

STATE OF MICHIGAN  
IN THE SUPREME COURT

CITY OF DEARBORN,

Plaintiff/Counter-Defendant/Appellee,

v

BANK OF AMERICA, N.A., as successor-in-  
interest to STANDARD FEDERAL BANK, N.A.,

Defendant/Counter-Defendant/Appellee,  
and

WEST DEARBORN PARTNERS, LLC,

Defendant/Counter-Plaintiff/Appellant.

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SC No. 159691  
COA No. 339704  
LC No. 15-012788-CH  
(Wayne Circuit Court)

**REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL**  
**PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE**

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**STATEMENT OF QUESTION PRESENTED**

Appellant West Dearborn Partners, LLC (“Appellant” or “West Dearborn”) refers this Court to the corresponding section in its Application for Leave to Appeal, page vi.

**STATEMENT IDENTIFYING ORDER APPEALED  
AND GROUNDS FOR SUPREME COURT REVIEW**

Appellant refers this Court to the corresponding section in its Application for Leave to Appeal, pages viii-x.

## STATEMENT OF FACTS

Appellant refers this Court to the corresponding section in its Application for Leave to Appeal, pages 1-9.

## STANDARD OF REVIEW AND SUPPORTING AUTHORITY

Appellant refers this Court to the corresponding sections in its Application for Leave to Appeal, pages 10, 16, and 23.

## ARGUMENT I

**THE COURT OF APPEALS ERRED WHEN AFFIRMING SUMMARY DISPOSITION IN FAVOR OF THE CITY OF DEARBORN BY RULING THAT WEST DEARBORN'S RECORDED MORTGAGE INTEREST DID NOT SURVIVE THE BANKRUPTCY ORDER, PRESERVING "ALL LIENS, INTERESTS, RIGHTS AND OBLIGATIONS OF RECORD," WHEN THE MORTGAGE WAS PREVIOUSLY RECORDED SIX YEARS EARLIER.**

In its Answer to Appellant's Application for Leave to Appeal ("Answer"), the City of Dearborn ("City") fails to distinguish West Dearborn's case law authority of *Prime Financial Services, LLC v Vinton*, 279 Mich App 245, 257; 761 NW2d 694 (2008) and *Coventry Park Homes Condo Ass'n v Federal Nat'l Mtg Ass'n*, 298 Mich App 252, 256-257; 827 NW2d 379 (2002). The City contends that these cases are inapplicable because neither involved a bankruptcy court order limiting the survival of interests "of record" and each involved priority disputes. This analysis misses the mark. If West Dearborn's assignment interest follows the mortgage, as established by these two cases, then the Bankruptcy Order cannot be read to eliminate West Dearborn's mortgage interest. The City readily agrees that the Bankruptcy Order preserved the mortgage, since it was of record. If the assignment follows the mortgage as a matter of law, then it is academic whether the assignment was recorded or not. The City is hard-pressed to argue otherwise, especially given its unclean hands with respect to the estoppel argument made in Argument II.

It is telling that the City does not address *Butner v United States*, 440 US 48 (1979), by which bankruptcy courts follow the law of the state in which real estate is located when dealing with real estate

issues. See Application, page 14. Under the case law previously discussed, the assignment follows the mortgage. To read the Bankruptcy Court Order contrary to Michigan law embedded in the Order is improper. This is especially true here. The City had actual notice of the assignment to West Dearborn and admitted to the Bankruptcy Court that West Dearborn Partners was the mortgagee and was the holder of both the note and the mortgage when obtaining the Bankruptcy Court Order. The City is unable to explain both its representation to the Bankruptcy Court resulting in the Bankruptcy Court Order which it claims eliminates West Dearborn rights, and its deafening silence when the Bankruptcy Court judge noted during the hearing that the mortgagee – West Dearborn – could enforce its remedy and that the proposed order submitted by the City “protects the rights of anybody else with an interest in the property.” (Exhibit K, p 37).

## ARGUMENT II

### **THE COURT OF APPEALS ERRED BY REJECTING WEST DEARBORN'S EQUITABLE ARGUMENTS, WHERE THE CITY REVERSED ITS POSITION IN THE BANKRUPTCY COURT REGARDING WEST DEARBORN'S INTEREST AND RECEIVED A WINDFALL AFTER PURCHASING PARCEL C FOR \$1.00 WITH ACTUAL KNOWLEDGE OF WEST DEARBORN'S INTEREST.**

Throughout this case, the City has pointed the finger at West Dearborn for its failure to “timely” file the relevant assignment. Most pronounced is the City’s assertion that West Dearborn’s failure to record the assignment in response to the City’s August 2011 Bankruptcy Court motion to abandon the property somehow justifies the City’s subsequent assurances to the Bankruptcy Court that West Dearborn’s interests would be protected through the Order of Abandonment. The City’s argument is meritless and the Court of Appeals’ refusal to apply judicial estoppel is erroneous.

