IN THE UTAH COURT OF APPEALS

THE BANK OF NEW YORK MELLON as TRUSTEE FOR THE CERTIFICATE HOLDERS CWMBS SERIES 2006-HYB5; Plaintiff and Appellee. vs. Paula A. Mitchell; Defendant and Appellant. AMERICA FIRST CREDIT UNION; and PEPPERWOOD HOMEOWNERS ASSOCIATION; Defendants (not participating in appeal)	Appellate Case No. 20180141 District Court Case No. 160902472

APPELLANT'S BRIEF

Appeal from the Orders of the
Third Judicial District Court
Issued by the Honorable Todd Shaughnessy

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INTRODUCTION

Appellant Paula Mitchell was instructed several years ago when the real estate market collapsed by the loan servicer of her home loan, that in order to get a loan modification she would have to stop making the monthly payments and then she would receive a loan modification.

Trusting what she was told, she followed the instructions and stopped making her payments in order to get the modification. After a few months she tried to make a payment but her payment was sent back to her. While waiting for the modification, her loan servicer never made any demand for the missed payments, understood they would be resolved by the modification.

After several months of waiting for the loan modification, and repeatedly sending the same documents over and over because the servicer said it had not received them, or they had been lost, etc., she was eventually told that she would not get the loan modification because her loan was not the type that could be modified (a fact the servicer had apparently known all along but did not disclose to Mitchell).

She was also told that she was now in "default" and had to immediately pay all of the missed payments that would have been taken care of by the modification, or her house would be foreclosed. Unfortunately, since this amount had grown quite large while the servicer needlessly dragged out the modification for months, it was a lump sum of tens of thousands of dollars by this point, and she could not cure the arrears all at once. ReconTrust then started non-judicial foreclosure proceedings.

Mitchell learned that she had been lied to because she did not need to miss any payment to obtain a loan modification, and that she had been a victim of a systematic scam by the loan servicer whereby homeowners were tricked into "defaulting" and then the modification process was dragged out for months so that the arrears would grow prohibitively large, thereby guaranteeing the arrears could not be cured so that the house would go into foreclosure, whereby the owners/servicers of her Loan could collect "insurance" as a result of the purported "default" that would pay the difference between the value of her home and the balance of her loan (which was more than the value of the home), or more, such that when the Loan was then foreclosed the owners would recover mot just the depressed market value of the house, but the full amount of the outstanding loan, or more.

Mitchell accordingly brought suit to stop the threatened non-judicial foreclosure she had been tricked into, and to be able to resume making regular payments and keep her home, as well as several other claims. The lawsuit sought several judicial declarations as to who owned her Loan, what rights the owners might have, whether insurance had paid down the Loan, challenging ReconTrust's and BNYM's right to conduct any foreclosure, etc. This case is referred to herein as *Mitchell I*. Because of the lawsuit, the non-judicial foreclosure was cancelled.

By virtue of several mistakes by the trial court, *Mitchel I* was improperly "dismissed" even though many of the claims brought therein were never addressed at all,

let alone resolved on the merits. The judge steadfastly refused to address the unresolved claims so they remain unresolved to this day.

BNYM did not resume any non-judicial foreclosure. When someone realized that there was not enough time to complete a non-judicial foreclosure before the statute of limitations would run, BNYM filed the present judicial foreclosure action on the eve of the limitation.

Mitchell accordingly brought counter actions to stop the judicial foreclosure, and to seek the judicial declarations that were ignored in *Mitchell I*, such as who in fact owns her loan, and to seek equitable reformation of the Loan so that she may resume making regular payments on her Loan in order to keep her home, etc.

BNYM was not the original lender on the Loan. To this day, BNYM has refused to provide any documentation showing that it in fact owns the Debt or has any interest in the Property. In particular, it has refused to produce any evidence proving that it actually owns the "Trustee's Lien it is seeking to judicially foreclose.

STATEMENT OF ISSUES

I. The trial court erred in holding that BNYM has standing to bring this foreclosure action.

SOR: Legal question;

Preserved: Motion to Dismiss REC.96; Reply REC.148,

Answer REC.444; Amended Answer Rec.538

Rule 59 Motion REC.1081; Reply REC.1134

II. Trial court erred in ruling BNYM did not waive its claim of judicial foreclosure by not bringing is as a counterclaim in Mitchell I.

SOR: Interpretation/Application of Rules, legal question;

USA Power, LLC v. PacifiCorp, 2010 UT 31.

Preserved: Motion to Dismiss: REC.202, REPLY REC.311__

Rule 59 Motion REC.1081; Reply REC.1134

III. Trial court erred dismissing Mitchell's counterclaims based on Res Judicata.

SOR: Legal Question

Preserved: Second Counterclaim REC.538

Opposition to Motion to Dismiss; REC.711

IV. Trial Court erred in dismissing counterclaims collaterally attacking Mitchell I.

SOR: Interpretation/Application of Rules, legal question; Same

Preserved: Opposition to Motion to Dismiss; REC.711

V. Trial Court erred by granting BNYM summary judgment without BNYM satisfying its initial burdens with supporting evidence.

SOR: Interpretation/Application of Rules, legal question; Same

Preserved: Opposition Motion for Summary Judgment REC.901

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SOR: Interpretation/Application of Rules, legal question; Same

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VIII. Trial court erred by not correcting its own legal errors raised in the Rule 59/52 motion.

SOR: Interpretation/Application of Rules, legal question; Same

Preserved: No opportunity to do so since court's refusal to do so was part of Rule 59 Ruling, which came straight to appeal

STATEMENT OF THE CASE

Appellant Paula Mitchell has been fighting for years to keep her home after being tricked into skipping payments in order to obtain a loan modification as discussed above.

BNYM brought this judicial foreclosure action pursuant to UCA 78B-6-901.

Mitchell claims that BNYM does not have the right to bring this suit, and has equitable defenses which were raised as counterclaims as well as numerous other claims for declaratory judgments and various claims for damages, and a quiet title action, and a potential class action. See Answer and Counterclaim for greater detail. REC.538

Procedural History

The relevant procedural history is set forth in that Summary of Issues section.

SUMMARY OF ARGUMENT

Mitchell moved to dismiss this case due to BNYM's lack of standing because BNYM not claim, nor has it proved, that it owns the Debt which is necessary since under UCA 57-1-35 the Trustee's Lien supposedly being foreclosed here is automatically transferred to whomever owns the Debt. BNYM instead asserts that it has been "assigned" an unidentified "beneficial interest" in the Trust Deed by MERS, but MERS was never given any "beneficial interest" that it could possible assign to BNYM. Therefore, BNYM has absolutely no legally protectible interest in the Mitchell Debt that gives it standing to bring this action. The court erroneously denied the Motion without analysis by incorrectly assuming that the question of standing was decided in *Mitchell I*

which was error because the issues were not "identical" because standing to bring a legal action in court is very different from having contractual authority to appoint a successor trustee as a nominee, which was the issue decided in *Mitchell I.*

Mitchell next moved to dismiss because when BNYM filed its answer in *Mitchell I,* it did not file a judicial foreclosure action as a counterclaim, as mandated by Rule 13(a), and therefore it waived this action and is forever barred from litigating it. The court, however, created a novel unwritten exception to Rule 13(a) by holding that even though this judicial foreclosure action clearly falls within the plain language of Rule 13(a), Mitchell cannot force a judicial foreclosure action as a counterclaim. This was an erroneous legal ruling contrary to the governing law which does not allow any exceptions to Rule 13(a).

BNYM next moved to dismiss all of Mitchell's counterclaims falsely claiming that they were all barred by Res Judicata. The court improperly dismissed all of Mitchell's counterclaims on a wholesale basis without conducting the mandatory issue by issue or claim by claim Res Judicata analysis. Had it done so, it could not have dismissed the counterclaims.

BNYM next moved for summary judgment on its own claim which the court improperly granted since BNYM did not make any effort to perform it initial burdens to prove entitlement as a matter of law by proving each element with evidence in the record. Nor did it prove with evidence in the record that the facts are undisputed.

The court entered an order of only partial summary judgment on BNYM's claim which expressly preserved for future adjudication the amount of attorney fees, and interest and other fines and fees etc. after May 31, 2017.

Despite the fact there were future adjudications expressly reserved in the order, the court *sua sponte* prepared its own "Final Judgment" and entered it the same day in violation of Rule 58A. But the premature *sua sponte* "Final Judgment" also reserved for future adjudication the question of attorney fees and interest etc. post May 31st. It therefore clearly was not a final judgment.

The court nevertheless improperly ordered enforcement of the interlocutory "Final Judgment" by sending an Order for Foreclosure Sale to the Sheriff.

Given the trial court's insistence that its "Final Judgment" was in fact final, Mitchell brought a combined Rule 52/59 Motion addressing the numerous errors made by the court, but the court refused to address the substance of the Motion, asserting that an appeal was Mitchell's only avenue if she did not like its rulings.

When the Order of Foreclosure sale was served, Mitchell brought a Rule 64 Reply and motion to recall or discharge the premature Order since there was still no final judgment with the total amount due as required by statute. But the court once again summarily denied the Motion without any substantive analysis.

The court has now adjudicated the amount of attorney fees, but it still has not adjudicated the post May 31st interest, fees, fines etc. Therefore, there is still no final

appealable judgment resolving all claims between the parties. But since the trial court has insisted that its "Final Judgment" was in fact final, and this Court has required the appeal move forward, Mitchell has been forced to appeal, but she recognizes that this Court will likely need to dismiss this appeal due to the lack of appellate jurisdiction.

