Case 119208 CLERK OF THE APPELLATE COURTS Filed 2018 Jul 16 PM 4:32

No. 119208-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

COREFIRST BANK & TRUST F/K/A
COMMERCE BANK & TRUST,
Plaintiff/Appellee,

vs.

TIMOTHY F. DEGGINGER A/K/A,
TIMOTHY DEGGENGER, ET AL.,
Defendant/Appellant.

BRIEF OF APPELLANT TIMOTHY F. DEGGINGER

Appeal from the District Court of Shawnee County, Kansas
The Honorable Judge Larry D. Hendricks
District Court Case Number 2015-CV-412

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ORAL ARGUMENT IS REQUESTED

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4. Appendix D - Appellate Case No. 115,717 Order of Dismissal.
5. Appendix D - Appellate Case No. 118,341 Order of Dismissal.

NATURE OF THE CASE

Upon full review the Defendant/Appellant Timothy F. Degginger, hereafter referred to at times as the "Borrower," respectfully shows this Honorable Appellate Court that this case on appeal is a sordid example of what happens when the Trial Court says, "I don't understand," rather than what is mandated by Supreme Rule 183(j) requiring the Trial Court to determine presented fact controversy and then make timely "findings of fact and conclusions of law on all issues presented." (2017 Kan. S. Ct. R. 224) (Emphasis supplied.) (Also, see *Labette* Cty. *Med. Center v. Kansas Dept. of Health and Environment*, No.116,416, 2017 WL 3203383(Kan. App. 2017) (unpublished opinion); (See also Appendix A - *Fish/Bednasek v. Kobach*, "Findings of Fact and Conclusions of Law".)

The Trial Court's failure to rule as such and in a timely manner, on the facts shown in this instant Record on Appeal, has atypically resulted in two (2) appeals to the Kansas Court of Appeals being involuntarily dismissed upon a representation to the Appellate Court by Plaintiff/Appellee CoreFirst Bank and Trust, hereafter referred to at times as the "Bank," complaining of issues "yet to be determined" and not articulated as "final," which has resulted in the first foreclosure case being voluntarily dismissed by the Bank within an approximate month on the Bank's "Motion for Relief From Judgment under K.S.A. 60-260(b)(1)" which by the terms of this statutory provision requires as a prerequisite relief only from a final judgment. (Amended R.O.A., Vol. 1, PP. 230-235.)

The Trial Court granted this Motion and then CoreFirst filed a second what the Borrower states is/was a "Quiet Title Action-Mortgage Foreclosure"; instead of a probated Determination of Descent to the subject pledged real estate, which is also believed to be a flawed approach under existing Kansas Mortgage Law.

The Trial Court then during this "second phase" in the manner of its delayed rulings, or in its ruling in a manner that precluded the Borrower from conducting discovery, thereby barred him his defenses and counterclaims raised by him in his filed Answer and Counterclaims to the Quiet Title Action-Mortgage Foreclosure in an attempt to cure its failed initial Mortgage Foreclosure Action. (Amended R.O.A., Vol. 1, PP. 346-353.) Everyone agreed CoreFirst and the Court had only "foreclosed" a fractional interest to the real estate pledged as security for the note in 2004, and when again it was refinanced in 2011.

For three (3) painful years, this litigation of mortgage foreclosure continued by judicial misunderstanding of mortgage foreclosure; UCC Holder in Due Course, improper use of an quiet title action to "remedy a fractional interest", and in so doing improperly disregarded the rights of known lienholders to the subject real estate having priority to the title to the property and adverse to the known pre-existing claims of the Internal Revenue Service's perfected Federal Tax Lien; and the District Court again failing to provide timely findings of facts and conclusions of law raised by the Borrower in its Second Motion to Dismiss for Appellate review.

The Appellant/Defendant Borrower contends that as a result of the inaction of the Trial Court to determine issues raised in a timely manner, coupled with the Bank's failure to journalize what the Trial Court designated as "final orders," these orders were subject to the Bank's not providing Rule 170 findings of fact and conclusions of law, the appeals as well as a vigorous defense culminated in a excessive and unfair award of attorney's fees to the Bank, and which attorney's fees award has never been liquidated to a sum certain, however believed to be in excess of ($24,881.77). This resulted in the Borrower being forced to appeal twice on this record within thirty (30) days of adverse rulings that failed to balance the litigant's needs and final resources which Borrower requests relief from the judgment on appeal. The Borrower raises on appeal his suggestion that due to the unexplained inaction on the Bank's failure to submit the requisite "final" order to appeal, should have a bearing on determining this appeal on the merits, as well as effecting the attorney's fees issues on the facts shown in this extensive Record on Appeal.

Thus, in the first instance, the Appellate Court determined in Appellate Case No. 115,717 that:

> "The district court's April 5, 2016, journal entry very clearly showed that the issue of property ownership remains outstanding."

And in Appellate Case No. 118,341 that:

> "While there may be a final judgement on Appellant's counterclaims, the district court has not yet entered a final judgment on Appellee's primary claim."

Thus, within the foregoing panoply of either the inaction on the part of the Trial Court to timely require findings of fact and conclusions of law deemed important and essential by the Appellate Court and in the manner required by the Appellate Court's guidance in *Labette County Medical Center,* supra., and the failure of the Court to allow discovery to make requisite findings of fact and conclusions of law on issues raised in its Counterclaims (Amended R.O.A., Vol. 1, PP. 349-352.), the Trial Court had assumed that the Defendant/Appellant Borrower , in its attempt to be treated fairly and to "have his day in court," had the burden of proof in determining the existence or non-existence of a fractional interest. (Amended R.O.A., Vol. 5, Transcript P. 15, Lines 9-21; and PP. 47-48, Lines 18-25 and 1-23.)

Borrower contends that while only a Probate Descent Action may determine the existence of heirs to the Estate, rather than a Quiet Tile proceeding, that in either case, neither would provide a remedy in applying existing Kansas Mortgage law applying the unity rules at the time of the Mortgages inception to protect negotiability of the Note which always follows the note as a bedrock of commercial law incident to the Kansas Uniform Commercial Code at Chapter 3 of Article 84.

Lastly, Borrower requests appellate relief from the Court's judgment and contends that it was improper that the Court determined that the Borrower in equity is to be penalized on this Record especially when his requests in his Counterclaims alleging the existence of a "Fraud upon the Court" were dismissed by a Motion without benefit of and

prior to discovery on this issue being denied Borrower, by the Trial Court imposing inordinate fees ordering the Borrower to his paying attorney's fees to the Bank in the assumed requested amount of ($24,881.77). [However, again, there is no journal entry submitted by the Bank, so one may assume it is the Court's direction that the amount of ($24,881.77) is the Court's final judgement for which the instant appeal is also taken.]

ISSUES ON APPEAL

I. Whether the District Court followed Chapter 60 Notice Procedures on the instant Record on Appeal.

II. Whether the District Court erred in failing to follow the UCC's Article 3 requirement that on a promissory note where there are multiple parties to the mortgage all of the parties must all be joined in the same action for the Bank to claim the right to be a holder in due course.

III. The District Court erred in determining that contended defects to title to the real estate was present in the case when applying the Kansas Unity Rule could be rectified by approving the Bank's remedy requested in its Second Petition, allowing it to obtain, or attempt to obtain, both in rem and in personam jurisdiction in the instant mortgage foreclosure proceedings. The Plaintiff has on this Record improperly attempted to determine a cure for its mortgage deficiency by creating an equitable mortgage; however, it is believed by the Borrower such an attempt to be based improperly upon the use of a in rem quiet title proceeding determined by the Kansas courts as being an improper method to determine rights inherent to a in personam foreclosure action. See *Bank of Blue Valley v. Duggan Homes, Inc.,* 48 Kan. App. 2d 828, 303 P.3d 1272 (2013) and *FV-I, Inc., In Trust for Morgan Stanley Mortgage Capital Holdings, LLC v. Constance M. Kallevig, et.al., and Bank of the Prairie,* (Appeal No. 111,235).

IV. The District Court erred in not granting Defendant's Motion to Dismiss in ruling against the Defendant on the foregoing Issues I – III.

V. The District Court erred on the instant Record in assessing attorney's fees, in whole or in part, to the Plaintiff on this Record on Appeal, the same being inequitable, arbitrary and capricious and should be set aside.

VI. The Hon. District Judge Larry D. Hendricks, did not apply the correct legal standard of *Brueggemann v. Schimke*, 239 Kan. 245, 718 p.2d 635 (1986) giving the Defendant/Appellant the benefit of every doubt on the submisible facts in the Record in its rulings below concerning Defendant/Appellant's pre-discovery K.S.A. 60 – 212 Motion and Renewed Motion to Dismiss without benefit of hearing, or of utilization of discovery in part to determine the essential jurisdictional prerequisite facts to determine the existence of a Mortgage; and all without the benefit of hearing was error.

STATEMENT OF FACTS

1. CoreFirst of Topeka, Kansas, is a commercial bank and Borrower obtained a commercial loan on pledged property in the amount of $50,000.00 in 2004. (Amended R.O.A., Vol. 1, P. 28.)

2. This Appeal to the Kansas Court of Appeals involves the Bank, trying to foreclose a Mortgage insured by Capital Title Insurance Co, where CoreFirst, on May 6, 2015 at paragraph 13 alleges Timothy Degginger was the "absolute owner" of the property. (Amended R.O.A., Vol. 1, P. 28.)

3. CoreFirst was subordinated to a Federal Tax Lien in the amount of $19,525.28 recorded in the office of the Register of Deeds, Shawnee County, on September 24, 2001, before the putative mortgage, of December 3, 2004, at Book 3549, page 28 and the heirs of the Estate of George J. Degginger. (Amended R.O.A., Vol. 1, P. 172.)

