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.

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

/

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

***** ORAL ARGUMENT REQUESTED *****

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

PLUNKETT COONEY

By: Robert G. Kamenec (P35283)
Attorney for Defendant/Counter-Plaintiff/Appellant
West Dearborn Partners, LLC
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(248) 901-4068

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City of Dearborn says "No."

West Dearborn Partners says "Yes."

The trial court presumably says "No."

The Michigan Court of Appeals says "No."

II.

WHETHER 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?

City of Dearborn says "No."

West Dearborn Partners says "Yes."

The trial court presumably says "No."

The Michigan Court of Appeals says "No."

III.

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City of Dearborn says "No."

West Dearborn Partners says "Yes."

The trial court presumably says "No."

The Michigan Court of Appeals says "No."

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Introduction.

In March 2011, West Dearborn Partners, LLC ("West Dearborn") purchased from Bank of America ("BOA") a note and a corresponding mortgage ("Mortgage") for real estate known as Parcel C (the "Subject Property"). An assignment of mortgage was contemporaneously executed but not filed with the Wayne County Register of Deeds until December 2015. However, the Mortgage given by the prior owner, West Village Commons, LLC, ("West Village") to the predecessor bank, Standard Federal Bank, was recorded on June 7, 2005. The City of Dearborn ("City") was well aware of these transactions since it was the entity which sold the Subject Property, along with other properties, to West Village Commons in May 2005, for approximately $2.8 million.

After West Dearborn purchased the note and obtained the corresponding Mortgage during West Village Commons' bankruptcy, the City moved to reacquire the property by convincing the bankruptcy court that the trustee should sign an order of abandonment. The City through its bankruptcy counsel was advised by BOA's counsel that the BOA Mortgage and related note had been sold to West Dearborn. The City was also served with a copy of West Dearborn's Limited Objection so advising of its mortgage interest by way of assignment. Attached to that Limited Objection was the Assignment of Mortgage. Armed with this knowledge, the City affirmatively represented to the bankruptcy court that West Dearborn's mortgage interest would be protected by the City's proffered abandonment order, through a reservation of claims, liens, interests, and obligations "of record." The bankruptcy court signed the order in October 2011 (October 5, 2011

Order Directing the Trustee to Abandon Real Property Located at 22271 West Village Drive, Dearborn, Michigan ("Bankruptcy Order")(Appx 000152a-000153a), noting specifically that the order preserved the rights of anyone who had an interest in the Subject Property. Then the City obtained the property via quit claim deed that same month, October 2011, for $1.00.

When the Court of Appeals ruled against West Dearborn on this issue upon finding the situation "unique," it reverted back to its erroneous determination that West Dearborn did not have a mortgage interest by virtue of the Bankruptcy Order. Acknowledging the mortgage-follows-the-note doctrine and that the mortgage interest was obtained by West Dearborn by operation of law, the "unique" escape hatch fashioned by the Court of Appeals fails.

Desirous of owning the property free and clear of West Dearborn's mortgage interest, the City then reversed course from its affirmative representations in the bankruptcy court, and filed the subject action to quiet title for a declaration that West Dearborn's Mortgage was invalidated by the Bankruptcy Order. The City also claimed to be a good faith purchaser under Michigan's race-notice statute under the theory that the assignment of mortgage had not been recorded upon the City's October 2011 quit claim purchase, altogether ignoring that it had actual notice of West Dearborn's mortgage interest. The City convinced both the Wayne County Circuit Court and the Michigan Court of Appeals that West Dearborn's failure to have the assignment of mortgage recorded when the Subject Property was conveyed to the City by the trustee by way of the October 2011 Quit Claim Deed also invalidated West Dearborn's mortgage interest. Yet, Michigan case law – consistent with almost all 50 states – holds that West Dearborn's mortgage interest followed the note which it purchased and vested in West Dearborn by operation of law, without the need for a written assignment of mortgage. The City also convinced both lower courts that a subsequent

discharge of mortgage by BOA – which no longer owned the Mortgage – further invalidated West Dearborn's mortgage interest, even though BOA no longer owned the Mortgage, and that the court order requiring the discharge related to separate property (not the Subject Property), evidenced by BOA's Affidavit of Scrivener's Error, correcting the earlier discharge to BOA's mortgage interest on the non-Subject Property.

The trial court ignored Michigan's mortgage-follows-the-note doctrine. Worse yet, the Michigan Court of Appeals acknowledged the doctrine but declined its application by labeling the situation here as "unique" and "particularly unique," thus avoid binding precedent from this Court which prevents invalidation of West Dearborn's mortgage interest.

When West Dearborn purchased the subject Mortgage loan on March 31, 2011, the mortgage interest followed the note. The Mortgage had been recorded years earlier, on June 7, 2005. The Bankruptcy Order signed by the bankruptcy court preserved interests "of record" which would include the recorded June 7, 2005 Mortgage. That mortgage interest was owned by West Dearborn by operation of law and falls outside the October 5, 2011 Bankruptcy Order because, inter alia, the Mortgage was indeed "of record" because it was recorded earlier on June 7, 2005. The Mortgage on the Subject Property was not owned by BOA when it later filed its court-ordered discharge of Mortgage (in a lawsuit in which West Dearborn was not a party). Having obtained the original sale proceeds of almost $2.8 million through a loan secured by the Mortgage which West Dearborn acquired as part and parcel of purchase of the note, the City has successfully maneuvered to re-purchase the land for $1.00 with no mortgage interest attached to it. Absent relief from this Court consistent with its long-standing case law and the reality that quiet title actions are equitable in nature, not only will West Dearborn lose its mortgage interest in the property, but

the City will obtain a massive windfall by retaining the property, free and clear of the mortgage interest.

B. Material facts.[1]

The Subject Property is a vacant piece of property lying between two parking decks in the West Dearborn area, between Michigan Avenue and the railroad tracks, west of Oakwood Avenue. It is identified as "Parcel C" in many of the related documents and instruments (Deed, Legal Description and Diagram; Appx 000020a, 000023a). On May 9, 2005, the City sold the Subject Property, along with other properties, to West Village Commons, LLC (Deed, Appx 000010a-000023a). The City received around $2.8 million dollars. *Id*. In part, the transaction appears to have been financed by the Mortgage given by West Village to Standard Federal Bank dated May 11, 2005, and recorded on June 7, 2005 (Appx 000024a-000038a).[2] The project apparently stalled. In 2009, the City filed suit in the Wayne County Circuit Court to specifically enforce certain agreements and for damages against the owner and the related developer, Burton-Katzman (Wayne County Circuit Court Case No. 09-001342-CH). That case went back and forth from the Court of Appeals.[3]

In the meantime, Anmar Sarafa ("Sarafa"), the then-managing partner of West Dearborn, was looking for investment opportunities in 2010-2011, as the economy was still in recession. He

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[1] The material facts and proceedings found in West Dearborn's Application for Leave to Appeal have not changed. They are repeated here with the addition of Appendix references for the convenience of Court and counsel.

[2] This mortgage, eventually acquired by West Dearborn from BOA is the subject of the present lawsuit. Prior to its assignment to West Dearborn, it was originally given to Standard Federal Bank National Association and then held by LaSalle Bank and then BOA, by related mergers.

