Superior Court of New Jersey
Appellate Division

U.S. BANK TRUST NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS OWNER TRUSTEE FOR RCF 2 ACQUISITION TRUST,

Plaintiff-Appellant,

-against-

BRONX GIRLS FLIPS LLC; LAYO TOYIN OYAWUSI; VICTORIA O. ODUNOWO; ROUCHELLE GLOVER; MR. GLOVER; HUSBAND OF ROUCHELLE GLOVER and PML FUNDING, LLC,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-001964-23

CIVIL ACTION

On Appeal from a Final Order of the Superior Court of New Jersey, Chancery Division, Essex County Granting Summary Judgment, Dated March 4, 2024

Sat Below:
Hon. Lisa M. Adubato, J.S.C.
Trial Court Docket No. F-008670-23

BRIEF ON BEHALF OF APPELLANT U.S. BANK TRUST NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS OWNER TRUSTEE FOR RCF 2 ACQUISITION TRUST

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PRELIMINARY STATEMENT

Plaintiff-Appellant U.S. Bank Trust National Association, not in its individual capacity but solely as Owner Trustee for RCF 2 Acquisition Trust ("Appellant") appeals from an Order entered on March 4, 2024 (the "Order") from the Superior Court of New Jersey, Chancery Division, Essex County (the "trial court"), granting Defendant-Respondent Alpha Flow Transitional Mortgage Trust 2021-WL1's ("Respondent") Motion for Summary Judgment, denying Appellant's Cross-Motion, dismissing the Complaint, dismissing the action with prejudice, expunging and discharging the underlying mortgage recorded in the Office of the Clerk of Essex County on June 6, 2008 in Book 12139, Page 7663 (the "Mortgage"), and deeming the underlying mortgage to be satisfied in full.

This appeal concerns a mortgage lender's (Appellant's) right to reject an insufficient payoff payment from a third-party, non-borrower and proceed with foreclosure after borrowers defaulted on the subject loan. PML Funding, LLC ("PML") (Respondent's predecessor) sent the prior servicer of the subject loan (Rushmore Loan Management Services, Inc. ("Rushmore")) the short payoff funds on behalf of third-parties Bronx Girls Flips LLC ("Bronx Girls") and Rochelle Glover who were deeded the property by Appellant's borrowers. As noted, those funds were insufficient to fully pay off the debt owed. As a result,

Rushmore returned the funds directly to Respondent's agent, Entrust Solutions, LLC ("Entrust"), which was serving as the escrow company on behalf of the settlement/title agent Prominent Title and Settlement Service, LLC ("Prominent Title"). It was Respondent's position that the funds, nevertheless, should have been applied to the loan and not returned to Respondent's escrow agent, who then misappropriated the funds.

Here, the trial court erroneously deemed the payment – not from Appellant's borrowers, but from another lender for third parties to whom the borrowers transferred title – as a short sale with the deficiency waived. In doing so, the trial court was heavily persuaded by an unpublished decision of this Court, *Mortgage Electronic Registration Systems, Inc. v. Omar*, No. A-5187-06T3, 2008 WL 2050834 (N.J. Super. Ct. App. Div. May 15, 2008), that arose in a starkly different factual scenario. The transaction at issue here was never intended to be a short sale, nor was there any contractual obligation on the part of Appellant to accept an insufficient payment. Accordingly, when the funds were returned to the Respondent's closing agent (who unfortunately, absconded), Appellant retained the lawful right to proceed with foreclosure.

At a minimum, the trial court should have allowed discovery (or supplementation of the record) on whether the requirements for a short sale were

even satisfied. Instead, summary judgment was granted on a converted motion to dismiss – before any discovery took place at all. The trial court improperly concluded that Appellant's cross-motion for summary judgment for foreclosure served as a concession that the case was ripe for adjudication. However, mortgage foreclosure claims are particularly suited for summary adjudication. The lack of genuine issues of material fact on the foreclosure claim does not mean that there were no fact issues surrounding the context of the insufficient payment and the conditions necessary to effect a valid short sale.

As further discussed below, Appellant had every right to reject the insufficient payoff and proceed with foreclosure. The trial court's order deeming the mortgage discharged and the note satisfied, if preserved, would serve as an unjust forfeiture that improperly protects Respondent from its own agent's theft at Appellant's expense.

Accordingly, this Court should reverse the Order, deny Respondent's summary judgment motion, and grant Appellant's cross-motion for summary judgment, or in the alternative, remand for further discovery on the factual issues raised by the trial court.

PROCEDURAL HISTORY

On July 19, 2023, Appellant commenced this foreclosure action on real property located at 436 Frankfurt Street, Orange, New Jersey 07050 (the "Property") against Victoria Odunowo and Layo Toyin Oyawusi (collectively, "Borrowers"). (Pa216 at ¶3.) Appellant was the holder of a note, dated April 30, 2008, bearing the signatures of Borrowers, memorializing an obligation to repay a loan in the principal amount of $201,832.00, together with interest thereon (the "Note"). (Pa260 at ¶8, Ex. B.) The Note was secured by a mortgage executed by Borrowers encumbering the Property (the "Mortgage") (together with the Note, the "Loan"). (Pa260 at ¶9, Ex. C.) Appellant commenced this action based upon Borrowers' default of their obligations under the operative loan agreements, as modified by a February 12, 2018 loan modification agreement with Bayview Loan Servicing, LLC (a prior servicer on the Loan) (the "Modification Agreement"). (Pa434-35 at ¶¶25, 31-32.)

In response to Appellant's foreclosure complaint, on September 20, 2023, PML filed a contesting answer (the "Answer"). (Pa217 at ¶9.)

On October 3, 2023, Respondent, assignee to PML, filed a motion to intervene and to dismiss. (Pa217 at ¶10.) On November 20, 2023, Appellant, PML, and Respondent entered into a consent order (the "Consent Order"),

substituting Respondent in place of PML and withdrawing the motion to intervene, among other relief. (Pa217 at ¶13.) On November 29, 2023, the Court granted the Consent Order. (Pa217 at ¶13.)

On November 30, 2023, Respondent filed its additional motion papers – refashioning the motion to dismiss as a motion for summary judgment –seeking an order for Appellant to accept $30.53, plus interest on that balance, in alleged full dismissal and satisfaction of the mortgage. (Pa217 at ¶15.)

On January 12, 2024, Appellant filed its opposition to Respondent's motion for summary judgment and filed a cross-motion for summary judgment seeking an order striking Respondent's Answer and affirmative defenses, deeming this matter uncontested pursuant to *R.* 4:64-1(c), entering default, and transferring this matter to the Office of Foreclosure. (Pa216 at ¶2.) It was Appellant's position, among other things, that the loan was accelerated upon the transfer of the subject Property to a third-party (*i.e.*, Bronx Girls) and as a result Rushmore was required to reject the short payoff funds. In addition, Appellant posited that Respondent was actually in the best position to prevent the loss here (or, at a minimum, mitigate its damages). Rather than pursuing the missing funds directly from the closing agent, it appears Respondent did nothing to follow-up on the wire until after the closing agent became a defunct entity.

On January 29, 2024, Respondent filed its brief in opposition to Appellant's cross-motion for summary judgment and in further support of Respondent's motion for summary judgment. (Pa428.)

On March 1, 2024, the trial court heard oral argument on both parties' motions for summary judgment. (1T.)[1] During oral argument the trial court issued a decision from the bench granting Respondent's motion and denying Appellant's motion on the basis that Appellant was in the best position to avoid the loss of the $177,887.35 payoff funds with which the closing agent absconded. On March 4, 2024, the trial court entered the Order, which is the subject of this appeal filed by Appellant on March 5, 2024. (1T.)[2]

[1] 1T refers to the transcript of the March 1, 2024, argument on the parties' motions for summary judgment.

[2] Also on March 5, 2024, Appellant filed an Order to Show Cause in the trial court requesting an order: (1) staying enforcement of the trial court's Order pending the determination of this appeal, and (2) prohibiting Respondent from encumbering or otherwise transferring the Property. On March 6, 2024, Respondent filed its brief in opposition to Appellant's Order to Show Cause. On March 11, 2024, the trial court heard oral argument on Appellant's Order to Show Cause. During oral argument, the trial court issued a decision from the bench denying Appellant's Order to Show Cause. On March 12, 2024, Appellant filed an Application for Permission to File Emergent Motion with this Court. On March 12, 2024, this Court denied the emergent application, determining that the application "on its face [did] not concern a threat of irreparable injury, or a situation in which the interests of justice otherwise require adjudication on short notice."

STATEMENT OF FACTS

A. The Loan And The Property

This matter involves a loan made to Borrowers on April 30, 2008, evidenced by a note in the amount of $201,832.00 (the "Note") and secured by a mortgage executed by Borrowers in the amount of $201,832.00 (the "Mortgage") in favor of Security Atlantic Mortgage Co. Inc. ("Security") on the Property. (Pa432 at ¶¶1, 3-4.)

Following six other assignments of Mortgage, on October 4, 2021, J.P. Morgan Acquisition Corp. ("J.P. Morgan") assigned the Mortgage to Appellant. (Pa433-34 at ¶¶10-23.) Rushmore serviced the Loan from February 1, 2020 to July 16, 2021, during the period in which J.P. Morgan was the lender. (Pa434 at ¶29.) Servicing of the Loan transferred to Selene Finance LP ("Selene") effective July 16, 2021. (Pa434 at ¶30.) Borrowers defaulted on December 1, 2020, by failing to pay their monthly installment payments due on the loan. (Pa435 at ¶¶31-32.) Borrowers have failed to cure their default to date. (Pa435 at ¶32.) On September 27, 2022, Selene sent Borrowers a Notice of Intention to Foreclose ("Notice of Intention") via regular and certified mail in compliance with the notice of intention requirements of the Fair Foreclosure Act of the State of New Jersey. (Pa435 at ¶34.) Pursuant to Paragraph 9(a) of the Mortgage,

Appellant had the right to "require immediate payment in full of all sums secured by" the Mortgage following Borrowers' default. (Pa276-77 at ¶9(a).)

B. Borrowers Sell The Property

By Deed dated February 23, 2015, Odunowo conveyed title to the Property to Oyawusi, which was recorded on March 3, 2015 in Book 12540, Page 8359. (Pa434 at ¶24.) Then, by Deed dated April 15, 2021, Oyawusi, conveyed title to the Property to Bronx Girls and Rouchelle Glover ("Glover"), which was recorded on July 6, 2021 in Instrument 2021081400. (Pa434 at ¶26.) Thereafter, on April 30, 2021, the mortgage that Bronx Girls executed in favor of PML encumbering the Property was assigned to Respondent. (Pa436 at ¶44.)

Pursuant to Paragraph 9(b) of the Mortgage, Borrowers' transfer of the Property to Bronx Girls required Plaintiff (as lender) to accelerate the Loan in full because Bronx Girls—an LLC—did not occupy the Property as its principal residence. (Pa276-77 at ¶9(b) ("Lender shall . . . require immediate payment in full of all sums secured by [the Mortgage] if: . . . (ii) The Property is not occupied by the purchaser or grantee as his or her principal residence. . . .").)

C. The Insufficient Funds Wire And Subsequent Return Wire

On April 9, 2021, Rushmore—the servicer of the Loan at the time—sent a Payoff Statement to Borrowers, which stated that the amount needed to fully

pay off the Loan was $177,276.75 (with a good through date of April 16, 2021). (Pa201.) The Payoff Statement also stated that the figures are subject to "final verification" by the lender. (Pa202.)

On Friday, May 7, 2021, three weeks after the transfer from Oyawusi to third party Bronx Girls, a wire in the amount of $177,887.35 was received from Entrust on behalf of PML, the lender on the Bronx Girls' loan. (Pa416 at ¶¶10.) Upon information and belief, Entrust was serving as the escrow company on behalf of the settlement/title agent, Prominent Title. (Pa416 at ¶10.) Entrust handled the closing funds and was responsible for disbursing the funds upon closing. (Pa218 at ¶16.) As of May 7, 2021, however, the total to pay off the Loan was $181,200.23. (Pa435 at ¶37.) Therefore, the funds received were short $3,312.88 due to fees, costs and escrow/impound overdraft incurred after the original April 16, 2021 payoff quote expired. (Pa435 at ¶37.) A new payoff quote was never requested prior to the May 7, 2021 wire transfer. (Pa435 at ¶38.)