4. CoreFirst and Stewart Title Guaranty Company classified the title as unmarketable. (Amended R.O.A., Vol. 1, PP. 175- 181.) (See also Appendix "B" - Stewart Loan Policy #C0901060)

5. CoreFirst did not petition to foreclose on the apriori Federal Tax Lien on August 6, 2015. (Amended R.O.A., Vo. l 1, P. 26.)

6. David S. Fricke, on August 5, 2015, as a licensed attorney and general counsel to CoreFirst filed a supporting affidavit that, "based on my own personal knowledge," (Amended R.O.A., Vol. 1, P. 63.) Degginger at Paragraph 7 "was the absolute owner" of title. (Amended R.O.A., Vol. 1, P. 64.)

7. A Response of the Defendant to Plaintiff's Motion for Summary Judgment was filed on October 21, 2015. (Amended R.O.A., Vol. 1, P. 78.)

8. Within that response the documents of CoreFirst as introduced into evidence showed:

a. Item 2, the title is subject to the interest of the heirs of the Estate of George J. Degginger. (Amended R.O.A., Vol. 1, P. 169) and see attending exhibits.

b. "The 6 rating was assigned because...issues were discovered with the title work and mortgage that put us in a subordinated position behind a federal

Tax Lien and heirs of the estate." (Amended R.O.A., Vol. 1, P. 174) and see attending exhibits.

c. Further, Stewart Title Guaranty Company for CoreFirst said that it (CoreFirst) had an unmarketable title. (Amended R.O.A., Vo.l 1, P. 170.)

d. "Loan is considered impaired due to the issue with our lien position in the collateral. We are subordinated to a Federal Tax Lien l/a/o $19,525.28 and we are subject to the estate of George J. Degginger and no one representing the estate has signed. This loan is being evaluated as an unsecured loan given the clouded title issues." (Amended R.O.A., Vol. 1, P. 176.)

e. Stewart Title Guaranty Company declared title to be in Timothy F. Degginger AND the Estate of George J. Degginger and guaranteed payment to Capital Title, that title being subject to the Estate and the Federal Tax Lien. (Amended R.O.A., Vol. 1, P. 178.)

f. Capital Title Insurance Co. (hereafter referred to as "Capital") declared title in Timothy F. Degginger and Mary Elizabeth (Betsy) AND the Estate of George J. Degginger. (Amended R.O.A., Vol. 1, P. 176.)

9. The Court documents of Capital show there are no mortgages of record by Capital and that last title shows Timothy F. Degginger and Mary Elizabeth (Betsy) Davis

AND the Estate of George J. Degginger are the grantees on the last deed filed. Capital Title Insurance Co. did not sign the mortgage. (Amended R.O.A., Vol. 1, P. 181.)

For three years, the Defendant/Appellant Borrower has been trying to assert his defenses and claims of wrongful mortgage foreclosure which due to misapplication of the Kansas Law and its unity rules on mortgages; has taken a life of its own, and fraud and defalcation by CoreFirst was a result of their taking what they were informed of in 2004 when the Mortgage instrument was created that they had only bargained for in the opinion of the existing records and files to the pledged property only holding an unsecured note.

ARGUMENT AND AUTHORITIES

I. Whether the District Court followed Chapter 60 Notice Procedures on the instant Record on Appeal.

Standard of Review

Our scope of review, where the trial court has sustained a motion to dismiss, is concisely defined in Knight v. Neodesha Police Dept., 5 Kan.App.2d 472, 620 P.2d 837 (1980): `When a motion to dismiss under K.S.A. 60-212(b)(6) raises an issue concerning the legal sufficiency of a claim, the question must be decided from the well-pleaded facts of plaintiff's petition. The motion in such case may be treated as the modern equivalent of a demurrer.' [Citation omitted.] `Disputed issues of fact cannot be resolved or determined on a motion to dismiss for failure of the petition to state a claim upon which relief can be granted. The question for determination is whether in the light most favorable to plaintiff, and with every doubt resolved in plaintiff's favor, the petition states any valid claim for relief. Dismissal is justified only when the allegations of the petition clearly demonstrate plaintiff does not have a claim.' [Citation omitted.] `In considering a motion to dismiss for failure of the petition to state a claim for relief, a court must accept the plaintiff's description of that which occurred, along with any inferences reasonably to be drawn therefrom. However, this does not mean the court is required to accept conclusory allegations on the legal effects of events the

plaintiff has set out if these allegations do not reasonably follow from the description of what happened, or if these allegations are contradicted by the description itself.' [Citation omitted.] Bruggeman v. Schimke, 239 Kan. 245, 247, 718 P.2d 635 (1986).

"When we must interpret statutes, our touchstone is legislative intent.

"When courts are called upon to interpret statutes, the fundamental rule governing our interpretation is that 'the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted.' *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 378, 22 P.3d 124 (2001). For this reason, when the language of a statute is plain and unambiguous, courts 'need not resort to statutory construction.' *In re K.M.H.*, 285 Kan. 53, 79, 169 P.3d 1025 (2007). Instead, '[w]hen the language is plain and unambiguous, an appellate court is bound to implement the expressed intent.' *State v. Manbeck*, 277 Kan. 224, Syl. ¶ 3, 83 P.3d 190 (2004).

"Where a statute's language is subject to multiple interpretations, however, a reviewing court 'may look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested. [Citation omitted.]' *Robinett v. The Haskell Co.*, 270 Kan. 95, 100-01, 12 P.3d 411 (2000). Generally, courts should construe statutes to avoid unreasonable results and should presume that the legislature does not intend to enact useless or meaningless legislation. *Hawley v. Kansas Dept. of Agriculture*, 281 Kan. 603, 631, 132 P.3d 870 (2006). We ascertain the legislature's intent behind a particular statutory provision 'from a general consideration of the entire act. Effect must be given, if possible, to the entire act and every part thereof. To this end, it is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. [Citation omitted.]' *In re Marriage of Ross*, 245 Kan. 591, 594, 783 P.2d 331 (1989); see also *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, Syl. ¶ 2, 69 P.3d 1087 (2003). Thus, in cases that require statutory construction, 'courts are not permitted to consider only a certain isolated part or parts of an act but are required to consider and construe together all parts thereof *in pari materia*.' *Kansas Commission on Civil Rights v. Howard*, 218 Kan. 248, Syl. ¶ 2, 544 P.2d 791 (1975)." *Board of Sumner County Comm'rs v. Bremby*, 286 Kan. 745, 754-55, 189 P.3d 494 (2008).

Memorandum of Law

The Amended Complaint by CoreFirst begins with a request for Relief of Judgment pursuant to K.S.A. 60- 260(b)(1). (Amended R.O.A., Vol. 1, P. 230.) (See also Appendix "C" – Bank's Rule K.S.A. 60-260(b)(1) Motion which is also an accurate case history to its filing on August 31, 2016.)

George J. Degginger died with an unprobated 50% tenant in common interest to 135 Clay, Topeka, Kansas. CoreFirst wanted to "validate" the Heirs of George J. Degginger thus eliminating the Plaintiff's first judgment where the Honorable Larry D. Hendricks fractionalized the mortgage foreclosure with 3/4 and 1/4 title interest, recognizing that title was in Timothy Degginger AND the Estate of George J. Degginger. (Amended R.O.A., Vol. 1, P. 213.)

Objection was made that the heirs of George J. Degginger required a probate hearing and a request for a determination of descent under K.S.A. 59-502 through 514.

To do that would require CoreFirst to admit that it did not have a valid mortgage of December 3, 2004 and that its note was fraudulently made up, and where the terms of the mortgage could not assess attorney fees, raise interest rates and admit, it had created a fraudulent and putative petition in its first pleadings. (Amended R.O.A., Vol. 1, P. 41.)

CoreFirst could not get paid for attorney fees, could not increase interest rates and would have to admit it created a fraudulent and putative petition all for more money.

David S. Fricke, as an attorney and General Counsel for CoreFirst, represented to the Court that Title to the property was not impaired and whether he knew same cannot be divined from the Record on Appeal as no discovery on this point was allowed by the District Court, however his statements by affidavit were in error and it is Appellant's position that it should have been corrected by subsequent Affidavit when the underlying material facts were made known which effect as a matter of law constitutes a fraud on the Court by not telling the Court that the title was subordinated to the Federal Tax Lien and the Estate of George J. Degginger' all to Appellant's disadvantage to be corrected on this Appeal in determining whether or not attorney's fees should be assessed against an innocent party.

Dana Petrik, Senior Vice President, an employee and agent of CoreFirst knew CoreFirst was a subordinate.

Objection was made by Appellant's Counsel of the fraud of CoreFirst by acknowledging its Title was not fully vested in 12-3-2004. (Amended R.O.A., Vol. 1, P. 254.)

Dana Petrik, Senior Vice President, noted "our [Appellant's]mortgage is signed by Timothy F. Degginger" but the title is vested in Timothy F. Degginger <u>AND</u> the Estate of George J. Degginger. (Emphasis supplied.) (Amended R.O.A, Vol. 1, P. 176.)

The ongoing fraud occurred on 12/3/2004 as a mortgage was signed and then that impaired security was used to create a promissory note on 2/18/2011 notwithstanding

CoreFirst's attributable knowledge. (Amended R.O.A., Vol. 1, PP. 233 and 234.) Defendant/Appellant's rights were ignored and without formal discovery this fact of a deficient Mortgage under the Unity Rules of Lasater would have been unavailable to the Appellant/Defendant in this litigation to fully advance as this Record demonstrates a vigorous defense to Plaintiff Bank's cause of action to foreclose a non-existent mortgage.

Objection was also made that the Court lacked jurisdiction in personam to foreclose a mortgage where there was no probate and unknown parties in interest. K.S.A. 60-217; and K.S.A. 60- 219.

Thus, as the mortgage follows the note K.S.A. 58-2323, the fraud on the Court was in the putative mortgage before the note which only would result in an incomplete unsecured note.

The fraud on the Court came with Dana Petrik, Senior Vice President of CoreFirst, was not disclosing that the note was unsecured.