[3] It appears that the trial court issued orders to enforce related agreements to develop the property, but the City was unable to obtain damages.

was assisted by attorney Scott Lites. Sarafa (on behalf of an entity to-be-named – ultimately West Dearborn) completed a deal with BOA to purchase the subject Mortgage loan for $150,000.00 (Appx 000042a-000076a), the Note Sale, Assignment Agreement, and First and Second Amendments). The deal closed on March 31, 2011, with the related allonge, a type of assignment of note (Appx 000039a), and assignment of mortgage ("Assignment") (Appx 000040a-000041a) delivered by BOA. The Mortgage itself provided that "the Mortgagor hereby mortgages, warrants and grants a security interest to the Mortgagee, *its successors and assigns*, in and to the Premises" (page 2; Appx 000025a) (emphasis added). Paragraph 19 of the Mortgage (page 10 of 15) states:

> *Binding Effect: All of the covenants and conditions hereof shall run with the land and shall be binding upon the successors and assignees of the Mortgagor and shall inure to the benefit of the successors and assigns of Mortgagee*; any reference herein to 'Mortgagee' *shall include the successors and assigns of Mortgagee*.

(Appx 000033a) (Emphasis added). In August 2010, West Village went into bankruptcy. While a primary concern seemed to be West Village's attempts to shed its obligations related to certain restrictions and a related Development Agreement, the City sought to recover the Subject Property through the bankruptcy. The bankruptcy trustee filed a Motion to Sell Property and, with such, West Dearborn then appeared in the bankruptcy and filed Objections to a Motion for Order Approving Sale (which *included* a copy of the executed Assignment to West Dearborn) to ensure that West Dearborn's interests were protected (Appx 000080a-000085a). Various other pleadings were filed, through which it became clear that the City had actual notice of the assignee interest of West Dearborn. On July 13, 2011, the City's bankruptcy counsel, Bob Gordon of Clark Hill, was advised by BOA's counsel that the BOA Mortgage and related loan had been sold to West

Dearborn. He was further advised in the same e-mail of the West Dearborn contact information for Sarafa and his attorney, Scott Lites (Appx 000077a-000079a).

On October 4, 2011, a hearing was held in the bankruptcy court to abandon the Subject Property and for its ultimate conveyance by the Trustee to the City. The Bankruptcy Order (Appx 000152a-000153a) did not require the recording of the Assignment to West Dearborn prior to the Quit Claim Deed to the City (Appx 000154a-000155a) in order to preserve West Dearborn's mortgagee interest. Instead, the Order stated that "[t]he Trustee is directed to promptly abandon the Debtor's real property... *Such abandonment shall not impair*, and the Property shall remain subject to, *all claims, liens, interests*, rights and obligations *of record*." (Appx 000152a) Accordingly, the City's bankruptcy counsel told the bankruptcy court:

> The other thing I wanted 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 not impair and the property shall remain subject to all claims, liens, interests, rights, and obligations of record. The West Dearborn Partners, the Mortgagee - - the holder of the Mortgage and the note on the property, has indicated 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. And the trustee has just indicated that there is no value to the property to the estate, so we would suggest that our motion is proper, and we would ask that it be granted. Thank you, your Honor.

(Appx 000147a, Transcript, p. 35). After the City confirmed that West Dearborn was the mortgagee/holder of the Mortgage and the note on the Subject Property, the bankruptcy judge noted ""I do believe under both 554 and 105 that there are grounds for this Court to require abandonment directly to the City. *The 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) (Appx 000149a) (Emphasis supplied). Under these stated expectations, the Bankruptcy Order was entered and the Subject Property was then conveyed to the City by the Trustee by way of a Quit Claim Deed dated October 17, 2011 (Appx 000154a-000155a).

In the instant action, West Dearborn's attorney, Scott Lites, testified in his deposition that because the Assignment (which had been prepared by BOA) lacked an acknowledgement page, he had to track down the signer of the Assignment, Mark Mokelke, and get his signature acknowledged in order to record the Assignment (Lites Deposition, pp. 39-44, 59-60; Appx 000422a-000427a, 000442a-000443a). Lites testified, and it was later corroborated by Mokelke, that Lites was unable to get the requisite acknowledgement page until approximately July 2014, because Mokelke had been transferred by BOA to California and had totally different contact information (Mokelke Deposition, p. 54, Appx 000533a). Accordingly, the assignment was not recorded until December 17, 2015 (Lites deposition, p 46; Appx 000429a)

The Mortgage includes both the Subject Property and separate property containing condominium units. (Appx 000024a-000038a). Both Sarafa and West Dearborn's current principal, Doraid Elder, testified that West Dearborn decided to let the condominium units "go down" for unpaid property taxes (those units were not owned by the City) (Sarafa Deposition, Appx 000239a-000293a; Elder Deposition, p. 82-84, Appx 000315a). In late 2014, the related property tax foreclosure purchasers of those condominium units filed a quiet title action in the Wayne County Circuit Court to clear the title as to any interest they had purchased as to those condominium units (see tax purchasers' Complaint, Appx 000156a-000223a). BOA was named as a defendant apparently because its Mortgage was still of record and West Dearborn's Assignment had not yet

been recorded (Appx 000233a-000234a). Eventually, the court in that case found that BOA had no interest in the property and ordered it to discharge the Mortgage (see Order, Appx 000224a-000226a and Discharge, Appx 000227a-000228a). BOA's representative, Sara Allen, testified that while the BOA loan and Mortgage had indeed been sold to West Dearborn, with the related Assignment signed on March 31, 2011, she had forgotten about the Assignment and the sale of the Note when she drafted the discharge and BOA did not realize this when the tax purchaser lawsuit was pending. Nevertheless, Ms. Allen confirmed that BOA had no interest in the Subject Property, had nothing to discharge, and that its actual participation in the lawsuit was in error (Sara Allen transcript, pages 58-60, 76, 79-80; Appx 000345a, 000349a-000350a). Later, BOA's attorney recorded an Affidavit of Scrivener's Error excluding the Subject Property from that Discharge (Appx 000237a-000238a).[4]

Deposition testimony reflects that sometime in late 2014 and into 2015, certain City officials were seemingly becoming pressured because nothing was happening with the development. Apparently, adjoining parking decks were costing the City money through bonds that had been sold, and with the lack of development, there was purported pressure to "get something going." Despite the prior communications from BOA's bankruptcy counsel to the City in July 2011 as to the interest of West Dearborn and information as to its primary contact, Sarafa, and his attorney, Scott Lites (Appx 000077a-000079a), as well as the pleadings and declarations made in the bankruptcy

[4] As demonstrated in Argument III, *infra*, here the City tries to latch on to this Discharge (with no other evidence to support same) in an attempt to create an impression that BOA somehow actually retained the Mortgage and then discharged any interest it had in the Subject Property through this Discharge. In reality, it had nothing to discharge.

case itself as to the assignee interest of West Dearborn, the City ran a title search as to recordings only related to the Subject Property.

In their depositions, the City's attorneys testified that since the West Dearborn Assignment was not yet of record, it filed this action against BOA on October 1, 2015. (Deposition of Debra Walling, pp 19-20; Appx 000549a). However, on October 29, 2015 the City was reminded by BOA's counsel Miller Canfield that the Mortgage and related loan had previously been sold to West Dearborn. Accordingly, on December 7, 2015, the City added West Dearborn to this action (see First Amended Complaint, without Exhibits, Appx 000229a-000236a).

In the lawsuit against West Dearborn (Count II), the City claims that as to the Subject Property, any interest of West Dearborn is subordinate to the interest of the City because the Assignment was not recorded prior to the City acquiring its interest through the bankruptcy trustee on October 17, 2011. Through its Second Supplemental Discovery Responses (Appx 000366a-000383a), with several "mays" and "mights," the City also argued that the Assignment was defective and therefore passed no interest to West Dearborn. The City also asserted in its discovery responses that since the assignment to West Dearborn was not recorded prior to the City acquiring its interest through the bankruptcy court, the City's interest was obtained free and clear of any mortgage interest of West Dearborn. The City also claimed that if the Mortgage itself remained and survived the bankruptcy, it was still held by BOA and since BOA later discharged the Mortgage in 2015 in the furtherance of the tax purchaser litigation, there is no longer any Mortgage (see Appx 000373a).