Here is a sequence of events which is fully supported by the record:

On or about July 12, 2011, the bankruptcy trustee sends a proposed motion of the trustee to sell Parcel C for \$6,000, “subject [to] all existing incumbencies, including the \$2.1M mortgage.” Bankruptcy

counsel for the City wishes to verify the existence of the mortgage and expresses a possible interest in purchasing the mortgage and the note from Bank of America. (**Exhibit H**, email of July 12, 2011).

On the following day, July 13, 2011, bankruptcy counsel for the City is advised that the note and mortgage had been purchased by West Dearborn, and further advised that West Dearborn is represented by Scott Lites at Plunkett Cooney. (**Exhibit H**, email of July 13, 2011).

*By this point, the City has actual notice of West Dearborn's assignment interest.*

On August 10, 2011, West Dearborn files its limited objection to the trustee's Motion for Order Approving Sale of Real Property (**Exhibit G**), in which it advised that it is the assignee of Bank of America's interest in the mortgage on the subject property (¶ 3), and further advises:

"West Dearborn Partners, LLC wishes for any of Order of Sale to specifically provide that such sale of property is subject to not only the claims, liens, and interest of record described in paragraph 9 of the Motion, but also subject to the interest of Bank of America now held by West Dearborn Partners, LLC as assignee of Bank of America, including but not limited to the waived right of redemption."

*Id.* at ¶ 5.

On August 29, 2011, the City files its Motion for Entry of an Order Directing the Trustee to Abandon Real Property Located at 22271 West Village Drive, Dearborn, Michigan. (**Exhibit EE**, U.S. Bank. Ct Docket Sheet, Case No. 10-66748-mbm, No. 65).<sup>1</sup> Attached to that motion is the proposed order of abandonment, subsequently entered by the Bankruptcy Court (**Exhibit I**).

On October 4, 2018, the City through its bankruptcy counsel, Robert D. Gordon, appears in the Bankruptcy Court and explains to the Bankruptcy Court that its proposed order protects the interest of West Dearborn Partners:

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<sup>1</sup> This Court can judicially notice the Bankruptcy Court docket entries under MRE 201(b)(2). The filing date and attachments to the document are not subject to reasonable dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, namely the Bankruptcy Court filings. Additionally, judicial notice may be taken at any stage of the proceedings. MRE 201(e).

“The other thing I want to highlight, Your Honor, is the proposed order here. Our proposed order states very clearly in paragraph 2, among other things, that the abandonment - - first of all, it contemplates a quit claim deed, and it says that such abandonment shall impair and the property shall remain subject to all claims, liens, interest, rights, and obligations of record. The West Dearborn Partners, the mortgagee - - the holder of the mortgage and the note on the property, has indicated that it wants to make sure that the property is subject to its rights and interests. This order already does that. So the rights of the holder of the mortgage are not prejudiced in any way by the abandonment here, and no other party other than the trustee has objected to the abandonment.”

(**Exhibit K**, 10/04/2011 hearing transcript) (emphasis supplied).

In granting the motion and approving the City’s proffered order requiring abandonment, the Bankruptcy Court specifically notes that:

“[t]he mortgagee in this case certainly can enforce its remedies. The order that was proposed and attached to the motion protects the rights of anybody else with an interest in the property.”

(*Id.* at 37). Counsel for the City remains silent to the Bankruptcy Court’s statement.

On November 5, 2011, the Bankruptcy Court formally enters the Order of Abandonment (**Exhibit I**). It follows the same terms found in the proposed order proffered by the City, together with the City’s assurances by counsel that the interests of West Dearborn were protected.

The City’s assurances given to the Bankruptcy Court and West Dearborn, and the Bankruptcy Court’s finding that all interest would be protected, were not to be the case. Instead, the City reversed gears in state court when seeking to quiet title.

As reflected in the transcript on the motion for summary disposition, the City argued that at the Bankruptcy Court hearing on October 4, 2011, “West Dearborn Partners showed up but didn’t say a word.” (**Exhibit Y**, 5/26/17 transcript on the state court motion for summary disposition, p 8). Then, the City disclaims its earlier Bankruptcy Court statement that the interests of West Dearborn will be protected (perhaps that is why West Dearborn “didn’t say a word” at that hearing), and convinces the state court judge that:

“The only interest of record would be that the property would be passed to Dearborn only subject to interest of record, even though she [state court judge] had been advised that West Dearborn was claiming interest that was not of record.”

(*Id.*).

And the City’s position in this regard was successful, as evidenced by Judge Hughes’ ruling from the bench, found at page 49 of that transcript:

“[THE COURT] The deficiencies in the assignment as noted by the City of Dearborn, are concerning. However, again, the Court need not make a ruling on the validity of the assignment because any interest held by West Dearborn Partners was extinguished by the bankruptcy court’s order due to WTP’s continued failure to correct the deficiencies and promptly record this assignment, their assignment.”

*Id.* (Emphasis supplied).

