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Jurisdictional Statement

This action involves Appellants' claim of a violation of Section 443.130 of the Missouri Revised Statutes (2000),¹ which requires mortgage companies to timely release deeds of trust encumbering property after payment in full of the loan secured by the property. Appellants contend that Respondents have a duty to provide Appellants with a deed of release after a statutory demand, even though the property was no longer encumbered because a deed of release had been filed on the property in question before the demand was received. See Legal File pp. 56-68.² On cross-motions for summary judgment, the Trial Court entered summary judgment against Appellants on April 27, 2006 (L.F. 129-130) and Appellants filed their Notice of Appeal on May 26, 2006. L.F. 138. The Missouri Court of Appeals reversed the Trial Court's grant of summary judgment in favor of Wells Fargo and held that Section 443.130 requires a lending institution to provide a copy of a deed of release to that institution's former borrower, even though the deed had already been released before any demand had been served on the institution. See Huber v. Wells Fargo Home Mortgage, Inc., 2007 WL 656286 (Mo. App. E.D. 2007). By Order dated May 29, 2007, this Court sustained Wells Fargo Home Mortgage, Inc.'s Application for Transfer and ordered this appeal transferred to this Honorable Court.

1. Unless stated otherwise, all further statutory references are to MO. REV. STAT. (2000).

2. References to the Legal File will be to "L.F. ____."

This appeal falls within the jurisdiction of the Missouri Supreme Court pursuant to Article V, Section 10 of the Constitution of the State of Missouri, as this Court ordered the appeal transferred to this Court after opinion by the Court of Appeals due to the general interest or importance of a question involved in this appeal and because this Court may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal.

Statement of Facts

Respondent, Wells Fargo Home Mortgage, Inc. (“Wells Fargo”), is dissatisfied with the accuracy and completeness of Appellants’ Statement of Facts and, accordingly, submits the following:

Appellants obtained a loan from Franklin American Mortgage Co. (“Franklin”) and, on September 12, 2002, executed a Deed of Trust in favor of Franklin, which was recorded at Book 14185 Page 2833 of the records of the Recorder of Deeds of St. Louis County, Missouri (the “Recorder of Deeds Office”). L.F. 25, 57-58. The original “mortgagee/beneficiary” on the Deed of Trust was “Mortgage Electronic Registration Systems, Inc. ‘MERS’ as nominee for Franklin American Mortgage Company.” L.F. 25, 29, 58. Wells Fargo subsequently obtained the servicing rights to the Appellants’ loan. L.F. 108, 116.

On February 6, 2004, Appellants paid the loan in full. The Deed of Trust securing the loan was then released by instrument (the “Deed of Release”) dated February 13, 2004 and recorded on February 23, 2004 at Book 15651 Page 1789 of the Recorder of Deeds Office. L.F. 25, 33, 58.

Fourteen days after the Deed of Release had been filed with the Recorder of Deeds Office, on March 8, 2004, Appellants sent Wells Fargo a letter signed by Scott E. Huber, which stated that “[w]e are making a statutory demand for immediate release of the Deed of Trust against our Birmingham Property;” Appellants also provided Wells Fargo with a check in the amount of \$40.00. L.F. 81. Because the loan had been paid in full and the Deed of Trust had already been released, Wells Fargo returned the \$40.00 check to the

Appellants. L.F. 93. On April 23, 2004, Wells Fargo sent a second Deed of Release to Kevin L. Fritz. L.F. 94. This second Deed of Release, however, was unnecessary, as the property was no longer encumbered by a Deed of Trust and Wells Fargo did not then have, and in fact had never had, an interest of record in the property.

On June 6, 2005, Appellants filed their First Amended Petition (the “Petition”) against Wells Fargo and Franklin. L.F. 11. In the Petition, Appellants alleged that Wells Fargo and Franklin had a statutory duty to provide Appellants with a deed of release within fifteen (15) days after receipt of Mr. Huber’s letter and that, upon a failure to do so, Appellants are entitled to 10% of the loan amount from the Respondents. L.F.11-14. Appellants’ Petition fails to mention that the property was not encumbered at the time Mr. Huber drafted his letter to Wells Fargo, or that the Deed of Release had been recorded before Mr. Huber delivered his letter.

