant a lien on her undivided one-half interest in the Property even though she signed the Mortgage." *Id*. at *1. Unlike this case, in *Doutt*, the wife had also signed the note.

The court found that, even though Mrs. Doutt truly was a "borrower" (i.e. indebted under the note), the fact that she was not defined as a "Borrower" (i.e. a mortgagor) in the mortgage made the mortgage ambiguous. *Id*. at *6. The court, therefore, found that it should consider extrinsic evidence to determine the parties' intent. *Id*. As in this case, the need for a determination of a disputed issue of fact, made summary judgment inappropriate. *Id*. at *8.

In reaching its decision, the *Doutt* court distinguished three opinions (one of which is cited by the BANK)[1] in which courts had held that a person who was not identified as a "Borrower" on the first page of the mortgage, but who signed only the mortgage (not the note), was a mortgagor. *Id* at *7. The *Doutt* court observed that the other three cases relied upon the "co-signer provision" to give the term

[1] *SFJV 2005, L.L.C. v. Ream*, 933 N.E.2d 819 (Ohio Ct. App. 2010) (cited in Answer Brief, pp. 26-29); *CitiMortgage, Inc. v. Kermeen*, 2012-Ohio-1655, 2012 WL 1264488 (Ohio Ct. App. 2012); *Mtge. Elec. Registration Sys. v. Kaehne*, 2008-Ohio-4051, 2008 WL 3271249 (Ohio Ct.App. Aug. 8, 2008) (an unreported decision to which one of the judges dissented).

"Borrower" new meaning midway through the mortgage. The co-signer provision in this case is Paragraph 13: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See, discussion in Initial Brief, pp. 18-21. The *Doutt* court found this provision to be inapplicable—ironically, because the wife in that case did, in fact, sign the note. *Id*. Thus a mortgage in which both signers were actually "borrowers" (although only one was defined as a "Borrower") was somehow deemed more ambiguous than one in which one of the two signers was not a "borrower."

The better-reasoned approach was that expressed in *In re Payne*, 450 B.R. 711 (Bankr. S.D. Ohio 2011) and footnoted by the *Doutt* court (*Doutt*, at n. 6). The *Payne* court had already rejected the co-signer provision argument because that section merely defines "co-signer." It cannot broaden the group of persons included in the definition of "Borrower" because it uses that very same, already-defined term. In this case, "Borrower" is defined on the first page as and alone. If were a "Borrower," she could be deemed a "Borrower who co-signs this Security Agreement," but she is not. In the words of

the *Payne* court, "the Mortgage unambiguously makes a person's status as a Borrower a prerequisite to being a co-signer [within the meaning of the Mortgage]." *In re Payne*, 450 B.R. at 719.

Perhaps this is best illustrated by the technique used by the BANK in its brief when it wrote the name "[redacted] in brackets after the term "Borrower":

> At page 2, under "Definitions," that the "Note" referenced in the First Deed of Trust is "the promissory note signed by Borrower [[redacted] and dated May 18, 2007"…[2]

First, it is important to observe that the BANK felt the need to clarify that "Borrower" means only "[redacted] in the definition of the "Note" in the security instrument. Indeed, it is nonsensical to say that "Borrower"—not "a Borrower" or "one of the Borrowers"—means both [redacted] and [redacted] in this context when [redacted] did not sign the promissory note. At the very least, that the BANK's counsel felt the need to clarify that the Instrument is referring only to [redacted] in this passage, while arguing that it means both [redacted] and [redacted] in other passages, demonstrates, not only that the document is ambiguous, but that the BANK itself recognizes it to be so.

Additionally, because "Borrower" is defined as "[redacted] it would serve the reader well to adopt the BANK's clarification technique and mentally insert

[2] Answer Brief, p. 22.

"[after every occurrence of "Borrower" in the Deed of Trust. Thus, Paragraph 13 becomes:

> 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.