On or about May 12, 2021, the loss mitigation team at Rushmore received a call from its borrower regarding the insufficient funds, and borrower indicated she would have her attorney contact Rushmore. (Pa436 at ¶39.) Eight business days after the wire was received, on May 19, 2021, the funds were designated

to be returned by outgoing wire back to Entrust. (Pa436 at ¶40.) The servicing notes do not reflect that the attorney ever called Rushmore regarding the insufficient funds. (Pa436 at ¶41.) The funds were then returned (by wire transfer) back to Entrust on May 21, 2021 – only ten business days after receipt of the insufficient funds. (Pa436 at ¶41.) The outgoing return transfer was sent back with the same Unique ID and Bank Ref. number as set forth in the incoming money transfer from Entrust. (Pa436 at ¶42.) By returning the wired funds to Entrust, Rushmore did not accept the funds, did not apply the funds to the Loan balance, and did not discharge the Mortgage. (*See* Pa262 at ¶¶22, 24, Exs. L, M.) Instead, the outstanding balance on the Loan remained intact and continued to accrue interest and fees in accordance with the Loan terms. (*See* Pa262 at ¶¶22, 24, Exs. L, M.) Even if Rushmore applied the wired funds to the Loan, the Mortgage would not have been discharged as the funds were not sufficient to fully pay off the Loan: the funds received were short $3,312.88 due to fees, costs and escrow/impound overdrafts incurred after the expiration of the payoff quote set forth in the Payoff Statement. (Pa416 at ¶10, Ex. A.)

It is unclear whether Respondent or PML knew that the wire funds were rejected and returned to Entrust. Neither Respondent nor PML were borrowers on the Loan. (Pa260 at ¶¶8, 9, Exs. B, C.) Borrowers were, however, notified

at least twice—on May 12, 2021 (the following Wednesday after the May 7, 2021 wire, which fell on a Friday) and again on June 29, 2021—that the payoff was deficient, that the wired funds were rejected, and that the Loan was not discharged. (Pa 417 ¶¶11, 13, Ex. B.) On May 12, 2021, Borrowers informed Rushmore that they would reach out to their attorney to resolve the issue with the deficient payoff. (Pa417 at ¶11.) However, Rushmore's servicing notes do not indicate that Borrowers' attorney ever contacted Rushmore or Plaintiff to address the payoff issue. (Pa 417 at ¶11, Ex. B.) On June 29, 2021, borrower was again advised that the payoff was rejected and returned because it was short $3,312.80. (Pa417 at ¶13.)

It was not until one year later that anyone went to look for, or follow-up with Entrust on the wire. (Pa263 at ¶25, Pa399-413.) According to Respondent's counsel, Entrust (or its members) can no longer be located. (Pa 218 at ¶16.) According to the Tennessee Secretary of State and Florida Secretary of State, Entrust appears to no longer be an active entity as of August 8, 2023, and September 22, 2023, respectively. (Pa218 at ¶16.) Other entities (like Entrust Enterprises, LLC) operated by the managing member of Entrust (Jonathan Yasko) also appear to no longer be in business, and the Entrust website is no longer operating. (Pa218 at ¶16.)

ARGUMENT

I. STANDARD OF REVIEW

Appellate review of a trial court's grant of summary judgment is *de novo*. *Bello v. Lyndhurst Bd. of Educ.*, 344 N.J. Super. 187, 190 (App. Div. 2001). An appellate court "appl[ies] the same standard that governs the trial court's review." *Branch v. Cream-O-Land Dairy*, 244 N.J. 567, 582 (2021).

"A motion for summary judgment should be granted only when the moving party establishes the absence of any genuine issue as to a material fact." *Turner v. Wong*, 363 N.J. Super. 186, 199 (App. Div. 2003) (citing *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 539–40 (1995)). The trial "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 242–43 (1986)). The Appellate Court must "accept plaintiff's version of defendant's conduct as true and give plaintiff the benefit of all reasonable inferences from the facts." *Turner*, 363 N.J. Super. at 199.

"If there is no genuine issue of material fact, [the Appellate Court] decide[s] whether the trial court's ruling on the law was correct." *Id.* "A trial

court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan*, 140 N.J. 366, 378 (1995), *superseded on other grounds by statute*, N.J.S.A. 40:55D-10.5.

"A trial court should not grant summary judgment when the matter is not ripe for such consideration, such as when discovery has not yet been completed." *Driscoll Constr. Co. v. State, Dep't of Transp.*, 371 N.J. Super. 304, 317 (App. Div. 2004); *Hollywood Café Diner, Inc. v. Jaffee*, 473 N.J. Super. 210, 219 (App. Div. 2022) ("[I]n general, summary judgment is inappropriate prior to the completion of discovery." (quotation marks omitted)). Rather, "[t]he court should afford every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case." *Driscoll Constr. Co.*, 371 N.J. Super. at 317 (quotation marks omitted). "If there is the slightest doubt as to the existence of a material issue of fact, the motion should be denied." *Hermann Forwarding Co. v. Pappas Ins. Co.*, 273 N.J. Super. 54, 60 (App. Div. 1994).

The mere fact that both sides moved for summary judgment is not dispositive of whether the matter was in fact ripe for adjudication. *Driscoll Constr. Co.*, 371 N.J. Super. at 318 ("[C]ross-motions of summary judgment do not, of necessity, obviate a plenary trial on disputed issues of fact.").

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENT AND DISCHARGING THE MORTGAGE BECAUSE THERE EXISTS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER APPELLANT WAS REQUIRED TO ACCEPT THE PARTIAL PAYMENT (Pa416-17).

The trial court erred by identifying and then subsequently ignoring genuine issues of material fact regarding whether, under the terms of the loan, Appellant was required to accept or reject the partial payment, making summary judgment both premature and inappropriate. As such, the Court should remand for further discovery on the factual issues raised by the trial court pertaining to whether Appellant was required to accept or reject the partial payment under the terms of the Loan.

While Borrowers generally had the right to make a partial pre-payment under the Note, the loan was already in default at the time of the wire transfer, and Borrowers' interest in the Property had already been transferred to third-parties – Bronx Girls and Glover. (Pa434-35 at ¶¶26, 32, 35.) Under both of these circumstances, Rushmore had the right under the Mortgage to reject any short payoff, and in fact was required to reject it under the latter circumstance. Notably, the short payoff was not being remitted on behalf of Appellant's Borrowers.

A. Applicability of Section 9 of the Mortgage

First, pursuant to Section 9(a) of the Mortgage, Appellant had the right to "require immediate payment in full of all sums secured by" the Mortgage, where the Borrowers were in default. (Pa276 at ¶9(a).) At oral argument the Court questioned whether it was Appellant's argument that if Appellant had "accepted the payment it would have been considered a short sale," and Appellant agreed that the short payment made by a non-borrower, purchaser of the Property, was akin to a short sale. (1T9:1-3; 4-5.) The trial court acknowledged that whether this was a short sale was "really important for [the trial court] to distinguish," and that the trial court did not see this argument in the record. (1T9:8-12.) The trial court furthered that "if this was presented as a short sale, there's a lot of things that has to happen before the lender accepts that," but that the trial court did not believe that factually this was a short sale. (1T9:13-13-20.) The trial court identified this genuine issue of material fact, yet, Appellant had no opportunity to establish a record on this point.

Second, pursuant to 9(b) Appellant was also entitled (and in fact, required) to accelerate the debt because Borrowers sold the Property to Bronx Girls, and Bronx Girls – an LLC – clearly did not occupy the Property as its principal residence. (Pa276 at ¶9(b).) Section 9(b) provides that:

> Lender *shall*, if permitted by applicable law (including section 341(d) of the Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. 1701j-3(d)) and with the prior approval of the Secretary, require immediate payment in full of all sums secured by this Security Instrument if: (i) All or part of the Property . . . is sold or otherwise transferred (other than by devise or descent), and (ii) The Property is not occupied by the purchaser or grantee as his or her principal resident, or the purchaser or grantee does so occupy the Property, but his or her credit has not be approved in accordance with the requirements of the Secretary.

(Pa276) In light of this transfer of interest, Appellant (and its predecessor and servicers) were obligated under the Mortgage to reject anything less than the full payoff. (*Id.*); *Clinton Cap. Corp. v. Straeb*, 248 N.J. Super. 19, 28 (Ch. Div. 1990) ("[A]cceleration, by definition, advances the maturity date of the debt so that payment thereafter is not prepayment but instead is payment made after maturity."), *abrogated on other grounds by Westmark Com. Mortg. Fund IV v. Teenform Assocs., L.P.*, 362 N.J. Super. 336 (App. Div. 2003).

Again, at oral argument, the trial court concluded that the record did not establish whether the lender was mandated by Section 9(b) of the Mortgage to reject a short payoff from a non-borrower. (1T54:2-6.) The trial court acknowledged that Appellant was relying on Section 9 (1T9:21-22), but questioned whether the introductory requirements of Section 9(b) had been met. (1T11-14.) In particular, the Court questioned, "[w]here is all of that in the record that says all of that has been met? That the law applies even to this loan

. . . that there's the prior approval of the secretary . . . of some division of department of the government." (1T12:13-18.) In response, Appellant expressly acknowledged that the record did not establish that the introductory requirements of Section 9(b) were met. (1T13:2-3.) The trial court refused to consider Appellant's argument under Section 9(b) despite acknowledging that Section 9(b) was "a pretty important part of this," since that was the provision Appellant was "going to rely upon to support almost the entirety of their argument." (1T14:1-5.) Again, despite identifying and appreciating the genuine issue of material fact, the trial court nevertheless proceeded with a summary judgment determination, without affording Appellant the opportunity to supplement the record.[3]

B. The Matter Was Not Ripe for Summary Judgment

The trial court should have denied summary judgment and ordered further discovery after identifying these genuine issues of material fact about the

[3] Instead, the trial court was heavily persuaded by an unpublished decision of this Court, *Mortgage Electronic Registration Systems, Inc. v. Omar*, No. A-5187-06T3, 2008 WL 2050834 (N.J. Super. Ct. App. Div. May 15, 2008), that arose in a starkly different factual scenario, and used this case to fill in the gaps of what should happen to the short funds, and who should bear the loss once they went missing. *See infra* Section III.

applicability of Section 9.[4] Although the trial court started oral argument by asking the parties whether this case was ripe for summary judgment (1T6:8-14), at the time the parties' motions for summary judgment were filed, no discovery had been exchanged, Respondent never challenged Appellant's reliance on Section 9, and Appellant never had the opportunity to develop this argument in discovery. The trial court stated that the lack of a record on this point was "a problem," (1T13:21), and that on the facts in front of the trial court, the trial court had "nothing that would show . . . that the lender was not allowed to accept the payoff with it being short." (1T54:13-15.) Despite the trial court's acknowledgment of an incomplete record, the trial court nevertheless stated that

[4] Throughout the argument, the trial court proceeded to raise several issues of fact that did not appear in the record, and that would have been relevant to the Court's analysis. For example, the trial court noted that the record, in particular, "[t]he notes, the internal notes, do not establish that anyone was advised that the wire was coming back." (1T56:13-15.) There was no discovery to determine what the Rushmore notes did or did not contain, although Borrower on Appellant's Loan was clearly aware the funds were insufficient and would be rejected. There was equally no discovery to determine what, if anything, Respondent did to mitigate their damages. Although recognizing the lack of evidence in the records pertaining to notes and what Rushmore did or did not advise, the trial court nevertheless made a negative inference against only Appellant/Rushmore that factored into the trial court's equitable analysis: "[Rushmore's] decision to reject [the wire] in the manner it was rejected in this case does not allow me to [] find that the blame for that should be put on any other party." (1T44:19-22.)

"summary judgment will be granted with the understanding that both parties agreed that it was ripe." (1T57:3-5.)

The fact that both parties filed for summary judgment was not, and should not have been, dispositive as to whether a plenary hearing was required to resolve disputed material facts. *Driscoll Constr. Co.*, 371 N.J. Super. at 317–18; *O'Keeffe v. Snyder*, 83 N.J. 478, 487 (1980) ("Cross motions for summary judgment do not preclude the existence of issues of fact."). "Although [one party] may assert that, according to his theory of the case, the material facts are undisputed, he must be allowed to show that if [opposing party's] theory is adopted there remains a genuine issue of material fact." *O'Keeffe*, 83 N.J. at 487. The trial court improperly concluded that Appellant's cross-motion for summary judgment for foreclosure served as a concession that the case was ripe for adjudication. However, mortgage foreclosure claims are particularly suited for summary adjudication. The lack of genuine issues of material fact on the foreclosure claim does not mean that there were no fact issues surrounding the context of the insufficient payment and the conditions necessary to effect a valid short sale. The trial court erred by identifying and subsequently making a determination regarding the truth of the matter, concluding that "[t]he plaintiff

has not established that it was mandatory that they accept a full payment." (1T44:18-19.)

Thus, this Court should remand this matter for discovery on whether, under the terms of the Mortgage, Appellant was required to accept or reject the partial payment.

III. ASSUMING THIS COURT FINDS NO MATERIAL ISSUES OF FACT, IT SHOULD DETERMINE THAT THE TRIAL COURT ERRED IN FINDING THAT APPELLANT WAS BARRED FROM PURSUING FORECLOSURE (Pa261-62).

