IN THE SUPREME COURT OF MISSOURI

Appeal No. SC85578

L. JOSEPH GARR, III and MARIANNE C. GARR,

Respondents/Cross Appellants

vs.

COUNTRYWIDE HOME LOANS, INC.,

Appellant/Cross Respondent.

On Appeal From the Associate Circuit Court of the County of St. Louis, Missouri
The Honorable Mary Bruntrager Schroeder, Presiding
Case No. 02AC-027220

RESPONDENTS/CROSS APPELLANTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Appellant/Cross Respondent Countrywide Home Loans, Inc. ("Appellant") has appealed from the trial court's judgment, as amended on July 3, 2003, entered in favor of Respondents/Cross Appellants Joseph and Marianne Garr ("Respondents") in the amount of $16,500 for violation of Mo. Rev. Stat. § 443.130. Appellant invoked this Court's exclusive jurisdiction by claiming that § 443.130 is somehow unconstitutional. Appellant also claims the demand letter at issue did not apprise it of a statutory demand, despite the fact that as a major national bank, Appellant is conclusively presumed to know the laws of Missouri. Appellant asserts this argument even though it was involved in reported litigation over the same statute in 1995 (Trovillion v. Countrywide Funding Corp., 910 S.W.2d 822 (Mo. Ct. App. E.D. 1995), and the relevant case law establishes that no particular form of words is necessary for a proper statutory demand. The statute at issue has been around in some form since **the 19th Century**.

Respondents have filed a cross appeal, pursuant to Missouri Supreme Court Rule 81.04(b), only on the issue of the trial court's failure to award them prejudgment interest as required by Mo. Rev. Stat § 408.020.

STATEMENT OF FACTS

The Statement of Facts Appellant has submitted with its Brief is, in some instances, incomplete and gives the wrong impression of the facts and evidence adduced. Pursuant to Missouri Supreme Court Rule 84.04(f), Respondents generally adopt the Statement of Facts submitted by Appellant, except as noted below.

On August 8, 2002, Respondents made a demand upon Appellant, via certified mail, return receipt requested, to immediately deliver to Plaintiffs in hand a sufficient deed of release releasing Defendant's deed of trust on the Property (hereinafter the "Demand Letter). Specifically, the Demand Letter stated:

> On August 2, 2002, we closed on our Marlann Drive home. On August 8, 2002, I confirmed via the Countrywide Automated Customer Service Line that our loan with Countywide Home Loans was paid in full on August 8, 2002 and that an escrow balance of $60.84 would be refunded to me. ***We still have not received a Deed of Release*** to release the lien against our personal residence . . . . ***We are demanding immediate release of the Deed of Trust*** against our Marlann Drive property. Enclosed is a check payable to your institution in the sum of $30.00 to cover the costs of filing and recording the Deed of Release regarding the transaction. ***Please deliver in hand to me*** evidence of the release of the Deed of Trust. . . .

(emphasis added) (L.F. 54).[1]

As expressly required by the statute, Respondents also enclosed and advanced with the Demand Letter monies for the expense of filing and recording the deed of release. (L.F. 54-57). Appellant received the Demand Letter and check by certified mail, return receipt requested, on August 12, 2002. (L.F. 17, ¶ 21).

Appellant admits that it did not deliver to Respondents the requested Deed of Release or evidence of same until "22 business days after [Appellant's] receipt of [Respondents'] August 8, 2002 letter." (App. Br. 15). Mo. Rev. Stat § 443.130 unequivocally requires that the lending institution deliver the instrument to the mortgagor/borrower (or other qualified entity deemed to have also made satisfaction) within ***15 business days*** or "absolutely" forfeit the statutory penalty. (App. Appx. A11-A12).

[1] L.F. = Legal File; App. Br. = Appellant's Brief; App. Appx. = Appellant's Appendix; Resp. Appx. = Respondents' Appendix.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE THE AUGUST 8, 2002 DEMAND LETTER WAS SUFFICIENT TO INVOKE MO. REV. STAT. § 443.130, IN THAT THE LETTER INFORMED APPELLANT WITH REASONABLE CERTAINTY THAT RESPONDENTS WERE REQUESTING A DEED OF RELEASE AS CONTEMPLATED BY § 443.130 BECAUSE THE DEMAND LETTER (1) MADE A REQUEST FOR A DEED OF RELEASE IN THE FORM OF A DEMAND LETTER; (2) PROVIDED SUFFICIENT EVIDENCE THAT THE DEBT SECURED BY THE DEED OF TRUST WAS SATISFIED WITH GOOD FUNDS; (3) ADVANCED WITH THE DEMAND LETTER THE EXPENSE OF FILING AND RECORDING A RELEASE; AND (4) WAS SENT BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, ALL AS REQUIRED BY THE STATUTE.

