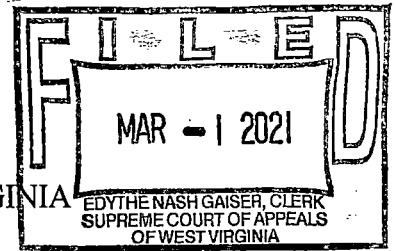


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

CLETE PAVONE,
Plaintiff Below, Petitioner

v.

APPEAL NO.: 20-0970
(Circuit Court of Monongalia County
Case No. 19-C-110)

NPML MORTGAGE ACQUISITIONS, LLC,
a foreign corporation,
Defendant Below, Respondent

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PETITIONER'S
PETITION FOR APPEAL

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**I. ASSIGNMENTS OF ERROR
AND RULINGS OF LOWER COURT**

Assignment of Error: The lower court erred and abused its discretion when it denied Petitioner Clete Pavone’s *Motion for Summary Judgment* and granted Respondent NPML Mortgage Acquisitions, LLC’s (hereafter “NPML”), *Motion for Summary Judgment* by the lower court’s *Order Granting Defendant NPML Mortgage Acquisitions, LLC, Summary Judgment and Order Denying Plaintiff Clete Pavone Summary Judgment* entered October 27, 2020 (hereafter the “Order”). (Appendix at 84).

Ruling of Lower Court: The issue in this appeal is whether the doctrine of "after-acquired title" applies to assignments of deeds of trust. In its *Order* the lower court found, generally, that the doctrine of “after-acquired title” applied to the assignment of deeds of trust. Mr. Pavone’s argument before the lower court and his argument herein is, generally, that in West Virginia one may only assign the interest that it possesses at the time of the assignment. In other words, the doctrine of “after-acquired title” applies only to title (or ownership) of real property, and it does not apply to assignments of deeds of trust because such assignments do not involve title (or ownership) of real property.

II STATEMENT OF THE CASE

Brief Description of the Facts¹

A brief summary of the case is as follows:

As noted above, the issue in this appeal is whether the doctrine of "after-acquired title" applies to assignments of deeds of trust.

Mr. Pavone purchased real property in Monongalia County. Unbeknownst to Mr. Pavone, at the time of his purchase of the real estate, the real estate was subject to an unreleased deed of trust related to an earlier loan obtained by the seller to Mr. Pavone. Further, this deed of trust had purportedly been assigned from one company to another to another, ultimately purportedly being assigned to NPML.

¹ Specific reference to the Appendix will be made in the next subsection.

Because the said seller had defaulted on the said loan, NPML attempted to foreclose on Mr. Pavone's real estate pursuant to NPML's purported assigned rights in the deed of trust.

However, the chain of assignments from the original deed of trust to NPML contained a fatal "break" in the chain. Specifically, one of the assignors attempted to assign its interest in the deed of trust BEFORE it had actually been assigned an interest in the deed of trust. By way of example, Mortgage Company B attempted to assign its interest in a deed of trust to Mortgage Company C on January 15, 2021. However, on this date Mortgage Company B had never been assigned the deed of trust. In fact, Mortgage Company A did not assign its interest in the deed of trust to Mortgage Company B until February 15, 2021, a month later. In this scenario, Mortgage Company B attempted to assign an interest in the deed of trust on January 15, 2021 – BEFORE it had actually been assigned the deed of trust, which did not occur until February 15, 2021.

The underlying facts -- and specifically the pertinent assignments related to the deed of trust related to Mr. Pavone's real property -- were not in dispute, and each party filed *Motions for Summary Judgment*. (Appendix at 4 and 44, respectively). Basically, Mr. Pavone argued that the law of assignments provides that one may only assign the interest that one owns and possesses at the time of the assignment. Using the example above, since Mortgage Company B had not been assigned an interest in the deed of trust at the time it attempted to assign its interest to Mortgage Company C, there was no assignment from Mortgage Company B to Mortgage Company C. NPML argued that the doctrine of after-acquired title cured the break in assignments and, using the example above, that Mortgage Company B's interest in the deed of trust was effectively assigned to Mortgage Company C as soon as Mortgage Company B acquired an interest in the deed of trust from Mortgage Company A a month later.

The lower court's said *Order* held in favor of NPML and against Mr. Pavone and found that the doctrine of “after-acquired title” cured this break in the chain of assignments. (Appendix at 84). In effect, the lower court ruled that NPML had been assigned an interest in the deed of trust in question, clearing the way for NPML to foreclose on Mr. Pavone’s real property.