The hallmark of judicial estoppel is the successful use in one court forum of a position that was contrary to that taken successfully in another court forum. See generally *Ford Motor Company v Public Service Com’n*, 221 Mich App 370; 562 NW2d 224 (1997). This Court has found that judicial estoppel applies with respect to inconsistent positions taken with real estate documents. *Aiken v Gonser*, 342 Mich 29; 69 NW2d 180 (1955). Judicial estoppel prevents a party from “playing fast and loose” with the courts and protects the essential integrity of the judicial and administrative processes. *Michigan Gas Utilities v Public Service Commission*, 200 Mich App 576; 505 NW2d 27 (1993). Clearly applicable here is equitable estoppel, which precludes a party which has successfully maintained one position on factual issues in a lawsuit from taking an inconsistent position in a subsequent lawsuit on the same factual issues. See e.g. *Burgess v Holder*, 362 Mich 53; 106 NW2d 379 (1960). Each type of estoppel applies here.

The City’s position that West Dearborn, through its counsel, did not object in the Bankruptcy Court to the terms of the Order is especially troublesome and supportive of application of both judicial and equitable estoppel. The City’s attorney obviously drafted the order to be entered and, knowing full-well of the terms of that order, made the representations to the Bankruptcy Court that the interests of West Dearborn would be protected. He knew at that point that West Dearborn had an assignment of the

mortgage and the note. To later distinguish between West Dearborn's interests that are recorded from those which are not recorded – the position taken in the state court to obtain the property free and clear of West Dearborn's mortgage – presents a quintessential case for estoppel. Indeed, in its bankruptcy objection, West Dearborn requested protection not only of interest "of record" but also interest of Bank of America "now held by West Dearborn Partners, LLC as assignee of Bank of America..." **Exhibit G**, ¶ 5.

The City seeks to excuse its inconsistent behavior by reference to a delay in recording the assignment. Assuming the Order of Abandonment was effective as of the date of its entry, October 8, 2015, (**Exhibit I**), what steps West Dearborn took or did not take with respect to recording the assignment after that point is legally academic. Yet, this notion of West Dearborn failing to timely record the assignment thereafter is a focal point of the City's response to the application.

In response to West Dearborn's estoppel argument, the City also argues that it did not receive any benefit from the quit claim deed. On the contrary, now that the City has convinced the state court to eliminate West Dearborn's mortgage interest in the property, it takes the property free of this large encumbrance. The City ignores the effect of the note purchased by West Dearborn for which the mortgage was security. Unless the City can demonstrate that the note no longer exists – an effort upon which it has not embarked – it cannot credibly claim that it received no benefit from the quit claim deed.<sup>2</sup>

Finally, as expected, the City cannot explain away the Court of Appeals' curious ruling that judicial estoppel is inapplicable because of the lack of consistency between the City's position taken in the Bankruptcy Court – and the City's position taken, in the same court, the Bankruptcy Court. Of course, inconsistency of position in the same court does not trigger judicial estoppel. But that is not the argument here, nor does it reflect the state of the record. As explained in great detail, inconsistent positions were

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<sup>2</sup> It is interesting that the City ignores that it received the deed in response to a request from the original developer to buy the note from the bankruptcy estate for \$6,000. That small amount was due partly to the encumbrance on the property through the existing mortgage – assigned to West Dearborn. Eliminating that mortgage undoubtedly created not only a benefit for but a windfall to the City.

taken by the City in the Bankruptcy Court and here, in the state court. Although the City seeks to divert the judicial estoppel argument by discussing West Dearborn's conduct and omissions, the pertinent question is whether the City took inconsistent positions in different forums to obtain an unwarranted advantage: possession of Parcel C unencumbered by West Dearborn's admitted mortgage interest.

### ARGUMENT III

#### **THE COURT OF APPEALS ERRED BY FINDING THAT THE MORTGAGE WAS EXTINGUISHED BY BANK OF AMERICA IN AUGUST 2015, WHEN BANK OF AMERICA HAD PREVIOUSLY ASSIGNED AND SOLD THE MORTGAGE AND UNDERLYING NOTE TO WEST DEARBORN IN 2011.**

The City's argument regarding extinguishment of the mortgage by Bank of America is easily defeated. As explained in Argument I in the Application, the claimed "discharge" of the mortgage would separate the note for which the mortgage acts as security, and the mortgage itself. This is legally impossible. Here, no one questions that the note was assigned and is still owned by West Dearborn. The City conveniently forgets that it knew that Bank of America had assigned the mortgage to West Dearborn (**Exhibit H**, emails), and also disregards altogether the Affidavits of Scrivener's Error filed by Bank of America (**Exhibit S**).

**RELIEF REQUESTED**

WHEREFORE, Defendant/Counter-Plaintiff/Appellant West Dearborn Partners, LLC requests this Court grant leave to appeal or oral argument on the application and reverse and vacate the trial court's June 5, 2017 Order, remand to the trial court with instructions that summary disposition be entered in favor of West Dearborn and against the City of Dearborn, and enter any other relief this Court deems appropriate, together with an award of costs and attorney fees so wrongfully sustained.

Respectfully submitted,

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