On June 23, 2005, Wells Fargo moved for summary judgment against Appellants, arguing that in order for Appellants’ to prevail, the property must have been encumbered by the Deed of Trust at the time Appellants made their alleged statutory demand. Because it was undisputed that the property was not encumbered by the Deed of Trust at the time of the alleged statutory demand, Wells Fargo asserted Section 443.130 was not implicated and judgment against Appellants was appropriate. Wells Fargo also noted that Section 443.130 states the that mortgagor must send the demand letter “to the mortgagee, cestui qui trust, or assignee....” Under the Deed of Trust, Wells Fargo was not the mortgagee, cestui qui trust or assignee; Franklin was the mortgagee of record prior to

release of the Deed of Trust and it is undisputed that no letter requesting a deed of release had been sent to Franklin.

By order dated April 27, 2006, the Trial Court granted summary judgment in favor of Wells Fargo and against Appellants. L.F. 129-130. On May 23, 2006, the Trial Court amended its order and also granted summary judgment in favor of Franklin and against Appellants. L.F. 137.

Points Relied On

I. The Trial Court did not err in granting Respondent's Motion for Summary Judgment because no issue of material fact exists in that Section 443.130 is only applicable if, at the time Appellants made their demand on Respondent, the property is encumbered by the Respondent's Deed of Trust.

MO. REV. STAT. § 443.060 (2000)

MO. REV. STAT. § 443.130 (2000)

Berndsen v. Flagstar Bank, 193 S.W.3d 828 (Mo. App. E.D. 2006)

Digman v. McCollum, 47 Mo. 372, 1871 WL 7647 (Mo. 1871)

Garr v. Countrywide Home Loans, Inc., 137 S.W.3d 457 (Mo. banc 2004)

II. The Trial Court did not err in granting Respondent's Motion for Summary Judgment because no issue of material fact exists in that Section 443.130 requires the mortgagor to serve a demand on the "mortgagee, cestui qui trust, or assignee" under the Deed of Trust and Wells Fargo was not the mortgagee, cestui qui trust or assignee under the Deed of Trust.

MO. REV. STAT. § 443.060 (2000)

MO. REV. STAT. § 443.130 (2000)

Ringstreet Northcrest, Inc. v. Bisanz, 950 S.W.2d 520 (Mo. App. W.D. 1997)

III. The Trial Court did not err in granting Respondent's Motion for Summary Judgment because no issue of material fact exists in that Section 443.130 is only applicable if, at the time Appellants made their demand on Respondent, the property is encumbered by the Respondent's Deed of Trust.

MO. REV. STAT. § 443.060 (2000)

MO. REV. STAT. § 443.130 (2000)

Berndsen v. Flagstar Bank, 193 S.W.3d 828 (Mo. App. E.D. 2006)

Digman v. McCollum, 47 Mo. 372, 1871 WL 7647 (Mo. 1871)

Garr v. Countrywide Home Loans, Inc., 137 S.W.3d 457 (Mo. banc 2004)

Argument

I. The Trial Court did not err in granting Respondent’s Motion for Summary Judgment because no issue of material fact exists in that Section 443.130 is only applicable if, at the time Appellants made their demand on Respondent, the property is encumbered by the Respondent’s Deed of Trust.

A. Standard of Review

This Court’s review of the propriety of summary judgment is a question of law and therefore review is *de novo*. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). The criteria for determining the propriety of summary judgment on appeal are no different than those used at the trial level. Id. This Court views the record and construes all inferences favorably to the non-movant, but facts set forth in support of the summary judgment motion are taken as true unless contradicted by the non-movant’s response. Id. at 376, 382-83.

A defendant may establish a right to judgment by showing (1) facts that negate any one of the elements of the plaintiff’s claim, (2) that the plaintiff cannot produce evidence sufficient to allow the trier of fact to find the existence of any one of the plaintiff’s elements, or (3) “that there is no genuine dispute as to the existence of each of the facts necessary to support the [defendant’s] properly-pleaded affirmative defense.” Id. at 381.

Once the defendant has met this burden, the plaintiff must show by reference to the record that “one or more of the material facts shown by the movant to be above any genuine dispute is, in fact, genuinely disputed.” Id.

A “genuine issue” exists where the record contains competent materials that demonstrate “two plausible, but contradictory, accounts of the essential facts.” Id. at 382.