While this action was pending, the bankruptcy court was asked to confirm the scope of its Bankruptcy Order. However, Bankruptcy Judge McIvor felt that the real estate issues raised were

best resolved in the state court action. A copy of Judge McIvor's December 21, 2016 Order and related transcript of is attached as Appx 000584a-000600a.

C. Material proceedings.

1. Counter-motions for summary disposition and the trial court's ruling.

West Dearborn and the City filed counter-motions for summary disposition, which were opposed. With its reply brief, West Dearborn supplied the trial court the City's sur-reply brief in support of its objections, filed in the bankruptcy court (Appx 000086a-000112a). West Dearborn also supplied the trial court with the Affidavit of Doriad Elder, establishing that Schedule A filed in the bankruptcy court listed Parcel C (a vacant lot) as having a value of $800,000, subject to the BOA Mortgage in excess of $2.1 million (Appx 000601a-000602a). This was juxtaposed with the Quit Claim Deed from the Trustee to the City reciting consideration of $1.00 (Appx 000154a-000155a). The numerous exhibits previously referenced in this application were attached to West Dearborn's motion for summary disposition dated February 23, 2017.

On May 26, 2017, the trial court entertained oral argument on the counter-motions for summary disposition (Appx 000603a-000655a, Transcript). The trial court ruled in favor of the City and against West Dearborn, finding "[a]ny interest West Dearborn Partners had in Parcel C was extinguished by the Bankruptcy Order and due to West Dearborn Partners' failure to record the assignment." (*Id*. at 46). The trial court quoted its understanding of the Bankruptcy Order, providing "such abandonment [to allow the trustee to quit claim the deed] shall not impair and the property shall remain subject to all claims, lien, interest rights and obligations of record." (*Id*. at 47). Apparently, the trial court did not consider the Mortgage "of record," instead keying in on the failure to file the Assignment. The trial court then stated that the Bankruptcy Order "could have

included language [which] protected WDP's [West Dearborn's] unrecorded interest," but that the Bankruptcy Order "retained only those claims, liens, interest rights and obligations of record." (*Id*. at 47-48). The trial court further reasoned that its result was "not unjust" because West Dearborn failed to comply with and did not record the 2011 Assignment until 2015, after the Bankruptcy Order was filed (*Id*. at 48).

As a result, the trial court did not reach the alternative argument regarding BOA's alleged discharge of the Mortgage in August 2015, and whether it was effective at extinguishing West Dearborn's Assignment (*Id*. at 49).

The trial court entered its conforming order on June 5, 2017, which provided *inter alia* that West Dearborn Partners, LLC did not have any interest in Parcel C, including but not limited to, any existing mortgage interest (Appx 000656a-000658a, Order, ¶ 4).

On June 26, 2017, West Dearborn filed its motion for reconsideration with the trial court. The trial court did not entertain oral argument on that motion, but instead entered an order denying the motion on July 27, 2017 (Appx 000659a-000660a).

2. The Court of Appeals Opinion.

On appeal by West Dearborn, the Court of Appeals affirmed the trial court's grant of summary disposition to the City (Appx 000661a-000669a). The Court rejected West Dearborn's position that the recorded Mortgage, and West Dearborn's interest in the Parcel C pursuant to its status as both assignee and holder of the Mortgage following the sale of the note, survived the bankruptcy order (Id. at 5-6; Appx 000665a-000666a). The Court found that West Dearborn's request that the Order of Sale be subject to West Dearborn's interest under the *Mortgage* was some sort of admission that the Order required the *Assignment* to be recorded in order for West

Dearborn's interest to survive the sale. Although the Court admitted that "generally an assignment of the note includes a transfer of obligation under the mortgage," it sidestepped that law by finding that "the situation before us is particularly unique" (Id. at 5) (Appx 000665a), and that the Order effectively extinguished West Dearborn's rights under the Assignment because it was unrecorded.

The Court then found that even if the Mortgage had been validly assigned to West Dearborn, BOA somehow retained the ability to discharge the Mortgage in the (admittedly erroneous) order resolving the quiet title proceeding involving Parcel A-3, different from the subject Parcel C, simply because West Dearborn had failed to put *others* on notice of the otherwise valid Assignment:

> Even if we accepted West Dearborn's position that it stood in BOA's shoes and had no obligation to record the assignment to protect its interest, then West Dearborn stood in BOA's shoes when BOA later discharged the mortgage in 2015 as a result of a separate quiet title proceeding regarding Parcel A-3. West Dearborn argues that the discharge was invalid because BOA, having no interest in Parcel C, had nothing to discharge. West Dearborn wants to be relieved of any obligation to notify the world of its interest in Parcel C and yet be protected when chaos ensues. West Dearborn provides no satisfactory explanation for why it failed to record the assignment for over 4 ½ years.

(Appx 000666a, p 6).

Next, the Court rejected West Dearborn's equitable arguments (Id. at 6-8). In particular, the Court again cited to the "unique" facts of this case to dismiss the notion that the City could not be a bona fide purchaser for value under MCR 565.29 because it had actual knowledge of the Assignment and Mortgage prior to acquiring its interest (Id. at 8) (Appx 000668a). The Court otherwise emphasized that West Dearborn had "inexplicab[ly] fail[ed]" to record the Assignment, which it found justified denying equitable relief (Id.). West Dearborn timely filed a motion for reconsideration, which was denied on April 19, 2019 (Appx 000670a).

3. This Court orders argument on West Dearborn's Application.

West Dearborn timely filed its application for leave to appeal with this Court on May 31, 2019. On November 22, 2019, this Court ordered oral argument on West Dearborn's application (Appx 000671a), directing the parties to file supplemental briefs addressing: (1) whether the federal bankruptcy court's October 5, 2011 order extinguished the appellant's interest in Parcel C; (2) whether BOA's filing of a discharge of the mortgage in 2015 impacted any interest the appellant had in Parcel C at that time; and (3) whether the equitable arguments raised by the appellant require the reversal of the Court of Appeals opinion.

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 BY RULING THAT WEST DEARBORN'S MORTGAGE INTEREST DID NOT SURVIVE THE BANKRUPTCY ORDER, PRESERVING "ALL LIENS, INTERESTS, RIGHTS AND OBLIGATIONS OF RECORD," WHEN THE MORTGAGE INTEREST WAS TRANSFERRED TO WEST DEARBORN BY OPERATION OF LAW UNDER THE MORTGAGE-FOLLOWS-THE-NOTE DOCTRINE, THE MORTGAGE WAS PREVIOUSLY RECORDED SIX YEARS BEFORE THE SUBJECT PROPERTY WAS QUIT-CLAIMED TO CITY OF DEARBORN FOR $1.00.