The fraud on the Court came with David S. Fricke, Senior Vice President and General Counsel, was "perjuring" himself by Affidavit as to Title. The problem came when the apparent mistake was known but not corrected.

The fraud on the Court came with counsel for CoreFirst subordinating and continuing this ongoing fraud in hopes of establishing a reformative mortgage believed to be favored on the facts by quieting Title after the facts were known to create an enforceable mortgage <u>and note</u> required by the Kansas Uniform Commercial Code at

Chapter 3 of Article 84 in this instant case on appeal which is why Appellant's Counsel has repeatedly suggested in good faith that: 'You cannot make a silk purse out of a sow's ear".

This follows the Uniform Commercial Code's Holder in Due Course and upholds *In re: Estate of Lasater*, 30 Kan. App.2d 1021, 54 P. 3d 511 (2002) stating in part:

"In addition to meeting the statutory requirement of clarity, a grant transferring property in joint tenancy must satisfy the traditional doctrine of 'four unities'. "
These unities rules are: (1) unity of interest, (2) unity of title, (3) unity of time, and (4) unity of possession. An interest in estate must be acquired by all cotenants, by the same conveyance, commencing at the same time, and held for the same term undivided possession.

The Holder in Due Course K.S.A. 84-3-302 as required by MERS (Mortgage Electronic Registration System) allowing negotiation is tempered by K.S.A. 84-3-305 defenses and disclaimers for fraud and lack of legal capacity.

As the old bromide goes, "it takes one to buy and all to sell or lien."

The Estate of George J. Degginger had to be probated and then all parties agreed to the mortgage and the promissory note that liens the property; which this Record substantiates Appellant's argument to the Court on numerous occasions.

This was all before the Honorable Larry J. Hendricks.

Judge Hendricks believed:

"So it seems to me that you can foreclose on three quarters interest that Mr. Degginger has, but I don't think that you can sell the property without giving notice..."(Amended R.O.A., Vol. 6, P. 16, lines 13-18.)

"Mr. Kjorlie: Well, we go back to the bank not being able to execute a promissory note and mortgage without having the unity interest; otherwise it would be, we don't think that is something that can be done." (Amended R.O.A., Vol. 6, P. 17, lines 6-9.)

In this second bite at the apple, CoreFirst's "second case", an Answer was filed on February 16, 2017, with affirmative defenses and counter-claims along with a Motion to Dismiss on the basis that the Court lacked personal jurisdiction and insufficient service of process ta effect a valid foreclosure under Kansas Law, and failure to join a party, the Estate of George J. Degginger under K.S.A. 60-219 was reversible error. (Amended R.O.A., Vol. 1, P. 346.)

When a Court determines at any time that it lacks jurisdiction, the Court must dismiss the action under K.S.A. 60-212.

Writing for the Kansas Supreme Court, the Honorable E. Rosen opined and ruled:

"...[a] mortgage is unenforceable when it is not held by the same entity that holds the promissory note" relying on our decision in *Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 540-41(2009); and as cited in *FV-1, Inc., In Trust for Morgan Stanley Mortgage Capital Holdings, LLC v. Kallevig, et al. and Bank of Prairie*, 306 Kan. 204, 392 P.3d 1248 (2017), at Page 9.

The rights of CoreFirst are lost to their putative mortgage and to the fraudulent note. Both the putative rights of the note and mortgage are lost to the Statue of Limitation, the Uniform Commercial Code and Core First's lack of honesty after the fact; and fair dealing, which the Appellate Court should visit on the issue of the Trial Court's granting attorney's fees as a result of the Bank's not correcting the record and its deleterious acts in not seasonably providing the Court Orders under Rule 170 when instructed by the Trial Court to do so.

II. Whether the District Court erred in failing to follow the UCC's Article 3 requirement that on a promissory note where there are multiple parties to the mortgage all of the parties must all be joined in the same action for the Bank to claim the right to be a holder in due course.

Standard of Review

Plaintiff/Appellant adopts and incorporates the applicable Standard of Review contained within his above Issue I to his Issue II.

Memorandum of Law

The Trial Judge believed that, as he was appointed to the Shawnee County Court, he had a right to foreclose whether all persons or entities were known or not. As the Judge stated in a Motion hearing on March 30, 2016:

"...(I have) jurisdiction over foreclosure actions on property located in Shawnee County. There is no question about that", and further:

"...whether you can foreclose upon three quarters of an interest;...and I guess you certainly can, and then the other heirs can come in and get their one quarter of the money

or whatever." (Amended R.O.A., Vol. 6, P. 7, lines 11- 14 and Amended R.O.A., Vol., 6, P. 8, lines 12-14.)

Counsel for CoreFirst, also said to the Trial Court:

> "Mr. McGivern: And that would probably be appropriate for a quiet title action after, perhaps after a sheriff's sale.
> The Court: Well, if there's a sheriff's sale there is going to be a sheriff's deed and that cuts off their interest.
> Mr. McGivern: If we proceed on the way you mentioned it would be fractional interest, a sale of a portion of the real estate, which is, I mean those transactions happen." (Amended R.O.A., Vol. 6, P. 22, lines 14-23.)

Further the District Court ruled as above noted on the Record that CoreFirst was not a holder in due course because it did not purchase the note for value.

"K.S.A. 84-3-302(a). Under this statue, the Plaintiff (Core First) is not a holder in due course because, at a minimum, it did not purchase the Note for value." (Amended R.O.A., Vol. 1, P. 124.)

In Kansas, the primary purpose of a mortgage is to insure the payment of the debt for which it provides security, and foreclosure is allowed when necessary to carry out that objective. *Bank of America v. Inda*, 48 Kan. App. 2d 658, 303 P.3d 696 (2013).

The Appellant suggests that it is clear on this instant Record on Appeal that CoreFirst knew it did not have a valid mortgage, that its note was defective, and this is why it is respectfully submitted that CoreFirst hired Stewart Title, as a collateralized Guarantor, in this instance Capital Tile Insurance Company, L.C., guaranteeing payment of the note for failure of any person to have authorized a transfer or conveyance, or that a

lien by government authority encumbering the property. This is why Stewart Title would not (Amended R.O.A., Vol. 1, P. 175.)

The Stewart Title guarantor insured Capital Title Insurance Company, L.C. and stated this guaranty was due to the fact that not all parties claiming an interest in the property, due to its being held in tenancy in common that the mortgage taken against some but not all of the claimed owners, executed the contested note and mortgage. (Amended R.O.A., Vol. 1, P. 175.)

As earlier noted in *Landmark Nat'l Bank v. Kessler*, 289 Kan. 528, 216 P.3d 158 (2009), a "mortgage is unenforceable when it is not held by the same entity that holds the promissory note."

The Honorable Larry D. Hendricks was right that the foreclosure was not barred by the Federal Tax Lien, but wrong that the Tax Lien was not a priority for payment and should be in the accounting of the foreclosure proceeding. *McDaniel v. Jones*, 235 Kan. 93, 679 P.2d 682 (1984).

Promissory notes and mortgages are contracts between the parties to which the ordinary rules of contract construction apply. *MetLife Home Loans v. Hansen*, 47 Kan. App. 2d 690, 280 P. 3d 225 (2012), thus there must be an offer, consideration, acceptance, legality and capacity to contract.

The note and mortgage were not valid as there was the issue of capacity because of the unknown heirs of the Estate of George J. Degginger. K.S.A. 84-3-305 defenses and

claims in recoupment at (1) (B)...lack of legal capacity...and (C) fraud that induced the obligator to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms.

CoreFirst, their General Counsel, and the attorneys of CoreFirst knew or should be held to their constructive knowledge that the mortgage was invalid as evidenced by CoreFirst hiring Stewart Title to insure Capital Insurance Title Co., L.C., and on the facts the knowledge of Stewart Title must be imputed to Core First Bank, its agents and employees.

III. The District Court erred in determining that contended defects to title to the real estate were present in the case when applying the Kansas Unity Rule and could be rectified by approving the Plaintiff Bank's remedy requested in its Second Petition, allowing it to obtain or attempt to obtain both in rem and in personam jurisdiction in the instant mortgage foreclosure proceedings. The Plaintiff has on this Record improperly attempted to determine a cure for its mortgage deficiency by creating an equitable mortgage; however, believed by the Defendant/Appellant such an attempt to be based improperly upon the use of a in rem quiet title proceeding determined by the Kansas courts as being an improper method to determine rights inherent to a in personam foreclosure action. See *Bank of Blue Valley v. Duggan Homes, Inc.,* 48 Kan. App. 2d 828, 303 P.3d 1272 (2013) and *FV-I, Inc., In Trust for Morgan Stanley Mortgage Capital Holdings, LLC v. Constance M. Kallevig, et.al., and Bank of the Prairie,* (Appeal No. 111,235).

Standard of Review

Plaintiff/Appellant adopts and incorporates the applicable Standard of Review contained within his above Issue I to his Issue III.

Memorandum of Law

It has been long argued that in this case there has been fraud on the Court.

When due process is lost, the Court has lost it raison d'etre. The purpose of codifying laws by the Kansas Legislature was to create expectation. The codification of civil procedure was to avoid trial by ambush similar to Core First's conduct in this case by repeatedly filing Summary Judgment Motions when the material fact controversy issues concerning Appellant's Motions to Dismiss, believed dispositive, were before the Court for determination to make requisite findings of fact incident to the Appellant's Motions to Dismiss of Record. (Amended R.O.A, Vol. 1, P.P. 160-181; and Amended R.O.A, Vol. 1, P.P. 354-361.)

The Uniform Commercial Code in the sixties set a standard for forty nine States to unify commercial law, bills and notes. The fiftieth State of Louisiana continued with its Napoleonic Code.

The Probate Code in Kansas allows for the practice and certainty of transferences. In Kansas the district court will use Kansas Laws of Intestate Descent and Distribution for determining the ownership of property.

This practice does not contemplate issuing a mortgage foreclosure for Letters of Administration and Decrees of Descent.

