IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

CLETE PAVONE,

Petitioner,

vs.

Appeal No 20-0970
(On Appeal from Monongalia County Circuit Court, Civil Action No. 19-C-110)

NPML MORTGAGE ACQUISITIONS, LLC,

Respondent

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Patrick Russell purchased property located at 320 Price Street, Granville, West Virginia in Granville, Monongalia County, West Virginia by deed dated June 25, 1999. JA 84. About six months later on December 20, 1999, Mr. Russell obtained a $20,000 loan from Equity South Mortgage. JA 13-20. The Equity South Mortgage was recorded in the Office of the Clerk of the County Commission of Monongalia County, West Virginia in Trust Deed Book 963, at page 690 that encumbers the real property at issue in this action. (hereinafter, "Russell DOT"). JA 13-20. The Russell DOT was duly recorded on or about December 29, 1999.

- The Russell DOT has never been released.
- The Russell DOT is in default.

The Russell DOT was subsequently assigned multiple times as follows:

- By Assignment dated January 16, 2000, recorded on February 7, 2019 in said Clerk's office in Assignment Book 139, at page 340, Equity South Mortgage LLC assigned to EFC Mortgage Corp. all beneficial interest in the Russell DOT. JA 34.
- By Assignment dated January 7, 2000, recorded on February 11, 2019 in said Clerk's office in Assignment Book 139, at page 351, EFC Mortgage Corp. assigned to Life Bank all beneficial interest in the Russell DOT. JA 35.
- By Assignment dated August 15, 2005, recorded on February 12, 2019 in said Clerk's office in Assignment Book 139, at page 360, Life Bank assigned to Franklin Credit Management Corporation all beneficial interest in the Russell DOT. JA 36.
- By Assignment dated February 4, 2009, recorded on February 13, 2019 in said Clerk's office in Assignment Book 139, at page 361, Franklin Credit Management Corporation assigned to Deutsche Bank National Trust Company, as Trustee for Franklin Credit Trust Series I all beneficial interest in the Russell DOT. JA 37.
- By Assignment dated January 30, 2019, recorded on February 14, 2019 in said Clerk's office in Assignment Book 139, at page 376, Deutsche Bank National Trust Company, as Trustee for Franklin Credit Trust Series I assigned to NPML Mortgage Acquisition LLC all beneficial interest in the Russell DOT. JA 38.

Patrick Russell, the individual who signed the Russell DOT, sold the encumbered real estate at issue in this action to Petitioner by warranty deed dated the 21st day of October, 2018, of record in the Office of the Clerk of the County Commission of Monongalia County, West Virginia in Deed Book 1646, at page 480. JA 40-43.

After Respondent NPML Mortgage Acquisitions, LLC (hereinafter, "Respondent NPML") commenced foreclosure proceedings, Petitioner filed a complaint in the Circuit Court of Monongalia County, West Virginia on of about April 26, 2019. The Circuit Court temporarily enjoined foreclosure of the Russell DOT by order entered April 29, 2019. After the filing of an Amended Complaint on November 19, 2019 and an answer by Respondent NPML filed on May 8, 2020, the Petitioner filed a motion for summary judgment. Respondent NPML filed a pleading entitled "*Opposition to Plaintiff's Motion for Summary Judgment on Behalf of NPML Mortgage Acquisition LLC and Cross-Motion for Summary Judgment on Behalf of Defendant NPML Mortgage Acquisition LLC*" on or about May 12, 2020. JA 44-77. After a hearing in this matter, the Circuit Court of Monongalia County denied summary judgment to the Petitioner, granted summary judgment to Respondent NPML and entered an order entitled "*Order Granting Defendant NPML Mortgage Acquisitions, LLC Summary Judgment and Order Denying Plaintiff Clete Pavone Summary Judgment*" on or about October 27, 2020. JA 84-96.

Partially relying upon the West Virginia Supreme Court of Appeals decision in *State ex rel. U. S. Bank Nat'l Ass'n v. McGraw*, 234 W. Va. 687, 769 S.E.2d 476 (2015), the Circuit Court found that a foreclosing party must produce and record assignments showing that the foreclosing part is the proper party to foreclose. JA 89. Further, the Circuit Court of Monongalia County found that the "the assignments from Equity South Mortgage to NPML are of record and recorded"

and that Respondent NPML was the "proper party to foreclose on the default of the Russell DOT". JA 95. Moreover, the Circuit Court found that "[e]ven if the assignments were not chronologically recorded, the doctrine of after acquired title cues any purported error in the assignment dates between Equity South Mortgage, EFC Mortgage Corporation and Life Bank." JA 90.