Although reciting case law precedent from this Court holding a mortgage follows the note, the Court of Appeals inexplicably labeled this case "particularly unique" and from there held West Dearborn's mortgage interest invalid because the written assignment of mortgage was not recorded before and therefore did not survive entry of the bankruptcy court's Bankruptcy Order and the subsequent transfer of the Subject Property to the City via quit claim deed. See Court of Appeals slip opinion, pp 5-6; Appx 000665a-000666a; Assignment of Mortgage, dated March 31, 2011, pp 1-3; Appx 000040a-000041a; Order Directing the Trustee to Abandon Real Property Located at 22271 West Village Drive, Dearborn, Michigan, dated October 5, 2011; Appx 000152a-000153a. The Court of Appeals' rationale is faulty and requires reversal for several reasons. *First*, the Court's conclusion is inconsistent with the long-standing common law principle that the transfer of an obligation secured by a mortgage on property also constitutes a transfer of the mortgage. Through this doctrine, West Dearborn owed the Mortgage duly recorded on June 7, 2005, which in

turn constitutes an interest "of record" saved by the Bankruptcy Order. The mortgage-follows-the-note rule has been acknowledged repeatedly by this Court. *Equitable Trust Co v Milton Realty Co*, 263 Mich 673, 676; 249 NW 30 (1933) ("a transfer or assignment of the obligation operates as an assignment of the mortgage"); *Ginsberg v Capital City Wrecking Co*, 300 Mich 712, 717; 2 NW2d 892 (1942) (a mortgage is a mere security on the underlying obligation and "anything which transfers the [note], transfers the mortgage with it."); *Jones v Titus*, 2008 Mich 392, 397; 175 NW2d 257 (1990) (when a note given with a mortgage was endorsed over to a third party it carried with it the equitable title to the mortgage); *John Schweyer & Co v Mellon*, 196 Mich 590, 594; 162 NW 1006 (1917). See also *Prime Fin Servs, LLC v Vinton*, 279 Mich App 245, 269-270; 761 NW2d 694 (2008), citing *Ginsberg*, 300 Mich at 717. This rule is recognized by nearly all states.[5] Its underpinnings are 150 years old, traced back to the United States Supreme Court case of *Carpenter v Longan*, 83 US (16 Wall) 271, 275; 21 L Ed 313 (1872):

> "The note and mortgage are inseparable; the former as essential, the latter as incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity…. *The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter*."

(Emphasis supplied). This only makes sense. The legal reality is that the mortgage is incident to the note transferred to the new owner of the note. The mortgage follows by operation of law. Otherwise, the mortgage lacks financial function. "[T]he mortgage instrument, without any debt,

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[5] See American Securitization Forum, *Transfer an Assignment of Residential Mortgage Loans in the Secondary Mortgage Market*, 16-21 (2010) (stating that "all states" follow the rule, providing case law citations for most states, available at http://www.americansecuritization.com/uploadFiles/ASF_White_Paper_11_16_10.pdf ("ASF White Paper"). The ASF White Paper lists cases from 31 states which acknowledge and have applied the common law mortgage-follows-the-note rule. Pages 17-21.

liability or obligation secured by it, can have no present legal effect as a mortgage or an encumbrance upon the land. It is but a shadow without a substance, an incident without a principal…." *Ladue v Detroit & Milwaukee R R Co*, 13 Mich 380; 387 87 Am Dec 759 (1865), quoted with approval in *Ginsberg*, 300 Mich at 717-718. The financial intertwine between the note and the mortgage is so entrenched in Michigan common law that an assignment of a mortgage without the note is considered a nullity. *Ladue, supra*, 13 Mich at 396. And transfer of a mortgage alone does not transfer the note. *Ginsberg*, 300 Mich at 717. Principally, it is not the recorded assignment of the mortgage which vests ownership of the mortgage, but rather the transfer of the note.

The Court of Appeals erred by finding the Bankruptcy Order invalidated West Dearborn's Mortgage. Assuming *arguendo* the written Assignment of Mortgage to West Dearborn did not survive the Bankruptcy Order, the Mortgage was recorded and thus survived as an interest "of record." (no party contends and no court has held otherwise). Under the mortgage-follows-the-note doctrine, West Dearborn's pre-bankruptcy order mortgage interest survived by reason of the Mortgage itself being "of record." By operation of law, the Mortgage vested with West Dearborn at the time it purchased the note on March 31, 2011 (Note Sale and Assignment Agreement, pp 1-13, Exhibit A, with First Amendment and Second Amendment, as well as Assignment of Mortgage; Appx 000040a-000041a). As of March 31, 2011, West Dearborn stood in the shoes of BOA with regard to the rights in interest under the note *and the Mortgage*. Contrary to the Court of Appeals reasoning, the interest in the Mortgage is ascertained by determining whether West Dearborn was granted an interest in the note, conceded here by all parties and all courts. See *Equitable Trust Co*, 249 NW at 31.

In *Livonia Property Holdings, LLC v Farmington Road Holdings, LLC*, 717 F Supp 2d 724 (ED Mich 2010), a borrower challenged a lender's right to foreclose on a mortgage obtained by that lender when it purchased the note and received an assignment *in blank*. The borrower asserted that the ownership interest in the mortgage was ineffective because the assignment was blank. The district court disagreed, noting that interests in a mortgage are ascertained by determining whether and to what extent an assignor grants the interest in the note, citing *Equitable Trust Co, supra.* Relevant for this case, the *Livonia Property* Court determined that even if the assignment in blank of the mortgage was ineffective, the mortgage incident to the note transfer by operation of law and thus was valid because the lender possessed the note. 717 F Supp at 751-752. By analogy, here even if the Bankruptcy Order is interpreted to invalidate the assignment of mortgage was ineffective, West Dearborn still possessed the note and thus the Mortgage incident to that note was transferred to it by operation of law. Since the Mortgage expressly survived the Bankruptcy Order because it was recorded, so too did West Dearborn's interest in the Mortgage survive the Bankruptcy Order.[6]

Second, when invalidating West Dearborn's mortgage interest, the Court of Appeals confused the validity of the Mortgage with the need to record an assignment of the mortgage to provide notice to third-party good faith purchasers.[7] In *Ginsberg*, this Court noted the difference:

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[6] Parenthetically, the court in *Livonia Property Holdings* found, as in this case, that the plaintiff had cited no binding authority contradicting the Michigan doctrine that a transfer of a note transfers the mortgage by operation of law – without regard to an agreement otherwise or, as here, without regard to whether the written assignment of mortgage survives. 717 F Supp at 751, n 19.

[7] As explained in Argument II, the City does not qualified as a bona fide purchaser under the race-notice provisions of Michigan law because it had *actual* notice of West Dearborn's mortgage interest at the time of transfer.

"The instrument can only take effect as a mortgage or an encumbrance from the time when some debt or liability shall be created, or some binding contract is made, which is secured by it. … [T]he mere recording of the instrument would not make it a mortgage or incumbrance in legal effect, if it were not so before, nor give it greater effect as to third person than it had between the parties." *Ginsberg*, 300 Mich at 718, quoting *Ladue*, 13 Mich at 397,398. The validity of the mortgage is not dependent upon whether a written assignment of the mortgage is recorded. No Michigan case supports this position. In contrast, there are many decisions applying the mortgage-follows-the-note rule in cases where the mortgage assignment was *not* recorded by the transferee, but the mortgage interest was transferred to and validly held by the buyer of the note. *National Livestock Bank v First Nat Bank*, 203 US 296, 307-308 (1906) (citing Kansas law for position that "where a mortgage upon real estate is given to secure payment of a negotiable note, and before its maturity, the note and mortgage are transferred by indorsement of the note to a bona fide holder, the assignment, if there be a written one, need not be recorded"); *Jackson v Mortgage Elec Registration Sys, Inc*, 770 NW2d 487, 497-498, 500 Minn (2009) (court applies the mortgage-follows-the-note rule where there is no assignment of the mortgage); *Federal National Mort Ass'n v Kuipers*, 732 NE2d 723, 727 (Ill App 2000) ("Because the assignment of the debt, with nothing more, is sufficient to preserve the mortgage lien, it cannot follow that the lien is somehow extinguished for failure to record the assignment. Therefore, we are persuaded that the mortgage lien and priority provision inure to the benefit of the assignee and that recording the assignment is unnecessary to preserve the security for the debt.") *In re Kennedy Mortgage Co*, 17 BR 957, 964, (Bankr D NJ 1982) ("The fact that assignments of mortgages may be recorded does not affect the validity of an assignment of a mortgage which has not been recorded."); *UNLIC VP LLC v Matthias*,

234 F Supp 2d 520, 523 (D VI 2000) ("Recordation of a mortgage assignment is not necessary to the effective transfer or the obligation or the mortgage securing it.").[8] Under this case law, the Court of Appeals erred by conflating the validity of the Mortgage through a recorded assignment with the potential risks to West Dearborn of failing to promptly record the assignment. They are separate questions (and the risk of failing to timely record did not inure to the benefit of the City which had *actual* knowledge of West Dearborn's mortgage interest – indeed of its assignment of the Mortgage). See Argument II.