ARGUMENT

I. The trial court erred in holding that BNYM has standing to bring this foreclosure action.

The trial court erred when it denied Mitchell's Rule 12(b)(1) Motion to Dismiss this judicial foreclosure action due to BNYM's lack of standing to foreclose the Trustee's Lien because it does not own the Mitchell Debt which the Trustee's Lien secures, and it is not the real party in interest.[1]

A plaintiff cannot bring an action asserting the claim of a third party. A plaintiff must affirmatively prove it is asserting its own claim for an injury caused to it by the defendant in order to have standing to invoke the jurisdiction of the court to decide the controversy.

> [P14] Utah's traditional standing test requires a showing of injury, causation, and redressability. Under the first prong of the traditional test, "the petitioning party must allege that **it has suffered** or will 'suffer some distinct and palpable injury **that gives it a personal stake in the outcome of the legal dispute.**'" Additionally, the party seeking relief must establish that **it has a "legally protectable interest in the controversy.**" And with the exception of those who are third-party beneficiaries or assignees, **only those who are a party to a contract have a legally protectable interest in that contract.** See *Holmes Dev., LLC v. Cook*, 2002 UT 38, P 53, 48 P.3d 895 and n.6, 2002 UT 38, 48 P.3d 895 (stating that generally **only a party to a contract** has an interest in the contract

[1] Rule 17 explicitly mandates that: "Every action shall be prosecuted in the name of the real party in interest."

> and thus standing to sue); see also *Harper v. Great Salt Lake Council, Inc.,* 1999 UT 34, P 20, 976 P.2d 1213 (holding that **an individual who is not a party to a contract** does not generally have standing because the individual has no cognizable interest in the agreement).

City of Grantsville v. Redevelopment Agency of Tooele City, 233 P.3d 461 (Utah 2010)(citations omitted).

> The trial court granted the Jenkinses' motion for summary judgment as to this cause of action because it determined that DUC lacked standing to assert a claim on Alan Jenkins's behalf. "In essence, **the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.**" To this end, "a party may generally assert only his or her own rights and **cannot raise the claims of third parties who are not before the court."** *Id*.

DU Company v Jenkins, 2009 Utah App 195, ¶ 11 (citation omitted). See also, *BV Lending v. Jordanelle Special Serv. Dist*., 2013 UT App 9, ¶ 10 ("BV Jordanelle could not litigate the rights of BV Lending because it was not BV Lending's successor in interest to the promissory notes or the deed of trust").

In simple terms: "Traditional standing criteria require that the interests of the parties be adverse and that **the party seeking relief** have a legally protectable interest in the controversy." *State ex rel. H.J. v State*, 1999 UT App 238, ¶ 17.222222222626.20.

But BNYM made no effort to prove that it personally has a legally protectable interest. Therefore it has failed to prove it has any standing.

A. BNYM has not proven any personal interest in this controversy by virtue of the purported "assignment" from MERS.

BNYM does not claim to actually own the Mitchell Debt for which the Trust Deed was granted to ensure repayment.[2]

[2] BNYM in fact affirmatively claimed it is not a party to the Note or Trust Deed in Mitchell v. ReconTrust et al, 3rd District, case no 110400816, so as to avoid liability for a claim of contractual damages.

Rather, BNYM claims to be the "Beneficiary" of the Trust Deed by virtue of an "assignment" from MERS of some unidentified "beneficial interest" in the Trust Deed. But MERS had no "beneficial interest" in the Trust Deed to assign BNYM because it lacked any ownership interest in the Debt it secured.

As this Court acknowledged in *Mitchell v. ReconTrust,* 2016 UT App. 88, fn 5 (involving this same loan)("Mitchell I"), the theory that MERS could be a "beneficiary" under a trust deed is flawed, citing to *Burnett v. MERS*, 706 F.3d 1231 (10th Cir. 2013) wherein the 10th Circuit held that MERS could not be "the person named or otherwise designated in a trust deed as the person, for whose benefit a trust did is given," because MERS held "**no ownership right in the Note**."

It is indisputable that MERS was not given any beneficial interest by the Trust Deed. To the contrary, the Trust Deed expressly rebuts any claim that MERS was granted any "beneficial interest" by stating: "MERS holds **only legal title** to the interests granted by borrower in this security instrument." REC.16

> "It is well established that an assignor **cannot assign rights he or she does not have**.". "The assignee acquires all of the rights and remedies possessed by the assignor at the time of the assignment . . . ." But an "assignee gains nothing more, and acquires no greater interest than had his assigner." Thus, **"the assignee never stands in a better position than the assignor."**

Todd Hollow Apts. v. Homes at Deer Mt. HOA, 2015 UT App 190, ¶ 23 (citations omitted).

Since MERS lacked any "beneficial interest" to assign, BNYM has not been "assigned" any "beneficial interest" by MERS as a matter of law.

Consequently, in order for BNYM to have a legally protectible interest that would

give it standing, BNYM needed to prove that it in fact owns the Mitchell Debt.

Only the actual owner of a debt secured by a trust deed holds the "beneficial interest" created by the trust deed, namely the trustee's lien, since the trustee's lien is inseparable from the debt.

> The law seems to be well settled that the mortgage is a mere incident to the debt and that **its transfer or assignment does not transfer or assign the debt or the note**. The mortgage goes with the note. If the latter is transferred or assigned, the mortgage automatically goes along with the assignment or transfer. . . . **The mortgage, being a mere incident of the debt, cannot be assigned separately from it, so as to give any beneficial interest**. . . . A mortgage, as distinct from the debt it secures, is not a thing of value nor a fit subject of transfer; hence **an assignment of the mortgage alone, without the debt, is nugatory, and confers no rights whatever upon the assignee**. . . . An assignment of the note carries the mortgage with it, while the **assignment of the latter alone is a nullity**.

Hill v. Favour, 52 Ariz. 561, 568, 84 P.2d 575, 578 (1938).

This concept is codified in Utah by UCA 57-1-35, titled "Trust Deed – Transfer of secured debts as transfer of security," which makes it perfectly clear: "The transfer of any debt secured by a trust deed shall operate as a transfer of the security therefor."

Consequently, BNYM's theory that it became the current "beneficiary" by virtue of the "assignment" from MERS fails as a matter of law.

Since BNYM has failed to prove any legally protectable interest of its own, it has failed to meet its burden to prove it has standing to bring this judicial foreclosure action.

> The party invoking … jurisdiction bears the burden of establishing these elements [i.e., the elements of standing]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, **each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof**, …

Brown v. Div. Water Rights, 2010 UT 14, ¶14.

Accordingly, the trial court never acquired any jurisdiction to entertain this foreclosure action. *Brown* at ¶12 ("standing is a jurisdictional requirement").

Consequently, all of the trial court's actions must be vacated due to the lack of subject matter jurisdiction. *Bott v., Bott*, 437 P.2d 329 (Utah 1968)(absent jurisdiction, a court's "subsequent proceedings are palpably null and void").

> "If a court acts beyond its authority those acts are **null and void**. Therefore, the initial inquiry of any court should always be to determine whether the requested action is within its jurisdiction. When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action."

Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah App. 1989)

"A court must have subject matter jurisdiction to have the power and authority to decide a controversy. Without subject matter jurisdiction a court cannot proceed." *Burns Chiropractic Clinic v. Allstate*, 851 P.2d 1209, 1211 (Utah App. 1993). "Because it is a threshold issue, we address jurisdictional questions before resolving other claims." *Housing Authority of the County of Salt Lake v. Snyder*, 44 P.3d 724, ¶11 (Utah 2002).

> [S]ubject matter jurisdiction goes to the very power of a court **to entertain** an action. A lack of subject matter jurisdiction cannot be stipulated around nor cured by a waiver. A lack of subject matter jurisdiction can be raised at any time and **when subject matter jurisdiction does not exist, neither the parties nor the court can do anything to fill that void**.

Curtis v. Curtis, 789 P.2d 717, 726 (Utah App. 1990); *Thompson v. Jackson*, 743 P.2d 1230, 1232 (Utah App. 1987)("subject matter jurisdiction cannot be created or conferred on the court by consent or waiver").

B. The trial court erred in holding BNYM's standing to bring suit was decided by Mitchell I.

The trial court improperly refused to even address Mitchell's standing challenge on the merits when she brought a Rule 12(b)(1) Motion to Dismiss by mistakenly holding

the BNYM's right to foreclose judicially was decided in Mitchell I. The court correctly stated the law:

> (i) [T]he party against whom issue preclusion is asserted must have been a party to . . .the prior adjudication; (ii) the issue decided in the prior adjudication must be identical to the one presented in the instant action; (iii) the issue in the first action must have been completely, fully, and fairly litigated; and (iv) the first suit must have resulted in a final judgment on the merits."

Snyder v. Murray City, 2003 UT 13, 35.

But the trial court failed to correctly apply each element of issue preclusion because it did not determine if the issues were "identical" in each case. Rather it only concluded that the issue in Mitchell I "underpins" Defendant's standing argument, rather than find it was "identical." "[T]he issue decided in the prior adjudication must be **identical to the one presented in the instant action**." *Oman v. Davis School District*, 2008 UT 70, ¶29.

The "issue" in Mitchell I was whether BNYM could appoint ReconTrust to be a successor trustee. The issue in this case is whether BNYM has standing to bring a judicial foreclosure action. These obviously are not "identical" issues, so the court erred in concluding that collateral estoppel applied.[3]

[3] The court cited paragraphs 20, 22, 23, and n.5 of this Court's opinion in *Mitchell I*. But those paragraphs actually contradict the court's conclusion because they show this Court was not discussing whether BNYM has standing to bring a judicial foreclosure, but rather, whether MERS could appoint a successor trustee to conduct a non-judicial foreclosure.