The trial court erred by determining that Appellant was barred from pursuing foreclosure because Appellant was obligated to accept partial payment from a non-borrower (akin to a short sale), and further that, based upon equitable considerations, Appellant was in the best position to avoid the subsequent loss of the returned short funds. On both of these points, the trial court relied heavily on the reasoning and outcome in the unpublished opinion *Mortgage Electronic Registration Systems, Inc. v. Omar*, No. A-5187-06T3, 2008 WL 2050834 (N.J. Super. Ct. App. Div. May 15, 2008), explaining that the Court did not "see a way to really distinguish [] the *Omar* case." (1T 44:22-45:1.) The trial court further stated that "the facts [of the present case] were very close to what occurred in *Omar*," particularly "because the reasons for the return were allegedly the shortfall." (1T 31:20-22.) The trial court, however, failed to

appreciate the presence of several material facts that distinguish this case from *Omar*, and instead improperly extended *Omar* beyond the factual circumstances under which it was decided. As such, the trial court erred by granting Respondent's motion for summary judgment in reliance on the "logic" of the *Omar* case.

A. *Omar* Is Distinguishable And Not Dispositive of Whether Appellant Was Required to Accept the Short Payment.

Omar involved a refinance transaction where the mortgagee errantly returned the refinance funds to the borrower instead of the refinance lender because the funds were insufficient to satisfy the loan in full. *Omar*, 2008 WL 2050834 at *2-3. In *Omar*, the "note gave the borrower the right to prepay the loan without penalty," and included specific language that the "Note Holder will use [borrower's] Prepayments to reduce the amount of Principal that [borrower] owe[s] under this Note." *Id.* at *1. The cover letter that accompanied the refinance funds specifically requested that the funds be applied to the loan as a prepayment in the event they were insufficient to pay it off in full. *Id.*

The *Omar* Court ultimately held that the mortgagee should have accepted the funds because the mortgage in that matter permitted prepayment. *Id.* at *4-5. It reasoned that "[t]he mortgage stated that a payment was deemed received when sent to the designated location, which is what occurred here, and the note

contained a clause giving the borrower the right to prepay at any time without penalty." *Id.* at *5. The *Omar* Court stated that "*[u]nder these circumstances*, [the lender] was obligated under the terms of the loan documents to accept the check . . . and apply it against the balance due on the loan." *Id.* (emphasis added).

The *Omar* Court also discharged the mortgage on equitable grounds. *Id.* at *6. It held that the mortgagee was in the best position to have avoided the loss because the mortgagee chose to return the check (and sent it to the borrower), despite its obligations under the Note regarding pre-payment rights. *Id.* at *1, 6.

There are several key distinguishing facts that demonstrate the holding in *Omar* should not have been extended to the circumstances here. First, unlike the refinance transaction in *Omar,* the short payoff here was made on behalf of a non-borrower, third party purchaser of the Property. There was no such transfer of ownership of the Property in *Omar*, and therefore no consideration in *Omar* as to the impact of such a transfer on the prepayment clause in Note or the balancing of equities among the parties. Rather than recognizing that *Omar* did not address this transfer of interest and its impact and rather than consider

this impact, the trial court relegated Rushmore's decision to return these funds to a "ridiculously silly business decision." (1T 61:13-15.)

Second, in contrast to *Omar*, Appellant's predecessor was not required to accept a short payoff. Rather, Rushmore was obligated to only accept a full payoff of the Loan per Section 9 of the Mortgage once the Loan was accelerated.[5] *See supra* Section II. There is no discussion in *Omar* as to these provisions and how they might impact the analysis.[6]

Third, in *Omar*, the lender rejected the refinance funds because they were short and mistakenly returned them to the borrower, who absconded with the funds. To the contrary, here, Rushmore and Appellant's predecessor did not send the funds to their borrowers. And they did not send the funds to the new owners of the Property who were the borrowers on the Alpha Loan. Rather, they

[5] As discussed more thoroughly above in Section II, the trial court identified a genuine issue of material fact as to whether the requirements of Section 9 were met, such that Rushmore/Appellant was obligated to only accept a full payoff of the Loan.

[6] Respondent also relied on another unpublished Appellate Division case, *Deutsche Bank National Trust Co. v. Vezeriannis*, No. A-1376-11T1, 2013 WL 3213627 (N.J. Super. Ct. App. Div. June 27, 2013), for the proposition that Rushmore/Appellant was required to apply the funds as soon as they were received, and that any subsequent decision to return the funds was an imprudent business decision attributable only to the lender. It is inapplicable because, in contrast to here, a full payoff of the loan was received in *Vezeriannis*. 2013 WL 3213627, at *4.

returned the funds directly to PML's (Alpha's predecessor) agent – Entrust[7]. Entrust absconded with the funds, and it was PML that placed Entrust in a position to do so. PML (and then Alpha) failed to do anything to recover the funds once they were notified of an issue, almost a year before Entrust became a defunct entity. Had PML or Alpha taken any action whatsoever the loss may have been avoided. Similar facts do not appear in *Omar*, and therefore were not part of the best position analysis employed by this Court.

As a result of these key facts, extending the holding and outcome of *Omar* to the present matter was reversible error. Rather, than extending the holding of *Omar,* the court should have engaged in a true best position analysis, which would have taken into account that: (1) Respondent and its predecessor failed to do anything at all to prevent the loss or mitigate the damages, and (2)

[7] Both parties acknowledged that there was a lack of case law in New Jersey as to whether an escrow agent is considered the agent of the refinance lender. (1T45:25-46:5; 48:10-14.) Nonetheless, agency law in New Jersey is clear: "[a]n agency relationship is created when one party consents to have another act on its behalf, with the principal controlling and directing the acts of the agent." *Sears Mortg. Corp. v. Rose*, 134 N.J. 326, 337 (1993). "[A] court must examine the totality of the circumstances to determine whether an agency relationship existed even though the principal did not have direct control over the agent." *Id.* at 338. Based upon this law, Entrust was clearly the agent for Respondent and its predecessor. At a minimum, this is another example of a genuine issue of material fact that should have precluded summary judgment. (1T48:20-24 (Respondent acknowledged that "in terms of the record . . . [t]here's no facts for the record that [] my client, you know, hired them.").)

Respondent and its predecessor authorized Entrust to perform the closing, placing them in a position to commit the misappropriation of funds. *Sears Mortg. Co. v. Rose*, 134 N.J. 326, 345-46 (1993) (stating that where two parties were innocent, loss was imposed on party in best position to prevent the loss created by a third party's theft). Under such an analysis, with all equitable considerations being taken into account, the loss should have been born by Respondent, not Appellant.

B. Appellant Established a Prima Facie Case for Foreclosure.

The trial court erred in denying Appellant's cross-motion for summary judgment because Appellant established its prima facie case for foreclosure.

> The purpose of a foreclosure action is to determine the right to foreclosure and the amount due on the mortgage, and to give the purchaser at the foreclosure sale the title and estate acquired by the mortgagee, as well as the estate of the mortgagor . . . free from subsequent encumbrances.

Cent. Penn Nat'l Bank v. Stonebridge, Ltd., 185 N.J. Super. 289, 302 (Ch. Div. 1982) (citation omitted). The "only material issues in a foreclosure proceeding are the validity of the mortgage, the amount of the indebtedness, and the right of the mortgagee to resort to the mortgaged premises" for satisfaction of the indebtedness. *Great Falls Bank v. Pardo*, 263 N.J. Super. 388, 394 (Ch. Div. 1993), *aff'd*, 273 N.J. Super. 542 (App. Div. 1994). Accordingly, a prima facie

case for foreclosure is established once the plaintiff proves "the execution, recording, and non-payment of the mortgage." *Thorpe v. Floremoore Corp.*, 20 N.J. Super. 34, 37 (App. Div. 1952).

As to the first element, in connection with this Cross-Motion, Appellant demonstrated that Borrowers executed the Note and the Mortgage. (Pa432 at ¶1, 3.) Appellant also proved the second element for a prima facie case for foreclosure: proper recording. The Mortgage and the assignments were properly recorded in the Office of the Clerk of Essex County. (Pa432-34 at ¶¶4, 11, 13, 15, 17, 19, 21, 23.) Lastly, with respect to the default prong, Amanda Harvey, who is the Contested Default Case Manager for the current servicer of the loan on behalf of Appellant, certified that the loan has been in default since December 1, 2020. (Pa435 at ¶32.) Respondent cannot dispute any of these facts. As such, the undisputed facts and applicable law show that Appellant established a prima facie case for foreclosure and is entitled to summary judgment.

Furthermore, Appellant complied with the notice of intention requirements set forth in the Fair Foreclosure Act of the State of New Jersey, N.J.S.A. §§ 2A:50-53 to -68 ("FFA"). On September 27, 2022, Selene served Borrowers with the Notices of Intention via regular and certified mail in accordance with the FFAA. (Pa435 at ¶34.)

CONCLUSION

For all of the foregoing reasons, Appellant respectfully requests that this Court reverse the decision of the Chancery Division, vacating the grant of summary judgment to Respondent. In the alternative, Appellant respectfully requests that this Court remand for discovery on the factual issues raised by the trial court.

Respectfully submitted,

DAY PITNEY LLP
Attorneys for Appellant U.S. Bank Trust National Association, not in its individual capacity but solely as Owner Trustee for RCF 2 Acquisition Trust

By: s/ Christina A. Livorsi
CHRISTINA A. LIVORSI
A Member of the Firm

Date: May 06, 2024

U.S. BANK TRUST NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS OWNER TRUSTEE FOR RCF 2 ACQUISITION TRUST, Plaintiff/Appellant, v. BRONX GIRLS FLIPS LLC; LAYO TOYIN OYAWUSI; VICTORIA O. ODUNOWO; ROUCHELLE GLOVER; MR. GLOVER, HUSBAND OF ROUCHELLE GLOVER; and ALPHA FLOW TRANSITIONAL MORTGAGE TRUST 2021-WL1 (formerly PML FUNDING LLC), Defendants/Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001964-23 Civil Action On Appeal from the Superior Court of New Jersey Chancery Division, Essex County Docket No. F-008670-23 Sat Below: Hon. Lisa M. Adubato, J.S.C.

BRIEF OF RESPONDENT, ALPHA FLOW TRANSITIONAL MORTGAGE TRUST 2021-WL1 (FORMERLY, PML FUNDING, LLC)

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PRELIMINARY STATEMENT

Appellant is a residential mortgage lender that, through its predecessor-in-interest, negligently mismanaged the application of $177,887.35 payment it received. Under contract law, state and federal statutory law, Appellant was *required* to apply the funds it received to the consumer loan at issue. Instead, in an error that the Trial Judge categorized as a "ridiculous" business decision, the predecessor, in possession of the payment, sent $177,887.35 to a third party. The third party then absconded with the funds.

Appellant believes that irrespective of its violation of the law and negligent business practice, it can nonetheless disavow its legal obligations, treat the loan as unpaid and foreclose on the home. In short, Appellant takes no accountability for its conduct and continues to believe that the innocent defendants in this action should be responsible for Appellant's illegal conduct.

The material facts are not in dispute and are irrefutable. Appellant's predecessor in interest, through its mortgage servicer-agent, Rushmore Loan Services Management (hereinafter "Rushmore") received a wire transfer representing a purported payoff of the Mortgage in the amount of $177,887.35 (hereinafter the "First Wire Transfer"). After 436 Frankfurt Street, Orange, New Jersey 07050 (hereinafter the "Mortgaged Premises") was

sold, Respondent[1] recorded its own mortgage to secure its loan to the buyer of the Mortgaged Premises.

Rather than applying the funds to the loan balance, as required by terms of the Mortgage and applicable statutory law, after holding the funds for a period of fourteen (14) calendar days, Rushmore inexplicably initiated a second wire transfer and sent an amount equal to the First Wire Transfer to a non-party Entrust Solutions, LLC (hereinafter "Entrust") which served as the escrow company for the settlement/title agent for the subject transaction, Prominent Title and Settlement Service LLC (hereinafter the "Title Company"). Entrust absconded with the funds and is now a defunct entity.

Refusing to take any responsibility for its own actions, Appellant proceeded with this foreclosure action. Respondent filed a contesting answer and counterclaim seeking discharge of the Mortgage as a result of Appellant receiving the First Wire Transfer. Respondent moved for Summary Judgment and Appellant cross-moved for Summary Judgment. The Trial Judge entered an Order granting Respondent's Motion for Summary Judgment and discharging the Mortgage in Respondent's favor and denied Appellant's cross-motion.

[1] Respondent is the successor to the lender who funded the First Wire Transfer during a closing of the Mortgaged Premises.

Ultimately, the Trial Court found Appellant's predecessor and servicer breached the terms of the Note and Mortgage and violated the Uniform Commercial Code (hereinafter "UCC"), by failing and refusing to apply the funds to the balance due on the loan. The Trial Court reasoned that Appellant failed to establish it had a right to "return" the First Wire Transfer and was required to provide a credit for the sum inarguably received. The court reasoned that Appellant's decision to send the funds to Entrust was not supported by the law and constituted a "ridiculously silly business decision." Furthermore, applying equitable considerations, the Trial Court ruled that the alleged *de minimis* balance due on the loan should be discharged under the Doctrine of Equitable Estoppel.

This Court should swiftly affirm the Trial Court's well-reasoned decision.