The conduct of CoreFirst has been fraud on the Court by filing a mortgage foreclosure when it knew it did not have a mortgage.

The fraud on the court has been CoreFirst having their general counsel subordinate a false affidavit, " Tim Degginger as sole owner" proven to be false by the tenants in

common deed of George J. Degginger as a 50% tenant in common for 135 Clay, Topeka, Kansas.

And then, CoreFirst sloppily attempting a "evaluation" of the heirs of George J. Degginger. (Amended R.O.A, Vol. 1, P.P. 228.) Who cares if Jurisdiction to make the mortgage had already been lost, and a "valuation" ten years later does not satisfy the Unity Rules; and contradicts Kansas Law that you can't utilize a Quiet Title proceeding to rectify a deficient mortgage. See *FV-1, Inc., In Trust for Morgan Stanley Mortgage Capital Holdings, LLC v. Kallevig, et al. and Bank of Prairie*, 306 Kan. 204, 392 P.3d 1248 (2017).

The fraud on the Court was the Plaintiff CoreFirst posing a false narrative on the instant Record that since Elizabeth Degginger (The 1936 Spouse of George Degginger) had her kids sign quit claim deeds for the benefit of her son that there was a probate of the Estate of George J. Degginger. This never occurred. (Amended R.O.A., Vol. 3, P. 5, lines 12-15.)

The Defendant/Appellant asserts the facts in this Record on Appeal are quite clear:

a.) George was a 50% tenant in common with his wife Elizabeth who also had 50% tenant in common. (Amended R.O.A., Vol 2, P. 44.)

b.) Upon George's death, Elizabeth took her 1/2 interest in 135 Clay and by quit claim deeds conveyed that interest to Tim Degginger, Sr., her son. (Amended R.O.A., Vol. 2, PP. 46, 48, 50, and 52.)

c.) Upon Tim Sr.'s death his probate showed that his wife, Mary, took 1/2 interest and their children the other half.

d.) There was no probate of the Estate of George J. Degginger. There has never been a probate of the Estate of George J. Degginger.

Thus, it as above noted, that the rationale for determining ownership to the subject property rests not on a Quiet Title-type proceeding but only as to the determination on the part of the Court that the 1958 Deed "miraculously cleared or was Manna from Heaven" that the Title of ownership to the subject real property now vested with the Defendant/Appellant Borrower! There has only thus been the "assumption" by the Honorable Larry D. Hendricks of ownership without making findings of fact and conclusions of law concerning this "leap of faith' through an attempted back door determination of descent [but only to Mary Degginger's interest (Mother of Defendant/Appellant) which is only 50% determination ownership to the pledged property [<u>because the Estate of George Degginger has not been probated and neither has a Quiet Title proceeding been completed</u> (emphasis ours.)] (Amended R.O.A., Vol 2, P. 82.) The Trial Court found:

> "...Defendant then had the burden to prove that the Plaintiff knew that its representations were false or that it made such representations recklessly and without knowledge concerning them." (Amended R.O.A., Vol 2, P. 8, lines 28-29.)

The Trial Court had before it sworn affidavits that the putative mortgage was unsecured and that Bank personnel, as well as attorneys for CoreFirst, knew it was unsecured. There was no testimony except for Tim Degginger:

> "Q. And can you give an explanation of that and why you would not have been able to know of any more than you did?
> A. Well, George had family in St. Joseph, Missouri. George D. Degginger had family in St. Joseph, Missouri. I answered all the questions I knew the answers to.
> Q Okay. But you didn't know who these individuals were?
> A. No." (Amended R.O.A.,Vol 5, P. 11, lines 1-10.)

Again, the Trial Court failed to make either a quiet title judgment disfavored by the Kansas Supreme Court; or a determination of descent to correct the mortgage deficiency.

K.S.A. 59-509 legislatively provides the purpose for a limitation on descent:

> "In all cases of intestate succession, the right of a living person to have property, or a share of it, pass to him or her, shall be determined as here provided...."

Chapter 59 of the Kansas Statues provides a legislative intent and legislation as to probate petition, notice and reporting. The fraud on the Court was CoreFirst taking a mortgage without a probate, and then petitioning to foreclose.

And this fraud on the Court was adopted by the Honorable Larry D. Hendricks who first ruled that there was only 3/4 interest and then 100% after a putative and defective attempted determination of descent.

The mortgage was taken on December 3, 2004, and CoreFirst knew it had not probated the Estate of George J. Degginger. So, CoreFirst changed positions by paying

Stewart Title Guaranty Company as guarantor for Capital Title Insurance Company, L.C., if CoreFirst was discovered for having a defective title, and had to pay the Federal Tax Lien.

Somewhere in 2015, CoreFirst contacted a third title company who provided the quit claim deeds. <u>There is no title report on record.</u> (Emphasis ours.) There are only the assumptions of the Honorable Larry D. Hendricks without probate Letters of Descent Determination or for that matter a valid judgment quieting title!

Justice Rosen writing in *FV-1, Inc., In Trust for Morgan Stanley Mortgage Capital Holdings, LLC v. Kallevig, et al. and Bank of Prairie*, 306 Kan. 204, 392 P.3d 1248 (2017):

> "In *Anthony v. Brennan,* 74 Kan. 707 (1906), the plaintiff obtained an assignment of the mortgage from one, but not all, and the plaintiff's later efforts to obtain assignments from the remaining mortgages did not cure the standing defect that existed at the time the suit was filed. "

IV. The District Court erred in not granting Defendant's Motion to Dismiss in ruling against the Defendant on the foregoing Issues I – III.

<u>Standard of Review</u>

Plaintiff/Appellant adopts and incorporates the applicable Standard of Review contained within his above Issue I to his Issue IV.

<u>Memorandum of Law</u>

On October 21, 2015 a Response to plaintiff's Motion for Summary Judgement was made. Plaintiff provided documents of CoreFirst which were attached by Affidavit. (Amended R.O.A., Vol. 2, PP. 78-87.)

The basic argument was that the property to be foreclosed was held as a tenant in common:

> "Whether a 'contingently necessary' person is subject to service of process, he shall be a party in the action". A person is contingently necessary if (1) complete relief cannot be accorded....or (2) he claims an interest to the property...." K.S.A. 60-219(a).

This Motion also dealt with the Federal Tax Lien, the "Show me the Note" proof *Gee v. U.S. Bank*, 72 So.3rd 211 (Fla. 5th DCA 2011), and the issue of multiple payment dates, application of payments, delinquencies, fees and late charges and further whether the Defendant is subject to attorney fees and penalties.

A "*Thomas v. County Commissioners of Shawnee County*, 293 Kan. 208 (2011)" Hearing , as per Judge Hendricks, to Appellant/Defendant's Response to Plaintiff's Motion for Summary Judgement was made as to the facts of the Summary Judgment of the 22 factual allegations, 16 were controverted and as shown at paragraph 8 (Amended R.O.A., Vol. 1, P. 81) :

> "Controverted. The note is a multiple renewal of a 2004 loan. The only parties with actual knowledge of the terms and conditions are Dana Petrik, of CoreFirst. This promissory note is a new loan structure with no new monies. The collateral was subject to a federal lien and heirs to the George Degginger Estate. See Page 000039 and (see Paragraph 2. of "Affidavit of Timothy F. Degginger", attached hereto..."...because issues were discovered with the title work and mortgage that put us (CoreFirst) in a subordinated position behind a federal Tax Lien and heirs to the estate. This loan is treated as unsecured and has been fully reserved."

There was a conflict of CoreFirst saying the mortgage is unsecured and CoreFirst's attorneys saying no. Summary judgement should not be used to prevent the necessary examination of conflicting testimony..."*Esquivel v. Watters*, 286 Kan. 292, 183 P. 3d 847 (2008).

But the Trial Court never provided any opportunity to present evidence, depositions, findings of facts, or conclusions of law independent of the Court's conclusions. There is nothing in the record to show compliance with the instructions of the Appellate Court in *Labette* Cty. *Med. Center v. Kansas Dept. of Health and Environment*, No.116,416, 2017 WL 3203383(Kan. App. 2017) (unpublished opinion).

CoreFirst filed a second Petition and an Answer was made, affirmative defenses and counter-claims. (Amended R.O.A., Vol. 1, PP. 346-353.) CoreFirst instead of answering filed a Motion to Dismiss Counterclaims. (Amended R.O.A., Vol. 1, PP. 362-393.) Normally, a counter-claim has to be answered and then a motion for judgment is made accompanied by a filing fee and a memorandum or brief. The District Court granted that Motion to Dismiss, eliminating answers, affirmative defenses and the counter-claim.

But that is not the end of the story, on the first Petition filed on January 15, 2016 (Amended R.O.A., Vol. 1, PP. 26-43.), the District Court granted a judgment on the foreclosure action against the Defendant Appellant however instructed Counsel for the Plaintiff/Appellee to join other parties to resolve the cloud or fractional interest

determined by the Court to be 5/6th's to Defendant/Appellant and 1/6th's to the unknown heirs to the Estate of George Degginger to the Title to the pledged property yet determined. (Amended R.O.A., Vol. 1, PP. 213.) (Amended R.O.A.,Vol. 1, PP. 214-217.) The Plaintiff/Appellee did nothing requiring an appeal to the Appellant Court to protect jurisdiction. (Amended R.O.A., Vol. 1, PP. 219-220.)

And on CoreFirst's second petition, the District Court again granted judgment where CoreFirst was to file a journal entry. The plaintiff did nothing requiring an appeal to the Appellant Court to protect jurisdiction.

And before the second appeal, there was a Motion for Certification for Judgment.

The District Court knew the Estate of George J. Degginger was un-probated.

That fact alone requires dismissal. Jurisdiction and venue begin the covenant of a Judge for due process before the law.

V. The District Court erred on the instant Record in assessing attorney's fees, in whole or in part, to the Plaintiff on this Record on Appeal, the same being inequitable, arbitrary and capricious and should be set aside.