Paragraph 20 states: "even if the Mitchells are correct that MERS does not meet this definition, the terms of the trust deed nevertheless gave MERS the authority to **appoint a successor trustee** and foreclose upon the property."

The court therefore erred as a matter of law in concluding that Mitchell was precluded by collateral estoppel from challenging BNYM's standing to bring this lawsuit. Accordingly it should have addressed the merits of the jurisdictional challenge, even though it didn't, this Court must now address it since jurisdiction may be raised at any time and this Court cannot affirm the trial court's actions if it lacks jurisdiction.

II. Trial court erred in ruling BNYM did not waive its claim of judicial foreclosure by not bringing is as a counterclaim in Mitchell I.

Mitchell moved to dismiss BNYM's judicial foreclosure action as being waived and forever barred because BNYM did not bring it in Mitchell I as a compulsory counterclaim under Rule 13(a). Rather than dismiss this action as mandated by the case law interpreting Rule 13(a), the trial court improperly created for the first time ever its own exception to Rule 13(a).

This is the second attempt of Bank of New York Mellon ("BNYM") to foreclose on the Property owned by Paula Mitchell. The first attempt was by means of a threatened unlawful non-judicial foreclosure sale by ReconTrust, which resulted in a preemptive quiet title action filed by the Mitchells in the Third District, case no. 110400816, before the foreclosure sale, M*itchell I*, at which point ReconTrust cancelled the non-judicial

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Paragraph 21, which the Court skipped over, also plainly states: "Case law from this court and the Tenth Circuit Court of Appeals indicates that a trust deed's plain language may give MERS, as 'nominee for Lender and Lendor's successors and assigns,' the authority to **appoint a successor trustee**."

Again paragraph 22 states: "Consistent with this case law, we conclude that the terms of the trust deed in this case explicitly gave MERS the right to **appoint a successor trustee** regardless of whether MERS satisfied the statutory definition of beneficiary."

sale, and it was never resumed.

BNYM was a defendant in *Mitchell I* which expressly challenged whether BNYM had any recognizable interest in Mitchell's Property, in particular, whether BNYM had any ownership interest in the Debt and the Trustee's Lien, and any right to foreclose the Trustee's Lien based on the alleged default on the Mitchell Note.

BNYM filed an answer on March 20, 2012, but it did not assert any counterclaims. In particular, it did not assert a judicial foreclosure action as a counterclaim, although it was necessarily asserting a right to do so because it was asserting the right to pursue a non-judicial foreclosure.

It thereby made its election of remedies and waived any right to bring a judicial foreclosure. But once it was too late for BNYM to complete a non-judicial foreclosure before the statute of limitations ran, BNYM changed its mind and filed this judicial foreclosure instead, on April 15, 2016, in direct violation of Rule 13(a). Mitchell therefore moved to dismiss it, REC.96, but the trial court denied the Motion on November 21, 2016. REC.360.

Rule 13(a) expressly states:

> A pleading **shall** state as a counterclaim **any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence** that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

It is undisputed that *Mitchell I* involves the same transaction or occurrence, it involves the same Property, the same "Borrower," the same Debt/Note, the same Trust Deed, and the same purported default. Therefore, this

judicial foreclosure action falls within the plain language of Rule 13(a), and should have been filed as a counterclaim in Mitchell I – but it wasn't.

It is well-settled law in Utah that any party failing to comply with Rule 13(a) is barred from asserting such claims in future litigation because "the purpose of rule 13(a) is to ensure that all relevant claims arising out of a given transaction are litigated in the same action." *Nu-Med USA v 4Life Research* 190 P.3d 1264, 1267. This Rule is absolute:

> [A] counterclaim not presented to the court on a matter involving the same transaction **is forever barred**. *Cox v. Dixie Power Co*., 81 Utah 94, 16 P.2d 916; *Jeremy Fuel & Grain Co. v. Mellen*, 50 Utah 49, 165 P. 791; *Moss v. Taylor*, 73 Utah 277, 273 P. 515.

Todaro v. Gardener, 285 P.2d 839, 842 (Utah 1955); *Slim Olson, Inc. v. Winegar*, 246 P.2d 608 (Utah 1952) (if a party fails to plead a compulsory counterclaim it is precluded from asserting it in a subsequent action); *Yanaki v. Iomed*, Inc. 116 P.3d 962, 963 (Utah 2005)(compulsory counterclaims not brought in the first case were waived).

The Supreme Court has plainly held that Rule 13(a) applies to "any" available claim without exception:

> [T]hey likewise had the obligation under rule 13(a) to raise any available counterclaims arising out of the same transaction. **To hold otherwise would eviscerate the purposes of rule 13(a)** and allow a party to gain full advantage of the affirmative defenses afforded a genuine party in interest, while avoiding any obligation to raise counterclaims in the same action.

Raile Family Trust v. Promax Dev. Corp., 24 P.3d 980, 983.

There is no dispute BNYM could have plead a judicial foreclosure action as a counterclaim in *Mitchell I* since it was claiming a previous default by Mitchell, which is all that was required to make such a claim "available."

But instead of barring BNYM's claim, the trial court created its own novel exception to Rule 13(a) in order to save BNYM from its voluntary decision to not comply with Rule 13(a).

The court held that even though a judicial foreclosure action would be based on the same transaction at issue in *Mitchell I*, and was available when BNYM filed its answer, it nevertheless was not a compulsory counterclaim based on its novel policy conclusion that a "borrower is not entitled to deprive the lender of its choice" between non-judicial foreclosure and judicial foreclosure.

There is not, however, any legal support in Utah Law for the court's novel holding, and it is in fact directly contrary to the plain language of the Rule and the governing Utah law interpreting Rule 13(a).

A. The Federal Court's interpretation of Federal Rule 13 in Texas may not be applied to create an exception in Utah's Rule 13(a).

The trial court improperly held it may resort to federal case law regarding the interpretation of Rule 13(a) of the Federal Rules of Civil Procedure in order to interpret Utah's Rule 13(a) on the flawed theory that there was no applicable Utah law interpreting the Rule. To the contrary, there is plenty of law on point, it is just contrary to what the trial court wanted to do, because it clearly holds there are no exceptions.

Nevertheless, the trial court relied on *Douglas v. NCNB Texas Nat'l Bank*, 979 F.2d 1128 (5th Cir. 801) for the proposition that since Federal Rule 13 did not require a judicial foreclosure to be filed as a compulsory counterclaim in Texas, Utah's Rule 13 also should be interpreted so as to not require the filing of a judicial foreclosure action as

a compulsory counterclaim.

But the court's interpretation and reliance on *Douglas* is misplaced because there was a key federal legislative provision in effect – the Rules Enabling Act, adopted by Congress – which expressly provides that the Federal Rules "shall not abridge, enlarge or modify any substantive right." 22 U.S.C. § 2072.

The Fifth Circuit therefore observed in *Douglas* that "[t]he federal counterclaim rule, Fed.R.Civ.P. 13(a), is inapplicable if it abridges, enlarges, or modifies the plaintiff's or defendant's substantive rights." The Fifth Circuit then proceeded to analyze Texas law (not the Federal Rule itself) and concluded that applying Federal Rule 13(a) to judicial foreclosures in Texas would impermissibly "abridge the lender's substantive rights and enlarge the debtor's substantive rights" **under Texas law**, which would be an impermissible violation of the Rules Enabling Act.

It concluded: "Thus, we believe it is appropriate **in this case** to follow **the state's practice of permitting a lender to refrain from filing a counterclaim on overdue notes** and to wait to pursue either a judicial or non-judicial foreclosure remedy." In considering the lender's "rights" under Texas law, the Fifth Circuit looked to *Kasper v. Keller*, 466 S.W.2d 326, 329 (Tex. Civ. App.Waco 1971) which held that Texas's own Rule 13 could not be applied to modify substantive rights because of Rule 815, Texas Rules of Civil Procedure, which similarly "directs that 'These rules shall not be construed to enlarge or diminish any substantive rights or obligations of any parties to any civil action.'"

Douglas therefore does not help BNYM, or justify the court's exemption because

there is no similar legislative limitation in Utah. Accordingly, the 5th Circuit would reach a totally different result if it were applying Federal Rule 13 to a Utah case. When it would look to Utah's Rules for a similar statutory limitation prohibiting the Utah Rules of Civil Procedure from modifying substantive rights, it would find none. Accordingly, it would hold that Federal Rule 13 could demand the filing of judicial foreclosure counterclaims in federal cases in Utah.

B. The trial court based its novel exception on an unsupported legal conclusion.

Furthermore, the trial court erred because it created it's novel exception based on its summary conclusion that the "lender has the option of selecting judicial or non-judicial foreclosure, and because **the borrower is not entitled to deprive the lender of its choice**, the court concludes that a counterclaim for judicial foreclosure is not compulsory and BNYM was not obligated to assert it as a counterclaim in *Mitchell I*."

The trial court, however, failed to identify any Utah law holding that a debtor may not "deprive the lender of its choice."

The court slides right past the fact its conclusion lacks any legal support and is contrary to the reality that Rules routinely affect parties' "choices." Rule 13 in particular obviously affects every defendant's "choice" whether to bring an available counterclaim or not.

It does not matter under Rule 13(a) whether the defendant wants to pursue its claim at that particular time or not. If the defendant wants to use the courts of Utah to pursue that claim, it must do so at the time the courts require. That is simply the "cost" of using Utah's courts to pursue one's judicial remedies.