SUMMARY OF ARGUMENT

The central issue in this action is whether Respondent NPML is the property party to foreclose on the Russell DOT. Importantly, the Petitioner has never disputed critical facts in this action as follows:

- The Petitioner is not a bona-fide purchaser for value under West Virginia law.
- The Russell DOT has never been released.
- The Russell DOT is in default.
- The Russell DOT, as shown above, has been assigned to Respondent NPML.

Instead, the Petitioner's simplistically, and erroneously, argues that because the initial holder, Equity South Mortgage, assigned its interest in the Russell DOT to EFC Mortgage Corporation by Assignment dated January 16, 2000, and EFC Mortgage Corporation assigned its interest in the deed of trust to Life Bank by Assignment dated January 7, 2000 – 9 days earlier, the whole assignment chain is invalid and NPML is not entitled to foreclose under the DOT. Under Petitioner's theory, someone is entitled to foreclose, presumably EFC Mortgage, but Respondent NPML is not.

First, the Plaintiff is not a bona fide purchaser for value under West Virginia law. See *Kyger v. Depue*, Syl. Pt. 1, 6 W.Va. 288 (1873) ("A bona fide purchaser is one who actually purchases in good faith."); *Pocahontas Tanning Co. v. St. Lawrence Boom & Manufacturing Co.*,

Syl. Pt. 1, 63 W.Va. 685, 60 S.E. 890 (1908) ("Whatever is sufficient to direct the attention of a purchaser to prior rights and equities of third parties, so as to put him on inquiry into ascertaining their nature, will operate as notice."). The Russell DOT was recorded and unreleased. Petitioner either had a title search completed and ignored the Russell DOT or should have had a title search completed. Black letter law provides that "an instrument properly made of record is notice to the world not only of the facts and claims therein expressly set forth, but also of all other material facts which an inquiry thereby reasonably suggested would have developed." *Loser v. Plainfield Sav. Bank*, 149 Iowa 672, 676, 128 N.W. 1101, 1103 (1910); 54A Am. Jur. 2d *Mortgages* § 263 ('A properly recorded mortgage is notice to all subsequent purchasers that they take subject to any lien the mortgagor may have on the property whether the record has been examined or not.").

In juxtaposition to Petitioner's argument, West Virginia law does not require assignments of deeds of trust to be recorded. This Honorable Court recently examined this issue finding that,

> The import of those statutes is that a party assigning a trust deed or mortgage, or receiving an assignment, is under no statutory duty to record the assignment in the office of the county clerk. Recording a trust deed assignment is not mandatory. The assignment is valid among the parties thereto, without any failure of the security, represented by the underlying trust deed or mortgage, for payment of the promissory note.

State ex rel. U. S. Bank Nat'l Ass'n v. McGraw, 234 W. Va. 687, 693, 769 S.E.2d 476, 482 (2015). *See also* 55 Am. Jur. 2d Mortgages § 924 (2009) ("The assignment of a note and mortgage does not need to be recorded to be valid."). Instead, all that is required to properly foreclose is that the foreclosing party produce and record assignment showing that the foreclosing party is the proper party to foreclose. *See Bambas v. CitiMortgage, Inc.*, 577 Fed. Appx. 461, 468 (6th Cir. 2014) ("There appears to be no compelling reason to require that the recordings be chronological before

the foreclosure can proceed, as long as the chain is complete and the rightful holder of the mortgage can be discerned from the public record.").

The Petitioner's central argument is that West Virginia law of assignments voids the assignments because Equity South Mortgage assigned its interest in the deed of trust to EFC Mortgage Corporation by Assignment dated January 16, 2000, and EFC Mortgage Corporation assigned its interest in the deed of trust to Life Bank by Assignment dated January 7, 2000 – 9 days earlier. This argument is erroneous.