B. The plain language of Section 443.130 (the “Penalty Statute”), as well as the purpose of the Penalty Statute, make clear that it is not applicable in a situation where the property is not encumbered by a deed of trust.

The Penalty Statute, prior to its recent amendment, provided that:

1. If any such person, thus receiving satisfaction, does not, within fifteen business days after request and tender of costs, deliver to the person making satisfaction a sufficient deed of release, such person shall forfeit to the party aggrieved ten percent upon the amount of the security instrument, absolutely, and any other damages such person may be able to prove such person has sustained, to be recovered in any court of competent jurisdiction. A business day is any day except Saturday, Sunday and legal holidays.

2. To qualify under this section, the mortgagor shall provide the request in the form of a demand letter to the mortgagee, cestui qui trust, or assignee by certified mail, return receipt requested. The letter shall include good and sufficient evidence that the debt secured by the deed of trust was satisfied with good funds, and the expense of filing and recording the release was advanced.

3. In any action against such person who fails to release the lien as provided in subsection 1 of this section, the plaintiff, or his attorney, shall prove at trial that the plaintiff notified the holder of the note by certified mail, return receipt requested.

The Penalty Statute is the enforcement mechanism for Section 443.060.1, “which requires a mortgagee to deliver a ‘sufficient deed of release of the security instrument’ upon satisfaction of the instrument.” Garr v. Countrywide Home Loans, Inc., 137 S.W.3d 457, 460 (Mo. banc 2004) (quoting § 443.060.1).

The purpose of the Penalty Statute is to ensure that encumbrances on real estate are released in a timely manner. See e.g., Garr, 137 S.W.3d at 460 (“[t]he purpose of section 443.130 is to enforce the duty of the mortgagee to clear the mortgagor’s title, so that the record is no longer encumbered”); Berndsen v. Flagstar Bank, 193 S.W.3d 828, 831 (Mo. App. E.D. 2006) (“[t]he purpose of Section 443.130 is to enforce the duty of the mortgagee to clear the mortgagor’s title, so that the record is no longer encumbered”); Roberts v. Rider, 924 S.W.2d 555, 558 (Mo. App. S.D. 1996) (“The purpose of § 443.130 is to enforce the duty of the mortgagee to clear the title of the mortgagor, so that it is apparent upon examination that the [e]ncumbrance of record no longer exists”) (internal quotations omitted).

Appellants argue that even though their property was no longer encumbered by the Deed of Trust at the time of Mr. Huber’s demand letter, the Penalty Statute still requires Wells Fargo to deliver a deed of release to the Appellants. Such an interpretation completely ignores the language and purpose of the Penalty Statute, which is to enforce the duty of the mortgagee to clear the mortgagor’s title. Without a need to clear the mortgagor’s title, there is no need for the enforcement mechanism of Section 443.130.

The Penalty Statute provides that “[i]f any such person, thus receiving satisfaction, does not, within fifteen business days after request and tender of costs, deliver to the

person making satisfaction a sufficient deed of release, such person shall forfeit to the party aggrieved ten percent upon the amount of the security instrument . . .” § 443.130.1 The Penalty Statute further explains that “[i]n any action against such person *who fails to release the lien as provided in subsection 1 of this section*, the plaintiff, or his attorney, shall prove at trial that the plaintiff notified the holder of the note by certified mail, return receipt requested.” § 443.130.3. (emphasis added).

The language of section 443.130.3, which defines the mortgagor’s obligation to prove service of a demand at a trial when the mortgagee “*fails to release the lien . . .*”, and the holding of this Court, which clarified the purpose of section 443.130 as being “*to clear the mortgagor’s title so that the record is no longer encumbered*”, makes it apparent that **the Penalty Statute does not apply to unencumbered property**. If it did, as Appellants contend, any person that has owned property free and clear of a previously recorded mortgage could make a demand on their prior lending institution for a deed of release, even if that property has been unencumbered for fifty years. There is no *purpose* in providing a deed of release to someone that owns unencumbered property.