C. The trial court's policy exception is contrary to the Supreme Court's policy decision to not have any exceptions.

The Supreme Court, as a matter of public policy, has determined in its wisdom that in order to preserve the limited resources of the courts, as well as to reduce the burden on the parties, that **ALL** related available claims "shall" be presented at the same time or be waived, without any exception. The trial court (and this Court) have no authority to say otherwise.

Consequently, the Rules as adopted by the Supreme Court may by design affect the contractual "choices" of parties.

D. The trial court improperly attempts to rewrite Rule 13(a).

Given the plain language of Rule 13(a) mandating that "any" available related claim "shall" be filed as a counterclaim, and the lack of any exception in Rule 13(a) for judicial foreclosures, the trial court has improperly attempted to rewrite Rule 13(a) to add an exception the Supreme Court has not elected to include.

> "When we interpret a procedural rule, we do so according to our general rules of statutory construction." In addition,
>
> > [W]hen interpreting a statute, we assume, absent a contrary indication, that the legislature used each term advisedly according to its ordinary and usually accepted meaning. Additionally, we presume[] that the expression of one [term] should be interpreted as the exclusion of another. We therefore seek to give effect to omissions in statutory language **by presuming all omissions to be purposeful.**

Aequitas Enterprises v. Interstate Inv. Group, 2011 UT 82, ¶15(citation omitted).

> A cardinal rule of statutory construction is that courts are not to infer substantive terms into the text that are not already there. Rather, the interpretation must be **based on the language used**, and **the court has no power to rewrite the statute to conform to an intention not expressed.**

Berrett v. Purser & Edwards, 876 P.2d 367, 371 (Utah 1994)(citations omitted); *Platts v. Parents Helping Parents*, 947 P.2d 658, 662 (Utah 1997)("The judiciary is obligated to interpret statutes as they are crafted, not to redesign them.").

Had the Supreme Court intended to create an exception to Rule 13(a) for judicial foreclosures, it could have easily done so. It didn't. Therefore, neither the trial court nor this Court can recognize any exception to the plain language: "A pleading **shall** state as a counterclaim **any claim**…"

"It is the duty and practice of this court to adhere to the plain language of a rule. And where **the text of the rule is clear and unambiguous**, **our inquiry ends**, and we need not resort to additional methods of interpretation." *St Jeor v. Kerr Corp*., 2015 UT 49, ¶12

Allowing trial courts to rewrite the plain language of Rule 13(a) *post hoc* to include exception(s) not included by the Supreme Court is a slippery slope that would promptly eviscerate Rule 13(a) since everyone would assert their newfound "right to choose." Which is why the Supreme Court has wisely not allowed any exceptions.

E. Lender agreed to be bound by Utah law, including Rule 13(a).

Contrary to the trial court's summary conclusion that Mitchell did not have any right to "deprive" lender of its choice, lender had already agreed that Mitchell did have that right by contract when it agreed in the Trust Deed to be bound by "Applicable" Utah law, which would naturally include Rule 13(a)'s requirement as to when to bring any judicial foreclosure action.[4]

[4] "Applicable Law" is defined in the Trust Deed as "all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders …"

> This Security Instrument **shall** be governed by federal law and **the law of the jurisdiction in which the Property is located**. All rights and obligations contained in this Security Instrument **are subject to any requirements and limitations** of Applicable Law.

Exhibit B Complaint: Trust Deed Page 8 ¶16. REC.21.

Lender has thereby conceded by contract that any possible option or "right" it may have to choose between judicial and non-judicial foreclosure may be deprived by Mitchell filing suit because it is "subject" to "any requirements and limitations" of Utah law, such as Rule 13(a). Accordingly, the court's assumption that Lender's right to choose was unlimited was flawed.

Accordingly, due to all the flaws in the trial court's analysis, and since its novel exception is directly contrary to the plain language of Rule 13(a) and the governing law interpreting it, the court's refusal to enforce Rule 13(a) must be reversed and the judicial foreclosure action dismissed with prejudice because it is forever barred.[5]

III. Trial court erred dismissing Mitchell's counterclaims based on Res Judicata.

BNYM, under the guise of a Motion to Dismiss, improperly asserted a fact sensitive affirmative defense, Res Judicata, by summarily claiming without any actual

[5] Inasmuch as the judicial foreclosure action is barred, the trial court did not acquire any subject matter jurisdiction to entertain it, since it is outside of the class of cases which a trial court could possibly hear, and therefore beyond the authority of the court to entertain. Therefore, all of the trial court's actions in this case are once again palpably null and void," *Bott* supra, and must be vacated.

support that the exact same issues being raised in the counterclaims in this case had all been previously raised and decided in *Mitchell I*.

Knowing that it was misleading to say so, BNYM nevertheless argued summarily that because each numbered "cause of action" was dismissed by the *Mitchell I* court, that each and every claim and issue was in fact addressed and decided, when in fact, as BNYM's counsel was fully aware, the *Mitchell I* court had failed to recognize that the numbered "causes of action" each actually had several separate and distinct claims/issues being raised which had been grouped together for convenience's sake and that the "cause of action" did not contain just the single claim or issue which the *Mitchell I* court was actually dismissing by dismissing the entire cause of action where it was located. See Opposition.

By not being candid with the court about what happened in *Mitchell I*, BNYM's counsel misled the court in this case into mistakenly assuming that all of the claims and issues raised in the counterclaims had in fact previously been resolved in BNYM's favor, even though they had not been. And therefore the trial court mistakenly dismissed Mitchell's counterclaims wholesale, without the required analysis for each individual issue or claim supposedly precluded by Res Judicata.

A. Had the facts alleged in the counterclaims been properly accepted as true, the Motion to Dismiss would have been denied.

Many of the facts alleged in the counterclaims, especially those set out in the

First,[6] Second,[7] and Third,[8] counterclaims, directly contradicted BNYM's unsupported factual assertions that all issues and claims in the counterclaims were in fact completely, fully, and fairly litigated, and finally resolved on the merits, in *Mitchell I*.

Since the court was entertaining a Motion to Dismiss, the court was obligated to accept Mitchell's version of the facts regarding what happened in *Mitchell I* as pled in detail in the counterclaims as true, as well as all reasonable inferences therefrom.

_____

The court, however, erred by not accepting Mitchell's allegations as true, in particular it did not accept the factual allegations that many of the issues and claims previously raised in *Mitchell I* were never even acknowledged as existing, let alone addressed, by the *Mitchell I* court, see ¶¶93-155 of the Answer and Counterclaim which set forth several controversies alleged in Mitchell I which were not decided on the merits. REC.565-576, such as the numerous claims seeking declaratory judgments which were never entered, and therefore did not result in a final judgment resolving all disputes on the merits.[9]

[6] Finality of Mitchell I ¶¶91-121.
[7] Lack of Res Judicata Effect of Mitchell I ¶¶122-145
[8] Denial of Due Process and Denial of Open Court ¶¶ 146-150
[9] Given the numerous claims and issues raised in the counterclaims, and the page limitations on this brief, it would be impossible to set forth all of the issues/claims with full analysis as to each, but the proper analysis was set forth in Mitchell's Opposition to the Motion to Dismiss, and therefore the Court is referred to it in order to see exactly how the BNYM's argument was flawed, issue by issue. Since BNYM asserted Res Judicata, it naturally bears the burden of making sure the court properly set out its analysis for this court to review, and since it failed to do so, Mitchell need not rebut any actual ruling on any individual claims or issues because there are no such findings to rebut.

For example, the counterclaims correctly claims that to this day, there has not been a declaratory judgment entered as to who in fact owns the Mitchell Debt, and requests such a declaration. Therefore, accepting this fact as true, the trial court was obligated to hold that the counterclaim seeking that declaratory judgment is not barred by Res Judicata. But it mistakenly failed to do so. Therefore, the dismissal of that counterclaim must be reversed.

And so on and so on through each counterclaim (which cannot all by addressed individually here given the page limit but can be reviewed in Mitchell's Opposition.

This Court may not make the same mistake here. In order for it to affirm the dismissal of any of the counterclaims and/or issues, it must naturally find that the trial court in fact made the proper analysis. And if it didn't, then this Court must summarily reverse and reinstate the counterclaim since it is not its job to do the trial court's mandatory analysis in the first instance.

B. Res Judicata was improper because *Mitchell I* did not result in a final judgment on the merits.

Despite the fact BNYM has the burden to prove that *Mitchell I* resulted in a final judgment on the merits for each issue or claim challenged, it made no attempt to do so.[10]

A "final judgment" is a legal term of art indicating that all controversies between

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[10] The test for claim preclusion is:

> First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or be one that could and should have been raised in the first action. Third, t**he first suit must have resulted in a final judgment on the merits**.

Snyder v. Murray City Corp., 2003 UT 13, P 34, 73 P.3d 325.

the parties have been resolved on the merits.

> For an order to constitute a final judgment, it must **end the controversy between the litigants**. *Loffredo v. Holt*, 2001 UT 97, P12, 37 P3d 1070 (citing *Kennedy v. New Era Indus., Inc*, 600 P.2d 534, 536 (Utah 1979). In other words to be a final order, the court's decision must "dispose of the subject-matter of the litigation **on the merits** of the case." *Kennedy*, 600 P.2d at 536 (internal quotations omitted);

Anderson v. Wilshire Investments, 2005 UT 59 ¶ 9.

Since BNYM failed to prove by evidence in the record that each and every controversy between the parties was resolved on the merits in *Mitchell I*, it once again failed to meet its burden of actually proving claim preclusion, as compared to merely asserting it exists. And the trial court erred in simply assuming that there was a final judgment without actually conducting the proper analysis and setting it forth in its ruling for this Court to review.