First, the Russell DOT existed at the time of all of the assignments at issue in this action. Petitioner conflates the law of assignment about whether something exists with whether a right or chose of action that comes into being can be assigned. Since the Russell DOT existed and was recorded at the time of all of the assignments in this action, black letter law provides the answer and states that "an assignment does not fail merely because the rights assigned are not ripe at the time of assignment. Thus, an assignment may properly relate to a future right which is adequately identified. Accordingly, an expectancy can be a conveyable interest." 6 Am Jur 2d *Assignments* § 12. Moreover, West Virginia has long recognized equitable assignments. *See First Nat'l Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555 (1880). *See also* 13A M.J., *Mortgages and Deeds of Trust* § 19.

Even if West Virginia law did not recognize equitable assignments, the doctrine of after-acquired title operates to vest beneficial ownership of the Russell DOT in Respondent NPML. "The after-acquired title doctrine states that title acquired by a grantor, who previously attempted to convey title to land which the grantor did not in fact own, inures automatically to the benefit of prior grantees." 9 *Thompson on Real Property*, Thomas Editions § 82.11 (2020). At least two

appellate courts have examined the issue presented in this appeal and found that assignments recorded out of date are subject to the after acquired title doctrine and foreclosure was appropriate. *See Shepard v. CitiMortgage, Inc.*, No. 4:12CV00129 ERW, 2012 U.S. Dist. LEXIS 84054, (E.D. Mo. June 18, 2012); *Bambas v. CitiMortgage, Inc.*, 577 Fed. Appx. 461 (6th Cir 2014). The Circuit Court was correct in ruling that Respondent NPML was the proper party to foreclose on the Russell DOT. As such, the Circuit Court's Order granting summary judgment to Respondent NPML should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Respondent requests oral argument pursuant to West Virginia Rule of Appellate Procedure 20(a) in that this action presents an issue of first impression and it involves a case of fundamental public importance.

IV. ARGUMENT

A. Standard of Review.

"A circuit court's entry of summary judgment is reviewed *de novo*." *Cunningham v. Herbert J. Thomas Mem. Hosp. Ass'n*, 2012 W. Va. LEXIS 867, *10 (2012). "In conducting this *de novo* review, we recognize that,

> '[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.'

Cunningham, 2012 W. Va. LEXIS 867 at *10-11 (quoting Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992)). Furthermore,

> '[s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Cunningham, 2012 W. Va. LEXIS 867 at *11 (quoting Syl. pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)). "Finally, we note that '[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." *Cunningham*, 2012 W. Va. LEXIS 867 at *11 (quoting Syl. pt. 3, *Painter*, 192 W. Va. 189, 451 S.E.2d 755). In addition, the West Virginia Supreme Court has provided guidance on what constitutes a genuine issue of material fact writing,

> Roughly stated, a "genuine issue" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

Jividen v. Law, Syl. pt. 5, 194 W. Va. 705, 461 S.E.2d 451 (1995).

B. The Petitioner is not a bona-fide purchaser under West Virginia law.

Initially, the Petitioner is not a bona fide purchaser for value under West Virginia law. See *Kyger v. Depue*, Syl. Pt. 1, 6 W.Va. 288 (1873) ("A bona fide purchaser is one who actually purchases in good faith."); *Pocahontas Tanning Co. v. St. Lawrence Boom & Manufacturing Co.*, Syl. Pt. 1, 63 W.Va. 685, 60 S.E. 890 (1908) ("Whatever is sufficient to direct the attention of a purchaser to prior rights and equities of third parties, so as to put him on inquiry into ascertaining their nature, will operate as notice."). The Russell DOT was recorded and unreleased. Petitioner either had a title search completed and ignored the Russell DOT or should have had a title search completed. Black letter law provides that "an instrument properly made of record is notice to the world not only of the facts and claims therein expressly set forth, but also of all other material facts

which an inquiry thereby reasonably suggested would have developed." *Loser v. Plainfield Sav. Bank*, 149 Iowa 672, 676, 128 N.W. 1101, 1103 (1910); 54A Am. Jur. 2d *Mortgages* § 263 ('A properly recorded mortgage is notice to all subsequent purchasers that they take subject to any lien the mortgagor may have on the property whether the record has been examined or not."). Since the Russell DOT was of record in the Office of the Clerk of the County Commission of Monongalia County, the Petitioner cannot claim that he is an innocent purchaser and cannot gain the protections of this status.