Third, the Court of Appeals misread the Bankruptcy Order when attaching to the Mortgage a requirement that there be a recorded assignment of that Mortgage, rather than just a recording of the Mortgage, for the Mortgage to survive. The Bankruptcy Order of October 5, 2011, is an order allowing the trustee to abandon the property, subject to certain restrictions. "Such abandonment shall not impair, and the Property shall remain subject to, all claims, liens, interest, rights and obligations of record." (Bankruptcy Order, p 1; Appx 000152a). The Bankruptcy Order does not impair in any way the Mortgage because it was recorded – everyone agrees. There is no language in the Bankruptcy Order which invalidates the mortgage interest obtained by West Dearborn *by operation of law*. On the contrary, its limitation of claims and rights "of record" by definition could apply only to the *written* assignment of mortgage (and West Dearborn does not concede that this is the case – see pages 14-15 of Application for Leave to Appeal). Many cases acknowledge that the absence of an actual separate written assignment of the mortgage does not defeat transfer of the mortgage by operation of law to the transferee holder of the note. See *Carpenter, supra*, 83 US at 275 (transfer of the note carries the security without any formal assignment or delivery); *Chase*

[8] Each of these cases is discussed in the ASF White Paper, pp 21-22.

Home Fin, LLC v Fequiere, 989 A2d 606, 610–611 (Conn App 2000) (Connecticut statute codifying mortgage-follows-the-note rule applied even where mortgage had not yet been assigned); *Bremer County Bank v Eastman*, 34 Iowa 392 (Iowa 1872) ("the transfer of the note, secured by the mortgage, carried the mortgage with that as an incident to the debt, and the indorsee of the note could maintain an action in his own name, to foreclose the mortgage without any assignment thereon whatever"); *US Nat'l Bank Ass'n v Marcino*, 181 Ohio App 3d 328, 337 (2009) (negotiation of a note operates as an equitable assignment of mortgage, "even when the mortgage is not assigned or delivered."); *Matthias,* 234 F Supp 523 (mortgage follows the note even if the transferee "does not know that the obligation is secured by the mortgage"); *In re Packaging Co*., 62 BR 96, 100 (Bankr D Neb 1986) (assignee of the promissory note has right to enforce the mortgage securing the note with or without the assignment of the mortgage).[9] Assuming *arguendo* the Bankruptcy Order did not preserve West Dearborn's written assignment of mortgage, then West Dearborn would be in no different position than the various noteholders in the cases just discussed through which its mortgage interest would survive by operation of law.

Fourth, the City's actual knowledge of not only West Dearborn's mortgage interest but also of its duly–executed assignment of mortgage acts as the significant equivalent of an interest "of record" under the Bankruptcy Order. As explained earlier and expanded upon in Argument III, the City was fully aware of the assignment of Mortgage from BOA to West Dearborn. (Objection to Trustee's Motion for Order Approving Sale, Exhibit A; Appx 000083a-000085a; Tr. 10/4/2011 Hearing Transcript, page 35; Appx 000147a; July 13, 2011 email from Allison Bach to Bob Gordon; Appx 000077a-000079a). Under Michigan law, when a second mortgagee has actual knowledge

[9] See cases cited at ASF Whitecap paper, page 22.

of a prior mortgage, though unrecorded, "[it] is the equivalent of filing" with the register of deeds. *Read v Horner*, 90 Mich 152, 157; 51 NW 207 (1882). The City's actual knowledge of the assignment of Mortgage acts as if it was recorded, which in turn legally renders it an interest "of record" under the Bankruptcy Order and requires that it be so treated as "of record."

Fifth, the Court of Appeals erred by expanding the scope, and misunderstanding the effect, of the Bankruptcy Order. The goal of the court when reviewing an order is to honor the intent of the parties. *UAW-GM v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). Construction of a court order is only permissible if the language of that order is ambiguous on its face. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 486 NW2d 884 (1992). Whether a court order is ambiguous is a question of law that this Court reviews *de novo*. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). Here, the Bankruptcy Order is unambiguous with respect to affecting West Dearborn's mortgage interest obtained by operation of law because it is unrelated to whether an assignment is recorded, and because the Mortgage itself was recorded.[10]

[10] Notably, the Bankruptcy Order states in the first paragraph that the good cause found by the bankruptcy court for the relief granted was based "upon the record of the case and the reasons stated on the record of the hearing conducted by the Court on October 4, 2011 in this matter." Appx 000152a. During that hearing, not only was the attorney for the City fully aware of West Dearborn's mortgage *and* assignment, but actively represented that the mortgage interest would be retained by way of the proffered abandonment order. Tr. 10/4/2011, p 35 (Appx 000147a) ("the West Dearborn Partners, the mortgage - - the holder of the mortgage and the note on the property, has indicated it wants to make sure that the property is subject to its rights in interest. This order already does that."). See also the bankruptcy court's reasoning during that hearing, page 37 (THE COURT: "the 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.")(Appx 000149a).

Sixth, the effect of the Court of Appeals' rationale that any mortgage interest – specifically reserved in the Bankruptcy Order is now eviscerated - is financially implausible. Such a result is so contrary to the terms of the Order, the background of the bankruptcy court's decision (statements made of transcript, the Objection to the Trustee's Motion for Order Approving Sale, with the attached Assignment of Mortgage (Appx 000083a-000085a)), as to defy providing any meaning to the Bankruptcy Order. Stated without rhetoric, "What happened to the mortgage interest?" Notwithstanding the terms of the Bankruptcy Order, the Court of Appeals reasons that it was eviscerated through the Bankruptcy Order. It is obvious why the City takes this position: it creates the very windfall which it contends did not exist in these circumstances (addressed next in Argument II).

ARGUMENT II

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 August 2015 Discharge ("Discharge") by BOA did not affect the mortgage interest retained by West Dearborn. The reasons are multiple and when considered in the aggregate, destroy any argument to the contrary.

First, BOA had nothing to discharge in 2015 because BOA sold the loan and the note, and assigned the Mortgage as to the Subject Property, as of March 31, 2011. It could not release something that it did not own. "*Nemo dat quod non habet*." See *Mitchell v Hanley*, 83 US 544, 549; 21 L Ed 322 (1872); *Salewske v Citibank, NA,* No. 12-CV-12580, 2012 WL 6840572 (ED Mich October 9, 2012), report and recommendation adopted, No. 12-12580, 2013 WL 142081 (ED Mich January 11, 2013). See also *McCormick v. Digby,* 8 Black 99, 1846 WL 2667 (Ind 1846) ("After a mortgagee has assigned a mortgage, it cannot discharge any part of the premises from the mortgage."); *Reeves v Hayes*, 95 Ind 521; 1884 WL 5312 (1884) (same); *Pellerito v Weber*, 22 Mich App 242, 245; 177 NW2d 236 (1970) ("It is axiomatic that a person cannot convey greater title than he possesses."). The subsequent "discharge" by BOA through the taxpayer lawsuit therefore had no effect on the Subject Property. Even assuming *arguendo* that the *written* assignment of mortgage was invalidated by the Bankruptcy Order, the mortgage interest to the Subject Property nonetheless was transferred by operation of law to West Dearborn in 2011, and could not legally be discharged by a non-owner four years later. See Argument I.

Second, and in related fashion, the Note secured by the Mortgage was never paid. There is no financial reality to the discharge of a mortgage when the note remains unsatisfied.

