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(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)NOT DESIGNATED FOR PUBLICATION

Court of Appeals of Kansas.
WELLS FARGO BANK, NATIONAL ASSOCIATION, Appellee,
v.
WOODLAND PARK AT SOLDIER CREEK, LLC, et al, Appellees,
(Neighbors Construction Company), Appellant.

Nos. **109,699**, 109,981.
May 23, 2014.

Appeal from Shawnee District Court; Franklin R. Theis, judge.
Vincent F. O'Flaherty and Courtney E. Noll, of Law Offices of Vincent F. O'Flaherty, Attorney, LLC, of Kansas City, Missouri, for appellant.

Michael E. Brown and Eric J. Aufdengarten, of Kutak Rock LLP, of Kansas City, Missouri, for appellee Wells Fargo Bank, National Association.

Before HILL, P.J., SCHROEDER, J., and HEBERT, S.J.

MEMORANDUM OPINION
PER CURIAM.

***1** This is one of two cases that has arisen from the district court's grant of summary judgment to Wells Fargo Bank, National Association, which determined its mortgage lien was superior to all other liens, including the construction lien of Neighbors Construction Company, Inc. Our review of the record leads us to agree with the district court that Neighbors performed no lienable activities and no lien therefore attached to the real estate. We hold the Consent Agreement signed by Neighbors is enforceable and that Wells Fargo as trustee of the note had standing to pursue a foreclosure of the mortgage.

We give a brief review of the facts.

In May 2007, Woodland Park made an agreement with the Kansas Development Finance Authority in which the Authority agreed to loan Woodland Park $15,715,000 to construct its housing project. Woodland Park signed a promissory note agreeing to repay the entire amount plus interest. The Authority assigned the note to Wells Fargo Bank, National Association, as trustee. A mortgage on the real estate owned by Woodland Park secured the repayment of the note.

On May 15, 2007, Woodland Park entered a construction contract with Neighbors. Under the contract, Neighbors agreed to construct the housing project for a total of $16,611,466. At that time, Roger Neighbors also signed a Consent and Agreement of Contractor. Language in the Consent Agreement confirmed Neighbors was also acknowledging and consenting to the Collateral Assignment made in connection with the project. Neighbors thereafter furnished labor, material, equipment, and supplies in its construction of the Woodland Park housing project.

In May 2011, Woodland Park owed Neighbors over $1,227,000. Neighbors ultimately filed two mechanic's liens against Woodland Park and filed suit against Woodland Park in the district court. Neighbors

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obtained a judgment of $1,277,701.31 against Woodland Park. See *Neighbors Construction Co. v. Woodland Park at Soldier Creek,* 48 Kan.App.2d 33, 284 P.3d 1057 (2012).

Meanwhile, Wells Fargo started a mortgage foreclosure action against Woodland Park seeking to foreclose on its mortgage and to determine the priority of any liens on the property. Neighbors—a lienholder named in the action—answered Wells Fargo's petition and asserted six counterclaims against it. Those claims were the subject of the appeal in *Neighbors Construction Co. v. Woodland Park at Soldier Creek,* No. 109,980, 214 WL 1796236 (Kan.App.2014) (unpublished opinion).

Wells Fargo moved for summary judgment on the foreclosure and the priority of lien issues, requesting, in part, that the court find Wells Fargo's interest superior to Neighbors' mechanic's liens. Neighbors opposed the motion.

The district court determined Wells Fargo was the owner and holder of both the note and the mortgage and that Woodland Park had failed to pay its obligation. Therefore, the court held Wells Fargo was entitled to foreclose the mortgage. The court rejected each of Neighbors' claims and held Wells Fargo's lien had priority over Neighbors' liens. The Woodland Park property was sold to Wells Fargo for a sum of $17,131,787.03 at a sheriffs sale, and the district court confirmed the sale in May 2013.