C. The Circuit Court order finding that Respondent is the proper party to foreclose should be affirmed because the Petitioner misapplies the law of assignments.

The Petitioner's argument fails because the Petitioner misapplies the law of assignments. Citing law providing that an assignee "steps into the shoes of the assignor and takes the assignment subject to all prior equities between previous parties. His situation is no better than that of the assignor," *Aldridge v. Highland Ins. Co.*, No. 15-0658, 2016 W. Va. LEXIS 538, at *11 (June 17, 2016) and "an assignor cannot assign rights he or she does not have", *Todd Hollow Apartments at Deer Mountain, LP v. Homes at Deer Mountain Homeowners Ass'n Inc.*, 2015 UT App. 190 (2015), the Petitioner erroneously argues that the since EFC Mortgage assigned its interest in the Russell DOT nine (9) days prior to receiving the assignment from Equity South Mortgage, the EFC Assignment, and thus all the assignments after this assignment are null and void. Accordingly, under Petitioner's theory, EFC Mortgage remains the only party entitle to foreclose. This overly simplistic argument fails to analyze or address West Virginia Code on security interests and black letter law regarding assignments.

West Virginia Code Section 46-9-204 expressly provides that "a security agreement may create or provide for a security interest in after-acquired collateral." Article 9 applies to both a security interest in a mortgage note to secure an obligation and to the rights of a buyer of a

promissory note of a mortgage or deed of trust. West Virginia Code §§ 46-9-109(a)(1) and (3). Thus, pursuant to these provisions of West Virginia Code, the assignment from Equity South Mortgage to EFC Mortgage inured to the benefit of Life Bank and the Circuit Court correctly granted summary judgment to the Respondent.

Even if this section of West Virginia Code did not exist, the assignments are not invalid. As to assignments, succinctly stated,

> Under the common law, in order for a right or interest to be assignable, it must have, at the time of the purported assignment, either an actual or a potential existence; a mere possibility is not assignable. However, an assignment does not fail merely because the rights assigned are not ripe at the time of assignment. Thus, an assignment may properly relate to a future right which is adequately identified. Accordingly, an expectancy can be a conveyable interest.

6 Am Jur 2d *Assignments* § 12. *See also First Nat'l Bank of Wellsburg v. Kimberlands*, 16 W. Va. 592 (1880); *Hansel v. Hartford-Connecticut Tr. Co.*, 133 Conn. 181, 189, 49 A.2d 666, 671 (1946) ("An assignment to be effective must transfer some chose in action or thing which actually or potentially exists as a specific entity or some definite part thereof."); *Leon v. Martinez*, 84 N.Y.2d 83, 88 n.1, 614 N.Y.S.2d 972, 974, 638 N.E.2d 511, 513 (1994) ("An assignment may properly relate to a future or conditional right which is adequately identified"); *Parker v. Blackmon*, 553 S.W.2d 623, 624 (Tex. 1977) ("[T]he effective conveyance of . . . an expectant interest is clearly permissible."); Restat 2d of Contracts, § 321 ("The conceptual difficulty posed by transfer of a right which does not exist can be met by giving effect to the attempted transfer when the right later arises. . . . A is negotiating to sell to B property part of which is subject to a mortgage from A to C. In consideration of C's release of the mortgage, A assigns to C a payment to be made by B. Later the same day A and B sign a contract to sell the property which provides for the payment expected. Notwithstanding the lack of a continuing business relationship, the assignment to C is effective when the contract to sell is made."); Restat 2d of Trusts, § 86 (2012) ("although a person

who has a mere expectancy has no interest of which he can create a trust, yet he can bind himself by a contract to create a trust or otherwise to dispose of the property if and when he should thereafter acquire it. . . . The mere fact that he purports to create a trust of the property before he acquires it does not preclude a court of equity from enforcing the contract or from compelling him to make a transfer in trust when he subsequently acquires the property, provided that he received fair consideration.")

At the time EFC Mortgage Corporation assigned its interest in the Russell DOT to Life Bank, EFC Mortgage Corporation either had an interest in the Russell DOT or an expectancy in the Russell DOT. Petitioner presented no evidence that EFC Mortgage Corporation did not have a vested right or an expectancy at the time of the January 7, 2000 assignment to Life Bank.