Third, even assuming BOA had a mortgage interest and further assuming that the circumstances dictated a discharge of the mortgage (through the Wayne County Circuit Court Order), the Discharge did not involve Parcel C, the Subject Property. The March 30, 2016 Affidavit of Scrivener's Error so verifies (Appx 000237a-000238a). In paragraph 5, the Affidavit provides that the legal description found in the August 12, 2015 Discharge of Construction Mortgage, which specifically included a property description of "Parcel C," constituted a scrivener's error in the legal description of the relevant property. Compare Exhibit to Discharge of Mortgage, Legal Description (Appx 000228a) with Affidavit of Scrivener's Error, ¶¶ 4-5 (Appx 000237a). The former contains a legal description of Parcel C. The latter states that there was an error in such a legal description, and a new legal description is provided which does *not* include Parcel C. The deposition testimony in this case supports the validity of the Affidavit of Scrivener's Error (Sara Allen Deposition Transcript, pp 58-60; 79-80) (Appx 000345a, 000350a) (one portion of the bank did not know what the other was doing, and when BOA realized its error in executing and recording the Discharge, BOA's attorneys chose to execute and record an Affidavit of Scrivener's Error).

Fourth, the Discharge of the Mortgage upon which the City relies should not have been entered at all as to Parcel C. The relevant Parcel, A-3, was the subject of an order entered in the taxpayer lawsuit involving condominium units lost through property tax foreclosures, separate and distinct from Parcel C. When Judge Brian Sullivan entered his order requiring discharge in the taxpayer lawsuit, he provided specifically that the discharge related to the condominium units lost through the property tax foreclosure, as evidenced by the legal description found in the June 26,

2015 Order Granting Plaintiff's [sic] Motion for Summary Disposition Against Bank of America, N.A., page 2 (Appx 000224a-000226a). In turn, since the only property for which the discharge was ordered in the taxpayer lawsuit involved the condominium units, and did not involve Parcel C, the Discharge upon which the City relies is contrary to the order of the circuit court, and thus invalid on this basis as well.

Fifth, West Dearborn Partners was never made a party to the taxpayer lawsuit. Thus, even if the order related to Parcel C – which it did not – it cannot bind West Dearborn Partners as it was not named as a party to that action. See MCR 3.411(H); [res judicata law].

There can be no legitimate reliance by the City on the erroneous BOA Discharge. The only rights which the City obtained through the Quit Claim Deed in the amount of $1.00 was obtaining the property subject to the Mortgage. Yet the note was never paid, the City did not acquire its interest as a result of the Discharge, and the City had full knowledge of West Dearborn's mortgage interest in Parcel C.

Where a claim of title is premised solely on the admitted mistaken description in a deed, which the parties knew to be the result of a scrivener's error, reliance on the mistaken description is not only unwarranted but sanctionable. *BJ's & Sons Const Co, Inc v Van Sickle*, 266 Mich App 400, 407; 700 NW2d 432, 438 (2005) ("Plaintiffs' claim of title to the property was premised solely on the admittedly mistaken description in the deed, which plaintiffs knew to be the result of a scrivener's error. Indeed, discovery clearly revealed what plaintiffs and their attorney knew before filing this suit—plaintiffs had no legitimate claim to this property."). See also *Wells Fargo Bank, NA v Ambrosov*, 993 NYS 2d 322, 324 (App Div 2014) (mortgage reformed to correct a scrivener's error in legal description of the subject property); *ABN AMRO Mortgage Group, Inc. v Southern*

Sec Federal Credit Union, 372 SW 3d 121, 130-131 (Tenn App 2011) (subsequent junior lienholder could not take priority over an erroneously released first mortgage, resulting from a scrivener's error); *Deutsche Bank Natl Tr. Co for Registered Holders of Ameriquest Mortgage Sec, Inc v McDonough*, 160 A3d 306, 313 (RI, 2017) (In circumstances where a mortgage is mistakenly discharged, equitable principles provide that the discharge be set aside and the mortgage reinstated to the position intended by the parties, citing, *Progressive Consumers Federal Credit Union v United States*, 79 F.3d 1228, 1236 (CA 1, 1996)).

ARGUMENT III

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 MORTGAGE INTEREST.

In its Application for Leave to Appeal to this Court, West Dearborn has raised four related equitable arguments which defeat the invalidation of its Mortgage to the benefit of the City. The Court of Appeals expressly rejected one of those arguments under the mistaken notion that the judicial estoppel argument was premised upon inconsistent positions taken by the City *in the same proceeding*. The remaining equitable arguments were rejected for various reasons in the Court's February 12, 2019 Opinion. As with the first argument presented on application, the equitable arguments are layered one upon the other which, considered in the aggregate, overwhelmingly defeat the City's position and the resulting windfall to the City at the expense of West Dearborn.

1. The City admitted that West Dearborn was protected by the Bankruptcy Order and is judicially estopped to claim otherwise in this action.

When the City admitted in the bankruptcy court that the interests of West Dearborn were protected by the City's proffered bankruptcy order, the City took a position contrary to that in the instant litigation (discussed in the next subsection). West Dearborn argued that judicial estoppel prevented the City from prevailing in this action when it was successful with an inconsistent position in the bankruptcy court. Rather than comparing the positions taken by the City in the two different forums – the bankruptcy court and the instant litigation – the Court of Appeals instead compared and found consistent two positions taken by the City in the bankruptcy proceedings, thus rejecting judicial estoppel. (Court of Appeals Opinion, pages 6-7; Appx 000666a-000667a).

Compare the Court of Appeals quotation of the City's August 16, 2011 Objections to the Trustee's Proposal to Sell the Property (Court of Appeals Opinion, pp 6-7; Appx 000666a-000667a) to the statements made by counsel for the City in the bankruptcy court proceedings (Tr. 10/04/2011, p 35; Appx 000147a). When West Dearborn highlighted this legal error to the Court of Appeals through its motion for reconsideration, no relief was granted. This is error.

Judicial estoppel is dependent upon inconsistent positions taken in different proceedings. *Dykema Gossett, PLLC v Ajluni*, 273 Mich App 1, 17; 730 NW2d 29 (2006), *aff'd in part, vacated in part on other grounds* 480 Mich 913 (2007). See also *Washburn v Peck*, 245 Mich 351, 352; 222 NW 768 (1929) ("[o]ne may not take contradictory positions in asserting a right in court, if the assertion of Plaintiff's right in the first case involves a negation of the right claimed in the second case."). This legal error by the Court of Appeals left unaddressed the consistency of the City's positions in the two different forums, first the bankruptcy court and second in this state court action.

The Court of Appeals compounded its error by finding that the City did not "prevail" on the positions taken in the bankruptcy court. Through its Objection to the Trustee's Proposal to Sell the Property, the City convinced the bankruptcy court to allow abandonment of the property by the trustee, subject to restrictions which included allowing the mortgagee to enforce its remedies notwithstanding the abandonment. The bankruptcy court judge specifically adopted this position:

> "The mortgagee in this case certainly can enforce its remedies. The order that was proposed and attached to the motion protects the rights of anyone else with an insured interest in the property."

(Tr. 10/4/2011, p 37; Appx 000149a). When the bankruptcy judge said that it adopted the very order submitted by the City for its ruling, it is logically impossible to contend that the City did not

prevail on this point in the bankruptcy court. Yet, as addressed next, the City argued and prevailed in this action that the bankruptcy court extinguished the interests of West Dearborn, the mortgagee.

The City is also equitably estopped from claiming in this action what it disclaimed in the bankruptcy court, upon which West Dearborn relied.