A more detailed summary description of the pertinent facts is as follows:

Patrick Russell purchased real property in Granville by deed dated June 25, 1999. About six months later on December 20, 1999, Mr. Russell obtained a \$20,000 loan from Equity South Mortgage, LLC (hereafter “Equity South Mortgage”). This \$20,000 loan was secured by a deed of trust in Equity South Mortgage’s favor on Mr. Russell’s property.

Mr. Pavone purchased the property from Mr. Russell on October 21, 2018.

Between the time that Mr. Russell obtained the said \$20,000 loan from Equity South Mortgage in 1999 and Mr. Pavone’s purchase of the real property in 2018, Equity South Mortgage’s deed of trust was purported assigned time and time again, with NPML being the last purported assignee. However, there was a fatal flaw with one of the first purported assignments, meaning that NPML had never actually received any assigned interest in the original deed of trust.

As a result of Mr. Russell’s default on the \$20,000 loan, after Mr. Pavone’s had purchased the real property, NPML attempted to foreclose on the property even though NPML had never been assigned the underlying deed of trust. The underlying lawsuit before the law court ensued.

Detailed Description of the Undisputed Facts

The pertinent facts are as follows:

By deed dated June 25, 1999, Patrick Russell purchased real property located at 320 Price Street, Granville, Monongalia County, West Virginia.

On December 20, 1999, Mr. Russell obtained a \$20,000 loan from Equity South Mortgage, LLC (hereafter "Equity South Mortgage"). This \$20,000 loan was secured by a deed of trust on Mr. Russell's real property. (Appendix at 13). It is without dispute that Mr. Russell defaulted on this \$20,000 loan well-prior to Mr. Pavone's purchase of the real property in question.

By Warranty Deed dated October 21, 2018, Mr. Russell conveyed the property to Mr. Pavone. (Appendix at 40). Mr. Pavone was not represented by counsel during this transaction.

As discussed briefly above, Equity South Mortgage's original deed of trust was purportedly assigned many, many times. In fact, there are actually two independent chains of assignments of record in the Office of the Clerk of the County Clerk of Monongalia County, West Virginia, both of which originated from the original Equity South Mortgage deed of trust. The First Chain of Assignments is described below. The Second Chain of Assignments is also described below. The First Chain of Assignments had a clear and unequivocal "break" in the chain. This "break," while fatal to the chain of assignments, is not at issue here. It is without dispute, and NPML will concede, that NPML was never assigned the said deed of trust by virtue of this First Chain of Assignments.

The Second Chain of Assignments consists of assignments (some of which were included in the First Chain of Assignment) recorded in the said Clerk's County in 2019. As you will see,

while both the First and Second Chains of Assignments end with NPML as the purported final assignee, NPML relies only on the Second Chain of Assignments for its contention that it was properly assigned the said deed of trust on Mr. Pavone's real property.

The First Chain of Assignments

For the sake of a complete understanding of the underlying facts, the First Chain of Assignments is as follows:

1. Original Deed of Trust

From: **Russell Patrick**

To: **Equity South Mortgage, LLC, (Delaware)**
Limited Liability Company
2604 East 63rd St. Lower Level
Brooklyn, NY 11234

Dated: December 20, 1999
Recorded: December 29, 1999
Trust Deed Book 963 at Page 690.

(Appendix at 13).

2. First "Assignment" of Deed of Trust

From: **EFC Mortgage Corporation,**
a California corporation

To: **Life Bank**

Dated: January 7, 2000
Recorded: June 4, 2001
Trust Deed Book 65 at Page 365.

(Appendix at 25).

3. Second "Assignment" of Deed of Trust

From: **Life Bank**

To: **Franklin Credit Management Corp**
6 Harrison St. NY, NY 10013

Dated: August 15, 2005
Recorded: August 22, 2005
Trust Deed Book 89 at Page 287

(Appendix at 26).

4. Third "Assignment" of Deed of Trust

From: **Franklin Credit Management Corp**
6 Harrison St. NY, NY 10013

To: **Deutsche Bank Nat'l Trust Co.**, as Trustee for Franklin Credit Trust
Series I
1761 East St. Andrews Place
Santa Ana, CA 92705

Dated: February 4, 2009
Recorded: February 9, 2009
Trust Deed Book 103 at Page 676

(Appendix at 27).

5. Fourth "Assignment" of Deed of Trust

From: **Thor Real Estate, LLC**, its successors and assigns
c/o Home Servicing, LLC
8641 United Plaza Blvd., Ste 302
Baton Rouge, LA 70809

To: **JHJR Investments LLC**, its successors and assigns
PO Box 70
Port Neches, Texas 77651

Dated: August 14, 2012
Recorded: August 23, 2012
Trust Deed Book 116 at Page 476

(Appendix at 28).