CONCISE PROCEDURAL HISTORY

On July 19, 2023, Appellant commenced the subject foreclosure action against the Victoria Odunowo and Layo Toyin Oyawusi (collectively hereinafter the "Borrowers") seeking to foreclose the Mortgage on the Mortgaged Premises (Pa1). Respondent's predecessor, PML Funding LLC ("PML") filed a contesting answer and counterclaim in response to Appellant's foreclosure complaint on September 20, 2023 (the "Answer"). (Pa19-35). Appellant filed an Answer to PML's Counterclaims on November 3, 2023. (Pa38-45).

Respondent, as assignee of PML, filed a motion to intervene and to dismiss the Complaint in this action on October 3, 2023. (Pa47-180), (the "Original Motion"). On November 29, 2023, a Consent Order signed by Appellant, PML, and Respondent (the "Consent Order") was entered by the Trial Court which, among other things, substituted Respondent in the place of PML, permitted Respondent to file supplemental pleadings refashioning the Original Motion as one for summary judgment and established a new return date and briefing schedule for the parties. (Pa236-38).

On November 30, 2023, Respondent filed supplemental pleadings in support of the Original Motion, which contained the requisite pleadings required for converting the motion to a

motion for Summary Judgment and, among other things, sought an order compelling Appellant to accept the sum of $30.53, plus interest, in full and complete satisfaction of the Mortgage. (Pa181-209). (Collectively, the Original motion and supplemental pleadings converting the motion to a Summary Judgment motion shall be referred to as the "Motion")

The Appellant filed opposition to the Motion together with a Cross-Motion for Summary Judgment seeking an order striking Respondent's answer, defenses and counterclaim, entering default and returning this matter to the Office of Foreclosure on January 12, 2024 ("Cross-Motion"). (Pa210-436). On January 29, 2024, Respondent filed its Response to Appellant's Statement of Material Facts and related pleadings filed in connection with the Cross-Motion. (Pa437-41). (Collectively, the Motion and Cross-Motion shall be referred to as the "Motions").

The parties presented oral argument in connection with the Motions before the Honorable Judge Lisa M. Adubato, J.S.C. on March 1, 2024. (1T). At the beginning of oral argument, Judge Adubato inquired of the parties' counsel whether the matter was "ripe for summary judgment". (1T6:8-14). Counsel for the parties both represented to the Court that this matter was ripe for summary judgment:

* * *

THE COURT: Both parties have moved for summary judgment, although I understand procedurally it started out differently. And then there was some conversation. And all the parties at this point, unless someone tells me differently, agree that the matter is ripe for summary judgment. And that's how I looked at it.

MS. LIVORSI: Yes, Your Honor.

THE COURT: Okay.

MR. KIZNER: And that's our position, as well, Your Honor, for the defendant.

During oral argument, Judge Adubato made several important findings of fact and conclusions of law including, among other things, that Appellant's predecessor and servicer:

- Should have accepted the First Wire Transfer (1T45:2-8);
- Should have applied the First Wire Transfer to the balance of the Loan and then withheld a discharge of the mortgage until the de minimis balance was received (1T52:19-25 to 1T54:1-18);
- Did not have the authority to reject and return the First Wire Transfer on the grounds that the payment was short (1T44:12-17 & 1T54:13-18); and
- Appellant was responsible for the loss of the funds due to its "ridiculously silly business decision" to send the funds to Entrust. (1T56:9-12 & 1T61:12-15).

Based on the foregoing, Judge Adubato granted Respondent's Motion (1T57:2-6) and denied Appellant's Cross-Motion (1T63:16-18). On March 4, 2024, the Trial Court entered the Order granting Respondent's Motion and denying Appellant's Cross-Motion which is the subject of this appeal filed on March 5, 2024. (Pa442).

STATEMENT OF FACTS

A. The Original Loan and Ownership of The Mortgaged Premises

Borrowers originally became the title owners of the residential Mortgaged Premises by way of a deed recorded with the Register of Essex County on June 6, 2008, in Book 12139, Page 7655. (Pa49-50 ¶3 & Pa53-58). The Borrowers financed the original purchase of the Mortgaged Premises with a $201,832.00 loan evidenced by the Note dated April 30, 2008 (Pa260, ¶8 & Pa270-72) and secured by the residential Mortgage encumbering the Mortgaged Premises which was recorded with the Register of Essex County on June 6, 2008 in Book 12139, Page 7663 (Pa260, ¶9 & Pa273-80).

Paragraph one (1) of the Mortgage states "*Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment and late charges due under the Note*." (Pa274). Additionally, under paragraph two (2) of the Note the Borrowers promised to repay the lender the principal sum of $201,832.00, plus interest at the annual rate of 6.5% per annum. Furthermore, Borrowers were permitted to make early pre-payments on the Loan, without penalty or cost. (Pa270, ¶5).

Noticeably absent from the Note and Mortgage is *any* language authorizing Appellant's predecessor in interest and Rushmore to reject and return funds that are tendered by or on

behalf of the Borrowers in connection with the Loan, particularly those tendered with the intention of satisfying the Mortgage. Instead, the Mortgage is quite clear as to Appellant (and its agents) obligations with respect to payments received. Paragraph three (3) of the Mortgage makes very clear that "*[a]ll payments*" received by the lender "*shall be applied"* as follows:

> First, to the mortgage insurance premium to be paid by Lender to the Secretary or to the monthly charge by the Secretary instead of the monthly mortgage insurance premium;
> Second, to any taxes, special assessments, leasehold payments or ground rents, and fire, flood and other hazard insurance premiums, as required;
> Third, to interest due under the Note;
> Fourth, to amortization of the principal of the Note; and
> Fifth, to late charges due under the Note.

(Pa275, ¶3). Thus, regardless of whether the First Wire Transfer was deemed a pre-payment under the Note or a payment made under Sections 1 or 9(a) of the Mortgage, the Mortgage is unmistakably clear that all payments were to be accepted and applied, not just those that were deemed full or complete from the Appellant's viewpoint.

B. The Borrowers' Sale of the Mortgaged Premises and Rushmore's Receipt and Acceptance of the First Wire Transfer

The Borrowers transferred title to the Mortgaged Premises to Bronx Girls Flip, LLC ("Bronx Girls LLC") by Deed dated April 30, 2021, in connection with Bronx Girls LLC's purchase of the

Mortgaged Premises from Borrowers (Pa51 at ¶9 & Pa69-74) which purchase was financed by PML.[2] In connection with the closing of this transaction, the escrow agent for the settlement agent, Entrust, wired the payoff funds to Rushmore.

A HUD-1 Settlement Statement (the "HUD-1") executed in connection with Bronx Girls LLC's purchase includes a line item for "*Payoff of Mortgage to Rushmore Loan Management*" (Line 504) in the amount of $177,276.75. (Pa185 at ¶5 & Pa198). The HUD-1 also includes a line item for "*Per Diem Interest for Mortgage Loan Payoff (18 days)*" (Line 505) in the amount of $549.54, as well as an "Escrow hold – payoff" (Line 506) in the amount of $500.00. (Id.)

Notably, the payoff amount listed on the HUD-1 (Line 504) matched the payoff amount listed on the Rushmore Loan Payoff Statement dated April 9, 2021, exclusive of the per diem interest (the "Payoff Statement"). (Pa198 & Pa201). Rushmore's

[2] On April 30, 2021, Bronx Girls executed a certain loan agreement in favor of PML evidencing a loan in the face amount of $260,140.00, payable with interest, which was secured by a first purchase money mortgage of even date and amount secured on the Mortgaged Premises (the "Bronx Girls Mortgage"), which was recorded with the Register of Essex County on July 6, 2021, as Instrument No. 2021081401. (Pa134 at ¶8 & Pa143-170). The Bronx Girls Mortgage was subsequently assigned by PML to Respondent, Alpha Flow Transitional Mortgage Trust 2021-WL1, by way of assignment of mortgage dated April 30, 2021, which was recorded with the Essex County Register's Office on October 22, 2022. (Pa134 at ¶9 and Pa171-176).

Payoff Statement sent to the Borrowers included the total amount to pay off the Loan in full through April 16, 2021 (Pa201). Notably, nowhere on the Payoff Statement does it state that any funds received after April 16, 2021, would be rejected and returned. In fact, the Payoff Statement states the opposite. The second page of the Payoff Statement states that any "*[f]unds received on or after April 16, 2021, will require an additional $30.53 interest per day*". Clearly, a reasonable person reading the Payoff Statement would have interpreted it to mean that any payments received after April 16, 2021 would be accepted by Rushmore.

The material facts regarding Rushmore's receipt and acceptance of the First Wire Transfer are also undisputed. The parties agree, and the voluminous record produced by Appellant and reviewed by Judge Adubato establish, that on May 7, 2021, Rushmore, which was Appellant's predecessor's servicer, received the First Wire Transfer from Entrust in the amount of $177,887.35 in the account maintained by Rushmore at Wells Fargo Bank. (Pa185 at ¶7 & Pa205). The First Wire Transfer identified the names of the borrowers, the loan identification number, and even the property address. (Id.)

There is also no dispute that although the First Wire Transfer was received by Rushmore and Rushmore maintained

possession of the funds in its account for a period of fourteen (14) calendar days, the funds were never applied to the Loan as Appellant's predecessor in interest and/or Rushmore claimed the payment was short by $3,312.88. Appellant claims the total amount then due was $181,200.33 as of May 7, 2021. (Id.)

C. The Second Wire Transfer and The Events That Followed

The robust documents produced by Appellant in connection with the Motions establishes that the decision to reject and return the First Wire Transfer was made by Appellant's predecessor and/or Rushmore twelve (12) calendar days after the wire transfer was received on May 19, 2021. (Pa421). Thereafter, on May 21, 2021, fourteen (14) days or two (2) full weeks after it first received the First Wire Transfer, Rushmore sent an amount of funds equal to the First Wire Transfer to Entrust, via an outgoing wire transfer (the "Second Wire Transfer"). (Pa417 at ¶12 & Pa427).

On July 16, 2021, servicing of the Loan changed from Rushmore to Selene Finance LP ("Selene"). (Pa260 at ¶10). Following several assignments of the Mortgage, the Appellant was assigned the Mortgage by J.P. Morgan Acquisitions Corp. on October 4, 2021. (Pa433-34 at ¶10-23). Almost one (1) year after Appellant became the assignee of the Loan, Selene forwarded the Borrowers the pre-foreclosure action notices required under the

Fair Foreclosure Act on September 17, 2022. (Pa262 at ¶24). Thereafter, approximately nine (9) months later, Appellant commenced this action on July 29, 2023, taking the position that the $177,887.35, inarguably received, was not paid (Pa1).

LEGAL ARGUMENT

A. The Standard of Review

This appeal arises from the Order dated March 4, 2024, granting summary judgment in favor of Respondent as to the Motion and denying summary judgment in favor of Appellant as to the Cross-Motion. The Appellate Division reviews a grant of summary judgment *de novo*. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021); *see also* Heyert v. Taddese, 431 N.J. Super. 388, 411 (App. Div. 2013) (explaining this Court applies the "same legal standard as the trial court in determining whether the grant or denial of summary judgment was correct" on appeal). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Friedman v. Martinez, 242 N.J. 449, 471-72 (2020) (*quoting* R. 4:46-2(c) and *citing* Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29(1995)). "To decide whether a genuine issue of material fact exists, the trial court must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" Id. 242 N.J. at 472(*quoting* Globe Motor Co. v. Igdalev, 225 N.J. 469, 480(2016)).

Generally, summary judgment is inappropriate prior to the completion of discovery. *See* Velantzas v. Colgate-Palmolive Co., Inc., 109 N.J. 189, 193(1988); *compare* Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 451 (2007)(holding that summary judgment is appropriate when the party opposing the motion for summary judgment is already in control of all the information sought). However, "'summary judgment is not premature merely because discovery has not been completed, unless' the non-moving party can show 'with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action.'" Badiali v. New Jersey Mfrs. Ins. Grp., 220 N.J. 544, 555 (2015)(*quoting* Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003)). "A party opposing summary judgment on the ground that more discovery is needed must specify what further discovery is required, rather than simply asserting a generic contention that discovery is incomplete." Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007).

Moreover, the fact that discovery is incomplete will not defeat a summary judgment motion or require discovery to be undertaken and completed by the parties where the additional discovery will "patently not change the outcome." Minoia v.

Kushner, 365 N.J. Super. 304, 307-08 (2004)(*quoting* Wellington, 359 N.J. Super. at 496 (App. Div. 2003).

POINT I : THE TRIAL COURT CORRECTLY CONCLUDED THE LOAN DOCMENTS AND APPLICABLE NEW JERSEY LAW REQUIRED THE APPELLANT'S PREDECESSOR AND/OR RUSHMORE ACCEPT AND APPLY THE FIRST WIRE TRANSFER TO THE BALANCE DUE ON THE LOAN

Appellant's predecessor was contractually obligated under the terms of the Note and Mortgage to accept and apply the First Wire Transfer to the balance due on the Loan. Moreover, statutes and case law governing wire transfers and acceptance of funds requires a lender to accept and apply payments to the loan balance as opposed to taking the position that it can "reject" funds and then claim that those funds were not paid.