The City's bankruptcy counsel told the bankruptcy court that West Dearborn Partners not only indicated it wanted to make sure that the property was subject to West Dearborn's rights and interests, but that the order proposed by the City "already does that." (Tr. 10/4/2011, p 35; Appx 000147a). "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." *Id*. Based on this representation, the bankruptcy court indicated that the mortgagee – specifically identified as West Dearborn Partners by the City – could certainly enforce its remedies. "The order that was proposed [by the City] and attached to the motion protects the rights of anyone else with an interest in the property." (*Id*. at 37; Appx 000149a). Based on these representations and reservations, the Court entered its Bankruptcy Order. (Appx 000152a-000153a). Based on these representations, specifically including that the proffered order would not impair let alone eviscerate West Dearborn's mortgage interest, counsel for West Dearborn did not press the previously-filed written objection to the proposed abandonment order by which West Dearborn requested that the sale be subject to its assignment of the Mortgage from BOA. (Limited Objection, pp 1-2; Appx 000080a-000081a; Tr. 10/4/2011, pp 4, 35; Appx 000116a, 000147a). "[By bankruptcy counsel for West Dearborn]: The West Dearborn Partners, the mortgagee - - the holder of the mortgage and the note on the property, has indicated it wants to make sure that the property is subject to its rights in interest. The 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." (*Id*. at p 35; Appx 000147a). Whether the Court views West Dearborn's Limited Objection as carrying over as an objection to the proposed order of abandonment, or whether it determines that no objection was made given the representations of Dearborn that West Dearborn's interest would be protected, equitable estoppel applies. The City by representation and admission intentionally or negligently induced West Dearborn to believe that its mortgage interest would be protected by way of the Bankruptcy Order – specifically drafted by the City and proffered to the bankruptcy court. Given this representation, accepted by the bankruptcy court, West Dearborn did not press to object to the abandonment or alter the terms of the order. Instead, it understandably and justifiably relied upon the effect of the order represented by the City and, most importantly, accepted by the bankruptcy court judge:

> "[THE COURT]: The 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."

(Tr. 10/4/2011, p 37; Appx 000149a). Given the representations by the City in the bankruptcy court, included in the eventually-accepted and entered Bankruptcy Order, West Dearborn will be prejudiced if the City is allowed to deny the existence of the order which purportedly protected the mortgage interest of West Dearborn. This has all the hallmarks of equitable estoppel. *Hoye v Westfield Insurance Co*, 194 Mich App 696, 705; 487 NW2d 838 (1992).

This is not a case where the City through its counsel inadvertently made a representation which convinced the bankruptcy court and induced West Dearborn to rely upon the represented scope of the to-be-entered Bankruptcy Order. There was no mystery that the relevant Note had been sold to West Dearborn Partners (Appx 000042a-000076a). And even if the City did not

understand or appreciate the mortgage-follows-the-note law in Michigan, West Dearborn's Limited Objection to Trustee's Motion for Order Approving Sale of Real Property so disclosed. In paragraph 3 of that objection, West Dearborn identifies itself as the "assignee of Bank of America having been assigned Bank of America's interest in the mortgage on the Subject Property." (Appx 000081a). West Dearborn then requested that any order of sale specifically provide that the sale of property is subject to not only claims, liens and interest of record, but also subject to the interests of BOA "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. Even if the City could not digest the representations made by West Dearborn in its Limited Objection regarding assignment, it had evidence of that assignment: Exhibit A to that Objection, which is the March 31, 2011 Assignment of Mortgage, with a specific time stamp from the federal court of August 10, 2011 (Appx 000083a).

Yet, having represented to the bankruptcy court that the interests of West Dearborn would be protected, without reservation so that the City could then purchase the property from the trustee for a mere $1.00, in this case, they reversed course and found that the Bankruptcy Order did not apply to West Dearborn at all because at the time of the order's entry the assignment had not been recorded, and therefore did not survive the bankruptcy court's Order preserving interest "of record." Interestingly, the copy of the March 31, 2011 Assignment of Mortgage attached to West Dearborn's Limited Objection did not have a Register of Deeds indication on the top as of the filing date in the bankruptcy court, August 10, 2011. The City had reason to know that the Assignment had not been recorded. Yet its statements to the bankruptcy court contained no such reservation.

2. The Assignee interest of West Dearborn has priority over the fee interest of the City of Dearborn.

Michigan is a race-notice state, and owners of interest in land may protect their interest by properly recording those interests. *Coventry Park Homes Condominium Ass'n v Federal Nat'l Mortgage NTG Ass'n,* 298 Mich App 252; 827 NW2d 379 (2012). Where an individual fails to record a lien or interest in property, that interest is void against a subsequent interest holder who purchased the interest in good faith for valuable consideration, and a person takes in "good faith" if he or she takes without notice of a prior unrelated interest. See generally, *Michigan National Bank & Trust v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992). A person who has notice of a possible defect in title and fails to make further inquiry into the possible rights of a third-person is not a good faith purchaser. *Royce v Dathler*, 209 Mich App 682, 690; 531 NW2d 817 (1995).

As earlier explained, the Court of Appeals erroneously conflated the validity of the Mortgage with the priority of the assignment over the fee interest of the City. The Court of Appeals also bootstrapped its "unique" and "particularly unique" escape hatches to avoid determining whether the City was a "good faith" purchaser under the law, notwithstanding a mountain of evidence that the City had <u>*actual*</u> knowledge of West Dearborn's assignment of Mortgage and mortgage interest.

Recognizing that the mortgage interest was retained by West Dearborn, the remaining question is whether that interest has priority over the fee interest of the City under MCL 565.29, which provides:

> Every conveyance of real estate within the state hereinafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. The fact that

> such first recorded conveyance is in the form or contains the terms of a deed of quit-claim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof.

The term "notice of a defect" has been defined as follows:

> "Notice is whatever is sufficient to direct attention of the purchaser of realty to prior rights or equities of a third party and to enable him to ascertain their nature by inquiry. Notice need only be the possibility of the rights of another, not positive knowledge of those rights. Notice must be of such facts that would lead any honest man, using ordinary caution, to make further inquiries into the possible rights of another in the property."

Royce, 209 Mich App at 690, quoting *Schepke v Dep't of Natural Resources*, 186 Mich App 532, 535; 464 NW2d 713 (1990). Notice to defeat an interest taken in "good faith" may be by constructive or actual notice. *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006).

Under this law, the City's priority argument lacks merit because it cannot assume the mantle of the good faith. *First*, unlike a priority dispute that involves constructive notice by way of a recorded instrument, here the City had *actual* notice of the assignment of the Mortgage to West Dearborn, as earlier referenced. See Limited Objection; Appx 000080a-000085a; attached Assignment of Mortgage; Appx 000083-000085a, statements made by counsel for the City in the bankruptcy hearing of October 4, 2011, p 35; Appx 000147a. The City's actual notice through these documents and through its counsel's acknowledgement of West Dearborn's mortgage interest predates the subsequent conveyance from the Trustee to the City.

Second, on July 13, 2011, counsel for the City received an email from counsel for BOA stating that BOA had sold the Note and Mortgage associated with it to "an entity called West Dearborn Partners, LLC." (7/13/2011 email; Appx 000077a-000079a). Additionally, the same email provided counsel for the City with contact information for both the purchaser, Sarafa, and the

attorney for West Dearborn Partners, Scott Lites (*Id.*). The City does not deny but simply ignores this actual notice of West Dearborn's mortgage interest via assignment, received two months before the City's quit claim deed was signed, and in the possession of counsel for the City who made the representations in the bankruptcy court that West Dearborn's assignment interest in the Mortgage would be protected by the proffered Bankruptcy Order.