Furthermore, the Penalty Statutes states that “[t]o qualify under this section, the *mortgagor* shall provide the request in the form of a demand letter to the mortgagee, cestui qui trust, or assignee by certified mail, return receipt requested.” § 443.130.2 (emphasis added). “Mortgagor” is defined as “[o]ne who mortgages property; the mortgage-debtor, or borrower.” BLACK’S LAW DICTIONARY 1030 (7th Ed. 1999). After the borrower has paid off his mortgage and the encumbrance is released, that party is no longer either a borrower or a mortgagor. That party owns his home free and clear and is

no longer subject to a mortgage. To trigger the obligations of the Penalty Statute, “the *mortgagor*” must provide the secured party with a request in the form of a demand letter. § 443.130.2 (emphasis added). If the deed is released and the home is owned free and clear of the encumbrance, there is no mortgagor. Accordingly, after Appellants paid off the mortgage and Franklin cleared its encumbrance on the Appellants’ home, the Appellants were no longer “mortgagors” and, therefore, lacked the status as “mortgagor” that is required to permit them to demand a deed of release under the Penalty Statute.

Also, under settled law, Appellants are deemed to have knowledge of the recordation of the Deed of Trust on February 23, 2004. In fact, the general rule is that a grantee is imputed with constructive notice of all duly recorded conveyances in the chain of title. See Digman v. McCollum, 47 Mo. 372, 1871 WL 7647, at *2 (Mo. 1871).

The general rule on this subject undoubtedly is that a purchaser must at his own peril inquire into the state of his grantor’s record title, since he will be affected with constructive notice of all duly-recorded conveyances by his grantor affecting that title. I am aware of no exception to this rule....

Digman, 1871 WL at *2.

There can be no dispute that the general rule is still observed over 100 years after it was alluded to in Digman. See Knutson v. Christeson, 684 S.W.2d 549, 551 (Mo. App. S.D. 1984) (“We see no reason why the circumstances of this case warrant suspending application of the general rule that *a grantee is charged with constructive notice of the contents of prior recorded instruments in his vendor's chain of title*”) (emphasis added).

The Appellants are the grantee under the Deed of Release and are otherwise functionally

in the position of a grantee with regard to the chain of title. There is no logical reason why they should not be charged with constructive notice of all instruments in their chain of title prior to the date of their alleged statutory demand. Appellants seek to recover a substantial statutory penalty that is, as a matter of law, only available if the deed of trust they seek to have removed from their chain of title is in fact in their chain of title. The fact that Appellants are imputed with constructive notice of the contents of prior recorded instruments in their chain of title deprives Appellants of the right to assert that they did not have notice that the Deed of Trust had in fact been released before the date of Mr. Huber's alleged statutory demand.

It is undisputed that the Deed of Release of Franklin's Deed of Trust was recorded on February 23, 2004, and that Mr. Huber made his demand on March 8, 2004. Accordingly, Appellants' property was unencumbered at the time of the demand. Because the property was unencumbered, there was no "lien" for either Franklin or Wells Fargo to release and no encumbrance to "clear." § 443.130.3; Garr, 137 S.W.3d at 460. As a result, Appellants' claim failed to implicate the Penalty Statute and therefore failed as a matter of law. Accordingly, the Trial Court properly granted summary judgment in favor of Respondents and against Appellants.

Furthermore, Appellants' claim that Wells Fargo is attempting to graft additional requirements into Section 443.130 is incorrect. Appellants disingenuously argue that recording a deed of release is not the same as "delivering" the deed of release to the person making satisfaction. Whether recording a deed of release operates as a delivery is *not* the issue in this case. Appellants highlight the argument in an attempt to direct this

Court's attention away from the fact that Appellants' property was not encumbered at the time of their demand. *If* Appellants' property was encumbered at the time of their demand and *if* Wells Fargo recorded a deed of release instead of delivering a deed of release to the Appellants, then Appellants' argument would be relevant. However, the argument is *not* relevant because no deed of trust encumbered the Appellants' property at the time of the demand. Consequently, Appellants' claim under the Penalty Statute fails as a matter of law and summary judgment in favor of Wells Fargo and against Plaintiffs was appropriate.

As such, the language in the Glass v. First Nat. Bank of St. Louis decision that “[e]ven if [the mortgage company] had recorded the deed of release within the statutory deadline, which it failed to do, that would not have excused its obligation to provide the [homeowners] with the deed as required by [S]ection 443.130.1,” does not require imposition of the statutory penalty for failure to provide a copy of the document that effectuated the release. 191 S.W.3d 662, 667 (Mo. banc 2006).