Martin v. STM Mortgage Co., 903 S.W.2d 548 (Mo. Ct. App. W.D. 1995)

McDermott v. Carnahan, 934 S.W.2d 285 (Mo. 1996) (en banc)

Rogers v. Bd. Of Police Com'rs of K.C., 995 S.W.2d 1 (Mo. Ct. App. W.D. 1999)

Trovillion v. Countrywide Funding Corp., 910 S.W.2d 822 (Mo. Ct. App. E.D. 1995)

Missouri Revised Statute § 443.130 (2000)

II. THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF RESPONDENTS IN THAT (1) MORTGATORS/ BORROWERS, SUCH AS RESPONDENTS, ARE CLEARLY CONSIDERED TO BE "PERSON[S] MAKING SATISFACTION" AS CONTEMPLATED BY MO. REV. STAT. § 443.130; AND (2) THIS ARGUMENT WAS NOT RAISED OR DISCLOSED BY APPELLANT BELOW AS AN AFFIRMATIVE DEFENSE, IN ITS DISPOSITIVE MOTION OR IN ANSWERS TO WRITTEN DISCOVERY, AND IS THEREFORE NOT PRESERVED FOR APPEAL.

Kloos v. Corcoran, 643 S.W.2d 94, 96 (Mo. Ct. App. E.D. 1982)

Masterson v. Roosevelt Bank, 919 S.W.2d 9 (Mo. Ct. App. E.D. 1996)

Ong Building Corp. v. GMAC Mort. Corp. of Pennsylvania, 851 S.W.2d 54 (Mo. Ct. App. W.D. 1993)

Missouri Revised Statute § 443.130 (2000)

III. THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE MO. REV. STAT. § 443.130 IS NOT UNCONSTITUTIONAL, IN THAT A PERSON OF COMMON INTELLIGENCE NEED NOT NECESSARILY GUESS AT ITS MEANING.

Board of Education of the City of St. Louis v. State, 47 S.W.3d 366 (Mo. 2001) (en banc)

Lincoln Credit Co. v. Peach, 636 S.W.2d 31 (Mo. 1982) (en banc)

State v. Mahurin, 799 S.W.2d 840 (Mo. 1990) (en banc)

State v. Stokely, 842 S.W.2d 77 (Mo. 1992) (en banc)

Missouri Revised Statute § 443.130 (2000)

IV. THE TRIAL COURT ERRED IN FAILING TO AWARD RESPONDENTS PRE-JUDGMENT INTEREST BECAUSE MO. REV. STAT. § 408.020 PROVIDES THAT A CREDITOR "SHALL" BE ALLOWED TO RECEIVE INTEREST AT THE RATE OF 9% PER ANNUM "FOR ALL MONIES AFTER THEY BECOME DUE AND PAYABLE" IN THAT THE MONIES AT ISSUE BECAME PAYABLE TO RESPONDENTS AFTER APPELLANT IGNORED THE DEMAND LETTER AT ISSUE AND FAILED TO COMPLY WITH THE TERMS OF MO. REV. STAT. § 443.130.

H&B Masonry Co., Inc. v. Davis, 32 S.W.3d 120 (Mo. Ct. App. E.D. 2000)

Commercial Union Assurance Co. of Australia v. Hartford Fire Ins. Co., 86 F.Supp.2d 921 (E.D. Mo. 2000)

Missouri Revised Statute § 408.020

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE THE AUGUST 8, 2002 DEMAND LETTER WAS SUFFICIENT TO INVOKE MO. REV. STAT. § 443.130, IN THAT THE LETTER INFORMED APPELLANT WITH REASONABLE CERTAINTY THAT RESPONDENTS WERE REQUESTING A DEED OF RELEASE AS CONTEMPLATED BY § 443.130 BECAUSE THE DEMAND LETTER (1) MADE A REQUEST FOR A DEED OF RELEASE IN THE FORM OF A DEMAND LETTER; (2) PROVIDED SUFFICIENT EVIDENCE THAT THE DEBT SECURED BY THE DEED OF TRUST WAS SATISFIED WITH GOOD FUNDS; (3) ADVANCED WITH THE DEMAND LETTER THE EXPENSE OF FILING AND RECORDING A RELEASE; AND (4) WAS SENT BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, ALL AS REQUIRED BY THE STATUTE.

A. Standard of Review

Appellant misstates the standard of review. In this matter, the parties expressly waived trial and submitted this matter to the trial court for disposition upon cross motions for summary judgment and memoranda of law. (L.F. 131, 136). Thus, judicial review is governed by Murphy v. Carron, 536 S.W.2d 30 (Mo. 1976). See City of Harrisonville v. Public Water Supply Dist. No. 9 of Cass County, 49 S.W.3d 225, 229 (Mo. Ct. App. W.D. 2001). According to Murphy, the judgment of the trial court will be reversed by the appellate court only if there is no substantial evidence to support the judgment, if it is

against the weight of the evidence, or if it erroneously declares or applies the law. Id. at 32.