It immediately becomes apparent that the paragraph was never applicable, or even intended to be applicable, when there is only one defined "Borrower"—when there is only one Borrower, there is no one with whom to share joint and several liability. Because this stock language in a Uniform Instrument would also be irrelevant, even nonsensical, whenever there is only one owner of the property (i.e. where there is no dispute that there is only one "Borrower"), it is inappropriate to interpret the provision using the assumption that it must apply and must make sense in this case.

Likewise, the use of the term "any" before "Borrower" reveals that the language is one-size-fits-all and contemplates that, on many occasions, there will be only one "Borrower" (as in this indistinguishable reformulation: "a Borrower

who signs the Security agreement without signing the note, if any, is a co-signer."). Thus, Paragraph 13, at best, provides an inference that the drafters of the Uniform Instrument intended that all the property owners (here, both [redacted] and [redacted] be named as "Borrowers" on the first page. It provides no information about the intent of lay homeowners when the BANK failed to use its own form properly.

Fortuitously, the court need not take sides in the on-going debate regarding the effect of the co-signer provision or the enforceability of security agreements against persons unnamed as a "Borrower" in the granting clause.[3] That learned judges have reached the exact opposite conclusions makes the Uniform Security Instrument ambiguous *per se*. *Mamo v. Skvirsky*, 960 A.2d 595, 599-600 (D.C. 2008) (stating that "a contract is ambiguous if it is "reasonably or fairly susceptible" of more than one materially different interpretations" and reversing summary judgment where ambiguous contract required consideration of conflicting extrinsic evidence). That ambiguity is sufficient to reverse the summary judgment below because it created a factual issue as to the parties' intent.

[3] *See In re Crouch*, CIV.A. 5:10-332-JMH, 2011 WL 3608095 (E.D. Ky. Aug. 16, 2011) (affirming bankruptcy court order determining that mortgage was not valid as to wife who was not named as a "Borrower"); *but see In re Gilchrist*, 467 B.R. 114 (E.D. Ky. 2012) (holding that such a mortgage is valid).

II. The Factual Dispute Concerning [redacted] Intent Bars Summary Judgment on Every Theory Posed by the BANK

Even if every other term of a contract is unambiguous, where there is a dispute over who are the parties to the contract, the trial court must consider evidence of the parties' intent. *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 327 (D.C. 2001) ("before a contract may be regarded as "duly signed and executed," the identity of the parties must be established, or at least there must be evidence from which a trier of fact could ascertain their identity if it is in dispute."). Here, there is conflicting evidence of that intent—both on the face of the contract and through summary judgment evidence—that precluded entry of summary judgment.

A. [redacted] intent is essential to determining whether an equitable lien should be imposed.

The BANK incorrectly claims that [redacted] and [redacted] made no argument against the BANK's entitlement to an equitable lien, and indeed, that [redacted] and [redacted] Brief was "entirely silent" on the matter.[4] In reality, [redacted] and [redacted] argued that "all roads lead to [redacted] intent," including the BANK's equitable lien and equitable subrogation theories.[5]

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[4] Answer Brief, p. 40.

[5] Initial Brief, pp. 25-26.

In reality, it is the BANK who was "entirely silent" on how its equitable lien and subrogation theories could be viable in the face of conflicting evidence about [redacted] intent.[6] The BANK busies itself with immaterial factual differences to sweep aside the cases cited by [redacted] and [redacted] but never addresses the broader holdings for which they were mentioned—that equitable subrogation does not exist where it is contrary to the parties' intent. The BANK does not explain how any resolution could be equitable that exalts one party's intent over that of the other, particularly where there is no suggestion of a fraudulent intent on the part of the latter.

Even the case cited by the trial court, *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58 (D.C. 2005), does not support the BANK's position. Even though it states that the law will create a quasi-contractual obligation "regardless of the intention of the parties" (*Id*. at 63.), it also holds that "[o]ne who has entered into a valid contract cannot be heard to complain that the contract is unjust, or that it unjustly enriches the party with whom he or she has reached agreement." *Id*. at 64. In short, unjust enrichment applies only in the absence of an actual contract. *Id*.