In Glass, this Court reviewed only whether the borrowers' letter sufficiently complied with the Penalty Statute so as to constitute a “demand” under the Penalty Statute. Id. at 666 (“What [the lender] argues is that the contents of the demand letter fail to sufficiently track the language of section 443.130 so as to provide adequate notice of the demand”). This Court analyzed the demand letter and found the letter sufficiently placed the lender on notice that a demand was being made pursuant to the Penalty Statute. Id. at 666-67. Although neither essential to nor required to support its holding, this Court gratuitously stated that “[e]ven if [the lender] had recorded the deed of release

within the statutory deadline, which it failed to do, that would not have excused its obligation to provide the *[borrowers] with the deed* as required by section 443.130.1.” Id. at 667 (emphasis added). Surely this statement was not intended to be construed to constitute an implicit intent to overrule this Court’s holding that the purpose of the Penalty Statute is to “enforce the duty of the mortgagee to clear the mortgagor’s title, so that the record is no longer encumbered.” Garr, 137 S.W.3d at 460.

This Court requires that “[a]ny reported opinion should be read in light of the facts of that particular case and it would be unfair as well as improper to give permanent and controlling effect to casual statements outside the scope of the real inquiry.” State ex inf. Dalton v. Miles Laboratories, Inc., 282 S.W.2d 564, 573 (Mo. banc 1955). “[D]icta” are statements “that [are] not essential to the Missouri Supreme Court’s decision.” Husch & Eppenberger, LLC v. Eisenberg, 213 S.W.3d 124, 132 (Mo. App. E.D. 2006). Such statements are not binding. Id. As such, the *dicta* in the Glass decision possibly requiring physical delivery of the original deed of release—not a copy—in a case where a statutory demand is made, and the property is encumbered at the time of the demand, is not binding on this Court.

Furthermore, the decision in Glass did not address the issue now before this Court. In Glass, the borrower served a demand letter on the lender and, at the time the demand letter was served, the property in question was encumbered by the lender’s deed of trust. Glass, 191 S.W.3d at 664. Here, there is no dispute Appellants’ home was not encumbered at the time Mr. Huber sent his letter demanding a release of his Deed of Trust. The property in Glass was encumbered at the time of the demand, thus triggering

the enforcement mechanism of the Penalty Statute. Here, the Penalty Statute could not have been triggered by service of Mr. Huber’s letter *after* the Deed of Trust was released. See § 443.130.3 (“[i]n any action against such person *who fails to release the lien as provided in subsection 1 of this section*”) (emphasis added). Accordingly, Glass is neither binding on this Court nor is it relevant to the issue before the Court.

The *dicta* in the Glass decision could be construed as requiring a lender to both record an original executed deed of release and provide an original executed deed of release to the borrower *if* the demand is served on the lender before the lender has recorded a deed of release on the property. That scenario is simply not the case here. Here, no encumbrance existed on the Appellants’ property at the time of their demand. The language of the Penalty Statute and this Court’s holding in Garr establish that the obligations contained in the Penalty Statute cannot be triggered unless the property subject to the demand is encumbered at the time of the demand. Otherwise, the Penalty Statute’s purpose—to enforce the mortgagee’s duty to timely release its encumbrance—is cast aside and the Penalty Statute simply provides a potential windfall for savvy plaintiffs.

Moreover, to construe the Glass decision as requiring lending institutions to provide a “copy” of a previously filed deed of release to a former borrower imposes substantial burdens upon those lending institutions. Such an opinion would be construed as requiring lenders to comply with the Penalty Statute even after the mortgagee/mortgagor (lender/borrower) relationship has concluded. This would unduly burden lenders because after a lender records a deed of release (and it does so before a

demand is made under the Penalty Statute), the lender should be able to close out that borrower's file. Instead, the lender must maintain those files for an indefinite period of time and record and deliver a "copy" of a deed of release to any former borrower that makes a demand under the Penalty Statute.

C. Amendment of the Statute Does Not Affect the General Interest and Importance of the Question Presented.

The revision to the Penalty Statute does not obviate the problem that a lender may be required to comply with the Penalty Statute years after it has recorded a deed of release on a property and moved the files for that property to an off-site location.