Standard of Review

Plaintiff/Appellant recites the applicable Standard of Review as set out by the Kansas Supreme Court in *Snider v. American Family Mutual Insurance Co.,* No. 103,340, (2013):

> "Even if the awarding of attorney fees is mandatory under a statute, the amount of the award is within the sound discretion of the awarding court, which means the award will be reviewed on appeal under an abuse of discretion standard.

> A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. Where it is argued an action was arbitrary, fanciful, or unreasonable, the party alleging the abuse of discretion must establish that no reasonable person would take the same action. In evaluating the reasonableness of an award of attorney fees, including the reasonableness of a fee allowed to a prevailing party by statute, a court should consider the eight factors set forth in the Kansas Rules of Professional Conduct Rule 1.5(a) (2012 Kan. Ct. R. Annot. 492)."

Also,

> "Whether a district court has the authority to award attorney fees is a question of law over which an appellate court has unlimited review. *Unruh v. Purina Mills*, 289 Kan. 1185, 1200, 221 P.3d 1130 (2009). The party requesting attorney fees and costs bears the burden of establishing entitlement to such an award. See *Estate of Bingham v. Nationwide Life Ins. Co.*, 7 Kan. App. 2d 72, 80, 638 P.2d 352 (1981), *aff'd as modified* 231 Kan. 389, 646 P.2d 1048 (1982)."

Memorandum of Law

Fraud on the Court begins with accepted judicial practice not being followed, and the inequity that results from the Court's duty to make timely findings of fact and conclusions of law, or to certify for Appellate review when the question is not only novel but where the Court acknowledges its uncertainty to presented legal issues before it.

CoreFirst dismissed its first petition because its foreclosure proceeding failed, but the District Court still awarded nearly $7,000.00 in attorney fees, and proceeded into uncharted waters. And, as the fee was part of the judgment, with Core First's voluntary dismissal of the judgment, the fee should have been lost. Supreme Court Rule 1.5 (4)....the result of the Defendant/Appellant obtained.

Defendant/Appellant contends that a dismissal of the judgement also dismisses the fee which is part of the judgment. This is only fair when the defect (i.e., Bank's Affidavit was not supported by its own records) was at the hands of the party seeking attorney's fees!

And later in the second suit filed by CoreFirst, the attorney fees were blithely set at the assumed requested amount of ($24,881.77) without Rule 170 evidence or finding of facts. *Labette* Cty. *Med. Center v. Kansas Dept. of Health and Environment*, No.116, 416, 2017 WL 3203383(Kan. App. 2017) (unpublished opinion).

CoreFirst complained that it had to defend against two appeals. Both appeals occurred because their attorneys would not prepare their required journal entries within thirty days. There was no comment by the Trial Court. When David S. Fricke, the bank's general counsel, was discredited, the Trial Court made no comment about his conduct. When the Trial Court allowed CoreFirst to petition for a mortgage foreclosure through a quiet title, there was not a judgment of certainty only an assumption of jurisdiction and fact on the part of the Trial Court.

Part of the Trial Court's granting fees was the Trial Court's unhappy discussions about appellate review. The Trial Court had before it an unanswered request for Appellant Certification. And then, the Trial Court's unhappy discussions of the 50% of Elizabeth Degginger, which in fact is only 50% of the whole. If the Trial Court had required a real quiet title judgment or a judgment in a probate determination of descent,

there would be certainty as to exactness of title and not a wondering about the extended family of George Degginger which in this case was from the environs of St. Joseph, Missouri.

In any event, CoreFirst knew it did not have a mortgage on December 3, 2004. It re-insured through Stewart Title for Estate of George Degginger and knew of the recorded federal tax lien against the pledged property. This conduct by CoreFirst should require a payment to Appellant's attorney for its failure to correct the Record when it knew, or should have known, from a review of its internal records that there was a cloud on the subject pledged property.

CoreFirst did not act in good faith as a matter of law on this Record by requiring a mortgage. CoreFirst knew it could not create a Uniform Commercial Code unity certification under Article Three, and thereby was not legally able to factor to Fannie Mae. The extent of the attorney's fees assessed in and of itself should be of concern to this Honorable Appellate Court.

VI. The Hon. District Judge Larry D. Hendricks, did not apply the correct legal standard of *Brueggemann v. Schimke*, 239 Kan. 245, 718 p.2d 635 (1986) giving the Defendant/Appellant the benefit of every doubt on the submisible facts in the Record in its rulings below concerning Defendant/Appellant's pre-discovery K.S.A. 60 – 212 Motion and Renewed Motion to Dismiss without benefit of hearing, or of utilization of discovery in part to determine the essential jurisdictional prerequisite facts to determine the existence of a Mortgage; and all without the benefit of hearing was error.

Standard of Review

Plaintiff/Appellant adopts and incorporates the applicable Standard of Review contained within his above Issue I to his Issue VI.

Memorandum of Law

In *Labette* Cty. *Med. Center v. Kansas Dept. of Health and Environment*, No.116,416, 2017 WL 3203383(Kan. App. 2017) (unpublished opinion); a similar case scenario in that case that is believed to exist in the present appeal where the legal standard and benefits of ruling on a pre-discovery motion to dismiss without benefit of hearing was determined in *Families Against Corporate Takeover v. Mitchell*, 268 Kan. 803, 1 P.3d 884 (2000) is that that the Honorable District Judge Larry D. Hendricks did not apply the correct legal standard of *Bruggeman v. Schimke*, 239 Kan, 245, 718 P. 2d 635 (1986): stating at Page 247:

> " 'The question for determination is whether, in light most favorable to plaintiff and *with every doubt resolved in plaintiff's favor*, the petition states any valid claim for relief ...In considering a motion to dismiss for failure of the petition to state a claim for relief, a court must accept that plaintiff's description of that which occurred along with any inferences reasonably to be drawn therefrom.' (Emphasis added)"

Here, the Trial Court ruled that independent of any oral argument on the motions pending before it in the second "Quiet Title Action-Mortgage Foreclosure", except for fees.

CONCLUSION/ARGUMENT

Thus, in the first instance, the Appellate Court determined in Appellate Case No. 115,717 that:

> "The district court's April 5, 2016, journal entry very clearly showed that the issue of property ownership remains outstanding." (See Appendix D.)

And in Appellate Case No. 118,341 that:

> "While there may be a final judgement on Appellant's counterclaims, the district court has not yet entered a final judgment on Appellee's primary claim." (See Appendix E.)

Thus, the costs were the delay was a result of the confluence of many pressures which in the opinion of the Defendant/Appellant Borrower that the panoply of inaction on the part of the Trial Court to timely require findings of fact and conclusions of law deemed important and essential by the Appellate Court in *Labette Cty. Med. Center,* supra; and the Plaintiff/Appellee Bank chaos in its attempt "to make a silk purse out of a sow's ear"; and failure of the Trial Court in failing to allow discovery to make requisite findings of fact and conclusions of law; is here respectfully shown. Further the Bank's seeking affirmative relief under K.S.A. 60-260(b)(1) should in and of itself require a finding that a final judgment upon its being filed occurred on August 31, 2016 and any subsequent award of attorney's fees applying current Kansas Law should be declared a nullity. Although the Appellate Court in Case No. 115,717 dismissed the appeal in its

Order of July 15, 2016 on the basis that "the issue of property ownership remains outstanding"; it is respectfully submitted that that is and remains the determinative issue; and this case on appeal should be considered final as of August 31, 2016 for review and especially upon the attorney's fees assessment issue here raised on appeal.

As the above transcript notations to the Amended Record on Appeal indicates, the Borrower asserts in this appeal that the Trial Court had wrongly assumed that the Defendant/Appellant, in its attempt to be treated fairly and to "have his day in court," had the burden of proof in determining the existence or non-existence of a fractional interest falling back on its erroneous belief that the 1958 Deed miraculously rendered 100% ownership in the Borrower without obtaining a Quiet Tittle Judgment (Findings of Fact/Conclusions of Law?), and the Record on Appeal is devoid of a Determination of Descent in probate court. The Defendant/Appellant Borrower raises in this instant Appeal that only a Probate Descent Action may determine the existence of heirs to the Estate under the Bank's theory adopted by the Court, however again this has been determined to be impermissible under current Kansas Mortgage Law, as above shown.

The Court has determination that the Defendant/Appellant Borrower in equity is to be penalized on this Record by paying attorney's fees to the Plaintiff/Appellee Bank in the assumed requested amount of ($24,881.77) is believed to be both arbitrary and capricious in this case on appeal. However, again, there is no journal entry establishing a liquidated dollar and cents amount submitted by the Plaintiff/Appellee Bank, so one

may assume it is the Court's direction that the amount of ($24,881.77+) is the Court's final judgement for which the instant appeal is taken against a $50,000.00 property with recorded federal tax lien of $19,525.28 should be of concern to the Appellate Court. There was no testimony, no depositions, and no real discovery.

It was CoreFirst Bank's trying to foreclose on an unsecured note, providing unfaithful affidavits, not timely making Journal Entries when required, and thus promoting a false narrative that the Estate of George J. Degginger was not needed to be probated to include the possible heirs of George Degginger by virtue of the 1936 tenants in common Deed in reliance upon a 1958 Deed conveying only 50% of the pledged property. Neither are these actions "clean hands" as a justification to award attorney's fees.