A. The Appellant's Predecessor Had a Contractual Obligation to Accept and Apply the First Wire Transfer Under the Loan Documents

As part of this appeal, Appellant argues the Trial Court erred in concluding that Appellant's predecessor and servicer was required to accept and apply the First Wire Transfer in accordance with the terms of the Note and Mortgage. (*See* Appellant's Brief, pp. 14-17). However, this argument is at odds with the plain language of the Note and Mortgage and underscores Appellant's predecessor, and its servicer, breached the terms of the Note and Mortgage by refusing to accept and credit the First Wire Transfer to the balance of the Loan.

The terms of the Note and Mortgage are governed by general contract law principles. "[T]he terms of an agreement are to be given their plain and ordinary meaning." M.J. Paquet v. N.J. DOT, 171 N.J. 378, 396(2002) (*citing* Nester v. O'Donnell, 301 N.J. Super. 198 (App. Div. 1997)). "[W]here the terms of a contract are clear, . . . the court must enforce it as written." Cnty. of Morris v. Fauver, 153 N.J. 80, 103 (1998). It is not the function of the courts to rewrite a contract or add terms which the parties did not agree upon. *See* Schenck v. HJI Assocs., 295 N.J. Super. 445, 450 (App. Div. 1996). In other words, it is well-established a court cannot "make a different or a better contract than the parties" entered into. *See* Wash. Const. Co. v. Spinella, 8 N.J. 212, 217 (1951).

Here, the relevant terms of the parties' contract are patently clear, not in dispute, and additional discovery will not change what is written in the Note and Mortgage. In its simplest form, the note is evidence of a debt and of Borrowers' promise to repay the debt. The Note required the Borrowers to make monthly payments of principal and interest and to make pre-payments, without penalty or charge. (Pa270, ¶¶4-5). The Mortgage simply provides the Borrowers shall make payments in accordance with the Note. (Pa274, ¶1).

The Mortgage creates an affirmative obligation on the part of its holder to both accept and apply all payments received on account of the Loan in the manner designated therein. (Pa274, ¶5). Paragraph one (1) of the Mortgage states that the Borrowers shall make all payments "when due." (Pa274, ¶1). Appellant has consistently maintained that it was entitled to accelerate the sums due and owing under the Loan pursuant to paragraph nine (9) of the Mortgage. (Pa276, ¶6). Respondent has not disputed that Appellant was entitled to accelerate. Accordingly, all sums were due pursuant to paragraph one (1) of the mortgage once Appellant decided to accelerate. Reading paragraph one (1) and three (3) together, the Mortgage specifically provides that "*[a]ll payments*" "when due," received by Appellant, which clearly includes the First Wire Transfer, must be applied to the balance due on the Loan. (Pa260 at ¶9 & Pa275, ¶ 3). Likewise, the use of the phrase "*shall be applied*" in paragraph three (3) eliminates any uncertainty over whether Appellant's servicer was obligated to apply the First Wire Transfer to the Loan. The Mortgage specifically sets forth how payments are to be applied and lists the order in which payments received are to be allocated amongst the five (5) categories listed in paragraph three (3) of the Mortgage. Accordingly, once Appellant's servicer received the First Wire Transfer, it was contractually

required to accept and apply the payment, per the plain language of the Mortgage.

Significantly, nowhere in the Note or Mortgage does it authorize Appellant's predecessor in interest or Rushmore to reject and return payments it received on account of the Loan. Because the parties' contract did not authorize the return of payments for any reason, including a payment being short by a *de minimis* amount, Appellant is liable for its predecessor's and its servicer's breach of contract and the loss that resulted after the funds were returned to Entrust via the Second Wire Transfer. In the end, because the Note and Mortgage are clear as to the lender's duty to accept and apply all payments, summary judgment was and is appropriate as a matter of law.

Appellant erroneously argues that the Borrowers' sale of the Mortgaged Premises to Bronx Girls LLC required its predecessor to accelerate the Loan and to reject partial payment, notwithstanding the requirement under paragraphs one (1) and three (3) of the Mortgage. This argument is entirely without merit since Appellant's predecessor's duties and obligations remained the same. Appellant's obligation to accept and credit all payments received was not conditioned on the status of the Loan, the ownership of the Mortgaged Premises, and/or whether the payment was deemed a prepayment or otherwise.

In the case at bar, the Trial Court correctly concluded that Appellant's predecessor and Rushmore were (a) required to accept and credit the First Wire Transfer to the balance of the Loan; and (b) breached the terms of the Note and Mortgage when it failed to do so and decided, instead, to wire an amount equal to the sum of the First Wire Transfer to Entrust[3] via the Second Wire Transfer.

[3] Appellant takes the position that Entrust was seller's agent and, therefore, Entrust's conduct should be imputed to Borrower or Respondent, the lender for the buyer of the property. It is clear based on available authority that an escrow agent is not the agent of any party. *See* Wagman v. Lee, 457 A.2d 401 (D.C. 1983). In that case, the court discussed the unique position an escrow agent holds in a transaction. The court stated an escrow holder "is the dual agent of both parties." Id. at 404 (*citing* Ferguson v. Caspar, 359 A.2d 17, 20, 22 (D.C. 1976)). If the escrow agent is entrusted with funds, it is acting in a fiduciary capacity with both parties in a transaction. Id. at 405.

The Wagman view has been echoed by our Supreme Court in Innes v. Marzano-Lesnevich, 224 N.J. 584 (2016), a case where the defendants' attorneys were entrusted with holding a child's passport in escrow during a divorce and custody matter. There, the defendants' attorneys impermissibly turned over the child's passport to defendant, who subsequently fled the country. Id. at 586. In discussing the unique role of an escrow agent, the court stated the attorneys acting as escrow agents "were fiduciaries for the benefit of both [the defendant] and [the plaintiff]." Id. at 598. As a result of the attorneys' actions in breaching their fiduciary duties, the plaintiff, who was not the attorneys' principal, could be entitled to relief in the form of counsel fees. Id. Although not factually on point, the case illustrates that an escrow agent is not simply an agent of one individual to a transaction, but acts as a fiduciary for all parties taking part in a closing, which includes both the Appellant and Respondent in this case.

Appellant's reliance on Clinton Capital Corp. v. Straeb, 248 N.J. Super. 19 (Super. Ct. 1990) in support of the proposition that it was entitled to reject and return the payment is wholly misplaced. The Straeb matter dealt with the limited issue of whether a borrower seeking a payoff under a defaulted mortgage could be required to pay a ten percent (10%) pre-payment fee, when the lender elected to accelerate the debt. Ultimately, the court sided with the borrower and agreed that lender could not both elect to accelerate the debt and seek a pre-payment fee on the accelerated debt. Id. at 32-33. The Straeb case does not provide any support for Appellant's argument that it was entitled to reject and return the payment in question.

In the final analysis, there are no genuine issues of fact in dispute concerning the payment and acceptance terms contained in the Note and Mortgage. Instead, there are only disputes between the parties over the legal interpretations of what is written in those documents. Contrary to Appellant's claims, the real issue presented on this appeal is not whether the Borrowers had the right to pay off the Loan but rather what were Appellant's predecessor's duties and obligations under the loan documents with respect to the funds that came into its possession. While Appellant seeks discovery concerning the facts

and circumstances related to Rushmore's receipt and return of the First Wire Transfer, no amount of discovery will change the outcome here. No amount of discovery will change what the loan documents required the Appellant's predecessor and its servicer to do when the First Wire Transfer was received. In the end, because the relevant provisions of the Note and Mortgage are clear and unambiguous and *required* application of *all* payments to the balance of the Loan, summary judgment was appropriate and should not be disturbed.

B. Appellant Is Responsible Under Applicable Law for The Consequences That Flowed from Its Predecessor's Imprudent Business Decision to Reject and Return the First Wire Transfer

As detailed above, *supra,* Appellant's predecessor was contractually obligated under the terms of the Note and Mortgage to accept and apply the First Wire Transfer to the balance due on the Loan. Further, state and federal statues, along with equitable principles also support that Appellant cannot "reject" payment, then claim that payment was not made.

I. *Appellant's Servicer Failed to Both Credit the First Wire Transfer Within Five Days Receipt and Thereafter Hold the Funds in A Suspense Count in Violation of the Truth in Lending Act*

The regulations governing the Truth in Lending Act ("TILA") that apply to residential loan mortgage administration, required Appellant's predecessor to apply the payment as "non-conforming

payments," to the total amount due. *See* 12 C.F.R. § 1026.36(c)(1)(iii). "If a servicer specifies in writing requirements for the consumer to follow in making payments but accepts a payment that does not conform to the requirements, the servicer shall credit the payments as of five days receipt." Likewise, under 12 C.F.R. § 1026.36(c)(ii), if partial funds are retained, they should be held in suspense or an unapplied funds account which did not happen here.

Here, Appellant violated TILA when it failed to credit what it claims in this litigation was a non-conforming payment to the Loan within the first five (5) days after it was received or deposited the funds into a suspense account, while any dispute was sorted out. Had Rushmore not disregarded its obligations under TILA, the loss of the funds and this lawsuit could have been avoided. Instead, Rushmore did neither and elected to return the funds which was neither sanctioned by the loan documents or under TILA.

II. *Acceptance of Completed Funds Transfers Under Article 4A of the Uniform Commercial Code and this Court's Unpublished Decision in Deustsche Bank Nat'l Tr. Co. v. Vezeriannis*

Article 4A of New Jersey's UCC governs "funds transfers" more commonly known as wire transfers. The term "'funds transfers" is defined as "…the series of transactions, beginning with the originator's payment order, made for the purpose of

making payment to the beneficiary of the order.'" N.J.S.A. 12A:4A-104(1). A funds transfer is deemed completed once funds are wired, received, and accepted by the beneficiary bank. Id. The "originator" is "the sender of the first payment order in a funds transfer." N.J.S.A. 12A:4A-104(3). A "'sender' is the person giving the instruction to the receiving bank," N.J.S.A. 12A:4A-103(1)(e), and a "payment order" is "an instruction of a sender to a receiving bank . . . to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary . . . ." N.J.S.A. 12A:4A-103(1)(a).

In Deutsche Bank Nat'l Tr. Co. v. Vezeriannis, No. A-1376-11T1, 2013 N.J. Super. Unpub. LEXIS 1588 (Super. Ct. App. Div. June 27, 2013), this Court affirmed a trial court's ruling that the aforementioned provisions of the UCC apply when a mortgage lender received a funds transfer from a refinancing lender.[4] Id. at 10-11. The facts of Vezeriannis are similar to the case at bar and highly persuasive. There, the borrower had a loan with Lender A secured by a mortgage. The borrower refinanced the original loan from Lender B. At the closing, the borrower directed the proceeds of the new loan be used to pay off the

[4] A copy of the Vezeriannis decision was attached as Exhibit "A" to Respondent's "Memorandum of Law" which was submitted in opposition to Appellant's Cross-Motion and in further support of the Motion. Respondent is producing same as part of Respondent's Appendix, Da1.

original mortgage loan from Lender A. The evidence revealed that although Lender A received the payoff funds, Lender A inexplicably returned the funds to Lender B because Lender A's mortgage servicer could not locate the borrower's account number. Id. at 12. This error by the servicer, agent of Lender A, resulted in the payoff funds disappearing and the mortgage not being discharged. Lender A subsequently filing a foreclosure action. Id. at 1-2.

Although Lender A argued the UCC did not apply, the trial court disagreed. In granting summary judgment in favor of the borrower, the trial court held that the borrower complied with the UCC when the funds were received by Lender A's servicer. Id. at 6. At that point, once the funds were received, the transaction was concluded, and Lender A was required to accept the funds.

In terms of placing blame and accountability, the judge found that plaintiff's predecessor's "imprudent business judgment . . . result[ed] in the loss of the returned funds." Consequently, given the court's findings of fact and after balancing all of equitable considerations, the trial judge concluded that "[e]quity demands discharge of the original mortgage." Id. at 6-7.

The Appellate Division affirmed the trial court's ruling in Vezeriannis that the funds transfer was completed once the funds were received by the Lender A's servicer, that Lender A's servicer made the imprudent business decision to return the funds, and that the servicer was responsible for the resulting loss of the funds. Id. at 6, 15. This Court observed that the borrower was innocent and nothing the borrower did or failed to do contributed to the loss of the payoff funds. Id. at ¶ 14. In addition, the Court noted there was no evidence suggesting the borrower had actual notice that Lender A's acceptance of the payoff funds was conditioned on the wire transfer referencing a certain account number. Id. at ¶ 14. Ultimately, this Court agreed with the trial court's decision that equity required the discharge of Lender A's mortgage. Id.