***2** Neighbors attacks the district court's grant of summary judgment in three ways. First, it contends the district court incorrectly granted summary judgment to Wells Fargo on the lien priority issue. Next, Neighbors claims the district court erred in determining Wells Fargo's lien was superior based on the Consent Agreement. Finally, Neighbors argues Wells Fargo lacked standing to foreclose on the mortgage. We will address the issues in that order.

Lien priority.

In cases such as this, well-established principles of law control our judgment. This court's review of the grant of summary judgment is well known.

> " 'Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. [Appellate courts] apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.' [Citation omitted.]
>
> "To the extent there is no factual dispute, appellate review of an order granting summary judgment is unlimited. [Citation omitted.]" *Carrothers Constr. Co. v. City of South Hutchinson,* 288 Kan. 743, 750–51, 207 P.3d 231 (2009).

In this case, the district court's grant of summary judgment was based on its interpretation of the contracts between the parties. Issues involving the interpretation and legal effect of a written contract involve questions of law subject to unlimited review by this court without deference to the district court's interpretations. *Shamberg, Johnson & Bergman, Chtd. v. Oliver,* 289 Kan. 891, 900, 220 P.3d 333 (2009). In interpreting written contracts, the primary rule is to ascertain the parties' intent. If the contract terms are clear, the intent of the parties must be determined from

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the contract language without applying rules of construction. Interpreting a contract that is free from ambiguity is a judicial function that does not require oral testimony to determine the contract's meaning. A contract is not ambiguous unless two or more meanings can be construed from the contract provisions. *Carrothers,* 288 Kan. at 751. In interpreting contracts, courts cannot isolate one particular sentence or provision but instead must construe and consider the entire contract in harmony where possible. See *City of Arkansas City v. Bruton,* 284 Kan. 815, 832–33, 166 P.3d 992 (2007).

***3** Neighbors first argues the district court erred in determining Neighbors performed no lienable activities and that no liens attached.

In determining Wells Fargo's mortgage lien had priority over Neighbors' mechanic's liens, the district court first focused on the Consent Agreement—noting it specifically provides Wells Fargo's mortgage is superior to any claim of Neighbors. The language in the Consent Agreement indeed demonstrates Wells Fargo was not obligated to pay lien holders like Neighbors. The Agreement provides:

> "FOR VALUE RECEIVED, the undersigned, each of whom has, pursuant to one or more of the Construction Documents described in the above Assignment of Construction Agreement (the 'Assignment'), performed or supplied, or agreed to perform or supply, certain services, materials and/or other items in connection with the construction of the Improvements referred to in the Assignment (each of the undersigned being hereinafter severally referred to as the 'Undersigned'), hereby acknowledge and consent to the Assignment. Each of the Undersigned does hereby warrant and represent that no default exists under the terms of any agreement between Borrower and the Undersigned relating to the real property described in Exhibit A of the Assignment (the 'Property'). Each of the Undersigned does hereby agree that (a) in the event of any default by Borrower under the terms of the bond Documents described in the Assignment, Trustee at its option shall be entitled to use, without further payment or charge of any kind, any and all plans, specifications, drawings, surveys or other documents, as the case may be, prepared or owned by the Undersigned relating to the construction of the Improvements contemplated by said Bond Documents, and that (b) in the event of any default by Borrower under the terms of said Bond Documents, the Undersigned shall, upon receipt of written notice and demand of Trustee, continue performance on behalf of Trustee, provided that the Undersigned (i) is reimbursed for such performance on behalf of Trustee in accordance with its agreement for the performing or supplying of such services, materials and/or other items and (ii) has been compensated for all past performance in accordance with such agreement, and that (c) in the event of any default by Borrower under the terms of any agreement between Borrower and the Undersigned relating to the Property, then the Undersigned shall deliver to Trustee at the address for Trustee set forth in the Assignment, by certified United States mail, postage prepaid, return receipt requested, written notice of such default and the action required to cure the same, and Trustee shall have a reasonable time (but in no event less than 30 business days after receipt of such notice) within which Trustee shall have the right, but not the obligation, to cure such default, and the delivery of such notice of default of the failure of Trustee to cure the same within the time allowed, as aforesaid, shall be conditions precedent to the exercise of any right or remedy of the Undersigned arising by reason of such default, and that (d) the Undersigned shall not enter into any modification or amendment of any agreement with a monetary effect exceeding $10,000 with Borrower regarding the Property and Improvements without providing not less than 10 days' written notice thereof to Trustee, or such shorter time period as necessary to avoid a default under any such agree-