In this case, the Russell DOT was a thing in actual existence at the time of both the EFC Mortgage Corporation to Life Bank Assignment dated January 16, 2000, and EFC Mortgage Corporation assigned its interest in the deed of trust to Life Bank by Assignment dated January 7, 2000. West Virginia has long allowed assignments of choses of action, debts, notes, and even wages. This is not different. There was an existing obligation to repay loan proceeds evidenced by the Russell DOT. Recorded assignments showing that Respondent NPML was the proper party to foreclose were of record in the Office of the Clerk of the County Commission of Monongalia County. Accordingly, the lower court did not err in granting Respondent NPML summary judgment and the lower court's ruling should be affirmed.

D. Even if West Virginia did not recognize assignment of future rights, the lower court was correct in granting Respondent NPML summary judgment based upon the law of equitable assignments.

Even if West Virginia did not recognize assignment of future rights, Respondent NPML was entitled to summary judgment and the lower court was correct in entering summary judgment in Respondent NPML's favor under the doctrine of equitable assignments.

"An assignment for value of a future right, such as money to be acquired in the future, operates as an 'equitable assignment.' Consequently, an equitable assignment does not pass legal title in the right assigned when it is subsequently acquired without some new act of the assignor, but, rather, vests an equitable ownership in the property in the equitable assignee as soon as the property is acquired by the equitable assignor."2A M.J. *Assignments* § 19 (2020).

Generally speaking, "[i]n equity, a mortgage of property ***to be acquired*** is valid and operates as a contract to take effect and attach as soon as the property comes into being." 13A M.J., *Mortgages and Deeds of Trust* § 19 (emphasis added). "While a mortgage of ***future-acquired property*** does not pass any immediate title to such property yet as 'equity considers that done which out to be done' such a mortgage creates an equitable lien which will attach to the subject matter immediately upon its coming into existence and create a valid title therein as against the mortgagor and third parties with notice without any further act on the mortgagee's part." *Id* (citing *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487, 40 S.E. 564 (1901), *overruled on other grounds*, 65 W. Va. 355, 64 S.E. 261 (1909) (emphasis added). These situations are called equitable assignments and recognized by West Virginia law.

For example, in *First Nat'l Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555 (1880), the West Virginia Supreme Court of Appeals recognized a valid equitable assignment for the future sale of a foundry writing, "[a]n order drawn on a particular fund or debt, and for the whole thereof,

though not accepted by the drawer, is a good equitable assignment of the fund or debt, and it will be recognized by a court of law to the extent of permitting the payee of such an order to institute a suit at law in the name of the drawer against the drawee." *Id.* at 572.

Because the EFC Mortgage Corporation Assignment to Life Bank was dated 9 days earlier than the assignment of the Russell DOT from Equity South Mortgage to EFC Mortgage Corporation, when EFC Mortgage Corporation made the January 7, 2000 Assignment to Life Bank, EFC Mortgage Corporation equitably assigned its interest – that it would receive - to Life Bank. Upon receipt of the January 16, 2000 assignment to EFC Mortgage Corporation from Equity South Mortgage, Life Bank was vested with the beneficial interest in the Russell DOT as a matter of law under equitable assignment law. The Circuit Court decision should be affirmed and no error was committed.

E. The Circuit Court was correct in finding the doctrine of after acquired title vests the beneficial ownership of the Russell DOT in NPML.

Even if this Honorable Court would determine that the law of assignments, including equitable assignments, did not dictate that the assignments at issue in this action were appropriate, the lower court was correct in applying the common law doctrine of after-acquired title to the fact scenario at issue and correct in granting summary judgment to Respondent NPML.

"The after-acquired title doctrine states that title acquired by a grantor, who previously attempted to convey title to land which the grantor did not in fact own, inures automatically to the benefit of prior grantees." 9 *Thompson on Real Property*, Thomas Editions § 82.11 (2020). Being the majority rule, *see Miller-Long v. John Hanson Sav. & Loan, Inc.*, 676 F. Supp. 298, 300 (D.D.C. 1987) ("[t]his rule, followed in a majority of jurisdictions"), West Virginia has long recognized the doctrine. *See, e.g., Summerfield v. White*, 54 W. Va. 311, 318, 46 S.E. 154, 157 (1903) ("Such after acquired title enures to the benefit of the grantee and passes to him.").