III. *Appellant's Receipt of First Wire Transfer Constituted Acceptance of the Funds Requiring Discharge of the Mortgage Under the UCC and this Court's Unpublished Decision in Mortg. Elec. Registration Sys. v. Omar*

Another case that is also directly on point, highly persuasive and fully supports Respondent's position that Appellant's servicer breached the terms of the Note and Mortgage by refusing and failing to provide a credit for the First Wire Transfer, is this Court's unpublished decision in Mortg. Elec. Registration Sys. v. Omar, No. A-5187-06, 2008 N.J. Super.

Unpub. LEXIS 1058 (App. Div. May 15, 2008).[5] The Trial Court below was heavily persuaded by and relied upon this Court's analysis in the Omar decision in making her ruling.

In Omar, the borrower originally took out a mortgage loan with Lender A[6] in 2003 and then refinanced the original loan with Lender B in 2004. In connection with the refinance, Homecomings Financial, LLC, the servicer for Lender A ("Homecomings") received a $298,219.57 check from the title agent at closing, Yorktown Title ("Yorktown"). Homecomings internal records confirmed its receipt of the check but noted the check was short by $559.65 representing additional per diem interest. Instead of depositing the check, applying the $298,219.57 to the outstanding loan balance and then contacting Yorktown to arrange for receipt of the additional sums, Homecomings apparently returned the check to Yorktown one (1) day later claiming it was short. Additionally, the record also reflected that Yorktown returned the check to Homecomings a second time, and Homecoming

[5] A copy of the Omar decision was attached as Exhibit "B" to Respondent's "Memorandum of Law" which was submitted in opposition to Appellant's Cross-Motion and in further support of the Motion. The Respondent is producing the same as part of its Appendix, Da6.

[6] Lender A's mortgage authorized pre-payments without penalty and included the following provision regarding payment: "Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15".

rejected it a second time. Instead of returning the check to Yorktown, Homecomings returned the check directly to Omar who endorsed the check, deposited it into a fraudulent account, and then absconded with the funds. Thereafter, Lender A asserted the position that the loan was in default for non-payment and commenced a foreclosure action.

The trial court in Omar concluded that: (i) Homecomings should have accepted and applied the check to the balance of the loan the first time it was received from Yorktown; (ii) Homecomings' decision to reject and return the payoff check constituted a "discharge" of Lender A's mortgage because the mortgage was effectively paid when the first payoff check was delivered to and received by Homecomings from Yorktown. Id. at 8-10.

In rendering its decision, the trial judge in Omar reasoned that Homecomings decision to return the check set in motion the events that *caused* the loss and disappearance of the funds. Id. at 9. Had Homecomings accepted, deposited and credited the funds to the loan, i.e., had it followed the law, the mortgage would have been satisfied and Omar would not have had the access and opportunity to convert the funds for his own personal use. Id. The trial court found that Homecomings' error in rejecting and returning the check, not once but twice, including returning the

check directly to the borrower, was a critical error and mistake that afforded Omar the access and opportunity to carry out the theft. Based on all the equities involved, the trial judge ordered that Lender A's mortgage be discharged of record. Id. This elevated Lender B's mortgage from second to first position. Id at 10-11.

On appeal, the Appellate Division in Omar affirmed the trial court's ruling that Lender A's mortgage was effectively paid off as of the date Homecomings received the *first check* from Yorktown. This Court recognized that "[a]'duly honored' check constitutes payment 'upon its delivery to and acceptance by the payee," (*citing* Hayes v. Fed. Shipbuilding & Dry Dock Co., 5 N.J. Super 212, 214 (App. Div. 1949) and that "[w]hen a check is delivered, if the drawer has funds in the drawee bank to meet it, and if the check is, upon presentment, honored and paid, . . . payment will be deemed to have been made as of the time of the delivery of the check." Id.; *see also* Bey v. Truss Sys., Inc., 360 N.J. Super. 324, 328-29(App. Div. 2003) (date of receipt of payment by check occurred on the "date [the check] was posted and delivered to [the petitioner's] residence"). Because the Appellate Division found there was no dispute of fact that the mortgagee's servicer received the check, that had the servicer deposited the check it would have been honored and

paid, and/or that the loan documents permitted prepayments without penalty, the Court agreed with the trial judge that the check should have been deposited and applied to the loan. Id. at * 12-13.

Additionally, the Appellate Division in Omar affirmed the trial court's ruling that Lender A was equitably estopped from enforcing its mortgage lien because it was the "party who 'made the injury possible or could have prevented it." Id. at 14-15 (*quoting* First Union Nat'l Bank v. Nelkin, 354 N.J. Super. 557, 568(App. Div. 2002). This Court further observed that "[e]quitable estoppel does not require evidence of fraudulent intent; the doctrine applies if the conduct "works an unjust or inequitable result to the person it was designed to influence" (*quoting* Hendry v. Hendry, 339 N.J. Super. 326, 336 (App. Div. 2001), and that "[A]s between two innocent parties[,] equity will visit the loss upon the one whose acts the injury first could have been avoided." Global Am. Ins. Managers v. Perera Co., 137 N.J. Super. 377, 388 (Ch. Div. 1975), *aff'd o.b.* 144 N.J. Super. 24 (App. Div. 1976); *see also* Sears Mortgage Co. v. Rose, 134 N.J. 326, 346 (1993)(where two parties were innocent, loss was imposed on party in best position to prevent the loss created by a third party's theft); Zucker v. Silverstein, 134

N.J. Super. 39, 52(App. Div. 1975) (same).[7] In the end, the Appellate Division in Omar agreed that Lender B had demonstrated by a preponderance of the evidence that Homecomings was in the best position to have avoided the loss when it initially received the check but failed to do so. Id. at 16.

1. Once Appellant Received the First Wire Transfer, Those Funds Must Have Been Credited to The Loan, As A Matter of Law

The express terms of the loan documents, the UCC, TILA, and basic principles of contract law and interpretation, and this Court's analysis and decisions in Omar and Vezeriannis establish a clear rule: once a wire transfer is received by a lender or its servicer, the transaction is deemed completed upon the payee's receipt of the funds and the funds **must** be credited towards the balance due on the note and mortgage. Where, as here, a lender fails to follow the express terms of the parties' contract and the lender rejects and returns the funds resulting in a subsequent loss of the funds, equitable considerations will demand a discharge of the mortgage due to the lender's imprudent decision.

The facts and circumstances in Omar and Vezeriannis are analogous to this case. Similar to the note in Omar, the terms

[7] To prevail on an equitable estoppel claim, the party seeking the relief must meet its burden by a preponderance of the evidence. *See* Harr v. Allstate Ins. Co., 54 N.J. 287, 307 (1969).

of the Note here permitted the Borrowers to make partial payments and prepayments without cost or penalty. In all three (3) cases the borrowers refinanced the original mortgage loan, payoff funds were received by the original lenders, the original lenders inexplicably returned the payoff funds for one reason or another, which resulted in a loss of the funds. In Vezeriannis, the funds were allegedly returned because the wire transfer did not designate an account number while in this case and in Omar, the funds were allegedly returned by the lender because, like here, the lender claimed the payoff was short. In all three (3) cases, the facts and circumstances also demonstrate that the lender/servicer that had possession and control of the funds was in the best position to have avoided the loss.

While the payment in Omar involved a physical check that was received and returned multiple times, the manner of payment in this case, as in the Vezeriannis case, was a wire transfer. Unlike a funds transfer where the funds are received instantly, the receipt of funds from a check is delayed for several days. A check must be delivered, then endorsed by the payee, then deposited into payee's clearing account and then the funds proceed through a clearing process between banks.

Here, when Appellant's servicer Rushmore received the First Wire Transfer on May 7, 2021, the funds transfer was deemed

completed. *See* N.J.S.A. 12A:4A-104(1). N.J.S.A. 12A:4A-104(1). As of May 7, 2021, the funds were in the possession and control of Appellant's predecessor's servicer. Appellant's servicer's conduct in this case is arguably much worse than in Vezeriannis since Rushmore not only failed to credit the payment to the Loan but also held onto the funds for fourteen (14) calendar days before returning initiating the Second Wire Transfer and returning a sum equal to the First Wire Transfer to Entrust. Additionally, as detailed in the voluminous record supplied by Appellant, neither Appellant's predecessor in interest nor Rushmore ever bothered to follow up with Entrust to demand return of the Second Wire Transfer in order to try to mitigate the ridiculous business decision it made.

Accordingly, based on this Court's decisions in Omar and Vezeriannis, the UCC, and TILA, it is clear that the First Wire Transfer was deemed completed when the funds were received by Rushmore and that the proceeds of the First Wire Transfer must have been applied to the balance of the Loan.

2. Appellant Should Be Equitably Estopped and its Mortgage Lien Was Properly Discharged

This Court should also affirm the Trial Court's conclusion that Appellant should be equitably estopped from enforcing the Mortgage and the Trial Court properly discharged the *de minimis*

balance due on the Mortgage, because its predecessor in interest and servicer made an imprudent business decision send an amount equal to the First Wire Transfer to Entrust, which ultimately caused the loss and the ensuing litigation.

Clearly, Appellant's predecessor in interest and Rushmore were in the best position to have avoided the loss that occurred here. Had they accepted and credited the funds—as they were contractually and statutorily required to do—the Loan would have been substantially paid off leaving a *de minimis* amount owed. They could have then communicated with the title agent or Entrust regarding the problem and arrangements could have been made for the balance to be paid in exchange for discharge of the Mortgage. Alternatively, if Appellant's predecessor in interest and Rushmore genuinely believed they could not apply the proceeds of the First Wire Transfer to the loan balance, they could have and were legally required to hold the funds in a suspense account and then petitioned the courts for declaratory relief as to their respective rights and obligations. The point is that Appellant's predecessor in interest and Rushmore chose none of these options and the option they selected inexplicably led to the loss of the funds.

It is also clear that Respondent and Borrowers were innocent parties and did not contribute to Appellant's

predecessor's and servicer's error and mistake in sending an amount equal to the First Wire Transfer to Entrust. Just like the borrower in Vezeriannis didn't know that the wire would be rejected because it did not reference the loan number. There is nothing to suggest the Borrowers or Respondent had actual notice the loan payoff would be returned if it was short. In fact, a plain reading of Rushmore's Payoff Statement is that the loan payoff would be accepted after April 16, 2021, provided the additional *per diem* interest was added to the payoff. Likewise, all Respondent did was make a new loan to the purchasers of the Mortgaged Premises and forward the payoff funds to the original lender in order to obtain a discharge of the Mortgage.

In the final analysis, it cannot be denied that Appellant's predecessor's and its servicer's critical error and mistake in sending an amount equal to the First Wire Transfer to Entrust triggered the chain of events that led to the loss of the funds and ultimately this litigation. *Had Appellant's servicer followed the law and exercised common sense and reasonable business judgment, the loss could have been avoided*. In light of the same, the Trial Court's discharge of the Mortgage based on equitable considerations was appropriate as a matter of law.

POINT II : APPELLANT SHOULD BE BARRED FROM ARGUING THAT FURTHER DISCOVERY IS WARRANTED AND THIS MATTER IS NOT RIPE FOR SUMMARY JUDGMENT SINCE APPELLANT DID NOT PRESERVE THIS ISSUE FOR APPEAL AND THE ARGUMENT IS INOPPOSITE TO THE POSITION ARGUED DURING THE TRIAL COURT PROCEEDINGS

Appellant chose to forgo engaging in discovery, never asserted that summary judgment was premature on discovery grounds, filed its own cross-motion for summary judgment, and although Appellant's counsel's *represented to Judge Adubato during oral argument that this matter was ripe for summary judgment*, Appellant now argues the complete opposite. Amazingly, Appellant claims this matter was not ripe for summary judgment and that the Trial Court erred by refusing to allow Appellant the opportunity to develop its case through discovery even though Appellant never requested, and the Trial Court never denied Appellant the opportunity to conduct discovery.[8]

A. Appellant Failed to Preserve "Discovery" Argument Before the Trial Court and is Therefore Barred from Advancing Argument

Appellant failed to argue that the Motions were premature because discovery was needed and therefore did not preserve the argument for appeal pursuant to R. 2:10-2. "The lack of any record is a fatal flaw" in preserving an argument for appeal.

[8] Appellant also continues to speak out of both sides of its mouth by taking inapposite positions both before the Trial Judge and in its appellate brief. Even though Appellant now claims, for the first time, it needs discovery and Summary Judgment was not ripe, it also insists that the Court should have granted its Cross-Motion. (*See* Appellant's Brief, pp. 25-36).

See State v. Jones, 232 N.J. 308, 321 (2018); and State v. Robinson, 200 N.J. 1, 3 (2009) (ruling that defendant never raised an issue argued before the appellate court before the trial court and "because its legal propriety never was ruled on by the trial court, the issue was not properly preserved for appellate review."); Big Smoke LLC v. Township of W. Milford, 478 N.J. Super. 203 (App. Div. 2024) (rejecting appellant's argument made for the first time on appeal that the trial court erred in considering dismissal of the claims against defendant, with prejudice, because the cross-motion was never amended or supplemented to include this relief and the court *only* considers arguments not raised to the trial court or otherwise preserved for appeal under the plain error standard).