The Supreme Court accepts evidence and inferences favorable to the prevailing party, disregarding all contrary evidence and deferring to the factual findings and determinations of the trial court. Lake Cable, Inc. v. Trittler, 914 S.W.2d 431 (Mo. Ct. App. E.D. 1996). Issues such as weight of the evidence and resolution of evidentiary conflicts are not for appellate review. Mediq PRN Life Support Services, Inc. v. Abrams, 899 S.W.2d 101 (Mo. Ct. App. E.D. 1994). Appellate courts will disturb a trial court's judgment only if there is a complete absence of probative fact to support it. Krame v. Waller, 849 S.W.2d 236 (Mo. Ct. App. E.D. 1993).

The trial court correctly declared and applied the relevant law to the facts herein, and its Judgment and Amended Judgment (L.F. 132-33, 144) are clearly supported by substantial evidence and probative facts. Accordingly, this Court should affirm the trial court in all respects and award prejudgment interest as requested in Respondents' Cross Appeal.

B. Respondents Properly Invoked Section 443.130

Appellant contends that the demand letter at issue did not invoke § 443.130 because there was no express mention of the statute, and it did not request the release be delivered within 15 business days. Appellant also claims that the demand letter somehow requested actions not required by the statute and, therefore, must be deficient. Appellant's argument misses the mark, and its attempt to graft additional requirements into the statute not included by the legislature must fail.

Section 443.130 is clear in its requirements. It simply requires that the "mortgagor" or borrower (1) make a request for a deed of release in the form of a demand letter, (2) provide good and sufficient evidence that the debt secured by the deed of trust was satisfied with good funds, (3) advance with the demand letter the expense of filing and recording the release, and (4) send the demand letter by certified mail. See Mo. Rev. Stat. § 443.130. If the demand letter meets these four elements, the lender must then deliver the release to the "mortgagor" (borrower) within 15 business days or be "absolutely liable" for the statutory penalty.

Of the four elements required under the statute, there is no dispute that the demand letter was sent by certified mail, included the costs of filing and provided evidence of payment of funds. The sole issue on appeal is whether the letter at issue constitutes a "demand" letter, as required by element one of the statute. As such, an analysis of the demand letter is appropriate. Respondents clearly met the requirements of § 443.130.

On August 8, 2002, Respondents made a demand upon Appellant, via certified mail, return receipt requested, to immediately deliver to Respondents in hand a sufficient deed of release releasing Respondents' deed of trust on their real estate (hereinafter the "Demand Letter). Specifically, the Demand Letter stated:

> On August 2, 2002, we closed on our Marlann Drive home. On August 8, 2002, I confirmed via the Countrywide Automated Customer Service Line that our loan with Countywide Home Loans was paid in full on August 8, 2002 and that an escrow balance of $60.84 would be refunded to me. ***We still have not received a Deed of Release*** to release the lien against our

personal residence . . . . ***We are demanding immediate release of the Deed of Trust*** against our Marlann Drive property. Enclosed is a check payable to your institution in the sum of $30.00 to cover the costs of filing and recording the Deed of Release regarding the transaction. ***Please deliver in hand to me*** **evidence of the release of the Deed of Trust**. . . .

(emphasis added) (L.F. 54).

As expressly required by the statute and referenced in the Demand Letter, Respondents also enclosed and advanced with the Demand Letter monies for the expense of filing and recording a deed of release. (L.F. 54-57). Appellant received the Demand Letter and check by certified mail, return receipt requested, on August 12, 2002. (L.F. 17, ¶ 21). Appellant unequivocally admits that it did not deliver to Respondents the requested Deed of Release until "22 business days after [Appellant's] receipt of [Respondents'] August 8, 2002 letter." (App. Br. 15). Thus, as correctly found by the trial court, Appellant is absolutely liable to Respondents for the statutory penalty, and this Court should defer to the trial court's factual finding. Lake Cable, 914 S.W.2d 431.

Relying on Lines v. Mercantile Bank, 70 S.W.3d 676 (Mo. Ct. App. S.D. 2002), Appellant argues that the Respondents were required to cite the statute and the 15 day time limitation to sufficiently invoke the statute. This argument is totally flawed because it imposes requirements not found in the statute. The Supreme Court's role is to enforce the statute as written. McDermott v. Carnahan, 934 S.W.2d 285, 287 (Mo. 1996) (en banc). The courts "may not engraft upon the statute provisions which do not appear in explicit words or by implication from other language in the statute. Rogers v. Bd. of

Police Com'rs of K.C., 995 S.W.2d 1, 6 (Mo. Ct. App. W.D. 1999), citing Schuettenberg v. Bd. of Police Com'rs of City of St. Louis, 935 S.W.2d 712, 714 (Mo. Ct. App. 1996).