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ment, and that (e) the lien of Trustee's Mortgage and other Bond Documents, whether now or hereafter recorded, shall be superior to any claims of the Undersigned, and the Undersigned does hereby subordinate any lien or claim which the Undersigned might now have or hereafter acquire upon the Property and Improvements to the lien of Trustee's Mortgage and Bond Documents.

***4** "The Undersigned represents that it is looking to Borrower, and not to Trustee, for payment under the Construction Documents, except as provided in clause (b) of the preceding paragraph, and the Undersigned waives any equitable lien which the Undersigned may now or hereafter have upon the proceeds of the Bonds."

This wording makes it clear that Wells Fargo was under no obligation to pay the liens of contractors like Neighbors. Instead, in the event of a default by Woodland Park, Wells Fargo was only obligated to reimburse Neighbors for its performance (and to compensate it for past performance) *if* Wells Fargo gave Neighbors written notice and demand for such performance. By signing the Consent Agreement, Neighbors agreed to the terms and requirements of the Consent Agreement, which makes no mention of instances where default occurs after substantial completion of the project. Neighbors cannot now complain about the terms of the contract it entered freely. Kansas courts consistently recognize that contracts should be enforced according to their terms. *Hall v. Shelter Mutual Ins. Co.,* 45 Kan.App.2d 797, 800–01, 253 P.3d 377 (2011), *rev. denied* 293 Kan. 1106 (2012). It is not the business of the courts to add to or alter the terms the parties have worked out for themselves. *Investcorp v. Simpson Investment Co.,* 277 Kan. 445, 462–63, 85 P.3d 1140 (2003).

Other language in the Consent Agreement similarly confirms Wells Fargo was not obligated to pay Neighbors in the event of default. The Consent Agreement provides that if Neighbors gives Wells Fargo written notice of a default by Woodland Park, Wells Fargo then has "the right, but not the obligation," to cure the default. The Consent Agreement confirms that Wells Fargo's mortgage "shall be superior to any claims of [Neighbors]" and that Neighbors will "subordinate any lien or claim" which it may have or acquire. The Consent Agreement notes Neighbors is "looking to [Woodland Park], and not to [Wells Fargo]" for payment under the construction documents. All of these provisions make it quite clear that Wells Fargo had no obligation to pay Neighbors and that Wells Fargo and Neighbors contracted to make Wells Fargo the superior lien holder.

In finding Wells Fargo's lien had priority, the district court next observed that the work upon which Neighbors' claim was based is not covered by Kansas' mechanic's lien statute. The court reasoned that in order for work to support a mechanic's lien under K.S.A. 60–1101, it must have been provided at the site and must have been done after the time the party holding the lien became contractually permitted to begin work. The court concluded that here, then, any work performed by Neighbors prior to May 21, 2007—when Neighbors was contractually permitted to begin work—was not lienable. The work upon which Neighbors was basing its claim was apparently done prior to that date. The court also observed that any work which predated the filing of the mortgage was not lienable work as a matter of law.

***5** Neighbors goes to great lengths to explain why the work it performed prior to May 21, 2007—which includes value-engineering services and work related to the payment and performance bonds—was "used or consumed for the improvement" of the Woodland Park property. This is because the statute at issue—K.S.A. 60–1101—states:

"Any person furnishing labor, equipment, material, or supplies *used or consumed for the im-*

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> *provement of real property,* under a contract with the owner or with the trustee, agent or spouse of the owner, shall have a lien upon the property for the labor, equipment, material or supplies furnished at the site of the property subject to the lien, and for the cost of transporting the same." (Emphasis added.)