None of the cases cited by the Petitioner deal with the issues presented in this case; however, at least two courts have dealt with this issue and found that assignments out of date are subject to the after-acquired title doctrine and foreclosure was appropriate.

In *Shepard v. CitiMortgage, Inc.*, No. 4:12CV00129 ERW, 2012 U.S. Dist. LEXIS 84054, (E.D. Mo. June 18, 2012), the United States District Court for the Eastern District of Missouri examined a chain of assignments that was similar to the one at issue in this case. The facts of Shepard are that the homeowners

> purchased property located at 2340 Windsor Drive in Florissant, Missouri ("the Property"). Plaintiffs obtained financing to purchase the Property through Equifirst Corporation ("Equifirst"), executing a Note secured by a Deed of Trust ("DOT"). The DOT, which was recorded with the St. Louis Recorder of Deeds, appointed Integrity Land Title Company ("Integrity Land Title") as Trustee. On August 31, 2010, CitiMortgage appointed the Millsap & Singer, P.C. ("Millsap & Singer") law firm as Successor Trustee to Integrity Land Title under the DOT. On May 6, 2011, Mortgage Electronic Registration System, Inc. ("MERS"), as nominee of Equifirst under the DOT, assigned the DOT to CitiMortgage.

Id. at *1-2. Thus, the successor trustee was appointed by the assignee a year prior to the assignee being appointed.

In finding that the doctrine of after-acquired title vested title in the successor trustee one year after it was appointed the Missouri court wrote,

> Plaintiffs base their lack-of-standing and lack-of-authority arguments on the timing of the appointment of the trustee, the assignment of the DOT, and the endorsement of the Note. However, under Missouri's after-acquired title doctrine, title immediately vested in CitiMortgage's appointed Successor Trustee, Millsap & Singer, when MERS assigned the DOT to CitiMortgage on May 6, 2011.

Id. at *9.

Similarly, the Sixth Circuit examined a fact pattern similar to the one at issue in this case when one link was recorded (not merely executed like in our case) after a predecessor link. *See Bambas v. CitiMortgage, Inc.*, 577 Fed. Appx. 461, 468 (6th Cir. 2014) .

In *Bambas*, the homeowner acquired a house in 1993 and a deed of trust to Gehrke Mortgage Corporation was filed in the Livingston County Register of Deeds. *Id.* at 463.

> A review of all of the exhibits presented by the parties establishes a record chain of title constituted by the following duly recorded assignments: Gehrke to Marathon Mortgage Corporation, recorded on November 5, 1993; Marathon to Union Federal Savings Bank of Indianapolis, recorded on March 15, 1995; Union Federal to Waterfield Mortgage Company, Inc., recorded on October 7, 1999; Waterfield to Union Federal, recorded on December 12, 2003; Waterfield to Mortgage Electronic Registration Systems, Inc., (MERS), as nominee for CitiMortgage, recorded on August 15, 2006; MERS to CitiMortgage, recorded on July 28, 2008; and finally, the Hunting National Bank, successor through Sky Bank to Union Federal Bank, to Waterfield, recorded on September 2, 2008. The most salient quirk in this record chain of title is that the link in the chain between Union Federal and Waterfield was recorded after both the Waterfield-MERS and MERS-CitiMortgage assignments.

Id. at 463-64.

Like this case, the *Bambas* plaintiff argued that the mortgage was held by someone else and that the assignment was erroneous as one of the assignor's had no interest in the mortgage at the time of the assignment. *Id.* at 466 (arguing "Waterfield had no interest in the mortgage, because its interest in the mortgage must have been held by either Fannie Mae or Union Federal Bank, to which Waterfield had already made separate assignments."). Rejecting this argument, the Sixth Circuit wrote, "[a]s inexplicable as this set of assignments is, all that matters for purposes of Bambas's challenge to the foreclosure sale is whether there is a 'record chain of title,'. *Id.* Since record chain of title existed in Bambas and exists in this case, foreclosure was appropriate. *Id.*

Specifically, as to the doctrine of after-acquired title doctrine, the Sixth Circuit held that the doctrine applied to mortgage assignments writing,

> The late assignment and recordation that purported to retroactively fix the missing link in the "record chain of title," *see* Mich. Comp. Laws § 600.3204(3), appear to be valid under Michigan's after-acquired title doctrine. Although we have found no Michigan case law applying that doctrine to mortgages, there are sound reasons why Michigan would extend the doctrine, typically applied to fee titles, to mortgages.