6. Fifth "Assignment" of Deed of Trust

From: **JHJR Investments LLC**, its successors and assigns
PO Box 70
Port Neches, Texas 77651

To: **NPML Mortgage Acquisition, LLC**, its successors and assigns
1946 Westholme Avenue
Los Angeles, CA 90025

Dated: July 15, 2013
Recorded: November 6, 2013
Trust Deed Book 120 at Page 612

(Appendix at 29).

As can be seen above, Equity South Mortgage never assigned its interest in the deed of trust in the First Chain of Assignments. If one were to only review the First Chain of Assignments, one would conclude that Equity South Mortgage still possessed an interest in the said deed of trust.

The Second Chain of Assignments

The Second Chain of Assignments is as follows:

1. Original Deed of Trust

From: **Russell Patrick**

To: **Equity South Mortgage, LLC, (Delaware)**
Limited Liability Company
2604 East 63rd St. Lower Level
Brooklyn, NY 11234

Dated: December 20, 1999
Recorded: December 29, 1999
Trust Deed Book 963 at Page 690

(Appendix at 13.)

2. First “Assignment” of Deed of Trust

From: **Equity South Mortgage, LLC, (Delaware)**
Limited Liability Company
2604 East 63rd St. Lower Level
Brooklyn, NY 11234

To: **EFC Mortgage Corporation,**
a California corporation

Dated: January 16, 2000
Recorded: February 7, 2019
Trust Deed Book 139 at Page 140

(Appendix at 34).

3. Second “Assignment” of Deed of Trust

From: **EFC Mortgage Corporation,**
a California corporation

To: **Life Bank**

Dated: January 7, 2000
Recorded: February 11, 2019
Trust Deed Book 139 at Page 351

(Appendix at 35).

4. Third “Assignment” of Deed of Trust

From: **Life Bank**

To: **Franklin Credit Management Corp**
6 Harrison St. NY, NY 10013

Dated: August 15, 2005
Recorded: February 12, 2019
Trust Deed Book 139 at Page 360

(Appendix at 36).

5. Fourth “Assignment” of Deed of Trust

From: **Franklin Credit Management Corp**
6 Harrison St. NY, NY 10013

To: **Deutsche Bank Nat’l Trust Co.**, as Trustee for Franklin Credit Trust
Series I
1761 East St. Andrews Place
Santa Ana, CA 92705

Dated: February 4, 2009
Recorded: February 13, 2019
Trust Deed Book 139 at Page 361

(Appendix at 37).

6. Fifth “Assignment” of Deed of Trust

From: **Deutsche Bank Nat’l Trust Co.**, as Trustee for Franklin Credit Trust
Series I
1761 East St. Andrews Place
Santa Ana, CA 92705

To: **NPML Mortgage Acquisition, LLC**, its successors and assigns
1946 Westholme Avenue
Los Angeles, CA 90025

Dated: January 3, 2019
Recorded: February 14, 2019
Trust Deed Book 139 at Page 376

(Appendix at 38).

As noted above, NPML asserts that it was a proper assignee to the deed of trust in question based upon the Second Chain of Assignments.

Please note from above that after Equity South Mortgage obtained the original interest in the deed of trust, Equity South Mortgage then assigned its interest in the deed of trust to EFC Mortgage Corporation (hereafter “EFC Mortgage”) by assignment document dated January 16,

2000.

In other words, EFC Mortgage (the first assignee) first possessed an interest in the deed of trust on January 16, 2000.

Further, as shown above, EFC Mortgage attempted to assign its interest in the deed of trust to Life Bank by assignment document dated January 7, 2000 – nine (9) days BEFORE it had been assigned the deed of trust from Equity South Mortgage.

In other words, as of January 7, 2000, EFC Mortgage had no interest in the deed of trust. Having no interest in the deed of trust to convey as of January 7, 2000, EFC Mortgage's assignment document dated January 7, 2000, assigned nothing to Life Bank. This is the fatal break in the chain of assignments at issue in this matter. As it stands, the deed of trust remains with EFC Mortgage as it has never assigned its interest in the deed of trust to anyone after it first acquired its interest in the deed of trust on January 16, 2000.