C. BNYM failed to present a prima facie claim of claim preclusion sufficient to dismiss all of the Counterclaims.

The following counterclaims were not raised in *Mitchell I* and therefore are not barred by Res Judicata: First, seeking judicial declarations collaterally attacking *Mitchell I* judgment and appellate decision as void; Second, seeking judicial declaration *Mitchell I* does not preclude any issue or claim raised in the counterclaim; Third, seeking declaratory judgment *Mitchell I* is void due the denial of due process, and denial of an open court; Fourth, seeking judicial declaration Note and Trust Deed are void in that there is no entity in whose favor they were supposedly made; Sixth, seeking judicial declaration there was not a valid notice of cure which is a contractual prerequisite for any judicial foreclosure; Seventh, seeking judicial declaration of BNYM's rights under the

Note and Trust Deed; Fourteenth, seeking reformation of the Note so that Mitchell may resume paying thereon; Sixteenth, seeking judicial declaration the Debt is unsecured and may not be judicially foreclosed because the security has been severed from the debt; Eighteenth, seeking quiet title against several new parties, including co-defendants America First and Pepperwood HOA; Nineteenth, seeking quiet title action regarding ownership of the Note and the Trust Deed themselves; and Twenty-third, alleging civil conspiracy and seeking a class action for bringing this judicial foreclosure. REC.538

Since BNYM did not demonstrate that any of these counterclaims could have been, or should have been raised in *Mitchell I*, it waived that argument. Therefore, the trial court erred in dismissing them on that basis *sua sponte* because by raising this ground *sua sponte* it impermissibly intruded into the role of BNYM's counsel by raising a ground waived by BNYM's own counsel. "Preservation of the integrity of the adversarial system … precludes the court from infringing upon counsel's role of advocacy." *Girard v. Appleby*, 660 P.2d 245 (Utah 1983)(court improperly raised issue not raised by parties).

> **Raising an issue not addressed by the parties is inappropriate** and outside of the discretion given the governing tribunal because it encroaches upon the advocate responsibility conferred upon counsel.

Hilton Hotel and Pacific Reliance Insurance v. Industrial Commission, 897 P.2d 352, 356 (Utah App 1995)*; See also Chevron v. State Tax Comm'n, 847 P.2d 418 (UT App 1993); Waters v. Jorgenson*, 2001 UT App 164 ¶17.

Since the trial court denied Mitchell a fair hearing on this issue by raising it *sua sponte* for the first time in its ruling, REC.1016, on behalf of BNYM who did not raise it, the *sua sponte* ruling is a denial of due process and therefore is null and void.

IV. Trial Court erred in dismissing counterclaims collaterally attacking *Mitchell I*.

The Trial Court erred in dismissing the First and Third counterclaims because they collaterally attack the rulings or actions of the courts in *Mitchell I* as being null and void. See ¶¶115-155.

As the Supreme Court has plainly held, a void judgment may be collaterally attacked at any time, in any proceeding.

> A void judgment," says Mr. Black, "is in reality no judgment at all. It is a mere nullity. ... It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever, … it does not raise an estoppel against him. **As to the person in whose favor it professes to be, it places him in no better position than he occupied before**; it gives him no new right, but an attempt to enforce it will place him in peril. … It is not necessary to take any steps to have it reversed, vacated, or set aside. But whenever it is brought up against a party, he may assail its pretensions and show its worthlessness. It is supported by no presumptions, and **may be impeached in any action, direct or collateral**. Black on Judgments, Sec. 170.

State v. Bates, 61 P. 905, 906 (Utah 1900).

Consequently, Mitchell has every right to bring the collateral attacks against the void actions of the *Mitchell I* courts, and the trial court cannot simply refuse to do its job. Therefore, the First and Third counterclaims must be reinstated.

V. Trial Court erred by granting BNYM summary judgment without BNYM satisfying its initial burdens with supporting evidence.

The trial court did not require BNYM to meet its initial burdens before granting it summary judgment on its judicial foreclosure claim, and has thereby unfairly injured Mitchell by denying her constitutional right to a jury trial.

> If the [requirements of the rules] are not fulfilled, **both in letter and spirit**,

> the summary judgment procedure becomes a **vehicle of injustice** rather than a salutary medium of reaching a swift but just result on a pure matter of law, as intended by the framers of the rules.

Timm v. Dewsnup, 851 P.2d 1178 (Utah 1993)(citations omitted).

As the Supreme Court plainly explained in *Orvis v. Johnson,* 177 P3d 600, ¶ 19 (Utah 2006) Rule 56(a) has two distinct tests which must both be fully satisfied by a movant before a court may properly grant summary judgment:

> The court shall grant summary judgment **if** the moving party shows that there is no genuine dispute as to any material fact **and** the moving party is entitled to judgment as a matter of law.

A. Trial court erred by not applying the proper standard for summary judgment motions.

Since BNYM is the plaintiff, in order to prove it was entitled to summary judgment as a matter of law, it had to prove its entire prima facie case with evidence in the record:

> Where the moving party would bear the burden of proof at trial, **the movant must establish each element of his claim in order to show that he is entitled to judgment as a matter of law**. . . .

Orvis at ¶10.

BNYM, however, failed to establish each and every element of its claim. It did not even bother to identify the elements of a breach of contract claim, or a claim for judicial foreclosure, let alone address them or prove them with admissible evidence in the record. It therefore failed to meet its initial burden to prove entitlement as a matter of law, and the court was bound to deny its motion. It therefore erred by granting it.

BNYM also failed to meet its second initial burden by failing to show with

admissible evidence in the record that each element of its claims is in fact undisputed.

Since BNYM failed to prove each fact was undisputed, Mitchell did not even have any obligation to dispute any fact asserted before the court should have denied the Motion:

> "[U]nless the *moving* party meets **its initial burden to *present evidence* establishing that no genuine issue of material fact exists**, 'the party opposing the motion is under **no obligation to demonstrate that there is a genuine issue for trial**.' *Harline, 912 P.2d at 445 & n. 13* (quoting *K & T, Inc. V. Koroulis, 888 P2d 623, 628 (Utah 1994)*)" (emphasis added). "Utah law does not allow a summary judgment movant to merely point out a lack of evidence in the non-moving party's case, but instead **requires a movant to affirmatively provide factual evidence establishing that there is no genuine issue of material fact.**"

Orvis at ¶16 (emphasis added).

Rule 56(c)(1) clearly explains how this must be done: "A party asserting that a fact cannot be genuinely disputed … must support the assertion by: (c)(1)(A) citing to **particular parts** of materials in the record, including … documents, … affidavits, … or other materials."[11]

Mitchell didn't even need to oppose BNYM's defective motion because it is only after the moving party meets its initial burden on both prongs that "[t]he burden on summary judgment **then shifts** to the non-moving party to identify **contested material facts**, or **legal flaws** in [the motion]." *Orvis* at ¶ 10 (emphasis added).

Consequently, even if Mitchell had not opposed the Motion the court was obligated to deny it before even reading Mitchell's opposition.

[11] As will be discussed more fully below, BNYM's reliance on Alvin Denmon's affidavit was misplaced because it was inadmissible.

> [S]ummary judgment may not be entered against the nonmoving party merely by virtue of a failure to oppose; the rules of civil procedure allow entry of summary judgment against a defaulted party **only "if appropriate."** Id. R. 56(e). Thus, while the nonmoving party's failure to oppose a motion for summary judgment will often result in a determination that there are no factual issues precluding a grant of summary judgment, **the district court must still determine** whether the moving party's pleadings, discovery, and affidavits demonstrate **its entitlement to judgment as a matter of law.** Id. R. 56(c);

Pepperwood Homeowners Ass'n v. Mitchell, 2015 UT App 137, ¶ 6 (reversing summary judgment as plain error due to plaintiff's failure to prove every element of the claim with evidence, even though no opposition was filed).

As this Court explained: "If 'the moving party fails to properly support its motion for summary judgment, the nonmoving party is **permitted to 'rest on the allegations in [its] pleadings**.'" *Pepperwood* at ¶ 8 (citations omitted).

The *Pepperwood* court then analyzed the answer to the complaint, and held: "In the face of Mitchell's denials, Pepperwood **needed to establish its claim with admissible evidence** that Mitchell was obligated by virtue of the Declaration to pay the claimed amounts." *Pepperwood* at ¶ 9.

Accordingly, where BNYM failed in this case to address or to disprove Mitchell's denials in her Answer (and counterclaims) with actual admissible evidence in the record (as compared to bare assertions), Mitchell could rest on her denials alone, without even opposing the Motion, and summary judgment should have been summarily denied.

Pepperwood puts the burden squarely on the shoulders of the court to make sure BNYM had in fact met both of its initial burdens based on the evidence actually in the record. See *Mountain State Tel. v. Atkin, Wright & Miles*, 681 P.2d 1258 (Utah 1984)(court's decision based on "**the evidence before the court**."), *Olympus Hills Shopping Center v. Smith's*, 889 P.2d 445, 450 (Utah App. 1994)(summary judgment

only "when reasonable minds could not differ on the facts to be determined **from the evidence presented.**")(emphasis added).

This case is similar to the situation in *Orvis:* "Orvis provided **no evidence** to show that the elements [of his affirmative defense] had been satisfied; in fact, Orvis did not even allege that those elements had been met. ... **Because Orvis did not offer the necessary evidence** to show that **all** the elements of [his affirmative defense] were met, **he failed to meet his initial procedural burden on summary judgment.**" *Orvis* at ¶12. Consequently, Orvis' motion for summary judgment was summarily rejected.