For all the above, the Plaintiff/Appellant Borrower respectfully requests the Appellate Court to reverse the Honorable Trial Court's rulings and decisions on the error shown; and to either remand to re-determine issues here resolved; or as instructed to proceed as directed by this Honorable Appellate Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing Appellant's Brief, was electronically filed upon the Clerk of the Appellate Courts, Kansas Judicial Center, 301 SW 10th Street, Topeka, Kansas, 66612-1507, and/or further by electronic service, on this 16th day of July, 2018, upon the following:

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/s/Eric Kjorlie
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STEVEN WAYNE FISH, et al., Plaintiffs, v. KRIS KOBACH, in his official capacity as Secretary of State for the State of Kansas, Defendant.	Case No. 16-2105-JAR-JPO
PARKER BEDNASEK, Plaintiff, v. KRIS KOBACH, in his official capacity as Secretary of State for the State of Kansas, Defendant.	Case No. 15-9300-JAR-JPO CASES CONSOLIDATED FOR TRIAL

FINDINGS OF FACT AND CONCLUSIONS OF LAW

To register to vote, one must be a United States citizen. The Kansas legislature passed the Secure and Fair Elections ("SAFE") Act in 2011, which included a new requirement that Kansans must produce documentary proof of citizenship ("DPOC") when applying to register to vote. These cases were consolidated for trial because they both challenge the DPOC law as a method for enforcing the citizenship qualification. In Case No. 16-2105, the *Fish* Plaintiffs challenge the law as it applies to "motor voter" applicants—individuals who apply to register to vote at the same time they apply for or renew their driver's license online or at a Division of Motor Vehicles ("DOV") office. Plaintiffs include the Kansas League of Women Voters, as well

Appellant/Defendant's
Opening Brief
APPENDIX-A

as several Kansas residents who applied to register to vote when applying for a driver's license, but were denied voter registration for failure to submit DPOC. One claim remained for trial in that case alleging that under the Election Clause in Article 1 of the United States Constitution, the Kansas DPOC law is preempted by § 5 of the National Voter Registration Act ("NVRA"), which provides that voter registration applications may only require the minimum amount of information necessary for a State to determine applicants' eligibility to register to vote, and to perform its registration duties.

In Case No. 15-9300, Plaintiff Parker Bednasek challenges the DPOC law on constitutional grounds. His remaining claim for trial is brought under 42 U.S.C. § 1983, based on a violation of the right to vote under the Fourteenth Amendment's Equal Protection Clause.[1] Mr. Bednasek's claim is not limited to motor-voter applicants.

The seven-day bench trial in these matters concluded on March 19, 2018. After hearing and carefully considering the evidence presented by the parties at trial, this Court first resolves the remaining motions by Plaintiffs to exclude expert testimony, and next issues its Findings of Fact and Conclusions of Law under Fed. R. Civ. P. 52(a). As explained more fully below, the Court grants in part and denies in part the motion to exclude Dr. Steven Camarota, and grants the motion to exclude Patrick McFerron. Under the test set forth by the Tenth Circuit Court of Appeals that governs whether the DPOC law violates § 5 of the NVRA, the Court finds in favor of Plaintiffs in the *Fish* case. The Court further finds in favor of Plaintiff Bednasek on his constitutional challenge to the law. Declaratory and injunctive relief is granted in both matters as set forth in this opinion. Further, the Court imposes specific compliance measures given

[1]The docket numbers referenced throughout this opinion are to the *Fish* matter, Case. No. 16-2105. References to documents filed in the *Bednasek* case will be preceded by that Plaintiff's last name.

ALTA Loan Policy (6-17-06)

LOAN POLICY OF TITLE INSURANCE
ISSUED BY

Any notice of claim and any other notice or statement in writing required to be given to the Company under this Policy must be given to the Company at the address shown in Section 17 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, STEWART TITLE GUARANTY COMPANY, a Texas corporation (the "Company") insures as of Date of Policy and, to the extent stated in Covered Risks 11, 13, and 14, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from
   (a) A defect in the Title caused by
      (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
      (ii) failure of any person or Entity to have authorized a transfer or conveyance;
      (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
      (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
      (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;
      (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
      (vii) a defective judicial or administrative proceeding
   (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
   (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.
3. Unmarketable Title.
4. No right of access to and from the Land.
5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
   (a) the occupancy, use, or enjoyment of the Land;
   (b) the character, dimensions, or location of any improvement erected on the Land;
   (c) the subdivision of land; or
   (d) environmental protection

Countersigned by:

Authorized Countersignature

Capital Title Insurance Company, L.C.
Company

Topeka, Kansas
City, State

Senior Chairman of the Board

Chairman of the Board

President

File No.: C0901060

Part 1 of Policy Serial No. M-9302-920465

If you want information about coverage or need assistance to resolve complaints, please call our toll free number 1-800-729-1902. If you make a cl notice in accordance with Section 3 of the Conditions. Visit our World-Wide Web site at http://www.stewart.com

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APPENDIX-B

Sep

Date: 2/14/2011

Borrower Name: Timothy Degginger

Loan Number: 7152671

Loan Type: Amortizing

Loan Status: Current/New Structure   Past Due   Non Accrual

Loan Risk Rating: 6

Definition of Impaired Loan: A loan is impaired when, based on current information and events, it is probable that the bank will be unable to collect all amounts due according to the contractual terms of the loan agreement.

Definition of Collateral Dependent Loan: A loan is collateral dependent if repayment of the loan is expected to be provided solely by the underlying collateral.

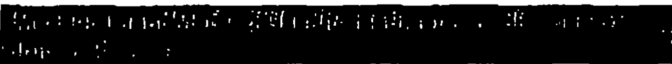
Is this an Impaired Loan? yes

Document the Analysis that Resulted in the above Impairment Decision.
This loan was transferred into my portfolio. Borrower was required to make interest only payments in the past and did make those payments, although sometimes later than scheduled. This particular loan was just set up to amortize out the balance owing on the line. Loan is considered impaired due to issues with our lien position in the collateral. We are subordinate to a Federal Tax Lien i/a/o $19,525.28 and we are subject to the heirs of the estate of George J. Degginger. Our mortgage is only signed by Timothy Degginger and no one representing the estate has signed. This loan is being evaluated as an unsecured loan given the clouded title issues.

Is this Loan Collateral Dependent? No

Analysis:

Timothy Degginger is 100% owner of Degginger Foundry. His business is viable and producing a revenue stream for him. This loan was previously an evergreen LOC that has been converted to this amortizing loan. The 6 rating was assigned because current financials have not been provided and because issues were discovered with the title work and mortgage that put us in a subordinate position behind a Federal Tax Lien and heirs to the estate. Customer's personal credit history is poor. Borrower is very articulate and detail oriented in his craft, but lacks that same focus in his bookkeeping abilities. However, Lender believes, at this time, that payments will come, but may be sporadic. This loan will be further evaluated once there has been some history established.



________ Present Value of Expected Future Cash Flow Discounted at the Loan's Effective Interest Rate. This method must be used if loan is ADC loan.

________ The Loan's Observable Market Price

MT

JT

3/21/11

Rev – 12/2010

000107

SCHEDULE A

Name and Address of Title Insurance Company: Stewart Title Guaranty Company, 1980 Post Oak Blvd., Houston, TX 77056

File No.: C0901050

Policy No.: M-9302-920455

***Address Reference:** *135 SW Clay Street, Topeka, Kansas 66606*

Amount of Insurance: $50,000.00

Date of Policy: December 10, 2004 at 3:22 PM

1. **Name of Insured:**

   Commerce Bank and Trust, its successors and/or assigns as their interests may appear.

2. **The estate or interest in the land that is encumbered by the Insured Mortgage is:**

   Fee Simple

3. **Title is vested in:**

   Timothy F. Degginger AND The Estate of George J. Degginger

4. **The insured Mortgage and its assignments, if any, are described as follows:**

   A Mortgage dated December 3, 2004, executed by Timothy F. Degginger, a single person, in favor of Commerce Bank and Trust, in the original amount of $50,000.00, recorded December 10, 2004, at 3:22 P.M., in the records of Shawnee County, at Book 4132, Page 910.

5. **The Land referred to in this policy is described as follows:**

   Lots 33 and 35, on Clay Street, in Harvey Subdivision, City of Topeka, Shawnee County, Kansas.

SCHEDULE B
PART I

File No.: C0901050 Policy No: M-9302-920455

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) that arise by reason of:

GENERAL EXCEPTIONS:

a. Rights or claims of parties in possession not shown by the public records.
b. Encroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises.
c. Easements or claims of easements not shown by the public records.
d. Any lien, or right to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown by the public records.
e. Taxes or special assessments which are not shown as existing liens by the public records.

SPECIAL EXCEPTIONS:

1. Subject to a Federal Tax Lien, against Tim Degginger, in the amount of $19,525.28, recorded in the Office of the Register of Deeds, Shawnee County, Kansas, on September 24, 2001, at Book 3549, Page 288.

2. Subject to the interest of the heirs of the Estate of George J. Degginger.

3. Building Set-Back Lines, Utility Easements, Easements, Rights-of-Way or servitudes appearing in the public records.

4. Terms and provisions of the Covenants, Conditions, Restrictions, if any, appearing in the public records.

5. Any Lease, grant, exception or reservation of minerals or mineral rights appearing in the public records.

6. Subject to the lien of the general and special taxes for the year 2004 and thereafter.

60008669

35619

STATE OF KANSAS SHAWNEE COUNTY REC'D FOR RECORD

2004 DEC 10 P 3:28 REGISTRATION FEES $ 130.00 Debt $ 50,000.00 No. 200350 Paid 10 day of Dec 2004

MARILYN L. NICHOLS Register of Deeds Shawnee County Kansas By Deputy

Capital Title Insurance Co.
2858 SW Villa West Dr.
Topeka, KS 66614
C 0411186

[Space Above This Line For Recording Data]

COMMERCIAL REAL ESTATE MORTGAGE

This Commercial Real Estate Mortgage (Security Instrument) is made on December 03 2004 by Timothy F Degginger A Single Person whose address is 135 SW Clay Topeka Kansas 66606 (Mortgagor) and Commerce Bank and Trust whose address is P O Box 5049 3035 S Topeka Topeka Kansas 66605 (Lender) which is organized and existing under the laws of Kansas

Mortgagor in consideration of the principal amount of Fifty Thousand Dollars And 00/100 Dollars ($ $50 000 00) (Maximum Principal Indebtedness) and for other valuable consideration the receipt of which is acknowledged hereby mortgages and grants to Lender its successors and assigns forever the land and property described below

Lots 33 and 35, on Clay Street, in Harvey Subdivision, City of Topeka, Shawnee County, Kansas.