III. SUMMARY OF ARGUMENT

Standard of review

Syllabus Points 1 and 2 of *Smith v. Chestnut Ridge Storage, LLC* (W. Va. 2021)

provides:

1. "This Court reviews de novo the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court." Syl. Pt. 1, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002).
2. "A circuit court's entry of summary judgment is reviewed de novo." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral Argument is not necessary pursuant to the criteria in Rule 18 of the West Virginia Rules of Appellate Procedure.

IV. ARGUMENT

Pertinent Law

As noted above, neither the First Chain of Assignments nor the Second Chain of Assignments served to assign NPML any interest in the deed of trust because of the fatal flaws in both Chains of Assignments discussed above.

It is axiomatic that an assignee can only be assigned the interest possessed by the assignor at the time of the assignment. "An assignee stands in the shoes of the assignor and ordinarily obtains only the rights possessed by the assignor at the time of the assignment, and no more." 6A C.J.S. Assignments § 88 (1975).²

In the very recent case of *TD Auto Fin. LLC v. Reynolds* (W. Va. 2020) the Court held:

As is universally-recognized:

[A]n assignee acquires no greater right than that possessed by his assignor, and he stands in his shoes; and an assignee takes subject to all defenses and all equities which could have been set up against an instrument in the hands of an assignor at the time of the assignment.

Syl. Pt. 10, *Lightner v. Lightner*, 146 W.Va. 1024, 124 S.E.2d 355 (1962).

In *Aldridge v. Highland Ins. Co.* (W. Va. 2016), the Court held that an assignee "steps

² See *Song v. Tappa* (Cal. App., 2016), *Smith v. Cumberland Group, Ltd.*, 687 A.2d 1167 (Pa. Super. Ct., 1997), *Bauer v. Blomfield Company/Holden Joint Venture*, 849 P.2d 1365 (Alaska, 1993), *United States v. American Nat'l Bank*, 443 F.Supp. 167 (N.D.Ill.1977), *Massey-Ferguson Credit Corp. v. Brown*, 567 P.2d 440 (Mont. 1977), *Bauer v. Blomfield Company/Holden Joint Venture*, 849 P.2d 1365 (Alaska, 1993).

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." *Cook v. E. Gas & Fuel Assoc.*, 129 W.Va. 146, 155, 39 S.E.2d 321, 326 (1946).

Other States have held the same:

In *Hobart v. Hale*, 477 N.E.2d 740 (Ill. App. 1985), the Court held:

In any event, the assignee can obtain no greater right or interest than that possessed by the assignor, inasmuch as one cannot convey that which he does not have.

In *Todd Hollow Apartments At Deer Mountain, LP v. Homes At Deer Mountain Homeowners Ass'n, Inc.*, 2015 UT App 190 (Utah App. 2015), the Court held:

It is well established that an assignor cannot assign rights he or she does not have.

In *Camco Int'l, Inc. v. Perry R. Bass, Inc.*, 926 S.W.2d 632, 636 (Tex.App.-Fort Worth 1996, writ denied), the Court held: "One cannot convey a right which one does not have."

The doctrine of "after-acquired title" applies when a person *conveys property by deed* to a second person but has no title to that property, and the conveyer subsequently acquires title to the property. In such a case, the doctrine of "after-acquired title" would give title to the property to the second person. For instance, "A" conveys property by deed to "B" on Monday, even though "A" did not have title at the time of the conveyance. "A" acquires title to the property on Tuesday. Under the doctrine of "after-acquired title" "B" would have title to property on Tuesday, the day "A" acquired title.

Recall above that after Equity South Mortgage obtained the original interest in the deed of trust, Equity South Mortgage assigned its interest in the deed of trust to EFC Mortgage by assignment document dated January 16, 2000.

In other words, EFC Mortgage first possessed an interest in the deed of trust on January 16, 2000.

Further, as shown above, EFC Mortgage attempted to assign its interest in the deed of trust to Life Bank by assignment document dated January 7, 2000 – nine (9) days BEFORE EFC Mortgage had actually been assigned an interest in the deed of trust.

As of January 7, 2000, EFC Mortgage had acquired no interest in the deed of trust. Having no interest in the deed of trust to convey as of January 7, 2000, EFC Mortgage's assignment document dated January 7, 2000, assigned nothing to Life Bank. This is a fatal break in the Second Chain of Assignments. As a result, the deed of trust remains with EFC Mortgage as it has never assigned its interest in the deed of trust since it first acquired its interest on January 16, 2000.

It is anticipated that NPML will argue that under the doctrine of "after-acquired title" that Life Bank obtained an interest in the deed trust on January 16, 2000, by virtue of Equity South Mortgage's assignment to EFC Mortgage by assignment document on that date even though EFC Mortgage had not acquired an interest in the deed of trust when it executed its assignment document in favor of Life Bank on January 7, 2000.