The Penalty Statute, as amended, states:

If the secured party, receiving satisfaction for the debt secured pursuant to this chapter, does not, within forty-five days after request and tender of costs, submit for recording a sufficient deed of release, such secured party shall be liable to the mortgagor....

MO. REV. STAT. § 443.130.1 (Supp. 2004) (hereinafter the "Revised Penalty Statute").

Under the Revised Penalty Statute, a lender must "submit for recording a sufficient deed of release" within forty-five days after a demand by a borrower *even if* the lender had already, prior to the demand, recorded a deed of release.

Neither the Penalty Statute nor the Revised Penalty Statute provide a date on which a lender will no longer have any duties under the statutes. It is logical that a lender will no longer owe any duties to a borrower after the borrower has paid off the loan and the lender has released its encumbrance; it is likewise logical that the only way a lender's

obligations under the Penalty Statute and the Revised Penalty Statute could be triggered is if the borrower's demand is made *before* the lender records a deed of release. Construing *dicta* in Glass to require lenders to provide copies of deeds of release after any demand for a deed of release is made, even if the deed of release was recorded before the demand, will place a heavy burden on lenders. Lenders would have an obligation to provide a deed of release on property that the lender may have already released years before. That is clearly not the purpose of either the Penalty Statute or the Revised Penalty Statute.

A finding that a lender's obligations cease after it has recorded its deed of release, if the Penalty Statute or Revised Penalty Statute are not triggered before then by a proper demand, is logical. If the statutes have not been triggered and the encumbrance released, the borrower is no longer a "mortgagor." Instead, that party owns his home free and clear and is no longer subject to a mortgage. To trigger the obligations of the Penalty Statute and the Revised Penalty Statute, "the *mortgagor*" must provide the secured party with a request in the form of a demand letter. § 443.130.2 (emphasis added); § 443.130.3 (Supp. 2004) (emphasis added). If the deed is released and the home is owned free and clear of the encumbrance, there is no mortgagor. There is only a person who was once a mortgagor—the Penalty Statute and Revised Penalty Statute should not be interpreted as requiring a never-ending duty on lenders to provide deeds of release to former borrowers.

D. Conclusion

For Appellants' claim to succeed, this Court would have to recognize that it would be possible under the Penalty Statute for anyone to demand a deed of release from their

prior mortgagee, even if that mortgagee had filed a deed of release on the property years ago. This would require mortgage companies to maintain records regarding properties that they have no interest in, for an *indefinite* amount of time. Moreover, it would be necessary for the records to be immediately assessable, as a strict delivery deadline is applicable under both the Penalty Statute and the Revised Penalty Statute. Under the clear language of the Penalty Statute, and this Court's explanation of the Penalty Statute's purpose, this could not have been the Legislature's intent. If it were, Appellants would actually have an incentive to wait as long as possible before demanding a deed of release. The longer they wait, the more likely that their mortgagee will convert their records to microfiche or place their records in a bulk storage area, thereby making it more difficult for the mortgagee to comply with the demand.

The purpose of section 443.130 "is to enforce the duty of the mortgagee *to clear the mortgagor's title so that the record is no longer encumbered*" (Garr, 137 S.W.3d at 460 (emphasis added)), not to provide a legal game of "gotcha" for savvy Plaintiffs. At the time of Appellants' demand, no encumbrance claimed by Wells Fargo or Franklin burdened the property. As such, the Penalty Statute was not implicated and Appellants' claim fails as a matter of law.

II. The Circuit Court did not err in granting Respondents’ Motion for Summary Judgment because no issue of material fact exists in that Section 443.130 requires the mortgagor to serve a demand on the “mortgagee, cestui qui trust, or assignee” under the Deed of Trust and Wells Fargo was not the mortgagee, cestui qui trust or assignee under the Deed of Trust.

A. Standard of Review

The standard of review applicable to this point relied on is the same as discussed above at section I, pages 12 and 13.

B. Appellants failed to serve a demand pursuant to Section 443.130 to the mortgagee, cestui qui trust or assignee.

In order for Appellants’ claim under the Penalty Statute to be successful, Appellants must show that they made their demand for a deed of release to the “mortgagee, cestui qui trust, or assignee.” § 443.130.2. Appellants cannot show that Wells Fargo is the “mortgagee, cestui qui trust, or assignee” under the Deed of Trust. The undisputed evidence is that the Deed of Trust provides that Franklin is the mortgagee, not Wells Fargo. Because Appellants cannot prove that they provided the required statutory demand to the “mortgagee, cestui qui trust, or assignee,” their claim fails as a matter of law.