Commonly known as 135 SW Clay Street, Topeka, KS 66606

TOGETHER WITH all easements appurtenances improvements buildings fixtures tenements hereditaments equipment rents income profits and personal property of every description and all other rights and privileges including all minerals oil gas and timber that is now or later located situated or affixed on or used in connection with it (hereinafter called the Property)

MORTGAGOR COVENANTS that Mortgagor is lawfully seised of the estate conveyed and has the right to mortgage grant convey and assign the Property (and if this Instrument is given on a leasehold that the ground lease is in full force and effect without modification except as noted above and without default on the part of either the lessor or lessee) that the Property is unencumbered and that Mortgagor will warrant and defend generally the title to the Property against all claims and demands subject to the easements and restrictions listed in the schedule of exceptions to coverage in any title insurance policy insuring Lender s interest in the Property

☐ This is a PURCHASE MONEY MORTGAGE whereby the indebtedness includes money that is used either in whole or in part to purchase the Property

RELATED DOCUMENTS The words Related Documents" mean all promissory notes security agreements prior mortgages business loan agreements construction loan agreements resolutions guaranties environmental agreements subordination agreements assignments of leases and rents and all other documents and agreements executed in connection with this Mortgage whether now or later existing The Related Documents are made a part of this Mortgage with the same force and effect as if they were fully set forth herein

INDEBTEDNESS This Mortgage secures the principal amount shown above as may be evidenced by a promissory note or notes of even prior or subsequent date hereto including future advances and every other indebtedness of every kind now and or later owing from Mortgagor to Lender however created or arising whether primary secondary or contingent together with all interest or charges provided in or arising out of such indebtedness as well as the agreements and covenants of this Mortgage and all Related Documents (all referred to in this Mortgage as the Indebtedness)

FUTURE ADVANCES *To the extent permitted by law this Mortgage will secure future advances as if such advances were made on the date of this Mortgage regardless of the fact that from time to time there may be no balance due under the note and regardless of whether the Lender is obligated to make such future advances*

CROSS COLLATERALIZATION It is the express intent of the Mortgagor to cross collateralize all of Mortgagor s indebtedness and obligations to the Lender however arising and whenever incurred

By initialing I acknowledge this page 1 of 8 of the Commercial Real Estate Mortgage	TFD. Initials	Initials	Initials	Initials

Compliance Systems Inc
To Order Call 1 800 968 8522 FAX 616 956 1868

BOOK 4132 PAGE 910

000070

No Waiver No delay or failure of Lender to exercise any right remedy power or privilege hereunder shall affect that right remedy power or privilege nor shall any single or partial exercise preclude the later exercise of any right remedy power or privilege No Lender delay or failure to demand strict adherence to the terms of this Mortgage will be deemed to constitute a course of conduct inconsistent with Lender s right at any time before or after an event of default to demand strict adherence to the terms of this Mortgage and the Related Documents

APPLICATION OF PROCEEDS Lender shall have the exclusive right to determine the order in which the Property securing this Mortgage shall be sold and the proceeds applied to the Indebtedness in the event Lender exercises its remedies

SALE OF NOTE The Note or a partial interest in the Note together with this Mortgage and Related Documents may be sold one or more times without notice to Mortgagor

MORTGAGOR NOT RELEASED FORBEARANCE BY LENDER NOT A WAIVER Extension of the time given by the Lender for payment of any of the Indebtedness will not operate to release discharge modify or otherwise affect the original liability of Mortgagor herein or of Mortgagor s continued obligation to the covenants herein contained or the covenants and terms of any portion of the Related Documents

Mortgagor expressly acknowledges that it is the intent of both itself and Lender to have Mortgagor s default of any of the provisions of this Mortgage constitute a default of all other agreements existing or later arising between them and that likewise a Mortgagor s default under any such agreement will be a default of this Mortgage

Mortgagor warrants that no provision warranty or promise made by Mortgagor in any of the Related Documents causes any conflict with the terms of any document related to any other transaction involving Mortgagor with any other person or entity.

It is further agreed that

(a) Upon Lender s request Mortgagor agrees to pay Lender in addition to payment of the Indebtedness a pro rata portion of the taxes assessments mortgage guarantee insurance premiums (so long as this Mortgage is insured by a mortgage guarantee insurance policy) and hazard insurance premiums next to become due as estimated by Lender so Lender will have sufficient funds on hand to pay taxes assessments and insurance premiums within thirty days before their due date and to pay Lender immediately any deficit the amount so held not to bear any interest and upon default to be applied by Lender to the Indebtedness at Lender s discretion

(b) all rights and remedies granted to Lender hereunder are cumulative and not exclusive of one another or of any other remedy provided for by law or agreement and may be exercised either successively or concurrently

(c) if any provision of this Mortgage is prohibited by state law such prohibitions shall apply only to that provision and all other provisions of the Mortgage shall remain in full force and effect

(d) Lender may at its option reduce release or modify the Indebtedness the persons liable for the Indebtedness or the Property that is subject to this Mortgage Any such action shall not affect Mortgagor s remaining obligations under this Mortgage or the Related Documents

(e) Mortgagor waives the right to assert the statute of limitations so as to preclude Lender from enforcement of the lien conferred upon it by this Mortgage

JOINT AND SEVERAL LIABILITY If this Mortgage is signed by more than one person all persons signing it agree that they are jointly and severally bound where permitted by law

SURVIVAL Lender s rights in this Mortgage will continue in its successors and assigns This Mortgage is binding on all heirs executors administrators assigns and successors of Mortgagor

NOTICES AND WAIVER OF NOTICE Unless otherwise required by applicable law any notice or demand given by Lender to any party is considered effective when it is deposited in the United States Mail with the appropriate postage mailed to the address of the party given at the beginning of this Mortgage unless an alternative address has been provided to Lender in writing To the extent permitted by law Mortgagor waives notice of Lender s acceptance of this Mortgage defenses based on suretyship all defenses arising from any election by Lender under the United States Bankruptcy Code the Uniform Commercial Code as enacted in the state where the Lender is located and other applicable law and also waives all rights of enquiry demand notice of acceleration notice of nonpayment presentment protest dishonor and all other notice

TO THE EXTENT PERMITTED BY LAW MORTGAGOR WAIVES ALL RIGHTS TO NOTICE OTHER THAN THE NOTICE PROVIDED ABOVE AND WAIVES ALL RIGHTS TO ANY HEARING JUDICIAL OR OTHERWISE PRIOR TO LENDER EXERCISING ITS RIGHTS UNDER THIS MORTGAGE

WAIVER OF HOMESTEAD EXEMPTION RIGHT Mortgagor hereby waives and releases all homestead exemption rights relating to the Property to the extent permitted by law

WAIVER OF APPRAISEMENT RIGHTS Mortgagor waives all appraisement rights relating to the Property to the extent permitted by law

LENDER S EXPENSE Mortgagor agrees to pay all expenses incurred by Lender in connection with enforcement of its rights under the Indebtedness this Mortgage and in the event Lender is made party to any litigation because of the existence of the Indebtedness or this Mortgage as well as court agency fees or reasonable attorney fees but not both and court costs and disbursements

By initialing I acknowledge this page 4 of 6 of the Commercial Real Estate Mortgage	T.L. Initials	Initials	Initials	Initials

Compliance Systems Inc
To Order Call 1 800 968 8522 FAX 616 956 1868

CERTIFICATE OF TITLE

File No C0411186
Charge $75 00

Date Typed 12/3/2004 cg

Prepared For Commerce Bank and Trust

Records Searched To November 30, 2004 at 8 00 a m

1 **ACCORDING TO THE PUBLIC RECORDS, THE GRANTEE SHOWN ON THE LAST DEED FILED FOR RECORD IS**

Timothy F Degginger and Mary Elizabeth (Betsy) Davis AND The Estate of George J Degginger

2 **LEGAL DESCRIPTION**

Lots 33 and 35, on Clay Street, in Harvey Subdivision, City of Topeka, Shawnee County, Kansas

3 **MORTGAGES.**

None of record

4 **TAXES**

Provide proof of payment for DELINQUENT Real Estate Taxes for the year 2002, in the original amount of $618 19, plus penalty and interest

Provide proof of payment for DELINQUENT Real Estate Taxes for the year 2003, in the original amount of $665 42, plus penalty and interest

Note Taxes for the year 2004, in the amount of $727 48, are unpaid but not delinquent First half delinquent December 21, 2004, second half delinquent May 11, 2005

PROPERTY ID 1093003007015000

5 **PENDING LITIGATION AND/OR JUDGMENTS**

In the District Court of Shawnee County, Kansas, Tax Warrant, Case No 96-U-324, Kansas Department of Revenue against Timothy F Deffinger, in the amount of $723 70

Federal Tax Lien, against Tim Degginger, in the amount of $19,525 28, recorded in the Office of the Register of Deeds, Shawnee County, Kansas, on September 24, 2001, at Book 3549, Page 288

As this report is furnished for a nominal fee, neither Capital Title Insurance Company, L C , nor Commonwealth Land Title Insurance Company assumes any liability beyond the amount paid for this report Please contact this office if further information is needed

Compiled By:

Capital Title Insurance Company, L.C.
2858 SW Villa West Drive, Suite 100
Topeka, Kansas 66614

Authorized Signature

000180

ELECTRONICALLY FILED
2016 Aug 31 AM 8:59
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2015-CV-000412

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

COREFIRST BANK & TRUST f/k/a
COMMERCE BANK & TRUST,

Plaintiff,

vs.

TIMOTHY F. DEGGINGER a/k/a
TIMOTHY DEGGINGER, et al.,

Defendants.