Similarly, the moving party in *Conner v Union Pacific* had argued for summary judgment by arguing that there was no evidence contrary to its position, but failed to support each and every one of its own facts with an affidavit or other evidence (even though it had submitted an affidavit in support of some facts). The Supreme Court held that approach resulted in a fatal factual dispute:

> [I]ts argument is **nothing more than a mere assertion**, which is **wholly insufficient** to support a summary judgment motion. ... Because [movant] failed to show by affidavit or otherwise [it's argument,] **we hold there was a genuine issue of material fact** and that the district court erred in granting [movant's] motion for summary judgment.

Conner v. Union Pacific R.R. Co., 972 P.2d 414, 418 (Utah 1998).

Since BNYM failed to fully support its Motion with affidavits or other admissible evidence as to each specific fact in each individual element in each claim, the "bare, self-serving allegations" of Mitchell to the contrary in her Answer and Counterclaim and Declaration defeat summary judgment without the need of any counter affidavit as to the unproven facts. *Gadd v. Olson*, 685 P.2d 1041 (Utah 1984). In other

words, Mitchell may simply "rest on the allegations in [her] pleadings," *Parrish v. Layton City Corp.*, 542 P.2d 1086, 1087 (Utah 1975), because BNYM merely made bare allegations of many of its "facts" without introducing actual admissible proof thereof into the record. See also *Wilkinson v. Union Pacific RR. Co.*, 975 P.2d 464, 465 (Utah 1998) (moving party failed to support its motion for summary judgment with affidavits showing all of the facts were undisputed, and therefore non-moving party could rely on the bare allegations in her pleadings).

Absent actual admissible evidence in the record proving each fact, the trial court could not logically conclude that said fact actually exists. As the *Conner* Court noted: "In short, [movant] does not cite anything **in the record** upon which the district court **could have relied** to justify its grant of summary judgment in [movant's] favor." *Id*.

The trial court in this case erred in granting BNYM's Motion for Summary Judgment because there was not evidence in the record as to each and every element/fact BNYM had to prove.

B. The Trial Court Erred in Allowing the Denmon Affidavit.

Before addressing the numerous gaps in BNYM's Motion, it is important to note that BNYM's purported "evidence" for many of its supposedly "undisputed facts," the Denmon affidavit, REC.808, was inadmissible. The court erred in admitting it and relying upon it.

Rule 56(c)(4) expressly limits the affidavits which may be submitted in support of a motion for summary judgment as follows:

An affidavit or declaration used to support or oppose a motion **must** be made on

> personal knowledge, **must** set out facts that would be admissible in evidence, and **must** show that the affiant or declarant is competent to testify on the matters stated.

Denmon's affidavit is not admissible since it shows he is incompetent because he either clearly lacks any personal knowledge, or the affidavit fails to "show that [he] is competent to testify on the matters stated" as explicitly required by Rule 56(c)(4). *See e.g., Preston v. Lamb*, 436 P.2d 1021 (Utah 1968)(in order for affidavit to be used in a motion for summary judgment, it must set forth facts as would be admissible in evidence); *Treloggen v. Treloggen*, 699 P.2d 747 (Utah 1985)(a supporting affidavit must be based upon an affiant's personal knowledge).

Many of the facts asserted would also be inadmissible since all Denmon does is regurgitate inadmissible hearsay from various documents in a form affidavit prepared by BNYM's counsel without any effort to comply with the requirements for business records, etc.

Furthermore, it was a denial of due process for the trial court to consider Denmon's Affidavit without first allowing Mitchell to take Denmon's deposition, since the affidavit was the first time BNYM disclosed him as a potential witness in violation of Rule 26. His deposition would likely confirm he was not in fact competent to testify as to any of the "facts" he supposedly has personal knowledge of. The Trial Court erred by not giving Mitchell the opportunity requested to take his deposition first, to show he is not competent to testify and lacks any personal knowledge.

Furthermore, the Court was obligated to ignore the Denmon Affidavit because he was never identified as a witness as required by Rule 26(a). Rule 26(d)(4) plainly states:

"If a party fails to disclose or to supplement timely a disclosure or response to discovery, **that party may not use the undisclosed witness,** document or material **at any hearing** or trial unless the failure is harmless or the party shows good cause for the failure."

Therefore, the Court must disregard the Denmon Affidavit in its entirety.

C. BNYM has not proven all of the elements of its claim with evidence in the record.

BNYM's claim is first and foremost a breach of contract claim: "The elements of a prima facie case for breach of contract are (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages." *Bair v. Axiom Design L.L.C.*, 20 P.3d 388, 392 (Utah 2001).

1. BNYM failed to prove there was in fact a contract between it and Mitchell.

BNYM failed to introduce any evidence to prove there was in fact a contract between it and Mitchell, whereby Mitchell owed it any contractual obligation.

Since BNYM was not an original party to the Note and Trust Deed, what it needed to provide was evidence that it in fact became the owner of the Debt, and thereby acquired a contractual obligation from Mitchell. But since BNYM fails to introduce into the record any chain of ownership of the Debt, and/or the Note or the Trust Deed, it fails to prove this element and its Motion should have been summarily denied for this reason alone.

Furthermore, since BNYM failed to introduce any evidence to prove its claim of a contract between them is undisputed, Mitchell's bare denials in her Answer and Declaration and the Declaration of her Husband that BNYM has no contractual rights

since she never entered into a contract with BNYM, and that it is not in fact the current owner of the Debt, and is not entitled to foreclose on the Property, are sufficient to create a disputed fact which defeats summary judgment.

The court therefore again erred in granting summary judgment for failing to prove the existence of a contract is undisputed.

2. BNYM has not proven that it and its predecessors have fully performed every contractual obligation.

Even assuming arguendo that there is a contract between the parties, BNYM does not submit any evidence into the record to prove that it and/or its predecessor(s) have fully performed all of their obligations under the purported contracts, as is required to prove a breach of contract claim.

In particular, there is no evidence introduce into the record that BNYM complied with either Paragraph 20 or 22 of the Trust Deed requiring advance written notice of any alleged breach/default proving Mitchell an opportunity to cure it – BEFORE BNYM filed suit. REC.22-23 There is also no evidence of any advance notice from Lender of the possibility it would accelerate the Debt BEFORE BNYM or its predecessor(s) supposedly accelerated the debt, or even any evidence that the Debt was ever accelerated before this suit was filed.

Indeed, in direct breach of Paragraph 20, BNYM attempts to accelerate the Note in the Complaint itself. REC.22

BNYM cites the Denmon Affidavit to say the acceleration took place, but his Affidavit does not show when this supposedly happened, or how he has any personal

knowledge as to when, or even if, the purported acceleration in fact took place. His Affidavit therefore does not prove full compliance, or that compliance is undisputed.

BNYM totally fails to go through each of the purported obligations of itself or its predecessor(s) under the contracts and then show how the contractual obligations were in fact satisfied, by introducing evidence in the record.

Therefore, there was no evidence in the record upon which the court could reasonably rely in concluding as a matter of law that Paragraphs 20 and 22 were in fact complied with by BNYM and/or its predecessor(s).

The same applies to any and all other contractual obligations. BNYM simply has not proven any compliance on its side of the agreements so as to be entitled to judgment as a matter of law.

3. BNYM fails to prove as a matter of law that Mitchell breached any contract term.

While BNYM does assert generally that Mitchell breached the Note by not making payments as scheduled, it does not actually introduce any evidence into the record that Mitchell in fact breached, or was in default. Therefore, it once again failed to satisfy its initial burdens as to this critical element.

All BNYM points to as a "record" of the alleged breach is the Denmon Affidavit, but the Denmon Affidavit once again is inadmissible since he lacks any personal knowledge as to any alleged breach, and he has based his "testimony" on nothing but hearsay.

Furthermore, given the uncontroverted assertions in the Answer that Mitchell was

fraudulently induced into missing payments by a knowingly false promise of a guaranteed loan modification, which was done for the purpose of inducing the alleged "default" so that BNYM and other could profiteer therefrom, (which factual assertions must be deemed true at this stage unless BNYM has affirmatively proven with admissible evidence they are not – which it has not done) BNYM has not proven by actual evidence in the record that there was in fact a breach or default, because it has not rebutted the possible defense that BOA agreed to the nonpayment.

Therefore, BNYM has again failed to meet its first burden on this critical element, and the court again erred in not summarily denying the Motion.

4. BNYM has failed to prove it is entitled to $1,343,034.81 in damages as a matter of law.

As to the final element, damages, BNYM has not introduced any admissible evidence into the record to prove the actual amount of the damages it claimed in this partial motion for partial damages. There is no evidence in the record providing the actual calculation of the principal or the variable interest. There is no evidence of any fees, penalties, etc.

There simply is no evidence at all as to how BNYM arrived at the summary amount of damages it "asserts" is owed. Each component of damages necessarily requires admissible evidence to prove that component of damages was in fact suffered but none has been provided.

For example, BNYM, does not set forth any evidence as to the interest it claims it is owed. It does not provide any evidence of the interest rates it supposedly used to reach

the total amount of interest it claims, which is critical since the interest rate is variable, and therefore in order to prove the amount of interest owed at trial, BNYM would have to introduce into evidence each of the various rates it applied and when they were used, showing they were in compliance with the Rider, etc. and showing the calculations. (Which calculations also were not provided under Rule 26.)

Likewise, there is no evidence in the record as to any fines, penalties, costs, that BNYM appears to be claiming but has not identified because it simply submitted a single total lump sum amount.

There is no evidence in the record to support the lump sum amount asserted.[12] As such it is nothing more than a bare assertion.

Accordingly, BNYM once again failed to prove with actual evidence in the record the damages as a matter of law. And the Court erred in not denying the Motion for failing to prove entitlement as a matter of law.