[6] Answer Brief, pp. 40-43.

B. The BANK's intent is not controlling.

The theme of the BANK's brief—one which is oft-repeated throughout—is that it is nonsensical to believe that the BANK would loan money without collateral to secure the loan.[7] The BANK's intent, however, is not in dispute. What is in dispute is [redacted] intent. It cannot be assumed that what appears rational and self-evident to a sophisticated national bank and its attorneys is obvious to the average layperson, who often does not fully understand the financial and legal instruments he or she is asked to sign at a real estate closing. The BANK is actually arguing that [redacted] should have divined what the BANK's intention was, and done so in the face of its unconventional use of everyday terminology. The BANK's reliance on its own intent to carry the day flies in the face of the basic rule of contract law that ambiguities are construed strongly against the BANK as the party that provided the contract language. *Capital City Mortg. Corp. v. Habana Vill. Art & Folklore, Inc.*, 747 A.2d 564, 567 (D.C. 2000)

[7] Answer Brief, pp. 7, 14 ("Wells Fargo intended and understood that the First and Second Deeds of Trust would be fully secured by the Subject Property."), p. 25 ("[I]t 'is **simply unbelievable** that a bank would consent to secure the entire amount of the purchase price of a home with something less than a complete interest in the property.'") (emphasis added by the BANK), p. 26 ("No reasonable person could think any such thing, for the simple reason that it doesn't make any sense."), p. 32 (the idea that "Wells Fargo knowingly agreed to loan $417,000.00 to [redacted] without any expectation or right to any security interest in the Subject Property" is "nonsense" and "patently absurd.").

(ambiguities in a contract are to be construed strongly against the drafter) (internal quotes and citation omitted).

The BANK also counters that [redacted] claim that she signed the Deed of Trust merely to show that she didn't object to what her husband was doing is not supported by any assertion in the document itself .[8] A formal statement of intent in the instrument, however, is unnecessary. For example, the court in *In re Wirth*, 355 B.R. 60 (N.D. Ill. 2005) held that the signature of an otherwise unmentioned third party is nothing more than an expression of assent to what the contracting party is doing:

> [w]here a third party merely annexes his name to a contract in the body of which he is not mentioned, and which is a complete contract between other parties signing it and mentioned in it, such third person does not thereby become a party to the efficient and operative parts of the contract, his signature in such case being only an expression of assent to the act of the parties in making the contract.

Id. at 63-64 (internal citation omitted). In *Wirth*, an ex-husband who held a one-half interest in the property signed a mortgage over a line labeled "Borrower" although he was not identified as a "Borrower" in the agreement. The court in *Wirth* affirmed the bankruptcy court's conclusion that the ex-husband's interest was not subject to the lien.

[8] Answer Brief, p. 29.

Notably, in reaching this conclusion the court in *Wirth* rejected arguments similar to those made by the BANK here: that the parties' intent was clear because no lender would have loaned such a substantial sum without a security interest in the property. *Id*. at 62. In concluding that the lien was inapplicable to a party who was never named as a "Borrower," the court tacitly agreed with the counterargument: that "it is not the duty of the Court to rescue a lender that is less than prudent, or to give it the deal it might wish it had made." *Id*. (quoting Appellee's Brief).

III. [redacted] Signature on the Riders Only Creates Additional Factual Issues.

The BANK also urges the Court to consider [redacted] signature on the various riders as evidence that she is a "Borrower" under the Instrument.[9] As with the main document, [redacted] merely signed on an available blank line (all of which were marked with "[blank]-Borrower"). Her name is not typed or printed underneath the line.

Two bankruptcy judges and a bankruptcy appellate panel have concluded that such riders will alter the definition of "Borrower" on the first page of the security instrument to include anyone who signed the rider. Their rationale was that: 1) the rider specifically alters the security agreement (the rider "shall be

[9] Answer Brief, p. 22.

deemed to amend and supplement the Mortgage, Deed of Trust…"); and 2) it can be interpreted to broaden the definition of "Borrower."