In this instance, the statute carefully sets forth the elements that must be included in a proper demand, including making the demand by certified mail, including evidence the debt has been paid and forwarding certain filing costs. Nowhere does the statute, either explicitly or implicitly, impose a requirement to cite the statute and the 15 day time frame for compliance. Yet Appellant now asks this Court to engraft these requirements despite the legislature's omission of them. Doing so would violate this Court's role to enforce the statute as written.

Moreover, the Missouri Court of Appeals for the Western District has addressed the issue of the sufficiency of a § 443.130 demand letter in the case of Martin v. STM Mortgage Co., 903 S.W.2d 548 (Mo. Ct. App. W.D. 1995). In Martin, the court of appeals properly held no particular form of demand is needed:

> A demand or request to the mortgagee to enter satisfaction of the mortgage is a condition precedent to the right to sue for the statutory penalty. **No particular form of words is necessary for this demand; it is sufficient if it informs the mortgagee with reasonable certainty that an entry of satisfaction of the particular mortgage is requested**. (emphasis added).

Id. at 550, citing 59 C.J.S. Mortgages § 474c (1949).

In Martin, the appellate court examined whether (1) the borrower's demand letter sufficiently informed STM Mortgage that the borrowers were requesting a release as contemplated by the statute, and (2) whether the borrowers satisfied the requirements of

the statute even though they failed to allege in their petition when their uncertified check for satisfaction of the loan was paid. Id. The Court reversed the trial court finding that the plaintiffs failed to prove an essential element of their case, i.e., when their uncertified check was paid. Id. However, the appellate court unequivocally held that the language of the letter, "Please mail release papers to: Lloyd Martin," followed by Mr. Martin's address and phone number, "sufficiently informed STM Mortgage that the plaintiffs were requesting a release and, therefore, was a request for release as contemplated by the above sections [Mo. Rev. Stat. §§ 443.060 and 443.130]." Id.

Here, the Demand Letter does more to advise Appellant that Respondents were requesting a release than what the Martin court found to be legally sufficient. Specifically, Respondents' Demand Letter advised Appellant that "We still have not received a Deed of Release to release the lien against our personal residence," and "We are demanding immediate release of the Deed of Trust against our Marlann Drive property," and "Please deliver in hand to me evidence of the release of the Deed of Trust." Under the holding of Martin, Respondents' Demand Letter to Appellant constitutes a demand or request for a release as contemplated by § 443.130. Accordingly, the trial court's judgment should be affirmed.

Defendant argues that Martin is inapposite because (1) the demand letter there cited §443.130, and (2) the Court found that the plaintiffs were not entitled to the penalty. (App. Br. 31-32). Defendant misstates the holding in Martin.

First, there is no indication whatsoever in Martin that the letter there cited § 443.130, and Appellant is being intellectually dishonest by making such an assertion.

Any reference to the statute comes out of the court's statement that "STM Mortgage claims that the letter contained nothing more than a recitation of § 443.130." Id. at 550. There is absolutely no evidence that the statute was cited in the letter and any attempt to argue the Martin court held a citation to the statute is necessary for a sufficient demand is a complete misreading of Martin.

Second, the Court found that the plaintiffs were not entitled to the penalty because the plaintiffs failed to prove when satisfaction had been made, which is not the case here. Accordingly, the Court should follow the reasoning of Martin in upholding the sufficiency of the Demand Letter herein. Had the legislature intended that the statute be specifically cited, it would have so stated as it has in other instances.

Moreover, Appellant's contention that if Respondents "desired to invoke the statute," they "could have referred to the statute in the [Demand Letter]" (App. Br. 32) is sophistic reasoning and should be ignored. In Missouri, persons are conclusively presumed to know the law. Mo. Highway & Transp. Comm'n v. Myers, 785 S.W.2d 70, 75 (Mo. 1990) (en banc). National banks are given no dispensation from this rule, nor should they be. Banking corporations, as are other parties, are presumed to know the law. See Round Prairie Bank of Filmore v. Downey, 64 S.W.2d 701, 704 (Mo. Ct. App. 1933). Here, Appellant must be deemed to know of § 444.130 and its requirements well before receiving Respondents' Demand Letter. In addition, Appellant was involved in similar litigation in 1995. See Trovillion v. Countrywide Funding Corp., 910 S.W.2d 822 (Mo. Ct. App. E.D. 1995).

Appellant's reliance upon Lines, 70 S.W.3d 676 is misguided, and, as specifically noted by the trial court, Lines does not reach the issues in the present case. (L.F. 133). The holding in Lines does not articulate a greater obligation or additional technical requirement for making demand under § 443.130 that did not already exist in the statute (and to the extent that it does, it is erroneous, because it engrafts additional requirements not found in the statute). Appellant's misstatement to the contrary, the Southern District held:

> This opinion holds only that the letter to Mercantile did not invoke the remedy afforded by § 443.130.1. The letter to Mercantile incorporated the settlement agreement, including its provision for release of the deed of trust, and under these facts did not invoke the provisions of § 443.130.