It also failed to prove with evidence in the record that the amount claimed was undisputed. And since it was nothing more than a bare assertion of a lump sum, Mitchell's bare denials were sufficient to create a factual dispute.

5. BNYM fails to introduce any evidence it is entitled to judicially foreclose the Trustee's Lien.

[12]The Denmon Affidavit does not constitute admissible evidence of any damages. Denmon does not claim to have personal knowledge of all of the factors which have been included in the amount claimed, or whether they were proper, etc. Nor is there any indication that Denmon as a mere "foreclosure specialist" who "robo-signs" affidavits all day has the requisite expertise to actually calculate the amount of damages actually owing (if any) so as to give an expert testimony as to the amount.

BNYM must also prove it has an interest in the Property to foreclose as required by the one-action rule it is invoking, but it doesn't. See UCA 78B-6-901(1)("There is only one action for the recovery of any debt, or the enforcement of any right, **secured solely by mortgage upon real estate** and that action shall be in accordance with the provisions of this chapter.").

While being careful to not claim actual ownership of the Debt, BNYM claims instead that it is the "holder" of the Note by means of a blank endorsement (without any admissible evidence that the wet ink note was actually transferred to it by the original lender). But since one may be the "holder" of a note without actually owning it, for example as a custodian or in order to try to collect it for the benefit of the actual owner, being a mere "holder" of the Note obviously does not carry with it any rights to the Trustee's Lien, which is necessarily owned and held by the owner of the Debt since it is inseparable therefrom, as discussed above.

Accordingly, BNYM has failed to introduce any evidence that it had any interest to foreclose. Once again, this evidentiary omission summarily defeats its Motion for a judicial foreclosure because BNYM has failed to prove as a matter of law that it may foreclose the Trustee's Lien as its own.

And once again BNYM failed to make any attempt to show how its claim to be the holder was undisputed, so it is a bare assertion which Mitchell's bare denials render disputed. Consequently, the trial court again erred by granting the Motion when BNYM did not meet its initial burdens.

D. Mitchell's alleged defenses precluded any award of summary judgment.

It has long been settled that "a judgment can properly be rendered against a defendant **only if**, on the undisputed facts, the defendant has **no valid defense**." *Disabled American Veterans v. Hendrixson*, 340 P.2d 416, 417 (Utah 1959)(emphasis added).

Mitchell's potentially "valid defenses," unless all of them were proven invalid with admissible evidence, should have defeated summary judgment by BNYM, since they defeat any claim by BNYM of entitlement to judgment as a matter of law since the court must assume the facts alleged are true.

BNYM and the Trial Court, however, totally ignored the defenses raised by the pleadings.[13]

Since the Trial Court failed to hold that BNYM had successfully disproved every potentially "valid defense" as plead, with evidence in the record, it once again erred in holding that BNYM is entitled to judgment as a matter of law while the defenses are still unresolved.

E. Summary re BNYM's summary judgment.

Given all of the missing evidence regarding the elements of BNYM's claim, and the missing evidence rebutting the possible defenses, the court clearly erred in not denying BNYM's Motion for failing to satisfy its initial burden to prove entitlement as a

[13] The potentially valid defenses include: Payment; Lack of Standing; Lack of Privity of Contract; Lack of Valid Assignment; Offset for Violations of Debtor's Rights; Waiver; Estoppel; Breach by Plaintiff; Setoff; Release; Statute of Frauds; Lack of Consideration; Fraud; Statute of Limitations; Waiver of Compulsory Counterclaim; Breach of Covenant of Good faith and Fair Dealing; Waiver of Default; and any more that may yet be discovered.

matter of law. It also erred in not denying the Motion due to BNYM's failure to prove with evidence in the record that the facts as to each of the elements are undisputed. The reality is that BNYM did not even try to meet its initial burdens, and it was the court's duty to summarily deny the Motion.

Consequently, this Court must reverse the summary judgment, and vacate the "Final Judgment" based thereon.

VI. Trial court erred in treating its purported "Final Judgment" as a final "judgment".

The trial court insists that the *sua sponte* "Final Judgment" it entered on November 27, 2017 was in fact a final "judgment" REC.1027, and has improperly taken steps based on it being a final "judgment," even though it is only an interlocutory order and no final "judgment" has yet been entered in this case.[14]

A. The Trial Court violated Rule 58A(c) by preparing and entering its own "Final Judgment" *sua sponte*.

The court violated Rule 58A(c) by preparing its own "Final Judgment" *sua sponte*, entered on November 27, 2017, the same day as it entered the Final Order and Judgment on BNYM's Motion for Summary Judgment, REC.1016, when there had not been a proposed final judgment prepared and circulated first as expressly required by Rule 58A(c), .

Rule 58A(c) clearly gave Mitchell the right to see any proposed judgment before it

[14] Admittedly, if this Court agrees, then it must dismiss this appeal for lack of appellate jurisdiction, but this was Mitchell's only course to get this issue resolved given the trial court's recalcitrance in recognizing the true nature of its "Final Judgment."

was filed with the court, and the option to approve or object to the form thereof before it was filed with the Court. Nowhere in Rule 58A, or elsewhere in the Rules of Civil Procedure, is the court granted the authority to prepare and summarily enter a "final judgment" itself.

Consequently, the Court impermissibly denied Mitchell her due process right to notice of the proposed judgment, and a meaningful opportunity to review the proposed judgment and to be heard on her objections thereto – including the obvious defect that it was premature.

This blatant denial of due process renders the November 27, 2017 "Final Judgment" null and void. See *Judson v Wheeler RV*, 2012 UT 6, ¶18 (judgment is void where due process is not provided); *Richins v. Delbert Chipman & Sons, Co.*, 817 P.2d 382 (Utah App 1991)(judgment is void "if the court acted in a manner inconsistent with due process."); *Workman v. Nagle Constr.*, 802 P.2d 749, 750-754 (Utah App. 1990)(any order issued without due process is "void").

B. The purported "Final Judgment" is not in fact a "judgment."

While the Court has called it document "Final Judgment," it is not in fact or law a "judgment" as that term is defined by and used in the Utah Rules of Civil Procedure because in its November __ ruling granting BNYM's motion for summary judgment, the Trial Court expressly reserved two questions for further adjudication. Since the purported "Final Judgment" was entered before those adjudications are complete, it is not in fact a "judgment."

Rule 54(a) plainly states: ""Judgment" as used in these rules includes a decree or

order that **adjudicates all claims and the rights and liabilities of all parties** or any other order from which an appeal of right lies."

Rule 54(b) further clarifies that:

> any order or other decision, **however designated**, that adjudicates fewer than **all** the claims or the rights and liabilities of fewer than **all** the parties **does not end the action as to any of the claims or parties**, and may be changed at any time before the entry of judgment adjudicating **all** the claims and the rights and liabilities of **all** the parties.

Until all claims and issues involving all parties are resolved on the merits, any document, even one called a "Final Judgment," is not in fact or law a "judgment." It is only an interlocutory order.

> For an order to constitute a final judgment, it must **end the controversy between the litigants**. In other words to be a final order, the court's decision must "dispose of the subject-matter of the litigation **on the merits** of the case."

Anderson v. Wilshire Investments, 2005 UT 59 ¶ 9.

> A judgment is not final even where it fully resolves issues advanced by one party, or even where it resolves a majority of the issues advanced by both parties. Rather, a judgment is final **only if** it "**dispose[s] of the case** as to all the parties, and finally dispose[s] of the subject-matter of the litigation **on the merits** of the case." Put more succinctly, **a judgment is final only if it "ends the controversy between the parties litigant**."

DFI Properties LLC v. GR 2 Enterprises LLC, 2010 UT 61, ¶17 (citations omitted); *Loffredo v. Holt*, 2001 UT 97, ¶ 12 (**"to be considered a final order, the trial court's decision must dispose of the claims of all parties**").

Inasmuch as the purported "Final Judgment" explicitly left issues open for further adjudication, it obviously did not "end the controversy between the parties litigant" on "the merits" and is only an interlocutory order, despite the Court's manifest intent that it be a final and appealable "judgment" ready to be enforced by a sheriff's sale.

Accordingly, the Court's treatment of it as a "judgment" was reversible error which must be reversed and vacated.

1. The question of damages after May 31, 2017 have yet to be adjudicated.

The court granted BNYM's motion for partial summary judgment seeking as damages $1,343,034.81 "plus additional interest, costs, taxes, and other fees owing to plaintiff incurred after May 31, 2017."

> 8. Based on the above, judgment should enter in favor of plaintiff and against defendant Paula A. Mitchell for the amount of $1,343,034.81, **plus additional interest, costs, taxes, and other fees owing to plaintiff <u>incurred after May 31, 2017</u>.**

Order REC.1020.

Since the purported "Final Judgment" does not contain a determination of Mitchell's liability for any amounts post May 31, 2017, it obviously does not resolve on the merits the full amount of the claimed liability. And no "judgment" will until such additional amounts are adjudicated.

Therefore, for this reason alone the purported "Final Judgment" is still merely any interlocutory order subject to change, contrary to the trial court's belief.[15]

2. The question of the amount of attorney fees being claimed remained unresolved when the "Final Judgment" was entered.

BNYM's motion for summary judgment, was only a motion for partial summary

[15] Indeed, the fact that this amount remains unadjudicated means that not only there is no final judgment yet, it also means this Court does not have any appellate jurisdiction to even be considering this appeal, but given the trial court's insistence that it is final, Mitchell has to appeal just to resolve this dispute.

judgment because it did not seek summary judgment for the amount of attorney fees, only for a ruling on liability therefore.[16]

When ruling on the motion for summary judgment, the Court ruled on liability for attorney fees but expressly reserved the amount of attorney fees for adjudication in the future.