This "after-acquired title" argument fails for two reasons reason. First, the law of assignments in West Virginia makes it clear that one may only assign an interest that it possesses at the time of the assignment. Second, the assignments in question do not purport to assign "title" to the underlying real property. The assignments in question only purport to assign the mortgagor's interest in the deed of trust. The mortgagor's interest is not "title," but instead it is a beneficial interest under the Deed of Trust. This is a very important distinction.

Let's look at how a deed of trust works. A deed of trust involves three parties: 1. The borrower; 2. The lender; and 3. The trustee. The borrower conveys land to a trustee who holds title in trust for a lender as security for credit or a loan to the borrower.

So in a deed of trust the TRUSTEE has title to the property, which the trustee holds in trust. The lender does not have title to the property. Since the lender does not have title to the real property, the lender can never assign title to the real property. Recall, Equity South Mortgage was the original lender and it had an interest in the original deed of trust. However, Equity South Mortgage never had title to the real property.

Could the doctrine of "after-acquired title" apply to a situation where the TRUSTEE acquired title by a later-dated instrument? Yes, because the doctrine of "after-acquired title" pertains to issues of TITLE to the real property. Again, the doctrine of "after-acquired title" applies only to issues of title, not issues of assignments. Again, in West Virginia the law of assignments is clear.

NPML will not argue that it has title or ownership of the real property under the doctrine of "after-acquired title." Instead, NPML will attempt to use the doctrine to "after acquired title" to completely abrogate the well-established West Virginia law of assignments.

For instance, in its *Motion for Summary Judgment* before the lower court, NPML argued:

"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."

(Appendix at 44, 50).

So, in this case, who is the grantee that would benefit from the doctrine of "after-acquired title"? The trustee, and certainly not any of the parties to the assignments in question, because

the assignments do not purport to transfer title.

Is NPML the trustee under the deed of trust? No. NPML is only the purported assignee of the lender's beneficial interest in the deed of trust in the defective Second Chain of Assignments of the mortgagor's (that is, Equity South Mortgage's) interest in the original deed of trust.

In its *Motion for Summary Judgment* before the lower court NPML argued:

“[T]he after-acquired doctrine states that the January 16, 2000 assignment from Equity South to EFC Mortgage Corporation, who previously attempted to assign the beneficial interest in the Russell DOT to Life Bank which EFC Mortgage Corporation did not in fact own, inures automatically to the benefit of Life Bank.”

(Appendix 44, 50-51).

This is incorrect. Let's break this down: The doctrine of “after-acquired title” applies to title or ownership. As NPML correctly notes, Equity South Mortgage had only a “beneficial interest” in the original deed of trust. Equity South Mortgage did not and never had title to the real estate subject to the original deed of trust. The trustee had title under the original deed of trust. The doctrine of “after-acquired title” does not apply to “beneficial interests,” it only applies to situations where title or ownership of real estate is later acquired.

Finally, there appears to be no West Virginia case law or statutes that apply the doctrine of “after-acquired title” to assignments. The law of assignments, however, is clear.

In summary, NPML was never assigned the deed of trust to Mr. Pavone's property and the lower court erred in so finding.

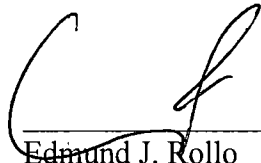
V. CONCLUSION

For the reasons stated herein, Petitioner Clete Pavone respectfully requests that this

Honorable Court find that the lower court committed reversible error when it denied Petitioner Clete Pavone's *Motion for Summary Judgment* and granted Respondent NPML Mortgage Acquisitions, LLC's *Motion for Summary Judgment* by the lower court's *Order Granting Defendant NPML Mortgage Acquisitions, LLC, Summary Judgment and Order Denying Plaintiff Clete Pavone Summary Judgment* entered October 27, 2020, and afford Petitioner Clete Pavone such other relief as this Honorable Court deems fair and just.

CLETE PAVONE,
Petitioner,

BY COUNSEL

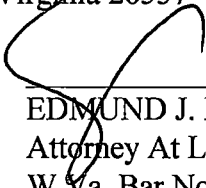


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CERTIFICATE OF SERVICE

I, Edmund J. Rollo, counsel for Petitioner Clete Pavone, do hereby certify that on the 27th day of February, 2021, I have served a copy of the foregoing PETITION FOR APPEAL upon the following through the United States Mail, postage pre-paid, in an envelope addressed as follows:

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