Lines, 70 S.W.2d at 680.

Accordingly, this Court should affirm the trial court in all respects and award prejudgment interest as requested in Respondents' Cross Appeal.

C. The Demand Letter did not Seek Items Beyond that Required by Mo. Rev. Stat. § 443.130, and, even assuming it did, Appellant only had to Comply with the Statute's Requirements to Avoid the Statutory Penalty

Appellant next argues the Demand Letter, on one hand, fails as a matter of law because it requested that Appellant "immediately" deliver the release to Respondents. On the other hand, Appellant erroneously argues that the Demand Letter is insufficient

because it requested that the release be "recorded." Appellant's arguments are not supported by the record and are in error.

First, as discussed above, no particular form of wording is necessary, as long as the demand reasonably advises the lender that a release is being requested. Martin, 903 S.W.2d at 550. As found by the trial court and supported by substantial evidence, the Demand Letter was legally sufficient as it reasonably advised Appellant that a release was being requested. Further, Appellant, under the statute, had 15 business days to comply. The trial court found and Appellant has admitted that it **did not** deliver the release to Respondents within 15 business days. (App. Br. 15; L.F. 132-33). There is no dispute as to this fact, and this Court should accept the trial court's factual finding pursuant to Murphy v. Carron. Therefore, Appellant is "absolutely" liable for the statutory penalty.

It must be pointed out that Appellant again attempts to sway the Court by resorting to semantics to spin plain and ordinary language. The Demand Letter did not request that Appellant record the release. Instead, it provided that Respondents "***still have not received a Deed of Release"*** and for Appellant to immediately "release" and "deliver **in hand**" the release to Respondents. (L.F. 54). The Demand Letter uses language from the statute and mentions that the filing and recording fee is enclosed, because that is an element required by the statute. Appellant's contention that it was confused by the statutorily mandated element of including the filing fee with the demand letter is simply Appellant's misguided attempt to change the law through the courts instead of the

legislature, all to the detriment of Missouri citizens and to the benefit of Appellant and its industry.

On August 26, 2002, without any actual notice to Respondents and contrary to the Demand Letter, Appellant filed the deed of release with the St. Louis County Recorder of Deeds. (L.F. 17, ¶ 24). However, as admitted by Appellant in its brief (App. Br. 25-26), this is not what is required by the statute, although, interestingly, below, Appellant originally took the position that recording somehow constituted compliance with the statute. (Resp. Appx. A24, A27). The legislature eliminated recording as a means of statutory compliance in the 1994 amendments. As illustrated by an Affidavit filed by Appellant in a companion case, the recorders' office is often not reliable. (Resp. Appx. A4-A5; A16-A17). Specifically, in the companion case, the release was sent by Appellant to the recorders' office on July 5, 2002 with, as here, instructions for the recorder's office to deliver the release to the borrowers. (Resp. Appx. A19). However, the release was not actually recorded until December 13, 2002, over five months later. (Resp. Appx. A4-A5; A17). Thus, this example illustrates why the legislature deleted recording as a means of statutory compliance.

Finally, the Martin demand letter, which was found to be sufficient, did not have any time period referenced for sending the release. This neither expanded nor contracted STM's rights and obligations. Here, asking for "immediate" release similarly neither expands nor contracts Appellant's rights under the statute. If, in addition to the language contained in Respondents' Demand Letter, they wrote, "Send us a free toaster with the release," and Appellant disregarded the command but provided a timely deed of release

as contemplated by the statute, Appellant would not be liable to Respondents. This is because Respondents cannot expand or contract Appellant's rights under the statute. Further, Appellant is presumed to know the law and what is required of it under the statute.

Accordingly, this Court should affirm the trial court in all respects and award prejudgment interest as requested in Respondents' Cross Appeal.

D. Respondents are Considered to have Made Satisfaction

On pages 26 through 35 of its brief, Appellant argues that mortgagors/borrowers, such as Respondents, are not entitled to receive delivery of the release, although they are clearly the most directly and adversely affected by a bank's failure to comply with the statute. Specifically, Appellant argues that a mortgagor/borrower is not deemed to be the "person making satisfaction." Rather, Appellant asserts that Respondents' new lender, Matrix Financial, is the only one that could receive the release. This argument is also raised by Appellant in its second Point Relied On. Thus, Respondents will address it in the next section, and incorporate it herein, to avoid duplication.

II. THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF RESPONDENTS IN THAT (1) MORTGAGORS/ BORROWERS, SUCH AS RESPONDENTS, ARE CLEARLY CONSIDERED TO BE "PERSON[S] MAKING SATISFACTION" AS CONTEMPLATED BY MO. REV. STAT. § 443.130; AND (2) THIS ARGUMENT WAS NOT RAISED OR DISCLOSED BY APPELLANT BELOW AS AN AFFIRMATIVE DEFENSE, IN ITS DISPOSITIVE MOTION OR IN ANSWERS TO WRITTEN DISCOVERY AND IS THEREFORE NOT PRESERVED FOR APPEAL.

The standard of review for this claim is the same as for Point I, above.

A. Respondents are Considered to have Made Satisfaction

On pages 26 through 35 of its brief and in its second Point Relied On, Appellant argues that a mortgagor/borrower, such as Respondents, are not entitled to receive delivery of the release, although they are clearly the most directly and adversely affected by a bank's failure to comply with the statute. Specifically, Appellant argues that a mortgagor/borrower is not deemed to be the "person making satisfaction" as contemplated by the statute. Rather, Appellant asserts that Respondents' new lender, Matrix Financial, is the only one making satisfaction. Therefore, Appellant argues that it had no duty to Respondents under the statute for failure to timely deliver the release to them. Appellant misses the mark.

The cases uniformly hold that those with a direct, substantial pecuniary interest in the real property may sue for the statutory penalty. See Ong Building Corp. v. GMAC

Mort. Corp. of Pennsylvania, 851 S.W.2d 54 (Mo. Ct. App. W.D. 1993). As Appellant has recognized, one purpose of § 443.130 is to clear the title of the **mortgagor**. Clearly, Respondents, as mortgagors, have standing to make the statutory demand, receive delivery of the release and the statutory penalty. To accept the interpretation espoused by Appellant would create the absurd result that the mortgagor does not have standing to demand and obtain a deed of release. Given that the mortgagor is the most affected by a bank's failure to deliver a timely deed of release, this would certainly create a result not intended by the legislature.

Appellant relies upon Masterson v. Roosevelt Bank, 919 S.W.2d 9 (Mo. Ct. App. E.D. 1996) in support of its argument. Masterson is inapposite. There, unlike here, the new lender and the borrower each made a separate demand statutory upon the lender. Id. at 10. The bank timely delivered a deed of release to the title company, the new lender's agent, but not the borrower. Id. The borrower proceeded to sue the bank. Id. The appellate court held that the new lender can fit into the meaning of the phrase "party making satisfaction." Id. at 11. However, the Masterson court did not hold that a borrower is not deemed to be such a person. On the contrary, the court only held that the legislature "intended to include all persons who make satisfaction in the statute." Id.

Clearly, a borrower is intended and deemed to be a "person making satisfaction" within the meaning of the statute. The money tendered by the new lender to pay off the old lender clearly belongs to the borrower. Specifically, the borrower signs a promissory note for the funds, agrees to pay interest and usually signs a mortgage with the new lender, in exchange for the funds. The borrower then directs the new lender to pay off

the old lender. At the time of payoff, as in the present case, which occurs after the closing date, the money is no longer the property of the new lender but belongs to the borrower. If the old lender subsequently discovers that it did not receive full satisfaction on the loan, it certainly would not seek redress from the new lender, but rather the borrower.

Interpreting the statute to prohibit the borrower from demanding and receiving the deed of release would be an absurd result that could not have been intended by the legislature. Such an interpretation would only benefit Appellant and such other companies in its industry, and deny aggrieved borrowers the rights prescribed by the General Assembly. This is neither the law nor the policy of Missouri.

Consequently, this Court should affirm the trial court in all respects and award prejudgment interest as requested in Respondents' Cross Appeal.

B. <u>This Argument is Waived on Appeal because it was not Raised By Appellant Below</u>

As discussed in the preceding section, Appellant argues that the statutory penalty can only be imposed if it failed to timely deliver the release to Respondents' new lender, Matrix Financial. Appellant also argues that Respondents presented no evidence below that such a failure occurred. (App. Br. 36). It then argues that this Court should reverse the trial court given this "failure of proof." (App. Br. 36). This is incorrect.

First, such an argument constitutes an affirmative defense, which was not raised by Appellant in its Answer (L.F. 10-12) nor, more importantly, in its Cross Motion for Summary Judgment. (L.F. 99-123). Thus, it is not preserved for this appeal. <u>See</u> <u>Kloos</u>

v. Corcoran, 643 S.W.2d 94, 96 (Mo. Ct. App. E.D. 1982). The Court should therefore affirm the trial court.