C. Conclusion

The Penalty Statute is to be strictly construed, and adherence with all requirements of the Penalty Statute is required before liability will be imposed. Ringstreet Northcrest, Inc. v. Bisanz, 950 S.W.2d 520, 522 (Mo. App. W.D. 1997).

As noted in paragraph 2 of the Penalty Statute, the mortgagor is required to provide the request for release in the form of a demand letter to “the mortgagee, cestui qui trust, or assignee.” Under the Deed of Trust, Franklin was the mortgagee of record. Appellants, however, failed to serve their demand on Franklin.³ Because Appellants failed to comply with the terms of Section 443.130, their claim fails as a matter of law.

³ Wells Fargo concedes that it received an assignment of some rights created by the Deed of Trust. It is undisputed, however, that there was no change of the applicable real estate records to reflect Wells Fargo’s interest. Given the state of the real estate records, it is clear that only Franklin, or Franklin’s nominee, could effectively release the interest created by the Deed of Trust—as it did by filing a deed of release on February 23, 2004.

III. The Circuit Court did not err in granting Respondents' Motion for Summary Judgment because no issue of material fact exists in that Section 443.130 is only applicable if, at the time Appellants made their demand on Respondents, the property is encumbered by the Respondents' Deed of Trust.

In response to Appellants' third Point Relied On, Wells Fargo hereby incorporates its arguments set forth in response to Appellants' first Point Relied On, pages 12 through 23, as though fully set forth herein.

Conclusion

Because the Deed of Trust had been released prior to the date of Appellants' alleged statutory demand, their claim fails as a matter of law. The Penalty Statute is intended to assure that encumbrances that have in fact been satisfied are no longer reflected in the official real estate records as encumbrances. Because the Deed of Trust had been released prior to the date of Appellants' demand, the statute was never implicated. Furthermore, Appellants' attempt to create a cause of action by submitting a statutory demand under circumstances in which the demand was not authorized because they were not mortgagors cannot create such a cause of action. In addition, Appellants failed to comply with the Penalty Statute because they did not send their purported statutory demand to the "mortgagee, cestui qui trust, or assignee."

For the reasons aforesaid, there is no genuine dispute of material fact and the Trial Court's grant of summary judgment was proper. Accordingly, Wells Fargo respectfully requests that this Court affirm the decision of the Trial Court.

Respectfully submitted,

HAZELWOOD & WEBER LLC

By: _____
David T. Hamilton, #28166
Nicholas J. Komoroski, #52675
200 North Third Street
St. Charles, Missouri 63301
Office 636-947-4700
Facsimile 636-947-1743
dhamilton@hazelwoodweber.com
nkomoroski@hazelwoodweber.com

Attorneys for Respondent,
Wells Fargo Home Mortgage, Inc.

Certificate of Counsel and Service of Brief

I hereby certify that Respondent's Substitute Brief on Appeal complies with the limitations contained in Rule 84.06(b) and that there are 5,513 words in the Substitute Brief, excluding the cover, certificate of service, signature block and appendix. A floppy disk containing a copy of Respondent's Substitute Brief on Appeal is attached and I hereby certify that said floppy disk has been scanned for viruses and is virus-free. I further certify that two (2) true copies of the Respondent's Substitute Brief on Appeal and a floppy disk containing a copy of the brief were mailed, postage prepaid, this 6th day of July 2007, to Kevin Fritz, 714 Locust Street, St. Louis, MO 63101 and Charles F. DuFour, 8011 Clayton Road, 3rd Floor, St. Louis, MO 63117 and state that ten (10) copies of Respondent's Brief were mailed via Federal Express, overnight shipping, to the Missouri Supreme Court, this 6th day of July 2007.

HAZELWOOD & WEBER LLC

By: _____

David T. Hamilton, #28166
Nicholas J. Komoroski, #52675
200 North Third Street
St. Charles, Missouri 63301
Office 636-947-4700
Facsimile 636-947-1743
dhamilton@hazelwoodweber.com
nkomoroski@hazelwoodweber.com

Attorneys for Respondent,
Wells Fargo Home Mortgage, Inc.

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