> The after-acquired title doctrine in Michigan is clear and straightforward, at least as typically applied to titles in real property:
>
> Under the doctrine of after-acquired title, if a grantor by warranty deed conveys an estate that the grantor does not own and subsequently acquires title to that estate, that title inures to the benefit of his or her grantee. This is a form of estoppel, and the grantor is estopped to deny the title the grantor subsequently acquired.

Richards v. Tibaldi, 272 Mich. App. 522, 726 N.W.2d 770, 781 (Mich. Ct. App. 2006) (quoting 1 John G. Cameron, Jr., *Michigan Real Property Law* § 10.24, at 366 (3d ed. 2005)). Contrary to Bambas's argument, *Richards v. Tibaldi* actually supports applying the doctrine to mortgages. In *Richards*, the Michigan Court of Appeals held that "quitclaim deeds can never operate to convey an after-acquired title," because such deeds "d[o] not contain any express or implicit statement that the grantors were seised of a title in fee, or, stated otherwise, that the grantors warranted title." *Id.* at 782. *See also* Mich. Comp. Laws § 565.3 (regarding quitclaim deeds); *see also Ziegler v. Simmons*, 353 Mich. 432, 91 N.W.2d 819, 822 (Mich. 1958) (same). Under Mich. Comp. Laws § 565.152, which formalizes the requirements of quitclaim deeds, a quitclaim deed must announce itself as such, effectively denying that there is any warranty. In contrast to an avowed denial, an "express or implicit statement" that the grantor has title is sufficient to pass after-acquired title. *Richards*, 726 N.W.2d at 782 (emphasis added). Indeed, some older Michigan Supreme Court cases have held that the doctrine of after-acquired title applies to non-quitclaim deeds that lack an explicit covenant of warranty. *Klever v. Klever*, 333 Mich. 179, 52 N.W.2d 653, 659-60 (Mich. 1952) (citing *Pendill v. Marquette Cnty. Agric. Soc'y*, 95 Mich. 491, 55 N.W. 384, 385 (Mich. 1893)); *see also Richards*, 726 N.W.2d at 781-82. There being no quitclaim-like denial of warranty in the mortgage assignments in this case, the after-acquired title doctrine applies.

Consistent with the principles of estoppel, this rule protects the interests of the parties who in good faith paid valuable consideration for the assignment of the mortgage. All that Michigan law necessarily requires with respect to the "record chain of title" is that all interim assignments be recorded prior to the date of sale. *Kim v. JPMorgan Chase, N.A.*, 493 Mich. 98, 825 N.W.2d 329, 332 (Mich. 2012); *see also Sobh v. Bank of Am., NA*, No. 308441, 2013 Mich. App. LEXIS 993, 2013 WL 2460022, at *3 (Mich. Ct. App. June 6, 2013). The record-chain-of-title requirement serves as an assurance that the foreclosing party rightfully holds the mortgage. ***There appears to be no compelling reason to require that the recordings be chronological before the foreclosure can proceed, as long as the***

chain is complete and the rightful holder of the mortgage can be discerned from the public record.

Bambas, 577 F. App'x 461 at 466-68. In short, the after-acquired title doctrine cures irregularities such as the one at issue in this case when the chain of title is clearly intended.

Moreover, title standards published by various states recognize that anomalies such as errors in dates, amounts, books, pages, etc., are insufficient to void the assignment. *See New Hampshire Bar Association Title Examination Standards* at p. 28 (2016) ("An instrument is sufficient as an assignment, discharge or partial discharge of a mortgage notwithstanding errors in dates, amounts, book and page of record, property descriptions, names and positions of parties, if, from circumstances of record, it can be inferred with reasonable certainty that assignment or discharge was intended."); *Mississippi Title Examination Standards* at pp. 17-4 to 17-5 (First. Ed. 2019) ("An instrument is sufficient as an assignment or release, notwithstanding typographical or other minor errors in dates, amounts, book and page or instrument number of record, or the names and positions of parties, if said assignments or releases give enough correct data to identify the instruments being assigned or released with reasonable certainty."). If title examiners nationwide rely upon standards such as these, a different standard should not be enunciated for the Plaintiff in this case. Nowhere in any of the documents filed does the Petitioner allege that the real estate is not encumbered by a valid existing deed of trust. Instead, Petitioner recognizes that the deed of trust is valid but mistakenly believes it is held by EFC Mortgage in Plaintiff's Motion for Summary Judgment writing, "EFC Mortgage continues to hold the deed of trust." Plaintiff's MSJ at p. 4. This assertion is erroneous. Under the after-acquired title doctrine, EFC Mortgage is estopped from claiming ownership in the Russell DOT. As a matter of law, upon execution of the January 16, 2000 Assignment from Equity South to EFC Mortgage, Life Bank was the beneficial owner of the