But here, the district court's conclusion did not rest upon whether Neighbors' work was used or consumed for the improvement of the property, but the court instead focused on the statutory requirement that the person furnishing the work be "under a contract with the owner or with the trustee" of the owner. See K.S .A. 60–1101. In other words, the court found that any work performed prior to May 21, 2007, would not qualify as lienable work since Neighbors was not contractually permitted to begin work until that date.

In this appeal, Neighbors' only argument on this point is that the court "denied" it the opportunity to present evidence that Woodland Park may have verbally authorized it to proceed with lienable work prior to May 21, 2007, or the possibility that Neighbors performed lienable work before 3:27 p.m. on the day of May 21, 2007 (when the mortgage was officially filed).

That is not persuasive. In opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. *Carrothers,* 288 Kan. at 750–51. An issue of fact is not genuine unless it has legal controlling force as to a controlling issue; a feigned or imaginary issue is not a genuine issue. *Weber v. Southwestern Bell Telephone Co.,* 209 Kan. 273, 281, 497 P.2d 118 (1972). Here, Neighbors essentially argues it is "possible" that there "could be" evidence that Woodland Park verbally authorized it to proceed with lienable work prior to May 21, 2007, or that Neighbors performed lienable work before 3:27 p.m. on May 21, 2007. These mere speculations as to possible facts are insufficient to overcome the district court's grant of summary judgment.

Here, the Construction Contract between Woodland Park and Neighbors indicated that the date of commencement for work would be the date of the "Notice to Proceed" issued by Woodland Park. The Notice to Proceed was dated May 21, 2007 (the same date the mortgage was signed). Neighbors was not under contract to begin work on the Woodland Park project until May 21, 2007. Any work Neighbors performed before that date could not be considered lienable work because it was not done "under a contract with the owner or with the trustee" as required by K.S.A. 60–1101. On appeal, Neighbors does not argue that any of the work at issue here was performed after this date. Under these facts, the district court correctly determined Neighbors' lien did not have priority over Wells Fargo's lien because it was not lienable work under Kansas statute.

The district court could rely upon the Consent Agreement.

***6** Neighbors next claims the district court erred in determining Wells Fargo's lien had superiority based on the Consent Agreement. Neighbors argues the court impermissibly weighed witness credibility when it evaluated the Consent Agreement, it failed to consider the other documents executed by the parties when it interpreted the Agreement, and it incorrectly determined the Consent Agreement does not violate public policy.

Neighbors says the district court wrongly judged Roger Neighbors' credibility when evaluating the Consent Agreement and points to the district court's comment in its memorandum opinion that Roger's recollection of his knowledge of the Consent Agreement was "truly sad or truly shameful." Notably, Roger had stated in an affidavit that he did not participate in the drafting of the Mortgage Agreement, he did not read or have access to the Mortgage Agreement before May 21, 2007, he did not understand he

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was subordinating his mechanic's lien rights by signing the Consent Agreement, and he always understood he had mechanic's lien rights. On appeal, Wells Fargo counters this by citing to extensive evidence in the record demonstrating Roger admitted he indeed obtained information—via his attorney—confirming he was subordinating his lien rights under the Consent Agreement, so that he knew what he was doing.

The Consent Agreement clearly stated Wells Fargo was not obligated to pay any liens Neighbors may acquire. The language in the Consent Agreement does not appear ambiguous in any way, and Neighbors makes no claim on appeal that it is. In these circumstances, Roger's understanding of the Consent Agreement is irrelevant for legal purposes. The district court recognized this when it stated that Roger's testimony not only lacked substance as a matter of fact, considering the undisputed facts related to Roger's knowledge of the Consent Agreement, but that any argument concerning the testimony failed as a matter of law because Roger had a duty to read what he signed. Kansas courts consistently hold it is the duty of every contracting party to learn and know the contents of a contract before he or she signs it; a person who signs a written contract is bound by its terms regardless of his or her failure to read and understand its terms. *Ridgway v. Shelter Ins. Co.,* 22 Kan.App.2d 218, 225, 913 P.2d 1231, *rev. denied* 260 Kan. 995 (1996). While the district court here may have commented on Roger's credibility, the testimony was irrelevant—as the district court recognized. Any testimony Roger may have offered regarding his knowledge or understanding of the Mortgage Agreement and the Consent Agreement made no difference where he voluntarily signed the Consent Agreement.