(Pursuant to K.S.A. Chapter 60)

Case No. 2015-CV-412
Division No. 6

TITLE TO REAL ESTATE INVOLVED

PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT UNDER KSA 60-260(b)(1)

COMES NOW plaintiff CoreFirst Bank & Trust f/k/a Commerce Bank & Trust, ("CoreFirst"), by and through its attorneys, Riordan, Fincher, Munson & Sinclair, PA, and, pursuant to KSA 60-260(b)(1), hereby moves the Court to relieve the parties of the Journal Entry of Judgment entered on February 25, 2016. In support of its motion, CoreFirst states as follows:

1. CoreFirst filed its foreclosure action on May 6, 2015.

2. The defendant Timothy F. Degginger a/k/a Timothy Degginger ("Timothy Degginger") filed his answer on July 1, 2015.

3. CoreFirst filed its motion for summary judgment on August 6, 2015.

4. Prior to CoreFirst's filing of summary judgment, Timothy Degginger had served a request for production of documents on CoreFirst. On August 27, 2015, CoreFirst served its responses.

5. On October 21, 2015, Timothy Degginger filed a timely response to CoreFirst's

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APPENDIX-C

motion for summary judgment.

6. CoreFirst filed its reply brief on November 9, 2015.

7. On January 15, 2016, the Court filed a memorandum and decision granting CoreFirst's motion for summary judgment. The memorandum was subsequently journalized by a Journal Entry of Judgment entered on February 25, 2016.

8. On March 23, 2016, Timothy Degginger filed a motion to dismiss on the basis that the Court lacked "in-rem jurisdiction."

9. On March 30, 2016, the Court held a hearing on Timothy Degginger's motion to dismiss, and denied the same.

10. However, at the hearing the Court exercised the equitable powers it has under equitable claims, such as mortgage foreclosure claims, and addressed the issue of the status of any potential interest held by the heirs at law of George Degginger in the subject real estate, commonly known as 135 SW Clay, Topeka, Kansas ("135 Clay'). The issue arose on the basis of a 1936 deed, which was submitted by Timothy Degginger to the Court on March 23, 2016.

11. At the hearing, CoreFirst argued that the Decree of Descent entered in Shawnee County District Court Case No. 98P440 ("1998 Probate Case"), a case filed by Timothy Degginger in which he sought a determination that he and his sister were the 100% owners of 135 SW Clay, was dispositive. The Court stated at the hearing that the record was incomplete for the Court to rule on the effect of the Decree of Descent in Timothy Degginger's 1998 Probate Case. The Court's orders were entered on April 5, 2016 as the Order on March 30, 2016 Hearing.

12. After the hearing, CoreFirst ordered a copy the notice of publication from the 1998 Probate Case. A copy of the affidavit of publication is attached as Exhibit "A."

13. A review of the notice filed in the 1998 Probate Case appears to be insufficient,

primarily on the grounds that it fails to contain any type of real estate description at all.

14. On April 8, 2016, Timothy Degginger filed a notice of appeal, appealing the Court's Order on March 30, 2016 Hearing. The appeal was docketed as appellate case number 115717. On July 15, 2016, the Court of Appeals dismissed the appeal by granting CoreFirst's motion for involuntary dismissal. The Court of Appeals issued its mandate of dismissal on August 24, 2016.

15. Based on the above, this Court has jurisdiction, and it does appear that the status of the heirs of George Degginger need to be addressed. Additionally, as this issue has arisen from Timothy Degginger's 1998 Probate Case, but were not brought forward until March 23, 2016, grounds exist under KSA 60-260(b)(1) for the Court to grant relief from the February 25, 2016 journal entry in the present case, and allow the status of George Degginger's heirs at law to be properly addressed.

16. Consequently, in order to fully and completely address the issue of the status of any potential interest held by the heirs at law of George Degginger in 135 Clay, CoreFirst proposes the following plan of action:

a. The Court grant CoreFirst's motion for relief under KSA 60-260(b)(1), and allow CoreFirst to amend its petition to add all heirs, and their spouses, of George Degginger, known and unknown, to the action

b. CoreFirst will then serve by publication all heirs, and their spouses, of George Degginger, and will also serve by personal service all known heirs of George Degginger.

c. CoreFirst will then amend paragraph 18 of its petition to state:

> f. The heirs of law, and their spouses, of George Degginger may claim an interest in the real estate, the exact nature of which is unknown to

CoreFirst.

d. CoreFirst will keep paragraph 19 the same, which means that CoreFirst will continue to assert that CoreFirst's mortgage interest is superior, including any interest of any heir at law. CoreFirst intends to contend that none of the heirs of George Degginger, except for Timothy Degginger, have any interest in 135 Clay, or if they do, it is inferior to CoreFirst's interest.

e. Under this plan, each of the heirs of George Degginger can do one of four things: i.) file a disclaimer; ii.) not answer, which will serve as the same as a disclaimer; iii.) file an answer admitting that CoreFirst has a superior interest; or iv.) file an answer that asserts they have a superior interest. If an heir asserts a superior interest, the matter can then be litigation.

17. CoreFirst believes that this plan will resolve any issues on the status of the heirs of George Degginger in 135 Clay.

18. CoreFirst further prays that, if this motion is granted and CoreFirst is granted leave to amend its petition as outline above, Timothy Degginger be directed to produce the identifications and location of residences of all heirs of George Degginger and their spouses that are known to him within five business days of the Court granting this motion or granting CoreFirst leave to amend its petition, whichever is later. This should not be difficult as Timothy Degginger has already identified the three children of George Degginger, two of which are his aunts and the other his father, and has identified the number of children each child of George Degginger had. The record has established any surviving grandchildren of George Degginger are the cousins of Timothy Degginger.

WHEREFORE, CoreFirst prays that the Court grant relief from the judgment entered in this case.

MICROFILMED
3rd JUDICIAL DIST

PAID
10-30-98 # 3866

Publisher's
Fee $ 64.18

THE TOPEKA METRO NEWS

Affidavit of Publication

State of Kansas, Shawnee County, ss.

J. M. RANDOM being duly sworn, says that he/she is duly authorized representative of **THE TOPEKA METRO NEWS** *(formerly THE TOPEKA LEGAL NEWS)*, and that he/she knows that it is a newspaper which is continuously and uninterruptedly printed and published in Shawnee County, Kansas at least weekly fifty (50) times a year, and has been so published for more than one year prior to the first publication of the attached notice, and which is of general paid circulation on a bi-weekly basis, in said County and State; and is not a trade, religious or fraternal publication: and has been admitted to the mails as second class matter in said county and that the notice, of which the attached is a true copy, was published for 3 insertions in said newspaper, as follows:

1st insertion October 28, 1998.
2nd insertion November 4, 1998.
3rd insertion November 11, 1998.
4th insertion ______.
5th insertion ______.
6th insertion ______.

SUBSCRIBED AND SWORN TO before me this 11th day of November A.D. 1998.

Notary Public

My commission expires Sept. 24, 2000.

Approved ______

Judge

Case No. 98-P-440
Degginger Estate
First Published In
THE TOPEKA METRO NEWS
October 28, 1998
IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
EIGHTH DIVISION
In the Matter of the Estate of
MARY E. DEGGINGER
Deceased.

NOTICE OF HEARING

The State of Kansas to All Persons Concerned:

You are hereby notified that a Petition has been filed in this Court by Timothy F. Deggiriger, as one of the heirs of Mary E. Degginger, deceased, praying for the determination of the descent; and you are hereby required to file your written defenses thereto on or before November 19, 1998, at 10:00 o'clock a.m., on such day, in such Court, in the City of Topeka, in Shawnee County, Kansas, at which time and place such cause will be heard. Should you fail therein, judgment and decree will be entered in due course upon said petition.

/s/TIMOTHY F. DEGGINGER
Petitioner

Attorney for Petitioner
/s/C. David Newbery #08491
NEWBERY& UNGERER
2231 SW Wanamaker Road,
Suite 101
Topeka, KS 66614
(785) 273-5250
Oct. 28, Nov. 4 & 11

Exhibit
"A"

ELECTRONICALLY FILED
2016 Jul 15 AM 10:42
CLERK OF THE APPELLATE COURT
CASE NUMBER: 115717

15 CV 412

CASE NO. 115,717

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

COREFIRST BANK & BRUST F/K/A
COMMERCE BANK & TRUST,
Plaintiff-Appellee,

v.

TIMOTHY F. DEGGINGER A/K/A
TIMOTHY DEGGINGER, ET AL.,
Defendants-Appellants.

ORDER

Appellee's motion for involuntary dismissal is granted. Appellants' response is noted. The district court's April 5, 2016, journal entry very clearly showed that the issue of property ownership remains outstanding. This April 5, 2016, journal entry is the only ruling listed in Appellants' docketing statement. Because the judgment being appealed is not a final decision, this court cannot take jurisdiction under K.S.A. 2015 Supp. 60-21029a)(4). Accordingly, this appeal is dismissed as premature.

DATED: July 15, 2016.

FOR THE COURT

Thomas E. Malone

THOMAS E. MALONE, Chief Judge

Appellant/Defendant's
Opening Brief
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15 CV 412

CASE NO. 118,341

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

COREFIRST BANK & TRUST
F/K/A COMMERCE BANK & TRUST,
Plaintiff-Appellee,

v.

TIMOTHY F. DEGGINGER
A/K/A TIMOTHY DEGGINGER, ET AL.,
Defendants-Appellants.

ORDER

The motion for involuntary dismissal is granted. The response is noted. Subject to exceptions, this court only has jurisdiction over final decisions. See K.S.A. 60-2102(a)(4). While there may be a final judgment on Appellants' counterclaims, the district court has not yet entered a final judgment on Appellee's primary claim. And in the absence of a ruling under K.S.A. 2016 Supp. 60-254(b), this court cannot evaluate half of an appeal. Accordingly, this appeal is dismissed as premature.

DATED: November 2, 2017.

FOR THE COURT

/s/ *Stephen D. Hill*

STEPHEN D. HILL, Presiding Judge

Appellant/Defendant's
Opening Brief
APPENDIX-E