In *In re Foster*, 448 B.R. 914, 921 (Bankr. S.D. Ohio 2011) *aff'd*, 458 B.R. 391 (B.A.P. 6th Cir. 2011), the judge rejected the usual arguments posed by the BANK, including the idea that the co-signer provision could change the definition of "Borrower." The judge went on to hold, however, that the Adjustable Rate Rider redefined the term "Borrower." *Id*. The decision, however, was predicated partly on the fact that the person being deemed to have agreed to this alteration had printed her name in the Rider's signature block in front of the word "Borrower" which is not the case here. *See also In re Rowe*, 452 B.R. 591, 594 (B.A.P. 6th Cir. 2011) (reaching same conclusion where spouse in question had signed over hand-printed name); and *In re Stephens*, 11-31062, 2012 WL 4086767 (Bankr. S.D. Ill. Sept. 17, 2012) (reaching same conclusion based in part on the fact that the spouse in question had also signed the note).

Even if these cases were factually identical, they are unpersuasive. The language which allegedly altered the meaning of "Borrower" does not expressly do so—there is still an element of interpretation, as shown by the Rider in *Foster* (virtually identical to that in this case):

> THIS ADJUSTABLE RATE RIDER is made this FOURTEENTH day of OCTOBER 2005, and is incorporated into and shall be deemed

> *to amend and supplement the Mortgage,* Deed of Trust, or ***920** Security Deed (the "Security Instrument") of the same date *given by the undersigned ("Borrower")* to secure Borrower's Adjustable Rate Note to [lending bank].

In re Foster, 448 B.R. at 919-20 (emphasis original). The Rider does not explicitly advise anyone that a signature on this auxiliary document will change the term "Borrower" as defined on the first page of the security instrument. Indeed, a natural reading of the sentence is that it is simply identifying a particular security agreement—i.e. the one given by the "Borrower." It suggests that it was expected the Rider would be signed by the person previously identified as the "Borrower."

To say that this reference to the Deed of Trust to which the Rider applies redefines "Borrower" renders the sentence nonsensical as it would now be identifying a non-existent Deed of Trust (one given by all the undersigned). If that were already clear, there would be no need to expand the definition in the Rider.

For example, if a third person had signed the Rider in this case (but not the Deed of Trust), it would be abundantly clear that the parenthetical use of "Borrower" in the Rider would not change its meaning because it would be referring to a Security Agreement also executed by that third person, which does not exist. This example reveals that the interpretation proposed by the BANK is circular in its reasoning. Only by first assuming that [redacted] "gave" a Deed of

Trust (as a "Borrower") can the Rider identify the Deed of Trust to which it applies and thus make her a "Borrower" under that instrument.

The BANK's suggested interpretation is not only circular, it contradicts the structure and purpose of the Rider. While the Rider consumes over three pages with painfully explicit prose as to the changes it is making to the interest rate terms, it purportedly leaves the all-important issue of who is bound by these instruments to a buried parenthetical. Thus, [redacted] and [redacted] do not dispute that the BANK most likely intended to include [redacted] as a "Borrower" (but failed to do so), it is very much disputed that the BANK ever intended to do so through the Rider.

Moreover, the language of the Adjustable Rate Rider (as well as identical language in the other Riders in this case) is, at best, ambiguous. It did not put [redacted] on notice that it was changing the term "Borrower" so as to appropriate her property rights. Accordingly, while the BANK is free to argue to the fact-finder on remand that [redacted] intent may be deduced from the Riders, their language is not so unambiguous as to permit a determination of intent as a matter of law at summary judgment.