In addition, by inference, Appellant is representing to this Court that it may have timely delivered a timely release Matrix. It knows it did not. Specifically, Respondents propounded various written discovery to Appellant below. (Resp. Appx. A21-A30). For example, First Interrogatory Nos. 13 and 14 sought a list of all facts to Appellant's knowledge showing it was not indebted to Respondents. (Resp. Appx. A23-A34). There is no mention of this defense. (See also Appellant's Answers to Second Interrogatories) (Resp. Appx. A26-A30). The Court should summarily dismiss this point.

Moreover, below, when Respondents' proved they did not timely receive the release, the burden shifted to Appellant to prove otherwise by showing that it either timely provided the release to Respondents or other "persons making satisfaction." Appellant failed to offer any such evidence or even allege it in its pleadings below. This Court should accordingly refrain from finding that the mortgagor is required to prove that all other entities or persons who could constitute a "person making satisfaction" did not receive a timely release.

Consequently, this Court should affirm the trial court in all respects and award prejudgment interest as requested in Respondents' Cross Appeal.

III. THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF RESPONDENTS BECAUSE MO. REV. STAT. § 443.130 IS NOT UNCONSTITUTIONAL, IN THAT A PERSON OF COMMON INTELLIGENCE NEED NOT NECESSARILY GUESS AT ITS MEANING.

The standard of review for this claim is the same as for Point I, above.

Appellant's final challenge is to the constitutionality of § 443.130. Specifically, Appellant argues that §443.130 is void for vagueness because "persons of common intelligence" must guess at its meaning. (App. Br. 38). Appellant's argument does not withstand scrutiny.

A statute is presumed to be constitutional and will not be invalidated unless it "clearly and undoubtedly" violates some constitutional provision and "palpably affronts fundamental law embodied in the constitution. Board of Education of the City of St. Louis v. State, 47 S.W.3d 366, 368-69 (Mo. 2001) (en banc), quoting Linton v. Missouri Veterinary Medical Bd., 988 S.W.2d 513, 515 (Mo. 1999) (en banc); State v. Stokely, 842 S.W.2d 77, 79 (Mo. 1992) (en banc). The burden to prove a statute unconstitutional is upon the party bringing the challenge. Id.

The standard for determining whether a statute is void for vagueness is whether the terms or words used are of "common usage and are understandable by persons of ordinary intelligence." State v. Mahurin, 799 S.W.2d 840, 842 (Mo. 1990) (en banc). Where the statutory terms are of such uncertain meaning, or so confused that the courts

cannot discern with reasonable certainty what is intended, the statute is void. Lincoln Credit Co. v. Peach, 636 S.W.2d 31, 36 (Mo. 1982) (en banc).

A statute is not void for vagueness simply because it is not drafted with absolute certainty or does not meet impossible standards of specificity. Cocktail Fortune v. Sup'r of Liq. Control, 994 S.W.2d 955 (Mo. 1999) (en banc). A statute is not unconstitutionally vague merely because of some ambiguity. State v. Schleiermacher, 924 S.W.2d 269 (Mo. 1996) (en banc).

A reading of § 443.130 demonstrates there is no ambiguity in the statute. Appellant's obligation is clear and precise. The statute specifically states that upon receiving demand in the proper form, Appellant's obligation was to "deliver to the person making satisfaction a sufficient deed of release…" within 15 business days. The statute clearly defines Appellant's obligation.

Well aware that the statute is clear, Appellant expends great effort to create ambiguity. Appellant's arguments fail.

Appellant first argues that the statute is ambiguous because it requires the Demand Letter include evidence that the expense of filing and recording the deed be provided. Appellant suggests that since prior amendments to the statute eliminated recording as a means of compliance, the requirement to provide evidence that the borrower has paid the recording fees creates ambiguity.

Respondents do not believe such ambiguity exists. First, the mere fact that the General Assembly has included a requirement that the borrower pay the recording fees as a precondition to personally demanding the deed of release does not create ambiguity. It

is merely the General Assembly's policy statement that before a demand may be made by the borrower for the deed of release, the borrower must pay to the lender the filing fee since the lender usually files the deed of release independent of providing the release to the borrower. The fact that the General Assembly has built in an additional protection for lenders does not create ambiguity.

Second, even if it does create some ambiguity, it does not in any way affect or impair the clear obligation of the lender. Even if one assumes that Appellant is correct that there is no reason to require a borrower to show evidence that the filing fee has been paid, Appellant's obligation is still precise – upon receipt of a proper demand, Appellant must provide the deed of release within 15 business days to the person making satisfaction.

Appellant also erroneously argues that the Demand Letter was faulty because Respondents demanded that Appellant provide an "immediate release" of the deed of trust, which Appellant contends could only be accomplished by *filing* the deed of release. This is simply not the case. Providing the deed of release to Respondents would have released the deed of trust. Filing the deed of trust is simply an act that informs the public of the release.

Appellant also argues that it was not obligated to provide Respondents with a deed of release because "the person making satisfaction" was not Respondents, but rather "Matrix Financial," their refinancing or new lender. As discussed in the preceding section, Appellant's argument is erroneous.