Appellant never argued before the Trial Court that the Motions were not ripe due to the need to conduct discovery. In fact, Appellant represented to the Court that this matter was ripe for summary judgment:

> THE COURT: Both parties have moved for summary judgment, although I understand procedurally it started out differently. And then there was some conversation. And all the parties at this point, unless someone tells me differently, agree that the matter is ripe for summary judgment. And that's how I looked at it.
>
> MS. LIVORSI: Yes, Your Honor.
>
> THE COURT: Okay.

> MR. KIZNER: And that's our position, as well, Your Honor, for the defendant.
>
> (1T6:8-14).

As a result, the "discovery" argument is being raised for the first time on appeal, which is plainly impermissible and should not be considered by the Court.

B. Appellant Should Be Barred from Arguing This Matter Was Not Ripe for Summary Judgment Under the Doctrine of Judicial Estoppel

"The filing of a cross-motion for summary judgment generally limits the ability of the losing party to argue that an issue raises questions of fact, because the act of filing the cross-motion represents to the court the ripeness of the party's right to prevail as a matter of law." *See* Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 177 (App. Div. 2008) (*citing* Petrocco v. Dover Gen. Hosp. & Med. Ctr., 273 N.J. Super. 501, 525, (App. Div. 1994); Muto v. Kemper Reins. Co., 189 N.J. Super. 417, 421 (App. Div. 1983)).

Moreover, Appellant should be barred from arguing discovery is needed under the Doctrine of Judicial Estoppel. While Appellant could have elected to serve discovery in this matter in the ordinary course like any other litigant, Appellant made a calculated business decision to not engage in any discovery below. Appellant made this decision because, like the

Respondent, Appellant agreed that further discovery was unnecessary as the material facts are not in dispute. This was Appellant's choice and its right. While Appellant could have opposed the Motion on the grounds that summary judgment was premature, the Appellant never argued a lack of ripeness below and instead chose to file the Cross-Motion. Again, this was Appellant's choice and its right. Appellant's litigation strategy below was to skip discovery, oppose the Respondent's Motion, and file its own Cross Motion which included an extensive record of over two hundred (200) pages of supporting certifications, exhibits and other pleadings (Pa 210 to Pa431).

Appellant correctly recites in its Brief that Judge Adubato inquired of counsel at the beginning of oral argument whether the case was "ripe for summary judgment" (1T6:8-14). Appellant's counsel's response to the Judge was a clear and unwavering "Yes, Your Honor". (1T6:11). Respondent's counsel agreed. (1T6:13-14). While Appellant's counsel could have advised the Judge that summary judgment was premature and/or that Appellant wanted to conduct discovery on one or more issues, she elected not to do so. In light of the above, Appellant should be judicially estopped from arguing on this appeal that this matter is not ripe for summary judgment.

Because the Appellant is now asserting a position on appeal that contradicts and is inconsistent with the position asserted by Appellant before the Trial Court below, this argument should be precluded under the equitable doctrine of judicial estoppel. "The doctrine of judicial estoppel is well entrenched in New Jersey's jurisprudence." Newell v. Hudson, 376 N.J. Super. 29, 38 (App. Div. 2005). "It is 'an equitable doctrine precluding a party from asserting a position in a case that contradicts or is inconsistent with a position previously asserted by the party in the case or a related legal proceeding.'" Id. (*quoting* Tamburelli Props. v. Cresskill, 308 N.J. Super. 326, 335 (App. Div. 1998)).

"[T]o be estopped [a party must] have convinced the court to accept its position in the earlier litigation. A party is not bound to a position it unsuccessfully maintained." In re Cassidy, 892 F.2d 637, 641(7th Cir. 1990). *See e.g.* Richardson v. Union Carbide Indus. Gases Inc., 347 N.J. Super. 524, 530 (App. Div. 2002)(barring a litigant who asserted a position and obtained summary judgment and dismissal of a party's claim for indemnification from asserting inconsistent position on appeal); Bender v. Adelson, 187 N.J. 411, 423 (2006)(holding that plaintiff's counsel's summation comments that defense witness was not qualified to testify as an expert violated principles of

judicial estoppel since counsel's comments were "clearly inconsistent" with his prior representations to the trial judge).

"Th[e] doctrine is intended to protect the integrity of the judicial system and is designed to prevent litigants from 'playing fast and loose with the courts.'" Newell, 376 N.J. Super. at 38 (citing Tamburelli Props., 308 N.J. Super. at 335 (quoting Scarano v. Central R.R., 203 F.2d 510, 513 (1953)); *see also* Cummings v. Bahr, 295 N.J. Super. 374, 387 (App. Div. 1996). While judicial estoppel is considered an extraordinary remedy, it may be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice. Newell, 376 Super. at 47. "Whether an issue is precluded based upon prior litigation is a question of law…." Gannon v. Am. Home Prods., Inc., 414 N.J. Super. 507, 523 (App. Div. 2010).

Again, Appellant's assertion that this matter was not ripe for summary judgment is in direct contravention with Appellant's counsel's representations to Judge Adubato at the beginning of oral argument. Furthermore, Appellant's own actions reveal that it never really intended to conduct discovery. Prior to the disposition of the Motions, Appellant never served written discovery in this action. Appellant never argued that summary judgment was premature or that discovery was necessary and why

in Appellant's Cross-Motion. At no time during oral argument did Appellant's counsel request leave of Judge Adubato to serve discovery.

It is also clear that Judge Adubato relied upon Appellant's counsel's representations during oral argument as to the ripeness of the matter. Although Appellant did not prevail below in the sense that the Trial Court granted its Cross-Motion and denied the Motion, Appellant's counsel succeeded in convincing Judge Adubato that this matter was ripe for summary judgment and that the Trial Court should proceed with the adjudication of the Motions. This is a critical fact that cannot be overlooked. In light of the procedural posture of the case, Judge Adubato was seeking to confirm the procedural posture of the case and the intention of the parties. Had Appellant's counsel informed Judge Adubato at this moment that the case was not ripe for summary judgment and that further discovery was necessary, it is possible the Trial Court would have permitted Appellant that opportunity and dismissed or adjourned the Motions.

Appellant's counsel's representations to the Judge that this matter was ripe for summary judgment are similar to the attorney's representations to the trial judge in Bender relating to the qualifications of a defense witness to testify as an

expert. In Bender the attorney made representations to the trial judge that the defense expert witness was qualified to testify as an expert. Then, during his summation before the jury, the attorney claimed the opposite. In Bender, like in this case, representations were made to the trial judge, that the trial judge relied upon those representations in making rulings and overseeing the conduct of the trial and so the court found it necessary to issue a curative instruction.

To allow Appellant to argue this matter was not ripe for summary judgment based on all of the facts and equities involved, will result in a miscarriage of justice. Appellant doesn't get a "do-over" or a second bite at the apple. Again, Appellant had every opportunity to engage in discovery and made a business decision not to engage in discovery because Appellant doesn't dispute the *material facts*- that Rushmore received the First Wire Transfer and then returned the funds via the Second Wire Transfer after holding the funds for two (2) entire weeks. These are the only facts that are germane to this appeal and the only ones that require consideration beyond what is expressly written in the loan documents.

C. Further Discovery Is Unnecessary and Will Not Change the Outcome of This Matter Since the Material Facts Are Undisputed

Alternatively, if the Court is inclined to consider the merits of the discovery argument raised by Appellant, it will quickly see that there is no merit on substantive grounds. Additional discovery is unnecessary because the material facts are undisputed, and discovery will not change the outcome. Appellant does not dispute that its predecessor's servicer received and subsequently returned the First Wire Transfer. Rushmore sent the Borrowers the Payoff Statement on April 9, 2021. (Pa201). On May 7, 2021, Rushmore received the First Wire Transfer from Entrust on behalf of PML, the lender on the Bronx Girls' loan. (Pa416 at ¶¶ 10). Because the funds received on May 7th were allegedly short by $3,312.88, the Rushmore directed the funds be returned to Entrust via outgoing wire twelve (12) days later on May 19, 2021. (Pa436 at ¶ 40). On May 21, 2021, Rushmore returned the funds to Entrust via the Second Wire Transfer, a full two (2) weeks after Rushmore first received the funds from Entrust. (Pa436 at ¶ 41).

In addition, Appellant concedes in its Brief that its predecessor and Rushmore: (i) did not accept the funds; (ii) did not apply the funds to the balance of the Loan; (iii) did not discharge the Mortgage; and (iv) returned the funds to Entrust via outgoing wire transfer on May 21, 2021. These are the only material facts that are relevant to the issue of whether

Appellant breached its obligations under the loan documents and applicable law by refusing to credit the funds to the balance of the Loan. This is not a case where discovery is needed because critical facts are peculiarly within Respondent's own knowledge. *See* Martinez, *supra*, 242 N.J. at 472. Here, it is quite the opposite since most of the relevant records establishing when and how the funds were received and returned by Rushmore were produced by Appellant in connection with the Motions.

While Appellant seeks discovery as to events and circumstances after the funds were returned to Entrust on May 21st, these facts and circumstances are irrelevant and have no bearing on Rushmore's responsibilities with respect to the First Wire Transfer *before* it was returned to Entrust. Because the Trial Court concluded that Rushmore failed to accept and apply the First Wire Transfer to the balance of the Loan in accordance with the terms of the loan documents and applicable law, it granted Respondent's Motion, denied the Cross-Motion, and entered an Order discharging the Mortgage.

While Appellant argues the Trial Court denied it the opportunity to establish a record as to whether Appellant's predecessor's acceptance of a "short payment" made the transaction a "short sale" (Appeal Brief, p. 15), Judge Adubato categorically rejected this argument. The Judge was very clear

in her ruling there was no evidence whatsoever that the subject transaction was initially presented to Appellant as a "short sale" and/or that Appellant's prior approval was necessary before payment could be made. (1T8:3-25 to 1T10:1-3). In fact, after further questioning, Appellant's counsel confirmed that Appellant was really relying on Paragraph 9(b) rather than Paragraph 9(a) of the Mortgage. (1T9:21-25 to 1T10:1-4).

In the end, Appellant refuses to comprehend that Appellant's predecessor and their servicer did not have the right to reject and return the First Wire Transfer under the loan documents and applicable law. Their only choice was to apply the funds to the balance of the Loan or hold the funds in a suspense account. Returning the wired funds simply was not an option.

CONCLUSION

For the foregoing reasons, Defendant- Respondent respectfully requests this Court affirm the Order of March 4, 2024, granting the Motion and denying the Cross-Motion.

Respectfully submitted,

STARK & STARK,
A Professional Corporation

/s/ Joseph R. McCarthy
JOSEPH R. MCCARTHY, ESQ.

/s/ Marshall T. Kizner
MARSHALL T. KIZNER, ESQ.

Dated: June 5, 2024

Superior Court of New Jersey

Appellate Division

Docket No. A-001964-23

U.S. BANK TRUST NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS OWNER TRUSTEE FOR RCF 2 ACQUISITION TRUST, *Plaintiff-Appellant,* vs. BRONX GIRLS FLIPS LLC; LAYO TOYIN OYAWUSI; VICTORIA O. ODUNOWO; ROUCHELLE GLOVER; MR. GLOVER; HUSBAND OF ROUCHELLE GLOVER and PML FUNDING, LLC, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM A FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, ESSEX COUNTY DOCKET NO. F-008670-23 Sat Below: HON. LISA M. ADUBATO, J.S.C.

REPLY BRIEF AND APPENDIX ON BEHALF OF APPELLANT U.S. BANK TRUST NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY BUT SOLELY AS OWNER TRUSTEE FOR RCF 2 ACQUISITION TRUST

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[1] The briefs are included because they fall within the exception to Rule 2:6-1(a)(2).

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PRELIMINARY STATEMENT

Plaintiff-Appellant U.S. Bank Trust National Association, not in its individual capacity but solely as Owner Trustee for RCF 2 Acquisition Trust ("Appellant") submits this reply brief in further support of its appeal from the Order entered on March 4, 2024 (the "Order"). (Pa442.)

As discussed below, Respondent spends an inordinate amount of time claiming that the Trial Court determined the Loan Documents required the short funds be applied to the Loan. But this was never found by the Trial Court, which engaged in an equitable "best position" analysis to determine which entity should bear the loss. Respondent then focuses on Paragraphs 1 and 3 of the Mortgage, and alleged violations of the federal Truth in Lending Act ("TILA"), and Article 4A of the Uniform Commercial Code ("UCC") – the latter two being improperly raised in reply. Each of these arguments are do not apply to the facts here, *i.e.*, a short payoff of funds made on behalf of a non-borrower. Respondent then attacks Appellant's argument that the record should have been further developed before the Trial Court ruled on the summary judgment motions, claiming that Appellant is judicial estopped from taking this position now. But like Respondent's arguments, judicially estoppel is inapplicable here. Lastly, Respondent continues to paint itself as an "innocent party," but this too ignores the facts in the record demonstrating that Respondent had multiple opportunities

to prevent the loss after the funds were returned to its escrow agent, but that it failed to do so.