IV. The BANK's Positional About-Face Is Not Proffered as an Independent Procedural Reason for Reversal.

[redacted] and [redacted] pointed out in their Initial Brief that the BANK had originally pled that the absence of [redacted] name from the definition of "Borrower" so unequivocally rendered the Deed of Trust unenforceable that she should be compelled to sign another.[10] Only after some courts began to find that such defective security instruments were nonetheless enforceable, did the BANK posit that the Deed of Trust is unambiguous. And it did so without advising the trial court of contrary decisions, even though the opposing party was unrepresented.[11]

The BANK responds that these points constitute a "procedural challenge" that was waived by the *pro se* litigants.[12] To be clear, [redacted] and [redacted] did not point out the BANK's theory-shifting as a procedural issue on appeal. The BANK's inability to be consistent in its own interpretation of the legal effect of the Deed of Trust is an argument in favor of finding the document to be inherently ambiguous. And pointing out that neither party advised the trial court of decisions

[10] Initial Brief, pp. 6-7, 16-17.

[11] Initial Brief, pp. 9-13.

[12] Answer Brief, p. 33.

favorable to [redacted] and [redacted] merely explains how the trial court could be led into error.

The BANK did not address the inconsistency of its pleadings, saying only that it alleged "in its Complaint that the First Deed of Trust *did*, in fact 'unambiguously encumber' [redacted] interest in the Subject Property."[13] If this were so, one can only wonder why the BANK filed this suit rather than continuing with the foreclosure proceedings it had already begun.

V. On *De Novo* Review, This Court Must Consider All Inferences in Appellants' Favor.

In the Initial Brief, [redacted] and [redacted] pointed out that the inclusion of [redacted] as a "Grantor" in the legal description was not evidence of [redacted] intent to be a "Borrower," because it could be inferred from other errors in the attachments that the legal description was actually prepared for the second Deed of Trust.[14] The BANK responds, not by denying that the attachment was, in fact, prepared for the second Deed of Trust, but rather by claiming this point had been waived.[15]

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[13] Answer Brief, p. 34 (emphasis original).

[14] Initial Brief, pp. 30-31.

[15] Answer Brief, pp. 30-32.

The BANK overlooks the fact that the trial court never adopted the BANK's argument about the legal description. The order under review does not mention the legal description or the term "Grantor." Nor were these mentioned at oral argument. [redacted] and [redacted] merely pointed out the reasonable inference regarding the "Grantor" language in anticipation of an argument by the BANK that the ruling could be upheld on other grounds—i.e. that the trial court was right for the wrong reason.

This Court must review the trial court decision *de novo*, drawing all reasonable inferences from the evidence in favor of the non-movant. *Estenos v. PAHO/WHO Fed. Credit Union*, 952 A.2d 878, 892 (D.C. 2008). The BANK placed the documents into evidence and is subject to all the conclusions from that evidence that can be reasonably inferred by this Court in favor of [redacted] and [redacted] Not surprisingly, the BANK cites no cases for its proposition that this Court is now limited to the evidentiary inferences that were specifically articulated to the trial court. Rather, this Court is required to independently review the record and draw its own conclusions. *See O'Malley v. Chevy Chase Bank, F.S.B*, 766 A.2d 964, 967 (D.C. 2001) (reversing summary judgment on foreclosure and noting that appellate court must make "an independent review of the record").

VI. Reversal Will Be the Beginning, Not the End.

The BANK argues strenuously on this appeal, tossing about inflammatory phrases such as "unjust enrichment,"[16] as if to suggest reversal would mean that it cannot foreclose—that this Court's action would [redacted] and [redacted] a "free house." A reversal by this Court, however, means only that the procedural shortcut sought by the BANK was inappropriate. Upon reversal, the BANK will still have the opportunity to present its evidence of intent and have its day in court, as will [redacted] and [redacted] *See, e.g., Onyeoziri v. Spivok*, 44 A.3d 279, 292 (D.C. 2012) (reversing summary judgment in foreclosure action so that jury could consider and decide issues of intent).

Nor is there any evidence that the BANK will be unable to collect its debt without the collateral. To the extent, if any, that the BANK's veiled and unsubstantiated claims of undue hardship are to be considered, they should be measured against the broader, and more weighty concerns of due process.

[16] Answer Brief, p. 38.

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 October 22, 2012 to all parties on the attached service list.

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