Both the trial court and the Court of Appeals ignore this evidence of actual notice and instead examine constructive notice, finding it was lacking because the assignment was not recorded at the time the property was transferred to the City. This ignores the law that provides that actual notice removes the City from the category of a "good faith" purchaser under MCL 565.29. *Kastle v Clemons,* 330 Mich 28; 46 NW2d 450 (1951); also see *Michigan National Bank & Trust v Morren*, 194 Mich App 407; 487 NW2d 784 (1992); *Wilcox v Hill*, 11 Mich 256; 1863 WL 1184 (1863); *Oliver v Sandborn*, 60 Mich 346; 27 NW 527 (1886); *Dennis v Dennis*, 119 Mich 380; 78 NW 333 (1899); *Oliver v Olmstead*, 112 Mich 483; 70 NW 1036 (1897); *Oakland Hills Dev Corp v Leuders Drainage Dist*, 212 Mich App 284; 537 NW2d 258 (1995); *Shotwell v Harrison*, 30 Mich 179; 1874 WL 6413 (1874).

In *Read v Horner*, this Court held that it has "never been held in the state" that one is a good–faith purchaser who has actual knowledge or notice of the chattel mortgage lien "though a mortgage had not been recorded." "One who purchases with actual knowledge of a prior mortgage is not a purchaser in good faith, within the meaning of the statute." 90 Mich at 157. Where subsequent purchasers have actual knowledge of a prior unrecorded mortgage, "actual notice to them of such prior mortgage, though unrecorded, is the equivalent to filing within the provisions of

this statute." *Id.*[11] *Read* stands for the proposition that "actual notice" is no different than if the subject document was recorded. This is a powerful and dispositive observation. Once the Court equates the City's "actual knowledge" of West Dearborn's mortgage interest, it is charged with the traditional constructive notice provided by way of a recorded interest with the register of deeds.

3. The City's position is inequitable because it creates a massive windfall for the City, to the detriment of West Dearborn.

The City prosecutes this civil action to avoid West Dearborn's mortgage interest with respect to the Subject Property which the City sold for $2.844 million in 2005 (Covenant Deed, pp 1, 8; Appx 000010a, 000017a), which the City subsequently re-attained from the Trustee through the bankruptcy proceedings for $1.00 (Quit Claim Deed, Appx 000154a-000155a). West Dearborn purchased the 2005 Mortgage and related Note for $150,000, which remains unpaid. The bankruptcy court schedules had the property valued at $800,000. Assemble all these facts, and it is evident that the City seeks an unjust windfall, which equity abhors. *Ollig v Eagles,* 347 Mich 49, 53; 78 NW2d 553 (1956); *In re Forfeiture of Thirty-Thousand Six Hundred Thirty Two and 41/100 ($30632.41) Dollars*, 184 Mich App 677, 679; 459 NW2d 99 (1990); *In re Anson,* 457 BR 130, 137 (2011). See also *Butner*, 449 US at 55 ("[u]niform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving a windfall merely by reason of happenstance of bankruptcy"). The City's plan will succeed absent intervention by this Court, recognition of West Dearborn's mortgage

[11] The "statute" referenced is the predecessor to MCL 565.29, including the "good faith" element which governs today. *Read*, 90 Mich App at 156.

interest, and a ruling that the City had actual notice of that mortgage interest at the time it re-attained the property through the October 17, 2011 Quit Claim Deed.

The Court of Appeals rejected West Dearborn's windfall arguments by assigning a responsibility equivalency between the City's obvious windfall and the failure of West Dearborn to earlier record the assignment. This analysis misses the mark for the reasons previously explained. West Dearborn had no obligation to record the assignment of mortgage to provide notice to the City, which had actual notice of that assignment. In turn, the lack of recordation at the time of the Quit Claim Deed cannot be used to offset the windfall befalling the City through the existing lower court rulings. Viewed differently, the City is not a victim of the unrecorded assignment because it had actual knowledge of West Dearborn's assignment interests, and its attorneys are certainly charged with the law of the mortgage-follows-the-note, by which they could not even claim that they relied upon the Bankruptcy Order to vitiate West Dearborn's mortgage interest. Nor can the City claim victim status since it only paid $1.00 for the property through the Quit Claim Deed, whereas West Dearborn has now lost its interest of $150,000 as security for the Note it purchased.

4. The City's position is contrary to its position in the bankruptcy court regarding the unrecorded Development Agreement.

In its Amended Complaint, the City sets forth that successors/assigns as to Parcel C are subject to an [unrecorded] Development Agreement (City's First Amended Complaint, paragraph 13; Appx 000232a). In the bankruptcy proceeding, the Trustee argued to the bankruptcy court that any sale of Parcel C should be free and clear of that unrecorded Development Agreement because it was not recorded. The City argued notice of the Development Agreement to the Trustee was implied, whether the Development Agreement was specifically recorded or not, because the

unrecorded Development Agreement was referenced in the 2005 Covenant Deed and also referenced in the recorded 2005 Declarations of Covenants and Restrictions, under Michigan law,. Additionally, the City argued that the bankruptcy could not usurp Michigan law as to real estate (See the City's Sur-Reply, Appx 000086a-000112a). The City cannot have it both ways: its unrecorded Development Agreement passed through the Bankruptcy Order, but West Dearborn's unrecorded assignment of mortgage does not.

The Court of Appeals dismissed this argument by reasoning that the mortgage documents "expressly referenced the development agreement whereas the mortgage could not specifically mention and refer to an assignment that did not yet exist" (Court of Appeals Opinion, p 8; Appx 000668a). But this ignores that the Mortgage *does* expressly reference the mortgagee's "successors and assigns," and that everyone involved—including the Trustee—knew that there was an unrecorded Assignment in favor of West Dearborn. The Court of Appeals otherwise dismissed West Dearborn's analogy to the Development Agreement as "irrelevant," but these inconsistences in the City's position cannot be ignored when it comes to estoppel.

RELIEF REQUESTED

WHEREFORE, Defendant/Counter-Plaintiff/Appellant West Dearborn Partners, LLC requests this Court 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,

PLUNKETT COONEY

By: /s/Robert G. Kamenec
Robert G. Kamenec (P35283)
Attorney for Defendant/Counter-Plaintiff/Appellant
West Dearborn Partners, LLC
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(248) 901-4068

Dated: January 30, 2020

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.

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

/

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

MONIQUE M. VANDERHOFF, being first duly sworn, deposes and says that she is an employee with the firm of Plunkett Cooney, and that on January 30, 2020, she caused to be served a copy of the Supplemental Brief in Support of Application for Leave to Appeal by Appellant West Dearborn Partners, LLC, Appellant's Appendix Volumes I through IV, and Proof of Service/Statement Regarding E-Service as follows:

E-Served Via MiFile

LICIA A. YANGOUYIAN (P56549)
DEBRA A. WALLING (P37067)
Attorneys for Plaintiff/Counter-Defendant/Appellee City of Dearborn
16901 Michigan Avenue, Suite 14
Dearborn, Michigan 48126

lyangouy@ci.dearborn.mi.us
dwalling@ci.dearborn.mi.us

DICKINSON WRIGHT PLLC
J. BENJAMIN DOLAN (P47839)
Attorneys for Defendant/Counter-Defendant/Appellee Bank of America, N.A., and Standard Federal Bank, N.A.
2600 West Big Beaver Road, Suite 300
Troy, Michigan 48084
bdolan@dickinson-wright.com

E-Served Via MiFile

ZAUSMER, AUGUST, & CALDWELL, P.C.
MATTHEW G. McNAUGHTON (P66097)
RICHARD A. PATTON (P76386)
Co-counsel for Plaintiff/Counter-Defendant/Appellee City of Dearborn
32255 Northwestern Highway, Suite 225
Farmington Hills, Michigan 48334
mmcnaughton@zausmer.com
rpatton@zausmer.com

E-Served Via MiFile

/s/Monique M. Vanderhoff
MONIQUE M. VANDERHOFF