Respondents contracted with Matrix Financial. Appellant is not a party to Respondents' contract with Matrix. When Appellant receives the payoff amount, it takes the monies and satisfies Respondents' obligation to it. The money paid to Appellant as satisfaction was Respondents' money, lent to them by Matrix. Respondents were the persons satisfying their prior loan, not Matrix.

In support of their argument, Appellant argues that this is a logical interpretation of the statute because Matrix has an interest in ensuring the prior deed of trust is released. Appellant, however, ignores the fact that the person with the greatest interest in seeing the deed released is the borrower. The borrowers are the party ultimately liable if the loan defaults, and not all deeds of trust have been properly released.

Accordingly, the Court should affirm the trial court and award prejudgment interest to Respondents as requested in the Cross Appeal.

IV. THE TRIAL COURT ERRED IN FAILING TO AWARD RESPONDENTS PRE-JUDGMENT INTEREST BECAUSE MO. REV. STAT. § 408.020 PROVIDES THAT A CREDITOR "SHALL" BE ALLOWED TO RECEIVE INTEREST AT THE RATE OF 9% PER ANNUM "FOR ALL MONIES AFTER THEY BECOME DUE AND PAYABLE" IN THAT THE MONIES AT ISSUE BECAME PAYABLE TO RESPONDENTS AFTER APPELLANT IGNORED THE DEMAND LETTER AT ISSUE AND FAILED TO COMPLY WITH THE TERMS OF MO. REV. STAT. § 443.130.

The standard of review for this claim is the same as for Point I, above.

The trial court correctly entered judgment in favor of Respondents by finding that Appellant violated § 443.130 and awarding Respondents the statutory penalty in the amount of $16,500.00 in damages. (L.F. 132-33, 144). However, the trial court only erred in refusing to award prejudgment interest to Respondents. (L.F. 144).

Mo. Rev. Stat. § 408.020 provides in relevant part that a creditor "shall" be allowed to receive interest at the rate of 9% per annum "for all monies after they become due and payable." Here, the monies became due and payable to Plaintiffs after Defendant ignored the demand letter at issue and failed to comply with Mo. Rev. Stat. § 443.130.

Under § 408.020, prejudgment interest is awarded whenever the amount due is liquidated or, if not strictly liquidated, readily ascertainable by reference to recognized standards. See H&B Masonry Co., Inc. v. Davis, 32 S.W.3d 120 (Mo. Ct. App. E.D. 2000); National Avenue Building Co. v. Stewart, 972 S.W.2d 649 (Mo. Ct App. S.D.

1998); Nangle v. Brockman, 972 S.W.2d 545 (Mo. Ct. App. E.D. 1998). Such an award is mandatory, not discretionary, with the Court. See Commercial Union Assurance Co. of Australia v. Hartford Fire Ins. Co., 86 F.Supp.2d 921 (E.D. Mo. 2000).

Accordingly, Respondents respectfully request that this Court enter an award of prejudgment interest at the per diem rate of $4.07 per day from August 8, 2002 to June 5, 2003 in the amount of $1,208.79 (L.F. 18, ¶¶ 33 and 34), plus post judgment interest thereafter until the judgment is satisfied.[2]

CONCLUSION

For the reasons discussed herein, the Judgment and Amended Judgment of the trial court in favor of Respondents should be affirmed, and pre-judgment interest should further be awarded to Respondents.

Respectfully submitted this 29th day of December, 2003.

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[2] Respondents anticipate that Appellant will argue that prejudgment interest is inapplicable in this case under the holding of Hoskins v. Business Men's Assurance, 116 S.W.3d 557, 579-82 (Mo. Ct. App. W.D. 2003). Hoskins is inapposite. There, unlike here, the case involved a discussion of a **tort** case involving interpretation of Mo. Rev. Stat. **§ 408.040** and an **unliquidated** sum.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing Brief and a disk in compliance with Rule 84.06(g) were mailed on this 29th day of December, 2003 by first-class mail, postage pre-paid, to: Duane L. Coleman, Lewis, Rice & Fingersh, L.C., 500 North Broadway, Suite 2000, St. Louis, Missouri 63101; and a copy to Richard L. Martin, Martin, Leigh, Laws & Fritzlen, P.C., 1044 Main Street, Suite 400, Kansas City, Missouri 64105.

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CERTIFICATE OF COMPLIANCE WITH RULES 84.06(c) AND (g)

The undersigned hereby certifies that the foregoing Brief complies with the limitations set forth in Rule 84.06(b) and that the number of words in the Brief are 7,171. The undersigned relied on the word count feature on his firm's word processing system to arrive at that number.

The undersigned further certifies that the labeled disk, filed concurrently herewith, has been scanned for viruses and is virus-free.

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