Russell DOT as a matter of law. Subsequent recorded assignments reveal that the present beneficial owner of the Russell DOT is Defendant NPML.

Petitioner's argument that the after acquired title doctrine only applies to deeds is without merit. The after-acquired title doctrine applies to "interests" in land including mortgages, easements, leases, and other interests in property such as liens. *See* 23 Am Jur 2d *Deeds* § 278 ("The "after-acquired title doctrine" addresses a situation in which a person purports to convey to another an interest in property that person does not possess and then, after actually obtaining that interest, seeks to avoid the consequences of the conveyance on the ground that he or she had no interest to convey in the first place."); *BCML Holding LLC v. Wilmington Tr., N.A.*, 201 So. 3d 109, 112 (Fla. Dist. Ct. App. 2015) ("The doctrine of after-acquired title applies to mortgages."); *Weber v. Laidler*, 26 Wash. 144, 66 P. 400, 401 (Wash.1901) ("The principle is too well established to call for discussion that, ordinarily, if one conveys or mortgages land to which he has then no title, his after-acquired title will inure to the benefit of his grantee or mortgagee."). "An "assignment" creates an interest in the property." 11 *Thompson on Real Property*, Thomas Editions § 96.12 (2021). Moreover, the West Virginia Supreme Court of Appeals has previously found that "[a]n assignment of a mortgage, as contradistinguished from an assignment of a note or bond mentioned, described and secured in it, is a conveyance of real estate or a contract for such conveyance." *Citizens Nat'l. Bank of Connellsville v. Harrison-Doddridge Coal & Coke Co.*, Syl pt. 5, 89 W.Va. 659, 109 S.E.892 (1921). Thus, the assignment at issue in this case properly falls within the purview of the after-acquired title doctrine and the Circuit Court did not err in applying it in this case.

The Circuit Court correctly rejected the Petitioner's request to ignore the law of the State of West Virginia, his own failure to have a title search, and his predecessor's default. Petitioner sought a forfeiture over a date purportedly being out of order nearly twenty years ago. In that West

Virginia law abhors both forfeitures, *see McCutcheon v. Enon Oil & Gas Co.*, 102 W. Va. 345, 353, 135 S.E. 238, 241 (1926) ("Equity abhors a forfeiture"), and windfalls, s*ee Heldreth v. Rahimian*, 219 W. Va. 462, 471, 637 S.E.2d 359, 368 (2006) ("Yet the very nature of recovery . . . is designed to prevent any such "windfall.""), the Circuit Court was correct in determining that the after-acquired title doctrine cured any irregularity in the assignments between Equity South, EFC Mortgage, and Life Bank.

CONCLUSION

The Circuit Court was correct in granting summary judgment to the Respondent. Accordingly, this Court should affirm the judgment of the Circuit Court and award the fund presently in Marshall County, West Virginia to the Respondent.

Respectfully Submitted,

NPML MORTGAGE ACQUISITION LLC,

By Counsel

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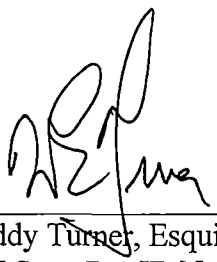
CERTIFICATE OF SERVICE

I, Buddy Turner, do hereby certify that I served the foregoing "**RESPONDENT'S BRIEF**" upon the following, by mailing a copy thereof to each by United States Postal Service or by other indicated express delivery service, postage prepaid, this 6th day of April, 2021.

By U.S. Mail
Edmund J. Rollo, Esq.
44 High Street
Morgantown, WV 26505

Counsel for Petitioner



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