Accordingly, this Court should reverse the Order, deny Respondent's summary judgment motion, and grant Appellant's cross-motion for summary judgment, or in the alternative, remand for further discovery on the factual issues raised by the Trial Court.

PROCEDURAL HISTORY

Appellant respectfully relies on the Procedural History section of its opening brief.

STATEMENT OF FACTS

Appellant respectfully relies on the Statement of Facts section of its opening brief.

ARGUMENT

I. THE TRIAL COURT DID NOT FIND THAT THE LOAN DOCUMENTS REQUIRED APPELLANT'S PREDECESSOR TO ACCEPT THE SHORT FUNDS (1T55:17-21.)

Respondent's primary argument is that the Trial Court correctly concluded that the "Loan Documents" required Appellant to apply the funds to the Loan and that Appellant and its predecessor therefore had no right to reject the short payoff funds. This is disingenuous, at best. As discussed in Appellant's opening brief, the Trial Court ultimately made no findings based on

the terms of the Loan Documents. (App. Br. at 15-17.) While the Trial Court inquired during oral argument about certain provisions of the Mortgage, the Trial Court ultimately concluded that facts were missing from the record relating to these provisions. (1T55:17-18, 11:15-14:6.) Respondent never raised any issues with these provisions (and in particular Paragraph 9 of the Mortgage) in its papers, and therefore Appellant had no opportunity to supplement the record to address and rectify the Trial Court's concerns.[1]

Ignoring that "material facts" were missing from the record, the Trial Court determined that, in line with *Mortgage Electronic Registration Systems, Inc. v. Omar*, No. A-5187-06T3, 2008 WL 2050834 (N.J. Super. Ct. App. Div. May 15, 2008) (which the Trial Court deemed analogous to the facts here), Appellant was in the best position to have avoided the loss and therefore should bear the risk. The Trial Court found that Appellant "made a business decision" to return the funds and that "[t]he fact that they did return it, the way they returned it, adds to the conclusion that they acted at least first and most unreasonably," and therefore Appellant should bear the entirety of the loss.

[1] Contrary to Respondent's arguments (Resp. Br. at 22), discovery (and supplementation of the record) would, in fact, answer all of questions the Trial Court raised for the first time (and sua sponte) during oral argument, namely: whether this was presented as a short sale (1T9:8-12) and whether the introductory requirements of Paragraph 9(b) had been met. (1T11-14.)

(1T54:23-25.) Again, the Trial Court made no findings based upon the Loan Documents themselves, but rather based its determination on this "equitable" and "best position" analysis under *Omar*. (1T55:17-21 (stating "[t]he idea of what provision of the mortgage really isn't controlling to me."); 1T56:6-8 ("[t]here's no privity between the . . . buyers and the [Appellant] under this document, certainly.").)

Contrary to Respondent's urging that *Omar* is "directly on point" (Resp. Br. at 26-31), *Omar* is inapplicable, among other reasons, because it did not involve non-borrowers to the loan or a short payment returned to the agent for the non-borrower's lender.[2] (*See* App. Br. at 21-25.) Extending the holding in *Omar* to the facts here would require a lender to always accept a payment from

[2] Respondent admitted that there is a lack of case law in New Jersey as to whether an escrow agent is considered the agent of the refinance lender, and only cited below to a District of Columbia case to support its position. (Resp. Br. at 20 n.3; 1T45:25-46:5; 48:10-14.) On appeal, Respondent claims that the District of Columbia holding (that an escrow agent is a dual agent) was adopted in New Jersey in *Innes v. Marzano-Lesnevich*, 224 N.J. 584 (2016). However, *Innes* involved the holding of a minor child's passport by attorneys in a contentious divorce. It had nothing to do with an escrow or settlement agent (as that term is used in the consumer finance world) holding funds and disbursing funds for a refinance lender. Clearly, in *Innes*, the attorney holding the passport was an agent of both parties, as they both agreed that attorney should hold the passport. Here, Appellant and its predecessors had no involvement in the engagement of Entrust, nor were they involved in the refinance transaction by a non-borrower at all. As a result, the Trial Court erred by failing to engage with this agency analysis in determining who should bear the loss resulting from Entrust absconding with the funds.

a third-party in connection with a short sale, even where that payment did not fully satisfy the outstanding debt. In the event a lender rejected the short funds and returned them, the lender would shoulder the risk if the funds were then misappropriated. On the other hand, if the lender accepted and applied the short funds, the non-borrower would most certainly argue that those short funds satisfied the loan in full due to the doctrines of accord and satisfaction (which is precisely what Respondent argued below). This cannot be the correct equitable outcome here.

II. RESPONDENT'S ARGUMENTS, RAISED FOR THE FIRST TIME IN REPLY, DO NOT GOVERN THE OUTCOME HERE (Pra1-22.)[3]

Sidestepping (and ignoring) the actual basis for the Trial Court's holding and decision, Respondent again interjects the same arguments it raised for the first time in its reply brief on the underlying motions. (Pra1-22.) Asserting these arguments on reply was improper, and Respondent did not preserve them for this Appeal. *Borough of Berlin v. Remington & Vernick Eng'rs*, 337 N.J. Super. 590, 596 (App. Div. 2001) ("Raising an issue for the first time in a reply brief is improper."); *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973) ("It is a well-settled principle that our appellate courts will decline to consider

[3] The excerpts from the briefs are included as they fall within the exception to Rule 2:6-1(a)(2). The briefs are submitted because the question of whether these issues were raised in the trial court is germane to the appeal.

questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." (internal quotations omitted)). Nonetheless, even if the Court considers them, Respondents' arguments are irrelevant to the facts here, as discussed below.

A. PARAGRAPHS 1 AND 3 OF THE MORTGAGE DID NOT REQUIRE THE SHORT PAYOFF TO BE APPLIED TO THE LOAN (Pa187-193.)

Paragraphs 1 and 3 of the Mortgage do not, as Respondent argues, create a contractual obligation to accept and apply the short payment to the loan balance. (Resp. Br. at 18-19.) The introductory language of Paragraph 3 provides that: "All payments *under Paragraphs 1 and 2* shall be applied by Lender as follows." (Pa189 (emphasis added).) Thus, looking first to Paragraph 1, the Mortgage provides that: "Borrower shall *pay when due* the principal of, and interest on, the debt evidenced by the Note and any prepayment and late charges due under the Note" (Pa188 (emphasis added)), and Paragraph 2 (*id.*) talks about monthly payments.[4] The latter clearly does not apply, as a short

[4] The Trial Court did not make any findings that Paragraphs 1, 2, and 3 "creat[e] an affirmative obligation on the part of its holder to both accept and apply all payments received on account of the Loan in the manner designed therein" as Respondent states. (Resp. Br. at 18 (emphasis in original).) Rather, the Trial Court said, without more, that which provision of the mortgage applies would

payoff is not a "monthly payment." As to the former, Respondent's argument that an accelerated debt becomes the "when due" amount under Paragraph 1 ignores the interplay with the acceleration of the debt, which Appellant was entitled to do under Paragraph 9 of the Mortgage. (Pa190-91.) Once accelerated, a lender no longer needs to accept anything less than the full amount due and owing on the mortgage. Respondent's argument also ignores that this short payoff was not being made on behalf of Appellant's borrowers, but rather on behalf of a third-party – a non-party, stranger to the Loan. This amounted to a short sale, which even the Trial Court agreed would have different restrictions and requirements. (1T8:20-9:20 ("[I]f this was presented as a short sale, there's a lot of things that has to happen before the lender accepts that. I fully appreciate that.").) As such, Respondent's reliance on Paragraphs 1 and 3 of the Mortgage have no bearing on the analysis here.

B. APPELLANT DID NOT VIOLATE THE TRUTH IN LENDING ACT BY REJECTING AND RETURNING THE SHORT PAYOFF (1T29:6-8.)

Respondent also argues that Appellant violated TILA and the accompanying regulations. (Resp. Br. at 22-23 (citing 12 C.F.R. § 1026.36(c).) But these provisions do not apply to prepayments or partial payments of the

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be based on "an interpretation of what does when due mean in paragraph 1." (1T55:18-20.)

total, accelerated debt, or any payoffs of the loan. Rather, by their very terms, these provisions apply to "periodic payments." 12 C.F.R. § 1026.36(c)(1)(i) ("No servicer shall fail to credit a *periodic payment*"); *id.* at ii ("Any servicer that retains a partial payment, meaning any payment less than a *periodic payment* ….")). As such, they do not apply to the short payoff that is the subject of this action.

C. APPELLANT DID NOT VIOLATE ARTICLE 4A OF THE UNIFORM COMMERCIAL CODE (1T29:17-30:1.)

Respondent further argues that Appellant violated certain provisions under Article 4A of the UCC, wrongly claiming that the Trial Court found Appellant violated the UCC. While this provision standing alone may appear at first blush to govern the present situation, a statute must be read in its totality. *Fiore v. Consol. Freightways*, 140 N.J. 452, 466 (1995) ("A statute should be read as a whole and not in separate sections."). N.J.S.A. 12A:4A-501(1) makes clear that "the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party." Therefore, if the UCC provisions were to apply, by its plain language, the terms of the Loan Documents and Paragraph 9 of the Mortgage would govern.[5]

[5] This makes it even more apparent that the Trial Court should have allowed for a fuller record to be developed prior to ruling on the summary judgment motions.

In support of its UCC arguments, Respondent heavily relies upon *Deutsche Bank National Trust Co. v. Vezeriannis*, No. A-1376-11T1, 2013 N.J. Super. Unpub. Lexis 1588 (Super Ct. App. Div. June 27, 2013), urging it is factually indistinguishable and should control. But *Vezeriannis* involved a full payoff of a loan, not a short payoff, and the funds were being remitted on behalf of the borrower – not a third party. Like *Omar*, these facts make this unpublished case inapplicable.

III. RESPONDENT'S JUDICIAL ESTOPPEL ARGUMENT MISSES THE MARK (1T13:4-8, 13:21-25.)

Respondent urges this Court to find that Appellant is judicially estopped from arguing that further discovery was needed because Appellant agreed with the Trial Court at the outset of oral argument that the case was ripe for summary judgment. (Resp. Br. at 38-43.) Appellant concedes that, at oral argument, counsel agreed that the case was ripe for summary judgment, but that verbal concession alone should not be dispositive of whether the case was in fact ripe for summary judgment – particularly given the way the oral argument unfolded. Nor does such a concession (or premature belief) meet the standard for judicial estoppel, where Appellant clearly did not obtain a favorable outcome from its position (*i.e.*, its motion was denied and its Mortgage was discharge). *Kimball Intern., Inc. v. Northfield Metal Prods.*, 334 N.J. Super. 596, 606 (N.J. App. Div. 2000) ("A threat to the integrity of the judicial system sufficient to invoke the

judicial estoppel doctrine only arises when a party advocates a position contrary to a position it successfully asserted in the same or a prior proceeding"); *id.* at 606-607 (citing *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990) ("[T]o be estopped [a party must] have convinced the court to accept its position in the earlier litigation a party is not bound to a position it unsuccessfully maintained.").)

Merely because the parties mistakenly believed the case was ripe for summary judgment, does not preclude a trial court from finding issues of fact and denying summary judgment – this is particularly true where no discovery had been conducted. *See Driscoll Const. Co. v. State, Dep't of Transp.*, 371 N.J. Super. 304, 317; *Hermann Forwarding Co. v. Pappas Ins. Co.*, 273 N.J. Super. 54, 64 (App. Div. 1994) (finding that summary judgment motions were premature where "critical factual issues were not fully developed before the trial court."). Furthermore, Appellant's cross-motion for summary judgment was narrow, focusing on its prima facie right to foreclose, and did not address the issues surrounding the context of the insufficient payment or the conditions necessary to effect a valid short sale.

IV. THE TRIAL COURT DID NOT PROPERLY WEIGH THE EQUITIES (1T55:1-16, 61:9-23.)

Despite Respondent referring to itself as an "innocent party" (Resp. Br. at 34), that is not an accurate depiction of the facts in the record. The Trial Court erred by not considering the actions of both parties after the funds were returned, and ending its "best position" analysis at the point in time when the funds were returned to the escrow agent. (1T61:9-23.) Indeed, the Trial Court failed to consider that Respondent did nothing to mitigate its damages and failed to seek any information from the escrow agent about the whereabouts of the funds, despite being well-aware of an issue with the funds for over one year before the escrow company became a defunct entity. (App. Br. at 11, 24.) The Trial Court also improperly discounted the significance of Respondent's (and its agents') failure to confirm the payoff amount, despite remitting funds after the payoff good through date expired (and into a new month). (1T55:1-16.) These facts should have been considered on the spectrum of the "best position" analysis.

CONCLUSION

For all of the foregoing reasons and those set forth more fully in Appellant's opening brief, Appellant respectfully requests that this Court reverse the decision of the Chancery Division, vacating the grant of summary judgment to Respondent. In the alternative, Appellant respectfully requests that this Court remand for discovery on the factual issues raised by the Trial Court.

Respectfully submitted,

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