> 16. Pursuant to the terms of the parties' written agreements, Plaintiff is awarded its attorney fees and costs incurred in this action **in an amount to be determined upon the filing of plaintiff's Affidavit of Attorney Fees and Costs.**

Order REC.1022.

The amount was again preserved for future adjudication in the "Final Judgment." See ¶16 of "Final Judgment" (awarding fees "in an amount **to be determined**").

It is well established that reserving the amount of attorney fees for further consideration prevents a ruling from being a "judgment." The final judgment rule "requires that **all claims**, including **requests for attorney fees**, be decided in order for a decision to be appropriately appealed to this court." *Loffredo* at ¶14.

> Where attorney fees are awarded to a party, whether denominated as an item of "costs" or not, and **the amount is not stated in the judgment rendered** on the merits of the case, and **evidence must be taken afterwards by the trial court either by affidavit or live testimony**, there is **no final judgment** for the purposes of appeal until the amount of the fees has been ascertained and granted.

ProMax Dev. Corp. v. Raile, 2000 UT 4, ¶ 12.

[16] It is nearly impossible to obtain summary judgment as to the amount of attorney fees since such amount must not be in dispute. "Specifically, where attorney fees are awarded to a prevailing party on summary judgment, the undisputed, material facts must establish, as a matter of law, that (1) the party is entitled to the award **and (2) the amount awarded is reasonable**." *Taylor v. Estate of Taylor*, 770 P.2d 163, 169 (Utah App 1989)(emphasis added). Accordingly, this damage issue must be decided at trial.

The Court mistakenly assumed in its ruling on the Rule 59 Motion that the recent amendments to Rule 58A and Rule 4 somehow altered the forgoing governing law, and therefore the explicit reservation of the amount of fees for future adjudication in the "Final Judgment" did not render it nonfinal.

This Court has already rejected the trial court's theory after explicitly pointing out that Rule 73 "is addressed to post-judgment motions" for attorney fees:

> In its August 9, 2017 order, the district court **awarded attorney fees in an amount to be determined at a later date**. Thus, the order, **by its own terms**, **contemplated additional actions** by the parties in order to resolve issues still in dispute. Accordingly, because **rule 4(b)(1)(F) applies only to post-judgment motions for attorney fees** and no such motion was filed in this case, **traditional case law concerning the finality of judgment for purposes of appeal still applies**.

McQuarrie v. McQuarrie, 2017 UT App 209, ¶ 4.

This Court explained that the recent amendments to Rule 58A and Rule 4 do not alter the traditional requirement that a judgment is only final if it resolves all claims, and that Rule 58A's new reference to attorney fees only applies to Rule 73 post-judgment motions for attorney fees, not bifurcated motions for fees which straddle a purported "judgment," with the liability determination on one side of the "judgment" and determination of the amount on the other, as was the case in *McQuarrie*, and as is the case here.

> Rule 58A(f) of the Utah Rules of Civil Procedure does not alter this court's analysis. While rule 58A(f) does not reference rule 73 of the Utah Rules of Civil Procedure, it mirrors the language of rule 4(b)(1)(F) of the Utah Rules of Appellate Procedure in stating that a "motion or claim for attorney fees" does not affect the finality of a judgment. … Thus, it is clear that rule 58A(f) is meant to address those situations in which a party files a motion for attorney fees **after**

> **entry of a judgment that otherwise would be final** for purposes of appeal. **It does not affect** the appealability issue in this case **in which the district court's order was never final because it contemplated additional actions by the parties.**

McQuarrie at ¶ 5.

Accordingly, the trial court erred in assuming that the Rule 58A and Rule 4 amendments somehow rendered the "Final Judgment" "final" when the "Final Judgment" clearly was not final because it expressly reserved for further adjudication the amount of fees to be awarded.

Consequently, this Court must hold the "Final Judgment" is not in fact a "final judgment," and reverse or vacate all actions mistakenly taken by the trial court erroneously treating it as a final judgment.

C. Trial court erred by including an order to the sheriff in the interlocutory "Final Judgment."

The trial court erred by including Paragraph 14 in the "Final Judgment" whereby the court orders the court clerk "to issue an Order of Foreclosure Sale **effectuating this Final Order and Judgment**," because it was not in fact a final order and appealable "judgment," as required by the judicial foreclosure statute before a sale may be ordered.

The Legislature plainly declared in UCA 78B-6-901(1) that any judicial foreclosure must comply with the statutory requirements it has created: "There is only one action for the recovery of any debt, or the enforcement of any right, secured solely by mortgage upon real estate and **that action shall be in accordance with the provisions of this chapter**."

The Supreme Court has consistently held that the statutory requirements of

judicial foreclosure are mandatory: "**The statute is therefore mandatory**, and, having spoken upon the subject of mortgage foreclosures, its mandate **must be obeyed by all courts**." *Hammond v Wall*, 171 P. 148, 151 (Utah 1917).

> Foreclosure proceedings on a mortgage securing a note in default **must** be conducted in accordance with the statutes, Sec. 104-55-1 to 9, U. C. A. 1943. **It is necessary to have the court ascertain what sum of money, if any, is due and owing** on the note and mortgage **before the court can properly issue an order of sale** to liquidate the debt through sale of the security.

Stewart Livestock Co. v. Ostler, 144 P.2d 276, 281 (Utah 1943).

Accordingly, the trial court was bound to comply with Subsection 78B-6-901(2) which plainly provides what must be included in a "judgment" before a judicial foreclosure sale may be ordered:

> A judgment **shall** include:
>
> (a) **the amount due**, with costs and disbursements;
>
> (b) an order for the sale of mortgaged property, or a portion of it to satisfy **the amount** and accruing costs;

Section 78B-6-902 then addresses what happens if the sale proceeds are not sufficient to cover "the judgment" previously entered in compliance with Section 901(2).[17] Section 78B-6-904 on the other hand addresses what happens if there is a surplus above "the amount due" on the trustee's lien, as should be set forth in "the

[17] Section 902 provides:

> If it appears that the proceeds of the sale are insufficient and a balance still remains due, the judgment shall be docketed by the clerk and execution may be issued for the balance as in other cases. A general execution may not be issued until after the sale of the mortgaged property and the application of the amount realized **to the preceding judgment**.

judgment."[18] Section 78B-6-906 then creates the right of redemption which also requires a "judgment." Likewise Rule 69C which governs the redemption process also repeatedly refers to "the judgment."[19]

Given the repeated references to a "judgment" and/or the "amount due" in the forgoing statutes and Rule, it is readily apparent that unless there is in fact an actual final "judgment" containing the total "amount due," as required by Section 901, a deficiency or surplus cannot be calculated, and a redemption cannot be effected.

Until an actual final "judgment" with a total "amount due" is entered, the trial court therefore has no statutory authority to issue an Order to sell.

This is confirmed by the Supreme Court's explicit ruling in *Stewart Livestock*, that a court must ascertain "what sum of money, if any, is due and owing … **before** the court can properly issue an order of sale."

Accordingly, there is no debate the trial court's "Final Judgment" does not comply with Section 901(2)(a), and therefore is the statutorily required "judgment" necessary to allow a judicial foreclosure. It therefore should not have presumed to authorize a foreclosure sale based thereon.

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[18] Section 904 provides:

> If there is surplus money remaining after **payment of the amount due on the** mortgage, **lien** or encumbrance, with costs, the court may order the amount paid to the person entitled to it. In the meantime the court may direct it to be deposited with the court.

[19] Rule 64 provides:

> (c) How made. To redeem, the redemptioner shall pay the amount required to the purchaser and shall serve on the purchaser:
> (c)(1) **a certified copy of the judgment** or lien under which the redemptioner claims the right to redeem;
> (c)(2) an assignment, properly acknowledged if necessary to establish the claim; and
> (c)(3) an affidavit showing **the amount due on the judgment** or lien.

The court therefore improperly issued the Order of Foreclosure Sale[20] prematurely because it did so before it had "ascertained what **sum** of money, if any is due and owing," and had not entered a statutorily compliant "judgment" with the total "amount due."

Absent the total "amount due," it is a legal impossibility to properly calculate any deficiency or surplus, and therefore it would be a legal impossibility to make those calculations based on the "Final Judgment."

Consequently, it is clear that since the requirements of Section 901(2)(a) had not been satisfied when the purportedly "Final Judgment" was entered, the Court had not yet acquired the statutory authority to order a foreclosure sale under Section 901(2)(b), rendering its Order unauthorized, null and void. It therefore must be vacated by this Court.

CLAIM FOR ATTORNEY FEES

Inasmuch as this is a statutory judicial foreclosure action where the court has heretofore allowed attorney fees to BNYM under UCA 78B-6-908, if Mitchell prevails on this appeal in a permanent manner, she will become entitled to her attorney fees as a matter of reciprocity, especially if this Court determines that the judicial foreclosure claim is barred as waived under Rule 13(a), or that BNYM lacks standing to bring this action. It is therefore requested that if Mitchell prevails on tis appeal that the Court award her her fees, the amount of which will be determined on remand by the trial court.

[20] REC.1076

CONCLUSION

The trial court's actions should be vacated in their entirety as being null and void due either to BNYM's lack of standing or because the this action is barred by Rule 13(a). In the alternative, the Court should declare the "Final Judgment" is not in fact final and therefore the court lacked any statutory authority to issue the Order for Foreclosure Sale, rendering it a nullity which must be vacated.

CERTIFICATE OF COMPLIANCE

This Brief is over the word limit of 14,000, but it is not over 15,400, and therefore a motion for overlength brief will be filed. This brief complies with requirements of Rule 21.

/s/ Douglas R. Short