Neighbors next challenges the district court's assessment of the Consent Agreement by arguing the court failed to consider the other documents when interpreting the meaning of the Consent Agreement. Neighbors points to language set forth in the Mortgage Agreement, the Construction Contract, and the Collateral Assignment to support its claim that Wells Fargo did, in fact, agree to pay the unpaid liens of entities like Neighbors.

***7** This argument is not persuasive. All of the documents executed between the three parties involved in this transaction—Woodland Park, Wells Fargo, and Neighbors—indicate Wells Fargo's lien was superior to Neighbors and that Wells Fargo was not obligated to pay Neighbors in the event of default.

In Section 4 of the Collateral Assignment, Woodland Park and Wells Fargo agreed that if Woodland Park failed to perform any covenants contained in the construction documents, Wells Fargo *could* perform such covenants "*without obligation to do so.*" (Emphasis added.) In Section 5 of the Collateral Assignment, Woodland Park and Wells Fargo acknowledged that although Wells Fargo was "not [ ] obligated" to perform any of Woodland Park's obligations under the construction documents, Wells Fargo could add any liability or loss it incurred in doing so to Woodland Park's indebtedness.

In Paragraph 2.06 of the Mortgage Agreement, Wells Fargo made an agreement with Woodland Park that in the event that Woodland Park failed to pay the liens of persons who supplied labor and materials, Wells Fargo would make payment. But Wells Fargo's promise was made to Woodland Park—not to Neighbors. And other language in the Mortgage Agreement indicates Wells Fargo was *not* obligated to pay Neighbors in the event of default. Section 7.03 of the Consent Agreement provides that if Woodland Park failed to make payment to Wells Fargo in accordance with the note, Wells Fargo has "the right, but not the obligation" to make payment or take appropriate action to perform covenants or obligations on behalf of Woodland Park in order to protect its security interest.

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Neighbors relies on *SNS Contractors v. Algernon Blair, Inc.,* 892 F.2d 430 (5th Cir.1990), to support its argument that Wells Fargo agreed to pay its liens. *Algernon* is clearly distinguishable from the present case. In *Algernon,* the contractor's consent agreement contained a provision which stated that if the borrower defaulted on the loan, the lender agreed the contractor would be "paid for the work done by it up to the date of such default and termination of the Construction Contract by Lender, including a pro-rata share of its construction fee and retainage." 892 F.2d at 432. Thus, in *Algernon* the lender expressly agreed to pay for the work done by the contractor if the borrower defaulted. Neighbors does not and cannot point to any express promise made to it by Wells Fargo here to pay its liens.

Public policy was not violated here.

Neighbors claims the district court erred in determining Wells Fargo's lien had superiority because it incorrectly determined the Consent Agreement does not violate public policy. Neighbors argues that under K.S.A. 16–1803, contracts for private construction are void as against public policy if they contain a provision which purports to waive, release, or extinguish a party's rights. Neighbors says that here, the Consent Agreement essentially forced Neighbors to waive its senior lien position.

***8** K.S.A. 16–1803 states:

> "(b) The following provisions in a contract for private construction shall be against public policy and shall be void and unenforceable:
>
> ....
>
> (2) a provision that purports to waive, release or extinguish rights provided by article 11 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto, except that a contract may require a contractor or subcontractor to provide a waiver or release of such rights as a condition for payment, but only to the extent of the amount of payment received."

K.S.A. 16–1802 states:

> "(b) 'Contract' means a contract or agreement concerning construction made and entered into by and between an owner and a contractor, a contractor and a subcontractor or a subcontractor and another subcontractor.
>
> (c) 'Contractor' means a person performing construction and having a contract with an owner of the real property or with a trustee, agent or spouse of an owner.
>
> (d) 'Owner' means a person who holds an ownership interest in real property."

The statute does not apply to the facts here. K.S.A. 16–1802(b) requires that the "contract" be an agreement between an owner and a contractor, a contractor and a subcontractor, or a subcontractor and another subcontractor. Although Neighbors is indeed a contractor, Wells Fargo is not the owner of the Woodland Park property. Instead, as the district court pointed out, Wells Fargo merely had a security interest in the property. Thus, the contract here was not the type mentioned in K.S.A. 16–1803.

Going further on this point, we are not convinced that Wells Fargo had an ownership interest in the real estate. Neighbors simply says, without explanation or authority, that because Wells Fargo was "granted [the] rights of the owner" via the Collateral Assignment, it held an ownership interest. But the Collateral Assignment clearly states Wells Fargo was only granted the right, title, and interest in items such as the documents and agreements related to the construction (for example, the construction contracts, plans and draw-

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ings, licenses and permits, and things of that nature). The Collateral Assignment states Wells Fargo acknowledged the Collateral Assignment was being given as security for the repayment obligations of Woodland Park under the Loan Agreement and that Wells Fargo had “no absolute ownership right, but only a security interest” in these things. Everything in the record supports the district court's conclusion that Wells Fargo only had a security interest in the property.

Thus, Neighbors has failed to demonstrate that Wells Fargo was an “owner” who entered an agreement with a contractor. Because the agreement here was not made between the owner of the property—Woodland Park—and the contractor, the Consent Agreement was not subject to K.S.A. 16–1803. Thus, the district court properly held the Consent Agreement could not be deemed void under that statute.

Wells Fargo had standing.

***9** Neighbors argues the district court erred in determining Wells Fargo lacked standing to foreclose on the mortgage. Neighbors says Wells Fargo never pled the status of trustee in the foreclosure action and that it loaned no money to Woodland Park. Neighbors contends that American First Tax Exempt Investors, L.P.—the bondholder for the project—was the party with standing to foreclose.

Standing is a jurisdictional issue. *Families Against Corporate Takeover v. Mitchell* 268 Kan. 803, 806, 1 P.3d 884 (2000) (citing *Moorhouse v. City of Wichita,* 259 Kan. 570, 574, 913 P.2d 172 [1996]). An objection based on lack of subject matter jurisdiction may be raised at any time, whether it be for the first time on appeal or even upon the appellate court's own motion. *Rivera v. Cimarron Dairy,* 267 Kan. 865, 868, 988 P.2d 235 (1999). Thus, Wells Fargo's complaint about Neighbors' failure to raise some of its standing arguments below is unpersuasive. The existence of standing is a question of law over which this court's scope of review is unlimited. *312 Education Ass'n v. U.S.D. No. 312,* 273 Kan. 875, 882, 47 P.3d 383 (2002).

Neighbors relies on three cases involving the issue of standing in foreclosure cases. In *Landmark Nat'l Bank v. Kesler,* 289 Kan. 528, 533–44, 216 P.3d 158 (2009), the Kansas Supreme Court held the district court did not abuse its discretion in denying a motion by Mortgage Electronic Registration Systems, Inc. (MERS) asking that it be allowed to join a mortgage foreclosure action as a contingently necessary party. There, the mortgage document stated the mortgage was made between the mortgagor and MERS, which was acting as the “nominee” for the lender. In holding MERS had failed to demonstrate an interest in the mortgage—so that it should have been permitted to join the action—the court emphasized several things. First, although MERS asserted that in some situations the mortgage document purported to give it the same rights as the lender, the document consistently referred only to the rights of the lender. 289 Kan. at 539–40. The document consistently limited MERS to acting “solely” as the nominee of the lender. Second, counsel for MERS had declined to demonstrate to the trial court a tangible interest in the mortgage and had actually insisted it did not have to show a financial or property interest. 289 Kan. at 541–42. Third, the court noted MERS had argued in another forum that it is not authorized to engage in the practices that would make it a party to either the enforcement of mortgages or the transfer of mortgages. 289 Kan. at 542. The court explained:

> “Indeed, in the event that a mortgage loan somehow separates interests of the note and the deed of trust, with the deed of trust lying with some independent entity, the mortgage may become unenforceable.
>
> “ ‘The practical effect of splitting the deed of trust from the promissory note is to make it impossible

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for the holder of the note to foreclose, unless the holder of the deed of trust is the agent of the holder of the note. [Citation omitted.] Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. [Citation omitted.] The mortgage loan becomes ineffectual when the note holder did not also hold the deed of trust.' [Citation omitted .]" 289 Kan. at 540.

***10** See also *Mortgage Electronic Registration Systems v. Graham,* 44 Kan.App.2d 547, 552–54, 247 P.3d 223 (2010), where the court dismissed a foreclosure action brought by MERS based on *Landmark* and ruled that MERS lacked standing to foreclose where the mortgage stated MERS acted solely as a nominee for the lender; there was no mention of MERS in the promissory note; there was no evidence the lender assigned the note to MERS; the note did not obligate the mortgagors to make payments to MERS; there was no indication that MERS possessed any interest in the note; and there was no evidence that MERS received permission to act as an agent for the lender.

Unlike *Landmark* and *Graham,* Neighbors fails to show what was lacking in those cases is lacking here. Instead, Neighbors actually admits that Wells Fargo's "role is as trustee and as agent" for American First. Neighbors' main complaint seems only to be that Wells Fargo did not disclose, in its petition, that it was acting as a trustee. Without making any further argument, Neighbors simply concludes without explanation that "Wells Fargo's allegations in the Petition are inconsistent with the facts establishing Wells Fargo as a trustee of the lender."

Contrary to Neighbors' claims, the record clearly establishes Wells Fargo's role as trustee. In the Mortgage Agreement, Wells Fargo is identified as the "Mortgagee" and the "Bond Trustee." The record contains a document demonstrating the Authority assigned the promissory note to Wells Fargo as trustee, and a document stating the Authority assigned all its rights in the loan agreement, the note, and the mortgage to Wells Fargo as trustee. The Trust Indenture states Wells Fargo has the right to exercise "any and all remedies afforded the Issuer under the Loan Documents in its name or the name of the Issuer without the necessity of joining the Issuer." On appeal, Wells Fargo contends it is the holder of both the mortgage and the note, and Neighbors points to no evidence indicating otherwise.

In the absence of any showing by Neighbors that the deficiencies identified in *Landmark* and *Graham* are present here, Neighbors has failed to demonstrate that Wells Fargo did not have the authority to enforce the mortgage on behalf of American First. Neighbors itself cites to language in case law indicating that a trustee—like Wells Fargo—can foreclose on a mortgage if it has the authority to enforce the mortgage on the original mortgagee's behalf.

In the bankruptcy case *In re Martinez,* 444 B.R. 192, 203 (Bankr.D.Kan.2011), a case Neighbors cites, the court explained that a trustee or agent of an entity like American First may indeed have responsibility to enforce the mortgage. The court explained that the trust or agency relationship may arise from the terms of the assignment, from a separate agreement, or from other circumstances—and that courts should be vigorous in seeking to find such a relationship.

Here, when the district court rejected Neighbors' claim of standing, the court reasoned that Neighbors had advanced no document or produced no evidence identifying any party other than Wells Fargo as having an obligation to foreclose. The district court did not err in determining Wells Fargo had standing to foreclose on the mortgage.

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***11** The district court did not err when it granted Wells Fargo summary judgment.

Affirmed.

Kan.App.,2014.
Wells Fargo Bank, N.A. v. Woodland Park at Soldier Creek, LLC
Slip Copy, 2014 WL 2402546 (Kan.App.)

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